



WEB COPY



OSA (CAD) NO.133 OF 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON: 27 / 03 / 2024

JUDGMENT DELIVERED ON: 27 / 06 / 2024

CORAM:

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

**OSA (CAD) NO.133 OF 2023
AND
CMP NOS.23503 AND 29484 OF 2023**

1.The Oriental Insurance Co. Ltd.,
Regional Office,
UIL Building, Fourth Floor,
No.4, Esplanade, Chennai – 600 108.
Represented by its Deputy General Manager
Mr.Ajith Kumar

2.The Oriental Insurance Co. Ltd.,
Divisional Office
173, J.N.Road,
Thiruvallur – 602 001.
Represented by its Senior Divisional Manager
Mrs.Karpaga Amutha

... Appellants /
Defendants 1&2

Vs.

M/s.Acme Commodities Pvt. Ltd.,
No.10 (Plot No.17)
Perumal Nagar First Street,
Nanganallur, Chennai – 600 061.
Represented by its General Manager
(Administration & Commercial)
V.Sriraman

... Respondent /
Plaintiff

PRAYER: Original Side Appeal filed under Section 13 of Commercial



OSA (CAD) NO.133 OF 2023

Courts Act, 2015 read with Clause 15 of the Letters Patent, praying to set aside the judgment and decree passed in C.S.No.399 of 2017 dated 27.06.2023 and thereby dismiss the Suit in C.S.No.399 of 2017 with costs.

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

For Respondent : Mr.K.Krishnaswamy

J U D G M E N T

R.SAKTHIVEL, J.

Assailing the judgment and decree dated *June 27, 2023* passed by the learned Single Judge of this Court in *C.S.No.399 of 2017*, the appellants / defendants have preferred this Original Side Appeal under Section 13 of Commercial Courts Act, 2015 read with Clause 15 of the Letters Patent, praying to set aside the judgment and decree.

2.For the sake of convenience, the parties will be referred to as per their array in the suit.

Case of the plaintiff:

3.Plaintiff, a reputed commodity trading company, entered into two contracts for purchase of Dried Raw Cashew Nuts in shell (Fresh Crop 2014) from 'M/s.SNK General Trading LLC, Dubai and SNK



General Trading Pte. Ltd, Singapore’ (henceforth collectively referred to as ‘sellers’). The sellers agreed to sell 3500 Metric Tonnes (M.T.) +/- 10% of the Cashew Nuts which were to be shipped from Port Guinea Bissau to Port Tuticorin in the vessel ‘MV Golden Endurance’ (henceforth ‘subject vessel’ for convenience and clarity) chartered by the seller through ‘M/s. St. John Logistics LLC, Dubai’ (henceforth ‘Charterer’). Apart from the plaintiff’s cargo, cargoes containing cashew nuts from a few other sellers were also to be loaded on the same vessel (subject vessel).

3.1. Upon the instance of the sellers, essential credentials of the subject vessel were made available to the plaintiff by the charterer vide Emails dated June 26, 2014 (Ex-P.5).

3.2. Since both contracts were on Cost and Freight basis (C&F contract), the plaintiff had to procure an insurance to save their own interest in the cargo. Accordingly, the plaintiff approached the Insurance Broker, who in turn approached the second defendant on June 26, 2014 along with all the essential certificates and credentials of the subject vessel, proposing to avail an “all risks” cover on warehouse-to-warehouse terms



for the plaintiff's cargo, which was to be loaded into the subject vessel.

There were discussions and the plaintiff had furnished all the relevant information regarding cargo, vessel and the voyage, before the loading commenced at Port Bissau on June 29, 2014. Upon the defendants' approval of the vessel and acceptance of the insurance proposal, the plaintiff paid a premium of Rs.2,22,474/- on July 2, 2014 through cheque. Then the defendants issued the voyage policy dated July 3, 2014 covering the plaintiff's cargo of all risks on warehouse-to-warehouse terms subject to 'Institute Cargo Clauses (A)' [henceforth 'ICC (A)'] and 'Institute Theft, pilferage and Non-delivery Clause'. The entire plaintiff's cargo was insured for 33 Crores, having been valued at their C&F Value + 10% towards their incidentals.

3.3.While so, loading of cargo as per the contract began on June 29, 2014. Plaintiff's cargo was packed in 41472 bags each containing approximately 80Kg of Cashew Nuts. When the subject vessel reached its draught limit, it sailed on its own power and reached a deeper berth on July 17, 2014, which shows that the subject vessel was seaworthy. Loading of 3350.069 M.T. of plaintiff's cargo and 1857.854 M.T. of other buyers' cargo was completed on July 19, 2014. Upon completion of loading, the



Master of the subject vessel issued 37 Nos. of Bills of Lading on July 20, 2014.

3.4. Right before her voyage on July 20, 2014, the subject vessel encountered a problem with her engine and the voyage was abandoned. The non-negotiable copies of Bills of Lading were sent by the plaintiff to the Insurance Broker on July 26, 2014, who in turn forwarded the same to the 2nd defendant. After due incorporation of the Bills of Lading numbers and the dates, the 2nd defendant released the policy document on August 7, 2014.

3.5. The plaintiff, on receiving communication from the charterer on August 8, 2014 about the frustration of the voyage and contemplation about transshipment of the cargo to Port Tuticorin through another vessel, gave notice of the same through the Insurance Broker to the defendants on the next working day viz., August 11, 2014. Defendants, being fully aware of the abandonment of the voyage, issued an endorsement on August 21, 2014 clarifying and confirming the continuance of the coverage on warehouse-to-warehouse terms effective



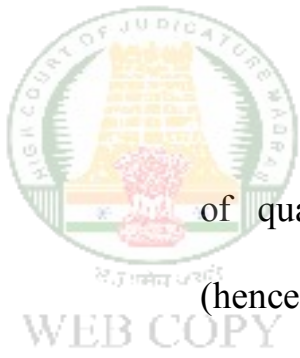
from its inception. Subsequently, the defendants further assured the plaintiff about the continuation of the policy.

3.6.The plaintiff then employed Lloyd's Surveyors to survey and supervise the transshipment process. The cargo unloading began on September 24, 2014 and ended on October 9, 2014. Relevant particulars of the survey report and the corresponding claims of the plaintiff are as hereunder:

<i>Description of Loss</i>	<i>Quantity Damaged / Lost in Metric Tonnes</i>	<i>Claim Amount in Rupees</i>
Cargo totally lost due to wet damages	25.796	21,28,170
Cargo shortage due to transshipment handling	11.055	9,12,038
Loss of Weight in the holds of the ship	103.182	85,12,515
Cargo Totally Lost	140.033	-
Cargo partially wet damaged – depreciation @ 50%	62.311	25,70,329
Total	202.344	1,41,23,052

Note: Claim Amount = Quantity damaged or lost multiplied by insured value per MT (Rs.82,500/-)

3.7.The plaintiff attributes the water damage to the presence of fresh water in the holds of the subject vessel as ascertained by the surveyors. The loss of weight in the holds of the subject vessel is attributed to poor handling while discharging, resulting in bursting of bags. The loss



OSA (CAD) NO.133 OF 2023

of quantity in reloading into the vessel, MV GRANDWAY STAR (henceforth 'second vessel') chartered by the charterer, is again attributed to poor handling. The Insured value of one M.T. of cargo is Rs.82,500/-. Accordingly, the plaintiff claims Rs.1,41,23,052/- as determined in the above table.

