
(2004) 12 MAD CK 0049
In the Madras High Court
Case No : O.S.A. No. 262 of 2000

Sri Balaji Traders

APPELLANT

Vs

United India Insurance Co. Ltd. and Another

RESPONDENT

Date of Decision : 15-12-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96
Evidence Act, 1872 — Section 45
Partnership Act, 1932 — Section 69(2)

Citation : (2005) 1 CTC 267 : (2005) 1 LW 595 : (2005) 2 MLJ 26

Hon'ble Judges : M. Thanikachalam, J;K. Govindarajan, J

Bench : Division Bench

Advocate : S. Sampath Kumaran, for Sampath Kumaran Assts, for the Appellant; Nageswaran, for the Respondent

Judgement

M. Thanikachalam, J.—The unsuccessful plaintiff in C.S.No. 1052 of 1990, who has laid the suit for the recovery of a sum of Rs.

14,84,660.32, is the appellant.

2. The brief facts leading to the dismissal of the suit are as follows:

(a) The plaintiff firm is carrying on business in cotton. It had insured its stock of cotton of all varieties with the first respondent/first defendant under

two policies, bearing numbers 051000/01/1/07078 for a sum of Rs. 6,00,000 and 051000/01/1/070795 for a sum of Rs. 4,00,000 on 3.6.1986

and 10.6.1986 respectively. The properties were insured against fire, under which the first respondent/first defendant is entitled to compensate the

damage, if any suffered by the plaintiff, by fire.

(b) On 28.6.1986, at about 3.00 a.m., there was a fire in the godown of the plaintiff firm, where stocks were stored, which was put off by the fire

brigade subsequently. In the meantime, the entire godown and stock were destroyed by the fire, which was inspected by the first defendant's

Assistant Divisional Manager, who came to the spot on the same day at about 10.00 a.m. At about 11.45 a.m., the first defendant's Surveyor also

came to the scene, conducted preliminary survey. The stock stored in the godown of the plaintiff's firm, which was valued at Rs. 9,92,420, was

destroyed completely, thereby making total loss. The plaintiff's claim for the above said amount, made to the first defendant on 17.10.1986 was

repudiated by the first defendant only on 20.3.1989, that too, without mentioning any grounds. Under the above circumstances, the plaintiff/

appellant, was constrained to file the suit, for recovery of the suit claim.

(c) The first respondent in its written statement, not admitting the worth of the stock as Rs. 9,92,420 in the godown, had contended, that the stock

is exaggerated, that the claim of interest is untenable, that the independent survey conducted at the request of the defendant has not made out the

case of the plaintiff, that the cause of fire alleged is imaginary, that the pressed bales stated to have been procured on credit basis is incorrect, that

even according to the surveyor's report, the value of the stock at the time of the loss, even on the basis of the unreliable document of the plaintiff,

was only Rs. 4,50,474, that there is no good faith in the claim of the plaintiff and in this view, the plaintiff is not even entitled to the amount assessed

by the surveyor.

(d) The Union Bank of India, who had advanced the loan to the plaintiff, had stated that the decretal amount may be directed to be paid through

the bank.

(e) On the basis of the pleadings of the parties, the learned Judge had framed the following issues for consideration:

(i) Whether the fire in the godown was due to a cause covered by the policy of insurance ?

(ii) What is the amount of indemnity the plaintiff is entitled to under the policy of insurance ?

(iii) Whether the plaintiff is entitled to interest, if so, at what rate ?

(iv) Whether this Court has no jurisdiction to entertain this suit"?

(f) The plaintiff, as well as the contesting defendants, in support of their rival contentions, produced documents, as well as adduced oral evidence.

The learned Judge evaluating the materials placed before him, had come to the conclusion, that the plaintiff has failed to prove the actual stock in trade, which is said to have been destroyed by fire, by producing acceptable documents, though it was claimed that they were available, that the documents produced by the plaintiff are self serving, not dependable, that the cause of fire pleaded is not at all made out and it cannot be attributed to any extent or to any negligence, that the good faith, on which the contract of insurance is based, has not been made out, whereas there are uncleared suspicion and that the fire in the godown is not a risk covered by the policy.

(g) On the basis of the above conclusion, the learned Judge unable to satisfy the claim of the plaintiff, dismissed the suit on 9.9.1999, which is under challenge in this second appeal.

