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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgement delivered on: 14.07.2025

+ **RFA(COMM) 256/2024 & CM APPL. 38351/2024**

ECGC LTD (FORMERLY KNOWN AS EXPORT CREDIT
GUARANTEE CORPORATION LTD.)Appellant

versus

M/S INVENTION INDIA (EXPORTS) PVT. LTD.Respondent

Advocates who appeared in this case

For the Appellant : Mr Anand Prakash, Advocate.

For the Respondent : Mr Naresh Thanai, Ms Khushboo Singh,
Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MR. JUSTICE TEJAS KARIA

JUDGMENT

TEJAS KARIA, J

1. The present Appeal has been filed under Section 96 of Code of Civil Procedure, 1908 (“CPC”) against the judgment dated 25.04.2024 (“**impugned judgment**”) in CS(COMM) No. 934 of 2022 (“**Suit**”) filed by the Respondent against the Appellant before the District Judge (Commercial Court), North-West District, Rohini Courts, Delhi (“**Commercial Court**”).
2. *Vide* the impugned judgment, the learned Commercial Court allowed



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the Suit of the Respondent and passed a decree against the Appellant for ₹77,32,749.43/- alongwith *pendente lite* and future interest @ 18% per annum with effect from 01.03.2022 till realisation thereof. In addition, the learned Commercial Court also awarded costs as well as counsel's fee quantified as ₹51,000/- in favour of the Respondent.

3. Being aggrieved by the impugned judgment, the Appellant has preferred the present Appeal.

FACTUAL BACKGROUND

4. The Appellant is a Government of India owned export credit agency and provides export credit insurance services to Indian exporters and Banks to boost and meet the requirements of export businesses.

5. The Respondent is a company incorporated in India and engaged in the business of export of garments. The Respondent availed "Buyer Exposure Policy" dated 10.07.2018 against the premium of ₹94,500/- for the period 03.07.2018 to 02.07.2019 ("**Policy**") with respect to four purchase orders dated 08.03.2019 received from M/S Morrison Super Markets PLC ("**MS**").

6. The Policy was renewed against a premium of ₹89,775/- on 17.07.2019 for a period from 03.07.2019 to 02.07.2020. At the time of renewal of the Policy, the maximum liability was restricted to ₹70,00,000/- which was subsequently revised / enhanced to ₹1,30,00,000/- *vide* letter dated 22.07.2019 issued by the Appellant against the additional premium of ₹76,950/-.

7. The Respondent manufactured the goods and supplied to MS pursuant to the purchase orders and raised eight invoices amounting to ₹184,264.08



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for the same. As per the terms and conditions of the purchase orders, the payment was to be received by the Respondent within 60 (sixty) days from the shipment of the goods. The first payment became due on 01.09.2019.

8. As per the terms of the Policy, the Respondent could avail the benefit of the Policy only if the Respondent complied with all the terms and conditions of the Policy. As per the terms of the Policy, the Respondent was under an obligation to report any default of payment that remained overdue for more than thirty days by the 15th of the subsequent month.

9. The Respondent submitted the Report of Default (“**ROD**”) on 30.11.2019 and informed the Appellant of the amounts due against the eight shipments sent by the Respondent to MS starting from 03.07.2019 till 08.08.2019.

10. According to the Appellant, the ROD was submitted with a delay of 15 days, which resulted in non-compliance of the Policy conditions. In view of the ROD, the Appellant placed MS in the Buyers’ Specific Approval List (“**BSAL**”), which is a caution-list maintained by the Appellant for internal underwriting purposes.

11. On 08.01.2020, MS sent an Email to the Respondent wherein certain defects were pointed out in the goods on account of which the payment of the Respondent had been withheld by MS. From 30.11.2019 till March, 2020, the Respondent and MS exchanged various Emails to negotiate and resolve the dispute with regard to the defect in the goods and the outstanding payments. On 10.01.2020 and 19.02.2020, MS sent Emails to the Respondent offering de-branding and resale of the bad quality products and further made a claim of ₹1,51,963.74 due to losses suffered by MS. The said



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negotiations were intimated to the Appellant. However, no tangible result could be achieved for resolving the said dispute.

12. Accordingly, the Respondent submitted its claim to the Appellant with requisite documents on 23.03.2020. However, *vide* letter dated 24.07.2020, the Appellant rejected / repudiated the claim of the Respondent due to the reason that MS had raised counter-claim of ₹1,51,963.74 on account of supply of bad quality of goods. Therefore, there was an “unresolved dispute” under Part III (Exclusions), Clause 3(b) of the Policy and the liability of the Appellant was excluded. The other reason given for rejection / repudiation was that there was a delay in submission of the ROD.

13. The Respondent made a representation dated 31.07.2020, which was received on 05.08.2020, stating that the reasons assigned in the repudiation letter rejecting the claim of the Respondent were not sustainable as the correspondence exchanged between the Respondent and MS was duly brought to the notice of the Appellant, which clearly established that the goods were manufactured as per the specifications and various tests at different stages were conducted. The allegations leveled by MS were baseless and misconceived. As regards the delay of 15 days in filing ROD, the same was immaterial as the default by MS was within the knowledge of the Appellant and did not cause any prejudice.

14. On 04.09.2020, the Respondent and MS arrived at a settlement agreement resolving the differences between them whereby MS agreed to pay ₹92,317 against the total outstanding of ₹1,84,264.08 (“**Settlement Agreement**”), which was agreed upon by the Respondent, without any intimation to the Appellant to minimize its losses.



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15. On 16.09.2020, the Respondent sent an email to the Appellant informing that MS and the Respondent had arrived at an amicable settlement of the dispute and the Respondent withdrew the complaint regarding MS and the non-payment of its invoices. It was confirmed by the Respondent that the matter has been resolved to its satisfaction and MS be removed from any blacklist and restrictions preventing the Appellant from supporting supply to MS.

16. Pursuant to the Settlement Agreement, the Respondent received £92,317 from MS and for the balance amount of £91,947.08, the Respondent issued a legal notice dated 28.01.2022 calling upon the Appellant to make payment of ₹77,32,749.43/- at the conversion rate of ₹84.10/- for £1 within a period of four weeks from the receipt of the notice.

