
(2005) 12 KL CK 0075
In the High Court Of Kerala
Case No : A.S. No. 79 of 1996

Josita Antony

APPELLANT

Vs

New India Assurance Company Ltd.

RESPONDENT

Date of Decision : 21-12-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 3, Order 8 Rule 3(1), Order 8 Rule 4, Order 8 Rule 5, Order 8 Rule 5(1)
Marine Insurance Act, 1963 — Section 23, 25, 55

Citation : (2006) 2 ACC 713 : (2005) 4 ILR (Ker) 869 : (2006) 1 KLT 393

Hon'ble Judges : R. Bhaskaran, J;M. Sasidharan Nambiar, J

Bench : Division Bench

Advocate : K.L. Joseph and Sareena George, for the Appellant; Joseph A. Vadakkal and George K. Varghese, for the Respondent

Final Decision : Dismissed

Judgement

M. Sasidharan Nambiar, J.—Whether the acceptance of the premium and the proposal for an insurance policy by themselves create a concluded contract? Whether the loss of the insured boat, without proving that the loss was due to one of the perils insured against, will enable the insured to claim the insured sum? These are the questions to be resolved in the appeal.

2. Plaintiff in O.S .No. 63/92 on the file of Principal Sub Court, Kochi is challenging the dismissal of the suit in this appeal. Respondents are the defendants. The fishing boat by name "Kadalthuruthu" was insured with first respondent New India Assurance Company Limited for the period 28-10-1988 to 27-4-1989 under Ext A-2 policy. The policy was not renewed before the expiry of the period. Appellant submitted Ext.B-2 proposal on 11-5-1989. Under Ext.A-2 policy the boat was insured for Rs. 2,00,000. Under Ext.B-2 proposal, appellant claimed the sum assured at Rs. 2,50,000. A premium of Rs. 4,168 was paid on 18-5-1989 for which Ext. A-I receipt was issued by first respondent. For the purpose of issuing a fresh policy, the value of the boat has to be assessed. D.W.

1 the approved Surveyor inspected the boat and prepared Ext.B-4 valuation certificate dated 12-5-1989, valuing the fishing boat with the machinery and assets at Rs. 1,50,000. The fishing boat was sunk in the sea on 30-5-1989. Appellant intimated first respondent on the very next day that the boat was sunk and all attempts to salvage the boat failed and it was irrecoverably lost. The factum of drowning was also reported to the Sub Inspector of Police, Willingdon Island as well as the Circle Inspector of Police, Mattancherry. According to the appellant, he received Ext. A-7 policy for the period from 18-5-1989 to 17-8-1989 for the sum insured as Rs. 1,50,000. Immediately appellant protested contending that insured sum is Rs. 2,50,000 and not 1,50,000. According to appellant, the Surveyor's report dated 12-5-1989 was not filed by the Surveyor till 30-5-1989 and was submitted only after the boat was sunk. According to appellant, after completing repairs and maintenance and including the newly purchased fishing net, the value of the boat was Rs. 2,50,000 and having received the premium, first respondent is not entitled to issue a policy for Rs. 1,50,000 and appellant is entitled to get the entire insured sum of Rs. 2,50,000. The suit was filed claiming the amount with interest at 18% contending that first respondent is bound to pay the insured sum as the boat was sunk during the period of insurance policy.

3. Respondents resisted the suit contending that the boat was not insured for Rs. 2,50,000 and the payment made under Ext. A-1 was received only provisionally and the fishing boat itself was purchased only for Rs. 1,25,000 and it was insured for Rs. 2,00,000 previously and the period under the earlier policy expired only on 27-4-1989 and the payment of instalment for the previous policy was paid only on 2-5-1989 and that cheque was dishonoured and immediately fresh payment was made and later Ext.B-2 proposal was submitted declaring the value of the boat at Rs. 2,50,000 and as value was seen enhanced within a span of nine days, first respondent suspected foul play. Immediately on getting the proposal an independent Surveyor was arranged to value the boat and the Surveyor inspected the boat on 11-5-1989 and Ext.B-4 Surveyor's report shows the value of the boat was only Rs. 1,50,000 and Bxt. A-7 policy was issued for the said sum. It was contended that Sri V.C.Mathew is the registered owner of the fishing boat and therefore appellant has to prove her ownership over the fishing boat. It was also contended that appellant has to prove the nature of the accident and investigation conducted by the respondents revealed that the incident was not due to any of the insured perils and appellant has to prove that the incident took place due to insured perils. It was contended that the delay in issuing the policy was due to the delay in getting the report of the Surveyor and after deducting the premium for Rs. 1,50,000 the balance was refunded to the appellant and appellant is not entitled to claim any amount and the suit is to be dismissed.

