**SUPREME COURT OF INDIA**

Peacock Plywood Pvt. Ltd.

Vs.

Oriental Insurance Co. Ltd.

C.A.No.5608 of 2006

(S.B. Sinha and Dalveer Bhandari JJ.)

05.12.2006

**JUDGMENT**

**S.B. SINHA, J:**

Leave granted.

Interpretation of a policy of marine insurance entered into by and between the parties herein covering goods in transit is in question in this appeal which arises out of a judgment and order dated 16th December, 2004 passed by the High Court of Calcutta in APO No. 363 of 2000 whereby and whereunder the appeal preferred by Respondent Insurance Company herein from a judgment and order dated 3rd December, 1999 passed in C.S. No. 480 of 1992 passed by a learned Single Judge of the said Court was allowed.

Appellant herein agreed to purchase 4000 cu. mt. of 'Sabha Log' (logs) at a total price of US $6,00,000/- from a Malaysian firm. 474 pieces of logs were loaded on a vessel known as 'Indera Pertama' (vessel) at the port of Western Sabah, Malaysia for their delivery at Calcutta. The ship left the Malaysian Port with cargo on 16th February, 1988. The logs were insured by Appellant with Respondent Insurance Company for a sum of Rs. 39,90,122/- against the peril and/ or risk of non-delivery of said goods. The policy contained Institute Cargo Clause (C). It also expressly included the risk of non-delivery of even single piece of log.

The relevant clauses of the said contract are as under: "Institute Cargo Clause (C)

Risks covered:

1. This insurance covers, except as provided in Clauses 4, 5, 6 and 7 below,

1.1 ***

1.1.1 ***

1.1.2 vessel or craft being stranded grounded, sunk or capsized"

*** *** *** *** *** ***

The insurance contract contained exclusion clauses, some of which are as under:

"4. In no case shall this insurance cover *** *** *** *** *** *** 4.6 loss, damage or expense arising from insolvency or financial default of the owners, managers, chaterers or operators of the vessel. *** *** *** *** *** *** 5.1 In no case shall this insurance cover loss damage or expense arising from unseaworthiness of vessel or craft;

Unfitness of vessel craft conveyance container or lift-van for the sale carriage of the subject-matter insured.

Where the assured or their servants are privy to such unseaworthiness or unfitness, at the time the subject-matter insured is loaded therein. *** *** *** *** *** ***

6. In no case shall this insurance cover loss, damage or expenses caused by

*** *** *** *** *** *** 6.2 capture, seizure, arrest, restraint or detainment and the consequences thereof or any attempt thereat;"

*** *** *** *** *** *** 8.3 This insurance shall remain in force (subject to termination as provided for above and to the provisions for clause 9 below) during delay beyond the control of the Assured, any deviation, forced discharge, re-shipment or trans-shipment and during any variation of the adventure arising from the exercise of a liberty granted to shipowners or charterers under the contract of affreightment.

9. If owing to circumstances beyond the control of the Assured either the contract of carriage is terminated at a port or place other than the destination named therein or the transit is otherwise terminated before delivery of the goods as provided for in clause 8 above, then this insurance shall also terminate unless prompt notice is given to the Underwriters and continuation of cover is requested when the insurance shall remain in force, subject to an additional premium if required by the Underwriters, either

*** *** *** *** *** *** 9.2 if the goods are forwarded within the said period of 60 days (or any agreed extension therein) to the destination named herein or to any other destination, until terminated in accordance with the provisions of clause 8 above.

*** *** *** *** *** ***

13. No claim for Constructive Total Loss shall be recoverable hereunder unless the subject-matter insured is reasonably abandoned either on account of its actual total loss appearing to be unavoidable or because the cost of recovering, reconditioning and forwarding the subject-matter to the destination to which it is insured would exceed its value on arrival."

An extended warranty clause was endorsed in the policy wherefor additional premium was paid in the following terms:

"Notwithstanding anything contained herein to the contrary, it is hereby declared and agreed that the coverage granted under the within mentioned policy be extended to include the risks of "Theft,

Pilferage and Non-Delivery" as well as "War and S.R.C.C." as per attached clause 6 & 11. In consequence above extension of risks, an additional premium of Rs. 1,496/- is hereby charged to the insured."

The ship developed engine troubles and was held up at Singapore Port till 13th March, 1988. It sailed for Port of Calcutta thereafter. It was, however, immobilised on reaching high sea at Anadamans. It underwent repairs but eventually returned back to Malaysia. Indisputably, Appellant kept Respondent Insurance Company informed all through. While at Malaysian Port, the ship was arrested at the instance of one Gobsobs, one of the owners of the cargo in May, 1988. Appellant filed a caveat in the said proceedings with a view to take appropriate steps to have the logs belonging to it released.