17. The Appellant *vide* interim reply dated 31.01.2022 informed the Respondent that the matter was being looked into and the Appellant would revert shortly. On 17.02.2022, the Appellant sent detailed reply to the legal notice received from the Respondent denying the contents of the same and reiterating that the claim of the Respondent was rightly repudiated. It was stated in the reply that the Policy categorically stated in Part III, Clause 3(b) that the Appellant shall not be liable for any losses where there was an unresolved dispute and the very fact that there was an amicable settlement between the Respondent and MS established that there existed an unresolved dispute. Accordingly, the Respondent was not entitled to any claim from the Appellant as the goods supplied had quality issues because of which the Respondent agreed for an amicable settlement and confirmed that the matter had been resolved between the Respondent and MS to the satisfaction of the Respondent. It was clarified that MS was not blacklisted but placed in BSAL



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for internal underwriting reference and was removed after the matter having been resolved to the satisfaction of the Respondent. Therefore, the Respondent was estopped from claiming any amount from the Appellant as *vide* Email dated 16.09.2020, the Respondent had withdrawn all claims on MS pursuant to which the name of MS was removed from the BSAL. Accordingly, the Appellant denied the liability to indemnify the Respondent for any amount whatsoever.

18. On 13.05.2022, the Respondent approached the Appellant for pre-institution mediation, however, as the claim had been withdrawn, the Appellant did not provide the consent to participate in the process of pre-institution mediation. A non-starter report was submitted on 04.06.2022 and the Suit was filed on 16.12.2022 claiming recovery of ₹89,92,653.43/- alongwith *pendente lite* and future interest @ 18% per annum.

19. The Appellant in its written statement, *inter alia*, made a preliminary objection that the Suit was bad for non-joinder of MS. The Appellant stated that there was a violation of the essential terms and conditions of the Policy and, as such, the claim of the Respondent was repudiated as there existed an unresolved dispute between the Respondent and MS and thereafter, the Respondent had withdrawn the claim against MS after the settlement of the matter. Additionally, ROD was submitted with a delay of 15 days which was in non-compliance of the terms and conditions of the Policy by the Respondent.

20. After examining the documentary and oral evidence submitted by the parties, the learned Commercial Court decreed the Suit *vide* impugned judgment holding as under:



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- a. MS was not a necessary or a proper party in the Suit as the subject matter of the Suit was not the quality or otherwise of the goods supplied by the Respondent to MS as the same was under a different contract between the Respondent and MS. As the dispute between the Respondent and MS was amicably resolved and the Suit is for the remaining amount of goods which was not included in the settlement between the Respondent and MS, it was not necessary to join MS as a defendant in the Suit.
- b. There was no delay in sending the ROD as the Branch Manager of the Appellant, who used to deal with the Respondent, was informed and the ROD was sent as per his instructions in furtherance of the discussions / advice by the said Branch Manager of the Appellant, who was aware of the defaults. Further, the requirement of ROD was a collateral condition. Hence, the delay in ROD as ground for repudiation of the claim of the Respondent was not sustainable in law.
- c. Interpretation of Clause 3(b) of the Policy providing for “Exclusions” by the Appellant was misconceived as it has to be read to mean that if there was any other dispute at the time of taking the Policy or at the time of making the claim, besides the purchase orders secured by way of Policy, and it being unresolved, the Appellant will have no liability. The clause cannot be read to mean that the dispute in respect to the purchase orders covered under the Policy and cannot be used for denying the claim in respect to the said purchase orders.



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- d. As regards the withdrawal of the claim *vide* Email dated 16.09.2020 by the Respondent pursuant to the settlement of dispute with MS, it was the complaint which was withdrawn by the Respondent and not the claim.
- e. The Policy requires the Respondent to take practicable measures available to prevent or minimize any loss in respect of the exports. The Respondent negotiated and amicably settled with MS, which appeared to be a *bona fide* settlement. By entering into the settlement, the Respondent saved the cost of litigation and reduced the loss which would have been caused to the Appellant, which was prudent on part of the Respondent.
- f. Accordingly, the Appellant was held to be liable for the amount claimed by the Respondent.
21. Being aggrieved by the impugned judgment, the Appellant has preferred the present Appeal.

SUBMISSIONS BY THE APPELLANT:

22. The learned counsel for the Appellant has submitted that the learned Commercial Court has erroneously allowed the Suit without considering the evidence at hand and the oral testimony of the witnesses of the Appellant and the Respondent.
23. It was further submitted that the Respondent could avail the benefit of the Policy only if the Respondent complied with all the terms and conditions of the Policy. The learned Commercial Court failed to appreciate the fact that the respondent miserably failed to comply with the terms of the Policy.



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24. It was further submitted that the Policy covered only three categories of Buyer Risks: (i) Protracted Default; (ii) Insolvency; and (iii) Contract Repudiation. These insured perils were subject to exclusions, *inter alia*, of any 'unresolved dispute' between the Respondent and MS. Upon receipt of the ROD, the Appellant *vide* Email dated 13.12.2019 enquired from MS the reason for the default and the payment schedule. MS in response informed the Appellant about the quality disputes. Through a series of communications between the Respondent and MS, it was established that there was an ongoing unresolved quality dispute between them.

25. It was further submitted by the learned counsel for the Appellant that the Settlement Agreement entered into between the Respondent and MS was without any intimation to the Appellant and the same was shared for the first time alongwith the Suit. The mere existence of a settlement agreement established that there was a dispute between the Respondent and MS, which excluded the liability of the Appellant in terms of Part III, Clause 3(b) of the Policy.

26. It was submitted that MS made the payment of £92,317 to the Respondent in terms of the Settlement Agreement and the remaining payment was not remitted by MS on account of quality issues. The Policy did not cover the liability for inferior quality of goods supplied by the Respondent as otherwise, it will lead to scenarios where exporters will supply inferior goods to the overseas buyers to reduce their expenses and then claim the amount disputed by the buyers from the Appellant and make profits on the insurance transaction.

27. The learned counsel for the Appellant submitted that the learned Commercial Court failed to appreciate that the Respondent submitted the



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ROD with a delay of 15 days. This delay in reporting amounted to non-compliance of the terms of the Policy.

28. It was submitted by the learned counsel for the Appellant that despite the quality issues raised by MS, the Respondent filed its claim with Appellant on 23.03.2020 and the same was rejected by the Appellant on the ground of 'unresolved dispute' of quality and delayed ROD *vide* letter of repudiation dated 24.07.2020.

29. It was further submitted that the Respondent *vide* email dated 16.09.2020 withdrew its complaint against MS and confirmed that the matter has been resolved to the satisfaction of the Respondent and requested that name of MS be removed from BSAL. The said email dated 16.09.2020 shows that the matter was resolved with MS and, therefore, the Respondent was not entitled to take contradictory stand by alleging that the quality issue raised by MS was baseless as otherwise the Respondent would not have requested the Appellant to remove the name of MS from BSAL.

30. It was further submitted that the Respondent has received the amount from MS for the goods supplied and there is no cause to file claim with the Appellant. It was further submitted that none of the insured perils are triggered and, thus, the Policy cannot be invoked.

