

IN THE HIGH COURT OF DELHI AT NEW DELHI

+ RFA No.423/2018

% 18th May, 2018

T T LTD. Appellant
Through: Ms. Shilpi Jain Sharma,
Advocate.
versus

GOLDEN EAGLE COMPANY LIMITED & ORS. Respondents

**CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA**

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. Appl. No. 20573/2018 (exemption)

1. Exemption allowed subject to just exceptions.
C.M. stands disposed of.

RFA No.423/2018

2. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff in the suit impugning the judgment of the trial court dated 11.1.2018 by which the trial court has dismissed the suit filed by the appellant/plaintiff for recovery of Rs.8,56,180. Suit was filed against the three defendants.

Respondent no. 1/defendant no. 1/company was the buyer of the goods situated at Vietnam. Respondent no. 2/defendant no. 2/ was the insurance company of the respondent no. 1/defendant no. 1/buyer. Respondent no. 3/defendant no. 3 is the New India Assurance Company Limited with whom the appellant/plaintiff had insured the exported goods.

3. The facts of the case are that the appellant/plaintiff filed the subject suit pleading that between the appellant/plaintiff and the respondent no.1/defendant no. 1 there was a contract to supply De-oiled Rice Bran Extraction. Appellant/plaintiff claimed to have supplied 4040 bags of 200.28 MT of goods at a unit price of US\$ 226 per MT and for which invoice no. GEX/0097 dated 1.11.2012 was raised upon the respondent no.1/defendant no. 1/buyer. Appellant/plaintiff further pleaded that it had taken a marine insurance police from the respondent no.3/defendant no. 3 on Cost Insurance Freight (CIF) basis for the consignment. The consignment was shipped on board on 14.11.2012 under the shipping bill dated 9.11.2012. Consignment was insured with the respondent no. 3/defendant no. 3, for the journey from the appellant/plaintiff's

warehouse at Kolkata to the respondent no. 1/defendant no. 1/buyer's warehouse at Hochiminh City, Vietnam. The respondent no. 1/defendant no. 1 had also separately taken an insurance policy for the goods from the respondent no. 2/defendant no. 2. In mid December, 2012, the appellant/plaintiff received information that a portion of the cargo was damaged and accordingly the appellant/plaintiff informed the respondent no.3/defendant no.3/insurance company, *vide* the appellant/plaintiff's letter dated 20.12.2012. Respondent no. 3/defendant no. 3 failed to take action and therefore appellant/plaintiff appointed its independent surveyor namely Intertek India Private Limited which gave its survey report dated 31.12.2012 that 10% of the bags were damaged. At the request of the appellant/plaintiff the respondent no. 1/defendant no. 1/buyer also appointed its surveyor which surveyed the damage to the cargo which occurred during the voyage to Hochiminh Port. Appellant/plaintiff raised the claim upon the respondent no. 3/defendant no. 3 *vide* its letters dated 23.1.2013 and 29.1.2013. The claim amount was US\$ 19129 i.e US\$ 17757 for the claim and US\$ 1372 towards inspection charges. In the meanwhile the respondent no. 1/defendant no. 1 had refused to take

the responsibility for the damaged consignment and it only paid US\$ 3771.27 to the appellant/plaintiff and the appellant/plaintiff was to take over the balance liability for which the appellant/plaintiff received the debit note dated 6.3.2003 of US\$ 14035.73 from the respondent no.1/defendant no. 1. Respondent no. 3/defendant no. 3/Insurance company repudiated the claim *vide* its e-mail dated 29.11.2013. Appellant/plaintiff had also approached Insurance Regulatory Development Authority (IRDA) but its grievances were not resolved. Appellant/plaintiff therefore issued a legal notice dated 28.8.2014 to the respondent no.3/defendant no. 3 claiming the suit amount along with interest, and thereafter the subject suit was filed.

4. Respondent nos. 1 and 2/defendant nos. 1 and 2 did not appear in the suit and were proceeded *ex-parte*. The respondent no. 3/defendant no. 3 filed its written statement and contested the claim of the appellant/plaintiff. The case of the respondent no.3/defendant no.3 was that no doubt the insurance policy was taken and loss was reported by the appellant/plaintiff but the suit was not maintainable as the consignment which was dispatched by the appellant/plaintiff was sold on CNF terms and consequently it was the buyer/respondent no.

