IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC

OF SRI LANKA

In the matter of an Appeal from a judgment of the Commercial High Court of Colombo dated 20th November, 2009.

Ispat Corporation (Private) Limited,
No. 19/27, Millagahawatta,
Siwaramulla Road, Nedungamuwa,
Weliweriya, Gampaha.

Plaintiff

SC CHC APPEAL 21/2010
H.C.(Civil) No. 98/2002(1)

Vs

1. Ceylinco Insurance Company Limited
   "Ceylinco House",
   No. 69, JanadhipathiMawatha,
   Colombo 01.
2. National Development Bank of Sri Lanka, No. 40, NawamMawatha,
   Colombo 02.
3. Sampath Bank Limited, No. 110,
   Sir James PeirisMawatha,
   Colombo 02.

Defendant

Ceylinco Insurance PLC,
"Ceylinco House", No. 69,
JanadhipathiMawatha,
Colombo 01.

1st Defendant Appellant

Vs

Ispat Corporation (Private) Limited,
No. 19/27, Millagahawatta,
Siwaralamulla Road, Nedungamuwa,

Weliweriya, Gampaha.

Now at,

No. 101, Pahalawela Road,
Pelawatta, Battaramulla.

Plaintiff Respondent

2. National Development Bank of Sri Lanka, No. 40, NavamMawatha,
Colombo 02.

3.Sampath Bank PLC.,
No. 110, Sir James PeirisMawatha,
Colombo 02.

Defendants Respondents

BEFORE : S. EVA WANASUNDERA PCJ
ANIL GOONERATNE J &
H.N.J.PERERA J.

COUNSEL :Nihal Fernando PC with N.R.Sivendran and Harshula Seneviratne for the 1st Defendant Apellant.
ChandakaJayasundera with ChinthakaFernandoinstructed by K.P. Law Associates for the
Plaintiff Respondent

ARGUED ON: 29.07.2016

DECIDED ON: 15.11.2016

S. EVA WANASUNDERA PCJ.

This is a direct Appeal preferred to this Court by the 1st Defendant Appellant, Ceylinco Insurance PLC from a judgement of the Commercial High Court of Colombo, dated 20th November, 2009.

The hearing of this Appeal was accelerated at the request of the Plaintiff Respondent, Ispat Corporation (Private) Limited in the year 2010. Thereafter, at the conclusion of submissions made by parties, this Court had been of the view that it is a fit and proper matter that could be referred to mediation under the supervision of this Court, and as such, Court had made order, on 08.05.2014 that the parties will be notified when a mediator is appointed. Then, a 'Reference to Mediation' was made by the then Hon. Chief Justice and the other two judges of this Court appointing the retired Supreme Court Judge, Hon. JusticeNimal E.Dissanayake as mediator to hold the mediation proceedings and conclude the matter within 3 months from the date of the reference, i.e. on 07.10.2014. It was recorded that the findings of the said mediator will be adopted by this Court as an order of this Court to which the parties of the proceedings had agreed to abide.

However, Hon. Justice N.E.Dissanayake made order to the effect that mediation between parties had not been successful and referred the matter back to the Hon. Chief Justice for a decision to be made by the Supreme Court. Thereafter, again, this Appeal was mentioned in open Court on 06.03.2015 and all counsel for all the parties appeared before Court and got the matter fixed for hearing on 29.04.2015. Again the hearing of the case had got postponed.

On the dates of hearing before this Bench, when the matter was taken up for hearing i.e. on 21.07.2016 and on 29.07.2016, the only contesting parties were the 1st Defendant Appellant and the Plaintiff Respondent. Hearing was concluded before this Bench.

The 2nd and 3rd Defendant Respondent Banks had been named as parties to this action since in accordance with the terms of the Insurance Policy, all monies payable by the 1st Defendant Appellant insurer to the Plaintiff Respondent, in the event of a claim on the insurance policy was to be paid directly by the 1st Defendant Appellant to the 2nd and 3rd Defendant Respondent Banks and the 2nd

and 3rd Defendant Respondent Banks would receive the said monies on behalf of the Plaintiff Respondent and hold/or apply the said monies on behalf of the Plaintiff Respondent. Accordingly, no relief had been sought against the 2nd and 3rd Defendant Respondents.

