

(2008) 10 DEL CK 0131
In the Delhi High Court
Case No : C.S. (OS) No. 2164 of 1997

Asha Soni

APPELLANT

Vs

New India Assurance Co. Ltd.

RESPONDENT

Date of Decision : 23-10-2008

Acts Referred:

Evidence Act, 1872 — Section 20, 91, 92
Insurance Act, 1938 — Section 64UM(2)

Citation : (2008) 106 DRJ 502

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Harish Malhotra and Vipul Gupta, for the Appellant; Niraj Singh, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.—The plaintiff has sued for recovery of Rs. 24,88,763/- being the balance of Rs. 32,28,530/- claimed by the plaintiff from the Defendant under a policy against the risk of fire taken from the Defendant. The plaintiff also claims pendente lite and future interest. On the defences raised in the written statement (to which replication was filed), the following issues were struck on 25th August, 1999.

- (1) Whether the plaintiff has no locus standi to institute and maintain the present suit? OPD
- (2) Whether the suit is bad for non-joinder of Punjab National Bank as a party, if so, its effect? OPD
- (3) Whether the payment of Rs. 7,11,237/- made by Defendant No. 1 under the policy of insurance was in full and final settlement of the claim of the plaintiff? OPD
- (4) Whether the plaintiff is entitled to the amount claimed in the suit or any other amount? OPP

(5) Whether the plaintiff is entitled to any interest, if so, at what rate and for what period? OPP

(6) Relief.

2. The plaintiff filed affidavit by way of examination-in-chief of Shri Naveen Soni being the son and attorney of the plaintiff. He was cross-examined before the Local Commissioner. The plaintiff also summoned and examined as PW-2, Mr. J.L. Tikku, the Joint Surveyor in the case and as PW-3, Mr. Mahendra Singh. The examination-in-chief of PW-3/ Mr. Mahendra Singh was deferred on the request of the counsel for the plaintiff since he had not brought the summoned record. However, the record does not show the said witness to have been examined after 5th September, 2005. Thus, factually, two witnesses as aforesaid, were examined by the plaintiff. The Defendant filed affidavit by way of examination-in-chief of its Divisional Manager Shri A.K. Gupta who was cross-examined before the Local Commissioner. The Defendant also examined before the Local Commissioner as DW-2, Mr. Adarsh Kumar Gupta, one of the surveyors. The Defendant also examined as DW-3, Mr. O.P. Gupta also working as senior Divisional Manager with the Defendant and who was also cross-examined before the Local Commissioner. The counsels for the parties have been heard.

My issue-wise findings are as under:

Re : Issues No. 1 and 2-

[(1) Whether the plaintiff has no locus standi to institute and maintain the present suit? OPD

(2) Whether the suit is bad for non-joinder of Punjab National Bank as a party, if so, its effect? OPD]

3. The plaintiff in the plaint itself stated that she had taken various limits from the Punjab National Bank and had also taken a hypothecation limit against the hypothecation of stocks which the plaintiff used to maintain at the premises where the incident of fire occurred. It was further pleaded that since the loan was taken by the plaintiff from Punjab National Bank and further since the goods were hypothecated with the Bank, the said goods were got insured by the Bank for the account of the plaintiff and for which the policy, subject matter of suit was taken. The objection of the Defendant is that the policy was issued by the Defendant to Punjab National Bank, Khari Bavli branch, Delhi and as such the said Bank alone has the right to sue, if at all and the plaintiff has no right to sue for claims under the policy which is not in the name of the plaintiff and in any case, without impleading the said Bank as a party to the suit.

