PETITIONER:
BIHAR SUPPLY SYNDICATE

Vs.

RESPONDENT:
ASIATIC NAVIGATION AND OTHERSANDUNITED SALT WORKS AND IND

DATE OF JUDGMENT17/03/1993

BENCH:
YOGESHWAR DAYAL (J)
BENCH:
YOGESHWAR DAYAL (J)
KASLIWAL, N.M. (J)

CITATION:
1993 AIR 2054 1993 SCR (2) 425
1993 SCC (2) 639 JT 1993 (2) 396
1993 SCALE (2)111

ACT:
Marine Insurance Act 1963: Ss. 2, 2(a), 2(e), 3.
Marine Insurance Policy with Institute Cargo Clauses (FPA)--Suit for recovery of cost of goods lost due to perils of the Sea--Burden of Proof on Plaintiff.
Code of Civil Procedure, 1908: O.41 Rule 33.
Scope and applicability of--Ingredients of R. 33--Powers of Court of Appeal--What are.

HEADNOTE:
The plaintiff had purchased crushed and uncrushed salt from Defendent No. 3 on payment By a charter party agreement Defendent No. 2, chartered a vessel to Defendent No. 3 for loading salt at Kandla Port in Gujarat and for carrying the same to Calcutta Port. The Plaintiff had directly paid to Defendent No. 2 the freight amount for transport of cargo from Kandla to Calcutta. Defendent No. 2 had inform Defendent No. 3 that the Plaintiff is accepted as Sub-Charteres. The Plaintiff had itself insured the cargo through the Insurance Company for Rs. 9,50,000. The policy was for the voyage from Kandla to Calcutta with Institute Cargo Clauses (FPA) cover attached including warehouse to warehouse risks and sling loss but excluding war and SRCC risks.
The plaintiff loaded the salt on the said Vessel at Kandla for shipment to Calcutta. The vessel left Kandla and the plaintiff received a telex message form defendent No. 2 informing that the vessel was at an anchorage at Sand-heads near Calcutta and was experiencing engine
426
trouble. The vessel was required to be towed from sand-heads to Vishakhapatnam as repairs could not be undertaken at sand-heads. The plaintiff was informed and it in turn informed the Insurance Company about the said development. The vessel could not be repaired as the Hindustan Shipyard who was to carry out the repairs were not paid the requisite charges by the Owner, Defendent No. 1.
The crew members were not paid their wages and they instituted an Admirality Suit in the High Court, which passed an order arresting the vessel including cargo etc. and appointed a Receiver for the vessel and the cargo.

Consent was given by the plaintiff for the sale of the vessel and the cargo. The High Court directed the receiver to sell the vessel along with the cargo. An amount of approximately Rs. 12.5 Lacs was received as sale proceeds of the vessel and the cargo. The plaintiff approached the High Court requesting to direct the receiver to withhold an amount of Rs. 9,50,000 for the benefit of the plaintiff against loss of its goods. High Court declined to grant the request and the appeal preferred by the plaintiff also ended in dismissal.

Plaintiff filed a suit claiming recovery of the loss suffered by him, viz. Rs. 9,50,000. The claim was made against the owner of the vessel, the charterer and the Insurance Company.

The Trial Court passed a decree against all the defendents in the sum of Rs. 10,49,750 i.e. 9,50,000 with interest.

On an appeal by the Insurance Company, the Division Bench of the High Court dismissed the suit decreed by the Single Judge against the Insurance Company and other defendents.

Being aggrieved by the High Court's judgment, the plaintiff and defendent No. 3 in the suit preferred the present appeals before this Court.

Dismissing the appeal of the plaintiff, and allowing the appeal of defendent No. 3, this Court,

HELD 1.1. It is axiomatic that the burden was on the plaintiff to prove the loss due to perils of the sea and on the facts of the case, at no stage, such a burden was shifted on Insurance Company to prove otherwise. [437E]

427

1.2. The cables sent by the Master of the ship do not show that sea water had entered the engine room and it was not a case of loss of goods due to perils of the sea. The expression "warehouse to warehouse" merely indicates the period during which the policy would remain in force and has nothing to do with the type of the risk policy covered. It was not a case of abandonment of the goods because of the perils of the sea. In fact the plaintiff gave the consent for permitting the sale of cargo and to recover the value thereof [437B-D]

1.3. 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. defendent No. 4 was rightly dismissed by the High Court. [438B-C]

2.1. The plaintiff was dealing itself directly with defendent No. 2. The plaintiff directly paid the freight of the voyage to defendent No.2. The plaintiff took the Bill of Lading in its own name itself. Thus there was no cause of action whatsoever against defendent No. 3. [438E]

2.2. On the facts and circumstance of the case in so far as it relates to defendent No, 3, it was a fit case for the High Court to have exercised power under Order 41 Rule 33 C.P.C. to set aside the decree passed by the trial court against defendent No. 3 without having discussed any issue against defendent No. 3 and to decide the case itself The facts are simple and life in narrow compass and show total non-liability of defendent No. 3 to the claim put forward by the plaintiff against it. No cause of action is established against defendent No. 3 who merely sold salt to the plaintiff and introduced defendent No. 2, the Charter Party to the plaintiff. The plaintiff thereafter directly deal with defendent No. 2 by paying the freight to defendent No.

