

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 08.05.2015

+ **WP(C) 3547/2014**

DWARIKA PROJECTS LTD. .... Petitioner

Versus

THE ORIENTAL INSURANCE COMPANY LTD. .... Respondent

Advocates who appeared in this case:

For the Petitioner: Mr. Satyabrata Panda and Mr. Shashwat Panda, Advocates

For the Respondent: Mr. Pankaj Seth, Advocate

**CORAM:**

**HON'BLE MR. JUSTICE RAJIV SHAKDHER**

**RAJIV SHAKDHER, J**

1. The central issue raised in the writ petition is: whether or not the decision of the respondent to repudiate the petitioner's claim for loss under the 'contractor's all risk insurance policy' (hereafter referred to as policy), on the sole ground, that there had been a failure on its part to intimate by way of a written communication, the factum of occurrence of the calamity within the period of 14 days, as stipulated in clause 5 of the General Conditions (GC), was valid?

2. The issue has arisen in the background of the following circumstances :-

2.1 The petitioner was appointed as a contractor by NHPC Ltd. for executing a project which required construction of new spurs and gabion structure on river Sharda, at Tanakpur, Banbassa in District Champawat, in

the State of Uttarkhand (hereafter referred to as the subject works). This contract was awarded in favour of the petitioner on 26.04.2011. As per the contract, the petitioner was required to complete the work within three months.

2.2 The petitioner had taken out an insurance with respect to the subject works, which was initially effective between the period 16.05.2011 and 15.08.2011. Undisputedly, an endorsement was made whereby, the policy stood extended till 14.01.2012.

2.3 Under the contract awarded to the petitioner by NHPC, the construction of the subject works had to be carried out between RD2000 to 4880 mtrs. The work was divided into 5 schedules.

2.4 On 18.08.2011 flash flood occurred in the river Sharda, which resulted in disruption of a part of the subject works at a point in time when the petitioner had executed the third schedule.

2.5 Apparently, due to heavy monsoon, water was being released on a regular basis in river Sharda by the Tanakpur Power Station, which is located at Banbassa.

2.6 It is the petitioner's case that on 25.08.2011, the intimation with regard to the loss was telephonically communicated to the respondent. However, since the immediate concern of the petitioner was to ensure the safety of its personnel and to rebuild the damaged portion of the subject works, as also to ensure that no further damage was caused, a formal intimation was sent via an e-mail dated 05.11.2011.

2.7 In response to the same, the respondent by a written mail dated 08.11.2011, called upon the petitioner to provide details of estimated loss so as to enable it to appoint a surveyor for the said purpose. Furthermore, the petitioner was also called upon to send a scanned copy of the policy.

2.8 The petitioner by an e-mail dated 08.11.2011 (which was sent a couple of hours later), indicated that the estimated damage, according to it, was a sum of Rs.25.50 Lakhs, inclusive of manpower and material cost. Alongwith this e-mail, a copy of the policy was also sent to the respondent.

2.9 The respondent acted with due promptitude and by a e-mail sent on the same date i.e., 08.11.2011, notified the petitioner about the factum of appointment of Mr. Vinod Surma, as the surveyor in the matter. The surveyor's contact details were also provided to the petitioner.

3. The surveyor, as instructed by the respondent, visited the site in issue for the first time on 16.11.2011.

3.1 On the said date, the surveyor gathered the information with regard to the fact that damage had occurred to the subject works on account of a flash flood in river Sharda. However, since, the representative of the petitioner could not give responses qua certain queries that the surveyor had, the surveyor requested him to arrange a meeting with an engineer employed with NHPC Ltd, being the owner of project.

3.2 A meeting for the aforesaid purpose was fixed on 24.12.2011. At this meeting, one Mr. Jagmal, Assistant Manager, NHPC, was available for rendering the necessary explanations, which were sought by the surveyor.

3.3 Consequent thereto, the petitioner provided the necessary data and documents sought by the surveyor along with its letters dated 27.03.2012 and 27.04.2012.

3.4 Despite this, there was no movement made by the respondent towards settlement of the petitioner's claim.

3.5 The petitioner asserts that several letters were written by it between May, 2012 and January, 2013. There is in fact a reference to, at least, 15 letters, which are dated : 07.04.2012, 27.11.2012, 17.01.2013, 18.01.2013,

29.01.2013, 01.02.2013, 21.02.2013, 18.03.2013, 02.04.2013, 27.04.2013, 08.05.2013, 22.05.2013, 03.06.2013, 20.06.2013 and 21.06.2013. This assertion of the petitioner is not denied by the respondent.

