



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 01.04.2021

Pronounced on :
29.07.2021

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CORAM :

THE HONOURABLE MR. JUSTICE N. KIRUBAKARAN
AND
THE HONOURABLE MR. JUSTICE P.D. AUDIKESAVALU
O.S.A. No. 225 of 2017

M/s. United India Insurance Co. Ltd.,
Reptd. by its Branch Manager,
No. 24, III Floor, Rattan Bazar,
Chennai - 600 003.

...Appellant/Plaintiff

-vs-

M/s. Sriraj Steels P. Ltd.,
Reptd., by its Director, Mr. S.Sridharan,
Sanniyasikuppam, Thirubhuvanai Post,
Mannadipet Commune,
Pondicherry - 605 107.

...Respondent/Defendant

PRAYER:- Original Side Appeal filed under Order XXXVI Rule 1 of the Original Side Rules read with Clause 15 of the Letters Patent, praying to set aside the judgment and decree dated 03.02.2017 made in C.S. No. 602 of 2010 by allowing the appeal.

For Appellant : Mr. M.B.Raghavan

For Respondent : Mr. Rathina Ashokan

J U D G M E N T
(through video conference)

Heard Mr. M.B.Raghavan, Learned Counsel for the Appellant and Mr. Rathina Asohan, Learned Counsel for the Respondent and perused the materials placed on record, apart from the pleadings of the parties.

2. The Respondent started a metal steel fabrication unit in Pondicherry in the year 1999 and had submitted a proposal dated 25.03.2003 (Ex. D-4) for insuring the building and machinery of its factory with the Appellant, who had in furtherance thereof, issued a Standard Fire and Special Peril Policy for the period from 27.03.2003 to 26.03.2004. The said insurance policy had been periodically renewed by the Respondent



and the last insurance policy (Ex. P-3) was for the period from 04.04.2007 to 03.04.2008. The Respondent by letter dated 31.07.2007 (Ex. D-1) informed the Appellant that theft had taken place at its factory by a mob. The Appellant had immediately appointed a Surveyor, viz., Mr. A.Mohammed Ali, who was licensed by the Insurance Regulatory Authority, to inspect the premises of the Respondent to assess the loss as required under Section 64-UM of the Insurance Act, 1938. The Respondent had submitted a claim dated 07.09.2007 (Ex. D-2) for Rs. 31,55,000/- along with certain invoices and further produced some estimates (Ex. D-3) to the Licensed Surveyor on 18.04.2008. The Licensed Surveyor in his Survey Report dated 15.07.2008 (Ex. P-9) submitted to the Appellant assessed the loss at Rs. 80,918/- and had pointed out that the Respondent had committed breach of the insurance policy conditions which lead to the Appellant by letter dated 20.08.2008 (Ex. P-6) to repudiate liability. The Respondent had on 02.02.2010 filed the suit in C.S. No. 602 of 2010 against the Appellant before the Original Side of this Court for recovery of the said sum of Rs. 31,55,000/- with interest and compensation of Rs. 10,00,000/- and for costs. The parties had produced documents and examined their witnesses during trial. After considering the matter elaborately, the Learned Judge by judgment dated 03.02.2017 passed in that suit rejected the defences raised by the Appellant and directed that the sum of Rs. 31,55,000/- as claimed by the Respondent had to be paid by the Appellant with interest at 6% per annum, but the claim for compensation made by the Respondent was not accepted by holding that the insurance policy (Ex. P-3) does not extend to provide solace for mental agony. The Appellant has preferred this intra-Court Appeal under Clause 15 of the Letters Patent read with Section 96 of the Code of Civil Procedure, 1908, challenging the aforesaid judgment in that suit.