2 and by estaining the Bill of Lading in its own name. The property in goods had already passed on to the plaintiff before it obtained the Bill of Lading. [442G-H, 443A-B]
Choudhary, Sahu (dead) by, L.Rs. v. State of Bihar, AIR 1982 SC 98: Mahant Dhangir and another v. Shri Madan Mohan and Others, Al R 1988 SC 54; Pannalal v. State of Bombay and others, [1964] 1 SCR 980 and Giani Rai?? and others v. Ramji Lal and others, [1969] 3 SCR 944, relied on. [438H, 439A-G]
428

JUDGMENT:
CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4611--12/.1992
From the Judgment and Order dated 16/17-1-1992 of the Bombay High Court in Appeal No. 670/88 in Suit No. 641 of 1973.
Dushyant Dave, Ms. Dipa Dixit, Jitender Singh and KJ. John (For Swarup John & Co., Advs.) for the Appellant.
M.S. Nagolkar, Deepak M. Nargolkar and P.H. Parekh for the Respondents.
The Judgment of the Court was delivered by
YOGESHWAR DAYAL, J. These are two appeals being Nos. 4611 of 1992 and 4612 of 1992 riled by M/s. Bihar Supply Syndicate, plaintiff in the suit and United Salt Works and Industries Ltd., defendant No.3 in the suit respectively, against the judgment of the High Court of Bombay dated 16th and 17th January, 1992.
By the impugned judgment the Division Bench of the High Court, on an appeal, by the National Insurance Company Limited, defendant No.4 in the suit, accepted the appeal against the judgment and decree dated 30th September, 1987 passed by the Single Judge in Suit No. 641 of 1973 and dismissed the suit decreed by the Single Judge against it and defendant Nos. 1,2 & 3.
The Single judge had passed a decree for a sum of Rs. 10,49,750 in favour of the plaintiff/appellant in Civil Appeal No. 4611 of 1992, along with interest on Rs. 9,50,000 at the rate of 12% per annum from 17th June, 1973 till realisation and costs of the suit.
The facts giving rise to the filing of Civil Appeal No. 4611 of 1992 filed by the plaintiff may be noticed.
The plaintiff/appellant is a partnership concern carrying on business as dealers in salt. Defendent No.1, M/s. Asiatic Navigation Incorporated is a Company incorporated in United States and is owner of vessel known as M.V. 'Atlas Navigator'. The vessel is registered at Panama and flies the Panama Flag. Defendant No.1 is carrying on business in Bombay through its agent. Defendant No.2, namely M/s. Thakur Shipping Company Ltd. is
429
a Public Ltd. Company carrying on business of shipping and operate the vessel Atlas Navigator belonging to Defendant No.1. Defendant No.3, United Salt Works and Industries Ltd., who is appellant in Civil Appeal No. 4612 of 1992 is also a Ltd. Company and carry on business in Bombay as manufacturers, merchants and charterers. Defendant No.4 is a General Insurance Company who, after the nationalisation of the General Insurance business had succeeded to the interest of the Skandia Insurance Company Ltd., a Company registered in Sweden.
By a Charter Party agreement dated 17th June, 1972, Defendant No.2, chartered the vessel Atlas Navigator to Defendant No. 3 for loading salt at Kandla Port in Gujarat and for carrying on the same to Calcutta Port. Clause 14 of

the agreement enabled Defendant No.3 to sublet the right under the Charter Party agreement and Defendant No.3 sublet the said right in favour of the plaintiff. The plaintiff had purchased from Defendant No.3 itself a cargo of 4434 metric tons of crushed salt at the rate of Rs. 33 per metric ton and 2741 metric tons of uncrushed salt at the rate of Rs. 30 per metric ton and had paid a sum of Rs. 6,82,000 towards the price of the salt of Defendant No.3. The plaintiff had directly paid to Defendant No.2 the freight amount of Rs. 3,95,000 for transport of cargo from Kandla to Calcutta. Defendant No. 2 had agreed to arrant,,,; for carriage of salt from Kandla to Calcutta as per the Bill of Lading issued in that behalf in favour of the plaintiff. Defendant No.2. had informed the defendant No.3 that the plaintiff is accepted as sub-Charteres and necessary steps will be taken to inform the plaintiff about the movement of the vessel. The plaintiff had itself insured the cargo through Skandia Insurance Company against the Insurance Policy dated 12th July, 1972 and the sum insured was Rs. 9,50,000. The policy was for the Voyage from Kandla to Calcutta with Institute Cargo Clauses (FPA) cover attached including warehouse to warehouse risks, including sling loss but excluding war and SRCC risks. Defendant No.4 is the successor to the Skandia Insurance Company, as stated earlier.

