

(1964) 12 AHC CK 0006
In the Allahabad High Court
Case No : First Appeal No. 184 of 1953

The General Assurance Society Ltd.

APPELLANT

Vs

Mohd. Salim

RESPONDENT

Date of Decision : 02-12-1964

Acts Referred:

Arbitration Act, 1940 — Section 34

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1, Order 41 Rule 2

Evidence Act, 1872 — Section 92

Citation : AIR 1965 All 561

Hon'ble Judges : V.G. Oak, J;D.D. Seth, J

Bench : Division Bench

Advocate : J. Sarup, for the Appellant; K.C. Saxena, for the Respondent

Final Decision : Dismissed

Judgement

Seth, J.—This is a defendant's appeal arising out of a suit filed by the plaintiff-respondent against the defendant appellant (Suit No. 10 of 1951) in the Court of the Civil Judge, Moradabad for recovery of Rs. 20,900/- on a policy of fire insurance on general merchandise goods belonging to the plaintiff.

2. The case of the plaintiff, according to the plaint allegations, was that the plaintiff had been carrying on business of general merchandise on a large scale for a long time and had acquired good reputation as a first class local stockist covering every variety of goods and commodities to meet the requirements of the public. The plaintiff was in occupation of a rented shop in Bazarganj, Moradabad. This shop contained the plaintiff's stocks of general merchandise insured or held by him on trust or commission. The plaintiff wanted to get the building of the shop which contained his stocks insured against loss or damage by fire or lightning. An agent of the General Assurance Society (hereinafter called the society), which did fire insurance business approached the plaintiff and requested him to enter into a contract with the society. On 3rd September 1949 the plaintiff made a proposal to the society and gave full information on the

prescribed proposal form. The society accepted the plaintiff's proposal and issued a policy No. 27108 to the plaintiff on 22nd October 1949. All the terms of the contract between the parties were embodied in the policy. The plaintiff paid the annual premium of Rs. 188-11- to the society. This premium included a risk of loss or damage to the property insured directly caused by persons taking part in riots or civil commotion and a reference to the annexed printed "Riot and Civil Commotions clause "B"" was specifically made in the policy. The policy was to be effective from 6th October 1949 to 6th October 1950 both days inclusive. It was agreed between the parties that if the plaintiff's goods or any part thereof shall be destroyed or damaged by fire during the stipulated period, the society will make good all that loss or damage and would pay the amount of Rs. 20,000/- to the plaintiff. The entire stock in trade and goods with the plaintiff were worth more than Rs. 70,000/- but in order to pay a lesser premium the plaintiff obtained insurance only for Rs. 20,000. The plaintiff paid huge amounts as sales tax in the year 1948-49 and Income Tax on the income assessed in the year 1948-49 which showed the flourishing condition of the plaintiff's business. It is stated in paragraph 9 of the plaint that on 5th March 1950 at about 8-30 p.m. when curfew order was in force in Moradabad, on account of communal riots and disturbances, some miscreants put the plaintiff's shop to fire and the entire stock of merchandise with all the furniture in the shop were burnt and reduced to ashes, on account of which the plaintiff suffered irreparable loss. The plaintiff lodged a report at police station kotwali, Moradabad. The fire continued to burn for a few days as it was not possible to extinguish it earlier. The plaintiff informed the society about the fire promptly after the accident and later on filed a regular claim. The plaintiff's claim was enquired into by the society through its surveyors for a long time but the society avoided to reply to the claim or come to a decision on the pretext that it had not received a report about the fire from the Superintendent of Police, Moradabad. The plaintiff went on pressing the defendant for a final decision of the claim preferred by him and ultimately the defendant, on a very flimsy excuse, repudiated its liability under the policy and rejected the plaintiff's claim. The plaintiff contended that it was wrong to suggest that the fire originated in a double-storeyed building adjoining the insured shop on the back side. According to the plaintiff there was no door in the shop communicating with any double-storeyed building and there was no mis-description or omission on his part as regards the extent or construction of the shop. The plaintiff further contended that the defendant, without any justification, pleaded breach of clause No. 1 of the conditions contained in the policy. Clause No. 1 of the conditions of the policy was fully complied with by the plaintiff in the proposal form which was issued to him by the society and which was verified and approved by the society's agent and inspector. Later on, the society tried to shift its case by alleging that the plaintiff insured his stocks in a portion of the shop and the policy did not cover general merchandise goods in the entire shop. According to the plaintiff this contention was not correct in view of the detailed entries of the proposal and its acceptance by the society. The society did not pay Rs. 20,000/- to the plaintiff which was payable under the

terms and conditions of the policy issued by the society's branch at Lalbagh Road, Lucknow on 22nd October 1949. The plaintiff demanded the payment from the society by a notice dated 4th November 1950 but the defendant did not pay any amount to him. The plaintiff had, therefore, to file the suit claiming Rs. 20,900/- together with interest by way of damages at 6 per cent per annum on the sum insured. The interest worked out to Rs. 900/- According to the plaintiff the cause of action arose on 5th March 1950 when the actual damage and loss to the goods by fire took place and subsequently on 4th November 1950 when the society rejected the plaintiff's claim and sent an intimation to that effect to him at Moradabad.

3. In defence the society admitted that the plaintiff carried on business of general merchandise at Moradabad and that he occupied a shop on rent in Bazarganj. It also admitted that the plaintiff made a proposal for insurance against loss or damage by fire or lightning to the building mentioned by him in his proposal and that the proposal was accepted by the society at Lucknow and a policy No. 27108 was issued to him by the society. It also admitted that the annual premium was Rs. 188-11-0 and that the period of insurance was from 6th October 1949 to 6th October 1950. The terms of the contract, as embodied in the policy, were also accepted. The society also accepted that the insurance was for Rs. 20,000/-. The society however, contested the plaintiff's claim and, inter alia, pleaded that the plaintiff had no cause of action against the defendant.

