THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.01.2024

CORAM:

THE HONOURABLE MR. JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MR. JUSTICE R.SAKTHIVEL

O.S.A.(CAD).No.131 of 2022
and
C.M.P.No.15206 of 2022

1.M/s. United India Insurance Co. Ltd.,
Registered Office,
No.24, Whites Road, Chennai – 600 014.

2.M/s. United India Insurance Co. Ltd.,
Branch Office,
No.95, First Floor, Big Street,
Thiruvannamalai. ...Appellants

Vs.

1.M/s.Thiruvannamalai Pothys,
Rep. by its Proprietor Mr.K.Sekar,
No.57A, Theradi Street,
Thiruvannamalai – 606601.

2.Bank of Baroda,
Rep. by its Branch Manager,
Thiruvannamalai Branch,
No.15, R.R.Complex, Polur Road,
Thiruvannamalai – 606601. ...Respondents

Prayer: Original Side Appeal (Commercial Appellate Division) filed under

Section 13(1A) of the Commercial Courts Act, 2015 to set aside the judgment and decree passed in C.S.No.444 of 2017 dated 21.06.2022 and thereby dismiss the suit in C.S.No.444 of 2017 with costs.

For Appellants : Mr.N.Venkatraman
for M/s.Nageswaran and Narichania

For Respondents : Mr.M.Santhanaraman for R1
Ms.Revathi Manivannan for R2

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J U D G M E N T

(Judgment of the Court was delivered by **R.SUBRAMANIAN, J.**)

The Insurance Company is on appeal aggrieved by a decree for payment of a sum of Rs.4,20,85,328/- with interest at 12% per annum on Rs.2,25,23,012/- from the date of decree till date of realization.

2. The parties will be referred to as per the rank in the suit for the purpose of convenience.

3. The suit in O.S.No.444 of 2017 was laid by the plaintiff seeking a decree for a sum of Rs.6,82,49,000/- being the loss caused to the plaintiff due to the fire accident that took place on 20.10.2014 in the textile showroom belonging to the plaintiff. The plaintiff had taken insurance policy to cover the risk of loss by fire on 25.03.2014 and the said policy was to be invogue till 24.03.2015. Claiming that the entire goods that were stored in the showroom were lost because of the fire and adding the value of other furniture and fittings that were there in the showroom, the plaintiff sought for a decree for Rs.6,82,49,000/- as aforesaid. The Insurance Company repudiated the liability on the ground that there is a breach of policy condition, particularly policy condition No.3(a) and therefore the Insurance Company was not liable. This repudiation triggered the suit.

4. The Insurance Company resisted the suit contending that there was suppression of material facts by the plaintiff and the premises remained closed for nearly 35 days, prior to the date of accident, since access to it was barred by the building owner in a dispute between him and the plaintiff. Terming it as violation of policy condition 3(a), the Insurance Company contended that the repudiation is justified. It was also further contended that the cause of the fire is not an accident and therefore the Insurance Company cannot be held liable. The report of the surveyor was relied upon to highlight the fact that the cause of the fire was not an accident.

5. On the above pleadings the Hon'ble Judge framed the following issues:-

(i) Whether the High Court has jurisdiction to try the suit?

(ii) Whether the plaintiff is entitled to the claim under the policy issued by the second defendant and whether the plaintiff had acted in a diligent manner and maintained proper stocks/ registers to prove the loss?

(iii) Whether there was breach of policy conditions by the plaintiff as concluded by the second defendant?

(iv) Whether the third defendant is a necessary party to the suit?

(v) Whether the repudiation of the claim by the defendants was legal?

(vi) Whether the first and second defendants are liable to be pay the suit claim?

(vii) To what reliefs are the parties entitled to?

6. On the jurisdiction, the Hon'ble Judge found that this Court has got territorial jurisdiction and the said finding is not very seriously challenged in the appeal. On issue No.4 regarding impleading of the Banker, the Hon'ble Judge found that the said issue was framed prior to the impleading of the 3rd defendant Banker of the plaintiff and upon impleading, the necessacity to dwell upon that issue do not arise. This left the Hon'ble Judge with issue

Nos.2, 3, 5, 6 and 7.

7. Since Issue Nos.2, 3 and 5 were interconnected the Hon'ble Judge dealt with them together and concluded that the failure on the part of the plaintiff to have informed the Insurance Company about the closure of the shop by the landlord, the expiry of the lease and the disconnection of the power supply by the landlord would not amount to breach of policy condition 3(a) and therefore the repudiation by the Insurance Company on the ground of violation of policy condition 3(a) is not justified. As regards condition 3(b) which relates to closure of the shop, the Hon'ble Judge as of fact found that the said condition was deleted. On the finding that there was no breach of policy conditions, the Hon'ble Judge concluded that the Insurance Company would be liable to discharge the claim and the repudiation was not justified.

