NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI

FIRST APPEAL NO. 419 OF 2013
(Against the Order dated 14/02/2013 in Complaint No. 110/2010 of the State Commission Maharashtra)

1. DCW LTD.
Nirmal, 3rd Floor, Nariman Point,
MUMBAI-400 021,
MAHARASTRA .....Appellant(s)

Versus

1. UNITED INDIA ASSURANCE CO. LTD. & ANR.
Divisional office No.8, Union Co- operative Insurance Building, 5th Floor, 23,
MUMBAI-400 001,
MAHARASTAR
2. THE UNITED INDIA ASSURANCE CO. LTD,
Head office: United India 24, Whites Road,
CHENNAI-600 014,
TAMIL NADU. .....Respondent(s)

BEFORE:
HON'BLE MR. JUSTICE SUDIP AHLUWALIA,PRESIDING MEMBER
HON'BLE AVM J. RAJENDRA, AVSM VSM (Retd.),MEMBER

FOR THE APPELLANT : MR. VINAY KUMAR MISHRA, ADVOCATE &
MS. NIKITA SHARMA, ADVOCATE
FOR THE RESPONDENT : MR. MAIBAM N. SINGH, ADVOCATE

Dated : 10 August 2023

ORDER

AVM J. RAJENDRA, AVSM, VSM (RETD.), MEMBER

1. The present First Appeal has been filed under Section 19 of the Consumer Protection Act, 1986 (hereinafter referred to as “the Act”) against the Order dated 14.02.2013 passed by the State Consumer Disputes Redressal Commission, Maharashtra (hereinafter to be referred as “the State Commission”), in Consumer Complaint No.110 of 2010, wherein the Complaint filed by the Complainant (Appellant herein) was dismissed.

2. For the sake of Convenience, the parties in the present matter being referred to as mentioned in the Complaint before the State Commission. "DCW Ltd." is the Complainant, which is a manufacturing company involved in the production of caustic soda, synthetic

rutile, PVC, etc. in Sahapuram, Tamil Nadu. "United India Assurance Co. Ltd." is referred to as the “Opposite Parties” or Insurer in this matter.

3. The main issue in this case is the alleged deficiency in service by the Opposite Parties/Insurer. The Complainant's insurance claim was repudiated based on the insurer's contention that the damage to the insured Diesel Generator Sets (for short ‘DG Sets’) resulted from willful negligence on the part of the insured or any person acting on their behalf. The dispute revolves around the application of *Clause 2(a)* of the insurance policy, which excludes claims arising from ***‘willful acts or willful negligence by the insured or any person acting on their behalf’.***

4. The Complainant (Appellant herein) purchased an ***‘Industrial All Risk Policy’*** No. 120200/11/08/06/00000492 from the Opposite Parties (Respondents herein) Company, to insure the Captive Power Plant comprising of Six ‘DG sets’ of 6MW capacity. The Policy was valid from 17.08.2008 to 16.08.2009 with a sum assured for Rs.1,20,00,00,000/-. Out of which plant and machinery comprised of Rs.95,00,00,000/-.

5. During the policy period, DG Set No. 5 encountered an accident on 02.11.2008, wherein the dummy plug near B-5 crank pin became loose, resulting in drop in lube oil pressure. Despite the alarm activation at 3.5 bar lube oil pressure, the ‘DG Set’ No. 5 trip at 1.40 p.m., leading to damage to the insured ‘DG set’ and other instruments.

6. The Complainant notified the OPs/Insurer about the damage on 04.11.2008. The Complainant hired M/s. Rastek Pvt. Ltd., an expert, to analyze the cause of damage. Their report was submitted with observations. Afterwards, the OPs/ Insurer appointed Shri Anantha Padmanaban, an Authorized Surveyor, to carry out survey of the damage. He observed that the Complainant allowed the ‘DG set’ engine to operate for 10 days with a drop in oil pressure, indicating gross negligence. He noted that the lube oil pressure progressively dropped, starting from 24.10.2008, and went down to 4.45 bar. Thereafter, the Complainant made an insurance claim of Rs. 54,34,858/-. However, the Surveyor assessed the claim at Rs. 35,53,868/-. Based on the Surveyor and Expert's Report, the insurance claim was repudiated by the OPs/ Insurer, citing Clause 2(a) of the insurance policy, which excludes claims arising from ***"any willful act or willful negligence on the part of the insured or any person acting on his behalf."***

7. Being aggrieved due to the deficiency in service on the part of the OPs/Insurer, the Complainant filed a Consumer Complaint (No. 110 of 2010) before the State Commission, claiming Rs.54,34,858/- with ancillary claim of interest @18% p.a. and amount of Rs.5,00,000/- as exemplary damages.

