
(2008) 08 AP CK 0069
In the Andhra Pradesh High Court
Case No : F.A. No. 801 of 1990

New India Assurance Co. Ltd. and Another	APPELLANT
Vs	
State of A.P. and Others	RESPONDENT

Date of Decision : 22-08-2008

Acts Referred:

Evidence Act, 1872 — Section 23
Insurance Act, 1938 — Section 64UM, 64UM(2)
Limitation Act, 1963 — Article 112

Citation : (2009) 1 ALT 87

Hon'ble Judges : V.V.S. Rao, J

Bench : Single Bench

Advocate : Kota Subba Rao, for the Appellant; Asst. G.P. for Appeals, for the Respondent

Final Decision : Dismissed

Judgement

V.V.S. Rao, J.—The New India Assurance Co. Ltd., Bombay, and its Branch Office at Kakinada in Andhra Pradesh, are the appellants. They are defendants in O.S. No. 134 of 1983 filed by State of Andhra Pradesh, represented by the Director of Fisheries, Hyderabad. The suit was for recovery of a sum of Rs. 88,8007- being insurance amount under Marine Hull policy for mechanized fishing boat - "Sorrah 30". The suit was decreed with costs on 17-10-1989 directing the appellants (hereafter, defendants) to pay insurance amount claimed with interest at 8% per annum.

2. The case of plaintiff is as follows. Director of Fisheries allotted "Sorrah 30", fishing boat, to third defendant on hire purchase basis. The hirer was required to pay hire purchase instalment amount as well as insurance for the boat on behalf of Director. Insurance policy expired on 1-1-1975. Third defendant took fresh insurance on 6-9-1975 near Pudimadaka in Visakhapatnam District. Third defendant gave telegram to Assistant Director of Fisheries, Kakinada, who filed claim with second defendant for insurance amount. Second defendant deputed

licensed surveyor appointed u/s 64UM of General Insurance Act, 1938 (Insurance Act, for short). Surveyor, after inspecting the area and boat that ran aground, submitted report on 16-9-1975. He opined that the ship ran aground on 3-9-1975 before issuing insurance cover note dated 6-9-1975 and therefore claim cannot be accepted. Defendants repudiated claim and informed plaintiff accordingly. Plaintiff however did not take any action immediately and filed suit after eight years, on 3-3-1983.

3. Defendants in their written statement admitted policy covering the period from 6-9-1975 to 5-9-1976. It was alleged that third defendant approached Inspector of Insurance, Sri M. Suryanarayana Murthy, through Sri M.G. Appa Rao for taking Hull insurance, that third defendant suppressed material facts and that believing him Inspector issued cover note dated 6-9-1975 without verifying particulars. Later he came to know that "Sorrah 30" ran aground at Pudimadaka in the evening of 3-9-1975 itself. On verification, defendants came to know that boat ran aground on 3-9-1975 and third defendant obtained cover note by making false representations. Insurance contract is "uberrima fides" (utmost good faith) and therefore cover note is not valid in law. While denying all other allegations, suit was defended as barred by limitation. During pendency of suit, third defendant (hirer) died and his legal representatives (wife and sons) were brought on record as defendants 4 to 6. They filed written statement stating that they are not aware of the circumstances under which boat met with accident but they pleaded that they are not liable to pay insurance amount.

4. The trial Court framed two issues. First issue is with regard to suit claim as such and second issue is regarding question of limitation. During trial, four witnesses were examined for plaintiff and sixteen documents were marked. Ex.A-2 is insurance cover note and Ex.A-12 is letter of Assistant Director claiming insurance amount. Defendants examined four witnesses and marked Exs.B-1 to B-7. Ex.B-7 is original survey report of M/s. Andhra Marine Engineering Co. On considering the evidence, trial Court came to the conclusion that defendants failed to prove that accident occurred on 3-9-1975 and that Ex.B-7 survey report cannot be relied on. Question of limitation was also decided in favour of plaintiff referring to Article 112 of Limitation Act, 1963.