1/defendant no. 1 who had to take the insurance coverage for the goods. It was also pleaded by the respondent no.3/defendant no.3 that the loss caused could not be attributed to any damage to the goods caused during the voyage and hence no amount was payable. It was pleaded by the respondent no.3/defendant no. 3 that the liability, if any, was of the respondent nos.1 and 2/defendant nos. 1 and 2.

5. After pleadings were complete, the trial court framed the following issues:-

- “(1) Whether the plaintiff is entitled to a decree of Rs.8,56,180/- OPP.
- (2) Whether the plaintiff is entitled to the interest, if so, at what rate? OPP
- (3) Whether the plaintiff has got no cause of action to file the present suit against defendant no.3? OPD3
- (4) Whether the suit of the plaintiff is bad for mis-joinder of necessary parties? OPD3
- (5) Relief.”

6. Before this Court, as also before the trial court, the issue is/was as to whether appellant/plaintiff had ‘insurable interest’ in the insured goods for being successful in claiming the amount of the suit from the respondent no.3/defendant no. 3. In this regard trial court has held that since property in goods/title of goods had already passed from the appellant/plaintiff to the respondent no. 1/defendant no. 1/buyer, therefore the appellant/plaintiff cannot be said to have any

insurable interest over the goods, resulting in the insurance policy having been validly repudiated by the respondent no.3/defendant no.3. Trial court also held that even if property in goods passes to the buyer yet in case the seller has control of the goods, even in such circumstances there would be an insurable interest but in the present case the appellant/plaintiff had retained no control over the goods.

7. Trial court has very exhaustively discussed all these aspects from paras 21 to 24 of the impugned judgment, and since the discussion is very illuminating and thorough, I would seek to reproduce these paras instead of giving my own words and reasoning. These paras 21 to 24 read as under:-

"21. First of all in order to sustain a claim for marine insurance the insured must possess requisite insurable interest in the goods at the relevant point of time. Now Sections 7 and 8 of the Marine Insurance Act, 1963 provide as under:-

"..... 7. Insurable interest defined.- (1) Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure.

(2) In particular a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof.

8. When interest must attach.-(1) The assured must be interested in the subject-matter insured at the time of the loss, though he need not be interested when the insurance is effected: Provided that, where the subject-matter is insured "lost or not lost", the assured may recover although he may not have acquired his interest until after the loss,

unless at the time of effecting the contract of insurance the assured was aware of the loss, and the insurer was not.

(2) Where the assured has no interest at the time of the loss, he cannot acquire interest by any act or election after he is aware of the loss

22. In the judgment titled as **Contship Container Lines Ltd. V. D.K. Lall reported as (2010) 4 SCC 256** the Hon'ble Supreme Court has observed:

"20. Halsbury's Laws of England, 4th Edn., Vol. 25 (para 190) has, while dealing with the expression "insurable interest" under the Marine Insurance Act, 1906 prevalent in that country, explained the purport of the expression "interest" in a marine adventure in the following words:

"190. Meaning of 'insurable interest'.-.. A person may be said to be interested in an event when, if the event happens, he will gain an advantage, and, if it is frustrated, he will suffer a loss, and it may be stated as a general principle that to constitute an insurable interest it must be an interest such that the peril would by its proximate effect cause damage to the assured, that is to say cause him to lose a benefit or incur a liability."

21. Halsbury's refers to the decision of House of Lords in *Lucena v. Craufurd* (1806) 2 Bos & PNR 269 as to the meaning of the expression "insurable interest":

".....A man is interested in a thing to whom advantage may arise or prejudice happen from the circumstances which may attend it;...and whom it importeth that its condition as to safety or other quality should continue. Interest does not necessarily imply a right to the whole or part of the thing, nor necessarily and exclusively that which may be the subject of privation, but the having some relation to, or concerning the subject of the insurance; which relation or concern by the happening of the perils insured against, may be so effected as to produce a damage, detriment or prejudice to the person insuring. And where a man is so circumstanced with respect to matters exposed to certain risks and dangers as to have a moral certainty of advantage or benefit but for those risks and dangers, he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction."

