

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CIVIL APPELLATE JURISDICTION)

Present

Mr. Justice Md. Iqbal Kabir

And

Mr. Justice Md. Riaz Uddin Khan

First Appeal No. 11 of 2003

IN THE MATTER OF:

Sadharan Bima Corporation

... Defendant-Appellant

Versus

Trading Corporation of Bangladesh and others

... Plaintiff-Respondents

Mr. Md. Abdur Rahman, Advocate

... For the Defendant-Appellant

Mr. Mohammad Mosfequs Salehin, Advocate

... For the Plaintiff-Respondent No.1

Judgment on: 30.07.2025

Md. Riaz Uddin Khan, J:

This appeal is directed against the judgment and decree dated on 05.08.2002 (decree signed on 03.09.2002) passed by the Joint District Judge (Arbitration Adalat), Dhaka in Money Suit No. 56 of 1993 (arising out of Money Suit No.245 of 1982) decreeing the suit.

Facts in a nutshell, for disposal of this appeal, is that the Respondent no.1 Trading Corporation of Bangladesh (TCB) being Plaintiff filed Money Suit No.245 of 1982 for realization of Money of US\$ 3,64,762.21 equivalent to Tk. 65,65,719.70/- and the said suit was filed against the Sadharan Bima Corporation (who was the insurer to import cargo and issued insurance

policy) as defendant no.1, Quincy Maritime Shipping Co. Ltd. was the carrier (owner of the Vessel INGA) as defendant no.2, the defendant no.3 SAI Shipping Co. Ltd. was the carrier (agent of defendant no.2), the defendant no.4 M/S Aquatic Shipping Ltd. was the local agent of defendant No.3, and the supplier M/S. A.A. Valibhoy and Sons (1907) PTE, LTD. as the defendant no.5. The plaintiff alleged *inter alia* that the plaintiff, Trading Corporation of Bangladesh entered into a contract with the supplier M/S. A.A. Valibhoy and Sons (1907) PTE, LTD vide contract no. TCB/IMP-8/81/1717, dated 12.06.1981 for the purchase of 3,300 Metric Tons (MT) of onions at a price of US\$ 222 per MT with a provision for 1st shipment of about 800 MT by June 1981 and second shipment of about 2500 MT by July 1981. As per contract 2nd shipment of 2,500 MT of onion was shipped from the port of Bombay through Vessel INGA and before shipment the said goods were inspected by Directorate of Marketing and Inspection, Government of India, and the weight, quality and quantity was found correct as per specification of contract. As per Pre-shipment inspection report (PSI) dated 30 July 1981, the inspection was done on 24th July 1981 to 29th July 1981. The consignment of 2500 MT of onion were packed in 100,000 Bags each containing gross weight 25.16 Kgs shipped by M/S AA Valibhoy & Sons (1970) Pvt Ltd per vessel 'INGA' from the

port of Bombay under Bill of Lading No.C-31 dated 29.07.1981 to Chittagong port for delivery to the plaintiff on whose favour the said Bill of Lading (B/L) was endorsed for valuable consideration and defendant no.3 issued clean B/L having received the goods on board by the vessel 'INGA'. The said consignment of 2,500 MT of onions shipped under the said B/L was insured against "All Risks" from the port of Bombay to Chittagong with Sadharan Bima Corporation, defendant no.1 under the Marine Cargo Policy dated 07.09.1981. The said consignment was delivered to the plaintiff at Chittagong port as 1128.999 MT damaged/rotten condition, 25.00 MT short landed quantities and 489.074 MT short in contents, that is, in total 1643.073 MT. The plaintiff further claims that the shortage and damage have been caused while goods were in transit. Agrani Inspection Co. Dacca/Chittagong and Vigilant Surveyors, Chittagong inspected and surveyed the said cargo and from their survey and inspection report it appears that the said damage and shortage have been caused not due to delay or inherent vice or nature of cargo but due to lack of proper ventilation in the holds of vessel and improper staking of cargo in the hatches of the vessel which prevented air circulation and produced excessive heat and damaged the said onion. The plaintiff further claims that as per Marine Insurance policy the defendant no.1 along with

other defendants liable to pay sum of US\$ 364,762.206 equivalent to Bangladesh Tk-65,65,719.70 only. As per B/L defendant nos. 2-4 are jointly and severally liable to pay the plaintiff the said sum of US\$ 364762.206 equivalent to Bangladesh Tk-6565719.70 only and the defendant no.5 as per contract is liable to supply the goods to the plaintiff as per contract. The plaintiff lodged claim with the defendants for the said amount with supporting documents and information but with no result hence the suit.