31. The learned counsel for the Appellant referred to Recital A of the Settlement Agreement to submit that it is admitted by the Respondent that a dispute had arisen between the Respondent and MS relating to the safety and quality of the garments supplied by the Respondent. It was further submitted that Settlement Agreement records that MS believed that the garments did not comply with the agreed specifications and / or with the contractual terms agreed with the Respondent. It also records that MS had refused to pay the



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Respondent for the supplied garments. In view of the same, it is clear that the dispute had arisen between the Respondent and MS.

32. The learned counsel for the Appellant further relied upon Clause 3 of the Settlement Agreement to submit that it records that there was full and final settlement and the Respondent had released and forever discharged MS and agreed to not take any action or raise any claim, demands or set-offs against MS. It was submitted by the learned counsel for the Appellant that in view of the Settlement Agreement, the demand raised by the Respondent *vide* legal notice dated 28.01.2022 demanding ₹77,32,749.32/- from the Appellant was baseless.

33. It was further submitted by the learned counsel for the Appellant that the claim of the Respondent was rightly repudiated by the Appellant as the Respondent had admitted to unresolved disputes by calling the counter-claim by MS a threatening technique. Further, the Settlement Agreement was entered into without any consultation with or information to the Appellant and in collusion with MS. The Appellant became aware of the Settlement Agreement only when the Suit was initiated by the Respondent against the Appellant.

34. It was submitted that MS was a necessary and proper party to the Suit and the learned Commercial Court erred in holding that Suit was maintainable without joinder of MS as a party, as MS was not made a party even though it was required to establish the facts about the quality of the garments and the negotiations between the Respondent and MS. In view of the same, the learned counsel for the Appellant submitted that the impugned judgment is liable to be set aside on the sole ground of non-joinder of a necessary party.



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35. The learned counsel for the Appellant submitted that the learned Commercial Court erred in holding that there was no delay in submission of the ROD as the Appellant was informed of the default. The learned Commercial Court wrongly held that mere verbal information to one officer of the Appellant would dilute the requirement of timely filing of ROD in the prescribed format. The impugned judgement failed to appreciate that the delay in filing of ROD was a material breach of the Policy as ROD was delayed by 15 days, which was a substantial delay sufficient to repudiate the claim of the Respondent by the Appellant.

36. It was further submitted by the learned counsel for the Appellant that the learned Commercial Court noted the admission on the part of the Respondent that there existed an unresolved dispute between the Respondent and MS and, therefore, Part III Clause 3(b) of the Policy excluded the liability of the Appellant. Once the claim was withdrawn after the settlement was reached between the Respondent and MS, the Respondent was not entitled to raise any subsequent demand after two years of withdrawing its claim as there was no liability of the Appellant to honour such a claim.

37. It was further submitted that the learned Commercial Court erred in observing that *“MS had also raised a fictitious counter claim in order to avoid making due payment”* as, if the counter-claim by MS was fictitious then the Respondent would not have accepted a much lesser amount of £92,317 as against the original due amount of £1,84,264.08. By its own conduct, the Respondent had accepted lesser amount without any prior approval or consultation with the Appellant by ‘amicably’ resolving the dispute, which establishes that MS did not default in the payment as the lesser amount was accepted to fully satisfy the claim of the Respondent. The



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decision to accept a lesser amount was taken by the Respondent on its own and it did not entitle the Respondent to claim the balance amount as part of the insured perils under the Policy.

38. The Respondent's subsequent demand for the balance amount from the Appellant made after two years of withdrawing its claim was baseless and an afterthought. It was submitted that the Respondent cannot be allowed to blow hot and cold, approbate and reprobate. The Settlement Agreement rules out any Protracted Default of the Buyer. It was also submitted that the learned Commercial Court has wrongly observed that the Settlement Agreement was brought to the notice of the Appellant as the same is not true and the Appellant became aware of the contents of the Settlement Agreement only when the Suit was filed by the Respondent.

39. It was submitted by the learned counsel for the Appellant that the learned Commercial Court wrongly observed that the signing of the Settlement Agreement was to minimize the loss. By no stretch of imagination, entering into a settlement agreement whereby the Appellant was required to remove the name of the Buyer from BSAL can be termed as minimizing the loss.

40. It was further submitted that the learned Commercial Court erred in concluding that there was no 'unresolved dispute'. Admittedly, the non-payment by MS was due to an unresolved dispute between the Respondent and the Insured Buyer. The Respondent had alleged that non-payment was due to Protracted Default of the Insured Buyer. However, when the settlement was entered between the Respondent and MS, there cannot be a Protracted Default of the Insured Buyer. Hence, the risk insured of Protracted Default under the Policy did not remain in existence.



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41. The learned counsel for the Appellant submitted that the impugned judgment wrongly holds that the Respondent withdrew its complaint and not the claim. It was submitted that the Appellant was not an authority to deal with complaint against the Buyer. The Appellant had a limited role to either pay or reject the claim as per the strict and well-defined terms and conditions of the Policy. The distinction between complaint and claim carved out by the learned Commercial Court was totally erroneous. The email dated 16.09.2020 clearly mentions that the claim was withdrawn by the Respondent and, therefore, there was no pending claim of the Respondent with the Appellant. The Respondent was estopped from taking a contradictory stand as once the Respondent got the name of the Buyer removed, it cannot make a claim to the Appellant. The Respondent has waived its right against the Appellant in view of the settlement of the payment dispute with the Buyer.

42. The learned counsel for the Appellant submitted that the impugned judgment has wrongly interpreted Part III Clause 3(b) of the Policy to hold that 'unresolved dispute' would mean that the dispute in respect of the purchase order covered under the Policy shall be excluded for denying the claim in respect of the purchase orders covered under the Policy. It was submitted that the Policy was a contract of indemnification and the Respondent was entitled to claim only in case of occurrence of loss provided the Respondent strictly complied with all the terms and conditions of the Policy. It was submitted that the Policy is based on the concept of *uberrimae fidei*.

43. The learned counsel for the Appellant relied upon Section 124 of the Indian Contract Act, 1872, which provides as under:



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“124. “Contract of indemnity” defined.— A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a “contract of indemnity”.”

44. In view of the above, it was submitted that the Policy was a contract by which the Appellant had promised to indemnify the Respondent from the loss caused to the Respondent. In the present case, there was no occurrence of loss in view of the Settlement Agreement and, therefore, the Appellant was not liable to indemnify the Respondent.

