

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

% *Judgment pronounced on: 20th January, 2015*

+ **O.M.P. No.1036/2012**

IFFCO-TOKIO GENERAL INSURANCE CO LTD Petitioner
Through Mr.Neeraj Kishan Kaul, Sr. Adv.
with Mr.Saurav Aggarwal,
Mr.Trinath, Mr.Mrinal OJha,
Mr.Siddhanth Sharma and
Mr.Bhuvan Mishra, Advs.

versus

INDO-RAMA SYNTHETICS LTD Respondent
Through Mr.Prag P. Tripathi, Sr. Adv.
Mr.Joy Basu, Sr. Adv. with
Mr.Aayush Agarwal,
Mr.Abhimanyu Bhandari,
Ms.Aanchal Mullick & Ms.Monisha
Handa, Advs.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The present petition has been filed by the petitioner under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") seeking setting aside of the Arbitral Award dated 1st August, 2012 passed by the Arbitral Tribunal of quorum comprising three arbitrators.

2. Brief facts of the present case are that the petitioner is a Company duly incorporated under the Companies Act, 1956 and having its registered office at IFFCO Tokio General Insurance Co.

Ltd., IFFCO Sadan, C-1, District Centre, Saket, New Delhi-110017. The respondent is Indorama Synthetics India Ltd., a company having its registered office at Nagpur, Maharashtra and Corporate office at Gurgaon, Haryana. The respondent manufactures Polyester Staple Fibre, Partially Oriented Yarn, Fully Drawn Yarn, Draw Texturized Yarn and Polyester Chips. The petitioner's Nagpur branch issued to respondent a Fire Loss of Profit Policy (Policy No.11171258 dated 28th February, 2007 – hereinafter referred to as the ("LOP Policy") and a Standard Fire and Special Perils Policy (Policy No.11179590 dated 31st March, 2007 – hereinafter referred to as Material Damages policy or the MD Policy). Both policies were worded in accordance with the policy wording statutorily mandated by the Tariff Advisory Committee (hereinafter referred to as the "TAC") set up under Section 64U of the Insurance Act, 1938 to stipulate policy wordings for all general insurance companies.

3. The MD Policy covers the respondent/insured for the risk of physical damage/loss to its property insured caused by the specific perils listed in the said policy. The loss of profit policy covers the peril of the loss of profits on account of the business interruption arising out of the consequence of the fire. The said LOP policy provides the mode of the computation of loss of profit by providing the methods of arriving at the loss of profit. The said policy also contained the definition indemnity period for which the said loss is required to be covered.

4. On 29th October, 2007, during the currency of the insurance policies, a fire broke out in Control Panel Room (in plant CP2 and CP3) of the respondent's polyester plant-I and four sets of control

panels were burnt/gutted/destroyed. Due to this fire, plants CP2 and CP3 that were manufacturing Polyester Staple Fibre (PSF), Partially Oriented Yarn (POY), Fully Drawn Yarn (FDY), Draw Texturized Yarn (DTY) and Polyester Chips came to a standstill. The said manufacturing activity remained stalled from the two plants 238 days, however the maximum indemnity period is 6 months, so the interruption of business is involved as per policy document for 182 days whereafter the respondent purchased 3 sets of control panels for making operational remaining 3 PSF draw lines. As per petitioner, on the date of the fire, the respondent had a stock in hand of 52,000 metric tonnes of the above said items which was sufficient to meet any sale requirement for a substantially long period.

5. After the incident of fire, the respondent informed the petitioner of the fire and the damage caused. Upon information, the petitioner appointed Mr. Adarsh Gupta of Messrs Adarsh Associates, New Delhi, as the Surveyor, to assess the loss under the MD and LOP policies, who visited the site for inspection on 31st October, 2007. By way of a letter dated 7th December, 2007, the respondent filed a provisional loss of profits claim (under the Fire Loss of Profit Policy) for Rs.25 crores on the basis of reduction in output from Plants CP2 and CP3 for two months, i.e. upto 31st December, 2007 which is the alternative basis provided under the loss of profit policy as against the turnover basis of computing the loss of profits.

6. On 8th January, 2008, while the survey and assessment of the loss was continuing, the Surveyor Adarsh Gupta submitted his interim report to the petitioner recommending an on-account payment of Rs.6 crores to be made to the respondent. He assessed the LOP

loss on the basis of turnover at about Rs.5,11,31,567 crores and the MD (Material Damage) loss at about Rs.2,24,82,332/-. He applied the turnover method when calculating the loss of profits on account of business interruption as a consequence to fire in LOP policy although in this interim report, the Surveyor recorded that the respondent/insured made a claim based on the alternative basis clause which was contained in the policy seeking payment under the LOP Policy on the basis of loss of output instead of loss of turnover.

7. By way of a letter dated 10th March, 2008, the respondent raised its objection to the method of assessment of the claim by the Surveyor. The respondent demanded Rs.60.33 cr. till 2088 on 17th March, 2008. The Surveyor responded to letter dated 10th March, 2008 stating that no single party has right to apply the alternative basis clause. On 28th July, 2008, after completion of indemnity period of 6 months, the respondent submitted its final claim under the Loss of Profits on the basis of reduction in output from Plants CP2 and CP3 during the period November, 2007 to April, 2008 to the tune of Rs.72,94,16,362/- (seventy two crores ninety four lakhs sixteen thousand three hundred and sixty two)

With regard to loss under the MD policy, the respondent had earlier submitted a revised claim for Rs.6,42,72,550/- net of salvage as against which the Surveyor arrived at an assessment of Rs.2,24,82,332/-.

8. On 24th June, 2009, the Surveyor Mr.Adarsh Gupta submitted a final report in which the business interruption claim under the LOP Policy was assessed at Rs.4,17,46,359/-. On 6th July, 2009 the

respondent wrote to the Surveyor asserting that the output basis should have been adopted.

Subsequently, by way of an Addendum Report of 10th September, 2009, the Surveyor upwardly revised assessment of the said business interruption loss to Rs.5,11,31,567/-. On 26th September, 2009, the Surveyor submitted its final report for the material damage i.e. MD claim under the Material Damage Policy as Rs.2.24 cr. against the claim of Rs.6.4 cr. made by the respondent.

On 6th November, 2009, the petitioner wrote to the respondent informing that as per report submitted by Adarsh Gupta, Surveyor, the loss assessed by him towards the loss of policy is Rs.5,11,31,567/- and material damages loss is Rs.2,24,82,332/-.

9. By way of a letter dated 8th February, 2010, the respondent approached the Insurance Regulatory and Development Authority (IRDA), Hyderabad, with a request to appoint a second Surveyor under Section 64UM(3) of the Insurance Act, 1938. Nothing is on record to suggest as to what has happened to the said application filed before IRDA by the respondent.

10. On 25th June, 2010, the respondent on its own appointed Mr.R.Srivatsan of Messrs Professional Surveyors & Loss Adjusters Pvt. Ltd. as its own Surveyor to assess the loss under the MD and LOP Policies.

11. Mr.Srivatsan, by way of his reports dated 25th and 30th October, 2010 calculated the claim under the MD Policy as being Rs.3,37,99,883/- and the claim under the LOP Policy as being Rs.35,79,42,559/-. Mr.R. Srivatsan has also dealt with the report of Mr.Adarsh Gupta, Surveyor in his affidavit dated 3rd August, 2011

before the Tribunal. By way of letter dated 1st November, 2010, the respondent submitted Mr.Srivatsan's report to the petitioner and sought a payment of the loss of profit claim and material damages claim in accordance with the said report and at the same time the respondent also invoked arbitration in view of the said disputed position between the parties. In view of arbitration clause, the Arbitral Tribunal was appointed consisting of three retired Judges.

12. Before the Arbitral Tribunal, the respondent submitted its statement of claims on 26th February, 2011 praying for the following reliefs:

- “(a) Pass an award for Rs.72,94,16,362/- in favour of the claimant and against the respondent;
- (b) Pass an award directing the respondent to pay the amount of Rs.6,42,72,550/- in favour of the claimant and against the respondent;
- (c) Award interest @ 18% in favour of the claimant and against the respondent from the date of the claim till commencement of arbitration, from the commencement of arbitration till date of award and post award till actual payment.”

13. The basis of claim No.1 was that the payment of the full claim amount of Rs.72,94,16,362/- for business interruption as calculated on output basis with regard to LOP policy. According to the respondent, the shortage in output from CP2 and CP3 during the indemnity period was 86,624 MT when compared with the output of CP2 and CP3 during the same time previous year (November, 2006 to April, 2007), which when multiplied with the expected gross profit of Rs.8421/- per/MT, the total loss of profits claimed was calculated as Rs.72,94,16,362/-. However, in the course of arguments, as noted

at paragraph 35 of the Award, the respondent limited its claim to Rs.35,79,43,559/- on the basis of Mr.Srivatsan's report. The claim No.2 was for payment of the full claim amount of Rs.6,42,72,550/- for material damage against MD policy.

In the claim statement, the respondent has relied upon the alternative basis clause by urging that the loss of profits are to be computed on the basis of output method of computation as against the turnover method. The respondent made the claim on 28th July, 2008 on the basis of reduction in output from plant CP2 and CP3. As per respondent, in accordance with the departmental clause CP2 and CP3 were taken as two separate departments and the claim was worked out on the 'Departmental Output basis'. The respondent referred to the working of the rate of gross profit and stated in the claim statement that the loss caused to the respondent on account of business interruption is based on standard output from CP2 and CP3 and loss of Gross Profit. The respondent stated that it had suffered losses due to damage to CPs1, 4 and 5. The losses on account of damage to CPs1, 4 and 5 are not included in Rs.72,94,16,362/- and that they are independent of the said amount. The reference was made to letters dated 11th May, 2000, assessment made by Adarsh Associates on 13th June, 2009, the final survey and assessment report by Adarsh Associates. Reference was also made to letter dated 23rd June, 2009 and letter dated 6th July, 2009 pointing out the mistakes in the final survey and assessment by Adarsh Associates. It is stated by the respondent that M/s Adarsh Associates has deliberately adopted an incorrect methodology. The respondent has referred to the addendum dated 10th September, 2009 issued by

Adarsh Associates. The respondent has referred to the letter dated 6th November, 2009 from the petitioner to the respondent wherein the final assessment by Adarsh Gupta on material damage is Rs.2,24,82,332/- and the loss of profit is Rs.5,11,31,567/- totaling Rs.7,36,13,899/-. The respondent has made a claim for Rs.6,42,72,550/- towards material damage under the material damage policy. The final report dated 26th September, 2009 on material damage by M/s Adarsh Associates is referred to. In fact the respondent challenged the appointment of M/s Adarsh Associates as Surveyor. The respondent relied upon the report of its own surveyor Mr.R. Srivatsan, Director, M/s Professional Surveyors & Loss Adjusters Pvt. Ltd., who on 25th October, 2010 made a final assessment for Rs.35,79,43,559/-. Mr. Srivatsan also assessed the claim under material damage at Rs.3,73,99,883/-.

14. The case of the petitioner before the Arbitral Tribunal was that:

- a) The terms of the policy have to be strictly construed as per interpretation of an alternative basis clause contains the expression “‘where found necessary’ and not at the whims and wishes of the petitioner. It was submitted before the arbitral tribunal that in the present case The same is sine qua non for the invocation of that clause.” It was submitted before the Arbitral Tribunal in para 11 of the statement of defence:

“11...”Where found necessary” is the sine qua non for the invocation of that clause.... Therefore, the claimant ought to appreciate the scope and sweep of the phrase “whenever found necessary” as employed in the said Alternative Basis Clause in the proper perspective, and that the said phrase is not a “mere verbal apparel” which can be sought to be worn by the

claimant at its will to embellish its claim under the Insurance Policy in question. Further, the context of output basis in lieu of turnover basis, by virtue of 'Alternative Basis Clause' cannot be seen in isolation and has to be examined in the context of the overall objective and principle of the LOP policy, which in any case, cannot be ignored to carry out any arithmetical calculation to depict erroneous result with an intent to making profit out of given situation, which otherwise could not have been earned by the claimant had the said loss not occurred."

In para 12, in reply to para 7 of the claim statement, it was submitted:

"12.... In the para under reply, the claimant had acknowledged that there are ups and downs in the sales and any excess accumulation of finished stocks, balances out in next upward cycle. However, under the Business Interruption Insurance Policy, any consideration for the period beyond the indemnity period, i.e., for 6 months in this case, cannot be considered affecting the assessment of loss, both on turnover or output basis. Further, the effect of market ups and downs, cannot be captured under the assessment of loss, during the indemnity period, covered under the involved Business Interruption Policy and loss or gain due to such factors is to be borne by the Insured/Claimant. For this purpose, the captioned Business Interruption Policy has suitable clauses and policy terms and conditions, which are being conveniently ignored by the claimant, as well as by its chose surveyor Mr.R. Srivastan."

- b) With reference to material damage, the petitioner adopted the report given by its surveyor M/s Adarsh Associates. In para 22, it was pointed by the petitioner that the department clause would not apply. The claim of Rs.72,94,16,362/- of the respondent was specifically denied and disputed by the petitioner. It was alleged that

the assessment by Mr.R. Srivatsan in respect of FLOP Policy at Rs.35,79,43,559/- is illegal. As per petitioner, the report of its surveyor Adarsh Associates is correct and valid.

- c) The petitioner submitted before the arbitral tribunal that the loss of profit policy is no exception to the applicability of the principle that the insurance policy is always intended to indemnify the insured to the extent to loss suffered by him as per the terms of the policy and cover provided therein. The petitioner also submitted that the insured cannot made profit out of the claims made to the insurance company.
- d) The petitioner also took the stand that the turnover method is the most preferred method of the computing the loss of profits on account of business interruption as against the output method which is seldom used. This is due to the reason that one has to show the interruption in business and the loss arising therefrom on account of such interruption which can be best indicated with that the loss of turnover basis.

15. The arbitral tribunal after considering the case of the competing parties proceeded to frame the following issues:

I. Whether the claimant is entitled to a claim of Rs.72,94,16,362/- (Rupees Seventy Two Crores Ninety Four Lakhs Sixteen Thousand Three Hundred and Sixty Two Only) as set out in the Statement of Claim pursuant to the terms of fire loss of profit policy (FLOP) or such other amounts as may be determined by the Tribunal.

II. Whether the Claimant is entitled to a claim of Rs.6,42,72,550/- (Rupees Six Crores Forty Two Lakhs Seventy Two Thousand Five Hundred and Fifty Only) as set out in the Statement of Claim pursuant to the terms of material damage policy or such other amounts as may be determined by the Tribunal.

III. Whether the claimant is entitled to interest in accordance with law from the date of the claim till commencement of arbitration, from the commencement of arbitration till date of award and post-award till actual payment and if so at what rate.

IV. Reliefs.”

16. After recording the evidence of the parties and hearing on behalf of both sides, the Arbitral Tribunal made and published its Arbitral Award on 1st August 2012.

17. The Learned Arbitral Tribunal accepted the calculations by Mr. R. Srivatsan/respondent surveyor and awarded a sum of Rs.34.70 crores (approx) towards Loss of profit and Rs.3.73 crores (approx) Material Damage policies, but rejected the application of departmental Clause. The respondent had received Rs 6 crores from the insured, taking that into account, the respondent was awarded a total sum of Rs.32.44 crores(approx) alongwith interest @ 9 % p.a.

18. The petitioner in the present petition has challenged the award dated 1st August, 2012, inter alia, on the following grounds:

- (a) The Award rendered by the Arbitral Tribunal is without any reason. It is non-speaking award on various issues raised by the petitioner. The same is mandatory requirement laid down in Section 31 (3) of the Act.
- (b) The award is perverse in law as the Arbitral Tribunal has ignored the well known principle of an insurance policy i.e. the principle of indemnity. The respondent has been benefited by virtue of findings arrived at which are contrary to the concepts and principles of insurance as such.

- (c) The award is contrary to the express terms of the policy, which is contract between the parties. The Tribunal has incorrectly given the meaning “whenever found necessary” and held that since the loss computation on output basis was higher than that achieved using the turnover method, the Tribunal opted for the output basis. The Arbitral Tribunal has failed to consider the issue involved in the matter as the issue before the Tribunal was the methodology to be used for computation of the loss. The award ignored that the assessment of the loss had to be carried out on the loss of turnover basis along with the accumulated stock clause and not on the loss of output basis which basis had to be applied only “whenever found necessary” under the special circumstance.

The Arbitral Tribunal has ignored the fact that the loss for which compensation was to be given had to be limited by the indemnity period (of 6 months) from the date of incident, as specified under the policy. The Tribunal has rather awarded compensation to the respondent for an anticipated loss which may occur several years later. The actual indemnity period of 6 months from the date of the incident has been completely sidestepped.

- (d) The Surveyor appointed by the Petitioner (who was an IRDA licensed surveyor) had, in his report, set out detailed reasons for the assessment of loss on the turnover basis. The reasons are explained and set out in the Surveyor Report at paragraphs 9.3 to 9.4 of his report. The award quotes some parts of the Surveyor’s report and rejects those with one-line conclusions. If

the reasoning given by the Surveyor for applying the turnover clause was not being accepted by the Tribunal, then it did not necessarily mean that the assessment of loss had to be carried out on output basis. There is no reason at all for applying the output basis except that the assessment of loss would be higher.

- (e) If the award is upheld then it would create serious prejudice as to the manner in which insurance business is carried out and would also tantamount to completely ignoring the difference between Specification J and Specification B of the tariff clauses issued by the Tariff Advisory Committee on the basis of which entire insurance business is conducted. The matter thus involves serious issues of public policy.
- (f) The Tribunal has erred in applying the “alternative basis clause” to the present claim. At paragraph of the Award, the Tribunal has held as follows:

“It is for the Court or the Tribunal, while considering the claim, to determine whether it is necessary to go to the alternative basis clause on the mechanism provided by the parties in the contract”.

“The sum assured could be only on the turnover. The alternative basis clause is a clause which is available free of cost in the All India Fire Tariff 2001, which is part of the TAC Mandated Wording. It did not add anything to the cover that was granted, and loss of profits was supposed to have been calculated on an indemnity basis.”

- (g) The Tribunal has incorrectly stated at paragraph 77.3 that *“the parties had agreed for two methods, turnover basis or the alternative basis clause”*. This is contrary to the policy terms as the parties nowhere agreed to the alternative basis clause as

being a method of assessment. The alternative basis clause only states that the output method may be employed if parties agree, and failing that agreement the default mechanism is an assessment based on turnover. As a matter of fact, there was no agreement between the parties to apply the alternative basis clause and the finding is contrary to specific terms of the contract and the factual scenario.

- (h) The Tribunal had ignored the complete absence of any materials to demonstrate that the Respondent's business is cyclical or it being so is relevant to the adjustment of the loss. The Respondent, for instance, ought to have shown when it would have sold the entire accumulated stock-during the indemnity period it managed to sell only c.16,000 tones out of the c.52,000 tones already accumulated with it and at that rate it would have taken more than 1 year (after the indemnity period was over) for the Respondent to have run out of accumulated stock. The true measure of the Insured/Respondent's loss of profits can only be ascertained by calculating the same with reference to the impact on the turnover of the Insured/Respondent. The Insured/Respondent's "profit" would only be calculated based on turnover which is linked to the sales. "Output" by itself is of no relevance to profits unless that output is sold in the market. It would be an artificial calculation if loss of profits were to be calculated on the basis of the output and not turnover. In the circumstances were the Insured/Respondent did not justify why this artificial calculation was to be adopted, such a calculation could not be deployed in this case by the Tribunal.

- (i) The Tribunal ignored crucial parts of the evidence on record, and in doing so has erroneously proceeded on the basis that Mr.Srivatsan's evidence was correct and in fact did not require any further justification. The Tribunal has wholly ignored that Mr.Srivatsan was appointed by the Respondent as a second surveyor which is a practice that has been discouraged by the Indian Courts, and the Courts have in fact gone to the extent of saying that the report of the second surveyor cannot be relied upon without first providing proper reasons for not relying on the first surveyors' reports. Mr.Srivatsan's appointment was made in 2010 and the first site visit that he carried out was on 3rd September 2010, which is almost 3 years after the loss, which occurred on 29th October, 2007. Essentially, Mr.Srivastan's assessment was a desk exercise, which had little or no relevance to the present case because it was carried out without the kind of empirical assessment that was carried out by the independent surveyor contemporaneously. Even though the Tribunal commented that a witness' statement in respect of policy interpretation is not relevant, it has effectively accepted the interpretation/resultant assessment made by Mr.Srivastan on output basis.

The indemnity afforded by consequential loss insurance, which is a claim for damages, is intended to be as complete as possible and is usually based on the turnover of the business, which is made up from three items. These may be called:

- (a) The prime costs (which will vary according to the amount of turnover) such as purchases for resale or manufacture, fuel, electricity or consumable stores,
- (b) Overhead expenses (which are constant) such as rent, insurance premiums, salaries to permanent staff and wages to skilled employees, usually referred to as “standing charges”, and
- (c) The net profit.

If a fire occurs, prime costs will not be incurred but the standing charges will be incurred and will form a much larger proportion of the turnover than before. At the same time there will be a loss of net profit since the turnover on which it can be earned is reduced. The usual form of consequential loss policy must compensate for these two factors and therefore agrees to pay, on the amount of turnover lost, the percentage which net profit plus standing charges bore to the turnover in the financial year preceding the loss (this percentage is known as the Rate of Gross Profit). Thus if, in the relevant year preceding the fire, the standing charges and net profit constitute 40 per cent of a turnover of 30,000, the consequential loss claim will be 20,000. This sum will afford an indemnity in respect of reduction in the turnover of the business; but the insured will also require compensation for the additional expenditure incurred in order to reduce the prospective loss of turnover, and the standard form of consequential loss policy therefore includes a further agreement to pay such compensation which may frequently exceed the loss suffered by a reduction of turnover.

19. The respondent has filed its reply disputing the grounds raised by the petitioner and reiterating the position taken by it before the arbitral tribunal and supported the award on the said basis. The petitioner has filed the rejoinder thereof. The matter came for hearing when Mr. Neeraj Kishan Kaul, learned senior counsel appeared on behalf of the petitioner and Mr. Prag P. Tripathi, learned Senior counsel appeared on behalf of the respondent.

20. Mr. Neeraj Kishan Kaul, learned Senior Counsel has made his submissions in support of the challenge laid the impugned award which can be summarized in the following manner:

- a) Firstly, Mr. Kaul, learned Senior counsel appearing on behalf of the petitioner has argued that all the findings of the Tribunal would show that they are without any reason. The said findings are without any answer to the arguments addressed by the petitioner. There is absolutely no reason given by the Tribunal as to basis of their conclusions. His argument is that the impugned award is thus contrary to Section 31 (3) of the Act which expressly requires that arbitral award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given, or the award is an arbitral award on agreed terms under Section 30 of the Act.
 - In order to demonstrate this position as to lack of reasons contained in the award, Mr. Kaul has painstakingly referred to several paragraphs of the award on diverse points discussed/ decided by the tribunal wherein there are stray observations made by the arbitral tribunal which read like “This is not acceptable in law” or “this is against the law” or

“this ratio does not help the case of the claimant/respondent”, “this approach is totally erroneous” without according any reasons as to how and why the various positions cited by the petitioner cannot be countenanced and the arbitral tribunal arrived at the said conclusion. It has been argued by Mr. Kaul, that the award in the present case is merely reproduction of the stands and evidence of both the parties with bare minimum reasoning on the part of the arbitral tribunal as why the tribunal is choosing to prefer one set of facts and legal proposition over the other. He refers paras 67.18, 67.28, 67.29 of the Award. Mr. Kaul argued that award does not disclose any reasons for arriving at the final conclusion and there are more than 20 unreasoned findings in the award where the Tribunal has rejected all the contentions of the petitioner and without any exception accepted all the contentions of the respondent without assigning any reasons for doing so. In fact, he has read various paras of the award and argued that the contention of the petitioner was rejected without disclosing any reason.

