
(1993) 03 CAL CK 0033
In the Calcutta High Court
Case No : Suit No. 417 of 1981

Amlagora Cold Storage (P) Ltd.

APPELLANT

Vs

National Insurance Co. Ltd. and another

RESPONDENT

Date of Decision : 18-03-1993

Acts Referred:

West Bengal Cold Storage (Licencing and Regulation) Act, 1966 — Section 12

Citation : AIR 1994 Cal 14

Hon'ble Judges : Baboolall Jain, J

Bench : Single Bench

Judgement

1. This suit has been instituted by the plaintiff Amlagora Cold Storage P. Ltd. against the National Insurance Co. Ltd. and another, inter alia, for a decree jointly in favour of the plaintiff and United Bank of India the defendant No. 2 for Rs. 39,35,726/- as per particulars mentioned in paragraph 12 of the plaint, for a further decree in favour of the plaintiff or a decree jointly in favour of the plaintiff and United Bank of India for Rs. 4,62,840.74 on account of alleged loss of profit, idle labour loss of interest and other loss and damages aggregating to Rs. 4,62,840.74, alternatively an enquiry into the damages suffered by the plaintiff and for a decree for the amount found due at such enquiry, interests and costs.

2. The case of the plaintiff, shortly stated, is that the plaintiff is the owner of the cold storage at Amlagora in the district of Midnapore in the State of West Bengal. The defendant No. 2 i.e. United Bank of India was the mortgagee of the potatoes of all kinds stored and/or contained in the said Cold Storage. By a policy of Insurance bearing No. E/410/54/00018/0 dated March . 27, 1979, the defendant No. 1 in consideration of payment of premium, insured potatoes of all kinds stored and/or contained in chambers No. I, II and III of the said cold storage, inter alia, against accident to the refrigeration machinery resulting in rise of temperature in the refrigeration chambers, thereby causing damage thereto by deterioration, putrefaction or contamination, then the insurance company i.e. the defendant No. 1 will subject to the terms, provisions warranties and conditions

contained in the said policy or endorsed or otherwise expressed thereon, indemnify the insured for such damage in the manner described in the said policy but not exceeding the sum insured stated in Schedule II, i.e. Rs. 70,00,000/- in all.

3. On or about April 23, 1979, there occurred an accident to the refrigeration machinery of the said cold storage resulting in rise in the temperature in the said refrigeration chambers thereby causing damage to the potatoes stored and/or contained therein by deterioration, putrefication and/or contamination following the said accident, whereby the plaintiff suffered losses and damages.

4. Further case of the plaintiff is that the said loss and damage was caused due to the perils insured, and the plaintiff gave immediate notice of the said accident to the defendant No. 1. Further case of the plaintiff is that the plaintiff suffered loss and damages to the extent of Rs. 43,18,056/-. Details whereof are given by the plaintiff in annexure-B to the plaint.

5. According to the plaintiff, on or about November 14, 1979 the defendant No. 1 had paid a sum of Rs. 12,19,060/- towards and in part payment of the claim of the plaintiff and that the plaintiff appropriated the said sum towards and in part payment of its said claim. According to the plaintiff, after giving credit to the defendant No. 1 for the said sum of Rs. 12,19,060/- which was paid on or about November 14, 1979, a further sum of Rs. 30,98,996/- remain due and payable by the defendant No. 1 to the plaintiff. The plaintiff claims interest @ 18% p.a. on the said sum which according to the plaintiff is reasonable having regard to the commercial nature of the transaction and the rate at which the money was lent by nationalised banks in relation to commercial transactions.

6. The plaintiff has further pleaded that the defendant No. 1 failed and neglected to pay the plaintiff's claim in full and as a direct consequence thereof, the plaintiff was compelled to close down its said cold storage and the plaintiff suffered loss and damages by way of loss or profit, idle labour, loss of interest and other losses and damages aggregating to Rs. 4,62,840.74 for the year 1980 as per particulars given in Schedule-C to the plaint. In Schedule-C a sum of Rs. 99,768.05 paise is claimed on account of bank interest and a further sum of Rs. 2,00,000/- is claimed on account of interest of other loans. The balance sum is claimed on different heads of expenditure i.e. salary, dearness allowance, bonus, medical, insurance and panchayat tax. The said sum of Rs.4,62,840/- has also been claimed as damages arisen out of breach of contract by the defendant No. 1.

7. It is also pleaded that the defendant No. 1 agreed and undertook that it would not plead that the award by Arbitrator as to the amount of loss and damages would be a condition precedent to the right of action under the said policy of insurance and waived the said condition and the plaintiff was entitled to institute the present suit. According to the plaintiff in spite of demands the said claims of the plaintiff were not paid by the defendant No. 1 and as such the instant suit was instituted.

8. In the written statement the factum of the contract of insurance is not disputed. In the written statement, the defendant No. 1 has set out various terms and conditions of the said policy which I shall discuss at the relevant time while dealing with the various issues wherever they are relevant. The defendant has, in the written statement, denied that on or about April 23, 1979 any potatoes were stored or contained in the said cold storage, to the extent as alleged or that there was any accident, loss or damage as alleged or at all or that the plaintiff was interested in the said alleged potatoes or to the extent as alleged. The defendant has denied that there was any accident to the refrigeration machinery on 23rd April, 1979 or any other date as alleged. The defendant states that on 22nd April, 1979 an accident had occurred to a diesel engine which according to the defendant was not refrigeration machinery, but was covered under a machinery break down policy bearing No.E/410/52/00008/0 and the claim made by the plaintiff was duly paid on 17th May, 1979 by the defendant No, 1 in terms of the machinery break down policy of insurance, which was another policy taken by the plaintiff. However, the defendant denies that the alleged accident resulted in rise in temperature in cold storage chambers or that any damage was caused thereby to the potatoes alleged to be stored or contained in the said cold storage. It has been denied that the plaintiff has suffered loss or damage as alleged or at all.

9. The defendant has denied that there was any accident as defined in the policy of insurance and it is denied that the alleged loss or damages to potatoes was caused due to the perils insured against as alleged. The defendant also denies that the plaintiff gave immediate notice to the defendant No. 1 in connection with policy No. E/410/54/00018/ 0. According to the defendant no notice in connection with said policy of the insurance was given till 4th June, 1979.

10. It was also been pleaded that in any event, the plaintiff was required to minimise the alleged loss and the plaintiff has failed to comply with the said requirement of the policy and/or the contract. According to the defendant by reason of such failure of the plaintiff to minimise the loss the defendant No. 1 is absolved from any liabilities whatsoever. The defendant also denies the quantum of the loss as claimed by the plaintiff and according to the defendant No. 1 such claim is remote or excessive or irrecoverable.

11. The further case of the defendant No. 1 is that the payment of Rs. 12,19,000/- was made under a mistaken belief that the risk under the said policy of insurance had attached and that the alleged loss or damage was caused due to perils insured under the said policy of the insurance and as such it has been pleaded that the defendant is entitled to be repaid the said sum of Rs. 12,19,080/- by the plaintiff and/or the defendant No. 2 jointly and severally. The alternative case of the defendant No. 1 is that the said payment of Rs. 12,19,080/- was in full and final settlement of the claim under the said policy of insurance and not a part payment as alleged. The defendant No. 1 denies that the defendant No. 1 paid the said sum of Rs. 12,19,080/- towards and in part

payment of the plaintiffs claim or that the plaintiff was or is entitled to appropriate the same towards or in part payment of the alleged claim of the plaintiff or that the sum of Rs. 30,98,996/-remained due or payable by the defendant No. 1 to the plaintiff.

12. The defendant No. 1 also denies and disputes the claim for the said sum of Rs. 4,82,840.74 p. which was claimed for loss of profit, idle labour, interest, etc. According to the defendant No. 1 the said claim was for losses which were consequential in nature and which were excluded in terms of Clause 5(a) of the exceptions to the said Policy of Insurance. Due to the exclusion by the said exception clause the defendant No. 1 could not be held liable for the said claim for Rs. 4,82,840.74 p. or any portion thereof. The defendant has further led that the plaintiff having treated its alleged claim of Rs. 30,98,996/- under the said Policy of Insurance to have been disclaimed by the defendant No. 1 on 14th November, 1979, the alleged claim is deemed to have been abandoned and not recoverable after the expiry of 12 calendar months from 14th November, 1979 in view of the amended arbitration clause contained in the said Policy of Insurance. The defendant No. 1 pleads that the said amended arbitration clause has not been waived by the defendant No. 1. The defendant relies on the order dated April 2, 1981 passed in Appeal No. ----- of 1981 (National Insurance Company Limited v. Amlagora Cold Storage Private Limited) for the terms and effect thereof. According to the defendant No. 1 this Court has no jurisdiction to entertain, try and determine the suit, since no part of the cause of action arose within the jurisdiction of this Court.

13. At the time of the trial the following issues were framed:

ISSUES

1. Has this Court no jurisdiction to entertain and try the suit on the grounds as alleged in paragraph 17 of the written statement?

2. (a) Was the loss caused due to perils insured under the Policy No. E/410/54/00018/0?

(b) Was the accident as alleged by the plaintiff not covered by the said Policy of Insurance?

3. Was the plaintiff under an obligation to take reasonable precaution to minimise the loss and if so, did the plaintiff fail to do so and if so to what effect?

4. Was the payment of Rs. 12,19,080/-made and accepted in full and final settlement?

5. Was Rs. 12,19,080/- paid by the defendant No. 1 under mistaken belief as raised in paragraph 10 of the written statement?

6. Is the plaintiff entitled to loss and damages as alleged in the plaint?

7. To what relief the plaintiff is entitled ?

14. The plaintiff examined Gurupada Sinha, the Managing Director of the plaintiff as its only witness. The defendant No. 1 examined Shyam Sundar Sarwal, who acted as a surveyor in the matter of surveying the loss and one Tapan Kumar Das who is an Engineer and is an employee of the defendant No. 1.

15. A large number of documents have been tendered in evidence during the trial. From the documents tendered in evidence it appears that on 24th April, 1979 the plaintiff gave a notice to the defendant No. 1 under Machinery Break-down policy (hereinafter referred to as "MB Policy") to the effect that 120 Horse Power Jessal Diesel Oil Engine met an accident yesterday i.e. 23rd April, 1979 and asked the insurance company to arrange for immediate inspection so that necessary repairing can be done. On 24th April, 1979 the Insurance Company wrote to the plaintiff that they have arranged for their surveyor Shri Arup Kumar Bose to inspect the damages at the premises of the said Cold Storage. They also asked for sending repairer's estimate to be made available to the Insurance Company. A claim form was also forwarded. It appears from the Surveyor's report which is Ext. 1(a) that following upon the break-down of the said Jessal Diesel Engine the surveyors (M/s. M.T. Kothari) visited the site on 28th April, 1979. The said surveyor reported sprouting and germination in the stocks of all the floors and in all the chambers though the sprouts were found to range between 1/4" to 1".

16. By letter dated 2nd May, 1979 from the plaintiff to the defendant the plaintiff confirmed the visit of the surveyors on 26th and on 28th April, 1979. The plaintiff also stated that they must have given the defendant No. 1 the detailed report. The plaintiff regretted that until the date of the writing of the letter no suggestions were given to the plaintiff for the repair of the said Engine. According to the plaintiff it was better to send the same for repairing to its manufacturer at Ludhiana. They also stated that on hearing from the defendant No.1 they will send the same to Ludhiana for repair. According to the plaintiff the repair would take upto 2 months or more. The plaintiff in the said letter mentioned that they were suffering from worst power crisis and under the circumstances a 120 Horse Power Engine was very essential to maintain adequate temperature. They also mentioned that in the absence of the said Engine the temperature was gradually rising. The plaintiff was trying its best and for getting better voltage & the plaintiff had purchased and installed a 1 x 400 KVA Transformer with voltage stabilizer instead of existing 250 KVA Transformer. It was also mentioned that until the plaintiff is able to repair and recommission the 120 Horse Power Diesel Oil Engine the plaintiff would like to instal one generating set for the time being. The plaintiff requested for financial assistance for purchase of a generating set but no decision had been communicated to the plaintiff. The plaintiff also stated that the plaintiff was very much anxious for the stocks of potatoes though any deterioration of stocks was the liability of the defendant No. 1.