The plaintiff's suit was barred under Clause 18 of the conditions of the policy of insurance. It was incumbent upon the plaintiff to comply with the provisions of that clause and the suit in its present form was not maintainable. It was also pleaded that the proposal for insurance made by the plaintiff was accepted by the society at Lucknow and hence the court of the Civil Judge, Moradabad had no jurisdiction to entertain the suit. In paragraph 4 of the written statement it was stated that the plaintiff carried on business in the shop which consisted of two different adjacent buildings. The front portion abutted on the main Gunj Bazar road and was one storeyed and the back portion of the shop was located on the ground floor of a two storeyed building facing east in a narrow lane. The roof of the rear portion was built partly with mortar and partly with corrugated iron sheets and there was a communicating passage between the two portions which was made by the plaintiff by removing the wall in between. According to the defendant the room adjacent to the front portion of the shop, which alone was insured, was a vegetable ghee shop and to the east was a stationery shop. The plaintiff did not insure the entire building in which his shop was located. In his proposal the plaintiff clearly mentioned the entire stocks as "stock whilst contained in the insured shop forming part of a building situate at Bazar Gunj, Moradabad". The description of the insured building given by the plaintiff was as follows :--

"The said building is one storeyed in height and is built of burnt bricks set in lime with mortar, Surkhi and Chunam, with roof of reinforced concrete over iron

girders".

and it was also stipulated

"that it is understood that the above described building is the only one so situate in which the insured has an insurable interest which answers to the above description".

According to the defendant the plaintiff insured only the stocks held in the front portion of the shop and that portion was one storeyed. That portion alone was covered by the policy of insurance. In paragraph 8 of the written statement it is stated that the very first and main condition of the insurance policy, which was the basis of the contract, was that

"if there be any material mis-description of any of the property hereby insured or of any building or buildings in which such property is contained as any misrepresentation as to any fact material to be known for the risk or any omission to state such facts, the society shall not be liable upon this policy so far as it relates to the property affected by any such mis-description, misrepresentation or omission".

It was pleaded by the defendant that there had been a clear breach of warranties. The plaintiff had not declared the communicating passage existing between the front one storeyed portion and the rear double storeyed portion situate in two buildings and the plaintiff was, therefore, legally not entitled to any damage. According to the defendant the mis-description was very material for the purposes of insurance. In paragraph 10 of the written statement it was stated that the roof of the front one storeyed portion which alone was insured was made up of timber kaliea and thin timber planks and the projecting portion of the said roof was also made of timber. The roof was not made of reinforced concrete, i.e., of pucca masonry. The mis-description in this respect was also very material and vitiated the entire contract. The defendant denied that the fire was due to communal disturbances or that any miscreants had set fire " to the shop. The curfew was in force in the city and the bazar was very well guarded. The doors of the plaintiff's shop were found closed in absolutely sound condition after the fire was detected and there was absolutely no forcible entry or setting fire from outside which disproved the plaintiff's case that the shop was set fire on by miscreants. According to the defendant the fire, in fact, originated from the back double storeyed non-insured portion of the building and then brought to the front portion through the open communicating passage. At the place where the fire originated some inflammable substance was noticed which could not be extinguished even two days after the fire. According to the defendant the fire was the result of the plaintiff's own pre-arranged deeds and the defendant was not liable to satisfy the plaintiff's claim. In paragraph 15 of the written statement it was stated that under Clause 11 of the conditions contained in the policy it was incumbent upon the plaintiff to give notice forthwith to the defendant of the alleged loss or damage and also to deliver to the defendant

within fifteen days his claim in writing for the loss and damages containing full particulars, as could be reasonably practicable, of all the several articles or items of goods damaged or destroyed and of the amount of loss or of damage suffered having regard to their value at the time of the loss or damage. The plaintiff completely failed to make his claim in writing within the time stipulated between the parties and it was clearly agreed between the parties that no claim under the disputed policy shall be payable unless the terms of condition No. 11 had been complied with. Long after the period mentioned in the policy the plaintiff submitted a long list of goods destroyed and it was clear from the list that it could not be prepared from memory which showed that the plaintiff had in his keeping some books of accounts, vouchers etc. which he was purposely and wrongfully withholding. The defendant pleaded that the amount claimed by the plaintiff had been grossly exaggerated. The plaintiff had a big godown where he kept most of his merchandise and some time near about the date of fire he removed cart-loads of merchandise articles which proves his mala fides. According to the defendant the plaintiff's claim was absolutely wrong and was mala fide and was liable to be dismissed. The defendant claimed special damages u/s 35A of the Code of Civil Procedure.

4. The learned Additional Civil Judge of Moradabad held that he had jurisdiction to entertain the suit and that the suit was not barred under Clause 18 of the conditions of the policy of insurance. The learned Additional Civil Judge further held that the plaintiff insured the entire stocks held by him in the entire shop known as "Delhi House" and not only the stock held in the front portion of his shop as alleged by the defendant. The trial Court also held that there was no substantial mis-description of the insured premises and that the mis-description, if any, was not material for the purposes of insurance and that the plaintiff was not guilty of any breach of warranties. It also held that the plaintiff's shop was set on fire by rioters during communal disturbances and that the fire did not originate from the back portion of the shop as alleged by the defendant nor was the fire an act of the plaintiff himself. The learned Additional Civil Judge also held that the plaintiff fully complied with condition No. 11 of the policy and the defendant could not avoid its liability under the policy on that ground. On these findings the trial Court decreed the plaintiff's suit for the recovery of Rs. 20,000/- as insurance money along with Rs. 250/- as interest thereon, i. e. the suit was decreed for Rs. 20,250/-with proportionate costs and pendente lite and future interest at 3% per annum till the amount was realised.

