

Hindusthan General Insurance Society ... vs Electrical Executive Engineer And Ors. on 15 May, 1968

JUDGMENT

Shambhu Prasad Singh, J.

1. This appeal by defendant No. 1, Messrs. Hindusthan General Insurance Society Ltd., arises out of a suit instituted on the 19th December, 1958, for recovery of Rs. 20,000 as price of electric transformers insured with the appellant-company which were lost in the Ganges at Manihari Ghat when they were being carried on a boat from Sahebganj to Baghmari Ghat for being taken to Katihar on the 2nd November, 1956, at about 4 p.m. and Rs. 600 as costs of salvaging operations. The plaintiff to the suit, who is respondent No. 1, before this court, is Electrical Executive Engineer, Electric Supply Division, Katihar, Purnea. Defendant No. 2 to the suit is Messrs. Easy Transport, a private firm, the carrier. Defendant No. 3 is the proprietor of defendant No. 2, The plaintiff claimed a decree against the defendant or defendants found liable. The court below has decreed the suit for Rs. 20,000 as against the appellant only with proportionate costs and dismissed it as against the other defendants.

2. Briefly stated, the plaintiff's case was that on 4th July, 1956, he entered into an agreement with defendant No. 2 for transporting electrical materials and other goods from Sahebganj to Katihar by boat and delivering them at the stores at Katihar, in accordance with the instructions issued from time to time by the Sub-Divisional Officer, Electricity, Katihar, or the plaintiff. Under the terms of the agreement, defendant No. 2 was required to get the consignments insured against all risks in transit and the insurance charges were to be paid extra against the original vouchers. Between the 20th September, 1956, and 2nd January, 1957, different kinds of electrical goods were insured with the appellants for different amounts under different policy numbers and in each case respondent No. 1 was the assured. On the 31st October, 1956, one consignment of seven electric transformers loaded on one boat by defendant No. 2 left Sahebganj Ghat and while proceeding to Katihar collided during storm with a jetty near Manihari Ghat and sank into the Ganges on the date and time as mentioned in the preceding paragraph. The said consignment was covered by Cover Note No. 1005E, which corresponded to Policy No. MPCB-2750, dated the 21st September, 1956. The appellant was informed of the accident soon after, and, after some correspondence, respondent No. 1 finally laid a claim for Rs. 20,000 at Calcutta office of the appellant by a letter dated the 13th November, 1956. Salvage operations were taken up by M/s. Landale and Clarke of Calcutta, who were appointed by the appellant for the purpose but without success. No written report of the salvaging operations was sent to respondent No. 1 by the appellant. After some further correspondence for the settlement of the claim on the 29th March, 1957, the appellant, in order to evade their liability falsely intimated respondent No. 1 that from information in its possession it had reasons to suspect that the claim was fraudulent in character, inasmuch as the said transformers were reported to have been smuggled out of Katihar and sold elsewhere by interested persons. The

Patna branch office of the appellant also lodged a first information report at Manihari Ghat police station under Section 407 of the Indian Penal Code. After investigation, the police submitted a final report, holding that the transformers had actually sunk. By order dated the 24th September, 1957, the Sub-Divisional Magistrate, Katihar, passed final orders holding the complaint to be false.

3. The appellant, in its written statement, denied any liability. Pleas taken by it relevant for the decision of the present appeal were that respondent No. 1 had no right or title to the goods which formed the subject-matter of the suit and, therefore, had no locus standi and right to sue, nor to payment of any claim in respect of the goods. Any risk for the alleged goods was not covered by any policy of insurance of the appellant. Cover Note No. 1005E and other cover notes were issued by the appellant on the basis of an application of defendant No. 3, dated the 31st August, 1956, wherein it was specifically declared that the loading of the goods was to commence on the 1st September, 1956. According to warranty No. 3 of the policy issued on the basis of the said cover note, the loading was to be completed within seven days and the voyage to be commenced without delay, but as the loading was done long after 1st September, 1956, and the sailing notice given by defendant No. 2 in respect of the goods which formed the subject-matter of the suit was dated the 30th October, 1956, the said warranty was violated and the appellant was not liable. The appellant agreed to bear the cost of salvaging operations gratuitously and as a gesture of goodwill and it was without prejudice and without acceptance of any liability.

