(2003) 09 KL CK 0049

In the High Court Of Kerala

Case No : AS. No. 97 of 2001

Raghunathan K APPELLANT

Vs

The National Insurance Co. Ltd. and others RESPONDENT

Date of Decision : 25-09-2003

Acts Referred:
Penal Code, 1860 (IPC) — Section 380, 457, 461

Citation : (2004) 1 KLJ 401

Hon'ble Judges : Plus C. Kuriakose, J;K.S. Radhakrishnan, J

Bench : Division Bench

Advocate : B. Radhakrishnan Thottathil and George Varghese, for the Appellant; N.B. Mahadevan Pillai, K. Subash Chandra Bose and K.B. Sreekumar, for the Respondent

Judgement

Radhakrishnan, J.—Plaintiff is the appellant. Suit was instituted for recovery of an amount of Rs. 87,04,872/- with 24% interest from the defendants towards insurance claim. We may extract the reliefs sought for by the plaintiff below:

1. To allow the plaintiff to recover a sum of Rs. 62,04872/- with 24% future interest as per Memo of Accounts (A) shown below from the defendants and their assets through court.

2. To allow the plaintiff to recover a sum of Rs. 25 lakhs as compensation for the reasons stated in para 38 & 39 of the plaint and shown in the Memo of

Accounts (B) from the defendants and their assets through court.

3. To allow the plaintiff to recover the cost of the suit from the defendants.

4. To allow such other reliefs to the plaintiff as this Hon''ble Court deems fit and proper in the nature and circumstances of this case.

Trial court found that the claim was not bonfide and dismissed the suit. Aggrieved by the same this appeal has been preferred. Plaintiff is the sole proprietor Lakshmi Vihar Finance & Investment, Kollam. He is conducting business as a pawn broker under licence No. 847. He is also engaged in other business (money lending business, cashewnut business, abkari business and also business in tile industry) for the last three decades. He is an income tax and wealth-tax payee. Lakshmi Vihar Finance is conducted in a three storeyed building situated on the side of Kollam-Alleppey National Highway. Plaintiff and members of his family are residing in the same compound at a distance of 60-70 feet from the business premises. Residential building as well as finance company are situated within strong boundary walls on all sides with an iron gate facing towards the public road on the northern side. Plaintiff as we have already, indicated is a pawn broker. There were strong iron safes in the building for keeping cash and gold ornaments pledged by the pawners. The Iron safes were kept in the 2nd floor of the building. Plaintiff is also a policy holder in connection With his business as per policy No. 570500/46/05/75/93/00014 dated 16-4-1993 for a- sum of Rs. 75 lakhs which Was valid from 18-4-1993 to 17-4-1994. Plaintiff was taking the policy of the like nature from 1992-93 onwards from the third defendant insurance company.

2. It was noticed that on 8-5-1993 during night time one iron safe kept in the 2nd floor of the plaintiffs office building was broke opened and the entire gold ornaments kept inside that safe was stollen away by some unknown persons. The gold ornaments of each customer as tied in small pouches and kept inside the drawer of the iron safe. The other iron safes kept in the same room were found in tact. On the next day morning it was noticed that the door of the room in which iron saves were kept was seen opened. Plaintiffs son immediately rushed to the spot and informed plaintiff. He also rushed to the spot. Matter was immediately reported by the plaintiff to the Kollam West Police Station and police came to the spot with dog squad. Police officials inspected the entire office premises and obtained finger prints and noted other available evidence. A case was registered by the Kollam West Police as crime No. 91/93 on 9-5-1993 itself u/s 457,380 and 461 of the Indian Penal Code based on the first information statement. West Circle Inspector of Police prepared a scene mahazar at about 10-30 a.m. on the same day. On verification of records, registers and books of accounts, the plaintiff found that gold ornaments wieghing 10630.550 gms. pledged by 735 pawners were stolen away by the burglars. The value of the gold ornaments so lost from his business comes to Rs. 4401047/-:

3. Plaintiff informed about the burglary to the 3rd defendant insurance company. Officers of the insurance company inspected the spot and premises of the business and as per the directions of the third defendant burglary claim was made on 11-5-1993 in the prescribed form claiming a sum of Rs. 4401047/- towards the value of the gold ornaments stolen away from the finance company. On information regarding the burglary by the public, the persons who have pledged their gold ornaments approached the plaintiff for making good the loss sustained by them. Plaintiff made request to the 3rd defendant to release gold ornaments kept in the other safes which were left untouched. Third defendant did not allow the said request stating that the items in the two iron safes can be

released only on getting clearance from the surveyors. On 13-5-93 M/s. Velayutham & Company, Madras was engaged to take survey and assess the loss. Velayuthem and Company sent a registered letter to the plaintiff directing him to submit a list of pledged articles from the iron safe together with a questionnaire to be duly filled up by the plaintiff. Plaintiff had returned the questionnaire duly filled up on 8-6-1993 along With a list of complete addresses of the 735 pawners whose gold ornaments were kept in the damages iron safe and also; given the particulars of their articles. Third defendant has also sent a registered letter dated 2-6-1993 asking the plaintiff to clarify certain facts. For that notice plaintiff sent a detailed reply on 14-7-1993.

