IN THE HIGH COURT AT CALCUTTA

ORIGINAL SIDE

COMMERCIAL DIVISION

Present:

The Hon'ble Justice Sugato Majumdar

CS-COM/91/2024
[OLD NO CS/11/2018]

SAURABH GUPTA

VS

ROYAL SUNDARAM GENERAL INSURANCE COMPANY LIMITED & ANR.

For the Plaintiff	:	Mr. Swarnendu Ghosh, Sr. Adv. Ms. Suchismita Ghosh, Adv. Mr. Abir Lal Ghosh, Adv.
For the Defendant No. 1	:	Mr. Avinash Kankani, Adv. Ms. Shree Chatterjee, Adv.
For the Defendant No. 2	:	Mr. Sayantan Bose, Adv. Ms. Pooja Chakrabarti, Adv. Ms. Arti Bhattacharyya, Adv.
Hearing concluded on	:	20/07/2026
Judgment on	**:**	**06/08/2026**

Sugato Majumdar, J.:

The Plaintiff herein instituted the instant suit praying, *inter alia*, decree for declaration, permanent injunction, recovery of money and other allied reliefs.

The plaint case may be summarized as follow:

i) The Plaintiff is carrying on a sole proprietorship business of the name and style of M/s Gupta Infotech having place of business at 54, Ezra Street, B-6, 2nd Floor, Kolkata-700001 within jurisdiction of this Court. The Plaintiff has his registered office cum workshop at Sector-I, SDF(G) Building, Falta SEZ, 24 Parganas (South) outside the jurisdiction of this Court. The Plaintiff carries on business of manufacturing compact fluorescent lamp and allied products. The Plaintiff created a good will of business.

ii) The Defendant no. 1 is an insurance company, registered under the Companies Act, 1956 having its registered office at Vishranthi Melaram Towers, No.2/319, Rajiv Gandhi, Salai (OMR), Karapakkam, Chennai. The Defendant no. 2 is a banking company, carrying on banking business, being incorporated in England, having one of its office at 19, Netaji Subhas Road, Kolkata-700001, within jurisdiction of this Court.

iii) The Plaintiff, in usual course of business needed credit facility. While availing such financial assistance from the Defendant no. 2, at the insistence and compulsion of the Defendant no. 2 had to change the insurance company and had to insure his products from the Defendant no. 1. The Defendant no. 2 acted as agent of the Defendant no. 1 and forced the Plaintiff to avail of insurance cover of his goods from the Defendant no. 1. In view of urgent financial need, the Plaintiff had to avail insurance policy from the Defendant no. 1. This was in the year 2013. This was a policy of insurance in respect of fire and burglary. The policy was renewed from time to time on payment of premiums. The last policy was from 04/09/2015 to 03/09/2016 bearing number YB00013052000102. This policy is the subject matter of the instant suit (hereinafter would be referred to as "the said policy"). Sum insured was Rs.14,50,00,000/-. The Plaintiff paid premium of Rs.1,93,285/-.

Properties insured were plants, machineries, and stocks in process, raw materials and finished goods including goods in respect of which customs duty had been paid.

iv) On 08/06/2016, one office space of the same business house, caught fire which spreaded and affected the goods of the Plaintiff. a fire broke out at a different office space of a business house at Falta other than that of the Plaintiff. This fire damaged the entire stock and raw materials and/or goods of the Plaintiff resulting in severe loss and damage to him. The Plaintiff lodged a complaint at Ramnagar Police Station, Falta intimating the incidence of fire. The incidence of fire was also reported in a local newspaper.

v) The Plaintiff assessed his loss and damage to the tune of Rs.10,74,79,736/- and lodged the claim to the Defendant no. 1. The Defendant no. 1 appointed a surveyor for statutory survey required for settlement of the claim. The Plaintiff furnished the said surveyors with all the necessary documents. The surveyors of the Defendant no.1 assessed loss of the Plaintiff to the extent of Rs.1,94,46,960/-. There were two survey reports; one is the original, the other is the supplementary one, both dated 12/05/2017. The Plaintiff got the loss and damage assessed by his own auditor. The auditor's report dated 29/03/2017 assessed the loss as Rs.10,74,79,736/- as above mentioned.

vi) The Plaint contains various grounds of challenge to the Surveyor's Report dated 12/05/2017.

vii) On 20/06/2017, a draft copy of a purported settlement agreement was handed over to the Plaintiff from the local office of the Defendant no. 1. The Plaintiff was also asked to contact with the Chennai office of the Defendant no.1. The Plaintiff along with his representative visited the Chennai Office of the Defendant no. 1 where the Plaintiff was practically forced to sign the settlement agreement with assurance that payment of the balance amount would be dealt with favourably. It was also promised that the claim settlement amount would be remitted to the Plaintiff by way of bank transfer. This Settlement Agreement was signed by the Plaintiff on 23/06/2017. According to the Plaintiff, the settlement agreement was executed by him under undue influence, by the Defendant no. 1's representative. Since the Defendant no.1 was the insurer of the Plaintiff, the former through its employees were in a position to dominate the will of the Plaintiff.

viii) Returning back from Chennai, the Plaintiff lodged a complaint in Ramnagar Police Station, anticipating foul play.

ix) The settlement claim amount of the Plaintiff amounting to Rs.1,94,46,960/- was remitted by the Defendant no. 1 to the bank account of the Plaintiff maintained with the Defendant no. 2 within jurisdiction of this Court.

x) When the claimed and the settled amount, as above mentioned, had been remitted by the Defendant no. 1 to the Plaintiff's bank account, maintained with the Defendant no. 2, it was informed that the facilities granted to the Plaintiff were *suo motu* reduced by the Defendant no. 2 and the amount of Rs.1,94,46,960/- was adjusted against the said facility. It is also averred that the account of the Plaintiff was not bad at all and the Plaintiff had all along been within the limits granted. This act of the Defendant no. 2 was in connivance with the Defendant no. 1 with a view to weaken the financial prospect of the Plaintiff.