4. The court below framed the necessary issues. The husband of the appellant was examined as P.W. 1 and the Surveyor who prepared Ext.A-18 report was examined as P.W. 2. On the side of respondents the Surveyor who submitted

Ext.B-4 Survey report was examined as D.W. 1. and the Officers of the first respondent were examined as D.Ws. 2 and 3. On the evidence court below found that the sum insured under Ext.A-7 insurance policy is only Rs. 1,50,000 and not for Rs. 2,50,000 as claimed by the appellant. Finding that the burden is on the appellant to prove that the boat was sunk due to one of the perils insured against under Ext. A-7 policy and appellant did not establish that fact and therefore she is not entitled to any amount under Ext. A-7 policy and dismissed the suit but without costs. Appellant is challenging the decree and judgment contending that the court below did not properly appreciate the evidence or facts. It was contended that having accepted the premium for Rs. 2,50,000, court below should have found that there was concluded contract between the parties and court below ought to have found that there is an insurance coverage for Rs. 2 1/2 lakhs. It was also contended that appellant need not prove admitted facts and as the respondents did not deny the factum of the accident, it should have been found that the boat had sunk due to the insured peril and court below should have granted the decree as prayed for. It was contended that in any event court below should have granted the decree for the sum insured under Ext. A-7 and the dismissal of the suit is unsustainable.

5. We heard the learned counsel appearing for the appellant and respondents. Learned counsel appearing for the appellant argued that having admitted the premium under Ext.B-2 proposal showing the sum insured at Rs, 2,50,000, respondents are not entitled to contend that the insurance coverage is only for Rs. 1,50,000. It was further argued that Rs. 4,162 as evidenced by Ext. A-I receipt was issued by the first respondent on 18-5-1989 itself and Ext.B-4 report of the Surveyor was furnished to the appellant only after the boat was sunk and Ext.A-7 policy was issued basing on the valuation shown in Ext.B-4 after the boat was sunk and as the premium was received earlier, there was a concluded contract and therefore it is to be found that the boat was insured for Rs, 2,50,000. Learned counsel also argued that there was no specific denial of the fact that the boat was sunk as claimed by the appellant and in the absence of specific denial of the case alleged in the plaint, appellant need not prove further that the accident was due to any of the perils insured against and therefore appellant is entitled to the decree sought for. Learned counsel relied on the decision of this court in *Regunathan, K. v. The National Insurance Co, Ltd.* and *Ors.* 2004 (1) KLJ 401, and argued that even if the factum of the accident was denied in the written statement, appellant need only prove a prima facie case and by examination of P.Ws. 1 and 2, a prima facie case was established and therefore appellant is entitled to the decree as sought for. Learned counsel finally argued that in any event appellant is entitled to Rs. 1,50,000 the sum insured as shown in Ext.A-7 and the dismissal of the suit is unsustainable.

6. Learned counsel appearing for the respondents argued that mere acceptance of the premium along with the proposal is not tantamount a concluded contract and unless first respondent agreed to issue the policy, there was no concluded contract and therefore by payment under Ext. A-I appellant is not entitled to

contend that the boat was insured for Rs. 2,50,000. Relying on the decision of the Apex Court in *Life Insurance Corporation of India v. Raja Vasireddy Komalavalli Kamba* AIR 1984 SC 1014, the learned counsel argued that neither the acceptance of the premium nor the delay in issuing the policy is a ground to hold that the proposal was accepted and unless a policy was issued or agreed to be issued for the amount shown in the proposal, appellant cannot contend that the boat was insured for Rs. 2,50,000. It was pointed out by the learned counsel relying on Ext.B-4 valuation certificate prepared by D.W.I that the value of the boat was only for Rs. 1,50,000 and appellant herself purchased the boat only for Rs. 1,25,000 and therefore the value of the boat was not Rs. 2,50,000 as claimed in Ext.B-2 and the insured sum is only Rs. 1,50,000 as shown in Ext.A-7 as rightly found by the court below. The learned counsel also argued that there is not even a prima facie evidence that the boat was sunk due to any of the perils insured against and P. W. 1 who was examined on the side of the appellant had no personal knowledge and the evidence of P.W. 2 is against his own Ext. A-18 report and therefore, court below rightly found that appellant is not entitled to realise any amount under Ext.A-7 policy.

