REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 971 OF 2014

M/s Rajankumar and Brothers (Impex) ....Appellant(s)

Versus

Oriental Insurance Company Ltd. ....Respondent(s)

J U D G M E N T

MOHAN M. SHANTANAGOUDAR, J.

1. This appeal arises out of judgement of the National Consumer Disputes Redressal Commission ('NCDRC') dated 12.11.2013, dismissing the consumer complaint filed by the Appellant herein.

2. The timeline of events giving rise to the present appeal is as follows: The Appellant is a partnership firm in the business of import-export of various commodities, including steel coils. The

Respondent insurance company issued a Marine Cargo Cover Note (hereinafter 'Cover Note') dated 14.5.2010 for a sum of 12,63,712.50 US Dollars, covering voyage from any port in China to Mumbai Port. It was stated in the aforesaid Cover Note that a policy document would be issued once the Appellant furnished the requisite particulars of the vessel in which the cargo was being carried. Accordingly, the Appellant forwarded the particulars of 'Khalijia-III', the vessel in which the cargo was to be carried (hereinafter 'subject vessel'), to the Respondent, vide letter dated 26.5.2010. It was stated in this letter that the subject vessel was built in March 1985, and its "class" was specified as 'I.R.S.'. The Appellant's case is that it had communicated the aforementioned details regarding the subject vessel to the Respondent, as well as the Respondent's insurance broker, as per the documents presented by the Overseas Seller.

2.1 Thereafter, Hangzhou Cogeneration (Hong Kong) Co. Ltd. (hereinafter 'Overseas Seller'), through its agent M/s Kirtanlal & Sons, shipped 80 prime hot rolled steel coils weighing 2000 Metric Tonnes on board the subject vessel from Caofeidian Port, China to

the Appellant, for discharge at Mumbai Port. The subject vessel was carrying on board consignments of prime hot rolled steel coils of seven other importers who had also imported them from the same Overseas Seller. Subsequently, the Respondent's brokers issued a single voyage policy dated 2.7.2010 (hereinafter 'Marine Insurance Policy') to the Appellant. It is undisputed that the Marine Insurance Policy covered all risks as per the Institute Cargo Clauses (A), Institute War Clause, and Institute Strike Clause.

2.2 The subject vessel reached Mumbai port on 6.7.2010 and was allotted a berth on 14.7.2010 for discharge of the cargo. However, on account of failure of the vessel's crane during discharge, further discharge could not take place, and the subject vessel was removed from the allotted berth by an order of the port authorities. Subsequently, on 19.7.2010, the Appellant came to know that the subject vessel had run aground on the midnight of 18.7.2010. Thus, by letter dated 20.7.2010, the Appellant informed the Respondent that there was a possibility of them claiming under the Marine Insurance Policy.

2.3 Thereafter, the shipowners engaged the services of M/S. Smit Singapore Private Ltd. ('Salvors') for the purpose of recovering the cargo. The shipowners also appointed M/s Richard Hogg Lindley as the General Average Adjustor ('GAA'). The GAA sent an email dated 27.7.2010 to both the Appellant and the Respondent, stating that the situation had given rise to a "General Average". The concept of General Average, in maritime law, refers to a loss mitigation measure whereby all those who are interested in a marine adventure make pro rata contributions towards the losses sustained or expenditure incurred in time of peril for the common good of all parties.[1] For instance, if a ship runs aground, as in the present case, the shipowners and the cargo interests are mutually liable for reimbursing the losses arising from such an event. If there is a contract of marine insurance in respect of the voyage, the insurer will be liable for reimbursing the amount on behalf of the assured cargo owner.

Accordingly, the Appellant requested its insurer i.e. the Respondent, to issue a General Average Guarantee in 'Form B', as

1 Kyraki Nouassia, *The Principle of Indemnity in Marine Insurance Contracts: A Comparative Approach* (Springer, 2007) 161.

required by the GAA. The Respondent consequently issued a guarantee dated 3.8.2010, agreeing to pay the GAA on behalf of the Appellant, for contribution towards the General Average, as well as towards other special charges. These documents were submitted by the Appellant to the GAA.

2.4 After the receipt of the General Average Guarantee, the GAA requested the Appellant to pay a separate salvage security of 25 per cent of the 'Cost, Insurance, and Freight' ('C.I.F.') value of their cargo, which amounted to 256,880 US dollars. Hence, by letter dated 5.8.2010, the Appellant requested the Respondent to issue the salvage security. The Appellant contends that the Respondent did not issue the separate salvage security as required, resulting in the withholding of the release of the Appellant's consignment at Mumbai port, and exposing it to heavy demurrage and likelihood of further damages. In addition to not issuing the salvage security, the Respondent, by letter dated 20.8.2010, informed the Appellant that they were withdrawing the General Average Guarantee, 'Form B' issued by them earlier in respect of the Appellant's consignment on

the subject vessel, on account of non-compliance with the 'Institute Classification Clause' ('ICC') in the Marine Insurance Policy.

2.5 Unfortunately for the Appellant, on 7.8.2010 there was a collision between the subject vessel and a navy vessel in the waters near Mumbai Port. On 13.8.2010, the Salvors claimed a maritime lien on the cargo. Further, the Salvors initiated arbitration proceedings against the Appellant and the shipowners. During the course of the aforesaid arbitration proceedings, the Salvors obtained interim orders from the Hon'ble High Court of Mumbai, restraining the Appellant from removing their consignment from Mumbai Port. Ultimately, vide order dated 24.8.2010, the High Court directed that the Appellant would be allowed to take its consignment on furnishing security in the form of a bank guarantee in the sum of Rs. 14 crores. The Appellant furnished the security as directed and took delivery of the consignment from the Mumbai Port Trust on 3.9.2010. On 2.12.2011, the Arbitrator passed an award against the Appellant and other cargo owners, finding them liable for reimbursing the costs incurred by the Salvors.

2.6 The Appellant, by letter dated 2.2.2012, requested the Respondent to settle the losses incurred by it, and also forwarded a copy of the aforementioned arbitration award dated 2.12.2011. A legal notice was also sent on 21.6.2012, followed by a reminder on 4.7.2012, but these went unanswered. Hence, the Appellant filed a consumer complaint before the NCDRC against the Respondent, asking for compensation on account of the losses incurred, for deficiency in service, and for the legal and other incidental expenses.

