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GAHC010123712014

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WRIT PETITION (C) No. 1889/2014

Jayacharan Barman @ Jay Chandra Barman, Son of Late Bangshidhar Barman, R/o Ganeshpara, Champak Nagar, P.S. – Fatasil Ambari, Guwahati – 781025, District – Kamrup [Metro], Assam.

……***Petitioner***

-Versus-

The Oriental Insurance Company Ltd. Athgaon Branch, Parmeswari Building Chatribari Road, Guwahati – 781001 Represented by Manager, Oriental Insurance Co. Ltd., Athgaon Branch, Parmeswari Building, Chatribari Road, Guwahati - 781001.

……***Respondent***

Advocates :

Petitioner : Ms. P. Das, Advocate
Respondent : Ms. R.D. Mozumder, Advocate
Date of Hearing & Judgment & Order : 06.02.2024

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BEFORE

HON'BLE MR. JUSTICE MANISH CHOUDHURY

JUDGMENT & ORDER

The instant writ petition under Article 226 of the Constitution of India is preferred seeking *inter alia* a direction to the respondent Insurance Company to satisfy the claim in respect of an insurance policy which the petitioner as the insured had taken in respect of a vehicle. The petitioner has approached this Court after the Insurance Ombudsman, Guwahati Centre had rejected a complaint preferred by the petitioner as the complainant before it, by an Order dated 03.09.2013.

2. The relevant events which have led the petitioner to prefer the writ petition can be narrated, in brief, as follows :-

2.1. The petitioner purchased a four-wheeler vehicle [Tata Indica Car] in the year 2006 with financial assistance from M/s HDFC Bank. The vehicle having Chassis no. 600132GTZPA8167 and Engine no. 4751D105GTZPA-3332, was registered with the District Transport Officer [Registration & Licencing], Kamrup, Guwahati with Registration no. AS-01/AA-5744 ['the subject-vehicle', for short]. The petitioner was plying the subject-vehicle as a commercial vehicle after obtaining a Tourist Cab Permit from the State Transport Authority, Assam, Guwahati with validity w.e.f. 13.09.2006 to 05.09.2011. The subject-vehicle was also insured under a Commercial Vehicles Package Policy [Passenger Carrying Commercial Vehicle] bearing Policy no. 321105/7/588/31/2007/1020 for the period from 31.08.2006 to 30.08.2007 [the Insurance Policy] from the respondent Insurance Company ['the Insurer' and/or 'the Insurance Company',

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for short].

2.2. The case of the petitioner is that on 14.10.2006, the subject-vehicle was hired at Guwahati by some passengers by contacting the driver for travelling to Nagaon. According to the petitioner, the driver engaged by the petitioner, Md. Alam Hussain after informing the petitioner that he was taking passengers to Nagaon on hire, proceeded for Nagaon. When the petitioner did not receive any information regarding whereabouts of the subject-vehicle as well as of the driver despite searches made for a few days, he had lodged a First Information Report [FIR] at the Paltan Bazar Police Station on 18.10.2006 stating about the same. The petitioner has also stated that the matter was also informed to the Insurer immediately. The FIR was registered as Paltanbazar Police Station Case no. 596/2006 for offences under Sections 392/342, Indian Penal Code [IPC].

2.3. After the matter was informed to the Insurer, the petitioner was asked to submit certain documents relating to the subject-vehicle. The petitioner has stated that there was some delay on his part to submit those documents as all documents were inside the subject-vehicle at the time it was hired on 14.10.2006. As the documents like Certificate of Registration, Fitness Certificate, Permit, etc. in original were inside the subject-vehicle, the petitioner had obtained duplicate copies of those documents, wherever possible, from the concerned authorities in order to submit the same before the Insurer and in the process, some delay occurred in submission of those documents.

2.4. According to the petitioner, the Branch Manager, Athgaon Branch of the Insurance Company, vide a Letter dated 11.07.2007 asked to the petitioner to

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submit the final police report. The petitioner had after submission of the Final Report by the Investigating Officer of the case before the Court, had obtained a copy of the said Final Report and submitted the same along with other documents relating to the subject-vehicle and the keys of the subject-vehicle to the Insurer on 26.03.2010. Thereafter when repeated approaches to the Insurer did not result in satisfaction of the claim by the Insurer, he had submitted a representation on 04.08.2010. Thereafter, he had approached the Insurance Ombudsman, Guwahati Centre on 08.04.2011 by submitting a complaint. The complaint was admitted by the Insurance Ombudsman under Rule 12[1][e] of the Redressal of Public Grievances [RPG] Rules, 1998 and registered the same as Complaint no. 14-005-043/11-12. After consideration, the Insurance Ombudsman disposed of the complaint by an Award dated 13.01.2012 observing that the Insurer shall complete the process of settlement of the claim within 15 days from the date of receipt of the Letter of Acceptance of the Award from the complainant.

