JANASHAKTHI INSURANCE CO. LTD.
v
UMBICHY LTD.

SUPREME COURT
S.N. SILVA, C.J.
JAYASINGHE, J.
SHIRANEE TILAKAWARDANE, J.
SC 26/99
HC CIVIL 187/96 (1)
DC COLOMBO 13405/MR
JUNE 19, 2006
OCTOBER 25, 2006
DECEMBER 15, 2006
JANUARY 26, 2007

Evidence Ordinance, Section 35, Evidence (Sp. Pro.) Act 14 of 1995 — Marine Insurance – Breach of warranty of seaworthiness - Burden of Proof – on whom? - Admissibility of documents – Documents maintained in the ordinary course of business – Setting up of a different case in appeal – Permitted?

The defendant-appellant successor to the original insurer appealed against the judgment of the Commercial High Court which awarded to the insured, the plaintiff-respondent on two causes of action for breach of contract to pay the sums insured on contracts of Marine Insurance, pertaining to the carriage of consignment of cargo.

In appeal it was contended by the appellant that the High Court erred in its application of the presumption, since there was no proof that the vessel had set sail for Colombo and there was no proof of unauthorized deviation from the normal route which discharged the insurer of liability and the plaintiff has failed to prove that it complied with the Institution classification clause and as such the claim is not maintainable and certain documents – telexes – have not been proved and as such were inadmissible.

Held:

(1) The evidence on record reveals that the vessel left the Port of Mersin and called at the port in Limersol due to engine trouble and from there sailed to Thessaloki and the documents or record indicate clearly that the shipment is to Colombo from Mersin via the Steam M.V. Elliot – which established that the voyage contemplated was in fact the voyage insured.

(2) Under the general law of insurance the burden of proving that a warranty has been broken lies upon the insurers. The burden of proof of breaches of conditions was on the insurer in accordance with the ordinary rule that the onus of proving a breach of a condition of an insurance policy which would relieve the insurer from liability in respect of a particular loss was, unless his policy otherwise provided, on the insurer.

Per Shiranee Tilakawardane, J.

"I do not believe there to be any doubt regarding the fundamental position of Insurance Law that burden of proof related to an alleged breach of warranty lies on the insurer alleging it – I cannot accept the contention of the defendant-appellant that the burden of proving compliance with the "Institute Classification clause" lies with the plaintiff-respondent".

(3) The law of evidence provides that the documents maintained by the party in the ordinary course of business can be produced by such party as evidence. Section 35 (a) of the Evidence Ordinance permits a witness who by reference to documents and studying the relevant documents learns to speak on the facts disclosed by those documents. The Director of plaintiff-respondent company has certified in Court that the documents were maintained in the ordinary course of business. There is no impediment to the admissibility of this evidence in the light of the provisions contained in the Evidence Ordinance.

Per Shiranee Tilakawardane, J.

"The defendant-appellant is prohibited from setting up a different case from that set up at the trial, he cannot take up a case in appeal which differs from that of the trial."

APPEAL from a judgment of the Commercial High Court.

Cases referred to:

(1) *Royster Guano Co.* v *Globe & Rutgers* 19230 AMC 11 (St. NY)
(2) *The Al Jubail iv* 1982 Lloyds Rep. 637 (Singapore)
(3) *Stebbing* v *Liverpool & London & Globe* 1917 2 KB 42323
(4) *Marshall* v *Emperor Life* (1865) LR 1QB 235
(5) *Parker* v *Potts* - 1815 23 Dow 223
(6) *Franco* v *Natush* (18236) Tyr & Gv. 401
(7) *Pickup* v *Thames and Mersey Marine Insurance* (1878) 23 QBD 594 CA
(8) *Bond Air Services Ire* v *Hill* 1955 2 QB 417
(9) *Barett* v *London General Insurance Co. Ltd.* (1935) 1KB 238.

Faiz Musthapha PC with *Dinal Phillips* for defendant-appellants.
K. Kanag-Iswaran PC with *K.M. Basheer Ahamed* for plaintiff-respondent.

Cur.adv.vult

May 23, 2007

SHIRANEE TILAKAWARDANE, J.

