
(2014) 12 CAL CK 0050
In the Calcutta High Court
Case No : C.S. No. 577 of 1987

Hindusthan Motors Ltd.

APPELLANT

Vs

National Insurance Company Limited

RESPONDENT

Date of Decision : 22-12-2014

Acts Referred:

Evidence Act, 1872 — Section 102, 60, 61, 62, 63
Insurance Act, 1938 — Section 64VB, 64VB(1), 64VB(2)
Registration Act, 1908 — Section 49
Stamp Act, 1899 — Section 35, 36

Citation : (2014) 12 CAL CK 0050

Hon'ble Judges : Debangsu Basak, J

Bench : Single Bench

Advocate : Mr. Utpal Bose, Sr. Advocate, Ravi Kapur, R. Dutt, Debraj Bhattacharya and Jeevan Ballav Panda, Advocate for the Appellant; Pradip Kr. Ghosh, Moloy Kr. Ghosh, Sr. Advocates, Swapn Kr. Das, A. Gangopadhyay, S. Dasgupta and S.K. Das, Advocate for the Respondent

Judgement

Debangsu Basak, J.—The plaintiff claims a money decree against the defendant nos. 1 and 2 on the basis of a contract of insurance.

2. According to the plaintiff, it had entered into two several contracts of insurance both dated April 1, 1986 with the defendant nos. 1 and 2 whereby and whereunder the plaintiff was indemnified for loss and damages caused, inter alia, by fire to all sorts of vehicles, engines, components, parts, raw materials, accessories lying in or about the factory of the plaintiff. Both the defendants issued interim protection notes on April 30, 1986 with effect on and from April 1, 1986 and valid up to April 1, 1987. Three several interim protection notes were issued in favour of the plaintiff. The premia in respect of the insurance contract was secured by five several bank guarantees issued on behalf of the plaintiff. The plaintiff caused such bank guarantees to be extended till March 31, 1987. According to the plaintiff it paid the premia under the contract of insurance by five several cheques. On September 30, 1986 the defendant no. 1 invoked the

bank guarantees and received the premia in respect of the contract of insurance. According to the plaintiff on June 29, 1986 a fire broke out at a portion of the factory of the plaintiff causing severe and extensive damage to various items of the insured assets resulting in loss and damages covered by the contract of insurance. The plaintiff informed the defendant no. 1 as to such incident by a letter dated June 29, 1986. By a letter dated July 2, 1986 the defendant no. 1 informed the plaintiff about the appointment of Surveyors. By a letter dated July 10, 1986 the plaintiff requested the defendant no. 1 to allow the plaintiff time to prepare a detailed estimate. Such extension of time was granted by the defendant no. 1 by its letter dated July 21, 1986. Under cover of letters dated July 27, 1986 and August 11, 1986 the plaintiff submitted its detailed claim amounting to Rs. 6,13,82,653/-. The plaintiff claims realization of a sum of Rs. 6,13,82,653/- from the defendants along with interest thereon.

3. The defendant no. 1 has filed written statement and is contesting the instant suit. The defendant no. 1 claims that, the fire occurred at a place which was not covered under the contract of insurance. The defendant denied its liability to pay any sum to the plaintiff.

4. The issues in the suit were settled by the Order dated July 26, 2010 and are as follows:-

"1. Whether as on the date of the incident of fire, i.e. on 29/6/1986 the subject insurance policy/Interim Protection Note No. 34/65, 34/68 and 34/67 was valid?

2. Whether the Bank Guarantees issued by the Bank of India, 119, Park Street, Kolkata-700016 (bearing Nos. G/5/50 to G/5/54) were issued for securing the insurance premia against the policies taken by the plaintiff from the 1st defendant?

3. Is the 1st defendant liable to pay to the plaintiff as sum of Rs. 4,34,78,287/- or any other sum in respect of loss relating to stock of goods under the contract of insurance covered under the contract of insurance covered under the interim protection note dated 30 April 1986 bearing No. 34/67 as stated in paragraph 21(a) of the plaint?

4. Is the 1st defendant liable to pay to the plaintiff a sum of Rs. 90,31,366/- or any other sum in respect of loss relating to building, machinery, contents under the contract of insurance covered under the interim protection note dated 30 April 1986 bearing No. 34/65 as stated in paragraph 21(b) of the plaint?

