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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.778 OF 2012

National Insurance Company Limited,
a Company duly incorporated under
the provisions of Companies Act, 1956,
and a Government of India Undertaking
having its Registered Office at 3,
Middletown Street, Kolkatta – 700 001
and inter-lia its Unit No.260201 (DAB-II)
at 1st Floor, Sterling Cinema Building,
65, Marzbhan Street, Fort, Mumbai – 400 001.

...Petitioners

..Versus..

Opera Clothing,
a Partnership Firm constituted under the
provisions of Indian Partnership Act, 1932,
having its Office at A/2, Shah & Nahar
Industrial Estate, Lower Parel (West),
Mumbai – 400 013.

...Respondents

Mr.A.M. Vernekar with Mr.Samarth Pai i/b Narichania & Narichania
for the Petitioners.

Mr.Chetan Kapadia with Ms.Rachita Romani i/b India law for the
Respondents.

CORAM _____ : R.D. DHANUKA, J.
RESERVED ON _____ : 6TH FEBRUARY, 2015
PRONOUNCED ON : 13TH MARCH, 2015

JUDGMENT :-

1. By this petition filed under section 34 of the Arbitration &
Conciliation Act, 1996 (for short the said “Arbitration Act”), the

petitioners have impugned the arbitral award dated 20th March, 2012 rendered by the learned arbitrator allowing some of the claims made by the respondents. Some of the relevant facts for the purpose of deciding this petition are as under :

2. The petitioners were original respondents in the arbitration proceedings, whereas the respondents herein were the original claimants. The respondents have been carrying on business of manufacture of apparels and readymade garments at its units at Mumbai and Daman. The respondents had obtained from the petitioners Unit No.260201, Mumbai two policies viz. (1) Standard Fire and Special Perils Policy No.260201/11/05/3100000004 insuring the Machinery, Electric Installations, Showroom, A.C., Computers, Printers, Scanners, Fax Xerox, Packing Materials lying at Lower Parel, Kurla and Daman for an amount of Rs.2,62,70,000/- and (2) Floater Policy No.260201/11/05/3100000005 insuring the stock of fabrics and readymade garments of all kinds' finished, semi finished and unfinished goods, raw materials pertaining to the respondents business lying at three locations viz. Lower Parel, Kurla and Daman for a sum of Rs.2,73,30,000/-. Both the policies were effective from 7th April, 2005 to midnight of 6th April, 2006.

3. On 26th July, 2006, due to heavy rains and floods at Mumbai, the entire premises of the respondents was immersed in water. By a letter dated 27th July, 2005, the respondents informed the petitioners that there was a damage to the machineries and raw-materials in their factory situated at Kurla on account of flooding due to heavy rains in Mumbai on 26th July, 2005 and requested the petitioners to depute the surveyor to survey the damage. The

petitioners appointed their surveyor M/s.Rashmi Desai & Associates to assess the loss at the factory premises of the respondents at Kurla. On 28th July, 2005, the said surveyor visited the factory premises of the respondents, however, could not carry out a detailed survey on that day as the rain water had accumulated in the insured premises, which was required to be removed. It is the case of the respondents that the surveyor accordingly instructed the respondents to segregate the damaged material from the sound material and to prepare a complete detailed list of damaged sock and other properties and to keep all the relevant documents pertaining to loss ready and on completion of the same to inform the said surveyor by following the procedure as stated in the policies.

4. By a letter dated 4th August, 2005, the respondents informed the petitioners that they were unable to quantify the loss on account of power supply being not restored and that no sooner all the relevant documents would be ready, the same would be handed over to the surveyor.

5. It is the case of the respondents that as the garments were fully soaked in water, foul smell emitted making the factory unhealthy and unhygienic. The insurance company issued a general advisory that due to inability to deal with such large number of claims that salvage above Rs.5.00 lakhs be disposed of following standard procedure prescribed by all insurers for disposal of affected stocks. The respondents accordingly issued an advertisement in Times of India and Loksatta on 6th August, 2005 inviting bids for sale of the damaged goods. In response to the said advertisement, 19 bidders submitted their quotations. It is the case of the respondents that on

8th August, 2005, the respondents sold the goods to the highest bidder for Rs.25,91,480/- in the said auction conducted on 8th August, 2005. The respondents informed the petitioners about the auction sale.

6. On 8th August, 2005, the petitioners alleged that the respondents had committed a breach of clause 7 of the policies by sale of goods and by not submitting a list of damaged properties and not making claims within fifteen days of the alleged loss suffered by the respondents. On 23rd September, 2005, the respondents lodged a claim with the petitioners at the estimated loss of Rs.2,63,68,667/- and deducted a sum of Rs.25,61,480/- as salvage amount, Rs.2,60,500/- as machinery buyback amount and made the net claim of Rs.2,35,16,687/-.

7. On 16th November, 2005, the respondents requested the petitioners to release the claim amount pointing out that the financial position of the respondents was disturbed and the respondents required the finance to complete the export orders. It is the case of the respondents that on 23rd November, 2005, the respondents recorded the response to all the queries raised by the surveyor and delivered all the documents sought by the surveyor appointed by the petitioners.

8. It is the case of the petitioners that the partner of the respondents Mr.Anil Kumar Jain was in regular touch with the surveyor and was holding discussions with him and providing documents for verification as called by the surveyor. On verification, the said surveyor assessed the net loss of Rs.1,90,08,775/- and the

said working was shown to the said partner of the respondents. It is the case of the petitioners that after being satisfied with the assessment of the net loss carried out by the surveyor, the respondents by their letter dated 22nd December, 2005 informed the petitioners that the respondents were agreeable to accept the net loss of Rs.1,90,08,775/- worked out by the surveyor and that they would accept the decision of the petitioners as final. It is however, the case of the respondents that the respondents had addressed the said letter dated 22nd December, 2005 under instructions of the surveyor who had forced the respondents to give written consent of the willingness to accept the assessment of Rs.1.90 crores by writing a letter.

9. it is the case of the petitioners that since the respondents were agreeable to accept the assessment of net loss of Rs.1,90,08,775/- as worked out by the surveyors, on 23rd December, 2005 the said surveyor submitted their final report No.1505/0524 to the regional office of the petitioners assessing the net loss of Rs.1,90,08,775/- towards the claim of the respondents. In the said surveyor's report, the surveyor had assessed the net loss after taking into consideration the salvage value of the damaged goods at Rs.50.00 lakhs and excess at 5%. The surveyors recommended to the petitioners to take a lenient view and not to reject and forfeit the claim of the respondents as a result of breach of warranty/condition of the policy by strict enforcement of the legal position which would cause hardship to the respondents and as per the fire insurance claim IC – 56 guidelines, recommended to treat the claim as Non-Standard and to process the claim at 75% of the assessed loss according to said guidelines.

10. It is the case of the petitioners that in view of the said letter addressed by the respondents and in view of the discussions held between the petitioners, the surveyor and the partner of the respondents, the surveyor had jointly worked out with the respondents a net amount of Rs.1,27,08,367/- to be paid in respect of policy No.260201/11/05/3100000005 and net sum of Rs.17,05,650/- in respect of policy No.260201/11/05/3100000004, totaling to Rs.1,44,14,017/- subject to the terms and conditions of the policy. It is the case of the petitioners that the said amount was arrived at after several meetings between the petitioners, surveyor and the said Anil Kumar Jain, one of the partners of the respondents, who was convinced with the correctness of the final amount offered on the Non-Standard basis due to the breach of the policy conditions.

11. It is the case of the petitioners that the respondents accordingly submitted an affidavit dated 16th October, 2006 agreeing to accept a sum of Rs.1,44,14,017/- less difference premium in full and final settlement from the petitioners and agreed not to make any claim or demand for any other amount or for difference any time in future. The petitioners made a draft of the said affidavit available to the respondents. It is case of the petitioners that the said draft of the said affidavit was made available to the respondents by the petitioners pursuant to the request made by Mr.Sameer Pathan of the respondents. The petitioners thereafter issued a cheque bearing No.396591 dated 20th October, 2006 of Rs.1,44,14,017/- in favour of the respondents. It is the case of the petitioners that the respondents received the said cheque in full and final settlement of their claim

under both the policies and also executed two vouchers accepting the said payment in full and final settlement and absolving the petitioners from all the liabilities present or future arising directly or indirectly out of the said loss or damage under both the policies.

12. The respondents by their letter dated 30th October, 2006 to the petitioners alleged that they were forced to accept a sum of Rs.1,72,00,000/- as settlement amount because the settlement was getting delayed and they were facing acute financial crises. It was further alleged by the respondents that unfair settlement was on account of major difference in the salvage value actually realized and amount of Rs.50.00 lakhs towards the salvage as assessed by the surveyor and requested the petitioners to pay the balance claim.

13. It is the case of the respondents that on 7th November, 2006, the petitioners promised the respondents during the telephonic conversation that they would seek advice from their higher authorities regarding the claim amount and would give reply to the letter dated 30th October, 2006.

14. On 4th December, 2006, the respondents sent a reminder to the petitioners to consider their claim. On 2nd February, 2007 the petitioners informed the respondents that their letter dated 30th October, 2006 was misplaced by the petitioners. On 9th February, 2007, the respondents forwarded a copy of the earlier letter to the petitioners and requested the petitioners to reconsider the claim amount.

15. On 9th February, 2007, the respondents by their

advocate's letter invoked arbitration clause no.13 of the policies demanding the reference of the quantum dispute to arbitration. The respondents suggested the name of a retired Judge of this Court as the sole arbitrator. The respondents thereafter sent a reminder to the petitioner to pay the balance amount on 6th March,2007.

