
(1990) 03 DEL CK 0025
In the Delhi High Court

Nibro Ltd.

APPELLANT

Vs

National Insurance Co. Ltd.

RESPONDENT

Date of Decision : 06-03-1990

Acts Referred:

Citation : AIR 1991 Delhi 25 : (1991) 70 CompCas 388 : (1990) 41 DLT 633

Hon'ble Judges : Sunanda Bhandare, J

Bench : Single Bench

Advocate : S.C. Malik, for the Appellant; P.P. Malhotra, for the Respondent

Judgement

Sunanda Bhandare, J.—This suit for recovery of Rs.7,40,606.65 together with costs and interest has been filed by the plaintiff against the defendant - National Insurance Co. Ltd. The plaintiff is a company incorporated under the Companies Act, 1956, having its registered office at E-5, Hauz Khas, New Delhi. The plaint has been signed and instituted by one Shri G. Jhajharia who claims to be the director and principle officer of the plaintiff company authorised to sign the plaint and institute the suit. The defendant is a nationalised company.

2. The plaintiff has a factory at Delhi Road, Gurgaon, Haryana. It is stated in the plaint that the factory of the plaintiff was insured by the defendant since 1973 against, theft, fire, damage, etc., from time to time under the policies taken by the plaintiff. The plaintiff with a view to reinsure its factory requested Shri Dilip Bhattacharjee, the Development Officer of Division No.II of the defendant, to visit and inspect the premises. Accordingly ,Shri Dilip Bhattacharjee visited the factory of the plaintiff on May 31, 1982, and agreed to insure the factory building goods and raw material against theft, fire, damages, etc. He further agreed to issue the cover note on the next day. According to the plaintiff, on June 1, 1982, Shri Dilip Bhattacharjee collected a cheque for Rs.12,324 which included Rs.6,364 towards fire insurance premium, Rs.5,400 towards burglary and Rs.516 towards traders" combined risk. It is alleged in the plaint that Shri Dilip Bhattacharjee signed the cover-note in the presence of Shri A.K. Jhajharia; however, Shri Dilip Bhattacharjee said that he will issue the insurance policy very

soon and took away the cover-note with him to do the needful in the matter. According to the plaintiff, Shri Bhattacharjee issued insurance cover-notes under cover-notes Nos.614129 and 591291 on June 1, 1982, itself for an aggregate sum of Rs.40,60,000. It is alleged that the plaintiff's proposal and the cheque were duly accepted by the insurance company through Shri Dilip Bhattacharjee, the Development Officer, and the above mentioned cover-notes were issued on June 1, 1982, to convey the acceptance.

3. A fire broke out in the factory of the plaintiff on the morning of June 2, 1982, at about 10.30/10.40 a.m. It is alleged that the officers of the plaintiff present in the factory immediately the Fire Brigade, Gurgaon, on the telephone as well as by deputing representatives and the fire was brought under control by the Air Force Fire Station and the Gurgaon Municipal Fire Station at about 2.30 p.m. However, the said fire caused substantial damage to the main building, its installation, raw materials, semi-finished/finished goods and to the goods lying in the customs bonded warehouse, etc. It is further alleged that the plaintiff on June 3, 1982, informed the Senior Divisional Manager of the defendant about the fire and requested the defendant to depute its surveyor immediately to survey the damage. Accordingly, a surveyor was deputed by the defendant who assessed the loss at Rs.2,72,458.71. The surveyor, however, had not calculated the loss caused to the goods lying in the customs bonded warehouse because the customs authorities were not available for inspection at the relevant time. It is alleged that the plaintiff time and again requested the defendant to depute a surveyor to inspect the loss suffered by the plaintiff in the customs bonded warehouse and pay the claim but despite that the defendant neither paid the claim nor sent the surveyor to assess the loss at the customs bonded warehouse. The plaintiff, Therefore, issued a notice on January 22, 1983, through its advocates, Gagrath and Co., calling upon the defendant to get the survey done in the customs bonded warehouse and for payment of Rs.2,72,458.71 with interest at 18% per annum within 15 days of the said notice. It is alleged that the said notice issued by Gagrath and Co. was received by the office of the defendant on January 25, 1983. Since the defendant neither made the payment nor sent the surveyor, the plaintiff assessed the loss at Rs.6,27,632.76.

4. The defendant controverted the allegations made by the plaintiff in the plaint. In the written statement filed on behalf of the defendant, the defendant challenged the authority of Shri G. Jhajharia and denied that he is competent to sign the plaint and institute the suit, engage counsel and do all necessary acts for due prosecution of the case. It is alleged that the plaintiff company has not passed any resolution for filing the present suit or expressing its intention to file the suit. The suit thus being unauthorised is not maintainable. The defendant in its written statement further alleged that though the defendant insures the property through its officers and agents for various kinds of risks, the contract of insurance only matures when a proposal submitted by the insured is finally accepted by the company and documents evidencing the contract of insurance are issued by the company. It is alleged that a contract is not completed by mere

