
(2002) 09 CAL CK 0023
In the Calcutta High Court
Case No : C.S. No. 383 of 1980

Lohia Jute Press (P) Ltd.

APPELLANT

Vs

The New India Assurance Co. Ltd. and Another

RESPONDENT

Date of Decision : 27-09-2002

Acts Referred:

Arbitration Act, 1940 — Section 37(5)
Interest Act, 1978 — Section 4
Limitation Act, 1963 — Section 14
Specific Relief Act, 1963 — Section 34

Citation : (2003) 1 CALLT 554 : (2003) 2 ILR (Cal) 227

Hon'ble Judges : Asit Kumar Bisi, J

Bench : Single Bench

Advocate : Bimal Kumar Chatterjee, Arindam Sinha, S.S. Kundu and V. Agarwalla, for the Appellant; T.C. Dutt, for the Respondent

Judgement

A.K. Bisi, J.—The plaintiff Lohia Jute Press (P) Ltd. instituted the suit claiming declaration that the defendant No. 1 the New India Assurance Co. Ltd. was liable to indemnify and/or reimburse and/or compensate the plaintiff or the defendant No. 2 or either of them for the loss of and damage to the insured goods lying stored at the godown No. 9FA at the factory premises at No. 28, Barrackpore Trunk Road, Calcutta-2, by reason of outbreak of fire and decree for Rs. 49,96,569.76p in favour of the plaintiff or the defendant No. 2. Alternatively the plaintiff claimed an enquiry into loss and damages for such sum against the defendant No. 1 as might be found due upon such enquiry as payable by the defendant No. 1 by way of indemnifying and/or reimbursing and/or compensating the plaintiff or the defendant No. 2 or either of them for loss of and damage to the insured goods. The plaintiff also claimed further interest including interim interest and interest upon judgment @ 18% per annum and other reliefs.

2. Briefly the case of the plaintiff is that the plaintiff company was the owner of the entire stock of Polythene Granules stored at godown No. 9FA at the factory

premises of the plaintiff at premises No. 28, Barrackpore Trunk Road. Calcutta-2. The said stock of Polythene Granules so lying stored at the said godown consisted of 11546 bags x 25 Kgs. = 285650 Kgs. and 2980 torn bags consisting of 2788.868 Kgs. total weight being 316540.368 Kgs. In consideration of the premium paid by the plaintiff the defendant No. 1 insured the said goods against destruction or damage by lire or lighting during the period from 5th October, 1975 to 6th October, 1976 upto 4 P.M. for the sum of Rs. 60,00,000 (Rupees Sixty lacs) covering such insurance under Fire Insurance Policy No. 1304312.18 dated January 3, 1976 and Fire Extra Endorsement Nos. 105930014-16 dated April 8, 1976 and April 26, 1976. On 8th May, 1976 fire broke out after midnight at godown No. 9FA of the plaintiff where the said goods were lying stored causing destruction of and/or heavy damage to the said goods. The said godown is a Customs" Bonded Godown.

3. By its letter dated May 8, 1976, the plaintiff duly reported the occurrence of the fire and the loss and damage caused by fire to the defendant No. 1 and invited defendant No. 1 to assess the loss and damage at the earliest. On or about the 12th May, 1976 in compliance with the requisition of defendant No. 1 the plaintiff duly filed a claim for Rs. 48,74,575.37p before the defendant No. 1 on the basis of the value of the entire stock of Polythene Granules lying stocked at the said godown at the time of outbreak of fire and insured under the said policy. Defendant No. 1 appointed Mr. S.C. Majumdar and M/s. Ascon & Avins for survey and assessment of loss. The said Surveyors checked the records of the plaintiff relating to the said stock of Polythene Granules and found that a total quantity of 3,16,540.305 Kgs. was lying in the said godown at the time of outbreak of the said fire instead of 3,16,530.868 Kgs. as mentioned in the claim form submitted by the plaintiff. In the course of the salvage operation the said Surveyors handed over to the plaintiff 2261 bags containing 84025 Kgs. of Polythene Granules which according to the said Surveyors were in sound condition. The said Surveyors also handed over a further quantity of 7754 damaged bags of polythene granules containing 50339.540 Kgs. which were in damaged condition and had depreciated in value being affected by fire. Out of the total quantity of 3,16,540.305 Kgs. of polythene granules lying in the said godown at the time of outbreak of fire 1,82,175.765 Kgs. of polythene granules were totally destroyed and lost to the plaintiff.

4. Further case of the plaintiff is that in the course of the survey and assessment of loss by the Surveyors appointed by defendant No. 1 it was agreed inter alia that the claim of the plaintiff would be based on the rate of Rs. 15.40p per Kg. inclusive of customs duty and that in regard to the bags which the plaintiff had received in damaged condition the deduction allowance would be made on the nett received contents thereof:-

(i) For weights on which Lloyds Agents Surveyors have assessed depreciation allowance the same rates of allowances;

(ii) For remaining nett received weights of the bags a flat allowance of 3% on

nett received materials.

5. The aforesaid terms were recorded in a letter dated 16th August 1976 addressed by the plaintiff to the said Surveyors. The plaintiff calculated its claim arising under the said Fire Insurance Policy by reason of damage and/or loss due to outbreak of fire during the subsistence of the risk under the said policy on the basis of the agreed method of calculation as recorded in the above-mentioned letter dated 16th August, 1976. On the basis of the said agreed method of calculation the claim of the plaintiff amounted to Rs. 29,59,176.62p as per particulars given below:-

(a)

Value of 1,82,175.765 Kgs. of Polythene Granules totally lost calculated @ Rs. 15.40p per Kg. inclusive of Customs Duty.

