IN THE COURT OF SH. ARUN SUKHIJA,
ADDITIONAL DISTRICT JUDGE – 07, (CENTRAL DISTRICT)
TIS HAZARI COURTS, DELHI.

SUIT NO.:- 53/2019

UNIQUE CASE ID NO.:- 611281/2016

IN THE MATTER OF :-

1. M/s. K.S. Exim Limited
105, Kundan Bhawan,
Azad Pur Commercial Complex,
Delhi – 110 033.

2. Zao Termoecostrol
109518, Russia,
Moscow UL. Graivoronovskaya 10,
BL. 1, Komnata Pravleniya.

Through

Shyam Garg,
Director, K.S. Exim Limited,
105, Kundan Bhawan,
Azad Pur Commercial Complex,
New Delhi – 110 033. ....Plaintiffs

VERSUS

The Oriental Insurance Company Limited,
Having its registered Office at:
Oriental House,
A-25/27, Asaf Ali Road,
New Delhi – 110 002. ....Defendant

SUIT FOR RECOVERY OF RS.35,84,155/- (RUPEES THIRTY FIVE LAKHS EIGHTY FOUR THOUSAND ONE HUNDRED FIFTY FIVE ONLY)

Date of institution of the Suit : 06.01.2004
Date on which Judgment was reserved : 08.07.2020
Date of Judgment : 25.07.2020

::- J U D G M E N T -::

By way of present judgment, this Court shall adjudicate upon suit for recovery of Rs.35,84,155/- (Rupees Thirty Five Lakhs Eighty Four Thousand One Hundred Fifty Five Only) filed by the plaintiffs against the defendant.

CASE OF THE PLAINTIFFS AS PER PLAINT

Succinctly, the necessary facts for just adjudication of the present suit, as stated in the plaint, are as under:-

(a) The plaintiff no.1 is a company incorporated under the Companies Act 1956, having its registered office at the aforesaid address. Sh. Shyam Garg is the Director and Principal Officer of plaintiff no.1. He has been duly authorized, by a resolution passed by the Board of Directors of plaintiff no.1 in its meeting held on 28.12.2003, to institute the present suit on behalf of the plaintiff no.1 and to sign and verify the pleadings, affidavits, etc. in respect thereof.

(b) The plaintiff no.1 is engaged in the business of trading of food grains. The plaintiff no.1, in pursuance to its business goals engages also in sale and export of various food items.

(c) The plaintiff no.2 is a company incorporated in Russia engaging in trading and import of commodities and has got its office at the aforesaid address. By an authority letter executed by the said plaintiff no.2, it has

authorized Sh. Shyam Garg, Director and Principal Officer of its co-plaintiff i.e. plaintiff no.1, to institute the present suit on its behalf and to sign and verify the plaint, affidavits and other pleadings.

(d) The defendant is an insurance company incorporated under the Companies Act, 1956 and is engaged in underwriting general insurance business across the country.

(e) Vide its Contract no. AR/TER/085/97, dated 27.10.1997, the plaintiff no.1 sold to M/s. Ariana + 500MT of "Indian Long Grain White Raw Rice 10% broken (Max)" to be consigned to plaintiff no.2 at Novorossiysk (Russia). The terms of sale were 'CIF Novorossiysk'.

(f) In pursuance to the aforesaid Contract, the plaintiff no.1 shipped a quantity of 233 MT net of rice, comprising of 4660 bags of 50 Kgs. Net each, on vessel ***Firas-I*** vide B/L No. Firas/KDL-NOV/05 dated 24.11.97 from Kandla for Novorossiysk to plaintiff no.2. The plaintiff no.1 insured its aforesaid consignment of rice with the defendant vide its cover note no. 141557, dated 11.11.97. The defendant extended to the plaintiffs' cargo cover against All Risks, War and SRCC. The defendant subsequently replaced the above mentioned cover note by its policy bearing no. 1998/596, dated 12.11.97. By the said policy, the defendant covered the cargo for a sum of Rs.35,75,000/- being CIF + 10% of the value of aforesaid goods, for voyage from Delhi to Novorossiysk. The cover provided in the policy issued by the defendant was subject to the following conditions and clauses:-

* Sailing Vessel Clause
* Institute Cargo Clauses (A)
* Institute Strike Clauses (Cargo)
* Institute War Clauses (Cargo)
* Malicious Damage Clause
* Institute Theft Pilferage & Non Delivery

(Insured Value) Clauses

* Institute Classification Clause
* The Insurance is subject to 1% Excess on the full sum insured or value of the car per truck/ wagon
* Institute Radio Active Contamination Clause
* Important Notice

(g) The vessel ***Firas – 1*** sailed from Kandla on 10.12.1997 carrying the above mentioned 233 MT net (i.e. 4660 bags) of rice of the plaintiffs for Novorossiysk. The plaintiff no. 1 negotiated the documents relating to the shipment to plaintiff no.2 at Russia. It would appear that around 31.12.1997, a dispute broke out between the charterers and the owners of the vessel and the vessel was withheld by the owners at some port on the way. Arising out of the said dispute, the whereabouts of the vessel were unknown in the first fortnight of January 1998. The plaintiff no. 1 informed the defendant of the said position by its letter 09.01.98 and the same communication the plaintiff no. 1 also put the defendant on notice of the probable claim that may have arisen in those circumstances following non-delivery of the cargo. For the reason of dispute between the vessel owner and the charterers, the vessel remained stuck at the Syrian port of Tartous. The owners of the vessel had obtained from Syrian Courts, order permitting them to expropriate the cargo.

(h) At the time when the aforesaid dispute broke out, in addition to the plaintiffs, goods belonging to several other parties also lay on the vessel. The plaintiffs, in association with all the other cargo interest on board the vessel, engaged M/s. R. D. Black & Co., Solicitors from London to defend

its interest against efforts by the vessel owner to confiscate their cargo. Negotiations were held in Cyprus, between Solicitors for plaintiffs and other cargo interest, and the vessel owner. After prolonged negotiations and upon payment of more money to vessel owner, the plaintiffs were successful in obtaining release of their cargo. The owner of the vessel, however, refused to complete the remaining voyage itself, and nominated another vessel namely M. V. Sara 3 for completing the remaining voyage from Tortous to Novorossiysk.

(i) Vide its letter dated 24.02.1998, the plaintiff no. 1 made the entire position clear to the defendant, and sought endorsement of the name of the new vessel, i.e. Sara 3 on the policy of insurance which had been taken from the defendant. Quite inappropriately, the defendant refused to endorse the policy with the name of the new vessel. Instead the defendant stated that the cover under policy number 1998/964 had terminated and that the plaintiff shall have to buy a new policy to cover itself for voyage from Tartous to Novorossiysk. The plaintiff no. 1 attempted to explain that the cover under the policy of insurance had not attempted to explain that the cover under the policy of insurance had not terminated at any stage, and that it would continue for the remaining journey up to Novorissiysk. The defendant, however, did not oblige. The plaintiff no. 1 was left with no choice but to pay extra premium afresh, and cover the cargo from Tartous to Novorossiysk by a new policy. The plaintiffs maintain that the action of the defendant in not continuing with the existing marine policy was contrary to the terms and conditions of the existing mạrine insurance policy, and was an unlawful attempt to take blatantly an unfair advantage of the crises in which

the plaintiffs were caught. In pursuance to the demand of the defendant, the plaintiff no 1 paid a sum of Rs.29,790/- towards premium for covering afresh the remaining voyage of the cargo from Tartous (Syria) to Novorossiysk. The defendant issued to the plaintiff no. 1 the policy no. 1998/ 964 subject the clauses mentioned under first policy. The claims payable to exporters will be in equivalent of India Rupees subject to SGS Inspection Report.

(j) The cargo consisting in all of 4660 bags of rice was transshipped at Tartous, Syria, from vessel Firas -1 to vessel Sara-3 between 02.03.98 and 15.03.98. The said transshipment was supervised and inspected by M/s. SGS, Syrian International Superintendence, a surveyor firm of international repute, who gave their report dated 16.03.98 under their reference no. 00258. In the said report, the surveyors certified that they found the cargo in good condition, fit for human consumption, and of natural odour. At the time of transshipment, the surveyors recorded that they found total 4580 bags had been transshipped in sound condition and that 77 bags were damaged in transshipment, and further that 3 bags were short at the time of transshipment.

(k) The cargo of 233 MT i.e. 4660 bags (less 3 bags short at transshipment) of subject rice reached the port of Novorossiysk on or around 28th April 1998. The cargo was discharged from the vessel Sara - 3 between 28th April, 1998 and 19th May, 1998. When the cargo reached Novorossiysk, it was found largely in damaged condition. The cargo was checked by the local health authorities, who found the same infested with 'dirty harmful insects' and 'dirt producing harmful insects'. The local health authorities declared that of

the total cargo, 3245 bags were 'unfit for human consumption'. Following arrival of the goods in damaged condition, the plaintiff no. 2 filed its claim with M/s. Ingosstrakh, the overseas survey agents of the defendant. Vide its survey report no.6-19-780033/MB, dated 13th July 1998, the said surveyor gave their report. The plaintiff no.2, vide its letter no. 28.7.1998, lodged its monetary claim on the defendant for shortage and damages sustained by it in the insured voyage for a sum of USD 57,673.21.

(l) Following lodgment of the claim by the plaintiff no. 2, the defendant raised several queries in relation to the circumstances of the loss, the perils operating on the cargo, and the nature of damage and quantum of loss. The plaintiff submits that all queries of the defendant were replied satisfactorily, and the plaintiff craves leave to refer to the correspondence exchanged in this connection between the plaintiff, surveyors and the defendant insurance company. The plaintiff no. 2 and plaintiff no. 1 have continuous business relations, for which reason the plaintiff no. 1 was assisting and attending to various inquiries, queries and questions of the defendant on behalf of plaintiff no. 2. For the sake of legal requirements, the plaintiff no. 2 had given a 'no objection certificate' in favour of the plaintiff no. 1, for negotiating the claim with the defendant and receipt of payment on its behalf and to give full and final discharge to the defendant. The said letter of authority had been presented to the defendant.

(m) Despite all clarifications, no attempt was made by the defendant to settle claim of the plaintiffs. Indeed more and more queries were created and raised after the old ones were explained and satisfied. There was a determined bid on the part of the defendant, not to pay the claim come what may. After several years of protracted correspondence, and after obtaining

satisfactory reply to all its queries, vide its letter of 12.12.2000, the defendant wrote to the plaintiff.

(n) The plaintiffs submit that the grounds taken for repudiation of liability were never earlier brought up by the defendant in any of the meetings or in the correspondence exchanged by the defendant with the plaintiffs. No occasion was afforded by the defendant to the plaintiffs to explain its stand on grounds taken for rejection of the claim. The plaintiffs further submit that the repudiation by defendant of the claim of the plaintiffs is wholly unjustified, against law and practices of marine insurance, and international trade, and against the terms-conditions of the policy of insurance. The grounds taken do not hold true in light of the provisions of various laws applicable to the present transaction, and the clauses and conditions to which the policy of insurance was subject.

(o) The loss which was caused to the cargo of rice forming subject matter of insurance was to the tune of Rs.21,85,460/-. In view of what has been stated above, the plaintiffs became entitled to the said amount from the defendant immediately after the happening of the loss. The plaintiffs have a valid claim for a sum of Rs.21,85,460/- from the defendant towards loss sustained to the cargo of rice whilst in transit. The said claim is under the policy of marine insurance which the defendant had issued for consideration in favour and for benefits of the plaintiffs and for the reason of which policy the defendant is liable to indemnify the plaintiffs. In addition to the loss sustained to the cargo, the plaintiffs also claim refund of premium of Rs.29,790/- charged by the defendant from plaintiff no. 1 for issuance of its policy No. 1998/964, dated 30.03.98. The voyage in question at all times, and without break was covered under policy no. 1998/696, dated 12.11.97,

and that charging of additional premium and issuance of a fresh policy was neither required nor contemplated in the then prevailing circumstances. The defendant took premium two times for the same risk and for the same cover. The premium charged of Rs.29,790/- was, therefore, without consideration, as the defendant did not have to bear any extra risk for the same amount. The defendant withheld illegally the claim amount which the defendant should have paid to the plaintiffs within a reasonable period of say 3 months. Having not paid the said amount to the plaintiffs within that period, the defendant has also become liable to pay interest thereon on the principal amount of Rs.21,85,460/-. Thus, the plaintiffs claim interest on the principal sum of Rs.21,85,460/- as from 18th August, 1998 @ 12% per annum till the filing of the present suit, which amount of interest comes to Rs.13,98,695/-.

(p) Under the terms of sale of the subject goods, the plaintiff no. 1 was obliged to provide at its own cost, to plaintiff no. 2, a valid insurance policy covering the cargo against all risks till the final destination. Since the defendant has in its letter of repudiation held the policy of insurance bad, the plaintiff no. 1 in consequence has been saddled with liability to plaintiff no. 2. The plaintiff no. 1 has, therefore, a cause of action against the defendant, inasmuch the performance of its obligations under the policy of insurance shall discharge the plaintiff no. 1 from its obligations to plaintiff no. 2. The plaintiff no. 2 had purchased the goods from plaintiff no. 1 under a CIF contract. The plaintiff no. 2 was a valid and lawful assignee of the insurance policy issued by the defendant. The plaintiff no. 2 was, therefore, the rightful claimant under the insurance policy, and has, thus, suffered due to wrongful repudiation of the claim by the defendant. The plaintiff no. 2, thus, has a cause of action against the defendant. That both the plaintiff no.

1 and plaintiff no. 2 have a right to relief in respect of and arising from the same act and transaction i.e. rejection of the claim by the defendant. Both the plaintiffs' cause of action gives rise to same question of law and fact namely whether the repudiation by the defendant of the insurance claim is valid in law. Both the plaintiff no. 1 and plaintiff no.2, therefore, have the right to proceed jointly against the defendant.