3. Heard the learned Senior Counsel for the appellant, Mr.S. Sampath Kumar and the learned counsel for the first respondent, Mr. Nageswaran.

4. The learned counsel for the appellant submitted, that the plaintiff has proved not only the stock available on the date of fire, but also the value of the stock in trade, by producing stock registers, which were not properly considered by the learned single Judge; that there is no defence of foul play or fraud on the side of the first defendant, questioning the cause of fire and in view of the admitted fire accident and the stock in trade was destroyed in the fire completely, the learned Judge ought to have decreed the suit. In this view, it is submitted, by the interference of this Court, a decree should be granted as prayed for.

5. The above submissions are countered by the learned counsel for the first defendant, that the materials placed for proving the stock in trade or the cause of fire, are insufficient and undependable, as held by the learned Single Judge, that the good faith, on which the contract of insurance is based upon, was shattered by the conduct of the plaintiff and that the suit filed by the plaintiff firm, without complying Section 69(2) of the Indian Partnership Act (hereinafter called "the Act") is not maintainable. On the above grounds, elaborating the same, taking us to the evidence, the pleadings as well as to the judicial precedents, it was urged that the judgment of the learned single Judge is to be confirmed, since the plaintiff/appellant had failed to discharge the burden of proof.

6. From the pleadings and the submissions, the following points would arise for consideration:

(1) Whether the suit is not maintainable on the ground of non compliance of Section 69(2) of the Indian Partnership Act.

(2) Whether the plaintiff/appellant has made out a case regarding the stock and its value. If so to what extent, he is entitled to a decree.

7. The plaintiff is a firm having partners, coming within the purview of the Act. In the plaint short cause title, it is stated that the plaintiff is

represented by its Managing Partner, Sri Gadagottu Raghunadha Babu. True, there is no specific plea regarding the registration of the partnership

firm, or all the names of the partners. The contesting defendant viz., the first respondent herein, though filed a written statement, questioning the

averments in the plaint, had not challenged the right, capacity and locus standi of the plaintiff to institute the suit represented by its Managing

Partner. Because of the stand taken by the contesting defendant, not questioning the maintainability of the suit, on the grounds contemplated u/s 69

of the Act, no finding has been given by the learned single Judge.

8. Order 8, C.P.C. gives direction to defendant, how a statement should be filed, how the denial should be made, etc. Order 8, Rule 5(1) says:

Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the

defendant, shall be taken to be admitted except as against a person under disability.

In this case, though the first defendant had an opportunity to question the competency of the signatory to the plaint, to sign and verify the plaint,

contending that he is incompetent to represent the plaintiff firm, since he is not the partner as his name was not found in the register of firms, the first

defendant has not specifically denied so, in the written statement and therefore, the presumption comes to the aid of the plaintiff, as if that fact is

admitted and the consequence must be, there is a waiver or that defence is not available to the contesting defendant, that too, in the appellate

stage.

9. But, the learned counsel appearing for the first respondent submitted, that the question of maintainability of the suit, for non- compliance of

Section 69(2) of the Act, is purely a question of law, which could be raised even

without any plea and in this way, making submission, an attempt was made, to non suit the plaintiff. Therefore, we have to see the effect of Section 69 of the Act, as well as the procedure contemplated under C.P.C., for the suits to be filed by or against firms and persons carrying on business in names other than their own.

10. Section 69(2) of the Act reads:

No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is

registered and the persons suing are or have been shown in the register of firms as partners in the firm.

This Section has two limbs and the first one is, the firm should be registered and the second is, that the persons suing are or have been shown in the

register of firms as partners in the firm. The plaintiff/appellant had satisfied the first requirement, which is conceded. It seems, the plaintiff has not

produced the extract of register of firms, where we could see the names of the partners, as on the date of filing of the suit. In the absence of

production of the extract of the register of firms, it is not possible to say, whether the partner, who has filed the suit, representing the firm, is shown

as partner in the firm, on the date of filing of the suit. Only on this technical ground, a submission was made by the learned counsel for the first

respondent, that in view of the fact, the copy of register of firms has not been produced, to satisfy the second requirement, the suit is not

maintainable. By going through the provisions of the above said Section, as well as as guided by the judicial precedent, and the inaction on the part of

the first respondent, to raise this plea, at the first instance before the trial Court, we are unable to persuade ourselves, to subscribe the above said

view, in order to say that the suit is not maintainable and the same should be dismissed, though it is a technical ground.

