(1995) 09 SHI CK 0006

In the High Court Of Himachal Pradesh

Case No : C.S. No. 11 of 1987

The Himachal Pradesh State Small Industries and Export Corporation Ltd.	APPELLANT
Vs	
Export Credit and Guarantee Corporation Ltd.	RESPONDENT

Date of Decision : 28-09-1995

Acts Referred:

Citation : (1995) 4 ILR HP 3029

Hon'ble Judges : L.S. Panta, J

Bench : Single Bench

Advocate : A.K. Goel, for the Appellant; Bhupender Gupta, for the Respondent

Judgement

Lokeshwar Singh Panta, J.—Plaintiff, the Himachal Pradesh Small Industries and Export Corporation is a Public Limited Company registered under the Indian Companies Act with its registered office at Kishore Bhawan, The Mall Shimla. It has claimed a decree for Rs. 7,51,417,94p with future interest and cost against the Defendant.

2. It is pleaded in the plaint that in the year 1977, M/s Bhatia Brothers of Industrial Area, Ludhiana approached the Plaintiff Corporation for providing to the said firm finances for exporting bicycle parts to Nigeria since the said firm had Export orders to the tune of Rs. 40 lakhs for exporting bicycle parts to different importers in Nigeria. The Plaintiff sought the approval of the Defendant regarding credit limit to be made available in favour of the Nigerian Importers before providing the requisite finances to M/s Bhatia Brothers. The Plaintiff shipped only that quantity of bicycle parts for which the approval had been sanctioned by the Defendant. The Plaintiff also took coverage under the Comprehensive Risks Policy, aggregating in the sum of Rs. 40 lakhs from the Defendant through Policy No. DEL/POL/42171/77 for the exports of bicycle parts to Nigeria. The Plaintiff paid the necessary premium of the Comprehensive Risks Policy prescribed by the Defendant from time to time.

3. The shipments of goods exported were made initially by the Plaintiff on the basis of cash against documents to be negotiated through its Bankers namely State Bank of India, Shimla. However, later on when some of the Importers desired the goods to be delivered to them on cash against acceptance, the Plaintiff sought the approval and acceptance of the Defendant with this regard and as such with its prior consent and concurrence, the payment terms of the goods shipped to Nigeria by the Plaintiff were converted from cash against documents to cash against acceptance basis, with the sole purpose that the payments of the goods exported to Nigeria would come forth from the Nigerian Importers who had placed orders for the imports of goods. However, the Nigerian Importers took delivery of the goods, but did not eventually pay the bills. The remaining goods for which terms of payments were not changed, the delivery thereof was not taken by the Nigerian Importers and consequently the Nigerian Port Authority auctioned the goods according to law applicable in Nigeria. In terms of Policy the Defendant was liable to pay to the Plaintiff to the extent of 90% of the loss suffered by it. The Nigerian Importers failed to make the payment to the Plaintiff, the Plaintiff duly informed the Defendant about this fact. The Managing Director of the Plaintiff Shri Dev Swaroop accompanied by Shri M.L. Aggarwal, the then Commercial Manager met Shri Sathe the then Chairman-cum-Managing Director of the Defendant and the entire matter was discussed in detail wherein the officers of the Plaintiff insisted upon the then Chairman-cum-Managing Director of the Defendant to pay the claims of the Plaintiff which stood fully covered under the Policy. After thorough deliberations and discussions, Shri Sathe informed the Managing Director of the Plaintiff that the claim in question could be paid provided the Plaintiff would have made available to the Defendant the landing certificate of the goods exported by the Plaintiff to Nigeria as also to have got bills noted and protested in accordance with law. It is alleged by the Plaintiff that it was specifically agreed by Shri Sathe during the course of the deliberations and discussions that in the event of these documents being made available to the Defendant, the claims of the Plaintiff as per terms and conditions of the Policy would be paid and the requirement of initiating legal action against the Nigerian Importers in Nigeria would be waived off. The matter was placed before the Board of Directors of the Plaintiff and the Board of Directors approved in its meeting that its Managing Director and General Manager should go to Nigeria and get the necessary documents as desired by the Defendant so that the claims of the Plaintiff were paid by the Defendant. The Plaintiff had not initiated legal proceedings for the recovery of its outstanding dues from the Nigerian Importers in Nigeria on the express assurance given by Shri Sathe the then Managing Director of the Defendant that the claims of the Plaintiff according to the Policy would be paid by the Defendant and requirement of initiating legal action against the Nigerian Importers in Nigeria would be waived off.

