OCD-7

IN THE HIGH COURT AT CALCUTTA
COMMERCIAL APPELLATE DIVISION
ORIGINAL SIDE

AD-COM/6/2024
WITH CS-COM/43/2024

NATIONAL INSURANCE CO. LTD.
-Versus-
SETHIA OIL INDUSTRIES LTD. AND ANR.

Present :
The Hon'ble Justice DebangsuBasak
-And-
The Hon'ble Justice Md. ShabbarRashidi

For the Appellant : *Mr. SaumyenDatta, Adv.*
Ms. DolonDasgupta, Adv.

For the Respondent : *Mr. Sakya Sen, Sr. Adv.*
Mr. Rudrajit Sarkar, Adv.
Mr. Jai Kumar Surana, Adv.
Mr. Abhimonyu Roy, Adv.

HEARD ON : 20.04.2026

DELIVERED ON : 20.04.2026

DEBANGSU BASAK, J.:-

1. The appeal is at the behest of the defendant and directed against the judgment and decree dated March 13,2024 passed in CS-COM/43/2024. By the impugned judgment and decree, learned Trial Judge decreed the claim of the respondent for damages.

2. Learned Advocate appearing for the appellant submits that, the appellant is an insurance company. A contract of insurance was entered into being Exbt.-A valid from April 13, 2004 to the midnight of April 12, 2005. Sum insured was Rs.10 crores. He draws the attention of the Court to Clause 2 of such contract of insurance being Exbt.-A. According to him, Clause 2.1 provides that in no case, the insurance cover should extendto loss, damage or expenses attributable to willful misconduct of the assured.

3. Learned Advocate appearing for the appellant refers to the document marked as exhibits at the trial. He submits that, it is established from Exbt.-E and Exbt.-L that there was overloading of the tanker carrying rise bran oil.According to him, therefore, such fact comes within the purview of Clause 2.1 of the contract of insurance being Exbt.-A and, therefore, the repudiation of the claim made by the appellant was correct.

4. Learned Advocate appearing for the appellant submits that, the learned Trial Judge misconstrued and misapplied the ratio of ***2004 (3) SCC 297 (National Insurance Co. Ltd. vs. Swaran Singh &Ors.), 1996 (4) SCC 647 (B. V. Nagaraju vs. M/s. Oriental Insurance Co. Ltd.)*** *and* ***20916 (3) SCC 100 (Laxmi Chand vs. Reliance General Insurance.)***

5. Learned Advocate appearing for the appellant draws the attention of the Court to the provisions of Section 113(3)(b) of the Motor Vehicles Act, 1988. He submits that, the Act of 1988 prohibits overloading of a vehicle. In the facts and circumstances of the present case, he submits that, the plaintiff i.e., the respondent no.1 herein caused the tanker concerned which met with an accident to be overloaded within the meaning of Section 113(3)(b) of the Act of 1988. Therefore, according to him, since, the plaintiff did the same willfully, it will come within the meaning of willful misconduct as contemplated under clause 2.1 of Exbt.-A.

6. Learned Senior Advocate appearing for the plaintiff submits that, Exbt.-L, is the Marine Survey Report. He submits that, one straysentence of such Marine Survey Report, in Exbt.-L does not establish that the appellant, as, insurance company, was able to discharge the burden of proof as enunciated in ***Swaran Singh (supra), B. V. Nagaraju (supra)*** *and* ***Laxmi Chand (supra).*** He submits that, there is no evidence on record to establish that the cause of the accident was due to the alleged overloading of the tanker concerned. He draws the attention of the Court to the evidence placed on record.

7. Learned Senior Advocate appearing for the respondent no.1 submits that, the tanker of the respondent no.1 met with an accident due to rash and negligent driving of the offending vehicle. The tanker over-turned due to the attempt by the driver of the tanker to avoid a head-on collision. He submits that, the proximate cause of the accident is not the alleged overloading of the tanker but the rash and negligent driving of the offending vehicle. Therefore, on such count also the claim of the respondent no.1 cannot be denied.