2.5. It was thereafter the Insurer by a Letter of Repudiation dated 19.10.2012 informed the petitioner that his claim had been repudiated on three grounds. When the Insurer did not satisfy the claim under the Insurance Policy in the afore-stated manner the petitioner approached the Insurance Ombudsman again by submitting a complaint on 10.12.2012. The said complaint was registered by the Insurance Ombudsman as Complaint no. 14-04-067/11-12 under Rule 12[1][b] of the Redressal of Public Grievances [RPG] Rules, 1998. Before the Insurance Ombudsman, both the sides after appearance, presented their respective case on the basis of documents in support of their respective claims. The Insurance Ombudsman considered the grounds on which the

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Insurer had repudiated the claim by the Letter of Repudiation dated 19.10.2012. After considering the grounds on which the claim of the petitioner was repudiated, the Insurance Ombudsman by his Award dated 03.09.2013 had observed that the Insurer had rightly repudiated the claim of the complainant [the petitioner]. With such observation, the complaint preferred by the petitioner herein was dismissed. Hence, the writ petition.

3. I have heard Ms. P. Das, learned counsel for the petitioner and Ms. R.D. Mozumdar, learned counsel for the respondent Insurer.

4. Ms. Das, learned counsel for the petitioner has submitted that the claim of the petitioner was repudiated by the Insurer on three untenable grounds. The Insurance Ombudsman in the Award had recorded its finding in favour of the Insurer in respect of two such grounds while recording its finding in favour of the petitioner-complainant in respect of the third ground, which was with regard to non-submission of vital documents like original Registration Certificate, original Fitness Certificate, etc. in time. Ms. Das has contended that the repudiation of the claim on the ground that there was commission of criminal breach of trust by the driver of the subject-vehicle is not legally sustainable. The Police had after completing its investigation, submitted the Final Report, which stood forwarded to the jurisdictional Magistrate on 23.08.2009 and the jurisdictional Magistrate, that is, the learned Chief Judicial Magistrate, Kamrup, Guwahati had accepted the Final Report vide its Order dated 07.09.2009. Thereafter, the petitioner had submitted a copy of the said Final Report along with the original keys, original Insurance Policy, etc. to the Insurer Company. By referring to the definition of ‘theft’ provided in Section 378, Indian Penal Code,

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Ms. Das has contended that the claim of the petitioner could not have been repudiated on the alleged ground of commission of criminal breach of trust by the driver of the subject-vehicle. In support of her such contention, Ms. Das has also relied upon a Judgment of a Division Bench of this Court in Ratul Das vs. Oriental Insurance Co. Ltd. and others, reported in 2008 [3] GLT 874. By referring to the terms and conditions of the Insurance Policy it has been contended that 'theft' was covered under the Insurance Policy. Since the act involved in the case in hand was an act of theft, repudiation of the claim of the petitioner was clearly arbitrary and illegal. It has been further contended that both the Insurer and the Insurance Ombudsman had referred to Insurance Policy Condition no. 7 to reject the claim of the petitioner-complainant. It is the contention that Policy Condition no. 7 of the Insurance Policy had been misconstrued by both the Insurer and the Insurance Ombudsman. It has also been contended that Policy Condition no. 7 in the Insurance Policy is clearly affront to the provisions of the Indian Contract Act, 1872.

5. *Au contraire*, Ms. Mozumdar, learned counsel appearing for the respondent Insurer has contended that the claim of the petitioner was rightly repudiated by the Insurer as well as by the Insurance Ombudsman. She has further contended that all the three grounds for repudiation were proper and valid and no interference is called for. The findings recorded by the Insurance Ombudsman as regards the Insurance Policy Condition no. 7 and criminal breach of trust by the driver of the subject-vehicle are with reasons and such reasons are not required to be interfered with in a writ proceeding instituted under Article 226 of the Constitution of India. Ms. Mozumdar has further contended that the petitioner had an alternative remedy before the District

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Consumer Forum and as such, this writ petition is not maintainable. To buttress such submissions, reliance has been placed in the decisions of the Hon'ble Supreme Court of India in Life Insurance Corporation of India and others vs. Asha Goel [Smt] and another, reported in [2001] 2 SCC 160, and Sadhana Lodh vs. National Insurance Company Ltd. and another, reported in [2003] 3 SCC 524.

6. I have duly considered the submissions of the learned counsel for the parties and have also gone through the materials brought on record by the parties through their pleadings. The learned counsel for the parties have placed a copy of the Insurance Policy - Commercial Vehicles Package Policy [marked as X], by which the subject-vehicle was insured.