5. Aggrieved by the decree of the trial Court the defendant has come up in appeal to this Court.

6. We have heard Sri Jagdish Swarup and Sri K.C. Saxena learned counsel for the parties at length.

7. Sri Jagdish Swarup contended that the Court was wrong in granting a decree to the plaintiff in direct violation of condition No. 17 of the policy and that on account of the "average clause" contained in condition No. 17 of the policy the

plaintiff was not entitled to more than rateable proportion of the loss sustained by him. Condition No. 17 of the policy runs as follows :--

"If the property hereby insured shall, at the breaking out of any fire, be collectively of greater value than the sum insured thereon, then the insured shall be considered as being his own insurer for the difference, and shall bear a rateable proportion of the loss accordingly. Every item, if more than one of the policy shall be separately subject to this condition".

8. There is overwhelming evidence on behalf of the plaintiff to show that his shop containing the goods was destroyed by fire on 5th March 1950. In fact, there is no controversy between the parties regarding it. The question is to what amount is the plaintiff entitled under the terms of the policy for the loss sustained by him. It has already been stated above that the plaintiff had insured his stock for Rs. 20,000/-. Condition No. 17 will come into play only if it is proved that the loss sustained by the plaintiff was less than Rs. 20,000/-. The plaintiff examined himself as P. W. 1. He stated that he had goods worth about Rs. 75,000/- in his shop on the date when fire broke out and that he got the goods insured for Rs. 20,000/- in order to pay lesser amount of premium. He got both the front and rear portions of the building, which contained the goods, insured. He further stated that all the goods were burnt.

9. Hafiz Ahmad P. W. 2 stated that he was the General Agent of the Society and was competent to insure cases of life and fire on behalf of the Society. He saw the stock register of the plaintiff and the value of the goods insured, according to the witness, was between Rs. 65,000/- to Rs. 67,000/-. This witness further stated that all the goods were burnt.

10. Har Narain P. W. 5 stated that he had a biscuit shop which was situate four shops after the plaintiff's shop. He saw the fire on 5th March, 1950. He further stated that all the goods of the plaintiff were burnt by the fire and nothing was left.

11. Dina Nath P. W. 6 also stated that all the goods of both the portions in the building, which contained the goods, were burnt.

12. Sri Sushil Kumar Mukherjee, Survey Manager of M/s. Surveyors and Salvagers Ltd. of Calcutta was examined on commission. He stated that his firm undertook assessment of insurance claims on behalf of various insurance companies and that the firm are also salvage contractors. His evidence also shows that all the goods of the plaintiff were burnt on the evening the fire took place. The survey report Ex. A also shows that the entire stock of the plaintiff was burnt by fire and there was nothing left for survey. There is absolutely no evidence in rebuttal on this point.

13. Thus, it must be held that the stock in the plaintiff's shop on the day of the fire was worth much more than Rs. 20,000/- and that the entire goods of the plaintiff were burnt. The loss sustained by the plaintiff was, therefore, much

more than Rs. 20,000/-. We, therefore, find no substance in Sri Jagdish Swarup's contention that the trial Court was wrong in granting a decree to the plaintiff in direct violation of condition No. 17 of the policy and that on account of the "average clause" contained in condition No. 17 of the policy the plaintiff was not entitled to more than rateable proportion of the loss sustained by him. It may be mentioned that it was not pleaded by the defendant in his written statement that the plaintiff was entitled to recover from the Society only a rateable proportion of the loss on account of the "average clause". For this reason also the contention has no force.

14. The next submission of Sri Jagdish Swarup is that the suit could not be decreed as it was not commenced within three months after the repudiation of the policy as required by condition No. 13 of the policy. Condition No. 13 reads as follows :---

"If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the Insured or anyone acting on his behalf to obtain any benefit under this Policy, or, if the loss or damage be occasioned by the wilful act, or with the connivance of the Insured; or, if the claim be made and rejected and an action or suit be not commenced within three months after such rejection, or (in case of an arbitration taking place in pursuance of the 18th condition of this Policy) within three months after the arbitrator or arbitrators or Umpire shall have made their award, all benefit under this Policy shall be forfeited".

15. According to Sri Jagdish Swarup condition No. 13 will operate in spite of Section 28 of the Indian Contract Act which deals with agreements in restraint of legal proceedings and says that

"every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent."

Sri Jagdish Swarup submitted that condition No. 13 was not void and it was covered by the Exceptions contained in Section 28 of the Contract Act. According to Sri Jagdish Swarup the plaintiff's claim was rejected by the society on 10th April 1950 vide Ex. K and the suit was instituted on 17th January 1951, i.e. long after three months after the repudiation of the claim and hence condition No. 13 of the policy barred the suit. In this connection Sri Jagdish Swarup relied upon the "Baroda Spinning and Weaving Co. Ltd. v. Satyanarayan Marine and Fire Insurance Co. Ltd." ILR 38 Bom 344 : (AIR 1914 2 Bom 225). In that case the Insurance Company had issued a policy of insurance against fire to the Baroda Spinning and Weaving Co. on certain property belonging to that company, the policy containing a clause to the effect that if a claim were made and rejected and an action or suit were not commenced within three months after such rejection all benefit under the policy should be forfeited. Damage was caused to

the property of the Baroda Spinning and Weaving Co. and a claim was made by that company. The Insurance Company rejected the claim. More than three months after the rejection a suit was filed by the Baroda Spinning and Weaving Co., against the Insurance Company to recover the amount of their claim. The suit was dismissed and it was held that: "There is a distinction between the extinction of a right and the loss of a remedy, that Section 28 of the Contract Act was aimed only at covenants not to sue at any time and at covenants not to sue for a limited time, that a conditional release or forfeiture was a very different thing from a covenant not to sue, although to avoid circuit of action a covenant not to sue had sometimes been held equivalent in effect to a conditional release, and that the condition of forfeiture in the policy in question in the suit was not within the scope of Section 28 of the Contract Act."

