IN THE BOMBAY CITY CIVIL COURT AT BOMBAY

NOTICE OF MOTION NO.2170 OF 2012
IN
SUMMARY SUIT NO.2803 OF 2012
HIGH COURT SUIT NO.481 OF 2012

Tata AIG General Insurance Co. .....Applicant

Jayesh Prabhudas Badani ....Plaintiff

V/s.

Tata AIG General Insurance Co. ....Defendants

Adv. Mr. S.R. Singh for the defendant
Adv Mr. Gautam Ankhad for the plaintiff.

Coram : **D. P. Satawalekar**
Judge, City Civil & Sessions Court
Gr.Mumbai.
C.R.No. **28**

ORDER BELOW NOTICE OF MOTION NO.2170/2012
(**Dated April 30th,2016**)

1. The notice of motion is taken out by the defendant to reject the plaint under Order 7 Rule 11 of the Code of Civil Procedure as it does not disclose cause of action.

2. The plaintiff filed reply and disputed the notice of motion.

3. Heard learned advocate Mr. S.R. Singh for the defendant and learned advocate Mr. Gautam Ankhad for the plaintiff.

4. According to the defendant , the suit has been instituted on the basis of 'Marine Open Cover Insurance Policy' and relevant certificates which merely covers ' loss' caused due to ' Maritime Perils' under section 2 (e) of the Marine Insurance Act, 1963. There are no initial pleadings as required to be averred in support of evidence/documents. The plaintiff must plead locus of the plaintiff, his insurable interest, types of terms and conditions of policy, duration of cover, nature of risk/loss., risk/loss covered by the policy. According to the defendant, there is no ' monetary loss' as price received by the plaintiff in advance. The risk had already passed to buyer on shipment of goods. Therefore, the defendant prays for rejection of plaint.

5. On the other hand learned advocate for the plaintiff submits that notice of motion is not maintainable. The plaintiff has purchased the policy. Therefore, the defendant is liable to indemnify the plaintiff. The defendant company is liable to cover entire risk from costs of goods, transport, insurance and any damage till it reached to the buyer. The policy is on CIF basis. The plaintiff already paid the premium that is not in dispute. The defendant has not made out any ground for rejection of plaint. The plaint cannot be rejected only on the allegation made by the defendant in his written statement or in an application for rejection of the plaint. One has to read the entire plaint as a whole the cause of action is a

question of fact, which are required to be proved for obtaining relief. The plaintiff has already pleaded material facts and necessary averments. The defendant has admitted its liability. The defendant has made survey of the lost. Hence, the plaintiff prays for dismissal of notice of motion.

6. Perused the plaint. It appears that the proprietorship firm of the plaintiff has obtained a Marine Cargo open policy , which was renewed from time to time. It was lastly, renewed on 07.07.2009 to 06.07.2010. Therefore, the policy was in existence and valid at the relevant time.

7. Under the said policy, there was special condition that policy covers for losses due to heat, sweat and spontaneous , combustion. M/s. Agri Best Commodities , a Philippines based company were in need of 100 terms of groundnuts Kernels. They entered into a tri party agreement dated 04.08.2010 , which was executed between the plaintiff , M/s. Agro Best Commodities and Commodity Impex. The plaintiff was exporter under the contract.

8. Under the said policy the plaintiff shipped goods to various countries across the world. The policy is an annual policy. The policy covers entire risk from cost of goods, transport and insurance for any damage till it reaches the buyer.

9. Learned advocate for the defendant referred following definitions from blacks law dictionary:-

. **Cost and freight. (C and F)**

Cost and Freight.(1819) A mercantile- contract term allocating the rights and duties of the buyer and seller of goods with respect to delivery, payment, and risk of loss, whereby the seller must (1) clear the goods for export, (2) arrange for transportation by water, and (3) pay the costs of shipping to the port of destination. When the goods are safely stowed on the receiving ship while docked, the seller's delivery is complete; the risk of loss then passes to the buyer. This term is used only when goods are transported by sea or inland waterway.

. Cost , Insurance, and Freight (CIF)

. Cost , Insurance, and Freight .(1906) A mercantile-contract term allocating the rights and duties of the buyer and the seller of goods with respect to delivery, payment, and risk of loss, whereby the seller must (1) clear the goods for export, (2) arrange for transportation by water, (3) procure insurance against the buyer's risk of damage during carriage, and (4), pay the costs of shipping to the port of destination. The seller's delivery is complete (and the risk of loss passes to the buyer) when the goods are loaded on the receiving ship while docked in the port of shipment. This term is used only when goods are transported by sea or inland waterway.

