IN THE HIGH COURT OF SINDH, KARACHI

M.A.No.01 of 2015

M/s. Alpha Insurance Co. Limited

v/s.

M/s. Poly Foils (Pvt.) Ltd and Another

Before: Mr. Justice Sajjad Ali Shah, the Chief Justice
Mr. Justice Zulfiqar Ahmad Khan

Date of Hearing	:	28.09.2016.
Appellant	:	Through Ms. Shumaila Sagheer, Advocate
Respondents	:	Through Mr. S. Hassan Imam, Advocate

J U D G M E N T

Zulfiqar Ahmad Khan, J.:- Being aggrieved and dissatisfied with the Judgment and Decree passed in Suit No.09 of 2007 passed by the Insurance Tribunal for Sindh, the Appellant, who is an Insurance Company has preferred this appeal, seeking setting aside of the impugned Judgment and Decree.

Brief facts of the case are that the Respondent No.1 is owner of the Poly Foils (Pvt.) Limited, who leased out building, plant, machinery and other facilities of the said company through a lease agreement dated 16.04.2004 to the Respondent No.2 (agreement reproduced at page 229). Interestingly the said lease agreement in terms of clause 12 required the lessee (Respondent No.2) to insure the building, equipment and machinery etc. against all risks in the sum of Rs.3,41,90,000/- while making the owner (Respondent No.1) beneficiary of the claimed amount and to register it as a co-policy, notwithstanding that no considerations were stipulated in the said agreement. However, per Annexure "A" of the

said lease (page 232) details of the equipment installed at Poly Foils (Pvt.) Limited are provided, from where it could be noted that the total amount of these equipment stood at Rs.3,41,90,000/-. Shown at page 241 is the Insurance Policy strictly amounting to Rs.34,190,000/-, which the Respondent No.2 obtained from the Appellant on 12.05.2004. Soon after the said policy was obtained and less than three months after the coming into force of the said policy and upon payment of the first premium of Rs.48,326/-, fire reportedly broke out in the said factory on 30.07.2004 which resulted in total loss.

The counsel for the Appellant submitted that in order to assess the loss sustained, the Appellant Insurance Company appointed M/s. Iqbal A. Nanjee & Company (Pvt.) Limited and M/s. Anwar-ul-Haq and Company as its surveyors. The counsel contended that though a number of meetings were held between the surveyors and the Respondents, but there had been a consistent delay in providing requisite details and documents by the Respondents. The counsel drew Court's attention to page 437A, which is a letter dated 12.08.2004, written just over 13 days after the fire incident, jointly by both the aforementioned surveyors, asking the Respondents to provide a number of documents and information listed as under:

(a) Detailed Statement on the circumstances of loss, cause of loss and eye-witness account
(b) Make available your Stock Register and provide certified photo copies.
(c) Complete purchase bills and invoices of all items.
(d) Copy of GST Registration Certificate.
(e) Copy of GST Returns filed since January, 2003.
(f) Copy of Electricity Bills since January, 2003.
(g) Copy of Income Tax Returns filed and their assessment order since registration.

(h) Copy of lease agreement of machines with the Lessor.
(i) Detailed claim Bill with supporting documents.

Similar communication also took place on 31.08.2004, 06.09.2004, 02.10.2004, 03.11.2004, 19.01.2005 and 17.03.2005 from both the surveyors (annexed at page 453), however, no complete list of documents nor information were provided by the Respondents. Of particular interest is the following paragraph reproduced in the communication dated 17.03.2005.

> "We understand that Messers National Development Finance Corporation / Poly Foils (Private) Limited, had taken a policy from Adamjee Insurance in 1997, Policy No.02/P/020/008227/01/97, and had lodged a claim of loss by fire on October 25, 1997, under Claim No.02/C/020/000374/11/97. The claim for Rs.4.0 Crores was lodged for building, machinery and stocks and was settled for 25% of the claimed figure. Therefore, the machinery was already severely damaged by fire at that time. We understand that you are claiming the same machinery now, presumably, after certain repairs were carried out. And, your basis of the present claim is on the same old documents."