5. In this appeal, same issues decided by trial Court are argued. Question of limitation may be considered as a first point. Article 112 of Limitation Act prescribed a period of 30 years for any suit by and on behalf of State Government. It is no doubt true that if the policy prescribes and stipulates time during which the claim has to be made, such Clause in the policy would prevail over Article 112. But a perusal of Ex.A-1, which is Hull policy for "Sorrah 30" for previous year, would show that no such Clause is incorporated therein. Therefore Article 112 of Limitation Act alone applies. It is no doubt true that the suit was filed eight years after alleged date of accident but in view of Article 112, the suit must be held to be within time.

6. The plea of appellants/defendants is that third defendant approached

Inspector of Insurance - D.W. 1, after boat ran aground and making false representations obtained Ex.A-2. It is axiomatic that when insurer resiles from the obligation and repudiates claim on the ground of fraud or misrepresentation, entire burden lies on him. Insofar as claimant is concerned, Ex.A-2 policy itself would show that it is valid for the period from 6-9-1975 to 5-9-1976 and if it is, on probabilities, proved that boat ran aground on 8-9-1975, defendants are liable. It is no doubt true that it is a case of "close proximity" giving rise to doubt about genuineness of the claim. But when insurer set up misrepresentation in obtaining policy, burden has to be discharged by insurer alone.

7. The Insurer examined D.Ws. 1 to 4 and marked Exs.B-4 and B-7. D.W. 2 is Sarpanch of Pudimadaka, who gave statement Ex.B-1 to D.W. 1 (Inspector of Insurance). He also deposed that he along with D.W. 1 and D.W. 3 visited place of accident on 10-9-1975 and on enquiries he came to know that the accident took place on 3-9-1975 but not on 8-9-1975. D.W. 1 and D.W.3 supported him. To the extent of D.W. 1 to D.W. 3 visiting place of accident at Pudimadaka, it may be true but their evidence that accident took place on 3-9-1975 is only hearsay evidence and cannot be relied on. If the oral evidence is eschewed, what remain are Exs.B-4 and B-6. Ex.B-4 is report of one Sri P.V.K. Sarma, Retired IPS Officer, who was offering detective services. He is not a surveyor appointed u/s 64UM of Insurance Act, and therefore, it has no evidentiary value. Next document is Ex.B7 which is report by M/s. Andhra Marine Engineering Co. There is no doubt that they are surveyors licensed/appointed u/s 64UM of Insurance Act.

8. As seen, Ex.B-7 is in three parts. First part is report, which gives details of accident site, details of damage and details of area where broken parts of fishing craft were found. Insurer opined that unless it is salvaged within 10 or 12 days, it would be total loss along with hull. There is no difficulty with regard to this. Second part of Ex.B-7 is recording "other salient details." According to this, on enquiries with fishermen in the village in and around Visakhapatnam on 11-9-1975, the surveyor came to know that "Sorrah 30" was not in commission, that it was lying in Vizag port during previous months and that it left Vizag harbour under towage. Both boats ran aground at Pudimadaka in the early hours on 3-9-1975 during high tide probably due to failure of engine of tow boat. Surveyor also opined that it is not correct to say boat ran aground on 8-9-1975. The third part is supplemental to second part and surveyor states that Sorrah 30 had no valid certificate of seaworthiness and that Assistant Director of Fisheries or hirer did not produce any document or statement of crew members of craft. Finally surveyor gave opinion that without certificate of seaworthiness, the vessel should not have been taken out to the sea and that insurance cover note was taken only on grounding of vessel.

9. Considerable emphasis is laid by learned Standing Counsel for New India Assurance Company on Ex.B-7. He submits that when a report is submitted by surveyor appointed u/s 64UM of Insurance Act even if surveyor is not examined, the same has to be considered and must be given utmost importance. Report of

surveyor cannot be rejected merely on the ground that surveyor was not examined. He relies on *United India Insurance Co. Ltd. v. Roshan Lal Oil Mills Ltd.*, (2000) 10 SCC 19, *National Insurance Co. Ltd. Vs. Harjeet Rice Mills*, , *Economic Roadways Corporation v. National Insurance Co.* 2002 LS 128 (A.P.) (D.B.), and *Bond Food Products Pvt. Ltd. v. Planters Airways Ltd.* 2006 ACJ 24 (Madras) (D.B.).