8. Learned Senior Advocate appearing for the respondent no.1 submits that, Exbt.-L was introduced in evidence during the cross-examination of the witness of the appellant. He submits that, no person came to the witness box to establish the contents of Exbt.-L at the trial. Therefore, the contents of Exbt.-L, should not be taken as sacrosanct. According to him, the stray sentence in Exbt.-L cannot be used for the purpose of validly repudiating the claim made by the respondent no.1 as against the appellant in terms of Exbt.-A.

9. Learned Senior Advocate appearing for the respondent no.1 draws the attention of the Court to Exbt.-K being a letter dated August 30, 2006. He submits that, by such letter, the appellant called upon the respondent no.1 to produce evidence duly certified by respective authorities that the tanker was carrying the consignment of the declared capacity. He submits that, the burden of proof was on the appellant. The appellant was trying to shift the burden of proof on the respondent no.1 which is not permissible in law.

10. A policy of insurance was entered into between the appellant and the respondent no.1 valid from April 13, 2004 to the midnight of April 12, 2005. Sum insured was Rs.10 crores. Such contract of insurance was tendered in evidence and marked Exhibit 'A'. Clause 2.1 of Exbt.-A is relevant and is as follows:

> *"**2.1** loss damage or expense attributable to willful misconduct of the Assured."*

11. Carrying of oil through the tanker of the respondent no.1 was covered by Exbt.-A for the period and for the sum as noted above. The terms and conditions of the contract of insurance appears from Exbt.-A.

12. A tanker of the respondent no.1 met with an accident on National Highway No.6 at Village- Mayurbhanj, P.O. Pandhara near Jharpokaria Police Station, District- Mayurbhanj, Orissa at about 12:30 hours on January 18, 2005.

13. A survey was conducted with regard to the damages suffered by the respondent no.1 due to such accident. Survey report was tendered in evidence through cross-examination of the witness of the appellant. Cross-examination was at the behest of the respondent no.1 who is the plaintiff to the suit. Consequently, the survey report was marked as a document of the respondent no.1/plaintiff.

14. Exbt.-L being the Marine Survey Report speaks of the accident. It is of the view that, the tanker of the respondent no.1 while proceeding on National Highway No.6, observed another vehicle coming from the opposite direction at high speed. In order to avoid a head-on collision, the driver of the tanker applied brakes. As a result, the truck slipped dragged towards right hand side of the road and finally capsized in upside down condition. Due to the violent impact of the accident, manhole cover of 5 tank compartments fell off and the contents went running to waste.

15. At two places in Exbt.-L, Marine Survey Report concluded that, the cause of the accident was due to overloading of the cargo in the tanker. One conclusion is specific. While the same conclusion, at a different place of the same Exbt.-L is slightly diluted.

16. In ***B. V. Nagaraju (supra)*** the insured truck was carrying passengers while the policy of insurance did not cover carrying of 9 passengers. It observed that, lifting of persons by the driver or cleaner of the vehicle without the knowledge of the vehicle owner, cannot be said to be such a fundamental breach that the owner should, in all events, be denied indemnification. It noted that misuse of the vehicle was not so fundamental in nature so as to put an end to the contract of insurance, unless some factors existed which, by themselves went to contribute to the cause of the accident. No such contributing factor was found in the facts of that case.

17. ***Swaran Singh (supra)*** noted that, a breach on the part of the insured must be established by the insurer to show that not only the insured used or caused permitted to be used the vehicle in breach of the Act of 1988, but also the damage he suffered flowed from such breach.

18. ***Laxmi Chand (supra)*** after referring to ***Swaran Singh (supra)*** *and* ***B.V. Nagaraju (supra)*** observed that, the insurance company in order to avoid liability must not only establish defence claimed in the proceeding concerned,but also establish the breach on the part of the owner/insured of the vehicle for which the burden of proof would rest with the insurance company. In the facts of that case it was held that, the insurance company did not produce any evidence on record to prove that the accident occurred on account of overloading of passengers in the goods carrying vehicle.

