

**IN THE HIGH COURT AT CALCUTTA
Commercial Appellate Division
ORIGINAL SIDE**

Present:

The Hon'ble Justice Arijit Banerjee

AND

The Hon'ble Justice Rai Chattopadhyay

APD/1/2020

IA NO. GA/2/2020 (Old No: GA/262/2020)

**National Insurance Company Limited
Vs.
Sethia Oil Industries Limited and Anr.**

For the Appellant : Mr. Malay Kumar Ghosh, Ld. Senior Adv.
: Mr. Saumyen Dutta, Adv.
: Ms. Dolon Das Gupta, Adv.

For the respondent No. 1 : Mr. Sakya Sen, Ld. Senior Adv.
: Mr. Rudrajit Sarkar, Adv.
: Mr. Jai Kumar Surana, Adv.
: Mr. Abhimanyu Roy, Adv.
: Ms. Vanshika Newar, Adv.

Heard on : **18.07.2025**

Judgment on : **20.08.2025**

Rai Chattopadhyay, J. :-

(1) A judgment of the Hon'ble Single Judge dated October 1, 2019 in CS No. 99 of 2008 is under challenge in this appeal that is, APD No. 1 of 2020. The suit involved the question of legality, propriety and justifiability of repudiation of claim for the loss and damage of the present

respondent/plaintiff insured under a policy, with the appellant/insurance company; that whether the respondent/plaintiff was entitled to redemption of damages for the loss said to have suffered by the same.

(2) The respondent/plaintiff has claimed in the said suit a decree for recovery of Rs. 73,28,754.54/- against the appellants/defendants and interest at the rate of 24% per annum.

(3) The plaintiff's case before the Hon'ble Single Judge was inter alia that the plaintiff company produces and supplies rice bran oil to various parts of the country by tankers. For the purpose of transportation of such oil, the plaintiff company engages various transportation companies, to provide for oil tankers. For the purpose of indemnifying itself from any loss which may arise during transportation, the plaintiff obtained insurance policy from the appellant/defendant insurance company known as "Marine Cargo Open Policy". Under such policy, the plaintiff was insured from loss arising from transit risk including accident etc. The insurance policy of the plaintiff was valid from the period April 04, 2003 to April 03, 2004.

(4) The consignments were dispatched on September 28, 2003 and October 10, 2003 respectively in the vehicles bearing No. WB 03A/3149 and WB 23A/4816. The plaintiff has stated in the plaint that the consignments as above were of the value of Rs. 13,20,500/- Rs. 13,70,040/- respectively. The plaintiff states and asserts that both the vehicles as above along with the entire consignment were untraceable and lost.

(5) The third consignment was carried in the vehicle No. WB 19A/3925, which was dispatched on October 12, 2003. It is stated that the same has met with an accident and the entire oil contained therein were soiled. According to the plaintiff, the value of the consignment in the vehicle which met with an accident was Rs. 13, 23, 000/-

(6) Hence, such loss and damage suffered by the plaintiff company due to the loss and accident of the vehicles respectively, the claim under the insurance policy, was raised by it, before the appellant/defendant insurance company but to no avail since the insurance company had repudiated the claim of the insured. Hence, the instant suit was filed before this Court to seek relief as described above. The claim of the plaintiff as described in the plaint itself may be produced herein below in a tabular form:-

WB 03A/3149	Principal amount for the First Consignment	Rs. 13,20,500.00
	Interest @ 18% p.a. from the date of dispatch i.e. 28.9.2003 to 7.5.2008	Rs. 10,95,978.82
WB 23A/4816	Principal amount for the Second Consignment	Rs. 13,70,040.00
	Interest @ 18% p.a. from the date of dispatch i.e. 10.10.2003 to 7.5.2008	Rs. 11,29,663.67
WB 19A/3925	Principal amount for the Third Consignment	Rs. 13,23,000.00
	Interest @ 18% p.a. from the date of dispatch i.e. 12.10.2003 to 7.5.2008	Rs. 10,89,572.05
Total		Rs. 73,28,754.54

(7) The transporter did not contest the suit. However, the appellant/defendant No.1 had contested and contended that the plaintiff violated terms of the insurance policy, including overloading tankers and delayed reporting of incidents; that the plaintiff failed to prove the loss and that there was a breach of insurance policy terms, which disentitles the plaintiff/respondent No.1 from any benefit under the policy. The appellant/defendant No.1 raised issues of misjoinder, limitation, and the plaintiff's responsibility for overloading. The defendant argued that the plaintiff having failed to prove any loss suffered; hence, is not entitled to any benefit under the policy and that there was a breach of insurance policy terms by the plaintiff/respondent No.1.

