Supreme Court of India
Metal Powder Company Ltd vs Oriental Insurance Co. Ltd on 7 April, 1947
Author: R Gogoi
Bench: P Sathasivam, Ranjan Gogoi, N.V. Ramana

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 481 OF 2009

METAL POWDER COMPANY LTD. ... APPELLANT (S)

VERSUS

ORIENTAL INSURANCE CO. LTD. ... RESPONDENT (S)

J U D G M E N T

RANJAN GOGOI, J.

1. This is a plaintiff's appeal against a decree of reversal made by the High Court of Madras by its judgment and order dated 28.04.2006.

2. The facts, which are not in dispute, are as follows:-

The plaintiff is a company engaged in the manufacture and sale of metal powders and red phosphorous having its manufacturing unit and administrative office at Maravankulam, Thirumangalam, Madurai District. The plaintiff had purchased 15.06 metric tonnes of yellow phosphorous from M/s. Metallgeseliachaft AG, Frankfurt, West Germany under Invoice No. 410 64821 dated 06.06.1983 for a value of US$ 23,946 C&F. The said commodity was booked through M.V. "Palam Trader" to be delivered at Bombay Port and from the Bombay Port to the plaintiff's factory at Maravankulam. The goods were insured for a sum of Rs. 2,65,000/- under Insurance Policy dated 24.06.1983 with the Divisional Office of the defendant-insurance company at Madurai. The policy specifically included and covered amongst other risks "loss due to non-delivery of the goods at Maravankulam."

3. While in transit the ship caught fire on 18.10.1983. The first intimation of the mishap was communicated to the plaintiff on 05.01.1984 by Richard Hoggs International Limited, Greece who appear to be the agents of the owners of the vessel "Palm Trader". By the aforesaid intimation, the plaintiff was informed that the estimate of the cost of repairs to the ship are much higher than the ship's insured value and, therefore, the ship owners consider the vessel as a total loss and had given notice of abandonment of the ship to the underwriters. The aforesaid facts were very promptly communicated to the defendant insurance company by the plaintiff on 06.01.1984 which was followed by a claim to indemnify the plaintiff for the value of the goods insured i.e. Rs. 2,65,000/-. Thereafter, it appears that the defendant repudiated its liability on 15.07.1985 on the ground that

the ship was abandoned by its owners due to bankruptcy and, therefore, the claim made by the plaintiff was covered by an exclusion clause i.e. Clause 4.6 of the Institute Cargo Clauses which formed a part of the terms and conditions of the Insurance Policy. Clause 4.6 is to the following effect:

> "4.6 Loss damage or expense arising from insolvency or financial default of the owners managers charterers or operators of the vessel."

4. Following the repudiation of its claim legal notice was issued on behalf of the plaintiff and as the same was not responded to the suit in question was filed claiming the value of the goods insured i.e. Rs. 2,65,000/- alongwith interest @ 18% per annum calculated from 21.03.1984 to 30.09.1985 which was quantified at Rs.73,053/-.

5. The claim made by the plaintiff was resisted by the defendant Insurer by relying on the exclusion clause, noticed above. According to the defendant the ship was abandoned by its owners on account of financial difficulties in meeting the cost of repairs. The claim was also resisted by the defendant on the ground that there was no damage to the cargo in transit and in fact the defendant had arranged with a third party for transporting the cargo to its destination at an additional cost of US$ 900 to be paid by the plaintiff which offer was, however, rejected by the plaintiff.

6. The learned Trial Court decreed the plaintiff's suit for an amount of Rs. 3,38,053/- inclusive of interest at 18% per annum upto 30.09.1985. Aggrieved, the Insurance Company filed a regular first appeal before the Madras High Court which was allowed by the impugned judgment and order dated 28.04.2006 on the ground that as per the terms and conditions of the policy, the plaintiff was not entitled to its claim as "the liability of the Insurance Company is excluded when the ship owners are declared as insolvent." Aggrieved, the present appeal has been filed by the plaintiff.

