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

% *Judgment Reserved on : March 04, 2014*
Judgment Pronounced on: March 14, 2014

+ RFA(OS) 97/2013

KUSUM SAHNI PVT LTD

..... Appellant

Represented by: Mr.Sanjeev Anand, Advocate
with Mrs.Kajal Chandra,
Mr.Arush Khanna and
Ms.Prachi Gupta, Advocates

versus

NATIONAL INSURANCE CO LTD

..... Respondent

Represented by: Mr.Yogesh Malhotra, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. The present Regular First Appeal is filed under Section 96 of the Code of Civil Procedure read with Section 10 of the Delhi High Court Act, 1966 challenging judgment and decree dated May 28, 2012 passed by the learned Single Judge of this court. The plaint is filed stating that the appellant is carrying on business from various tin sheds located in the Industrial Complex of Okhla Industrial Estate, Phase-I, Delhi and is engaged in the business of hand block printing, screen printing, manufacture of fashion accessories, home furnishings and readymade garments. We are for the purpose of this appeal concerned with Shed No.203 and 204.

2. The appellant took out an insurance policy from the respondent against loss by fire etc. The insurance policy was issued by the respondent

on January 22, 1981 and May 29, 1981. Amendment of the policy as contained in the appellant's letters dated May 29, 1981 and June 10, 1981 were also carried out. It is stated that by virtue of the said insurance, the assets of the appellant's company as follows were insured:-

(1) *"On stock in trade, clothes, finished goods, dies, semi finished goods chemicals and like use for printing cloth lying in Shed No.220, 223, 192, 193, 217, 218, 203, 204, 153, 139 and A-2, Maharani Bagh, New Delhi.*

.... ₹30 lakhs

(2) *On stock of plant and machinery workshop equipment, office equipment air-conditioners, coolers and refrigeration equipment & electrical fittings, furniture, fixtures and fittings hand blocks, tables, in Shed No.220, 223, 192, 193, 217, 218, 203, 204, 153, 139, and A-2 Maharani Bagh, New Delhi.*

... ₹10 lakhs

Total ... ₹40 lakhs"

3. On the night of 15th/16th June 1981 at around 1.00 AM a fire took place in sheds No.203 and 204. The fire is stated to have destroyed not only the building but also the goods of the appellant's company including finished goods, fabrics, etc. The appellant claims to have suffered a loss of ₹18,00,000/- (Rupees eighteen lacs only). The respondent was informed on June 16, 1981. The respondent initially appointed M/s Mehta and Padamsey Pvt.Ltd. as surveyors to assess the damage and losses. Later on, the respondent re-appointed joint surveyors, namely, M/s V.N.Sarin Co.Pvt.Ltd. and M/s J.D.Gulshan & Co.

4. As there was stated to be delay by the respondent in settlement of the case of the appellant, the appellant filed a petition under Section 20 of the Arbitration Act, 1940 before this court being Suit No.853A/1982 in 1982 for

referring the appellant's claim for arbitration. It is stated that in the said proceedings initiated by the appellant, the respondent filed the survey report where the surveyors have not disputed that the fire did occur and have assessed the losses suffered by the appellant at between ₹5,92,829 (Rupees five lacs nine two thousand eight hundred twenty nine only) and ₹14,55,605/- (Rupees fourteen lacs fifty five thousand six hundred five only).

5. While the Arbitration Petition was pending, the appellant filed the present suit. It is claimed in the plaint that the said assessment in the surveyors report is incorrect as certain errors in accounting and calculations have been committed by the surveyors. It is urged that the respondent is actually liable to pay the sum of ₹18,00,000/- (Rupees eighteen lacs only) being the amount of losses suffered by the appellant in the fire. The appellant further claims a sum of ₹8,50,000/- (Rupees eight lacs fifty thousand only) by way of damages on account of business losses suffered by the appellant for non-payment of the insurance claim.

6. The respondent in their written statement took various objections. It is claimed that the fire was not accidental but manipulated, planned and the claim is bogus. It is further stated that the appellant failed to comply with the terms and conditions of the policy as the appellant did not produce either the books of accounts or the statement of its claim within the period allowed under the insurance policy. It is further stated that the suit is barred as the appellant has already filed a suit being Suit No.853A/1982 for reference of matter to arbitration and that the appellant cannot be permitted to continue two parallel proceedings. It is further urged that the suit is barred by time inasmuch as it was filed in 1984, twelve months after the date of repudiation.

