
(1997) 05 DEL CK 0098

In the Delhi High Court

Case No : Suit No's. 167 and 224 of 1971

State Bank of India

APPELLANT

Vs

Agents and Manufacturers

RESPONDENT

Date of Decision : 06-05-1997

Acts Referred:

Evidence Act, 1872 — Section 91

Citation : (1997) 4 AD 81 : AIR 1998 Delhi 84 : (1999) 97 CompCas 538 :
(1997) 67 DLT 318 : (1997) 41 DRJ 639

Hon'ble Judges : J.B. Goel, J

Bench : Single Bench

Advocate : Sanjeev Kalra, Atul Kumar, Rajender Dhawan and S.C. Sharda, for the Appellant;

Final Decision : Dismissed

Judgement

J.B. Goel, J.

(1) plaintiff, M/s. Agents & Manufacturers (in Suit No. 224/71) is a partnership firm (hereinafter called the claimant) and is carrying on business of manufacturing sewing machines bases, covers, tables, cabinets of wood etc. and for this purpose it purchases and maintains stocks of timber, plywood, fittings, materials and block boards and other raw materials etc. It has its office at 131, Chhota Bazaar, Shahdara, and factory and godowns inter alias at premises No. 508, Circular Road, Shahdara, 525/16, Chhota Bazaar, Shahdara, Harsharan Niwas and also at 471, Circular Road, Delhi.

(2) For the purpose of its business it has been availing cash credit facilities against hypothecation of its stocks since 1964 from the State Bank of India, Shahdara branch, (hereinafter called the Bank) and the limits of these facilities have been increased from time to time. The credit facilities are (1) Cash Credit Facility on "Lock and Key" basis, and (2) Cash Credit Facility of "Factory Type Account". In April, 1970 the limit of the facility in relation to Lock and Key (Cash

Credit Account) was fixed at Rs. 1,25,000.00 and in Factory Type Account in February, 1970 the facility limit was fixed for Rs. 75,000.00 .

(3) M/S. Co-operative General Insurance Society Ltd., New Delhi (hereinafter called the Insurance Company) is an Insurance Company and the claimant in order to secure the bank loan taken against hypothecation of its stocks of material in both the facilities had obtained following five Insurance Policies from the Insurance Company:-

S.No.	Policy No. & Date	Amount insured
1.	DL-69/F/461 (Ex.P/2)	8.9.1969 to 8.9.1970 Rs.80,000.00
2.	DL/69/F.462 (Ex.P/3)	8.9.1969 to 8.9.1970 Rs. 30,000.00
3.	DL/69/F/567 (Ex.P/4)	29.10.1969 to 29.10.1970 Rs.40,000.00
4.	D1770/F/173 (Ex.P/5)	26.2.1970 to 26.2.1971 Rs.40,000.00
5.	S.D1770/174	26.2.1970 to 26.2.1971 Rs.40,000.00

(4) A fire took place in the premises situated at 525/16, Chhota Bazaar, Shahdara in the early hours on 15.5.1970 thereby causing loss of its stock lying there due to burning in that fire. Claim dated 20.6.1970 was submitted by the claimant company to the Insurance Company. Loss was surveyed by the Surveyors, namely, M/s. Darbari Lal Puri & Sons and M/s. Lokendra claims Care Corporation who submitted their report and on the basis of the material available with it, the Insurance Company rejected the claim of the claimant vide letter dated 27.1.1971 for the reasons given therein i.e., for alleged breaches of warranties and conditions of the policies. The claim having been repudiated the claimant filed the suit being Suit No. 224/71 claiming a sum of Rs. 1,90,000.00 against 4 policies mentioned at SI. No. 1,3,4, and 5 in Para No. 3 above.

(5) In the credit facilities availed by the claimant from the Bank, the bank alleged that a sum of Rs. 77,092.53 P. in the Cash Credit Factory Type Facility and sum of Rs. 1,30,548.23 P. in the Cash Credit Lock. and Key Type Account, i.e., in all Rs. 2,07,640.76 were due from the claimant to the Bank. Besides, this the Bank also claimed that the claimant had mortgaged their property No.VI/1553-B/3045(New) situated at Ballimaran, Delhi by means of an equitable mortgage on 11.11.1969. The Bank claimed recovery of the aforesaid amount of Rs. 2,07,648.76 P. and a mortgage decree against the claimant. It also has claimed a decree against the Insurance Company for the recovery of Rs. 1,90,000.00 against the aforesaid four insurance policies. The Bank has filed suit No. 167/1971 impleading the claimant firm as defendant No. 1 and its four partners as defendants No. 2, 3, 4, and 5 and Insurance Company as defendant No. 6.

(6) The Insurance Company contested both these suits and denied their liability for the reasons already mentioned in their letter dated 27.1.1971. However, the bank has supported the claim of the claimant against the Insurance Company.