Rs. 28,05,506.78p.

(b)

Depreciation in value in respect of 50,339.540 Kgs. of Polythene Granules salvaged in damaged condition calculated @ 17% of the sound value in respect of 16,835.380 Kgs. and @ 40% of the sound value in respect of the balance 33,504.160 Kgs. in terms of the agreement.

Rs. 1,53,669.84p.

Rs. 29,59,176.62p.

6. By its letter dated 30th April, 1977 the plaintiff demanded payment of the said sum of Rs. 29,59,176.62p from defendant No. 1. The plaintiff also claimed interest at the rate of 18% per annum from 8th May, 1976 until payment of the aforesaid dues of the plaintiff. Defendant No. 1 wrongfully failed and neglected to pay the said sum or any part thereof in spite of demands. The goods stored in the said godown and affected by fire as aforesaid were mortgaged and/or hypothecated in favour of defendant No. 2. The plaintiff had no objection to the amount to be received from defendant No. 1 to be paid to defendant No. 2 to the credit of account of the plaintiff. In view of the arbitration clause contained in the said policy of insurance the claim as made in the suit was referred to arbitration on or about May 5, 1977. On March 22, 1978 the Arbitrator made and published the award which was filed in this Court. On May 8, 1978 defendant No. 1 made an application for setting aside the said award. On or about February 5, 1980 the Hon'ble Justice T.K. Basu (as His Lordships then was) delivered a judgment in the said award Case No. 55 of 1978 and set aside the award. His Lordship was pleased to grant stay of operation of the judgment and order for a period of five weeks from February 5, 1980. The period of stay expired on March 12, 1980 when the said award was set aside. It had been alleged by the plaintiff that the period between May 5, 1977 being the date of commencement of arbitration and March 12, 1980 being the date when the award stood set aside should be

excluded in computing the period of limitation for institution of the suit. Subsequently by a letter dated April 11, 1978 defendant No. 1 wrongfully denied its liability under the said award and wrongfully repudiated the claim of the plaintiff. A sum of Rs. 49,96,569.76p inclusive of interest @ 18% per annum from May 18, 1976 till March 15, 1980 was due and payable by defendant as per the following particulars:-

(a) Amount due as mentioned earlier.

Rs. 29,59,176.62p.

(b) Interest @ 18% per annum from May 18, 1976 till March 15, 1980

Rs. 20,37,393.14p.

Total

Rs. 49,96,569.76p.

7. Defendant No. 1 was liable to pay or reimburse the plaintiff or defendant No. 2 for the aforesaid loss and damage of the said insured goods.

8. Defendant No. 1 contested the suit by filing the written statement wherein the material allegations contained in the plaint had been denied. The case of defendant No. 1 in brief is that the quantity of goods claimed by the plaintiff to be lying at its godown at the material time was actually not stored there at all. As a result of full enquiry by the agents appointed by it this defendant had information that the goods claimed to be lying at the said godown, at about the same time, were being sold in markets in Madras, Visakapatnam and New Delhi through an agent associated with the plaint. By the Fire Extra Endorsement No. 105930014 dated 5th April, 1976 the limit of the policy was enhanced to Rs. 60 lakhs and by the Fire Extra Endorsement No. 105930016 dated 26th April, 1976, the stock supposedly lying at the said godown No. 9FA was brought within the cover of insurance. Twelve days thereafter on 8.5.1976 the incident of fire took place. When this fact was taken into account in the context of various survey reports and chemical reports obtained by this defendant, there was every reason to hold that the plaintiffs claim under the policy was fraudulent. It had been denied by the defendant that immediately prior to the incident of fire at the said godown the quantity of stock claimed by the plaintiff was actually lying there. On receipt of intimation of outbreak of fire by the plaintiffs letter dated 8.5.1976, this defendant appointed Sri S.C. Mazumdar, Surveyor to carry out necessary survey and submit a report in respect of the incident. The said Surveyor visited the site of the said fire on the same day i.e. on 8th May, 1976. The employees of the plaintiff did not allow the said Surveyor to enter the said godown and inspect the place. It was alleged that the said godown No. 9FA was Bonded Warehouse under the Customs Authorities and prior permission of the customs as also of the Police Authorities was required for the purpose of entering the said godown. Despite repeated requests and demand the plaintiff failed and neglected to obtain permission for this defendant to enter the said godown until 12th May,