5. Is the 1st defendant liable to pay to the plaintiff a sum of Rs. 88,73,000/- or any other sum in respect of its claim on account of loss of profits and standing charges relating to stock of goods under the contract of insurance covered under the interim protection note dated 30 April 1986 bearing No. 34/68 as stated in paragraph 21(c) of the plaint?

6. Are the 1st and 2nd defendants liable either jointly or severally to pay the aforesaid amount or any portion thereof to the plaintiff?

7. To what other relief, if any, is the plaintiff entitled?"

5. The plaintiff has produced one witness in support of its case. The defendant no. 1 relies upon one witness.

6. The plaintiff is a manufacturer of vehicles. It has a factory at Hindmotor, Hooghly. The plaintiff approached the defendant nos. 1 and 2 for an insurance covering loss and damages caused by fire to finish vehicles, diesel engines, components, parts and other items. The defendant nos. 1 and 2 issued interim protection notes dated April 30, 1986 with effect on and from April 1, 1986 and valid up to April 1, 1987. In consideration of such interim protection notes, the plaintiff caused issuance of five several bank guarantees in favour of the defendant no. 1. On June 29, 1986 a fire broke out at store no. 2 of the plaintiff causing damage to the articles lying thereat. The plaintiff lodged its claim with the defendant nos. 1 and 2 by a letter dated June 29, 1986. The defendant no. 1 informed the plaintiff as to the appointment of a Surveyor by a letter dated July 2, 1986. The plaintiff asked for extension of time to submit the estimate with regard to the damages by a letter dated July 10, 1986. The defendant no. 1 by a letter dated July 21, 1986 allowed extension of time. The plaintiff paid the defendant no. 1 premia by five several cheques between August 14, 1986 and September 30, 1986. The defendant nos. 1 and 2 did not settle the claim of the plaintiff. Hence, the suit.

7. Mr. Moloy Kr. Ghosh, learned Senior Advocate for the defendant no. 1 submits that, he would advance arguments on the basis of three grounds rather than on the basis of the issues framed. He submits that, the three grounds of defence that he urges will address all the issues raised in the suit.

8. The first of the grounds urged by Mr. Ghosh is the General Exemption mentioned in Article 47 of Schedule-I of the Indian Stamp Act, 1899 as applicable in the State of West Bengal. He points out that, the three interim protection notes being Exhibit "C", "D" and

9. "E" do not bear the stamp prescribed by the Indian Stamp Act, 1899 for the policies of insurance. He submits that, he is not objecting to the three documents which have already been marked as exhibits, to be marked and considered as exhibits, in view of Sections 35 and 36 of the Indian Stamp Act, 1899. He is also not taking any point under Section 49 of the Indian Registration Act, 1908. He submits that, the legal effect of an unstamped interim protection note needs to be considered.

10. He contends that, in view of the proviso to General Exemption of Article 47 of Schedule-I of the Indian Stamp Act, 1899, the plaintiff is not entitled to claim anything under the three interim protection notes being Exhibits "C", "D", and "E". In support of this submission, he relies upon All India Reporter R. Ratilal and Co. Vs. National Security Assurance Co. Ltd., . He submits that, he is entitled to raise this objection even though this plea has not been pleaded in the written statement, no issue thereof was framed and no suggestion with regard to this

ground was given to the witness of the plaintiff. He relies upon All India Reporter Seth Badri Prasad and Others Vs. Seth Nagarmal and Others, and submits that, a point of law emerging out of the materials on record can be taken by a party in such circumstances.

11. The second ground of defence urged by Mr. Ghosh is that, the plaintiff did not pay any premia in terms of Section 64VB(2) of the Insurance Act, 1938. According to him, premia in the instant case is an ascertained amount determinable in advance and was required to be paid either by cash or in cheque. Payment by way of a bank guarantee would not constitute payment of premia in view of Section 64VB(2) of the Insurance Act, 1938. In support of such contention he relies upon 103 Company Cases page 1 (Shriram Investments Ltd. v. Oriental Insurance Co. Ltd. & Ors.).