The plaintiff loaded 7165 metric tons of salt on the said Atlas Navigator at Kandla for shipment to Calcutta and loading was completed on July 4, 1972. The vessel left Kandla on July 9, 1972 and on July, 28, 1972 the plaintiff received a telex message from defendant No.2 informing that the vessel was at, an anchorage at Sand-heads near Calcutta and was experiencing engine trouble. The plaintiff was informed that the agent of

430

the vessel would be communicated from time to time. M/s. Shaw Wallace and Company who is the agent of defendant No.2 informed the plaintiff on July 28, 1972 that the discharge of the vessel will be commenced only after the plaintiff provided with usual General Average Bond in lieu of the cash deposit. The plaintiff by its letter dated August 17, 1982 addressed to defendant No.1 complained about failure to advise movement of the vessel. The vessel was required to be towed from Sand-heads to Vishakhapatnam as repairs could not be undertaken at Sand-heads. The plaintiff became aware of the said facts. Defendant No.2 addressed a letter dated August 18, 1972 to one R.Ramos of Hexagon Shipping Ltd. and endorsed a copy to the plaintiff. The letter inter alia recited that the vessel had been diverted to Vizag along with the cargo under tow. The plaintiff claimed to have informed the Insurance Company about the above development. The repairs to. the vessel were expected to be completed shortly and vessel was expected to be back in Calcutta with cargo. The vessel could not be repaired as the Hindustan Shipyards who was to carry on the repairs were not paid the requisite charges by the owner, Defendant No.1.

The vessel was neither repaired nor the wages of the crew members were paid with the result that the crew members instituted Admirality Suit No.1 of 1973 in the High Court of Judicature, Andhra Pradesh at Hyderabad. On February 13, 1973 the Court passed an order arresting the vessel including cargo etc. and appointed a Receiver for the vessel and the cargo. The consent was given by the plaintiff to the sale of the vessel and the cargo and the vessel along with the cargo was sold by order of the Court on March 27, 1973. The order of the High Court directed the Receiver to

sell the cargo also. The plaintiff, as stated earlier, had given the consent to sell the cargo. The consent was given by the plaintiff as it was found that the costs of unloading the cargo from the damaged vessel was more than the value of the cargo itself. Subsequently, the plaintiff tried to withdraw the consent but the Receiver had by that time not only obtained the order for sale of the vessel along with cargo but had also auctioned the vessel along with the cargo. An amount of approximately Rs.12.5 lacs was received as sale proceeds of the vessel and the cargo. The plaintiff then approached the Andhra Pradesh High Court requesting that the Receiver should be directed to withhold the amount of Rs. 9,50,000 out of the sale proceeds for the benefit of the plaintiff. The High Court of Andhra Pradesh declined to grant the request and the appeal preferred by the plaintiff also ended in dismissal. It was claimed by the plaintiff that they
431
had informed the Insurance Company about the abandonment of their right in respect of the Cargo due to inability to reclaim the cargo from the damaged vessel.

On these averments the plaintiff claimed that defendant No.1 as owner of the ship was bound to deliver the cargo at Calcutta and having failed to do so was required to pay to the plaintiff the market value of the goods estimated at Rs.9,50,000. The plaintiff claimed that defendant No. 2 who was the charterers and operators of the vessel and defendant No. 3 as sub-charterer are bound and liable to pay to the plaintiff value of the goods estimated at Rs. 9,50,000. In paragraph 38 of plaint it was averred that defendant No.4 had insured under the policy goods from warehouse Kandla to warehouse Calcutta. The plaintiff claimed that as the goods were not delivered to the plaintiff at Calcutta and as the expenses incidental to reshipment to Calcutta were much more than the insured value, the goods were deemed to be the total loss. The plaintiff claimed that the goods were abandoned and notice was given to the Insurance Company and the Company had acquiesced in and accepted the abandonment of the cargo by the plaintiff in favour of defendant No.4. The plaintiff claimed that as they had suffered a loss of Rs.9,50,000 the Insurance Company was bound to reimburse the claim to the extent of Rs.9,50,000 under the Insurance Policy.