8. The OPs/Insurer, in their written version, denied the Complainant's claim, stating that the insured DG Set was not handled prudently. The Complainant, even after the alarm was activated at a lube oil pressure of 3.5 bar, did not discontinue the engine and allowed it to automatically trip off at a lube oil pressure of 2.8 bar when there was a significant load on the engine. The Respondents contended that the Complainant should have immediately turned off the machine when the alarm was activated at 3.5 bar to minimize further damage to the insured property. The OPs/Insurer presented the following important findings from the surveyor and expert, Mr. K Gopalkrishnan, which included the following points: -

a. The insured appears to have changed Lube Oil on 23.10.2008 (10 days prior to breakdown) and restarted the Engine and the oil pressure recorded at that time was 5.6 bar.

b. From the Lube Oil pressure readings forwarded by the insured, it is observed that the lube oil pressure was progressively dropping (though slowly) from 24/10/2008, without getting stabilized and went down to 4.45 bar at 1.01. p.m. on 02/11/2008 i.e., the date of loss and further was dropping rapidly.

c. The insured's contention, that the engine cannot be stopped abruptly, stands to reasoning, since, on the date of loss, it tripped and stopped at full speed only. Her it cannot be constructed as a rule that in an emergency, the engine cannot be stopped. It is possible to shift the load to the other Engines and take a shutdown this engine, much ahead of the failure, when lube oil pressure, drop was observe and recorded by the insured.

9. The State Commission upon hearing the parties, and considering the facts and the circumstances, of the case dismissed the complaint with following observation: -

"(9) From the forgoing observations, we find that the complainant company failed to establish deficiency in service against the opponent insurance company as the repudiation of the insurance claim cannot be constructed as arbitrary one. Complaint is devoid of merit. We hold accordingly and pass the following order.

ORDER

(1) The Complainant stands dismissed.

(2) Under the circumstances, parties to bear their own costs."

10. Being aggrieved by the impugned State Commission's order, the Complainant Company (Appellant herein) has filed this present Appeal no. 419 of 2013 with the following prayer:

a) To allow this Appeal.

b) To declare that the Respondents are liable for deficiency of service and set aside and quash the impugned order dated 14th February 2013 passed by the Learned State Consumer Dispute Redressal Commission, Maharashtra, Mumbai in Complaint No. 110 of 2010.

c) To award a sum of Rs.52,06,142/-(Rupees Fifty-Two Lakh Six Thousand One Hundred and Forty Two Only) together with the interest at 18% per annum from months after the date of loss being 2nd November 2008 till the filing of the Complaint and further to pay this sum with interest at 18% per annum from the of the Complaint till the filing of this Appeal.

d) To award a further interest of 18% from the date of filing of this Appeal against the Order dated 14th February 2013 till the date of realization.

e) To award costs of the proceedings.

f) To pass any suitable order as this Hon'ble Commission may deem fit and proper in the facts and circumstances of the case.

11. There was a delay of 35 days in filing the present Appeal. Vide Order dated 08.07.2013, the delay of 35 days in filing the Appeal was condoned.

12. In the Present Appeal, the Appellant mainly raised following issues:

a) The State Commission failed to recognize that the loss suffered by the Appellant falls within the insuring clause of Section-I (Material Damage) of the Policy. The Appellant disputed the learned State Commission's conclusion that the loss occurred due to the Appellant's negligence and contended that it was an 'accident'.

b) The State Commission failed to apply the principle of 'Proximate Cause of Loss' and disregarded the Rastek Report dated 06.11.2008, which identified the cause of loss as the 'loosening of the Dummy Plug of the Crank Shaft,' a mechanical failure covered under the policy.

c) The Commission did not consider the significance of original Survey Report dated 04.03.2009, acknowledging the Rastek Report findings about the cause of loss. Instead, the State Commission relied on the Additional Survey Report dated 02.08.2009, prepared in violation of IRDA Regulations and thus illegal. Further, the Surveyor, in the Original Survey Report, did not conclusively determine any 'Negligence' on the part of the Appellant, leaving the issue to be decided by the Respondent. However, the Additional Report surprisingly concluded that the Appellant displayed gross negligence.

d) The State Commission failed to consider the evidence submitted by the Appellant to counter the findings of the Additional Survey Report and the expert's evidence regarding the cause of the loss.