xi) Contention of the Plaintiff is that the settlement agreement dated 23/06/2017 executed by and between the Plaintiff and the Defendant no. 1 is void/voidable as against the Plaintiff.

xii) In the plaint, the Plaintiff raised a claim of Rs.31,51,12,896/-, particulars of which are as follows :

a) Loss and damage due to	:	Rs.8,80,32,776/-
b) Loss of reputation and good will	:	Rs.22,70,80,120/-
		Rs.31,51,12,896/-

The Plaintiff also claimed interest at a rate of 18% per annum from 08/06/2016 to 30/11/2017 on the sum of Rs.2,73,84,855/-. Total amount claimed by the Plaintiff being:

a) Principal claim	:	Rs.31,51,12,896/-
b) Interest	:	Rs.2,73,84,855/-
		Rs.34,24,97,751/-

xiii) The Plaintiff, therefore, instituted the instant suit praying for declaratory decree that the purported settlement agreement dated 23/06/2017 is void/voidable, not binding on the Plaintiff; perpetual injunction restraining the Defendant no. 1 from giving any effect and/or further effect to the purported Settlement

Agreement dated 23/06/2017; decree for Rs.34,24,97,751/- against the Defendants jointly and /or severally; interest at a rate of 24% per annum along with other prayers.

The Defendants contested the suit by filing respective written statements.

Contentions of the Defendant no. 1 in the written statement may be summarized as follow:-

i) The Defendant no. 1 challenged jurisdiction of this Court. According to the Defendant no. 1 the suit is barred by law, does not disclose any cause of action.

ii) It is contended that the Defendant no. 1 has different agents throughout the country. The Defendant no. 2 is such an agent and the Plaintiff approached the Defendant no. 1 through the Defendant no. 2 out of his own will and volition. The Defendant no. 2 did not force the Plaintiff to avail the subject policy. The Plaintiff continued the policy for several years and, therefore, cannot raise any objection.

iii) The Defendant no.1 was not aware of any arrangement between the Plaintiff and the Defendant no. 2.

iv) It is stated by the Defendant no. 1 that the Plaintiff raised false, frivolous and inflated claims for making illegal gains at the cost of the Defendant no. 1.

v) The Defendant no. 1 denied and challenged the grounds pleaded by the Plaintiff to challenge the Surveyor's report. It was averred that the report of the Surveyor was correct and based on proper assessment. There was a tripartite meeting between the Plaintiff, the Defendant no. 1 as well as the Surveyor at the office of the Defendant no. 1 and various issues were discussed. The Plaintiff never disputed the Surveyor's report. Most of the stocks of the Plaintiff were obsolete. It was also denied that the Surveyor's Report was erroneous. The Plaintiff accepted the insurance amount without any demur or protest. The Defendant no. 1 denied and disputed the Plaintiff's Auditor's Report.

vi) The Defendant no. 1 also denied and disputed that the Plaintiff was forced to arrive at any settlement of claim. The claim amount was settled at Rs.1,94,46,960/- on consent of the parties. The allegation of undue influence was also denied and pleaded to be an afterthought. The Plaintiff acted upon the claim settlement agreement dated 23/06/2017, derived benefit thereunder; therefore, the Plaintiff is estopped from challenging the same.

vii) The Defendant no. 1 denied all other allegation and averred that the Plaintiff is not entitled to the relief prayed for.

The Defendant no. 2 also contested the suit by filing separate statements, challenging the contentions of the Plaintiff made in the plaint. The sum and substance of the written statement of the Defendant no. 2 may be summarized as follow:

a) The Defendant no. 2 challenged the jurisdiction of this Court; it was also stated that the suit does not disclose any cause of action, barred by the principle of estoppel, waiver and acquiescence.

b) The Defendant no. 2 pleaded certain factual aspects of the matter. On or about 01/02/2012, the Plaintiff approached the Defendant no. 2 as the sole proprietor of M/s Gupta Infotech for grant of credit facilities. An application was also filed in prescribed format. On 25/04/2012, the Defendant no. 2 executed a facility letter whereby credit facilities up to the limit of Rs.12,00,00,000/- were sanctioned in favour of the Plaintiff. The Plaintiff accepted the facility letter on 25/04/2012 and conveyed is assent to the terms and conditions of such facility letter. Grant of such facility was secured by way of: (a)Guarantee All Money dated April 26, 2012, (b)Hypothecation Agreement dated April 26, 2012, (c)Mortgage by way of deposit of title deeds dated April 28, 2012 and 6th July 2012, (d)Letters of Security Over Fixed Deposit/set off dated April 26, 2012 and (e)Letter of Indemnity dated April 26, 2012. The Plaintiff also executed a Master Credit Terms on 26/04/2012 which formed part and parcel of the documents executed by the Plaintiff, as above mentioned, following the execution of the Facility Letter dated 25/04/2012. The Master Credit Terms dated 26/04/2012 particularly provided that the borrower, namely, the Plaintiff should obtain insurance cover over any asset or property specified by the Defendant no. 2. The Master Credit Terms further provided that in the event the Plaintiff became entitled to make any claim on such insurance cover, all money receipts should be applied either in reinstatement of the relevant asset or towards the repayment of facilities, as the Defendant no. 2 might elect. A hypothecation agreement was also executed on 26/04/2012 between the Plaintiff and the Defendant no. 2 in respect of stocks, book debts and movable fixed assets belonging to the Plaintiff or at the Plaintiff's disposal or at the Plaintiff's factory. It also required the Plaintiff to insure the hypothecated assets comprehensively for loss of damage caused by fire, theft, lightening, riots, civil commotion, war and for such further risk that the bank may require, for full market value of such items and stocks. The insurer should be approved by the Defendant no.2 and the policy of insurance should be produced when demanded by them. Accordingly, the Plaintiff was under a contractual requirement to maintain a fire and burglary insurance cover with regard to hypothecated goods with an insurance provider approved by the Defendant. Agreeing with such condition, the Plaintiff executed the hypothecation agreement on 26/04/2012.

