

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

% **Date of decision: 6th February, 2017.**

+ **CS(OS) 1085/2007**

UNICORN INSURANCE BROKERS PVT. LTD. Plaintiff

Through: Mr. Kirti Uppal, Sr. Adv. with Mohd.
Amanullah and Mr. Sidharth Chopra,
Adv.

Versus

ORIENTAL INSURANCE CO. LTD. Defendant

Through: Mr. Vishnu Mehra, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff has sued the defendant for recovery of Rs.1,26,99,578/- with interest and costs.
2. It is the case of the plaintiff in the plaint:
 - (i) that the plaintiff is an insurance broker duly licensed by the Insurance Regulatory & Development Authority (IRDA) and the defendant is a company carrying on business of insurance;
 - (ii) that in anticipation of Uttar Pradesh State Road Transport Corporation (UPSRTC) requiring insurance for its buses, the plaintiff introduced itself as an insurance broker for handling UPSRTC's business and UPSRTC vide its letter dated 3rd January, 2004 authorised the plaintiff to negotiate premium rate with terms and conditions for Third Party plus Passenger Liability cover for their business;

- (iii) that however subsequently UPSRTC floated tenders inviting bids for insurance premium rates for about 4000 buses;
- (iv) that the plaintiff had detailed meetings with Mr. Yogesh Lohiya, General Manager (Technical) and Mr. I.S. Phukela, Assistant General Manager (RO-1) at the Head Office of the defendant wherein *inter alia* the loading of tariff premium was discussed;
- (v) that Mr. Yogesh Lohiya, General Manager (Technical) of the defendant confirmed to the plaintiff and agreed that if the defendant gets the said business from UPSRTC, the defendant shall pay 10% of the premium amount received by the defendant from UPSRTC as brokerage to the plaintiff;
- (vi) that brokerage at 10% was consistent with the customary brokerage and IRDA Rules which also permit payment of 10% as brokerage to brokers;
- (vii) that on assurance of the defendant that plaintiff would be paid 10% brokerage, the plaintiff made efforts for securing the business of UPSRTC;
- (viii) that the defendant vide its letters dated 27th February, 2004 and 19th March, 2004 confirmed that the rates quoted by the plaintiff to UPSRTC had their approval;
- (ix) that the plaintiff submitted its bid dated 19th March, 2004 to the tender of UPSRTC;
- (x) that the bid of the plaintiff was accepted by UPSRTC vide letter dated 8th April, 2004 and the plaintiff immediately informed the

defendant of the same;

(xi) that pursuant to the spade work done by the plaintiff, UPSRTC issued cheque for Rs.56,99,683/- in favour of the defendant towards premium of the first batch of 500 buses with effect from 10th May, 2004 and which cheque was forwarded by the plaintiff to the defendant, accepted by the defendant and in pursuance whereof the defendant issued the Cover Note dated 10th May, 2004 for the period till 9th May, 2005;

(xii) that the said Cover Note also indicated that it was through the plaintiff;

(xiii) that the plaintiff vide its letter dated 3rd June, 2004 called upon the defendant to pay 10% brokerage;

(xiv) that the defendant vide its letter dated 6th July, 2004 advised the plaintiff that the defendant had authorised Mr. K.L. Gupta, Senior Divisional Manager to coordinate with the plaintiff;

(xv) that due to efforts of the plaintiff, the defendant got insurance premium to the total tune of Rs.4,00,30,781/- from UPSRTC and the defendant became liable to pay 10% thereof i.e. Rs.40,03,078.10 paise to the plaintiff;

(xvi) that the policies were renewed and the defendant received further premium of Rs.5,95,60,267/- on which the plaintiff became entitled to brokerage of Rs.59,56,026.70 paise;

(xvii) that thus the plaintiff is entitled to Rs.99,59,104.80 paise;

(xviii) that the plaintiff is entitled to interest @ 15% per annum for the

delay in payment.

Hence the suit for recovery of Rs.1,26,99,578/- with future interest and costs.

