
(2014) 03 MAD CK 0014
In the Madras High Court
Case No : CS. No. 840 of 2000

S.A. Raghunathan

APPELLANT

Vs

United India Insurance Co. Ltd.

RESPONDENT

Date of Decision : 19-03-2014

Acts Referred:

Citation : (2014) 2 MadWN(Civil) 352

Hon'ble Judges : Aruna Jagadeesan, J.

Bench : Single Bench

Advocate : Mr. Kasthuri Rangan for M/s. Sampathkumar & Associates, Advocates, for the Plaintiff; Mr. M.B. Gopalan, Advocate, for the Defendant No. 1

Final Decision : Partly Allowed

Judgement

Mrs. Aruna Jagadeesan, J.—This suit has been filed to pass a Judgement and Decree directing the 1st Defendant to pay the claim amount of Rs. 42,50,000/- with interest at 18% p.a. on Rs. 42,50,000/- till the date of payment in full and for costs.

2. The plaint averments are as follows:-

a. The Plaintiff is doing business of purchase and export sale of waste boiled cocoon (a variety of silk waste). On 12.6.1996, the Plaintiff insured a quantum of Waste Boiled Cocoons, vide Policy NO.10801/103/11/13/1528/96 for a sum Rs.42,50,000/-, covering the period 12.6.1996 to 11.6.1997. In the Policy itself, all the particulars of the stocks, including the place in which they were stocked, have been disclosed. As per the business practise, the Policy is held in the name and custody of the Plaintiff's Banker i.e. the India Bank, the 2nd Defendant herein, so that in case of loss or damage to the insured consignment due to risk covered by the Policy, payment by the 1st Defendant will be made directly to the 2nd Defendant. On 30.12.1996 (or 31.12.1996) accidentally fire broke out in the godown Ammapettai, Thiruporur Taluk, where the insured stocks were stored. Immediately, the Fire Station was informed. With the best efforts of Fire Service

Personnel and the employees of the Plaintiff, the fire was put out after four hours. The Plaintiff suffered a loss to tune of Rs.72 lakhs and filed a complaint with the Thiruppur Police Station. The Plaintiff, through the 2nd Defendant, submitted his claim for Rs.42,50,000/- being the insured amount to the 1st Defendant. In the fire accident, over 62 tonnes of Waste Boiled Cocoons worth Rs.72,05,000/- was destroyed. The cause for the fire accident was found to be short circuit of electricity.

b. M/s. Matha and Padamsey Surveyors P. Limited appointed by the 1st Defendant to assess the loss, submitted a report, stating that it was total loss. The 1st Defendant also appointed another non technical Investigator by name M/s. Vasu Agencies in July 1997, who submitted a report, raising certain unsustainable and irrelevant objections, for which the Plaintiff replied by letter dated 11.2.1998. However, the 1st Defendant rejected the claim of the Plaintiff by letter dated 29.1.1998 and there is absolutely no reason for rejecting the claim of the Plaintiff. As far as the stock quantity is concerned, the 2nd Defendant has been periodically making inspections and verifications, which was made available to the 1st Defendant. The Plaintiff is entitled for 18% interest p.a. on the said claim amount from 30.12.1996 till the date of payment. Hence, this civil suit has been filed for the reliefs as stated above.

3. In the Written Statement filed by the 1st Defendant , it is averred as follows:-

a. On the basis of the proposal of the Plaintiff dated 12.6.1996, the 1st Defendant had insured stock of waste boiled cocoons stored at godown in Ammapettai, Thiruporur Taluk for a sum of Rs.42,50,000/- under Fire Policy No.10801/103/11/13/1528/1996 dated 12.6.1996 for the period from 12.6.1996 to 11.6.1997. The Policy was issued favouring the 2nd Defendant Bank and the Plaintiff, since the Bank was stated to be the mortgagee. The issue of Policy does not constitute any admission of the availability or value of property insured, especially when it pertains to stocks. The claim was lodged on 30- 31/12/1996 and the Plaintiff claimed a quantity of 65.5 MT of value of Rs.72,05,000/- as the loss. The Investigator M/s. Vasu Associates appointed by the 1st Defendant, after thorough enquiry submitted a report dated 30.10.1997.

b. In the said report of the Investigator appointed by the 1st Defendant, it is stated as under:-

(i). The Plaintiff is alleged to have entered the business of export of waste boiled cocoon on the basis of one order of an Italian buyer who opened a Letter of Credit in January 1992. The Letter of Credit expired in June 1992 and the only order was never executed. Even thereafter, without any order, the Plaintiff claims to have purchased and accumulated the large quantity of stocks over a period of three years from 1992- 1995 without any sale or business whatsoever. The conduct of the Plaintiff in accumulating stocks without any order for sale, that too, after expiry of the only order in January 1992, for more than 3 years thereafter, on alleged borrowing from the Bank does not stand to scrutiny as

being normal course of any bona fide business.