2.7 The Respondent did not file a written statement before the NCDRC, and its request for consideration of written arguments was rejected. However, counsel for the Respondent was allowed to make oral submissions on the questions of law involved in the case. The NCDRC found that the Appellant had failed to prove that the subject vessel was in compliance with the ICC stated in the Marine Insurance Policy. It noted a communication dated 9.8.2010, in which the Respondent's claim settling agent in London had informed the Respondent that the subject vessel was classed with Lloyd's Register of Shipping until 10.10.2007, after which Lloyd's

had withdrawn the aforesaid classification, and that the subject vessel appeared to be outside the scope of the ICC. The NCDRC further found that the subject vessel had been more than 25 years old on the date of loss i.e. when it ran aground on 18.7.2010, and the Appellant had not produced any document showing that the subject vessel was classed as 'I.R.S.' Hence, the complaint was dismissed.

3. Heard learned counsel for both parties.

3.1 Learned counsel for the Appellant submitted that the 'I.R.S.' classification was granted to the subject vessel by the 'International Register of Shipping', which is an independent classification society. Further, that after the issuance of the Cover Note, the Appellant had provided all particulars regarding the subject vessel, and expressly asked the Respondent whether the subject vessel was acceptable. It was argued that had the Respondent indicated at the time of the issuance of the Marine Insurance Policy that the classification was not acceptable; the Appellant could have paid an extra premium to purchase the policy.

This is as per the terms of Clause 6 of the Cover Note, which reads thus:

> "6 For coverage of shipments by sea: the vessel shall conform to the current Institute Classification Clause; otherwise the cover shall be subject to additional steamer extra premium such as coverage, under tonnage, non-classification and non approval extra at underwriter's discretion."

Learned counsel also referred to the Institute Marine Cargo Clause (A) ('Cargo Clause') within the Marine Insurance Policy, which provides for waiver of any breach of implied warranties of seaworthiness of the subject vessel. He argued that under the terms of the Cargo Clause, the Respondent would have the right to not indemnify the Appellant only if the Appellant or its servants were privy to such unseaworthiness. It was argued that the Appellant was merely a cargo-importer, and not the vessel owner, and had communicated all the particulars of the vessel as provided to it by the Overseas Seller. Therefore, the Appellant could not be said to have been privy to the unseaworthiness, if any, of the subject vessel.

Lastly, it was contended that indemnification by the Respondent could not be dependent on the amount of loss caused to the insured or on the nature of accident that caused the loss. It was argued that that once the Respondent provided the General Average Guarantee, it was estopped from claiming that the Respondent had breached the ICC.

3.2 On the other hand, learned counsel for the Respondent argued that there was a clear breach of the ICC, inasmuch as the Appellant had failed to disclose that the classification granted to the subject vessel by Lloyd's Register of Shipping had been withdrawn on 10.10.2007. So far as the I.R.S. classification is concerned, it was submitted that 'I.R.S.' referred to Indian Register of Shipping, and not International Register of Shipping, as claimed by the Appellant. Furthermore, it was contended that although the Appellant claimed to possess a certificate proving the 'I.R.S.' classification of the subject vessel, it had neither submitted the said certificate to the Respondent, nor produced the same before the NCDRC.

In response to the Appellant's argument that the Respondent was estopped from claiming breach of the ICC by its

conduct in providing the General Average Guarantee, it was submitted that at the time when such Guarantee was sought for by the Appellant, the priority of all parties involved was to ensure mitigation of losses by saving as much of the cargo as possible. It was only after the collision of the subject vessel on 07.08.2010 that the Respondent began investigating into the seaworthiness of the vessel, and found out that it was not a classed vessel at the time of issuance of the Marine Insurance Policy. Therefore, it was submitted that the Respondent would not be estopped from claiming breach of the ICC merely because it had, in good faith, provided the General Average Guarantee so as to mitigate the Appellant's losses.

4. Upon our perusal of the material on record and after hearing the learned counsels, we find that two issues arise in the instant case:

First, whether the Appellant had committed breach of warranty with respect to compliance with the ICC?

Second, whether the Respondent had waived such breach of warranty by the Appellant?

5. With respect to the first issue, it is not disputed that both the Cover Note and the Marine Insurance Policy stated that the 'ICC' would be one of the warranties/terms of insurance. Additionally, Clause 6 of the Cover Note, as mentioned supra, prescribed that the subject vessel needed to conform to the current ICC, in the absence of which, the insurance cover would be subject to payment of an additional premium.

At this juncture, we find it useful to dwell upon the scope and relevance of the ICC in marine insurance contracts. The ICC is drafted and issued by the Joint Cargo Committee of the Lloyd's Marketing Association (a premier marine insurance market in London) in consultation with insurance and shipping interests. It is commonly understood that this 'classification' relates to the seaworthiness of the vessel in which the cargo is carried.[2] The relevant portion of the latest version of the ICC, as revised in 2001 ('ICC 01/01/2001'), which was in force at the time of the Marine Insurance Policy, and continues to be in force till date, reads as follows:

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2 See John Dunt, *Marine Cargo Insurance* (Informa Law, Routledge, 2009)166.

"**QUALIFYING VESSELS**

1 This insurance and the marine transit rates as agreed in the policy or open cover apply only to cargoes and/or interests carried by mechanically self-propelled vessels of steel construction classed with a Classification Society which is:

1.1 a Member or Associate Member of the International Association of Classification Societies (IACS), or

1.2 a National Flag Society as defined in Clause 4 below, but only where the vessel is engaged exclusively in the coastal trading of that nation (including trading on an inter-island route within an archipelago of which that nation forms part).

Cargoes and/or interests carried by vessels not classed as above must be notified promptly to underwriters for rates and conditions to be agreed. Should a loss occur prior to such agreement being obtained cover may be provided but only if cover would have been available at a reasonable commercial market rate on reasonable commercial market terms.

