Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ahmedbhoy Habibbhoy v. The Bombay Fire and Marine Insurance Company, Limited, from the High Court of Judicature at Bombay (P.C. Appeal No. 56 of 1911), delivered the 26th November 1912.

PRESENT AT THE HEARING:

LORD MACNAGHTEN.
LORD MOULTON.
SIR JOHN EDGE.
MR. AMEER ALI.

[DELIVERED BY LORD MOULTON.]

This Appeal relates to certain arbitration proceedings instituted for the purpose of ascertaining the amount due to the Appellant under fire policies taken out by him with the Respondent Company and 18 other Companies upon a cotton mill in Bombay known as Victory Mill.

The facts of the case are very simple and may be briefly stated as follows:—A fire broke out in the Victory Mill on the 14th October 1906, and did very extensive damage. Immediately after the fire the Appellant gave notice of his claim to the Insurance Companies, and they took possession of the premises under powers reserved to them in that behalf and retained possession for a considerable period for salvage purposes during which time they sold and realised certain salvaged property. Possession of the premises was ultimately given back to the Appellant, who

[89.] J. 186. 125.—12/1912. E. & S.

thereupon made out the amount of his claim under the policy. The Companies disputed the amount of his claim, and in accordance with the terms of the policies, the matter was referred in each case to arbitration, but as the policies were substantially in the same form a joint enquiry was held before the arbitrators, at which all the Companies were represented by one Counsel. Its object was to ascertain once for all the total amount of the loss from which the shares to be borne by the respective Companies could immediately be deduced.

In these arbitration proceedings the present Appellant tendered evidence to prove that the machinery was seriously injured not only by the fire, but by the effect of the water that had been used to extinguish the fire. This evidence showed that the injury to the machinery by the presence of the water was in its nature progressive, *i.e.*, that it had been seriously increased by the length of time during which the water had been allowed to lie on the machinery. Counsel for the Companies objected to the admission of this latter evidence. He admitted that damage done by the water employed to extinguish the fire, came within the loss insured by the policy, but he raised the contention (to use his own words) " that the liability for damage to property ceased " the moment the fire was extinguished."

The question of the admission of this evidence was formally argued before the arbitrators and they decided that they would allow the evidence to be given. Thereupon the whole of the Companies petitioned the High Court to revoke the submissions to arbitration on the ground that the arbitrators had exceeded their jurisdiction in admitting the evidence. The petition came on for hearing before Davar, J., on the 11th January 1908. The facts were not in dispute. In the argument on the hearing Counsel for

the Insurance Companies apparently treated the evidence that the injury to the machinery from the presence of the water had increased during the time that had elapsed between the fire and the delivery up of possession by the Companies as being evidence that could relate solely to what was termed "a tortious act" on the part of the Insurance Companies, and they contended that no such question was referred to the Arbitrators. On the 23rd January 1908, judgment was delivered. The learned Judge made no order on the petition and directed the Petitioners to pay the costs of the present Appellant in the petition. The main ground of the judgment was that by admitting the evidence the arbitrators had decided nothing, and that there was no cause to interfere with their action.

From this decision the present Respondent appealed to the High Court sitting in appeal from its original civil jurisdiction. The appeal was heard by Chandavarkar and Batchelor, JJ., and on the 7th December 1908 judgment was delivered allowing the appeal. The main ground of the judgment is expressed by Batchelor, J., as follows:—

"For whereas this contract refers only to loss by fire, "those damages would arise from a totally different origin, "an origin which it seems to me is wholly distinct and "separable from the fire, namely a neglect by the Com- "panies of some duty imposed on them after the loss by "fire and water had become an accomplished fact."

