

(2013) 12 CAL CK 0068
In the Calcutta High Court
Case No : F.A. No. 3 of 2007

National Insurance Company

APPELLANT

Vs

Sanjay Chowdhury

RESPONDENT

Date of Decision : 05-12-2013

Acts Referred:

Citation : AIR 2014 Cal 38 : (2014) 2 CHN 53

Hon'ble Judges : Tapabrata Chakraborty, J; Indira Banerjee, J

Bench : Division Bench

Advocate : Abhijit Gangopadhaya, for the Appellant; Probal Mukherjee, for the Respondent

Final Decision : Dismissed

Judgement

1. This appeal is against the judgment and decree dated March 13, 2006, passed by the Learned Judge, 3rd Bench, City Civil Court at Calcutta in Money Suit No. 83/2000, whereby the Learned Court decreed the suit, directing the defendant to pay Rs. 4,13,400/- by account payee cheque in the name of the plaintiff within six months, failing which the amount of decree would carry interest at the rate of 7.5% per annum till realization. Shorn of unnecessary details, the facts material for disposal of this appeal are that the plaintiff, being the respondent herein, is a trader dealing with iron and steel products who got himself insured against loss of money in transit. On or about March 19, 1997, the plaintiff submitted a proposal form for insurance and subsequent thereto the defendant, being the appellant herein, issued a Money Insurance Policy dated March 31, 1997 for a period of one year at a premium of Rs. 7,311/-.

2. On January 14, 1998 the plaintiff entrusted one of his employees, namely, Soumen Seal to go to one of his suppliers, namely, M/s. Ellenbarrie Industrial Gases Limited with cash of Rs. 5 lacs for the purpose of purchasing certain items. The said employee went to the office of the said supplier, but as there was none to receive the cash, the said employee left the said office of the supplier but he did not come back with the money to the plaintiff's premises at 150B, Rabindra

Sarani, Calcutta-700 007. The said employee misappropriated the entire amount.

3. Upon coming to learn about the misappropriation, the plaintiff lodged an FIR with Borobazar Police Station, Calcutta, on January 15, 1998. Later, on January 20, 1999, the plaintiff lodged its claim with the National Insurance Company Limited for a sum of Rs. 3 lacs being the amount covered for fidelity guarantee insurance under the Money Insurance Policy, in the prescribed pro forma as supplied by the defendant. After the plaintiff lodged his claim, the defendant made over a fidelity guarantee claim form to the plaintiff. The claim form was also duly filled up and submitted by the plaintiff on March 5, 1998. Thereafter, a Surveyor was appointed and the plaintiff duly appeared before the Surveyor. However, surprisingly by a letter dated July 23, 1998, the defendant intimated the plaintiff that he had failed to provide the cash records to the Surveyor and that no documentary evidence could be produced by him to show that the cash was handed over to Soumen Seal on January 14, 1998 to carry the same to M/s. Ellenbarrie Industrial Gases Limited and that the plaintiff's claim in respect of the loss of money in transit was not covered under the policy. The plaintiff duly replied to the said letter by a letter dated March 18, 1998. Ultimately the plaintiff's claim was repudiated by the defendant by a letter dated 17.01.2000. In support of his claim the plaintiff placed reliance on 17 documents marked as Exhibits-1 to 17 including the proposal for Money Insurance Policy being Exhibit-12, the Money Insurance Policy being Exhibit-2, the Money Claim Form being Exhibit-5, the fidelity guarantee claim form being Exhibit-13, the complaint to the police authorities being Exhibit-15, the charge sheet issued in Case No. R-81/98 being Exhibit-16 and the letter of repudiation dated 17.01.2000 being Exhibit-11.

