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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ O.M.P. 20/2015

% **Date of Decision: 05th November, 2015**

ROYAL SUNDARAM ALLIANCE

INSURANCE CO LTD Petitioner

Through: Mr. P.K. Seth, Advocate.

versus

CEPCO INDUSTRIES PVT LTD Respondent

Through: Mr. Jai Sahai Endlaw, Advocate.

CORAM:

HON'BLE MR. JUSTICE J.R. MIDHA

JUDGMENT (ORAL)

1. The appellant has challenged the award dated 27th August, 2014 passed by the learned arbitrator whereby the learned arbitrator has awarded Rs.48,06,776/- along with interest thereon @ 9% per annum w.e.f. 03rd February, 2010 along with costs.

2. The respondent insured twelve windmill machines installed at Village Jodha, Jaisalmer District, Rajasthan with the petitioner vide Standard Fire and Special Peril Policy for the period 07th April, 2009 to 06th April, 2010. On the night of 15th June, 2009, there was strong dust storm in major parts of Rajasthan which damaged one windmill machine. This windmill was installed at huge height and therefore, the respondent's engineers at site could observe the tip of one rotor blade to have bent and developed cracks. The damage to the other two

blades could not be ascertained to the ground level. The respondent intimated the damage to the petitioner who appointed M/s R.K. Patel & Co. surveyors to assess the damage.

3. The surveyors conducted the survey and submitted survey report dated 12th January, 2010 in which they assessed the respondent's loss to be Rs.48,06,776/- in respect of the three blades of the windmill machine. However, the petitioner took the decision to make the payment of claim of Rs.17,17,328/- in respect of only one rotor blade on the ground that only one rotor blade was damaged by storm and the two blades got damaged later on because the respondent continued to operate the windmill.

4. The respondent invoked the arbitration agreement contained in the insurance policy whereupon Justice K.S. Gupta (Retd.) was appointed as sole arbitrator by this Court under Section 11 of the Arbitration and Conciliation Act, 1996.

5. The learned arbitrator held that the surveyors admitted the respondent's loss in respect of the three blades to be Rs.48,06,776/- and all the three blades were replaced by the respondent in the presence of surveyors and were successfully commissioned thereafter. The learned arbitrator further held that the entire loss suffered by the respondent was covered in the policy. The learned arbitrator further observed that the manufacturer of the windmill, M/s Enercon India Ltd. had stated that one blade cannot be replaced and all the three blades of the windmill had to be replaced by a complete new set. In that view of the matter, even if one blade is taken to have been damaged by the storm, the entire set of three blades has to be

replaced. The relevant portion of the award is reproduced hereunder.

“.....Claimant has filed the copy of contract for operating the wind farm which was entered into between Enercon and the claimant on 24.11.2005 for a period of 10 years Ex. R.D. Clause 2.1 of this contract provides that during the currency thereof the wind farm shall be completely operated and managed by Enercon. Email dated 8.7.2009 sent by Enercon to the claimant, copy whereof was forwarded by the claimant alongwith email dated 10.7.2009 Ex. R-A to Parag Verma of the respondent, would show that on checking on 2.7.2009 the dynamic response of the blade rotor was found not satisfactory and as a matter of preventive and safety measure the WEC was stopped w.e.f. 2.7.2009. Similar information given to the surveyors by the Engineers of Enercon finds mention in sub-paras (5) and (6) at page 13 of the survey report. It is not born out from the record that any Engineer other than deputed by Enercon was posted at the site. Said para 11 of the statement of claim as it stands does not suggest that damage to rotor blade ‘A’ was noticed by Engineers at site on 16.7.2009 as alleged. Rohit Aggarwal In the cross examination recorded on 13.8.2008 stated that he received telephonic call on 16.6.2009 from Enercon regarding the incident. As Enercon had found damage to the rotor blade only on 2.7.2009, there was no occasion for them to have intimated of the damage to the rotor blade on 16.6.2009 to said Rohit Aggarwal. Alleged admission is, thus, to be read in context of dust storm/cyclone occurring in the area on 15.6.2009 alone. Insurance company cannot legally evade payment of loss/damage on ground of the claimant having operated the subject windmill machine willfully between 16.6.2009 to 2.7.2009. Coming to submission at 3 above, there has been change in circumstances after the Enercon pleaded that inter-changeability of blade from one set with

