2024:KER:22336

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

THURSDAY, THE 21ST DAY OF MARCH 2024 / 1ST CHAITHRA, 1946

RSA NO. 40 OF 2018

AGAINST THE JUDGMENT AND DECREE DATED 16.08.2017 IN AS NO.133 OF 2012 OF ADDITIONAL DISTRICT COURT-I, MAVELIKKARA

ARISING OUT OF THE JUDGMENT AND DECREE DATED 13.03.2012 IN OS NO.71 OF 1998 OF SUB COURT, MAVELIKKARA

APPELLANT/APPELLANT IN AS/PLAINTIFF IN O.S.:

E.D.RAJAN
S/O.DANIEL, EAPAN PARAMBIL,
MATTOM NORTH, THATTARAMBALAM,
MAVELIKKARA.

BY ADVS.
SRI.R.LAKSHMI NARAYAN (SR.)
SRI.M.ASHOK KINI
SMT.R.RANJANIE

RESPONDENTS/RESPONDENTS IN AS/DEFENDANTS IN OS:

1 THE NATIONAL INSURANCE COMPANY LTD.
REPRESENTED BY THE DIVISIONAL MANAGER,
NATIONAL INSURANCE COMPANY LTD.,
VAZHUTHAKKAD, THIRUVANANTHAPURAM-695 001.

2 THE BRANCH MANAGER
NATIONAL INSURANCE COMPANY LTD.,
BRANCH THIRUVALLA-686 012.

BY ADV SRI.RAJAN P.KALIYATH, SC, NATIONAL INSURANCE COMPANY LTD.- R1 AND R2

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON 11.03.2024 AND THE COURT ON 21.03.2024 DELIVERED THE FOLLOWING:

2024:KER:22336

CR

JUDGMENT

Dated this the 21st day of March, 2024

This regular second appeal has been filed under Section 100 read with Order XLII of the Civil Procedure Code, 1908 (hereinafter referred to as 'CPC' for short), challenging the judgment and decree dated 16.08.2017 in A.S.No. 133/2012 on the files of the Additional District Court-I, Mavelikkara and also the judgment and decree dated 13.03.2012 in O.S.No.71/1998 on the files of the Sub Court, Mavelikkara. The plaintiff in the above suit is the appellant and the respondents are the defendants in the above suit, M/s. National Insurance Company and its Manager, Thiruvalla branch.

2. I shall refer the parties in this regular second appeal as 'plaintiff' and 'defendants' for convenience.

3. Heard the learned counsel for the plaintiff and the learned standing counsel appearing for the defendants in detail. Perused the records of the trial court and the appellate court along with decisions placed by both sides.

4. As on 16.08.2023, this Court admitted this appeal on the substantial questions of law framed in the memorandum of second appeal. Since it is mandatory for the court to formulate substantial questions of law, the following substantial questions of law are formulated in this appeal:

> *"(1) Whether the trial court and the first appellate court failed to apply the maxim UBERRIMA FIDES in this case properly?.*
>
> *(2) What is the legal effect of an amendment brought into the pleadings during the pendency of the suit?*

5. The short facts are as under:

The plaintiff, who insured his residential building,

compound wall and household items with the defendants with effect from 1992 and continued periodical renewal thereafter till 1997, had approached the defendants/insurance company when a portion of the compound wall so insured was collapsed on 01.10.1997 and 04.11.1997. Though a surveyor was appointed to assess the damages and he had assessed some amount, the claim of the plaintiff was repudiated. Accordingly, the plaintiff claimed compensation to the tune of Rs.1,17,382.85/- (Rupees one lakh seventeen thousand three hundred and eighty two and eighty five paise only) from the defendants/insurance company towards damages in terms of the contract of insurance.

6. The first defendant filed written statement and refuted the contention of the plaintiff, mainly on the ground that the plaintiff was guilty for non-disclosure of material facts, misdescription, and fraud. According to the defendants, the loss and damages were caused due to the fault existing at the time of commencement of the contract of insurance, for which

the company did not have liability and the policy as void.

7. In an earlier round of litigation, the trial court tried the suit and dismissed the suit. Against which, A.S.No. 33/2006 was filed before the First Additional District Court, Mavelikkara and as per judgment dated 20.09.2010, the learned Additional District Judge set aside the verdict of the trial court and remanded the matter for fresh consideration.