The defendant no.1 contested the suit by filing written statement wherein it is stated that this defendant in no way liable for the claim in the suit inasmuch as the loss occasioned, as per plaintiff's own averment, owing to the failure of the carrier to carry the goods under proper ventilation in the holds of the vessel and for improper staking of cargo in the hatches of the vessel and as the said alleged loss occasioned owing to the faults of the carrier in performance of its obligation and duties. This defendant is in no way liable for the claim in the suit as alleged loss/damage to the cargo was occasioned owing to the inherent vice of thing itself which was not covered by the insurance policy. The quality of the onions was not good and the consignment of onions was not fit to undertake the sea voyage. The inspection

as alleged was perfunctory, indefinite and of no consequence whatsoever. The plaintiff never informed this defendant of the B/L, nor produced the same before this defendant, or the plaintiff ever informed the arrival of the vessel or of the survey of goods and of the alleged loss at any time. This defendant came to learn of the same only upon receipt of the summons of the suit in 1984. It is true, the plaintiff took an insurance policy but said policy was also conditioned with 'Important Notice' clause in red which amongst others, enjoined upon the plaintiff to give immediate notice of any loss. This defendant has been kept completely in the dark by the plaintiff as to the alleged loss and the circumstances surrounding the said alleged loss hence the plaintiff is not entitled to any relief whatsoever under the policy of insurance. The cargo of onion of the plaintiff suffered loss owing to the inherent vice of the thing itself and therefore not covered under the policy. The carrier and the supplier are liable for the loss. The plaintiff never lodged any claim nor sent any supporting documents or papers or information to this defendant on 10.09.1981 or on any date or gave any reminders. There is no cause of action against this defendant and the suit is filed in a wrong forum at Dhaka and the reasons stated above, the suit is liable to be dismissed against this defendant.

Both the parties adduced 1(one) witness each and produced some documents to prove their respective case. The other defendants did not contest the suit though the defendant no.4 filed written statement. The trial court after taking evidence from both sides decreed the suit by the impugned judgment and decree dated 05.08.2002 against all the defendants.

Being aggrieved by and dissatisfied with the said judgment and decree the defendant no.1 filed the instant appeal before this Court.

Mr. Md. Abdur Rahman, the learned advocate appearing for the defendant-appellant submits that admittedly plaintiff-respondent No.1, Trading Corporation of Bangladesh (hereinafter referred to as TCB) entered into a Marine Insurance contract with the defendant No.1-appellant, Sadharan Bima Corporation (hereinafter referred to as SBC) with respect to importing 2,500 Metric Tons (MT) of Onions from India, having voyage from Bombay to Chittagong to which SBC issued a Marine Cargo Policy being No. DAC/C/MP-848/81(Open) with All Risk while covering the total risk of Tk.99,90,000.00 (US\$ 5,55,000.00), subject to an excess of 10% per shipment. It is also admitted that the said Marine Cargo Policy which is a contract referred to above, was subject to two most important Clauses namely: (a) Institute Cargo Clauses (All Risk) and (b) IMPORTANT NOTICE.

The learned advocate then submits that said Institute of Cargo Clauses which was duly attached with the Marine Cargo Policy whereby insured TCB was warned/cautioned with the stipulated terms and conditions. Similarly by the clause IMPORTANT NOTICE which was also duly attached with the said Marine Cargo Policy whereby insured TCB was warned/cautioned with the conditions and reminding the liability and duty as well of the insured TCB. Admittedly the plaintiff from the very inception of issuance of the aforementioned Marine Insurance policy were very much aware as to the condition embodied in the body of the said insurance policy with the words "ALL RISKS, subject to an excess of 10% per shipment." Admittedly in the instant case the policy itself embodied with the terms an excess of 10% per shipment. And pursuant to the said terms, since the aforementioned Marine Insurance Policy is for a Sum Insured of Tk. 99,90,000.00 so plaintiff ought to have bear 10% of the said sum insured i.e Tk. 9,99,000.00 which is deductible from their alleged claim amount of Tk.65,65,719.00 and by calculating this alleged claim stood at (Tk 65,65,719.00-9,99,000.00) Tk. 55,66,719.00 only. But the plaintiff-respondent knowing full well as to the same by suppressing this important aspects had filed the alleged suit upon calculating valued at Tk. 65,85,719.00 which is very much improper, unlawful and unwarranted.

Hence, the impugned judgment and decree is liable to be set aside on this score alone.

The learned advocate next submits that admittedly the plaintiff-respondent filed its alleged Money suit No. 245 of 1982 before the court of the learned Third Sub-Ordinate Judge, Dhaka on 04.08.1982 long after one year of the occasion of alleged claim. But pursuant to the clauses i.e IMPORTANT NOTICE the plaintiff ought to have filed suit against the carrier and bailees with a view to ensure the legal right to recover the alleged loss properly but not against the insurer, defendant-Appellant. So, by filing this instant suit in a wrong forum the plaintiff have had committed wrong for which it is not entitled to any benefit whatsoever inasmuch as it has violated the policy conditions and contract for which it cannot claim any relief whatsoever.