The counsel submitted that the Insurance Company vide its letter dated 09.06.2005, declared that on the basis of the surveyor reports, the loss could not be payable by the Insurance Company on account of breaches of conditions (1) and (11) of the Insurance Policy by the Respondents. A compete and final joint survey report was accordingly issued by both the surveyors on 16.09.2005 in terms of which on page 13, final remarks of the surveyors were given, which are reproduced as under:

"FINAL REMARKS

From the facts mentioned above and its enclosed correspondence it is evident that the Insured not only failed to provide necessary information and documents but also did not co-operate in arranging inspection of the items said to have been damaged by fire.

The Insured did not take due precaution and did not observe various warranties, stipulation and clauses of the Insurance Policy No.FEN/04/03720 and are therefore, in breach of policy conditions as already stated herein.

Despite repeated request and opportunities provided to the Insured they failed to establish that this is a bonafide claim and they have insurable interest under the policy. The operative condition of the Plant and the requisite technical staff was not available prior to or subsequent to the reported loss and therefore, the operative condition of the machinery at the time of the loss was not established by them.

Due to the fire which had occurred earlier and having recovered claim under the loss the insured tried to avoid admission of this fact but when evidence was pointed out to them they did not refute the same and could not establish that the machinery was not already severely damaged in 1997 nor that it had been repaired after the first loss in 1997.

Under the circumstances mentioned above, we are unable to certify this loss and are therefore, submitted our report for the consideration of the Underwriters."

The counsel contended that as it was evident from the said joint survey report that despite many other irregularities committed by the Respondents, the surveyors found that the machinery was already severely damaged in the earlier fire that erupted in 1997 (the claim of which was already made through another insurance company). In particular the surveyors found that operative conditions of the machinery were also not established from the fact that electricity bills of June and August, 2004 show very small consumption attributable to the use of Air-Conditioners and not by the use of heavy machinery. The machinery, per surveyors' reports, which was purchased some time in 1995-96 was never put to commercial use since its installation.

Having denied the claim, the Respondents approached the Federal Insurance Ombudsman, which initially tried to settle the dispute between the parties amicably, but failed, however, in the proceedings pending before the Ombudsman, the parties agreed on 05.12.2006 to nominate their respective surveyors. M/s. Pakistan Inspection Company (Pvt.) Limited was appointed by the Respondents, whereas M/s. Ghafoor Associates (Pvt) Limited was appointed by the Appellant to carry out the joint survey. After

receiving the survey reports, the parties were called to appear before the Ombudsman on 20.06.2007 to consider the said reports submitted by these two surveyors. Per Ombudsman order dated 03.07.2007, M/s. Pakistan Inspection Company (Pvt.) Limited (appointed by the Respondents) in its report dated 30.04.2007 mentioned that they have also hired services of an independent entity namely M/s. Pakistan Machinery and Equipment Company (Pvt.) Limited, whose report suggested that the assessed loss to stocks, machinery, tool and building was in the sum of Rs.1,56,61,621/-. To the contrary, M/s. Ghafoor Associates (Pvt.) Limited (appointed by the Appellant) vide its report dated 23.04.2007, assessed the net loss in the sum of Rs.29,08,000/-. Per Ombudsman, in view of the conflicting reports of the surveyors and other observations made by them, wherein certain infirmities and deficiencies of the parties surfaced, the Ombudsman concluded that since the case does not fall within the ambit of mal-administration, the remedy provided under section 122 of the Insurance Ordinance or adjudication of the matter by the Insurance Tribunal, which has all powers of the Civil Courts, is to be availed.

Thereafter the Respondents filed the petition before the Insurance Tribunal for Sindh at Karachi being Petition No.09/2007, where a prayer was made to order the Appellant to make payment of the total Insured sum of Rs.34,190,000/-. The Tribunal framed five issues on 13.02.2008, whereas an additional issue was added being Issue No.6 on 11.11.2009. These issues are reproduced in the following:

Issue – 1 Whether the plaintiffs have provided/filed all the relevant documents to the surveyors for insurance claim?

Issue – 2 Whether loss assessors/surveyors visited the factory twice, made video film of the damages building and machinery and obtained requisite details of loss occurred during the fire?

Issue – 3 Whether the defendant t their satisfaction got conducted pre-insurance survey (physically from their own experts) involving surveyors of their own choice to access the loss?