AGE LIMITATION

2 Cargoes and/or interests carried by Qualifying Vessels (as defined above) which exceed the following age limits will be insured on the policy or open cover conditions subject to an additional premium to be agreed.
Bulk or combination carriers over 10 years of age or other vessels over 15 years of age unless they:

2.1 have been used for the carriage of general cargo on an established and regular pattern of trading between a range of specified ports, and do not exceed 25 years of age, or

2.2 were constructed as containerships, vehicle carriers or double-skin open-hatch gantry crane vessels (OHGCs) and have been continuously used as such on an established and regular pattern of trading between a range of specified ports, and do not exceed 30 years of age.

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PROMPT NOTICE

5 Where this insurance requires the assured to give prompt notice to the Underwriters, the right to cover is dependent upon compliance with that obligation."
(emphasis supplied)

As is evident from the above, the ICC 01/01/2001 imposes two requirements to ensure that the vessel complies with a certain minimum standard of seaworthiness. The first is a classification requirement which requires that the vessel should be classed with a Classification Society which is a Member/Associate Member of the International Association of Classification Societies ('IACS') or, in the case of vessels engaged exclusively in coastal trading, a National Flag Society. The second is an age limitation in respect of the insured vessel. The IACS consists of 12 member societies, as listed below:

(i) American Bureau of Shipping (A.B.S.)

(ii) Bureau Veritas

(iii) China Classification Society (C.C.S.)

(iv) Croatian Register of Shipping (C.R.S.)

(v) Det Norske Veritas-Germanischer Lloyd (D.N.V.-G.L.)

(vi) Indian Register of Shipping (I.R.S.)

(vii) Korean Register of Shipping (K.R.)

(viii) Lloyd's Register (L.R.)

(ix) Nippon Kaiji Kyokai (ClassNK)

(x) Polish Register of Shipping (P.R.S.)

(xi) Registro Italiano Navale (R.I.N.A.)

(xii) Russian Maritime Register of Shipping (R.S.)

The official statement provided by the IACS about its Quality Standards is significant for understanding why classification of a cargo vessel with a member-society of the IACS, as opposed to any other society, is considered as a yardstick to judge whether the voyage policy can be reasonably insured. Members of the IACS have to comply with the IACS 'Quality System Certification Scheme' (QSCS), which, after 25 years of continuous

evolution, is considered as the 'gold standard' for ship classification societies. Moreover, every IACS member is required to have its own 'Internal Quality Management System' for ensuring that classed vessels meet certain minimum criteria of quality. The audits of all IACS members, and of those societies who wish to be considered for such membership, are carried out by independent accreditation bodies,[3] which lends further legitimacy to the classification accorded to vessels by IACS members.

Thus, it can be inferred from the above that an underwriter/insurer would usually trust the quality of, and be prepared to issue a reasonable premium for, a vessel classed with an IACS member society. On the other hand, the insurer may demand a higher premium, or deny insurance cover altogether, for a voyage in respect of a vessel classed by a non-IACS member society. Hence, the ICC prescribes classification with a member of the IACS as the baseline for ensuring that the policy involves less risk for the underwriter.

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3 International Association of Classification Societies, *Quality System Certification Scheme* (QSCS), http://www.iacs.org.uk/quality/quality-system-certification-scheme-qscs/ (Last visited Feb. 2, 2020).

Therefore, Sub Clause 1 of the ICC 01/01/2001 provides that cargo interests are obligated to promptly notify insurance underwriters if the cargo is being carried by a vessel which is not classed as prescribed in the ICC, and Clause 5 makes it clear that failure to provide such information will lead to exclusion of the insurance cover.

5.1 It has been contended by the Appellant that the NCDRC has erred in relying on the older version of the ICC, i.e. the 1978 version. We are in agreement with the said contention of the Appellant, inasmuch as the 1978 version of the ICC was replaced by the ICC 13/4/92, the ICC 1/8/97, and the ICC 01/01/2001. As mentioned supra, the ICC 01/01/2001 is the most recent version of the ICC, and the one which is relevant for the purpose of the present case.

However, the most recent version of the ICC, i.e., ICC 01/01/2001, parts of which we have quoted earlier, does not help the Appellant's case inasmuch as it is stricter in its import. We find it useful to undertake a comparative analysis of the older versions of the ICC and the ICC 01/01/2001 in this regard. Clause 1 of

previous versions of the ICC stated that, "*The marine transit rates* agreed in this insurance apply only to cargoes and/or interests… classed as below by one of the following classification societies." This phrasing had led to confusion as to whether a failure of the vessel to comply with the classification requirement would mean that the risk was completely excluded from cover or merely that the premium rate, as agreed upon, would no longer apply and the assured would have to pay a different premium rate.[4] Hence, in the ICC 01/01/2001, Sub Clause (1) was modified to read as follows:

> "This insurance and the marine transit rates as agreed in the policy or open cover apply only to cargoes and/or interests…classed with a Classification Society…" (emphasis supplied)

The word 'insurance' was specifically added in the ICC 01/01/2001 to clarify that the insurance itself, and not merely the rate of premium, is subject to compliance with the classification requirement.[5] Furthermore, the 1978 version provided that:

> "Cargoes and/or interests carried by mechanically self-propelled vessels not falling within the classification of the above are held covered subject to a premium and on conditions to be agreed." (emphasis supplied)

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4 Dunt, supra note 2, at 167.
5 Dunt, supra note 2, at 167.

The aforementioned 'held covered' provision acted as a saving clause to cater for situations where an assured discovered that the vessel in which their cargo was being carried fell outside the classification and/or age requirement in the ICC. In such a situation the assured cargo owner could still avail of the insurance cover subject to negotiating payment of an additional premium with the insurer.

English jurisprudence stipulates two requirements to avail of such 'held covered' provisions - *first*, 'prompt notification' to the underwriter, and *second*, the availability of cover at reasonable commercial market rates. However, the wording of the 'held covered' provision in the ICC 1978, quoted supra, did not expressly state these requirements, leading to the apprehension that it may be interpreted to mean that cover could be obtained in all cases, without any precautionary measures being followed by the assured. Hence, it appears that in order to avoid any confusion, the ICC 01/01/2001 has been drafted to expressly incorporate the aforesaid two requirements. Under the ICC 01/01/2001, the assured must immediately inform the insurer/underwriter if they discover that

the vessel carrying the cargo does not meet the classification requirement.