4. Plaintiff stated that on 6-12-1993 several persons gathered together and threatened the plaintiff to make good the loss sustained by them. Later plaintiff had to obtain police protection for him and the members of his family. Plaintiff published the real state of affairs for information of the pawners who were not satisfied. Consequently mediators intervened. Sri. Samarian who was the then Municipal Councillor and Sri. Sethanan Pillai, Advocate who was also District Panchayat Member negotiated the matter. Plaintiff and pawners had to enter into an agreement to give the value of the gold at the rate of 410 grm, which was the then market value of the gold with interest for the amount. Plaintiff had to sell away his cashew factory and realise an amount of Rs.42.5 lakhs and paid the same to pawners and settled their claim at Rs. 43,50,920/-. Plaintiff submitted in spite of repeated requests claim was not honoured by the insurance company. He had to approach National Consumer Disputes Redressal Commission, New Delhi and filed O.P. 89/94 on 18-4-1994. Later insurance company had intimated the plaintiff regarding the repudiation of the claim vide letter No. 57050G/SB/buk/94 dated 17-5-1994. Insurance company resisted the claim before the Commissioner. Later the OP filed before the Commissioner was withdrawn and plaintiff instituted the present suit.

5. The Insurance Company resisted the claim by filing written statement. According to them the suit was laid without any bonafides and the pleadings are devoid of good faith. It was pointed out that plaintiffs place of business was not protected or safeguarded properly as per the terms and conditions of the policy. According to them, the burglary and house breaking alleged by the plaintiff is false and misguiding. It was stated that the safe in which the pawned gold were allegedly kept as seen opened first and demaged later. The flush door of the cabin of the insured was broken in a strange way. 735 pouches were found in the adjacent compound as empty making it virtually impossible for burglars to empty them in the early hours of the morning when four dogs were roaming and the traffic had already started in full swing on the main road. Further it was also stated that Crime Branch is in league with the plaintiff and they did not investigate the case properly. It was pointed out that the claim was repudiated after considering the details of the burglary and the evidence collected from the spot as well as from the report of the surveyors. Before the court below plaintiff get himself examined as PW 1. PWs. 2 to 9 were also examined on the side of

the plaintiff. Exts. A1 to A 107 documents were also marked on the side of the plaintiff. On the side of the defendants DWs. 1 to 3 were examined and Exts. B1 to B53 documents were marked. Plaintiff was having a valid policy for an amount of Rs. 75 lakhs covers the period from 18-4-1993 to 17-4-1994 is admitted. Policy has been produced as A6. Insurance company contended that the claim is not bonafide and that the plaintiff has to be suspected. They have conducted their own investigation. A retired Dy. S.P. was examined as DW2 who submitted preliminary report Ext. B5 and final report B10. Insurance company also relied upon the oral evidence of DW1 to disprove the case put up by the plaintiff. They also highlighted the various facts and circumstances. Plaintiff gave oral evidence as PW1 and also examined PWs. 2 to 9 and also produced various documents. Insurance. Company further submitted that even if the plaintiff has not violated the terms of the insurance policy plaintiff is not entitled to get insurance claim.

6. A contract of insurance may be defined as a contract whereby one person called the "Insurer" undertakes in return for the agreed consideration, called the "premium" to pay to other person, called the "assured", a sum of money or its equivalent, on the happening of a specified event. It is a fundamental principle of insurance law that the almost good faith must be observed by each party. This rule has been clearly stated by Lord Mansfield in Carter v. Boehm (1966) 3 Brr 1905 at page 1909 as follows :

Insurance is a contract upon speculation. The special facts, upon which the contingent chance is to be computed, lie more commonly in the knowledge of the insured only the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risque as if it did not exist. The keeping back such a circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived, and the policy is void, because the risque run is intended to be run at the time of the agreement. The governing principle is applicable to all contracts and dealings. Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary.