45. The learned counsel for the Appellant relied upon the decisions of the National Consumer Disputes Redressal Commission, New Delhi (“NCDRC”) in the cases of *M/S International Corporation v. Export Credit Guarantee Corporation of India Ltd.* [First Appeal No. 596 of 2012]; *M/S Galundia Textiles Pvt. Ltd. v. E.C.G.C. Ltd.* [First Appeal No. 2015 of 2017] and *ECGC of India Ltd. v. Blossom Grocery & Foods India Pvt. Ltd.* [First Appeal No. 2344 of 2019], which have interpreted the terms of the policies issued by the Appellant that are similar to Part III Clause 3(b) of the Policy. It is held by the learned NCDRC that when there were unresolved disputes between the policyholder and the insured buyer, the Appellant was not held to be liable to reimburse the Complainant for the loss alleged to have suffered by it. The learned NCDRC has held that if the cause of non-payment was unresolved disputes between the policy holder and the buyer, it was immaterial whether the goods were actually defective or not. It was further held that once the buyer took the position that the goods were defective and the policyholder did not accept the stand taken by the buyer, the issue with respect to the quality of the goods exported had arisen and



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that issue having remained unresolved, the reimbursement in terms of the policy was not available to the policyholder.

46. In view of the above, the learned counsel for the Appellant submitted that the Appellant was not liable under the terms of the Policy and prayed that the present Appeal be allowed by setting aside the impugned judgment passed by the learned Commercial Court in the Suit.

SUBMISSIONS BY THE RESPONDENT:

47. The learned counsel for the Respondent submitted that the learned Commercial Court has passed the impugned judgment within the four corners of law, after appreciating all the contentions raised by the parties and the documentary evidence and oral testimony placed by the parties and no ground has been made out which warrants interference by this Court.

48. The learned counsel for the Respondent submitted that the Respondent had informed the officer of the Appellant about the defaults by MS and after the discussion with the said officer of the Appellant, the ROD was submitted on 30.11.2019. The same was admitted by DW-1 in his cross-examination. Therefore, there was no delay in submitting the ROD. Even otherwise, no prejudice was caused to the Appellant because of any such delay. Further, after the ROD, the Appellant wrote an email to MS and enquired about the default in making payment. The Appellant did not inform the Respondent that there was any delay in ROD. Therefore, the Appellant is not entitled to assail the impugned judgment on the ground of delay in submission of the ROD.

49. It was further submitted by the learned counsel for the Respondent that the rejection of claim on the ground of 'unresolved dispute' between the



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Respondent and MS was misconceived. It was submitted that the said Clause 3(b) has to be read to mean that there was any other dispute at the time of taking policy or making claim, besides the purchase orders secured by way of the Policy. If any such dispute was unresolved, the Appellant would not have any liability. However, the Policy was taken for the purpose of securing amounts of purchase order and the default in payment of the said purchase orders cannot be said to be an unresolved dispute.

50. The learned counsel for the Respondent submitted that as per the terms of the Policy, the Respondent was liable to take all practical measures to prevent or minimize any loss and take all prudent and reasonable steps in connection of that loss, which may have been incurred or is likely to be incurred. As per the legal advice received by the Respondent, the Respondent negotiated and accepted the reduced amount from MS. The Settlement Agreement was entered into to reduce the loss as a prudent party.

51. It was submitted that the Respondent never withdrew its claim and the email dated 16.09.2020 was only sent to have the name of MS removed from the blacklist.

52. It was submitted that as the Policy was a separate, distinct and independent contract between the Appellant and the Respondent and the claim being in terms of the Policy, MS was neither a necessary nor a proper party to the Suit.

53. The learned counsel for the Respondent placed reliance on the judgment of the Division Bench of the Bombay High Court in **Ramchandra B. Loyalka v. Shapoorji N. Bhowmagree** 1940 SCCOnLine Bom 21, wherein it was held that the contract of indemnity is different from the contract of guarantee. It was further held that the contract of guarantee



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requires an additional / a third contract between the principal debtor and surety whereby the principal debtor requests the surety to act as surety. The surety has the right to seek recovery from the principal debtor. Unless the third contract by which the principal debtor expressly or impliedly requests the surety to act as surety is present, it is impossible to work out the rights and liabilities of the surety under the Indian Contract Act, 1872. Section 145 of the Indian Contract Act provides that in every contract of guarantee, there is an implied promise by the principal debtor to indemnify the surety. Unless the principal debtor is privy to the contract of suretyship, a promise cannot be implied by the principal debtor to indemnify the surety. The right of a surety to call upon the principal debtor to discharge the debt of the creditor which has become due, cannot be worked out, unless the principal debtor has authorized the contract of suretyship. Unless the same has been done, the surety is not in a position to compel the principal debtor to pay the debt. In a contract of indemnity, the constituent does not know the guarantee which was unascertained when the contract is made. The learned counsel for the Respondent has relied upon the following paragraphs:

“It is I think true that a contract might fall within both those definitions, but it is clear from s. 126 that a contract of guarantee involves three parties, - the creditor, the surety and the principal debtor -, and I agree with the view taken by the Madras High Court in Periamanna Marakkayar v. Banians & Co that a contract of guarantee involves a contract to which those parties are privy. Of course, the contract need not be embodied in a single document, but I think there must be a contract or contracts to which the three parties referred to in s. 126 are privy. There must be a contract, first of all, between the principal debtor and the creditor. That lays the foundation for the whole transaction. Then there must be a contract between the surety and the creditor, by which the surety guarantees the debt, and no doubt the consideration for that contract may move either from the creditor or from the principal debtor or both. But if those are the only contracts, in my opinion, the case is one of



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indemnity. In order to constitute a contract of guarantee there must be a third contract, by which the principal debtor expressly or impliedly requests the surety to act as surety. Unless that element is present, it is impossible in my view to work out the rights and liabilities of the surety under the Indian Contract Act. Section 145 provides that in every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety. It is impossible to imply a promise by the principal debt or to indemnify the surety, unless the principal debtor is privy to the contract of suretyship. A promise cannot be implied against a stranger to the transaction of guarantee. Again, the right of a surety to call upon the principal debtor to discharge the debt of the creditor which has become due,-a right which is referred to in Mulla's note to s. 145 of the Contract Act, and is illustrated by the English case there referred to, Ascherson v. Tredegors Dry Cock and Wharf Company, Limited, cannot be worked out, unless the principal debtor has authorised the contract of suretyship. Unless he has done that, the surety is not in a position to compel the principal debtor to pay the debt. In my view, therefore, exhibit A is a contract of indemnity and not a contract of guarantee; the principal debtors, namely the constituents introduced by the plaintiff not only knew nothing of the alleged guarantee, but were unascertained when the contract was made.