The Malaysian Court discharged the order of arrest on 30th December, 1988 and the ship eventually proceeded again towards Singapore. At Singapore, the ship became stranded. On 3rd January, 1989, it offloaded its cargo and did not resume its journey. Appellant, however, with a view to minimise its loss due to non-delivery, took steps to recover the cargo or its value and on an application filed by it, the High Court of the Republic of Singapore in suit No. 711 of 1989 passed an order on 9th June, 1989 allowing the sale of the cargo. Admittedly, Appellant had received a sum of Rs. 20,01,743.53 out of the sale proceeds.

A claim by way of constructive total loss was raised by Appellant with the Insurer in terms of its letter dated 12th August, 1989 which was repudiated by Respondent in terms of its letter dated 1st April, 1991. The said stand was reiterated by it in terms of a letter dated 22nd October, 1991.

Appellant filed a suit before the original side of the Calcutta High Court which was marked as CS No. 480 of 1992 praying for a decree for a sum of Rs. 49,48,407/- with interest.

The Singapore Court, however, during pendency of the said suit on or about 19th May, 1995 released the money in favour of Appellant. The said sum being 20,01,740.53 was received by it at the then prevailing exchange rate on 22nd June, 1995.

The learned Single Judge in the suit inter alia framed the following issues:

"1. Is the plaintiff the owner of the subject goods?

*** *** ***

2(b) Was there any constructive total loss as alleged in paragraph 8 of the plaint?

3. Is the suit barred by the laws of limitation?

4. To what relief, if any, is the plaintiff entitled?"

In regard to Issue No. 1, the learned Judge opined:

"It follows therefore that the said Clause 6 cannot be set up by the defendant against the plaintiff's claim on account of non-delivery i.e. the peril insured against. Further in any event I am satisfied on the evidence adduced at the trial that the plaintiff had given prompt notice of the termination of the

voyage at the Singapore Port but the defendant did not ask for payment of additions, premium for continuation of the said policy. The defendant therefore must be considered to have acquiesced in the continuation of the said policy at any rate it must be taken to have waived the condition prescribed in the said clause. I, therefore, answer this issue in the affirmative."

So far as Issue No. 2(b) is concerned, the learned Judge noticed the definition of 'constructive total loss' as contained in Section 60 of the Marine Insurance Act, 1963 and opined:

"There is no "express provisions" to the contrary in the said policy and as such it cannot be disputed that there has been constructive total loss of the said consignment. There is evidence on record to show that the cost of bringing down the said consignment to the Calcutta Port from the Singapore Port would be more than it is actual cost (see exhibit 'S' supra). I, therefore, here (sic) that this issue should be answered in the affirmative."

As regards, Issue No. 3, the learned Judge noticed the Respondent's contention which is in the following terms:

"Plaintiff's claim was wrongful and not maintaining and the same was repudiated by this defendant's letter dated April 1, 1991 and October 22, 1991."

In regard to the said contention, it opined that the said repudiation was made on 1st April, 1991 and 22nd October, 1991.

As regards Issue No. 4, it was held that the suit was within limitation.

Keeping in view the fact that Appellant had received a sum of Rs. 20,01,740.53, it was opined that it was entitled only to a sum of Rs. 8,48,259.47 and the suit was decreed therefor together with simple interest at the rate of 18% per annum.

Aggrieved thereby, Respondent filed an intra-court appeal before a Division Bench of the said High Court which was marked as APD No. 363 of 2000. The High Court held that the repudiation of claim having been made on 8th July, 1988, subsequent correspondences having been marked as 'without prejudice', the same would not amount to extension of period of limitation as the suit was filed on 7th August, 1992. In regard to the correspondences passed between the parties, it was opined:

"The conduct of the defendant/appellant in this regard clearly indicates that in order to help tracing out the situation, the defendant had extended its good office and that too without prejudice. Such a gesture does not seem to extend the period of limitation by admission or otherwise when on the face of Exhibit 5 (8th July, 1988), the defendant had already declined/denied its liability"

It was furthermore held that having regard to Clause 9 of the policy, the contract of carriage stood terminated. On merit of the matter, the court, on the question as to whether the claim was established, held that the same had not been quantified in the absence of any definite proof with regard to the amount to be ascertained as claimable.

In regard to the question as to whether the policy was an all risk policy, the Division Bench opined that the policy was not an all risk policy and the exclusion clause contained in Clause 4.6 would

operate.