3.8.Further, it is averred that the plaintiff took due care and sincere steps to minimize the loss under the policy. The plaintiff obtained an order from the Bissau Port authorities, arrested the subject vessel through a Court Order and also chartered the second vessel, besides appointing Lloyd's Surveyors and taking another policy covering the cargo in the second vessel, all as a loss-minimization measure. In the course of all these, the plaintiff incurred huge expenses as tabulated hereunder:



3.9. The plaintiff is entitled to recover these expenses as per and 16 of ICC(A). Therefore, under the heads of 'Physical Loss Claim' and 'Loss Minimisation', the plaintiff totally raised a sum of Rs.4,59,20,828/- before the defendants on December 3, with all the necessary documents. Several discussions were and the documents demanded were duly furnished. Though the are bound by Clause 9(5) of IRDA (Protection of r's Interest) Regulations, 2002 and by their own Citizen take a call on the claim within 30 days, they kept on delaying for about 2 years with a callous attitude. Having faced losses, the plaintiff sent an legal notice on October 4, 2016 to



the defendants. Finally, the defendants repudiated the claims through letter dated January 25, 2017 on the following grounds:

- (i) Non-disclosure of material facts
- (ii) Un-Seaworthiness of the vessel
- (iii) Termination of Contract of Carriage
- (iv) Forwarding Charges
- (v) Sue and Labour Clause
- (vi) Water Damage

3.10. Further it is contended by the plaintiff that it's the 1st Defendant who had the authority to decide on the claim. All the meetings and discussions were held with the 1st defendant, and the 2nd defendant merely communicated the decisions formally. It is contended that the cause of action arose entirely in Chennai where the claims were dealt with by the 1st Defendant. Thus, the plaintiff filed a suit before this Court claiming a sum of Rs.6,19,93,117.80/-. The breakdown is as follows:



OSA (CAD) NO.133 OF 2023

WEB COPY

DETAILS OF CLAIM		
		Rs. P.
Physical Loss or Damage Claim	Rs.	14,123,052.00
Loss Minimization Expenses	Rs.	31,797,776.00
Total Value of Claim	(A)	45,920,828.00
Date of Claim	Date	03.12.2014
Date of filing of Suit	Date	03.04.2017
Difference / Months Lapsed	Months	28 Months
Percentage of Interest Per Year	%	15.00
Percentage of Interest Per Month	%	1.25
Interest for the period		
Rs.45920828 X 1.25% X 28	(B)	16,072,289.80
Total Value of Claim (A+B)		6,19,93,117.80

Case of the Defendants:

4.The defendants contend that the plaint has not been duly verified by a competent person and that this Court lacks Jurisdiction as no cause of action arose within the jurisdiction of this Court. Further that, the owners or the charterers of the subject vessel are not added as a party to this Suit and therefore, this Suit is bad for non-joinder of necessary parties.

4.1.The second defendant issued a marine cargo-single voyage (sea) Policy bearing No. 414600/21/2015/10 for the voyage from Guinea



Bissau to Tuticorin, India for transportation of Cashew Nuts. The sum insured being Rs. 33 Crores. The Policy of Insurance issued by the defendants is strictly governed by the Policy terms and conditions and the provisions of the Marine Insurance Act. There was no proper notice to the defendants on the abandonment of voyage of the cargo through the subject vessel due to a breakdown in the main engine. The plaintiff filed a formal claim on December 3, 2014 and the same was repudiated on January 25, 2017 on the following grounds:

i) Non-disclosure of material facts

The loading of the cargo into the vessel commenced on June 29th June, 2014. The plaintiff failed to disclose the factum of commencement of loading while seeking insurance cover on 3rd July 2014. Further, the plaintiff suppressed other material facts such as stoppage in loading, delay due to various climatic conditions like rain, mechanical breakdown and problem relating to hatch cover in holds, which amounts to breach of utmost good faith, which is the foundation of Contract of Insurance.

ii) Un-Seaworthiness of the vessel

The vessel lacked seaworthiness even before the voyage



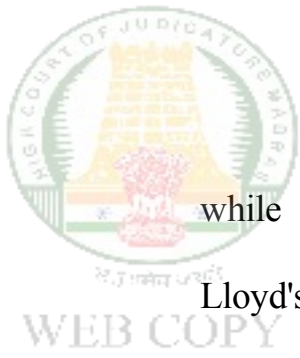
began, as stipulated in subsection (2) of Section 42 of the Marine Insurance Act, 1963. Consequently, the defendant's liability is not attracted.

iii) Termination of Contract of Carriage

The plaintiff was aware of the fact that the contract of carriage had terminated on July 20, 2014, as the voyage had not commenced due to engine problems. However, the plaintiff failed to provide prompt notice to the defendants, as stipulated in the termination clause of the contract of carriage and hence there is no cover under the policy. Even if the freshwater damage occurred after the engine problem, the insurer cannot be held responsible because there was no request for an extension of coverage from the plaintiff.

iv) Forwarding Charges

Since there was no operation of risk covered under marine peril and since the engine failure is also before the commencement of the voyage, in view of Condition 12 of ICC(A), forwarding charges are not payable. Further, in case of abandonment of voyage, the plaintiff ought to have submitted fresh carrier/ vessel details; in case they notice any damage



while stuffing and de- stuffing to new vessel the insured will engage Lloyd's surveyor for assessment of loss. In absence of the above requirements, forwarding charges are not payable.

v) Sue and Labour Clause

Expenses incurred in minimizing losses which are not covered under the policy are not recoverable under the sue and labour clause as per Section 78(3) Marine Insurance Act, 1963. Further, the plaintiff has violated Section 78(4) thereof. Hence, they are not entitled to claim under sue and labour clause.

vi) Water Damage

There was water damage to the cargo due to rain even before the commencement of insurance. The plaintiff, being fully aware of the same, suppressed it with malafide intentions. Thus, there is breach of utmost good faith. Therefore, the plaintiff is not entitled to any claim under this head.

4.2.It is the further contention of the defendants that the plaintiff failed to take necessary action to protect the right of subrogation available to the defendants; and that the plaintiff failed to initiate necessary



legal action against the subject vessel. The plaintiff failed to find an appropriate carrier for safe transportation of the cargo. The insurance covers only a valid journey and not abandonment of voyage and it is only for sea transit from the port of loading upto the port of discharge. The insurance covers only perils of the sea and not the expenses incurred in transportation of the cargo including the loss of cargo on account of damage and shortage. Further, forwarding charges won't be applicable to general average or salvage charges and the cargo was not stowed as per the terms and conditions. The cargo was loaded onto the subject vessel over a period of approximately two months. This delay would have subjected the cargo to various natural elements and the damage to the cargo could have been due to improper handling. Further, the plaintiff has not proved the reason for the abandonment of voyage. Hence, the defendants prayed to dismiss the Suit.

5. Based on the above pleadings, the learned Single Judge framed the following issues:

“(i) Whether this Court has territorial jurisdiction to try the suit when the policy issued by the defendant's office is situated outside the jurisdiction of this Court?”



(ii) *Whether the person who has signed and verified the plaint is competent to represent the plaintiff, sign and verify the plaint?*

(iii) *Whether the suit is bad for non-joinder of necessary parties?*

(iv) *Whether the plaintiff had provided all the relevant details of the voyage to the defendants prior to issuance of the policy?*

(v) *Whether or not the policy issued by the defendants is a warehouse to warehouse policy?*

(vi) *Whether the Insurance Policy covers the risk of damage including loss and shortage caused to the cargo during trans-shipment?*

(vii) *Whether or not the vessel M.V.Golden Endurance was seaworthy at the time of the commencement of loading of cargo on board the vessel on 29.06.2014?*

(viii) *Whether the insurance policy issued by the defendant was still in force till the cargo reached the destination?*

(ix) *Whether the plaintiff had been prudent and carried out loss minimization measures?*

(x) *Whether the plaintiff is entitled to the suit claim?*

6. On the side of the plaintiff, the plaintiff's General Manager (Administration and Commercial) was examined as P.W.1, and they



marked 53 documents as Exs-P.1 to P.53. On behalf of the defendants, the Deputy Manager of the second respondent's office was examined as D.W.1, and one document was marked as Ex.D1.

