

Brief Note on the Judgement dated 07.02.2020 of the Supreme Court of India in

Rajankumar & Brothers (Impex) v Oriental Insurance Ltd.

Civil Appeal No. 971 of 2014

Appellant, a partnership firm purchased from Respondents, a Marine Cargo Insurance to cover a voyage of hot rolled steel coils purchased by appellants from China to India. Institute Cargo Clauses (A) 2001, and other standard clauses were applicable to the policy. Cover Note of the policy was issued on 14.05.2010 and the policy was to be issued once the details of the vessel were furnished by the appellants. Vide a letter dated 26.05.2010, the appellants, as per documents presented by their sellers, forwarded the details of the nominated vessel viz. M.V Khalijia-III, a 1985 built vessel and classed with International Register of Shipping, however the abbreviation of Class used in the letter was I.R.S instead of INTLREG. Accordingly, respondents issued a single voyage policy on 02.07.2010. After reaching the discharge port Mumbai on 06.07.2020, vessel ran aground in the mid-night of 18.07.2010. On 20.07.2020, appellants informed the respondents regarding the possibility of them claiming under the policy. Salvage operations commenced and Owners appointed General Average Adjustors and appellants requested the respondent to issue General Average Guarantee (Form-B). On 3.08.2010, respondents issued a guarantee for contribution towards the General Average and other charges. Thereafter on 05.08.2010, appellants requested the respondents to issue salvage security which was withheld by the respondents. On 07.08.2010 there was a collision between the vessel and a naval ship. Thereafter on 13.08.2010, Salvors claimed a maritime lien on the cargo and at the same time commenced arbitration proceedings against the appellants & owners. Appellants furnished a bank guarantee of Rs. 14 crores before the Hon`ble Bombay High Court and got the cargo released. On 02.12.2011, the Arbitrator passed an award against the appellants and the owners finding them liable for reimbursing the costs incurred by the Salvors. Appellants vide their letter dated 02.02.2012 followed by a legal notice dated 21.06.2012 etc. requested the respondents to settle the losses incurred, however the respondent did not reply to the said letters and notice.

Appellants moved the National Consumer Disputes Redressal Commission (NCDRC) seeking compensation on account of losses incurred, deficiency in service and for legal and incidental costs. Id. NCDRC dismissed the complaint filed by the appellants on the ground that appellant had failed to prove that the vessel was in compliance with the ICC (NCDRC relied on the 1978 version of ICC whereas the correct version applicable was of 2001). Further the NCDRC took note of a communication dated 09.08.2010 wherein the claim settling agent of the respondent had informed the respondent that Lloyds Register had withdrawn the classification. Id. NCDRC also noted the fact that the vessel was more than 25 years old on the date of lost i.e. when it ran aground on 18.07.2010 and was therefore was not covered under clause 2.2.

Appellants challenged the dismissal order before the Supreme Court where the appellants inter alia contended that the vessel was classed with International Register of Shipping which was an independent classification society and after the issuance of the Cover Note, the appellant who was only the cargo-importer had provided all particulars regarding vessel, as provided by the seller and had expressly asked the respondent whether the subject vessel was acceptable. Appellants also relied on the ICC (A) Cargo Clause which provided for waiver of any breach of implied warranties of seaworthiness of the subject vessel. It was further contended that the respondents would have the right to not indemnify the appellant only if the appellants or its servants were privy to the unseaworthiness. Appellants also contended that once the respondents provided the General Average Guarantee, they were estopped from claiming that the appellants had breached the ICC. On the other hand, the respondents contended that there was a clear breach of the ICC as the appellants had failed to disclose that the classification granted to the vessel was withdrawn. It was further contended that, though the appellants had been claiming that the vessel was I.R.S classed but no certificate was produced or submitted by the appellant before the NCDRC. On the issue of estoppel, it was contended that the Guarantee was issued in good faith and it was only upon investigation the respondents found out that the vessel was not classed at the time of issuance of the Marine Insurance Policy.

Two issues arose for determination before the Supreme Court; whether the Appellant had committed breach of the warranty with respect to compliance with the ICC? And; secondly whether the Respondent had waived such breach of warranty by the appellant?

Dismissing the Appeal and upholding the judgment of the Id. NCDRC, inter alia on the ground that the appellants had breached the warranty regarding the requirement of vessel to be classed with IACS, thereby discharging the insurer from its liability. The Supreme Court held that;

- a. The court discussed the scope of Institute cargo Clauses including the requirement for seaworthiness of the vessel viz. vessel should be classed with a recognized classification society which is member of

International Association of Classification Societies (IACS) and; the age limitation of the insured vessel. The court observed that the requirements are important as classification of the vessel plays an important factor in influencing underwriter's decision-making regarding issuing the cover or not. The court took note of the provision under the ICC whereby the assured is required to promptly notify insurance underwriters if the cargo is being shipped on a vessel which is not classed in accordance with the requirements, as above, and failure to provide such information will lead to the exclusion of insurance cover under clause 5. Further, the court noted that as per the "held covered" clauses and the requirements under English laws which were incorporated into the ICC 2001 version, the assured upon coming to know about the vessel not meeting the classification and age requirements under ICC could still avail the cover upon negotiating additional premium with the underwriters.

