IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.771 OF 2010

United India Insurance Company Ltd. Having its Registered Office at 24, Whites Road, Chennai – 600 014 And Divisional Office at 1, P. J. Chambers, Mumbai-Pune Road.	]]]]]	… Appellant / (Orig. Defendant)

Versus

M/s. Eagle Flask Industries Limited. A company registered under the Indian Companies Act, 1956 having its Head Office at Eagle Estate, Talegaon Dabhade, Taluka – Maval, District – Pune. Through its authorized signatory Shri Shankar Gurupad Koshti Age – adult, Occu. - Service, Residing at Eagle Estate, Talegaon Dabhade, Taluka – Maval, District – Pune.	]]]]]]]]]]	… Respondent / (Orig. Plaintiff)

Mr. A. S. Vidyarthi a/w Ms. Ruchika Dave i/b S. S. Vidyarthi for Appellant.
Mr. D. J. Bhange for Respondent.

CORAM :-	**K. K. TATED & SARANG V. KOTWAL, JJ.**
RESERVED ON :-	**11 JANUARY, 2018**
PRONOUNCED ON :-	**24 JANUARY, 2018**

JUDGMENT (PER : SARANG V. KOTWAL, J.) :-

1. By this Appeal, the Appellant has challenged the Judgment and Decree dated 28/01/2010 passed by the 8th Joint Civil Judge Senior Division, Pune in Special Civil Suit No.12 of 2004 whereby the Respondent's (original Plaintiff) Suit was partly decreed and the Appellant (original Defendant) was directed to pay an amount of Rs.1,78,58,867/- towards the value of damaged and insured goods and also Rs.5,00,000/- by way of compensation along with interest @ 9% per annum from the date of filing of the suit till the realization of the amount.

2. The Respondent had filed the above Suit claiming compensation and damages for Rs.2,71,30,524/-. It is the case of the Respondent in the plaint that the Respondent is a deemed Public Limited Company incorporated under the Companies Act. 1956. The Respondent Company was carrying on the business of manufacturing and marketing of vacuum flasks, thermally insulated containers, glass wares, porcelain wares, crockery, etc. under the name and style 'Eagle Flask Industries Limited', having its registered office at Talegaon-Dabhade, Disrict – Pune. It is pleaded in the plaint that the Respondent – Plaintiff Company was having depots, godowns and warehouses all over India. It is further the case of the Respondent that the Respondent had taken godown in New Delhi on rental basis at 29, Najafgarh Road, New Delhi admeasuring about 12,700 sq.ft. for a period of 9 years from 1999. The Respondent Company used the said godown for the purpose of storing their products and other

articles for distribution in and around New Delhi and North Region. The Respondent had hypothecated the products stored in the said godown with their bank. The products were insured with the Appellant. The Respondent had taken a policy from the Appellant bearing no.160700/11/01/00739 for a premium of Rs.2,38,320/- and the insured value of the company's entire goods was Rs.8,23,85,000/-.

3. The Appellant is an Insurance Company and is a subsidiary of General Insurance Corporation of India. The main business of the Appellant is to insure the life of houses and products and important and valuable articles of the public from fire, theft, riots etc. by accepting the premium after executing the necessary documents of and issuing policies on the agreed terms and conditions.

4. On 25/12/2001 at about 2.00 a.m., fire took place in the aforementioned godown at New Delhi. It is the case of the Respondent that it was a massive fire and the fire-brigade took 5 hours to extinguish it. It is the case of the Respondent that the fire was caused due to electric short-circuit. It is further pleaded in the plaint that at that time, the Respondent had stored products worth Rs.1,75,35,619/- which were damaged. It is further mentioned in the plaint that the Respondent has suffered a monetary loss to the tune of Rs.1,80,08,867/- due to damaged goods, Rs.75,000/- towards the loss of furnitures, fixtures and fittings, etc., Rs.65,000/- for damage to their computers and Rs.10,000/- for damage to cash in stock.

5. The Respondent informed the Appellant in respect of the incident of fire on 26/12/2001 itself and submitted their claim in the requisite form and claimed an amount of Rs.1,78,58,867/- from the Appellant. The Appellant appointed M/s. Vinod Sharma & Associates, New Delhi, as the Surveyor to prepare the survey report after physical inspection. The Respondent has further pleaded in the plaint that the said Surveyor used to send his deputy for the inspection. The Respondent always cooperated with the said Surveyor and provided all the documents.

