
(2019) 08 BOM CK 0108
In the Bombay High Court
Case No : Admiralty Suit No. 2 Of 2006

Elecon Engineering Company Limited	APPELLANT
Vs	
Rickmers Dubai A Motor Vessel Flying Panamanian Flag Together With Her Hull And Ors	RESPONDENT

Date of Decision : 23-08-2019

Acts Referred:

Contract Act, 1872 — Section 230
Marine Insurance Act, 1963 — Section 19, 20
Code Of Civil Procedure, 1908 — Order 41 Rule 33

Citation : (2019) 08 BOM CK 0108

Hon'ble Judges : K.R. Shriram, J

Bench : Single Bench

Advocate : Rahul Narichania, Aditi Pawar, D. N. Motiwala, Sneha Pandey, Sneha S. Dwivedi, Jyoti Bajpayee

Judgement

1. Plaintiff carries on business, interalia, as manufacturers, importers and suppliers of Bulk Material Handling Equipments and Transmission Equipments. Plaintiff settled the suit with defendant nos.1 to 7 and pursuant to an order dated 30-1-2013, has withdrawn the suit against defendant nos.1 to 7. There is nothing on record against defendant no.8 and I do not see they having even entered appearance. Anyway plaintiff, after 30-1-2013, has and is pursuing the suit only against defendant no.9, who henceforth is referred to as defendant. Defendant, who was original defendant no.9, is an Insurance Company, who had covered a consignment which plaintiff was importing. Defendants originally were :

- (i). defendant no.1 - motor vessel- Rickmers Dubai (vessel that carried the cargo),
- (ii). defendant no.2 - Bibi Shipping (that owned/chartered defendant no.1 vessel),
- (iii). defendant no.3 - Rickmers Linie GmBH & CIE KG Hamburg (carrier that issued the Master Bill of Lading),

- (iv). defendant no.4 - United Liner Agencies of India Pvt Ltd. (Agent of defendant no.3 in India),
- (v). defendant no.5 - Henderson Line Limited (carrier that issued the house bill of lading in Antwerpen),
- (vi). defendant no.6 - Excel GmbH (agent of defendant no.5 in Antwerpen),
- (vii). defendant no.7 - DHL Lemuir Logistics Pvt Ltd. (Agent of defendant no.5 in India),
- (viii). defendant no.8 - Turbowinds NV (the seller of the consignment),
- (ix). defendant no.9 - United India Insurance Company Limited (Cargo Insurers)

2. Plaintiff had, on or about 30-04-2004, placed a purchase order on Turbowinds NV, who was original defendant no.8, for purchase of four sets (1 set = 3 nos.) of blade type 23.3 P for Model T-600-48DS Wind Operated Electricity Generator. These are more commonly known as Wind Mill Blades. The payment term was C & F Nhava Sheva or Chennai or any other port as may be advised. The total purchase price was Euro 2,80,000. The shipment, which is the subject matter of insurance claim in this suit is one set, i.e., 3 nos. windmill blades (the said consignment). The equipment was to be packed by shipper, i.e., Turbowinds - original defendant no.8, in suitable wooden / water proof / seaworthy strong packing, for protection and to prevent damage to or deterioration of the cargo under the normal transport condition including sea and rain water. The insurance cover in

respect of the transit of the said consignment was from warehouse of Turbowinds to plaintiff's factory at V V Nagar, Gujarat. To cover the risk associated with transit of the said consignment, and plaintiff had been importing many other consignments, plaintiff had taken from defendant an open cover policy bearing 180100400008 dated 17-06-2004 (Exhibit P-6). The period covered was from 12.36 Hrs. on 17-6-2004 to midnight on 16-6-2005.

3. Plaintiff by letter / declaration dated 6-10-2004 (Exhibit P-8) to defendant, informed defendant that the said consignment would be shipped on board, "the vessel Rickmers Dubai", which was original defendant no.1, from Antwerp to port of Mumbai/Nhava Sheva Seaport. In the declaration, plaintiff had also made it clear to defendant, that the bill of lading number and date will be intimated later on. The cargo value declared (CIF + 10%) was Rs.64,56,157/-. Based on the declaration made, defendant issued a Marine Insurance Certificate (Exhibit P-9), under which the sum insured was Rs.64,56,157/-. Basis of valuation was "CIF + 10% extra" and the period of risk covered was from "journey anywhere from the

world/Antwerpen Seaport" to "journey upto V. V. Nagar via Mumbai/Nhava Sheva Seaport" and the mode of transit was "vessel/road/rail". The risk covered included (ICC) (A) including war and SRCC (Strike Riots and Civil Commotion). ICC

(A) means Institute Cargo Clauses (A). What is relevant for the matter at hand, is only "ICC (A)" cover. It is an all risk cover except for certain

exceptions provided in clause 4 to 7 given of ICC(A). As per Marine Open Cover (Exhibit P-6) issued, it provided - "Special condition : open cover shipping particulars : To be declared to the company immediately upon receipt of shipping documents". Company is defendant.

4. On or about 12-10-2004, plaintiff was informed by an email from original defendant nos.6/7, who were the agent of the carrier (defendant no.5) under the house bill of lading (HBL) issued to Turbowinds (original defendant no.8- sellers), that they had received a message from original defendant no.3 stating, during the voyage of original defendant no.1 vessel, two blades out of the said consignment of three blades, which were stacked on board original defendant no.1 vessel had fallen into the sea and one was lying on board damaged. Plaintiff, in turn, by its letter dated 12-10-2004 (Exhibit P-22) immediately informed defendant about the loss and requested defendant to treat that as a formal claim. Plaintiff also requested defendant to arrange for survey of the damage / loss of consignment at Genoa, Italy, where original defendant no.1 vessel was due to arrive on the same day.