7. As a question regarding maintainability of a writ petition under Article 226 of the Constitution of India has been raised, it is apposite to mention that the matter of enforcement of claim under a contract of insurance where the Insurance Company had repudiated the claim, has been considered by the Hon'ble Supreme Court of India in Asha Goel [supra]. Having regard to the power of judicial review available to the High Courts under Article 226 of the Constitution of India, the Hon'ble Supreme Court of India has observed as under :

> 10. Article 226 of the Constitution confers extra-ordinary jurisdiction on the High Court to issue high prerogative writs for enforcement of the fundamental rights or for any other purpose. It is wide and expansive. The Constitution does not place any fetter on exercise of the extra-ordinary jurisdiction. It is left to the discretion of the High Court. Therefore it cannot be laid down as a general proposition of law that in no case the High Court can entertain a writ petition under Article 226 of the

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Constitution to enforce a claim under a life insurance policy. It is neither possible nor proper to enumerate exhaustively the circumstances in which such a claim can or cannot be enforced by filing a writ petition. The determination of the question depends on consideration of several factors, like, *whether a writ petitioner is merely attempting to enforce his/her contractual rights or the case raises important questions of law and constitutional issues; the nature of the dispute raised; the nature of inquiry necessary for determination of the dispute etc. The matter is to be considered in the facts and circumstances of each case*. While the jurisdiction of the High Court to entertain a writ petition under Article 226 of the Constitution cannot be denied altogether, Courts must bear in mind the self-imposed restriction consistently followed by High Courts all these years after the constitutional power came into existence in not entertaining writ petitions filed for enforcement of purely contractual rights and obligations which involve disputed questions of facts. The Courts have consistently taken the view that in a case where for determination of the dispute raised it is necessary to inquire into facts for determination of which it may become necessary to record oral evidence a proceeding under Article 226 of the Constitution is not the appropriate forum. The position is also well settled that if the contract entered between the parties provide an alternate forum for resolution of disputes arising from the contract, then the parties should approach the forum agreed by them and the High Court in writ jurisdiction should not permit them to by-pass the agreed forum of dispute resolution. At the cost of repetition it may be stated that in the above discussions we have only indicated some of the circumstances in which the High Courts have declined to entertain petitions filed under Article 226 of the Constitution for enforcement of contractual rights and obligation; the discussions are not intended to be exhaustive. This Court from time to time disapproved of a High Court entertaining a petition under Article 226 of the Constitution in matters of enforcement of contractual rights and obligation particularly where the claim by one party is contested by the other and adjudication of the dispute requires inquiry into facts. We may notice a few such cases; *Mohammed Hanif vs. the State of Assam, [1969] 2 SCC 782; Banchhanidhi Rath vs. the State of Orissa and others [1972] 4 SCC 781; Smt. Rukmanibai Gupta vs. Collector, Jabalpur and others, [1980] 4 SCC 556; Food Corporation of India and others vs. Jagannath*

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Dutta and others, [1993 [Suppl.] 3 SCC 635; and State of H.P. vs. Raja Mahendra Pal and others, [1999] 4 SCC 43.

11. The position that emerges from the discussions in the decided cases is that ordinarily the High Court should not entertain a writ petition filed under Article 226 of the Constitution for mere enforcement of a claim under a contract of insurance. *Where an insurer has repudiated the claim, in case such a writ petition is filed the High Court has to consider the facts and circumstances of the case, the nature of the dispute raised and the nature of the inquiry necessary to be made for determination of the questions raised and other relevant factors before taking a decision whether it should entertain the writ petition or reject it as not maintainable. It has also to be kept in mind that in case an insured or nominee of the deceased insured is refused relief merely on the ground that the claim relates to contractual rights and obligations and he/she is driven to a long drawn litigation in the civil court it will cause serious prejudice to the claimant/other beneficiaries of the policy. The pros and cons of the matter in the context of the fact situation of the case should be carefully weighed and appropriate decision should be taken*. In a case where claim by an insured or a nominee is repudiated raising a serious dispute and the Court finds the dispute to be a *bona fide* one which requires oral and documentary evidence for its determination then the appropriate remedy is a civil suit and not a writ petition under Article 226 of the Constitution. Similarly, where a plea of fraud is pleaded by the insurer and on examination is found *prima facie* to have merit and oral and documentary evidence may become necessary for determination of the issue raised then a writ petition is not an appropriate remedy.

8. In Sadhana Lodh [supra], the appellant therein filed a claim application before the Motor Accident Claims Tribunal ['the Tribunal', for short] seeking compensation for the death of the appellant's son in a motor vehicle accident. The learned Tribunal awarded a sum of Rs. 3,50,000/- as compensation. Aggrieved thereby, the Insurer, that is, National Insurance Company Limited

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filed a writ petition under Article 226 and Article 227 of the Constitution of India before this High Court. A learned Single Judge of the High Court dismissed the writ petition. The insurer carried the matter to the Division Bench by way of a letters patent appeal. Before the Division Bench, the appellant-claimant took an objection that the writ petition under Article 226/227 would not be maintainable and as such, the letters patent appeal should deserve dismissal. When the Division Bench of the High Court allowed the appeal preferred by the Insurer and reduced the compensation from Rs. 3,50,000/- to Rs. 3,00,000/-, a special leave petition was preferred by the appellant-claimant. By granting leave, the Hon'ble Supreme Court of India has observed as under :-