8. It was thereafter, the trial court relied on the evidence of PW1 to PW4 and Exts.A1 to A5 on the side of the plaintiff and DW1 and DW2 and Exts. B1 and B2 marked on the side of the defendants, to address the claim of the plaintiff and finally, the suit was dismissed. In appeal, the appellate court also concurred the said finding. Thus, the concurrent findings are under challenge before this Court.

9. It is argued by the learned counsel for the plaintiff that when foundation of contract of insurance is '*utmost good faith (uberrima fide)*', the good faith should have been mutual and the same not one that would apply to the insured and not

applicable to the insurer. The learned counsel placed a decision of this Court in **C.Sivadasan v. New India Assurance Company Ltd. And Others,** reported in **2011(2) KHC 284 : 2011 (2) KLJ 694**, wherein this Court considered a case where claim arose out of a contract of marine insurance was repudiated and in paragraph Nos.72 to 76, this Court addressed the maxim *causa proxima non remota spectatur* and after referring the precedents held as under:

> *"72. The proximate cause is defined as an action that leads to an unbroken chain of events ending in someone suffering loss.*
>
> *73. The maxim causa proxima non remota spectatur is applicable to contracts of marine insurance. But it is well settled that when there are two or more causes contributing to the production of the loss, the proximate cause is not necessarily the cause nearest in point of time to the loss but it is the efficient, predominating cause of which the loss was natural and almost inevitable result. In Stroud's Judicial Dictionary 'proximate' is defined as follows:*

"The proximate cause of the loss of a ship is the effective and predominant cause, ascertained by applying commonsense standards, and not necessarily the cause which operates last. See Yorkshire Dale Steamship Co. Ltd. v. Minister of War Transport (1942) A.C. 691 (ship engaged in a war operation held to be lost in consequent of "warlike operations" when the loss was due to a variety of causes, including a deviation of course under naval orders to avoid apprehended submarine attack, coupled with an unexpected set of the tide- negligence being disproved).

Negligence which is the proximate cause of a mistake as to work estoppel means that which is the real cause (Seton v. Lafone, 19 Q.B.D. 68). Cp. Contributory negligence, under Negligence."

74. *In the decision reported in* ***Global Process Systems v. Syarikat Takaful (2010 (3) All.E.R. 248)*** *it was held as follows:*

"The question whether both can be a proximate cause and, if so, what result that would produce depending on the terms of the policy, may also have to be considered. It is thus worth having in mind the basic rules if two causes are equally proximate as to

which there is no issue. If there are two proximate causes one of which is covered by the policy and one of which is not but is not excluded, the policy must respond, but if there are two proximate causes one of which is covered and one of which is expressly excluded, the policy does not respond. It is this latter point which was floated by the respondents at the trial because under this policy inherent vice is specifically excluded.

In considering these questions, which I have found far from easy, I should immediately record my gratitude to Professor Bennett and an article he wrote in Llyod's Maritime and Commercial Law Quarterly 'Fortuity in the Law of Marine Insurance' from which I shall unashamedly borrow.

The starting point is the well known quotation from British and Foreign Marine Insurance Co.Ltd v. Gaunt, All ER Rep. 447. Since it is helpful to see also what Professor Bennett says about it, I will quote from his article at p317:

"With respect to fortuity on the facts, the insurers argued that, if bales of wool are not properly covered, becoming wet if it rains is not fortuitous. It was held, however, that the failure to cover properly at a time of rain would supply the requisite

fortuity. Responding to the insurer's argument and elaborating more broadly on fortuity in an all risks context, Lord Sumner stated as follows:

"All risks"..... includes the risk that when it happens to be raining the men who ought to use the tarpaulins to protect the wool may happen to be neglecting their duty. this it is not a thing concurrence is fortuitous; ..... it is not a thing intended but is accidental; it is something which injures the wool from without; it does not develop from within. It would not happen at all if the men employed attended to their duty.

There are, of course, limits to "all risks". There are risks and risks insured against. Accordingly the expression does not cover inherent vice or mere wear and tear or British capture. It covers a risk, not a certainty; it is something which happens to the subject-matter from without, not the natural behaviour of that subject-matter, being what it is, in the circumstances under which it is carried. Nor is it a loss which the assured has brought about by his own act, for then he has not merely exposed the goods to the chance of injury, he has injured them himself. Finally the description "all risks" does not alter the general law; only risks are covered which is lawful to cover...."