tender of proposal for insurance or by tendering money. The defendant denied that the factory of the plaintiff was being insured since 1973 and it is alleged that the factory of the plaintiff was insured from 1978 till 29 the December, 1981. This insurance was also arranged by the bankers of the plaintiff. The insurance expired on 29th December, 1981, and, thereafter, the plaintiff did not obtain any insurance in view of the dispute between the plaintiff and its bankers, namely, United Bank of India, Connaught Circus, New Delhi. The bank had filed a suit for recovery of Rs.66 lakhs against the plaintiff and the bank had refused to advance any money to the plaintiff and thus the plaintiff was unable to obtain the insurance. The defendant has admitted that Shri Dilip Bhattacharjee visited the factory of the plaintiff company on 31st May, 1982; however, the defendant denies that there was any agreement to insure the factory of the plaintiff against theft, damage, fire of the building, goods in stock lying in the factory and raw materials as alleged by the plaintiff in the plaint. It is alleged in the written statement that the plaintiff did not give any proposal for insurance, nor made any payment as stated in the plaint and Shri Dilip Bhattacharjee did not agree to insure the factory or give the cover-notes as alleged in the plaint. It is stated that the plaintiff had in fact asked Shri Dilip Bhattacharjee to visit the factory on 2nd May, 1982. The defendant has denied that Shri Dilip Bhattacharjee visited the plaintiff company on 1st June, 1982, and collected a cheque for Rs.12,324 on that day as alleged in the ;complaint. The defendant has alleged in the written statement that investigation carried out by the defendant revealed that the plaintiff tried to obtain an ante-dated insurance after the incident of fire on June 2, 1982. The defendant has further alleged that Shri Dilip Bhattacharjee at the instance of the plaintiff company tried to impress upon the defendant that he had accepted the risk on June 1, 1982, subject to the approval of the company although in his statement before the defendant on June 3, 1982, he did not mention anything about the preparation of the cover-note. The defendant has further alleged that the plaintiff also tried to obtain an ante-dated insurance through another agent of the company, namely, Shri P. Sengupta, but failed in that attempt. It is alleged that Shri Dilip Bhattacharjee did not accept the proposal or the cheque on June 1, 1982, but received them later on subject to acceptance and approval by the defendant-insurance company. The defendant company has stated that if the plaintiff had given the cheque on June 1, 1982, and the proposal had been accepted by Shri Dilip Bhattacharjee, there was no occasion for Shri Bhattacharjee not to issue the cover-note and hand it over to the plaintiff right away. It is stated that the alleged premium of Rs.12,324 does not represent the correct figure of the premium for the two alleged cover-notes stated to be prepared by the defendant-insurance company. It is stated that the cover-note No.591291 does not even mention the sum assured. The defendant has alleged in the written statement that the two alleged cover-notes were got prepared in great haste after the fire in an attempt to get an ante-dated insurance from Shri Dilip Bhattacharjee, however, the insurance company saw through the game and did not accept the insurance. The defendant has stated in its written statement that the senior divisional manager was informed of the fire

on June 4, 1982, though the letter bears the date June 3, 1982. It is further alleged that this letter did not mention the cover-note or the number of the certificate of insurance which shows that no such cover-note or certificate was issued prior to that date and an attempt was being made to ante-date the insurance-cover. It is stated that the surveyor was appointed by the defendant without prejudice to the rights of the parties. The defendant has also denied that the loss assessed by the surveyor did not include the goods lying in the customs bonded warehouse. The defendant has referred to the investigation report of Shri M.P. Bakshi of the National Institute of Surveyors to show that an attempt was being made to obtain the insurance after the fire. The defendant has thus denied the contract of insurance and consequently denied the liability.

5. The plaintiff filed a replication once again reiterating the claim made in the plaint and further stated that the moment the money is tendered and the same is accepted by the insurance agent of the insurance company, the contract of insurance is complete. It is alleged that the formal documents are drawn up at a much later stage but the insurance starts operating from the date on which the money is tendered and accepted by the insurance agent. It is stated in the replication that the plaintiff has settled its dispute with the bank. The plaintiff has denied the knowledge of any investigation that might have been undertaken by the defendant and thus denied that there was any attempt by the plaintiff to ante-date the insurance as alleged by the defendant. It is stated in the replication that since the defendant has failed to disclose the details of investigation and the plaintiff was not made a party to the investigation, the investigation has to be disregarded. The plaintiff has denied that the insurance was accepted by Shri Dilip Bhattacharjee subject to the approval of the defendant. The plaintiff has also denied that Shri Dilip Bhattacharjee did not mention about the issuance of the cover-note in his statement dated June 3, 1982, and denied that the plaintiff tried to obtain an ante-dated insurance through another agent. Shri P. Sengupta, as alleged by the defendant. The plaintiff has reiterated that a cheque for the insurance premium of Rs.12,324 was given on the basis of the calculation made by Shri Bhattacharjee and contended that non-acceptance of the insurance by the defendant is without any cause or reason and was only to avoid liability. The plaintiff has alleged that the non-mention of the cover- note number or certificate of insurance number in the letter dated June 3, 1983, does not in any manner affect the claim of the plaintiff. The plaintiff has further reiterated in the replication that the defendant did not assess the loss in the customs bonded warehouse and denied the investigation report of Shri M.P. Bakshi. The plaintiff has thus denied the case of the defendant that no insurance was issued or that there was no completed contract between the parties.

1. On the pleading of the parties, the following issues were framed : 1. Was the factory of the plaintiff along with the goods and machinery therein insured with the defendant company on June 2, 1982 ?

2. Did a fire take place in the factory premises of the plaintiff on June 2, 1982 ? If so, what damage was suffered by the plaintiff in the fire and of what value ? 3. In case issue No.1 is proved, is the defendant company not liable to pay for the loss suffered by the plaintiff in that fire subject to the conditions of the insurance? 4. Has the suit been instituted on behalf of the plaintiff company by an authorised person and the plaint signed and verified by a competent person ? 5. Relief.

6. Only two witnesses were examined by the plaintiff. PW-1 is the bank official, a representative of the United Bank of India, and PW-2, Shri Ashok Jhajharia, director of the plaintiff company.