But even if I am wrong on that point, I feel no doubt whatever that under exhibit B the plaintiff is liable to pay the whole amount of Rs. 16,176 therein referred to. Exhibit B is, I should say, neither a contract of guarantee nor a contract of indemnity. It is a contract to pay an agreed sum ascertained, I will assume, as the amount due on a contract of guarantee. I can see no answer on the part of the plaintiff to a suit against him for payment of the agreed amount. No doubt, had such a claim been made against him, he would have been entitled to require the defendant to assign to him the debts covered by his contract, and if the creditor had compromised some of those debts without consulting the plaintiff, the plaintiff might have challenged the compromise. But he would then have to show that he had suffered loss by reason of the compromise, and that he has not done. Prima facie under s. 135 of the Indian Contract Act and also under the express terms of exhibit B, I am of opinion that the defendant was entitled to compromise the claim. Exhibit B refers to his giving credit to the plaintiff for whatever amount or amounts the defendant realized from the named clients. I think that implies a right to realize the amount in the ordinary course of business. There



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is no suggestion here of any collusion or imprudent conduct in arranging the compromise.

In my opinion, therefore, the defendant is entitled to claim as against the plaintiff the amount due under exhibit B, less the sums which he has actually received in respect of the debtors named in that document, and that amount will have to be set off against anything due to the plaintiff for sub-brokerage.”

54. In view of the above, the learned counsel for the Respondent submitted that the Respondent was entitled to enter into the Settlement Agreement as it had the right to realize the amount received under the Settlement Agreement in the ordinary course of business. It was submitted that there was no suggestion of any collusion or imprudent conduct in arriving at the Settlement Agreement. Therefore, the Respondent was entitled to claim against the Appellant the amount due to the Respondent less the amount which the Respondent had actually received under the Settlement Agreement.

55. The learned counsel for the Respondent has relied upon the decision of the Madras High Court in case of **Alla Venkataramanna v. Palacherla Mangamma** 1943 SCC OnLine Mad 254 to submit that it is a settled law that a judgment obtained after *bona fide* contest against the party indemnified in respect of the matter to which a contract of indemnity applies, is conclusive against the indemnifier although the latter was not party to it. This is because such judgment binds the indemnifier as *res judicata* and because the claim against which the indemnification has been promised, has been conclusively established against the party indemnified. It was held that the indemnifier is bound by the settlement entered into between the party indemnified and a third party, and is not entitled to question the liability thereby established against the indemnifier.



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56. In view of the above, the learned counsel for the Respondent submitted that the Appeal deserves to be dismissed as there is no infirmity with the impugned judgment.

ANALYSIS AND FINDINGS:

57. In the present case, the core issue that requires consideration is whether the Appellant is liable under the Policy in view of the Settlement Agreement entered into between the Respondent and the Buyer to amicably resolve all the disputes by full and final settlement and releasing and discharging the Buyer from any actions, claims, rights, demands and set-offs without admission of any liability either by the Respondent or the Buyer.

58. The relevant clauses of the Policy are as under:

“PART-I INSURED PERILS

(a) Buyer risks:

- i. *Protracted Default;*
- ii. *Insolvency; or*
- iii. *Contract Repudiation.*

PART-III EXCLUSIONS

(1) We shall not be liable for losses arising out of any shipment despatched by you the Insured Buyer where under your contract of export sale, payment of the invoice value of the goods sold by you is to be received under a documentary letter of credit (LC) if -

(a) The LC opening bank has refused to make payment on the documents sent by you under the LC citing discrepancy in documents; OR

(b) In response to your requirement as stated in the Proposal, we have excluded all such shipments from the purview of cover under the Policy and shown as such in the Schedule;

(2) We shall not be liable for losses arising out of any of the insured Perils that falls within the class of Insured Perils that is specified as



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excluded from the purview of cover under the Policy in the Schedule in pursuance of your requirement as stated in the Proposal and specified against 'Excluded Class of Insured Perils' in the Schedule;

(3) Unless we have agreed otherwise in writing, we shall not be liable for any losses where:

(a) The buyer is one of your subsidiary or associated companies or you have any direct or indirect interest in or connection with the buyer other than that between a supplier and his customer; or

(b) There is an unresolved dispute between you and the Insured Buyer;"

59. In view of the above clauses, it is clear that the Appellant would be liable only if there is (i) Protracted Default; (ii) Insolvency; or (iii) Contract Repudiation by the Buyer. However, Part III Clause 3(b) of the Policy provides for exclusions of the liability of the Appellant in case of there being an unresolved dispute between the Respondent and the Insured Buyer.

60. The Respondent had submitted the ROD on 30.11.2019 for eight invoices, under which the goods were supplied to MS by the Respondent. Pursuant to the ROD, the Appellant on 13.12.2019 sent an email to MS enquiring about the reason for delay / non-payment of the eight invoices mentioned in the ROD and also seeking the payment schedule for the exports made by the Respondent. In response, MS vide Email dated 20.12.2019 informed the Appellant that the payment was withheld as the goods supplied by the Respondent were defective which posed a choking hazard to young children. MS also informed that it has a counter-claim of £151,963.74 against the Respondent. The Appellant forwarded the said Email to the Respondent on 08.01.2020 informing that MS had raised a dispute with regard to the overdue bills reported by the Respondent. The Appellant sought comments of the Respondent on the same.



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61. On 14.01.2020, the Respondent informed the Appellant that the goods were manufactured as per the agreed specifications of MS and the agent of MS was in the factory premises to ensure that the product was as per the agreed specifications. It was further stated that MS took a wrong decision of recalling the goods without any notice to the Respondent. It was also informed that the representative of the Respondent had visited MS and checked the goods in front of the technician of MS and there was no problem. The Respondent also forwarded a copy of the detailed reply given by the Respondent to MS on 28.12.2019, to the Appellant alongwith the said Email dated 14.01.2020. On 10.01.2020, MS sent an Email to the Respondent providing the steps forward and the summary of losses suffered by MS which was followed by an Email dated 19.02.2020 from MS to the Respondent. On 23.03.2020 the Respondent submitted a claim form under the Policy, claiming loss due to default of the Buyer. On 05.06.2020, MS sent an Email to the Appellant providing the details of the product investigation process and the serious nature of the complaint received by MS with regard to the quality of the products supplied by the Respondent. The Appellant *vide* letter dated 24.07.2020 repudiated the claim of the Respondent on the ground that the Buyer had made counter-claim of £1,51,963.74 due to quality of supplied material and, therefore, there was an unresolved dispute between the Respondent and the Insured Buyer, which entitled the Appellant to exclude its liability as per Part III Clause 3(b) of the Policy. It was further stated that ROD was submitted with a delay of 15 days, which was in non-compliance of Clause 3(b) of the Policy.