(q) The plaintiffs had submitted to the defendant most of the documents in original related to the shipment, damage, survey and valuation. Despite repudiation of the claim, the defendant has not returned such papers back to the plaintiffs. The relief being claimed in the present suit may be awarded to the plaintiff no. 2, who is the principal party, entitled to relief under the suit. In the alternative, it may be awarded to the plaintiff no. 1 as attorney of and for and on behalf of plaintiff no. 2. Thus, the plaintiffs claim Rs.21,85,460/- by way of principal amount and a sum of Rs.13,98,695/- towards interest, in all a sum of Rs.35,84,155/- in the present suit.

CASE OF THE DEFENDANT AS PER WRITTEN STATEMENT

Succinctly, the case of the defendant is as under:-

(a) The suit of the plaintiff is barred by time. As admitted in para 24 of the plaint, the claim of the plaintiff was repudiated by the defendant insurance company vide their letter dated 13.12.2000 and the suit has been filed on or after 3rd January, 2004 as per the plaint (the actual date of filing has to be ascertained) which is well after the period of 3 years of the date of the repudiation and accordingly, the suit is barred by time and is liable to be dismissed on this short ground alone.

(b) The plaintiff no.1 has no locus-standi to file the present suit against the defendant for the simple reason that the plaintiff no.1 had no insurable

interest on the date of taking the insurance policy no.1998/964 for shipment per M.V. SARA-3 from the defendant. By the time, the insurance under policy no. 1998/964 for shipment per M.V. SARA-3 was effected, the plaintiff no.1 K.S. Exim Ltd. had already parted with their interest in the consignment in favour of the consignee M.S. Zao Termoecostroi, the plaintiff no.2. The plaintiff no.1, therefore, had no insurable interest in the consignment on that date and was not entitled to insure the consignment in its own name. There is no privity of contract between the plaintiff no.2 and the defendant.

(c) The insurance in respect of the shipment per M.V. SARA-3 was obtained by the plaintiff no.1 on 25.3.1998 whereas the Bill of Lading is dated 19.3.1998. Thus, the risk commenced on 19.3.1998 but the premium had been paid by the plaintiff no.1 and received by the defendant after the commencement of the risk in violation of the Mandatory provisions of Section 64 VB of the Insurance Act, 1938.

(d) The plaintiffs have not filed all the necessary documents in their power and possession. The present suit has not been signed, verified and instituted by a duly authorized person.

(e) On merits, the contents of the plaint have been denied the claim of the Plaintiffs. It is submitted that the claim under the policy of insurance is always subject to the terms and conditions of the policy besides the insurable interest of the persons taking the policy at the time of the insurance cover and at other material stages and strict observance of the mandatory provisions of Section 64 VB of the Insurance Act, 1938. In the instant case, both these material requirements namely insurable interest and

Section 64VB of the Insurance Act were found missing and accordingly, the claim was repudiated by the defendant.

(f) It has been submitted that by raising queries does not tantamount to admission of any liability under the policy. Any claimant has to reply to the queries raised by the insurer in respect of any claim. The further allegations that "the plaintiff no.2 had given a 'no objection certificate' in favour of plaintiff no.1, for negotiating the claim with the defendant and receipt of payment on its behalf and to give full and final discharge to the defendant". The claim has been repudiated on valid grounds. The final decision on the claim is taken after examining the claim in all its aspects. In this case, after examining the claim thoroughly, the defendant came to the irresistible conclusion that the claim was liable to be repudiated for the reasons stated in the latter dated 12.12.2000.

(j) The alleged amount of loss being Rs.21,85,460/- or any other amount are also wrong and denied. It is denied that plaintiff even became entitled to the said amount or any other amount. In any event, the alleged terms of the contract between the plaintiffs has no bearing on the admissibility of liability of the defendant. Neither plaintiff no.2 nor plaintiff no.1 entitled to any relief against the defendant. It has been prayed to dismiss the suit with exemplary costs.

REPLICATION AND ISSUES

The plaintiffs have not filed any replication to the Written Statement of the defendant.

From the pleadings of the parties, following issues were framed by Hon'ble High Court vide its Order dated 13.09.2005:-

ISSUES

1. *Whether the suit is barred by limitation? OPP.*

2. *Whether plaintiff no.1 had no insurable interest as stated in Preliminary Objection No.2? If yes to what effect on the suit? OPD.*

3. *Whether there was violation of Section 64 VB of the Insurance Act 1938? If yes to what effect on the suit? OPD.*

4. *Whether policy no. 1998/964 was issued by defendant without consideration and/ or that the cover afforded by policy no. 1998/596 had been continuing when policy no. 1998/964 was issued – as averred in para 29 of the plaint? If yes, to what effect on the suit? OPP.*

5. *Whether the plaintiff is entitled to refund of premium charged in lieu of policy No. 1998/964 as averred in para 29 of the plaint? OPP.*

6. *Whether the repudiation of the claim by defendant is unlawful and against terms and conditions of the policy of insurance as averred in para 26 of the plaint? OPP.*

7. *To what amount, if any, is plaintiff entitled to under the policy/policies of insurance issued by defendant? OPP.*

8. *Whether the plaintiff is entitled to interest? If yes at what rate? OPP.*

9. *Relief.*

Vide order dated 16.03.2007, following additional issues were framed as issues no. 9 to 12 by Hon'ble High Court:-

ISSUES

9. *Whether the suit has been signed, verified and instituted by a duly authorized person on behalf of plaintiff No.1? If not, its effect.*

10. *Whether the suit has been signed, verified and instituted by a duly authorized person on behalf of plaintiff No.2? If not, its effect.*

11. Whether there is any privity of contract between the plaintiff No.2 and the defendant? If not, its effect.

12. Whether the plaintiffs have any locus standi to file the suit in their own name? If not, its effect.

Issue no.9 framed earlier was re-numbered as issue No.13.

EVIDENCE OF THE PLAINTIFFS AND DEFENDANT AND DOCUMENTS RELIED UPON BY THEM

The plaintiffs, in order to prove their case, led plaintiff's evidence and got examined Sh. Shyam Garg as PW-1. PW-1 has filed his evidence by way of affidavit Ex.PW-1/A, wherein, he reiterated and reaffirmed the contents of the plaint. PW-1 in his testimony has relied upon the documents:-

1. Copy of Agreement No.AR/TER/085/97, dated 27.10.1997 entered into by the plaintiff No.1 with M/s. Arian+ is Ex.PW-1/1 (Colly.).
2. Copies of invoice, copy of packing list and SGS Certificate are Ex.PW-1/2 and Ex.PW-1/3.
3. Copies of cover note no. 141557 and policy schedule bearing no. 1998-596 are Ex.PW-1/4 and Ex.PW-1/5.
4. Copy of Bill of Lading is Ex.PW-1/6.
5. Copy of letter dated 05.01.1998 from plaintiff no.2 to plaintiff no.1 is Ex.PW-1/7.
6. Copy of letter dated 05.01.1998 from plaintiff no.2 to M/s. Arina+ is Ex.PW-1/8.
7. Copy of letter dated 06.01.1998 from M/s. Arina+ to plaintiff no.1 is Ex.PW-1/9.

8. Copy of letter dated 06.01.1998 from the plaintiff no.1 to M/s. Hind Shipping is Ex.PW-1/10.
9. Copy of letter dated 09.01.1998 from the plaintiff no.1 to defendant is Ex.PW-1/11.
10. Copy of letter dated 09.01.1998 from the plaintiff no.1 to defendant is Ex.PW-1/12.
11. Copy of letter dated 10.01.1998 from M/s. Arina+ to M/s. Ingosstrakh is Ex.PW-1/13.
12. Copy of letter dated 12.01.1998 from the plaintiff no.2 to plaintiff no.1 is Ex.PW-1/14.
13. Copy of letter dated 12.01.1998 from M/s. Arina+ to plaintiff no.1 is Ex.PW-1/15.
14. Copy of letter dated 05.02.1998 from the plaintiff no.1 to plaintiff no.2 is Ex.PW-1/16.
15. The letter dated 24.02.98 is Ex.PW-1/17.
16. The facsimile dated 03.03.98 giving complete details was sent by plaintiff no.1 to defendant is Ex.PW-1/18.
17. Copy of Bill of Lading no. H/2/98 showing shipment by vessel Sara 3 and copy of policy issued fresh by the defendant on vessel M.V. Sara 3 are Ex.PW-1/19 and Ex.PW-1/20.
18. Copy of Survey Repot of transshipment of cargo from Firas to Sara 3, conducted by M/s. SGS Syria is Ex.PW-1/21.
19. Copy of translation of noting of the health authorities of the port of Novorossiysk is Ex.PW-1/22.
20. Copy of Survey Report is Ex.PW-1/23.

21. Copy of letter dated 28.7.98 by plaintiff no.2 to M/s. Ingosstrokh Moscow, the agents of defendant, is Ex.PW-1/24.
22. Copy of agreement no. 11/98 along with English Translation of the sale of damaged goods by the plaintiff no.2 is Ex.PW-1/25.
23. Copy of invoice no. TAR/INV/XI/98, dated 20.05.1998 regarding the damaged quantity sold by plaintiff no.2 is Ex.PW-1/26.
24. Copy of letter dated 18.05.1998 from the plaintiff no.2 to the owner of Sara-3 is Ex.PW-1/27.
25. Copy of letter dated 28.07.1998 from the plaintiff no.2 to M/s. Ingosstrakh is Ex.PW-1/28.
26. Copy of letter dated 17.08.1998 from the plaintiff no.2 to M/s. Ingosstrakh is Ex.PW-1/29.
27. Copy of letter dated 19.08.1998 from the plaintiff no.2 to M/s. Ingosstrakh is Ex.PW-1/30.
28. Copy of letter dated 27.08.1998 from M/s. Ingosstrakh to the defendant is Ex.PW-1/31.
29. Copy of letter dated 10.09.1998 from the plaintiff no.2 to M/s. Ingosstrakh is Ex.PW-1/32.
30. Copy of letter dated 11.09.1998 from the plaintiff no.2 to M/s. Arina+ is Ex.PW-1/33.
31. Copy of letter dated 16.09.1998 from M/s. Arina+ to plaintiff no.1 is Ex.PW-1/34.
32. Copy of letter dated 04.11.1998 from the plaintiff no.2 to M/s. Ingosstrakh is Ex.PW-1/35.
33. Copy of letter dated 18.11.1998 from M/s. Ingosstrakh to the plaintiff no.2 is Ex.PW-1/36.

34. Copy of letter dated 23.11.1998 from the plaintiff no.2 to M/s. Ingosstrakh is Ex.PW-1/37.
35. Copy of letter dated 24.11.1998 from M/s. Ingosstrakh to the plaintiff no.2 is Ex.PW-1/38.
36. Copy of letter dated 10.12.1998 from the plaintiff no.1 to the defendant is Ex.PW-1/39.
37. Copy of letter dated 6.3.1999 from the plaintiff no.1 to defendant is Ex.P-1.
38. Copy of letter dated 22.03.1999 from the defendant to M/s. Ingosstrakh is Ex.PW-1/40.
39. Copy of letter dated 01.04.1999 from the plaintiff no.1 to the defendant is Ex.PW-1/41.
40. Copy of letter dated 12.04.1999 from M/s. Ingosstrakh to the defendant is Ex.PW-1/42.
41. Copy of letter dated 13.05.1999 from the plaintiff no.1 to defendant is Ex.PW-1/43.
42. Copy of letter dated 30.07.1999 from the plaintiff no.1 to the defendant is Ex.PW-1/44.
43. Copy of letter dated 2.8.1999 from the defendant to plaintiff no.1 is Ex.P-2.
44. Copy of letter dated 05.08.1999 from M/s. Ingosstrakh to the defendant is Ex.PW-1/45.
45. Copy of letter dated 08.03.2000 from the defendant to M/s. Ingosstrakh is Ex.PW-1/46.
46. Copy of letter dated 03.04.2000 from the defendant to M/s. Ingosstrakh is Ex.PW-1/47.
47. Copy of letter dated 15.05.2000 from the defendant to M/s. Ingosstrakh is Ex.P-3.

48. Copy of letter from M/s. Ingosstrakh to the defendant is Ex.PW-1/48.
49. Copy of letter dated 16.06.2000 from the defendant to M/s. Ingosstrakh is Ex.PW-1/49.
50. Copy of letter dated 17.07.2000 from M/s. Ingosstrakh to the defendant is Ex.PW-1/50.
51. Copy of letter dated 8.8.2000 from the defendant to plaintiff no.1 is Ex.P-4.
52. Copy of letter dated 08.08.2000 from the defendant to M/s. Ingosstrakh is Ex.P-5.
53. Copy of letter dated 08.09.2000 from M/s. Ingosstrakh to the defendant is Ex.PW-1/51.
54. Copy of letter dated 09.09.2000 from the plaintiff no.1 to the defendant is Ex.P-6.
55. Copy of letter dated 10.11.2000 from the plaintiff no.2 to plaintiff no.1 is Ex.PW-1/52.
56. Copy of letter dated 20.11.2000 addressed to the defendant by plaintiff no.1 is Ex.P-7.
57. Original Letter dated 12.12.2000 is Ex.P-8.

Subsequently, additional evidence by way of affidavit was filed by Sh. Shyam Garg and the same was exhibited as Ex.PW1/A2 and he relied upon the Resolution passed on 28.12.2003, which was exhibited as Ex.PW-1/53.

During cross-examination of PW-1, the Authority Letter executed by defendant no.2 in favour of Sh. Shyam Garg is marked as Mark PW1/D1.

During further cross-examination of PW-1, the Surveyor Report dated 28.05.2004 (running into eleven pages) filed by the plaintiff was exhibited as Ex.PW-1/DX1.

