weeks, the directions as stated above will not come into effect. In the event the parties are unable to arrive at an amicable settlement for discharge of the dues of the petitioner, counsel for the petitioner shall inform the official liquidator, who shall on receipt of such communication proceed to take the necessary steps in accordance with law and in conformity with the directions as issued herein.

List on August 12, 2014. 27

In view of the above, C. A. No. 1209 of 2012 stands disposed of. 28

[2016] 194 Comp Cas 545 (Mad)

[IN THE MADRAS HIGH COURT]

BHARAT SALT REFINERIES LTD.

v.

NEW INDIA ASSURANCE CO. LTD.

T. S. SIVAGNANAM J.

August 21, 2015.

ARBITRATION—APPOINTMENT OF ARBITRATOR—INSURANCE—SIGNING OF SETTLEMENT VOUCHER NOT SOLE GROUND TO DISMISS CLAIMANT'S PETITION FOR APPOINTMENT OF ARBITRATOR—FACTS OF EACH CASE TO BE LOOKED INTO—CLAIMANT RAISING DISPUTE REGARDING SURVEYOR AND ALSO SEEKING TO SIGN VOUCHER AS PARTIAL SETTLEMENT—CANNOT BE NON-SUITED DESPITE SIGNING VOUCHER—COMPANY NOT REPLYING TO CORRESPONDENCE OF CLAIMANT—FORTY DAY LAG BETWEEN RECEIVING OF CHEQUE AND REQUEST FOR RE-OPENING CLAIM NOT FATAL—ARBITRATOR TO BE APPOINTED TO LOOK INTO ISSUES—ARBITRATION AND CONCILIATION ACT, 1996, S. 11(6).

Whether an insurance claim can be dismissed on the ground that the claimant has signed the settlement voucher, cannot be decided sans facts. The facts of the case need to be looked into to examine whether the discharge was conditional, or unconditional, and whether there was any precarious circumstance, which compelled the claimant to execute such discharge voucher.

NATIONAL INSURANCE CO. LTD. *v.* BOGHARA POLYFAB P. LTD. [2009] 1 SCC 267 *relied on.*

The petitioner availed of three insurance policies from the respondent-insurance company which were valid till May 27, 2006. During the last week of October 2006, on account of cyclone, the petitioner's salt fields were damaged, and the petitioner submitted a claim petition to the respondent on

193

November 29, 2006, estimating the loss at Rs. 2.66 crores. After various letters on behalf of the petitioner, a printed receipt was forwarded to the petitioner, mentioning the amount of Rs. 73,24,996 as full satisfaction and discharge of the claim and other options in the receipt were struck off. On receipt of this pre-prepared receipt, the petitioner sent a fax message to the senior divisional manager of the company stating the amount claimed by it was Rs. 2,96,56,803.50 whereas, the amount proposed for settlement was Rs. 73,24,996 and requested to confirm whether it could discharge the voucher as partial settlement. Thereafter, the petitioner signed the receipt and the cheque for a sum of Rs. 73,24,996 was issued to the petitioner. The petitioner, by a letter, dated December 31, 2008, while thanking the company for payment of Rs. 73,24,999 made on November 20, 2008, stated that, it was not satisfied with the quantum of settlement, as the surveyor of the company had not assessed the claim in a prudent manner, for, he did not wait to accept the supportive documents given by them, which would substantiate the actual loss claimed by it, and also stated that there was biased attitude on the part of the surveyor, which had deprived it of its legitimate entitlement. Therefore, a request was made to reopen the claim for a fair and final settlement. This was followed by two letters, which were not replied to. The petitioner addressed a letter to the chairman-cum-managing director of the company, reiterating its earlier stand, and requested for fair and reasonable assessment, by reassessing its claim. A reply was received from the senior divisional manager, stating that the petitioner, having executed the voucher, confirming the amount to be in full and final discharge of the claim without any reservation, the question of reopening the claim did not arise. On receipt of the reply, by a representation, the petitioner requested the matter to be referred for arbitration, in terms of clause 13 of the insurance policy. The company reiterated its earlier stand, stating that the petitioner had accepted the amount as full and final discharge of the claim, and it was not agreeable for arbitration proceedings. The petitioner filed a suit for recovery of the differential amount but the plaint was returned on the ground that there was an arbitration clause in the agreement. On a petition for appointment of an arbitrator :

