(2018) 01 MAD CK 0544

In the Madras High Court

Case No : 857 of 2013

M/s.Swiss Park Vanijya (P) Ltd. APPELLANT

Vs

The New India Assurance Company Ltd. & Ors. RESPONDENT

Date of Decision : 03-01-2018

Acts Referred:

Citation : (2018) 01 MAD CK 0544

Hon'ble Judges : R.Subramanian

Bench : Single Bench

Advocate : K.Ramaswamy, S.P.Chockalingam

Judgement

1. The suit has been filed by the plaintiff seeking compensation for the loss caused to the Solar panels of the plaintiff due to the cyclonic storm that

hit the area around the factory area of the plaintiff in Jodhpur District of Rajasthan on 13.05.2012.

Brief summary of the plaint is as follows:

2. The plaintiff is a Private Limited Company having their Registered Office at Chennai and the Factory premises is at Tinwari Village, Tehsil

Osian, Jodhpur District of Rajasthan. The plaintiff is engaged in production of power using solar panels and it supplied such power to various

Central and State Government undertakings. In order to cover the risk of natural calamities the plaintiff had obtained Fire and Special Perils Policy

and Business Interruption Policy. The plaintiff had obtained the policy bearing No.71030011110100000134 covering Fire and Special Perils and

Policy No.71030011110500000003 covering Business Interruption Policy from the 1st defendant covering the risks for 5 MW Solar Power plant

inclusive of the Solar panels installed at the plant, transformer cables, electrical equipments, and other miscellaneous assets against the loss/damage

caused by Fire, Lightening, Explosion/Implosion, Bush Fire, Missile testing operations, Impact damage due to rail, road, vehicle, or animal, Aircraft

damages, Bursting/Overflowing of water tanks/Pipes/Apparatus, Sprinkler Leakage, Storm, Cyclone, Typhoon, Hurricane, Tornado, Flood,

Inundation, etc., the period of Insurance is from 29.02.2012 to 27.02.2013.

3. According to the plaintiff, there was a ""Severe Cyclonic Storm"" with Hurricane wind, heavy rain and lightening occurred in and around the

factory premises of the plaintiff between 00:50 to 02.10 hours and 20:35 to 23:35 hours. It is claimed that the squelly weather continued for a few

days. As a result the Insured property, viz. Solar Panels and other materials were badly damaged. The thin sheets of solar panels were thrown

away from the table causing wide damage. The plaintiff would also rely upon the weather report issued by the Director of the India Meteorological

Department (IMD) dated 02.07.2012 to show that a severe Cyclonic Storm had occurred in the area of the factory of the plaintiff. Therefore, the

plaintiff had lodged a claim with the defendant/Insurance Company, which had assigned a Surveyor to assess the loss. The said Surveyor had

found that about 1394 numbers of Solar Panels belonging to the plaintiff are damaged, the Surveyor had advised the Plaintiff to replace the same.

After replacing the solar panels the plaintiff submitted a claim for the actual loss at Rs.58,64,642/- for the damages caused under the Fire and

Special Peril Policy and a sum of Rs.21,66,037/- under the Business Interruption (Fire) Policy. The Surveyor had assessed the loss at

Rs.19,49,994/-. However the Insurance Company vide its letter dated 05.07.2013 repudiated the claim of the plaintiff on the ground that the

cause for damage was not covered by the policy. In view of such repudiation the plaintiff has come forward with the present suit, claiming

indemnification by the Insurance Company.

4. The suit is resisted by the defendants contending that the cause of the loss is not covered by the Policy. The defendants would claim that though

the area in which the factory of the plaintiff is situate had experienced bad weather during May 2012, there was no severe cyclonic storm as

alleged by the plaintiff. Relying upon the Beaufort wind force scale, it was pleaded by the Insurance Company that the velocity of the wind has been reported to be only at 32 km per hour and therefore, there was neither Storm nor Hurricane in the area on 13.05.2012. It is also claimed that

a severe cyclonic storm must be a storm which has got a speed at the surface level between 34 to 47 knots. In the case on hand even according to

the IMD report, it is seen that the wind speed was only about 32 km per hour and therefore, there was no Storm or Harricane. It is also further

contended that the survey report would show that there was no shortage of production of Electricity immediately after the alleged accident. It is

also further contended that the plaintiff is attempting to make good the loss that might have been caused to the solar panels due to other reasons.

