

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

Reserved on: 25.02.2016

Pronounced on: 03.03.2016

+ **RFA (OS) 71/2009**

M/S. ANANTRAJ AGENCIES PVT. LTD.Appellant
Through: Ms. Biji Rajesh and Sh. Mrinal Beri,
Advocates.

Versus

NATIONAL INSURANCE CO. LTD.Respondent
Through: Sh. Rajiv Saxena, Ms. Mehak Tawan and Ms.
Sonia Sharma, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT

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1. The plaintiff sued the defendant/insurer, to recover under a policy of fire insurance in respect of a fire which occurred in its premises at E-2 Jhandewalan Extension, New Delhi ("the insured premises"). The learned Single Judge dismissed the suit.

2. The brief factual account necessary to decide this appeal is that the plaintiff sued for recovery of ₹21,66,725.25 together with pre-institution interest at 17.5% per annum of ₹5,94,236.52 and for *pendente lite* and future interest. The suit claim was based on a Fire Insurance Policy for ₹30 lakhs in respect of a building including electrical, sanitary, wooden and sideling of cork in the factory at the insured premises. The policy was renewed from time to time and last was for the period 24.11.1986 to 24.11.1987. The fire incident occurred on 01-06-1987. The plaintiff claimed that it spent ₹21,66,725.25 on repairs and reinstatement of the building to its original condition. The defendant/insurer refused to settle the fire claim. This led to

filing of the suit.

3. The defendant (hereafter “National Insurance”) contested the suit and alleged that the plaintiff had no insurable interest in the building and had obtained the policy by misrepresentation and fraud and was thus not entitled to any claim. Six issues were framed for decision in the suit; i.e (1) Whether the suit is properly instituted and filed? (2) Whether the plaintiff had no insurable interest in the premises as alleged; (3). Whether the insurance has been obtained by misrepresentation and fraud as alleged; (4) To what amount the plaintiff is entitled to; (5) To what rate of interest, the plaintiff is entitled and the last issue, (6), relief.

4. The parties led oral and documentary evidence. In the impugned judgment, the learned Single Judge concluded on the first issue, that the plaintiff had proved that the suit was properly filed but had not proved that it was properly instituted (because the resolution authorizing the filing was not proved); the second and third issues were found in favour of the plaintiff; it was held that there was a valid insurance policy which was not vitiated by fraud or misrepresentation. However, the learned Single Judge held that since the plaintiff had not proved the reinstatement value, it was not entitled to any amount; consequently the suit was dismissed.

5. The learned Single Judge’s observations and findings on the said issue No. 4 are as follows:

“the plaintiff was merely a collaborator in the redevelopment of the property. The plaintiff had till the incident of fire not redeveloped the property and thus not incurred any expenses thereon. The plaintiff had only paid Rs.8 lacs to the owners of the property till then. The plaintiff was to pay a further Rs.3 lac which also from the reading of the compromise in the suit between the plaintiff and the Virmanis, (copy whereof was filed

by plaintiff and even though not proved can be read against the plaintiff) it appears were not paid till the said compromise. The plaintiff nevertheless got the property insured for Rs.30 lac, though having paid Rs.8 lac themselves for the same. The existing structure on the property as per the collaboration agreement was in any case to be re-developed. No material has been placed before this court to show the extent of the fire or the damage caused thereby. Though the witness of the plaintiff sought to prove an estimate of the cost of repairs from M/s Rajan Agency but without author of the document being produced the same is not evidence in law. Nothing has been stated as to what the old structure of the property was. Ordinarily when floors are to be added and/or the property redeveloped, the old structure is found to be of no use. I had during the hearing inquired from the counsel for the plaintiff whether any basement had been constructed underneath the property as is now the norm or as to how many floors the property comprised earlier and now. Nothing was forthcoming. Common sense tells that a structure meant for ice factory or a cold storage is of no value in conversion of the property to commercial as it admittedly now is. Exhibit P-2 does not disclose that any portions of the structure were to be retained. No site plan has been proved before the court. The plaintiff has suppressed the best evidence from this court. The plaintiff to be entitled to any amount under the policy ought to have proved the structure which was damaged and as to how that structure was of use/relevance in the work of redevelopment of the property admittedly carried out by the plaintiff.