(ii). The verification with various suppliers by the Investigator revealed that the transactions were not genuine. The transactions were disowned by the suppliers. In certain cases, the invoices were found to be not genuine on the face of it and no satisfactory proof for payment was available.

(iii). While the goods were stated to have been originally purchased at Bangalore, they were allegedly shifted and stored in a Village away from Chennai on various dates. However, verification did not establish such transportation having taken place.

(iv). Thus, there is no satisfactory proof of purchase of the quantity as alleged or their storage or loss at the premises as claimed. The same is, therefore, specifically disputed and denied by the 1st Defendant and the Plaintiff is put to strict proof of the same.

(v). It is pertinent to mention that the stocks of the Plaintiff were not previously insured for more than one year and even in the Proposal, no prior Insurance particulars is stated. It does not stand to reason that the Plaintiff had such valuable quantity of stocks without being insured.

(vi). While the Fire is reported to have occurred during the night of 30-31/2/1996, the intimation to Fire Brigade was belated and it was later claimed that the entire stocks had been gutted. The explanation for the inordinate delay in intimation is not bona fide, but reveals imprudent conduct with ulterior motives.

(vii). As per Fire Brigade Report, the value of the property was only Rs.3,50,000/-, out of which the property saved was reported to be Rs.3,40,000/-. The extent of loss stated by the authorities does not even remotely compare with the loss as is being alleged by the Plaintiff.

(viii). Both the Surveyor of the Plaintiff and Investigator of the 1st Defendant reported that the 2nd Defendant did not cooperate in furnishing any records of having conducted verification or inspection of the stocks.

(ix). The Fire Brigade Report clearly mentions stacking of hay which was partially retrieved. Substantial portion of the affected material was therefore only hay, which is also confirmed from the fact that characteristics of the substance that went on fire is not that of cocoon. Hence, loss or damage to the alleged stock of cocoons was not made out.

(c). The plaintiff's claim of loss of stocks of Waste Boiled Cocoon to the extent of Rs.72,50,000/- in fire on 30-31/12/1996 is strongly denied. The various allegations in the plaint contrary to what is stated above are all denied. The Plaintiff has chosen to remain silent about the time of fire. The report of the Investigator established that the business of the Plaintiff, various transactions of purchase of materials, transportation of the same to Chennai, storage and loss in

fire are all not bona fide or true. The survey report did not reveal verification of genuineness of the transactions and other crucial aspects, which necessitated the appointment of Investigator. The facts set out above, confirming the lack of any bona fide or merit in the claim as brought by the Investigation would render the claim inadmissible, independent of any recommendations of the Surveyor. The claim has been repudiated after a thorough and proper verification for justifiable reasons. The Plaintiff is not entitled to any amount and claim of interest is also not sustainable, as there is no contract to pay interest on loss. There is no cause of action for this suit and the suit is also barred by limitation. In such circumstances, the suit is not maintainable either in law or on facts and is liable to be dismissed.

4. The following issues were framed for determination:-

1. Whether the Plaintiff is sustained loss of Rs.72 lakhs due to destruction of over 62 tons of Waste Boiled Cocoons due in incident of fire on 30.12.2006 as alleged?
2. Whether the Plaintiff is entitled to claim Rs.42,50,000/- under Policy of Insurance?
3. Whether the claim of the Plaintiff is payable under the Policy of Insurance?
4. Whether the Plaintiff is entitled to interest?
5. To what reliefs, the parties are entitled to?

5. On the side of the Plaintiff, the Plaintiff examined himself as PW.1 and examined one Sridhar Kathare as PW.2 and marked Exs.P1 to P18. On the side of the Defendants, DW.1 and DW.2 were examined and Ex.D1 to D23 have been marked.

6. This court heard the learned counsel on either side and also perused materials on record.

7. It is contended by the learned counsel for the Plaintiff that the Plaintiff was in the business of purchase and export sale of waste boiled cocoons, which were stored in a godown at Ammapettai, Thiruporur Taluk and insured with the 1st Defendant under Policy No.010801/103/11/13/1528/96 for the period from 12.6.1996 to 11.6.1997 for a sum of Rs.42,50,000/- and the stocks were hypothecated with the 2nd Defendant Indian Bank, whose interest was recorded in Ex.P1 Insurance Policy. The entire stocks insured for the said sum were burnt in a fire accident on 30.12.1996 due to short electricity circuit, which was put off by the Fire Service Personnel after fighting for four hours. The occurrence was informed immediately to the 1st Defendant Insurance Company, who appointed M/s. Mehta and Padmasey Surveyors P Limited for conducting survey and investigation, who also submitted their report, after investigation, stating that it was a total loss. But, on the basis of the report of another non-technical Investigator by name M/s. Vasu Associates in July 1997 appointed by the 1st Defendant after 7 months from the date of occurrence, raising certain

unsustainable and irrelevant objections, the claim of the Plaintiff was rejected on 29.1.1998 by the 1st Defendant.

