NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI

CONSUMER CASE NO. 85 OF 2014

1. MAVJI KANJI JUNGI & ANR.,
Navapara Fish Market,
PORBANDAR - 360575.
2. Harshit Mavji Jungi
Navapara Fish Market, Porbandar
Gujarat - 360 575 .....Complainant(s)

Versus

1. M/s ORIENTAL INSURANCE COMPANY LTD.,
Represented Through its Branch Manager, Branch Office,
PORBANDAR. .....Opp.Party(s)

BEFORE:
HON'BLE MR. ANUP K THAKUR,PRESIDING MEMBER

For the Complainant : Mr.Vipin Nair, Advocate
Mr.Karthik Jayashankar, Advocate

For the Opp.Party : Mr.Vishnu Mehra, Advocate

Dated : 22 Dec 2020

ORDER

ANUP K. THAKUR

1. The complainants are the owners of the vessel, "Dhananjay" insured with the opposite party – Oriental Insurance Company Limited (OP hereafter) since inception i.e. almost 8 years prior to the accident on **16.12.2009** . Per plaint, this vessel, en route to Sharjah on **16.12.2009,** at about 22:30 hours, was hit by *some unidentified object from the bottom* which resulted in ingress of water causing it to finally sink. Immediate intimation to the authorities ensured that no lives were lost. The OP was intimated, vide letter dated **18.12.2009;** M/s J. Basheer and Associates Surveyors Pvt. Ltd. were appointed by the OP on **24.12.2009** ; surveyor's report was submitted on **06.12.2010.** In this report, reason for sinking of the vessel was found to be *"contact / impact with some unidentified under water floating object"* . Finding it to be a case of total loss as also no violation of any terms and conditions of the insurance policy, claim was filed with the OP. It is the case of the complainant that despite this being the case, the OP appointed another Surveyor. Vide report dated **31.10.2011** , the second surveyor submitted in its report with the following findings: that the vessel was not maintained properly and that engine was being used by the vessel and, therefore, the reason for sinking of the vessel was *"Continuous vibrations caused by engine*

over a period severely affected the hull joints and resulted in giving away the joints" . The complainants's claim was finally repudiated by the OP vide letter dated **6.6.2012** . Hence this consumer complaint was filed on **28.03.2014** seeking the following reliefs:

> *"i. Direct the respondent insurance company to honour the claim of the complainant under the policy amounting to Rs.1,75,00,000/-;*
>
> *ii. Award interest @ 16% p.a. w.e.f. the date of occurrence i.e. 17.12.2009;*
>
> *iii. Award a sum of Rs.10 lacs towards mental agony caused due to the wrongful repudiation of the claim;*
>
> *iv. Award a sum of Rs.5 lacs towards loss of business on account of the delayed processing of the claim;*
>
> *v. Award costs of the complaint;*
>
> *vi. Pass any other order as may be deemed fit and proper in the present circumstance of the case."*

2. This complaint was resisted by the OP through a written version/reply filed on **27.06.2014** . First preliminary objection taken was that the complaint was hopelessly time barred and liable to be dismissed on this ground alone. The reason argued was that the claim was repudiated on **17.11.2011** whereas the complaint was dated **28.03.2014,** i.e. after the expiry of two years from the date of repudiation, thereby attracting section 24 A of the Consumer Protection Act, 1986 (in short, the Act). Citing letters of the OP to the complainant dated **15.05.2012** and **06.06.2012,** it was explained and argued that these letters were in response to the complainant's representation against repudiation of the claim on **17.11.2011** and had merely reiterated the repudiation, and therefore, did not extend the period of limitation. Second preliminary objection raised was that the consumer complaint was, in any case, not maintainable under the Act as there was no deficiency in service attributable to the OP: this was so because the insurance claim was duly considered and validly repudiated for cogent reasons. Further, it was stated that the plaint emerged from the accident of vessel "Dhananjay" when, allegedly, some unidentified object hit it from the bottom on **16/17.12.2009** . The OP had got this allegation duly investigated by Uday Bhogate & Associates (hereinafter referred to as the Investigator): It was argued that there was no bar to appointment of an investigator in addition to the appointment of a surveyor under section 64 UM of the Insurance Act, 1939, as amended. The investigator's report dated **31.10.2011** had concluded that the most probable cause for breach in the hull was *"Continuous vibrations caused by engine over a period severely affected the hull joints and resulted in giving away the joints "*. On this basis, inter alia, the claim had been repudiated.

