

HIGH COURT OF ORISSA, CUTTACK

FIRST APPEAL No. 161 OF 1991

From the judgment and decree dated 30.03.1991 and 15.04.1991 respectively passed by Shri S.K.Pradhan, Additional Subordinate Judge, Berhampur in Money Suit No. 7 of 1988 (32/85 B.S.J.C.).

New India Assurance Company Ltd. Cuttack and another	Appellants
	Versus.	
M.Nageswar Rao and others.	Respondents
For Appellants	: Mr. S.S.Rao,adv.	
For Respondents	: Mr. C.R.Das, advocate.	
	

PRESENT :

THE HON'BLE MR. JUSTICE D.DASH

Date of hearing : 14.10.2014 : Date of judgment: 30.10.2014

The unsuccessful defendant in the court below has filed this appeal challenging the judgment and decree passed by the learned Additional Subordinate Judge, Berhampur (as it was then) in Money Suit No.7/88 (32/85 B.S.J.C.). By the said judgment and decree the suit filed by the respondent no.1 has been decreed in part for realization of sum of Rs.60,050/- from the appellants with pendent lite and future interest @ 9% per annum.

2. For the sake of convenience, clarity and to avoid confusion, the parties hereinafter have been referred to as they have been arrayed in the court below.

3. The case of the plaintiff (respondent no.1) is that being an unemployed educated youth being financed for purchasing trawler (boats), nets and other machineries he had taken up the business of mechanized fishing. The purchased trawler named 'Sarada' was insured with the New India Assurance Company at Berhampur Branch. Necessary policy to that effect was issued, which was valid from 01.02.1982 to 31.01.1983. The policy was issued in the name of the plaintiff and the defendant no.3-the banker, on payment of required premium, covering the risk to the tune of Rs.2,20,000/- in respect of the said trawler 'Sarada'. According to the case of the plaintiff, the policy covered the risk of hull and engine along with machinery and other accessories as per the valuation certificate issued by the surveyors. It covered total loss, constructive total loss, including salvage, sue and labour charges in connection with peril. The plaintiff was running that trawler for catching fish around Paradeep port. On 03.06.1982, there was a cyclone warning followed by heavy rainfall with wind blowing with speed. It started around 4.30 P.M. It is further stated that about 6.30 P.M., the storm struck the trawler 'Sarada' and as a result the same was thrown away and drifted into the sea water after severance of the connection with the anchor ropes from Kakinada Jetty where it was so anchored. However, with the help of the local fishermen it was saved from being drowned and the plaintiff had to spend a sum Rs.15,000/- for the purpose. It is further stated that on that very day when the wind

speed increased, the trawler again got tilted and agrounded at the place where it was anchored. It is further stated that in the process there was heavy damage on the hull and the engine got completely filled with sea water and sand. The plaintiff then informed the matter at the local police station and also to the defendants. The defendant no.1 acknowledged the receipt of the same and advised the plaintiff to take immediate necessary precautionary measure to salvage the damaged trawler in order to minimize the loss in consultation with their approved surveyor. On 29.06.1982, the staff of the survey agency inspected the trawler which was in an agrounded condition and other boats lying atop. Though they made the survey at random, they further advised the plaintiff for immediate salvage. The perfunctory manner in which said survey was made was informed by the plaintiff to the defendant nos.1 and 2 while advancing further demand of resurvey through an independent surveyor. He was asked to submit proper estimate of repairs to be effected for the said damage to the hull and the engine. The plaintiff further asserts to have spent a sum of Rs.10,000/- to salvage the agrounded trawler. At the instance of the plaintiff, the estimate was given for a sum of Rs.90,000/- for the engine. The plaintiff also described the loss to the tune of Rs.25,000/- towards the nets and other fishing equipments lost from the said trawler. Besides, he claimed a sum of Rs.10,000/- for the navigational equipment, a sum of Rs.25,000/- towards salvages, sue and labour charges. So, the plaintiff estimated that a

sum of Rs.2,49,250/- was required and laid it before the defendant nos.1 and 4 for the trawler's restoration to its original condition as it was prior to the damage. Being not in a position to spend such amount, the plaintiff ultimately abandoned the damaged trawler and requested the defendant to make arrangement for sale of the same. It is stated that the defendant nos.1 to 3 showed indifferent attitude and, therefore, the plaintiff got the trawler surveyed through another surveyor assessing the constructive total loss. It is further stated that as against the sum of Rs.25,000/- spent by the plaintiff towards the salvage, sue and labour charges, the defendant nos.1 and 2 sanctioned only a sum of Rs.13,000/- and that was received by the plaintiff under the pressure from the defendant no.3- the banker with endorsement as being so done without prejudice. The trawler being insured with the defendant nos.1 and 2 to meet such contingency as against the damage, the plaintiff ultimately was compelled to file the suit for recovery of sum of Rs.2,20,000/- with interest.