- b. The court held that where the vessel is not classed with a recognized classification society, in terms of ICC, then any loss incurred by the cargo owner will be outside the scope of insurance cover. The court referred to judgments of courts of Singapore and Hong Kong on the issue of non-compliance with the classification requirement in the ICC particularly in the case of *Everbright Commercial Enterprises Pte. Ltd. v Axa Insurance Singapore Pte Ltd* [2001] SGCA 24, where the insurer had issued an "open-cover" insurance policy and had also issued the cover note. However before the insurance policy could be issued, the vessel was lost and the insurer came to know that the vessel was not registered and had no valid classification. Repudiation of insurance cover by insurer was upheld by the courts of Singapore by holding inter alia that even though the insured had given prompt notice but the held covered clause could not be applied as no reasonable underwriter would agree to issue cover for a vessel with a suspicious classification background. The Court then referred to the judgment of the High Court of Hong Kong in *Kam Hing Trading (Hong Kong) Ltd. v. The People's Insurance Co. of China (Hong Kong) Ltd. and Anr.* [2010] 4 HKLRD 630, where the High Court of Hong Kong had held that the obligation of the assured to disclose the vessel's classification was a continuous obligation and the assured was required to promptly inform the insurer once it became privy to the fact of non-classification of vessel, even if the such information was discovered after the policy had already been issued.
- c. The Supreme Court while following the abovementioned decisions held that "*therefore where the insurer issued the policy based on incomplete or incorrect details provided by the assured, it does not amount to acquiescence to improper classification of vessel. It is the duty of the assured to provide the full and correct particulars of vessel at the time of issuance of the policy, irrespective of the fact that the insurer carries out any due diligence at their end.*". Coming to the present case, Supreme Court held that the vessel did not comply with the ICC clause and appellants did not give prompt notice to the respondents about the non-compliance. The court noted that the even though Appellants had referred to vessel's classification as I.R.S which stood for Indian Register of Shipping and not International Register of Shipping and rejected the contention of the appellant that I.R.S stood for International Register of Shipping. Supreme Court took note of the fact that the vessel was classed with the International Register of Shipping but held that since the registry was not part of the IACS and it was never the case of appellant that the vessel was classed with the Indian Register of Shipping or a National Flag Society, therefore the appellants were held to have violated the classification requirement under clause 1 of ICC. Further it was held that the prompt notice requirement was not satisfied and there was no ground for applying the "held covered" clause.
- d. On the second issue of waiver of requirement of the compliance of the subject vessel with the requirements under the ICC by the respondent through its conduct or communications, Supreme Court referred to sections 35 & 36 of Merchant Shipping Act. The court noted that mere issuance of Marine Insurance Policy does not indicate acceptance of waiver of the vessel's classification or lack thereof. It was also held that the appellants were aware that the vessel did not comply with the minimum standards of seaworthiness as laid out in the policy and therefore could not take protection of waiver under clause 5.2 of the policy or; the respondents had waived the breach of warranty. On the issue of alleged waiver by the respondents upon issuing the General Average Guarantee, the court observed that at the time of issuing the guarantee, the respondent was under the impression that the vessel complied with the conditions and the guarantee was withdrawn only after the respondent came to know about the non-compliance of classification requirements. Therefore the court held that "*Hence, the issuance of the General Average Guarantee cannot not be understood as a waiver inasmuch as the Respondent, on the date of such issuance, did not have the knowledge of the breach of warranty committed by the Appellant and was only fulfilling its duty to contribute to the General Average (as explained supra) in good faith, as required by Clause 2 of the Marine Insurance Policy.*".
- e. The Court did not go into the issue of age limitation of the vessel under the ICC as the court had earlier concluded that the insurer was discharged from liability on account of breach of warranty by the appellant.

Practical insight on the subject

In the present case, the appellants forwarded the details of the vessel to the respondents, which was nominated by the seller to carry the cargo of the appellants and others, however as a buyer it is always advisable to ensure that the terms of agreement of sale includes relevant clauses regarding shipping and handling of the cargo so as to minimize exposure to unnecessary risks and comply with the trading practices and regulatory requirements. The duties of assured and the express and implied warranties are a crucial aspect of insurance agreements and as rightly held by the court-are continuing in nature. In a marine policy, the seaworthiness of the vessel is of paramount importance. While classification of vessel may not have a direct impact on the seaworthiness or cargo worthiness of the vessel in the literal terms but the annual surveys conducted by classification societies are essential for the vessels eligibility to trade and sail and includes surveys and inspections, the criteria for which are laid down by the classification societies in order to meet international regulations.

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