7. Issue No.4 : The plaint has been signed by Shri G. Jhajharia as principal officer of the plaintiff company. The plaintiff, however, did not examine Shri G. Jhajharia but examined Shri Ashok Kumar Jhajharia, director of the plaintiff company, who stated that Shri G. Jhajharia is his elder brother. He has stated that Shri G; Jhajharia was the director of the plaintiff company from 1975 to 1987. Shri G. Jhajharia ceased to be a director after his retirement in 1987, and thus his statement could not be recorded in court. Shri Ashok Kumar Jhajharia has identified the signatures of Shri G. Jhajharia since he has seen him writing and signing. He has proved exhibit PW-2/1, which is the resolution of the board of directors reappointing Shri G. Jhajharia as director had stated that he continued to act as director from July 7, 1983, till he retired. Shri Ashok Kumar Jhajharia has further stated that he himself was handling the day-to-day management of the plaintiff company including the insurance of the factory. The plaintiff, however, in the plaint has stated that Shri G. Jhajharia had instituted the suit as director and principal officer of the company. The plaintiff has not filed any resolution of the plaintiff company authorising either Shri G. Jhajharia or Shri Ashok Kumar Jhajharia to institute the present suit.

8. It was contended by learned counsel for the plaintiff that under Order 29, rule 1 of the Code of Civil Procedure, the pleadings can be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case. Thus, since Shri G. Jhajharia was the director of the plaintiff company he was authorised to sign and verify the complaint on behalf of the plaintiff company and thus no separate resolution of the plaintiff company was necessary authorising him to institute the suit. Learned counsel relied on the judgment of this court in *Mercantile Bank Ltd. v. Phool Chand Fateh Chand* (Suit No.11 of 1967 - 10 - 8 - 1973) and submitted that a principal officer of the company is competent to sign any verify the plaint under the provisions of Order 29, rule 1 of the CPC without his being specifically empowered by a resolution to institute the suit. Learned counsel submitted that Shri G. Jhajharia who was the director of the company was in a position to depose to the facts of the case and thus competent to file the suit. Learned counsel further submitted that non-filing of the resolution of the board of directors authorising Shri G. Jhajharia is a mere technicality which

must be ignored. He relied on *S.B. Noronah Vs. Prem Kumari Khanna*, , and *Bhagwan Swaroop and Others Vs. Mool Chand and Others*, , in support of this submission. Learned counsel further submitted that under Order 3, rule 1 of the CPC the suit can be presented either by a party in person or by his recognised agent or by a pleader appearing, applying or acting, as the case may be, on his behalf. Thus, since the advocate had filed the suit in whose favor Shri G. Jhajharia has given the power of attorney, no further resolution was required. He relied on *Mst. Barkate v. Feroz Khan* [1944] PLR 96 in support of this contention.

9. On the other hand, it was submitted by learned counsel for the defendant that signing and verifying the suit is one thing whereas having the authority to institute the suit is another. There is nothing on record to show that the director, Shri G. Jhajharia, was authorised by the the board of directors of the plaintiff company to file the suit. The plaint has failed to place on record any such resolution. Institution of a suit is different from filing of a suit. Furthermore, there is nothing on record to show that Shri g. Jhajharia was able to depose to the facts of the case or that he was conversant with the facts of the case. In fact, Shri Ashok Kumar Jhajharia in his statement has himself stated that he was handling the day-to-day management of the plaintiff company including the insurance part. Thus, it can not be said that Shri G. Jhajharia was conversant with the facts and as such in a position to depose to the same. Learned counsel referred to section 14, 26, 28; Schedule I and Table A and section 291 of the Companies Act and contended that all powers of the company are with the board of directors and an individual director cannot, without a specific resolution of the board, institute a suit. The power to institute a suit vests with the board and an individual director can institute a suit only if he is specifically empowered to do so. Learned counsel relied on the judgments of this court in *Oberoji Hotels (India) Pvt Ltd. v. Observer Publications (P.) Ltd.* (Suit No.469 of 1966-26-11-1968), *South India Insurance Co. Ltd. v. Globe Motors* (Suit No.68 of 1969 - 19-4-1974), the judgment of the Punjab and Jaryana High Court in *National Fertilizers Ltd. v. M.C. Bhatinda* (C.R. No.1406 of 1981 - 26-2-1982) and *The Jaipur Udyog Ltd., Sawaimadhopur and Others Vs. The Union of India (UOI) and Others*, , in support of this contention. Learned counsel further submitted that Shri G. Jhajharia has signed the plaint as principal officer but there is no evidence on record that he was the principal officer nor there is any evidence to show that he was conversant with the facts of the case . Learned counsel referred to Chapter IV of the Delhi High Court (Original Side) Rules and submitted that Shri G. Jhajharia had no authority to present the suit under these Rules as well. Learned counsel submitted that Order 29, rule 1 of CPC only talks about signing and verification of the pleadings on behalf of the corporation but does not talk about institution of suits. Learned counsel relied on *Notified Area Committee, Okara v. Kidar Nath*, AIR 1935 Lah 345 Delhi and *London Bank Ltd. v. A. Oldham* [1893] 2nd 21 Cal 60 *State of Jammu and Kashmir v. Shree Karan Singh Woollen Mills Ltd.* AIR 1960 J 7 K 47 and *Food Corporation of India Vs. Baldev Kaur and Others*, , and submitted that the judgments referred to by

learned counsel for the plaintiff only deal with the question of signing and verification of the plaint and are on totally different facts.

10. It will be useful to reproduce the two provisions of the Code of Civil Procedure, namely, Order 3, rule 1 and Order 29, rule 1, on which the plaintiff relies.

11. Order 3, rule 1 of the CPC reads thus :

"Any appearance, application or act in or to any court, required or authorised by law to be made or done by a party in such court, may except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent or by a pleader appearing, applying or action, as the case may be, on his behalf:

Provided that any such appearance shall, if the court so directs, be made by the party in person."

12. Order 29, rule 1 of the CPC reads thus :

"In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or be any director or other principal officer of the corporation who is able to depose to the facts of the case."