(7) Statements of counsel for the parties before issues were recorded on

14.7.1972 and the following issues were framed on 18.7.1972:

ISSUES(Suit No. 167/1971) 1. Whether the suit has been properly instituted and the plaint duly signed and verified by an authorised person? Opp 2. Whether defendants Nos. 1 to 5 are entitled to defeat the plaintiffs claim on the ground of loss of pledged goods by fire? (Onus objected to.) 3. Whether the mortgaged property is ancestral property and is not available to the bank for enforcement of its claim? 4. Whether the mortgage of the immovable property as collateral security was valid and whether the plaintiff is entitled to enforce the same? 5. Whether defendant No. 3 has retired from the partnership and if so, when and what is the effect thereof on his liability? 6. Whether the cash credit agreements have not been properly executed? (Onus objected to). 7. Whether the plaintiff is entitled to interest and if so, how much? 8. Whether there is no privity of contract between defendant No. 6 and the plaintiff and if so, what is the effect? 9. Is the suit bad for misguide of causes of action? 10. Is the suit of the plaintiff or any part of it barred by time qua defendant No. 6? 11. Whether the goods worth Rs. 1,26,200.00 lying in the open and the remaining goods worth Rs. 78,280.00 were covered by the insurance policies? (Onus objected to.) 12. Whether the plaintiff and defendants No. 1 to 5 are not entitled to recover the amount of Rs. 78,280.00 or Rs. 1,26,200.00 from defendant No. 6 on account of the breach of terms and conditions and exceptions of the warranty contained in the Insurance Policy as claimed by defendant No. 6? 13. Whether the construction of the godown No. 479, Circular Road, Shahdara, mentioned in the letter dated nil was per declaration made by defendants No. 1 to 5 in the letter dated nil and what is its effect? 14. To what amount, if any, is the plaintiff entitled and from whom?

(8) And following issues were framed on 19.7.1972 in Suit No. 224/71:

"1. Whether the plaintiff firm is registered with the Registrar of Firms and/ whether the suit has been filed and verified by a duly authorised person? 2. Whether the goods worth Rs. 1,26,200.00 lying in the open and the remaining goods worth Rs. 78,280.00 were covered by the insurance policies?/Onus objected to. 3. Whether the plaintiff and defendant No. 2 are not entitled to recover the amount of Rs. 78,280.00 or Rs. 1,26,200.00 from defendant No. 1 on account of the breach of terms and conditions and exceptions of the warranty contained in the insurance policy as claimed by defendant No. 1? 4. Whether the construction of godown No. 479, Circular Road, Shahdara, mentioned in the letter dated nil was as per declaration made by defendants No. 1 to 5 in the letter dated nil and what is its effect? 5. To what amount, if any, is the plaintiff and/or defendant No. 2 entitled from defendant No. 1."

(9) These two suits were ordered tti be tried together and oral evidence has been recorded in Suit No. 224/1971 but documentary evidence is available in both the suits.

(10) The parties produced oral as well as documentary evidence. The claimant

examined only Shri Rameshwar Dayal, its Partner as Public Witness .1. The bank examined two witnesses, namely, Shri S.D. Chandra its then Agent, as D2WI and Shri S.R.Kapur, then Manager as D2W2 and the Insurance Company examined four witnesses namely, Shri Birbal Lunial, its the then Assistant Branch Manager as D1W1, Shri D.K. Bhalla, formerly its Regional Manager as DIW2, Shri M.L. Pandya, Surveyor as DIW3, and Shri Lokendera Pandya, another partner of Surveyor Firm as DIW4. DIW3 Mr. M.L. Pandya was not produced for cross-examination and on October 10, 1990, he was allowed to be given up and it was ordered that any statement made by him shall not be looked into. So his evidence has to be excluded.

(11) Documents filed by the parties are quite large in number. Parties have addressed arguments on a number of dates. I have perused the pleadings, oral and documentary evidence produced and considered the oral arguments addressed. My findings issue wise are as under- issue No. 1 in Suit No. 224/71. Issue No. 1: Whether the plaintiff firm is registered with the Registrar of Firms and whether the suit has been filed and verified by a duly authorised person?

(12) No arguments were addressed on this issue and the issue was not pressed on behalf of defendants during the arguments. Public Witness .I Shri Rameshwar Dayal has deposed that the plaintiff is a Partnership Firm duly registered with the Registrar of Firms and he is one of its partner. He has also proved Ex.P-1, a certified copy of Form A. He has not been cross-examined nor there is any evidence in rebuttal. This issue is accordingly proved and is decided in the affirmative in favor of the plaintiff. Issue No. 2 (in Suit No. 224/71) and Issue No. 11 (in Suit No. 167/71) Whether the goods worth Rs. 1,26,200.00 lying in open and remaining goods worth Rs. 78,280.00 were covered by the insurance policies? (OPP) Claimant had obtained following 5 Insurance Policies from the Insurance Company:-

S.No.	Policy No.	Validity period	Amount insurance Rate and Amount of Premium per thousand
1.	DL-69/8/461 (Ex.P/2)	8.9.69 to 8.9.70	Rs. 80,000.00 Rs. 10.00 Rs. 800.00
2.	DL-69/F/462 (Ex.P/3)	8.9.69 to 8.9.70	Rs. 30,000.00 Rs. 7-1/2 Rs. 225.00
3.	DL-69/F/567 (Ex.P/4)	26.10.69 to 26.10.70	Rs.40,000.00 Rs. 10/. Rs. 400.00
4.	DL-70/F/173 (Ex.P/5)	26.2.70 to 26.2.71	Rs. 30,000/. Rs. 7-1/2 Rs. 225.00
5.	DL-70/F/174 (Ex.P.6)	26.2.70 to 26.2.71	Rs. 40,000.00 Rs. 10.00 Rs. 400.00

(13) The claimant and the Bank have made claims in the two suits in respect of policy at SI. Nos. 1, 3, 4 & 5, i.e., Ex.P.2, P.4, P.5 and P.6 though in the notice of claim they had made claim in respect of all the 5 policies.