Subsequent to the institution of the action, the 2nd and 3rd Defendant Respondent Banks had recovered the money owed to them by the Plaintiff Respondent and therefore are now not entitled to receive any money on behalf of the Plaintiff Respondent. **Accordingly, it is pleaded by the Plaintiff Respondent that any monies now payable by the 1st Defendant Appellant to the Plaintiff Respondent under the Insurance Policy should be paid directly to the Plaintiff Respondent.**

The facts pertinent to the matter before this Court is precisely as follows:--

The Plaintiff Respondent Company (hereinafter referred to as the Plaintiff) was previously named as "Sterling and Walton Steel (Pvt) Limited". It was engaged in the business of manufacturing "steel structural" from the year 1997 at the factory at Weliweriya. On 16th January, 2002, the name of the Plaintiff was changed to "Ispat Corporation (Private) Limited". In 1999 the Plaintiff temporarily ceased production due to a shortage of working capital owing to money market and exchange rate fluctuations. By that time, the Plaintiff had owed substantial sums of money to the 2nd and 3rd Defendant Respondent Banks. The 3rd Defendant Bank had advised the Plaintiff to hand over management of the manufacturing and sale of the products to a company sponsored by the 3rd Defendant Bank named Lanka Consolidated Agencies (Pvt) Limited on the basis that if the Plaintiff agreed to do so, the Bank would restructure the Banking facilities granted to the Plaintiff and grant additional working capital.

The Plaintiff had agreed to the said suggestion and as a result Lanka Consolidated Agencies (Pvt) Limited nominated yet another company

by the name of Orison Management Services (Pvt) Limited to enter into a Management Agreement dated 04.04.2000. and a memorandum of understanding dated 07.04.2000 in terms of which the Plaintiff had handed over only the Management of the Manufacturing and Sale of the Plaintiff's products to the said Orison Management Services (Pvt) Limited for a period of 6 years commencing from 4.4.2000. Subsequently, the Plaintiff issued a special power of attorney to Orison Management Services Private Ltd for specific purposes of only for manufacturing and sale of steel structural and to maintain the accounts etc. **The said company was in sole and exclusive possession and control of the Plaintiff's factory and the Plant, Machinery, Equipment, Buildings , Assets an Stocks therein from 4.4.2000 to 1.3.2001. The Plaintiff had pleaded that the 1st Defendant Appellant was aware of these facts.**

The 1st Defendant Appellant issued the Insurace Policy No. CO 00 CF 007942 dated 11.07.2000 in favour of the Plaintiff and thereby, insured the Plaintiff's factory against many risks and perils. The premium was paid for an aggregate value of Rs. 100 Million. It is alleged that the insurance was against inter alia, all Loss and / damage to the Plaintiff's factory and premises and the plant and machinery, equipment and stocks therein including any loss and damage caused by **several risks or perils including malicious damage.**

Thereafter, the Orison Management Services Private Limited had at one time not performed its duties to the Plaintiff and as such the Agreement for management of the factory of the Plaintiff was terminated. The Plaintiff had taken over possession of the factory on 01.03.2001 in the presence of the representatives of the 2nd and 3rd Defendant Banks.

The Plaint divulged that the Security Company, namely Defence and Security Private Limited had informed the 2nd Defendant on the 1st of March, 2001 that the factory was non operational due to the

removal of the plant and machinery done by the Orison Management Services Private Limited which could not be controlled and that thus damage continued to be caused within the few days prior to 01.03.2001. The Plaint submitted that on 07.03.2001 the Plaintiff had given notice to the 1st Defendant, of the loss and damage caused by malicious damage carried out by Orison Management Private Limited against the Plaintiff. The Plaintiff's employee K.N.Balakrishnan had made a complaint to the Weliweriya Police.