The plaintiff also got examined Sh. Ashok Kumar Jayaswal as PW-2, who has filed his evidence by way of affidavit, which are Ex.PW-2/A and relied upon the following documents:-

1. Copy of his Air Ticket and the relevant pages of Passport are Ex.PW-2/1 (OSR) (3 pages – Colly.).
2. Copy of Passport showing his employment with Bentimi Group of Companies in the year 1996 along-with its English translation are Ex.PW-2/2 (OSR) (3 pages – Colly.).
3. Copy of his Passport showing his employment with Bentimi Group of Companies in the year 2003 along-with its English translation are Ex.PW-2/3 (OSR) (3 pages – Colly.).
4. Office copy of the Handwritten Letter dated 18.05.1998 written by him to the owner of Vessel SARA-3 is Ex.PW-2/4, which bears his signature at point-A.
5. Office copy of letter Ref. No. Lar/610/98, dated 10.09.1998 is Ex.PW-2/5, which bears his signature at point-A.
6. The Certificate no. 002258 issued by SGS dated 16.03.1998 is Ex.PW-2/6 (2 pages), which bears his signature at point-A.
7. The FAX message sent by plaintiff no.1 to him on 31.03.1999 and confirmed by him on behalf of plaintiff no.2 on 01.04.1999 is Ex.PW-2/7 and
8. Special Power of Attorney dated 15.12.2003 issued by plaintiff no.2 in favour of plaintiff no.1 is Ex.PW-2/8 (2 pages), which bears signature of Kovalevskaja Elena Alexandrovna, Director of plaintiff no.2 at point-A.

On the other hand, the defendant has examined the witness Sh.R.S. Kalra, Senior Divisional Manager (Son of the deceased defendant) as DW-1, who filed his evidence by way of affidavit Ex.DW-1/A and relied upon the already exhibited documents i.e. Ex.P-8 and Ex.PW-1/20.

During cross-examination, the report of Syrian International Superintendence dated 02.03.1998 to 15.03.1998 was exhibited as Ex.D1/X1, Bill of Lading was exhibited as Ex.D1/X2, the insurance policy no. 1998/984, dated 25.03.1998 was exhibited as Ex.D1/X3, notice under Order XII Rule 8 Civil Procedure Code is Ex.DW1/X4.

The defendant has also got examined the summoned witness Sh. Shiv Kumar, Divisional Manager as DW-2, who brought the summoned record i.e. Circular of Head Office regarding preservation of the records and the same was exhibited as Ex.DW2/A (Colly. – 12 pages).

This Court heard final arguments, as advanced by Ld. Counsel for the parties through video conferencing. This Court has perused the material available on record and also the written submissions filed by Ld. Counsel for the parties.

FINDINGS AND CONCLUSIONS OF THE COURT

ISSUE NO.1

1. Whether the suit is barred by limitation? OPP

The burden of this issue has been cast upon the Plaintiff, however, in the present case, the question of Limitation is not pure question of law but mixed question of facts and law. There is no dispute between the parties that the receipt of the repudiation letter dated 12.12.2000 would be starting point of Limitation. The said letter was dispatched by the defendant. As per Section 103 of the Indian Evidence Act, the burden of proof, as to particular fact, would lie upon a person who wishes the Court to believe in its existence and as per Section 106 of the Indian Evidence Act, when any fact is specifically within the knowledge of any person, the burden of proving that fact is upon him. It is case of Plaintiffs that Plaintiff No.1 has received the said repudiation letter dated 12.12.2000 on

08.01.2001 and it is the case of the defendant that they have immediately dispatched the repudiation letter dated 12.12.2000 and therefore, in terms of the mandate of Sections 103 and 106 of Indian Evidence Act, 1872, the factum of dispatch was in the particular and special knowledge of the defendant and it was the duty of the defendant to prove on record that they immediately dispatched the said repudiation letter dated 12.12.2000.

The Ld. Counsel for the Plaintiffs has assiduously argued as under:-

> The suit has been filed on 4/5th of January 2004 and is well within limitation. The letter of repudiation dated 12.12.2000 (Exhibit P8), was received by the plaintiff no. 1 on 08.01.2001 as mentioned in para 37 of the plaint. Plaintiff no. 1 has also deposed the said fact in its evidence. In his cross-examination dated 29.01.2013, (last page), PW 1 has clearly stated that the letter dated 12.12.2000 was received by plaintiff no. 1 on 08.01.2001. The counsel for the plaintiff, during the cross examination dated 22.11.2016, 12.07.2017, 03.08.2017 and 04.01.2018 to DW-1 and on 22.03.2018 to DW-2, had put specific questions to the witness for the defendant regarding any file pertaining to the dispatch of the letter of repudiation dated 12.12.2000, but the defendant failed to produce any such file. Moreover, the witness told that the said dispatch register has been weeded under the policy of the Defendant Company. It was also stated by the witness DW-1 that Defendant Company follows weed out policy of the Government of India. It is further stated by the DW-1 that the weed out policy formulated by the Directors of the Defendant Company would be in the Company record. The policy has been produced by the defendant witness no. 2 which has been exhibited as DW-2/A. DW-2 has admitted that the documents of the present case must have been retained by the defendant till the time matter is finally disposed of. DW-2 replied:
>
> "Q. In the section of special instructions of Ex. DW-2/1, it has been mentioned that in case of litigation or recovery dockets, the same are to be kept till the time, matter is finalized. What you have to say?
>
> Ans. It is correct."

Furthermore in DW-2/A, at point B to B1 it is stated in the policy section that the claims over 1 lac, the documents should be maintained for minimum 12 years from the date of settlement. It is further pointed out that the claim of the plaintiffs was not settled and had been repudiated wrongly by the Defendant.

That the notice under order 12 Rule 8 CPC (Exhibit D-1/X-4) was issued to the defendant to produce:

"1. Dispatch Register clearly showing the dispatch of letter dated 12.12.2000 issued by Assistant General Manager vide your Reference No. NR/EXP/XI/25/99 from your office Jeevan Bharti Bldg., 9th Floor, Tower-I, 124, Connaught Circus, New Delhi-110001.

2. Complete departmental file along with noting in respect of insurance claim of the Plaintiff under Policy No. 1998/596 dated 11.11.1997 and 1998/964 dated 23.05.1998."

DW-1 has admitted the receiving of the said notice in his cross-examination dated 04.01.2018. Neither any reply to the said notice was given by the defendant nor the documents were produced which clearly establishes the case of the plaintiffs that the letter of repudiation dated 12.12.2000, was received by the plaintiff no. 1 on 08.01.2001 and the present suit has been filed within limitation.

The Ld. Counsel for Defendant has also relied upon the Judgments:- ***D C Sankla Vs. Ashok Kumar Parmar (First Appeal No. 27 of 1995) decided by Hon'ble Delhi High Court on 24.01.1995, (1995) 111 (3) PLR68, 1995 RLR 292, 1995 (2) RCR 459, MANU/DE/0741/1995***.

It was the bounden duty of the defendant to prove on record the date of dispatch of the repudiation letter dated 12.12.2000 and thereafter, the question of receipt of the said letter was to be adjudicated upon. However, the defendant has not produced any record of dispatch and on the contrary came out with the plea that the record has been wedded out. At the cost of repetition, the question of Limitation in the present case is not the pure question of law but it is the mixed

question of facts and law. The defendant has taken the defence that suit of the plaintiff is barred by law of limitation, then, it was defendant who had to maintain and produce the record in order to rebut the Plaintiffs' version in their plaint as well Plaintiffs' witness that the said letter was received by Plaintiff No.1 on 08.1.2001 but the defendant company has failed to produce the same. As per record, the suit was filed on 06.01.2004. This Court is fully in agreement with the arguments of the Ld. Counsel for Plaintiffs that the suit filed by the Plaintiffs is well within the prescribed period of Limitation.

Accordingly, in view of discussions made hereinabove, Issue no.1 is decided in favour of the plaintiffs and against the defendant.

ISSUES NO.9 AND 10 AS FRAMED ON 16.03.2007

9. Whether the suit has been signed, verified and instituted by a duly authorized person on behalf of plaintiff No.1? If not, its effect.

10. Whether the suit has been signed, verified and instituted by a duly authorized person on behalf of plaintiff No.2? If not, its effect.

The aforesaid issues are interrelated and interconnected with each other. Moreover, the discussion on the aforesaid issues may have overlapping discussion of the pleadings, arguments and evidence led by the parties. Accordingly, they are dealt with and decided together.

FINDINGS AND CONCLUSIONS OF THE COURT

The Ld. Counsel for Plaintiff has canvassed the arguments to the following effect:-

i. The letter dated 20.11.2000, it was represented to the Defendant that the No-Objection sought by them from the Plaintiff No. 2 has been submitted and preferred action may be taken to expedite the settlement and payment of claim.

ii. Plaintiff No. 2 vide its letter dated 10.11.2000 (Exhibit No. PW-1/52) had given No –objection in favour of Plaintiff No. 1 stating as such :-

"Keeping in view inordinate delay in the settlement of the claim and to avoid any further delay in remittance of the claim as may be finally settled, due to Indian Banking regulation etc., we have no objection whatsoever in your receiving the payment from the insurance Company M/s Oriental Insurance Company Ltd. directly in your name in full and final settlement. We hereby authorize you to accept the payment from the insurers"

iii. Therefore, the plaintiff No.1 became entitled to receive the claims so receivable to Plaintiff No. 1 itself and in favour of the Plaintiff No. 2 also.

iv. Further, vide board resolution dated 28.12.2003 (Exhibit PW-1/53) passed in favour of the Sh. Shyam Garg, by Plaintiff No. 1 Company, he has been "authorized to sign and verify the plaint, application, affidavits and such other documents as may be required" for filing the case against rejection of claim by Oriental Insurance Co. Ltd.

v. Also, vide special power of attorney dated 15.12.2003 (exhibit PW-2/8) the Plaintiff No. 1 has been authorized by the Plaintiff No. 2.

vi. PW2 in his deposition deposed that:

a) he had been involved in the present project right from the beginning and the consignment which was sent by Plaintiff No. 1 to Plaintiff No. 2 was handled by him for clearance and for getting the certification as a part of supply chain management on behalf of Plaintiff No.2. He further deposed that he had joined Bentimi Group of Companies in January, 1996. Plaintiff No. 2 M/s ZAO Termoecostroi was formed in the year 1997 which was a company of Bentimi Group of Company. Copy of his Passport showing his employment with Bentimi Group of Companies in the year 1996 is Exhibit PW-2/2. Copy of his Passport showing his employment with Bentimi Group of Companies in the year 2003 is Exhibit PW-2/3.

b) PW-2 further deposed that he used to deal with all custom and documents related issues including certification of the product, custom clearance etc. for the company M/s ZAO Termoecostroi within the group companies.

c) He further deposed that the contract No. AR/TER/085/97 dated 27th October, 1997 in which, Plaintiff No. 1 sold to M/s ARINA+ 500MT of "Indian Long Grain White Raw Rice 10% broken (Max)" to be consigned to Plaintiff No. 2 at Novorossiysk (Russia), was handled by him on behalf of the Plaintiff No. 2 Company.

d) He further deposed that he had written a letter to the owner of the Vessel SARA-3 in which, the goods i.e. 233 MT rice, was transshipped from Tartous to Novorossiysk to authorize the Captain of the Ship for issuing a certificate that "during transshipment and discharging most part of goods/bags were torne and lost their shape and condition of the Cargo". Office copy of the said handwritten letter dated 18.05.1998 written by him to the owner of Vessel SARA-3, is Exhibit PW-2/4, which bears his signature at Point 'A'.

e) He further deposed that he had also written a letter dated 10.09.1998 to the agent (M/s Ingosstrakh) of the Defendant Company at Moscow requesting therein to hand over all original documents regarding claim addressed to the Defendant Company. Office copy of the letter Ref. No. Lar/610/98 dated 10.09.1998 is Exhibit PW-2/5, which bears his signature at Point 'A'.

f) He further deposed that he had also forwarded the copy of the SGS Certificate of quality and quantity in which inspection of the goods was carried out at Tartous, Syria from 02.03.1998 to 15.03.1998 to the Director of Plaintiff No. 1 Company on 07.08.1998. The certificate issued by SGS dated 16.03.1998 is Exhibit PW-2/6, which bears his signature at Point 'A'.

g) He further deposed that he on behalf of Plaintiff no. 2, had confirmed to Plaintiff No. 1 about the message being sent to the agent of Defendant No. 1 namely, M/s Ingosstrakh, Moscow via Fax on 01.04.1999 as requested by Plaintiff No.1. The Fax message sent

by Plaintiff no. 1 on 31.03.1999 and confirmed by him on behalf of Plaintiff no. 2 on 01.04.1999 is Exhibit PW-2/7.

h) He further deposed that he knew the Director of the Plaintiff No. 2 Company, namely Kovalevskaja Elena Alexandrovna very well. He had seen her writing and signing on several occasions. He confirmed that the Special Power of Attorney dated 15th December, 2003, issued by the Plaintiff No. 2 in favour of Plaintiff no. 1 has been signed by the Director of the Plaintiff No. 2 Company namely Kovalevskaja Elena Alexandrovna. The Special Power of Attorney dated 15th December, 2003 is Exhibit PW-2/8 which bears signature of Kovalevskaja Elena Alexandrovna at point 'A'.

vii. Therefore, the Suit has been signed, verified and instituted by a duly authorized person on behalf of plaintiff No. 2 and has been signed, verified and instituted by a duly authorized person on behalf of plaintiff no. 1. Company.

Per Contra, Ld. Counsel for the defendant has argued that the Incorporation Certificate of Plaintiff No.2 Company has not been produced by the Plaintiffs and the bare perusal of cross-examination of PW-1 shows that plaintiffs have not been able to prove the aforesaid issues.

The insurance has been taken by Plaintiff No.1 Company and right from the beginning, the defendant was in the knowledge of the fact that Plaintiff No.1 is the Limited Company. The defendant Company was also aware that Plaintiff No.2 is the consignee of the goods as they were possessed with Invoice and Bill of Lading. There is no dispute that Sh. Shyam Garg is the Director and Principal Officer of plaintiff no.1. Furthermore, the Resolution dated 28.12.2003, passed by the Board of Directors of plaintiff no.1 in its meeting, has been proved on record as Exhibit Ex.PW-1/53. The Plaintiff No.2 has given the Special Power of Attorney dated 15th December, 2003 is Exhibit PW-2/8 to sign, institute and prosecute its case before the Court.