7. The following issues were framed on March 22,1999:-

- “1. *Whether the suit has not been instituted and plaint has not been signed and verified by a duly authorized person? OPD*
2. *Whether there is any mis-joinder of necessary parties and, if so, its effect? OPD*
3. *Whether the suit is barred by limitation in view of clause-19(A) of the terms and conditions of policy of insurance? OPD*
4. *Whether the suit is maintainable in view of clause-18 of the terms and conditions of the policy of insurance? OPD*
5. *Whether in view of the orders passed this court in S.No.853A/1982 filed by the plaintiff, the present suit is not maintainable? OPD*
6. *Whether the plaintiff has not committed breach of terms and conditions of policy of insurance by not producing the books of accounts and records, in accordance with the terms of the policy of insurance? If so, its effect. OPD*
7. *Whether the plaintiff is entitled to recover an amount of ₹26,50,000/- from the defendants? OPP*
8. *Whether the plaintiff is also entitled to any interest on the aforesaid amount and, if so, for which period and at what rate? OPD*
9. *Relief.”*

8. For the purposes of this appeal we are concerned only with issues No.7 and 8 inasmuch as the issues No.1 to 6 were decided in favour of the appellant and there is no challenge to the same.

9. After framing of issues parties led evidence. The appellant has filed the evidence of Mr.Sanjiwan Sahni, its director, PW-1. The said director in his testimony has exhibited eight documents. One officer Mr.Kishore C.Surma from M/s.A.F.Ferguson & Co was also summoned by the plaintiff.

The respondent has filed the affidavit by way of evidence of three witnesses, namely, DW-1 Mr.A.K.Gupta, Manager (Legal) of the respondent Company, DW-2 Mr.Rajiv Gupta, Executive Director of M/s Mehta and Padamsey Surveyors Pvt.Ltd. and DW-3 Mr.J.D.Gulshan, Partner of J.D.Gulshan & Co. DW-2 has exhibited the survey report as DW-2/1.

10. We have heard learned counsel for the parties. Both sides have also filed written submissions.

11. As far as the issue No.7 is concerned the impugned order has accepted the assessment of the joint surveyors dated September 20, 1982 (Ex.PW-1/4) that the appellant suffered losses which are covered under the policy to the tune of ₹5,92,829/-(Rupees five lacs ninety two thousand eight hundred twenty nine only). The impugned order further holds that nothing has been produced by the appellant to substantiate its submission before the surveyors or before the court that they have suffered losses to the tune of ₹14,00,000/- to ₹15,00,000/-.

12. Learned counsel for the appellant while arguing issue No.7 has strenuously urged that the appellant is entitled to recover ₹15,00,000/- (Rupees fifteen lacs only) being losses suffered and that the impugned order to the extent it passed a decree for only ₹5,93,000/-(Rupees five lac ninety three thousand only) is erroneous.

13. It is firstly urged that at internal page 58 of the Survey Report (Ex.PW-1/4), the surveyors have noted the submissions of the appellant regarding the losses and have noted the value of stock lying in shed No.203 and 204 i.e. the affected sheds on the basis of the appellant's representation being ₹12,44,844/- (Rupees twelve lac forty four thousand eight hundred and forty four only), all of which was lost in the fire. Regarding loss to fixed assets including machinery fixtures, etc., the said report also notes the

representation of the appellant that the same is ₹2,10,761/- (Rupees two lacs ten thousand seven hundred sixty one only). Hence, it is urged that if the computation had been carried out by the surveyors as suggested by the appellant, the losses would have been correctly computed to the actual loss suffered by the appellant, namely, ₹14,55,605/- (Rupees fourteen lacs fifty five thousand six hundred five only). In the plaint a loss of Rs.18,00,000/- (Rupees eighteen lac only) is claimed. However, for the present proceedings the appellant has pressed a claim of Rs.14,55,605 (Rupees fourteen lac fifty five thousand six hundred and five only). It is next urged that on account of certain differences about the correct valuation of losses, the parties had agreed to refer the matter to M/s.A.F.Ferguson & Co. for assessment of losses suffered by the appellant. It is urged that the said Firm has submitted a report of the losses suffered by the appellant but the respondents have clandestinely and malafidely withheld the report and not produced it in court despite having made a statement in court that they will produce the report. Hence it is urged that the best evidence has been withheld by the respondent.

14. Learned counsel appearing for the respondent in contrast submitted that as far as the first submission is concerned, namely, the observation in the assessment report relied upon by the appellant, these were only submissions of the appellant which have been noted and do not in any way show that the surveyors have accepted the said assessment of losses. Hence, it is stated that the submission of the appellant in this regard has no merit. As far as the report of M/s.A.F.Ferguson & Co. is concerned, learned counsel has submitted that there is no such report in existence and no such assessment of losses was carried out by the said Firm and the submissions of the appellant to that extent are entirely misconceived.