This is an appeal by the successor to the original insurer, the defendant-appellant, against the judgment of the Commercial High Court dated 22nd April 1999, awarding the insured, the plaintiff-respondent, damages on two causes of action for breach of contract to pay the sums insured on two contracts of marine insurance, pertaining to the carriage of consignments of cargo from Turkey to Sri Lanka.

The High Court awarded the insured an amount aggregating to Rs. 27,323,372.00 with legal interest thereon from 1st September 1987 to the date of decree and thereafter on the aggregate amount of the decree till payment in full and taxed costs.

The plaintiff-respondent instituted action against the defendant-appellant on 24th May 1993 for the loss of cargo consisting of 2000 metric tons of red split lentils valued at Rs. 25,668,380/- and 200 metric tons of chickpeas valued at Rs. 1,654,992/- consigned to the

plaintiff-respondent on M.V. 'Elitor' which sailed from the port of Mersin in Turkey on or about 24th May 1987.

The cargo comprising 2000 metric tons of red split lentils valued at Rs. 25,668,380/- had been insured on 2nd April 1987 by the policy marked as P1, against total loss of the entire consignment by total loss of the carrying vessels and the 200 metric tons of chickpeas valued at Rs, 1,654,992/- was insured on 12th May 1987 by the policy marked as P2 against loss by any risk, except those excepted under the said policy by Institute Cargo Clause A.

The said policies of insurance were issued by National Insurance Corporation. The defendant-appellant is the successor to the business of the said Corporation and all its assets and liabilities.

The plaintiff-respondent's version is that after sailing from the Port of Mersin on 24th May 1987, the vessel M.V. 'Elitor' developed engine trouble and called at its home port in Limersol, and sailed therefrom on or about 20th June 1987 and sank with all its cargo on or about 8th July 1987. The entire consignment of the plaintiff-respondent was lost.

The plaintiff-respondent notified the defendant-appellant of its claims on the said policies in August 1987. However these claims were not met by either the defendant-appellant or its predecessor. The plaintiff-respondent states however, that others who had consigned cargo on board the same vessel were paid by the National Insurance Corporation admitting its liability. A cause of action having arisen to sue the defendant-appellant for monies due under the above policies, the plaintiff-respondent has instituted this action.

At the trial the defendant repudiated liability on several grounds, including that the vessel never left the port on its voyage to Colombo, the ship was not seaworthy for the voyage to Colombo, the ship secretly discharged the cargo of red split lentils and chickpeas in Lebanon, the plaintiff failed to inform the defendant immediately of the sinking of the ship, and the plaintiff has not suffered any loss or damage since the equivalent of the consignment said to have been lost was supplied to the plaintiff by Betas Beton.

S. Ashokan, a director with the plaintiff company gave evidence that the vessel, 'Elitor' did not arrive at the port of Colombo and that ordinarily the ship would have arrived within two to three weeks. Due

to the non-arrival of the ship, the plaintiff made inquiries through Lloyds and from local agents and the owners. Telexes received from Lloyds of London, marked as P3 and P4 were produced by the witness. Referring to the originals of these documents the witness stated that these documents were taken over by the CID as part of an ongoing investigation. The witness certified that documents P3 and P4 are copies of the originals and were taken and maintained in the ordinary course of business.

The plaintiff-respondent made its claims to the defendant-appellant through its letters P8 dated 24th August 1987, and P11 dated 18th August 1987. The plaintiff-respondent also produced documents P9(a) and P10(a) which are Clean Shipped on Board Bills of Lading stating that the consignments described therein have been shipped at the Port of Loading in Mersin, Turkey. Documents P10(b) and P10(c) are certificates issued by the shipping agent in Turkey certifying that the shipment has been effected in the vessel 'Elitor' and that the vessel 'Elitor' is an ocean going seaworthy vessel.

The documents submitted along with claims P8 and P11 establish that the consignment of red split lentils and chickpeas were shipped on board the vessel 'Elitor' from the Port of Mersin, Turkey. These documents have not been contested by the defendant-appellant. As remarked upon by the learned Judge, although the Defendant has taken several positions against the plaintiff's claim, the defendant has neither called any witnesses not elicited even under cross-examination the veracity of the position taken by them.