8. Addressing the quantum, the Hon'ble Judge found that the evidence placed by the plaintiff cannot be accepted, since supporting materials in the form of stock registers were not produced. He however went by the Surveyor's report which assessed the value of the goods damaged at Rs.2,25,23,012/- and held that the plaintiff would be entitled to the amount of loss as certified by the Surveyor. As a sequitur to the above finding, a decree followed, leading to this appeal by the Insurance Company.

9. We have heard Mr.N.Venkatraman, learned counsel for M/s.Nageswaran and Narichania appearing for the appellants, Mr.M.Santhanaraman, learned counsel appearing for the 1st respondent and Ms.Revathi Manivannan, learned counsel appearing for the 2nd respondent Bank.

10. Mr.N.Venkatraman, learned counsel appearing for the appellants would vehemently contend that the Hon'ble Judge erred in concluding that there was no violation of the policy condition 3(a), he would invite our attention to the judgment of the Hon'ble Supreme Court in ***Isnar Aqua Farms Vs. United India Insurance Co. Ltd.,*** reported in ***2023 SCC OnLine SCC 945,*** wherein, the Hon'ble Supreme Court had reiterated the well settled principle of Insurance Law that an utmost good faith is expected from both the parties to the contract. Specific attention is drawn to paragraph No.12 of the said judgment which reads as follows:-

> *12. Be in noted, in General Assurance Society Limited v. Chandumull Jain [AIR 1966 SC 1644], a Constitution Bench*

had observed, in the context of the insured, that uberrima fides, i.e., good faith, is the requirement in a contract of insurance. More recently, in Jacob Punnen v. United India Insurance Company Limited [(2022) 3 SCC 655], this Court affirmed and reiterated the edict laid down earlier in Modern Insulators Limited v. Oriental Insurance Company Limited [(2000) 2 SCC 734], that it is the fundamental principle of insurance law that utmost good faith must be observed by the contracting parties; that good faith forbids either party from non-disclosure of the facts which the party knows; and that the insured has a duty to disclose and similarly it is the duty of the insurance company to disclose all material facts within their knowledge since the obligation of good faith applies to both equally. This obligation and duty would rest on both parties not only at the inception of the contract of insurance but throughout its existence and even thereafter.

11. The learned counsel would also further contend that the plaintiff having failed to report the factum of expiry of the lease, the closure and the dis-connection of electricity supply to the premises is guilty of suppressing material facts which would have an effect on the perils insured. The learned counsel would fault the Hon'ble Judge for concluding that non-disclosure of these facts would not have an effect on the peril and therefore such non-disclosure cannot be a ground for repudiation of the policy.

12. On the value of damages, the learned counsel would contend that the Hon'ble Judge having disbelieved the evidence that was placed by the plaintiff, regarding the value of the goods that were stored during the date of accident, ought not to have decreed the suit going by the surveyor's report. It is the contention of the learned counsel that once the plaintiff has failed to discharge the burden to prove the quantum of loss, the Court cannot fall back on the evidence of the defendants to grant a decree.

13. Contending contra Mr.M.Santhanaraman, learned counsel appearing for the 1st respondent would submit that no doubt, an insurance is the contract based on good faith, but, at the same time, a non-disclosure in order to render the policy voidable should be on a material fact which will have an impact on the peril that is insured. Unless it is shown that non-disclosure increases the chances of peril or there is a non-disclosure with reference to a very material fact, the insured cannot be said to have committed breach of clause 3(a) and hence the Insurance Company cannot be absolved of its liability on the basis of non-disclosure of a fact which is not vital.

14. Addressing the issue relating to burden of proof, the learned counsel would submit that in a civil dispute, the Court can go by preponderance of probability and once the fact that there was an accident in a textile showroom and the fact that there were goods inside is established, the rejection of evidence of the plaintiff regarding valuation of the goods, by itself cannot non-suit the plaintiff. If some other evidence is available, it was open to the Court to look into that evidence and base its conclusion on that evidence. The learned counsel would submit that this is the exercise that had been carried out by the Hon'ble trial Judge and he having gone by the surveyor's report there is no ground for interference with the said finding of the Hon'ble Judge.

15. We have considered the rival submissions.

16. From the arguments of the learned counsel on either side, the following points arise for determination:

1. Whether there is a breach of condition 3(a) by the Insured.

2. Whether the trial Judge was right in basing his finding relating to the loss on the report of the Surveyor.

POINT NO.1:

17. The policy condition Nos.1, 3(a) and 3(b) reads as follows:-

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

3. Under any of the following circumstances the insurance ceases to attach as regards the property affected unless the insured, 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.

(b) If the building insured or containing the insured property becomes unoccupied and so remains for a period of more that 30 days (this condition is not applicable to dwellings).