- Similarly, Mr. Kaul argued that not merely there are stray observations made by the learned tribunal on various aspects as noted above which demonstrate the lack of reasons provided by the tribunal but also the decisions on the main points of contentions which form the basis of the ultimate decision of the arbitral tribunal to award the claims in favour of the respondent are also lacking. This can be seen by reading paragraph 65.12 and 66 of the award

wherein upto paragraph 65.12 the detailed discussion of the disputed point on the interpretation of “wherever found necessary” has been recorded and thereafter the arbitral tribunal proceeded to decide the said point by merely observing that “it is court which considers necessary to go in to the alternative basis clause on the mechanism provided by the parties under the contract” without according any reasoning as why the court feels necessitated to adopt alternative basis clause and without answering the import of “wherever found necessary”. The said decision as per Mr. Kaul is without any reason and affects the ultimate decision of the tribunal to award the claim in favour of the respondent and thus go into the root of the matter which vitiates the award on the basis of lack of reasons or non speaking award.

- It is argued by Mr. Kaul that the only reason for applying the alternative basis clause is that the real object of the policy is to indemnify the claimant and as the loss suffered is immense, thus, the learned tribunal is choosing to proceed to adopt alternative basis clause. This can be seen by reading paragraph 42.1 read with paragraph 77.3 and 77.4, of the Award. It has been argued by Mr. Kaul that this reasoning is no answer to the disputed point “wherever found necessary” and also to the issue as to how the computations made by the surveyor do not intend to indemnify the respondent and only the respondent’s surveyors computations are required to be preferred just

because the respondent states the computation of the loss is more. It is argued by Mr. Kaul, there is a complete mix up of the concepts by the learned arbitral tribunal wherein no reasons are given for the various points decided which form the pillars of the decision making by the learned arbitral tribunal and even if there exists any reasons, the same are totally perverse as no reasonable person can arrive at the said view.

- b) Mr. Kaul argued in the present case the parties did not agree that no reasons are to be given. In fact the arbitration clause states that the “arbitration shall be conducted under and in accordance with the provisions of the Act”. It has been laid down in a catena of judgments that under the Act it is mandatory for the Tribunal to state reasons in the award as per the provisions of Section 31 (3) of the Act. It is argued that the award passed in contravention to the provisions of Section 31 (3) of the Arbitration and Conciliation Act, 1996 would be an award which would be against the public policy as it violates the provisions of law relating to the Arbitration and thereby warranting interference of this court. Learned counsel for the petitioner relies upon the following cases:

- (a) **Saroj Bala v Rajive stock Brokers Ltd.**, 2005 (4) AD (Delhi) 266 at paragraphs 5, 6 & 7.
- (b) **Mc Dermott International Inc. V. Burn Standard Co Ltd**, (2006) 11 SCC 181, at paragraphs 55 and 56.
- (c) **Som Datt Builders v State of Kerala**, (2009) 10 SCC 259, at paragraphs 20, 21, 23 & 25.

(d) ***Videsh Samachar Nigam Ltd. v. Ess Kay Furnishers, 2009*** (6) R.A.J. 1 at paragraphs 21, 22 & 23.

- c) Mr. Kaul argued that the impugned award passed by the arbitral tribunal is also against the fundamental policy of law which is that the contract of insurance is contract of indemnity. The impugned award though states that the intent of the policy is to indemnify the respondent for the losses suffered it but proceeds to adopt an approach which clearly deviates from the applicability of the said principle. Mr. Kaul, learned Senior counsel for the petitioner has argued that the impugned award proceeds to analyze the claim of the respondent based on output basis of the methodology on the strength of the surveyor report who has been appointed to computing the loss of profits 3 years after the occurrence of the incident at the instance of the respondent company.
- It has been argued that while choosing to prefer the output basis for computing the loss of the profits arising out the business interruption due to fire by merely stating that it can be seen from intent of the parties and object of the insurance policy only due to the reason that the computation shown by the respondent is on higher side, the learned tribunal has failed to evaluate the stands of the parties and surveyor reports of both the parties by applying the principle of indemnity. It has been argued by the learned senior counsel for the petitioner that there was categorical submission made by the petitioner that the respondent

cannot made profit out of the insurance. Still, the learned tribunal has not arrived at any finding as to how the computation made by the petitioner's surveyor does not indemnify the respondent and only respondent's surveyors computation is closer to the real indemnification. It has been argued that by not adopting this approach of evaluating the claims of the policy on touchstone of the principle of indemnification and by merely finding faults upon the surveyor report of M/s Adarsh and Associates in order to sidetrack the main issue as to whether it really seeks to indemnify for the loss of profits suffered by the respondent, the impugned award passed by the arbitral tribunal is bereft of any enquiry as to indemnification on account of the business interruption in consequence of incident of fire. As such, the impugned order warrants interference of this court as it proceeds to grant the hypothetical valuation of loss of profits submitted by the respondent.

- The award is therefore based on an erroneous proposition of a fundamental principle of law and its application that the LOP policy was not a policy of indemnity and is thus contrary to the settled law and public policy of India. The award recompensed the respondent by an amount which was much more than the loss actually suffered by the respondent. The basic premise of an insurance contract is that the insured has to be put in a situation he was before the occurrence of the loss. It is submitted that in the award the Tribunal not only ignored but also expressly rejected

such a fundamental principle of insurance law. This deviation, which led the respondent to profit from the insurance policy, reflects the sheer perversity in the award. This reason is enough to show that the award is contrary to the settled law of the land and it shocks the conscious and also puts the whole business of insurance in jeopardy. Reliance in this regard is placed on ***Amravati District Central Cooperative Bank Ltd v. United India Fire & General Insurance Co. Ltd.*** (2010) 5 SCC 294 at paragraph 23.

- The petitioner relies on the Tariff Advisory Committee's (TAC) General Regulation 1 on Consequential Loss (Fire) Insurance Section 1 which reads as under:

“Policy to constitute contract of Indemnity: Every policy shall constitute a contract of indemnity only.”
The Tariff Advisory Committee was formed under Section 64U of the Insurance Act, 1938 to prescribe the terms/conditions/premium rates and wordings of insurance policies, and at the time when the insurance policy was issued to the respondent by the petitioner, it was mandated by law to issue it only in accordance with the LAC's prescribed wording. The policy was in fact issued in the mandated form, and was a policy of “indemnity only” as required by law and by the TAC's regulations.”

- It is submitted that it has also been laid down in a catena of judgments that contracts of insurance are contracts of indemnity except in the case of life insurance, personal

accident and sickness or contracts of contingency insurance. The following cases were relied upon:

- (a) ***United India Insurance Co Ltd v. Kantika Colour Lab***, (2010) 6 SCC 449 at paragraph 19.
 - (b) ***State of Orissa v. United India Insurance Co. Ltd***, (1997) 5 SCC 512.
 - (c) ***Union of India v. Sri Sarada Mills Ltd.***, (1972) 2 SCC 877, at paragraph 36.
- It is argued that the award is contrary to express terms of the contract, the TAC mandated wording and specifications. His submission is that the policy is issued in accordance with the Tariff Advisory Committee's prescribed wordings of "Consequential Loss (fire) Tariff's (paragraph 4.1 of the petition). As stated above, the TAC is set up under Section 64U of the Insurance Act 1938 to stipulate policy wordings for all general insurance companies, and the policy was issued by the petitioner in accordance with the TAC wording only.
 - Each specification in the TAC document deals with a separate set of circumstances. For instance, "specification A" covers insurance of gross profit on turnover basis which has with it its own set of definitions, "Specification B" on the other hand covers insurance of gross profit on output basis exclusively with its own set of definitions and terms, "Specification C" is entitled difference basis and provides

cover on the basis of reduction in turnover, again with its own set of definitions.

- d) Mr. Kaul, learned Senior counsel for the petitioner has argued that the impugned award criticizes the report of the surveyor namely Adarsh & Associates by finding faults in the same in the one line conclusions and proceeds to draw an inference on the basis of the answers provided by him in the cross examination. It has been argued that the criticism or non acceptability of the report of the surveyor M/s Adarsh & Associates does not ipso facto lead to the conclusion that the turnover basis which is considered to be real indicator of the loss of profits on account of the business interruption should not be preferred and only output method and the computation arrived by the respondent is an indicator towards indemnification. It has been argued that the said approach and conclusion by mere ipse dixit of the respondent's surveyors and finding faults in the report of M/s Adarsh and Associates ignores the principle of law relating to indemnification and also enables the arbitral tribunal to arrive at the hasty findings on the adoption of the output method in lieu of turnover method without giving cogent reasons of preferring one method over the other in the impugned award when the entire case of the parties are dependent upon the finding as to which method of computation is the best indicator towards indemnification in the circumstances like the present one. Thus, the impugned award is clearly against the non speaking award, ignores the settled principles of law and mix up the legal

concepts leading to perversity of the nature warranting interference of this court.

- e) Mr. Kaul argued that the only reason provided by the respondent to compute the losses on the basis of alternative method which is output basis is that their business is cyclical in nature. It is argued that the said plea has been accepted by the learned arbitral tribunal as such without any evidence on record to suggest that the business of the respondent is cyclical in nature. It has been argued by Mr. Kaul while responding the submissions of the respondent that the mere fact that the petitioner did not cross examine the respondent's witness on the computation proposed by them does not lead to a conclusion as a matter of consequence that the method of computation adopted by the respondent is correct. It has been argued by Mr. Kaul that the challenge of the petitioner is at non applicability of particular method of computation of loss of profit and as such the cross examination on the actual computation or finding inaccuracies therein would be inconsequential when the petitioner's case is that the said method ought to not have been applied at all in the particular circumstances of the present case. Lastly, it is submitted by Mr.Kaul that it is true that the cross-examination of the petitioner before the Court did not produce or cross the witnesses of respondent on the aspect of calculation mainly on the reason that the challenge of the petitioner was from the very beginning about the method adopted by the respondent towards the claim of output instead of turnover basis,

the method stressed by the petitioner in its case which is appropriate in the facts and circumstances of the present case.

By making the aforementioned submissions, It has been prayed by Mr. Kaul that this Court should allow the petition filed by the petitioner under the provisions of the arbitration and conciliation Act and proceed to accept the turnover method as a basis of the computation of loss of profits arising out of the business interruption as a consequence of fire and set aside or modify the award accordingly.

21. Per Contra, Mr. Prag P. Tripathi, learned Senior counsel appearing on behalf of the respondent has made his submissions in support of the award and the same can be outlined in the following manner:

- a) Mr. Tripathi, learned Senior counsel appearing on behalf of the respondent has argued that the alternate basis clause providing for the output method of computation of loss of profits in LOP policy was added to safeguard the interests of the respondent so that the respondent should be fairly indemnified by the losses on account of business interruption. The said clause has been a part of the policy in dispute for the last many years and the insurance policy was renewed from time to time. The reason for use of this clause was that, as there are ups and downs in the sales of the respondent's products and any excess accumulation of stocks balances out in the next upward cycle, the respondent sought protection based on the actual production rather than the turnover. The nature of the business of the respondent is cyclical. The products manufactured by the respondent are not

perishable goods and have a shelf life and that accumulated stock gets depleted once the market picks up, thus output is correctly adopted to calculate the loss suffered by the respondent who has rightly sought to invoke the “alternative basis clause”. The respondent has suffered huge losses due to the fire and the petitioner now is trying to avoid its liability to pay the loss suffered by the respondent.

- b) Mr. Tripathi has argued that the words “whenever it is found necessary” denote some level of subjectivity in the determination of what is necessary and it is the right of the insured to determine the situation. The said submission advanced by the learned senior counsel is the reiteration of the submission advanced by the respondent before the arbitral tribunal that it is upon the respondent as insured to choose the method of computation of the loss of profits on account of business interruption.
- c) Mr. Tripathi, learned Senior counsel for the respondent has argued that assuming for the sake of argument, the learned Arbitral Tribunal after considering the evidence of the parties came to the conclusion that the output method is to be adopted for the computation of loss of profits claimed by the respondent, which is one of the possible view other than the view that turnover method as per contract was also possible under certain circumstances. It has been argued by Mr. Tripathi, that the merely because one of the two possible interpretations have been adopted by the learned arbitral tribunal is no ground to interfere within the scope of Section 34 of the Act as per the

settled law of Apex Court. The Apex Court in ***Rashtriya Ispat Nigam Ltd. v. Dewan Chand***, (2012) 5 SCC 306 has held:

“43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator. The legal position in this behalf has been summarized in paragraph 18 of the judgment of this Court in *Sail v. Gupta Brother Steel Tubes Ltd.* (supra) and which has been referred to above. Similar view has been taken later in *Sumitomo Heavy Industries Limited v. ONGC Limited* reported in 2010 (11) SCC 296 to which one of us (Gokhale J.) was a party. The observations in paragraph 43 thereof are instructive in this behalf. This paragraph 43 reads as follows:

“43. ...The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which amount to sitting in appeal. As held by this Court in *Kwality Mfg. Corpn. V. Central Warehousing Corpn*, 2009 (5) SCC 142. The Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of

the agreement. If he does so, the decision of the umpire has to be accepted as final and binding.”

Mr. Tripathi also relied upon the judgment/order dated 11th January, 2010 in OMP No. 8/2010 in the matter of ***Cement Corporation v. Vaswani Industries***, wherein this Court held:

“10. It is settled law that if two views are possible from a situation an Arbitrator is fully entitled to take one plausible view. The detailed Award shows that Arbitrator was justified in taking one plausible view which he has taken. Merely because another view is possible, as is contended by counsel for the petitioner, does not entitle this Court to interfere with the findings arrived at OMP 08/2010 by the Arbitrator. The scope of challenge to an award in a proceeding under Section 34 is no longer res-integra. This Court can interfere with an Award only if the Award is illegal or it is against the contractual provisions or it is so perverse that it shocks the judicial conscience. I do not find that the Award is in any manner illegal in view of what has been stated above”.

- d) Mr.Tripathi submits that the purpose is always by the insured is to get the losses arising from interruption to its business from fire damage. In the present case, the respondent has correctly requested that the output measure be applied in order to know the actual losses would have been suffered as the respondent was not able to produce what it would have been able to produce had the fire not taken place. The main reasons behind asking for the Output method was that the nature of the respondent's business was such that it could only be indemnified for its loss due to the fire under the LOP policy if the loss was calculated on the Output method basis. The facts even admitted by the petitioner:

- (i) The Respondent's production is usually and normally constant and stable while its sale is cyclical.
- (ii) The Respondent continues to produce and run its machines on a 24 X 7, 365 days basis. The major products (PSF, POY and DTY) are produced in different varieties such as merge and denier, etc.

In view of the aforementioned position, Mr. Tripathi argued that no fault can be found with the view adopted by the learned arbitral tribunal and the output basis was rightly adopted as mode of computation of the loss of profits as per the peculiar nature of the business despite the respondent restricted its claim before the Tribunal. The calculation of the respondent was on the basis of rate of profit i.e. 10.3%.

Mr. Tripathi, in order to lend strength to his submission relied upon the literature available on the adoption of alternative basis of the computation of loss of profits including IRDA guidelines wherein it has been provided that the output basis of computation of losses can be adopted when the business of the entity is cyclical in nature which is that when the decrease in production level does not immediately reflect corresponding decrease in the sales due to peculiar nature of the business. In such cases, as the losses are there but are not reflected in decrease in sales or turnover, the alternative basis which is output method is adopted to arrive at the computation. Mr. Tripathi argued that the present case is of such a nature wherein the respondent has lead such evidence before the tribunal by filing the production trend of the respondent for the last 5 years and other evidences which has not been disputed by the

petitioner and has been appreciated by the tribunal. In such a case, it cannot be said that the view adopted by the arbitral tribunal is illegal or perverse.

- e) Mr. Tripathi argued that interpretation given by the petitioner of the “alternative basis clause” is absolutely devoid of any logic. In fact the petitioner has misinterpreted the said clause. The trigger of “whenever found necessary” is fully satisfied in the present case. The Alternative Basis Clause has been correctly applied by the Arbitral Tribunal who after discussing evidence and certain admissions made by the petitioner has reached the conclusion that Alternative Basis Clause should be applied.
- f) Mr. Tripathi has argued that the Arbitral Tribunal has placed reliance on the “output method” of calculation of loss suffered by the respondent who has dealt with each and every point by way of objections raised by the petitioner. It is a well considered and speaking award and is sustainable in law. The Arbitral Tribunal has taken a plausible view and the said alternative clause is correctly interpreted by the Arbitral Tribunal. The same does not render the award unjust and unreasonable and ripe for interference by this Court.
- g) Mr. Tripathi has argued that as far as calculation of loss suffered by the respondent as mentioned in the final reports of Mr. Srivatsan appointed by the respondent is concerned, the petitioner never disputed the calculations given by the respondent for the amount of loss claimed on the output basis. The learned Tribunal has clearly held in para 68.25 of the award, that:

“Therefore, it could easily be seen that there is no cross examination on the actual figures given by CW-3 in his report dated 25.10.10. Thus, the irresistible inference is that the respondent has accepted them as being correct and there is no need to analyze those details. When that is the factual position, the argument on behalf of the respondent that the policy is a contract of indemnity and if the alternative basis clause is applied, it would result in unjust enrichment by the claimant is not sustainable.”

In view of the said finding, as per Mr. Tripathi, the petitioner challenge of the impugned award should be rejected.

- h) It has been argued by Mr. Tripathi that it has been established by the respondent before the Arbitral Tribunal that the respondent's production is usually and normally constant and stable while its sale is cyclical. The respondent continues to produce and run its machines on a 24X7, 365 days basis. The major products (PSF, POY and DTY) are produced in different varieties such as merge and denier, etc. The reason the respondent does this is because the respondent needs to maintain a very high level stock so that it is in a position to meet the demand of any customer as and when it occurs. There is a significant time lag between production and sales. The accumulation of stock if any gets depleted very rapidly as sales trends are erratic in nature and the goods produced by the respondent are non-perishable goods, hence can be stored for a long period of time.
- i) The respondent has provided last 5 years production data demonstrating the cyclical nature of the respondent's business, which was accepted by the Surveyor Mr. Adarsh Gupta as has

been recorded by the Arbitral Tribunal in para 76 and 76.1 of the award as under :

“76. Mr. Abhimanyu Bhandari, learned counsel for the claimant, submitted that the claimant had produced records to show the production made by the claimant for five years from 2003 to 2008. The details are given at page 10 of the written arguments of the claimant:

- (a) For example, that from June 2003 to March 2004, the production was static. Notwithstanding, that in February 2004, net sale had fallen to 17, 545 MT, but still the claimant produced 25, 488 MT in March 2004.
- (b) Production continued in full swing between April 2004 & December 2004. This is notwithstanding that sales dipped to 18, 292 in the month of November 2004, whereas the production in the month of December 2004 remained static at 21, 108 MT.
- (c) Similarly, between April 2005 and November 2005, production was stable notwithstanding that sales dropped to 12, 948 MT in September 2005.
- (d) Between April 2006 and December 2006 the maximum produce by the claimant was of 34, 317 MT however the sales dropped to 14, 165 MT. Yet, the claimant continued its production in January 2007 and produced 33606MT of yarn.
- (e) Production increased during the months from April 2007 to October 2007, since CP-4 was commissioned. Production was again stable, however there were fluctuations in the sales pattern.

The above data clearly shows that the claimant continues to produce regardless of its sales patterns.

76.1. Mr. Adarsh Gupta-RW-1 has accepted the factual position presented by the claimant with regard to production.”

- j) It has been argued by Mr. Tripathi that the respondent is not disputing the contract being one of indemnity. Admittedly, the respondent has paid the premiums of the policy, the respondent was covered under the insurance policy when the incident occurred, and therefore the respondent is entitled to receive the compensation. It has been argued that the mere fact that the respondent’s witness states that it is not policy of indemnity would not alter the legal position. A witness’s view who does not have legal viewpoint cannot be the basis for asserting that the respondent is stating that this is not a policy of indemnity. The Arbitral Tribunal specifically states at para 42.1 of the Award that the intention of the contract is to indemnify the insured.

“42.1. The main object and intent of the contract of insurance is to indemnify the loss as per the terms of the policy. According to the respondent-insurer, on a true construction of the contract/policy, the turnover basis alone could be followed for assessing the loss of consideration. It seems to us that it would defeat the object and intent of the contract to hold that it was entered into with an absolute and unchangellable right to the respondent to assess the loss in the manner in which it liked and arrive at the quantum as it calculates and determines. Dealing with such a construction, the House of Lords opined:

“Is there any rule of law which compels the construction contended for? I think there is not. Where general words are used which are obviously intended to be applicable, so far as they

are applicable, to the circumstances of the particular contract, which particular contract is to be embodied in or introduced into that printed form, I think you are justified in looking at the main object and intent of the contract and in limiting the general words used, having in view that object and intent.”

Similarly, the Arbitral Tribunal reiterated at para 77.3

“... The object and the intent of such clauses is to really indemnify the claimant for the loss which has been immense, as admitted by RW-1 and also the respondent.”

In view of the same as per Mr. Tripathi, the Tribunal has followed the principle of indemnity and the petitioner challenge on this count has to be rejected.

- k) Mr. Tripathi has argued that the report of the surveyor M/s Adarsh and Associates suffered from the fundamental faults which are not trivial but are vital in nature. The surveyor M/s Adarsh and associates opinion that the calculation of losses at the output method or turnover method would give same results is indicative of the fact that the report of the surveyor was based on wrong premise and as such rightly discarded by the learned arbitral tribunal. It has been argued by Mr. Tripathi that the conclusion arrived by the learned arbitral is based on established facts and evidence on which if the legal position as narrated by the petitioner is applied, still the conclusion arrived by the learned arbitral tribunal is clearly justifiable and cannot be faulted with.

22. In the light of the aforementioned submissions, it has been prayed by Mr. Tripathi that this Court should dismiss the challenge laid by the petitioner in the form of present petition. The learned Senior counsel has also referred many decisions of the Apex Court as well as of this Court with regard to scope of interference of Court sitting under the jurisdiction of Section 34 of the Act. He says that the Tribunal has taken the plausible view out of two, thus the question of any interference does not arise.

23. I have gone through the impugned award passed by the learned arbitral tribunal. I have also seen the records of the present case including the petition filed by the petitioner, reply and rejoinder and documents filed by the parties in the matter. I have also given my careful consideration to the submissions advanced by the learned counsel for the parties at the bar.