4. Defendants Nos. 2 and 3, by a separate written statement, supported the case of respondent No. 1 that the goods were properly insured and the appellant was liable to pay for the loss, but they denied their own liability. They filed a petition for amendment of the written statement alleging that the agreement between respondent No. 1 and them was not executed according to the provisions of law, and, as such, it was invalid, unlawful and unenforceable.

5. The court below has found : (1) that the plaintiff, that is respondent No. 1, before this court, had cause of action and locus standi and right to sue, (2) that the appellant did cover the risk for the alleged goods by a policy of insurance, (3) that the boat which was carrying the seven electric transformers did sink along with them and the claim was not fraudulent, (4) that the claim could not be defeated on the ground that loading did not commence on 1st September, 1956, and was not completed within seven days from the date, and (5) that only the appellant was liable to pay to respondent No. 1, the cost of the transformers and defendants Nos. 2 and 3 were not liable. It appears that though not specifically pleaded in the written statement, it was contended before the court below on the basis of warranty No. 7 to the police that as the suit was not filed within six months of the date of loss it was not maintainable. It has negatived this plea as well.

6. Mr. J.C. Sinha, appearing for the appellant, did not challenge the finding of the court below that the boat carrying the 7 electric transformers did sink on the 2nd November, 1956, as alleged by respondent No. 1, and the claim was not fraudulent, but urged that (1) respondent No. 1 having no right or title to the seven electric transformers had no locus standi to sue and the suit filed by him was not maintainable, (2) the evidence on the record did not prove that the seven electric transformers were insured by the appellant under a policy and, as such, the court below erred in passing a decree against it, (3) as admittedly the loading did not commence on 1st September, 1956,

and was not completed within seven days from that date, in view of warranty No. 3 no decree could be passed in favour of respondent No. 1, and (4) respondent No. 1 having failed to institute a suit within six months from the date of the loss forfeited his right under the policy according to warranty No. 7(f) attached to it.

7. It is not in dispute that, on the date of the loss, the seven electric transformers belonged to the State Government and that on the date of the suit whatever interest the State Government had in them had vested in the Bihar Electricity Board. According to Mr. Sinha, under the provisions of the Electricity Supply Act, 1948, the board alone could maintain the suit and as respondent No. 1 held no insurable interest in the goods on the date of the loss the suit by him was not maintainable.

8. Learned counsel for respondent No. 1 conceded that ordinarily a person holding no insurable interest in the goods on the date of the loss cannot maintain a suit, but contended that, in the instant case, respondent No. 1 was not mentioned as the assured in the insurance policy in his own right but only as servant of the State of Bihar who had insurable interest in the goods on the date of the loss, and that the appellant having expressly contracted that in case of any loss or misfortune it shall be lawful to the assured, their factors, servants and assigns to sue, it was not open to the appellant to contend that the suit was not maintainable on the aforesaid ground. There is an express covenant to the said effect in the insurance policy, exhibit 1(q). If there would have been no such covenant, respondent No. 1 might not have insured the goods in his own name but in the name of the State of Bihar. Mr. J.C. Sinha has conceded that such a covenant is not special to this insurance policy only but it is common to all such marine insurance policies issued by the appellant. It, therefore, appears that respondent No. 1 got the goods covered by the said policy insured in his own name on an assurance by the appellant that he would be entitled to sue in case of any loss, and it has rightly been contended by learned counsel for respondent No. 1 that now the appellant is estopped from challenging the right of respondent No. 1 to sue for the loss. Further, even if it be assumed that the insurance was for the benefit of the real owner, i.e., the State of Bihar, the covenant also provides that a servant of the assured could also institute a suit in case of any loss or misfortune. It is not in dispute that respondent No. 1 was a servant of the State of Bihar at the date of the loss. Therefore, he could maintain a suit even as a servant of the State of Bihar. Thus, there is no substance in the first contention of Mr. Sinha.

9. Warranty No. 3 on the back page of the policy of insurance, exhibit 1(q), runs as follows :

" That loading shall be completed within seven days and that the voyage shall be commenced without delay, and shall not deviate from the customary route nor delay upon the voyage. "