The Order made by the High Court was of a very unusual kind; the only operative part was that it set aside the Order of Davar, J., and directed the present Appellant to pay the costs of the petition and appeal. This was accompanied by an expression of the view of the Court on the point of law involved to which more particular reference will be made later on. But no order was made revoking the submission, the Court evidently realizing that their expression of

opinion would be accepted by the arbitrators as authoritative guidance in the matter and that there was no reason to fear their not acting in accordance with it in the future conduct of the arbitration.

From this Order the present Appeal is brought. It raises, therefore, the plain and simple issue whether the loss due to fire and water under such a policy is to be determined at the moment the fire is extinguished or when the Companies give up possession of the premises to the owner after exercising the powers given to them by the policy for the purpose of enabling them to minimise the damage. It is, however, scarcely necessary that their Lordships should formally negative the contention of the Companies in this respect for it is so obviously unreasonable that the eminent Counsel who appeared for them on the appeal did not attempt to support it. They confined their argument to contending that although the Insurance Companies were undoubtedly liable for the damage done by the presence of the water subsequently to the fire during the time that the premises were in their possession the judgment appealed from was correct in law because it did not pronounce to the contrary but only decided that no claims based on breach of duty by the Companies had been referred to the arbitrators. Their Lordships are of opinion that this does not rightly represent the effect of the judgment or of the Order made thereon. The effective portion of that Order is a declaration of the opinion of the Court in the following words :—

"This Appellate Court is of the opinion that the "jurisdiction of the said arbitrators extended only to the "dispute relating to loss or damage from fire under "the terms of the policy of insurance in each case and not "to the question of any loss or damage alleged to have "arisen from the neglect of the Insurance Companies who "are parties to the above-mentioned arbitration to take

" care of the machinery of the Respondent after the fire
" mentioned in the petition of the Petitioners above named
" . . . . . had been extinguished and the Insurance
" Companies had entered upon possessession under Clause 11
" of the Policy of Insurance mentioned in the said petition."

Taken in connection with the contentions of the parties it is clear that the High Court intended by this expression of opinion to direct the arbitrators that the loss must be estimated from the condition of the machinery, &c., at the moment when the fire was extinguished. Had the present Appellant permitted this order of the High Court to remain unappealed against, the arbitrators would have been bound to estimate the damages upon that erroneous footing.

The fundamental error in the contention of the present Respondent seems to their Lordships to have arisen from a misapprehension of the position of an insurance company taking and holding possession of premises damaged by a fire under the provisions of the policy in that behalf. The provisions in virtue of which it does so are for the purpose of enabling it to minimise the damage. Inasmuch as it has to bear the loss there is no one so directly interested in doing everything that is wise for the purpose of making the best of the situation. It does so in its own interest, not because it is under a duty to the assured. Its powers are of the nature of a privilege to do that which is most for its own benefit under the circumstances so as to reduce the loss. In the present case, therefore, there is no question of tort on the part of the Companies. They may have thought that it was not worth while to expend money in drying the machinery. In this view they may have been right or wrong but they unquestionably had full power to take the course which in fact they did take. But when they have thus taken possession of the premises and done what in their opinion was wisest to minimise the damage, they cannot

say that the actual damage is not the natural and direct consequences of the fire.

Their Lordships are therefore of opinion that the High Court ought to have affirmed the Order of Davar, J., dismissing the petition, and they will therefore humbly advise His Majesty that the Appeal be allowed and that the Order of Davar, J., be restored and that the present Respondent be directed to pay the costs of the Appeal to the High Court and of this Appeal.

There have been various irregularities in procedure in connection with the various stages of the petition. But it is not necessary to refer to them in this judgment because at the hearing of the Appeal these irregularities were waived by the Appellant on the terms assented to by the Respondents, that the General Accident Fire and Life Assurance Corporation Limited should be taken to be a Respondent to the Appeal so far as liability for costs is concerned.

In the Privy Council.

AHMEDBHOY HABIBBHOY

v.

THE BOMBAY FIRE AND MARINE INSURANCE COMPANY, LIMITED.

DELIVERED BY LORD MOULTON.

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