17. Another letter was written by the plaintiff to the defendant No. 1 (Ext. 0)

dated 5-5-79 stating that uptil now the plaintiff had not received any information from the defendant No. 1. The plaintiff stated that due to power crisis they could not use their electric motors regularly and in the absence of the said 120 H.P. Engine the plaintiff was not able to control the temperature, so the insurance company was requested to think over the matter and arrange immediately for a generator as prayed for. It was also made quite clear that the detonation of the stock was the liability of the defendant No. 1. By letter dated 7-5-79 the defendant No. 1 wrote to the plaintiff in reply to the plaintiff's letter dated 17-5-79 denying that the defendant No. 1 agreed to assist the plaintiff for purchasing a diesel generating set verbally or otherwise. It was also written as follows:--

"You are however requested to take necessary steps to safeguard the stocks stored in the chamber as expected by a prudent insurer".

18. It was also stated that the insurance company believed that the plaintiff had taken expeditious action for repairing and/or re-commissioning the damaged 120 H.P. Jassal Diesel Generating Set.

19. By letter dated 10-5-79 the plaintiff, inter alia, stated that from the date of accident until the writing of the said letter the defendant No. 1 had not taken any appropriate steps for re-placement of the engine nor had advised to sent the same to the repairer. It was also mentioned that when the surveyor/engineer visited the plaintiffs cold storage on 28-4-79, at that time he had informed that until there is any written order from the defendant No. 1, the plaintiff is not to handle the broken engine. The plaintiff also stated that on its part the plaintiff had taken necessary steps to safeguard the stocks namely the plaintiff had changed the existing transformer for better voltage and had also commissioned one 80 H.P. Diesel Oil Engine, more so as the plaintiff was not getting any generator on rental basis, the plaintiff had placed order for purchase of 120 KVA New Generating Set which the plaintiff was expected to get soon. The plaintiff also stated in the said letter that in the meantime if any stock detonated, the liability will be absolutely on the defendant No. 1, which could be noted by the defendant No.1. On 14-5-79 the plaintiff wrote another letter to the Bank being Defendant No. 2 (Ext. T) inter alia, stating that the insurance company had settled the claim for Rs. 1,08,500/- against the total loss of the said 120 H.P. Jassal brand diesel oil engine and that they will take back the salvage of the said engine for their disposal. It was also stated that an order for 125 KVA Kirloskar Cummins generating set has already been placed.

20. It appears from the survey report that on 15-5-79 the said Mr. Sarwal visited the said Cold Storage. According to him besides the wide spread sprouting and germination of the stocks, evidence of rottage amongst some of the bags observed and Mr. Sarwal further stated in his report that on the occasion of the said visit on 15-5-79 the insurer was advised to arrange for immediate removal of bags of potatoes where rottage had started and those stored in the passages to minimise further detonation and damage to the stocks. (Ext. 1-A).

21. By letter dated 26th May, 1979, the plaintiff informed the Additional Director of Agriculture, Govt. of West Bengal about the circumstances which led to the rise of the temperature in the cold storage and the replacement of the diesel engine which went out of order and also informed about the sprouting and the deterioration of the stock and further likely deterioration thereof. The plaintiff requested the said authority to cause inspection by appropriate Officer to assess the extent of deterioration and to arrive at a decision in the matter of compensation. The plaintiff also informed that the plaintiff was issuing notice to the hirers u/s 12 of the Cold Storage Act (Exhibit-V). On 4th June, 1979, the plaintiff wrote to the defendant No. 1 (Exhibit-D) in relation to the fire policy and also the deterioration of stock policy informing that the market price from the month of June for the said quantity of potatoes had increased from Rs. 70/- per quintal to Rs. 80/- per quintal and the value as of date was declared by the said letter. It is to be noted that in addition to the machinery break down policy and the deterioration of the stock policy, there was also another policy for fire insurance in respect of the said cold storage and/or potatoes stored therein, all issued by the defendant No. 1, in favour of the plaintiff.

22. Pursuant to the instruction given by Mr. S. Sarwal on the 15th May, 1979, when he visited the said cold storage along with Sri D.K. Das, the plaintiff started delivery of the stocks from 4th June, 1979. The said instructions and the said inspection are also confirmed in the letter of Insurance Co. dated 8th June, 1979 (Exhibit-W), From letter dated 27th June, 1979 written by the plaintiff to the defendant No. 1 (Exhibit-X) it appears that the plaintiff had forwarded to the Insurance Co., a copy of the letter written by the plaintiff dated 26th May, 1979 to the Additional Director of Agriculture. In Exhibit-W the Insurance Co. confirmed that during the time of inspection at the cold storage on 15th May, 1979 it transpires that the stocks were found heavily sprouted and huge bags of potatoes under racks 40E were also found deteriorated. However, in Exhibit-X the plaintiff stated that the Insurance Co. had not suggested as to how the deterioration of the stock is to be assessed. It was also stated that the Insurance Co. should appreciate that as each day passes deterioration and sprouting are getting bad to worse.

23. It is to be noted that the Insurance Co. was informed about the accident to the diesel engine on 24th April, 1979, on 28th April, 1979, the surveyors of the Insurance Co. had found sprouting and germination in the stocks of all the floors in all chambers to the extent of quarter inch to one inch. On 2nd May, the plaintiff stated that the Insurance Co. will be responsible for the losses and damages. The entire circumstances were known to the Insurance Co, as to the accident, the consequential rise in temperature and the consequential sprouting and germination as on 28th April, 1979, the claim of the insured in respect of damages, the condition of the stock on 15th May, 1979 ascertained by the Insurance Co., by sending two representatives the Surveyor Mr. S. Sarwal and Mr. T.K. Das an engineer employee of the Insurance Co. On 15th May, 1979 as the agents of the Insurance Co. asked the insured to remove the damaged

stocks, it appears that the Insurance Co. was not taking any steps for keeping any person at the cold storage site or for assessment of the damages of the stocks which were being taken out. Under the circumstances, on the evidence stands, the plaintiff commenced delivery of the stocks on and from 4th June, 1979 and by 27th July the plaintiff delivered 20,124.09 quintals of potatoes to the depositors of potatoes on commitment basis. The evidence on behalf of the plaintiff is that the plaintiff committed to pay loss and damages to the depositors of potatoes in respect of the said 20,124.09 quintals amounting to Rs. 5,63,600/- in all which works out to an average about Rs. 28/- per quintal.

24. The Insurance Company wrote a letter dated 3rd July, 1979 (Ext. Y) which refers to a meeting between the representatives of the Insurance Company and the representatives of the plaintiff including the Managing Director Mr. G.P. Sinha who gave evidence that the said representative of the plaintiff informed about the extent of the damages, namely, sprouting in 95% of the stocks and shrinkage and rotting to the extent, of 30% of the stocks. The Insurance Company had written that the plaintiff never informed the defendant No. 1 that the stocks had sprouted heavily and there is possibility of deterioration. This allegation is apparently contrary to the facts because the Insurance Company was informed about the accident to the Diesel Generator on 24th April, 1979. On 28th April, 1979 the Surveyor as representative of the Insurance Company found sprouting and germination which in essence means deterioration of stocks. By several letters the plaintiff was informing the Insurance Company about the rise in the temperature and consequential damages and was also claiming the damages. On the 15 May, 1979, there was inspection by T.K. Das, Engineer employee of the Insurance Company and Mr. Sarwal and they found as a fact that there was heavy sprouting and germination and rottages were also found. It is difficult to understand as to how the Manager of the Insurance Company could write that the plaintiff never informed the defendant No. 1 that the stocks had sprouted or that there was possibility of deterioration. Even the copy of the letter of 26th May, 1979 written to the Additional Director of Agriculture was also forwarded to the Insurance Company and in the very same letter dated 3rd July 1979, the Insurance Company has acknowledged the receipt of the copy of the said letter. In the said letter the Insurance Company on the one hand is stating that it would not be advisable to make delay in view of the reported deterioration and at the same time the Insurance Company is writing that they are advising the Surveyor M/s. S.S. Sarwal to carry out the inspection work and to give his comments with regard to the condition and disposal of the stocks. The Insurance Company asked for a copy of the Report of the Additional Director of Agriculture stating the condition of the stocks as orally reported to it on Behalf of the plaintiff.

25. On the 6th July, 1979 the plaintiff wrote a letter to the Additional Director of Agriculture asking for a copy of the report of the Superintendent of Agriculture (Marketing) who had visited the plaintiff's Cold Storage. The plaintiff also asked that the copy of the Report may even be sent to the Insurance Company. Copy of the said letter was forwarded by the plaintiff to the Insurance Company also. This

letter read in the context of the letter dated 3rd July, 1979, shows that the Superintendent of Agriculture (Marketing) had inspected the Cold Storage some time prior to 3rd July, 1979 and had, inter alia, orally conveyed to the plaintiff that 95% of the stocks had sprouted and the rottage and shrinkage was to the extent of 30%.

26. On 10th July, 1979, the plaintiff wrote to the Insurance Company with copy to Mr. Sarwal. The said letter is in reply to the letter of the defendant No. 1 dated 3rd July, 1979. The plaintiff in the said letter gives the entire history and points out that the plaintiff as early as on 2nd May, 1979 had informed about the accident, the consequential rise in the temperature, the anxiety about the stocks and informing that the deterioration of the stocks would be the liability of the Insurance Company. The plaintiff also wrote that the defendant No. 1 was being regularly informed and was fully aware about the heavy sprouting deterioration of the stocks. The plaintiff also wrote that the plaintiff had made a claim under the Machinery Break-down Policy which was also admitted and settled by the Insurance Company. The plaintiff also informed about the visit of the Additional Director and recommended further inspection by a very senior officer of the Licensing Authority. The plaintiff recommended that a Joint inspection be taken by Mr. Sarwal as well as a Senior Officer of the Licensing Authority which will be mutually beneficial.

27. By a letter dated July 16, 1979 (Ext. BB) the defendant No. 1 again stated that the letters dated 2nd May and 5th May, 1979 did, not constitute-a notice of deterioration of the stocks. According to the defendant No. 1, the defendant No. 1 received the intimation of deterioration from the plaintiff by letter of the plaintiff dated 27th June, 1979.

28. The plaintiff wrote, another letter dated 19-7-79 (Ext. CC) to the Defendant No. 1. By the said letter, the plaintiff repeated the earlier facts and informed the Insurance Company that the Senior Official from the Licensing Authority will visit the Cold Storage on 27-7-79.

29. By letter dated 25-7-79 the Defendant No. 1 acknowledged the receipt of the letter dated 4th June and 20th July and noted the request of the plaintiff to increase the sum insured by Rs. 7,65,000/- to Rs. 77,65,000/-. The said letter is only regarding the Fire Policy though the request of the plaintiff by the said letter dated 4th June was in respect of the Fire Policy as well as the deterioration of stocks policy. The Defendant No. 1 by the said letter dated 25-1-79, also asked for payment of Rs.2,533/- being the extra premium due with regard to the Fire Policy.

30. On 27-7-79 there was a joint inspection by the surveyor of the Defendant No. 1 Mr. S. Sarwal and the Deputy Director, Agricultural Marketing for assessment of damage and deterioration. By letter dated 28th July, 1979 (Ext. DD), the plaintiff expressed that the Defendant No. 1 must have received the report and asked for settlement of the claim. The claim form filled in by plaintiff

was also forwarded to defendant No. 1 along with the letter of 28-7-79. The claim Form is Ext. DD and the same was filed on 1-8-79. On 13-8-79 the Directorate of Agriculture, Marketing Branch, Govt. of West Bengal forwarded their report bearing No. 7063. The said report is signed by the Addl. Director of Agriculture (Marketing), West Bengal and is marked as Ext. EE. In the said report, it is stated as follows:--

"I am of the view that 90-95% of the stocks stored in your Cold Storage by different hirers this year has been sprouted and the extent of damage may be assessed at 30-35% as on 27-7-79. Considering the prevailing market price of potato in Garbeta area and other factors connected with the storage of potato in your Cold Storage, I give the award that the hirers may be paid compensation at the rate of Rs. 85/- per quintal. You are further entitled to deduct charges on account of storage, rent, insurance and drriage from the hirers out of the total amount payable on account of compensation."

