(2010) 09 PAT CK 0083

In the Patna High Court

Case No : First Appeal No. 162 of 2001

The Oriental Insurance Company and Another — APPELLANT

Vs

Purnima Enterprises — RESPONDENT

Date of Decision : 23-09-2010

Acts Referred:

Citation : (2010) 09 PAT CK 0083

Final Decision : Allowed

Judgement

Mungeshwar Sahoo, J.—The defendants-appellants have filed this first appeal challenging the judgment and decree dated 17.1.2001 passed by Sri Subodh Kumar, the learned Subordinate Judge 5th, Muzaffarpur in Title Suit No. 59 of 1992 decreeing the plaintiff-respondent''s money suit.

2. The plaintiff-respondent filed the aforesaid suit claiming a decree for Rs. 17,00,000/- from the appellants. The plaintiff claimed the said relief on the facts inter alia that the plaintiff is a small scale industries unit and is a partnership firm which carries of the business of manufacturing Box Strapping Jericane (Plastic Container) and reprocess raw materials from PP/HDPE Granales. The raw materials such as Polypropelene, Koyelene, Master Batch, Pigments, Titanium etc. were purchased from countrywide manufactures and were stored in the godown. The scrapes were purchased from local venders and were stored in open field and the costly finished products were stored in the godown whereas voluminous products were stored in open field.

3. The further case of the plaintiff is that the factory of the plaintiff was insured with the appellants including loss and damage by fire and the policy number was 33211/8/0/F/419/88. On 29.4.1989 the firm of the plaintiff caught fire. As a result of the said fire the godown, the wooden switch board and other materials were badly burnt as a result of which the raw materials, semi furnished goods and finished products which was stocked up to 6 feet height in the godown were also burnt. The plaintiff immediately after the fire sent written intimation to the Police Station, Fire Officer, Nirala Studio, Central Bank of India and the

appellants. The plaintiff also lodged a claim under the insurance policy aforesaid claiming Rs. 8,17,000/- by way of loss due to fire. It is stated that the insured premises was 92.5 feet wide (east to west) and 185 feet long (north to south). The plaintiff also described the length and breadth of workshop, guardroom, godown and also raw materials kept on the veranda.

4. The further case of the plaintiff is that since loan was obtained from Central Bank of India, the plaintiff was submitting the statements and was also submitting periodic sales tax returns. As per the stock statement submitted at the end of March 1989 the stock value was Rs. 10,79,700/-. On the basis of the said statement submitted on 31.3.1989 and goods receipt register, sales register, the stock of raw materials and finished goods, the total damage was calculated at Rs. 8,17,000/-. The appellants deputed Sri A.K. Nathani as a surveyor to visit the plaintiff''s factory who visited on 1.5.1989 and inspected the books of account and other documents and he was satisfied that the plaintiff sustained loss of Rs. 8,17,000/- due to fire. However, the defendants-appellants appointed another surveyor Mr. N.N. Jha who also inspected the business premises and documents. Thereafter the plaintiff ran from pillar to post and requested the defendants-appellants to settle the claim amount and also sent several letters but in spite of the same the defendants delayed the settlement and lastly on 10.4.1991 sent a loss voucher of Rs. 72,020/- only as full and final settlement against the claim of the plaintiff of Rs. 8,17,000/-. The plaintiff refused to accept the loss voucher and thereafter filed the suit claiming Rs. 17,00,000/- including interest @ 18% and also loss of profits, name, fame, credit and goodwill and loss of current and prospective business caused by the defendants.

5. The defendants-appellants appeared and filed a contesting written statement. The defence is that the suit is barred by law of limitation, estoppel, waiver and acquiescence. The insurance of the plaintiff was denied. Catching of fire due to electric short-circuit and allegation of badly burnt were denied. Lodging of claim of Rs. 8,17,000/- was also denied. The stock statements were denied. Likewise all other allegations made in the plaint was evasively denied.

6. On the basis of the above pleadings of the parties the learned trial court framed 9 issues as follows:

(I) Whether plaintiff has got cause of action and right to sue?

(II) Whether the suit is barred by law of limitation, estoppel, waiver and acquiescence ?

(III) Whether the plaintiffs firm i.e. Purnima Enterprises was insured by the defendants ?

(IV) Whether there was accidental fire due to electric short circuit on 29.4.1989 in the premises of Purnima enterprises ?

(V) Whether on account of fire the stock of finished and raw materials of the plaintiff was completely burnt ?