Held, *allowing the petition, (i) that a claim for appointment of an arbitrator could not be rejected solely on the ground that the settlement agreement or discharge voucher had been executed by the claimant. The facts had to be looked into. A series of letters were sent by the petitioner from November 7, 2006 and there appeared to be no response to any of such communications from the company. The surveyor submitted his report March 2, 2007 and thereafter, the petitioner had been corresponding with the respondent for*

nearly one and half years, and only when it was addressed to the higher official, viz., chairman-cum-manager, on July 7, 2009, did the petitioner receive a reply from the company, which itself was cryptic and did not take the matter anywhere. It was thereafter, that a settlement intimation voucher was sent. There was a communication sent by the petitioner seeking a confirmation whether it could discharge the voucher as partial settlement. The company had not denied or disputed this communication. It was not a case where the petitioner as an afterthought, had addressed the authority after receiving the payment. Series of communications had been made and in each and every letter, the petitioner had pointed out the discrepancies in the surveyor report and its dissatisfaction with it. The plea raised by the petitioner was a bald plea, but the petitioner had been able to prima facie establish by placing materials that there were differences and discrepancies in the surveyor's report and the amount estimated by him. The 40 days' time lag between the receipt of the cheque and request for reopening the claim could not be held to be fatal. The issue appeared to be whether full and final settlement was a conscious action, or whether there was any unfortunate circumstance, which compelled the petitioner to accept the payment. The communication and correspondence between the parties and the plea of acceptance of the cheque in the year 2008 were all material documents, which had to be gone into and these factual matters had to be adjudicated, for which purpose, the matter was required to be dealt with by an arbitral tribunal. The arbitral tribunal could also examine whether the settlement intimation voucher was a pre-prepared one, and whether it was one such document, which was deprecated by the Supreme Court. A sole arbitrator was to be appointed.

Cases referred to :

Deepak Bhandari *v.* Himachal Pradesh State Industrial Development Corporation Ltd. [2015] 5 SCC 518 (para 6)

Gimpex Ltd. *v.* Aanchal Cement Ltd. [2015] 2 LW 916 (para 4)

National Insurance Co. Ltd. *v.* Boghara Polyfab P. Ltd. [2009] 1 SCC 267 (paras 4, 5, 13, 14, 21)

New India Assurance Co. Ltd. *v.* Genus Power Infrastructure Ltd. [2015] 2 SCC 424 (paras 6, 8, 9, 14)

Union of India *v.* Master Construction Co. [2011] 12 SCC 349 (para 14)

O. P. No. 496 of 2013.

V. Ramakrishnan Viraraghavan for the petitioner.

Mrs. S. Radhadevi for the respondent.

195

JUDGMENT

1 T. S. SIVAGNANAM J.—This original petition has been filed under section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") for appointment of an arbitrator to decide the dispute between the petitioner and the respondent, in terms of clause 13 of the terms and conditions of the insurance policy.

2 The facts of the case, which led to the filing of this petition, in short, are as follows :

(i) The petitioner is a company, engaged in production of salt and the respondent is New India Assurance Co. Ltd. The petitioner availed of three insurance policies on May 27, 2006, with the respondent, which is valid till June 26, 2007. This is not in dispute. During the last week of October 2006, on account of cyclone, the petitioner's salt fields were damaged, and the petitioner submitted a claim petition to the respondent on November 29, 2006, estimating the loss at Rs. 2.66 crores. Thereafter, the petitioner submitted another letter, dated November 30, 2006, requesting permission of the respondent to carry out certain initial works on temporary measures, and stating that, the same was also explained to the local surveyor of the respondent. On March 2, 2007, report was submitted by the surveyor. Thereafter, the petitioner, vide letter, dated February 7, 2008, alleged gross negligence and biased attitude on the part of the surveyor, who was deputed by the respondent, and raised various issues in their representation and also requested to release 75 per cent. of the claim amount made by them so as to meet the immediate financial obligations. In this regard, reference was also made to the duties and responsibilities of the surveyor in terms of the manual published by the Insurance Regulatory and Development Authority (IRDA).

