

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

+ **CS (OS) No. 191/2003**

% **Judgment reserved on: 2nd May, 2018**
Judgment pronounced on: 8th May, 2018

CENTRAL WAREHOUSING CORPORATION ... Plaintiff
Through: Mr. Manoj K. Srivastava,
Advocate.

versus

ORIENTAL INSURANCE COMPANY LTD. & ANR. ... Defendants
Through: Mr. Vishnu Mehra, Advocate.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J

1. Plaintiff/Central Warehousing Corporation has filed this suit for recovery of Rs.5,36,11,018/- from the defendant M/s Oriental Insurance Company Limited. Though there are two defendants, they are actually the same entity Oriental Insurance Company Limited with separate addresses, and therefore reference in this judgment will be to the defendants as the defendant/insurance company. Both the parties to the suit are Public Sector Undertakings. The principal amount of the

claim is a sum of Rs.2,67,38,658/-. Balance amount of the suit claim is towards interest.

2. The facts of the case are that plaintiff pleads that it had been storing paddy stocks at Dhuri open Warehousing facility of the plaintiff corporation situated at Punjab. Paddy stocks which were stored by the plaintiff belonged to Food Corporation of India (FCI). FCI had to lift the stocks before 31.5.1995, and since FCI could not do so, and because of the *factum* of ensuing monsoon and slow pace of liquidation of the stocks by FCI, the officers of plaintiff at Dhuri Warehouse suggested an insurance to be obtained for the stocks lying in the open at Dhuri Warehouse. Insurance was to be obtained against flood and fire risk. On FCI being informed, FCI agreed to insure its stocks and reimburse the actual insurance premium to the plaintiff. The plaintiff on 28.7.1995 accordingly obtained an insurance policy from the defendant/insurance company at about 5:30 P.M. The sum insured was Rs. 34 crores and the plaintiff paid a premium of Rs.50,19,420/-. Insurance policy covered the period from 28.7.1995 to 27.7.1996.

3. On 2.8.1995, the stocks at Dhuri Warehouse were affected by flood/flooding and the plaintiff therefore reported this fact to the defendant/insurance company. As a result of the flooding on 2.8.1995, 7921 quintals of paddy stocks were damaged with the loss being calculated at Rs.24,99,157/-. Defendant/insurance company appointed surveyors being M/s Mehta & Padamsey Surveyors Pvt. Ltd. and M/s A.K. Gupta & Associates.

4. Again on 26.8.1995 there was another flooding resulting in a further loss of 20621 quintals of paddy stocks of the value of Rs.65,06,139/-.

5. On 5.9.1995 a third incident of flooding took place causing loss of 52114 quintals of paddy stocks of the value of Rs.1,64,42,505/-.

6. An incident of fire took place on 9.5.1996 resulting in destruction of paddy stocks of 3104.63 quintals of the amount of Rs.12,90,857/-.

7. Plaintiff submitted to the defendant/insurance company a total claim of Rs.2.67 crores on account of the aforesaid losses caused

due to flooding and fire on 2.8.1995, 26.8.1995, 5.9.1995 and 9.5.1996. In spite of plaintiff writing letters during the years 1997 till 2001, yet the defendant/insurance company did not make payment of the claim amount. Defendant/insurance company refused to release the claim as the defendant/insurance company contended, and it was so written to the plaintiff on 21.1.2002, that plaintiff was guilty of concealment of facts because the flooding of the said area had taken place prior to obtaining of the insurance cover on 28.7.1995 resulting in non-disclosure of multi particulars and the claim hence stood repudiated. The subject suit has been filed claiming the suit amount from the defendant/insurance company as the loss was covered under the insurance policy.

8. Defendant/insurance company contested the suit and denied the claim of the plaintiff. It was pleaded that plaintiff was guilty of non-disclosure of facts and suppression of material particulars resulting in the claim of loss being repudiated. It was pleaded that plaintiff was guilty of non-disclosure of facts that flooding of the area had taken place prior to obtaining of the insurance cover on 28.7.1995. It was also pleaded in the written statement that

stocks were lying in Dhuri since October, 1994 but insurance cover was taken for the first time on 28.7.1995. It was further pleaded in the written statement that as per the rainfall data maintained by the concerned authorities it was shown that there was very heavy rainfall prior to the date of taking of the insurance policy, and this data was also maintained in the site register of the plaintiff at Dhuri, and such facts showed that the stocks were already flooded due to heavy rainfall which had lashed Dhuri on 1.7.1995 and hence plaintiff's claim has been validly repudiated.

