

**(2000) 08 CAL CK 0047**

**In the Calcutta High Court**

**Case No :** Civil Appellate Jurisdiction Appeal from Original Decree No. 484 of 1997 Suit No. 97 of 1988

National Insurance Company Ltd.

APPELLANT

Vs

New Darjeeling Union Tea Co. Ltd.

RESPONDENT

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**Date of Decision :** 04-08-2000

**Acts Referred:**

Constitution of India, 1950 — Article 12  
Evidence Act, 1872 — Section 101, 102, 3  
Insurance Act, 1938 — Section 64VB, 65VB

**Citation :** (2001) 1 CALLT 218

**Hon'ble Judges :** Satyabrata Sinha, J;Hrishikesh Banerji, J

**Bench :** Division Bench

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## **Judgement**

S.B. Sinha, J.—This Appeal is directed against a judgment and decree dated 28th November, 1996 passed by a learned single Judge of this Court in Suit No.97 of 1988 whereby and whereunder the Suit filed by the respondent herein claiming a decree for a sum of Rs. 10,39,726.26 paise was decreed with interest.

2. The Plaintiff-Respondent in the plaint, inter alia, stated that as regard the stock of tea owned by it, an insurance policy bearing No. 1461/3108735 dated 21st December, 1985 was taken by the plaintiff. The subject matter of such insurance was 1,64,000 Kgs. of tea, the value whereof was assessed at Rs. 36,80,000/-.

3. According to the Plaintiff, the cost of production of tea is Rs. 10.23 per Kg. although the market price thereof was Rs. 22.43 per Kg. Having regard to the loss sustained by it, it confined its claim only to the extent of Rs. 10,39,726.26 although the goods were insured for a sum of Rs. 3,61,900.00/-.

4. The learned counsel appearing on behalf of the Defendant-Appellant, inter alia, submitted that the learned trial Judge erred in passing the decree in so far as he failed to take into consideration : (1) that the claim had not been made in accordance with the policy. (2) In any event the learned trial Judge failed to take

into consideration the evidence on record in the true perspective as regard the quantification of the damages allegedly suffered by the plaintiff-respondent. (3) A bare perusal of the terms of the interim protection as contained in Exbt. B read with the subsequent documents including the receipt dated 23.12.1985 as contained in Exbt.C it will be evident that the entire claim had been made on a wrong premise inasmuch as in terms thereof, the policy could come into effect only on 23.12.1985 and not prior thereto. (4) As regard the second question the learned trial Judge committed an error in considering the relevant provisions of the insurance policy as the stock of the tea earlier year could not have been the subject matter of insurance in so far as although from Exbt.S/1 and Exbt.7 it would appear that in respect of such policy, additional premium was payable which having not been done, no relief could be granted to the plaintiff. (5) The learned trial Judge failed to take into consideration the evidence of the witnesses examined on behalf of the defendants-Appellants in their proper perspective and in this connection our attention has been drawn to deposition of D.W.2 Budhadeb Chakraborty and in particular Question No.361 to 363 as well as Question No.37 to 41 of D.W.1 Deb Kumar Basu. (6) The learned trial Judge committed an error in giving due credence to the report submitted by S.P. Banerjee dated 4.1.86 (Exbt.3) and that of Sri B. Bag dated 3.3.86 (Exbt.6), from a perusal whereof it would appear that value of the tea should have been assessed at the rate of Rs.7/- per Kg. only.

5. The learned counsel appearing on behalf of the Plaintiff-Respondent, on the other hand, submitted that a new case is sought to be made out by the appellant at this stage which should not be permitted. According to the learned counsel, the question that the appellants were not bound to indemnify the plaintiff had never been raised before the learned trial Judge not any issue was framed in that regard. The learned counsel contends that the fact that an accident had taken place being admitted, and it having not been shown that there had been any act of mala fide on the part of the insured, the learned trial Judge must be held to have acted within his jurisdiction in passing the decree. It has been submitted that in the case, the statements of the plaintiff's witnesses remained uncontroverted and the Defendant-Appellant had neither cross-examined the said witnesses on material particulars not even gave any suggestion in that regard.