24. Firstly, I deem it appropriate to consider the plea that the challenge laid by the petitioner is required to be dismissed as it seeks to reappreciate the evidence in the matter or the interpretation of the contract/ insurance document which can result in plausible view by the tribunal, the same is not required to be interfered with under the provisions of Section 34 of the Arbitration and Conciliation Act. I have examined the said submissions canvassed by the respondent on the count that the award passed by the tribunal takes one view about the matter by awarding the claims preferred under the FLOP policy by adopting the output method as prescribed under the insurance policy/ contract by examining the intent of the policy and purpose of the policy which is to indemnify the respondent and the said view being a plausible view should be respected and should not be interfered with

in order to arrive at the different view of the matter on the appreciation of the same material available on record. I would have in the normal course concurred with the respondents submissions if that would really have been the only case which does not require interference of this court under the provisions of Section 34 of the Act. On the contrary, the careful perusal of the award would reveal that the arbitral tribunal not merely proceeds to award the claims preferred by the respondent under FLOP policy and MD policy by adopting the view on the matter which is a particular method of arriving at the consequential loss of profits payable under the insurance policy but has given minimum reasons which are totally contrary to the fundamental policy of law governing the insurance contract which is that the insurance is aimed at to indemnify the insured and not to profit anyone whereas the reasoning in the award seems to suggest that the claim is awarded to the insured on account to the higher valuation suggested by the method of the computation presented by the insured. Such reasoning is clearly affecting the larger public policy governing the law of insurance more particular the business interruption insurance which are based of assessment of loss of profits as a consequence of the peril insured. Moreover, the analysis done by me in the later part of the judgment would reveal that not merely the interpretation done by the arbitral tribunal to the contract/ policy document is erroneous but also the said incorrect interpretation has resulted in granting the hypothetical claims in the form of the consequential loss of the profits which are not the direct

consequences of the happening of the event without showing any such loss occurring during the indemnity period or for that matter in the near future and thus violating the principles of law which are fundamental policy of law of insurance and contracts which are that the insurance contract is always the contract of indemnity and the insured cannot get more than the mere indemnity out of the insurance policy and the principle that insurer is liable only for losses proximately caused by the events insured against and not the ones which are remotely caused and connected. Accordingly, the submissions of the respondent that the award rendered by the tribunal is justifiable as it merely takes one of the two plausible views and/or even if gives erroneous interpretation to the contract should not be interfered with by this court are non meritorious as for manifold reasons the award violates the fundamental policy of law which is the ground prescribed under the provisions of Section 34 of the Act for interference of the award and also as per the well settled law in the case of *ONGC v. Saw pipes Ltd*, AIR 2003 SC 2629 and the lines of the authorities emerging therefrom empowering this court to interfere with the award passed by the arbitral tribunal.

25. I shall now proceed to examine the award in detail and simultaneously answer the challenge laid by the petitioner and the submissions of the parties on the various points raised by the parties. The award dated 1st August, 2012 begins with providing with the overview of the facts with the preliminary observations where it has been stated that the factory of the claimant/respondent was

established in the year 1989. The sales of the claimants product are cyclical in nature. The accumulation of stocks if any during the downward sales cycle get depleted within a couple of months once the market picks up. By making these observations, the tribunal proceeded to narrate the facts of matter including the control panels which are CPs working at the respondents premises. It has been stated that the fire accident took place on 29th October, 2007 in the control panel room of the respondents continuous process plant which causes the extensive damage to the control panels of all four Polyester Staple Fiber. Thereafter tribunal narrated the events post the incident of fire including the lodging of the provisional claim by the respondent, report of the surveyor M/s Adarsh and Associates, final claim raised by the respondent after obtaining the report of Mr. Srinivatsan and all other events noted above giving rise to the invocation of the arbitral proceedings. It is noticeable that, the tribunal has made certain observations along side the narration of facts by observing that “this is not in accordance with the policy” without giving reasons as how it is not accordance with the policy. The later part of the discussion made in the judgment together with the reading of such stray observations noticed herein would show that at many places such one line observations exist where the tribunal has attempted to brush aside several aspects which are vital to arriving at the decision making including the report of the surveyor M/s Adarsh and Associates by making fewer observations like “this is not accordance with policy” or “this is not accordance with law” without informing as to how and why the same is not accordance with the policy or the law.

26. Pursuant to the narration of facts which quotes the version of both the sides along with the observations of the tribunal on several points including the criticism to the report of the surveyor M/s Adarsh and Associates at the threshold itself, the tribunal proceeded to record the case of the parties by reproducing the contentions from the claim statement and the statement of defence and rejoinder. Likewise, the tribunal reproduces the exhibits or annexures which were filed along with the claim statement and statement of defence and later on by the parties. The tribunal thereafter records the issue as to challenge of the jurisdiction of tribunal and observes that in view of the concession made by the counsel for the petitioner/respondent therein, the tribunal has jurisdiction to entertain and try the proceedings.

27. Thereafter, the Arbitral Tribunal at paragraph 32 of the impugned award reproduced the issues framed by the same and divided the said issues under two heads which are:

- a) The assessment of loss under the FLOP (Fire loss of profit) policy.
- b) The assessment of loss on Material Damage policy.

Claim 1 : Assessment of loss under FLOP

Under the first head of assessment of loss under the FLOP policy, the arbitral tribunal reproduced the submissions of the counsel for the parties and proceeded to frame the question upon reading of the terms of the policy, whether the alternative basis clause could be applied in paragraph 37 of the award. Thereafter, the arbitral tribunal proceeded to discuss the law on the subject that for the purposes of

interpreting the policy of insurance, the object and intent of the parties are to be derived upon reading of the policy of the document. After discussing the said law, the arbitral tribunal arrived at some finding at paragraph 42.1 unrelated to the analysis of law done by the tribunal by observing that the object of the contract of insurance is to indemnify the loss as per the policy and it would defeat the object and intent of the contract if the turnover basis alone could be followed for assessing the loss. Thereafter, again the tribunal reproduced several judgments of the Supreme Court as to how the sale deed and other instruments are to be read in order to deduce the intention of the parties and also quoted the judgments cited by the respondent on the principle of contra preferentum upto paragraph 58.3. It is noteworthy to mention that the award merely reproduces the judgments from paragraph 43 to 58.3 with some one line observations like “this ratio does not advance the case of the claimant” or like nature. The said discussion of law is not further analyzed by the arbitral tribunal as to which principle of law is applicable to case and what bearing it has on the facts in hand.

Furthermore, the arbitral tribunal reproduced the relevant clauses of the insurance policy including the Specification C relating to the Gross profit computation, Specification J relating to alternative basis clause, the definitions of the various terms prescribed under the policy. The said reproduction of the terms continued upto paragraph 61. In paragraph 62 of the impugned award, the arbitral tribunal proceeded to discuss the applicability of the alternative basis clause by observing that the term “output is to be substituted here” and in paragraph 63 onwards, the arbitral tribunal proceeded to discuss the

meaning of the words “wherever found necessary”. By this time, if one reads the award from paragraph 42.1 to paragraph 63, it is difficult to discern any discussion and reasoning relating to the true meaning of the terms of the policy. The award upto paragraph 63 proceeds to reproduce the judgments cited by the parties along with the clauses of the policy without interpreting the wordings of the policy document which is essential for the purposes of analyzing what sort of the damage or loss is recoverable under the policy. There is no answer to the said question after reading the policy document as to what is the extent of the damage or loss recoverable under the policy document after doing the analysis of the same. The arbitral tribunal only states that the object of the policy is to indemnify the insured and it would defeat the object of the policy, if the turnover basis remains the only one to assess the loss. I find that the petitioner never disputed the very existence of the alternative basis clause but merely maintained through the report of the surveyor M/s Adarsh and Associates, turnover is the index for the assessment of the loss in the case in hand and is widely used. Thus, the finding of the arbitral tribunal that the alternative basis clause goes out of consideration if the turnover basis is applied is almost unnecessary. The tribunal on the other hand failed to give any satisfactory reasoning upto paragraph 63 as to why the alternative basis clause is applicable to the instant case.

The discussion of the arbitral tribunal after paragraph 63 onwards is on the interpretation of the wordings “wherever found necessary”. The said discussion begins with the reproduction of the arguments of the parties and continued upto paragraph 65.11 which

is almost reproduction of the authorities including case laws and law lexicons. Thereafter in paragraph 65.12 and 66, the arbitral tribunal observed that it is the court or tribunal to determine whether it is necessary to go the alternative basis clause. In paragraph 67, the arbitral tribunal again observed that the necessity to assess the loss on the alternative basis clause has arisen because the value of the loss is far less than the value arrived at the loss on the basis of the alternative basis clause. The said findings of the tribunal in paragraph 66 and 67 are again without any analysis and reasoning as to how it is upon the court or tribunal necessary in the given facts to invoke alternative basis clause. The finding that merely because the value of the loss comes on higher side by way of alternative basis clause is in violation of the principle of law of insurance which is that the insurance is the contract of indemnity and not to profit the insured. In that light of the matter, one has to really pose the question as to which of the methods provided under the policy document, turnover or the alternative basis clause or output method truly indemnify the loss which has arisen as a consequence of the event of fire and damage arising from the same. The discussion on the same can be done by interpreting the terms of the policy in order to find out of what kind of loss is payable by the insurer to the insured and the analyses of the recovery of the said kind of loss by adoption of suitable methodology as provided under the insurance policy document which is in consonance with the indemnity principle. The discussion on the said aspect is completely missing in the findings of the arbitral tribunal while finding it necessary to invoke the alternative basis clause or output method merely on the ground that the value of the

loss if calculated by adopting the alternative basis clause is higher than the value in the case of the turnover basis. I shall discuss this later on. However, at this stage shall proceed to analyze the award completely.

The arbitral tribunal thereafter proceeded to invoke the alternative basis clause or output basis by finding that the surveyor evidence Adarsh Gupta RW1 is faulty and pointed out number of faults and proceeds on wrong premise and the said fact coupled with the higher valuation in the case of the output basis has enabled the arbitral tribunal to observe in paragraph 67.6 that the tribunal finds it necessary to go into alternative basis clause for the assessment of the loss. Thereafter, the arbitral tribunal proceeded to analyse the reports of RW1 Adarsh Gupta further and pointed out numerous infirmities in the same by observing that the approach followed by Mr. Gupta is not correct. This position continued upto paragraph 67.50. There are similar one line findings alongside the analyses of the report that “this is not correct approach” or “this is not acceptable” “this is not relevant”. The arbitral tribunal by paragraph 67.50 discussed the report of the surveyor Adarsh Gupta and his cross examination and concluded that the same is flawed approach. The arbitral tribunal from paragraph 67.51 to 67.57 also disregarded with the evidence of RW2 – Mr. Srinivasan by observing that the mere assertion by RW2 to support the report of RW1 Mr. Adarsh Gupta cannot at all be taken as evidence to prove a particular fact. Likewise, the arbitral tribunal proceeded to examine the evidence CW1 Dr. Ranjit Kumar Datta by merely reproducing the questions asked to him during cross examined and observed that there was fewer

questions and suggestions which were put to the CW1 on the applicability of the turnover basis and the objection on the alternative basis clause. The said finding is arrived at paragraph 68.4 and 68.5.

The arbitral tribunal further examined the report of CW3 Mr. R. Srivatsan of M/s Professional Surveyors and Loss Adjusters Pvt. Ltd. and his evidence and cross examination. By reproducing the questions and answers, the tribunal proceeded to observe that the report of Mr. Srivatsan is appealing as there will be a variation between the assessment of loss on turnover basis and output basis. This finding is arrived at in paragraph 68.20 merely on the basis of the answer of the witness and not on the basis of any legal discussion otherwise done by the arbitral tribunal. Further, there were some questions of the cross examination of Mr. Srivatsan were reproduced along with the answers upto paragraph 68.24 of the Award and in paragraph 68.25 it was concluded that there is no cross examination on the actual figures given by CW3/Mr. Srivatsan on the assessment of the loss and thus the inference can be drawn that the respondent has accepted them as being correct and there is no need to analyse them in detail. On the ground of failing to cross examination on the figures submitted by the CW3 Mr. Srivatsan, the arbitral tribunal also rejected the submission that the insurance company/ petitioner herein that the policy is a contract of indemnity and the alternative basis clause would lead to unjust enrichment to the respondent. The said submission is again rejected by merely on the basis of the fact finding that there is no cross examination of the CW 3 done by the petitioner herein on the figures submitted it and not on the legal discussion.

The discussion done by the tribunal in paragraph 69.4 and 69.5 by the arbitral tribunal further show that the tribunal observed that it is not acceptable in law that the principle of indemnity is intrinsic to all insurance contracts and the an insured cannot be allowed to make a profit out of the insurance.

The arbitral tribunal paragraph 70 onwards started discussing the various case laws along with the submission of the parties and simultaneously rejecting or accepting the said submissions and proceeded to observe in paragraph 77.3 and 77.4 that the object and intent of the alternative basis clause is to really indemnify the claimant for the loss and the tribunal again reiterated that it is necessary to apply alternative basis clause and is the real object and intent of the policy. In between tribunal also observed in paragraph 75.1 that the tribunal is on the interpretation of the contract and thus the opinion of the witness on behalf of the insurance company cannot be of any assistance. At this stage, it is suffice to say that it is difficult to find any interpretation to the contract/ insurance policy rendered by the arbitral tribunal in the award. So far, the award is merely the reproduction of the position of the parties, case laws, contentions, reproduction of the clauses of the policy document and evidence of the parties. There is no interpretation which has been found in the award of the interplay between the clauses of insurance policy document upto paragraph 77.4. The award merely adopts the inferences of the cross examination of the surveyors and forms the opinion of the tribunal on the basis of the answers to the questions when the said questions are not purely factual in nature. I shall

discuss this in detail while commencing my discussion immediately after I complete my analysis of the award with respect to first claim.

From paragraph 77.5 onwards, the learned arbitral tribunal proceeded to discuss the computation of the loss given by CW3/ Mr. Srivatsan, surveyor of the respondent. After making certain corrections in the computation in paragraph 77.6, the arbitral tribunal proceeded to observe that the actual loss is quantified at Rs.34,70,55,231-/ and proceeded to award the said sum at paragraph 80.32. At this stage, I would discuss the points which fall for consideration with respect to challenge of claim No. 1 preferred by the petitioner. I shall discuss the award with respect to other claims along side my discussion under the respective heads.

28. **The entire reading of the award for the Claim No.1 leaves several questions unanswered or not explained with cogent reasons in law and the reasons whatsoever are existing are contrary to the well settled principles of law governing the insurance including the principle of indemnity and proximate cause existing in the law of insurance which has lead to this court to examine the said questions as no useful purpose would be served by adjourning the matter for supply of additional reasons under Section 34(4) of the Act as the entire approach of the tribunal and the mindset reflected from the reading of the reasons that are existing in the award seems to be flawed and contrary to the well settled principle of law. Therefore, this court is proceeding to examine the said questions.** The said questions are:

- a) When it is desirable to adopt the alternative basis method in assessment of losses of business interruption in consequence of the damage arising out the incident of fire. The tribunal answers this question by observing that it is the point for the tribunal determination and the tribunal deems it necessary to apply the said method merely due to the reason that valuation of the loss on the output basis comes on higher side than that of the turnover basis, secondly that it is in the nature and purpose of the policy to indemnify the insurer and thus it would be in consonance with the purpose and nature of the policy to adopt such method. Thirdly, the tribunal though nowhere categorically observed that the business of the respondent is cyclical in nature but by approving the report of CW3 and analyzing the cyclical nature of business in certain paragraphs but by not returning the findings on the same in effect implicitly approved the said reasoning as well. Thus, all these reasons according to the learned Arbitral Tribunal enabled the Tribunal to depart from the turnover approach.

I find that the said reasons are either no reasons in law to justify the adoption of the alternative basis method for computation of the consequential loss and/or in the alternative the said reasons are not in consonance with the fundamental policy of law of insurance which is that the insurance contract is always a contract of indemnity and the insured cannot benefit out of the payments made towards the indemnification. I find that merely because the value of sum to be recompensed to the insured is higher when computed by

one method or the other can never be the basis for preferring one method over the other. **The true test according to me is that which of the two methods would truly and realistically indemnify the insured.** The enquiry from the said standpoint is completely missing in the impugned award contrary the public policy and settled principles of law relating to insurance and thus perverse which would also affect the future grant of the claims in the business interruption insurance contracts as well. **Likewise, it cannot be the nature of the policy and/or purpose of the policy to recompense higher sum to the insured. The indemnity policy never mean that invariably the view which benefits the insured with higher sum is to be preferred over and above the insurer till the time the decision on the question which of indemnity is determined or ascertained.**

The third reasoning which is a sub silentio finding on the cyclical nature of the business of the respondent is also no where firstly answering the question as to how the respondent could not be adequately indemnified by way of loss of turnover basis which is the first method for assessment of the losses. Even assuming for the argument that the cyclical nature of the business is per se an answer to the question why the respondent could not adequately indemnified by any other method, still it would be reflected on facts of the case in the later paragraphs of the judgment when the evidence is analyzed that the said plea of the respondent about the cyclical nature of business does not advance the case of the respondent towards the applicability of the output basis as a method to assess the loss of profits in

consequence of the damage arising out the incident. In view of the same, I would answer this question in my discussion.

- b) Whether the business interruption insurance or loss of profit insurance in consequence to the damage arising out of the fire is a contract of indemnity. The answer to this question is essential in as much as the Arbitral Tribunal at paragraph 69.4 and 69.5 has while rejecting the submission of the petitioner that it is a contract of indemnity observed that it is not acceptable in law. **As the tribunal has not given any reasoning as to why it is not acceptable in law. I shall be proceeding to analyze the terms of the policy document and also the legal position as to whether the business interruption insurance or loss of profit insurance is a contract of indemnity or not.**
- c) Whether the desirability and adoption of the method for the assessment of the loss of the profit on account of the business interruption in consequence to damage arising out of the incident of fire is a pure question of fact or mixed question of fact and law. The answer to this question is also essential in as much as the arbitral tribunal proceeded to answer the said question by merely placing reliance of the stand of the rival parties and contentions advanced by them and finding faults of the testimony and cross examination of one side over the other. The arbitral tribunal did not conduct any analyses as to why it is legally desirable to adopt the alternative basis or output basis in order to indemnify the respondent as against the reduction of turnover basis. **I find that the said question is not merely dependent upon the pleadings or evidence of the parties but is on the**

other hand is a mixed question of fact and law as the desirability of the method to be adopted for computation of the losses has to be ultimately tested upon the touchstone of the well settled principle of law of insurance which is indemnity principle and other principles which is that the insurance indemnifies for the losses for the proximate cause of the perils insured and not others. In that way, the question of desirability and adoption of the method for assessment of the loss is a mixed question of fact and law and not pure question of fact.

- d) Which method for assessing the consequential loss of profit in the facts of the present case and as per the legal principles evolved by the courts governing the field is applicable to the present case which can be said to be indemnify the respondent. I shall answering this question after objectively analyzing the terms of the policy and legal position. This is due to the reason that though the tribunal observed that it has given some interpretation and justification for the adoption of the method or basis for computation of the consequential loss of the profits in the present case but did not as a matter of fact provide any such interpretation and nor discussed legally on the same.

All these four questions which are unanswered by the tribunal can be answered sequentially if one firstly analyses the terms of the policy in order to see the language of the policy and ascertain as to whether it provides for indicators towards indemnification principle or not and thereafter apply analyze the

case of the parties along with the application of the legal principles on the same.

Firstly, it is therefore necessary to discuss the terms of the FLOP policy which are reproduced hereinafter:

“CONSEQUENTIAL LOSS (FIRE) POLICY

Policy Form, Schedule and Conditions

In consideration of the insured named in the Schedule hereto having paid to The Iffco-Tokio General Insurance Co. Ltd. (hereinafter called the Company), the premium mentioned in the Schedule, the Company agrees (subject to the Special Conditions and Exclusions contained herein or endorsed or otherwise expressed hereon and also to the Conditions and Exclusions contained in the Fire Policy covering the interest of the insured in the property at the premises) that if any building or other property or any part thereof used by the insured at the premises for the purpose of the Business, be destroyed or damaged by the perils covered under the Fire Policy, (destruction of damage so caused being hereinafter term damage), and the business carried on by the insured at the premises be in consequences thereof interrupted or interfered with, then the Company will pay to the insured in respect of each item in this schedule hereto the amount of loss resulting from such interruption or interference in accordance with the provisions contained therein :

Provided that

- 1) Such Damage is caused at any time after payment of the premium during the period of insurance named in the Schedule or of any subsequent period in respect of which the insured shall have paid and the Company shall have accepted the premium required for the renewal of the policy.
- 2) At the time of the happening of the Damage there shall be in force a Fire Policy covering the interest of the insured in the property at the premises against such Damage and that payment shall have been made or liability admitted thereunder. However, the Proviso shall not apply where payment is not made under Fire Policy solely due to operation of a proviso in fire policy excluding liability for losses below a specified amount.

- 3) The liability of the Company shall in no case exceed in respect of each item the sum expressed in the said Schedule to be insured thereon or in the whole the total sum insured hereby or such other sum or sums as may hereafter be substituted therefor by memorandum duly signed by or behalf of the company.

No claim under this Policy shall be payable unless the terms of this condition have been complied with and in the event of non compliance therewith in any respect, any payment on account of the claim already made shall be repaid to the Company forthwith.

- 4) In no case whatsoever shall the Company be liable in respect of any claim under this Policy after the expiration of :

- (a) One year from the end of the period of indemnity or if later,
- (b) Three months from the date on which payment shall have been made or liability admitted by the Insurers covering the Damage giving rise to the said claim, unless the claim is the subject of pending action or Arbitration.

- 5) This Policy and Schedule annexed (which forms an integral part of this Policy) shall be read together as one contract, and words and expressions to which specific meanings have been attached in any part of this Policy or of the Schedule shall bear such specific meanings wherever they may appear.

- 6) This insurance does not cover any loss resulting from damage occasioned by or through or in consequence, directly or indirectly of any of the following occurrences, namely :-

- (a) War, Invasion, act of foreign enemy, hostilities or Warlike Operations (whether war be declared or not), Civil War.
- (b) Mutiny, Civil, Commotion assuming the proportion of or amounting to a popular – rising, military rising, insurrection, rebellion revolution, military or usurped power.

In any action suit or other proceeding where the Company alleges that by reason of the provision of this condition any loss or damage is not covered by this Insurance, the burden of proving that such loss or damages is covered shall be upon Insured.

- 7) At all times during the period of insurance of this Policy, the insurance cover will be maintained to the full extent of the respective sum insured in consideration of which, upon the settlement of any loss under this Policy, pro-rata premium for which the unexpired period from the date of such loss to the expiry of period of insurance for the amount of such loss shall be payable by insured to the company.

The additional premium referred above shall be deducted from the net claim amount payable under the Policy. This continuous cover to the full extent will be available notwithstanding any previous loss for the company may have paid hereunder and irrespective of the fact whether the additional premium as mentioned above has been actually paid or not following such loss. The intention of this condition is to ensure continuity of the cover to be Insured subject only to the right of the Company for deduction from the claim amount when settled of pro-rata premium to be calculated from the date of the loss till expiry of the Policy.