Mr. Rahman further submits that admittedly 2,500 MT Onion in question was imported as part of 2nd shipment from Bombay, India through the defendant Nos. 2-5 under the aforementioned Marine Insurance Policy referred to above, which arrived at Chittagong Sea Port on 10.08.1981. A Post-Landing Inspection was held at the instance of the plaintiff-respondent No.1 by appointing a surveyor namely "Agrani Inspection Company" who submitted report on 22.08.1981. In the report it is transpired that the said enquiry was held from 10th August to 19th August, 1981 and admittedly

there was short landed of 1,000 bags from the vessel and in the remarks column of the said report it is stated that bags of Onion were dumped into the Twin Docks instead of staking. The Chief Officer of the Vessel informed that it was raining at the time of loading and as such the stevedores dumped the same. Although there was provision of mechanical ventilation, which was ineffective as air could not circulate. As a result due to generation of heat the Onions were damaged/rotten. The stock of onion of lower holds were broken due to rough weather, heavy rolling etc encountered by the vessel in transit as stated by the Chief Officer of the vessel. The bags were heaped at the centre and were rotten/damaged due to generation of heat. It was also stated by the Chief Officer of the Vessel that the Onions were packed in bags around 14th July, 81 and there was some delay in loading which may have caused onions start rotting as the cargo is of perishable nature. The carrier's Local agent did not allow joint survey at first but later after discharge of 19,983 bags they appointed their surveyor. This report of the surveyor was affirmed by the joint Survey report. Referring the deposition of PW-1 Mr. Rahman submits that from the statement of the Survey report and deposition of PW-1 as well it is crystal clear that the damage/rotten of Onions were caused by the supplier and carrier of the

subject matter insured. As such they are solely liable for the alleged loss/damage but not the insurer. On the other hand, Insured also did not perform their duty properly. Even then, the learned court below totally over looking and/or non-considering this important aspects decreed the suit against the defendant-appellant which is unjust, illegal and not tenable in law which is liable to be set aside against the insurer, defendant-appellant. Had the insured i.e the plaintiff pursuant to the provision of the instant Marine Policy conditions would perform their duty properly specially lodging claim to the carrier/supplier or their agents as the case may be, obviously scenario would have arisen otherwise and the provision of right to recovery may be preserved. If that be happened obviously plaintiff-respondent No.1 could realize their claim from the insurer i.e from the defendant applying the principle of "SUBROGATION". But this path had been shut down by the insured-plaintiff-respondent No.1. Moreover, by passing 45 years of time the whereabouts of the carrier/supplier are unknown and none of them had contested the suit and the Appeal as well for which plaintiff-respondent No.1 is liable for its own fault. Since the plaintiff-respondent No.1 did neither take any step pursuant to the terms of the Marine policy conditions, nor they pay any heed specially Institute Cargo Clause All Risk and

IMOIRTANT NOTICE their alleged claim is legally liable to be prejudiced.

The learned advocate further submits that the Appellant did not have any liability whatsoever as per conditions of insurance policy to compensate the Plaintiff-respondent for the loss sustained by them due to delayed loading of the consignment, improper stacking of the onions in the hatches and failure of the carrier to provide and ensure proper ventilation to the consignment of onions loaded in the holds of the ship and the Trial Court has not applied its judicial mind to the assessment of evidences adduced in determining the extent of responsibility of each of the defendants of the loss of the plaintiff. As a result, findings arrived at by the Trial Court holding the Defendant-Appellant as well liable for compensating the plaintiff-respondent for the loss is flawed, for the consignment was damaged, as affirmed by the surveyors, due principally to mechanical failure of the ship's ventilation system, and not because of any peril of the seas or anything fortuitous or accidental.

The learned advocate next submits that Trial Court has not appreciated the findings regarding the cause of damage to the relevant consignment of onions and the responsibility for the loss/damage as fixed by the Surveyors. As a result, it has wrongly decreed the suit against

the Defendant-Appellant. The decree passed against the Defendant Appellant, being illegal, need, therefore, be reversed/modified/nullified exonerating the Defendant Appellant from compensating the plaintiff-respondent for the loss which directly resulted from negligence/failure of the carrier in providing/maintaining proper ventilation/cooling system in the ship during its journey to the port of unloading. The Trial Court has not evaluated the Bill of Lading of the relevant vessel prior to arriving at the findings attributing responsibility for the loss also to the Defendant Appellant, though the Defendant-Appellant have had no hand nor any responsibility for pre-shipment inspection regarding quantity and quality of the suit consignment and or proper stacking of the consignment in the hatches of the ship and or providing adequate and proper ventilation in the holds where the consignment was kept to prevent damage to the onions by heat during the hot summer months of July-August.

The learned advocate for the defendant-appellant finally submits that under the forgoing facts and circumstances of the case, material witnesses, surveyor reports and the law applicable thereto, the claim of the plaintiff-respondent No.1 was not payable and as such the decree passed by the learned court below is

liable to be set aside against the defendant-appellant for securing justice.