31. This report shows that compensation was assessed at the rate of Rs. 85/- per quintal. This report also shows the extent of damage as on 27-7-79 was assessed to be 30-35%. The report nowhere says that the hirers or the depositors of the potatoes are to be paid compensation in respect of only 30-35% or that no damages or compensation were payable on 90%-95% of the stock. The direction of the authorities was that the Cold Storage owner was to pay to the hirers the full price, as compensation at the rate of Rs. 85/-per quintal deducting its charges for rental, insurance, drying etc., which were in any event recoverable by plaintiff from hirers. This implies that the entire damaged potatoes as per the department's directive, were to be retained by the owner of the storage and could be disposed of by him and whatever value could be realised will naturally go towards reduction of the losses of the cold storage owner. On 22-8-79 the plaintiff forwarded the said report of the Agricultural department to the Insurance Company for being forwarded to Mr. Sarwal. By the said letter the plaintiff stated that upon unloading of the stock of the potatoes, it is found that in most cases the damage is 40% or more. The plaintiff also stated that in accordance with the Award, the plaintiff was settling the compensation with the hirer and the plaintiff needed money very badly. The plaintiff also requested for an on account payment of Rs. 15 lacs as the bank was also pressing for payment of the loan advanced by the bank. The plaintiff also stated that the plaintiff was keeping accounts with regard to the disposal of the stocks and such records may be produced to the Defendant No. 1 as and when necessary.

32. By letter dated 22nd August, 1979, the plaintiff wrote to the Additional Director of Agriculture that the damages assessed were rather low and the same in most cases was 50% or more. The plaintiff also stated that the settling compensation to the hirer @ Rs. 85/-per quintal was on the high side and lodged a protest to the said authority. Copies of the said letter were forwarded to the defendant No. 1. By letter dated 27th August, 1979 (Ext. HH) the Insurance Co.

asked the plaintiff as to whether he had obtained permission from the Additional Director of Agricultural (Marketing) for disposal of the stocks. The defendant No. 1 has stated that the said permission was required so that the stocks may be disposed of without delay by auction. The defendant No. 1 had also stated that Mr. Sarwal was to give instruction with regard to the disposal of the stock and an enquiry was made with regard to the disposal of the stock by the said letter. This letter dated August 27, 1979 shows that the Insurance Co. wanted the stocks to be disposed of by auction.

33. It is to be noted that so far as the delivery of stocks to the hirers is concerned such delivery is permissible u/s 12 of the West Bengal Cold Storage (Licencing and Regulation) Act, 1966. Mr. S.P. Majumdar, learned counsel for the defendant No/ 1, had drawn my attention to Section 12 of the said Act. The said Section reads as follows:--

"(1) Whenever agricultural produce stored in a cold storage deteriorates or shows signs that it is about to deteriorate from causes beyond the control of the licensee, the licensee shall forthwith give notice of the fact to the Licencing Officer and to the hirer requiring the hirer to take delivery of the agricultural produce immediately, after surrendering the cold storage receipt duly discharged and paying all charges due to the licensee.

(2) If the hirer does not, within a reasonable time, comply with the notice given to him under sub-section (1), the licensee may cause the agricultural produce to be removed from the cold storage and sold in the prescribed manner by public auction at the cost and risk of the hirer.

(3) The proceeds of a sale held under subsection (2) shall be made over by the licensee to the hirer after deducting therefrom all amounts due to the licensee on account of charges for the storing of the agricultural produce and the costs of the sale."

34. The said Section provides for delivery of the stocks to the hirer and it also provides that in case of non-taking of delivery by the hirer the power is given to the cold storage owner to sell the same by auction. It is difficult to appreciate as to wherefrom the Insurance Co. found out the provisions with regard to a permission from the Additional Director of Agriculture (Marketing). The evidence of the plaintiff is that the plaintiff did give a notice u/s 12(1) to the Additional Director of Agriculture (Marketing) as also to the hirers on 26th May, 1979. A copy of the notice to the Government authorities was forwarded to the Insurance Co., The damage to the stock of potatoes was fully known to the surveyor of the Insurance Co. in course of the inspection on 28th April, 1979 as also 15th May, 1979. Admittedly the representative of the Insurance Co. on 15th May, 1979, asked the plaintiff to deliver the damaged stocks of potatoes. The plaintiff also commenced delivery of the potatoes on and from 4th June, 1979. All that was required in the circumstances was that the Insurance Co. at that stage could post either its surveyor or some authorised representative, at the cold storage,

without prejudice and consent to the quick disposal of the stocks either by delivery to the hirers, in cases where they came and intended to take delivery or by disposal of other potatoes by auction in cases where the hirer did not come for taking delivery.

35. It is also quite apparent that the stocks were damaged and/or deteriorated prior to 4th June, 1979 and in the normal course of things the loss was to be borne by the plaintiff and no hirer could be expected to take delivery of the affected & damaged stocks of potatoes unless they were paid or assured with regard to the compensation to be paid to them for the damage which had taken place to their potatoes.

36. The next exhibit to be considered is the final assessment report of the surveyor Mr. S. Sarwal which is ext-A1 and is dated 29th August, 1979.

37. In the said Report the Surveyor has stated, inter alia, that following upon the break-down of the "Jassal" diesel engine the Surveyor M/s. M.T. Kothari visited the site on 28th April, 1979 and they reported sprouting and germination ranged between 1/4" to 1". He has also stated that on the 15th May during the surveyor's visit to the Cold Storage widespread sprouting and germination of the stocks, evidence of rottage amongst some of the bags were observed and the insurer was advised to arrange for immediate removal of the bags of potatoes where rottage has started. He has also accepted that during 4/5 days following the break-down of the Jassal Diesel Engine the temperature rose rapidly upto 56°F and thereafter the same gradually started coming down and by 15th May reached 40°F. He has also accepted that the replacement Engine was installed and commissioned on 25th May, 1979. He has also referred to the Report of the Agricultural Department. His finding with regard to the damages is as follows:

"On an average above 90% of the stocks in the cold chambers as on 27-7-79 were affected and/or showed signs of deterioration. Of these according to the test, 13.52% were rotted and 16.7% were shrunk i.e. 30.22% were totally damaged."

Thereafter he has in his report proceeded to assess the damages and according to him the damages as payable by the Insurance Company to the plaintiff came to Rs. 12,53,977/-. So far as the question of assessment of the damages is concerned, I shall discuss it later on at the time of assessing the damages. He has also in his report recorded the temperature in the three chambers of the cold storage which rose upto 56°F as on the 29th April, 1979 and thereafter the same gradually went down. On the 9th May the temperature as per the said report was upto 48.5°F and it further gradually went down and came to 40°F on the 15th May, 1979.

38. On 25th, May 1979 i.e. the date of replacement of the diesel engine, the temperature was upto 38°F and thereafter it further went down and on 31st May onwards the temperature went below 36°F. Thereafter the same was maintained below 36°F.

39. The letter dated 13-9-79 (Ext. JJ) from the Directorate of Agriculture, shows that the said Directorate was not agreeable to review the earlier order as per request made by the plaintiff by letter dated 22-8-79. However, in the said letter, it is stated that the assessment of damages was as on 27-7-79 and during the subsequent period there is every reason to believe that further deterioration might take place in respect of the relevant stored agriculture produce which is a perishable item.

40. By letter dated 19-9-79 (Ext. KK) the plaintiff wrote to the Insurance Company inter alia, to the effect that in spite of the letter of the insurance Company dated 3-7-79 Mr. Sarwal was requested to give instruction with regard to the disposal by auction of the goods but neither the Insurance Company nor Mr. Sarwal, gave any instructions and therefore, the plaintiff was held up. The plaintiff also pointed out that any increase in the damages was the responsibility of the Insurance Company and the plaintiff sought clear cut instruction for the damaged stocks of potatoes and also asked that the representative of the Insurance Company to be present at the time of auction and/or disposal of the damaged stocks. The plaintiff also requested the Insurance Company for interim payment for Rs. 15 Lacs.

41. On 8-10-79 (Ext. 1B) the said Surveyor Mr. S. Sarwal by his report of the said date revised the assessment of the loss pursuant to the meeting held with the representatives of the Insurance Company. In the said report, the assessment of loss payable to the plaintiff, has been reduced from Rs. 12,53,977/- (as originally assessed by him) to Rs. 12,19,060.40."

42. Thereafter on 14-11-79 a payment of Rs. 12,19,060.00 was made by the defendant No. 1, to the plaintiff (Ext. 3). There are several other letters which were exchanged between the parties and a controversy had arisen between the parties as to whether the said payment was in full and final settlement of the dues of the plaintiff or not. I propose to deal with the related facts relevant to the said dispute, while dealing with the issue on that point, I now deal with the various issues as hereunder: --

Issue No. 1 : This issue relates to the jurisdiction of this Court to entertain, try and determine the suit. This issue was not pressed by the learned Counsel for the defendant No. 1 and in my opinion rightly so inasmuch as both the defendants have their offices within the jurisdiction and there is also a clause in the policy which provides that the competent Court of Law at the place where the policy is issued shall have the jurisdiction to the exclusion of all other courts. The policy was issued from within the jurisdiction of this Court. This issue, is therefore, answered in favour of the plaintiff, and I hold that this Court has jurisdiction to entertain, try and determine this suit.

Issue No.2(a) and (b): The Issue No. 2(a) is on the point as to whether the loss caused was due to perils insured under the said policy. That the loss was caused due to the accident to the 120 H.P. Diesel engine is sufficiently proved by the

evidence given on behalf of the plaintiff as also by the report of the surveyor and his oral evidence. The contention of Mr. Majumdar was that under the policy terms the accident should be to the refrigeration machinery described in Schedule--I, resulting in rise in temperature in the refrigeration chambers, thereby directly causing damage to the goods. According to Mr. Majumdar, the accident was related to 120 H.P. Jassal Diesel Engine. According to Mr. Majumdar, a diesel engine cannot be and is not a refrigeration machinery. It is to be noted that the refrigeration machinery has been described in the body of the policy as the "refrigeration machinery described in Schedule I to the policy. In Schedule-I the refrigeration machinery is described to be as per machinery break-down policy and renewal endorsement thereto. The renewal endorsement is Ext. "B" in which the entire list of the machinery is given, which includes diesel oil engines, compressors, electric motors etc.

43. By endorsement dated 14th April, 1979 (Ext. C), the Insurance Co. included in the list of machinery insured the said 120 Horse power Jassal Brand Diesel Oil Engine. Therefore, in my opinion, the said Jassal Brand Diesel Oil Engine was a part of the refrigeration machinery as mentioned in the Schedule I to the said policy. Furthermore, when the accident occurred and when the claim was made under the Machinery Breakdown policy, the Insurance Co. paid the full claim in respect of the said Diesel Oil Engine which was insured for a sum of Rs. 1,10,000/-subject to deductible franchise of Rs. 1,500/ -.

44. The term accident has also been defined in the subject insurance policy being Ext. A and as per the said definition damage to the refrigeration machinery described in Schedule I of the said policy due to accidental cause covered by the machinery break down policy specified in Schedule 1 is included. The subject insurance policy which is for deterioration of stock refers to the machinery break down policy and it is one of the provisions in the insurance policy (Ext. A) that at the time of the happening of the accident, an insurance policy covering the cost of repair to or replacing of the insured machinery necessitated by such accident should be in force and that payment shall have been made or liability admitted therefore under such insurance policy but if no payment shall have been made or liability admitted under such insurance policy as a result of operation of any excess, thereunder, the liability of the company under the policy shall not be affected. The provisions of the subject insurance policy make it quite clear that there has to be in force a machinery break down policy in existence and there should be an accident within the meaning of said machinery break down policy and the claim should be admitted or paid by the Insurance Co. The provisions aforesaid are also understandable because in case there is an accident of the refrigeration machinery, then the likely consequence is the rise in temperature, resulting in loss or damages to the potatoes. The Insurance Co. as a matter of policy does not issue any deterioration of stock policy without there being in force a machinery break down policy. The two policies are in existence side by side so that the Insurance Co. has power to deal with the accident by repair or replacement of the machinery under the machinery break down policy and thus

prevent damages to the stock of potatoes. I am unable to appreciate the submission on behalf of the Insurance Co., that though there was accident within the meaning of machinery break down policy and though the claim under the machinery break down policy was paid in full and though the said diesel engine was covered by the machinery break down policy yet the said accident to the machinery was only under the machinery break down policy which was paid and the plaintiff cannot claim under deterioration of stock policy. An accident to the machinery raises two claims one is for the repair and replacement of the machinery which is under the machinery break down policy and the other is for the likely loss which may follow to the stocks and comes under the subject policy for deterioration of stock.