5. Before we go further, it will be necessary to briefly state the course of voyage that was adopted to send the said consignment to India.

6. Turbo Winds (seller), original defendant no.8 had entrusted the said consignment to original defendant no.6, who had issued House Bill of Lading no.002596 dated 4-10-2004 (HBL) (Exhibit P-18). Original defendant no.7 was agent in India of original defendant no.6, who was to be contacted for delivery. The shipper shown in this HBL was Turbowinds, consignee shown was "To order" and notify party was "Bank of Baroda". Original defendant no.6 was the agent in Germany of Henderson Line Limited (carrier) who is original defendant no.5. Original defendant no.5 instead of carrying the said consignment by itself, entrusted the said consignment to Rickmers Linie, i.e., original defendant no.3. Rickmers Linie, original defendant no.3, issued a Master Bill of Lading no.BOMCV018 dated 2-10-2004 (MBL) (Exhibit P-21) showing original defendant no.6 as the shipper and original defendant no.7 as the consignee. It is clear from this MBL that plaintiff was nowhere concerned either as shipper or consignee or at all. Even Turbowinds - seller (original defendant no.8) is not concerned with this MBL. As per the MBL, the contract of carriage was between original defendant no.3 as carrier and original defendant no.6 as shipper. If the goods had arrived at Mumbai, what would have happened is, plaintiff would have collected the HBL from Bank of India, who would have received the documents in

view of the conditions in L.C. issued by Bank of India, surrendered the HBL to original defendant no.7 as agent of original defendant no.5 in Mumbai, and original defendant no.5 in the meanwhile

would have collected the delivery order for the said consignment from original defendant no.4, the agent of original defendant no.3 - Rickmers Linie. The delivery order would then be submitted to the port who would have handed over the said consignment to plaintiff. Therefore, the contract of carriage, which plaintiff will have and which plaintiff would have received from Bank of Baroda (LC issuing Bank) would be the HBL (Exhibit P-18) and not the MBL (Exhibit P-21). The shipping details mentioned in the HBL is what plaintiff is required to declare as per the special condition given in Exhibit P-6, that "shipping particulars were to be declared to defendants immediately upon receipt of shipping documents". Which vessel or bill of lading details, are not material for the declaration to be made by plaintiff and for issuance of Marine Insurance Certificate by defendant because under the open cover plaintiff was to give these details only 'immediately upon receipt of shipping documents'. Shipping documents would take its own time and it was also acceptable to defendant because defendant accepted the declaration (Exhibit P-8) with the endorsement "bill of lading date will be intimated later on" and issued the Marine Insurance Certificate (Exhibit P-9), stating "RR/LR/BL/AWB. To Be DECLARED dated _____".

For ease of reference and better understanding, Exhibit P-6,

Exhibit P-8 and Exhibit P-9 and first page of ICC (A) are scanned and reproduced:

EXHIBIT P-6

EXHIBIT P-8

EXHIBIT P-9

7. After plaintiff intimated defendant about the damage / loss of the said consignment vide its letter dated 12-10-2004 (Exhibit P-22), defendant immediately engaged services of one Gastaldi International SRL, Cargo Surveyors (Gastaldi) to enquire and inspect the remaining blade and submit a report. Gastaldi, by a fax dated 18-10-2004 (Exhibit P-42), informed defendant that a box of considerable dimensions, i.e., the said consignment, was shipped on board, on weather deck. The usual stamp "Carried on deck without liability for loss or damage howsoever caused", was endorsed on the bills of lading (signed by agents) (MBL), while no remarks were inserted on Mate's Receipt signed by Master. Bill of lading (MBL) was issued without remarks in respect of the condition in the box and, therefore, it must be considered shipped in good order and condition. Gastaldi, it appears, gave the cause of damage and also reported on the extent of damage to one Wind Mill Blade. Gastaldi also submitted various

documents to defendant, with a copy to plaintiff and for the first time plaintiff also came to know about the said consignment having been shipped on deck and not under the deck and a MBL having been issued.

8. Plaintiff, in view of the damage caused to the said consignment, lodged this suit, in which, defendant was originally defendant no.9. Defendant was sued because defendant did not pay plaintiff's claim for loss of cargo under the insurance policy. Other defendants have been described earlier.

9. After the trial began, plaintiff settled the claim with defendant nos.1 to 7 and received a sum of Rs.34 lakhs. Defendant nos.1 to 7 settled the claim without admitting liability but under package limitation. Defendant nos.1 and 2 together paid Rs.5,00,400/-. Defendant nos.3 and 4 together paid Rs.11,48,910/- and defendant nos.5, 6 and 7 together paid Rs.17,50,690/-. We need not go into any further details on this.

10. Before arriving at the settlement (Exhibit P-2/2), plaintiff gave notice to defendant about the proposed settlement offer from defendant nos.1 to 7 and in response, advocate for defendant stated that plaintiff cannot settle only with defendant nos.1 to 7 and if plaintiff was settling with defendant nos.1 to 7 and withdrawing the suit, plaintiff should withdraw the suit against defendant also and not just against defendant nos.1 to 7 (Exhibit 2/3). Plaintiff by its letter dated (Exhibit P-2/4) once again informed defendant that they were ready to settle the suit with defendant also, upon defendant paying Rs.60 lakhs without assigning rights of subrogation in full and final settlement of all claims against defendant, or, in the alternative, defendant may pay a sum of Rs.91.24 lakhs with plaintiff assigning the rights of subrogation in full and final settlement. Plaintiff made it clear that, if defendant does not agree, then plaintiff will go ahead to settle the matter with defendant nos.1 to 7. I have to note that the only witness of defendant has given rather strange answers to these correspondence. We shall deal with that later.