The Plaintiff and the 1st Defendant had discussions with regard to the matter. The Plaintiff had given notice of the claim on the insurance to the 1st Defendant on 18.06.2001. On 21.06.2001 the 1st Defendant had acknowledged in writingthe receipt of the notice and had confirmed the appointment of a Loss Adjuster and had sent a claim form to be completed and returned together with all supporting documents to enable the said 1st Defendant to look into the claim. Thereafter the 1stDefendant's Loss Adjuster and Employees and/or Agents had carried out a detailed inspection of the Loss and Damage caused to the Plaintiff and the Loss Adjuster and the team continued their inspection, with the Plaintiff's unreserved and full cooperation, till the end of September, 2001.

The Plaintiff submitted that following the completion of the Joint Survey and Inspection **both parties formulated a Joint Survey Report according to which, the Loss and Damage caused to the Plaintiff by the malicious, willful and wrongful acts of Orison Management Services Private Limited was estimated at Rs. 48,708,319/57**. The said amount was calculated under 5 items. The claim form dated 27.09.2001, claiming payment from the Defendant the aforementioned sum of money on the Insurance Policy was then submitted to the Defendant by the Plaintiff. After many reminders from the Plaintiff to the Defendant, the Defendant had informed the Plaintiff that the Defendant had sought legal opinion on the matter and would revert no sooner such opinion is received by the 1st

Defendant. The 1st Defendant disclaimed liability on the said claim on 20.02.2002 and also on 4.3.2002. **Thereafter by letter dated 14.03.2002, the Defendant had specifically informed the Plaintiff that, (a) the alleged loss or damage was occasioned by the willful act of the Plaintiff within the meaning of Condition 14 and (b) the claim is excessive and grossly exaggerated within the meaning of Condition 14.**

The Plaintiff filed action in the High Court to recover a sum of Rs. 48,708,319/35 from the said 1st Defendant claiming that the 1st Defendant as the insurer is liable and bound and obliged to pay in terms of the Insurance Policy as a measure of indemnification of the Plaintiff.

The Plaintiff's case was: that there was a **valid and operative insurance policy** between the Plaintiff and the Defendant; that the claim of the Plaintiff was related to **a risk on malicious damage which was an insured risk in terms of the policy**; that the loss and damage was caused to the Plaintiff **arising out of risk malicious damage;** and that the amount of loss and damage was Rs. 48,708,319/35.

The 1st Defendant filed answer and denied liability taking up a lot of different defenses and prayed for a dismissal of the action. But the 2nd and 3rd Defendants filed separate answers and prayed for an order of court that any monies payable by the 1st Defendant on the Policy of Insurance be paid to the 2nd and 3rd Defendants and also prayed for **a just and equitable order from court**.

The Plaintiff raised Issues Nos. 1 to 22 at the trial and the 1st Defendants raised Issues Nos. 23 to 29. The other Defendants had not raised any issues. It is important to reckon the issues raised by the 1st Defendant, the insurer. They are as follows;-

Issue **No. 23**: Does the Plaint not disclose a cause of action against the 1st Defendant?
Issue **No. 24:** Does the Plaint and the annexed documents set out a claim, if any, only against the 2nd and/or 3rd Defendant?
Issue **No. 25**: Is the Plaintiff's action prescribed in law?
Issue **No. 26**(a) Does the Plaint not conform to the imperative provisions of the Civil Procedure Code?
(b) Have the dates of the alleged cause of action not been set out in the Plaint?
Issue **No. 27**: Is there a misjoinder of Defendants as set out in the Plaint?
Issue **No. 28**:Cannot the Plaintiff have and maintain this action

(a) Due to the averments as set out in paragraph 8 of the answer of the 1st Defendant?
(b) In view of condition No. 14 of the Insurance Policy?

Issue **No. 29**: If any one and/or all of the above issues are answered in the 1st Defendant's favour, should the Plaintiff's action be dismissed as prayed for in the answer of the 1st Defendant?

The 1st Defendant had made an application to treat issues Nos. 23 , 26(a) and 26(b) as preliminary legal issues and to be decided by court at the commencement of the trial. The then High Court Judge had then considered the submissions written and oral made by both parties and made a considered order dated 17th March, 2005 stating inter alia that " the contention of the plaintiff that **the cause of action** which had given rise to the filing of this action **is the alleged refusal** of the 1st Defendant to meet the claim preferred by the Plaintiff."He had answered the issue No. 26(a) as "Plaint conforms to the imperative provisions of the Civil Procedure Code" and the issue No. 26(b) as " The dates of the alleged cause of action has been set out in the Plaint." He had refixed the action for trial.