On the other hand Mr. Mohammad Mosfequs Salehin, the learned advocate appearing on behalf of the plaintiff-respondent no.1 submits that the plaintiff entered into a contract with the supplier M/S. A.A. Valibhoy and Sons (1907) PTE, LTD vide contract no. TCB/IMP-8/81, dated 12.06.1981 for the purchase of 3,300 MT of onion at a price of US\$ 222 per MT with a provision for 1st shipment of about 800 MT by June 1981 and second shipment of about 2,500 MT by July 1981. As per contract 2nd shipment of 2,500 MT of onion was shipped from the port of Bombay through Vessel INGA and before shipment the said goods were inspected by Directorate of Marketing and inspection, Government of India, and the weight, quality and quantity was found correct as per specification of contract. As per Pre-shipment inspection report (PSI) dated 30 July 1981 (the inspection was done on 24th July 1981 to 29th July 1981) the onions were found hard looking and fit for human consumption. The said consignment of 2,500 Mt of onion shipped under the Bill of Lading (B/L) dated 29.07.1981 was insured against "All Risks" from the port of Bombay to Chittagong with Sadharan Bima Corporation (defendant no.1) under the Marine Cargo Policy dated 07.09.1981. The policy was valued Tk-99,90,000 for 2,500 MT onion and marine premium was deposited Tk-

1,31,535 along with stamp duty. From the date of shipment of 2,500 MT of onion, an insurance policy was taken under ALL RISK COVERAGE against the Insurance Cover Note (Cover Note No-DAC/C/MC-063/81-OPEN) by paying 100% insurance premium. However, the issued insurance policy mentions All Risk, subject to an excess of 10% per shipment. As per Institute Cargo Clauses (All Risks) means the Insurance is against all risks of loss or damage to the subject-matter insured but shall in no case be deemed to extend to cover loss damage or expense proximately caused by delay or inherent vice or nature of the subject-matter insured. According to the learned advocate the Claims recoverable under the said policy shall be payable irrespective of percentage.

The learned advocate then submits that as per Institute Cargo Clauses (All Risks) Paragraph No-1, this insurance attaches from the time goods leave the warehouse or place of stowage at the place named in the policy for the commencement of the transit, continues during the ordinary course of transit and terminates either on delivery: (a) to the Consignees' or other final warehouse or place of storage at the destination named in the policy, (b) to any other warehouse or place of storage, whether prior to or at the destination named in the policy, which the Assured elect to use either: (i) for stowage other than in the ordinary course of transit or (ii) for allocation

or distribution, (c) on the expiry of 60 days after completion of discharge over side of the goods hereby Insured from the oversea vessel at the final port of discharge whichever shall first occur. The contracted goods of 2,500 MT of onions arrived at Chittagong Port on 10th August 1981 for unloading, the Post Landing Inspector (PLI) Company, Agrani Inspection Company, inspected the goods between 10th August and 19th August 1981 and report was prepared on 22nd August 1981 with some remarks. During the PLI, it was found that out of 1,00,000 bags, only 99,000 bags were received and 1,000 bags were short landed. During the Survey it was found that in Twin Docks 37.27% contents damaged of 25,531 bags and 55% of the contents damaged rotten of 53,486 bags in lower holds. In remarks of PLI report it was mentioned that Onions were dumped into the Twin Docks instead of stacking, and the Chief Officer of the vessel informed that it was raining at the time of loading, there was provision of mechanical ventilation, which was infective as air could not circulate. As a result due to generation of heat the onions were damaged/rotten. The Stocks of bags of onion of lower Holds were broken due to rough weather heavy rolling etc encountered by the vessel in Transit. The bags were heaped at the centre and were rotten/damaged due to generation of heat. On the other hand the defendant no.1, Sardharan Bima Corporation has

appointed their surveyor 'Vigilant Survey' who prepared their report on 24.08.1981. The said survey company mentioned in their report as remarks that, Rotten as it is a Perishable item and also due to climatic condition. They mentioned in their report that, rotten 1159.510 MT, Short landed 25.00 MT and Shortage in weight due to drying/rotten 489.074 MT, total loss 1673.073 MT and on the basis of this report the respondent TCB claimed the damages against Insurance Company, Carrier, Local agent and supplier on 05.09.1981 and 07.09.1981, the learned advocate submits.

Mr. Salehin then submits that it was mentioned in remarks of Joint Survey that at the time of joint inspection in the hatches was found in each bag 46.86% contents on average in rotten and balance said to be good. Thus the total rotten may rise up to 56.85% and rest contents may be in good condition. Since Onion is a perishable item cannot expect fully good bags from a huge lot it gets rotten day by day. So if a proper segregation is made out of the whole percentage may arise above declaration. The Trading Corporation of Bangladesh being plaintiff duly filed the suit and claimed as per Bill of Lading and Marine Insurance Policy against the Insurance Company, Carrier, Local Agent and Supplier jointly and severally liable to pay US\$ 3,64,762.206 equivalent to Tk. 65,65,719.70.

The learned advocate next submits that the Appellant being defendant no.1 admitted in Written statement that the Onion by nature of itself is a perishable cargo and the circumstances in which it was carried proves beyond doubt that owing to the inherent vice of thing itself it became damaged/rotten and therefore the claim is not covered by the all risks policy, as the delay and inherent vice are excluded from the all risks cover but as per survey report the damages or shortages of cargo have been caused not due to delay or inherent vice or nature of the cargo but due to lack of proper ventilation in the holds of the vessel or excessive heat, thus the appellant is liable to pay for the damaged/rotten and short in contents onion. Because they took out the policy as per the Bill of Lading which clearly states that "Perishable Cargo", which was about 1,00,000 Bags i.e 2,500 MT and the premium was charged as per the B/L.

