

Presented on: 06.02.2006

Registered on: 06.02.2006

Decided on: 30.03.2019

Duration: 13Y 01M 24D

IN THE COURT OF DISTRICT JUDGE-6, AKOLA.**(Presided over by Shri S.P.Pol.)****REG.CIVIL APPEAL No.01/2018**
(OLD FIRST APPEAL No.233/2006)
(CNR NO. MHAK-01-000001-2018)**EXH.No.**United India Insurance Company Ltd.,
Rajasthan Bhawan, Old Cotton Market,
Akola Taluka and Dist. Akola.**..Appellant**
(Defendant)**-Vrs-**

1. Amol Bhagwandas Toshniwal,
Aged 31 yrs. Occ: Business,
Proprietor of Aishwarya Saree
Show Room, having its business
at Shop No.76, New Cloth Market
Akola, Taluka and Dist. Akola
2. The Akola Janata Commercial
Co-operative Bank Limited, Akola,
Main Branch – Old Cotton Market
Branch, Akola through its Manager.

..Respondents.
(Plaintiff & Deft)**APPEAL U/S. 96 OF CODE OF CIVIL PROCEDURE AND**
CROSS-OBJECTION AS PER ORDER 41 RULE 22 OF CODE
OF CIVIL PROCEDURE

Shri. S.R.Malvia Adv. for the Appellant.
Shri G.K.Sarda Adv. for Respondent no.1
None is present for Respondent no.2.

JUDGMENT**DATE:- 30.03.2019**

1 This appeal is by the original defendant No.1 in Spl.C.S.No.29/2002 against the judgment and decree passed by the IV Adhoc District Judge, Akola dt. 10.10.2005 therein. As per said judgment and decree the suit filed for recovery of compensation with interest on account of loss of goods gutted in a fire from the Insurance Company as the goods were insured under the fire insurance policy, came to be decreed. The present respondent no.1 is the original plaintiff and present respondent no.2 is the original defendant no.2. The respondent no.1 has also filed cross-objection claiming modification in decree to the extent of amount awarded. The parties are referred hereinafter as per their status in Spl.C.S.No.29/2002 for the sake of convenience.

2. Facts of the case are summarized as under:-

 The plaintiff is proprietary concerned dealing with the business of Saree and clothes. There was cash credit loan

facility availed by the plaintiff for the sum of Rs. 25, 00,000/- in the year 1999 from the defendant no.2 Bank. The goods in the shop used to be hypothecated with the defendant no.2. The plaintiff used to submit periodical statement to the defendant no.2. The defendant used to keep stock of goods is Rs.50,00,000/- regularly in the shop. The furniture in the shop was worth Rs.4,00,000/-. The goods in the shop and furniture of the shop was insured under a fire policy with the defendant no.1 for period from 19.9.1998 to 28.9.1999. The policy No. 161700/012/11/00574/1998. As per the policy, stock of the clothes insured with the defendant no.1 was to the extent of Rs.55,00,000/- and furniture in the shop was insured to the extent of Rs. 4,00,000/-. The plaintiff was taking insurance since 1995. In the intervening night of 30.4.1999 and 1.5.1999 there was an incidence of fire took place in the shop of the plaintiff. The plaintiff suffered huge loss due to the said fire. In the said fire incidence entire stock and furniture guttered to fire and badly damaged. During the investigation carried out by the Electrical Department it was revealed that the fire in the shop was due to short circuit. The

plaintiff came to know about the fire when one Mr. Om Sav had informed about the incidence. After getting information, the plaintiff and his brother rushed to the shop and opened the locks of the shutters. The fire incidence reported to the fire brigader of the Municipal Council Akola and also to the police by the people. The fire brigader had come on the spot and they had extinguished fire by the use of the fire vehicle No. MH-05-902, MH-30B-245, MVJ-2552. There is certificate issued by the Municipal Council on 22.10.1999 to that effect. The plaintiff had informed by telephone to the defendant no.1 about the fire incidence took place in the shop. The Assistant Electrical Inspector from the office of Electrical Inspector Akola had inspected the shop and issued a letter to the plaintiff on 5.5.1999 for entire wiring in the shop should be fixed by the license contractor and thereafter its report of license contractor be submitted to the office. The panchanama of the shop of the plaintiff was carried out by the police on 1.5.1999. The plaintiff has submitted a claim for compensation to the defendant no.1 and claimed Rs. 49,48,000/- for the loss of the stock. The plaintiff also claimed

Rs.4,71,580/- for loss caused to the furniture in the shop. The plaintiff claimed total amount of Rs.53,19,630/- from defendant no.1. The Divisional Manager, Shri Saidappa Onkarappa Mashalkar and Surveyor Shri D.N.Sisodiya of the defendant no.2 and Radhesham Bhansali from the Divisional Officer of the defendant no.1 have visited the shop of the plaintiff on 1.5.1999 itself. The Surveyor Shri D.N.Sisodiya had taken photographs of the shop during his visit. The defendant no.1 also engaged services of photographer for video-graphy of the shop of the plaintiff.

