

(2014) 04 BOM CK 0171
In the Bombay High Court
Case No : Suit No. 2716 of 1986

M/s. Haldyn Glass Works Private Limited	APPELLANT
Vs	
Oriental Fire and General Insurance Co. Limited, Maharashtra State Financial Corporation, Industrial Development Bank of India and State Bank of India	RESPONDENT

Date of Decision : 16-04-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 18, 2(3), 35, 35(2), 35A
Contract Act, 1872 — Section 28

Citation : (2014) 04 BOM CK 0171

Hon'ble Judges : G.S. Patel, J

Bench : Single Bench

Advocate : S.U. Kamdar, Senior Advocate, Mr. Zubin Behramkamdin, Mr. Vivek Vashi, Ms. Parinaz Vakil, Mr. Krishnendu Satya and Ms. P. Vakil i/by Bharucha and Partners, Advocate for the Appellant; Satish Kumar i/by M.V. Kini for Defendant No. 1, Advocate for the Respondent

Judgement

G.S. Patel, J.—The final disposal of this suit has taken 28 years. By any measure, this is an extraordinary and unacceptable length of time for the disposal of any suit. This is also a suit in which a very considerable amount of evidence has been led. Five witnesses have been examined: three by the plaintiffs and two by the 1st defendant. There is an extraordinary amount of documentary evidence as well. This fills one entire trunk. It is spread over a dozen volumes or more. At the same time, the claim, substantial when it was first made in 1986, by today's standards, is no more than commonplace: for a decree in the sum of Rs. 1,83,51,397/- against the 1st defendant.

I Pleadings

The plaintiff, a private limited company, manufactures glass products, including amber and white glass bottles. The 1st defendant is a public limited company incorporated under the Companies Act, 1956. It is engaged in the business of

insurance. Defendants No. 2, 3 and 4 are mortgagors of the plaintiffs' premises. They have been joined to this suit as pro-forma defendants. No relief is claimed against them.

2. The controversy in the suit is very narrow. The plaintiffs claim that on account of a labour unrest between 8th January 1984 and 28th February 1985, they suffered significant losses in their factory. The claim is that those of plaintiffs' workers involved in the agitation at the plaintiffs factory destroyed the plaintiffs' finished and semi-finished goods. The plaintiffs have made two claims. The first is, according to the plaintiffs, covered by a malicious damage endorsement to four "material damage" policies. The second, and more substantial claim, is under two "consequential loss" policies that, according to the plaintiffs, cover losses due to fire, riots, strikes and malicious damage. As we shall see, the 1st defendant's own surveyor has accepted that there is a loss in the sum of Rs. 4,29,801/- under the material damage policies. He has, however, opined that the action of the agitating workmen was not malicious in its nature. It is on this basis that the plaintiffs' claim has been denied. Having considered the material before me and carefully gone through the evidence, including the documentary and oral evidence, and having heard and considered the submissions of learned advocates for both sides, it is, in my view, not possible to accept the defence put forward by the 1st defendant. In my view, the suit must be decreed, for reasons that follow.

3. Between 1983 and 1985, the 1st defendant ("the Insurer"; "the Insurance Company") issued several policies in favour of the plaintiffs. Six of these policies are material for the purposes of the present suit. Four policies are described as "Material Damage Policies". These are, respectively; a policy dated 7th March 1983, No. 8301503, valid from 1st March 1983 to 1st March 1984, for a total cover in the sum of Rs. 2.08 crores; a policy dated 9th June 1983, No. 8303207, valid from 1st June 1983 to 1st June 1984, for a cover of Rs. 1.14 crores; a policy dated 5th September 1983, No. 8305092, valid from 1st September 1983 to 1st September 1984, for a cover of Rs. 1.14 crores; and a policy dated 5th December 1983, No. 8306663, valid from 1st December 1983 to 1st December 1984, for a sum insured of Rs. 1,07,80,000/-. These four policies insured the plaintiffs against loss of or damage to the plaintiffs' properties as specified in the said policies inter alia by riots, strikes, and malicious damage. Each of these policies had a Malicious Damage Endorsement attached to it.

4. There were also two Consequential Loss Fire Insurance Policies. The first is dated 30th May 1983, No. CL8303058, valid from 25th May 1983 to 25th May 1984, for a total insured value of Rs. 2,75,24,000/-. The second is dated 29th May 1984, No. CL8403080, valid from 25th May 1984 to 25th May 1985, covering a total amount of Rs. 2,75,74,000/-.

5. The plaintiffs have a factory at Goregaon (East) off the Western Express Highway in Mumbai. At this factory, the plaintiffs manufacture glass bottles of white or amber colour. At the relevant time, there were about 1,000 workmen

working in this factory.

6. At the plaintiffs' Goregaon factory, bottles were made and manufactured in a three-step operation. There were two furnaces and six glass bottle annealing lehrs. All raw material required for the manufacture of glass bottles was fed into a furnace mould. The raw material was melted down in the furnace. The molten glass dropped into the glass-forming mould. This was controlled by a leader mechanism. At the second stage, the molten glass gob fell into a blank mould. This was to be manually removed by a workman to the finishing mould, where finally bottles were formed with compressed air. Workmen on the blank mould section transferred half blown bottles to finishing moulds for the final stage. Thereafter, the finished bottles were placed on a conveyor belt for transfer to the lehr by other workmen engaged for feeding into the lehr.

7. It was possible, according to the plaintiffs, for a workmen engaged in the above two stages of production to willfully damage the products by throwing the bottles into the waste bins, and also to push finished bottles from the conveyor belt instead of transferring them to the lehr.

8. The final stage was the process of annealing. Bottles were transferred from the conveyor to the lehr immediately for this purpose. Bottles passed through this lehr for a period of nearly three hours. They were checked by the quality control work workmen manually. The bottles were then packed for sale. At this stage, too, it was possible to cause malicious damage to the bottles simply by not passing them on for packing.

9. By its very nature, the process followed by the plaintiffs at their factory was continuous. It was not possible to interrupt this process either by shutting down the systems or by firing down the furnaces. To close down a furnace was a process that could take several days, even weeks. A closure of the furnace was likely to cause it damage and reduce its life cycle. This would also affect the final product making it unusable and unsaleable. Closing a furnace was a delicate and sensitive operation. Care had to be taken to avoid fire and other hazards. Otherwise the furnace itself was likely to become completely useless.

10. On 22nd November 1983, a gate meeting was conducted by one Datta Samant on behalf of the Maharashtra General Kamgar Union. This was not a recognized union. The plaintiffs alerted the police in anticipation of a law and order problem. To avoid an escalation of tension, the plaintiffs agreed to meet with Datta Samant in the plaintiffs' office on 3rd December 1983. Following that meeting, the plaintiffs received a charter of demands from Maharashtra General Kamgar Union on 19th December 1983. A small group of workers insisted that the plaintiffs open negotiations with this union although it was not recognized. To press their demands, which, according to the plaintiffs, were unlawful, the workers affiliated to the Maharashtra General Kamgar Union began shouting slogans in the premises of the factory from 24th December 1983. They also began moving around within the factory premises in groups, intimidating other

workers and officers during and after office hours. It is the plaintiffs' case that not all workmen at the Goregaon factory were affiliated to this union led by Datta Samant. There was in existence a recognized union with which the plaintiffs had entered into a settlement under applicable labour laws.

11. On 2nd January 1984, at about 2.45 p.m., about 300 factory workers gathered in a crowd without provocation. They armed themselves with iron rods, and created an atmosphere of terror by beating drums and shouting within the factory premises. They tried to smash the glass windows of one of the production departments. The plaintiffs' staff tried to calm them. Some workers then rushed into the administrative block of the office and forced themselves into the director's cabin. They demanded an instant decision on their demands. This, the plaintiffs contend, was an unlawful act. On 3rd January 1984, the plaintiffs wrote to the Inspector of Police, Goregaon Police Station, requesting 24-hour police protection.

12. The plaintiffs then learned that from 6th January 1984 the workers planned to intensify their agitation. To avoid any damage to the plaintiffs' properties and harm to other workers, the plaintiffs requested the police to deploy a Special Reserve Police contingent from 6th January 1984 onward. A list of active union committee members of the Datta Samant-led union was also sent to the police.

