TEAM CODE: 01

BEFORE THE HON'BLE SUPREME COURT OF INDIA

SPECIAL LEAVE PETITION NO.: ___/ 2014

UNDER ARTICLE 136 OF THE CONSTITUTION OF INDIA

PETRO OIL CORPORATION

(APPELLANTS)

V.

NATIONAL INSURANCE CORPORATION

(RESPONDENTS)

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

MEMORIAL FOR THE RESPONDENTS

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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 RESPONDENTS, NATIONAL INSURANCE CORPORATION, HEREBY HUMBLY SUBMIT TO THIS HON'BLE COURT'S JURISDICTION UNDER ARTICLE 136 OF THE CONSTITUTION OF UNION OF INDIA.

THE RESPONDENT WOULD LIKE TO HUMBLY SUBMIT THAT THIS SPECIAL LEAVE FOR APPEAL IS NOT MAINTAINABLE.

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 20th 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 (NIC) 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 (POC) called up Mr. Bhullar who is authorized on behalf of the Insurance Company (NIC) 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 NIC on 17 October 2013. The same was rejected by the Insurance Company.
- The Pirates were given a ransom of US $2 million by MSC; 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, POC 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 SPECIAL LEAVE PETITION IS NOT MAINTAINABLE BEFORE THIS HON'BLE COURT.

It is humbly submitted to this Hon'ble Court that in the given factual matrix, there is no necessity or compulsion for the intervention of this Hon'ble Court and invoking its powers under Article 136. The Appellants have committed a breach of contract by failing to approach the Courts in Delhi as was provided under the Contract. The Bombay High Court expressed the same while dismissing the matter.

2. THE RESPONDENT COMPANY, NATIONAL INSURANCE CORPORATION IS NOT BOUND BY THE CONTRACT AS AMENDED BY MR. BHULLAR.

It is humbly submitted that a company shall not be bound the acts of its agent or an employee, as the case maybe, if the respective agent or employee, while dealing with a third party, acts beyond the scope of the authority as vested with him. Similarly, a company shall not be liable if a third party is negligent while making transactions with the company. It is humbly submitted that the Board of National Insurance Company did not approve the Contract, and hence, the contract was never subject to any amendment whatsoever.

3. THE APPELLANTS DID NOT HAVE A GOOD CLAIM AT THE TIME OF SERVING THE NOTICE OF ABANDONMENT TO THE RESPONDENTS.

The petition neither had a good claim of Actual Total Loss nor Constructive Total Loss at the time of serving the notice of abandonment. Respondent is not liable to indemnify the petitioner, as there was a deviation in the route of the vessel, changing the nature of the risk the respondent had agreed to indemnify Appellants under. Moreover, Appellants are in violation of the principle of *Uberrima Fides.*

ARGUMENTS ADVANCED

1. THE APPEAL IS NOT MAINTAINABLE BEFORE THIS HON'BLE COURT

1.1 Irrespective of the *locus standi* of the Appellants, the Petition for Special Leave is not maintainable

1.1.1 Article 136 does not confer a Right of Appeal, but merely, a discretionary power to the Supreme Court to be exercised for satisfying the demands of justice under exceptional circumstances[1]. In ***Pritam Singh* v. *The State***[2], the Supreme Court held that the power under Article 136 is to be exercised sparingly and in exceptional cases only. In concluding the discussion on Article 136 in the same case, it was held the by the Supreme Court that ' Generally speaking, this court will not grant Special Leave, unless it is shown that exceptional and special circumstances exist, that substantial and grave injustice has been done and that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against.'

1.1.2 Although the power has been held to be plenary, limitless[3], adjunctive, and unassailable[4], in ***M. C. Mehta* v. *Union of India***[5] and ***Aero Traders Private Limited* v. *Ravider Kumar Suri***[6], it was held that the powers under Article 136 should be exercised with caution and in accordance with law and set legal principles.