The Hon'ble Supreme Court in ***United Bank of India Vs. Naresh Kumar & others*** **(*1996) 6 SCC 660***, in para 13 said that there is a presumption of valid institution of a suit once the same is prosecuted for a number of years and in the present case, more than 16 years have already been elapsed.

I have profit to refer the Judgment passed by our Hon'ble High Court in ***RFA No. 160/1991 titled as M/s. United India Insurance Co. Ltd. & Anr. Vs. M/s. Okara Trade Parcel Carriage, decided on 7th December, 2010*** which vividly caters the arguments of the Ld. Counsel for defendant No.1. Paras No.6 and 7 of the aforesaid Judgment are reproduced herein for apt understanding:-

> *"6. In my opinion, the trial court has clearly fallen into an error in dismissing the suit on behalf of the appellant no.2/plaintiff no.2 on the ground that it was not validly instituted. A reference to the power of attorney exhibited as P-2 shows that the same was duly notarized. Once the same is notarized then under Section 85 of the Evidence Act, 1872 there is a presumption that all necessary acts have been performed for execution of the power of attorney. Thus, the finding of the trial court that Sh. M.M. Kapoor, the attorney holder was not authorized to verify and sign the pleadings on behalf of appellant no.2/plaintiff no.2 is clearly illegal. In fact this finding is also illegal because Sh. M.M. Kapoor was the General Manager of the plaintiff no.2/appellant no.2 company and a General Manager is a principal officer within the meaning of Order 29 Rule 1 of the CPC and he was therefore duly authorized to sign the pleadings and institute the suit. I have had an occasion to consider this aspect only yesterday on 6.12.2010 as regards the effect of Order 29 Rule 1 CPC in the judgment in RFA No. 343/2001 titled as* ***MTNL Vs. Bharat Bhushan Sharma****. Paras 3 to 5 of the said judgment are relevant and the same read as under:-*
>
> *3. In my opinion the court below has clearly fallen into an error in dismissing the suit on the ground that the plaint was not duly signed and verified. In terms of Order 29 Rule 1 of the CPC, any principal officer of a corporation, such as the appellant, can sign and verify the pleadings. It need not be gainsaid and that an Accounts Officer*

(Legal) is definitely a principal officer of the appellant corporation. In this regard reference may be made to Section 2(30) of the Companies Act, 1956 which defines an "officer" and which provision reads:-

""officer" includes any director, manager or secretary, or any person in accordance with whose directions or instructions the Board of directors or any one or more of the directors is or are accustomed to act;"

The aforesaid is an inclusive definition. Though there appears to be possibly a mistake in the language of the said sub-section because it is an officer who acts on the instructions of the board and not vice versa which appears to be wrongly stated in this section, however it is quite clear that an officer of a corporation includes besides a Director or Manager or Secretary, a person who is having duties as cast upon him by the Board of Directors and an Accounts Officer thus would also be a principal officer within the meaning of Order 29 Rule 1 CPC.

4. This aspect, with respect to the authority to sign and verify the suit by a principal officer has been dealt with by a Division Bench of this Court in the case of ***Kingston Computers (I) P. Ltd. Vs. State Bank of Travancore 153 (2008) DLT 239 (DB)*** *and in which, it has been held that a principal officer is authorized by virtue of Order 29 Rule 1 CPC not only to sign and verify the pleadings, but also therefore to institute the suit. Paras 23 to 26 of this judgment are relevant and the same read as under:-*

23. This then is the short issue which needs to be considered by us exercising appellate jurisdiction.

24. Order 29 Rule 1 of the Code of Civil Procedure reads as under:-

> ***" 1 . Subscription and verification of pleading.-***
> *In suits by or against a corporation, any pleading maybe signed and verified on behalf of the corporation by the*

secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case."

25. Discussing Order 29 Rule 1 of the Code of Civil Procedure, in the decision in United Bank of India's case (supra), in para 10, Hon'ble Supreme Court held as under:-

"Reading Order 6 Rule 14 together with Order 29 Rule1 of the Code of Civil Procedure it would appear that even in the absence of any formal letter of authority or power of attorney having been executed a person referred to in Rule 1 of Order 29 can, by virtue of the office which he holds, sign and verify the pleadings on behalf of the corporation. In addition thereto and dehors Order 29 Rule 1 of the Code of Civil Procedure, as a company is a juristic entity, it can duly authorize any person to sign the plaint or the written statement on its behalf and this would be regarded as sufficient compliance with the provisions of Order 6 Rule 14 of the Code of Civil Procedure." 26. Suffice would it be to state that in law, the Secretary, Director or a Principal Officer of a company would be treated as duly authorized to institute suit on behalf of a company. This flows out from a bare reading of Order 29 Rule 1 of the Code of Civil Procedure and as further explained in the decision in United Bank of India's case."

5. Reference may also be made usefully to the judgment of the Supreme Court in the ***United Bank of India Vs. Naresh Kumar & others (1996) 6 SCC 660****, in which, in para 13, it is said that there is a presumption of valid institution of a suit once the same is prosecuted for a number of years. This test as laid down by the Supreme Court is also satisfied in the present case inasmuch as the suit in fact has been prosecuted for four years by the appellant corporation for seeking an appropriate decree against the respondent by adducing evidence. I may note that the appellant is a public sector undertaking and not a private company where there would be disputes between two sets of shareholders claiming right to management and one set of shareholders are opposing*

> *another set of shareholders with respect to control and management of the company. This thus is an additional fact that there can be no dispute as to the authority of the person signing /verifying the pleadings and instituting the suit."*
>
> *7. Therefore, the finding of the trial court is completely illegal and perverse that Sh. M.M.Kapur was not authorized on behalf of the appellant no.2/plaintiff no.2 to file the suit. Not only Sh. M.M.Kapur was authorized under Order 29 Rule 1 CPC being the General Manager and the principal officer of the appellant no.2 company but he was duly authorized by the notarized power of attorney proved as Ex.P-2."*

Considering the law laid-down by the Hon'ble Apex Court and our own Hon'ble High Court and in view of the facts and circumstances of the present case, I am completely in agreement with the arguments, as advanced by the Ld. Counsel for the Plaintiffs that the suit has been instituted by duly authorized person on behalf of Plaintiffs.

Accordingly, issues No.9 and 10 are also decided in favour of the Plaintiffs and against the defendant.

ISSUES NO.2 TO 8 AND 11 & 12

2. *Whether plaintiff no.1 had no insurable interest as stated in Preliminary Objection No.2? If yes to what effect on the suit? OPD.*

3. *Whether there was violation of Section 64 VB of the Insurance Act 1938? If yes to what effect on the suit? OPD.*

4. *Whether policy no. 1998/964 was issued by defendant without consideration and/ or that the cover afforded by policy no. 1998/596 had been continuing when policy no. 1998/964 was issued – as averred in para 29 of the plaint? If yes, to what effect on the suit? OPP.*

5. *Whether the plaintiff is entitled to refund of premium charged in lieu of policy No. 1998/964 as averred in para 29 of the plaint? OPP.*

6. Whether the repudiation of the claim by defendant is unlawful and against terms and conditions of the policy of insurance as averred in para 26 of the plaint? OPP.

7. To what amount, if any, is plaintiff entitled to under the policy/policies of insurance issued by defendant? OPP.

8. Whether the plaintiff is entitled to interest? If yes at what rate? OPP.

11. Whether there is any privity of contract between the plaintiff No.2 and the defendant? If not, its effect.

12. Whether the plaintiffs have any locus standi to file the suit in their own name? If not, its effect.

The aforesaid issues are interrelated and interconnected with each other. Moreover, the discussion on the aforesaid issues may have overlapping discussion of the pleadings, arguments and evidence led by the parties. Accordingly, they are dealt with and decided together.

FINDINGS AND CONCLUSIONS OF THE COURT

ON THE QUESTION OF INSURABLE INTEREST OF PLAINTIFF NO.1, LOCUS STANDI OF PLAINTIFFS, AND PRIVITY OF CONTRACT BETWEEN PLAINTIFF NO.2 WITH DEFENDANT.

The Ld. Counsel for Plaintiffs has fervently argued as under:-

1. The Plaintiff No. 1 had taken the insurance pertaining to the transaction with Plaintiff No. 2. The contract/agreement with the Plaintiff No. 2 i.e. the Importer has been exhibited as PW-1/1. As per this contract, the Plaintiff No.1 had to export Indian Long Grain White Raw Rice 10% broken (MAX) to the Plaintiff No. 2. An irrevocable Letter of Credit for 100% value was issued by the Plaintiff No. 2 to the State Bank of Mysore, Connaught Place Branch, Antriksh Bhawan, K.G. Marg, New Delhi as per the said agreement exhibit PW-1/1. The shipping

documents also contained the detail of the goods shipped. A certificate dated 21.11.1997 was issued by SGS India Limited in respect of the said goods. The goods were insured with the Defendant vide Policy No. 1998/598 and a premium of Rs.14,091/- was paid by the Plaintiff No. 1 for the said goods which was sent through the vessel namely FIRAS-1. As per the said policy, the said goods were collected on 12.11.1997 and shipped on 24.11.1997, exhibit PW-1/4. Later, some disputes arose between the owner of the ship and the Charterers who had taken the vessel on Voyage Charter basis and had issued Bill of Lading. Due to undue delay in the delivery of the said goods, Plaintiff No. 2 had given a notice to Plaintiff No. 1 (which is exhibited PW-1/7 and PW-1/8 respectively). The Plaintiff No. 1 had to appoint solicitor in London to look after interests of the Plaintiff No. 1, Plaintiff No. 2 as well as the other shippers in the said Cargo. After hectic persuasion by the Plaintiff, agreement was arrived between the Indian Shippers of the Cargo and owner of the vessel. As per the settlement, the goods were transshipped from FIRAS-1 to smaller vessel namely, SARA-3. Thereafter, the Defendant again told to obtain a new policy for voyage from Tartous port (Syria) to Novorossiysk (Russia), under the circumstances the Plaintiff had no option but to take a new policy in continuation of the earlier policy, the same is exhibited as Exhibit D-1/X-3. This policy was also valid till the port of discharge. Hence, the Plaintiff No. 1 had insurable interest throughout the shipment till the destination at Russia.

2. As per purchase order contract is CIF wherein Cost, Insurance and Freight (CIF) is an expense paid by seller to cover the costs, insurance and freight of the order of a Buyer's while the consignment is in transit . The goods are exported to a port named in the sales contract. Until the goods are fully loaded onto a transport ship, the seller bears the costs of any loss or damage to the product. Once the freight loads, the buyer becomes responsible for all other costs and hence there is privity of contract between plaintiff No.2 and defendant as well. Although, the policy No. 1998/598 and No. 1998/964 was not taken by the Plaintiff No. 2, yet, the Plaintiff No. 2 is a necessary party as the loss has been suffered by the Plaintiff No. 2, to which it had raised claim over Defendant's counterpart in Russia and both Plaintiffs have raised claims against the Defendant. Plaintiff No. 2 is also beneficiary of the claim received by the Insurance Company. So, even it is held that there is no privity of contract between the Plaintiff No. 2 and the Defendant; no

consequence will follow, as the suit has been instituted by the competent person and valid under Order I, Rule 1 of CPC.

There is no dispute that Plaintiff No.1 has received the entire amount of the consignment from Plaintiff No.2. The question arises, whether the Plaintiff No.1 is discharged from its obligation to supply the merchantable and marketable goods at the destination of Plaintiff No.2. As per the contract between Plaintiff No.1 and Plaintiff No.2, it was the obligation and primary duty of Plaintiff No.1 that goods in merchantable condition must reach at the destination of Plaintiff No.2. Moreover, as per settled law, it was duty of the seller of goods to supply the merchantable and marketable goods to buyer. For the sake of arguments, if the merchantable goods do not reach the destination of Plaintiff No.2, then who will be responsible to bear the loss and as per the contract between Plaintiff No.1 and Plaintiff No.2, the Plaintiff No.1 was required to bear the entire loss and reimburse the amount to Plaintiff No.2. The records clearly borne-out that Plaintiff No.2 vide its communications dated 05.01.1998 and 06.01.1998 (Exhibits as PW-1/7, PW-1/8 and PW-1/9 respectively) addressed to Plaintiff No.1 have already invoked the said clause and even called their amount with interest. The plaintiff no. 2 has also written a letter dated 12.01.1998 (Ex. PW1/14) to plaintiff no. 1 and copy of the same was also sent to the importer. It is clearly mentioned in the letter Ex.PW1/14 that there is no information about the vessel i.e. MV Firas 1 and the said vessel, as per them, will not be going to reach by 15.01.1998 and therefore, they have lodged claim against plaintiff no. 1 for refund of the amount along-with interest.

The Plaintiff No.1 had, first of all, taken insurance on the goods, which was the part & parcel of Invoice dated 10.11.1997 to be supplied through Bill of Lading dated 24.11.1997 through Cover Note dated 11.11.1997 (Exhibit PW-1/4) and

Policy dated 12.11.19917 and thereafter taken the insurance on the Bill of Lading dated 19.03.1998 through Insurance Policy dated 25.03.1998 (Exhibit PW-1/19).

So far as the liability of defendant Insurance Company is concerned, it is nothing but contractual liability that is emerging from the contract of indemnity, which means that a contract by which one party promises to save the other from loss caused to him by the contract of the promisor himself or by the conduct of any other person is called a contract of indemnity.

Indemnity is the controlling principle in marine insurance law. All insurance policies, except the life policies and personal accident policies, are contract of Indemnity. This principle may be defined as "under the indemnity contract the insurance company undertakes to indemnify the insured against the loss suffered by the insured peril. Literally, Indemnity means "make good the loss". The object of the insurance is to place the insured as far as possible in same financial position in which he was before the happening of the insured peril. The insured is not allowed to make any profit out of the happening of the event because the object is only to indemnify him and profit would be against this principle.