Mr. Salehin further submits that Institute Cargo Clauses (All Risks) Paragraph No-1 mentioned that, this insurance attaches from the time goods leave the warehouse or place of stowage at the place named in the policy for the commencement of the transit, continues during the ordinary course of transit and terminates on delivery of goods. The 'Vigilant Surveyor' was appointed by the Insurance Company and they

prepared the report on 24.08.1981, as the goods reached Chittagong Port on 10th August 1981 and the survey was conducted from 10th August 1981 to 19th August 1981, then the claim was submitted with supporting documents on 07.09.1981 as per Important Notice of Marine Caro clause 4 which stated to give Notice in writing to the Carriers, representative or other Bailees within three days of delivery, if the loss or damage was not apparent at the time of taking delivery and to make prompt arrangements for survey to be held. Following the official procedure the Trading Corporation of Bangladesh submitted their claim as per official report on 05.09.1981 and 07.09.1981 and legal notice was served on 28.06.1982 but the appellant, Sadharan Bima Corporation, did not respond of said notices, nor did they formally reject the claim.

The learned advocate then submits that some contradictions were found among PSI and PLI reports but the respondent TCB filed the Money suit relying upon the report of 'Agrani Inspection Company' and 'Vigilant Surveyor'. The joint survey report found that total rotten could increase by 56.85%. The inspection showed that the mechanical ventilation of the cargo was ineffective, the air was not able to circulate, and the onions were rotting due to heat generation and these are not inherent vice as such the insurance covers these losses. Because,

Cargo insurance can mitigate the financial impact of losses to perishable cargo and the inherent risk of the goods availing of all risk cargo insurance coverage can ensure protection against a wide range of potential risk. This includes changes in humidity, temperature, transit risk, spoilage. The Inherent vice, in marine and transit insurance, refers to the deterioration or damage to goods or cargo due to their intrinsic nature and not caused by external factors such as accidents or weather. Thus as per PLI report mechanical ventilation was ineffective, due to generation of heat the onions were damaged.

Referring the depositions of DW-1 Mr. Salehin submits that DW-1 admitted that কাগজ পত্র দেখে আমরা ইনসিউরেন্স করি। আমরা মাল দেখি নাই। পঁয়াজ মাল দেখি নাই। পঁয়াজ পরিবহন যোগ্য পন্য। বিল অব লেডিং দেখে শুনে আমরা ইনসিউরেন্স করছি। এর প্রথম পৃষ্ঠায় মালের বিবরণে যা বলা আছে সঠিক আছে। বাদীর কাছ থেকে সব প্রিমিয়ার বুক পেয়েছি। পলিসি অল রিস্কস কভার স্বীকার করি। Since a bill of lading is a document that is issued by a carrier to the shipper which contains details about goods which are being shipped, where the shipment is coming from and going to, as well as details of the shipper, carrier, and consignee. As the defendant Insurance Company issued marine cargo insurance policy upon 2500 MT onion and received the insurance premium accordingly to cover All Risks from the port of loading, Bombay to the port of unloading, Chittagong as such the insurer is liable to adjust the damages as per claim of the respondent insured, TCB.

The learned advocate for the plaintiff-respondent lastly submits that the respondent TCB duly filed the Money suit before the Court at Dhaka, since the cause of action has arisen partly in Dhaka where the insurance policies have been issued and Letter of Credit has been opened.

We have heard the learned advocate for both the parties, examined the impugned judgment and decree and perused the lower court records including the depositions and exhibited documents of both parties.

It appears from the facts as stated above that the plaintiff entered into a contract with defendant no.5, the supplier, M/S. A.A. Valibhoy and Sons (1907) PTE, LTD vide contract no. TCB/IMP-8/81, dated 12.06.1981 for purchase of 3,300 Metric Tons (MT) of onions at a price of US\$ 222 per MT with a provision for 1st shipment of about 800 MT by June 1981 and second shipment of about 2,500 MT by July 1981. There is no dispute regarding the 1st shipment. As per contract 2nd shipment of 2,500 MT of onions was shipped from the port of Bombay through Vessel INGA and it appears from the facts that before shipment the said goods were inspected by Directorate of Marketing and Inspection, Government of India, and the weight, quality and quantity was found correct as per specification of contract. As per Pre-shipment inspection report (PSI) dated 30 July 1981 (the inspection

was done on 24th July 1981 to 29th July 1981) the onions were found hard looking and fit for human consumption (exhibit-2). The said consignment of 2,500 MT of onions shipped under the Bill of Lading dated 29.07.1981 (exhibit-4) was insured against "All Risks" from the port of Bombay to Chittagong port with Sadharan Bima Corporation (defendant no.1) under the Marine Cargo Policy dated 07.09.1981. The policy was valued Tk-99,90,000 for 2,500 MT of onions and marine premium was deposited Tk-1,31,535 (exhibit-5). The insurance policy was taken under All Risk, subject to an excess of 10% per shipment drawing attention of Important Notice attached with. The defendant-appellant produced those Institute Cargo Clauses (All Risks) and Important Notice as exhibit-Ka and Ka(I) respectively.