10. It is not stated therein, the seven days are to be counted from which date, whether from the date on which the loading was to commence according to the application for insurance, or from the date of issue of the cover note, or from the date when the policy itself was issued, or from the date of the actual commencement of loading. According to learned counsel for respondent No. 1, this warranty merely mentioned that the loading was to be completed within seven days from its actual commencement and the appellant did not cover any risk for more than seven days in loading and

that it does not mean that the seven days were to be counted either from the executed date of commencement of the loading mentioned in the application for insurance, or from the date of issue of the cover note or the policy itself. There appears substance in this contention. There is nothing in the Cover Note No. 1005 (exhibit C) dated the 31st August, 1956, or in another cover note of the same date, exhibit 2(e), which, according to respondent No. 1, is Cover Note No. 1005E, or in the policy of insurance, exhibit 1(q), to show that the loading must commence from the 1st September, 1956. Exhibit A, the application for issue of a policy, is on a printed form meant for use at Calcutta port only. It does not show that the loading was to commence from 1st September, 1956, but states "loading commenced 1-9-56". Obviously, such a statement could not have been made on 31st August, 1956, and it was an incorrect statement. It appears from the evidence of B.D. Sharma (D. W. 5) who was the local agent of the appellant at Katihar at the relevant time that ordinarily there used to be two declarations on behalf of the assured before a policy was actually issued, one in the form of an application for insurance, and another a sailing notice. As the form of application for issue of a policy indicates that application was to be made only after the boat was fixed and loading had commenced and the date of the commencement of the loading and the name of the manjhi of the boat were to be mentioned therein. In the application, exhibit A, the name of the manjhi was not mentioned but it was stated that the name would be intimated in the sailing notice. It is, therefore, manifest that it was not intended by the parties that if loading did not commence on 1st September, 1956, and was not completed within seven days from that date no risk would be covered by the appellant. The date 1-9-56 as mentioned in exhibit A was merely a tentative date of the commencement of the loading and all the necessary information about loading and sailing were to be given in the sailing notice. From the challan, exhibit 7(e), it appears that the boat with the seven transformers could not have sailed before 26th October, 1956. The sailing notice, exhibit A, which was sent to the appellant about the goods is dated 30th August (sic October), 1956, and it refers to the application for insurance dated the 31st August, 1956. It was not expected that sailing notice about the goods, loading of which were completed on 7th September, 1956, would be sent as late as 30th October, 1956. From this sailing notice, the appellant ought to have inferred that there was delay in the loading but no objection was taken to this sailing notice and the appellant did not inform respondent No. 1 or defendants Nos, 2 and 3 that as the loading was not done within seven days of 1st September, 1956, its liability had ceased. The policy of insurance, exhibit 1(q), is dated the 21st September, 1956, three weeks after the proposal dated the 31st August, 1956. If really the declaration in exhibit A that loading was to start from the 1st September, 1956, was to be taken seriously, the appellant would have gathered the necessary information whether it was completed within seven days from that before issuing the policy. In the circumstances, the court below has rightly held that the claim of respondent No, 1 cannot be defeated, because loading was not completed within seven days of 1st September, 1956, inasmuch as it was not disputed by learned counsel for the parties that if any loss occurs after the policies are issued they are covered by the terms of the policy and not by the terms of the cover note or the application containing proposal for insurance. Thus, there is no substance in the third contention of Mr. Sinha either.

11. Mr. Rai Parasnath appearing for respondent No. 1 took objection to the fourth contention of Mr. Sinha. According to him, as the appellant did not plead in the written statement that respondent No. 1 had lost its right by forfeiture, because he did not bring the suit within six months from the date of the loss as stipulated by warranty No. 7(f), the appellant cannot be allowed to challenge the claim of

respondent No. 1 on this score. He contended that the court below should not have entertained such an argument at the time of the hearing in the absence of any pleading, issue or evidence (of course excluding the policy of insurance itself) in support of it. On the other hand, Mr. Sinha contended that this was a pure question of law which could be raised at any stage, even if not specifically pleaded, unless it was shown that respondent No. 1 would be prejudiced by raising this question at a late stage. Warranty No. 7(f) runs as follows :

" It is furthermore hereby expressly provided that no suit or action of any kind against the said society for the recovery of any claim upon, under or by virtue of this policy, shall be sustainable in any court of law or equity unless such suit or action shall be commenced within a period of six months after the happening of the loss or damage in respect of which such claim is made, and in the event of no such suit or action being commenced within such period of six months no liability shall attach under this policy."