13. Order 3, rule 1 provides that any appearance, application or act in or to any court required or authorise by law can be made or done by the party in person or by his recognized agent or by a pleader appearing, applying or acting, as the case may be, on his behalf. Provided of course, such an appearance, application or act in or to any court is required or authorised by law to be done or done by a party in such court. Where, however, there is an express provision of law, then that provision will prevail. Thus, if an authority is given to a pleader or a recognised agent as provided by law, the recognised agent or pleader can file an appearance or file a suit in court if the party himself is not in a position to file it. In my view, if a party is a company or a corporation, the recognised agent or a pleader has to be authorise by law to file such a plaint. Such an authority can be given to a pleader or an agent in the case of a company by a person specifically authorised in this behalf. In other words, a pleader or an agent can be authorised to file a suit on behalf of a company only by an authorised representative of the company. If a director or a secretary is authorised by law, then he can certainly give the authority to another person as provided under Order 3, rule 1.

14. Order 29, rule 1 of the CPC provides for subscription and verification of pleadings and states that in suits by or against the corporation, any pleadings may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case.

15. This court in Oberoi Hotels (India) Pvt. Ltd. (Suit No.469 of 1966-26-11-1968), while dealing with the scope of Order 29 of the CPC has observed as

follows : "Learned counsel for the plaintiff lastly argued that Shri Ram Lal Chaudhary had stated that he had authority to file the suit as a principal officer of the plaintiff company even apart from the resolution marked "A". He did not say so. But how does that help ? The authority of a principal officer of a company in relation to suits filed on behalf of the limited company does not extend beyond what is laid down in Order 29 of the Code of Civil Procedure. That provision does not entitle the principal officer of a company to file a suit on its behalf and for that the authority has to be found either in the articles of association of the company or in the resolution of its board of directors. In the articles of association of several companies, provision is generally made authorising their managing directors and other officers to file and defend suits on their behalf. Similarly, the board of directors of a company can authorise the institution of a suit on behalf of the company by a resolution. In the case of some companies the articles empower the managing director or directors to appoint general attorneys and general managers and given them authority to institute suits on behalf of the company. But in the absence of any proof in regard to any such power having been conferred on Shri Ram Lal Choudhary, it is not possible to accept his statement that he was authorised to file the suit as the principal officer of the plaintiff hotel.

16. I, Therefore, hold that although the plaint has been signed and verified by a person duly authorised to do so on behalf of the plaintiff company, it has not been proved that the suit has been instituted by any such person. The issue is consequently decided against the plaintiff."

17. Similarly, in South India Insurance Co. Ltd. (Suit No.68 of 1969-19-4- 1974), this court has dealt with a similar objection as raised by the defendant in this case and observed that a company being a corporate body or a juristic person has to act through somebody and that the person has to be specifically authorised to institute the suit. In Notified Area Committee, AIR 1935 Lah 345, the Lahore Bench considered the scope of Order 29, rule 1 of the CPC and it has been observed thus (at page 346):

"Similarly, Order 29, rule 1, Civil Procedure Code, also does not help the appellant. It merely defines the person who is authorised to sign or verify the pleadings on behalf of the corporation (in this case the committee). It, Therefore, comes into operation only after the proceedings have been validly started and cannot be utilised to authorise an unauthorised person to institute suits on behalf of the corporation."

18. In Seth Kirpal Chand v. Traders Bank Ltd. AIR 1954 J & K 45 the court, while dealing with the question that though there is no original authorisation, a subsequent ratification could render it legitimate, has approved the view taken by the Division Bench of the Lahore High Court in Notified Area Committee, AIR 1935 Lah 345 and observed thus (at page 47):

"Here the initiative to institute the suit could be properly transferred to the

manager under article 105 of the articles of association and, Therefore, the subsequent ratification of the act of the agent by the principal could cure the original defect."

19. Thus, the Division Bench accepted the view that there should be a specific authorisation in favor of a person permitting him to institute a suit.

20. In *University of Kashmir v. Ghulam Nabi Mir* AIR 1978 (NOC) 114 (J & K), the court has observed that signing and verification of the plaint is different from filing the suit by a competent person.

21. In the case of *Food Corporation of India Vs. Baldev Kaur and Others*, , while considering the issue whether an application was filed by a competent person, the court has observed that Order 29, rule 1, does not empower an officer to conduct the case on behalf of the corporation. Only the limited power to sign and verify the pleadings has been conferred upon the officer.

22. I find that the judgments on which the plaintiff has relied upon, namely, *Mercantile Bank Ltd. (Suit No.11 of 1967 - 10-8-1973)*, *S.B. Noronah Vs. Prem Kumari Khanna*, , *Bhagwan Swaroop and Others Vs. Mool Chand and Others*, , and *Mst. Barkate* [1944] PLR 96 deal with the question of signing and verification of the plaint and not institution of the plaint.

23. In *Mercantile Bank Ltd. (Suit No.11 of 1967 - 10-8-1973)*, the learned single judge of this court was dealing with the question whether the person who had signed the pleadings was a principal officer and constituted attorney of the plaintiff. The learned judge held that Mr. Carey was the principal officer of the plaintiff company who was able to depose to the facts of the case and thus under Order 29, rule 1 of the CPC could validly sign, verify and file the plaint. The question whether the company is required to specifically pass a resolution empowering Mr. Carey to institute the suit was not for the consideration of the court. The issue that was raised in the suit was :

"Is the plaint signed and verified by a duly authorised person ?"

24. Since the court found that Mr. Carey was the principal officer, it was observed that under Order 29, rule 1, he could sign, verify and file the plaint.