Thus the preliminary issues were answered in favour of the Plaintiff by the sitting judge at that time. Later on, the learned High Court Judge who took up the trial on the said issues of the Plaintiff and the

1st Defendant, had delivered Judgment on 20th of November, 2009. The Judgment was in favour of the Plaintiff.

The Petition of Appeal dated 15th January, 2010 preferred to this Court by the 1st Defendant contains eighteen grounds of appeal in paragraph 15 of the same. I wish to summarise the grounds of appeal for convenience. It is alleged that the High Court had failed to consider that the Plaintiff had failed to comply with the conditions of the Insurance Policy, **especially Condition 14 and Condition 21: that the claim of the Plaintiff was time barred in terms of Clauses 12 and 21 and that there was a gross over estimation of the purported loss and damage and as such the claim of the Plaintiff was fraudulent under Clause 14 of the Insurance Policy.**

The Insurance Policy was named as a Fire Insurance Policy but for the extended premium, the Policy covered risks or perils including Malicious Damage to an aggregate value of Rs. 100 Million. The Plaintiff handed over management and sale of the products to a company named Orison Management Services Private Limited. They were unsatisfactory and the Plaintiff terminated the agreement. Then, close to the date of handing over the factory back to the Plaintiff, Orison MSPL had taken out some machinery and equipment resulting in the Plaintiff becoming unable to go on with any production of steel structural which was the main product of the Plaintiff.

The **Plaintiff** alleges that the damage thus caused to him is covered by the insurance policy **under "malicious damage**". The **1st Defendant Appellant** alleges that the damage thus caused by Orison MSPL **does not come under "malicious damage" but can be categorized as burglary or pilfering** which is not covered by the Insurance Policy.

Condition 12 of the Insurance Policy No. CO 00CF 007942 reads as follows:

"On the happening of any loss or damage, the insured shall forthwith give notice therof to the Company, and shall within 15 days after the loss or damage or such further time as the Company may in writing allow deliver to the Company, (a) A claim in writing for the loss and damage containing as particular an account as may be reasonably practicable of all the several ariticles or items of property damaged or destroyed and the amount of the loss or damage thereto respectively, having regard to their value at the time of the loss or damage, not including profit of any kind, (b) Particulars of all other insurance if any.
The Insured shall also at all times, at his own expense, produce, procure and give to the company all such further particulars plans specifications, books, vouchers, duplicates or copies thereof documents, proofs and information with respect to the claim and the origin and cause of the fire and the circumstances under which the loss or damage occurred, an any matter touching the liability of the amount of the Liability of the Company as may be reasonably required by or on behalf of the Company together with a declaration on oath or in other legal form of the truth of the claim an of any matters connected therewith. No claim under this Policy shall be payable unless the terms of this condition have been complied with."

The evidence of the Plaintiff and the documents produced by him with regard to notice being given within time, which were not challenged but accepted by way of replies acknowledging the notice of damage etc. is proof before this Court that the aforementioned condition contained in Clause 12 had been complied with by the Plaintiff. I am of the opinion that Clause 12 has been complied with by the Plaintiff and he was entitled to pursue his claim and the Insurer has to accommodate his claim. The Plaintiff has taken steps and complied with the formalities on the occurrence of loss or damage which are contained in Clause 12 of the Policy.

Clause 14 of the Insurance Policy reads:-

"Forfeiture – If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the insured or any one acting on his behalf to obtain any benefit under this Policy or if the loss or damage be occasioned by the willful act or with the connivance of the insured; or if the claim be made and rejected and an action or suit commenced within three months after such rejection or (in case of an arbitration taking place in pursuance of the 20th condition of the Policy) within three months after the arbitrator or arbitrators or umpires shall have made their award, all benefit shall be forfeited."

