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**(2016) 03 MAD CK 0221**

**In the Madras High Court**

**Case No : W.A. No. 138 of 2012 and M.P. No. 1 of 2012**

United India Insurance Co. Ltd.

APPELLANT

Vs

SBK Shipping Private Ltd.

RESPONDENT

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**Date of Decision : 29-03-2016**

**Acts Referred:**

**Citation :** (2016) AIR(Madras) 150 : (2016) 2 KLT 104 : (2016) 3 MLJ 682

**Hon'ble Judges :** R. Sudhakar and S. Vaidyanathan, JJ.

**Bench :** Division Bench

**Advocate :** N. Vijayaraghavan and M.B. Raghavan, for the Appellant; Vijay Narayan, Sr. Counsel for R. Parthiban, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

R. Sudhakar, J.—1. Eleven years after tsunami wreaked havoc along the coasts of India and other South-East Asian Countries, the moot question raised for consideration before us is as to whether tsunami is an insurable risk or not.

2. Aggrieved by the order dated 18.8.2011 passed by the learned Single Judge in W.P. No. 6063 of 2008, the appellant/ insurance company has filed this appeal.

3.1. Let us get down to brass tacks. The respondent company is engaged in the business of providing barges for transporting materials like Iron Ore, etc. from the port to the ships. They owned four steel barges bearing registration Nos. CGE 50, WAI 185, WAI 206 and WAI 217.

3.2. The respondent entered into an insurance contract with the appellant on 5.11.2004, insuring the four barges against damages, etc. Clause 4 of the contract states that the insurance covers loss or damage to the subject matter caused by perils of the seas, rivers, lakes or other navigable waters. It also covers loss caused by other actions such as fire, violent threat and piracy. Clause 5 of the Contract states that the insurance shall not cover loss, damage, liability or expenses caused by earthquake or volcanic eruption.

3.3. On 26th December, 2004, the world stood witness to the wrath of nature as the massive tsunami waves crushed against the shores of South Asia killing lakhs of people and destroying properties worth Crores. The respondent is a victim of such loss caused by tsunami, as the four barges that belonged to them were damaged. Of the four barges belonging to the respondent, two barges, namely, CGE 50 and WAI 185, were found floating on the sea and the respondent towed the barges back to the port incurring a sum of Rs. 14,400/-, which amount was compensated by the appellant/insurance company.

3.4. The other two barges, namely, WAI 206 and WAI 217, were totally damaged and the respondent made a claim for Rs. 4,97,160/- and Rs. 9,16,250/- respectively. While in respect of the barge bearing registration No. WAI 206, the insurance company made good the loss suffered, in respect of barge No. WAI 217, the insurance company, by order dated 13.9.2005, repudiated the claim of the respondent holding that the proximate cause of tsunami is earthquake, which is not covered under the Institute Time Clauses - Port risk.

3.5. Impugning the said order passed by the appellant/ insurance company, the respondent sent a representation on 19.9.2005 to the Insurance Regulatory and Development Authority, Hyderabad. As the said authority did not pass any orders, on 5.2.2006, the respondent sent a further representation to the insurance company seeking settlement of the insurance claim in respect of the Barge bearing registration No. WAI 217. However, the respondent/insurance company, by proceedings dated 27.3.2006, rejected the claim holding that "The cause of loss of "tsunami" is not covered under ITC Port Risks."

3.6. Thereafter, the Insurance Regulatory and Development Authority, Hyderabad, by proceedings dated 25.1.2007, reiterated the stand taken by the insurance company and also observed that as regards the three claims which have been paid, the insurer is in the process of recovering the same. However, it is beyond any cavil that till date no steps have been taken for recovery of the amount paid by the insurance company in respect of barge bearing Registration No. WAI 217.

3.7. Calling into question the order dated 27.3.2006 passed by the appellant/ insurance company, the respondent filed W.P. No. 6063 of 2008 seeking issuance of a writ of certiorarified mandamus calling for the records relating to the order of the respondent dated 27.03.2006 and quash the same and consequently direct the respondent to sanction and disburse the claim amount as preferred in respect of barge bearing Registration No. WAI 217 covered by Insurance Policy No. 011500/22/04/ 01/00000044.

3.8. The learned Single Judge, by order dated 18.8.2011, allowed the writ petition and set aside the order dated 27.3.2006 passed by the appellant/ insurance company. Hence, the present appeal for the relief stated supra.