19. Cause of accident, therefore, assumes significance. In view of the grounds for repudiation of the policy of insurance to the Exbt.-A being the policy of insurance allows the insurance company to repudiate the claim in the event the insured is guilty of willful misconduct. In the facts and circumstances of the present case, the tanker which met with the accident, was overloaded beyond its carrying capacity. Learned Trial Judge noted that, the carrying capacity of the tanker was 16 M.T while it was laden with a cargo of rice bran oil to the extent of 26.640 MT.

20. The three authorities of the Supreme Court noted above require the insurance company to establish that the insured was in fundamental breach of the contract of insurance, the insured used or caused or permitted to be used the vehicle in breach of the Act of 1988 and that, the damage the insured suffered flowed from such breach. The owner of vehicle must partake in the breach of the Act of 1988, or it must be with his knowledge.

21. Few facts are established through Exhibit-L. The fact that, the tanker was overloaded is established. It was loaded by the plaintiff is established. Knowledge of the plaintiff as to the overloading is also established. The cause of the accident was stated to be overloading of the tanker in Exhibit-L.

22. Independent of Exhibit-L, the invoice of the respondent no.1 being Exhibit-A established that, the tanker was carrying rice bran oil of 26.640 MT.

23. Exhibit-L was introduced in evidence while cross-examining the witness of the appellant. As noted above, the cross-examination was done by the respondent no.1. The respondent no.1, therefore, cannot now contend justifiably that, the contents of Exhibit-L are not true and correct and that the contents of Exhibit-L cannot be relied upon by the Court. When, a witness is confronted in cross-examination, with a document, then the party who is tendering such document in cross-examination, accepts the existence of such document as also the contents thereof. As against the party, who is cross-examining the witness, the contents and existence of such document stands established.

24. In the facts of the present case, the appellant as the Insurance Company is not denying the existence of the contents of Exhibit-L. Exhibit-L, again as noted above, was introduced by the respondent no.1 through the witness of the appellant. Therefore, the respondent no.1 cannot be permitted to contend that, the contents of Exhibit-L are not true and correct.

25. Exhibit-L, states that the cause of the accident was overloading of the tanker. In our view, therefore, the cause of the accident stands established. The cause of the accident is overloading of the tanker. Tanker was loaded by the plaintiff and therefore the overloading leading to breach of Section 113 of the Act of 1988 is within the knowledge of the plaintiff.

26. The authorities of the Supreme Court noted above, observed that in the events, it is established that the vehicle was used by the insured with the object of the same being in violation of the Act of 1988, the contract of insurance can be justifiably repudiated. In the facts and circumstances of the present case, at the trial, it was established that the tanker was overloaded by the plaintiff, to its knowledge and that, the cause of the accident was due to the overloading.

27. In our view therefore, the appellant was able to discharge its burden of proof of establishing the cause of the accident as that of overloading to the knowledge of plaintiff which is in violation of the Act of 1988 and, therefore, falling within clause 2.1 of the contract of Insurance being Exhibit-A.

28. In view of the discussion above, the impugned judgment and decree is set aside.

29. We are informed that, pursuant to an interim order passed by the Co-ordinate Bench, the amount covered under the impugned judgment and decree was secured by the appellant.

30. Security lying with the Registrar, Original Side, to the credit of the suit of the appeal, to be returned to the appellant. Registrar, Original Side, is at liberty to encash the fixed deposit, if so created, prematurely. Registrar, Original Side will make over the proceeds of such fixed deposit along with the accrued interest thereon after deducting all costs and charges. Registrar, Original Side will do so within a period of four weeks from date.

31. AD-COM/6/2024 is disposed of accordingly, without any order as to costs.

(DEBANGSU BASAK, J.)

32. I agree.

(MD. SHABBAR RASHIDI, J.)

A/s./pkd