10. In *United India Insurance Co. Ltd. v. Roshan Lal Oil Mills Ltd.*, (2000) 10 SCC 19, claimant having failed to get claim amount due to alleged fire accident, approached National Consumer Disputes Redressal Commission. The claim was allowed for a sum of Rs. 61,65,902/- being the loss of mustard seed due to self-spontaneous combustion. The insurer relied on the report of joint surveyors that though there was a spontaneous combustion, it did not result in "fire". This report was not considered by the National Commission. In appeal before Supreme Court, *inter alia*, it was contended that report of surveyor appointed in terms of Section 64UM of Insurance Act cannot be legally ignored. This found favour with Supreme Court. While remanding the matter to National Commission Supreme Court observed thus.

The appellant had appointed joint surveyors in terms of Section 64UM(2) of the Insurance Act, 1938. Their report has been placed on the record in which a detailed account of the factors on the basis of which the joint surveyors had come to the conclusion that there was no loss or damage caused on account of fire, was given and it was on this basis that the claim was not found entertainable. This is an important document which was placed before the Commission but the Commission, curiously, has not considered the report. Since the claim of the respondent was repudiated by the appellant on the basis of the joint survey report, the Commission was not justified in awarding the insurance amount to the respondent without adverting itself to the contents of the joint survey report specially the factors enumerated therein. In our opinion, non-consideration of this important document has resulted in serious miscarriage of justice and vitiates the judgment passed by the Commission. The case has, therefore, to be sent back to the Commission for a fresh hearing.

(emphasis supplied)

11. In *Harjeet Rice Mills* (2 *supra*), Supreme Court held that even the report of private investigator hired by Insurance company can be considered when repudiation is based on fraud. In *Economic Roadways Corporation* (3 *supra*), a Division Bench of this Court relying on *T. Venkatachalapathi Lorry Service v. The N.I.A. Co. Ltd.* 1998 ACC 102 (D.B.), observed as follows.

When the 1st plaintiff accepted the Surveyor's report, even at that stage no objection was taken by the defendant to show that the Survey report was not genuine. The learned Counsel further submits that since the document itself is not admissible in evidence as it has not been proved by the person who prepared the report therefore no reliance can be placed on this report. It is true that this

report was not proved by the Surveyor and the Surveyor was not produced as a witness but the fact remains that the Insurance company had settled the claim and paid the claim amount to the 2nd plaintiff on the basis of this report. Therefore, we do not agree with the learned Counsel for the appellant that plaintiffs had not been able to prove their case. On the other hand, the defendant had denied the certificate issued and submitted that it had the forged signature but he did not take any steps to prove such an assertion.

12. Bond Food Products Pvt. Ltd. (4 supra) is a case, which arose under Carriers Act, 1865. A consignment of biscuits was entrusted to the carrier at Bangalore to be delivered at Calicut. The goods were insured. On the next day, goods were damaged in accident. The insurer appointed surveyor to assess the damage. He submitted a report assessing Rs. 66,368.83. The insurer negotiated with consignor, settled and paid Rs. 56,307.55. The consignor executed letter of subrogation and thereafter the insurer along with consignor filed suit for recovery of said amount on the file of the Court of II Assistant Judge, City Civil Court, Madras. Defendant-carrier opposed the suit, inter alia, on the ground that surveyor's report is inadmissible in evidence nor binding, as defendant was not given notice before appointment of surveyor and that report cannot be accepted in view of Section 23 of Indian Evidence Act, 1872. The trial Court dismissed the suit. A regular first appeal was filed before Madras High Court. Rejecting the plea of defendant, Division Bench of Madras High Court observed as under.

14.5 When the defendant carrier failed to employ a surveyor for the assessment of the damages on his own and also failed to prove that they have not committed any negligence, the evidence of the surveyor, P.W. 2, the report of the surveyor, Exh.A-4 and his assessment with respect to the quantum of damages have to be accepted.

14.12 We are, therefore, unable to accept the argument made on behalf of the defendant that the letter of subrogation is only a power of attorney, particularly in view of the relevancy and admissibility of the evidence of the surveyor, P.W. 2 and his report, Exh.A-4, as well as Exh.A-7, A-8 and A-9, assessing the damages and shortfall of the goods entrusted to the defendant for transportation from Bangalore to Calicut.