(ii) Thereafter, the petitioner addressed another letter, dated February 8, 2008, to the deputy general manager of the respondent, stating that, they submitted claim details along with necessary documents to the Divisional Office, Chennai, and also enclosed copies for his reference. This was followed by another letter, dated February 7, 2008, addressed to the senior divisional manager, at the Chennai office. Among other issues, which were pointed out, the petitioner would state that, in the absence of required data collection and proper measurement/weighment/accounting by the surveyor, they were under the impression that the surveyor has not completed his job, and he would come back for spot inspection to complete his job, but, they were surprised that the final report was submitted. It appears that to these correspondence, there was no reply from the respondent.

(iii) Once again, on June 4, 2008, the petitioner addressed another letter to the senior divisional manager of the respondent, pointing out the facts and stating that, they have been awaiting patiently for settlement for the last 2 years and expressed their disappointment that the claim statement is not in progress at all in a proper and professional manner. This was followed by another letter, dated September 8, 2008, addressed to the deputy general manager, pointing out that the surveyor has submitted his report without even taking into consideration of the petitioner's consent on the loss assessed by them, and the surveyor also did not wait to accept the supportive documents to be given by them, which would substantiate the actual loss. Further, the petitioner stated that, after accepting the said surveyor's recommended payment from the respondent, they will be reconciling, or analysing the settlement details with the concerned and the reserve their right and liberty to represent the matter further with the competent authorities, if required. With these contentions, the petitioner requested for release of payment. Finally, a reply was sent to the petitioner by e-mail from the senior divisional manager, stating that the letter addressed by the petitioner to the deputy general manager, has been received in the Regional Office, and the same is in progress, and it would take approximately 10 to 15 days to settle the payment subject to the terms and conditions of the insurance policy. It is further stated in the said reply that this e-mail is issued without any prejudice. It is thereafter, printed receipt is forwarded to the petitioner, mentioning the amount of Rs. 73,24,996 as full satisfaction and discharge of the claim and other options in the receipt were struck off.

(iv) The petitioner would state that, on receipt of this pre-prepared receipt, they sent fax message to the senior divisional manager, Mr. Rajkumar, stating the amount claimed by them is Rs. 2,96,56,803.50, whereas, the amount proposed for settlement is Rs. 73,24,996, and requested to confirm whether they can discharge the voucher as partial settlement. This fax message is said to be sent by the petitioner to the respondent (Senior Divisional Manager, Mr. M. Rajkumar) on November 17, 2008. To justify the same, print out of the generated receipt has been filed. Thereafter, the petitioner has signed receipt, which has been received by the respondent on November 19, 2008. On November 20, 2008, the cheque, for a sum of Rs. 73,24,996 was issued to the petitioner, and it has been acknowledged by them. The fact regarding the receipt of the cheque is not in dispute.

(v) The petitioner, by letter, dated December 31, 2008, while thanking the respondent for payment of Rs. 73,24,999 made on November 20, 2008, stated that, they are not satisfied with the quantum of settlement, as the

197

surveyor of the respondent has not assessed the claim in a prudent manner, for, he did not wait to accept the supportive documents given by them, which would substantiate the actual loss claimed by them, and they also stated that there is biased attitude on the part of the surveyor, which has deprived them of their legitimate entitlement. Therefore, a request was made to re-open the claim for a fair and final settlement. This was followed by letters, dated February 13, 2009 and March 16, 2009, addressed to the senior divisional manager.

(vi) It is not in dispute that the respondent did not give any reply to any of these three letters, dated December 31, 2008, February 13, 2009 and March 16, 2009. Therefore, the petitioner addressed a letter, dated July 7, 2009, to the chairman-cum-managing director of the respondent, reiterating their earlier stand, and requested for fair and reasonable assessment, by reassessing their claim. It is for this communication, a reply was received from the senior divisional manager, stating that the petitioner, having executed the voucher, confirming the amount to be in full and final discharge of the claim without any reservation, the question of re-opening the claim does not arise.