16. Ex. 3 is a letter addressed to the plaintiff by the society and is dated 14th October, 1950. It speaks of certain mis-descriptions in the proposal form on the basis of which the policy was issued and says that those mis-descriptions rendered the policy void under Clause 1 of the conditions of the policy and hence the society repudiated liability under the policy and rejected the plaintiff's claim. Thus Sri K.C. Saxena submits that the repudiation took place on 14th October, 1950 and not on 10th April 1950. There is, thus, a dispute between the parties regarding the fact of repudiation. No plea based on condition No. 13 of the policy was taken by the defendant in the written statement. No issue regarding condition No. 13 of the policy was also framed by the trial Court. No ground in respect of condition No. 13 of the policy has been taken in the grounds of appeal in this Court. Since there is dispute between the parties regarding the fact of repudiation of the policy the learned counsel for the appellant cannot be allowed to raise a new point at this stage. We, therefore, see no force in this contention also.

17. Sri Jagdish Swarup next submitted that the claim of the plaintiff was not made within the prescribed time and the terms contained in condition No. 11 of the policy were not observed by the plaintiff and hence the trial Court was wrong in presuming that the society had extended the time for lodging the claim. Condition No. 11 of the policy runs as follows :

"On the happening of any loss or damage the insured shall forthwith give notice thereof to the Society, and shall within 15 days after the loss or damage or such further time as the Society may, in writing, allow in that behalf, deliver to the Society :

(a) a claim in writing for the loss and damage

.....

(b).....

No claim under this policy shall be payable unless the terms of this condition have been complied with."

18. Sri Jagdish Swarup relies on para. 491 of Halsbury's Laws of England, Volume 22 (3rd Edn.), p. 252 and submits that the condition quoted above required the notice of the loss to be given "immediately" or "forthwith" and the claim should have been lodged within 15 days of the fire.

19. The fire took place on 5th March 1950 and by a letter (Ex. 34) dated 9th March 1950 sent on 12th March 1950 under registered cover the plaintiff informed the Society about the loss sustained by him on account of the fire and asked the Society to send him the papers relating to the claim. A copy of this letter was given to Hafiz Ahmad P. W. 2 by the plaintiff on 9th March 1950. Hafiz Ahmad P. W. 2 stated that he received copy of the letter from the plaintiff and that he had, even before the receipt of the copy of the letter, intimated to the Society regarding the fire. It is thus clear that the plaintiff did give notice of the loss to the Society without any delay.

20. By a letter (Ex. 35) dated 14th April, 1950 the plaintiff wrote to the Society that he was arranging to send the claim paper separately under registered post. The plaintiff concluded that letter by saying "the delay in submitting the claim paper though beyond my physical control is very much regretted and I fully hope that you will very kindly not impose the Clause 11 and repudiate the claim."

21. Ex. 36 is the claim form and is dated 18th April 1950. Together with Ex. 36 the plaintiff sent to the Society a list of the goods (in 38 pages) which were destroyed by fire. This list contained an estimated value of the goods also. Ex. 37 is the covering letter dated 18th April 1950 which the plaintiff sent to the Society along with his claim. This letter mentioned that the list of articles was prepared by the plaintiff from memory and that the loss sustained by him was very heavy. At the end of the letter the plaintiff requested the Society to pass the claim and to arrange the payment.

22. These documents do show that there was delay on the part of the plaintiff in lodging his claim. But in our opinion the delay was condoned and time to lodge the claim was extended by the Society.

23. Exhibit 2 is the letter dated 23rd March, 1950 by which the Society sent a claim form to the plaintiff and asked him to complete and return the same to the head office of the Society. There is a post script in the letter which says :

"In this connection we have to refer you to condition No. 11 of the above policy and no claims shall be payable unless the terms of this condition are complied with."

24. It is thus clear that the Society itself sent the claim form to the plaintiff 18 days after the fire although the plaintiff had informed the Society about the fire by his letter dated 9th March, 1950 sent on 12th March, 1950. Thereafter, the Society instructed its surveyors to undertake the survey of the loss resulting from fire. Exhibit 6 dated 31st March, 1950 is a letter addressed to the plaintiff by Sri S. K. Mukherjee, Assistant Manager of Surveyors and Salvagers Ltd.,

asking for particulars of the loss. Exhibit 6 does not speak of Clause 11 of the policy at all. Exhibit 7 dated 20th April, 1950 is the letter sent to the plaintiff by Sri S. K. Mukherjee of Surveyors and Salvagers Ltd., complaining that the particulars regarding the fire had not been received from the plaintiff and asking the plaintiff to expedite the matter. The letter ended by saying "Please note that further delay will prejudice your claim."

25. By Ex. 8 dated 28th April, 1950 the Surveyors and Salvagers Ltd., again wrote to the plaintiff for further particulars regarding the plaintiff's Income Tax and sales-tax returns. Exhibit 8 shows that before 26th April, 1950 the Surveyors and Salvagers Ltd., had received the list of articles destroyed by the fire from the plaintiff.

26. By Ex. 9 dated 18th May, 1950 the Surveyors and Salvagers Ltd., again asked the plaintiff for some more particulars.

27. The fact that even after the receipt of the list the plaintiff was asked to furnish further particulars shows that the Society was prepared to condone the delay in lodging the claim.