c) Credit Facilities, so granted to the Plaintiff, have been renewed from time to time on mutually accepted terms and conditions and on execution of various security documents. The last renewal was made, as averred, on 07/06/2017. Credit limits were reduced to Rs.8,50,00,000/- between 02/08/2012 and 07/07/2017. The Plaintiff accepted the terms and conditions of the facility letters. It was agreed that all the securities executed pursuant to the previous facility letters, should remain in full force unless otherwise agreed between the parties.

d) Execution of the facility letters were followed by execution of respective supplementary hypothecation agreement contained in unchanged terms and conditions.

e) The Defendant no.1 is an insurance company approved by the Defendant no.2. In order to comply with the conditions prescribed in the hypothecation agreement, the Plaintiff obtained a combined fire and burglary policy provided by the Defendant no.1. Defendant no. 2 acted as an agent of Defendant no.1. The policy provided for a cover of an amount of Rs.14,50,00,000/- for fire and allied perils and an amount of Rs.14,50,00,000/- for burglary . The policy was valid for a period of one year and renewed from time to time, extended last time on 04/09/2015. No coercion, whatsoever, was ever exercised by the Defendant no. 2 in respect of the Plaintiff's decision to subscribe to the policy of insurance of the Defendant no.1. It was a contractual requirement that the insurer should be approved by the Defendant no. 2. Schedule of the policy contained "Agreed Bank Clause" whereby any sum of money, payable under the policy to the Plaintiff was to be transferred in the account of the Plaintiff maintained with the Defendant no.2.

f) From an e-mail dated 25/08/2016, Defendant no. 2 came to learn from the Plaintiff that there had been a fire in the Plaintiff's office premises. The Plaintiff, therefore, sought assistance of the Defendant no.2 since all the hypothecated stocks were destroyed in fire.

g) On 27/06/2017, the Defendant no. 2 learnt that an amount of Rs.1,94,43,816/- had been remitted by the Defendant no. 1 to the Plaintiff towards settlement of the insurance claim by way of bank transfer to the account of the Plaintiff maintained with the Defendant no. 2.

h) The Defendant no. 2 also received a confirmation from the Defendant no. 1 from the e-mail dated 28/06/2017. Payment advice was forwarded also.

i) In accordance with the condition of the hypothecation agreement and the Master Credit Terms, the settled amount of Rs.1,94,43,816/- was adjusted against amounts outstanding on account of credit facilities. Following adjustment of the remitted amount against the credit facilities, the Plaintiff executed a supplemental facility letter dated 07/08/2017 in favour of the Defendant no. 2 whereby the existing limit of credit facility was reduced in consideration of the amount remitted by the Defendant no. 1. As a result, total limit of the credit facility became Rs.6,63,00,000/- . According to the Defendant no.2, the Plaintiff did not raise any objection in respect of the adjustment of the insurance claim by the Defendant no.2 against the credit facility. Following the execution of the supplemental facility letter, a supplemental hypothecation agreement was executed by the Plaintiff on 07/08/2017 along with a personal guarantee deed for the purposes of securing the facility amount.

j) The contention of the Defendant no. 2 is that the instant suit challenges the legality of purported Settlement Agreement dated 23/06/2017 executed between the Plaintiff and the Defendant no. 1 to which the Defendant no. 2 was not a party; the Defendant no. 2 was neither present nor had any role to play in execution of the Settlement Agreement or determining the amount payable thereunder. It is further contended that there is no plea of the

Plaintiff alleging contravention of the terms of policy document or security documents between the Plaintiff and the Defendant no. 2. The insurance claims settlement amount was adjusted in terms of the contract. The Plaintiff never raised any grievance against the Defendant No.2. The Plaintiff executed the supplemental facility letter dated 07/08/2018 on his own volition, after such adjustment was made without any demur or protest whatsoever; all these conjugated facts established that allegations raised by the Plaintiff afterthought. Therefore, the suit is barred by the principle of estoppel. According to the Defendant no. 2, they are not liable for payment of any money and the Plaintiff cannot raise any claim of money against the Defendant no. 2.

k) According to the Defendant no. 2, the suit should be dismissed.

On the basis of rival Pleadings, following issues are framed:

1. *Whether this Court has jurisdiction to entertain the suit?*
2. *Whether the suit is maintainable under the law? Whether the suit is barred by any law?*
3. *Whether the suit discloses any cause of action?*
4. *Whether there was any valid and subsisting insurance policy between the Plaintiff and the Defendants in particular the Defendant no.1?*
5. *Whether the goods of the Plaintiff were damaged in fire? Whether the fire was attributable to any negligent or any fault of the Plaintiff?*

6. *Whether the Defendant no. 1 duly and properly assessed? What should be the actual assessment of loss and damage of the Plaintiff?*

7. *Whether the settlement agreement dated 23/06/2017 was duly executed and binding between the parties or whether the execution of the agreement was vitiated with coercion or undue influence?*

8. *Whether the Defendants or any of them was justified in reducing facilities granted to the Plaintiff?*

9. *Whether the Defendants either jointly or severally justified in adjusting a sum of Rs.1,94,46,960/- or any other sum against the facilities.*

10. *Whether a relationship of Principal-agent between the Defendants?*

11. *Whether the Plaintiff is entitled to the reliefs prayed for?*

12. *Whether the Defendants jointly and/or severally liable to the Plaintiff?*

13. *What other relief or reliefs the Plaintiff is entitled to?*

<u>Argument on behalf of the Plaintiff:</u>

1. The principal limb of argument on behalf of the Plaintiff was that it was known to the Defendant no. 1 or its representative that the sum of Rs.1.94 crores paid under the settlement was not the fully and finally settled amount. In the draft settlement agreement, handed

over to the Plaintiff space for the settled amount of claim was kept blank for such reason. The Defendant no.1 through its representatives held several meetings to finalize the amount. The Plaintiff was assured to pay the balance and was called to meet at the Chennai Office of the Defendant no.1. The Plaintiff was subjected to duress for signing the settlement deed for a sum of Rs.1.94 crores, at the Chennai Office.