12. The third ground of defence of the defendant no. 1 is that, the contents of the Surveyor Report dated November 17, 1986 being Exhibit "TT" have not been proved adequately by any person. He points out that, Exhibit "TT" was produced pursuant to a subpoena by a person responding to such subpoena. The document produced pursuant to the subpoena was tendered in evidence and was marked as Exhibit "TT". He points out that, no person came to the witness-box to vouch for the veracity of the contents of the Surveyor Report. According to him, the truth of the contents of Exhibit "TT" has not been proved adequately and, therefore, the plaintiff has not established its claim amount. There is no other evidence on record, according to him, to establish the claim of the plaintiff, apart from the Surveyor Report being Exhibit "TT".

13. He refers to Section 60 of the Indian Evidence Act, 1872 and submits that, oral evidence must be direct. He relies upon All India Reporter Om Prakash Berlia and Another Vs. Unit Trust of India and Others, , All India Reporter Bishwanath Rai Vs. Sachhidanand Singh, in support of his contention that the truth of the contents of the document must be proved adequately. He refers to All India Reporter Sait Tarajee Khimchand and Others Vs. Yelamarti Satyam alias Satteyya and Others, and contends that, the mere marking of a document as an exhibit does not dispense with the proof of the contents of such document. According to him, in view of Section 102 of the Indian Evidence Act, 1872 the burden of proof of quantification of damages in the present suit lies on the plaintiff. Since the plaintiff did not adduce adequate evidence in respect thereof, the suit is required to be dismissed.

14. Mr. Utpal Bose, learned Senior Advocate for the plaintiff refers to the plaintiff case and the evidence on record. He contends that, none of the three grounds urged on behalf of the defendant no. 1 has any substance to deny a decree to the plaintiff as prayed for. On the first ground of defence he submits that, the contention on behalf of the defendant no. 1 misconstrues and misinterprets the General Exemption of Article 47 of the Indian Stamp Act, 1899. He submits that, the contention made on behalf of the defendant no. 1 was considered by the minority judgment in the case of R. Ratilal and Company (supra). He points out

that, the point of inadequacy stamp on the document should have been taken at the appropriate stage. This defence was not raised in the pleading. No issue was raised and framed at any time during the witness action and that, such defence was not taken when the documents were marked as exhibits. He refers to Section 36 of the Indian Stamp Act, 1899 and submits that, the interim protection notes being Exhibits "C", "D" and "E" cannot be questioned any longer. He relies upon All India Reporter Javier Chand and Others Vs. Pukhraj Surana, , All India Reporter S. RM. S.T. Narayana Chettiar and Another Vs. The Kaleeswarar Mills Ltd. and Others, , All India Reporter Andi Ambalam Vs. Sevani Ammal, and All India Reporter Nirode Basini Mitra Vs. Sital Chandra Ghatak, in this regard.

15. With regard to the second defence of the defendant no. 1, Mr. Bose submits that, Section 64VB(2) of the Insurance Act, 1938 uses the word "may" which makes it optional for the insurer to assume risks for which the premium may be paid in cash or by cheque. He points out that, the bank guarantees furnished by the plaintiff was valid on the date of the accident. The fact that the defendants did not cross-examine the witness of the plaintiff in this regard is also pointed out. He refers to All India Reporter United India Insurance Co. Ltd. Vs. Murugan alias Krishnan and another, and Deokar Exports Pvt. Ltd. Vs. New India Assurance Company Ltd., and submits that, an insurance company can assume risk before the premium payable in respect thereof is actually received.

16. On the third ground of defence of the defendant no. 1, Mr. Bose for the plaintiff refers to Exhibit "W", "FF", "HH", "MM", "OO" and "SS" and submits that, the Surveyor was appointed at the instance of the plaintiff. The Surveyor was issued a subpoena pursuant to which an employee from the office of the Surveyor appeared and filed its report. The defendant did not cross-examine the person producing the report. The existence of the report cannot be disputed. He points out that, no competent person is available in the service of the office of the Surveyor who has personal knowledge on the subject matter of the claim. He contends that, though not conclusively proved, a very strong presumption and probative value ought to be placed on Exhibit "TT". He contends that, once a document is exhibited and admitted without objection, the contents of such document is also admitted and relies upon All India Reporter P.C. Purushothama Reddiar Vs. S. Perumal, , All India Reporter Harnath Malhotra and Another Vs. Dhanoo Devi Agarwala, and Food Corporation of India Vs. Assam State Cooperative Marketing and Consumer Federation Limited and Others, in this regard.