Defendant No.1, the owner of the ship did not file the written statement and trial against it proceeded ex-parte. Defendant No.2, the charterer filed its written statement claiming that the master of the vessel intimated that the engine room of the vessel was flooded and vessel was in a dangerous condition and the crew was standing by for abandoning the ship. Defendant No.2 claimed that they are not liable for the claim made in the suit in view of the terms and condition of the Charter Party and the Bill of Lading. Defendant No.3 by its written statement claimed that defendant No.2 had accepted the sub-letting in terms of clause 14 of Charter Party and all rights and responsibilities of defendant No.3 had passed to the plaintiff and no cause of action arose against defendant No.3. Defendant No.3 had also pleaded that the plaintiff had directly paid the freight to defendant No.2 and consequently the liability, if any, was of defendant No.2 and not of defendant No.3. Defendant No.3 also claimed that the title of the cargo was passed to the plaintiff and defendant No.3 had nothing to do with the non-delivery of cargo at Calcutta.
432

Defendant No.4, the Insurance Company, filed its written statement claiming that the plaint did not disclose any cause of action against the Insurance Company. Defendant No.4 also pleaded that the plaintiff had not even averred in the plaint that the owner of the vessel had advised of abandoning of frustration of voyage and under the circumstances no claim under the policy could be made. Defendant No.4 then pleaded that the liability under the policy should arise provided the perils of the sea had damaged the cargo as the policy had insured against the perils encountered. The Insurance Company denied that the Cargo was deemed to be lost and that the plaintiff had abandoned the cargo and the Insurance Company had acquiesced or accepted the alleged abandonment.

On these pleadings the learned trial court settled separate issues between the plaintiff and defendant No.2; as many as five issues between the plaintiff and defendant No.3 (appellant in Civil Appeal No. 4612 of 1992) and between plaintiff and defendant No.4. The issues settled between the plaintiff and defendant No.4 were as under :-

> "(1) Whether the plaint does not disclose any cause of action against the 4th defendants as alleged in para 1 of, the written statement ?
> (2) Whether the plaintiffs have suffered any loss due to any of the perils insured against by the Policy of Insurance dated 12.7.1972 ?
> (3) Whether the plaintiffs abandoned the goods as alleged in para 38 of the plaint ?
> (4) Whether the 4th defendants acquiesced in abandonment as alleged in paras 35 and 38 of the plaint ?
> (5) Whether there was total loss as alleged in para 38 of the plaint ?
> (6) What relief, if any ?
> The issues settled between the plaintiff and defendant No.3 were as under :-
> (1) Whether the plaintiffs are a registered partnership
> 433
> firm as alleged in para 1 of the plaint ?
> (2) Whether the plaint discloses any cause of action as against this defendant as alleged in para 31 of the written statement ?
> (3) Whether this defendant was liable as sub-charterers to pay the plaintiffs the market value of the said goods at Calcutta being Rs.9,50,000 as set out in Ex.'E' of any part thereof as alleged in para 3 of the plaint ?
> (4) Whether this defendant is absolved from all liabilities of the plaintiffs as alleged in para 28 of the written statement ?
> (5) Whether the plaintiffs are entitled to any relief against this defendant ? If so, what ?"

The trial court, as stated earlier, decreed the suit of the plaintiff against all the four defendants. In the present appeals before us we are not concerned with the rights of the plaintiff vis-a-vis defendants 1 and 2 as defendants 1 and 2 did not prefer any appeal against the decision of the trial court. The defendant No.4, namely the Insurance Company, filed the appeal before the Division of the High Court whereas defendent No.3, United Salt Works and Industries Ltd., (appellant in Civil Appeal No. 4612 of 1992) preferred cross-objections on receipt of notice of

appeal filed by M/s. National Insurance Company Ltd. The trial court while decreeing the suit against the Insurance Company held issue numbers 1, 2, 3 in the affirmative, in favour of the plaintiff and against defendant No.4. On issue No.4 he held that it was not necessary. Issue No.5 was also answered in the affirmative and issue No.6 as per the order. Consequently the trial court decreed the claim of the plaintiff against all the defendants in the sum of Rs. 10,49750 with interest on Rs. 9,50,000 at the rate of 12 per cent per annum from 17th June, 1973 till realisation with costs of the suit.

It is curious that though the trial court found issues as settled between the plaintiff and defendant No.3 against defendant No.3 but there is no discussion at all in the trial court judgment for various findings recorded against defendant No.3. On appeal by the Insurance Company the Division Bench of the Bombay High court examined the oral evidence

434

led by the Insurance Company of its Assistant General Manager Shri Dhirubhai A. Shah and one of its employee Shri Mangaldas Keshavji Jagad. The Division Bench also examined the evidence led on behalf of Defendant No.2 of Sh. Sentu Vazirmal Ramchandani who had carried out the work of survey of the damaged vessel at Vishakhapatnam.