4.1. The learned counsel for the appellant/insurance company even though initially pleaded that the writ petition filed to decide a contractual dispute as

regards admissibility of a claim under the Insurance Policy that involved substantial questions of interpretation of the terms of the policy requiring evidence is not maintainable and the learned Single Judge erred in holding that the writ petition is maintainable, during the course of the argument, he fairly submitted that he is not seriously pressing this ground of challenge, as the writ petition pertains to the year 2008 and the issue has been agitated threadbare on merits by both parties. Therefore, at this juncture it is not proper to plead on maintainability. We therefore do not embark on that issue.

4.2. The learned counsel appearing for the appellant/ insurance company pleaded that the massive undersea earthquake and tsunami were directly linked as cause and effect and since the Marine Hull Policy specifically excluded earthquake, the claim made by the respondent deserves to be repudiated. In other words, it the case of the appellant that since tsunami has been caused only due to earthquake, the damage to the barge was proximately caused by earthquake, which is a exclusion and, therefore, the claim was rightly rejected. In support of the plea that tsunami was caused due to earthquake, the learned counsel placed reliance on Notification No. 32-5/2004-NDM-I, issued by the Government of India, Ministry of Home Affairs, dated 26.12.2004.

4.3. The learned counsel for the appellant submitted that the proximate cause is not the cause which is nearest in time or place, but the active and efficient cause that sets in motion a train or chain of events which brings about the ultimate result without the intervention of any other force working from an independent source and inasmuch as in the case on hand, earthquake is the dominant cause for the occurrence of tsunami and since a damage caused due to earthquake is excluded, the claim made by the respondent does not merit acceptance. To fortify the said plea, he placed reliance on the decision of the Supreme Court in *New India Assurance v. Zuari Industries Ltd. and others*, , (2009) 9 SCC 70.

4.4. It is further pleaded that merely because claims in respect of three other barges have been mistakenly settled by the insurance company and recovery was not effected, it does not entitle the respondent to seek compensation for the fourth barge, when tsunami is not covered under ITC Port Risks.

5.1. Per contra, it is pleaded by Mr. Vijay Narayan, learned Senior Counsel appearing for the respondent that in respect of three other barges, the insurance company has made good the loss suffered, whereas in respect of the fourth barge, the claim was rejected on untenable reasons and, therefore, the act of the appellant reeks of arbitrariness.

5.2. It is the further plea of the respondent that even assuming that the cause of tsunami was earthquake, the earthquake occurred off the coast of Sumatra in Indonesia and the said earthquake caused giant waves which destroyed the barges, which is a peril of sea.

5.3. Lastly, it is pleaded that by the respondent that the doctrine of *Contra Proferentem* comes to the aid of the respondent-company, as it clearly stipulates

that when a provision of the contract can be interpreted in more than one way, the Court will prefer that interpretation which is more favourable to the party who has not drafted the agreement. To put it differently, Court will prefer the interpretation which goes against the party who has inserted/ insisted on inclusion of the alleged ambiguous clause in the agreement. To fortify the said plea, he placed reliance on the decisions of the Constitution Bench of the Supreme Court in *General Assurance Society Ltd. v. Chandmull Jain and another*, , AIR 1966 SC 1644 and *United India Insurance Co. Ltd. v. Pushpalaya Printers*, , (2004) 3 SCC 694, *United India Assurance CO. Ltd. v. Kiran Combers and Spinners*, , (2007) 1 SCC 368.

6. We have heard the learned counsel for the appellant and the learned Senior Counsel appearing for the respondent and given our anxious consideration to the issue involved in this appeal.

7. It is beyond any cavil that the barge which was damaged was covered under the insurance policy and the same was in force at the time of the occurrence. It is apposite to refer to the following clauses of the Institute Time Clauses Hulls Port Risks:

"Clause 4.1.1: This insurance covers loss of or damage to the subject-matter insured caused by perils of the seas, rivers, lakes or other navigable waters.

Clause 5. In no case shall this insurance cover loss, damage, liability of expense caused by earthquake or volcanic eruption. This exclusion applies to all claims under clauses 7, 9, 11 and 13."

8. In the case on hand, the fact that barge was damaged due to tsunami is beyond quibble and it is, in fact, fortified by the letter of the Director (Marine Services), Ennore Port Limited, dated 10.6.2005, wherein it is stated as under:

"This is to inform that lash barges No. WAI 217, WAI 185, CGE 50 and WAI 206 are under charter with M/s. Anand Transport for transporting iron ore at Ennor Port. On 26.12.2004 due to tsunami waves, the lash barge No. WAI 217 and WAI 206 were carried over to the sand dunes and were refloated. Lash barges No. WAI 185 and CGE 50 were drifted out of the Port basin due to the waves and were brought back."