3. The gravamen pivoted in this appeal is that the Respondent in the proposal form dated 25.03.2003 (Ex. D-4) had represented that its factory was in operation and for Query No. 18 in which it was asked 'if used as an industrial/manufacturing unit, please state whether the factory is silent at present', it had been replied as 'no' and the risk had been covered for running the factory. During subsequent renewals, including the one in which the claim (Ex. D-2) was made, the Respondent was continued to be insured on the said information as there was no intimation for change of the material circumstances stated in the proposal dated 25.03.2003 (Ex. P-3). It was only during the course of examining the claim made, it had come to light:

- (i) that the Respondent was entangled with disputes relating to operation of various quarters including Electricity Board, besides local residents;



(ii) that the factory was closed atleast from 30.08.2006 and it had no power supply; and

(iii) that several thefts had taken place before the incident on 30.07.2007 which had been reported to the police, but no effective follow up action had been taken.

These facts are said to have materially altered and increased the risk considerably than what was originally insured. It is contended that at the time of obtaining the subsequent policies including the insurance policy for the period from 04.04.2007 to 03.04.2008 (Ex. P-3) under which the claim has been made, the Respondent ought to have disclosed the same to the Appellant so as to evaluate the risk and decide whether or not to insure the factory of the Respondent and if so, at what rate. Relying on condition nos. 1 and 3(a) of the insurance policy (Ex. P-3), it is contended that when the Respondent had not communicated the events which had turned the risk as adverse and had not obtained any confirmation in writing from the Appellant for continuation of the insurance policy, the contract itself was not valid and in any event, the insurance ceases to attach the insured property as sanction had not been obtained prior to the occurrence of the loss on 30.07.2007 and consequently, the Appellant could not be held liable for the same.

4. The Learned Judge in the impugned judgment held that neither the condition nos. 1 or 3(a) of the insurance policy (Ex. P-3) would entitle the Appellant to deny liability on the ground of adverse change of risk by showing that the insurance was based on the proposal dated 25.03.2003 (Ex. D-4) which had been submitted at the time of taking initial insurance policy from 27.03.2003 to 26.03.2004, when the Appellant had contended that it had not inspected the factory premises of the Respondent before renewals and when its witness has stated that inspections are not done for each insurance policy except large insurances.

5. Learned Counsel for the Appellant assails the impugned judgment by emphasizing that the Learned Judge has not decided the issue by applying the settled legal principles to the evidence, but on extraneous requirement of inspection to be carried out by the Appellant when there is no such obligation imposed by law.

6 In response to the aforesaid contentions of the Appellant, it is claimed by the Respondent that the Appellant was fully aware of the real state of affairs as the officials of the Appellant had visited the factory at the time of collecting premium for renewal of the insurance policy (Ex. P-3) for the period from 04.04.2007 to 03.04.2008. It is asserted that the Respondent had not committed any breach of the terms of the



contract for which the Appellant could deny its liability undertaken.

7. There cannot be any qualms on the proposition of law that in a contract of insurance, which is governed by the principle of utmost good faith, information in a proposal are material facts which the insured has to disclose to the insurer and the questions in the proposal are proof of materiality and that the terms of the insurance policy must be strictly construed, which cannot be added, subtracted or modified as would affect the risk. In the present case, denial of liability by the Appellant is based upon condition nos. 1 and 3(a) of the insurance policy (Ex. P-3), which are extracted below:-

"1. This policy shall be voidable in the event of mis-representation, mis-description or non-disclosure of any material particular.

....

3. Under any of the following circumstances the insurance ceases to attach as regards the property affected unless the Insure, before the occurrence of any loss or damage, obtains the sanction of the Company signified by endorsement upon the policy by or on behalf of the Company:-

(a) if the trade or manufacture carried on be altered, or if the nature of the occupation of or other circumstances affecting the building insured or containing the insured property be changed in such a way as to increase the risk of loss or damage by Insured Perils."

