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Present : Ennis A.C.J. and De Sampayo J.

ESUFALI & CO. *v.* SAMARANG SEA AND FIRE INSURANCE COMPANY.

271—D. C., Colombo, 9,771.

Marine insurance—Perils of the sea—Certificate of damage—Condition precedent to the right to recover claim—Evidence of previous claim —Ordinance No. 14 of 1895, s. 15:

Where a policy of marine insurance contained a clause to the following effect:—"In case of damage the agents of the company must be applied to for a certificate, and no claim will be admitted without their certificate."

Held, that it was a condition precedent to the recovery of a claim under the policy that such a certificate should be obtained.

Evidence that, on a previous occasion, on a claim preferred by the plaintiff in respect of another consignment of goods said to have been damaged by sea water, it was found by Court that the goods had been wilfully damaged by the plaintiff is admissible.

THIS was an action against an Insurance Company to recover a sum of Rs. 13,477.65 on a policy of insurance relating to 165 bags of coffee shipped by the Liangui Trading Company to the plaintiff from Singapore. The ship arrived on August 23, 1922. The coffee was landed on August 23 and 24, and stored in the warehouse of the Ceylon Wharfage Company, Ltd. On August 28 the plaintiff transferred the coffee to a Government warehouse for transhipment. On August 31 the plaintiff, without any notice to the defendant company or its settling agents in Colombo, caused the goods to be surveyed by Mr. Howard Smith. On September 4 he sent to the settling agents of the defendant company a copy of the survey report, and made a claim for Rs. 12,333.32, being the value of two-thirds of the coffee, which the surveyor was of opinion had been damaged by salt water. The company declined to pay the claim, as the bill of lading stated that the coffee had been shipped in apparent good order and condition, and as the boat notes issued by the Wharfage Company, when the goods left the ship's hold, showed that only two bags had stains, the contention being that the documents showed that the damage had occurred after the goods had left the ship's side, and that under the terms of the policy the company's liability ceased when the goods left the ship. By its answer the defendant company, for the first time, maintained further that the plaintiff could not maintain the claim in the absence of a certificate in terms of the following clause in the policy : "In case of damage Messrs. The South British Insurance Company, Ltd. must be applied to for a certificate, and no claim will be admitted

without their certificate." At the trial evidence was led by defendant company that in connection with another shipment of sugar covered by a policy with another company, it was found that the plaintiff had caused the cargo to be wilfully damaged by sea-water after it had been landed on shore. The learned District Judge gave judgment for the plaintiff, and the defendant company appealed.

Samarawickreme (with him *N. K. Choksy*), for defendant, appellant.—The District Judge should not have admitted the bill of lading on its mere production as evidence against the defendant company as to the condition of the goods when shipped at Singapore. It could be evidence only as between the parties to it, and not against a third party (*Arnold's Marine Insurance, EE, 1279 and 1282; Scrutton on Bills of Lading, Article 52*).

ENNIS A.C.J.—It may be *prima facie* evidence, although not conclusive.

Samarawickreme.—Assuming that it is so, the boat notes are stronger proof of the condition of the goods when delivered from the ship except for two bags. The plaintiff has failed to discharge the onus on him to prove that the damage by salt water was caused by a peril of the sea. There is also clear evidence of the untrustworthy character of the plaintiff.

ENNIS A.C.J.—How is the evidence of another transaction admissible ?

Samarawickreme.—Under sections 11 and 15 of the Evidence Ordinance, the question here is whether the damage was accidental or intentional. It is submitted that the clause in question constitutes a condition precedent to the plaintiff's right to make a claim against the company, and as he had failed to apply to the company's agents in Colombo for a survey and obtain their certificate, he is not entitled to sue the Company.

Cites Worsley v. Wood, [1] *Oldman v. Bewick,* [2] *Roudedge v. Burrel,* [3] *Kekulawela v. Attorney-General.* [4]

James Joseph (with him *A. V. Kulasingham*), for plaintiff, respondent, relied upon certain letters written by the agents of the defendant company to the effect that no damage had been caused on the voyage and the acceptance by them in those letters of the statement in the bill of lading as to the condition of the goods.