11. In view of defendant not agreeing to settle, plaintiff accepted a sum of Rs.34 lakhs and is claiming for the balance from defendant with interest plus cost.

12. Defendant nos.1 to 7 had filed defence and also started cross-examining plaintiff's witness, but at that stage, settlement was entered into. Therefore, we need not consider the defence raised by defendant nos.1 to 7. Plaintiff is pursuing this suit only against defendant.

The defence of defendant can be summarised, from the written statement as under:

(a). the claim raised in the plaint is not and cannot be covered under the Marine Insurance Policy because, plaintiff was, under the Marine Insurance Act 1963, duty bound and liable to disclose to defendant, before the contract was

concluded, every material circumstances which is known to plaintiff and plaintiff is deemed to know every circumstances, which in the ordinary course of business ought to be known to plaintiff.

(b). Plaintiff was aware that the said consignment was shipped on deck and plaintiff has suppressed that material fact at the time of declaring the said consignment.

(c). The loss and/or damage, if any, is caused due to the negligence and/or tortuous, mischievous and felonious acts on the part of defendant nos.1 to 8 and/or their servants, agents or employees. Such loss, if any, was payable by defendant nos. 1 to 8 and, therefore, defendant cannot be made liable to pay the same.

(d). Plaintiff by its fax dated 6-10-2004 (Exhibit P-6) and 16-10-2004 (Exhibit P-7) submitted wrong details regarding particulars of dispatch.

(e). Plaintiff has invalidated the insurance policy as plaintiff has suppressed material facts from defendants.

(f). Plaintiff misguided and negotiated with their bankers by submitting the HBL numbers and the date of MBL and plaintiff is faulted for the unauthorised deck stowage of the said consignment.

None of the case put forth by defendant has been proved by defendant.

13. 24 issues were framed on 24-11-2006, which read as under:

"1) Whether this Hon'ble Court has jurisdiction to entertain, try and dispose off the present suit ?

2). Whether the plaintiffs have any right, title, interest or locus to file and maintain the present suit ?

3). Whether the plaintiffs have a cause of action against defendant nos.1 to 7 or any of them ?

4). Whether there is privity of contract between the plaintiffs and defendant nos.1 to 7 or any of them ?

5). Whether in the absence of any privity of contract between the plaintiffs and defendant nos.1 to 7 the plaintiffs have any right in rem against defendant no.1 and/or a right in personam

against defendant nos.2 to 7 or any of them ?

6). Whether Indian Law is applicable in respect of the suit transaction as alleged by the plaintiffs ?

7). Whether the suit is liable to be dismissed for paying insufficient court fees ?

- 8). Whether the suit be barred by the law of limitation ?
- 9). Whether the plaintiffs are bound by the clause and terms of the bill of lading at Exh.G to the plaint including the clause 'carried on deck without liability for loss or damage howsoever cause' contained on the face of the Bill of Lading ?
- 10). Whether the plaintiffs were aware and/or deemed to be aware that the suit consignment was being carried on the deck of the vessel ?
- 11). Whether the defendant no.4 at the material time the agent of defendant no.3 ?
- 12). If the answer to issue above is in the affirmative, whether defendant no.4 as an agent of defendant no.3 is liable to be the plaintiff in view of section 230 of the Contract Act 1872 ?
- 13). Whether the suit is liable to be dismissed against defendant no.7 as agent of a disclosed principal i.e. defendant no.6 ?
- 14). Whether the defendant nos.5 to 7 or any of them had taken charge of the said consignment only as a freight forwarder ?
- 15). Whether the defendant nos.5 to 7 or any of them are entitled to limit liability as contended by them in paragraph 5 of their written statement ?
- 16). Whether the defendant nos.5 to 7 are disentitled from relying upon the numerous exceptions under the bill of lading and in law ?
- 17). Whether the defendant nos.5 or 6 were required to obtain express permission / consent of the defendant no.8 to stow the consignment on the deck of the vessel as alleged in paragraph 33(f) of the plaint ?
- 18). Whether the loss was caused due to an Act of God and/or Peril of the Sea ?
- 19). Whether the lashing / stowage of the plaintiffs consignment was insufficient ? And whether the same was causative of the loss ?
- 20). Whether defendant no.8 is liable for the loss as contended in paragraph 36 of the plaint ?
- 21). Whether the loss is covered under the insurance Policy issued by the defendant no.9 ?
- 22). Whether the defendant no.9 proves that the plaintiffs have committed a breach of sections 19 and 20 of the Marine Insurance Act 1963 ?
- 23). Whether the defendant no.9 is liable to indemnify the plaintiffs for the loss caused to the aforesaid consignment ?
- 24). Whether the plaintiffs prove that they have suffered any loss or damage amounting to Rs.67,83,177/- or any other amount and whether the plaintiffs are entitled to an order and decree as prayed for in the plaint together with interest

and if so at what rate and for what period ?"

14. Only issue nos.10, 21, 22, 23 and 24 which have been highlighted above, are relevant to what remains in the suit Plaintiff led evidence of two witnesses. Defendant led evidence of only one witness. Total of 69 documents from plaintiff have been marked and total of

13. documents from defendant have been marked. Issue no.24 can be answered at the out set, because it is not disputed by defendant that the cargo suffered a loss because defendant's own surveyors have, vide their survey report (Exhibit P-53), certified the loss. We will, however, deal with the quantum later. All other issues are interlinked and can be dealt with together.

15. Let us see what is the risk that is covered under the open policy. As noted above, the policy incorporates ICC(A), which is commonly called an all risk policy. Clauses 1 to 4 of ICC (A) deal with the risk covered under

the policy. In the present case we are only concerned with clause (1) and it reads as under:

"1) This insurance covers all risks of loss of or damages to the subject-matter insured except as provided in clauses 4, 5, 6 and 7 below."