Therefore, the sum and substance of the defence is that the damage having not been caused due to any one of the factors covered by the policy the

Insurance Company cannot be made liable.

5. On the above pleadings, this Court had framed the following issues:

1. Whether the plaintiff is entitled to the suit claim with interest?

2. Whether this Court has got jurisdiction to try the suit?

3. Whether the alleged loss is due to cyclonic storm?

4. Whether the claim of the plaintiff on Business Interruption Policy is admissible?

5. Whether the rejection of the policy claims by the defendant is valid?

6. On the side of the plaintiff its General Manager has been examined as P.W.1 and has produced Exhibits P1 to P12. On the side of the

defendants the Surveyor, who inspected the spot and surveyed the damages, has been examined as D.W.1 and he has produced Exhibits D1 and

D2.

Issue Nos.1,3,4 and 5:

7. All these issues are taken up to together as they are interlinked. The existence of the policies of the Insurance is not in dispute. The sole basis on

which the claim of the plaintiff''s is rejected by the Insurance Company is that there was no storm as covered under the terms Storm, Typhoon,

Flood and Inundation perils of the fire policy availed by plaintiff. It is also claimed that the speed of the wind was only 32 km per hour that too on

one day i.e. on 13.05.2012. It cannot be said that the cause for damage is one of the causes covered by the policy. The report of the Surveyor is

produced by the plaintiff as Ex.P6 from the report it is seen that the project of the plaintiff is spread over nearly 42 acres of land and it is a Solar

Power Plant which has got a 5 Mega Watts capacity. It is seen that there were about 96000 Solar Panels and the Solar Panels are of 65 and 40

watts capacity.

8. The Surveyor Report shows the cause of the loss as follows:

Due to strong winds. The maximum wind speed recorded during that period is 32 kms per hour and the same is not termed as storm"".

It is also seen that the power plant was commissioned in October 2011. The damage caused is to only 1394 numbers of Solar Panels out of the

total 115000 numbers. It is also found that there is no significant change in the Power Generation because of the damage caused to the solar

panels. It is also stated in the report that they are given to understand that they are the damage reported to the solar panels during transit in

October- November 2001, either belonging to the insured and/or their sister concern. The Surveyor would conclude that the minimum percentage

of damage as mentioned above could not have been due to storm like situation in the area. While calculating the loss, the surveyor has deducted

35% damage due to reasons as mentioned above and again after deducting 5% towards excess and arrived at net assessed loss at Rs.19,49,994/-

. The Surveyor has also concluded that there is no business interruption loss, in view of the fact that there is no significant decrease in the power

generation due to the accident.

9. A reading of the policy issued by the defendants would show that what is covered is loss destruction or damage directly caused by Storm,

Cyclone, Typhoon, Tempest, Hurricane, Tornado, Flood or Inundation excluding those resulting from Earth Quake, Volcanic Eruption or other

convulsions of nature. While the plaintiff would base its claim on the report of the India Metrological Department and contend that there was a

thunder storm with lightening that occurred on 13.05.2012 and there were rains between 11.05.2012 and 16.05.2012. The said claim of the

plaintiff is resisted by the Insurance Company on the ground that the maximum wind speed in the area was only about 32 km per hour and

therefore the same cannot be called as Storm or Hurricane or Typhoon.

10. To buttress its contention the defendants would rely upon Ex.D1 the Beaufort scale, as per the same only wind speed above 88 kms per hour

can be called Storm, wind speed between 30 and 39 kms per hour is classified as Fresh Breeze.

11. Therefore, according to the Insurance Company, the cause of the damage is not one covered by the policy and hence the Insurance Company

cannot be held liable. The fact that there was inclement weather in the area in question during the relevant period is not in dispute. The question to

be decided is whether the Insurance Company is justified in repudiating the liability on the ground that the damage though caused was not due to

any of the causes which would come within the ambit of the Policy.