75. The proximate cause itself may not do any direct damage. The insurance policy may cover the proximate cause but not the event that actually causes the damage. It has been observed that simply taking the last event in point of time is not a judicious act but a routine process, a process of selection. In the decision reported in ***Mayban General Insurance BHD v. Alstom Power Plants Ltd. ((2004) 2 Ly.L.R. 609)*** *it was observed as follows:*

> *"The first is that in order to recover under the policy the insured must prove that the loss was caused by an accident or casualty of some kind. Insurers accept the risk, but not the certainty, of loss. The second is that although the insured must prove a loss by an accident of some kind, it is not necessary for him to go further and establish the exact nature of the accident by which it occurred. The third is that the policy does not cover the insured against loss due to wear and tear or the inherent vice of the thing insured, whether that loss was bound to occur or fortuitous in the sense that the its occurrence depended on the particular circumstances to which the goods happened to be exposed in the course of the voyage.These principles emerge was clearly from the decision of the House of Lords in British*

and Foreign Marine Insurance Co. Ltd. v. Gaunt (1921) 2 A.C.41)."

76. It therefore follows that even if the loss is suffered due to the negligent act of the crew members of the vessel, that would fall within the ambit of perils of the sea. If that be so, the matter comes within the parameters of the loss as provided under Section 55(2)(a) of the Act. One may remember here that the definite stand of the Insurance company was that the accident was due to the negligence on the part of the members of the crew."

10. It is also argued by the learned counsel for the plaintiff that even though initially the plaintiff failed to plead the reason for the collapse of the compound wall as 'flood', by way of amendment, the same was incorporated. Then also, the trial court disbelieved the case of the plaintiff on the finding that absence of pleadings projecting 'flood' as the reason for the collapse of the compound wall, at the initial stage is fatal to the plaintiff. It is argued by the learned counsel for the plaintiff that in case of amendments brought

into under Order VI Rule 17 of CPC, the doctrine of relation back would apply and all amendments could be deemed to have been available originally as such and the evidence should have to be appreciated in the light of amended pleadings. In this regard, the three Bench decision of the Hon'ble Apex Court in **Siddalingamma and another v. Mamtha Shenoy,** reported in **AIR 2001 SC 2896** is also placed. In paragraph No.10 of the above judgment, the Hon'ble Apex Court held as under:

> *"In a civil case, once an amendment has been unreservedly permitted to be incorporated in the pleadings, the correctness of the facts introduced by amendment cannot be doubted solely on the ground that they were not stated in the original petition. So also genuineness of the landlady's statement, supported by medical prescription, that she needed to have treatment at Bangalore cannot be doubted by the Court forming an opinion that the ill-health of landlady was not so serious as to warrant her shifting to a city from a village and then submitting its opinion for the*

> *seriousness felt by the landlady. The requirement pleaded and proved was neither a pretext nor a ruse adopted by the landlady for evicting the tenant. In such circumstances, in our opinion, the order of the trial Court deserves to be restored. On the question of comparative hardship as also on the issue of partial eviction, having ourselves evaluated the well-reasoned findings recorded by the trial Court we are inclined to uphold the same more so when they have not been reversed by the High Court."*

11. The learned standing counsel for the defendants argued that the doctrine would not apply to the facts of this case.

12. It is submitted by the learned counsel for the plaintiff further that in this matter, the plaintiff produced Ext.A4, the assessment made by an expert Engineer, showing the total damages to the tune of Rs.1,17,382.85/- and the said amount ought to have been allowed even though the author of Ext.A4 could not be examined because he was no more at the time of evidence.

13. Per contra, the learned Standing Counsel appearing for the defendants argued that this is the fifth time a Judge is considering the claim of the plaintiff, though on three occasions, the claim of the plaintiff was found against and at the first instance, the First Additional District Judge, who dealt the first appeal, initially, remanded the matter. It is argued that as per the evidence available as that of PW1 to PW4 and DW1 to DW2 read along with Exts.B1 to B2, it is emphatically clear that the plaintiff herein obtained the policy in respect of building, compound wall and other structures, after suppressing material facts, particularly, the feeble nature of the compound wall because of its poor construction. He also submitted that since '*good faith*' is the cardinal element, which makes a contract of insurance, suppression of material facts, particularly, regarding the careless manner in which compound wall was constructed, to be discernible from the evidence, would defeat the claim of the plaintiff. Therefore, the concurrent verdicts do not require

any interference.