4. The plaintiff filed only the temporary cover note which has been proved as Ex. P-1 which shows the name of the insured as of the Bank, a/c M/s New Gayatri Cork Industries. The Defendant in the written statement admits the plaintiff to be proprietor of M/s New Gayatri Cork Industries though claims that it was always Mr. Naveen Soni who appeared as PW-1 who represented the said M/s New

Gayatri Cork Industries. The Defendant filed the insurance policy on which no exhibit mark has been given but which can always be read against the Defendant and which is to the same effect, i.e. showing the name of the insured as of the Bank, a/c M/s New Gayatri Cork Industries. The other relevant documents on these issues are the legal notice dated 25th May, 1996 proved as Ex. P-3 got issued by the plaintiff to the Defendant and the letter dated 15th July, 1996 proved as Ex. P-5 issued by the Defendant to the plaintiff informing the plaintiff that the claim of the plaintiff had been settled for Rs. 7,11,237/-. Ex. DW 1/17 is the receipt issued by the plaintiff and the Punjab National Bank in favour of the Defendant of Rs. 7,11,237/-. The cheque for the said amount was also drawn by the Defendant in favour of the Bank a/c of M/s New Gayatri Cork Industries. The claim-form was filled by the Bank and the initial correspondence of the Defendant was with the Bank, though subsequent correspondence of the Defendant prior to the payment aforesaid is with the plaintiff. In the aforesaid circumstances, it has to be adjudicated whether the plaintiff alone could maintain the present suit.

5. In my view, in the present day business scenario where financial assistance from the institutions/Banks is a must and a norm for any business to be carried on, and where the Banks themselves, as a condition for such financial assistance against hypothecation of stocks etc., insist upon the said stocks being insured, the Bank is but a mere intermediary in the insurance. The insurance premium is also paid from the or deducted from the account of the client of the Banks. It is thus not as if the Bank is the beneficiary in its own rights. The Bank is the beneficiary only to secure the amounts advanced. If during the term of the insurance, the dues of the Banks are settled, the Bank even if continues to be shown as the insured, is not the beneficiary and the insurance is for the benefit of the person in whom the title of the goods vests. It is not as if the plaintiff in the present case is a stranger or an assignee of the Bank, who would not be entitled to the benefit of the insurance. The Defendant at the time of insurance itself and at all subsequent times after the incident and during the settlement of the claim, was fully aware that in fact, it was the plaintiff which was the beneficiary. The Defendant also insisted upon taking the signatures of the plaintiff on the receipt obtained by it of full and final settlement. In the circumstances, it cannot be said that the plaintiff is not entitled to maintain the suit. The plaintiff in such situation, if aggrieved by the action of the Defendant, cannot compel the Bank to initiate proceedings against the Defendant. The reason for the Banks insisting on taking insurance policy in the Bank's name is to, in the event of security in the form of goods on which the Bank has advanced monies, disappearing and in the further event of advances of the Bank being not settled, to enable the Bank to realise the insurance claims in settlement of its dues.

6. The counsel for the Defendant argued that there is some controversy about the cheque for Rs. 7,11,237/- issued by the Defendant. It is the case of the Defendant that the said cheque though in the name of the Bank to the account of

the plaintiff was handed over by the Defendant to M/s New Gayatri Cork Industries. It is further the case of the Defendant that the Defendant received complaint from the Bank that the plaintiff had not deposited the said cheque with the Khari Bavli branch of the Bank which had advanced monies to plaintiff but with some other branch of the Bank. Even though we are in this suit not concerned with the said controversy but it shows that the Defendant was satisfied in handing over the cheque to the plaintiff and did not insist upon handing over the cheque to the Bank which was the insured. Even though the senior counsel for the plaintiff has argued that the plaintiff has since settled all its accounts with the Bank, in my view irrespective of the same, if the Defendant is ultimately found liable in this suit to the plaintiff, the controversy can be resolved by directing the Defendant to issue the cheque for the said amount in the name of the Bank to the account of the plaintiff as before and/or if the plaintiff wants the cheque in her own name, by directing the plaintiff to, at the time of execution, produce the "no objection" of the Bank. However> the suit cannot be defeated for the said reason.

7. I also do not find the suit to be bad for nonjoinder of the Bank. As aforesaid, the lis in such disputes is between the plaintiff and the Defendant and requiring the Bank to be impleaded as the party would not only have burdened and delayed the trial but would also have put the Bank to unnecessarily incur costs in appearance in the present suit, when its interest can be satisfied by moulding the relief, as aforesaid. Even otherwise the claim, if any, of the plaintiff cannot be defeated for nonjoinder. At best, notice would have to be issued to the Bank, of which also, as aforesaid, need is not felt.