Issue – 4 Whether the plaintiffs are also entitled for the relief under Section 118 of the Insurance Ordinance, 2000?

Issue – 5 What should the decree be?

Additional Issue

Issue – 6 Whether the petition is maintainable according to law?

In its Judgment dated 12.03.2015, the learned Judge, presiding the Insurance Tribunal gave its findings on all the issues in affirmative and decreed the suit as prayed, thereby settling the insurance claim of Respondents in the sum of Rs.34,190,000/- in favour of the Petitioner.

The learned counsel for the Appellant contended that while the Tribunal miserably failed to discuss the essential piece of evidence, regarding the sixth issue about the maintainability of the petition, per counsel, the petition was barred by time under section 3 of the Limitation Act, 1908. Notwithstanding the foregoing, per counsel, granting of the prayer of the Respondents for the total sum claimed (Rs.34,190,000/-), the said outcome is not based on any of four survey reports, even to the report of the surveyors appointed by

the Respondents itself which restricted the claim in the sum of Rs.1,56,61,622/-, therefore, the judgment and decree transgresses the factual evidence, even if the findings of their own surveyors are honored. Learned counsel led us through the evidence to show that the Tribunal failed to consider the factual controversy and infirmities between the various pieces of evidence brought forwarded by the parties. The counsel submitted that the affidavit-in-evidence on behalf of the Petitioner No.1, who was the owner of M/s. Poly Foils (Pvt.) Ltd did not accompany the appropriate Board Resolution, empowering Mr. Tariq Sajjad (Exhibit 26) to lead the evidence. Similar was the situation in relation to the affidavit (Exhibit 6) filed by Dr. Khalid Mehmood (Respondent No.2). With regards the affidavit provided by Mr. Ghulam Mustaf Memon, Relationship Manager of NDFC (Exhibit 28), as well as, in respect of Affidavit submitted by Mr. Abdullah Noman, Director of Pakistan Machinery and Equipment Company (Pvt.) Limited (Exhibit 31), who were representing duly incorporated companies but without any board resolutions. The counsel submitted that when such objections were raised before the Tribunal, the learned Tribunal recalled its earlier findings on 09.04.2008 and re-affirmed the cross-examination dated 15.03.2011 to superficially fill the missing gap of appropriate authorization. Learned counsel further submitted that Insurance Company presented witnesses who filed their affidavits and who were also crossed. They being Mr. George Anthony of Respondents Insurance Company (Exhibit 33), Mr. Ovais Usman Ghafoor of Ghafoor Associates (Pvt.) Limited (Exhibit 34) and Mr. Hasnain Nanjee of Nanjee Company (Pvt.) Limited (Exhibit 35). The counsel took us to the cross-examination (Exhibit 38) of Majid Khan Jadoon,

Director and CEO of Pakistan Inspection Company (Pvt.) Limited, where he admitted that he was not provided with any invoice of the value of the machinery burnt during the fire incident and he fictitiously allowed 50% of the claim in the sum of Rs.1,56,61,621/- without providing any reason or establishing any foundation for such and adjudication.

Opening his line of arguments, the learned counsel for the Respondents denied the assertions of the counsel for the Appellant by submitting that all the formalities were complied with within time by the insured party and referred to Section 118 of the Insurance Ordinance, 2000, in terms of which, if an insurer fails to make the payment within 90 days from the date of which the payment becomes due, it is eligible for the payment of liquidated damages also. With regards the assertions that the suit filed before the Tribunal was time-barred, the learned counsel submitted that such assertion was raised when both the sides were closed and no evidence on this point was led. Learned counsel submitted that the denial letter was also not served upon his client as the factory was closed down after the fire incident. With regards to the applicability of the Limitation Act, the learned counsel submitted that the cause of action (the incident of fire) commenced on 30.07.2004 and the Insurance Tribunal was set up on 20.06.2006 and the presentation was made on 17.10.2007. When posed with the question as to why he took the route of going to the Ombudsman rather than filing civil suit, the learned counsel could not satisfy this Court as to why he avoided the appropriate remedy of filing civil suit which was always available before the Tribunal constituted on 20.06.2006. In support

of his assertions, the learned counsel relied on 2009 CLD 1480, 2014 MLD 1095, 2010 CLD 792, 2010 CLD 1171 and 2015 CLD 1155.