13. The Learned Counsel for the Appellant/ Complainant argued that the impugned order perverse and was passed without proper application of mind. The said order is contrary to established legal principles and the facts presented on record. He emphasised against the conclusion of the State Commission in Paragraph 8 of the Order dated 14.02.2013 that the repudiation of claim cannot be considered arbitrary, and no deficiency in service can be attributed to the insurance company. The Counsel further argued that the cause of loss was due to an accident, and the Respondent's repudiation of the valid claim based on an inapplicable exclusion clause amounted to a gross violation of the insured's legitimate claim. The Appellant exercised due diligence, but the State Commission incorrectly attributed negligence to the Appellant, suggesting that the incident could have been avoided through better care and attention.

14. The Appellant brought on record the ‘User Manual’ issued by the Original Equipment Manufacturer of the subject DG set. The said Manual provides for different Lube Oil gauge pressures (bar) for normal operation of the DG set, below which the warning will come on and thus the DG set was to be switched off.

15. The counsel for the Appellant has relied on findings from the following cases:

a. AIADMK versus L K Tripathi (2009 5 SCC 417).

b. Rakapalli Raja Rama Gopala Rao vs. Naragani Govinda Sehar Rao (1984 4 SCC 255)

c. Govind Versus Raghunath (AIR 1930 Bom 572).

d. Subhammal Versus Tencasi Cooperative Bank (AIR 1977 Mad, Page 92-95)

16. The learned Counsel for the Respondents reiterated their written version and affidavit filed before the learned State Commission. As per him, the State Commission correctly observed that there were no prompt steps taken to prevent damage to the DG set, as noted by the surveyor and the expert's evidence. The conclusion that the repudiation of the claim was not arbitrary and there was no deficiency in service on the part of the insurance company is supported by the survey report and expert evidence of Shri K Gopalkrishanan. There is no evidence presented by the Appellant to counter these findings. The additional documents filed by the Appellant in the present appeal are an attempt to mislead. The Appellant did not feel the need for these documents until rejection by the State Commission. The photographs submitted are irrelevant as they were taken after the State Commission's dismissal of the Complaint on 14.02.2013. Thus, the Appellant is trying to strengthen their case by introducing new documents at this stage. As per him, the Appeal lacks merit and deserves be rejected.

17. We have carefully gone through and considered entire pleadings made by both the parties and arguments advanced by the learned Counsels for both the parties.

18. The case of the Complainant/Appellant is that the Complainant purchased an 'Industrial All Risk Policy' to cover the Captive Power Plant comprising six DG sets. During the policy period, one of the DG sets encountered an accident, on 02.11.2008 resulting in damage. The Complainant filed an insurance claim. But, the Opposite Parties/Insurer repudiated the claim, citing wilful negligence on the part of the insured in the operation of the DG set. The Complainant argued that the loss was due to an accident covered under the insurance policy and not a result of any negligence. He relied on expert and survey reports findings to support their claim. However, the State Commission dismissed the Complaint, upholding the repudiation of the claim stating that there was no deficiency in service by the insurance company.

19. The State Commission in its Order dated 14.02.2013 has observed the following: -

> "(7) The complainant and opponent relied on the operating manual and the operation chart of the said insured DG set. However, it is not clear whether running of insured DG set was safe with lube oil pressure above 4.5 bar as no expert evidence led by the complainant company. The expert report submitted on behalf of the insurance company is disputed. However, there is no rebuttal documentary evidence filed by the complainant company to establish as to what corrective steps were initiated and actually steps taken from the date of changing lube oil on 23/10/2008 till the date of breakdown

on 02/11/2008, when admittedly there was progressive and rapidly dropping of lube oil pressure effective from 24/10/2008 to stabilize the engine at 4.5 bar on the date of occurring of an incident on 02/11/2008. It appears no steps were taken to prevent variation in operating parameters of machinery when it was identified before the reported break down. Authorised surveyor assessed net loss to the tune of Rs.31,25,288/- (-) salvage of Rs.8,16,2371- which comes to Rs.23,09,051/-. however, the loss is attributed to negligence of the complainant company. A useful reference can be made to relevant part of survey report:-