7. It is admitted case that the boat Kadalthuruthu was earlier insured by the appellant with the first respondent under Ext.A-2 policy and the period in the policy was originally from 28-10-1988 to 27-10-1989. Thereafter it was renewed upto 27-4-1989. The sum insured under Ext.A-2 policy was Rs. 2,00,000. It is also admitted that appellant had paid the premium for the subsequent period before the expiry of the period under Ext.A-2 policy by a cheque. That cheque was dishonoured. Instead of renewing the policy, appellant submitted Ext.B-2 proposal for a fresh policy showing the value of the boat with assessories as 2,50,000: Ext.B-1 proposal was submitted on 11-5-1989. Towards the premium under the proposal, Rs. 4,162. was paid for which Ext.A-1 receipt was admittedly issued. The sum assured under Ext.A-2 policy was Rs. 2,00,000 which was inclusive of the value of the boat, the machineries and other assessories. In Ext.B-2 proposal appellant had shown the proposed insurance sum as Rs. 2,50,000. The value of the boat was shown as Rs. 1,50,000 and the value of machinery Rs. 1,00,000. The evidence of D.W.I the approved surveyor establish that he had inspected the boat on 11-5-1989 and furnished Ext.B-4 valuation certificate showing the value of the boat at Rs. 60,000, value of the machinery at Rs. 75,000 and value of the assessories like net, wire rope, winch etc. at Rs. 50,000. The total value shown was Rs. 1,50,000. There was delay in issuing the policy sought for by the appellant under Ext.B-2 proposal. In the meanwhile the boat admittedly sunk in the sea on the afternoon of 30-4-1989. Ext.A-5 letter was submitted by the appellant on 1-5-1990 informing the respondent the said fact. On 26-4-1980 first respondent sent Ext.A-6 letter enclosing a voucher for Rs. 1,709-50 being the excess premium remitted intimating that Ext.A-7 policy for the period 18-5-1989 to 17-8-1999 for Rs. 1,50,000 basing on the valuation certificate was issued. Ext.A-7 policy and Ext.A-11 voucher were also sent. In answer, appellant sent Ext.A-5 letter contending that the sum insured is Rs.

2,50,000 and she is not accepting the policy for Rs. 1,50,000. On getting Ext. A-5 letter, first respondent sent Ext.A-9 reply showing that as per Ext.B-4 report the value of the boat with the machinery and assessories is only Rs. 1,50,000 and the value shown in the sale deed obtained by the appellant is only Rs. 1,25,000 and therefore the policy was issued for Rs. 1,50,000. Appellant then sent Ext. A-10 letter asserting that the policy should be for Rs. 2,50,000 and if the policy is not issued for the said sum, legal steps would be initiated. On receipt of that letter, first respondent by Ext. A-4 letter requested the appellant to explain how the value of the boat purchased for Rs. 1,25,000 on 28-2-1989 could be increased to Rs. 2,50,000 and why the premium which was paid earlier by cheque when dishonoured, appellant made fresh proposal for a new policy enhancing the sum at Rs. 2,50,000. Appellant thereafter sent Ext. A-12 lawyer notice demanding Rs. 2,50,000 towards the loss of the boat with interest.

8. Even though learned counsel appearing for the appellant vehemently argued that having accepted the premium and issued Ext. A-1 receipt, respondents are not entitled to dispute the sum insured as shown in Ext.B-2 proposal, as there was a concluded contract we cannot agree with the submission.

9. The contract between the appellant and first respondent is undoubtedly governed by the Marine Insurance Act. Section 23 of the Act deals with the conclusion of contract. Section 23 reads:

23. When contract is deemed to be concluded -- A contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not; and for the purpose of showing when the proposal was accepted, reference may be made to the slip, covering note or other customary memorandum of the contract, although it be unstamped.