3.6 Be that as it may, the record shows that the respondent for the first time vide email dated 21.06.2013 sought an explanation from the petitioner as to why the factum of loss was reported to its regional office at Dehardun after a delay of “28 days”. In the e-mail, it was further indicated that without the petitioner’s reply, it was unable to register the claim.

3.7 On the same date by a registered letter dated 24.06.2013, the petitioner informed the respondent that they had telephonically lodged the complaint of loss in and around 25.08.2011, with Sh. N.L. Meena.

3.8 The registered letter was followed by an e-mail dated 24.06.2013, wherein this fact was reiterated and, it was further asserted that an e-mail was sent when, the petitioner’s representative was informed that a formal complaint had to be registered. Furthermore, in the very same e-mail, the respondent stressed that the incident had occurred nearly two years ago, and that, at no point in time, was the issue with regard to the delay of intimation of the incident raised with it. The fact that the surveyor had inspected the site and evaluated the damage to the subject works, as also, his interaction with the officials of NHPC, was reiterated in the said e-mail. Accordingly, a request was made to the respondent to look into the matter and approve the claim, as it was a case of genuine loss.

3.9 The respondent by a communication dated 09.07.2013, reiterated the contents of its earlier email dated 21.06.2013 (wherein, as indicated above, the aspect of delayed intimation of the loss was raised for the first time) – without adverting to the petitioner’s registered letter dated 21.06.2013 or the e-mail dated 24.06.2013. This is important as the petitioner in the said

communication had referred to a specific officer by name i.e., Sh. N.L. Meena, to whom the intimation of loss was telephonically given in and around 25.08.2011.

4. Notwithstanding the assertion of the petitioner, the consequences of the communication dated 09.07.2013 was that, the respondent adhered to its stand that the intimation of loss was delayed by more than two months after its occurrence whereas, the policy conditions required intimation within 14 days of the occurrence of the incident causing loss. The respondent, however, did not reject the claim at this stage but proceeded to, once again call for the “comments of the petitioner as to why its claim ought to be entertained”.

4.1 Since, the petitioner, had not been supplied with a copy of the surveyor’s report, a request was made in respect of the same, vide letter dated 08.08.2013. In the very same letter, copies of other documents related to the survey at the subject site was also sought, which had been submitted to the respondent for the purposes of evaluation of the claim.

4.2 A similar letter of even date i.e., 08.08.2013, was also sent to the surveyor by the petitioner. The only difference being in so far as the surveyor was concerned, that only the copy of the report was sought from him.

4.3 By a letter dated 22.08.2013, sent by the respondent, in response to the petitioner’s letter dated 08.08.2013, the petitioner was informed that its claim was found to be untenable in view of the fact that intimation was not given of the event of loss, as required under GC clause no.5, within 14 days of its occurrence. Once again, the respondent reiterated that intimation to it was made by the petitioner vide e-mail dated 05.11.2011. There was, however, no reference to the telephonic conversation that the petitioner

claimed its representative had, with Sh. N.L. Meena, employed at its regional office in Dehradun.

4.4 The respondent, it appears, did not enclose a copy of the surveyor's report with its letter of 22.08.2013. All that the respondent did was give one more opportunity to the petitioner to substantiate its claim, in view of the grounds of repudiation cited in its letter dated 22.08.2013, before it took a final decision in the matter.

4.5 By a written letter dated 29.08.2013, the petitioner reiterated that it had not received a copy of the surveyor's report. By way of explanation, the petitioner, once again, asserted that there was no delay in intimation of the loss. It further asserted the fact that intimation was given to Sh. N.L. Meena, on 25.08.2011, who had according to the respondent provided the cover note details. The fact that the surveyor had been appointed and, inspection had been carried out, was also reiterated.

4.6 By a letter dated 11.09.2013, the respondent while reiterating its earlier stand, informed the petitioner that it was free to establish, with the help of necessary documents, its assertion with regard to timely intimation of the loss as, none of the officials had confirmed intimation of loss by telephone or by way of receipt of a hard copy of any such communication.

4.7 Interestingly, though the petitioner had specifically in its previous correspondence referred to Sh. N.L. Meena, in the respondent's office, as the person to whom the intimation had been given, the respondent gave a, broad reply, that none of the officers had confirmed receipt of telephonic intimation.

