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IN THE HIGH COURT OF DELHI AT NEW DELHI

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OMP No. 319/2003

14th October, 2009

ORIENTAL INSURANCE COMPANY LTD. ...Petitioners

Through: Mr. N.K.Kaul, Sr. Advocate with Mr. Joy
Basu and Ms. Anu Bagai, Advocates.

VERSUS

AMIRA FOODS (INDIA) LTD.

....Respondents

Through: Jayant Nath, Sr. Advocate with Mr. Ayush
Aggarwal, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? YES
3. Whether the judgment should be reported in the Digest? YES

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JUDGMENT (ORAL)

VALMIKI J. MEHTA, J.

1. OMP 319/2003 is the objection petition filed by M/s Oriental Insurance Company Ltd. against the award dated 9.5.2003 passed by the Arbitral Tribunal consisting of 3 Arbitrators. There are two awards, one by the majority of Hon'ble Mr. R.S.Pathak (Retired Chief Justice of India) and Justice J.K.Mehra (Retired Judge of this Court) and a separate award has been rendered by the third Arbitrator Sh. Vishnu Mehra, Advocate and which also decides all issues in accordance with the majority award except that in respect of the issue with regard to the survey report, the matter has been remitted for preparing a fresh survey report.

2. The facts of the case are that the respondent/non-objector company sought an insurance policy for its stocks which were to be in different locations i.e. at different ports/godowns. The policy was also required keeping in view the total overall value limit of the policy, although there would be changes in the value of stocks and sub-limits in different locations from time to time. The business of the respondent was, inter alia, of export of its goods (mostly rice) and as per the stand of the respondent, as orders were executed and procurements made the value of stocks in the different godowns in the country fluctuated frequently. According to the case of the respondent, it was difficult to keep track of these fluctuations and hence it could not take separate policies for each godown and, therefore, a single policy was required to meet its insurance requirement.

3. The insurance policy was given by the objector to the respondent initially for a sum of Rs.20 crores under its cover note dated 7.8.1997. This figure of Rs.20 crores was enhanced to Rs. 25 crores on the endorsement in the cover note dated 12.8.1997. The insurance policy in this regard was issued on 14.8.1997. This court is, therefore, concerned with this policy, and the endorsements. Further enhancements were made to the value of the policy. First one was by 8 crores on 24.11.1997 and the second one by Rs.5 crores on 26.3.1998 bringing the total value of the policy for the stocks covered to Rs. 38 crores w.e.f 26.3.1998. The policy in question is a Fire Declaration Policy. This policy required the respondent to make a declaration on a monthly basis for the value of stocks at each location. Such declarations were duly made by the respondents on a monthly basis to the objector and the last relevant declaration which is material, is the one dated

5.6.1998 because the incident/event for which the insurance claim was made is dated 9.6.1998 when the Kandla Port was hit by a cyclone causing damage to the stocks of rice of the respondent. The damage was surveyed by the surveyor of the objector company. The respondent made a claim of Rs.11.3 crores which after removal of partially damaged stocks was reduced to Rs.7.2 crores. As against this claim of Rs.7.2 crores, the objector company accepted a claim of Rs. 4,30,91,103/- only and disallowed the balance amount on the ground that stocks were under insured.

4. What is relevant is that the objector company first made an on account ad hoc payment of Rs. 2,49,36,994/- out of the total claim approved of Rs. 4,30,91,103/-. As per the respondent the objector insurance company asked the claimant to approve this figure of Rs.4,30,91,103/- in full and final settlement before releasing the balance. The contention of the non-objector is that disputing this position it had already written a letter to the objector on 16.12.1998 and the date of the signing of the full and final satisfaction voucher was subsequently done on 17.12.1998. Also, the respondent company on the next day thereafter vide its letter dated 18.12.1998, immediately after signing of the alleged full and final settlement voucher, wrote that the voucher had been got signed under economic duress because the objector insurance company refused to release even the admitted amount unless the full and final settlement voucher was signed by the respondent company.

5. The majority award of the arbitrators has held as follows:-

(i) The full and final settlement voucher was not signed voluntarily by the respondent company but was signed under duress and therefore, it cannot be said to be full and final settlement between the parties.