8. I thus hold the plaintiff to have locus standi to institute the suit and do not find the suit to be bad for nonjoinder of the Bank. The issues No. 1 and 2 are thus decided in favour of the plaintiff and against the Defendant.

Re: Issue No. 3:

(Whether the payment of Rs. 7,11,237/- made by Defendant No. 1 under the policy of insurance was in full and final settlement of the claim of the plaintiff?)

9. The documents show the plaintiff to have got issued legal notice dated 25th May, 1996 proved as Ex. P-3 to the Defendant for non-settlement of her claims and threatening that the Defendant would also be liable for interest at the rate of 24% per annum. The Defendant vide letter dated 15th July, 1996 proved as Ex. P-5 informed the plaintiff that the claim had been settled for Rs. 7,11,237/- towards full and final settlement, as recommended by the Surveyors and also enclosed to the said letter, discharge vouchers in duplicate for the plaintiff to have the said discharged by the Bank as well as by herself and to return to the Defendant to enable the Defendant to make the payment. The vouchers enclosed to the said letter have been proved as Ex.P-6. They are in printed form and provide for the amount to have been received in full settlement of claims under the policy. The Defendant has also proved as Ex. PW 1/14, the office copy of the

letter dated 22nd August, 1996 sent to the plaintiff as reminder to the letter dated 15th July, 1996 supra. The A.D. card returned to the Defendant from address of the plaintiff has been proved as Ex. DW 1/15. There is no cross-examination of DW-1 by the counsel for the plaintiff with respect to the said letter and A.D. card and hence, I take the said letter to have been proved and delivered to the plaintiff. The Defendant has also proved as Ex. DW 1/16, a letter dated 4th October, 1996 purportedly sent by the plaintiff to the Defendant, enclosing therewith the receipt as desired by the Defendant and asking for the issuance of the cheque. Though the said document was denied by the plaintiff during admission/denial but again I do not find the plaintiff to have in the cross-examination of DW-1 challenged the said document. The said document even otherwise appears to be in the normal course of the business. The letter dated 15th July, 1996 of the Defendant to the plaintiff to collect the cheque after giving the receipt for full and final settlement is an admitted document. I have also found the reminder dated 22nd August, 1996 supra to have been served by the Defendant on the plaintiff. It is also not in dispute that the cheque for Rs. 7,11,237/- is dated 4th October, 1996. It is also not in dispute that the receipts of full and final settlement signed by the plaintiff and the Bank were given prior to the delivery of the said cheque by the Defendant to the plaintiff. In the circumstances, the version of the Defendant that the receipts were sent under cover of DW 1/16 is more believable than the denial of the plaintiff. The signatures on DW 1/16 appear to be same as the admitted signatures on the full and final receipt Ex. DW 1/17 as well as the signatures of PW 1 Mr. Naveen Soni on his affidavit by way of examination-in-chief. It is, therefore, believable that the Bank on the same day made and delivered the cheque to the authorized signatory of the plaintiff who had given the letter dated 4th October, 1996 proved as Ex. DW 1/16 and also signed the full and final receipt. It is the evidence of the Defendant that the said person is none other than Mr. Naveen Soni, attorney of the plaintiff. It is the admitted case of both the parties that it was Mr. Naveen Soni who was dealing with the Defendant on behalf of the plaintiff. It is further admitted in evidence that Mr. Naveen Soni/PW 1 had collected the cheque on 4th October, 1996.

10. The importance of Ex. DW 1/16 is that the same does not state that the plaintiff is giving the receipts without prejudice to its rights and contentions or reserving rights to claim the balance.

11. The next relevant plea in this regard is with respect to a legal notice dated 5th October, 1996 which the plaintiff in its pleadings claimed to have got sent to the Defendant. The plaintiff claimed to have informed the Defendant vide the said letter that the sum of Rs. 7,11,237/- had been received in part payment and the signatures on discharge voucher were obtained by the Defendant from plaintiff under coercion. The receipt of the said notice was denied by the Defendant in its pleadings as well as during admission/denial of documents as well as in evidence. The said document on its face shows the same to have been sent by registered post by the Advocate for the plaintiff to the Defendant and