ORAL ARGUMENTS

3. This matter was heard on **06.03.2020** .

4. **Learned counsel for the complainant** at the outset submitted a list of dates for the convenience of the Bench. He submitted that the insurance cover was not in dispute. The owners

of the vehicle were in this business for over 40 years and the insured vessel was what is commonly known as "Dhow": this was not a small boat; it was powered through an engine, in addition to sails. He submitted that prior to issue of insurance, M/s J.B. Boda Surveyors Pvt. Ltd., engaged by the OP, had thoroughly examined the vessel, and submitted a report finding it fit in all respects for proceeding at sea and valuing the insurable risk at Rs. 1,75,00,000/- (Rs one crore seventy five lakh). He further mentioned that the vessel had been insured for the last 8 years, by way of a testimony to it's fitness and insurability. He stated that all required permissions and certifications from the authorities were in place when the vessel left Porbander for Sharjah on the unfortunate voyage: The accident was on the night of **16/17.12.2009** when the vessel was hit by some unidentified floating object at about 22:30 hours and by 11.30 hours on **17.12.2009** , the vessel sank. The coast guard vessel, "Meera Behn", rescued the crew members. On **18.12.2009** , the OP was informed and they appointed M/s J Basheer and Associates Surveyors Pvt. Ltd. to investigate and assess the claim. He described the surveyor as a very reputed entity. The surveyor concluded that the insured "Dhow" (vessel) was in fit condition and that the claim was valid (surveyor report dated **17.12.2009** at pages 42-57). After this, the second surveyor, M/s Uday Bhogate and Associates, was appointed: His report concluded that the vessel was poorly maintained and that the most probable cause of the breach in hull could be continuous vibrations caused by engine over a period which severely affected the hull joints(2 nd surveyor's report dated **31.10.2011** at pages 59-64, SR 2 hereafter); the reasoning put forth was low maintenance and the fact that engine of the vessel was in use throughout the voyage till it sank.

5. Learned counsel for the complainant argued that nothing prohibited the use of engine as against sails except that engine was used only when necessary and any prudent captain of any boat will resort to the use of engine only when required to do so. He argued that before the voyage, DG Shipping had given permission and that this permission is given only if everything is in place. It was thus wholly improper and wrong for the second surveyor to have concluded as it had as it amounted to the surveyor stepping into the shoes of the established authorities who found nothing wrong with the vessel when they gave permission for the voyage. He further argued that it was established law that the OP could not go on appointing surveyor after surveyor till it obtained a report in it's favour. He also pointed out that in over 40 years of business, this was the complainant's first insurance claim; further, the insured vehicle was 23 years old being of 1993 vintage.

6. Learned counsel for the complainant argued that in face of the fact that the first surveyor had given a detailed report, opposite party could not have appointed the second surveyor without cogent reasons. Moreover, in face of the fact that the vessel had all the clearances necessary for the voyage, the second surveyor could not have come up with an alternate distinctive theory as to what may have happened to the vessel when it sank. In support, the learned counsel invoked the following citations:

a. (2019) 6 SCC 36 – New India Assurance Company Limited Vs. Luxra Enterprises Private Limited and Anr.in Civil Appeal No. 4371-4372 of 2015 decided on 01.05.2019;

b. (2009) 8 SCC 507 – Venkateswara Syndicate Vs. Oriental Insurance Co. Ltd. in Civil Appeal No. 4487 of 2004 decided on 24.08.2009.

7. He also pointed out that there were three letters of repudiation dated **17.11.2011** (page 97), **15.05.2012** and **06.06.2012** (pages 67-68). This would adequately answer the preliminary objection of the complaint being time barred.

8. **Learned counsel for the opposite party** (OP) began his arguments by pointing out at the outset that the main crux of the case argued by the complainant's counsel was that the second surveyor could not have been appointed except for very good and cogent reasons. He agreed that this indeed was the position in law; however, what was to be noted was that there was no prohibition in law either in appointing a second surveyor under section 64 UM of the Insurance Act, 1938. Therefore, the OP was within it's legal rights in appointing the investigator.