4. Controverting the allegations in the plaint, the defendant filed a written statement contending inter alia that the Money Insurance Policy being No. 100500/48/96/7600033 issued in favour of the plaintiff does not cover the loss in question and had been repudiated by the letter dated 17.01.2000. The defendant contended that the policy covers loss of money in course of transit to the insured's premises or the bank only and not otherwise and that accordingly the plaintiff's claim was repudiated by the said insurance company by the letter dated 17.01.2000.

5. In corroboration of the facts pleaded in the plaint, the plaintiff as PW 1 tendered his evidence and in course of cross-examination he categorically denied the suggestion as put to him, that he had not sent Soumen Seal to M/s. Ellenbarrie Industrial Gases Limited with of Rs. 5 lacs in cash. He further categorically denied the suggestion put to him that the loss of cash on transit did not stand covered under the said policy.

6. For and on behalf of insurance company, being the appellant herein, one Sri Dharendra Chandra Das, the Assistant Administrative Officer tendered his evidence as DW 1 stating inter alia that the defendant company had received premium of Rs. 7,311/- towards the Money Insurance Policy of the plaintiff and

that no extra premium was received by the defendant to cover full infidelity risk of cash carrying messengers and/or employees of the insured. In course of cross-examination the DW 1 categorically denied the suggestion as put to him that he had no authority to sign the Money Insurance Policy and that he was not competent to depose regarding the said policy. The DW 1 admitted that the fidelity guarantee claim form was duly issued to the plaintiff by the said company and that the claim of the plaintiff was fully covered by the said Money Insurance Policy.

7. Upon considering the materials on record and upon evaluating the evidence as tendered, the Learned Court below decreed the suit.

8. Mr. Gangopadhaya appearing on behalf of the appellants emphatically argued that the Learned Court below had not decided any of the issues as framed.

9. Mr. Gangopadhaya drew the attention of the Court to the proposal for Money Insurance Claim at Exhibit-12 and submitted that the plaintiff had answered "Yes" to the specific question "Do you have a Fidelity Guarantee Policy covering the employees carrying/handing the cash?". This shows that the plaintiff was having a separate fidelity guarantee policy and that accordingly it can be deduced that there was no fidelity guarantee in the Money Insurance Policy as availed by the plaintiff.

10. That Mr. Gangopadhaya further drew the attention of the Court to the Money Insurance Policy at Exhibit-2 and emphatically submitted that the plaintiff's claim does not come under the purview of Section (1)C(sic) which runs as follows:-

Money other than described in "A" and "B" above collected by and in the personal custody of the insured or the authorities of employees of the insured whilst in transit to the premises or bank with a period not existing 48 hours from the time of collection.

11. According to Mr. Gangopadhaya the ultimate misappropriation of the money by the plaintiff cannot be construed to be "Whilst in transit to the premises or bank" and that the term "Premises" had been incorporated in the proposal form at Exhibit-12 to be the premises at 150B, Rabindra Sarani, 4th Floor, Room No. 13, Calcutta-700 007.

12. Mr. Gangopadhaya further submitted that the Learned Court below had erroneously observed that the DW 1, in course of cross-examination, had admitted that the claim of the plaintiff is fully covered by the insurance policy.

13. In explaining the statement of DW 1, in course of cross-examination, Mr. Gangopadhaya argued that the said witness had, in effect and substance deposed that plaintiff was fully covered by the Money Insurance Policy, Mr. Gangopadhaya argued that the witness did not admit that fidelity guarantee was available to the plaintiff under the Money Insurance Policy.

14. In support of his argument, Mr. Gangopadhaya placed reliance upon the

judgments of the Supreme Court in the case of The Amravati District Central Co-operative Bank Ltd. Vs. United India fire and General Insurance Co. Ltd., and in the case of the Suraj Mal Ram Niwas Oil Mills (P.) Ltd. Vs. United India Insurance Co. Ltd. and Another,), and also the unreported judgment of a Single Bench of this Court in the case of M/s. Banerjee & Banerjee v. National Insurance Company Limited. In the M/s. Banerjee & Banerjee (supra), the Hon''ble single Judge discussed the principles relating to interpretation of insurance contracts as laid down by the Constitution Bench of the Hon''ble Supreme Court in the case of General Assurance Society Ltd. Vs. Chandumull Jain and Another, wherein the Court held "In interpreting documents relating to a contract of insurance, the duty of the court is to interpret the words in which the contract is expressed by the parties, because it is not for the Court to make a new contract, however reasonable, if the parties have not made it themselves".