11. The learned counsel for the first respondent, in support of his submission, that this is purely a question of law, which could be raised even in the

appellate stage, sought strength from the decision of this Court rendered by a division bench in Goverdhandoss v. Abdul Rahiman, AIR (29) Mad

634. In the above decision, this Court had taken the view that the suit could not be dismissed suo motu, on the ground of non-registration of firm,

as if a suit can be dismissed on the ground of limitation suo motu, whether the

defence of limitation was raised or not, since a duty is cast upon the Court, to see whether the suit is in time or not, as contemplated u/s 3 of the Limitation Act. It is also further held, non-registration of a firm being one of law, can be raised for the first time in appeal, if all the facts necessary for its determination are on the record. Thus, it is seen, the above decision is not an authority to conclude, that the non registration of the firm or the failure on the part of the plaintiff to produce extract from the register of firms is purely a question of law, which could be raised at any stage in the continuation of the proceedings, since this Court had observed that the non- registration could be raised, provided all the facts necessary for its determination are on record. In this case, the latter part of the condition, contemplated in the ruling is not at all available, and the first respondent also admittedly failed to challenge the capacity of the managing partner, who claim so, to sign and verify the pleadings. On this point, no evidence has been let in, and materials are also not available, to decide whether the partner, who has filed the suit, was shown as a partner in the register of firms. In this view of the matter, we are of the considered opinion, that the point now raised by the learned counsel for the first respondent is not a pure question of law, which could be raised in the appeal, without raising the same before the trial Court. In this context, we have to see Order 30, Rule 1 of C.P.C.

12. Order 30, Rule 1, C.P.C. contemplates, how two or more persons claiming or being liable as partners and carrying on business may sue or be sued in the name of the firm. Satisfying this condition i.e. by producing the firm's registration certificate, the suit was filed and the same was taken on file. As indicated by us hereinbefore, the cause title shows that the signatory to the plaint is the Managing Partner of the firm. If the contesting defendant had any doubt about the competency of the signatory, or the capacity of the Managing Partner, who signed, to institute the suit on behalf of the firm or representing the firm, the first defendant ought to have invoked Order 30, Rule 2, C.P.C. which reads:

Where a suit is instituted by partners in the name of their firm the plaintiff's, or their pleader shall, on demand in writing by or on behalf of any defendant, forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the suit is

instituted.

It further contemplates, on the failure to comply the demand, the further proceedings shall be stayed. Realising that the suit based on valuable claim should not be dismissed on technical ground alone, this procedure is contemplated, enabling the parties to demand, giving an opportunity to other side, to fulfill the demand, thereby satisfying the requirement of partnership firm and the partners available therein, who are competent to represent the firm. In this case, the 1st defendant having failed to adopt this course, in our view, it is not open at the appellate stage, to raise the plea of maintainability of the suit, only on the ground, that the plaintiff has failed to produce the extract of register of firms, showing the names of the partners.

13. The registration of the firm is a condition precedent, to the right to institute the suit and the Court has no jurisdiction to proceed with the trial, when the condition precedent has not been fulfilled, as ruled by a Division Bench of this Court in K.K.A. Ponnuchami v. Muthusami, AIR 1942

Mad. 252. Drawing strength from this decision, the learned counsel for the first respondent submitted, since the institution of the suit itself is bad, question of invoking Order 30, Rule 2, C.P.C. will not come to the aid of the plaintiff, and therefore, no demand made by the first defendant, as contemplated under Order 30, Rule 2, C.P.C., would not cure the defect, which had been already committed.

14. It is observed in Goverdhandoss's case, cited supra, considering the scope of Section 69(2) of the Act as follows:

A stringent provision of this nature has, first of all, to be strictly construed. It is, moreover, immaterial in our opinion, whether the benefit of a suit is to go to any person other than the plaintiff ultimately. The provisions of Section 69(2), Partnership Act, could only be attracted to a suit if it was instituted either by or on behalf of the firm, that is to say, ex facie it purports to be filed either by or on behalf of the firm.