(8) The Court held that the plaintiff's claims were within the limitation period and supported by evidence; that the insurance policy covered the losses, and the appellant/defendant no. 1 failed to prove any breach of terms by the plaintiff; that the plaintiff acted reasonably in pursuing the claims and inquiries regarding the lost consignments. That, it has provided sufficient documentation including valid insurance policy covering the losses and also the correspondence with the transporter. The Court found that the plaintiff had a valid insurance policy covering the loss. The Court also addressed the defendant's arguments regarding overloading and breach of policy conditions, noting that the burden of proof for such breaches lies with the insurance company. Ultimately, the Court found that the plaintiff was entitled to the claimed amount. The Court held that the insurance company/appellant/defendant No.1, had

failed to prove any breach of policy conditions that would absolve them of liability under the insurance contract. The transporter (defendant no. 2) was also found to be jointly liable. The suit was decreed in favour of the plaintiff/respondent No.1, with the directions that the plaintiff is entitled to a decree for principal sum of Rs. 40,13,540/- being the value of the consignments together with interest @ 9% from the date of institution of the suit till satisfaction of the decree; considering that the claim is of 2003 and the suit is pending for a prolonged time, the Court directed that in the event the principal sum and the interest thereon is not paid within a period of three months from date the plaintiff shall also be entitled to interest @ 9% from January 1, 2004 till the institution of the suit. The Court has also held that the burden of proof for breach of insurance policy terms lies with the insurer. That, overloading of vehicles cannot be a ground for rejecting claims, unless it directly contributes to the loss.

(9) Mr. Malay Kumar Ghosh, learned senior counsel, has represented the appellant/Insurance Company (in APD 1 of 2020 and his submissions are adopted in the other appeal as well). His first attack against the impugned judgment is with regard to defect of document, which fails the verdict, he says. This is with regard to the truck which has met with an accident and the entire consignment carried therein is said to have been soiled. Mr. Ghosh says that the extent of damage of the vehicle, duly corroborated in the 'surveyor's report' should have been the basis for invocation of the insurance contract clauses. According to him,

proof of a document comprises with a three stage procedure; that is, proof of existence of a document, proof of contents thereof and thirdly, proof of truth of contents of the said document. Mr. Ghosh argues that the maker of the document, that is, in this case the surveyor himself, is the competent and eligible person under law, to duly prove before the Court all the three stages of proof of the document, that is his own report, to render the contents thereof to be acceptable by the Court, as evidence and proof of a fact. Mr. Ghosh learned senior counsel, refers to the impugned judgment to say that the report of the surveyor has not even been tendered in evidence in the suit though even mere tendering the document or marking it as the exhibit, would not prove the evidentiary value of the contents thereof; that since the said report has been supplied by the appellant to the respondent company, its existence may not be doubted. However, since the same has not been tendered in evidence and the maker thereof, that is the surveyor has not proved the contents or truth thereof, the said document would not bear any evidentiary value in the suit. Allegedly, the Court without considering the legal aspects of the matter as above, has erroneously placed reliance on the 'surveyor's report', which is a document not tendered in evidence and contents of which have not been proved. That the Court unreasonably and illegally founded its judgment on the same.

(10) Mr. Ghosh, learned senior counsel has submitted that the onus of proving the 'surveyor's report', in the suit lied with the respondent/plaintiff company, who should have brought the surveyor as

the witness and prove the document in support of its claim that insurance contract clauses are to be invoked to make good the loss suffered by the respondent/plaintiff company.

(11) According to the appellant, the suit before the Hon'ble Single Judge was hopelessly barred by limitation. In this regard Mr. Ghosh has taken this Court to the relevant portion of the plaint filed before the suit Court, wherein the respondent/plaintiff has mentioned that between July 2006 and March 2008, the plaintiff has pursued remedy at the National Consumer Disputes Redressal Forum. Mr. Ghosh argues that mere pleading is not the proof and that such pleading of the plaintiff is not proved in absence of production of any order copy of the National Consumer Disputes Redressal Forum. Learned senior counsel has also submitted that even if the National Consumer Disputes Redressal Forum has mentioned in order that the plaintiff be entitled to obtain benefit of Article 14 of the Limitation Act in the event it filed a suit, that would not be binding on the suit Court and the suit Court would be authorised and at liberty under the law, to consider if the delay in filing the suit is to be condoned or not. Learned senior counsel has submitted that in the instant suit neither there has been any prayer to that effect nor any consideration and decision by the Court as regards condonation of delay. According to him the suits being barred by limitation were liable to be dismissed.