12. Section 28 of the Indian Contract Act lays down that every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent. Mr. Sinha conceded that the first part " It is furthermore in respect of which such claim is made" of warranty No. 7(f) is void, inasmuch as it limits the time within which respondent No. 1 could enforce his rights in a court of law, but contended that the rest, that is the second part of warranty No. 7(i), is merely a forfeiture clause and is not illegal or void. In support of his contention, he relied on the decisions in *South British Fire & Marine Insurance Company of New Zealand v. Brajanath Shaha*, [1909] 13 C.W.N. 425; I.L.R. 36 Cal. 516 (F.B.). *Baroda Spinning, and Weaving Co. Ltd. v. Satyanarayan Marine and Fire Insurance Co. Ltd.*, [1914] I.L.R. 38 Bom. 344. *Girdharilal Hanuman Bux v. Eagle Star and British Dominions Insurance Co.*, [1923] 27 C.W.N. 955 ; A.I.R. 1924 Cal. 186. *Pearl Insurance Co. v. Atma Ram*, A.I.R. 1960 Punj. 236 (F.B.) and *Ghulam Malik v. Jabar Mandu*, A.I.R. 1962 J. & K. 14. He also relied on some other decisions and observations in *New Asiatic Insurance Co. Ltd. v. Bihar State Co-operative Bank Ltd.*, [1967] 37 Comp. Cas. 30 ; A.I.R. 1966 Pat. 69 which was a case under the first clause of Section 28 of the Contract Act, Mr. Rai Parasnath, on the other hand, contended that the terms of the agreements which were considered in those decisions were different from the terms of warranty No. 7(f) and these decisions were not of much assistance in deciding the present case. According to him, warranty No. 7(f) could not be dissected into two parts. It has to be read as a whole and as the dominant intention of this clause was to limit the time within which respondent No. 1 could enforce his rights, the whole of it was void under Section 28 of the Indian Contract Act. He further contended that warranty No. 7(f) was also void under Section 23 of the Indian Contract Act, inasmuch as the object of this agreement was of such a nature that if permitted it would defeat the provisions of the Indian Limitation Act. He pointed out that their Lordships of the Calcutta High Court in the cases of *South British Fire and Marine Insurance Co.*, [1909] 13 C.W.N. 425 ; I.L.R. 36 Cal. 516 (F.B.) did not at all consider Section 28 of the Contract Act. He further contended that Section 23 of the Indian Contract Act was not considered in any of these cases except in the case of *Pearl Insurance Co.*, A.I.R. 1960 Punj. 236 (F.B.) and *Ghulam Malik*, A.I.R. 1962 J. & K. 14; but even these decisions did not take into account the particular clause of Section 23 on which he was relying.

Thus, according to him, these decisions required reconsideration. He cited (1) *Midnapur Zamindari Co. v. Deputy Commissioner of Manbhum*, [1918] 3 Pat. L.J. 132 ; 44 I.C. 570 where it was held that limitation could not be extended even by express agreement and (2) *Ballapragada Ramamurthy v. Thammana Gopayya*, [1917] I.L.R. 40 Mad. 701, laying down that a promise not to raise the plea of limitation is void as it defeats the provisions of the Limitation Act and, therefore, falls under Section 23 of the Contract Act. He also relied on the observations of King J. in *Jawahar Lal v. Mathura Prasad*, A.I.R. 1934 All. 661 (F.B.) that a contract by which parties altered the statutory period of limitation would be void. He maintained that no one should be allowed to do something indirectly which he could not do directly.