3. It is further alleged by the plaintiff that Mr. D.L.Sisodiya on 1st and 2nd May had been at Akola and he had collected the copies of documents and information required from the shop. Thereafter on 1st May, 1999 Mr. D.L.Sisodiya by registered letter demanded from the plaintiff, copies of financial statement which are trading and profit and loss account, balance sheet for the year 1996-97, 1995-96 and 1994-95. He also demanded bills of purchase for the above mentioned three years Books of account, ledger, cash book and sales bills. The plaintiff has supplied all original copies of

statement of accounts and all the bills to Mr. D.L.Sisodiya. The plaintiff has also produced original book. Original bills for verification before Mr. D.L.Sisodiya. The plaintiff also complied all the requirements by 22.5.1999. On 22.5.1999 the salvages of the fire work was finalized and it was assessed for salvages was worth Rs.85,000/-. On 24.5.1999, the plaintiff had informed all these facts to the Divisional Manager of the defendant no.1 at Akola. The Divisional Manager of the defendant no.1 passed a remark of the letter of the plaintiff dt. 24.5.1999 that in the amount of claim is finalized the salvages be kept intact.

4. It is further alleged by the plaintiff that the plaintiff received a letter dt. 5.7.1999 issued by the Divisional Manager of the defendant no.1 informing that the plaintiff is permitted to dispose of the salvages and others in this letter. There is reference of letter dt. 3.6.1999 and it was informed to comply the said letter of Mr. D.L.Sisodiya by letter dt. 3.6.1999 Mr. D.N.Sisodiya made request that the bills of purchase and sales which were found dislocated on 21.5.1991 be made available for his perusal. The plaintiff made

compliance of the same immediately.

5. It is further alleged by the plaintiff that the plaintiff was regularly pursuing the defendant no.1 for settling the claim made by the plaintiff. It was also brought to the notice of defendant no.1 that plaintiff has to settle claim with the defendant no.2 Bank as defendant no.1 plaintiff is required to make payment to the bank. However, the defendant no.1 did not reply to the plaintiff. The plaintiff received a letter from defendant no.1 dt. 1.10.1999 wherein it was informed that Mr. D.L.Sisodiya has written letter dt. 14.9.1999 in which it claimed that some compliance remained to be done by the plaintiff. Infact, there was no compliance due or remained to be complied with by the plaintiff. The plaintiff felt that the defendant no.1 is unnecessarily dealing to seek the claim of the plaintiff. Therefore, the plaintiff asked the bank to ask the defendant no.1 to settle the claim of the plaintiff immediately. The defendant no.2 therefore, issued notice to the defendant no.1. On receipt of the said notice the defendant no.1 issued a letter to Mr. D.L.Sisodiya and asked him to finalize the survey report and send it to the defendant

no.1 along with all papers submitted by the plaintiff with video cassette. The copy of the said letter was sent to the plaintiff. The plaintiff has received a letter dt. 13.3.2000 from the defendant no.1 wherein again a false claim was made by the defendant no.1 that the plaintiff has not complied with information which was sought and the plaintiff asked to submit clarification/requirement as asked for the Surveyor. The plaintiff felt that the defendant no.1 and its surveyor Shri D.L.Sisodiya were unnecessarily prolonging the matter without any reason. Therefore, the plaintiff by letter dt. 18.3.2000 informed to the defendant no.1 that the entire information and requirement asked by Mr. D.L.Sisodiya was given by the plaintiff. After that, the plaintiff received a letter from defendant no.1 dt. 19.6.2000 and the defendant no.1 has sought declaration from the plaintiff that the net profit of the firm of the plaintiff was drastically increased in 1998-99 and hence, declaration was sought at the abnormal trade of increase gross profit. The plaintiff gave explanation of the same immediately. The plaintiff informed that in view of the settled name and fame of the plaintiff and in view of the huge

investment of the plaintiff, the plaintiff has increased the margin of profit and hence, the net profit has increased. Mr. D.L.Sisodiya by his letter dt. 20.5.2000 had again asked for copy of certificate of fire from Municipal Council, panchanama of police and detail estimate of replacement of repairs of the damaged furniture, expenditure and fittings. The plaintiff has supplied the copies as asked by the Surveyor immediately. Thereafter, the plaintiff has received copy of letter dt. 23.5.2000 given by the defendant no.1 to Mr. D. L. Sisodiya. In this letter, it was made clear that the defendant no.1 had given various letters to Mr. D.L.Sisodiya and he had not replied those letters and explanation is called from him as to what there is such inordinate delay for delay of more than one year.