6. It is further mentioned by the Respondent in the plaint that a joint meeting between the officers of both the parties attended by the said Surveyor Mr. Vinod Kumar took place. According to the Respondent, the Appellant asked the Respondent to settle the claim for Rs.1.25 Crores instead of 1.80 Crores. The said offer was rejected by the Respondent.

7. Finally vide letter dated 15/12/2002, the Appellant repudiated the Respondent's claim on the ground that the Plaintiff had not observed and had breached the Condition Nos.6(i)(b) and 8 of the insurance policy.

8. It is the case of the Respondent that though they had submitted all the documents, the Appellant, on this false pretext, rejected their claim and thereafter the Respondent approached the Civil Court at Pune for the claim amount as well as damages. The

Respondent had claimed in the suit that they were entitled for Rs.1,80,08,867/- for destroyed and insured goods, Rs.17,50,000/- by way of compensation and Rs.73,71,657/- by way of interest @ 18% per annum from 26/12/2001 till filing of the suit, thus claiming in all Rs.2,71,30,524/-.

9. The Appellant filed their Written Statement and denied the claim of the Respondent. Besides denying the major portion of the plaint, the Appellant stuck to their stand that the Respondent had breached the conditions of the insurance policy. In the Written Statement, the Appellant emphasized that the risk covered under the said policy was always subject to strict observations and compliance of the terms of conditions of the insurance policy. It is further mentioned in the Written Statement that the Surveyor Mr. Vinod Sharma visited the spot on several occasions and also the manufacturing unit for physical verification of the stock. Mr. Sharma had repeatedly called for various documents viz. Books, vouchers, invoices, registers relating to damaged stock, rejected stock, dead stock, slow moving stock etc. but the officers of the Respondent did not comply with the request and did not provide these documents for assessment of the exact loss. It is the Appellant's case in the Written Statement that on their inquiry, it was found that the goods which were not damaged in the fire were removed from the godown and were kept at a different place and out of them some were sold. It is further their case that though on the initial visit the Surveyor found huge quantity of rejected / damaged stock which were not forming part of the loss in the fire,

were subsequently mixed with the stock damaged in the fire and thus inflated stock affected by the fire was shown. According to the Appellant, the Surveyor had assessed the loss to the tune of Rs.92,45,650/- and that too was subject to the terms and conditions of the insurance policy and since those conditions were breached, the Respondent was not entitled to receive any claim amount.

10. In support of their case, the Respondent examined Mr.Umesh Ramdev Vasudeva who was the Manager of the Respondent Company. He deposed abut the available stock at the Delhi depot. The Respondent examined their witness no.2 Mr.Shankar Gurupad Koshti who was the then Deputy Manager (Finance) of the Respondent Company. He gave details about the godown at New Delhi and the stock stored therein. He gave evidence about obtaining the insurance policy and produced the correspondence between the Respondent and the Appellant as well as the Appellant's Surveyor Mr. Sharma. This witness supported the averments in the plaint through his evidence in respect of the fire and the loss of goods, etc.

11. The Appellant, on the other hand, examined their first witness Yallappa Rudrappa Jamkhandikar who was their Senior Manager. He gave evidence about the appointment of the Surveyor Mr. Vinod Sharma and receipt of his reports dated 01/01/2002 and 17/09/2002. According to him, the Respondent had breached the conditions and therefore were not entitled to receive the claim

amount. The Appellant examined the afore-mentioned Surveyor Mr.Vinod Sharma as their second witness who produced his report and his evidence shows that according to him, the Respondent had not cooperated and had not submitted the documents required by him for assessing the damage caused due to fire. He gave evidence about his visit to the damaged godown and the physical verification of the available damaged goods.

12. After considering the documents on record and the evidence tendered by both the parties and after hearing the arguments, the learned Trial Judge reached his conclusion as recorded by him in the impugned Judgment and Decree as mentioned earlier.

