

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

**APPEAL NO.122 OF 2016
IN
SUIT NO.2716 OF 1986**

M/s. Oriental Fire & General Insurance
Co. Limited

A Public Limited Company incorporated
under the Provisions of the Companies Act,
doing business of Insurance and having its
Divisional Office No.4 at Gresham Assurance
House, 2nd Floor, Sir P. M. Road, Mumbai.

... Appellant

V/s.

1. M/s. Haldyn Glass Works Private Limited
A private limited company incorporated under
the Companies Act, doing business as
manufacturers and Dealers of glass bottles and
other glass products and having its registered
office at : Off Western Express Highway,
Goregaon (East), Mumbai 400063.

2. Maharashtra State Financial Corporation
A body corporate incorporated under the
State Financial Corporation Act, 1951 having
its office at United India Building, Sir P.M. Road,
Mumbai 400001.

3. Industrial Development Bank of India
Nariman Point, Nariman House,
Mumbai 400021.

4. State Bank of India
Commercial Branch, a bank constituted under
the State Bank of India Act, 1955,
Having its branch at Bank Street,
Mumbai 400023.

... Respondents

**WITH
NOTICE OF MOTION NO.1027 OF 2018
IN
APPEAL NO.122 OF 2016**

Mr. Rushabh Vidyarthi, Counsel S. S. Vidyarthi and Ms. Ishita Bhole, Mr. Shasvat Vidyarthi, Mr. Mohit Turakhia, Mr. Chittesh Dalmia i/by Mr. Asim Vidyarthi for the Appellant.

Mr. Zubin Behramkamdin, Senior Counsel a/w Ms. Sneha Jaisingh, Ms. Tanya Chaudhary and Mr. Akshay Ayush i/by Bharucha & Partners for Respondent No.1.

Mr. Chetan Akerkar for Respondent No.3.

Mr. Shailesh Hande, Manager, IDBI Bank is present.

**CORAM : DEVENDRA KUMAR UPADHYAYA, CJ. &
ARIF S. DOCTOR, J.**

DATE : 30th OCTOBER 2023

JUDGEMENT : (PER ARIF S. DOCTOR, J.)

1. The present Appeal assails the judgement and decree dated 16th April 2014 passed by a Learned Single Judge of this Court in the captioned Suit ("*the Suit*"). The Appellant is Defendant No.1 in the Suit and the real contesting Party. Respondent No.1 is the Plaintiff in the Suit and Respondent

Nos.2, 3 and 4 are Defendant Nos.2, 3 and 4 in the Suit respectively. By the Impugned Judgement, the Learned Single Judge has not only decreed the Suit, but has also granted actual costs to the Respondent No.1 ("*the Respondent*").

2. Before dealing with the rival contentions, it will be useful to briefly set out the background of the facts, which gave rise to the filing of the Suit. The same are as follows, viz.

- i. The Appellant is a general insurance company providing insurance and various allied services. The Respondent is a manufacturer of glass products who at the relevant time i.e. in the year 1983 had approximately 1000 employees working in the Respondent's factory from where the glass manufacturing activities were being carried out. The Appellant had at the relevant time issued Eight Fire Insurance Policies (FIPs) and Two Consequential Loss Policies (CLPs) to the Respondent. The FIPs indemnified the Respondent against loss or damage to the properties of the Respondent. It is not in dispute that the FIPs had a

fire, riots, strikes and malicious damage endorsement by which the Respondent was also indemnified from loss occasioned. Equally it is not in dispute that condition 5 of the riot and strike damage endorsement did not cover any loss occasioned from mere cessation of work. The CLPs indemnified the Respondent against consequential loss caused to the Respondent *inter alia* including loss on account of reduction in turnover etc. *inter alia* due to fire, riots, strikes and malicious damage.

- ii. On account of labour unrest at the Respondent's factory between 8th January 1984 to 28th February 1985 the Respondent's workers by the various acts caused damage to *inter alia* the finished, and semi-finished bottles as also damaged the *lehr* belt. These incidents and damage caused was reported by the Respondent to the police authorities. On account of the acts of the workmen the Respondent suffered damage *inter alia* not only to its manufacturing unit and finished and semi-finished goods, but also resulted in a reduced turnover.