with copy to the Bank. In spite of the denial by the Defendant, the plaintiff neither filed any postal receipt of having sent the said letter by registered post to the Defendant nor made any effort to show that the copy of the said letter was served on the Bank. The witnesses of the Defendant have denied receiving the said letter. Mr. Naveen Soni, the only witness of the plaintiff did not even attempt to prove the said letter. The admission of the letter into evidence was objected to and kept open for adjudication at this stage. Though in affidavit by way of examination-in-chief Ex. P-16 was given to the said letter but no exhibit mark was put on the document and no evidence of despatch by post of the said letter or of delivery of said letter, as required to be led as laid down by Division Bench of this Court in *Surender Bala v. Sandeep Foam Industries* (2004) IV AD (Delhi) 730 and by full Bench of Gujarat in *Memon Adambhai Haji Ismail v. Bhaiya Ram Das* AIR 1975 Gujarat 54 was led. He was cross-examined with respect to said letter and admitted that he had not filed any proof of despatch of the said letter. The plaintiff has filed and proved Postal Receipts and A.D. card with respect to earlier legal notice dated 25th May, 1996 and the failure to file proof of despatch and delivery or to give any explanation for same leads to inescapable conclusion that it was never sent. I find the said letter has not been proved and is to be ignored.

12. The plaintiff instituted the present in or about October, 1997 i.e. after more than one year of having received the payment of Rs. 7,11,237/- from the Defendant.

13. The plaintiff in the plaint pleaded that the Defendant was in a dominating position; the plaintiff was financially hard pressed; that the Defendant threatened the plaintiff that in case the plaintiff does not sign the discharge voucher, then even the sum of Rs. 7,11,237/- Would not be paid; that on account of coercion exercised by the Defendant, the plaintiff was compelled to sign the discharge voucher so that the payment of Rs. 7,11,237/- could be received and the plaintiff could liquidate its liability; that the plaintiff received the said payment without prejudice to her right to receive the balance amount from the Defendant; that the plaintiff, as aforesaid, vide letter dated 5th October, 1996 informed the Defendant that the payment had been received in part and not in full and final settlement; that the payment of Rs. 7,11,237/- could not settle the claim.

14. What has to be seen is whether on the basis of the aforesaid documents and the evidence led by the plaintiff, the aforesaid contentions are substantiated. The law in this regard is no longer *res integra* having been reviewed in *Chairman and M.D., N.T.P.C. Ltd. Vs. Reshmi Constructions, Builders and Contractors, United India Insurance Vs. Ajmer Singh Cotton and General Mills and Others*, and *Damodar Valley Corporation Vs. K.K. Kar*, relied upon by the senior counsel for the plaintiff. The counsel for the Defendant on the contrary, has drawn attention in this regard to *New India Assurance Company Limited v. Sri Venkata Padmavathi RandB Rice Mill*, (2000) 10 SCC 334 *Ajmer Singh Cotton and General*

Mills (supra).

15. The principle which emerges from the perusal of the aforesaid judgments is that whether the payments have been made in full and final settlement, is a question to be considered on the facts of each case. When there is accord and satisfaction by final settlement of the claims and the subsequent allegation of coercion is an after-thought and a device to get over the settlement of dispute, the contract is novated and action cannot be brought on the original contract. The Apex court in *Rashmi Constructions supra* noticed that public sector undertakings would not ordinarily release the money unless No Dues certificate is signed and a person may have to succumb to the other party to the bargain who is in a stronger position. The Apex court however, hastened to add that such a case has to be made out and proved before the adjudicating authority/court. In facts of that case, the Apex court found that disputes as regards the final bill and its acceptance had arisen prior to the full and final receipt, that no settlement took place as a result whereof the payment could be stated to have been accepted without any reservation and also found the claimant therein to have immediately after receiving the payment lodged its protest and reiterated its claims.