1.1.3 In the cases of ***Secretary, State of Karnataka* v. *Umadevi***[7] and ***Shivanand Gaurishankar Baswanti* v. *Laxmi Vishnu Textile Mills***[8], the Supreme Court has criticized the approach of settling private disputes under Article 136, stating that it would lead to confusing results and lack of precedents. The Court observed that the Court is not bound to interfere even if there is error of law in the impugned order[9].

1.1.4 It is humbly submitted to this Hon'ble Court that there was no error in the judgement of the Bombay High Court; the contract between the Appellants and the Respondents provided

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[1] *N. Suriyakala* v. *A. Mohandoss,* (2007) 9 SCC 196
[2] *Pritam Singh* v. *The State*, AIR 1950 SC 169
[3] *A.V. Papayya Sastry* v. *Government of Andhra Pradesh,* AIR 2007 SC 1546
[4] *Zahira Habibullah Sheikh* v. *State of Gujarat,* AIR 2004 SC 3467
[5] *M.C. Mehta* v. *Union of India*, AIR 2004 SC 4618
[6] *Aero Traders Private Limited* v. *Ravider Kumar Suri,* AIR 2005 SC 15
[7] *Secretary, State of Karnataka* v. *Umadevi*, AIR 2006 SC 1806
[8] *Shivanand Gaurishankar Baswanti* v. *Laxmi Vishnu Textile Mills,* (2008) 13 SCC 323
[9] *Mathai Joby* v. *George,* (2010) 4 SCC 358

Delhi as the place of suing, and the Bombay High Court has observed the same in while dismissing the matter. The counsel for the Respondents would also like to submit to this Hon'ble Court that there is no pressing matter or question of law, for which, the intervention of this Court would be necessary, i.e. there is no necessity to invoke the jurisdiction conferred upon this Hon'ble Court under Article 136.

1.2 Non-interference in the decision of the lower courts:

1.2.1 If it appears prima facie that the order in question cannot be justified by any judicial standard, the ends of justice and the need to maintain judicial discipline require the Supreme Court to intervene[10]; the Supreme Court in this case pointed out the errors of the High Court, but, did not interfere in the decision of the High Court. The Supreme Court does not interfere with the conclusion arrived at by the Tribunal if it has taken all the relevant factors into consideration and there has been no misapplication of the principles of law[11].

1.2.2 Normally, in exercising its jurisdiction under Article 136, the Supreme Court does not interfere with the findings of the fact concurrently arrived at by the tribunal and the High Court unless there is a clear error of law or unless some important piece of evidence has been omitted from consideration[12].

1.2.3 A question is not allowed to be raised for the first time in an appeal before the Supreme Court[13]. It would refuse a question to be developed before it when it had neither been urged before the High Court nor before the Appellate Tribunal[14].

1.2.4 Though Article 136 is conceived in widest terms, the practice of the Supreme Court is not to interfere on questions of fact except in exceptional cases when the finding is such that it shocks the conscience of the court[15].

1.2.5 The Supreme Court in the instant case need not interfere in the decision of the High Court of Bombay. The High Court of Bombay, while dismissing the matter, observed that it is not the right forum for deciding the matter; this decision of the High Court can be attributed to the place of suing as provided in the Contract between the Appellants and the Respondents, which remains intact *vis-à-vis* the amendments to the contract subsequently.

[10] *Union of India* v. *Era Educational Trust,* AIR 2000 SC 1573
[11] *DCM* v. *Union of India,* AIR 1987 SC 2414
[12] *Mehar Singh* v. *Shri Moni Gurudwara Prabandhak Committee,* AIR 2000 SC 492
[13] *Nain Singh Bhakuni* v. *Union of India*, AIR 1998 SC 622
[14] *Asst. Controller, Central Excise* v. *N T Co.,* AIR 1972 SC 2563
[15] *Panchanan Misra* v. *Digambar Mishra*, AIR 2005 SC 1299

Hence, it is humbly submitted to this Hon'ble Court to dismiss the Petition for Special Leave and allow the matter to be first heard by a Court in Delhi, subsequent to which, an appeal might be preferred in this Hon'ble Court.