8. The 1st Defendant would contend that the Policy was issued in good faith on the basis of the proposal dated 12.6.1996 covering waste boiled cocoons for a sum of Rs.42,50,000/- stored at the godown at Ammapettai, Thiruporur. The issue of the Policy was not an admission of the availability or value of the property insured, especially when it pertains to stocks. The Plaintiff lodged a claim for loss of stocks stated to be 65.5 MT of total value of Rs.72,05,000/- in a fire that occurred on 30-13/12/1996. On intimation of the claim, the 1st Defendant appointed M/s. Mehta Padamsey Surveyors P Limited for conducting survey and subsequently M/s. Vasu Associates had been appointed as Investigator, whose report revealed that the alleged purchase of stocks were not true, the Plaintiff had no orders to justify the purchases, there were no such stocks available or destroyed in the fire and the claim of the Plaintiff is not true. The 1st Defendant rejected the claim by letter dated 29.1.1998 Ex.P1 for various reasons elaborately.

9. Regarding the occurrence of the fire accident, the 1st Defendant denied the claim of the Plaintiff, disputing only the availability of the stocks claimed and not the cause of fire. The 1st Defendant has not raised any issue about the fire being intentional or that the Plaintiff was in any manner involved in causing the fire accident intentionally. It is necessary to point out that though the 1st Defendant denied the occurrence of fire in the Written Statement, but, the 1st Defendant has not raised any specific plea or adduced evidence to the effect that the fire itself was intentional. From the evidence of PW.1, it is made out that the fire occurred in the closed godown accidentally on 30-31/12/1996 at night hours, which was informed to PW.1 by watchman and on intimation to the Fire Service Station, they came there and put out the fire after fighting for four hours. On a perusal of the letter of repudiation dated 29.1.1998, rejecting the claim of the Plaintiff, it is seen that there is no whisper about the cause of fire and the rejection of the claim was based entirely referring to the stocks, their purchase, availability, their destruction in the fire and other aspects. It is well settled that in a fire accident claim, once the occurrence of fire is not disputed, the burden is upon the Insurance Company to prove that it was intentional by the Insured himself. There is no evidence whatsoever to raise any doubt over the occurrence. Hence, it must be held that there was accidental fire on 30- 31/12/1996, in which the stocks of the Plaintiff had been destroyed and it was an unanticipated event that was not expected or planned by the Plaintiff. Thus, the case of the Plaintiff that the occurrence was accidental is borne out from the evidence of PW.1 as also from the Police Report. The Policy insures the stocks against the loss due to fire. Therefore, the 1st Defendant is entitled to be indemnified for the loss sustained, as may be proved by the evidence.

10. With regard to quantum of stocks, the entire claim of the Plaintiff is for loss of stocks of waste boiled cocoons, which were stocked in the godown and the 1st

Defendant disputed the purchase, storage and availability of stocks. According to the Plaintiff, he had procured stocks of 65.5 MT of waste boiled cocoons and stored the same in the godown, anticipating export orders and the same were destroyed in the fire. Though the destroyed stocks were worth about Rs.72 lakhs, but, as the stocks were insured for a sum of Rs.42,50,000/-, the Plaintiff claimed only the insured amount under the Policy. Therefore, it is to be analysed as to whether the case of the Plaintiff that substantial quantity of stocks of waste boiled cocoons was available in the godown and the same were lost in fire as claimed by him, is proved or not?

11. In this regard, on the side of the Plaintiff, the Plaintiff was examined as PW.1 and the Proprietor of M/s. Ganga Cauveri Products, who is one of the suppliers to the Plaintiff was examined as PW.2. On the side of the Defendants, the Branch Manager of the 1st Defendant and Investigator Soundrarajan were examined as DW.1 and DW.2 respectively. Crucially, though the 1st Defendant has, firstly, appointed a Surveyor, by name, M/s. Mehta Padamsey Surveyors P. Limited for conducting survey immediately after the intimation of the claim and even before the Investigator was appointed, however, the Surveyor has not been examined by them and the survey report alone was marked as Ex.D6. On a perusal of the entire evidence, it is clear that the Plaintiff procured the stocks and claimed on the basis of the purchases made from two sources, viz. M/s. Flora Silks and M/s. Ganga Cauveri Products, Bangalore. PW.1, in his cross examination, has admitted to the effect that the copies of his purchase bills enclosed with the Surveyor's report are Ex.D2 (Series 12 Nos.), are the only bills, under which he procured the stocks. On the basis of Ex.D2, the Plaintiff claimed that more than 65 MT of stocks were available and destroyed in the fire.