7. After careful consideration, the learned Single Judge concluded that, since the second defendant is not competent to issue a policy of this value and since it is the 1st defendant who approved the policy, part of cause of action arose within the territorial limits of this Court and therefore, this Court has territorial jurisdiction. Accordingly, Issue No.(i) was answered in favour of the plaintiff.

7.1. Further, since the plaintiff's company had authorised its General Manager to verify the plaint and file suit vide Ex-P.43 – Board Resolution, the learned Single Judge held that the plaint is duly verified. Accordingly, Issue No.3 was answered in favour of the plaintiff.

7.2. Further, on the strength of *Saurashtra Chemicals Case*

[*Saurashtra Chemicals Ltd. Vs. National Insurance Company Ltd.*



reported in 2019 19 SCC 70] the learned Single Judge held that the defendants can't raise a new ground viz., violation of Clause 16(2) of the Contract of Insurance pertaining to preservation of rights against carriers and other third parties, which was not raised in the letter of repudiation. Accordingly, Issue No.3 was answered in favour of the plaintiff.

7.3.Further, by referring to Ex-P.17 – Communication, Ex-P.18 - Communication and Ex-D.1 – Policy, the learned Single Judge answered Issue No.4 in favour of the plaintiff.

7.4.Further, relying on the deposition of D.W.1 and Ex-D.1 – Policy, the learned Single Judge answered Issue No.5 in favour of the plaintiff.

7.5.Further, by relying on the Ex-P.41 – Endorsement by the defendant and Ex-D.1 – Policy, the learned Single Judge answered Issue Nos.6 and 8 in favour of the plaintiff.

7.6.Further, on the strength of the dictum laid down in **Rajan kumar Case** (cited *infra*) as well as by referring to Ex-P.7 – Particulars of



the vessel and Ex-P.12 – Statement signed by the Master of the Ship, the learned Single Judge held that the ship was seaworthy and accordingly, answered Issue Nos.7 in favour of the plaintiff.

7.7.Further, on the strength of *Saurashtra Chemicals case* (*supra*), the learned Single Judge answered Issue No.9 in favour of the plaintiff.

7.8.Further, the learned Single Judge held that, out of the claims under the 5 heads, the plaintiff is not entitled to the claims under the head of ‘legal expenses’ and ‘New Cargo insurance Premium for the onward voyage of the saved cargo’. The Single Judge noted that the new insurance was out of abundant caution as the suit insurance itself covers risk from warehouse to warehouse. Accordingly, Issue No.10 was answered partly in favour of the plaintiff.

7.9.Accordingly, the learned Single Judge decreed the Suit in part and directed the defendants to pay a sum of Rs.4,30,08,344/- to the



OSA (CAD) NO.133 OF 2023

plaintiff with interest at the rate of 9% from December 3, 2014 till the date of realisation and the Suit Cost.

7.10. Feeling aggrieved with the same, the defendants preferred this Original Side Appeal.

Arguments:

8. Mr. Venkatraman, the learned counsel for the appellants / defendants would argue that, the documents relied on by the plaintiffs are electronic records including emails, and they do not comply with the Section 65B of 'the Indian Evidence Act, 1872' (henceforth 'Evidence Act'). The learned Single Judge failed to consider the said aspect of the matter.

8.1. Further would argue that, the Complaint has not been duly verified by a competent person. Further, this Court lacks Territorial Jurisdiction since the Insurance policy was issued by the second defendant's office situated outside the territorial limits of this Court and since, as per the plaintiff's case, the destination port is Port Tuticorin.



WEB COPY



OSA (CAD) NO.133 OF 2023

8.2.Further would argue that, the loading of the cargo into the vessel commenced on June 29, 2014. The plaintiff failed to disclose the said fact while issuing the policy on July 3, 2014. This would amount to non-disclosure of material facts. Further, the plaintiffs suppressed other material facts such as stoppage of loading, delay due to climatic conditions like rain, mechanical breakdown and defects relating to the hatch cover in the holds.

8.3.Further would argue that, the plaintiff ought to have ensured that the subject vessel was seaworthy. There is an implied warranty of seaworthiness of the ship in favour of the defendants as per Section 41 and 42 of the Marine Insurance Act, 1963. The Insurance contract is based on the principle of *uberrima fidei* and the onus is on the plaintiff to prove that the subject vessel was seaworthy and fit to carry the cargo to the destination, before commencement of the voyage. Further, the plaintiff failed to provide prompt notice about the abandonment of the voyage of the subject vessel. Since, the fresh water damage occurred after the abandonment of the voyage, the insurer / defendants are not liable for



the same.

WEB COPY

8.4.Further would argue that, the owner of the subject vessel is a necessary party to this Suit and therefore, this Suit is bad for non-joinder of necessary parties. It is an obligation on the part of the plaintiff to keep alive the right of subrogation of the defendants against the sea carrier. The learned Single Judge failed to consider the aforementioned aspects. Accordingly, he prayed to allow the Original Side Appeal and dismiss the Civil Suit.

8.5.The learned counsel for the appellants / defendants would rely on the following judgments in support of his arguments:

(i)**Narasu's case** - Judgment of this Court in Narasu's Roller Flour Mills Vs. Narasu's Coffee Company and Ors. [MANU/TN/8588/2022 : 2022-5-LW440]

(ii)**Jagmail Singh's case** - Judgment of the Hon'ble Supreme Court in Jagmail Singh and Another Vs. Karamjit Singh and Others [(2020) (5) SCC 178]

(iii)**Kingston Computer case** - Judgment of the Hon'ble Supreme Court in State Bank of Travancore



WEB COPY



OSA (CAD) NO.133 OF 2023

Vs. Kingston Computers India Private Limited
[(2011) 11 SCC 524]

(iv)***Nibro case*** - Judgment of Delhi High Court
in M/s.Nibro Limited Vs. National Insurance Co.
Ltd., [AIR 1991 DELHI 25]

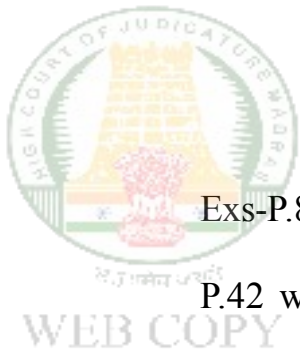
(v)***Schmenger case*** - Judgment of this Court in
Schmenger GMBH and Company Leder Vs. Saddler
Shoes Private Limited [MANU/TN/3885/2010]

(vi)***EID Parry case*** - Judgment of this Court in
E.I.D. Parry (India) Limited Vs. Far Eastern Marine
Transport Co. Ltd., and Another [1998 1 L.W. 320]

(vii)***Rekhaben's case*** - Judgment of the
Hon'ble Supreme Court in Reliance Life Insurance
Company Limited and Another Vs. Rekhaben
Nareshbhai Rathod [(2019) 6 SCC 175]

(viii)***Rajan Kumar case*** - Judgment of the
Hon'ble Supreme Court in Rajan Kumar & Brothers
(IMPEX) Vs. Oriental Insurance Company Ltd.,
[2020 CPJ 124 (SC)]

9.Mr.K.Krishnaswamy, learned counsel for the respondent /
plaintiff would argue that P.W.1 - plaintiff's General Manager had filed an
affidavit and the same is sufficient compliance of Section 65B of the Indian
Evidence Act, 1872. Further, the defendants have admitted the contents of



Exs-P.8, P.13, P.15, P.16, P.20, P.23, P.29, P.31, P.33, P.36, P.40, P.41 and P.42 which are all electronic records as well as the issuance of Ex-D.1 - Policy, in their 'affidavit of admission and denial under Order XI Rule 4 of CPC as amended by the Commercial Courts Act, 2015' (henceforth 'Order XI Rule 4 affidavit').