Therefore a contract of marine insurance can be deemed to be concluded only when the proposal of the assured is accepted by the insurer. The fact that Ext.B-2 proposal was submitted by the appellant and the payment of premium evidenced by Ext. A-1 was received by the first respondent, do not automatically mean that the proposal was accepted by the insured. The legal position has been well-settled. The mere receipt and retention of premium without signifying by some act or acts agreed on by parties or from which the law raises the presumption of acceptance it cannot be said that the proposal was accepted and the contract was concluded. In *Corpus Juris Secundum*.Vol.XLIV page 986 the position has been stated as follows:

The mere receipt and retention of premium until after the death of applicant does not give rise to a contract, although the circumstances may be such that approval could be inferred from retention of the premium. The mere execution of the policy is not an acceptance; an acceptance, to be complete, must be communicated to the offerer, either directly, or by some definite act, such as placing the contract in the mail. The test is not intention alone. When the application so requires, the acceptance must be evidenced by the signature of

one of the company's executive officers.

Apex Court in *Life Insurance Corporation of India v. Raja Vasireddy Komalavalli Kamba* AIR 1984 SC 1014, has settled the legal position. In that case one R.B. Chandra Dhara Prasad who died on 12-1-1961 had filed a proposal for insurance on 27-12-1960. There was a medical examination by the doctor of the deceased on the same day. The deceased had issued two cheques in favour of the Insurance Company as the first premium out of which one was encashed on 29-12-1960 and the other was encashed on 11-1-1961. Subsequent to his death the widow claimed the insured amount which was declined by the Insurance Company. Considering the claim that acceptance of the premium and the proposal would amount to a concluded contract, the Apex Court held:

14. Though in certain human relationships silence to a proposal might convey acceptance but in the case of insurance proposal, silence does not denote consent and no binding contract arises until the person to whom an offer is made says or does something to signify his acceptance. Mere delay in giving an answer cannot be construed as an acceptance, as *prima facie*, acceptance must be communicated to the offerer. The general rule is that the contract of insurance will be concluded only when the party to whom an offer has been made accepts it unconditionally and communicates his acceptance to the person making the offer. Whether the final acceptance is that of the assured or insurers, however, depends simply on the way in which negotiations for an insurance have progressed. See in this connection statement of law in *Macgillivray & Parkington on Insurance Law*, Seventh Edition page 94 paragraph 215.

15. Reference in this connection may be made to the statement of law in *Halsbury's Laws of England* 4th Edition in paragraph 399 at page 222.

16 Having regard to the clear position in law about acceptance of insurance proposal and the evidence on record in this case, we are, therefore, of the opinion that the High Court was in error in coming to "the conclusion that there was a concluded contract of insurance between the deceased and the Life Insurance Corporation and on that basis reversing the judgment and the decision of the learned Subordinate Judge.

It is clear from the evidence that though Ext.B-2 proposal was submitted by the appellant and the premium for the sum assured proposed in Ext.B-2 was received by the first respondent and Ext. A-1 receipt was issued, in the absence of any evidence to prove that first respondent has accepted the proposal to insure the fishing boat for Rs. 2,50,000 it cannot be said that there was a concluded contract as claimed by the appellant. Evidence would establish that D.W. 1 was deputed to value the boat. In fact D.W.1 inspected the boat on 11-5-1989 and prepared Ext.B-4 valuation certificate on 12-5-1989. The evidence would establish that the report was submitted only on 2-6-1989, after the boat was sunk on 30-4-1989. Ext.A-2 policy was forwarded showing the sum insured as 1,50,000 lakhs. The fact that there was delay in issuing the policy, do

