Form No.(J)2
HEADING OF JUDGMENT IN ORIGINAL SUIT

District--------Nalbari

IN THE COURT OF CIVIL JUDGE ::::::::::::::::NALBARI

Present : Himakshi Thakuria Buragohaign
Civil Judge
Nalbari.

Monday, the 21st day of January, 2019

TITLE SUIT NO : 2/08

Nalbari Urban Co-Op. Bank Ltd.

--------Plaintiff

- VS -

New India Assurance Co. Ltd. & Others

--------Defendants

The suit is coming on for final hearing on 21/12/2018 in presence of:-

Advocates for the Plaintiff:-

i) Sri Dilip Choudhury
ii) Sri Rinku Lahkar.

Advocate for the Defendant :- Sri Chandan Malakar.

And having stood for consideration to this day, the court delivered the following Judgment:-

J U D G M E N T

1. This is a suit for specific performance of contract.

2. The fact of the plaintiff's case in brief is that the plaintiff is a registered Co-Operative Bank under The Assam Co-Operative Societies Act, 1949 and has been carrying banking business under its registration as registered Co-Operative Societies situated at Nalbari town. The plaintiff bank had insured its movable and immovable properties including cash with a coverage of loss up to Rs. 10,00,000/- on 15/03/99 thereafter the plaintiff got it renewed from time to time and the last renewal was done vide certificate No. 530902/46/06/04/00000095 dated 12/03/2007 for the period effected from 13/03/2007 to 12/03/2008 till midnight. Under the name and style of 'Burglary and house breaking policy' in the happening of certain future event such as Burglary / house breaking using reasonable force in the insured premises. The plaintiff would be indemnified by defendant to the extent of loss. Unfortunately the plaintiff bank had an incident which could be discovered after opening of the bank on 28/05/07 in the morning since the bank was closed on 2-30 pm on 26/05/2007, whereby a sum of Rs.5,92,639/- was stolen away. According to the plaintiff the aforesaid incident of Burglary took place in between the day of 26/05/07 after the closure of Saturday works at 2-30 PM to the morning of 28/05/2007 at 10 AM. It was found on the morning of 28/05/07 that the main entry door which was a iron collapsible door was opened and thereafter the wooden door and a number of locks were lying in broken condition at the floor outside. The plaintiff averred that the said burglary can be said as 'forcible and violent entry' since the burglary entered into it by a perforce breaking down the locks of every gate and damage also some other parts of the premises. Being acquainted with such fact on 28/05/07 Jitumani Das, the Branch Manager of the plaintiff bank lodged an FIR at Nalbari Police Station informing about the occurrence and also informed about the same to the defendant No. 3 i.e. the Branch Manager, New India Assurance Co. Ltd. of Nalbari Branch. On receipt of

the FIR Nalbari Police Station registered a case as Nalbari PS Case No : 111/07 u/s 457/380 IPC. The Investigating Officer attended the bank of the plaintiff on 28/05/2007 investigated the case and recovered a number of locks in broken condition from the place of occurrence. Two number of keys of the iron safe locker wherein the custody of the joint custodian, one Jitumani Das, Branch Manager and Pramod Kr. Dutta, the concerned Clerk cum Cashier. The I/O had seized the locks and keys along with cash summary register of bank and thereafter issued seizure list to the plaintiff. By the said act of burglary, the plaintiff lost an amount of Rs. 5,92,639/-. An amount of Rs. 1695.25 was found abandoned in the iron safe after the incident. As per a calculation of the I/O it appears that the amount lost is Rs. 5,94334.25/-. Thereafter the I/O arrested Pramod Kr. Dutta, the concerned Cashier of the plaintiff bank. It appears that when the plaintiff filed a claim petition before the defendant No. 3 on 4/6/07, defendant No 3 did not respond to the claim. The plaintiff issued letters on 12/10/07, 8/01/08, 22/01/08, 24/03/08. The defendant denied the lawful claim of the plaintiff in his reply to the last letter of the plaintiff on 28/03/08. Hence, the plaintiff has filed this suit claiming Rs. 5,92,639/- along with Rs. 30,000/- being the cost of the expenses for repairing of iron collapsible door and other two wooden doors along with interest, cost of the suit and others.