It was further argued that the Plaintiff adduced oral as well as documentary evidences with regard to the document dated 23/06/2017 (Ext. B). The Plaintiff's evidence established that the Plaintiff had been subjected to duress for signing the deed of settlement dated 23/06/2017. None of the representative of the Defendant no.1 who had been present at the meeting held on 23/06/2017 came forward to depose. The witness, Ms. E. K. Srividya, who deposed on behalf of the Defendant no.1, was not present at the meeting and her statements on the meeting was hearsay evidence. To rebut the evidence of the PW-1 the Defendant no.1 should produce any one of those persons who were present at the meeting, and who could have stated the facts which happened therein. But the Defendant no.1 withheld any such witnesses, failing thereby to produce the best evidence.

The Learned Counsel appearing for the Plaintiff referred to Section 3, Section 60 and Section 114 (g) of the Indian Evidence Act, 1872. Relying upon the decision of this Court in **Sris Chandra Nandy Vs. Smt. Annarpurna Roy (AIR 1950 Cal 173)**. The Learned Counsel argued that hearsay evidence is no evidence. The Learned

Counsel also referred to a decision of the Supreme Court of India in **Iswar Bhai C. Patel Vs. Harihar Behera & Anr. [(1999) 3 SCC 457]** to argue that the evidence which could be and is not produced, would, if produced, be unfavorable to the person who withholds the same. Referring to the decision of this Court in **Asit Kumar Das Vs. Kalpana Das [AIR 2007 Cal 160]** the Learned Senior Counsel argued that a fact is disproved normally by the person who claims that an alleged fact in not true. In the instant case, the fact of the Plaintiff having given assurance by the Defendant no.1's representative has not been disproved. As such the fact remained proved.

2. The second limb of argument of the Learned Senior Counsel for the Plaintiff was on the Survey Reports. It was contended that the amount of Rs.1,74,46,960/- had been arrived at by the Defendant no.1 on the basis of the Surveyor's Report and the Supplementary Report, both dated 12/05/2017 (Ext. D1/3 & Ext. D1/4). The observations made by the Surveyors in the said reports are contradictory and inconsistent. It was argued that in Clause 24.13, the Surveyor had observed that the value of non-moving/old/obsolete stocks required adjustment. The valuer deducted huge amount from the book value of the so called non-moving/slow/obsolete stock. A drastic reduction of the value of the damaged stocks had been done by the valuer to the extent of 70% to 80%. It was also held that the damaged stock had no commercial value. The Surveyor deposed as DW-1 and stated in evidence that deductions had been made applying best judgments. The

observations made in the supplementary report, based on documentary evidence produced by the Plaintiff and certified by an independent Chartered Accountant was totally contrary. It was contended that there was ongoing productions which should that damaged stocks were not obsolete or non-moving or old. The Report of the Surveyor, is, therefore, wrong and the amount of compensation, worked out as Rs.1,94, 46,960/- was also wrong and contrary to the records. The claim of the Plaintiff, therefore, is of Rs.10,14,92,726/- as loss due to fire.

3. So far as the jurisdiction issues are concerned, it was argued that a portion of the claimed amount, sent to the Defendant no.1, covered under the fire insurance policy had been wrongfully retained by the Defendant no.2 within the jurisdiction of this Court. As such, part of cause of action arose within jurisdiction of this Court. The Learned Counsel referred to **A.B.C. Laminart Pvt. Ltd. & Anr. Vs. A.P. Agencies, Salem [(1989) 2 SCC 163]** to substantiate the point that receipt of money forms a part of the cause of action.

4. Next it was argued that no case has been made out by the Defendants that fire broke out due to negligence of the Plaintiff. Therefore, the suit may be decided in favour of the Plaintiff.

5. Next, it was argued that admittedly there was a principal agent relationship between the Defendants. However, the principles of Section 230 of the Indian Contract Act, 1872 will not be applicable to the benefit of the Defendant no.2, in as much as the Defendant no.2 did not enter into the contract with the Plaintiff by executing the facility agreement for or on behalf of the Defendant no.1.

Admittedly, the Defendant no.2 provided credit facilities to the Plaintiff. Admittedly, the Defendant no.1 provided fire and burglary policy to the Plaintiff. Both the agreements were independent and separate. Under such circumstances, by no stretch of imagination it can be said that the Defendant no.2 acted on behalf of the Defendant no.1. The Defendant no.2 was not entitled to unilateral adjustment of the compensation amount against credit facility provided pursuant to Clause 12.11 (iv) of the Master Credit Terms (Ext.21). Under the clause, the Defendant No.2 has the right only to elect as to whether money received should either be for reinstatement of the relevant assets or towards the repayment of such facility. The next is to be done by the borrower. No unilateral right had been given to the Defendant no.2 to adjust the compensation money anyway. Furthermore, there was no outstanding liability with regard to the account of the Plaintiff and, as such, the Defendant no.2 was not entitled to unilateral adjustment of the amount received.

