

In the High Court of Punjab and Haryana at Chandigarh

**RSA No. 1469 of 2015 (O&M)
Date of Decision: January 15, 2016**

Oriental Insurance Co. Ltd.

... Appellant

Versus

Varinder Gupta, Proprietor of M/s Vee Kay Agencies

... Respondent

**CORAM: HON'BLE MR. JUSTICE PARAMJEET SINGH
DHALIWAL**

Present: Mr. Ashwani Talwar, Advocate,
for the appellant.

Paramjeet Singh Dhaliwal, J.

CM-4103-C-2015

Having heard learned counsel for the appellant and for the reasons recorded in the Civil Misc. application, same is allowed. Delay of 23 days in refiling the appeal is condoned.

RSA No. 1469 of 2015

This regular second appeal has been preferred by the appellant-defendant against the judgment and decree dated 06.05.2011 passed by learned Civil Judge (Junior Division), Chandigarh, whereby suit filed by the respondent/plaintiff for recovery decreed, as well as, against the judgment and decree dated 12.08.2014 passed by learned Additional District Judge, Chandigarh, whereby appeal preferred by the appellant/defendant has been dismissed.

For convenience sake, hereinafter parties will be referred to as they are arrayed in the Court of first instance.

The detailed facts are already recapitulated in the judgments of the Courts below and are not required to be reproduced. However, brief facts relevant for disposal of this second appeal are that plaintiff filed a suit for recovery of Rs.3,04,568/- (Rs. 2,69,530/- as principal amount and Rs.35,038/- as interest w.e.f. 28.12.2003 to 10.02.2005) along with the pendente-lite and future interest @ 12% to the effect that plaintiff is running a proprietorship firm, which deals with electrical items like Video Games, VCD Players, DVD Players, Water Filters, Vacuum Cleaners and other related electronic and electrical gadgets from its business place. The plaintiff got the above said gadgets insured with defendant Insurance Company upto the value of Rs.10,00,000/- and a cover note bearing No.857749 dated 27.06.2003 was issued by defendant in that regard after personally visiting at the business place of the plaintiff. At that time gadgets/items were lying and physical verification thereof was done before issuing the cover note. On the intervening night of 27.12.2003, burglary incident took place in the shop and various items were removed by the thieves therein. Thereafter, the matter was reported to the police and a FIR bearing No.243 dated 28.12.2003, under Sections 457, 380 of Indian Penal Code was registered at Police Station Sector 26, Chandigarh. The police failed to trace out the burglaried stock valuing Rs.2,69,530/-. Since the main items stolen were insured with the defendant company, intimation regarding the burglary was given to the defendant company on 28.12.2003 itself. The claim was duly lodged with the defendant company. The list of missing items was supplied to the defendant and value of missing items comes out to be Rs.2,69,530/- as per purchase bills. The stock position of the main items, after the incident dated 27.12.2003, as per the record reduced to

Rs.2,80,478/- from Rs.5,50,008/-. The defendant company on receipt of intimation of theft/burglary, appointed a Surveyor for assessing the loss, to whom the plaintiff had supplied all the relevant documents, vide letter dated 08.04.2004. The plaintiff furnished the required information as and when asked by the surveyor. The plaintiff was shocked to received a letter dated 02.11.2004 on 04.11.2004, in which the consent of the plaintiff for accepting the sum of Rs.51,711/- as full and final settlement of claim was asked for, whereas, the plaintiff has suffered a loss of Rs.2,69,530/-. Therefore, the plaintiff served a legal notice dated 17.12.2004 to the defendant, but of no use. Hence, suit was filed.

Upon notice, defendant appeared and filed written statement taking the preliminary objections with regard to concealment of material facts; suit filed being without any privity of contract and locus-standi; etc. On merits, it is averred that the defendant had processed the claim of M/s. V.K. Agencies and assessed the loss to the tune of Rs.51,711/- on the basis of the report furnished by the surveyor. M/s. V.K. Agencies lodged the claim for the loss of 19 items, but defendant company passed the claim of 14 items, because, the plaintiff failed to prove the ownership with regard to remaining five items. Rather those five items were purchased in the name of M/s. Shri Ram Mulakh Dayal Marketing, M/s. Krisons Technosoft Limited. The assessment made by the surveyor is scientific, whereby, the requisite depreciation of items was subtracted from the cost of the item shown in the purchase bills keeping in view the age thereof.