(emphasis supplied)

Therefore, every possible situation is covered except those provided under clauses 4 to 7 of ICC (A). Only clause 4 is relevant for this matter and we need not look into the other clauses 5 to 7. Clause 4 reads as under:

"4) In no case shall this insurance cover

4.1) loss damage or expense attributable to willful misconduct of the Assured

4.2) ordinary leakage, ordinary loss in weight or volume, or ordinary wear and tear of the subject-matter insured.

4.3) loss damage or expense caused by insufficiency or unsuitability of packing or preparation of the subject-matter insured (for the purpose of this Clause 4.3 "packing" shall be deemed to include stowage in a container or liftvan but only when such stowage is carried out prior to attachment of this insurance or by the Assured or their servants).

4.4) loss damage or expense caused by inherent vice or nature of the subject-matter insured.

4.5) loss damage or expense proximately caused by delay, even though the delay be caused by a risk insured against (except expenses payable under Clause 2 above)

4.6) loss damage or expense arising from insolvency or financial default of the owners managers charterers or operators of the vessel

4.7) loss damage or expense arising from the use of any weapon of war employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter."

Mr. Narichania submitted, and rightly so, when it is an all risk cover, every risk under the sun is covered, except which are excluded.

16. Though not pleaded, across the bar, Ms. Diwedi submitted that exclusion clause 4.3 will be applicable, i.e., "loss damage or expense caused by insufficiency or unsuitability of packing or preparation of the subject-matter insured". Defendant, in its written statement has not stated that the loss covered was due to risk, which has been excluded expressly under clause 4.3. Even the survey report (Exhibit P-53) issued by defendant's surveyor does not indicate that the loss or damage occurred due to insufficiency or unsuitability of packing or preparation of subject matter insured.

17. Now let us also consider what is meant by an open cover policy, because the nature of the cover provided is critical to appreciate the role which time to time declarations were intended to play in an open cover. The main thrust of defence as noted earlier, is non disclosure/mis-disclosure under the declarations to be made as per the open cover policy issued.

18. In paragraph 21 of the Judgment of the Court of Appeal in the matter of Glencore International A.G. Vs. (The "Beursgracht")¹, the Court has dealt with open cover and it reads as under:

21.. I think the nature of the cover provided is critical to any consideration of the role which declarations were intended to play in this open cover. The words "open cover" are not determinative, although interestingly R. H. Brown's Dictionary of Marine Insurance Terms describes an open cover as:

A form of long-term insurance contract whereby the insurer guarantees to accept risks when they are put forward by the assured

as they arise during the period of the contract. The assured agrees to declare every item that falls within the scope of the cover and does not have the option to place such risks elsewhere should he consider it advantageous so to do. Thus the open cover is an obligatory contract binding both parties to its terms."

19. What is an open cover is also defined in M. N. Srinivasan's - Principles of Insurance Law, by Dr. Avtar Singh, published by Wadhwa and Company, Seventh Edition 2002, page 139 and the same reads as under:

"This is a contract to insure cargo that may be shipped by a merchant during a period usually 12 months at rates fixed in the beginning itself, irrespective of the total value of the goods that may be sent, the only limit fixed is of the goods that may be sent in any one vessel. As and when each shipment goes, a separate policy is issued to satisfy the requirement of S.24. The open cover thus corresponds to an original slip for a series of policies for each shipment sent

during the period. This is more popular than the floating policy as the merchant here gets the advantage of a long term agreement for his insurance needs at fixed rates without limit of sum assured. He has only to declare the particulars of each shipment during the period and cover is assured. Even if a declaration is missed or loss occurs before advice is given to the insurer the insured is given protection of the insurance. The open cover is not reduced by the value of the shipment sent as in a floating policy." (emphasis supplied)

Therefore, even if the declaration is missed or loss occurs before advice is given to insurer, the insured is given protection of the insurance. It is for this reason, defendant was perfectly happy when in the declaration made on 6-10-2004 (Exhibit P-8), plaintiff stated "bill of lading date will be intimated later on and the Marine Insurance Certificate (Exhibit P-9) also states" to be declared, dated _____".

20. It is defendant's case that plaintiff did not disclose a material fact before the insurance contract was concluded and that material fact was

that the said consignment was carried on deck. First of all, the contract was concluded when the open policy cover for the period 12.36 Hrs on 17-6-2004 to midnight of 16-6-2005 was issued. It is not defendant's case that the contract was concluded when defendant issued the Marine Insurance Certificate (Exhibit P-9). At the same time, even if, we say that every time the declaration was made, there was a responsibility on the insurer, i.e., plaintiff, to declare correctly (and that is not defendant's case) still, I say there is no fault on the part of plaintiff.

21. Section 19 and Section 20 of the Marine Insurance Act 1963, read as under:

19.. Insurance is unberrimae fidei:- A contract of marine insurance is a contract based upon the utmost good faith, and if the utmost good faith be not observed by either party, the contract may be avoided by the other party.

20.. Disclosure by assured:- (1) subject to the provisions of this section, the assured must disclosed to the insurer, before the contract is concluded, every material circumstance which, is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known to him. If the assured fails to make such disclosure, the insurer may avoid the contract.

(2). Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3). In the absence of inquiry the following circumstances need not be disclosed, namely:- (a) any circumstance which diminishes the risk.

(b). any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge,

and matters which an insurer in the ordinary course of his business as such ought to know;

(c). any circumstance as to which information is waived by the insurer;

(d). any circumstance as to which it is superfluous to disclose by reason of any express or implied warranty.

(4). Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact.

(5). The term "circumstance" includes any communication made to, or information received by, the assured.