> 6. The right of appeal is a statutory right and where the law provides remedy by filing an appeal on limited grounds, the grounds of challenge cannot be enlarged by filing a petition under Article 226/227 of the Constitution on the premise that the insurer has limited grounds available for challenging the award given by the Tribunal. Section 149[2] of the Act limits the insurer to file an appeal on those enumerated grounds and the appeal being a product of the statute it is not open to an insurer to take any plea other than those provided under Section 149[2] of the Act [see *National Insurance Co. Ltd, Chandigarh vs. Nicolletta Rohtagi and others 2002[7] SCC 456*]. This being the legal position, the petition filed under Article 227 of the Constitution by the insurer was wholly misconceived. Where a statutory right to file an appeal has been provided for, it is not open to High Court to entertain a petition under Article 227 of the Constitution. Even if where a remedy by way of an appeal has not been provided for against the order and judgment of a District Judge, the remedy available to the aggrieved person is to file a revision before the High Court under Section 115 of the Code of Civil Procedure. Where remedy for filing a revision before the High Court under Section 115 of CPC has been expressly barred by a State enactment, only in such case a petition under Article 227 of the Constitution would lie and not under Article 226 of the Constitution. As a matter of an illustration, where a trial Court in a civil

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suit refused to grant temporary injunction and an appeal against refusal to grant injunction has been rejected, and a State enactment has barred the remedy of filing revision under Section 115 C.P.C., in such a situation a writ petition under Article 227 would lie and not under Article 226 of the Constitution. Thus, where the State legislature has barred a remedy of filing a revision petition before the High Court under Section 115 C.P.C., no petition under Article 226 of the Constitution would lie for the reason that a mere wrong decision without anything more is not enough to attract jurisdiction of High Court under Article 226 of the Constitution.

7. The supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution is confined only to see whether an inferior court or Tribunal has proceeded within its parameters and not to correct an error apparent on the face of the record, much less of an error of law. In exercising the supervisory power under Article 227 of the Constitution, the High Court does not act as an appellate court or the tribunal. It is also not permissible to a High Court on a petition filed under Article 227 of the Constitution to review or reweigh the evidence upon which the inferior court or Tribunal purports to have passed the order or to correct errors of law in the decision.

9. The Insurance Ombudsman was constituted under the Redressal of Public Grievance [RPG] Rules, 1998 [since repealed], framed by the Central Government in exercise of the powers conferred by sub-section [1] of Section 114 of the Insurance Act, 1938. Rule 6 of the RPG Rules, 1998 provided for appointment of Ombudsman. Rule 12 of the RPG Rules, 1998 had outlined the powers of the Ombudsman. As per Clause [b] of sub-rule [1] of Rule 12, the Ombudsman could receive and consider any partial or total repudiation of claims by an insurer. Clause [e] of sub-rule [1] of Rule 12 permitted an Ombudsman to receive and consider the matter involving delay in settlement of claims. Rule 13 had provided for a manner in which complaint was to be made and Rule 16 had provided for an Award by the Ombudsman. Rule 17 provided for consequences

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of non-acceptance of an Award. If the complainant did not intimate the acceptance of the Award passed by the Ombudsman, the Award was not required to be implemented by the Insurance Company. The RPG Rules, 1998 had neither provided for any statutory appeal against an Award of the Insurance Ombudsman nor had specifically mentioned that a complainant if aggrieved by an Award passed by the Insurance Ombudsman, should approach the forum constituted under the Consumer Protection Act, 1986. The decision in Sadhana Lodh [supra] was rendered in the context of a specific statutory right of appeal, limited in nature, available to the Insurer under Section 173 r/w Section 149[2] of the Motor Vehicles Act, 1988. In the present case, no such issue is involved. In Asha Goel [supra], it has been observed that it cannot be laid down as a general proposition of law that in no case the High Court can entertain a writ petition under Article 226 of the Constitution to enforce a claim under a life insurance policy. Like a life insurance policy, the Insurance Policy involved in the case in hand is also a contract of insurance, entered into between the present petitioner and the respondent-Insurer. It is trite to say as a reminder that ordinarily, a writ petition filed for enforcement of purely contractual rights and obligations which involve disputed questions of facts, is not to be entertained. It has been held consistently that in case where for determination of the dispute raised it is found necessary to inquire into facts for determination of which it may become necessary to record oral evidence a writ proceeding under Article 226 of the Constitution is not the appropriate proceeding. Keeping the aforesaid propositions in mind, it is necessary to look into the fact situation obtaining in the case in hand to see as to whether the instant writ petition should be entertained or not.

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10. The facts that the petitioner was the registered owner of the subject-vehicle and the subject-vehicle was under coverage of an Insurance Policy [Commercial Vehicles Package Policy] with the respondent Insurance Company during the period from 31.08.2006 to 30.08.2007 are not in dispute. The incident which led the petitioner as the Insurer to lodge the claim under the Insurance Policy, occurred on 14.10.2006. In the FIR lodged on 18.10.2006 and registered as Paltanbazar Police Station Case no. 596/2006, it was alleged that the subject-vehicle was hired by some passengers after negotiating the matter of hiring with the driver of the subject-vehicle, Md. Alam Hussain. After negotiation, the fact of hiring was duly informed by the driver of the subject-vehicle to the petitioner. When no trace was found either of the subject-vehicle or of the driver, the petitioner had lodged the FIR on 18.10.2006. From the materials on record as well as from the Award of the Insurance Ombudsman dated 03.09.2013, it is noticed that the Investigating Officer of Paltanbazar Police Station Case no. 596/2006 submitted the Final Report in that case by reporting that as no trace of the driver of the subject-vehicle was found it was presumed that the driver of the subject-vehicle had stolen the subject-vehicle and fled away to his native place, Bihar. From the copy of the Final Report placed before this Court, it is found that the Investigating Officer of the case had reported that the case under Section 381, IPC was true. The Investigating Officer had further reported that as there was no trace of the accused [the driver], the Final Report was filed. The Final Report was thereafter, forwarded by the Officer-In-Charge, Paltan Bazar Police Station to the Court of learned Chief Judicial Magistrate, Kamrup [M] through the P.I., Guwahati Court on 23.08.2009. The Final Report came to be accepted by the learned Chief Judicial Magistrate, Kamrup [M] on 07.09.2009 after hearing the complainant, that is, the petitioner