On the basis of the pleadings of the parties, the Court of first instance framed the following issues:-

“1. Whether the plaintiff is entitled for recovery of Rs.3,04,568/-

(Rs.2,69,530/- as principle amount and Rs.35,083/- as interest for the period from 28.12.2003 to 10.02.2005) in his favour and against the defendant as prayed for ?OPP

2. *Whether the plaintiff is entitled for future interest @ 12% as well as cost of the suit ?OPP*
3. *Whether the plaintiff has concealed material facts ?OPD*
4. *Whether the plaintiff has no cause of action ?OPD*
5. *Whether the plaintiff has no locus standi to file the present suit ?OPD*
6. *Whether the suit is barred by limitation of time ?OPD*
7. *Relief.”*

The Court of first instance, after perusal of the evidence led by the parties, decreed the suit vide judgment and decree dated 06.05.2011. Against that, defendant preferred an appeal, which has been dismissed by the lower appellate Court vide judgment and decree dated 12.08.2011. Hence, this second appeal.

I have heard learned counsel for the appellant.

Learned counsel for the appellants has submitted that the following substantial questions of law formulated in para no. 10 of grounds of appeal, arise for consideration in this second appeal:-

- “i) Whether both the Courts below have totally misread and misinterpreted the evidence brought on record and thus the judgments & decrees of both the Courts below are perverse and liable to be set aside?*
- ii) Whether the report of the Surveyor being an important document, the courts below have erred in decreeing the suit for*

Rs.2,69,530/- whereas as per the surveyor report, the plaintiff was entitled at the most of Rs.51,711/-?

Learned counsel for the appellant contended that the impugned judgments and decrees passed by both the Courts below are the result of misreading of evidence on record. The judgments and decrees of both the Courts below are based on conjectures and surmises. Learned counsel relied upon judgments of Hon'ble Supreme Court in **Sri Venkateswara Syndicate vs. Oriental Insurance Company Ltd. and another, 2009(4) R.C.C. (Civil) 872, Sikka Papers Ltd. vs. National Insurance Co. Ltd. and others, 2009 AIR (SC) 2834 and United India Insurance Co. Ltd. and others vs. Roshan Lal Oil Mills Ltd. and others, (2000) 10 SCC 19** to contend that even though report of surveyor was not proved by the Surveyor by appearing as witness, the same is admissible in evidence and should have been taken into consideration by the learned lower Courts. Therefore, the impugned judgments and decrees are liable to be set aside.

I have considered the contentions raised by learned counsel for the appellant and perused the record.

Both the Courts below, after appreciating the evidence on record, have recorded findings of fact with regard to the existence of passage. The Court of first instance recorded the following findings:-

“11. After giving thoughtful consideration to the rival submissions made by the ld. Counsels for the parties this Court is of the considered view that there is no dispute in between the parties that plaintiff had got insured the articles lying in his shops in order to cover up the loss and the cover note which has been produced and proved on the file by the plaintiff as PW1. So far as the incident of burglary having taken place at the shop of the plaintiff is not a disputed fact. The FIR lodged

to effect of incident of burglary has also not been denied and contested by the defendant. The plaintiff by preparing his stock list and the extent of loss that he suffered and filled the claim form and submitted the same with the defendant company for indemnifying the loss, is not a disputed fact in between the parties. The surveyor was appointed by the defendant company and he made investigation of the place of incident and made physical verification and assessed the loss in his own method and prepared the assessment report of loss having occurred to the plaintiff and his report has been proved on the file as Ex.D3 and only the dispute arose that the defendant company made the assessment of loss to the tune of Rs.51,711/- and while making the assessment of loss the defendant has not counted the loss items of first items in their assessment of loss and the reason made in the assessment report was that the first five items in the list of items submitted were not belonging to the plaintiff rather those were belonging to C&F of the plaintiff company and hence could not be put into loss of the plaintiff. But this court is of the considered view that in view of the admitted facts the case of the plaintiff is considered as proved. The survey/assessment report made by the surveyor of the defendant company has not been proved on the file by producing the surveyor in the witness box and merely exhibiting a document in evidence does not mean that it has been proved as per law. The surveyor was the agent of the defendant company and it was in the power and prerogative of the defendant to produce him in the witness box to support his report a a piece of evidence in this case. The best evidence has been withheld by the defendant and under such circumstances the adverse inference is necessary to be drawn against the defendant because the surveyor never wanted to face the tune of cross examination. The surveyor in his statement has not given and explained the basis of his assessment of loss in the survey report. The depreciation of articles is totally arbitrary