22. Under Section 19, it is very clear that the contract of marine insurance is a contract based upon the utmost good faith, and if the utmost good faith be not observed by either party, the contract may be avoided by the other party. Therefore, good faith has to be maintained by either party, i.e., not only by assured but also the insurer. What is relevant to this case is Section 20, under which, the assured (plaintiff) must disclose to the insurer (defendant), before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known to him. If the assured fails to make such disclosure, the insurer may avoid the contract. Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk. What fact is material would depend on facts and circumstances of each case. If the insurer-defendant is rejecting the claim on the basis of non-disclosure of a material fact or avoiding the contract on the basis of non-disclosure of a material fact by plaintiff, the onus is on the defendant to prove :- a) that the information regarding

loading of the said consignment on the deck was a material fact; b) if it had been disclosed despite issuing an open cover, defendant would have still refused to cover or cancelled the cover to the said consignment or atleast increased the premium payable; and c) that material fact was known to assured, i.e., plaintiff before the contract was concluded to wit, before the issuance of the open cover (Exhibit P-6) or before the declaration (Exhibit P-

8). was made. I have to say that defendant has miserably failed in all these three counts.

23. While dealing with an all risk policy, King's Bench Division of England in London and Provincial Leather Processes Ltd. Vs. Hudson² has held that for a loss to be recoverable under an all-risks policy there must only be a casualty, something accidental or fortuitous. The court held that an all risk policy insures against all and every risk whatsoever, however arising. Before a claim can attach on a policy of insurance there must be a loss of an accidental or fortuitous character, there must be in some form or another a casualty. The court held that it is accidental and fortuitous in the sense that the assured is deprived by some

unexpected acts of his property in the goods or his possession of the goods. An assured would have suffered a loss in the sense that they cannot get their goods.

24. In paragraph 23-80 in Arnould Law of Marine Insurance And

Average, 19th Edition, printed by Sweet & Maxwell, an all risks cover is explained as under:

"All risks" policies are not subject to any ejusdem generis limitation. Goods insured against all risks are in effect, and subject to the express exclusions in the policy, covered against loss or damage from any external cause. A policy against all risks does not absolve the assured from the need to prove that he has suffered loss from an insured peril; he must, as it is sometimes expressed, prove a casualty; but the class of insured perils is so wide that he may be able to do this by necessary inference. If the goods are shipped sound and arrive damaged, and the damage is of such a kind as to raise a presumption of some external cause, there is prima facie evidence of loss by an insured peril and the burden is on the underwriter to prove that the loss in fact occurred in some way for which he is not liable.

(emphasis supplied)

25. Therefore, in all risks policies, the class of insured perils is so wide that the assured will be able to prove the casualty by necessary inference. If the goods are shipped sound and arrive damaged, and the damage is of such a kind as to raise a presumption of some external cause, there is prima facie evidence of loss by an insured peril and the burden is on the underwriter to prove that the loss in fact occurred in some way for which he is not liable. I have already stated that the only point raised by counsel for defendant that too orally was that risk was not covered because it fell under clause 4.3 in the exclusions of ICC (A) and I have negated it. The fact that there has been a casualty and that there has been prima facie evidence of loss by an insured peril has been proved, because admittedly even the surveyor Gastaldi appointed by defendant has confirmed the loss of the said consignment (Exhibit P-42) and (Exhibit P-53).

26. Has defendant discharged the burden to prove that the loss in fact occurred in some way for which he is not liable?

27. Ms Diwedi submitted that it is plaintiff's own case that defendant no.3 illegally and without authority carried the said consignment on deck and, therefore, the loss is not payable. Open cover policy or Marine Insurance Certificate issued or ICC(A), which is included and is part of the insurance cover, does not ban or bar carriage of goods on deck or excludes loss due to goods being carried on deck. Moreover, it is precisely the reason why insurance cover is taken to cover for loss due to such misdemeanors / misadventures by third party or act of God etc. The only witness, who gave evidence on behalf of defendant no.9, in answer to question nos.14 and 15 of his cross-examination stated he did not even know what "on deck stowage" means and what "under deck stowage"

means. In the affidavit in examination in chief, defendant's witness states that MBL was a qualified bill of lading. When he was asked what according to him was the meaning of the term "qualified bill of lading", his answer is beyond comprehension. Question no.33 and answer thereto read as under:

"Q.33. What is the meaning of the term "qualified bill of lading" ?

Ans. A qualified bill of lading a bill of lading. Most of ships which are seaworthy belong to the London Underwriter Classification. No ship comes out of London, without classification."

He was shown a MBL and was asked, was that a qualified bill of lading or not clean bill of lading and his answer was "I cannot say".

Question no.40 and the answer thereto reads as under:

"(Witness is shown Bill of Lading No.BOMCVO18 dated 2nd October 2004. This document is not exhibited but is annexed at Exhibit G to the plaint. It is also disclosed at Sr. No.17 to the plaintiff's compilation of documents)

Q.40. Is this a qualified bill of lading or not a clean bill of lading" ?

Ans. I cannot say."

28. The other defence of defendant was non disclosure of material fact and the material fact was that the said consignment was loaded on deck, which plaintiff failed to disclose. The onus to prove that it was a material fact and it was not disclosed, though plaintiff was aware, was on defendant. The only place where the bill of lading contains endorsement of stowage on deck, was the MBL. In response to question no.48 in his cross-examination defendant's witness states that he was not aware as to whether at the time of applying for insurance coverage, plaintiff was aware of and had in its possession the MBL. Question No.48 and answer thereto read as under:

"Q.48. Do yo know whether at the time of applying the insurance coverage, the plaintiff was aware of and had in its possession bill of lading No.BOMCVO18 dated 2nd October 2004 ?"