The learned High Court Judge having examined and analysed the evidence in view of relevant legal positions, concluded that *"the plaintiff has established its claim on the basis that the ship M.V. Elitor on board of which the plaintiff-respondent's consignment of goods covered by P1 and P2 were legally presumed to be lost and resulted in the actual total loss of goods to the plaintiff which is covered by P1 and P2 with the liability of the defendant, having to pay the value the two contracts have covered."*

Aggrieved by this decision of the High Court, the defendant-appellant has raised this appeal on the following grounds;

Firstly, that the High Court has erred in its application of the presumption, since there was no proof that the vessel has set sail for

Colombo and there was proof of unauthorized deviation from the normal route which discharged the insurer of liability.

Secondly, that the plaintiff-respondent has failed to prove that it complied with the institute Classification Clause, and as such the claim is not maintainable.

Thirdly, that the documents P3 and P4 which are copies of telexes said to have been received from Lloyds have not been proved and as such, were inadmissible.

Considering the first ground of appeal, it is the defendant-appellant's contention that the presumption has been incorrectly applied in the instant case as for the presumption to operate it is necessary to establish that the vessel sailed on the voyage insured. The defendant-appellant submits that in the instant case, there is no evidence that the vessel set sail for Colombo.

The evidence on record reveals that the vessel left the Port of Mersin, and called at the port in Limersol due to engine trouble, and from there sailed to Thessaloki on or about the 20th of June 1987. The documents submitted together with the claims P8 and P11 confirm that the consignment of 2000 metric tons of red split lentils and 200 metric tons of chickpeas were shipped on board the vessel M.V. Elitor as covered by the policy. Document P4 from Lloyds established that the ship has reached the port in Limersol and left the port on the 29th of June and hence no information is available.

There is no doubt that the vessel has in fact left the port of Mersin, and the documents on record indicate clearly that the shipment is to Colombo from Mersin via the steamer M.V. Elitor (Vide documents P6, P9(a), which established that the voyage contemplated was in fact the voyage insured – from Mersin, Turkey to Colombo, Sri Lanka). I find that the Learned Judge correctly held that vessel did sail from the Port of Mersin on or about 24th May 1987 for the port of Colombo.

As part of the same ground, the defendant-appellant has also contended the issue that there has been a deviation from the authorised voyage and that this discharges the insurer from all liability on the policy of insurance. It is unnecessary to examine the merits of this argument as this is a new issue which the defendant-appellant failed to raise at the trial stage. The defendant-appellant is prohibited

from setting up a different case from that set up at the trial. I agree with the plaintiff-respondent's submission that deviation is a question of fact and the impact of such a deviation upon the insurer's liability must be considered in light of attendant circumstances.

The defendant-appellant has also alleged that it is not liable under the insurance policy since the plaintiff-respondent is in breach of a condition of the policy, namely the Institute Classification Clause. The written submissions of the defendant-appellant clearly mentions that the same issue is contained in paragraph 8 of the answer at page 45 and issue 5 of the defendant at page 164.

However a bare reading of both documents does not reveal any reference to the Institute Classification Clause or a breach thereof. In paragraph 8 of the answer reference is made to the un-seaworthiness of the vessel and also to the breach of the unseaworthiness and unfitness exclusion clause. No clear mention is made of the breach in the manner taken up in appeal; that the plaintiff-respondent is in breach of the conditions of the policy pertaining to the Institute Classification Clause. There is no doubt that the defendant-appellant cannot take up a case in appeal, which differs from that of the trial. Therefore, where the defendant-appellant has failed to raise the matter clearly at the trial stage, it is prohibited from doing so in appeal.

However, even if this court considers the alleged breach of the Institute Classification Clause as raised by the defendant-appellant, the contention fails since the defendant-appellant has failed to discharge the burden of proving a breach of warranty by the plaintiff-respondent.