9. He drew attention to the first surveyor's report (SR1 hereafter) and to the discussion therein under the heading **"Cause of Sinking / Loss".** He argued that a perusal of this survey report would make it clear that it could not be called a good report; in particular, the cause of action has been discussed in a manner which cannot be accepted as a serious inquiry and as such, has little value and no clarity. It was for this cogent reason that the OP had to appoint a second surveyor / investigator.

10. Drawing attention to SR1, the counsel argued that the surveyor had only furnished a written statement of the insured in respect of the accident. There were no affidavits of the crew members or the master or of any other authority. In this situation, it was not possible to make out a case for the complainant on the basis of self serving averments. He further argued that therefore it is clear that the allegation of complainant's counsel that the OP had appointed the second surveyor / investigator only in order get a tailor made report to repudiate the claim is neither fair nor valid. His further submission was that SR1 was a short report, adding however that there was no problem as such in this as what mattered was the quality of the report and this was clearly inadequate. To substantiate, he referred to the discussion under the section, **"CONDITION AND OPERATION OF VESSEL"** , to argue that the surveyor had merely noted that M/s J B Boda Surveyors Pvt. Ltd, Porbandar vide their report dated **15.10.2008** had found the vessel fit in all respects for proceeding to sea and had valued the insurable risk to be around Rs.1,75,00,000/-, emphasizing that merely noting was not sufficient and that the surveyor ought to have said something more, on it's own. Similarly, the counsel argued that under the section, " **OCCURRENCE"** , what is seen is a mere recording of what the surveyor was told, no finding on it's own.

11. Referring to the discussion under the heading **"OUR ENQUIRY WITH TINDEL AND OTHER CREW MEMBERS"** , he read out that *"on **16.12.2009** night around 22:00 hours when the vessel was off Jhakau, they had heard sound as if something had dashed. On looking around the vessel for cause of such impact, they could not locate any object as it was very dark being Amavas day and also the sea was deep at the location"*. Learned counsel emphasized *"could not locate any object"* deeming it to be a very important fact to be noted. He then referred to the statement of Mr.Vinay Mansukh Khodiyar, the Tindel (Master of the vessel), dated **29.06.2010** (at page 28-29): to the question *'what was the incident and when it had happened?'* , he had answered that some unknown object had hit the vessel with a very loud noise and the vessel had shuddered heavily; to the question *'what was the cause of the accident'* , he replied *"I do not know. After the coast guard vessel picked us up, they searched the area for any wreck/rock/any obstruction. They found nothing. "* Learned counsel argued that this clinched the issue in favour of the OP. He argued that it was precisely this that the first surveyor should have gone into, examined thoroughly and arrived at it's own finding. This, however, was not done. Instead, the first surveyor went by statement made by others.

12. Counsel for OP then drew attention to the discussion in section **"PRELIMINARY ENQUIRY REPORT ISSUED BY MERCHANTILE MARINE DEPARTMENT**

(MMD)/DGS" to highlight that under **"Analysis and Comments"** , it was noted that (i) the condition of the vessel's hull, main engine and other equipments were satisfactory at the time of sailing; (ii) unknown object hitting the vessel cannot be established; and (iii) the coast guard searched the area for any wreck / rock / any obstruction but could not find anything. On this basis, learned counsel questioned the conclusion of SR1 viz. " *We, therefore, conclude that the incident of sinking of vessel would have been due to the cause as alleged by the Tindel (captain of the vessel) & Insured and that it is accidental in nature"* (pages 55-57). Learned counsel argued that he was not sure if this conclusion could be called the finding of the surveyor and in his opinion, SR 1 was nothing more than a **desk top report** .

13. He then drew attention to the statement of Shri Dipesh Mavil Jungi, son of the owner of the vessel, made on **29.06.2010** (page 33) to the officer appointed under section 358 (2) of the Indian Merchant Shipping Act, 1958. He highlighted that to the question *"What do you think could be the cause of accident?"* , the answer was *"I do not know, sir."* . Argument of the counsel was that if the statements in respect of the cause of accident were a uniform *"I do not know"* by the master of the vessel, the owner's son and the preliminary inquiry report of MMD/DGS, how could it be then said that cause of accident has been established!!. On this ground alone, the complaint and the claim deserves to the dismissed. His further argument was that this clearly showed the need to appoint the second surveyor / investigator, stressing the point that Sh. Uday Bhogate, the second surveyor / investigator, had been appointed as an investigator to investigate the cause of accident and not as a surveyor, as argued by counsel for the complainant. The reason for his appointment was to establish the reason for sinking of the vessel. This had become necessary as the first surveyor had failed to explain this and SR1 was based on mere statements made by others.