6. It is further alleged by the plaintiff that one Mr. Ravi Naphade visited the shop of the plaintiff in the month of September and October of 2000. He again asked for Rokad khata for 1998-99, ledger for 1998-99, journal for 1998-99 and copies of bills of purchases of April-1998–31.3.1999. In the month of November, he again asked to the

plaintiff to submit earlier books of account. The plaintiff has supplied all required books of account to Shri Ravi Naphade. Meanwhile, defendant no.2 has filed proceeding for recovery of their claim before the Co-operative Court at Amravati. The plaintiff informed to the defendant no.2 about the same. The plaintiff received a letter dt. 9.3.2001 from the Divisional Manager of the defendant no.1 wherein it was informed that the detail investigation carried out. Mr. Naphade had come to the conclusion that the claim of the plaintiff is not genuine. For the first time, the plaintiff insured shop in those letters that there is irregularity in account. There is suppression of stock statement, income tax papers and information of inflation of stock value and with the claim of the plaintiff is not bonafide. It was alleged that fire could not be accidental but appears to be a willful act and hence, the claim of the plaintiff is not acceptable and same is repeated. However, all the allegations in this letter made by the defendant no.1 were totally false. Observation of Mr. Naphade are without any signs having. The defendant no.1 has either managed the said report of Mr. Ravi Naphade or as found it convenient to

accept such false report of the investigator Mr. Naphade. On receipt of the said letter the plaintiff made representation to the original Manager of defendant no.1 on 12.4.2001. At that time, the plaintiff has submitted the copies of the FIR lodged with police station, copy of police panchanama, copy of Fire brigade, copy of inspection of electrical Inspector and other documents. Thereafter, again Mr. D.N.Sisodiya had been at Akola and had given letter to Assistant Electrical Inspector dt. 14.6.2001 and the Electrical Inspector replied the said letter of Shri Ravi Naphade on 30.6.2001 and in the said letter it was made clear that certificate was issued on the basis of inspection carried on 5.6.1999. The plaintiff has thereafter again made correspondence with defendant no.1 on 25.7.2001 and 4.10.2001. However, there was no response from the side of defendant no.1. Therefore, the plaintiff was constrained to file suit.

7. It is further alleged by the plaintiff that as per account books as on 1.4.1998 and opening stock in the shop of the plaintiff was worth Rs. 37,74,500/- and in the year 1998-99 purchases were worth Rs.21,64,159.10. In the year

1998-99, there was sale of Rs.14,44,058/-. Therefore on 31.3.1999 the total stock in the shop of the plaintiff was worth Rs. 50,31,580/- from 1.4.1999 to 30.4.1999. There were purchases worth Rs. 4,426/- and sale of worth Rs. 17,845/- and during this period goods worth Rs.16,043/- were returned to the vendors from whom the goods were purchased. Therefore, as on 30.4.1999 the stock of the goods in the shop of the plaintiff was worth Rs. 50,04,630/-. After deducting the amount of salvages Rs.85,000/- from this amount the actual damages of loss suffered by the plaintiff due to fire in the shop of the plaintiff was worth Rs. 49,19,630/-. The plaintiff has suffered loss on account of damage to the furniture worth Rs.4,71,580/-. The plaintiff had given estimate of furniture provided by one Bhaveshkumar Vora who estimated the cost of proposed furniture for the shop of the plaintiff at Rs. 4,71,580/-. The plaintiff is claiming loss of furniture worth Rs. 4,00,000/-. As such the plaintiff claimed Rs. 53,19,610/-.

8. It is further alleged by the plaintiff that the plaintiff was required to obtain deposits from the market for

the purchasing the goods to do the business in the year 1998-99. The plaintiff was required to pay interest @ Rs. 1.60 percent p.m. to the depositor. The plaintiff was also required to pay interest @ 15 % p.m. to the finance broker. At the relevant time i.e. on 30.4.1999 there was outstanding debited balance of the defendant no.2 worth Rs. 24,65,672.ps The defendant no.2 charged interest @ 17.50 % p.m. which includes penal interest @ 2 % p.a. and such interest is debited by the bank with quarterly rests. Therefore, the plaintiff is entitled to claim damages by way of interest from defendant no.1 @ 18 % p.a. The amount of interest on the claimed amount of Rs. 53,19,630/- comes Rs. 32,25,874/- till the date of filing of the suit. Therefore, the claim of the plaintiff is Rs.84,44,874/-. The plaintiff also claimed Rs.60,000/- on account of mental pain and agony. Therefore, total claim of the plaintiff is Rs.86,00,000/-. The plaintiff has claimed future interest @ 21 percent per annum from the date of filing of the suit till the actual payment of amount.