In regard to the question of constructive total loss, keeping in view the fact that the goods were in existence, the court purported to have relied upon Middows v. Robertson [(1940) 67 Lloyd's Law Report 484] opining:

"The unseaworthiness would not come within the peril of the insured against as was held in Wadsworth Lighterage Co. Ltd. (supra). The unseaworthiness of the vessel is a ground excluded in the policy as referred to hereinbefore. There is no pleading or any attempt to prove that the plaintiff or its servant was not privy to the unseaworthiness of the vessel at the time of loading."

It was held:

"6.15 If in a situation, loss occurs due to combination of more than one factors then if one factor is excluded the claim of the plaintiff cannot succeed. In the instant case, the proximate cause was delay and defaults committed by the plaintiff as mentioned aforesaid. Hence, the plaintiffs claim must fail."

In regard to the issue of loss caused by measures taken by Appellant to avert or minimize the effect of an insured period, it was opined that as the ship was detained due to unseaworthiness which is exclusionary clause the plaintiff cannot succeed in its claim. It was further opined that the insurance was hit by 'sue and labour clause' and Appellant has not been able to discharge its burden.

In regard to warehouse to warehouse loss, it was held that the policy did not include the risk of loading the goods in vessel which were unseaworthiness. It being a maritime industry peril, the enforcement would be against the exclusion clause contained in Clause 5.1.

It was concluded:

"10. For all these reasons, we are of the view (1) that because of the fact of denial by the insurer by its letter dated 8th July, 1988 (Ext. 5) coupled with the termination of the policy and its non-extension after the Cargo Safety Construction Certificate and Load Line Certificate expired on 15th July, 1988 and on account of plaintiff's failure to discharge its obligation either to obtain re-shipment of the goods soon thereafter and the failure to take a decision to sell the goods locally immediately and filing of the suit after 7th August, 1992 clearly indicates that the claim of the plaintiff was barred by limitation and the suit ought to have been dismissed; (2) the plaintiff has not been able to prove that he had taken all steps to avoid the delay; (3) the policy was not an all risk policy but was circumscribed and restricted by reason of the Institute Cargo Clause (c) containing the restrictive clauses enumerated in paragraph 5 hereinbefore; (4) the plaintiff has not been able to establish its claim by discharging the burden lay upon it to sustain the claim on merit and that the goods were not lost when the claim was lodged; (5) the plaintiff has not been able to prove constructive loss by reason of abandonment; (6) that by reason of Sections 20 and 32 of the Evidence Act, it was proved that the goods were still in existence and were in good condition; and (7) that the loss cannot be ascribed to any peril insured as discussed hereinbefore."

Mr. Prasenjit Keswani, learned counsel appearing on behalf of Appellant, would submit that the Division Bench of the High Court committed a serious error in arriving at its conclusions insofar as

it failed to take into consideration that once the goods were stranded, it was covered by the terms of extended insurance policy which would include non-delivery for any reason whatsoever. Non-delivery of goods, the learned counsel urged, would bring within its fold constructive total loss as there is no serious dispute in regard to the fact that cost of transportation of goods from Singapore to Calcutta was much higher than the actual costs of the goods. The burden of proof to show that the exclusionary clauses are attracted being on the insurer and such burden having not been discharged the decision of the Division Bench should not be upheld.

It was furthermore pointed out that neither any case of applicability of the exclusion clauses was made in the written statement nor any issue was raised. In any event, in case of an ambiguity, a contract of insurance should be construed in favour of the insured. Reliance in this behalf has been placed on United India Insurance Co. Ltd. v. Pushpalaya Printers [(2004) 3 SCC 694].

Mr. Vishnu Mehra, learned counsel appearing on behalf of Respondent, on the other hand, would submit that Institute Cargo Clause (C) contained restrictive clauses. Drawing our attention to Section 78 of the Marine Insurance Act, he would submit that the Division Bench of the High Court has rightly construed the words 'any peril'. It was submitted that having regard to Sub-section (4) of Section 78 of the Marine Insurance Act, the insured had a duty to minimize the loss and only in that view of the matter, Respondent extended its assistance which cannot be said to be an admission of its liability. It was urged that the insurance policy would cover only the perils mentioned therein and no case has been made out that the vessel was stranded.

Having regard to Clause No. 9 of the policy, it was contended that the contract became terminated and there being no request for continuation of the contract, it came to an end in December, 1988 when it was stranded at Singapore.

In regard to claim of Appellant on constructive total loss, it was submitted that the contract came to an end in December, 1988 and, thus, the case would come within the purview of Section 60 of the Marine Insurance Act. Constructive total loss, it was urged, must be commensurate with actual total loss, but, no case has been made out that it was a case of actual total loss as goods were existing and they were sold and the insured, therefore, have never been deprived of possession of the entire goods.