4. The defendant nos.1 and 2 (appellants) in their written statement while traversing the plaint averments while taking plea of limitation, lack of jurisdiction of the Court to try the suit, however, admitted that on 03.06.1982 due to heavy cyclone, the trawler 'Sarada', which was insured with them was caused with partial damage due to agrounding. But, they stated that the insurance policy in respect of said trawler covered against the perils of constructive total loss including salvage charges; sue and labour charges and for

partial loss only due to fire, collision and loss due to strike, riot and civil commotions. So, they defended to thwart the claim of the plaintiff that the policy did not cover the risk of partial loss due to agrounding. They also took a plea that agrounding had happened only due to carelessness and negligence of the plaintiff which did not make them liable to pay any compensation.

It is the further case that on receipt of intimation they had engaged a surveyor, who had made detail measurement. They again asserted that the damage being purely partial on account of agrounding, it was not an insured peril and as such the question of payment of repairing costs as per the terms and conditions of the policy did not arise. It is further stated that there was no damage to the engine and other machinery. However, they estimated to have paid a sum of Rs.13,000/- towards sue and labour charges. With all these, they prayed to non-suit the plaintiff.

5. Defendant no.3 in their written statement has denied their liability in the matter. However, they asserted that the plaintiff and defendant nos.4,5 and 6 are jointly and severally liable to pay the outstanding loan amount to them while further intimating to have filed the suit for realization for the said sum.

6. In view of the above pleadings, the trial court framed six issues. Out of those, the pivotal one is issue no.3, which is regarding the liability of the defendant nos.1 and 2 to satisfy the plaintiff's claim as advanced. The other issues are with regard to the

maintainability of the suit; the suit being bad for mis-joinder of parties; lack of jurisdiction of the court to try the suit and the claim being barred by limitation.

As it appears the trial court has very rightly taken up issue no.3 first for decision as practically the fate of the suit revolves round the finding on that issue.

7. The plaintiff has examined four witnesses including himself when the defendant nos.1 and 2 have also adduced oral evidence through two witnesses. Besides the above, the parties have proved the documents which have been admitted in evidence and will be discussed hereinafter as and when found necessary.

8. Learned counsel for the appellants submits that the finding of the trial court on issue no.3 is wholly erroneous and upon misconstruction of relevant clause of the Insurance Policy as also against the weight of evidence. According to him, the claim in the present case being partial and that having been so found by the trial court, there was no justification to saddle any liability upon the shoulder of these appellants since the very Insurance Policy Ext.A-1 by which the appellants have undertaken the liability to compensate on account of the damage caused to the trawler does not make such provision. It is his submission that so far as the damages to the trawler only in case of fire, collision, strike, riot and civil commotions are governed under the terms and conditions of the policy and not the partial loss due to agrounding which is here the case of the

plaintiff. In this connection, he has referred to the damage conditions which find mentioned in Ext.A-2. He further submits that the said finding on issue no.3 rendered by the trial court is wholly contrary to the terms and conditions of the policy in question and it was not permissible for the trial court to stretch it to any further extent of covering the claim of the plaintiff as laid. According to him, the construction of the terms and conditions of the policy has to be made in a strict manner and there remains no scope to read anything more which does not find place in so many words. It is his further submission that the claim on other heads as awarded by the trial court are also not covered under the terms and conditions of the policy. Therefore, he urges that the judgment and decree passed by the trial court are unsustainable in the eye of law.

9. None appeared on behalf of the respondent despite opportunities being given in that regard.

10. The relationship between the plaintiff on one hand and the defendant nos.1 and 2 on the other as that of insured and insurer stands admitted. The partial damage caused to the trawler-Sarada owned by the plaintiff is also not denied. In view of the submission of the learned counsel for the appellants, the matter now boils down to the extent for consideration that whether as per the terms and conditions of the insurance policy in force at the relevant time, the claim advanced by the plaintiff on account of damage to the trawler is allowable or not.

11. At this stage, it is pertinent to take note of the findings of the trial court. It has been held by the trial court that the plaintiff had sustained partial loss to the tune of Rs.38,050/- due to agrounding. It has been further found that the insurance policy, in question, covers such partial loss caused due to agrounding on account of cyclone.

Thereafter, on analysis of evidence the trial court has found the plaintiff to be entitled to a sum of Rs.2,000/- more towards sue and salvage charges, Rs.20,000/- towards cost of other accessories lost during the peril. Thus, in total the entitlement of the plaintiff has been quantified at Rs.60,050/- with interest pendent lite and future @ 9% per annum. At the same time, the Court below has found that the plaintiff has miserably failed to establish the service of abandonment notice as required under section 62 of Marine Insurance Act and thus has refused to allow benefit of constructive total loss on the ground of cost of repair exceeding the insured value of vehicle and this is not challenged here by the plaintiff.