Ans. No, I am not aware"

29. Per contra, plaintiff's witness in his examination in chief has expressly stated that plaintiff learnt about the MBL (it states as "carried on deck without liability for loss or damage howsoever caused"), only when

they received a copy of letter from the claims agents of Defendant, Gastaldi on or about 18-10-2004, which is Exhibit P-42. Paragraph 12 of the affidavit in lieu of examination in chief, reads as under:

"12 After entrustment of the said consignment to the 5th Defendant as stated above, unknown to the plaintiff, it appears that the 5th Defendant through the

6th Defendants had entrusted the said consignment for carriage to the 2nd and 3rd Defendants from Antwerp to Mumbai. On receipt of the said consignment on board the 1st Defendant vessel, the 3rd Defendant apparently issued in favour of the 6th Defendant on Board Ocean Bill of Lading bearing no.BOMCV018 dated 02/10/2004 (MBL). The said Ocean Bill of Lading mentions Shipper as the 6th Defendant and Consignee as 7th Defendant. The said Ocean Bill of Lading mentions the Port of Loading as Antwerp and Port of Discharge as Mumbai Seaport. The said Ocean Bill of Lading mentions that the said consignment would be carried on board the 1st Defendant vessel. The Ocean Bill of Lading further states as "Carried on Deck without Liability for loss or damage howsoever caused." The said Ocean Bill of Lading mentions freight payable at Hamburg. However, in the description of goods column it is mentioned as freight prepaid. The said ocean Bill of Lading appears to have been signed at Hamburg. The Plaintiff learnt the aforesaid facts when they received a copy of letter from the claims agents Gastaldi International srl on or about 18/10/2004. I am producing herewith a copy of the obverse and reverse of the Ocean Bill of Lading bearing no.BOMCV018 dated 02/10/2004. A copy of the said Bill of Lading (MBL) was received by the plaintiffs from the claims agents Gastaldi International srl." (emphasis supplied)

In the cross-examination by defendant, defendant has not even made an attempt to prove what P.W.-1 has stated was incorrect. Mere suggestion that plaintiff is guilty of non disclosure of material fact at the time of declaring the said consignment and at the time of issuing the insurance policy or with respect to the shipment, to which, plaintiff's witness has disagreed is not enough. In response to defendant's counsel's question after showing the HBL to P.W.-1, P.W.-1 confirmed, that was the document that plaintiff received from the bank, which was lodged with

defendant no.9 (Exhibit P-17). Marine Open Cover (Exhibit P-6) provides as noted earlier for shipping particulars to be declared to defendant immediately upon receipt of shipping documents, and in his cross-examination, plaintiff has confirmed that HBL (Exhibit P-17) is what was received and that was submitted to defendant. The HBL does not disclose anywhere that the said consignment was stowed on deck. Therefore, there was no way that plaintiff would have known that the consignment was stowed on deck. In his cross-examination, in response to question no.261, P.W.-1 has confirmed that no bill of lading number and date was communicated at the time of declaration as shown in document dated 6-10-2004 (Exhibit P-8). Question nos.252, 257, 259, 261 and answers thereto in cross-examination of P.W.-1, are important and reproduced hereinbelow:

"(Witness is shown the bill of lading issued by Henderson Line Limited bearing no.002596 dated 04.10.2004 i.e. document P-17)

Q.252. Is this the document you received from the bank which you lodged with the defendant no.9?

Ans. Yes .

Q.257. I put it to you that the plaintiff is guilty of non-disclosure of material facts at the time of declaring the consignment and at the time of issuing of the insurance policy ?

Ans : I do not agree.

Q.259. I put it to you that the plaintiff failed to disclose and suppressed material facts and circumstances with respect to the shipment of the consignment ?

Ans. I do not agree.

Q.261 At the time of declaration, for issuance of the insurance certificate, which bill of lading number and date did you mention to defendant no.9 ?

Ans .No bill of lading number and date was communicated at the time of declaration as shown in document, dated 6th October 2004, which document is at page 15 of the plaintiff's compilation of documents of 2nd May 2008.

I must add, defendant's counsel also put a positive question to plaintiff's witness that plaintiff was not aware of bill of lading number and date before 12-10-2004 and bill of lading number and date was communicated to defendant only on 12-10-2004. Question nos.263 and 265 of P.W.1's cross-examination and answers thereto read as under:

"Q.263. When did the plaintiff inform the defendant no.9 about the date and the number of the bill of lading" ?

Ans. The bill of lading number and date was communicated to the defendant no.9 as shown in the document at page no.33 of the plaintiff's compilation of documents of 2nd May 2008 i.e. letter dated 12th October 2004.

Q.265. Would it be correct to say that before 12 th October 2004 the plaintiff was not aware of the bill of lading number and date ?

Ans. Yes, the plaintiff was not aware."

(emphasis supplied)

Therefore, defendant has failed to prove: (a) the said consignment being on deck was material fact as defendant's only witness stated that he does not know what was the meaning of on deck stowage and under deck stowage; and (b) Even for a moment we assume that on deck stowage was a material fact, still defendant has failed to prove that before declaration was made on 6-10-2004, plaintiff was aware that the said consignment was stowed on deck and hence guilty of non disclosure.

30. Though, Ms Diwedi mentioned that plaintiff submitted wrong

details regarding particulars of despatch, she did not even identify which are those alleged wrong details. Plaintiff had made a positive case that it came to

know about on deck stowage only on 12-10-2004, whereas defendant did not cross-examine P.W.-1 to disapprove that. It is a rule of essential justice that whenever opponent has declined to avail himself of the opportunity to put his case in cross-examination, it must follow that the evidence tendered on that issue ought to be accepted. (Sarwan Singh Vs. State of Punjab AIR 2002 SC 3652)

31. Ms Dwivedi relied upon a judgment of the English High Court of Justice (Kings Bench Division) in *Alluvials Mining Machinery Company Vs. Stowe* to submit that the insurance company is not liable to indemnify plaintiff for the loss caused and when the consignment is carried on deck. I am afraid, this judgment does not aid Ms Dwivedi because there the assured had conceded that the policy provided that it would not cover goods carried on deck. There is no such concession in our case. Neither does the open cover or Marine Insurance Certificate or ICC(A) exclude cover for goods carried on deck. Moreover, in that case the insured were aware that the goods were carried on deck because bill of lading issued expressly had a disclaimer and that was not disclosed to the insurer. The facts in our case are totally different. Therefore, the said judgment is not applicable to this case.