3. The suit was entertained. The defendant contested the same, pleading:
 - (a) that the plaintiff had earlier filed petition for winding up of the defendant being CP No.321/2005 and which was dismissed as withdrawn as the plaintiff had failed to prove any agreement or admission of liability on behalf of the defendant;
 - (b) that the plaintiff in its letter dated 4th August, 2004 to the defendant has categorically admitted that in the very first meeting of the plaintiff with the General Manager of the defendant it was made clear that no brokerage is payable for this type of the business;
 - (c) that there was thus no occasion for the defendant to enter into any agreement with the plaintiff to pay any brokerage as alleged in the plaint;
 - (d) that the defendant had taken a policy decision way back in the year 2002 that it would not pay any commission / brokerage to agents / brokers for insuring any type of commercial vehicle; in early 2003 another decision was taken that no commission / brokerage would be paid for insuring any type of motor vehicle for act of theft / fire;
 - (e) that the said policy decisions were duly communicated to all the operating offices across the country;
 - (f) that the process of the subject insurance according to the plaintiff also commenced on 7th March, 2004 and there was no

question of any official of the defendant, after the aforesaid policy decision, entering into any agreement in contravention thereof;

(g) that no commission/brokerage was assured to be paid to the plaintiff and the plaintiff has raked up the issue of brokerage as an afterthought;

(h) that in the brokerage business in the insurance industry, on many occasions, the brokers render services and even procure insurance business even without any payment of brokerage because they have business relationship with the insurer or in the hope that in other businesses they will be considered favourably;

(i) that the plaintiff knew it fully well that the defendant would not be able to pay any brokerage on motor third party insurance;

(j) that the plaintiff was not and could not be in a position to influence the decision of UPSRTC which was in terms of the tender;

(k) that motor third party business is a tariff business where premium chargeable is determined by the Tariff Advisory Committee, an autonomous body created by law and in tariff business, it is not open to any insurer to reduce the rate of premium or indulge in any other activity so as to reduce the rates chargeable;

(l) that in fact the defendant was not at all interested in obtaining the motor third party business but the plaintiff persuaded the defendant to allow it to quote in response to the tender and the defendant had made it clear that no brokerage would be paid to the plaintiff;

(m) that while in the petition for winding up, the claim of the

plaintiff was in the sum of Rs.40,03,078.10 paise but in the suit it has been inflated to Rs.99,59,104.80 paise;

(n) denying that the suit has been instituted and the plaint signed and verified by a duly authorised person;

(o) denying that Mr. Yogesh Lohiya or Mr. I.S. Phukela of the defendant had assured the plaintiff for payment of commission / brokerage @ 10%; pleading that there was no occasion even for the said officials to meet the plaintiff as the subject did not pertain to their department.

4. No replication is stated to have been filed to the written statement aforesaid.

5. On the pleadings of the parties, the following issues were framed in the suit on 18th November, 2008:

“1. Whether the suit has been instituted and the plaint signed and verified by a duly authorized person on behalf of the plaintiff? OPP

2. Whether the claim in suit is within time? OPP

3. Whether there was any agreement between the parties of payment of commission/brokerage by the defendant to the plaintiff or is the plaintiff otherwise entitled to recover any commission/brokerage? OPP

4. If the issue no.3 is decided in favour of the plaintiff, whether the plaintiff is entitled to any interest, if so, on what amount, at what rate and for what period? OPP

5. Relief.”

6. The plaintiff examined only one witness namely its Director Mr.

Ashok Kumar Sharma. The defendant has also similarly examined one witness only namely its Regional Manager Mr. Birpal Singh.

7. When, after recording of evidence in the suit, it came up before this Court on 2nd February, 2017, it was the contention of the senior counsel for the plaintiff that the adjudication of the suit entailed only the interpretation of Clauses 2(d), 2(i) and 19 of the Insurance Regulatory and Development Authority (Insurance Brokers) Regulations, 2002 (hereinafter called 'Regulations') and thus the disposal of the suit would not take much time and on the said contention, the suit, instead of being listed in the category of 'Finals', was taken up for hearing on 2nd February, 2017 itself.

8. However, on perusal of the Clauses aforesaid of the Regulations, it was *prima facie* felt that they do not make the defendant liable as an insurance company to pay brokerage / commission to the plaintiff, even if insurance business was brought by the plaintiff to the defendant. It was thus enquired on 2nd February, 2017 from the senior counsel for the plaintiff, as to how reliance on the Regulations could be placed without establishing a liability of the defendant to pay brokerage / commission, whether by way of a contract or otherwise. The matter was as such posted for further arguments for today.