1.3 Scope of Powers under Article 136:

1.3.1 It is humbly submitted that if Special Leave is granted, the matter is registered as an appeal and the Court does not take into cognizance all the points that may arise on appeal and decide them on Merits[16]. The Supreme Court has also held that "it is not bound to go into merits and even if we do so and declare the law or point our the error – still we may not interfere if the justice of the case on facts does not require interference or if we feel that the relief could be moulded in a different fashion."[17]

1.3.2 The Supreme Court in ***Kunhayammed* v. *State of Kerala***[18] held that Article 136 consists of two distinct stages, the first stage where the matter is merely being decided if it is to be accepted as an appeal or not; if the Supreme Court decides to adjudicate the matter, it becomes an appeal, if otherwise, the matter was never an appeal.

1.3.3 Hence, it is humbly submitted to this Hon'ble Court that by reason of lack of any specific matter that requires the intervention of this Hon'ble Court, the Court need not entertain the matter; however, if this Hon'ble Court does decide to accept the Petition for Special Leave, it is humbly submitted that this Hon'ble Court only adjudicate upon the order of the Bombay High Court, i.e., not to hear this Appeal on merits, but merely, on the right place of suing.

1.4 Grounds on which appeal are granted not satisfied:

1.4.1 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.[19]

(ii) When there is an apparent error on the face of the decision[20].

(iii) The tribunal has erroneously applied well-accepted principles of jurisprudence[21]

[16] *Taherkhatoon* v. *Sala,bin Mohammam,* AIR 1999 SC 1104
[17] *Taherkhatoon* v. *Sala,bin Mohammam*, AIR 1999 SC 1104
[18] *Kunhayammed* v. *State of Kerala,* (2000) 245 ITR 360 (SC)
[19] *Chief Administrator cum Jt. Secretary, Government of India* v. *D. C. Dass*, AIR 1999 SC 186
[20] *Siemens Eng & Mfg Co*. v. *Union of India,* AIR 1976 SC 1785

(iv) The tribunal acts against the principles of Natural Justice[22], or has approached the question in a manner likely to cause injustice[23]

1.4.2 In the instant case, the Bombay High Court has not committed any error in law. The High Court has respected the subsisting contract between the parties and has observed that it was not the right forum for adjudicating the matter. There is no breach in law or natural justice; to say the decision of the Bombay High Court was wrong would be wrong because the matter has not been adjudicated on merits whatsoever. Hence, it is humbly submitted to this Hon'ble Court that no grounds can be made out for accepting this petition for Special Leave.

1.5 Grounds of rejection:

1.5.1 In ***Kunhayammed and Others* v. *State of Kerala and Another*[24]**, it was held that a petition seeking grant of special leave to appeal may be rejected for several reasons 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; it is humbly submitted that there is no ground for invoking this Hon'ble Court's jurisdiction under Article 136.

<u>2. NATIONAL INSURANCE CORPORATION IS NOT LIABLE FOR THE ACTS OF MR. BHULLAR AND THE AMENDMENT TO THE CONTRACT WILL NOT BE VALID.</u>

2.1 Extent of Authority of an Agent

2.1.1 Section 187 of the Indian Contract Act defines the extent of authority vested in the agent in the course of dealings with the third parties. It reads as, "An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the

[21] *Clerks of Calcutta Tramways* v. *Calcutta Tramways Co. Ltd.*, AIR 1957 SC 78
[22] *City Corner* v. *P.A. to the Collector,* AIR 1976 SC 143
[23] *Mohan Lal* v. *Management, Bharat Electronics Ltd.*, AIR 1981 SC 1253
[24] *Kunhayammed and Others* v. *State of Kerala and Another*, (2000) 6 SCC 359

ordinary course of dealing, may be accounted circumstances of the case."