(ii) The arbitration clause between the parties was interpreted and it was held that the clause in question is wide enough to include therein the determination of the issue as to whether full and final settlement between the parties was arrived at. This finding was arrived at because the objector insurance company contended that the arbitrators under the subject arbitration clause could only adjudicate upon the quantum of the claim and could not decide the issue with regard to whether or not there was full and final settlement under the voucher in question.

(iii) The nomenclature of the policy whether the same is a Fire Declaration Policy or a Floaters Policy is immaterial because what has to be referred to are the terms of the contract between the parties, contemporaneous correspondence and the actions of the parties in furtherance of the contract so as to determine the meaning which the parties would ascribe to the terms of the contract. Accordingly, it is held that the sublimits for each location will change as per monthly declarations submitted by the respondent.

The arbitrators awarded the respondent company the amount with respect to the loss of its stocks on the ground that though the sub-limit of the stocks at Kandla Port as per the insurance policy was stated to be of Rs. 9 crores however, on account of the important exchange of correspondence dated 2.8.97, it was clear that the valuation so fixed of the sublimit at Kandla Port was to be taken in the overall total limit of the insurance policy because by means of the monthly declaration different valuations of the stocks at

different locations had to be given by the respondent company and which figures were duly given clearly showing that with respect to each month the sublimit amount for different locations stood changed than as mentioned in the insurance policy and the actual value of stocks was different each month which accordingly changed each sublimit of insurance amount at the different locations.

(iv) The arbitrators refused the request of the objector company to refer the matter back to the surveyors for fresh valuation of the loss in stocks because the arbitrators came to a finding that sufficient opportunity right from the beginning was available to the objector insurance company in case it was of the opinion that the policy was a Floaters Insurance Policy and not a Fire Declaration Policy, and if that be so then, the objector ought to have got the survey report accordingly.

(v) There are other findings and observations in the award which would be referred to in due course in this judgment.

(vi) The arbitrators have finally awarded interest at the rate of 15% per annum from 11.12.1998 till the date of the award and also costs of Rs.9,16,333/- and on the entire amount thus awarded interest thereon was further held payable at the rate of 12% per annum from the date of the award till the date of payment by the objector company to the respondent.

6. Before I proceed to make my observations and give my judgment, it must at once be made clear that the scope of hearing of objections under Section 34 of the Arbitration and Conciliation Act, 1996 is now well defined and no longer res integra. There are basically only three grounds on which the award passed by the Arbitrator can be challenged under Section 34 of

the Act. These grounds are : (i) the award is illegal i.e. against the law of the land (ii) the award is against the contractual provisions between the parties and (iii) the award is so perverse that it shocks the judicial conscience. Keeping in mind the aforesaid requirements and ingredients of Section 34 of the Act, the award and objections raised needs to be examined and has been so examined by me.

7. The learned counsel for the objector Mr. Neeraj Kishan Kaul, Senior Advocate has strenuously argued two points. The first point is that according to the objector the arbitration clause in question has been wrongly interpreted by the Arbitrators to come to the decision as to that they were entitled to determine whether or not there was any full and final settlement between the parties on account of the respondent signing the full and final settlement dated 17.12.1998. He further argued that the judgment of the Supreme Court in ***National Insurance Co. Ltd. Vs. M/s. Boghara Polyfab Ltd. 2008(12)Scale 654*** is distinguishable and what actually ought to have been applied is the ratio of the decision of the Supreme Court in the case of ***Nathani Steel Ltd. Vs. Associated Constructions 1995 Supp. (3)SCC 324***. The counsel has also further contended that the Arbitrator can have no jurisdiction in case the arbitration clause does not permit the Arbitrators to decide the issue of full and final settlement between the parties because that would amount to the Arbitrator exceeding his jurisdiction. For this purpose, the counsel has relied upon ***Gaya Electric Supply co. Ltd. Vs. State of Bihar AIR 1953 SC 182***. It was also argued that in fact there was a full and final settlement when the respondent signed the full and final settlement receipt dated 17.12.1998.

8. The counsel has further strongly urged that since the policy in question is a Fire Declaration Policy it has necessarily to be location specific with a fixed sublimit for each location and since in this case the valuation of stock with respect to different locations has changed, it is contended that consequently the respondent company was not entitled to the benefit of change in the valuation of difference in stocks under different locations as specified by them every month in their declaration to the objector company. It is further contended that unless and until the respondent company specifically applied for change of sublimit with respect to each of the locations, it was not permissible for the respondent company to claim an insurance amount at a location which is higher than that prescribed in the sublimit for that location.

