

**(2012) 05 DEL CK 0032**

**In the Delhi High Court**

**Case No :** Regular First Appeal (OS) 16 of 2009

Asha Soni

APPELLANT

Vs

The New India Assurance Co. Ltd.

RESPONDENT

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**Date of Decision :** 09-05-2012

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 8  
Contract Act, 1872 — Section 15

**Citation :** (2012) 05 DEL CK 0032

**Hon'ble Judges :** Siddharth Mridul, J; Pradeep Nandrajog, J

**Bench :** Division Bench

**Advocate :** Harish Malhotra, instructed by Mr. R.K. Modi, for the Appellant; Niraj Singh, for the Respondent

**Final Decision :** Dismissed

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## Judgement

Pradeep Nandrajog, J.—Carrying on business as the sole proprietor of the firm M/s. New Gayatri Cork Industries, vide Ex.DW-1/6, being the cover note, appellant obtained an insurance cover pursuant to her proposal Ex.D-2, assuring her to be indemnified loss or damage to the raw product and finished goods at her factory premises bearing No.3, DLF Industrial Area, Moti Nagar, New Delhi-110015. It is not in dispute that Ex.DW-1/6, the fire temporary cover note, records that the insurance cover in sum of Rs. 32,00,000/-pertains to the goods within the factory premises (not in the open) and the period of the cover is June 07, 1993 till June 06, 1994. Unfortunately, neither party has bothered to prove the policy which was subsequently issued by the insurance company.

2. A fire took place on the intervening night of June 12, 1993 and June 13, 1993 in the factory premises of the appellant i.e. within six days and pertaining to which, vide Ex.DW-1/8, on July 08, 1993 i.e. after a delay of 21 days of the incident, appellant lodged a claim informing that broken cork in sum of Rs. 32,16,909/-and finished goods valued at Rs. 2,18,276/-were destroyed at the fire i.e. the total loss was Rs. 34,35,185/-. Prior thereto, since the stock was

hypothecated with Punjab National Bank which had extended a credit facility to the appellant, on June 14, 1993, vide Ex.DW-1/7, the Bank Manager informed the Insurance Company of the fire and requested that a surveyor be appointed to assess the loss. It is this request made by the bank, which triggered the investigation by the surveyor appointed by the insurance company who had to write numerous letters on various dates commencing from June 16, 1993 till June 26, 1993, being Ex.D-8, Ex.DW-1/9 and Ex.DW-1/16, seeking co-operation from the appellant, and since none was forthcoming the Branch Manager of the respondent was constrained to send a letter Ex.D-10 dated July 23, 1993 requiring the appellant to co-operate with the surveyor.

3. What happened thereafter till the surveyor submitted the report Ex.P-2 after more than two years and nine months i.e. on March 03, 1996 is not clear for the reason parties have not filed the requisite documents, probably for the reason the respondent did not have the letters/correspondence exchanged between the appellant and the surveyor, and for reasons best known to the appellant, she has chosen not to file them; the only evidence we have of correspondence being exchanged between the appellant and the surveyor is Ex.DW-1/2, a notice served upon the appellant under Order XII Rule 8 of the CPC requiring her to produce the 14 letters listed therein. Ex.DW-1/2 would reveal that the respondent called upon the appellant to produce 6 letters written by the surveyor to the appellant between June 16, 1993 and March 18, 1994.

4. It so happened that a day prior to the closure of the financial year ending on March 31, 1993, Excise Department had raided the factory and had seized the books of accounts as also the stock register and at that time, whatever goods were found at the site i.e. the factory were inventoried by the officer of the Excise Department who headed the raiding party and in respect of which the appellant disclosed that the value of the closing stock was Rs. 44,37,792/-. It may be noted that the inventory prepared did not record as to which goods were stored within the factory building and how much were kept on the roof or in the courtyard outside the factory building.

5. Since the fire took place on the intervening night of June 12, 1993 and June 13, 1993, it had to be ascertained as to how much raw material was purchased after April 01, 1993 and how much finished product was sold from said date till the fire took place, and for which, the best evidence would be the stock register and the books of accounts maintained by the appellant.