14. Drawing attention to Bhagote's report dated **31.10.2011** (pages 59-63), he read out the first para to emphasize that investigator had acknowledged at the beginning of its report that they had been asked to comment upon the most probable cause of the sinking of the vessel. Reading from the investigator's report, counsel observed that the investigator wanted to confirm the maintenance standard of the vessel and for this purpose, had requested for earlier maintenance invoices and receipts. Complainant in response to this request had produced maintenance invoices, for a period of one year from April 2008 to March 2009, aggregating Rs. 17,89,586/-, all settled in cash. Counsel argued that cash receipts were not admissible and cited an order of the National Commission in this regard. He highlighted the finding of the investigator that the assured could not furnish any concrete evidence of money spent on maintenance. In the result, it could be said that the standard of maintenance was not high.

15. Counsel then drew attention to the **Marine Casualty Report** (page 34) dated **06.01.2010** to point out the following:

> ……
>
> *(74) Cause of Casualty : Not Applicable*
>
> *(72) Brief Report on Casualty:* last two paras described the efforts made to pump out water for more than three hours but all in vain.

Learned counsel made the point that a reading of the marine casualty report does raise a question mark on the maintenance of the vessel, remarking that notably there was no whisper of this in the complaint petition.

16. He then drew attention to the letter dated **17.11.2011** (page 97) vide which the claim had been repudiated citing two reasons viz. (i) the loss could not be attributed to any of the insured perils but rather to " *continuous vibrations caused by the engine over a period which resulted in giving away of joints, causing the vessel to sink"* and (ii) the fact that the vessel had not been navigated under sails as required under Merchant Shipping Act 1958 which was an act of gross negligence.

17. Concluding, he further argued that in fact, since the complaint had been filed on **28.03.2014** , after the claim had been repudiated vide letter dated **17.11.2011** , it was totally barred by limitation. He contended that representations against this first repudiation and replies thereto by the OP dated **15.5.2012** and **6.6.2012** did not extend the period of limitation. In support of his argument that the insurer could appoint second surveyor and that there was no bar to it, he invoked the citation ***2018-SCC-Online-NCDRC-200 in CC No. 254 of 2011*** decided on **26.03.2018** .

18. **In a short rebuttal** , learned counsel for the complainant argued that limitation was not attracted since the letter of repudiation dated **06.06.2012** had taken a different reason from the one taken earlier for repudiation; therefore, it is this letter and date **(6.6.2012)** that would count for calculating the period of limitation. Referring to the statement of Mr.Vinay Mansukh Khodiyar, the Tendil, referred to by counsel for the OP, drawing attention to the answer to the question as to what was the incident and when it happened, he pointed out that in the answer it had been mentioned that *"there was damage on fine on the port bow, half a meter below the water level. Size of the damage is 1 m x 30 cm. There was heavy ingress of water. We tried out all 7 pumps to pump out the water but was in vain since the water force was heavy"* (page 29). He further submitted that it is this which has been mentioned in the report of the first surveyor and that the complainant's case sinks or swims on this statement of the Tindel (master of the vessel). He then also drew attention to **Certificate of Inspection** of a sailing vessel (page 51, part III) issued on **16.11.2009** and valid till **03.10.2011** . Referring to the Casualty Report (supra), learned counsel argued that it was about lives and nothing much qua the accident needs to be read in this report. He also referred to a certificate dated **09.04.2012** issued by Port Officer, Gujarat Maritime Board, Porbandar which had certified that *"all the mechanic sailing vessel … from western coast of Gujarat to gulf country, normally navigate under the force of engine and sometimes with the help of sails. It is not mandatory for the mechanized sailing vessels to use sails all the time ."* (page 66) The point made was that this has to be kept in view while considering the question raised about the use of engine as a contributory factor to the accident. Referring to the report of the first surveyor, counsel argued that it was a survey as well as an investigation. Referring to the discussion under **"CAUSE OF SINKING /LOSS"** , he pointed out that the surveyor reached it's conclusion on the basis of their inquiry / investigation into the incident and perusal of various documents as furnished by the insured, especially the Enquiry report issued by the Surveyor Incharge cum Deputy Director General (Tech), that the incident of sinking of the vessel was due to contact/ impact with some unidentified under water floating object on the night of **16.12.2009** . Counsel emphasized that the report of Tindel /master of the vessel must be understood and appreciated. His report is to be relied upon as this position carries a very high level of responsibility in the field of shipping and is not to be dismissed lightly. He drew attention in this regard to the report of the second surveyor/investigator dated **31.10.2011** . He read out the conclusion in the last para of the report viz. *"…in our opinion, the most probable cause for breach in the hull could be as follows. Continuation vibrations caused by engine over a period severely affected the hull joints and resulted in giving away the joints. "* The point made was that the second surveyor had expressed it's opinion about the most probable cause, not a definitive