9. In the said factual backdrop, let us analyse whether insurer is liable to compensate the loss caused by tsunami, a peril of the sea, and as to whether the proximate cause for the loss caused to the insured, i.e., to say earthquake, will apply to the facts of the present case. Loss must be caused by the peril insured against. While assessing the cause of the loss, the rule of proximate cause, to wit, the maxim in jure non remota causa sed proxima spectatur, is to be regarded. The maxim means "in law the immediate and not the remote cause is to be considered in measuring the damages". When a loss occurs there will often be a series of events leading up to the incident and so it is sometimes difficult to determine the nearest or proximate cause. The important point to note is that

the proximate cause is the nearest cause and not a remote cause.

10. If the earthquake occurs in the ocean, it pushes up powerful giant waves known as tsunami. The sudden upward or downward movement of the sea-floor during an earthquake creates large tsunami waves. On 26.12.2004, tsunami waves were generated due to a Magnitude 9.3 undersea earthquake off the coast of Banda Aceh, Northern Sumatra. The tsunami waves travelled thousands of miles across several continents and hit several coastal areas in India. To be more specific, it not only caused huge waves and destruction on the eastern shore but also on the western shores of India.

11. Scientifically it is stated that earthquake is the cause of tsunami, but for the person who suffered the wrath of tsunami in Tamil Nadu, the occurrence of earthquake, which is an excepted cause, is virtually a remote cause. The proximate cause for the damage caused to the property is giant tidal waves tsunami, a peril of the sea and not the earthquake. He suffered damages to his barge on sea because of the giant tidal waves, which is a peril of sea. In the case on hand, the barge was damaged while at sea or moored when it was hit by the giant tidal waves and, therefore, the damage caused is nothing but a peril of sea. Whether in each case, is it essential to trace the origin of the peril if we can, without much labour identify the proximate cause, we then need not go to the remote cause. In interpreting documents relating to a contract of insurance, the duty of the court is to interpret the words in which the contract is expressed by the parties, because it is not for the court to make a new contract or to rewrite the same, however reasonable, if the parties have not made it themselves. A contract has to be interpreted based on the plain and unambiguous terms of the contract and not by dissecting with the help of scalpel or deriving by a scientific formula or theory of science. That will amount to rewriting the terms of the contract.

12. In our considered view, in the present case, there is no ambiguity in the contract because all forms of peril of sea is covered. The purpose of the insurance policy is to secure an indemnity against accidents of a specified nature, which may happen. In the case on hand, the tidal waves arose in the mighty ocean and hit the coastlines of several continents and ravaged the coastal areas far and near. The loss in the present case occurred due to giant tidal waves (Tsunami) which hit the barge with great force and damaged it. The barge of the respondent is one among the many thousands of sea borne vessel. We are unable to accept the appellant's plea that earthquake is the proximate cause for it. On the contrary it is the remote cause. If the tsunami, a peril of the sea, is the direct cause for the damage, there is no need to embark on further enquiry as to what caused tsunami. We need not confuse with the issue as to what is the proximate cause of tsunami. It is certainly earthquake. The proximity is in relation to the damage and if the claim answers the same it is maintainable. In this case, we have no hesitation to accept the respondents plea that damage/loss was caused due to the perils of the sea (Tsunami) and that is the proximate

cause. The learned single Judge has rightly ruled so.

13. Furthermore, the doctrine of *Contra proferentem* cannot be made applicable to the present case because there is no ambiguity in the terms of the contract. Further, if we read the tenor of the contract, it only speaks about admissible claims, which includes perils of sea (Clause 4.1.1), and excludes earthquake (Clause 5). There is nothing in the contract to indicate that if any of the above admissible claims is caused due to factors enumerated in the excepted clause, though it is very remote, the admissible claim will also stand excepted.

14. Since we find no ambiguity in the marine insurance policy and the barge in this case has suffered the peril of sea, namely, tsunami, we have no hesitation to accept the claim of the respondent that the damage caused to the barge due to the ravages of the sea is an admissible claim, which falls within the contours of perils of sea. The appellant erred in rejecting the claim.