4. The Managing Director and the General Manager of the Plaintiff had gone to Nigeria and obtained the necessary landing certificate as well as the bills duly noted and protested in accordance with law. They submitted the details of claims

in respect of 19 outstanding bills through letter dated 21.11.1981. The Plaintiff having done whatever was required by the Defendant for the payment of claims, the payment was not forthcoming and in the month of October 1982, Shri Surinder Kishore the then Managing Director and Shri G.L. Deogar, General Manager of the Plaintiff again met Shri Sathe in the presence of the then General Manager of the Defendant and reminded him of the earlier commitments made by him on behalf of the Defendant. In the course of discussion Shri Sathe again confirmed the earlier commitments made by him on behalf of the Defendant and assured the then Managing Director and General Manager of the Plaintiff that the claims would be paid very shortly. As a consequence of this meeting first payment of 14 bills was made by the Defendant to the extent of 60% on 16.12.1982 as against coverage to the extent of 90% in terms of the Policy. According to the Plaintiff a total sum of Rs. 5,10,177.44p was due outstanding and payable by the Defendant towards 30% balance amount which had been with-held without any justification. As against 5 bills amounting to Rs. 2,41,240.50p against 90% coverage of these bills nothing had been paid by the Defendant to the Plaintiff. Thus, it is pleaded that a total sum of Rs. 7,51,417.94 p is due and outstanding payable by the Defendant to the Plaintiff and there is no justification in with holding this amount by the Defendant and the Plaintiff is entitled to recover the amount from the Defendant with interest and costs.

5. The Defendant in its written statement resisted and contested the claim of the Plaintiff by raising preliminary objections with respect to limitation, causes of action and estoppel. On merits, the claims of the Plaintiff have been denied. It is admitted that on being approached the Defendant did issue to the Plaintiff a shipment (Comprehensive Risks Policy being Policy No. 42171) covering the Plaintiff (Policy Holder) and the commercial risks covered under the Policy were only the risks specified at serial Nos. (i) (ii) and (iii) in the Policy under the head ''Risks Insured''. The Defendant has denied that it was liable to pay to the Plaintiff 90% of the alleged losses. According to it under the terms of the Policy, due performance and observance of each term and condition contained in the Policy or in the proposal or declaration, has been made a condition precedent to fasten the liability on the Defendant or to the enforcement of any liability against the Defendant by the Plaintiff. It is stated that Plaintiff had failed to perform and observe the terms of the Policy. It had failed to make punctual declaration of shipments and payment of premium to the Defendant which was required to be done under Clauses 8 and 10 of the Policy document. It is also stated that Plaintiff had failed to exercise normal care and prudence to minimize the losses by initiating legal proceedings against the Nigerian buyers as per Clause 7 of the Policy. The Defendant has denied that it was duly informed punctually of the defaults on the part of the buyers to pay the amount or of all other developments. However, it is admitted that the officers of the Plaintiff met the Chairman-cum-Managing Director of the Defendant with respect to the claim of the Plaintiff, but it is denied that there was any commitment on the part of the Defendant or its Chairman-cum-Managing Director to pay to the Plaintiff its

claim. It is also denied that there was any agreement to waive off any of the condition precedent especially the condition of not initiating legal action against the Nigerian Importers. It is stated that the true facts are that the Plaintiff had made representations to the Defendant pointing out that legal action against the Importers in Nigeria was likely to yield no results and on the inquiries made by the officers of the Plaintiff they had learnt that launching of legal proceedings would incur sizable expenditure and would also be highly time consuming process and on this ground, the Plaintiff had represented to the Defendant that condition of initiating legal proceedings against Defendant be waived off and the Defendant had at no point of time given its consent of waiving of this requirement. However, the Managing Director of the Defendant asked the officers of the Plaintiff to procure necessary documents so as to enable the Defendant to consider the claim of the Plaintiff for being compensated. This advice on the part of the Managing Director given to the officers of the Plaintiff cannot amount to waiving off one of the conditions which was to be performed by the Plaintiff to minimize the loss. It is stated that the claim of the Plaintiff in the absence of the necessary requirements of the terms of the Policy were considered by the Defendant and though the Plaintiff was not entitled to the amount of loss mentioned in the claim, yet keeping in view the consideration that the Plaintiff is a Government Company, the Defendant sympathetically considered its claim and made the payments as ex-gratia payments to the extent of 60% of the loss.

6. In replication, the Plaintiff reiterated the averments made in the plaint and controverter the defence of the Defendant. It is further submitted that outstanding declarations were not delayed by the Plaintiff and were sent to Ludhiana and Delhi offices of the Defendant at the earliest. The Plaintiff made the payment of due premium to the Defendant for the conversion of the negotiation arrangement of the document from time to time in 1977 and 1978 respectively.

7. On the pleadings of the parties, this Court vide its order dated 11.7.1988 settled the following issues:

1. Whether the suit is within limitation? OPP.

2. Whether this Court has no territorial jurisdiction to try the suit? ...OPD.

3. Whether the Plaintiff is estopped from filing the suit due to its own acts, conduct and acquiescence ? ...OPD.

4. Whether the Plaintiff''s claim stands covered under the terms of comprehensive risk policy ? .OPD.

5. Whether the Defendants waived off the condition of initiating legal proceedings by the Plaintiff against the Nigerian Importers ? ...OPP.

