** **"**Interim Order passed by AP High Court dated 22/10/2009 staying the cancellation Order. IRDA contesting the Case."**

REF:IRDA/ORD/SUR/34/09/2009

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**ORDER**

**OF**

**THE INSURANCE REGULATORY AND DEVELOPMENT AUTHORITY**

**AGAINST**

**KALYAN PRASAD SEN**

1. All surveyors and loss assessors functioning in the general insurance sector are subject to the provisions of Section 64UM read with Section 42D of the Insurance Act, 1938 (hereinafter called 'the Act') as also the provisions of the Insurance Surveyors and Loss Assessors (Licensing, Professional Requirement and Code of Conduct) Regulations, 2000 (hereinafter referred to as 'the Regulations').

2. Kalyan Prasad Sen (hereinafter referred to as 'the Surveyor') was granted a license by the Insurance Regulatory and Development Authority (hereinafter referred to as 'the Authority') to carry out survey and loss assessment vide license no. SLA-14633/2006-2011 dated November 16, 2006 which is valid up to December 8, 2011 and is the subject matter of the present proceedings.

3. While dealing with the issue under consideration, the following facts are relevant and hence detailed below:

   - A Special Civil Application (SCA) No. 7095/08 was filed by one M/s Giriraj Pharma before the Gujarat High Court at Ahmedabad, in which M/s.Kaypsens Surveyors Pvt. Ltd.,

M/s.United India Insurance Company Limited (the insurer) and the Authority were impleaded as respondents.

- In the petition, while challenging the incomplete settlement of their insurance claim by the insurer, the petitioner had also contended that one Dinesh Chand Jain, a licensed surveyor and loss assessor of the Authority, who was deputed by the insurer for the work of survey and loss assessment for the petitioner's insurance claim that was lodged with him, in association with the Surveyor, had carried out the work of survey and loss assessment as a 'corporate surveyor and loss assessor', in the name and style of 'M/s Kaypsens Surveyors Pvt. Ltd" without being licensed as a surveyor and loss assessor by the Authority.

- Vide an order dated 5th September, 2008, the court disposed off the petition with a direction to the insurer to pay the undisputed amount of the claim to the petitioner, who was incidentally also directed to approach the consumer forum in respect of the remaining claim amount.

- In compliance thereof, M/s Giriraj Pharma filed a consumer case being CC No. 907/2008 before the District Consumer Forum, Vadodara which was allowed vide order dated June 01, 2009, against which the insurer filed an appeal before the State Forum which is presently pending. However, aggrieved by the order of the Gujarat High Court, both the insurer and M/s.Kaypsens Surveyors Pvt. Ltd. filed LPA Nos. 1272/08 and 1273/08 respectively.

- However, the Division Bench of the High Court vide its order dated January 21, 2009, upheld the order of the single judge and disposed off the appeals on the ground that since the

claimants had already moved the Consumer Forum and the matter was pending before the said forum, the same was to be considered by the forum itself. The court further observed that appropriate action in accordance with law was to be taken by the Authority in case the surveyor and loss assessor as licensed by the Authority was found to have committed any violations of the provisions of the Insurance Act, 1938 and the IRDA Act, 1999.

4. Having regard to these facts as also the observations of the Division Bench of the Gujarat High Court, the Authority issued a notice dated September 23, 2008 to the surveyor calling upon him to show cause as to why appropriate action should not be initiated against him. The surveyor replied to the notice vide his letter dated October, 10, 2008, in which he inter-alia stated as follows :-

   i. He had associated with another licensed surveyor and loss assessor; Dinesh Chand Jain and formed an entity i.e. 'M/s Kaypsens Surveyors Pvt. Ltd.', Insurance Surveyors and Loss Assessors, in 2002, registered with RoC, Ahmedabad.

   ii. The survey related work was allotted by the insurance companies to both of them in their individual names. However, that work was done jointly by them and reports thereof were signed either jointly or singly by him or Dinesh Chand Jain.

   iii. As per his understanding of the licensing provisions of the Insurance Act, a company or a firm was required to have a license to act as surveyor and loss assessor only in case all its directors, individually though eligible for a surveyor's license, did not possess the individual surveyor's license.

iv. As they did not consider it necessary to obtain a surveyor's license for their corporate firm, it was not licensed.

5. Having regard to the facts of the case, IRDA issued a notice of hearing dated March 03, 2009, upon the surveyor providing him an opportunity of personal hearing on April 02, 2009.