9. The senior counsel for the plaintiff has been heard further and the counsel for the defendant has also been heard.

10. Admittedly, there is no agreement in writing whereunder the defendant has agreed to pay brokerage @ 10% or at any other rate to the plaintiff.

11. The senior counsel for the plaintiff has during the hearing not

addressed arguments on the basis of any agreement by the defendant to pay brokerage to the plaintiff. At the time of dictation also, the counsel for the plaintiff, on specific query, admits that the claim of the plaintiff for brokerage is not on the basis of any oral agreement which may have been arrived at between the plaintiff and the defendant.

12. The counsel for the defendant also invites attention to the first question put by the counsel for the defendant to the sole witness of the plaintiff during the cross-examination recorded on 30th August, 2013 where the witness of the plaintiff has admitted that there was no agreement between the plaintiff and the defendant to pay any brokerage.

13. The claim of the plaintiff for brokerage against the defendant is thus to be adjudicated only on the interpretation of the Regulations aforesaid.

14. The senior counsel for the plaintiff has however drawn attention to an answer to a question recorded during the cross-examination on 30th August, 2013 of the sole witness of the plaintiff, where the witness has deposed that for other business brought by the plaintiff to the defendant, the defendant has been paying brokerage to the plaintiff as per the said Regulations and without any written agreement.

15. The senior counsel for the plaintiff has today also handed over photocopy of the licence issued by IRDA in exercise of powers under Section 42D(1) of the Insurance Act, 1938, to the plaintiff, to act as 'Insurance Broker-Direct' under the Act. Though the said document is not on record and has not been proved but the counsel for the defendant fairly states that it is not in dispute that the plaintiff is an Insurance Broker-Direct licensed by IRDA.

16. I will now proceed to decide Issue No.3 first before going into the Issues No.1&2 which are technical in nature.

17. The Regulations aforesaid have been framed by IRDA in exercise of powers conferred by Section 114A of the Insurance Act read with Sections 14 & 26 of the Insurance Regulatory and Development Authority Act, 1999. The Regulations to which attention has been invited are as under:

“2. Definitions—(1) Unless the context otherwise requires—

(a)

(b)

(c) “Authority” means the Insurance Regulatory and Development Authority established under sub-section (1) of section 3 of Insurance Regulatory and Development Authority Act, 1999 (41 of 1999)’;

(d) “composite broker” means an insurance broker who for the time-being licensed by the Authority to act as such, for a remuneration, arranges insurance for his clients with insurance companies and/or reinsurance for his client/s;

(e) “direct broker” means an insurance broker who for the time-being licensed by the Authority to act as such, for a remuneration carries out the functions as specified under regulation 3 either in the field of life insurance or general insurance or both on behalf of his clients;

(f)

(g)

(h)

(i) “insurance broker” means a person for the time-being licensed by the Authority under regulation 11, who for a remuneration arranges insurance contracts with insurance companies and/or reinsurance companies on behalf of his clients.

Explanation: The term “insurance broker” wherever it appears in these regulations shall be deemed to mean a direct broker, a reinsurance broker or a composite broker, as the case may be, unless expressly stated to the contrary.

3. ***Functions of a direct broker***— *The functions of a direct broker shall include any one or more of the following:—*

(a) obtaining detailed information of the client’s business and risk management philosophy;

(b) familiarising himself with the client’s business and underwriting information so that this can be explained to an insurer and others;

(c) rendering advice on appropriate insurance cover and terms;

(d) maintaining detailed knowledge of available insurance markets, as may be applicable;

(e) submitting quotation received from insurer/s for consideration of a client;

(f) providing requisite underwriting information as required by an insurer in assessing the risk to decide pricing terms and conditions for cover;

(g) acting promptly on instructions from a client and providing him written acknowledgements and progress reports;

(h) assisting clients in paying premium under section 64VB of Insurance Act, 1938 (4 of 1938);

(i) providing services related to insurance consultancy and risk management;

(j) assisting in the negotiation of the claims; and

(k) maintaining proper records of claims;

19. ***Remuneration***— *(1) No insurance broker shall be paid or contract to be paid by way of remuneration (including royalty or licence fees or administration charges or such other compensation), an amount exceeding:*

(A) on direct general insurance business—

(i) on tariff products:

(a) 10 percent of the premium on that part of the business which is compulsory under any statute or any law in force;

(b) 12½ percent of the premium on others.