25. Learned single judge while deciding *Mercantile Bank's* case (Suit No.11 of 1967 - 10-8-1973) had relied on the case of *The Jaipur Udyog Ltd., Sawaimadhopur and Others Vs. The Union of India (UOI) and Others*, . I find that the facts of the case *The Jaipur Udyog Ltd., Sawaimadhopur and Others Vs. The Union of India (UOI) and Others*, , were totally different. The preliminary objection raised in that case by the respondent was that the petitions were filed by unauthorised persons as they were not signed by the secretary or the director of the company concerned and, Therefore, the petitions were not maintainable. On the facts of the case, the court observed that the evidence clearly showed that the petitions were signed and verified on behalf of the company by their principal officers who were able to depose to the facts of the case and as such

were entitled to sign the petitions and present them in the court. After this case as well, no objection was raised regarding the validity and power of the principal officer to institute the petitions.

26. In the case of National Fertilisers Ltd. (C.R.No.1406 of 1981 - 26-2- 1982), the question whether the person who had signed the plaint had the authority to institute the suit was not for consideration before the court and, Therefore, the court held that the revision petition filed by the advocate on the basis of the vakalatnama signed by the estate officer of the National Fertilisers Ltd. was competent.

27. On the analysis of the judgments, it is clear that Order 29, rule 1 of the CPC does not authorise persons mentioned therein to institute suits on behalf of the corporation. It only authorises them to sign and verify the pleadings on behalf of the corporation.

28. In my view, the provisions of the Companies Act, 1956m and particularly sections 14, 26, 28; Schedule I, Table A and section 291 are very clear.

29. It is well-settled that u/s 291 of the Companies Act except where express provision is made that the powers of a company in respect of a particular matter are to be exercised by the company in general meeting, in all other cases the board of directors are entitled to exercise all its powers. Individual directors have such powers only as are vested in them by the memorandum and articles. It is true that ordinarily the court will not unsuit a person on account of technicalities. However, the question of authority to institute a suit on behalf of a company is not a technical matter. It has far-reaching effects. It often affects the policy and finances of the company. Thus , unless a power to institute a suit is specifically conferred on a particular director, he has no authority to institute a suit on behalf of the company. Needless to say such a power can be conferred by the board of directors only by passing a resolution in that regard.

Chapter IV of the Delhi High Court (Original Side) Rules deals with the question of presentation of suits. Under this rule, a suit can be presented by a duly authorised agent or by an advocate duly appointed by him for the purpose. This authorisation, in my view, in the case of a company can be given only after a decision to institute a suit is taken by the board of directors of the company. the board of directors may in turn authorise a particular director, principal officer or the secretary to institute a suit.

30. The plaintiff has not placed on record nay resolution passed by the company authorising Shri G. Jhajharia to institute the suit. Shri G. Jhajharia did not come forward to make a statement that he was in a position to depose to the facts of the case. In the plaint signed by him, he claims to be a principal officer and director, but there is no evidence on record to indicate that he had the authority to institute the suit. The memorandum and articles of association of the plaintiff company are also not placed on record. Even after the suit was instituted by Shri G. Jhajharia, no resolution was passed by the company ratifying this action. No

such decision of the board of directors is placed on record in the present case. The plaintiff has examined Shri Ashok Kumar Jhajharia. He has placed on record, exhibit PW-2/1, which is the resolution of the board of directors reappointing Shri G. Jhajharia as the director but this resolution does not empower Shri G. Jhajharia as a director to institute the present suit. Shri Ashok Kumar Jhajharia has stated that he was handling the day-to-day management of the plaintiff company including the insurance part of it. He, however, does not state that Mr. G. Jhajharia was handling the day-to-day management or was in charge of the insurance claim.

31. Thus, there is no evidence to prove that Shri G. Jhajharia had the authority to institute the present suit.

32. Issue No.4 is thus decided against the plaintiff and in favor of the defendant.

33. Issue No.2: It is the case of the plaintiff that fire broke out at the factory of the plaintiff on June 2, 1982. The plaintiff has placed on record a copy of the letter dated June 3, 1982, exhibit PW-2/6, and a copy of the letter dated June 3, 1982, exhibit PW-2/7, addressed to the defendant informing about the fire. Exhibit PW-2/7 contains the rubber stamp of the defendant company acknowledging the receipt of the said letter though there is no signature of any representative of the defendant on the said letter. Exhibit PW-2/5 is a copy of the letter dated June 2, 1982, sent by the plaintiff to the Station House Officer, Police Station (City), Gurgaon. The defendant has not disputed that a fire took place in the factory of the plaintiff on June 2, 1982, in as much as a surveyor was appointed by the defendant to assess the damage caused by the said fire and the surveyor gave his report assessing the loss at Rs.2,72,458.71. This is evident from the copy of the letter dated July 21, 1982, exhibit PW-2/9, addressed by the plaintiff to the defendant. Thus, it can be safely inferred that the fire did take place in the factory premises of the plaintiff on June 2, 1982. The surveyor has assessed the damage at Rs.2,72,458.71 which, as stated herein above, is indicated by letter dated July 21, 1982. According to the plaintiff, this damage did not cover the loss suffered by the plaintiff because of the damage caused to the goods lying at the customs bonded warehouse. The plaintiff has relied on the correspondence entered into between the plaintiff and the defendant for getting the loss in the customs bonded warehouse also surveyed. It is not disputed by the defendant that after Mr. M.P. Bakshi had surveyed the loss, no further survey was ever conducted by the defendant. The plaintiff, Therefore, got the loss surveyed by their own surveyor. The plaintiff's surveyor, Shri Darshan Indar Singh Kohli, gave his report on June 28, 1983, exhibit -2/20. The loss suffered according to this surveyor's report is Rs.3,55,174.05. The defendant has not challenged this report of the surveyor. Therefore, the damage suffered by the plaintiff in the fire would have to be taken as per the two surveyors' reports, i.e., Rs.2,72,458.71 and Rs.3,55,174.05.

