



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INTERIM APPLICATION (L) NO. 21862 OF 2024
IN
EXECUTION APPLICATION (L) NO.3758 OF 2021

Dr. Arvind Aggarwal

...Applicant

In The Matter Between

Dr. Arvind Aggarwal

...Applicant/Plaintiff

V/S.

M.V. Petr Dutov And Others

...Respondents

And

United India Insurance Co. Ltd.

...Proposed Respondent

Mr. Abdul Majid Dar, Senior Advocate a/w Mr.Siddesh Ashok Pilankar,
Advocate for the Applicant.

Mrs. S.S. Dwivedi, Advocate for the Respondent-United India Insurance
Company Ltd.

CORAM : ABHAY AHUJA, J.

RESERVED ON : 16th DECEMBER, 2024

PRONOUNCED ON : 2nd JANUARY, 2025

ORDER :

1. This Application has been filed under Section 146 of the Code of Civil Procedure, 1908, ("CPC") seeking to array United India Insurance Company through its Chairman and Managing Director as party in the execution petition for the purpose of satisfaction of decree dated 2nd September, 2009 in Admiralty Suit No.23 of 1994.

2. Relevant facts leading to the filing of the present Application as submitted by the Applicant are as under:-

a. In 1993, the applicant had sent a shipment of 499 cartons, each containing 100 pieces T-shirts, total 49900 pieces, for total value USD 4,99,000.00. The goods were shipped by trucks from New Delhi to Bombay vide two LR'S bearing No.92990 and 92991.

b. The goods were handed over to customs in Bombay and after custom clearance, the goods were handed over to MULTIMODAL TRANSPORTER i.e. Mazario Maritime SRL, (an Italian Shipping Company), with the contract for carrying goods up to final place of delivery i.e. Budapest (Hungary). The goods were fully insured by United India Insurance company vide Marine insurance Policy No. 41200/21/06/11/75/92 from warehouse in India to warehouse in Budapest (Hungary) for all risks, including non-delivery.

c. On 5th February, 1993, the consignments were shipped on board in container no. 446143-5 on the first respondent vessel, named MV PETER DUTOV, a foreign flag vessel flying the flag of Russia for voyage, Bombay (Indian Sea Port) to Hamburg (Transit sea port in Germany). From Sea Port Hamburg the goods were to be transported

by surface transport (by rail or road) to Budapest (Hungary) the final place of delivery.

d. Since Budapest is not a sea port, Hungary being a land locked country, goods were to go by sea from Bombay to Germany (sea port Hamburg) and from there the goods were to be loaded on rail or trucks for surface transportation to Budapest (Hungary) final place of delivery.

e. Entire freight and all other charges were prepaid ie. sea freight, land freight, all other handling charges, loading, unloading and terminal charges etc. and the same were mentioned on the Bill of Lading.

f. Goods were off loaded from sea vessel (i.e. ship) in Hamburg, but were not sent to Budapest by rail/road, thus were never offered to buyer for delivery in Hungary, as goods never reached Hungary.

g. The Applicant had a valid Marine Insurance Policy and the goods were insured for all risks, including non-delivery by the Respondent United India Insurance Company Ltd. Declaration was submitted to

Insurance Company and premium was prepaid. The Insurance Company had issued the necessary Marine Insurance Certificates bearing No. 14911, 14912, 14913, 14914 and 14915 which indicate that the port of discharge/final delivery was Budapest and the policy covered all risks including non-delivery from warehouse in India to final warehouse in Budapest.

h. When the consignment did not reach Budapest, the final place of delivery within the normal transit period to the consignee M/s Szentex International Limited, the applicant made vigorous enquiries from the Multimodal Transporter.

i. On the request of the Multimodal Transporter a 1/3 (one out of three) original bills of lading was sent to the German Agent of Multimodal Transporter by/through Central European International Bank, Budapest through the DHL Courier Service for tracing the cargo. However, the German Agent of Multimodal Transporter claimed that it did not receive the bill of lading through DHL sent by Central European International Bank. In the meantime, the Austrian Agent of the Multimodal Transporter informed the Applicant /shipper vide fax dated 23rd June, 1993, that the container no. 446143-5 has reached

Hamburg, but alleged that the freight was prepaid only up to transit port Hamburg only.