In the case involved in the above decision, only non-production of the registration certificate alone was in dispute and the second limb of Section 69(2) was not considered. Therefore, on the basis of the above decision, in this case, where it is proved that the firm is registered, it cannot be said that the institution of the suit itself is bad, from the inception.

15. A Division Bench of Bombay High Court in *Gandhi and Co. Vs. Krishnan Glass Pvt. Ltd.*, has considered the scope of Section 69(2) of the

Act, as well as Order 30, Rules (1) & (2), C.P.C. While considering so, the Division Bench has held that the question of applicability of provisions

of Order 30, Rules (1) & (2) of the CPC arises only if the suit itself is validly instituted in compliance with the provisions of Section 69(2) of the

Act and therefore, the provisions of C.P.C. cannot lend any support, in a curing defect viz., non-compliance of Section 69(2) of the Act. It is

further held as follows:

On a plain reading of Section 69(2) it is clear that in order that the suit is validly instituted by or on behalf of the firm against any third party two

conditions must be fulfilled viz. (1) the firm is registered and (2) the persons suing are or have been shown in the Register of firms as partners in the

firm. The scope and ambit of the provisions of Rules 1 and 2 of Order 30 of the Civil P.C. is different from the provisions of Section 69(2) of the

Partnership Act. The provisions contained in Rules 1 and 2 are procedural; whereas the provisions of Section 69(2) are substantive and create a

bar at the threshold of the filing of a suit by or on behalf of a firm if the conditions mentioned therein are not fulfilled. The expression "person suing"

in Section 69(2) can only mean the persons who file the suit on behalf of the firm. If this is the construction which requires to be adopted on the

said phrase used in the provision it would logically follow that the word "and" cannot be construed disjunctively. The question of the applicability of

the provisions of Rules 1 and 2 of Order 30 of the Civil P.C. arises only if the suit itself is validly instituted in compliance with the provisions of the

Civil P.C. Therefore, cannot be of any assistance in interpreting the provisions of Section 69(2). In the present case the name of one of the

partners had not been shown in the Register of the firms on the date of the filing of the suit. The suit filed by the partnership firm must, therefore,

fail.

In the case involved in the above decision, by evidence it was shown that the name of one of the partners had not been shown in the register of

firms on the date of filing of the suit. On the proved fact, invoking Order 30, Rule 2, C.P.C. may not serve any purpose, the Division Bench has

held that the suit filed by the partnership firm, must therefore fail, which may

not applicable to the case on hand, in view of the fact that the plaintiff firm is a registered, one concededly. Therefore, the institution of the suit, at the first instance, cannot be termed as invalid institution, thereby preventing the operation of Order 30, Rule (2), C.P.C. In our considered opinion, the institution of the suit is proper and therefore, it is for the contesting defendant, to raise the plea of maintainability of the suit on the ground, that the name of the person, who has sued, representing the firm, has not been shown in the register of firms, then demanding to produce the certificate, as contemplated under Order 30, Rule 2, C.P.C, thereby giving an opportunity to the plaintiff to satisfy the requirement of latter part or second limb of Section 69(2) of the Act. Since such an opportunity has not been made available to the plaintiff, having taken this defence surprisingly at the time of the second appeal, the first respondent's attempt to non suit the plaintiff, is not acceptable to us, since this is not a question of law alone, which could be decided on the facts available, for its determination, the fact being no concentration was made by the parties to let in evidence, to satisfy the requirement of Section 69(2) of the Act or otherwise. In the above case only considering the fact, that the name of one of the partners does not find place in the register of firms, the division bench has ruled as extracted above, which ratio cannot be applied as such to the case on hand.

16. The submission of the learned counsel for the first respondent, that the person suing must be shown as partner of firm at the time of filing of the suit is well recognized by the Division Bench in *Bank of Koothattukulam v. Thomas*, AIR 1955 TC 155, wherein it is held it is necessary not only that the firm should be registered, but the person suing must be shown as a partner in the firm. And when it is found that on the date when the plaint is filed the second part of this condition has not been carried out then Section 69(2) is not complied. The condition precedent viz., the firm should be registered to institute a suit of the nature mentioned in Section 69(2) of the Act cannot be cured by the subsequent registration and this kind of case is not available before us, the fact being the plaintiff firm was already registered, before the institution of the suit.