6. The surveyor appeared before the Authority for the hearing on the scheduled date and reiterated the contentions advanced earlier. He admitted of signing on the letter heads of the corporate firm; M/s Kaypsens Surveyors Pvt. Ltd., Insurance Surveyors and Loss Assessors, in their capacity as individual surveyor and loss assessor license holders, but however pointed out that as the license of his associate i.e. Dinesh Chand Jain had expired on August 25, 2008 and his application seeking renewal of license had not been granted by the Authority, he had stopped accepting new assignments since the date of the expiry of the license of Dinesh Chand Jain on August 25, 2008. He further emphasized that he had not violated any of the provisions of the Insurance Act or the IRDA Act.

7. Upon the conclusion of the hearing, the surveyor forwarded his written submission vide his letter dated April 09, 2009 with a request that the Authority treat the contents therein as minutes of the said hearing. In terms of these submissions, while reiterating the contentions advanced earlier, the surveyor contended that he had at no stage, made any false statement, which made him ineligible for obtaining a license and that he had not obtained any disqualification as mentioned in Section 42(D) of the Act, subsequent to the grant of license to him and that he had acted in accordance with his understanding of the statutory and regulatory

framework, licensing regulations and related provisions thereof that apply to him as a licensed surveyor and loss assessor. He further stated that in case any of the provisions had been violated, then the same was only on account of ignorance of law and committed without any intention to violate the law.

8. Upon consideration of the facts and circumstances of the case, the submissions made by 'the Surveyor' in writing and during the course of the personal hearing, it is observed as follows:-

   i. Section 64UM(1)(D)(ii) of the Act as also Regulation 4(1) of the Regulations categorically provide that where an applicant seeking a license to act as a surveyor or loss assessor is a company or a firm, it is required to satisfy the Authority that all its directors or partners as the case may be, possess one or more of the qualifications specified in Section 64UM(1)(D)(i) of the Act and that none of such directors or partners suffer from any of the disqualifications mentioned in Section 42(4) of the Act. This unequivocally means that notwithstanding the directors/partners of a corporate or a firm, fulfilling the prescribed qualifications and also being licensed to operate as a surveyor and loss assessor, the corporate or the firm would also have to be necessarily licensed to operate as a corporate surveyor and loss assessor.

   ii. In the facts of the given case, the surveyor was granted a license to act as a surveyor and loss assessor as an individual only. So also was the case of other licensed surveyor and loss assessor; Dinesh Chand Jain. Admittedly, both these licensed surveyor and loss assessors were undertaking the work of survey and loss assessment and submitting their reports under the umbrella of the entity 'M/s Kaypsens Surveyors

Pvt. Ltd', which admittedly is a registered entity but not licensed to act as a corporate surveyor and loss assessor.

iii. As is apparent from a cumulative reading of the facts of the case and the provisions of the law referred to above, there are no two views about the fact that an entity who seeks to function as a surveyor and loss assessor, be it an individual or a firm, is required to be licensed by the Authority and no leeway is provided in case of a company whose directors are holding individual surveyor licenses. The contention that the firm per se was not functioning as a licensed surveyor and loss assessor and that the surveyor related works were being carried out as an individual, though submitted under the letter head of the corporate firm, carries no weight in as much as the surveyor related activities carried out whether singly/jointly with another surveyor, when submitted under the letter head of the corporate surveyor firm, gives rise to the mistaken assumption of any right thinking person that the corporate firm is a licensed entity.

*iv.* Although the surveyor has tried to justify his actions by attributing them to his understanding of the relevant legal provisions, the same cannot be accepted or condoned since the surveyor, being a licensed entity, is expected to be quite thorough in all aspects of the insurance business and ought to have been aware of the mandate prescribed by the Authority. In any case, ignorance of law is no excuse nor is that plea that there was no intention to commit any violation. In this regard, it is relevant to note that in AIR 2004 SC 86, the Supreme Court was pleased to hold that a guilty mind or proof of mens rea is not absolutely essential in every case. The Supreme Court in Radhey Shyam Khemka and Anr. v.

State of Bihar, held that there is a basic difference between offences under the Penal Code and acts and omissions which have been made punishable under different Acts and Statutes. It was held that for framing charges in respect of those acts and omissions, in many cases, mens rea is not an essential ingredient; the concerned statute imposes a duty on those who are in charge of the management, to follow the statutory provisions and once there is a breach or contravention, such persons become liable for punishment.