12. According to the Plaintiff, these stocks were originally procured and kept in store at Bangalore and later, shifted to the affected godown in Chennai after they were insured with the 1st Defendant under Policy Ex.P1. During the period of Insurance the stocks were destroyed in the fire on 30.12.1996. Although the Plaintiff has not produced the original purchase bills, but the 1st Defendant's Surveyor was engaged immediately on intimation of the claim and in assessing the loss the Surveyor has accepted the purchases as per various invoices listed in Annexure-B of the Survey Report Ex.D6, which indicates that the Surveyor had visited the premises and conducted a detailed survey as per Ex.D6. The Surveyor had examined all the relevant aspects of the claim of the Plaintiff and reported that stocks of 65,500 Kgs worth Rs.40,28,250/- were destroyed in the fire accident and assessed the loss at Rs.40,28,250/- and certified to the said effect observing that all warranties of the Policy have been duly observed.

13. Further, the assessment by the Surveyor indicates that on the basis of the physical evidence and the documents, including invoice copies submitted by the Plaintiff and on enquiry with various persons and on studying the nature of the stocks, composition, storage, etc., he came to the conclusion that the stocks were in existence and destroyed in fire. Thus, the 1st Defendant's own Surveyor,

who is the first person to visit on the side of the 1st Defendant and inspect the premises, submitted a report confirming the genuineness of the claim. The survey has a statutory character, inasmuch as it is mandated by the Insurance Act and conducted by a licensed professional. It is presumed that the Surveyor is an expert in the field and although not binding, the Report carries great weight. The 1st Defendant has not questioned the professional competence or credibility of the Surveyor and there is not even a whisper by the 1st Defendant that the Surveyor had colluded with the Plaintiff to certify a false claim.

14. It is also pertinent to note that the Surveyor was not examined by the 1st Defendant and only Investigator was examined. While the evidence of the Investigator has serious loopholes, the examination of the Surveyor would be of much helpful for the court to appreciate the correctness of their report to the claim which is diagonally opposite to the findings of the Investigator. Therefore, non-examination of the Surveyor would lead to an adverse inference drawn against the 1st Defendant that the 1st Defendant knowing fully well that the Surveyor's report was not supporting the Investigator's report and the claim based on such Investigator's report would get weakened by the evidence of the Surveyor and weakness of the investigation report would get exposed if the Surveyor had been examined. Therefore, while drawing an adverse inference against the non-examination of the Surveyor by the 1st Defendant, this court finds that the assessment made by the Surveyor is crucial in coming to the conclusion as to whether substantial quantity of stocks were available and destroyed, contrary to the suggestion of the Investigator that only hay was kept and burnt in the fire and there were no worthwhile stocks at all.

15. If there was only hay and no stocks of waste boiled cocoons stored or affected, certainly it would have come to the knowledge of the professional Surveyor on the first inspection itself and he would not have certified that 65.5 MT were destroyed. It is pertinent to point that the Investigator had visited and inspected the place nearly eight months after the incident. Besides the Plaintiff's assertion through evidence and the assessment of the Surveyor regarding the stocks, there is also further evidence adduced by the 2nd Defendant Bank viz. Ex.P9, letter from the 2nd Defendant to the 1st Defendant, asserting the stock value at Rs.42,18,500/- and that there was inspection by the Bank Officials in March 1996 and September 1996. In Ex.P9, the Bank, after confirming the stock position, advised the Plaintiff to contact them for any further clarifications. Under Ex.P10, the Bank certified payment for purchase of stocks and informed that there were figures readily available and more particulars could be given after thorough search if required by the 1st Defendant. However, the 1st Defendant has not chosen to pursue the matter with the Bank. It is not the case of the 1st Defendant that the Bank has colluded with the Plaintiff to falsely certify the availability of stocks. On the other hand, without any proof of Bank having any fraudulent intention or interest in the matter, it must be presumed that just like an Insurance Company, the Bank was also discharging their duty in a bona fide manner and its confirmation in regard to the availability of stocks cannot be

ignored or simply brushed aside.