(vii) The petitioner, on receipt of the reply, by their representation, dated June 18, 2010, requested the matter to be referred for arbitration, as per clause 13 of the insurance policy. The respondent, by reply, dated July 27, 2010, reiterated their earlier stand, stating that the petitioner has accepted the amount as full and final discharge of the claim, and they are not agreeable for arbitration proceedings. Thereafter, the petitioner is said to have filed suit in the original side of this court, being C. S. Sr. No. 27326 of 2012, for recovery of the differential amount, and the plaint was presented before this court on October 5, 2012. However, the registry returned the plaint, stating that there is an arbitration clause in the agreement, hence, the suit is not maintainable. In these circumstances, the present original petition has been filed for appointment of an arbitrator.

3 Learned counsel appearing for the petitioner, after referring elaborately to the entire facts, submitted that there was gross delay in settlement of the petitioner's claim, total inaction and callousness in considering the petitioner's claim, for, the petitioner, to recoup the loss, has been incessantly sending letters, but, there was no reply forthcoming from the respondent's side, and there was also arbitrariness in assessment of the petitioner's claim by the surveyor of the respondent, as he conducted the inspection/survey astutely, without even waiting for the supportive documents, which were to be submitted by the petitioner. Above all, the petitioner were led to believe the surveyor is yet to complete his job, but, by then, the final report

198

has been submitted, which would per se prove that the surveyor is totally biased against the petitioner.

Learned counsel petitioner further submitted that, even prior to the acceptance of the amount of Rs. 73.24 lakhs, by sending fax massage, stated that they are willing to accept the said amount as partial settlement. However, in order to meet with the economic duress, financial constraints, they had accepted the cheque, and thereafter, requested for re-opening the matter for fair and reasonable settlement. Learned counsel submitted that, the issue as to whether the contract has been discharged by recording the satisfaction itself is mixed question of fact and law and this decision is also arbitrable. In support of such contention, reliance has been placed on the decision of the hon'ble Supreme Court in *National Insurance Co. Ltd.* v. *Boghara Polyfab P. Ltd.* reported in [2009] 1 SCC 267) and the decision rendered by me (*Gimpex Ltd.* v. *Aanchal Cement Ltd.* reported in [2015] 2 LW 916). 4

Learned counsel further submitted that, the receipt, which was forwarded to the petitioner was a prepared receipt by the respondent, and this type of receipts are usually obtained by the Government companies and corporations, and the hon'ble Supreme Court, in paragraph No. 49 of the judgment rendered in *National Insurance Co. Ltd.* v. *Boghara Polyfab P. Ltd.* [2009] 1 SCC 267 took note of such procedure being adopted by the Corporations and Government companies, and held that such practice is unfair, irregular and illegal, and requires to be deprecated. 5

Learned counsel further submitted that the counter affidavit filed by the respondent largely proceeds by placing reliance on the decision of the hon'ble Supreme Court in *New India Assurance Co. Ltd.* v. *Genus Power Infrastructure Ltd.* reported in [2015] 2 SCC 424, wherein, it is held that bald plea of fraud, coercion, duress or undue influence, is not enough, and the party, who sets up such plea, must prima facie, establish before the hon'ble Chief Justice or his designate that there was fraud, coercion, duress. Further, learned counsel submitted that, in the said decision, the hon'ble Supreme Court held that, for a period of three weeks, the claimant therein had kept quiet without any demur or protest. Therefore, in that context, it was held to be an afterthought. Learned counsel submitted that time limit for referring the matter for arbitration is not ratio decidendi of the judgment, if this appears to be the stand of the respondent, then, learned counsel would point out as to how the judgment has to be read and the ratio decidendi therein to be culled out, for which purpose, he placed reliance on the decision of the hon'ble Supreme Court rendered in 6

199

Deepak Bhandari v. *Himachal Pradesh State Industrial Development Corporation Ltd.* reported in [2015] 5 SCC 518.