(VI) Whether the account of loss as given by plaintiff is correct ?

(VII) Whether defendants are liable to pay damages to the plaintiff for loss caused by accidental fire ?

(VIII) Whether the plaintiffs sustained loss of Rs. 17,00,000/- (Rupees Seventeen lacs) and the defendants are liable to pay the same to the plaintiff under the terms of insurance policy ?

(IX) To what any relief or reliefs plaintiffs is entitled ?

7. It appears that during the trial in support of the case the plaintiff-respondent only adduced oral as well as documentary evidences. The defendants-appellants did not adduce either oral or documentary evidence. After trial the learned court below found that the plaintiff-respondent''s firm was insured with the appellants during the period in question i.e. when the firm caught fire causing damage. The learned trial court also found the actual value of the stock of the firm on the date of fire i.e. on 29.4.1989 at 1 p.m. was only Rs. 11,78,101/- and, accordingly, held that the defendants are liable to pay 11,78,101/- only. The learned court below also granted interest @ 12% per annum pendent elite and future till realisation.

8. Mr. Priyadarshi, learned Counsel appearing on behalf of the appellants submitted that although no evidence was adduced on behalf of the appellants in the court below but the finding of fact recorded on the basis of evidence by the court below are wrong on fact as well as in law. The learned Counsel submitted that in this case it is admitted fact that the insurance was only for Rs. 10,00,000/-. Against the said insurance cover the plaintiff claimed only Rs. 8,17,000/- as loss due to fire but the learned court below granted more than the claim of the plaintiff without applying his mind. The learned Counsel further submitted that the non-application of mind is further apparent that although the insurance contract was covering for Rs. 10,00,000/- only but the learned court below even granted decree more than the insurance cover of Rs. 10,00,000/-.

9. The learned Counsel further submitted that there was no contract between plaintiff and the defendants regarding the payment of interest and, therefore, interest should not have been granted @ Rs. 12% per annum. The learned Counsel submitted even if interest is payable then it will be payable only after the decree is passed and that too @ 6% as provided u/s 34 of the Code of Civil Procedure.

10. The learned Counsel further submitted that the plaintiff has claimed Rs. 8,17,000/- as damages according to the case when the suit was filed he claimed more than the double amount i.e. 17,00,000/- and, therefore, the plaintiff approached the court with uncleaned hand. On these grounds, the learned Counsel submitted that the impugned judgment and decree are liable to be set aside.

11. On the other hand, the learned Counsel appearing on behalf of the

respondents submitted that there is no illegality in the impugned judgment and decree and the learned court below has rightly after considering the ex parte evidence of the plaintiff- respondent decreed the plaintiff''s suit. The learned Counsel further submitted that plaintiff had taken loan from the Central Band of India and the rate of interest charged by the Bank is 18% per annum, therefore, considering these facts the learned court below has rightly granted decree with interest @ 12% per annum. On these grounds, the learned Counsel submitted that the appeal is liable to be dismissed with costs.

12. As stated above, it appears that no evidence at all has been adduced by the appellants. So far the plaintiff-respondent is concerned 24 witnesses have been examined. Out of the said 24 witnesses except PW 1, PW 8, PW 9, PW 11, PW 12, PW 24 all other witnesses are advocate clerk who have proved the documents on behalf of the plaintiff. PW 1 is Managing Director of the plaintiff who has stated the same thing as detailed in the plaint. At paragraph 12 he has stated that on 29.4.1989 fire caught in the factory due to which the raw materials and furnished goods were burnt. The factory premises and the wiring were also damaged. Informations were given. He has also stated that the godown at that time contained materials worth Rs. 10,79,700/-. The surveyor of the defendants assessed the damage worth Rs. 8,17,000/-. He has proved stock register which has been marked as Ext. 1. He has also proved signature of Mr. A.K. Nathani, surveyor which has been marked as Ext. 3 series i.e. 3 to 3/C. PW 8 is ex-accountant of the firm. He has proved purchase register Ext. 8 and 8-A and also the signature of Mr. Nathani on it, the signatures have been marked as Ext. 3-D and 3-E. PW 9 is scrap dealer who has been examined to say that the plaintiff was purchasing scrap materials. He has proved the cash memos issued by him which has been marked as Ext. 9 to 9-G. He has also proved the invoice of purchase by plaintiff from Kedar Pd. Gupta which has been marked as Ext. 9-H to 9-N. Likewise PW 10 has proved the receipt which has been marked as 9-O to 9-W. PW 11 has only stated that he used to do the wiring work of the firm. PW 12 is ex-driver who was present at the time of firing i.e. at 1 p.m. on 29.4.1989. He has described how he informed the owners and the fire brigade and how the materials burnt in his presence. PW 19 has proved the letters Ext. 10-D which was written to the appellants for settlement of claim. PW 24 is an employee of Fire Station, Muzaffarpur. He has stated that he had got an occasion to extinguish fire of the plaintiff''s firm.