16. As against the above evidence, the 1st Defendant would rely upon Ex.D10 investigation report as proof that there were no such stocks available and that the claim was not genuine in regard to the quantum of stocks claimed. On a careful examination of Ex.D10 investigation report dated 30.10.1997 and the evidence of DW.2, it is seen that the investigation report does not satisfactorily make out the case of the 1st Defendant that there were no stocks purchased by the Plaintiff at Bangalore or transported to Chennai or stored at the affected godown and that the purchases were all bogus transactions and that the claim itself was fraudulent.

17. Firstly, it is to be pointed out that the investigation report Ex.D10 is signed by someone as "Manager (Investigation)" and not by DW.2 who claims to be the Proprietor of M/s. Vasu Associates. He had deposed in support of the investigation report and he would say in his proof affidavit that the report was prepared under his instructions and signed by one Mukundan, Manager, which itself raises a doubt as to why DW.2, who projected himself as the Investigator, Proprietor and done the investigation, has allowed such an important document, which is not merely some correspondence, to be signed by someone whose identity itself is not clearly expressed in the report. Further, the report does not mention the name of the signatory, which also casts a serious cloud over it, for such document, there is great importance attached to role of the signatory as the person who has authored and to whom the contents shall be attributed. But, if some one else such as DW.2 appears and says that the investigation was conducted by him (and not the signatory), it raises a doubt over the credibility of the narrations and conclusions. It is pertinent to point out that throughout the report, the identity of the Investigator, who had contacted the various persons, is not clearly revealed, besides that the signatory has not appeared to adduce evidence. As claimed by DW.2, if the investigation was conducted by him and his staff is to be accepted, then it is not possible to treat all the narrations as personal information gathered by DW.2 or consider his evidence as proof of the report. The report cannot be taken as substantiated merely on the evidence of DW.2. This court finds it difficult to accept the contents of the report of the Investigator as proved.

18. There are certain aspects stated by DW.2 in his evidence which also raise doubts about the bona fides of the investigation. Despite the Investigator being appointed 7 months after the occurrence and Surveyor had already been appointed and submitted his report Ex.D6 dated 28.4.1997, the Investigator has stated in his evidence that he neither contacted the Surveyor or examined his report. The Investigator claims that he had not seen the report nor concerned with the same. The Investigator has stated the following in his cross examination:-

"The letter of appointment was received by me on 21.7.1997, seven months after the fire incident. The letter dated 21.7.1997 referred to in my report dated

31.10.1997 is the letter of appointment received by me from the 1st Defendant. This was the first intimation received by me from the 1st Defendant about this claim. At that point of time, I know that the 1st Defendant Insurance Company had appointed a Surveyor who conducted preliminary as well as final survey and also submitted a preliminary and final report to the 1st Defendant. I have not seen the Surveyor's report. I did not meet the Surveyor and discuss with him about the claim, since I have no mandate."

19. The above attitude of the Investigator raises serious question about his impartiality and objectivity. The investigation report reveals that the Investigator has confronted (in his own words) with the Bank Officials, the Plaintiff, the transporter, etc. While so, it is not known as to why the Investigator should avoid to contact the Surveyor and get his views or crucial information regarding the physical evidence and Surveyor's perception, considering the crucial role of the Surveyor in an Insurance claim. When appointed for investigation, it is not believable that any further mandate is necessary for an Investigator to meet the Surveyor for information, when he contacted various other persons. The credibility and motive of the Investigator must reflect in his approach and attitude. When he has been appointed by the Insurance Company to conduct an investigation after such delay, it must be expected that the Investigator would contact the Surveyor for crucial information before proceeding with his own enquiries and verifications. At least, during the investigation, the Surveyor should have been contacted. It is not also believable that the Investigator had not even seen the Survey Report, especially when it is clear that the Investigator was appointed after receipt of the Survey Report for some investigation of the claim that has been surveyed. This raises a fundamental doubt about the motive of the Investigator. It would have given credibility to the investigation report, if the Investigator had approached the Surveyor or discussed the survey report and pointed out any defects therein. The statement of the Investigator that he was not concerned with the Surveyor, when both are essentially dealing with a claim of an insured person, appears to be unreasonable and unfair approach to determine the truth. It is not even the case of the 1st Defendant that after the investigation report was received, they approached the Surveyor for clarification or that the Surveyor was unable to explain any aspect of the matter dealt with in his report. The 1st Defendant appears to have avoided such enquiry.

20. It is relevant to extract the conclusions arrived at by the Investigator as under:-

1. The material that went on fire does not correspond to the material insured.
2. The analytical report obtained from Regional Laboratory from the remnants of the Fire does not correspond to the material supposed to have been on fire and insured.
3. The material insured is a perfect Insulator and non conductor of electricity.
4. The material supposed to have been shifted from Bangalore has not taken

place as per the statement of the transporter.