(ii) on non-tariff products:

17½ percent of the premium on direct business;

(B) on direct life insurance business –

(i) individual insurance

(a) 30 percent of first year's premium

(b) 5 percent of each renewal premium

(ii) annuity

(a) Immediate annuity or a deferred annuity in consideration of a single premium, or where only one premium is payable on the policy:

2 percent of premium

(b) deferred annuity in consideration of more than one premium:

(i) 7½ percent of first year's premium

(ii) 2 percent of each renewal premium

(iii) group insurance and pension schemes:

(a) one year renewable group term insurance, gratuity, superannuation, group savings linked insurance –

7½ percent of risk premium

Note:- Under group insurance schemes there will be no remuneration for the savings component.

(b) single premium -

2 percent of risk premium

(c) annual contributions, at new business procurement

stage –

5 percent of non risk premium with a ceiling of Rupees three lakhs per scheme.

(d) single premium new business procurement stage -

0.5 percent with a ceiling of Rupees five lakhs per scheme.

(e) remuneration for subsequent servicing –

(i) one year renewable group term assurance –

2 percent of risk premium with a ceiling of rupees 50,000/- per scheme.

(C) on reinsurance business—

(i) as per market practices prevalent from time to time.

Explanation:- For purposes of the procurement of business, an insurer shall not pay an agency commission, allow a special discount, and pay a remuneration to brokers for the same insurance contract.

(2) The settlement of accounts by insurers in respect of remuneration of brokers shall be done on a monthly basis and it must be ensured that there is no cross settlement of outstanding balances.

24. Professional indemnity insurance—*(1) Every insurance broker shall take out and maintain and continue to maintain a professional indemnity insurance cover throughout the validity of the period of the licence granted to him by the Authority.*

Provided that the Authority shall in suitable cases allow a newly licensed insurance broker to produce such a guarantee within fifteen months from the date of issue of original licence.

(2) The insurance cover must indemnify an insurance broker against

(a) any error or omission or negligence on his part or on the part of his employees and directors;

(b) any loss of money or other property for which the broker is legally liable in consequence of any financial or

fraudulent act or omission;

(c) any loss of documents and costs and expenses incurred in replacing or restoring such documents;

(d) dishonest or fraudulent acts or omissions by broker's employees or former employees.

(3) The indemnity cover —

(a) shall be on a yearly basis for the entire period of licence;

(b) shall not contain any terms to the effect that payments of claims depend upon the insurance broker having first met the liability;

(c) shall indemnify in respect of all claims made during the period of the insurance regardless of the time at which the event giving rise to the claim may have occurred.

Provided that an indemnity insurance cover not fully conforming to the above requirements shall be permitted by the Authority in special cases for reasons to be recorded by it in writing.

(4) Limit of indemnity for any one claim and in the aggregate for the year in the case of insurance brokers shall be as follows :

*Category of
Insurance broker*

Limit of indemnity

(a) Direct broker three times remuneration received at the end of every financial year subject to a minimum limit of rupees fifty lakhs.

(b) Reinsurance broker three times remuneration received at the end of every financial year subject to a minimum limit of rupees two

crores and fifty lakhs.

(c) Composite broker three times remuneration received at the end of every financial year subject to a minimum limit of rupees five crores.

(5) The un-insured excess in respect of each claim shall not exceed five percent of the capital employed by the insurance broker in the business.

(6)

(7)”

18. The senior counsel for the plaintiff has argued (i) that as per Regulation 2(e) supra, the plaintiff as a direct broker “acts as such, for a remuneration”; (ii) that the plaintiff as an insurance broker within the meaning of Regulation 2(i) supra is licensed to “for a remuneration, arrange insurance contract with insurance companies and/or reinsurance companies on behalf of his clients”; (iii) that the plaintiff, as per Regulation 19(1)(A)(i)(a) supra, is entitled to be paid on direct general insurance business, brokerage @ 10% of the premium; (iv) that it is the plaintiff who as a direct broker becomes liable to the client i.e. UPSRTC and it is for this reason only that the plaintiff vide Regulation 24 is required to obtain indemnity insurance.

19. I have considered the aforesaid contentions and am unable to interpret the provisions cited as statutorily creating a liability of the insurance company in favour of a broker licensed by IRDA.