It was further submitted that even if the broad meaning is given to the term 'stranded', the insured having not been deprived of the possession of the goods, no loss occurred.

The questions which arise for consideration before us are:

(i) Whether the suit was barred by limitation. (ii) Whether the policy of insurance was an all risk policy. (iii) Whether the policy covered constructive total loss. (iv) Whether the exclusion clauses in the policy are applicable in the facts of this case so as to repudiate the claim of Appellant.

In the plaint it was stated:

"13. By letters dated April 1, 1991 and October 22, 1991 the defendant wrongfully rejected the claim of the plaintiff."

In response to the said contentions, Respondent averred:

"15. With reference to paragraph 13 of the plaint this defendant denies that this defendant has wrongfully rejected the claim of the plaintiff. Plaintiff's claim was wrongfully and not maintainable and the same was repudiated by this defendant's letters dated April 1, 1991 and October 22, 1991. This defendant states that the contents of the said two letters are true and correct."

Appellant lodged its claim on 24th June, 1988. On or about 8th July, 1988, the Insurance Company purported to have repudiated the claim stating:

"We acknowledge receipt of your letter of 24th ultimo and note what you write. We would like to invite your attention to our letter dated 3.6.88, wherein requested you to take sincere and serious efforts to get the cargo landed at Calcutta Port before 11.7.88 even if necessary, by taking appropriate action that may be deemed fit. We also advised you to utilize the assistance of our Singapore Office, as and when necessary.

It is not clear from your letter under reference what steps have been taken to compel the ship owners to deliver the cargo at Calcutta Port as lading issued by them.

Please note that as the vessel loaded with full cargo has been located the question of 'Non- delivery' does not arise and no claim will be admissible by the underwriters where the existence of the goods is there. As per the terms and conditions of Marine Insurance Policy "Delay" is the excluded peril which note."

From a perusal of the said letter, it is evident that the only ground on which the claim of Appellant was not accepted was that the question of any 'Non-delivery" did not arise as the cargo had been in existence. Other contentions of Appellant in the said letter had not been repudiated.

On or about 11th August, 1988, Appellant herein served a notice of abandonment inter alia stating:

"In the circumstances of the case, we are to give you this Notice of abandonment of the consignments to you and you are at liberty to take possession of the subject matters insured.

In this connection, we may state that in a similar case in British & Foreign Marine Insurance Company Limited vs. Sanday & Another it was held that "Consequent on the adventure being frustrated by an insured peril the assured may abandon it and rever for a constructive total loss on the ground that the actual loss of the subject matter insured appears to be unavoidable, even though the goods themselves are uninjured."

It was stated:

"We lodged our formal claim with the shipowners at Kuala Lumpur as required under the Policy and copy of the same was endorsed to you. The shipowners have not acknowledged our claim notice and they have purposely kept silent. However, on any recovery proceedings we would render our full assistance even by signing the plaint etc."

Respondent admittedly got a survey conducted in March, 1989. Even in December, 1988, the ship had proceeded towards Singapore but only upon reaching the port of Singapore in January, 1989, the cargo was offloaded. A finding of fact has been arrived at by the learned Single Judge that the

ship did not proceed due to its unseaworthiness. It is not in question.

We have noticed hereinbefore that indisputably Appellant on its own as also at the behest of Respondent took steps for realisation of cargo to the extent possible. It moved the Singapore High Court for sale of the cargo. It had also opposed the prayer of arrest of ship before a Malaysian Court. Respondent itself contended that Appellant made a pre-mature claim of constructive total loss. Having said so, it could not have raised a plea of limitation.

Our attention has been drawn to correspondences between the parties. In response to the Appellant's letter dated 11th August, 1988, Respondent in its letter dated 2nd September, 1988 stated that the settlement of claim would be considered strictly in terms of the policy. It was, however, stated:

"So that the goods are not sold at the interest of the one consignee alone who has already taken action in Kuala Lumpur Court, we would without prejudice strongly recommend in your interest that action be taken by you as consignees and owners of the goods in proper Court at Kuala Lumpur to compel the shipowners to complete the voyage and meantime, 'restraint order' should also be secured to protect your interest as well alongwith the other interested Consignee so that no single or arbitrary action is taken by the Court jeopardizing your other consignee's interest.

We may here draw your attention that in terms of the Loss Minimisation Clause in the Policy, you are in duty bound to see that all protective measures are taken adequately against Carriers.

However, settlement of the claim under the policy would be considered only strictly in terms and conditions of the policy of insurance. This is without prejudice."