This view has been affirmed once again by the Supreme Court in Appeal (Civil) 9523-9524 of 2003 in the case of The Chairman, SEBI vs Shriram Mutual Fund & anr and also in Swedish Match AB and Anr vs SEBI & anr. (2004) 11 SCC 641 wherein the court came to the following finding:-

*"The provisions of Section 15-H of the SEBI Act mandate that a penalty of rupees twenty five crores may be imposed. The Board does not have any discretion in the matter and, thus the adjudication proceeding is a mere formality. Imposition of penalty upon the appellant would, thus, be a forgone conclusion. Only in the criminal proceedings initiated against the appellants, existence of mens rea on the part of the appellants will come up for consideration."*

8. Here, it becomes imperative to consider a few provisions of the Act and Regulations, related to the case.

   i. Regulation 8(3) of the Regulations states that where it is found that a surveyor and loss assessor suffers from any of the disqualifications (mentioned in Section 42(D) of the Act) or has knowingly contravened any provisions of the Act or

the IRDA Act, 1999 or the rules or regulations made therein or any order or direction or instruction issued by the Authority, the Authority, may after giving such surveyors and loss assessor an opportunity of being heard, refuse to grant or renew the license or suspend or cancel his license with effect from such dates as may be specified by it.

ii. Regulation 8(4)(iii) of the Regulations inter-alia empowers the Authority to refuse to grant or renew the license or suspend or cancel a license already granted, to a surveyor and loss assessor, if he/it makes a statement which is false in material particulars with regard to the eligibility for obtaining license or if he has, after the issue of renewal of such license, acquired any of the disqualifications provided under sub-section (4) of Section 42 of the Act, read with clause D of sub-section (1) of Section 64UM of the Act.

iii. Sections 64UM(G) and 64UM(G)(7) further empowers the Authority to cancel a license already granted to a surveyor and loss assessor in case he fails to discharge the duties and responsibilities in a satisfactory and professional manner or violates the code of conduct prescribed under the Regulations or if he makes a statement which is false in material particulars with regard to the eligibility for obtaining license or has, after the issue or renewal of such license, acquired any of the disqualifications provided under sub section (4) of Section 42 of the Act, read with clause D of sub section (1) of Section 64UM of the Act.

9. Given the fact that both the individuals i.e. the surveyor and Dinesh Chand Jain, were associated with M/s Kaypsens Surveyors Pvt. Ltd. as Directors and were representing themselves

through the said entity, it appears that they have failed to discharge the duties and responsibilities in a satisfactory and professional manner and in fact have violated the code of conduct prescribed under the Regulations which, inter alia requires such an entity to behave ethically and with integrity in the professional pursuits which includes fair dealings and truthfulness. This assumption is lent further credence on account of the fact that the letter head of the corporate firm 'Kaypsens Surveyors Pvt. Ltd' is followed by the words 'Insurance Surveyors and Loss Assessors' following by the address of the said entity. This blatant usage of letter heads of an unlicensed corporate firm during the course of survey related jobs, only confirms the violation.

10. All regulated entities are expected to observe all the laid down rules, regulations and guidelines in letter and in spirit at all times. The non-observance of the fundamental piece of legislation relating to observing the code of conduct by a licensed entity and the mandatory licensing of a regulated entity indicates the casual manner in which the surveyor chose to operate. It is therefore imperative to check such actions that are bound to cause unnecessary confusion in the minds of the policyholders; else such deviations could disrupt the smooth regulation of the insurance business in India.

11. As it has been firmly established that the Surveyor alongwith another licensed surveyor i.e. Dinesh Chand Jain had represented themselves as a 'Corporate Surveyor and Loss Assessor' although not licensed so, the Authority before taking any final decision, referred the case to the Consultative Committee, as provided for u/s 110G of the Act.

12. The Authority after considering the opinions given by the members of the Consultative Committee constituted u/s 110G of the Act, in the context of the submissions made by the Surveyor during his various correspondence exchanged with the Authority, the facts and circumstances of the case as also the material on record, concludes that:

    The Surveyor has represented himself as a corporate surveyor and loss assessor, although not licensed in this regard and thus has failed to behave ethically and with integrity in his professional pursuits which include fair dealing and truthfulness. He has thus failed to discharge his duties in a satisfactory and professional manner resulting in the violation of the code of conduct as specified by the Authority.

13. Having regard to the facts of the case and the gravity of the violations committed by 'the Surveyor', the Authority is of the considered opinion that the license earlier granted to the Surveyor to act as surveyor and loss assessor, be cancelled.

14. Accordingly, on a judicious exercise of the powers and the discretion vested in the Authority under Section 14(1) of the Insurance Regulatory and Development Authority Act, 1999 read with Regulation 8(4)(iv) of the Regulations, the license granted to the Surveyor to act as surveyor and loss assessor, is hereby cancelled with immediate effect.

**PLACE: HYDERABAD** **T S NAIK**
**DATE: 15th SEPTEMBER, 2009** **DEPUTY DIRECTOR**