

BEFORE THE HON'BLE  
SUPREME COURT OF INDIA

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SPECIAL LEAVE PETITION No.: \_\_\_/2014  
UNDER ARTICLE 136 OF THE CONSTITUTION OF INDIA

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PETRO OIL CORPORATION

(APPELLANTS)

V.

NATIONAL INSURANCE CORPORATION

(RESPONDENTS)

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SPECIAL LEAVE PETITION UNDER ARTICLE 136 OF THE  
CONSTITUTION OF INDIA CHALLENGING THE DISMISSAL  
OF THE MATTER BY THE HON'BLE BOMBAY HIGH COURT

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MEMORIAL FOR THE APPELLANTS

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## LIST OF ABBREVIATIONS

1. &: And
2. AIR: All India Reporter
3. All : Allahabad
4. Bom : Bombay
5. Cal: Calcutta
6. Co.: Company
7. Corp.: Corporation
8. Del : Delhi
9. Edn.: Edition
10. Hon'ble: Honourable
11. HC : High Court
12. Ltd: Limited
13. No: Number
14. Ors: Others
15. p: Page
16. pp: Pages
17. Pvt.: Private
18. SC: Supreme Court
19. SCC: Supreme Court Cases
20. SCR: Supreme Court Reports
21. Sec.: Section
22. Ss.: Sections
23. v: Versus
24. vol.: Volume

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**STATEMENT OF JURISDICTION**

**THE COUNSEL FOR THE APPELLANTS, PETROL OIL CORPORATION, HEREBY HUMBLY  
SUBMIT TO THIS HON'BLE COURT'S JURISDICTION UNDER ARTICLE 136 OF THE  
CONSTITUTION OF UNION OF INDIA.**



## STATEMENT OF FACTS

- M.V. Shazia, a vessel owned by the Modular Shipping Corporation, which is reputed for the services rendered by it, was hired by Petro Oil Corporation, a state owned entity in India, for the purpose of carrying cargo between Malaysia and Mumbai.
- The Vessel, took a deviation from the normal route, during which, the Vessel was captured by Somali Pirates on 19 August, 2013, near Jaffna, Sri Lanka. On 20<sup>th</sup> August, Modual Shipping Corporation sent a mail to Petro Oil Corporation, stating that negotiations were being carried on with the Pirates.
- Meanwhile, a U.S. Naval Ship intercepted a message between the Somali pirates which gave them cause to believe that the vessel with its crew and cargo were not likely to be released in short order as the pirates were not satisfied with the ongoing negotiations. All the negotiations were carried on without the consultation of the Cargo owners, i.e. Petro Oil Corporation.
- Petro Oil Company was still out of possession of its cargoes and planned to initiate negotiations with its insurer, the National Insurance Corporation having its registered office at Kolkata.
- Initially, the insurance contract only covered 80% of the total loss due to a Pirate intervention. However, Mr. Das who is authorized on behalf of Insured Company called up Mr. Bhullar who is authorized on behalf of the Insurance Company to amend these terms, requested Mr. Bhullar to increase the cover to 100%.
- Mr. Bhullar replied in affirmative and said that this proposal would most likely be approved by his Board. However, he further added that he will himself reply in one week time after taking approval of the Board. The Insurance Contract provided a clause wherein a Contract could be amended on mutual consent of both the parties in a written or an oral manner. Subsequently, Petro Oil Company served a notice of abandonment to National Insurance Corporation on 17 October 2013. The same was rejected by the Insurance Company.
- The Pirates were given a ransom of US \$2 million by Modular Shipping Corporation; the voyage to Mumbai was completed on 4 November 2013.
- Petro Oil Corporation commenced proceedings against National Insurance Corporation at the Bombay High Court for rejection of their claim for treating the

cargo as total loss, demanding 100% of the value of the goods. Bombay High Court dismissed the matter on grounds of lack of jurisdiction. A division bench of the same court also dismissed the matter *in-limine*.

- Aggrieved by the decision of Bombay High Court, Petro Oil Corporation has preferred a Special Leave Petition before the Hon'ble Supreme Court of India claiming 100% of total loss and arguing that contract does not specifically or expressly bars the jurisdiction of Court in Bombay

**ISSUES RAISED**

1. **WHETHER THE SPECIAL LEAVE PETITION IS MAINTAINABLE BEFORE THIS HON'BLE COURT.**
  
2. **WHETHER THE RESPONDENT COMPANY, NATIONAL INSURANCE CORPORATION IS BOUND BY THE CONTRACT AS AMENDED BY MR. BHULLAR.**
  
3. **WHETHER THE APPELLANTS HAD A GOOD CLAIM AT THE TIME OF SERVING THE NOTICE OF ABANDONMENT TO THE RESPONDENTS.**

## SUMMARY OF ARGUMENTS

### 1. THE PETITION IS MAINTAINABLE BEFORE THIS HON'BLE COURT

It is humbly submitted to this Hon'ble Court that under Article 136 of the Constitution of India, any person, aggrieved by any order or decision of any court in India can approach the Supreme Court through a Petition for Special Leave. In the instant case, the Bombay High Court has gravely erred in not exercising its inherent jurisdiction as provided under the Civil Procedure Code. This has led to a loss to the Appellants and a violation of the principles of Natural Justice. The Appellants humbly submit that all grounds required for the grant of a Special Leave for appeal are satisfied and hence, this Hon'ble Court adjudicate the same.