There had been no repudiation even at that stage. It was only when the ship could not leave the Singapore Port due to unseaworthiness, a claim of constructive total loss was made. Terms of the policy would indisputably have to be invoked for determining the rival clauses. But, it is one thing to say that the claim was barred by limitation or the exclusionary clauses would apply; but it is another thing to say that the question of invoking the said clause did not arise in terms of the contract of insurance.

Only because the expression "without prejudice" was mentioned, the same, in our opinion, by itself was not sufficient and would not curtail the right of the insured to which it was otherwise entitled to. The expression "without prejudice" may have to be construed in the context in which it is used. If the purpose for which it is used is accomplished, no legitimate claim can be allowed to be defeated thereby. [See Cutts v. Head and Another, (1984) 2 WLR 349 and Rush & Tompkins Ltd v. Greater London Council and another, (1988) 1 All ER 549]

In Phipson on Evidence, Sixteenth Edition, pages 655-657, it is stated:

"Without prejudice privilege is seen as a form of privilege and usually treated as such. It does not, however, have the same attributes as the law of privilege. Privilege can be waived at the behest of the party entitled to the privilege. Without prejudice privilege can only normally be waived with the consent of both parties to the correspondence. Whilst the rule in privilege is "once privileged, always privileged", the rule for without prejudice is less straightforward, and at least in three party cases, this will not always be the position. A third distinction is that in the three party situation, which is not governed by contract, without prejudice documents are only protected in circumstances

where a public policy justification can be provided, namely where the issue is whether admissions were made. That is not a principle applicable in the law of privilege. Fourthly, whereas legal professional privilege is a substantive right, without prejudice privilege is generally a rule of admissibility, either based on a contractual, or implied contractual right, or on public policy. This may have consequences relevant to proper law issues. Finally, if a party comes into possession of a privileged document, subject to equitable relief for breach of confidence, there is no reason why he should not use it and it will be admissible in evidence. But, the mere fact that a party has a without prejudice document does not entitle him to use it without the consent of the other party.

(c) When is correspondence treated as within the rule?

The first question is to determine what communications attract without prejudice privilege. The second stage is to consider when the court will, nevertheless, admit such communications.

Correspondence will only be protected by without prejudice privilege if it is written for the purpose of a genuine attempt to compromise a dispute between the parties. It is not a precondition that the correspondence bears the heading without prejudice. If it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible. The converse is that there are some circumstances in which the words are used but where the documents do not attract without prejudice privilege. This may be because although the words without prejudice were used, the negotiations were not for the purpose of a genuine attempt to settle the dispute. The most obvious cases are first, where the party writing was not involved in genuine settlement negotiations, and secondly, where although the words were used, they were used in circumstances which had nothing to do with negotiations. Surveyors reports, for example, are sometimes headed without prejudice, although they have nothing to do with negotiations. The third case is, where the words are used in a completely different sense. Thus, in Council of Peterborough v. Mancetter Developments, the documentation was admissible because in context the words meant "without prejudice to an alternative right and without concession to the other application" and had nothing to do with settlement.

There are circumstances in which the correspondence is initiated with a view to settlement but the parties do not intend that the correspondence should be without prejudice. It may be that the parties positively want any subsequent court to see the correspondence and always had in mind that it should be open correspondence. It may be a nice point whether negotiations at which no one mentioned the words "without prejudice" should be admitted in evidence: for example at an early meeting between the parties when the dispute first developed. There is no easy rule here. On the other hand, even when a letter is sent as the "opening shot" in negotiations, and is not preceded by any previous correspondence, it may be without prejudice. There are authorities in both directions on this and it will depend on the facts.

It has been said that if one is seeking to change the basis of the correspondence from without prejudice to open it is incumbent on that person to make the change clear, although that may be more a pointer than a rule. There is no reason why every letter for which without prejudice is claimed should contain an offer or consideration of an offer, so long as the without prejudice correspondence is part of a body of negotiation correspondence."

The actual repudiation was made on 1st April, 1991 and, thus, the suit having been filed on 7th

August, 1992 was within the period of limitation in terms of Article 44 of the Schedule appended to the Limitation Act, 1963, the relevant portion whereof is as under:

"Description of suit Period of limitation Time from which period beings to run 44 (a) *** (b) On a policy of insurance when the sum insured is payable after proof of the loss has been given to or received by the insurers. Three years The date of the occurrence causing the loss, or where the claim on the policy is denied, either partly or wholly, the date of such denial."

When the termination of the contract of insurance has actually taken place is essentially a question of fact. An insurance policy is to be construed in its entirety. A marine insurance policy does not come to an end only because the ship became stranded at a port.

