
(2005) 05 NCDRC CK 0017

In the National Consumer Disputes Redressal Commission

PRIYA BLUE INDUSTRIES LTD.

APPELLANT

Vs

NEW INDIA ASSURANCE CO. LTD.

RESPONDENT

Date of Decision : 19-05-2005

Acts Referred:

Citation : 2005 0 NCDRC 69 : 2005 3 CPJ 94

Hon'ble Judges : M.B.SHAH , RAJYALAKSHMI RAO J.

Advocate : C.S.VAIDYANATHAN , K.R.SHRIRAM , VIKAS MEHTA , INDU MALHOTRA , R.A.KAPADIA , RAHUL NARICHANIA , SUNITA DUTT , Ketki Gandhi

Judgement

1. THIS case illustrates how whole purpose of insurance coverage could be frustrated. Despite insurance coverage and receipt of large amount as premium, insurance claim is not settled on one or the other ground for years together. This attitude results in lot of harassment to the insured. This could be avoided if before giving such high value policies and accepting premium, agents or development officers or the engineers of the insurance company inspect and verify the status/condition of the articles/vessel/vehicle which is being insured. If this is done many disputes would not arise. It is true that that insurance contract is a contract of uberrima fides (utmost good faith). However, in the present day condition for such high value policies, it would be worthwhile to have pre-inspection/verification report. It is for the insurance companies to decide for the same.

2. COMPLAINANT , a company engaged in ship breaking and scrap dealers at Bhavnagar, has filed this complaint alleging deficiency in service on the part of the insurance company in unjustifiably repudiating their claim despite the clear terms of the policy. Undisputedly, the complainant has taken a marine insurance policy for hull and machinery on 4.6.1997 for the vessel "Valoo Arun" which was on its "funeral voyage". This policy was obtained by the insured after taking possession of the vessel for covering only 9 kms. distance between Alang Anchorage to Alang Ship Breaking yard. Insurance cover was for a sum of Rs.25,70,00,000/- for which the complainant paid in all Rs.1,14,280/- as

premium. As per the special condition it was "Institute Voyage Clause (Hulls) dated 1.10.1983 as attached with a specific condition "but to cover and/or Constructive Total Loss only. Including salvage charges and sue and labour and expenses". It is contended that on 9.6.1997, when vessel started its voyage, because of the rough weather it was damaged and could not be beached at the specified place. There was total loss and hence, the insurance company was informed accordingly. It is also contended that the complainant wrote repeated letters as to what action was to be taken by them with regard to the stranded vessel. There was no response from the insurance company. The complainant, in the complaint has claimed an amount of Rs.18,30,44,912/- with interest @ 19.5% p.a. from 14.6.1997 till its payment and Rs.2.5 lakhs as costs and expenses of the litigation and Rs.5 lakhs towards harassment. Surveyor's Reports: In response to the claim put forward by the insured, the insurance company appointed: (a). M/s. Trans Ocean Marine and General Survey Agencies; (b). M/s. J.B. Boda Offshore Surveyors and Adjusters Pvt. Ltd.; as surveyors, and the complainant with the acceptance and approval of the Insurance Company appointed (c). Tony Fernandez Average Adjusters Pvt. Ltd. as its surveyor. (a) M/s. Trans Ocean Marine and General Survey Agencies: On receipt of the letter, it is admitted that the insurance company appointed M/s. Trans Ocean Marine and General Survey Agencies, as the surveyors who submitted their report on 24.6.1997. They have narrated the policy details as under: "Special condition and warranties : Subject to institute voyage clauses hull dtd. 1.10.83 as attached, but to cover total and/or constructive total loss only. Including salvage charges and sue and labour and expenses. Subject to deductible of Rs.12,85,000/- each accident or occurrence in respect SC and SL claims warranted adequate crew maintained on board the vessel at all times as under : 1) One certified officer 2) Two bona fide seamen, and 3) Three watchmen The cover hereunder is for the voyage of the vessel from Alang Anchorage to Alang Ship Breaking Yard. Main Engine Generators: 2 X B+W total 40,000 BHP 1 set MTV 12V 956 TB60 1X1280 KW 2 set MTV 12V 956 TB 2 X 960 KW Plus 1 Siemens 196 Shaft Gen 1 X 1280 KW 2 MTV 12V 956 TB Coupled with pumps

3. DURING discussions it was learnt that the said vessel's one engine out of the two was not in working condition prior to its voyage from Singapore to Alang Anchorage point. From Singapore to Alang Anchorage point, voyage was carried out on one engine only. Delivery of the vessel was given to the insured at Alang Anchorage point by the seller. At the time of delivery, one engine was in out of order condition and another engine was in working condition. Beaching of the vessel was scheduled on 6.6.1997 at evening tide (around 1600 hrs.). As the second engine too failed to start on the same day, beaching was not carried out. Insured's representatives could start another engine by 9.6.1997 and beaching of the vessel was scheduled on 9.6.1997 around 1600 hrs. By 1430 hrs. on 9.6.1997, the beaching process was started under piloting of Capt. Pande of Gujarat Maritime Board. During the voyage from Alang Anchorage point to insured's ship breaking yard No.V-1, the sea condition was rough and strong sea

currents were flowing due to strong monsoon winds. During the voyage the engine started developing problems again and was not in the position to give required or designed full power to keep the course. In the circumstances, the vessel instead of coming on fixed or head on course i.e. 90 Degree perpendicular to the shore/yard line, it started drifting away from the yard and it's angle had become minus 30 to 45 Degree to the required course. Due to strong sea waves and current and poor self power the vessel drifted away towards plot No.V-5 and beyond towards plot No.115. Near plot No.V-5 and beyond, there is a coral rock structure on sea bed, which is not visible during high tide time. The vessel's keel (bottom) was collided with the rocks and vessel was grounded. All efforts to move the vessel on available power failed."