The contracted goods of 2,500 MT of onions arrived at Chittagong Port on 10th August 1981 for unloading, the Post Landing Inspector, Agrani Inspection Company, inspected the goods between 10th August and 19th August 1981 and report was prepared on 22nd August 1981 with remarks that out of 2,500 MT (1,00,000 bags), only 2,475 MT (99,000 bags) were received and 25 MT (1,000 bags) were short landed. In that report it was also stated that in Twin Docks 37.27% contents damaged of 25,531 bags and 55% of the contents damaged/rotten of 53,486 bags in lower holds. In remarks of that Post Landing Inspection report it

was mentioned that Onions were dumped in to the Twin Docks instead of stacking, and the Chief Officer of the vessel informed that it was raining at the time of loading, there was provision of mechanical ventilation, which was infective as air could not circulate. As a result due to generation of heat the onions were damaged/rotten. The Stocks of bags of onion of lower Holds were broken due to rough weather heavy rolling etc encountered by the vessel in Transit. The bags were heaped at the centre and were rotten/damaged due to generation of heat. (exhibit-6).

The defendant no.1, Sardharan Bima Corporation (appellant) appointed their surveyor 'Vigilant Survey' who prepared their report on 24.08.1981 on the finding that, onions were Rotten as it is a Perishable item and also due to climatic condition. The report further mentioned that at the time of joint inspection the hatches they found in each bag 46.85% contents on average in rotten and balanced said to be good. The actual contents of the remaining could be ascertained after proper segregation. In their opinion the rotten may extend to another 10%. Thus the total rotten may arise up to 56.85% and rest contents may be good on condition of the onion after segregation. Since Onion is a perishable item cannot expect fully good bags from a huge lot it gets rotten day by day. So if

a proper segregation is made out of the whole percentage may arise above declaration. In such view it found total rotten 1159.510 MT, Short landed 25.00 MT and Shortage in weight due to drying/rotten 489.074 MT, total loss 1673.073 MT. (exhibit-7). On the basis of the said joint survey report the plaintiff-insured submitted claim through Claim Bill dated 10.09.1981 to the defendant nos.1, 4 and 5.(exhibit-8).

The Defendant-appellant's case is that he is not liable to pay as the loss occurred due to inherent vice as per Marine Cargo Policy condition No. 5 which runs as under:

"5. This Insurance is against all risks of loss or damage to the subject matter insured but shall in no case be deemed to extend to cover loss damage or expense proximately caused by delay or inherent Vice or nature of the subject matter insured. Claims recoverable hereunder shall be payable irrespective of percentage."

So, we have to determine first whether the loss was occurred due to inherent vice. Inherent vice refers to a loss or damage that arises from the natural behavior, internal quality, or condition of the goods themselves, without any external accident or peril of the sea. In other words, if the cargo damages itself because of what it is, not because of what happens to it, in

that case the insurer is not liable to pay. For example: Fruit rotting due to natural ripening, Grain sweating, fermenting or moulding naturally, Metal rusting due to internal moisture etcetera. The key idea is that: No external fortuity - no insurance liability. On the contrary loss is covered if inherent tendencies are triggered or aggravated by an insured peril, such as, delay caused by storm, seawater ingress, collision, heavy weather, stranding etcetera. For example: Bananas rot because a storm delays the voyage- the insurer is liable to pay but Bananas rot because they naturally ripen- the insurer is not liable to pay. Inherent vice is not a peril, marine insurance covers fortuities, not certainties. Inherent vice in marine insurance refers to loss arising solely from the natural condition or internal characteristics of the insured goods, without the intervention of any insured marine peril. However, if the policy wording is a contrary provision e.g., all-risk/risk description broad enough the parties are governed by the contract terms and the insurer may not be able to defeat the claim simply by pleading inherent vice. The burden is on the insurer to prove loss was caused by an insured peril, not mere deterioration.

A contract of Marine Insurance is a contract which is essentially based on utmost good faith and the obligation is binding on both the

contracting parties. The question is whether the parties had the good faith at the time of taking the insurance policy as per the Bill of Lading. In the present case 2,500 MT of onions were shipped from Bombay to Chittagong as per Bill of Lading dated 29.07.1981 (exhibit-4) containing 100,000 bags in new well dried clean & assorted onions in light porous hessian new bags. We find from the bill of lading that the nature of goods were specified as perishable cargo. From the bill of lading as evidenced before the court the nature of the goods have been properly specified and both the contracting parties knew about the nature of the goods and there was no lack of good faith between the parties. Further from the Pre-shipment Inspection Report dated 30.07.1981 (Exhibit-2) it appears that several bags at random were opened and inspected and the onions were found hard looking and fit for human consumption and total net weight was 2,500,000 Kgs. So, from above evidence it appears that goods were shipped as per contract but not delivered at the time of unloading. This is apparently not breach of sale contract but breach of contract of carriage.

The defendant-supplier preferred not to contest the suit/appeal. Nevertheless, it cannot be declared liable for loss arising from short landing, short in contents and/or for rotten/damaged goods received as no breach of the

contract of sale occurred as evident from the Pre-shipment Inspection Report along with the Bill of Lading which tally with the invoice/contract of purchase.