15. The learned counsel for the appellant placed heavy reliance on the decision of the Supreme Court in *New India Assurance Co. Ltd. v. Zuari Industries Ltd.*, referred *supra*, wherein the main question that was considered was whether the flashover and fire was the proximate cause of the damage. The Supreme Court after referring to a catena of decisions rendered by foreign courts, while disagreeing with the plea of the insurance company that fire was not the cause of the damage to the machinery of the claimant, held that had the fire not occurred, the damage would not have occurred and there was no intervening agency which was an independent source of the damage. In the said case, all the events happened within the same premises, the fire which is an inclusive clause led to the damages. The said case may not apply to the facts of the present case if we go by the tenor of the contract. We find there is no ambiguity in the contract in the present case and we have already observed that earthquake which occurred off the coast of Sumatra in Indonesia may be the cause for tsunami. The earthquake did not cause damage as such to the far away continents like India. It is plausible that it may cause damages at the place of occurrence, i.e., Banda Aceh - Indonesia. The giant tidal waves that caused damage to the barge as it did to many boats, vessels on the shores are the proximate cause for the loss suffered by the respondent. That is a peril of the sea and is therefore covered.

16. Secondly, the learned counsel for the appellant relied on the decision in *Leyland Shipping Co. Ltd. v. Norwich Union Fire Insurance Society Ltd.*, (1918) AC 350, wherein a ship was torpedoed during the First World War. She was towed to a quay in the outer harbour. The port authorities fearful that she would sink there and obstruct a quay ordered the ship out. She was taken out to a breakwater, where the master hoped to continue to take off cargo but, buffeted by the heavy seas, she soon sank. The shipowners contended that this was a loss by perils of the sea. The insurers argued that his loss was a consequence of hostilities (exception). The House of Lords held that the proximate cause was the torpedo and, therefore, that the claim failed. In the said case, the sea is not the

cause for the damage of the vessel and, therefore, it did not fall under the perils of sea. The ship sunk as it was torpedoed, which is an external excluded factor. However, in the case on hand, as we have already observed tsunami is a deadly manifestation of nature and tsunami is exclusively a peril caused by the sea. Therefore, the decision in Leyland Shipping case, referred supra, stands distinguished on facts.

17. The learned counsel for the appellant relied on the decision of the Supreme Court in Export Credit Guarantee Corporation of India Ltd. v. Garg Sons International, , (2014) 1 SCC 686, wherein it is held as under:

"10. It is a settled legal proposition that:

"26. ... [while] construing the terms of a contract of insurance, the words used therein must be given paramount importance, and it is not open for the court to add, delete or substitute any words. It is also well settled that since upon issuance of an insurance policy, the insurer undertakes to indemnify the loss suffered by the insured on account of risks covered by the policy, its terms have to be strictly construed [in order] to determine the extent of the liability of the insurer."

Therefore, the endeavour of the court should always be to interpret the words used in the contract in the manner that will best express the intention of the parties. (Vide Suraj Mal Ram Niwas Oil Mills (P) Ltd. v. United India Insurance Co. Ltd., , (2010) 10 SCC 567)

11. The insured cannot claim anything more than what is covered by the insurance policy. "... the terms of the contract have to be construed strictly, without altering the nature of the contract as the same may affect the interests of the parties adversely." The clauses of an insurance policy have to be read as they are. Consequently, the terms of the insurance policy, that fix the responsibility of the insurance company must also be read strictly. The contract must be read as a whole and every attempt should be made to harmonise the terms thereof, keeping in mind that the rule of contra proferentem does not apply in case of commercial contract, for the reason that a clause in a commercial contract is bilateral and has mutually been agreed upon. (Vide Oriental Insurance Co. Ltd. v. Sony Cheriyan, , AIR 1999 SC 3252, Polymat India (P) Ltd. v. National Insurance Co. Ltd., , AIR 2005 SC 286, Sumitomo Heavy Industries Ltd. v. ONGC Ltd., , AIR 2010 SC 3400 and Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran, , AIR 2012 SC 2829.)"

In the case on hand, as we have observed earlier, there is no ambiguity in the terms of the contract. The damage occurred only due to the giant tidal waves that hit the barge and we are of the firm view that the proximate cause for the damage is the peril of sea and the excepted cause - earthquake had occurred thousands of miles away in Indonesia and it can by no stretch of imagination be treated as a proximate cause for the damage that occurred to the barges.

18. In our considered opinion, the learned Single Judge in the order under challenge has rightly observed as under:

"15..... Apart from this, as far as the case in hand is concerned, it is not disputed that policy covers loss caused by perils of the sea. When the direct cause for the damage sustained by the barge in question is Tsunami, based on an indirect cause and especially taking note of the fact that for the other barges which were also damaged during the same Tsunami on the same day, the claim of the petitioner was accepted, for this particular barge alone, the petitioner's claim cannot be rejected."

and allowed the writ petition. We are in respectful agreement with the said finding of the learned Single Judge for the reasons that we have stated above.

Resultantly, this appeal is dismissed. No costs. Consequently, M.P. No. 1 of 2012 is closed.