(14) There is a dispute between the parties whether Policy No.DL-70/F/173(Ex.P.5) related to goods lying in Godowns No. 62,62A, 62B, and 62C

situated at property No. 525/16, Chhota Bazaar, Shahdara, Delhi, as according to the claimant description of the premises was inadvertently made wrong and it pertained to the property lying in these premises whereas according to the Insurance Company the premises are correctly described in the policy and risk pertained to the premises mentioned in the policy and in any case, policy was not obtained in respect of the goods lying in the property as claimed by the claimant as it involved higher premium which was not paid and as such no liability arises against this policy as there was no fire in the premises mentioned therein.

(15) As appears from the details of the 5 policies first two policies were taken on 8.9.1969, the third policy was taken on 29.10.1969, and the other two policies were taken on 26.2.1970. The Bank in its suit No. 167/71 has alleged that the claimant has been availing diverse cash credit facilities since November, 1964 and by agreement dated 10th February, 1970 the limit in respect of factory type facility was enhanced to Rs. 75,000.00 whereas in respect of lock and key facility it was increased to Rs. 1,25,000.00 in November, 1969 and again in April, 1970. Obviously, the two last policies were obtained on 26.2.1970 on the basis of enhanced limits of the credit facilities in the two accounts..

(16) Admittedly, the fire had taken place in the premises situated at Property No. 525/16, Chhota Bazar, Shahdara, Delhi in the early hours on 15.5.1970. The claimant had made claim for loss caused by this fire vide letter dated June 20, 1970 (Ex.PW.1/D-4). In this notice various premises in occupation of the claimant were described. The premises inter alias were the following:

(1) Premises No. 525/16, (Khasra No. 1135/1072), Chhota Bazaar, Shahdara, Delhi. Godowns No. 62, 62A, 62-B, and 62-C situated in this property. The goods lying in this premises are the subject matter of the insurance policies Exhibits P/2, P/4, and P/6.

(2) Godown at Harsharan Niwas Building, Railway Road, Shahdara, Delhi used as godown (No.62-D). The goods lying in godown No.62-D are insured by policies Exhibit Nos. P/3 and P/5.

It was alleged in the notice of claim that the premises were taken on rent in July, 1969 and were surrendered to the Landlord in December, 1969; and the goods lying there were shifted to 471, Circular Road, Shahdara, Delhi and intimation to this effect was also given to the Insurance Company.

(3) Premises No. 471, Circular Road, Shahdara, Delhi, used as godown since January, 1970.

(17) In Para 10 of their plaint (Suit No. 224/71) the claimant has pleaded that the Policy No.DL-70/F/173 (Ex.P/5) was intended by them to cover godown Nos. 62, 62-A, 62B, and 62C and factory situated at M.No.525/16, Chhota Bazaar, Shahdara but due to clerical mistake the Insurance Company had mentioned therein Godown No.62-D at Harsharan Niwas, Railway Road, Shahdara, Delhi

which premises to their knowledge had ceased to be in possession of the claimant at the time of taking the said policy, the Insurance Company has denied it and claimed that this policy was obtained in respect of the godown No.62-D, Situated at Harsharan Niwas, Railway Road, Shahdara, Delhi.

(18) On behalf of the claimant Shri. Rameshwar Dayal, its Partner appeared as PW.1. He has stated that they had taken out insurance Policies Ex.P/2 to P/6 from the Insurance Company and they had two types of Cash Credit Facilities with the Bank, i.e., (1) one lock and key and (2) factory type facility. He has not stated in his statement-in chief that there was any mistake committed by them in the description of the premises in policy Ex.P/5.

(19) However, it is seen that policy No.DL-69/F/462(Ex.P.3) is in respect of premises shown as Godown No.62-D, Harsharan Niwas. This policy was issued on 8.9.1969. On that date admittedly, the claimant was having godown No.62-D, situated at Harsharan Niwas and so that policy was correctly, issued. The claimant, it appears, in their letter dated 14.1.1970 had informed the Insurance Company that they had shifted godown No.62-D from Harsharan Niwas to 471, Circular Road, Shahdara, Delhi and requested them to effect this change of address in the record/policy. Copy of this letter has been produced on record by the claimant but has not been exhibited. This letter is being exhibited now as EX.P/A. This request was accepted by the Insurance Company vide letter No.DL-70/F/Ext.009 (Ex.PW.1/D-8) and the change of the address of go-down No.62-D as mentioned in this Policy DI-69/F/462 (Ex.P.3) was effected as shifted to premises No. 471, Circular Road, Shahdara, Delhi with effect from 30.1.1970. It is, however, not proved by claimant nor it is so deposed by PW1 that the godown/premises situated at Harsharan Niwas were actually surrendered by them.