not mean that first respondent has consented to the issuance of a policy for the proposed amount shown in Ext.B-2 proposal. Ext.A-2 was the previous policy admittedly issued by the first respondent in respect of the very same boat. It was initially for the period from 28-10-1988 to 27-1-1989. Ext. A-2 policy was issued only on 28-2-1989 as is seen from Ext.A-2 itself. Therefore it is absolutely clear that the delay in issuing Ext.A-7 policy was only the administrative delay as is clear from the delay in issuing Ext.A-2 policy also. The silence after receipt of Ext.B-2 policy till the date of issuance of Ext, A-7 policy cannot be taken as an acceptance of the offer made under Ext.B-2 proposal. Moreover, as rightly pointed out by the learned counsel appearing for respondents, there is sufficient justification for the action of the first respondent in not issuing a policy for the sum proposed under Ext.B-2 proposal. Even according to appellant the price of the boat shown in the sale deed obtained by her was only Rs. 1,25,000 in February, 1989. At the same time Ext.B-1 shows that prior to the sale to the appellant her husband who was examined as PW. 1 had purchased the very same boat for Rs. 1,75,000. It is not clear how the boat which was already purchased by P.W. 1 under Ext.B-1, could be transferred by the assignor of P.W.I again to the appellant. But considering the fact that first respondent had issued Ext. A-2 policy in respect of the very same boat to the appellant earlier and Ext.A-7 policy was also issued in favour of the appellant for the subsequent period, that aspect is not very material in this case. First respondent is not entitled to dispute the title of the appellant, as Exts. A-2 and A-7 policy were issued to the appellant for the same boat. Whatever it be, when the value shown for the boat, when it was purchased by P.W. 1 was Rs. 1,75,000 when it was purchased by the appellant the value shown was Rs. 1,25,000. It was insured for the period 28-10-1988 to 27-4-1989 for Rs. 2 lakhs including the value of machineries and assessories. If so the value of the boat could not have been Rs. 2,50,000 as proposed under Ext.B-2. First respondent was therefore fully justified in relying on Ext.B-4 valuation certificate to issue Ext.A-7 policy for Rs. 1,50,000 which is the value assessed by D.W.1 for the boat, its machinery and assessories. The learned Sub Judge rightly found that the boat was insured only for Rs. 1,50,000.

10. The argument of the learned counsel appearing for the appellant was that there was no justification for the court below to dismiss the suit as the fact that the boat was sunk in the sea on 30-5-1989 was not disputed. Being the insured and the owner of the boat, it was argued that appellant is entitled to realise at least the sum assured under Ext. A-7 policy. The learned Sub Judge rejected the claim holding that it was for the appellant to establish that the boat was sunk due to one of the perils insured against and as it was not proved, appellant is not entitled to the insured sum. The argument of the learned counsel for the appellant was that court below erred in considering the said question and when the allegations in the plaint that the boat was surik for the reasons shown therein was not specifically denied under Order VIII, Rule 5 appellant need not prove an admitted fact which was not specifically denied as it is to be taken as admitted and therefore court below should have granted the decree.

11. Before considering the question whether there is absence of a specific denial would amount to an admission of the allegations in the plaint, it is necessary to bear in mind the specific pleadings in the plaint, and the written statement. The allegations are in paragraph 2 of the plaint. It reads:

The plaintiffs/petitioner's boat "KADAL THURUTHU" sunk at Kochi on 30-5-1989. The plaintiff/petitioner has intimated the defendants/respondents about the drowning of the boat on the next day itself to the 3rd defendant/respondent and the claim was lodged for total loss by the plaintiff/petitioner with the branch office of first defendant/respondent's company at W/Island from where the plaintiff/petitioner has taken the policy.

In paragraph 3 it was contended that the factum of drowning of the boat was intimated to appropriate authorities including the appellant and in spite of best efforts of the appellant, the boat could not be salvaged. There is no specific allegation in the plaint that the boat was sunk due to any one of the perils insured against under Ext.A-7 policy. The pleadings in respect of the loss of the boat in paragraph 4 of the written statement reads:

Many of the matters mentioned in paragraph 3 of the plaint are not known to the defendants. The plaintiff is put to strict proof as to the nature of the accident. From the investigations conducted by the defendants, it is understood that the fishing boat "Kadalthuruthu" met with the alleged accident not due to any insured perils.

The matters pleaded in paragraph 3 of the plaint are in respect of the complaint lodged by the appellant to police and other authorities as well as the alleged futile attempt to salvage the boat. Therefore it cannot be said that the pleadings in the written statement that the matters mentioned in paragraph 3 of the plaint are not known to them and appellant is put to strict proof as to the nature of the accident cannot be termed as an admission that the accident was due to any of the perils insured against. At the same time there is a specific contention in the written statement that the investigation conducted by them revealed that the fishing boat did not meet with the accident due to any of the insured perils and the appellant has to prove that the accident took place due to insured perils. Therefore it cannot be said that there was any admission either express or implied admission about the nature of the accident.