22. Dealing with the question whether the seller of goods retains any insurable interest, Halsbury explains (in Pare 201):

"201. Seller and buyer.- When, however, the property which is the subject matter of the contract of sale has completely passed from the seller to the buyer or when it has under the contract of sale become completely at the buyers' risk, the seller ceases to have any insurable interest, and the buyer acquires one. Thus, a contract for

the sale of goods to be supplied on board, a particular vessel may be so framed that the property in them and the risk of their loss do not pass to the buyer until a complete cargo has been loaded, in which case the buyer has no insurable interest until the complete cargo has been loaded; or the contract may be so framed that the property in and the risk as to any part of the goods passed to the buyer on shipment, in which case the buyer acquires an insurable interest on any part of the goods then shipped.”

23. Reference may also be made by us to MacGillivray on Insurance Law. While dealing with insurable interest under contracts for the sale of goods, the author has the following to say:

“The unpaid seller of goods who has parted with property in them has no insurable interest in them unless either they remain at his risk or he has a lien, charge or other security interest over them for the price. So long as the risk remains with him, he has an interest whether the property has passed or not, and the measure of his interest is the purchase price or the actual value of the goods, whichever is the greater.

Even when risk and property have both passed, the seller retains an insurable interest in the goods while he still possesses them because, if he is unpaid in whole or part on account of the buyer’s insolvency or for other reasons, he has an interest in respect of his lien for the purchase money. His possession of the goods would also permit him to insure on the buyer’s behalf if his intention is clear and the policy does not forbid it.”

.....31. Coming to the case at hand, the contract of sale was on f.o.b. basis even when the contract of insurance proceeded on the basis that the transactions between the seller and the purchaser and meant to be covered by the policy would be on c.i.f. basis. The distinction between c.i.f. (cost, insurance and freight) and f.o.b. (free on board) contracts is well recognized in the commercial world. While in the case of c.i.f. contract the seller in the absence of any special contract is bound to do certain things like making an invoice of the goods sold, shipping the goods at the port of shipment, procuring a contract of insurance under which the goods will be delivered at the destination etc., in the case of f.o.b. contracts the goods are delivered free on board the ship. Once the seller has placed the goods safely on board at his cost and thereby handed over the possession of the goods to the ship in terms of the Bill of Lading or other documents, the responsibility of the seller ceases and the delivery of the goods to the buyer is complete. The goods are from that stage onwards at the risk of the buyer.

32. It is common ground that the seller had, in the case at hand, reserved no right or lien qua the goods in question. In the absence of any contractual stipulation between the parties the unpaid seller’s lien

over the goods recognised in terms of Sections 46 and 47 of the Sale of Goods Act, 1930 stood terminated upon delivery of the goods to the carrier. The goods from that stage onwards held by the carrier at the risk of the buyer and the property in the goods stood vested in the buyer.

33. The principle underlying transfer of title in goods in f.o.b. contracts was stated by a Constitution Bench of this Court in B.K. Wadeyar v. Daulatram Rameshwarlal [AIR 1961 SC 311]. The question as to the transfer of title in the goods arose in that case in the context of a fiscal provision but the principle relating to the transfer of title in goods in terms of FOB contract was unequivocally recognised. This Court held that in FOB contracts for sale of goods, the property is intended to pass and does pass on the shipment of the goods. The National Commission was, therefore, right in holding that the seller had no insurable interest in the goods thereby absolving the insurance company of the liability to reimburse the loss, if any, arising from the mis-delivery of such goods.....”

23. Adverting to the facts of the present case it is seen that as per commercial invoice Ex.PW1/D-1 the material was sold on CNF basis. The correct expression for CNF under Incoterms, 2010 is CFR (Cost & Freight). Under a CFR (CNF) contract the risk passes on to the buyer when the goods have been placed safely on board and therefore the risk of the plaintiff ceased once the goods passed through the ship's rails. Accordingly, in the present case when the cargo was delivered on board the risk passed on the buyer i.e. the defendant no.1. No evidence has been led by the plaintiff to establish as to when the property in the goods was intended to pass. The contract was for sale of specific goods in deliverable state, though they were to be weighed etc., and therefore the under the normal course the property in the goods passed on the buyer at any rate before the goods were delivered on board. Conversely, there is no evidence to show that the property in the goods had not passed on to the buyer at the time of loading of goods on board or that the parties had agreed that the property in the goods shall pass on a later date.