because these were not the items which were running at the time of incident and there was no reason and basis to put the articles on depreciation. The articles were new and were yet to be sold and there is no question of depreciation even from the age point of view as the articles were not in a running condition at the time of alleged incident of burglary. Moreover the only witness Sudarshan Kumar DW1 produced by the defendant as a witness in this case has not turned up for the purpose of complete cross examination and hence his statement being bereft of complete cross examination cannot be read and be not taken into consideration for deciding present case and in the light of these peculiar facts and circumstances the case of the defendant has to be considered without proper cogent and admissible piece of evidence on the file as in such a way the case of the plaintiff has gone unrebutted on the file and moreover the cross examination part of the witness shows that he has dealt with the case being an employee of defendant company has never dealt the case and hence his testimony of no help to the case of the defendant.

12. The plea in the defence of the defendant has been that the plaintiff has not been cooperating and supplying the documents to the defendant and hence the loss was assessed by the surveyor on the basis of the material which was made available to him, but this court is not in respectful agreement with submissions made by the counsel for the defendant primarily because DW1 in his cross examination has categorically admitted that all the requisite documents were handed over by the insured to the surveyor after 7.7.2004, vide letter dated 15.7.2004 the company repudiated the loss saying that as the plaintiff has failed to supply any satisfactory information the competent authority considering all facts has repudiated the claim but the surveyor in his report has nowhere stated that the requisite documents were not supplied. On 2.11.2004 the defendant company after repudiating the

claim, offered a sum of Rs.51,711.00 and asked the plaintiff to submit the full and final settlement voucher for taking the above amount. The objection raised by the surveyor regarding the ownership of the items could not have arisen when all the relevant bills were supplied to the defendant company's surveyor. Moreover, no provision of any rule law and bylaw has been quoted on the basis of which the principle of depreciation has been applied. Despite the opportunity granted to DW1 the document showing the guidelines to apply the principle of depreciation on items, the same could not be produced and hence adverse inference is necessary to be drawn against the defendant and it has not been considered that the report of the surveyor is arbitrary and without any basis. So in considered opinion of this court the case of the plaintiff under these issues stands fully proved and the plaintiff is held entitled to the recovery of Rs.2,69,730/- stands fully proved and along with that amount the plaintiff is entitled to interest thereon at the rate of 6% p.a. from the date of occurrence till the date of realization. Accordingly, both issues are proved successfully by the plaintiff and are accordingly decided in favour of the plaintiff and against the defendant.”

The judgments cited by learned counsel for the appellant are not applicable in the facts and circumstances of the present case. The courts below after appreciating the evidence have not accepted the report of surveyor of the company. Even otherwise, in the present case, the courts have appreciated the evidence at its own, surveyor report is not binding on the civil court. The Courts below independently assessed the evidence and came to the conclusion with regard to the findings of fact.

Learned counsel for the appellant has failed to show that the findings of fact recorded by both the Courts below are perverse or illegal or based on misreading, non-reading or mis-appreciation of the material

evidence on record.

In view of concurrent findings of fact recorded by both the Courts below, I do not find any illegality or perversity in the impugned judgments and decrees passed by both the Courts below. No question of law, much-less substantial question of law, as alleged, arises for adjudication in this second appeal.

No other point has been urged.

Dismissed in limine.

January 15, 2016
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[Paramjeet Singh Dhaliwal]
Judge