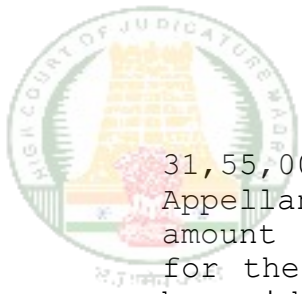
It is borne out from the materials on record that after the proposal made on 25.03.2003 (Ex. D-4), insurance policy was issued for the period from 27.03.2003 to 26.03.2004 and periodical renewals have been made by the Appellant by receiving premium from the Respondent on the same terms and conditions. However, it has not been proved that there is any express condition in the insurance policy at the time of inception that the proposal dated 25.03.2003 (Ex. D-4) then submitted would govern the parties for subsequent renewals also, unless fresh proposal had been obtained. It is also not the case of the Appellant that at the time of renewal everytime on receipt of premium, the Appellant had called upon the Respondent to submit fresh proposal and had informed that if it failed to do so, the contents of the proposal form dated 25.03.2003 (Ex. D-4) would be deemed to be adopted for subsequent renewals. It must be highlighted at this juncture that the Hon'ble Supreme Court of India in Commissioner of Income Tax, Madras -vs- Prithvi Insurance Co. Ltd., (AIR 1967 SC 853) has ruled that the general insurance contracts are in law fresh contracts entered into at the time of each renewal. This would mean that just because the Appellant has unilaterally endorsed in the renewed insurance



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policy dated 04.04.2007 (Ex. P-3) that the date of proposal and declaration is 25.03.2003, it cannot be countenanced that the Respondent had misrepresented or misdescribed or not disclosed any material particular as per condition no. 1 of that insurance policy. Coming to the repudiation of liability by the Appellant on account of the disputes that the Respondent was entangled relating to operation of various aspects including Electricity Board and obstruction from local residents, which had forced the factory to remain closed from 30.08.2006 onwards without any power supply and several thefts had taken place before the incident on 30.07.2007 and complaints had been made in that regard to the police for which no effective follow up action had been taken, the Appellant has not placed any evidence to show that that it has been its practice as insurer not to undertake insurance of any factory when it was not functioning or had become silent. There are also no materials produced as to what would be the higher amount of premium in the tariff that had to be charged from the Respondent for the additional risks that were required to be covered by such insurance. Viewed from that perspective, there does not appear to be any justification to accept the contention of the Appellant that it could avoid liability in terms of condition no. 3(a) of the insurance policy (Ex. P-3) in this case. It is hastened to add here that the said conclusions arrived at are specific to the aforesaid peculiar fact situation and ought not to be construed as meaning that an insurer cannot at all rely on those conditions in the insurance policy to deny liability under any circumstances whatsoever.

8. This turns to the determination of the amount of loss for which the Appellant has to indemnify the Respondent under the policy of insurance. The Licensed Surveyor appointed by the Appellant in his Survey Report dated 15.07.2008 (Ex. P-9) had recommended the admissibility of the claim only to the extent of Rs. 80,918/- and the Appellant had refused to accept the entire claim made by the Respondent in letter dated 20.08.2008 (Ex. P-6). However, the Appellant has been held liable in the impugned judgment for the whole amount of claim of Rs. 31,55,000/- as had been sought by the Respondent for the reason that it was not within the authority of the investigator to invalidate the claim as his duty was only to assess, quantify, investigate and 'validate' the claim and if he had doubts regarding the admissibility, he must refer that aspect to the higher officials of the Appellant, but they did not perform such obligations in this case and consequently, the Appellant would have to suffer the loss created by that failure of the Licensed Surveyor and non-application of mind by the higher officials. It is not possible either to subscribe to the lackadaisical opinion of the Licensed Surveyor followed by the Appellant for rejecting the claim in this case, or to approve the reasons that have weighed with the Learned Judge in directing the entire amount of Rs.



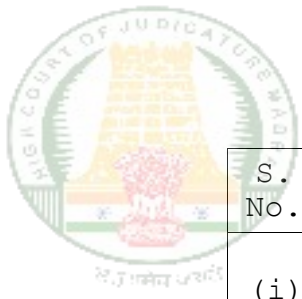
31,55,000/- claimed by the Respondent to be paid by the Appellant. In this context, it must be remembered that the amount fixed in the policy of insurance is only an outer limit for the insurance liability and the maximum amount which has to be paid in the case of loss and that the insured must establish the actual loss incurred to recover the amount claimed under the insurance policy.