12. Rule 3 of Order VIII deals with specific denial and Rule 4 deals with evasive denial and Rule 5 with specific denial. All these three Rules form an integrated Code dealing with the manner in which allegations of fact in the plaint should be traversed and the legal consequences flowing from its non-compliance. The written statement must deal specifically with each allegation of fact in the plaint. When a defendant denies any such fact alleged in the plaint, he must not do so evasively but must answer the point of substance. If denial of fact is not specific but evasive, the said fact shall be taken to be admitted. In such an event, the admission itself being proof, no other proof is necessary. To do justice between

the parties, for which courts are intended, the rigor of Rule 5 has been modified by the proviso. Under the proviso the court may in its discretion require any fact so admitted to be proved otherwise than by such admission. True, in construing such pleadings, the proviso can be invoked only in exceptional circumstances to prevent obvious injustice to a party or to relieve him from the results of an accidental slip or omission. It cannot be to help a party who designedly made vague denials. The discretion under the proviso has to be exercised by a court having regard to the justice of a cause with particular reference to the nature of the parties, the standard of drafting in a locality, and the traditions and conventions of a court wherein the pleadings are filed. Rule 3 provides that it shall not be sufficient for a defendant to deny generally the grounds alleged by the plaintiff and the defendant must deal specifically with each allegation of fact, of which he does not admit the truth except damages. Rule 4 provides that where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance and if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances. Sub-rule (1) of R. 5 of Order VIII of C.P.C. reads: .

(1) Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability: Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

Sub-rule (1) of Rule 3 of Order VIII only mandates that every allegation of fact in the plaint shall be denied either specifically or by necessary implication, or stated to be not admitted in the pleading and if not the allegations in the plaint shall be taken as admitted except the acts against a person under disability. To decide whether there is a specific denial or a denial by necessary implication, the written statement has to be read as a whole. When so read, we cannot agree with the argument of the learned counsel for the appellant that there was no denial in the written statement that the boat was sunk due to one of the insured perils. We find that there is no specific allegation in the plaint that the boat was sunk due to one of the perils insured against. If so, it is not open to the appellant to contend that as there was no specific denial, the fact is to be taken as admitted.

13. Moreover, it is clear from the records that even the appellant has proceeded on the basis that there is a denial of the claim made by the appellant, on the basis that the boat was sunk due to one of the perils insured against. It is seen that issues were framed by the learned Sub Judge, after draft issues were submitted by the appellant herself. Issue No. 3 reads:

Whether the alleged accident occurred due to insured perils?

Therefore having proceeded with the trial with the clear understanding that respondents have denied the claim that the accident was due to the insured perils, it is not open to the appellant at the appellate stage to contend that there

is no denial in the written statement and therefore that fact has to be taken as admitted. This aspect was considered by the Apex Court in *Shipping Corporation of India Ltd. and Another Vs. Nissar Export Corporation*, . There the suit was filed for recovery of the loss sustained by the plaintiff on account of sale of onion as a result of the preferential and discriminatory treatment to the cargo. The trial court dismissed the suit. In the appeal the Judgment and Decree were set aside and the suit was remanded for fresh disposal in the light of the observations contained in the Judgment. The order of remand was challenged before the Apex Court. The Division Bench, in the appeal, had held that there was no denial of the allegations made in the plaint and therefore the allegations are deemed to have been admitted. Construing the written statement Apex Court held that the allegations in the plaint were fully and effectively traversed and therefore the trial Judge was justified in disposing the suit on the basis of the issues framed by him. The Apex Court held that the trial Judge has framed the issue considering that the allegations in the plaint were traversed by the defendant and that was not objected to by the plaintiff and therefore it is not open to the plaintiff to contend that there was an admission by non-denial of the allegations. The Apex Court held:

We might mention that the respondent-plaintiff did not contend in the trial court, that the allegations contained in paragraph 6 of the plaint were not traversed by the appellants and should therefore be deemed to have been admitted. No objection was raised to the learned Trial Judge raising an issue on the matters stated in paragraph 6 of the plaint. We do not think that the respondent should have been permitted in these circumstances to raise for the first time in the appeal the contention that a part of his claim must be deemed to have been admitted for the reason that it was not traversed in the written statement.