24. Be that as it may, after loading of the cargo on board, the cargo was at the risk of the defendant no.1 as the contract was a CFR (CNF) contract and therefore the plaintiff had no insurable interest in the cargo thereafter. As per the case of the plaintiff the cargo was damaged during the course of voyage. As per section 8 of the Marine Insurance Act the plaintiff must establish insurable interest in the goods at the time of the loss/when damage was caused to the goods. The result is that the plaintiff has failed to show any insurable interest in the cargo during the voyage when it was allegedly damaged since the risk already stood transferred to the buyer i.e. the defendant no.1. Since there was no insurable interest at the time of the loss the plaintiff is not entitled to any insurance claim with respect to the

damaged cargo and the insurance claim was therefore rightly repudiated by the defendant no.3 Insurance company.” (underlining added)

8. A reading of the aforesaid paras of the impugned judgment shows that trial court has rightly arrived at a finding that the appellant/plaintiff had no insurable interest because ownership of the goods had passed to the respondent no.1/defendant no.1/buyer. Once the appellant/plaintiff had no insurable interest because ownership of the goods had passed on to the responded no.1/defendant no.1, hence the appellant/plaintiff was not entitled to amount under the insurance policy from the respondent no.3/defendant no.3. I may note that it is settled law that loss of goods is upon the owner of the goods and therefore it is the owner of the goods being the respondent no. 1/defendant no.1 who had to insure the goods and not the appellant/plaintiff. Even if the appellant/plaintiff had taken an insurance policy, then that insurance policy to be valid had to have as the beneficiary of the policy as the respondent no.1/defendant no.1 and who had an insurable interest in the goods being the owner, however admittedly the beneficiary under the insurance policy of the appellant/plaintiff with the respondent no.3/defendant no.3 was the appellant/plaintiff and not the respondent no.1/defendant no.1. No

fault therefore can be found with the impugned judgment of the trial court dismissing the suit against the respondent no.3/defendant no.3 on the ground that the appellant/plaintiff had no insurable interest in the goods.

9. As regards the respondent no.2/defendant no.2, and which is the insurance company with whom the respondent no.1/defendant no.1/buyer had insured the goods, trial court has rightly dismissed the suit against the respondent no.2/defendant no.2 because admittedly the appellant/plaintiff had no privity of contract with the respondent no.2/defendant no.2 as the respondent no.2/defendant no.2 had issued the policy in favour of the respondent no.1/defendant no.1.

10. As regards the respondent no.1/defendant no.1 trial court has dismissed the suit by observing that the appellant/plaintiff itself had accepted the debit note of the respondent no.1/defendant no.1 and consequently the appellant/plaintiff to the extent of giving discount of the goods will not be entitled to such amount from the respondent no.1/defendant no.1. This is so stated by the trial court in paras 36 and 37 of the impugned judgment and these paras read as under:-

“36. In so far as the defendant no.1 is concerned, the plaintiff has itself proved the debit note dated 06.03.2013 for an amount of USD 14035.73. A perusal of the said debit note Ex.PW1/12 reveals that the same has been issued towards “Discount for damaged and bad cargo for USD 14,035.73”

37. The said debit note was issued by the plaintiff and signed by the Vice President (Finance) and Company Secretary of the plaintiff company. The same has been exhibited as Ex.PW1/12 by PW1. Since the plaintiff had voluntarily given a discount on account of damaged and bad cargo to the defendant no.1, the plaintiff is not entitled to recover the said amount from the defendant no. 1 also. No evidence has been adduced by the plaintiff to show that at any point of time the plaintiff had communicated to the defendant no. 1 that the said amount is payable by the defendant no. 1. Neither there are proper pleadings in this respect nor appropriate evidence has been adduced on this count. Thus the plaintiff is not entitled to recover the said amount from the defendant no.1 also.”

11. In view of the aforesaid discussion, I do not find any merit in the appeal. Trial court has rightly dismissed the suit against the three defendants in the suit, being the respondent nos. 1 to 3 in this appeal. Dismissed.

MAY 18, 2018

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VALMIKI J. MEHTA, J