Notwithstanding what is stated above, the Sum Insured shall stand deduced by the amount of loss in case Insured, immediately on occurrence of the loss, exercises is option not to reinstate the sum insured as above.

Specification C – “Difference” Basis

Item No.	Sum Insured
1. On Gross Profit	Rs.3801840000/-

The insurance under Item No.1 is limited to loss of Gross profit due to (a) Reduction in Turnover and (b) increase in Cost of Working and the amount payable as indemnity thereunder shall be : -

(a) IN RESPECT OF REDUCTION IN TURNOVER : the sum produced by applying the Rate of Gross Profit to the amount by which the Turnover during the Indemnity Period shall, in consequence of the damage, fall short of the Standard Turnover.

(b) IN RESPECT OF INCREASE IN COST OF WORKING: the additional expenditure necessarily and reasonably incurred for the sole purpose of avoiding or ,diminishing the reduction in Turnover which but for that expenditure would have taken place during

Indemnity period in consequence of the Damage but not exceeding the sum produced by applying the Rate of Gross Profit to the amount of reduction thereby avoided.

Less any sum saved during the Indemnity Period in respect of such of the charges and expenses of the business payable out of the Gross Profit as may cease or be reduced in consequence of the Damage;

Provided that if the Sum Insured by this Item be less than the sum produced by applying the Rate of Gross Profit* to the Annual Turnover, the amount payable shall be proportionately reduced.

* Insert the appropriate multiple if the indemnity period exceeds 12 months.

Departmental Clause:

If the business be conducted in departments, the independent trading results of which are ascertainable, the provision of Clauses (a) and (b) of Item 1 shall apply separately to each department affected by the damage except that if the Sum Insured by the said item be less than the aggregate of the sum produced by applying the rate of gross profit for each department of the business (whether affected by the damage or not) to the relative Annual Turnover thereof, the amount payable shall be proportionately reduced.

Definitions

GROSS PROFIT – The amount by which

- (1) The sum of the Turnover and the amount of the Closing Stock shall exceed.
- (2) The sum of the amount of the Opening Stock and the amount of the Specified Working Expenses.

Note 1- The amount of the Opening and Closing Stocks shall be arrived at in accordance with Insured's normal accountancy methods, due provisions being made for depreciation.

Specified Workings Expenses:-

1. All Purchases (less Discounts Received) ;

2. % of the Annual Wage Roll (including Holiday and Insurance contributions);-
3. Power;
4. Consumable Stores;
5. Carriage;
6. Packing Materials;
7. Packing Material;
8. Bad Debts;
8. Discounts Allowed;
9. Any other expenses to be specified.

Note 2-- The words and expressions used in this Definition shall have the meaning usually attached to them in the books and accounts of the Insured.

TURNOVER - The money paid or payable to the Insured for goods sold and delivered and for services rendered in course of the business at the premise.

INDEMNITY PERIOD - The period beginning with the occurrence of the damage and ending not later than Six months thereafter during which the results of the business shall be affected in consequence of the damage.

RATE OF GROSS PROFIT-- The rate of Gross Profit earned on the turnover during the financial year immediately before the date of the damage.	To which such adjustments shall be made as may be necessary to provide for the trend of the business and for variations in or special circumstances affecting the business either before or after the damage or which would have affected the business had the damage not occurred so that the figures thus adjusted shall represent as nearly as may be reasonably practicable the results which, but for the damage, would have been obtained during the relative period after the damage.
Annual turnover – The Turnover during the twelve months immediately before the date of the damage.	
Standard Turnover – The Turnover during that Period in the twelve months immediately before the date of the damage which corresponds with the Indemnity Period.	

Memo 1 :If during the Indemnity Period goods shall be sold or services shall be rendered elsewhere than at the

premises for the benefit of the business either by the Insured or by others on his behalf of money paid or payable in respect of such sales or services shall be brought into account in arriving at the Turnover during the Indemnity Period.

Memo: 2 If the Insured declares, at the latest twelve months after the expiry of any Period of Insurance, that the Gross Profit earned (or a proportionately increased multiple thereof where the maximum Indemnity Period exceeds 12 months) during the accounting period of 12 months most nearly concurrent with any period of Insurance, as certified by the Insured's Auditors, was less than the Sum Insured thereon, a pro-rata return of premium not exceeding 50% of the premium paid on such Sum Insured for such period of Insurance shall be made in respect of the difference. Where, however, the declaration is not received by the Company within twelve months after the expiry of the period of insurance, no refund shall be admissible.

If any damage has occurred giving rise to a claim under this policy, such return shall be made in respect only of said difference as is not due to the damage.

11. Return of Premium :

- i) The full premium for the selected sum insured based on estimated Gross Profits shall be chargeable under all Consequential Loss (Fire) Policies in advance.
- ii) Where it is desired to provide for the Return of premium for the actual Gross Profits being lower than the selected sum insured, the following clause should be used :

"If the Insured declares at the latest twelve months after the expiry of any period of Insurance, that the Gross Profits earned (or a proportionately increased multiple thereof where the maximum Indemnity Period exceeds 12 months) during the accounting period of 12 months most nearly concurrent with any period of Insurance, as certified by the Insured's Auditors was less than the Sum Insured thereon, a pro-rata return of premium not exceeding 50% of the premium paid on such Sun Insured for such period of insurance shall be made in respect of the difference. Where however the declaration is not received by the Company

within twelve months after the expiry of the period of insurance no refund shall be admissible.

If any damage has occurred giving rise to claim under this Policy, such return shall be made in respect only of said difference as is not due to such damage.”

- iii) Similar Clause in respect of “Wages” cover under Rules 3(a) and (b) of Section II should be used by substituting the words “Actual Wages Paid” for the words “Gross Profit Earned” in the third line of the above Clause.
- iv) In exceptional circumstances, Head Office of TAC may permit, on specific applications from the Insurers, Return of Premium upto a maximum of 75 percent under the above Clause, on the merits of each case.

Note : The above Rules/Clause shall uniformly apply to all factories/industries.

N.B. No reduction will be allowed in the Sum Insured during the currency of the Policy except as provided for under this Clause.

Specification J – Alternative Basis Clause

It is agreed and declared that, whenever found necessary, the term ‘Output’ may be substituted for the term “Turnover” and for the purpose of this policy ‘Output’ shall mean the sale value of goods manufactured by the ‘Insured’ in the course of the business at the premises.

Provided that :

- (a) Only one such meaning shall be operative in connection with any one occurrence involving damage (as within defined).
- (b) If the meaning set out above be used, memo No.1 shall be altered to read as follows :

Memo 1 : If during the INDEMNITY PERIOD goods shall be manufactured other than at the premises for the benefit of the business either by the Insured or by others on the Insured’s behalf, the sale value of the goods so manufactured shall be brought into account in arriving at the OUTPUT during the INDEMNITY PERIOD.

13. Accumulated Stock Clause :

“In adjusting any loss, account shall be taken and an equitable allowance made if any shortage in turnover due to the damage is postponed by reason of the Turnover being temporarily maintained from accumulated stock of finished goods in the Insured’s warehouse.”

14. Earthquake Extension :

Extension to cover Consequential Loss due to Earthquake Fire and Shock

In consideration of the payment of the after mentioned premium, it is hereby agreed and declared that, notwithstanding anything in the within written policy contained to the contrary, the term ‘Damage’ as defined in this policy shall (subject always to the Special Conditions hereinafter contained) extend to include damage due in Earthquake Fire and Shock.

Provided that it is hereby further expressly agreed and declared that :

- (1) The liability of the Company shall in no case under the Endorsement and the Policy exceed the sum insured by this Policy.
- (2) All the Conditions of this Policy shall apply in all respects to the insurance granted by this extension save in so far as the same may be expressly varied by the above Special Conditions.
- (3) The Special Conditions herein shall apply only to the Insurance granted by this extension and the Conditions of the Policy shall apply in all respects to the insurance granted by the policy as if this Endorsement had not been made thereon.”

29. From the reading of the aforementioned provisions of the policy document, specification and definitions mentioned and appended along with the policy, the following position can be discerned:

- a) From the reading of the wording the main clause/ clause 1 along with the title of the policy, it can be seen that the kind of the loss which is insured in the present policy is “consequential loss”. The

main clause/ clause 1 providing for the insurance states that the company agrees (subject to the special conditions and exclusions contained herein or endorsed or otherwise expressed hereon and also to the conditions and exclusions contained in the Fire policy covering the interest of the insured in the property at the premises)..... be destroyed/damaged by the perils covered and **the business carried on by the insured at the premises be in consequence thereof interrupted or interfered with**, the company will pay to the insured in respect of each item in the schedule hereto the amount of the **loss resulting from such interruption or interference in accordance of the with the provisions contained herein**. The careful reading of the clause would show the wordings used in the clause providing the liability of the company is towards the “business interruption in consequence of the damage by the perils covered” and/or loss resulting from such interruption or interference. The use of the wordings “in consequence” or “loss resulting from” indicates that the kind of the loss payable under is the insurance is the consequential loss which is the on account of the damage or destruction to the property or any part at the premises for the purpose of the business by the perils covered. The consequential loss is thus has to have some realistic nexus with the business interruption. The said loss thus has to have proximate reality and/or in real likelihood to be suffered by the insured in order to be categorized or called as consequential loss and not the one which is merely favoring the insured on account of higher valuation.

- b) The reading of the first proviso to the operative clause would show that the damage is caused at any time after the payment of the premium during the period of insurance named in the schedule or of any subsequent period of which the insured shall have paid and the company has accepted the premium required for the renewal of the policy. The period of the policy for the one year from 2nd March, 2007 to 1st March, 2008. The damage has to occur within the said period only. There is an indemnity period which is prescribed which is for the period of 6 months from the date of the occurrence of the damage during which the results of the business shall be affected in consequence of damage. The rationale behind the distinction of indemnity period from the period of the policy is that liability of the company is circumscribed by the consequential effect on the business or interruption to be shown on the business on account of the damage during the indemnity period and not beyond the same though the damage may occur during the validity of the policy and basing upon which the indemnity period shall be ascertained.
- c) The reading of clause 4 of the proviso to the main clause shows that in no case whatsoever shall the company be liable in respect of any claim under this policy after the expiration of one year from the end of the period of the indemnity or if later. The wordings used in proviso clause 4 is “period of indemnity” is itself indicator to the fact that the policy is intended to indemnify the losses that too consequential losses arising out the damage due to perils insured.

- d) The reading of definition of indemnity period would reveal that the period commences with the occurrence of the damage and ending not later than six months thereafter during which the results of the business shall be affected in consequence of the damage. The said definition again reinforces the belief that the policy is intended by the parties for the purposes of the indemnification and that for the occurrence of the business interruption or interference in consequence of the damage during the period of 6 months from the damage. The use of the words “in consequence” of the damage is likewise indicator towards consequential loss.
- e) Another thing which is obvious after reading of the definition of the indemnity period is that the results of the business shall be affected during the indemnity period only. Thus, the indemnity period is kind of cut off period which delimits the cover of the policy and the liability thereof towards the business interruption which has occurred during this indemnity period by way of showing the results of the business having been affected in consequence of the damage. It is essential to discern this position in order to indentify as to how one has to show loss of the profits during the indemnity period. **The results of business cannot be said to be effected during the indemnity period in case the said results are not shown to have adversely effecting the business on account of the damage caused in this period but somewhere postponed which cannot be forecasted in any manner which shall be seen later on in the**

judgment. At this stage, it is noteworthy to mention the definition of the indemnity period.

- f) The reading of the main clause of the policy alongside the other clauses would show that the company liability is towards “business carried on by the insured..... in consequence thereof interrupted or interfered with”. This is again clear when the definition of the indemnity period also use the wordings “the period during which the results of the business shall be affected”.
- g) For the purposes of assessment of the business interruption, the mode of the computation is prescribed under specification C annexed with the policy document which is on the basis of the calculation of the gross profits. The term gross profit is defined as the amount by which the sum of the turnover and the amount of the closing stock shall exceed and the sum of the amount of the opening stock and the amount of the specified working expenses.

The said assessment is logical in nature in as much as the gross profit of any business without deduction of the expenditure/ and other deductions which is called net profit would at least reflect the business done by any enterprise during the period.

- h) The computation of the gross profit is provided on the basis of the reduction in turnover. The definition of the turnover provides the money paid or payable to the insured for the goods sold and delivered and for the services rendered in the course of the business at the premises. The computation of the gross profit is arrived at on the basis of the assessment of the reduction in the

turnover/ price for which the goods ought to have been sold but for the damage and multiplying the same with the rate of the gross of profit. This is again logical in commercial sense in as much as the gross profit as we have seen above would atleast indicate the business done by the enterprise. If one would have to assess the business interruption, then one has to find out the gross profit which ought to have been earned by the enterprise in case there is no loss or damage during the interruption period. This is done by notionally seeing the amount of the sales of the enterprise of the last year for the same period which is called standard turnover and after seeing the same, one comes to the figure of the reduction in turnover. The said figure of the reduction in turnover is thereafter multiplied with the rate of the gross profit in order to find out of the gross profit which could have been earned by the insured in case there was no damage.

- i) There is a formula prescribed in specification C which provides for the assessment of the gross profit in respect of the reduction of the turnover and the other adjustments and reductions like sum saved during the during indemnity period, other circumstances clause in respect of the expenses of the business payable out of the gross profit etc.
- j) The computation of the gross profit simplicitor shall also not suffice the purpose lead to the conclusion that it is loss of profit during the indemnity period, the said gross profit computed during the indemnity period thereafter be compared with the standard turnover and annual turnover of the business in order to foresee the possible loss of profits and thereafter the deductions

are made including under “other circumstances clause” which are towards the circumstances other than that of the damage as a result of peril in order to arrive at the realistic figure of the loss of profits/ business interruption as against notional one. This is due to the reason that the insurance policy is aimed at recompensing the consequential loss which is direct consequence of the damage as a result of the peril and not for the losses suffered on account of the other circumstances like bad weather, business crunch etc.

- k) The reading of the entire scheme of Specification C and the wordings used therein would show that the insurance under the item No.1 **is limited to the loss of gross profit** which is due to the reduction of the turnover and increase in the cost of the working. Thus, the entire scheme of the calculation of the loss of profit is based on the assessment of the gross profit and its loss thereof on account of the damage. The reading of the later clauses of the policy document providing for the output basis would also show that the gross profit is calculated on the basis of value of the production as against the reduction in the turnover.

Thus, in order to assess the loss of profits arising out the business interference, every endeavor is made for the assessment of the gross profit during the interruption period/ indemnity period in view of the formulae provided/ annexed herewith the policy document and thereafter to foresee its effect on the business during the indemnity period due to damage caused. This is due to the reason that one has to ultimately arrive at the business interruption or interference which can be

reflected from the gross profits which is sale of the goods or services done by the enterprise or by any other mode during the indemnity period.

- l) The reading of the specification J provides that it is agreed and declared that wherever found necessary, the term “output” may be substituted for the term “turnover” and for the purposes of “output” shall mean that the sale value of the goods manufactured by the insured in the course of the business at the premises. This clause provides an alternative method of the assessment of the gross profit which is on the basis of the reduction of the output as against the reduction in the turnover. The existence of this clause coupled with the wordings “whenever found necessary” raise a question of the desirability or necessity as to when this clause would be pressed in to service which shall be seen later part of the discussion.
- m) The reading of clause 13 would show that in adjusting any loss, the account shall also be taken to the shortage in turnover due to the damage is postponed and is being maintained from the accumulated stocks of the finished goods in the insured warehouse. The clause essentially provides that in case there exists a reduction in turnover which is maintained by selling of the accumulated stocks from the warehouse of the insured, the account shall be taken in adjusting the said loss for assessment of the reduction of turnover.

Upon reading of the terms of the policy document and analyzing the import of the terms used in the policy which are germane to the present controversy, Let me now deal with the

various aspects in this regard which fall for consideration as an unanswered questions by the arbitral.

The Contract of FLOP/Business Interruption Insurance as contract of indemnity.

30. As noted above that the impugned award based the finding in paragraph 67 for awarding the sum of Rs. Rs.34,70,55,231/- in the claim no. 1 as loss of profits computed on output basis by observing that the valuation of the loss when computed on output basis is coming to be higher than that of the turnover basis. Further, the learned arbitral tribunal also rejects the submissions of the petitioner herein/ respondent therein in paragraph 69.5 that the business interruption insurance/ FLOP policy is a contract of indemnity by observing that "it is not acceptable in law". Likewise on the facts of the case, the claimant's surveyor/ Mr. R. Srivatsan/CW3 during his cross examination in answer to the questions 62 and 69, 72, 73, 74 also maintained the position that the business interruption insurance/FLOP is not the indemnity policy but is policy driven by the definitions and can provide higher and smaller loss as per definitions. All this clearly goes on to show that the arbitral tribunal by making the observations that the computation of the loss which is higher in valuation is required to be preferred over the computation and simultaneously rejecting the plea that the indemnity principle is intrinsic to all insurance contracts has in effect mixed up with the concept of the indemnity underlying the insurance contracts and/ or has tampered with the same. The question then arises as to whether the policy of the business interruption insurance/ FLOP is a contract of the indemnity. **The respondent though in the written**

submissions argued that this question is non issue as the respondent maintains the position is that the business interruption insurance is the contract of indemnity. I find that the said submission of the respondent is misconceived as the respondent fails to realize that the arbitral tribunal renders the contradictory findings in paragraph 69.5 as noted above. Further, the arbitral tribunal proceeds to approve the report of the surveyor Mr. Srivatsan who computes the losses under the policy document on the premise as if the said policy is not of indemnity but to provide maximum amount to the respondent which is clear from his cross examination reproduced below. Thus, the arbitral tribunal clearly gave a nelson's eye to the principle of indemnity and approved the report of the surveyor who computes the losses on erroneous premise and belied and also renders finding that it is not acceptable in law that the indemnity principle is intrinsic to all insurance contracts. Under these circumstances, the change of the position by respondent today that it also believes that the business interruption insurance policy is a contract of indemnity does not absolve the court's duty to examine as to whether the arbitral tribunal applied the principle of indemnity or not. Thus, the issue of indemnity indeed arises for consideration in the present case on account of non application of the said principle by the tribunal and rendering contradictory findings on the same. I find that both in law as well as on the facts of the present case, the business interruption policy is the contract of indemnity and my reasons for arriving at the said finding are as follows :

- a) The business interruption insurance contracts or fire loss of the profit policy like other contracts of insurance are no exception to the applicability of the principle of indemnity. The said policies are clearly aiming at indemnifying the insured and not to allow the insured to earn more than the suffering of the loss. This due to the reason that the term consequential loss of profit as a term itself suggests that there has to be an establishment of the loss of the profit on account of the business interruption as a result of the damage. Thus, the establishment of the loss is a condition precedent. There are number of the case laws indicating that the business interruption insurance is a contract of indemnity.

Even in the case of ***City Tailor v. Montague Evans***, 1921 Loyds Law Reports, 394, decided by the Court of Appeal, which the respondent herein/claimant before the arbitral tribunal relies upon heavily to support the view that the output basis of assessment of loss of profits should be applicable in the present case, it was clearly laid down in the opinion expressed by Lord Atkin (as he then was) that the business interruption insurance is a prima facie a contract of indemnity. In the words of the Lord Atkin, it was observed thus :

“This result in a contract which prima facie is one of indemnity, appears unreasonable and though undoubtedly the contract may be framed so as to give plaintiffs the right claimed one is bound to examine such a suggested contract with some care.”

From the reading of the aforementioned observations of Lord Atkin in the case of ***City Tailor*** (supra), it is clear that the even the valued policy where the loss of the profits are valued

continue to be the policy of indemnity and it merely discharges the insured to compute the loss.

Likewise, In the case of ***Coalex Pty. Ltd. v Commercial Union Assurance Company of Australia***, decided by Supreme Court of New South Wales by Wood J on 23rd July 1986 available on lexis-nexis which was a case relating to business interruption insurance and has been discussed in detail later in this judgment under separate head. In the said case, learned single judge Wood J had observed that the business interruption insurance is a contract of indemnity by placing reliance on the decisions passed by Queens Bench Division in the case of *Castellian v. Preston* in the year 1882 by Brett J. In the words of the Wood J, it was observed thus:

“In relation to a policy of indemnity, as Windeyer J said (at 104): "An assured is not entitled to recover the amount specified in the policy unless it represents his actual loss." The fundamental rule was stated in *Castellain v Preston* (1882) 11 QBD at 350, by Brett LJ at 386: **"In order to give my opinion upon this case, I feel obliged to revert to the very foundation of every rule which has been promulgated and acted on by the Courts with regard to insurance law. The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it, that is to say,**

which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong. (Emphasis Supplied)

The circumstances in which a policy might be construed as a valued policy were examined in *Wilson v Nelson* (1864) 33 LJ KB 220, from which it appears that, in general, **a clear intention will need to be conveyed by the language of the policy before such a conclusion will be reached.**

(Emphasis supplied)

Unmistakably, it **appears to me, the present policies are those of indemnity. Not only is the promise by the insurers one "to indemnify" the insured for material damage or consequential loss, but the property insured is defined in terms of "loss of gross profit" and the wording in S2 Item 1 relates to "Actual Loss sustained by the Insured". There are other clear indications pointing to this conclusion in the deduction from increased costs of working of any sums saved (p17), the co-insurance clause (p24) and the due diligence clause (p26).** (Emphasis Supplied)

The decision of Wood J was affirmed by the Court of Appeal in a separate Judgment rendered on 7th June, 1988. Thus, as a matter of law, the business interruption insurance is a contract of indemnity though the true intention is to be deduced from the reading and construing the policy document which if done in the present case would also lead to the same conclusion that the policy in the instant case is a contract of indemnity.

The above analysis became necessary in order to show that the contract of business interruption insurance is a contract

of indemnity. Otherwise, there are several judgments passed by our own Supreme Court in the field of insurance law approving the same very principle which is fundamental to the insurance law. (For Reference please see ***Union of India v. Sri Sarda Mills***, (1972) 2 SCC 877 and ***United India Insurance Co Ltd v. Kantika Colour Lab***, (2010) 6 SCC 449)

- b) Upon the facts of the case, Wood J in ***Coalex*** (supra) observed that the reading of the policy suggests that there are clear indicators as to indemnity by employment of the language “actual loss” and the words “to indemnify” used in the policy document besides other. In facts of the present case, from the reading of the clauses of the policy document as done above, it is clear that there are clear indicators that insurance policy in the present case is intended to indemnify the insured. The clause like deduction from the increased costs of working of any sums saved during indemnity period is also present in the policy document of the present as in the case of ***Coalex*** (supra) which is indicator as to indemnity based on actual loss. It has been discerned above upon the plain reading of the clauses of the policy document that the loss which is recoverable is arising out of the interference or interruption of business resulting from the damage. The policy document provides for the indemnity period which is again an indicator that the insurance policy/FLOP is intending to indemnify the insured and not to provide any higher valuation of the loss of the profits.