9. I have very carefully considered the submissions of the learned counsel for the objector and the respondent company. I am afraid that I do not agree with the contentions as raised by the objector and the objection petition has to fail.

10. A reference to the impugned award shows that with respect to each of the contentions which have been raised by the present objector, the Arbitrators have duly referred to the respective contentions and thereafter arrived at necessary findings. On the issue with regard to whether the arbitration clause in question entitled the Arbitrators to decide whether there was full and final satisfaction between the parties, the majority award holds as under:

“10.2. This contention has only to be stated to be rejected. The Arbitration Clause reads as under:

“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 disinterested 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 provisions of the Arbitration 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 an arbitrator within two calendar months after receipt of a notice in writing requiring an appointment, the other party shall be at liberty to appoint a 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 meeting.”

The phrase, “if any difference shall arise as to the quantum to be paid under this Policy is sufficiently wide to cover the claims in the present case. The Claimant’s whole contention is that the quantum determined by the Respondent as being payable under the policy i.e. Rs. 4,30,91,103/- is not correct and that the quantum or the amount that the Claimant was entitled to be paid was Rs.7,05,07,442.77 towards the actual loss suffered and Rs.30,70,606/- towards expenses incurred in minimizing or mitigation of loss. Additionally, the Claimant has also pointed out that whereas the loss accepted by the Respondent as per the final Surveyor Report is Rs.6,83,44,556.80, the actual loss suffered is Rs.7,05,07,442.77 and therefore it is not correct for the Respondent to suggest that the actual loss suffered is not disputed. It is clear that there is a dispute or difference as to the quantum to be paid under the Policy itself. The Tribunal has therefore jurisdiction to determine this dispute.” (Emphasis added)

11. In the realm of the interpretation of the contract, the Arbitrators are supreme and this matter has been pronounced upon repeatedly by the Supreme Court and one such judgment is the judgment in ***Mc Dermott International Inc. Vs. Burn Standard Co. Ltd. 2006 (11)SCC 181.***

“112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to

the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law."

(Emphasis added)

12. I find that the interpretation given by the Arbitrators to the arbitration clause that within the term "quantum to be paid in this policy" is a valid one to cover the determination of the issue of full and final settlement as this is one possible view and it is not such a perverse view which calls for interference by this Court, more so under Section 34 of the Act. Not only this, the Arbitrators have referred to the doctrine of *contra proferentes* and the various Supreme Court judgments to hold that in case of ambiguity in interpretation of an insurance policy the same should be strictly interpreted in favour of the insured and against the insurance company. Again this is a plausible view. I am also of the view that once a quantum has to be decided naturally and automatically it has to be decided that whether quantum is at all payable or not. If that be so, that whether any quantum as claimed by the insured is payable or not, then to determine such a question it is necessary to arrive at a decision whether there was an earlier full and final settlement.

13. At this stage, it is necessary to refer to the recent decision of ***National Insurance Co. Ltd. Vs. M/s. Boghara Polyfab Ltd. (supra)*** in which an absolutely identical clause as the one in question in the present case was in

issue. Para 12 of the judgment refers to that clause and the issue in question. This para is reproduced below:

“12. In this case existence of an arbitration clause in the contract of insurance is not in dispute. It provides that “if any dispute or difference shall arise as to the quantum to be paid under this policy (liability being otherwise admitted) such difference shall, independently to all other questions be referred to the decision of a sole Arbitrator.” The rival contentions give rise to the following question for our consideration:

In what circumstances a court will refuse to refer a dispute relating to quantum to arbitration, when the contract specifically provides for reference of disputes and differences relating to the quantum to arbitration? In particular, what is the position when a respondent in an application under section 11 of the Act, resists reference to arbitration on the ground that petitioner has issued a full and final settlement discharge voucher and the petitioner contends that he was constrained to issue it due to coercion, undue influence and economic compulsion?"