13. The contention of Mr. Rai Parasnath challenging the correctness of the decisions relied on by Mr. Sinha may require serious consideration, but, in my opinion, it is not necessary to examine that question in the instant case, inasmuch as Mr. Rai Parasnath appears to be right that the appellant not having raised this plea in his written statement cannot be allowed to rely on it. It cannot be said that respondent No. 1 would not be prejudiced in any manner by raising this defence at a late stage, though not pleaded in the written statement. If the appellant would have specifically pleaded that respondent No. 1 had forfeited his right by virtue of warranty No. 7(f) of the policy it would have been open to respondent No. 1 to show by bringing evidence on the record that the appellant was estopped from or had waived his right for raising such a plea. There are materials on the record which show that the appellant also contributed by its conduct in delaying the institution of the suit by respondent No. 1. As stated earlier, the loss took place on 2nd November, 1956. If the agreement contained in warranty No. 7(f) be treated as valid and not void, the suit could be instituted by 2nd May, 1957. On 14th December, 1956, the appellant informed respondent No. 1 about the appointment of Messrs. Landale and Clarke for doing salvaging operations and that it would bear all costs of salvaging and repairing the transformers but never submitted any report to respondent No. 1 about the result of the efforts of Messrs. Landale and Clarke. On 29th March, 1957, the appellant informed respondent No. 1 that it suspected that the claim was fraudulent and by a letter, exhibit 3(j), dated the 30th April, 1957, only a few days before the expiry of six months, the branch secretary of the Patna office of the appellant requested the officer-in-charge of Manihari police station to institute a case alleging that the claim was not genuine. The said officer-in-charge did institute a case under Section 407 of the Indian Penal Code. From the final report (exhibit 9) submitted by the officer-in-charge it appears that the allegations of the branch secretary of the appellant were not true. The Sub-divisional Magistrate of Katihar accepted the final report of the police and held that the complaint under Section 407 of the Indian Penal Code was false, by his order dated the 24th September, 1957. This was specifically pleaded in paragraph 24 of the plaint and was not denied by the appellant in its written statement. It merely stated that it had no knowledge of this order of the Sub-divisional Magistrate of Katihar and, therefore, was not admitting the correctness of the allegation. In the circumstances, respondent No. 1 was reasonably expected to wait and see the result of the case instituted at the instance of the branch secretary of the appellant. In my opinion, therefore, the court below was wrong in entertaining at the time of hearing only in the absence of any pleading, issue or evidence (of course excluding the policy of insurance itself) in support of it, an argument that respondent No. 1 had forfeited his rights under the policy because of violation of the terms of warranty No. 7(f), and the appellant cannot be allowed to raise this plea before this court and to challenge the finding of the court below on this question which is against it.

14. Adverting to the main question whether the several electric transformers which were lost due to sinking of the boat were insured by the appellant, I find that the court below has rightly observed in its judgment that before the filing of the written statement in the suit it was not the case of the appellant that the articles said to have been lost by the incidents in question, that is, the seven electric transformers, were not insured with it. On receiving the information that the transformers were lost in transit the executive engineer (P.W. 1) sent a telegram (exhibit B-3) to the appellant on 3rd November, 1956, informing him of the incident. The policy number mentioned in that telegram was MPCB 2751 and cover note No. 1005E. In reply the appellant sent a telegram (exhibit B-2) on 5th November, 1956, which runs as follows :

" Yours 3rd wire correct policy number."

15. Exhibit D is a letter from the appellant dated 6th November, 1956, confirming the said telegram. In the telegram as well as the letter the appellant only challenged the correctness of the policy number and did not challenge the correctness of the cover note. P. W. 1 sent another telegram (exhibit B-1) on 6th November, 1956, itself to the appellant mentioning the correct policy number as MPCB 2750. According to him, he did this after consulting B.D. Sharma, the agent of the appellant at Katihar. On 7th November, 1956, the appellant again sent a telegram (exhibit B) stating that this policy No. 2750 too was incorrect and asking P. W. 1 to quote correct policy number. On 7th November, 1956, it sent a confirmatory letter (exhibit D-1). On 9th November, 1956, there was telephonic conversation between the manager of the appellant and P. W. 1 about this confusion as to the correct policy number and on 10th November, 1956, P. W. 1 appears to have sent another letter explaining the position. Exhibit D-2 is the reply of the assistant manager of the appellant of the letter dated 10th November, 1956, of P.W. 1. Mr. Sinha strongly relied on this letter because it is stated therein that neither a cover note nor a policy was issued by the appellant covering the consignment of transformers and consequently no risk was covered by it. On the very day, that is, on 13th November, 1956, P.W. 1 sent Sitaram Chamaria, a representative of defendant No. 2, with a letter [exhibit 3(f)]. He laid a formal claim by this letter. The letter states that Mr. Chamaria was carrying all the policies, the cover notes, copies of the said notices and the different challans of each trip and it was hoped that they would be of assistance to the appellant. It appears that before this letter was sent to B.D. Sharma, the agent of the appellant at Katihar had some communication with the Calcutta office of the appellant. After having discussed the matter with Shri Chamaria, the assistant manager of the appellant wrote a letter [exhibit 3 (h)] on 16th November, 1956, to B.D. Sharma. The main portion of this letter runs as follows ;

" As advised earlier Sri Sitaram Chamaria of M/s. Easy Transport called on us this morning and as confirmed by you over the telephone yesterday morning we are requesting Sri Sitaram Chamaria to contact you in regard to this claim. You are, therefore, requested to deal with this matter under advice to us."