18. On an assessment of the evidence, the Hon'ble Judge has found that the first limb of 3(a) is not attracted viz., the trade or manufacture carried on in the premises is not altered. As far as the second limb is concerned, the Hon'ble Judge found that the fact that the lease had expired and the possession of the plaintiff became as one of the tenant holding over instead of tenant is not something that would materially alter the risk of the Insurance Company. As regards the disconnection of electricity supply also, the Hon'ble Judge concluded that it would not increase the peril, but, it would have an effect of decreasing the peril. On the closure of the premises for more than 30 days it was found that since 3(b) stood deleted the same cannot be a ground to repudiate the policy.

19. It is this finding of the Hon'ble Judge which is challenged by the learned counsel for the appellants contending that once there is a suppression of some information, be it material or not and irrespective of weather it will have an effect of increasing the chances of peril, the Insurance Company will have a right to repudiate the policy.

20. We are unable to subscribe to the said contention of the learned counsel. A policy of the Insurance Company covers a particular risk and clause 3(a) sets out a requirement or a duty of the insured. As rightly held by the Hon'ble Judge it is not enough for the Insurance Company to show that there was a failure on the part of the insured to provide information to it which would go one step further and show that the aspect or the fact which was kept away from the Insurance Company had a direct link to the chances of peril and increased the possibilities of the accident. Unless it is shown that the fact that was not intimated to the Insurance Company had a direct link or a direct effect on the peril covered, it cannot be said that there was a violation of condition 3(a). We have no quarrel with the proposition of law that contract of insurance being a contract in good faith, there is a duty on the part of the insured as well as the insurer to act in good faith throughout its subsistence. But, that by itself would not in our considered opinion enable the Insurance Company to repudiate a policy on flimsy reason of non information.

21. The Hon'ble Judge has taken pains to examine the evidence on record, advert to each and every condition that occurs in condition 3(a) and conclude that none of the circumstances pointed out would have an effect of increasing the chances of peril and therefore it would not amount to suppression of material information within the meaning of condition 3(a).

We see no reason to disagree with the Hon'ble Judge on the said conclusions.

POINT NO.2:-

22. On the quantum, the insured viz., the plaintiff claimed a sum of Rs.6,82,49,000/-. He produced some evidence in the form of purchase bills to show the availability of the materials. The Hon'ble Judge disbelieved that evidence since it was not supported by any corroborative material in the form of stock register. Possibility of the plaintiff having sold some of those goods was also not ruled out. Therefore, the evidence offered by the plaintiff on the quantum of loss was not accepted. The Hon'ble Judge went by the surveyor's report and concluded that since the surveyor quantified the loss at Rs.2,25,23,012/-, the plaintiff would be entitled for a decree for the said amount with 12% interest.

23. Mr.N.Venkatraman, learned counsel appearing for the appellants would vehemently contend that having held that the plaintiff has not proved the value of the goods that were damaged, the Court was not right in relying upon the surveyor's report to grant a decree in favour of the plaintiff.

24. The learned counsel would contend that the plaintiff has not discharged the burden of proving the loss. This submission of the learned counsel in our opinion overlooks the fact that the proof of loss is one thing and proof of quantum of loss is another. As regards proof of loss there is overwhelming evidence available in the case on hand. The fact that the plaintiff was conducting textile business was not in dispute. The fact that a fire accident occurred is not in dispute. Therefore, the fact that there was a loss cannot be disputed. It is only the quantum of loss that is to be proved. The plaintiff has placed some evidence on the quantum of loss. That evidence has been rightly rejected by the Hon'ble Judge for want of supporting materials. The surveyor's report is also evidence. Though it has been produced by the defendant it could be looked into for the purpose of ascertaining the quantum of loss.

25. As we had already pointed out, in civil cases, the Court can go by preponderance of probabilities and strict proof or proof beyond doubt is not required. There is some evidence to show that there has been loss and quantum of loss is Rs.2,25,23,012/-. There is no suggestion by the Insurance Company that the assessment of the quantum of the loss by the surveyor is flawed for some reason or the other. The surveyor has been cross-examined by the plaintiff at length on the valuation and his evidence, in our opinion, supports the report and there is no reason for us to take a contra view.

26. We are therefore unable to conclude that the Hon'ble Judge had erred in accepting the surveyor's report on the quantum of loss. We therefore do not see any reason to interfere with the judgment and decree of the Hon'ble Judge. The appeal fails and it is accordingly **dismissed**. No costs. Consequently, the connected miscellaneous petition is closed.

(R.S.M.,J.) **(R.S.V,J.)**
05.01.2024

dsa

Index :No
Internet :Yes
Neutral Citation :No
Speaking order

<u>R.SUBRAMANIAN, J.</u>
<u>and</u>
<u>R.SAKTHIVEL, J.</u>

dsa

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