15. At the outset, we may note that issue No.7 is only whether the plaintiff is entitled to recover an amount of ₹26,50,000/- (Rupees twenty six lac fifty thousand only) from the defendant. A perusal of the plaint would show that there is no cogent challenge made to the conclusion of the joint surveyor's assessment report. The only reference to the report in the plaint is at paragraph nine relevant portion of which reads as follows:-

“9. ... In the said report the surveyors have at no stage disputed the fact that an actual fire did occur and that the plaintiff suffered loss. The surveyors have assessed the loss suffered by the plaintiff at between ₹5,92,829/- and ₹14,55,605/-. The said assessment is however incorrect as certain errors both in accounting and in calculations have been committed by the surveyors.”

16. The evidence of the plaintiff, namely, affidavit by way of evidence of PW-1 Mr.Sanjiwan Sahni also repeats the same averment as in the plaint. Hence, the pleadings, do not challenge the report of the Surveyor. No evidence in this regard also has been led. No issue regarding the validity of the Surveyor Report has been framed.

17. In the above context, reference may be had to the judgment of a Division Bench of this High Court in LPA 775/2003, Grand Vasant Resident Welfare Association vs. DDA & Ors. pronounced on March 05,2014 where in paragraph 32 this Court held as follows:-

32. In the decision reported as 2012 (5) SCC 370 Maria Margarida Sequeria Fernandes vs Erasmo Jack de Sequeria it was held as under:-

“72. The Court will examine the pleadings for specificity as also the supporting material for sufficiency and then pass appropriate orders.

x x x

74. If the pleadings do not give sufficient details, they will

not raise an issue, and the Court can reject the claim or pass a decree on admission. On vague pleadings, no issue arises. Only when he so establishes, does the question of framing an issue arise. Framing of issues is an extremely important stage in a civil trial. Judges are expected to carefully examine the pleadings and documents before framing of issues in a given case.

x x x

78. The Court must ensure that pleadings of a case must contain sufficient particulars. Insistence on details reduces the ability to put forward a non-existent or false claim or defence.”

18. In view of the above legal position, the submissions of the appellant that the survey report (PW-1/4) gives an incorrect assessment is liable to be rejected. However, we have still examined the said submissions of the appellant on the validity of the Surveyor Report.

19. As far as the first submission of the appellant is concerned i.e. the noting of the figures for losses propounded by the appellant, it is clearly a mis-reading of the surveyors' report. Internal page 58 of the said report which is the portion relied upon by the appellant clearly notes at the top as follows:-

“On the basis of value of stock as worked out on the basis of format the insured finally preferred to adopt which has not been accepted by us on the grounds mentioned earlier in the report but included in the report, as desired by the company.

20. Similarly in internal page 63 the figures which are relied upon by the appellant are noted as follows:-

“As represented by the insured

<i>Description</i>	<i>Value at the time of loss (Rs.)</i>	<i>Value of salvage (Rs.)</i>	<i>Assessed loss (Rs.)</i>
	<i>II</i>	<i>III</i>	<i>IV</i>
<i>Stock</i>	<i>12,44,844.00</i>	<i>Nil</i>	<i>12,44,844 .00</i>
<i>Fixed and moveable assets which include machinery as well as furniture, fixtures, fittings etc.</i>	<i>2,10,761.00</i>	<i>Nil</i>	<i>2,10,761. 00</i>

21. The said report merely notes the contention of the appellant. It does not in any way accept the figures projected by the appellant. There is also no explanation by the appellant as to why the figures stated by it and which are noted by the surveyors are the correct figures and why the figures recommended by the surveyors are erroneous. No submission in this regard has been made. The plaint is also completely silent on this aspect. No cogent evidence has also been led to show why the submissions of the appellant about the loss are correct. There is nothing in the survey report which would support the contention of the appellant that it suffered a loss of ₹ 14,55,605/- (Rupees fourteen lack fifty five thousand six hundred and five only) in the fire as claimed. In view thereof, the said contention of the appellant has to be rejected.

22. As far as the report of M/s.A.F.Ferguson & Co. is concerned, this contention of the appellant is also misconceived. A perusal of the documents placed on record by PW-1 which relates to correspondence between the respondent and M/s.A.F.Ferguson & Co. would show that M/s.A.F.Ferguson & Co. was never appointed to assess the losses suffered by the appellant in

the fire. Ex.PW-1/8 is a letter dated December 14, 1989 written by the respondent to M/s.A.F.Ferguson & Co. requesting the said Firm to take steps to estimate the value of the closing stock as on the concerned date. Thereafter another letter dated January 11, 1990 has been written by the respondent reminding the said M/s.A.F.Ferguson & Co. to confirm their acceptance of the request of the respondent. Obviously only a request was made by the respondent to M/s.A.F.Ferguson & Co. There is nothing on record to show that the said M/s.A.F.Ferguson & Co. accepted the request of the respondent and prepared the valuation report.