(12) Mr. Ghosh has stated that it has also been erroneous on the part of the Court to rely on the document marked as Exhibit J, which include the surveyor's report and FIR as well, along with other two letters. He says that Exhibit J cannot be relied on having no evidentiary value since the author of the letter has not been examined to prove the truthfulness of the contents thereof.

(13) The appellant's further contention is with regard to the letter marked as 'Exhibit-W' in the suit. That is a letter dated July 10, 2006, written by the Senior Divisional Manager of the appellant/Insurance Company addressed to the Managing Director of the respondent/plaintiff company. In answer to the claim raised by the respondent company, the appellant writes therein that "On the basis of the documents submitted by you and the relevant survey/investigation reports, it has been without prejudices concluded that 1) Though the transporter did not deliver your Cargo of rice bran oil worth Rs. 39,51,331.00 (under three different consignment notes) you neither informed Police authorities nor initiate any legal action against the transporters, 2) It is difficult to accept the three tankers, certified to carry far less quantity of oil, were carrying oil far in excess of its capacity". Citing the reasons as above the appellant insurance company rejects the plaintiff's claim. According to the appellant, the plaintiff's witness (P.W.1) not only asserts existence of the said letter of the appellant, but also the correctness of the contentions therein. Mr. Ghosh, learned senior counsel has argued that such ocular and documentary evidence not only mark the facts, that no legal

proceedings were adopted by the plaintiff company against the transporter in spite of the allegation of the vehicles being lost – as proved, but also the plaintiff has failed to discharge the burden of proof which lied on the plaintiff, it having asserted the facts of loss of the vehicles. The learned senior counsel has stated that simply recounting the facts that the vehicles were lost in transit is inadequate as proof of the matter, unless it is substantiated by additional credible documentary or testimonial evidence to establish a plausible context of the occurrence of such an event. According to the appellant, the suit Court has erred in assessing the same and thus has arrived at a wrongful decision.

(14) Mr. Ghosh has argued that the Court should have considered the case of the plaintiff respondent according to its own merit and upon application of mind to the fact that the plaintiff has not been able to produce and prove sufficient documents to corroborate the fact it has urged about regarding loss and damage being suffered. He says that even if the appellant/defendant insurance company was not there before the Hon'ble Single Judge, the Court ought to have considered the plaintiff's case according to its own merits unless the plaintiff was able to prove its own case with sufficient evidence, the Court would not have been justified in allowing the claim of the plaintiff, as it has been done in the instant suit. Mr. Ghosh says that the judgment impugned is based on no evidence, is not maintainable in law and is thus liable to be set aside.

(15) Mr. Ghosh, learned Senior Counsel has relied on the judgments as follows:-

- i) ***Sait Tarajee Khimchand and Others Vs. Yelamarti Satyam Alias Sattaya And Others*** reported at ***(1972) 4 SCC 562***
- ii) ***Om Prakash Berlia and Another Vs. Unit Trust of India and Others*** reported in ***1982 SCC OnLine Bom 148***
- iii) ***Life Insurance Corporation of India and Another Vs. Ram Pal Singh Bisen*** reported at ***(2010) 4 SCC 491***
- iv) ***Bishwanath Rai Vs. Sachhidanand Singh*** reported at ***(1972) 4 SCC 707***

(16) Mr. Sen, learned Senior Counsel has represented the respondent/plaintiff company. Mr. Sen resists the contentions and prayer of the appellant for the reason submitted that the fact of loss of the vehicle by way of being encompassed and being damaged due to accident, are the admitted and accepted facts to be true. He refers to the written statement filed by the appellant/defendant before the Hon'ble Single Judge in support of his contention as above. In such background, he says, that the plaintiff was not required to prove something which fact was uncontroverted in the suit. Thus, he raises objection as to the argument advanced on behalf of the appellant that proof of certain facts by proving the truthfulness of the contents of the supporting documents were imperative, in the suit.