17. The learned Counsel for the parties, distinguished the cases cited at the bar on behalf of the opposite party.

18. The answer to the issues raised depends on the three defences taken by the defendant no. 1. The first defence is that, the three interim protection notes being Exhibits "C", "D" and "E" does not have a legal effect of granting a decree in favour of the plaintiff in the instant suit.

19. Mr. Bose contends that, the legal effect of Exhibits "C", "D" and "E" cannot be considered as such point was not raised in the written statement, no issue with regard thereto was raised and that no suggestion was put to the witness of the plaintiff.

20. Mr. Ghosh contends that, the legal effect of Exhibits "C", "D" and "E" is a pure question of law and cannot be taken at any stage.

21. In *Badri Prasad & Ors. (supra)* the Supreme Court allowed a pure question of law, not requiring the investigation of any facts to be raised before the Supreme Court for the first time. It held that, no Court can enforce as valid that which competent enactments have declared shall not be valid, nor is obedience to such an enactment a thing from which a Court can be dispensed by the consent of the parties, or by a failure to plead or to argue the point at the outset.

22. Mr. Ghosh is taking the point of the legal effect of an unstamped interim protection note in view of the provisions of the Indian Stamp Act, 1899. He seeks to contend that, relying on the proviso of the General Exemption to Article 47 Schedule-I of the Indian Stamp Act, 1899 that, no money decree can be passed on the basis of an unstamped interim protection note. This plea is a pure question of law not requiring the investigation of any fact. In such circumstances, Mr. Ghosh is allowed to take the point of the legal effect of a cover note although marked as an exhibit in the facts of this case. The contention raised on behalf of the defendant no. 1 emerges out of the pleadings and the evidence on record and is a pure question of law. The contention of the defendant No. 1 revolves around the interpretation of Exhibits "C", "D" and "E" in light of the provisions of Article 47 in Schedule-I of the Indian Stamp Act, 1899. The proviso in the General Exemption to Article 47 in Schedule-I of the Indian Stamp Act, 1899 has the effect in permitting any letter of engagement not bearing the stamp prescribed by the Indian Stamp Act, 1899 to claim anything thereunder or utilize it for any purpose other than compelling the delivery of the policy mentioned therein. Such proviso in the General Exemption has the effect of disentitling the plaintiff to a money decree as claimed on the basis of Exhibits "C", "D" and "E".

23. *R. Ratilal and Company (supra)* revolves around a suit for recovery of insurance claim on the basis of a duly completed policy of a fire insurance and an unstamped letter of cover in respect of the same kind of insurance. In paragraph 7 of such judgment, the Supreme Court notes the questions posed to itself in the proceeding namely, "What then is a letter of cover? How is it to be distinguished from a policy of insurance?" It goes on to hold that, "The Act contains no definition of it or of an "engagement to issue a policy of insurance", but the terms are well known in trade. The Act is dealing with businessmen and with mercantile documents well known to them. It may be shortly stated that a letter of cover no doubt contains a contract of insurance but it is not a policy of insurance in the common understanding of that word in the trade. It is well known that in order to obtain an insurance against the risk of fire the assured has first to send a proposal to the insurer and then the insurer takes a little time

in making enquires as to whether it would accept the proposal and undertake the obligation of covering the risk. He issues a policy only after he is satisfied that it would be a prudent business proposition to do so. Experience of trades people has however shown that some kind of protection for the interim period when the insurer is making the enquiries is necessary. This protection is given by what is called a "letter of cover". It is expressly a contract granting insurance for the period between its date and until a policy is prepared and delivered if one is eventually issued or otherwise upto a date mentioned in it, just as a period of thirty days is mentioned in the Interim Protection Note issued in this case..... An engagement to issue a policy means, it seems to us more or less the same thing as a letter of cover. A letter of cover, therefore, cannot be admitted in evidence under Section 35 as a policy of insurance."

