(2018) 05 DEL CK 0062

In the Delhi High Court

Case No : CS (OS) No. 191 of 2003

CENTRAL WAREHOUSING CORPORATION APPELLANT

Vs

ORIENTAL INSURANCE COMPANY LTD & ANR RESPONDENT

Date of Decision : 08-05-2018

Acts Referred:

Code of Civil Procedure, 1908 — Section 34

Citation : (2018) 05 DEL CK 0062

Hon'ble Judges : VALMIKI J.MEHTA

Bench : Single Bench

Advocate : Manoj K. Srivastava, Vishnu Mehra

Final Decision : Disposed Of

Judgement

,,,

VALMIKI J. MEHTA, J",,,

1.Plaintiff/Central Warehousing Corporation has filed this suit for recovery of Rs.5,36,11,018/- from the defendant M/s Oriental Insurance Company",,,

Limited. Though there are two defendants, they are actually the same entity Oriental Insurance Company Limited with separate addresses, and",,,

therefore reference in this judgment will be to the defendants as the defendant/ insurance company. Both the parties to the suit are Public Sector,,,

Undertakings. The principal amount of the claim is a sum of Rs.2,67,38,658/-. Balance amount of the suit claim is towards interest.",,,

2.The facts of the case are that plaintiff pleads that it had been storing paddy stocks at Dhuri open Warehousing facility of the plaintiff corporation,,,

situated at Punjab. Paddy stocks which were stored by the plaintiff belonged to Food Corporation of India (FCI). FCI had to lift the stocks before,,, 31.5.1995, and since FCI could not do so, and because of the factum of ensuing monsoon and slow pace of liquidation of the stocks by FCI, the",,,

officers of plaintiff at Dhuri Warehouse suggested an insurance to be obtained for the stocks lying in the open at Dhuri Warehouse. Insurance was to,,,

be obtained against flood and fire risk. On FCI being informed, FCI agreed to insure its stocks and reimburse the actual insurance premium to the",,,

plaintiff. The plaintiff on 28.7.1995 accordingly obtained an insurance policy from the defendant/insurance company at about 5:30 P.M. The sum,,,

insured was Rs. 34 crores and the plaintiff paid a premium of Rs.50,19,420/-. Insurance policy covered the period from 28.7.1995 to 27.7.1996.",,,

3.On 2.8.1995, the stocks at Dhuri Warehouse were affected by flood/flooding and the plaintiff therefore reported this fact to the defendant/insurance",,,

company. As a result of the flooding on 2.8.1995, 7921 quintals of paddy stocks were damaged with the loss being calculated at Rs.24,99,157/-.",,,

Defendant/insurance company appointed surveyors being M/s Mehta & Padamsey Surveyors Pvt. Ltd. and M/s A.K. Gupta & Associates.,,,

4.Again on 26.8.1995 there was another flooding resulting in a further loss of 20621 quintals of paddy stocks of the value of Rs.65,06,139/-.",,,

5.On 5.9.1995 a third incident of flooding took place causing loss of 52114 quintals of paddy stocks of the value of Rs.1,64,42,505/-.",,,

6.An incident of fire took place on 9.5.1996 resulting in destruction of paddy stocks of 3104.63 quintals of the amount of Rs.12,90,857/-.",,,

7.Plaintiff submitted to the defendant/insurance company a total claim of Rs.2.67 crores on account of the aforesaid losses caused due to flooding and,,,

fire on 2.8.1995, 26.8.1995, 5.9.1995 and 9.5.1996. In spite of plaintiff writing letters during the years 1997 till 2001, yet the defendant/insurance",,,

company did not make payment of the claim amount. Defendant/insurance company refused to release the claim as the defendant/insurance,,,

company contended, and it was so written to the plaintiff on 21.1.2002, that plaintiff was guilty of concealment of facts because the flooding of the",,,

said area had taken place prior to obtaining of the insurance cover on 28.7.1995 resulting in non-disclosure of multi particulars and the claim hence,,,

stood repudiated. The subject suit has been filed claiming the suit amount from the defendant/insurance company as the loss was covered under the,,,

insurance policy.,,,

8.Defendant/insurance company contested the suit and denied the claim of the plaintiff. It was pleaded that plaintiff was guilty of non-disclosure of,,,