6. Whether the Plaintiff failed to perform and observe the terms of the Policy ? If so, its effect ? ...OPD.

7. Whether the suit is bad for misjoinder of causes of action ? ...OPD.

8. Whether the Plaintiff is entitled to recover a sum of Rs. 7,51, 417.94 p or any other amount from the Defendant-Corporation ? ...OPP.

9. Relief.

8. Issue No. 2 was directed to be tried as a preliminary issue vide order dated October 3, 1988. On November 12, 1990, this Court held that the cause of action in part is proved to have arisen at Shimla and therefore, this Court has territorial jurisdiction to entertain and dispose of the instant suit.

9. Plaintiff in support of its claim has produced three witnesses besides documentary evidence. The Defendant in its defence has not produced the oral evidence but few documents were tendered in evidence.

Issue No. 1.

10. In paragraph 18 of the plaint, the Plaintiff has stated that in the month of July, 1980 the liability was agreed to be paid off during the course of discussion between the then Managing Director of the Plaintiff and the then Chairman-cum-Managing Director of Defendant. On 21.11.1981, necessary documents alongwith claims were formally submitted to the Defendant as per commitment of the then Chairman-cum-Managing Director of Defendant. Thereafter claims for 14 bills to the extent of 60X were admitted and paid by the Defendant through letters Ext.PX-1 dated 16.12.1982, Ext.PX-2 dated 5th November, 1992, Ext.PX-3 dated 27.12.1982, Ext.PX-4 dated 6th December, 1982, Ext.PX-5 dated 20.1.1983, Ext.PX-6 dated 12th January, 1983, Ext.PX-7 dated October 7, 1983, Ext.PX-8 dated 28th September, 1983, Ext.PX-9 dated 7th October, 1983, Ext.PX-10 dated 28th September, 1983 and Ext.PX-11 dated 13th February, 1984. Final payment in respect of one of the bills to the extent of 60% was made through letter Ext.PX-12 dated 20.2.1984. Thereafter, Plaintiff issued legal notice Ext.PW-3/A dated 2.1.1987 calling upon the Defendant to make the balance payments of 30% of the amounts in respect of 14 bills and 90% coverage amount in respect of the remaining 5 bills. The Defendant has acknowledged the receipt of the legal notice but no reply was given with regard to the claim of the Plaintiff. The Defendants in its reply has stated that each claim has been dealt with separately though the policy is one. The claim of the Plaintiff with respect to the remaining amount accruing on the five bills stood rejected. The limitation has to be computed from the date of accrual of cause of action which accrued to the Plaintiff on the date when it suffered loss/damage or when the claim was first time preferred. The contention of the learned Counsel appearing on behalf of the Defendant cannot be accepted that the suit is time barred. As referred to above, the final payment in respect of one of the bills to the extent of 60% was made by the Defendant through letter Ext.PX-12 on 20.2.1984 and no intimation was sent to the Plaintiff about the rejection of the claims to the extent of 90% covered by remaining 5 bills No. 1029 to 1033. The Defendant has also not controverted the claim of the Plaintiff raised by it in its legal notice (Ext.PW-3/A) dated 2.1.1987. Therefore, the period of limitation for filing the suit will start from 20.2.1984 on

the basis of Ext.PX-12. The last date for filing the suit was 20.2.1987. However, admittedly, this Court was closed for Winter Vacations and reopened on 27.2.1987 on which date the suit was filed. In the face of the documents referred to above, the suit is held having been filed within limitation. This issue is decided in favour of the Plaintiff and against the Defendant.

Issue Nos. 3.4.5 and 6:

11. All these issues are intrinsically interconnected with each other and decision thereof depends upon the discussion of the same evidence. As such, all these issues are being decided together.

12. Shri Bhupender Gupta, learned Counsel for the Defendant has vehemently contended that the Plaintiff had failed to perform and observe the terms of the Policy by making punctual declaration of shipments and payment of premium to the Defendant which were conditions precedent under Clauses 8 and 10 of the Policy (Ext.PW-3/1). According to him, it is specifically mentioned in Clause (d) of Proviso to the heading Risks Insured that the Defendant shall not be liable for loss which arises due to failure or refusal on the part of the buyer to accept the goods and/fir due to the claim of the buyer that he is justified in with-holding payment of the contract price or the gross invoice value of the said goods or any part thereof by reason of any payment, credit, set-off or counter-claim and / or due to his claim that for any other reason he is excused from performing his obligations under the contract, unless, except where the Corporation agrees in writing to the contrary, the Exporter has for the amount of his loss obtained by legal proceedings in a competent Court of Law in the country of the buyer, a final judgment enforceable against him. He submits that according to this clause, the Defendant had never agreed in writing that the claims of the Plaintiff would be paid by the Defendant and the requirement of initiating legal action against the Nigerian Importers in Nigeria would be waived off.

