vai

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.635 OF 2015

The New India Assurance Co. Ltd. ...Petitioner
V/s.
The Mohini Agency ...Respondent

Mr.Y.C. Naidu with Mr.Asim Vidyarthi, Ms.Veena Iyer and Mr.Gurdeep Singh S. for the Petitioner.

Mr.Chetan Kapadia with Mr.Sankalp Anantwar and Mr.Abhishek Bhadang i/b PMH Law for the Respondent.

CORAM : R.D. DHANUKA, J.
DATE : 22ND SEPTEMBER, 2015.

P.C. :-

1. By this petition filed under section 34 of the Arbitration & Conciliation Act, 1996 (for short "Arbitration Act") the petitioner has impugned the arbitral award dated 5th November, 2014, allowing part of the claims made by the respondent made under Standard Fire & Special Peril Insurance Policy. I have heard learned counsel for the parties at length.

2. The petitioner issued Standard Fire & Special Peril Insurance Policy in favour of the respondent for the period between 22nd September, 2006 to 21st September, 2007. On 29th August, 2007, a major fire broke out in one of the neighbouring galas being Gala at Ghatkopar and spread to the factory premises of the respondent causing loss to the respondent's property. The respondent made a

claim under the said policy to the petitioner. The petitioner appointed a surveyor for the purpose of submitting the report on the claims made by the respondent. On 13th November, 2007, the surveyor released their interim survey report recommending on account payment to the maximum extent of Rs.10.00 lacs as an immediate relief to the respondent. The said amount of Rs.10.00 lacs were released to the respondent by the petitioner on 10th December, 2007. The said surveyor submitted a final report on 24th June, 2008 reflecting the net assessed loss amount as Rs.23,05,739/-.

3. The learned arbitrator passed an interim order directing the petitioner to make a further sum of Rs.13,05,739/- in favour of the respondent. The said amount was received by the respondent on 26th August, 2009 against the discharge voucher.

4. The respondent called upon the petitioner to pay a sum of Rs.58,75,475/- together with interest vide its advocate letter dated 29th December, 2009.

5. Dispute arose between the parties. The matter was referred to arbitration of former Judge of this Court appointed by the learned designate of the Chief Justice by an order dated 8th October, 2010.

6. Both parties examined their witnesses before the learned arbitrator. The learned arbitrator has rendered an award on 5th November, 2014, directing the petitioner to pay a sum of Rs.53,13,432/- towards loss of stock and directed the petitioner to pay the said amount with interest at the rate of 15% p.a. with effect from 1st June, 2009 till the date of award and further interest at the rate of

18% p.a. from the date of award till payment and also costs quantified at Rs.3,50,000/-.

7. Mr.Naidu, learned counsel appearing for the petitioner submits that the learned arbitrator has considered the opinion of M/s.A.P. Phadke & Co., a Valuer dated 25th April, 2009 as if the same was surveyor's report. He submits that in view of the claim made by the respondent, the petitioner had obtained an opinion of the said M/s.A.P. Phadke & Co. He submits that the said M/s.A.P. Phadke & Co. was not examined as witness by the respondent and thus the learned arbitrator could not have considered the said opinion while allowing the claims made by the respondent.

8. The next submission of learned counsel for the petitioner is that the statement recorded before the Income Tax Officer made by the respondent under section 133-A of the Income Tax Act, 1961 could not have been considered by the learned arbitrator while allowing the claims made by the respondent. In support of this submission, learned counsel placed reliance on the judgment of the Madras High Court in case of ***The Commissioner of Income Tax vs. S. Khader Khan Son, 300 ITR 157 (Madras)***. He submits that even if the respondent had made any such submission thereby accepting higher valuation of the stock, the said stock could not be the basis for awarding the claims made by the respondent.

9. It is submitted by learned counsel for the petitioner that the learned arbitrator has not considered oral evidence led by the petitioner in the impugned award and has allowed the entire claim on the basis of the opinion given by M/s.A.P. Phadke & Co. and the income tax returns filed by the respondent.

