IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 21.05.2021

\+ **O.M.P. (COMM.) 147/2018 and IA Nos. 4710/2018, 12775/2019 & 3041/2020**

ORIENTAL INSURANCE CO. LTD. ..... Petitioner

versus

DIAMOND PRODUCTS LTD. ..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr A.K. Singla, Senior Advocate with Mr Abhishek Gola and Mr Akshit Sachdeva, Advocates.

For the Respondent : Mr Vineet Kumar, Advocate.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter the 'A&C Act') impugning an arbitral award dated 03.11.2017 (hereafter the 'impugned award') passed by the Arbitral Tribunal comprising of three arbitrators.

2. The impugned award was rendered in the context of disputes that had arisen between the parties in respect of an insurance claim

made by the respondent company in terms of the Standard Fire and Special Peril Policy issued by the petitioner.

3. The respondent is a company and is, *inter alia*, engaged in the business of manufacturing various types of footwear. It has two manufacturing units; one at A-9, Mayapuri Industrial Area, Phase-II, New Delhi and the other at village Moginand, Kala Amb, Nahan Road, District Sirmour, H.P.

4. The respondent had purchased a Standard Fire and Special Perils Policy bearing no. 215502/11/2008/293 (hereafter 'the Policy') from the petitioner, for an assured sum of ₹24,25,00,000/-, which was increased to ₹27,25,00,000/- with effect from 30.06.2008, in respect of its manufacturing unit at village Moginand, for the period from 20.03.2008 to 19.03.2009.

5. On 14.12.2008, a fire broke out at the respondent's manufacturing unit located at village Moginand, Kala Amb. The same resulted in severe damage to the building, plant and machinery, stocks and furniture, fixtures, fittings, computers, peripherals and other movables. The respondent reported the occurrence of the said event to the petitioner by a letter dated 15.12.2008.

6. The petitioner appointed a Surveyor to assess the damage suffered. On 16.12.2008, the Surveyor visited the unit and submitted a preliminary survey report, estimating the loss at ₹12,00,00,000/-.

7. On 10.01.2009, the respondent submitted a provisional claim in the prescribed format, claiming an aggregate loss of ₹13,21,56,318/-. In March 2009, the petitioner released an interim payment of ₹2,50,00,000/- to the respondent. Thereafter, on 10.08.2009, the respondent revised its claim to a sum of ₹12,02,31,749/-.

8. The Surveyor submitted its final report on 18.03.2010, assessing the amount payable at ₹ 5,46,72,292/- and the respondent was asked to furnish a letter of consent for receiving the aforesaid amount in full and final settlement of its claim(s).

9. The respondent states that although the said amount was much less than its entitlement, the respondent was willing to accept the same as it was in dire need of funds. Accordingly, on 05.05.2010, the respondent submitted its letter of consent for receiving an amount of ₹ 5,46,72,292/- against its claim for ₹ 12,02,31,749/-. Despite furnishing the consent letter, the amount was not released. The petitioner sought a letter of consent/discharge voucher from the respondent on two occasions and the respondent complied with the same on both occasions.

10. In December 2010, the petitioner released the final amount of ₹2,96,59,810/- after deducting the interim payment of ₹2,50,00,000/- towards full and final settlement.

11. Thereafter, the respondent sent a letter dated 13.12.2010 registering its protest and claiming that it was coerced to accept the lower sum against its claims. And, its agreement to accept the amount

offered was secured by undue influence. The respondent invoked the Arbitration Clause and sought reference of the disputes to arbitration. The petitioner did not agree to refer the disputes to arbitration, resultantly the respondent filed a petition under Section 11 of the A&C Act before this court and by an order dated 31.05. 2011 passed by this court, the Arbitral Tribunal was constituted. The arbitral proceedings have culminated in the impugned award.

12. By the impugned award, the Arbitral Tribunal had directed the petitioner to pay the respondent – (i) a sum of ₹2,08,76,700/- on account of loss of stock; (ii) interest at the rate of 15% per annum on the sum of ₹2,96,59,810/-, which was paid by the petitioner belatedly, for the period 05.05.2010 – 12.12.2010 amounting to ₹27,05,950/-; (iii) ₹75,000/- towards cost of litigation; and (iv) future interest at the rate of 9% per annum on total award made amounting to ₹2,35,82,650/- (₹2,08,76,700 plus ₹ 27,05,950/-) from the date of award till its realization.