16. The respondents thereafter filed Arbitration Petition No.196 of 2007 under section 11 of the said Arbitration act in this Court. By an order dated 5th February, 2010, the learned designate Judge of the Chief Justice appointed a retired Judge of this Court as the sole arbitrator. Pursuant to the directions issued by the learned arbitrator, the respondents filed the statement of claim on 14th June, 2010, claiming an amount of Rs.1,78,80,003/- comprising of Rs.91,02,670/- being the difference of the amount claimed by the respondents and paid by the petitioners, Rs.38,61,891/- being interest at 18% p.a. on Rs.2,35,16,687/- for a period 23rd December, 2005 till 20th October, 2006 at Rs.49,15,442/- being the interest at 18% p.a. on Rs.91,02,670/- for a period 21st October, 2006 till filing of the proceedings. The petitioners filed their statement of defence of 23rd August, 2010 raising various pleas, including a plea that the dispute was not arbitrable as per clause 13 of the insurance policy. The parties filed further pleadings before the learned arbitrator. On 3rd December, 2010, the learned arbitrator finalized the points for determination. On 27th December, 2010, the respondents filed affidavit of evidence of their partner Anil Kumar Jain in lieu of examination in chief along with list of documents. The said witness was cross-examined on behalf of the petitioners on various dates. The petitioners filed affidavit of their two witnesses in lieu of examination in chief who were cross-examined on behalf of the

respondents on various dates.

17. On 20th March, 2012, the learned arbitrator made an award directing the petitioners to pay a sum of Rs.91,02,670/- together with interest thereon at 12% p.a. from 23rd December, 2005 till 20th October, 2006 on Rs.1,44,14,017/-, interest at the rate of 18% on Rs.91,02,670/- from the date of the award till payment and/or realization whichever is earlier and Rs.16,04,201/- as costs of arbitration. The said arbitral award has been impugned in this petition by the petitioners.

18. Learned counsel for the petitioners submits that since the respondents had accepted the payment of Rs.1,44,14,017/- plus price for sale of salvage sold in full and final settlement and having not raised any dispute prior to acceptance of the payment, there were no disputes or differences as to the quantum to be paid prior to the acceptance of the payment and thus under clause 13 of the policies, the dispute raised by the respondents was not arbitrable. It is submitted that the interpretation of the learned arbitrator that since there existed vast difference between the quantum claimed by the respondents and the payment made by the petitioners, the dispute was arbitrable is contrary to clause 13 of the policies and such interpretation is untenable.

19. It is submitted by the learned counsel that since the claim was not lodged by the respondents within fifteen days on the happening of any loss or damage with the petitioners by the respondents, the respondents were precluded from making any such claim against the petitioners. There was a prohibition under clause 6

of the policies from making any such claim after fifteen days. The learned arbitrator has acted contrary to clause 6 of the policies and has allowed the prohibited claims against the petitioners.

20. It is submitted by the learned counsel that under clause 7(d) of the policies, right to sell the salvage was only with the petitioners and not with the respondents, which right could be exercised by the petitioners at any time until a notice in writing was given by the respondents that they would make no claim under the policies. It is submitted that in this case, the respondents had not informed the petitioners that the respondents would not make any claim in respect of salvage. The learned counsel submits that since the claims made by the respondents were pending consideration before the petitioners, the disposal of the salvage was always within the powers of the petitioners and not the respondents. Since the respondents had unilaterally sold the salvage without any intimation to the petitioners depriving the petitioners of selling such salvage, the respondents were not entitled to any benefits under the policies in question. He submits that the sale of salvage was *ex-facie* in breach of clause 7 of the policies. The learned arbitrator has awarded the claims in favour of the respondents in breach of clause 7 of the policies.

21. Learned counsel for the petitioners submits that till 4th August, 2005, admittedly the survey could not be done even according to the respondents in view of the electricity not having been restored. On 6th August, 2005, the respondents had issued an advertisement in two newspapers for sale of salvage without any notice to the petitioners. The respondents also did not give any

opportunity to the petitioners to survey the status of such salvage and sold the salvage on 8th August, 2005 in breach of the policies.

22. Learned counsel submits that in the cross-examination of the witness examined by the respondents, the respondents had accepted the valuation report of the surveyor. The respondents had for about ten to twelve months did not make any allegations of duress and coercion in filing affidavit and issuing a receipt thereby accepting the amounts offered by the petitioners and agreeing not to make any claim whatsoever in future. The respondents also did not allege at any point of time prior to the receipt of cheque that the settlement between the parties was unfair or that the salvage calculated by the surveyor at Rs.50.00 lakhs was incorrect. The allegations of duress came to be made only when a notice invoking the arbitration agreement issued by about three months from the date of the receipt of the payment.

23. Learned counsel invited my attention to the various parts of the cross-examination of the witness examined by the respondents and would submit that there was no economic duress as alleged by the respondents in the statement of claim. The respondents themselves had got the affidavit typed, stamped and notarized and only thereafter had sent the said affidavit to the petitioners for payment. Learned counsel submits that the witness examined by the respondents had admitted in cross-examination that there were several orders received by the respondents for supply of various materials and that they had received the financial assistance from the bank. It is submitted that the allegation of the respondents that there was an economic duress which compelled the respondents to sign

such affidavit acknowledging the payment in full and final settlement and that the respondents would not make any claim in future was false and incorrect.

24. It is submitted by the learned counsel that since the respondents had denied the contents of the surveyor's report, the respondents could not have been permitted to rely upon any part of the survey report and thus were required to prove their claim independently by leading appropriate evidence before the learned arbitrator. The learned arbitrator could not have allowed the respondents to rely upon any part of the surveyor's report in support of their claim. Since there was no appropriate evidence led by the respondents to prove their claim independently, the award rendered by the learned arbitrator is based on no evidence.

25. The learned counsel for the petitioners placed reliance on the following judgments in support of the plea that since the respondents had accepted the entire amount in full and final settlement of their claim and there was complete accord and satisfaction, the claims made by the respondents were not arbitrable and the learned arbitrator could not have decided the allegations of duress and coercion against the petitioners.

1) In the case of Chairman & Managing Director, NTPC Ltd. vs. Reshmi Constructions Builders & Contractors, *AIR 2004, SCC 1330* (paragraphs 35 to 37)

2) In the case of *Kapurchand Godha v. Mir Nawab Himayatalikhan Azamjah*, *AIR 1963 SC 250* =

(1963) 2 SCR 168 (paragraphs 7 to 9)

3) An order dated 26th August, 2011 in Arbitration Petition No.400 of 2007, passed by the Bombay High Court :

4) In the case of *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267 (paragraph 25) :

5) Delhi High Court judgment dated 27th October, 2009 in Arbitration Petition No.144 of 2008, *M/s.Polystone & Fragrance Industries Pvt. Ltd. vs. National Insurance Company Limited.*

26. In support of the submission that the respondents cannot be allowed to approbate and reprobate, the learned counsel for the petitioners placed reliance on the following judgments :

1) In the case of *Pradeep Oil Corporation Vs. Municipal Corporation of Delhi & Anr.*, (2011) 5 SCC 270 (paragraphs 33, 34 and 35).

2) In the case of *International Airport vs. Golden Chariot Airport*, (2010) 10 SCC 422 (paragraphs 45 to 55)

3) In the case of *R.N. Gosain A vs. Yashpal Dhir* AIR 1993 SC 352 (paragraphs 9 and 10)

27. Learned counsel submits that the respondents could not have lodged any protest after acceptance of a cheque and thus no claim could be made by the respondents subsequently. In support of this submission, the learned counsel placed reliance upon the judgment of the Supreme Court in the case of *M/s.Bhagwati Prasad Pawankumar vs. Union of India*, AIR 2006 SCC 2331.

28. It is submitted by the learned counsel that since the respondents had committed various breaches of the policies, under the guidelines framed by the company, the petitioners were liable to release only upto 75% of the amount recommended by the surveyor in its report. In support of this submission, the learned counsel placed reliance on the judgment of the Supreme Court in the case of *Amalendu Sahoo vs. Oriental Insurance Co. Ltd.*, (2010) 4 SCC 536 and in particular paragraphs 11, 12, 14 and 15.

29. Learned counsel also placed reliance on the judgment of the Supreme Court in the case of *National Insurance Company Limited vs. Nitin Khandelwal*, (2008) 11 SCC 259 in support of the aforesaid submission and in particular paragraphs 13 to 16.

30. It is submitted by the learned counsel that even the surveyor's report though appointed by the petitioners was not binding on the petitioners. In support of this submission, the learned counsel placed reliance on the judgment of the Supreme Court in the case of *Sri Venkateswara Syndicate vs. Oriental Insurance Company Limited & Anr.* (2009) 8 SCC 507 = (2009) AIR SCW 6749.

31. In support of his submission that if the insured disputes

the surveyor's report, he is required to prove the claims made by him, the learned counsel placed reliance on the judgment of this Court delivered on 4th October, 2005 in Arbitration Petition No.90 of 2005 in the case of United India Insurance Company Limited vs. Jaisu Shipping Company Pvt. Ltd. and in particular paragraph 6 thereof.

32. The learned counsel submits that the learned arbitrator has accepted the files containing various disputed documents produced by the respondents. The learned arbitrator has allowed huge claim of the respondents without any evidence.

33. It is submitted by the learned counsel that the learned arbitrator could not have awarded interest on damages and that too at the rate of 12% p.a. from the date of the surveyor's report but could have awarded interest, if any, only from the date of award till payment and not for a period prior to the date of the award. It is submitted that awarding of interest at the rate of 18% p.a. from the date of award is also exorbitant and shall be set aside.

34. Lastly, it is submitted that the award of the arbitration cost of Rs.16,04,201/- is also contrary to law and in conflict with the public policy. On the issue of interest raised by the learned counsel for the petitioner, he relied upon the judgment of the Supreme Court in the case of *National Insurance Company Limited vs. Nipha Exports (P) Ltd.*, (2006) 8 SCC 156 and in particular paragraphs 8, 9, 10, 12.