16. However, the facts of the present case are entirely different. The survey report on which strong reliance has been placed by the senior counsel for the plaintiff itself shows that the Surveyors had been unable to reach any final conclusion and had suggested payment of either Rs. 7,11,237/- or of Rs. 22,08,606/-, depending upon the satisfaction of the Defendant with respect to a transaction of which the Surveyor could not give a final opinion. The survey report is dated 3rd March, 1996. The plaintiff, the facts show was fully aware of the same. It appears that there were negotiations between the parties thereafter. The plaintiff had also taken legal counsel prior to the receipt of Rs. 7,11,237, as would be borne out from the issuance of the legal notice Ex. P-3 supra dated 25th May, 1996. The plaintiff in the said legal notice objected to the deduction of Rs. 3,23,241/- on account of salvage. The Defendant vide Ex. P-5 dated 15th July, 1996 informed the plaintiff of the settlement for Rs. 711,237/- in full and final settlement. There is nothing on the record to show that the plaintiff protested to the same. On the contrary, Ex. DW 1/14 dated 22nd August, 1996 show that the plaintiff had after 15th July, 1996 maintained a stoic silence leading to the issuance of the reminder. In spite of the said reminder also, there is not a single protest letter from the plaintiff for the next more than 2 months. Thereafter, as aforesaid, under cover vide DW 1/16 dated 4th October, 1996 request for the release of cheque for Rs. 7,11,237/- was made and the cheque collected on the same date and encashed immediately thereafter. The plaintiff has failed to prove the case set up by it of having protested on the next day i.e. 5th October, 1996. The failure of the plaintiff to prove the letter dated 5th October, 1996 also shows the falsity of the case set up by the plaintiff. The plaintiff filed the case after more than one year of having accepted the payment in full settlement. The only witness of plaintiff in cross-examination stated he

could not recollect whether he had met officers of Defendant between July 1996 and 4th October, 1996. Thus, there could be no occasion of plaintiff protesting against Rs. 7,11,237/- offered by the Defendant in July, 1996.

17. The conduct of the plaintiff shows that the allegations made in the plaint of coercion etc. are an afterthought. The plaintiff is found to be lying on the plea of the Defendant having written full and final settlement on the discharge vouchers after getting the same signed from the plaintiff. Ex. P-6 filed by the plaintiff as well as Ex. DW 1/17 proved by Defendant, both have full and final settlement/discharge/satisfaction printed and which could not have been introduced after admitted signatures of plaintiff. The witness of the plaintiff has also not been able to demonstrate any hardship owing to which the plaintiff was compelled to accept the said payment. On the contrary, the failure of the plaintiff to collect the cheques immediately after 15th July, 1996 and the action of having collected the cheque only on 4th October, 1996 shows that the plaintiff was under no pressure or hardship. No debts were disclosed which had to be immediately settled with the said payment. In the circumstances, the present is not a case where the plaintiff should be relieved of the written documents. Ordinarily under Sections 91 and 92 of the Indian Evidence Act, a written document is the sole repository of the transaction between the parties. However, the courts have on special circumstances being established, relieved the parties of the written document. However, no such circumstances are found to exist in the present case. There is no whisper of protest from the plaintiff prior to the institution of the suit. The averments in the plaint are drafted by lawyers steeped in law but unless substantiated by evidence on oath, no credence can be given thereto. The plaintiff on the contrary, after deliberation is found to have voluntarily and unequivocally accepted the payment of Rs. 7,11,237/- in full and final settlement. It is significant that the plaintiff, prior to approaching the Defendant for the cheque for the said amount also got the receipts of full and final payment signed from the Bank. The time lag of more than three months between the date when the payment was offered by the Defendant and when finally accepted by the plaintiff, also shows that the plaintiff was in no such hurry to receive the payment of Rs. 7,11,237/- at least. I thus, find that the payment of Rs. 7,11,237/- was received by the plaintiff in full and final settlement of the claim and without any protest and without any coercion and the plaintiff is also not found to be under any pressure to receive the said payment at least. The plaintiff after one year of so receiving the payment appears to have changed his/her mind and instituted the present suit. There is no evidence of the plaintiff, after receiving intimation from Defendant on 15th July, 1996 of Defendant offering Rs. 7,11,237/- in full and final settlement, having protested against the same. There is no evidence of plaintiff having protested at the time of receiving the payment.

The Defendant had offered Rs. 7,11,237/- in full and final payment which offer was unequivocally accepted by plaintiff and plaintiff now cannot be permitted to resile and to the detriment of the Defendant. Issue No. 3 is decided in favour of the Defendant and against the plaintiff. Re: Issue No. 4:

(Whether the plaintiff is entitled to the amount claimed in the suit or any other amount?)