> ***"It is observed from the papers submitted by the insured that there was a progressive reduction in lube oil pressure from 5.6 bar on 23/11/2008 (the date on which the insured had changed the Lube oil) to 4.8 bar on 01/11/2008) date of loss and there is no documentary evidence to understand as to how, this has gone up - noticed by the insured, when the set being a critical power Generator with full monitoring. In fact, on the date of loss on 01/11/2008, even after the alarm got activated at lube oil pressure at 3.5 bar, the insured did not stop the engine and allowed it to get tripped automatically at lube oil pressure at 2.8 bar, when there was appreciable load on the Engine. Whether, this is to be construed as Negligence, is left to the discretion of insurers."***

(8) Record does not reveal prompt steps taken to prevent damage to DG set as observed by surveyor and the expert evidence. Survey report is supported by affidavit evidenc the surveyor and so also the expert report of Shri K Gopalkrishanan. There is no material/evidence to counter these findings. Therefore, repudiation of claim cannot b constituted as arbitrary and no deficiency in service against the insurance company c be attributed."

20. Towards appreciating the circumstances of the incident and the scope of damage, this Commission considered appropriate to require the presence of the Surveyor who carried out the survey of the DG set in dispute vide order of this Commission dated 03.03.2020. However, as his presence could not be procured with reasonable efforts, vide order dated 25.05.2022 he was directed to file an Affidavit as regards reduction of the amount. Accordingly, Shri S Anantha Pabmanaban S/o. S. Srinivasan (Late) aged about 72 years R/o Anna Nagar West, Chennai - 600040 filed an Affidavit dated 13.07.2022. In his affidavit he has stated that as a qualified Surveyor and Loss Adjustor under the provisions of Insurance Act, he made the survey report in the matter dated 04.04.2009 (04.03.2009 as per his Report). On being appointed by the United India Insurance Co Ltd on 14.11.2008, Shri Padmanaban carried out survey/inspection in respect of the breakdown of DG Set No.5 of the insured/ Appellant. From the nature of damages sustained, as per him, the proximate cause of loss was loosening of Crank Shaft Dummy Plug and the chain reaction of the damages that followed. Post the accident, Rs.49,81,667/- was claimed by the insured toward the damages. The details of breakup of net loss assessed by him were Rs.36,25,888/- as per details in the report dated 04.03.2009. For the Insurance Policy held by the Insured 'excess clause' is applicable, subject to the minimum of Rs.5,00,000/- and maximum of Rs.50,00,000/-. Applying the minimum amount of the excess clause, the net loss assessed was Rs.36,25,888-Rs.5,00,000/- = Rs.31,25,288/-. Further, the insured had imported

majority of the affected items and lodged their own claim with invoices. Some of the items to the tune of Rs.16,32,473/- were drawn and most of these were purchased in 2005-2006. The fresh items purchased were replenished in their stores and have not gone into the Engine. Since old spares were gone on replacement basis the life of the engine will be de-rated to some extent. Therefore, he assessed a reasonable depreciation of 50% in these items i.e. 50% of Rs.16,32,473/-= Rs.8,16,237/-. Thus, the liability of the insurer with respect to the accident would be Rs. 31,25,288 – Rs. 8,16,237 = Rs.23,09,051/-.

21. The learned State Commission considered the absence of clarity as regards safety in running of insured DG set with lube oil pressure about 4.5 bar as no expert evidence was led by the Complainant. While the expert report submitted on behalf of the insurance company was disputed, no rebuttal was filed by the Complainant to address what corrective steps were initiated. It was considered that actually no steps were taken to stabilize the engine at 4.5 bar from the date of changing lube oil on 23.10.2008 till the date of breakdown on 02.11.2008 when, admittedly, progressive and rapid dropping of lube oil pressure was noticed from 24.10.2008 onwards and the incident occurred on 02.11.2008.

22. It is an admitted fact that, upon intimation of the incident, the OPs appointed Shri Anantha Pabmanaban as Authorised Surveyor. He made a survey report on 04.03.2009 an final report on 02.08.2009. Though in his report the Surveyor concurred with the expert report by M/s. Rastek Pvt. Ltd, he observed that there was progressive reduction in the lu oil pressure from 5.6 bar on 23.10.2008 (the date on which the insured had changed the lu oil) to 4.8 bar on 01.11.2008 had gone unnoticed by the insured. As per him, on the date o loss, even after the alarm got activated, at the lube oil pressure of 3.5 bar, the insured did n stop the DG set and allowed to trip of automatically at the lube oil pressure of 2.8 bar when there was appreciable load on the engine. Whether this is to be construed as negligence, he left to the discretion of the insurers. In his final report, he considered that the alarm was activated as lube oil pressure was low and the Complainant did not stop the engine and allowed to it to trip automatically. He observed continuing to operate the DG Set with drop in oil pressure amounts to gross negligence.