1976. On 12th May, 1976, even before any inventory could begin, the plaintiff filed a claim form to this defendant whereby it claimed that it had suffered loss by reason of the said fire in respect of 316530.868 Kgs. of Polythene Granules stated to be valued at Rs. 48,74,574.37. On 12th May, 1976 the said godown was, for the first time, allowed to be inspected by the said Surveyor Sri S.C. Mazumdar and Sri P.K. Sen the Administrative Officer of this defendant. On 13th May, 1976 the said Administrative Officer submitted a confidential report to this defendant stating inter alia that there was no sign of smoke damage, nor was there any residue of burnt ash, or any sign of electric short-circuit alleged by the plaintiff and its employees to have caused fire. The said Administrative Officer also reported that the loss claimed by the plaintiff was not justified. In view of the said report this defendant appointed M/s. Ascon and Avins, Surveyors to act on its behalf in joint consultation and collaboration with Sri S.C. Mazumdar and ascertain and report the facts and circumstances concerning the alleged incident. The plaintiff deliberately and wrongfully obstructed and delayed the expeditious commencement of inventory and ultimately by a letter dated 2nd June, 1976 the plaintiff stated that such inventory should not be commenced until Director Sri K.K. Lohia, returned from holiday in Kashmir. It had been alleged by this defendant that the delay caused by the plaintiff was deliberate and unreasonable and In breach and violation of Clauses 11 and 12 of the conditions of the said policy. From the investigation report and information received by this defendant as aforesaid, it becomes evident that the huge stock of goods of which no trace whatsoever had been found and which were allowed to have been lost in the said fire could not have been lost in the said fire and that the same could not have been In the godown at all when the incident of fire took place. The said Joint Surveyors M/s, Ascon and Avins and Sri S.C. Mazumdar submitted their report dated 12th January, 1977 to this defendant. In the said report the Joint Surveyors stated inter alia that out of 7,443 bags, trace could be found of only 4032 bags although in varying degrees of fire damaged condition and no trace at all could be found in the remaining 3,411 bags which were purported to have been kept in the affected godown. This defendant was surprised to receive the award as the agreement contained in the policy did not permit reference to arbitration of a repudiation of liability but only provided for arbitration In case of dispute about the quantum of loss or damage. This defendant made in application for setting aside the award. The learned trial Court set aside the said award whereupon the plaintiff filed an appeal against the said judgment but the appeal was dismissed.

9. Further case of defendant No. 1 is that by reason of the fraud appearing to have been practised by the plaintiff its rights under the policy stood extinguished. This defendant did not accept any liability to the plaintiff under the policy. There was no question of this defendant making payment of defendant No. 2. It was further alleged by defendant No. 1 that the facts relating to the arbitration proceedings would reveal the attempt by the plaintiff to obtain an award by practising fraud upon the defendant and there was no question of the

plaintiff being entitled to exemption of the period of pendency of the arbitration proceedings from computation of the period of limitation for institution of the suit. The plaintiff's claim was barred by limitation. This defendant denied any liability to reimburse or compensate the plaintiff in the facts and circumstances of the case. By reason of the fraud practised by the plaintiff upon this defendant the plaintiff had no right to the relief claimed.

10. Defendant No. 2 Central Bank of India had filed the written statement but it had not contested the suit. In the written statement filed on behalf of defendant No. 2, it had been averred inter alia that the plaintiff had diverse accounts with this defendant and at the request of the plaintiff, this defendant from time to time lent and advanced to and/or paid and disbursed for and on behalf of the plaintiff diverse sums in the said accounts. The goods mentioned in the plaint were the securities of this defendant who was a secured creditor of the plaintiff. All the goods which were lying hypothecated in favour of this defendant in the godown of the plaintiff were covered by the Fire Insurance Policy issued by defendant No. 1. The amount payable by the defendant Insurance Company stood charged for repayment of the dues of this defendant from the plaintiff.

11. On consideration of the pleadings of the contesting parties and the materials on record the following issues were framed for the purpose of trial of the suit:-

- (1) Is the suit barred by limitation as alleged in the written statement?
- (2) Did the plaintiff store the materials in the godown as claimed in the plaint before the outbreak of the fire?
- (3) Did the parties enter into an agreement on or about 16th August, 1976 in course of survey and assessment of loss by the surveyor appointed by the defendant No. 1 in the manner indicated in paragraph 9 of the plaint?
- (4) Was any fraud practised by the plaintiff upon the defendant No. 1 as alleged in paragraphs 1, 3 and 18 of the written statement?
- (5) Is the plaintiff entitled to get a decree for declaration as prayed for?
- (6) Is the plaintiff entitled to get a decree for Rs. 49,96,569.76 or for any other sum?
- (7) Is the plaintiff entitled to get any alternative relief as prayed for as regards inquiry into the loss and damages and thereafter to get a decree for reimbursement or compensation?
- (8) To what other relief or reliefs is the plaintiff entitled?

Issue No. 1:

12.1. The suit, as it appears, was instituted by the plaintiff on 30th April, 1980 to recover compensation from defendant No. 1 for loss and damage to the insured goods which were lying stored in godown No. 9FA of the plaintiff, which was a customs" bonded warehouse, at premises No. 28, Barrackpore Trunk Road,

Calcutta. As per the case of the plaintiff the insured goods were lost by reason of the outbreak of fire on 8th May, 1976. The suit was filed by the plaintiff on 30th April, 1980. According to the provisions of Article 44(b) of the Limitation Act, 1963 the prescribed period of limitation for institution of such suit is three years from the date of the occurrence causing the loss, or where the claim on the policy is denied, either partly or wholly, the date of such denial. The plaintiff, however, claimed exemption u/s 14 of the Limitation Act, 1963 on the grounds enumerated in paragraphs 16 to 22 of the plaint. At the time of hearing of argument it has fairly been conceded by the learned senior counsel for the plaintiff that the exemption ought to have been sought u/s 37(5) of the Arbitration Act, 1940 and not u/s 14 of the Limitation Act. It has further been contended by him that though reference to Section 14 of the Limitation Act in paragraph 20 of the plaint was inappropriate, the facts pleaded in paragraphs 16 to 20 of the plaint were sufficient to entitle the plaintiff to claim such exclusion of time for computing the period of limitation. The facts pleaded on that score have not been disputed by the learned counsel for defendant No. 1.

