

(2002) 01 PAT CK 0131
In the Patna High Court
Case No : First Appeal No. 162 of 2001

The Oriental Insurance Company Ltd. and Another	APPELLANT
Vs	
Purnima Enterprises	RESPONDENT

Date of Decision : 08-01-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 5, 151
Insurance Act, 1938 — Section 64UM

Citation : (2002) 1 PLJR 439

Hon'ble Judges : Radha Mohan Prasad, J

Bench : Single Bench

Advocate : Ajay Kumar, for the Appellant; Shashi Shekhar Dwivedi, Ujjwal Kumar Jha and Anil Kumar Singh, for the Respondent

Judgement

Radha Mohan Prasad, J.—In I.A. 2926 of 2001 filed under Order XLI Rule 5 read with Section 151 of the CPC at flag "A", prayer is to stay further proceedings in Execution Case No. 1/2001 pending before the Subordinate Judge v. Muzaffarpur arising out of Title Suit No. 59 of 1992.

2. This appeal filed on behalf of the Insurance Company is directed against the judgment and decree dated 17th January, 2001 passed in Title Suit No. 59/92 by the Subordinate Judge, v. Muzaffarpur, whereby the Plaintiff-Respondent has been held to be entitled to get Rs. 11,78,101/- along with 12% per annum pendente lite and future interest till "realisation, besides pleader's fee Rs. 64/- and Pleader's Clerk fee Rs. 16/- in "their favour.

3. In short, the relevant facts are that the Plaintiff is a firm named as M/s Purnima Enterprises, registered as S.S.I. unit carried on business of manufacturing box strapping jerrican and reprocessed raw materials from PP/HDPE grandless. The Plaintiff got the factory M/s Purnima Enterprises insured with Defendants No. 1 and 2 Appellants against many other things, including loss and damage by fire vide Policy No. 33211/8/0/F/419/88. According to the Plaintiff, due to electric short circuit on 29.4.1989, the Plaintiff firm caught fire,

as a result of which its godown, wooden switch board and junction were badly burnt and the fittings in PVC cover were also burnt, found hanging. The fire spread in the entire godown and engulfed the materials stocked in the godown. It gave intimation to Ahiyapur Police Station, Fire Officer, Studio Nirala, State Bank of India and the Appellant Company, vide telegram dated 29.4.1989. The Plaintiff also lodged claim to Defendant No. 2-Appellant Company being Insurance Claim No. 33211/8/F/1/89-90 under the above Policy for Rs. 8,17,000/- by way of loss due to fire.

4. The Appellant-Company filed written statement and disputed the claim and the trial Court thus after framing issues passed the impugned judgment and decree.

5. In I.A. No. 2926 of 2001 the Insurance Company has admitted that the Company on 10.4.1991 offered a sum of Rs. 72,020/- to the Plaintiff, but the Plaintiff refused to accept the same and claimed Rs. 17,00,000/- with 18% interest in the present suit. The claim was bifurcated as Rs. 13,00,000/- towards loss due to fire with 18% interest from 29.4.1992 and Rs. 4,00,000/- against the damages for the loss of profit, name, fame, credit and goodwill with 13% interest from 29.4.1992.

6. The validity of the impugned decree has been challenged mainly on the ground that the Court below has failed to consider the loss assessed by the Registered Surveyor who is the only competent person to assess the loss under the provision of Section 64 UM of the Insurance Act, 1938.

7. It is contended on behalf of the Appellants that the suit has been decreed on consideration of the evidence of the witnesses, who are not at all concerned with the business premises inasmuch as out of 23 witnesses, 14 witnesses were Advocate's Clerk who proved stock register, Surveyor's report, scrap purchase register etc. in order to establish the loss of stock. It is contended that though the title suit was filed in the year 1992, but 23 witnesses were examined within a span of 15 days after 14.11.2000 and judgment was delivered on 25.1.2001. According to the learned Counsel for the Appellants, in any view of the matter, from the claim it; was a clear case of excess stock which was hit by the "average clause" in the Insurance Act and if the formula of "average clause" is applied, the insured is not entitled for more than Rs. 6,93,488/- on the basis of the decree. Learned Counsel has also contended that though the insured had claimed only Rs. 8,00,000/-, but the court below has allowed a sum of Rs. 11,78,101/- and that too on the "basis of the statement of the witnesses who were not at all concerned with the Plaintiff's business, stock etc. Thus, prayer has been made for stay of the execution of the decree in Execution Case No. 1/2001, for a total claim of Rs. 24,51,160.80.

8. In the rejoinder filed on behalf of the claimant it is admitted that the Appellants offered Rs. 72,020/-. However, it is contended that earlier Shri A.K. Nathani was deputed as Surveyor by the Appellants who visited the factory, inspected all the relevant registers, documents and the places and goods burnt

and damaged and prepared inventory after examining very closely and after fully satisfying submitted report of loss of Rs. 8.17 lacs. Yet, the Appellants again appointed Sri N.N. Jha as Surveyor, who submitted another report which is being made basis for challenging the impugned judgment. As regards non-consideration of the report by the registered Surveyor, it is contended that it was never raised during the trial.

9. This Court fails to appreciate as to what was the occasion for raising said question during the trial. It is not the stand on behalf of the Plaintiff-Respondent that the report of the registered Surveyor was not before the Court for consideration. There cannot be any dispute that normally execution of money decree is not stayed but on the face of the report of the registered Surveyor, this Court, in the peculiar facts and circumstances, finds it difficult to outright reject the prayer for stay of the execution of the money decree.

10. Having heard learned Counsel for the parties, this Court directs that there be stay of further proceedings of Execution Case No. 1/2001 pending before the Subordinate Judge v. Muzaffarpur arising out of Title Suit No. 59 of 1992, during the pendency of this appeal, on Appellants-Company paying the amount, which was initially offered by them and admittedly not accepted by the Respondent, with up-to-date interest at the rate of 12% per annum within two weeks and depositing the entire remaining decretal amount in fixed deposit earning maximum interest in any nationalised Bank in the name of the Company itself by way of the Bank guarantee in favour of the Respondent to be finally released according to the final outcome of this appeal.

11. I.A. No. 2926 of 2001 is, thus, disposed of.