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herein.

11. When the petitioner approached the Insurance Ombudsman for the first time complaining that the Insurer had not taken any steps to settle the claim, the said complaint was registered as Complaint no. 14-005-043/11-12 under Rule 12[1][e] of the RPG Rules. After going through the documents on record, the Insurance Ombudsman had observed that the claim of the complainant for settlement was pending with the Insurer for a long time. Observing so, the Insurance Ombudsman passed an Award on 13.01.2012 observing that the Insurer shall complete the process of settlement of the claim within 15 days from the date of receipt of the Letter of Acceptance of the Award from the complainant. It was further observed that if the claim was found payable, the Insurer shall pay penal interest @ 8% per annum on the settled amount w.e.f. the date of submission of the claim papers till the date of release of the settled amount.

12. The petitioner had approached the Insurance Ombudsman for the second occasion claiming that the claim was repudiated by the Insurer without any justified ground. The complaint preferred by the petitioner was registered as Complaint no. 14-04-067/11-12 under Rule 12[1][b] of the RPG Rules, 1998. The Insurance Ombudsman had found that the claim of the petitioner was repudiated by the Insurer by a Letter of Repudiation dated 19.10.2012 on three grounds, [i] abandonment of the claim as per the Policy Condition no. 7; [ii] non-submission of vital documents like original Registration Certificate, original Fitness Certificate, original Permit, letter to the DTO intimating the loss of the vehicle; and [iii] commission of the offence, criminal breach of trust by the

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insured person's employee i.e. the driver. The stand taken by the Insurer in the affidavit-in-opposition, filed in the present writ petition, is to the effect that after receipt of information from the petitioner, the petitioner was requested to submit relevant documents on 17.04.2007 and 22.05.2007. Thereafter, a final reminder for submission of documents was given, on 11.07.2007, to the petitioner with the observation that in the event of failure, the claim would be treated as no claim. The version put forth by the Insurer was that the claim had to be closed on 31.07.2007 as no claim due to non-submission of documents. Thereafter it was on 26.03.2010, the petitioner approached the Insurer with the request to re-consider his claim and after examining the same, the claim was repudiated on the three grounds, mentioned hereinabove.

13. On consideration of the entire facts and circumstances obtaining in the case in hand, it is found that there was no factual dispute. What have, thus, been left to be examined are the legality and correctness of the grounds of repudiation and legality and validity of the impugned Order passed by the Insurance Ombudsman. It is also to be seen whether any case for interference under Article 226 has been made out or not.

14. As regards the ground regarding non-submission of documents by the petitioner in support of his claim, the Insurance Ombudsman had observed that ordinarily, the original documents of a vehicle were kept inside the vehicle to avoid security checking or any other administrative purposes. The Insurance Ombudsman had further observed that in the case of the petitioner, the original documents were kept inside the subject-vehicle for which he lost his original documents along with the subject-vehicle. It was, thus, observed that in such

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situation, the Insurer could not have insisted for the documents of the subject-vehicle if the petitioner had produced the certified copies of the required documents from the concerned authorities. By observing so, the Insurance Ombudsman did not accept and approve the said ground of repudiation. With no challenge made to such finding of the Insurance Ombudsman by the Insurer, the said finding has attained finality in so far as the Insurer is concerned.

14.1. In this connection, it is also apt to refer to the following observations made by the Hon'ble Supreme Court of India in the case titled Om Prakash vs. Reliance General Insurance and another, reported in [2017] 9 SCC 724, :-

> 10. It is common knowledge that a person who lost his vehicle may not straightaway go to the Insurance Company to claim compensation. At first, he will make efforts to trace the vehicle. It is true that the owner has to intimate the insurer immediately after the theft of the vehicle. However, this condition should not bar settlement of genuine claims particularly when the delay in intimation or submission of documents is due to unavoidable circumstances. The decision of the insurer to reject the claim has to be based on valid grounds. Rejection of the claims on purely technical grounds in a mechanical manner will result in loss of confidence of policy-holders in the insurance industry. If the reason for delay in making a claim is satisfactorily explained, such a claim cannot be rejected on the ground of delay. It is also necessary to state here that it would not be fair and reasonable to reject genuine claims which had already been verified and found to be correct by the Investigator. The condition regarding the delay shall not be a shelter to repudiate the insurance claims which have been otherwise proved to be genuine.....

