

REPORTABLE

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CS(OS) No. 1445 of 2002**

% **Date of Decision :** January 23rd, 2009.

M/S. GAMMA INVESTMENTS Plaintiff.

Through Ms.Anuradha Mukherjee,
advocate.

VERSUS

NATIONAL INSURANCE COMPANY LTD. Defendant.

Through Mr.Trideep Pais and
Mr.L.K.Tyagi , advocates.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be

allowed to see the judgment?

2. To be referred to the Reporter or not ? Yes.

3. Whether the judgment should be reported Yes.

in the Digest ?

SANJIV KHANNA, J:

1. Gamma investments (hereinafter referred to as the plaintiff) is a partnership firm engaged in the business of stock broking. National Insurance Company Ltd., the defendant is an insurance company which had on payment of premium issued "stock brokers' indemnity insurance policy", Exh. P-1

for the period 1st June, 2000 to 31st May, 2001 in favour of the plaintiff. The plaintiff has filed the present suit for recovery of Rs.46,22,795.30 against the defendant on account of loss covered by the policy and Rs.14,02,036.82 towards interest. Plaintiff has also claimed damages for pain and suffering amounting to Rs.1 lac.

2. The plaintiff, had sold 7,96,900 shares of M/s. Jindal Vijayanagar Steel Ltd. (hereinafter referred to as the shares, for short) as a broker for their clients Mr.Gunjan Jain and Mr.Vishnu Kumar. These shares were subsequently lodged for transfer but the Registrar of M/s.Jindal Vijayanagar Steel Ltd. refused to register the transfer on the ground that they were partly paid up shares and the sticker of “fully paid up” affixed thereon was forged.
3. The plaintiff lodged police complaints, Exh. PW 1/2 & PW 1/3, and FIR(s) was registered against Mr.Gunjan Jain and Mr.Vishnu Kumar. They were arrested.
4. The plaintiff was required to make good and replace the forged/bad delivery of shares with new shares. The plaintiff replaced and purchased new shares of M/s Jindal Vijaynagar Steel Ltd. from the market and in this process suffered losses. They made claim(s) under the policy which

was rejected. The plaintiff also approached Ombudsman and National Consumer Disputes Redressal Commission but their claim was not entertained on the ground of lack of jurisdiction.

5. The defendant has repudiated the claim of the plaintiff on two grounds (1) the transaction was done without following and complying with the guidelines of the Security & Exchange Control Board of India (SEBI, for short) and (2) there was breach of requirement to take reasonable care. In the written statement it is also stated that as per policy the liability of the defendant is limited to Rs. 25 lacs.
6. On the basis of the pleadings of the parties, the following issues were framed on 22nd September, 2004:

- “1. Whether the plaintiff is registered partnership firm and the suit instituted by a authorised person on behalf of the plaintiff? OPP.
2. Whether the clam of the plaintiff in the present suit is not maintainable in view of the preliminary objection No.1 taken by the defendant in the written statement in regard to the non-compliance of the condition precedent by the plaintiff? OPD.
3. Whether the defendant has validly repudiated the claims raised by the plaintiff under the Insurance Policy? OPD.
4. If issue No.3 is answered in affirmative whether the defendant was entitled to seek any further clarification after submission of

a joint survey report from only one of the surveyors, if so, to what effect? OPD.

5. Whether the plaintiff has suffered any loss after February 21, 2001, and if so, to what amount the defendant is liable to compensate the plaintiff for the same? OPD.
 6. Whether the plaintiff is entitled to damages, if so, to what amount? OPD.
 7. Whether the claim of the plaintiff would be limited to the amount of Rs.25 lacs in view of the stipulations in the policy? OPP
 8. Whether the plaintiff is entitled to any interest, if so, at what rate and on what amount and for what period? OPP.
 9. Relief.”
7. The plaintiff has produced one witness Col. (retd.) G.S. Gujral-PW.1 and the defendants have examined three witnesses Mr. J.N. Vats DW-1, Sr. Divisional Manager of the defendant, Mr.Dinesh Kr. Jain, DW-2, Surveyor working with M/s.Mehta and Padamsey Surveyors Pvt. Ltd. and Mr.Shyamal Bhadra DW-3, Surveyor working with M/s. Bhadra and Associates Pvt. Ltd.

ISSUE NO.1

8. PW-1, Col. (retd.) G.S. Gujral has proved Form-B issued by Registrar of Firms, Government of NCT of Delhi, Exhibit PW1/1, stating inter alia, that the firm M/s. Gamma Investments is duly registered and Col (retd) Gurnam Singh

Gujral, Mohini Gujral and Ankush Singh Gujral are partners of the said firm. This portion of the testimony of PW-1 remains unchallenged in the cross examination. Accordingly, issue no.1 is decided in favour of the plaintiff and against the defendant.

