

(1990) 06 KL CK 0024
In the High Court Of Kerala

New India Assurance Co. Ltd.

APPELLANT

Vs

Radhakrishnan

RESPONDENT

Date of Decision : 22-06-1990

Acts Referred:

Evidence Act, 1872 — Section 114, 57, 85
MARINE INSURANCE ACT, 1963 — Section 35

Citation : (1991) 1 ACC 190

Hon'ble Judges : Padmanabhan, J

Bench : Single Bench

Judgement

Padmanabhan, J.—Fishing boat "Chitralckha" belonging to the plaintiff was insured with the appellant-first defendant under a marine insurance policy valid from 12-1-1978 to 11-1-1979. The policy included a special condition by way of warranty (monsoon cover) prohibiting fishing operations during monsoon season from 1-6-1978 to 15-8-1978 outside the limits of Neendakara Port While engaged in fishing operations by about 6.00 a.m. on 9-3-1978, due to engine failure and weather conditions, the boat was washed off and lost in the sea. The crew was saved by fishermen. These are admitted facts.

2. In the suit claiming over Rs. 93, 000/- under the policy, the main defence (the only one which was pressed into service before me other than regarding quantum) was violation of the special condition which exonerated and discharged the insurer. On the evidence, trial court found that the boat did not go beyond the Port limits and hence it did not violate the special condition. The suit was decreed. The only question that has to be considered is whether the claim is liable to fail due to violation of the condition. Correctness of the amount decreed may come up only if this question is found in favour of the plaintiff.

3. There is no dispute on the question that if the special condition is violated, the insurer is automatically discharged from liability. A warranty in a marine insurance policy involving risk is a special condition which may be either express or implied. It must be exactly complied with, whether it be material to the risk or

not If it is not complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred before that date. Warranty is different from a representation in the sense that the former requires a strict and literal fulfilment, but the latter may be satisfied with substantial and equitable compliance. The contract does not exist unless the warranty is literally complied with. It is a promissory warranty by which the assured undertakes that some particular thing shall or shall not be done or that some condition shall be fulfilled or affirms or negatives the existence of a particular state of facts. Warranty, as signifying a condition precedent, is inveterate in marine insurance unlike in some other branches of law, for example, in relation to the law of sale of goods, where it signifies only a collateral stipulation, the breach of which gives rise to merely a claim for damages and not a right to avoid the contract. The position, so far as a marine insurance policy is concerned, is otherwise as Section 35 of the Marine Insurance Act specifically indicates. I am fortified in this context by various authorities on the subject quoted before me.

4. In this case, there was a prohibition against conducting fishing operations during monsoon season, on account of risk involved. By the special cover inserted only on payment of additional premium, restricted permission alone was given for fishing operations from 1-6-1978 to 15-8-1978 during monsoon on account of the risk involved. During that period, fishing operations covering the risk on the policy was permitted only within the Port limits. Fishing beyond that limit was prohibited. That means, if the boat has gone beyond the limits and thereby incurred the risk, it is outside the policy. There is no dispute regarding the fact that the Port limits extend only upto the sea, where the water is 10 fathoms deep and not beyond that. Therefore, the short question for consideration is only whether-the boat was within the above area or not at the time when the risk was involved.

5. In deciding this question, we have got the depositions of PWs 1 to 3, DWs 1 to 3 and various documents produced and proved by either side. Trial court did not consider the evidence convincing in order to find that there was violation of the condition. I disagree. Under the licence issued to the boat, it could go upto 15 miles into the sea. DW 1 is the surveyor and Ext. B8 is his survey report. In Ext. B8 report, he did not advert to the special conditions in Ext. A1 policy. On the basis of the licence conditions, he said in Ext. B8 that fishing operations were within the limits. But in the box he gave clear evidence that at the time of the tragedy, the boat was engaged in fishing operations in the sea beyond the Port limits, where the water is 20 fathoms deep. Ext. B8 report and his evidence in the box were based on Exts. B9, B10, B14, B15, XI, X2 as well as some other statements and the answers given by PWs 1 to 3 before him. PW1 is the plaintiff and PWs 2 and 3 are respectively the rank and driver of the boat at the time of the incident. Exts. B9 and B10 are the statements given by PWs 2 and 3 before the Notary and attested by him under his seal. Exts. B14 and B15 are affidavits filed before the Notary by PWs 2 and 3. They are also under his signature and

seal. Exts. X1 and X2 are statements filed by PWs 2 and 3 before the Port Officer, on whose behalf his assistant, DW 2, was examined. All these documents were duly received in the Port Office in time and duly made available to DW 1. There is no case or evidence that these are subsequent manipulations. The trend of these affidavits and statements given before the competent statutory authorities by the members of the crew, who are admittedly the only competent persons, is that at the time of tragedy, the boat was fishing in the sea within 15 miles, but in water 20 fathoms deep. It was then that it had engine failure and was washed off and sunk in spite of rescue operations.

