ASSURED'S FAILURE TO COMPLY WITH WARRANTY CLASS DISCHARGES THE UNDERWRITER FROM LIABILITY UNDER A MARINE INSURANCE POLICY

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Introduction

1. The judgment of *Hind Offshore Pvt. Ltd. v. IFFCO-Tokio General Insurance Co. Ltd.,* 2023 SCC OnLine SC 966 breaks new ground on issues surrounding the duty of utmost good faith/ *uberrimae fidei* and the warranty of the vessel to be in class under Indian maritime insurance law. In this case, the Supreme Court of India held that an underwriter can validly repudiate liability under a Hull & Machinery Policy **("H&M Policy")** *inter alia* on the failure of the assured to ensure that the certification issued by the Classification Society was valid as well as the failure of the assured to provide requisite disclosure to the underwriter.

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Brief background

2. The H&M Insurance Policy between the Underwriter and the Assured for M.V. Sea Panther ("**the Vessel**") contained a clause providing that "*this insurance shall terminate automatically*" upon "*suspension, discontinuance, withdrawal*" of Class. During the currency of H&M Policy, the Vessel suffered damage to its port main engine, and the surveyors upon the preliminary inspection opined that the crankshafts and connecting rods were found beyond repair. Due to the urgency of the commercial commitments of the Vessel, temporary repairs were carried out on the main port engine. The Underwriter issued a cheque of INR 1,00,00,000/ USD 120,125 as an advance payment for replacing the engine crankshaft and other components. Despite receiving INR 1,00,00,000/ USD 120,125 from the Underwriter for replacing the engine crankshaft and other components, the Assured chose not to do the same.

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3. Subsequently, after the expiry of the initial H&M Policy, the Assured entered into a subsequent H&M Policy with the Underwriter. Unfortunately, during the currency of the Subsequent Policy, the Vessel was struck by a tugboat while being on a voyage and sank with all cargo on board, following which the Assured submitted a claim with the Underwriter for the total loss of the Vessel and the cargo. The surveyors as appointed by the Underwriter for ascertaining the loss arrived at a finding that the Assured had not disclosed to the Classification Society the previous damage sustained by the main port engine.

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According to the rules of the Classification Society, should the Vessel sustain damage to its machinery and the same was not reported to the Classification Society, the Vessel would be deemed to be out of Class. The Underwriter repudiated liability *inter alia* on the ground that at the time of the incident leading to the total loss of the Vessel, she was not in class and that the same constitutes a breach of warranty on the part of the Assured. The Assured had initiated proceedings before the National Consumer Disputes Redressal Commission **("NCDRC").**

Decision of the NCDRC

4. The NCDRC accepted the contention of the Underwriter that they could validly repudiate liability on the ground that at the time of the incident leading to the total loss of the Vessel, the Vessel's class had been suspended. The NCDRC arrived at a finding that the Assured ought to have disclosed to the Classification Society the damage sustained to the port main engine and the remedial measures undertaken to rectify the same. Given that there was a failure of disclosure of material on the part of the Assured to the Classification Society, the certificates issued by the Classification Society had been suspended.

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5. The Assured appealed against the judgment of the NCDRC to the Supreme Court of India *inter alia* on the ground that the Underwriter's surveyor got in touch with the Classification Society without seeking the approval of the Assured and that at the time of the incident, the Vessel was seaworthy. The Supreme Court of India rejected these arguments by referring to the below provisions of sections 35, 37, 41(5), and 55 of the Indian Marine Insurance Act, 1963 ("**the Act**") (which substantially mirrors the provisions of the English Marine Insurance Act, 1906):

5.1. Section 35 (Nature of warranty) - which imposes an obligation upon the Assured to continue to undertake a particular thing during the course of the insurance policy;

5.2. Section 37 (express warranty) – in the context of the contractual obligation to ensure that the Vessel was within class;

5.3. Section 41 (5) (Warranty of seaworthiness of a ship) – in the particular facts of the case the H&M Policy was a time policy and the Vessel was sent to sea in an unseaworthy state with the privity of the Assured.

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6. The Supreme Court of India came to a finding that the Vessel was unseaworthy because her certificates were suspended. Additionally, the ship

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owner is privy to the unseaworthiness of the Vessel given the fact that the required disclosure had not been made to the Classification Society. The Supreme Court of India observed that the defects if any, before the issuance of such Class Certificate since the insurance coverage to be provided by the insurer is based on such Class Certificate which is assumed to have been issued by the Classification Society after keeping in view all aspects including the defects if any brought to their notice.

7. The Supreme Court of India also examined the issue of whether in the facts of the case, it can be said that the Underwriter had waived its right to repudiate liability on the ground of breach of a warranty and arrived at a finding that the mere breach of a warranty is sufficient to discharge the Underwriter from liability. The Court came to a conclusion of law that the issue of whether or not the Vessel was seaworthy at the time of the incident is of no relevance if there is a breach of a warranty. In this context, the Supreme Court of India placed reliance on the judgment of *Rajankumar & Brothers (IMPEX) v. Oriental Underwriter Ltd.*, (2020) 4 SCC 364, wherein it was held that Section 35 of the Act automatically discharges the Assured from liability under H&M Policy as it imposes certain obligations on the Assured, and compliance with a warranty is one such obligation under Section 35 (3), regardless of whether or not its non-compliance materially affects the risk.

8. The Supreme Court of India also reiterated the law laid down in its earlier judgments that an insurer can repudiate liability on the ground of failure of the insured to provide the necessary disclosure per *Sea Lark Fisheries v. United India Insurance Company* 2008 (4) SCC 131 and *Contship Container Lines Limited vs. D.K. Lall* 2010 (4) SCC 256. In the instant case the Assured ought to have disclosed to the Underwriter that despite receiving money from the Underwriter to undertake repairs for the engine crankshaft and other components under the earlier policy, the Assured at the time of the renewal of the policy with the Underwriter ought to have disclosed to the Underwriter that the engine crankshaft was not repaired.

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