2.1.2 As denoted from the circumstances, Mr. Bhullar acted in the capacity of an agent while representing National Insurance Corporation in the negotiations for the amendment of the contract. However, the authority conferred on him was restricted only to the negotiations pending the approval of the directors. Hence, any representations that were made by him were beyond the scope of his authority.

2.1.3 An agent has "apparent authority" to bind a corporate principal when the corporate principal does something by word or deed to cause a third party to reasonably believe that the agent has authority to act, even though the agent lacks such authority.[25] In order for a corporate principal to be liable, the principal must communicate, directly or indirectly, with the third party in a manner sufficient to instil a reasonable belief of the agent's authority, based upon objective manifestations of the principal.[26] Such a belief is not "reasonable" if the third party had such "knowledge of facts as would reasonably require him to inquire as to the authority of the agent.[27]

2.2 Creation of Agency by Estoppel

2.2.1 On the same basis, the creation of agency by estoppels cannot be argued by the Appellants due to the fact that Mr Bhullar as an agent has been held out to have a limited authority to effect an amendment in the contract. If the agent is held out as having only a limited authority to do, on behalf of his principal, acts of a particular class, the principal is not bound by an act outside that authority even though it be an act of that particular class.[28] The onus lies upon the person dealing with the agent to prove either real or ostensible authority[29], and it is a matter of fact in each case whether ostensible authority existed for the particular act for which it sought to make the principal liable.[30] No representation made solely by the agent as to the extent of his authority can amount to holding out by the principal.[31]

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[25] *Ballantine, Private Corporations*, (1927) 347 at p. 110.
[26] *Smith* v. *Hansen*, 63 Wash App 355.
[27] *Deers Inc.* v. *DeRuyter*, 9 Wash App 240.
[28] *Grant* v.*Norway* (1851) 10 CB 665; *Armagas Ltd* v.*Mundogas SA, The Ocean Frost,* [1986] AC 717
[29] *Pole* v.*Leask*, (1862) 33 LJ Ch 155 ; *Rohtas Industries Ltd.* v. *Maharaja of Kasimbazar China Clay Mines*, ILR (1951) 1 Cal 420.
[30] *Leckenby* v.*Wolman*, [1921] WN 100 ; *Bocking Garage* v. *Mazurk* ,[1954] CLY 14.
[31] *V/O Rasnoimport* v.*Guthrie & Co. Ltd.*, [1966] 1 Lloyd's Rep 1.

In the ***LIC case***[32]**,** it was argued that the LIC was liable on the basis of the doctrine of apparent authority of the agent to collect premium from the policy holders. Though collection of premium amount is a general practice followed by the LIC agents, it was found that the LIC had not by any of its conduct induced the policy holders into believing that the agents were authorised to collect premium.

In the present circumstances, Mr. Bhullar who had been authorised by the National Insurance Company to negotiate the amendment of the contract exercised his authority negligently. Hence, the National Insurance Corporation will not be vicariously liable for the acts of Mr. Bhullar. The requirement of the passing of the resolution by the Board of Directors was an essential one and Mr. Das, who was authorized by the Petroleum Oil Corporation , had knowledge about it.

Where a person contracting with the agent has actual or constructive notice of any restriction on the agent's ostensible authority, he is bound by the restriction. Thus, where an agent, authorised by the power of attorney to operate a business, but not to borrow money, produced the power of attorney to a lender he asked for a loan, but the lender did not read it and advanced a loan, he could not recover it from the principal because he had a constructive notice that the agent had no power to borrow. [33] Once an ostensible authority is created, the principal becomes bound by agent's acts within the scope of such authority. He cannot rely upon any private restrictions upon the agent's authority.[34]

2.3 Doctrine of Constructive Notice:

2.3.1 Section 610 of the Companies Act, 1956 provides for the Doctrine of Constructive Notice, according to which, a company is protected against third parties dealing with the company; the third party is presumed to have knowledge of the company's public documents, recorded in the relevant register by the Registrar. The presumption arises because there documents are open to public for inspection.