28. By Ex. 28 dated 7th July, 1950 the Assistant Manager of Surveyors and Salvagers Ltd, informed the plaintiff that a detailed report in connection with the fire had been received by them from the Superintendent of Police, Moradabad and asked the plaintiff to send certificates from all the dealers showing the total amount of purchases and informed the plaintiff that as soon as the same was received they shall prepare their assessment report and forward it to the Society.

29. Exhibit 42 is the telegram which the plaintiff sent to the Society on 9th August, 1950 and reads as follows :

"Send reply our reg. letter No. 457, dated 31st July, 1950 and remit amount of claim by cheque immediately."

30. Exhibit 43 is the telegram dated 11th August, 1950 sent to the plaintiff by the Society and says : "Waiting survey report." It is clear from these documents that the Society had either extended the time for lodging the claim or had waived condition No. 11 of the policy. There was no question of waiting for the survey report if the Society had decided to insist on condition No. 11.

31. Exhibit 11 is a letter dated 12th September, 1950 from the Assistant Manager of Surveyors and Salvagers Ltd. sent to the plaintiff. By it the plaintiff was informed that survey report in connection with the fire had been sent to the Society.

32. Exhibit 3 is the final letter dated 14th October, 1950 sent to the plaintiff by the Society repudiating its liability under the policy and rejecting the plaintiff's claim. This letter mentions that certain mis-descriptions contained in the proposal form rendered the policy void under Clause 1 of the conditions of the policy. There is no mention of condition No. 11 of the policy in this letter and it is

not said that the plaintiff's claim was repudiated on account of his failure to lodge his claim within fifteen days of the fire.

33. It follows that the Society, in its final reply, did not insist on condition No. 11 of the policy and it must, therefore, be held that the Society had condoned the delay in lodging the claim and had waived condition No. 11 of the policy.

34. Sri Jagdish Swarup next contended that the entire building containing the plaintiff's stock was not insured. Only the front portion of the building described as "one storeyed" in height was insured and not the back portion of the building which was "double storeyed." According to the defendant the shop containing the plaintiff's goods was located in two different adjacent buildings. The front portion of the shop was located in a room measuring 12'8" x 9' forming part of an one storeyed pucca building. The back portion of the shop measuring 36'6" x 16' 9" was located on the ground floor of a two storeyed building facing a narrow lane. A communicating passage was made by the plaintiff by removing a portion of the wall between the two shops. Sri Jagdish Swarup contended that if those goods which were kept in the portion of the building which was not insured were destroyed the Society was not liable to pay any damage in respect of the same.

35. According to the plaintiff the entire shop including both the portions of the building was insured. The policy described the insured goods as

"the stock of general merchandise, the property of the insured or held by him in trust or on commission or on joint account with others or for which he is responsible in case of loss or damage by fire (Loss, if any, to be adjusted with and payable to Mohd. Salim Esqr, for the account of all interests) whilst contained in the insured's shop forming part of a building situate at Bazar Ganj, Moradabad. The said building is one storeyed in height and is built of burnt bricks set in lime and mortar Surkhi or Chunam with roof of reinforced concrete over iron girders."

This description of the insured goods shows that the goods contained in the entire shop were insured. The policy does not mention that only the front portion of the building described as "one storeyed in height" was insured and not the back portion of the building which was double storeyed.

36. From the evidence produced by the plaintiff it is proved that the plaintiff's goods were contained in one shop and that the whole building was known as Delhi house. Mohd. Salim (Plaintiff) P. W. 1 stated that he got both the front and rear portions of the building containing the goods insured.

37. Hafiz Ahmad P. W. 2, who was the General Agent of the Society, stated that he had filled the proposal form and that there were two portions of the shop. The front portion was towards the south and was single storeyed. The rear portion was double storeyed. He also stated that the plaintiff wanted to insure both the portions and that the witness described both the portions of the plaintiff and insured the goods of both the portions.

38. There is no evidence in rebuttal produced by the defendant. The original proposal form which was the basis of the policy has not been produced by the Society. The description in the policy is of a "shop" and not a building. It follows, therefore, that the insurance was not of the building but of the goods contained in the plaintiff's shop. The final letter dated 14th October, 1950 (Ex. 3) by which the Society repudiated the plaintiff's claim also does not mention that only the stock contained in the front portion of the plaintiff's shop was insured. The report, Ex. A, submitted by the Surveyors and Salvagers Ltd. describes the property insured as "Mohd. Salim Esqr General Merchants, Bazarganj Moradabad, U. P." It must, therefore, be held that the entire shop consisting of the portions was insured and not the front portion only of the building described as "one storeyed in height".

39. It was then contended by Sri Jagdish Swarup that there was breach of warranties by the plaintiff and that there was a clear mis-description of the building containing the plaintiff's goods in the proposal form and that the description of the building contained in the policy did not tally with the building which was insured. According to the learned counsel the description of the roof in the policy as "reinforced concrete roof on iron girders" and the description of the building being built of burnt bricks set in lime and mortar, Surkhi or Chunam and the absence of the description of the connecting passage between the two portions of the shop were patent and material mis-descriptions and thus under condition No. 1 of the policy the Society was not liable to the plaintiff.

40. In support of his contention Sri Jagdish Swarup relied upon para. 365 of Halsbury's Laws of England, Vol. 22, 3rd Edn. at page 191 which deals with honest misrepresentations and says that :

"The principle has been well settled for many years that, if information is given which is in fact inaccurate in material particulars, albeit that the misstatement is innocent and the truth of the statement has not been made a matter of contract, yet the misrepresentation may be a ground for avoiding the policy even after loss."