13. He also submits that the Plaintiff had failed to make the requisite declaration punctually regarding the fault on the part of the buyer thus violating Clause 8(ii) of the Policy which envisages that all amounts which at the end of the previous month remained wholly or partly unpaid for more than one month from the due date of payment in respect of shipments previously declared (such declaration shall continue to be delivered to the Corporation in respect of all transactions insured with it, so long as such transactions remained outstanding, even though the Policy might have expired). The Plaintiff had failed to exercise normal care and prudence to minimize the losses by initiating legal proceedings against the Nigerian buyers and flouted the Clause 7 of the Policy also. The Defendant had filed statements Exts.D-1 and D-2 thereby 60% of the loss in respect of 14 bills was admitted and the entire claim in respect of five bills was rejected. According to the learned Counsel 60% loss was compensated by the Defendant as Ex-gratia payment because Plaintiff is a Government undertaking.

14. The Plaintiff in support of its claim has produced S/Shri Surinder Kishore

(PW-1), Dev Swaroop (PW-2) and J.L. Deogar (PW-3) and relied upon number of documents exhibited in the case.

15. Shri Surinder Kishore (PW-1) remained posted as Managing Director of the Plaintiff from July, , 1982 till October 31, 1385. He has stated that he alongwith PW J.L. Deogar the then General Manager-cum-Secretary of the Plaintiff had gone to Bombay in October 1982 and met the Chairman of the Defendant namely Mr. Sathe who was accompanied by other officers. According to his version Defendant had undertaken to indemnify the Plaintiff for losses whatsoever incurred on account of export of bicycle parts to Nigerian Importers. He deposed that on his visit to Bombay, he had a detailed talk with Mr. Sathe in respect of the payment asked for by the Plaintiff through his predecessor as well. Mr. Sathe had assured him that in case certificate of landing and bills on the Importers duly noted and protested in Nigeria were given to the Defendant, then by waiving off legal actions, payment to the Plaintiff would be made/ released. Consequent to this talk, the Defendant had released some payments in favour of the Plaintiff during his tenure. He has issued letters dated April 18, 1983 and August 23, 1983 copies whereof are exhibited as Ext.PW-1/A and Ext. PW-1/B respectively. In his cross-examination, he has stated that definite intimation with respect to export of goods used to be duly sent to the Defendant. He used to be in contact over telephone with officers of the Defendant for the meeting with . Mr. Sathe in connection with the dispute in question. He has shown his ignorance about the fact whether Defendant had never agreed to waive off legal actions against the importers of Nigeria in respect of the dispute in question and agreed to make the payments on production of documents of landing and bills referred to in his statement. He has also stated that prior to his meeting with Mr. Sathe, the claim with respect to the recovery of payments had already been submitted to the Defendant-Corporation.

16. Shri Dev Swaroop (PW-2) remained posted as Managing Director of the Plaintiff from September 1979 to September 1981. He deposed that during his tenure with respect to the supply of bicycle parts to Importers in Nigeria Policy Cover had been obtained from the Defendant for the purpose of indemnifying the losses in case of the importers not accepting the goods etc. as per the terms contained therein. Some claims regarding the supply of bicycle parts had been lodged with the Ludhiana Branch of Defendant and money with'' respect to the same was not forthcoming to the Plaintiff. There were other claims pertaining to the recovery of the amounts qua the supply of bicycle parts to other importers which were also of the like nature and policy cover had been given by the Defendant in that connection. He had visited Bombay and met Mr. Sathe, Chairman-cum-Managing Director of the Defendant. Pursuant to their talks, the Chairman of the Defendant gave guidance with respect to the action to be taken against the pending three claims already preferred to Ludhiana branch and advised him to take steps for procuring certificates of landing and bills on the Importers duly noted and protested by going to Nigeria or also through lawyer. It is stated by him that Mr. Sathe assured him that as long as certificate of landing

and bills on the Importers duly noted and protested in Nigeria were produced alongwith the claims, the Defendant would be making the payment to the Plaintiff. On the guidelines and advice given by Mr. Sathe, he accompanied by PW J.L. Deogar, the then Secretary of the Plaintiff went to Nigeria for collecting certificate of landing and bills. Certificate of landing and also some bills on the Importers duly noted and protested in Nigeria were collected by them. He has further submitted that Shri Sathe had in particular mentioned to him and to the Secretary of the Plaintiff that so far as the Plaintiff''s claims were concerned, in case certificate of landing and bills on the Importers duly noted and protested in Nigeria were produced or submitted to them, then they would not insist upon taking legal action against the Importers in Nigeria and in that case, they would continue to make the payment to the Plaintiff with respect to its claim. On the basis of this assurance, the Plaintiff did not plan/take legal action against the Importers in Nigeria. In his cross-examination, he states that prior appointment with Defendant was fixed up through its Delhi office on telephonic conversation. He has admitted that no document in writing in respect of waiving off legal action against the Importers in Nigeria as discussed between him and Mr. Sathe was obtained by the Defendant nor it had of its own sent it to the Plaintiff during his tenure. He has denied the suggestion that nothing was concluded in his discussion with the Chairman Mr. Sathe regarding the recovery of the claim amount. He has also denied the suggestion that Mr. Sathe the then Chairman of the Defendant never given the assurance to waive off legal action on Importers to Nigeria with respect to the claims to be recovered by the Plaintiff. Similarly, he has denied the suggestion that Mr. Sathe did not advise him and Mr. Aggarwal, the Commercial Manager of the Plaintiff who accompanied him to Bombay at the office of the Defendant to procure certificate of landing and bills on the Importers duly noted and protested in Nigeria by going there. He also denied the suggestion that as legal action in Nigeria would have consumed sufficient time and money to recover the claims, thus he had suggested to Mr. Sathe that he should agree to waive off legal action on Importers with respect to the claims to be recovered from the Defendant.