13. Mr. AK Singla, learned Senior Counsel appearing on behalf of the petitioner, has assailed the impugned award on the ground that the same is in conflict with the public policy of India, inasmuch as, the Arbitral Tribunal has erred in not following the Surveyor Report and has overlooked the observations of the Surveyor. In this regard, he submitted that the Arbitral Tribunal had erred in relying on the manufacturing cum trading account to assess the loss suffered on semi-furnished goods despite the Surveyor's categoric finding that the loss cannot be calculated on the basis of the trading account due to

high fluctuations in the gross profit rate. He further contended that the Surveyor was justified in making a 20% ad-hoc deduction from the stocks and quantity of finished goods as the respondent did not furnish the records to substantiate the quantity of loss suffered. Next, he submitted that, in any event, the respondent had agreed to accept the amount assessed in full and final settlement of its claim and therefore no further claim, challenging the Surveyor Report, could be made at a subsequent stage.

14. Mr. Vineet Kumar, learned counsel appearing on behalf of the respondent, submitted that the Arbitral Tribunal has correctly not assigned due weightage to the Surveyor Report as the Surveyor had made ad-hoc deductions on assumptions, without assigning any weight to the physical examination conducted on 16.12.2008 and other books of accounts and documents, which were duly verified by the Surveyors. He submitted that in relation to loss of stock and raw materials, the Arbitral Tribunal has correctly evaluated the loss on the basis of 'First In First Out' (FIFO) method, which is based as per Accounting Standard no.2. The Surveyor has failed to provide any reason to make an overall ad-hoc deduction of 5% on account of dead stock, from the total value of raw material. In relation to semi-furnished goods, he submitted that the Surveyor made an ad-hoc deduction of 10% and erroneously discarded ignored the manufacturing cum trading account method. He submitted that the Arbitral Tribunal was correct in assessing the loss on the basis of the trading account. Finally, in relation to the loss suffered against the

quantity of finished goods, Mr Kumar contended that the Surveyor had erred in computing gross profit at 50.81% on the basis of manufacturing cum trading account method as he did not consider the amount, which was debited towards depreciation, as a part of cost of production. In the event the amount of depreciation was considered, the gross profit for the year ended 31.03.2008 would be in negative and, the Arbitral Tribunal had correctly assessed the loss by assuming gross loss of 2.41% on the sale value. Finally, he submitted that the petitioner is incorrect in relying on the consent letter dated 05.05.2010 as the respondent was compelled to sign the consent letter without which the insured amount would not have been released. He also submitted that despite repeated requests, the claim amount was not released by the petitioner and it was under these circumstances, the respondent was forced to sign the consent letter.

Reasons and Conclusion

15. As is apparent from the above, the controversy in the present petition, essentially, revolves around two questions. First, whether the contract of insurance between the parties stood fully discharge by accord and satisfaction as the respondent had agreed to accept the payments disbursed by the petitioner as full and final settlement of its claims. And second, whether the respondent was entitled to any additional amount against its claims for loss of stocks/material.

16. Insofar as the first issue is concerned, Mr. Singla had contended that since the respondent had given a consent letter accepting the

amounts determined by the Surveyor as full and final settlement of its claims, it was precluded from raising any disputes in that regard.

17. The Arbitral Tribunal had examined the aforesaid issue. It had noted that the Final Survey Report was received on 18.03.2010 and the petitioner company had asked the respondent to send a consent letter accepting ₹5,46,72,292/- as full and final settlement of its claims. The respondent had, in response to the requirement of furnishing a consent letter, submitted the same on 05.05.2010. Although the respondent had complied with the petitioner's demand for a consent letter, the petitioner did not immediately release the admitted amounts due against the respondent's claim. After considerable time had elapsed, the petitioner once again asked the respondent to send a fresh letter of consent. The respondent did so on 03.09.2010. The Arbitral Tribunal noted that the said consent letter was in the form as forwarded by the petitioner. Despite the same, the petitioner did not release the funds due to the respondent. Subsequently, it once again called upon the respondent to execute yet another consent letter. The respondent once again complied by sending a letter dated 06.12.2010. The Arbitral Tribunal noted that the language of the consent letter dated 06.12.2010 was similar to the consent letter dated 03.09.2010.

18. The Arbitral Tribunal also evaluated the evidence led by parties and in particular, the cross examination of Sh. Rajender Kumar, Divisional Manager of the petitioner. Sh. Rajender Kumar confirmed that the amounts due to the respondent would not have been released

without first taking its consent to accept the same in full and final satisfaction of its claims and executing a discharge voucher.

19. After considering the evidence, the Arbitral Tribunal held that the petitioner company was in a dominant position and its refusal to pay the admitted amount without the respondent executing a consent letter in the format as required, would amount to exerting undue influence and duress.