4.8 The petitioner, as asked, did respond to the respondent's communication dated 11.09.2013 vide a letter dated 24.09.2013. In this letter, the petitioner made the following assertion, which is extracted

hereinbelow, since a large part of the respondent's defence to sustain its repudiation of the claim is based on failure on the part of the petitioner to give intimation within the stipulated period :-

“..We are humbly trying to make you understand that settling claims requires many procedures to be fulfilled and waivers are typically given in the event of catastrophes, where documents are lost and local authorities cannot confirm losses. For example, during the Mumbai floods, companies such as ICICI Prudential offered spot settlements on minimal documentation. The company received 1,500 property damage claims, amounting to about Rs.200 crore, and 70 per cent of these were settled in under a month due to the simplified procedure.

We were operating from a remote location where there were no internet or telephone facilities and there was chaos due to the unforeseen flood situation. But no such relief has been provided from your side.

However, we again raise the question to you, that assuming there was a delay in informing the insurance company, why you have raised this query after 2 years. Had this query been raised earlier we would have been in a better position to give proof of intimation given by us on time. It is impossible for us to get telephonic records / emails of the staff that was in touch with the insurer at that point of time. As it was a project based work, the staff is no longer associated with the company. We were following up the claim and providing all the documents that were asked for by the surveyor or yourself. And the person (insurer representative) to whom our representative (employee on the site), we are aware intimation was provided has declined that he was not informed..”

(emphasis is mine)

4.9 Finally, by the impugned communication dated 30.09.2013, the petitioner was informed by the respondent that since new facts had been brought to fore, its claim was repudiated based on what had been indicated by it, in its earlier communication i.e., e-mail dated 21.06.2013, and letters

dated 09.07.2013, 22.08.2013 and 11.09.2013.

5. Before I proceed further, I may only indicate that in the interregnum i.e., 20.09.2011, the Insurance Regulatory Development Authority (in short IRDA) issued a circular dated 20.09.2011 to all life insurers and non-life insurers qua the issue of rejection of genuine claims on the ground of delayed intimation and submission of documents. Since, this circular has a crucial bearing on the matter, I will be adverting to it in the course of my discussion hereafter.

6. Suffice it to say, the petitioner being aggrieved by the rejection of its claim, instituted the captioned writ petition under Article 226 of the Constitution.

7. Notice in the petition was issued on 27.05.2014 whereupon, the respondent filed its counter affidavit in the matter.

8. Arguments on behalf of the petitioner were advanced by Mr. Panda, while the respondent was represented by Mr. Pankaj Seth.

9. The counsel for the petitioner, broadly, relied upon the averments made in the petition and the documents filed thereto, to demonstrate that there had been no delay in intimating the loss contrary to what was contended by the respondent, and that, the ascertainment of the extent of loss by the surveyor vide his report dated 31.05.2013 was, flawed.

9.1. The learned counsel for the petitioner relied upon the NHPC report dated 06.02.2012. Based on this report, it was submitted that the loss occasioned by the petitioner was, equivalent to a sum of Rs.22,37,506.50 and, not a sum of Rs.1,46,800/-, as found by the surveyor. It was submitted by the learned counsel that the surveyor had wrongly calculated the loss by peculiarly limiting the liability of the respondent qua loss caused to the first and second layers at each RD which were, above water, while infact, as per

the NHPC report, there were several layers above water at each RD, which were not taken into account. The learned counsel thus submitted that the repudiation of the claim was totally illegal.

9.2 The fact that intimation of the loss was in time was sought to be demonstrated by reference to pleadings and the communications exchanged in that behalf, to which I have made a reference hereinabove.

9.3 Dehors the aforementioned, the learned counsel for the petitioner, based on IRDA's circular dated 20.09.2011, submitted that a genuine claim could not be rejected on a technical ground of delay in intimation of the occurrence of the loss. The learned counsel submitted that, the loss was genuine, is established by the surveyor's report dated 31.05.2013.

10. On the other hand, Mr. Seth, argued that the final repudiation communicated to the petitioner vide letter dated 30.09.2013 had to be sustained in view of the subsistence of clause 5 of the GC contained in the policy. The learned counsel for the respondent, with all vehemence at his command, argued that delay in intimation beyond 14 days of the occurrence of the event of loss, was fatal to the petitioner's claim. The learned counsel relied upon, for this purpose, on the decision of the National Consumer Disputes Redressal Commission (in short the Commission) dated 04.12.2014, passed in *Revision Pet. No.3049/2014*, titled : ***HDFC Egro General Insurance Co. Ltd. Vs. Bhagchand Saini.***

10.1 A great emphasis was laid by the learned counsel on the decision of the Supreme Court in *Oriental Insurance Co. Ltd. Vs. Parvesh Chander Chadha (Civil Appeal No. 6739/2010, decided on 17.08.2010)* which, found mention in the commission's judgment, in the aforementioned case.