17. The next witness is Shri J.L. Daogar (PW-3), who remained posted as Secretary in the initial stage and thereafter as General Manager-cum- Secretary of the Plaintiff from 1969 till retirement in the year 1991. This suit was filed through him. He states that Plaintiff had exported bicycle parts to the Nigerian firms located in Nigeria which was worth about Rs. 24 lakhs. The consignment was transported through ships. Before exporting the goods Plaintiff had taken insurance cover in the sum of Rs. 40 lakhs from the Defendant vis-?-vis export of cycle parts to Nigeria by the Plaintiff. The Plaintiff had also taken insurance cover for its firm located in Nigeria with respect to the export of the bicycle parts to one of them from the Defendant. He has produced number of letters received from Defendant addressed to the Plaintiff. Copies of the letters were also received by the Plaintiff-Corporation from the Defendant in respect of the shipments of goods to Nigeria which are placed on record as Exhibits PW-3/1 to

Ext. PW-3/11 and Ext. PW-3/12, Ext. PW-3/12-A to Ext.PW-3/13 and Ext.PW-3/13-A, Ex.PW-3/14, Ext.PW-14/A, Ext.PW-15, Ext.PW-3/15-A to D, Ext.PW-3/16 and Ext.PW-3/16-A, Ext.PW-3/17 and Ext.PW/3/17-A to Ext.PW-3/17-C and Ext.PW-3/18 and Ext.PW-3/18-A and Ext.PW-3/18B, Ext.PW-3/19, Ext.PW-3/19 A & B, Ext.PW-3/20, Ext.PW-3/20 A to C, Ext.PW-3/21 to Ext.PW-3/23, and other letters received from the Defendants by the Plaintiff. The insurance cover initially to the extent of Rs. 20 lakhs was extended by the Defendant to the tune of Rs. 40 lakhs regarding which confirmation letter dated 23.4.1977 (Ext.PW-3/24) and its endorsement letter (Ext.PW-3/24-A) were also received by the Plaintiff. The Plaintiff was negotiating the bills through its Banker namely, State Bank of India, Shimla on the buyers in Nigeria in respect of the goods so exported to the different Nigerian Importers. The terms of the payment by the Nigerian Importers were cash against documents to be retired from their Bankers. Some of the Nigerians Importers from their Bankers wanted that instead of cash against documents, the Plaintiff should agree to deliver against acceptance, mode of payment whereunder they were to first accept the goods and then make payment. This arrangement was brought to the notice of the Defendant by the Plaintiff and on acceptance of this arrangement, the Plaintiff had paid the premium as asked for by the Defendant and thereafter agreed to aforesaid arrangement of delivery against acceptance against cash against documents. Some payment was received from the Nigerian Importers against the earlier arrangement but no payments were received from them against the subsequent delivery against acceptance which had been approved by the Defendant. Plaintiff on non-receipt of payment from the Nigerian Importers, requested them to clear off the arrears but failed. Thereafter the Plaintiff deputed him to Nigeria for making the Nigerian Importers agreeable and asking them to clear all the bills of the Plaintiff- Corporation with respect to the goods so supplied by the Plaintiff in the year 1978. He went to Nigeria and met the Nigerian Importers and made efforts to get the clearance of the bills with respect to the goods supplied by the Plaintiff but he remained unsuccessful in getting the needful done. On his return, he intimated the Plaintiff of the result of his visit upon which the Plaintiff lodged the claim with the Defendant but that claim remained unpaid. In July, 1980 Mr. Dev Swaroop, Managing Director of the Plaintiff went to Bombay in connection with the settlement of the unpaid claims and met Mr. D.D. Sathe, the then Managing Director of the Defendant. Mr. Dev Swaroop informed him being Secretary of the Plaintiff that Mr. Sathe the then Managing Director of the Defendant had desired that in case the Plaintiff-corporation provided the landing certificate of the goods so supplied to the Nigerian Importers, and if the relevant bills noted and produced in Nigeria and provided these notices of protest to the Defendant then the Defendant would waive off legal action against the Nigerian Importers and make the payment of the bills to the Plaintiff. Thereafter, Plaintiff deputed a team consisting of PW Dev Swaroop the then Managing Director and himself being the Secretary to get the needful done by the Nigerian Importers. They collected the landing certificate from Nigerian Port Authorities besides the protest notices through Notary Public who are appointed by the Banks of that cities in respect of the goods so supplied by the Plaintiff to the Nigerian Importers. The original landing certificates are Exts. PW-3/25 and PW-3/26 respectively. They also collected the protest bills Exts. PW-3/A-1 to Ext. PW-3/A-19 from the concerned authorities. In November, 1981 and April, 1982 Mrs. ParmInder Bhatia the then Managing Director of the Plaintiff issued letters Ext.PW-3/B-1 and Ext.PW-3/B-2 to the Defendant. Despite the demand of the Plaintiff, the Defendant did not make the payment in respect of the claim lodged upon it. Mr. M.L. Aggarwal who was next in command with the Plaintiff also sent letters copies whereof are Ext.PW-3/C-1 to Ext.PW-3/C-11 respectively. In October, 1982 PW Surinder Kishore the then Managing Director of the Plaintiff went to Bombay alongwith him to meet Mr. Sathe, the Chairman of the Defendant in connection with this claim. They met Mr. Sathe in the presence of Mr. K.G. Krishna and Mr. Raheja. Mr. Surinder Kishore told Mr. Sathe in his presence that his predecessor had requested him to make the payment but he had demanded landing certificates and protest notes with respect to the goods and further agreed to waive off the