As per insurance law the onus of proving that the loss was caused by a peril insured against lies upon the assured. Unless he discharges the onus, the claim must fail. In Gorman v. Hand-in-Hand Insurance Co; (1877) I.R. 11 C.L. 224 (fire insurance, Ross v. Hunter (1790), 4 Term Rep. 33 (marine Insurance) Mac Donald v. Refuge Assurance Co. 1890,17 R. (Ct. of Sess.) 955 (personal accident insurance) Macbet & Co. v. King (1916) 115 L.T. 221 (marine insurance) stated that the assured is not, however, required to prove the cause of the loss conclusively. All that he need do is to establish a prima facie case. In Nobel''s Explosive Co. v. British Dominions General Insurance Co., (1918) W.C. & Ins. Rep. 106, Ibid at page 108 Lord Guthrie said as follows:

Outside the region of mathematics, proof is never anything more than probability. It is for the Court in each case to say whether the probability is so slight, or so equally balanced by counter-probabilities are so strong and so one-sided as to amount to legal proof. The abstract possibility of mistake can never be excluded.

In many cases direct evidence as to the cause of the insurance is not always available and accordingly the success or failure of the claim depends upon whether the onus of proof, upon the materials before the court has been discharged.

7. On the above mentioned legal principle we may examine whether the plaintiff has primafacie established loss in the manner in which it was caused. Incident had occurred on 8-5-1993 during night time. It was noticed that one iron safe kept in the second floor of the plaintiffs Lakshmi Vihar Office Building was broke opened and the entire gold ornaments kept inside the safe were stolen away. Matter was immediately informed to the Kollam West Police Station and the police came to the spot With dog squad. Police officials inspected the entire office premises and obtained finger prints and noted other available evidence. A case was registered by the Kollam West Police as Crime No. 91/ 93 on 9-5-1993 itself u/s 457,880 and 461 t of the Indian Penal Code based on the first Information statement. The West Circle Inspector of Police prepared a scene mahazar at about 10.30 A.M on the same day. Police investigation was not fruitful and the culprits were not caught during the period of investigation. Consequently plaintiff had filed O.P. 15056/93 before this Court. This Court disposed of the writ petition on 12-11-1993 with a direction that the special team under leadership of Dy. S.P, may continue the further investigation and expedite the matter and to file the final report at the earliest. Investigation resulted in certain arrest of the culprits and based on the disclosure statement made by them resulted in recovery of certain gold ingots and a mahazar was prepared and the same was produced before the Judicial First Class Magistrate Court. Kollam. Copy of the mahazar relating to the gold ingot is Ext. A59. After investigation case was filed before the Chief Judicial Magistrate Court based on the charge laid by the concerned police. Ext. A60 is the charge sheet. Another recovery mahazar prepared by the Deputy Superintendent Crime Branch C.I.D. is Ext. A61 and recovery mahazar dated 14-3-1996 was also prepared by the Dy. S.P. Copy of that recovery mahazar is Ext. A62. Case diary produced by the Dy. S.P. is Ext. A 63. Add1. Sub Inspector of Museum Police Station prepared a mahazar in connection with the recovery of the material object after arresting the accused. Copy of that mahazar is Ext. A64. The Circle Inspector of Police, Museum has recovered the gold ingot after the arrest of the accused. Copy of the mahazar relating to the gold ingot recovery by the Circle Inspector is Ext. A65. Ext. A66 is another mahazar prepared by the Crime Branch C.I.D. on 14-3-1996. On the side of the appellant PW-3 Superintendent of Crime Branch was examined. He deposed that he had laid final charge Ext. A60 before the Criminal Court. According to him, as per the charge sheet, 53 witnesses were cited by the Crime Branch Police and

investigation revealed that 10 kilograms, 360 grams and 550 s1 grams of gold ornaments worth Rs. 44,01,047/- has been lost in the alleged occurrence. Eight accused were charge sheeted out of which accused 1 and 2 were arrested and it was noticed that they committed the burglary by breaking open the collapsible gates and after tampering the lock of the safe and they took the gold ornaments from the safe. It was also noticed that the accused had entrusted the gold ornaments to third accused from whom the 4th accused had received the said gold ornaments and through accused 4,5 and 6 the gold ornaments are also seen received by 7th accused. Seventh accused sold the same to 8th accused. According to him, out of the material objects produced before the court items 12 and 13 are the items recovered by the Museum police in connection with Crime No. 28/96 and those items were produced before the Judicial First Class Magistrate Court III, Thiruvananthapuram. On the side of the appellant also examined PW4, Dy. S.P. Of Crime Branch, Kollam. He had conducted investigation during the period from 20-5-1993 till 23-4-1993. A mahazar was prepared at that time which is Ext. A59. PW5 is the Crime Branch Dy. S.P. He identified Ext. A3 Scene mahazar in which he has noted the details of the Lakshmi Vihar Building which is having third floor and the bank is functioning in the third floor. He had prepared Ext., A4 mahazar after collecting the details found at the scene of occurrence. PW6 is the Crime Branch Superintendent of Police, Kollam. He has also narrated the incident. PW-7 is the C.I. of Thampannoor Police Station. He has also given the details of investigation.