It is the defendant-appellant's position that being a warranty, the burden was on the plaintiff-respondent to establish compliance. The defendant-appellant claims that as the plaintiff-respondent has failed to discharge its burden and prove compliance with the conditions in this clause, the defendant-appellant is discharged from any liability under the policy.

The Institute Classification Clause stipulates that:

> *"The marine transit rates agreed for this insurance apply only to cargoes and/or interests carried by Mechanically self-propelled vessels of steel construction Classed as below by one of the following classification societies".*

"Provided such vessels are:

(i) Not over 15 years of age or

(ii) Over 15 years of age but not over 25 years of age and have established and maintained a regular pattern of trading on an advertised scheduled to load and unload at specific ports."

The clause clearly requires that the vessel be classed with a Classification Society agreed by the underwriters, remains in the same class and also that the Classification Society's recommendations, requirements and restrictions regarding seaworthiness and of her maintenance thereof be complied with by the date(s) set by the Society. (Vide, Hodges on Law of marine Insurance at page 113).

The main objective of the clause is to improve safety standards and ensure the seaworthiness of the vessel through the intervention of a reputed Classification Society agreed by the underwriters. Though not specifically mentioned as such, the clause be considered as a warranty if there is an intention to warrant. It follows that a breach of this clause would relieve the insurer from all liability under the policy as from the date of the breach.

It is not uncommon that a policy will contain a warranty that the vessel will not be operated without a certificate of seaworthiness or that the vessel will be surveyed and inspected by an approved surveyor and a certificate issued by the surveyor attesting to the seaworthiness of the vessel. (Vide, Parks on the Law and Practice of Marine Insurance and Average at page 247; *Royster Guano Co.* v *Globe & Rutgers*[1]. In *The Al Jubail IV*,[2] it was held that the compliance with the warranty was a condition precedent to coverage, and the assured failed to recover.

There is little doubt therefore that the Institute Classification Clause in the policy is a warranty which requires compliance by the plaintiff-respondent. However, the question of where the onus of proof lies in such a case is for the court to consider when coming to a determination.

Under the general law of insurance the burden of proving that a warranty has been broken lies upon the insurers. (Vide. Colinvaux on The Law of Insurance at page 115) In *Stebbing* v *Liverpool and*

London and Globe[3] where a claim by the applicant was challenged by the respondent insurers on the basis that the applicant had suppressed material facts and had made untrue answers in the proposal form, the court held that the burden of proving the untruth of the answers in the proposal, lay on the respondents; if they cannot establish it, then they fail in the defence. Laying down a test for determining the onus of proof in a given case, Lord Reading stated that, "the burden of proof lies at first on the party against whom judgment would be given if no evidence at all was adduced."

Similarly in *Marshall* v *Emperor Life*,[4] where the right of the assured to recover on a policy is disputed on the ground that he had stated in the proposal that he had not had certain diseases, whereas he in fact had one of them at the time, it was held that the insurer is obliged to give particulars of the symptoms of the disease alleged.

In the case of marine insurance it is well established that the burden of proving a breach of the implied warranty of seaworthiness lies on the insurer where he alleges it. (Vide, Ivamy on Marine Insurance at page 298). Ivamy refers to the decisions in *Parker* v *Potts*[5] and *Franco* v *Natusch*[6]. In *Pickup* v *Thames and Mersey Marine Insurance Co.*,[7] the court upheld the principle that even where a ship springs a leak soon after commencing her voyage, the burden of proof remains on the insurer and there is no shift in the principle that the party alleging un-seaworthiness must prove it.

Parks in *The Law and Practice of Marine Insurance and Average* at page 249, states conclusively that, *"the burden of proving a breach of warranty is on the underwriter, and that is so even where compliance is expressed as a condition precedent to recovery under the policy."* The same view is expressed in Arnold on The Law of Marine Insurance and Average at page 684.

In *Bond Air Services Inc* v *Hill*,[8] the court clearly held that *"the burden of proof of breaches of conditions was on the respondents in accordance with the ordinary rule that the onus of proving a breach of a condition of an insurance policy which would relieve the insurer from liability in respect of a particular loss was, unless the policy otherwise provided, on the insurer."* Also in *Barett* v *London General Insurance Co. Ltd.*[9] at 238 it was pronounced that the burden of proof lies on the insurers.