- iii. It was thus that the Respondent made claims under both the said policies. The claim under the FIPs was for the material damage caused on account of damage caused by the workmen and the claim under the CLPs was for the consequential loss caused on account of the reduction of the Respondent's turnover.
- iv. The Appellant however by its letter dated 15th February 1985 repudiated the claim of the Respondent under the CLPs before the appointment of a Surveyor, on the ground that the loss was not covered under the CLPs. It was thus that the Respondent filed the Suit claiming wrongful repudiation under the CLPs and making a claim for the consequential loss suffered on account of the reduction of turnover of the Respondent.
- v. It was thus that the Suit was filed by the Appellant.

SUBMISSIONS OF MR. VIDYARTHI ON BEHALF OF THE APPELLANT.

3. At the outset, Mr. Vidyarthi submitted that what had occasioned at the Respondent's factory between 8th January 1984 to 28th February 1985 was not a declared riot and/or strike but was merely a cessation of work on account of labour unrest. He invited our attention to condition 5 of riot and strike damage endorsement to point out that cessation of work was specifically not covered under the terms thereof. Basis this, he submitted that since the claim made by the Respondent did not fall within the scope of the CLPs, the Appellant had every right to reject the same outright without appointing a Surveyor. Mr. Vidyarthi then placed reliance upon a judgement of a Division Bench of this Hon'ble Court in the case of ***Century Textiles and Industries Ltd. Vs. Oriental Fire and General Insurance Co. Ltd. and Others***¹ to submit that this Court had also held that any loss occasioned on account of mere cessation of work would not render the Insurance Company liable. Basis this, he submitted that the claim of the Respondent under the CLPs were correctly rejected by the Appellant.

¹ 2011 (1) Mh.L.J. 540

4. Mr. Vidyarthi then submitted that interpretation of the terms of the policy would squarely lie within the purview of the Insurer. He submitted that since on a plain reading of the terms of the CLPs it was clear to the Appellant that the claim of the Respondent was untenable since it was covered by the exemption clause, there was no occasion for the Appellant to appoint a Surveyor. He therefore submitted that the entire criticism attributed to the Appellant in the Impugned Judgement in repudiating the claim under the CLPs before appointing a Surveyor was entirely unfounded. He then placed reliance upon the judgement of the Hon'ble Supreme Court in the case of ***Galada Power and Telecommunication Limited Vs. United India Insurance Company Limited and Another***² to submit that had the Appellant appointed a Surveyor, the same would have amounted to a waiver of the Appellant's right to repudiate the claim. Basis this, he submitted that the Learned Single Judge had gravely erred in holding that the Appellant had prejudged the issue as regarding excluding the Respondent's

² (2016) 14 SCC 161

claim and had committed an error by directing the Surveyor not to assess the Respondent's claim under the CLPs.

5. Mr. Vidyarthi then, without prejudice to his contention that the claim under the CLPs was not tenable in view of the same being covered by the exemption clause, submitted that the loss and/or damage caused by the agitating workmen were at the highest only stray acts of vandalism. He placed reliance upon a judgement of the House of Lords in the case of ***London and Manchester Plate Glass Company Limited Vs. Heath***³ to submit that such stray acts of vandalism could not be construed as a riot and thus would not be covered under the CLPs. Basis this, he submitted that the Appellant's repudiation of the claim under the CLPs was absolutely justified.

6. Mr. Vidyarthi then, insofar as the claims made under the FIPs were concerned, submitted that the Appellant had appointed a Surveyor, namely M/s. C. P. Mehta & Company ('Surveyor') as per the scheme of Section 64-UM of the

³ (1913) 3 K.B. 411

Insurance Act, 1938. He pointed out that the Respondent had filed the said Suit even before the Survey Report could be obtained. He submitted that the final Survey Report was dated 18th July 1991, whereas the said Suit was filed in the year 1986. He submitted that a perusal of the Survey Report indicated that the Surveyor had categorically observed that the loss had not been caused on account of malicious damage. He then submitted that it was well settled that a Survey Report should ordinarily form the basis of the claim settlement. In support of his contention, he placed reliance upon the following judgements: -

(i) New India Assurance Company Limited Vs. Pradeep Kumar⁴

(ii) Khatema Fibres Ltd. Vs. New India Assurance Co. Limited and Another⁵

(iii) National Insurance Co. Ltd. Vs. Hareshwar Enterprises (P) Ltd.⁶

He pointed out that it was the usual practice to accept the Survey Report unless there was some element of illegality

⁴ Judgement dated 09/04/2009 in Civil Appeal No.3253 of 2002

⁵ 2021 SCC Online SC 81

⁶ 2021 SCC Online SC 628

involved. He submitted that this was in conformity with the general practice, followed by insurance companies as had recently been held by the Hon'ble Supreme Court in the case of ***New India Assurance Company Vs. M/s. Luxra Enterprises***⁷. He submitted that in the facts of the present case the Respondent filed the Suit without even waiting for the Survey Report.