13. Matters came to a head on 8th January 1984. Workmen on the shop floor of the plaintiffs Goregaon factory premises resorted to various unfair labour practices. They damaged finished and semi finished products in all areas of production. The plaintiffs tried to reason with these workmen, but without success. The plaintiffs entire supply line was damaged after 8th January 1984. The plaintiffs informed the 1st defendant about this occurrence on 9th January 1984. On that day, i.e., 9th January 1984, lehr No. 6 on what was known as the white furnace was damaged: bottles were jammed between the belts and the rollers. The workmen who were stationed at the sorting end of lehr No. 6 maliciously jammed the lehr belt. They discarded good bottles. This caused a heavy accumulation, and the lehr's belt and gears were prevented from moving freely. The lehr belt came to a halt at about 12.00 noon. This forced the plaintiffs to stop production on feeder No. 4 of furnace no. II (clear glass) as the bottles could no longer be annealed on lehr No. 6. On the other five lehrs, too, workmen also engaged in similar malicious activities and damaged production. Workmen at the glass-forming machine threw hot bottles around the working area instead of placing them on the conveyor belt for annealing. Window panels were also damaged with hurled bottles and iron pipes. The workers at the quality control section deliberately and maliciously sorted good bottles as bad, and rejected the entire production.

14. On 9th January 1984, the plaintiffs informed the 1st defendant that the workers were damaging semi-finished and finished products. The plaintiffs requested the 1st defendant to send its surveyor immediately to assess the extent of damage to the lehr and to the products. These actions of the workmen

were observed by senior officers of the plaintiffs. The plaintiffs took such steps as they were able to do to prevent further damage, including putting up warning notices and signs.

15. Matters escalated from that point onward. On 10th January 1984 at 8.45 a.m., riots took place in the factory. The agitating workers incited other workers to commit assault and to damage the company property. The plaintiffs" attempted to put these workers to notice that if they continued in these actions, criminal complaints would be filed, but to no avail. Instead, some of the workers threatened truck drivers with assault if they attempted to enter the factory to load finished goods for onward delivery to customers.

16. From 11th January 1984, at about 8.45 a.m., the workmen at the plaintiffs Goregaon factory struck work. That strike continued. The workers were already on an intensive go-slow. They had already committed several unfair labour practices. The plaintiffs initiated action in the Industrial Court in Mumbai. An injunction was obtained restraining the Maharashtra General Kamgar Union and its members, agents and employees from inter alia engaging acts of violence etc. The plaintiffs also demanded a good conduct undertaking from the second shift of 14th January 1984 as also subsequent shifts. A majority of workers, however, refused to sign these undertakings. They stayed away from work. A few loyal workers remained in the factory premises. The plaintiffs had to incur expenses for tending to their needs, including food and housing within the factory premises. This confrontation and standoff between the plaintiffs and the agitating workmen continued for several days. The police were kept informed throughout. All attempts by the plaintiffs to reason with the agitating workmen came to naught.

17. Some time thereafter, the 1st defendant appointed one M/s. C.P. Mehta & Co., Mumbai, Surveyors to assess the loss and damage caused to and suffered by the plaintiffs on account of this agitation. On 29th January 1984, the plaintiffs sent to M/s. C.P. Mehta & Co. copies of various letters and documentation written by the plaintiffs to various authorities. Between March 1984 and August 1985, the plaintiffs lodged their claims for loss and damage with the 1st defendant and M/s. C.P. Mehta & Co.

18. On 15th February 1985, the 1st defendant wrote to the plaintiffs inter alia stating that M/s. C.P. Mehta & Co. had been asked to assess the loss and claim under the four Material Damage Policies. The 1st defendant, however, stated that the claim under the Consequential Loss Policy was not covered.

19. On 19th March 1985, M/s. C.P. Mehta & Co. asked the plaintiffs for some clarifications. By their letter dated 15th April 1985, M/s. C.P. Mehta & Co. informed the plaintiffs that they would restrict their assessment to the plaintiffs" claim under the four Material Damages Policies and that they would not be assessing the claim under the Consequential Loss Policy. This, M/s. C.P. Mehta & Co. said, was under the directions of the 1st defendant. The final claim lodged by

the plaintiffs with M/s. C.P. Mehta & Co. was in the amount of Rs. 1,83,55,767/- under the plaintiffs' letter dated 26th August 1985.

20. In paragraph 29 of the plaint, the plaintiffs have set out the various steps and actions they took to minimize their loss.

21. On 15th February 1985, the plaintiffs' claim was rejected by the 1st defendant. Till that time M/s. C.P. Mehta & Co. had not yet made their report. That report had not been made even on the date of filing of the suit on 12th February 1986. In the suit, the plaintiffs claimed an amount of Rs. 4,29,801/- under the Fire Insurance Policies for material damage. The plaintiffs also claimed an amount of Rs. 1,79,21,596/- as malicious damage under the Consequential Loss (Fire Insurance) Policies from 14th January 1984 to 28th February 1985. The case of the plaintiffs is that both these losses were occasioned and caused directly by the illegal actions of the striking and agitating workmen and the riots started by them.

22. A written statement was filed by the 1st defendant on 4th January 1994. That written statement contains nothing but denials. In paragraph 19 of the written statement, the 1st defendant has relied on a report of its surveyor, M/s. C.P. Mehta & Co. The final survey report is dated 18th July 1991. This would mean that it was not for a period of about seven years that the final report was made. It would also mean that the 1st defendant rejected the plaintiffs' claim even before the final report was received by them from their own surveyor.

II Issues

23. On these pleadings, the following issues came to be framed on 3rd October 2003 :

Sr. No.

Issues

Findings

1

Whether the plaintiffs are entitled to claim for material damage caused by the riots, strikes and malicious damage to their factory under the Fire Insurance Policies issued by the 1st defendant in favour of the plaintiffs?

Yes.

2

Whether the plaintiffs are entitled to claim for consequential loss/malicious damage caused by the riots, strikes and malicious damage to their factory under the consequential loss (Fire Insurance) Policies issued by the 1st defendant in favour of the plaintiffs?

Yes.

3

Whether the plaintiffs are accordingly entitled to a decree in the sum of Rs. 1,83,51,397/- and interest thereon at the rate of 21% on the said sum till payment and/or realization?

As per order.

4

Whether the plaintiffs prove that they are entitled to receive any amount from the 1st defendant under the policies as claimed in paragraph 3 of the plaint?

As per order

5

Whether the plaintiffs prove that the suit has been filed within the period of

Yes.

6

limitation?

Whether the defendants prove that the plaintiffs are not entitled to any claim under the insurance policies as alleged by the defendant?

No.

7

Whether the defendants prove that the suit is not maintainable on account of the fact that the defendants No. 2 to 4 have not been joined as co-plaintiffs?

No.

24. I have, in listing these issues, indicated my findings against each. My reasons follow.

III Assessment of Evidence

25. Before dealing with each of the issues, I have taken the somewhat unusual course of assessing the overall evidence that has been brought on record. I have chosen to do so only because to discuss the same material and evidence for each issue would involve needless repetition. For this reason, I will first assess the evidence as it stands before indicating briefly my reasons for my findings against each issue.

26. First, as to the documentary evidence. The plaintiffs have produced a large amount of documentation that has been marked Exhibits "P1" to "P12". Exhibit "P1" (collectively) consists of 68 documents. It includes the Insurance Policies in

question as also the correspondence between the plaintiffs, the 1st defendant, police authorities and M/s. C.P. Mehta & Co. Exhibit "P2" (collectively) consists of two volumes and contains photographs of the strike. Exhibit "P3" (collectively) has two volumes which contains ledger entries and vouchers. For convenience this has been split in two volumes, since these documents run into some 487 pages. These volumes contain the ledger entries and vouchers of the expenses incurred on various items by the plaintiffs between January 1983 and December 1983. Exhibit "P4" (collectively) has ledger entries and vouchers in relation to the laboratory stalls, accessories, etc. It runs into some 251 pages. The second part of Exhibit "P4" contains additional ledger entries and vouchers. Altogether the whole of Exhibit "P4" between both parts is of some 661 pages. Exhibits "P5", "P6", "P7", "P8" (Volume I) also contain ledger entries for various items such as rent, depreciation, expenses, interest payments etc. Exhibit "P5" is of 478 pages; Exhibit "P6" is of 378 pages; Exhibit "P7" is of 343 pages. Part I of Exhibit "P8" runs into 453 pages. Part II of Exhibit "P8" contains bank books for the period January to May 1983 and the bank book for the commercial branch of the plaintiffs for the period March 1983 to July 1983. Volume IV of Exhibit "P8" contains cash books for the period August 1983 to October 1983. Exhibit "P9" (collectively) is in five volumes. It contains the muster roll-cum-pay sheet of the plaintiffs for the month of January 1984 for staff on various types of duty. Exhibit "P10" is in four parts. This contains the pay-sheet for the period January 1982 to May 1986, as also the muster-roll-cum-pay sheet for the month of March 1985 for staff on various types of duty as also for the month of May 1985. Exhibit "P11" contains the muster-roll-cum-pay sheet for the month of March 1985 for the staff on a specific kind of duty. Exhibit "P12" is in two parts and contains the production chart of furnaces I and II for the period January 1984 to 31st March 1984; 1st April 1984 to 30th September 1984; 1st October 1984 to 31st December 1984; and a melting shed report for the month of January 1984.

