APPELLATE CIVIL

Before Shamsher Bahadur, J.

M. MOHAN LAL KALIA,—*Appellant.*

versus

M/s. WOOD TRADING COMPANY AND ANOTHER,—*Respondents.*

Regular Second Appeal No. 327 of 1955.

1960

Jan., 21st

Marine Insurance—Risk under—Nature and extent of—Deliberate short supply of the goods by the consignor—Whether covered—Words "Lost or not lost" in marine Insurance policy—Meaning of.

Held, that underwriters in a policy of Marine Insurance undertake in consideration of a certain premium, to idemnify the party insured against loss arising from certain perils of the sea, or sea risks to which the ship, merchandise or freight of the insured may be exposed during a particular voyage or for a specified period of time. Coverage of such risks is essential for commerce, as it tends to promote the spirit of maritime adventure by diminishing the risk of ruinous loss to which those who engage in it would otherwise be exposed.

Held, that it is well-known principle of marine insurance that an insurer is not liable for any loss attributable to the misconduct of the assured. If an abstraction takes place, the insurer is liable for the loss which is the result of theft, pilferage or non-delivery subject to the over-riding condition that the loss or damage arises from any external cause. The deliberate short supply of the goods by the consignors themselves is not an external cause and is not insured against. A loss arising from the wilful misconduct of the assured is also excluded on ground of public policy from the perils insured against in a contract of marine insurance. It may be that an insurer may take over such a risk, but it must be definitely provided for.

Held, that the words "lost or not lost" which are wholly technical in their nature are used in marine insurance

policies to cover up situations where a policy of insurance has been effected after the goods have been laden on board the ship. Where the insurance is "lost or not lost", the thing insured may have been irrecoverably lost when the contract is entered into, and yet the contract is valid. It is a stipulation for indemnity against past as well as future losses and the law upholds it.

Second Appeal from the decree of the Court of Shri Harbans Singh, District Judge, Ludhiana, dated the 31st day of December, 1954, modifying that of Shri Chander Gupt Suri, Sub-Judge, 1st Class, Ludhiana, dated the 7th December, 1953 (granting the plaintiff an ex parte *decree for the recovery of Rs. 4,490 and costs against defendant No. 1 and further ordering that his suit was dismissed against defendant No. 2 and directing that the plaintiff would pay the costs of defendant No. 2 and further ordering that the Court-fee due on the plaint would be recovered from the plaintiff and a copy of the decree to be sent to the collector) to the extent of directing defendant No. 2 to bear his own costs throughout and affirming the rest of the decree, and further ordering that a copy of the decree be sent to the collector for necessary action as the appeal was filed in* forma pauperis.

N. L. WADHERA, for the **Appellant**

D. N. AGGARWAL, for the Respondents.

JUDGMENT

Shamsher Bahadur, J.

SHAMSHER BAHADUR, J.—The plaintiff-appellant, Mohan Lal Kalia, placed an order with the respondent Messrs Wood Trading Co., Hongkong, for 250,000 hosiery needles at a rate of Rs. 12 per thousand. The goods arrived at Ludhiana in the month of August, 1952, and were examined by Gillanders Arbuthnot and Co., Ltd., surveyors, on 26th of August, 1952. The total number of needles actually in the parcel received by the plaintiff-appellant was 27,200, making a shortage of 2,22,800 needles. According to the report of the surveyors, "the parcels did not show any

signs of having been tempered with in transit and they could not have contained any more needles, the measurements of the parcels being..... From the foregoing it is apparent that the parcels have been received in the same condition as have been forwarded by the consignors and the shortage therefore is due to short supply". It was a C.I.F. contract which the parties entered into. The goods were insured by the second respondent, the Hanover Fire Insurance Co., which is an American concern with a branch office in New Delhi.