9.1.Further would argue that, Ex-D.1 - Policy was issued and the claim request was later repudiated by the second defendant on behalf of the first defendant whose office is located well within the jurisdiction of this Court. Hence, this Court has Territorial Jurisdiction over the matter. Further, Ex-P.43 - Board Resolution has been marked, wherein and whereby the plaintiff's General Manager was authorised to file a Suit against the defendants, and to sign and verify the plaint. Hence, the plaint has been verified by a competent person.

9.2.Further would argue that, undisputedly, the contract between the plaintiff and the seller is a C & F contract wherein, the seller is in charge of chartering the vessel and loading the goods. Since the buyer is in a distant location, he would not be aware of the exact time loading



begins. Once the seller loaded the goods into the ship and shared the bills of lading with due endorsements with the buyer, the seller is entitled to the agreed price and the responsibility over the goods then shifts on the buyer. Further, Ex-D.1 does not require the plaintiff to supervise the loading. Hence, the plaintiff has not suppressed any material facts.

9.3.Further would argue that only after the issuance of policy, the damage had occurred. At the time of loading, the subject vessel was seaworthy. Moreover, the policy was on warehouse to warehouse terms covering all risks and the defendants had assured the continuance of the policy vide Ex-P.23 - Email. Hence, the defendants cannot shirk their liabilities towards the plaintiff.

9.4.Further would argue that, as far as seaworthiness is concerned, Ex-P.5 would show that the subject vessel is classed with Russian Maritime Register of Shipping which is a member of 'International Association of Classification Societies' (henceforth 'IACS'). It *prima facie* establishes the sea-worthiness of the subject vessel. Further, the defendants waived any breach of implied warranty of seaworthiness under Clause 5.2



of Ex-D.1 unless the assured is privy to such unseaworthiness. The defendants failed to prove that the plaintiff was privy to the unseaworthiness of the subject vessel.

9.5. Further would argue that, the plaintiff submitted the claim to the defendants on January 2, 2015. The defendants withheld the claim without assigning any reason. Hence, the plaintiff was constrained to issue notice on October 4, 2016. The defendants by their reply dated January 25, 2017 repudiated the claim. As per the proviso to Article III (6) under the Schedule to 'the Indian Carriage of Goods by Sea Act, 1925' (henceforth 'ICGS Act') liability of the owner of the subject vessel is discharged unless the Suit is brought within one year after the delivery of goods or from the date the goods would have been delivered. Since the delay is caused by the defendants, they cannot turn around and say that the plaintiff failed to protect their right of subrogation against the owner of the subject vessel. Further, in the repudiation letter, the plaintiff did not mention the plea of non-joinder of the owner. Hence, the plea of non-joinder of necessary party does not have any merits.



9.6.The learned counsel for the respondent / plaintiff would

rely on the following judgments in support of his arguments:

(i)***S.K.Ramalingam Chettiar's case*** - Judgment of the Hon'ble Supreme Court in The East and West Steamship Company Vs. S.K.Ramalingam Chettiar [AIR 1960 SC 1058]

(ii)***Hira Lal's case*** - Judgment of the Hon'ble Supreme Court in New India Assurance Company Limited Vs. Hira Lal Ramesh Chand and Others [(2008) 10 SCC 626]

(iii)***AFRECO case*** - Judgment of the Kerala High Court in AFRECO Vs. Kerala State Cashew Development Corporation Ltd. [2019 SCC Online Ker 647]

(iv)***Mudit Roadways case*** - Judgment of the Hon'ble Supreme Court in New India Assurance Co. Ltd. And Others Vs. Mudit Roadways [2023 SCC Online SC 1532]

(v)***Wheels India case*** - Judgment of this Court in Wheels India Limited Vs. Khemchand Rajkumar and Ors. [MANU/TN/0526/1969 : 1970 (2) MLJ 648]



Points for consideration:

10. This Court has heard the arguments advanced on either side and perused the records. The following points arise for consideration:

- (i) Whether this Court has Territorial Jurisdiction to try the Suit?
- (ii) Whether the Complaint has been verified by a competent person?
- (iii) Whether this Suit is bad for non-joinder of necessary party?
- (iv) Whether the requirements under Section 65B have been duly complied with in this Suit?
- (v) Is there any suppression of material facts on the side of the plaintiff?
- (vi) Whether the subject vessel was seaworthy?
- (vii) Whether there exist any implied warranty as to the seaworthiness of the subject vessel in favour of the defendants?
- (viii) Whether the plaintiff is entitled to the Suit Claim?

Discussion and Decision:

(i) Whether this Court has Territorial Jurisdiction to try the Suit?



11.The second defendant issued Ex-D.1 - Policy in favour of the plaintiff. According to the plaintiff, though Ex-D.1 - Policy was issued by second defendant, owing to the quantum of loss / claim, first defendant alone had authority and jurisdiction to deal with the claim petition. The plaintiff had been called to the first defendant's office for meetings and discussions with the Deputy General Manager and the Regional in-charge in regard of the claim on various occasion as tabulated under Paragraph No.52 of the Plaint. The second defendant had been merely communicating the decisions of first defendant and Ex-P.42 would fortify the said fact. Second defendant never engaged in any formal discussion with the plaintiff in regard of the claim.

11.1.This Court has perused Ex-P.42 - Registered Post with Acknowledgement Due. Notably, defendants have admitted Ex-P.42 in their Order XI Rule 4 affidavit. Ex-P.42 is dated April 11, 2017 and addressed by the first defendant to the plaintiff. Relevant extract of Ex-P.42 reads thus:

“Ref: Marine Cargo Claim reported under our Policy No 414600/21/2015/10 Our Claim No 410000/21/2015/30028 Damage to cashew nuts Import from Guinea Bussau to



OSA (CAD) NO.133 OF 2023

Tuticorin.

*We refer the captioned claim **lodged with us** and also your query under the RTI act through online portal regarding the status of the claim.*

We observe from the online portal that the decision with regard to settlement of the claim is still pending.

*In this connection, we wish to inform you that we have already **conveyed our decision vide our letter dated 25.01.2017** sent through Regd. Post with RPAD on 27.01.2017. However, we are again sending today a copy of the said letter receipt of which kindly acknowledge.*

In case you are not satisfied with our reply, you may please contact the First Appellate Authority as per the detailed given as under:-

*Shri Ajitkumar,
DGM/First Appellant Authority
The Oriental Insurance Company Limited
Regional Office, No.4, UIL Building.
4, Esplanade, Chennai 600.108.
Telephone No: 044-23458200”*

(emphasis supplied)

11.2.It is easily discernible from Ex-P.42 that the plaintiff's claim petition had been dealt with either by the first defendant solely or by



the defendants jointly.

WEB COPY

12.Further, D.W.1, who is the Deputy Manager of the second defendant, has admitted in her cross-examination that second defendant had no power to issue Ex-D.1 in 2014; that Ex-D.1 was examined by Mr.Varadharajan who is employed in the first defendant office; that Ex-D.1 was prepared by second defendant and approved by first defendant; and that without first defendant's approval, Ex-D.1 could not be issued.