On facts, even the claimant/respondent's witness Mr. Alok Banerjee took the position that the company should be reimbursed the actual losses as it has incurred while answering the cross examination to the following questions :

"Q. Please turn to Q. No.91, can you tell the Hon'ble Tribunal what do you mean by the term "more beneficial"?

A. By the term "more beneficial" I meant that the company should be reimbursed for the actual losses it has incurred.

...

Q. From your answer to question No.91 will it be correct to infer that more beneficial according to you would mean indemnity?

A. Yes, the actual losses ought to be indemnified."

From the above discussion, it is beyond cavil of doubt that the business interruption insurance or FLOP is a contract of indemnity as a matter of law like other insurance contracts and the said position is also clear from the construction of the policy and the attendant circumstances as the respondent also took the same position.

Thus, to say that the principle of indemnification has no application either from the claimants/ respondents surveyor's end or finding from the tribunal's finding on the facts of the present case is factually and legally incorrect and against the fundamental policy of law involving the insurance contract rendering the award contrary to public policy as per the provisions of Section 34 of the Arbitration and Conciliation Act, 1996.

Desirability and Adoption of Mode of the Assessment of Loss of Profits

31. The question now arises as to which of the mode of assessment of loss of profits/ method of computation of the loss of profits is applicable to the facts of the case and when it is desirable to apply the alternative basis of assessment of the loss of profits as per specification J which reads that “whenever found necessary”. I have already answered one of the connected question that may also aid in the answering the larger question on desirability which is the desirability and adoption of the method of assessment of loss of the profit is a mixed question of fact and law and not merely the question of fact. The arbitral tribunal in paragraphs 65.12, 66 and 67 of the impugned award proceeded to adopt the alternative basis of assessment of loss of profits merely because the tribunal found it necessary on facts and in the said enquiry, the tribunal analyzed the facts, pleading presented before it and evidence adduced by the parties on that basis came to the conclusion that it is desirable to adopt the alternative basis method of computation of losses in the facts of the fact of the case. I find that the said question is not merely dependent upon the pleadings or evidence of the parties but is on the other hand is a mixed question of fact and law as the desirability of the method to be adopted for computation of the losses has to be ultimately tested upon the touchstone of the well settled principle of law of insurance which is indemnity principle and other principles which is that the insurance indemnifies for the losses for the proximate cause of the perils insured and not others. In that way, the question of desirability and adoption of the method for assessment of

the loss is a mixed question of fact and law and not pure question of fact.

32. The first limb of the question which is required to be answered is that how this desirability is required to be determined. In tribunal's view, it is the tribunal to determine whether it is necessary to go to the alternative mechanism provided by the parties in the contract as per the finding of paragraph 66 are no reasons in law, the tribunal in paragraph 67.6 observed that it finds it very necessary to go to the alternative basis clause for the assessment of loss. I find that the said discussion done in paragraph 66 to 67.6 and thereafter towards the necessity to adopt the alternative assessment of loss of profits as per specification J is not objective assessment of desirability to adopt the alternative basis approach for assessment of losses. Nor the reasonings provided thereafter by the tribunal either in the form of criticism to the testimony of surveyor of the petitioner M/s Adarsh and Associates or the other reasoning as to higher valuation in case the computation is made on output basis is an answer to the said question or provide any reason for adopting the alternative approach. This court is thus proceeding to determine the said question as the parties dispute the desirability of the adoption of alternative mode of assessment in the present case by seeing as to how the necessity or desirability of the adoption of the mode of assessment is determined.

33. In order to answer the question as to when it is desirable to adopt the alternative basis of assessment of losses, it is always upon the court or tribunal to answer "whenever found necessary" as per the clause where there exists a dispute between the parties as to

whether it is necessary to adopt the alternative basis of assessment of losses or not. For adopting the said view that it is jury question or decision of the tribunal, no further legal analysis is necessary to be done as it is obvious that once there exists a dispute, it is for the court or tribunal to answer the said question. **The tribunal view which is deciding the desirability on the necessity to adopt the alternative basis of assessment of losses in business interruption losses cases must however adopt a judicious approach. The said judicious approach must have some objectivity in it which reflects the necessity to compute the loss of profits by adopting an alternative mode of assessment. The said objectivity in the decision of “whenever found necessary” would only come when the tribunal provide the reasons for adopting the said approach which are justifiable in facts and law and not the ones which are unconnected thereto. Thus, it is though correct that it is for the court or tribunal to determine the desirability of adopting the alternative mode of assessment of losses but the said determination must adopt some judicious approach.**

34. The said judicious approach can be adopted by the tribunal by analyzing the host of the factors including construing the policy document, comprehending the requirements of adopting and preferring one particular method of assessment of loss of profits over the other, understanding the nature of business of the claimant company and the tenability of the pleas raised or position taken by the parties whether correct or incorrect, discussing the pre-requisites for the applicability of particular approach or method and whether one

particular method of assessment of loss of profits is befitting or justifiable in the given circumstances or not. All this enquiry is missing from the tribunal's decision making in the present case in the impugned award on the basis of which it can be said that the tribunal has adopted any such judicious approach in preferring one particular method of assessment of loss of profit over the other. That is also the reason why I do not agree with the contention of the learned senior counsel for the respondent Mr. Tripathi that the tribunal has adopted one of the two plausible views. In my view, the tribunal has not even justified while adopting a view as to why it is adopted that particular view and also whether it is plausible one in the given case or not when the dispute was raised before it that it is not plausible in the given facts by the petitioner herein. Such a case like the present one is not the case of two views about the matter but is the case involving the reasons which contrary to well settled principles of law relating to insurance contracts and the settled principles governing its operation.

35. Coming back to the second limb of the question which is when it is desirable to adopt the alternative method of assessment of loss of profits in the business interruption insurance case, no straight jacket guidelines can be laid down by the court. Suffice it to say that the answer to the said question can be given by looking into overall attendant circumstances in the case which can be summarized in the following steps which are inclusive but not exhaustive :

- a. Firstly by construing the policy document itself in order to understand the true nature of the policy, ascertaining intent of the parties from the policy and analyzing the other clauses peculiar to the policy;
- b. Secondly by understanding the pleas raised by the parties in support of the desirability of one method over the other and also the factual position in the case including the peculiarities attached to the business of the company if any;
- c. Thirdly by analyzing the requirements in law or other pre-requisites in adopting and preferring one approach or method of calculation of losses of profit over the other;
- d. Fourthly by applying the said principles to the facts of the case and see as to whether the said requirements are fulfilled in the facts of the case;
- e. Fifthly by finding out the most desirable method of assessment of loss of profits by posing the question as to which of the method of assessment of losses can truly and most appropriately indemnify the insured in the given case.

36. Let me now evaluate the desirability of the method of assessment of the loss of profits step by step in the following manner :

- a) Firstly, I have already analyzed the clauses of the policy document in detail and I shall briefly discuss the position discerned in the form of following pointers:

- The mode of computation of the business interruption is based on the computation of gross profit as per specification C. This is due to the reason that one has to calculate the loss of profits which may indemnify towards the business interruption caused as a result of the damage during the indemnity period.
- The term gross profit is defined under the definition clause which is the sum of the turnover and the closing stock.
- The gross profit is computed on the basis of reduction of turnover as per the formula provided under the specification C appended to the policy.
- The shortage of the turnover **during the indemnity period** computed after analyzing the standard turnover is multiplied or applied to the rate of the gross profit in order to arrive at the figure of the loss of profits and thereafter such adjustments as mentioned in the formula are made.
- The indemnity period is the period beginning with the occurrence of the damage and ending not later than 6 months thereafter **during which the results of the business shall be affected in the consequence of the damage**. The indemnity period is thus a period which delimits the liability of the company to indemnify the business interruption occurring the during the said period only as a consequence of damage and not beyond the same. Thus, the results of the business interrupted or loss

of profits are required to be shown during the indemnity period only and not beyond the same.

- Specification J provides that it is agreed and declared that wherever found necessary, the term “output” may be substituted for the term “turnover” and for the purposes of “output” shall mean that the sale value of the goods manufactured by the insured in the course of the business at the premises. This clause provides an alternative method of the assessment of the gross profit which can be by operation of this clause can be computed on the basis of the reduction of the output as against the reduction in the turnover by replacing output in place of turnover in the formula provided in specification C.

All these pointers amply explain the nature of the policy which is towards the business interruption caused as a consequence of the damage occurred during the indemnity period and the conditions and exclusions on the basis of which the liability of the company/ insurer is decided. The validity of the claim under the policy is dependent upon the occurrence of the damage during the term of the policy, for which the premium is paid to the company/ insurer which is evident from the first proviso to the policy. Likewise, **the liability of the of insurer company towards business interruption is limited to the results of the business having been affected during the indemnity period in consequence of damage.** (This can be evinced from the reading of definition of indemnity period and the

formula which provides for the computation of the gross profits on the basis of the shortage of the turnover which also talks about the indemnity period). **All this position discerned from the policy as mentioned in this paragraph as well as the pointers above contribute towards arriving at the determination as to when it is desirable to adopt the alternative basis of assessment of loss of profits and in what circumstances which shall be seen in the subsequent steps below.** (Emphasis supplied)

- b) Secondly, let me now evaluate the case of both the sides towards the desirability and adoption of the mode of assessment of the loss of profits by analyzing the arguments raised by both the parties in support of the particular method of assessment of losses. The same can be outlined in the following manner:
- The petitioner contends that the reduction of the turnover is one of the most recognized and credible mode for assessment of loss of profits and thus the same should be applicable. There is no need to apply for the alternative mode of assessment as the turnover basis itself would reflect the results.
 - The petitioner contends that the results of the output method and reduction in turnover method should be more or less the same with minor variation. The petitioner gives the rationale that the possible variation between the computation of loss of profits done on output basis vis a

vis the turnover basis. The said rationale is explained in the following manner:

“(i) P 20 of Mr. Srinivasan’s affidavit : “I state that I do not agree with Mr.Srivatsan that working of the claim on output and turnover basis would give different results. In my considered opinion, both the methods would give more or less the same results with minor variation, as rate of gross profit on output and turnover would vary. However, in a running plant, where the insured has been able to sell whatever it produces, the variation will be minor”.

(ii) P 25 of Mr. Srinivasan’s affidavit : “I do not agree with the claimant that the loss ascertained from ‘output basis’ will differ from ‘Turnover basis’. In my opinion, the loss will nearly work out to same (variation of about 5% to 7.50%) on both the bases, if suitable allowance is made for depletion of stocks under Turnover basis; but subject to condition that the Insured has been able to sell whatever they produce. The variation is on account of rate of gross profit, which will differ on ‘Output basis’ vis-à-vis ‘Turnover basis’.”

- The petitioner also contends that if the respondent/ claimant is simply accumulating stock and has accumulated to the extent that can reasonably keep up the turnover even if the production was stopped, then the respondent/ claimant would not be entitled to claim the loss of production as there would no business interruption. The respondent/claimant in such a case would be entitled to claim the amount of stock utilized to keep up the sales and the turnover. This as per the petitioner can be seen from reading of the stock accumulating clause contained

in the policy. Therefore, as per the petitioner, the turnover basis is appropriate index applicable to assess the loss of the profits.

On the contrary, the respondent/claimant contends the following :

- That the respondent/claimant had specifically written to the petitioner by its communication dated 28th February, 2007 to incorporate the alternative basis clause. It is contended that the respondent consciously requested for the insertion of the alternative basis clause considering the nature of the business which is cyclical in nature.
- The respondent has contended that given the cyclical nature of the business it has, the output method can provide more fair and accurate assessment of loss.
- The respondent has relied upon commentaries explaining the desirability of alternative basis clause when there is no link between the production and demand and the nature of business is cyclical in nature. The said authorities are reproduced as under:

“(a) To further understand the implications of the above clause it will not be out of place to cite certain leading commentaries on LOP policies generally. Learned author G.J.R. Hicknott at page 225 has stated that :

“The desire for this clause arises from the problem of a short interruption of production and the practical difficulty of tracing the fall in turnover therefrom especially where large stocks of

completed products are held. This is particularly true where production of only one product out of many is interrupted and where the turnover is very large. It also applies to plants which are run on a continuous basis irrespective of demand.

To meet this it has been common practice for insurers and adjusters to calculate the loss on a sales value of output basis, provided that the output could not be made up within the indemnity period and thus minimize any loss of turnover or output.”

“...For example where, if there had been no damage a plant would have still been kept in operation, the effect of the incident is to reduce the output over a period resulting probably in a combination of lost turnover and run down or run up of completed stocks. If the stock level is up, but less than what it would have been if the damage had not occurred, the business has been affected by such damage. The quantum is the loss arising from not having such extra stock and the realizable sale value of it less the cost of the raw material and variable production costs may be the best estimate.” (Emphasis Added)

The Insurance Institute of India has stated in its Manual called “Fire and Consequential Loss Insurance” (IC-57) Revised Edition 2010 as follows :

“To conclude, the output basis is useful in the following circumstances :

- When one or more standard products are manufactured where each unit of production can be said to earn a regular proportion of gross profit.
- Where there is efficient cost accounting system to determine the overall cost per unit of production.

- Factory is working at a constant rate of production, sales show a definite seasonal tendency or are liable to irregular fluctuations.
- Where there is appreciable time lag between production and sales, there can be interruption of production without any immediate or corresponding reduction in turnover.”

37. As per the respondent, the said factors are fully applicable to its case. It is stated that the respondent products are all standard polyester based products. It is stated that the respondent maintains the efficient cost accounting system by which it can be determined what the overall cost per unit of the production would be. It is stated that the respondent’s factory works at the constant rate of the production and the sales are liable to be irregular and fluctuations and fourthly, there is a time lag between the production and sales.

- It is contended by the respondent that it has shown the following evidence in order to show the cyclical nature of the business :

(i) Para 20 Evidence by way of Affidavit of Mr. Alok Banerjee.

“21. I state that, it was brought to the notice of the respondent that :

(a)

(b)

(c) given the cyclical nature of sales in the claimant’s business and late sale of the excess production during an upward cycle, in the present case, the computation of loss should be based on the production and not turnover.”

(ii) At Para 25 page 391, Mr. Alok Banerjee state that

“The methodology used by the Surveyor was not in consonance with the Contract for Insurance :

Firstly, the output of POY is almost nearly constant whereas the sales/turnover varies from time to time, as the POY industry has cyclic ups and down and the period of cycle is not fixed. Therefore, the production and sales have no correlation and as per the Alternate Basis clause, the correct basis for calculation is the production.”

(iii) Further, during the cross examination of Mr.Alok Banerjee, he stated the following at page 409 Vol. 3 :

“Q 82What are the ups and downs in the sales of products as mentioned in para 5 of your affidavit?

A. As I have explained earlier the business ups and downs cyclical. The sales move ups and downs erratically.

Q 83 Based on your company experience are such ups and downs not foreseeable?

A. Our experience shows that it is not foreseeable and since the movement are erratic and do not follow any set pattern.

Q 84 In such a contingency how do you plan your inventory?

A. Our production is static and we keep manufacturing our products. The finished products are stored till they are sold off. Our past experience is that in the due course the finished products are sold out.”

(iv) The above evidence clearly shows that the sales pattern of the claimant is cyclical in nature and that the claimant does not stop production despite having

stocks. The above submission is also supported by the following evidence, where Mr.Srivatsan in his cross-examination at page 445 Vol. 3 has stated :

“Q102.Please see answer to Q 101, what is the management philosophy of the claimant and what was the availability of working funds?

A. I have studied the production and sales trends of the insured for the last five years before the loss and found that they have never stopped the production based on inventory build up. Based on this, I came to the conclusion that the management philosophy of the claimant was to keep producing, store the same and sell the same when the market is good. Obviously, the claimant had enough working funds to carry out this management philosophy based on the historical data.” (Emphasis added)

(v) The claimants in good faith submitted last five years production and sales data to M/s Adarsh Gupta & Associates which further substantiated the Claimant's claim. In particular, the last five years monthly sales and production data clearly demonstrates that :

(a) The Claimant has always produced on a continuous 24X7 basis.

(b) Regardless of the level of sales or the level of inventory the Claimant continues to produce and run its CPs.

(c) The claimant has never stopped production because stocks are high.

This data is set out at pages 124-128 of Vol. 2A and has also been annexed by M/s Adarsh Gupta in their final Survey report.

(vi) The above-mentioned sales and production data support the claimant's contentions :

- (a) For example, that from June 2003 to March 2004, the production was static. Notwithstanding, that in February 2004, net sale had fallen to 17, 545 MT, but still the Claimant produced 25, 488 MT in March 2004.
- (b) Production continued in full swing between April 2004 and December 2004. This is notwithstanding that sales dipped to 18,292 in the month of November 2004, whereas the production in the month of December 2004 remained static at 21,108 MT.
- (c) Similarly, between April 2005 and November 2005, production was stable notwithstanding that sales dropped to 12,948 MT in September 2005.
- (d) Between April 2006 and December 2006 the maximum produce by the claimant was of 34,317 MT however the sales dropped to 14,165 MT. Yet, the claimant continued its production in January 2007 and produced 33606 MT of yarn.

- (e) Production increased during the months from April 2007 to October 2007, since CP-4 was commissioned. Production was again stable, however there were fluctuations in the sales pattern.

The above data clearly shows that the claimant continues to produce regardless of its sales patterns.

(vii) The above clearly demonstrates that :

- (a) In the last five years the Claimant has never shut down its plant because of inventory build up or erratic sales.
- (b) The Claimant was producing in full swing immediately prior to the fire incident.
- (c) The Claimant continued to produce during the interruption period as using CP-4 and CP-5.
- (d) There was no intention or plan to shut down any of the machines had the fire not taken place.

(viii) M/s Adarsh Gupta during his cross-examination admitted that to his knowledge CP-2 and CP-3 were fully functional and were producing till the date of the incident. This shows that the claimants were producing the goods and running CP-2, CP-3 CP-4 and CP-5 immediately prior to the incident.

(ix) The following cross-examination of Mr. Adarsh Gupta @ page 482 of Vol. 3 supports the above contention of the Claimant :

“Q87. Were CP-2 and CP-3 fully functional and up and running prior to the date of the incident?

A. Yes, they were functioning in their normal course.

Q 74. During your visits did you notice whether CP-4 and CP-5 were shut down or functioning?

A. Yes they were functioning.

Q 91. Did you notice during your visit to the site that goods manufactured by the claimant was stored outside the claimant's warehouse ?

A. Yes

Q 92. Am I right to suggest that this shows that the claimant continued producing the goods notwithstanding that the warehouse was full?

A. Yes, because claimant had only meager storage capacity in the warehouse.

Q.70. Does the LOP policy specifically state that the goods produced have to be sold during the indemnity period?

A. No. It need not.

Q.103. Does the policy anywhere state that the stock in hand should be all before the Alternative Basis Clause could be invoked?

A. No. It need not.”

(x) The Claimant humbly submits that M/s Adarsh Gupta and Associates have completely ignored the

Claimant's contention and overlooked all this evidence set out above which clearly shows that the claimant continues to produce regardless of inventory levels or sales pattern. M/s. Adarsh Gupta completely dismisses the Alternative Basis Clause in their interim report dated 8th January, 2008, wherein in para 10.1 of their report, they state :

“10.1 Insured submitted that provisional claim on the basis of shortfall in production/output from Plants CP-2 and 3, without properly accounting the actual rate of gross profit, as per their last audited balance sheet and as per other provisions/standard basis specified in policy. Insured argued that in view of 'Alternative Basis Clause' attached in the policy; they are entitled for settlement of loss on output basis. Similarly, they also argued that in view of 'Departmental Clause' their loss shall be assessed for the output of the affected Plants i.e. CP-2 and 3. However, we appraised Insured that keeping in view of their sales trend and inventory position in hand, before and after the incident, we don't find any merit/justification to carry out assessment of loss on output basis. Similarly, in respect Departmental Clause, also we did not find any merit to consider plant-wise assessment of loss, as all Plants are producing common products, using similar raw materials and plant-wise assessment would distort the spirit of the assessment under LOP policy.”

The above shows M/s Adarsh Gupta fails to appreciate that Claimant continues to produce irrespective of their sales trend or inventory position. ”

38. As per the respondent, the said evidence shown by the respondent would clearly establish that the business of the respondent is such that the respondent continues to produce irrespective of the sales trend or inventory position. Besides the above, it is contended by the respondent for manifold reasons, the petitioner's surveyor has wrongly interpreted the alternative basis clause and thus there exists a desirability to apply the alternative basis clause in its favour.

39. I have gone through the submissions advanced by both the parties towards the preference of one mode of assessment of loss of profits over the other. I shall answer the said pleas/ submissions in the subsequent steps after considering the legal position on the subject. This is essential as some guidance is required from the relevant authorities and case laws which have been decided on the subject which will throw some light on the tenability of the pleas raised by parties.

40. As I said that some guidance from authorities on the subject is essential in order to answer the problem raised before the court, I shall now proceed to discuss some relevant concepts which would enable the court to proceed to answer the questions raised before the court and act as a guideline to test the appropriateness of the method or mode of assessment of loss of profits in a business interruption policy case. The said concepts along with the commentaries are discussed as under:

- Alternative basis clause and its option to convert to output basis
 - It is indeed correct there are business interruption policies wherein the wordings allow the calculation of loss following an incident to be based on loss of production suffered and gives an option in the hands of the insured to convert the turnover basis to output basis. Riley on Business Interruption Insurance, 9th Edition, Sweet and Maxwell (hereinafter referred to as 'Riley or Riley on Business Interruption'), which is an authority on the subject recognizes the said option in the hands of the insured to convert the computation of the assessment of loss of profits to output basis but only when the wordings of the policies allow the same. The learned author infact discusses the wordings of the clauses wherein such options are available to the insured in the business interruption insurance policies. The learned author observes as under:

“(c) Option to convert to output

Some policy wordings allow for the calculation of the loss following an incident to be based on the loss of production suffered. The calculation of the output loss follows very much along the lines of the reduction in turnover calculation including application of the other circumstances clause. Two example wordings are given below :

- “In respect of any lost insured under Section 1 of this Policy the Insured shall have the option to convert the basis of settlement from Turnover to output or such other basis as may more realistically measure the loss. For this purpose output shall mean the sale value of materials produced by the Insured in the course of the Business as the

Premises provided that only one basis shall be operative in connection with any one loss”.

- “At the option of the Insured, the term Output may be substituted for the term Turnover, provided that only the meaning of Output or the meaning of Turnover shall be operative in connection with any one event resulting in interruption if the meaning of Output be used the Accumulated Stock Clause shall be inoperative and the following memo shall be added at the end of the definition of Rate of Gross Profit :

‘If during the Indemnity Period, goods, shall be manufactured or processed other than at the Premises for the benefit of the business either by the Insured or by others on behalf of the Insured, the sale or transfer of such goods shall be brought into account in arriving at the Output during the Indemnity Period.”

“Output shall mean the sale or transfer value, as shown in the Insured’s books of goods manufactured or processed by the Insured, to which such adjustment shall be made as may be necessary to provide for the trend of the business and for the variation in other circumstances affecting the business either before or after the Incident or which would have affected the business had the Incident not occurred, so that the figures thus adjusted shall represent as nearly as may be reasonably practicable the results which but for the Incident would have been obtained during the relative period after the Incident.”