Learned counsel for the Appellant by way of rebuttal denied the assertions of the counsel for the Respondents and submitted that the entire game plan was cooked for getting the insurance claim, for which only one premium was paid and the factory caught fire within few months thereof. Particularly these assertions are more significant as the insured mis-declared the earlier incident of fire in respect of the same machinery. With regards the case law referred, wherein the claim was allowed even after the lapse of statutory time-limit, the learned counsel for the appellant distinguished these cited cases from the one at hand by submitting that all these cases relate to life insurance (where courts have been lenient), however the case at hand relates to fire insurance, for which the statutory period is strictly enforced. She placed reliance on 1997 CLC 1441, PLD 1989 Lahore 390, PLD 1982 Karachi 627 and AIR 1940 Bombay 225, and contended that the claim inherently was time-barred and ought not to have been allowed.

Heard the counsel for the parties and perused the record. To commence our analysis, attention is drawn to six issues which were framed and decided by the learned tribunal.

With regards Issue No.1, whether the Insurer provided all the relevant documents to the surveyors for claiming the insured sum, the evidence is very clear that it was not done. The joint survey report of M/s. Iqbal and Nanji and Anwar-ul-Haq and Company as well as re-survey reports speak volume about the conduct of the insured. In his cross examination (Exhibit 30-A) Mr. Jadoon

admitted that he was not provided with the invoice of the machinery burnt in the incident. It is interesting to read the last part of the cross statement where he states that "*It is correct that I have mentioned in my report on page 8 that I had not provided invoices and other record of the machinery and other items. But I had submitted report with justification along 50% losses in my assessment report. I had given correct report in my conclusion at page 17.*" It could also be seen from the conclusive summary of findings that the insured had not provided any import, purchase, repairs, replacement estimates, bills, cash memos or shipping documents in respect of the reinstatement of their machinery and building after the fire incident of 1997. The said report also provides that the insured had failed to furnish official records whatsoever in respect of their factory's operation ever since its inception in 1995. The said report also suggests that the insured did not appear to have formalized the lease agreement with SECP (Companies Division), which appears to have been just a mutual agreement between two individuals. In such a situation, the insurable interest of Dr. Khalid Mehmood also doesn't arise in the instant matter. On the above basis, we fully endorse the view of the learned counsel for the Appellant that the insured failed to provide the necessary relevant documents to the surveyors, which were mandatory in respect of the insurance claim regarding fire, that too when it took place for the second time at the same premises for the same machinery.

With regard Issues No.2 & 3, the material present on the record shows that M/s. K.S Ahmed & Co. surveyors visited the factory, but the insured did not furnish him relevant information, rather the report was not issued due to non-cooperation of the latter.

(Letter dated 29.03.2005 - Exhibit D-12). Due to such non-production of the required documents, the surveyor was not able to determine whether any loss was caused to the insured and of what magnitude, finds mention in the joint survey report, as well as, in re-survey report. (Exhibit D-13 to D-14).

Further, in the report produced by M/s. Ghafoor Associates (Pvt) Limited, there are numerous noticeable incidents of the relevant information and documents having not been provided by the Respondents. It is also very important to note that as per the evidence available on the file, the factory was never put to successful operation. The surveyors of NDFC in their report dated 23.09.2000 (page 251) observed that M/s. Poly Foils (Pvt.) Ltd. ran into problems even before coming into commercial production, thus, never actually started effective production. There is ample evidence available on the record that suggests that no details of the raw material and stocks were kept, nor produced before the Surveyors, as well as, the Surveyors confirmed that the machinery had already caught fire in 1997, for which a claim was satisfied by M/s. Adamjee Insurance Company. It is quite amusing that the only report that came in favour of the Respondent was from their own surveyor Majid Khan Jadoon, Director and CEO of Pakistan Inspection Company (Pvt.) Limited, whose cross-examination has been provided at Exhibit 30-A. He arbitrarily granted 50% of the claim in a quite a non-methodological way by using his own whims. One also cannot ignore the fact that in the lease agreement entered into between the Respondents No.1 and 2, there is not a single clause specifying the amount, but as per clause 12 the lessee was bound to insure the building, stocks, base equipment, plant and machinery to