Before the Division Bench it was submitted on behalf of the Insurance Company No.4, that its liability arises out of Marine Insurance Policy and the plaintiff cannot succeed in obtaining a decree against it unless it is established that the goods were lost due to perils of the sea. It was submitted on its behalf that the plaintiff had not even averred in the plaint that the goods were damaged due to perils of the sea. It was also submitted that the trial court entirely misconstrued the terms of policy and erroneously concluded that the loss was caused due to perils of the sea. It was submitted on behalf of the Insurance Company that the trial court was in error in assuming that the term in the policy that the risk is covered from warehouse to warehouse means that the policy covers all kinds of risks to the vessel and the goods.

On behalf of the plaintiff/respondent No.1 in the appeal before the High Court, it was submitted on the other hand that the finding of the trial court that the loss was caused due to perils of the sea justified. It was also pleaded in the alternative that the policy covered all risks from warehouse at Vishakhapatnam to warehouse at Calcutta and as there was constructive loss of all the goods the plaintiff was entitled to a decree.

In view of these rival contentions, the High Court felt that the question which falls for determination is whether the plaintiff has suffered loss due to any perils of the sea insured against by the policy for insurance dated July 12, 1972.

After examining the Marine Insurance Policy dated 12th July, 1972 the High Court took the view that the policy of insurance was subjected to FPA terms as per the Institute Cargo Clauses (FPA attached) including warehouse to warehouse risks. It also found that the "plain reading of the policy makes it clear that claim under the policy is permissible provided the insured establishes that the loss was caused due to perils of the sea". Thereafter the High Court examined four cables on which the plaintiff relied namely the cable dated 19th July, 1972 sent by the master of ship which inter alia recites that the engine has stopped due to damaged boiler

435
and it further recites that there is no remedy and sought permission to employ Tegboat; the second cable dated 21st July, 1972 which stated that the vessel is steaming on power near Sand-heads; the third cable dated 22nd July, 1972 recited that anchored pilot stationed at Calcutta Port refused to bring the vessel in the Port due to non-availability of the engine power and steamer power; the cable then recited that there is no provision of Water and urgent assistance is required and the last cable dated 25th July, 1972 rejected that the engine room had been flooded and the request for emergency pump had not received any response. The cable then mentioned that the generator is likely to shut out any time and the situation has become very dangerous and crew had been ordered to stand by for abandoning the ship. The learned Judges of the Division Bench noticed that from the contents of theses four cables the trial judge came to the conclusion that the vessel had suffered casualty on account of the damage to the machine and the engine and the main boiler not functioning. The High Court further noticed that trial judge felt that the cables disclosed that initially there was engine trouble due to damage to the boiler but later the engine room was flooded and that had resulted in the condition of the vessel becoming very dangerous so much so that the crew was standing by for abandoning the vessel. The Division Bench also noticed that the finding of the trial court that the flooding of the engine room could not have been possible except from the sea water. The Division Bench felt difficulty in appreciating on what basis the trial judge proceeded to draw such an inference. After examining the contents of the four cables the Division Bench took the view that the contents of the cables no where disclose that the water which entered the engine room was the sea water. The High Court felt that it was a matter of common knowledge that the water is stored an the vessel for the purpose of ballast. The learned Judges felt that the trial judge's finding that the engine room was flooded with sea water and therefore the vessel had suffered by perils of the sea was erroneous. The learned Judges of the Division Bench felt that the trial judge had overlooked that the evidence on record urmistakably establishes that the vessel was towed back to Vishakhapatnam; was ultimately arrested by the order of the Andhra Pradesh High Court and was sold along with the cargo and they took the view that the finding of the trial judge that the flooding of the engine room with sea water is without any basis. The High Court observed "'it is nobody's case that the vessel was leaking and the sea water had flooded in the vessel. The fact that the vessel could be towed back to Vishakhapatnam and was available for being arrested and sold in auction,
436
is a telltale circumstance to establish that there was hardly any damage to the vessel and much less due to perils of the sea at Sand-sea near Calcutta Port." On the other hand the High Court gave a finding that there is positive evidence to establish that sea water had never entered in the vessel at any time and the cargo had not even been damaged. The Division Bench also examined the survey report produced by the plaintiff itself dated 14th March, 1973 made by Erlcoon and Richards (Andhra) (Ext. IN,) which showed that the surveyors boarded the vessel on 12th March, 1973 while it was lying alongside J-3 berth, Vishakhapatnam in order to inspect and ascertain the condition of the cargo on board. The report establishes that the bulk cargo of salt