11. In rejoinder, the counsel for the petitioner in effect reiterated his submissions. Furthermore, the learned counsel for the petitioner brought to

my notice another judgment of the commission, dated 06.02.2014, passed in ***Revision Pet. No.2852/2013***, titled : ***National Insurance Co. Ltd. Vs. B. Venkataswamy***, in which, a contrary view has been taken, after noticing the provisions of the IRDA's circular dated 20.09.2011.

12. Having heard the learned counsel for the parties and perused the record, what clearly emerges, is as follows :-

- (i). That due to flash floods in river Sharda, a part of the subject works was damaged.
- (ii). The incident which caused the loss to the petitioner occurred on 18.08.2011.
- (iii). It is the petitioner's assertion that telephonic communication, in that behalf, was made to, one, Sh. N.L. Meena, employed at respondent's regional office in Dehradun, in and around 25.08.2011.
- (iv). A formal intimation was sent to the respondent on 05.11.2011.
- (v). Clause 5 of the GC, contained in the policy, required notice of the event of loss within a period of 14 days of its occurrence.
- (vi). The surveyor, appointed by the respondent vide his report dated 31.05.2013 has, after taking into account the NHPC's report, crystallized the loss caused to the petitioner, in pecuniary terms, at Rs.1,46,800/-.
- (vii). In the said report, the surveyor has limited the liability of the respondent to the first and second layers, which were above water, at each of the RDs, though in NHPC's report, there is a reference to several layers being above water.
- (viii). For the first time, the respondent raised an objection to the tenability of the claim on the ground of delay in its e-mail dated 21.06.2013. This objection was taken after the petitioner had furnished the documents sought by the respondent and its surveyor as far back as in November of 2011.

(ix). The surveyor, had made two visits to the site in issue i.e., on 16.11.2011 and 24.12.2011.

13. Given these facts, two aspects come to fore.

13.1 First, did the petitioner make out a case that it had actually intimated the factum of the occurrence of event of loss in and around 25.08.2011, as claimed by it.

13.2 Second, even if, it is accepted that there was no formal communication, in that behalf, till an e-mail dated 05.11.2011 was sent by the petitioner to the respondent, could the respondent reject the petitioner's claim, on that sole ground.

14. In so far as the first aspect is concerned, the material placed before me, on balance, persuades me, based on preponderance of probability, that the petitioner's version of the events, has a ring of truth in it. This conclusion, I have reached, as, the petitioner in its correspondence, has made a reference to a specific officer by name i.e., Mr. N.L. Meena. The respondent in none of its communications has denied that such an officer was not employed in its regional office at Dehradun.

14.1 On the other hand, the respondent in its letter of 09.11.2013 has, broadly, claimed that none of its officers had confirmed having received a telephonic conversation. It must be remembered that when this objection was taken by the respondent, for the first time, i.e., 21.06.2013, nearly 22 months had passed since, the occurrence of the incident, which occasioned damage to the subject works. Human memory is weak and depending on the mode of communication, it may have been difficult, if not impossible, for the petitioner to produce the relevant material to back its claim that such a telephonic conversation took place. Nevertheless the petitioner reiterated its stand in the communication dated 24.09.2013. The relevant part of this

communication has already been extracted hereinabove by me. (See paragraph 4.8).

14.2 Based on my appreciation of the record, on balance, I find that the version put up by the petitioner appears to be correct. Therefore, if the petitioner's version is found to be correct then, the entire edifice of the respondent's stand to sustain the repudiation would collapse and I would not be required to proceed any further.

14.3 However, the aforesaid conclusion is based on the principle of preponderance of probability, and therefore to answer the second poser as crystallized hereinabove, I would assume in favour of the respondent, that no oral intimation was sent, as contended by the petitioner, on 25.08.2011.

14.4 Dehors the telephonic communication, the record reveals that there is no dispute that a written communication was sent by the petitioner, on 05.08.2011. There was, according to the respondent, a delay beyond 14 days from the date of the occurrence of the incident which, occasioned the loss. The loss, admittedly, occurred on 18.08.2011. The question which has been posed is : could the respondent have rejected the petitioner's claim on this sole ground.