9. The following issues have been framed in this suit:-

- “1. Whether the plaint has been signed and verified and the suit instituted by a duly authorised person? OPP
2. Whether this Court does not have the territorial jurisdiction to entertain and adjudicate upon the subject matter of the suit? OPD
3. Whether heavy rains had been lashing Dhuri and its adjoining areas from 26.7.1995 onwards and flooded the affected the godowns of the plaintiff? Its effect? OPD
4. Whether flooding of area took place prior to obtaining insurance policy? OPD
5. Whether there has been any deliberate non-disclosure of material non-particulars by the plaintiff at the time of obtaining insurance? OPD
6. If issue Nos. 3 to 5 are decided in favour of the plaintiff, whether the plaintiff is entitled to any amount? If so, to what amount? OPP
7. Whether the plaintiff is entitled to any interest? If so, at what rate, on what amount and for what period? OPD
8. Relief.”

ISSUE Nos. 1 & 2

10. I may note that issue nos. 1 and 2 have not been pressed because no arguments have been addressed on these issues before this Court and accordingly it is held that the suit is duly signed and filed by the authorized persons of the plaintiff especially because of the ratio of the judgment of the Supreme Court in the case of *United Bank of India Vs. Naresh Kumar and Others (1996) 6 SCC 660*. Also, this Court has territorial jurisdiction to try the suit since it is the admitted position that the insurance policy was issued by the defendant/insurance company at Delhi.

ISSUE Nos. 3 to 5.

11. Issue nos. 3 to 5 are dealt with together for decision as they are connected issues as to whether plaintiff is entitled to any amount or that the defendant/insurance company is entitled to repudiate the claim under the policy on account of plaintiff allegedly concealing material facts that the flooding had already taken place prior to issuance of the subject insurance policy.

12.(i) I may at this stage note that on behalf of the plaintiff evidence was led by filing the affidavit by way of evidence of one Sh. Deepak Ramchandani, Senior Assistant Manager of the plaintiff. Sh.

Deepak Ramchandani thereafter appeared for cross-examination and he was also partly cross-examined on 5.7.2011, however thereafter for one reason or the other evidence could not be recorded and PW-1 Sh. Deepak Ramchandani retired in the meanwhile. This witness therefore refused to appear for cross-examination and the plaintiff did not summon him for his remaining cross-examination. Therefore it is seen that there is no evidence which is led on behalf of the plaintiff because evidence of a witness whose cross-examination is not completed on account of non-appearance of such witness, cannot be looked into.

(ii) Defendant/insurance company has led evidence of its witness Sh. C.M. Kotnala. Sh. C.M. Kotnala had deposed on the same lines as per the pleas of the defendant/insurance company in its written statement. Sh. C.M. Kotnala has exhibited the subject policy as Ex.OPW1/1. The Joint Final Survey Report dated 8.5.1999 has been proved and exhibited as Ex.OPW2/1.

13. Though there is no evidence led by the plaintiff however on account of admitted facts and documents this case can be decided. That an insurance policy was issued is not disputed and the insurance

policy is Ex.OPW1/1. The only issue to be examined is whether defendant/insurance company has led evidence to show that flooding of the stocks had taken place prior to obtaining of the insurance policy at 5:30 P.M. on 28.7.1995. Once there is an insurance policy and loss took place during the currency of the insurance policy, the insurance company is liable unless the insurance company is able to satisfy this Court in terms of the evidence led that the insurable event of flooding took place not during the currency of the policy but before, and that on account of the stocks being damaged due to flooding prior to the commencement of the insurance policy hence the insurance policy is rightly repudiated by the defendant/insurance company including pleading concealment of facts by the plaintiff of the stocks being already damaged by flooding prior to commencement of the policy.