j. The Applicant spoke to one Mr. Nascimento, the Austrian Agent of the Multimodal Transport Company under whose operational territory Hungary falls and clarified all doubts and submitted copies all relevant documents.

k. Mr. Nascimento enquired from German Agent of the shipping company who said that they had not received the bill of lading sent by Central European International Bank through DHL. However, upon verification from DHL, DHL confirmed the delivery of the packet containing bill of lading to one Mr. Gaffert of the Multimodal Transport Company in Germany and submitted the proof of delivery.

l. It has been submitted that in fact the Multimodal Transporter failed to arrange the transportation of the consignments from ocean port in transit-Hamburg (Germany) to final port of delivery Budapest (Hungary) and it took a completely false and baseless false plea of non payment of freight from Hamburg to Budapest. All freight, other

charges and haulage charges, were all prepaid and the same were mentioned on the face of the bill of lading no. PET/261/HAM-4.

m. After waiting for several months when the goods did not arrive at the final destination vide their fax dated 29th June, 1993, M/s Szentex International Limited cancelled their order and filed a claim of USD 180,000 for loss of profit suffered by them due to non-delivery of the said consignment against the applicant.

n. When the goods did not reach at the final destination as per the Policy, Applicant notified the surveyor cum settling agent of the United India Insurance Company i.e. Magyar Kereskedelmi Kamara (Hungarian Chamber of Commerce) as mentioned in the policy.

3. It is submitted that this surveyor-cum-settling agent was deputed and authorized by the insurance company, to conduct an enquiry and together relevant information from the shipping company, consignee and the collection bank and in furtherance thereto demanded subrogation letters from the shipper/insured party and upon its satisfaction recommended the claim for settlement.

4. That the surveyor of the insurance company issued and forwarded to Applicant the five survey reports bearing No 393/527A, 393/527B, 393/527C, 393/527D, 393/527E certifying "NON DELIVERY OF GOODS INSURANCE MUST SETTLE THE CLAIM".

5. It is submitted that for Insurance Claim, relevant documents like policy copy, invoices, Marine Insurance Certificates, Declarations Surveyor/Settings Agents Report were submitted but the Respondent insurance company refused to settle claims and vide letter dated 22nd February, 1994, it advised the Applicant to file a suit against shipping company.

6. It is submitted that, therefore, the Applicant filed Suit No. 23 of 1994 against the carriers for recovery of the consignment value of USD 499,000 with interest. It is submitted that at that stage, as per the advice obtained, the proposed Respondent herein was not made a party Defendant in the said suit.

7. The said suit was heard and decreed by this Court on 12th July 2002 in terms of prayer clause (a) in the sum of USD 704,000 and USD

530,484 towards interest with further interest @ 8% per annum on USD 704,000 until payment.

8. It has been submitted that due to inadvertence, the order dated 12th July 2002, did not direct that decree be drawn up nor did the order dated 12th July 2002 dispense with the decree and that, therefore, the decree has been drawn only on 2nd September 2009.

9. It is submitted that thereafter the Applicant had filed a consumer complaint bearing OP No. 114 of 2003 against the Respondent before the National Consumer Disputes Redressal Commission, New Delhi, (“NCDRC”) and also filed an application for condonation of delay for the period spent in the admiralty suit before this Court. However, the NCDRC by order dated 9th October 2012, rejected the application for condonation for delay and accordingly dismissed the applicant's complaint on the technical grounds of limitation without hearing the applicant on merits.

10. That the aforesaid rejection and dismissal was challenged by the Applicant before the Hon'ble Supreme Court of India by filing Civil Appeal No. 9188 of 2022 and the same also came to be dismissed by

the Hon'ble Supreme Court of India by its order dated 11th January 2013 on the technical ground of limitation and again the applicant could not be heard on merits.

11. It is submitted that thereafter the Applicant was constrained to file Execution Application No. 3758 of 2021 before this Court. That, thereafter, an Interim Application No 15960 of 2022 was filed in 2022, but since due to inadvertent mistakes the Applicant had not annexed the relevant trail of insurance documents which were necessary, the same was withdrawn with the liberty to refile fresh one and therefore, this fresh application has been filed. It is submitted that the Applicant has also filed Garnishee Application bearing No. 599 of 2023 and had also filed interim application under section 151 CPC read with Order 1 Rule 10 and sought amendment in the execution petition by arraying United India Insurance Company as the party in execution proceedings, on the ground that the appellant had valid insurance claim with the said insurance company and that the said insurance company is a necessary party to be impleaded in the execution proceedings and also to carry out amendment to that extent, in an endeavour to satisfy the decree earned by the Applicant, which has been dismissed on 12th July, 2023.