The 1st Defendant had raised a specific issue namely Issue No. 28(b) in regard to Clause 14. Issue 28(b) reads as "Cannot the Plaintiff have and maintain this action in view of Condition No. 14 of the Insurance Policy?" However, in the Written Submissions of the said Defendant, it was alleged that the learned High Court Judge had failed to decide the said issue correctly. I observe that the learned High Court Judge has analysed the evidence before the trial court and decided that the claim was not fraudulent and had answered that issue stating that "The Plaintiff can have and maintain this action". Fraud has not been proved by the 1st Defendant who alleges that the claim was fraudulent as the loss and damage was occasioned by the willful act with the connivance of the Insured. The 1st Defendant depended on the reasoning that ' the claim is an exaggerated one and therefore it is fraudulent'. The 1st Defendant did not bring forward any evidence before the trial court. Nobody gave evidence on behalf of the 1st Defendant.

A general definition of "Fraud" in Insurance matters is contained in **Colinvaux's Law of Insurance** (8th Edition – Sweet and Maxwell South Asian Edition 2009) at page 312 as follows: " A claim can only be

fraudulent if the assured is dishonest or at the very least culpably reckless. Mere negligence on the part of the assured will not suffice." At page 314 it is stated that Exaggerated Loss does not amount to Fraud. It reads thus:- " The amount of a loss may be inflated by the assured for a number of reasons: the assured may be seeking to make a profit from his loss; he may be presenting a bargaining claim in the belief that the ultimate compromise agreement reached with the insurer will approximately represent his actual loss; or he may genuinely have overestimated the value of his property by e.g. including an element for consequential loss not covered by the policy. It is established that the mere fact that a claim has been inflated is not conclusive evidence of fraud and that bargaining claims and innocent overvaluation will not defeat the assured. In the absence of independent evidence of the assured's state of mind, the decisive dividing factor between fraud and innocence will generally be the degree to which the claim has been inflated, as the greater the inflation the easier it becomes to impute a fraudulent intent to the assured. Thus**, a hundredfold exaggeration** of the degree of loss will **be fraudulent**, as will a claim for the purchase price of goods which were at the time of the loss seriously defective or of goods which the assured did not actually loose, **whereas a claim for the value of new goods under a policy which provides cover for replacement value only is a bargaining claim** and **cannot be regarded as fraud…"**

The valuation report done by the Peoples' Bank at the time of handing over the factory to Orison MPSL , of the Machinery and Equipment of the factory of the Plaintiff was placed before the trial court as P5. This was undisputed and uncontradicted. It was prepared by an independent chartered engineer and valuerretained by the Peoples' Bank and not by the Plaintiff. **The value of the Plant and Machinery then was Rs. 93.6 Million.** As a result of the malicious damage caused by Orison MPSL the Plaintiff's factory had closed down and the Plaintiff had suffered a severe losses. **But in the case in hand, he is asking only the amount covered by the Insurance**

Policy due to the damage and loss caused maliciously and nothing more than that.

The **Survey Report marked P40** was undisputedly prepared following a Joint Survey carried out by the **Plaintiff,** the **Defendant's** Loss Adjustor, the **Defendant's** Chartered Engineer and the **Defendant's** other Representatives. This Joint Report has clearly described the Loss and Damage in detail and has set out in great detail the break down and analysis of the manner in which the sum of Rs. 48,708,319/35 was reached as the loss and damage. It consists the calculation of damage under 5 categories as follows:

(a) Estimated cost of repairs /resurrection of Plant and Machinery Rs. 24,811,990/57

(b)Estimated cost of missing inventory items **to be imported**- Rs.16,711,791/28.

(c)Estimated cost of missing inventory **items available locally** – Rs. 3,532,368/50.

(d)Estimated cost of missing inventory items Fabrication Steel- Rs. 1,055,400/00.

(e)Estimated cost of repairs/replacement building/civil work – Rs.2,596,769/35.

This Report had been done during the period of a few months. The Plaintiff's managing director produced this report at the trial. He was not cross examined regading the contents of the report. There was no dispute over the contents of the Report. It was marked subject to proof but at the closing of the case of the Plaintiff, the Defendant did not object to any of the documents which were marked subject to proof. Therefore as a matter of law, according to the ratio decedendi of the case of **Sri Lanka Ports Authority and Another Vs. Jugolinija – Boat East 1981, 1 SLR 18,** the document P 40 stands proven.