3. On receiving notice the defendants appeared and contested the suit by filing the written statement. In their statement the defendants denied the entire averments made by the plaintiff in the pleadings. The defendant admitted the issuance of the policy to the plaintiff with validation from 13/03/07 to 12/03/08 subject to the term, conditions and exclusion clause of the policy. As per the terms and agreements the policy was depended on the fulfillment of the terms, conditions and excludes clauses. According to the defendants the working in the office till late night on 26/05/07 up to 2-30 AM was not a normal work hours which left the question marks on the role of the bank officials in the alleged incident of the so called burglary. The defendant took the plea that in Nalbari PS Case No 111/07 the Cashier of the plaintiff bank Shri Pramod Kr. Dutta was arrested by the police on strong suspicion which suggested the involvement of the bank staff in the alleged act of burglary. There was no damage caused to the iron safe which suggested faul play of the plaintiff which does not cover the

terms and liability of the insurance policy of the defendant. As the criminal case has not been finally disposed of, the defendant were not liable to indemnify the plaintiff. As such the defendant has prayed to dismiss the suit with cost.

4. On perusal of the pleadings following issues were framed-

i) Whether there is any cause of action for the suit ?
ii) Whether the suit is maintainable in its present form ?
iii) Whether the suit is bared by limitation of law ?
iv) Whether the plaintiff is entitled to get decree as prayed for ?
v) To what other relief the parties are entitled to ?

5. After discussing the issue at length vide judgment and order dated 26/10/09 the suit was decreed on contest with cost for realization of a sum of Rs. 5,92,639/- from the defendant along with interest @ Rs. 10% per annum almost equally to the lending rate of banks from the date of 4/06/07 on which the claim petition was filed by the plaintiff bank till realization of the decreetal amount. Against this judgment and order dated 26/10/09 passed by the then learned Civil Judge,Nalbari in TS 2/08 the defendant as appellant preferred appeal before Hon'ble Gauhati High Court which was registered as RFA No. 9 of 2010. The said appeal was disposed of vide judgment and order dated 24/08/2017 by Hon'ble Mr. Justice Ajit Barthakur wherein the appeal was partly allowed and the suit was remanded back to the learned trial court to decide afresh the issue of alleged burglary / house breaking in respect of the lost money by clearly ascertaining the amount and damaged caused to the other property, if any, with reference to the terms of the insurance contract referred to above and the mandate of the Appex Court in this context, affording opportunity to the party to adduce additional evidence, if so advised.

6. Initially the plaintiff side examined 3 witnesses and exhibited 19 documents. The defendant side examined two witnesses and exhibited one document. On remand the plaintiff adduced the evidence of Shri

Pramod Dutta, who is the Cashier of the plaintiff bank and who was arrested in connection with the alleged act of Burglary as PW 4. However, the plaintiff did not exhibit any documents after remand.

DISCUSSION, DECISION AND REASONS THEREOF

7. I have heard the argument of the learned counsels for the plaintiff and the defendants and have discussed the issues freshly as follows --

ISSUE NO 1 :

Whether there is cause of action for the suit ?

Cause of action means "every fact which, if traversed, it would be necessary for the plaintiff to prove in order to support of his right to a judgment of the court." In the instant suit the plaintiff has claimed Rs. 5,92,639/- from the defendant being the cash lost from the insured premises of the plaintiff bank and has also claimed Rs. 30,000/- being the cost of expenditure for repairing of iron collapsible door and other two wooden doors of the plaintiffs premises. According to the plaintiff, the plaintiff bank had insured with the defendant No 3 vide different certificates which were renewed from time to time and the last certificate was renewed on 12th March, 2007 for the period effected from 13/03/07 to 12/03/2008 till midnight with the coverage of lost up to Rs. 10,00,000/-. According to the plaintiff an incident of burglary had taken place in the bank between the day of 26/05/07 and 28/05/07 and the same was discovered on the morning of 28/05/07 whereby a sum of Rs. 5,92,639/- was stolen away from the plaintiffs premises and damage was also caused to some other articles of the plaintiff upon a actual forcible and violent entry into the premises of the plaintiff during the

validity of the insurance. According to the plaintiff the said certificate of insurance under the name and style of "Burglary and house breaking policy" was itself a promise effecting certain terms and conditions precedent, interalia which states that in the happening of certain future event as such, burglary/ house breaking using reasonable force in the insured premises, the plaintiff would be indemnified by defendants to the extent of loss. Unfortunately that the event happened in the premises by an act of burglary, whereby a sum of Rs. 5.92,639 was stolen away by the infidels by perforce activity. The said activity of the vile wretch indeed comes within the purview of loss to indemnify plaintiff and the plaintiff is legally entitled to a reasonable amount to the extent of loss by strict observance of the Hon'ble Court.