20. All that the Regulations do is (a) to control and limit the persons entitled to practice as insurance broker, by requiring them to be licensed by

IRDA; (b) to enable the insurance broker to charge remuneration therefor; and, (c) to put a cap on the remuneration of the insurance broker. The same cannot be read as creating a liability of the insurance company to pay any remuneration to the broker for the insurance business, even if brought by the insurance broker to the insurance company.

21. Insurance, for long (till it was opened to the private sector) was considered as a welfare measure for the citizens of the country and to ensure that citizens reaped benefit thereof, was nationalised vide the General Insurance Business (Nationalisation) Act, 1972 confined to the public sector. Even after the same was opened to the private sector, it is a regulated business. The rates, advantages, terms and conditions that may be offered by insurers are controlled by the Tariff Advisory Committee constituted under Section 64U of the Insurance Act. Though middlemen as brokers have been permitted to function for remuneration but since their remuneration is to ultimately flow from the insurance premium charged, need for putting a cap thereon was felt to ensure that the insured is not prejudiced. The use of the words “for remuneration” in Regulation 2(e)&(i) is only an enabling provision permitting the insurance brokers to earn remuneration and in the absence whereof they would not be entitled to as Sections 31A & 40 of the Insurance Act prohibited the same. Even now Section 31B prohibits the insurer from, in respect of insurance business transacted, paying any remuneration in excess of that specified in the Regulations. Neither Regulation 2(e) & (i) providing the definitions nor Regulation 3 providing for the functions of a direct broker are concerned with remuneration if any payable by the insurance company to the insurance broker. Similarly, merely because the insurance broker is made liable to perform the prescribed

functions for his / her clients and is made liable for the claims if any of the clients qua the functions performed by the insurance broker, cannot lead to any inference in law that the insurance company is liable to the insurance broker for any remuneration.

22. During the hearing, the counsel for the plaintiff, on specific query, whether in the event of the client / insured suffering a loss insured against, the claim of the client/insured would be against the insurance broker or against the insurance company states that the claim would be against the insurance company but if the claim is denied for any reason attributable to the insurance broker, the client / insured would be entitled to maintain a claim against the insurance broker in terms of Regulation 24 aforesaid.

23. Similarly, merely because Regulation 19 provides for the maximum rates of remuneration, does not, in my opinion, make the insurance company *ipso facto* liable to pay brokerage at the rate prescribed therein to the insurance broker. The same becomes evident from the prohibition therein from the insurance broker being “paid or contracted with to be paid” remuneration exceeding the rates provided therein. The purport of Regulation 19 is to cap the remuneration which the insurance broker can earn and not to make the insurance companies as the defendant statutorily liable to pay to the insurance broker.

24. The very fact that Regulation 19 provides a cap is indicative of the fact that the remuneration can be less than the maximum provided therein. The remuneration thus necessarily has to be a matter of contract between the broker and the insurance company and unless the broker establishes such contract and which plea though taken in the plaint has been given up by the

plaintiff, the insurance broker cannot maintain a claim against an insurance company for remuneration.

25. Faced therewith, the senior counsel for the plaintiff contends that Regulation 19, besides using the expression “contracted to be paid” also uses the word “paid”. The senior counsel contends that the use of the word “paid” creates a liability.

26. I am unable to agree. Merely because there is a bar of payment in excess of the rates provided cannot be read as mandating a payment.

27. The Supreme Court in ***Vishwanath Sood Vs. Union of India*** (1989) 1 SCC 657 was concerned with a clause in a contract providing for compensation not exceeding 10% of the estimated cost of work being recoverable. It was held that use of such language conferred the deciding authority with a wide margin of discretion, who may not only reduce the percentage but who can even reduce it to nil if the circumstances so warrant. Similarly, in ***High Court of Judicature For Rajasthan Vs. Veena Verma*** (2009) 14 SCC 734 where the Service Rule provided a maximum limit for direct recruits, it was held that there is no minimum quota and it is entirely in the discretion of authorities concerned to decide how much percent of the total vacancies will be allotted to direct recruits, provided that the maximum prescribed is not exceeded. The provision in the Stamp Act, 1899 empowering the Collector to levy penalty not more than ten times the duty payable, was also in ***Peteti Subba Rao Vs. Anumala S. Narendra*** (2002) 10 SCC 427 held to be not obliging the Collector of Stamps to impose the maximum duty; it was held that the Collector has the discretion, depending upon the facts of the case to impose less than ten times

penalty.