legal action and make the payment. He also reminded Mr. Sathe that he had assured to make the payment in case needful was done by the Plaintiff. He then also told that the Plaintiff had provided the requisite documents as desired by Mr. Sathe, but the payment had not been made till that date. On this Mr. Sathe the then Chairman of the Defendant confirmed the entire talk which had occurred in between them and again assured the Plaintiff through Mr. Surinder Kishore that they would make the payment of the claims immediately. Thereafter the Defendant started making payment against the said claims to the extent of 60% instead of 90% as mentioned in the documents. No payment was made in respect of some bills by the Defendant. The total unpaid claims amounts to Rs. 7.51 lakhs which remained so till he retired. Shri Prabhakar was the successor of Mr. Sathe after his retirement. PW Surinder Kishore and he had got a meeting fixed with Mr. Prabhakar in Delhi in respect of the claims in question but at the material time Shri Surinder Kishore suddenly fell ill and he went alone to Delhi and met Shri Prabhakar in respect of the claims in dispute. He explained the entire position from the beginning till that date in respect of the claim alleged against the Defendant and gave him the proof in writing which fact had been confirmed by the Plaintiff through letter Ext.PW-1/B addressed to the Chairman of the Defendant. On his return to Shimla, he made a official note of the entire circumstances which transpired between him and Mr. Prabhakar in the shape of a official note contained in File No. 5-247/81 at page 288. The copy of the official note in Ext.PW-3/D. On 5th August, 1983, when he had met Mr. Prabhakar, Shri K.G. Krishna, General Manager of the Defendant was also present, who had also confirmed the previous decision of the last meeting held at Bombay in October, 1982 between Surinder Kishore and Mr. Sathe. He deposed that no legal action was taken against the Nigerian Importers by the Plaintiff because Mr. Sathe the then Chairman of the Defendant had waived off the legal action besides having agreed to make the payment towards the liquidation of the claims of the Plaintiff on production of documents referred to above. He stated that had this legal action been not waived off by the Defendant through Mr. Sathe, they on their own visit to Nigeria would have positively taken legal action by initiating legal proceedings against the Nigerian Importers for the recovery of their dues towards the claims in question. He has produced the photostat copy of the legal notice Ext.PW-3/E issued to the Defendant on behalf of the Plaintiff and stated that despite this notice no payment had been made by the Defendant.

18. He has been subjected to lengthy cross-examination on behalf of the Defendant. In his cross-examination, he has admitted that as per the terms of the policy, monthly declaration of shipment was to be sent to the Defendant within one month of the consignment and further that under the initial arrangement the bankers were bound to send the payment to the Plaintiff on the basis of arrangement styled as Cash against document, that is to say, the consignments were to retire by making the payment to the bankers in Nigeria and thereafter get the documents therefrom for the purposes of getting the goods so delivered by the Plaintiff. It is also admitted by him that some of the declarations sent to the Defendant were belated. No notice through Lawyer was sent by the Plaintiff to the said consignees (Nigerian Importers) directly. The Plaintiff did not ask the Defendant to initiate legal action against the Nigerian Importers by telling it that the Plaintiff was not receiving the payments as agreed. He has also admitted that Shri Dev Swaroop did not hand over any such assurance in writing from and on behalf of Defendant received by him through Shri Sathe in respect of waiving off legal action against the Nigerian Importers. He has denied the suggestion that Mrs. Parminder Bhatia the then Managing Director of the Plaintiff never met the then Chairman or any other official of the Defendant. According to his version, she had gone to Bombay but the Chairman of the Defendant for reasons best known to him did not meet her and this fact finds support from the letter dated 5th May, 1982 (Ext.PW-3/B-2). He has stated that at the time of his visit to Nigeria in the year 1978, he met each and every Nigerian Importers who had received goods from the Plaintiff and on making demands from them some of them told that they had suffered losses due to fire to their residential houses while others stated that there was slump in the market and the Plaintiff should give rebate on the bills etc. He denied the suggestion that one of the reasons for non-payment of the claim by the Nigerian Importers was the supply of sub-standard goods by the Plaintiff. He has categorically denied the suggestion that in October, 1982 Mr. Sathe had not given any assurance to waive off the legal action despite providing requisite documents namely landing certificate and protest notes to the Defendant by the Plaintiff. He has also denied the suggestion that in the second meeting Mr. Sathe had clearly told the Plaintiff through its representatives that as the Plaintiff had not complied with the terms of the Policy, the Defendant would not be making any payment of the claim in question. He has admitted that the Plaintiff did not seek any confirmatory letter from the Defendant with respect to the talk held between the representatives of the two Corporations or the assurance given by the Defendant through its Chairman to the Plaintiff because the Plaintiff had conveyed this fact