ISSUE NOS. 2, 3 & 4

9. These issues pertain to terms of the insurance policy and interpretation of the insurance document. Insurance is a contract whereby an insurer undertakes to pay to the insured a sum of money or its equivalent on happening of a specified event. In case of a liability policy which is in the nature of indemnity, as in the present case, the insurer agrees to pay to the insured on happening of the peril, loss or damages which may be occasioned. Insurance contract is a matter of intention of the parties, which is to be gathered from the language and words used in the written contract to express their intention. It is therefore necessary to refer to the relevant terms of the insurance policy.
- 10 The insurance policy consists of five sections, Section I, Section IA, Section IB, Section IC and Section II. They have exclusions general as well as specific to each of the five sections. There are also general conditions

applicable to the entire policy and those applicable to Section I and Section II. It appears that both the parties have lost distinction between the five Sections of the Policy and the subject matter of insurance covered by the five sections.

11. Section IA of the Policy deals with loss resulting from dishonest or fraudulent acts by employees. Similarly, Section IB pertains to computer crime indemnity. No claim has been made under the said Section and therefore is not required to be examined. Section IC deals with legal fee, which again is not a subject matter of the claim/suit.
12. Section I of the policy relates to direct financial loss suffered by the plaintiff during the period of insurance pertaining to, connected with or dealing in transactions through National Stock Exchange "only complying with the laid down norms and procedures in respect of transactions made through National Stock Exchange". Section I relates to First Party liability, as is apparent from the reading of the said section, which is as under :-

"SECTION – I

NOW WE the Company hereby undertake and agree, subject to the following terms, exclusions, limitations and conditions, to make good to the Insured, as stated in the Insuring Clauses, or in any emendatory

endorsements attached thereto, in excess of the amounts of the deductible stated to be applicable, such direct financial loss sustained by the Insured subsequent to the Retroactive Date and discovered by the Insured during the period of the Policy subject to the clause 3(c) of General conditions applicable to Section I and subject to the Policy Limits as stated in the Schedule or in any emendatory endorsements attached thereto provided that such losses arise only out of or pertain to or are connected with or result from dealings or transactions through National Stock Exchange only complying with laid down norms and procedures in respect of transactions made through National Stock Exchange.”

13. Section I of the Policy relates to losses and damages suffered by the plaintiff i.e. the First Party or the insured, in dealings and transactions in the National Stock Exchange as a trader.
14. The relevant portion of Section II reads as under:

“SECTION II

INSURING CLAUSE

This Section subject to its terms, exclusions, limitations and conditions provides an indemnity to the Insured in respect of the Insured’s legal liability to third parties for any third party claim which meets the following requirements.

Any third party claim must

- (i) be for compensatory damages, such Indemnity to include claimant costs and expenses, including such damages and costs and expenses as a result of the

Assured's physical loss of or damage to documents or Securities, but excluding however the intrinsic value or any property or the fact value or costs of reconstruction of any documents or any loss compressible under a Bankers Blanket Bond or equivalent policy irrespective of the amount thereof and whether or not such a policy is actually maintained by the Assured; and

- (ii) be first made against the Insured during the Policy period;

and

- (iii) a) be for financial loss caused by a negligent act, negligent error or negligent omission on the part of an officer or Employee of the Insured;

b) be for financial loss caused by a dishonest or fraudulent act or omission on the part of an officer or Employee of the Assured; and

- (iv) arise out of the ordinary course of the provision by the Insured of the transactions conducted and recorded on the National Stock Exchange complying with laid down norms and procedure; and

- (v) be brought other than wholly or partly within the United States of America and/or Canada; and

- (vi) arise other than from any negligent act, negligent omission or dishonest or fraudulent act or omission which was or may have been or is alleged to have been committed or omitted (as the case may be) wholly or partly within the United States of America and/or Canada.

- (vii) relate other than to a negligent act, negligent error or negligent omission which was or may have been or is alleged to have been committed or omitted (as the

case may be) before the Retroactive Date specified in the Schedule hereto.”

15. Section II of the Policy provides indemnity to the plaintiff against legal liabilities to Third parties i.e. liability of the insured to Third Parties to pay damages or loss arising out of transactions conducted and recorded on the National Stock Exchange, complying with the laid down norms and procedure. The insurance Policy therefore combines both loss/damage suffered by the insured as a First Party and loss/damage which the insured may have to pay to third parties.
16. Section I will not apply as no loss or damage has been suffered by the plaintiff i.e. the insured in connection with or as a result of their transaction as a purchaser or seller of shares in the National Stock Exchange. The plaintiff had not sold or purchased any shares as a trader in their name. The plaintiff had acted as a broker in the transactions or sales of shares made by Mr.Gunjan Jain and Mr.Vishnu Kumar. The plaintiff became liable to third parties i.e. the purchaser because of bad delivery, as they had acted as brokers and in terms of the Rules and Regulations of the National Stock Exchange.