27. For their part, the 1st defendant has produced seven documents marked Exhibit "A" to Exhibit "G". Exhibits "A" to Exhibit "E" are copies of the five Insurance Policies. Exhibit "F" is the Survey Report of M/s. C.P. Mehta & Co. dated 18th July 1991. Exhibit "G" is the original of the very same report.

28. The plaintiffs have led the oral evidence of three witnesses. The first witness is one N.D. Shetty. He was, at the relevant time, the Managing Director of the plaintiffs. He filed two affidavits in lieu of examination in chief. He was also further examined in chief and later cross-examined. The plaintiffs' second witness was one V.N. Shetty. At the relevant time, he was the Director-Works of the plaintiff Company. He has also filed two affidavits in lieu of examination in chief and has been cross-examined. The third and final witness for the plaintiffs was one Babi Parab. He was the Assistant Manager (Warehouse) of the plaintiffs from April 30th, 1992 and during 1983-1984 also held the position of Junior Officer (Quality Control). Parab also filed two affidavits in lieu of examination in chief and was cross-examined.

29. The 1st defendant, for its part, led the evidence of two witnesses. The first was one Vijay Shankar Tiwary, the Divisional Manager of the defendant Company. He filed an affidavit in lieu of examination in chief and was cross-examined. The 1st defendant's second witness was one Milan D. Mehta, the sole proprietor of M/s. C.P. Mehta & Co. He filed an affidavit in lieu of examination in chief, in which he deposed to the correctness of his survey report dated 18th July 1991. He, too, was cross-examined.

30. P.W. No. 1, N.D. Shetty, the Managing Director of plaintiffs, deposed to the various incidents narrated in the plaint. He also deposed to the fact that the plaintiffs suffered a consequential loss as a result of the labour unrest. The witness was, at the time of his examination, the Managing Director of the plaintiffs. He, however, candidly stated that at the relevant time, there was no Managing Director and that the operations and the affairs of the plaintiffs were being managed by two Directors. The cross-examination of P.W. No. 1 is almost entirely ineffective. Apart from suggesting that the photographs and other materials produced by the plaintiffs do not relate to the labour unrest in question, the only other suggestion seemed to be that the plaintiffs did not take sufficient steps to prevent the labour unrest. For instance, it was suggested that the plaintiffs should have had more security or police personnel; that they ought not to have put up warning notices as this might only have aggravated the feelings of the agitating workmen; etc. To my mind, these suggestions do not in any way advance the 1st defendant's cause. Questions 62 to 64 and their answers are material.

Q. 62 Can you please justify as to why the damage was being permitted to be continued continuously between the period 8th to 13th January 1984 when you could have halted the production on the 8th itself?

Answer Since we are a continuous process industry, work 24x7 with so many workmen inside the plant, any action taken by the Management would have precipitated the matter and the situation would have taken a turn for the worse whereby lives would have been at stake. Therefore we had to handle the situation very carefully and we are not switch-on switch-off kind of industry. Closing a furnace takes about 7 to 8 days.

Q. 63 How do you justify not switching off the furnace?

Answer Switching off the furnace would have destroyed the furnace due to thermal shock. The loss would have been far grater.

Q. 64. Do you agree that the molten glass could have been permitted to be drained away?

Answer Not possible under the circumstances. Outside contractors would have had to come with their equipments which the workmen would not have allowed.

31. Further, this is how N.D. Shetty responded to the suggestion that there was no sabotage or a riot.

Q. 18 Is it true that your letter bearing K-106 also dated 9th January 1984 does not mention any act of sabotage?

Answer Yes. It does mention.

Q. 19 Can you please read out the relevant part?

Answer "The industry being very sensitive and the operations being hazardous and risky, illegal activities on the part of the workmen may damage the furnaces and machineries resulting in very high losses to the company and danger to the plant."

Q. 20 Was there a riot?

Answer Yes, the next day.

32. These answers have been obtained by the 1st defendant itself in cross-examination. They are a complete answer to the 1st defendant's case. N.D. Shetty has clearly deposed to the fact that it was not possible to shut down production on 8th January 1984 as this was a continuous process industry. He has also explained why switching or firing down the furnace was not a viable option available to the plaintiff Company at that time. In its evidence, in contrast, the defendant has not led the evidence of any expert witness to show that this could have been done or to counter the answers given by the plaintiffs' witness in cross-examination. The plaintiff was one of the two directors overseeing the working and affairs of the plaintiff Company at the relevant time and undoubtedly knew of the processes being employed by the plaintiff Company in its production line. His testimony obtained in cross-examination has gone entirely uncontroverted.

33. P.W. No. 2, V.N. Shetty joined the plaintiff Company in 1973 as a Chief Time Keeper. In March 1998, he was promoted to Director-Works. He continued to hold that position. In November 1983, at the relevant time, he was the Manager, Personnel & Industrial Relations (PIR) of the plaintiff Company. In that capacity, he was directly in charge of personnel and industrial relation matters of the plaintiffs. At the time of the labour unrest, V.N. Shetty was, therefore, personally involved from the plaintiffs' side. He was a witness to the various acts of rioting, intimidation and malicious action from January 1984 onward. It was V.N. Shetty who personally prepared and signed the notices to workers (also marked in evidence), letters to the police, applications to the Labour Court, etc. The applications to the Labour Court were filed on V.N. Shetty's personal knowledge of events that transpired during that period. In his examination in chief, V.N. Shetty deposed on the basis of his personal knowledge to various incidents during the labour unrest. This included the damage caused by the workmen to the plaintiffs' production lines, equipment, machinery, and stocks of finished and semi-finished goods. He also deposed to the fact that riots took place on 10th January 1984. He identified by name the workmen who assaulted the employees of the plaintiffs during the labour unrest in January 1984. Most startling of all is

his testimony that he himself was stabbed and hospitalized for several days in the on-going labour unrest. He also deposed to the fact that another colleague was also stabbed and hospitalized at about the same time. V.N. Shetty's testimony is that normalcy was finally restored only as late as in the end of February 1985. On these matters which are to his personal knowledge, V.N. Shetty was not cross-examined at all.

34. V.N. Shetty also stated that the situation was not merely one of a strike. The workmen, he deposed, engaged on a systematic campaign of sabotage which caused willful loss to the Company. He also deposed that the prevailing circumstances made it impossible for the Company to declare a lock out; this would have further inflamed the situation and caused even greater loss and damage.

35. V.N. Shetty was cross-examined quite extensively by the 1st defendant. A suggestion was put to him that there was no willful damage to semi-finished bottles during the relevant period (Question 27). V.N. Shetty denied the suggestion. He was also asked about the date of the riot and where he had pointed this out in his affidavit (Questions 37 and 38). V.N. Shetty not only specified the date, but also showed that he had deposed to this in his affidavit in lieu of examination in chief. To a further question in cross-examination he also said that the photographs that have been produced by the plaintiffs in evidence were taken in his presence. He also pointed out from these photographs that they showed the workers throwing bottles on the machinery. Not only that, he also specified the date when the photographs were taken, and the fact that these were taken by P.W. 1 N.D. Shetty. The testimony of V.N. Shetty has not been shaken under cross-examination. He also deposed that there was a riot during that period and denied the suggestion to the contrary by the 1st defendant's advocates. He specifically answered that there were acts of violence and has maintained the correctness of his evidence in lieu of examination in chief.