Termination of the transit before delivery of goods is subject to Clause 8 of the contract. The duration of contract is mentioned in Clause 8 of the contract of insurance. It commences from the time the goods leave the warehouse or other contingencies mentioned therein. It terminates:

(i) on delivery to the Consignees or other final warehouse; (ii) on delivery to any other warehouse or place of storage; (iii) for storage other than in the ordinary course of transit; or (iv) for allocation or distribution or on the expiry of 60 days after completion of discharge overside of the goods insured from the oversea vessel at any final port of discharge.

None of the aforementioned clauses are attracted in the facts and circumstances of the present case.

Clause 8.3, subject of course to the operation of other provisions contained in Clause 8 as also the provisions contained in Clause 9, remains in force during delay beyond the control of the assured, any deviation, forced discharge, reshipment or transshipment and during variation of the adventure arising from the exercise of a liberty granted to ship owners or charterers under the contract of affreightment.

The Division Bench of the High Court committed an error in holding that the insurance policy stood terminated after June/ July, 1988 in terms of clause 9 of the policy when the contract of carriage had terminated on account of the unseaworthiness of the ship. Even Respondent had not made out any case to the said effect in the pleadings. If the contract of insurance did not terminate on its own, as was wrongly opined by the Division Bench of the High Court, the question of any request for its extension did not arise.

Undoubtedly, the contract of insurance was covered under Institute Cargo Clause (C). However, it included expressly the risk of non-delivery of even single piece of log. It included the risk of the vessel or craft being stranded or grounded. It also included the risk of institute theft pilferage and non-delivery.

Yet again on 2nd March, 1988 and 11th March, 1988, evidently, the scope of aforesaid policy was enlarged pursuant whereto or in furtherance whereof further endorsements were made by paying additional premium, in terms whereof the risk of non-delivery was specifically covered. It will bear repetition to state that the vessel could not proceed from Singapore owing to its unseaworthiness. It was, thus, covered by the terms of the extended terms of insurance policy. The Division Bench failed to consider this aspect of the matter.

Clause 1.1.2 included the risk of the vessel or craft being stranded or grounded. The word 'stranded' is not a term of art. The expression has also been used in the Navy Act.

In Stroud's Judicial Dictionary of Words and Phrases, Fifth Edition, Volume 5, the word 'strand' has been defined as:

"'Strand' is a Saxon word, signifying a shore or bank of a sea or any great river"

In The New Lexicon Wesbter's Dictionary of the English Language, Volume 2, the word 'strand' has been defined as:

"strand: 1. the shore of body of water (esp. of a sea or lake). 2 to drive onto the shore/ to run (a boat) aground/ to cause (someone) to find himself accidentally and unwillingly held up on a journey or left suddenly somewhere without resources, the fog stranded passengers at the airport (esp. pass.) to leave ashore when the tide goes out or water level sinks, the whale was stranded."

In P. Ramanatha Aiyar's Advanced Law Lexicon, 3rd edition, page 4494, it is stated:

"Strand. The word "strand" means the verge of the sea, or of any river.

Strand (Sax.) is any shore or bank of a sea or river. Hence the street in the west suburbs of London, which lay next the shore or bank of the Thames, is called the Strand."

In Black's Law Dictionary, Fifth Edition, the word 'strand' has been defined as:

"A shore or bank of the sea or a river." If the ship was stranded at Singapore and goods were offloaded from it, Appellant must be held to have discharged its burden. Findings of fact were arrived at by the learned Single Judge on the basis of the pleadings of the parties. If a clause of Marine Insurance policy covers a broad fact, in our opinion, it would be inequitable to deny the insured to raise a plea particularly when the insurer being a State within the meaning of Article 12 of the Constitution of India is expected to act fairly and reasonably. The purport and object for which goods are insured must be given full effect. In a case of ambiguity, the construction of an insurance policy should be made in favour of the insured and not insurer.

In Pushpalaya Printers, this Court held:

"Where the words of a document are ambiguous, they shall be construed against the party who prepared the document. This rule applies to contracts of insurance and clause 5 of the insurance policy even after reading the entire policy in the present case should be construed against the insurer"

Section 60 of the Marine Insurance Act defines 'constructive total loss' in the following terms:

"60. Constructive total loss defined.

(1) Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure

which would exceed its value when the expenditure had been incurred.

(2) In particular, there is a constructive total loss-- (i) where the assured is deprived of the possession of his ship or goods by a peril insured against, and (a) it is unlikely that he can recover the ship or goods, as the case may be, or

(b) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered; or

(ii) in the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired.

In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if required; or

(iii) In the case of damage to goods, where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival."

The definition of "constructive total loss" contained in Section 60 is not exhaustive. The opening words of Section 60 of the Marine Insurance Act are important.