The Principle of Indemnity has been explained in an English case, ***Castellian V. Preston (1883 2 Q.B. 38)***: ***"Every contract of marine and fire insurance is a contract of indemnity and of indemnity only, the meaning of which is that the insured in case of loss is to receive full indemnity but is never to receive more. Every rule of insurance law is adopted to carry out this fundamental rule, and if ever any proposition brought forward the effect of which is opposed to this fundamental rule, it will be bound to be wrong."***

The main characteristics of the principle of indemnity are:

1. That it applies to all contracts of insurance except the life and personal accidental insurance.

2. That the amount of compensation is restricted to the amount of loss, meaning thereby, that the insured cannot be allowed to make profit out of it.

3. If there are more than one insurer for the property, if destroyed, the amount of loss could be recovered from any of them but not from all of them, and

4. The insurers take all the rights that the insured had, after the payment of compensation in the subject matter.

As per Section 125 of the Indian Contract Act, 1872, the promisee, acting within the scope of his authority, is entitled to recover from the promisor all damages which he may be compelled to pay in any suit in respect of any matter to be the promise to indemnify applies.

Suppose, the Plaintiff No.2, itself had filed the suit against the Plaintiff No.1 and defendant company, the question arises, whether the suit is maintainable and the answer is in the affirmative as the Plaintiff No.1 had obligated to Plaintiff No.2 to supply the merchantable and marketable goods of the required quantity and quality, as agreed between the parties and if the Plaintiff No.2 had not received, then the Plaintiff No.2 is entitled to reimbursement of the amount along-with reasonable interest.

The Plaintiff No.1 itself is claiming that Plaintiff No.1 is liable to "make good the loss" of Plaintiff No.2 which they suffered. It cannot be said that there is no insurable interest of Plaintiff No.1 as the Plaintiff No.1 had to "make good the loss" of Plaintiff No.2 which they had alleged to suffer prior to reaching the goods at the final destination in Russia at Novorossiysk. The Plaintiff No.2, although, may not have privity of contract with the defendant, but on account of principle of

Indemnity, the defendant may be liable to pay the loss covered under the insurance policies to Plaintiff No.2 which was taken by Plaintiff No.1 from the defendant.

In order to understand the principle of Insurable interest, it is apposite to reproduce Section 7 of the Marine Insurance Act, 1963, which defines the insurable interest as follows:-

> *"(1) Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure.*
>
> *(2) In particular a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof."*

Insurable interest is an interest which can be or is protected by a contract of insurance. This interest is considered as a form of property in the contemplation of law. It is assimilated to an actionable claim transferable to the same extent and within the same limitations. The classical definition of insurable interest was given by ***Lawrence, J., in Lucena v. Craufurd(1806) 2 B & P 269 HL*** which is as under:-

> *"The having some relation to, or concern in, the subject of the insurance, which relation or concern, by the happening of the perils insured against may be so affected as to produce a damage, detriment or prejudice, to the person insuring and where a man is so circumstanced with respect to matters exposed to certain risks or dangers, he may be said to be interested in the safety of the thing with respect to it as to have benefits from its existence – prejudice from its destruction."*

To put it in short, in his Lordship's words in the same case: 'interest' means *'if the event happens, the party will gain advantage, if it is frustrated, he will suffer a loss'*.

Walton J. in Moran Galloway V. Uziclli (1905) 2 K.B. 555, 563 observed that the definition of insurable interest has been continuously expanding and dicta in some of the older cases, which would tend to narrow it, must be accepted with caution. A study of modern cases reveals that a vested or proprietary interest is not essential, but such interest may be merely possessory, inchoate, contingent, defensible, equitable or expectant. To sum up, insurable interest is a financial or other interest in preservation of the thing insured and continuance of the life which has been insured.

In view of the discussions, made hereinabove, this Court is in completely agreement with the arguments of the Ld. Counsel for Plaintiffs that the Plaintiffs have locus standi to file the case against the defendant company and there is Insurable interest in favour of Plaintiff No.1 as the Plaintiff No.1 is liable to "make good the loss" of Plaintiff No.2.

ON THE QUESTION OF VIOLATION OF SECTION 64 VB OF THE INSURANCE ACT 1938, POLICY NO. 1998/964 WAS ISSUED BY DEFENDANT WITHOUT CONSIDERATION, REPUDIATION OF INSURANCE OF POLICY WAS UNLAWFUL AND ENTITLEMENT OF PLAINTIFF NO.1 AND PLAINTIFF NO.2 UNDER THE SAID POLICIES.

The Ld. Counsel for Plaintiffs has argued with forensic tenacity and the same is as follows:-

1. The documents pertaining to the case, specially Ex. PW-1/1, Ex. D-1/X-2, Ex. D-1/X-3, Ex. PW-1/4 shows that the insurance taken by Plaintiff No. 1 from Defendant i.e. Ex. D-1/X-3 was in continuation of the earlier insurance bearing No.

1998/598 and the later policy was taken only at the instance of Defendant. According to Clause (d) of Section 2 of the Contract Act, consideration is spoken of thus: "(d) When, at the desire of the promisor, the promisee or any other person had done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise." Similarly, Clauses (e) and (f) provide as under: "(e) Every promise and every set of promises, forming the consideration for each other, is an agreement. (f) Promises which form the consideration or part of the consideration for each other are called reciprocal promises." It is further provided by Clause (h) that an agreement enforceable by law is a contract. Now, a contract of insurance, like any other contract, is concluded by offer and acceptance. Hence, both the contracts i.e. No. 1998/598 and No. 1998/964 are valid contracts. However, it is argued on behalf of the Plaintiffs that the earlier contract i.e. 1998/598 was still subsisting when next policy i.e. 1998 /964 was taken under threat and duress of the Defendant.

2. Further, DW-1 during his cross-examination dated 12.07.2017 DW-1 has stated that "it is correct that the plaintiff had got the same consignment re-insured from Tartous to Novorossiysk on 25.03.1998. It is wrong to suggest that the re-insurance for the same consignment was taken by the plaintiff no. 1 voluntarily and not at the instance of the defendant Company." It was also admitted by the plaintiff that the re-insurance was taken by the Plaintiff No. 1 for the same consignment before it could reach at the final destination. Hence, it can safely be stated that the present case is not hit by section 64 VB of the Insurance Act.

3. The goods containing 4660 bags were loaded (approx. 233 MT) on the vessel, namely, FIRAS-1. This cargo was bond for Novorossiysk and some of the cargos containing Sesame seed in the same vessel was meant for Mersin. The cargo sailed during first week of December 1997 from Kandla Port. It was reported that due to some technical reasons, the

ship kept on waiting in Indian waters. Further, it was informed in January, 1998 that the vessel was waiting at Suez Canal due to some disputes arose between the owners of the vessel (FIRSA-1) with its Charterers who had taken the vessel on Voyage.

4. It is also visible from the records that due to the delay in delivery of the consignment, the consignee i.e. the Plaintiff no. 2 gave notices to the Plaintiff No. 1 vide notices dated 05.01.1998 and 06.01.1998 which are exhibited as PW-1/7, PW-1/8 and PW-1/9 respectively.

5. Further, due to such delay in the shipment, the Plaintiff No. 1 called upon Defendant No. 2 to process the claim for the insured amount vide two letters both dated 09.01.1998 exhibited as PW-1/11 and PW-1/12. Defendant assigned the ascertainment of the claim to its Russia counterpart i.e. Ingosstrokh Insurance Co. Ltd. The buyer of the said goods i.e. Arina + wrote to the Ingosstrokh Insurance Co. Ltd. for claim for non-delivery of the insured goods vide its letter dated 10.01.1998 exhibited as PW-1/13. The consignee of the goods i.e. Plaintiff No. 2 Zao Termoecostroi in clear and unequivocal terms wrote reminder letter dated 05.01.1998 to the Plaintiff No. 1 stating "if the vessel is not reaching port by 15.01.1998, we are no more interested in this material and want full compensation for 110% of contract value with 40% interest.".

6. Buyer of the goods i.e. Arina + also started building pressure upon the Plaintiff No. 1 to know whereabouts of the Shipped goods. Through letter dated 12.01.1998 (PW1/15) the Buyers asked to give necessary details. But, in fact the Plaintiff No. 1 itself had no knowledge of the whereabouts of the goods till that day.

7. The Plaintiff no.1 and other charters of the shipment hired M/s Black & Co. Solicitors at London to resolve the matter. Vide the FAX massage dated 02.02.1998 the solicitors at London had advised for meeting at Cyprus on 06.02.1998 to resolve the matter.

8. Through the letter dated 05.02.1998 (Ex. PW-1/16) defendant was notified about non-delivery of the goods even after such delay with all the requisite information and documents pertaining to the shipment were provided to the Defendant, so that the claim of the Plaintiff No.1 may be processed at the earliest.

9. Later, the owner of the Ship refused to continue the voyage, due to dispute with the same vessel, as he was fearing arrest at Novorossiysk and having no other option the shippers/ receives had to agree to a transshipment at Tartous, Syria. This information was also provided to the Defendant vide letter dated 24.02.1998 for requisite endorsement about transshipment as well as the change of name of vessel. It was also made clear to the Defendant that the receivers are seeking endorsement from the Defendant. Again vide letter dated 03.03.1998 (Ex. PW1/18) detailed information was given to the Defendant with a view that the Defendant will honor the money spent by Plaintiff No. 1 in salvaging the goods, which would otherwise have been lost. The Plaintiff also told the Defendant to settle its claims.

10. The Plaintiff was compelled to take re-pay the premium amount for transshipped vehicle i.e. Sara-3. The premium of Rs. 29,790/- was paid by the Plaintiff No. 1 to Defendant for re-insuring the same goods. The Plaintiff No. 1 had no other option but to pay the same in order to protect his interest. Hence, this amount of re-insurance is also payable to the Plaintiff.

11. Further, DW-1 in his cross-examination dated 12.07.2017 has stated:-"it is correct that the plaintiff had got the same consignment re-insured from Tartous to Novorossiysk on 25.03.1998. It is wrong to suggest that the re-insurance for the same consignment was taken by the plaintiff no. 1 voluntarily and not at the instance of the defendant Company." It is also admitted by the plaintiff that the re-insurance was taken by the Plaintiff No. 1 for the same consignment before it could reach at the final destination.

12. It is also matter of record that the plaintiff had repeatedly requested to Defendant that the claims of the Plaintiff No. 1 may be released. The plaintiff has given various letters to the Defendant in order to keep the Defendant aware about the happening of shipment. Vide Letter dated 14.02.1998 (Ex. Pw-1/17) the Plaintiff No. 1 asked the Defendant to put endorsement of Sara-3 in insurance policy no. 1998/596, but the Defendant in complete disregard to act as per the request of the Plaintiff No.1. Further, Exhibit PW-1/10, Exhibit PW-1/11, Exhibit PW-1/12, Exhibit PW-1/16 and Exhibit PW-1/17 shows that the Defendant were made aware about all the facts and circumstances throughout the shipment. It is further pertinent to note that because Defendant failed to make endorsement/alteration in the policy Exhibit PW-1/5, therefore, a new policy was taken by Plaintiff No. 1 on 25.03.1998 by paying a premium amount of Rs.29,790/-. This shows that the Plaintiff No. 1 paid premium to the Defendant twice for same shipment (once on 12.11.1997 of Rs.14,091/- and secondly on 25.03.1998 of Rs.29,790/-).

13. During the cross-examination of DW-1, it was stated that "the policy was issued towards insurance of goods from Delhi to Novorossiysk via Gandhi Dham/Kandla. The goods were issued from Delhi to its final destination vide the said policy. It is correct that Plaintiff No. 1 had paid premium of Rs.14,092/- (including tax) in order to secure his interest towards sending the goods from Delhi to its final destination to Plaintiff No. 2. It is correct that Plaintiff had got the same consignment re-insured from Tortous to Novorossiysk on 25.03.1998." It has been further pointed out by the DW-1 that there are agents of Defendant overseas. He further admitted that the survey might have been conducted by overseas agent of Defendant Company, namely, M/s Ingosstrakh. In such circumstances, it is clear that the Plaintiff No. 1 was compelled to take another policy by paying Rs.29,790/- for re-insurance of the same goods. Although, the same was not necessary but because of stubborn attitude of the Defendant, the Plaintiff was constrained to re-insure same goods on 25.03.1998 which is exhibited as Ex. DW-1/X-3.

14. The Plaintiff is entitled to refund of premium charged in lieu of policy No. 1998/964 as the same was charged under duress. The Plaintiff No. 1 was under threat that if the earlier policy i.e. Exhibit PW-1/5 is not endorsed with a new vessel, the consignee as well as the buyer may raise technical objections. There was pertinent threat that the insurer may also raise technical objections, if the goods are rejected by the buyer after reaching at the destination. In a situation when the goods carried by SARA-3 would have lost in transit from Syria to Russia, the insurer could also have possibly raised such objection that in policy No. 1998/596 does not bear the endorsement of Sara-3, hence they would have rejected the claim of the Plaintiff No. 1, to dislodge such contingency the plaintiff was constrained to take insurance of the same goods again vide policy no. 1998/964.

15. The policies exhibited as Ex. PW-1/5 and Ex. PW-1/20 is to be read in conjunction and in continuation with each other. As submitted earlier, policy dated 25.03.1998 covered claims of earlier policy dated 12.11.1997.

16. The survey report dated 13.06.1998 of the Surveyor i.e. Ingosstrokh which is exhibited as Ex. PW-1/23 is very important in this regard. This Surveyor was the agent /counter-part of Defendant in a foreign country (Russia). The Surveyor conducted a survey of the goods reached at the destination. The Surveyor inspected the goods from 28.04.1998 to 18.05.1998 at Novorossiysk port. In its exhaustive report, the Surveyor found that bags were stowed in bulk in both holds without ventilation holes and necessary separation from boards of the vessel; there were torn bags and poured out rice in the holds, some bags had through punctures caused by metal hooks; there were about 300 non-standard bags without marking in hold No. 2 sewed by hand. In view of the inspected consignment, it was opined by the Surveyor that 3245 bags is non-standard and cannot be fit for human consumption. The cause of damage has mentioned in the said report is as under:-

"in our opinion the damage to the cargo could be caused by insufficient transshipment operations and a long time delay in transit.