35. Learned counsel for the petitioners also placed reliance on the commentary of E.R. Hardy Ivamy, Professor in Law in University of London on "Fire and Motor Insurance", and in particular on the

topic “Salvage of the Property”, rights and duties of the insured and insurers. Learned counsel also placed reliance on the commentary by M.B. Gopal and Raghawan on the law and practice of fire insurance.

SUBMISSIONS ON BEHALF OF THE RESPONDENTS:

36. Mr.Kapadia, learned counsel for the respondents submits that though the respondents have made claims after 15 days of the loss having been suffered in view of the flood, it is not in dispute that the petitioners had entertained such claims made by the respondents and thus the petitioners have waived their rights if any under clause 6 of the policies and could not have been permitted to urge this submission before the learned arbitrator as well as in the present proceedings. Similarly in so far as alleged breach of clause 7 of the policy by the respondents is concerned, it is submitted that the petitioners have waived their rights if any, under clause 7 in view of the petitioners having made payment of 75% of the recommended amount to the respondents.

37. Insofar as the issue about arbitrability of the claims in view of clause 13 of the policies is concerned, learned counsel submits that since there was a duress on the part of the petitioners upon the respondents and the consent of the respondents was obtained under such duress by the petitioners which was established, the petitioners having paid lessor amount than what was due and payable by the petitioners to the respondents, quantity dispute existed and thus the claims made by the respondents were arbitrable and were not contrary to clause 13 of the policies. Learned counsel placed reliance on the order passed by the then learned Acting Chief Justice

in Arbitration Application No.169 of 2007 filed by the respondents herein under section 11 of the Arbitration and Conciliation Act, 1996 against the petitioners herein. It is submitted that the plea now raised in this proceeding was also raised by the petitioners in the said proceedings filed under section 11 of the Arbitration Act. By the said order dated 9th February, 2010 passed by the then Acting Chief Justice holding that if the Chief Justice or his designate is satisfied *prima facie* that the discharge voucher was not issued voluntarily and the claimant was under some compulsion or coercion, and that the matter deserved detailed consideration, he may instead of deciding the issue himself, refer the matter to the arbitral tribunal with a specific directions that the said question should be decided in the first instance. It is held that the respondents herein had made out a *prima-facie* case which required adjudication. In the said order, the learned Acting Chief Justice followed the judgment of the Supreme Court in case of National Insurance Co. Ltd. vs. M/s.Boghara Ployfab Pvt.Ltd. and appointed former judge of this court as an arbitrator. Relying upon the said order passed in the said Arbitration Application No.169 of 2007, learned counsel submits that the issue of arbitrability thus cannot be raised by the petitioners in these proceedings or could not have been raised even before the learned arbitrator.

38. Learned counsel invited my attention to the correspondence exchanged between the parties which were forming part of the record before the learned arbitrator and also some part of the oral evidence. In so far as submission of the learned counsel for the petitioners that the respondents could not have sold the salvage without completion of the surveyor's visit report is concerned, it is submitted that though the respondents had tried to contact the

surveyor appointed by the petitioners, the surveyor being very busy in view of large number of claims made by several insured parties having affected due to flood, the surveyor was not able to visit each and every premises for the purpose of survey. With a view to mitigate further loss and in view of the problems of hygenity and odor smell and lack of space and since the respondents were to restart the business, the respondents were forced to sell the salvage without waiting for the visit of the surveyor. He submits that the surveyor was very busy and even otherwise unable to visit the premises of the respondents for the purpose of survey immediately.

39. Learned counsel submits that the respondents had produced all the relevant documents before the surveyor, including the invoices issued by the respondents, the documents relating to the tender invited by the respondents and the details of the payment received from the successful bidder including the relevant bank statements. He submits that a sum of Rs.25.00 lakhs received from the sale of salvage was adjusted against the total claim of Rs.2.63 crores recoverable by the respondents from the petitioners. The surveyor appointed by the petitioners also agreed in the survey report that there was no breach committed by the respondents in selling the salvage in the circumstances referred to in the said report. The surveyor had scrutinized the documents produced by the respondents however without any basis recommended the salvage value at Rs.50.00 lakhs instead of Rs.25.00 lakhs. He submits that though the surveyor was examined as one of the witness by the petitioners, the surveyor could not prove as to how the said sum of Rs.50 lacs recommended to be the value of salvage by the surveyor was the correct amount.

40. Insofar as the submission of the learned counsel for the petitioners that the surveyor's report once having been disputed by the respondents, no part of such surveyor's report could be relied upon by the respondents is concerned, he submits that even in the statement of claim as well as in the rejoinder the respondents had also relied upon part of the surveyor's report. It is submitted that the petitioners themselves had relied upon the said report and had acted upon the recommendation made by the surveyor and had examined the said surveyor as one of the witness to prove the correctness of the said report before the learned arbitrator which was forming part of the record, the petitioners cannot be allowed to raise any objection if the respondents also seek to rely upon any part of such surveyor's report which was forming part of the evidence before the learned arbitrator. Learned counsel distinguished the judgment of this court in case of United India Insurance Company Limited vs. Jaisu Shipping Co. Pvt. Ltd., delivered on 4th October, 2005 in Arbitration Petition No.90 of 2005.

41. It is submitted that the surveyor examined by the petitioners in their surveyor report had observed that the surveyor had already made enquiry from the purchaser of the salvage and observed that there was no breach on the part of the respondents in selling the salvage, the sale of salvage conducted by the respondents was justified.

42. Learned counsel relied upon part of the oral evidence led by the witness examined by the respondents and submits that even in the oral evidence led by the respondents, it was proved beyond the

reasonable doubt that the surveyor was informed about the sale of salvage from time to time and was also called by the respondents to visit the factory of the respondents for the purpose of valuation of the loss suffered by the respondents and also to carry out the valuation of the salvage. The surveyor was however very busy and was unable to visit factory premises of the respondents.

43. It is submitted by the learned counsel that the petitioners did not address any letter to the respondents alleging any breaches of any of the provisions of the policies. There was unexplained delay on the part of the petitioners to release the payment for 8 to 10 months from the date of the receipt of the surveyor's report though the respondents were running from pillar to post for getting the payment. It was case of the economic duress on the respondents committed by the petitioners.

44. Insofar as submission of the petitioners that the respondents having filed affidavit stating in clear term that the amount mentioned therein was in full and final settlement of all their claims and thus there was accord and satisfaction is concerned, learned counsel submits that the draft of such affidavit was sent by the petitioners to the respondents with a direction to file such affidavit strictly in accordance with such draft. The witness examined by the petitioners also admitted that such draft was given by the petitioners to the respondents for processing the claims of the respondents. The respondents thus had no alternate then to file such affidavit and receiving the amount at least to the extent the surveyor of the petitioners had recommended and then to make the claim for the balance amount. The respondents had proved their allegations of

duress against the petitioners by leading oral as well as documentary evidence before the learned arbitrator.

45. The learned arbitrator has rendered findings in the impugned award which cannot be interfered with by this court under its limited scope under section 34 of the Arbitration Act. Learned counsel submits that the petitioners had not even submitted a copy of the surveyor report to the respondents for its perusal. Learned counsel submits that the demand of such affidavit and advance receipt from the respondents before even considering the claims of the respondents by the petitioners was not in normal circumstances and was contrary to the business principles. The petitioners in ordinary course ought to have made payment whatever was due and payable according to the petitioners and if according to the respondents any further sum was due and payable by the petitioners to the respondents, the respondents could have raised dispute for the balance amount. Learned counsel submits that the term economic duress is different from the commercial bargaining. He submits that for the purpose of proving the allegations that there was economic duress by the petitioners upon the respondents, it is not necessary for the respondents to prove that he had come on the street and therefore was forced and compelled to sign such affidavit and advance receipt.

46. It is submitted by the learned counsel that in view of the flood and the petitioners not having released amount due to the respondents, the respondents had already suffered monetary losses as well as production. Various orders placed by the customers of the respondents were cancelled. The respondents were without

any compensation for about 15 months. There was a complete economic duress upon the respondents by the petitioners. It is submitted by the learned counsel that since the consent of the respondents was not a free consent, such consent is revocable at the option of the respondents whose consent was obtained by coercion and duress. In support of this submission, learned counsel placed reliance on the judgment of this Court in the case of *Dai-ichi Karkaria Private Limited Vs. Oil and Natural Gas Commission*, reported in 1991 (4) Bom.C.R. 631 and in particular paragraph 36 thereof.

47. Learned counsel also placed reliance on the judgment of the Supreme Court in the case of *National Insurance Company Limited Vs. Boghara Polyfab Private Limited*, reported in (2009) 1 Supreme Court Cases 267. The Supreme Court has held that procedure for obtaining full and final discharge/settlement voucher/no-dues certificate from the private contractors by government departments/Public Sector Undertakings/Statutory Corporations acknowledging receipts of the sums less than the claim 'in full and final settlement' of all claims, as a condition precedent for releasing even admitted dues is unfair, irregular and illegal and requires to be deprecated.

48. Learned counsel fairly submits that in so far as the sum of Rs.11.77 lakhs which is awarded by the learned arbitrator is concerned, under clause 1(a) of the policy, the Insurance Company is allowed to deduct such amount from the claim amount of the insured and thus the respondents have no objection if this amount of Rs.11.77 lakhs awarded by the learned arbitrator only is set aside

by this Court in this petition filed under Section 34 of the Arbitration Act. Statement is accepted.

49. In so far as recommendation of the surveyor valuing salvage of Rs.50.00 lakhs is concerned, the learned counsel invited my attention to the cross-examination of the surveyor who admitted that there was no evidence for any marketing enquiry conducted by the surveyor. There was no basis for reduction of rates.

50. In so far as the reduction of rates recommended by the surveyor is concerned, the learned counsel invited my attention to the findings rendered that such reduction was not proper and reduction was found invalid. In so far as the furnitures, fixtures and fittings are concerned, it is submitted that since the respondents were permitted to buy-back those items, there is no question of any salvage as considered by the surveyor of Rs.27,579.95/-.