12. The Special Peril Policy marked as Ex.P2 series would show that any loss destruction or damage directly caused by Storm, Cyclone,

Typhoon, Tempest, Hurricane, Tornado, Flood or Inundation excluding those resulting from Earth Quake, Volcanic Eruption or other convulsions

of nature could be covered. According to the plaintiff, there was a severe thunder storm in the area on 13.05.2012. In order to prove the said

contention the plaintiff would rely upon Ex.P4, which is the weather report issued by the India Metrological Department, wherein it is stated that

thunder storm with lightening occurred from 00:50 to 02.10 hours and 20:35 to 21:25 hours it also continued the next day. It is also found that

Dust Storm occurred from 00.35 to 00.50 and 20.00 to 20.15 and 22.30 hours on 13.05.2012. It is stated that the maximum wind speed was

about 32 km per hour in the north eastern direction during the storm period.

13. The New Webster''s Dictionary defines ""Storm"" as

A disturbance of normal condition of the atmosphere, manifesting itself by winds at an unusual force or direction, often accompanied by rain,

snow, hail, thunder and lightening are flying sand or dust

Ramanatha Aiyar Advanced Law Lexicon, 3rd Edition, the word ""storm"" is defined as follows:

While the word ''Storm'' used in the Insured Perils clause of an Insurance Policy, might involve an element of violence in the sense of rapid

movement of air or water, it was not to the restricted to that meaning, not to the particular technical significance of the Beaufort scale. It could also

properly be used to cover an extreme or unusually intends precipitation"".

14. No doubt true the Beaufort Scale prescribes wind speed of about 88 kms per hour in order to constitute a storm, it has to be seen as to

whether any damage caused by a lesser wind speed would not be covered by the policy of the Insurance. After all insurance is a contract of

indemnity based on good faith. The Hon''ble Supreme Court had in United India Insurance v. M.K.J Corporation reported in 1996 (6) SCC 428,

pointed out that the good faith required in a contract of Insurance equally applied to the insurers also. Therefore, the insurer cannot be allowed to

take shelter under a Hyper Technical Interpretation of the Insurance Contract and contend that it is not liable for the damage caused. Once the

Policy covers natural calamities, unless it takes in various forms of natural calamities within its fold, the very object of the insurance would be

defeated. To interpret the Policy of Insurance in the way suggested by the Insurance Company in the case on hand would amount to nullifying the

very contract of the Insurance. If the Insurance Company is allowed to rely upon the Beaufort scale measurements and deny the claim the very

object of the contract of Insurance would be nullified. As seen from the definition of the word Storm in the New Webter''s Dictionary as well as

Ramanatha Aiyar Advanced Law Lexicon, it is clear that the word Storm used is more general in nature and it cannot be confined only to the

occurrence of wind with a speed of above 88 kms per hour.

15. In United India Insurance Co. Ltd., v. Kiran Combas and Spinners reported in 2007 (1) SCC 368, the Hon''ble Supreme had pointed out that

adopting a Hyper Technical meaning to the terms of the Policy with a view to defeat any purpose of the contract of the Insurance cannot be

allowed by the Courts.

16. A faint suggestion is made by the learned counsel for the defendant / Insurance Company based on the observations in the Surveyors Report

to the effect that the damage could have been caused in transit while the solar panels were brought to the factory site. The said contention cannot

be accepted for the two reasons.

1. The policy in question was taken on 29.02.2012 and it is seen from the Surveyor Report that the power generation unit had commenced

operations even during the year 2011. The officers of the Insurance Company would have definitely inspected the installations before entering into

the contract of the insurance. Therefore, it is too late in the day for the Insurance Company to contend that the solar panels were damaged even prior to the natural calamity that took place on 13.05.2012.