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35. The plaintiff has not proved any such thing. The insurable interest of the plaintiff in the property was only to the extent of preserving it for the purposes of redevelopment. No loss is found to have been occasioned to the said insurable interest of the plaintiff. There is no evidence of loss or damage or of the extent of the incident of fire. The report of the Delhi Fire Service though on record has also not been proved. If the same is read the same

shows that the property involved in the fire was care taker house, household articles, one Lambretta scooter, one cooler, old furniture, electrical fittings, godown insulation cork and also building damaged. The plaintiff in the claim form also though not proved but which can always be read against the plaintiff had stated that the property was primarily vacant and only old furniture was lying therein.

36. The counsel for the plaintiff relied heavily on the survey report. With respect to the survey report, before proceeding to discuss the same I may notice that the Apex court recently in New India Assurance Company Ltd. Vs. Pradeep Kumar Civil Appeal No.3253/2008 decided on 9th April, 2009 has held that although the assessment of loss by the approved surveyor is pre-requisite for payment or settlement of claim of Rs.20,000/- or more by insurer but surveyor's report is not the last and final word. It is not that sacrosanct that it cannot be departed from. It is not conclusive. It was further held that the approved surveyor's report may be base or foundation for settlement of a claim by the insurer in respect of the loss suffered by the insured but surely such report is neither binding upon the insurer nor insured.

37. The surveyors have reported that the building was constructed in 1950 to use as an ice factory and cold storage but after some years the ice factory and cold storage was closed. They have also reported that the fire was serious in nature and caused heavy damage to the building and contents. The entire insulation coverings on the walls, ceilings and columns in the storage chambers consisting of bitumen layers, wooden framework and cork lining had been burnt/destroyed and the value of the cork insulation constituted the major part of the loss. Besides the same, it is reported that the cement plaster on the walls, ceilings and columns was dislodged and the brick walls at places had developed cracks and/or were broken by the fire brigade to fight the fire effectively. The wooden doors and windows are also reported to have been burnt. Some of the columns are reported to have been damaged and the RCC slabs of the extended balconies is stated to have been badly damaged.

The concrete floors at places is reported to have bulged out due to heat and required replacement. The surveyor assessed the loss on reinstatement value basis at Rs.21,88,034.00 and at depreciated value at Rs.10,58,203.00. The surveyor left the question of insurable interest to be decided by the defendant.

38. Even though, the survey report as aforesaid is not binding on the defendant but the plaintiff to be entitled to any claim thereunder ought to have shown as to how the plaster of walls which was dislodged, the brick walls which had developed cracks and the columns and the RCC slabs which were damaged and the concrete floor which had bulged out were relevant in the context of redevelopment of the property, which was the only right of the plaintiff on the date of the incident and only which could have been insured. The plaintiff would have been found to be entitled to any monies under the policy only on establishing that the walls, columns and floors aforesaid which were damaged if had not been damaged were to be retained in the same manner and position during redevelopment also and could have been used and as to how much expense the plaintiff has had to incur in repairing, replacing, strengthening the same. In the year 1951 which the surveyors have reported to be the year of construction and to which nothing adverse has been shown by the plaintiff, construction was generally of load bearing walls. The modern construction is on columns and beams with walls being merely to partition. In the normal course, the original load bearing walls, columns the RCC slabs, wooden floors would not be retained or be of any use in redevelopment of the property. The surveyors have also reported that the main loss was owing to the burning of the cork linings along the walls. However, the said cork lining was of no value in the future plans of the building and as aforesaid by its very nature had no salvage value even if had not been burnt. It appears that the said cork lining and bitumen layers on the walls for the purposes of insulation must have been the cause of the fire smouldering for long.”