14. The Supreme Court in the judgment of ***Boghara Polyfab*** interpreting this very identical clause has after considering the entire case law and the earlier judgments has held that an issue with regard to full and final settlement can and ought to be in fact adjudicated by the Arbitrators. The various illustrations given by the Supreme Court in ***Boghara Polyfab case*** with respect to full and final settlement whether the issue can be urged or not before the Arbitrator is contained in para 28 of the judgment and the present case falls within the sub para (iii) and (iv) of the judgment which are reproduced below:

"28 "

(iii) A contractor executes the work and claims payment of say Rupees Ten Lakhs as due in terms of the contract. The employer admits the claim only for Rupees six lakhs and informs the contractor either in writing or orally that unless the contractor gives a discharge voucher in the prescribed format acknowledging receipt of Rupees Six Lakhs in full and final

satisfaction of the contract, payment of the admitted amount will not be released. The contractor who is hard pressed for funds and keen to get the admitted amount released, signs on the dotted line either in a printed form or otherwise stating that the amount is received in full and final settlement. In such a case, the discharge is under economic duress on account of coercion employed by the employer. Obviously, the discharge voucher cannot be considered to be voluntary or as having resulted in discharge of the contract by accord and satisfaction. It will not be a bar to arbitration.

(iv) An insured makes a claim for loss suffered. The claim is neither admitted nor rejected. But the insured is informed during discussions that unless the claimant gives a full and final voucher for a specified amount (far lesser than the amount claimed by the insured), the entire claim will be rejected. Being in financial difficulties, the claimant agrees to the demand and issues an undated discharge voucher in full and final settlement. Only a few days thereafter, the admitted amount mentioned in the voucher is paid. The accord and satisfaction in such a case is not voluntary but under duress, compulsion and coercion. The coercion is subtle but very much real. The 'accord' is not by free consent. The arbitration agreement can thus be invoked to refer the disputes to arbitration."

15. In the present case, the Arbitrators have come to a categorical finding that the full and final settlement voucher was not signed by the respondent voluntarily and it was under duress. The Arbitrators in this regard have held as under:

"10.14 We hold that the evidence on record establishes that the Claimant did not voluntarily or unconditionally issue the discharge voucher dated 17 December 1998. We do not accept the Respondent's contention that any protest must only be in writing. A protest can be made orally or in writing or even be inferred from the conduct of the party. Even otherwise there is sufficient evidence in writing as to the state of affairs.

10.15. The Claimant has proved that it received the letter dated 11 December 1998 on 14 December 1998 when Mr. Vaishnavi, Mr. Phukela and Mr. Dua of the Respondent, came to the office of Mr. Anil Chanana of the Claimant carrying the said letter. This has been spoken to by Mr. Anil Chanana in his affidavit in evidence at para 23 and there has been no suggestion to the contrary by Respondent or its witness. Mr. Anil Chanana has also stated that he had informed the said officers that the payment could not be in full and final settlement as the claim was for Rs.7.354 crores which was a

genuine claim and that the Respondent had not even explained as to why it was sought to be reduced. Mr. Anil Chanana has stated that the Respondent officials stated that without an unconditional discharge voucher being issued, they would not release the balance payment. What is material is that Mr. Anil Chanana was not at all cross examined on the paragraph referred to above and not even a suggestion was put that the contents were not correct. We have no reason therefore not to accept the Statement of Mr. Anil Chanana.

10.16 Further, evidence has been led that on 16 December 1998, Mr. Anil Chanana visited the office of Mr. Vaishnavi, Assistance Manager of the Respondent Company at Jeevan Bharti Building where Mr. Phukela and Mr. Dua were also present. He had carried with him a letter on Claimant's letterhead acknowledging receipt of the balance payment being released but reserving the right to claim further amounts not approved by the Respondent Company. His statement is that once again Mr. Phukela and Mr. Vaishnavi refused to accept the letter stating that there must be an unconditional discharge without which no payment would be made. A document of discharge in standard format of the Respondent Company was handed over to the Claimant for signature. This is stated in para 24 of Mr. Anil Chanana's affidavit in evidence and he has not been cross examined on this paragraph also.

10.17 It is also evident that on 16 December 1998 itself, the Claimant posted a letter by Registered Post (proof of registry was produced during the hearing) bringing out all these facts which are stated by Mr. Anil Chanana. By this letter also the Claimant informed the Respondent that due to financial pressure they were being coerced to issue a discharge voucher as desired by the Respondent but the Claimant was reserving their right to press for the balance due. It was specifically stated that the voucher was being signed involuntarily under pressure and coercion. This letter was admitted received by the Respondent on 18 December 1998 which was, no doubt, after the money was released. However, the letter was posted on 16 December and is evidence of the prior protest and involuntarily signature appended to the discharge voucher dated 17 December 1998. Along with the letter is enclosed a receipt on the Claimant's letterhead acknowledging release of payment but with the right to press for the balance due. This also shows that Mr. Anil Chanana's statement in para 24 of his affidavit is true.