45. The claim under the Deterioration of Stock Policy of course arises in a situation as is specified in Ext. A, that is, if at any time during the period of insurance an accident as defined in the subject Insurance Policy occurs to the refrigeration machinery described in Schedule 1, resulting in rise in temperature in the refrigeration chambers thereby directly causing damage to the goods described in Schedule II by deterioration, purification or contamination, following such accident, then the Company will indemnify such loss. Therefore, in my opinion, the claim under the Deterioration Stock Policy falls under Ext. A as per the accident as defined in the said Deterioration of Stock Policy (Ext. A).

46. Under Cl. 4 of the subject insurance policy being exhibit A, what is required is that in the event of any accident the insured is to give immediate notice thereof to the office of the company.

47. Under Cl. 14 of the said Policy, on the happening of an accident or any event likely to give rise to the claim under the said Policy, the Insurance Company may enter the building of the premises where the goods insured under the subject policy were stored. In the list of machineries under the Machinery Breakdown Policy, even H.T. Switches, ceiling fans, electric motors fitted with starter, switch transformer, electric motors etc. are included along with compressors, diesel engines, water circulating pump, water pump etc. The whole purpose of keeping diesel engines is to run the refrigeration system in case of failure of electric supply or in case of low voltage. Diesel engines are a necessary part of the refrigeration machinery in order to run the refrigeration system, when the same cannot be run by the public electric supply. This is a sort of stand by requirement in case of need. It cannot be said that any of the said machines do not form part of the refrigeration machineries. In my opinion, all the said machineries as are specified in the Machinery Breakdown Policy, are required for bringing down or maintaining the requisite temperature under required and/ or necessary circumstances. All of them may not be required to be run at the same time. All the compressors may not be required to be run at the same time. They can be run by turns or sometimes together or sometimes under given circumstances. Each and every item of machinery as specified in the Machinery Breakdown Policy in my opinion forms part of the refrigeration machinery and comes within

the definition of the refrigeration machinery as mentioned in the subject insurance policy, being Ext. A. Under the circumstances I am of the opinion that the loss in the instant case was caused by perils insured. Even the insurance company, with full knowledge of all facts, admitted liability under the policy and paid the damages as assessed by its surveyor. This could only be on the basis that the peril as alleged by plaintiff was covered by the policy. The contention raised in this issue is apparently an after thought and without any substance. I therefore answer issue No. 2(a) in the affirmative, and in favour of the plaintiff.

48. The determination of the Issue No. 2(b) also follows the decision of Issue No. 2(a). I have already held that the loss was caused to the insured by perils -- insured under the said Policy and it follows that the accident as alleged by the plaintiff was covered by the subject insurance policy. The Issue No. 2B is, therefore answered accordingly and in favour of the plaintiff.

Issue No. 3.

49. Clause 4 of the Policy Conditions provide that in the event of an accident, the insured shall take all reasonable precautions to minimise their loss or damage and shall prevent further loss or damage. Cl. 6 of the Policy conditions provide that it shall be the responsibility of the insured to check up any damage to the stock of potatoes stored immediately following an accident and detailed account thereof shall be sent to the Company. In paragraphs of the written statement, the pleading is that the plaintiff has not complied with the provisions of conditions 4 and 6 of the said Policy of Insurance. No particulars whatsoever have been given of the breaches alleged. If one looks into the correspondence which were exchanged between the parties soon after the accident, one does not find that there was any allegation that the plaintiff committed any act which was in breach of the plaintiffs obligations under Cls. 4 and 6. The accident took place on 23rd April, 1979. The notice of accident was given to the Insurance Company on 24th of April, 1979. On 28-4-79 the Surveyor of the Insurance Company in course of inspection found that there was sprouting and germination ranging between 1/4" to 1". On 28-4-79, the plaintiff purchased one 400 KVA Transformer fitted with voltage stabilizer and installed the same in place of the existing 250 KVA Transformer, The plaintiff also informed the Insurance Company by letter dated 2-5-79 (Ext. M) that the temperature was rising since after the accident. In course of the inspection on 28-4-79 the company's surveyor detected and found sprouting and germination and in the letter 2-5-79 the plaintiff clearly mentioned about the rising of the temperature and complained about indecision of the Insurance Company in the matter of repairing and also informed that installation of diesel oil engine was necessary in view of the power crisis. The Insurance Company was aware with regard to the condition of the potatoes which had already been affected by sprouting and germination as on 28-4-79. Under Cl. 8 of the Policy, the company had the power on the happening of any accident in respect of which damage may occur and whereby the claim may be made under the subject policy, without incurring any liability, to takeover

the possession of the premises where the accident had taken place, by their authorised officer or servants or to take possession of goods and keep possession and deal with such goods in any reasonable manner. By the said condition, the plaintiff gave leave and licence to the Insurance Company to do so and if the insurer or anyone acting on his behalf created any hindrance or obstruction all the benefits under the policy would be forfeited. Under Cl. 14 of the Policy, on the happening of any accident or accidents likely to cause, the claim under this policy or at any other time, the Insurance Company could enter the cold storage premises for the purpose of examination, inspection or verification and could require to take such steps as the Insurance Company deemed fit in respect of the machineries. By letter dated 2-5-79 and 5-5-79 the plaintiff informed the Insurance Company and was making claim but the Insurance Company by letter dated 7-5-79 had requested the plaintiff to take steps as may be necessary to safeguard the stock as stored in the chamber. The plaintiff also by the letter dated 10-5-79 specified the steps already taken by the plaintiff namely, the changing of the transformer for better voltage, commissioning of their 80 HP diesel oil engine and also informed that the plaintiff was not getting any generator on rental basis and the plaintiff has placed order for purchase of 120 KVA new generating set. The plaintiff had already informed the Insurance Company by letter dated 2-5-79 that the repair or re-commissioning will take two months or more because the generator will have to be sent to the manufacturer at Ludhiana for repair. The writing on behalf of the Insurance Company that the Insurance Company believes that the plaintiff had taken expeditious action for repair and recommissioning of the Jassal Diesel Generator is meaningless because no direct suggestion was given prior to that date to send the generator for repair. Furthermore, repair would have taken two months or more and under the circumstances before the diesel generator would be repaired, and recommissioned, the potatoes could not be safeguarded. In my opinion, the plaintiff took all possible steps which were reasonable in the facts and circumstances of the case and it appears that as a result of the steps taken by the plaintiff namely the replacement of the transformer and commissioning of the 80 HP diesel oil engine, the temperature which had risen up to 56°F on 29-4-79 gradually went down and even before the new diesel engine was purchased and commissioned on 25-5-79 the temperature was brought under control and was lowered steadily. On 28-5-79 the temperature had already reached below 36°F.

50. In any event, I do not find that the Insurance Company at any point of time give any positive or practical suggestion inspite of having the power to do so. The contemporary correspondence also does not show that the Insurance Company at any point of time made out any such case as against the plaintiff, that the plaintiff did not take reasonable or practicable steps.

51. The steps taken by the plaintiff and the conduct of the plaintiff shows that the plaintiff was very much concerned with the preservation and the safeguarding of the stocks and that the plaintiff took various steps to lower down

the temperature. The plaintiff had also kept Insurance Co, informed about the steps which the plaintiff had taken.

52. In my opinion the allegations made in the written statement with regard to the breaches of conditions Nos. 4 and 6 are vague and are lacking in particulars.

53. No suggestion was made to the plaintiffs witnesses with regard to any further or other steps which the plaintiff could reasonably take or did not take inspite of being able to do so. There was no positive evidence oft behalf of the defendant with regard to the defaults on the part of the plaintiff in taking desirable steps for preservation of the potatoes. It was submitted on behalf of the plaintiff that Cls. 4 and 6 of the subject policy (Ext. A) were merely stipulation which were collateral to the main contract of insurance, breach of which did not relieve the Insurance Co. from its liability. It was also submitted that collateral stipulation are not conditions precedent to the assumption of liability of the defendant No. 1. The learned counsel on behalf of the plaintiff relied on the passage in Colinviaux's Law of Insurance, sixth edition at page 118 which reads as follows :--

"Conditions as collateral stipulations

A stipulation in the policy is not necessarily a condition precedent to validity or liability. In fact, unless the insurers use apt words to show that its performance is a condition precedent in either of the senses described above, or that it forms the basis upon which they contract, a stipulation in a policy will be construed merely as collateral to the main contract, breach of which gives right to an action or counterclaim for damages, but in no way relieves the insurers from their liability. Such collateral stipulations rarely occur in insurance policies, but this is only because insurers are careful to give stipulations in their policies the force of full conditions. Where they have not clearly done so it is a matter of construction whether a condition precedent or collateral agreement was intended, the guiding principle being that if the insurers wish a clause to be a condition precedent they must say so quite clearly. Thus, in *Re Bradly and Suffolk Accident* (1912) 1 KB 415 a term in an employer's liability policy that the assured should keep a proper wages book was held to be merely a collateral agreement relating to the adjustment of premium, the breach of which would not discharge the insurers from liability. So in *Stoneham v. Ocean, Railway and General* (1887) 19 QBD 237 it was held that a stipulation that "in case of fatal accident notice must-be given to the company within seven days" was not a condition precedent to recovery. In the absence of such notice the company could only recover damages for the increased expenses of investigation."

54. It is to be noted that in Cl. 5 of the conditions of the policy it is clearly stated that no claim under the said policy shall be payable unless the said condition No. 5 had been complied with. In Cls. 4 and 6, such stipulation as aforesaid, is not to be found. Again in Cl. 8 if the Insurance Co. gave any instruction or took possession of the stocks and dealt with the stocks even without incurring any liability then the plaintiff could not obstruct the Insurance Co. and it is specifically

provided in the said Cl. 8 that if the insured or any one on behalf of the insured did not comply with the requirement of the company or obstructed the Insurance Co. in doing any of the acts mentioned in Cl. 8 then all the benefits under the said policy shall be forfeited. This is to be noted that sort of stipulation is absent in Cls. 4 or 6 whereas the same is to be found in Cls. 5 and 8 which clearly provided that the benefits under the Policy will be lost if there is breach of conditions of Cls. 5 and 8. I am of the view that Cls. 4 and 6 were in the nature of stipulation which were collateral to the main contract of insurance and even if there was any breach thereof, the same did not relieve the Insurance Co. from its liability.

55. In any event, I am of the view that reasonable steps had been taken by the plaintiff to control the temperature and minimise the loss, inter alia, by changing the transformer by commissioning one 80 Horse Power Diesel Engine and placing of an order for replacement of the diesel engine and the replacement thereof.

56. So far as the disposal of the goods is concerned, the plaintiff after the instructions of the surveyors of the plaintiff commenced delivery of the potatoes with effect from 4th June, 1979 and the delivery was being continued up to the 27th July, 1979. This fact is also admitted in the survey report (Ext. 1A). In the survey report it is not stated that the plaintiff had not taken precaution to minimise the loss or that the plaintiff committed any breach of Cl. 4 or 6. On 27th July, 1979, the surveyor inspected the goods and it is the evidence of the plaintiff's witness that the plaintiff was asked on the said date not to dispose of the goods any further. It is also proved by the oral evidence on behalf of the plaintiff as also the documents produced, that further delivery after 27-7-79 was stopped by the plaintiff and the plaintiff was seeking directions from the Insurance Co. for disposal of the goods. It is to be noted that the evidence on behalf of the plaintiff is that notice was given to the hirers for taking delivery in accordance with the S. 12 of the West Bengal Cold Storage (Licencing and Regulation) Act, 1966, and the delivery was in fact commenced on and from 4th of June, 1979. Disposal of goods after 27-7-79, was with held due to the non-giving of such instructions for quite some time by or on behalf of the insurance company, by its surveyor and the plaintiff cannot be held responsible for the same. It was for the insurance company to issue clear cut instructions for disposal of the goods and it had power to do so, even without ad milling liability. The plaintiff was informed that the surveyor will give such instructions but the surveyor failed to do so and as such the plaintiff cannot be held responsible for any delay in the disposal of the goods.