12. I have heard the learned Senior Counsel for the Applicant as well as the learned Counsel for the Respondent-Insurance Company.

13. At the outset Mr. Dar, learned Senior Counsel for the Applicant has clarified that this Application is being filed and pursued as an Application under Section 146 of the CPC and not under Section 151 of the CPC as the Application under Section 151 read with Order I Rule 10 of the CPC has already been dismissed although an appeal has been filed by the decree holder before the Division Bench which is pending disposal.

14. Mr. Dar, learned Senior Counsel would submit that the decree obtained by the Applicant/Decree Holder is required to be satisfied on the ground that there was already a valid insurance policy from the United India Insurance Company Ltd. which was subsisting at the relevant point of time. Mr. Dar, learned Senior Counsel would submit that the report of the surveyor of the Hungarian Chamber of Commerce (English name of the nominated surveyor Magyar Kereskedelmi Kamara of the Insurance Company as mentioned in the Insurance Policy) confirms and sets out that there was non-delivery of the cargo and the insurance company was liable to settle the Applicant's claim on

the basis of the recommendation of the surveyor of the insurance company. But since the United India Insurance Company Ltd., was not arrayed as a party in the original suit and since there was already a valid policy this application has been filed.

15. Mr. Dar, learned Senior Counsel submits that the Applicant/Decree Holder, is entitled to reap the fruits of the decree but it was only on the basis of a technical point that since Insurance Company was not a party in the main suit, that the decree could not be executed against it.

16. Mr. Dar has submitted that not only, there was a valid insurance policy which was in operation at the time of the incident, but the fact of the matter remains that the claim of the Decree Holder was directed to be settled by the nominated surveyor of the insurance company and survey reports were issued by the Surveyor along with subrogation letter for making the claim from the insurance company as the surveyor concurred that the Decree Holder was entitled to the benefit of the Insurance claim.

17. Relying upon the decision of the Calcutta High Court in the case of *Jatindra Mohan Banerjee and Ors. v/s. Kali Charan & Ors*¹, which in turn relied upon a decision of the Hon'ble Supreme Court in the context of Section 146 of the CPC, Mr. Dar, has submitted that even if the person is not a party in the suit and the original decree holder has died and the person who has interest in the decree and even persons in a suit filed in a representative capacity can seek the execution of decree for the purpose of satisfaction of the decretal amount.

18. Mr. Dar has submitted that the Hon'ble Calcutta High Court has held that there is no reason why the decree cannot be executed against the person simply because the law of procedure is constricted and would not include those persons who have not been party in the suit. Learned Senior Counsel submits that law of procedure is the process for doing justice and cannot be understood as to create a difficulty in their dispensation.

19. Mr. Dar has further submitted that there is no doubt that a decree cannot ordinarily be executed against a person who is not a party in the decree, however, that such a person may be brought on the

1 MANU/WB/0169/1960

record, and having been brought on the record he would become a party to the decree and then the decree can be executed.

20. Mr. Dar submits that Section 146 of the CPC applies only when there are no other provisions of the CPC.

21. Mr. Dar submits that the said judgment directly covers the case of the Applicant/Decree Holder.

22. Mr. Dar emphasises that even if the Decree Holder is dead, persons interested in the decree, should be allowed to execute the decree.

23. That, therefore, the Applicant may also be given the benefit to execute the decree against the United India Insurance because as after all the Applicant must reap the fruits of the decree and the technical point should not come in his way to claim the benefit of the decree. Mr. Dar urges that the application filed by the Applicant under section 151 for similar reliefs came to be dismissed, because the present Calcutta High Court's judgment which supports the case of the Applicant was not in hand. Learned Senior Counsel further submits that in any event

the order passed in 151 application has been challenged before the division bench in an appeal which is pending disposal.

24. Mr. Dar submits that the relief prayed for would advance the cause of justice and no prejudice would be caused to the other side in case this application is considered.