4. ON 23.6.97, we have visited the grounded site at low tide time and could walk down up to the grounded vessel which was lying partially on coral reefs and on marshy land. The approach was through receded sea water, coral reef and marshy/ quick sand. It was observed that the vessel has developed big holes in amid section due to impact with the stone/coral reefs and crack of a few feet are developed from keel to the amid section on both the side of vessel, i.e., on port and starboard side. Water was found to be entering into the vessel from these holes/cracks at high speed during high tide and used to get out during low tide. The aft section of the vessel was found deeply imbedded into soft/quick sand up to the depth of 5 feet. Both the rudders and aft sokages were found deeply imbedded inside the mud/sand. It was found that sea water was gushing out of all the developed cracks."Due to ingress of sea water inside the aft section, it has become more heavier and removing of the water is next to impossible by conventional methods. Sealing of developed cracks within available 1 hour at low tide is not possible. With all normal efforts, floating of the vessel, which is partially lying on the rock structure and is partially submerged inside the sand on aft side, is not possible.If the vessel can be brought to floating condition, pulling it with the help of ground winches or towing of it up to some distance with heavy duty tugs and then pulling it with the ground winches is possible." Remarks: A] This letter gives brief overview of our visit to grounded site of the vessel and our inspection of the same during available time and other its parafernalia. B] We can finalise our preliminary survey report after receipt of required documents as stated above. C] In our opinion, the grounded vessel cannot be re-floated with normal salvaging procedure and cannot be beached." (b) M/s. J.B. Boda Offshore Surveyors and Adjusters Pvt. Ltd.: Thereafter, the insurance company appointed M/s. J.B. Boda Offshore Surveyors and Adjusters Pvt. Ltd. who submitted their preliminary report on 14th July 1997. The relevant part is as under: "Circumstances leading to stranding of the vessel As narrated and reported to us by the following: i) Managing Director of M/s. Priya Blue Industries P. Ltd., Shri Sanjay Mehta ii) Additional Port Officer, Shipbreaking Yard, Alang, Capt. L.A. Pandey Beaching Master, Mr.Pereira had boarded the vessel at Alang Anchorage. Anchor was heaved up and the vessel "RUN" proceeded towards her beaching plot No.V-1 at Sosiya at full speed on her port engine on June 9, 1997 at 1800

hours as the starboard engine was not operational. Vessel's draft was about Forward 3 00 M and Aft 6 00 M. Weather was seasonal monsoonic with South Westerly wind blowing in gusts, rough sea and swell and strong surface current. The vessel suspected to have cracked severely at the bottom shell plating in way of Hold Nos. 5, 6 and 7 and pump room in the after part. Cause of stranding and subsequent physical damage On the basis of our survey/inspection of the vessel at the site and discussions held with Assureds and the Port Officer, Alang, the cause of loss and damage by stranding was attributed to prevailing adverse weather conditions at the time of attempted beaching of the vessel at the designated plot. Following the stranding along the after part, the vessel had sustained severe compressive tensile and torsional stresses in way of No.5 hold resulting in cracking/fracturing of the structure transversely."

Feasibility of salvage/refloating and shifting: v) The vessel has collapsed structurally in the area around the middle of the vessel and around Cargo Hold No.5. The outer bottom plate has totally collapsed and the plates have telescoped into each other by about 1½ Mtr. Severe buckling has been observed on the side shell extending upto deck level. It was also observed that the fracture has extended totally from port to starboard side. Transverse bulkhead between Cargo Holds No.4 and 5 as well as longitudinal bulkhead forming the boundary of the wing tank has collapsed in the lower region. The tank top (inner bottom) has been observed also to be buckled. In Hold No.4 the longitudinal bulkhead observed to be buckled right up to main deck level. Apparently, it is possible that there was a structural failure of the transverse bulkheads especially in the lower region as all the wing tanks aft of the No.4 Hold are tidal. vi) Due to tidal conditions and the location of the vessel, the effective time that the starboard side is dry is about two hours in spring tides. This means that welding of the outer bottom plating is not practical. Our comments and remarks for minimization of loss/claim

5. IN consideration of the status the vessel cannot be repaired, salvaged/refloated and shifted to its designated plot for breaking up/demolition, the following are possible alternatives for minimization of loss/claim 1) Cutting/demolition of vessel on "as is where is" basis at situ and in smaller sections and dragging the same to their plot site for final breaking up. 2) As above except that it would be in larger section and cut/demolished at the closest plot to the site of stranding. 3) Disposing off of the vessel on "as is where is" basis by public auction.

Conclusion: In view of various points enumerated in the foregoing, we are of the opinion that the captioned vessel cannot be repaired in its present state and location and its salvage/refloating is technically not feasible. In order to refloat the vessel by restoring the buoyancy it will be necessary to carry out extensive repairs comprising of sealing all the fractures and strengthening by welding heavy steel sections after alignment of the cracked section. In our view it is not technically feasible to undertake such extensive repairs in the present location."