34. Issues Nos. 1 and 3 : The whole case of the plaintiff is that on May 31, 1982, Shri Dilip Bhattacharjee, the Development Officer of the defendant, visited the

factory of the plaintiff and agreed to insure the factory against theft, damage, fire, etc. The plaintiff has relied on the visitor's register maintained in the factory to prove the visit of Shri Dilip Bhattacharjee on May 31, 1982. The photocopy of the entry in the visitor's register is exhibit PW-2/2. As per the plaint, Shri Dilip Bhattacharjee collected a cheque for Rs.12,324 on June 1, 1982, towards the premium. He signed the cover-notes in the presence of Shri A.K. Jhajharia but took away the cover-notes with him on the promise that he will be giving the insurance policy very soon. The particulars giving the number of the cover-notes are mentioned in the plaint PW-2, Shri Ashok Kumar Jhajharia, in his examination-in-chief has stated that the said cover-notes were in his possession for about 10 minutes and it is, thereafter, that Mr. Dilip Bhattacharjee took back the cover-notes.

35. The defendant, on the other hand, has denied that Shri Dilip Bhattacharjee visited the plaintiff on June 1, 1982, as alleged by the plaintiff and has, in fact, alleged that the plaintiff tried to obtain an insurance after the fire had already taken place. The defendant has denied that any cover-notes were issued by Mr. Dilip Bhattacharjee to the plaintiff. The case of the defendant is that Mr. Dilip Bhattacharjee himself also tried to convince the company, however, in his statement on June 3, 1982, he did not mention anything about the preparation or issuance of cover-notes. Thus, the defendant contends that Mr. Dilip Bhattacharjee did not accept the proposal or the cheque on June 1, 1982, but he received them later on subject to acceptance and approval by the defendant company. The defendant has alleged that the plaintiff had also tried to obtain an ante-dated insurance through another agent of the company, namely, Shri P. Sengupta, but had failed in that attempt.

36. It was contended by learned counsel for the plaintiff that the defendant has not specifically denied in the written statement that cover-notes were prepared by Mr. Dilip Bhattacharjee; thus the defendant having failed to produce these cover-notes in spite of the fact that notice under Order 12, rule 8 of the CPC was given by the plaintiff to the defendant, an adverse inference must be drawn against the defendant. Learned counsel submitted that since the plaintiff had acted in good faith with an employee of the defendant, the plaintiff cannot be penalised simply because the employee was part of a bigger fraud. Learned counsel submitted that the Bakshi Committee Report is also not placed on record by the defendant and, Therefore, it must be inferred that the proposal was accepted by Shri Dilip Battacharjee. Learned counsel further submitted that the moment a cover-note is issued by the insurance company, the contract of insurance is complete and the insurance company is bound to make the payment for the loss suffered though the regular policy may not have been issued. Learned counsel relied on the judgment of the Supreme Court in General Assurance Society Ltd. Vs. Chandumull Jain and Another, , and submitted that the legal status of a cover-note is that it is an interim insurance policy. Learned counsel submitted that since the defendant failed to produce the cover-notes in their possession, an adverse inference is to be drawn against the defendant.

Learned counsel submitted that if a party fails to produce the best evidence in its possession, an adverse inference should be drawn. Learned counsel relied on *Bawa Singh Vs. Jagdish Chand and Others*, , *Ram Murty Gupta Vs. Suresh Chandra Agrawal*, , *Gurnam Singh and Others Vs. Surjit Singh and Others*, , *Irudayam Ammal and Others Vs. Salayath Mary*, and *Bharat Bhushan Vs. Ved Prakash*, , in support of this contention.

37. On the other hand, learned counsel for the defendant submitted that the cover-notes were not given to the plaintiff and thus there was no concluded contract between the parties. He submitted that the alleged cover-notes were got prepared by the plaintiff in great haste after the fire in an attempt to wrongfully cover the insurance ante-date since the defendant company did not accept the insurance. Shri. Dilip Bhattacharjee did not issue the cover-notes. Learned counsel submitted that the plaintiff had shown Shri Dilip Bhattacharjee in the list of witnesses but this witness was given up later on by the plaintiff. Learned counsel further submitted that mere preparation of the cover- notes was not conclusive unless the cover-notes had been given by the development officer of the defendant to the plaintiff. Learned counsel submitted that the cheque was given by the plaintiff to Shri Dilip Bhattacharjee after the fire and was never encashed. The proposal was never accepted by the defendant and thus there was no concluded contract between the parties. Learned counsel submitted that for Constituting a concluded contract, meeting of minds is important and since in the present case there was no meeting of minds between the plaintiff and the defendant, there was no valid contract between the parties. Learned counsel relied on Halsbury, volume 25, fourth edition, para 398, at page 221, section 46VB of the Insurance Act read with rule 58 of the Insurance Rules and *Life Insurance Corporation of India Vs. Raja Vasireddy Komalavalli Kamba and Others*, in support of his contention.

38. The Supreme Court in *General Assurance Society Ltd.* [1966] 36 Comp Cas 468 has observed as follows (at page 478) :

"A contract of insurance is a species of commercial transaction and there is a well-established commercial practice to send cover notes even prior to the completion of a proper proposal or while the proposal is being considered or a policy is in preparation for delivery. A cover note is a temporary and limited agreement. It may be self-contained or it may incorporated by reference to the terms and conditions of the future policy. When the cover note incorporates the policy in this manner, it does not have to recite the terms and conditions, but merely to refer to a particular standard policy. If the proposal is for a standard policy and the cover note refers to it, the assured is taken to have accepted the terms of that policy. The reference to the policy and its terms and conditions may be expressed in the proposal or the cover notes or even in the letter of acceptance including the cover-note. The incorporation of the terms and conditions of the policy may also arise from a combination of references in two or more documents passing between the parties. Documents like the proposal,

cover-note and the policy are commercial documents and to interpret them commercial habits and practice cannot altogether be ignored. During the time the cover-note operates, the relations of the parties are governed by its terms and conditions, if any, but more usually by the terms and conditions of the policy bargained for and to be issued. When this happens the terms of the policy are incipient but after the period of temporary cover, the relations are governed only by the terms and conditions of the policy unless insurance is declined in the meantime. Delay in issuing the policy makes no difference. The relations even then are governed by the future policy if the cover-notes give sufficient indication that it would be so. In other respects there is no difference between a contract of insurance and any other contract except that in a contract of insurance, there is a requirement of *uberrima fides*, i.e., good faith on the part of the assured and the contract is likely to be construed *contra proferentem*, that is, against the company in case of ambiguity or doubt. A contract is formed when there is an unqualified acceptance of the proposal. Acceptance may be expressed in writing or it may even be implied if the insurer accepts the premium and retains it. In the case of the assured, a positive act on his part by which he recognises or seeks to enforce the policy amounts to an affirmation of it."