was stored in the vessel's five numbers hatches and the same was found in apparent good condition throughout. The High Court thus gave a finding that the vessel and the cargo had not suffered due to perils of the sea. The High Court also on examination of the evidence of Shri R.C. Walia, partner of the plaintiff clearly gave another finding that "the case put forward by the plaintiff was that the vessel was towed back to Vishakhapatnam for effective repairs by Hindustan Shipyards. Walia in examination-in-chief stated that the vessel reached Sand-heads near Calcutta and suffered from engine trouble and therefore could not reach Calcutta Port. Walia further stated that the Port Authorities did-not permit the vessel to enter the Port and the vessel had to be towed to Vishakhapatnam for repair. Walia then stated "the Hindustan Shipyard tried to repair the ship but as the defendant No.1 did not give the necessary funds the vessels could not be repaired ultimately. In the meantime the Master of the vessel and crew were not paid their wages for which they filed a suit in the Andhra Pradesh High Court. Thereafter the vessel and the cargo were sold." The engine and the boiler of the vessel failed possibly because of non-repair and it was not the liability of the Insurance Company to reimburse the plaintiff for the loss of the goods because of failure of the owner of the vehicle of incur expenses for repair of the ship. Thereafter the High Court also noticed that after the proceedings had been lodged by the Master and the crew members in the Andhra Pradesh High Court for arrest and sale of the vessel, the plaintiff had given the consent to the sale of the carge. The High Court accordingly gave further finding that "it is therefore futile for plaintiff now to claim that the cargo was abandoned because of the inability to salvage it without incurring expenses higher than the value of the cargo itself." The High Court felt that the failure to carry out repairs can by no stretch of imagination be said to be the perils of the sea and accordingly gave a finding that the trial judge

437

was in error in concluding that the plaintiff had established that the loss of the cargo was due to perils of the sea.

We have gone through the evidence on record including the four cables mentioned earlier. We are in complete agreement with the Division Bench of the High Court that the cables do not show that sea water had entered the engine room and it was not a case of loss of goods due to perils of the sea. The Judges of High Court took the view that the expression "warehouse to warehouse" in the policy merely denotes the time during which the policy would remain in force and by no stretch of imagination can be interpreted as covering each and every risk. We are also in agreement with the Division Bench of the High Court that expression "warehouse to warehouse" merely indicates the period during which the policy would remain in force and has nothing to do about the type of the risk policy covered.

The policy remained a typical Marine Voyage Policy with Institute Cargo Clauses (FPA) and in the absence of loss due to perils of the sea, the Insurance Company was not liable. We are also in agreement with the view of the High Court that it was not a case of abandonment of the goods because of the perils of the sea. We are also in agreement with the view of the High Court that it was not a case of abandonment of the goods. In fact the plaintiff gave the consent for permitting the sale of cargo and to recover the value thereof It. is axiomatic that the burden was on the

plaintiff to prove the loss due to perils of the sea and on the facts of the case, at no stage, such a burden was shifted on Insurance Company to prove otherwise. Under Section 2(a) of the Marine Insurance-Act 1963 (Act No.11 of 1963) (shortly stated the Act) a "contract of Marine Insurance" means a contract of Marine Insurance as defined by Section 3. Section 3 defines that a contract of Marine Insurance is an agreement whereby the insurer undertakes to indemnify the assured, in the manner and to the extent thereby agreed, against marine losses, that is to say the losses incidental to marine adventure. "Marine adventure" is also defined in the Act under Section 2 and includes any adventure where (i) any insurable property is exposed to maritime perils; (ii) the earnings or acquisition of any freight, passage money, commission, profit or other pecuniary benefit, or the security for any advances, loans, or disbursements is endangered by the exposure of insurable property to maritime perils; (iii) any liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property by reason of maritime perils. "Maritime perils" is again defined in Section 2(e) and means the perils
438
consequent on, or incidental to, the navigation of the sea, that is to say perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints and detainments of princes and peoples, jettisons, barratry and any other perils which are either of the like kind of may be designated by the policy. 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 fi nding 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 No. 4 was rightly dismissed by the High Court.

We are now left with the appeal filed by M/s. United Salt Works and Industries Ltd., who was defendant No.3 in the suit. It is most unfortunate that though the trial court framed issues but without any discussions gave findings on those issues against defendant No.3. The High Court on the cross-objections filed by the appellant took the view that the cross-objections were not covered by the provisions of Order 41 Rule 22, of the Code of Civil Procedure and also took, the view that no case had been made out for granting relief to defendant No. 3 inspite of the provisions contained in Order 41 Rule 33 of the Code of Civil Procedure.

