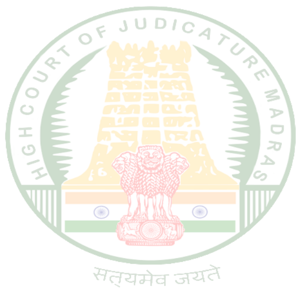

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 25.11.2024	Pronounced on:06.12.2024

CORAM

THE HONOURABLE **MR.JUSTICE P.B.BALAJI**

Arb.O.P.(Comm.Div.) No.319 of 2024

Tagros Chemicals India Private Limited,
having its Registered Office at
Tagroshouse, 4th Floor, No.4 (Old 10),
Clubhouse Road, Annasalai,
Chennai, Tamil Nadu, India - 600 002
Represented by its Authorised Signatory ... Petitioner

vs.

United India Insurance Company Limited,
having its Registered Office at
24, Whites Road, Royapettah,
Chennai , Tamil Nadu, India - 600 014
Also at:
Kirti Tower Tilak Road,
Podium Floor, In front of SSG Hospital,
Vadodara, Gujarat -390 001.
Represented by its Authorised Signatory ... Respondent

PRAYER: Arbitration Original Petition filed under Sections 11 (6) of the Arbitration and Conciliation Act, 1996 to appoint Mr.Justice Shiavax J Vazifdar (Retired), Former Chief Justice, Punjab & Haryana High Court, or

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any other person as this Court may deem fit, proper and appropriate to act as the Sole Arbitrator to enter into reference and arbitrate the disputes that have arisen between the petitioner and the respondent and award costs of the present petition to the petitioner.

For Petitioner	:	Mr.N.Vijay Narayan, Senior Counsel for Mr.Abishek Jenasenan, Ms.Smiti Tewari, Mr.Aditya Nair Mr.Shreyas Lele Ms.Vaidehi
For Respondent	:	Mr.M.S.Krishnan, Senior Counsel for Mr.Keerthikiran Murali

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ORDER

The Insurer, aggrieved by the refusal of the Insurance Company to agree to the disputes being adjudicated by arbitration as contemplated under the insurance policy, has filed the present Arbitration Original Petition seeking appointment of Hon'ble Justice Shiavax J. Vazifdar (Retd.), former Chief Justice of Punjab and Haryana High Court, or any other person as the

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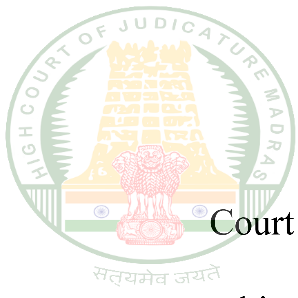
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Court may deem fit, to act as the sole arbitrator, to enter into reference and arbitrate the disputes that are arising between the petitioner and the respondent.

2. I have heard Mr. Vijay Narayan, learned Senior Counsel for Mr. Abishek Jenasenan, learned counsel for the Petitioner and Mr.M.S.Krishnan, learned Senior Counsel for Mr.Keerthikiran Murali, learned counsel for Respondent.

3. The learned Senior Counsel, Mr. Vijay Narayan would take me through the insurance policy issued by the Respondent in the year 2019 and contend that during the subsistence of the said policy, on 07.04.2020, there was a fire mishap at Plant No.4 of the petitioner which spread uncontrollably and led to destruction of the Plant as well as stock and machinery inside the Plant.

4. According to the learned Senior Counsel, the claim made to the Respondent insurer was two-fold. One was in respect of a material damage

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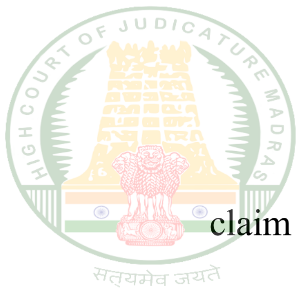
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claim and the other was in respect of a business interruption loss claim. The learned Senior Counsel would submit that in respect of the material damage claim, the Respondent Insurer has already released a sum of Rs.15 Crores as an interim payment and subsequently, on 07.06.2022, a second interim payment to the tune of Rs.7.5 Crores was also released by the Respondent. In respect of the balance claim made by the Petitioner, the learned Senior Counsel would submit that since the Respondent is disputing the claim, the matter will have to go for arbitration. The learned Senior Counsel would further submit that with regard to the business interruption claim, the Respondent has not admitted the claim and even in the reply notice to the arbitration invocation notice, the Respondent has clearly stated that the dispute was not arbitrable.