10. After shipping the goods, the plaintiff filed their invoices with Custom Department. The goods were stocks with custom. However, due to typographical error and inadvertence the shipping bill copy filed before the Custom Department recorded that the supplies were to be made on C and F basis instead of CIF basis. However, that typographical error were corrected by the plaintiff. It is the case of the plaintiff that during the voyage the goods were damaged. Therefore, on defendant's instructions M/s. D Exponents surveyors and adjusters company were appointed as surveyors for assessing the damaged cargo. The defendant's surveyors conducted survey and reported that 1534 bags of goods were damaged and that the damaged cargo should be disposed off immediately to minimize the losses. Thereafter, on 12.10.2010 a claim of USD 125, 418.000 for total loss on 1534/2000 bags was made by M/s. Agri Best Commodities on the defendants through their settling agents. This claim was lodged under this policy. The lodging of insurance claim was duly confirmed by the defendant. No objection was raised either by the defendant or by its settling agent that the goods were not insured. The defendant thereafter called upon the plaintiff to submits various documents. All the documents requested were immediately submitted. Initially the defendant's settling agent and claims representative did not allow the plaintiff's purchaser to sell the cargo which was in good condition. This was strongly objected by the plaintiff on 21.10.2010. The certificate of insurance dated 28.08.2010 is on record. The defendants surveyors by its final report recommended immediate disposal of damaged cargo. Pursuant to the recommendation of surveyors an action was

conducted on behalf of the defendant for sale of damaged cargo. Thereafter the defendant rejected the claim. Therefore, suit came to be filed.

11. Learned advocate for the defendant further relied on the definition of 'insurable property', 'insurable interest' and when interest must attach from the 'Marine Insurance Act, 1963. The definition are as follows:-

> **“Insurable property”** means any ship, gods or other movables which are exposed to maritime perils;
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> **Insurable Interest defined**.-(1) Subject to th provisions of this Act, every person has an insurable interest who is interested in a marine adventure.
>
> (2) In particular, a person is interested, in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto or by the detention thereof, or may incur liability in respect thereof.
>
> “**When interest must attach.-(1)** The assured must be interested in the subject matter insured at the time of the loss, though he need not be interested when the insurance is effected:
> Provided that, where the subject-manner is insured “ lost or not lost” , the assured may recover although he may not have acquired his interest until after the loss, unless at the time of effecting the contract of insurance the assured was aware of the loss, and the insurer was not.

12. It is further submitted that there is no insurable interest in the goods of plaintiff since the plaintiff shipped the goods. Now, losses if any may be sustained by the purchasers. On these grounds, it is submitted that there is no loss to the plaintiff and unless there is loss , the plaintiff is not entitled to claim the insurance. It is further put forth that claim by the purchaser against seller cannot be said to be a loss. Therefore, the defendant prays for rejection of the plaint.

13. Though there is no specific averments or paragraphs, the pleading discloses primafacie, about cause of action. However, it must be considered that the plaintiff is purchaser of the policy. In such circumstances, rest of all the disputes covers cause of action if plaint is wholly read. All these points are mixed question of law and facts. Advocate for the defendant relied on following citations and their ratios.

1) New India Assurance Co. Ltd V/s. Hiralal ((2008) 10 SCC 626 (para-19))

2) State Bank of Saurashtra V/s. Ashit Shipping Service ((2002) 4 SCC 736 (page 741 para-14) r/w. 64 UM of Insurance Act.)

3)I.T.C. Ltd V/s. Debt Recovery ((1998)2 SCC)

4)Church of Christ V/s Pomiaman Education.((2012) 8SCC 706)

14. However, all the ratios are decided on merits not at the stage of rejection. Hence, they cannot be helpful to the defendant. Therefore, they need trial for proper settlement. Hence, at this stage plaint cannot be rejected. Hence , I pass the following order.

O R D E R

Notice of motion No.2170/2012 is rejected.

(D.P. Satawalekar)
Judge,
City Civil Court,
Gr.Mumbai,

Date.30.04.2016

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"I affirm that the contents of this PDF file judgment/order are the same, word to word, as per the original judgment."
Name of the Steno with post :- Mr. M.P. Tathe (H.G.Stenographer)
Name of the Judge (with Court no.) :- Shri D.P. Satawalekar, C.R.No.28
Date of pronouncement of judgment :-30.04.2016
Judgment signed by the P.O. On :- 17.05.2016
Judgment uploaded on :-19.05.2016