Additionally, if the vessel is such that a prudent underwriter would not be prepared to underwrite the risk at a reasonable premium, the assured is not entitled to the insurance cover.[6] These requirements are important because, as discussed earlier, the classification of the vessel is a significant factor for influencing the underwriter's decision-making as regards whether an insurance cover should be issued for the marine voyage or not.

5.2 We find it useful to refer to some of the common law decisions on the impact of non-compliance with the classification requirement in the ICC. The courts of Singapore and Hong Kong have frequently been seized with this question, and have held that non-compliance would render the claim of the assured excluded from cover, and that it is the burden of the assured to inform the insurer about such non-compliance and negotiate a reasonable premium beforehand.

6 Dunt, supra note 2, at 168.

5.3 In ***Everbright Commercial Enterprises Pte Ltd*** **v.** ***Axa Insurance Singapore Pte Ltd*** [2001] SGCA 24, the respondent insurance company issued an 'open cover note' to the appellant in that case, trading in respect of shipment of wood logs from the Solomon Islands to Tuticorin, India. The arrangement between the parties under the terms of the aforesaid 'open cover' was that the appellant would provide the respondent's insurance broker, Wilcom, the details with respect to the description of the goods, and the ports of loading and discharge, for the purposes of issuance of the cover note. However, the particulars of the carrying vessel were to be declared subsequent to the cover note being issued. The insurance policy was to be issued only once the vessel was on the way to the port of discharge.

The cover note was issued by Wilcom on behalf of the insurer on 9.5.1997. On 2.7.1998, the appellant communicated the particulars of the ship to Wilcom, including that the class of the vessel was 'HSR-100A1'. Subsequently, before the insurance policy could be issued, the ship was lost. The insurer came to know that the ship was a 'phantom ship', i.e. one which has no valid

classification, is not registered with any recognized ship registry, and is usually operated by criminals. Hence, the insurer repudiated the appellant's claim on the ground that the vessel did not comply with the requirements of the ICC 13/4/92 (which was the version of the ICC in force at that time) as stipulated in the cover note.

The Singapore Court of Appeal upheld the repudiation. It also held that though the appellant cargo company had given prompt notice, it would not be saved by the 'held covered' clause as no reasonable underwriter would agree to issue cover for a vessel with a suspicious classification background, even for a higher premium. It is pertinent to note that the above decision in ***Everbright Commercial Enterprises*** (supra) was rendered in the context of the ICC 13/4/92 when the 'held covered' provision did not expressly provide for the requirements of 'prompt notification' and 'availability of reasonable premium'. However, the Court relied upon the common law interpretation of 'held covered', as laid down in the decisions of ***Thames and Mersey Marine Insurance Co Ltd*** **v.** ***H T Van Laun & Co*** [1917] 2 KB 48 and ***Liberian Insurance***

Agency Inc v. Mosse [1977] 2 Lloyd's Rep 560, to incorporate the aforesaid requirements, and made the following observations:

> "35 In construing this clause, we should bear in mind that the purpose of adopting the ICC is to ensure that the vessel chosen by the insured to carry his cargo would meet certain standards of seaworthiness and maintenance by virtue of the fact that the carrying vessel is classed by one of the well-established international classification societies listed in the ICC and is within certain age limits. In an open-cover insurance, as in the present case, the ICC is adopted and forms part of the cover note, and is principally intended to deal with the agreed rates of premium for the insurance of a shipment in a case where the cover is provided before the particulars of the carrying vessel are declared to the underwriter. Where the carrying vessel subsequently declared has a listed classification and is within the age limitation, the ICC applies the agreed rates of premium for the insurance of such shipment. Where, however, the carrying vessel declared does not have a listed classification or is not within the age limitation, such agreed rates are not applicable for the insurance of the shipment; but in such event, the shipment is, nonetheless, covered and falls within the held covered clause, subject to the payment of a premium as well as on conditions to be agreed between the underwriter and the insured. In *Marine Reinsurance* (1981) by Robert H Brown and Peter B Reed, the learned authors said at p 127:
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> When operating a cargo open cover the underwriter is not in a position to examine each risk separately, nor to assess it on the basis of the carrying vessel. He is obliged to accept all valid declarations declared under the open cover. However, to ensure that he obtains a premium commensurate with the additional risk arising

from the use of inferior vessels or bad management he attaches a "classification clause" to the open cover. The effect of this clause is to apply a higher premium rate to shipments carried by overseas vessels that do not meet the minimum requirements of the classification clause.

The held covered clause is in effect a safety net to provide shippers a cover for their cargoes in the event that the carrying vessels declared by them do not satisfy the requirements as to class and age specified in the ICC, subject to the payment of a premium and on conditions to be agreed…

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53 Reverting to the present facts, one has to ask what a reasonable commercial rate of premium would be, that would have been fixed, if the parties were aware of all the facts affecting the risk involved in shipping the cargo on board the *Sirena 1*. No regard should be given to the fact that the *Sirena 1* eventually turned out to be a phantom ship since that would be erroneously taking into account the "casualty" that happened later. Instead, the focus should be on all the facts that were available on 2 July 1998, when Everbright declared the details of the *Sirena 1* to AXA…It is clear from the *Greenock* case ([49] *supra*) and the two cases which followed it, that it does not matter that the relevant facts affecting the risks were not known to the parties until after the loss had already occurred. All the facts that were available at that time should be taken into account. The following are the relevant and undisputed facts about the *Sirena 1* which we find could have been known to the parties on 2 July 1998:

(a) The vessel was not classed by any recognised classification society. Its classification was stated as HSR-100A1. It is unclear which classification society classed the vessel. It was speculated that "HSR" could either be Hellenic Shipping Registry of Greece or Honduras Shipping Registry. A proper check would have revealed that the *Sirena 1* had no proper classification…

(c) The vessel was not listed or found in the Lloyd's Register of Ships…

(e) The cover was on Institute Cargo Clauses (All Risks) terms.

(f) The shipment was a chartered shipment, where there is higher risk involved, bearing in mind the size and value of the cargo to be insured.