5. The learned Senior Counsel would take me through the relevant Clauses in the All Risk Policy bearing No.1814001119P103131495, dated 27.05.2019, which is the subject insurance policy applicable to the fire mishap that occurred in April of 2020.

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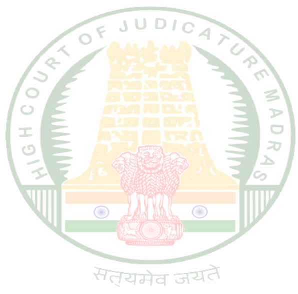
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6.The learned Senior Counsel would invite my attention to Section I which pertains to Material Damage and to Section II which relates to Business Interruption. Referring to the above two Sections, the learned Senior Counsel would submit that when the business interruption claim is dependent on, and also arising out of the Section I- material damage, the said issue would also have to be decided only by the arbitrator and is not open to the Respondent, Insurance Company to repudiate the said portion relating to business interruption claim alone.

7. In this regard, the learned Senior Counsel would place reliance on the following decisions: *SBI General Insurance Co. Ltd. v. Krish Spinning,* reported in *2024 SCC OnLine SC 1754* and *Payu Payments Private Limited v. New India Assurance Co. Ltd.,* Reported in *2024 SCC OnLine Del 6777*. The learned Senior Counsel would conclude his submissions praying for appointment of the sole arbitrator.

8. Meeting the said submissions of the learned Senior Counsel for the Petitioner, Mr.M.S.Krishnan, the learned counsel appearing for the

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Respondent Insurance Company would submit that when the claim has been repudiated right from the inception, the dispute cannot be referred to arbitration. The learned Senior Counsel would further submit that it was not as if the Petitioner was without remedy and he could always approach the Civil Court in respect of the business interruption claim.

9. The learned Senior Counsel would further submit that if the Petitioner opts to canvass both the claims together in a single Forum, the Petitioner could always opt to file a Civil Suit even in respect of the material damage claim and stated that the Respondent would not raise the objection of maintainability of the suit in respect of the material damage position, on the ground that there exists an arbitration clause. The learned Senior Counsel, Mr. M.S. Krishnan would also place reliance on Section II, business interruption clause and contend that the claim for business interruption would refer to the general conditions of the arbitration agreement, especially condition 12 which is reproduced for easy reference.

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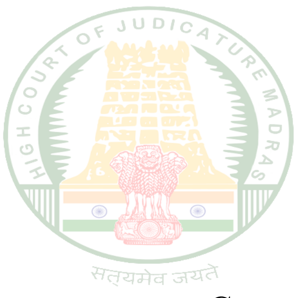

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10. Referring to the said condition, Mr.M.S.Krishnan, learned Senior Counsel would contend that arbitration would be possible only when liability is admitted by the Insurer and when it has been agreed to between the parties that difference or dispute would not be referred to arbitration, if the insurer has disputed or not accepted liability under or in respect of this policy, then the Petition seeking appointment of arbitrator is clearly not maintainable.

11. The learned Senior Counsel would place reliance on the following decisions:

(i) *Oriental Insurance Company Limited v. Nabheram Power and Steel,* Reported in *2018 6 SCC 534*,

(ii) *United India Insurance Company Limited v. Hyundai Engineering and Construction,* Reported in *2018 17 SCC 607,*

(iii) *Kohinoor Steel V Bajaj Allianz,* Reported in *2011 SCC Online Cal 3252,*

(iv) The Vulcan Insurance Co V Maharaj Singh Reported in 1976 1 SCC 943, Sukanya Holdings V Jayesh H Pandya, Reported in *2003 5 SCC 531*.

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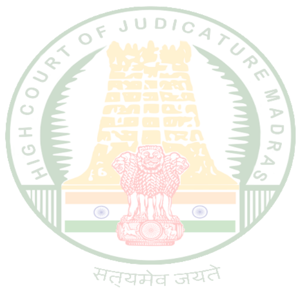
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12. The learned Senior Counsel would further submit that the Petitioner has paid two separate premiums in respect of material damage coverage as well as business interruption coverage and even two separate surveyors were appointed who had given two separate independent reports. Therefore, he would contend that the two claims were independent and merely because an arbitration Clause was agreed upon, it would not necessarily bind the Insurer to go for arbitration.