The defendants in their written statement though admitted the issuance of the insurance policy to the plaintiff with validity from 13/03/07 to 12/03/2008 stated that the plaintiff bank offices were working at the branch office on 26/05/07 up to 2-30 AM which is not normal working hours which left a question mark on the role of the bank officials in the alleged incident. According to the defendant during investigation in Nalbari Police Case No : 111/07, the insurer of the plaintiff bank was arrested on strong suspicion of the police that the alleged act of burglary must have been committed by him and his associates. The defendants also stated that referred to the exclusion clauses of the terms and conditions of the said policy and contested the claim of the plaintiff by way of repudiating the insurance benefits.

From the above discussion it appears that, as there is assertion of right by the plaintiff and denial of right by the defendants there is cause of action in the suit.

Accordingly this issue is decided in the affirmative and in favour of the plaintiff.

ISSUE NO : (ii)

Whether the suit is maintainable in its proper form ?

There is no specific pleadings that the suit is not maintainable in its present form or in the manner it should have been filed. The plaintiff has claimed for realization of a sum of Rs. 5,92,639/- being the cash lost from the premises of the plaintiff and for realisation of Rs. 30,000/- being the cost of expenditure for repairing of iron safe collapsible door and other two wooden doors of the plaintiff premises from defendant No 3 as per the insurance policy No. 53902/46/ 06/04/00000095 dated 12/03/07 effecting from 13/03/07 to the midnight of 12/03/08. I find nothing to hold that the suit is not maintainable in its proper form.

Accordingly this issue is decided in the affirmative and in favour of the plaintiff.

ISSUE NO (iii)

Whether the suit is bared by limitation ?

From the pleadings of the parties it is seen that the alleged burglary took place in between 26/05/07 to the morning of 28/05/07. It is seen that the present suit was lodged on 7/07/08 which is within the statutory period of limitation. As such the suit is not bared by limitation.

Accordingly this issue is decided in the negative and in favour of the plaintiff.

ISSUE NO (iv) and (v)

Whether the plaintiff is entitled to a decree as prayed for ?

A N D

To what other relief the parties are entitled to ?

For the sake of convenience these two issues are decided together.

The learned counsel for the plaintiff while submitting his argument has stated that the evidence on the record has proved the fact that the safe remained at a place which is to be reached by passing through several collapsible gates. According to learned counsel, the evidences are clear that the gate at the entry point was found broken and the locks were also found broken for opening the entry gate of the bank. It is also submitted that the use of force and violent activity in respect of taking away the cash from the locker is present and the rejection of the insurance claim on filthy ground is illegal.

The learned counsel for the plaintiff further submitted that the evidence on the plaintiff side is clear that there has been a loss of money from the banks safe which is Rs. 5,92,334/- and as such loss was caused because of taking away the same by breaking the entry gate violently and further, the iron door of the same was found broken which establishes that there was violent entry into the banks premises and the amount was looted by miscreants. Therefore, according to the learned counsel this is a clear case of burglary.

The submission of learned counsel for the defendant in reply is that as per the exclusion clause vide Exhibit-3 the plaintiff has failed to lead any evidence to show that the iron safe was broke open by force and as such in absence of any evidence regarding burglary by breaking or causing damage to the iron safe, the only inescapable inference has to be that the iron safe was opened by use of its keys only, which remained in the custody of bank officials.

The learned counsel for the defendant has further submitted

that the investigating officer on the day of opening of the bank on 28/5/2007 investigated the circumstances and mode of commission of the offence and after vigorous investigation found no clue of any miscreants. The learned counsel for the defendant submitted that the photograph of the iron safe was taken by the investigating officer as well as by the surveyor and those photographs are exhibited in the record which proves that not a single damage was caused on the body and door of the iron safe.