### 2. THE RESPONDENT COMPANY, NATIONAL INSURANCE CORPORATION IS BOUND BY THE CONTRACT AS AMENDED BY MR. BHULLAR.

It is humbly submitted to this Hon'ble Court that the contract that was subsisting between the Appellant the Respondent stood amended after acts of the persons authorized to do so on behalf of the respective companies. The argument of the Respondent that the Contract was not amended is on baseless grounds. It is humbly submitted that by virtue of Doctrine of Estoppel, Doctrine of Holding Out and Doctrine of Indoor Management, the Respondents are bound by the amended contracts.

### 3. THE APPELLANTS HAD A GOOD CLAIM AT THE TIME OF SERVING THE NOTICE OF ABANDONMENT TO THE RESPONDENTS.

The Appellants submit that at the time when the notice of abandonment was given to the insurer, the loss caused fell within the ambit of 'actual total loss' as defined Section 57 of the Marine Insurance Act, 1963. MV Shazia was captured by the Somalian pirates on 19 August 2012. The Negotiations for the release went on till one month when the the US Naval Ship intercepted the message indicating that the vessel and its crew were unlikely to be released in short order. The negotiations further went on for about one month when the petitioner finally served the notice of abandonment to the respondent. It is submitted that, at that juncture the Appellants were irretrievably deprived of the goods in question and there claim under the policy taken from respondent was good in law as well as in fact.

## ARGUMENTS ADVANCED

### 1. THE PETITION IS MAINTAINABLE BEFORE THIS HON'BLE COURT

#### 1.1 The Appellant has Locus Standi to approach this Hon'ble Court

1.1.1 Article 136 empowers the Supreme Court to grant in discretion Special leave to Appeal from any judgement, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India. It is humbly submitted that powers under Article 136 can be exercised against any kind of judgement or order which is causing injustice to any party, and to serve the need, the power under Article 136 is unfettered<sup>1</sup>.

1.1.2 In the case of *Jamshed Hormusji Wadia v. Board of Trustees*<sup>2</sup>, the Supreme Court commented on the developing trend of settling private disputes under Article 136 and it said that it would become necessary for the Supreme Court to intervene in private controversies if such matters have not received sufficient attention from the lower courts or if a decision has lead to grave injustice. It is submitted that Article 136 is an over-riding power where under the Court may generally step in to impart justice to remedy injustice<sup>3</sup>.

1.1.3 It is humbly submitted to this Hon'ble Court that there has been a serious miscarriage of justice caused by the dismissal of the matter by the Bombay High Court. The Counsel for the Appellants would humbly request this Hon'ble Court to correct the same and hear this matter.

#### 1.2 *Arguendo*, if it is assumed the Petition is not maintainable, this Hon'ble Court can still hear the matter.

1.2.1 For the purposes of arguments, if it assumed that the current petition is not maintainable, it is humbly submitted that the width of the discretion of this Hon'ble Court may extend to a situation where although the appeals are found not to be maintainable, yet, the Supreme Court may decide on the merit of the appeals<sup>4</sup>.

Hence, it is humbly submitted to this Hon'ble Court that the situation requires immediate intervention by this Hon'ble Court to avoid any further injustice to the Appellants.

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<sup>1</sup> *Durga Shankar v. Raghu Raj*, AIR 1954 SC 520

<sup>2</sup> *Jamshed Hormusji Wadia v. Board of Trustees*, AIR 2004 SC 1815

<sup>3</sup> *Narpat Singh v. Jaipur Development Authority*, AIR 2002 SC 2036

<sup>4</sup> *Villianur Iyarkkai Padukappu Maiyam v. Union of India*, (2009) 7 SCC 561

### **1.3 Scope of powers of this Hon'ble Court under Article 136 of the Constitution of India**

1.3.1 The power has been held to be plenary, limitless<sup>5</sup>, adjunctive and unassailable<sup>6</sup>. The Supreme Court can use the powers under Article 136 to impart justice and remedy any injustice<sup>7</sup>. The Supreme Court with regard to scope of Article 136 held that it is a residual power which enables the Supreme Court to interfere with the judgement or order of any court or tribunal in India in its discretion<sup>8</sup>.