It will be noticed that apart from the fact that defendant No.3 was merely the seller of the salt to the plaintiff and had introduced defendant No.2 to the plaintiff, he had no other role in the actual carriage of the goods by the ship concerned. the plaintiff was dealing itself directly with defendant No.2. The plaintiff directly paid the freight of the voyage to defendant No.2. The plaintiff took the Bill of Lading in its own name itself. Thus there was no cause of action whatsoever against defendant No.3, yet the trial court without any discussions, decreed the suit against defendant No.3 alongwith the decree against defendants 1,
2 & 4.

We are in agreement with the High Court that the cross-objections filed by defendant No.4 against the plaintiff were not maintainable. However, we are not in agreement with the High Court that the provisions of Order 41 Rule 33 of the Code of Civil Procedure were not applicable. The High Court
439
noticed the decisions of this Court in Choudhary Sadu (dead) by L.Rs. v. State of Bihar, AIR 1982 S.C. 98 and Mahant Dhangir and another v. Shri Madan Mohan and others, AIR 1988 S.C. 54 but felt that it could not grant relief to defendant No.3. In the Constitution Bench decision of this Court in Pannalal v. State of Bombay and others, [1964] 1 S.C.R. 980 the facts were that the appellant therein had brought three suits claiming full payment with interest in respect of three hospitals constructed by him in execution of three separate contracts. The trial court decreed the suits for part of his claim against the State of Madhya Pradesh and held that other defendants were not liable, and accordingly dismissed the suits against them. On appeals preferred by the State of Madhya Pradesh the High Court set aside the decree against the State Government and allowed the appeals with costs. The plaintiff at that stage prayed for leave of the High Court to file a cross objection and also for decrees to be passed against the Deputy Commissioner under Order 41 Rule 33 of the Code of Civil Procedure, which was rejected and all the suits were dismissed. It was inter alia urged that the High Court ought to have granted relief against such of the other defendants as it thought fit under Order 41 Rule 33 of the Code of Civil Procedure. This Court held that the wide wording of Order 41 Rule 33 empowers the appellate court to make whatever order it thinks fit, not only as between the appellants and the respondent but also as between a respondent and a respondent. In could not be said that if a party who could have filed a cross-objection under Order 41 Rule 22 did not do so, the appeal court could under no circumstances give him relief under the provisions of Order 41 Rule 33. Order 41 Rule 22 permits as a general rule, respondent to prefer an objection directed only against the appellant and it is only in exceptional cases that an objection under Order 41 Rule 22 can be directed against the other respondents. On the facts of these cases the High Court refused to exercise its powers under Order 41 Rule 33 on an incorrect rule of the law and so the appeal must be remanded to the High Court for decision what relief should be granted to the plaintiff under Order 41 Rule 33 of the Code of Civil Procedure.
The Provisions of Order 41 Rule dealing with the power the appellate court of grant relief to parties to suit who have not appealed or filed cross-objections came up for consideration before this Court in Giani Ram and others v. Ramji Lal and others, [1969] 3 SCR 944. The facts of that case may be noticed. Under the Punjab customary law the female heirs were not entitled to challenge a sale of ancestral property by a male owner. The father sold property in 1916 without legal necessity. Son filed suit in 1920
440
and obtained a declaratory decree that the sale would not enure beyond the life-time of his father. In the meantime in 1956 Hindu Succession Act, 1956 came into force giving equal rights to females and the daughters and widows were also recognised as the heirs. Father died in 1959 and the question arose of the right of the family to sue for possession of the alienated property from the purchaser on

the basis of the decree obtained by son. After the death of the father, the three sons,- the widow and the daughters filed a suit for possession of the alienates land on the basis of the decree obtained by the son in 1920. Under Section 8 of the Punjab Custom (Power to Contest) Act 1 of 1920 only those competent to contest an alienation could take advantage of a decree obtained by a reversioner. The trial court passed a decree for a half share of the suit property in favour of the son only, holding that the female heirs of the alienor were not entitled to take advantage of the decree passed in the suit in 1920. The District Court modified the decree by decreeing the suit in respect of the whole property in favour of the son. In second appeal the High Court restored the decree of the trial court holding that the claim of the female heirs of the alienor could not be upheld, firstly because of the Punjab customary law and Section 8 of Punjab Custom (Power to Contest) Act 1 of 1920 and secondly because they had not filed any appeals against the order of the lower courts. In appeals by special leave before this Court it was held by Shah, J. (i) that the preliminary objections raised by the alienees that the suit in its entirety should have been dismissed because by the enactment of the Hindu Succession Act father was deemed to be a full owner and notwithstanding the decree of 1920 his son had after that Act no subsisting reversionary interest in the property, must stand rejected. There is nothing in the Hindu Succession Act which retrospectively enlarges the power of a holder of ancestral land or nullifies a decree passed before the Act; (ii) under the customary law of Punjab the wife and the daughter of a holder of ancestral property could not sue to obtain a declaration that the alienation of ancestral property will not bind the reversioners after the death of the alienor. But a declaratory decree obtained in a suit instituted by a reversioner competent to sue has the affect of restoring the property alienated to the estate of the alienors. This Court took the view that the effect of the declaratory decree in the suit filed by the son in 1920 was merely to declare that by the sale, the interest conveyed .4 to the alienee was to enure during the life-time of the alienor. The conclusion was therefore inevitable that the property alienated reverted to the estate of the father at the point of the death and all persons who would,