In reply the learned counsel for the plaintiff submitted that the company's evidence to dislodge the claim of the plaintiff bank through surveyors evidence to substantiate his report for rejection of the claim of the bank is having no evidenciary weight so far arising from the photographs produced without the original source of such photographs. According to the learned counsel the documents which have been executed by the insurance company are mere photographs and no original source from which the same are developed have been exhibited, for which, the probative value of the photograph are lacking without the originals that the photographs are in the proceeding and the same can not be given weight as evidence against the claim of the plaintiff. In this respect the learned counsel has cited the decision in **J. Yashoda -Vs- Sobharani reported in (2007) 5 SCC 730** wherein it is held that documents can be received as secondary evidence only when copies made from or compared with the original are certified copies. Accordingly, where the original source of the documents is absent there is no possibility to compare the same with the original and the same can bear no probative value and the same can not be treated as carrying any evidenciary weight. Here, in this case too the defendant has failed to furnish the original source from which the photographs have been made. So, the said photographs can not be treated as evidence u/s 65 of the Evidence Act.

The learned counsel has further submitted that the evidence of the insurance company has failed to prove the facts as per the exclusion clause to avoid its liability. Though the claim was rejected with the plea of no loss due to burglary and suspicion was there for using the actual key for opening the locker, but the insurance company failed to discharge its burden to prove the facts of its assertion so far rejecting the claim of the plaintiff. To this effect the plaintiffs cites a decision of Delhi High Court reported in **AIR 1986 Delhi 403, Mrs. Kela Devi and another -Vs- Ramchand** wherein it was held that "If the Insurance Company was to ascertain that its liability is not unlimited liability but limited only to the act policy, the duty of burden to prove the same was on the insurance company." In another decision of the Hon'ble Gauhati High Court reported in **(1989) 2 GLR 399** it was laid down that when the insurance company makes an assertion that there was no fire damage caused to the entire goods etc, in the opinion of the High Court, when the destruction of the insured properties by accidental fire was not disputed. The onus is on the defendant insurer to establish that the value of the stock in trade destroyed by fire was lesser then what was insured. So according to the learned counsel for the plaintiff, in the instant case the plaintiff has proved the fact about the loss of the aforesaid money due to burglary and how the burglary was caused. If the insurance company inspite of the acquittal of the arrested employee whom they suspected to be involved in the alleged act of burglary, wants to reject the claim standing on their plea, then onus is on the insurance company to prove the fact that the money was stolen not in burglary.

Before going into a detailed discussion on the matter, I would like to put forward the view taken by Hon'ble Mr. Justice Ajit Barthakur in his judgment dated 24/08/2017 passed in RFA 09/10, which was preferred by the present defendant against the judgment and order of

the trial court passed in this case on 26/10/09. Vide the said judgment and order dated 24/08/2017 passed in RFA 09/10, the judgment and decree of the trial court passed on 26/10/09 in connection with this case was set aside and the suit was remanded back to the trial court with a direction to decide the issue a fresh by allowing the parties to adduce additional evidence so as to ascertain the vital aspect of actual amount lost. On perusal of the aforesaid judgment and order dated 24/08/17 passed in RFA 09/10 it is seen that the Hon'ble Court had opined that the plaintiff bank did not produce any documentary evidence such as the volt register or any other register to prove that during the relevant period a sum of Rs. 592639/- was in the iron safe enabling to court to ascertain the amount lost in the alleged incident. It was further opined that the aforesaid ascertained amount, as the plaintiff bank stated was contradicted by the investigating officers confirmation that the amount lost was in fact Rs. 5,94,334.25/-. The aforesaid vareation in lost money amount kept in the volt of the plaintiff bank has remained unexplained. It was further opined that the plaintiff bank also did not examine Sri Pranab Kr. Dutta, the then Clerk cum Cashier who was the also custodian of the key of the iron safe along with Jitumani Das(PW 2), the then Branch Manager who was arrested by the police in connection with the alleged incident and also the impartial investigating officer of Nalbari PS Case No 111/07 relating to the incident. According to the Hon'ble Gauhati High Court had the above named persons been examined the definite quantum of money lost and the mode of commission of offence could be ascertained enabling the court to consider the incident with reference to the terms of the insurance contract.

Accordingly the suit was remanded back to the learned trial court to decide afresh the issue of alleged burglary / house breaking in respect of the lost money by clearly ascertaining the amount and damaged caused to others property, if any, with reference to the terms of the

insurance contract referred to above and a mandate of the Apex Court, in this context, affording opportunity to the parties to adduce additional evidence, if so advised.