39. It was contended by learned counsel for the defendant that the above mentioned observations of the Supreme Court were made after considering totally different facts inasmuch as the Supreme Court was considering whether an insurance cover could be cancelled by the insurance company.

40. The Supreme Court in *Life Insurance Corporation of India* [1984] 56 Comp Cas 174 has observed as follows (at page 181):

"When an insurance policy becomes effective is well-settled by the authorities but before we note the said authorities, it may be stated that it is clear that the expression "underwrite" signifies "accept liability under". The dictionary meaning also indicated that (see in this connection *The Concise Oxford Dictionary*, sixth edition, page 1267). It is true that normally the expression "underwrite" is used in marine insurance but the expression used in Chapter III of the Financial Powers of the Standing Order, in this case, specifically used the expression "underwriting and revivals" of policies in the case of the Life Insurance Corporation and stated that it was the Divisional Manager who was competent to underwrite a policy for Rs.50,000 and above. The mere receipt and retention of premium until after the death of the applicant or the mere preparation of the policy document is not acceptance. Acceptance must be signified by some act or acts agreed to by the parties or from which the law raises a presumption of acceptance. See in this connection, the statement of law in *Corpus Jurisdiction Secundum*, volume XLIV, page 986, wherein it has been stated as :

"The mere receipt and retention of premiums until after the death of the applicant does not give rise to a contract, although the circumstances may be such that approval could be inferred from retention of the premium. The mere

execution of the policy is not an acceptance; an acceptance, to be complete, must be communicated to the offered ,either directly, or by some definite act, such as placing the contract in the mail. The test is not intention alone. When the application so requires, the acceptance must be evidenced by the signature of one of the company"s executive officers."

Though in certain human relationships silence to a proposal might convey acceptance, in the case of an insurance proposal, silence does not denote consent and no binding contract arises until the person to whom an offer is made says or does something to signify his acceptance. Mere delay in giving an answer cannot be construed as an acceptance, as, prima facie, acceptance must be communicated to the offered .The general rule is that the contract of insurance will be concluded only when the party to whom an offer has been made accepts it unconditionally and communicates his acceptance to the person making the offer. Whether the final acceptance is that of the assured or the insurer, however, depends simply on the way in which negotiations for an insurance have progressed. See in this connection, the statement of law in MacGillivray and Parkington on Insurance Law, seventh edition, page 94, paragraph 215."

41. It was submitted by learned counsel for the plaintiff that the observations of the Supreme Court in Life Insurance Corporation of India [1984] 56 Comp Cas 174 cannot be relied upon by the defendant because in that case the Supreme Court was dealing with a case of life insurance and not general insurance.

42. In my view, after reading the observations of the Supreme Court in the two authorities cited hereinabove, whether the case relates to general insurance or life insurance makes no difference. As observed by the Supreme Court itself in Life Insurance Corporation of India [1984]56 Comp Cas 174 the general rule is that the contract of insurance will be concluded only when the party to whom an offer has been made accepts it unconditionally and communicated his acceptance to the person making the offer. Whether it is done by giving a cover-note or by issuing a letter depends on the facts of each case. In order to hold that there was binding contract of insurance , there must be an offer put forward by one party to the contract and acceptance of it by another. As observed in MacGillivray and Parkington on Insurance Law, eighth edition, chapter 2, page 87, para 212, the material terms of a contract of insurance are : the definition of the risk to be covered, the duration of the insurance cover, the amount and mode of payment of the premium and the amount of insurance payable in the event of a loss. As to all these there must be a consensus ad item, that is to say, there must be either an express agreement or the circumstances must be such as to admit of a reasonable inference.

43. In the present case, admittedly, the factory of the plaintiff was insured by the bank only till December 29, 1981, for a period between 1978 and December 29, 1981. From December 30, 1981, till June 1, 1982, the factory was not insured. It is admitted by the plaintiff that no policy was issued by the defendant. It is also admitted that the cheque which was allegedly given by the plaintiff was never

encased by the defendant. The short question, Therefore, to be determined is whether Shri Dilip Bhattacharjee issued cover-notes and whether the same were received by the plaintiff on June 1, 1982, as alleged. Admittedly, the case of the plaintiff is that Shri Dilip Bhattacharjee took away the cover-notes on June 1, 1982., itself. Rather, PW-2, Shri Ashok Kumar Jhajharia, in his statement has stated that Shri Dilip Bhattacharjee handed over the cover-notes to him on June 1, 1982, and there were in his possession for 10 minutes and Shri Dilip Bhattacharjee immediately took them back with the promise that he will issue the policy shortly. Thus, admittedly the cover-notes are not in the possession of the plaintiff.