7 Learned counsel for the respondent stoutly assailed contentions putforth by learned counsel for the petitioner by submitting that the claim was assessed in a proper manner, and the surveyor submitted report on March 2, 2007, estimating the loss would be at Rs. 73.32 lakhs. Thereafter, the petitioner has accepted the payment of Rs. 73.24 lakhs, and signed the settlement intimation voucher, dated November 19, 2008, in full and final settlement of the claim, and the cheque was handed-over to the petitioner November 20, 2008. Thereafter, for about 40 days, there is no demur or protest from the petitioner, and it is only thereafter, the petitioner has raised the present dispute. Further, learned counsel submitted that the petitioner received payment on November 20, 2008, but, filed the suit only in the year, 2011, and no reason has been assigned for the interregnum period of delay. Thereafter, the petitioner has filed this petition for appointment of an arbitrator.

8 On these factual contentions, it is submitted by learned counsel for the respondent that the petitioner's claim for referring the matter for arbitration is clearly an afterthought, bald plea, and there can be no allegation of any coercion between two companies and by applying the ratio decidendi of the hon'ble Supreme Court rendered in *New India Assurance Co. Ltd.* v. *Genus Power Infrastructure Ltd.* [2015] 2 SCC 424, this petition is liable to be dismissed.

9 Further, it is submitted by learned counsel for the respondent that the decision rendered by the hon'ble Supreme Court in *New India Assurance Co. Ltd.* v. *Genus Power Infrastructure Ltd.* [2015] 2 SCC 424 was referred to and relied upon by the hon'ble High Court of Delhi, in its recent decision in the case of (*Prabhu Dayal Trilok Chand* v. *Oriental Insurance Co. Ltd.*, in ARB. P. No. 536 of 2014, dated January 6, 2015, and based on this decision also, the petitioner's petition, seeking for appointment of an arbitrator is liable to be dismissed.

10 Heard learned counsel appearing for both parties and perused the materials placed on record.

11 The factual details, which are required to be gone into while examining this petition under section 11(6) of the Act are merit considered.

12 The facts that the petitioner-company have made a claim petition, estimating the loss at Rs. 2.66 crores, and that, a surveyor was appointed, who estimated the loss at rupees 73.32 lakhs, and that, the petitioner has received the payment of Rs. 73.24 lakhs are not in dispute. The only issue, which falls for consideration in this petition, is as to whether the

200

petitioner's claim for referring the matter for arbitration for resolving the dispute is not maintainable on the ground that the petitioner has signed the voucher, in full and final settlement of their claim, and whether they can now turn around and say that the amount paid by the respondent is inadequate and unfair.

The issue, as to whether the claim for appointment of an arbitrator 13
should be rejected solely on the ground that the settlement agreement/discharge voucher had been executed by the claimant, is no longer res integra, as it has been settled by the hon'ble Supreme Court in *National Insurance Co. Ltd.* v. *Boghara Polyfab P. Ltd.* [2009] 1 SCC 267, 284. At this juncture, it is beneficial to refer to the relevant paragraph of the said judgment :

> "24. What is however clear is when a respondent contends that the dispute is not arbitrable on account of discharge of the contract under a settlement agreement or discharge voucher or no claim certificate, and the claimant contends that it was obtained by fraud, coercion or undue influence, the issue will have to be decided either by the Chief Justice/his designate in the proceedings under section 11 of the Act or by the arbitral tribunal as directed by the order under section 11 of the Act. A claim for arbitration cannot be rejected merely or solely on the ground that a settlement agreement or discharge voucher had been executed by the claimant, if its validity is disputed by the claimant.
>
> 25. We may next examine some related and incidental issues. Firstly, we may refer to the consequences of discharge of a contract. When a contract has been fully performed, there is a discharge of the contract by performance, and the contract comes to an end. In regard to such a discharged contract, nothing remains—neither any right to seek performance nor any obligation to perform. In short, there cannot be any dispute. Consequently, there cannot obviously be reference to arbitration of any dispute arising from a discharged contract. Whether the contract has been discharged by performance or not is a mixed question of fact and law, and if there is a dispute in regard to that question, that is arbitrable. But there is an exception. Where both the parties to a contract confirm in writing that the contract has been fully and finally discharged by performance of all obligations and there are no outstanding claims or disputes, courts will not refer any subsequent claim or dispute to arbitration. Similarly, where one of the parties to the contract issues a full and final discharge voucher (or no-dues certificate, as the case may be) confirming that he has received the payment in full and final satisfaction of all claims, and he has no outstanding claim, that amounts to discharge of the contract by

201

acceptance of performance and the party issuing the discharge voucher/certificate cannot thereafter make any fresh claim or revive any settled claim nor can it seek reference to arbitration in respect of any claim.

