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

ARBITRATION PETITION NO. 1228 OF 2012

M/s Lift and Shift India Pvt. Ltd. ...Petitioner.
vs
M/s Iffco Tokio General Insurance Co. Ltd. ...Respondent.

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Mr Atul Chitale Sr. Advocate with Ms Bhairavi Thakkar i/b Bhalchandra Saraf for Petitioner.
Mr Yogesh Naidu with Mr Asim Vidyarthi for Respondent.

CORAM : S.C. GUPTE, J
Order Reserved on : 27 November 2014
Order Pronounced on : 09 March 2015

JUDGMENT :

The arbitration petition challenges an award passed by an arbitral tribunal of three arbitrators, under Section 34 of the Arbitration and Conciliation Act, 1996 ("the Act"). The disputes between parties relate to a claim of loss made by the Petitioner (an insured) against the Respondent (an insurer), under a policy of insurance. The arbitral tribunal awarded the Petitioner's claim of Rs.27,75,749 with interest, out of the total claim of Rs.77,91,878. The Petitioner challenges the rejection of its balance claim.

2 In 2004, the Petitioner imported a second hand Crawler Crane – American make Hoist 9310 – 1982 Model of 200 ton capacity ("Crane"). The total value of the Crane including customs duty was about Rs.2.53 crores. Based on this initial purchase value, the Respondent insured the Crane for a sum of Rs.2 crores, accepting a premium of Rs.2,21,777 per annum. The insurance policy

issued on 22 December 2004 was renewed from time to time. During the currency of the policy, the Crane met with an accident and was damaged. A survey report prepared by a Surveyor appointed by the Respondent assessed the loss at Rs. 76,98,886, but after making a provision for an alleged under insurance of about 71.43 %, salvage value and depreciation, calculated the net loss of Rs.16,75,713. The Respondent offered to pay this loss. The Petitioner did not accept the assessment and invoked the arbitration agreement contained in the insurance policy. The arbitral tribunal made an interim award of Rs.16,75,713/- (towards the net assessed loss), which was paid by the Respondent. The arbitral tribunal made a final award of Rs.27,78,749, with interest, and after deducting the sum awarded in the interim award, which was already paid, and adding interest on the balance at 15% p.a., directed the Respondent to pay a sum of Rs.13,41,654 within 90 days and on failure of such payment, a further interest at 15% p.a. from 10 October 2012.

3 The impugned award accepts the assessed loss but proceeds on the footing that the sum insured under the policy is required to be the replacement lost (as new equipment of the same kind and capacity) and that there is an underinsurance element of 55% (instead of 71.43% applied by the Surveyor). The award works out the net adjusted loss after deducting 55% from the assessed loss and excess under the policy. Though the aspect of underinsurance is not elaborately discussed in the impugned award, we can gather from the Surveyor's report that the Surveyor's assessment of the cost of new Crane was Rs.7 crores, whereas the insured Crane was a second hand Crane insured for Rs.2 crores (the insured, i.e. the Petitioner, had purchased the

Crane second hand in 2004 at Rs.2.53 crores), and thus there was under insurance to the extent of 71.43%. Without discussing the basis of its own assessment of under insurance the arbitral tribunal put it at 55% and worked out the net loss accordingly. The revised assessment shown in the award is as follows:

Particulars	**Amount Rs.**		
	Boom Section	**Main Section**	**Total**
Assessed Loss	73,31,245	2,01,500	75,32,745
Less Under Insurance @ 55.00%	40,32,185	1,10,825	41,43,010
Adjusted Loss	32,99,060	90675	33,89,735
Less Excess Under the Policy	6,10,986	Nil	6,10,986
Net adjusted Loss			27,78,749

4 The main plank of the Petitioner's challenge to the impugned award, as submitted by the learned Counsel for the Petitioner, is that the claim of the insured under the present policy was not for total destruction of the insured equipment but a pure and simple claim for repairs to the damaged equipment; the total cost of repairs of Rs.76,98,886 being less than the actual value meaning the replacement cost of Rs.1.90 crores (the sum insured, i.e. Rs.2 crores less the depreciation of 5%, i.e. Rs.10 lakhs), the claim had to be settled under clause 3.2 (a) of the policy and not under clause 3.2 (b); and therefore, there was no question of reduction of the amount of the claim on account of any alleged under insurance. Learned Counsel for Petitioner made submissions on the concept of indemnity generally as well as particularly under the subject policy, and also relied on the contra preferential rule for the construction of insurance policies, citing several judgments.

5 The relevant provisions of the policy, namely, clauses 3.1 and 3.2, are quoted below:

"3.1 SUM INSURED:

It is a requirement of this insurance that the sum insured shall be equal to the cost of replacement of the insured items by new items of the same kind and the same capacity, which shall mean its replacement cost including freight, customs duties and erection cost if any.

