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(1953) 04 GUJ CK 0006

In the Gujarat High Court

Case No : First Appeal No. 41 of 1951

Amarshi Gokaldas APPELLANT

Vs

The Indian Globe Insurance Co. Ltd. RESPONDENT

Date of Decision : 16-04-1953

Acts Referred:

Kathiawar Limitation Law, 1890 — Article 82
Limitation Act, 1908 — Section 17

Citation : AIR 1954 Guj 81

Hon'ble Judges : Mohanlal Ujamshi Shah, C.J;J.A. Baxi, J

Bench : Division Bench

Advocate : G.B. Joshi, for the Appellant; A.R. Bakshi, for the Respondent

Final Decision : Dismissed

Judgement

Baxi, J.—The facts material to this appeal are briefly as follows. The Appellant shipped 500 bags of onions from Porbander for

Mozambique by country craft ""MADHAVRAV"" and got them insured against damages or total loss due to the total loss of the ship for Rs. 7600/-

with the Respondent Company. The ship sailed from Porbander on 26-3-1944 but did not reach the port of destination nor did it call at any other

port. After about a year after the ship sailed from Porbander the Plaintiff Appellant started correspondence with the Respondent Company to

obtain, the insurance money stating that as the ship was not heard or for twelve months it should be taken as lost. The Respondent Co. replied by

their letter dated 11-4-45 that according to their information the ship was lost by enemy action and therefore they were not liable under the policy

as the risk of war was not covered thereby. Some letters were exchanged thereafter between the parties but the correspondence petered out. In

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1950 i.e., about 5 years later the owner of the ship Bhima Kana performed the obsequies of the men on board the ship on 13-6-50 after duly

obtaining permission of his caste and thereafter a certificate to the effect that the ship was totally lost at sea was issued by the Port Officer,

Porbander on 25-7-1950, The Plaintiff Appellant then renewed his demand for the payment of insurance money by the Respondents Co. by his

letter dated 5-6-1950 but his claim, was repudiated on the ground that it was time barred. The Appellant thereupon filed this suit against the

Respondent Co. on 2-11-50 in the Court of the Assistant Judge, Porbandar, claiming Rs. 6070/- due under the policy of insurance with interest

and costs. The Respondent Co.''s defence was that the Plaintiff''s suit was barred by limitation. They further contended that the policy did not

cover war risks and their information was that the ship was lost on account of war and the Appellant not having proved that-the loss was due to

causes covered by the policy he could not recover. The learned Assistant Judge dismissed the Plaintiff''s suit and held in favour of toe Respondent

Co. on both the points. He held that the Appellant''s suit was barred by limitation and. he could not recover the claim because he had failed to

prove that the loss to the ship was of a nature which was covered by the policy (i.e., perils of the sea). The Appellant has therefore preferred this

appeal against the Assistant Judge''s decree.

2. It will be convenient to consider the question of burden of proof first. The policy of insurance which is at Ex. 66 in the papers of the suit insured

the goods against loss during their transit from Porbandar to Mozambique by the country craft ""MADHAVRAV"" subject to the conditions

contained in the policy. By Clause 17 of the policy the Respondent Co. undertook to pay the insurance money subject to certain deductions on

production, by the Appellant of satisfactory proof of damage to the goods or total loss of goods on account of total loss of the ship in accordance

with the terms of the policy. Clause 14 exempted the Respondent Co. from liability in respect of war risks. The Respondent Co. contended before

the learned Assistant Judge, which, contention was accepted by him, that the onus of proving that the ship was lost due to causes covered by the

policy was on the Appellant and it was for him, to show that the loss was not due to war risks. Mr. G.B. Joshi the learned Advocate for the

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Appellant contends that the learned Judge has, erred in taking this view of the burden of proof and submits that the Company should have been

called upon to prove that the ship was lost on account of war.

3. Now one of the events against which the goods were insured by the party was the total loss of the ship and by Clause 17 the Company

undertook to pay the insurance money on the assured tendering satisfactory evidence of the total loss of the ship subject to the performance by him

of other conditions of the policy. It is not the Respondent Co.''s case that other conditions of the policy have not been fulfilled and, there fore,

under this clause the Appellant was entitled to receive the insurance money on submitting satisfactory proof of the loss of the ship. This, clause

does not entitle the Respondent Co. to call upon the Appellant to allege and prove the actual cause of the loss. The loss of the ship is admitted by

the Company and therefore the Appellant discharged the burden which was placed upon, him by this- clause. The Company however relied on

Clause 14 and claimed exemption, on the ground that though the loss was caused by the event insured against , it was due to risks of war which fell

within the exception contained in that clause. We think that after the Appellant, established that he was entitled to claim u/s 17, it was for the

Respondent Co. to prove that though the, loss was due to an event insured against, the event was caused under circumstances which brought the

case within the exception contained in the policy. They were not justified in calling upon the Appellant to show under what circumstances the ship

was lost. The learned Assistant Judge therefore erred in holding that the Appellant should have proved how the ship was lost.