24. R. Ratilal and Company (supra) considers Schedule-I Article 47 of the Indian Stamp Act, 1899 and construes the General Exception clause in Article 47. It is held in paragraph 10 that, "We think the proper construction of the General Exemption clause is that the exemption is to apply only if the letter of cover is used for compelling the delivery of the policy mentioned in it. If it is used for any other purpose, then it is not exempted. That is why a proviso has been employed in the provision and the effect of that is to take the letter of cover out of the exemption in all other cases. If it is taken out of the exemption, then, of course, the present argument fails. We are unable to see how a letter of cover can be said to have been exempted for all purposes, if certain things cannot be claimed under it for the sole reason that it does not bear a stamp. If it were exempted for all purposes, it would be fully enforceable even without a stamp. When a letter of cover is not stamped, then nothing is claimable under it except the delivery of a policy. If, however, it bears the stamp prescribed for the appropriate policy, a claim can be made under it. It seems to us that if an instrument bears a stamp it has incurred the liability for the stamp duty; it has not then been exempted. Therefore, it cannot be said that a letter of cover is exempted from duty in all cases. When it is not exempted, it is an instrument chargeable to duty."

25. Article 47 of Schedule I of the Indian Stamp Act, 1899 as applicable to the State of West Bengal is follows:-

26. In the case at hand, the three cover notes being Exhibit "C", "D", and "E" were marked as exhibits without any objection. The defendant no. 1 is not raising a plea under Section 35 of the Indian Stamp Act, 1899 as after marking of the three cover notes as exhibits the same are to be considered as a piece of evidence under

27. Section 36 of the Stamp Act, 1899. The defendant is contending that, in view of the proviso to the General Exemption in Article 47 and in view of the ratio of R. Ratilal and Company (supra) that "When a letter of cover is not stamped, then nothing is claimable under it except the delivery of a policy" the plaintiff is not entitled to a money decree on the basis of the cover notes.

28. Mr. Bose for the plaintiff contends that, the ratio of *R. Ratilal and Company* (supra) is not applicable to the facts and circumstances of the instant case. He submits that, the defendant is misconstruing and misinterpreting the ratio of the judgment.

29. While reading *R. Ratilal and Company* (supra) I am mindful of the fact that, I need to read a precedent for what it decides. It is rendered in the fact situation as obtaining in the precedent. I need not take out a sentence or a paragraph from the precedent and read it as a statute. Reading *R. Ratilal and Company* (supra) in such context, I am of the view that it considers the legal effect of a cover note not stamped under the Indian Stamp Act, 1899. It also considers Article 47 in Schedule I of the Indian Stamp Act, 1899 and the General Exemption and the proviso therein.

30. In *R. Ratilal and Company* (supra) it is held that, in the event a cover note is used for the purpose of obtaining delivery of the insurance policy the General Exemption applies and such cover note is exempted from stamp. In all other cases a cover note must be duly stamped. If the cover note is utilized for any other purpose other than obtaining delivery of the insurance policy, a cover note must be duly stamped under the Indian Stamp Act, 1899. In the instant case, the plaintiff is seeking a money decree on the basis of three cover notes. In such case the cover notes are required to be duly stamped. The cover notes have been admitted in evidence and marked as exhibits without any objection. The cover notes do not bear the requisite stamp. The admission of such a cover note in evidence and marking of the same as an exhibit in a suit does not allow an unstamped cover note to evolve into a policy of insurance. It continues to remain as an unstamped cover note, though admitted in evidence and marked as an exhibit. A money decree cannot be passed on the basis of treating such unstamped cover note as a policy of insurance in view of the express bar contained in the General Exemption of Article 47 of Schedule-I of the Indian Stamp Act, 1899 and the ratio laid down in *R. Ratilal and Company* (supra). As explained in *R. Ratilal and Company* (supra) a letter of cover containing a contract of insurance cannot make it a policy of insurance. In my view, the legal effect of a cover note not being duly stamped and admitted in evidence is that, a plaintiff is entitled to seek an insurance policy on the basis of such cover note and not a money decree. Allowing a plaintiff to obtain a money decree on the basis of an unstamped cover note would allow such plaintiff to obtain a relief expressly barred by the General Exemption in Article 47 of Schedule-I of the Indian Stamp Act, 1899.

31. Once such a finding is returned, the judgments cited on behalf of the plaintiff on the point that, the admissibility of a document at this stage cannot be raised, namely, *Javer Chand & Anr.* (supra), *Narayana Chettiar Anr.* (supra), *Andi Ambalam* (supra) and *Nirode Basini Mitra* (supra) loses relevance. Moreover, Mr. Ghosh for the defendant no. 1 submits that, the ratio of the aforesaid four judgments has no application as the defendant no. 1 was not raising any issue

with regard to the admissibility of the Exhibits "C", "D" and "E". The defendant no. 1 was raising the issue of the legal effect of a cover note or an interim protection note which is not duly stamped under the Indian Stamp Act, 1899.