It is interesting to note that the Policy of Insurance gives a definition of Malicious Damage as follows under clause "F9" which reads as follows:

Malicious Damage:
"In consideration of the payment of an additional premium it is hereby agreed and declared that the insurance under said Riot and Strike Endorsement shall extend to include **Malicious Damage** which for the purpose of this extension **shall mean**:
Loss of or damage to the property insured directly caused by the malicious act of any person (whether or not such act is committed in the course of a disturbance of public peace) not being an act amounting to or committed with an occurrence mentioned in Special Condition 6 of the said Riot and Strike Endorsement.
But the Company **shall not be liable** under this extension for (1) any loss or damage by fire or explosing**(2) any loss or damage arising out or in the course of a burglary, house breaking, theft or larceny** or any attempt thereat or caused by any person taking part therein and (3) the Excess stated in the Schedule in respect of each and every loss or damage.
Provided always that all the conditions and provisions of the said Riot and Strike Endorsement shall apply to this extension as if they had been incorporated herein."

The Plaintiff claimed that it is a loss of property and damage caused to the property which was insured, directly by Orison MPSL when the management agreement was terminated by the Plaintiff as the Plaintiff was not satisfied with the management carried on by Orison MPSL. The Plaintiff alleged and proved with evidence that Orison MPSL had taken lorry loads of machinery and equipment thus causing damage and loss to the insured property which the security personnel could not stop. Even at the time of giving notice to the Insurance Company, the damage was continuing. **I am of the view that the loss and damage to the insured property was done by a third party acting maliciously according to the aforementioned**

interpretation contained in the Insurance Policy regarding "Malicious Damage".

Clause 21 of the Insurance Policy reads:

"Time Limit for Company's Liability – In no case whatsoever shall the Company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration."

The happening of the loss which occurred was found out on the 1st of March, 2001. On the 7th of March, the Plaintiff gave notice to the Insurance Company. On the 30th of July, the1st Defendant informed the Plaintiff to forward the claim document directly to the 1st Defendant for onward transmission to the Loss Adjustor. The Plaintiff by letter dated 18th August gave reasons for the delay and requested time for the submission of the claim form and specifically stated that the estimate of the reinstatement cost would be approximately Rs. 50 million. The Defendant's Loss Adjuster with the cooperation of the Plaintiff carried out the inspection till almost the end of September,2001. The claim form for Rs.48,708,319/35 was sent to the Defendant on 27th September,2001. The Plaintiff kept on writing to the Defendant. Finally, on the 20th February, 2002 the Defendant disclaimed liability. The cause of action to file a case under the Policy arose only at that time.

I hold that the Plaintiff had adhered to Clause 21 by having given notice of the occurrence of the loss and damage immediately and having pursued the claim till it was disclaimed on 20.02.2002. Plaint was filed on 17.05.2002 and it is not time barred.

I have gone through the written submissions and case law submitted by the 1st Defendant, the Insurer, in addition to the oral submissions made by counsel at the hearing on behalf of the Defendant as well as

the submissions made by the Plaintiff. I have considered the case law with regard to the onus of proof.

I am of the opinion that the policy covered the risk of malicious damage. The loss and damage was caused maliciously by the third party, Orison MPSL against the Plaintiff. It was so proven by evidence led by the Plaintiffs. The value of the loss and damage was proven by the Survey Report which was before the trial court. The Insurer's contention that it was a fraudulent claim has failed. The insurer has not proved that the Plaintiff willfully connived in causing damage to the property insured even though it was so pleaded.

I am of the opinion that the learned High Court Judge has considered all matters quite correctly according to the legal principles pertinent to insurance, having analysed the evidence before the trial court and delivered judgment in favour of the Plaintiff. Therefore I dismiss the Appeal of the 1st Defendant Appellant with costs in both courts.

Judge of the Supreme Court

Anil Gooneratne J
I agree.

Judge of the Supreme Court

H.N.J.Perera J
I agree.

Judge of the Supreme Court