13. We have heard Mr. A. S. Vidyarthi, the learned Counsel for the Appellant and Mr. D. J. Bhange, the learned Counsel for the Respondent. After hearing the learned Counsel for both the parties and going through the record and proceedings as well as the evidence the following points arise for our determination.

SR. NO.	POINTS	FINDINGS
1	Whether impugned Judgment and Decree is correct ?	Yes, to the extent mentioned in the Final Order
2	Whether the Appellant can deny to pay the amount under the insurance policy issued by the Appellant in favour of the Respondent ?	No
3	What Order ?	As per the Final Order

REASONS

14. Mr. Vidyarthi, learned Counsel for the Appellant, did not seriously challenge the issuance of the concerned policy and he did not challenge the fact that the fire was caused due to electric short-circuit and that there was no sabotage. Mr. Vidyarthi basically emphasized that the terms and conditions of the insurance policy were breached and therefore, the Respondent were not entitled for any compensation. In the alternative, he submitted that the claim of the Respondent was exorbitant and at the highest, the Respondent were entitled to the compensation for the loss caused due to fire to the tune of Rs.92,45,650/- as mentioned in the Surveyor's report dated 16/12/2002 produced vide Exh.91. Mr. Vidyarthi submitted that the Surveyor Mr. Sharma had immediately visited the site and had submitted a Preliminary Fire Survey Report dated 01/01/2002 which was produced on record at Exh.89. Mr. Vidyarthi further submitted that the survey report dated 17/09/2002 submitted by Mr. Vinod Sharma was based on his exhaustive survey and submitted that the reasoning given in the said survey report should be accepted. He drew our attention to the averments in the said survey report showing that the Respondent had not made the concerned records available. Mr. Vidyarthi also pointed out that the Surveyor's report shows that the saleable stock which was not damaged in the fire was removed from the godown and was sold in the market and thus there was misappropriation of the stock. Mr. Vidyarthi relied on the calculation arrived at by the Surveyor wherein he has taken into consideration the factors like unaffected stocks, missing stocks, rejected stocks, which

were not deduced by the Respondent. Mr. Vidyarthi also relied on the deductions made by the Surveyor for 1% cost of sales of damaged stock for the year 2000-2001 giving concession for the amount which could be obtained as the scrap material of such damaged stock. Some deductions were also made for dead stocks / slow moving stocks as according to the Surveyor, all these stocks were forming part of the goods stored at the Delhi depot.

15. As against the submissions made by Mr. Vidyarthi, Mr.Bhange, the learned Counsel for the Respondent, submitted that the Respondent Company had always cooperated with the Surveyor and the voluminous correspondence and the records show that all the documents required by the Surveyor were always promptly provided by the Respondent Company. He further submitted that the Surveyor's report is based on assumptions which have no basis and the Surveyor was not entitled to deduct various amounts under the heads which were not applicable in the facts of the present case. He further submitted that there was no breach of any condition from the policy and therefore, there was absolutely no reason as to why the Appellant should not have accepted the Respondent's claim.

16. Having heard both the Counsel and after going through the entire documents, we are of the opinion that the Appellant had unjustifiably rejected the claim of the Respondent. The Surveyor's report is lop sided. The Surveyor's report is favouring the Appellant on every aspect without there being any basis to arrive at the conclusions mentioned in the report.

17. The fact that there was a valid insurance policy in existence on payment of premium, is not disputed. There is nothing on record to show that the fire was caused due to sabotage or any fraudulent action on the part of the Respondent. The fact that goods of the Respondent Company were damaged in the fire, is not in dispute. The fire was massive and required 50 to 60 fire-brigade tankers, is also not in dispute. In this background, the only questions that remain are whether the Respondent had breached any of the conditions of the insurance policy and whether their claim was exorbitant though they had not suffered the actual damage. To reach our findings in answer to these questions, we have carefully gone through the evidence led by both the parties as well as the documents tendered by them in support of their respective cases.