41. Sri Jagdish Swarup also relied on para. 357 of Halsbury's Laws of England, Vol. 22, 3rd Edn. at page 187 and submitted that the basic test is whether the mind of a prudent insurer would be affected, either in deciding whether to take the risk at all or in fixing the premium, by knowledge of a particular fact if it had been disclosed. Further relying on para. 367 of Halsbury's Laws of England, Vol. 22, 3rd Edn. at page 192, Sri Jagdish Swarup contended that the effect of non-disclosure or misrepresentation in the instant case was that the Society had the right to repudiate and to avoid the policy. He submitted that it was the Society's inherent right derived as a matter of law from the nature of the contract between the parties.

42. Sri Jagdish Swarup also relied upon "Golding v. Royal London Auxiliary Insurance Co. Ltd." (1914) 30 T L R 350 in which it was held that:

"Where a person in making a proposal to an insurance company for an insurance against fire makes a bona fide mistake in his answers to the questions on the proposal form, but before the issue of a cover note draws the attention of the agent of the company to the mistake and corrects it, it is the duty of the agent to convey to the company the correct answer, and if he fails to do so the company are not entitled to refuse to pay a claim under the cover note on the ground that there was a misstatement in the answers to the questions on the proposal form."

Sri Jagdish Swarup, therefore, contended that if the Society knew of the mis-description probably it would not have insured the plaintiff's goods.

Condition No. 1 of the policy runs as follows :

"If there be any material mis-description of any of the property hereby insured, or of any building or place in which such property is contained, or any misrepresentation as to any fact material to be known for estimating the risk or any remission to state such fact, the Society shall not be liable upon this Policy so far as it relates to property affected by any such mis-description, misrepresentation or omission."

43. Hafiz Ahmad P. W. 2 the General Agent of the Society, stated that he filled the proposal form and that he did not commit any mis-description in the proposal form. The Society did not contest that Hafiz Ahmad P. W. 2 was its agent.

44. Sri Jagdish Swarup submitted that Hafiz Ahmad's oral evidence on this point was not admissible u/s 92 of the Evidence Act. Section 92 of the Evidence Act says that:

""When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the Vast section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or sub-trading from, its terms."

45. In our opinion Hafiz Ahmad in making the statement mentioned above was only explaining the intention of the parties and was neither contradicting, varying, adding to, or subtracting from the terms of the policy. His statement cannot, therefore, be excluded by Section 92 of the Evidence Act. It is also significant that no such objection was raised by the defendant at the time of the statement of Hafiz Ahmad P. W. 2.

46. In our opinion the description of the building contained in the policy is vague and is not exhaustive and the oral evidence of Hafiz Ahmad on that point was, therefore, admissible. We have, therefore, to read the policy along with the statement of Hafiz Ahmad P. W. 2. No evidence in rebuttal of the statement of Hafiz Ahmad P. W. 2 was produced by the defendant. There is no evidence on the record that higher premium was to be charged by the Society in insuring a

building which did not have a pucca roof.

47. Hafiz Ahmad P. W. 2 also stated that Sri J. S. Bhatnagar, an Inspector of the Society, also inspected the insured building in the presence of the witness and did not find anything contrary in the proposal form. The inspection was made after the Society had received the proposal form.

48. According to Hafiz Ahmad P. W. 2 it was not necessary to mention the connecting passage in the proposal form and its omission had no effect on the risk which the Society undertook. In our opinion it is not open to the Society to say that there were mis-descriptions in the proposal form when its own agent filled the form and when its own inspector, who inspected the insured building, found everything in order.

49. According to Para. 440 of Halsbury's Laws of England. Vol. 22, 3rd Edn. at page 232 any description, whether of the locality of the property insured, or of the circumstances affecting the subject-matter or the incidence of the peril is in general sufficient if it is substantially accurate; in other words a mis-description must be material if it is to affect the validity of the policy.

50. The final letter Ex. 3 dated 14 October, 1950 which the Society sent to the plaintiff repudiating the policy only complains of the non-mention of the communicating passage between the two portions of the insured building and does not speak of any other mis-description in the proposal form. No complaint was made in that letter regarding the fact that the roof of the building was not of reinforced concrete on iron girders as stated in the proposal form or that the building was not built of burnt bricks set in lime and mortar, Surkhi or chunam.

51. From the statement of Hafiz Ahmad P. W. 2 it must be held that the description of the building in the proposal form was substantially true and that the mis-descriptions were not material. It is true that the description of the building in the proposal form was not happily worded and was slightly incorrect. It is clear from the statement of Hafiz Ahmad P. W. 2 that before the Society accepted the plaintiff's proposal form it sent its inspector to inspect the shop and the inspector found nothing contrary to the description given in the proposal form. It is, therefore, clear that the Society made a thorough enquiry before accepting the proposal and was satisfied that the insured building had been correctly described. In "In re Universal Non-Tariff Fire Insurance Co. (1875) 19 Eq 485 a fire insurance was effected in respect of certain property through an agent named Donald who inspected the premises. One condition of the policy was that any material mis-description of the property would render the policy void. The buildings were described as built of brick and slated, but it turned out that one of the buildings was not roofed with slate but with tarred felt. The company alleged that Donald was not their agent but the agent of insured, and that the mis-description rendered the policy void. It was held that the mis-description was immaterial and was not sufficient to vitiate the policy; but that if material, it was made by Donald, as the agent of the insurance company, and the

insured were not responsible for it.

52. In the instant case there is no denial on the part of the Society that Hafiz Ahmad was its agent or that the insured building had not been inspected by its inspector before the Society accepted the proposal form. It must, therefore, be held that the mis-description of the building in the proposal form was immaterial and was not sufficient to vitiate the policy. Since the Society's agent had filled the proposal form it must be presumed that the Society knew all the facts and was not prejudiced in any way. In our opinion there was no breach of warranties by the plaintiff.