finding. He therefore argued that even this report was tentative: It did not say that it was continuous vibrations which caused the breach in the hull; it only said that it was the most probable cause.

19. Counsel for the complainant invoked the order of the Hon'ble Supreme Court **(2019) 6 SCC 36** in **Civil Appeal No. 9668 of 2014** with **No. 4371-4372 of 2015** decided on **01.05.2019,** para 25, to stress the point that it was not open to the OP to appoint another surveyor without cogent reasons. Relevant portion of para 25 reads as under: *"We find that in view of the judgment in Sri Venkateswara Syndicate Vs. Oriental Insurance Company Ltd., it is not open to appoint another surveyor till such time, it gets report in its favour."* Learned counsel further submitted that this order was passed in the context of a ship that had been lost after 40 years of existence. In the case at hand, the vessel was built in **1993** and sank in **Dec 2009** . Responding to the argument of counsel for the OP, he submitted that the complainant only had a certificate showing the sea worthiness of the insured vehicle and nothing more, and that it was not clear as to what standard of proof the opposite party wanted.

DISCUSSION AND ORDER

20. The facts of the case are straight forward viz. the insured vessel sank on **16/17.12.2009** . There was a valid insurance policy cover available on the date of the incident/accident. The case of the complainant is simple: the vessel was seaworthy and certified to be so by the authorities; it sank upon some unidentified object hitting it from below and causing a breach in the hull resulting in huge ingress of water which, despite over three hours of pumping, could not be controlled and caused the vessel to sink. The case of the opposite party is that it could not have been a matter of some unidentified object hitting it from below; rather, it was clearly a case of a poorly maintained vessel, propelled by engine as against sails, which caused vibrations over a period, causing the breach in the hull and thereby the vessel.

21. After hearing detailed arguments of the learned counsels and a careful perusal of the record, I am of the considered view that in the facts of the case, it is reasonable to say that nobody involved in the sailing of the vessel really knew as to what precisely was the cause of the accident. It is for this reason that the statements of the tindel/master of the vessel and the insured have, to their credit, very forthrightly, answered the query as to what was the cause of accident by simply stating that they did not know. They indeed could not have said otherwise. Instead of making any extraordinary claim qua the cause of accident, record reveals they preferred to simply state what they did know which was that they did not know. This cannot be held against the complainants as argued on behalf of the opposite party.

22. It is clear from the facts of the case that this vessel had come from Dubai with cargo on **21.5.2009** . Thereafter, after obtaining all port clearances, it sailed to Sharjah, on **15.12.2009** . It had all the documents necessary for sailing and there was no reason to believe that it was not sea worthy at the time of sail. The incident/accident happened on **16/17.12.2009** . The first surveyor submitted it's report on **6.12.2010** . In this final report, the surveyor, on the basis of enquiry of the insured/owner, the Tindel (Master of the vessel), the navigator of the vessel, khalasi of the vessel, the Indian Coast Guard, the Custom Authority, the Port Officer, and the Marine Casualty Report, the Preliminary Enquiry Report by Mercantile Marine Department, came to the conclusion " *that the incident of sinking of Vessel would have been due to the cause as alleged by the Tindel & Insured and it is accidental in nature".* Since the vessel was lost irretrievably, the surveyor correctly concluded that it was a case of total loss.

23. It seems unreasonable to me that this first surveyor's report was disregarded and brushed aside by the OP on certain grounds argued in the written version and during oral arguments. This was not merely a question of whether the OP had the legal right to appoint an investigator or not. OP certainly had the right and there are indeed citations to support the view that it did. What however has to be seen is whether the first surveyor report was really and manifestly so deficient, so apparently in error that it needed another surveyor /investigator to investigate the cause of loss. However, the OP exercised it's right and appointed a second investigator, mandating that it ascertain the cause of sinking of the vessel.