The main argument in favour of this alternative basis of cover is that it can provide a more accurate assessment of the loss suffered by an Insured in a business which seeks to maximize its output from the plant in which it has invested. Its application can prove difficult, however, if there are a number of processes involved and only one is halted by an incident. If the production process is lengthy, or stocks of finished product are held strategically, the impact on

turnover will be delayed and, a bit like ripples on a pond, will be less pronounced as they spread out.

Against this type of cover, are the arguments that a loss of production may not actually result in a loss of turnover, either within the maximum indemnity period, or actually result in a loss of turnover, either within the maximum indemnity period, or at all. Thus no loss may actually be suffered. The clause also provides an opportunity for the insured to select against the Insurer. If there is a demonstrably greater reduction in turnover on the traditional basis insurers will be required to pay the higher figure. If, however, the turnover loss is less than on the output basis, insurers will pay on the (higher) output figures. In reality the provisions of the standard business interruption wording are sufficiently flexible to address both the above issues and thus this type of cover is generally only available as per of an engineering breakdown cover and, even then only rarely included.”

41. From the above reading of the excerpts from Riley on Business Interruption insurance, it is clear that peculiar to the wordings of the policy, there lies an option in the hands of the insured to insist the computation on particular method of assessment of loss of the profits. However, if one sees the wordings of the specification J on the facts of the case, it can be seen that the wordings of the alternative basis clause nowhere gives any option in the hands of the respondent but on the contrary reads “whenever found necessary”. Therefore, the said necessity either are to be based on the agreement on both the sides and if not then, the decision to the same vests with the competent authority or court or tribunal where such dispute is pending. That is an additional reason for me to arrive at the finding that the decision on the desirability and need for the adoption of the

alternative method of the assessment lies with the court or tribunal based on judicious considerations.

- Determining the adequate cover – It is equally essential for the insurer and insured to determine consciously and carefully the events covered in the policy so that the insured is adequately indemnified for the given circumstances leading to loss of business under certain peculiar conditions best known to him and the insurer is paid the same level of the premium required under the policy depending upon the events covered. In order to fairly determine the cover required under the business interruption policy, there are several aspects which fall for consideration on which the decisions are required to be taken including as to whether the cover should be sought for gross profit or for increase in cost for working, what is the length of the indemnity period, How the sum of the gross profit is calculated. Riley on Business Interruption Insurance, 9th Edition, Sweet and Maxwell, outlines the number of the questions which are required to be asked in order to fairly determine the cover under the business interruption insurance policy which as per the learned author are the decisions required to be made while deciding the cover. It has been observed by the learned author in the following word:

“4.15 Determining the cover required

The remaining chapters of this section of the book address the factors that are most likely to be relevant when seeking to obtain business interruption insurance.

There are a number of key decisions that need to be made including, not necessarily in the order that follows :

1. Should cover be sought on an all risk basis or on specified perils? If the former, which exclusions should be bought back? If the latter, which perils need to be included?
2. What income streams would be affected by an event?
3. Should cover be sought for gross profit, gross earnings or for increase in cost of working?
4. What length of maximum indemnity period is appropriate?
5. Should cover be sought on a declaration linked (non-averag) basis?
6. How is the sum Insured/estimated gross profit calculated?
7. What additional clauses are required?
8. What dependencies are there, e.g. on suppliers or customers? What limits should apply to any extensions of cover?
9. Are there any different types of cover available, tailored more closely to the requirements of the business?"

From the reading of the aforementioned paragraph from Riley on Business Interruption Insurance, it is clear that there exists several considerations for the purposes of determination of the cover in the policy. The maximum period of indemnity or period of indemnity is one such consideration. The aspect is relevant in order to comprehend the next concept which is based on the maximum indemnity period.

- Role of Indemnity Period in the Business Interruption Insurance- As underscored above at several places while analyzing the insurance policy/ FLOP in the instant case, the indemnity period has been distinctly defined under the policy which has a role to play in order to determine the scope and extent of the cover provided by the policy. The indemnity period is thus period delimiting the liability of the insurer company to a specified period defined in the policy as per the permissible wordings in the policy document.

In UK, there exists a peculiar definition of indemnity period which also incorporates the term named as “Maximum indemnity period”. This dual use of the terms indemnity period and within which there is extension available upto maximum indemnity period is consciously provided so that the insured at the time of taking insurance can decide and prescribe the maximum period for which the insured intends to have cover/ indemnification from the insurers end and the maximum indemnity period can even extend beyond the time when the business of the insured has been resumed to normal trading. This has been explained in Riley on Business Interruption Insurance lucidly in the following word:

“7.2 Definition of Indemnity period

In the standard UK business interruption specification, the definition of the indemnity period reads,” The period beginning with the occurrence of the incident and ending not later than the maximum indemnity period thereafter during which the results of

the business shall be affected in consequence thereof” and is completed by a definition of the maximum indemnity period which simply states the number of months selected. The dual definition, is an example of the careful drafting which applies throughout the specification in order to express the exact intention of the insurers.

It is important to note first of all, that the indemnity period does not necessarily end when a business is rehabilitated to the point of being able to resume normal trading activities. **Subject to the maximum limit selected and stated in the definition the indemnity period continues until the results of the business are restored to normal, which may be many months after the physical damage to buildings, machinery and stock has been made good.** Whilst there is no definition of the term “results” this should be taken to mean financial results and thus encompass not just the turnover of the business, but also its costs. Therefore, if the business continues to incur additional expenditure by way of increase in cost of working once turnover returns to pre incident levels, then the indemnity period will extend as long as that expenditure is being incurred, subject to application of the maximum indemnity period. It is also conceivable that the costs of a business may be reduced, e.g. if a more efficient production process is introduced following an incident. Again the results of the business are continuing to be affected and thus the indemnity period is extended. (Emphasis Supplied)

It should further be noted, **that should an incident cause an interruption of business the indemnity period is not necessarily the same as the maximum period during which indemnity may be given, that is, the number of months which is selected to be shown in the definition for any particular insurance. It is the period, measured from the date of the incident, at the end of which liability ceases because the results of the business are no**

longer affected by the incident, subject to this period not exceeding the insured maximum number of months (“months” means “calendar months”, as in all such contracts: vide the law of property act 1925 s.61). **For example, in the case of an insurance with a maximum indemnity period of 12 months if an incident should occur and cause an interference with the business for 15 weeks the indemnity period will be 15 weeks. This point is also of special relevance in connection with the time limit in the claims condition-action by the insured.”**

(Emphasis Supplied)

42. The reading of the aforementioned excerpts from Riley on Business Interruption Insurance, the following position can be discerned :

- i) That the indemnity period prescribed in the policy is dependent upon the wordings provided in the definition and subject to the wordings being flexible and incorporation of the concept of the maximum indemnity period, the indemnity period can be extended upto the limit of the months or years provided in the definition of maximum indemnity period. In the present case, there is no maximum indemnity period which as a concept is incorporated in the policy document. What is relevant at this stage is to comprehend is that the indemnity period is largely dependent upon the wordings of the policy which are germane in order to ascertain whether it can be extended at all or not.
- ii) That the indemnity period prescribed in the policy does not mean that the insurer company shall be liable to indemnify the insured for all this period irrespective of the business resumed to normal

condition and is no longer affected by the incident. This can be explained by way of an example like if there is an indemnity period of 12 months starting from the date of the incident and the business of the insured is affected only for one month. Then, the liability of the insurer is limited to the period when the business of the insured is interruption. This is obvious as the liability of the insurer to indemnify against the business interruption caused within the period of indemnity upto the maximum period prescribed in the definition and not for the entire period of indemnity dehors the interruption period. In simple words, it does not always hold true that the interruption period coincide with the indemnity period and sometimes interruption may last for lesser period though occur within the indemnity period.

- Delayed commencement of the indemnity period but only in certain cases where the language of the policy permits – There exists a possibility wherein the terms of the policy, it can be argued that there can be delayed commencement of the indemnity period. Riley on the business interruption insurance recognizes the said concept but goes on to state that the terms of the policies should be flexible enough to accommodate the delayed commencement of the indemnity period. In the words of the author, it has been observed:

“Delayed start of indemnity period: There are occasions when an incident occurs but the turnover of the business is not immediately affected as a result. However, it is difficult to predict when the circumstances will be such as to cause this to happen.

Thus in determining the length of the maximum indemnity period required all assumptions regarding the time that will be required to rehabilitate the business should have, as the start date ,the assumed date of any incident. The indemnity period is normally defined as being “ the period relating beginning with the occurrence of incident and ending not later than the maximum indemnity period thereafter during which the results of the business shall be affected in consequence thereof.

The end of the indemnity period is thus determined by the trading results of the business (unless the results are affected beyond the maximum indemnity indemnity period when the limits of the period applies).It might therefore be argued that the indemnity period should not commence until the results of the business are affected by the incident .Indeed such an argument was submitted by the claimants in *Loyaltrend Ltd v Creechurch Dedicated Ltd* (2010)EWHC 425 (Comm) where subsidence caused damage to retail premises occupied by the insured and which subsequently resulted in water ingress that caused damage to trade contents and tenants improvements.

Evidence of subsidence had first become apparent in 2003 where there had been minor ingresses of water which had caused some damage to trade contents and tenants improvements but had no apparent effect on trading results. The subsidence damage became more severe during the later stages of 2004.More serious ingress of water occurred and trading results started to be adversely affected, with a further deterioration during 2005.

The policy in question only provided business interruption cover in the event of damage to property insured under the material damage section of the policy. In particular event, this meant that damage to the building itself would not trigger the business interruption cover. With a 12 month maximum

indemnity period, the claimants were concerned that if the indemnity period commenced with the date of the initial damage in 2003, their loss over the subsequent 12 months would prove to be minimal. Thus, the claimant's chose to base their business interruption claim on a 12 month maximum indemnity period commencing when the results of the business started to show a downturn.

The case was actually decided on other issues. Thus, the judge did not have to consider the extent of damage suffered both prior and subsequent to the year of insurance in question. Nevertheless Judge Mackie QC observed that taking Oct 2004, when trading results started to be affected, as being the date of incident "was not a helpful starting point." Thus, whilst damage was continuing to occur the claimants could not merely wait and choose a later date based on the impact on trading results .A valid business interruption claim had to be the result of material damage. General conditions five of the policy required the insured to give, immediate notice to the insurers on the happening of any injury or damage in consequence of which a claim is or may be made under this policy." The test was an objective one, not subjective.

The three most likely scenarios where there may be a delay before the turnover of the business is adversely affected are discussed below:-

1. Turnover maintained from accumulated stockholding. It is possible that finished goods may escape damage in an incident, particularly if they are stored off site, or in a segregated area. Under these circumstances, insurers may benefit from the existence of such stocks. If the insured is likely to be disadvantaged at the end of the maximum indemnity period the inclusion of accumulated stocks will redress the position.

2. Subsidence. The first signs of subsidence are normally damage in the form of cracks in the structure of the building. However such damage rarely necessitates an immediate response by way of repair. Indeed the likelihood is that a period of investigation and monitoring will be required to establish the root cause of the problem, and in particular to establish if the damage is the result of subsidence. There are no particular provisions in the policy to cater for these circumstances but for the reasons outlined earlier, it is normally the case that an equitable solution can be found. Nevertheless for those businesses that seek cover for subsidence, either as a specified peril or by buying back this cover under an all risks policy, they might be well advised to seek a revised definition, atleast in respect of subsidence such as follows:

“The “indemnity period “shall be a period of up to xx months, being the period during which the business is or would have been interfered with, for such length of time as would be required to rebuild, repair or replace the property which has been list, destroyed or damaged and to resolve the resulting interruption or interference, commencing with the date of damage or interference and not limited by the date of expiration of this policy.”

- iii) Trading has not yet commenced, or has been temporarily suspended. If the business is not expected to commence trading until some future date, then any impact on turnover can only occur from that point in time onwards. This scenario is catered for by a specific type of cover known as advanced profits or delayed start up. Under such policies the definition of the indemnity period is amended to make the commencement date coincide with the date on which trading would have commenced.

For a business which is temporarily silent a similar amendment to the definition of the indemnity period can be

sought from insurers. Temporary inactivity should not be confused with seasonality where for the reasons outlined later, insurers would not accede to any divergence from the standard definition of the indemnity period.”

From the reading of the aforementioned excerpts from Riley on business interruption insurance, it can be said there are limited eventualities where it can be said that there should be delayed commencement of the indemnity period. However much shall be dependent upon the terms of the policies flexible enough to accommodate such belated start. The definition of the indemnity provided in the policy documents are required to be amended in order to allow such belated start of the indemnity period. **The three eventualities recognized by Riley no where exists in the present case except the first one which is that the turnover is maintained in the present case out the accumulated stock in which case, the policy document provides for the adjustments for the accumulated stock in the form of accumulated stock clause. Thus, the terms of the policy in the present case allows such adjustments of the turnover being maintained from the existing stock and no need arises to initiate the commencement of the indemnity period belated and it is not the case of either side as well in the present case.** The concept is discussed here in order to complete the discussion and for better understanding that there are certain eventualities where delayed commencement of the indemnity period can be possible in terms of the policy.

- Special consideration to indemnity period in seasonal business:
As discussed above that the indemnity period has a role to play

in delimiting the liability of the insurance company and in determine the cover of the loss under the policy, greater caution and care is required to be taken by the insured in choosing the indemnity period on the basis of the nature of the business carried out by the insured. Riley on business interruption Insurance recommends that the seasonal businesses where there exists a business cycle or business season, the business interruption policies require the longer period of indemnity as otherwise the policies carrying shorter period of indemnity period wherein the effect of the loss on the business is not realized upto completion of business cycle would contribute nothing or very little to the insured. In the words of the author, it has been discussed as under:

“Seasonal businesses:

General

Businesses which are predominantly of a seasonal nature such as hotels, boarding houses ,holiday camps, fairgrounds, amusement parks, theatres ,bingo halls, amusement arcades and other concerns at seaside resorts and inland holiday and tourist centres and businesses in some sports and games and other seasonal trades may earn a year's profit in 6 months or even less but it does not follow that a maximum indemnity period of 6 months is adequate for their needs .The deciding factor is the length of time which it would take to restore the earnings of the business to normal. **If a serious incident were to occur immediately after the end of the busy season a maximum indemnity period of six months would expire before the start of the next season. The turnover during that first six months of the period of interruption, say, October to march, would be**

compared with turnover in the same out of season months in the preceding year and little if any diminution would be shown. The premises might still be closed during the following summer season but the maximum indemnity period, i.e. 6 months from the date of incident would have expired. The result would be that although an insured might suffer the loss of a year's earnings the insurance would contribute little or nothing towards that loss. (Emphasis Supplied)

In fact , if an incident occurred at almost any time in the off season at least part of the benefit under a 6 months indemnity period would be lost because it would relate to a period when there would normally be little or no trading. In the above context, it should be noted that the other circumstance clause would not be applicable as there is nothing unusual about the position, the business being always of a seasonal character. The failure of the insurance to recompense the insured would be due entirely to the fact that too short a maximum indemnity period had been selected.

Based on the above it should be evident that a seasonal business needs at least a minimum 12 month maximum indemnity period, even just to address the problem posed by reinstatement of the physical damage. However, even a 12 month maximum indemnity period may be insufficient when consideration is given to the build up period. Some seasonal businesses have regular clientele. An incident could occur when the property is being prepared just prior to the peak season. Regular clientele would have to make last minute alternative arrangements for the coming season and there is no guarantee that they would then return the following year."

From the reading of the afore noted observations of the author including the example which the author has given which is that in the policies containing a shorter indemnity period say for 6 months, the occurrence of the incident after the end of the busy

season when the effect of the loss on the business is really going to be realized upon the expiry of the 6 months when the season shall recommence would contribute little or nothing towards indemnity, it can clearly said that greater degree of care and caution is required while opting for the indemnity period in the cases relating to the seasonal nature of the business and the said considerations are available with the insured as he can opt for the indemnity period after ascertaining the nature of the business and term of the business cycle.

- The loss of profits which are payable under the business interruption insurance are proximately caused by the peril insured – This principle of causa proxima or proximate cause which is often applied in marine insurance cases is no exception when its comes to its applicability in business interruption insurance policy cases. Thus the losses “which are in consequence of” or “direct result of the incident” or the wordings analogous there to used in the policies are payable only when they are proximately by the peril insured and not otherwise. There has to be established a causal connection between the losses suffered and damage caused by the incident and only such losses are payable by the business interruption policies. The reason is very simple and plain which is that the policy is aimed to indemnify the losses for the peril insured. Thus, the losses which is direct consequence of the damage or peril shall be payable and not the remote ones. Riley on business interruption recognizes the applicability of the said principle to

the business interruption insurances policies by observing in the following manner :

“3-11 Prolongation – delays in restoration of business (extraneous causes and proximate cause)

A distinction must be drawn, however, between the circumstances which would have affected the trading results had there been no interference with the business caused by an incident, as stated in the preceding paragraph 3.10 and those which prolong the period of the interruption. For example, bad weather, worldwide shortage of materials or industrial action in the building industry might delay the restoration of damaged premises.

As such a contingency could not have affected the insured business had it not happened during a period of rehabilitation following the incident, insurers regard the incident as the prime cause of an insured loss for which they have accepted premium. They therefore hold themselves liable for the lengthened period of interruption upto the maximum indemnity period limit.

This is not to say that the doctrine of proximate cause should not apply. The model ABI policy wording refers to losses, “in consequence of the incident” but some other policies use the phrase, “as a direct result of the incident”. In fact there is no legal distinction between these phrases, both of which will be construed as meaning “proximately caused by” (See Liverpool and London War Risks v. Ocean S.S. Co. [1948]....” (Emphasis supplied).

In view of the above, it can be said that the doctrine of the proximate cause has clear applicability in the cases involving business interruption policies while assessing the remoteness or directness of the losses and only those kind of losses are payable which have the causal connection with the peril insured

vis a vis its effect on the business of the insured and not any other kind of losses.

These were certain concepts which are relevant to the present case and are generally required to be kept in mind besides the terms of the policy while determining the desirability of the mode/ method of assessments of the loss of the profits on account of the damage caused as a result of the fire/ incident insured. I shall be discussing the case laws under the next head while answering the submissions advanced by the parties after applying the said concepts to the facts of the present case.

43. Let me now apply the said concepts as discussed above to the facts in hand in order to ascertain as to which of the method of assessment of the loss of the profits is desirable in the present case. The same is done as follows:

- a) Option to convert to output option – I have already discussed above that there exists a possibility wherein the option can be given at the hands of the insured to convert and insist the method of the computation of the loss of profits on the output basis instead of the turnover basis but only in those cases where the language of the policy document permits the same. The wordings used in the insurance policy in the present case read “wherever found necessary” and the same do not leave any option solely at the hands of the respondent to decide to switch over or insist the operation of the alternative basis clause. Therefore, the necessity of the operation of the alternate basis

clause shall be either be determine on the basis of the consensus or satisfaction of both the parties and if the parties the dispute the said position, the said determination shall be done by the court/ tribunal or any authority seized of the dispute by adopting the judicious approach on the basis of the sound judicial principles and keeping the terms of the policy and legal position in mind. On facts of the case, I do not find that the wordings in the policy document permits any such option in the hands of the respondent to insist the calculation to be done by alternative basis clause as provided in specification J appended to be policy.

- b) Indemnity period – I have already discussed the significance of the indemnity period when I explained the concepts above in detail by placing reliance on Riley on Business interruption insurance. I have also arrived at the conclusion that the indemnity period is required ascertained after reading the definition of the indemnity period under the policy document which varies from case to case and in that context also quoted the definition of the indemnity period and maximum indemnity period in UK. It is also discussed above in detail that the insured has to give due consideration to the duration of the indemnity period while applying for the policy when the nature of the business is seasonal in nature or cyclical in nature as otherwise undertaking an insurance policy for a six months indemnity period when the effect on the business is ultimately to be realized in the next season which is after the expiry of 6 months

would contribute little or nothing as per the discussion done in Riley on Business Interruption Insurance which is an authority on the subject and has been quoted by the parties before the tribunal and also by various common law courts including Supreme Court of Queensland in Australia in the case of Coalex (supra) while deciding the cases relating to business interruption insurance.

Accordingly, one has to really see on the facts of the present case the definition of the indemnity period and how the said definition is required to be interpreted. The said definition of the indemnity period reads as under:

Indemnity period – The period beginning with the occurrence of the damage and ending not later than 6 months thereafter during which the results of the business shall be affected in consequence of the damage.

44. Upon the reading of the definition of the indemnity period, the following position emerges:
- I. The indemnity period commences with the occurrence of the damage which is the date of the incident which is between 29th October, 2007 to 28th April, 2008.
 - II. The indemnity period will last for the period of 6 months from the date of damage. The said position is undisputed between the parties.
 - III. The language used in the definition of the indemnity period is “during which the results of the business shall be affected in

consequence of the damage” – The use of the said language in the definition of the indemnity period is noteworthy as the same is the clear indicator that the results of the business are required to be affected during the said indemnity period which is the 6 months from the date of the occurrence of the incident. The language used under the definition clearly states that not merely some anticipated loss/ future loss is to be shown during the indemnity period but the results of the business shall be affected during the said indemnity period of 6 months only. This is significant in the light of the nature of the policy which is the indemnity towards business interference or interruption caused on account of damage as a result of the peril insured. Therefore, what one is looking for is the business interference or results of the business being affected during the indemnity period of 6 months and not some anticipated loss in future which may not have any effect on the business during the relevant indemnity period.

The import of this definition of the indemnity period has to be further examined in depth especially in the light of the submission/ plea of the respondent which is that the gross profit/ loss of profits under the policy is required to be calculated on loss of output basis as the business of the respondent is cyclical in nature but the sales of the respondent are erratic and the same cannot be predicted. **If one examines the said position taken by the respondent and tests the tenability of the same while reading the**

definition of the indemnity period, the answer straightaway comes that the method of assessment of loss of profits suggested by the respondent which is output basis in alternative to reduction in turnover basis is clearly inapplicable and undesirable in view of the respondent's own position/ stand which is that the business of the respondent is cyclical in nature and sales cannot be predicted. This is due to the following reasons:

- a) Firstly, the definition of the indemnity period use the wordings “during which the results of the business shall be affected” which means that while computing the gross profit/ lost profits as mentioned in specification C (that also uses the expression “indemnity period” in the formula), it should be kept in mind that the said loss of profits as computed has to have affect on the results of the business during the indemnity period. **There has to be a causal connection between the loss of profits computed and the results on the business and both events should occur within the indemnity period.** Only then the computation of the gross profit/ lost profit or loss of profit shall be termed as per the policy. This can be discerned from the combined reading of the specification C point (a) read with the definition of the indemnity period. (Emphasis supplied)

- b) The alternative basis clause mentioned in specification J appended to the policy provides “wherever found necessary” “the term output may be substituted with the term turnover”. The said substitution of the term “output” with that of the “turnover” in the clause is qualified by the words “wherever found necessary”. Thus, prior to making such substitution, one has to first ask the question as to whether it is really desirable to substitute the term “output” with that of the “turnover” in the given facts of the case. **The existence of such alternative clause in the policy does not imply that merely one can substitute the expression “Output” with that of “turnover” in the formula provided in specification C and proceed to claim or state as a matter of consequence that the said computation leads to the gross profit/ lost profit during the indemnity period without becoming mindful of the fact that the definition of indemnity period requires the establishment of effect on the results of the business during the same very period.** Thus, the formula provided in the specification C and the alternative basis clause provided in specification J appended to the policy are merely the tools to arrive at the computation of loss of profits and are broad guidelines for computation of the said losses. However, one has to ultimately test the desirability or the appropriateness of the mode of computation of loss of

profits/ gross profits during the indemnity period on case to case basis by looking at the terms of the policy and facts and circumstances of the case.