14. The relevant document in this regard is the Joint Survey Report of M/s Mehta & Padamsey Surveyors Pvt. Ltd. and M/s A.K. Gupta & Associates dated 8.5.1999. This report is Ex.OPW2/1. The relevant paras of this report are as under:-

“IV. OCCURRENCE

1. Loss dated 2.8.1995

It was reported by the Insured that there was heavy down-pour in and around Bhasaur from 5:30 P.M. onwards on 2.8.95. The heavy

rains caused accumulation of water in the low lying areas around the open plinths, where stocks of paddy in bags were stored. The heavy down-pour continued for about 8-10 hours and thereafter the intensity of rain reduced. There was also heavy rain on subsequent days, till the date of our first visit on 5.8.95. The extensive rains and accumulation of water resulted in part or complete submersion of the lowermost layers of a large number of stacks in the open. In some of the stacks, the level of water had touched the 2nd & 3rd layers also. The accumulated water was slowly getting absorbed in the soil. The Insured were also trying to pump out the accumulated water but it was a very difficult task as the area involved was very large.

During the course of our visit, we noticed that occasional rains were continuing. The plinths were found surrounded with sheet of water and bottom layers of a large number of stacks had come in direct contact with water. The lowermost layers of the stacks were already drenched and germination of the grain had started. Some of the stocks of Paddy was turning black. The Insured had already started casual salvaging operations in a few stacks but the progress was hindered due to frequent rains. We advised the insured to carry out the salvaging operations expeditiously.

We have examined the damage to stocks of Paddy on 5.8.95 jointly with the Senior Officials of the Insured. Based on the preliminary verifications, it was agreed that the lowermost layers of a large number of stacks had been affected. In some of the stacks, water had come in contact with upper two layers also, but in most of the stacks, only one layer from below was directly affected. Based on the above exercise, the quantity of bags affected initially worked out to roughly 31000 bags (2008 M.T.)

2. Losses dated 26.8.95 & 5.9.95

It was reported by the Insured that due to heavy rains, the same stocks were again affected on 26.8.95 and on 5.9.95. They informed us that the damage caused on 5.9.95 was more extensive because of heavier rains which resulted in 2nd and 3rd layers from bottom of several stocks getting inundated.

V. CAUSE

It was apparent that the damage to the stocks had taken place due to the flooding of the open compound caused by rains. As per the rainfall data provided by the concerned local authorities at Dhuri and sent to us by the Insured; the rainfall on the relevant dates as recorded at Dhuri is as under. It may be noted that the rainfall data shown as recorded on a particular date (normally, at about 8.00 A.M.) relates to the previous 24 hours. That means, recording of 28.7.95 would represent rainfall from 8:00 A.M. of 27.7.95 to 8.00 A.M. of 28.7.1995:

Recording Date	Rainfall Data	Remarks
<u>1.7.1995</u>	<u>Dhuri</u> <u>23 mm</u>	First flood loss claimed
<u>16.7.1995</u>	<u>19 mm</u>	
<u>27.7.1995</u>	<u>5 mm</u>	
<u>28.7.1995</u>	<u>67 mm</u>	
<u>2.8.1995</u> ----	<u>4 mm</u> -----	
<u>3.8.1995</u>	<u>58 mm</u>	
4.8.1995	14 mm	
5.8.1995	22 mm	
6.8.1995	10 mm	
7.8.1995	3 mm	
8.8.1995	2 mm	
9.8.1995	11 mm	
10.8.1995	2 mm	
11.8.1995	3 mm	
17.8.1995	Not legible	
20.8.1995	Not legible	
22.8.1995	1 mm	Second flood loss claimed
27.8.1995 ---	5 mm -----	
28.8.1995	13 mm	
29.8.1995	19 mm	
30.8.1995	60 mm	
31.8.1995	7 mm	
3.9.1995	40 mm	
4.9.1995	121 mm	
5.9.1995 ----	109 mm -----	Third flood loss claimed

The Insured's Dhuri warehouse also records the rainfall occurring at the site in a Register, which we have examined. The remarks made on this register are as follows for those dates when rainfall had occurred from 11.7.95 onwards, and relevant to this claim:

Date	Remarks in the Register
15.7.95	"Cloudy – Heavy Rain from 11.00 A.M. to 12.00 P.M."
16.7.95	"Cloudy – Rains"
<u>26.7.95</u>	<u>"Cloudy – Heavy rain w.e.f. 6.00 P.M. & continue"</u>
<u>27.7.95</u>	<u>"Heavy rain followed by wind storm w.e.f. early morning to 3.30 P.M."</u>
<u>28.7.95</u>	<u>- do -</u>
<u>1.8.95</u>	<u>"Cloudy–Slightly & heavy rain 4.00 P.M. to 4.45 P.M.""</u>
<u>2.8.95</u>	<u>"Cloudy–All plinth flooded due to very heavy rain w.e.f. 5.00 P.M. to 8.20 P.M. & continue."</u>
3.8.95	"Cloudy–Rain started since morning to 2.00 P.M."
25.8.95	"Cloudy– Rains w.e.f. 1.30 to 3.00 P.M."
26.8.95	"Cloudy–Torrential rain from 8.30 A.M. to 11.30 A.M."

	& drizzling throughout the day. All plinths flooded by rains water”
2.9.95	“Cloudy– Torrential rain from 8.30 P.M. & continue all plinths flooded”
3.9.95	“Cloudy–Torrential rain throughout the day & night all plinths flooded.”
4.9.95	“Cloudy–Torrential rain continued upto 12.30 P.M. & dizzling continues – Plinths flooded.”
5.9.95	No remarks recorded.

VI OUR OBSERVATIONS

A) Loss claimed for 2.8.1995:

As per the rainfall data at Dhuri, the rainfall recorded on 28.7.95 was 67 mm. This is for the period from 8.00 A.M. on 27.7.95 to 8.00 A.M. of 28.7.1995. As per Insured’s own records, there were heavy rains on 26.7.1995, 27.7.1995 & 28.7.1995. The Policy has been issued w.e.f. 28.7.95, and time noted on the Policy by hand is 5.30 P.M. On 27.7.95, the Insured have recorded in their register “Heavy rains followed by wind storm w.e.f. early morning to 3.30 P.M.” On 26.7.95 also they have recorded heavy rains w.e.f. 6.00 P.M. Coupled with rainfall data recorded at Dhuri on 28.7.95 (8.00 A.M. on 27.7.95 to 8.00 A.M. on 28.7.95), it is apparent that the open compound must have already got flooded, when the insurance was taken effective from 5.30 P.M. on 28.7.95.

B) Loss claimed for 26.8.1995

There is no rainfall data available for Dhuri for 26.8.95, however, the Insured’s records show torrential rains from 8.30 P.M. to 11.30 P.M. on 26.8.95.

C) Loss claimed for 5.9.1995

The rainfall data recorded at Dhuri for 3.9.95, 4.9.95 & 5.9.95 is 40 mm, 121 mm & 109 mm. This is also corroborated by Insured’s site records for 3.9.95 & 4.9.95.

From the above, it can be reasonably concluded that the Insurance cover was obtained after some flooding had already taken place before 5.30 P.M. on 28.7.95. The Insurers may verify from the records of their concerned office, the circumstances under which, the cover was granted w.e.f. 28.7.95 at 5.30 P.M., when according to the Insured themselves, heavy rains had taken place on 26.7.95, 27.7.95 & 28.7.95. If the Insured had sought cover against flood risk knowingly, it will amount to concealment of a material fact, thereby making the policy voidable. However, if the Insurers consider the policy as valid, then we are of the opinion that, at least the loss due to the first claim of 2.8.95 should be disallowed. Fortunately, we have been able to quantify this loss during our first visit on 5.8.95, as 31000 bags (please see page 6 of our Preliminary Report), which was worked out in agreement with the Insured.

They also confirmed this is the statement of Damage submitted by them vide their letter No. CWC/CH-IV/Flood/Dhuri/8/95/6902 dated 19.4.96, in which they have quantified the loss on 2.8.95 as 30996 bags, which practically tallies with the quantities mentioned in the Preliminary Report dated 7.8.95. We have therefore not considered these 30996 bags in our computation of loss, worked out without prejudice to the liability of the Insurers.

Regarding the loss claimed for 26.08.1995 and 5.9.95 are concerned, it is evident from the records that heavy rains had indeed taken place and could have caused additional losses beyond the bottom layers already affected earlier. Unfortunately, no separate quantification of this additional loss could be possible because of no timely intimation to us.