Thereafter, final survey report was submitted by surveyors, J.B. Boda, on 28.7.1997 and it was observed that: "As such we would conclude that the vessel was seaworthy at the time of commencement of the beaching voyage. Vessel Power: We have been given to understand that the vessel had only one engine (port) as the starboard engine was not operational from the time of her departure from Singapore. This aspect has been clearly indicated in the Memorandum of Agreement, Addendum 2 dated June 3, 1997 (copy of Memorandum of Agreement and Addendum is attached as Annexure - D1). No doubt having additional power would definitely have helped in reducing the uncontrollable drifting of the vessel in the process of beaching. We understand that one of the main reasons for scraping the vessel was the defective starboard engine. The decision of beaching the vessel with one engine is taken by the Port Authorities. Had the Port Officer been not confident of beaching the vessel on one engine he could have requested for tug assistance which he did not feel necessary to deploy for the beaching. Estimate of Loss: At this juncture the vessel is primarily an Actual Total Loss as the vessel cannot be recovered and brought to the owner's breaking plot in one position. The vessel as of now is irretrievably stranded in its present location as described in our report of even number dated July 14, 1997."

6. WE had detailed discussions with the insureds as well as pertaining to the further course of action with respect to the three options indicated in our preliminary report and which are reproduced hereunder: 1) Cutting/demolition of vessel on "as is where is" basis in-situ and in smaller sections and dragging the same to their plot site for final breaking up. 2) As above except that it would be in larger section and cut/demolish at the closest plot to the site of stranding. 3) Disposing off of the vessel on "as is where is" basis by public auction. Based on the above, the estimate of loss can only be arrived after obtaining quotations for disposing of the vessel on "as is where is" basis by public auction. In the event the offers received are not favourable, then the cost for recovery as per option (1) and (2) requires to be monitored and certified for the fair and reasonability. Please note: There is no precedent for the above 2 options i.e. cutting the vessel on "as is where is" basis away from the actual beaching plot and in other's plot. Additional expenses incurred can only be monitored and expenses arrived at for cutting cost per ton rates can be computed periodically. Loss of irretrievable tonnage also got to be considered which is possible only on progress basis i.e. Progress of demolition. At this stage for budgetary provisions alone, we would suggest that a provision of 50% of the sum insured i.e. Rs.12,85,00,000/- be provided. This could be revised based on results of the quotations received on "as is where is" basis or breaking up of the vessel as per above mentioned No.2 option.

Conclusion: Based on the above, in our opinion we conclude that the vessel is irretrievably stranded due to a marine causality which has resulted in the vessel being deemed a Total Loss. We recommend that in order to minimize the loss the process of recovery be commenced by initiating either cutting the vessel in-situ

or by salvage sale of the vessel on "as is where is" basis. (c). Tony Fernandez Average Adjusters Pvt. Ltd.: In addition to the aforesaid two reports on record, there is a report and evidence of Tony Fernandez Average Adjusters Pvt. Ltd. This company was appointed by the complainant to report on cause, nature and extent of loss and damages. They were appointed as average adjusters and the insurance company by their letter dated 5.8.1997 have accepted and approved their appointment. The insurance company, in the said letter has stated as under: "We write in reference to above and, as informed by our Assured that you have been appointed as an Average Adjuster to adjust above claim and we confirm that we are in agreement for your appointment as an Adjuster. We shall appreciate if you give us your adjustment report in consultation with our attending surveyor M/s. J.B. Boda and Associate. We enclose herewith preliminary report and final report which is in letter form to our various queries replied by the surveyor. Thanking you, Yours faithfully, (M.M. Desai) Dy.Manager Tony Fernandez Average Adjusters Pvt. Ltd. have given a detailed report and they also filed an affidavit which is on record. As per the report, the cause of loss is as under: "Cause of the loss: The proximate and dominant cause of the vessel becoming a Total Loss, was the stranding on a rocky shoal prior to arriving at the destination. The stranding itself was due to heavy weather encountered on the "funeral" voyage to the ship-breaking yard. The stranding was accidental and fortuitous in nature. Both heavy weather and stranding are perils of the sea. The proximate cause of the loss is an insured peril, falling under Clause 4.1.1 of Institute Voyage Clauses Hulls, 1/10/83 wordings (Clause 285), which covers loss of or damage to the subject-matter caused by, "perils of the seas rivers, lakes or other navigable waters."

7. WE have satisfied ourselves that the loss was neither caused proximately nor concurrently, by any of the excluded perils listed in Section 55 of the Marine Insurance Act 1963, (MIA 1963), read in conjunction with the terms and conditions of the Policy of Insurance. We have also satisfied ourselves that the loss was not caused proximately or concurrently by perils enumerated in the Paramount Exclusions of Clauses 20, 21, 22 and 23 of the Institute Voyage Clause Hulls 1/10/83 wordings. "After Section 17 of the Marine Insurance Act, they observed that "we have come across no evidence to indicate that there was either non-disclosure of material facts, or of any misrepresentation to Underwriters by PBIL as the Proponent". To find out whether there was total loss of the ship or not, they gave the reasons as under: "The late J. Kenneth Goodacre, in his book, MARINE INSURANCE CLAIMS (Second Edition), in Chapter XXV, relating to Total Loss, quotes Sections 57 and 58 of MIA 1906, and then states on pages 660 and 662: "It will be realized that an actual total loss can occur in three ways, either from complete destruction; "loss of specie"; or when it is absolutely impossible to procure the arrival of the subject matter insured." "The leading case for distinguishing between actual and constructive total loss is Roux v. Salvador (1836)*, in which Lord Abinger is reported as saying: "The underwriter engages that the object of the assurance shall arrive in safety at its

destined termination. It in the process of the voyage, it becomes totally destroyed or annihilated, or if it is placed, by reason of the perils against which he insures, in such a position that it is wholly out of the power of the assured or the underwriter to procure its safe arrival, he is bound by the very letter of his contract to pay the sum insured". In all these or similar cases, if a prudent man, no insured, would decline any further expense in prosecuting an adventure, the termination of which will probably never be successfully accomplished, a party insured may, for his own benefit, as well as that of the underwriter, treat the case as one of a total loss, and demand the full sum insured."