6. She never volunteered to produce the same and her attitude towards the surveyor was non-cooperative and for which the evidence are the facts noted by us in paragraph 4 above. The surveyor could ultimately manage to submit the report Ex.DW-2/1 dated March 03, 1996 after two years and nine months of the incident. In the introductory paragraph, the report highlights, the difficulties faced by the surveyor. It is highlighted that for reasons best known to the assured, certain information sought was not furnished. It is recorded in the report that the factory unit comprises three rooms having RCC roof. It stands

recorded that the assured imports cork waste from Portugal in fully pressed bits which are manually opened and then grinded in Mill to obtain granules. Dust is segregated by sieving process and the granules of desired size are mixed with chemicals and additives and pressed into iron modules of size 900 X 150 mm in form of blocks. The moulds are heated in an oven to form bricks which are then cut into desired thickness. Recording that an accidental fire took place in the factory at about 02.30 hours in the intervening night of 12th and 13th June 1993, it stands recorded that there was extensive damage to the building and the stocks. Noting that the insurance cover relates only to the stocks, the report was confined to the loss of stocks only. Listing, in Annexure-C to the report, the physical inventory of the damaged and undamaged stock, the report opines that initially the insured claim raw cork valued at Rs. 32,16,909/-and finished goods valued at Rs. 2,18,276/-but later on reduced the value to broken raw cork weighing 42,789 Kg. and valued the same at Rs. 31,65,530/-and finished goods valued at Rs. 63,000/-. On the subject of the value of the risk, in paragraph 10 of the report, it was recorded: (Quote) : "Since the purchase records were not available, our scrutiny of the duplicate records did not prove of much help. Only a few months back the Excise Department released the entire records seized (sic. should read "seized") by them.? With respect to the previous record, the data was tabulated as under:-

#### FINANCIAL YEAR

#### G.P. RATE ON SALES

#### CLOSING STOCK AT THE END OF THE FINANCIAL YEAR AS PER THE BALANCE SHEET IN RS.

#### STOCK DECLARED TO THE BANK

31.03.1990

13%

15,26,286.00

15,26,286.00

31.03.1991

12.91%

52,26,493.49

39,93,096.00

31.03.1992

12.90%

45,52,701.94

28,90,509.00

31.03.1993

7.50%

44,37,792.00

44,37,792.00

31.05.1993

(Return not filed with Income Tax)

34,35,185.00

7. From the data, the report highlighted a diminishing G.P. rate on sales. The report thereafter records a difference in the closing stocks as per the record and as informed to the bank.

8. Highlighting that the written record was not bringing out the picture with clarity, the report records that when the Excise Department raided the premises and inventoried the stock, the value would come to Rs. 50,71,985/-.

9. The report highlights that on May 15, 1989, a sister concern by the name M/s. Gayatri Cork Products (firm of the appellant being M/s. New Gayatri Products) had reported an incident of fire and loss of insured goods, the report terminates by suggesting that there being no clarity of stocks worth Rs. 15,26,286/- being disposed of after the fire, the Insurance Company could pay either Rs. 22,11,106/- if it treated no sales being effected or pay Rs. 7,13,737/- if it opined that sales were effected.

10. We would be failing not to mention that the report is most unclear as to where from the issue of stocks valued at Rs. 15,26,286/- being sold or unsold originated.

11. The matter was clarified by the surveyor as per Ex.DW-1/9 dated April 07, 1996 in which it was informed to the Insurance Company as under:

Ref. No. Fire/8884/561/96 Date: 07.04.1996

New India Assurance Co. Ltd.,

Divisional Office,

Hemkunt House,

Rajendra Place,

New Delhi-110008.

Dear Sirs,

Re: Fire loss under Policy No. 1131100104385 A/c. M/s. New Gayatri Cork

Industries, Moti Bagh, New Delhi; Loss dated Intervening night of 12/13th June 1993.

We invite underwriter's attention towards 111 para of our joint letter bearing Re.No: Fire/8882/561//96 dated 06.04.1996, and as stated we give below our observations/facts and findings made during our initial visits to the insured's factory as follows:-

Immediately after our appointment, we had visited the site on various occasions, examined nature and extent of damages in details and finally inventorised the available stocks. In this regards we shall submit as follows:

1. The fire was confined basically in the 2 rooms out of the total 3 rooms of Insured's factory. This aspect has been duly confirmed in the fire report.
2. We did not receive cooperation from the Insured at initial stages to inventory the available stocks after the incident. Finally after lot of correspondence and initiation, the sound as well as damaged identifiable stocks in both the affected rooms were quantified and inventorised. 3. However it was neither physically possible nor feasible to weigh loose stock of cork scrap/waste in powder/granular form lying in heap form on the roof top, therefore the same were ascertained on volumetric analysis basis, as valued in enclosed schedule marked as Annexure-"F", attached with the report amounting to Rs.4,78,594/-.
4. However on perusal of the excise seizure memo as well as the excise order, it has been observed that at the time of raid by excise authorities on 30.03.1993, physical inventory of stocks were taken. From the above documents it is ascertained that a large quantity of 40,000 Kgs. Of cork granulars were lying at the roof top. Further the exact location of another quantity of loose cork waste/scrap of 10,000 Kgs. could not be specifically ascertained but considering the space available the said stocks is also presumed to be stored at roof top in open. The said stocks is not found covered under the involved policy.
5. We had also sent fax messages to the two suppliers of Cork waste in Portugal, as per copy enclosed and received their response. After calculating the volume required for storage of 50,000 kgs. The space required varies between 655 mtr.cu to 825 mtr. cu. which is very large volume and is not available neither at roof top nor in the three rooms of Insured's factory. Further it is also not understandable why such large stock of cork bales were broken and stored for a long period in open, which required three times space when stored in bale form.
6. We also inspected the above discussed stocks lying in the roof top and agree with the excise enforcement team that the same were waste and scrap of Insured's process. We have learnt from the supplier's that the yield obtained for cork granulars after grinding is from 75 to 90% depending upon the product quality. Insured however had stated that there is no waste/scrap in his process which in any case is not true.

In view of the above situation, we confirm that the actual loss sustained by the party as worked out in second alternative, amounting to Rs.7,11,237/-i.e. considering that the stocks worth of Rs.15,28,286/-were disposed off by the Insured on 31.03.1990, appeared to be in line with the actual loss sustained by the Insured.

The above facts are being submitted to apprise underwriters to take appropriate decision, whilst settling the loss.

Thanking you,

Yours faithfully,

For ADARSH ASSOCIATES

(A.K. GUPTA)

SURVEYOR

12. Ex.DW-1/9 gives us a good clue. There was no space available to stock such a large quantity of raw and finished cork product within the rooms comprising the factory.

13. On May 25, 1996 vide Ex.P-3, the appellant called upon the Insurance Company to pay the claim in sum of Rs. 32,28,530/-to which the Insurance Company replied vide Ex.P-5 on July 15, 1996, informing that claim had been settled in sum of Rs. 7,11,237/-and enclosed therewith a printed voucher Ex.P-6 calling upon the appellant to sign the same so that the Insurance Company could release the cheque to her. Ex.P-6 has a printed term that the recipient receives the money in full and final settlement of the claim. The Insurance Company did not receive Ex.P-6 duly executed from the appellant and thus sent a reminder Ex.DW-1/14 on August 22, 1996 requesting the appellant to execute and send Ex.P-6 to enable the Insurance Company to release the cheque in sum of Rs. 7,11,237/-to her and this letter we find has been sent under Regd. A.D. Post and was duly received by the appellant as per A.D. Card Ex.DW-1/15. There being no response from the appellant, the Insurance Company wrote letter dated October 04, 1996, Ex.DW-1/16, and enclosed therewith another proforma of the receipt Ex.P-6. The appellant executed Ex.P-6 and received a cheque in sum of Rs. 7,11,237/-and thereafter raised a dispute of having been coerced into executing Ex.P-6 by the officers of the Insurance Company.

14. Now, who coerced the appellant, has not been pleaded in the plaint. What was the act constituting coercion has not been pleaded. Suffice would it be to state that as per Section 15 of the Indian Contract Act, 1872 coercion would be committing or threatening to commit an act forbidden by the Indian Penal Act or the unlawful detaining or threatening to detain any property to the prejudice of any person whatever with the intention of causing the person to enter into an agreement. There are just not material particulars pleaded in the plaint wherefrom coercion can be inferred. Sh.Harish Malhotra, learned senior counsel

for the appellant conceded that what was intended to be conveyed was "undue influence", for the reason the relationship between the parties was of a kind where the Insurance Company was in a position to dominate the will of the appellant.

15. Learned senior counsel drew our attention to the cross-examination of DW-3, the Senior Divisional Manager of the Insurance Company, wherein he stated that settlement cheques are issued, as a matter of practice after the insured consents to accept the same in full and final settlement of the claim. Therefrom, it was urged, that it is apparent that an undue pressure was generated upon the appellant of getting nothing or the amount which was offered by the Insurance Company i.e. she was left with a Hobson's choice.