The plaintiff brought a suit both against the consignors and the Insurance Co., for a sum of Rs. 4,490 which was made up of the price of needles which were withheld by the consignors and also the expected profits which were likely to accrue to the plaintiff. The consignors did not oppose the suit at all and an *ex parte* decree has been granted in plaintiff's favour against the Wood Trading Co., for Rs. 4,490. It was, however, found that respondent No. 2 is not liable as the subject-matter of the loss was not covered by the perils insured against. The learned District Judge, in appeal, affirmed the decree of the Subordinate Judge. The plaintiff has come in second appeal to this Court and has claimed that a decree should be granted also against the second respondent, the Hanover Fire Insurance Co.

The case turns entirely on the terms of the contract of insurance which is contained in the policy of insurance. Exhibit P. 3, which accompanied the documents despatched by the consignors to the plaintiff. The insured goods are described to be five cartons "said to contain 63,000 pcs. of knitting machine needles." "This insurance is against all risks of physical loss or damage from any external cause whatsoever

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irrespective of percentage including fire, theft, pilferage and non-delivery arising from time of registration at the Post Office until delivered at destination." In the policy, it is stated that "the said Company promises and agrees that the Insurance aforesaid shall commence upon the said Freight Goods and Merchandise from the time when the Goods and Merchandise shall be laden on board the said Ship or Vessel, Craft or Boat as above and continue until the said goods and merchandise be discharged and safely landed at as above." The policy includes the risk of war, strikes, riots and civil commotions. Admittedly, none of these are applicable to this case. Again, the policy is subject to "parcel post insurance" according to which the liability of the Company is to commence from the time of registration until delivery of the packages at destination, including physical loss or damage from any external cause whatsoever irrespective of percentage". According to clause 3 of the Institute War Clauses, "the insurance against the risks covered by these clauses attaches from the time the interest hereby insured leaves the premises of the senders at the place named in the policy for the commencement of the transit and continues, but with the exclusion of any period during which the interest is in packers' premises, until the interest is delivered to the addressees at the destination named in the policy".

According to the report of the surveyors which has been accepted by both the Courts below and which finding has not been assailed by Mr. Wadhera, the learned counsel for the appellant, the parcels contained short supply and the consignors themselves were responsible for the deficiency. Plainly the insurance is against the risks which have been specified and it cannot be said that the fraud perpetrated by the consignors

themselves is a peril which is covered by the policy of insurance. The loss or damage must be caused by "external causes" to make the insurer liable.

The counsel for the appellant has based his case on the following words which occur in the insurance policy:—

> "And it is hereby agreed and declared that the said Insurance shall be and is an Insurance (lost or not lost) at and from Honkong to Ludhiana, India".

It is contended that the words "lost or not lost" are of such amplitude that they cover a loss even at the consignor's end. These words in a marine insurance policy are ordinarily used to give retrospective effect to policies of insurance. As stated in Halsbury's Laws of England, Volume 22 (Simonds Edition) page 56, "a time policy, however, may be effected retrospectively by the insertion of the ordinary clause" 'lost or not lost'; for instance if a policy is effected on 15th August to commence on 1st day of the same month, it will cover any losses occuring on or after 1st August". These words are sometimes read into a policy of marine insurance. In Wharton's Law Lexicon, it is stated at page 612 that "lost or not lost' are words used in marine insurance policies in order to prevent the policy being void if the ship is lost at the time of insurance provided that this fact is unknown to the insurer." As an illustration of this principle may be cited the authority of *The Mercantile Mutual Insurance Company* v. *Benjamin F. Folsom,* (1) which is an American case. In this case, the policy of insurance was effected on 1st March, 1869, though the vessel on

(1) 85 United States Supreme Court Reports (18 Wallace) at page 827.