7. Mr. Vidyarthi then submitted that another aspect which rendered that the Appellant was not liable under both the policies, was the fact that the Respondent had committed a breach of warranty. He submitted that the Respondent had been permitted to erect a monsoon protection shed only from 15th May 1983 to 31st October 1983 which the Respondent had undertaken to demolish on or before 31st October 1983. He pointed out that the Respondent had not demolished the monsoon shed, despite undertaking to do so, thus committing a breach of warranty. He pointed out that the Surveyor had in his Affidavit of Evidence specifically deposed this fact. He pointed

⁷ (2019) 6 SCC 36

out that the aspect of breach of warranty had neither been dealt with by the Respondent or the Learned Single Judge. He therefore submitted that given the breach of warranty by the Respondent, no claim, whether for material loss or otherwise, could be considered and hence the claims under both policies were required to be repudiated on this ground alone. In support of his contention that a breach of warranty in a contract of insurance is fatal to a claim whether material to the cause of loss or otherwise, placed reliance upon a judgement of the House of Lords in the case of ***Newcastle Fire Insurance Co. Vs. MaCMorran and Co.***⁸ as also a judgement of the Hon'ble Supreme Court in the case of ***Hind Offshore Pvt. Ltd. Vs. IffcoTokio General Insurance Co. Ltd.***⁹. Mr. Vidyarthi however fairly submitted that the Appellant became aware of the breach of warranty only on submission of the Surveyor's Report and had not repudiated the claim on this ground since the captioned Suit had been filed prior to submission of the final Survey Report.

8 (1815) III Dow. 1057

9 Civil Appeal No.7228 of 2015

8. Mr. Vidyarthi then submitted that the Learned Single Judge had granted actual costs which was impermissible and contrary to the then existing regime for granting costs as per the Bombay High Court Rules, 1980. Mr. Vidyarthi pointed out that the Learned Single Judge had in fact noticed the ceiling for granting costs as provided for in the Bombay High Court (Original Side) Rules, 1980, but proceeded to grant actual costs placing reliance upon Section 35 of the Code of Civil Procedure, 1908 ("*CPC*") which according to him was impermissible since in cases of conflict between the Bombay High Court (Original Side) Rules and the CPC the provisions of the Bombay High Court (Original Side) Rules would apply. In support of his contention, he placed reliance upon a judgement of this Court in the case of ***Saga Department Stores Limited Vs. Falak Home Developers Pvt. Limited***¹⁰

9. Mr. Vidyarthi also submitted that the Learned Single Judge in the Impugned Judgement had made specific reference to the judgement of the Hon'ble Supreme Court in the case of

¹⁰ (2008) 6 Bom CR 59

Vinod Seth Vs. Devinder Bajaj and Another¹¹ wherein the Hon'ble Supreme Court had set aside a judgement of the High Court granting exorbitant costs and had held in paragraph 45 thereof that there was no mechanism (then existing) so as to levy actual/realistic costs. He submitted that despite referring this judgement, the Learned Single Judge had proceeded to grant actual/realistic costs which was in the teeth of the law laid down by the Hon'ble Supreme Court.

10. Basis the above, he submitted that the present Appeal deserved to be allowed and the Impugned Judgement be set aside.

SUBMISSIONS OF MR. BEHRAMKAMDIN ON BEHALF OF RESPONDENT NO.1

11. Mr. Behramkamdin at the very outset submitted that the entire basis of the Appellant's challenge was totally untenable and misconceived. He pointed out that the Respondent's claim was squarely covered under the Malicious

¹¹ (2010) 8 SCC 1

Damage Endorsement and the Riot and Strike Endorsement
which reads thus;

"In consideration of the payment of the aftermentioned additional premium it is hereby agreed and declared that the term "damage" as defined under the Riot and Strike Damage Endorsement of this Policy shall extend to include MALICIOUS DAMAGE which for the purpose of this extension shall mean:-

Destruction or damage directly caused by the malicious act but excluding any omission of any kind of any person (whether or not such act is committed in the course of a disturbance of the public peace) not being an act amounting to or committed in connection with an occurrence mentioned in Special Conditions 6 of the Riot and Strike Damage Endorsement of this Policy."