51. Learned counsel tendered a chart showing the amounts recommended by the surveyor in his report including the deduction considered in the said report in support of the submission that some of the recommendations made by the surveyor were illegal and not proved in the evidence led by the surveyor on behalf of the petitioners.

52. Learned counsel for the respondents then submits that the petitioners had accepted the survey report in toto. The surveyor had also opined that there were no breaches committed by the respondents in so far as the sale of salvage is concerned. Since the

petitioners had produced the survey report by examining the surveyor before the learned arbitrator, the respondents are also entitled to rely upon the evidence produced by the petitioners to the extent the surveyor having found the claim of the respondents as genuine. The respondents are also entitled to rely upon the evidence led by the petitioners in support of their claim. The surveyor had considered the documents of the respondents and had derived the rates but made deduction therefrom without any evidence. The surveyor had cross verified the documents produced by the respondents in the said survey report.

53. In so far as deduction of 25% of the amount recommended by the surveyor of the petitioners is concerned, it is submitted that the petitioners did not produce any guidelines before the learned arbitrator nor such guidelines were forming part of the policy. No material was produced before the learned arbitrator to indicate that such guidelines were applicable to the policy between the parties. The petitioners had failed to prove that such guidelines were forming part of the contract. Since even according to the surveyor, no breach was committed by the respondents, the petitioners could not have deducted any such amount. Such deduction was totally illegal. The learned counsel invited my attention to the cross-examination of the surveyor who admitted in the cross-examination that the respondents had no choice but to submit an affidavit and no claim certificate.

54. Learned counsel submits that the learned arbitrator has rightly awarded interest in favour of the respondents and the same was not in violation of the Insurance Regulatory and Development

Authority (Protection of Policy-holders' Interest) Regulations, 2002 as canvassed by the petitioners. Since there was a gross delay on the part of the petitioners in releasing the amount as recommended by the surveyor within the time prescribed in the said regulations of 2002, the learned arbitrator was justified and was empowered to grant interest in view of the delay on the part of the petitioners in releasing the amount. Learned counsel invited my attention to Regulations 9 (1) and 9 (2) of the said Regulations in support of the aforesaid submission. Learned arbitrator has allowed interest @12% p.a. from 23rd December 2005 i.e. after expiry of three months from the date of the claim.

55. In the rejoinder, Mr.Vernekar, learned counsel for the petitioners submits that the respondents cannot be allowed to pick up any part of the survey report. Since the respondents have disputed the survey report, the respondents were liable to prove the entire claim independently of the survey report in favour of the respondents. The petitioners had accepted the survey report in *toto* and since there were breaches committed by the respondents, the petitioners were entitled to deduct 25% of the amount recommended by the surveyor. It is submitted that on 13th October 2006, the petitioners had made offer for settlement of the liability and on 20th October 2006, the petitioners had already released payment i.e. within 7 days from the date of such offer. The question of payment of any interest, therefore, did not arise. It is submitted that since the respondents were required to prove that deductions were illegal and were not proved, the learned arbitrator could not have granted such claim in favour of the respondents.

REASONS AND CONCLUSIONS :

Accord and satisfaction – arbitrable claims :-

56. The learned counsel for the petitioners has vehemently urged that the respondents had accepted payment of Rs.1,44,14,017/- plus the price for sale of the salvage sold in full and final settlement and have signed the affidavit and the payment receipt stating that no other amount was due and payable by the petitioners to the respondents and thus there was complete accord and satisfaction of the claims made by the respondents and thus the claims made by the respondents were not arbitrable. In support of this submission, learned counsel invited my attention to the various parts of the oral evidence led by the parties and also the correspondence entered into between the parties. Learned counsel also placed reliance on the judgment of the Supreme Court and this Court in support of this submission.

57. Learned counsel for the respondents also on the other hand invited my attention to various parts of the oral evidence led by the parties and also the judgments of the Supreme Court and this Court and distinguished the judgments relied upon by the petitioners. It is submitted by learned counsel that after considering the entire documentary as well as oral evidence led by the parties, the learned arbitrator has rendered a finding of fact which finding is not perverse and thus cannot be interfered with by this Court under section 34 of the Arbitration & Conciliation Act, 1996.

58. Both the parties have examined the witnesses before the learned arbitrator. In the cross-examination of the witness examined by the respondents, the witness did not agree that in the month of December, 2005 the surveyor had informed the respondents that

they had assessed the net loss at Rs.1,90,08,775/-. The witness deposed that the surveyor had informed the respondents to give an undertaking of Rs.1.90 crores and told that the respondents would get the payment within one week. In reply to question No.86 when the witness was shown a letter dated 22nd December, 2005 addressed by the respondents to the petitioners, the witness deposed that the said letter was addressed by the respondents however, the format of the said letter was given by the surveyor. The witness denied the suggestion of the petitioners that the said letter dated 22nd December, 2005 was issued by the respondents because they had agreed and accepted the assessment of Rs.1,90,08,775/- made by the surveyor. The witness deposed that their claim was for Rs.2,63,68,667/-. The respondents were in financial trouble and therefore, were forced to agree as the surveyor had promised that the money would be paid within weeks time. The respondents had to complete further export orders and needed money.

59. The witness further deposed that he had told the surveyor that the claim of the respondents was Rs.2,63,68,667/- and the assessment loss was much more. The surveyor said that if the respondents refuse to accept the lower amount, then the respondents would not get even that much amount. When the witness was asked as to why the respondents did not withdraw their consent though the amount was not paid by the petitioners for over 10 to 12 months even after the alleged assurance was given by the surveyor, the witness deposed that the surveyor had informed him that if he did not agree to accept the lower amount, the claim of the respondents would be rejected. The witness of the respondents had personally visited the branch office of the petitioners and requested

for some on account money but was told that they were still studying the surveyor's report and as soon as the same was over, money would be paid. The witness was also told that if the respondents withdrew their consent, the respondents would not get even that much amount of money.

60. The witness in the cross-examination further deposed that there were meetings between the petitioners, respondents and the surveyor in which the witness had informed the branch manager of the petitioners that the claim of the respondents was Rs.2,63,68,667/- and the surveyor had forced him to accept the lower amount of Rs.1,90,08,775/- and that he would get the cheque within week's time but still the respondents had not received the same. The witness however, could not produce any letter addressed by the respondents for a period of 10 months.

61. In reply to question No.128, when the witness was asked whether it was correct that before signing of affidavit, a draft of the affidavit has been forwarded to him by the petitioners on 13th October, 2006 for execution of the same on stamp paper, the witness answered in the affirmative. The witness was asked whether the respondents were sent for signature the discharge vouchers only after the respondents submitted the said affidavit, the witness answered in the affirmative. The witness deposed that he was forced to give the said affidavit otherwise he would not have given such affidavit to the petitioners. The said draft was given by the petitioners to the respondents and the witness was just asked to sign. When the witness was asked that if he was not agreeable to the amount mentioned in the draft affidavit and discharge vouchers, then why he

did not put an endorsement of under protest or without prejudice on the said documents, the witness deposed that he was told by the petitioners that if he makes any such endorsement of under protest or without prejudice then he would not get any payment from the petitioners. The witness also deposed that he was told to accept the cheques and then take other steps subsequently. He deposed that since the respondents were in financial trouble, he had to accept the cheque issued by the petitioners and therefore, he did not return the cheque. After 15 months the respondents had received the payment and the respondents had to pay interest to the bank.

62. The witness was asked whether the respondents had fulfilled all the export orders which were in their hand, the witness deposed in the negative and further deposed that because of the floods about 72% to 80% orders were cancelled. With respect to the remaining 20% orders, the respondents had bought new fabric and completed those orders. The respondents received further export orders during the financial year ending 31st March, 2006 and also for subsequent financial year. The respondents also received remittance and the payments in respect of such export orders. The respondents also received the credit facilities from the said Bank of Patialia, Dadar Branch.

63. The petitioners had examined Mrs.Lalitha Narayanan, the Branch Manager of the respondents. In her cross-examination, the witness admitted that she had not personally handled the claims made by the respondents. She also admitted that she had no personal knowledge about the oral communication between the partners of the respondents, surveyor and the then Branch Manager

of the petitioners. When this witness was shown the vouchers signed by the respondents, the witness admitted that there was no date on the said vouchers. The witness was when put a suggestion that on the date of signing vouchers the respondents had not received cheque from the petitioners, the witness answered in the affirmative and deposed that it was quite possible because it was not the practice of the petitioners to give the cheque on the same day. The petitioners have to call for funds. In this case, the cheque was dated 20th October, 2006. The witness also admitted that the contents of the vouchers that 'the respondents absolved the petitioners from all the liabilities present or future arising directly or indirectly out of the said loss or damage under the said policy' had been printed by the petitioners.

64. It is curious to note that when the witness was asked whether the insured had any choice of accepting whatever amount was offered by the petitioners and yet disputing the balance amount of claim, the witness answered in the affirmative and admitted that the insured had no choice. In reply to question No.53 when the witness was asked if the respondents herein was not to sign on the said particular condition as mentioned by the witness, would the petitioners still have handed over the cheque to him, the witness answered "yes – now I say no". The witness admitted that the draft affidavit enclosed a letter dated 13th October, 2006 which was addressed by the respondents to the petitioners which was prepared by the petitioners. When the witness was shown the contents of the letter dated 13th October, 2006 stating the words "to comply with an affidavit strictly in the enclosed draft format", and the witness was asked to explain the meaning thereof, the witness deposed that it

would mean that the affidavit should be in the same format and there should not be any change.

65. The petitioners had examined the surveyor – Mr.Haituk R.Desai, the sole proprietor of M/s.Rashmi Desai & Associates as one of the witness. In his cross-examination, the said witness deposed that the respondents had disposed of all the stocks. The insurance company decided to take sympathetic view of the act of the insured because the surveyor and the insurance company felt that the insured was in financial trouble because of loss. The surveyor took sympathetic view. In the cross-examination, the surveyor deposed that the insurance company decided to settle the claim as a special case and asked the surveyor to assess the loss and claim based on the available evidence. The surveyor accordingly took a sympathetic view.