17. The defendant has made an error by referring to terms and conditions of Section IA, which deals with loss due to and directly from dishonest and fraudulent act of employees of the insured i.e. the plaintiff. The plaintiff has also referred to section 1 and 1A in the plaint. However, the plaintiff has also referred to the insurance policy and parties have lead evidence with reference to the entire policy. Language of Section II is similar to the stipulation in section 1 relied upon by the defendant and therefore no prejudice is caused to defendant. For a claim to covered by Section II it should “arise out of the ordinary course of the provision by the Insured of the transactions conducted and recorded on the National Stock Exchange complying with laid down norms and procedure.” Section1 also states “such losses arise only out of or pertain to or are connected with or thereto provided that such losses arise only out of or are connected with or result from dealings or transactions through National Stock Exchange only complying with the laid down norms and procedures in respect of transactions made through National Stock Exchange.”

Reasonable Care Clause

18. The Policy under the heading “General Conditions applicable to this policy” in Clause 9 relating to reasonable care states as under:

“Reasonable Care :

The Policy is subject to the duty of care on the part of the Insured and the Insured shall extend all due diligence care and concern having due regard to the market practice to protect and safeguard the legitimate interest of the Insurer, Duty of care as applicable to the Insured shall be deemed to extend to their agencies and their Employee also.

The Insured shall initiate disciplinary or legal action as and when warranted on his own initiative &/or as advised by the Insurer. The Insured shall also cooperate with the Insurer in all legitimate manner in all criminal or civil proceedings that are so warranted.”

19. Clause 9 required the plaintiff to extend due diligence, care and concern having regard to the market practice to protect and safeguard legitimate interest of the insurer, i.e. the defendant and nothing more. The said Clause makes specific reference to market practice. Onus to establish that the plaintiff had acted without due diligence having regard to the market practice was on the defendant. Statements of the three witnesses produced by the defendant do not show that the plaintiff had acted in a manner contrary to market practice. In fact they do not aver and state what was the

market practice and in what manner the plaintiff has failed to extend due diligence and concern to safeguard interest of the defendant. Insurance is taken to protect the insured against uncertain events befalling on the insured. Negligence on the part of the insured is not a relevant consideration and a ground to avoid claims on the insurer. Reasonable care clauses protect the insurer against deliberate or reckless acts by the insured and not acts which can be categorised as negligent. Negligent acts normally do not absolve insurance companies for one of the objects of insurance is to protect the insured against consequences of negligence. Wilful acts, misfeasance, or deliberate acts amounting to misconduct may constitute exceptions under the 'reasonable care' clause but these have to be distinguished from acts of negligence. Clause 12 of General Definitions of policy defines "Dishonest or fraudulent act or omission" as follows:

"Dishonest or fraudulent act or omission" means an act or omission on the part of the any officer or employee of the assured which was committed with manifest intent of cause a third part to whom assured may be held legally liable, to sustain loss. "

20. Section II, as quoted above, specifically states that financial loss caused to a third party by a negligent act, negligent error or negligent omission is covered by the Policy. The defendant therefore cannot deny payment under the Policy on the ground of negligence in view of Clause 9.
21. The second ground therefore raised by the defendant has no force and is liable to be rejected for even if the plaintiff or their employees had been negligent, the defendant would be liable to indemnify loss/damage suffered. There is no allegation and evidence to establish and show that the plaintiff was reckless or had deliberately induced losses. Mere allegation of negligence even if proved will not absolve the defendant from liability under the insurance Policy.

“Norms and Procedure”

22. Section II of the Policy covers compensatory damages claimed by third parties arising out of ordinary course of transactions conducted and recorded on the National Stock Exchange complying with the laid down norms and procedures. The requirement of the said Clause is that the transaction should be conducted and recorded in the National Stock Exchange. There is no dispute between the parties that the transactions on which the loss was

occasioned was due to sale of shares by Mr.Gunjan Jain and Mr. Vishnu Kumar. These were made through the plaintiff as a broker and were recorded and conducted through the National Stock Exchange.