Relevant extract is hereunder:

“Q67: (Ex.D1 is shown to the witness) In Ex.D1, there are 2 names found in the policy namely Mrs. Malathi Parthasarathy and Mr.K. Varadharajan. Mr.Varadharajan is employed in the Regional office namely the 1st defendant?

A: Yes.

Q68: Therefore Ex.D1 policy was issued by the 1st defendant?

A: Ex.D1 policy is approved by the 1st defendant and issued by the 2nd defendant.

Q69: Without the approval of the 1st defendant the policy, Ex.D1 could not be issued?



A: No, could not be issued.

Q365: I put it to you that the policy Ex.D1 was issued by both the first and second defendants.

A: It was prepared by second defendant and approved by the first defendant.

Q366: Whether Ex.D1 bears the name of officers of both the first and second defendants.

A: Yes.

Q391: I put it to you that the first defendant has approved the policy Ex.D1 at its regional office in Chennai.

A: Yes. ”

12.1.The oral evidence of D.W.1 also corroborates the version of the plaintiff that Ex-D.1 - Policy was issued by second defendant on behalf of first defendant and part of cause of action arose in Chennai within the original territorial limits of this Court.

13.Further, since second defendant office is situated beyond



the Territorial jurisdiction of this Court, the plaintiff filed an application seeking leave to sue against the second defendant in *A.No.2672 of 2017* and the same was allowed by this Court and leave was granted on April 27, 2017. Thereafter, the defendants filed an application in *A.No.4755 of 2018* praying to revoke the leave granted in *A.No.2672 of 2017*. Hon'ble Single Judge of this Court, after a detailed discussion, held that this Court *prima facie* has Territorial Jurisdiction and dismissed the application of the defendants, while reserving the rights of the defendants to raise those contentions pertaining to jurisdiction in the main suit.

14.To be noted, while the first defendant asserts that the plaintiff does not have any cause of action *qua* first defendant, the Written Statement of the defendants has been verified by Mr.Lingeshwaran, who is the Regional Manager of the first defendant. Bare reading of the Written Statement would show that Ex-D.1 - Policy was issued under the authorisation and supervision of the first defendant. Further, in Paragraph No.43 of the Written Statement, the defendants have admitted that there were meetings regarding the claim at first defendant's office.

15.Hence, this Court concludes that the first defendant is a



proper party to the Suit; and that part of cause of action arose within the territorial limits of this Court. Therefore, this Court has Territorial Jurisdiction to try the Suit.

**Accordingly, Point No.(i) is answered in favour of the plaintiff
and against the defendants.**

(ii)Whether the Complaint has been verified by a competent person?

16.In Paragraph No.2 of the said Written Statement verified by the Regional Manager of the first defendant, it has been stated that the plaintiff is a private limited company incorporated under the Companies Act, 1956; and that the person who has signed and verified the Complaint has not filed any document to show that he is a competent person to represent the plaintiff.

16.1.This Court has perused the Complaint. Complaint has been verified and signed by Mr.V.Sriraman who is the General Manager of the plaintiff's company. He was examined as P.W.1. He marked Ex-P.43 - Board Resolution which authorises him to verify and sign the Complaint. Perusal of Ex-P.43 reveals the fact that the plaintiff company in its Board Meeting held on April 15, 2017, passed a resolution authorising



Mr.V.Sriraman, plaintiff's General Manager, to verify and sign the Plaint, Affidavit, Vakalat, Petition and also tender evidence before any Court in respect of Plaintiff company's claim case with Ms.Oriental Insurance Company Limited.

17.Notably, as per Order VI Rule 15 of Code of Civil Procedure, the plaintiff or any other person acquainted with the facts of the case is competent to verify the Plaint.

18.In ***Kingston Computer case***, in the absence of Board Resolution and any valid authorisation, the Hon'ble Supreme Court held that the Suit is not verified by a competent person.

18.1.In ***Nibro case***, Hon'ble Delhi High Court *inter alia* held that unless power to institute a Suit is specifically conferred on a particular director he has no authority to institute a Suit on behalf of the Company. Such powers shall be conferred by the Board of Directors only by passing a resolution in that regard.

18.2.In ***Schmenger case***, in a Suit for recovery of money by a German Company against a Chennai based company, the plaintiff therein



neither field Memorandum of Association nor Articles of association nor Resolution of Board Members authorising the liaisoning officer to verify the plaint and institute the Suit. Hence, a learned Single Judge of this Court held that the plaint is not duly verified.

18.3. In the instant case, Mr.V.Sriraman has been specifically authorised vide Ex-P.43 - Board Resolution. Hence, he is a competent person. The above case laws relied on by the defendants would not be applicable to the instant case.

19. Hence, this Court is of the view that the Plaint in question has been verified by a competent person.

**Accordingly, Point No.(ii) is answered in favour of the plaintiff
and against the defendants.**

(iii) Whether this Suit is bad for non-joinder of necessary parties?

20. The contention of the defendants in this regard is that, as per Ex-D.1 - Policy, the plaintiff ought to have taken reasonable care and caution to protect the goods from loss or damages as well as to preserve the right of subrogation of the defendants against the sea carrier / owner of



the subject vessel. In this Case, the plaintiff failed to initiate the Suit against the sea carrier and thereby failed to protect the right of subrogation of the defendants. Further, the sea carrier, is a necessary party to the Suit.

21.The contention of the plaintiff in this regard is that, the plaintiff submitted revised claim petition on January 2, 2015 under Ex-P.33 and the defendants did not act upon it leaving it to languish without any resolution. Hence, the plaintiff issued Notice dated October 4, 2016 under Ex-P.38. Thereafter the defendants issued reply dated January 25, 2017 repudiating the claim under Ex-P.41.

22.As per the proviso to Article III (6) under the schedule to the ICGS Act, liability of the owner of the subject vessel is discharged unless the Suit is brought within one year after the delivery of goods or from the date on which the goods would have been delivered. Though the ICGS Act would apply when carriage of goods in ship takes place from a Port situated within India and not a Port outside India, Article III under the schedule to the ICGS Act was enacted in consonance with the International Conference on Maritime Law held at Brussels in October 1922 and the



pursuant Rules (Hague Rules). Hence, since Indian law is silent on this aspect, the principle underlying Article III under the schedule to the ICGS Act would apply to the instant case.

23.The defendants had taken two years to decide on the said revised claim petition of the plaintiff. It is due to the inordinate delay on the side of the defendants in deciding the claim petition, the period of limitation of 1 Year for a Suit against the sea carrier prescribed by the ICGS Act got lapsed and the sea carrier's liability got extinguished. Hence, the defendants cannot turn around and say that the plaintiff failed to preserve their right of subrogation against the sea carrier and that the sea carrier is a necessary party to the Suit. Therefore, the plea of non-joinder of necessary parties does not have any merits.