62. In response, the Respondent made a representation dated 31.07.2020 explaining its position that the goods were manufactured as per the protocols



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shared by MS, in the presence of its agent. The goods were offered for third party inspection and after sharing the reports with MS, the goods were shipped by the Respondent. The payments were not contingent on the decision of MS to sell or recall the goods as invoices became due for payment once the goods were inspected, approved and accepted by MS.

63. On 16.09.2020, the Respondent informed the Appellant about an amicable settlement between MS and the Respondent. The Respondent withdrew the complaint against MS regarding the non-payment of the invoices and confirmed that the matter was resolved to the satisfaction of the Respondent. The Respondent also requested the Appellant to remove MS from the blacklist.

64. The said email was sent by the Respondent to the Appellant pursuant to the Settlement Agreement dated 04.09.2020 entered into between the Respondent and MS. However, the said email did not contain the copy of the Settlement Agreement. The Settlement Agreement which was filed alongwith the Suit provides that the Respondent agreed to receive an amount of ₹92,317 against the total outstanding amount of ₹184,264.08. The Settlement Agreement also provided that the said amount of ₹92,317 was in full and final settlement of the dues of MS and the Respondent released and forever discharged MS of all and / or any actions, claims, rights, demands and set-offs.

65. After a gap of almost 15 months, the Respondent issued a legal notice to the Appellant making a claim of ₹77,32,749.43/- for the balance amount after receipt of ₹92,317 from the total amount of ₹184,264.08. As the Appellant refused the liability, the Respondent preferred the Suit, which resulted into the impugned judgment.



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66. We have considered the impugned judgment, the documentary and oral evidence considered by the learned Commercial court, grounds of Appeal and the submissions made by the learned counsel for the parties.

67. Part III Clause 3(b) of the Policy provides for an exclusion of the liability of the Appellant in cases where there is an unresolved dispute between the Respondent and the Buyer. From the correspondence exchanged between the Appellant, the Respondent and MS, it clearly shows that there was a dispute with regard to the quality of the goods supplied by the Respondent. At the time when the claim was repudiated, there was an unresolved dispute between the Respondent and MS. In the representation dated 31.07.2020, the Respondent sought to justify that the dispute was misconceived, however, there was no denial with regard to existence of the dispute between the Respondent and MS.

68. The Settlement Agreement clearly admits the existence of dispute between the Respondent and MS that was amicably resolved in terms of the Settlement Agreement. Pursuant to the Settlement Agreement, the Respondent withdrew its complaint against MS in view of the settlement to the satisfaction of the Respondent.

69. The claim made by the Respondent for the difference between the amount for goods supplied and the amount received under the Settlement Agreement under the terms of the Policy can be considered if the said claim is termed as loss suffered by the Respondent even after entering the Settlement Agreement voluntarily. It is the case of the Respondent that the Settlement Agreement was entered into to reduce the loss. The Settlement Agreement also provides that the settlement was full and final as regards the



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claim of the Respondent against MS and the Respondent had released MS from any further claim or liability.

70. Although the Settlement Agreement mentions that neither the Respondent nor MS had admitted any liability towards the quality issues, the Settlement Agreement conclusively settles the dispute with regard to the same. In view of the same, the right to recover the balance amount by the Respondent from MS was extinguished by way of the Settlement Agreement.

71. In the case of *Economic Transport Organization vs. Charan Spg. Mills (P) Ltd.*, (2010) 4 SCC 114, the Constitutional Bench of the Supreme Court held as under:

“15. A contract of insurance is a contract of indemnity. The loss/damage to the goods covered by a policy of insurance, may be caused either due to an act for which the owner (assured) may not have a remedy against any third party (as for example when the loss is on account of an act of God) or due to a wrongful act of a third party, for which he may have a remedy against such third party (as for example where the loss is on account of negligence of the third party). In both cases, the assured can obtain reimbursement of the loss, from the insurer. In the first case, neither the assured, nor the insurer can make any claim against any third party. But where the damage is on account of negligence of a third party, the assured will have the right to sue the wrongdoer for damages; and where the assured has obtained the value of the goods lost from the insurer in pursuance of the contract of insurance, the law of insurance recognises as an equitable corollary of the principle of indemnity that the rights and remedies of the assured against the wrongdoer stand transferred to and vested in the insurer.

16. The equitable assignment of the rights and remedies of the assured in favour of the insurer, implied in a contract of indemnity, known as “subrogation”, is based on two basic principles of equity:

(a) No tortfeasor should escape liability for his wrong;

(b) No unjust enrichment for the injured, by recovery of compensation for the same loss, from more than one source.



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The doctrine of subrogation will thus enable the insurer, to step into the shoes of the assured, and enforce the rights and remedies available to the assured.”

72. In view of the above it is clear that the insured can suffer a loss / damage covered under a policy of insurance for which the insured either may or may not have a remedy against any third party. In either case, the insured can obtain reimbursement of the loss from the insurer. If insured did not have remedy against third party, neither the insured nor the insurer can make any claim against the third party. But when the damage is on account of negligence of a third party, the insured will have the right to sue the wrongdoer for damages and when the insured has recovered the losses from the insurer, the right to sue is transferred to and vested in the insurer.

73. In the case of ***West of England Fire Insurance Company v. Isaacs*** [1897] 1 QB 226 certain premises were insured against fire by two insurance companies. Lord Esher held as under:

“In this case there were some premises insured against fire in two insurance offices, and there has been a fire, and in respect of that each of the offices has paid 100L. The question is whether that state of things can stand. For the plaintiffs it is said that the cases shew that that situation must be got rid of, and I think it can be by the application of well-known principles.

The action is by one of the insurance companies, and the plaintiffs do not say that they were not bound to pay on their contract ; but they say that on their doing so any remedy which the defendant had against anybody in respect of the damage is subrogated to them, and that the defendant had no right to deal with such a claim to the prejudice of the plaintiffs. That proposition is not disputed on behalf of the defendant. Did he, then, deal with any rights he had against third parties? He had a right against the person who was in the position of being the lessor at that time arising out of a covenant in the lease that the lessor would insure the premises against loss by fire, and expend any money received under the insurance as far as might be



necessary in restoring the damage done by the fire. There was some suggestion that there was no one whom the defendant could have sued on that covenant ; but the position at the time of the fire was that Jones had taken upon himself the fulfilment of the covenant, and that the defendant had agreed to be tenant upon these terms. The lessor was bound to endeavour to recover from the Royal Insurance Company, and to spend any money recovered in putting the premises to rights. If that had been done before the present plaintiffs had been called on to pay, as they were only bound to indemnify the defendant, they would not have had to pay anything. They now say that, having paid under their policy, they are entitled to the right which the defendant had to insist that Jones should expend the money he had received in repairing the damage done by the fire, and that they ought to be in a position to force Jones to do this, or to recover damages from him for his breach of covenant in not doing it. Inasmuch as the damage by the fire was agreed at 100%, they say that would be the amount of damages that they would have been entitled to recover from Jones. The defendant has given up this right of action against Jones, so that the plaintiffs can never recover that amount, and the course taken by the defendant has damaged the plaintiffs to that extent. The plaintiffs claim that this gives them a right to recover that amount in their action. That was the view taken by the learned judge; and it seems to me that it is perfectly right, and in accordance with the law of insurance. I think, therefore, that the plaintiffs were entitled to succeed, and that the appeal should be dismissed.