23. Learned counsel for the defendant submitted that there was violation of guidelines issued by the Securities and Exchange Board of India (SEBI for short) and therefore the transactions were made without complying with laid down norms and procedure. My attention was drawn to the following SEBI Guidelines:

“Due care may be exercised when a member broker is introducing/delivering broker for shares in the market. In all such cases the transferor(s) or seller(s) signature(s) should be witnessed either by the member broker himself or by any of his SEBI authorised sub brokers through whom concerned sale has been effected. If transfer deed are witnessed by a third party, insist on signature of seller being witnessed by the concerned sub-broker also. Do not make payment by issuing a cheque in a name other than the name of the shareholder when a member-broker is an introducing broker.

Proper enquiries may be made when the names of the selling clients and names appearing on share certificates delivered against sales are different. Proper record should be kept for explaining the reasons for difference.

No adjustment between one client account to another should be made unless express

authority has been obtained from the clients. Such authority should be preserved by the broker.”

24. SEBI Guidelines are not mentioned and referred to in the insurance Policy. The words and language used in policy are relevant and material. There is no specific pre-condition or requirement in the Insurance Policy for compliance of SEBI Guidelines and/or failure to do so the Policy shall become void or the claim will be repudiated. Section II quoted above relates to subject matter of insurance. Section II has to be read as a common man to give effect to the specific words used therein. A reasonable reading of the above Clause is that the transactions should have been conducted and recorded on the National Stock Exchange as per the norms and procedures of the National Stock Exchange. In other words, private transactions or transactions in other exchanges or transactions which are not conducted/recorded in the National Stock Exchange would not be covered by the peril or risk. These transactions were excluded and what was covered or the subject matter of the Policy was the transactions recorded and conducted in the National Stock Exchange as per the prescribed norms and procedure of the said Stock Exchange. Guidelines issued by SEBI cannot be regarded as a “norms and

procedure” of National Stock Exchange. The above reasoning will equally apply to a claim under section I.

25. If there is any doubt or ambiguity in a clause of the insurance contract, the *Rule of Verba Chartarum Fortius Contra Proferentem Accipiuntur* applies. The contract was drafted by the defendant and in case of ambiguity and doubt in any clause the said clause is to be interpreted to the advantage and benefit of the insured. SEBI guidelines and affect of failure to comply with the same are not mentioned in the contract of insurance. They cannot be incorporated and read into the said contract. Even there is a doubt as to whether or not “norms and procedure” includes SEBI guidelines benefit has to be given to the insured.
26. Failure to follow and take precautions as per SEBI Guidelines may amount to lapse or even negligence. But, as already stated above, the Policy in Section II covers negligent acts also. Section II of the policy covers negligent act, negligent error or omission. Negligence will include failure to take due care and caution as per SEBI guidelines. Any other interpretation would make the provisions relating to negligence and the liability of the defendant in case of negligence nugatory and meaningless.

27. In preliminary objection no.1 the defendant has referred to Section I of the Policy of insurance and stated that the plaintiff had failed to comply with the condition precedent mentioned in the said Section. As already stated above, Section I of the Policy is not applicable and subject matter of insurance in the present case is not the first party liability but third party liability which is covered by Section II of the Policy. However, Section I and Section II of the Policy are similarly worded in so far as they both refer to transactions conducted/recorded in the National Stock Exchange complying with laid down norms and procedures.
28. Law of Insurance makes a distinction between warranty clauses and conditions for payment of a claim. Warranty clauses are those stipulations which are the most fundamental term of the Policy and constitute the essential *promise* made to the insurer by the insured. Warranty in insurance contracts is opposite and invert of warranty as understood in contracts for sale of goods etc. Good faith, existence of subject matter of insurance, identification of subject matter in the Policy and insurable interest of the insured are normally regarded as implied warranty clauses. Insurance contract can also incorporate express warranty clauses to protect interest of the insurer. Warranty clause

can relate to a condition precedent to the contract of insurance, promissory conditions to be performed in future and conditions to be performed after the event/loss. In case of violation of condition precedent, subject to statutory provision to the contrary, (see section 45 of the Insurance Act, 1938), the contract of insurance is void abinito. Breach of a future promissory condition, in absence of any statutory provision, makes the contract of insurance void at the instance of the insurer from the date of the breach but not for the prior period. Defendant has not pleaded or alleged that breach of a warranty clause has made the contract void or voidable and was terminated. Plea and contention raised in the written statement is that the claim of the plaintiff was repudiated as not covered by the policy. The question of "subject matter" of the policy has been examined above with reference scope of Section I and II and it has been held that transactions conducted and recorded in the National stock exchange are covered. Repudiation of a claim is different and distinct from a policy being void/voidable on breach of a warranty clause. Repudiation of a claim does not make the policy void/voidable but the claim is denied. "Repudiation of the claim" is reiterated by the witness DW-1 Mr. J.N. Vats, Sr. Divisional Manager who in his affidavit by way of

evidence has stated that the letter of repudiation, Exhibit P-3 was written denying the claim for good and justified reasons (see statements made in paragraphs 9 and 10 of the affidavit).