facts and suppression of material particulars resulting in the claim of loss being repudiated. It was pleaded that plaintiff was guilty of non-disclosure of,,,

facts that flooding of the area had taken place prior to obtaining of the insurance cover on 28.7.1995. It was also pleaded in the written statement that,,,

stocks were lying in Dhuri since October, 1994 but insurance cover was taken for the first time on 28.7.1995. It was further pleaded in the written",,,

statement that as per the rainfall data maintained by the concerned authorities it was shown that there was very heavy rainfall prior to the date of,,,

taking of the insurance policy, and this data was also maintained in the site register of the plaintiff at Dhuri, and such facts showed that the stocks",,,

were already flooded due to heavy rainfall which had lashed Dhuri on 1.7.1995 and hence plaintiff?s claim has been validly repudiated.,,,

9.The following issues have been framed in this suit:-,,,

â??1.Whether the plaint has been signed and verified and the suit instituted by a duly authorised person? OPP,,,

2.Whether this Court does not have the territorial jurisdiction to entertain and adjudicate upon the subject matter of the suit? OPD 3. Whether heavy,,,

rains had been lashing Dhuri and its adjoining areas from 26.7.1995 onwards and flooded the affected the godowns of the plaintiff? Its effect? OPD,,,

4.Whether flooding of area took place prior to obtaining insurance Policy? OPD,,,

5.Whether there has been any deliberate non-disclosure of material non-particulars by the plaintiff at the time of obtaining insurance? OPD,,,

6.If issue Nos. 3 to 5 are decided in favour of the plaintiff, whether the plaintiff is entitled to any amount? If so, to what amount? OPP",,,

7. Whether the plaintiff is entitled to any interest? If so, at what rate, on what amount and for what period? OPD",,,

8.Relief.â??,,,

ISSUE Nos. 1 & 2,,,

10.I may note that issue nos. 1 and 2 have not been pressed because no arguments have been addressed on these issues before this Court and,,,

accordingly it is held that the suit is duly signed and filed by the authorized persons of the plaintiff especially because of the ratio of the judgment of the,,,

Supreme Court in the case of United Bank of India Vs. Naresh Kumar and Others

(1996) 6 SCC 660. Also, this Court has territorial jurisdiction to try",,,

the suit since it is the admitted position that the insurance policy was issued by the defendant/insurance company at Delhi.,,,

ISSUE Nos. 3 to 5.,,,

11.Issue nos. 3 to 5 are dealt with together for decision as they are connected issues as to whether plaintiff is entitled to any amount or that the,,,

defendant/insurance company is entitled to repudiate the claim under the policy on account of plaintiff allegedly concealing material facts that the,,,

flooding had already taken place prior to issuance of the subject insurance policy.,,,

12.(i) I may at this stage note that on behalf of the plaintiff evidence was led by filing the affidavit by way of evidence of one Sh. Deepak,,,

Ramchandani, Senior Assistant Manager of the plaintiff. Sh. Deepak Ramchandani thereafter appeared for cross-examination and he was also partly",,,

cross-examined on 5.7.2011, however thereafter for one reason or the other evidence could not be recorded and PW-1 Sh. Deepak Ramchandani",,,

retired in the meanwhile. This witness therefore refused to appear for cross-examination and the plaintiff did not summon him for his remaining cross-,,,

examination. Therefore it is seen that there is no evidence which is led on behalf of the plaintiff because evidence of a witness whose cross-,,,

Recording Date,Rainfall Data,Remarks,

Date,Remarks in the Register,,

15.7.95

16.7.95

26.7.95

27.7.95

28.7.95

1.8.95

2.8.95

3.8.95

25.8.95

26.8.95","â??Cloudy â?" Heavy Rain from 11.00 A.M. to 12.00

P.M.â??

â??Cloudy â?" Rainsâ??

â??Cloudy â?" Heavy rain w.e.f. 6.00 P.M. & continueâ??

â??Heavy rain followed by wind storm w.e.f. early morning

to 3.30 P.M.

- do -

â??Cloudyâ?"Slightly & heavy rain 4.00 P.M. to 4.45

P.M.""â?? â??Cloudyâ?"All plinth flooded due to very

heavy rain w.e.f. 5.00 P.M. to 8.20 P.M. & continue.â?