24.In *EID Parry Case*, the plaintiff therein filed a Suit for damages against the vessel owner for short landing of goods. The shipments of containing 259 drums and 1319 drums of Goods were covered by two Bills of Lading dated August 30,1977. The goods were insured against all risks including shortage with the third defendant



therein. The vessel arrived at Madras Harbour on September 18, 1977 and upon discharge of the cargo, it was found that 125 drums out of the total 1578 drums were short landed. The Port Trust of Madras issued requisite short landing certificates to the plaintiff therein. The plaintiff company lodged a claim with the first defendant therein on November 28, 1977 for the value of the shortage. It went in vein. Hence, the plaintiff therein filed a Suit against the owner of the Ship and the Insurance Company. Originally the Suit was instituted against the 2nd and 3rd defendant therein alone. The 1st defendant carrier was impleaded subsequently on December 8, 1978 when the Suit was already barred by limitation against the 1st defendant therein. In such a scenario, a learned Single Judge of this Court held that, the liability of the 1st defendant - carrier has been extinguished. Further held that, because of the plaintiff's failure to institute the Suit against the 1st defendant in time, the insurance company has lost its remedy against the carrier. Hence, the Court held that the Suit must fail. In the instant case, the claim petition was filed on December 3, 2014 and repudiated by the insurance company on January 25, 2017. Hence the delay is on the part of the insurance company. Law presumes that the Insurance Company would be aware of Article III (6) under the Schedule to the ICGS Act. ***EID***



Parry case would not aid the case of the defendants.

WEB COPY

25.The defendants also relied on the judgment of the Hon'ble Supreme Court in *Mudit Roadways case* wherein, while referring to *Saurashtra Chemicals Case*, Hon'ble Supreme Court has reiterated that the Insurer cannot introduce additional reason beyond those detailed in their letter to justify their repudiation. There is no quarrel with the said proposition of law. But the said proposition of law would not be applicable to the plea of non-joinder of parties as the question of non-joinder of parties arises only on filing of the Suit. The said Question would not arise at the time of repudiation of the claim. Hence, *Mudit Roadways case* is not applicable to the present case.

**Accordingly, Point No.(iii) is answered in favour of the plaintiff
and against the defendants.**

**(iv)Whether the requirements under Section 65B have been duly
complied with in this Suit?**

26.The contention of the defendants is that the plaintiff has marked printouts of various Email Communications without annexing



certificate under Section 65B of the Evidence Act.

WEB COPY

27. This Court has perused the Complaint. Out of the 39 documents filed along with the Complaint, 36 documents are printouts of various Email Communications pertaining to the Suit subject. Needless to mention that printouts of Email communications are documents as per Section 3 of the Evidence Act. It is pertinent to cite the judgment of the Hon'ble Delhi High Court in ***Super Cassettes case*** [Super Cassettes Industries Ltd. Vs. Shreya Broadcasting Pvt. Ltd., reported in 2019 SCC Online Del 7314]. Essential facts of the case are: The plaintiff therein is a copy right holder for various literary, music and other works. In random monitoring, the plaintiff therein came to know that the defendant therein has been broadcasting plaintiff therein's copyrighted work without their permission / licence. P.W.2 recorded the programmes wherein copyrighted work of the plaintiff therein were broadcasted. In the pursuant Suit, P.W.2 marked the CDs / DVDs containing those recordings. The defendant therein raised objection that Section 65B Certificate has not been produced and hence, the same is inadmissible in view of ***Anwar's case*** [Anwar P.V. Vs. P.K. Basheer, reported in (2014) 10 SCC 473].

27.1. In these facts and circumstances, the Hon'ble Delhi High Court rejected the objection of the defendant therein by observing that the



affidavit of P.W.2 satisfies the requirements laid down under Section 65B of the Evidence Act and also the law laid down in *Anvar's case*.

27.2. Notably, the Hon'ble Supreme Court in *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal., reported in (2020) 7 SCC 1* has held that certificate under sub-section (4) of Section 65B is mandatory and a condition precedent to admit any electronic record as secondary evidence. There is no prescribed form for a certificate under Section 65B. As stated *supra*, in the instant case, the aforementioned 36 documents were marked through P.W.1. P.W.1 while marking the said documents, filed Ex-P.45-Affidavit whereby he has substantially complied with the requirements under Section 65B of the Indian Evidence Act, 1872.

28. Moreover, the defendants have admitted the contents of Exs-P.8, P.13, P.15, P.16, P.20, P.23, P.29, P.31, P.33, P.36, P.40, P.41 and P.42 which are all electronic records (mostly print out of E-mails) as well as the issuance of Ex-D.1 - Policy, in their Order XI Rule 4 affidavit. Hence, this Court is of the view that Section 65B has been duly complied with in this case.



29. In this regard, the defendants relied on *Narasu's case* which was filed for recovery of money based on books of accounts. The plaintiff therein did not comply with the provisions of Order VII Rule 17. On the other hand, he produced computerised ledger without complying with the requirements of Section 65B Certificate. The defendant therein denied the truthfulness of the accounts. In such facts and circumstances, this Court had held that electronic statements of account maintained in computers require the compliance of Section 65B of the Evidence Act. Hence, the decision relied on by the defendants is distinguishable from the instant case and therefore, not applicable.

30. Further, the defendants relied on *Jagmail Singh's case* for the above contention wherein the Hon'ble Supreme Court has dealt with production of secondary evidence. The said decision is not relevant to the present case.

**Accordingly, Point No.(iv) is answered in favour of the plaintiff
and against the defendants.**



(v) Is there any suppression of material facts on the side of the plaintiff?

WEB COPY

31. According to the defendants, the proposal form was given by the plaintiff's insurance brokers on June 2, 2014 (Ex-P.8). Based on Ex-P.8, Ex-P.11 - Policy was issued on July 3, 2014 without incorporating the Bills of Lading. Ex-P.12 - Statement of facts sets out the events pertaining to the movement of the subject vessel and the loading of goods that occurred from 03:00 hours on June 29, 2014 to 13:30 hours on July 20, 2014. It would reveal the fact that the sellers had moved the goods from the warehouse to the Port Guinea Bissau and the cargo was exposed to the vagaries of weather even before issuance of Ex-P.11 - Policy; and that there were some issues with the ship (dense smoke emanating from the hold) on July 1, 2014. Further, the defendants contend that Ex - P.22 - Surveyor's Report would reveal the fact that there were water damages on the cargo due to ship's sweat; that sufficient care, caution and precautionary measures had not been taken while and after loading the cargo into the ship; that the cargo was not in seaworthy condition before the issuance of the Ex-P.11 - Policy. Hence, the defendants contend that the plaintiff failed to act in a *bona fide* manner, and suppressed these material facts.

32. In this regard, D.W.1 has admitted that there is no



evidence, even when considering the Surveyor's report and the Ex-P.41 - Reply to the plaintiff's Notice (Ex-P.38) whereby the defendants repudiated the plaintiff's claim, to suggest that the damage to the cargo occurred between June 29, 2014, and July 3, 2014. To be noted, Ex-P.22 - Surveyor's Report was based on the Survey taken on August 20, 2014, and August 21, 2014, *i.e.*, after the frustration of the voyage.

32.1.It is pertinent to cite here *Wheels India* case, wherein this Court had explained the nature of C&F Contracts as hereunder:

“39.The C. and F. contract is not a destination but a shipment contract with risk of subsequent loss or damage to the goods passing to the buyer with risk of subsequent loss or damage to the goods passing to the buyer upon shipment if the seller has properly performed all his obligations with respect to the goods. Delivery to the carrier is delivery to the buyer for purposes of risk and title. Delivery of possession of the goods is accomplished by delivery of the bill of lading and upon tender of the required documents the buyer must pay the agreed price without awaiting the arrival of the goods and if they have been lost or damaged after proper shipment he must seek his remedy against the carrier or insurer.”

32.2.***Wheels India*** case has been relied on by the Hon'ble



Kerala High Court in *AFRECO case* while explaining the nature of C&F Contract.