29. I need not examine the question of warranty as this is not pleaded or alleged by the defendants in their evidence. The defendant has pleaded and alleged repudiation of the claim made by the plaintiff on the ground of non-compliance of the term of the Policy i.e. SEBI guidelines. However as held above compliance with SEBI guidelines is not a term of the insurance contract and therefore the claim cannot be repudiated on this ground.
30. Learned Counsel for the defendant had urged that the Registrar of M/s Jindal Vijayanagar Steel Ltd. had rejected the share certificates as signatures on the transfer forms did not tally and match specimen signatures and therefore non compliance with SEBI guidelines was relevant. The plaintiff disputes the said contention on merits also. The shares sold by Mr.Gunjan Jain and Mr.Vishnu Kumar to the plaintiff were returned as bad delivery with letters from the Registrar of M/s.Jindal Vijaynagar Steel Ltd., recording as under:-

“The shares lodged by you bear unauthorized endorsement pertaining to

call money payment. As per our records the subject shares are partly paid and the fully paid sticker affixed thereon is forged and fake. Please note any unauthorized entry on the share certificate invalids the share certificate and all persons involved are liable to be prosecuted.

In view of the above, the subject shares are rejected for transfer in your name and the original transfer deed along with the copy of the share certificate is enclosed to enable you to take appropriate action at your end through your broker.

Signature of the first/joint transferor in the transfer deeds) differs with the specimen signature recorded with us.

31. Details of share certificate rejected are :

<u>Letter folio</u>	<u>No.of shares</u>	<u>Certificate No.</u>	<u>Distinctive No.</u>
<u>No.</u>			
XXXX	XXXX	XXXX	XXXX

Balance shares if any will be processed and sent to you in due course sellers name and address is given below.”

32. The first part of the said letter states that the shares were partly paid and the fully paid sticker affixed thereon was forged and fake. Thus there is merit in the contention of the plaintiff that the shares were found to be forged and fake in view of the fully paid sticker affixed thereon, though the shares were to be partly paid and as call money had not been paid they had been forfeited. The Guidelines do not help or deal with forged and fabricated fully paid up stickers.

The Guidelines relate to identity of the seller/holder and prescribe care and caution which normally a broker should take to ensure that the seller is authorised holder of the said shares and competent to enter into the transaction. The letter of Registrar, quoted above, does state that the signature of the first/joint transferor in the transfer deed differs with the specimen signatures in their record. However, this defect is curable and can be rectified. The registrar had not stated that the share certificates were forged and it is also not the case of either party that the original/recorded holders of the shares have not signed the share transfer deeds and the shares have fallen in the hands of Mr. Gunjan Jain and Mr. Vishnu Kumar without they being transferred by the original/recorded owners. In this regard, I may also refer to the cross examination of DW-1, Mr. J.N. Vats who has stated as under :

“I do not know whether any of the owners of the shares have disputed the sale affected which is subject amount of the claim.

I do not know whether there has been no dispute regarding the genuineness of the share certificates or otherwise.”

33. Similarly, DW-2, Mr.D.K. Jain in his cross examination has stated :

“ I do not remember whether the owners of these shares have disputed the transfer of the shares by them.

Vol. The same could be contained in our survey report.

I do not remember whether or not the genuineness of the subject shares were questioned.

It is correct to suggest that the normal genuineness of the fully paid up sticker of share is ascertainable only by the share transfer agent or by the company registering the transfer.

Vol. Until there is an absolute un-genuine appearance on the face of the shares.”

34. DW-3, Mr.Shyamal Bhadra in his cross examination has stated :

“It is correct to suggest that there was no dispute with regard to the genuineness of the shares, the only dispute was with regard to fully paid up stickers.

x x x x

It is definite possibility that the shares may have gone through so many hands before they finally reached the Registrar/Transfer Agents of the company through one transfer or the other till such time registered the same.

x x x x

We are not aware of any dispute raised by the Registered owner of the shares with reference to the shares sold by them which are subject matter of this suit.”

35. Present case pertains to the period where transfers/sale and purchase of the shares was by way of physical delivery with

transfer forms and de-materialised shares was not in vogue. Registered owners of the shares used to sign blank transfer deeds along with the share certificates in original. The blank transfer deeds and certificates used to exchange hands physically in transactions through stock exchanges and in a given case after several such transactions the last/end purchaser would apply for effecting registration in the records. This was a matter of a common business practice accepted and undertaken before de-mat share accounts were introduced.