54 Before the incidence of the loss, it was probably unlikely that a reasonable and prudent underwriter would conclude with reasonable certainty that the *Sirena 1* was a phantom ship. But it does not follow that a reasonable and prudent underwriter would be prepared to provide insurance for the kind of risks involved. In our view, when confronted with the facts which we have discussed, a reasonable and prudent underwriter would be put on enquiry and upon enquiry, they would find that there was no record of *Sirena 1*, and what emerged would be a vessel with a highly suspect background. Clearly, there were sufficient warning signs which would persuade a reasonable and prudent underwriter to reject providing cover rather than to accept a higher premium to cover the increased risks. This is especially so since the policy required was on Institute Cargo Clauses (All Risk) terms and the value to be insured was high as it was a chartered shipment. In our judgment, in the circumstances, a reasonable commercial rate of premium would not be available for insuring the shipment of logs on board the *Sirena 1*, and

> consequently Everbright would not be able to invoke successfully the held covered clause…"
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> (emphasis supplied)

Thus, it can be seen from the above that the lack of recognized classification was a significant factor in leading the Court to conclude that the appellant therein would not be saved by the 'held covered' clause. This is because no underwriter/insurer would agree to insure a high value shipment, and include all risks arising thereunder for a voyage involving a vessel which is of suspect classification, even if the assured agreed to pay a higher premium in respect of the same.

The Court further held that the fact that the insurer had not specifically informed the appellant, prior to loss of the ship, that the vessel was not included in the ICC, would not amount to a case of estoppel by silence or acquiescence. Rather, it was held that it was the obligation of the assured to ensure that the shipment complied with the terms and conditions of the cover note, as elucidated by the Court in the following terms:

> "57 In considering this issue of estoppel, it is helpful to bear in mind the obligations of each party in effecting the

> insurance under the cover note. It is not disputed that the insurance sought to be effected by Everbright with AXA was not a facultative insurance where the insured provides full details of the shipment, including the relevant particulars of the vessel, to the underwriter for consideration on whether the shipment would be accepted for immediate insurance. What the parties here had arranged for was an open-cover insurance or one akin to an open-cover insurance, where a cover note incorporating the ICC was first issued for the prospective shipment of cargo and the relevant particulars relating to the shipment were to be declared later by Everbright to AXA. In respect of this arrangement, the obligation was on Everbright to ensure that their shipment complied with the terms and conditions of the cover note, and only if such shipment complied with the terms would there be insurance coverage for the shipment. AXA, on their part, had no right to reject a vessel which complied with the terms and conditions, but they were under no obligation to inform Everbright, if the vessel declared did not fall within the terms of the ICC."

It is true that the Court's reasoning in ***Everbright*** was significantly predicated upon the fact that the respondent insurer had issued an 'open-cover' insurance in which the insurer had only issued a cover-note based on the details of the cargo and the port of origin and destination of the voyage, and the relevant particulars of the vessel had not been provided to the insurer in advance. This is important to note because in the present case, though the Respondent initially issued the Cover Note dated 14.5.2010 (supra)

without knowing the particulars of the vessel, it subsequently issued the Marine Insurance Policy dated 2.7.2010 after having received the Appellant's communication that the vessel was classed as 'I.R.S.'

Subsequent common-law decisions, however, have held that the obligation of the assured to inform the correct details in respect of the vessel's classification extends even where a policy is issued after the particulars of the vessel have been provided.

5.4 In ***Nam Kwong Medicines & Health Products Co. Ltd. v. China Insurance Co. Ltd.*** [2002] 2 Lloyd's Rep. 591, the insurer denied liability for loss of goods during sea voyage *inter alia* on the ground that the vessel was unclassified, and thus, there was a breach of the ICC. It was contended by the insured that in 'facultative' insurance covers where there was no warranty that the ship was classed with an approved classification society, and where an 'overage' surcharge (i.e. an extra premium with respect to the age of the vessel) had been duly paid, the ICC could not be made applicable.

The High Court of Hong Kong rejected the argument of the insured, holding that facultative insurance covers and the ICC were not mutually exclusive, and that the requirement of ICC classification was no different from the one that existed in open-cover insurances. The Court also reaffirmed the principle of English law as stated in ***Liberian Insurance Agency*** (supra), i.e., that the 'held covered' clause in insurance contracts could not be invoked in cases where it would have been impossible to insure the risk at a reasonable commercial rate of premium.

5.5 In ***Kam Hing Trading (Hong Kong) Ltd.* v. *The People's Insurance Co. of China (Hong Kong) Ltd. and Anr.*** [2010] 4 HKLRD 630, the respondent insurance company repudiated the claim of the appellant cargo seller on the ground that that the vessel carrying was not classed in compliance with the ICC. It may be worth noting that in ***Kam Hing Trading*** (supra), the appellant cargo company had produced a certificate to show that the vessel was classed by the International Register of Shipping. However, it was observed by the High Court of Hong Kong that the

International Register of Shipping was not a Member or Associate Member of the IACS, as required by the ICC 01/01/2001.

It was argued by the appellant that the burden to verify whether or not the vessel was classed was upon the insurer, and that once the insured had provided the name of the vessel to the insurer, the insurer had the means to verify the class of the vessel from registers/databases of ships, and the subsequent issuance of a marine cargo policy by the insurer amounted to acceptance of the non-classed vessel.