9. The defendant no.1 resisted plaintiff's suit claim by filing written statement at Exh.10. It is contention of the

defendant no.1 that policy in question is in the name of Akola Janata Commercial Co-operative Bank, Akola account of M/s. Aishwarya. Therefore, present suit in the name of present plaintiff independently is not maintainable in law and liable to be dismissed. The defendant no.1 denied the incidence took place between 30.4.1000 to 1.5.1999. The defendant no.1 denied all the material allegations made in the plaint. It is contention of the defendant no.1 that service of photographer for video-graphy of the shop of the plaintiff was availed by the defendant no.1 at the time of visit. The video-graphy of the shop of the plaintiff was carried on 1st May, 1999. This fact has been admitted by the plaintiff in the plaint. If the video-graphy and photographs of the shop in question are seen then it will reveal that the fire was not due to short circuit but a willful action on the part of the plaintiff. The investigation reports submitted by Shri Ravi Naphade clearly show the facts and thorough investigation. The report of investigator is based on the actual inspection carried out at the site and based on knowledge and ability and without any prejudice. The plaintiff has made request and submitted

documents along with MSEB report and the plaintiff has submitted his representation with some claim papers. The defendant no.1 has instructed to Ravi Naphade to **give** observation on the matter. Ravi Naphade has submitted his final report on 30.7.2001. The claim of the plaintiff is not bonafide and genuine. Therefore, it is liable to be dismissed.

10. During the pendency of the suit, the defendant no.2 i.e. Akola Janata Commercial Co-operative Bank Ltd. was added as a defendant. The written statement filed by defendant no.2 is at Exh.156. The defendant no.2 admitted all the averments made in the plaint and contended that it had sanctioned and granted hypothecation loan upto Rs.25/- lacs to the plaintiff for the purpose of selling the Saree and clothes and stock in the shop was hypothecated by the plaintiff with it by way of security for the loan amount. The said stock of the goods of the plaintiff was duly insured with the defendant no.1 as per the requirement of the defendant no.2 and said insurance policy was taken for the stock under hypothecation with the bank. Therefore, defendant no.2 is having first legal charge over the stock of the goods and the price of the

amount of said hypothecated stock of goods. It is further contended by the defendant no.2 that it was agreed between the plaintiff and defendant no.2 bank that if any incidence takes place in which the hypothecated stock of goods is destroyed or damaged then in that event the bank shall have the first right to directly receive the claim amount from the Insurance Company and to credit appropriate amount of the said amount towards the satisfaction of the outstanding amount of loan. The defendant no.2 has issued many letters to the plaintiff and also the defendant no.1 to pay the amount of claim for the satisfaction of the outstanding loan amount. The plaintiff has committed default in repayment of outstanding loan amount. Therefore, registered notice dt. 6.3.2002 was issued to the plaintiff and to the guarantors of the plaintiff through Advocate. However, the plaintiff failed to repay the loan amount. Therefore, defendant no.2 has filed dispute No.387/2001 against the plaintiff and its guarantors before, the Co-operative Court at Amravati and same is pending. There is huge amount of Rs.46/- lacs outstanding against the plaintiff. Therefore, the defendant no.1 be

directed to remit and pay the outstanding due amount together with future interest to the defendant no.2 bank. From the basis of rival contentions of the parties issues were framed at Exh.18 and additional issues were framed. The first issue was in respect of the alleged incidence dt. 30.4.1999. The second issue was regarding the loss suffered by the plaintiff. The third issue was pertaining to the entitlement of the plaintiff to claim interest and rate of interest. The other issues were pertaining to the claim of the defendant no.2 and costs of the suit. During the course of trial, the plaintiff and defendant no.1 have adduced oral as well as documentary evidence. After considering the evidence on record, the learned lower court has partly decreed the suit by judgment and order dt. 10.10.2005. The defendant no.1 i.e. present appellant was directed to pay Rs. 26,12,669/- to the plaintiff along with interest @ 12 % per annum from the date of filing of the suit till realization of the amount. The plaintiff was directed to pay the outstanding amount of loan to the defendant no.2 Bank. The defendant no.1 has filed present appeal against the judgment and decree of the lower court

and prayed for quashing and setting aside the judgment and decree of the lower court passed in Spl.C.S.No.29/2002 on various grounds mentioned in the appeal memo. The plaintiff has filed cross-objection dt.26.6.2006.

11. Heard learned Adv. Shri S.R.Malviya for the appellant, learned Adv. Shri G.K.Sarda for the respondent no.1. None was present for the respondent no.2 Bank. Perused the judgment and order passed by the learned lower court carefully. Perused the record and proceeding.

12. After considering the facts of the case and argument advanced on behalf of both the parties, following points arise for determination and finding thereon are recorded for the reasons given hereinafter.