1.3.2 In *Ganga Kumar v. State of Bihar*<sup>9</sup>, the Supreme Court has held that it is open to the Supreme Court to interfere with the findings fact by the High Court if the High Court has acted perversely or otherwise improperly.

Hence, it is humbly submitted to this Hon'ble Court to hear the instant matter because the High Court has been gravely wrong in not exercising its inherent jurisdiction in the instant matter.

### **1.4 The instant petition satisfies all grounds required for an appeal under Article 136**

1.4.1 It is humbly submitted that if special leave is granted and the same is restricted to a particular question, the Court is not constrained in any manner to restrict itself to hearing only those matters<sup>10</sup>, insofar as an opportunity of being heard is giving to the opposite party also<sup>11</sup>. Hence, it is submitted that this Hon'ble Court can dwell into all matters, including question of fact and decide this matter on merits grant justice.

1.4.2 The Supreme Court has exercised its Jurisdiction under Article 136 under the following circumstances-

- (i) When the Tribunal ostensibly fails to exercise its patent jurisdiction.<sup>12</sup>
- (ii) When there is an apparent error on the face of the decision<sup>13</sup>.
- (iii) The tribunal has erroneously applied well-accepted principles of jurisprudence<sup>14</sup>

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<sup>5</sup> *A.V. Papayya Sastry v. Government of Andhra Pradesh*, AIR 2007 SC 1546

<sup>6</sup> *Zahira Habibullah Sheikh v. State of Gujarat*, AIR 2004 SC 3467

<sup>7</sup> *N. Suriyakala v. A. Mohandoss*, (2007) 9 SCC 196

<sup>8</sup> *N Suriyakala v. A Mohan Doss & ors.* (2007) 9 SCC 196

<sup>9</sup> *Ganga Kumar v. State of Bihar*, AIR 2005 SC 3123

<sup>10</sup> *Suresh Chandra v. State of Uttar Pradesh*, AIR 2005 SC 3120

<sup>11</sup> *Pubnjab State Electricity Board v. Darbbara Singh*, AIR 2006 SC 387

<sup>12</sup> *Chief Administrator cum Jt. Secretary, Government of India v. D. C. Dass*, AIR 1999 SC 186

<sup>13</sup> *Siemens Eng & Mfg Co. v. Union of India*, AIR 1976 SC 1785

<sup>14</sup> *Clerks of Calcutta Tramways v. Calcutta Tramways Co. Ltd.*, AIR 1957 SC 78

- (iv) The tribunal acts against the principles of Natural Justice<sup>15</sup>, or has approached the question in a manner likely to cause injustice<sup>16</sup>

1.4.3 In the instant case, the High Court of Bombay has denied not only justice to the Appellants, it has even failed in exercising its inherent jurisdiction, as given to it under Section 20 of the Civil Procedure Code. Hence, there is an over-whelming error on the part of the High Court, leading to severe injustice and loss to the Appellants; thus, the counsel for the Appellants would like to invoke the jurisdiction of this Hon'ble Court and remedy the above injustice.

### **1.5 Exhaustion of Remedies:**

1.5.1 The Supreme Court has imposed on itself a restriction that before invoking the jurisdiction of the Court under Article 136, the aggrieved party must exhaust any remedy which maybe available under the law before the lower appellate authority or the High Court<sup>17</sup>.

1.5.2 In the instant case, the Appellants have indeed exhausted all local remedies by approaching a Divisional Bench of the High Court and a higher bench of the same Court. The only remedy available for the Appellants is this Hon'ble Court and hence, it is humbly requested of this Hon'ble Court to grant justice to the Appellants.

### **1.6 Grounds of rejection:**

1.6.1 The limitation on exercise of the discretionary powers under Article 136 of the Constitution has been laid down by the Supreme Court itself<sup>18</sup>. In *Kunhayammed and Others v. State of Kerala and Another*<sup>19</sup>, it was held that a petition seeking grant of special leave to appeal may be rejected for several reasons, some of which are as follows:

- (i) If the Petition is barred by time;
- (ii) If the Petition is presented in a defective manner;
- (iii) The petitioner has no *locus standi* to file the petition;
- (iv) The conduct of the petitioner disentitling him to any indulgence by the court;

<sup>15</sup> *City Corner v. P.A. to the Collector*, AIR 1976 SC 143

<sup>16</sup> *Mohan Lal v. Management, Bharat Electronics Ltd.*, AIR 1981 SC 1253

<sup>17</sup> *Nirma Ltd v. Lurgi Lenteges Energietechnik GmbH*, AIR 2002 SC 3695

<sup>18</sup> *Kunhayammed v. State of Kerala*, AIR 2000 SC 2587

<sup>19</sup> *Kunhayammed and Others v. State of Kerala and Another*, (2000) 6 SCC 359

- (v) The question raised by the petitioner for consideration by this Court being not fit for consideration or deserving being dealt with by the Apex Court;

1.6.2 In the instant case, it is obvious on a prima-facie level that the Appellants have no grounds on which the instant petition for special leave could be rejected. The questions raised by the Appellants involve substantial questions of law, as would be shown in the subsequent submissions, and the same requires to be adjudicated by this Hon'ble Court.