Further the evidence of PW-1 Mr.Sanjiwan Sahni merely states that the said Firm M/s.A.F.Ferguson & Co. was appointed to estimate the value of the closing stock and that they submitted their report. There is no detail of any interaction that may have taken place between the appellant and the said M/s.A.F.Ferguson & Co. There is no mention about any remuneration paid to the said Firm. It is obvious that if the said M/s.A.F.Ferguson & Co. had carried out a survey or assessment of loss, they would have interacted with the officials of the appellant, surveyed the site and inspected the books of accounts of the appellant. The appellant would have also been asked to pay the fee of the said Firm. No such evidence has been placed on record.

Further the appellant did summon the concerned officer from the said Firm M/s.A.F.Ferguson & Co. The said officer Mr.Kishore C.Surma appeared before the Local Commissioner. However, in his evidence he states that the summoned record is beyond 20 years old and has been destroyed.

Clearly there is nothing on record to show that the said M/s.A.F.Ferguson & Co. carried out the survey assessment and filed its report.

23. The submissions of the appellant are misconceived as there is no report prepared by the said M/s.A.F.Ferguson & Co. The respondent cannot obviously produce the same.

24. The appellant has hence failed to prove or show any infirmity in the impugned order on the findings recorded on issue No.7. We uphold the said findings in the impugned order.

25. We will now take up issue No.8 regarding interest. The plaintiff claims interest from the date of filing of the suit @ 21% per annum. The impugned order only notes that keeping in view the pleas of the appellant regarding interest and based on the discussions on the evidence of the parties on record and having regard to the conduct of the appellant, the appellant is not entitled to any interest during pendency of the suit.

26. Learned counsel appearing for the respondent has urged that the impugned order has rightly declined to grant interest to the appellant on account of the huge delay on the part of the appellant. It is urged that the suit was filed in December 1983 and the respondent filed his written statement on November 09, 1984. However, replication was filed by the appellant on April 15, 1998. Issues were finally framed on March 22, 1999. After a gap of five years, on August 16, 2004 the appellant filed its affidavit by way of evidence and filed some copies of documents inasmuch as no documents have been filed earlier. The evidence of the appellant continued till 2009. Hence, it is urged that denial of interest was a valid exercise of discretion and there are no grounds to interfere with the same.

27. Learned counsel for the appellant, on the other hand, has stated that there is no delay in prosecution of the suit by the appellant as the appellant had previously filed a petition under section 20 of the Arbitration Act, 1940 for reference of disputes to arbitration and both the proceedings could not

have proceeded together. Hence, on January 08, 1987 the present suit was adjourned *sine die*. The petition was revived on December 01, 1995. Hence it is urged that the appellant cannot be blamed for delay. It is further urged that the Surveyor has accepted a loss of ₹5,93,000/- (Rupees five lac ninety three thousand only) to the goods/assets of the appellant. The respondent at no stage offered to pay the said amount which ought to have been offered to the appellant in or around 1982 by the respondents. It is hence urged that there are no ground available to deny *pendente lite* interest to the appellant on the sum decreed by the impugned order. Reliance is placed on section 34 of the Code of Civil Procedure. Reliance is also placed on the judgment of the Supreme Court reported as AIR 1992, SC 732 Secretary, Irrigation Department, Government of Orissa vs. G.C.Roy, where the Supreme Court while interpreting Section 34 of CPC held that a person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation. Reliance is also placed on judgment of the Hon'ble Supreme Court reported as (2009) 5 SCC 599 Vikram Greentech India Limited vs. New India Assurance Company Ltd. where the Hon'ble Court held that an insurance contract is a species of commercial transactions.