S. No.	POINTS	FINDINGS
1	Whether the alleged fire dt. 30.4.1999 took place in the shop of the plaintiff is accidental or willful action ?	It was accidental.
2	Whether the plaintiff proves that there was total loss of Rs. 53,19,610/- due to the fire took place in the shop ?	Partly affirmative
3	Whether the plaintiff is entitled to claim interest ? If yes, at what rate ?	Yes @ 12 % p.a.

4.	Whether the defendant no.2 is entitled for relief as claimed ?	In the negative
5.	Whether the interference in the judgment and decree passed by in SplC.S.No. 29/2002 dt. 10.10.2005 is necessary ?	To the extent of grant of interest.
6	What order ?	As per final order.

REASONS

AS TO POINT NO.1:

13. The oral evidence of the plaintiff consists the deposition of Amol Toshniwal at Exh.19, Bhavesh Vora (PW2) at Exh.123, Ghansham Chandak Chartered Accountant (PW3) at Exh.124. The oral evidence of defendant no.1 consists deposition of Saidappa Onkarappa Mashalkar, Surveyor Shri D.L.Sisodiya and Investigator Shri Ravi Naphade at Exh.128,131 and 132 respectively. The defendant no.2 has examined one witness namely Jitendra Mandani at Exh.159.

14. There is no dispute that the shop named M/s. Aishwarya is situated at New Cloth Market Akola. The plaintiff is running the business of Saree and Clothes in the said shop. Initially, it was a partnership firm and since 1.4.1997 it is proprietary firm. The plaintiff is proprietar of this firm. The fact of insurance with the defendant no.1 is also not in dispute. As per the Insurance Policy the extent of

liability of the defendant no.1 was is Rs. 55/- lacs towards the stock of clothes and to the extent of Rs.4/- lacs towards furniture of the shop. It is also not in dispute that the plaintiff had taken cash credit hypothecation loan to the extent of Rs.25/- lacs in the year 1999 from the defendant no.2. The goods in the shop of the plaintiff were hypothecated with the defendant no.2. Therefore, insurance policy was in the name of the defendant no.2 for the account of the plaintiff. It is also not in dispute that the incidence of fire took place in the shop of the plaintiff in the intervening night of 30.4.1999 and 1.5.1999. It is also not in dispute that when the plaintiff had made claim of insurance to the defendant no.1 one Surveyor namely Shri D.L.Sisodiya was appointed by the defendant no.1 to carryout the survey and to assess the loss of stock of Saree and damage to the furniture, fixtures and fittings caused due to the fire. The officers of the defendant no.1 also visited the shop of the plaintiff on 1.5.1999. the survey report submitted by Surveyor Shri D.L.Sisodiya is at Exh.29. As per the said report the quantum of damage has been determined as Rs. 26,12,669/- payable by the defendant no.1. The defendant no.1 after receiving the report of Surveyor Shri D.L.Sisodiya appointed Shri Ravi Naphade to investigate the cause of fire.

15. It is argued on behalf of the plaintiff that the reports of Electrical Inspector and Assistant Engineer of MSEB at Exh.61 and 121 specifically show the cause of fire is due to short circuit. The witness of the defendant no.1 Shri Ravi Naphade has no special qualification or knowledge about making investigation. Therefore, the report of Ravi Naphade is not sufficient to show that the fire incidence was and willful act. On the contrary, the material on record shows that the incidence took place due to short circuit. On the other hand, it is argued by Adv. Shri S.R.Malviya on behalf of the appellant/defendant No.1 that, investigation carried-out by Shri Naphade clearly show that the incident was willful act and not short circuit. The photography on record and videography support the report of Shri Naphade. The reports of the Electrical Inspector and Assistant Engineer of M.S.E.B., Akola (Exh.61 & 121) are not proved documents. No evidence adduced on behalf of respondent/plaintiff to prove the fact that incidence of fire occurred due to short circuit.

16. It is came on record in evidence of the plaintiff that the plaintiff's shop was closed at 9.00 p.m. on 30.4.1999 and said shop is situated on New Cloth Market Akola. There is compound wall on all the sides and there are two main gates on New Cloth Market Akola. There is security guard on

duty for 24 hours. After closing the shop both the main gates of the New Cloth Market were closed and for entering in the New Cloth Market the person is required to go through the main gate and with the knowledge of the security guard. The fire brigade came at the shop at about 11.30 p.m. on 30.4.1999 and work of fire extinguishing was going on for 3-4 hours till 3.30 p.m. on 1.5.1999. There are other shops adjacent to the shop of the plaintiff. The police were informed about the incident. The police prepared panchanama of the place of incidence. The defendant no.1 was informed about the incidence on 1.5.1999. The plaintiff has submitted the claim in prescribed form to the defendant no.1 The Surveyor appointed by the defendant no.1 visited the place of incidence on 1.5.1999 and 2.5.1999. The surveyor had obtained several documents from the plaintiff for verification by issuing letters. The plaintiff had sent several letters to the defendant No.2 till 19.9.2000 for settling his claim as early as possible. Thereafter, the defendant No.1 appointed an investigator namely Shri Ravi Nafade who also visited the shop of the plaintiff in the month of Oct.2000. The investigator asked the plaintiff to produce the documents regarding business of the plaintiff.