25. On the other hand, Mrs. Dwivedi, learned Counsel for the Respondent-Insurance Company has submitted that the present Application under Section 146 of the CPC, seeking to array United India Insurance Company through its Chairman Managing Director as party in the execution petition for the purpose of satisfaction of decree dated 2nd September, 2009 in Admiralty Suit No.23 of 1994 is not maintainable against the Insurance Company and that this Court dismiss the Application with cost.

26. Mrs. Dwivedi, learned Counsel would submit that recourse to Section 146 of CPC, in the facts and circumstances of the present case, would be misplaced. Learned Counsel submits that it is an admitted fact that the Insurance Company was not made a party in the original proceedings. The Applicant had, in fact, raised a claim before

the Insurance Company, after the loss was suffered. That the Insurance Company on 24th March, 1994, repudiated the claim of the Applicant and hence, the Applicant was fully aware about the stand taken by the Insurance Company. That the Applicant chose to file Admiralty Suit only against the Judgment Debtors/Respondents. It is submitted that the Insurance Company has no legal liability for the loss suffered by the Applicant.

27. It has been submitted that the Applicant proceeded against the Insurance Company by filing a complaint under the provisions of Consumer Protection Act, 1986 and the NCDRC dismissed the complaint of the Applicant on 9th October, 2012 and admittedly, the Appeal filed against the same before the Supreme Court, was also dismissed on 11th January, 2013.

28. It is submitted that the Applicant cannot now take recourse under Section 146 of CPC at this stage and attempt to foist the liability on the Insurance Company.

29. That what the applicant failed to achieve directly, cannot be allowed to be done in an indirect manner, by allowing the present application.

30. It is submitted that the Applicant has before filing the Admiralty suit, received the repudiation letter from the Insurance Company and that the Applicant was aware that the Applicant's claim under the said policy had been repudiated by the Insurance Company. That the Applicant chose not to make the Insurance Company party to the Admiralty suit as the Applicant was aware that the claim did not fall within the purview of the Policy and not that the Applicant inadvertently could not be arrayed as a party in the original suit.

31. Mrs. Dwivedi would submit that this Court has dismissed the Applicant's Application under Order I, Rule 10 read with section 151 CPC on merits. To reap the fruits of the decree, the Applicant cannot take recourse under Section 146 CPC.

32. It has been submitted that the appointment of surveyor does not mean that Insurance Company is admitting liability. The Insurance company thoroughly examined the claim documents submitted by the

Applicant, relevant terms and conditions of the insurance policy and also examined the admissibility of the claim in view of the nature of loss. It was found that the shipment was transported from New Delhi via the Port of lading, Mumbai to be discharged at Hamburg port and the place of delivery was Budapest, Hungary. The coverage under the insurance policy was from Delhi to Budapest subject to provisions of Institute Cargo Clause (A). As per the Transit clause of this clause, the insured transit would terminate as soon as any of three following eventualities occurred first:

- (i) Delivery to the consignees or other final warehouse or place of storage at the destination named in the policy.
- (ii) Delivery to a place of storage, which the assured intended to use "other than in the ordinary course of transit for allocation or distribution".
- (iii) Expiry of 60 days after completion of discharge from the ocean to the final port of discharge.

33. Mrs. Dwivedi would submit that in the facts of this case the export consignment was available at the final port of discharge at Hamburg on 13th March, 1993, but the foreign buyer declined to take delivery of the consignment on account of delay as the season was over

and cancelled the purchase order. That neither the consignees nor the consignor had bothered to take care of the cargo and arranged for further transit and left the cargo virtually abandoned. The said consignment/cargo was continued to be held at Hamburg by the ship's agent due to dispute between themselves and the shippers/consignees for non-production of bill of lading and non-payment of additional freight and demurrage charges. That the transit time between Hamburg and Budapest by truck is one day and by train two days maximum and despite this as per the cover granted in the policy even if the intended inland transit from Hamburg to Budapest was not performed immediately, therefore, the consignment having been discharged at Hamburg on 13th March, 1993, the period of 60 days expired on 11th May, 1993, itself and on that date the insured transit came to be terminated. That the Applicant lodged the claim in respect of non-delivery of the said consignment which was lying at Hamburg only after the period of expiry of 60 days of the date of discharge on 13th March, 1993. Accordingly, since the insurance cover ceased on 11th May, 1993 and the consignment in question remained at Hamburg port even thereafter, the insurance claim of the Applicant about non-delivery of the said consignment under the policy was therefore not maintainable/payable and was accordingly repudiated and the

Applicant was duly communicated about the repudiation of their insurance claim by letter dated 22nd February, 1994, as the claim did not fall within the purview of the policy.