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which the goods were laden had started on its voyage on 6th January. 1869, whereabout the loss had occurred. It was held that the loss was covered by the policy. It was stated by Mr. Justice Glifford that "policies of insurance intended to have a retrospective effect, usually contain the words 'lost or not lost', and the defendants contend that the policy in this case, inasmuch as it does not contain those words, does not cover the loss described in the declaration; but it is well settled law that other words may be employed in such a contract which will have the same operation and legal effect, and it appears that the policy in this case, by its express terms, was to commence on the first day of January, 1869 . . ." As I understand from the *ratio decidendi* of this authority, the words "lost or not lost" which are wholly technical in their nature are used for situations where a policy of insurance has been effected after the goods have been laden on board the ship. This is clearly not applicable in the circumstances of the present case and Mr. Wadhera has not explained, how and in what manner the words "lost or not lost" can be utilised to support the result which has been contended for. To the same effect is the decision in *James Hooper* v. *Douglass-Robinson and others*, (1). It was held by Mr. Justice Swayne that "where the insurance is 'lost or not lost', the thing insured may be irrecoverably lost when the contract is entered into, and yet the contract be valid. It is a stipulation for indemnity against past as well as future losses, and the law upholds it." It is a well-known principle of marine insurance that an insurer is not liable for any loss attributable to the wilful misconduct of the assured [see paragraphs 151 and 161 of Halsbury's Law of England (Simonds Edition) Volume 22). In the present case the loss

(1) 98 United States Supreme Court Reports, (25 Law Ed.) at page 219

took place in the consignors' office in as much as some thing less than the quantity contracted for was actually despatched. According to the report of the surveyors, the parcels could not possibly contain anything more than was found in them at the time of delivery. In other words, there was no tampering with the parcels during the transit which was a risk covered by the policy. The liability of an insurer can arise only if the loss is attributable to a peril which has been insured against. Mr. Wadhera has made no attempt to justify the recovery of the loss from the Insurance Company on any clause in Ex. P. 3 other than the one in which the words "lost or not lost" are used. Even if it be found that the risk was to commence from the time when the parcels were still in the office of the consignors, the risk of short consignment was not the one which was insured against. If an abstraction takes place, the insurer, in my opinion, is liable for the loss which is the result of theft, pilferage or non-delivery subject to the overriding condition that the loss or damage arises from any external cause. Can it be said that the deliberate short supply of the goods by the consignors themselves is an external cause? In my judgment the answer must be in the negative. Underwriters in a policy of marine insurance undertake, in consideration of a certain premium, to indemnify the party insured against loss arising from certain perils of the sea, or sea risks to which the ship, merchandise or freight of the insured may be exposed during a particular voyage or for a specified period of time. Coverage of such risks is essential for commerce, as it tends to promote the spirit of maritime adventure by diminshing the risk of ruinous loss to which those who engage in it would otherwise be exposed. It is for this reason that a wilful misconduct of the assured is a risk which is

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definitely excluded. A loss arising from the wilful misconduct of the assured is also excluded on ground of public policy from the perils insured against in a contract of marine insurance. It may be that an insurer may take over such a risk but it must be definitely provided for. In exhibit P. 3, which is the basis of the present suit, the insurer has not covered such a risk.

For these reasons, I think the Courts below have arrived at a correct conclusion of law and this appeal must fail and is accordingly dismissed. The parties are, however, left to bear their own costs.

K. S. K.

APPELLATE CIVIL

Before Shamsher Bahadur, J.

SHRIMATI SAMITRAN DEVI,—*Appellant.*

versus

SUBA RAM,—*Respondent.*

First Appeal From Order No. 71 of 1959.

1960

Jan., 22nd

Guardian and Wards Act (VIII of 1890)—Section 25—"Custody", "Guardian" and "Removal"—Meaning of—Custody, whether includes Constructive Custody—Guardian, whether includes de facto guardian—Removal, whether limited to physical removal only.

Held, that the word "Custody" as used in section 25 of the Guardians and Wards Act referes not only to actual but also to constructive or legal custody. To exclude constructive custody would be to place a restriction which is not justified in the context of the Act. When the father of the child is alive and has not abandoned his right, any relation who has the actual custody of the child must be deemed to have that custody with the knowledge and consent of the father.

Held, that the term "guardian" in section 25 of the Guardians and Wards Act has been used in a wide sense. It