AND

"In consideration of the payment of Rs..... the aftermentioned premium it is hereby agreed and declared that notwithstanding anything in th within written Policy contained to the contrary the term Damage as defined in this Policy shall extend to include Riot and Strike damage which for the purpose of this endorsement shall mean (subject always to the Special Conditions hereinafter contained).

Destruction or damage directly caused by:-

(1) The act of any person taking part together with others in any disturbance of the public peace (whether in connection with a strike or lock-out or not) not being an occurrence mentioned in Condition 6 of the Special Condition hereof.

(2) The action of any lawfully constituted authority in suppressing or attempting to suppress any such disturbance or in minimising the consequences of any such disturbance.

(3) The wilful act of any striker or locked-out worker done in furtherance of a strike or in resistance of a lock out resulting in visible

*physical damage by external violent means.
(4) The action of any lawfully constituted Authority in preventing or attempting to prevent any such act or in minimising the consequences of any such act."*

He invited our attention to the CLPs and pointed out that the same specifically indemnified the Respondent against consequential loss from *inter alia* fire, riots, strikes and malicious damage. Mr. Behramkamdin then submitted that the Respondent had led extensive evidence in support of the fact that it had suffered damage on account of the malicious acts of the workmen. Basis this, he submitted that the Respondent's claim fell squarely within the CLPs and the repudiation of the same was *ex facie* wrong and contrary to the express terms of the policies.

12. Mr. Behramkamdin then placing reliance upon a judgement of the Hon'ble Supreme Court in the case of ***Venkatesh Construction Company Vs. Karnataka Vidyuth Karkhane Limited***¹² submitted that it was well settled that the Appellate Court would not interfere with the findings of the Trial

¹² (2016) 4 SCC 119

Court unless the findings recorded by the Trial Court were erroneous or the Trial Court had ignored the evidence on record. He submitted that in the facts of the present case, the Respondent had led ample evidence to show both the material damage as also the consequential loss occasioned on account of the malicious acts of the workmen of the Respondent. He also placed reliance upon a judgement of this Hon'ble Court in the case of ***Shekoji Bhimrao and Others Vs. Motiram Maruti Maratha and Others***¹³ to submit that the Appellate Court has to be more careful in reversing the judgement of the Trial Court especially when the evidence led by the parties has been accepted by the Trial Court. He submitted that the First Appellate Court would not draw any inference directly opposite to that of the Trial Court in the absence of perverse appreciation of evidence on the part of the Trial Court.

13. In dealing with the Appellant's contention that appointing a Surveyor under the CLPs would have prejudiced the Appellant, he submitted that such a contention was entirely

¹³ 2007 (1) Mh.L.J. 747

misplaced and legally untenable. He submitted that the Appellant could have appointed a Surveyor expressly stating that the same was being without prejudice to the Appellant's right to reject the claim. He pointed out that the said Survey Report in fact made explicit that the same was without prejudice to the Appellant's rights and was subject to the terms, conditions and warranties of the policies issued to the Respondent. Basis this, he submitted that the Appellant's contention that appointing a Surveyor would amount to a waiver of the Appellant's right to repudiate the claim was entirely untenable and that the Appellant's reliance upon the judgement of the Hon'ble Supreme Court in the case of ***Galada Power and Telecommunication Limited*** (supra) was entirely misplaced.

14. Mr. Behramkamdin, submitted that the Appellant's contention that the Respondent's claim was not payable since there was no declared riot but only a cessation of work on account of labour unrest, which was not covered under the CLPs, was factually incorrect and entirely devoid of merit. *First,*

he pointed out that the Appellant had not even taken this plea in the written statement and therefore no issue on this aspect had been framed. He submitted that it was well settled that a contention that was not taken before the Trial Court could not be raised for the first time in Appeal. In support of his contention, he placed reliance upon a judgement of the Hon'ble Supreme Court in the case of ***Karpagathachi and Others Vs. Nagarathinathachi***¹⁴ and ***B. Leelavathi Vs. Honnamma and Another***¹⁵. *Second*, he pointed out that in the facts of the present case the Industrial Court had infact held that the strike of the Respondent's workmen was an illegal strike and that the workmen had resorted to acts of violence which caused damage to the property of the Respondent. He reiterated that the Respondent had led ample evidence to demonstrate the damage caused on account of the various malicious acts of the workmen. Basis this, he submitted that it was not open for the Appellant to contend that the damage caused to the Respondent's property was on account of cessation of work and not by the malicious acts of the workmen.