2.3.2 Any outsider who intend to deal with the company to be informed of the contents of such documents available for inspection at the Registrar"s office as well as statutory records available for inspection at the registered office of the company in their own interest, and even

[32] *Harshat J. Shah* v.*LIC*, (1997) 5 SCC 64.
[33] *Jacobs* v.*Morris*, (1902) 1 Ch 816 (CA)
[34] *Sarshar Ali* v. *Roberts Cotton Assn.*, (1963) 1 SC 244 ; *Kamal Singh Dugar* v. *Corporated Engineers (India) Ltd.*, AIR 1963 Cal 464.

if they do not do so they are deemed in law to have done so and have the knowledge of contents, and they will not be heard to say that they did not do so[35].

2.3.3 In one of the Madras case that of ***Kotla Venkataswamy* v. *Chinta Ramamurthy***[36] , the Articles of association of the company required that all documents should be signed by the managing director, secretary and the working director on behalf of the company. A deed of mortgage was executed by the secretary and the working director only. The court held that no claim would lie under such deed. The learned judge observed that the mortgagee should have consulted the articles before the deed was executed. Therefore, even though the mortgagee may have acted in good faith and the money borrowed applied for the purpose of the company, the mortgage was nevertheless invalid.

2.3.4 Thus, persons dealing with a body corporate, incorporated company or a society are bound to take notice of disabilities imposed on the body corporate and its officials by the memorandum and articles or other documents of constitution[37]

2.3.5 Consequently, if a person enters into a contract which is beyond the powers of the company, as defined in the memorandum, or outside the limit set on the authority of the directors as per the memorandum or articles, he cannot, as a general rule, acquire any rights under the contract against the company.

2.4 Exceptions to the Doctrine of Indoor Management are applicable

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

2.3.4.1 *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.***[38], 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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[35] Taxmann"s Company Law by Krishnamurti D.S.R., 2006 Ed. Page 295
[36] *Kotla Venkataswamy* v. *Chinta Ramamurthy* AIR 1934 Mad 579
[37] Taxmann"s Company Law & Practice By Majumdar AK 1995 Ed. Page 143
[38] *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.

2.3.4.2 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*[39]**, 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.

2.3.4.3 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.*[40]**, 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*[41].**, 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 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.

2.3.4.4 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

[39] *Anand Bihari Lal* v. *Dinshaw & Co,* (1946) 48 BOMLR 293
[40] *Kreditbank Cassel* v. *Schenkers Ltd*., [1927] 1 KB 826
[41] *Sri Krishna* v. *Mondal Bros.& Co*., AIR 1967 Cal 75

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 has entered into the contract.

In ***Kreditbank Cassel v. Schenkers Ltd.***[42], 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. It was held that the company was not bound. But if an officer of a company acts fraudulently under his ostensible authority on behalf of the company, the company is liable for his fraudulent act.

In ***Sri Krishna v. Mondal Bros.& Co.***[43]***,*** wherein 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 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.

2.4.2 It is hence humbly submitted to this Hon'ble Court that by virtue of the current factual matrix falling within the exceptions to the Doctrine of Indoor Management, as mentioned above, the Appellants cannot claim any of the exceptions and attempt to bind the Respondents. The Respondents have done no misrepresentation of facts whatsoever. An act of negligence on the part of the Appellants shall not make the Respondents binding under whatsoever circumstances. Hence, any contractual liability, if at all, would only be as per the initial contract and not as per the amended contract.