24. With such a mandate, perhaps unsurprisingly, the investigator arrived at it's opinion that it was not possible that some unidentified object in the deep sea could have been the cause of accident. Rather, he surmised, after asking for maintenance invoices and being given only cash invoices totaling Rs. 17,89,586/- with the explanation that these were all settled in cash, that this established conclusively that the vessel was poorly maintained. It is hard to agree with this conclusion. First, a poorly maintained vessel would not have led M/s J.B. Boda, Surveyors Pvt. Ltd. to reach the opinion viz. *" Taking into consideration the condition of the vessel as inspected by us, we are of the opinion that the vessel is found fit in all respect for proceeding at sea and is an insurable risk"*, in report dated **15.10.2008** . Nor would the vessel have been permitted to sail by the relevant authorities on the fateful voyage. The fact that the insured could only provide maintenance invoices towards maintenance expenditure became a determining factor for the Investigator to conclude that the vessel was poorly maintained; the OP accepted this finding in toto and proceeded to repudiate the claim. However, this was possibly a wrong conclusion. If the complainant claimed cash expenditure against maintenance invoices, it would have been necessary for the Investigator to make further inquiries to investigate this claim. This was not done. Making expenditure in cash of over Rs. 20,000/- may indeed be illegal but that was not the issue: the issue was whether the vessel had or had not been maintained as per standards and to prove this, the investigator had to have inquired from the maintenance service providers who had raised maintenance invoices. Transactions in cash over Rs. 20,000/- were required to be made through Banks. There may therefore have been a violation of banking laws. But this did not mean that payments were not made towards maintenance or that maintenance was given the go by completely. OP was therefore mistaken in accepting the Investigator's report in toto and making it the basis for repudiation of the claim, notwithstanding that OP has not denied the loss of the vessel, the existence of the insurance policy nor has alleged any foul play by the complainant qua the facts of the case. This was, on the face of it, unreasonable. At best, the complainant had violated a banking law for which the remedy lies elsewhere. It was wrong to have concluded poor maintenance and use this finding to repudiate the claim.

25. Further, the repudiation letter claimed that the loss was attributable to *continuous vibrations caused by the engine over a period of time which resulted in giving away of joints causing the vessel to sink.* Clearly, for the OP, it was poor maintenance, coupled with use of engine, which must have led to continuous vibration, over a period of time, which caused the vessel to sink. However, the relevant questions here would be that if this was so, how could the vessel been have been certified as sea worthy and cleared for undertaking the voyage? If the concerned authorities had cleared the vessel for sailing, and no questions on these clearances has been raised, there cannot reasonably be any scope for expressing an opinion on this later, after the happening of an accident. Yet, the admitted fact is that the vessel sank. So, the cause has to be what the Master of the vessel and the navigator of the vessel say. They say that they heard a thud, found a breach in the hull, and that this led to huge ingress of water. They also say that they do not know any more than this. This has to be accepted. The Tindel, as argued by the counsel for the complainant, is a

responsible position and his testimony is important. The First Surveyor did accept this and made it's recommendation. It is well established law that a surveyor's report is an important document and cannot be treated lightly. It is therefore unreasonable on the part of the OP to have not accepted the first report citing the reason that it did not come to it's own finding but relied on statements of the Tindel, the Insured and so on while readily accepting the Investigator's report which too was, in the nature of an opinion, and hardly a conclusive finding.

26. One argument of the OP is that the first surveyor did not come to it's own finding; rather, the surveyor accepted the statements of the concerned parties, including the Tindel and the maritime authorities. So, the OP had to per force appoint a second investigator. However, the fact is that even the second investigator ended up expressing an opinion, not a definitive finding. It was his opinion that continuous vibration over a period of time may have caused the hull to breach on that fateful night, especially because engine may have been used, causing vibrations. This opinion of the investigator is such as would apply in all similar cases!!! The fact that it is based on a legal factum of cash payments for maintenance expenditure which, as discussed earlier, proves nothing about maintenance per se, only underscores the fragile basis for the opinion formed. Not only this, the finding of the second Investigator viz. *…in our opinion the most probable cause for breach in the hull could be as follows…continuous vibrations caused by engine over a period severely affected the hull joints and resulted in giving away the joints."* is not only vague, but tantamount to saying that any machine that is put to use would, over a period of time, fail and collapse, precisely because it was put to use. Clearly, this opinion/finding/conclusion of the second investigator is tautological and not at all helpful to the case of the OP.