57. In any event, it is to be noted that the Insurance Co. ultimately on or about 14th November, admitted the claim of the plaintiff on account of the damages and/or deterioration of the stock. The contention that there was non-compliance of the conditions of the policies resulting in and absolving the defendant No. 1 from its liability cannot, therefore, be accepted. That will be contrary to the contemporaneous conduct of the Insurance Co., which accepted its liability under

the policy. This also shows that the Insurance Co. by admitting the claim under the policy waived, the alleged non-compliance if any of the terms and conditions of the policy or of any statutory provisions. In my opinion the plaintiff was obliged to take steps reasonably practicable to minimise the loss in terms of the Cls. 4 and 6 of the policy condition. I am further of the opinion that the plaintiff did take reasonable precaution to minimise the loss. I do not accept that the plaintiff failed to take any steps to minimise the loss, as alleged on behalf of the defendant No. 1. I am also of the opinion that the said Cls. 4 and 6 of the Policy were merely terms collateral to the main contract of insurance and in any event the breach, if any, of such terms and conditions did not relieve the defendant Insurance Co. of its liability. I am further of the opinion that the defendant Insurance Co. by admitting the claim of the plaintiff under the subject policy waived the alleged non-compliance, if any, of the said Cls.4 and 6 of the policy and/ or of any statutory provisions. The Issue No. 3 is answered accordingly and in favour of the plaintiff. In the facts of this case it cannot be said that the plaintiff failed to take reasonable precaution to minimise the loss.

58. Issue No. 4: The next issue is -- was the payment of Rs. 12,19,060.00 made and accepted in full and final settlement. So far as this issue is concerned, the plaintiff has pleaded that the defendant No. 1 paid a sum of Rs. 12,19,060.00 towards and in part payment of the claim of the plaintiff and that the plaintiff appropriated the said sum towards the part payment of the plaintiffs claim. While dealing with the said allegations of the plaintiff as pleaded in paragraph 9 of the plaint, the defendant in paragraph 11 has pleaded that the said payment was in full and final settlement of the claim under the said policy and not a part payment as alleged. It has been submitted on behalf of the defendant No. 1 that the plaintiff had accepted the said payment in satisfaction of his claim. According to that submission made on behalf of the plaintiff, a payment without satisfaction of the claim cannot constitute an accord and satisfaction. It is also submitted that only accord and satisfaction can discharge the defendant No. 1 from its liability under the policy. The question that arises is whether there was an accord and whether there was satisfaction. Reliance was placed on behalf of the plaintiff on the judgment of the Supreme Court reported in *The Union of India Vs. Kishorilal Gupta and Bros.*, In the said case the Supreme Court held as follows (at p. 1366 of AIR):--

"The law on the first point is well settled. One of the modes by which a contract can be discharged is by the same process which created it i.e. by mutual agreement; the parties to the original contract may enter into a new contract in substitution of the old one. The legal position was clarified by the Privy Council in *Payana Reena Saminathan v. Pana Lana Palaniappa* (1914) AC 618 622. Lord Moulton defined the legal incidents of a substituted contract in the following terms at p. 622:

"The "receipt" given by the appellants, and accepted by the respondent, and acted on by both parties proves conclusively that all the parties agreed to a

settlement of all their existing disputes by the agreement formulated in the "receipt". It is a clear example of what used to be well known in common law pleading as "accord and satisfaction by a substituted agreement." No matter what were the respective rights of the parties inter-se they are abandoned in consideration of the acceptance by all of a new agreement. The consequence is that when such an accord and satisfaction takes place the prior rights of the parties are extinguished. They have in fact been exchanged for the new rights; and the new agreement becomes a new departure, and the rights of all the parties are fully represented by it."

59. The Supreme Court, after considering various other authorities on the subject observed as follows *The Union of India Vs. Kishorilal Gupta and Bros.*,

"From the aforesaid authorities it is manifest that a contract may be discharged by the parties thereto by a substituted agreement and thereafter the original cause of action arising under the earlier contract is discharged and the parties are governed only by the terms of the substituted contract. The ascertainment of the intention of the parties is essentially a question of fact to be decided on the facts and circumstances of each case."

60. In absence, accord is an agreement by which the plaintiff may agree to accept the performance of a substituted consideration in satisfaction or he may agree to accept the promise of such performance and satisfaction is the actual performance thereof.

61. Reliance was also placed on the judgment reported in *Shyamnagar Tin Factory Private Ltd. Vs. Snow White Food Product Co. Ltd.*, In the said case, A. N. Ray, J. as His Lordship then was held as follows (at p. 545 of AIR):--

"This decision brings to the fore-front the legal principle that the sending of a cheque for a smaller amount than the amount claimed by creditor along with a letter to the effect that it was in full settlement, does not amount to discharge of the entire debt, nor does it amount to payment or tender of the amount on any condition that acceptance of that amount is in full and complete discharge of the entire debt. Further the fact of keeping the cheque is not conclusive in law. The entire matter is a question of fact. The Court has to find out the true character of the transaction, the real intention of the parties and the correct and essential transaction between the parties. In the case of (1889) 22 QBD 610 *Bowen, L. J.* said that if the money was kept it would be a question of fact as to the terms which it was so kept. Accord and satisfaction imply an agreement to take the money in satisfaction of the claim in respect of which it was sent. In the present case the specific defence was accord and satisfaction and issues were framed and the defendant did not lead any evidence. The defendant in the present case failed to establish that there was any accord and satisfaction. The contention of the defendant was that keeping the cheque by the plaintiff amounted to acceptance of the money in full discharge because the defendant had paid the money on condition that it was in entire discharge of the debt."

"The letter relied Upon by the defendant in the present case did not impose any condition and the acceptance of the cheque is not conclusive and it is essentially a question of fact as to what was the real transaction between the parties and what was their real intention".

62. In the aforesaid case the defendant made a payment of smaller sum by cheque alleging that the same was in full satisfaction of the claim of the plaintiff. The defendant retained the sum and appropriated it without prejudice. The question was whether the plaintiff was entitled to recover the balance claim. The Court after going into the facts of the case was of the opinion that the defendant had failed to prove that there was any case to accord or satisfaction.

63. In the instant case there has been lot of correspondence between the parties both before and after the payment. The correspondence between the parties in my opinion clearly shows that there was no agreement to accept a smaller amount for a larger claim nor did the plaintiff accept the amount in full satisfaction of its claim. In the claim form (Ext. DD) dated 1-8-79 the claim was made to the extent of 40% of the insured value which would be for more than the sum of Rs. 12,19,060/-. By letter dated 22-8-79 (Ext. FF) the claim of 40% was reiterated and an advance of Rs. 15 lacs was requested by the plaintiff.

64. By letter dated 31st August, 1979 (Ext. ii), the plaintiff disputed the assessment of damages as made by the Surveyor and claimed higher amount and again demanded interim payment of Rs. 15,00,000/ -. It is to be noted that by the said letter dated 31st August, 1979, the plaintiff stated that inspite of letter of the Insurance Co. dated 3rd July, 1979. Mr. Sarwal had not given any direction with regard to the disposal of the stock. By letter dated 9th October, 1979, the Insurance Company referred to the receipt of the Survey Report and stated that the claim is under process. The Insurance Co. also stated that in the mean time the Insurance Co. believes that the plaintiff had disposed of the entire unaffected stock to safeguard the plaintiffs interest. By letter dated 19th October, 1979, it is stated that the plaintiff is disposing of the stock of potatoes and the relevant account will be shown to the Insurance Co. in due time. By the said letter the plaintiff disputed the assesement of damages made by the surveyor. On 13th November, 1979, the Insurance Co. wrote to the plaintiff informing that the higher office of the Insurance Co. had approved final settlement of the above claim at Rs. 12,19,060/- and necessary steps are being taken by them for payment of the same to the plaintiff. This letter was written without prejudice. On 14th November, the Insurance Co. wrote a letter to the United Bank of India (Ext. 3) informing the bank that the claim has been approved for a net amount of Rs. 12,19,060/- by the Board of Directors of the Insurance Co. It was also stated that the Insurance Co. was enclosing a cheque for Rs. 12,19,060/- being the amount of final settlement along with two loss vouchers. The said letter dated 14th November, 1979 (Ext. 3) seems to have been written after the making over of the cheque since there is a note at the bottom of the letter that the said cheque has already been handed over on 14-11-71 against signed

receipt of date. The letter of 13th November, 1979 (Ext. UU) did not say that there was any agreement for accepting the said sum of Rs. 12 lakh and odd in full and final settlement of that the payment was being made in full and final settlement of the claim. The final settlement as referred to in (Ext. UU) dated 13th November, 1979 and 14th November, 1979 is the unilateral approval of the claim to the extent mentioned therein. There is no allegation in the two letters which have been written by the Insurance Co. one immediately before making over of the cheque that there was any agreement between the plaintiff and the defendant No. 1 or with the bank. On 14th November, 1979 the plaintiff wrote a letter that the loss of the plaintiff will be approximately Rs.35,00,000/-. It was also stated that the loss cannot be ascertained until the disposal of his stock had not been completed. The plaintiff also stated that the plaintiff is accepting the cheque for the payment as a part payment of their claim. This letter also says that the plaintiff was not agreeable to accept the said sum of Rs. 12,19,060/- in full satisfaction of its claim. A copy of the receipt granted by the plaintiff is also tendered in evidence as (Ext. YY). The said (Ext. YY) which is dated 14th November, 1979, is in the printed form of the Insurance Co. In the printed form of the receipt certain writings have been filled in on behalf of the Insurance Co. The said receipt has been signed by the plaintiff with the word "without Prejudice" and the defendant No. 2, i.e. the bank has put the remark "counter signed by" and has signed the same with that remark. The language of the receipt is as follows:--

"Received from National Insurance Co. Ltd., Eastern Regional Office, the sum of Rs. 12,19,060/- only being final settlement of D.O. as claimed in respect of our file No. DRO/Tech/EC/79/86. Inds-United Bank of India account Amlagora Cold Storage Pvt. Ltd.. Account Division 11."

65. It has been submitted that the remark put by the plaintiff i.e. "without prejudice" on the receipt, could not prejudice the plaintiffs rights or claims in any manner whatsoever. There is no reference in the receipt that there was any agreement between the parties nor does it indicate that the plaintiff accepted the same in full and final settlement of its claim. The existence of the word "without prejudice" shows that the plaintiff did not intend to prejudice its rights. The signature of the bank is merely a counter signature to the plaintiffs signature. This receipt with the mark "without prejudice" was obtained by the Insurance Co. and if the Insurance Co. was at all not willing to make the payment "without prejudice" to the plaintiffs rights and contentions, then the Insurance Co. could easily withhold the cheque. It is in evidence that the cheque was made over without any accompanying letter at the office of the defendant bank against the receipt with the remark "without prejudice" as put by the plaintiff. Furthermore it is in evidence that the letter dated 14-11-1979 which has been written to the Insurance Co., was delivered to the Insurance Co. on 15-11-79. The evidence on behalf of the plaintiff is that the said letter was written and signed by Mr. Sinha prior to leaving for the office of the bank on 14-11-1979. In that letter the plaintiff had clearly written that the plaintiff would be accepting the payment as

part payment. This letter was delivered to the Insurance Co. on 15th November, 1979. If the Insurance Co. was not agreeable to the receipt granted "without prejudice" and the letter of the plaintiff dated 14th November, 1979 then the Insurance Co. could even take steps to stop the payment of the cheque. The evidence shows that the said cheque was not enacted at least 2, 3 days after 15th November, 1979. The letter written on behalf of the Insurance Co. dated 4th December, 1979 also does not state that there was an agreement between the parties that the plaintiff would accept the said sum of Rs. 12,19,060/- in full and final settlement of its entire claim.