It is to be remembered that contract of marine insurance is not dealt with by any specific law of our country. In England matter is largely covered by Marine Insurance Act, 1906. There is no such law in our country. Marine Insurance contract is therefore governed by the general principles of contract and also the English principles. The general principles embodied in English Marine Insurance Act, 1906 are also applicable. This has been observed by our Appellate Division in the case of Eagle Star Insurance Co. Ltd Vs. Rahmania Trading Co. reported in 28 DLR (AD) 109.

Section 55(2)(c) of Marine Insurance Act, 1906 reads as under: *Unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject-matter insured, or for any loss proximately caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils.*

Under the above section the insurer is not liable for the loss occasioned by an inherent vice. It is true that section 55(2)(c) of the Act excludes liability of the insurer on account of inherent vice of the subject-matter but it is

qualified by the words '*Unless the policy otherwise provides*'. This indicates that a policy may contain a contrary provision. Section 55(2)(c) being qualified the parties will be governed by the contract itself. This has been held by our High Court Division in the case of *The Mercantile Fire and General Insurance Co. (Pakistan) Vs. Bata Shoe Company (Pakistan) Ltd. and others* reported in 1989 BLD 533. The policy in the present case described All Risk, subject to an excess of 10% per shipment and Important Notice. These words must be held to constitute a sufficient contrary provision. In a leading case on insurance law namely *British and Foreign Marine Insurance Company Limited Vs. Gaunt* reported in 1921 (2) AC 41 at page 57 Lord Sumner observed: *There are, of course, limits to "all risks." They are risks and risks insured against. Accordingly the expression does not cover inherent vice or mere wear and tear or British capture. It covers a risk, not a certainty; it is something, which happens to the subject-matter from without, not the natural behavior of that subject-matter, being that it is, in the circumstances under which it is carried. Nor is it a loss which the assured brings about by his own act, for then he has not merely exposed the goods to the chance of injury, he has injured them himself. Finally the description "all risks" does not alter the general law; only risks are*

covered which it is lawful to cover, and the onus of proof remains where it would have been of a policy against ordinary sea perils. The House of Lords in the case held that in marine insurance a plaintiff who sues in respect of loss under "all risks" policy must prove that the loss was due to an accident or casualty, but is not bound to prove the exact nature of the accident or casualty which occasioned the loss. "All risks" does not mean "all losses whatsoever".

In the case before us, admittedly 2,500 MT Onions in question was imported as part of 2nd shipment from Bombay, India through the defendant Nos. 2-5 under the aforementioned Marine Insurance Policy referred to above, which after arrival at Chittagong Sea Port on 10.08.1981, a Post-Landing Inspection was held at the instance of the plaintiff-respondent No.1 by appointing a surveyor namely "Agrani Inspection Company" who submitted report on 22.08.1981. In the report it is transpired that the said enquiry was held from 10th August to 19th August, 1981 and admittedly there was short landed of 1,000 bags from the vessel and the remarks column of the said report runs as under:

- a) On opening of the hatch covers we observed that bags of Onion were dumped in to the Twin Docks instead of staking. The Chief Officer of the Vessel informed us that it was raining

at the time of loading and as such the stevedores dumped the same.

Although there was provision of mechanical ventilation, which was ineffective as air could not circulate. As a result due to generation of heat the Onions were damaged/rotten.

b) The stock of onion of lower holds were broken due to rough weather heavy rolling etc encountered by the vessel in transit as stated by the Chief Officer of the vessel. The bags were heaped at the centre and were rotten/damaged due to generation of heat.

c) It was also stated by the Chief Officer of the Vessel that the Onions were packed in bags around 14th July, 81 and there was some delay in loading which may have caused onions start rotting as the cargo is of perishable nature.

d) The carrier's Local agent did not allow joint survey at first but later after discharge of 19,983 bags they appointed their surveyor.

This report of the surveyor was affirmed by the joint Survey report.

In the insurance policy there was mention of the Important Notice which amongst other runs as under:

1. LIABILITY OF CARRIERS, BAILEES, OR OTHER THIRD PARTIES.

IT IS THE DUTY OF THE ASSURED AND THEIR AGENTS, IN ALL CASES TO TAKE SUCH MEASURES AS MAY BE REASONABLE FOR THE PURPOSE OF AVERTING OR MINIMISING A LOSS AND TO ENSURE THAT ALL RIGHTS AGAINST CARRIERS, BAILEES OR OTHER THIRD PARTIES ARE PROPERLY PRESERVED AND EXERCISED, IN PARTICULAR. THE ASSURED OR THEIR AGENTS ARE REQUIRED:

1. To claim immediately on the carriers, port authorities or other bailees for any packages that are missing or that cannot be found.
2. To apply immediately for survey in the docks by carriers or other Bailees representatives if any loss or damage be apparent or for any packages discharged defective, and to claim on the carriers or other bailees for any loss or damage found at such survey.
3. In no circumstances, underwritten protest, to give clean receipts where goods are in doubtful condition.