*NOTE : The citation for Roux v. Salvador (1836) is "3 Bing. N.C. 266; 4 Scott 1; 2 Hodges 209 (1835) 1 Bing N.C. 526; 1 Scott 429; 1 Hodges 49" as given in "Index To Cases Cited", Page XLIX of MARINE INSURANCE CLAIMS, Second Edition." Thereafter, they finally assessed the claim under Total Loss Claim at Rs.13,69,00,000/-. Relevant part of the conclusion is as under: "The ship drifted due to heavy weather and stranded on a rocky shoal. The ship was severely damaged to such an extent that repairs and re-floating was technically impossible. The stranding was accidental and fortuitous in nature and was proximately caused by an insured peril, which is not subject to the "due diligence" proviso. The loss was not caused concurrently by any of the perils exempted in the Policy or by the Marine Insurance Act. No warranties, implied or express, were breached. The ship was port-worthy at the commencement of the risk and was seaworthy for the intended "funeral voyage". There was no change of voyage or deviation. The conduct of the Assured was not of such a nature as to attract any adverse reaction from Underwriters. We have satisfied ourselves that the Assured had acted prudently, as if not insured and had taken all steps that were reasonable, to minimize the loss, by disposing off the wreck in an "as is where is" condition, to the highest bidder. This claim is not subject to contribution or recovery under subrogation. After crediting the sale proceeds, the Policy is to respond for an amount of Rs.13,69,00,000/- (Rupees thirteen crore sixty nine lakhs only), for an Actual Total Loss. Additional claims, if any, in the nature of Sue and Labour and expense incurred for disposing the wreck, have not yet been quantified by the Assured. Such claims, to the extent that they are found fair and reasonable by Underwriter's Surveyors, would be payable over and above the sum-insured under the Sue and Labour Clause of the Policy of Insurance."

The aforesaid Survey Reports inter alia establish that: (i) insurance coverage was taken for a short voyage of the vessel from Alang Anchorage to Alang Ship Breaking Yard; (ii) the vessel came from Singapore to Alang Anchorage point and was on its funeral voyage (iii) from Singapore to Alang Anchorage point voyage was carried out on one engine only; (iv) delivery of the vessel was given to the insured at the Alang Anchorage point by the seller; (v) at the time of the delivery one engine was functioning and was in working condition. The other engine was out of order. (vi) beaching of the vessel was scheduled on 6.6.1997 at the evening tide time; (vii) as the engine failed to start, beaching was not carried

out; (viii) thereafter, beaching was scheduled on 9.6.1997; (ix) during the voyage, the sea condition was rough and strong sea currents were flowing due to strong monsoon winds; (x) the vessel started drifting away from the yard, and drifted towards a different point; (xi) Near Plot No.V-5 (resting place) and beyond there was a coral rock structure on sea bed which was not visible during the high tide time. The vessel's bottom collided with rocks and the vessel was grounded and all efforts to move the vessel on available power failed. (xii) the vessel was thereafter, badly damaged and was found deeply imbedded to the depth of 5 ft. (xiii) it has developed holes and cracks; (xiv) with all normal efforts floating of the vessel was not possible because it was partially lying on the rock structure and partially submerged in sand; and (xv) the grounded vessel could not be re-floated with the normal salvaging procedure and could not be beached. In addition, in the report of J.B.Boda Offshore Surveyors and Adjusters Pvt. Ltd. it is stated that: (i) the ship sustained severe comprehensive tensile and torsional stresses in hold resulting in breaking/fracturing of the structure transversely way off No.5 due to prevailing adverse weather conditions. The vessel was sea-worthy at the time of commencement of the voyage and technically not feasible to repair it; (ii) the vessel cannot be repaired, salvaged, refloated and shifted to its designated plot for breaking up; (iii) It is a "total loss" because it was irretrievably stranded - it was concluded that the vessel was irretrievably stranded due to marine casualty which has resulted for the vessel being deemed a total loss, and (iv) To mitigate the loss, the ship may either be cut at the site or the salvage may be sold on as is where is basis. Further, Tony Fernandez Average Adjusters Pvt. Ltd. additionally stated that: (a). (i). Stranding was accidental and the proximate and dominant cause is covered under insured peril; (ii). there is no evidence with regard to non-disclosure of material fact nor misrepresentation; (iii). there was no change of voyage or deviation; (iv). the assured was prudent and had taken all the steps in mitigating the loss; (b) The proximate and dominant cause of vessel becoming a total loss was stranding on the rocky shoal prior to arriving at the destination. This was due to heavy weather encountered on the "funeral" voyage to the ship-breaking yard. The stranding was accidental and a fortuitous in nature and was proximately caused by an insured peril. (c) The assured had acted prudently as if not insured and had taken all steps that were reasonable to minimise the loss by disposing of the wreck in as-is-where-is condition to the highest bidder. It was, further, recommended that after crediting the sale proceeds the policy is to respond for an amount of Rs.13,69,00,000/- for actual total loss. Findings: Despite the aforesaid three survey reports the claim was repudiated by the Insurance Company. Undisputedly, the insurance coverage was taken for funeral voyage for a short distance. After taking the possession of the vessel at anchorage the distance which was required to be covered was only 9 kms. where the vessel was to be broken. As found above by the surveyors, the vessel was badly damaged due to rough weather and strong winds and has collided with coral rock structure which was not visible during the high tide. All efforts to move the vessel failed. Surveyors have stated that there was a total loss and grounded vessel cannot be refloated with normal salvaging procedure

and cannot be beached. Port Officer has also stated that that damage by stranding was attributable to the prevailing adverse weather conditions at the time of attempting to beach the vessel at the designated plot. Therefore, there was no justifiable ground for repudiating the claim.