### **1.7 Reliefs that could be granted by this Hon'ble Court.**

1.7.1 Under Article 136, the Supreme Court can give whatever relief that might be necessary and proper in the facts and circumstances<sup>20</sup>. The Supreme Court may even invoke its power under Article 142 for this purpose<sup>21</sup>. Hence, it is submitted that this Hon'ble Court grant orders that could remedy the injustice that is being caused to the Appellants.

## **2. THE ACTS OF MR. BHULLAR CAN BE IMPUTED TO NATIONAL INSURANCE CORPORATION AND THE AMENDMENT TO THE CONTRACT IS BINDING ON THE COMPANY.**

### **2.1 Mr. Bhullar was acting as the agent of the National Insurance Corporation**

2.1.1 Section 182 of the Indian Contract Act defines an agent as a person employed to do any act for another or to represent another in dealings with third persons.

2.1.2 It is submitted before this Hon'ble Bench that Mr. Bhullar's act of negotiating the terms of the contract is indeed an act which can be attributed back to his principal, National Insurance Corporation, thereby making the amendment of the contract valid. Mr. Bhullar, as given in the facts, had the authority to bring amendments to the contract. Application of the doctrine of apparent authority can be made to the instant matter which states that a third party is entitled to assume that an agent has such authority he appears to have or normally should have had, irrespective of whether the principal had granted such authority.<sup>22</sup>

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<sup>20</sup> *Divisional Manager A.P.S.R.T.C v. P. Lakshmoji Rao*, AIR 2004 SC 1503

<sup>21</sup> *K.M. Nanavati v. State of Bombay*, AIR 1961 SC 112

<sup>22</sup> *Ram Avtar v. Ram Jivan*, AIR 1956 Hyd 131



2.1.3 The Principal will be bound to the third parties because the agent appeared to have authority, although between him and his principal no such authority was granted.<sup>23</sup> Unless, in rare cases where the question of written authority arises, it will be the agent's ostensible, not his actual, authority that will determine the extent to which it will bind the principal. Thus, where an agent had been in the habit of giving temporary cover with the knowledge and consent of the insurers, it was held that a temporary cover given by him, pending the company's decision on a proposal, was binding on the company, though he had no express authority to give it.<sup>24</sup>

## **2.2 Arguendo, if it is assumed Mr. Bhullar was acting beyond his authority, National Insurance Corporation is still bound by the acts of Mr. Bhullar.**

2.2.1 However, for the sake of arguments, if it is assumed that Mr. Bhullar was acting beyond the scope of his authority, it is submitted to this Hon'ble Court that the acts committed by Mr. Bhullar will make the Principal liable to the third party under the doctrine of Estoppel as stated under the Indian Contract Act.

2.2.2 Section 237 of the Indian Contract Act states, "When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations, if he has by his words or conduct induced such third persons to believe that such act and obligations were within the scope of the agent's authority.

2.2.3 An agency by estoppel<sup>25</sup> arises where one person has so acted as to lead another to believe that he has authorised a third person to act on his behalf, and that other to such belief<sup>26</sup> enters into transactions with third person within the scope of such ostensible authority. In this case the first-mentioned person is estopped from denying the fact of third person's agency under the general law of estoppel, and it is immaterial whether the ostensible agent had no authority in fact, or merely acted in excess of his actual authority.<sup>27</sup>

2.2.4 The Principal cannot set up a private limitation upon the agent's actual authority so as to reduce the ostensible authority<sup>28</sup>, for, so far as the third person are concerned, the

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<sup>23</sup> Section 237 and Section 186, Indian Contract Act.

<sup>24</sup> *Murfitt v. Royal* (1922) 38 T.L.R. 334.

<sup>25</sup> *Rama Corpn Ltd v. Proved Tin and General Investments Ltd*, [1952] 2 QB 147, *Eastern Distributors Ltd. v Goldring (Murphy, third party)* [1957] 2 QB 600 at 607.

<sup>26</sup> *MacFisheries Ltd. v. Harrison*, (1924) 93 LJKB 811.