17. The learned Senior Counsel for the appellant, to rebut the submission of the learned counsel for the first respondent, regarding the

maintainability of the suit, brought to our notice a decision of this Court in V.V. Textiles v. Mahavir Fabrics, 2001 (4) CTC 409 , wherein, the

learned Judge has elaborately considered the provisions of Section 69(2) of the Act, as well as Order 8, Rule 1, C.P.C., including the principle of

waiver, referring to two decisions of this Court in Jalal Mohammed Ibrahim (Died) and Others Vs. Kakka Mohammed Ghouse Sahib and

Another, and N.A. Munavar Hussain Sahib v. E.R. Narayanan, AIR 1984 Mad 471 and held, that in case, the defendant has not raised the plea

based on Section 69 of the Act, he cannot be allowed to raise it at later stage and the said principle is squarely applicable to the present case also,

that too considering the effect of Order 8, Rule 2, C.P.C., which we have already adverted to above. Considering the various decisions of the

High Court and the Supreme Court, the learned Judge, further held:

(1) The Registration of a firm is a condition precedent for the launching of a suit by the firm as per Section 69(2) of the Partnership Act.

Subsequent registration cannot cure the defect.

(2) The objection regarding non-registration has to be specifically pleaded. Once pleaded it is incumbent on the plaintiff to prove the same and

failure is fatal.

(3) If non-registration is not specifically pleaded no evidence can be let in for the plea not raised. The objection regarding non-registration can be

waived. Unless the waiver of the right or the absence of the right makes any particular matter illegal, or where the benefit is conferred by a statute

which has public policy for its object, and,

(4) Such waiver can be expressed or be inferred from the facts and circumstances of the case.

The above principle could be made applicable to the present case, since the defendant has not raised the maintainability of the suit, based on

Section 69 of the Act, thereby bringing his conduct within the meaning of waiver, which could be inferred from the facts and circumstances of the

case. For the foregoing reasons, we are of the firm opinion that the suit is maintainable and the non-compliance of second limb of Section 69(2) of

the Act under the facts and circumstances of this case, cannot be raised by the first defendant, to non suit the plaintiff, at the appellate stage. Hence

this point is answered accordingly.

Point No. 2

18. The fact that the plaintiff insured its stock of cotton of all varieties, with the first respondent under two policies, totaling a sum of Rs. 10,00,000

is not in dispute. The first policy was taken on 3.6.1986 and the second policy was taken on 10.6.1986. Within 18 days, the godown of the

plaintiff, where the plaintiff stocked its trading goods, caught fire and the materials were completely damaged. Immediately, a claim has been

lodged on 17.7.1986. The repudiation, not even assigning any reason was made only on 20.3.1989 i.e. more than 31 months, thereby compelling

the plaintiff to come to the Court. As rightly held by the learned Judge to some extent and as submitted by the learned counsel for the first

respondent, though certain documents are available, as seen from the oral evidence of P.W.1 himself, to prove the actual stock on the date of the

fire accident on 28.6.1986, he has failed, in his duty to produce the same and hence it could be said, there is some laches on the part of the

plaintiff in not proving the claim, as projected in the plaint, by producing those documents. However, taking this alone, the suit claim cannot be

dismissed in toto, as did by the learned single Judge, in our considered opinion, erroneously, when there are materials to prove the actual damage

sustained by the plaintiff, irrespective of the burden of proof, even on the basis of the materials produced on behalf of the first defendant, the

learned single Judge ought to have decreed the suit to that extent and the reason assigned for not granting a decree, as per the surveyor's report

filed on behalf of the first defendant, who would not have favoured anybody, being an independent licensed surveyor. Even to deny this claim viz.,

Rs. 4,50,474 as per the surveyor's report filed on behalf of the first defendant, the learned counsel for the first respondent submitted, that from the

date of insurance, there was no good faith on the part of the plaintiff and even he has failed to perform his obligation, as per the terms and

conditions of the contract of policy, which should disentitle him, even from claiming the said amount.