The High Court of Hong Kong, referring to the decision of the Singapore Court of Appeal in ***Everbright Commercial Enterprises*** (supra), held that as per the ICC 01/01/2001, the insured was obligated to disclose that the vessel was not classed in accordance with the ICC. The Counsel for the appellant sought to distinguish ***Everbright*** on the ground that in ***Kam Hing***, a policy had been issued subsequent to the open cover-note. However, the High Court of Hong Kong held that the obligation to disclose the vessel's classification was a continuing obligation - the assured was

required to provide a 'prompt notice' to the insurer once it became privy to the fact that the vessel was non-classed, even if such information was discovered after the policy had already been issued. The following observations of the High Court of Hong Kong are relevant to the instant case:

> "172. It was the evidence of Mr Bilney, which in its substantially amended form I accept, that the ICC/01 class requirement is of central importance, and constitutes a condition of the insurance. I also accept the evidence of Mr Xie that such internal check as was made by the insurer did not extend to class, and in any event my view is that as a matter of principle that in the situation as had arisen the plaintiff was obliged to ensure by 'prompt notice' to the insurer that the carrying vessel was an "approved" vessel in terms both of the Open Cover and after issue of an actual policy; the Open Cover and the Cargo Policy each incorporated the ICC, and I have no doubt that this must be a continuing obligation on the part of the insured.
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> xxx
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> 174. It follows that I reject the plaintiff's submission that the legal/evidential 'burden' of discovering the non-compliant class of the vessel lay on the insurer, which in light of such information as it may then discover of its own volition then has to evaluate whether, and upon what terms, it is going to assume the increased risk, just as I reject the argument that the formal issuance of a cargo policy effectively is conclusive of the insurer's acceptance of the situation and/or that by such issuance

a 'non-ICC-classed' vessel thereby is, in effect, somehow transmuted to an ICC/01 'approved vessel'.

xxx

179. Accordingly, I reject the argument that in the circumstances of this case the information given by the insured to the insurer constituted 'prompt notice' in ICC/01 terms (see clauses 1 and 5 of ICC/01), and that thereafter it was the responsibility of the insurer to do its own investigation from the primary (but patently incomplete) data provided by the putative insured, and thereafter to 'fill in the blanks' in terms of acceptance or otherwise arising from any perception of increased risk due to any knowledge which may have been gained as to the 'non-ICC-classed' status of this carrying vessel.

180. I accept the contention of the 1st defendant that the whole object of the ICC/01 - even absent an express 'held covered' clause - is to place the underwriter on risk, and that if the assured wishes to seek extended cover - as for example, due to the use, as here, of a non-ICC-classed vessel - then "prompt notice" (*vide* Clause 5 of the ICC) *must* be given to underwriters.

xxx

181. In this context I record, and also accept, Mr Bartlett's submission that the plaintiff never pleaded a case that it did send 'notice' to the insurers, and factually never did so, although he noted that at trial Mr Sussex but "faintly" had referred to an email from a Mr Sunny Ng of the plaintiff to loss adjusters dated 27 December 2007 as comprising such 'notice'. I agree with the submission that this email clearly was nothing of the sort, and said no more than it was attaching documents pursuant to a request from the loss adjusters for such documents, and made no mention of a desire to engage in negotiation for revised insurance terms, and thus could not possibly constitute nor

> purport to be a 'notice' to insurers; indeed, in her evidence Ms Lui had confirmed that the plaintiff had never sent nor instructed the 2nd defendant to send such a notice to the insurer under ICC/01."
>
> (emphasis supplied)

Therefore, where the insurer issues the insurance policy based on incomplete or incorrect details provided by the assured, it does not amount to acquiescence to improper classification of the vessel. It is the duty of the assured to provide the full and correct particulars of the vessel at the time of issuance of the policy, irrespective of whether or not the insurer carries out any due diligence from their end. Since no such prompt notice was given by the appellant in ***Kam Hing Trading*** (supra), the High Court held that the appellant was excluded from the scope of the insurance cover. The High Court further observed that even if such evidence had been given, there was no evidence to show that premium could have been obtained at reasonable market terms, and hence the 'held covered' clause would not apply.

5.6 Thus, it can be seen from the above decisions that where a vessel is not classed with a recognized classification society in terms of the ICC, any loss incurred by the cargo-owner will be

excluded from the scope of the insurance cover. Further, the cargo owner is required to immediately notify the underwriters and negotiate an additional premium if the vessel is not classed in accordance with the ICC.

5.7 In the instant case, it is apparent that neither was the subject vessel in compliance with the ICC clause, nor had the Appellant given prompt notification to the Respondent about such non-compliance. The Appellant, in its letter dated 26.5.2010 (supra) had informed the Respondent that the vessel is of 'I.R.S.' class. However, the full form of 'I.R.S.' was not specified. As mentioned supra, the Appellant has contended that the NCDRC wrongly interpreted the term 'I.R.S.' to mean 'Indian Register of Shipping' and that the subject vessel was actually registered and classified with the 'International Register of Shipping'. However, our perusal of the official website of the International Register of Shipping shows that its official acronym is 'INTLREG'.[7] Whereas 'I.R.S.' is the official acronym of the 'Indian Register of Shipping'.[8] Hence the

7 See International Register of Shipping, 'About', https://intlreg.org/about/.
8 See Indian Register of Shipping, 'About IRClass', https://www.irclass.org/about-irclass/.

Appellant's contention that 'I.R.S.' refers to the International Register of Shipping is prima facie sustainable.

The Appellant had also averred in its complaint before the NCDRC that the Overseas Seller had produced a certificate dated 11.6.2010, certifying that the subject vessel was registered with an approved Classification Society as per the Institute Classification Clause. Further, that as per the said certificate, the class of the subject vessel was equivalent to Lloyd's 100A1, and the subject vessel was seaworthy and not more than 30 years old. However, no such evidence of the vessel's classification was ever provided to the Respondent. It is true that the Appellant has, during the course of hearing this appeal, placed the certificate dated 11.6.2010 before this Court. However, a perusal of the certificate shows that is only a self-certification wherein the vessel owners have claimed that the subject vessel is classed with an approved classification society as per the ICC clause. It cannot be taken as conclusive evidence that the vessel was actually classed with an IACS member society.

Even if we were to accept the Appellant's contention that the vessel is classed with the International Register of Shipping

(hereinafter 'INTLREG' for convenience), this does not help its case inasmuch the INTLREG is not one of the 12 accredited Member Societies of the IACS. Rather, it is the I.R.S. which is an IACS member. It has never been the case of the Appellant that the subject vessel was classed by the Indian Register of Shipping. It is also not the Appellant's case that the subject vessel was classed with a National Flag Society. Hence we find that the Appellant had committed breach of the classification requirement contained in Clause 1 of the ICC.

5.8 The letter dated 26.5.2010 sent by the Appellant to the Respondent, in respect of the ship's particulars, cannot be said to constitute 'prompt notification' as the particulars of the subject vessel's classification were not clearly specified therein. The Respondent may have, in good faith, assumed that 'I.R.S.' meant that the subject vessel was classed with the 'Indian Register of Shipping', and may have consequently inferred that the subject vessel fell within the scope of the ICC clause.