14.5 In my view it could not have done so in view of the fact that the claim was genuine as is borne out by its own surveyor's report, and therefore, repudiation on this ground, was contrary to the IRDA's circular dated 20.09.2011. The fact that the respondent has accepted the correctness of the surveyor's assessment of loss is borne out by following assertions made by the respondent in paragraphs 2, 8 and 19(J) of the counter affidavit. For the sake of convenience, the said averments are extracted hereinafter :-

"...2. That the report of the surveyor is a creation under Section 64 UM of the Insurance Act and until and unless it is proved in evidence that the conclusions arrived at by the

surveyor in assessing the loss are biased, arbitrary, based on non-application of mind, against records and based on imagination and wrong appreciation of facts by the surveyor, the same cannot be set aside. Therefore, the evidence has to be produced and proved on record by the petitioner to establish that the survey report is wrong and is liable to be set aside...”

“..8. ...It is submitted that the assessment of loss by the surveyor is correct..”

“....19(J). That the contents of Ground J of the petition are wrong as stated and are denied. The assessment of loss by the surveyor is correct...”

(emphasis throughout is mine)

14.6 IRDA’s circular dated 20.09.2011 clearly says that genuine claims cannot be rejected on account of delay in intimation, and that, the insurer’s decision to reject a claim must be based on “sound logic” and “valid grounds”. In fact, IRDA has advised the insurers to incorporate additional provisions in the policy documents, which would enable them to condone delay on merits where, it is proved that the delay was beyond the control of the insured. The relevant part of the circular is extracted hereafter :-

“...The Authority has been receiving several complaints that claims are being rejected on the ground of delayed submission of intimation and documents.

The current contractual obligation imposing the condition that the claims shall be intimated to the insurer with prescribed documents within a specified number of days is necessary for insurers for effecting various post claim activities like investigation, loss assessment, provisioning, claim settlement etc. However, this condition should not prevent settlement of genuine claims, particularly when there is delay in intimation or in submission of documents due to unavoidable circumstances. The insurers’ decision to reject a claim shall be based on sound logic and valid grounds. It may be noted that such limitation

clause does not work in isolation and is not absolute. One needs to see the merits and good spirit of the clause, without compromising on bad claims. Rejection of claims on purely technical grounds in a mechanical fashion will result in policy holders losing confidence in the insurance industry, giving rise to excessive litigation.

Therefore, it is advised that all insurers need to develop a sound mechanism of their own to handle such claims with utmost care and caution. It is also advised that the insurers must not repudiate such claims unless and until the reasons of delay are specifically ascertained, recorded and the insurers should satisfy themselves that the delayed claims would have otherwise been rejected even if reported in time.

The insurers are advised to incorporate additional wordings in the policy documents, suitably enunciating insurers' stand to condone delay on merit for delayed claims where the delay is proved to be for reasons beyond the control of the insured..”

14.7 In the present case, given the fact that the floods caused the damage to the subject works, which disrupted the working at the subject site, in my view, in terms of the circular, gave enough reason to condone the delay. The respondent ought to have examined the tenability of the claim on merits. The reliance by the respondents counsel on the judgment of the Commission in the case of **HDFC Egro General Insurance Co. Ltd.**, in my opinion, is misplaced as, firstly, it dealt with a loss caused on account of theft of a vehicle, and secondly, did not take into account the IRDA's circular dated 20.09.2011. The judgment of the Supreme Court in the case of **Oriental Insurance Co. Ltd. Vs. Parvesh Chander Chadha**, had also been pronounced in the context of a theft case and more importantly, prior to the issuance of the IRDA's circular dated 20.09.2011.

14.8 On the other hand, the judgment of the commission in **National Insurance Company Ltd. Vs. B. Venkataswamy** took into account the

aforementioned circular of IRDA, and gave relief even in a theft case, (as the circular makes no distinction as to the nature of the policy) on the ground that it could not reject claims, on technical grounds, like delay in intimation, as long as, the claims were genuine.

14.9 In another judgment dated 18.07.2014, passed in *Revision Petition No.2719/2014*, titled : *National Insurance Co. Ltd. Vs. Kulwant Singh*, the Commission has applied the circular and given relief to the insured. In this case, the judgment of the Supreme Court in *Parvesh Chander Chadha's* case was cited and distinguished.