3.2 BASIS OF INDEMNITY:

a) In cases where damage to an insured item can be repaired, the Company will pay expenses necessarily incurred to restore the damaged machine to its condition immediately prior to the accident/loss plus the cost of dismantling and re-erection incurred for the purpose of effecting the repairs, as well as ordinary freight to and to from a repair-shop, custom duties and dues, if any, to the extent of percentage included in the sum insured. If the repairs are executed at a workshop owned by the insured, the company will pay the cost of material and normal wages incurred for the purpose of the repair plus a reasonable percentage to cover overhead charges included in the sum insured.

No deduction shall be made for depreciation in respect of parts replaced, except those with limited life, but the value of any salvage will be taken into account. If the cost of repairs as detailed herein above equals or exceeds the actual value of the machinery insured immediately before the occurrence of the damage, the settlement shall be made on the basis provided for in b) below.

b) In case where an insured item is totally destroyed the Company will pay the actual value of the item immediately before the occurrence of the loss, including cost for ordinary freight, erection and custom duties if any, provided such expenses have been included in the sum insured, such actual value to be calculated by deducting proper depreciation from the replacement value of the item. The value of any salvage shall be taken into account.

Any extra charges incurred for overtime, night-work on public holidays, express freight, are covered by this insurance only if especially agreed to in writing.

In the event of the Maker's drawings, patterns and core boxes necessary for the execution of a repair not being available, the company shall not be liable for the cost of making any such drawings, patterns and core boxes.

The cost of any alteration, improvements or overhauls shall be recoverable under this policy.

The cost of any provisional repairs will be borne by the company if such repairs constituted part of the final repairs and do not increase the total repair expenses.

If the insured is less than the amount required to be insured as per Provision – 1 hereinabove, the Company will pay only in such proportion as the sum insured bears to the amount required to be insured. Every item, if more than one, shall be subject to this condition separately. The Company will make payments only after being satisfied, by production of the necessary bills and documents, that the repairs have been affected or replacement have taken place, as the case may be. The company may, however, not insist for bills

> and documents in case of total loss where the insured is unable to replace the damaged for reasons beyond their control. In such case claims can be settled on 'indemnity basis'.

6 Under the clauses quoted above, the sum insured must be equal to the cost of replacement of new items of the same kind and same capacity, i.e. the replacement cost including freight, customs duties and erection cost, if any. The real question is whether the clause regarding proportionate payment if the sum insured is less than the amount required to be insured, which provides that in case of the sum insured being less, the insurer will pay only in such proportion as the sum insured bears to the amount required to be insured, applies to only clause 3.2 (b) in case of total destruction of the insured item or even in case of damage to the insured item under clause 3.2(a). The arbitral tribunal was called upon to decide this question. The arbitral tribunal does not appear to have addressed itself to this question. There is no discussion on this important and fundamental aspect of the claim.

7 The arbitral tribunal had to first find the correct basis of working out the claim, namely, whether the correction of the loss to be paid in terms of the ratio of the replacement cost and the insured value ought to be applied. Then it had to actually work out the replacement cost and thereafter apply the ratio. Even as far as the replacement cost is concerned, there was no basis for accepting any particular replacement cost in the impugned award. Despite coming to the conclusion that the replacement cost worked out by the surveyor Rakesh Narula was convoluted, the arbitral tribunal appears to have simply accepted the same

purportedly *"since the respondents having already admitted the working of Rakesh Narula, we would not like to question it"*. There was no question of the Respondent unilaterally accepting the valuation and the arbitral tribunal acting on it. The Petitioner had not accepted this valuation and if the parties were at issue on the same, the arbitral tribunal had to adjudicate upon it and not simply go by the unilateral acceptance of the Respondent. Even the ratio of underinsurance worked out by the arbitral tribunal is entirely arbitrary. The tribunal simply put it thus: *"In our opinion an adjustment of 45% towards above factors* (negotiation, improvement, etc.?) *would be fair and reasonable"*. There is no basis for such opinion except the *ipse dixit* of the arbitrators.

8 There is, thus, no application of mind by the arbitrators whilst adjudicating the claim. The whole assessment is arbitrary and without considering the issues germane to adjudication. The award cannot be sustained and ought to be set aside.

9 In the course of the hearing, particularly having regard to the fact that the Respondent has paid the awarded amount to the Petitioner, this Court put it to both sides if they would like to have the award set aside by consent and go before another arbitral tribunal, making suitable provisions for the amount paid under the impugned award. The Respondent declined to do so. In the premises, the only option for this Court is to simply set aside the impugned award and leave the parties to their own devices with a view to adjudicate their disputes. Since the award is set aside on the ground of non-application of mind and not on merits, the parties would be free to have their disputes adjudicated upon under the

arbitration agreement, which still survives.

10 The arbitration petition is, thus, allowed and the impugned award is set aside. There shall be no order as to costs.

(S.C.GUPTE J.)

CERTIFICATE

Certified to be true and correct copy of the original signed Judgment/ Order.