12.2. On perusal of the terms and conditions stipulated in the policy which is marked Exhibit "A" I find that Clauses 13 and 19 are extinction clauses. It has been stipulated in Clause 19 that in no case whatever shall the Insurance Company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration. It is gathered from the admitted facts and materials on record that twelve months from 8.5.1976 which was the date of occurrence of outbreak of fire was due to expire on 7/8.5.1977. It had been admitted by defendant No. 1 in paragraph 4(q) of the written statement that defendant No. 1 extended the said period of twelve months as mentioned in Clause 19 of the said policy by three months on and from 30.4.1977. So the extended period under Clause 19 was due to expire on 31.7.1977. Admittedly the plaintiff made its claim on 30.4.1977 which was much before 31.7.1977 when the extended period under Clause 19 was due to expire. This fact is borne out by the letter dated 30.4.1977 addressed by the Manager on behalf of the plaintiff Company to defendant No. 1 copy of which is marked Exhibit "F". As evident from Exhibit "G" and other materials on record, the plaintiffs claim was referred to arbitration on 5.5.1977. As per Section 37(3) of the Arbitration Act, 1940, an arbitration shall be deemed to be commenced when one party to the arbitration agreement serves on the other parties thereto a notice requiring the appointment of an Arbitrator. Exhibit "G" being the letter dated 5.5.1977 from the plaintiff to defendant No. 1 is such a notice. The Arbitrator made and published the award on 22nd March, 1978. This is quite apparent from Exhibit "H". By the letter dated 11th April, 1978 copy of which is marked Exhibit "I" defendant No. 1 repudiated liability under the fire policy and denied obligation to pay any sum under the said policy. Thereupon defendant No. 1 made an application for setting aside the award on 8th May, 1978 and the learned Judge set aside the award on 5th February, 1980 and granted the stay of operation of

the judgment and order for a period of five weeks from 5th February, 1980. The period of stay expired on 12th March, 1980. All these facts are undisputed. The plaintiff has claimed exclusion of the period commencing from 5th May, 1977 till 12th March, 1980 for the purpose of limitation.

12.3. As already referred to, the learned senior counsel for the plaintiff has conceded that such exclusion of the period ought to be sought u/s 37(5) of the Arbitration Act, 1940 and not u/s 14 of the Limitation Act which has been referred to in paragraph 20 of the plaint by mistake. It is no doubt settled principle of law that if an Act relied upon by the plaintiff is not applicable, it is the duty of the Court to give relief as per the provision of law found to be applicable. The learned senior counsel for the plaintiff has pertinently cited the decision of *Sobana Bai Vs. S. Epsi and Others*, on this score.

12.4. Sub-section (5) of Section 37 of the Arbitration Act, 1940 provides:-

"Where the Court orders that an award be set aside or orders, after the commencement of an arbitration, that the arbitration agreement shall cease to have effect with respect to the difference referred, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Indian Limitation Act, 1908, for the commencement of proceedings (including arbitration) with respect to the difference referred."

12.5. In *Purshottamdas Hassaram Sabnani Vs. Impex (India) Ltd.*, the Division Bench comprising Chagla C.J. and Dixit, J. (as Their Lordships then were) held as follows:-

"Therefore, we have now a statutory provision for exclusion of time taken up in arbitration proceedings when a suit is filed, and the question arises of computing the period of limitation with regard to that suit, and the time that has got to be excluded is only that time which is taken up as provided in Section 37(5). There must be an order of the Court setting aside an award or there must be an order of the Court declaring that the arbitration agreement shall cease to have effect, and the period between the commencement of the arbitration and the date of this order is the period that has got to be excluded."

12.6. The Supreme Court quoted the said observation with approval in *The Commissioner of Sales Tax, U.P., Lucknow Vs. Parson Tools and Plants, Kanpur*, .

12.7. Relying on the aforesaid provisions of law and the above noted decisions the learned senior counsel for the plaintiff has argued that the plaintiff is entitled to relief of exclusion of time u/s 37(5) of the Arbitration Act, 1940 and if the abovementioned period commencing from 5th May, 1977 till 12th May, 1980 is excluded as per Sub-section (5) of Section 37 of the Arbitration Act, 1940 for the purpose of limitation, the plaintiff's claim can in no way be said to be barred by limitation.

12.8. The learned counsel for defendant No. 1 has contended on the other hand

that the plaintiff is not entitled to get such relief of exclusion of time u/s 37(5) of the Arbitration Act, 1940 because the suit had been filed by the plaintiff prior to final disposal of the matter by the Hon'ble Division Bench affirming the order of setting aside of the award passed by the learned single Judge. He has further contended that a party is entitled to protection u/s 37(5) of the Arbitration Act, 1940 after the final order is passed by the Division Bench in respect of setting aside of the award where the appeal has been filed. The learned senior counsel for the plaintiff has repudiated the above contention of the learned counsel for defendant No. 1 by urging that the word "final" does not appear before the expression "order" in Section 37(5) of the Arbitration Act, 1940 and the Court cannot legislate by inserting or adding any word in a particular statutory provision. He has cited the decision of the Supreme Court in *Nalinakhya Bysack Vs. Shyam Sunder Haldar and Others*, , *P.K. Unni Vs. Nirmala Industries and others* [OVERRULED], and *R.S. Raghunath Vs. State of Karnataka and another*, in support of his contention.