14. It is submitted by the learned standing counsel for the defendants further that if at all compensation is entitled, as found by this Court, the same shall not be in excess of Ext.B2 survey report and the survey report is a vital document while assessing compensation for damages in case of properties. The learned counsel relied on the decision of the Hon'ble Apex Court in **United India Assurance Company Limited v. Roshan Lal Oil Mills Ltd,** reported in **LAWS (SC) 1999 723**. On perusal of the judgment with reference to paragraph Nos.6 to 7, it is revealed that in the said case, the Hon'ble Apex court considered a surveyor's report under Section 64-UM (2) of the Insurance Act, 1938, jointly appointed by the parties while giving emphasis to the same, as a vital document.

15. On perusal of the trial court judgment, in paragraph No.30, the learned Munsiff extracted the terms

and conditions of the insurance policy in extenso as under:

> *"30. Admittedly, the terms and conditions of the policy of insurance are incorporated in Ext.B1. The rights and liabilities of the parties are strictly governed by Ext.B1. Sec.1 of Ext.B1 provides that, "The Company will indemnify the Insured in respect of loss of or damage to the Contents/Building whilst contained in the insured premises by:*
>
> *(a) Fire, Lightning, Explosion of gas in domestic appliances.*
>
> *(b) Bursting and overflowing of water tanks, apparatus or pipes.*
>
> *(c) Aircraft or articles dropped therefrom.*
>
> *(d) Riot, Strike or Malicious Act.*
>
> *(e) Earthquake (Fire and/or Shock) Subsidence and Landslide (including & Rockslide) damage"*
>
> *(f) Flood, Inundation, Storm, Tempest, Typhoon, Hurricane, Tornado or Cyclone*
>
> *(g) Impact damage*

16. Going by the terms of the policy as extracted above, it is clear that the policy would cover contingencies

dealt under clause (a) to (g), viz., *'flood, inundation, storm, tempest, typhoon, hurricane, tornado or cyclone'*. It is apparent from paragraph No.31 of the trial court judgment that the plaintiff projected a case stating that the compound wall was collapsed due to flood and accordingly, invoking clause (f) of the policy herein above extracted, compensation was claimed. The trial court also addressed the contention raised by the defendants that the collapse of the wall was due to structural weakness. Finally, the trial court concluded that the first defendant is not liable as per the terms and conditions of Ext.B1 to indemnify the plaintiff on account of collapse of the compound wall, due to its structural weakness and the said finding was confirmed by the appellate court also.

17. In answer to the question as to what is the legal effect of an amendment brought into the pleadings during the pendency of the suit and the application of the doctrine of relation back, it is held that, generally, when amendments sought for in the pleadings, not on the basis of a subsequent

cause of action, and the courts allow the same without specifying the date of its operation (whether the amendment operates from the date of the suit or from the date of the amendment), the doctrine of relate back theory would apply and the said amendments would relate back to the date of the suit. But the position is not always static. Say for example, when a suit for injunction was filed and subsequently amended to incorporate a prayer for title declaration and recovery of possession on the basis of a title, in view of subsequent cause of action, inasmuch as the reliefs of declaration and recovery of possession are concerned, the suit would be filed only on the date of amendment of the plaint and the order allowing such amendment application would specifically state so. ***[Sampath Kumar v.Ayyakannu and Another (2002) 7 SCC 559]***

18. Insofar as the present case is concerned, the amendment incorporated by adding '*flood*' as the reason for

collapse of the compound wall to be read as one relate back to the filing of the suit.

19. Adverting to the question as to whether the trial court as well as the appellate court went wrong in negating the claim at the instance of the plaintiff, it is apposite to refer the approach of the plaintiff. It is an admitted fact that the plaintiff insured his residential building, compound wall and household items with the defendants with effect from 1992 and continued periodical renewal of the same till 1997. The mishap was occurred after 5 years of the start of the policy and as per the allegation incorporated by way of amendment, the reason for collapse of the wall is nothing, but '*flood*'. It is interesting to note that '*uberrimae fidei*' means utmost good faith. The principles of utmost good faith are as under:

1. The insurance contract must be signed by both parties in an absolute good faith or belief or trust.
2. The person getting insured must willingly disclose and surrender to the insurer his

> complete true information regarding the subject matter of insurance. The insurer's liability gets voidable (may be legally revoked or cancelled) if any facts, about the subject matter of insurance are either omitted, hidden, falsified or presented in a wrong manner by the insured.

Thus utmost good faith (*uberrimae fidei)* is the principle that would apply the contract of insurance and both parties must contract each other with utmost good faith.