For more details see photos taken by Surveyor. Encl."

17. Further, under Clause-12 of the policy document, it has been assured that-

"12. Where, as a result of the operation of a risk covered by this insurance, the insured transit is terminated at a port or place other than that to which the subject matter is covered under this insurance, the underwriters will reimburse the Assured for any extra charges properly and reasonably incurred in unloading, storing and forwarding the subject-matter to the destination to which it is insured hereunder."

18. The defendant also does not qualify for any exclusion clauses as mentioned in clauses-4, 5, 6 & 7 of the underwriting agreement. Further, vide letter dated 28.07.1998 exhibited PW-1/24 and PW-1/28, Plaintiff No. 2 filed a claim to the counterpart of defendant i.e. Ingosstrakh. It was requested that a sum of USD 57,673.21 be released. Various documents including the policies, invoices, packing list, notice of losses, examination statement No. 329, bills of survey charges etc. were handed over in original for reimbursement as soon as possible. A reminder letter dated 17.08.1998 exhibited PW-1/29 (page 33 of the documents filed by the defendants) was again written to the Russian counterpart of the Defendant i.e. Ingosstrakh. Again on 19.08.1998, another letter was written to Defendant's Russian counterpart for reimbursement of the claim.

19. The Russian counterpart of the Defendant while arriving at the conclusion that the claims of Plaintiff No. 2 are correct as per policy No. 1998/596 and policy No. 1998/964. The letter dated 27.08.1998 is exhibited as Ex. PW-1/31. Further, vide letter dated 10.09.1998 (Ex.PW-1/32), Plaintiff No. 2 showed its dissatisfaction over the claim agreed by the Ingosstrakh. It was also stated that the loss shall be paid either by the Shipper

of cargo or by the Insurance Company. Also, vide letter dated 04.11.1998 (Ex. PW-1/35 of the document filed by the Defendant), Plaintiff No. 2 sought clarification regarding long voyage period and insufficient transshipment. In reply to this, the counterpart of Defendant wrote to Plaintiff No. 2, vide its letter dated 18.11.1998 (Ex. PW-1/36), it was clarified that the cargo delivered to Syria from FIRAS-1 to SARA-3 at Tartous was in sound condition and fit for human consumption, therefore, it could be concluded that the infestation might have occurred in transit from Tartous, Syria to Novorossiysk Russia and not before. The cause was stated not to be obvious. Further, vide letter dated 23.11.1998 (Ex.PW-1/37), Plaintiff No. 2 sought further clarification from Russian counterpart of Defendant regarding quality of rice and reason of damage. In reply to this, vide letter dated 24.11.1998 (Ex. PW-1/38), a reference was made to the Certificate No. 002258 issued by SGS Company, Syria that during the transshipment from FIRAS-1 to SARA-3, the goods were found in sound condition and fit for human consumption, which means that the cargo became unfit for human consumption during its carriage from Syria to Novorossiysk Russia only. In respect of cause of damage to the rice, it was stated that it is difficult to find out real cause of damage. It was concluded by Russian counterpart of Defendant that "nature of damage could not be attributed to inherent vice of cargo"

20. Vide letter dated 10.12.1998 (Ex. PW-1/39), Plaintiff No. 1 sought claim for losses incurred in cargo SARA-3. It was stated by the Plaintiff No. 1 that the Claim Settling Agent of Defendant in Russia i.e. Ingosstrokh had referred the claims to the Defendant. It was also made clear that the cargo was delivered as per the contract between Plaintiff No. 1 and Plaintiff No. 2, hence the claim lies with Plaintiff No. 1 against the claims raised by Plaintiff No. 2. Plaintiff No. 1 is liable to make good the losses to Plaintiff No. 2. Further, all important documents pertaining to the claim were handed over to the Defendant vide letter dated 06.03.1999. After long slumber, Defendant wake up and finally vide letter dated 22.03.1999 (Ex.PW-1/40) addressed to its Russian

counterpart/ agent for clarification had observed that the claim of the Plaintiffs may be rejected on the basis of Exclusion clauses 4.4 & 4.5, without application of mind and without considering the report of its Russian Counterpart.

21. Initially, the Defendant was of the opinion that damage of rice was due to inherent vice and delay and thus falls under exclusion No. 4.4 and 4.5. However, its Russian counterpart in its reply dated 12.04.1999 (Ex. PW-1/42) itself concluded that the exclusions No. 4.4. and 4.5 of ICC(A) do not apply in the present case as the same has not happened due to inherent vice. This shows that the Defendant was finding reasons for denial of the claim of the Plaintiffs. A combined reading of survey report dated 13.07.1998 and exhibits PW-1/29, PW-1/,30, PW-1/31, PW-1/,32, PW-1/35, PW-1/36, PW-1/37, PW-1/38, PW-1/40, PW-1/42, PW-1/45, PW-1/46, PW-1/49, PW-1/50 and PW-1/51, it can be stated that while Defendant's Russian counterpart i.e. Ingosstrokh had repeatedly clarified that exclusions No. 4.4. and 4.5 of ICC(A) do not apply, yet, Defendant on its own in order to avoid its contractual liability with Plaintiff No. 1 is pondering for any reason to avoid the claim. It is pertinent to mention herein that M/s Ingosstrokh (Defendant's Russian counterpart/agent) is the actual surveyor which inspected the goods physically at the port itself and given its findings on the basis of physical inspection, whereas, Defendant never examined any shipment or inspected any goods physically but was trying to deny the claim on flimsy and imaginary grounds.

22. Defendant could not make basis for repudiation of the claim of Plaintiffs as derived from official correspondences between the Defendant and M/s Ignosstrakh, therefore, after more than a year of procrastinated communications, Defendant vide its letter dated 12.12.2000 (which was actually received in the first week of Jan. 2001) repudiated the claim of the Plaintiffs on entirely new grounds.

23. That initially the claim of USD 57,673.21 was raised by Plaintiff No. 2 vide its letter dated 28.07.1998, but, the

Defendant kept on lingering the matter for more than 2 years and finally vide its letter dated 12.12.2000 (Ex. P-8), the Defendant came up with an entirely new and flimsy ground that the case is repudiated on the basis of section 64VB of the Insurance Act and there is no insurable interest of Plaintiff No. 1.

24. It is, therefore, clear that Defendant is willingly, intentionally, malafidely and illegally repudiated the claim of Plaintiffs. Hence, the repudiation of claim by defendant is unlawful and against terms and conditions of the policy of insurance.

It is admitted case of the defendant insurance company that defendant has insured the Bill of Lading No. Firas/KDL-NOV/05 dated 24.11.97. The defendant insurance company has insured the said goods from Delhi (India) to Novorossiysk (Russia). The Bill of Lading clearly provides name of the vessel as Firas-1. The Policy also provides the name of said Vessel. The port of lading was from Kandla (India) and the port of discharge was Novorossiysk, Moscow (Russia). Net weight of the goods was 233 MTS and the gross weight was 236.495 MTS. The Invoice dated 27.10.1997 which is Ex.PW1/2 has been produced by the defendant itself. The Cover Note insuring the Invoice is dated 11.11.1997 (Ex.PW1/4). The risk covered under the said Cover Note is "All risk, War and CC (subject to 10% excess). The defendant has also produced copy of insurance policy and as per the policy, the policy period is from 12.11.1997 to the date is blank, because the risk has been insured from Delhi (India) to Novorossiysk, Russia. The said policy also reflects the Cover Note number 141557, dated 11.11.1997 (Ex.PW1/14). The said policy at the bottom clearly reveals as under:-

> *"in the event of loss or damage which may involve claim under this insurance immediate notice thereof and application for survey should be given to; Survey/settling agent namely M/s. Ingosstrakh Insurance Company Limited."*

The policy type has been shown "MARINE CARGO- Sea-Cover type- A - Single voyage. The defendant company has taken a total sum of Rs.14,092/- as premium under the Cover Note Ex.PW1/4, but as per the insurance policy dated 12.11.1997, an amount of premium has been shown as Rs.14,091/-. There is no dispute between the parties that voyage has started from Kandla Port to the desired destination on or about 10.12.1997.

The plaintiff no.2 has written a letter dated 05.01.1998 (Ex.PW1/8) to the plaintiff no. 1 and it is submitted by them that vessel i.e. MV Firas had not reached the desired destination on 30.12.1997 and they further apprehend that the ship might have lost and accordingly, cargo might have lost. The Plaintiff No.2 has further submitted that it will claim an amount from Plaintiff No.1 Company, in case, cargo is not delivered at the port of Novorossiysk latest by 15.01.1998. The communications Ex.PW1/7, Ex.PW1/8 and Ex.PW1/9 show apprehension to the loss of vessel/ship and consequently, loss of cargo. The plaintiff no. 1 has followed-up the matter with Hind Shipping and relevant portion of the letter dated 06.01.1998 (Ex.PW1/10) reveals as under:-

"……

1. *Let us have pin point location of the vessel now and name of the proximate port.*
2. *Confirmation that our cargo is on board and not sold off.*
3. *A copy of the time C/P per return fax/courier.*
4. *Please tell us the telex no. of Eurasia Shipping.*
5. *Please let us have the details of the P+I club with whom this vessel has insured.*
6. *Whether the voyage is insured from the side of the head/dispowners.*
7. *A list with full contact details of all the other shippers who have cargo on board this vessel. Since you were the loadport agents we do not think that this information is unavailable to you. Also please do not quote confidentially because if you had exercised some*

caution and due diligence before becoming agents of such a shipping co/time charterers we would not have had to address this fax to you."

The Plaintiff No.1 company has followed up the matter with defendant company vide letter dated 09.01.1998 (Exhibit PW-1/11) and the relevant portion of the said letter is as follows:-

".....We have been informed by the local agents of the vessel that due to financial dispute between owners of the vessel and time charterers (on whose behalf the Bill of Lading has been issued to us) the vessel has not crossed the Suez Canal and its whereabouts are unknown as of present.

It is even apprehended that the cargo on board may be misappropriated by either party.

Since our cover with you is on All Risks basis including non-delivery and the cargo remains undelivered to our consignee till date, we hereby lodge our claim to the insured amount of Rs.3,575,000/--.

We are ready to give you our letter of Subrogation and other necessary documents to enable you process our claim for the insured amount. Kindly inform us the details of the required papers…"

The aforesaid letter dated 09.01.1998 (Ex.PW1/11) reveals that plaintiff no. 1 has actually lodged claim of Rs.35,75,000/-, which was covered under the Cover Mote dated 11.11.1997 coupled with the insurance policy dated 12.11.1997.

A letter dated 09.01.1998 (Ex.PW1/12) issued by Plaintiff No.1 to defendant company also reveals that plaintiff no. 1 has promptly and immediately informed the defendant company about the actual position that they are not known about the whereabouts of vessel and consignee already apprehends that cargo got damaged and misappropriated.

The perusal of Ex.PW1/13 reveals that importer has written a letter dated 10.01.1998 to the surveyor/settling agent of the defendant company namely M/s. Ingosstrakh Insurance Company Ltd. and the importer has lodged claim under the insurance policy dated 12.11.1997. The importer has also provided account number where the insurance company was required to make payment. The copy of the said letter was also sent to the defendant company.

The plaintiff no. 2 has written a letter dated 12.01.1998 (Ex. PW1/14) to plaintiff no. 1 and copy of the same was also sent to the importer. It is clearly mentioned in the letter Ex.PW1/14 that there is no information about the vessel i.e. MV Firas 1 and the said vessel, as per them, will not be going to reach by 15.01.1998 and therefore, they have lodged claim against plaintiff no. 1 for refund of the amount along-with interest.

The importer has also written a letter dated 12.01.1998 (Ex.PW1/15) to plaintiff no. 1 that they have not received any information regarding the Ship MV Firas 1 and they have requested to plaintiff no. 1 to send the required information to the settling agent/surveyor M/s. Ingosstrakh. It is also written in the said letter that they are in regular touch with the ship agent at Novorossiysk, but till that date, the ship agent has no information regarding the same.

The plaintiff no. 1 has again written a letter dated 05.02.1998 (Ex.PW1/16 (colly.) to the defendant company and the relevant portion is reproduced as under:-

"…….

1. *The consignees have authorized us to deal with this matter on their behalf.*

2. *We are seeking legal advices M/s. R.D. Black & Co. Solicitors, 31 Old Jewry, London EC2R 8DQ, 44.171.6008282 Fax 6008228.*

3. Vide their latest communication dated 2.2.98, they have advised us for a possible meeting at Cyprus on 6.2.98 to resolve the matter. Copy of their fax message dated 2.2.98 is attached.

4. Enclosed also please find a copy of the fax message dated 6.1.98 which the charterers have sent to the owners of the vessel. On going through this message, you will please observe that as against a very small amount of dues to the owners from the charterers, the owners are taking quite unjustified and illegal stand for putting a lien on the entire cargo on board the vessel. Even though the charterers have offered to give a bank guarantee, the owners are not agreeing for this reasonable offer.

5. For your information and appreciation, we are sending herewith certain documents (listed in annexure) which will convey to you the efforts that we are already taking in this matter with the sole objective of ensuring that the dispute is solved at the earliest and the vessel is allowed to prosecute the voyage and finally discharge the cargo at Novorossiysk.

6. We would also point out that we have taken all possible protective steps and would request you once again to institute all necessary action to avert and minimise losses including if necessary joining solicitors in their action.

7. Should the meeting, as stated above is finalised, we will inform you about the developments in this regard.

8. In the meantime, we welcome your valuable advice in this regard as to the steps being taken by us being appropriated. In case, we receive no advice from you in this regard we shall assume that you deem our efforts to be fully appropriate in this regard on behalf of the consignee/assured party.

9. Since, the cargo was loaded on the vessel around end-November from Kandla, the possibility of some

damage/deterioration of the consignment of rice cannot be ruled out.