44. On a perusal of the various documents which have been placed on record by the plaintiff, I find that in the letters issued by the plaintiff immediately after the fire broke out on June 2, 1982, no reference is made to the cover-notes or the insurance policy. The plaintiff examined only two witnesses on September 5, 1988; one was Shri R.P. Sharma, Manager, United Bank of India, Connaught Circus Branch, New Delhi, as PW-1 who has stated that the last policy taken out by the bank for the factory of the plaintiff expired on December 29, 1981; and the other was that Shri Ashok Kumar Jhajharia himself as PW-2. PW-1 has stated that the letter dated June 2, 1982, exhibit PW1/1, was written by the plaintiff to the bank. Exhibit PW1/1 indicated that the accounts officer of the plaintiff company had informed the bank on June 2, 1982, that the cover-notes would be sent by the insurance company directly to the bank. This witness, however, does not state when this letter was received by the bank and in fact a suggestion was made by counsel for the defendant that exhibit PW-1/1 was manipulated between the plaintiff and the bank. In any event, the letter does not give the particulars as to who gave the cover-notes and also does not give the details of the insurance cover. This letter only states that the cover-notes would be sent by the defendant to the bank directly. Thus, even as per this letter, the cover-notes were not with the plaintiff on June 2, 1982, and were still with the defendant. On a perusal of this letter, I find that though the rubber stamp "RECEIVED" is stamped on this letter, it does not bear any signature of the bank official. In my opinion, this letter does not help the plaintiff in any manner. PW-2, Shri Ashok Kumar Jhajharia, in his statement has admitted that the plaintiff had tried to obtain insurance from another agent, Shri P. Sengupta, of National Insurance Company, Division No.V, in respect the same factory and had in fact obtained the cover-notes from Mr. P. Sengupta on June 1, 1982. According to this witness these cover-notes bore the date, May, 1982, and also June, 1982. It is not clear from the evidence of PW-2 as to how the plaintiff was able to obtain cover-notes from Mr. P. Sengupta though the plaintiff had not obtained a policy from Mr. P. Sengupta. In fact, this witness himself says that initially the plaintiff was trying to get a policy of insurance from Division No.V, i.e. from Mr. P. Sengupta, but it was later on decided to shift to Division No.II, i.e. the defendant company.

45. Now, I find that though the plaintiff has proved the visit of Shri Dilip Bhattacharjee to the plaintiff's factory on May 31, 1982, by referring to a copy of

the entry in visitor's register, exhibit PW-2/2, there is no document to prove the visit of Shri Dilip Bhattacharjee on June 1, 1982. The plaintiff could prove his visit and the receipt of cover-notes by Shri Ashok Kumar Jhajharia for 10 to 15 minutes by examining Shri Dilip Bhattacharjee himself. But the plaintiff has not chosen to do that and the plaintiff relies only on the statement of PW-2, Shri Ashok Kumar Jhajharia, for that purpose. I find that Shri Dilip Bhattacharjee was summoned by the plaintiff and he in fact appeared before the Deputy Registrar on December 18, 1987. The plaintiff had, however, not given the particulars of the documents which Shri Dilip Bhattacharjee was required to produce. The plaintiff later on gave the particulars of the required documents and this witness was again summoned for the dated of trial fixed from September 2, 1988, to September 6, 1988. The plaintiff examined PW-1 and PW-2 on September 5, 1988, and closed the evidence. The plaintiff did not insist on the examination of Shri Dilip Bhattacharjee.

46. It was contended by learned counsel for the plaintiff that since Shri Dilip Bhattacharjee was in the employment of the defendant and the cover-notes were also in the possession of the defendant, it is the defendant who should have examined Shri Dilip Bhattacharjee and produced the cover-notes.

47. I do not find any force in this contention. It is the plaintiff who asserted that cover-notes were issued by Shri Dilip Bhattacharjee and were received by Shri Ashok Kumar Jhajharia for 10 to 15 minutes on June 1, 1982. Thus, the onus of proving this fact was entirely on the plaintiff. It would have been a different matter if Shri Dilip Bhattacharjee was summoned by the plaintiff and if he had not come after receipt of summons, but that is not the case. Even though Shri Dilip Bhattacharjee was summoned and he came, the plaintiff did not choose to examine him. No doubts, as submitted by learned counsel for the plaintiff himself, an adverse inference must be drawn because Shri Dilip Bhattacharjee was not examined, but in the circumstances of the case as narrated hereinabove, an adverse inference has to be drawn against the plaintiff for not examining Shri Dilip Bhattacharjee. The case of the defendant throughout has been that no cover-notes were issued by the defendant to the plaintiff. Since the plaintiff has not been able to prove the receipt of the cover-notes there was no necessity for the defendant to produce the cover-notes even if they were written and prepared and may have been available in the office of the defendant.

48. In my view, even if Shri Dilip Bhattacharjee had written and prepared the cover-notes, since the cover-notes remained in the office of the defendant and are not proved to have been given to the plaintiff, the contract between the parties cannot be held to be concluded. The facts, to my mind, show that there may have been a proposal for insurance but it was not accepted by the defendant company before the fire.

49. Great emphasis was laid by learned counsel for the plaintiff on the fact that the defendant sent the surveyor to assess the damage caused because of the fire, I do not consider this fact relevant for deciding whether there is a valid and

completed contract between the parties or not. Obviously, in the present case, the surveyor had assessed the damage at the instance of the plaintiff without prejudice. The correspondence between the parties, exhibit - 2/8 to PW - 2/6, is ample evidence of this fact.

50. In my view, the circumstances in this case do not admit of a reasonable inference that there is a binding contract of insurance between the parties.

51. The plaintiff having failed to prove the receipt of the cover-notes allegedly prepared by Shri Dilip Bhattacharjee and having failed to prove that there was a contract of insurance between the plaintiff and the defendant, issue No.1 is decided against the plaintiff and in favor of the defendant.

52. Since issue No.1 is not proved by the plaintiff, the defendant company is not liable to pay for the loss suffered by the defendant in the fire. Thus, issue No.3 is also decided against the plaintiff and in favor of the defendant.

53. The plaintiff is thus not entitled to the relief sought and the suit is dismissed with costs.