However, the learned counsel appearing on behalf of the opposite party submitted that: I. No deficiency: The complaint is not maintainable as there is no deficiency of service on the part of the insurance company as (i) surveyors and loss assessors were appointed immediately; (ii) meetings were held with the complainants on several occasions; (iii) addressed various letters to the complainant explaining the position of the insurance company. The complaint under the Consumer Protection Act is not maintainable, as the opposite party had complied with its obligations under the insurance policy. In our view, this submission is devoid of any substance mainly because mere appointment of surveyors or writing letters would not be sufficient for discharging the liability by the insurance company. Secondly, application of mind, as contended by the opposite party only in one direction of not paying the amount due and payable is also deficiency in service. Therefore, this contention does not require any further deliberations. Admittedly, insurance coverage was given for a short journey on 4.6.1997 after charging a premium of Rs. 1,14,280/- and if there is total loss the insurance company is bound to discharge its contractual obligations and reimburse the insured. Otherwise, the whole purpose of obtaining insurance coverage is frustrated. Not doing so is deficiency in service. II. Total and/or constructive total loss: The learned Senior Counsel Mr. Kapadia appearing for the insurance company submitted that the insurance policy was for "total and/or constructive total loss only". It is the contention of the insurance company that total loss and constructive loss are defined under Sections 57 and 60 of the Marine Insurance Act, 1963 and in this case it cannot be said that there was a total loss as the insured has recovered more than Rs.13.00 cores by sale of the vessel. Actual total loss is defined in Section 57 as under: "57. Actual total loss." (1) Where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss. (2) In the case of an actual total loss no notice of abandonment need be given". Similarly, constructive total loss is defined as under: "60. Constructive total loss defined." Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred. (2) in particular, there is a constructive total loss" (i) where the assured is deprived of the possession of his ship or goods by a peril insured against, and (a) it is unlikely that he can recover the ship or goods, as the case may be, or (b) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered; or (ii) in the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the

damage would exceed the value of the ship when repaired; In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable, if repaired; or (iii) in the case of damage to goods, where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival." From a bare reading of the aforesaid Section 57(1), it is apparent that in the present case there was actual total loss of the vessel to the complainant because the complainant could not bring the vessel to the destined point for its breaking. The whole purpose of ship breaking at the plot allotted to the complainant is frustrated. Therefore, it can be held that the assured was irretrievably deprived of the vessel for its breaking purpose. Learned counsel for the opposite party relied upon some statements made by the witnesses to the effect that the vessel was brought only for the purpose of breaking. In our view, it is not necessary to reproduce the said questions and answers as it is undisputed that the vessel was brought for the purpose of breaking. But that purpose is frustrated because of sea peril and, therefore, there is actual total loss of the vessel to the complainant. This is admitted by the witness of the opposite party, Shri N.B. Menon by stating that "at this juncture the vessel is primarily on Actual Total Loss as the vessel cannot be recovered and brought to the owner's breaking plot in one portion. The vessel as of now is irretrievably stranded in its present location as described in our report of even No. dated July 14, 1997". Similar are the reports of the aforesaid surveyors and they have stated that it was not possible to refloat the vessel. Hence, it would not be necessary to discuss any further on this aspect.

12. In support of the contention that there was actual total loss, learned counsel for the complainant referred to the decision rendered in the case of *Akooji Jadwat Pvt. Ltd. vs. Oriental Fire and General Insurance Co. Ltd. and Ors.* [AIR 1972 CALCUTTA 228] wherein after elaborate discussion the Court held: "81. A loss, under the law of Marine Insurance, is either partial or total. A total loss is either constructive or actual. An actual total loss of the subject-matter of assurance by reason of the perils insured against occurs in three different situations; (1) Where the res is totally destroyed or is wholly annihilated; (2) Where the res ceases to remain in its original condition; and (3) Though the res is not destroyed it remains in specie but, it is irretrievably lost to the assured.

13. And even where the assured has not abandoned her to the under-writer but by the subsequent turn of events she becomes an actual total loss, during the currency of the policy, by the perils insured against the under-writer must pay her value in terms of the policy to the assured and no abandonment is required from him because there nothing remains to be abandoned for the benefit of the under-writer. In (1836) 43 RR 638 at pp.643-644 of the report Lord Abinger laid down the law relating to the actual total loss in the following terms: "If the goods once damaged by the perils of the sea, and necessarily landed before the

termination of the voyage, are, by reason of that damage, in such a state though the species be not utterly destroyed that they cannot with safety be reshipped into the same or any other vessel; if it be certain that, before the termination of the original voyage, the species itself would disappear, and the goods assume a new form, losing all their original character; if, though imperishable, they are in the hands of strangers not under the control of the assured; if by any circumstances over which he has no control they can never, or within no assignable period, be brought to their original destination; if any of these cases, the circumstance of their existing in specie at that forced termination of the risk, is of no importance. The loss is, in its nature, total to him who has no means of recovering his goods whether his inability arises from their annihilation or from any other insuperable obstacle".

Again at page 649 of the report the learned Law Lord said: "The underwriter engages that the object of the assurance shall arrive in safety at its destined termination. If, in the progress of the voyage, it becomes totally destroyed or annihilated, or if it be placed, by reason of the perils against which he insures, in such a position, that it is wholly out of the power of the assured or of the underwriter to procure its arrival he is bound by the very letter of his contract to pay the sum insured".