6. Our attention has further been drawn to the fact that initially the damaged tea was segregated and only such stock of tea which was found to be unfit for human consumption had been destroyed but later on the Special Officer appointed by this Court had destroyed the remaining quantity of tea. It was pointed out that when the claim had been made, the Regional Manager of the Appellant agreed to pay damages at the rate of Rs. 8/- per Kg. and as the said offer could not be acceded to, the suit had to be filed.

7. The learned trial Judge having regard to the rival contentions of the parties, framed the following issues :--

"1. Did the plaintiff fulfil and/or satisfy the condition of the policy of insurance? Did the plaintiff fail to disclose the carried over stocks of tea of the previous year at the time of making the proposal for insurance as alleged in the written statement?

2. Are the alleged losses and damages recoverable under the interim protection note dated 21.12.85 policy of Insurance?

3. Has the plaintiff filed the suit within 12 months from the date of occurrence of loss or damage as stipulated in condition 10 of the Policy of insurance?

4. Is the plaintiff entitled to a decree for Rs.14 lacs and odd as prayed for in the plaint?

5. To what relief the plaintiff is entitled?"

8. All the issues had been answered in favour of the plaintiff. As regard Issue No. 1, the learned trial Judge held that all the conditions of the policy of insurance had been fulfilled and, thus, Issue No.2 was also answered in favour of the plaintiff having regard to his finding aforementioned on Issue No.1. Issue No.3 has not been pressed before us. As regard issue No.4 the learned trial Judge held that the plaintiff has been able to prove his case.

9. From the materials on records it appears that the stock of tea held by the Respondent was being insured since 1975. Such stock of tea having been hypothecated, the banker used to enter into a contract of insurance with the Appellant However, the plaintiff-respondent having discovered that for the said year the bank had not entered into such contract, a request was made to the Appellant herein to enter into the said contract of insurance.

10. A survey of the stock of tea was made on 20th December, 1985. An interim protection note was issued on 21.12.1985. The policy of insurance was taken against consequential loss and damage by fire including fire resulting from Explosion, Lightning, Explosion of boiler used for domestic purposes. N.B.-2 appended to the said policy reads thus :--

"This Interim Protection Note will not be valid unless the premium or deposit premium has been received by the Company or there is a Bank guarantee in force."

11. The said Interim Protection Note was issued on 21.12.1985 and the Policy of Insurance was valid from 21.12.1985 to 21.3.1986.

12. The sum insured was Rs. 36,80,000/- in respect of the aforementioned quantity of tea. A receipt showing premium of insurance both in respect of fire protection and burglary was issued on 23.12.1985.

13. As indicated hereinbefore, the period of insurance was for three months i.e. 21.12.1985 to 21.3.1986. The proposal was made on 20th December, 1985 which, as noticed hereinbefore, was accepted on 21.12.1985. It is not the case of

the appellant that the premium had not been paid either by cheque or in cash. It is possible that a receipt had been granted on 23.12.1985 wherein it was stated that in the case of remittance by cheque the receipt would be subject to its realisation.

14. It appears that the cheque for payment of insurance was paid on 21st December and the same was encashed on 26th December. It is, therefore, not a case where the cheque has been dishonoured or no payment has been made at all. It is now a well settled principle of law that payment of cheque, in a commercial transaction, is a good payment.

15. Although section 64VB of the Insurance Act prohibits the Insurer from entering into a contract of insurance unless the premium is paid in advance, such a condition can even be waived. Except in certain cases as for example contract of life insurance, personal accident or sickness insurance, the principle of indemnity applies to a contract of insurance in which case the insurer's liability would be limited to actual loss.

16. Reference in this connection may be made to *Darrell v. Tibbitts* reported in 1880(5) Q.B. Div 560 and *Meacock and Anr. v. Bryant & Co.* reported in 1942(2) AELR 661. Yet again in *West Wake Price & Co. v. Ching* reported in 1956(2) ALLER 821 at 825. Devlin, J. held :--

"The essence of the main indemnity clause, as indeed of any indemnify clause, is that the assured must prove a loss. The assured cannot recover anything under the main indemnity clause or make any claim against the underwriters until the assured have been found liable and so sustained a loss."

17. Thus, the event must in fact result in a pecuniary loss to the assured only then he becomes entitled to be indemnified subject to the limitations contained in the contract.