(17) Mr. Sen has argued that the obligation, if any, of the plaintiff would be limited to the stipulations made in the insurance contract itself. That its obligation would be limited to showing a valid insurance contract to be in place, that the subject matter is covered by the insurance contract. He says that once these facts are on record, the insurance claim of the insured cannot be repudiated by the insurer. It is submitted that the insurer would not be at liberty to reject claim of the insured unless the same falls within the exception clause enumerated in the insurance contract. He says that in that case, the insurance company would be obliged to bring evidence as to how and why they say that the claim of the insured should be treated within the exception clauses in the insurance contract.

(18) Mr. Sen has elaborated further that it has never been the stand of the appellant insurance company by disbelieving the claim of the plaintiff or that the plaintiff company was guilty of willful misconduct and, therefore, the claim was excluded under the policy. Instead, according to the respondent/plaintiff, the insurance company has made out a case of belated steps being taken by the respondent/plaintiff company that the company should have lodged the complaint before the police at an earlier stage or a better explanation should have been given by it for delay in filing the complaint. According to Mr. Sen, learned Senior Counsel, it is not the same thing as saying that there was no complaint at all or no steps has ever been taken by the respondent/plaintiff. He says further that the insurance company once having accepted the fact of lodging of FIR is not authorized now under the law to throw question as to the genuinity or proof of that

complaint due to the fact that the complaint has not been examined in Court. He says that it would have been an unnecessary exercise so far as validity of claim of the plaintiff company under the insurance policy is concerned.

(19) Mr. Sen, learned Senior Counsel has placed reliance on the following judgments in support of his argument as above. He says that those were cited before the Hon'ble Single Judge too.

i) ***M/s. ICICI Lombard General Insurance Company Ltd. Vs. Suresh Mehta & Anr.*** reported at **2017 SCC OnLine Del 9511.**

ii) ***Lakhmi Chand Vs. Reliance General Insurance*** reported at **(2016) 3 SCC 100.**

iii) ***Narcinva V. Kamat and Another Vs. Alfredo Antonio Doe Martins and Others*** reported at **(1985) 2 SCC 574.**

iv) ***National Insurance Co. Ltd. Vs. Swaran Singh and Others*** reported at **(2004) 3 SCC 297.**

v) ***Vikram Greentech India Limited Vs. New India Assurance Company*** reported at **(2009) 5 SCC 599.**

(20) The suit before the Hon'ble Single Judge being C.S.No. 99 of 2008, is a suit for recovery of the insurance claim amount and interests, by the respondent/plaintiff. So far as the fact that at the time of loss or accident of the vehicles, those were duly covered under a valid insurance policy with the appellant/defendant/insurance company, is concerned, the same has not been denied or challenged in the instant appeal. Hence, is an admitted fact. An insurance policy is a contract between the insurer and the insured and the parties would be strictly bound by the terms and conditions as provided in the contract between the parties. It is a contract of indemnification. The Supreme Court in the case of **United India Insurance Company Limited vs Levis Strauss (India) Private Limited [reported at (2022) 6 SCC 1]** has held that an insurance contract is to cover defined losses. The same Court in the case of **New India Assurance Company Limited vs Rajeshwari Sharma [reported at (2019) 2 SCC 671]** has also held that exclusion clauses in the insurance contracts are interpreted strictly since those have the effect of completely exempting the insurer of its liabilities.

(21) Before the Hon'ble Single Judge, the plaintiff has pleaded loss and damage of the subject matter covered under the insurance policy and standard of proof of the same is to be the preponderance of probability. The plaintiff had to show that the loss incurred was covered within the terms of the policy and that on a balance of probability there existed a proximate cause between the loss incurred and the vehicle being in transit. In this regard the Court may beneficially refer to the judgment of **Bajaj Allianz**

General Insurance Company Limited vs State of Madhya Pradesh [reported at (2020) 18 SCC 376] and extract the relevant portion, as follows:

“41. In Rhesa Shipping Co. S.A. v. Edmunds [Rhesa Shipping Co. S.A. v. Edmunds, (1985) 1 WLR 948 : (1985) 2 All ER 712 (HL)] , the plaintiff's cargo ship sank in calm weather in the Mediterranean Sea. The plaintiff sought to recover damages under two identical marine insurance policies that covered losses incurred by perils of the sea. While discussing the burden of proof on the plaintiff to prove its case, Lord Brandon, speaking for the House of Lords held : (WLR pp. 951 B-D & 956 C-D)

“In approaching this question it is important that two matters should be borne constantly in mind. The first matter is that the burden of proving, on a balance of probabilities, that the ship was lost by perils of the sea, is and remains throughout on the shipowners. Although it is open to underwriters to suggest and seek to prove some other cause of loss, against which the ship was not insured, there is no obligation on them to do so. Moreover, if they chose to do so, there is no obligation on them to prove, even on a balance of probabilities, the truth of their alternative case.