13. From perusal of Ext. 13 the insurance policy, it appears that the insurance cover is for Rs. 10,00,000/-. The report of Mr. Nathani as surveyor has been marked as Ext. 15. From perusal of Ext. 4 and 10-D it appears that the plaintiff originally lodged claim of Rs. 8,17,000/with the defendants-appellants on the ground of loss and damage due to fire in the factory premises.

14. From perusal of the impugned judgment at paragraph 9, the learned court below granted decree on the basis of value of the stock on 29.4.1989. As has been admitted by the plaintiff that some of the materials was not burnt fully and

considering those things the plaintiff lodged claimed of Rs. 8,17,000/- only which impliedly mean that the materials worth value at Rs. 8,17,000/- was only burnt. This was the consistent case of the plaintiff in the advocate notice as well as in the plaint. From perusal of the stock register Ext.1 it appears that the surveyor has signed on the stock register and approved the quantity of materials which have been burnt totally and his signatures have been marked Ext. 3 series. In paragraph 29 of the plaint the plaintiff has valued those materials to be Rs. 8,17,000/-. Therefore, according to the pleading, according to the PW 1 and according to the claim alleged by the plaintiff the materials worth Rs. 8,17,000/- was burnt in the fire. There is no contrary evidence adduced by the defendants. As stated above the learned court below did not consider this fact that the plaintiff claimed loss and damage due to fire for Rs. 8,17,000/- only. Without considering this fact the learned court below came to the finding that the defendants are liable to pay Rs. 11,78,101/- the actual value of the stock on 29.4.1989. It is not the case of the plaintiff that the entire stock was burnt. Therefore, in my opinion the learned court below has wrongly granted the above amount of Rs. 11,78,101/because that was neither the claim of the plaintiff nor it was admitted by the defendants.

15. The other aspect of the matter is that as stated above the insurance policy covers only Rs. 10,00,000/- therefore, in no circumstances the insurance company is liable to pay more than the contractual amount but the learned court below granted more than the contractual amount.

16. The learned Counsel for the appellants submitted that in fact the second surveyor was appointed who valued the burnt materials at Rs. 72,020/- and the said amount was paid to the plaintiff which was refused. The learned Counsel submitted that generally the report of the surveyor is accepted by the court but in the present case the learned trial court did not accept the report of second surveyor. The learned Counsel relied upon a decision reported in Sri Venkateswara Syndicate Vs. Oriental Insurance Company Ltd. and Another, and submitted that no claim in respect of a loss be admitted for payment unless the insurer obtains a report on the loss that has occurred from a person who has a licence issued under Sub-Section 1 of Section 64-UM of the Insurance Act, 1938 as a surveyor or loss assessor and therefore the report of surveyor cannot be rejected outrightly. The learned Counsel further submitted that the insurer has a right to appoint another surveyor and accordingly, the appellant had appointed Sri Jha another surveyor who gave a report of the value of burnt materials to Rs. 72,020/-. So far this submission is concerned, I find no force because in the present case the appellant has not brought on record the report of the second surveyor. Therefore, there is nothing on record to show that on what basis and on what materials the second surveyor assessed the loss of Rs. 72,020/- only. There is nothing on record that the assessment made by the first surveyor i.e. Mr. Nathani was not accepted by the insurer. From perusal of the above referred decision of the Hon''ble Supreme Court it appears that the Hon''ble Supreme Court has interpreted Section 64UM of the Insurance Act and at paragraph 33 to

35 has held as follows:

33. Scheme of Section 64-UM, particularly of Sub-sections (2), (3) and (4) would show that the insurer cannot appoint a second surveyor just as a matter of course. If for any valid reason the report of the surveyor is not acceptable to the insurer may be for the reason if there are inherent defects, if it is found to be arbitrary, excessive, exaggerated, etc., it must specify cogent reasons, without which it is not free to appoint the second surveyor or surveyors till it gets a report which would satisfy its interest. Alternatively, it can be stated that there must be sufficient ground to disagree with the findings of surveyor/surveyors. There is no prohibition in the Insurance Act for appointment of second surveyor by the insurance company, but while doing so, the insurance company has to give satisfactory reasons for not accepting the report of the first surveyor and the need to appoint second surveyor.