16. The debate before the learned Single Judge, whether the receipt Ex.P-6 was sent to the appellant for the second time under cover of the letter dated October 04, 1996 was not canvassed before us, and we would simply note that the said debate before the learned Single Judge was a useless debate for the reason it was not the case of the appellant that when she was in the office of the Insurance Company she was compelled to execute Ex.P-6. If she had so pleaded, one could have understood a debate on the subject.

17. Now, learned senior counsel had argued on the admission that Ex.P-6 was signed by the appellant at her office and no officer of the Insurance Company was present. The issue was: Whether there was an undue influence upon the appellant to execute Ex.P-6 which had a pre-recorded condition of the acceptance being full and final. The learned Single Judge has held against the appellant.

18. Learned senior counsel for the appellant referred to the decision reported as Chairman and M.D., N.T.P.C. Ltd. Vs. Reshmi Constructions, Builders and Contractors, to bring home the point that such kind of standard forms of receipts have been opined to be not voluntarily executed receipts.

19. It is normal for parties to try and resolve disputes by negotiations; and this is always welcome by a Court. On the issue of accord and satisfaction being the result of undue pressure, though relating to a dispute being referred to an arbitrator, in the context of whether an arbitrable dispute existed which was capable of being referred to an arbitrator, apart from the decision in Reshmi Construction's case (supra), the issue was discussed by the Supreme Court in five prior decisions reported as Union of India (UOI) and Another Vs. L.K. Ahuja and Co., M/s B.K.Ramaiah & Co. vs. Chairman & Managing Director, NTPC, 1995 (Suppl) 3 SCC 324 Union of India Vs. M/s. Popular Builders, Calcutta, Jayesh Engineering Works v. New India Assurance Co. Ltd., Jayesh Engineering Works vs. New India Assurance Com. Ltd.

20. The ratio of law which can be culled out from the aforesaid decisions has been pithily stated by the Supreme Court in Reshmi Construction's case (supra) by highlighting, in para 39(ii), that where there is evidence of parties negotiating

prior to a settlement taking place resulting in a full and final discharge voucher/ receipt being executed, later on the party executing the receipt cannot turn around and reprobate to claim that the accord was not voluntary.

21. The learned Single Judge has opined that the appellant voluntarily executed Ex.P-6, a finding with which we agree for the reason after the surveyor submitted the report on March 03, 1996, the parties exchanged not only correspondence but even legal notice and the receipt was finally executed in October 1996. That the witness of the Insurance Company stated that it was a practice for the Insurance Company to obtain signatures on pre-receipts is thus neither here nor there.

22. Our apology for noting in detail the contents of the surveyor's report and the subsequent clarification; we have done so to bring home the point that there was a serious doubt cast upon the claim of the appellant to the quantity of unsold stock lying at the premises. Therefrom, one can gather that a serious debate took place in the mind of the appellant. She obviously pondered over the matter and weighing the option to insist as per her stand and litigate even to receive Rs. 7,11,237/-or accept the same. Having taken a call to accept the same; having pocketed the money thereafter, she was ill-advised to sue by way of a litigation which is speculative. We highlight appellant's conduct of not being cooperative with the surveyor, resulting in the surveyor report being submitted after two years and nine months. Her non-cooperative attitude would be a good enough justification for anybody to raise his/her eyebrows. The clarificatory letter Ex.DW-1/9 written by the surveyor indicates the hollowness of the claim of the appellant and lastly we cannot lose sight of the fact that a similar named sister concern of the appellant had raised a claim for loss due to fire, a year prior.

23. The issue of the claim as passed being restricted to the goods only inside the factory premises was sought to be urged as a wrong act. Unfortunately, neither party has produced the policy issued and the only document we have before us is the cover note which admittedly limits the liability of the Insurance Company to underwrite the loss only relating to goods stored inside the premises and not outside i.e. in the courtyard or the roof. It is in this context that Ex.DW-1/9 assumes importance, because the quantity of the goods claimed by the appellant to have been destroyed due to the fire could not be physically stored inside the factory premises. We concur with the view taken by the learned Single Judge who has diligently discussed all aspects of the matter and thus we dismiss the appeal but refrain from imposing costs.