5. The material supposed to have been stored in a particular manner prescribed by the silk board authorities has not been adhered to in this case.

6. The financial transaction supposed to have taken place has not at all taken place in the instant case.

7. The necessary permission required to be obtained from the concerned authority for export has not been done in the instant case.

8. The letters obtained from various connected people have denied that they issued such a letter to the insured.

9. The rental agreement and invoices supposed to have been given by those people have been stoutly denied.

10. There is a dip in electricity consumption during the bare injunction-monthly reading from its usual consumption of electricity.

21. With regard to the first conclusion that the material went on fire does not correspond to the material insured, it is relevant to point out that while the Insurance Policy Ex.P1 clearly describes the subject matter of Insurance as "waste boiled cocoons" and not "cocoons". In the cross examination, he would say that the subject matter of Insurance was "mulberry cocoons waste". He would assert that the subject matter of Insurance was cocoons and not waste. The understanding of the subject matter of DW.2 is fundamentally incorrect. Therefore, his conclusion of the material being different cannot be given any serious consideration.

22. DW.2 claims to have drawn samples from the affected location and obtained analytical report from the Regional Laboratory. In all fairness, he should have taken the sample in the presence of the Plaintiff after due notice to him, given one set of samples to the Plaintiff and also one set to the Insurance Company, but in his cross examination, he admitted that he did not do so. If samples are taken after 7 months, it is doubtful whether such sample can be considered as remaining in the same condition after the lapse of several months so as to provide any reliable basis to draw conclusions about the composition of the material. DW.2 is not an expert in forensic study and it is not clear as to whether he has followed any scientific procedure and no sample is produced before the court.

23. According to the investigation report, the transportation of the material from Bangalore has not taken place as per the statement of the Transporter, which is not justified even by the reported information. The letter of the Transporter dated 17.9.1997 addressed to M/s. Vasu Associates is also not to that effect. According to the said letter annexed to the report, the Transporter has only stated that G.C. Notes referred to above were entrusted to their Associates at Chennai and has also given the name and address of their Associates. DW.2

could not say as to whether he has contacted P. Arumugam, who is stated to be the associate of the Transporter at Chennai. In such circumstances, the conclusion that the transportation of the material from Bangalore to Chennai had not taken place cannot be sustained.

24. The conclusion of the Investigator that the manner prescribed by the Silk Board in which the material has to be stored has not been adhered to by the Plaintiff is without any merit, as DW.2 is not even aware of the subject matter of Insurance whether it is waste boiled cocoons or cocoons. The entire analysis in the report lacks proper understanding and identification of the material involved. Another conclusion arrived at by M/s. Vasu Associates that financial transactions supposed to have taken place have not at all taken place is also without any merit, as Ex.P9 letter from the 2nd Defendant to the 1st Defendant shows the stock position on various dates and it is also stated that the stocks were inspected by the Bank Officials in the months of March 1996 and September 1996 to verify the genuineness of the stock statement furnished by the Plaintiff to the Bank. The Bank had also written a letter dated 6.2.1998, Ex.P10, giving details of payment for the purchase of stock by the Plaintiff. In providing information regarding the payments of purchases, the Bank has clarified that it was based on information that was then available and specifically offered to provide further information to the 1st Defendant if required. But, the 1st Defendant did not chose to pursue their correspondence with the Bank for reasons best known to them. In Ex.P6 letter written by the 2nd Defendant to the 1st Defendant, it is stated that any payment in respect of the claim may be made directly to the Bank, since the goods were hypothecated to the Bank. All these factors would go establish the financial transactions.

25. The Plaintiff relied upon the inspection done by one Manu Ramchandani prior to the fire on behalf of a customer in Hong Kong to support the availability of stocks. However, DW.2 claims to have obtained a letter from Manu Ramchandani stating that no such confirmation was issued by him. Manu Ramchandani has not been examined to prove either the issue of confirmation or the denial. The letter dated 17.9.1997 produced with the investigation report does not even have the address of Manu Ramchandani. The evidence of DW.2 as to how he located Manu Ramchandani in Delhi, where and when he obtained that letter, is also not convincing. In any case, with the Bank confirming stock verification, any attempt to disprove Manu Ramchandani's inspection is not significant, but has only a dramatic value. In the same way, the fact that the Plaintiff had no export orders on hand, does not affect the purchases made or the availability of the stocks.