The second matter is that it is always open to a court, even after the kind of prolonged inquiry with a mass of expert evidence which took place in this case, to conclude, at the end of the day, that the proximate cause of the ship's loss, even on a balance of probabilities, remains in doubt, with the consequence that the shipowners have failed to discharge the burden of proof which lay upon them.

... It requires a Judge of first instance, before he finds that a particular event occurred, to be satisfied on the evidence that it is more likely to have occurred than not. If such a Judge concludes, on a whole series of cogent grounds, that the occurrence of an event is extremely improbable, a finding by him that it is nevertheless more likely to have occurred than not, does not accord with common sense. This is especially so when it is open to the Judge to say simply that the evidence leaves him in doubt whether the event occurred or not, and that the party on whom the burden of proving that the event occurred lies has therefore failed to discharge such burden.”

(22) The Supreme Court in the case of **Texco Marketing Private Limited vs Tata AIG General Insurance Company Limited** [reported at (2023) 1 SCC 428] has held while dealing with an exclusion clause, that the burden of proving the applicability of an exclusionary clause lies on the insurer. Further, the judgment of the Supreme Court in **National Insurance Company Limited vs Vedic Resorts and Hotels Private Limited** [reported at (2023) 12 SCC 823] may be mentioned in which the

Court has held that it is the duty of the insurer to plead and lead cogent evidence to establish application of exclusion clause, if at all. In ***National Insurance Company Limited vs Ishar Das Madan Lal [reported at (2007) 4 SCC 105]*** the Supreme Court has held that the evidence must unequivocally establish that the event sought to be excluded is specifically covered by the exclusionary clauses in the contract.

(23) Therefore, the law is well settled that the preliminary burden of proving loss and damage pertaining to the coverage under the insurance policy lies on the claimant, the plaintiff/respondent in this case. After the plaintiff discharges his burden to the standard of preponderance of probability regarding a proximate cause between the loss incurred and the vehicle being in transit, the burden shifts to the insurer, the appellant in this case, to plead and lead cogent evidence to establish application of exclusion clauses in case of the claimant.

(24) Both Mr. Ghosh and Mr Sen learned senior counsels have put forth two different circumstances when they say that their respective clients could have withheld producing evidence in the Court and the facts and records which were already before the Court should have been sufficient in that case, for the Court to decide against the respective opponent. According to Mr. Ghosh such hypothetical situation would have been if the suit had remained undefended and the insurance company would not have contested therein. He says that even in such a circumstance the lack of cogent evidence produced by the plaintiff/respondent should have led the Court to

hold against the plaintiff. Similarly, Mr. Sen has submitted that the facts of loss of vehicles, lodging of FIR and damage of the vehicle due to accident being not denied by the insurer, would not have required any further evidence for proof of the same. Hence, according to him the alleged deficiency in evidence as put forth by the appellant should bear no relevance at all.

(25) As stated earlier, the burden of proof of existence of a proximate cause between the loss incurred and the vehicle been in transit lies with the claimant, respondent/plaintiff in this case. Hence, by way of adducing positive evidence in Court, that burden could have been discharged by the plaintiff and not merely on the basis of the fact that surrounding circumstantial evidence proximate to the loss said to have been incurred, has not been denied by the insurer, in so many words. Worth here to mention is a portion in **MacGillivray on Insurance Law**:

“20-006 The burden of proving that the loss was caused by a peril insured against is on the assured. It is not necessarily for him to prove precisely how the casualty occurred, but he must show the proximate cause falls within the perils insured against.” [Sweet & Maxwell, 12th Edition, 2012].

(26) For the benefit of discussion, let the Court proceed under the two broad headings, relating to the two vehicles said to have lost in transit, and the other vehicle, said to have been damaged due to accident, separately.

(27) Before that, it is pertinent to look in the policy documents and its clauses, including the "exclusion clauses", under which claim for indemnification may be repudiated.