(20) The Bank has also not adduced any evidence to show that in their records the Go-down No.62-D, or the premises at Harsharan Niwas had ceased to be in occupation of the claimant. In any case, it is not the case of the claimant that godown No.62-D was shifted to property No. 525/16, Chhota Bazar, Shahdara.

(21) Policy Nos.DL/70/F/173 (Ex.P.5), and DL-70/F/174 (Ex.P.6) had been taken on the same date, i.e., 26.2.1970, former is in the sum of Rs. 30,000.00 and the other is in the sum of Rs. 40,000.00 . In the first policy the premises shown are 62-D, Harsharan Niwas whereas in the 2nd policy the premises shown are Godown No. 62, 62-A, 62-B, and 62-C, and factory situated at 525/16, Chhola Bazaar Shahdara. These policies obviously were obtained by or at the instance of the claimant.

(22) There is no evidence led by the claimant that this policy Ex.P/5 was obtained in respect of premises No. 62, 62-A, 62-B, and 62-C, Chhota Bazaar, Shahdara, Delhi nor that godown No.62-D was set up there before this policy was obtained. On the other hand, following circumstances would show that this policy was not obtained in respect of the goods lying at premises/godowns

situated at 525/16, Chhota Bazaar, and it pertained to goods lying in Godown No.62-D, situated either at 471, Circular Road or at Harsharan Niwas as the policy shows.

(23) In policies No.Ex.P/3 and P/5 which are in respect of godown No.62-D, the premises described are of first class construction whereas in Policies Ex.P-2, P-4, and P-6 the premises are of second class construction. The premium charged in respect of policies Ex.P.3 and Ex.P.5 for first class construction, is at lesser rate of Rs. 7-1/2 per thousand whereas in respect of other three policies (Ex.P.2, P.4 and P.6) for second class construction it is more, i.e., at the rate of Rs. 10.00 per thousand. Obviously the policy No.Ex.P-5 related to premises different from those mentioned in Ex.P-2, P-4 and P-6. Unless the premium at higher rate was paid, and it was shown that it was of first class construction, higher risk in respect of the premises as mentioned in policies Ex.P.2, P.4 and P.6 could not be undertaken by the Insurance Company. Further both the policies Ex.P/5 and P/6 are of same date and pertain to the same period, i.e., 26.2.1970 to 26.2.1971. If both these policies were intended to be in respect of the same premises, there seems to be no reason nor it is so explained as to why two separate policies were obtained for the same premises, same goods, same risk and for the same period, but at different rates of premiums. Only one policy would have been obtained if it was in respect of goods lying at the same property. The premium in respect of these two policies (Ex.P-5 and Ex.P-6) appears to have been paid by means of cheque No. 708200 through letter Ex.PW.1/D-8 which PW.1 has admitted to be in his hand and signed by him. This letter is addressed to the Insurance Company and reads as under:

"PLEASE Find herewith one cheque No. 708200 for Rs. 625.00 against the proposed fire policy. Please issue the cover note as under; For Rs. 30,000.00 under Lock & Key in Godown situated in No. 471, Circular Road, Shahdara, 1st Class construction @ Rs. 7.50 per thousand = 225.00 For Rs. 40,000.00 under Factory Type in Factory in premises No. 1135/1072 (Khasra No.) or 525/16 (Municipal Number) in Chhota Bazaar @ Rs. 10.00 = 400.00 . Total Rs. 625.00 "

(24) Premium charged in respect of Ex.P/3 and P/5 is at the same rate, i.e, Rs. 7-1/2 per thousand for first class construction and it is in respect of godown No.62-D. It is not the case of the claimant that Godown No. 62-D if shifted from Harsharan Niwas was not maintained and continued at 471, Circular Road, nor that the goods lying there were not under the lien of the Bank. In these circumstances it cannot be said that the policy Ex.P/5 was obtained in respect of goods lying in the godowns situated at property No. 525/16, Chhota Bazaar, Delhi or godown No.62-D, mentioned therein was situated at 525/16, Chhota Bazaar.

(25) There was no fire at Godown No.62-D situated at 471, Circular Road, or Harsharan Niwas. Obviously the claimant has as an after thought come with a false claim to make wrongful gain out of the fire which had broken out at Godowns and factory at No. 525/16, Chhota Bazaar. The claim made against

policy Ex.P.5 in these circumstances is not proper and is not tenable. Claimant is thus not entitled to any claim in respect of this Policy Ex.P/5.

(26) Coming to the remaining three policies Ex.P-2, P-4 and P-6. In all these three policies the goods insured were the goods lying in godowns situated at No. 525/16, Chhota Bazaar, Shahdara. The description of the risk as given in Ex.P-2 is as under:

"ON stock of Sawn Timber, Plywood, fittings, material and black board act. the property of the insured, under lien to the aforesaid Bank whilst stored and/or lying in godown forming part of a building, built of 2nd class construction, bearing Godown Nos. 62,62-A, 62-B, 62-C, with lock and key and factory type, M. No. 525/16, situated at Chhola Bazaar, Shahdara, Delhi". And is subject to warranties Nos. i, k, m, n, 1 to 8 as per warranty slip attached with it."