18. The senior counsel for the plaintiff admitted that the plaintiff had before this Court not proved the loss of Rs. 32,28,530/- for the balance whereof the suit is filed before this court. The emphasis however was that the Surveyors appointed by the Defendant u/s 64 UM (2) of the Insurance Act had found the loss of the plaintiff to be of Rs. 32,01,956/- and the deductions made therefrom of Rs. 1,60,098/- towards dead stocks and of Rs. 4,78,594/- towards value of stocks lying on the rooftop were not correct and the plaintiff was thus entitled to the amount. The counsel for the Defendant on the contrary relied upon letter dated 7th April, 1996 of the Surveyor to the Defendant proved as Ex. DW 1/9 (collectively) whereby the Surveyors had recommended payment of Rs. 7,11,237/-

19. There being no independent evidence of the plaintiff, the questions which arise for consideration are:

(i) Whether the Survey Report is binding on the insurance company and the insurance company is bound to pay in accordance therewith?

(ii) What does not Survey Report recommend in the present case?

As far as the legal position is concerned, in my opinion, the same admits of no controversy in view of the proviso to Section 64UM (2) and which is as under:

Section 64 UM (2)

No claim in respect of a loss which has occurred in India and requiring to be paid or settled in Indian equal to or exceeding twenty thousand rupees in value on any policy of insurance, arising or intimated to an insurer at any time after the expiry of a period of one year from the commencement of the Insurance (Amendment) Act, 1968, shall, unless otherwise directed by the Authority, be admitted for payment or settled by the insurer unless he has obtained a report, on the loss that has ; occurred, from a person who holds a licence issued under this section to act as a surveyor or loss assessor (hereafter referred to as "approved surveyor or loss assessor"):

Provided that nothing in this sub-section shall be deemed to take away or abridge the right of the insurer to pay or settle any claim at any amount different from the amount assessed by the approved surveyor or loss assessor.

20. It is thus clear that the insurer though bound to appoint a Surveyor is free to pay more or less than recommended by the Surveyor. The Surveyor, it appears is a fact finding authority but the insurance company has the final say in the matter and is entitled to draw its own inferences from the Survey Report. The senior counsel for the plaintiff has relied upon *United India Insurance Co. Ltd. v. Roshan Lal Oil Mills Ltd.*, (2000) 10 SCC 19 to contend that the insurer is bound by the Survey Report. I, however, do not find the Apex court to have laid down any such

proposition. All that the Apex court did in that case was to remand the matter to the National Commission for the reason of the National Commission having not considered the Survey Report. The Apex court laid down that no decision could be given by the National Commission without adverting to the factors enumerated therein for rejecting the claim. The counsel for the Defendant has also relied upon a number of decisions of the National Commission but the legal principle which can be deciphered therefrom also is only to the extent that Survey Report is an important piece of evidence. No judgment has been brought to my notice in which it has been held that the Survey Report is decisive.

21. In my view, the Survey Report even otherwise cannot be made decisive. If the Survey Report was to be decisive, there would be no possibility of disputes as to the insurance claim coming before the courts and other forums for adjudication. If that had been the intent, the Surveyor would have been anointed as a referee within the meaning of Section 20 of the Indian Evidence Act whose word would be binding as an admission on the parties. However, that is not so.

22. The only legal conclusion therefore is that even if the Survey Report is in favour of the claimant and if the insurer has differed from the same, the claimant would still have to establish its claim which was accepted by the Surveyor before the court. Of course, in such a situation depending upon the facts, the onus may shift. However, if the facts are as such that the claim can be established by evidence which in the domain of the claimant only, the claimant only will have to satisfy the court of the claim and cannot rely on the doctrine that the onus is shifted. Of course, if the facts are such that the insurer is repudiating, the Survey Report for reasons not factual, the onus would be on the insurer to satisfy the court that its repudiation is correct.