13. Having considered the submissions advanced by the learned Senior Counsels on either side and also having gone through the entire records filed by way of typeset of documents and after considering the pleadings namely the petition, counter as well as the rejoinder filed. I am able to see that a short but interesting question that arises for consideration is as to when the Insurance Company repudiates the claim, whether the claim can be referred to arbitration. The following Clauses in the Risk Policy dated 27.05.2019, assume significance and relevance for the purposes of designing the present dispute.

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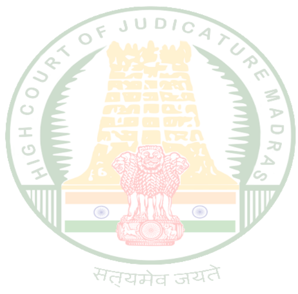
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"1. <u>Section I - Material Damage</u>,

"In Consideration Of the insured paying to the Company, the premium shown in the schedule, the Company agrees (subject to the terms, conditions and exclusions contained herein or endorsed or otherwise expressed hereon which shall so far as the nature of them respectively will permit be deemed to be conditions precedent to the right of the Insured to recover hereunder) that if after payment of the premium any of the property insured be accidentally physically lost destroyed or damaged other than by an excluded cause during the period of insurance or any subsequent period in respect of which the insured shall have paid and the Insurer shall have accepted the premium required for the renewal of this policy, the insurer will pay to the insured the value of the property at the time of the happening of its accidental physical loss or destruction or damage (being hereinafter "termed Damage) or at its option reinstate or replace such proeprty or any part thereof."

2. <u>Section II - Business Interruption</u>,

" The Insurers agree that if during the period of insurance the business carried on by the insured at all the premises specified & listed in the Schedule is interrupted or interfered with in consequence of loss destruction or damage indemnifiable under Section I, then the Insurers shall indemnify the Insured for the amount of loss as hereinafter defined resulting from such interruption or interference provided that the liability of the Insurers in no case exceeds the total sum insured or such other sum as may hereinafter be substituted therefore by endorsement signed by or on behalf of the Insurers."

3. <u>Condition 12</u> of the Industrial All Risk Insurance Policy dated 25.05.2019.

"12. If any difference shall arise as to the quantum to be paid under this policy (liability being otherwise admitted) such difference shall independently of all other questions be referred to the decision of an arbitrator to be appointed in writing by the parties in difference, or if they cannot agree upon a single arbitrator, to the decision of two dis-interested persons as arbitrators of whom one shall be appointed in writing by each of the parties within two calendar months after having been required so to do in writing by the other party in accordance with the provision of the Arbitration

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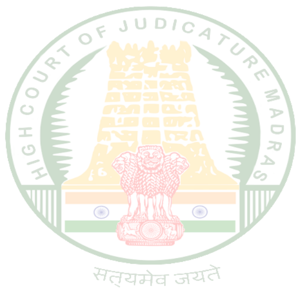
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> *Act, 1940, as amended from time to time and for the time being in force. In case either party shall refuse or fail to appoint arbitrator within two calendar months after receipt of notice in writing requiring an appointment, the other party shall be at liberty to appoint sole arbitrator and in case of disagreement between the arbitrators, the difference shall be referred to the decision of an umpire who shall have been appointed by them in writing before entering on the reference and who shall sit with the arbitrators and preside at their meetings. It is clearly agreed and understood that no difference or dispute shall be referable to arbitration as hereinbefore provided, if the Company has disputed or not accepted liability under or in respect of this policy. It is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator, arbitrators or umpire of the amount of the loss or damage shall be first obtained."*

14. Before I delve into the facts of the present case, it would be relevant to discuss the decisions on which the learned Senior Counsel has placed reliance on. Mr.M.S.Krishnan, learned Senior Counsel has placed reliance on the decision of *Oriental Insurance Company Limited v. Nabheram Power and Steel,* reported in *(2018) 6 SCC 534*, where the Hon'ble Supreme Court while deciding a similar arbitration Clause in an agreement, held that since the Insurer has disputed and not accepted the liability, the dispute cannot be referred to Arbitration.

