(2018) 02 DEL CK 0199

In the Delhi High Court

Case No : Civil Suit (OS) No. 1417 Of 1979

M/S Jain Exports Pvt. Ltd — APPELLANT

Vs

New India Assurance Co. Ltd. & Anr. — RESPONDENT

Date of Decision : 06-02-2018

Acts Referred:

Citation : (2018) 02 DEL CK 0199

Hon'ble Judges : Valmiki J. Mehta, J

Bench : Single Bench

Advocate : Kuljeet Rawal, Sunita Dutt

Final Decision : Dismissed

Judgement

Valmiki J. Mehta, J

1. This is an old suit of the year 1979. Plaintiff in the suit is M/s Jain Exports Private Limited. The contesting defendant in the suit is defendant no.

1/The New Indian Assurance Company Limited. The second defendant in the suit is a proforma defendant/The Punjab and Sind Bank.

2. By the subject suit plaintiff seeks recovery of a sum of Rs.63,95,102.72/- along with interest. Amount which is claimed by the plaintiff is on account

of the goods being Brass Scrap (Honey quality) which were shipped under M/s Bentrex & Company, Singapore by the vessel SS AVERILLA having

been lost on account of sinking of the ship. As per the plaintiff the goods were insured in terms of the cover note Ex.PW1/11. In terms of the cover

note plaintiff claims an amount of Rs.63,23,380/- as principal amount due under the cover note.

3. The contesting defendant no. 1/New Indian Assurance Company Limited has contested the suit and pleaded various grounds for dismissal of the

suit. In essence, the contention of the defendant no. 1/insurance company is that the cover note was got issued by the plaintiff by fraud from the

defendant no. 1 and that really no goods were ever shipped on SS AVERILLA, which belonged to the plaintiff M/s Bentrex & Company, Singapore to

the ultimate destination at Ghaziabad in the state of Uttar Pradesh.

4. As many as 28 issues were framed in the suit vide order dated 11.3.1981, and these issues read as under:-

1. Has defendant no.2 been joined as a defendant within time, if not, to what effect?

2. Whether the plaintiff agreed to purchase and the said Bentrex & Co. agreed to sell to the plaintiff 410 Metric Tons of Brass Scrap (Honey Quality)

as alleged in paragraph 3 of the plaint?

3. Whether the plaintiff opened an irrevocable letter of credit in favour of the sellers through the Punjab & Sind Bank, the predecessor in interest of

the 2nd Defendant for US$5,10,000/- on 24th July 1979 as alleged in paragraph 4 of the plaint?

4. Whether any goods were unconditionally appropriated to the contract in favour of the plaintiff by the sellers as alleged in paragraph 5 of the plaint?

5. Whether 407,960 metric tons brass scrap packed in 1315 drums were duly loaded and shipped on board the SS â??Averillaâ?? on 6th August 1979

at Singapore as alleged in paragraphs 6 and 7 of the plaint?

6. Whether there was a contract of affreightment contained in a bill of lading bearing No.AB-17 dated 6th August 1979 as alleged in paragraph 7 of

the plaint?

7. Whether the plaintiff was the buyer of any goods or was the owner of 407.960 metric tons of brass scrap of the value of Rs.99,14,000/- or any

other value as alleged in paragraph 8 of the plaint?

8. Are the pleas embodied in the Issues No.3 to 9 available and open to the defendant?

9. Whether the Insurance Policy is valid ab initio and unforceable for the reasons alleged in Preliminary Objection 4 of the written statement of

defendant No.1.

10. Whether the plaintiff was a privy or a party to a fraud intended and calculated to fraudulently obtain an insurance policy and/or to obtain

fraudulently a claim there under as alleged in Preliminary Objection 4(a) of the written statement of defendant No.1?

11. Whether the policy of insurance is liable to be avoided by the first defendant as alleged in Preliminary Objection 4(b) and (c) of the written

statement of defendant No.1?

12. Whether the transactions in suit were calculated to cause injury to the 1st Defendant and/or make unlawful gains for the plaintiff and are therefore

unenforceable null and void as alleged in preliminary objection 4(d) of the written statement of defendant No.1?

13. Whether the policy of Insurance is void on the ground of mistake as alleged in preliminary objection 4(e) of the written statement of defendant

No.1?

14. Whether the suit transactions are a result of a conspiracy between the plaintiff and one Mr. B.S. Ahuja or are founded in the illegalities as alleged

in paragraph s 7 and 11 of the written statement of defendant No.1?

15. Whether the plaintiffs have forfeited their rights to recover any of the money or any liquidated sum under the Insurance Policy by reason of the

allegations made in paragraph 7 of the written statement of defendant No.1?