16. Apparently this letter shows that the Calcutta office of the appellant was satisfied as to the insurance of the electric transformers and directed B.D. Sharma to deal with the matter. Exhibit 3 is a letter written by officer-in-charge, Katihar branch, that is, B.D. Sharma, informing that salvaging of the electrical transformers might be immediately undertaken at minimum possible cost to the

appellant. Of course the letter recites that it was without any prejudice or liability towards acceptance of the claim, but it is manifest that B.D. Sharma who had accepted the proposal for insurance and recommended for it was satisfied, *prima facie*, that the seven electric transformers were insured, otherwise there could be no question of undertaking of any salvaging operation at the cost of the appellant. The statement that the letter was being written without any prejudice or liability towards acceptance of the claim merely meant that the appellant did not accept that the seven transformers were lost by sinking or the correctness of the amount claimed on account of the loss. B.D. Sharma who has been examined as D. W. 5 has admitted in his evidence that after Sitaram Chamaria had seen him with the letter, exhibit 3(h), he wrote his reply to the head office. The appellant had suppressed that letter of B.D. Sharma and not produced it before the court. In the circumstances it can reasonably be presumed that in this letter B.D. Sharma did accept that the seven electric transformers were insured by the appellant. From a letter, exhibit 3(i), dated 6th April, 1957, of the Sub-divisional Officer, Electric Supply Sub-division, Katihar, addressed to P. W. 1 it appears that B.D. Sharma had visited the place of incident together with the writer of this letter on 7th November, 1956. Exhibit 3(j) is a letter dated 31st May, 1957, written by the secretary of the Patna branch of the appellant to the officer-in-charge, Manihari police station, and it is stated therein " That we were the insurers in respect of the alleged consignment of 7 transformers alleged to have been despatched from Sahebganj to Baghmari Ghat by country boat, the carriers being Messrs. Easy Transport, Bara Bazar, Katihar. The 7 transformers were being despatched by Messrs. Easy Transport on account of the Electrical Executive Engineer, Katihar ".

17. Thus, this letter admits in express terms that the appellant was the insurer in respect of the seven electric transformers in question and leaves no scope for doubt that after Sitaram Chamaria discussed the matter with the officers of the appellant at the Calcutta head office they were satisfied that the seven transformers were insured by the appellant and they acted on that basis.

18. Mr. J.C. Sinha, however, contended that the policy No. MPCB 2750 [exhibit 1(q)] under which the seven transformers according to respondent No. 1 were insured, on the very face of it showed that it was not a policy in respect of them, for it was in respect of miscellaneous electrical goods and not in respect of electrical transformers. On the other hand, it was argued by Mr. Rai Parasnath that the expression " miscellaneous electrical goods " was wide enough to include electrical transformers. It has been elicited in the cross-examination of P. W. 1 that electrical goods is a term which is used for all items of goods to be used in electricity department. He has further stated that while insuring the articles no particular attention was paid to mentioning each specific item in the cover note or the policy because cover notes were prepared much in advance of the despatches and as the contractor, that is, defendant No. 2, did not know as to which article he would be transporting when all items were described as electrical goods. Though B.D. Sharma (D. W. 5) in his examination-in-chief has attempted to show that he never intended to insure electric transformers under the description electrical goods or miscellaneous electrical goods, he has admitted that transformers do come in the category of electrical goods in the broader sense. Of course while making this admission he has attempted to make out a distinction between electrical goods and miscellaneous electrical goods. He has further admitted: "I have not stated that the transformers in question were not insured because they were not specified as such in any of the cover notes...It is only with reference to the sailing notices that it can be said as to what articles were insured for which particular boat". He has