15. The Insurance Ombudsman had accepted the ground that there was commission of criminal breach of trust by the driver of the subject-vehicle, one of the other two grounds on which the Insurer had repudiated the claim. To

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reach such a view, the Insurance Ombudsman had referred to the Final Report submitted in connection with Paltanbazar Police Station Case no. 596/2006. In the Final Report, the Investigating Officer [I.O.] had observed that the driver of the subject-vehicle might have stolen away the subject-vehicle and had fled away to his native place, Bihar. By taking note of the remark made by the Investigating Officer, the Insurance Ombudsman had observed that there was criminal breach of trust by the driver of the subject-vehicle which, in turn, had gone to prove that there was serious lapse on the part of the petitioner-Insured. On perusal of the contents of the Final Report by this Court, it is noticed that the Investigating Officer [I.O.] in the Final Report had observed that the driver had stolen the subject-vehicle and shifted to his native place, Bihar thereafter along with his family.

15.1. The offence of 'theft' is defined in Section 378, Indian Penal Code [IPC]. As per Section 378, IPC, whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft. The offence described in Section 381, IPC, that is, 'theft by clerk or servant of property in possession of master' is an aggravated form of the offence of theft. In this context, it is also apposite to refer to Illustration [d] of Section 378, IPC which reads as under :

> Illustration [d] :-
> A, being Z's servant, and entrusted by Z with the care of Z's plate, dishonestly runs away with the plate, without Z's consent, then it is considered that A has committed theft.

The version reported by the Investigating officer in the Final Report indicated about commission of the offence under Section 381, IPC. A combined reading of the

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ingredients of the offences defined under Section 378 and Section 381 of the Indian Penal Code [IPC] goes to establish that the offence under Section 381, IPC is an aggravated form of theft. Illustration [d] to Section 378, IPC makes it amply clear that the commission of offence reported by the Final Report would fall within the offence, 'theft' and it would not fall within the offence, 'criminal breach of theft'. The filing of the FIR in respect of the subject-vehicle by the petitioner amply demonstrates absence of consent on his part.

15.2. The factual scenario involved in Ratul Das [supra] were, in brief, that the appellant-insured was the owner of a motor vehicle [Tata Sumo] which was used as commercial vehicle for carrying passengers. A First Information Report [FIR] was lodged before the Nagaon Police Station on 26.05.2003 stating that on 24.05.2003, the said vehicle was hired by four passengers from Nagaon for Golaghat and thereafter, the vehicle proceeded to Golaghat, driven by the driver engaged by the appellant-insured. As the vehicle did not return and in spite of searches made by the appellant-insured, no information could be gathered as regards whereabouts of the vehicle as well as of the driver, the appellant-insured apart from lodging the FIR, made a claim with the Insurer as at the relevant time, the vehicle was under a valid policy of Insurance. After investigation, the Investigating Agency submitted a report in final form before the Court of learned Chief Judicial Magistrate, Nagaon on 30.08.2003 stating that though the case registered under Sections 420/406/379, IPC was true but sufficient evidence could not be gathered against the suspects. The said final report was accepted by the learned Court on 24.09.2003. But the claim of the appellant-insured for settlement of claim for theft of the vehicle was repudiated by the Insurer on 08.06.2004 on the ground that the driver had committed criminal breach of trust and hence, no compensation could be paid.

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15.3. The Division Bench had *inter alia* observed that the Insurer therein is an authority under Article 12 of the Constitution of India and therefore, was amenable to the writ jurisdiction under Article 226 of the Constitution of India. The Division Bench had observed that the only ground on which the Insurer had refused to pay the compensation was that it was a case of criminal breach of trust by the driver. It was observed that there was no material before the Insurer except the registration of the FIR lodged by the appellant-insured. It was found that the Insurer at the time of repudiation of the claim did not take into consideration the report in the final form submitted by the Investigating Agency under Section 173, CrPC, which was accepted by the learned Magistrate, wherefrom it was evident that the Investigating Agency had reported that the case under Sections 406/420/379, IPC though was true, but there was lack of materials to prove. It was in that context, the Division Bench had observed that for the purpose of a claim under a policy of insurance, the claimant need not have to prove the factum of theft as required under the criminal law. It would be sufficient if the factum of taking away the insured property by someone thereby depriving the insured of it permanently, is established. It was noticed that in the concerned policy, theft was not defined. Since the taking away of the property with the intention of depriving its true owner permanently, having not been disputed, the appellant-insured was found to be entitled for the compensation under the contract of insurance and repudiation of such claim by the Insurer was found not sustainable in law. The Division Bench directed the Insurer to assess the quantum of compensation payable for the loss sustained by the appellant-insured therein, under the policy of insurance and to pay the same within a period of two months.