36. The plaintiffs' third witness, P.W. No. 3 was one Babi Parab. He joined the plaintiffs in 1983 as a Senior Supervisor. He was promoted to the post of Assistant Manager (Warehouse) on 30th April 1992. He continued to hold that position during 1983-1984. He also held the position of Junior Officer (Quality Control) of the plaintiffs. In that capacity, Parab was involved in supervising the bottle manufacturing process. This included supervising proper operation of the furnaces and lehrs. Parab, too, deposed to the fact of demonstrations, strike, riot and malicious acts in January 1983 and which continued till February 1985. He also deposed to the bottle manufacturing process. His deposition was that this process, though continuous, was not fully automated and required manual human intervention at various stages. He specifically stated in paragraph 3(f) of his evidence in lieu of examination in chief that the plaintiffs' bottle manufacturing process being continuous, it was not possible to shut down the production line. Parab, in paragraph 3(d) of his affidavit in lieu of examination-in-chief, explained that the glass making furnace, once charged and made

operational, was required to continue without interruption for its full life of about four years. Any abrupt shutdown would reduce the life of the furnace. It would also cause thermal shock, affecting the quality of the final product and a risk of fire and explosion. Parab's succinct explanation of this continuous manufacturing process under controlled conditions is not only compelling testimony, but has not been affected in the slightest under cross-examination.

37. Parab also deposed to various acts of rioting, sabotage and damage by the workmen. He was personally present during some of these times and personally witnessed numerous acts of sabotage on the shop floor. The testimony in paragraph 4 of his evidence in lieu of examination in chief is extremely precise. Parab detailed the actions taken by the workmen, how they damaged the finished and semi-finished products, windows, jamming bottles between the belt and the roller of lehr No. 6, destroyed good bottles etc. In paragraph 5, Parab deposed to the damage caused on the other five lehrs too. Workmen threw formed hot bottles around the working area instead of placing them on the conveyor belt for annealing. Good bottles were rejected as bad bottles, creating confusion and loss down the production line. More specifically, he demonstrated that on account of this, production halved from January 1984 onward, falling from 80-82 tonnes to less than 39 tonnes, and even going to as low as 20 tonnes per day. Parab also deposed to the fact that the plaintiffs took several steps to minimize the loss and damage. In his supplemental affidavit by way of examination in chief, Parab provided further details of individual workmen who were involved in the agitation and their actions of damage, rioting and malice causing loss to the Company.

38. Far from assisting the 1st defendant, Parab's cross-examination only reaffirms the plaintiffs' case and reinforces the witness's credibility. Parab affirmed that the photographs in question were taken by P.W. No. 1, N.D. Shetty (Questions 46 and 47), and that Parab was present at the time. He also stated in his answer to Question 52 that he was personally present when Mithailal, an active member of the Maharashtra General Kamgar Union gave orders to the other workers to break the good bottles as bad and damage the machinery. This was reiterated in response to Question 56.

39. On a careful examination of the cross-examination and the evidence in lieu of examination in chief, it is not possible to take a view that the plaintiffs have failed to prove their case. The 1st defendant's case that there was no riot (because there was no formal police complaint) is of no consequence, and in any case was specifically denied. All three witnesses from the plaintiffs have been unequivocal in their descriptions of the incidents that occurred, the damage caused and the persons who were responsible.

40. The defendant's first witness was one Vijay Shankar Tiwary, the Divisional Manager of the 1st defendant. He deposed on the basis of records available with the 1st defendant. His deposition was limited to stating that M/s. C.P. Mehta & Co. were appointed and that they submitted a report on 18th July 1991; and that

under various policies, the plaintiffs' claim is not covered. Much of the direct "evidence" is in the form of opinion rather than matters to the witness's personal knowledge: it is thus not only without value but ought never to have been permitted to enter the record. Had Tiwary given his examination-in-chief from the witness box, this testimony would undoubtedly have been excluded.

41. In cross-examination, it was established that at the time when the incidents occurred Tiwary was a student. He was 21 years old at the time, and studying in New Delhi. It was also established that he had no absolutely personal knowledge regarding the facts of the present case. In response to question No. 7, Tiwary admitted that his evidence affidavit was based on documents available with the 1st defendant. This witness was unable to explain why M/s. C.P. Mehta & Co., the surveyors, had taken seven years to submit their report. The witness stated that current guidelines required a report to be submitted within 30 days. Tiwary was unable even to say when the plaintiffs' claim was first rejected by the 1st defendant; he needed to check his records. He reiterated his opinion that the plaintiffs' claim for consequential loss was not covered by the Consequential Loss Policies. Importantly, in response to question No. 31, the witness admitted that the 1st defendant had accepted the survey report of M/s. C.P. Mehta & Co. From Question No. 39 onwards, Tiwary was asked about his personal knowledge about the facts of holding a continuous manufacturing process. He said he was aware that the plaintiffs' process was such a process and that there was a likelihood of explosion, fire or thermal shock if a furnace was shut down. However, he said that this had nothing to do with the claim. He attempted to bolster this opinion, and it is nothing more than an opinion from a person who is demonstrably no expert, on the basis of certain profit and loss accounts. As to individual incidents, Tiwary was compelled under cross-examination to admit that his answers were on the basis of the observations made by M/s. C.P. Mehta & Co.

42. Question No. 61 and its answer are particularly revealing:

Q. 61 Mr. Tiwary, I put it to you that you have been coached by your Advocate in respect of the present cross-examination?

Answer Partly, yes.

This, at least, has the advantage of candour. Unfortunately, that works to the 1st defendant's disadvantage.

43. Equally interesting are Tiwary's answers to questions No. 72 to 80.

Q. 72 I put it to you that this rejection was made before the survey report was made or issued?

Answer Yes. Because on prima facie observation of the surveyor discussed with the insurance company it was concluded that the claim was not payable.

Q. 73 How was this prima facie conclusion conveyed to the 1st defendant by the surveyor - was it by way of a letter?

Answer Through unrecorded discussion supplemented by information given by the insured, the Plaintiff.

Q. 74 Can you please name the individuals who participated in these unrecorded discussion?

Answer The surveyor Mr. Milind D. Mehta and the Divisional Manager whose name I do not know.

Q. 75 Were you present at these discussions?

Answer No. I was not even an employee of the Oriental Insurance in 1984.

Q. 76 I put it to you that all the answers you have given in respect of these discussions are in the nature of hearsay?

Answer I do not agree with this observation.

Q. 77 Who informed you about these "unrecorded discussions"?

Answer It is an observation made while going through the claim file.

Q. 78 Therefore is it correct to say that no person told you about this unrecorded discussions?

Answer Yes.

Q. 79 Please produce the relevant part of the file which discloses this unrecorded discussion.

Witness draws attention to letter dated 15th April 1985 addressed by Milan Mehta to the plaintiff and a copy to the 1st defendant (which is at page 188 of plaintiff's compilation)

Q. 80 I put it to you that this letter does not bear any reference to any unrecorded discussions between Milan Mehta and the then Divisional Manager (whose name you do not even know)?

Answer Yes.

44. This is the clearest possible indication that the 1st defendant's witness was speculating in his responses. He also admitted that statements had been made in his evidence affidavit for which no foundation had been laid in the written statement; i.e., his testimony purported to travel beyond the pleadings.

Q. 84 In your affidavit you have referred to other suits filed by the Plaintiff against the defendants and you have stated that the present suit is "hence an adopted means to make a false insurance claim". What do you mean by this?

Answer It is because the malicious damage against which this claim has been lodged is not of the kind which is stipulated in the scope of cover of the policy. The scope of cover says that any attempt within the insured's premises caused by any person taking part within that premises shall not held covered.

Q. 85 Please point out where you have taken this stand in your written statement?

Answer This stand has not been taken in the written statement.

45. The 1st defendant's second witness was Milan Mehta, the Sole Proprietor of M/s. C.P. Mehta & Co. His detailed affidavit notes the complaints made by the plaintiffs. A close reading of this evidence affidavit, even without reference to the cross-examination that follows, indicates that Milan Mehta expected to have evidence of damage to be preserved for days altogether awaiting his inspection. Mehta's evidence contains opinion as to what might, ought, and could possibly have been done by the plaintiffs.