15. Mr. Mukherjee emphatically argued that all the issues as framed had been decided by the Learned Court below and that a perusal of the money insurance claim policy at Exhibit-2 would reveal that it contains an additional condition to the effect that the policy is subject to assault cover and full infidelity risk of cash - carrying messengers and/or employees and that it extends to cover riot, strike, terrorism activities, risks and that the plaintiff had availed full infidelity risk cover by paying premium of Rs. 7,133/-.

16. Mr. Mukherjee further argued that the claim of the plaintiff stands covered u/ S. (1)C(sic) of the Money Insurance Policy at Exhibit-2 inasmuch as the employee of the plaintiff went to the premises of M/s. Ellenbarrie Industrial Gases Limited and as there was none to receive the cash he left the said office but did not come back with the money to the premises of the plaintiff and that as admittedly the plaintiff's employee did not come back to the premises of the plaintiff it needs to be construed that the loss was whilst in transit to the premises.

17. Mr. Mukherjee further drew the attention of the Court to the exclusion clause in the said Money Insurance Policy in Exhibit-2, which runs as follows:-

Loss of money were the insured or his employee is involved as principal or accessory, except loss due to fraud or dishonesty of the cash carrying employee of the insured, occurring whilst in transit and discovered within 48 hours.

18. Relying upon the said exclusion clause Mr. Mukherjee submitted that as the loss was due to fraud and dishonesty of the cash carrying employee of the insured and as the same had occurred whilst in transit and discovered within 48 hours, the said loss stands categorically covered by the Money Insurance Policy in terms of Section (1)C(sic). Mr. Mukherjee, accordingly, argued that as the loss suffered by the plaintiff stands covered under the Money Insurance Policy, the DW 1 had rightly admitted that the claim of the plaintiff was fully covered by the Money Insurance Policy.

19. Mr. Mukherjee further submitted that the argument of Mr. Gangopadhaya on

the basis of question (c) at clause. 11 of the proposal form is absolutely fallacious inasmuch as a positive answer to the question as to whether the proposer had a "Fidelity Guarantee Policy" does not establish that the Money Insurance Policy lacks fidelity guarantee.

20. Mr. Mukherjee, in support of his argument placed reliance upon the judgment delivered by the Supreme Court in the case of the The Food Corporation of India Vs. The New India Assurance Co. Ltd. and others,) and submitted that the nature of fidelity insurance is intended to protect the assured against the contingency of a breach of fidelity on the part of a person in whom confidence had been reposed and that according to Mr. Mukherjee the contingency of breach of fidelity stands established from the materials on record inasmuch as the amount of Rs. 5 Lacs as given to its employee by the plaintiff for payment to one of its suppliers namely M/s. Ellenbarrie Industrial Gases Limited was misappropriated whilst in transit to the premises.

21. In reply, Mr. Gangopadhaya could not dislodge the argument of Mr. Mukherjee made on the basis of the exclusion clause contained in the Money Insurance Policy and reiterated and placed reliance upon question 11(c) as incorporated in the proposal at Exhibit-12.

22. Upon considering the submissions made on behalf of the Learned Counsel appearing for the respective parties and upon going through the evidence on record we find that the loss due to fraud or dishonesty of the cash carrying employee of the insured, occurring whilst in transit and discovered within 48 hours, squarely falls within the ambit of the money insurance claim policy as would be explicit from the exclusion clause No. (3) incorporated in the Money Insurance Policy at Exhibit-2 and furthermore, the averments made in the plaint supported by the deposition of PW 1, the contents of Section (1)C(sic), the admission on the part of the DW 1 to the effect that the claim of the plaintiff is fully covered by the Money Insurance Policy establish that the loss of money was whilst in transit to the premises.