66. By letter dated 11th December, 1979 (Ext. AAA) the plaintiff, inter alia, denied that payment was accepted in full and final settlement of the claim and reiterated that the plaintiff received the same in part and without prejudiced.

67. There was no suggestion by the defendant No. 1 to Mr. Sinha that there was an agreement that the plaintiff would accept the sum of Rs. 12,19,060/- in full and final satisfaction of its dues. No one has come on behalf of the Insurance Company to give evidence that there was any agreement as between the plaintiff and the defendant Insurance Company and/or the Bank and that the plaintiff would accept the said sum in full and final settlement of its claim. The oral evidence of Mr. Sinha that he received the payment without prejudice to his rights and claims remains uncontradicted and is supported by the contemporaneous correspondence and also by the receipt which uses the words without prejudice. In this connection reference may be made to Sinha's answers to Qqs. 449-456, 487-511 716-719, 725-727, 1123, 1126-1161. Mr. T.K. Das was not present and could not say with whom any agreement was arrived at. (T.K. Das Qqs. 50-54, 327, 459.). However, no one has come to prove the alleged statement, that the payment was in full and final settlement of the plaintiffs claim. There is no evidence that the plaintiff accepted the payment in full and final settlement of its claim.

68. It was also argued on behalf of the insurance company that the payment to the bank i.e. the defendant No. 2, under agreed bank clause and the acceptance by the bank of the payment operates as discharge of the insurance company. So far as receipt being Ext. YY is concerned, the same is signed on behalf of the plaintiff without prejudice. The bank has merely counter-signed the said receipt. The payment was for and on account of the plaintiff and the bank merely acted as agent of the plaintiff. There is no pleading nor evidence that the bank accepted payment in full and final settlement. On the other hand, the evidence on behalf of the plaintiff is otherwise.

69. In this connection, the learned counsel on behalf of the plaintiff relied on the meaning of the word "without prejudice" in Black's Law Dictionary, 6th Edition, page 1603 which reads as follows:--

"Without prejudice: The words "without prejudice" import into any transaction that the parties have agreed that as between themselves the receipt of money

by one and its payment by the other shall not of themselves have any legal effect on the rights of the parties, but they shall be open to settlement by legal controversy as if the money had not been paid. In *Re Bell*, 344 Pa 223, 25 A.2d 344, 350".

The plaintiff also relied on a Division Bench judgment of the Patna High Court reported in AIR 1956 Pat 425 (*Umesh Jha v. State*). In that case the Division Bench of the Patna High Court held as follows (at p. 427 of AIR) :--

"The words "without prejudice" import into any transaction that the parties have agreed that as between themselves the receipt of money by one and its payment by the other shall not by themselves have any legal effect on the rights of the parties, but they shall be open to settlement by legal controversy as if the money had not been paid. (See Words and Phrases, Permanent Edition, West Publishing Company, Volume 45, page 439.)."

70. In the instant case even the letter dated 13th November, 1979 written on behalf of the Insurance Company was written without prejudice. The receipt for the payment made thereafter was also signed by the plaintiff without prejudice. The use of the word "without prejudice" itself shows that the parties agreed that as between themselves the receipt of money by the plaintiff and its payment by the insurance company was not to have any legal effect on the rights of the parties including those of the plaintiff. It is nobody's case that there was any accord as between the parties or that there was any satisfaction of such accord. The Issue No. 4, is therefore answered in the negative and in favour of the plaintiff.

71. Issue No. 5.

"Was Rs. 12.19.060/- paid by the defendant No. 1 under mistaken belief as stated in paragraph 10 of the written statement?"

72. The insurance company has not called any evidence in support of the alleged mistake.

73. The payment was made to the plaintiff after long consideration and claim of the plaintiff was considered and approved by the Board of Directors of the Insurance Co. to the extent of Rs. 12,19,060/-. The claims and contentions of the plaintiff were apparently considered at various levels and the survey report was also obtained by the Insurance Co. The said survey report was, thereafter, sought to be modified at the instance of the Insurance Co. In this connection, reference can be made to Ext. 3 that is the letter dated 14th November, 1979 which is written by the Manager, Mr. A. Sen of the Insurance Co. Neither the said Manager nor any of the members of the Board of Directors were called to prove the alleged mistake. The surveyor who was examined on behalf of the Insurance Co. supported his report and according to him the said sum of Rs. 12,19,060/- was payable by the Insurance Co. Mr. T.K. Das was neither competent nor did he give evidence with regard to any alleged mistake. No case was made out in the

contemporaneous correspondence as to any mistake. Even in the letter written on behalf of the Insurance Co. by its Advocate dated May 13, 1980, no such case was made out. The case of mistake has apparently been made out for the first time in the written statement and in my opinion the same is an afterthought and no attempt has been made to prove the alleged mistake by any competent witness. The Issue No. 5 is, therefore, answered in the negative and in favour of the plaintiff.

74. Issue No. 6: "Is the plaintiff entitled to loss and damages as alleged in the plaint?"

75. In the plaint the plaintiff has claimed damages on stocks amounting to Rupees 43,18,056/-. The net claim on that account after giving credit for payment made is Rs. 30,98,996/- after taking into account the payment of Rs. 12,19,060/- made by the defendant No. 1, on 14-11-1979. The other claim is on account of loss of profit, idle labour etc. amounting to Rs. 4,62,840.74P. The plaintiff also claims interest on the aforesaid claims.

76. There is no dispute that the total quantity lying in stock as on the date of accident was 97,060 quintals. The accident took place on 23rd April, 1979 and as early as on 28th April, 1979, the surveyors of the Insurance Co. M/s. M.T. Kothari reported sprouting/germination in the stocks on all the floors and in all the chambers, (Ext. 1A). On 15th May, 1979, during Mr. Sarwal's visit to the Cold Storage besides the wide spread sprouting and the germination of the stocks evidence of rottage amongst some of the bags were observed. A formal claim was made by the plaintiff by its letter dated 2nd May, 1979. During the course of the inspection on 28th April, 1979, it was found that stocks were already affected and the same was reported to the Insurance Co. (Ext. 1A). According to Mr. Sarwal and his report he advised the plaintiff to arrange for immediate removal of the bags of potatoes where rottage had started, to minimise further deterioration and damage to the stocks (Ext. 1A). Pursuant to the said directions the plaintiff delivered 20,124 quintals between 4th June, 1979 to 27th July, 1979 (Ext. 1A) as per the said report of 15th May, 1979 instructions were given by Mr. Sarwal to minimise further deterioration/damage to the stocks that were already deteriorated and damaged on 15th May, 1979 and the steps suggested were for minimising further deterioration/damage. On 26th May, 1979, the plaintiff gave notice to the Director of Agriculture and also to the hirers to take delivery of the goods under S. 12 of the West Bengal Cold Storage (L& R) Act, 1966. On and from 4th June, 1979 deliveries were commenced to the hirers. The evidence on behalf of the plaintiff is that these deliveries were made on commitment basis namely the plaintiff committed itself to pay the loss to the hirers who took delivery of the goods. The plaintiff has tendered the commitment Delivery Register (Ext. MM). In his oral evidence also Mr. Gurupada Sinha in questions 1023 to 1055 and 1070 to 1073, inter alia, stated that the plaintiff delivered 20,124 quintals on the basis of 35% loss commitment. He also stated that out of total of Rs. 5,63,600/- the plaintiff made payment of Rs. 4,54,000/- and a sum

of Rs. 1,08,000/- was still lying due and payable to the hirers. The payments are recorded in (Ext. MM) and the Balance Sheet tendered in evidence also shows the said payment of Rs. 4,54,000 and odd and the outstanding dues of Rupees 1,08,000/-. Mr. Sarwal, therefore, took inspection jointly with the Dy. Director, Agricultural Deptt. on 27th July, 1979; The report of Mr. Sarwal with regard to the condition of the stock as on 27th July, 1979, is as follows:--

"On an average above 90% of the stocks in the cold chambers as on 27th July, 1979 were affected and/or showed sign of deterioration of these according to tests, 13.52% were rotted and 16.7% were shrunk that is 30.22% were totally damaged."

77. If 30.22% were totally damaged then even according to report of Mr. Sarwal the said 30.22% from out of the balance 76,936 quintals lying in the cold storage as on 27th July, 1979, were totally damaged and became worthless. From out of the said 76,936 quintals even according to Mr. Sarwal 90% of the stock were affected.

78. Mr. Sarwal in his assessment of the damages has not taken into account the damages as to the totally lost potatoes and the damages in respect of affected potatoes. He had to take into account firstly the totally lost potatoes and secondly, the quantum of damages and/or deterioration in the 90% of the affected stocks, in order to assess the total damages as per his report.

79. Mr. Sarwal has also referred to the letter of the Directorate of Agricultural dated 13-8-1979 (Ext. FF). In the said report it is stated that 90% to 95% of the stock stored in the cold storage by different hirers had been strouted and the extent of the damage may be assessed at 30 to 35% as on 27-7-1979. The Director of Agricultural was mainly concerned with the amount that was to be payable to the hirers and the amount payable to the hirers as compensation was assessed by the said Directorate in the said letter dated 13th of August, 1979 as Rs. 85/- per quintal. The said award of compensation does not say that the said amount was payable only in respect of any particular goods only. On proper reading of the said letter it appears that the plaintiff was directed to pay the total value of the goods as per the said award in the form of compensation to all the hirers at the rate of Rs. 85/- per quintal. The Directorate was not concerned as to on which of the potatoes the amount was payable nor could the plaintiff by virtue of the said assessment of compensation, say that the plaintiff would pay only 30% or 35% of the total value or that the plaintiff will not pay in respect of the 90% or 95% or that the plaintiff could return the balance 5% or 10% of the stocks not affected. The mode of approximation of the quantity affected and the quantity damaged in the sense that the affected quantity as 90% to 95%, and the damaged quantity as 30 to 35%, was intended to find out only the approximate extent of the quantum of stocks that were damaged or affected. The compensation was payable under the said award at the rate of Rs. 85/- per quintal and that also to all the hirers on all the stocks. Whatever goods were lying in the cold storage either affected or unaffected or damaged could all be

sold by the plaintiff on its own account and whatever the plaintiff could realise therefrom would naturally reduce the loss of the plaintiff to that extent. By reading the said award of the Directorate of Agriculture, one cannot say that the plaintiff was directed to pay to the hirers on any percentage basis of the total value or that the plaintiff was directed to pay the compensation only in respect of the affected stocks or in respect of damaged stocks or that the plaintiff was not directed to pay in respect of the unaffected stocks. Furthermore, Mr. Sarwal failed to consider the position that once the deterioration started the extent of the damage was likely to increase with the passage of time. The fact that damages and/ or deterioration was likely to increase with the passage of time is indicated even in the report of Mr. Sarwal namely, on 15th May, 1979 he gave instruction for disposal of the potatoes "to minimise further deterioration or damage to the stocks". As per the said report, there was a difference in the extent of deterioration as on 28th April, 1979, on 15th May, 1979 and on 27th July, 1979. The plaintiff in various letters wrote to the insurance company that the damages were increasing. The oral evidence of Mr. Sinha is also there that the damages were likely to increase with the passage of time. Ext. JJ, being the letter of the Agricultural Directorate dated 13-9-1979 also shows that the extent of damage was assessed by them as on 27th July, 1979 and during the subsequent period there was every reason to believe that further deterioration might take place in respect of the relevant stored agricultural produce which is a perishable item.