In Mukesh K. Tripathi v. Senior Division Manager, LIC and Others [(2004) 8 SCC 387], this Court observed:

"The interpretation clause contained in a statute although may deserve a broader meaning having employed the word "includes" but therefor also it is necessary to keep in view the scheme of the object and purport of the statute which takes him out of the said definition. Furthermore, the interpretation section begins with the words "unless the context otherwise requires".

40. In Ramesh Mehta v. Sanwal Chand Singhvi it was noticed: (SCC p. 426, paras 27-28)

"27. A definition is not to be read in isolation. It must be read in the context of the phrase which would define it. It should not be vague or ambiguous. The definition of words must be given a meaningful application; where the context makes the definition given in the interpretation clause inapplicable, the same meaning cannot be assigned.

28. In State of Maharashtra v. Indian Medical Assn. one of us (V.N. Khare, C.J.) stated that the definition given in the interpretation clause having regard to the contents would not be applicable. It was stated: (SCC p. 598, para 8)

'8. A bare perusal of Section 2 of the Act shows that it starts with the words "in this Act, unless the context otherwise requires ". Let us find out whether in the context of the provisions of Section 64 of the Act the defined meaning of the expression "management" can be assigned to the word "management" in Section 64 of the Act. In para 3 of the Regulation, the Essentiality Certificate is required to be given by the State Government and permission to establish a new medical college is to be given by the State Government under Section 64 of the Act. If we give the defined meaning to

the expression "management" occurring in Section 64 of the Act, it would mean the State Government is required to apply to itself for grant of permission to set up a government medical college through the University. Similarly it would also mean the State Government applying to itself for grant of Essentiality Certificate under para 3 of the Regulation. We are afraid the defined meaning of the expression "management" cannot be assigned to the expression "management" occurring in Section 64 of the Act. In the present case, the context does not permit or requires to apply the defined meaning to the word "management" occurring in Section 64 of the Act.'"

[See also M/s. Pandey & Co. Builders Pvt. Ltd v. State of Bihar & Anr. 2006 (11) SCALE 665]

Interpretation of 'constructive loss' contained in Section 60 is subject to any express provision in the policy. The definition of constructive total loss, therefore, as contained therein would be subject to any other clause which may be in the policy. The policy contained a clause which was not in commensurate with the said provision. We, in a case of this nature, have to give effect to the terms of insurance.

The Division Bench of the High Court has referred to Middows (supra), which has expressly been reversed by the House of Lords in Rickards v. Forestal Land Timber and Railways Co., Ltd. 1941 (3) All ER 62] wherein it was clearly held that the notice of abandonment can be given.

In Halsbury's Laws of England, Fourth Edition Volume 25, Reissue 2003, page 257, 'constructive loss' has been defined as follows:

"Subject to any express provision in the policy, there is a constructive total loss where the subject matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred. Whether these conditions as to constructive total loss are or are not satisfied is in each case a question of fact.

In particular, there is a constructive total loss-- (1) where the assured is deprived of the possession of his ship or goods by a peril insured against, and: (a) it is unlikely that he can recover the ship or goods, as the case may be, or (b) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered;"

The likelihood of recovery must be judged in the light of the probabilities as they would have appeared to a reasonable assured at the moment when he knew of his loss and could have given notice of abandonment. The former rule of law that a frustration of the venture by an insured peril gives rise to a constructive total loss under a voyage policy on goods, although the goods themselves are not damages, has not been altered. [See Rickards (supra)]

It is again undisputed that after the ship became unseaworthy, Appellant took steps to recover the value of the cargo with a view to minimize its loss due to non-delivery. It, therefore, fulfilled its contractual obligation in that behalf. Sale of cargo was allowed by the High Court of Singapore in suit No. 711 of 1989. It was only at that stage, Appellant could come to the conclusion that the cost of recovering and getting the cargo back to Calcutta would cost more than if the sale was effected at Singapore. The cause of action arose then. The learned Single Judge has taken specific note of the said fact stating that Appellant had sought for advice of Respondent as to whether the sale would go through at Singapore or in Calcutta by its letter dated 12th August, 1989 which was marked as Ex.

S, relevant portion whereof reads as under:

"Local Sale in Singapore"

On Solicitor's request the Court has given permission to dispose off the cargo in order to minimize the loss in view of the deterioration in quality of material. Accordingly, the Solicitors appointed M/s. Toplings, Recovery Agent, who advertised the sale in newspapers and the best offer received for the cargo consisting of 2300 CBM now lying over there is U.S. $ 85,000. Out of this our share comes as under:

Total value offered for 2300 CBM = US$ 85,000. Therefore, our shoare 85000 x 2057.73/ 2300 = US$ 76,046.54

US$ 76,046.54 x Rs. 16.90 = Rs. 12,85,166.50

Whereas we have already paid Rs. 12,85,166.50 towards the consignment of 296 logs measuring 1268.99 CBM under the L/C and US $ 1,18,416/- is still payable to the shipper against the documents for 178 Logs measuring 789.74 CBM received under the D.A. Thus, there is a loss of around over 30 lakhs while disposing the entire consignment in Singapore.