12.9. In the case of *Nalinkhya Bysack* (supra) at page 152 (para 9) the Supreme Court observed as follows:-

"It must always be borne in mind, as said by Lord Halsbury in *Commissioner for Special Purposes of Income Tax v. Pemsel* (1891) AC 531(G), that it is not competent to any Court to proceed upon the assumption that the Legislature has made a mistake. The Court must proceed on the footing that the Legislature intended what it has said. Even if there is some defect in the phraseology used by the Legislature the Court cannot, as pointed out in *Crawford v. Spooner* 6 Moo. PG 1 (II), aid the Legislature's defective phrasing of an Act or add and amend or, by construction, make up deficiencies which are left in the Act. Even where there is casus omissus, it is, as said by Lord Russell of Killowen in *Abdullah Ashgar Ali v. Ganesh Das*, AIR (20) 1933 PC 63 , for others than the Courts to remedy the defect."

12.10. In the case of *P.K. Unni* (supra) at page 936 (para 11) it was held by the Supreme Court that the words of statutes being clear, explicit and unambiguous, there was no scope to have recourse to external aid for their construction.

12.11. In the case of *R.S. Raghunath* (supra) at page 88 (para 11) the Supreme Court held that the non obstante clause need not necessarily and always be co-extensive with the operative part so as to have the effect of cutting down the clear terms of an enactment and if the words of enactment were clear and were capable of only one interpretation on a plain and grammatical construction of the words thereof a non-obstante clause could not cut down the construction and restrict the scope of its operation.

12.12. On a conspectus of the above authorities it emerges that the Court must not add anything to the words used in the statute when such words are clear explicit and unambiguous. In this context the observation of the Supreme Court in *Management Shahdara (Delhi) Saharanpur Light Railway Co. Ltd. Vs. S.S.*

Railway Workers" Union, is quoted below:-

"It is well settled that the meaning which words ought to be understood to bear is not to be ascertained by any process akin to speculation and the primary duty of a Court is to find the natural meaning of the words used in the context in which they occur, that context including any other phrase in the Act which may throw light on the sense in which the makers of the Act used the words in dispute."

12.13. Use of the expression "the date of the order of the Court" in Sub-section (5) of Section 37 of the Arbitration Act, 1940 must be judged in the light of the principles of law relating to construction of the statutes as enunciated by the Supreme Court in the above noted decisions. If so judged, the said expression "the date of the order of the Court" must be given its literal meaning and necessarily signifies the order of the trial Court which has set aside the award. The original order of setting aside of the award passed by the learned single Judge is operative on its own strength and no greater efficacy can be gained by it from the subsequent orders of dismissal of the appeal. It has been argued by the learned counsel for defendant No. 1 that the order of the Court of the first instance becomes final only on the termination of all proceedings by way of appeal or revision, as the case may be. But such argument has got no legal force. Rather it goes contrary to the principle of law enunciated by the Supreme Court in *State of Uttar Pradesh v. Mohammad Nooh* AIR 1958 SC 86 at page 95 (para 13) which has been rightly cited by the learned senior counsel for the plaintiff. In the case of *State of Uttar Pradesh* (supra) at page 95 (para 13) the Supreme Court made the following observations :-

"In the next place, while it is true that a decree of a Court of first instance may be said to merge in the decree passed on appeal therefrom or even in the order passed in revision, it does so only for certain purposes, namely, for the purposes of computing the period of limitation for execution of the decree as in *Batuk Nath v. Munni Dei*, 41 Ind App 104 : AIR 1914 65 (Privy Council) , or for computing the period of limitation for an application for final decree in a mortgage suit as in *Joward Hussain v. Gendan Singh* 53 Ind App 197 : AIR 1926 93 (Privy Council) (I). But as pointed out by Sir Lawrence Jenkins in delivering the judgment of the Privy Council in *Juscurn Boid v. Pirthichand Lal* 46 Ind App 52 : ILR 46 Cal 670 : AIR 1918 PC 151 (J), whatever be the theory under other systems of law, under the Indian law and procedure an original decree is not suspended by the presentation of an appeal nor is its operation interrupted where the decree on appeal is merely one of dismissal. There is nothing in the Indian Law to warrant the suggestion that the decree or order of the Court or tribunal of the first instance becomes final only on the termination of all proceedings by way of appeal or revision. The filing of the appeal or revision may put the decree or order in jeopardy but it is reversed or modified it remains effective. In that view of the matter the original order of dismissal passed on April 20, 1948 was not suspended by the presentation of appeal, by the respondent nor was its operation interrupted when the Deputy Inspector General of Police simply

dismissed the appeal from that order or the Inspector General simply dismissed the application for revision. The original order of dismissal, if there were no inherent infirmities in it was operative on its own strength and it did not gain any greater efficacy from the subsequent orders of dismissal of the appeal or the revision except for the specific purposes hereinbefore mentioned."

12.14. Applying the above noted principles of law to the facts and circumstances of the case at hand I find that the period from 5th May, 1977 to 12th March, 1980 shall be excluded in computing the statutory period of limitation in terms of Section 37(5) of the Arbitration Act, 1940 for the reasons already indicated.

12.15. Under the above circumstances I hold that the suit is not at all barred by limitation. This issue is accordingly decided in favour of the plaintiff.

Issue Nos. 2, 3 and 4:

13.1. Being interlinked all these issues are taken up together for consideration for the sake of convenience and brevity.