8. We are of the considered view that the police department had conducted a very detailed investigation and there is no evidence to connect the incident with the plaintiff. Unless and until there is evidence to show that the investigation conducted by the police is faulty and motivated it would not be possible to discard their findings and accept that of the investigating officer appointed by the Insurance Company. Insurance officer, appointed by the Insurance Company. Insurance company conducted their own '' investigation through DW2, a retired Dy. S.P. who submitted Ext. B5 preliminary report and Ext. B 10 final report. B 5 and B 10 reports submitted by DW2 did not inspire confidence. Reports on the face of it would indicate that he has made investigation on a preconceived notion. Report would indicate that he had no faith in the police department of which he was Deputy Superintendent of Police once. We may refer to a portion of the report which reads as follows: ''

Efforts are continuing by the Crime Branch. Though the Crime Branch Officers have their opinion that this is a cooked up case, they may not be in a position to refer the case as-false or otherwise due to the influence of the insured. They may continue to investigate the case for some more months and send the case to undetected list.

We fail to see why a retired Superintendent of Police felt that though the Crime Branch Officers have their opinion that this is a cooked up case they may not be in a position to refer the case as false or otherwise due to the influence of the insured. He is also of the opinion that the Crime Branch may continue to investigate the case for some more months and send the case to undetected list. We are of the view this is not the manner in which an investigating officer of the Insurance Company should function and approach the issue. We must approach the issue in a detached and dispassionate manner. In the final report dated 27-7-1994 he has pointed out certain circumstances which according to him would dilute the case of the plaintiff. The absence of a watchman on the crucial day, fact that the dog not bark, the manner in which the safe was broken are also highlighted apart from other special circumstances.

9. This case has been investigated by a team headed by Deputy Superintendent of Police as per the direction of this Court. There is no materials to show that they are conducted the investigation in a haphazard manner in order to help the plaintiff. They have also produced the case diary before this court. We have perused the same. We are not justified in rendering any opinion on the basis of the case diary. Further criminal case is pending before the Court. We would not however subscribe the view of the retired Deputy Superintendent of Police who investigated the case on behalf of the Insurance Company. On the other hand, we find no reason to discard these facts unearthed on the investigation conducted by the police department. We therefore hold as far as plaintiff is concerned he has discharged the burden of proving that loss was caused by burglary.

10. We have found that assured had proved a prima facie case of loss within the policy due to the incident happened on 8-5-1993. If the insurer wanted to disprove the claim onus should be shifted to insured in proving loss within exempted clause 2. Ext. A6 is Burglary & Housebreaking Policy which consists of general conditions. General Condition No. 3 of the Policy reads as follows:

REASONABLE CARE: The insured shall lake all reasonable steps to safeguard the property insured against accident, loss or damage.

Reference may be made to general conditions No. 9 which is extracted below :

FRAUD: If any claim under this policy shall in any respect fraudulent or if any fraudulent means or devise are used by the insured or any one acting on the insured''s behalf to obtain any benefit under this policy, all benefits and rights under the policy shall be forfeited.

Contention was also raised that since watchman was not there on the date of the occurrence it is to be taken that insured has not taken reasonable care to safeguard the property. We have to read the said condition along with clause viii of the exclusion clauses which says that company shall not be liable if the premises shall have been left uninhabited by day and night for seven or more consecutive days and nights. So mere fact that on the crucial day watcher was absent in the premises itself would not be ground to deny the claim of the insured. When the assured has established a prima facie case of loss within the policy,- the insurers are entitled to show that the loss falls within an exception.

The burden of proving that the loss was caused by an excepted peril lies upon them. If the insurance company fails to produce sufficient evidence and they have not discharged the onus of proof, the assured succeeds in his claim.