It was only pursuant to the Appellant's request for release of separate salvage security that the Respondent's claim settling

agents, M/s. W.K. Webster & Co., London by e-mail dated 9.8.2010 informed the Respondent that as per their investigation, the subject vessel was classed with Lloyd's Register of Shipping only until 10.10.2007, after which the classification was withdrawn. Hence it was only from this e-mail that the Respondents came to know that the shipment may fall outside the scope of the insurance cover, as per the terms of the ICC. Consequently, we find that the 'prompt notification' requirement has not been satisfied, and there is no ground for the application of the 'held covered' clause.

5.9 Further, as per the observations of the Singapore Court of Appeal in ***Everbright Commercial Enterprises*** (supra), we consider it highly unlikely on the facts of this case that any prudent underwriter would have agreed to cover the risk involved in a such a high value shipment under the Marine Cargo Clause (which covers almost all risks of loss or damage), even though the Appellant had no documentary evidence on record to prove the classification of the subject vessel. However, neither of the parties has led evidence on whether the Respondent would have agreed to insure the policy for a reasonable premium had the correct

particulars of the subject vessel been disclosed. Hence we do not consider it appropriate to record any findings on the same. In any case, such question does not arise inasmuch as the Appellant did not provide "prompt notification" in the first place. Hence, as provided under Clause 5 of the ICC, the insurer's liability is automatically discharged.

Consequently, we conclude that the Appellant had committed breach of the warranty contained in the Marine Insurance Policy requiring the subject vessel to be classed in accordance with the ICC, and such breach of warranty discharged the liability of the insurer.

6. The second issue which then arises for our consideration is whether the Respondent had, through its conduct or in any of its communications, waived the requirement of compliance of the subject vessel with the classification requirement of the ICC. In this regard, it may be of use to refer to Sections 35 and 36 of the Marine Insurance Act, 1963 ('1963 Act'):

> "**35. Nature of warranty.**—(1) A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say a warranty by which the assured undertakes that some particular thing shall

or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.

(2) A warranty may be express or implied.

(3) A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.

36. When breach of warranty excused.—(1) Non-compliance with a warranty is excused when, by reason of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract, or when compliance with the warranty is rendered unlawful by any subsequent law.

(2) Where a warranty is broken, the assured cannot avail himself of the defence that the breach has been remedied, and the warranty complied with before loss.

(3) A breach of warranty may be waived by the insurer."

A warranty imposes certain obligations on the insured, and Section 35(3) makes it amply clear that a warranty needs to be complied with, regardless of whether or not its non-compliance materially affects the risk involved in carrying the shipment. As a corollary, when a warranty is not complied with, i.e., there is a breach of warranty, the insurer is discharged from liability from the

date of such breach, by virtue of Section 35(3). At the outset, therefore, it is important to note that the scheme of the 1963 Act is clear inasmuch as the automatic consequence of a breach of warranty is discharge of the insurer's liability. Such discharge of liability does not require any express conduct or representation from the insurer.

However, Section 36(3) of the 1963 Act provides that the insurer may waive a breach of warranty. Such a waiver may be done either by or by way of incorporating certain terms in the insurance contract, such as the 'held covered' clause in the ICC or the exclusion clause found in the Institute Cargo Clauses, or by a representation or conduct of the insurer. We shall first examine whether the Respondent had waived the breach of warranty by way of incorporating certain terms in the contract.

6.1 In the instant case, though the Respondent initially issued the Cover Note dated 14.5.2010 without knowing the particulars of the vessel in which the Appellant's cargo was to be carried, it subsequently issued the Marine Insurance Policy after the particulars of the subject vessel, including the purported

classification of 'I.R.S.', were received. However, while the importance of the ICC is undoubtedly more significant in cases of 'open-cover' insurances where the specific details of the vessel carrying the cargo are not known to the insurer, as held in ***Nam Kwong Medicines*** (supra), a 'facultative' insurance policy in which the details of the subject vessel are specified, need not be mutually exclusive with the ICC.

It is not the Appellant's case that the Respondent had chosen to issue the Marine Insurance Policy despite being informed by the Appellant that the vessel was non-classed. Rather the Appellant had represented that the subject vessel was 'I.R.S.' classed. That being the case, as noted in ***Everbright Commercial Enterprises*** and ***Kam Hing Trading*** (supra), it was not the Respondent's burden to have investigated the Appellant's claim and informed the Appellant that the subject vessel was non-classed. Hence, at the outset it is important to note that the mere formal issuance of the Marine Insurance Policy by the Respondent does not indicate 'acceptance'/waiver of the vessel's classification or lack thereof.

6.2 At this juncture, it may be pertinent to refer to Clause 5 of the Marine Insurance Policy which provides for exclusion of loss arising from unseaworthiness of the subject vessel.

> "5.1 In no case shall this insurance cover loss damage or expense arising from unseaworthiness of vessel or craft…
>
> 5.2 The Underwriters waive any breach of the implied warranties of seaworthiness of the ship and fitness of the ship to carry the subject-matter insured to destination, unless the Assured or their servants are privy to such unseaworthiness or unfitness."

It was contended by the Appellant that non-compliance with the ICC stood waived by Clause 5.2, as stated above. However, it cannot be said that the ICC was an 'implied' warranty within the meaning of Clause 5.2. It was stated on the face of the Marine Cargo Cover dated 14.5.2010 and the Marine Insurance Policy that the ICC is one of the warranties/terms of insurance.

In any case, the Appellant's stand is that the subject vessel was classed with the 'INTLREG' (which it has mistakenly referred to as 'I.R.S.'). As the Singapore Court of Appeal has observed in ***Everbright Commercial Enterprises*** (supra) and as discussed supra, the very purpose of adopting the ICC is to ensure

that the vessel chosen by the insured meets certain minimum standards of seaworthiness, by virtue of being classed with one of the well-established member societies of the IACS. The Appellant, having known that the subject vessel was classed with the 'INTLREG', which neither was nor is a member of the IACS, was privy to the fact that the subject vessel was not compliant with the minimum standard of seaworthiness as laid out in the Marine Insurance Policy. Clause 5.2 only waives breaches of implied warranties of seaworthiness where the assured was not privy to the unseaworthiness of the vessel. Hence, the Appellant would not be saved by Clause 5.2 of the Policy, and it cannot be said that the Respondent had waived the breach of warranty before the Appellant's claim, by incorporating Clause 5.2 of the Policy.