(27) Similar risk and conditions are also incorporated in policy Exhibit Nos. P/4. In Ex.P-6 the risk is same but is subject to warranties 2, 12, 14, 15, 16, 19, 20 of Form A and also NE-2 attached thereto.

(28) Warranties & conditions attached to and forming part of the policy No.DL/69/F/461 (Ex.P.2) are as follows: It is hereby warranted that during the currency of this policy:-

(I)No fire wood or other fuel and/or Hay, Straw, or fodder and/or vegetable oils and/or other Hazardous goods should be lying and/or deposited in the open within 50 ft. of the property insured hereby.

(K)The building referred to therein is built of burnt silica or sand lime bricks with roof of tiles and/or slates or of metal or of corrugated asbestos sheetings or of mud, soorkey or chunam over timber boards.

(M)That smoking and cooking be strictly prohibited in or about the said premises except in place specially set apart for such purpose only.

(N)No building of Timber, Kutcha, or Thatched construction be situated within 50 feet of any building referred to herein unless the wall facing the higher rated risk is entirely of burnt brick or stone having no opening therein or having the windows and openings, if any protected by iron doors shutters.

(29) Policy No.DL.70/F/174 (Ex.P.6) contains the following material warranties affecting the liability:

(A)Warranted that there will be no cooking in the building to which this insurance applies except in a place separately provided for the purpose being of brick-work, stone-work or concrete protected. Warranted that fire-place is securely set in masonry or brick with a hearth of stone or concrete protected by a metal fender, and that the chimney is properly built. Warranted that sweeping is done daily.

2.Building constructed of bricks, silica or sand lime, bricks with roof of tiles and/or slated and/or corrugated asbestos sheetings, mud, soorkey, or chunam over

timber boards.

xx xx xx

12. Lighting by Kerosene and/or Vegetable Oil and/or electricity allowed; electric fans are also allowed.

20. All terms, conditions and warranties of the policy applying during the currency of the Policy.

(30) The claimant in their notice of claim dated June 20, 1970 Ex.PW.1/D-4 sent to the Insurance Company had given the description of the premises, nature of the construction, and the place where the goods were lying and had also annexed thereto a building plan (Ex.PW.1/D-6) of the premises No. 525/16, Chhota Bazaar and adjoining property No. 508, Circular Road, Shahdara, Delhi.

(31) SURVEYOR'S report is (Ex.DIW4/1). The claim of the claimant was rejected by the Insurance Company vide their letter No. 1646, dated 27.1.1971 (Ex.PW.I/D2/1) for breach of warranties and conditions for the following reasons:

"3. The stocks declared by you are as under:- In open: Rs. 1,26,200.00 In Godowns Including bases which were unassembled and/or unfinished : Rs. 78,280.00 Rs. 2,04,480.00 Thus, stocks declared by you in godowns were for Rs. 78,280.00 only at the time of fire. 4. On going through your letters and Surveyors' report the following facts are observed: a) The construction of godown No. 62, is not in conformity with the policy description. The two and half walls are built of plank fitted over it corrugated iron sheets and not of burnt bricks, as required under warranty No. 2 of the Policy No. DL-70/F/174 and warranty "K" of policies No. DL-69/F/461 & 567. b) There is thatched construction within the premises with one wall of wooden planks, marked No. 1 in the plan. c) The construction on plot No. 508, Circular Road, Shahdara, communicating and adjoining to the risk insured is built of wooden walls. d) There is also a coal and fuel depot adjoining to the risk insured. e) The premises has more than one circular saw and band saw and jig saw. As such for all purposes, the premises are to be treated as Saw Mill with 4th class construction for thatched shed. f) The contents of godown No. 62 B were partly lying outside the godown with walls of planks."

(32) The case of the insurance Company is that the goods lying in the open compound are not covered and as such they are not liable for loss of goods worth Rs. 1,26,200.00 lying in open. And about the remaining damage worth Rs. 78,280.00 also the liability is denied due to breaches of warranties noticed above.

(33) On behalf of the claimant it has been contended that the goods insured with the Insurance Company were of two categories (1) Lock & Key type and (2) Factory type facility. The goods of the First type were lying inside the godowns and were under the lock and key of the bank whereas the goods in the "factory type" were lying in the open. These were in the process of manufacture. As these goods in both these categories were under lien of the Bank all these goods were

insured under these policies.

(34) The question thus is whether such goods lying outside the godowns are insured or not? It is not disputed on behalf of the claimant that the goods of the value of Rs. 1,26,200.00 out of the amount claimed for loss were lying outside the godowns when they were destroyed by fire.

(35) The goods insured and the risk undertaken are described in the policies Ex.P-2, P-4, and P-6 as mentioned in paragraphs No. 26 to 29.

(36) There is no ambiguity in the description of the risk. The premises where the goods should be stored, as given in the policies are the godowns of a building built of 2nd class construction with a roof. Building is defined in clause (k) in policies Ex.P-2, and Ex.P-4 and clause No. 2 of policy Ex.P-6. Goods not stored/kept in such godowns are not covered by the protection of these policies.

(37) Words would not be given an interpretation which nullifies the provisions of the contract of insurance. If the parties have provided express definitions in their policy for particular words, such definition must prevail.