<sup>27</sup> *Abdullah Ahmed v. Animendra Kissen Mitter*, [1950] SCR 30

<sup>28</sup> *Hawken v. Bourne*, (1841) 8 M & W 703.

ostensible authority are the sole criterion for his liability.<sup>29</sup> A person who assumes to act as an agent is estopped, as between himself and the person on whose behalf he professed to act, from denying the agency.<sup>30</sup>

2.2.5 In the case of *Freeman & Lockyer*<sup>31</sup>, the court has held that a contractor can hold the company liable for a contract made on its behalf on the ground of holding out if the following are proved:-

1. That a presentation that the agent or the officer had authority to enter, on behalf of the company, into a contract of the kind sought to be enforced was made to the contractor.
2. That such representation was made by a person or persons who had actual authority to manage the business of the company either generally or in respect of those matters to which the contracts relates.
3. That the contractor was induced by such representation to enter in to contract, that is, that he in fact relied upon it; and
4. That under its memorandum or articles the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent.

2.2.6 In the instant matter, Mr. Bhullar had acted in the capacity of an agent by negotiating the terms of the amendment. From the facts provided, it can be deduced with absolute certainty that Mr. Bhullar had the authority to negotiate the terms of the contract. The assurance provided by Mr. Bhullar can be considered as an act which was within the scope of his authority. The mere fact of disavowing the acts of Mr. Bhullar as negligent establishes the premise that Mr. Bhullar, indeed, had the authority to effect an amendment to the contract entered between National Insurance Corporation and Petro Oil Corporation.

2.2.7 Hence, when it has been demonstrated by the conduct of National Insurance Corporation that Mr. Bhullar had acted in the capacity of his agent and within the purview of his authority then in such circumstances the acts, regardless of the negligence exhibited as contended by National Insurance Corporation, will be attributable to National Insurance

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<sup>29</sup> *Pickering v. Busk*, (1812) 15 East 38.

<sup>30</sup> *Ram Chandran v. Registrar, Cooperative Societies*, AIR 1963 Mad. 105 at p.106

<sup>31</sup> *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd*, [1964] 2 QB 480.

Corporation. In the eventuality of this Hon'ble Court dismissing the argument regarding the authorising power of Mr. Bhullar and consequent attribution of his acts to National Insurance Corporation, then it is humbly submitted that the acts, even if *ultra vires*, will be covered under the doctrine of Estoppel under Section 237 of the Indian Contract Act and National Insurance Corporation will be held liable.

2.2.8 Section 115 of the Indian Evidence Act lays the doctrine of estoppels. The doctrine of estoppels, under its wide canvass, has been branched out to include promissory estoppels which has found its origin in the Common Law.<sup>32</sup> The ingredients for the application of this doctrine are:

1. That there was a representation or promise made in regard to something to be done in the future,
2. That the representation or promise was intended to affect the legal relationship of the parties and to be acted upon accordingly, and,
3. That it is, one on which, the other side has, in fact, acted to its prejudice.

2.2.9 The doctrine has been affirmed by this Hon'ble Court in multitude of cases.<sup>33</sup> In the case of *Century Spinning and Mfg. Co. Ltd. v. Ulhasnagar Municipal Council*<sup>34</sup>, it has been held by the Supreme Court that the doctrine of promissory estoppels applies to private individuals and entities as well.

2.2.10 In the present matter, relying on the representation made by Mr. Bhullar, Petro Oil Corporation submitted the notice of abandonment to National Insurance Corporation for treating the cargo seized by the pirates as total loss and changed their legal position with respect to the cargo being covered to the extent of 100 per cent. Acting upon the promise made by Mr. Bhullar, Petro Oil Corporation has suffered detriment due to their subsequent change in legal position and hence, the National Insurance Corporation is estopped from denying the amendment of the contract and will be bound by it.

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<sup>32</sup> *Central London Property Trust Ltd. v. High Trees Ltd.*, [1947] K.B 130.

<sup>33</sup> *M/s. Motilal Padampat Sugar Mills Co. Ltd. v.. The State of U.P. and others*, AIR 1979 SC 621, *Joint Chief Controller of Imports and Exports, Madras v.. Amin Chand Mutha*, 1966 SCR 262, *Tata Motors Ltd. v. State of Maharashtra and Ors.*, AIR 2004 SC 3618

<sup>34</sup> *Century Spinning and Mfg. Co. Ltd. v. Ulhasnagar Municipal Council*, [1970] 3 SCR 854

## 2.3 Appellants protected under the Doctrine of Indoor Management

2.3.1 It is humbly submitted to this Hon'ble Court that irrespective of the nature of arrangement between Mr. Bhullar and National Insurance Corporation, the third party in the instant case, i.e. Petro Oil Corporation is protected from the procedural requirements as within the company. This is referred to as the Doctrine of Indoor Management.

2.3.2 According to the doctrine of indoor management, an outsider dealing with the company is required to see that the authority of dealing had been given by the articles to the person with whom the outsider is dealing but he cannot be assumed to do any more: he is not expected to enquire whether the proper procedure has been followed for the delegation of the authority to the person with whom the outsider is dealing.<sup>35</sup>

2.3.3 In *MRF Ltd. v. Manohar Parrikar*<sup>36</sup>, it was held that “The doctrine of indoor management is an exception to the rule of constructive notice. It imposes an important limitation on the doctrine of constructive notice. According to this doctrine, persons dealing with the company are entitled to presume that internal requirements prescribed in memorandum and articles have been properly observed.”