in the letter issued by the Plaintiff. According to him for taking the legal action against the Nigerian Importers, the Plaintiff had to move the Defendant and seek its permission as incorporated in clauses 25 to 28 of the Policy under the heading "Recoveries" (Ext.PW-3/1). He has denied the suggestion that the Defendant was not legally bound to indemnify the Plaintiff even to the extent of 60 instead of 90X and the payment of 60 made by the Defendant to the Plaintiff was not pursuant to the talk of the representatives of two Corporations assuring the waiving off the legal action but it was pursuant to the goodwill gesture on the part of the Defendant or it was a sort of ex-gratia payment. He states that the statement of claim lodged by the Plaintiff with the Defendant and shown in Ext.D-1 and Ext.D-2 attached with the written statement are wrong in as much as the dates shown therein are not correct and the correct position has been reflected in the statements Ext.PW-3/F filed with the replication. He has also denied the suggestion that the Plaintiff had lodged fraudulent claims in question with the Defendant, suppressed certain dates pertaining to supply of goods to the Nigerian Importers and the date of payment by Defendant in the said statements.

19. The Defendant has not led oral evidence to counter the evidence of the Plaintiff. The Plaintiff has produced responsible officers on its behalf. Admittedly, Plaintiff has failed to make punctual declaration of shipments and payment of premium to the Defendant as per the terms of the Policy, but the Defendant had been accepting the declaration and the payments of the premium after due date meaning thereby that it had not seriously objected to the late submissions of the declarations and payment of the premium. The Defendant has admitted the meeting of the officers of Plaintiff with the Chairman-cum-Managing Director of Defendant with respect to the claim of the Plaintiff but denied (sic) there was any commitment on the part of the Defendant to pay the Plaintiff''s claim. The oral evidence of the Plaintiff witnesses referred to above clearly proves that the assurance was given to the officers of the Plaintiff by the then Mr. Sathe, Managing Director of the Defendant and subsequently by Mr. Prabhakar that the claims of the Plaintiff would be indemnified by the Defendant to the extent of 90% as per the terms of the Policy and initiation of legal proceedings against the Nigerian Importers was waived off. The officers of the Plaintiff did act on the advice and guidelines of Mr. Sathe and visited Nigeria to procure necessary documents desired by him and the same were supplied to the Defendant with the clear understanding that the claims of the Plaintiff would be indemnified by the Defendant. A perusal of letter dated 17/18th December, 1982 (Ext.PW-3/C-1) written by PW G.L. Deogar to Shri M.G. Jhamnani, Senior Claims Manager of the Defendant would go to show that the officers had discussed the matter in Bombay on 30th November and 1st December, 1982 with regard to the claims of the Plaintiff and requested the Defendant to make the payment. Similarly, letter dated 23rd August, 1983 (Ext.PW-1/B) written by PW Surinder Kishore to Shri V. Prabhakar, Chairman of the Defendant shows that the claims of the Plaintiff already agreed to by the Defendant would be released to it. Another letter dated