36. As compliance with SEBI guidelines was not a part of the Insurance Contract, Exh. P-1, the question of the causal connection between the cause of loss and non compliance of SEBI guidelines is not been examined. Counsel for the plaintiff had argued that failure to comply with SEBI Guidelines has not occasioned the loss/damage suffered by the plaintiff. The loss/damage suffered by the plaintiff was on account of forged and fabricated sticker affixed on the share certificates. The Guidelines would not have helped the plaintiff or any other broker in this regard. This argument and contention is not being decided as it does not arise in view of the finding that SEBI guidelines were not a part of the policy.

37. In view of the findings given above, issue nos. 2, 3 and 4 are decided in favour of the plaintiff and against the defendant. It is held that the loss/damage suffered by the plaintiff is covered by the insurance policy and the defendant is liable to pay and indemnify the plaintiff for the said loss.

ISSUE NOS. 5 AND 6

38. Plaintiff has claimed an amount of Rs.46,22,795.30 as loss/damage which was subject matter of Policy. Loss has been calculated on the prevailing market price when replacement shares were purchased to replace bad delivery shares. Plaintiff in his affidavit has stated that the shares were returned back in several lots as and when request was sent to the Registrar, M/s. Karvy Consultants Ltd. to record transfer of shares in the name of the purchasers. Details of losses is mentioned in the statement of accounts marked Exh. Nos. PW-1/14 to 1/17. In paragraph 16 of the affidavit Col. (retd) G.S. Gujral has stated that the total loss/damage suffered by the plaintiff for sale of the shares was Rs. 46,22,795.30. Break-up of this amount is given in paragraph 20 of the said affidavit, which is as under:-

“20. That the surveyors have assessed the loss for the shares which were received as ‘bad delivery’ up to February 21, 2001 (and purchased back from the

market for replacement upto February 28, 2001). The number of such shares was 3,79,700 in respect of Mr.Gunjan Jain and the consequent loss of Rs.22,90,706/- which is detailed in Ex-PW 1/16. Subsequently, 16,000 shares have been received as bad delivery in respect of Mr.Gunjan Jain and their replacement value is a sum of Rs.55,477.50 which is detailed in EX-PW 1/17. Similarly, the number of shares received as 'bad delivery' up to February 21, 2001 (and purchased back from the market for replacement upto February 28, 2001) mentioned in the survey report with respect to Mr. Vishnu Kumar was 3,57,500 shares and the consequent loss of Rs. 21,93,885/- which is detailed in EX-PW 1/14. The number of shares received as bad delivery in respect of Mr Vishnu Kumar after February 21, 2001 are 23,000 shares and their replacement value is a sum of Rs.82,726.80 which is detailed in EX-PW 1/15. It is mentioned that the survey report itself contemplates discovery of further bad deliveries even subsequent to the survey report, which till the date of the suit are detailed in EX-PW 1/15 and EX-PW 1/17."

39. PW-1, Col. (retd) G.S. Gujral has not been cross examined in respect of the specific amounts. It was only suggested that the total claim made in paragraph 16 of the affidavit is exaggerated. The defendant it appears have proceeded on the basis that till survey reports were submitted bad delivery amounting to Rs.22,92,590/- had been received in the case of Mr.Gunjan Jain and to the extent of Rs.21,68,885/- in the case of Mr.Vishnu Kumar. The defendant has not taken

into consideration the bad delivery received in the two cases after the date of the survey reports, Exh. – DW 1/2 & DW 1/1. The survey reports themselves state that the amount may go up in case further bad deliveries are received. Accordingly, these two issues are decided in favour of the plaintiff and against the defendant and it is held that the plaintiff has suffered a loss of Rs. 21,93,885/-,Rs.22,90,706/-, Rs.55,477.50/- and Rs. 82,726.80/- , total Rs. 46,22,795.30/- relating to subject matter of the Policy.

ISSUE NO.7

40. As per the defendant the indemnity limit under the Policy is Rs.25 lacs. The plaintiff however claims that this outer limit is in respect of one claim but the total policy limit is Rs.50 lacs and therefore the plaintiff is entitled to payment of the entire amount demanded by him as two separate claims have been made, both below Rs.25 lacs, in case of Mr.Gunjan Jain and Mr.Vishnu Kumar. The relevant provisions of the Policy are as under:-

“Stock Brokers Indemnity Insurance Policy

Schedule

ITEM 6 :	POLICY LIMITS:	Indemnity with one	Limit free
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	25,00,000/-	Reinstatement for NSE transaction only
ITEM 7 :	DEDUCTIBLES : 25,000/-	For every claim
ITEM 8 :	COLLECTION NO. 7993	DATE : 01/06/2000 AMOUNT : 20,000/-

(10) Reinstatement of sum Insured :-

The insurance cover will be maintained to the full extent of the respective policy limits, with one reinstatement without charge of any additional premium. However, the limit for fee reinstatement shall not exceed the indemnity limit selected or Rs.5 crores whichever is lesser.