10.18. The evidence of Mr. A.P.Singh and Mr. Anil Chanana also shows that before handing over the discharge voucher once again an attempt was made to reserve the right in writing also, but that was also not accepted by the Respondent leading to the 17 December 1998 receipt being issued in the printed format. This is stated in paras 9 to 11 of Mr. A.P.Singh's affidavit and he was also not cross examined on it.

10.19. Immediately afterwards also on 18 December 1998, the Claimant sent a letter which was admittedly received by the Respondent reiterating the contents of the letter dated 16 December 1998 and stating that the 17 December 1998 discharge voucher was not binding having been issued under coercion.

10.20. Thus, the chain of protest and reservation of right has been adequately established and proved by the Claimant. What the Tribunal also finds significant is that even the Respondent's witness Mr. I.S.Phukela accepted in cross examination that they insisted upon the issue of the discharge voucher dated 17 December 1998. It has been conceded by the Respondent's counsel in argument that if the discharge voucher was not issued, payment would not have been released."

(Emphasis added)

16. In fact the last line of para 10.20 above notes the concession of the objectors counsel that if the discharge voucher was not issued payment would not have been released. If that be so, I do not feel that how such a finding of fact which is arrived at by the Arbitrator can in any manner be faulted with.

17. That takes me to the second issue which has been urged on behalf of the objector. To put it crisply the contention is that unless and until the sublimit which is specified in the policy for a particular location is changed by consent of the parties it was not open to the respondent company to claim a higher amount than as specified in the sublimit for the particular location and which location in this case happens to be Kandla. It was the contention that the sublimit with respect to Kandla port was only Rs.9 crores and consequently it was not open to the respondent company to claim a sum of Rs.7.05 crores. Though this amount of Rs. 7.05 is less than 9 crores but applying the principle of under insurance the valuation of the

stocks is said to be higher than Rs.9 crores at Kandla Port and therefore alleged to be a case of under insurance.

18. Great stress has been laid by the counsel for the objector on Section 64 UM and 64 UC of the Insurance Act, 1938, and also the fact that there are tariff regulations which are statutory in nature with respect to insurance policies which are binding on the objector insurance company and the respondent. It has been further contended a reference to the description of the different types of policies being one, a declaration policy and other a floating policy, that, this latter floating policy specifically requires declaring the sum insured at each location and which is fixed. It was argued that it was not permissible therefore for the respondent to claim the amount in question. It was also specifically contended by referring to the tariff regulations that in respect of declaration policies containing more than one specific location, the insurer should stipulate separate sums insured and separate declarations in respect of each separate location and beyond which insurance claim cannot be made.

19. I find that the arbitrators have in this behalf validly held that the nomenclature of the policy is not a relevant factor but what is to be seen are relevant terms and the contemporaneous correspondence which reflected the agreed terms and conditions between the parties. The learned arbitrators have also further relied upon the conduct of the parties and specially of the respondent in respect of giving necessary declarations each month which in fact shows that the fixed sublimit originally specified in the insurance policy was for each month after the issue of the policy declared to

be different then as specified in the sublimits of the policy and right up to May, 1998 when the last declaration was given on 5.6.1998 viz just before the insured event occurred on 9.6.1998. In this regard, I would do no better than refer to the following paragraphs from the award which deals with the respective contentions and arrives at a finding in favour of the respondent company.

“Para 11.5. To the policy dated 14 August 1997, is an Annexure. This Annexure reads as follows:

M/s Amira Foods (I) Ltd.

LOCATIONS ANNEXURES TO FIRE POLICY 98/208

NAME OF GODOWN MAXIMUM LIMIT (IN LACS)

GODOWN AT BAKOLI ALIPUR Rs. 400.00

GODOWN AT KANDLA PORT Rs. 900.00

GODOWN AT BOMBAY PORT Rs. 500.00

GODOWN AT VIJAY RICE MILL Rs. 200.00

KASHIPUR ROAD, RUDERPUR

ANNEXURE TO FIRE POLICY ENDT. 98/2

FACTORY AT VILLAGE HARSAROO

DISTT. GURGAON, HARYANA Rs. 5 Crores”

It is submitted by the Respondent Company that the Maximum Limit stipulated in this Annexure with respect to each go-down is derived from the letter dated 2 August 1997 addressed by the Claimant to the Respondent and from the declaration when the first enhancement was sought on 12 August 1997.”