74. MacGILLIVRAY in Insurance Law Relating to All Risks other than Marine (Fourth Edition, page 1700, 1701) states that:

“After a loss has occurred but before the insurers have made payment, any release or settlement made by the assured with third parties to the prejudice of the insurers will free the insurers from liability upon the policy (x). The insurers are in the same position as sureties where the creditor has released or given time to the principal debtor (y). The assured is not, however, precluded in the case of a doubtful claim from making a reasonable settlement for the benefit of himself and the insurers, and such a settlement is no defence to the assured's claim on the policy.



If the insurer desires to have the question of settlement in his own hands he must either make an express condition to that effect, or pay a full indemnity to the assured so as to become dominus litis. If the assured does release a third party before payment has been made by the insurers, the release is good and as effective against the insurer as it would be against the assured (z). But where the release of the third party was not made unconditionally, but subject to the express condition that it should be without prejudice to the assured's claim against the insurers, it was held that the release was only operative as between the assured and the third party, and that it did not prevent the assured recovering from the insurers or the insurers recovering by subrogation from the third party (a)."

75. The position related to the right of subrogation is explained by **W.I.B. Enright in Professional Indemnity Insurance Law, Sweet and Maxwell**, (page 729, 730) that subrogation is literally the substitute of one person for another. Its effect is that the rights of the one party then attach to the substituted other party. In terms of insurance law, the right of subrogation is thus, the right by which the insurer is entitled to, and has transferred to it, the rights of the insured by which its loss can be diminished. The said rights, by which the insurer may diminish the loss, are rights acquired by subrogation. While explaining it further, Enright has quoted the following extract from the case of **Castellion v Preston** (1883) 11 Q.B.D. 380, which is reproduced as under:

"...as between the [insurer] and the [insured], the [insurer] is entitled to the advantage of every right of the [insured], whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the [insured] by the exercise or acquiring of which right or condition the loss against which the [insured] is insured, can be, or has been diminished."



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76. In the present case, it is not disputed that the Respondent, before any payment was made by the Appellant, entered into a Settlement Agreement with the Buyer whereby the Respondent released the Buyer from all claims, demands, and actions relating to the dispute. Clause 3.1 read with Clause 4.1 of the Settlement Agreement make it clear that the Respondent agreed, “on behalf of itself and on behalf of its Related Parties”, not to sue or prosecute the Buyer. The effect of this clause being that the Appellant is also barred from pursuing any recovery from the Buyer.

77. This release is further reinforced by the Respondent’s email dated 16.09.2020, wherein it was communicated that the matter with the Buyer had been resolved “to its satisfaction” and the complaint against the Buyer was withdrawn. The Respondent also requested the Appellant to remove the Buyer’s name from the BSAL, which is a crucial risk-control mechanism.

78. The Respondent has argued that it acted in furtherance of the policy requirement to take all practical measures to minimize the loss. Minimization of loss, as contemplated under the Policy, cannot be stretched to include acts that have the effect of compromising or extinguishing the insurer’s rights under the subrogation. Entering into a full and final settlement that permanently bars any claim against the defaulting Buyer cannot be said to be a measure of loss mitigation.

79. It may instead be termed a business compromise, made possibly to preserve the ongoing commercial relationship. Be that as it may, once the matter is fully and finally settled, even when a lesser amount is accepted with respect to the claim, no further default exists under the Policy. Hence, the Buyer had discharged its liability as per the Settlement Agreement.



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There is no evidence of consultation with the Appellant insurer regarding the settlement of the Respondent's claims against the Buyer.

80. In ***United India Insurance Co. Ltd. v. Kantika Colour Lab*** (2010) 6 SCC 449, the Supreme Court emphasized that insurance policies being contracts of indemnity, only entitle the insured to recover the actual loss suffered. However, in the present case, the amount sought by the Respondent does not stem from any loss due to the Settlement Agreement arrived at between the Respondent and the Buyer. The concept of Protracted Default under the Policy presupposes existence of a continuing failure to pay by the Buyer. However, upon settlement, the loss as alleged, crystallized to the reduced amount agreed upon, and no claim in the form of loss remains for which the Appellant was liable to pay.

81. In ***Trustees of the Port of Madras v. Home Insurance Co., Ltd.*** 1967 SCC OnLine Mad 206, a Division Bench of the Madras High Court held as under:

“Contracts of insurance are considered really as contracts of indemnity and the principle of subrogation is applied to it being an equitable arrangement incidental to all contracts of indemnity and to payments on account of the indemnity. Subrogation is an equity rule and the equity of subrogation arises as the assured has concurrent remedies for relief from the loss against the person responsible for the loss, say on contract or tort, and also against the insurer on the contract of insurance, each independent of the other. And equity will not permit the injured to be doubly compensated by the insurer and the person liable for the loss. On payment to the assured by the insurer in terms of his policy the doctrine of subrogation steps in and vests in the insurer the rights the assured has against the person who has caused the loss. He succeeds to all the ways and means by which the assured may have reimbursed himself for the loss from the person responsible for the loss. Arnould in his classic on Marine Insurance (British Shipping Laws Vol. 10, page 1193) states the position thus:



“.....it is entirely foreign to the spirit of contracts of indemnity that a person damnified should recover his loss more than once; it is, therefore, clear that if he has already recovered from a third party, there can be no liability under the contract of indemnity. On the other hand, if he has not previously recovered from such third party, but has the right to do so, there is no reason why such third party, should be allowed to allege that his liability has been satisfied or reduced by a payment made by a stranger to him, under a contract with which he has nothing to do. The third party remains liable to the person indemnified just as if there had been no contract of indemnity. But the person indemnified can only take the sum recovered from the third party as trustee for the indemnifier, and similarly, if he has not himself received any sum to which he is entitled, he is bound to afford the latter all facilities for doing so. In practice, the commonest way in which the principle of subrogation is applied to insurance, is for the insurer to pay the claim of the assured, and then to institute proceedings in the name of the latter, but for his own benefit, against the party ultimately liable”—Para. 1215.