emphasised that the company was not liable only because boats were not loaded within seven days of the issue of the cover notes and the insurance lapsed ipso facto. It has already been shown in the preceding paragraph that B.D. Sharma as well as other officers of the appellant acted on the footing that the seven electric transformers which were lost were insured. In my opinion, therefore, the expression " miscellaneous electrical goods" in exhibit 1(q) is wide enough to include electric transformers and there is no substance in this contention of Mr. Sinha. Mr. Sinha also contended that the cover note, exhibit 2(e), is not the cover note (Rat.) 1005E which, according to the case of respondent No. 1, was issued in respect of the seven electric transformers. This argument was advanced mainly on the basis that the letter " E " after the figure " 1005 " is not there in the original. The letter has been punched. According to Mr. Sinha, the letter which was there was " B " and not " E", whereas according to Mr. Rai Parasnath it was " E ". The appellant was expected to have copies of all these cover notes in its possession and if it intended to challenge that exhibit 2(e) was not the cover note No. 1005E, it ought to have filed the copy in its possession ; and, in the circumstances, I am not inclined to accept the contention of Mr. Sinha. The further contention of Mr. Sinha was that the seven electric transformers were not at all covered by cover note No. 1005E as was the case of respondent No. 1. In support of this contention he relied on exhibit 7(e), a document filed on behalf of respondent No. 1. It is a challan of transport of materials in respect of the seven electric transformers. From the oral evidence it appears that whenever goods were transported challans were prepared in quadruplicate one of which was retained by the store-keeper at Sahebganj, another made over to the contractor and two others forwarded to the SDO and the Executive Engineer, Electricity Department, respectively. In this challan the number of cover note is mentioned as 1003, dated 11th August, 1956. There can be no doubt that the number of the cover note " 1003 " was mentioned in the challan, exhibit 7(e), by mistake. Item No. 1 of the challan shows that the seven electric transformers weighed 112 maunds 26 seers and their approximate cost was Rs. 21,000. The relevant part of the sailing notice (exhibit E) which was sent by defendant No. 2 to the appellant reads as follows:

" Referring to my application insurance dated 31-8-1956, for a shipment of electrical goods valued at Rs. 21,000 as per Mishri Manjhi's boat, I now beg to inform you that the actual amount shipped in Sahebganj Ghat to Baghmaragbat (Manihari) of electrical goods weighing 112 mds. 26 seers valued at Rs. 21,000, which kindly note and oblige. "

19. This sailing notice, it is manifest, was in respect of seven electric transformers, application for insurance of which was made on 31st August, 1956. A cover note dated 11th August, 1956, could not, therefore, have been issued in respect of these electric transformers. Thus, there is no substance in this contention of Mr. Sinha either.

20. In exhibit A, the application for insurance, Ran Narain Singh, Chhedi Singh, Rajendra Singh and Jogendra Singh are mentioned as charundars who were to accompany the goods to be insured during their transit on boat. None of these charundars really accompanied the boat, but one Sarju Singh (D. W. 1 for defendants Nos. 2 and 3) actually accompanied the goods. According to Mr. Sinha, the appellant was not liable to make good the loss because of the change in the charundars. After a policy is issued the terms of the insurance are governed by the policy itself and not by the

cover note or the application for insurance. Of course if there be some ambiguity in the policy, these documents may be referred to for clarifying the matter. In the policy of insurance [exhibit 1(q)], the name of the charundar was not mentioned. It is obvious, therefore, that the appellant never intended that a particular charundar should accompany the goods insured during their transit. In exhibit 1(q) the name of the manjhi who was to accompany the boat carrying the goods insured is specifically mentioned as Meghu Manjhi. In the sailing notice (exhibit E) the manjhi who actually accompanied the boat is stated as Mishri Manjhi. The oral evidence also shows that it was Mishri Manjhi who accompanied the goods. Mr. Sinha urged that due to this change of manjhi who accompanied the boat, the appellant was not liable. As observed earlier, it was stated in exhibit A, the application for insurance, that manjhi's name was to be intimated in the sailing notice and the sailing notice (exhibit E) does intimate the name of manjhi as Mishri Manjhi and that according to oral evidence of D.W. 5 only two declarations were to be made, one in the application for insurance and another in the sailing notice. It is not known on what basis that the appellant mentioned the name of Meghu Manjhi as manjhi in the policy of insurance, exhibit 1(q). No document has been produced showing that they had received any such information from any of the defendants that Meghu Manjhi would accompany the boat carrying the goods insured under this policy. If the appellant's office, of its own accord, inserted the name of Meghu Manjhi in exhibit 1(q), respondent No. 1 cannot be made to suffer on that account.

21. Mr. Sinha's contention also was that these differences in the names of manjhi and charundars would show that the application (exhibit A) or the policy of insurance, exhibit 1(q), did not relate to the seven transformers. From what has been discussed earlier there appears no substance in these contentions of Mr. Sinha and there can be no doubt that from the evidence on the record it is fully established that the seven electric transformers which were lost due to the sinking of the boat were insured by the appellant.

22. There being no merit in any of the points raised on behalf of the appellant, the appeal must fail, and is accordingly dismissed with costs.

Choudhary, J.

I agree.