11.6. On this date i.e 2 August 1997 two letters were also exchanged between the Claimant and the Respondent Company when the cover note for Rs.20 Crores was issued. The Claimant’s letter was with reference to the cover note on the basis of which the Policy was issued. In this letter, the Claimant informed as follows:

“This refers to personal discussion held with you today regarding clause No. XII of the Insurance declaration Policies. With regard to declaration of stocks at different locations/go-downs all over India will change frequently depending upon shipment to be effected. You are requested to confirm that our prior information to you for changes in location of godowns within the value of the

Policy on different occasions will be treated as approved. Kindly confirm.”

11.7 The Respondent’s reply on the said date (2 August 1997) states as follows:

“Reference discussion at your office and as agreed that permission for change of locations **and values** will stand automatically granted **on receipt of request letter**.”

This also refers to your letter dated 2 August 1997.

Thanking you and assured you of our best services always”

11.23 Our decision is also consistent with the two cover notes dated 2 August 1997 and 12 August 1997 pursuant to which the Policy of insurance was issued on 14 August 1997. It has however been contended by the Respondent that once the Policy is issued, no reference can be made to the cover note and it is only the Policy which must be construed or looked at. This submission is too broadly stated. No doubt, if there is any irreconcilable conflict between a Policy issued and the Cover Note issued prior to the Policy, the terms of the Policy must prevail. However, if there is no such irreconcilable conflict then the Policy and Cover Note must be read consistently and it would be permissible to refer to the terms of the Cover Note to construe the policy.”

20. The finding of the arbitrators on this issue is fully justified because it has been held by the Supreme Court judgment ***in Godhara Electricity Co. Ltd. vs. The State of Gujrat & another 1975 SC 32*** that conduct of a party subsequent to entering into contract is very much relevant for the understanding and interpretation of the terms of the contract between the parties. Para 11 of the judgment is opposite and is reproduced below.

“In the process of interpretation of the terms of a contract, the court can frequently get great assistance from the interpreting statements made by the parties themselves or from their conduct in rendering or in receiving performance under it. Parties can, by mutual agreement make their own contracts; they can also by mutual agreement, remake them. The process of practical interpretation and application , however, is not regarded by the parties as a remaking of the contract; nor do the courts so regard it. Instead, it is merely a further expression by the parties of the meaning that they give and have given to the terms of their contract previously made. There is no good

reason why the courts should not give great weight to these further expressions by the parties. In view of the fact that they still have the same freedom of contract that they had originally. The American Courts receive subsequent actings as admissible guides in interpretation."

(emphasis supplied)

21. The counsel for the objector has contended that the survey report ought to have been taken afresh in terms of the provision of Section 64 UM of the Insurance Act, 1938. I again find that this objection is misconceived because the learned arbitrators have held the following in paragraph 11.28 of the award and which is reproduced herein.

" Learned counsel for the Claimant contends that having regard to the nature of the policy asserted by the Claimant, account should be taken, when determining the liability of the Respondent, of the value of the stocks in all the godowns of the Claimant as on 31 May 1998. The value of such stocks on that date, says the Claimant, was Rs.38,08,98,000/-. In support of such value of the stocks the Claimant relies on Ext.C-24 filed by it. Exhibit C-24 is a declaration dated 5 June 1998 made by the Claimant to the Respondent setting out the value of the stocks as on that date in various godowns of the Claimant in the country. Excluding the item at Sr. No. 5(since it is covered by a separate cover note) the total value of the stocks at various godowns of the Claimant in the country adds up to Rs.38,08,98,000/-. It appears from the oral evidence on the record that declaration of the stocks in various godowns of the Claimant were made periodically by the Claimant to the Respondent. The statement contained in these declarations as to the value of the stocks was never challenged by the Respondent by any oral or written communication addressed to the Claimant before this arbitration proceeding. The Claimant relies heavily on the value of the stocks so declared, that is to say, a total value of Rs. 38,08,98,000/-. It is urged on behalf of the Respondent that the Respondent laid out its case in this arbitration on the basis that the policy under consideration is a fire declaration policy and not a policy of the description asserted by the Claimant and therefore, the Respondent says, it did not question the value of the stocks as declared in the declaration dated 5 June 1998. Its seems to us that if the Respondent did not do so, the Respondent took its chance in not meeting the case of the Claimant on the basis that the policy was of the particular nature asserted by the Claimant.