After all the sound bags from the top layers of all the stacks had been delivered/disposed off, the Insured, in their claim bill received by us in June, 97 has claimed total 124507 bags (80657.10 qtls.) as having been affected by the floods; out of which they have disposed off 54502.72 qtls. We examined the Insured's relevant records and found that after the sound bags from the top layers had been removed/delivered, there were 124507 bags, (80657.10) qtls.) as having been affected by the floods; out of which they have disposed off 54502.72 qtls. We examined the Insured's relevant records and found that after the sound bags from the top layers had been removed/delivered, there were 124507 bags, (80657.10 qtls) as damaged by said floodings. Out of this, they got only 54502.75 Qtls. As salvage; which they disposed off for Rs.6978273/-. This means, they could not recover 26154.35 Qtls. (80657.10-54502.75) by weight, which appears to have become total loss due to decay of paddy grain as a result of prolonged storage and flood water. This loss on total quantity of 124507 bags (80657.10 Qtls.) has apparently arisen, due to three main reasons:

- a) By the floods on three different dates.
- b) Spillage/wastage during multiple handlings, and some quantity washed away.
- c) Quality degradation due to long storage from around October, 1994, till the salvage in the bottom layers was retrieved after about 2 years.

VII. INSURED'S CLAIM

The Insured had first claimed total 315614 bags as having been damaged by floods dated 2.8.1995, 26.8.1995 & 5.9.1995 vide their letter No. CWC/CH-IV (Flood) Dhuri/8/95/6902 dated 19.4.1996, as follows:

Date of Flood	No. of bags claimed as damaged
2.8.1995	30996 bags
26.8.1995	80695 bags

5.9.1995	203923 bags
Total	<u>315614 bags</u>

Thereafter, the Insured finally submitted their claim bill aggregating to Rs.2,55,47,801/- on 124507 bags having been damaged by floods dated 2.8.1995, 26.8.1995 & 5.9.1995 (without giving the quantities of bags damaged on each date). A photocopy of the Claim Form dated 'Nil' (forwarded to us by the Insurers vide letter dated 10.6.97), giving the brief details of their claim for losses aggregating to Rs.2,55,47,801/- is enclosed. As per the above Claim Form, the Insured had worked out their claim for losses at Rs.2,55,47,801/- as under:

Sl. No.	Quantity & Commodity	Rate per Qtl. Rs.	Value Rs.
01	124507 bags of paddy weighing 80657 qtl.	360.00	2,90,36,556
02	124507 gunnies	15.00	18,67,605
03	Cost of 124507 gunnies used for refilling	10.25	12,76,197
04	Salvaging Expenses	--	3,12,761
05	Advertisement cost		<u>32,955</u>
			3,25,26,074

Less: Salvage Realisation

i)	3969.05 qtls.,	@ Rs. 220 per qtl.	Rs. 8,73,191
ii)	9386.30 qtls.	@ Rs. 207.90 per qtl.	Rs.19,51,412
iii)	8119.90 qtls.	@ Rs. 101.81 per qtl.	Rs.8,26,687
iv)	10000.05 qtls.	@ Rs. 101.50 per qtl.	Rs.10,15,005
v)	12918.10 qtls.	@ Rs. 100.50 per qtl.	Rs.12,98,269
vi)	6410.30 qtls.	@ Rs. 100.31 per qtl.	Rs.6,43,017
vii)	<u>3699.15 qtls.</u>	@ Rs. 100.21 per qtl.	<u>Rs.3,70,692</u>

54502.75 qtls.

69,78,273

2,55,47,801

Note:

- 1) It will be observed from the above that the insured had claimed Rs. 18,67,605/- towards the value of 124507 gunny bags (@ Rs.15 each) in which the paddy was originally packed. The rate of Rs.360/- per qtl., was the prevailing market rate for this type of paddy; inclusive of the value of bags in which the paddy is packed. this is the normal commercial practice, that is, the market rate includes the cost of the bag. Hence, there can be no additional claim for the bags. As state earlier, there have been no declarations under this Policy declaring a separate value for the gunny bags. We

have therefore treated the Policy as a normal one; wherein the market value is the basis of Indemnity. In view of this, we have not considered Insured's separate claim for the value of the gunny bags.