Exhibit "A" is the copy of Fire Insurance Policy No. 130431218 dated 3.1.1976. Three copies of Fire Extra Endorsement Nos. 105930014 dated 8th April, 1976, 105930012 dated 3rd March, 1976 and 105930016 dated 26th April, 1976 have been marked Exhibit "B" collectively. Those documents were proved by PW 1 Sunil Kumar Das who had come as sole witness to prove the case of the plaintiff. He had categorically stated in his evidence that Exhibit "A" was the photocopy made from the original policy and Exhibit "B" collectively were the photocopies made from the original documents. The learned counsel for defendant No. 1 raised objection at the time of marking of those documents as exhibits. But such objection is unsustainable in view of the fact that those documents were admitted by defendant No. 1 in paragraph 2 of the written statement. Furthermore, those documents were relied on and disclosed by defendant No. 1 as well. Admittedly, Exhibits "A" and "B" are the photocopies of the original policy of insurance and the original fire extra endorsements respectively, as already referred to. It is worth noting in this context that copies of the policy and fire extra endorsements were disclosed by defendant No. 1 as its disclosures marked as DD1-1, DD1-2, DD1-3 and DD1-4 appearing on pages 29 to 33 of the Judge's brief of documents. The learned counsel for defendant No. 1 has contended that PW 1 who proved the documents marked Exhibits "A" and "B" did not state in his evidence that he himself obtained the copies of the original documents through mechanical process. He has further drawn my attention to Section 63 and Section 65 of the Indian Evidence Act. Section 63 of the Indian Evidence Act defines what is called secondary evidence and Section 65 of the said Act enumerates the cases in which secondary evidence relating to documents may be given. As mentioned earlier. Exhibits "A" and "B" are photocopies of the original policy of insurance and the original endorsements relating thereto. By the order dated 18th September, 2001 passed by G.C. Dey, J. the plaintiff was given liberty to rely on secondary evidence since the record of the

award case the original documents were filed could not be traced as per specific report of the department. No contrary evidence had been adduced nor any suggestion had been given to PW 1 to the effect that those documents marked Exhibits "A" and "B" were not genuine or that they were not copies made from the originals. It had been specifically stated by PW 1 Sunil Kumar as at the time of proving the said two documents (Exhibits "A" and "B") that those documents were photocopies made from the original policy and the three endorsements on the said policy respectively. Reference can be made in this context to the answers given by PW 1 to question Nos. 24 to 30. That apart, the learned senior counsel for the plaintiff has rightly drawn my attention to the answers given by PW 1 to question Nos. 127 to 130 put in cross-examination wherefrom it appears that PW 1 specifically stated that the photocopy of the original policy was made in front of him. No question regarding photocopies of the endorsements marked Exhibit "B" collectively was asked to PW 1 in cross-examination. In absence of any contrary evidence or any suggestion in cross-examination objection as to tendering of Exhibits "A" and "B" in evidence raised by the learned counsel for defendant No. 1 can in no way be sustained. In my view the documents marked Exhibits "A" and "B" can well be treated as secondary evidence within the scope and amplitude of Section 63 of the Indian Evidence Act.

13.2. By the letter dated 8th May, 1976 copy of which is marked Exhibit "C" the plaintiff informed defendant No. 1 of the occurrence of outbreak of fire in its particular godown and requested the latter to assess the loss and damage at the earliest. Exhibit "D" is the copy of the letter dated 12th May, 1976 whereby the plaintiff submitted the claim forms duly filled up in duplicate together with an inventory list in respect of the said claim.

13.3. It appears from the materials on record that defendant No. 1 appointed Surveyors Mr. S.C. Mazumdar and M/s. Ascon and Avins to act on its behalf in joint consultation as admitted in paragraph 4(e) of the written statement filed by defendant No. 1. By the letter dated 16th August, 1976 copy of which is marked Exhibit "E" the plaintiff informed the Joint Surveyors about their acceptance of the agreed basis of claim as per the discussion with the said Joint Surveyors and the said Joint Surveyors confirmed the same on the said letter by putting signature therein. Defendant No. 1 craved leave to rely on the said letter as evident from paragraph 7 of the written statement. Exhibit "E" is the copy of the said letter proved by PW 1. By the letter dated 30th April, 1977 copy of which is marked Exhibit "F", the plaintiff demanded payment of Rs. 29,59,176.62p and interest @ 18% per annum from 8th May, 1976 until realisation of dues from defendant No. 1. It is significant to note in this context that the original documents copies of which are marked Exhibit "C" to "F" were lying in the custody of defendant No. 1 and upon failure of defendant No. 1 to produce the same when called upon, the copies of the said documents were duly proved by PW 1 and marked Exhibit "C" to "F". The learned counsel for the defendant No. 1 raised no objection at the time when those documents marked Exhibits "C" to "F" were tendered in evidence but curiously enough he has raised objection to

tendering of those exhibits at the time when the argument has been advanced. The learned senior counsel for the plaintiff has argued that once a document has been taken into evidence as an exhibit without any objection, the contents of that document are also admitted in evidence. To fortify his argument he has cited the case of P.C. Purushothama Reddiar Vs. S. Perumal, wherein the Supreme Court held that once a document was properly admitted, the contents of that document were also admitted in evidence though those contents might not be conclusive evidence. The learned senior counsel for the plaintiff has further cited two other decisions viz. Dol Govinda Das Vs. Makbul Sekh's infant heir and Others, and Pramatha Nath Sarma and Another Vs. Tarini Charan Das, on this score.

13.4. In the case of Dol Govinda Das (supra) at page 165 R.C. Mitter, J. (as His Lordship then was) held as follows:-

"If the document is not inadmissible per se and if secondary evidence of it is sought to be tendered, the right time to object would be at the time when the document is put in and not either at the appellate stage or at the time of the argument."