17. The Surveyor appointed by the defendant no.1 namely Shri D.L.Sisodiya in his report stated that the fire took place due to short circuit. It is admitted fact that the photographs and video-graphy was conducted. There is dispute between the parties who obtained photos and done video-graphy. But it is came on record that the photos and Video-graphy was in possession of the defendant no.1 since inception. The investigation report submitted by Shri Ravi Naphade is submitted after more than one year. In such circumstances, the facts came on record in evidence of the plaintiff the conclusion drawn by the Surveyor Shri D.L.Sisodiya cannot be kept aside. Therefore, the report of Investigator Shri Ravi Naphade cannot be accepted to hold that the fire incidence took place due to willful act on the part of the plaintiff. Hence, I record finding on point no.1 that the incidence took place due to short circuit.

AS TO POINT NO.2:

18. As per pleadings of the plaintiff, the plaintiff has obtained cash credit hypothecation loan to the extent of Rs. 25/- lacs in the year 1999. The goods in the shop used to be hypothecated with the bank. The plaintiff was required to

submit a periodical stock statement to the bank. The plaintiff used to keep stock of goods around Rs.50/- lacs regularly. There was furniture of Rs. 4/- lacs in the shop. The furniture in the shop was insured under the fire insurance policy with the defendant no.1 along with the goods in the shop. The plaintiff submitted a claim of Rs.49,48,000/- on account of loss of stock and Rs. 4,71,580/- towards loss of furniture. The plaintiff has claimed total amount of Rs. 54,19,580/- from the defendant no.1. The plaintiff maintains regular books of accounts. As per account book as on 1.4.1998 the opening stock in the shop of the plaintiff was worth Rs. 37,74,500/-. In the year 1998-99, there were purchases worth Rs. 21,64,159.10 ps. In the said year, there was sale of Rs.14,44,058/-. There was stock in the shop of the plaintiff worth Rs. 50,31,580/- during the period from 1.4.1999 to 30.4.1999 there were purchases worth Rs. 4,426/- and there were sales worth Rs. 17,845/- and during this period the goods worth Rs. 16,043/- were returned to the vendor from whom the goods were purchased. As on 31.4.1999 the stock in the shop of the plaintiff was worth Rs. 50,04,630/-.

19. In support of the claim as averred in the plaint the plaintiff has examined himself and two witnesses. The witness namely Ghansham Chandak is a Chartered

Accountant. As per the evidence of this witness, he had prepared trading and profit and loss account for the year ended on 31.3.1999 on the basis of books of accounts and other records of M/s. Aishwarya i.e. plaintiff. He was provided all the account books and record by the proprietor of M/s. Aishwarya. The said trading and profit and loss account is prepared in a sheet no.1 i.e. Exh.65 which bears his signature. He had also prepared a balance sheet as on 31.3.1999 for the plaintiff firm on the basis of account books and other records prepared to him. The balance sheet is a sheet no.2 of Exh.65 which also bears his signature. He had also prepared trading and profit and loss account for the year ended on 30.4.1999 which is sheet no.1 of Exh.66. In cross-examination of this witness it is came on record that for making balance-sheet, the account book, journal. Ledger and sales book are required to be maintained. He has filed the balance-sheet from 1.4.1998 to 30.3.1999 and 1.4.1999 to 30.4.1999. He audited account for 13 months only. He has not given reference of earlier period of audit in the balance-sheet. He admitted that Exh.65 has been prepared on the basis of earlier balance sheet and he has shown the opening stock of Rs. 37,74,500/-. He had not verified the account for the period prior to 1.4.1998. He has not submitted returns of

the plaintiff for the year 1998-99. He has given the audited balance-sheet to the plaintiff only. The net profit of the plaintiff was Rs.38,009.70 ps. for the financial year 1998-99. The gross profit for the financial year 1997-98 was 33.48 %. He admitted that profit increases along with stock. In 1997-98, the net purchase was Rs.24,29,121.50 ps. In the year 1998-99 purchases was Rs. 21,64,159.16 ps. The net purchase for April-1999 was Rs.4,426/- and sale was Rs.17,845/-. The balance-sheet was prepared by this witness on 20.11.2000.

20. The plaintiff in his evidence stated all the facts pleaded in the plaint. In his cross-examination, it is came on record that he does not remember about the sale and purchase of the previous last three years. In the year 1998-99, he had purchased goods worth Rs. 14/- to 15/- lacs. He has submitted income tax return for the year 1997-98. He is having account books since the year 1997.