6.3 We may now turn to whether the Respondent waived the breach of warranty by its conduct or any representation. During the course of arguments, it was put to the learned counsel for the parties whether the act of provision of General Average Guarantee amounted to a waiver of breach of warranty. It is commonly understood that a waiver in the context of marine insurance, apart

from one already provided for by way of 'held covered' or other such terms in the insurance contract, must include two elements, namely, (i) knowledge of the insurer, and (ii) unequivocal representation of the insurer. The presence of both these elements is indispensable.

For instance, after the occurrence of loss, even if the insurer makes an express representation that it would affirm the contract and indemnify the loss, if the insurer can prove that such a representation was made without the knowledge that there was a breach of warranty on part of the insured, the liability of the insurer would stand discharged from the date on which the warranty was breached. Similarly, mere knowledge on the part of the insurer that there was a breach of warranty would not amount to a waiver, in the absence of an express representation to that effect.[9]

6.4 Insofar as the element of knowledge is concerned, if the vessel carrying the insured cargo incurs loss, and the insurer seeks to investigate into whether or not there was a breach of warranty, no knowledge can be attributed to the insurer until such

9 Baris Soyer, *Warranties in Marine Insurance* (Cavendish, 2001) 206-213.

investigation is completed.[10] Once there is knowledge, the second element, i.e., unequivocal representation comes into play. The representation must be of such a nature that it is sufficient for the insured to conclude that the insurer is aware of the breach of warranty and has chosen to waive such breach and indemnify the loss. The determination of whether or not these elements are present assumes more complexity in cases where such a representation comes from an agent of the insurer, or where such an agent has knowledge of the breach. However, these arguments with respect to representations made by the insurer's agent have not been raised before us, and hence, such issues need not be addressed for the purposes of the present case.

6.5 Under the facts and circumstances of this case, the breach of warranty occurred when the Appellant informed the Respondent by letter dated 26.5.2010 that the subject vessel was classed by 'I.R.S.', thereby indicating the subject vessel was compliant with the ICC. After the subject vessel ran aground on the

10 *Id*, 209.

midnight of 18.7.2010, the Appellant requested the issuance of General Average Guarantee, and the same was issued on 3.8.2010.

At the outset, the General Average Guarantee in 'Form B' dated 3.8.2010 issued by the Respondent to the GAA was only an undertaking to pay the shipowners and the GAA on behalf of the Appellant for their contribution to the General Average, as and when such contribution was ascertained. This Guarantee was issued as per Clause 2 of the Marine Insurance Policy, under which the Respondent had agreed to cover all general average and salvage charges. Clause 2 reads as follows:

> "2. This insurance covers general average and salvage charges, adjusted or determined according to the contract of affreightment and/or the governing law and practice, incurred to avoid or in connection with the avoidance of loss from any cause, except those excluded in Clauses 4, 5, 6 and 7 or elsewhere in this insurance."
>
> (emphasis supplied)

At the time the aforesaid General Average Guarantee dated 3.8.2010 was issued, the Respondent was still under the impression that the subject vessel is in compliance with the ICC. Obviously, such impression was based on the representation made by the Appellant that the subject vessel was classed with I.R.S. It

was only by the e-mail dated 9.8.2010 from its claim settling agent that the Respondent came to know that the subject vessel does not meet the prescribed classification. Subsequently, the Respondent withdrew the Guarantee and refused to pay the separate salvage security. Hence, the issuance of the General Average Guarantee cannot not be understood as a waiver inasmuch as the Respondent, on the date of such issuance, did not have the knowledge of the breach of warranty committed by the Appellant and was only fulfilling its duty to contribute to the General Average (as explained supra) in good faith, as required by Clause 2 of the Marine Insurance Policy.

6.6 Further, in any case, at the time of issuing the General Average Guarantee, the Respondent did not expressly state that it was aware of the non-compliance with the ICC and it was waiving the same. In fact, the moment the breach of warranty was discovered, the Respondent initiated steps to withdraw the General Average Guarantee that had been issued by them and refused to pay the additional salvage security, which clearly demonstrates that there was no intent to waive the breach of warranty. Therefore, it

cannot be said that the Respondent had waived the breach of warranty through its conduct or representations after the claim was made by the Appellant.

7. Since we have concluded that the liability of the insurer was discharged on account of the breach of warranty caused by non-compliance with the classification requirement within the ICC, we do not consider it relevant to deal with the age limitation requirement therein for the purpose of the present case.

8. It is pertinent to note that during the course of hearing the present appeal, three other parties, namely K. Amishkumar Trading Pvt. Ltd., Baijnath Melaram and Viraj Impex Pvt. Ltd. ('Intervenors') filed Intervention Applications No. 3 of 2016, No. 4 of 2016 and No. 5 of 2016 respectively in the present appeal. The aforesaid Intervenors filed individual consumer complaints against the Respondent before the NCDRC, which are presently pending adjudication.

The Intervenors' applications were allowed by this Court vide order dated 27.10.2017. We do not consider it appropriate to decide the Intervenors' claims on merits at this stage, especially

since these may require separate findings of fact as to the terms and conditions of the policies issued by the Respondent to them, the warranties made by the Intervenors to the Respondent and so on. Hence, we direct that the Intervenors be relegated to record their evidence before the NCDRC, and the NCDRC is requested to hear the matters on merits and decide the same expeditiously, in accordance with the law as stated by us above.

9. Thus, we conclude that the Appellant had committed breach of warranty and the same was not waived by the Respondent. As a result, the Respondent rightly repudiated the claim of the Appellant.

10. In view of the above, the impugned judgement of the NCDRC stands confirmed, and the appeal is dismissed.

.....J.
(MOHAN M. SHANTANAGOUDAR)

.....J.
(K.M. JOSEPH)

NEW DELHI
FEBRUARY 07, 2020