Towards the very end of this case, a point was sought to be made by learned counsel for the Respondent that if the policy

is regarded as one of the nature described by the Claimant
the basis of determining the liability would be different from
that on which the surveyor had proceeded and therefore, it is
urged, the matter should be referred to the surveyor afresh.
We see no reason why a second chance should be given to the Respondent in the matter, considering that a full opportunity was available to it from the outset to meet the case of the Claimant in all its several aspects. There is therefore no justification for accepting the Respondent's prayer that the matter should be referred to the surveyor for the purpose of verifying the value of the stocks relied on by the Claimant. Indeed, when reference to the document, Ex.C-24, was made specifically in paragraph 23 of the Claimant's Statement of Claim, the Respondent's Reply, in its corresponding paragraph 23, did not contradict the value of the total stocks disclosed in that letter. In paragraph 46-47 of the Respondent's Reply to the Statement of Claim the Respondent has stated that it is found that the policy is a floater policy the rules and conditions applicable to a floater policy will apply necessitating a reassessment based on such rules and conditions. We enquired from learned counsel for the Respondent as to what were those rules and conditions to which it referred but we have not been told what they are. If learned counsel for the Respondent had indicated what those rules and conditions are, we would have been able to judge whether it would make any difference to an assessment of the value of the stocks mentioned in the declaration dated 5 June 1998. We enquired from learned counsel for the Respondent whether he could show any specific ground for doubting the declaration made by the Claimant. Learned counsel stated that it was not possible for him to do so and it was a matter for the surveyor. In the absence of any attempt by the Respondent to show why the value of the stocks disclosed in the declaration dated 5 June 1998, which is part of the Claimant's documentary evidence, should not be accepted, we see no reason why the declaration should not be considered in determining the liability of the Respondent. In fact by order dated 6 February 2003 we had drawn the attention of the parties specifically to the question whether there would be any change in the assessment of the loss if the policy was of one nature or the other, and indicated that upon being so satisfied we would determine whether the assessment already made should be referred to the surveyor for a fresh assessment. But the Respondent reiterated the position that it could make no statement in the matter, and that it was for the surveyor alone on a fresh reference made to him to determine that matter. It seems to us that the burden lay on the Respondent to show even prima facie that the position taken by the Claimant on the evidence adduced by it cannot be relied on, and therefore, a fresh assessment by the surveyor is called for. There was no attempt to discharge that burden.

Our attention has been drawn to section 64-UM(2) of the Insurance Act, 1938, which requires that no claim in respect of a loss shall be admitted for payment unless a report has been obtained from an approved surveyor or loss assessor on the loss that has occurred. In our opinion the loss suffered at Kandla has already been assessed by the surveyor in a preliminary report followed by a final report. It is not the case of either party that loss was also suffered at any other place. So far as that condition in section 64-UM is concerned, it appears that it stands satisfied in the present case."

Accordingly, if the objector company was of the opinion that it was a floaters policy, I also do feel that, it was well open to the objector insurance company right from the beginning to duly inform its surveyor when the survey report was made that in fact there is a correspondence dated 2.8.1997 and the contents of which should be considered by the surveyor at the time of preparation of its survey report. If this was not done by the objector insurance company, it must necessarily bear the consequences. In any case, the learned arbitrators have also duly noticed that questions were put to the counsel for the objector as to what would be the consequences of such fresh report and effect thereof, however, the counsels for the objector were not able to satisfactorily reply and in fact, could not reply at all to this pointed query which was put by the arbitrators thus forcing the arbitrators to accept the declaration of Value made by the respondent on 5.6.1998.

22. It is seen that the respondent company had every month in terms of the exchanged correspondence dated 2.8.1997 had repeatedly given the different sublimit values at different locations each month and which were different than the fixed sublimit for each location as originally stated in the insurance policy. It is not as if that it is a one off situation where only one or two declarations have been given, the fact of the matter is that such

declarations have been given each and every month right till the insurable event took place. It is also a fact that no whisper of any objection to any of such declarations month after month was ever made by the objector insurance company. Accordingly, there is no reason for this court, once again, more so in Section 34 of the Act, to interfere with the aforesaid findings of fact arrived at in this regard. This contention of the objector also therefore, fails.