The insured can also opt for additional cover equivalent to the indemnity limit selected at inception, once in a Policy period by paying Pro-rata additional premium.”

Clause 10

“10. Limit of liability

- (a) Payment of loss under this policy reduces the liability of the Company for any other losses covered by this policy.

The total liability of the Company for all losses shall not exceed, in the aggregate the limit of Indemnity stated in the Schedule.

The limit of Indemnity shall not be increased or reinstated by any salvage or

recovery made subsequent to any payment of loss by the Company and applied in accordance with general condition (3) of general conditions applicable to this policy. In the event that a loss of property is settled by the Company through the use of an Indemnity agreement, including where applicable a lost Instrument bond, such loss shall not, to the extent it remains unpaid by the Company, reduce the limit of Indemnity.

The exhaustion or reduction of the limit of Indemnity does not affect the Company obligation in connection with any Indemnity agreement issued prior to such exhaustion or reduction.

- (b) Deductible : The Company shall be liable only in excess of the deductible of the applicable Insuring Clause stated in item 7 of the Schedule.

The deductible shall apply to the ultimate net loss sustained by the Insured subsequent to the Retroactive Date.

Where a series of and/or several losses are attributable directly or indirectly to the same cause or source all such losses shall be added together and all such losses shall be treated as one claim and such claim shall be deemed to have been made at the point in time when the first of the losses has been discovered. For this purpose any claim or loss or series of claims or losses arising from collusion between two or more persons shall be deemed to be one loss."

"General Conditions Applicable to section 2 Only"

" (1) Limit if indemnity

- (a) The total liability (inclusive of claimant costs and the Insured's approved defence expenses and regardless of the total number or amount of third party claims made against the Insured) of the Company shall not exceed the sum stated in Item 6 of the Schedule, in the aggregate, for all third party claims made against the Insured during the policy period.
- (b) The Company may at any time pay to the Insured in connection with any third party claim or series of third party claims notified hereunder the amount of the limit of Indemnity as shown in the Schedule (after deduction of any sum or sums already paid by the Company whether as costs and expenses or as compensation) or any lesser amount for which such claim or claims can be settled and upon such payment being made the Company shall be under no further liability in connection therewith and shall (except with respect to any subrogation action) relinquish the conduct and control of such claim or claims.

(2) Deductible

Subject to the limit of Indemnity, the Company shall be liable only for that part of each and every third party claim during the policy period, including third party claimant costs and Insured's approved defence expenses, which exceeds the Deductible stated in Item 7 of the Schedule.

The deductible shall apply to each and every third party claim and shall be subject to no aggregate limitation. If a series of third party claims shall result from any single negligent act, negligent errors or negligent omissions) then, irrespective of the total number of claims, all such third party claims shall be considered to be a single third party claims for the purpose of the application of the Deductible."

41. A careful examination of the said clauses reveals that the Policy limit is Rs.25 lacs but with one free re-instatement for NSE

transaction only. The term “reinstatement” as per the plaintiff means that after full insurance cover of Rs.25 lacs has been paid, there will be one reinstatement without charging of any additional premium. This is debatable for reinstatement in insurance law means settlement of claim by salvage or replacement. In ***CIT versus Kasturi & Sons Ltd.***, reported in (1999) 3 SCC 346, the following observations were made :

“ *Halsbury’s Laws of England*, (4th Edn.) and several textbooks wherein *Brown case* has been cited without reference to any contrary decision. In *Halsbury’s Laws of England*, 4th Edn., Vol. 25, paras 634, 635 and 636 read as under:

“634. *Option as to reinstatement.*—By the form of policy in general use, the insurers reserve to themselves the option of reinstating the property instead of making payment in money. (*) This option is reserved for the insurers’ benefit, and it is for them to elect whether to reinstate; the assured is not entitled to require them to reinstate. (**) Nor may he prevent them from reinstating if they elect to do so. (***).....