15. In this context, I am reminded of the observations of the Supreme Court in *Madras Port Trust Vs. Hymanshu International, (1979) 4 SCC 176* whereby, it deprecated the practice often adopted by governmental and public authorities, of denying just claims of citizens on technical pleas, even though the claim lodged with them was otherwise well founded. In this case, the appellant before the Supreme Court took the defence of limitation under Section 110 of the Madras Port Trust Act. The relevant observations are extracted hereinbelow:

“.....2. We do not think that this is a fit case where we should proceed to determine whether the claim of the respondent was barred by Section 110 of the Madras Port Trust Act (II of 1905). The plea of limitation based on this Section is one which the court always looks upon with disfavour and it is unfortunate that a public authority like the Port Trust should, in all morality and justice, take up such a plea to defeat a just claim of the citizen. It is high time that governments and public authorities adopt the practice of not relying upon technical pleas for the purpose of defeating legitimate claims of citizens and do what is fair and just to the citizens. Of course, if a government or a public authority takes up a technical plea, the Court has to decide it and if the plea is well founded, it has to be upheld by the court, but what we feel is that such a plea should not ordinarily be taken up by a

government or a public authority, unless of course the claim is not well-founded and by reason of delay in filing it, the evidence for the purpose of resisting such a claim has become unavailable. Here, it is obvious that the claim of the appellant was a just claim supported as it was by the recommendation of the Assistant Collector of Customs and hence in the exercise of our discretion under Article 136 of the Constitution, we do not see any reason why we should proceed to hear this appeal and adjudicate upon the plea of the appellant based on Section 110 of the Madras Port Trust Act (II of 1905)....”

(emphasis is mine)

15.1 While I am conscious of the fact that the observations of the Supreme Court were made in the context of power exercised by it under Article 136 of the Constitution, the aforesaid observations are clearly applicable in the instant case as, it is not the stand of the respondent that, IRDA’s circular, is not binding upon it. [See ***K.P. Varghese vs. Income Tax Officer (1981) 4 SCC 173***]. IRDA’s circular in fact reflects the view of the court expressed 35 years ago. The stand taken is that the circular is being misread. To my mind, the said circular can be read only, in the manner, as indicated hereinabove.

16. Having regard to the above, in my view, the petitioner’s prayer for setting aside the communication dated 30.09.2013 has to be accepted. Accordingly, communication dated 30.09.2013 issued by the respondent is quashed and set aside.

17. There are three other reliefs prayed for by the petitioner. These being:

“..B. Quash and set aside the Surveyor’s Report dated 31.05.2013.

C. Direct the Respondent to allow the insurance claim of the petitioner for the amount of Rs.22,37,506.50.

D. Direct the Respondent to pay interest on the amount of

Rs.22,37,506.50 calculable at the rate of 18% payable from a just and convenient date..”

17.1 According to me, these prayers cannot be granted at this juncture as the respondent has not examined the claim on merits. At least, that aspect is not reflected in the respondent’s impugned communication dated 30.09.2013. I must, however, record herein that in the counter affidavit, as indicated above, the respondent has taken the stand, that the surveyor’s report, is correct. For several reasons, this assertion, presently appears to me, to be founded, on very shaky ground. I say so with some trepidation as I do not wish to give a final view in the matter.

17.2 I may briefly point out the reason why this is so, according to me : the NHPC report clearly adverts to the damage caused qua several layers which were above the water, at the RDs, referred to in the report. The surveyor, while relying upon the NHPC report, has given no reason whatsoever as to why it has chosen to limit the liability of the respondent only to the first and second layers, found above water. There is no reference to any limitation clause; that is, if, there is one, incorporated in the policy. The respondent in its counter affidavit has also not referred to any limitation clause appearing in the policy.

18. The respondent, in my view, therefore, would have to revisit the issue and carry out a fresh determination of the loss, keeping in mind the material available to it, which would include not only the surveyor’s report but also the NHPC report.

18.1 Thus, in respect of the other reliefs sought for by the petitioner, the matter is remanded to the respondent to carry out the exercise, with regard to ascertainment of the loss. The respondent will return its finding within four weeks from today. In the event respondent requires any further material to

ascertain the loss and / or damage caused, it will issue necessary written intimation to the petitioner, in that behalf. The respondent, should also be aware of the fact that the petitioner has already put it to notice, that it would be claiming interest, on delayed payment of its claim lodged with it.

19. The petition is thus allowed and disposed of in the aforesaid terms.

**RAJIV SHAKDHER, J**

**MAY 08, 2015**

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