26. From the above discussions of the report of the Investigator and the evidence of DW.2, this court comes to the conclusion that the Investigator has not done a fair and thorough enquiry and that he appears to have started in a particular direction, avoided any information that could divert his attention and reached the conclusions, which cannot be provided with the seal of approval by this court. The Honourable Supreme Court in 2006-8-SCC-35 (M/s. Shobika

Attire v. New India Assurance Co. Limited and another) has commented upon the Investigator's report and held as under:-

"18. The report submitted by the Investigators, M/s. Vasu Associates, proceeds to a large extent on surmises and the conclusion ultimately arrived at by them which reads as follows does not inspire much confidence:-

"The owners themselves claim looting, because they did not find some of the textile goods after the incident, but they have no material to strengthen their claim by way of supplying us with substantial evidence which are unassailable. In the absence of substantial evidence, they themselves are not for sure, it was looting. From what we have seen and heard we are also of the opinion that there could not have been looting at all. Surveyors are also convinced and therefore, they are not also inclined to assess the loss"

19. As will be evident from the above, it will appear that the aforesaid conclusion was arrived at by adopting a negative approach. The Investigators reached the aforesaid conclusion merely by stating that the Appellants had no material to strengthen their claim by providing unassailable evidence of looting. Such an approach cannot be supported since apart from claiming that the goods in the showroom had been looted and the attendant circumstances, the Appellants were not in a position to supply any further evidence."

As pointed out by the Honourable Supreme Court in the decision cited supra, even in the case on hand, the conclusion of the Investigator proceeds to a large extent on surmises and the conclusion was arrived at by adopting a negative approach.

27. In Sri Venkateswara Syndicate v. Oriental Insurance Company Limited (2009-AIR-SCW-6749), the Honourable Supreme Court has deprecated the practise of engaging the second Surveyor. In the instant case, the 1st Defendant, on the other hand, sought to justify the appointment of Investigator for the purpose of collateral verification relying upon the decision of the Honourable Supreme Court reported in 2005-5-Supreme-206 (National Insurance v. Harjeet Rice Mills) and contended that the scope of investigation was different. However, the 1st Defendant has failed to explain by examination of the concerned officials who took the decision to investigate after submission of survey report as to what circumstances prompted the investigation. Further, the investigation report is also not proved properly and proceeds largely on surmises.

28. The report Ex.D6 of the Surveyor, however, is cogent and the survey had been done immediately after the fire. In this case, there is no reason given as to why the report of the Surveyor viz. M/s. Mehta and Padamsey Surveyors Private Limited Ex.P6 is not acceptable. There is no valid reason made out for not accepting the report. DW.1, the Manager of the 1st Defendant Insurance Company would say that he is not aware as to who was the official who had declined to accept the report of the Surveyor, but ordered investigation. According to him, the decision of the Regional Office for ordering an investigation

is not available in the file. This court is persuaded by the survey report, non examination of the Surveyor and the confirmation of the Bank as satisfactory proof that the Plaintiff had stored substantial quantity of stocks in the godown and the same was damaged in the fire and the claim of the Plaintiff cannot be rejected in the manner done by the 1st Defendant.

29. However, while accepting the availability of stock in the godown, this court is not satisfied that the entire quantity claimed and assessed by the Surveyor can be accepted as the loss suffered by the Plaintiff. However, this court, while declining to accept the vehement and strenuous submissions of the learned counsel for the 1st Defendant that the claim of the Plaintiff of purchase of stocks or their transfer to chennai was entirely false and there were no such stocks available or destroyed in the fire, at the same time finds that the Plaintiff has not established a portion of the claim by satisfactory explanation.

30. The assessment by the Surveyor is based on premise that stocks were procured under purchase bills listed in the survey report from two parties viz. M/s. Flora Silks and M/s. Ganga Cauveri Products. PW.1 has also admitted the same in his evidence. However, when confronted by the learned counsel for the 1st Defendant as to how bills of M/s. Ganga Cauveri Products were carrying sales tax registration of a subsequent date than the dates of the bills, he is unable to furnish any explanation. By way of offering such explanation, PW.2 the Proprietor of M/s. Ganga Cauveri Products has been examined by the Plaintiff to confirm the supply of the goods and issue of the bills. PW.2 has produced registration certificates under Central Sales Tax Act, Karnataka Sales Tax Act and balance sheets of his firm for the period from 1993 to 1995 as Ex.P14 to P18. While these documents establish the credibility of his business, in respect of the disputed bills pertaining to his firm M/s. Ganga Cauveri Products under Ex.D2 (Series), he has admitted that they were issued subsequent to the fire, on the representation that the original bills were destroyed in the fire accident. However, it has also been brought out in his cross examination that his business was not directly in cocoons and that the purchases by the Plaintiff were not reflected in the accounts. The overall evidence of PW.2 can only be taken as proof of the issue of bills by a business firm, but it does not establish the transactions reflected in the bills satisfactorily.