I do not believe there to be any doubt regarding the fundamental position of insurance law that the burden of proof related to an alleged breach of warranty lies on the insurer alleging it. I cannot accept the contention of the defendant-appellant that the burden of proving compliance with the warranty contained in the Institute Classification Clause lies on the plaintiff-respondent. In this case the burden of proving non-compliance with the warranty lies squarely on the defendant-appellant. It is clear that the defendant-appellant has failed to prove the charge against the plaintiff-respondent.

The final ground of appeal put forward by the defendant-appellant related to the admissibility of documents P3 and P4, which were admitted by the learned Judge under section 35(1) of the Evidence Ordinance. The witness, S. Ashokan stated in evidence that due to the non-arrival of the ship, the plaintiff-respondent Company made inquiries as to the whereabouts of the ship, through Lloyds by telex and also the local agents and owners of the ship.

The documents P3 and P4 produced by the witness are communications from Lloyds to the plaintiff-respondent Company in response to inquiries made in the ordinary course of business of the plaintiff-respondent company. With regard to the originals of these documents, the witness stated that these documents were taken over by the CID as part of an investigation on matters concerning the vessel M.V. Elitor. The witness gained access to these documents when he became a Director of the plaintiff-respondent company following the death of both his father and uncle .The witness has certified that these were copies taken from the originals which were handed over to the CID and they were copies taken in the ordinary course of business related to the company.

Section 35(a) of the Evidence Ordinance makes admissible a statement of fact contained in a record compiled,

(a) *by a person in the course of any trade or business in which he is engaged or employed or for the purposes of any paid or unpaid office held by such person, and*

(b) *from information supplied to such person by any other person who had or may have had personal knowledge of the matter dealt with in that information.*

The law of evidence provides that the documents maintained by a party in the ordinary course of business can be produced by such party as evidence. Section 34(a) of the Evidence Ordinance permits a witness who by reference to documents and studying the relevant documents learns to speak on the facts disclosed by those documents.

It is contended by the defendant-appellant that the said documents have not been maintained in the ordinary course of business. The record shows that the documents were admitted subject to proof and that objections were raised by the defendant against their reception in evidence as they had not been proved. However the defendant did not raise a challenge at the trial to the statement of the witness that the documents were maintained in the ordinary course of business. No questions were put to the witness on whether the documents had been maintained in the ordinary course of business of the company. The documents are admissible under 35(a) of the Evidence Ordinance. The Director of the plaintiff-respondent Company has certified in Court that the documents were maintained in the ordinary course of business.

I find no reason to disbelieve the statements of the witness. I find that the documents P3 and P4 produced before court were maintained in the ordinary course of business of the company and find no impediment to the admissibility of this evidence in light of the provisions contained in the Evidence Ordinance.

The defendant-appellant has also sought to rely on the Evidence (Special Provisions) Act No. 14 of 1995. It was contended that while this Act provides for the admissibility of contemporaneous recordings by electronic means, such evidence would only be admissible if notice is given to the other party and an opportunity to inspect the evidence and the machine used to produce the evidence. I find it unnecessary to comment on the merits of this submission, as this too is a fresh submission made at the appeal stage which finds no place in the trial proceedings.

It is clear having considered all three grounds of appeal submitted by the respondent that the vessel M.V. Elitor certainly left the port in Mersin for Colombo as evidenced by the several shipping documents and communications produced in Court. It is also clear that the burden

of proving the breach of warranty lay on the defendant-appellant and that no evidence has been produced to establish its claim against the plaintiff-respondent. On the admissibility of documents, I find that the documents are admissible under section 35(a) of the Evidence Ordinance as they had been maintained in the ordinary course of business of the plaintiff-respondent Company.

For these reasons, I find that the judgment of the High Court is correct in fact and law and this appeal is refused and dismissed. I order that the defendant-appellant pay costs in the sum of Rs.10,000/- to the plaintiff-respondent.

S.N. SILVA, C.J. – I agree.

JAYASINGHE, J. – I agree.

Appeal dismissed.