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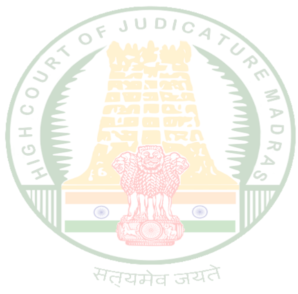
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15. In *United India Insurance Company Limited v. Hyundai Engineering and Construction,* reported in *(2018) 17 SCC 607,* the Hon'ble Supreme Court held that the arbitration Clause has to be interpreted strictly and deciding on a similar Clause which was before the Hon'ble Supreme Court, it was held that the arbitration Clause will get activated or kindled only if the dispute between the parties is limited to the quantum to be paid under the policy and the liability should be unequivocally admitted by the Insurer, which is a precondition and sine qua non for triggering the arbitration clause.

16. The learned Senior Counsel then relied on the decision of the Calcutta High Court, where it was held that, though it is open to the parties to limit the scope of the arbitration agreement and some disputes arising out of the transaction between the parties alone be covered by the arbitration agreement and other disputes to be kept outside the purview thereof. On facts, the Court finding that the liability in respect of one item was not admitted by the respondent at any stage, clearly took it out of the realm of arbitrability.

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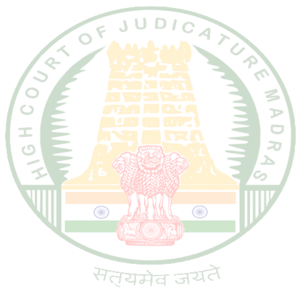
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17. In later decisions, the Hon'ble Supreme Court in *Vidya Drolia and others v. Durga Trading Corporation,* reported in *(2019) 20 SCC 406* and *In re,* interplay between arbitration agreement under Arbitration and Conciliation Act 1996 and in Indian Stamp Act 1899, reported in *2023 INSC 1066,* it is held that once an arbitration agreement exists between the parties, then the option of approaching the Civil Court is unavailable to them and in such a scenario, if the parties seek to raise a dispute, they necessarily have to do so before the arbitral tribunal. At the stage of Section 11 Petition, the reference Court cannot asurp the power of arbitral Tribunal which was intended by the parties and ultimately held that the existence of the arbitration agreement in the insurance policy was not disputed by the Insurer and the dispute regarding accord and satisfaction raised by the appellant can be adjudicated by the Arbitral Tribunal as a preliminary issue.

18. In a more recent decision, Delhi High Court in *Payu Payments Private Limited v. New India Assurance Co. Ltd. Reported in 2024 SCC OnLine Del 6777,* held that, the reference Court cannot return a finding

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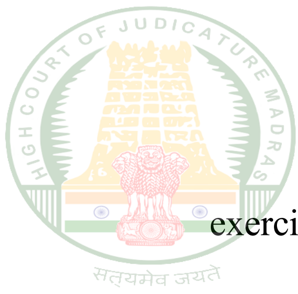
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exercising power under Section 11 that the dispute is not arbitrable as the respondent has repudiated the petitioner's claim. In fact, in the said decision, the Delhi High Court has considered both the decisions in *Oriental Insurance Company Limited v. Nabheram Power and Steel,* reported in *2018 6 SCC 534* and *United India Insurance Company Limited v. Hyundai Engineering and Construction,* reported in *2018 17 SCC 607*, which have been relied on by learned Senior Counsel appearing for respondent, Insurance Company.

19. Finding that both these decisions were rendered before the decision of *SBI General Insurance Co. Ltd. v. Krish Spinning Reported in 2024 SCC OnLine SC 1754* and *Vidya Drolia and others v. Durga Trading Corporation reported in (2019) 20 SCC 406*, which have resulted in a paradigm shift in the scope of examination via Section 11, the Delhi High Court held that, the High Court sitting under Section 11 cannot examine the aspect of arbitrability of the dispute. The Delhi High Court has also made specific reference to the ratio laid down in *SBI General Insurance Co. Ltd's case,* that the scope of enquiry at the stage of appointment of arbitrator is