The Insured have claimed a sum of Rs.12,76,197/- towards the cost of 124507 gunnies used for refilling the affected stocks sold by them as salvage. It may be noted that the Insured had actually disposed off total 54502.75 quintals which could be retrieved as salvage (out of total 80657.10 Qtls. Contained in 124507 bags). Hence, this salvage of 54502.75 qtls. could have consumed total 84135 bags (64.78 Kg. per bag), and not 124507 gunnies for refilling the salvaged quantity. In view of this, we have considered Rs. 8,62,384/- (84135 bags x Rs.10.25 per bag) as cost of refilling the salvageable quantity of stocks, and not Rs.12,76,197 (124507 bags x Rs.10.25 per bag). Thus, the total salvaging expenses would work out to Rs. 12,08,100/- (Rs.8,62,384 + Rs.3,12,761 + Rs. 32,955), and the same has been taken into account while working out the assessment of loss.

3. Further, during the course of selling the salvage through tenders, two of the buyers (tenders) submitted their tenders to the Insured with earnest money deposit of Rs. 50,000/- each. These tenders were accepted by the Insured, but the concerned tenderers did not turn up to lift/remove the salvages sold to them. Hence, the earnest money of total Rs.1,00,000/- deposited along with these two tenders was forfeited by the Insured. Thus the total salvage realisation would work out to Rs.70,78,273/- (Rs.69,78,273 + Rs.1,00,000), and not Rs.69,78,273/- as stated by the Insured in the Claim Form.” (emphasis added)

15. A reading of the aforesaid paras of the survey report of the defendant/insurance company shows that on 1.7.1995 rainfall of 23 mm was recorded, on 16.7.1995 rainfall of 19 mm was recorded. These two days of 1.7.1995 and 16.7.1995 are well prior to taking of the policy on 28.7.1995 and it cannot be held that rains on 1.7.1995 and 16.7.1995 caused flooding on 2.8.1995 i.e 17 days later especially as storage was not in a building or its basement but on open grounds.

On 28.7.1995 rainfall of 67 mm was recorded. It is noted that the quantification of the rainfall *qua* the date will be of 24 hours prior to the specified day. On the basis of these aforesaid figures of rainfall the defendant/insurance company on account of the Survey Report contends that flooding had already taken place in the open compound at Dhuri and consequently plaintiff is not entitled to the suit claim on account of having concealed facts that flooding had already taken place. The issue is whether the surveyors of the defendant/insurance company were justified at arriving at the conclusion of flooding having taken place of the stocks prior to taking of the insurance policy at 5:30 P.M. on 28.7.1995.

16. In my opinion, the defendant/insurance company has failed to prove that the stocks were already damaged by flooding prior to taking of the insurance policy at 5.30 P.M. on 28.7.1995. This is firstly because it is not as if the paddy stocks were stored in a basement which was flooded. Paddy stocks were stored in the open ground and not in any basement type of area. As already stated above, the rainfall which took place on 1.7.1995 and 16.7.1995 in an open area at Dhuri cannot be a basis of holding that the flooding has taken

place and stocks damaged much much later on 28.7.1995. Even if we take the rain of 67 mm on 28.7.1995 it cannot be held in the facts of the present case that the insured stocks were in fact damaged due to flooding prior to taking of the insurance policy at 5.30 PM on 28.7.1995 because there is difference between heavy rains and flooding and it is not necessary that merely because there are heavy rains there would have been flooding and damage caused to the stocks as on 5.30 PM on 28.7.1995. It is extremely important to note that the surveyors have concluded the *factum* of flooding only as an assessment, 'it is apparent that the open compound must have already got flooded' (Para VIA of the Survey Report) and not because of actual facts showing existence of flooding.

It is seen that the site registers of plaintiff at Dhuri show flooding only on 2.8.1995 i.e well after the policy being issued on 28.7.1995. In the entries of plaintiff's registers on 27.7.1995, 28.7.1995 and 1.8.1995 no flooding is shown and which is shown only on 2.8.1995. Plaintiff's site registers cannot be disbelieved. Also, there is nothing before this Court, in the form of expert's report or any other documentary evidence to show that a particular amount of rain will cause flooding,

and more so in an open area, and that too such open area where the stocks were stored in the open area at Dhuri at Punjab.