23. The Complainant submitted that the insurance claim for Rs.54,34,858/- under the policy, which was inclusive of various invoices, work orders, payment to banks and other charges. However, the surveyor slashed the claim to Rs.23,09,051/-. The same was, however, repudiated by the Respondents in terms of exclusion clause 2(a) of the Insurance Policy which provides that '**any willful act or willful negligence on the part of the insured or any person acting on his behalf'**.

24. The Hon'ble Supreme Court in ***Suraj Mal Ram Niwas Oil Mills Pvt. Ltd. v. United India Insurance Co. Ltd, (2010) 10 SCC 567*** decided on 08.10.2010 reiterated the

sacrosanct nature of the terms and conditions of an Insurance Policy. The relevant portion is reproduced hereunder:

> ***"26. Thus, it needs little emphasis that in construing the terms of a contract of insurance, the words used therein must be given paramount importance, and it is not open for the court to add, delete or substitute any words. It is also well settled that since upon issuance of an insurance policy, the insurer undertakes to indemnify the loss suffered by the insured on account of risks covered by the policy, its terms have to be strictly construed to determine the extent of liability of the insurer. Therefore, the endeavor of the court should always be to interpret the words in which the contract is expressed by the parties."***

25. The Hon'ble Supreme Court further reiterated the requirements of strict interpretation of the Insurance Clauses in the case of ***Canara Bank v. United India Insurance Co. Ltd. (2020) 3 SCC 455***, decided on 06.02.2020, the relevant portion is reproduced hereunder:

> ***"21. The principles relating to interpretation of insurance policies are well settled and not in dispute. At the same time, the provisions of the policy must be read and interpreted in such a manner so as to give effect to the reasonable expectations of all the parties including the insured and the beneficiaries. It is also well settled that coverage provisions should be interpreted broadly and if there is any ambiguity, the same should be resolved in favor of the insured. On the other hand, the exclusion clauses must be read narrowly. The policy and its components must be read as a whole and given a meaning which furthers the expectations of the parties and also the business realities. According to us, the entire policy should be understood and examined in such a manner and when that is done, the interpretation becomes a commercially sensible interpretation..."***

26. The Respondents repudiated the claim of the Appellant on the grounds of exclusion clause of **willful act or willful negligence on the part of the insured or any person acting on his behalf.**

27. In legal sense, Negligence signifies failure to exercise a standard of care which the doer as a reasonable man should have exercised in a particular situation. Negligence is to be either established or Res-ipsa Loquitur that the situation of a particular act is enough to understand what has happened or mere occurrence of some type of accident is sufficient to imply negligence. Wilful negligence, also known as reckless or wanton negligence is where the defendant disregards the risks of his actions and possible impacts. Wilful negligence has all the elements of gross negligence, but it also requires that the defendant knows or should have known about the potential injury. It is the highest degree of negligence. It is indifference not just to safety or rights but also to the effects of their behaviour.

28. As regards element of negligence in Claims, in a UK case P (A Child) v Royal London Mutual Insurance Society Ltd [2006] EWCA Civ 421 (30 March 2006)

> The Court stated that: "Most acts, including negligent acts, are deliberate and intentional." The court further stated: "Obviously if the act is deliberate and intended to cause damage of the kind in question it will be within the exclusion. It will be wilful, as the judge held, and might also be malicious or criminal. But for an act to be wilful I do not think it is necessary to go as far as this. It will be enough to show that the insured was reckless as to the consequences of his act. Recklessness has been variously defined but if someone does something knowing that it is risky or not caring whether it is risky or not he is acting recklessly."

29. The Circuit Court of Appeals, Fifth Circuit, US, in the case Federal Insurance Co. et al. v. Tamiami Trail Tours Inc. et al. (1941) stated that:

> "An overwhelming percentage of all insurable losses sustained because of fire can be directly traced to some act or acts of negligence. Were it not for the errant human element, the hazards insured against would be greatly diminished. It is in full appreciation of these conditions that the property owner seeks insurance, and it is aft painstaking analysis of them that the insurer fixes his premiums and issues the polici It is in recognition of this practice that the law requires the insurer to assume the risk the negligence of the insured and permits recovery by an insured whose negligence proximately caused the loss. In the absence of fraud or gross negligence on the part o the insured, his negligence is no defence against his recovery."