14. The above statements of law were no doubt made in relation to the insured cargoes but they are equally applicable to the insured ships. Dr. Arnould in Art. 1048 at page 1025 under the heading "What amounts to actual total loss" summarises the law laid down by Lord Abinger and the material portion of it is set out below: "If, in the progress of the voyage, the thing insured becomes totally destroyed or annihilated, or if it be placed by the perils insured against in such a position that it is totally out of the power of the assured or the underwriter to procure its arrival, the latter is bound, by the very letter of his contract to pay the sum insured.

15. The great principle, therefore, on which all the cases of actual total loss depend appears to be this: the impossibility, owing to the perils insured against, of ever procuring the arrival of the thing insured. If, by reason of those perils, the assured is permanently and irretrievably deprived not only of all present possession and control over it, but of all hope or possibility of ever ultimately recovering possession of, or further prosecuting the adventure upon it, that is a case of actual total loss, independently of the election of the assured to treat it as such. Notice of abandonment would in such case be a mere idle formality because nothing remains to be abandoned. 16. The law relating to constructive total loss, was altered to the disadvantages of the assured by the Act but the law relating to the actual total loss remains the same. An actual total loss is not a pure question of law. The loss must be actual and the actual loss must be a total loss. An actual total loss does not depend on the treatment, volition or election of the assured whereas the foundation of the constructive total loss is the election of the assured. In actual total loss a total destruction of the insured ship must be

proved as a fact. Her conversion into a completely different thing is also a pure question of fact. And every irretrievable deprivation of the ship stands on the same footing. And here there is no scope for applying any subjective test. And all facts, subsequent to an actual total loss are wholly irrelevant for the purpose of determining the rights of the assured and the liabilities of the insurer because once there is an actual total loss it is actual total loss for all time to come under the law of Marine Insurance and it does (not) matter in the least whether the assured or the underwriter have any knowledge of the actual total loss nor their futile attempt to procure her arrival can alter its legal consequence. 17. According to Dr. Arnould: "Every effective deprivation of the spes recuperandi amounts to an actual total loss: if the thing insured be in the hands of the strangers, not under the control of the assured; if, by any circumstances over which he has not control, it can never, or within no assignable period be brought to its original destination, in such cases the fact of its remaining in specie at any forced termination of the risk is of no importance. The loss is in its nature total to him who has no means of recovering his property, whether his inability arises from its annihilation or from any other insuperable obstacle". (See Art.1052 at pp.1028-9. In the present case also it is apparent that the vessel which was brought for the sole purpose of breaking is lost to the Complainant. He could not bring it to the destined point because of the sea peril. As stated by the surveyors it was impossible for the Complainant to refloat the vessel for bringing it to the destined point for the purpose for which it was purchased. The assured was, therefore, permanently and irretrievably deprived of the possession and control over it and also deprived of all hope or possibility of ever ultimately recovering possession of, or further prosecuting the adventure upon it, namely, its breaking, and, therefore, this is a case of actual total loss. The position would not be changed even on receipt of the salvage value by selling the vessel on as-is-where-is-basis. It is on the principle of minimising the loss as insisted by the Insurance Companies. Hence, there is no substance in this contention also.

III. Non-disclosure: 18. The learned Counsel Mr. Kapadia for the insurance company submitted that the complainant has committed utmost breach of principles of good faith as: (i) The Complainants submitted a MOA to the Opposite Party which stated that the vessel was fitted with 2 engines of total 40,000 BHP, (2 engines x 20,000 BHP = 40,000 BHP). Thus the representation contained in the MOA was that there were 2 engines with a total power of 40,000 BHP. (ii) The proposal letter dated 4.5.97 stated that the vessel would be beached on her own power. It was absolutely meant and represented that the power was 40,000 BHP. (iii) Relying on the representation in the MOA, the Opposite Party issued the insurance policy covering the vessel to be beached on her own power. (iv) As it now transpires that one engine of the vessel (starboard side engine) was not working, thus the power of the vessel was reduced by half from 40,000 BHP to 20,000 BHP (the vessel however turned out to be admittedly under powered). (v) The representation of the Complainant, as contained in the MOA (which was a material representation), that the vessel was to be beached