39. Thus even the survey report does not advance the case of the plaintiff any further. The plaintiff has not proved any expenses

incurred. The plaintiff has not proved any loss suffered or any prejudice suffered by it owing to the incident of fire.

6. Ms. Biji Rajesh, learned counsel for the plaintiff/appellant, argued that the adverse findings on the issue of lack of proof of proper institution have now been taken care of, because during the pendency of this appeal, it was permitted to lead additional evidence under Order 41, Rule 27 CPC; this also led to tendering of documents and oral testimony. Reliance is placed on the resolution and the depositions, which point to the fact that the minutes book which recorded the authorization by the company's Board of Directors at the time of filing and institution of the suit, went missing and were misplaced. As a result, a fresh Board resolution, giving retrospective authorization and validating the institution of the suit, was passed. A Copy of this resolution was marked in evidence. On the merits, it was urged that even if the plaintiff was held not to have proved the reinstatement value, the documents on record showed that it had insurable interest to the extent of 60% of the premises. The depreciated value of the premises was a matter of evidence placed on record. Under the circumstances, the learned Single Judge could not have required further proof of damage. It was highlighted here that unlike a contract for delivery of goods or performance of service, the breach of which has to be quantified in monetary terms for entitlement of damages or compensation, a contract of insurance is one of indemnity. The Court has to satisfy itself that the contract was validly entered into; there are no disqualifying conditions, nor are there any vitiating circumstances which exist and the event which led to the claim actually occurred. If these elements are proved, the insurer cannot escape liability.

7. Ms. Sonia Sharma and Mr. Rajeev Saxena, Advocates for National Insurance, argued that the impugned judgment should not be interfered with. Counsel highlighted that the cover note issued did not mean that a binding policy of insurance came into existence. It was sought to be highlighted that National Insurance was entitled to avoid the insurance claim because the cover note contained overwriting regarding the date. Furthermore, though the surveyor's report indicated damage, the fact remained that the insured, i.e the appellant could not claim that damage was to such an extent that the entire reinstatement value had to be paid.

Analysis and Conclusions

8. The factual discussion reveals that as to the insurable interest, the learned Single Judge concluded that the plaintiff had proved its case; it had paid consideration and was in possession of the property. Its interest was to the extent of 60% of the insured premises. On the insurer's objection that the policy was not produced and that this disentitled the claim, the learned Single Judge, correctly held against the plea. Here, the authority of the Supreme Court in *General Assurance Society Ltd. v. Chandmull Jain*¹ is categorical that cover notes do constitute binding contracts of insurance:

"A contract of insurance is a species of commercial transactions had there is a well-established commercial- practice to send cover notes even prior to the completion of a proper proposal or while the proposal is being considered or a policy is in preparation for delivery."

9. The question then is whether the insurer could have, consistent with its obligation assumed in the contract of insurance, correctly decline its liability.

¹ AIR 1966 SC 1644

The learned Single Judge felt that though the appellant's cause was espoused by the Surveyor's report, which was part of the record, the insurance company was not bound to accept it. This Court holds as correct the statement of law that an insurer is not bound to accept a surveyor's report. Yet, there should be sound and valid reasons impelling such a course. The question is were there any such reasons.

10. The surveyor's report stated that the allegations of negligence on part of the owners (there were two of them, the appellant, being to the extent of 60%) were *"not of such nature as to enable the Insurers of either party to repudiate liability for the loss, on grounds that can be established in a court of law."* The National Insurance did not place on record any material or document to arrive at a contrary conclusion. As far as extent of damage was concerned, the surveyor's report observed as follows:

"The fire was very serious in nature and caused heavy damages to the building and contents. Stocks in the warehouse portion of the building had been badly burnt/destroyed."