4. To give notice in writing to the carriers, representatives or other bailees within 3 (three) days of delivery if the loss or damage was not apparent at the time of taking delivery, and to take prompt arrangements for survey to be held.

.. .. .

Note: Failure to comply with the above instructions will prejudice any claim under this insurance.

In the present case, notice was given and survey was conducted by both insurer and assured dated 22.08.1981 (survey conducted between 10.08.81 to 19.08.81) and 24.08.1981 (survey conducted between 10.08.81 to 18.08.81) respectively. (exhibits-6 & 7) and claim bill was submitted on 10.09.1981, exhibit-8. In the present case the particular of the loss was conveyed to the insurer in due time and the proof of the same is evidenced by the survey report. Thus in such facts the assured has proved its prima facie case of loss under the peril clause and the plaintiff is entitled to get relief in part. Because, in the instant case the policy itself embodied with the terms an excess of 10% per shipment. And pursuant to the said terms, since the aforementioned Marine Insurance Policy is for a Sum Insured of Tk. 99,90,000.00 so plaintiff ought to have bear 10% of the said sum insured

i.e Tk. 9,99,000.00 which is deductible from their alleged claim amount of Tk.65,65,719.00 and by calculating this alleged claim stood at (Tk 65,65,719.00-9,99,000.00) Tk. 55,66,719.00 only.

According to the Bangladesh Marine Tariffs the word "Excess" means An excess, usually expressed in terms of a percentage (%) of sum insured or of claim amount and in Marine Cargo Claim is calculated subject to deductible (%) of the Sum Insured of the entire/whole shipment. The insured shall bear this amount (calculated as the percentage of the entire /whole shipment) on each and every claim arising from that shipment. In Marine Insurance, an excess (also known as deductible or franchise) is a clause where the insured agrees to bear a certain portion of loss before the insurer pays out. This means the insured is responsible for a specific amount or percentage of the claim, and the insurer only covers the remaining amount.

From the evidence on record as discussed above it is crystal clear that the loss occurred not for inherent vice but for external cause and for this loss the carrier cannot escape his liability.

It appears from the impugned judgment and decree that the trial court did not specify the liability of the each and every defendant which was required in the given facts of the case in hand and decreed the suit against all the

defendants without apportionment. Although the policy was an all-risks policy obliging the insurer to indemnify the assured for covered losses, the trial court committed wrong decreeing the suit against all the defendants without determining the respective liabilities of the carrier. In such view of the matter, we are constrained to interfere with the impugned judgment and decree.

Accordingly, the appeal is **allowed-in-part**.

The judgment and decree passed in Money Suit No. 56 of 1993 dated 05.08.2002 are modified in the following manner:

The defendant-appellant is held liable to indemnify plaintiff-respondent no.1 only in respect of such loss or damage to the insured goods as falls within the coverage of the All-Risk marine insurance policy, namely loss caused during the voyage by external and fortuitous causes, including damage attributable to improper staking (dumping), lack of due care and failure of the ventilation system.

The defendant-appellant shall not be liable for any loss arising from short landing or non-delivery of goods and short in contents (weight) and rotten, as such losses do not constitute insured marine perils as loss arising from causes not amounting to insured marine perils cannot be fastened upon the insurer merely because an insurance policy exists.

Since the instant Marine Insurance Policy is for a Sum Insured of Tk. 99,90,000.00 the plaintiff ought to have bear 10% of the said sum insured i.e Tk. 9,99,000.00 which is deductible from their alleged claim amount of Tk.65,65,719.00, pursuant to the terms of the said insurance policy, and by calculating this alleged claim stood at (Tk 65,65,719.00-9,99,000.00) Tk. 55,66,719.00 only which is to be paid by the defendant appellant.

The defendant-carrier, (defendant nos.2-4) having remained absent in both suit and in appeal, is declared liable for loss arising from short landing of goods and for damage caused by negligence, including improper staking (dumping) and failure to maintain a functional ventilation system during transit. A carrier is bound to exercise due care in stowage and carriage, and failure to do so attracts liability notwithstanding the existence of insurance.

Upon payment of amount as above by the defendant-appellant to the plaintiff-respondent in satisfaction of the insured loss, the appellant shall be entitled to exercise its statutory and contractual right of subrogation against the carrier and its agents to the extent of their respective liabilities as determined hereinbefore. The insurer's liability is secondary, not ultimate. Insurer steps into shoes of insured and can recover from the carrier. The

doctrine of subrogation is inherent in contracts of indemnity and has been consistently recognized by the courts that payment by the insurer does not absolve the wrongdoer of liability. The failure of the defendants to contest the suit does not absolve them from substantive liability, and the Court is competent to declare their liabilities on the basis of evidence on record. Ex-parte proceeding do not alter legal responsibility.

The decree shall be executable against the appellant only to the extent of the insured loss covered by the policy, and execution, if any, against the carrier shall be confined to losses attributable to their respective breaches of carriage contract.

Having regard to the facts and circumstances of the case, we make no order as to costs.

Send down the Lower Court Records at once along with a copy of this judgment.

Md. Iqbal Kabir, J.

I agree.