18. The principal contention of the Appellant is that there was breach of conditions of the insurance policy namely Condition Nos.6(i)(b) and 8 of the insurance policy. These conditions are as under :-

> *"6(i) On the happening of any loss or damage the Insured shall forthwith give notice thereof to the Company and shall within 15 days after the loss or damage, or such further time as the Company may in writing allow in that behalf, deliver to the Company.*
>
> *(b) Particulars of all other insurances, if any*
> *The Insured shall also at all times at his own expense produce, procure and give to the Company all such further particulars, plans, specification, books vouchers, invoices, duplicates or copies thereof, documents, investigation reports (internal/external),*

proofs and information with respect to the claim and the origin and the cause of the loss and the circumstances under which the loss or damage occurred, and any matter touching the liability or the amount or the liability or the Company as may be reasonably required by or on behalf of the Company together with a declaration on oath or in other legal form of the truth of the claim and of any matters connected therewith.

No claim under this policy shall be payable unless the terms of this condition have been complied with.

8 If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof or if any fraudulent means or devices are used by the Insured or any one acting on his behalf to obtain any benefit under the policy or if the loss or damage be occasioned by the wilful act, or with the connivance of the Insured, all benefits under this policy shall be forfeited."

19. Thus, basically, it is to be decided as to whether the Respondent Company had submitted all these documents as were required by Surveyor Mr. Sharma. In this connection, the Respondent has produced a number of documents mentioned in the list at Exh.21. All these documents mentioned in the said list are separately exhibited before the Trial Court. The Respondent has produced, *inter alia*, the concerned policy (Exh.36), statement showing stock reconciliation for the month of December 2001 (Exh.37), claim form (Exh.38) and mainly all correspondence which started from 01/01/2002 through a

letter issued by the Surveyor Mr. Vinod Sharma to the Respondent from Exh.42 onwards. The said correspondence went on till about July 2002.

20. Mr. Bhange, the learned Counsel for the Respondent, invited our attention to the letter issued by the Respondent to the said Surveyor which is placed on record before the Trial Court at Exh.43. A copy of the said letter shows that it was received by Mr. Vinod Sharma on 07/01/2002. This letter was in response to the request made by Mr. Vinod Sharma vide his letter dated 01/01/2002. The Respondent Company had forwarded whatever documents were available with them till then and had also mentioned that the other records would be provided in due course. Mr. Vinod Sharma, vide his letters dated 14/01/2002 and 21/01/2002, called for furnishing the remaining documents.

21. The Respondent had already submitted the book stocks in respect of the Delhi depot as on 24/12/2001 which gave detailed description, the book stock, the rate, whether they were partially damaged or totally damaged etc. This book stock is produced on record vide Exh.38. There is no reference in the Surveyor's report as to why this book stock register is not acceptable. It is not the case of the Appellant that these documents were fraudulently prepared by the Respondent Company and therefore, there was no reason for the Surveyor not to have relied on or not to have taken into consideration these documents which gave details about the damaged stock.

22. On the other hand, the Surveyor Mr. Sharma's report dated 17/09/2002 shows that he has unilaterally applied some deductions i.e. there is a deduction of 2% of cost of sale for 2000-2001 and April 2001 to December 2001. Now, it is not explained neither it is mentioned that this cost of rejected stock was based on the damaged stock of the company pertaining to the entire country or only to Delhi depot. There is nothing to show that it pertains to the stock only at Delhi depot. Thereafter even the value of scrap was arrived arbitrarily. There is no reason or ground mentioned as to on what basis the Surveyor had fixed the quantity and value of dead stocks / slow moving stocks or the deductions in respect of salvage of 1%. Even the mentioning of unaffected stocks and missing stocks is without any basis. The Surveyor's report mentions that one Mr.Krishnan Lal had confirmed that certain safe stock of the Respondent Company was lying with him which was left with him by the staff of the Respondent Company after fire. The Surveyor was allegedly informed by Mr. Krishnan Lal that one of the employees of the Respondent Company had sold one full truck of safe goods in the open market. However, the said Krishnan Lal was not examined by the Appellant before the Trial Court and there is no reliable evidence to believe such statement. Thus, we find that the Surveyor's report is given with an object to favour the Appellant Company and the Surveyor Mr. Sharma has not based his conclusion on a proper and reliable material before him. The Appellant's case heavily relies on this Surveyor's report and since we are not inclined to accept the said

Surveyor's report, the Appellant's case based on this Surveyor's report must fail.