21. It is argued on behalf of the plaintiff that the report of Surveyor Shri D.L.Sisodiya at Exh.129 also show that in the year 1998-99 stock of goods was worth Rs.37,74,750/-. It is also mentioned in the said report that the purchases were Rs.21,96,081/- and sale was of Rs. 14,47,118/- in the year 1998-99. Therefore, total stock in

plaintiff's shop was worth Rs. 45,23,712/- as on 31.3.1999.

22. There is no dispute that initially Surveyor Shri D.S.Sisodiya carried out the investigation and submitted his report to the defendant no.1. The defendant no.1 also examined Shri D.L.Sisodiya as its witness. The report submitted by Shri D.L.Sisodiya has been filed on record by the defendant no.1. The defendant no.1 has not denied the contents of the report submitted by Shri D.L.Sisodiya. The plaintiff also relied on the report of Shri D.L.Sisodiya. It is only argument on behalf of the plaintiff that the surveyor Shri D.L.Sisodiya has not calculated the cost of Saree in proper manner to determine the total amount of cost in shop on the date of incidence. Therefore, it will be proper to mention here the facts mentioned in the report of Shri D.L.Sisodiya. On perusal of the report of Surveyor Shri D.L.Sisodiya at Exh.128, it appears that the Surveyor found that the plaintiff has submitted excessive value of the closing stock as on 31.3.1998. Therefore, surveyor decided to verify the stock as on 31.3.1998 on the basis of purchases and sales from the date of commencement of the business till the date of fire. He has further mentioned that the plaintiff has submitted such particulars for verification. On verification, this surveyor found that the stock of Saree as on 31.3.1998 was 5402. The

purchases during the year 1998-99 6198. Sales and returns during the year 1998-99 4031. Therefore, stock of Sarees as on 31.3.1999 was 7369. There were no purchases during April-1999. There was sales and returns during the month of April-1999 of 52 sarees. The Surveyor therefore, considered the stock of Sarees as on 30.4.1990 7317 i.e. on the date of fire. In order to determine the rate of purchase of one Saree, the Surveyor considered the purchases of Sarees as per bills of the year 1995-96, 1996-97, 1997-98 and 1998-99. The Surveyor assessed the cost of one Saree @ Rs.351.34 and on the basis of expenses required for transport, Octori and Hamali. The Surveyor worked out the cost of one Saree @ Rs.357.78 and assessed total loss of Rs. 26,17,876/-. The Surveyor assessed loss pertaining to the furniture of Rs.1,48,72/- and total loss of Rs.27,66,598/-. The surveyor deducted amount of salvage Rs.1,53,929/- and calculated net payable loss of Rs. 26,12,769/-.

23. After considering the evidence adduced by the plaintiff and the evidence of Surveyor Shri D.L.Sisodiya, it appears that the evidence of both the sides shows that the opening stock in the year 1998-99 was Rs.37,74,750/-. There were purchases of Rs. 21,96,089/- and sales of Rs. 14,47,118/- during the said year. The plaintiff has not

adduced evidence to show the stock of sarees as on 31.3.1998. However, it is admitted fact that the plaintiff has produced all the books of account for verification before the Surveyor Shri D.L.Sisodiya. The Surveyor Shri D.L.Sisodiya in his report mentioned the stock of sarees as on 31.3.1998 on the basis of account books produced before him by the plaintiff. Therefore, the conclusion drawn by the Surveyor Shri D.L.Sisodiya regarding the cost of one saree and assessment of total loss appears to be probable and same can be accepted. The learned lower court also accepted the conclusion drawn by the Surveyor Shri D.L.Sisodiya by giving cogent reasons. Therefore, it can be said that the plaintiff is entitled to claim Rs.26,12,669/- towards the loss of goods and furniture. Hence, I record finding on point no.2 accordingly.

AS TO POINT NO.3:-

24. The plaintiff has claimed interest @ 18 % per annum. The grounds raised by the plaintiff for claiming interest @ 18 % per annum are that he was required to make payment of interest @ 1.60 % per month to the three persons from whom he had taken deposits in the year 1998-99 and at the rate of 0.15 % per month to the finance brokers and at the relevant time as on 30.4.1999 there was outstanding

debit balance of the defendant no.2 worth Rs.24,65,672.28 ps. And on that amount bank has charged interest @ 17.50 % per annum including penal interest @ 2 % with quarterly rests. According to the plaintiff, he suffered loss due to non payment of the claim amount by the defendant no.1. The plaintiff has relied on the correspondence made by the plaintiff with the defendant no.1 in respect of settling the claim made by the plaintiff. According to the plaintiff, the defendant no.1 delayed in settling the claim and ultimately repeated the claim on baseless ground. On the other ground the defendant no.1 came with the case that the plaintiff himself is responsible for the delay. The plaintiff has not furnished necessary information and documents to the Surveyor that repeatedly asked. The defendant no.1 also relied on the correspondence took place between the Surveyor and the plaintiff as well as the defendant no.1 and the plaintiff.