66. A perusal of the award on this issue indicates that the learned arbitrator has rendered a finding that the case of the respondents herein that the respondents had signed the affidavit and two discharge vouchers under duress and implied coercion was believable. The loss had taken place on 26th July, 2005 and the petitioners herein had made the respondents run from pillar to post for due payment. The respondents were exporters of apparels and readymade garments and used to export their goods to mostly European countries. Their turnover had gone steadily from Rs.7.00 crores in the financial year 2000-2001 to Rs.25.00 crores in the financial year 2004-2005. The respondents had huge orders in hand for completion from European countries. Because of deluge their machineries and raw materials were extensively damaged and they

had to start from scratch, complete their orders and maintain their reputation.

67. It is held that the respondents had to pay installments to the banks and they were in financial difficulties. Though the respondents had completed all the formalities to claim loss from the petitioners, no payment was forthcoming even though almost 10 months had elapsed. Several meetings took place between the officers of the petitioners and the respondents. The respondents had made a claim of Rs.2.63 crores and were constrained to accept whatever amount so offered by the petitioners, as they had no choice. The discharge vouchers were signed on dotted lines, under compelling circumstances, the condition was "take it or leave it".

68. The learned arbitrator rendered a finding that since the respondents were in dire need of money, they could not leave it and were constrained to accept the amount of Rs.1,44,14,017/-. The learned arbitrator also referred to a detailed claim procedure provided in the notification dated 26th April, 2002, issued by the Insurance Regulatory & Development Authority for making a claim under the insurance policy prescribing the time for making and processing of such claim.

69. The learned arbitrator has referred to various Supreme Court judgments on the issue whether such no claim certificates issued by the respondents could amount to accord and satisfaction and such claims whether would be arbitrable or not. The learned arbitrator observed that in the present case, the discharge vouchers were undated and were to be submitted strictly in the same format as

were furnished by the insurance company. Thus all these elements of coercion and compulsion existed. By making the respondents herein run from pillar to post and by delaying the payment, the petitioners brought the respondents herein down on their knees. The learned arbitrator came to the conclusion that the respondents had succeeded in proving that the losses suffered by them were to the tune of Rs.2.63 crores.

70. A perusal of the oral evidence which has been considered by the arbitrator clearly indicates that the witness examined by the petitioners had admitted in the cross-examination that the respondents were bound to execute an affidavit and discharge vouchers which were provided by the petitioners without any changes. If the respondents would have made any changes in such draft forwarded by the petitioners, the petitioners would not have released any amount. The witness also admitted that the respondents had no choice than to accept what was mentioned in such draft affidavit and discharge vouchers. The witness also admitted that the payments were not released prior to the date of taking signature of the respondents on such affidavit and discharge vouchers. The surveyor examined by the petitioners admitted in the cross-examination that the respondents had suffered financial loss.

71. The petitioners could not dispute that even after insisting the respondents to sign the affidavit as well as discharge vouchers as drafted by the petitioners, for a period of 8 to 10 months, the petitioners did not make any payment. The surveyor of the petitioners himself has recommended payment of about Rs.1.44 crores. It was thus clear that there was running business of the respondents, which

was seriously affected due to flood and substantial part of the stocks were damaged. The surveyor himself has brought on record in his own report about the condition of the stock and had approved the action on the part of the respondents in selling such salvage.

72. In my view even if the respondents had obtained certain finances from the bank for the purpose of restarting the business from scratch, that would not conclude that there was no economic duress on the respondents when they signed an affidavit making no claim over and above what was agreed to be paid by the petitioners or that the respondents were not in financial trouble because of the floods. In my view the learned arbitrator has fully dealt with the oral evidence led by both the parties and also documentary evidence and has considered the principles laid down by the Supreme Court and has rendered a finding of fact which in my opinion is not perverse and thus no interference with such finding of fact is permissible under section 34 of the Arbitration & Conciliation Act, 1996.

73. Insofar as the judgment of the the Supreme Court in the case of *Chairman & Managing Director, NNTPC Ltd. vs. Reshmi Constructions Builders & Contractors*, reported in AIR 2004 SC 1330 relied upon by the petitioners is concerned, it is held by the Supreme Court that the Court cannot shut their eyes to the ground reality in the cases where a contractor has made huge investment, he cannot afford not to take from the employer the amount under the bills, for various reasons which may include discharge of his liability towards the banks, financial institutions and other persons. In such a situation, the public sector undertakings would have an upper hand. They would not ordinarily release the money unless a “No Demand

Certificate” is signed. It is held that necessity knows no law. A person may sometimes have to succumb to the pressure of other party to the bargain who is on a stronger position.

74. In my view in the facts of this case, the respondents have proved beyond reasonable doubt that there was an economic duress and coercion upon the respondents by the petitioners to sign such affidavit and discharge vouchers without which the petitioners would not have released even the amount as agreed under the said affidavit and discharge vouchers which were drafted by the petitioners and had been forwarded to the respondents for typing and signature. In my view such affidavit and discharge vouchers purporting to discharge the petitioners from any further liability thus would not be binding on the respondents. The petitioners being in dominating position and had an upper hand had compelled the respondents to sign such affidavit and discharge vouchers. In my view, the petitioners could have released the amount what was due and payable according to the petitioners to the respondents. If according to the respondents, the petitioners had not cleared the entire dues of the respondents, in that event the respondents could have exercised their remedy available in law. By adopting this method, the petitioners wanted the respondents to give up their legitimate claim by forcing the respondents to sign such affidavit and discharge vouchers. The learned arbitrator has considered all these aspects, including oral evidence and has rightly rejected this submission of the petitioners.

75. Paragraphs 27 to 29 of the judgment of Supreme Court in the case of *Chairman & Managing Director, NTPC Ltd. vs. Reshmi*

Constructions Builders & Contractors, reported in (2004) 2 SCC 663, 675 = AIR 2004 SC 1330 read thus :-

“27. Even when rights and obligations of the parties are worked out, the contract does not come to an end *inter alia* for the purpose of determination of the disputes arising thereunder, and, thus, the arbitration agreement can be invoked. Although it may not be strictly in place but we cannot shut our eyes to the ground reality that in a case where a contractor has made huge investment, he cannot afford not to take from the employer the amount under the bills, for various reasons which may include discharge of his liability towards the banks, financial institutions and other persons. In such a situation, the public sector undertakings would have an upper hand. They would not ordinarily release the money unless a “No-Demand Certificate” is signed. Each case, therefore, is required to be considered on its own facts.

28. Further, *necessitas non habet legem* is an age-old maxim which means necessity knows no law. A person may sometimes have to succumb to the pressure of the other party to the bargain who is in a stronger position.

29. We may, however, hasten to add that such a case has to be made out and proved before the arbitrator for obtaining an award.”

76. Insofar as the judgment of the Supreme Court in the case of *Lala Kapurchand Godha & Ors. vs. Mir Nawab Himayatalikhan Azamjah, reported in AIR 1963 SC 250*, relied upon by the petitioners is concerned, a perusal of the said judgment indicates that the claimant in that matter was made payment in two installments. The Court considered the oral evidence of the claimant who had clearly deposed that he had endorsed the receipt for full payment and had received full payment. The claimant in that case had not raised any plea to the effect that the endorsement had been obtained by

coercion. The facts of that case, in my view are totally different. In this case, the witness examined by the petitioners has admitted that the said affidavit and the discharge vouchers were drafted by the petitioners and were directed to be complied with strictly and that the respondents had no choice but to sign such affidavit as well as discharge vouchers. The judgment of the Supreme Court in the case of *Lala Kapurchand Godha & Ors. vs. Mir Nawab Himayatalikhan Azamjah*, (supra), in my view, thus is distinguishable in the facts of this case and does not assist the petitioners.

77. Insofar as the judgment of this Court in the case of *New India Assurance Co. Ltd.* (supra) relied upon by the petitioners is concerned, this Court has considered a clause in the agreement which provided that the receipt issued by the bank to the parties shall be a complete discharge of the liabilities of the petitioners towards the respondents. The facts before this Court in the said matter were totally different. The said judgment does not assist the petitioners.

78. Insofar as the judgment of the Supreme Court in the case of *M/s.Bhagwati Prasad Pawankumar vs. Union of India*, reported in *AIR 2006 SC 2331* relied upon by the petitioners is concerned, a perusal of the said judgment indicates that the Union of India had forwarded two cheques to the contractor in full and final settlement of the claim of the contractor and providing that in case the offer was not acceptable, the cheques should be returned forthwith. The contractor did not return the cheques and encashed the same. In the facts of that case, the Supreme Court held that the contractor had signified its acceptance of the amounts compromised in the two cheques in full and final settlement of its claims. Such acceptance by

conduct is recognized by Section 8 of the Contract Act. In my view the said judgment is clearly distinguishable in the facts of this case. In this case, there was no such option given to the respondents for returning the amount in case the same was not acceptable to the respondents as proposed by the petitioners. Paragraph 7 of the said judgment in *M/s.Bhagwati Prasad Pawankumar vs. Union of India*, reported in (2006) 5 SCC 311 = AIR 2006 SC 2331 reads thus :-

“7. The moot question that arose for consideration of the High Court was whether the acceptance of the two cheques by the appellant and their encashment by it did not amount to acceptance of the offer contained in the two letters of 7-4-1993. The aforesaid letters of 7-4-1993, as noticed earlier, offered the amounts contained in the two cheques in full and final settlement of appellant's claim and further provided that in case the offer was not acceptable, the cheques should be returned forthwith. It is the case of the Railways that by retaining the cheques and encashing them, the appellant signified its acceptance of the amounts comprised in the two cheques in full and final settlement of its claims. Such acceptance by conduct is recognised by Section 8 of the Contract Act.”