blade from another set was not practical or that drawing out one blade from the spare set would cannibalize balanced blade set leaving the other two blades as dead stocks. Discussion at pages 22 and 23 of the survey report would show that the rest of two visually undamaged blades were checked using sophisticated travel camera on 10.9.2009 by Enercon, manufacturer at the instance of surveyors and those blades were found to have undergone internal fractures and bonding failure and hence not fit for use. Checking report Ex. CW 1/6 with photographs was forwarded to the claimant alongwith letter dated 11.9.2009 Ex. CW-1/7 by Enercon. It is to be noted that surveyors have not differed with this checking report. In view of these subsequent events, aforementioned stand taken by Enercon has no relevance whatsoever now.

Submission at 4 above, relates to the surveyors not having accepted damage to all the three blades. As is manifest from the survey report, the surveyors have assessed the loss in respect of all the three blades but have stated that if the insurer wants to pay for one blade, the assessment for the same is also given in report. At page 22 of the report it is mentioned that set of three blades was replaced in the presence of surveyors and WTJ CEPCO-05 commissioned successfully thereafter. It cannot, thus, be said that surveyors had not accepted damage to all the three blades.

Survey report is a valuable piece of evidence and it cannot be legally ignored as the surveyors are appointed in terms of Section 64 UM (2) of the Insurance Act, 1938 (see United India Insurance Co., Ltd. Vs. Roshan Lai Oil Mills and Anr. (2000) 10 SCC 19 and Sri Venkateshwara Syndicate vs. Oriental Insurance Co. Ltd. and Anr. (2009) 8 SCC 507). Both the parties have relied on the surveyor report for settling the claim. Net loss assessed at page 28, reproduced above, of the report is

Rs.48,06,776/-. Dust storm/cyclone occurring on 15.6.2009 was the peril insured under the policy. In view of aforesaid discussion and survey report, the claimant is entitled to said amount of Rs.48,06,776/- in respect of damage to all the three blades and not one as claimed by the respondent”.

(Emphasis supplied)

6. Learned counsel for the petitioner submits that only one blade of the windmill was damaged by the storm dated 15th June, 2009 and the other two blades were damaged because the respondent continued to operate the windmill till 02nd July, 2009.

7. Learned counsel for the respondent disputes the submissions made by the petitioner. It is submitted that all the three blades of the windmill was damaged in the storm dated 15th June, 2009. Without prejudice, it is submitted that even assuming one blade was damaged, the whole set of three blades was replaced as per the manufacturer, M/s. Enercon India Ltd. as one blade of the windmill cannot be replaced. Learned counsel further submits that the disputes relating to the merits to this case cannot be looked into by this Court in view of the amendment of Section 34 of the Arbitration and Conciliation Act by the Arbitration and Conciliation (Amendment) Ordinance, 2015. Explanation 2 of amended section 34 specifically bars the Court from going into the merits of the claim. Section 18(1) of the Arbitration and Conciliation Act (Amendment) Ordinance, 2015 is reproduced hereunder.

***“Section 18: In section 34 of the principal Act-
(I) in sub-section (2), in clause (b), for the
Explanation, the following Explanations shall be***

substituted, namely:-

Explanation 1- For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India only if,-

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81: or

(ii) it is in contravention with the fundamental policy of Indian law: or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2- For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.”

8. On careful consideration of the rival contentions raised by both the parties, this Court is of the view that the contentions raised by the petitioner on merits of this case cannot be looked into by this Court. In considering an objection to the award, the Court does not sit in appeal over the decision on merits. That apart, this Court does not find any infirmity in the well reasoned award of the learned arbitrator as admittedly the respondent has suffered loss of Rs. 48,06,776/- for the replacement of the three blades of the windmill. The surveyors appointed by the petitioners had inspected the windmill when all the three blades of the windmill were found damaged. The manufacturer had replaced all the three blades of the windmill in the presence of the surveyors for which the respondent has paid Rs. 48,06,776/- to the manufacturer.

9. There is no merit in the objections filed by the petitioner, which are hereby dismissed.

J.R. MIDHA, J.

NOVEMBER 05, 2015
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