(38) In *General Assurance Society Ltd. Vs. Chand Mull Jain & Am.* Air 1666 Sc 1644 (at page 1649) it has been laid down as under:

"IN interpreting documents relating to a contract of insurance, the duty of the Court is to interpret the words in which the contract is expressed by the parties, because it is not for the Court to make a new contract, however, reasonable, if the parties have not made it themselves."

(39) The general rule is that where a contract is expressed in writing oral evidence is inadmissible to explain or vary the terms of the written contract. Although a contract is always to be construed according to the intention of the parties, that intention can only be ascertained from the instrument itself and all other evidence of intention is excluded because when an agreement is reduced into writing the parties thereto are bound by the terms and conditions of it. In *Tamil Nadu Electricity Board and another Vs. N. Raju Reddiar and another*, it has been laid down as under:

"(7).....Once a contract is reduced to writing, by operation of section 91 of the Evidence Act it is not open to any of the parties to seek to prove the terms of the contract with reference to some oral or other documentary evidence to find out the intention of the parties. u/s 92 of the Evidence Act where the written instrument appears to contain the whole terms of the contract then parties to the contract are not entitled to lead oral evidence to ascertain the terms of the contract. It is only when the written contract does not contain the whole of the agreement between the parties and there is any ambiguity then oral evidence is permissible to prove the other conditions which also must not be inconsistent with the written contract."

(40) In view of this no oral evidence can be looked into to explain the meaning of

the language of the policy. Thus it has to be held that only the goods which were lying inside the godowns of the building as defined in clause (k) of Ex.P-2 & P-4 and clause 2 of Ex.P-6 only were insured and the goods lying outside such godowns are not insured. This follows that the goods worth Rs. 1,26,200.00 which were lying in the open at the time of the fire are not covered by the protection of these policies Ex.P/2, P/4 and P/6.

(41) The goods of the value of Rs. 78.280.00 which were inside the godowns would be covered by these policies, if other conditions and warranties are fulfilled. Whether the claimant is entitled to compensation to this extent is being decided in Issue No. 3.

(42) Issue No. 2 in Suit No. 224/71 and which is also issue No. II in Suit No. 167/871 is decided accordingly. Issue No. 3 (Suit No. 224/71) & Issue No. 12 (Suit No. 167/71) 3. Whether the plaintiff and defendant No. 2 are not entitled to recover the amount of Rs. 78.280.00 or Rs. 1,26,200.00 from defendant No. 1 on account of the breach of terms and conditions and exceptions of the warranty contained in the insurance policy as claimed by defendant No. 1?

(43) As held in Issue No. 2 in Suit No. 224/71 above the risk in respect of goods of the value of Rs. 1,26,200.00 lying outside the Godown is not covered by the policies Ex.P/2, P/4 and P/6 as such the Bank or the claimant is not entitled to claim any compensation on account of the loss caused to such goods due to fire on the basis of these policies.

(44) As regards the loss for the remaining goods of the value of Rs. 78,280.00 lying inside the Godowns it has been contended on behalf of the Insurance Company that the claimant had committed breaches of warranties and conditions and as such they are not entitled to any loss of such goods also; whereas learned counsel for the claimant has contended that there is no breach so far as the claim in respect of such goods is concerned.

(45) The claim has been rejected by the Insurance Company vide their letter dated 27.1.1971 Ex.PW.I/D-2/1 on account of breaches of conditions and warranties of the policies as mentioned in para 4 of this letter.

(46) The breaches are of warranties No.(i) (k) and (n) of the warranties in Policies Ex.P/2, P/4 and clause 2 of Ex.P-6.

(47) Along with the claim petition the claimant had submitted a building plan showing the nature of the structure and construction existing at and near premises where insured goods were lying. The breaches mentioned in this letter of repudiation are not disputed and in fact are based on the admissions made by the claimant in their claim dated 20.6.1970 and the building plan sent with it.

(48) The breach of a warranty entitles the Insurance Company to repudiate its entire liability. In *South British Fire and Marine Insurance Company Vs. Brij Nath Sahai* (1909) 2 I C 573 it was laid down that the warranties are conditions precedent to the policy and whether they be material to the risk or not, they

must, unless waived, be fulfilled with the most scrupulous exactness and if they be not so fulfilled there is a breach of express stipulation which is one of the essential terms of the contract and the insurer is discharged from liability as from the date of the breach of the warranty.

(49) The four essentials of a contract of Insurance are (1) Definition of the risk; (2) Duration of the risk; (3) Premium; (4) Amount of Insurance (Macgillivray on Insurance Law referred to with approval in General Assurance Society Ltd. Vs. Chandumull Jain and Another, .

(50) Risk means the circumstances which give rise to it. All facts which minimise or improve the chance of the event insured against happening or not are elements of the risk to be undertaken by the Company.

(51) In the case of insurance on property the description of the subject matter and the nature and situation of property are important elements of risk and serve to define the risk undertaken by the Insurer. Such description must be correct. The amount of premium is determined on the extent of risk undertaken. Any special facts relating to neighborhood which is to increase the risk is material and must be disclosed.