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[42] *Kreditbank Cassel v. Schenkers Ltd* [1927] 1 KB 826
[43] *Sri Krishna v. Mondal Bros.& Co.* AIR 1967 Cal 75

3. THE PETITIONER DID NOT HAVE A GOOD CLAIM AT THE TIME OF SERVING THE NOTICE OF ABANDONMENT TO THE RESPONDENT.

3.1 There was a case of deviation by the ship

3.1.1 It is humbly submitted that the Respondent's liability under the policy is 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[44]. It is therefore submitted at the outset that a deviation from normal customary route to another would constitute to be a 'deviation' within the meaning of Section 48 of the Marine Insurance Act, 1958.

3.1.2 Any failure to comply with the normal customary route changes the nature of risk which the insurer has assumed for indemnifying the insured.[45] MV Shazia deviated from the normal route, and hence it is prayed that the respondent's liability under the policy stands discharged.

3.1.3 It is also submitted that such a deviation is not excusable as per Section 51 of the Marine Insurance Act, 1958.[46] There is nothing in the factual matrix of the present case, which effortlessly shows that the deviation was made under any of the situations laid down in Section 51. One of the crewmembers fell sick just after the beginning of the voyage[47], but there is nothing to show that the deviation took place for the purpose of obtaining medical aid for the infirm crewman.

3.1.4 It is therefore prayed that such a deviation had changed the nature of the risk assumed by the respondent and discharges it of any liability to indemnify insurers on such account.

3.2 A case for Constructive Total Loss cannot be made out

3.2.1 It is relevant to point out that the doctrine of Constructive Total Loss is a special feature of marine insurance law and is not found outside marine insurance. The essential learning of

[44] Section 48(2) of the Marine Insurance Act, 1958
[45] *Green* v. *Young,* (1702) 2 Salk. 444 also cited in Arnould, 17th Edition, 2008 at para 14-24.
[46] Section 51(f) of the Marine Insurance Act, 1958
[47] Paragraph 3, Moot Problem

Constructive Total Loss is that an insured does not have to prove an Actual Total Loss if he is able to show that the cost of recovering ship or cargo, or of repairing a damaged ship, would exceed its value when recovered or repaired, or, where he is deprived of possession of ship or cargo, if he can show that recovery is "unlikely". Although the Act is in general a codification of prior common law, the common law test in the case of Constructive Total Loss dispossession had been where recovery was "uncertain", not "unlikely".[48]

3.2.2 There is not any principle which authorizes abandonment, unless where the loss has been actually total, or in the highest degree probable, at the time of abandonment.[49] It is submitted that at the time when the respondent was served notice the loss of the cargo was not in any degree probable. This can be asserted by the following facts:

1. Piratical captures are only for the purpose of payment of ransom and it was only a matter of time before the negotiations would have yielded results.
2. The loss of cargo therefore, was not "unlikely", as payment of ransom would have led to retrieval.
3. Payment of ransom is not unlawful and therefore cannot be disregarded as one of the possibilities of procuring the cargo.

3.2.3 There appears to be little doubt that where a payment which is not illegal under any relevant law is made to secure the release of property, this can be recovered even though the persons demanding the payment are not acting lawfully in so doing. Thus, for example, payment to recover property from pirates or hijackers must, it is submitted, in general be recoverable.[50] It also needs to be observed that there is no legislation against the payment of ransoms.

3.2.4 It is therefore prayed to this honorable court that no claim of Constructive Total Loss arises from the factual matrix of the present case.

3.3 A case for Actual Total Loss cannot be made out

3.3.1 Actual Total Loss is defined as a situation where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is

[48] *Masefield AG* v. *Amlin Corporate Member Ltd,* 2011 EWCA Civ 24 : (2011), para. 15, 16.
[49] *Anderson* v. *Wallis,* (1813) 2 M & S 240, also cited in Arnould, 17th Edition, at 1359.
[50] Arnould, 17th edition, 2008, at 25-21.

irretrievably deprived thereof.[51] In actual total loss a total destruction of the subject-matter insured must be proved as a fact. Its conversion into a completely different thing is also a pure question of fact. And every irretrievable deprivation of the subject-matter on the same footing. And here there is no scope for applying any subjective test.[52]