441

but for the alienation have taken the estate were entitled to inherit the same. If the father had died before the Hindu Succession Act, 1956 was enacted the three sons would have taken the estate to the exclusion of the widow and the two daughters. After the enactment of the Hindu Succession Act the estate devolved upon the three sons, the widow and the two daughters. It was further held that the High Court was therefore in error in holding that because in the year 1920 the wife and daughters of the alienor were incompetent to challenge the alienation of ancestral property by the father, they could not, after the enactment of the Hindu Succession Act inherit the estate when succession opened after that Act came to force. This Court further held that the High Court was equally in error in holding that because the widow and daughters had not filed an appeal or cross-objection against the decree of the lower courts, they were not entitled to any relief. The sons, the daughters and the widow of the alienor had filed the suit for a decree for possession of the entire property and their claim was that the alienee had no subsisting interest. The District Court accepted that claim and granted a decree in favour of the

three sons for the entire property which was alienated. If the alienees were unable to convince the court that they had any subsisting interest in the property in dispute after the death of the alienor the court was competent under Order 41 Rule 33 of the Code of Civil Procedure to adjust the rights between the sons, the daughters and the widows of the alienor in that property. In Order 41 Rule 33 the expression "which ought to have been passed" means "what ought in law to have been passed". If the appellate Court is of the view that any decree which ought in law to have been passed was in fact not passed by the subordinate court, it may pass or make such further or other decree or order as the justice of the case may require.

It may be noticed that in that case no first appeal or even the second appeal was filed on behalf of the daughters and the widow yet this Court thought it fit to grant them relief under Order 41 Rule 33 of the Code of Civil Procedure.

The decision in the case of Pannalal v. State of Bombay, (supra) was followed by this Court in Mahant Dhangir and another v. Madan Mohan and others, [1987] (Supp) S.C.C. 528 = AIR 1988 S.C. 54.

If the relief can be granted by the appellate court even when no appeal or cross-objections were filed by the respondent, surely relief can be granted by the appellate court when cross-objections have been filed by

442

the respondent against a co-respondent. Order 41 Rule 33 of the Code of Civil Procedure reads as under:-

> "33. Power of Court of Appeal The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or make and to pass or made such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercise in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees."
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> (emphasis added)

Really speaking the Rule is in three parts. The first part confers on the appellate court very wide powers to pass such orders in appeal as the case may require. The second part contemplates that this wide power will be exercised by the appellate court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection. The third part is where there have been decrees in cross-suits or where two or more decrees are passed in one suit, this power is directed to be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees.

The present case falls within the third part of Rule 33 of Order 41 of the Code of Civil Procedure.

We are of the view that on the facts and circumstances of this case it was a fit case for the High Court to have exercised power under Order 41 Rule 33 to set aside the decree passed by the trial court against defendant No.3 without having discussed any issue against defendant No.3

and to decide the case itself. We also thought of remanding back the matter to the High Court but we find that the facts are simple and lie in narrow compass and show total non-liability of defendant No.3 to the claim put
443
forward by the plaintiff against it. As we have noticed earlier no cause of action is established against defendant No.3 who merely sold salt to the plaintiff and introduced defendant No.2, the Charter Party to the plaintiff. The plaintiff thereafter directly dealt with defendant No.2 by paying the freight to defendant No.2 and by obtaining the Bill of Lading in its own name. The property in goods had already passed on to the plaintiff before it obtained the Bill of Lading.

The result is that Civil Appeal No. 4611 of 1992 is dismissed and Civil Appeal No. 4612 of 1992 is accepted and suit of the plaintiff filed against defendant No.3 is dismissed. The judgments of the trial court and High Court are modified further to the extent that the suit against defendant No.3 is also dismissed. In both the appeals the parties are left to bear their own costs.

V.M. CA No. 4611/92-dismissed
CA No. 4612/92-allowed.

444