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15.4. Reverting back to the facts of the case in hand, it can be seen that the subject-vehicle was run as commercial vehicle by the petitioner through a driver engaged by the petitioner and the subject-vehicle was with the driver on 14.10.2006, when the subject-vehicle was taken on hire and there was no trace of the subject-vehicle as well as of the driver thereafter. The Final Report had recorded that the Investigating Officer was of the view that the case under Section 381, IPC was true. As mentioned hereinbefore, an offence under Section 381, IPC is an aggravated form of the offence of 'theft'. From the Final Report, the factum of taking away of the subject-vehicle from the petitioner, thereby, depriving him from it permanently has been established. In the Insurance Policy, the Insurer had undertaken to indemnify the insurer thereunder for 'theft' of the subject-vehicle. The term, 'theft' is not defined in the Insurance Policy. Moreover, illustration [d] of Section 378, IPC has clearly demonstrated that a case of a nature like the one in hand, is a case of 'theft'. The observations made by the Division Bench in *Ratul Das* [supra], quoted in the preceding paragraph 15.3, are found similar to the case in hand. Thus, the ground of repudiation on the ground that there was commission of criminal breach of trust and accepted by the Insurance Ombudsman is clearly not sustainable in law, as both the authorities had arrived at such ground by clearly misconstruing the law.

15.5. In view of the above discussion, this Court finds that the ground taken by the Insurer to repudiate the claim of the petitioner that there was commission of criminal breach of trust by the driver of the subject-vehicle and agreed to by the Insurance Ombudsman was in erroneous interpretation of the term 'theft', on occurrence of which the Insured was liable to be indemnified under the Insurance Policy. In such view of the matter, the findings recorded by the

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Insurer and the Insurance Ombudsman in that context, are also found to be in manifest error of law.

16. The other ground on which the claim of the petitioner was repudiated by the Insurer was that there was abandonment of the claim by the petitioner as per the Policy Condition no. 7 of the Insurance Policy. To appreciate the issue, it is necessary to reproduce the relevant excerpts of Policy Condition no. 7 from the Insurance Policy, based on which the Insurer had repudiated the claim, :-

> 7. * * * * * *
> It is also hereby further expressly agreed and declared that if the Company shall disclaim liability to the insured for any claim hereunder and such claim shall not, within twelve calendar months from the date of such disclaimer have been made the subject matter of a suit in a court of law, then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder.
> * * * * * *

16.1. The above excerpts of Policy Condition no. 7 envisage the following situations :- *firstly*, the Insurer has disclaimed the liability in respect of any claim made under a policy of insurance; *secondly*, the Insured has not made such disclaimer a subject-matter of a suit in a court of law within a period of 12 calendar months from the date of such disclaimer; and *thirdly*, a period of 12 calendar months is thereafter, over from the date of disclaimer of the liability by the Insurer. If the above situations have occurred, the claim for all the purposes has to be deemed to have been abandoned and the claim is not recoverable thereafter under the policy of insurance. Disclaimer, as per the *Black's Law Dictionary*, Ninth Edition, is a repudiation of another's legal right or claim.

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16.2. Recourse has been taken to the said Policy Condition no. 7 by the Insurer herein as one of the three grounds to repudiate the claim of the petitioner. The reason, apparent, for repudiation by the Insurer was that the petitioner made the request for consideration of his claim on 26.03.2010, that is, after 2 [two] years and 7 [seven] months, which was counted from 31.07.2007, that is, the date when the Insurer closed the claim as no claim. The closure of claim as no claim was only due to non-submission of documents. That ground had been discarded by the Insurance Ombudsman. It was/is not the case of the Insurer that the case was/is not genuine. On 31.07.2007, the claim was not repudiated but closed as no claim. Repudiation of a claim has to be with reasons and it cannot be equated with closure of a claim as no claim. Closure of a claim as no claim is different from repudiation of a claim. Had the closure of a claim as no claim been a case of repudiation of claim, the Insurer here would not have reopened the case to repudiate the claim again at a later date on 19.10.2012 on three specific grounds, mentioned therein. The Insurance Ombudsman had not endorsed the ground taken as regards delay in the Award dated 03.09.2013.

16.3. In this context, a reference to the provisions of Section 28 of the Indian Contract Act, 1872 appears necessary. For ready reference, the relevant portions of Section 28 of the Indian Contract Act, 1872 are quoted herein :-

> 28. Agreements in restraint of legal proceedings, void. —
> Every agreement,—
> [a] by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or
> [b] which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified

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period so as to restrict any party from enforcing his rights,

is void to the extent.

Exception 1.—

Saving of contract to refer to arbitration dispute that may arise. — This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Exception 2.—

Saving of contract to refer questions that have already arisen. — Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

Exception 3.—

Saving of a guarantee agreement of a bank or a financial institution. — This section shall not render illegal a contract in writing by which any bank or financial institution stipulate a term in a guarantee or any agreement making a provision for guarantee for extinguishment of the rights or discharge of any party thereto from any liability under or in respect of such guarantee or agreement on the expiry of a specified period which is not less than one year from the date of occurring or non-occurring of a specified event for extinguishment or discharge of such party from the said liability

16.4. It is relevant to note that the Insurance Policy in the case in hand was for the period from 31.08.2006 to 30.08.2007. Exception 3 to Section 28 has been inserted in the Indian Contract Act, 1872 by the Banking Laws [Amendment] Act, 2012 w.e.f. 18.01.2013. Thus, the provisions of Exception 3 to Section 28 is not applicable to the case in hand.