53. These contentions of Sri Jagdish Swarup also have, therefore, no force.

54. Lastly it was submitted by Sri Jagdish Swarup that Condition No. 18 of the policy barred the plaintiff's suit and that on a correct interpretation of that condition no suit could be filed without first referring the dispute between the parties to arbitration as required by that condition. He also contended that, in any event, after the liability to make the payment was settled by the court, the fixing of the amount of damages was not within the jurisdiction of the court below and could be decided only by arbitration. Condition No. 18 of the policy says that: --

"If any difference arises as to the amount of any loss or damage such difference shall independently of all other questions be referred to the decision of an arbitrator, to be appointed in writing by the parties in difference, or if they cannot agree upon a single arbitrator, to the decision of two disinterested persons as arbitrators, of whom one shall be appointed in writing by each of the parties within two calendar months after having been required so to do in writing by each of the parties.....And it is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator or arbitrators or umpire of the amount of the loss or damage if disputed shall be first obtained."

55. In support of his argument Sri Jagdish Swarup relied upon. "The The Eagle Star and British Dominions Insurance Company Vs. Dinanath and Hemraj, In that case the plaintiffs had claimed under a policy the conditions of which provided (1) that if the claim was made and rejected and an action or suit was not commenced within three months after such rejection all benefit under the policy would be forfeited, and (2) that if any difference arose as to the amount of any loss or damage such difference should, independently of all other questions, be referred to arbitration and that it should be a condition precedent to any right of action or suit upon the policy that the award of the arbitration or umpire of the amount of the loss if disputed should be first obtained. It was held that when the defendants rejected the claim, the plaintiffs had a right of action in order that it might be decided by the Court whether such rejection was right or wrong and it was only in the event of that question being decided in favour of the plaintiffs that it would become necessary that the amount of loss or damage should be

ascertained. According to Sri Jagdish Swarup it was held in the Bombay case that the court could decide the two issues involved in that case but could not determine the extent of the loss. The Bombay High Court did not decide whether the plaintiff's suit was to be decreed or dismissed. It only set aside the order of the court below staying the plaintiffs' suit and ordered the proceedings to continue in the ordinary course.

56. Reliance was next placed by Sri Jagdish Swarup on paragraph 505 of Halsbury's Laws of England, Volume 22, 3rd Edn. at page 257 which says that:

""As a general rule, however, the arbitration clause provides that the award of an arbitrator is to be a condition precedent to any action on the policy, and that no action is to be brought except for the amount of the award."

and :

"The cause of action is not complete until an arbitration has taken place in accordance with the clause, and an award has been made by an arbitrator."

That paragraph further says that :

"The only obligation of the insurers is to pay the amount awarded, and unless the award is in his favour the assured can bring no action at all."

57. According to Sri Jagdish Swarup the Society never repudiated the policy. It only repudiated its liability to pay the damage. Sri Jagdish Swarup contended that if the contract between the parties was valid then the arbitration clause contained in condition No. 18 was also valid and if the contract was void then the plaintiff's suit could not be decreed.

58. It is nobody's case that condition No. 18 of the policy was void. Condition No. 18 of the policy was, in our opinion, a valid condition.

59. Sri Jagdish Swarup also placed reliance on paragraph 1987 at page 966 of Mac Gillary On Insurance Law Volume 2, 5th Edn. by Denis Browne. It was said in that paragraph that:

"As a rule, where the amount of the loss or damage is the only matter which the parties refer to arbitration, then if the insurers repudiate any liability on the policy there is no obligation on the assured to arbitrate as to the amount before commencing an action on the policy. The policy may, however, provide that the settlement by arbitration of any difference as to amount shall be a condition precedent to the commencement of any action on the policy, whether the right to recover on the policy is disputed or not. Where this is so the question arises whether the company can, by disputing the amount of the loss as well as its liability on the policy, compel the insurer to incur the costs of what will be a fruitless arbitration if the company is justified in its denial of any liability."

60. Sri Jagdish Swarup further relied on *Macaura v. Northern Assurance Co. Ltd* 1925 A. C. 619. In that case an arbitration and award were conditions precedent

to any action to enforce the policy.. The defendants in that case did not repudiate the policy or disputed its validity as a contract, on the contrary they relied on it and said that according to its terms, express and implied, they were relieved from liability.

61. Reliance was next placed by Sri Jagdish Swarup on the following decisions also :

(1) "South British Insurance Co, Ltd. v. Gauci Brothers & Co. 1928 A. C. 352 in which it was held that:

"When an action on a contract has been dismissed upon a contention by the defendant that an award is a condition precedent to the right to sue, and the claim is then submitted to arbitration, the defendant is precluded from contending that the award is bad in that the arbitrators had not jurisdiction to construe the contract, but only to determine the sum (if any) due."

(2) Alexander Scott, v. George Avery (1856) 5 H. L. C. 811. It was held in this case that:

"It is a principle of law, that parties cannot by contract oust the courts of their jurisdiction but any person may covenant that no right or action shall accrue till a third person has decided on any difference that may arise between himself and the other party to the covenant."

and that:

"These conditions were lawful, and that (Even should the difference relate to other matters than those of mere amount,) till award was made no action was maintainable."

62. The principle of (1856) 5 H. L. C. 811 has been put down as Exception I to Section 28 of the Indian Contract Act. Section 28 of the Contract act is as follows :

"Agreements in restraint of legal proceedings void.--Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals or which limits the time within which he may thus enforce his rights, is void to that extent.