27. Arguing, as the learned counsel has, that the first surveyor could not have concluded as it did, since it was not their finding but was merely accepting self serving averments of the insured and the Tindel/master, is fraught: It can be asked as to how else could the surveyor have found the reason for sinking of the ship? Obviously, it had to be based on inquiries made from all concerned. The exercise undertaken by the second surveyor was no different, except that it was in a different direction viz. looking for documents of repair, finding cash transactions and concluding, wrongly as discussed earlier, that maintenance was poor, and was thus equally fraught. Law is established that in a case where it is not clear whether there is doubt over the admissibility of a claim in terms of the insurance policy, benefit of doubt should go to the insured. Even on this reasoning, the repudiation of the claim has to be held to have been incorrect. From this discussion, I am of the considered view that this complaint deserves to be allowed.

28. As far as the issue of limitation raised by the OP is concerned, it is seen that accident took place on **16/17.12.2009** and the insured was first informed about it's claim by the opposite party vide registered letter dated **17.11.2011** . In this letter, two grounds were cited : (i) the loss could not be attributed to the perils of the sea/insured perils, and the cause of loss was continuous vibrations caused by the engine over a period ; (ii) the vessel was not navigated under sails as required under Merchant Shipping Act, 1958. This was first letter of repudiation. It was reasonable to accept that the complaint would seek recourse in the first instance from the opposite party itself. It is often the case that when a complainant does not do so, an argument is made that complainant ought to have approached the OP first instead of approaching the Commission. Be that as it may, in this case, the complainant represented to the OP and was visited with the second letter of repudiation dated **15.05.2012** . The reasons furnished were similar to the first letter of repudiation; however, the gist of the investigator's findings was also enclosed. Notably, this had not been done with the first letter of repudiation. Again, it was reasonable that complainant seek

recourse with the opposite party in the first instance. The complainant did that and thereafter, the claim was repudiated vide letter dated **06.06.2012** . In this final letter of repudiation, it was mentioned, in addition to the fact that claim stood repudiated, that the vessel came under jurisdiction of Mercantile Marine Department who had conveyed that sailing vessels were permitted to navigate on sails and occasionally / during restricted waters, on engine power. As pointed out by counsel for the complainant, this was a new ground furnished and, therefore, period of limitation would start from the date of receipt of this letter dated **06.06.2012** . It is reasonable that it is this last letter that would be considered as all options for recompense finally stood closed by the OP. The complaint was filed on **28.03.2014** . This was within two years of **06.06.2012** and hence within the period of limitation.

29. The next question that needs to be decided is the compensation that may be awarded to the complainant. It is established law that apart from insured amount, since the complainant has remained deprived of the vessel as well as any insurance amount thereby suffering a loss, some compensation by way of interest would be justified. As to what this rate of interest should be, this has been discussed in various judgment of the Hon'ble Supreme Court: It has been held that no hard and fast rule can be laid down for the purpose and that the rate of interest payable by way of compensation would depend on the facts of the case and would have to be reasonable, neither too low nor exorbitantly high. The complainants have claimed interest @ 16% p.a. w.e.f. the date of occurrence of the accident alongwith Rs.10.00 lakh for mental agony, Rs.5,00,000/- towards loss of business and cost. In the facts of the case, I am of the view that an interest of 6% p.a. would meet the ends of justice. As interest itself is a compensation for the insurance money not paid to the complainants, there cannot be separate award towards mental agony and loss of business. In addition, cost of Rs.50,000/- appears to be reasonable.

30. This consumer complaint is accordingly decided with the following directions:

(i) The opposite party shall pay the complainants an amount of Rs.1,75,00,000/- (Rupees One Crore Seventy Five Lac) with 6% interest from the date of repudiation of the claim i.e **. 06.06.2012,** till realization.

(ii) The opposite party shall pay Rs.50,000/- (rupees Fifty Thousand only) towards cost of litigation to the complainants.

This order shall be carried out within three months of the date of receipt of this order.

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ANUP K THAKUR
PRESIDING MEMBER