26. When we refer to a discharge of contract by an agreement signed by both the parties or by execution of a full and final discharge voucher/receipt by one of the parties, we refer to an agreement or discharge voucher which is validly and voluntarily executed. If the party which has executed the discharge agreement or discharge voucher, alleges that the execution of such discharge agreement or voucher was on account of fraud/coercion/undue influence practised by the other party and is able to establish the same, then obviously the discharge of the contract by such agreement/voucher is rendered void and cannot be acted upon. Consequently, any dispute raised by such party would be arbitrable".

14 The above being the law on the subject, it has to be applied by considering the facts of each case. In the judgment rendered by the hon'ble Supreme Court in *New India Assurance Co. Ltd.* v. *Genus Power Infrastructure Ltd.* [2015] 2 SCC 424, claim was made for arbitration as against New India Assurance, after about three weeks after discharge voucher was signed by the claimant. The hon'ble Supreme Court, after taking into consideration of its intra court judgments, viz., in cases of *National Insurance Co. Ltd.* v. *Boghara Polyfab P. Ltd.* [2009] 1 SCC 267 and *Union of India* v. *Master Construction Co.* reported in [2011] 12 SCC 349, held that bald plea of fraud, coercion and duress or undue influence is not enough and the party, who sets up a plea, must prima facie establish the same by placing materials before the Chief Justice, or his designates. After stating the above legal position, the hon'ble Supreme Court analysed the facts of the said case and found that the claimant therein did not raise any protest or demur soon after the letter of subrogation was signed, and the notice alleging fraud, or coercion, was issued three weeks thereafter, and therefore, it was held that, upon execution of letter of subrogation, there was full and final settlement of the claim.

15 In my view, whether the claim can be non-suited on the ground that that the petitioner has signed the settlement voucher, cannot be decided sans facts. Therefore, facts of the case that needs to be looked into is to examine as to whether the discharge was conditional, or unconditional, and whether there was any precarious circumstance, which compelled the petitioner to execute such discharge voucher.

In the preceding paragraphs of this order, factual position has been stated. As pointed out earlier, there were series of letters sent by the petitioner from November 7, 2006, and there appears to be no response to any of such communications from the respondent. The surveyor submitted his report March 2, 2007 and thereafter, the petitioner has been corresponding with the respondent for nearly one and half years, and only when it is addressed to the higher official, viz., chairman-cum-manager, on July 7, 2009, the petitioner received reply from the respondent, by e-mail, dated August 12, 2008, which itself is cryptic and does not take the matter any where. It is thereafter, settlement intimation voucher was sent. The copy of the same has been placed in page No. 85 of the paper book. On the bottom of the said page, there is a written endorsement addressed to the senior divisional manager of the respondent, which is reproduced hereunder : 16

> "You are award that amount claim by us Rs. 2,96,56,803.50. Amount proposed by you as settlement Rs. 73,24,996.00. Kindly, confirm whether we can discharge the voucher as 'partial settlement'."

The communication, quoted supra, is said to have sent by fax on August 17, 2008, to the respondent and the print out of the same is placed at page No. 86 of the paper book. It is true that, this communication has not been acknowledged by the respondent, and there is nothing to show that this was accepted by them or denied. However, it is the petitioner's case that there was communication. Conspicuously, in the counter affidavit, there is no dispute, or denial to this communication. Be that as it may, at page No. 87 of the paper book, settlement voucher signed by the petitioner finds place and at page 89, copy of the cheque leaf issued to the petitioner was placed. 17

Going by factual situation in the instant case, it appears that, it is not a case, where the petitioner as an afterthought, has addressed the authority after receiving the payment. Series of communications have been referred to in the preceding paragraphs, where, in each and every letter, the petitioner has pointed out the discrepancies in the surveyor report and their dissatisfaction to the same. Further, the petitioner also pointed out that they were under the impression that the surveyor has not yet complete his job and he would come back to conduct spot inspection, and they were in possession of supportive documents to be submitted to him, to substantiate their claim for loss, but, by then, the final report has been submitted by the surveyor. This communication has been placed before this court and this court is fully convinced that, it is not a case, where plea raised by the petitioner is a bald plea, but the petitioner has been able to prima facie establish by placing materials before this court that there were differences 18

203

and discrepancies in the surveyor's report and the amount estimated by him.