7. We have heard Mr. V. Prabhakar, learned counsel for the plaintiff- appellant and Mr. M.K. Dua, learned counsel for the defendant-Insurance Company.

8. Learned counsel for the appellant has strenuously urged that there is no material on record to hold that the owners of the ship have been adjudged as insolvent or bankrupt so as to attract exclusion clause 4.6 of the Insurance Policy under which the liability of the insurer is excluded in case of loss or damage arising from the insolvency or financial default of the owners etc. of the vessel. Referring to the communication dated 05.01.1984 learned counsel has submitted that the reason for abandonment of the ship by the owners is that the estimate of the cost of repairs are much higher than the insured value of the ship. It is pointed out that the letter dated 14.10.1985 (Exbt.D-37) relied upon by the defendant to show financial default and bankruptcy of the owners of the vessel does not contain any basis to support the contention advanced. Learned counsel has further pointed out that the risks covered by the Policy included 'non- delivery of the goods at Maravankulam' and the cargo not having been so delivered, the defendant is clearly liable. It is also contended that the alleged arrangement made by the insurer to have the goods transported by a third party on payment of additional cost of US$ 900 by the plaintiff was outside the scope of the agreement between the parties and hence was rightly rejected by the plaintiff.

9. On the other hand, learned counsel for the insurer has contended that under the Policy, the risk covered was in respect of the loss and damage to the subject matter insured. It is pointed out that in the present case the cargo which was insured was in perfect condition and no loss or damage was caused to it. Learned counsel has also relied on Clause 5.1 of the Institute Cargo Clauses (A), which formed a part of the insurance agreement between the parties, to contend that the loss or damage claimed by the plaintiff is not covered by the policy.

10. Under the Policy the risks covered are :

"All risks" Marine, theft, pilferage, non-delivery, civil commotion, strikes, riots, breakage, damage, dentage, etc."

11. 'Non-delivery' being a specific risk covered by the Insurance Policy, the failure to deliver the cargo, as agreed, would clearly amount to loss of the subject matter insured. The situations in which the insurer could avoid its liability are contemplated by the exclusion clauses. Clause 4.6 which was sought to be invoked by the defendant insurer excludes the liability of the insurer for loss or damage arising from the insolvency or financial default of the owners etc. Insolvency or bankruptcy would always be a matter of authoritative determination under the relevant municipal laws of a country and certainly not a matter of individual perceptions and opinions. No material to establish the insolvency or bankruptcy of the owners is available on record. In fact, in the earliest communication i.e. dated 05.01.1984, the plaintiff was informed that the repair cost of the vessel having exceeded the insured value, the owners had decided to abandon the ship. The said act on the part of owners cannot have the effect of their being adjudged as insolvents, which Clause 4.6 contemplates. The subsequent communication of the insurer dated 14.10.1985 (Exbt. D-3), relied upon by the defendant, is a mere assertion made by it that the owners have become bankrupt. The same is neither conclusive nor determinative of the question and appears to have been made by the insurer only to attract Clause 4.6. In the absence of any material whatsoever to show that Clause 4.6 can be attracted to the present case, the finding to the said effect, recorded by the High Court, cannot be sustained.

12. Insofar as Clause 5.1 is concerned the same ex facie is not attracted inasmuch as no question of unseaworthiness of the vessel, much less, prior knowledge of the plaintiff of such unseaworthiness can and does not arise in the present case so as to exclude the loss and damage suffered by the plaintiff from the purview of the Insurance Cover as contemplated by Clause 5.1.

13. In view of the above, we set aside the judgment and order dated 28.04.2006 passed by the High Court of Madras and restore the judgment and decree dated 28.04.1989 passed by the learned Trial Court. Consequently, the appeal is allowed. If the amount has not been paid till date, naturally, the same will carry interest at the rate awarded by the learned Trial Court, namely, 18% per annum till date of payment.

.....CJI.

[P. SATHASIVAM] .....J.

[RANJAN GOGOI] .....J.

[N.V. RAMANA] NEW DELHI, APRIL 7, 2014.