32. The next ground of defence of the defendant no. 1 is that a bank guarantee does not constitute payment of premia for the insurance under consideration in view of Section 64VB of the Insurance Act, 1938 is taken up for consideration. To appreciate the submissions made by Mr. Ghosh under Sections 64VB(1) and (2) are set out below:-

"64VB. No risk to be assumed unless premium is received in advance.-

2(1) No insurer shall assume any risk in India in respect of any insurance business on which premium is not ordinarily payable outside India unless and until the premium payable is received by him or is guaranteed to be paid by such person in such manner and within such time as may be prescribed or unless and until deposit of such amount as may be prescribed, is made in advance in the prescribed manner.

(2) For the purposes of this section, in the case of risks for which premium can be ascertained in advance, the risk may be assumed not earlier than the date on which the premium has been paid in cash or by cheque to the insurer.

Explanation.-Where the premium is tendered by postal money order or cheque sent by post, the risk may be assumed on the date on which the money order is booked or the cheque is posted, as the case may be."

33. Mr. Ghosh contends that, there is a distinction between sub-section (1) and (2) of Section 64VB. While sub-section (1) of Section 64VB allows a premium to be paid by way of a bank guarantee the same is noticeably absent in sub-section (2). According to him, in the case of risk for which the premium can be ascertained in advance the risk may be assumed not earlier than the date on which the premium has been paid in cash or by cheque to the insurer in accordance with sub-section (2) of Section 64VB. He submits that, the policy of insurance concerned in the facts of this case can be had only after payment of premium by cash or cheque as the premium in respect thereof could be ascertained in advance. He refers to Shriram Investments Ltd. (supra) in this context.

34. A few writ petitions came up for consideration in Shriram Investments Ltd. (supra). The petitioners there had obtained insurance cover on the basis of bank guarantees. The claim was rejected by the insurance company. The petitioners challenged such action by the writ petitions. The insurance coverage was in respect of motor vehicles. In such context it was held that, reading subsections (1) and (2) of Section 64VB the risk was assumed not earlier than the date on which the premium had been paid in cash or by cheque to the insurer in respect of an insurance coverage where the premium was ascertainable in advance. Even though the insurance company was acting upon the bank guarantees, it was held

that, they could not be asked to act against the statute.

35. Mr. Bose for the plaintiff refers to Section 64VB(1) and Rule 58 of the Insurance Rule and submits that, sub-section (1) of Section 64VB makes it mandatory for the insurer to assume risk once guaranteed to be paid. According to him, the word "may" used in sub-section (2) of Section 64VB makes it optional for the insurer to assume risk on payment by cash or cheque. He points out that, the bank guarantees were valid subsisting and lawful on the date of the accident being June 29, 1986. He also points out that, there is no cross-examination on this issue at all. The defendant did not adduce any evidence to suggest that the bank guarantees were valid.

36. Mr. Bose relies on United India Insurance Co. (supra) and Deokar Exports Private Limited (supra) to meet the contention of Mr. Ghosh. In United India Insurance Co. (supra) an appeal against an award passed by the Motor Accident Claims Tribunal came up for consideration. The Court considered and proceeded on sub-section (1) of Section 64VB as would appear from the report. Rule 58 of the Insurance Rules, 1939 was also considered. Mr. Bose has also relied on such Rule in the present proceedings. Rule 58 of the Insurance Rules, 1939 relates to advance payment of premium in respect of sub-section (1) of Section 64VB. In Deokar Exports Private Limited (supra) the Supreme Court considered both the sub-sections of Section 64VB of the Insurance Act, 1938. Their Lordships expressed the following view in paragraph 10 of the report as follows:-

"...

Two things emerge from the said section. The first is that the insurer cannot assume risk unless and until premium is received or guaranteed or deposited. The second is that a policy issued can assume the risk from a retrospective date provided such date is not earlier than the date on which premium has been paid in cash or by cheque to the insurer."