20. This Court finds no infirmity in the aforesaid conclusion. It is seen that despite the respondent furnishing the consent letters as required, the petitioner did not immediately release the balance of the assessed loss. It was explained on behalf of the petitioner that the delay in doing so was because the petitioner was required to fully verify the claims. It was stated that after the Surveyor had submitted its report, investigators were appointed to, *inter alia*, investigate the issue of stock transfer to the respondent's Kala Amb unit from its other unit. Thus, there is no dispute that the petitioner did not simply act on the consent letter or on the basis of any discussion to settle the claims. It had taken all steps to verify the claims made by the respondent and yet, had withheld the sums as due to the respondent against its claim till the respondent had complied with the directions of furnishing the consent letter/discharge voucher. It is also not disputed that the fire had substantially destroyed a large part of the respondent's unit and the respondent was under considerable financial distress on this account. It was contended on behalf of the petitioner

that keeping this in view, the petitioner had in fact released an *ad hoc* payment of ₹2.5 crores against the claims made by the respondent.

21. Considering the evidence on record, this Court finds no reason to differ with the conclusion of the Arbitral Tribunal that the respondent had furnished the consent letters/discharge voucher under economic duress and the same was without free consent. The respondent had immediately after receipt of the balance amount, raised its protest.

22. Insofar as the claims made by the respondent are concerned, the Arbitral Tribunal had rejected most of the claims. The Arbitral Tribunal found the respondent's claim regarding damage to the building was exaggerated. It noted that initially the respondent had filed a claim of ₹6,71,04,488/- towards loss/damage to building but the same was later reduced to ₹5,26,64,697/-. The Arbitral Tribunal observed that the capital value of the building, which was constructed a few months prior to the incident, was reflected at ₹7,99,77,081/- in the books maintained by the respondent. The capital value of the building also included pre-operative expenses of ₹1,13,63,505/-. Thus, the effective capital value of the building as reflected in the books of the respondent was ₹6,86,13,576/-. This included the cost of construction of the plinth and the foundation of the building as well. Considering the aforesaid, the Arbitral Tribunal held that the estimate of value furnished by M/s Design Forum, Architect – which was relied upon by the respondent – was exaggerated. The Surveyor had appointed Sh. R.C. Bagga, a Civil Engineer to estimate the cost of

construction of the damaged building and had based the assessment of loss on the estimates submitted by him.

23. The Arbitral Tribunal observed that one of the reports submitted by M/s Design Forum was dated 10.08.2009 and the assessed loss was equal to the claim made by the respondent prior to the date of the said report. In view of the above, the Arbitral Tribunal held that the circumstances lent support to the petitioner's objection that the report/estimate was prepared by M/s Design Forum to suit the convenience of the respondent.

24. As noted above, the capital value of the building, after reducing pre-operative expenses of ₹1,13,63,505/- was reflected in the books of the respondent at ₹6,86,13,576/-. As against the aforesaid value, the respondent had claimed ₹5,26,64,697/-. The Arbitral Tribunal considered the evidence led before and found that the Surveyor's assessment based on the report of Sh. R.C. Bagga was more reliable. In view of the above, the Arbitral Tribunal held that the respondent was not entitled to any further amount againt its claim for loss and damage to the building.

25. The respondent did not seriously contest the assessed loss on plant and machinery including fire-fighting equipment or the loss on account of furniture, fixtures, fittings, computers, computer peripherals and air conditioners.

26. The Arbitral Tribunal did not accept the respondent's claim for ₹15,07,041/- towards fees for architects, surveyors and consulting

engineers. According to the terms and conditions of the Policy, only 3% of the adjusted loss was covered towards the said expenses. Therefore, the Arbitral Tribunal found that insofar as claim for loss on account of fees is concerned, the Surveyor's report could not be faulted .

27. The respondent had made a claim of ₹2,88,652/- on account of expenses incurred towards removal of debris. The petitioner had assessed the same at ₹1,50,000/-. The Arbitral Tribunal noted that in terms of the policy, 1% of the insured amount was admissible subject to the actual amount incurred. The Tribunal noted that the claim made included labour cost of ₹2,26,000/-, which in turn included salary of administrative staff. In view of the above, the Arbitral Tribunal found that there was no interference with the decision of the Surveyor to restrict the said claim to ₹1,50,000/-.

28. The controversy relates mainly on account of the Arbitral Tribunal's decision to enhance the amount of loss on account of stocks.

29. Mr. Singla contended that the Arbitral Tribunal had grossly erred in enhancing the value of the claim and not concurring with the Surveyor's assessment regarding loss of stocks. The Surveyor had divided the stocks into raw material, semi-finished goods and finished goods. And, deducted 20% of the quantity as claimed, as the respondent had not maintained stock records for different stages of production.

30. The respondent had deducted 20% of the valuation based on selling price as margin for profit. The Surveyor had rejected the same on the ground that the gross profit margin for the financial year ended 31.03.2008 was 50.81%. The Arbitral Tribunal examined the Surveyor's report and found that the Surveyor had adopted different methodologies to assess the loss/damage in respect of the raw materials, semi-finished goods and finished goods. Although the assessment was based on the stock statement furnished by the respondent to Bank of India, the Surveyor had doubted the veracity of the said statement and discounted the claims submitted by the respondent.