â??Cloudyâ?"Rain started since morning to 2.00 P.M.â??

â??Cloudyâ?" Rains w.e.f. 1.30 to 3.00 P.M.â??

â??Cloudyâ?"Torrential rain from 8.30 A.M. to 11.30 A.M.",,

2.9.95

3.9.95

4.9.95

5.9.95","& drizzling throughout the day. All plinths flooded by rains

waterâ??

â??Cloudyâ?" Torrential rain from 8.30 P.M. & continue all

plinths floodedâ??

â??Cloudyâ?"Torrential rain throughout the day & night all

plinths flooded.â??

â??Cloudyâ?"Torrential rain continued upto 12.30 P.M. &

dizzling continues â?" Plinths flooded.â? No remarks

recorded.",,

Sl.

No.",Quantity & Commodity,"Rate per

Qtl.

Rs.",Value Rs.

01

02

03

04

05","124507 bags of paddy weighing 80657 qtl.

124507 gunnies

Cost of 124507 gunnies used for refilling

Salvaging Expenses

Advertisement cost","360.00

15.00

10.25

--","2,90,36,556

18,67,605

12,76,197

3,12,761

had already taken place in the open compound at Dhuri and consequently plaintiff is not entitled to the suit claim on account of having concealed,,,

facts that flooding had already taken place. The issue is whether the surveyors of the defendant/insurance company were justified at arriving at the,,,

conclusion of flooding having taken place of the stocks prior to taking of the insurance policy at 5:30 P.M. on 28.7.1995.,,,

16.In my opinion, the defendant/insurance company has failed to prove that the stocks were already damaged by flooding prior to taking of the",,,

insurance policy at 5.30 P.M. on 28.7.1995. This is firstly because it is not as if the paddy stocks were stored in a basement which was flooded.,,,

Paddy stocks were stored in the open ground and not in any basement type of area. As already stated above, the rainfall which took place on",,,

1.7.1995 and 16.7.1995 in an open area at Dhuri cannot be a basis of holding that the flooding has taken place and stocks damaged much much later,,,

on 28.7.1995. Even if we take the rain of 67 mm on 28.7.1995 it cannot be held in the facts of the present case that the insured stocks were in fact,,,

damaged due to flooding prior to taking of the insurance policy at 5.30 PM on 28.7.1995 because there is difference between heavy rains and,,,

flooding and it is not necessary that merely because there are heavy rains there would have been flooding and damage caused to the stocks as on,,, 5.30 PM on 28.7.1995. It is extremely important to note that the surveyors have concluded the factum of flooding only as an assessment, 'it is",,,

apparent that the open compound must have already got flooded' (Para VIA of the Survey Report) and not because of actual facts showing,,,

existence of flooding.,,,

It is seen that the site registers of plaintiff at Dhuri show flooding only on 2.8.1995 i.e well after the policy being issued on 28.7.1995. In the entries,,,

of plaintiff?s registers on 27.7.1995, 28.7.1995 and 1.8.1995 no flooding is shown and which is shown only on 2.8.1995. Plaintiff?s site registers",,,

cannot be disbelieved. Also, there is nothing before this Court, in the form of expert?s report or any other documentary evidence to show that a",,,

particular amount of rain will cause flooding, and more so in an open area, and that too such open area where the stocks were stored in the open",,,

area at Dhuri at Punjab.,,,

17.It is therefore seen that there is no direct and primary evidence available, and which has been proved by the defendant/insurance company, that",,,

paddy stocks which were insured were in fact damaged due to flooding prior to taking of the insurance policy at 5.30 PM on 28.7.1995. As already,,,

stated above, the surveyors have tried to show damage of stocks due to flooding by the amount of rain but a particular amount of rain, be it very",,,

heavy rains, does not necessarily mean that flooding would have taken place more so in open grounds and if an insurance policy has to be repudiated",,,

on the ground of alleged concealment of facts of the stocks already having been damaged on 28.7.1995 because of flooding, then this aspect had to",,,

be clearly established before this Court on behalf of the defendant/insurance company, and finding of flooding cannot be given simply because giving",,,

figures of rainfall will not be equivalent to and lead to an automatic conclusion/ result of flooding having taken place at Dhuri Warehouse facility of,,,