Argument on behalf of the Defendant No.1:

The Learned Counsel for the Defendant No.1 addressed mainly on three issues, namely, the Issue Nos. 1, 6 & 7.

1. So far as the Issue no.1 is concerned which pertains to the territorial jurisdiction of this Court, it was argued that the occurrence of fire was outside the jurisdiction of this Court at Falta SEB, District South 24 Parganas. The settlement agreement had been handed over to the Plaintiff at Salt Lake City, outside the jurisdiction of this Court. The settlement agreement dated

23/06/2017 was executed at Chennai. The reliefs mentioned in para (a) and (b) of the prayers pertains to the settlement agreement which had been executed at Chennai. It was further argued that the plaint failed to disclose any cause of action which arose within jurisdiction of this Court. Therefore, according to the Learned Counsel for the Defendant no.1, this Court lacks territorial jurisdiction to entertain the suit.

2. The second limb of argument of the Learned Counsel for the Defendant no.1 was related to the binding nature of the settlement agreement dated 23/06/2017.

It was argued that admittedly the settlement agreement was for Rs.1,94,46,960/-. It was also admitted in the plaint that on 20/06/2017, a draft copy of the purported settlement agreement had been handed over to the Plaintiff mentioning that the proposed settlement would be for the same amount, though alleged that the Plaintiff had been coerced to accept the settlement amount. From the draft settlement agreement (Ext.B) it is evident that the parties adopted the Surveyor's Report as the full and final settlement of claim. Clause 6 of the draft settlement agreement stipulated that payment would be released on submission of no objection certificate from the Commissioner of Customs and the Bank. The Defendant No.1 filed GA No.7 of 2024 praying to file additional documents. In the affidavit-in-opposition, filed therein, the Plaintiff admitted that he wrote a letter to the customs authorities dated 21/06/2017 regarding settlement of the issue. Conducts of the Plaintiff, as argued, showed that the terms and the claim amount had been accepted by the Plaintiff. It was further argued that there were several sitting with the Plaintiff, as appeared in course of cross-examination of PW-1. Accordingly, it was submitted that impeccable evidences established that the Plaintiff had accepted the settlement and is estopped to raise any further claim. The Learned Counsel for the Defendant no.1 referred to Section 63 of the Indian Contract Act, 1872 to argue that the claim of the Plaintiff is bared by the principal of accord and satisfaction. The Learned Counsel also relied on the decision of the Supreme Court of India in **Lala Kapurchand Godha & Anr. Vs. Mir Nawab Himayatali Khan [(1962) SCC OnLine SC 412].** Referring to **Afsar sheikh & Soleman Bibi [(1976) 2 SCC 142]** the Learned Counsel refuted the allegations of undue influence and coercion.

3. The Learned Counsel for the Defendant no.1 alternatively argued that the valuation of the claim in terms of the Surveyor's Report was correct. It was argued that the policy of insurance was a market value policy. The assets were insured at the market value, that is to say, for its actual worth in the market at the relevant point of time. The entire claim of the Plaintiff of Rs.10,74,79,736/- was false and fabricated and was based on the market value of goods procured by the Plaintiff from the year 2013. This fact had been admitted by the Plaintiff in course of cross-examination. The Plaintiff based its valuation of CFL components, PCB components on the basis of purchase price in the financial year 2013-14 onwards. The Plaintiff himself admitted that he had stopped

manufacturing CFL from the year 2016. The Plaintiff started manufacturing of LED lights from the year 2014-15. Therefore, according to the Learned Counsel for the Defendant no.1, stocks, lying at the premises were dead stocks and had practically of no value. That is why, the Surveyor depreciated the value of such stocks. The Surveyor's Report (Ext.D-1/3) shows that there was huge accumulation of stock due to non-movement and slow-movement of raw materials, consequent to slowing down of production for lack of orders. Productions and sales fell down suddenly in March, 2015 and there was total stoppage of sale since February, 2016. It was further revealed that the claim of the Plaintiff included stocks at basement which were not covered by the policy of insurance.

4. It was further argued that the certificate of the Chartered Accountant of the Plaintiff, which had been exhibited, and which contained value of goods, cannot be relied upon. It was further argued that the certificate had not been proved as the marker of the certificate did not appear to depose. It was also argued that, in course of cross-examination, the Plaintiff admitted that the books of accounts on the basis of which valuation of stock had been done, was based on purchase price of the materials from time to time and not on the basis of the value of the goods at the time of the incident. In nutshell, it was argued that the claim of the Plaintiff is false and should be dismissed.

Argument on behalf of the Defendant No.2:

1. The first limb of argument of the Learned Counsel for the Defendant no.2 was in respect of the Issue Nos. 1, 2 & 3. It was submitted that the settlement agreement was executed at Chennai between the Plaintiff and the Defendant no.1, outside the jurisdiction of this Court. The Defendant no.2 was not a party to the said settlement agreement. The Defendant no.1 does not carry on business within jurisdiction of this Court. The Defendant no.2 being an agent of the disclosed principal, the Defendant no.1, is not liable for any sum that might or might not be payable under the policy of insurance. As such no part of cause of action arose within jurisdiction of this Court. Therefore, according to the Learned Counsel for the Defendant no.2, this Court lacks territorial jurisdiction to entertain this suit and the suit should be dismissed.

2. The second limb of argument was in respect of the Issue No.9, 10 & 12. It was argued that the Defendant no.2 was the agent of the Defendant no.1, admittedly. The policy of insurance, issued by the Defendant no.1, was through the agency of the Defendant no.2. It was also admitted in the plaint that the fact that the Defendant no.2 acted as the agent of the Defendant no.1 had been disclosed to the Plaintiff by the Defendant no.2. Section 230 of the Indian Contract Act, 1872 states that an agent cannot be personally bound by the contract entered into by him for the principal unless there is a contract to the contrary. According to the provisions of the Section 230, such contracts are presumed to exist in three

situations, as provided therein. None of the situations or conditions existed or pleaded by the Plaintiff. Therefore, the Defendant no.2 cannot be made liable for any action by the principal. The Learned Counsel referred to **Vivek Automobiles Ltd. Vs. Indian Inc. [(2009) 17 SCC 657], Marine Container Services South (P) Ltd. Vs. Go Go Garments [(1998) 3 SCC 247] and Prem Nath Motors Ltd. Vs. Anurag Mittal [(2009) 16 SCC 274]**.