6. But, in the box, when they were made conscious of the adverse effect on the plaintiff on account of the warranty in the policy, they retracted from the above statements and pleaded ignorance of them. As PWs 2 and 3, they said that fishing operations were only in eight fathoms depth of water, which is within the permissible limits under the policy. Since the Notary and the Port Officer, before whom the statements and affidavits were filed, were not examined and since Exts. B9, B10, B14, B15 and Exts. XI and X2 were not admitted by PWs 2 and 3, the trial court refused to act on these documents. In doing so, the trial Judge even ignored the evidence of DW 1 that PWs 2 and 3 were produced before him by the plaintiff himself and he questioned them and elicited that the boat was in 20 fathoms water. The admission of PWs 2 and 3 that they were questioned by DW 1 was also ignored. As PW1, the plaintiff admitted that Ext. B3 affidavit was sworn to by him.

7. By Ext. B17 letter, the insurer wrote to the Port Officer to ascertain the limits of Neendakara Port and the depth of water, where fishing operations were conducted at the relevant time. Ext B2 reply from the Port Officer dated 15-11-1978 is that it was about 20 fathoms of water, which is beyond the Port limits. That answer could only be on the statements given by PWs 2 and 3. This is the information in Ext. B5 certificate given by the Port Officer also. Ext. B5 was quoted with approval by the plaintiff in Ext. B18 letter sent by him to the insurer. He was only contending that the boat was being operated within 15 miles according to the licence. That means, in Ext. B 18 he admitted what is contained in Exts. B2 and 5 that the boat was in 20 fathoms of water to be correct. That was reiterated by the plaintiff in Ext B19 also. Thus the position before suit was that Exts. B9, B10, B14, B15 and Exts. X1 and X2 were not disputed and it was an admitted fact that fishing was in 20 fathoms of water, but within the limits of 15 miles which has nothing to do with the special condition in Ext A1. In these circumstances, the above documents and the evidence of DWs 1 and 2 had to be accepted in preference to the doubtful belated versions of PWs 1 to 3, which went against their previous statements.

8. The Notary was not available for examination. Even without his examination, Exts. B9, B10, B14 and B15 filed before him had to be accepted as they contained his signature and seal, which are not in dispute. They came from proper custody. That is the case with Exts. X1 and X2 also. The statements were

recorded in the discharge of official duties and there is no question of any mala fides involved in them. u/s 8(c) of the Notaries Act, 1932 the Notary is entitled, by virtue of his office, to administer oath to or take affidavit from any person. When such an act is done by him under his signature and seal, it had to be deemed to be a notarial act, as provided in Sub-section (2). That means, it must be accepted as an official act of the Notary. Section 57(6) of the Evidence Act authorises the court to take judicial notice of the seals of the Notaries Public. Notary is a person appointed under the Notaries Act and officially recognised in the Commercial World. u/s 85 of the Evidence Act, there is presumption of execution and authentication for his acts. As held in Jugraj Singh and Another Vs. Jaswant Singh and Others, , when there is an endorsement by the Notary Public that the document had been subscribed and sworn before him, there is the presumption of regularity of official acts attached to it That presumption, unless otherwise shown, extends to the level that he satisfied himself in the discharge of official duties that the person who was executing was the proper person. There is the presumption of regularity envisaged by Section 114 of the Evidence Act Therefore, Exts.B 9, B10, B14, B15 as well as Exis.X 1 and X2 had to be accepted as genuine by the trial court.

9. In this case, we are having some added circumstances also. There is the evidence of DW 1 that PWs 2 and 3 were produced before him by PW 1, plaintiff, and all were questioned by him and he was satisfied. So also, there are the admissions of the plaintiff in the documents referred to above and the correspondence from the Port Office and the evidence of DW 2. PWs. 2 and 3 admit that they were questioned by DW 1 and they gave statements. All the records came from the proper custody of the Port office. PWs 2 and 3 were not able to specifically deny Exts. B9, B10, B14 and B15. They are employees of the plaintiff, who had added reason to redact from their previous statements. The fact that the boat was in 20 fathoms water, which is beyond the Port limits, was an admitted fact also before suit Ext. B1 notification, defining the limits of Nccndakara Port, is not in dispute and it is admitted that Port limits extend only upto 10 fathoms of water.

10. Trial Judge has not considered any of these factual or legal aspects. There cannot be any dispute that the plaintiff violated the special warranty condition in the policy. The contract is, therefore, discharged and the insurer is exonerated.

Appeal is allowed. Decree and judgment are set aside. Suit is dismissed. Considering the admitted fact that the boat is lost, there will be no order as to costs.