the plaintiff before 5.30 P.M. on 28.7.1995.,,,

18.Officers of plaintiff are not perfect astrologers that they could have known at 5.30 PM on 28.7.1995 that flooding would take place. In any case,",,,

insurance policy is taken for an unexpected event, and even if the officers of plaintiff validly predicted and forecasted heavy rains would result in",,,

flooding after 5.30 PM on 28.7.1998, that by itself cannot be a reason to hold that officers of plaintiff were guilty of concealment of facts because",,, the issue is not of prediction of heavy rains but if flooding had already taken place at 5.30 PM on 28.7.1995. Once and if flooding has taken place,,,

after 5.30 PM on 28.7.1995 then there cannot be any concealment of facts by the plaintiff. There is nothing illegal in expecting flooding, which may",,,

or may not happen, and therefore taking an insurance policy. It was well open to the defendant/insurance company to have refused to undertake the",,,

risk by issuing the policy.,,,

19.Therefore, in my opinion, the defendant/insurance company has miserably failed to prove that the stocks of paddy were damaged due to flooding",,,

even prior to the taking of the policy at 5.30 PM on 28.7.1995.,,,

20.It is also noted that the defence of the defendant/insurance company of flooding and concealment will definitely not apply with respect to the next,,,

two floodings after 2.8.1995 i.e on 27.8.1995 and 5.9.1995. These dates are much after the commencement of the insurance policy at 5.30 P.M. on,,,

28.7.1995, and if there is flooding on these dates and consequent damage to the stocks then such damage is obviously covered within the insured",,,

damage under the subject insurance policy.,,,

21.Similarly also there cannot be any valid defence whatsoever raised by the defendant/insurance company with respect to the loss on account of,,,

fire which took place on 9.5.1996.,,,

22.I may note that counsel for the defendant/insurance company had sought to argue that it was strange for the plaintiff company which had never,,,

taken an insurance policy for flooding prior to the subject insurance policy, and that it only suddenly took a policy for flooding on 28.7.1995, however",,,

this argument of the defendant/insurance company with respect to suspicious circumstances is clearly without basis because surely the officers of,,,

the plaintiff were in fact acting in discharge of their duties by estimating that since heavy rains can fall in the ensuing monsoon season which was,,,

coming and therefore it would be better if insurance policy is taken with respect to the stored paddy stocks. Merely because a flooding/insurance,,,

policy had not been taken by the plaintiff earlier does not mean that such policy when taken is not validly taken inspite of the fact that due to flooding,,,

caused by rains damage has taken place to the stocks during the currency of the policy. In such facts it cannot be argued that therefore a policy,,,

which had to be taken, would result in the policy being void. I also reject the contention urged on behalf of the defendant/insurance company that the",,,

officers of the plaintiff company were bound to estimate that rains would be such and so heavy that there would have taken place flooding and,,,

therefore this aspect ought to have been disclosed to the defendant/insurance company prior to taking up the policy. As already discussed above the,,,

officers of the plaintiff are not expected to be astrologers with respect to the amount of rains which will happen, and more importantly as to whether",,,

that much amount of rain would actually fall resulting in flooding of open areas where stocks are stored in the open warehouse. Officers of the,,,

plaintiff are not expected to be accurate astrologers that they ought to have predicted the flooding and ought to have informed the,,,

defendant/insurance company. This argument of the defendant/insurance company is therefore rejected.,,,

23.Issue nos. 3 to 5 are therefore held in favour of the plaintiff and against the defendant/insurance company. It is held that defendant/insurance,,,

company has failed to prove that there was any flooding in Dhuri as on 28.7.1995, and more particularly with respect to warehouse stocks lying in",,,

open storage of the plaintiff at Dhuri i.e not in any godown or basement. It has to be held that no flooding took place resulting in damage of stocks,,,

prior to taking of the insurance policy at 5:30 P.M. on 28.7.1995. It has to be held that plaintiff is not guilty of non-disclosure of material particulars,,,

because stocks in question were never damaged due to flood prior to taking of the insurance policy at 5:30 P.M. on 28.7.1995.,,,