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limited to scrutiny of prima facie existence of arbitration agreement, and nothing else and the law of the Supreme Court laying down in clear terms that, the scope of examination at a Section 11 stage should be minimized and as many issues in controversy as possible have to be relegated to the arbitral tribunal for decision. Both in *Oriental Insurance Company Limited v. Nabheram Power and Steel* reported in *(2018) 6 SCC 534 and United India Insurance Company Limited v. Hyundai Engineering and Construction* reported in *(2018) 17 SCC 607,* though there were similar Clauses as in the present case, in both the cases the Insurance Company had categorically denied to accept liability, even on account of material damage and interpreting the arbitration Clause, the Hon'ble Supreme Court held that, the dispute could not be referred to arbitration. The facts of the present case stand on a different footing. From the All Risk Policy, which is the basis for the claim and the repudiation, it is seen that the very same policy containing the arbitration Clause at General Condition 12, incorporates two Sections which has already been reproduced for ease of convenience.

20. Section I, pertains to material damage. Admittedly in the instant

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case, the respondent has agreed to indemnify the petitioner in respect of material damage suffered by the petitioner. In fact, a sum of Rs.22.5 crores has already been released as an interim payment. There is no dispute with regard to reference of the balance claim to arbitration, since it clearly falls within the quantum aspect of dispute between the parties.

21. However, the issue now is regarding Business Interruption, which is Section II of the All Risk Policy. As can be seen from the extracted portion, the respondent has agreed to indemnify the petitioner for any interruption or interference of business as a consequence of loss, destruction or damage indemnifiable under Section I. Therefore, it is clear that the indemnity Clause in respect of business interruption is directly linked to Section I – Material damage. The said Clause clearly indicates that the respondent has agreed to make good any business interruption loss which has arisen as a consequence of loss which is indemnifiable under Section I. It is only capped at the total sum insured. Therefore, it is not as if the Policy does not contemplate indemnification of a business interruption loss. Further, when there is no repudiation of the material damage claim except

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for questioning the quantum, as a corollary and consequence, when the claim is made under the head 'business interruption' arising out of the very same fire mishap resulting in material damage to the Petitioner, it is to be seen whether the Respondent can take shelter under the Condition 12 and claim that liability is not admitted and therefore, the question cannot be referred to the decision of the Arbitrator.

22. I am unable to agree with the submissions of the learned Senior Counsel appearing for the Respondent. The incident that has triggered the claim is admittedly one, unlike in the case of *Kohinoor Steel* and the loss claimed under the head 'business interruption' is directly and substantially connected to 'material damage' which is admittedly accepted to be indemnified by the insurance company. In fact, as already discussed above, the Respondent has already released substantial payments towards 'material damage' and they are only disputing the claim of the Petitioner on quantum. Therefore, in my considered view the claim for business interruption cannot be dissected or segregated from the total claim made by the Petitioner, though it may be under two heads for which separate premiums have been

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paid. The documents that may be relied on by the parties and the evidence that may be let in would also be the same, leave alone the same parties being examined as witnesses before either the Arbitrator or the Court.

23. As held by Hon'ble Supreme Court in *SBI General Insurance Co. Ltd.*, (referred herein supra) when a valid arbitration agreement exists, then the reference cannot fall back on *'Eye of the Needle'* and 'ex facie meritless' tests, since the principles of modern arbitration place arbitral autonomy and judicial non-interference on the highest pedestal. Here having found that business interruption loss is related to material damage, it is not open to the Insurance Company to contend that since the claim 'business interruption loss' is repudiated, the said issue cannot be referred to the decision of the Arbitrator.

24. The decisions relied on by learned Senior Counsel Mr.M.S.Krishnan appearing for the Respondents is also clearly distinguishable on facts. In fact, as held by the Hon'ble Delhi High Court in *Payoo Payment's* case, (referred herein supra), there has been a shift in the