The aforesaid judgments were followed by me in *Essar Steel Ltd. Vs. Union of India* (2011) 184 DLT 700 to hold that the words “a maximum quantity of 5 mmscmd” in the decision of allocation of natural gas could not be read as creating an entitlement to the said quantity. Reference in addition may also be made to *S.C. Magavi, Haveri Vs. Commissioner of Income Tax, Mysore* 1966 SCC OnLine Kar 228 (DB) holding that the provision for imposing maximum penalty does not prevent imposition of less than maximum and to *M/s Fertilizer Corporation of India Ltd. Vs. The State of Bihar* 1974 SCC OnLine Pat 72 (FB) holding that the words “extend to” in a provision empowering imposition of penalty did not prevent the authority concerned from choosing to not impose any penalty.

28. As far as the plea of the senior counsel for the plaintiff, of the defendant having paid remuneration to the plaintiff qua other insurance business brought by the plaintiff to the defendant and at the rate of 10% of the premium and without any contract in writing is concerned, the counsel for the defendant has argued (a) that the defendant as a matter of policy does not pay brokerage on the kind of insurance subject matter of this suit i.e. insurance of public vehicles against third party claims and that too government vehicles; (b) that with respect to the insurance business qua which there is no such policy decision against payment of brokerage, the defendant pays brokerage as per its policy decision from time to time.

29. The senior counsel for the plaintiff has in this regard also drawn attention to Ex.DW-1/P-2 being the internal Circular dated 26th March, 2003 of the defendant enclosing a copy of the Regulations together with the

Administrative Instructions and has in particular drawn attention to the Administrative Instruction 3 providing the code under which remuneration would be paid to the brokers and to Administrative Instruction 4(ii)(B) providing the manner in which the brokerage / commission would be worked out.

30. I am afraid, the administrative instructions are being misread. The relevant administrative instruction is Administrative Instruction 4, relevant part whereof is as under:

“4. The maximum remuneration as brokerage fee payable to the brokers as per IRDA is as under:-

- (i) In respect of fire and engineering classes of business of Govt. and Public Sector undertakings, no brokerage is to be paid. The business from these classes of customers will be placed directly by them with the insurance companies. This category of customers will continue to get a 5% discount on the basic tariff applicable. Public sector undertakings will be those companies or organisations as are covered by Section 617 of Companies Act, 1956.*
- (ii) In respect of other insures (sic. insured)(excluding Govt. and PSUs), the brokerage will be...”*

31. The aforesaid Administrative Instruction clearly spells out the policy decision pleaded by the defendant in its written statement, of no brokerage being payable in respect of fire and engineering classes of business of Government and Public Sector Undertakings (PSUs) and, while providing the rates of brokerage payable in other cases, excluding Government and PSUs. It is not in dispute that UPSRTC, if not Government, is a PSU.

32. The aforesaid document has been produced by the plaintiff and was put by the counsel for the plaintiff to the witness of the defendant. The plaintiff was thus well aware of the said policy decision of the defendant and has notwithstanding the same, first pursued the winding up petition and now this suit.

33. Even otherwise, merely because the defendant may, even without a written agreement, pay brokerage to the plaintiff qua other businesses brought by the plaintiff, would not entitle the plaintiff to brokerage qua the subject business. Merely because the defendant, even without a written agreement, pays brokerage to the plaintiff for other businesses qua which it has policy decision to pay brokerage and at the rates determined administratively, cannot make the defendant liable for payment of brokerage for other businesses qua which it has policy decision not to pay any brokerage. It cannot be lost sight of that the defendant is a PSU and is to abide by the principles of Article 14 of the Constitution of India and cannot contract arbitrarily and cannot discriminate between brokers. Payment of brokerage without any written contract, by the defendant to the plaintiff, in accordance with the policy decision of the defendant cannot in the absence of contract make the defendant liable for brokerage qua other business where it has policy decision not to pay any brokerage.

34. The counsel for the defendant in this regard also draws attention to answer to a question put by the counsel for the defendant to the witness of the plaintiff during the cross-examination recorded on 22nd October, 2013 where the Director of the plaintiff admitted that there is no bar / prohibition on the insurance company deciding not to pay brokerage on a particular

business.