"RISKS COVERED

- 1. This insurance covers all risks of loss or damage to the subject matter insured except as provided in clause Nos. 2, 3 and 4 below.***

Exclusions

- 2. In no case shall this insurance cover***

2.1 Loss damage or expense attributable to willful misconduct of the assured.

2.2 Ordinary leakage, ordinary loss in weight or volume, or ordinary wear and tear of the subject matter insured

2.3 Loss damage or expense caused by insufficiency or unsuitability of packing, or preparation of the subject matter insured (for the purpose of this clause 2.3 packing shall be deemed to include stowage in a container or lift van but only when such stowage is carried out prior to attachment of this insurance or by the Assured or their servants).

2.4 Loss damage or expense proximately caused by delay even though the delay be caused by a risk insured against

2.5 Loss damage or expense caused by inherent vice or nature of the subject matter insured

- 3. In no case shall this insurance cover loss damage or expense caused by:***

3.1 War civil war revolution rebellion insurrection or civil strife arising therefrom, or any hostile act by or against a belligerent power.

3.2 Capture seizure arrest restraint or detainment and the consequences thereof or any attempt threat

3.3 Derelict mines, bombs or other derelict weapons of war

- 4. In no case shall this insurance cover loss damages or expenses***

4.1 Caused by strikers, locked out workmen or persons taking part in labour disturbances, riots or civil commotions

4.2 Resulting from strikes, lockouts labour disturbances, riots or civil commotions

4.3 Caused by any terrorist or any person acting from a political motive."

(28) The policy also mentions that in the event of loss or damage which may result in a claim under the said insurance, immediate notice must be given to the policy issuing office or nearest Branch office.

(29) Hence, therefore, the claimant would be entitled to be indemnified, he having an insurable interest in the subject-matter insured at the time of loss and having proved on balance of probability that there existed a proximate cause between loss incurred and the vehicle being in transit.

(30) Mr. Ghosh has challenged claim of the respondent/plaintiff to be at all maintainable due to inordinate delay in filing the suit. He says that the averment made in plaint that the plaintiff/respondent had previously moved the Consumer Forum and by virtue of the leave granted by it, the instant suit has been filed, is not worthy of consideration, for the reason that order of the Forum has not been exhibited and proved in this case. Also that the order of the Forum, if any, is not binding upon the Court. Hence, without condoning the long delay for sufficient reasons, the Court could not have held the instant suit as maintainable.

(31) Section 74 of the Indian Evidence Act defines public documents as those forming acts or records of acts of sovereign authority, official bodies, tribunals or public offices, and public records of private documents. The law permits the court to presume the existence of a public document, which relates to existence and authenticity of the document.

(32) Therefore, an order passed by the Consumer Forum is a public document. The law explicitly permits the court to presume existence of that, without producing or exhibiting the original or certified copy. Like Section 74(2) of the Indian Evidence Act recognizes that public records of private documents are also public documents. Section 76 thereof, authorizes public officers to issue certified copies, which are secondary evidence of the contents but do not necessarily prove the existence of the original. Section 114 of the Evidence Act permits Courts to presume the existence of certain facts, including the existence of a public document.

(33) The Supreme Court in ***Appaiya Vs. Andimuthu*** reported at **2023 SCC OnLine SC 1183**, has clarified that certified copies of public documents are admissible to prove their contents, but the existence of the document can be proved without exhibiting the original or certified copy. The Court has emphasized that the proof of existence does not require formal proof of the document itself.

(34) Hence, Mr. Ghosh's submission regarding delay in filing the suit having remained unexplained due to not production of certified copy of order of the consumer Forum, does not appear to be tenable, since its order

being a public document, existence of the same can well be presumed without production of the original or certified copy thereof.

(35) Next remains that if the leave granted by the Forum could be binding on Court or not. Mr. Ghosh argued that it could not and rightly so. However, by proceeding with the suit, the court has implied maintainability of the suit even without spending too many words, on the aspect of delay etc. In view of the nature of the suit which was based on a beneficial legislation and the fact of existence of the order of the Consumer Forum, this Court finds no error for the Hon'ble Judge, to try the suit.

(36) The two vehicles being No. WB03A 3149 and WB23A 4816 were dispatched with the consignment on September 28, 2003 and October 10, 2003 respectively from Burdwan to Jalgaon at Maharashtra for delivery of consignment. The plaintiff/respondent has stated that the vehicles were lost in transit. Intimation for non-delivery of consignment was given by the plaintiff to the insurance company vide letter dated November 03, 2003. On November 16, 2003, FIR was lodged due to the vehicles being untraceable at Burdwan Police Station being Case No. 1529 dated 16.11.2003. By dint of a letter dated November 17, 2003, the plaintiff informed the fact of lodging of FIR to the insurance company. The said letter is part of Exhibit-J in the suit.