2.3.4 Since Memorandum and Articles of Association of the company are public documents which are open to the public inspection, an outsider is presumed to have the knowledge of their contents but the details of internal procedure are not open to public inspection and therefore it would be unfair if an outsider dealing with the company is presumed to have the knowledge of the details of internal procedure<sup>37</sup> (the rule of internal management.)

2.3.5 The exceptions to the doctrine of indoor management are as under:

2.3.5.1 Knowledge of irregularity: When a person dealing with a company has actual or constructive notice of the irregularity as regards internal management, he cannot claim benefit under the rule of indoor management. In the case of *T.R Pratt (Bombay) Ltd. v. E.D. Sassoon & Co. Ltd.*<sup>38</sup>, Company A lent money to Company B on a mortgage of its assets. The procedure laid down in the articles for such transactions was not complied with. The directors of the two companies were the

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<sup>35</sup> *Bigger Staff v. Rowatt's Wharf*, (1896) 2 Ch. 93

<sup>36</sup> *MRF Ltd. v. Manohar Parrikar*, (Civil Appeals No. 4219 and 4220 of 2010, decided on May 3, 2010)

<sup>37</sup> Rai Kailash on Company Law 10th Ed. 2006 Page 115

<sup>38</sup> *T.R Pratt (Bombay) Ltd. v. E.D. Sassoon & Co. Ltd.*, AIR 1936 Bom 62

same. Held, the lender had notice of the irregularity and hence the mortgage was not binding.

2.3.5.2 Negligence: Where a person dealing with a company could discover the irregularity if he had made proper inquiries, he cannot claim the benefit of the rule of indoor management. The protection of the rule is also not available where the circumstances surrounding the contract are so suspicious as to invite inquiry, and the outsider dealing with the company does not make proper inquiry. In *Anand Bihari Lal v. Dinshaw & Co*<sup>39</sup>, the plaintiff, in this case, accepted a transfer of a company's property from its accountant. Held, the transfer was void as such a transaction was apparently beyond the scope of the accountant's authority. The plaintiff should have seen the power of attorney executed in favour of the accountant by the company.

2.3.5.3 Acts outside the scope of apparent authority: If an officer of a company enters into a contract with a third party and if the act of the officer is beyond the scope of his authority, the company is not bound. In such a case, the plaintiff cannot claim the protection of the rule of indoor management simply because under the articles the power to do the act could have been delegated to him. The plaintiff can sue the company only if the power to act has in fact been delegated to the officer with whom he entered into the contract. In *Kreditbank Cassel v. Schenkers Ltd.*<sup>40</sup>, a branch manager of a company drew and endorsed bills of exchange on behalf of the company in favour of a payee to whom he was personally indebted. He had no authority from the company to do so. Held, the company was not bound.

Similarly in *Sri Krishna v. Mondal Bros. & Co*<sup>41</sup>, the manager of a company had the authority under the Memorandum and the Articles of the company to borrow money. He borrowed money on a *hundi* but did not place the money in the coffers of the company. It was held that the company was bound to honour the *hundi*. It could not defeat the bona fide claim of the creditor for recovery of the money on the ground of fraud of its own officer.

2.3.6 In furtherance of the above arguments, it is humbly submitted that Petro Oil Corporation indeed has a right claim against Mr. Bhullar and National Insurance Corporation.

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<sup>39</sup> *Anand Bihari Lal v. Dinshaw & Co*, (1946) 48 BOMLR 293

<sup>40</sup> *Kreditbank Cassel v. Schenkers Ltd.*, [1927] 1 KB 826

<sup>41</sup> *Sri Krishna v. Mondal Bros. & Co.*, AIR 1967 Cal 75

The acts of Mr. Bhullar, representing himself as authorized on behalf of the Insurance Company, irrespective of the nature of agreement between the Insurance Company and Mr. Bhullar, shall bind the Insurance Company. It is also submitted that none of the exceptions to The Doctrine of Indoor Management are applicable in the instant case; the Appellants did not have the knowledge of the irregularity, they did not act in negligence and only had a *bona-fide* belief that Mr. Bhullar was acting within the scope of his powers to ‘amend’ the contract, as stated in the facts, and as he represented himself to the Appellants. Thus, the amended contract is binding on the National Insurance Corporation.

### **3. THE APPELLANTS HAD A GOOD CLAIM AT THE TIME OF SERVING THE NOTICE OF ABANDONMENT TO THE RESPONDENTS**

#### **3.1 There is a good claim for Constructive Total Loss.**

3.1.1 A constructive total loss in Insurance law is that which entitles the assured to claim the whole amount of the insurance, on giving due notice of abandonment.<sup>42</sup> Actual total loss is total loss in law and in fact, whereas constructive total loss is loss in law but not in fact, to entitle the assured to claim a total loss against his insurers.