46. Mehta was also asked about the consequence of shutting down a furnace and tested on his knowledge of the likely consequences. The cross-examination from Questions No. 13 to 23 is revealing.

Q. 13 Are you aware of the effect of shutting down the furnace?

Answer Yes, broadly.

Q. 14 Can you please give details?

Answer There could be damage to the refractories if the shutting down is not done properly. This is a fairly elaborate procedure needing control by the insured's staff. Further details are not with me at the moment.

Q. 15 If this elaborate procedure is properly undertaken how long it would take to shut down the furnace?

Answer I can not say.

Q. 16 Do you have even a remote idea on how many days it would take to shut down the furnace?

Answer No, present I cannot say.

Q. 17 Are you aware that the manufacturing process of the plaintiff's is a continuous process?

Answer Yes, I am.

Q. 18 Are you aware that shutting down the furnace could lead to reducing the life of the furnace due to thermal shock?

Answer Present I cannot recollect this.

Q. 19 Are you aware that shutting down of the furnace also affects the quality of the glass with stones, chips and blocks being formed due to sudden and uncontrolled cooling of the molten glass?

Answer Yes. This could happen if there is an uncontrolled and unregulated shut down.

Q. 20 Please explain what you mean by a controlled and regulated shut down?

Answer When it is planned shut down and procedures are controlled.

Q. 21 Can you give us any specific technical details about a planned shut down or procedures as you have mentioned above?

Answer No, I cannot.

Q. 22 Mr. Mehta, I put it to you that, even if there is a planned shut down while the glass is in molten form, there is a serious likelihood of fire and explosion as highly combustible flue glass are expelled from the furnace and the molten glass is kept at a very high temperature?

Answer This is an issue for the experts to deal with and I cannot comment on this.

Q. 23 Are you aware that even if production of glass bottles was stopped the burners would have to be left on to keep the glass in molten form in order to avoid the various accidents mentioned above?

Answer Yes. I do not recollect being so informed.

Mehta however stood by his report that the plaintiffs had suffered a net loss of Rs. 4,29,801/- but this loss was not caused by malicious damage.

47. Mehta was then asked why he had not assessed the consequential loss claims. He replied that he was asked not to assess these losses, and this was a decision taken by the 1st defendant. He did not recollect how this decision was communicated to him. He was also unable to explain why it had taken him an extraordinary seven years to make his report.

48. Some of Mehta's answers, given that he is or was supposedly an expert, are absurd. For example, cross-examination from questions No. 50 to 56:

Q. 50 What do you mean by physical proof?

Answer The plaintiffs could have asked the workers to keep aside bottles claimed to be defective instead of throwing them in the cullet bin.

Q. 51 Are you aware of the manufacturing process?

Answer Broadly I am.

Q. 52 Are you aware that it would not be feasible and be impractical to collect the defective bottles instead of throwing them into the cullet bins?

Answer In my opinion, this is possible. They could have kept it aside.

Q. 53 Are you aware that defective bottles that are thrown into the cullet bin are recycled and used as raw material?

Answer Yes I am aware of this and I understand that only a small percentage can

be re-used.

Q. 54 Please explain what you mean by only a small percentage can be re-used?

Answer From what I recollect, in a batch of raw materials the constituents cannot be entirely cullet, and only some percentage of cullet can be used.

Q. 55 Where do you recollect this from? Has this been mentioned to you? Have you read this in some book?

Answer Based on information given to me.

Q. 56 Who gave you this information?

Answer I cannot recollect.

If there was any credibility left to M/s. C.P. Mehta & Co.'s conduct and the quality of its survey report, this one portion of the cross-examination alone is sufficient to obliterate it.

49. Mehta reaffirmed his survey report. But that Survey Report, marked in evidence, is contrary to the 1st defendant's suggestions and to Mehta's answers in cross-examination. For instance, paragraphs 10.2 and 10.3 of the report contain an admission that at the time of the surveyors' first visit on 10th January 1984

10.2... we were informed that the production losses were continuing. It was seen that quite a few of the workers at the sorting end of the lehrs were away from their places of work and were beating barrels with sticks, creating a din.

10.3 As regards the broken bottles, there was no evidence of any large quantity. We were informed that these had to be cleared away at hourly intervals or so, else there would not be any walking space on the factory floor. As reported, the workers were not permitting photographs. The furnaces were working.

50. Now this is the 1st defendant's own evidence. I am unable to understand how, in the face of these express statements, any suggestions to the contrary could ever have been put in cross-examination to any of the plaintiffs' witnesses; or, indeed, now Mr. Satish Kumar, learned counsel for the 1st defendant, could even attempt to argue contrary to this material.

IV Submissions & Findings

51. At this stage, it is necessary to note an important endorsement in the relevant policies. The riot, strike and malicious damage endorsement read as follows:

Attached to and forming part of the said policies:

In consideration of the payment of the sum of Rs. Additional Premium It Is Hereby Agreed And Declared That The Insurance Under The Said Riot And Strike Damage Endorsement Shall Extend To Include Malicious Damage Which For The

Purpose of This Extension Shall Mean "Loss of Or Damage To The Property Insured Directly Caused By The Malicious Act But Excluding Any Commission of Any Kind of Any Person (Whether Or Not Such Act Is Committed In Course of Any Disturbance of The Public Peace) Not Being An Act Amounting To Or Committed In Connection With An Occurrence Mentioned In Special Condition No. 6 Of The Riot And Strike Damage Endorsement.

52. Thus, once it is established by evidence that there was malicious damage, it matters not whether there was a formally declared strike, lock-out or what Mr. Satish Kumar calls a "declared riot" (presumably a riot duly noted in police records).

53. Mr. Satish Kumar's submissions are that it has not been established that there was a riot or, indeed, any unrest; no damage was visible on the shop floor during the surveyors' inspection; and that the consequential loss policies do not cover these losses, inter alia because production had not entirely ceased. Mr. Kamdar, learned senior counsel for the plaintiffs, quite rightly rubbishes these contentions. He points to the evidence of Mehta and the survey report; both contain unequivocal admissions of the existence of damage and loss. The survey report, as I have noted earlier, itself shows that there was, even at the time of the visit in January 1984, a cogent reason for removing the detritus from the shop floor. Mehta himself has noted that even during the survey visit, several workers were not at their stations "and were beating barrels with sticks, creating a din." What else can this show but the existence of ongoing unrest?

54. Mr. Satish Kumar was not, I found, able to controvert from the material on record the plaintiffs' assertions as to their loss. I must note that the 1st defendant's in their cross-examination of the plaintiffs' witnesses did not at any time attempt, in as sedulous a manner as one might ordinarily expect in a trial of this sort, a testing of the vast amount of documentary material adduced by the plaintiffs. Most of the questions remained in generalities. The specifics sought were of irrelevancies: whether a riot had been "declared", and so on. Mr. Satish Kumar was not able to point out where the 1st defendant had cross-examined the PW. 2 on his deposition as to the assaults on him personally and on his colleague; or his testimony naming an individual involved in the illegal actions of damage. That the production lines were jammed, that bottles were discarded though good, that lehr no. 6's operation was disrupted is all not controverted by satisfactory evidence.

55. Having considered all the evidence, there is, in my view, no manner of doubt that the plaintiffs were put to loss on account of the labour unrest. The claim under the malicious damage endorsement of the four material damage policies was assessed by M/s. C.P. Mehta & Co. at Rs. 4,29,801/-. The plaintiffs have accepted this amount. That the plaintiffs' workers acted with a malicious intent during the strike is undeniable. It is fully established by evidence. The plaintiffs took all reasonable steps to mitigate their loss. There is no valid ground for denial of this liability.

56. Mehta's opinion in his survey report is that the action of the workers was not malicious. It is difficult to understand what, if anything, this is supposed to mean. The evidence indicates that workers jammed bottles between the belt and the rollers of at least one lehr. This caused the lehr to stop functioning. This is a positive act. It is clearly malicious. It caused damage. It is impossible to say that the loss caused by act like this is not malicious. There is evidence, too, of other similar acts; discarding good bottles into the rejected lot; allowing bottles to fall off the belt into the cullet bin; throwing bottles around, damaging windows and equipment, and so on. Why this should not be construed to be malicious is never adequately explained by the 1st defendant's witnesses.

