IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.06.2019

CORAM: THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.No.1547 of 2005
and
CMP.No.19926 of 2005

The New India Assurance Company Ltd.,
Having their Divisional Office at
171, Thambu Chetty Street
Madras - 1. ... Appellant / Appellant / 1st Defendant

Vs

1.Tamil Nadu Fisheries Development Corporation Ltd.,
Represented by its Managing Director T.Lakshminarayanan
Having their Office at No.15, Ashok Nagar Main Road
Kodambakkam, Madras - 600 024.

2.Indian Overseas Bank
Represented by its Manager
Friday Market
Kanyakumari District.
... Respondents /Respondents /Plaintiff & 5th Defendant

(The defendants 2 to 4 in the suit before the Trial Court were not added as parties in the first Appeal since suit abated as against them, Hence, defendants 2 to 4 are not added as parties to the second Appeal and they are not shown in the cause title. R2 herein was given up in the First Appeal and herein also. As unnecessary party to the Appeal).

Prayer :- Second Appeal filed under Section 100 of CPC, against the judgment and decree dated 28.07.2005 made in A.S.No.328 of 2004 on the file of Fast Track Additional District Court No.II, Chennai, confirming the decree and judgment dated 07.10.2003 made in O.S.No.2806 of 1996 on the file of VIII Assistant City Civil Court, Madras.

For Appellant : Mr.S.Manohar
For Respondents : Ms.S.Rekha
for Mr.R.Parthasarathy [R1]

JUDGMENT

The Insurance Company which lost both its suit for compensation filed by the Tamil Nadu Fisheries Development Corporation and also the first appeal preferred by it, is the appellant herein. Parties would be referred to by their rank before the trial Court

2. The short point involved in this case are that:

- The plaintiff owned a vessel and it was insured with the appellant/Insurance Company. While so, the vessel chose to venture into the sea at about 2 a.m., on 24.07.1980, only not to return shore, as it sank in the high seas at about 3.00 p.m. on the same date. The plaintiff had moved the trial Court with a suit for compensation against the Insurance Company.

- The trial Court granted the plaintiff a decree for Rs.2,05,000/- with interest at 12% p.a. This was unsuccessfully challenged by the appellant herein before the First Appellate Court in A.S.No.328 of 2004.

3. The decree of the first appellate Court is now challenged by the Insurance Company.

4. This appeal was admitted on the following substantial questions of law:

> ''1. Has there not been a breach of warranty conditions as contemplated under Section 35 of Marine Insurance Act, 1963 in the circumstances of the case?
> 2. Is not the insurer/appellant entitled to be exonerated as per Section 35 of the Marine Insurance Act, 1963, on the admitted facts of the case?''

5.1 The learned counsel for the appellant submitted that there is a warranty attached to the police of insurance, whereby the plaintiff had undertaken not to employ the vessel during adverse weather conditions. In this regard, the Meteorological Department in Ext.B3 letter dated 17.03.1981 is stated to have issued a warning at 10.45 hrs., on 22.07.1980 and which status was to be valid for the next 48 hrs. And, contrary to the warning issued by the Meteorological Department, the plaintiff had ventured into the high sea in the vessel concerned, and invited the awaiting disaster for itself. Under Section 35 of the Marine Insurance Act, 1963, the insured shall comply with the condition exactly, which implies it does not permit any deviation. Here the plaintiff has willingly broke the condition. Under the statute, the breach of warranty can be excused under Section 36 of the Act, but that warrants a change of circumstance. So far as the present case is concerned, no such change of circumstance is available.

5.2 According to the appellant, the first respondent herein (Tamil Nadu Fisheries Development Corporation Limited) through its lessees of the vessel, have broken this condition. This was the pointed defence which the insurance company had taken in its written statement.

6. The learned counsel for the first respondent / plaintiff would contend that as per the surveyor's report which the defendants have relied on, the meteorological warning was in force only on 23.07.1980. The vessel was removed from anchorage at about 2.00 a.m. on 24.07.1980, well beyond midnight of 23/24-7-1980, and it is an admitted case that at the time when the accident took place the time was about 3.00 p.m. on 24.07.1980, and at the relevant time, the weather condition was absolutely normal. This would imply that there is no violation of policy condition and that the appellant/first defendant cannot escape liability.

7. When this Court perused the surveyor's report (marked as Ext.B-2), it has referred to a certain communication from the Meteorological Department, according to which warning was given only for 23.07.1980. However, the suveyor's report further adds that further communication is sought from the Meteorological Department if there was any cautioning against venturing into the sea specifically till midnight of 23.07.1980 or atleast six hours on 24.07.1980. It is here Ext.B-3 steps in to make a clarification, and its contents has been provided in paragraph No.5.1 above. This document was introduced in evidence by D.W.2 and on going through the cross-examination of D.W.2, it is seen that no where was Ext.B3 challenged. The entire line of cross-examination is all about how the weather condition was when the accident took place.

8. The issue however, is not about how the weather condition was when the accident took place. To be precise, the question is if there is a breach of the condition in the policy of insurance, and if the plaintiff has ventured into the sea in the vessel ignoring the warning/cautioning by the Meteorological Department? Ext.B3 makes a categorical statement that there was a warning till 10.45 hours on 24.07.1980. Admittedly, the vessel was taken to high seas by 2.00 a.m, on 22.07.1980, some 8½ hours before the warning-period expired, and it is in this context, the warranty condition becomes imperative. The condition is :

> Warranted vessel shall not be employed during adverse weather conditions notified by the concerned State Fisheries Department or Meteorological Department or by the Port Authorities and shall be safely anchored or mooted or secured with proper watch and ward.

This condition does not give a choice to the insured at all in all instances when a warning by either by the Meteorological Department or by the Port Authorities etc., are in force. And here, the case of first respondent/plaintiff is on the basis of its own admitted facts that there is a violation of warranty or policy condition. Once it is done, Section 35 of of the Marine Insurance Act, 1963 invites itself automatically. Section 35 of the Marine Insurance Act reads as follow:

> S.35. Nature of warranty :
>
> (1) A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.
>
> (2) A warranty may be express or implied.
>
> (3) A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy the insurer is discharged from liability as from the date of the branch of warranty but without prejudice to any liability incurred by him before that date.

When the statute spells out the consequence of an act contrary to its provisions, then that has to be strictly construed. Sec.35(3) of the Act, in no unequivocal terms has spelt out the consequence in the context. This would mean, that the plaintiff has taken a chance not just with the weather, but with the policy condition and the statute as well. One who flouts mandatory provisions consciously may not deserve remedy in law.

10. In conclusion, this Court allows this second appeal and set aside the decree dated 07.10.2003 passed by the Fast Track Additional District Court No.II, Chennai, in A.S.No.328 of 2004, confirming the decree and judgment of the trial Court. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CCC)

//True Copy//

Sub Assistant Registrar

Ds

To:

1.The Fast Track Additional District Court No.II
Chennai.

2.The VIII Judge,
The VIII Assistant City Civil Court
Madras.

3.The Section Officer
VR Section, High Court, Madras.

+1cc to Mr.R.Parthasarathy, Advocate, S.R.No. 46128

S.A.No.1547 of 2005

BR(CO)
GN(07/02/2020)