3.1.2 There is a constructive total loss where the assured is deprived of the possession of his ship or goods by a peril insured against, and it is unlikely that he can recover the ship or goods, as the case may be.<sup>43</sup> The doctrine itself had originated in the cases of capture.<sup>44</sup> It is submitted that the factual matrix of the present case give rise to petitioner’s claim of constructive total loss. This can be asserted by the following facts:

The ship was captured by unreasonable use of force, resulting in killing of one armed guard and was taken from the Sri Lankan coastal waters near Jaffna to Eyl in Somalia; a distance of about 2382 miles.

The negotiations were going on for almost two months without any result.

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<sup>42</sup> *Western Ass Co of Toronto v. Poole*, [1903] 1 K.B. 376 at 383.

<sup>43</sup> Section 60(2)(i)(a) of the Marine Insurance Act, 1963

<sup>44</sup> *Moore v. Evans*, [1918] A.C. 185 at 193-194

The Malaysian Shipping Company briefed the family members of the crew saying the ordeal would be over within 30-40 days. However, despite passing of 40 days of negotiations, there was no sign of any positive result.

The US Naval Ship intercepted a message pirates giving them cause to believe that the pirates were not satisfied with the negotiations.

3.1.3 It is therefore submitted that on 17<sup>th</sup> October 2012, the petitioners had good reason to believe that it is “unlikely” that it will recover the possession of the goods. It was also held by Lord Atkinson in the case of *Moore v. Evans*,<sup>45</sup> that “*the assured should not be obliged to wait till he had definitely ascertained whether his ship had been recaptured or not.*”

3.1.4 In the case of *George Cohen, Sons & Co v. Standard Marine Insurance Co*,<sup>46</sup> an obsolete warship purchased for scrapping which grounded off the coast of Holland while being towed from England to Germany was held to be a constructive total loss, but not an actual total loss. As her recovery was neither a physical nor a legal impossibility. Similarly, In *Panamanian Oriental Steamship Corporation v. Wright*<sup>47</sup> a vessel that had been detained by Vietnamese customs officials and subsequently confiscated by an extraordinary military tribunal outside the ordinary judicial system of Vietnam, was held to be a Constructive Total Loss.

3.1.5 It is further submitted that in *In Masefield AG v. Amlin*<sup>48</sup> (Queen’s Bench Division), it was noted that a period of 6-8 weeks is usually required for the negotiations to get over and ship and its crew to get released. It was also noted that the Somalian pirates operate for only for the purpose of payment of ransom with the then average number of detention days being 37.<sup>49</sup> It is submitted at the outset that piratical acts are universally unlawful with no identifiable patterns. And to use a broad brush to classify all Somalian pirates as only profit oriented would be a stale approach. There were violent exchanges between the and crew resulting in killing of one armed guard. Furthermore, it was almost two months and no positive sign was seen as regards the ongoing negotiations. It is therefore submitted that in the light of the facts of the present case, the petitioners had a good reason to believe that the goods were unlikely to be retrieved.

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<sup>45</sup> *Ibid.*

<sup>46</sup> *George Cohen, Sons & Co v. Standard Marine Insurance Co* (1925) 20 Lloyd Rep 30

<sup>47</sup> *Panamanian Oriental Steamship Corporation v. Wright* [1970] 2 Lloyd's Rep 365

<sup>48</sup> *Masefield AG v. Amlin Corporate Member Ltd*, [2010] EWHC 280 (Comm), at para 22

<sup>49</sup> *Ibid.* at para 26.

### **3.2 Whether there is a good claim for actual total loss?**

3.2.1 It is humbly submitted by the Appellants that their claim was good when made on the 17<sup>th</sup> of October, 2013 since at that time, the Appellants were reasonably entitled to believe that the cargo of the MV Shazia was irretrievably lost, and this amounted to an actual total loss. It is also submitted that in the course of interpreting the Marine Insurance Act, 1958, English authorities are both relevant and helpful since the provisions of Marine Insurance Act, 1906 enacted by the British Parliament are in *pari material* with those contained in the Indian Act.

3.2.2 The classification of the loss as ‘actual’ or constructive must be made by the assured at the time of the notice of abandonment being made to the insurer<sup>50</sup>. In Practice, in cases of doubt, and as a general rule, in all cases where the assured wishes to claim a total loss on the ground that he's been deprived of possession of the insured property, the assured should give notice of abandonment, leaving it to be determined afterwards whether the loss was actually or constructively total.