57. Mr. Kamdar points out that this Court has in two other suits against inter alia the said 1st defendant for similar claims but for different time periods has already held that substantially similar actions were, in fact, malicious. Suit No. 1042 of 1983 was decided on 24th November 2005 by a learned Single Judge of this Court. He held that the act of not lifting the bottles is not merely an inadvertent omission. It is a deliberate and direct act designed to cause loss. That suit was decreed. The 1st defendant appealed. However, it accepted its liability and paid the decretal amount to the plaintiffs. The appeal was, therefore, dismissed on 22nd January 2008.

58. Similarly, in suit No. 2613 of 1986, a learned Single Judge of this Court held on 14th December 2005 that the failure of workers to pick up bottles from the lehns was not only malicious and intended to cause damage, but also to cause consequential loss to the plaintiffs. This, too, was held not to be a mere omission. This suit was also decreed. The plaintiffs itself appealed on the limited issue of an error in quantification of the loss. The 1st defendant's separate appeal was disposed of on 10th December 2007.

59. The present case is on substantially similar lines. The plaintiffs and the 1st defendant are the same. The facts are almost identical. The only difference of consequences is the duration of time and the indemnity period.

60. There is, therefore, no manner of doubt in my mind that the plaintiff is entitled to its claim for Rs. 4,29,801/-.

61. The two consequential loss policies indemnify the plaintiffs against the consequential loss due to riot, strike and malicious damage. The aggregate sum assured under these two policies is Rs. 2,75,24,000/-. The plaintiffs' evidence is that the labour unrest resulted in a loss in production between 14th January 1984 and 28th February 1985. The plaintiffs' claim is only on account of a reduction in turnover for this period. There is evidence on record to show that the turnover declined from over 13 crore pieces in 1983 of an aggregate value of nearly Rs. 7 crores to about 6.72 crore pieces in 1984 of the aggregate value of only about Rs. 3.75 crores. The monthly turnover halved: from about 1.12 crore pieces in 1986 to 56 lakhs pieces in 1984. The plaintiffs' computation is for a reduction in the six monthly turnover of 55,84,878 bottles. For the 14-month

indemnity period between 8th January 1984 to 28th February 1985, the loss in turnover amounts to 7,81,88,285 bottles. The rate per bottle is worked out at Rs. 0.51. The value of the loss in turnover of bottles is, therefore, Rs. 3,98,76,025/-. It is on this basis that the plaintiffs have computed their claim for malicious damage under the consequential loss insurance policies at Rs. 1,79,21,596/-.

62. The plaintiffs' evidence on this aspect has been totally uncontroverted. Indeed, the claim has not even been assessed. The plaintiffs have led voluminous evidence indicating how this consequential loss has been computed. Given the lack of any material from the 1st defendant, this claim must be held to be undisputed.

63. Most disturbing of all is the unequivocal testimony of Mehta that he was asked by the 1st defendant not to assess the consequential losses. In other words, even before the survey report was received, the 1st defendant had pre-judged the issue and closed the plaintiffs' claim. I do not see how this could have been done. If there was an exclusion in the consequential loss policies, it was for the 1st defendant to show so by cogent and direct evidence. All we have instead is the evidence of Tiwary, a student at the relevant time, who, on the basis of records, claims to have formed an uneducated opinion as to the exclusion. How and why he arrives at this understanding of those two policies he does not elucidate. Mehta, too, takes it as given that there is such an exclusion. His answer at least is comprehensible: he says he was so told by the 1st defendant, and lets it rest at that. To describe this as unsatisfactory is to be charitable to the 1st defendant in ways it does not deserve.

64. I turn now to my findings on the various issues that have been framed.

66. Issues No. 1, 2 and 6:

1. Whether the plaintiffs are entitled to claim for material damage caused by the riots, strikes and malicious damage to their factory under the Fire Insurance Policies issued by the 1st defendant in favour of the plaintiffs?

2. Whether the plaintiffs are entitled to claim for consequential loss/malicious damage caused by the riots, strikes and malicious damage to their factory under the consequential loss (Fire Insurance) Policies issued by the 1st defendant in favour of the plaintiffs?

6. Whether the defendants prove that the plaintiffs are not entitled to any claim under the insurance policies as alleged by the defendant?

Consistent with the preceding discussion, issues Nos. 1 and 2 must be answered in the affirmative, and issue no. 6 in the negative. The plaintiffs are entitled to their claim for material damage under the Material Damage Policies and to their claim for consequential loss under to Consequential Loss Policies.

66. Issues No. 3, 4 and 7:

3. Whether the plaintiffs are accordingly entitled to a decree in the sum of Rs.

1,83,51,397/- and interest thereon at the rate of 21% on the said sum till payment and/or realization?

4. Whether the plaintiffs prove that they are entitled to receive any amount from the 1st defendant under the policies as claimed in paragraph 3 of the plaint?

7. Whether the defendants prove that the suit is not maintainable on account of the fact that the defendants No. 2 to 4 have not been joined as co-plaintiffs?

(a) Issues 3 and 4 must also be answered in the affirmative in the principal amount of Rs. 1,83,51,397/- in favour of the plaintiffs against the 1st defendant. There remains the question of interest, claimed at the rate of 21% per annum. In my view, that is an unreasonably high rate of interest. At the same time care must be taken to provide interest that is not illusory. In assessing this, I must have regard to the fact that the 1st defendant delayed filing of its written statement for a considerable period of time. The survey report itself was delayed for a period of more than seven years. In my view, therefore, a rate of interest of 6% per annum from the date of the suit till the date of the decree and of 12% thereafter adequately meet the ends of justice.

(b) As regards issue No. 4, the 1st defendant's case is that since defendants No. 2, 3 and 4 are mortgagors of the plaintiffs' premises, the plaintiffs are not entitled to the amounts claimed. There is no substance in this submission. A similar contention has been rejected by this Court twice before in the suits between the plaintiffs and the 1st defendant. No arguments have been advanced on the part of the 1st defendant on this point. This issue is, therefore, answered in the affirmative in favour of the plaintiffs.

(c) The issue as to the maintainability in Issue No. 7 is one that need not detain us. It is not, in my view, necessary that the defendants No. 2 to 4 ought to have been joined as plaintiffs. It is sufficient that they were made parties to the suit. There is no substance in this averment made in the written statement. No arguments have been advanced on this basis. The issue is answered in the negative.

65. Issue No. 5 is on the question of limitation:

5. Whether the plaintiffs prove that the suit has been filed within the period of limitation?

(a) Clause 19 of the insurance policies contains a limitation clause that reads thus:

19. In no case whatsoever shall the company be liable for any loss or damage after the expiration of 12 months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration, it being expressly agreed and declared that if the company shall disclaim liability for any claim hereunder and such claim shall not within 12 calendar months from the date of the disclaimer have been made the subject matter of an suit in a court of law,

then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder.

(b) In *National Insurance Co. Ltd. Vs. Sujir Ganesh Nayak and Co.* and another, in relation to a similarly worded clause, the Supreme Court upheld the validity of such clauses that provided for a shorter period of limitation than under the Limitation Act, 1962. It held that a clause that curtails the period of limitation and prescribes a shorter limitation than that prescribed by law is void as violative of Section 28 of the Contract Act. But an agreement that does not seek to curtail the time for enforcement of the right but provides for the forfeiture or waiver of the right itself if no action is commenced within the period specified is not so void. "To put it differently, curtailment of the period of limitation is not permissible in view of Section 28, but extinction of the right itself unless exercised within a specified time is permissible and can be enforced.

(c) There is, therefore, no question of the present clause being invalidated. What Mr. Kamdar says is that the claim itself was lodged within time. The period of material damage loss suffered by the plaintiffs is from 8th January 1984 to 13th January 1984. The consequential loss period is from 14th January 1984 to 28th February 1985. The claim on account material damage was lodged on 20th February 1984; it is, therefore, well within time.

(d) Further, on 15th February 1985, the 1st defendant informed the plaintiff that it had advised C.P. Mehta & Co, surveyors, to restrict their assessment to the loss under the material damage policies and that the plaintiffs' claim did not fall within the purview of the consequential loss policies. On 26th August 1985, the plaintiffs lodged their final claim with the surveyors for a sum of Rs. 1,83,55,767/-. This, too, was within time. In any case, the present suit was filed on 12th February 1986, within the 12 calendar months specified in clause 19.