34. Mrs. Dwivedi would submit that the Insurance Company denies that the Applicant has the right to proceed against the United India Insurance Co. Ltd. and that the Insurance Co. has rightly rejected the claim of the Applicant as the claim is not payable under the policy Terms and conditions.

35. Further it has been submitted that the facts, circumstances and legal issues involved in judgment of the Kolkata High Court, *Jatindra Mohan Banerjee and Ors. v/s. Kali Charan & Ors. (supra)* relied by the Applicant are distinguishable.

36. Mrs. Dwivedi would submit that the Applicant filed Interim Application (L) No.11903 of 2023 under Section 151 of the CPC which was dismissed on 12th July, 2023.

37. Mrs. Dwivedi would submit that the Applicants claim under the marine Insurance Policy has been repudiated and thereafter the

Hon'ble Supreme Court has dismissed the Appeal filed by the Applicant. Mrs. Dwivedi would submit that, therefore, the present Application is against the Doctrine of Res Judicata as the issue involved is adjudicated before the NCDRC and the Hon'ble Supreme Court Of India. It is submitted that the Applicant has filed the present Application to mislead and misguide this Hon'ble High Court.

38. Mrs. Dwivedi would submit that the Applicant has already instituted proceedings in various courts including the Hon'ble Supreme Court of India, after no relief obtained thereof the Applicant with malafide intention filed the present proceedings which are ultra vires and in violation of the Articles of the Constitution of India.

39. It has, therefore, been submitted by Mrs. Dwivedi, learned Counsel for the Insurance Company that the present Application under section 146 of Civil Procedure Code, 1908 is not maintainable against the Insurance Company and the Applicant cannot take shelter under Section 146 CPC after exhausting all the legal remedies under the law and the same be dismissed.

40. I have given anxious consideration to the concerns raised and interpretation of Section 146 as submitted by Mr. Dar, learned Senior Counsel for the Applicant and the submissions by Mrs. Dwivedi, learned Counsel for the Insurance Company. I have also taken note of the fact that an application under Section 151 of the CPC to implead the Insurance Company has been dismissed by this Court although an appeal against the same is statedly pending.

41. It is not in dispute that by order dated 12th July, 2002, this Court (Coram : S.A. Bobde J. as His Lordship then was) decreed the Suit against the carriers noting the Plaintiff's viz. the Applicant's case that the Plaintiff made several attempts to ensure the delivery of the consignments at the destination besides having visited Hungary personally and also having received from the Hungarian Chamber of Commerce five survey reports certifying that there was a non delivery of the said consignment at Hungary and that according to the surveyor, the goods might have been lost, damaged, pilfered during the transit and presumably after the vessel's unloading at Hamburg. That due to the inordinate and unreasonable delay in respect of the consignment at Hungary, the buyers cancelled the order by their fax dated 29th June 1993 and also preferred a claim against the Plaintiff of a sum of USD

180,000 towards loss of profits suffered by them. The said judgment also records that the Plaintiff viz. the Applicant had restricted the Plaintiff's claim to the claim by the consignee buyer against the Plaintiff. It is not in dispute that the said judgment in respect whereof a decree statedly has been drawn up has not been set aside and is valid and subsisting.

42. A perusal of a copy of the Insurance Policy as submitted by Mr. Dar, suggests that the policy is to insure against loss, damage and liability. The survey reports of the surveyor of the Hungarian Chamber of Commerce clearly suggest that the case is of non delivery of Cargo and that insurance must settle the claim of the sellers as per insured value.