To bring the Cargo to Calcutta for Sale in India:

To bring the cargo from Singapore to Calcutta for sale in India, the position will be as under:

a) Expenditure to be borne by insurance co. towards freight and other charges like loading into ship etc. at Singapore

i.e. US $75/- per CBM

i.e. 2057.73 CBM x US $ 75

$1,54,329.75 x Rs. 16.90 = Rs. 26,08,172.77

b) Expenditure to be borne by us towards Duty and clearing expenses i.e. Rs. 721/- CBM i.e. 2057.73 CBM x Rs. 721/- per CBM comes = Rs. 14,83,623.30

Total = Rs. 40,91,796.07

The best price that we can get for the said Cargo in Calcutta is Rs. 1942/- per CBM. Therefore, the total sale realization will be as under:

2057.73 x Rs. 1942 = Per CBM Rs. 39,95,700/-"

In that view of the matter, Respondent was held to be entitled to get credit thereof. Clause 13 of the insurance policy was, thus, clearly attracted.

Reliance has strongly been placed on a decision of this Court in Bihar Supply Syndicate v. Asiatic Navigation and Others [(1993) 2 SCC 639 : AIR 1993 SC 2054] wherein this Court was dealing

with a different fact situation. In that case, the vessel in question was diverted to Vishakhapatnam along with cargo where the repairs of the vessel were expected to be completed. The vessel was, however, not repaired nor the wages of the crew members were paid as a result whereof the ship was directed to be arrested. It was in the aforementioned fact situation opined:

"It is thus clear, after knowing the fact, that we are dealing with a Marine Insurance Policy with Institute Cargo Clauses (FPA) attached against the Insurance Company, it is the duty of the plaintiff to prove as a fact that the cargo was lost due to perils of the sea. Since the finding of the High Court is that no sea water entered in the engine room and the fact that the cargo was intact even after the ship was towed to Vishakhapatnam showed that no sea water entered the ship and, therefore, the loss to the plaintiff was not on account of perils of the sea and the suit of the plaintiff against the Insurance Company i.e. defendant 4 was rightly dismissed by the High Court."

The said decision cannot be said to have any application in this case in view of the extended terms of policy. Non-delivery of goods may be on any account. It need not always be a 'case of reasonably abandoned'. The meaning of the expression 'peril insured against' would depend upon the terms of the policy. The policy was extended to a case where the costs of transportation would be more than the value of the goods. Marine Insurance Act is subject to the terms of insurance policy. Where the insurer takes additional premium and insure a higher risk, no restrictive meaning thereto need be given. A term of the policy must be given its effect. While construing a contract of insurance, the reason for entering thereinto and the risks sought to be covered must be considered on its own terms.

When the entire case is based on a construction of insurance policy, the question of adduction of any oral evidence would be irrelevant particularly when the learned Single Judge gave due credit of the amount received on auction of the goods under the orders of the Singapore Court. The value of the cargo was known. It is not a disputed amount. Thus, whatever has been recovered by way of sale of the said logs, the same has to be credited for and Appellant should be held entitled only to the balance amount.

What would, thus, be the meaning of the word 'possession' under Sub-section (2) of Section 60 of the Marine Insurance Act read with Clause 13 of the policy? It is not the case of any of the parties that Appellant was given actual possession of the goods. Unseaworthiness of vessel due to which it became stranded as a result whereof the goods could not be delivered to Appellant, in our opinion, would come within the meaning of the expression "peril insured against".

This leaves us to the question as to whether the exclusionary clauses contained in the insurance policy are attracted.

Respondent in its written statement did not raise such a contention. It was required to be specifically pleaded and proved by Respondent. The burden to prove the applicability of exclusionary clauses was on Respondent. Neither any issue has been raised, nor any evidence has been adduced in this behalf. It is also not a case that the servants of the assured were privy to the unseaworthiness as provided for in Clause 5.5.1 of the insurance policy. There has been no evidence to that effect. Even the said provision has not been applied by the learned Single Judge.

For the reasons aforementioned, the appeal is allowed and the impugned judgment of the Division Bench is set aside and the judgment and order of the learned Single Judge is restored. Appellant

shall be entitled to costs throughout. Counsel's fees in this appeal assessed at Rs. 10,000/-.