10. *We will apprise you further in this regard in due course of time as and when the cargo is discharged."*

The plaintiff no. 1 has written a letter dated 24.02.1998 (Ex.PW1/17) to the defendant company and it was inter-alia informed and requested to the defendant company:-

"Since the voyage to Novorossiysk was truncated half way, with the owners refusing to continue voyage due to dispute with charterers, the shippers and receivers of the cargo had, in the interests of protecting the cargo and getting the owners to prosecute the voyage, intervened with the owners using a London based attorney, and, after considerable negotiations and agreeing to pay a lump sum amount, got the owners to agree to reship the cargo to Novorossiysk. The owners however refused to continue the voyage with the same vessel, perhaps fearing arrest at Novorossiysk, and having no other option the shippers/ receivers had to agree to transshipment at Tartous, Syria, where currently the original vessel is moored. The owners have nominated and shippers/receivers have perforce accepted this nomination of vessel MV SARA III with the following particulars:-

Built in 1976
Flat Syrian
DWT 4500 MT
Grain Capacity: 170,000 cu ft
Holds/Hatches one book shape
Cranes 2 x 3T each
LOA 84.85 meters
Beam 14.46 meters
Class INCLAMAR equivalent Lloyds 100A
Special Survey and Docking January 1998
Laycan to commence loading Ex-Firas 1 at Tartous from 22.2.98

We trust we have informed you sufficiently this way. In case, you need any further information or clarification, please let us know. Please issue an endorsement to the policy showing transshipment/ change of vessel as the receivers have asked us to obtain this endorsement."

The perusal of Ex.PW1/21 (Colly.) reveals that Syrian International Superintendence (SIS/SGS) has inspected the consignment and a certificate of quality and quantity was given by them at Syrian Port. The relevant portion is reproduced as under:-

"Upon terminating the transshipment operation, the following has been ascertained:-

- *Good condition bags transshipped from M/V "FIRAS 1" to M/V "SARA 3"- 4580 jute bags.*
- *(SAY: FOUR THOUSAND FIVE HUNDRED EIGHTY JUTE BAGS ONLY)*
- *Bags damaged during transshipment from M/V "FIRAS 1" to M/V "SARA 3"- 77 jute bags.*

  (SAY: SEVENTY SEVEN JUTE ONLY)
- *There was a shortage of 3 (three) jute bags only."*

A Liner bill of lading bearing number H/2/1998, dated 19.03.1998 (Exhibit PW-1/19) has been produced by the defendant company itself. As per the said Bill of Lading there were 4657 bags measuring gross weight 236.342 MTS and net weight 232.850 MTS. The said Bill of Lading clearly provides the Bill of Lading Firas/KDL/November 05, dated 24.11.1997 which was pre-carriage by MV Firas 1 to Tartous, Syria and which was transshipped from MV Firas 1 to MV Sara 3. Port of loading was Tartous, Syria and port of discharge/delivery was Novorossiysk, Russia.

The plaintiff no. 1 has sought from defendant company that endorsement to be made in the policy dated 12.11.1997 (Cover Note dated 11.11.1997). However, as it appears that it was a single voyage policy, therefore, defendant has again insured the goods under the said liner Bill of Lading reference number H/2/1998, dated 19.03.1998. Although, the quantity was less, however, sum insured was Rs. 39,97,000/- and earlier, the premium was charged by the defendant company was Rs.14,092/-, but in the policy dated 25.03.1998, the defendant company has charged a premium of Rs.29,790/-. The goods reached at the desired place i.e. Novorossiysk sometime in April, 1998. The survey was conducted by the settling agent of defendant's company namely M/s. Ingosstrakh at the said delivery place. The survey was conducted from 28.04.1998 to 18.05.1998. It is recorded in the Survey Report that an application for survey was made on 12.01.1998. It appears that the inspection was done on the application, which was initially made under the first insurance policy, whereby, importer and the plaintiffs had lodged claim before the said insurance company and on that basis, they have surveyed the goods.

The relevant portion of the Survey Report (Exhibit PW-1/23) is reproduced as under:-

> *"....After examination we can declare the following:-*
>
> *On 28th April, 1998 before unloading the cargo it was found that bags were stowed in bulk in both holds without ventilation holes and necessary separation from boards of vessel; there were torn bags and poured out rice in the holds, some bags had through punctures caused by metal hooks; there were about 300 non-standard bags without marking in hold no.2 sewed by hand.*
>
> *Upon landing the consignment the shortage of 2059 kgs Gross and 3 bags of 150 kgs. Net was actually ascertained in Novorossijsk Fish port.*

As per Statement-Notice No.05/08 dated on 18th May, 1998 4574 of 234283 kgs gross were actually discharged including:

-4553 sound bags 231060 kgs gross;
-50 bags of 2346 kgs gross of spilt and dirty rice;
-21 wet damaged bags of 877 kgs gross;

A part from that on 17 May, 1998 the cargo was inspected by Grain Inspection department during loading in the wagon. According to their Certificate No.290 of 26.05.98 3245 bags with rice were infected by insects. As per the conclusion issued by The State Grain Inspection Service, Novorossijsk No.5-065 dated on 9 July, 1998 in the sample it was found infestation by alive insects (two insects in one kg); it was also found in the same sample thirty pieces of dead insects.

*In view of the above the inspected consignment of rice-**3245 bags-** is non-standard and cannot be fit for human consumption. The cause of infestation is not obvious.*

Cause of damage:

-in our opinion the damage to the cargo could be caused by insufficient transshipment operations and a long time delay in transit.

For more details see photos taken by surveyor, encl."

Thus, as per the Report of surveyor, 50 bags of 2346 KG gross weight were spilt and dirty rice, 21 bags were wet containing 877 KG gross weight and as per the Report dated 17.05.1998 of Grain Inspection Department, 3245 bags contains insects and were infected and Inspection Department has found that 3245 bags are non-standard and cannot be fit for human consumption.

The Surveyor has opined that cause of infestation is not obvious i.e. they are not able to opine why and how the infestation has caused in 3245 bags. However,

under the head of cause of damage, it has been opined that damage to the cargo could be caused by insufficient transshipment operation and a long time delay in transit.

The settling agent/surveyor has given a letter dated 27.08.1998 (Ex.PW1/31) to the defendant company. The following relevant portion of the said letter is reproduced as under:-

> *"....We consider that the claim for shortage/ damage of 104 bags (5200 KG) is to be paid in full with further recovery against sea carrier.*
>
> *3. As far as, claim of infestation of 162.25 MT of the rice which was not fit for human consumption. we consider that this loss is not payable according to para 4, 5 terms of Insurance ICC (A)...."*

The Plaintiff No.2 has written a letter dated 04.11.1998 (Exhibit PW-1/35) to the Settling Agent/Surveyor and the relevant portion of the said letter is reproduced as under:-

> *".....We have received a letter from Exporter wherein they seek clarification about*
>
> *a. Long Voyage period*
>
> b. *Insufficient Transshipment*
>
> *Please clarify the above two observations mentioned in the Surveyors reports, responsible for deterioration in the quality of rice. With regard to "Long voyage period", the Survey done by SGS in Syria at the time of transshipment, did not find quality deterioration.*
>
> *With regard to second observation, it does not specify what is the insufficiency in transshipment which may have caused quality deterioration..."*

The aforesaid letter was replied vide letter dated 18.11.1998 by M/s. Ingosstrakh to plaintiff no. 2 and the relevant portion of the said letter is reproduced as under:-

> *"We thank you for your message of 4 November, 1998 with a copy of Certificate No.002258 issued by SGS Company, Syria the content of which we have duly noted.*
>
> *According to that Certificate, the cargo delivered to Syria and transshipped from M/v FIRAS-1 IN M/v SARA-3 at Tartous was in sound condition and fit for human consumption.*
>
> *So, we may conclude that the infestation may have occurred in transit from Tartous Syria to Novorossijsk, Russia, not before. The cause of that is not obvious.*
>
> *As you could note, 50 bags of spilt and dirty rice have been delivered at Novorossijsk, Port, the final destination were ascertained. That rice may be from 77 bags damaged in transshipment at Syria…."*

The Plaintiff No.2, vide letter dated 23.11.98, has again sought the following clarification from M/s. Ingosstrakh:-

> *"….As we know from SGS Syria report, the infestation have not occurred during long voyage from Kandla to the destination but only from Tartous, Syria to Novorossijsk in shorter time. Thus a further clarification is required about quality of rice and reason of damage."*

The aforesaid letter dated 23.11.1998 was replied vide letter dated 24.11.1998 (Ex.PW1/38) by M/s. Ingosstrakh to plaintiff no. 2 and it reveals that the settling agent/company has no document at its disposal confirming the real cause of damage to the rice. It has also been mentioned by the said company that according to the Survey Report no. 002258 issued by SGS Company, Syria, the

cargo delivered to Syria and transshipped was in sound condition and fit for human consumption, therefore, they concluded that the nature of damage could not be attributed to inherent vice of the cargo. The inherent vice means that there was no inherent defect in the quality of rice.

The letter dated 22.03.1999 (Ex.PW1/40) produced by the defendant company reveals that defendant company has inter-alia sought following clarifications from M/s. Ingosstrakh:-

> *"……..*
>
> 1. *On page 1 of survey report, the date of application of survey is stated as 12th January, 1998, whereas cargo actually arrived at Novorossiysk Port on/ after 28th April, 1998, please clarify.*
>
> 2. *On going through the remarks of master of vessel on statement notice no. 5/08 all cargo was discharged as per bill of lading and manifest in good condition. It is therefore not clear as to how and where the shortage of 83 bags has taken place. Kindly let us have your comments/observations on shortages.*
>
> 3. *The consignment of rice was loaded overboard MV Firas 1 on 24th November, 1997, and it was transshipped at Tartous port in March, 1998, and arrived at final destination in April, 1998. From the survey report we observe that no insured peril was operated during transit. You would, therefore, appreciate that the consignment remained in transit for nearly 5 months during which it was subjected to infestation without operation of any peril. This implies that the present claim of damage of rice has arisen due to inherent vice and delay and thus falls under exclusion no-4.4 and 4.5 of ICC(A). You have accordingly rightly mentioned in your letter dated 27th August, 1998, stating therein that claim for infestation of 162.25 MT of rice which is unfit for human consumption is not payable. We however do not understand as to how you have concluded that nature of damage could not be attributed to the inherent vice of the cargo in your letter dated 24th November, 1998, addressed to the consignee.*

4. *Incidentally, we observe that as per SGS report issued after transshipment, cargo contain of dead insects at the rate of 24/100 KG. Further as per your remarks on page 2 of Survey Report the rice bags were stored in bulk in both holds without ventilation holes and necessary separation from boards of the vessel."*

The said letter was duly replied vide letter dated 12.04.1999 (Ex.PW1/42) to defendant company and the following clarifications were inter-alia given as under:-

"…….

1. *We have been really applied by the consignee on the 12th January, 1998, but the consignee applied to us in view of non-delivery of the full consignment of rice dispatched from India onboard the vessel Firas 1. Investigating the matter, we found out the circumstances of delay in transit and transshipment of the subject consignment onboard the vessel SARA 3. In view of this, we did not set another file on the matter but continued the same, thus, we found it possible to left the same date of application for survey in our report.*

2. *As you can see, we in our report did not confirm shortage of 83 bags, but there was received actually 4574 bags, including 4553 sound bags and 21 water damaged bags (4553 bags + 21 bags = 4574 bags). Apart from that, dirty spillage of rice collected from the vessel's hold was packed into 50 spare bags. So actual quantity including dirty spillage was 4624 bags (4574 bags + 50 bags dirty spillage). So that, we in our opinion, could speak about shortage of 33 bags only (4657 bags – 4624 bags). We could suppose that loss could be attributable to the fact that not all the dirty spillage was collected and unsafe/ unsecured handling operation, taking in mind that according to the loading supervision report 77 bags were ascertained damaged during transshipment.*

3. *Coming to the infestation damage to 162.250 MT of rice in 3245 bags, we can note that according to certificate of quality and quantity # 002258 all the consignment of rice was ascertained, among other things, as "fit for human consumption and of*

natural odour" (Insurance Policy # 1998/964 dt. 30.03.98 covers voyage from Tartous Port, Syria to Novorossiysk).

4. *Taking into account the circumstances of the matter, it could be supposed that quality of rice worsen and it became unfit for human consumption due to improper stowage of the consignment in holds in bulk, without necessary separations and lack of ventilation.*

   You will appreciate that the present loss is not due to inherent vice as the consignment was inspected by the agent of SGS and was found to be fit for human consumption. Moreover, the delay caused to the consignment cannot be construed against the consignor for two reasons, first because the consignor cannot be held responsible for it and, second, after prolonged delay in Syria, the consignment which was in good condition was insured by your office.

   In view of this, in our opinion, the exclusions no. 4.4 and 4.5 of ICC (A) do not apply in the present case.
   We hope that by the present, we cover your questions and it help you to take proper decision on the subject matter.
   Should you have any further questions or need any further clarifications, please do not hesitate us directly……"

Again on 05.08.1999 (Ex.PW1/45) -M/s. Ingosstrakh written a letter to defendant company and the relevant portion is reproduced as under:-

"With reference to your letter NR/EXP/XI/25/99 of 14th June 1999 regarding the captioned matter, we would like, first of all, to apologize for the delay in replying to you due to our very tough schedule here.

In our opinion, our previous letters regarding the captioned matter covered all outstanding questions.

Coming to the matter again, we would like to emphasize that the insurance as taken out on 30.03.99, and the subject consignment arrived at destination towards end April 1998, i.e. the consignment

was not delayed. Prior to commencement of transit, the consignment was inspected and found fit for human consumption and of natural odour, according to the certificate of quantity and quality 00258 issued by local SGS Agent. Taking into consideration that fact, we cannot attribute infestation of rice to inherent vice, but as we noted before, bad or improper stowage of rice in holds affected its quality. To say the truth, it is impossible to pin point the exact cause which brought to damage (infestation) of the consignment of rice. Under the circumstances of the matter, we consider that exclusions no. 4.4 and 4.5 of ICC(A) do not apply."