28. In our view, a perusal of the impugned order would show that the said order does not give any reasons as to why *pendente lite* interest has not been granted to the appellant. Some of the relevant facts for this purpose may be noted. Firstly, the suit was adjourned *sine die* on January 08, 1987 and revived on December 01, 1995. A perusal of order dated January 08, 1987 would show that the suit was adjourned *sine die* on the request of counsel for the plaintiff to await disposal of the petition under section 20 of the Arbitration Act and the said request was not opposed by the respondent. Secondly the Surveyor gave their report on 20th September, 1982 (Ex.PW-

1/4) accepting that a fire took place and the appellant is entitled to ₹5,92,829/-(Rupees five lacs ninety two thousand eight hundred twenty nine only) for the loss suffered in accordance with the Insurance Policy. There is no cogent repudiation of this report by the respondent. There is no plausible explanation as to why the payment as suggested by the surveyor, was not tendered to the appellant. The only defence taken in the written statement and the evidence filed is that the defendant got the matter investigated through an independent investigator who have given documentary evidence to show that the fire was manipulated. No cogent evidence to support these bald averments is filed. There is hence merit in the said contention of the learned counsel for the appellant.

29. Section 34(1) of the CPC reads as follows:-

“34 Interest-(1)Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, [with further interest at such rate not exceeding, six per cent, per annum as the Court deems reasonable on such principal sum], from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit:

Provided that where the liability in relation to the sum so adjudged had arisen out of a commercial transaction, the rate of such further interest may exceed six per cent per annum, but shall not exceed the contractual rate of interest or where there is no contractual rate, the rate at which moneys are lent or advanced by nationalised banks in relation to commercial transactions.”

30. Hon’ble Supreme Court in the case of Irrigation Department’s case (supra) while interpreting section 34 CPC noted as follows:-

43....

“On a conspectus of aforementioned decisions, the following principles emerge:

- (i) *A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of S.34 C.P.C. and there is no reason or principle to hold otherwise in the case of arbitrator.”*

31. Reference may also be had to the judgment of Constitution Bench in the case of AIR 2001 SC 3095 Central Bank of India v. Ravindra & Ors. In para 55 (8), the Court held as follows:

“(8) Award of interest pendente lite and post-decree is discretionary with the Court as it is essentially governed by Section 34 of the CPC de hors the contract between the parties. In a given case if the Court finds that in the principal sum adjudged on the date of the suit the component of interest is disproportionate with the component of the principal sum actually advanced the Court may exercise its discretion in awarding interest pendente lite and post-decree interest at a lower rate or may even decline awarding such interest. The discretion shall be exercised fairly, judiciously and for reasons and not in an arbitrary or fanciful manner.”

32. In 2009 (159) DLT 60 M/s Sharma Enterprises vs. Hotel Leelaventure Ltd., a Single Judge of this court in para 46 held as follows:-

“46. This cannot be disputed that under Section 34 of the Code of Civil Procedure the courts have discretion both in the matter of the grant of interest and rate of interest. The power to grant pendente lite and future interest is not dependent upon a specific claim being made by the plaintiff. Ordinarily, the interest pendente lite is granted under Section 34 of the Code of Civil Procedure unless there are cogent reasons for depriving the

plaintiff of interest during trial.”

33. In view of the above legal position, in our view the appellant would be entitled to *pendente lite* interest.

34. Certain facts in this regard are however noteworthy. The appellant filed the present Suit and got the same adjourned *sine die* on January 08, 1987 to await disposal of the petition under section 20 of the Arbitration Act (Suit No.853A/82). The appellant thereafter on August 01, 1990 withdrew the petition under section 20 of the Arbitration Act stating that a regular suit has been filed and hence the appellant would like to withdraw the arbitration petition. The said suit No.853A/82 was accordingly dismissed as withdrawn. Thereafter the appellant filed IA No.8476/1995 on August 25, 1995 for revival of the present Suit which application was allowed on December 01, 1995. Hence, the appellant has filed arbitration petition in June 1981. Thereafter, in 1984, the present suit has been filed. On 8.1.1987, the present suit is got adjourned *sine die* on account of pendency of the arbitration petition. In August, 1990 the arbitration petition was withdrawn stating that the regular suit has been filed. Thereafter, in 1995, the application is filed for revival of the present suit. Clearly after filing of the suit in 1984, the matter kept lingering needless by till 1995 for acts of the appellant.

35. Hence, there is no equity in favour of the appellant for claiming interest from the period of date of filing of the suit upto August 25, 1995 when IA No.8476/1995 was filed for revival of the present Suit.

36. In view of the above facts and legal position we modify the impugned order regarding *pendente lite* interest. We direct that the appellant shall be entitled to simple interest @ 9% per annum from the date of filing of IA No.8476/1995 i.e. August 25, 1995 till the date of decree on the amount

decreed. Directions in the impugned order pertaining to the interest after the decree shall remain unchanged.

37. With the aforesaid modification the present Appeal is accordingly disposed of.

**JAYANT NATH
(JUDGE)**

**PRADEEP NANDRAJOG
(JUDGE)**

**MARCH 14, 2014
rb/n**