30. As regards wilful, deliberate and negligence acts, in Sheehan v. Goriansky, (1947) the Supreme Judicial Court of Massachusetts stated: "Wilful means intentional….. The "undoubted rule applicable to ordinary insurance" is that an insurance policy indemnifying an insured against liability due to his wilful wrong is void as against public policy."

31. In the case Beresford v Royal Insurance Co Ltd, HL 1938, the House of Lords stated:

> 'On ordinary principles of insurance law an assured cannot by his own deliberate act cause the event upon which the insurance money is payable. The insurers have not agreed to pay on that happening. The fire assured cannot recover if he intentionally burns down his house, nor a marine assured if he scuttles his ship, nor the life assured if he deliberately ends his own life. This is not the result of public policy, but of the correct construction of the contract.' and 'But apart from these considerations the absolute rule is that the courts will not recognise a benefit accruing to a criminal from his crime.'"

32. However, in a recent judgement by the England and Wales Court of Appeal, in the case CA Blackwell (Contracts) Ltd v Gerling Allegemeine Verischerungs -Ag [2007] EWHC 94, the court stated:

> "49. It is common ground that an insured is not entitled to indemnity in respect of a casualty which he or it (as opposed to someone else) was brought about by wilful misconduct, the principle arising as a matter of public policy."

33. Thus, the conclusions are twofold: (1) most claims will have some element of negligence, and this is not a bar to paying the claim, unless the negligence is wilful, or the insured had acted recklessly; (2) the onus of proving wilful negligence or recklessness is on the insurer. Mere allegations will not be sufficient.

34. Towards appreciation of the 'Exclusion Clause' in a contract, the Hon'ble Supreme Court in Civil Appeal No. **8249 of 2022** [Arising out of SLP (Civil) No. 25457 of 2019] between M/s Texco Marketing Pvt. Ltd Vs Tata AIG General Insurance Company Ltd. & Ors. laid down that

> **11.** An exclusion clause in a contract of insurance has to be interpreted differently. Not only the onus but also the burden lies with the insurer when reliance is made on such a clause. This is for the reason that insurance contracts are special contracts premised on the notion of good faith. It is not a leverage or a safeguard for the insurer but is meant to be pressed into service on a contingency, being a contract of speculation. An insurance contract by its very nature mandates disclosure of all material facts by both parties.
>
> **12.** An exclusion clause has to be understood on the touch-stone of the doctrine of reading down in the light of the underlining object and intendment of the contract. It can never be understood to mean to be in conflict with the main purpose for which the contract is entered. A party, who relies upon it, shall not be the one who committed an act of fraud, coercion or mis-representation, particularly when the contract along with the exclusion clause is introduced by it. Such a clause has to be understood on the prism of the main contract. The main contract once signed would eclipse the offending exclusion clause when it would otherwise be impossible to execute it. A clause or a term is a limb, which has got no existence outside, as such, it exists and vanishes along with the contract, having no independent life of its own. It has got no ability to destroy its own creator, i.e. the main contract. When it is destructive to the main contract, right at its inception, it has to be severed, being a conscious exclusion, though brought either inadvertently or consciously by the party who introduced it. The doctrine of waiver, acquiescence, approbate and reprobate, and estoppel would certainly come into

operation as considered by this court in **N. Murugesan v. Union of India** (2022) 2 SCC 25.

13. On the aforesaid principle of law, particularly with respect to the issues *qua* onus, burden and reading down, this Court in **Shivram Chandra Jagarnath Cold Storage v. New India Assurance Co. Ltd.** (2022) 4 SCC 539 has held as follows:

"19. Another instance where exception clauses may be interpreted to the benefit of the insured is when the exception clauses are too wide and not consistent with the main purpose or object of the insurance policy. In *B.V. Nagaraju v. Oriental Insurance Co. Ltd.* (1996) 4 SCC 647, a two-Judge Bench of this Court read down an exception clause to serve the main purpose of the policy. However, this Court clarified that the breach of the exception clause was not so fundamental in nature that would have led to the repudiation of the insurance policy. In that case, the terms of the insurance policy allowed an insured vehicle to carry six workmen, excluding the driver. When the vehicle met with an accident, it was carrying nine persons apart from the driver. The insured had moved a claim for repair of the vehicle, which was rejected by the insurer.