19. In support of this contention, condition No. 11 of the policy was brought to our notice, which reads:

On happening of any loss or damage, the insured shall forthwith give notice thereof, to the company and shall within 15 days after the loss or

damage or such further time, as the company may in writing, all in that behalf, deliver to the company -

(a) a claim in writing for the loss and damage containing as particular an account as may be reasonably practicable of all the several articles or

items of property damaged or destroyed, and of the amount of the loss or damage thereto respectively, having regard to their value at the time of

the loss or damage, not including profit of any kind;

(b) particular of all other insurances if any;

The insured shall also at all times at his own expense produce, procure and give to the Company all such further particulars, plans, specifications,

books, vouchers, invoices, duplicates or copies thereof documents, proofs and information with respect to the claim and the origin, and cause of

the matter touching the liability or the amount of the liability of the company as may be reasonably required by or on behalf of the Company

together with a declaration on oath or in other legal form of the truth of the claim and of any matters connected therewith.

The above said conditions mandate the insured that he should produce books, vouchers, invoices, etc., in respect of the claim, probably in this

case, to prove the actual stock as on the date of fire. According to the learned counsel for the first respondent, except Exs. P.7 and P.8, the self

serving stock registers, said to have been maintained by him, not even written by the accountant though available, no other documents have been

produced, such as vouchers for the purchase of cottons, documents transporting the cotton to the ginning factory, where the cottons were pressed

actually, stock verification statement sent to the bank, since the plaintiff had obtained loan showing the stock as security and therefore, it should be

presumed that there is violation of the condition and this being the position, there is absence of good faith and in that case, the insurance company

is competent and within its right to repudiate the claim. Considering the surveyor's report and the documents produced before him, which he had

verified, as indicated in the report, we are unable to persuade ourselves to conclude, that there is violation of the policy conditions as contended,

thereby disentitling the plaintiff to claim the amount, even as per the assessment of the surveyor, on the basis of the documents produced by the

plaintiff, whether it is dependable or undependable.

20. It is an admitted position that immediately without any delay, the fire accident was notified to the insurance company and the Assistant

Divisional Manager had also inspected the Godown at 10.00 a.m. and thereafter, at about 11.45 a.m., the Surveyor came there, conducted a

preliminary survey, at that time, some of the documents were shown, in which the surveyor had also signed, whether its correctness is accepted or

not. Therefore, it is not the question of non-compliance of any of the conditions, whereas if at all, the question would be whether the documents

relied on by the plaintiff could be accepted or not.

21. It is not the case of the first respondent, that there was no stock or nil stock, at the time of the fire accident. A reading of the written statement

and the surveyor's report would go to show, that there was some stock at least, though not to the entire extent, as claimed by the plaintiff. The

Surveyor, D.W.2, who had inspected the place of occurrence has given a detailed report, considering the insured version, the documents

produced to prove the claim, as well as the inaction on the part of the plaintiff in not sending statements to the bank regularly, regarding the stock

and taking into consideration that M.S. Strips available at site after the fire, and worked out the stock that could have been available prior to fire,

at 198 No. of bales. Though the Surveyor has doubted and observed that there is a feeling as if some of them have been dumped in the godown,

later on calculated the value of the stock at Rs. 4,50,474. In the surveyor's report itself, number of documents were attached, thereby indicating

that the insured had produced the documents available with him, to prove the stock. Therefore, disowning the surveyor's report, the first

respondent is not entitled to repudiate the claim in entirety, which was unfortunately accepted by the learned single Judge as such, concluding that

there was no good faith on the part of the plaintiff, and the circumstances suggest that the fire is attributable to a cause, which is not a reason

covered by the policy of insurance, which appears to be not the case of insurer. The policy covers specifically the damage caused to the stock by

fire also. It is not the case of the defendant that there is any foul play or fraud, for the purpose of claiming insurance amount, to enrich themselves

unlawfully. This being not the defence, we do not find any reason to ignore the surveyor's report filed on behalf of the first defendant, which

proved the damage, to the stock that could have been available on the date of fire accident, for which the plaintiff is entitled to a decree.

Unfortunately, the learned single Judge has dismissed the claim totally, which requires modification, setting aside the judgment and decree.