80. In my opinion, once the accident took place, the accident became a cause for rise in temperature and the stocks started getting deteriorated and damaged. What the insurance company was liable to pay was the actual damages as suffered by the plaintiff subject of course to the deductions and/or exceptions as per the terms of the policy. It cannot be said that the insurance company was liable to pay the damages as on any particular date. The damages were first noticed on 28th April, 1979 and thereafter it went on increasing. On 2nd of May, 1979 the plaintiff wrote to the insurance company that the damages were the responsibility of the insurance company and on 7th May, 1979 the insurance company wrote to the plaintiff to safeguard the stocks, The inspection on 28th April, 1979 was on behalf of the insurance company and must be in presence of the plaintiffs representatives at the cold storage. The insurance company was also aware that the damages and/or deterioration was likely to increase with the passage of time and that is why the letter dated 7th May, 1979 was written to safeguard the stocks. Whether and to what extent the stocks could be safeguarded or how the damages could be minimised were the concern both of the plaintiff as also of the insurance company. If the insurance company had so chosen, it could send its representative forthwith on or after 2nd May, 1979 and issue all instructions and get them carried out as far as practicable. Nothing of the sort was done so far as the insurance company is concerned and so far as the plaintiff is concerned the plaintiff had to pay the compensation to the hirers as per contract terms and even under the Statute. The plaintiff was interested in

minimising the loss and/or safeguarding the stock as far as practicable. The evidence given on behalf of the plaintiff, the contemporaneous correspondence and the documents tendered on behalf of the plaintiff leave no doubt in mind that the plaintiff was taking every reasonably practicable step to safeguard the stocks and also to minimise the loss.

81. The delivery of 20,124 quintals was pursuant to the instruction of the insurance company and was to minimise the loss. In my opinion, it cannot be denied or disputed that the said stocks were affected. The said stocks which were delivered between 4th of June, 1979 to 27th of July, 1979, were affected and damaged. The plaintiff had no alternative but to agree to pay the reasonable damages to the hirers and the damages which the plaintiff agreed to pay on commitment basis were reasonable and the insurance company was liable to pay the same. If the insurance company did not keep any representative or take charge of the stocks even after the notice of the damages, the plaintiff cannot be blamed for the same. The hirers could not possibly be expected to take delivery of affected and damaged stocks without agreement as to compensation to be paid, specially when they were entitled to such compensation.

82. It is to be noted that though by letter dated 3rd July, 1979 the insurance company wrote to the plaintiff that Mr. Sarwal was to give comments with regard to disposal of stocks yet neither the insurance company nor Mr. Sarwal gave any such instructions even on the date of inspection i.e. 27th of July, 1979. The evidence of Mr. Sinha is that Mr. Sarwal asked the plaintiff to stop further deliveries and in fact the further deliveries were stopped on and from 27th of July, 1979. This fact is proved by the oral evidence of Mr. Sinha as also by the various books tendered in evidence on behalf of the plaintiff (Ext. MM, Ext. NN and stock register etc.). Even thereafter, the insurance company did not give positive instructions to the plaintiff to start disposal of the stocks or to sell the stocks.

83. The evidence on behalf of the plaintiff is that out of 76,936 quintals the plaintiff could dispose of only 55,266.50 quintals by way of salvage sale and total sum of Rs. 24,00,424/- was realised by such salvage sale. The further evidence is that about 21,000 and odd quintals could not be sold as they were totally damaged. This is quite commensurate even with the report of Mr. Sarwal because if 30.22% were totally damaged from out of 76,936 quintals, then the same will come to about 23,250 quintals. The plaintiff has tendered in evidence its sale register (Ext. NNN), Cash book (Ext. WW) and XX) and ledger (Ext. RR) to corroborate the oral evidence of Sinha. Questions 402-443, 457-473, 853-860-, 884-904, 1055-1069 and 1080 to 1084 also proves the said facts. There is no suggestion to the witness of the plaintiff that he could realise any higher amount, by such sales.

84. My attention was also drawn to Clause 3 of the policy under the heading "Claim Settlement". The said clause reads as hereunder:--

"3. Claim Settlement.

In the event of damage the damaged goods" will be weighed and the claim payable will be the difference between the insured value of an equal weight of the goods less the excess provided hereunder and the value of the damaged goods ascertained at the option of the Company by sale or survey.

In the event of damage of a certain number of entire bags/packages/containers/ crates the Company at its option may not weigh the bags/packages/ containers/ crates but pay the difference between the insured value of equal number of bags less the shrinkage and rottage hereinafter mentioned and excess provided hereunder and the value of damaged goods determined at the option of the Company by sale or survey.

In arriving at the value of the damaged goods due allowance will be made for shrinkage or rottage as mentioned below.

In no event will a claim be payable unless the value of the damaged goods is less than the insured value and no regard will be paid to the market value of sound goods at the time and place of damages unless such market value is less than insured value in which case the market value will be substituted for the insured value and appropriate deductions shall be made therefrom for any shrinkage rottage and the proceeds if any from the sale proceeds of the damaged stock and the excess as stated in Exceptions hereunder."

85. It was submitted on behalf of the plaintiff that since the goods were actually sold, therefore the damages were ascertained at the option of the company by sale and not by survey. The case of defendant No. 1, however, is that damages were ascertained by survey.

86. It was submitted on behalf of the plaintiff that shrinkage and rottage as provided in the Clauses 4 and 5 of the policy should not be allowed as Clause 4 provides for deduction of shrinkage to the extent of 5% and Clause 5 provides deduction of rottage to the extent of 5%. The policy provides for exception to the extent 10% of the amount of loss which the insured has to bear. I am unable to accept the submission of Mr. Bachawat, Ld. counsel on behalf of the plaintiff that in assessing the damages no allowance should be made for shrinkage and rottage to the extent of 5% each as provided under the terms of the policy. In my opinion whether the damages are ascertained by sale or by survey, the insured is entitled to the actual damages suffered by the insured with deductions on account of shrinkage to the extent of 5% and rottage to the extent of 5% and further deduction of 10% under Clause 1 of the exceptions. In the instant case, the Insurance Company held a survey with regard to the extent of damages. But the said survey report is defective in the sense that it purported to assess the extent of damages as on 27th July, 1979 and not the actual damages as suffered by the plaintiff up to the date of disposal of the goods. As per clause 3 of the policy quoted above, the surveyor had to take into account the difference between the insured value and the value of the damaged goods. The surveyor

did not even attempt to do so. He could do so by state under his own supervision or control or could do so by survey. He had to bear in his mind that what had to be assessed was the actual damage. If it was to be based on survey then the minimum that could be excepted to consider or obtain was an offer for purchase of the salvage otherwise he could allow the plaintiff to sell and survey on the basis (sic). He could not hypothetically assess percentage of damage and assess damages on percentage basis. The policy provides otherwise. Furthermore, in my opinion, the assessment of the extent of damage as made by the surveyor suffers from the basic defect that the surveyor only took into account the total loss of the goods as per his report which was 30.22% and did not take into account the extent of the damage to the 90% of stocks which is per his own report, were affected and damaged. Therefore, the said survey report cannot in my opinion be accepted as true and correct as to the assessment of damages suffered by the plaintiff or likely to be suffered by the plaintiff.

87. There is one more aspect with regard to assessment of the damage, it was submitted on behalf of the plaintiff that this was a declaration policy since declarations were required to be made from time to time. In the policy, the value of the stock as on the date of the storage was declared as 70 lakhs and the per quintal value was declared as Rs. 70/- per quintal. The word "declaration basis" has been used in schedule 1 of the policy itself and declarations were in fact required to be made from time to time. Mr. T.K. Das in his evidence (Questions Nos. 436 to 475, 480 to 492 and 504 to 519) inter alia, accepted that the policy was a declaration policy. In answer to questions No. 463, 464, 465 he also accepted that in the insurance of this kind there will be variations from time to time in the quantity and the value of the subject matter of the risk. Mr. Sinha has also stated in his evidence that the value was declared at Rs. 80/- per quintal vide letter dated 4th June, 1979 (Ext. D.) By the said letter the value was given at Rs. 80/- per quintal. That the market value was Rs. 80/- per quintal is proved by the evidence of Mr. Sinha. The letters of the Agricultural Directorate show that the value was assessed at Rs. 85/- per quintal though the plaintiff contended before the Directorate that the value was Rs. 80/- per quintal. The value declared by the said letter dated 4th June, 1979 was accepted in respect of fire policy by the letter of the Insurance Company dated 25th June, 1979 (Ext. C). So far as the subject policy for deterioration of stocks is concerned, in my opinion, the said policy was a declaration policy as admitted by Mr. T.K. Das, and a mere declaration as to value was sufficient to alter the value for the purpose of said insurance. In my opinion, therefore, the value of the stocks for the purpose of assessment or loss under the subject policy is to be taken at Rs. 80/- per quintal. It is to be noted that the said letter of the plaintiff dated 4th June, 1979 was received and acknowledged by the defendant by the said letter dated 15th July, 1979 and Insurance Co. did not say that the plaintiff was not entitled to declare the increased value.

88. Mr. Bachawat learned counsel for the plaintiff relied on the passage in the book "The Law Relating to Fire Insurance" Fourth Edition, written by Welford and

Otter-Barry at page 92. The passage reads as hereunder ;--

"Where the subject-matter of insurance is not a particular object, but a class of objects (k), the insurance attaches to such objects as may from time to time form members of the class (1). Sometimes it may be necessary, by the terms of the policy, for the assured to make declarations defining the particular objects which are intended to be covered, in which case the policy applies only to the objects declared (m). This kind of policy, known as a declaration policy, is used in the case of insurances upon stock and materials in trade. In an insurance of this kind, there may be considerable variation from time to time in the quantity or value of the subject-matter at risk, and the assured may think it convenient to provide for a corresponding variation in the amount of insurance and in the amount of premium. This object is secured by requiring the assured to make periodical declarations of the value of his stock as on a particular day (n); the sum representing such value is treated as the amount of insurance for the subsequent period, and at the end of the year the premium is adjusted according to the average amount of insurance throughout the year. A declaration policy may be used as an excess insurance, applying only after the more specific insurances are exhausted (o). The policy in ordinary use does not require a declaration; and it is sufficient to show that the objects destroyed belong to the class described, and are, in fact, the objects intended as the subject-matter of insurance (p). In such a case, the policy is not exhausted by the fact that before the date of the loss other objects equalising in value of the amount of the insurance have been exposed to peril, and that, if such objects had been destroyed, the assured would have been entitled to recover their value under the same policy, for the policy is by its terms to continue for a fixed period, and, if it was thus exhausted, its object would be defeated. It therefore remains operative during the whole of the specified period and covers all the objects at risk at any one time up to the amount of the insurance, regardless of the total value of the objects which may during its continuance have been at risk (q)."

89. In my opinion, the subject policy of insurance in this case was a declaration basis policy and the plaintiff was entitled to increase the valuation by declaration as was done by the plaintiff by letter dated 4th June, 1919. Mr, Sarwal did not take into account the increased value as declared by the plaintiff.

90. The report of Mr. Sarwal also suffers from another infirmity. He has assessed the damages in respect of 20,524 quintals to the extent of 8.42%. By the said assessment, Mr. Sarwal accepted that the Insurance Co. was liable to compensate the loss in respect of the said 20,524 quintals. Actually only 20,124 quintals was delivered and 400 quintals was in course of drying. However, his assessment at 8.42% was merely a guess work, inasmuch as he did not take care to inspect the said 20,124 quintals at the time of the delivery. He of course tried to state in his evidence that the said quantity namely 8.42% of the said 20,524 quintals was lying damaged. If it was lying damaged then it was total loss and so far as 20,124 quintals of goods which were delivered are concerned, the

same were delivered between 4th June, 1979 to 26th July, 1979 and he did not take the opportunity either to inspect the condition of the same at the time of the delivery nor has he tried to assess the extent of damages to the said 20,124 quintals in his report. His evidence was that he found a quantity of damaged potatoes which were separated if that is so, the said damaged potatoes were a total loss but even on the basis of his inspection as on 15th May, 1979, the 20,124 quintals were in fact damaged and affected and for the said damages the plaintiff was entitled to recover the loss from the Insurance Co. The said report of Mr. Sarwal suffers from further infirmity that he does not take into account the further and subsequent deterioration which continued to the stocks even after 27th July, 1979 and in my opinion the plaintiff is entitled to the loss actually suffered by the plaintiff. Mr. Sarwal even had no hesitation in revising his report at the instance of the plaintiff (Ext. 1B) that also shows that Mr. Sarwal is not so independent a person that he even went to the extent of revising his report even after the final report had been submitted, at the request of the Insurance Co.