23. One another aspect qua Section 64 UM, I may consider at this stage. The argument I understand is that under Section 64 UM an existence of a surveyors report is mandatory before proceeding forward with a claim of insurance. This argument of the bindingness of a surveyors report has been dealt with by the Supreme Court in its recent judgment reported as ***New India Assurance Co. Ltd. Vs. Pradeep Kumar, 2009 (7) SCC 787***. In paras 21 & 22 of this judgment it has been held as under:-

“Although assessment of loss by approved surveyor is a prerequisite for payment or settlement of claim of twenty thousand rupees or more by the insurer, yet surveyors report is not the last and final word. It is not that sacrosanct that it cannot be departed from, it is not conclusive. The approved surveyors report may be basis or foundation for settlement of a claim by the insurer in respect of loss suffered by insured but such report is neither binding upon the insurer nor insured.”

(Emphasis added)

I may note that the above ratio is squarely applicable and no reason to depart therefrom as per ***Sikka Papers Ltd. Vs. National Insurance Co. Ltd. 2009(7)SCC 777*** because as pointed out by me in para 21 above that no good reasons were given to the arbitrators on behalf of the objector why the value stated in the declaration dated 5.6.98 be not accepted and

therefore such declaration was accepted and consequently it is not necessary in view of ***New India Assurance Case*** to remit the matter for preparing a fresh survey report.

24. That takes me to the issue with regard to the interest which has been awarded by the arbitrators. In the recent catena of decisions, the Supreme Court has said on account of the liberalisation of the interest regime and the change of the economic scenario there is a drastic reduction in the rates of interest and the courts must in arbitration proceedings and the awards passed subsequently must necessarily reduce the rate of interest keeping in view this subsequent scenario. This issue was considered by a Division Bench of this Court in ***MMTC vs. Al Bamar Co. Ltd. 2009 (159) DLT 513*** referring to the aforesaid Supreme Court judgments. I have also had an occasion to consider this issue of interest in different judgments and two of the said judgments are ***CS(OS) No. 73/1996 decided on 6.10.2009*** and ***CS(OS) No. 44A/1997 decided on 8.10.2009***. Accordingly, in accordance with the ratio of the Supreme court judgments, stated above, instead of awarding the rate of interest of 15% and 12% as is done in the award, the rate of interest is reduced by me to 9% and the figure 15%-12% wherever stated in the award should be read as 9%. To this extent the objection to the award is well merited. I may note that this reduction interest will give huge and substantial relief to the objector insurance company

25. That takes me to the issue of the costs to be awarded for these proceedings. For this purpose I have naturally taken into account the paying capacity of the parties and the disputed amount involved. It has been held in

para 37 of the decision of the Supreme Court in ***Salem Advocate Bar Association vs. Union of India (2005) 6 SCC 344*** that actual costs and not nominal cost should be imposed. This is also the requirement of Section 35 of the Code of Civil Procedure, which requires costs to follow the event. At the commencement of the arguments I had indicated to the parties that I am inclined to impose actual costs with respect to these proceedings especially as it is the respondent who has not had the benefit of the award and also the fact that the respondent is out of pocket with respect to the amount awarded right from the time when actual loss was caused to it on account of insurable event in June 1998. Today, eleven years later we are in October, 2009 and the respondent is still out of pocket with respect to part of the amount which is claimed by it as loss on account of the stocks of rice damaged in the cyclone at Kandla Port on 9.6.1998. Accordingly, I direct that the respondents should file an affidavit of the concerned and authorized persons as to that what amounts have already been paid for legal costs of advocates or are immediately payable within a period of four weeks from today, in terms of the commitments already made with respect to these proceedings under section 34 of the Act. In terms of such affidavit filed by the respondent company, and duly supported by the certificate of the advocates of receipt of fees such costs will be the costs of these proceedings provided the needful is done in four weeks from today. In awarding of costs I have taken into account the benefit on account of reduction in the rate of interest having been given to the objector. I have also for the purposes of costs taken into account the value of the claims involved and the financial capacity of the parties. I may note that on the issue of costs, I am supported

by a decision of a learned Single Judge of this court (Madan Lokur, J) in the case reported as *Austin Nichols & Co. Vs. Arvind Behl 2006 (32) PTC 133*.

26. With these observations, the objection petition is dismissed.

VALMIKI J.MEHTA, J

October 14, 2009

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