79. I will now decide the issue raised by the petitioners that the respondents having accepted the payment by signing the affidavit and the discharge vouchers, the claims made by the respondents were not arbitrable. In my view, since the respondents were under economic duress and under compulsion, such affidavit and the discharge vouchers issued by the petitioners were not binding on the respondents. The respondents had demanded much higher amount admittedly before signing such affidavit and the discharge vouchers. In my view the dispute remained whether such documents signed by the respondents were signed unconditionally and it amounted to

accord and satisfaction or were signed under any duress or coercion and whether the respondents are entitled to recover any further amount from the petitioners or not such dispute was arbitrable and could be decided in the arbitration proceedings.

80. In my view, learned counsel for the respondents was right in placing reliance on the order passed by the then Acting Chief Justice on 9th February, 2010 in Arbitration Application No.169 of 2007, which was filed by the respondents for seeking an appointment of the arbitrator. The learned Acting Chief Justice after considering the principles laid down by the Supreme Court in the case of *National Insurance Co. Ltd. vs. M/s.Boghara Polyfab Pvt. Ltd.* held that the issues and contentions raised by the petitioners herein in the matter of settlement of claim of the respondents deserves to be referred to arbitrator in the light of the various judgment of the Supreme Court, including in the case of *M/s.Boghara Polyfab Pvt. Ltd.* (supra). The learned Acting Chief Justice held that the respondents herein had made out a strong *prima-facie* case which required adjudication and accordingly appointed a former Judge of this Court as an arbitrator.

81. The Supreme Court in the case of *National Insurance Co. Ltd. vs. M/s.Boghara Polyfab Pvt. Ltd.*, (2009) 1 SCC 267, has though held that obtaining of undated receipts in advance in regard to regular / routine payments by government departments and corporate sector is an accepted practice which has come to stay due to administrative exigencies and accounting necessities. It is held that such procedure requiring the claimant to issue an undated receipt acknowledging the receipt of a mere claim in full and final

settlement as a condition for releasing admitted lesser amount is unfair, irregular and illegal and requires to be deprecated. Paragraph 49 of the judgment reads thus :-

“49. Obtaining of undated receipts-in-advance in regard to regular/routine payments by government departments and corporate sector is an accepted practice which has come to stay due to administrative exigencies and .accounting necessities. The reason for insisting upon undated voucher/receipt is that as on the date of execution of such voucher/receipt, payment is not made. The payment is made only on a future date long after obtaining the receipt. If the date of execution of the receipt is mentioned in the receipt and the payment is released long thereafter, the receipt acknowledging the amount as having been received on a much earlier date will be absurd and meaningless. Therefore, undated receipts are taken so that it can be used in respect of subsequent payments by incorporating the appropriate date. But many a time, matters are dealt with so casually that the date is not filled even when payment is made. Be that as it may. But what is of some concern is the routine insistence by some government departments, statutory corporations and government companies for issue of undated “no-dues certificates” or “full and final settlements vouchers” acknowledging receipt of a sum which is smaller than the claim in full and final settlement of all claims, as a condition precedent for releasing even the admitted dues. Such a procedure requiring the claimant to issue an undated receipt (acknowledging receipt of a sum smaller than his claim) in full and final settlement, as a condition for releasing an admitted lesser amount, is unfair, irregular and illegal and requires to be deprecated.”

82. In my view Mr.Kapadia, learned counsel appearing for the respondents has rightly placed reliance on the judgment of this Court in the case of *Dai-ichi Karkaria Pvt. Ltd. vs. Oil & Natural Gas Commission, Bombay & Anr.*, reported in 1991(4) Bom.C.R. 631, on

the issue of economic duress. This Court has at length discussed the issue of economic duress after advertent to the judgment of the House of Lords in the case of *Universe Tankships Inc. of Monrovia v. International Transport Workers' Federation* holding that if a party is forced to renegotiate the terms of the contract to his disadvantage and had no alternative but to accept the new terms offered, his apparent consent to the new terms was vitiated by economic duress. In my view, the principles laid down by this Court on the aspect of economic duress would squarely apply to the facts of this case. The relevant part of the said judgment is extracted as under :-

“(i) In *Universe Tankships Inc. of Monrovia v. International Transport Workers Federation*, reported in , the House of Lords dealt with a "problem involving 'Economic duress'. A ship registered in Liberia and flying a Liberian flag docked at Milford Haven on July 17, 1978 and discharged her cargo by the following afternoon. The International Transport Workers Federation adopted a policy to 'black the ships' in an attempt to improve the wages and conditions of service of crews on ships. As a result of blacking by the respondent, no tugs were available and the ship could not sail. The ship owners were virtually compelled to pay U. S. Dollars 80,000 by way of back pay for crew of the ship and a contribution of 6,480 Dollars to the I.T.F. Welfare Fund. The owners acceded to the respondent's demands for fear of disastrous economic consequences if they refused. In consequence of payment made and the agreement signed by the American shipowners in these circumstances, the ship was allowed to sail on July 29, 1978. On August 10, 1978, the owners' Solicitors demanded the return of 80,000 Dollars maintaining that the agreement was arrived at by duress and was void. The owners commenced and pursued action for return of Dollars 6,480 paid to the I.T.F.'s Welfare Fund. Parker J. upheld the plea of duress. The Court of Appeal allowed the appeal of the respondent. The owners appealed to the House of Lords. The House of Lords referred to large number of cases cited by

counsel including the case in *North Ocean Shipping Co. Ltd. v. Hyundai Construction Co. Ltd.*, , and the Privy Council judgment in *Pao On v. Lau Yiu Long*, , Lord Diplock observed, inter alia, as under:--

"It is not disputed that the circumstances in which I.T.F. demanded that the shipowners should enter into the special agreement and the typescript agreement and should pay the moneys of which the latter documents acknowledge receipt, amounted to economic duress upon the ship-owners ;that is to say, it is conceded that the financial consequences to the shipowners of the *Universe Sentinel* continuing to be rendered off-hire under her time charter to Texaco, while the blacking continued, were so catastrophic as to amount to a coercion of the shipowner's will which vitiated their consent to those agreements and to the payments made by them to I.T.F."

"This concession makes it unnecessary for your Lordships to use the instant appeal as the occasion for a general consideration of the developing law of economic duress as a ground for treating contracts as voidable and obtaining restitution of money paid under economic duress as money had and received to the plaintiffs' use. That economic duress may constitute a ground for such redress was recognised, albeit obiter, by the Privy Council in *Pao On v. Lau Yiu Long*, ."

In this case, Lord Diplock inter alia expressed the view that the rationale behind the developing law of economic duress was that the apparent consent of the party aggrieved was induced by pressure exercised upon him by the other party which the law does not regard as legitimate, with the consequence that his consent was treated as revocable unless approbated expressly or by implication after the illegitimate pressure had ceased to operate on mind. Lord Diplock took specific precaution to distinguish the doctrine or concept of "economic duress" from

mere "commercial pressure" which in some degree always existed whenever one party to a commercial transaction was in a stronger bargaining position than the other party. Commercial pressure by itself does not amount to economic duress. Lord Diplock equated the rationale behind recognition of economic duress as a ground of relief by observing inter alia at page 813 as under:--

"It is a rationale similar to that which underlies the avoid ability of contracts entered into and the recovery of money exacted under colour of office or under influence or in consequence of threats of physical duress."

The majority of law Lords decided to allow the appeal. Lord Scarman dissented. Lord Brandon also dissented. Lord Scarman observed that the demand for contribution and blacking of the ship in support of the demand amounted to a legitimate exercise of pressure and did not constitute duress. In his dissenting judgment, Lord Scarman referred to the Privy Council judgment in the case of *Pao On v. Lau Yiu Long* (supra) highlighting the law of economic duress. It was held by the Privy Council in this case that two elements were necessary to constitute duress i.e. (1) pressure amounting to compulsion of the will of the victim; and (2) the illegitimacy of the pressure exerted. For all practical purposes, the victim of duress must have no other choice. The early law of duress dealt with threat to life or limb. The later developments recognise threat to property or threat to business or trade as duress. In a given situation, a party may be virtually ruined unless it submitted to illegitimate pressure for the time being although the wrongdoer was exploiting the situation and theoretically it could be said in every case that the victim should have refused to submit to duress and resorted to law Courts. Lord Scarman also observed that the development of law on this subject was well traced in Goff and Jones, *The Law of Restitution*, 2nd ed.(1978) Chapter 9.

(vi) Mr. Cooper, the teamed counsel for the plaintiff,

has heavily relied on the judgment of Macotta J. in the case of North Ocean Shipping Co. Ltd. Hyundai Construction Co. Ltd., . In this case, the shipbuilders refused to honour the contract unless the stipulated payment was increased. In this case, a special case was stated by the Arbitrators. In this case, two questions arose; (1) Whether the threat of the shipbuilding company to break the contract without any legal justification unless increase in price by 10% was agreed upon constituted duress and the re-negotiated agreement was therefore voidable by the victim of duress and (2) Whether the alleged victim of duress had conducted themselves so as to affirm the renegotiated contract? The dictum of House of Lords in the case of Universe Tankships's case, reopening the Court to consider as to whether the alleged victim of duress had approbated in the matter or affirmed the impugned transaction expressly or by implication after the illegitimate pressure had ceased to operate on the mind of the victim must be kept in mind while appreciating and analysing the judgment of Macotta J. in North Ocean Shipping v. Hyundai & Co. (supra). In the above-referred judgment, Mocatta, J referred to large number of cases decided by the Courts in various countries of the world including Australian and American Courts. The learned Judge held that the threat to break the contract unless the price was increased in the circumstances amounted to economic duress. Mocatta J. agreed with the proposition of law formulated by Issac J. of High Court of Australia in Smith v. William Charlick Ltd., . The learned Judge held that the owners were free from duress on November 27, 1974 and took no action by way of protest or otherwise till 30th July 1975. It was therefore held that there was no danger in registering protest at the time when the final payments were made without any qualification. It was held in substance that the shipowners had affirmed the contract after the duress had ceased to operate and the owners could not avoid their liability at a late stage and plead duress.