13.5. In the case of Promotha Nath Sharma (supra) it was observed by the Division Bench comprising Thadani C.J. and Ram Labhaya J. (as their Lordships then were) that where no objection was raised as to the admissibility of certain documents when they were tendered in evidence, no objection could be raised as to their admissibility at a later stage.

13.6. Applying the tests formulated by their Lordships in the above noted decisions to the case at hand I am clearly of the view that since no objection was raised at the time of tendering of the documents marked Exhibits "C" to "F" in evidence, no objection as to admissibility of those documents which are not inadmissible per se can be raised subsequently at the time of argument.

13.7. It appears that in the written statement defendant No. 1 raised a plea that the plaintiffs claim under the policy was fraudulent. However, at the time of argument the learned counsel for defendant No. 1 has fairly conceded that such plea is not pressed by him. There is not an iota of evidence as well from the side of defendant No. 1 to substantiate any such plea. No oral and documentary evidence is forthcoming from the side of defendant No. 1 nor anything is elicited in cross-examination to impeach credibility of the version of PW 1. On the facts pleaded in the plaint and proved in evidence there can hardly be any dispute regarding the storing of the goods in the plaintiffs godown prior to outbreak of fire and shortage of the goods and quantum after fire broke out in the godown.

13.8. As mentioned hereinabove, admittedly defendant No. 1 appointed Mr. S.C. Mazumdar and M/s. Ascon and Avins as Joint Surveyors to act on its behalf. It is quite evident from Exhibit "E" that the parties entered into an agreement on 16.8.1976 in course of survey and assessment of loss by the surveyor appointed by defendant No. 1. Following are the terms accepted by the plaintiff and

confirmed by the surveyor of defendant No. 1:-

"(a) Our claim will be based on the rate of Rs. 15.40 per kg., inclusive of Customs Duty.

(b) In regard to the bags which we had received in damaged condition (damaged in transit) the following deduction allowance will be made on the nett received contents thereof:-

(i) For weights on which Lloyds Agent Surveys have assessed depreciation allowance, the same rates of allowance.

(ii) For remaining nett received weights of the bags a flat allowance of 3% on nett received material.

(c) However, there will be no claim for Customs Duty in respect of the damaged goods retained by us. Also there will be no claim for Customs Duty on the goods destroyed and lost in the fire unless of course we have to pay duty for the destroyed stocks.

(d) The damaged goods recovered after salvaging operation will be retained by us on the following basis:-

Quantity

Depreciation in value

16,835.380 Kgs.

@ 17?

of the sound valued calculated on the basis of the above stated claim rates i.e. excluding the Customs Duty

33,504.160 Kgs.

@ 40%

-ditto-

13.9. It appears from the letter dated 30th April, 1977 copy of which is marked Exhibit "F" that pursuant to the terms of agreement as referred to in Exhibit "E" and quoted above the plaintiff made its claim for Rs. 29,59,176.62p and the calculation was made at the agreed rate of Rs. 15.40p per kg. for the quantity of materials referred to therein. There is no evidence whatsoever from the side of defendant No. 1 to disprove the same.

13.10. For the foregoing reasons I hold that the plaintiff stored the materials in the godown as claimed in the plaint before outbreak of fire and the parties entered into an agreement on 16th August, 1976 in course of survey and assessment of loss by the Surveyor appointed by defendant No. 1 in the manner indicated above and no fraud was ever practised by the plaintiff upon defendant

No. 1 as alleged in paragraphs 1, 3 and 18 of the written statement. These issues are accordingly decided in favour of the plaintiff.

Issue No. 5:

14.1. The plaintiff has sought a decree for a declaration that defendant No. 1 is liable to indemnify and/or reimburse and/or compensate the plaintiff or defendant No. 2 or either of them for the loss of and damage to the insured goods lying stored at godown No. 9FA of the factory premises at No. 28 Barrackpore Trunk Road, Calcutta-2 by reason of outbreak of fire. Defendant No. 2 has not come to contest the suit after filing of the written statement. So the question to be decided on the basis of the facts pleaded in the plaint and proved in evidence is whether or not the plaintiff is entitled to get a declaration that the defendant No. 1 is liable to indemnify and/or reimburse and/or compensate the plaintiff for the loss and damage to the insured goods lying stored at the said godown by reason of outbreak of fire. The godown of the plaintiff where the goods were stored prior to outbreak of fire on 8th May, 1976 was a customs" Bonded Godown. On the facts proved in evidence, as mentioned hereinbefore, it is established that due to outbreak of fire on 8th May, 1976 in the said godown the plaintiff sustained loss and damage and made its claim under the policy of insurance duly entered into between the plaintiff and the defendant No. 1. The learned senior counsel for the plaintiff has drawn my attention to the relevant passages in chapter 40 of General Principles of Insurance Law by E.R. Hardy Ivamy (fifth edition). Those passages referred to by the learned senior counsel for the plaintiff are quoted below:-

"The onus of proving that the loss was caused by a peril insured against lies on the assured. Unless he discharges the onus, the claim must fail." (page 413)

The assured is not however, required to prove the cause of the loss conclusively. All that he need to do is to establish a prima facie case." (page 415)

"When the assured has proved a prima facie case of loss within the policy, the insurers are entitled to show that the loss falls within an exception. The burden of proving that the loss was caused by an excepted peril lies upon them." (page 417)