11. We are of the view in this case insurance company have not succeeded in establishing that claim was made by fraud or that claim would fall under exclusion clause in the policy. We are therefore of the view that insurance claim raised by the plaintiff is valid and liable to be honoured. We may in this connection refer to the evidence given by DW1 who is Senior Divisional Manager of Insurance Company. According to him, after getting information that theft had occurred on 8-5-1993 he went to the site of occurrence. He found pouches with yellow colour in the adjacent compound. He had noticed 735 pouches there and each pouch was found opened and were empty. The ties of the pouches were untied and paper slips with numbers were also seen affixed in the pouches. He counted all the pouches in the presence of the plaintiff. Police officers were also present at that time. He stated that at the time when he saw the pouches in-the adjacent compound, he felt that those pouches were left there for helping the company to estimate the quantity of stolen jewellery. He felt that considerable time is required for loosening 735 pouches by the alleged burglars within a short period, which causes suspicion of on the case put up by the plaintiff. Counsel appearing for the insurance company also tried to project the different versions given by police-on various occasions. Reference was made to A4 wherein a dozen number of pouches were noted. We find in the final report the noting 150 is a mistake. Quantity of gold shown in the report is same. In this connection reference may also be made to evidence of DW3. After all he is not an expert in criminal investigation. We notice that plaintiff had issued a suit notice A44 on 22-03-1994 to which defendant sent A45 reply 19-04-1994. There is no dispute regarding the number of pouches. No accusation was made against appellant as well. Further the deposition of DW1 that he had noticed 735 pouches empty cannot be believed. Those facts were with him when he deposed against the police report. With those report he tried to make out a case in his oral evidence. We are of the view the suspicious circumstances as suggested by DW 1 or DW2 are itself not sufficient to hold that no proper investigation was conducted by the crime branch team headed by Dy. Superintendent of Police.

12. We have al ready found in the facts and circumstances of the case the claim made by the plaintiff is bona fide. We find no suspicious circumstance to hold that the crime branch team headed by Deputy Superintendent of Police has not properly investigated the crime.

13. We may now examine what is the extent of relief that could be granted to the plaintiff in this case. We have pointed out plaintiff has raised claim under two heads, i.e., A and B. We find no reason to grant any of the reliefs prayed for under head B. We are not inclined to hold that because of the incident and because of the attitude of the insurance company that the plaintiff had sustained loss. Insurance company had not committed any mischief so as to cause, loss of

reputation of the plaintiff. We find no reason to grant the relief. Mental agony suffering also cannot be attributed to the insurance company. Insurance company cannot be held liable for plaintiff moving the national commission for redressing his grievance. So also for filling a writ petition before this court. We therefore reject all the grounds raised under head B. With regard to the claim under head A we have to refer to the report of the surveyor. As we have already indicated that N. Velayudhan & Company was appointed as surveyor who submitted Ext.B6 report. Surveyor assessed the weight of the gold alleged to have been burgled at 10,631-100 grams. Market value of gold at Trivandrum 09-05-1990 published in the press was Rs.410.00 per gram. They therefore concluded that the market'' value of 10631.100 grams of new gold would come to Rs.43,58,751.00. We find from the surveyor''s report that they have reduced an amount; of Rs.6,53,813.00 ie. 15% for fineness. We are of the view the deduction of 15% for fineness cannot be justified since the plaintiff is not selling or purchasing gold. Therefore there is no question of fineness. As we have already indicated that plaintiff had already satisfied all customers and therefore necessarily insurance company has to honour the claim. We therefore hold that deduction made for fineness cannot be justified. If that be so, going by the valuation made by the surveyor plaintiff is entitled to get an amount of Rs.43,58,751.00 towards market value of 10,631.100 grams of gold. Surveyor also found there is under insurance. It was noticed that total value of 26,332.75 grams at Rs.410/- per gram and after deducting 15% for lesser fineness works out to Rs.91,76,964/- while the insurance is only for Rs.75,00,000/- and hence under insured after deducting the amount towards under insurance ultimately surveyor has fixed Rs.30,27,912.00 as the amount due. We are of the-view there is no substance or material before this court to show under insurance Therefore the deduction made in the case under insurance cannot be sustained. Under such circumstance we are of the view plaintiff is entitled to get a decree for an amount of Rs. 43,56,751.00 with interest. Counsel for the plaintiff submitted that he is entitled to get 25% interest from the date of suit notice. Rate of interest claimed by the plaintiff is excessive. We think 12% interest is reasonable. Therefore the plaintiff is entitled to get interest at the rate of 12% per annum on the amount awarded from 22-3-1994 to 14-12-1995. We also hold he is entitled to another 9% interest from 15-12-1995 till the date of the decree. From the date of the decree till realization he would be entitled to get 6% per annum interest. Suit is decreed accordingly. In the facts and circumstances of the case plaintiff would also be entitled to get costs through out the proceedings.