ISSUE NO. 6,,,

24.Issue no. 6 is now taken up for decision as to what is the amount of money decree which the plaintiff will be entitled to. In this regard, it is seen",,,

that in the Survey Report Ex.OPW2/1 the surveyors have concluded at internal page 14 that the total loss caused to the plaintiff company was for an,,,

amount of Rs.2,19,81,951/-. This is in terms of para 6 at pages 14 and 15 of the Survey Report and these paras read as under:-",,,

6. Based on the above, we have worked out the assessment of loss at Rs.21981951/-, which was then adjusted to net Rs.16409629/- due to the non-",,,

coverage of first flood loss dated 2.8.1995 and excess clause etc., as under:-",,,

Total No. of bags claimed as affected and disposed off as salvage by the Insured.

(124507 bags x 64.78 kgs.),,,

6. Based on the above, we have worked out the assessment of loss at Rs.21981951/-, which was then adjusted to net Rs.16409629/- due to",,,

the non-coverage of first flood loss dated 2.8.1995 and excess clause etc., as under:-",,,

Total No. of bags claimed as affected and disposed off as : 124507 bags,,,

salvage by the Insured. (124507 bags x 64.78 kgs.),,,

(80656 qtls.),,,

Less: Number of bags already affected before,,,

Commencement of insurance on 28.7.95; hence,,,

not considered. (30996 bags x 64.78 Kgs),,,

: 30996 bags,,,

(20079 qtls.),,,

93511 bags,,,

(60577 qtls.),,,

Pre-damage value of 80656 qtls. (124507 bags x 64.78 kgs) Of Rice,,,

Paddy claimed as affected and disposed off as Salvage by the,,,

Insured @ Rs.360/- per quintal.,,,

Rs.29036160,,,

Less: 3.649% deduction towards storage losses,,,

as per Insured?s records,,,

Rs. 1059529,,,

Less: Salvage value as realised by the Insured, Rs.27976631",,,

By inviting tenders. (6978273 + 100000),,,

Rs. 7078273,,,

Add: Salvaging expenses allowed as explained earlier Rs. 20898358,,,

Less: Salvage value as scrap of old gunny bags Rs. 1208100,,,

= 124507 bags @ Rs.1/- each Rs. 22106458,,,

Assessed Loss,,,

Rs. 124507,,,

Less: Proportionate loss on 20079 qtls. Rs.21981951,,,

(30996 bags x 64.78 bags) already,,,

affected before the commencement of,,,

insurance on 28.7.95, hence not to be",,,

considered,,,

{Rs.21981951 x 20079 qtls.},,,

{ 80656 qtls. },,,

Adjusted loss,,,

Rs.5472322,,,

__________,,,

Rs.16509629,,,

Less: flood excess applicable under the policy,,,

(two occurrences of 26.8.95 & 5.9.95 Rs.100000,,,

taken into account),,,

Net Adjusted loss Rs. 16409629,,,

25.On account of the defence of the defendant/insurance company having been rejected, and the admitted position appearing on record that the loss to",,,

the plaintiff has been assessed by the assessors and surveyors of the defendant/ insurance company itself at Rs.2,19,81,951/-, therefore this amount is",,,

liable to be paid by the defendant/insurance company to the plaintiff, and the plaintiff therefore will be entitled to a money decree for a claim of",,,

Rs.2,19,81,951/- against the defendant/insurance company.",,,

ISSUE NO. 7,,,

26.The next issue is issue no. 7 as to whether plaintiff is entitled to interest. Admittedly, there is no contract for payment of interest. The plaintiff has",,,

also not served any legal notice upon the defendant/insurance company so that the plaintiff could have claimed interest under the Interest Act, 1978.",,,

Therefore, plaintiff will not be entitled to interest for the pre-suit period, but plaintiff is held entitled to pendente lite and future interest till realization of",,,

the money decree at 9% per annum simple. Pendente lite and future interest is granted by this Court in exercise of powers conferred under Section,,,

34 CPC.,,,

RELIEF,,,

27.In view of the aforesaid discussion, the suit of the plaintiff is decreed, against the defendant/insurance company, for a sum of Rs.2,19,81,951/-.",,,

Plaintiff is also held entitled to pendente lite and future interest till realizatio at 9% per annum simple. Plaintiff is further held entitled to costs of the,,,

suit. Decreed sheet be prepared.,,,