23. Mr. Vidyarthi, the learned Counsel for the Appellant, relied on the Judgments of the Hon'ble Supreme Court in support of his contention. Mr. Vidyarthi invited our attention to the observations made by the Hon'ble Supreme Court in the case of ***Sikka Papers Limited Vs. National Insurance Company Limited and Others***[1]. It is held in the said Judgment that, while it was true that the Surveyor's report is not the last word, but there must be legitimate reasons for departing from such report. In the discussion made hereinabove, we have already referred to the reasons why we are not willing to give much credence to the Surveyor's report. Mr. Vidyarthi thereafter relied on the Judgment in the case of ***Sri Venkateswara Syndicate Vs. Oriental Insurance Company Limited and Another***[2]. In the said case, the insurance company had not accepted the report of the Surveyor in the first instance and had appointed a second Surveyor. In that connection, the Hon'ble Supreme Court had held that there was no prohibition in the Insurance Act, 1938 for appointment of second Surveyor by the insurance company, but while doing so, the insurance company had to give satisfactory reasons for not accepting the report of the first Surveyor and the need to appoint second Surveyor. Scheme of Section 64-UM particularly of sub-sections (2), (3) and (4) shows that the insurer would not appoint a second Surveyor just as a matter of course. If for any valid reason the report

1 **(2009) 7 Supreme Court Cases 777**
2 **(2009) 8 Supreme Court Cases 507**

of the Surveyor is not acceptable to the insurer, it must specify cogent reasons, without which it was not free to appoint the second Surveyor. It was further observed that if the reports were prepared with good faith, with due application of mind and in the absence of any error or ill motive, the insurance company was not expected to reject the report of the Surveyor. In the present case, the insurance company, in fact, want to rely on the Surveyor's report and therefore, this authority is not applicable to the present facts. Mr. Vidyarthi thereafter relied on the case of ***United India Assurance Co. Ltd. and Others Vs. Roshan Lal Oil Mills Ltd. and Others***[3] wherein it was observed by the Hon'ble Supreme Court that National Consumer Disputes Redressal Commission had erred in not considering the Surveyor's report which was placed on record. In the present case, we have considered in detail the report submitted by the Surveyor and therefore, even this case is not applicable to the present set of facts.

24. The Surveyor's report has drastically reduced the amount of claim based of some deductions which has no basis. However, the Appellant rejected the claim entirely on the ground that the Respondent had breached the Conditions Nos.6(i)(b) and 8 of the insurance policy. In our opinion, there was no such breach and the Appellant has unjustifiably rejected the claim of the Respondent.

25. The learned Trial Judge has awarded a sum of Rs.1,78,58,867/- towards the value of damaged and insured goods

3 **(2000) 10 Supreme Court Cases 19**

which consisted of the damaged goods worth Rs.1,42,94,780/- plus additional 8% standard overhead plus Excise duty which totalled at Rs.1,78,58,867/-. From the policy on record, it is clear that what was insured by the Respondent was stock worth Rs.1,75,00,000/- in respect of the godown at Shivaji Marg, New Delhi, as well as Rs.75,000/- by way of furnitures, fixtures and fittings at the same godown. Thus at the most, the Respondent is entitled for Rs.1,75,75,000/- under the said policy. Therefore to that extent, the Award for Rs.1,78,58,867/- is excessive and we reduce it to Rs.1,75,75,000/-. The learned Judge, in his discretion, has awarded compensation of Rs.5,00,000/- because the Appellant had unjustifiably repudiated the claim. We are not inclined to interfere with the Award of such compensation neither are we inclined to interfere with the interest awarded by the learned Judge. Hence the following Order.

ORDER

(i) The Appeal is partly allowed.

(ii) Decree dated 28/01/2010 passed by the 8th Joint Civil Judge Senior Division, Pune in Special Civil Suit No.12 of 2004 is modified to the extent that instead of Rs.1,78,58,867/-, the Appellant to pay an amount of Rs.1,75,75,000/- towards the value of damaged and insured goods and also Rs.5,00,000/- by way of compensation along with interest @ 9% p.a. on the above amount from the date of filing of the suit till its realization.

(iii) Decree be drawn accordingly.

(SARANG V. KOTWAL, J.) **(K. K. TATED, J.)**