(vii) Most of the above-referred cases were noticed by

our Supreme Court in paragraph 52 of its judgment in the case of (*Central Inland Water Transport Corporation Ltd. v. Brojo Nath, A,I,R, 1986 S.C. 1571* at 1606 of the above referred judgment reads as under :---

"82. It would appear from certain recent English cases that the Courts in that country have also begun to recognize the possibility of an unconscionable bargain which could be brought about by economic duress even between parties who may not in economic terms be situate differently."

I am in complete agreement with the principles of law to be applied in cases involving economic duress. It is not possible to accept the submission of Mr. M. S. Sanghavi, the learned counsel for defendant No. 1, that the principles of law enunciated in English, American and Australian judgments have no relevance in Indian legal system. The Indian Contract Act, 1872 is not exhaustive. The, above-referred principles are also relevant for interpretation and elucidation of law of coercion contained in Section 15 of Indian Contract Act, 1872. These principles was broadly approved by our Supreme Court in a different context in the case of Central Inland Water Transport's case and cannot be ignored in a case pertaining to bank guarantee as bank guarantee is also a contract governed by the same provisions. Section 15 of the Indian Contract Act, 1872 defines 'coercion' as under:--

" 'Coercion' is the committing, or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement."

The underlined portion of the Section brings within its sweep the concept of 'Economic Duress'. If the

consent of a party to any transaction is not a free consent, such consent will be revocable at the option of the party whose consent was obtained by coercion, undue influence, fraud etc. It is open to the victim of duress to impugn the part of the transaction or even a particular stipulation which was got incorporated in the contract by use of duress. Sometimes it may happen that the entire transaction is not vitiated by duress or fraud and only a particular stipulation is vitiated. It all depends upon facts of each case. The plaintiff is entitled to rely on Sections 14 and 15 of Indian Contract Act, 1872 as well as the general principles of law of economic duress now being recognised in English, American and Australian legal system. Whenever the duress results in a varied contract, the victim of duress may refuse to abide only by the new term introducing the variation. In certain situations, the victim of duress may seek an injunction restraining enforcement of the impugned term imposed on him by the other side by use of economic duress without setting aside the entire transaction and in appropriate case subject to consideration of equities of the situation, the Court may be persuaded to grant permanent or temporary injunction if the allegations made are substantiated by the plaintiff. In my judgment, Courts must always bear in mind the distinction between mere commercial or business pressures permissible in the trade conforming no cause of action and the 'economic duress' amounting to coercion vitiating the consent. The distinction between the two concepts is well-recognised although the divided line in a given case may appear to be every thin. If the beneficiary under a bank guarantee invokes a stipulation in the bank guarantee, brought about by economic duress and the conscience of Court of equity is shocked and the conduct of beneficiary is inequitable, it shall be duty of the Court to grant the injunction and protect the victim of the duress."

OTHER ISSUES :

83. Insofar the judgments of the Supreme Court in the case of

Pradeep Oil Corporation vs. Municipal Corporation of Delhi & Anr., reported in (2011) 5 SCC 270, in the case of *Mumbai International Airport Pvt. Ltd. vs. Golden Chariot Airport & Anr.*, reported in (2010) 10 SCC 422 and in the case of *R.N. Gosain vs. Yashpal Dhir*, reported in AIR 1993 SC 352, relied upon by the petitioners in support of the submission that the respondents cannot be allowed to approbate and reprobate at the same time is concerned, in my view none of these judgments will apply to the facts of this case. The petitioners have not come out with a case that the respondents have approbated and reprobated at the same time. It was the case of the respondents consistently that the respondents had signed the affidavit and discharge vouchers under duress and coercion. The judgments relied upon by the petitioners thus do not assist the petitioners.

84. Insofar as the submission of the petitioners that since the claim was not made by the respondents within 15 days after loss of damage had been caused to the respondents, the petitioners were not liable to make any payment to the respondents is concerned, a perusal of the oral evidence led by the petitioners witness Mrs.Lalitha Narayanan and in particular her reply to question No.18 clearly indicates that the witness had admitted that in this case the respondents had filed their claim within 15 days in writing of the loss damaged or destruction. The witness also admitted in this particular case that the petitioners had not indicated anything in writing to the respondents about the breach of policy condition Nos.6 and 7.

85. A perusal of the award indicates that after receipt of the claim by the petitioners from the respondents, the surveyor had

examined the claims, had cross verified the quantity of stock claimed by the respondents and had recommended payment. Thus there was no reason for the petitioners to say that there was breach of general condition No.6. In my view, the learned arbitrator has rightly held that there was no breach of condition No.6. The claims were made by the respondents within 15 days and the same was even admitted by the witness examined by the petitioners. I am therefore, not inclined to accept the submission of the petitioners that the claims were not made within 15 days by the respondents and thus the petitioners were not liable to make any payment to the respondents or that the same was in breach of condition No.6 of the policies. Be that as it may, the petitioners not only has verified the claims made by the respondents but have also released the payments whatever was due and payable according to the petitioners to the respondents. The petitioners thus cannot be allowed to raise such plea.

86. Insofar as the submission of learned counsel for the petitioners that the respondents had committed breaches of clause 7(d) of the policies by selling salvage which right could be exercised only by the petitioners is concerned, a perusal of the survey report indicates that the learned surveyor has in his report dated 23rd December, 2005 has observed that the surveyor had inspected the stock samples kept by the respondents, damage to the stock was extensive, fabric had lost colour, had shrinkage and stains on the same, fall of fabric had been spoilt, the freshness of the fabric had also gone, garments had gone damaged badly, the garments had shrivelled look, there were stains on the garments from oil, mud etc. The learned surveyor also summarized the procedure followed by the respondents for disposal of the salvage by giving advertisements in

the newspapers and obtaining the tenders.

87. The learned surveyor inspected the damage to the stocks, machineries, building etc. The surveyor had contacted the concerned salvage buyers who had taken salvage to Ahmedabad. The surveyor asked an acquaintance in Ahmadabad to go and verify the salvage and compare the same with damaged samples kept by the insured. The surveyor was informed that the samples tallied and that flood water damage to the stocks was extensive. The surveyor opined that the fabric was badly stained, crumpled, weak etc. The stocks were badly damaged. The surveyor thereafter, cross-verified the quantity of the stocks claimed by the respondents as damaged orders received by the respondents, copies of purchase orders, quantities manufactured, all payment advices for raw materials imported etc.

88. The surveyor also cross-verified the quantities claimed by the insured, quantities of salvage sold. The surveyor in the said report opined that the stock claim preferred by the respondents seems to be correct and on the basis of their verification, the surveyor did not think that the act or disposal of the stocks by the respondents had in any manner aggravated the claim or increased the risk. The salvage obtained by the respondents was reasonable. The surveyor also opined that the surveyor had not come across any breach during the course of survey. It is not in dispute that the petitioners accepted the said report submitted by the surveyor in toto and had examined the said surveyor as their witness before the learned arbitrator.

89. A perusal of the oral evidence led by the surveyor

indicates that the said witness admitted that the respondents had taken right steps in advertising for inviting bidders for disposal of the damaged stocks. The surveyor had also perused all the bids received by the respondents. The respondents had retained the samples of each of the damaged stocks and had given the same to the petitioners. The surveyor did not make any attempt to find out from the regular bidders as to the best price they could have given.

90. The deposition made by the witness of the respondents on this issue was not shaken in the cross-examination. In the impugned award, the learned arbitrator has considered this issue at length and has rendered a finding that the surveyor did not have any buyer with him who could have purchased the damaged goods from the respondents. The entire process of public auction was well documented. The surveyor also has cross checked from the salvage buyer from Ahmedabad and also inspected the samples kept by the respondents and found the same badly stained weak, discoloured and which tallied with the material which was sold in auction. The learned arbitrator has rendered a finding that everything done by the respondents for sale of salvage was done in a transparent manner. The respondents tried to mitigate the loss and could not be faulted with. The condition of the salvage material was very unhygienic. The learned arbitrator has thus rightly rendered a finding that there was no breach on the part of the respondents on condition No.7. Even the surveyor has categorically held that there was no breach on the part of the respondents in selling salvage. The petitioners, in my view thus cannot be allowed to raise an issue that there was any breach on the part of the respondents in selling salvage. The surveyor examined by the petitioners had clearly admitted in his evidence that

he was very busy with processing the claim and had to visit the sites of large number of claimants.

91. The learned arbitrator also placed reliance on the General Advisory issued by the petitioners to dispose of the case above the value of Rs.5.00 lakhs without waiting for any intimation from the insurance company. In my view the finding rendered by the learned arbitrator is based on the documentary as well as oral evidence led by the parties and such findings are not perverse and thus no interference is warranted. In my view, there is no merit in the submission of learned counsel for the petitioners that there was any violation of clause 7 of the policies by the respondents by selling salvage.

92. The next submission of learned counsel for the petitioners is that the respondents having disputed the surveyor's report could not have relied upon any part of the survey report and was required to prove the entire claim made by the respondents independently by leading appropriate evidence before the learned arbitrator which the respondents had failed. A perusal of the pleadings filed by the respondents clearly indicates that the respondents had also placed reliance upon the surveyor's report. It is not in dispute that the petitioners had relied upon the surveyor's report in toto. To prove the contents of the survey report, the petitioners had admittedly examined the same surveyor before the learned arbitrator. During the course of his evidence, the said surveyor admitted various parts of the survey report. The oral evidence was forming part of the record before the learned arbitrator and thus any party to the proceedings was entitled to rely upon the same. The petitioners having relied

upon the survey report in toto, in my view could not have disputed any part of such report. The respondents also could have relied upon the said survey report, which was part of the evidence on record before the learned arbitrator. In my view, there is no merit in the submission of learned counsel for the petitioners that the respondents could not have placed reliance on the survey report though it was relied upon by the petitioners and was part of the evidence before the learned arbitrator.