14 (1965) 3 SCR 335

15 (2005) 11 SCC 115

15. He submitted that the Appellant's reliance upon the judgement of the Hon'ble Supreme Court in the case of ***Century Textiles and Industries Ltd.*** (supra) was also entirely misplaced since the claim in the case of ***Century Textiles and Industries Ltd.*** (supra) was purely on account of cessation of work/strike by the workmen and not for reduction in turnover, which was caused as a direct consequence of the damage occasioned by the malicious acts of the workmen. It was in these circumstances that he submitted that condition 5 of the riot and strike damage endorsement, would not be applicable to the facts of the present case.

16. Mr. Behramkamdin then distinguished the judgement of the House of Lords in the case of ***London and Manchester Plate Glass Company Limited*** (supra) by pointing out that in the facts of the said case the insurance was related to property damage caused by civil commotion or rioting however, the claim was rejected because the insured could not substantiate that the damage had been caused by '*civil commotion or rioting*'. He

reiterated that in the present case, the Respondent had in fact led ample evidence to demonstrate that the damage was caused solely on account of the malicious acts of the Respondent's workmen. He pointed out that this evidence had gone uncontroverted. He then submitted that it was this evidence which formed the basis of the Impugned Judgement and therefore the judgement in the case of ***London and Manchester Plate Glass Company Limited*** (supra) would be of no help to the Appellant as the same was rendered in a completely different fact scenario.

17. He then submitted that the Appellant's contention that the repudiation of the claims under the said policies were based on the recommendations of the Surveyor was patently incorrect. He pointed out that the Survey Report was published only in 1991 while the Appellant had rejected the Respondent's claim under the CLPs in the year 1986 which was well before the report of the Surveyor. He then submitted that it was well settled that a Survey Report was not conclusive, and the findings contained were not conclusively binding on either the

insurer or the insured. In support of his contention, he placed reliance upon the judgement in the case of ***New India Assurance Company Limited Vs. Pradeep Kumar***¹⁶ which *inter alia* held viz.

"22. *In other words although the assessment of loss by the approved surveyor is a prerequisite for payment or settlement of claim of twenty thousand rupees or more by insurer, but surveyor's report is not the last and final word. It is not that sacrosanct that it cannot be departed from; it is not conclusive. The approved surveyor's report may be the basis or foundation for settlement of a claim by the insurer in respect of the loss suffered by the insured but surely such report is neither binding upon the insurer nor insured."*

Basis the above, he submitted that the Appellant's reliance upon the said judgement was entirely misplaced and that the Survey Report was not binding and/or sacrosanct. He submitted that therefore an insurer who adopts a Survey Report which is slipshod always runs the risk of having the same disregarded by a competent Court/Tribunal.

18. Insofar as the Appellant's contention that the Respondent had committed breach of its warranty, he submitted

¹⁶ Judgement dated 09/04/2009 in Civil Appeal No.3253 of 2002

that this alleged breach of warranty was made known to the Appellant only by the Survey Report being furnished to the Appellant which was on 18th July 1991. He submitted that despite the fact that the Appellant had the benefit of this Survey Report they did not raise any such contention in the written statement filed before the Trial Court. He submitted that had the Appellant taken such contention, the same would have been adequately dealt with by the Respondent. He thus reiterated that the Appellant was estopped from now raising defenses which were not raised before the Trial Court.