the benefit of the owner. It is very clear that on account of failure of any consideration, the said lease *ab initio* loses to be of any legal value, it also appears that the game-plan was broiled between Respondent No.1 and 2 through the lease agreement dated 16.04.2004 to take insurance on the unspecified machineries and by merely making one payment of Rs.48,326 on 12.05.2004 they had declared fire on 30.07.2004 and came up with a claim of Rs.34,190,000/-. The intent of the parties by hiding specific details of the total assets and stocks available at the factory premises at the time of the insurance and not even providing these information to the surveyors also cements ones doubts as to the total value of claim that suddenly appeared just immediately after the fire incident took place within no more than 79 days of the insurance. It cannot be ignored that no Board Resolution was provided from the owner of the company empowering him to enter into the lease agreement with the respondent No.2, which makes the very agreement questionable, least to say. The upshot of the above is that while there was overwhelming evidence in the form of survey reports and various examinations and cross-examinations, the Tribunal did not apply judicious mind to the said evidence. Surprisingly it could also be noted that while the highest possible claim that any surveyor proposed was in the sum of Rs.1,56,61,621/-, the Tribunal in its order, for no cogent reasons accepted the claim in full to the tune of Rs.34,190,000/-, without assigning any reasons. Apparent from the above scenario, in our view Tribunal's findings on initial 3 issues and on Issue No. 5 are not based on the facts as depicted from the records and the claim in whole ought not to have been granted at all, as none of the surveyors recommended it.

With regards Issues 4 and 6 regarding applicability of Section 118 of the Insurance Ordinance and the maintainability of the suit, we agree with the contentious of the learned counsel for the appellant that the claim was time-barred as it was lodged after the expiry of the contractual limitation period of three months from the date of claim's rejection. While in this regard the learned counsel for the Respondents' contention that the delay in filing suit before the Insurance Tribunal on account of latter being only constituted on 20.06.2006 has some merit where he cited Court decisions including 2009 CLD 1413 (State Life Insurance Corporation v/s. Mst. Nasim Begum), 2009 CLD 1480 (Mrs. Nasreen Begum v/s. State Life Insurance Corporation) and 2015 CLD 1155 (Mst. Nasim Bibi v/s. State Life Insurance Corporation) wherein Courts have held that the limitation not to commence from the date of complaint rather from 20.06.2006 when the forum for lodging of such complaint under section 118 of the Insurance Ordinance, 2000 was established and that application under section 118 of the Insurance Ordinance was not barred by time in such circumstances, however, in the instant case the incident took place on 30.07.2004 and the claim thereof was filed on 18.08.2004, which was rejected on 09.05.2006 and a petition before the Ombudsman was filed on 13.06.2006 and the Tribunal having been established on 20.06.2006 and the order for transfer made on 03.07.2007, the Insurer only approached the Tribunal on 17.10.2007 i.e. between rejection of the claim and reaching the Ombudsman he took one month and four days; while from the order of transfer by the Ombudsman in approaching the Insurance Tribunal on 17.10.2007, the Insurer took three months and seven days, therefore, in total, the time taken by the Insurer

even ignoring the time lapsed when the complaint was pending before the Ombudsman exceeds one month and 18 days from the contractual period of three months as provided in clause 13 of the Insurance Policy. By placing reliance on the case of EFU General Insurance Limited v/s. Fahim-ul-Haq (1997 CLC 1441), which requires that the suit against the rejection ought to have commenced within no more than three months after the rejection, the instant case where the Insurer took four months and 18 days, we are of the view that the impugned order which held that the suit was not hit by limitation (on page 11) is not only bad as to the facts rather has failed to apply the appropriate law.

For the aforesaid reasons, we are of the opinion that the impugned judgment was passed without appreciating evidence, mutilating merit to extreme, thus does not command any respect in the eyes of law.

The instant appeal is therefore allowed by setting aside the impugned judgment and decree and dismissing the suit.

Karachi 28.12.2016 Judge

Chief Justice