32. Ms Dwivedi also relied upon the judgment of the Supreme Court of India in the matter of *M/s Bihar Supply Syndicate Vs. Asiatic Navigation & Ors* AIR 1993 Supreme Court 2054 to submit that no cause of action is established by plaintiff against defendant. That judgment was peculiar to its own facts and apart from pointing out paragraph 28 of the said judgment, Ms Dwivedi did not make any submissions. Paragraph 28 is totally unconnected to any facts in our present case, because that was concerning cross objections and provisions of Order 41 Rule 33 of Civil Procedure Code.

33. In the records and proceedings, I find another judgment given by defendant's counsel in the matter of *Rangammal Vs. Kuppuswami & Anr* 2011 Lawsuit (Sc) 551

I am ignoring this judgment, because that was not referred to during the hearing and not even argued and it has been given after the matter was reserved for judgment. In any event, that judgment is only given to suggest a proposition that onus is on plaintiff to positively establish its case on the basis of material available and it cannot rely on the weakness or absence of defence to discharge its onus. There can be no quarrel on this proposition but once plaintiff has discharged its onus in an all risk policy that the goods has suffered a casualty due to a fortuitous event and there is a prima facie evidence of loss by an insured peril, the onus shifts to defendant to prove that loss in fact occurred in some way due to a risk which was not covered

under the policy or for which it was not liable. That burden, defendant has to independently discharge and failure to discharge will result in decree to plaintiff.

34. To conclude, a) plaintiff has proved the loss is covered under the insurance

policy issued by defendant, b) defendant has failed to prove that plaintiff's were aware and/or deemed to be aware that the suit consignment was carried on deck of the vessel, and, c) defendant has failed to prove that plaintiff has committed a breach of Sections 19 and 20 of the Marine Insurance Act 1963. Therefore, defendant is liable to indemnify plaintiff for the loss caused to the said consignment.

35. Now comes the issue of quantum. The insured value under the policy is Rs.64,56,157/-. Strangely, plaintiff has not claimed this amount , but has claimed Rs.67,82,492/-, the break up of which is as under:

Sr. No.. Particulars. . Amount

. .

1. Invoice No.23 dt. 28/09/2004 of Turbowinds,.

. Belgium for a set of windmill blade type 23.3 P.

. for model T-600-18DS wind operated.

. electricity generator. .

. Euro 81.640 =. (C = Cost). Rs.46,66,542.00

. .

2. Ocean freight charges as per cargo arrival.

. notice CCX/2402341 dt. 17/11/2004 of Excel.

. India Pvt Ltd.. (F = freight). Rs.12,02,047.00

. . .

. .

3. Marine Insurance Charges as per certificate. Rs.4,981.00

. no.180100/21/04/80402 dt. 6/10/04.

. . (I = Insurance).

. . .

. .

4. Marine Insurance Charges as per certificate.

. No.180100/21/04/80403 dt. 6/10/04. (on. Rs.1,868.00

. duty part). (I = Insurance). .

. . . .

. . .

5. Cost incurred at Italy for scrapping of the.
. damaged blade as per Debit Note dated.
3/3/05 of Excel India Pvt Ltd.. Rs.3,20,195.00

6. Incidentals & others losses approx 10% in
terms of the policy. (+ 10%). Rs.5,86,859.00

Total claim. . Rs.67,82,492.00

The basis of valuation under the policy was CIF + 10% extra. From the particulars of break up given above, item 1 relates to "C", i.e., cost, item 2 relates to "F", i.e., freight and items 3 and 4 relate to "I", i.e., insurance. These amounts are, therefore, certainly payable. As regards, items 5, it is claimed for cost incurred at Italy for scrapping the damaged blade as per the debit note dated 3-3-2005 (Exhibit P-56) of Excel India Pvt Ltd., which is original defendant no.7. No submissions, however, were made by Mr. Narichania on how this head of claim is covered under the policy. Hence this has to be rejected.

36. Item 6 of the particulars of claim given is incidentals and other losses approximately 10% in terms of the policy. The amount claimed is Rs.5,86,859/-. Again no submissions were made by Mr. Narichania as to how this amount is payable under the policy. Therefore, this head of claim is rejected.

37. As regards item 1, 2, 3 and 4, the reason why I have said it is payable is because, in paragraph 34 of the affidavit in lieu of examination in chief P.W.-1 has stated as under:

"34. The plaintiff by its letter dated 04/03/2005 informed the 9th Defendants that one blade which was discharged at Genova was disposed off. The Plaintiff further informed the 9th Defendants that the Plaintiff had incurred storage charges, charges for clearing and scrapping of the said blade, port demurrage and other charges. The Plaintiff informed the 9th Defendants that the Plaintiff was sending revised claim bill in the sum of Rs.67,82,492/- after taking into account the said expenses. The Plaintiff also forwarded to the 9th Defendants copies of documents requested by the 9th Defendant and also informed the 9th Defendants that apart from the freight charges of Rs.12,02,047/- paid to the 7th Defendants plaintiff also paid Rs.3,20,195/- to the 7th Defendants. I am producing herewith an office copy of the plaintiff's said letter dated 04/03/2005 to the 9th Defendants alongwith the revised claim bill."