3.3.2 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, independently of the election of the assured to treat it as such. Notice of abandonment would in such case be a mere idle formality because nothing remains to be abandoned.[53]

3.3.3 It is submitted that the Appellants in the present case were not irretrievably deprived of the subject-matter insured. This can be asserted by following facts:

1. The goods were in the custody of the pirates, and negotiations for the release on payment of ransom were going on at all times between the Shipping company and the pirates.
2. There is no evidence to show that the pirates intended to exercise dominion over the ship or the cargo thereof.
3. The cargo of the ship was not destroyed or annihilated in such custody.

3.3.4 In ***Panamanian Oriental Steamship Corporation* v. *Wright,***[54] it was held by Mocatta J, that it might be true that the confiscation divested the plaintiffs of possession. But the test of irretrievable deprivation is clearly far more severe than the test of unlikelihood of recovery of possession. It is therefore, submitted that despite the good or bad prospect of retrieving the ship it is difficult to conclude that the respondents were irretrievably deprived of the cargo on 17 October 2012.

[51] Section 57, Marine Insurance Act, 1963.
[52] *Akooji Jadwat Pvt. Ltd.* v. *Oriental Fire and General Insurance Co. Ltd. and Ors.,* AIR 1972 Cal. 228 citing Dr. Arnould in para 88.
[53] *Ibid.* at para 87.
[54] *Panamanian Oriental Steamship Corporation* v. *Wright*, [1970] 2 Lloyd's Rep 365

3.3.5 In the case of ***Masefield AG* v. *Amlin,***[55] it was held that, there is no rule of law that capture or seizure is an Actual Total Loss. The subject-matter is not amenable to a rule of law at all: it is all ultimately a question of fact. The typical case of capture, by a nation's warship, subject to condemnation as a prize, is also not an Actual Total Loss, although it may mature into one. Piratical seizure, in the absence of a policy of ransom, may amount to an ATL, where the pirates escape with their prize for their own use and there is no prospect whatever of finding or recovering vessel or cargo: but where a chance of recapture remains even such a seizure will not give rise to an immediate Actual Total Loss. It is prayed that in the instant case, there is nothing to show that the pirates intended to escape with the cargo for their own use. And a chance of retrieval always existed. Such circumstances will not give rise to an Actual Total Loss.

3.3.6 In ***Masefield AG* v. *Amlin***[56] (Queen's Bench Division), the *modus operandi* of the Somalian pirates was identified and was held that, those pirates demand a ransom and release the vessel, cargo and crew upon payment. It was therefore, also likely that the ransom would be paid and that the vessel, cargo and crew would be released. This was also taken note of in the Court of Appeal judgment.[57] Similarly, in the appeal judgment it was also held that in such cases of piratical capture it is more a situation of "wait and see" than of an Actual Total Loss[58] as was held in the ***Kuwait Airways Corp.* v *Kuwait Insurance Co.***[59]

3.3.7 It is therefore, prayed to this honorable court that the Appellants did not have a good claim of Actual Total Loss when the Notice of Abandonment was served on the respondents by them.

[55] *Masefield AG* v. *Amlin Corporate Member Ltd,* 2011 EWCA Civ 24 : (2011), para. 56.
[56] *Masefield AG* v. *Amlin Corporate Member Ltd,* [2010] EWHC 280 (Comm)
[57] Supra, note 5 at para. 10, 11.
[58] Supra note 5
[59] *Kuwait Airways Corp* v *Kuwait Insurance Co,* [1996] 1 Lloyd's Rep. 664

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. There is no expediency to invoke the jurisdiction of this court in the instant case;
2. The Appellants did not have a good claim at the time of serving the Notice of Abandonment to the Respondent and
3. Insurance Contract between the Appellants and the Respondents was never amended.

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 Respondents)