on her own power, therefore, was untrue/false. It is also contended by learned Counsel for the Insurance Company that Section 19 of the Marine Insurance Act provides that a contract of marine insurance is a contract based on utmost good faith and if the utmost good faith was not observed by either party, the contract may be avoided by the other party. In view of the above the opposite party is entitled to avoid liability under Sec. 22 of the MIA, 1963. IV Non Disclosure of Material Facts (i) The Complainant did not disclose to the opposite party at or before taking the insurance policy that : (a) one engine of the vessel (viz. starboard engine) was not working. (b) the Addendum No.2 dated 3.6.97, which records that the starboard engine of the vessel was not working. As against this it has been pointed out by the learned Counsel for the Complainant that this defence is baseless, firstly, because it is concocted, and is being raised for the first time, at the time of filing the written version by alleging non-disclosure. We have to state that at no point of time the contract is avoided by the Insurance Company for non-observance of good faith or on the ground of non-disclosure of material facts. The contract is repudiated solely on the ground that there was no total loss. Secondly, it is apparent that this defence of non-disclosure is taken for the first time at the time of filing of written version. Written version was filed on 8.01.1999. Prior to that admittedly there was a lot of correspondence between the parties. At no point of time the insurance company stated that there was any suppression on the part of the complainant in not disclosing that one engine of the vessel was not functioning. For this purpose, learned Counsel for the Complainant further submitted that in the meeting of the Board of the insurance Company reliance was placed upon the advice given by their lawyers - Mulla and Mulla. In their advice also nowhere it was mentioned that there was non-disclosure of any fact, material or otherwise, by the complainant. In the note prepared for passing the resolution by the Board for repudiating claim, no such allegation was made. The witness of the Opposite Party - Mrs. Ruckmani Venkatachari , OPW3 in her cross examination has confirmed that repudiation was only on the ground that the vessel had encountered neither total loss nor a constructive total loss. Hence, it is apparent that the contract is not avoided by the Insurance Company on the ground of non-disclosure of non-functioning of one engine. The contract was sought to be avoided by repudiating the claim on the only ground that there was no total loss. Therefore, avoiding of the contract for the non-disclosure is not at all there, but it is a defence which is sought to be raised only for the first time in the proceedings before this Commission. It is true that even if there is no prior denial, if there is suppression, then, that fact can be brought on record. However, the Complainant has pointed out that at the time of making insurance proposal they had given MOA along with two addendums and one addendum clearly stated that the vessel was with one engine, and it has come from Singapore to Alang Anchorage for its funeral voyage. In our view, there is no reason to disbelieve the version of the Complainant. Neither the agent of the Insurance Company nor the Development Officer who had given the policy have stated that Addendum No.2 was not given to the Insurance Company by the agent at time of issuing the policy. Addendum No.2 specifically provides

that starboard engine was not in working condition. In the affidavit filed by PW No.1 he has stated that he had forwarded to the Opposite Party a copy of the original purchase agreement dated 2.6.1997 and the two addendums both dated 3.6.1997. The evidence of Dilip Sinha, O.P.W-1 who was examined by the Insurance Company reveals that he was not aware of the said fact because every year they issue 15,000 policies which include 50 to 60 high value policies and during his tenure at Bhavnagar about 250 to 300 high value policies were issued. He has admitted that there is nothing in the file that only the MOA without the addendums were submitted with the proposal. In our view, therefore, it is apparent that there is no concealment or suppression on the part of the Complainant. In any case, even if there is non-disclosure of the fact that only one engine was working, it would not be of much material in the present case because, admittedly, the vessel sailed from Singapore on one engine without any incidence. And, therefore, it would not be possible to believe that for a short trip of approximately 5 to 6 nautical miles from Alang Anchorage to the ship-breaking yard of the Complainant, it required more than one engine. In this view of the matter, it is not necessary to discuss this point in detail. For the alleged non-functioning of the second engine Complainant has examined Naval Architect who is expert on the subject. In his affidavit he has opined that for the vessel to achieve 5, 6, or 7 nautical miles, the BHP required would be 471, 815, 1294 respectively. This would leave a reserve of 19242, 18898 18419 BHP respectively, even on the only engine available. This has not been contradicted by the Opposite Party anywhere. In our view, on this aspect there is no reason for not relying upon report of Tony Fernandez Average Adjusters Pvt. Ltd. who was appointed by the Complainant and whose appointment was approved by the insurance Company wherein they had stated that the loss was proximate and dominant cause for loss of the vessel becoming a Total Loss, was the stranding on a rocky shoal prior to arriving at the destination. The stranding was due to heavy weather encountered on the "funeral" voyage. This has no bearing with one engine not working. Further it is contended that because of the non-functioning of the second engine the vessel could not have been placed at the destined place. Further OPW.4, the surveyor appointed by the Opposite Party, has also in his cross-examination admitted that he had not made any technical calculations as to propulsion power required for this vessel with one engine. Moreover, both these witnesses, OPW2 and OPW4, have admitted that it will ultimately be the decision of the Master or the Pilot or the Port Officer to decide whether the vessel could have made the funeral voyage on one engine or not. They have admitted that the Master of the vessel, in order to hit 315° set the course of the vessel at 290° and this was to combat the drag the vessel would face and the effect of wind, if any. Further, both these witnesses have admitted that to do this funeral voyage, the vessel's full propulsion power would not have been required which in other words means that one engine would have been more than enough. Both have also admitted that the entire power of both the engines together which is 40000 BHP, is required for full displacement of 316300 mt to achieve the maximum speed of 15 knots. It is admitted in this case that

the vessel was light with a displacement of only 56783 tons and would not have exceeded 5 to 7 knots of speed. Therefore, the contention of the Opposite Party placing reliance on the evidence of the witnesses that the engine power was less for the purpose of beaching due to non-availability of the 2nd engine is unjustified. The availability of 2nd engine would not have in any case mattered much because with the displacement of 56783 tons to achieve 5 to 7 nautical miles would have in any case left a surplus of 18419 to 19242 BHP on one engine itself. If there were two engines working there would have been a surplus power of 38419 to 39242 BHP out of $2 \times 20000 \text{ BHP} = 40000 \text{ BHP}$. In cross-examination, PW.2 has admitted that he has made no engine power calculation. He has confessed that he is not familiar with the calculations as to what is the BHP required for a light vessel to maintain maximum speed and that he has confessed that he has not made any power calculations to arrive at a requirement as a light ship for the purpose of his opinion. He has also admitted that even with reference to speed calculations he has not made any calculations. It is also admitted by both the witnesses that the Master or the Pilot or the Port Officer has to decide whether the vessel could have made the funeral voyage on one engine or not. Hence, in our view, the insurance company has failed to establish that the non-functioning of one engine resulted in such loss.