18. It is trite that the question as to whether a contract of insurance would be a contract of indemnity will depend upon construction of a particular contract subject to the consideration that in the absence of the clear words showing that the contract was intended, the Court will construe the contract as one of indemnity.

19. In *New India Assurance Co. Ltd. Vs. Rula and Others*, , the apex Court has held :--

"Now, a contract of insurance, like any other contract, is concluded by offer and acceptance. Normally, a liability under the contract of insurance would arise only on payment of premium if such payment was made a condition precedent to the insurance policy taking effect. But such a condition which is intended for the benefit of the insurer can be waived by the insurer as laid down in *P. Abdul Azeez and Co. and Others Vs. New India Assurance Co. Ltd.*, in which a decision of the Bombay High Court in *The Ocean Accident and Guarantee Corporation Co. Ltd. Vs. D.K. Patkar*, was followed. To the same effect is an old decision in *Equitable*

Fire & Accident Office Ltd. v. Ching Wo Hong (1907 AC 96). These are the principles relating to an ordinary contract of insurance, but the contract of insurance relating to motor vehicles has to be understood in the light of the various provisions contained in the Motor Vehicles Act. 1988. Chapter XI of the Motor Vehicles Act deals with insurance of motor vehicles against third-party risks. Section 146(1) inter alia, provides as under :

"146. Necessity for insurance against third-party risk.-(1) No person shall use, except as a passenger, or cause or allow any other person to use, a motor vehicle in a public place, unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, a policy of insurance complying with the requirements of this Chapter".

20. Thus, having not raised any objection with regard to the validity of the period of insurance and having not taken the said point before the learned trial Judge, the first contention raised by the learned counsel for the Appellant cannot be accepted.

21. The learned counsel for the Appellant has drawn our attention to the policy as contained in annexure "S" and in particular the following clauses :--

"No payment in respect of any premium shall be deemed to be payment to the Company unless a printed form of receipt for the same signed by an Official or duly appointed Agent of the Company shall have been given to the insured.

The insured shall give to the Company of any insurance or insurances already affected, or which may subsequently be effected, covering any of the property hereby insured, and unless such notice be given and the particulars of such insurance or insurances be stated in or endorsed on this policy by or on behalf of the Company before the occurrence of any loss or damage all benefit under this policy shall be Forfeited.

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In any action, suit or other proceedings, the burden of proving that any fall or displacement is caused by fire as aforesaid shall be upon the insured. (1) This insurance does not cover,

(a) Loss by theft during or after the occurrence of a Fire;

(b) Loss or damage to property occasioned by its own fermentation, natural heating or spontaneous combustion, or by its undergoing any heating or drying process;

(c) Loss or damage occasioned by or through or in consequence of

(1) The burning of property by order of any public authority;

(2) Subterranean Fire;

(d) .....

In any action, suit or other proceeding where the Company alleges that by reason of the provisions of this condition any loss or damage is not covered by this insurance, the burden of proving that such loss or damage is covered shall be upon the insured.

.....

22. So far as the question of burden of proof is concerned keeping in view the fact that the procedure for proving a fact is governed by the provisions of the Indian Evidence Act, the insertion of such a clause would be against the public policy being contrary to the statutory provisions.

23. In any event, when both the parties have adduced evidence, the question of burden of proof takes a back seat

24. In the instant case, the actual cause of the fire could not be ascertained. Whether the fire was self inflicted or not would be a question of fact. The evidence of D.W. 1 in this connection is not very clean. The fire report, Exbt. D shows that cause thereof was unknown and it is not the case of the defendant that the plaintiff was responsible for causing the fire. Whether "tea" is self combustible or not had been taken into consideration by the learned trial Judge.

25. The learned trial Judge did not rely upon the deposition of the Appellant's witnesses. D.W.2 Buddaheb Chakraborty although sought to contend that there may be self-ignition of tea, but his evidence for cogent reasons had not been believed by the learned trial Judge. He was not an expert. He did not make any survey. He did not have anything to do with the matter. He was merely an Administrative Officer. In Examination-in-Chief, he stated :--

Q. Can you say the reason for not admitting?

A. The fire policy states that there must be actual ignition--it means heat and simultaneous flame. If there is no flame that is not burnt as fire as per fire insurance law of contract. So it was not at the first instance admitted. Secondly, policy condition stands in the way. The condition states that loss or damage to any property by its own spontaneous combustion, natural heating and except as provided in the condition 7(f) or by its undergoing any heating or drying process the claim is not admissible.