4. We shall next consider the question of limitation. It is not possible to ascertain exactly when the ship was lost but in letter dated 15-3-45, Ex.

38, to the Respondent Co., the Appellant states that the ship had not been, heard of for twelve months and should be taken to have been totally

lost and therefore they should pay the insurance money. The Respondent Co. replied by their letter dated 11-4-45, Ex. 39, that according to their

information the loss of the ship was due to war and therefore they were not liable. Thus both parties assumed, when these letters were exchanged,

that the ship was totally lost. The ship may therefore be taken to have been lost at some date before March 1945. On that date the law of limitation

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in force in the Porbandar State was the Kathiawar Limitation Law, 1890. Under Article 82 of this law, the period of limitation for the suit is five

years and time begins to run when proof of the loss is received by the insurers, whether from the Plaintiff or from any other person. We have

therefore to see when this proof was received by the Co. The Appellant says that the proof of the loss was the performance of the obsequies of

the ship''s crew by the owner on 13-6-50 and the Port Officer''s certificate dated 25-7-50 and therefore limitation should start from these dates

when these proofs could be furnished to the Co. However we think that the Company had already received proof of the loss before April 1945.

They had categorically admitted the loss of the ship in their letter dated 11-4-45, Ex. 39 and though according to their information the ship was lost

by enemy action they were satisfied that the information that the ship was lost was correct. The Article does not state the nature of the proof to be

received by insurers nor is it necessary that the proof should be produced by the assured. As soon therefore as the Co. received information which

induced them to conclude that the ship was lost, the Co. must be deemed to have received proof of the loss and time began to run against the

Plaintiff from the date of the receipt of this information. We do not know its exact date but it must have been received by the Co. latest on 11-4-45

when they addressed Ex. 39 to the Appellant. The suit would therefore be barred after five years from that date i.e., after 11-4-50 and as the suit

was filed on 2-11-50 it became barred by'' ""time. No doubt when the suit was filed, the Kathiawar Limitation Law had been replaced by the

Indian Limitation Act as applied to Saurashtra; but the application of that Act cannot extend .the period of limitation under the former law.

5. Mr. G.B. Joshi for the Appellants submitted that the Respondent Co. had been continuously demanding proof of the loss of the ship in the shape

of proof of performance of the obsequies of the ship''s crew or the Port Officer''s certificate and refused to consider his claim unless such proof

was forthcoming. His client had therefore no alternative except to wait till the owner of the ship chose to perform the obsequies after which only the

certificate could be issued. The Co.''s insistence upon production of these proofs, he submitted, was therefore responsible for the delay and

limitation, should begin from 15-6-50, when he was in a position to inform the Co. and actually Informed them that the obsequies were performed.

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The correspondence produced by the parties however does not warrant, Mr. Joshi''s contention and. does not suggest that the Co. asked for any

proof of the loss of the ship. The loss was conceded by them by their letter dated 11-4-45 Ex. 39 and they only insisted upon being supplied with

the proof that the ship was lost otherwise than by enemy action. Mr. Joshi, however, referred us to the oral evidence of Dharamshi Morarji Ex. 64,

Narain Meghji Ex. 61 and Ratilal Narbheram Ex. 62. Dharamshi Morarji was the local Manager of the Co. at Porbandar. He states that right till

the institution of the suit the Plaintiff was demanding payment and he (Dharmshi) was insisting on behalf of the Company upon submission of the

proof of the loss of the ship. Narain Meghji states that the Appellant was asked to renew his demand after obtaining the Port Officer''s certificate

about the loss of the ship or when the obsequies of the crew were performed. Ratilal also testifies to the same effect. All these persons, left the

service of. the, Company in 1949, when, they closed their business in Porbandar arid we do not see how Dharamshi and these Ors. could have

insisted upon production of any kind of proof on behalf of the Company. Assuming however that such proof was demanded from him it cannot

assist the Appellant. Time began to run against him when the loss of the ship was admitted by the Co. by their letter dated 11-4-45 and it cannot

stop because the Co. wrongfully insisted , upon production of further or particular kind of I proof and the Appellant waited till such proof I was

forthcoming. After the Co. had admitted the loss of the ship, it was plainly the Appellant''s duty to file the suit in time instead of acquiescing in the

Co.''s alleged demands.

6. In the result the appeal fails and is ordered to be dismissed with costs.

Shah, C.J.

7. I agree.

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