Exception I. Saving of contract to refer to arbitration dispute that may arise. -- This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

"Suits barred by such contracts.--When such a contract has been made, a suit may be brought for its specific performance, and if a suit, other than for such

specific performance or for the recovery of the amount so awarded, is brought by one party to such contract against any other such party in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit Exception 2.--Saying of contract to refer questions that have already arisen.--Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen or affect any provision of any law in force for the time being as to reference to arbitration."

63. It may be noted that in (1856) 5 H. L. C. 811 none of the parties had repudiated the contract.

64. We have, therefore, to determine what was repudiated by the Society in the instant case. Ex. 34 is a letter dated 9th March 1950 sent on 12th March 1950 to the Branch Secretary of the Society by the plaintiff in which the plaintiff informed the Society that he had sustained a loss of about Rs. 80,000/-and that he shall submit a detailed report later. By letter (Ex. 2) dated 23rd March 1950 the Society sent a claim form to the plaintiff and drew his attention to condition No. 11 of the Policy. By letter (Ex. 6) dated 31st March 1950 the Surveyors and Salvagers Ltd. asked the plaintiff to supply some more information. This letter was sent under instructions from the Society, After the Surveyors had submitted its report the Society sent a letter (Ex. K) dated 10th April, 1950 to the plaintiff in which it was said that condition No. 11 of the policy was not observed and the claim was not lodged within fifteen days of the fire and hence the claim stood repudiated. The Society did not touch the assessment of loss at all in its correspondence With the plaintiff. Ex. 3 is a letter dated 14th October, 1950 sent by the Society to the plaintiff in which it was said that since there was no mention of the connecting passage between the two portions of the plaintiff's shop in the policy the policy was rendered void under Clause 1 of the conditions of the policy and, therefore, the Society repudiated liability under the policy and rejected the plaintiff's claim.

65. Hence it is clear that the Society completely repudiated its liability under the policy. That is, the entire policy was repudiated.

66. In our opinion the contingency contemplated by condition No. 18 did not arise at all in the instant case. That condition was to come into force if any difference arose between the parties as to the amount of any loss or damage sustained by the plaintiff. The Society avoided the question of assessment of loss and decided to repudiate the policy.

67. In the instant case the controversy between the parties regarding the quantum of loss arose after the suit had been filed and not before the institution of the suit. In our opinion if there was a real controversy between the parties after the institution of the suit then there should be arbitration in accordance with condition No. 18 and the proper course for the Society to follow was to have applied u/s 34 of the Arbitration Act. Admittedly no such application was made

by the defendant. Section 34 of the Arbitration Act provides that:--

"Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order; staying the proceedings."

68. Once recourse was not taken by the defendant u/s 34 of the Arbitration Act the defendant I cannot get any benefit from condition No. 18. That condition could not be pleaded by the defendant after he suit had been instituted. If the Society did not raise the question of arbitration before the institution of the suit the dispute between the parties as regards the quantum of loss cannot now be referred to arbitration.

69. In *Jureidini v. National British and Irish Millers Insurance Co. Ltd.* 1915 A C 499 a claim was made for indemnity for the loss of goods by fire under the policy the conditions of which provided (1) that if the claim were fraudulent or if the loss were occasioned: by the wilful act or with the connivance of the insured all benefit under the policy should be forfeited, and (2) that if any difference arose as to the amount of any loss such difference should independently of all other questions, be referred to arbitration, and that it should be a condition precedent to any right of action upon the policy that the award of the arbitrator or umpire on the amount of the loss it disputed should be first obtained. The Insurance Company: repudiated the claim in toto on the ground of fraud and arson and it was held that the repudiation of the claim on a ground going to the root of the contract precluded the company from pleading the arbitration clause as a bar to an action to enforce the claim. This decision fully supports the plaintiff.

70. It was held in *Ranjit Singh Vs. State*, that :--

"If a person, who has been a party to an arbitration agreement, brings a suit ignoring that agreement, the defendant's remedy, if he wants to rely on that agreement, is to proceed u/s 34, Arbitration Act, and to ask for stay of the suit. If he does not avail of that remedy the Court has jurisdiction to hear the suit and to give a decision on merits."

71. In *Middle East Trading Co. Vs. The New National Mills Ltd.*, it was held that,

"Where the defendant asks for the stay of suit u/s 34, it is incumbent upon him to aver all the requirements of the section which are necessary in order to obtain stay of the suit. One of the necessary conditions to be fulfilled before a stay

could be granted u/s 34 is that the applicant for stay must be a party to the legal proceeding and he must have taken, no steps in the proceeding after appearance. It is also necessary that he should satisfy not only that he is but also was at the commencement of the proceedings ready and willing to do everything necessary for the proper conduct of the arbitration. Such an averment is all the more necessary in a case, where even though plaintiffs had given notice to the defendants of their intention to take legal steps the defendants did not reply nor stated that the dispute between them should be referred to arbitration."

72. The defendant's remedy, if it wanted to rely on condition No. 18 in the instant case, was to proceed u/s 34 of the Arbitration Act and to ask for stay of the suit. Since the defendant did not avail of that remedy the court below had jurisdiction to hear the suit and to give a decision on merits. Section 34 of the Arbitration Act is, therefore, a complete bar for the defendant to plead condition No. 18 after the institution of the suit. A plea based on condition No. 18 of the policy is not now open to the defendant. The letter (Ex. 3) dated 14th October, 1950 was the last letter sent by the Society to the plaintiff. In this letter the Society did not mention Clause 18 of the policy at all. It is clear, therefore) that the Society never insisted on the observance of condition No. 18 of the policy and the situation contemplated by condition No. 18 did not arise. It follows, therefore, that the plaintiff's suit was maintainable and condition No. 18 of the policy was not a bar to the plaintiff's suit.

73. The result, therefore, is that the appeal is dismissed with costs.