32.3.As rightly pointed out by the learned counsel for the respondent / plaintiff, the contract between the parties being a C&F Contract, the sellers being in charge of loading and the plaintiff being in a distant location, the plaintiff would generally not be aware of the exact time the loading begins. Further, conjoint reading of the answers of D.W.1 to Question Nos.214, 215 and 216 in her cross examination, would show that Ex-D.1 does not require the plaintiff to supervise the loading. Nor the plaintiff has such duty under the Sales Contract. Even assuming that the plaintiff had suppressed the factum of commencement of loading before the issuance of Ex-P.11, it would not cause any prejudice as there is no evidence to show that the damage had occurred before the issuance of Ex-P.11. Hence, the argument advanced by the defendants that the plaintiff suppressed the factum of commencement of loading before the issuance of Ex-P.11 and that, the cargo underwent damage even before the issuance of Ex-P.11 - Policy does not hold up under scrutiny.

33.Ex-P.12, - Statement of Facts would reveal that loading



commenced on June 29, 2014, and was completed on July 19, 2014. On July 1, 2014, loading was halted for two hours due to dense smoke emanating from one of the holds. Loading was also stopped on various occasions due to problems with the hatch cover. Between July 8, 2014, and July 17, 2014, the vessel re-berthed to a deeper berth. Thereafter, loading was again halted due to issues with the shaft generator. On July 20, 2014, the captain released the cargo documents for sailing.

33.1. In a nutshell, Ex-P.12 would show that there had been some issues with the subject vessel and consequent halts in loading; but there is nothing to show that there were any major issue concerning the engine or the vital parts of the subject vessel which could potentially lead to abandonment of the voyage. The fact that the subject vessel re-berthed to a deeper berth on her own power would itself show that she was seaworthy.

34. The plaintiff sent the Bill of Lading issued by the captain of the ship to the second defendant on July 26, 2014 through the Insurance Broker under Ex-P.14. The Bill of lading would show that the loading was



completed on July 20, 2014. The second defendant incorporated the Bill of Lading numbers on Ex-D.1 - Policy under Ex-P.20. This would show that the plaintiffs had duly forwarded the Bills of Lading. Further, on receiving communication from the charterer on August 8, 2014 (Friday) about the frustration of the voyage and contemplation about transhipment of the cargo to Port Tuticorin through another vessel under Ex-P.17, the plaintiff gave notice of the same through the Insurance Broker to the defendants on August 11, 2014 (the next working day) under Ex-P.18. Notably, after the frustration of the voyage, the defendants issued Ex-P.23, admitting their liability in case of forced discharge, reshipment or transhipment. From the above, there seems to be no suppression of material facts on the side of the plaintiff.

35.Hence, this Court is of the view that the plaintiff has not suppressed any material facts.

36.In ***Rekhaben's case***, Hon'ble Supreme Court held that life insurance is based on the principle of *uberrima fidei* and that failure on part of the plaintiff to disclose material facts, would enable the insurer to repudiate the claim. There is no quarrel with the proposition of law. In this



case, there is no suppression of material facts. Hence, it is not applicable to this case.

**Accordingly, Point No.(v) is answered in favour of the plaintiff
and against the defendants.**

(vi)Whether the subject vessel was seaworthy?

37.It is pertinent to cite here *Rajan Kumar case* wherein, the Hon'ble Supreme Court while considering the question of seaworthiness of a vessel, has held as hereunder:

“7.As is evident from the above, the ICC 01/01/2001 imposes two requirements to ensure that the vessel complies with a certain minimum standard of seaworthiness. The first is a classification requirement which requires that the vessel should be classed with a Classification Society which is a Member/Associate Member of the International Association of Classification Societies ('IACS') or, in the case of vessels engaged exclusively in coastal trading, a National Flag Society. The second is an age limitation in respect of the insured vessel. The IACS consists of 12 member societies, as listed below:

...

... ..

8.The official statement provided by the IACS about its



WEB COPY



OSA (CAD) NO.133 OF 2023

quality standards is significant for understanding why classification of a cargo vessel with a member-society of the IACS, as opposed to any other society, is considered as a yardstick to judge whether the voyage policy can be reasonably insured. Members of the IACS have to comply with the IACS "Quality System Certification Scheme" (QSCS), which, after 25 years of continuous evolution, is considered as the "gold standard" for ship classification societies. Moreover, every IACS member is required to have its own "Internal Quality Management System" for ensuring that classed vessels meet certain minimum criteria of quality. The audits of all IACS members, and of those societies who wish to be considered for such membership, are carried out by independent accreditation bodies, which lends further legitimacy to the classification accorded to vessels by IACS members."

37.1.From the aforecited authority it is clear that, when a vessel is a member of any of the member societies of IACS, it is *prima facie* considered as seaworthy. D.W.1 in her evidence has agreed under Question No.84 that seaworthiness of a vessel is ascertained based on its Ship Certificate. In this case, Ex-P.5 / P.7 - Email containing the Ship Certificates of the subject vessel would show that the subject vessel is a member of the Russia Maritime Register of Shipping which was a member of IACS at the material point of time and that it was built in the year 1997



which means it was below the age of 25 years at the material point of time and satisfies the corresponding age limit provided under Clause 2.1. of the Institute Classification Clause. The said certificate was in force at the material point of time as it was valid till August 24, 2017. Hence, the subject vessel is deemed to be seaworthy.

**Accordingly, Point No.(vi) is answered in favour of the plaintiff
and against the defendants.**

(vii) Whether there exist any implied warranty as to seaworthiness of the subject vessel in favour of the defendants?

38.The defendants contended that as per Section 41 and 42 of the Marine Insurance Act, 1963, there is an implied warranty as to the seaworthiness of the ship in his favour. However, as rightly pointed out by the learned counsel for the plaintiff, the defendants have misplaced their reliance on Section 41 and 42 of the Marine Insurance Act, 1963 as they have expressly waived the implied warranty in their favour under Clause 5.2 of Ex-D.1 - Policy. Clause 5 of Ex-D.1 - Policy reads thus:

***“5. Unseaworthiness and Unfitness Exclusion
Clause***

5.1.In no case shall this insurance cover loss damage



or expense arising from unseaworthiness of vessel or craft, unfitness of vessel craft conveyance container or liftvan for the safe carriage of the subject-matter insured, where the Assured or their servants are privy to such unseaworthiness or unfitness, at the time the subject-matter Insured is loaded therein

5.2.The Underwriters waive any breach of the implied warranties of seaworthiness of the ship and fitness of the ship to carry the subject-matter insured to destination, unless the Assured or their servants are privy to such unseaworthiness or unfitness.

38.1.As stated *supra*, the plaintiff has *prima facie* proved that the subject vessel is seaworthy and fit to carry the goods to the destination. There is absolutely no piece of evidence to suggest that the plaintiff was privy to the unseaworthiness of the vessel. The unseaworthiness of the subject vessel came to light only at the time of commencement of the voyage when there arose a problem in the engine crankshaft. The plaintiff could not have reasonably foreseen it. In the absence of anything to suggest the contrary, this Court is of the view that there is no implied warranty in favour of the defendants.

**Accordingly, Point No.(vii) is answered in favour of the plaintiff
and against the defendants.**



(viii) Whether the plaintiff is entitled to the Suit Claim?