(37) According to the appellant insurance company, Exhibit-J is not a sufficient document to prove the fact of loss of vehicle in transit so as to

make the plaintiff eligible for being indemnified under the insurance policy. It is submitted that the unexplained inordinate delay in lodging the FIR would pose a serious question and doubt as regards the genuinity of the contents therein. Furthermore, it has been submitted that the complainant of the said police case has not been examined and thus the truthfulness of the contents of the FIR is also not proved and suspicious.

(38) Contracts of insurance are governed by the principles of utmost good faith. In a contract of insurance, any fact which would influence mind of a prudent insurer in deciding whether to accept or not to accept risk, is a material fact. According to the principle of “Uberrima Fides” as enunciated under Section 45 of the Insurance Act, 1932, any fraudulent misrepresentation, knowledge of misrepresentation of the insured, his deliberate non-compliance with breach of duty of good faith, utmost care, to be accurate with his statements and information asymmetries due to such accuracy of the statement made by him, any material misrepresentation or concealment would render him liable under the exclusion clauses of the insurance policy. The legal standards for identifying suspicious circumstances leading to the rejection of vehicle insurance claims during transit preliminary hinge on the timing and manner of compliance with statutory and policy conditions, the materiality of non-disclosures or breaches and the presence of genuine, bona fide reasons for any irregularities. The Court is vested with the duty to scrutinise whether deviations from policy conditions are material and whether they suggest

mala fide intent or concealment which could justify repudiation. In various judgments, the Constitutional Courts have held that suspicious circumstances would include delay in reporting, non-disclosure of material facts, improper handling or violations of regulatory guidelines specially when such breaches are deliberate or there is concealment of material facts.

(39) Supreme Court in ***Kanwarjit Singh Kang Vs. ICICI Lombard General Insurance Company Limited*** reported at **(2024) 1 SCC 375** has been pleased to hold that delay in reporting or lodging FIR and informing the insurer can be considered suspicious if it indicates mala fide intent or concealment of material facts.

(40) Delay in lodging FIR or providing immediate notice especially when coupled with other suspicious conduct can be a strong indicator of mala fide intent requiring closer scrutiny of the claim. Immediate lodging of FIR and co-operation with police is essential in case of theft of a vehicle; delay in informing the insurer and failure to safeguard the vehicle can lead to repudiation of the claim.

(41) In the present case, the vehicles as mentioned above, were scheduled to travel from Burdwan to Maharashtra. The intimation of the consignment having not been delivered is dated November 03, 2003 after a little less than one month from the date of dispatch of the second vehicle. The November 03, 2003 letter written by the plaintiff to the insurer has been

marked as Exhibit-F regarding the truthfulness of the content thereof there is no argument in this case. The Court is constrained to notice in the said letter regarding no averment of loss of the two vehicles as mentioned above only that the tankers have not reached destination is the information given by the plaintiff to the insurer.

(42) Later on, on November 16, 2003, an FIR was lodged at Burdwan Police Station alleging loss of two vehicles as above. On perusal of the copy of FIR (though the truthfulness of the contents thereof and admissibility of the same is under challenge), it appears that the complainant has not recorded any reason therein regarding the delay in filing of the FIR. Hence, evidently there is gross violation of the policy condition in this case by the plaintiff regarding timely furnishing of information of any loss or damage suffered. In the factual background of the case, the delay in filing FIR raises suspicion and doubt as regards the truthfulness of the statements made in the FIR itself over and above the fact that the claimant has acted in gross violation of the terms of insurance policy. As discussed above, this should be a relevant and material fact for the insurer while deciding whether to accept or not the claim.

(43) The Hon'ble Single Judge has lost sight of the circumstances which are marred with the cloud of doubt as to the reason of such late submission of First Information Reports particularly, when it is well understandable that the loss incurred in that case would have been huge for the plaintiff. The Hon'ble Single Judge has proceeded on the basis that since

the standard of proof is of preponderance of probability and such standard is met with coming on record the First Information Report as mentioned above, no other factor would have been relevant for the Court. This Court is unable to accept such finding of the Hon'ble Single Judge as tenable in the eye of law. In case of an insurance policy, indemnification and/or repudiation of the claim of the policy holder, where care and good faith are the essential conditions of conduct of the parties, the factors which may raise question as regards any doubtful conduct, should have been taken into consideration by the Court. This Court is constrained to hold that the Hon'ble Single Judge has erred in considering the evidence on record vis-à-vis the factual background of the case in its proper perspective and in terms of the law and settled legal principles therefor, the decision of the Hon'ble Single Judge vide judgment dated October 01, 2019 for indemnification of loss suffered due to the loss of vehicles No. WB 03A 3149 and WB 23A 4816 is found liable to be set aside.