(e) This issue on limitation must, therefore, be answered against the 1st defendant and in favour of the plaintiffs. The suit is within time.

V Decree And Costs

66. In the result, there will be a decree in favour of the plaintiffs against the 1st defendant in the sum of Rs. 1,83,51,397/- with interest thereon at the rate 6% per annum from the date of the suit till the date of the decree and with further interest at the rate of 12% per annum on principal amount of Rs. 1,83,51,397/- from the date of decree till payment or realization.

67. I come now to the question of costs. Section 35 of the Code of Civil Procedure, 1908 ("CPC") reads:

35. Costs. (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the

purposes aforesaid. The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers.

(2) Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing.

68. The principle that underlies the award of costs is stated in a decision of a Division Bench of the Calcutta High Court in *Manindra Chandra Nandy and Others Vs. Aswini Kumar Acharyya*, thus:

We must remember that, whatever the origin of costs might have been, they are now awarded, not as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected, or, as Lord Coke puts it, for whatever appears to the Court to be the legal expenses incurred by the party in prosecuting his suit or his defence. We are now far removed from the days when "the plaintiff who failed was punished in amendment pro falso clamore, and the defendant, where the judgment was against him, in miserecordia cum expenses litis, for his unjust detention of the plaintiffs right". The theory on which costs are now awarded to a plaintiff is that the default of the defendant made it necessary to sue him, and to a defendant is, that the plaintiff sued him without cause costs are thus in the nature of incidental damages allowed to indemnify a party against the expense of successfully vindicating his rights in Court, and consequently the party to blame pays costs to the party, without fault. These principles apply, not merely in the award of costs, but also in the award of extra allowance or special costs. Courts are authorised to allow such special allowances, not to inflict a penalty on the unsuccessful party, but to indemnify the successful litigant for actual expenses necessarily or reasonably incurred in what are designated as important cases or difficult, and extraordinary cases. The object of the provision plainly is, not to give exemplary damages or smart money by way of punishment to a party for unsuccessfully bringing a difficult or extraordinary question, nor to enable the successful party to make anything in the way of gain or profit over and above the expenses for maintaining or defending such an action. The object and intention of the special scale is to enable the successful litigant to obtain indemnity for his expenses in very special or unusual circumstances, which would not be covered by the ordinary scale prescribed for fill actions (other than short causes). It is manifest that no rigid definition of an important cause can be framed; this must be clear that the character of a case cannot be determined by any particular phase of it, but various factors, such as the difficult and complicated nature of the questions of law and fact involved, the large amount in controversy, the length of time consumed in the trial, and like matters must be taken into account, not separately but in the aggregate. Finally, apart from all this, it must be remembered that, even though a case may appear important or difficult and extraordinary, the Court is not bound to award costs on the special scale.

(emphasis supplied)

69. Sections 35, 35A and other provisions of the CPC have been considered by the Supreme Court in several decisions. In Salem Advocate Bar Association, Tamil Nadu Vs. Union of India (UOI), , the Supreme Court said: Para 37 of the SCC report

37. Judicial notice can be taken of the fact that many unscrupulous parties take advantage of the fact that either the costs are not awarded or nominal costs are awarded on the unsuccessful party. Unfortunately, it has become a practice to direct parties to bear their own costs. In large number of cases, such an order is passed despite Section 35(2) of the Code. Such a practice also encourages filing of frivolous suits. It also leads to taking up of frivolous defences. Further wherever costs are awarded, ordinarily the same are not realistic and are nominal. When Section 35(2) provides for cost to follow the event, it is implicit that the costs have to be those which are reasonably incurred by a successful party except in those cases where the Court in its discretion may direct otherwise by recording reasons thereof. The costs have to be actual reasonable costs including the cost of the time spent by the successful party, the transportation and lodging, if any, or any other incidental cost besides the payment of the court fee, lawyer's fee, typing and other cost in relation to the litigation. It is for the High Courts to examine these aspects and wherever necessary make requisite rules, Regulations or practice direction so as to provide appropriate guidelines for the subordinate courts to follow.

(emphasis supplied)

70. In Ashok Kumar Mittal Vs. Ram Kumar Gupta and Another, the Supreme Court's expressed its distress at the practice of levying trivial or no costs in civil suits. There is, the Supreme Court said, then no deterrent to vexatious or luxury litigation. Ego, greed and dilatory tactics defeat justice; a more realistic approach is the need of the hour. The Court said:

6. u/s 35 of the Code, award of costs is discretionary but subject to the conditions and limitations as may be prescribed and the provisions of any law for the time being in force. u/s 35A, compensatory costs for vexatious claims and defences may not exceed to Rs. 3,000/-. Further the primary object of levying costs under Sections 35 and 35A CPC, is to recompense a litigant for the expense incurred by him in litigation to vindicate or defend his right. It is therefore payable by a losing litigant to his successful opponent. When an appellant or a plaintiff has already paid the prescribed court fee in regard to the appeal or suit, to the state at the time of institution, it is debatable whether any costs can be awarded to the state by way of penalty, in a litigation between two private parties. Courts will have to act with care while, opening new frontiers.

7. One view has been that the provisions of Sections 35 and 35A CPC do not in any way affect the wide discretion vested in by High Court in exercise of its inherent power to award costs in the interests of justice in appropriate civil cases. The more sound view however is that though award of costs is within the

discretion of the court, it is subject to such conditions and limitations as may be prescribed and subject to the provisions of any law for the time being in force; and where the issue is governed and regulated by Sections 35 and 35A of the Code, there is no question of exercising inherent power contrary to the specific provisions of the Code.

9. The present system of levying meagre costs in civil matters (or no costs in some matters), no doubt, is wholly unsatisfactory and does not act as a deterrent to vexatious or luxury litigation borne out of ego or greed, or resorted to as a "buying-time" tactic. More realistic approach relating to costs may be the need of the hour. Whether we should adopt suitably, the western models of awarding actual and more realistic costs is a matter that requires to be debated and should engage the urgent attention of the Law Commission of India.

(emphasis supplied)

71. In *Vinod Seth Vs. Devinder Bajaj and Another*, the Supreme Court enunciated the intended goals of our provisions for costs:

48. The provision for costs is intended to achieve the following goals:

(a) It should act as a deterrent to vexatious, frivolous and speculative litigations or defences. The specter of being made liable to pay actual costs should be such, as to make every litigant think twice before putting forth a vexatious, frivolous or speculative claim or defence.

(b) Costs should ensure that the provisions of the Code, Evidence Act and other laws governing procedure are scrupulously and strictly complied with and that parties do not adopt delaying tactics or mislead the court.

(c) Costs should provide adequate indemnity to the successful litigant for the expenditure incurred by him for the litigation. This necessitates the award of actual costs of litigation as contrasted from nominal or fixed or unrealistic costs.

(d) The provision for costs should be an incentive for each litigant to adopt alternative dispute resolution (ADR) processes and arrive at a settlement before the trial commences in most of the cases. In many other jurisdictions, in view of the existence of appropriate and adequate provisions for costs, the litigants are persuaded to settle nearly 90% of the civil suits before they come up to trial.

(e) The provisions relating to costs should not however obstruct access to courts and justice. Under no circumstances the costs should be a deterrent to a citizen with a genuine or bonafide claim, or to any person belonging to the weaker sections whose rights have been affected, from approaching the courts.

At present these goals are sought to be achieved mainly by Sections 35, 35A and 35B read with the relevant civil rules of practice relating to taxing of costs.

72. In *Vinod Seth*, the Supreme Court then reflected on the fact that the existing system of bills of costs and their taxation inadequately compensated or dandified

a successful litigant. The Supreme Court considered the practice in England, and then made these observations.

52. The provision relating to compensatory costs (Section 35A of the Code) in respect of false or vexatious claims or defences has become virtually infructuous and ineffective, on account of inflation. Under the said section, award of compensatory costs in false and vexatious litigation, is subject to a ceiling of Rs. 3,000/-. This requires a realistic revision keeping in view, the observations in Salem Advocates Bar Association (supra). Section 35B providing for costs for causing delay is seldom invoked. It should be regularly employed, to reduce delay.