23. Coming to the facts of the present case, it is found that the value of the stocks at the time of the incident of fire was dependent upon sale of some of the stocks earlier claimed by the claimant at the time of making an earlier insurance claim and which sale, the claimant subsequently represented had not fructified. Thus, the Surveyors found that if stocks worth Rs. 15,26,286/- had not been disposed of by the plaintiff, then the value of the stocks in the premises at the time of fire was Rs. 32,01,956/- and if had been disposed of as earlier claimed by the plaintiff, then the value of the stocks at the time of fire was Rs. 10,36,978/-.

24. The legal position as found above is that the plaintiff has to establish its claims before the court. The plaintiff has not led any evidence whatsoever before the court of the stocks lying in the premises at the time of the incident. The said evidence could have been in power and possession of the plaintiff only and thus the facts are not such where the onus had shifted on the Defendant.

25. The senior counsel for the plaintiff argued that the Surveyor has in para 11 of the Report stated that the version of the plaintiff that the deal of sale of stocks had not materialized seemed to be correct because the raid at the premises of

the plaintiff by the Excise Authorities on 30th March, 1993 as per inventory prepared wherein, the sale had not been effected. However, the same Surveyor has in the letter dated 7th April, 1996 supra and for the reasons stated therein stated that it was unlikely that stocks of such value were lying in the premises. The Surveyor has in the said letter opined that considering the space available at the premises and the volume which stocks of such value would occupy, it could not be believed that stocks of such large value were lying in the premises. The Surveyor also expressed doubt as to why stocks of such large value were kept for a long period and that too in the open, specially considering nature thereof.

26. The senior counsel for the plaintiff faced with the said letter contended that the said letter had not been proved by the Surveyor when examined by the Defendant and as such there was no need for the plaintiff to cross-examine the Surveyor with respect to what has been opined in the said letter. I am unable to accept the said contention of the senior counsel for the plaintiff. Once the letter dated 7th April, 1996 had been admitted into evidence and further since the plaintiff without leading any evidence before the court of its claims is relying only on the Surveyor's report only, it was incumbent upon the plaintiff to cross-examine the Surveyor with respect to the reasoning given in the letter dated 7th April, 1996. The Surveyors in the Report, did not give any categorical finding of the plaintiff being entitled to the claim of approximately Rs. 32 lacs. The Surveyors after placing the facts left it for the decision of the Defendant. The Defendant decided, and which it under the law as aforesaid was entitled to decide, that a case of claim of Rs. 7,11,237/- only was made out. If the plaintiff deferred from the said decision of the Defendant, it ought to have proved before the court basis for a higher claim. The insurer u/s 64 UM of the Insurance Act is entitled to seek clarifications from the Surveyor appointed by it. The letter dated 7th April, 1996 is such a clarification given by the Surveyor and, thus forms part and parcel of the Report of the Surveyor and the plaintiff cannot pick and choose some part of the Report of the Surveyor and reject the other. I am inclined to take the said view also for the reason that I find the plaintiff to have not followed the principle of *ubberima fides* in the present case. Not only has the plaintiff been found to have lied with respect to the letter dated 5th October, 1996 but a perusal of the Survey Report relied upon by the plaintiff also shows that the plaintiff did not make all the records available to the Surveyors. It is recorded in para 10 of the Survey Report that the purchase records were not made available, that the stocks which the plaintiff claimed to be existing at the time of the incident had not been shown in the income tax records of the plaintiff for the previous years; of course the plaintiff gave explanation for the same but the plaintiff ought to have placed at the disposal of and before the court all the said material from which this Court could have deciphered whether the stocks on the basis whereof loss is claimed existed or not. The affidavit of the only witness of the plaintiff in this regard is absolutely quite on the subject. Considering the nature of the stocks i.e. cork which is highly inflammable, it is difficult to believe that the plaintiff would retain the stocks for such long periods or store the same

in the open on the terrace.