The Apex Court in Sarwan Singh (supra) in paragraph 8, observed that it is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination, it must follow that the evidence tendered on that issue ought to be accepted. The document (Exhibit

P-56) has been received in evidence without any murmur from defendant. Defendant has not put any questions in cross-examination and, therefore, the evidence tendered by plaintiff ought to be accepted.

38. Therefore, what is payable under the policy is:

. .

Sr. Particulars. Amount

No.. .

. .

(I). Invoice. Rs.46,66,542.00

. .

(ii). Ocean Freight. Rs.12,02,047.00

. .

.

(iii). Marine Insurance Charges. Rs.. 4981.00

.

(iv). Marine Insurance Charges. Rs.. 1868.00

.

. Total. Rs.58,75,438.00

.

39. The other point that comes up for consideration is, as noted earlier, plaintiff has received a sum of Rs.34,00,000/- from defendant no.1 to 7. Certainly, defendant has to be given credit for the said amount. As noted earlier, plaintiff had informed defendant about the settlement offers from original defendant no.1 to defendant no.7 and sought defendant's consent. Defendant did not consent nor pay. Therefore, plaintiff went ahead and mitigated its losses by accepting Rs.34 lakhs from defendant no.1 to defendant no.7 as per the break-up noted earlier. In his cross examination defendant's witness confirmed having received the letters informing defendant about the settlement offers from defendant no.1 to defendant no.7. According to defendant's witness, there was no question of defendant giving any answers to plaintiff's letters because it was conditions of the policy. Q.34 to Q.36 and answers thereto of defendant's witness in cross examination read as under :

(Witness is shown the documents marked as Exhibits P-2/2, P-2/4 and P-2/5)

Q.34. Do you agree that the plaintiff addressed letters to the advocate of defendant no.9 informing her of settlement offers received from the other

defendants to the suit?

Ans. Yes, I agree.

Q.35. What was the response of defendant no.9 to these letters?

Ans. As per the policy terms and conditions, it was the agent's liability who made the shipment. So, there was no question of defendant no.9 giving any answer to these letters. It was pure condition of the policy.

Q.36. Who is this "agent" you are referring to in your answer to Q.35?

Ans. I do not remember. There may be 500 agents.

But the fact is defendant's advocate had initially replied (Exhibit 2/3) as noted earlier. This witness of defendant does not even know that. From the answers given in the cross examination it is rather evident that defendant's witness had no idea what the matter was about and was giving unintelligible answers. Defendant's witness's evidence lacks credibility.

40. As I have held above, a sum of Rs.58,75,438/- is payable under the policy. From this amount of Rs.58,75,438/-, a sum of Rs.34,00,000/- has to be deducted which would leave a sum of Rs.24,75,438/- payable by defendant to plaintiff.

41. Now comes the issue of interest, at what rate and for what period. Plaintiff has claimed interest at the rate of 18% p.a. from the date of suit until payment / realisation. No evidence has been led as to how and why 18% should be granted. Mr. Narichania submitted that under the claim proceedings for General Insurance Policy prescribed by IRDA, it is provided in regulation 15, clause 10 that in the event, the claim is not settled within

30. days, the insurer shall be liable to pay interest at the rate, which is 2% above the bank rate from the date of receipt of last relevant and necessary

document from the insured / claimant by insurer till the date of actual payment. Again, no evidence is led by plaintiff as to what was the "bank rate". Counsel for defendant did not make any submissions, but simply stated that as the claim itself has to be dismissed, where is the question of paying any interest. I am allowing part of the claim. Therefore, interest is payable. In my view, interest at the rate of 12% p.a. would be a reasonable rate of interest, from the date of filing the suit.

42. By an order dated 30-1-2013, plaintiff withdrew the suit as against defendant nos.1 to 7. Mr. Narichania states that defendant nos.1 and 2 gave a sum of Rs.5,00,400/-, defendant nos.3 and 4 gave Rs.11,48,910/- and defendant nos.5 to 7 together gave Rs.17,50,690/-, totalling to Rs.34,00,000/- and all the three payments were received by plaintiff on 30-1-2013, when plaintiff withdrew the suit as against defendant nos.1 to 7. Therefore, interest @ 12% p.a. shall be payable on Rs.58,75,438/- from 14-10-2005, the date on which the plaint was lodged, until 30-1-2013 and from 31-1-2013 on the balance

amount of Rs.24,75,438/- until payment / realisation. Plaintiff is also be entitled to cost in the sum of Rs.5,00,000/-.

43. Suit stands decreed as under:

I. Plaintiff will be entitled to a sum of -. Rs.58,75,438.00

. . +

. Interest @ 12% p.a. from 14-10-2005 to 30-

. .

.

. 1-2013 (8 years 16 days) -. . . Rs.56,71,326.89.

. . . _____

. Rs.1,15,46,764.90.

. Less amount received from defendant nos.1 -. . .

. to 7. . . Rs.. 34,00,000.00.

. Total amount payable as on 30.01.2013. _____

. Rs.. 81,46,764.89. (A)

. Interest @ 12% p.a. from 31-1-2013 to 22-. . . +. . .

.

. 8-2019 on Rs.24,75,438.00 (6 years 203. . . Rs.. 19,47,525.41. (B)

. days).

.

. Total (A) + (B). . . Rs.1,00,94,290.30.

.

II. Cost. . . Rs.. 5,00,000.00.

.

. Sum total I + II. . . Rs.1,05,94,290.30.

.

III. Plus further interest from the date of. judgment until payment /

. realisation will accrue at 12% pa. on Rs.24,75,438/- - Rs.813.84 per

. day..

.

44. . All issues are answered accordingly.. . . .