53. The lack of appropriate provisions relating to costs has resulted in a steady increase in malicious, vexatious, false, frivolous and speculative suits, apart from rendering Section 89 of the Code ineffective. Any attempt to reduce the pendency or encourage alternative dispute resolution processes or to streamline the civil justice system will fail in the absence of appropriate provisions relating to costs. There is therefore an urgent need for the legislature and the Law Commission of India to re-visit the provisions relating to costs and compensatory costs contained in Section 35 and 35A of the Code.

(emphasis supplied)

73. In Sanjeev Kumar Jain Vs. Raghubir Saran Charitable Trust and Others, the Supreme Court considered all these decisions extensively in an appeal where the High Court allowed costs of Rs. 45 lakhs on the basis of the Supreme Court's observations in Salem-II. The Sanjeev Kumar Jain Court held that those observations were apt to be misconstrued. They did not mandate the award of actual costs, however astronomical, but only such costs as the court feels are reasonable. It is for the High Court on its administrative side to make appropriate rules, regulations and practice directions where these do not exist. While CPC Section 35 prescribes no ceiling or limit on the award of costs, these must nonetheless be reasonable, not whimsical; certainly, a losing party cannot be expected to foot the bill of a wealthy opponent who chooses to engage a battery of advocates. Recognizing the value of imposing costs, the Supreme Court said:

27. The mandate of Sub-section (2) of Section 35 of the Code that where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing is seldom followed in practice by courts. Many courts either do not make any order as to costs or direct the parties to bear their respective costs without assigning or recording the reasons for giving such exemption from costs. Unless the Courts develop the practice of awarding costs in accordance with Section 35 (that is, costs following the event) and also give reasons where costs are not awarded, the object of the provision for costs would be defeated. Prosecution and defence of cases is a time consuming and costly process. A plaintiff/petitioner/appellant who is driven to the court, by the illegal acts of the Defendant/Respondent, or denial of a right to which he is entitled, if he

succeeds, to be reimbursed of his expenses in accordance with law. Similarly a Defendant/Respondent who is dragged to court unnecessarily or vexatiously, if he succeeds, should be reimbursed of his expenses in accordance with law. Further, it is also well recognised that levy of costs and compensatory costs is one of the effective ways of curbing false or vexatious litigations.

(emphasis supplied)

74. In subsequent paragraphs, the Supreme Court once again reiterated the need for a very realistic approach to the award of costs and has repeatedly recommended that the Law Commission should not only take up the matter, but that the High Courts should amend the Rules to reflect modern-day exigencies. However, the Supreme Court in *Sanjeev Kumar Jain* held that the High Court had misconstrued the decision of the Supreme Court in *Salem-II*. It held that *Salem-II* only called for High Court's to revise existing Rules or to make Rules when none existed.

75. These decisions have been briefly reviewed in a recent decision of a learned single Judge of this Court in *Shri Dilipkumar Hirachand Jain Vs. Dena Bank and Others*, per Ghuge, J.

76. In my view, in a matter such as this, it would be difficult to justify not awarding costs to the plaintiffs. They have shown the utmost diligence in prosecuting their case. They have waited nearly three decades for a decree. They have marshalled an enormous amount of evidence. They have led evidence of three witnesses. The 1st defendant's rejection of their claim is neither valid nor lawful. There is a gross and unexplained delay on the part of the 1st defendant, and most especially, the 1st defendant's surveyor M/s. C.P. Mehta & Co. It would, in my view, be entirely unjust to the plaintiffs to afford them a decree but not recognize the expenses they have incurred in obtaining it. A claim under a contract of insurance cannot be dealt with in so cavalier a manner. The grounds for rejection are without merit or substance. This, in my view, is a fit case where actual costs should be awarded.

77. I have asked the plaintiffs to prepare a statement of their costs and they have done so. I have taken it on record. From 1986 to 2014, the plaintiffs have had to spend Rs. 33,12,324/- in prosecuting this suit. Of this, an amount of Rs. 2,13,132 is on photocopying charges alone from February 1986 to March 2014. These costs are not exorbitant, unreasonable or irrational.

78. Justice demands that the plaintiffs also be awarded the entire amount of their actual costs. The 1st defendant should not be permitted to take advantage of their own delays and their obdurate and unreasonable conduct. The costs are roughly one-fourth of the plaintiffs' principal claim. That means that in prosecuting their cause, the plaintiffs have been forced to spend a quarter of it on legal expenses.

79. I find from a reading of the High Court (Original Side) Rules that despite this

delay, and despite these actual costs incurred, the plaintiffs are entitled to no more than about Rs. 25,000/- (or perhaps only insignificantly more) as costs. This is far less than the Rs. 2,13,132/- photocopying expenses incurred by the plaintiff. The costs that can be awarded are thus wholly unrealistic and illusory, especially given the fact that litigations in this Court tend to be commercial litigations as Mumbai is still the commercial heart of the country.

80. The provisions of the Bombay Pleaders Act, 1920, which has not till date been repealed, also contain restrictions on the award of costs. Even assuming that the Original Side Rules are confined to a certain class of suits as mentioned in Rule 601 (a doubtful proposition at best), the provisions of the Bombay Pleaders Act would nonetheless operate to restrict the amount that can be awarded as costs. The provisions of the BPA broadly apply to "pleaders" and "vakils", but the definition of "pleader" in Sn. 2(3) includes a High Court attorney. Given the provisions of the Advocates Act, that would include all High Court advocates today. Section 2(3) also says that some other sections of the BPA will not apply to attorneys of the High Court. However, section 18 is applicable and it says that where costs are awarded to a party in any proceeding, the amount of the pleaders' fee to be taxed in the bill of costs as recoverable by such party from his adversary shall be computed in accordance with rules in Schedule III, unless that fee has been settled in a lesser amount by the Section 3 of the Legal Practitioners' (Fees) Act, 1926, a central enactment. There is an identical provision in Rule 606(13) of the High Court (Original Side) Rules. By my reckoning, on a claim of Rs. 2 crores (for instance), the maximum recoverable under the BPA would be Rs. 1 lakh.

81. Rule 606(1) of the High Court (Original Side) Rules puts the cap at a much lower figure, roughly Rs. 25,000/-. This rule has not been amended even after the change in the pecuniary jurisdiction of this Court. The slabs are still, apparently, reckoned on some historical basis, with the uppermost slab of the value of the subject matter of the suit frozen at Rs. 5 lakhs. In this suit of 1986, the maximum possible costs that can be awarded are thus about 11% of the photocopying charges; only about 0.75% of the total costs incurred by the plaintiffs; and only 0.14% of the plaintiffs' principal claim. I believe this to be not only wholly unrealistic, but actually counter-productive: it can only serve to goad the shiftless, the laggardly, and the mendacious to disallow these costs. This is not the intent of Section 35 of the CPC; it cannot possibly be. We cannot any longer afford the luxury of an adherence to some archaic norms and rules in commercial matters. Delayed disposal and a regulatory choke on the award of costs are, together, the most damning indictment of our legal system today. If we do not right our course now, we risk that which is vital: public confidence in the judiciary.

82. For these reasons, I believe it is imperative, having regard to the decisions of the Supreme Court, and given the extraordinary costs of litigation in this city and in our Court that our Rules be urgently revised without delay. If there are now

proposals to set up a "commercial courts division", then I believe our High Court must lead the way by dealing with "commercial" matters in a "commercial" manner. The Original Side Rules relating to costs must be amended immediately, consonant with the increased pecuniary jurisdiction, increased litigation costs and the decisions of the Supreme Court. The Bombay Pleaders" Act, 1920 must also be taken up for review so that a suitable replacement act or amendments can be suggested to the State Government.

83. There will, therefore, be a decree for costs in favour of the plaintiffs and against the 1st defendant (a) in the amount of Rs. 32,12,324/-, if allowable; or (b) in accordance with the extant rules for costs and taxation; together with interest thereon at the rate 8% per annum from the date of the decree till payment or realization.

84. Decree to be drawn up accordingly. At this stage the learned advocate for the plaintiffs makes a request for return of the original documents. The original documents shall be returned to the plaintiffs upon their filing an undertaking to have the same produced in Court, as and when required.