13. From the above precedents, the principles that can be culled out are:

(i) When a surveyor appointed/licensed u/s 64UM of Insurance Act, is engaged to assess damage/loss arising claimed by insured, report of surveyor cannot be rejected only on the ground that surveyor failed to give notice to the claimant before commencing survey for assessment of damage;

(ii) Even when an unlicensed private investigator is engaged as a surveyor, Court should give an opportunity to the parties to prove investigation report;

(iii) Report of surveyor is important document and it cannot be ignored only on the ground that the licensed surveyor is not examined;

(iv) Non-consideration of report of licensed surveyor would result in serious miscarriage of justice and vitiates adjudication; and

(v) If the claimant fails to appoint surveyor before or after filing a claim, it is a strong circumstance, which increases probate value of surveyor's report.

14. In view of these principles, it has to be considered whether Ex.B-7 supports the case of defendants. There is no gainsaying to say that a civil case has to be decided on preponderance of probabilities. Whether "Sorrah 30" ran aground on 3-9-1975 and third defendant and Assistant director raised claim misrepresenting that boat ran aground on 8-9-1975 only to suit Ex. A-2 cover note dated 6-9-1975? Answer to this question would also explain truth or otherwise of Ex.B-7. This depends on Exs.A-6 and A-9. It is the case of plaintiff that after fishing boat ran aground on 8-9-1975, third defendant informed Assistant Director by issuing Ex.A-6 telegram. It was received (as endorsed on Ex.A-6) at the office of Assistant Director at 12.45 pm. P.W. 1 who is Regional Director of Fisheries, Visakhapatnam, proved Ex.A-6. In turn Assistant Director issued telegram to second defendant. Admitting the same Ex.A-9 letter dated 12-9-1975 was sent by second defendant to Assistant Director, which reads as under.

Dear Sir,

Re: Mechanised Fishing Boat SORRAH-30 ran aground near Pudimadaka -Hirer Mr. K. Veerraju.

We confirm we have received your telegram of 8th inst. reading as under:

Hirer Reported Sorrah 30 Aground Near Pudimadaka Depute Surveyor

We also confirm we have received your confirmation letter d/8-9-75 regarding the above.

We now refer to the personal discussion we have had at Visakhapatnam on 11-9-1975 during the course of which we had informed you that along with the Surveyor we visited the spot of accident and found that the boat Sorrah-30 was abandoned and its engine was completely submerged in the sand. We had also informed you during the discussion, that the Surveyor is of the opinion that in case the Engine is not salvaged within 48 hours it would be considered as a total loss. As such, we request you to kindly advise the hirer of the above boat Mr. K. Veerraju, to take immediate action to salvage the engine.

We now await your advices for having taken action in the matter.

Thanking you,

Yours faithfully, For The New India Assurance Co. Ltd., Sd/- V.S. Angadi

15. The above letter is self-explanatory. It does not make any reference to

allegation that "Sorrah 30" ran aground on 3-9-1975 or other details contained in Ex.B-7 report. Ex.B-7 dated 16-9-1975 came to be given by surveyor four days after Ex.A-9. In Ex.A-9 second defendant refers to visit of surveyor to the spot of accident. If that be the case, Ex.A-9 must have contained averment that as per the enquiries made by surveyor, the ship ran aground on 3-9-1975 before Ex.A-2 cover note was issued by D.W. 1. These are strong circumstances, which would improbabilise contents of Ex.B-7 report. Mr. V.S. Angadi, who is signatory on Ex.A-9 on behalf of second defendant was not examined and this is fatal to the case of defendants. He would have been best person to speak about the facts, which are conspicuous by their absence in Ex.A-9. Therefore a reading of Exs.A-6, A-9 and B-7 would show that the case set up by defendants is improbable and in any event it is not proved. Further Ex.A-9 letter written by Sri Angadi on behalf of second defendant also speaks about surveyor visiting spot does not contain any such allegation that the ship ran aground on 3-9-1975.

16. Therefore it must be field that defendants Tailed to prove their allegation that third defendant obtained Ex.A-2 cover note by making false representation.

17. In the result, for the above reasons, appeal fails and is liable to be dismissed. It is accordingly dismissed confirming the judgment and decree of trial Court. The appellants shall pay costs through out to respondent/plaintiff.