The letter dated 17.07.2000 (Ex.PW1/50) written by M/s. Ingosstrakh to defendant company and the relevant portion is reproduced as under:-

"With reference to your letter dated 16th June 2000 regarding the captioned matter we would like to advise you that we in our previous letters clearly expressed our position and now again after careful examination of the documents available to us we reiterate that exclusions no. 4.4 and 4.5 are not applicable to that case because there was no delay in transit of MV Sara 3 (B/L H/2/98) from port Tartous to Novorossiysk covered with policy no. 98/964.

The loss has occurred to the cargo due to insured peril only as informed earlier because this does not come under any exclusions under ICC(A) of your policy.

We again emphasize that before loading in port Tartous the consignment was inspected by the local surveyors and was found fit for human consumption and of natural odour. Thus, the loss could not be attributed to inherent vice of goods but was due to insured perils only. The loss may have occurred to the cargo due to fresh/rain/sea water even slightly coming into contact with cargo.

We reiterate as already stated in our letter dated 5th August 1999 that it is impossible to pinpoint the exact cause which brought damage to the consignment of rice and we cannot attribute infestation of rice to inherent vice but also as we noted before the

bad and improper stowage of rice in holds has brought damage (infestation) to the consignment of rice.

And in the conclusion, we once again, would like to attract your attention to the fact that in the survey report 6-19-780033/mb was stated that bags were stowed in bulk in both holds without ventilation holes and necessary separation. The same was repeated in our letter of 12th April 1999 (see point 4 of the letter). According to our experience such loading lapse usually brings to huge damage to goods. The quality of the rice worsened and it became unfit for human consumption due to improper stowage of the consignment in holds without necessary separation and due to lack of ventilation. This does not come under exclusions no. 4.4 and 4.5 of ICC(A) pointed by us in our letter dated 12.04.1999."

The letter dated 08.09.2000 (Ex.PW1/51) written by M/s. Ingosstrakh to defendant company and the relevant portion is reproduced as under:-

".....With regard to your letter dated 8th August 2000 content of which we have duly noted we would like to advise the following:-

1. *Recovery rights, first of all, we would like to attract your attention to the fact that the consignee on the 18th May 1998 passed on to the Master of MV SARA 3 a letter addressed to the ship owners regarding the losses suffered by them. Upon the discharge of the subject consignment in the port there were issued the General Statement and the statement notice in which the losses were ascertained. On the other side, we must emphasize that the consignment was landed in the May of 1998 i.e. more than 2 years ago. So that, the prospects of recovery actions against the carriers are not clear.*

2. *Referring to the reasons of dispute between the vessel's owner and the charterers we should let you know that that question with regard to this case was not investigated by us, so, exact reasons are unknown to us and we have no in our possession any documentary evidences from the parties concerned.*

3. *According to the documents submitted by the consignee, the damaged rice in amount of 169564 KG (infected and dirty rice in 3245 bags of gross weight and dirty rice in 50 bags of gross weight 2345 KG) was sold in accordance with agreement no. 11/98 dated 20.05.98 for sale and purchase of goods concluded between the consignee (ZAO Termoecostroi) and the buyer, OOO Aksilak at the salvage price which amounts in average to RUR 42156.40 what was equal to USD 6881.55 on the date of invoice 28.05.1998. The balanced part of the damaged rice was destroyed in the port.*

4. *As the reasons of shortage, we would like you to look through our letter dated 12th April 1999 and, specifically, point 2 of the letter, where we described in details the shortage and it's cause.*

5. *Our surveyor was deputed to survey the consignment as soon as we received information from the port regarding the vessel's birthing end the effected the discharge supervision from 28th April 1999 up to 18th May 1998.*

   We hope that the above information will help you in processing this outstanding claim…."

The perusal of the aforesaid letters written by Settling Agent/Surveyor reveals that the Defendant Company has repeatedly sought clarifications from the Settling Agent/Surveyor and it was duly replied and clarified repeatedly. M/s. Ingosstrakh was not only the Surveyor but also the settling agent in view of the insurance policies issued by defendant Company. The final conclusions arrived by Settling Agent was binding upon the defendant Company.

Ultimately, defendant company has repudiated the claim vide letter dated 12.12.2000, not on the basis of exclusion clauses for which they were seeking repeated clarifications from M/s. Ingosstrakh, but totally on the different grounds which they have not even uttered during entire correspondence with the plaintiffs

company specifically plaintiff no. 1 or even with the settling agent i.e. M/s Ingosstrakh. The clarifications as sought from Settling Agent/Surveyor by defendant company was duly answered and replied in total satisfaction of the defendant company and therefore, defendant could not find any other way to repudiate the claim of plaintiffs, defendant company has come out with totally new grounds i.e. plaintiff no. 1 has no insurable interest and policy dated 25.03.1998 was not issued in accordance with the provision of 64 VB of Insurance Act, 1938. As far as the question of insurable interest is concerned, this Court has already herein-above discussed in detail that plaintiff no. 1 was/is having the insurable interest. The said findings are not repeated herein for the sake of brevity.

As far as the provision of 64 VB of Insurance Act 1938 is concerned, it is not the case that Insurance Company has not insured the said goods earlier and it was insured for the first time on 25.03.1998. The said goods were got insured by Plaintiff No.1 through Cover Note dated 11.11.1997 and policy of insurance dated 12.11.1997. The cover was made from 12.11.1997 from Delhi to ultimate destination i.e. Novorossiysk, Russia. It was not voyage policy but complete package policy from Delhi to Novorossiysk, Russia. There was dispute occurred between the owners and charterers of the ship and the ship was taken to the Syria port. The said dispute was not attributable either to Exporter i.e. Plaintiff No.1 or to the importer/Consignee. The first insurance policy covers all risks and definitely, the said risks cover delivery, loading and unloading of the cargo at Syria port from vessel Firas-1 to vessel Sara 3. Even if the damage to the goods has been caused at that moment, the insurance company was liable to “make good the loss of Plaintiff No.2” under first insurance as the Cover Note and policy had covered “all risks”.

The perusal of record reveals, which has already been discussed hereinabove in detail, that plaintiff no. 1 company time and again informed the defendant company about non whereabouts of the concerned vessel and thereafter, about the entire dispute between the charterers and the owners. The same was done promptly and immediately as and when the information was received by the Plaintiffs. The Plaintiffs and importer has already lodged the claim under the first insurance itself. If there was damage to the cargo at that moment, then, the defendant company was liable to get surveyed the entire goods at that moment itself and was liable to pay under the first insurance itself. However, the Local agent/Surveyor at Syrian port has inspected the goods and found that 4580 jute bags were in sound position at the time of transshipment of the goods at the Syrian port. There was loss of 80 bags, as 77 bags were damaged and 3 bags were short. The insurance company is liable to "make good the loss of Plaintiff No.2" of the said bags itself under the said first insurance itself.

The Bill of lading dated 19.03.1998 was insured by the defendant under the second policy from Syrian port to Novorossiysk, Russia. The defendant was in the knowledge of each and every fact. The defendant company, with opened eyes, has done the second insurance. In my considered view, the first policy was itself operative even at the time of taking the second policy. It can be said that the second policy was taken in continuation of the first policy itself. The second Bill of Lading also clearly mentions the first Bill of Lading. The defendant company has charged double premium amount from Plaintiff No.1 in second insurance compared to what was charged in the first insurance policy. The defendant company was posted with all the material particulars and it is not the case of defendant that Plaintiff No.1 has not disclosed the material particulars or that there

was violation of principles of utmost good faith. Per Contra, the plaintiffs company as well importer has been repeatedly informing the defendant company as well as their settling agent/surveyor about each and every fact which came to their knowledge at the relevant time. The insurance company was having the full facts and knowledge about the actual dispute of the charterers and owners and loading and unloading of the shipment from "Firas 1" to "Sara 3" and thereafter, defendant company insured the goods under the Bill of Lading dated 19.03.1998 which is nothing but the continuation of Bill of Lading dated 12.11.1997. As per the Local Agent/Surveyor at Syrian Port of the defendant company, there was no damage to the goods to 4580 jute bags at the Syrian port. The second policy, issued by Defendant Company, itself covers the goods under the Bill of lading dated 19.03.1998 from 25.03.1998.

The Hon'ble Supreme Court in **Deokar Exports Pvt. Ltd. Versus New India Assurance Company Ltd. (CIVIL APPEAL NO. 5103 OF 2002) decided on September 23, 2008** after referring to Section 64VB of Insurance Act, 1938 has held that two things emerge from the said section. The first is that the insurer cannot assume risk unless and until premium is received or guaranteed or deposited. The second is that a policy issued can assume the risk from a retrospective date provided such date is not earlier than the date on which premium had been paid in cash or by cheque to the insurer.

It is not the case of Defendant Company that they have not received the premium amount of the second policy which covers the risk from 25.03.1998. The said policy also states that the same is effective from 25.03.1998. It is not the case of defendant company or the settling agent, the damage has been caused prior to

25.03.1998 and in my considered view, even if for the sake of arguments, the loss has been caused prior to 25.03.1998, still the damage/loss of the cargo was duly covered under the first policy, which was effective from 12.11.1997, which covers "all risks" from Delhi (India) to Novorossiysk (Russia).

The second insurance itself covers "all risks" from 25.03.1998 and prior to that, the "all risks" were covered under the first policy, which was taken by Plaintiff No.1 on 11.11.1997. In the facts and circumstances of the present case, the provision of Section 64 VB of the Insurance Act, 1938, as invoked by the defendant company, does not come to the rescue of defendant.

Considering the detailed discussion hereinabove, repudiation letter dated 12.12.2000, whereby, repudiation made on the grounds of Section 64 VB of the Insurance Act, 1938 and insurable interest of Plaintiff No.1 is not valid and the same are unlawful.

The plaintiff no. 1 has claimed that the second policy is taken under duress and threat. The plaintiff no. 1 has not been able to prove duress and threat during its evidence. It was sole prerogative of plaintiff no. 1 whether to enter into second contract of taking insurance from Defendant Company. There was heavy burden upon Plaintiff No.1 to prove threat and duress to take second insurance policy from Defendant Company. The records, nowhere, suggest that insurance company has put any threat, duress and coercion upon the plaintiffs company specifically plaintiff no.1 to enter into second Contract dated 25.03.1998, whereby, the goods were again insured. The plaintiff no. 1 is not entitled to the insurance premium

amount, which has been paid by plaintiff no. 1 voluntarily and out of its own volition to defendant.

The Plaintiffs have given the computation of loss as per Annexure "A". As per the Plaintiffs, the Plaintiffs have suffered loss of Rs.21,55,670/- on account of claim lodged and Rs.29,790/- on account of premium paid in second insurance. This Court has already held that the Plaintiff No.1 is not entitled to Rs.29,790/-, which was paid by it during the second insurance. The defendant has not disputed the calculation of the loss of Rs.21,55,670/- suffered by plaintiff no.2. The question arises that who is entitled to the said amount i.e. whether Plaintiff No.1 or Plaintiff No.2. There is not dispute that the Plaintiff No.1 has already received the entire consignment amount from Plaintiff No.2. However, the Plaintiff No.1 is required to pay the said loss to Plaintiff No.2 and accordingly, in view of principle of indemnification, the said amount was required to be paid by defendant company to Plaintiff No.2 only. The Plaintiffs have also claimed interest from 18th August, 1998 @ 12% per annum till the filing of the present suit. In my considered view, interest is required to be paid only for three years prior from the date of filing of the case i.e. on 06.01.2004 and considering the entire facts and circumstances of the present case, the Plaintiff No.2 is also entitled to simple interest @ 9% per annum from 06.01.2001 till filing of the case i.e. 06.01.2004.

The Plaintiffs have also claimed pendent-elite and future interest. Section-34 CPC postulates and envisages the pendent-elite interest at any rate, not exceeding 6% and future interest at any rate, not exceeding the rate, at which nationalized banks advance loan. Keeping in mind the mandate of the said proposition, the interest of justice would be served if plaintiff No.2 is granted

pendent-lite simple rate of interest @ 6% per annum and future simple rate of interest @ 9% per annum till its realization.

Accordingly, the issues no.2 to 8, 11 and 12 are decided in the aforesaid terms.

RELIEF

From the discussions, as adumbrated hereinabove, I hereby pass the following

FINAL ORDER

a. A decree of Rs.21,55,670/- is passed in favour of plaintiff No.2 and against the defendant along-with simple rate of interest @ 9% p.a. from 06.01.2001 till filing of this case. The plaintiff No.2 is also granted pendent-lite simple rate of interest @ 6% per annum and future simple rate of interest @ 9% per annum till its realization and the same is also payable by the defendant to Plaintiff No.2.

b. The cost of the suit is also awarded in favour of the plaintiff No.2 and against the defendant.

Decree-sheet be prepared accordingly.

File be consigned to Record Room after due compliance.

Announced through Video Conferencing on this 25th day of July, 2020.

ARUN SUKHIJA
Digitally signed by ARUN SUKHIJA
Date: 2020.07.25 12:22:40 +05'30'

(ARUN SUKHIJA)
ADJ-07 (Central)
Tis Hazari Courts, Delhi

CS No. 53/19 (ID no. 611281/16)
M/s K.S. Exim Ltd. & Anr.
Vs.
The Oriental Insurance Co. Ltd.

25.07.2020

The matter has been heard through cisco webex video conferencing.

Present: Sh. Rakesh Mittal, Ld. Counsel for the Plaintiff
and Shri Shyam Garg Director of Plaintiff Company
Sh. Kapil Chawla, Ld. Counsel for the Defendant

Vide Separate Judgment announced through video conference the suit of the Plaintiffs is decreed in terms of the Judgment. Decree Sheet be prepared accordingly. File be consigned to record room after due-compliance.

ARUN SUKHIJA
Digitally signed by ARUN SUKHIJA
Date: 2020.07.25 12:23:29 +05'30'

(Arun Sukhija)
ADJ-07/Central/Tis Hazari Courts,
Delhi/25.07.2020