12. In order to consider the submission of the learned counsel for the appellants and in view of the admitted facts as mentioned in the foregoing paragraph, the terms, conditions and warranties against fishing vessel attached to and forming part of hull policy Ext-A-1 are required to be gone through for proper construction and in order to appreciate the submission as advanced. The terms, conditions and warranties to which the learned counsel

for the appellants has drawn the attention of the Court in support of his submission are the followings:-

- (1) Insured against Total and/or Constructive Total Loss, subject to institute Standard T.L.O. Clause (Hull) dated 1.10.70 as attached.
- (2) Including Salvage charges incurred, in connection with a peril insured against.
- (3) Including Sue and Labour Expenses.
- (4) Subject to Cancelling Returns only, No refund of premium payable in the event of the Vessel is laid-up in port or on hard during.
- (5) Subject to Partial Loss or damage to the Vessel due to Fire with deductible of 33½% of the assessed loss or Rs.1,000/- each claim whichever is higher.

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xxx	xxx	xxx	xxx
xxx	xxx	xxx	xxx

- (9) Warranted vessel not employed during unsafe weather conditions and when not in use. She should be anchored or moored or secured with proper watch and ward.
- (10) On payment of additional premium, it is declared and agreed that the monsoon prohibited period as stipulated in warranty No.8 of this schedule is hereby deleted and the vessel may be employed for fishing operation during this period subject to the undernoted condition:-

THE VESSEL SHALL NOT BE EMPLOYED DURING UNSAFE WEATHER CONDITIONS AS NOTIFIED BY THE CONCERNED STATE FISHERIES DEPARTMENT OR METEOROLOGICAL DEPARTMENT OR BY THE PORT AUTHORITY AND WHEN NOT IN USE SHALL BE SAFELY ANCHORED OR MOORED OR SECURED WITH PROPER WATCH AND WARD.

- (11) Warranted loss or damage to fishing equipments and/or accessories payable only if a claim for loss or damage to Hull and Machines is admitted under the Policy.

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12. Subject to valuation clauses as attached.

On a careful reading of the aforesaid terms and conditions and upon their harmonious construction, the submission of the learned counsel for the appellants does not appear to be acceptable that it is only in case of partial loss on account of fire, the liability of the insurer-appellants springs up to make good the loss occasioning and due to the insured thereby and not on account of partial loss on account of cyclone and consequential agrounding. Clause-5 is pressed into service and is employed very much to deny the claim of plaintiff states as to how in case of partial loss or damage due to fire deduction of 33 1/2% the assessed loss or Rs.1,000/- whichever is higher is to be made. This clause nowhere prohibits/excludes the claim of the insured on account of partial loss on other admissible reasons. In this connection, it is further seen

that when there has been deletion of prohibition clause regarding employment during monsoon period, the insured has been burdened with detail condition as regards the keeping of the vessel during the period while being prohibited from using it during unsafe weather condition as notified by specific authority. This clearly shows that the partial loss is not prohibited as stated by the defendants. In view of above, the submission of the learned counsel for the appellants fails.

13. The survey report proved by the defendant nos.1 and 2 Ext-B that has been accepted by the trial court by discarding the case of the plaintiff as projected on a higher plane shows that a damage was caused to the boat but no assessment was done as such partial was not covered under the policy. However, basing on that report and taking into consideration the report of P.Ws.2 and 3 that the very surveyor agency has given an estimation as regards entitlement of the plaintiff to Rs.38,050/- towards repairing cost of hull as against Rs.89,250/- as claimed by the plaintiff on the basis of Ext.3, the trial court has accepted the same to be justified and refused the higher claim of the plaintiff. It is partial loss due to agrounding that has been held by the court below but as stated when the policy nowhere excludes such a claim when it just states the entitlement of damage together with the quantum how to be determined as per clause-5 (supra) in case of partial loss due to fire, this Court find no legal justification to differ with the finding of the trial court that the partial loss caused to the boat due to agrounding

on account of cyclone is covered under the insurance policy, more so, when it has been proved that such partial loss was sustained as it was then the cyclonic weather. Therefore, the trial court's finding that the defendant nos.1 and 2 are liable to pay Rs.38,050/- to the plaintiff towards partial loss is hereby confirmed.

14 Next, on the head of sue and salvage charges, the defendant nos.1 and 2 have already paid Rs.13,000/- as against claim Rs.25,000/- The plaintiff has led evidence and has proved a number of documents on that score. The trial court has made detail analysis of evidence and has held plaintiffs entitlement to Rs.2,000/- more on that head and also on the head of loss of accessories of fishing to the tune of Rs.20,000/- which has been arrived at looking at the evidence as placed and upon their detail examination. This Court find no such infirmity or illegality in those. Therefore, the judgment and decree holding the plaintiff's entitlement to a sum of Rs.60,050/- towards partial loss of the hull, total loss of fishing accessories and the balance dues towards suits and salvage charges are hereby confirmed.

15. In the result, the appeal stands dismissing with cost throughout.

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D. Dash, J.