635. *Exercise of option to reinstate.*—An election for or against reinstatement is final once it is made, and cannot afterwards be withdrawn. (*) No formal election is necessary; an election by conduct is sufficient, provided that the conduct is clear and unequivocal. The insurers will be taken to have elected against reinstatement and in favour of a payment in money, if the negotiations for a settlement have been conducted by the insurers throughout on the footing that the loss is to be made good by a payment in money (**), or if they have proceeded to arbitration for the purpose of ascertaining the amount to be paid under the policy. (***) On the other hand, they are not bound, in the absence of specific provision, to exercise the option immediately (****); they are

entitled before exercising it to investigate the loss and to ascertain what its amount is likely to be. Therefore a merely provisional assessment of the amount, even if made in conjunction with the assured, does not debar them from electing to reinstate.”

42. Even if the interpretation of the plaintiff is accepted, in view of clause 10 and ‘Limit of indemnity’ under the heading “General Conditions Applicable to Section 2 only” quoted above, the maximum amount payable would be Rs.25 lacs less Rs.25,000/- mentioned in item 7 as deductible. For the purpose of deciding whether one single claim or multiple claims have been made, series of several losses directly or indirectly to the same cause or source have to be added together and treated as one claim as per clause 10. A single claim cannot exceed Rs.25 lacs. The question therefore is whether the plaintiff has made one claim or two separate claims. There were two sellers, Mr.Gunjan Jain and Mr.Vishnu Kumar, but the shares belonged to only one company, i.e. M/s.Jindal Vijayanagar Steel Ltd. and the cause of the loss/damage was the same i.e. forged and fabricated stickers affixed on the share certificates. It also appears that both Mr.Gunjan Jain and Mr.Vishnu Kumar were in collusion with each other and had adopted the same *modus operandi*. Mr.Gunjan Jain had sold the shares on 2nd June, 2000 and Mr.Vishnu Kumar had sold shares between 7th June, 2000

and 19th June, 2000. In these circumstances and on reading of the terms and conditions of the Policy quoted above, it is clear that the claim made by the plaintiff is in respect of one claim and the said amount cannot exceed Rs.25 lacs. "Limit of liability" clause also states that the total liability of the insurance company on aggregate of all third party claims shall not exceed the amount stated in item 6 of the schedule. Therefore, the defendant will not be liable to pay more than Rs.25 lacs (less Rs.25,000/-) according to the Policy. The claim of the plaintiff is therefore restricted to Rs.24,75,000/-.

ISSUE NO. 8

43. Plaintiff has claimed interest @ 14% p.a. and has prayed for Rs.14,02,036.82 as pre suit interest. Interest has been calculated w.e.f. 12th August, 2000 when the plaintiff had intimated the claim to the defendant.
44. The date of intimation of claim is not the relevant date. The date on which payments were made by the plaintiff to third parties i.e. the National Stock Exchange will be the relevant date as the plaintiff went out of pocket on the said date. Plaintiff has paid various amounts on different dates to National Stock Exchange. These dates have not been specified in the affidavit by way of evidence of Col

(retd) G.S. Gujral, PW-1. However, the plaintiff has filed on record various letters being Exhibit nos. PW.1/5 to PW.1/17 intimating and informing the defendant/surveyors appointed by them about the loss and their replacement/reimbursement amount paid by the plaintiff. I have restricted the claim of the plaintiff to Rs.24,75,000/- only in view of the terms of the Policy. Keeping all these aspects in mind, including the time which the defendant should have normally taken to verify the claim, I feel the plaintiff is entitled to interest @ 12% p.a. w.e.f. 1st January, 2001. In this connection, I may note here that the plaintiff had written the first letter intimating their claim on 12th August, 2000 (Exhibit PW.1/5) and subsequent letters were written on 2nd September, 2000 (Exhibit PW.1/6), 11th September, 2000 (Exhibit PW.1/7). The rate of interest @ 12% p.a. has been fixed keeping in mind the interest prevailing from 2001 onwards and harassment/inconvenience caused.

ISSUE NO. 6

45. Plaintiff has claimed damages of Rs. 1 lac on account of pain and suffering. Claim for special damages has not been made out. Affidavit of PW-1 Col.(retd.) G.S. Gujral

does not elaborate and state any specific facts and give details to justify monetary compensation claim of Rs.1,00,000/- towards mental hardship and suffering. Plaintiff is being awarded pre-suit interest @ 12% per annum keeping in mind market rate of interest for failure of the defendant insurance company to make payment. Interest will be payable till payment is made. No separate amount is being awarded under this head.

RELIEF

46. Plaintiff is held entitled to decree of Rs. 24,75,000/- against the defendant under the insurance policy Exh.-P1. Plaintiff is entitled to pre suit interest w.e.f. 1st January, 2001, pendente-lite and future interest @ 12% p.a. till payment of Rs.24,75,000/- is made. Plaintiff will be entitled to costs.

Decree sheet will be prepared accordingly.

(SANJIV KHANNA)

JUDGE

JANUARY 23rd, 2009.

P