(52) There is a presumption in insurance policies of fire insurance that when the policy contains representation which is material to the risk it was the intention of the parties to create a warranty as to the truth of the representation contained therein and claimant's misrepresentation as to a fact material to the risk vitiates a contract of insurance. Insurance is a contract of the utmost good faith and it is of the utmost importance to commerce that it should be observed.

(53) In the present case, the mis-representation had been made regarding the nature of construction of godown No. 62. This is in respect of a fact material to the risk. This amounted to breach of warranty.

(54) The breach on account of which claim has been repudiated are mentioned in Para 4 of letter dated 27.1.1971 (Ex.PW.1/D-2/1) which has been reproduced in Para 31 hereinabove. The facts on account of which the claim has been repudiated as mentioned in Para No. 4 in this letter have not been disputed.

(55) It is contended that the policies were issued after verifying the facts at site by the representatives of the Insurance Company and so now they cannot avoid it.

(56) The claimant's witness PW.1 has so deposed but Insurance Company D-2/W1 has denied it. From this material and statements of PW. 1 it cannot be said that the policies were issued after the site inspection. Otherwise the terms and conditions would not have been agreed contrary to the state of affairs existing at site. Parties are bound by the terms of their written agreement and no oral evidence can be allowed to be produced to disprove the written terms.

(57) MIS-DESCRIPTION of a part of the property "will avoid the whole contract

for the contract is one and indivisible.

(58) The other two breaches, i.e., thatched construction and a Coal Depot within 50 ft. distance without complying with the relevant conditions mentioned in the policies are also in respect of the facts material to the risk. These are material warranties. The breach of warranty entitles the Insurance Company to repudiate its entire liability. Insurance Company was justified in repudiating the claim on this ground. The plaintiff is thus not entitled to any compensation for loss caused to the goods insured which were lying in the godowns also. Thus the plaintiff is not entitled to claim Rs. 78,280.00 for the loss of such goods. These issues are decided against the claimant and the Bank, i.e., the plaintiff in the two suits. Issue No. 4 (S. No. 224/71) & Issue No. 13 (S. No. 167/71) 4. Whether the construction of godown No. 479, Circular Road, Shahdara, mentioned in the letter dated nil was as per declaration made by defendants No. 1 to 5 in the letter dated nil and what is its effect?

(59) Learned counsel for the parties did not dispute that the controversy involved in the two suits does not pertain to Godown No. 471 (wrongly mentioned as 479) as no fire had taken place in that godown and as such this issue does not arise and is redundant and unnecessary. Issue No. 5 (S. No. 224/71) & Issue No. 14 (Suit No. 167/71) 5. To what amount, if any, is the plaintiff and/or defendant No. 2 entitled from defendant No. 1.

(60) As already held the claimant is not entitled to any compensation from the Insurance Company. This issue is accordingly decided that neither the claimant nor the Bank is entitled to any amount from the Insurance Company.

(61) In view of the findings on Issues No. 1 to 5 the suit of the claimant (plaintiff) (Suit No. 224/71) is dismissed. Issue No. 1 (in Suit No. 167/71) 1. Whether the suit has been properly instituted and the plaint duly signed and verified by an authorised person? Opp

(62) This suit is filed by the Bank. This issue was not pressed during arguments on behalf of the insurance Company or on behalf of the claimant and as such this issue is decided in favor of the plaintiff Bank. Issue No. 2 . 2. Whether defendants Nos. 1 to 5 are entitled to defeat the plaintiff's claim on the ground of loss of pledged goods by fire? (Onus objected to).

(63) Learned counsel for the claimant has contended that the goods of the claimant were under hypothecation and pledged with the Bank. Apart from the liability of Insurance Company, the liability of the claimant towards the bank is discharged as goods have been lost and destroyed in fire while in the possession and in the custody of the bank and as such the Bank is not entitled to claim any amount from the claimant. Learned counsel for the claimant has relied on: The Dhanalakshmi Bank Ltd. Vs. K.K. Jose alias Jose Mohan and Others, ; S.K. Engineering Works and Others Vs. New Bank of India, Batala, , AIR 1929 194 (Nagpur) ; Dhulipudi Namayya Vs.. Union of India 1958 Ap 533; Lallan Prasad Vs. Rahmat Ali and Another, .

(64) Whereas the learned counsel for the Bank has contended that these authorities are not applicable.

(65) In these cases it was held that if the pawnee or pledgee has put himself in a position that he is not able to return the goods, he cannot sue for his debt. These cases have no relevance. In the present case, the Bank has not appropriated the goods to itself nor the pledged goods have been lost in fire due to any default or negligence on their part. The bank is not responsible for loss caused and as such they cannot be deprived of their claim because of destruction of the pledged goods in the fire. This issue is thus decided against the claimant/defendants No. 1 to 5. Issues No. 3 & 4 (in S. No. 167/71) 3. Whether the mortgaged property is ancestral property and is not available to the bank for enforcement of its claim? 4. Whether the mortgage of the immovable property as collateral security was valid and whether the plaintiff is entitled to enforce the same?