19. Mr. Behramkamdin in dealing with the Appellant's contention on the grant of actual costs placed reliance upon Section 35 of the CPC to submit that the grant of costs was at the discretion of the Court under Section 35 to pass such an order granting actual costs. In support of his contention, he placed reliance upon the judgement of the Hon'ble Supreme Court in the case of ***Salem Advocate Bar Association, T.N. Vs. Union of India***¹⁷ and pointed out that the Hon'ble Supreme

¹⁷ (2005) 6 SCC 344

Court had by placing reliance upon Section 35(2) of the CPC held that the grant of costs was at the discretion of the Court and there was no ceiling to costs that could be applied. He submitted that the interpretation given by the Hon'ble Supreme Court must necessarily be followed since the law laid down by the Hon'ble Supreme Court was binding on all lower courts by virtue of Article 141 of the Constitution of India. He then pointed out that the judgement in the case of ***Vinod Seth*** (supra) was of no assistance to the Appellant since firstly, the same was by a two Judge Bench of the Hon'ble Supreme Court as opposed to the judgement in the case of ***Salem Advocate Bar Association, T.N.*** (supra) which was by a three Judge Bench and secondly, the same did not address the issue of costs. He pointed out that the issue in the case of ***Vinod Seth*** (supra) was as to whether a Court can issue an order *inter alia* directing a Plaintiff to sign an undertaking to pay damages to the Defendant in the event a Suit filed by such Plaintiff is unsuccessful. He therefore submitted that the findings in the case of ***Vinod Seth*** (supra) were wholly immaterial to the present case.

20. Mr. Behramkamdin then submitted that the judgement of this Court in the case of ***Saga Department Stores Limited*** (supra) was also misplaced in view of the judgement of the Hon'ble Supreme Court in the case of ***Salem Advocate Bar Association, T.N.*** (supra) and that the Learned Single Judge was thus bound by the law laid down in ***Salem Advocate Bar Association, T.N.*** (supra). Basis the above, he submitted that the Appeal must be dismissed.

21. We have heard learned counsel for the parties and have considered the rival submissions made as also the case laws relied upon by respective counsel. At the outset, we must note that the submissions made by the learned counsel for the Appellant were essentially twofold (a) the claim under the CLPs was not payable and (b) the order granting actual costs was impermissible. We shall first deal with whether the claim under the CLPs was not payable.

- i. Firstly, we must note that the entire thrust of the Appellant's contention that the claim under the CLPs was not payable was premised upon the fact that there was no declared strike and/or riot at the Respondent's factory, but merely a cessation of work which was specifically excluded under condition 5 of the riot and strike damage endorsement. However, we must note that such a plea was never even raised before the Learned Single Judge nor taken in the written statement filed by the Appellant. Thus, the Appellant cannot now raise such a plea for the first time in the Appeal. We find that the Respondent's reliance upon the judgements of the Hon'ble Supreme Court in the case of ***Karpagathachi and Others*** (supra), ***B. Leelavathi*** (supra) and ***Venkatesh Construction Company*** (supra) will squarely apply.

- ii. Secondly, we find that the Appellant's reliance upon the judgement in the case of ***Century Textiles and Industries Ltd.*** (supra) is entirely misplaced and inapplicable to the facts of the present case. The claim in the case of ***Century Textiles and Industries Ltd.*** (supra) arose on account of a cessation of work, whereas in the present case the claim arose from the strike and/or malicious damage caused by the acts of the Respondent's workmen. Thus, in the present case the claim made under the CLPs was on account of reduction in turnover on account of these various malicious acts of the Respondent's workmen. The CLPs specifically provides for such a claim to be made in case of a reduction in turnover basis any of the grounds set out therein *inter alia* including fire, riot, strikes and malicious damage. We must also note that in the present case there is in fact a finding of the Industrial Court that the workmen of the Respondent had

gone on an illegal strike and had resorted to violence which caused damage to the property of the Respondent. Given this, there can be no manner of doubt that the claim made under the CLPs fell squarely within the terms thereof in particular the fire, riots, strikes and malicious damage extension. Condition 5 of the riot and strike damage endorsement would thus in the present case have absolutely no application.

- iii. The next submission of the Appellant that the Respondent had committed a breach of warranty also needs only to be stated to be rejected since no such plea and/or contention was ever taken in written statement and has been raised for the first time in the present Appeal. Hence the judgements in the case of ***Newcastle Fire Insurance Co.*** (supra) and ***Hind Offshore Pvt. Ltd.*** (supra) are absolutely of no assistance to the Appellant.