17. It is therefore seen that there is no direct and primary evidence available, and which has been proved by the defendant/insurance company, that paddy stocks which were insured were in fact damaged due to flooding prior to taking of the insurance policy at 5.30 PM on 28.7.1995. As already stated above, the surveyors have tried to show damage of stocks due to flooding by the amount of rain but a particular amount of rain, be it very heavy rains, does not necessarily mean that flooding would have taken place more so in open grounds and if an insurance policy has to be repudiated on the ground of alleged concealment of facts of the stocks already having been damaged on 28.7.1995 because of flooding, then this aspect had to be clearly established before this Court on behalf of the defendant/insurance company, and finding of flooding cannot be given simply because giving figures of rainfall will not be equivalent to and lead to an automatic conclusion/result of flooding having taken place at Dhuri Warehouse facility of the plaintiff before 5.30 P.M. on 28.7.1995.

18. Officers of plaintiff are not perfect astrologers that they could have known at 5.30 PM on 28.7.1995 that flooding would take place. In any case, insurance policy is taken for an unexpected event, and even if the officers of plaintiff validly predicted and forecasted heavy rains would result in flooding after 5.30 PM on 28.7.1998, that by itself cannot be a reason to hold that officers of plaintiff were guilty of concealment of facts because the issue is not of prediction of heavy rains but if flooding had already taken place at 5.30 PM on 28.7.1995. Once and if flooding has taken place after 5.30 PM on 28.7.1995 then there cannot be any concealment of facts by the plaintiff. There is nothing illegal in expecting flooding, which may or may not happen, and therefore taking an insurance policy. It was well open to the defendant/insurance company to have refused to undertake the risk by issuing the policy.

19. Therefore, in my opinion, the defendant/insurance company has miserably failed to prove that the stocks of paddy were damaged due to flooding even prior to the taking of the policy at 5.30 PM on 28.7.1995.

20. It is also noted that the defence of the defendant/insurance company of flooding and concealment will definitely not apply with respect to the next two floodings after 2.8.1995 i.e on 27.8.1995 and 5.9.1995. These dates are much after the commencement of the insurance policy at 5.30 P.M. on 28.7.1995, and if there is flooding on these dates and consequent damage to the stocks then such damage is obviously covered within the insured damage under the subject insurance policy.

21. Similarly also there cannot be any valid defence whatsoever raised by the defendant/insurance company with respect to the loss on account of fire which took place on 9.5.1996.

22. I may note that counsel for the defendant/insurance company had sought to argue that it was strange for the plaintiff company which had never taken an insurance policy for flooding prior to the subject insurance policy, and that it only suddenly took a policy for flooding on 28.7.1995, however this argument of the defendant/insurance company with respect to suspicious circumstances is clearly without basis because surely the officers of the plaintiff were in fact acting in discharge of their duties by

estimating that since heavy rains can fall in the ensuing monsoon season which was coming and therefore it would be better if insurance policy is taken with respect to the stored paddy stocks. Merely because a flooding/insurance policy had not been taken by the plaintiff earlier does not mean that such policy when taken is not validly taken in spite of the fact that due to flooding caused by rains damage has taken place to the stocks during the currency of the policy. In such facts it cannot be argued that therefore a policy which had to be taken, would result in the policy being void. I also reject the contention urged on behalf of the defendant/insurance company that the officers of the plaintiff company were bound to estimate that rains would be such and so heavy that there would have taken place flooding and therefore this aspect ought to have been disclosed to the defendant/insurance company prior to taking up the policy. As already discussed above the officers of the plaintiff are not expected to be astrologers with respect to the amount of rains which will happen, and more importantly as to whether that much amount of rain would actually fall resulting in flooding of open areas where stocks are stored in the open warehouse. Officers of the plaintiff are not expected to be

accurate astrologers that they ought to have predicted the flooding and ought to have informed the defendant/insurance company. This argument of the defendant/insurance company is therefore rejected.