In the Law of Insurance by Preston and Colinviaux, 2nd Edition, at page 128 we find the position stated thus:

“The right of 'subrogation' rests upon the ground that the insurer's contract is in the nature of a contract of indemnity and that he is therefore entitled, upon paying a sum for which others are primarily liable to the assured, to be proportionately subrogated to the right of action of the assured against them.”

In Macgillivray Insurance Law, 5th Edition, para. 1882 the learned author points out that the right of subrogation is a corollary of the general principle that insurance, is only a contract to indemnify the assured, that the insurer's right of subrogation arises whenever he pays a loss for which he is liable under his policy, and that it arises upon payment of a partial as well as upon payment of a total loss. The learned author states in para. 1886:

“The legal right to compensation remains in the assured, and, therefore unless there has been an express assignment of the legal right, actions at law brought for the benefit of the insurer are brought in the name of the assured, In Courts of Equity or of



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Admiralty the insurer has always been allowed to sue in his own name.”

In Porter's Laws of Insurance, 8th Edition, at page 232 the position is stated thus:

“The insurer having contracted to indemnify, could not insist on others being sued first who were primarily liable, or on consolidation of his action with others by the same assured against other insurers in respect of the same loss. The mere payment of a loss by the insurer does not afford any defence to a person whose fault has been the cause of the loss in an action brought against the latter by the assured. But the insurer acquired by such payment a corresponding right in any damages recoverable by the assured against the wrongdoer or other party responsible for the loss.”

At page 237, the learned author points out:

“An insurer suing the party through whose fault the loss occurred can only assert the right of the assured, and will be subject to any defences or equities which would be good against him. The insurer stands in no relation of contract or privity with such a party. His title arises out of the contract of insurance, and is derived from the assured alone, and can only be enforced in right of the latter. Thus, where damage occurred through contributory negligence, that defence would be an answer to the action of the subrogated insurer. Again, if two ships of the same owner collided by the fault of one to the destruction of the other, the insurer could not sue the owner, since they claim under him.”

82. Once the Buyer was released through the Settlement Agreement, the Respondent's right to sue the Buyer ceased, and resultantly, the Appellant's subrogation rights were extinguished. As noted above, the insurer's right of action is not independent as it flows through the insured. The insurer can only sue in the name of the insured, and once that right is barred by the insured itself, no remedy survives in favour of the insurer.



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83. The Madras High Court in the case of ***E.I.D. Parry (India) Limited v. Far Eastern Marine Transport Co. Ltd.*** 1983 SCC OnLine Mad 61 has observed that:

“...It is therefore incumbent upon the assured to keep alive his remedies against the carrier or other third party and any default committed by the assured either by allowing the remedy to get time barred or by abdicating or abandoning, his rights against the carrier or the third party will deprive the insurer of its remedies against the third party for indemnity. In such cases, it is open to the insurer to repudiate the liability under the policy, the loss is not paid to the assured or to lay a counterclaim against the assured for damages if it has paid the loss to the assured. The law is thus stated in MacGiilvray & Parkington Insurance Law, seventh edition, paragraph 1172 :—

“The assured is under an obligation not to deal with any claim he possesses, or will possess, against a third party in such a manner as to prejudice the insurer's rights of subrogation in relation to it. The insurer's remedy will be to repudiate liability on the policy, or to counterclaim for damages for the loss of, or diminution of their rights, depending on the circumstances. The position varies slightly, depending on whether the insurer has paid for the loss”.

84. Thus, by entering into the Settlement Agreement without insurer's consent, withdrawing its complaint, and requesting removal of the Buyer's name from BSAL, the Respondent has prejudiced the insurer's right of subrogation, disentitling it to any claim under the Policy against the Buyer.

85. Learned Counsel for the Respondent has placed reliance on the judgment of the Division Bench of the Bombay High Court in ***Ramchandra B. Loyalka*** (*supra*) wherein Sir John Beaumont, C.J., while differentiating a contract of guarantee with that of indemnity, held that the former requires an additional/a third contract between the principal debtor and surety whereby the principal debtor requests the surety to act as surety. Thus, the surety has



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the right to seek recovery from the principal debtor, whereas the insurer cannot effect the same with a third party at fault as there is no contract between them.

86. We are unable to accept this argument as the well-established equitable right of subrogation ensures that the insurer can seek recovery from the third party at fault, that caused loss to the insured, which is indemnified by the insurer.

87. The reliance placed on *Alla Venkataramanna (supra)* by the learned counsel for the Respondent is also not helpful to the Respondent as the same was specific to the facts of that case in which it was held that a compromise without notice to the indemnifier was binding on the indemnifier as the notice would have been an empty formality as the circumstances of that case led to the inference that the indemnifier knew all about the plaintiff's claim against the defendants in execution proceedings.

88. It is not the case of the Respondent that the Respondent entered into the Settlement Agreement in view of the exclusion clause contained in Part III Clause 3(b) of the Policy. The Settlement Agreement was an independent transaction without reserving any right of the Respondent to claim the balance amount from the Appellant. In fact, the Respondent withdrew its complaint against the Buyer after entering into the Settlement Agreement.

89. There is nothing on record to show that the Settlement Agreement was entered into with the knowledge of the Appellant and even a copy of the same was not sent by the Respondent to the Appellant until the filing of the Suit. Hence, the impugned judgment incorrectly holds that the Appellant was informed about the Settlement Agreement.



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90. By unilaterally entering into the Settlement Agreement, the Respondent has deprived the Appellant of its right of subrogation available under the contract of indemnity. Hence, the Appellant has no remedy against the Buyer in view of the release of claims given by the Respondent, which is binding on the Appellant, even though there is no admission of liability by the Respondent.

91. In view of the above, the impugned judgment has incorrectly held that the Appellant is liable to pay the Respondent for the loss suffered by the Respondent in the Policy as no loss has been suffered by the Respondent in view of the Settlement Agreement, which prevents any further claim against MS. If the Appellant is made to pay under the Policy to the Respondent, the Appellant will not have any remedy against the Buyer in view of the Settlement Agreement, which is against the settled law of the right of subrogation by the insurer in case of discharging its liability under the insurer's policy.

92. In view of the above, the impugned judgment is liable to be set aside. Accordingly, the present Appeal is allowed and the impugned judgment passed by the learned Commercial Court is set aside. Pending application(s), if any, stand disposed of. No orders as to cost.

TEJAS KARIA, J

VIBHU BAKHRU, J

July 14, 2025
'SMS'/'ST'