43. Further a perusal of the purported letter of repudiation dated 22nd February, 1994 in respect of the claim under the Insurance Policy, records that the consignment had reached Hamburg, Germany on or about 26th April, 1993 and at the request of the Applicant Banker's bill of lading were endorsed in favour of the shipping company for delivery of cargo for storing to M/s. Argocare/Punto Franch/Bonded Warehouse Halasi-Hungary and the said cargo was to be released from the bonded

warehouse only against the release letter which was to be issued upon receipt of the counter value of the goods. Based on these facts, the Insurance Company has recorded that thus the insured had already passed title in the goods and as such the insured had no *locus standi* to lodge claim under the policy which stood transferred. It has also been recorded that it was not a case of non delivery either. In my view, the facts based on which it has been concluded that the title in the goods had already been passed appear to have been controverted as there is no record of the goods having moved from Hamburg (Germany) to (Budapest) Hungary. The title would have passed only once the goods would have been moved from Hamburg in Germany to M/s. Argocare / Punto France / Bonded Warehouse Halasi in Budapest, Hungary and if the goods would have been released from the Bonded Warehouse upon receipt of the counter value of the goods. None of the survey reports perused suggest that the goods moved from Hamburg, Germany to any Bonded Warehouse in Hungary or to any other person. There is also no mention in the purported letter of repudiation that the claim was time barred as now sought to be submitted on behalf of the Insurance Company. In fact as noted above, the facts on which the letter dated 22nd February, 1994 is based, appear to be controverted by the decision of this Court in Order/Decree dated 12th July, 2002, where it has been

clearly recorded that the five survey reports certify that there was non delivery of the consignment at Hungary. The said Judgment/Decree has not been challenged nor has there been any contrary judicial finding to the facts recorded in the said Judgment/Decree.

44. Therefore, although parties appear to be disputing the facts and reasons leading upto the non delivery, it is undisputed that this is a case of non delivery of goods as also recorded in the judgment dated 12th July, 2002, which had been insured and the claim also examined by the surveyor and assessed to be settled.

45. There is also no declaration or judicial finding on merits with respect to the repudiation of the insurance policy except the claim that the letter dated 22nd February, 1994 is a letter repudiating the insurance policy. The NCDRC order and the Hon'ble Supreme Court confirming the said order are with respect to dismissal on the ground of delay and not on merits. I, therefore, agree with the learned Senior Counsel for the Applicant that procedure is the handmaiden of justice and the law of procedure is the process for doing justice and cannot be understood as creating difficulties in the dispensation of justice.

46. However, before proceeding further, it would be useful to quote Section 146 of the CPC as under :

“146. Proceedings by or against representatives:- Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him.”

47. As pointed out by Mr. Dar, the Calcutta High Court in the case of *Jatindra Mohan Banerjee and Ors Vs. Kali Charan and Ors (supra)*, has exhaustively considered Section 146 of the Code of Civil Procedure, 1908 (“CPC”). I have also noted that this decision could not pointed out to the Court when the Application under Section 151 was heard and dismissed.

48. The Hon’ble Calcutta High Court has observed that there is no doubt that a decree cannot ordinarily be executed against a person who is not a party to the decree. However, while observing so, the Calcutta High Court has held that if such a person may be brought on record and having been brought on record he would become a party to the decree or to the execution case and the decree would then be executed. While it has been observed in the said decision that there is no definite provision in the CPC by which a decree would be executed against

persons who are not parties *eo nomine*, however, it has been held that the only thing for consideration is Section 146 of the CPC as this Section applies only when there are no other provisions of the Code. It has been observed that if Order 21 Rule 16 and Order 21 Rule 22 of the CPC do not apply and if these persons are not strictly either transferees or legal representatives there are no other provisions of the Code and in that view of the matter, Section 146 of the CPC would apply so far as persons who are not parties to a decree or a Suit. I am in agreement with this interpretation of Section 146 of the CPC. I also agree that Section 146 says if there is no other provision in the Code then any person claiming under the person who is a party may start the proceeding or a proceeding may be started against him. The phrase 'claiming under him' cannot be limited to the cases of a transferee and legal representative as then the whole Section 146 would become redundant for there are enough provisions for the transferee as well as the legal representative under Order 21 Rule 16 and Order 21 Rule 22 of the CPC. Therefore, Section 146 necessarily would apply to persons who are neither transferees of the decree nor the legal representatives of the Judgment Debtors, the words any person claiming under him to mean, any person claiming under him by the same title, which means that when the title to which or the title against which any person is

bound then again then any other person who claims under the same title would be equally bound.