According to the Learned Counsel for the Defendant no.2 the Issue No.10 ought to be answered affirmatively by holding that there existed a relationship of agent and principal between the Defendants and the Issue Nos. 9 and 12 ought to be answered against the Plaintiff.

3. In respect of the Issue No. 8, it was argued by the Learned Counsel for the Defendant no.2 that the Master Credit Terms, executed between the Plaintiff and the Defendant no.2 provided that the borrower should obtain insurance for any asset or property, as would be specified by the Defendant no.2 and that in any event, the borrower would be entitled to make a claim on such insurance and all monies received should be applied either in reinstatement of the relevant asset or towards repayment of the facilities as the Defendant no.2 might elect. The Defendant no. 2 had adjusted the amount of Rs.1,94,43,816/-, remitted by the Defendant no.1 toward the credit facility availed of by the Plaintiff, in exercise of the contractual right and such action should not be challenged by the Plaintiff on any account. Such election, in terms of Clause

12.11 (iv) by the Defendant no.2 should be an unilateral act and consent of the Plaintiff was not required. Although it was pleaded by the Plaintiff that the reduction of the facility was unjustified, no relief has been claimed in respect of that.

Therefore, according to the Learned Counsel, the Issue No.8 should be decided against the Plaintiff.

Having heard the rival arguments, the disputes should be considered and decided Issue wise.

Issue No. 1 and 2:

The principal limb of argument of the Learned Counsels for the Defendants was that this Court has no territorial jurisdiction to entertain the suit. The whole gamut of argument has been discussed above, therefore, not repeated.

Clause 12 of the Letters Patent empowers this Court to try and determine suits "if the cause of action shall have arisen, either wholly, or, in case the leave of the Court shall have first obtained, in past, within the local limits of the ordinary original jurisdiction…"

In this case Leave of the Court, granted to institute the suit, still stands. The plea of the Plaintiff is that money was received in his bank account maintained within the jurisdiction of this Court and further that the Defendant no. 2 retained money, being the claim amount, remitted by the Defendant no. 1 to the Plaintiff's account within jurisdiction, without any authority of the Plaintiff giving rise to the cause of action against the Defendant no. 2. Even though the Defendants carry on business outside the jurisdiction of this Court, and the incident of fire took place also outside the jurisdiction of this Court, definitely, as observed above, part of cause of action arose within jurisdiction of this Court and the suit was instituted on leave of this Court. In **A.B.C Laminart Pvt. Ltd. Vs. A.P. Agencies, Salem [(1989) 2 SCC 163]**, referred to by the Learned Senior Counsel for the Plaintiff, the Supreme Court of India considered the jurisdictional issues in a suit based on contract. It was held that part of cause of action arises where money is expressly or impliedly payable under a contract. Relying on the ratio of the decision, it can be concluded that part of the cause of action arose within jurisdiction of this Court where money had been paid and allegedly adjusted by the Defendant no.2, which is one of the issues to be decided by this Court.

There was no argument on other issue of maintainability of the suit in its form. However, the maintainability of the substantive claims will be discussed below.

So far as the question of whether the suit is barred by law, there was no argument advanced in this regard.

Issue No. 1 is decided in favour of the Plaintiff.

Issue No. 3:

Issue No. 3 was not argued. Cause of action of the suit is implicit in the plaint itself. Therefore, this issue is decided in favour of the Plaintiff.

Issue No. 4 and 5:

Issue No. 4 and 5 are taken up together. It is the case of the Plaintiff that there was a valid insurance policy subsisting between the Plaintiff and the Defendant no. 1. There is no cavil that the goods of the Plaintiff were destroyed in fire and the Defendant No. 1 paid claim on account of that fire. What is in dispute is the mode of assessment and quantum of claim, as between the Plaintiff and the Defendant no. 1. When the Defendant no. 1 paid compensation to the Plaintiff under the policy of insurance it stands proved that there was fire accidentally destroying the goods for which the Plaintiff was entitled to compensation under the fire insurance policy and the Defendant no. 1 entertained part of the claim of the Plaintiff and paid compensation. Payment of compensation under the policy of insurance itself proved that there was a valid policy existing and the cause of fire was not attributable to any latches of the Plaintiff. Therefore, these two issues are decided in favour of the Plaintiff.

Issue No. 6,7,8,9 and 10:

Issue No. 6,7,8,9 and 10 are taken together for consideration since these issues cannot be considered in isolation as they are connected and related to each other.

The Issue No. 10 should be addressed first.

Plea of the Plaintiff was that there was a principal-agent relationship between the Defendants. This was also pleaded by the Defendant no.1 in the written statement. The Learned Counsel for the Plaintiff argued that there was no agency between the Defendants. The policy of insurance shows that the Defendant no.2 was the agent. No agency agreement had been filed. No documentary evidence is there. The fire policy was executed between the Plaintiff and the Defendant no.1 on principal to principal basis. Therefore, it is evident that the said policy was not executed by the Defendant no.1 as agent of the Defendant no.2. In view of pleading, admitted facts and documentary adduced, it may be concluded that the Defendant no.2 was the agent of the Defendant no.1 and the later is a disclosed principal, coming within the ambit of Section 230 of the Indian Contract Act, 1872,

Issue No. 10 is decided accordingly.