That exactly is the position herein. Even though there was no specific allegation in the plaint that the accident was due to one of the insured perils, respondents in their written statement specifically contended that investigation conducted by them revealed that the accident was not due to the insured perils and therefore appellant has to prove that it was due to one of the insured perils. On the basis of this pleadings, appellant herself suggested issue No. 3 in the draft issue submitted before the Court below and the learned Sub Judge finding that the said issue arises, framed the issue. Evidence was also let in. It is not open to the appellant at this stage to contend that the fact is to be deemed to have admitted when in fact there was no admission either express or implied and instead there was a positive denial in the written statement. Therefore the Court below rightly considered the issue.

14. The crucial question is whether the accident was caused due to one of the perils insured against. Clause (6) of the policy deals with the perils. Though Ext. A-7 policy does not contain the clauses, Ext.B-8 is the office copy of Ext. A-7 policy issued to the appellant. The perils shown in Clause 6 of Ext.B-8 reads:

6.1- This insurance covers total loss (actual or constructive) of the subject-

matter insured caused by

6.1.1-perils of the seas, rivers, lakes or other navigable waters

6.1.2-fire, explosion

6.1.3-violent theft by persons from outside the vessel

6.1.4-jettison

6.1.5-piracy

6.1.6- breakdown of or accident to nuclear installations or reactors

6.1.7-contact with aircraft or similar objects, or objects falling therefrom, land conveyance, dock or harbour equipment or installation

6.1.8-earthquake, volcanic eruption or lightning

6.2- This insurance covers total loss (actual or constructive) of the subject-matter insured caused by

6.2.1-accidents in loading, discharging or shifting cargo or fuel

6.2.2.-bursting of boilers, breakage of shafts or any latent defect in the machinery or hull

6.2.3-negligence of Master Officers Crew or Pilots

6.2.4-negligence of repairers or charterers provided such repairers or charterers are not an Assured hereunder

6.2.5-barratry of Master Officers or Crew.

provided such loss or damage has not resulted from want of due diligence by the Assured, Owners or Managers.

6.3--Master Officers Crew or Pilots not to be considered Owners within the meaning of this Clause 6 should they hold shares in the vessel.

Under Section 25 of the Marine Insurance Act, a marine policy must specify the name of the assured, or of some person who effects the insurance on his behalf, the subject-matter insured and the risk insured against, the sum or sums insured and the name or names of the insurer or insurers. Section 55 of the Marine Insurance Act provides that unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but he is not liable for any loss which is not proximately caused by a peril insured against. So also the insurer is not liable for any loss attributable to the wilful misconduct of the assured. Unless the policy otherwise provides, the insurers is liable for any loss proximately caused by a peril insured against even though the loss would not have happened but for the misconduct or negligence of the master or crew. So also unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the

subject-matter insured, or for any loss proximately caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils. Section 55 of the Marine Insurance Act, 1963 reads:

55. Included and excluded losses-

(1) Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.

(2) In particular-

(a) the insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew;

(b) unless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against;

(c) unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject-matter insured, or for any loss proximately caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils.

The first cause of loss mentioned in Clause (6) of Ext. B-8 policy namely perils of the sea is not itself a single peril but a class of perils of indefinite extent. Arnould's Law of Marine Insurance and Average Vol. II 1981 Edn. page 790 has dealt with perils of sea. It has been explained as follows:

Much difficulty has been felt in defining the expression "perils of the sea". The words obviously embrace all kinds of marine casualties, such as shipwreck, foundering, stranding, etc. as also every species of damage done to the ship or goods at sea by the immediate action of the winds and waves, as distinct from that included in the ordinary wear and tear of the voyage or directly referable to the acts and negligence of the assured as its proximate cause. And the limitation suggested by the word "violent", which Arnould used, cannot, in view of later authorities, be supported. It is enough that damage be done by the fortuitous action of the sea. For instance, where cargo was damaged by the incursion of sea-water through a hole in a pipe gnawed by rats, the House of Lords held this to be a loss by a peril of the seas. It is perhaps easier to arrive at a true understanding of the term by suggesting rather what it does not embrace than what it does. It is clear, for instance, that there may be a peril which is not a peril of the seas, and there may be damage caused by the sea without any peril. These points were well brought out and illustrated by Lord Herschell in the case of *The Xantho*. I think it clear that the term "perils of the sea" does not cover

every accident or casualty which may happen to the subject-matter of the insurance on the sea. It must be a peril "of the sea.