20. In approval with the said principle, when insurance company, acting on an offer made by the insured with utmost good faith on accepting the same, issues an insurance policy covering the residential building, compound wall and household items together, it cannot be held that such offer and acceptance are without utmost good faith. In such instances, concluded contract of insurance came into effect in good faith. It is true that, in a concluded contract of insurance also, the insured must willingly disclose and

surrender to the insurer complete true information regarding the subject matter of the insurance and the insurance liability gets avoided if any omission, anything either omitted, hidden or falsified or presented in a wrong manner, and those aspects should be proved to avoid liability. In this matter, surveyor was appointed by the defendants to assess the damages and he filed Ext.B2 report. As per Ext.B2 report, the surveyor found that the damages due to collapse of the retaining wall as on 01.10.1997 as **Rs.2,410/-** and as on 04.11.1997 as **Rs.9,628/-** and 50% was reduced towards depreciation and accordingly, the surveyor assessed the total damages to the tune of **Rs.6,019.20** *[1,205 (50% of Rs.2410) + 4,814 (50% of Rs. 9,628)]*.

21. On perusal of the evidence given by DW2, who authored Ext.B2, DW2 supported Ext.B2 and his finding as per Ext.B2. His evidence is that the retaining wall was collapsed due to rain and flood. His further evidence is that the wall was not constructed scientifically and the reason,

according to DW2, is that the soil was reclaimed soil and the construction was made without piling. During cross-examination, it was brought in evidence that, DW2, who is licensed to assess damages, is a Mechanical Engineer, though he stated that he also studied 'civil' as subsidiary.

22. The evidence of DW2 coupled with Ext.B2 report is that a two-storied building was constructed by A class RCC construction of about 12 years old, situated in 24 cents of reclaimed land by filling soil in the paddy field. The building and plot were surrounded by compound wall and gate. The collapsed wall was constructed with RR masonry retaining wall foundation. As per the report, it was stated that the rubble of the collapsed wall can be re-used for re-construction. That would go to show that the compound wall was constructed on a rubble foundation.

23. Whereas as per Ext.A4, the estimate filed by the plaintiff, the private surveyor, P.N.Ram Mohan, B.Sc, BE., licensed Engineered, MMC license No.22/96-97(E) estimated

the value of construction at Rs.1,17,382.85 (Rs.67,637.15 and Rs.49,745.70) and the same is the amount claimed in the plaint. But the author of Ext.A4 was not examined and the reason for the non-examination is that, according to the plaintiff, he was no more. Anyhow, the amount of compensation covered by the policy in relation to the retaining wall is only Rs.1 lakh.

24. On an evaluation of the evidence, the view taken by the trial court as well as the appellate court in the factual background of the case herein, where the plaintiff insured his residential building, compound wall and household items with the defendants from 1992 and continued periodical renewal thereafter till the date of the mishap acted without any good faith, could not be justified. When the insurer issues a policy covering the risk of flood, that pre-suppposes the fact that there is a likelihood of affection of flood in the said area and that might be the reason for the insured to opt for such a policy. Floods can collapse even strong structures. If so, it

could not be held that the plaintiff entered into a contract of insurance with the defendants without utmost good faith, though the retaining wall collapsed due to flood, for which the insurer is liable to pay damages. Although surveyor's report under Section 64-UM(2) of the Insurance Act, 1938, is of much significance while assessing damages, as rightly pointed out by the learned standing counsel for the defendants, here, there is a gigantic difference between the estimate as per Ext.A4 and the estimate as per Ext.B2. Anyhow, I am not inclined to reject Ext.B2. However, I am of the view that the entire amount assessed by the surveyor as per Ext.B2, i.e., Rs.12,038.40 (Rs.9628.40 + Rs.2410.00) with interest at the rate of 12% per annum, without any depreciation, can be granted in this case, not as a precedent, as reasonable damages and for the said purpose, verdicts under challenge would require interference.

In the result, this regular second appeal stands allowed and the verdicts under challenge stand set aside and the suit is decreed, granting Rs.12,038.40 (Rupees twelve thousand and

thirty eight and forty paise only) as damages with 12% interest from the date of the suit till the date of realisation or deposit. Considering the nature of dispute, the plaintiff is entitled to get proportionate cost of the proceeding throughout.

All interlocutory orders stand vacated and all interlocutory applications pending in this regular second appeal stand dismissed.

Registry shall inform this matter to the trial court as well as the appellate court forthwith.

Sd/-
A. BADHARUDEEN
JUDGE

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