31. The learned counsel for the 1st Defendant also relied on the previous Insurance held by the Plaintiff with M/s. National Insurance Company Limited for Rs.20,00,000/- as per Ex.D3 (Series) and there was a sudden increase in the Insurance with the 1st Defendant taken for the first time under which claim was made. The Plaintiff has explained that since the Insurance was taken by the Bank, it was restricted and does not reflect the actual value of stocks. This aspect cannot lead to the conclusion that there was any fraudulent motive as sought to be portrayed by the 1st Defendant, but also, on the other hand, the Insurance earlier can be seen as indication that the Plaintiff was indeed holding substantial quantity of stocks. Upon Insurance with the 1st Defendant, even if

there may be no detailed scrutiny of the valuation and quantity at the time of Insurance, the Policy cannot be considered as issued without any stocks being available.

32. Therefore, this court is convinced to accept the submissions of the learned counsel for the 1st Defendant only to the extent that the bills issued by M/s. Ganga Cauveri Products cannot be taken into consideration for the purpose of arriving at the quantum of stocks available at the time of loss. Excluding the said quantity of Rs.25,500 Kgs, the total quantity of stocks procured by the Plaintiff is 40,000 Kgs as per bills of M/s. Flora Silks mentioned in Annexure-B to the survey report Ex.D6, whose bills have not come under cloud during trial, must be treated as the loss. Coupled with the survey report and the confirmation of the Bank of the stock verifications made even at the earliest point of time, this court can safely accept that the Plaintiff suffered loss of not less than 40,000 Kgs of waste boiled cocoons.

33. The stocks have been purchased under the bills of M/s. Flora Silks for a sum of Rs.25,62,000/- as per the survey report Ex.D6 and the bills Ex.D2 (Series). However, the Surveyor has taken the market value of the stocks at Rs.61.50/- per kg. This court accepts that the cost of acquisition itself cannot be treated as the value of the stocks at the time of loss and the Plaintiff is entitled to indemnity representing the value as on the date of loss and not based on the cost of purchases that were never exported and kept idle. Accordingly, the Surveyor's assessment being the only reliable analysis of market value available, taking the same as Rs.61.50/- per kg as assessed by the Surveyor, the loss suffered by the Plaintiff is quantified as Rs.24,60,000/- and the 1st Defendant is liable to indemnify the Plaintiff for the said amount under the Fire Insurance Policy.

34. In so far as the period of limitation is concerned, the learned counsel for the 1st Defendant submitted that Condition No.13 of the Policy discharges the 1st Defendant from any liability one year after the date of repudiation and inasmuch as the present suit is not filed within one year from repudiation, it is time barred. However, the learned counsel for the Plaintiff pointed out that under Article 44(b) of the Limitation Act, the statutory period of limitation for filing a suit on a Policy of Insurance is three years from the date of repudiation and a restricted period under the Policy is not valid especially in view of the amendment to Section 28 of the Contract Act.

35. The observations of the Honourable Supreme Court reported in 2009-ACJ-684 (H.P. State Forest Company Limited v. M/s. United India Insurance Co. Limited) appears to record concession by counsel that the amendment was not in force. In view of the fact that the claim is otherwise found payable to the extent indicated above and the amendment to Section 28 of the Contract Act, this court is of the view that the suit is not barred by limitation.

36. The Plaintiff claims interest at 18% p.a. from the date of loss. However, the 1st Defendant cannot be mulcted with liability for interest from the said date

itself. Even as per the decision of the Honourable Supreme Court reported in AIR-1997-SC-408 (United India v. MKJ Corporation) the insurer has to await Surveyor report and will require reasonable time of about six months from the said date for settlement of the claim. On failure to do so, interest can be granted thereafter. Accordingly, considering the survey report having been issued on 28.04.2007, the 1st Defendant is liable to pay interest from 01.11.1997. However, in the light of the recent decision of the Honourable Supreme Court rendered in the case of Sri Venkateswara Syndicate (2009- AIR-SCW-6749), it would be just and reasonable to award interest on Rs.24,60,000/- at 9% p.a. from 01.11.1997 till the date of payment. All the issues are answered accordingly.

37. In the result, this civil suit is allowed partly and decreed for a sum of Rs.24,60,000/- with interest at 9% p.a. from 01.11.1997 till the date of payment and the 1st Defendant is liable to pay the same to the Plaintiff under the Fire Insurance Policy. However, in the circumstances of the case, there will be no order as to costs.