Q. What kind of claim was lodged by the plaintiff company?

A. They raised the question that it was due to chemical reaction. They wrote a letter to the Siliguri Police Station immediately after occurrence of loss--one of the Managers said that it was due to chemical reaction. So the Surveyor went there and he found that there was no cause of ignition."

26. He alleged that the Policy could not be issued stating :--

"Actually the proposal was stated to have been submitted on 21st December, 1985 at about 4.00 p.m. after the closure of the office hour to one of our

inspectors and he submitted the proposal to our branch office on the 23rd December, 1985 at about 3.00 p.m. whereas the alleged loss occurred at about 7.30 p.m. on 23rd December, 1985. So the question of issuance of policy does not arise."

27. He, however, although named the Inspector who had issued the policy and according to him he could be examined but he was not. An adverse inference, thus, could be raised to the effect that had the said officer been examined, his evidence would have gone against the interest of the Appellant. Sri Deb Kumar Basu, Surveyor conducted the survey. He admitted that the tea was not in saleable condition. He, however, alleged that the quality of the tea was inferior. He further alleged that stock of tea of earlier year had been carried over. He further alleged that the tea was stocked in an "unparallel" condition. What would be a continuous combustion, in answer to the question, he stated :--

"Possibly due to impact or due to wet pit ignition."

28. He admitted that several reports had been filed, one of them being the Department of Excise and other reports were that of R.V. Bricks & Company. J. Thomas & Co. Pvt. Ltd. also issued a certificate. In his report D.W.1 allegedly identified the cause of fire and smoke. He explained the said words stating :--

"I mean fire and smoke actually there because tea does not catch fire--tea get burnt and smoke will come out."

29. According to him, between his report and the report of the Excise Authorities, there was a difference of about 6000 Kgs.

30. However, the learned trial Judge having regard to the materials on records believed the witnesses examined on behalf of the plaintiff particularly in view of the fact that it was categorically stated that the Regional Manager having regard to the fact situation offered to settle the claim at Rs. 8/-. He stated :--

"Q. You have said that they offered to settle at Rs.8/-?

A. Rupees 8 per Kg. of tea."

31. The aforementioned documents brought on records clearly show that quantity of tea which became damaged was wholly unfit for human consumption and destroyed first, but later on at the instance of the Special Officer of this Court, the entire stock of tea had to be destroyed. The Appellant did not examine the Regional Manager who intended to settle the entire claim of the plaintiff at the rate of Rs. 8/- per Kg. Again an adverse inference may be drawn against the Appellant. The Appellant is a "state" within the meaning of Article 12 of the Constitution of India.

32. It was its duty to the Court to produce all relevant documents and examine witnesses who can throw light on the subject matter of the lis. See National Insurance Co. Ltd., New Delhi Vs. Jugal Kishore and Others, .

33. In the instant case, the plaintiff has merely claimed the actual cost of production in support whereof, it has proved a certificate issued by a Chartered Accountants "Saha and Majumdar". There is no dispute with regard to the cost of production. There is also no dispute that the claim of insurance was made upon arriving at a satisfaction by the concerned Inspector that market value of 1,64,000 Kgs. of tea would be Rs. 3,80,000/-i.e. @ Rs. 22.43 per Kg. In this situation, in our opinion, the learned trial Judge has rightly held that the plaintiff-respondent is entitled to the decree for the principal amount. However, with regard to the fact situation of this case we are of the opinion that interest @ 17% p.a. should not have been awarded. We, therefore, direct that the interest would be payable to the plaintiff-respondent at the rate of 9% per annum which would sub-serve the interest of Justice.

For the reasons aforementioned, the appeal is allowed in part to the extent mentioned hereinbefore. In the facts and circumstance of this case there will be no order as to costs.

H. Banerji, J.

34. I agree.

35. Appeal allowed

R.B