The damages to Insured's portion of the building were mainly as under: -

- a) The entire insulation coverings on the walls, ceiling and columns in the storage chambers consisting of bitumen layers, wooden framework and cork lining had been burnt/destroyed. The value of the cork insulation constituted the major part of the loss.*
- b) The cement plaster on walls, ceilings and columns of storage chambers had dislodged due to heat generated in the fire.*
- c) The brick walls at places had developed cracks and/or were broken by the fire brigade to fight the fire effectively.*
- d) Some of the columns were damaged.*

- e) *Wooden doors & windows had been burnt.*
- f) *RCC slabs of the extended balconies had been badly damaged. The reinforcement had got exposed.*
- g) *Cement: Concrete floors at places had bulged out due to heat and required replacement.*
- h) *Electric wiring inside the chambers had burnt."*

11. The surveyor then noted that the appellant claimed ₹30,00,000/- (total sum insured on the policy) stating that its portion of the building had been very badly burnt/damaged and would have to be demolished and rebuilt. The building kept on burning continuously for five days and the structure had weakened. The report then contained the section on verification and assessment:

"9. Verification:

We examined the building and observed that there were serious damages to the portion of the building where storage chambers were housed, but the damages to machine room, verandah and the first floor were not very serious. The roof of the chambers also did not sustain serious damages. However, the insulation had been completely destroyed.

We determined the repairs/replacement cost of various jobs to be done in order to reinstate the building, verified the quantities and worked out the cost at Rs.38,50,494/- Keeping various relevant factors in view, the loss was assessed/adjusted as under: -

	<i>Assessed Loss Rs.</i>	<i>Adjusted Loss Rs.</i>
<i>On Reinstatement Value Basis</i>	<i>38,50,494.00</i>	<i>21,88,034.00</i>
<i>On Depreciated Value Basis</i>	<i>12,09,790.00</i>	<i>10,58,203.00</i>

The Insured Have agreed to our assessment/adjustment in writing.

The details of assessment/adjustment are given below: -

10. Valuation:

A) On Reinstatement Value Basis:

The Insured was under-insured to the extent of 35.05% on Reinstatement Value Basis, as per detailed computation given in the attached Annexure-III.

B) On Depreciated Value Basis:

On the basis, the Insured was fully covered. The detailed computation is given in the attached Annexure III.

11. Assessment:

A) On Reinstatement Value Basis:

<i>Cost of repairs/replacement to the building and cork insulation as per details given in the attached Annexure II (Only on the portion which was in possession of the Insured)</i>	<i>Rs.38,50,494.00</i>
<i>Less: Insured's own share of loss on account of under-insurance of 35.05%</i>	<i>Rs.13,49,598.00</i>
<i>Loss Assessed</i>	<i>Rs.25,00,896.00</i>
<i>Less: New India's share 12.51% (as per computations shown in Annexure III)</i>	<i>Rs.3,12,862.00</i>
<i>Loss Adjusted (National's share)</i>	<i>Rs.21,88,034.00</i>

B) On Depreciated Value Basis:

<i>Repairs/replacement cost of the building and cork insulation, as per details given in the attached Annexure II</i>	<i>Rs.12,09,790.00</i>
<i>Less: New India's share as per computations given in attached Annexure III 12.53%</i>	<i>Rs.1,51,587.00</i>

<i>Loss Adjusted (National's Share)</i>	<i>Rs.10,58,203.00</i>
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Note: There was no salvage of any commercial value on Insured's portion of loss.

12. Reinstatement:

The insured have not so far reinstated the building. However, some minor temporary repairs had been carried out. As such, the adjusted loss on the basis of Depreciated Value Assessment only would be payable at present, if liability is admitted by the Insurers."