25. After perusal of the correspondence between the parties it appears that the plaintiff has asked several times to the defendant no.1 to settle his claim immediately and the defendant no.1 also asked the plaintiff to supply documents and information for settling the claim. It is came on record that on 1.5.1999 Surveyor Shri D.L.Sisodiya, the Divisional

Manager Shri Masalkar and one Bansali had visited the plaintiff shop and asked the plaintiff to produce all the account books and copies of sale and purchase receipts. The Surveyor in his cross-examination admitted that the plaintiff has supplied all the relevant documents for verification. The Surveyor Shri D.L.Sisodiya after period of 13 months asked the plaintiff to send certificate of fire form Akola Municipal Corporation, panchanama of police, detail estimate of repairs/replacement of damage in furniture, fixtures and fittings. There was no explanation on the part of Surveyor regarding the time required for asking the plaintiff to submit above mentioned documents after period of 13 months. The correspondence made by the office of defendant no.1 shows that the Surveyor Shri D.L.Sisodiya was asked to give his explanation for causing inordinate delay in submitting his report. All these facts show that the Surveyor Shri D.L.Sisodiya submitted his report after period of one and half years. The defendant no.1 had appointed one Investigator Shri Ravi Naphade to investigate the actual cause of fire after receipt of report of Surveyor Shri D.L.Sisodiya. The Investigator Shri Ravi Naphade also took time to submit his report. There is no explanation on the part of the defendant no.1 for appointing Shri Ravi Naphade as Investigator when

there was report of surveyor Shri D.L.Sisodiya regarding the cause of fire and loss caused to the plaintiff. All these facts show that there was a delay on the part of the defendant no.1 in settling the claim. In such circumstances, it can be said that the plaintiff is entitled to claim interest. Now question arises what should be the rate of interest. As mentioned above, the plaintiff has claimed interest @ 18 % per annum. It is true there is no any oral or written agreement in between the plaintiff and defendant no.1 regarding the interest. The nature of transaction between the plaintiff and defendant no.1 can be said to be of commercial nature. As per provision of section 34 of Civil Procedure Code in case of a transaction of commercial nature, rate of interest can be determined more than 6 %. After considering all these facts, it will be proper to determine the rate of interest 12 % per annum. Hence, I record finding on point no.3 accordingly.

AS TO POINT NO.4:-

26. As per the judgment and decree of the learned lower court the defendant no.2 is held entitled for keeping the charge on the decretal amount. Accordingly, as per the operative part of the judgment, it is ordered to keep charge form the decretal amount with direction to the plaintiff to pay the outstanding amount of his loan to the defendant no.2

bank out of the decretal amount. However, during the pendency of this appeal and cross-objection filed by the plaintiff it is brought on record that the plaintiff has repaid all the dues to the respondent no.2 i.e. defendant no.2 Bank. The defendant no.2 also issued no due certificate in favour of the plaintiff. It appears that the loan account is closed on 6.6.2006, it means no claim of defendant no.2 is pending against the plaintiff. In view of this fact, it can be said that the defendant no.2 is not entitled for any relief. Hence, I record, finding on point no.4 in the negative.

AS TO POINT NO.5 & 6:

27. After considering the findings on point nos. 1 to 4, only rate of interest is required to be enhanced @ 12 % p.a. instead of 6 % p.a. and to that extent modification in the judgment and decree passed in Spl.C.S.NO. 29/2002 dt. 10.10.2005 is necessary. Hence, finding on point no.5 is recorded accordingly and in order to record finding on point no.6 I pass the following order.

ORDER

1. Appeal is dismissed and cross-objection is partly allowed.
2. The judgment and decree dated 10.10.2005 is modified as under:-

- a) The defendant No.1 Insurance Company shall pay an amount of Rs. 26,12,669/- (Rs. Twenty Six lacs Twelve thousand Six hundred sixty nine only) to the plaintiff with interest @ 12 % p.a. from 1.11.1999 till filing of the suit i.e. 7.3.2002 and @ 12 % p.a. from the date of filing of the suit till realization of the decretal amount.
 - b) The claim of plaintiff of rs. 60,000/- towards pans and agony stands rejected.
3. Decree be drawn accordingly.

Date : 30.03.2019.

(S.P.Pol.)
District Judge-6
Akola.

CERTIFICATE

I affirm that the contents of this P.D.F. file are same word for word as per original order.

Name of Steno : A.M.KALE.

Court Name : District Judge-6, Akola.

Date : 30.03.2019.

Signed by presiding Officer on:22.04.2019.

Uploaded on : 22.04.2019..