37. Applying the principles as aforesaid, to the facts of this case, the conclusion is that, no premium under Section 64VB(2) was paid by the plaintiff to the defendant no. 1 in respect of the fire insurance prior to the incident. Fire insurance is a nature of insurance where premium can be ascertained in advance. The conduct of the defendants subsequent to the incident highlighted by Mr. Bose to the effect that, the defendants encashed the bank guarantees and accepted the premium, in my view, does not take away the obligation of the parties to act in terms of Section 64VB of the Insurance Act, 1938. Since the premium was not paid in cash or by cheque in terms of Section 64VB of the Insurance Act, 1938 prior to the date of the incident sought to be covered by the contract of insurance, the insurer cannot assume any risk. On this ground also, the claim of the plaintiff cannot be allowed.

38. The third defence of the defendant that, the truth of the contents of Exhibit "TT" has not been proved is taken up for consideration. Exhibit "TT" is the Surveyor Report dated November 17, 1986. It was introduced in evidence

pursuant to a subpoena issued to the Surveyor company and was marked as an exhibit by consent of the parties.

39. In *Om Prakash Berlia & Anr. (supra)* the Bombay High Court considered Sections 61, 62 and 63 of the Indian Evidence Act, 1872. It was of the view that reading Sections 61 and 62 together would show that the contents of a document must, primarily, be proved by the production of the document itself for the inspection of the Court. The mere production of the document for inspection of the Court is not enough. What it states must be established. The writer of a document must dispose to truth of its contents. The Bombay High Court referred to various decisions, one of them was *Bishwanath Rai (supra)*.

40. In *Bishwanath Rai (supra)* the Supreme Court was of the view that, in absence of the examination of the writer of the letter, the correctness of the contents of the letter was not proved. In the facts of the case before the Supreme Court, it was found that, the witness could prove the contents of the letter as he knew the signature of the person signing the letter. However, since the writer of the letter was not produced in evidence, the correctness of the contents of the letter was held not to be proved.

41. In the facts of this case, the writer of the Surveyor Report was not produced as a witness. Mr. Bose submits that, the writer cannot be produced. He also points out that, the existence of the report cannot be disputed. He also points out that, no other person is available in the service of the Surveyor who had personal knowledge to conclusively prove the contents of the Surveyor Report. He contends that the Surveyor Report has high probative value and should be relied upon to pass a decree in favour of the plaintiff. I am afraid, none of the grounds urged by Mr. Bose justifies the Court to accept the correctness of the contents of a document when the correctness of the contents of such document has not been adequately proved in evidence by a duly conversant witness.

42. Mr. Bose relies upon three authorities on this aspect. In *P.C. Purushothama Reddiar (supra)* the Supreme Court was of the view that, once a document is properly admitted, the contents of the document are also admitted, though those contents may not be conclusive evidence. Similar view has been expressed in *Harnath (supra)* by this Court. The Division Bench of this Court has held that, when a particular document is admitted in evidence without objection by the opposite party the contents of such document though may not be conclusive evidence are also admitted. In *Food Corporation of India (supra)* the Supreme Court was of the view that, the witness of the plaintiff admitted the contents of three letters of the defendant produced in evidence. The correctness of the contents of the letters issued by the defendant stood established by the evidence of the witness of the plaintiff in that suit. In the instant case, there is no evidence of the witness for any of the parties vouching the correctness of the conduct of Exhibit "TT". The claim of the plaintiff fails on this ground also.

43. The existence of a document is proved by its production in the original or by

adducing secondary evidence as to its existence by a duly conversant witness. The moment a document is marked as an exhibit, the fact that it has some contents is also established. The truthfulness of such contents however remains to be established. The truthfulness of the contents of the document can be established either by the parties agreeing to its admissibility or a duly conversant witness proving the truthfulness of the contents of it. In the instant case no witness vouched for the truthfulness of the contents of the Surveyors Report.

44. The issues raised in the suit are required to be answered. The first issue is answered in the negative and against the plaintiff by holding that, the interim protection notes being Exhibits "C", "D" and "E" were not valid on the date of incident of fire, that is, June 29, 1986.

45. The second issue raised in answered by holding that, the bank guarantees that were issued for securing the insurance premium against Exhibits "C", "D" and "E" did not constitute payment of premium in view of the provisions of Section 64VB of the Insurance Act, 1938.

46. The third, fourth, fifth, sixth and seventh issues are answered in the negative and against the plaintiff.

47. C.S. No. 577 of 1987 is dismissed. No order as to costs.