16.5. As per Section 28 of the Indian Contract Act, an agreement which limits the time within which a party thereto may enforce his rights under or in respect

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of an agreement by the usual legal proceedings in the ordinary tribunals is void to that extent. It means that the parties to an agreement are not allowed to substitute another period of limitation in place of the period of limitation prescribed in the general law of limitation. What is prohibited by Section 28 is an agreement whereby one party has been made to relinquish the remedy only, by providing that if any usual legal proceeding is to be initiated before ordinary tribunal, then it should be filed within a specified time limit with such time-limit being shorter than the period of limitation provided by the Limitation Act. If such a clause is inserted in the contract including in a policy of insurance, it would mean that though the rights accrued would continue even beyond the time-limit and would not extinguish, yet there is limiting of the time to sue as prescribed by the Limitation Act. It is such kind of clause which is regarded as void by Section 28 of the Indian Contract Act. When Policy Condition no. 7 in the Insurance Policy of the case in hand *qua* the provisions contained in Section 28 of the Indian Contract Act, 1872 is considered, what is discernible is that the Policy Condition no. 7 has limited the time-period for the claimant to pursue the subject-matter in a suit in a court of law to a period of 12 calendar months from the date of disclaimer, that is, the date of repudiation, and such a clause is already void in law. Assertion of a right under an agreement in the form of a claim is different from enforcing the right in a court of law. Section 28 is in connection with the second situation. Even by plain meaning of Policy Condition no. 7, no person properly instructed in law could have reached a view that it has prohibited the Insured from the making of a claim under the Insurance Policy beyond a period of 12 calendar months. Thus, the Insurer in repudiating the claim as well as the Insurance Ombudsman in approving the ground of repudiation erred in holding that the claim was deemed to have abandoned in

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view of Policy Condition no. 7. Thus, the reliance placed by the Insurer on Policy Condition no. 7 to repudiate the claim of the petitioner is found to be as a result of misinterpretation of the Policy Condition no. 7. Otherwise also, the three situations envisaged in Policy Condition no. 7 were not present on the date of repudiation of the claim on 19.10.2012. As has already been found above, the closure of a claim as no claim cannot be equated with repudiation of claim, the Insurer and the Insurance Ombudsman had committed manifest error in law to hold that the date of closure of the claim as the date of disclaimer. Consequently, they had committed manifest error to hold that as the Insurer did not approach the court of law to enforce his right against the disclaimer within a period of 12 calendar months thereafter, there was abandonment of claim on the basis of Policy Condition no. 7 the conditions of which are otherwise void vis-à-vis Section 28 of the Indian Contract Act.

17. It is settled that a writ of certiorari or in the nature of certiorari is issued in exercise of extra-ordinary jurisdiction under Article 226 of the Constitution of India. The writ jurisdiction extends to cases where orders are passed by tribunals or authorities in excess of their jurisdiction or as a result of their refusal to exercise jurisdiction vested in them or if they act illegally or improperly in the exercise of their jurisdiction causing miscarriage of justice. A writ in the nature of certiorari, under Article 226 of the Constitution, is issued for correcting errors of jurisdiction i.e. when a tribunal or an authority is found to have acted [i] wholly without jurisdiction – by assuming jurisdiction where there exists none, or [ii] in excess of its jurisdiction – by overstepping or crossing the limits of jurisdiction, or [iii] in flagrant disregard of law or the rules of procedure, or [iv] in violation of the principles of natural justice where there is

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no procedure specified; and thereby occasioning failure of justice. A writ in the nature of certiorari is exercisable when the decision or determination itself of a tribunal or an authority, which is apparent on the face of the proceedings, is based on clear ignorance or disregard or misinterpretation of the provisions of law. The present one is such a case where both the Insurer, an authority within the ambit of Article 12 of the Constitution of India, and the Insurance Ombudsman, a statutory authority constituted under the RPG Rules, 1998, both amenable to the writ jurisdiction under Article 226 of the Constitution of India are found to have ignored, disregarded and misinterpreted the provisions of law while repudiating the claim on 19.10.2012 and passing the Award dated 03.09.2013. Therefore, the Letter of Repudiation dated 19.10.2012 and the Award dated 03.09.2013 are found unsustainable in law and, therefore, are to be interfered with for the purpose of granting relief sought for in this writ petition, for which the petitioner as the Insured is found entitled. It is accordingly ordered.

18. In view of the above discussion and for the reasons stated therein, the respondent Insurer is directed to assess the quantum of compensation payable for the loss sustained by the petitioner-Insured under the concerned policy of insurance. After assessment of quantum of compensation, the respondent Insurer shall pay the petitioner-Insured the assessed amount along with interest @ 8% per annum from the date of repudiation of claim [19.10.2012] till the date of payment. The payment, as above, shall be made within a period of 2 [two] months from today.

19. The writ petition stands allowed to the extent indicated above. There shall,

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however, be no order as to cost.

JUDGE

Comparing Assistant

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