20. Allowing the claim, this Court held thus: (B.V. Nagaraju case (1996) 4 SCC 647], SCC pp. 650-51, para 7)

"7. It is plain from the terms of the Insurance Policy that the insured vehicle was entitled to carry 6 workmen, excluding the driver. If those 6 workmen when travelling in the vehicle, are assumed not to have increased any risk from the point of view of the Insurance Company on occurring of an accident, how could those added persons be said to have contributed to the causing of it is the poser, keeping apart the load it was carrying. Here, it is nobody's case that the driver of the insured vehicle was responsible for the accident. In fact, it was not disputed that the oncoming vehicle had collided head-on against the insured vehicle, which resulted in the damage. Merely by lifting a person or two, or even three, by the driver or the cleaner of the vehicle, without the knowledge of the owner, cannot be said to be such a fundamental breach that the owner should, in all events, be denied indemnification. The misuse of the vehicle was somewhat irregular though, but not so fundamental in nature so as to put an end to the contract, unless some factors existed which, by themselves, had gone to contribute to the causing of the accident. In the instant case, however, we find no such contributory factor. In Skandia case [Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan, (1987) 2 SCC 654] this Court paved the way towards

reading down the contractual clause by observing as follows : (SCC pp. 665-66, para 14)

'14. ... When the option is between opting for a view which will relieve the distress and misery of the victims of accidents or their dependents on the one hand and the equally plausible view which will reduce the profitability of the insurer in regard to the occupational hazard undertaken by him by way of business activity, there is hardly any choice. The Court cannot but opt for the former view. Even if one were to make a strictly doctrinaire approach, the very same conclusion would emerge in obeisance to the doctrine of "reading down" the exclusion clause in the light of the "main purpose" of the provision so that the "exclusion clause" does not cross swords with the "main purpose" highlighted earlier. The effort must be to harmonise the two instead of allowing the exclusion clause to snipe successfully at the main purpose. The theory which needs no support is supported by Carter's "Breach of Contract" vide para 251. To quote:

> "Notwithstanding the general ability of contracting parties to agree to exclusion clauses which operate to define obligations there exists a rule, usually referred to as the "main purpose rule", which may limit the application of wide exclusion clauses defining a promisor's contractual obligations. Fo example, in Glynn v. Margetson & Co. [1893 AC 351 (HL)] , AC at p. 357 Lord Halsbury, L.C. stated : (AC p. 357)
>
> '… It seems to me that in construing this document, which is a contract of carriage between the parties, one must in the first instance look at the whole instrument and not at one part of it only. Looking at the whole instrument, and seeing what one must regard … as its main purpose, one must reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract.'
>
> Although this rule played a role in the development of the doctrine of fundamental breach, the continued validity of the rule was acknowledged when the doctrine was rejected by the House of Lords in Suisse Atlantique Societed' Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale (1967) 1 AC 361 :(1966) 2 WLR 944 (HL)]. Accordingly, wide exclusion clauses will be read down to the extent to which they are inconsistent with the main purpose, or object of the contract."
>
> *(emphasis in original and supplied)"*

35. In Civil Appeal No.10671 Of 2016 between Narsingh Ispat Ltd Vs Oriental Insurance Company Ltd. & Anr 2022 LiveLaw (SC) 443, the Hon'ble Supreme Court while reiterating *National Insurance Co Ltd vs Ishar Das Madan Lal (2007) 4 SCC 105 (Para 12)* has held that the burden is on the insurer to show that the case falls within the purview of exclusion clause. In case of ambiguity, benefit goes to the insured.

36. The 'User Manual' of M/s Wartsila the Original Equipment Manufacturer (OEM) of the DG (Annexure E to the Complaint) provides for requisite Lube Oil gauge pressures (bar) for normal operation of the DG set, below which the warning will comes on, requiring switching off of the DG set. The normal value of Lube Oil pressure notified by the OEM for running of the DG set is between 3.8 and 4.5 bar. Thus, when the lube oil drops below 4.5 bar it may be considered as reduction. As long as the lube oil pressure is above 4.5 bar, the engine running is normal as far as lube pressure is concerned. As per Annexure M and N to the Complaint, the Lube Oil pressure which was 5.5 bar on 24.10.2008 reduced to 5.0 bar on 25.10.2008 and 26.10.2008 and then increased to 5.1 bar on 27.10.2008 and further increased to 5.2 bar on 28.10.2008 and came down to 5 bar on 29.10.2008 and 30.10.2008. It again reduced to 4.8 bar on 01.11.2008 and on 02.11.2008. As stated, as long as the Lube Oil pressure is above 4.5 bar, the engine running is normal as far as Lube pressure is concerned. The Appellant's stand was corroborated by Wartsila Vasa Diesel Engine Manual 01. Main Data, Operating Data and General Design and 01.2 Recommended operating data which brings out gauge pressures (bar) to be maintained.