34. Section 64-UM(2) of the Insurance Act, 1938, reads that:

64-UM. (2) No claim in respect of a loss which has occurred in India and requiring to be paid or settled in India equal to or exceeding twenty thousand rupees in value on any policy of insurance, arising or intimated to an insurer at any time after the expiry of a period of one year from the commencement of the Insurance (Amendment) Act, 1968, shall, unless otherwise directed by the authority, be admitted for payment or settled by the insurer unless he has obtained a report, on the loss that has occurred, from a person who holds a licence issued under this section to act as a surveyor .....

35. In our considered view, the Insurance Act only mandates that while settling a claim, assistance of a surveyor should be taken but it does not go further and say that the insurer would be bound by whatever the surveyor has assessed or quantified; if for any reason, the insurer is of the view that certain material facts ought to have been taken into consideration while framing a report by the surveyor and if it is not done, it can certainly depute another surveyor for the purpose of conducting a fresh survey to estimate the loss suffered by the insured.

17. Therefore, it is settled principles of law that the insurer cannot appoint second surveyor just as a matter of course. If there is inherent defect in the first surveyor''s report it must specify cogent reasons, without which he is not free to appoint the second surveyor. As stated above in the present case there is no such case made by the appellants that the first report of the surveyor was rejected, either on the ground of arbitrary, excessive, exaggerated etc. Moreover, as stated above the report of the second surveyor is not available on record the evidence of plaintiff regarding loss of Rs. 8,17,000/- remained unchallenged.

18. In view of my above discussion, I find that the plaintiff has been able to prove that because of the fire in the godown it sustained loss of Rs. 8,17,000/- as claimed by the plaintiff and, therefore, the plaintiff is entitled to get the said sum from the insurer i.e. the defendants-appellants. I find that the learned court below has granted more than the claim of the plaintiff and also more than the

insurance cover and therefore, that finding of the lower court below as discussed above is set aside. It is held that the defendants-appellants are liable to pay Rs. 8,17,000/- as claimed by the plaintiff with interest. So far interest is concerned in the aforesaid decision the Hon''ble Supreme Court has held that the nationalized bank are now granting the interest @ 9% on fixed deposits for 1 year and, therefore, in that case the Hon''ble Supreme Court directed the insurance company to pay the damaged with simple interest @ 9% per annum as compensation.

19. The learned Counsel for plaintiff-respondent submitted that in the present case the plaintiff has taken loan from the Central Bank of India and bank is charging 18% interest on the loan amount and, therefore, the appellant is liable to pay 18%. So far this submission is concerned, in my opinion it has got no force because that is a contract between the Central Bank and the plaintiff. The defendants are not involved in that case and moreover the liability to pay the interest by the defendants is not dependent upon the contract of the plaintiff with the Central Bank. The Hon''ble Supreme Court in another decision reported in 2009 (12) SCC 324 Rampur Fertilizer Ltd. v. Vigyan Chemical Industries at paragraph has held that the interest can be awarded in terms of an agreement or statutory provisions and it can also be awarded by reason of usage or trade having the force of law or on equitable consideration but the same cannot be awarded by way of damages except in cases where money due is wrongfully withheld and there are equitable grounds therefore, for which a written demand is mandatory. In ascertaining the rate of interest the courts of law can take judicial notice of both inflation as also fall in bank rate of interest. In that case also it was held that 9% simple interest per annum was granted holding that the said percentage is reasonable. I therefore, find that in the present case the defendants-appellants is liable to pay simple interest @ 9% per annum on the damage i.e. Rs. 8,17,000/- from the date of filing the suit by the plaintiff till realization. The finding of the learned court below regarding payment of interest at 12% is set aside.

20. In view of my above finding to sum-up it is held that the plaintiff-respondent is entitled to get the total of Rs. 8,17,000/- with simple interest @ 9% per annum from the date of filing of suit till the payment and the defendants-appellants are liable to pay the said amount of Rs. 8,17,000/- with simple interest @ 9% per annum from the date of institution of the suit.

21. In the result this first appeal is allowed in part and the impugned judgment and decree are modified to the extent indicated above. The plaintiff''s suit is decreed to the extent of Rs. 8,17,000/with interest @ 9% from the date of institution of the suit.