49. The Calcutta High Court relied upon two decisions of the Hon'ble Supreme Court which considered Section 146 of the Code. Citing the decision of *Saila Bala Dassi Vs. Nirmala Sundari Dassi*², the Calcutta High Court has observed that it has been stated that Section 146 should be considered much liberally so as to advance justice and not in a restricted or technical sense. The reason is that if read in a technical or a restricted sense then the difficulty would be that the persons who are really entitled to the benefits of a decree or persons who are really burdened by a decree would escape the benefit or a liability under the decree and therefore, the decrees would be infructuous and that is the reason why the Supreme Court has considered that the provisions should be read not in a restricted sense nor in a technical sense. It has also been observed by the Hon'ble Calcutta High Court that just because Section 146 of the CPC is applied that Section 47 of the CPC will not apply is not a correct proposition. The Calcutta High Court has held that even Section 47 would apply in as much as Section 47(3) says that where a question arises as to whether any person is or is not a

² [1958] 1 SCR 1287

representative of the party such questions shall for the purposes of this Section be determined by the Court. In other words Section 146 of the CPC, also applies to execution proceedings as well.

50. In my view, it would be useful to quote paragraphs 9, 13, 14, 15, 17, 18 and 19 of the decision of the Calcutta High Court in the case of *Jatindra Mohan Banerjee and Ors Vs. Kali Charan and Ors (supra)* as under:-

“9. On behalf of the appellants it is submitted if the respondents are bound by the decree and if the principle of res judicata is also applicable to them, there is no reason why the decree cannot be executed against them simply because the law of procedure, if very strictly construed, would not include them. What is submitted is, the law of procedure is the process for doing justice and cannot be understood as creating difficulties in the dispensation of justice and that is why the Courts have said to have an inherent power.

13. The only thing for consideration is Section 146 of the Code of Civil Procedure. This section applies only when there are no other provisions of the Code. It has been found that if Order 21 Rule 16 and Order 21 Rule 22 do not apply and if these persons are not strictly either transferees or legal representatives, there are no other provisions of the Code. In that view of the matter Section 146 of the Code would apply so far as this matter is concerned.

14. The next thing is whether the present proceeding for execution is a proceeding within the meaning of Section 146 of the Code. There is no doubt about that and none of the advocates denied that a proceeding for execution under Order 21 Rule 32 is not a proceeding within the meaning of Section 146 of the Code. The whole question arises is whether the

persons who were not eo nomine parties can be considered to be persons claiming under him. In substance, Section 146 says, if there is no other provision in the Code of Civil Procedure, then any person claiming under the person who is a party may start the proceeding or a proceeding may be started against him. In this case a proceeding could be brought against the defendants who were by name parties and the question is whether the other persons who were not parties but who belonged to the village are persons claiming under him and whether they could take proceedings.

15. *It is suggested that the words 'claiming under him' must be limited to the cases of a transferee and a legal representative. If that is so, then the whole section becomes redundant for there is enough provision for the transferee as well as the legal representative under Order 21 Rule 16 and Order 21 Rule 22. Necessarily, this means (sic) (that as regards) persons who are neither transferees of the decree nor the legal representatives of the judgment-debtors, the words 'any person claiming under him' mean 'any person claiming under him by the same title' -- that means, when the title to which or the title against which any person is bound, then any other person who claims under the same title, would be equally bound. In order to test that we may refer to Section 11, Explanation 6. That Explanation says "where persons litigate bona fide in respect of a public right all persons interested in such right shall for the purposes of this section be deemed to claim under the persons so litigating". That shows that persons who are not eo nomine parties are considered to be the persons claiming under the persons who are eo nomine parties. What is necessary is that the other persons must be interested in such right, that means, the other persons must come under the same title as those represented by name.*

17. *We have two recent decisions of the Supreme Court where they have considered Section 146 of the Code. In a case between Saila Bala Dassi v. Nirmala Sundari Dassi, in an appeal from this Court it has been stated that it should be considered much liberally so as to advance justice and not in a restricted or technical sense. The reason is that if read in a*

technical or a restricted sense, then the difficulty would be that the persons who are really entitled to the benefits of a decree or persons who are really burdened by a decree would escape the benefit or a liability under the decree and, therefore, the decrees would be in-fructuous and that is the reason why the Supreme Court has considered that the provisions should be read not in a restricted sense nor in a technical sense.