37. It is a matter of record that the said DG Set abruptly came to a halt at 1.08 PM on 02.11.20008 and the damage occurred. The observation of negligence extending to willful negligence in handling of the DG Set due to mishandling when lube oil pressure was lower than prescribed as per the manual is a mere presumption. It has been consistently stated that the lube oil pressure did not go below 4.5 bar from 23.10.2008 to 01.11.2008. There is also nothing on record mandating certain actions by the Appellants when the lube oil pressure is between 5.5 to 4.8 bar. Therefore, apparently there was no situation of concern pertaining to lube oil pressure vis-à-vis safety in operation of the said DG set at such lube oil pressure.

38. Other than the two Reports of the of the same Surveyor no independent evidence is brought on record establishing negligence verging to willful negligence as a consequence of which the said DG set tripped off and sustained damage. In addition, no nexus has been established in the alleged delay in switching off, trip off of the DG set and the damage occasioned. Further, it is an admitted position that the subject failure was first of its kind. Thus, we do not consider that any act or omission on the part of the Complainant which tantamounts to willful negligence in operation of the said DG set has been revealed in the case which could result in the denial of the Insurance claim on this ground alone. Therefore, the action of the Respondents in rejecting the insurance claim of the Appellant on the ground of willful negligence is arbitrary.

39. Based on the above discussion and on careful perusal of material on record, we are of the considered view that the damage occasioned to the DG set in dispute at 1.08 PM on 02.11.2008 is within the scope of the insurance contract between the parties. Subsequent to the accident, the Appellant claimed Rs. 49,81,667/- towards damages. The Surveyor assessed the loss to be Rs. 36,25,888/-. Thereafter, in terms of excess clause, the loss amount was subjected to reduction of Rs. 5,00,000/-, the minimum amount prescribed. Thus, the amount due was Rs. 31,25,288/-. The Surveyor considered that the Appellant had imported majority of the affected items and lodged their own claim with invoices and some of the items drawn from their stores were valued Rs.16,32,473/- and most of these items were purchased in the year 2005-2006. The fresh items purchased, replenished to their stores and had not gone into the engine. As the old spare parts were gone on replacement basis, the life of the engine was de-rated to some extent. Thus, he applied depreciation of 50% on the total value of such stock Rs. 16,32,473/- amounting to Rs.8,16,237/. Thus, the liability assessed towards the damage caused to the subject DG set on 02.11.2008 was Rs.31,25,288 - Rs.8,16,237/- = Rs.23,09,051/-. As the above calculations made by the Surveyor are in terms of the insurance contract between the parties and the items and records were inspected by him, these are considered as appropriate and reasonable.

40. As the damage occasioned on 02.11.2008 and the claim was preferred immediately, the same ought to have settled within of six months. There is deficiency in the service of the Respondents in respect of the subject insurance contract.

ORDER

41. Based on the above discussion, we set aside the order dated 14.02.2013 passed by the learned State Consumer Disputes Redressal Commission, Maharashtra in CC/10/110 and partly allow the present Appeal. The Respondents are directed to pay Rs. 23,09,051/- to the Appellant towards the claim in respect of the damage occasioned to the DG set in question in the accident on 02.11.2008. The Respondents are also liable to pay simple interest on Rs. 23,09,051/- @ 8% per annum from 02.05.2009, the date after the lapse of six months from the date of accident on 02.11.2008. These payments shall be made within a period of three months from the date of this order. If the Respondent fails to comply with the payment within three months, payment of Interest @ 12% per annum will be applicable for the period of delay after the specified period of three months.

42. There shall be no order as to costs.

43. All pending Applications, if any, are disposed of accordingly.

.....J

SUDIP AHLUWALIA

PRESIDING MEMBER

……

AVM J. RAJENDRA, AVSM VSM (Retd.)
MEMBER