No evidence has been adduced to support the suggestion, based on suspicion, that the plaintiff had wilfully caused the damage. The company had not challenged the correctness of the statements

[1] *6 Term. Rep. 710.*
[2] *2 Blackstone's Rep. 577.*
[3] *1 Blackstone's Rep. 255.*
[4] *(1912) 16 N. L. R. 19.*

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in the survey sent to them on September 4, nor asked for another survey. It is submitted that the condition, quoted above, had been waived by the defendant company, as it had not taken the alleged non-compliance by the plaintiff as its ground of exemption during the long period that had elapsed before the institution of the action. The condition was unreasonable and unconscionable.

The legal effect of the clause was that if the certificate was produced, the company would be bound to settle at once. It did not mean they are not obliged to pay, if compelled by law.

February 27, 1925. ENNIS A.C.J.—

This was a claim against an insurance company for Rs. 13,477.65 on a policy of insurance relating to 165 bags of coffee shipped by the Liangui Trading Company from Singapore to the plaintiff. The coffee was shipped on August 16, 1922. It arrived on August 23 in Colombo, and was landed and warehoused on August 24. On August 28 it was transferred to another warehouse, and on August 31 it was surveyed at the instance of the plaintiff. Notice of claim was given to the defendant company on September 4. It was urged in the claim that the goods had been damaged by sea water during the voyage. A number of issues were framed on questions of fact, and one issue of law was raised namely, whether the plaintiff could maintain the action without obtaining a certificate from the South British Insurance Company according to a condition in the policy of insurance. The learned Judge found that the coffee had been damaged by sea water, and the plaintiff could maintain the action. He gave judgment for the plaintiff, and the defendant appeals.

For the apellant it was urged that the plaintiff had not established that the goods were damaged by any of the perils insured against. It seems certain from the evidence of Mr. Howard Smith that on August 31, some two-thirds of the consignment of coffee was in a damaged condition due to the salt water. The policy of insurance contained the following conditions: " In case of damage Messrs. The South British Insurance Company, Ltd., Agents for the Company in Colombo, must be appplied to for a certificate, and no claim will be admitted without their certificate ". The case of *Worsley v. Wood* (*supra*) laid down the law that where a policy of insurance provided that the insured should procure a certificate as a condition precedent to his right to recover, no action could be maintained in the absence of such certificate, and this was stated to have been settled law from that time onwards in the case of the *The London Guarantee Company v. Fearnley*. [1] It seems to be established beyond question that where the parties intended that something should be done before a claim could be presented, the parties were not at liberty to substitute some other act for the act agreed upon. These

[1] *5 A. C. at page 916.*

stipulations appear to be entered in insurance policies to protect insurance companies against fraudulent claims, a matter upon which the present case throws some light. Here the circumstances were such that a doubt might arise as to whether the damage was caused accidentally or intentionally. There was a delay, after the arrival of goods, of nine days before a survey was made. The usual custom of giving notice to the Wharfage Company, the Shipping Company, and the Insurance Company was not followed by the plaintiff. No application was made to the South British Insurance Company for a survey. The bills of lading declare that the goods were shipped in "apparent good order and condition," and the boat notes issued by the Wharfage Company show that two bags only were observed to be stained when the consignment was landed. In circumstances such as these the provisions of section 15 of the Evidence Ordinance might well apply, and in fact in this case evidence has been led to show that the plaintiff had preferred a claim in respect of some other consignment of goods on a previous occasion said to have been damaged by sea water, and the Insurance Company suspected that the goods had been intentionally damaged by the plaintiff, a fact which was subsequently found by the Court to be true.

In these circumstances the condition agreed upon between the parties and embodied in the policy of insurance no longer has a trivial aspect, because the insurance company, if it had been applied to for a survey, could have sent a representative to be present at the survey to examine the goods to see whether there were marks which would indicate whether the damage had been accidentally or intentionally caused. On September 4 when the claim was made to them, and they were first notified of the damage, it was too late to do this, as the survey at the instance of the plaintiff four days earlier had destroyed, to some extent at any rate, the possible evidentiary value of the stained bags, and also of the coffee. The only attempt to meet this contention was that the Insurance Company by not immediately declaring their line of defence had waived the condition. It appears, however, that the defence was specially set up in the answer, and cannot, therefore, be deemed to have been waived. I am, therefore, of opinion that the action cannot be maintained, as the plaintiff had not complied with the condition agreed upon between the parties. In the circumstances I would allow the appeal, with costs.

DE SAMPAYO J.—I agree.

Appeal allowed.