12. As noticed earlier, the learned Single Judge held that the appellant had insurable interest; he also held that the National Insurance was bound by a contract for insurance. However, the narrow ground for declining relief was that the insurer is not bound to accept the surveyor's report and that given the nature of the interest acquired by the appellant and considering the negligible amount spent towards consideration and investment in the equipment made by it, no amounts were payable. This Court is of opinion, with due respect to the learned Single Judge, that the whole approach on this aspect is erroneous, in that it equates a claimant under an insurance contract with a claimant in a breach of contract action, where the law requires proof of damage. Considering that the essential characteristic of a contract of insurance is that it is one to indemnify the insured against the agreed sum to be paid in the eventuality of something occurring- which is uncertain, necessarily what is to be proved by the claimant is radically different. Here again, the Court recollects *Chandmull Jain* (supra), which states that what is binding on the parties are the actual terms, nothing more, nothing less:

"Acceptance may be expressed in writing or it may even be implied if the insurer accepts the premium and retains it. In the

case of the assured, a positive act on his part by which he recognises or seeks to enforce the policy amounts to an affirmation of it. This position was clearly recognised by the assured himself, because he wrote, close upon the expiry of the time of the cover notes that either a policy should be issued to him before that period had expired or the cover note extended in time. In interpreting documents relating to a contract of insurance, the duty of the court is to interpret the words in which the contract is expressed by the parties, because it is not for the court to make a new contract, however reasonable, if the parties have not made it themselves. Looking at the proposal, the letter of acceptance and the cover notes, it is clear that a contract of insurance under the standard policy for fire and extended to cover flood, cyclone etc. had come into being.”

Later, in *Oriental Insurance Co. Ltd. v. Samayanallur Primary Agricultural Coop. Bank* ² the same rule was reiterated, i.e that the contract has to be construed, to see what is the nature of the risk assumed:

“The insurance policy has to be construed having reference only to the stipulations contained in it and no artificial far-fetched meaning could be given to the words appearing in it.”

This Court has also analysed *New India Assurance Co Ltd v Zuari Industries Ltd* 2009 (9) SCC 70. Here, in an industrial unit which contained a boiler, a flashover occurred, resulting in excessive heat which caused a short circuit and led to stoppage of electricity. As a result excess steam was fed into the boiler, which then became extensively damaged. The insured's claim under a policy of general and fire insurance was allowed. The Supreme Court dismissed the appeal holding that the proximate cause of the loss was the flashover fire.

² 1999 (8) SCC 543

13. In the UK, the law in case of such general fire policies is that even a limited estate owner may sue and collect the entire extent of the loss; in such event, his obligation to indemnify the owner or superior lessor is independent. What is seen, however, is the extent of damage to assess what is recoverable under the policy. This was stated in *Lonsdale & Thompson-v-Black Arrow*³ as follows:

"If the assured has only a limited interest in the property, being, for example, a tenant or reversioner, a trustee, a mortgagee or a bailee, the value of his own interest may have diminished by much less than the value of the property or the cost of its reinstatement. But it does not necessarily follow that if the assured recovers the whole diminution in the value of the property or the whole cost of reinstatement he will be getting more than an indemnity. That must depend on what his legal obligations are as to the use of the insurance proceeds when he has got them. If he is accountable for the proceeds to the owners of the other interests, then he will not be receiving more than an indemnity if the insurer pays the full amount for which the property was insured. This will be so, whether the assured is accountable to the owners of the other interests as a trustee of the proceeds of the insurance or simply on the basis that he owes them a contractual obligation to pay those proceeds over to them or to employ them in reinstatement. None of this means that a party with a limited interest who insures the entire interest in the property is insuring on behalf of the others as well as for himself. All that it means is that his obligations as to the use of the insurance moneys once they have been paid are relevant in determining whether he will recover more than an indemnity by getting the measure of loss provided for in that policy."