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legal position with the pronouncement of the Hon'ble Supreme Court in *SBI General Insurance Co. Ltd. v. Krish Spinning*, and consequently the decisions of the Hon'ble Supreme Court in *Oriental Insurance Company and United India Insurance Company*, have been watered down. In the decision of the Hon'ble Calcutta High Court, the claim was in respect of two distinct items, namely, a crane and an overhead tank and with the High Court finding that the claim on the count of the crane was beyond the scope of the arbitration agreement, it was held that the arbitration could proceed only in respect of the overhead tank and not the crane. Though much reliance has been placed on by learned Senior Counsel on this decision, to apply to the facts of the case, I am unable to countenance the said contention, because in the said case before the Hon'ble Calcutta High Court, the items in respect of which the claim was made were entirely distinct and different, namely, a crane and an overhead tank. However, in the present case, there is no such distinctiveness in respect of the subject matter of the claim. Both the 'material damage' as well as the 'business interruption claim' arise out of the fire accident that occurred on 07.04.2020 and in fact, as already discussed even the claim under ' business interruption loss' is directly

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associated with the 'material damage' claim.

25. Further, the learned Senior Counsel appearing for the Petitioner would also invite my attention to the communication of the Insurance Regulatory and Development Authority of India (IRDAI) dated 27.10.2023, where it has been stated that pursuant to the reference by the Hon'ble Supreme Court of India, the IRDAI has undertaken a comprehensive review exercise of the arbitration Clauses that are prevalent across the general insurance industry and found the necessity to amend them. The insurance companies are bound by the regulations of the IRDAI and it is high time that the IRDAI takes earnest steps to review its archaic arbitration clauses in the insurance policies, to be in tune with the present times and also the latest legal position.

26. Be that as it may, in the present case I am unable to accept the contention of the Insurance Company that since they are repudiating the business interruption claim part, the same cannot be referred to arbitration. Since the business interruption loss claim is clearly dependent on the

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material damage claim which is accepted even by the Insurance Company under the policy, it has to be decided by arbitration alone. It is not as though the claims for material damage and business interruption are totally distinct and unconnected altogether. The very business interruption Clause in Section II itself, clearly refers to the indemnity Clause to material damage suffered by the policy holder. Therefore, both the claims are intertwined and cannot be separated, relegating the parties to litigate before different Forums, one before the Arbitrator and another before the Civil Court.

27. Even in *Oriental Insurance Company Limited's case* (as discussed herein supra), the Hon'ble Supreme Court held that where an arbitration clause can be interpreted in a way that denial of a claim would itself amount to dispute and therefore, it has to be referred to arbitration would apply to the facts of the present case, especially since I have already found that the claims are related and connected to each other and not separate and distinct as claimed by the respondent Insurance Company.

28.For all the above reasons, I am inclined to accept the prayer for

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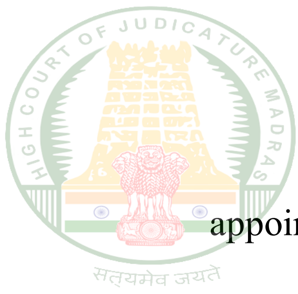
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appointment of the sole Arbitrator in the matter. **Mr.Justice V.Ramasubramanian, Judge (Retd) of Hon'ble Supreme Court, Old No.12/2, New No.15, Town Planning Scheme Road, Raja Annamalaipuram, Chennai, Tamil Nadu – 600 028 / K-90Aa, 1st Floor, Hauz Khas Enclave, Delhi – 110 016**, is appointed as the sole arbitrator. The sole Arbitrator is directed to enter upon reference and adjudicate the dispute in accordance with law.

29. The learned Arbitrator is entitled to fix his fees as per the Schedule-IV to the Act. This Court further requests the learned Arbitrator to endeavor to decide the dispute as expeditiously as possible, however, not later than six (6) months from the date of his entering into reference.

30. Accordingly, this Arbitration Original Petition is allowed.

06.12.2024

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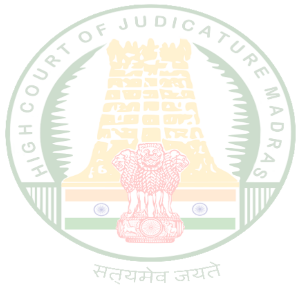

P.B.BALAJI, J.,

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Arb.O.P.(Comm.Div.) No.319 of 2024

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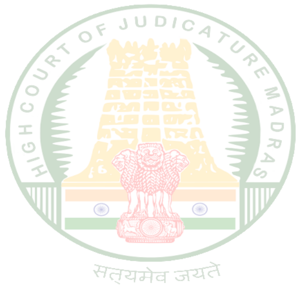
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