- c) In the terms of the policy in the present case, the formula mentioned in specification C provides for the computation of the loss of profits on the basis of **shortfall in turnover during the indemnity period. The collective reading of the definition of indemnity period alongside point (a) in the formula of specification C and the substitution of the term “output” in lieu of “turnover” as per specification J would reveal that the gross profit would be calculated by applying the rate of the gross profit to the amount by which the output during the period of 6 months from the date of occurrence of damage fell short of the standard output so that the results of the business are affected in that period. Thus, For output basis to apply in the formula, twin events should occur either simultaneously or upto the end of the indemnity period which are that falling short of the output than of the standard output and its consequential effect on the business.** Doing of the computation on this basis would allow output basis to be truly workable within its sweep by taking into consideration only that output/ produce which would have bearing on the business results within the

indemnity period as against simply multiplying all the produce/ shortage of the output with the rate of gross profit without realizing when it would have bearing on business either within the indemnity period or beyond the same which would give different results and would include lost profits for which cover is not provided by the policy and would lead to wrong computation as per policy. In the present case, the respondent surveyor Mr. Srivatsan and the respondent itself are doing the computation of loss of profits by adopting the later approach which is by taking into consideration the entire shortage of output and multiplying the same with the rate of gross profit and terming it as gross profit/ lost gross profit when as a matter of fact, it is not the gross profit/ lost gross profit during the indemnity period as it has no causal connection with the affect on the results of the business within the indemnity period and thereby leading wrong computation of loss of profits making the claim hypothetical and speculative dependent future events. This is due to the reason that it is the respondent's own case that the sales of the output are cyclical, erratic and are not foreseeable but there shall be sale of output in future no matter in whatever time period. Once, the sales of the respondent are not foreseeable within the indemnity period or even later than that as per the respondent

own saying, then it passes human comprehension as to how the output method is applicable and desirable at all in the present case as the shortage of the output has no nexus with its likely effect on the business during the indemnity period.

(Emphasis Supplied)

- d) I have also gone through the authorities and literature cited by the respondent which states that the output method of assessment of loss of profits is desirable in cases wherein the business is such where there exists no immediate effect on turnover but the production activity continues/ increases or where the sales are seasonal in nature or where the demand and supply has no correlation etc. **I do not deny the correctness of the said eventualities giving rise to the applicability of the output method for assessment of loss of profits in a given case subject to the terms of the policy accommodating the computation by the output method. However, in such cases where sales are seasonal in nature or demand has no nexus with supply, the wordings of the policy should be such which should sufficient cover the said events within its ambit giving rise to a valid claim under the policy. Like in a case where there is a cyclical nature of business, if the indemnity period is of one year/ 12 months and the results of the business are likely to**

be effected in last 6 months though the damage occur in the first 6 months, the policy in such a case is flexible enough to provide indemnity period of 12 months wherein one can foresee the likely effect of the production done vis a vis a sale or upon the business within the entire indemnity period. In such a case, output method is workable and the literature cited by respondent may hold good and applicable. However, in the present case, the terms of the policy provide for 6 months time period from the date of the occurrence of the damage during which the results of the business shall have to be affected. The case of the respondent is that though the produce/ output is increasing as per the past practice but the sales are cyclical and erratic with no foreseeability in future.

To this effect, the answers to the cross examination of the respondent witness Mr. Alok Banerjee which shows the understanding of the respondent is reproduced below:

“Q 28 In planning your production do you take into account any business trend analysis industrywise?

A. I am not aware of this.

Q 29 Is your business subject to cyclical ups and downs?

A. Yes

- Q 30 In such a scenario is it not proper to conduct trend analysis?
- A. I cannot comment on this.
- Q 34 What is the period of indemnity under the policy?
- A. Six months from the date of incidence.
- Q 35 Who opts for the indemnity period whether the Insurer or the insured?
- A. Insured.
- Q 46 When in your opinion turnover basis or output basis is adopted?
- A. In the business like us where the business is cyclical, output basis is applicable where the production is almost static but the sales is cyclical and the goods produced are not perishable.
- Q 82 What are the ups and downs in the sales of products as mentioned in para 5 of your affidavit?
- A. As I have explained earlier the business ups and downs cyclical. The sales move up and down erratically.
- Q 83 Based on your company experience are such ups and downs not foreseeable?
- A Our experience shows that it is not foreseeable and since the movement are erratic and do not follow any set pattern.
- Q 84 In such a contingency how do you plan your inventory?
- A Our production is static and we keep manufacturing our products. The finished products are stored till they are sold off.

Our past experience is that in the due course the finished products are sold out.

Q 89 Is it correct to presume that in as much as you have taken the indemnity period to be six months that your cyclical fluctuations would not exceed beyond six months?

A No doubt one may assume that the fluctuations will work out within six months, that will be only be a guess and does not ensure certainty.

Q 90 Do you agree that the insurance company would not look beyond the indemnity period of six months?

Ans : Yes

Q 105 Can you state the gap between to ups and downs?

Ans This cannot be predicted, but we have given the actual data with graph to the actual surveyor.”

From the reading of the cross examination of the respondent's witness, it is clear that the respondent clearly maintained the position that the sales of the output are not foreseeable and there is no answer by the respondent in evidence whether the respondents conduct business trend analysis in order to forecast the length of the business cycle. Rather, the respondent merely maintains the stand that the sales are cyclical and erratic but are not foreseeable which can be seen from answers to questions 82 to 84 and 89 and 90.

Once it is the respondent's own case that the sales of the production are not foreseeable or are erratic in nature and there exists no cycle as such for sales. Further, there exists no evidence on the record on the basis of which it can be said that output produced is likely to be disposed of during the said indemnity period, **it cannot be said the literature and the authorities cited by the respondent would aid the case of the respondent in the peculiar facts of the present case where the indemnity period is of 6 months from the date of the damage coupled with the fact that the respondent itself has taken the position that the salability of the stock is not foreseeable in future and it would be guess that the fluctuation of the business will work out within the 6 months. In simple words, the respondent is unable to show the results of its business is affected during the indemnity period of 6 months from the date of the damage due to occurrence of the incidence of fire by merely computing a shortage of the output during the period and multiplying the same with the rate of the gross profit with certain adjustments as per the formula terming it as if it is a lost gross profit for the indemnity period. The said computation is contrary to the respondent's own case that the sales are not foreseeable and erratic in nature. Though, it is altogether different matter that as per the respondent's own saying that the respondent could have produced more during the indemnity period but for the incident of fire and the**

result in the business should have been realized in the future when the production is sold of which is not foreseeable as per the respondent. But the insurance policy shall not indemnify for the affect on the results of business with no foreseeable future which shall fall outside the purview of the indemnity period. Thus, in the given facts of the case, terms of the policy especially the definition of the indemnity period and the position taken by the respondent that the business of the respondent is cyclical in nature, the claim of the respondent on the output basis does not reflect that the results of the business are affected during the indemnity period and therefore the applicability of the alternative basis clause is undesirable. (Emphasis Supplied)

- e) Furthermore, as discussed in the previous head of concepts that the seasonal nature of the business requires a special consideration by the insured for the selection of the duration of indemnity period which is clear from reading of Rileys on Business interruption insurance and that the insurance containing 6 months indemnity period for seasonal nature of business when the effect on the business is to be realized in the next six months would contribute little or nothing. The same principle is applicable to the present case afortiori without any variance. The submission of the respondent that it is upon the respondent's

insistence the clause relating to alternative basis of the assessment of the loss of profits was added in the insurance policy as per the communication dated 28th February, 2007 in view of the cyclical nature of the business requires examination at this stage. If the submission of the respondent is to be accepted then the respondent was conscious of its nature of the business and implication on the indemnification of the loss arising from the occurrence of any incident and thus could have equally insisted for the larger indemnity period in the policy so as provide adequate cover to the cyclical nature of the business conducted by it as advised by the authorities on the subject. Having not done so and keeping the indemnity period intact which is 6 months from the date of the occurrence of the damage, the respondent with open eyes undertook the insurance policy on its own peril and entered into such an agreement. In such a case in order to claim the indemnity under the policy, the respondent's claim has to fall within the ambit of the cover provided by the policy which is by establishing the consequential loss of profits by showing that the results of the business is affected within in the indemnity period and computing the lost gross profit during the indemnity period and not by merely showing shortage of the production unconnected with its

likely affect on the business within the indemnity period which would lead to the computation of loss of profits outside the purview of the indemnity period. The claim of the said nature would not be indemnified by the insurance policy as the respondent never took due care and consideration while opting for indemnity period and consciously chosen the indemnity period which delimits the liability of the insurance company/ petitioner herein. (Emphasis supplied)

- f) I have also gone through the evidence shown by the respondent in order to support the plea the sales pattern do not follow pattern but the production is more stable which is mentioned in the form of details of the production, sales, closing stock details including bar charts for atleast 6 years. **Even if all these evidences are to be believed and the respondent position is to be assumed as correct that the sales do not follow any pattern and are not foreseeable but the production is more stable, still the manner in which the policy of business interruption insurance in the present is couched in the present case does not permit the indemnification of the losses on the mere shortage of the output without showing its consequential effect on the sales/ business of the respondent company within the indemnity period.** Such evidence of showing the causal link between the

production and its affect on the results of the business is clearly missing in the present case and thus even if the respondent has shown such evidence to support the plea of applicability of the output basis would not aid the case of the respondent.

In view of the my reasoning and analysis done above, It can be said that the computation of loss of profits by alternative basis method or the output method is clearly undesirable in the present case in the manner suggested by the respondent as it would take into consideration entire shortage of the output which has no connection with the affect on the results of the business within the indemnity period when the policy requires otherwise.

- IV. Loss of profits are payable under the business Interruption Insurance which are proximately caused by the perils insured – As I have discussed this concept in earlier head is that the fundamental rule governing the law of the insurance relating to perils be it marine or fire or the business interruption insurance which is that the loss payable under the insurance is one which is proximate cause of the peril insured. In simple words, the loss has to be direct consequence of the peril insured and not the remote one. In the present case, if one examines the terms of the policy, it can be seen that the policy clearly provides that what is payable is the loss resulting from business interference or interruption in consequence of the damage to the property etc

due to peril insured which is fire. Thus, the expression “in consequence of” or “resulting from” has to be interpreted as direct consequence of the peril as against the remote one. Accordingly, the loss of profit which has the direct nexus with the peril insured would be recoverable under the policy as against any other loss. Applying the said principle to the facts of the present case would show that the loss of profits which have the affect on the results on the business within the indemnity period as per the terms of the policy would be called as losses which are direct consequences of the perils insured as per the policy and are recoverable under the policy as they would be in real sense of term the loss resulting from the business interruption as a consequence of damage due to fire. **On the contrary, the losses which do not have the bearing on the business during the validity of the policy or indemnity period but would be dependent upon future events including the demand in the market or business cycle would not be in the peculiar terms of the present policy can be categorized as the proximate cause of the perils insured and more so when the definition of the indemnity period insist the showing the affect on the results of the business. This is due to reason that had this been within the contemplation of the parties to cover such losses as direct consequences of the insured events to the extent sought by the respondent, then the policy period or indemnity period should have sufficient covered such events within the terms of the policy which is missing in the present case. Therefore, the computation of**

the lost profit on the basis of the reduction of turnover by considering the reduced turnover during the indemnity period which reflects the effect on the business during the indemnity period are clearly recoverable under the policy as a direct consequence of the business interruption due to fire as against the losses based on the shortage of output/produce which has no connection with the likely effect of the same on the business within the indemnity period. This is additional reasoning as to why the claim presented by the respondent is hypothetical in nature and thus cannot be considered in terms of the present policy. (Emphasis Supplied)

- V. Testing the loss of profits on the principle of indemnity – It is also noteworthy to mention that the business interruption insurance is the contract of indemnity where the insured has to indemnify the actual loss suffered. The use of the expressions “during which the results of the business are affected” also indicate that there has to be some harm or loss to the business as a consequence to damage on account of incident of fire. Thus, the loss to fall cause business interruption has to be in actuality or closer to reality during the indemnity period in comparison to the previous year business depending upon the definition of the indemnity period.

It is also pertinent to mention that in the present case, the damage has caused the loss in terms of the reduction in turnover coupled with some kind of output loss which would have likely effect on the business in future as per

respondent's case. It is not the case of the respondent that its turnover was not at all affected during the indemnity period. This is due to the reason that the respondent has already been paid the interim payment about Rs. 6 Crores as indemnification on the basis of the report of surveyor M/s Adarsh and Associates on 8th January 2008 which was premised on reduction of turnover basis towards FLOP and material damage. On the contrary, the case of the respondent is that due to certain factors which are like the sales of the respondents business are fluctuating but the production is constant and cyclical nature of business having no nexus with that of the sales, the alternative mode of assessment of loss of profits should be adopted. I have already arrived at the finding above that the consideration of the entire shortage of the output and multiplying the same with the rate of gross profit would not give the lost gross profit during the indemnity period but would include presumptive/ hypothetical loss of profits without the insured making those sales in the indemnity period or showing the effect of such lost output on business in anticipation that the insured company is likely to sell the products in future with no certain period and thus the same will have no affect on the business of the insured during the indemnity period which is a condition precedent in the formula to be read with along with the definition of indemnity period and the terms of the operative clause of the policy. Now, if one weighs the computation of loss of profits done on both these modes on the touchstone

of the principle of indemnity and ascertain which of the loss of profits would truly indemnify the insured in the given terms of the policy and the facts and circumstances of the case, the answer would again not be so difficult and would lean towards the loss of profits on the reduction of turnover basis which would atleast show some affect on the business during indemnity period which is infact a kind of loss recoverable in terms of the policy over and above the output basis where the computation is made on presumptuous basis. The reason is very simple and plain which is again that the insurance including the business interruption insurance is seeking to indemnify the loss and in the case of business interruption insurance a loss of particular kind which is a loss arising out of the business interruption in consequence of the damage due to incident of fire. **Thus, the said loss has to have some nexus with the business interruption and that is why the definition of indemnity period insists the effect on the business during the said period.** Once, the said effect on the business is shown during the indemnity period, then the loss computed as per formula would become the loss arising out of the business interruption. **That is why, when in the case like the present one where we have the computation of loss of profits on the basis of loss of turnover available with us which has been done by the surveyor M/s Adharsh and Associates, to which the respondent does not dispute to the extent that the turnover of the respondent did not fall at all during the indemnity**

period (but merely protest on some mistakes in the calculation in the said report) which is a reflection on the effect on the business during the indemnity period as against another computation which though higher in sum but does not reflect such picture on its likely effect on the business, one has to prefer the approach which has the effect on the business as against the one which has not for obvious reasons which are that business interruption insurance is a contract of indemnity and would indemnify only those losses arising out of the business interruption and given the terms of the policy only ones which have the effect on the business during the indemnity period (Emphasis supplied)

- VI. **The principle of loss mitigation:** There is another principle which is applicable to insurance relating to perils either marine or fire and also not uncommon to the business interruption insurance which is that the insured has an obligation to mitigate the loss at the time of the damage arising out of the incident. The said breach of the duty to mitigate allows the insurers to insist the reduction in the claim of insurance that the insured has not complied with the duty to mitigate the loss. Therefore, when the respondent in the present case with an insurance policy of lesser indemnity period of 6 months insists that the loss of profits should be computed on the alternative basis which is output basis as against the turnover basis when the reduction in turnover is recognized as tried and tested index for the business

interruption and the said reduction of turnover is available in the present case coupled with the fact that output basis takes into consideration some loss of profits on the hypothetical basis that whatever has been manufactured by the respondent has been sold but not within the indemnity period but in uncertain future, **the adoption of the output basis in such circumstances would also presume that the respondent has no capability to increase the production of the output in the future and reduce the damage caused and thus would lead to violation of the rule of mitigation of losses. All this would mean that the respondent as an insured could not have increased the production in future so as to reduce the anticipated loss but keep on producing otherwise within the same pace having uncertain future of its selling. The said choice of methodology over and above the actual reduction of the turnover which is available and reflects the business interruption in actuality during the indemnity period besides being violative of several principles of public policy including law relating to insurance also commercially sounds unviable and accommodates too many presumptive approaches which are not reasonable in the facts of the present case.** This is more so when the trend shows that the total stock available at the time of commencement of the indemnity period as on 1st November, 2007 was 51,598 MT (metric tones) and the total stock at the end of the indemnity period was 33,950 metric tones. Thus, the sale of the production during the indemnity period is minimal and in such

circumstances, it cannot be said that the production which the respondent could have increased during the indemnity period would have likely to affect on the business soon when as per the respondent own case the same cannot be forecasted. Further, the said production could have been increased or decreased as per the respondent's own philosophy as per respondent's own saying. In such an event, the choice of output basis over the turnover basis in relation to assessment of the loss is not warranted and desirable.

45. In view of the above discussion referred in detail, it can be said that the turnover basis of assessment of loss which would provide the true indemnification of the loss of profits or business interruption suffered by the respondent in the indemnity howsoever lesser or higher it may be and not the output basis of computation of loss which is undesirable in the facts of the present case and terms of the policy. The abovesaid conclusion arrived by me is on the basis of the facts of the present case and the application of the legal concepts governing the law of business insurance as discussed above which are relevant to the present case.

46. Let me now discuss the case titled as ***Coalex Pty. Ltd. v. Commercial Union Assurance Company of Australia Ltd.*** decided on 26th July 1986 - the facts of which are if not identical then similar to the present case. The said case has been decided by Supreme Court of New South Wales Common Law Division Commercial List by Wood J as Single Judge. The facts of the said case were one claim arising out of two insurance policies issued to the plaintiff by the

defendant in respect of special risks and consequential laws but related to different layers of insurance.

- On facts, the policy terms provided

“The relevant policy of provisions may be noted. First, the policies called upon the Insurers “to indemnify the Insured for Material Damage to the Property Insured or Consequential Loss as hereafter described”. The Property Insured was defined in a schedule to include: “S1 Industrial Special Risks All property of every kind and description (not otherwise excluded), owned, leased, acquired or hired by the Insured or in respect of which the Insured may acquire or assume an interest or is under any obligation to insure including, ... S2 Consequential Loss Loss of Gross Profit due to reduction in turnover and increase in cost of working including additional increased costs resulting from a peril insured under S1.” In relation to “S2 - Consequential Loss”, the policies provided: “Subject to the Definitions, Conditions and Exclusions herein contained, this Policy insures against damage resulting from INTERRUPTION OF BUSINESS caused by, or arising from, or out of Material Damage (as insured under S1 of this Policy) occurring during the Period of Insurance.”

- Indemnity period in the said policy was defined as period beginning with the occurrence of damage and ending not later than 12 months thereafter during which the results of business shall be affected in consequences of damage.
- On facts of the case, it was stated by the plaintiff that the plaintiff conducts a joint venture operation at Clarence Colliery involving the extraction, processing and sale of coal. On November 82 during the period of insurance, the damage occurred to the belt

of the main drift conveyor which constituted "material damage" to property within the meaning of S1 of the policies of insurance. The belt which was damaged was some 2,000 metres in length and was used to convey run of the mine (ROM) coal to the pit head. As a result of the material damage which the defendants admitted had occurred, the plaintiffs' business was interrupted between 22 November 1982 and 11 April 1983. During this period, plaintiffs were unable to maintain full production of ROM coal and the method of quantification of the loss of production was in dispute.

- One of the central issue in the said case was the applicability of the mode of computation of assessment of loss whether to be done on turnover basis or on loss of production basis. Whereas the insured claimed that the computation should be done on the basis of output/ loss of production basis, the insurer continued to insist that the computation of assessment of loss is required to be done on the basis of turnover which is selling price of the coal at the relevant indemnity period / interruption period.
- In the case also, there was an expert of insurance company/ defendant expert who also disagreed with the conclusion by way of output formula. The said problems were discussed in the submission recorded in the judgment which is as under:-

“The defendants' expert Mr. Morgan, disagreed with these calculations for application of the output formula. Two problems were identified by him. First, the basis of valuing the opening and closing stocks, which were not derived from the method used in the

accounts but by re-evaluation referable to the prevailing sales values at the respective dates. It was argued that there was no justification for adjusting or revaluing such stocks. In this regard reliance was placed on the note within the definition of "gross profit" requiring the opening and closing stocks to be arrived at "in accordance with the Insured's normal accounting methods with due provision for depreciation." Substituting stock variations from the annual accounts for the revalued opening and closing stocks, Mr. Morgan came up with a gross profit ratio of 54.33 per cent for the year ended 30 June 1982, (in place of Mr. Bracher's 58.2 per cent) and of 51.34 per cent for the six months ended 31 December 1982. These calculations were made as follows: For the year ended 30 June 1982, the calculation was:

Output	\$60,345,461	
Stock fluctuation	161,451	
		60,506,912
less Specified working expenses		27,722,945
Gross Profit		32,783,967
Rate of Gross Profit		
(32,783,967/60,345,461) x		
100 = 54.33%		

For the half year ended 31 December 1983 the calculation was:

Output	\$41,557,216
Stock fluctuation	1,588,156

	43,145,372
<i>less Specified working expenses</i>	21,809,142
Gross Profit	21,336,230

Rate of Gross Profit (21,336,230/41,557,216) x 100 = 51.34%

The second problem identified was the application of the formula to produce a gross profit ratio of 58.24 per cent without adjustment for the trend of the business or for variations in or special circumstances affecting it. The alternative calculations referable to rates of gross profit of 52.8 per cent (for the year ended 30 June 1982), and the preferred rate of 48.78 per cent (for the half year ending 31 December 1982), Mr. Morgan saw as accepting the need for some downward adjustment to reflect the trend of the business. The ratio of 48.78 per cent selected by Mr. Bracher to provide for the trends of the business had the merit of incorporating opening and closing stock values in accordance with normal accounting methods, but in his view it did not fully reflect that trend since the examination stopped too soon. Applying the same methods adopted by Mr. Bracher to calculate the rates of gross profit of 52.8 per cent and 48.78 per cent (in reference to turnover for the year ended 30 June 1982 and half year ended 31 December 1982 respectively) he calculated a further downward trend into the next six months ending 30 June 1983, of 42.38 per cent:

Turnover	37,574,507	
Stock fluctuation	1,730,273	

		39,304,780
less Specified working expenses		23,380,700
Gross profit		15,924,080

Gross Profit ratio (15,924,080/37,574,507) x 100 = 42.38%

here was some uncertainty as to whether the stock fluctuation figure was correct by reason of the possible deduction from closing stocks of 66,976 tonnes of coal borrowed from Clutha to which I will refer later. Adjustment on this account, it was agreed, would increase the weighted gross profit ratio to 46.91 per cent for that period."