Final assessment was made by the Surveyor in a Final Survey Report (Ext.D1/3) and Supplementary Survey Report (Ext.D1/4).

A strong argument was made by Mr. Ghosh, the Learned Senior Counsel for the Plaintiff challenging the assessment of loss made by the Surveyor. The Plaintiff claimed an amount of Rs.10,74,79,736/-. Net loss was calculated at Rs.9,68,75,785.44/- paisa. After adjustment of slow moving, old stock and gross loss came to Rs.9,08,88,773/-. Net loss was assessed as Rs.2,04,70,484/-. After adjusting policy excess at 5% the amount came to Rs.1,94,46,960/-. Final Survey Report being Ext.d1/3 stated that Plaintiff had huge stocks of CFL lamps which was non-moving and CFL market shifted to LED lamps, rendering the stocks as slow, non-moving and obsolete. The Survey Report noted the statement of the insured that CFL components were purchased on interaction with buyers for supply of finished goods but the buyers did not place confirmed order leading to accumulation of stocks. Ages of the stocks were between 18 months to 24 months. In the Survey Report a deduction of was made on account of this obsolete non-moving goods/stocks consisting of CFL and PCB components. The deduction was made to the extent of Rs.6,90,96,000/-. The reason behind such deduction was that the deduction or devaluation of stocks was due to aging and obsolesce.

Mr. Ghosh, the Learned Senior Counsel arguing for the Plaintiff pointed out that in the supplementary report itself, it was noted that Behala unit of the Plaintiff had been carrying on manufacturing of CFL. It was noted in the supplementary report that PCB production for CFL and diverse for LED had been going on. This being the so, according to the Learned Counsel it is wrong observation and conclusion that CFL stocks were obsolete. Therefore, since this CFL constituted a part of running stock, should not be treated as obsolesce and deduction of Rs.6,90,96,000/- should not be made.

PW-1 in his evidence stated that after fire they stopped producing CFL (question no.349). This is the own statement of the Plaintiff and is direct evidence.

Standard terms of the policy of insurance contained stipulation that the Insurer should pay to the insured value of the property at the time of happening of its destruction. It was admitted by PW-1 that the loss claimed by him to the tune of Rs.10,74,79,736/- was on the basis of purchase price of the materials from time to time. This admission goes against the main artery of the policy which contemplated valuation as on the date of incident. The Surveyors followed the policy terms. The Surveyor's Report excluded certain stocks at ground floor which were not included in the policy of insurance. The Surveyors also excluded old and slow moving stocks as noted above. The Surveyor is of course justified in excluding those stocks which had been covered by the policy of insurance. In the context of objection of the Plaintiff the provision of Section 64 UM(4) may be considered:

> **"64UM. Surveyors or loss assessors.-**
>
> (4) No claim in respect of a loss which has occurred in India and requiring to be paid or settled in India equal to or exceeding an amount specified in the regulations by the Authority in value on any policy of insurance, arising or intimated to an insurer at any time after the expiry of a period of one year from the commencement of the Insurance Laws (Amendment) Act, 2015 (5 of 2015), shall, unless otherwise directed by the Authority, be admitted for payment or settled by the insurer unless [it] has obtained a report, on the loss that has occurred, from a person who holds a licence issued under this section to act as a surveyor or loss assessor (hereafter referred to as "approved surveyor or loss assessor")
>
> Provided that nothing in this sub-section shall be deemed to take away or abridge the right of the insurer to pay or settle any claim at any amount different from the amount assessed by the approved surveyor or loss assessor."

The Reports of the Surveyor come within ambit of the provision. The point of settlement would be discussed lateron. To rebut the said Reports of the Surveyor, the Plaintiff did not file any other report prepared by a licensed surveyor or loss assessor. The aforesaid provision makes it clear that there can be payment either on report of a licensed loss assessor or surveyor or by way of a settlement. In absence of any contrary report, as such, claim cannot be entertained.

The principal argument of the Defendant no.1 was that the Plaintiff, however, reason full on the assessment of loss, accepted the same when he executed the settlement agreement. On the contrary, it is Plaintiff's case that the settlement agreement was a product of misrepresentation duress, coercion.

The Plaintiff received the Surveyor's Reports. He was well aware of the assessed loss of Rs.1.94 crores. From evidence of PW-1, it was clear that he was not happy with the said "peanut" amount. PW-1 also stated that when the draft settlement letter had been handed over, the contemplated settlement amount was about Rs.1.94 crores (Q.374). He was well-aware *a priori* what the settlement amount would going to be and the same was in accordance with the Survey Reports.

PW-1 stated althroughout that the Defendants' representative assured him to pay the gross loss value. It is neither in pleading nor in evidence, who the representative was. Whether the representation was binding on the Defendant no.1. There is no document to establish or suggest that the Defendant no.1 assured the Plaintiff to settle the claim by an amount higher than the Survey Report. It is most unlikely that commercial bodies would be willing to settle the claim without offer or documentation when they would not be relying upon the Survey Report. When it comes to a settlement, there must be an offer agreeable and accepted by the other party. No documentation is there. The representative might have said that the claim might be favourably considered but that's not acceptance. In this context absence of particulars of the representee become fatal.

The final agreement is Ext.B and the draft settlement agreement is Ext.D1/2. Clause 6 of the draft settlement agreement stated that payment shall be released upon submission of no objection of consent of Commissioner of Customs and the Banks. The Plaintiff applied for clearance from the Commissioner of Customs to obtain the said payment of Rs.1,94,46,960/-. Therefore, it can be said that the Plaintiff was aware that as per Survey Report assessment of loss and payment of claim to be settled at Rs.1,94,46,960/-. As noted above, the Plaintiff did not state who represented and whether such representation was on behalf of the Defendant no.1, there is no documentary evidence in this regard. Although, Mr. Ghosh, Learned Counsel for the Plaintiff argued that the Defendant no.1's witness had no personal knowledge on what happened inside the Chennai office in the hours preceding the execution of the settlement agreement this argument is not very impressive. As discussed above, the Plaintiff had been put on notice in terms of Survey Report that the claim amount come down to Rs.1,94,46,960/-. There is no documentary evidence that the insurance company was willing to settle the matter for some higher amount.