On perusal of the pleading of the plaintiff, it is seen that the plaintiff has stated that an amount of Rs. 5,92,639/- was lost by the plaintiff bank. It is further averred by the plaintiff that the I/O has confirmed the amount lost to be of Rs. 5,94,334.25 which may be through oversight of the cash summery register. We also find DW 2 stating in his cross-examination that he had gone through the account book and cash book of the bank and found that there is a shortage of cash of Rs. 5.94334.25/-

But inspite of getting opportunity to adduce additional evidence while the suit was remanded back, the plaintiff neither adduced the evidence of the I/O nor did they exhibit the cash summary register, account book of the bank to explain the variation in the lost amount of money kept in the volt of the plaintiff bank.

However, the plaintiff has only adduced the evidence of the cashier, Pramod Dutta as PW 4. PW 4 in his cross-examination stated that on 26/5/07 Babul Sutradhar left the office a bit earlier. According to PW 4 he could not remember to whom Babul Sutradhar handed over the keys before leaving. It is observed that the pleading and evidence of the plaintiff is totally silent about this fact and the handing over the keys by Babul Sutradhar to someone else before going. It is also admitted by PW 4 in his cross-examination that he along with Jitumoni are responsible for maintaining the iron safe together.

PW 3, Babul Sutradhar also stated in his cross-examination that he did not lock the main gate on 26.5.07 as he left little earlier. It is further revealed from the cross of PW 3 that on 28. 5.07 he came to the office first before any of the staff and saw the door of the strong room of the iron safe as well as the door of the door of the iron

safe open. PW 3 also stated that the handles of the iron safe were intact and not broken. According to PW 3 he did not see any injury on the iron safe and the money was taken out by opening the door.

Coming to the cross-examination of PW 1 we find him stating that he could not say whether the lock of the iron safe was damaged or not. PW 1 also stated that there was no injury in the body of the iron safe. At the same time, we find him stating that in his plaint he had mentioned that the locker was found in a broken condition. As there are two contradictory statement in the evidence of PW 1, I find it difficult to rely in the veracity of his statement as a witness.

It is also revealed from the cross of PW 2 and PW 3 that they too did not find any injury in the iron safe.

Now on perusal of the cross-examination of DW 1 we find him stating that as there was no force being seen in respect of any damage of iron safe and breaking of locks by any violent means. Insurance company found it not suitable to settle the claim in favour of the bank.

DW 2 who conducted the survey stated in his cross that in a burglary case they observe and take care of all the external evidence available at the spot to ascertain the genuineness of the claim. DW 2 also stated that in a burglary case they see that whether there was any forcible entry for committing the occurrence. According to DW 2 the iron safe was either kept open before the burglary or it was opened by regular keys which were only available with the authority. DW 2 further expressed his view that the iron safe could not be opened without the actual keys of the safe, thus he opined that the bank staff might be involved in the commission of the offence.

From the cross-examination of the PWs it appears that none of them saw any kind of damage caused to the iron safe. The plaintiff while cross-examining the DWs also could not shake the plea of the defendant that there was no forcible entry at the time of occurrence.

Apart form that as the cash summary register account book was not exhibited by the plaintiff by adducing additional evidence, the variation in the lost amount of money kept in the volt of the plaintiff bank could not be ascertained. Therefore it is clear that the plaintiff's Bank could not comply with the observation of the Hon'ble Gauhati High Court by adducing additional evidence after the case was remanded back. The cross-examination of the DW 1 and DW 3 also makes it clear that there was no forceful or violent entry in the bank which resulted in burglary. As such the plaintiff bank is not are protected by the exclusion Clause No II and VII as incorporated in the contract agreement.

In view of the above discussion, it appears that the plaintiff is not entitled to any relief as prayed for.

Accordingly these two issues are decided in the negative and in favour of the defendants.

O R D E R

8. In the result, the suit is dismissed with cost.

The Plaintiff is not entitled to any relief as prayed for.

Let a decree be drawn up accordingly.

Given under my hand and seal of this court on this the 21st day of January/2018.

Civil Judge
Nalbari

Dictated & Corrected by me

Civil Judge

Nalbari