27. The next objection of the counsel for the plaintiff is with respect to exclusion by the Surveyors of the value of the stocks lying at the rooftop. The reason in the survey report given, therefor, is of the said stocks being not covered under the scope of the policy. The plaintiff, as aforesaid, did not even bother to prove the policy. It was only argued orally that the stocks lying on the roof could not be excluded. In my opinion, such arguments cannot be raised without reference to the policy. Considering the nature of the stocks i.e. the cork which is highly inflammable, it is possible for the insurer to insist that the stocks insured should be kept in the covered space only and be not kept in open. The plaintiff claims its goods to be lying in open on the terrace for over a period of three years. Considering the various festivities in the cities during which there is a display of fireworks in all localities, it is highly unlikely that such large stocks would be kept on the terrace. The insurance policy though not proved also shows that it was one of the conditions of insurance that if the nature of occupation of or other circumstances affecting the building insured or containing the insured property be changed in such a way as to increase the risk of loss or damage by insured, the insurance would cease. The insurance was of the goods lying in the premises and cannot extend to goods lying on the terrace of the premises. Open terrace of the premises cannot form part of the premises.

28. Ex. D-1 being the proposal of the plaintiff for insurance also shows that the plaintiff while obtaining the insurance described the premises where the goods sought to be insured were to be stored, to be of 1st class construction having opening of a front door only and which can refer to a closed premises only. Thus, no fault can be found with the Surveyor excluding the goods lying on the open terrace.

29. The documents filed by the Defendant also show that the Surveyors had to repeatedly write to the plaintiff to produce its records. In this regard, letter dated 16th June, 1993 has been proved as Ex. D-8, and another letter dated 16th June, 1993, letter dated 18th June, 1993, 19th June, 1993, 22nd June, 1993, 24th June, 1993, 26th June, 1993, 23rd July, 1993, 28th October, 1993, 24th January, 1994, 4th February, 1994, 18th March, 1994, 27th October, 1994 have all been collectively proved as Ex. DW 1/9 and all of which show a non-cooperative attitude of the plaintiff and the reluctance of the plaintiff to produce the records for the Surveyors. The Defendant has also proved Minutes of the meeting held on 25th April, 1995 and 10th May, 1995 as Ex. DW 1/10 and Ex. DW 1/11 and in which also it is recorded that the plaintiff had agreed to produce the documents. This shows that the plaintiff even after 2 years after the incident had not produced its records for the Surveyor.

30.1 thus find the plaintiff to have failed to prove before the court that it suffered any loss more than for which the plaintiff has already been paid by the Defendant. Without the plaintiff having proved any loss which was insured, the plaintiff cannot be found entitled to the amount claimed or any other amount.

Issue No. 4 is thus decided in favour of the Defendant and against the plaintiff.

Re: Issue No. 5:

(Whether the plaintiff is entitled to any interest, if so, at what rate and for what period?)

31. The plaintiff having not been found entitled to any amount, the question of the plaintiff being entitled to any interest does not arise. However, I may notice that the issues were framed on 25th August, 1999 and the trial dates were fixed for 11th and 12th February, 2003. However, as on 9th November, 2001 also, the plaintiff had not filed any list of witnesses. The plaintiff failed to do so in spite of being given time by the Registrar and further time was given to the plaintiff on 30th October, 2002. The plaintiff still did not take any steps and when the matter came up on 11th February, 1993, the plaintiff, subject to costs was permitted to file affidavits within 6 weeks. The plaintiff yet again failed to file any evidence as noted in the order dated 12th January, 2005. Finally on 22nd March, 2005, it was again recorded that the plaintiff had till then also not filed any list of witnesses or affidavits. The plaintiff has thus been guilty of delaying the suit and even if the plaintiff had been entitled to any amount, the plaintiff would not have been entitled to pendente lite interest for the period for which the plaintiff itself delayed the suit.

Re: Issue No. 6: (Relief)

32. In view of my findings on Issues No. 1 to 5 above, the plaintiff is not entitled to any relief and the suit of the plaintiff is liable to be dismissed. I have also found the plaintiff to have set up a false case with respect to the letter dated 5th October, 1996 and of the Defendant having introduced "full and final payment" in the receipt and discharge voucher. Not only so, the plaintiff failed to lead any evidence on loss before the court. In the circumstances, the only conclusion is that the plaintiff approached the court with no case whatsoever. I am, therefore, constrained to, while dismissing the suit burden the plaintiff with costs of Rs. 50,000/- payable to the Defendant within 8 weeks of today.

Decree sheet be drawn up accordingly.