2. The second ground is that the surveyor while assessing the loss had taken into account the reasons for the loss and has reduced 35% damage

due to reasons mentioned above viz. possibility of damages having occurred at the time of installation or thereafter prior to the incident on

13.05.2012. Therefore, it cannot be said that the entire loss was due to damages caused at the time of installation.

17. Considering the very nature of the contract and the admitted fact that there was a Dust Storm/Thunder Storm that occurred on 13.05.2012,

which had resulted in certain damage to the solar panels of the plaintiff. I am unable to accept the stand of the Insurance Company that it cannot be

made liable for the loss since the storm that had occurred on the event full day on 13.05.2012 did not satisfy the requirements of storm as per the

Beaufort scale. I had an occasion to consider a similar defence raised by the Insurance Company with reference to a term Flood in National

Insurance Company Ltd., v. New Kashmir Arts and Craft, case in AS No.963 of 2008 and 485 of 2011, wherein I had observed as follows:

18.The learned counsel for the Insurance Company would not dispute the fact that there was heavy rain fall accompanied by wind during the

relevant time. He would however contend that if the cause of the loss shown in the claim is not covered by the policy the company will be at liberty

to repudiate the claim. I am unable to persuade myself to agree with the said contention of the learned counsel. I find it to be hyper technical. It

should be born in mind that the contract of Insurance is in the nature of special contract, which is entered into with the object of minimising the loss

caused by a natural calamity. If the Courts are to interpret the contract of Insurance in the manner suggested by the learned counsel

Mr.N.Venkatraman, the very object of the contract of insurance would be defeated.

18. In the case on hand the fact that there were strong winds accompanied by rain, dust storm etc., during the relevant period is not in dispute. The

only ground on which the Insurance Company since to repudiate its liability the technical ground that the wind speed of the storm was not at 88

Kms per hour, therefore, the same could not be technically called as storm.

19. For the reasons stated above, Iam unable to uphold the defence of the

Insurance Company. Therefore, the Issue Nos.1 & 3 are answered in

favour of the plaintiff and Issue No.5 is answered against the defendant holding that the rejection of the claim is not valid, what remains to be

considered is the quantum of damages. The plaintiff would claim the total loss at Rs.80,30,679/- along with interest at 12% the suit claim is

quantified as Rs.94,76,187/-. The loss claimed is on two grounds, one is on the damages at Rs.58,64,642/- and the other is on the ground

business interruption/fall in power generation to the tune of Rs.21,66,037/-. The report of the Surveyor is marked as Ex.P6, a perusal of Ex.P6

would show that the surveyor as assessed the total loss at Rs.19,49,994/- the data given by the Surveyor in his report shows that there was no

significant change in the Power generation because of the damage caused on 13.05.2012. Insofar as the plaintiff is concerned out of 115000 Solar

Panels only 1394 panels are found to have been damaged. Therefore, the Surveyor had not assessed the business interruption loss. The plaintiff

has not produced any material to show that the survey report is erroneous. In view of the above I do not think that the plaintiff would claim any

amount towards the business interruption loss. Therefore, Issue No.4 is answered against the plaintiff.

Issue No.2:

20. This issue relates to the jurisdiction of this Court to try the suit. The Registered Office of the plaintiff is situate at Chennai (within the jurisdiction

of this Court), and the defendant is also at Chennai. The Policies in question have been issued by the defendants Office at Chennai. Therefore, the

entire cause of action has arisen within the jurisdiction of this Court at Chennai and though a plea relating to jurisdiction was raised in the written

statement, I do not find the same has been pressed ahead seriously. Since the entire cause of action for the suit has been arisen within the

jurisdiction of this Court, I am of the considered opinion that this Court has got jurisdiction to try the suit.

21. As already observed that there is nothing in the evidence of P.W.1 or in the Cross-examination of D.W.1 that would discredit the report of the

Surveyor. The Surveyor has assessed the loss at Rs.19,49,994/-. Therefore, I find that the plaintiff would be entitled to a decree to the extent of

loss as pointed out by the Surveyor.

22. In the result the suit is decreed for a sum of Rs.19,49,994/- with interest 9% per annum from the date of suit till the date of decree and at 6%

thereafter, the plaintiff will also be entitled to proportionate costs.