18th April, 1983 (Ext.PW-1/A) written by PW Shri Surinder Kishore to Shri K.G. Krishna, General Manager of the Defendant shows that all the four objections again raised by the Defendant in letter dated 14th February, 1983 were discussed in a meeting held in October, 1982 under the Chairmanship of Shri Sathe the then Chairman of the Defendant which was attended by Shri K.G. Krishna and others in which it was agreed by the Defendant that the claims of the Plaintiff would be paid on the basis of the documents already furnished by it and on the basis of the decision taken in that meeting 60% claim was made as against the entitlement of 90% in terms of the Policy. The contents of other letters Exhibits PW-3/C-3, 3/C-4, 3/C-5, 3/C-6, 3/C-7, 3/C-8, 3/C-9, 3/C-10 and 3/C-11 issued by the Managing Director of the Plaintiff to the Defendant on number of dates starting from November, 1981 to September, 1983 would go to show that to indemnify the claims of the Plaintiff by the Defendant, the matter was discussed in detail by the officers of the Plaintiff with the Chairman and other officers of the Defendant in a meeting held at Bombay in July, 1980 and on the basis of such discussion and assurance the Plaintiff has been requesting the Defendant to indemnify it to the extent of 90% under the covenants of the Policy. The Defendant has not refuted oral and documentary evidence produced by the Plaintiff. Statement of claims (Ext.D-2) allegedly rejected by the Defendant was never conveyed to the Plaintiff. The Plaintiff has explained in document (Ext.PW-3/F) that excepting three cases at serial Nos. 17, 18 and 19 of these documents all the declarations were sent by the Plaintiff to the Defendant in time. The Defendant has subsequently converted the bills into DA. It is also stated in its statement that since the taking of the legal action was waived off by the then Chairman-cum-Managing Director of the Defendant and this commitment also supersedes the minor occurrence like late submission of the declarations/non-submission of un-paid bills of exchange (In case of DA Bills only) and also the non-submission of GR-1 clearance of the RBI. The Defendant made 60% payments to the Plaintiff on the basis of the protest notes and landing certificates and there is no valid reason why the payment of other bills have not been made on the basis of the similar documents having been submitted in respect thereof.

20. The Defendant is bound by the terms and conditions of the Policy and Clause 13 of the same binds the Defendant to pay 90% of any loss where the loss is due to the occurrence of the causes specified in Sub-clauses (i) (ii), (iv) and (xi) of the Risks Insured under the Policy. The claim of the Plaintiff is covered under Sub Clauses (ii) and (iii) of the Risks Insured. Though the Plaintiff failed to send monthly declaration of Shipment to the Defendant within one month of the consignment in terms of the Policy, yet the Defendant had accepted the late submissions of the consignment and made payment to the extent of 60% of the lose. The Plaintiff''s case is squarely covered under the terms of Comprehensive Risks Policy and it is entitled for the recovery of 90% loss in terms of the clause of the Policy referred to above. The Defendant has not led evidence to prove that the amount of 60% loss was sanctioned and paid to the Plaintiff on account of

sympathy or in the form of Ex-Gratia as alleged by it in the written statement. The sanction and payment orders (Exts.PX-1 to PX-12) do not show that losses to the extent of 60% in respect of 14 bills had been admitted and paid on account of ex-gratia grant. Therefore, these issues are also decided in favour of the Plaintiff and against the Defendant.

Issue No. 7:

21. From the oral and documentary evidence discussed above, the Plaintiff shipped only that quantity of bicycle parts for which the approval had been sanctioned by the Defendant and in addition to this, the Plaintiff took coverage under the Comprehensive Risks Policy, (Ext.PW-3/A) aggregating in the sum of Rs. 40 lakhs from the Defendant for the export of bicycle parts to Nigerian Importers. The Plaintiff paid the necessary premium of this policy prescribed by the Defendant from time to time. In terms of the Policy, the Defendant was liable to pay to the Plaintiff to the extent of 90% of the loss which the Plaintiff had suffered. Out of 19 total bills the Defendant admitted and paid to the Plaintiff losses to the extent of 60* in respect of 14 bills and in respect of the remaining 5 bills no payment has been made which was outstanding under the same Policy. The causes of action arose to the Plaintiff on the basis of the terms of the Policy and the transactions for exporting bicycle parts to Nigeria were covered by the said Policy. The Defendant has failed to prove that the suit is bad for misjoinder of causes of action. This issue stands decided in favour of the Plaintiff and against the Defendant.

Issue No. 8:

22. The Plaintiff has proved by oral and documentary evidence as discussed in the preceding paragraphs under issues No. 3 to 6 that in terms of the Policy issued by the Defendant, losses incurred by the Plaintiff to the extent of 90% were covered and the Defendant had made good the losses to the extent of 60% only in respect of 14 bills. Thus, the Plaintiff is entitled to recover the balance amount due from the Defendant to the extent of 305% amounting to Rs. 5,10,177.44 p. and this amount has been with-held by the Defendant without any justification. If the Defendant has admitted and paid the liability of losses incurred to the Plaintiff to the extent of 60%, it is not understandable why the 30% balance amount has been with-held. There is no iota of evidence on record to show the justification for with-holding the amount to the extent of 30% in respect of 14 bills submitted by the Plaintiff to the Defendant. Similarly, there is no justification to with-hold the payment of 5 bills which amount comes to Rs. 2,41,240.50p which is due and outstanding payable to the Plaintiff by the Defendant against 90% coverage of these bills in terms of the Policy. Thus, the Defendant has wrongfully with-held the payment of total amount of Rs. 7,51,417.94p to the Plaintiff which amount was due and payable by the Defendant on the basis of the terms of the Policy to the extent of 90% losses. This issue stands decided in favour of the Plaintiff and against the Defendant.

23. In view of my findings on the aforesaid issues, a decree for an amount of Rs. 7,51,417.94p with interest 0 6% per annum from the date of filing of suit i.e. 27.2.1987 till the date of realization is passed in favour of Plaintiff and against Defendant alongwith costs of the suit.