- iv. Also, we find the Appellant's reliance upon the judgement of the House of Lords in the case of ***London and Manchester Plate Glass Company Limited*** (supra) to be entirely misplaced and inapplicable to the facts of the present case. We must note that in the case of ***London and Manchester Plate Glass Company Limited*** (supra) the insurance claim was related to property damage caused by civil commotion or rioting which was rejected by the Court because the insured in that case could not substantiate that the damage had been caused by civil commotion or rioting. Thus, in the case of ***London and Manchester Plate Glass Company Limited*** (supra) the claim was rejected/denied because the insured failed to establish by leading evidence that the damage had infact resulted from civil commotion. In the present case however, the Respondent has led

extensive evidence which has been accepted by the Learned Single Judge which conclusively established that the damage and consequent loss caused to the Respondent on account of the various malicious acts of the Respondent's workmen. These acts consequently directly affected the turnover of the Respondent and thus were covered by the CLPs. Therefore, in the facts of the present case, the Respondent has established by leading evidence both the malicious acts of its workmen and the consequent damage caused and loss occasioned on account thereof. It is thus we find that the judgement of the House of Lords in the case of ***London and Manchester Plate Glass Company Limited*** (supra) would be of no assistance to the Appellant.

- v. We must note that in the present case, the Appellant chose to repudiate the claim of the

Respondent under the CLPs without appointing and/or awaiting the report of the Surveyor. While no doubt the Appellant could have done so in its discretion, the Respondent would have every right to challenge/impugn such a decision which is exactly what the Respondent has done in the present case. The Learned Single Judge has after examining the evidence and terms of the FIPs and CLPs, found such a repudiation to be bad in law and unjustified.

- vi. Additionally, though the Respondents have relied upon a Surveyor's Report to justify the repudiation, admittedly the Surveyor's Report is after the repudiation, and it is well settled that such Surveyor's Report is not conclusive, and the findings do not conclusively determine the merits of the claim under the policy. The Hon'ble Supreme Court has in the case of ***Pradeep Kumar*** (supra) accordingly so held. Hence, for all

these reasons, we find that the Appellant's contention that the claim under the CLPs is not payable is patently untenable and thus the Appeal to that extent must fail.

22. Insofar as the challenge to the grant of actual costs is concerned, we find merit in the contention of the learned counsel for the Appellant. Apart from the fact that the Impugned Judgement contains inherent contradictions, we find that reliance placed by the Learned Single Judge upon Section 35 of the CPC to justify the grant of actual costs is infact contrary to the scheme of the law as was then prevailing. Firstly, we must note that at the time when the Impugned Order was passed, Section 35 of the CPC provided as follows, viz.

"35. Costs.- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers.

(2) Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing."

Thus, it can be seen from the plain wording of Section 35 as it then was that costs could be granted "**Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force**". There is no doubt that at the relevant time the Bombay High Court Rules were applicable to the said Suit and Rule 606 provided thus viz.

"R. 606. Computation of Advocate's fee.-

(1) In the following matters, viz:-

- (a) Suits which are decided on merits;*
- (b) Appeals from decrees decided on merits (including preliminary decrees) other than appeals from execution proceedings,*
- (c) References under Land Acquisition Act, I of 1894 or appeals, therefrom decided on merits, the amount of Advocate's fees shall be computed on the amount or value of the subject-matter in dispute in the suit, appeal or reference at the rates specified below:-*

If the amount or value of the subject-matter in dispute does not exceed Rs. 25,000 at 8 per cent.

If such amount or value exceeds Rs. 25,000 but does not exceed Rs. 50,000, on Rs. 25,000 as above and on the remainder at 6 per cent.

If such amount or value exceeds Rs. 50,000 but does not exceed Rs. 1,00,000, on Rs. 50,000 as above and on the remainder at 4 per cent.

If such amount or value exceeds Rs. 1,00,000 but does not exceed Rs. 5,00,000, on Rs. 1,00,000 as above and on the remainder at 2 per cent.

If such amount or value exceeds Rs. 5,00,000 on Rs. 5,00,000 as above and on the remainder at 1 per cent subject to maximum of Rs. 25,000."

In view of the aforesaid it is clear that any costs granted in the Suit could not exceed the above.

23. Secondly, on a careful reading of the judgement of the Hon'ble Supreme Court in the case of ***Salem Bar Association*** (supra), we must note that the Hon'ble Supreme Court had held as follows, viz.