16. Whether the Insurance Policy is void for the reasons alleged in para 7 of the written statement of defendant No.1?

17. Whether the plaintiffs had interest in the goods or have insurable interest as alleged in paragraph 9 and 18 of the plaint?

18. Whether the said goods became a total loss by reason of the perils insured against as alleged in paragraph 9 of the plaint?

19. Whether replacement import licences for the consignment of brass scrap alleged to be lost were available or could have been obtained by the

plaintiff as alleged in paragraph 10 of the written statement?

20. Whether the plaintiff did not behave as a prudent person as alleged in paragraph 14 of the written statement of defendant no. 1?

21. Whether the documents relied upon by the plaintiff have discrepancies and/or are vitiated as alleged in paragraph 14 of the written statement of

defendant No.1?

22. Whether the plaintiffs are entitled to recover a sum of Rs.63,23,380/- or any other sum under the insurance policy as alleged in paragraph 14 and

16 of the plaint?

23. What is the effect of the claim made by the 2nd defendant in its written statement on its behalf?

24. Whether the plaintiff has not paid any consideration in respect of the purported goods and refused to make payment under the letter of credit as

alleged in paragraph 16 of the written statement of defendant No.1? If so, to what effect?

25. Whether the plaintiff is entitled to receive any amount from defendant No.1?

26. Can now defendant No. 1 raise the pleas embodied in Issues No. 9 to 16 in view of the objections raised by the plaintiff in preliminary objections

No.1 in the replication?

27. Is the plaint vague and indefinite as alleged by the defendants in preliminary objections No. 3 in the written statement, if so, to what effect?

28. Relief.â??

5. Though issues are large in number, ultimately, the issues can be brought down to the following heads:-

(i) Whether the Brass Scrap (honey quality) of 410 Metric Tones were owned by the plaintiff?

(ii) Whether the subject Brass Scrap (honey quality) was covered under any insurance policy/cover note issued by defendant no. 1/insurance

company?

(iii) Whether a fraud has been played upon the defendant no.1 or any mistake was committed by the defendant no.1 for issuing of the subject cover

note and consequently defendant no.1 is not liable to pay the suit amount?

6. This is the old suit of the year 1979 i.e this suit is around 38 years old. I have heard the counsel for the plaintiff for some time and at this stage a

very crucial aspect has emerged as a result of which this Court has no option but to dismiss the suit. The reason is stated hereinafter.

7. Before a plaintiff succeeds in a suit for a claim under an insurance policy what are the terms of the insurance policy have to be known. In the

present case admittedly, there is no policy containing contractual terms which is on record and the only contract which is on record is the cover note

proved as Ex.PW1/11. This cover note is a single page note and which does not contain any of the terms of the insurance contract, and meaning thereby that it cannot be determined as to whether or not the subject loss which took place on account of sinking of the vessel was or was not covered

under the contract of insurance of the plaintiff with the defendant no.1. Any and every type of loss i.e all types of losses are not covered under an

insurance policy merely because there exists an insurance policy. Every insurance policy covers certain type of losses of goods and those as provided

under the contract of insurance, and therefore it is necessary that courts will have to be satisfied as to the loss which is the subject matter of the suit

being covered under the terms of the subject insurance policy/contract. The cover note Ex.PW1/11 only says that loss and the terms of the policy are

those as per an open policy, but this open policy has not been filed and proved by the plaintiff in the suit. No doubt, plaintiff claims that no policy was

issued to the plaintiff, however, the cover note does refer to the normal open policy of the defendant no.1 and surely this open policy being the

insurance policy which was to be issued under the cover note could have been summoned by the plaintiff from the defendant no.1 and which

admittedly has not been done.

8. The sequitur of the aforesaid discussion is that the issues in the present suit cannot be decided because the subject matter of the suit is based upon

a contract for a contract of insurance, and loss being covered under the contract of insurance, but what is that insurance policy covering the loss

which the plaintiff alleges in the plaint, does not exist on record, and this Court therefore is completely incapable of deciding as to whether or not

plaintiff has succeeded in bringing his suit for a particular loss which is specially covered under the contract of insurance being the insurance policy.

Obviously, existence and filing of the policy containing the detailed terms is a sine qua non, because, under such an insurance policy, there would be

also provided various defences for denying the claim of the plaintiff even assuming the plaintiff alleges and proves a loss of goods under the policy,

noting that the defendant no.1/insurance company in the present case has taken up various defences as is seen from the issues aforesaid.

9. Therefore in my opinion in the absence of the very basic document which would contain the contractual terms between the parties being not proved

by the plaintiff no other issue is therefore called for decision.

10. Suit is accordingly dismissed. Parties are left to bear their own costs.