(44) The other vehicle No. WB 19A 3925 has been claimed to have met with an accident, resulting into damage of the vehicle beyond repair and loss of the entire consignment carried in the same. The appellant insurance company has stated in evidence that a surveyor was appointed for assessing the loss and a report of the surveyor is available. The appellant has argued that the report of the surveyor was duly communicated to the plaintiff/respondent. Since the plaintiff desire to ascertain and prove the fact of damage of the vehicle so much so that the insurance may be indemnified, it was the onus of the plaintiff to prove in the Court the

surveyor's report. According to the appellant defendant since the plaintiff has not cited any witness that is, the surveyor himself to prove the content of the said report, no claim could have been granted in favour of the plaintiff by the Court on the basis of the report of the surveyor. Mr. Ghosh, learned Senior Counsel has contended that the Hon'ble Single Judge has erred in relying upon the document which has not been proved in the Court to come to a finding. Such finding is only perverse, he says.

(45) The surveyor's report in an insurance claim is to be proved primarily by the insurance company that appointed the surveyor. The insurer has the burden of establishing the authenticity, credibility and proper conduct of the surveyor's report which is considered as important and valuable document in claim settlement proceedings. The Supreme Court in **Sri Venkateswara Syndicate Vs. Oriental Insurance Company Limited** reported at **(2009) 8 SCC 507** has held that *"Surveyors are appointed under the statutory provisions and they are the link between the insurer and the insured when the question of settlement of loss or damage arises. The report of the surveyor could become the basis of settlement of a claim by the insurer in respect of the loss suffered by the insured."* This underscores that the surveyor's report is intended to be a foundational document for claim settlement and its importance is well recognised. It is incumbent upon the insurer to give valid reasons in order to depart from the findings in surveyor's report. The Courts have held that the surveyor's report is admissible and carries significant evidentiary value, unless proved otherwise.

(46) The surveyor was appointed by the insurance company to ascertain the damage who has prepared a report. Merely because the report was served upon the plaintiff by the defendant, the plaintiff would not be obliged to call the surveyor as a witness in the Court to prove the said document. Since the fact that surveyor was appointed by it and he has prepared a report, has been ascertained by the appellant company, the same was duty bound under the law to call the surveyor as a witness and prove his report. In case of the appellant/defendant, not complying with the statutory duty of citing the surveyor as a witness, the statement of the plaintiff/respondent that the vehicle has met with an accident and suffered hundred per cent damage and loss of consignment remains uncontroverted. By doing so, the appellant/insurance company has tried to shift the onus of proof of the said document on the claimant, which is not permissible under the law.

(47) In such view of the facts and circumstances in the instant case, this Court is constrained to find that the Hon'ble Single Judge has not acted erroneously or unreasonably in relying on the surveyor's report which actually ascertains the extent of damage of the vehicle as above due to accident. The proof of the pudding is in its eating – this Court finds no error whatsoever for the Hon'ble Single Judge to go into the surveyor's report which is corroborating the uncontroverted claim of the plaintiff of damage of vehicle due to accident and loss of consignment. So far this portion of the impugned judgment is concerned, this Court finds no reason to interfere

with the same. Hence, the insurance claim allowed for the vehicle No. WB 19A 3925 is hereby upheld.

(48) Hence, the instant appeal being No. APD 1 of 2020 is partly allowed with the following directions:-

i) The insurance claim as regards vehicle Nos. WB 03A 3149 and WB 23A 4816 are rejected; the relevant portion of the impugned judgment dated October 01, 2019 in CS No. 99 of 2008 is set aside.

ii) The insurance claim with respect to vehicle No. WB 19A 3925 is allowed; the portion of the impugned judgment dated October 01, 2019 in CS No. 99 of 2008 is upheld.

iii) The appellant/insurance company is directed to comply with the order as above positively within a period of three (03) weeks from the date of communication of copy of this judgment.

(49) Urgent certified copy of this judgment if applied for, be supplied to the parties upon compliance with all requisite formalities.

(Arijit Banerjee, J.)

(Rai Chattopadhyay, J.)