22. The Surveyor's report produced by the first defendant/first respondent cannot be so easily ignored, since it is a piece of evidence, that too

when no motive is alleged, attributing any favouritism. In the case on hand, the Surveyor's report was produced only at the request of the insurer,

who had visited the scene of occurrence more or less forthwith and assessing the statement of the insured, as well as gathering the intrinsic

evidence available at the spot. A division bench of this Court in Bond Food Products Private Ltd. and The Oriental Insurance Co. Ltd., (now

changed and hitherto known as the Oriental Fire and General Insurance Co.) Vs. Planters Airways Ltd., had an occasion to consider surveyor's

report, wherein it is held that the Surveyor is expert in his field and the report has to be accepted, when the same was not under challenge. Here

there is no evidence to show that the report of the Surveyor was arbitrary, or any intrinsic evidence to say that he has not considered the

documents produced by the insured, though he had entertained some doubt. The doubt must be relating to the quantum claimed by the insured and

certainly it cannot be to the extent and its value assessed by the surveyor. Therefore, by saying that the documents produced by the plaintiff are

undependable, in our considered opinion, ignoring the surveyor's report is not possible and the same being the document produced by the first

defendant/first respondent, the further fact being that the report was submitted by an independent surveyor, who is licensed by the Government at

the instance of the first respondent. In this view, we are inclined to accept the Surveyor's report, in order to fix the quantum of cotton gutted in fire,

as well as its value.

23. As seen from the Surveyor's report, the amount is quantified at Rs. 4,50,474, to which extent there should be a decree, unless it is shown that

the claim of the plaintiff is against the principle ""Insurance is uberrimae fidei"". The learned counsel for the first respondent though contended that

there is no good faith in the claim of the plaintiff, which could be seen from the date of the insurance, as well as the date of fire, and the fact that the

cause of fire was not established, we are unable to persuade ourselves to doubt about the bona fide of the claim, though it could be said, the

plaintiff having made a claim of Rs. 9,92,420, failed to prove the same to the entire extent.

24. The learned counsel for the appellant relying upon certain passage in "'Fire and Motor Insurance'" by E.R. Hardy Ivamy, (1973 Edition),

submitted that the cause of fire in this case may not weigh the quantum of evidence or it may not be the cause for rejecting the claim, since the

contract is to provide for the payment of money, upon the happening of a fire. In the said book, it is observed under the heading "Immateriality of

Cause of the Fire" as follows:

The object of the contract is to provide for the payment of a sum of money, or for some corresponding benefit, to meet a loss or detriment which

may be suffered by the insured upon the happening of a fire. To carry the investigation, therefore, beyond the cause of the loss, and to cast upon

the insured the burden of establishing that the cause of the fire itself was covered by his contract, would largely defeat this object.

When it is once established that the loss is due to fire within the meaning of the contract, the cause of the fire is, as a general rule, immaterial.

The fact that the fire was occasioned by negligence does not exempt the insurers from liability, for one of the objects of the contract of fire

insurance is to provide against the consequence of negligence. It is therefore immaterial whether a fire which causes a loss is lighted improperly, or,

after being properly lighted, is negligently attended, since the insured is in both cases entitled to recover.

It is equally immaterial whether the fire is caused by the negligence of servants or strangers, or even by the negligence of the insured himself.

It is also observed in the above cited book that,

Where the act is committed without his privity, the insured, being guilty of no misconduct himself, does not commit a breach of good faith in

making a claim in respect of his loss, and is therefore not precluded from recovery.

25. From the above observation, which was deduced from the rulings of the High Court, it is clear that it is immaterial whether the fire was caused

by the negligence of the servant of the plaintiff firm or by some other method,

unless it is pleaded specifically that the fire occasioned by the wilful act of foul play or fraud by the insured himself. The first defendant has not raised any plea of fraud and therefore, as observed by the learned single Judge, since the plaintiff has failed to prove the cause of fire, the claim should be negatived, is not acceptable to us.

26. The learned counsel for the appellant submitted, that the fire loss caused negligently by the insured, even if it is correct, is covered by fire insurance, since otherwise such policies would practically be of little importance. Therefore, on the ground that the contract is based upon the utmost good faith, the insurer cannot repudiate the claim of the insured, unless it is shown that the assured or insured failed to make such disclosure as agreed under the terms of the contract.

27. In the book "Principles of Insurance Law" by Dr. Avtar Singh, it is said as follows, under the heading "Cause of fire is immaterial":

In insuring against fire, the insured wishes to protect himself from any loss or detriment which he may suffer upon the occurrence of a fire, however

it may suffer upon the occurrence of a fire, however it may be caused. So long as the loss is due to fire within the meaning of the policy, it is

immaterial what the cause of the fire is, generally. Thus, whether it was because the fire was lighted improperly or was lighted properly but

negligently attended to thereafter or whether the fire was caused on account of the negligence of the insured or his servants or strangers is all

immaterial and the insurer is liable to indemnify the insured.