WEB COPY

39. The plaintiff in Paragraph No.36 of the Plaint claims a sum of Rs.1,41,23,052/- towards loss/damage to the cargo. The breakdown is hereunder:

<i>Description of Loss</i>	<i>Quantity Damaged / Lost in Metric Tonnes</i>	<i>Claim Amount in Rupees</i>
Cargo totally lost due to wet damages	25.796	21,28,170
Cargo shortage due to transshipment handling	11.055	9,12,038
Loss of Weight in the holds of the ship	103.182	85,12,515
Cargo Totally Lost	140.033	-
Cargo partially wet damaged – depreciation @ 50%	62.311	25,70,329
Total	202.344	1,41,23,052
Note: Claim Amount = Quantity damaged or lost multiplied by insured value per MT (Rs.82,500/-)		

39.1. Exs-P.22 and P.32 - Surveyor's Reports substantiate the total claim amount of Rs.1,41,23,052/- under the head of loss / damage to the Cargo as per the above breakdown. In view of the endorsement dated August 21, 2014 on Ex-D.1 - Policy, it is clear that Ex-D.1 is on warehouse to warehouse basis. As per Clause 1 of ICC (A), Ex-D.1 covers all risks. Hence, this Court is of the view that the plaintiff is entitled to the claim amount of Rs.1,41,23,052/- under the head of loss / damage to the Cargo as per the above breakdown.



39.2.Further, the plaintiff claims a sum of Rs.3,17,97,776/- as

tabulated hereunder:

Description of Expenses	Amount spent for the whole shipment of 5262.160 MTs in Rupees	Prop. Amount spent for plaintiff's cargo of 3350.069 MTs. in Rupees
Legal Expenses	42,57,360	27,10,235
Cost of Unloading from the subject vessel – Warehousing and loading on to second vessel	97,57,740	62,11,535
Cost of Additional Freight paid for the second Vessel	3,47,92,500	2,21,48,906
Survey Fees for Unloading / Loading and Quality Report	8,24,460	5,24,851
Cargo Insurance Premium paid for the onward voyage of the saved cargo	-	2,02,249
Total	-	3,17,97,776

40.However, the plaintiff has miserably failed to adduce any document to substantiate plaintiff's claim except the revised claim petition submitted by the plaintiff to the defendants (Ex-P.33). In Ex-P.33, no original receipt or document has been annexed. According to the plaintiff, Ex-P.33 is a printout of Email communication. The plaintiff has not made a foundational plea about the primary evidence viz., the original receipts or documents. In the absence of such foundational plea, secondary evidence is inadmissible.

41.In this regard, during the course of trial on February 23,



2022, the plaintiff issued Notice (Ex-P.46) to the defendants calling upon them to furnish a copy of the initial claim dated December 3, 2014 as well as the revised claim dated January 2, 2015 filed by the plaintiff with the defendants together with its enclosures as listed therein. The plaintiff did not file a copy of the alleged initial claim petition dated December 3, 2014 before the Court. Thereafter, plaintiff issued another Notice dated August 24, 2022 (Ex-P.52) to the defendants calling upon them to produce the a copy of the entire Claim File in respect of the claim made by the Plaintiff bearing *No.410000/21/2015/030018* under the Marine Insurance Policy bearing *No.414600/21/2015/10*. The plaintiff counsel would submit that the Email regarding Settlement Offer (Ex-P.36) whereby first defendant offered a total sum of Rs.1,55,07,480/- as a settlement, is admitted by the defendants in their Order XI Rule 4 affidavit. Plaintiff's side posed a question about Ex-P.36 - Email regarding Settlement Offer to D.W.1. She denied Ex-P.36 as she is not aware of it. Further, the plaintiff's side posed questions about Ex-P.46 and Ex-P.52., for which, D.W.1 replied that the relevant files are not available in the second defendant's office. There is no plea that the plaintiff had handed over the original documents or receipts to the defendants along with the claim petitions. In the absence of such a plea, no adverse inference can be drawn against the defendants



over non-production of the documents in Ex-P.46 and Ex-P.52.

WEB COPY

42.Plaintiff has not filed any document to show that plaintiff or its agent or its seller has paid any amount towards legal fees, loading and unloading charges, additional freight charges etc. In the absence of proof the plaintiff would not be entitled to said claim. However, the fact that due to the abandonment of voyage of the subject vessel, the plaintiff had chartered the second vessel and shipped the cargo to Port Tuticorin has been established vide Ex-P.49 - New Insurance Policy for the voyage of the second vessel. Hence, the factum of unloading from the subject vessel and loading onto the second vessel is easily discernible. Therefore, the plaintiff is entitled to the claim amount of Rs.62,11,535/- towards unloading and loading.

43.As far as the claim amount of Rs.2,21,48,906/- towards additional freight expenses is concerned, as stated above, there is no documentary evidence to substantiate the same. The plaintiff has not filed any documents to ascertain the difference between freight charges of both the vessels. In such a scenario, the plaintiff is not entitled to the claim



amount of Rs.2,21,48,906/- towards additional freight expenses.

WEB COPY

44.As far as the claim towards legal expenses is concerned, perusal of Ex-P.31 would show that it is the sellers who preferred a legal action against the sea carrier before the Tribunal of Commerce at the Republic of Guinea Bissau. There is no document or proof to ascertain the legal expenses nor there is any proof to show that the legal expenses were borne by the plaintiff. In such circumstances, the plaintiff is not entitled to the claim amount of Rs.27,10,235/- towards legal expenses.

45.As far as the claim towards Survey Fees is concerned, there is no document to establish the same. Hence, the plaintiff is not entitled to the claim amount of Rs.5,24,851/- towards Survey Fees for Unloading / Loading and Quality Report.

46.As far as the claim of Insurance is concerned, as rightly held by the learned Single Judge, the new insurance was out of abundant caution by the plaintiff as the Suit insurance itself covers risk from warehouse to warehouse. Hence, the plaintiff is not entitled to the same.



WEB COPY



OSA (CAD) NO.133 OF 2023

47. In a nutshell, the plaintiff is entitled to the claims as tabulated below:

<i>S.No.</i>	<i>Head</i>	<i>Claim Amount in Rupees</i>
1.	Loss / damage to the Cargo	Rs.1,41,23,052/-
2.	Cost of Unloading from the subject vessel – Warehousing and loading on to second vessel	Rs.62,11,535/-
<i>Total</i>		Rs.2,03,34,587/-

Accordingly, Point No.(viii) is answered partly in favour of the plaintiff and partly in favour of the defendants.

48. In *Ramalingam Chettiar's case*, Hon'ble Supreme Court interpreted Article III (6) under the Schedule to the ICGS Act. In Hira Lal's case, Hon'ble Supreme Court has dealt with the warehouse-to-warehouse policy terms and Institute Cargo Clauses A, B and C. There is no quarrel with the proposition of law laid down in the above judgments. They are not of much relevance to the instance case, in view of the above findings of this



OSA (CAD) NO.133 OF 2023

Court.

Conclusion:

49.Resultantly, OSA(CAD)No.133 of 2023 is partly allowed with appeal costs against the plaintiff and the Judgment and Decree of the learned Single Judge is modified as hereunder:

(i) The defendants shall pay a sum of Rs.2,03,34,587/- (Rupees Two-Crore Three-Lakh Thirty-Four Thousand Five-Hundred and Eighty-Seven only) along with interest at the rate of 9% per annum from the date of initial claim *viz.*, December 3, 2014 till the date of realisation to the plaintiff;

(ii) Consequently, connected Civil Miscellaneous Petitions are closed.

[R.SUBRAMANIAN, J.]

[R.SAKTHIVEL, J.]

27 / 06 / 2024

Index : Yes
Internet : Yes
Neutral Citation : Yes
Speaking Order
TK



WEB COPY



OSA (CAD) NO.133 OF 2023



WEB COPY



OSA (CAD) NO.133 OF 2023

R.SUBRAMANIAN, J.
AND
R.SAKTHIVEL, J.

TK

PRE-DELIVERY JUDGMENT MADE IN
OSA (CAD) NO.133 OF 2023

27 / 06 / 2024