93. Insofar as the judgment of the Supreme Court in the case of *Sri Venkateswara Syndicate vs. Oriental Insurance Co. Ltd. & Anr.*, reported in 2009 AIR SCW 6749, relied upon by the petitioners in support of his submission that the surveyor's report was not binding on the insurance company is concerned, in my view the petitioners cannot be allowed to urge this issue in view of the fact that the petitioners have accepted the said report and had examined the surveyor as their witness to prove the contents of such report. A perusal of the affidavit of evidence filed by the surveyor indicates that the survey has deposed that the contents of the final surveyor report dated 23rd December, 2005 were true and correct. In my view, the petitioners thus cannot be allowed to urge that the surveyor's report was not binding upon the petitioners. The judgment of the Supreme Court in the case of *Sri Venkateswara Syndicate* (supra) does not assist the petitioners in any manner whatsoever.

94. Insofar as the judgment of this Court in the case of *United India Insurance Company Limited vs. Jaisu Shipping Company Pvt. Ltd.* relied upon by learned counsel for the petitioners in support of the submission that the respondents could not rely upon any part of

the survey report once the respondents having disputed the same is concerned, in my view since both the parties have relied upon the survey report and the same was on record of the arbitral proceedings in evidence, the judgment of this Court in the case of *United India Insurance Company Limited* (supra) does not assist the petitioners.

95. The next submission of Mr.Vernekar, learned counsel for the petitioners is that since the respondents had committed various breaches of the policies, the petitioners were liable to release only upto 75% of the amount recommended by the surveyor. In support of this submission, learned counsel placed reliance on the judgment of the Supreme Court in the case of *Amalendu Sahoo vs. Oriental Insurance Co. Ltd.* reported in (2010) 4 SCC 536. A perusal of the said judgment indicates that the Supreme Court was considering a claim under the Motor Vehicles Act. The National Consumer Disputes Redressal Commission had held that in case of violation of the condition of policy as to the nature of the use of vehicle, the claim ought to be settled on non-standard basis. Reliance is also placed by learned counsel for the petitioners on the judgment of the Supreme Court in the case of *National Insurance Co. Ltd. vs. Nitin Khandelwal* (supra)

96. After perusing the surveyor's report as well as oral evidence led by the parties, including oral evidence of the witness examined by the petitioners, the learned arbitrator has rendered a finding that there was no breach committed by the respondents of any of the provisions of the policies. Since there was no breach committed by the respondents, the question of deducting any amount from the amount recommended by the surveyor of the petitioners did

not arise. Be that as it may, the petitioners in this case could not point out any such guidelines issued by any authority directing the insurance company to settle a claim of the insured on non-standard basis. No such alleged guidelines were forming part of the policies issued by the petitioners in favour of the respondents. A perusal of the cross-examination of Mrs.Lalitha Narayanan, who was the Branch Manager of the petitioners, clearly indicates that though the witness deposed that non-standard claims were generally assessed at 75%, the witness admitted that there was no condition specifying that non-standard claims were to be assessed at only 75%. When the witness was called upon to produce the guidelines referred by her in her evidence, the witness deposed that the respondents could take it that there were no guidelines.

97. A perusal of the award on this issue clearly indicates that the learned arbitrator has rightly found that the witness examined by the petitioners could not point out what breach was committed by the respondents of the general conditions. The witness on the contrary admitted that there was no breach of any of the terms. The petitioners never communicated to the respondents that the respondents had committed any breach of the general condition Nos.6 and 7 of the policies or their claim was being assessed on non-standard basis. The learned arbitrator held that it was thus evident that the claim of the respondents was slushed considerably for imaginary breach. In my view, since no such guidelines issued by any authorities was produced by the petitioners, nor such alleged guidelines were forming part of the policies issued by the petitioners, the petitioners could not have deducted any amount from the amount recommended by the surveyor. The learned arbitrator has rightly

rendered a finding in favour of the respondents holding that the reduced amount paid by the petitioners was without any basis. No interference with such finding of fact is thus warranted.

98. Insofar as the salvage value considered by the surveyor at Rs.50.00 lakhs as against the value of Rs.25.00 lakhs, realized by the respondents on sale of salvage is concerned, a perusal of the report submitted by the surveyor itself indicates that the surveyor had closely scrutinized the procedure followed by the respondents for sale of salvage, tendered documents, bids received by the respondents, payments received by the respondents from the successful bidder by cheques, by cross verifying the facts of auction in favour of such successful bidder etc. On perusal of the oral evidence led by the surveyor clearly indicates that he had affirmed the transactions which the respondents had claimed. He had tallied the figures given by the respondents. The witness also agreed with the observations made by him in the survey report that the respondents were justified in fast disposal of salvage. The witness also admitted that there could not have any buyer who could have purchased salvage sold by the respondents. The surveyor examined by the petitioners admitted that he had no basis for suggesting the value of salvage of Rs.50.00 lakhs.

99. When the surveyor was confronted with the figures of Rs.30.00 lakhs and Rs.50.00 lakhs mentioned by him in his report towards value of salvage, the surveyor deposed that the same was a slip of pen. The witness however, could not produce any proof or basis for recommending the value of salvage at Rs.50.00 lakhs. The witness himself had opined that the sale of salvage by the

respondents was absolutely in a transparent manner and he had cross-verified the complete transaction. The learned arbitrator in my view has considered this aspect at length in the impugned award and has rendered a finding that the stray figure of Rs.50.00 lakhs coming in the report of the surveyor was without any basis and smacks of sheer arbitrariness and had to be struck down. The learned arbitrator also considered that the surveyor himself in his report had opined that the respondents did wise thing in disposing of salvage. The findings of fact, in my view, are not perverse and thus cannot be interfered with under section 34 of the Arbitration & Conciliation Act, 1996.

100. Insofar as the other deductions made by the surveyor in the survey report are concerned, a perusal of the oral evidence led by the surveyor clearly indicates that the surveyor could not justify the basis of such deductions in the surveyor's report and the same was without any evidence. The learned arbitrator, in my view, thus was right in holding that the respondents had proved the claim for damages in the sum of Rs.2.63 crores. Learned counsel for the respondents however, fairly admitted that the petitioners were entitled to recover a sum of Rs.11,77,115.70 towards 5% policy access and has no objection if the said amount is deducted from the award made by the learned arbitrator. The statement of learned counsel is accepted. In my view, part of the award to the extent of Rs.11,77,115.70 can be modified along with corresponding interest payable thereon.

101. Insofar the submission of learned counsel for the petitioners that the learned arbitrator could not have awarded interest

for a period prior to the date of payment of Rs.1,44,14,017/- by the petitioners is concerned, a perusal of the record indicates that the learned arbitrator has awarded interest at the rate of 12% p.a. from 23rd December, 2005 on Rs.91,02,670/- till the date of award. The learned arbitrator has also awarded interest at 12% p.a. from 23rd December, 2005 till 20th October, 2006 i.e. the date of payment of Rs.1,44,14,017/- on the said sum of Rs.1,44,14,017/-. The learned arbitrator has awarded interest at 18% p.a. on Rs.91,02,670/- from the date of award till payment or realization. I am not inclined to accept the statement of learned counsel for the petitioners that no interest could have been awarded prior to the date of release of Rs.1,44,14,017/- and from the date of surveyor's report.

102. Under Insurance Regulatory & Development Authority (Protection of Policy-holders' Interest) Regulations, 2002, a claim procedure in respect of general insurance policy is provided for making and processing with the claim. The surveyor has to communicate his findings to the insurer within 30 days of his appointment with a copy of the report being furnished to the insured if he so desires. It is not the case of the petitioners that due to any special and complicated nature, any extension was granted for submission of the report. Under Regulation 9(5), the insurance company has to make an offer of settlement of that claim with the insured within 30 days from the date of receipt of the survey report. Upon acceptance of offer of settlement by the insured, payment of the amount has to be made within 7 days from the date of acceptance of the offer by the insured. It provides that in case of delay in the payment, the insurer shall be liable to pay interest at the rate which should be 2% above the bank rate prevalent at the

beginning of the financial year in which the claim is reviewed by it. In my view, if there was any delay in releasing payment beyond a period of 30 days on the part of the petitioners from the date of receipt of the surveyor's report, the petitioners are liable to pay interest for such delayed payment.

103. The petitioners admittedly did not release payment within 30 days of the surveyor's report and/or did not release such payment though the respondents had filed affidavit and discharge vouchers. The learned arbitrator has thus rightly allowed the claim for interest on the sum of Rs.91,02,670/- with effect from 23rd December, 2005 and on the sum of Rs.1,44,14,017/- with effect from 23rd December, 2005 till 20th October, 2006. The learned arbitrator has allowed interest at the rate of 12% p.a. I am thus not inclined to accept the submission of learned counsel for the petitioners that no interest could have been allowed by the learned arbitrator as directed. There is no merits in this submission of learned counsel for the petitioners. The learned arbitrator is empowered to award interest for such period as the learned arbitrator deems fit in terms of section 31(7)(a) and at such rate as it he thinks reasonable however, subject to the agreement between the parties. In my view, the learned arbitrator has rightly exercised that powers and thus no infirmity with this part of the award can be found by this Court. It is however, made clear that the petitioners would be liable to pay interest at the rate and for the period awarded by the learned arbitrator on the amount determined by the learned arbitrator excluding a sum of Rs.11,77,115.70.

104. I therefore, pass the following order :-

- a). The arbitration petition is dismissed except to the extent of of Rs.11,77,115.70 and corresponding interest thereon.
- b). There shall be no order as to costs.

(R.D. DHANUKA, J.)