Therefore, considering the policies taken by the insured here, we affirm the above said view, thereby concluding that the claim of the plaintiff

cannot be dismissed on the ground that the cause of fire pleaded in the plaint has not been established. The cause of fire becomes material and

should be seen, where there is a defence such as that the fire occasioned not by the negligence, but by the wilful act of the insured or where any

foul play has been made out or suspected, which are not even pleaded in this case and no such case has also been made out.

28. In *Harris v. Poland*, 1941 KB 462, Lord Atkinson, J. has ruled that,

It mattered not whether the property had gone to the fire or the fire had gone to the property. There had been ignition of insured property not

intended to be ignited, and the loss fell within the plain words of the policy.

29. Mr. Justice Salmon in *Slattery Mance*, 1962 1 Q.B. 60, has held that, Once it was shown that loss was caused by fire, plaintiff had made out prima facie case and onus was upon insurer to show that, on balance of probabilities, fire was caused or connived at by plaintiff; and (2) that there was no principle of common law or authority for proposition that, when facts were peculiarly within knowledge of person against whom assertion was made, onus shifted to that person; and that, therefore, onus was on insurer.

30. In the light of the above discussion, considering the admitted fact, that there was a fire in the godown of the plaintiff, it is only for the insurer to make out a case, in view of the admitted policies, that they are not liable to pay any amount, either on the ground of fraud or foul play or making out a case of non-availability of good faith. Though from the evidence of P.W.1, it could be seen that he had not given the correct particulars, regarding the quantum of cotton said to have been stored in the godown, as well as failed to produce certain documents that are said to be available, it is not possible to say that there is no good faith, considering the proximity of the fire alone. As held by us supra, we find no reason to disown the surveyor's report produced by the first respondent, which is supported not only by the materials produced by the insured, but also by the report submitted by the fire squad, where it is observed, No foul play is suspected and the quantity of 429 F.p bales of cotton reported to have been gutted in the accident is correct according to registers.

The surveyor unable to accept the report of the Inspector of Police, independently conducted an enquiry and analysed the inaction of the plaintiff, as well as the action of the plaintiff, in addition to the materials available on the spot, on which basis, he had reached the conclusion that number of pressed bales of cotton that could have been available at the time of fire was 198 bales or 330.6 quintal and quantified its value at Rs. 4,50,474.

31. Despite the fact that the surveyor's report was given on 17.2.1987, the same was not repudiated till 20.3.1989 i.e. for more than two years and only after the repeated request and reminder by the plaintiff, the insurer had informed the insured that they have decided to repudiate the claim for compensation and thereby, the same was repudiated, that too without

assigning any reason, leave alone the valid reason, as could be seen from

Ex. P. 19. If really the insurer had thought that there was no stock, either as claimed by the plaintiff or as assessed by the surveyor, nothing would

have prevented the insurer from repudiating the claim forthwith. Whereas they have waited for more than two years, which would indicate that the

insurer had never thought of any foul play in this case and if at all, at belated stage, without assigning any reason, the repudiation was made, which

is not acceptable to us.

32. The learned Judge commenting upon the evidence of P.W.1 alone, though the burden is upon him to prove the suit claim, failed to take into

consideration the surveyor's report and went to the extent of saying, that it has to be held that the fire in the godown is not a risk covered by the

policy, which is not the case of the first respondent also.

33. In the light of the above discussion, as well as the law quoted by us, we are of the considered opinion that on the basis of the surveyor's report

filed on behalf of the first respondent/first defendant, the plaintiff is entitled to a decree with interest for the delayed payment as held by the Apex

Court in LIC v. Gangadhar Vishwanath Ranade, 1989 (4) SCC 297. Considering the prevailing rate of interest at present, the rate of interest is

fixed at 9% per annum, which is liable to be paid by the insurance company to the insured/plaintiff from the date of repudiation i.e. 20.3.1989.

In the result, the appeal is allowed in part, granting a decree in favour of the plaintiff, against the first respondent/first defendant in a sum of Rs.

4,50,474 with interest thereon at 9% per annum from the date of repudiation viz-, 20.3.1989, till the date of payment, with proportionate cost

throughout, dismissing the rest of the claim without costs.