"The insurers must produce affirmative evidence of facts supporting their contention, and such evidence must be sufficient to be submitted to the jury. If they fail to produce such evidence, they have not discharged the onus of proof, and the assured accordingly succeeds in his claim." (page 419)

14.2. Apart from referring to the above passages a decision in the case of *Narcinva V. Kamat and Another Vs. Alfredo Antonio Doe Martins and Others*, has been cited by the learned senior counsel for the plaintiff. In the case of *N.V. Kamath (supra)* it was held by the Supreme Court at page 1284 (para 14) that the burden to prove that there was breach of the contract of insurance was squarely placed on the shoulders of the insurance company and it could not be

said to have been discharged by it by mere a question in cross-examination. In the said case at page 1285 (para 15) the Supreme Court held as follows:-

"To sum up the insurance company failed to prove that there was a breach of the term of the contract of insurance as evidenced by the policy of insurance on the ground that the driver who was driving the vehicle at the relevant time did not have a valid driving licence. Once the insurance company failed to prove that aspect, its liability under the contract of insurance remains intact and unhampered and it was bound to satisfy the award under the comprehensive policy of insurance."

14.3. In the instant suit the plaintiff has sufficiently discharged the onus of proving a prima facie case of loss within the policy of insurance duly entered between the plaintiff and defendant No. 1. The circumstances in which the plaintiff had made its claim under the said policy have been proved by positive evidence on record. Not a scintilla of evidence to the contrary is forthcoming from the side of defendant No. 1 to disprove the claim of the plaintiff. Defendant No. 1 being the insurance company has utterly failed to prove that there was a breach of the term of the contract of insurance as evidenced by the policy of insurance. That being so, the plaintiff is entitled to get a decree for declaration as prayed for in prayer (a) of the plaint. This issue is decided accordingly in favour of the plaintiff.

Issue No. 6 and 8:

15.1. As mentioned hereinbefore, by the letter dated 12th April, 1977 addressed to defendant No. 1 copy of which is marked Exhibit "F" the plaintiff has claimed payment of Rs. 29,59,176.62p. which was found to be due and payable by defendant No. 1 to the plaintiff. For the reasons already set forth the said claim of the plaintiff is found to be sustainable on the face of the materials on record. It further appears from Exhibit T that the plaintiff claims interest @ 18% per annum from 8th May, 1976 till realisation of the dues. To substantiate the plaintiffs claim for interest the learned senior counsel for the plaintiff has referred to Section 3 of the Interest Act, 1978 which empowers the Court to allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, at a rate not exceeding the current rate of interest for the whole or part of the period mentioned therein. "Current rate of interest" as defined in Section 2(b) of the said Act means the highest of the maximum rates at which interest may be paid on different classes of deposits (other than those maintained in savings account or those maintained by charitable or religious institutions) by different classes of scheduled banks in accordance with the directions given or issued to banking companies generally by the Reserve Bank of India under the Banking Regulation Act, 1949.

15.2. It is contended by the learned senior counsel for the plaintiff that in view of the said provisions of law embodied in the Interest Act, 1978 and in view of the decision of the Supreme Court in State of Rajasthan Vs. Raghubir Singh and

Others, the plaintiff is entitled to get interest @ 18% per annum as claimed in the plaint. But on careful consideration of the matter relating to the plaintiffs claim for interest I find that the interest as claimed by the plaintiff @ 18% per annum is higher than the current rate of interest. On weighing the pros and cons of the matter I am of the view that the plaintiff is entitled to get interest @ 9% per annum on the amount of Rs. 29,59,176.62p for the period in respect of which the interest has been claimed. It appears from the particulars set forth in paragraph 23 of the plaint that the plaintiff has claimed interest @ 18% per annum from May 18, 1976 till March 15, 1980 amounting to Rs. 20,37,393.14p. If the said interest is calculated @ 9% per annum for the period in question, the amount of interest is found on such calculation to be Rs. 10,18,696.57p. If the said amount of interest to the tune of Rs. 10,18,696.57p is added to the principle amounting to Rs. 29,59,176.62p payable by defendant No. 1 to the plaintiff, the total sum inclusive of interest payable by defendant No. 1 to the plaintiff comes to Rs. 39,77,873.19p. Thus I find that the plaintiff is entitled to get decree for the sum of Rs. 39,77,873.19p against defendant No. 1. The plaintiff is also entitled to get further interest @ 9% per annum from the date of the decree till realisation of the dues against defendant No. 1. The plaintiff is also entitled to get proportionate cost of the suit. Both the issues are accordingly disposed of.

Issue No. 7:

16.1. In view of my above findings with regard to issue Nos. 6 and 8 there is no necessity of adjudicating upon this issue.

16.2. Court fees paid are sufficient.

17. The suit is decreed in part with proportionate cost against defendant No. 1 in the following manner. The plaintiff do get decree for declaration in terms of prayer (a) of the plaint to the effect that defendant No. 1 is liable to indemnify and/or reimburse and/or compensate the plaintiff for the loss of and damage to the insured goods lying stored at godown No. 9FA at the factory premises at No. 28, Barrackpore Trunk Road, Calcutta-2 by reason of outbreak of fire. The plaintiff do get decree for the sum of Rs. 39,77,873.19p along with proportionate cost of the suit against defendant No. 1. The plaintiff do get further interest @ 9% per annum from this date till realisation of the dues against defendant No. 1.

Decree be drawn up as expeditiously as possible.