9. The claim for Rs. 31,55,000/- made by the Respondent consists of loss caused on account of theft to the extent of Rs. 18,95,000/- and loss caused on account of damages for the remaining sum of Rs. 12,60,000/-. Learned Counsel for the Appellant has brought to notice that the Standard Fire and Special Perils Insurance Policy dated 04.04.2007 (Ex. P-3), which has been issued to the Respondent, excludes the liability for 'theft' as it reads as follows:-

"Riot, Strike, Malicious and Terrorism Damage
Loss of or visible physical damage or destruction
by external violent means directly caused to the
property insured but excluding those cause by
(d) Burglary, housebreaking, theft, larceny or any
such attempt or any omission of any kind of any
person (whether or not such act is committed in
the course of a disturbance of public peace) in
any malicious act."

However, the Learned Judge in the impugned judgment has held to the contrary under the mistaken impression as if it would include claims for 'theft' also. On a plain reading of the said terms of the contract, it is evident that liability for 'theft' has been specifically excepted, and the Respondent would have to confine the claim for loss of visible physical damage or destruction by external violent means loss directly caused to the property insured after deleting those caused by theft or other categories of cases mentioned therein. It would follow that the Respondent is not entitled for the sum of Rs. 18,95,000/- claimed for 'theft' which mostly relates to machineries in the factory of the Respondent.

10. As held by the Learned Judge, the Survey Report dated 15.07.2008 (Ex. P-9) of the Licensed Surveyor does not make any clear or fair assessment of the damages to the building in the factory of the Respondent. However, the Appellant has filed a letter dated 07.09.2007 (Ex. D-2) sent to it by the Respondent, which contains various enclosures and one of which relates to estimate for Rs. 9,58,352/- from Mr. S.Sattayavel, Civil Engineering Consultant and Contractor for civil works in the building of the factory of the Respondent as per the following particulars:-



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S. No.	Particulars	Amount
(i)	Production area machinery foundation cum furnace room Alteration work 7.8mX5m, 420 sft	Rs 2,08,26 . 2/-
(ii)	Production area main shed 44X75.5, total area 3322 sft	Rs 2,72,13 . 5/-
(ii i)	Existing store room demolishing, new store room work	Rs 2,05,24 . 3/-
(iv)	Office room correction work	Rs 47,184/ . -
(v)	E.B. Transformer area fencing work	Rs 58,746/ . -
(vi)	Sump Slab covering work	Rs 12,511/ . -
(vi i)	Chimney foundation correction work	Rs 12,605/ . -
(vi ii)	Security room correction work	Rs 12,712/ . -
(ix)	Worker Toilet, Bath room correction work	Rs 34,501/ . -
(x)	Over Head Tank, stair case, lab room works	Rs 77,360/ . -
(xi)	Compound wall damage area correction work	Rs 17,093/ . -
	Total	Rs 9,58,35 . 2/-

There is no other evidence for assessing the loss caused by damage to the building in the factory of the Respondent. In such circumstances, it would be appropriate to accept the aforesaid estimate of Rs. 9,58,352/- for the cost of civil works to be carried out in that regard. Having regard to the nature of liability of the commercial transaction and prevailing market rate during the relevant period, it would be reasonable to award interest at 7.5% per annum for the delayed payment, instead of 6% per annum, from the date of institution of suit till realization.

11. The result of the foregoing discussion is that the Respondent would be entitled to recover Rs. 9,58,352/- from the Appellant with interest at 7.5% per annum from the date of institution of suit till realization and the decree dated 03.02.2017 passed in the suit in C.S. No. 602 of 2010 shall be



modified to that extent. It is represented that at the time of admission, a sum of Rs. 31,50,000/- has been deposited by the Appellant with the Registry, which was directed to be invested in an interest fetching fixed deposit in a Nationalized Bank by order dated 06.09.2017. In view of the same, the Respondent is entitled to payment out from that deposited amount in terms of the modified decree, and the balance amount shall be refunded to the Appellant on filing necessary applications by the concerned parties.

12. In fine, the Original Side Appeal is disposed on the aforesaid terms. The parties shall bear their respective costs.

s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

vjt
To

The Sub-Assistant Registrar (O.S.),
High Court of Madras,
Chennai.

+1 CC to Mr. Rathina Ashokan, Advocate sr 36715.

O.S.A. No. 225 of 2017

VGII(CO)
SP(02/08/2021)