91. Mr. Sarwal while assessing the damages even by survey did not take into account the loss or damages in respect of the 20,124 quintals which were affected and delivered prior to 27th of July, 1979. Though he has said in his report that the damages in respect of 20,524 quintals is 8.42%, yet his oral evidence clearly shows that what he took into account was the totally damaged potatoes which were lying outside the cold storage from out of the said quantity of 20,524 quintals which was inspected by him. This shows that the extent of damages to the delivered goods that is 20,124 quintals was not taken into account by him, at all. He has also not taken into account the extent of loss and damages to the affected 90% of the goods. Furthermore, the basis on which he has sought to assess the damages, is as if the Company was only liable to pay the damages as on 27th July, 1979 in respect only of the totally damaged goods, which is totally erroneous. What the company was liable to pay was the actual damages which was suffered by the insured as a consequence of the accident until disposal of the goods both in respect of totally damaged goods as also the affected goods. He has taken into account the value of totally damaged goods which according to him were found to be totally damaged and removed prior to 27th July, 1979, on percentage basis as if it was 8.42% of 20,524.09 quintals which is also erroneous. Furthermore, he has not taken into account the extent of damages which he himself inspected on 15th May, 1979 and which was further inspected towards the end of May on behalf of the insurance company in so far as the 20,124 quintals is concerned. The attempt on the part of the insurance company or the surveyor has to be to assess the actual loss and damages based on value as per clause 3 and which could be either ascertained by the sale of the goods as provided in clause 3 as to claim settlement or even if it was to be based on survey then also he had to find out the resale value of the damaged and/or affected goods. He has not taken into account the net re-sale value. Such resale value can be found by means of obtaining offers for purchase of the affected goods or by ascertaining the resale value in consultation with the insured if at all

the insured was willing to keep it at assessed value. There has to be a solid foundation for the assessment of loss, which can be either by actual sale or by assessment by survey of the realisable value of the total goods affected or damaged and what is the resale value thereof. If the insurance company so desired it could keep the salvage on its own account, if there was no buyer at the assessed value of the plaintiff declined to keep it at any assessed value. No such attempt has been made. The deductions on account of rottage and shrinkage has to be made from total quantity stored and so far as deduction on account of exception is concerned, it has to be made after ascertaining the actual damages. He however takes rottage and shrinkage on the total quantities stored whereas he has only tried to find out the damages of about 60,000 quintals. As a matter of fact he has only taken into account, the totally damaged goods and not the damage to the affected goods. Furthermore, he does not dispute the report of the Agricultural Directorate. The said Directorate directed the insured to pay at the rate of Rs. 85 / - per quintal. Of course he could take the value at Rs. 80/- per quintal, the same being declared value of the insured- But so far as the balance goods, which were lying in the cold storage as on the date of inspection, are concerned he should have taken into account the resale value thereof, because that alone could be the criteria to assess the damage suffered by the insured. He could also adopt the other procedure as provided in sub-paragraph (1) of Clause 3 under the heading "claim settlement" by means of actual sale. If however the damage was to be based on survey, then also the relevant basis could only be the value of the salvage as provided in clause 3 sub-clause 1 thereof. I therefore, cannot accept, the purported assessment of losses and damages as purported to be assessed by My. Sarwal, the Surveyor.

92. So far as the claim of the plaintiff in this suit is concerned, the plaintiff has not taken into account either the rottage or shrinkage which he was even entitled to deduct from the claims of the hirers, as per his own contracts with the hirers. In any event, the policy provides that 5% rottage and 5% shrinkage will not be payable by the insurance company. The insured in his calculation has also not taken into account the deduction on account of the excess as provided in the insurance policy and amounting to 10% as per clause as to the exceptions. The deduction on account of rottage and shrinkage as provided in the policy could of course be deducted from the total quantity of the stocks.

93. In my opinion, the total damages as suffered by the insured are as follows:--

(a) Total quantity of potatoes stored 97,060 quintals

Less deduction on account of rottage and shrinkage as per policy terms

9,706

Net quantity for which the claim could be made 87,354 quintals

Less quantity delivered on commitment basis prior to 27th July, 1979

20,124 quintals

67,230 quintals

Undelivered balance quantity for disposal and for assessment of damages

(b) The total value of 67,230 quintals at the rate of Rs. 80/- per quintal being the declared value

Rs. 53,78,400.00

Less realisation from salvage Rs. 24,00,424/-

The total loss on 67,230 quintals Rs. 29,77,976/-

Add commitment loss on 20,124 quintals Rs. 5,63,600/-

(c) Total loss in respect of 87,354 quintals after taking into account rottage and shrinkage

Rs.35,41,576/-

Less 10% on account of excess as per policy terms and conditions

Rs. 3,54,158/-

(d) Net amount which the insured was entitled on account of loss

Rs. 31,87,418/-

Less amount already paid by the insurance company on 14-1-79

Rs. 12,19,060/-

Net amount that remained payable to the insured as on 14-11-79

Rs. 19,68,358/-

94. In my opinion the plaintiff is only entitled to claim a balance sum of Rs. 19,68,358/- instead of the claimed amount of Rs. 30,98,996/- as claimed on account of balance of the loss and damages on the stocks of potatoes.

95. The plaintiff has made another claim under the heading "loss due to closure". The said claim is for a sum of Rs. 4,62,840.74p and a sum of Rs. 3,00,000/- out of the said sum consists of interest only. The said claim is being sought to be made as a consequential loss on account of salary, dearness allowance, bonus, medical, insurance, interest and Panchayat tax. The subject "policy" in express terms provides that the company shall not be liable for any consequential loss. This is to be found in Clause 5(a) of the exceptions. So far as the claim of the plaintiff on account of loss due to closure as made in the plaint is concerned, I accept the arguments and the contentions of Mr. Majumdar made on behalf of the defendant No. 1 and the said claim of the plaintiff is therefore rejected.

Issue No. 7

96. "To what relief the plaintiff is entitled to?"

97. While arguing on this issue it was submitted on behalf of the insurance company that the claim of the plaintiff had been extinguished in view of the amended arbitration clause that was applicable to the policy of insurance. The said amended arbitration clause reads as hereinunder:--

"If any difference shall arise as to the quantum to be paid under this policy, (liabilities being otherwise admitted) such difference shall independently of all other questions be referred to the decision of the arbitrator, to be appointed in writing by the parties to the difference, or if they cannot agree upon a single arbitrator to decision of two disinterested persons as arbitrator of whom one shall be appointed in writing by each of the parties within two calendar months after having been required so to do in writing by other parties in accordance with the provisions of the Arbitration Act, 1940 as amended from time to time and for the time being in force. In case either party shall refuse or fail to appoint arbitrator within two calendar months after receipt of notice in writing requiring an appointment, the other party shall be at liberty to appoint scale arbitrator, and in case of disagreement between the arbitrators the difference shall be referred to the decision of umpire who shall have appointed by them in writing before entering on the reference and who shall sit with the arbitrators as presided at their meetings.

It is clearly agreed and understood that no difference or dispute shall be referable to arbitration as hereinbefore provided, if Company has disputed or not accepted liability under or in respect of this policy.

It is hereby expressly stipulated and declared that it shall be condition precedent to any right of action or suit upon this point that the award by such arbitrator, arbitrators or umpire of the amount of the loss or damage shall be first obtained.

It is also hereby further expressly agreed and declared that if the Company shall disclaim liability to the insured for any claim hereunder and such claim shall not, within 12 calendar months from the date of such disclaimer have been made the subject-matter of a suit in a Court of law, then the claim shall for all purposes deemed to have been abandoned and shall not thereafter be recoverable hereunder."

98. It was submitted on behalf of the Insurance Company that the said arbitration clause provides that if the company disclaims liability to the insured for any claim and such claim was not within 12 calendar months from the date of such disclaimer, made the subject-matter of a suit in a Court of law, then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable under the policy. The policy also provides that if there is any difference with regard to the quantum to be paid up under the said policy, the liability being otherwise admitted such difference is referable to arbitration. The point raised is, was it a case of disclaimer of liability or was it a case of difference as to quantum to be paid where the liability was otherwise admitted. It is apparent that the insurance company admitted the liability and its Board of

Directors approved the payment of such liability. The quantum of such liability was fixed by the insurance company at Rs. 12,19,060/-. Therefore in my opinion this was a case where the dispute was with regard to the quantum to be payable. This was not a case where the insurance company disclaimed liability. I am unable to accept the submission made on behalf of the insurance company that since the quantum was disputed by the insurance company therefore there was a disclaimer of liability in respect of the balance of the unpaid amount. If that contention is to be accepted then it will lead to absurdities because in each and every case wherever there is dispute as to the quantum of the liability the same cannot go to arbitration as balance amount will in all cases be disclaimed. Such interpretation will defeat the very purpose of the amended arbitration clause which provides that in case where the quantum of the liability is in dispute the same will be determined by reference to the arbitration.

99. In the instant case since there was a dispute as to the quantum of liability, the plaintiff did commence the arbitration proceedings. The said arbitration proceedings were ultimately disposed of by a consent order made in the appeal being the order dated April 2, 1981.

100. The said consent order inter alia provided that the respondents or either of them which included the plaintiff would be at liberty to file a suit against the appellant, namely, the insurance company for adjudication by a Court of law as to the extent of damage to the stock of potatoes and as to the quantum of money to be paid under the subject "policy of insurance". If there was an agreement to the effect as recorded in the consent order, the same amounted to variation of the agreement between the parties, namely, that the plaintiff would be at liberty to file a suit for ascertaining the quantum of money to be paid under the subject "policy of insurance" and to determine the quantum of loss suffered by the plaintiff. The insurance company also agreed to waive the condition precedent clause and Mr. Majumdar has fairly submitted that he is not relying on the condition precedent clause. The said consent order was made on 2nd April, 1981 and the instant suit was filed on 4th June, 1981. The argument of Mr. Majumdar that a suit could only be filed within 12 months from 14th of November, 1979 cannot be accepted in this case. Firstly because the dispute was with regard to the quantum of the damages and/or the quantum of the amount payable. The plaintiff did go to arbitration and commenced proceedings under the Arbitration Act and thereafter it was agreed between the parties as reflected by the consent order that the plaintiff could get such quantum of damages and/ or the quantum of amount payable to be determined by filing a suit, for adjudication thereof in a Court of law. The parties referred to a decision of the Supreme Court reported in *The Vulcan Insurance Co. Ltd. Vs. Maharaj Singh and Another*, That was a case where there was a total repudiation of liability. That was not a case where the liability for payment of the damages or loss was admitted. In the said case the Supreme Court held as follows (at p. 290 of AIR) :--

"But the repudiation of the claim could not amount to the raising of a dispute as to the amount by any loss or damage alleged to have been suffered by respondent No. 1. If the rejection of the claim made by the insured be on the ground that he had suffered no loss as a result of the fire or the amount of loss was not to the extent claimed by him, then and then only, a difference could have arisen as to the amount of any loss or damage within the meaning of Clause 18. In this case, however, the company repudiated its liability to pay any amount of loss or damage as claimed by respondent No. 1. In other words, the dispute raised by the company, appertained to its liability to pay any amount of damage whatsoever. In our opinion, therefore the dispute raised by the appellant company, was not covered by the arbitration clause."

In the instant case the arbitration proceedings and/ or the proceedings under the Arbitration Act, were commenced within time. Furthermore, the clause with regard to the period of 12 months has been varied by the consent order which records the agreement between the parties.

101. The plaintiff has also claimed interest at the rate of 18%. Sinha in his evidence stated that the banks are charging interest at the rate of 20%. He also stated that the rate of interest charged is correct. There is no evidence to contradict the said evidence. The plaintiff has been deprived of the benefit of the amount which was payable to the plaintiff on 14th November, 1979. In my opinion, the said rate of 18% as claimed is a reasonable rate of interest and the plaintiff is entitled to the same.

102. There will, therefore, be a decree in favour of the plaintiff for a sum of Rs. 19,68,358/-. There will also be a further decree on account of interest at the rate of 18% per annum on the said sum of Rs. 19,68,358/- on and from 14th of November, 1979 up to 3rd June, 1981. There will also be a decree for interim interest and interest on judgment at the rate of 18% per annum on the said sum of Rs. 19,68,358/- until payment. There will also be a decree for costs as against the defendant No. 1 and in favour of the plaintiff certified for two counsels.

103. Suit decreed.