35. It is also the contention of the counsel for the defendant that the Regulations nowhere provide for a contract.

36. In my opinion, for it to be held that a contract of payment of brokerage is required, there is no need for looking into the Regulations. The licence issued by IRDA only entitles the plaintiff to act as a broker and without which licence, none can act as a broker. No provision has been shown which makes the plaintiff *ipso facto* entitled to any brokerage on any insurance business brought by it to an insurance company. Mere provision for ceiling on the rates of brokerage which may be paid to the broker does not make payment of brokerage mandatory. If the Regulations were to be read so, it would make the insurance companies liable for claims of brokers of having procured the insurance business which the insurance companies may have procured themselves. The relationship between the insurance company and a broker essentially has to be contractual. For insurance covers for which the administrative instructions / policy of the insurance company do not provide for any standard rates of brokerage, they will still have to be negotiated between the broker and the insurance company.

37. Since during the course of arguments, the senior counsel for the plaintiff had referred to certain other portions of the oral evidence also but which in the light of the findings aforesaid are now no longer relevant. I have before closing the finding on this issue, enquired from the counsel for the plaintiff, whether he desires any other part of the record to be dealt with.

38. The counsel for the plaintiff has only stated that the insurance business is a business of good faith and the plaintiff as an insurance broker had acted

in a good faith.

39. The principle of *uberrima fides* applicable to insurance is between the insured and the insurer and not between the broker and the insurer. No merit is thus found in the said contention.

40. Accordingly, I answer Issue No.3 by holding that the plaintiff has given up the claim of any agreement with the defendant for payment of brokerage by the defendant to the plaintiff and the defendant is otherwise not found liable under the provisions of the Regulations or by way of custom or practice to pay any brokerage / commission to the plaintiff. The Issue No.3 is thus decided in favour of the defendant and against the plaintiff.

41. The Issue No.3 having been decided against the plaintiff, Issue No.4 has to be axiomatically decided against the plaintiff.

42. That leaves the technical Issues No.1&2 which though in view of finding aforesaid are not required to be decided but in accordance with Order XIV Rule 2 of the Code of Civil Procedure, 1908 (CPC) requiring this Court as the Suit Court to return finding on all the issues, have also to be decided.

43. The counsel for the defendant has argued that the plaintiff has not proved the resolution of its Board of Directors authorising institution of the suit or the power of the signatory of the plaint to sign and verify the plaint.

44. The counsel for the plaintiff states that the extract of the resolution of the Board of Directors has been proved as Ex.PW1/1.

45. The counsel for the plaintiff, on enquiry, whether the original minutes book was brought on the date when exhibit mark was put on the extract of the resolution or when the affidavit by way of examination-in-chief was

tendered, fairly states that it was not brought. He further points out that on the date when the sole witness of the plaintiff was cross-examined by the counsel for the defendant including on the said aspect, the witness had not carried the original minutes. He however states that the witness was never asked to produce the same.

46. Though it was for the plaintiff itself to have, while tendering the said document into evidence, produced the original minutes book before the Court and which in this case has not been produced but I am otherwise of the view that it being not in dispute that the registration as a licensed broker by IRDA is of the plaintiff and the plaintiff was a broker in the subject insurance effected by the defendant and the fact that the money if any in the event of the plaintiff succeeding in the suit would have been paid by the defendant in the name of the plaintiff, the aforesaid technicalities should not be allowed to come in the way of the plaintiff. Even otherwise, during the hearing it has transpired that though the parties after leaving the jurisdiction of the winding up Court chose the jurisdiction of the Civil Court but have not proved most of the documents by satisfying the technicalities of the CPC and the Evidence Act, 1872. It has been the experience that if these technicalities are to be observed, a large number of suits would be decreed or defeated on such grounds alone. I therefore do not deem it appropriate to defeat the claim of the plaintiff, found to be otherwise not tenable, on this account. Accordingly, Issue No.1 is decided in favour of the plaintiff and against the defendant.

47. The counsel for the defendant states that in view of the aforesaid, he is not pressing Issue No.2 qua limitation, reserving his right to press the same if

the plaintiff goes in appeal and if the need arises.

48. Thus, no finding is returned on Issue No.2.

49. The suit is accordingly dismissed.

50. No costs.

Decree sheet be prepared.

RAJIV SAHAI ENDLAW, J.

FEBRUARY 06, 2017

bs

(corrected & released on 22nd February, 2017)