10. The next submission of learned counsel for the petitioner is that though the insured value of the stock was Rs.65.00 lacs, the learned arbitrator has awarded a sum of Rs.53,13,432/-, which according to the learned arbitrator is the net amount directed to be paid after giving credit of the amount of Rs.23,05,739/- already paid by the petitioner to the respondent. He submits that thus if both the amounts are considered together, the amount awarded by the learned arbitrator is more than the insured sum. He submits that the learned arbitrator has thus exceeded the scope of reference.

11. Mr.Kapadia, learned counsel for the respondent on the other hand invited my attention to the documents annexed to the petition as well as to the compilation and would submit that the respondent had already disclosed the amount of closing stock in their income tax returns much prior to the date of fire. He submits that the Income Tax Officer had assessed the income of the respondent and after physical verification of the stock at the factory premises and conducting inventory of the stock had concluded that the value of the stock in question on the date of inspection was under valued by Rs.40.00 lacs. He submits that the said closing stock was thereafter carried forward from time to time in the subsequent income tax returns of the respondent which were duly accepted by the Income Tax department. He submits that on the basis of this increase of value of stock, the respondent has enhanced the policy amount which was duly accepted by the petitioner. He submits that the learned arbitrator was thus justified in accepting the income tax returns duly assessed by the Income Tax Officer.

12. Insofar as the submission of the learned counsel for the

petitioner that the report of M/s.A.P. Phadke & Co. could not have been considered by the learned arbitrator is concerned, he submits that the said report was obtained by the petitioner. The said M/s.A.P. Phadke & Co. had discussed the issue with the respondent and had found that the report of the first surveyor was totally faulty. According to the opinion of M/s.A.P. Phadke & Co., the first surveyor could not have ignored income tax returns which were duly assessed by the Income Tax Officer. He submits that the said report was not disputed by the petitioner before the learned arbitrator.

13. Insofar as the submission of learned counsel for the petitioner that the learned arbitrator has not considered oral evidence led by the petitioner is concerned, he invited my attention to the impugned award and would submit that the learned arbitrator has considered the evidence of both the parties, documentary as well as oral and has rendered findings of fact which cannot be interfered with by this Court under section 34 of the Arbitration Act.

14. Insofar as the last submission of learned counsel for the petitioner that the learned arbitrator has awarded the amount more than the insured sum is concerned, learned counsel invited my attention to the recommendation made by the first surveyor and also the opinion of M/s.A.P. Phadke & Co. My attention is also invited to the payment of Rs.10.00 lacs and Rs.13,50,750/- released by the petitioner to the respondent as and by way of *ad-hoc* payment. He submits that the learned arbitrator has accepted the amount of stock as recommended by the said M/s.A.P. Phadke & Co. based on the evidence led by the respondent. He submits that in the concluding portion of the award, the learned arbitrator has however, inadvertently not directed the respondent to give credit of the sum of

Rs.19,15,739/-, which was paid in respect of stocks. He submits that the respondent has no objection if this Court directs the respondent to give credit of the said amount and to adjust the said amount as against the gross amount of Rs.53,13,432/- directed to be paid by the learned arbitrator to the respondent. He thus submits that the amount awarded by the learned arbitrator is not more than insured sum. The learned counsel distinguished the judgment of the Madras High Court in the case of ***The Commissioner of Income Tax*** (supra) on the ground that in this case there was assessment order passed by the Income Tax Officer and was not the case of search and seizure.

15. Insofar as the submission of learned counsel for the petitioner that the learned arbitrator has awarded the amount more than the insured sum is concerned, it is not in dispute that the respondent had claimed the amount under four heads, including the claim for stock destroyed by fire. In the first survey report, the surveyor had recommended various amounts for all such four heads, including stock. The petitioner has already released the amount as recommended by the first surveyor. The respondent has accepted the amount recommended by the first surveyor insofar as the other heads are concerned. The dispute remains only in respect of stock. It is not in dispute that the sum insured in respect of the stock was Rs.65.00 lacs. A perusal of the reports submitted by M/s.A.P. Phadke & Co. clearly indicates that in the said opinion, the said surveyor had opined that the value of closing stock as on the date of fire was ascertained at Rs.52,12,325/-.