18. *The question also came up in a case of Jugal Kishore Saraf v. Raw Cotton Co. Ltd. reported in (S) AIR 1955 SC 376, as to whether a person who was not a party to the decree nor who was. a legal representative of the decree-holder, could execute the decree. The decree was on the basis of certain book-debts but the book-debts had already been assigned to somebody else and the other person, the assignee, was not in the decree. The assignment took place before the decree in question, therefore, the assignee was not a transferee of the decree either by act of party or by operation of law nor was a legal representative of the decree-holder and if he could not execute the decree, the decree would remain infructuous. Under that circumstance the Supreme Court considered the matter very liberally, found that he is the person who is interested in the decree and then applied Section 146 of the Code as a person claiming under it. The whole reason is that the benefit of the decree belonged to him. He was interested in the decree in the same manner as the decree-holder by name and, therefore, Section 146 of the Code was applied.*

19. *I have just referred to the decisions of the Supreme Court in the case . There during the pendency of an appeal a person who was the transferee of the property but not of the decree, applied for being made a party because he understood that the person in whose favour the decree stood, might not proceed with that matter. The application was rejected by a Division Bench of this High Court probably on the reason that Order 22 Rule 10 of the Code would not apply. The Supreme Court in considering that matter again applied Section 146 and allowed him to continue the appeal. The person who sought himself to be added as a party to the appeal, was*

neither the legal representative nor the transferee of the decree but he was the person who was interested in the decree and who was entitled to the benefit of the decree.”

51. As noted above, it also is not in dispute that the consumer complaint filed by the Applicant against the insurance company before the NCDRC, came to be rejected on the ground of delay as the Application for condonation of delay came to be dismissed on the ground of limitation. The matter was never heard on merits. Even the challenge to the order of the NCDRC before the Hon’ble Supreme Court could not consider merits. Repudiation of the policy as sought to be done by the Insurance Company was not decided or considered on merits. There is also no reason to doubt that the proceedings that had been filed by the Applicant were based on the legal advice that the Applicant had received then and the Insurance company was not made a party. The decree/judgment dated 12th July, 2002 decreeing the suit on the ground of non delivery of the consignment has not been challenged and is a judicial finding with respect to the non delivery of the consignment. It is not in dispute that when the non delivery happened, the Insurance policy was very much valid. The Insurance Policy covers loss or damage. There has been no adjudication on merits in respect of the letter of repudiation. Just because the insurance

company has not been added as a party to the suit, in my view ought not to frustrate a decree obtained against the Judgment Debtor in respect of the same cause of action viz. non delivery of the consignments. The Applicant cannot be deprived of the fruits of a decree, especially when the insurance company can also be said to be burdened under the liability of the decree in as much as the loss or damage of the consignment had been insured by the insurance company and that the said loss or non delivery has been clearly recorded as a fact in the judgment / decree of this Court under execution. Therefore, although this Court has not been called upon to decide whether the United India Assurance Company is a representative of the Defendant or the Judgment Debtor in the decree under execution, however, what is pertinent here is whether the proposed Respondent or the Insurance Company can be considered to be a person burdened by a decree or burdened under a liability or a similar liability under the decree such that if the Insurance Company is not made a party it would escape the liability of the burden under the decree passed by this Court. It appears that if the insurance company is allowed to escape the liability of the burden under the decree, the decree would be rendered infructuous. Section 146 should be considered liberally so as to advance the cause of justice and not in a

restricted or technical sense as observed by the Hon'ble Supreme Court in the case of *Saila Bala Dassi Vs. Nirmala Sundari Dassi(supra)*.

52. Ergo, applying the principles discussed above, I am inclined to allow this Application under Section 146 of the Code of Civil Procedure, 1908 in terms of the prayer Clause (a), which reads thus:-

“a) It is requested that this application be accepted and the United India Insurance may be arrayed as a Party on the basis of the judgments and the proportion of law referred to in above and appropriate order may be passed in favour of the applicant, arraying United India Insurance as a party in the execution petition for the purpose of satisfying the decree dated 02.09.2009 in Admiralty Suit No. 23 of 1994 in execution Application (L) No. 3758 of 2021 to meet the end of justice.”

53. The question of repudiation, not having been decided on merits, it is open for the Respondent-Insurance Company to raise an objection with respect to the same in the execution proceedings after having been added as a party to the said proceedings and let the said issue be decided on merits before any orders are passed in aid of execution of the decree.

54. The Application accordingly stands allowed and disposed as above.

(ABHAY AHUJA, J.)

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