23. It is also not in dispute that in reply to the plaintiff's letter dated January 20, 1998, the appellant forwarded the fidelity guarantee claim form (final) to the plaintiff and the same was duly filled up by the plaintiff and was accepted by the appellant and from such sequence it is explicit that a fidelity guarantee in terms of the Money Insurance Policy No. 100500/48/96/7600033 was available to the plaintiff.

24. We do not find any substance in the argument of Mr. Gangopadhaya that, because the plaintiff had answered "Yes" to the question as to whether he had a fidelity guarantee policy covering the employees carrying/handing the cash, in the proposal for money insurance, it has to be construed that fidelity guarantee was not available to the plaintiff under the said Money Insurance Policy and that the plaintiff was having some other fidelity guarantee policy under some other company.

25. In our view, a positive answer to the said question "Do you have a fidelity guarantee policy covering the employees carrying/handing the cash?" does not establish that there was no fidelity guarantee under the Money Insurance Policy availed by the plaintiff.

26. DW 1, in course of his cross-examination, had categorically admitted that the claim of the plaintiff is fully covered by the Money Insurance Policy and that accordingly the plaintiff was given the fidelity guarantee claim form in reply to the plaintiffs letter dated January 20, 1998 at Exhibit-4 wherein he had categorically stated "On 14th January, 1998 through the said employee, I had sent Rs. 5,00,000/- (Rupees five lacs) in cash to M/s. Ellenbarrie Industrial Gases Ltd; of 2nd floor, 3A, Ripon Street, Calcutta - 700 016 at about 1.00 p.m. The said Mr. Soumen Seal did not come back till 5.00 p.m. which was a reasonable time for his coming back. I contacted M/s. Ellenbarrie Industrial Gases Ltd; when I came to know that the person who used to receive cash for the company was not available and the said sum of Rs. 5,00,000/- was not deposited with them". It is, thus, explicit that the fidelity guarantee was available to the plaintiff in terms of Section (1)C(sic) of the Money Insurance Policy and that the said claim was illegally withheld by the appellant.

27. The argument of Mr. Gangopadhaya to the effect that the plaintiff was aware that fidelity guarantee was not available to him and that as such, he had given positive answer to question No. 11(c) in the proposal form at Exhibit-12, and that the claim of the plaintiff was, therefore, rightly repudiated by the letter dated January 17, 2000, is unacceptable inasmuch as a perusal of the said letter reveals no such ground towards repudiation of the plaintiff's claim. Loss due to fraud or dishonesty of the cash carrying employees of the insured, occurring whilst in transit and discovered within 48 hours, comes within the purview of the Money Insurance Policy, as would be explicit from the exclusion clause No. 3 therein and that the said clause read with Section (1)C(sic) brings the claim of the plaintiff within the purview of the said Money Insurance Policy, inasmuch as admittedly the cash was misappropriated by the plaintiff's employee whilst in transit to the plaintiff's premises from the premises of M/s. Ellenbarrie Industrial Gases Limited and such finding does not in any manner lead to substitution of the contents of the policy.

28. Accordingly, we hold that the impugned judgment and decree passed by the Learned Court below is sustainable in law and as a result, we dismiss the appeal and affirm the impugned judgment and decree dated March 13, 2006, passed by the Learned Judge, 3rd Bench, City Civil Court at Calcutta in Money Suit No. 83/2000.

29. The lower court records be sent back along with the copy of the judgment, at the earliest.

30. Urgent Photostat certified copy of the judgment be supplied to the Learned Counsel of the parties, if applied for.

Indira Banerjee, J.

I agree.