23. Issue nos. 3 to 5 are therefore held in favour of the plaintiff and against the defendant/insurance company. It is held that defendant/insurance company has failed to prove that there was any flooding in Dhuri as on 28.7.1995, and more particularly with respect to warehouse stocks lying in open storage of the plaintiff at Dhuri i.e not in any godown or basement. It has to be held that no flooding took place resulting in damage of stocks prior to taking of the insurance policy at 5:30 P.M. on 28.7.1995. It has to be held that plaintiff is not guilty of non-disclosure of material particulars because stocks in question were never damaged due to flood prior to taking of the insurance policy at 5:30 P.M. on 28.7.1995.

ISSUE NO. 6

24. Issue no. 6 is now taken up for decision as to what is the amount of money decree which the plaintiff will be entitled to. In this regard, it is seen that in the Survey Report Ex.OPW2/1 the surveyors have concluded at internal page 14 that the total loss caused to the

plaintiff company was for an amount of Rs.2,19,81,951/-. This is in terms of para 6 at pages 14 and 15 of the Survey Report and these paras read as under:-

6. Based on the above, we have worked out the assessment of loss at Rs.21981951/-, which was then adjusted to net Rs.16409629/- due to the non-coverage of first flood loss dated 2.8.1995 and excess clause etc., as under:-

Total No. of bags claimed as affected and disposed off as salvage by the Insured. (124507 bags x 64.78 kgs.)	: 124507 bags (80656 qtls.)
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Less: Number of bags already affected before Commencement of insurance on 28.7.95; hence not considered. (30996 bags x 64.78 Kgs)	: 30996 bags (20079 qtls.) 93511 bags (60577 qtls.)
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Pre-damage value of 80656 qtls. (124507 bags x 64.78 kgs) Of Rice Paddy claimed as affected and disposed off as Salvage by the Insured @ Rs.360/- per quintal.	Rs.29036160
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Less: 3.649% deduction towards storage losses as per Insured's records	<u>Rs. 1059529</u> Rs.27976631
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Less: Salvage value as realised by the Insured, By inviting tenders. (6978273 + 100000)	<u>Rs. 7078273</u> Rs. 20898358
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Add: Salvaging expenses allowed as explained earlier	<u>Rs. 1208100</u> Rs. 22106458
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Less: Salvage value as scrap of old gunny bags = 124507 bags @ Rs.1/- each Assessed Loss	<u>Rs. 124507</u> Rs.21981951
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Less: Proportionate loss on 20079 qtls. (30996 bags x 64.78 bags) already affected before the commencement of insurance on 28.7.95, hence not to be considered	Rs.5472322
{ <u>Rs.21981951 x 20079 qtls.</u> }	
{ 80656 qtls. }	

Adjusted loss	<u>Rs.16509629</u>
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Less: flood excess applicable under the policy
(two occurrences of 26.8.95 & 5.9.95
taken into account)

Rs.100000

Net Adjusted loss

Rs. 16409629

25. On account of the defence of the defendant/insurance company having been rejected, and the admitted position appearing on record that the loss to the plaintiff has been assessed by the assessors and surveyors of the defendant/insurance company itself at Rs.2,19,81,951/-, therefore this amount is liable to be paid by the defendant/insurance company to the plaintiff, and the plaintiff therefore will be entitled to a money decree for a claim of Rs.2,19,81,951/- against the defendant/insurance company.

ISSUE NO. 7

26. The next issue is issue no. 7 as to whether plaintiff is entitled to interest. Admittedly, there is no contract for payment of interest. The plaintiff has also not served any legal notice upon the defendant/insurance company so that the plaintiff could have claimed interest under the Interest Act, 1978. Therefore, plaintiff will not be entitled to interest for the pre-suit period, but plaintiff is held entitled to *pendente lite* and future interest till realization of the money decree

at 9% per annum simple. *Pendente lite* and future interest is granted by this Court in exercise of powers conferred under Section 34 CPC.

RELIEF

27. In view of the aforesaid discussion, the suit of the plaintiff is decreed, against the defendant/insurance company, for a sum of Rs.2,19,81,951/-. Plaintiff is also held entitled to *pendente lite* and future interest till realization at 9% per annum simple. Plaintiff is further held entitled to costs of the suit. Decreed sheet be prepared.

MAY 08, 2018
AK/ib

VALMIKI J. MEHTA, J