V. Sea Worthiness of the Vessel: Learned Counsel for the Insurance Company submits that the vessel was unsea-worthy. In our view, it would be difficult to arrive at the conclusion that the vessel was unsea-worthy. It was brought from Singapore to Alang Anchorage for breaking it at Along ship breaking yard. After taking the possession of the vessel at the Alang Anchorage from its previous owner, the Complainants took insurance coverage for bringing it to the ship breaking yard because from that time it was under their ownership. Surveyors' Reports, particularly, that of Tony Fernandez Average Adjusters Pvt. Ltd., establish that the vessel was seaworthy. There is nothing on record to show that the vessel was un-sea worthy at that time.

IV. Failure to act reasonably to avert and minimise the loss: Learned Senior Counsel for the Insurance Company further submitted that the insured is required to act at all times as a prudent uninsured. The Insurance Company suggested that the vessel be broken at site. However, that was not done by the Complainant. In our view, this submission has no merit. Undoubtedly, the insured is required to act as a prudent uninsured would act. However, that would not mean that in such a situation the insured should enter the sea water and break the vessel. The Complainant had taken insurance policy for covering a short distance to see that it is broken at the site assigned for that purpose and not in the sea water. In such a situation Section 78 has no application which provides for suing and labouring clause empowering the assured to recover expenses properly incurred pursuant to the said clause of the policy. It was suggested that additional cost for breaking the vessel at the site only was Rs.10 Crores, but the Complainant had not done so because : (i) the Complainant had taken a credit facility from the bank for the purchase of the vessel "VLOO ARUN" and was paying interest to the bank; and (ii) the Complainant had another vessel which was lying on the same plot for the

purpose of being broken. Hence, the Complainant did not want to spend more on accommodating and breaking of the vessel "VLOO ARUN". In our view, these submissions are imaginary. The Complainant had purchased the vessel for breaking at the site which was leased to him and has made all the necessary efforts for brining the vessel at the site. The Complainant in such a situation was only expected to minimise the loss and that has been done by them by auctioning the vessel for breaking it at the site by public auction, that too, after informing the Insurance Company repeatedly. That correspondence is on record. Hence, in view of the above discussion, there is no substance in the contentions raised by the Insurance Company. There was no justifiable ground for repudiating the claim and in not accepting the survey reports.

QUANTUM: The next question would be quantum of reimbursement. The Complainants have claimed thus: Insured value .. Rs.25,70,00,000 Less Sale value .. Rs.12,01,00,000 Balance Rs.13,69,00,000 Sue and Labolur Rs.47,76,000 Further damages .. Rs.4,13,68,192 _____ Total payable .. Rs.18,30,44,192 ===== Interest from 9.6.1997 (the date of the loss) at 19.5% p.a. plus costs." As against this, it has been pointed out that excess clause in the policy reads as follows: "Subject to deductible of Rs.12,85,000/- each accident or occurrence in respect of SC and SL claims".

19.It is also contended that if the Complainant had undertaken breaking of the vessel at the site it would have cost him between Rs.8 crores to Rs.10 Crores and, therefore, the claim for the balance amount of Rs.5,69,00,000/- is exaggerated. (Rs.13,69,00,000/- minus Rs.8,00,00,000/- = Rs.5,69,00,000/-). 20.In our view, it would be difficult to arrive at the conclusion that the Complainant ought to have undertaken breaking of the vessel at the site where it was imbedded in the sea water. It would be difficult to arrive at the conclusion that the estimated cost of Rs.8 crores would have met with the expenses which the Complainants were required to incur. Further, it depends upon various contingencies such as expertise and requirement of breaking the vessel in the sea water itself. It has been further pointed out by the Complainant that at no stage Opposite Parties agreed that they would pay the cost that would be incurred for breaking the vessel in situ. The Complainant estimated the additional cost for breaking the vessel in situ at Rs.10.07 crores. In any set of circumstances, considering the way in which the officers of the Insurance Company conducted themselves, even if the Complainant had broken the vessel by incurring the cost, it would have been difficult for the Complainant to get reimbursement for years together, because the claim was repudiated despite three survey reports which are in favour of the Complainants. Further, even in the letter dated 19.9.1997 which is part of Board Note prepared by the Insurance Company for ratification of repudiation it has been stated that "additional cost of breaking the vessel in the situ would be about Rs.10.07 crores and that such estimates have been prepared in good faith and were based on information gathered from various sources at the ship breaking yard and the exposure/ expenses of his company in surveying losses related to ship breaking claims".

21. In our view, this stand of the Insurance Company's witness is binding to the Insurance Company. 22. With regard to the excess clause sought to be relied upon, in our view, there is no substance. How it is made applicable is not known. The Insurance Company has not explained how it is applicable. Hence, "the clause which says that subject to deductible of Rs.12,85,000/- each accident or occurrence in respect of SC and SL claims", has no bearing on the present case, because it appears that it is connected with the previous part which provides for sue and labour expenses." 23. With regard to claim of sue and labour charges and further damages we do not think that there is any justification for granting the same. With regard to the rate of interest it is true that the complainant had taken loan from the bank and was paying loan amount with interest at much more higher rate. However, on this part also there is not much evidence. Hence we direct that complainant would be entitled to receive the amount of Rs.13,69,00,000/- with interest @ 9% per annum from 9th June, 1997. 24. In the result, the complaint is allowed. Accordingly insurance company is directed to pay a sum of Rs.13,69,00,000/- with interest @ 9% per annum from 9th June, 1997 till its realisation within a period of 12 weeks from today. The Insurance company shall pay costs of Rs.25,000/-. That amount shall be deposited with the Legal Aid Fund, NCDRC Bar Association within a period of four weeks from today.