16. A perusal of the impugned award rendered by the learned arbitrator clearly indicates that the said figure recommended by M/s.A.P. Phadke & Co. and proved by the respondent has been

accepted as the valuation of the closing stock on the date of the loss. The respondent does not dispute that during the pendency of the arbitral proceedings, the petitioner had already released a sum of Rs.23,05,739/-. A perusal of the record however, indicates that the learned arbitrator in the concluding portion of the award, has not considered the amount paid by the petitioner as and by way of *ad-hoc* payment to the respondent while directing the petitioner to pay a sum of Rs.53,13,432/- towards the loss of stock. In my view, merely on this ground that the learned arbitrator did not give credit of the amount when the respondent has agreed to give credit of the said amount to the petitioner, the award cannot be set-aside. I am inclined to accept the submission made by Mr.Kapadia, learned counsel for the respondent that the said amount of Rs.19,15,739/- can be deducted from the gross sum of Rs.53,13,432/- as calculated by the learned arbitrator.

17. Insofar as the submission of learned counsel for the petitioner that the learned arbitrator has not considered oral evidence led by the petitioner is concerned, a perusal of the award clearly indicates that the learned arbitrator has discussed and dealt with the documentary evidence as well as oral evidence led by both parties and has rendered various findings of fact. I am thus not inclined to accept this submission made by learned counsel for the petitioner.

18. Insofar as the submission of learned counsel for the petitioner that the respondent could not have placed any reliance on the report of M/s.A.P. Phadke & Co. is concerned, a perusal of the record indicates that the learned arbitrator has made an observation about the conduct of the petitioner that though the said report ought to have been produced by the petitioner before the learned arbitrator,

the same was not produced. It is not in dispute that the petitioner had obtained the said report from M/s.A.P. Phadke & Co. who was on the panel of the petitioner for the purpose of verifying the claims made by the respondent. It is clear that the petitioner did not dispute the contents of the said report submitted by M/s.A.P. Phadke & Co. The respondent thus was entitled to place reliance upon the said report. Since the petitioner has not disputed the contents of the said report, in my view, the learned arbitrator has rightly considered the same in evidence while allowing the claims made by the respondent. This Court does not find any fault in the impugned award insofar as the consideration of the said report as one of the piece of evidence is concerned.

19. Insofar as the submission of learned counsel for the petitioner that the learned arbitrator could not have relied upon the income tax assessment orders in the impugned award is concerned, it is not in dispute that much before the fire took place, the respondent had already reflected these stocks in its books of account from time to time. The Income Tax Officer had assessed the stock. It is a matter of record that there was physical verification carried out by the Income Tax department and upon computation of actual stock found in the premises, the Income Tax department had assessed the stock higher than Rs.40.00 lacs than what was reflected by the respondent. The respondent had accepted the said order and reflected the said enhanced amount of stock in the books of account and also in the income tax returns, which were duly assessed by the Income Tax Officer. The said closing stock continued to be reflected in the books of account till the date of fire. I am thus not inclined to accept the submission of learned counsel for the petitioner that the said amount was reflected for the purpose of making higher claim against the

petitioner. The learned arbitrator thus, in my view is right in referring to the income tax assessment orders passed by the Income Tax Officer. In my view, this Court cannot re-appreciate the evidence considered by the learned arbitrator in this petition filed under section 34 of the Arbitration Act.

20. A perusal of the award indicates that the learned arbitrator has rendered various findings of fact and has rightly come to the conclusion that the stock on the date of loss was at Rs.53,13,432/- and has rightly allowed the said claim. In my view, since the findings recorded by the learned arbitrator are not perverse and are based on oral as well as documentary evidence led by both parties, no interference is warranted with the impugned award.

21. In view of the statement made by Mr.Kapadia, learned counsel for the respondent, it is made clear that the petitioner shall be liable to pay to the respondent a sum of Rs.53,13,432/- minus Rs.19,15,739/- with interest on the balance amount at the rate as directed by the learned arbitrator and costs as awarded. The impugned order is modified to this extent. Rest of the award is upheld.

22. The arbitration petition is disposed of in aforesaid terms. No order as to costs.

(R.D. DHANUKA, J.)

“Certified to be true and correct copy of original signed order.”