3.2.3 The Appellants humbly submit that at the time when the notice of abandonment was given to the insurer, the loss caused fell within the ambit of ‘actual total loss’ as defined by the Calcutta High Court: “The great principle, therefore, on which all the cases of actual total loss depend appears to be this: the impossibility, owing to the perils insured against, of ever procuring the arrival of the thing insured. If, by reason of those perils, the assured is permanently and irretrievably deprived not only of all present possession and control over it, but of all hope or possibility of ever ultimately recovering possession of, or further prosecuting the adventure upon it, that is a case of actual total loss”<sup>51</sup>

3.2.4 The Court in that case went on to cite Dr. Arnould to the effect that a loss is actual and total if the goods “can never, or within no assignable period be brought to its original destination”. The Court also held in that case that it was a case of actual total loss when the assured had been permanently and irretrievably deprived of the possession and control over

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<sup>50</sup> *The Bamburi* [1982] 1 Lloyd’s Rep. 312, citing Dr. Arnould from Art. 1048 at page 1025

<sup>51</sup> *Contship Container Lines Ltd. v. D. K. Lall & Ors.*, AIR 2010 SC 1704



the cargo and also deprived of all hope or possibility of ever ultimately recovering possession of the cargo<sup>52</sup>.

3.2.5 It is submitted that at the time of making the claim, three facts had deprived the Appellants of all hope or possibility of ever ultimately recovering possession of the cargo:

*Firstly*, that on the 19<sup>th</sup> of August, 2012, the MV Shazia had been captured by Somali pirates, and subsequently, negotiations had commenced for its release on the 20<sup>th</sup> August, 2012; on the 15<sup>th</sup> of September, about a month after the negotiations had begun, Lloyd's List reported that the negotiations were still ongoing<sup>53</sup>.

*Secondly*, that a US Naval Ship had intercepted a message between the Somali Pirates that gave them cause to believe that the pirates were not satisfied with the ongoing negotiations and that the MV Shazia was not likely to be released in short order<sup>54</sup>.

*Thirdly*, the notice of abandonment had been presented to the insurer on the 17<sup>th</sup> of October, nearly two months after the negotiations had begun, and a month after the US Navy had reported the negotiations to have been going badly<sup>55</sup>.

As a result of the above facts, the Appellants could reasonably have lost all hope of ever seeing their cargo again, or could not assign any period within which the goods would be returned to their original destination, by the time the notice of abandonment had been given to the insurer.

### **3.3 Whether there was a case of deviation?**

3.3.1 It is humbly submitted that the Respondent's liability under the policy is not discharged due to the deviation made by the MV Shazia. In the present matter, a deviation could only have occurred had the vessel taken a route other than the normal or customary route<sup>56</sup>. However, there can be more than one customary route<sup>57</sup>; it is therefore submitted that a deviation from one customary route to another would not be a 'deviation' within the meaning of s.48 of the Marine Insurance Act, 1958.

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<sup>52</sup> Ibid, para 89, citing Dr. Arnould at Art.1052 at pp.1028-9.

<sup>53</sup> Paragraph 4 of the Moot Problem

<sup>54</sup> Paragraph 4 of the Moot Problem

<sup>55</sup> Paragraph 7 of the Moot Problem

<sup>56</sup> Section 48(2) of the Marine Insurance Act, 1958

<sup>57</sup> 511 Arnould para 14-33

3.3.2 It is humbly submitted that since the MV Shazia deviated from one customary route to another, the Respondent's liability under the policy is not discharged since no 'deviation' in the terms of the Section 48 has taken place.

3.3.3 Assuming but not conceding that a 'deviation' in the terms of Article 48 has taken place, the Appellants humbly submit that such a deviation is excusable as per s.51 of the Marine Insurance Act, 1958, if it has taken place to obtain medical aid for anyone on board the ship<sup>58</sup>.

3.3.4 In the present matter, one of the crew members fell sick just after the beginning of the voyage<sup>59</sup>, and the deviation took place for the purpose of obtaining medical aid for the infirm crewman. The necessity of obtaining medical aid was reasonable, and it is therefore humbly submitted that the 'deviation', if any, was excusable under s.51(f) of the Marine Insurance Act, 1958.

3.3.5 Hence, it is humbly submitted to this Hon'ble Court that there exists a good claim against the Respondents in the instant case.

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<sup>58</sup> Section 51(f) of the Marine Insurance Act, 1958

<sup>59</sup> Paragraph 3, Moot Problem

**PRAYER**

Wherefore, in light of the facts of the case, issues raised, arguments advanced and authorities cited, this Hon'ble Court may be pleased to:

Find that:

1. The Appellants had a good claim at the time of serving the Notice of Abandonment to the Respondent.
2. The Insurance Company is liable to pay 100% of the value of the goods to the Appellants.

And pass any other order that it may deem fit in the ends of justice, equity, and good conscience. All of which is respectfully submitted.

Place:

S/d \_\_\_\_\_

Date:

(Counsel on behalf of the Appellants)