³ 1993 (3) All ER 648

14. In the most recent decision of the Queen's Bench Division, in *Western Trading Ltd. v Great Lakes Reinsurance (UK) plc*⁴ the nature of the right to recover reinstatement value was explained as follows:

"The requirement on the assured to reinstate cannot be read to arise until the insurer has confirmed that it will indemnify. Neither will there be an absence of reasonable despatch before the insurer's obligation is accepted or established. That seems obvious where the assured cannot afford to pay for the reinstatement without the benefit of the indemnity which the insurer withholds. As I see it, nowadays the same considerations apply even to a successful business. The assured cannot reasonably be expected to take a decision about whether to spend what may be millions of pounds until it knows the fundamental financial ramifications of committing to reinstate. Even a profitable business will reasonably defer a decision whether or not to reinstate until it knows whether the funding will come from insurers or will have to be diverted from elsewhere to the detriment of some other business activity. So I prefer the Claimant's approach."

15. In the present case, the proven and established facts are that the appellant had acquired proprietary rights over 60% of the premises. It had taken out insurance two years before the fire incident; the policy was renewed twice and was in force when the fire broke out. National Insurance did not repudiate the policy on the ground of fraud, violation of the *uberrima fide* (utmost good faith disclosure obligation) or any other vitiating circumstance. The policy conditions were known to National Insurance, which did not produce the policy. The learned Single Judge held that the appellant had insurable interest. The insurer's surveyor had determined the reinstatement value of the property at ₹21,88,034/- and the depreciated value

⁴ [2015] EWHC 103

at ₹10,58,203/-. It was held in the said report that the appellant had underinsured the property to the extent of 35%; the report, therefore, deducted the equivalent of 35% value while arriving at the said figures. The defendant-insurer disclosed no reason why the claim was rejected; nor did it state why the surveyor's report was unacceptable. There was nothing on record to show that the report had exaggerated the value of the property or had arrived at an inflated value due to erroneous inclusion of any element or component. In fact the evidence on behalf of National Insurance was not able to shed any light on this aspect. Its denial of liability (through letter dated 31.12.1991, Ex. D-3) merely stated that the competent authority had decided not to allow the claim, which stood rejected. In these circumstances, the learned Single Judge should not have taken upon himself the task of assessing the value of the property, because that was the job of the insurer- given the purpose of a fire policy, which is to- in the event of fruition of the uncertain event against which it is issued indemnify the loss. The liability can be avoided either entirely if the risk is not covered, or the amount claimed is over and above actual loss, or more than the assured value. Therefore, we agree that the learned Single Judge erred in holding that the plaintiff/appellant was not entitled to any amount.

16. As to the first issue, i.e whether the suit was properly instituted, the Court is of the opinion that in the light of the additional evidence led, i.e the copy of the resolution authorizing the institution of the suit, by the Board of Director's resolution, which was proved as Ex. AW-1/2 this issue is to be answered in favour of the appellant/plaintiff.

17. For the above reasons, this Court holds that the finding of the learned Single Judge that the plaintiff was not entitled to any amount is without

basis. On the issue of relief, this Court notices that the additional evidence of the respondent insurer was *inter alia*, in the form of documents as well as testimony of Mr. Vats, its officer. The appellant had cross-examined the said officer; he was sought to be questioned about a document, specifically whether a blank space in the last renewal letter mentioned that the insurance was for reinstatement value. Now, the document itself would be the primary evidence on this aspect. (The plaintiff had it – and even what was produced in Court and exhibited did not contain that stipulation). Consequently it could not have validly claimed the reinstatement value. In the circumstances, it is clearly entitled to the surveyor assessed depreciated value, i.e ₹10,58,203/-. Since the defendant wrongly denied liability and withheld the said amount, the plaintiff would also be entitled to interest @ 12% p.a from the date of institution of the suit, in April, 1990, till payment (inclusive of *pendente lite* interest at the same rate).

18. Consequently, the impugned judgment is hereby set aside. The plaintiff's suit is decreed for the sum of ₹10,58,203/- with *pendente lite* and future interest @ 12% p.a from the date of institution of the suit, in April, 1990, till payment (inclusive of *pendente lite* interest at the same rate). The plaintiff is also entitled to costs throughout; counsel's fee is quantified at ₹75,000/-. The appeal is allowed in the above terms.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

MARCH 3, 2016