Mr. Ghosh devoted a considerable part of his argument on best evidence principle submitting that evidence of DW-2, on behalf of the Defendant no.1 was not direct; that she was not present. As stated above, the quantum of compensation had been known to the Plaintiff. That was the settled amount. It was observed above, that there was no documentary evidence that the Defendant no.1 either offered or accepted settlement at a higher amount. Absence of direct evidence does not give rise to an adverse presumption. This Court, is of opinion, for reasons aforesaid, that the Plaintiff failed to establish alleged misrepresentation, fraud or coercion.

The settlement agreement is, therefore, not vitiated or avoidable. Therefore, the settlement agreement stands and the principle of accord and satisfaction applies. In National Insurance Co. Ltd. Vs. Boghara Polyfab (P) Ltd. [(2009) 1 SCC 267], the Supreme Court of India explained that while discharge of contract by performance refers to fulfilment of the contract, discharge by "accord and satisfaction" refers to the contract being discharged by reason of performance of certain substituted obligations. The agreement by which the original agreement is discharged is the accord and the discharge of the substituted obligation is satisfaction. A contract can be discharged by the same process which created it, that is by mutual agreement. Now in this case the execution of the settlement agreement and receiving of money by the Plaintiff discharged the parties from mutual obligations under the contract of insurance

As observed above, the Plaintiff accepted by executing settlement agreement that the quantum of loss should be Rs.1,94,46,960/-. Therefore, the Plaintiff is estopped and cannot question the quantum of loss.

Adjustment of application of the claim amount in repayment of overdraft facility by the Defendant no. 2 is the cause of grievance of the Plaintiff against them.

Credit facility was initially extended to the Plaintiff by the Defendant no.2 in the year 2012 which had been extended from time to time. Facility letter and the Master Credit Term were the applicable contracts between the parties. There is no plea or grievance of the Plaintiff on the terms of the contract. This Master Credit Term and the facility letter of different dates were adduced in in evidence and are exhibits herein. Clause 12.11 (a) (iv) states that:

> **"12.11. Insurance**
>
> (a) If the Bank requests, a Borrower shall:
>
> (i) obtain insurance for any asset or property specified by the Bank (an "Asset");
>
> (ii) obtain insurance against loss of life or total permanent disability of the Borrower and/or such other persons as the Bank shall require, in either case through an insurance company approved by the Bank (the "Insurer") on the Bank's required terms including, without

> limitation the insurance coverage amount, naming the Bank as loss-payee and endorsing non-cancellation and loss-payee clauses;
>
> (iii) assign or procure the assignment of the relevant insurance to and deposit or procure the deposit of the insurance documents with the Bank; and
>
> (iv) in the event that the Borrower becomes entitled to make any claims on such insurance, promptly do so and apply all monies received either in reinstatement of the relevant Asset or towards the repayment of such facility(ies) as the Bank shall elect."

The relevant Clause invoked by the Defendant No.2 was Clause 12.11. Sub-clauses mentioned in Clause (a) should not be read and interpreted in isolation. Clauses (i), (ii) and (iii) states what the borrower should do on request of the bank in relation to a policy of insurance. This sub-clause (iv) states that in the event the borrower became entitled to make any claim on such insurance, the borrower should promptly do so and apply all money receipts either in reinstatement of the relevant assets or to repayment of such facility and the **Bank shall elect** (emphasis provided). This Clause bestows the power of election on the Bank whereas the previous three sub-clauses contends mandate on the borrower. Clearly, if the Bank elects, the Bank may apply all money receipts in repayment of such facility; mandate of the borrower or the acts to be taken by the borrower are contemplated in sub-para 1, 2 and 3 whereas sub-clause (iv) provides a clause of election. It does not depend on the mandates of the borrower or his consent as manifest from the express words. When the express terms were agreed upon by the parties the Court cannot add or modify the same importing something new which had not been contemplated. Obviously, election or consent of the borrower was given a go-by. Reason can be understood easily. An unwilling borrower would try to avoid repayment by withdrawing consent, had the consent been mandatory leaving the bank with accumulated debt. Since, the consent of the borrower was not contemplated in this clause, there is no reason to import such thing in the express term of the Bank. Therefore, Bank was right and acted within the four corners of the contract in adjustment of the claim amount against the unpaid due. One question was raised herein was whether Defendants or any of them was justified in reducing the facilities granted to the Plaintiffs. No relief is there in the plaint on this issue. Providing credit facility is a matter of agreement between the Plaintiff No.1 and the Defendant no.2. Availability of credit depends on various factors and is outcome of bargain between the parties. Even though alleged, absence of relief in respect of this shows that the Plaintiff was not about to enforce any claim in respect of this. Therefore, further adjudication need not be embarked upon.

For reasons aforesaid, this Court comes to the conclusion that the Defendant no.2 was justified in adjusting the same against the facilities.

Issue Nos. 7, 8, 9 and 10 are decided against the Plaintiff. Issue Nos. 11, 12 and 13 are decided against the Plaintiff and it is the conclusion that the suit is liable to be dismissed and the Plaintiff is not entitled to any claim or relief as prayed for.

In view of discussion made above and after reaching issue wise conclusion, as above, it is ordered that the suit be dismissed on merit but without any costs.

The instant suit stands disposed of along with all pending applications, if any.

(Sugato Majumdar, J.)