19 With regard to the delay of 40 days, which has been stated by the respondent to reject the claim of the petitioner, cannot be computed as stated by the respondent. But the correspondence between the parties commencing from November, 2006 has to be taken into consideration. Though the surveyor's report was submitted on March 2, 2007, the payment was made only on November 20, 2008. The respondent has admitted that, in the interregnum period, the petitioner was refusing to accept the amount, which would be probably due to the fact that they were dissatisfied with the surveyor's report. Therefore, 40 days' time lag between the receipt of the cheque and request for re-opening the claim made on August 31, 2008, cannot be held to be fatal nor can the petitioner can be non suited on the said ground.

20 Other factor, which has been pointed out by the petitioner is that though the petitioner, vide letters, dated December 31, 2008, February 13, 2009 and March 16, 2009, addressed to the senior divisional manager, sought for re-opening the claim for a fair and final settlement, the same did not evoke any response. Therefore, final request has been made to the higher official, viz., chairman-cum-manager on July 7, 2009. It is only thereafter, the respondent has opened up their mind and stated that they cannot re-open the claim, as there is full satisfaction. Thereafter, the petitioner by letter, dated June 18, 2010, invoked the clause 13 of the contract of the insurance policy, and requested the matter to be sent for arbitration, to which, the respondent, vide reply, dated July 27, 2010, rejected the petitioner's request and refused to refer for arbitration on the ground that the petitioner has accepted the payment as full and final settlement.

21 Therefore, issue appears to be as to whether full and final settlement was a conscious action, or whether there was any unfortunate circumstance, which compelled the petitioner to accept the payment. The communication and correspondence between the parties and the plea of acceptance of the cheque in the year 2008 are all material documents, which have to be gone into and these factual matters have to be adjudicated, for which purpose, the matters requires to be dealt with by an arbitral tribunal. The arbitral tribunal can also examine as to whether the settlement intimation voucher was a pre-prepared one, and whether it was one such document, which was deprecated by the hon'ble Supreme Court in *National Insurance Co. Ltd.* v. *Boghara Polyfab P. Ltd.* [2009] 1 SCC 267, 294. At this stage, it would be worthwhile to refer the observations of the hon'ble Supreme Court in regard to the undated receipts :

"49. Therefore, undated receipts are taken so that it can be used in respect of subsequent payments by incorporating the appropriate date. But many a time, matters are dealt with so casually that the date is not filled even when payment is made. Be that as it may. But what is of some concern is the routine insistence by some Government Departments, statutory corporations and Government companies for issue of undated 'no-dues certificates' or 'full and final settlements vouchers' acknowledging receipt of a sum which is smaller than the claim in full and final settlement of all claims, as a condition precedent for releasing even the admitted dues. Such a procedure requiring the claimant to issue an undated receipt (acknowledging receipt of a sum smaller than his claim) in full and final settlement, as a condition for releasing an admitted lesser amount, is unfair, irregular and illegal and requires to be deprecated".

As pointed out earlier, 40 days' delay period cannot be a sole ground to non suit the petitioner, since, there were several correspondence between the parties, most of which are one sided, as the respondent did not reply to any of the correspondence by the petitioner. Hence, this court is of the firm view that the petitioner has made out their case. 22

For the reasons stated hereinabove, I appoint, Justice K. Govindarajan, retired judge of High Court, Madras, as the sole arbitrator, to enter upon the reference and after issuing notice to the parties and upon hearing them, pass an award as expeditiously as possible, preferably, within a period of six months from the date of receipt of the order. The learned arbitrator is at liberty to fix the remuneration and other incidental expenses, which shall be borne by the parties equally. In the event of the respondent not entering appearance, the same may be borne by the petitioner at the initial stage to form part of the main cause. 23

The original petition is, accordingly, allowed, leaving the parties to bear their own costs. 24