31. The respondent claimed that it was difficult to maintain stock records at each stage of production but it had maintained the stocks as received and periodically furnished the same to its lending bank (Bank of India). After evaluating the evidence, the Arbitral Tribunal was of the view that in the absence of any production related documents, the value of the loss on account of damage to the stocks could be ascertained on the basis of the manufacturing cum trading account. The Arbitral Tribunal found that the manufacturing cum trading account of the preceding financial year (financial year ended 31.03.2008) indicated gross loss at the rate of 2.41%. It accepted the manufacturing cum trading account for the period from 01.04.2008 to 14.12.2008 as prepared on the assumption of gross loss of 2.41%, which indicated the value of closing stock as on 14.12.2008 at ₹6,25,08,799/-

32. Mr. Singla had submitted that the Arbitral Tribunal had erred in accepting the gross loss at 2.41% as the Surveyor's report indicated a higher profit margin and therefore, the impugned award was liable to be set aside. This contention is unpersuasive because the Arbitral Tribunal had examined the said issue and had proceeded on the basis that the gross loss was required to be computed after considering the amount towards depreciation, which had been excluded by the Surveyor. This Court finds no infirmity with the view of the Arbitral Tribunal that the cost of goods are required be computed after taking into account the depreciation on plant and machinery used in the manufacturing process. Since the respondent had submitted a claim for ₹5,98,12,000/-, the Tribunal accepted the said value as the same was less than the closing stock as determined on the basis of a manufacturing and trading account drawn up by assuming the gross loss at 2.41% of the sale value. The Tribunal also reduced the assessed value of the damaged stock by 5% on account of the dead stock. The Arbitral Tribunal noted that the value of the stock saved amounted to ₹1,32,47,435/-. After deducting the amount of stocks that were saved and accounting for 5% dead stock, the Arbitral Tribunal determined the loss of stocks at ₹4,42,36,337/-. The Surveyor had determined the loss at ₹2,33,59,637/- and therefore, the Arbitral Tribunal awarded a sum of ₹2,08,76,700/- being the balance amount of claim on account of loss of material payable to the respondent.

33. Although Mr. Singla had invited this Court to examine the question as to the correctness of the decision of the Arbitral Tribunal

regarding assessment of loss, the same is beyond the scope of examination under Section 34 of the A&C Act. It is trite law that an arbitral award can be set aside only on the limited ground as set out in Sub-section (2) and (2A) of Section 34 of the A&C Act. This Court cannot re-appreciate and re-evaluate the evidence and supplant its opinion in place of that of the Arbitral Tribunal. This Court does not act as a court of first appeal and the decision of an arbitrator with regard to the facts is final. It cannot be interfered with unless the same is patently illegal or otherwise falls foul of the fundamental policy of Indian law. (See: ***Associate Builders v. Delhi Development Authority: (2015) 3 SCC 49***)

34. In ***Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.: (2019) 20 SCC 1***, the Supreme Court had observed as under:

> "24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.

> 25. Moreover, umpteen number of judgments of this Court have categorically held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act."

35. This Court is unable to accept that the impugned award suffers from any patent illegality that strikes at the root of the said matter. It is also not contrary to the fundamental policy of India or opposed to the most basic notions of morality and justice. Thus, no interference with the decision of the Arbitral Tribunal on the merits of the claims raised by the respondent, is warranted.

36. The Arbitral Tribunal had also concluded that there was an inordinate delay in release of the amount of the assessed claim. The petitioner had released ₹2,50,00,000/- on an interim basis by a cheque dated 30.03.2009 and had thereafter, on the basis of the Final Survey Report, assessed the loss at ₹5,46,72,292/-. Although it had assessed the said loss, it did not immediately release the same to the respondent. By a letter dated 04.05.2010, the petitioner called upon the respondent to furnish a letter of consent to accept the said amount in full and final settlement of the claim. Thus, at least by 04.05.2010, the petitioner was in a position to release the balance amount of the assessed loss. The respondent furnished a letter of consent dated 05.05.2010 but the balance amount was not released even after receipt of the said letter. In the circumstances, the Arbitral Tribunal's decision

to award interest for the period 05.05.2010 to 13.12.2010 on the admitted value of the balance loss (₹2,96,59,810/-) cannot be faulted.

37. In view of the above, this Court finds no ground to interfere with the impugned award. The petition is unmerited and is, accordingly, dismissed. All pending applications are also disposed of.

VIBHU BAKHRU, J

MAY 21, 2021
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