The primary burden to show that the accident is due to one of the perils insured against is definitely on the plaintiff. The effect of the failure of the plaintiff to discharge the burden as to the cause of the accident was dealt with by the author in page 1356. Relying on the decision in *Campania Martiartu v. Royal Exchange Assurance Corporation* 1923 1 KB 650, it is stated:

On the question of the onus of proof, the ordinary rule is that where, upon the evidence, the court is left in doubt whether the loss was due to a peril insured against or to some cause not covered by the policy, then, the plaintiff having failed to discharge the burden which lies upon him of showing that his loss is covered by the policy, there must be judgment for the defendant underwriter.

The Court of Appeal in that case expressed the view that the onus is on the plaintiff to prove that the loss was due to a peril insured against.

15. A Division Bench of this court in *Reghunathan K. v. The National Insurance Co. Ltd.* 2004 (1) KLT 37 : 2004 (1) KLJ 401, held that unless the plaintiff discharges his onus of proving that the loss was caused against peril insured the claim must fail. The Division Bench also held that the assured is not required to prove the cause of the loss conclusively and all that he need to do is to establish a prima facie case.

16. The question is whether appellant has succeeded in establishing that the accident was caused due to one of the perils insured against. As rightly pointed out by the learned counsel appearing for the respondents, on the evidence it is clear that appellant has not discharged the onus of proving the prima facie case that the accident was caused due to one of the perils insured against. Appellant was not examined. Even if examined, she could not have thrown light into the controversy as she was not in the boat at the time of the incident. Admittedly her affairs were being looked after by P.W. 1, the husband. The evidence of P.W. 1 also is insufficient to prove the cause of the accident or at least to prima facie show that the incident was caused due to one of the perils insured against. P.W.1 was not in the boat at the time. If at all he could only be hearsay evidence. The evidence of P.W. 1 is insufficient to discharge the burden. Eventhough there were several crew members at the time when the accident occurred and even according to appellant all of them reached shore safely, none of them were examined. Evidence of one of them would have unveiled the real cause for the incident. The argument of the learned counsel for the appellant was that evidence of P.W. 2, the Surveyor who submitted Ext. A-18 report is sufficient to prima facie discharge the onus. Though P.W. 2 from the box tried to depose in favour of the appellant that the boat sunk due to an accident, as rightly pointed by the learned counsel for the respondents his evidence is against his own Ext A-18 report. What was stated by P.W. 2 in Ext A-18 was that his inquiry revealed that five members were there in the vessel on 30-5-1989 and the driver noticed water

entering inside through the stern tube side and the crew members tried to stop the ingress of the water by blocking/ bailing out/pumping etc., but the water level was not getting reduced and when it started to rise thinking that their life is in danger crew members attracted attention of a vessel which was coming from behind and they were rescued by that boat and this version of the incident could not have been verified by P.W. 2 as he could not contact any of the crew members. It has been specifically stated by P.W. 2 in Ext. A-18 report that there are contradictory statement as to the state of repairs carried out and the cause of water entry was not stated by the crew members. P. W.2 has reported as follows:

The shaft is passing through a recess made in a solid wooden block and through a shaft tube. The inboard and outboard end is provided with a stuffing box in which bushes are provided. The inboard end is further provided with a gland with packing. There will be normal leakages through this gland and in case the leak increases, the gland can be tightened. Due to normal operations and if the vessel is maintained in a fit state as to repairs to encounter the ordinary perils of the voyage such a quantity of water cannot enter inside. Any abnormal incident has not been reported by the crew.

In the light of these observations P. W,2 could not have deposed from the box that the incident was due to any of the perils insured against. Though P.W. 2 justified the changing of his stand from the box by stating that he collected further details after the submission of Ext.A-18 report, we find that part of the evidence of P.W. 2 unreliable.

17. When the appellant is claiming the sum insured under Ext A-7 policy for the loss sustained, it is for the appellant to prove that when the boat was taken to the sea on that fateful day, it was seaworthy. There is absolutely no evidence on that aspect. Appellant has also to prove that the incident was caused due to any one of the perils insured against. There is no evidence to prove that fact also. On the evidence, we find that the learned Sub Judge rightly held that appellant did not establish that the boat sunk due to any of the perils insured against. Therefore appellant is not entitled to realise any amount from the first respondent under Ext A-7 policy. The suit was rightly dismissed. We find no merit in the appeal. Appeal is dismissed. No cost.