(66) The burden of proving first issue is on the claimant. PW.1 has appeared on their behalf and he has not said anything on this aspect. On the other hand D2WI Shri S.D. Chandra Agent of the Bank has deposed that Shri Rameshwar Dayal as Sole proprietor had created equitable mortgage by deposit of title deeds of his property No.6/1553 B/3045(new) Ballimaran, Delhi; he has proved documents of title Ex.DW.1/10-11, House Tax Receipt D-2W.I/12 and the letter of deposit of documents Ex.D-2WI/13. He has not been cross-examined on behalf of the claimant. It is thus proved that Shri Rameshwar Dayal had deposited documents of title of the property claiming to be sole owner. He is now estopped from disputing or denying his title thereto.

(67) As regards issue No. 4 obviously the documents of title of the property were deposited by way of equitable mortgage and the bank is entitled to enforce the same as mortgage of the property.

(68) Issue No. 3 is decided against the claimant and Issue No. 4 is decided in favor of the Bank. Issue No. 5; 5. Whether defendant No. 3 has retired from the partnership and if so, when and what is the effect thereof on his liability?

(69) The, burden of this issue was on the defendant No. 3. No evidence has been led to this effect. This issue is accordingly decided against defendant No. 3. Issue No. 6 6. Whether the cash credit agreements have not been properly executed? (Onus objected to).

(70) No arguments on this issue were addressed. And in fact this issue was not pressed. This issue is accordingly decided against the claimant. Issue No. 7 7. Whether the plaintiff is entitled to interest and if so, how much?

(71) The Bank in Para 4 of the plaint has pleaded that the claimant had executed agreement dated 10th February, 1970 for availing the cash credit facility and had agreed to pay interest at the rate of 1-1/4% above the State Bank of India Advance Rate subject to a minimum of 8-1/4% per annum and in Para .5 it is pleaded that on 4th April, 1970 the claimant had executed another agreement in

respect of Cash Credit limit of Lock and Key facility and had agreed to pay interest at the rate of 1/4% above the State Bank of India Advance rate subject to a minimum of 7-3/4% per annum. D2W1 examined on behalf of the Bank has proved the two agreements as Ex.D2WI/4 and Ex.D2WI/5. On behalf of the claimant Shri Rameshwar Dayal who had appeared as PW.1 has not said anything about their liability to pay interest nor he has denied execution of these documents. The Bank is thus entitled to interest as agreed in these two agreements. This issue is decided accordingly in favor of the bank. Issue No. 8 8. Whether there is no privity of contract between defendant No. 6 and the plaintiff and if so, what is the effect?

(72) As already held the Insurance Company is not liable to make any payment against the insurance policies to the claimant or to the Bank. As such the bank is not entitled to claim any amount from the insurance Company. However, the goods insured so far as the same were subject to the lien of the bank, the bank had interest in the goods which was security to them. There was privity of contract between the bank and the Insurance Company. This issue is decided accordingly. Issue No. 9 9. Is the suit bad for misguide of causes of action?

(73) This issue was not pressed during arguments and is accordingly decided in favor of the Bank. Issue No. 10 10. Is the suit of the plaintiff or any part of it barred by time qua defendant No. 6?

(74) This issue was not pressed on behalf of the Insurance Company and is decided against them and in favor of the Bank, Issue No. 14 14. To what amount, if any, is the plaintiff entitled and from whom?

(75) That the claimant had availed Cash Credit facilities is not denied. The Bank has proved agreements Ex.D2WI/4 and 5 and the statements of Account Ex.D2W1/2 and Ex.D2W1/3. Correctness of these has not been disputed by the claimant. D2W1 the Agent of the Bank has also deposed that the claimant has availed these facilities. It is thus proved from the statements of account that in Lock and Key Account a sum of Rs. 1,30,548.23 P. and in the Cash Credit Factory Type facility, a balance of Rs. 77,092.53, were due on 26.4.1971 when these balance amounts Were transferred to the Protested bills Account. Thus the total amount due from the claimant to the Bank" is Rs. 2,07,640.76. The Bank is thus entitled to recover Rs. 2,07,640.76 as claimed in the suit. From the claimant. This issue is decided accordingly in favor of the Bank. Issue No. 15. 15. Relief.

(76) Suit No. 167/71 of the State Bank of India thus succeeds only against defendants No. 1 to 5 arid accordingly a decree for recovery of Rs. 2,07,640.76 with costs of the suit is passed in favor of the plaintiff bank and against the defendants No. 1 to 5. plaintiff Bank is also awarded interest thereon at the rate of 6% per annum from the date of institution of the suit till the dale of decree and further interest at the same rate till realisation. Suit against defendant No. 6 is dismissed with no order as to costs.

(77) The defendant No. 2 had created an equitable mortgage as held above. A

preliminary decree is passed in favor of the plaintiff bank and against defendant No. 2 to the effect that if the defendant No. 2 fails to pay the decretal amount within 6 months, the plaintiff will be entitled to a final decree for realisation of the decretal amount by sale of the immovable property No.VI/1553-B/3045(01d) (both land and building) situated at Ballimaran, Delhi. .

(78) Suit No. 224/71 M/s. Agents & Manufacturers Versus The Co-op. General Insurance Society Ltd. & another is dismissed with no order as to costs. Original judgment shall be placed in Suit No. 167/1971.