"37. *Judicial notice can be taken of the fact that many unscrupulous parties take advantage of the fact that either the costs are not awarded or nominal costs are awarded against the unsuccessful party. Unfortunately, it has become a practice to direct parties to bear their own costs. In a large number of cases, such an order is passed despite Section 35(2) of the Code. Such a practice also encourages the filing of frivolous suits. It also leads to the taking up of frivolous defences. Further, wherever costs are awarded, ordinarily the same are not realistic and are nominal. When Section 35(2) provides for cost to follow the event, it is implicit that the costs have to be those which are reasonably incurred by a successful party except in those cases where the court in its discretion may direct otherwise by recording reasons therefor. The costs have to be*

actual reasonable costs including the cost of the time spent by the successful party, the transportation and lodging, if any, or any other incidental costs besides the payment of the court fee, lawyer's fee, typing and other costs in relation to the litigation. It is for the High Courts to examine these aspects and wherever necessary make requisite rules, regulations or practice direction so as to provide appropriate guidelines for the subordinate courts to follow."

Thus from the above, it is clear that the Hon'ble Supreme Court in the said judgement, in any manner, does not hold that the existing rules and/or applicable laws pertaining to the grant of costs as then existing were overridden by the said judgement.

24. *Thirdly*, we must note that, although the Learned Single Judge has placed reliance upon the judgement of the Hon'ble Supreme Court in the case of ***Sanjeev Kumar Jain Vs. Raghubir Saran Charitable Trust and Others***¹⁸ to justify the grant of actual costs, by quoting paragraph 27 thereof, we must note that paragraphs 16 and 17 of the said judgment expressly held as follows, viz.

"16. Though Section 35 does not impose a ceiling on the costs that could be levied and gives discretion to the Court in the matter, it should be noted that Section 35 starts with the words "subject to such conditions and

¹⁸ (2012) 1 SCC 455

limitations as may be prescribed, and to the provisions of any law for the time being in force". Therefore, if there are any conditions or limitations prescribed in the Code or in any rules, the Court, obviously, cannot ignore them in awarding costs.

17. *Chapter 11 Part C of the Delhi High Court Rules ("the Rules", for short) deals with award of costs in civil suits. Chapter 23 of the said Rules deals with taxation of costs. Rule 1 relates to appointment of Taxing Officer. Rule 6 provides that advocate's fee should be taxed on the basis of a certificate filed under Chapter 5 Rule 2 but not exceeding the scale prescribed in the Schedule to Chapter 23. Therefore, the Court could not have awarded costs exceeding the scale that was prescribed in the Schedule to the Rules. Doing so would be contrary to the Rules. If it was contrary to the Rules, it was also contrary to Section 35 also which makes it subject to the conditions and limitations as may be prescribed and the provisions of law for the time being in force. Therefore, we are of the view that merely by seeking a consent of the parties to award litigation expenses as costs, the High Court could not have adopted the procedure of awarding what it assumed to be the "actual costs" nor could it proceed to award a sum of Rs.45,28,000/- as costs in an appeal relating to an interim order in a civil suit."*

Thus, the said judgement, after considering the relevant High Court Rules and Section 35 of the CPC, went on to hold that the Court could not have awarded costs exceeding the scale that was prescribed in the Schedule to the concerned High Court Rules. The said judgement infact held that if costs were awarded which were contrary to the Rules, then the same would be contrary to Section 35 of the CPC.

25. It is crucial to note that Section 35 of the CPC came to be amended in the year 2015 *qua* commercial disputes. The amended provision reads thus :-

"35. *Costs. - (1) In relation to any commercial dispute, the Court, notwithstanding anything contained in any other law for the time being in force or Rule, has the discretion to determine:*
(a) whether costs are payable by one party to another;
(b) the quantum of those costs; and
(c) when they are to be paid.

"

Therefore, it is clear that prior to 2015, costs could only be awarded as long as they were in conformity with the relevant rules governing the same.

26. Hence, for the aforesaid reasons, we set aside the Impugned Judgment insofar as the same grants actual costs to the Respondent. Costs shall be awarded to Respondent No.1 as per Bombay High Court (Original Side) Rules, 1980.

27. The Appeal is accordingly disposed of in the above terms.

28. In view of disposal of the Appeal, the Notice of Motion does not survive and is disposed of accordingly.

(ARIF S. DOCTOR, J.)

(CHIEF JUSTICE)