47. Thereafter, the discussion in the said case revolved around that no actual loss has been suffered by the insured which has been proved on record and it was stated that the actual loss might appear to be outside the indemnity period and even if it is shown that the said loss flows directly from the damage. This has been reproduced in the submission of defendants in the following manner:-

"The primary submission of the defendants remained, that no actual loss had been proved to have been sustained. In this regard Mr. Morgan expressed a view, which was explored in evidence, that the actual loss might appear outside the indemnity period and would be indemnified provided it could be shown to flow directly from the damages.

The plaintiffs elected, during the course of the hearing, not to pursue any claim on this basis.

Some further factual matters require mention. In February 1983 the plaintiffs borrowed from Clutha Development Pty Limited, 76,260 tonnes of primary coal to meet their contractual sales obligation. This borrowing was repaid by the provision of primary coal over a period concluded in September 1984."

- Thereafter, the Court delved into the inquiry that whether in terms of policy what is payable is actual loss which is to be indemnified and nothing else. The court observed that in terms of the policy, there were ample indicators that what is payable in terms of policy was the actual loss though in terms of the policy the word actual loss has been stated in the policy and came to conclusion that the business interruption insurance policy is a policy of indemnity. The court observed thus :-

“In relation to a policy of indemnity, as Windeyer J said (at 104): "An assured is not entitled to recover the amount specified in the policy unless it represents his actual loss." The fundamental rule was stated in *Castellain v Preston* (1882) 11 QBD at 350, by Brett LJ at 386: "In order to give my opinion upon this case, I feel obliged to revert to the very foundation of every rule which has been promulgated and acted on by the Courts with regard to insurance law. The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward

which is at variance with it, that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong.

The circumstances in which a policy might be construed as a valued policy were examined in ***Wilson v Nelson*** (1864) 33 LJ KB 220, from which it appears that, in general, a clear intention will need to be conveyed by the language of the policy before such a conclusion will be reached.

Unmistakably, it appears to me, the present policies are those of indemnity. Not only is the promise by the insurers one "to indemnify" the insured for material damage or consequential loss, but the property insured is defined in terms of "loss of gross profit" and the wording in S2 Item 1 relates to "Actual Loss sustained by the Insured". There are other clear indications pointing to this conclusion in the deduction from increased costs of working of any sums saved (p17), the co-insurance clause (p24) and the due diligence clause (p26)."

48. From the reading of above quoted observations of the learned Single Judge sitting in Supreme Court of New South Wales, it is clear in terms of the policy, learned Judge came to the conclusion that the insurance policy relating to business interruption was the policy of indemnity and the wordings used in the policy were "actual loss" and "the loss in consequence of the damage" at several places are all indicators in the policy revealing that what is payable in the policy is the actual loss which is aimed at to indemnify the insured and not the one by which the insured can profit out of the insurance. The position of the case in ***Coalex*** (supra) is no different from the instant case as in the present case also there are indicators to policy document showing that insurance policy is aimed at to indemnify the

loss in consequence of damage as a result of peril insured which is incident of fire. The insurance policy also talks about the results of the business being affected during the indemnity period. It also provides other circumstances clause for making adjustments in the gross profits in the formula to arrive at the figures as realistic as possible to the loss as against the hypothetical loss. All these are clear indicators towards the actual loss which is payable in the present case. Rather the respondent maintains the same very position in answers re-examination done by the respondent Advocate of Mr. Alok Banerjee which reads as under:-

“Q. Please turn to question no. 91, can you tell the Hon’ble Tribunal what do you mean by the term “more beneficial”?

A. By the term “more beneficial” I meant that the company should be reimbursed for the actual losses it has incurred.

Likewise, Mr. R Srivatsan, respondent’s surveyor also maintained the same position that the actual losses are payable in terms of the policy in his cross examination and the same reads as under:

Q Whether the loss you are talking about is the loss of possible or potential increase in the inventory of the insured?

No. It is only the actual loss of output sustained by the insured following the fire accident.”

49. In view of the aforesaid position, it can be said that whether the wordings “actual loss” were existing in the case of **Coalex** (supra) and were defined therein and which is not present expressly in the present case does not really alter the position so long as there are

indicators in the policy document showing that the actual loss payable under the policy and the respondent also maintains that what is payable are actual losses. In that event, indemnity principle shall continue to apply in the present case.

- Further in **Coalex** (supra) Wood J. also observed that the formula provided in the policy document cannot be equated with the liability as the real purpose of policy is to indemnify the insured for the actual loss sustained and therefore the loss of gross profit and the reduction of turnover/ output through formula are two different things. The said observations of Wood J. are as under:-

"I agree with the plaintiffs' submission that the meaning of "consequential loss" for the purpose of the policies is to be gained from the definition they provide namely loss of gross profit due to reduction in turnover or output where appropriate, and increase in cost of working. I also agree that notion needs to be carried through to S2. It does not, however, follow as the plaintiffs submitted, that the loss of gross profit actually sustained is to be equated with or derived from the formula. To my mind the extent of the cover is to be divined from the full wording in Item No 1 S2 (p17). That, to my mind, is concerned first with stating the liability to indemnify the insured for the actual loss sustained, and secondly with establishing a limit to that liability by reference to the formula. Elevating the formula to a definition of the liability (or property insured), is to overlook the structure of the clause and the work it is designed to do. What does emerge from the definition and the clause, to my mind, is the concept that the loss of gross profit and the reduction in turnover/output

are two different things, and that it is necessary to find a loss of gross profit resulting from reduction in turnover/ output.” (Emphasis Supplied)

- From the reading of the said observations of Wood J. which are in consonance the conclusion arrived at by me in the present case, it can be said that the formula in the policy document provide guidelines/ tools to arrive at the assessment of loss of gross profit during the indemnity period. But that does not however mean that the said notional loss of profit should not be compared with the reality situation so as to see as to whether the business of the company is actually and really affected during the indemnity period of not due to damage or not. This is due to the reason that there are number of circumstances where business of an enterprise can be affected which may or may not include damage due to fire or peril insured but for other reasons irrespective of the fact that enterprise has got ample output for sale or even there exists no reduction of turnover comparing to the last year but in fact there is financial crunch situation due to which the business is not even able to maintain the previous year's turnover. Thus, one cannot say the figures arrived at by the formula is equivalent to the liability and cannot really elevate the formula with that of liability payable in the insurance policy which is correctly held by Wood J. in **Coalex's** case (supra).
- Thereafter, Wood J. further made significant finding that believing the plaintiff's contention that what is payable is loss of gross profit arising out of loss of output as defined in formula in policy document would be overlooking the enquiry as to actual

loss suffered by the insured. This has been observed by Wood J. in the following words:-

“It appears to me erroneous within the policy terms to equate the "Actual Loss Sustained" with a loss of production or output. First, to do so is to read the words "due to" as qualifying "actual loss" when in truth they qualify "the loss of gross profit". That this is so is indicated from a natural reading of the clause and from the obviously different ways that "actual loss" and "reduction in turnover/output" are used. If they were the same there would be no occasion for the stipulation of a causal relationship. Secondly, to contend as the plaintiffs did that where there is a loss of output the plaintiffs are entitled to a sum for a loss of gross profit due thereto as defined in the formula, involves something of a non sequitor since it overlooks the need for inquiry for an actual loss. Strictly applied the plaintiffs' contention requires an inquiry for loss of output due to reduction in output which makes little sense.”

- Thereafter, in the case of **Coalex** (supra), there was further evidence which was submitted by the insured in the said case to the support the plea there was indeed a loss of profits in the form of insured's inability to fulfill contractual obligations/ shipments in the year 1984 though the indemnity period was between 1982 to 1983. This has been recorded by the learned Judge in the following manner:-

“The defendants submitted that while there was a loss of production proved, no actual pecuniary loss was established in respect of which the plaintiffs were now entitled to be indemnified. In particular it was submitted that the Kepco transaction which came into consideration in December 1984, was well

remote in time and could not be shown to be related back to the loss in production between November 1982 and April 1983.

The plaintiffs did not suggest that there was any other sale lost by reason of the damage to the conveyor. The steps which they suggested found their way towards establishing a causal connection between the damage and an actual loss involved the following facts which I find were established in the evidence of Mr. Knight:

- i) the borrowing of 76,260 tonnes of primary coal from then existing, which was finally repaid by September 1984;***
- ii) the borrowing in April 1984 of a further 46,000 tonnes which was replaced by December 1984;***
- iii) the purchase from Clutha in July 1984 of 18,000 tonnes of coal to meet a contractual shipment”***

Defendants on the contrary contended in the case of Coalex(supra) that there was no causal link/ connection between the damage and loss of sales extending over to the period of 19 months from April 1983 to December 1984, the learned Judge agreed with the Defendants by finding that there was no causal connection between the loss of production vis a vis the plaintiffs inability to fullfil the orders in the year 1984 and 1985 which is beyond the period of indemnity. In the words of Wood J, it was observed thus:-

“It may be accepted that there is considerable practical difficulty in proving a relationship of cause and effect between an interruption affecting production from November 1982 to April 1983, and a suggested loss of a sale in December 1984, and that what the Court is concerned with is

a "commonsense cause" as explained by Lord Sumner in Becker, Gray and Company v London Assurance Corporation [1918] AC 101 at 112 to 114. As the evidence presently stands, I am unable to conclude that there is such a link, although I recognize that an examination of actual production and sales, budgeted production and sales, production difficulties, market conditions and the like during the period in question may yet establish it. In particular, it seems to me that it is not possible to infer from the evidence of Mr. Knight, which I accept, that there was insufficient coal stockpiled or planned for production in December 1984 for an emergency sale to Kepco, and from the borrowings, that there was the necessary causal relationship. The onus of proving the connection rests upon the plaintiffs, although by reason of the manner in which the case was conducted by each party this aspect became very much a side issue. This relates also to the quantum of loss. Kepco inquired after "additional tonnage", the plaintiffs offered 55,000 tonnes of coal from another source which was outside the usual required specification, and Kepco responded by indicating that it required 55,000 or 110,000 tonnes of coal within its specification. A range of possible prices was identified. Kepco's telegram referred to "1985 price"; the plaintiffs' reply referred to "C and F price" on an understanding that the "provisional FOBT price to be quality adjusted based on 1984 settlement EPDC for Kepco". The 1984 contract price was \$36.89 per tonne, the 1985 price was then unknown although later it was negotiated at \$48.47 a tonne. In the result, I am presently left in uncertainty as to the tonnage which would have been sold and the price/profit to the plaintiffs for the transaction, and as to whether a sale would have been made had there been no

production loss in the quantity I have determined.” (Emphasis Supplied)

From the reading of the aforementioned observations of Wood J. in the case of **Coalex** (supra), it can be seen that the learned Judge also appreciated the evidence which was available on record in the said case in relation to sustenance of actual loss beyond the period of indemnity which was in the year 1984 -85 when the indemnity period was between November 1982 to April 1983. **Learned Judge was of the view that no causal connection can be established between the losses carried out in the year 1984-85 vis-à-vis the loss of production which was excess as per the formula between the interruption period of 1982 to 1983. In effect, the learned Judge found that the losses in the year 1984-85 for which evidence was available on record in the said case was not the direct consequence of losses and as a result of damage there and was no evidence to this effect on record.** Applying the said principle to the instant case, there exists no evidence at all that the actual loss has been suffered by the respondent herein. **The respondent also contends the same that by putting the values in the formula, the respondent should be entitled to the sum claimed on the basis of loss of production irrespective of the fact when such loss is actually is sustained in future is unknown. The respondent in this context claims that the business of the insured is cyclical in nature where it is difficult to foresee as to when the**

production ought to have been made during the interruption shall be sold. Thus, the present case of the respondent becomes the case of lack of evidence where the exists no evidence presented by the respondent so as to show as to when the loss of productions shall be sold in future so as to cause its affect on the business as against the Coalex case [supra] where at least the Plaintiff in the said case made endeavors to show the sufferance of actual loss in the year 1984 -85 which was rejected by the court. Though it is altogether different matter that in the case of Coalex (supra) the court also found on facts that the evidence furnished does not establish its cause and effect relationship and thus rejected the same. The case of Coalex (supra) also demonstrates the point that the values derived from the formula are to be compared with its actual effect of the business on the indemnity period and thus respondent's plea that the entitlement of the loss of products is dependent upon the values derived from formula are also addressed by the court in Coalex (supra) by rejecting such plea/ submission of the insured.

(Emphasis Supplied)

The said case of **Coalex** (supra) was further taken up in appeal before the Supreme Court of New South Wales, presided over by the three Judges namely, Hope J., Samuels J. and Priestly J. on 23rd February, 1988 affirming the order of Wood J. under appeal which is titled as **Coalex Pty. Ltd. v.**

Commercial Union Assurance of Company of Australia Ltd. (1988) 5 ANZ Insurance Cases 60-858. Samuels J. reexamined the entire issue after the judgment of Wood J. which was put to severe criticism by the ***Coalex Pty. Ltd.*** in appeal. Firstly, the Appellate Court Judge observed that the business interruption insurances are contracts of indemnity irrespective of the fact whether it is a valued policy or not though the appellate court concurred with other comments of Wood J. This is reflected from the findings of Samuels J which are reproduced below:-

“Before indicating my reasons, which are much the same as those of Wood J, I can dispose of the argument debated, at the trial, that the contest can be clarified by formulating it in terms of the question whether the insurance was one of indemnity, or was contained in a valued policy. To express the matter in this way is, I think, to create a false dichotomy. As the majority judgment in British Traders Insurance Co Ltd v Monson (1964) 111 CLR 86 at 93 makes clear, a valued policy may remain a contract of indemnity and in full compliance with the well known statement of Brett LJ in Castellain v Preston (1882) 11 QBD 350 at 386. As professor Hardy Ivamy observes in his General Principles of Insurance Law 2nd Ed 1970 at 8:- "A contract of insurance, which is otherwise a contract of indemnity, does not cease to be a contract of indemnity because it is contained in a 'valued' policy, providing for payment of a specified sum on the happening of the event. The effect of the valuation is to dispense with proof of the extent of the loss. The assured must still prove that he has in fact sustained a loss." So, in the present case, even if the appellants' contention

were correct, the contract remains one of indemnity; and the loss which must be proved is the shortfall in output the value of which is then established, however, by reference only to the machinery provided in the formula. Little or no assistance is to be derived from seeking to categorise the policy in the manner suggested. An answer to a misleading question will not provide the solution to the problem which can be found only by determining the true construction of the policy”

Thereafter Samuels J. also rejected the contention of insured who argued that the order of Wood J. is bad in law as actual loss was defined in the policy as loss of gross of profit arising out of turnover / output and no further inquiry as to actual loss is warranted except what is covered in the definition and formula. The learned Judge also dealt with the position whether the Court can consider the loss of production which could have been sold in the year 1984-85 at the prices subsequently negotiated for sale of insured. Samuels J. approved this finding of Wood J. that there exists no causal connection between the loss which could have been occurred on account of deficient sales attributable to the loss of output during the indemnity period. This has been done by Samuels J. by furthering the discussion in the following manner:-

“The appellants’ alternative submission was that, if they were bound to prove an actual loss of gross earnings, they had sustained it by reason of a lost opportunity to sell a consignment to a regular customer, Korean Electrical Power Company (“KEPCO”) in December 1984. Put shortly, the appellants’ case was that they calculated their loss of production at 90,398 tonnes, all of which could have

been sold to KEPCO in December 1984 or January 1985, at the prices subsequently negotiated for sales in 1985. Evidence in support of this claim was led in April 1986. In his judgment delivered on 23 July 1986 Wood J, noting that the appellants' case on actual loss had not been fully investigated since it was, of course, subsidiary to their principal contention, offered the parties the opportunity to consider the question further. The matter came before the Court again on 17 October when the appellants declined to call further evidence but obtained leave to make further submissions, adopting for that purpose the learned judge's finding that their loss of output during the period of interruption was 68,140 tonnes rather than the larger figure originally advanced."

"The learned judge found that he was unable to infer from the material before him a causal connection between the interruption, which ended on 11 April 1983, and the loss of an opportunity to sell coal to KEPCO in December 1984, by reason of lack of stock, when that organisation inquired about "an emergency purchase". Wood J analysed the facts in both his judgments, and I agree in his conclusion that the necessary nexus cannot be inferred. I do not make my own analysis because the appellants failed upon a separate point also. In order to establish an actual loss of gross profit the appellants must have proved the rate of gross profit attributable to a sale in December 1984 or, perhaps, January 1985. But no such evidence was led." (Emphasis Supplied)

"This question was raised in the course of the appeal. Counsel for the appellants frankly conceded that there was no evidence of the rate of gross profit applicable at the time the sale was notionally lost. He contended that, as a matter of construction of the policy, the actual loss was to be valued by reference to the definition of rate of gross profit in the policy. But this, as counsel agreed, is the rate earned on turnover during the financial year immediately before the date of

the damage i.e. immediately before November 1982, and therefore presumably means the rate earned during the year ended 30 June 1982. In any event, the financial year relevant to the computation of rate of gross profit for the purposes of a calculation under the formula is remote from the financial year ended 30 June 1985 in which the sale to KEPCO would, or might, have been made. The attempt to resort to the definition of rate of gross profit in the policy, supported by the dubious proposition that the loss is to be treated as if it fell within the indemnity period and ought therefore to be assessed according to factors current at that time, is really a further attempt to establish the difficulties said to attend the respondents' construction of the document. That must be an irrelevant exercise since it is performed in the course of working a calculation entailed by the assumption that the respondents' construction is correct."

"I must say, with all respect, that I can see no reason why the gross profit earned during the financial year ended June 1985, and likely to have been earned upon this transaction, had it come to fruition, could not have been proved at the trial in the latter half of 1986. Various elements necessary to the assessment of loss under the policy depend upon recourse to the insured's books e.g. turnover and gross profit, or reliance upon the insured's accountancy methods e.g. the amount of opening and closing stocks. Moreover, Condition 4 (of the Conditions applying to s2) provides that documentary evidence of accounting details required for the purpose of investigating or verifying claims may be certified by the insured's auditors and that such a certificate shall be prima facie evidence of the facts. Whatever the reasons for the omission to produce the evidence in question they could not have included difficulties presented by the form of the policy or any obstacles to proof which it presented. However that may be, the necessary material was not offered and, as a result, whatever the probability of the

sale to KEPCO (and I have said that I agree with the learned judge that it was not established) the means of transmuting it into financial loss were not available. Thus the appellants' alternative claim fails."

"I add that it was not argued that, even if the notional sale were shown to have been causally linked to the loss of output and its value supported by evidence, it could not constitute a loss within the policy because its occurrence would have fallen outside the indemnity period. It may be that although the indemnity period imposes a limit on the losses which may be regarded for the purposes of the formula, it does not so apply to the assessment of "actual loss sustained." That concept is not expressly restricted as it would be in a standard United States policy by use of language such as "actual loss sustained..... resulting directly from such interruption of business for only such length of time as would be required..... to rebuild, repair or replace..... However, as I have said the point was not raised and I say no more about it." (Emphasis Supplied)

50. From the reading of above both the judgments by Samuels J. and Wood J. in the case of **Coalex** (supra), it is clear that **both the learned Judges were not inclined to apply the output basis for assessment of loss of profits during the indemnity period as there was no causal connection between the loss which was shown to have occurred in the year 1985 vis-à-vis the indemnity period which was between 1982-83. Another significant finding in the case of Coalex [supra] was that the formula provided in the policy was mere guidelines to assessment of loss of gross profit.** However, the said lost gross profit on the basis of loss of production has to be measured after seeing its the effect on the business of insured during the indemnity period and making the necessary adjustments thereto, if any, considering the other

circumstances in the business so as to arrive at the figures which are as realistic as possible to indemnify the insured. **Thus, merely computing the loss on output basis or on turnover basis without making an inquiry of suffering of actual loss and causally linking with damage would be hypothetical exercise and would not provide realistic figures which would be against the principle of indemnification as enshrined in law relating to insurance contracts.** The said conclusion arrived at after analyzing the judgment of ***Coalex*** (supra) is also in consonance with my independent findings arrived at after applying the legal concepts discussed above from Riley on Business Interruption Insurance which leave no room for doubt that the view taken herein is widely accepted by the authorities and the case laws in the common law jurisdictions.

51. The resultant effect of the overall discussion is that the impugned award dated 1st August, 2012 passed by the learned arbitral tribunal is devoid of any judicious approach for finding out the appropriateness of the mode of assessment of loss of profits when the parties dispute the applicability of either of the said modes. The reasons whatsoever are recorded by learned arbitral tribunal are all contrary to settled principles of law of Insurance and concepts governing the field including that merely because the valuation of the loss of profits on the output basis is coming on higher side, then the claim should be awarded in favour of the respondent as if the insurance is meant to profit the insured which is contrary to the law that insurance is contract of indemnity. The other reasons are cyclical nature of business of respondent which I have already dealt with that

it will not aid the case of the respondent as there exists no evidence as to the period constituting the business cycle leading to no forecasting of the effect of the anticipated loss of profits on the business in the future and thus the said reasons are also contrary to the legal position and well accepted principles of business interruption insurances and the manner the losses are computed and ascertained in the business interruption insurances. Thus, the said reasons are no reasons in the eyes of law and contrary the public policy which is governing law of insurance including like principle of indemnity, principle of proximate cause and all the legal concepts discussed above and enabling this court to interdict and interfere with the impugned award.

52. Thus, the grant of impugned award in relation to claim 1 and the reasons contained therein to support the application alternative method of assessment of losses which is output basis in lieu of turnover basis is clearly against the public policy of India in view of the settled position on the law relating to insurance including principle of indemnity amongst others. The said award of claim No. 1 thus clearly falls within the ambit of the interference under the provisions of the Section 34 of the Arbitration and Conciliation Act, 1996 as the view adopted by the arbitral tribunal is not plausible one and no reasonable person conversant with the legal position and legal concepts governing the insurance contract would arrive at this conclusion by awarding the hypothetical claims which have not causal connection with the peril insured when there is no reasonable foreseeability of the salability of the output within the indemnity period

and even after the expiry of the same. As a result, I find the impugned award in relation to claim No. 1 so far as it necessitates the applicability of the output basis and proceeds to apply the output basis for the purposes of the computation of the loss of the profits for the interruption period on account of the damage as a result of the peril is liable to be interfered and as such set aside in view of the reasoning provided by me in the preceding paragraphs of this judgment that there is no necessity to switch over to the alternative basis of the computation of the loss of profits as the same is not desirable in the present case nor the same would provide the realistic assessment of the loss of profits. As such, the turnover basis is the appropriate basis as per the facts of the present case and by applying the legal position to the facts in hand.

53. Now, the question remains in relation to the grant of sum towards indemnification as per claim no. 1 in view of my clear finding that the appropriate mode of assessment of the loss of profits in the present case is the turnover basis which atleast reflects the realistic loss of profits during the indemnity period howsoever lower or higher side they may be depending upon the circumstances of the business done during the indemnity period. To this effect, one has to see the report of the surveyor M/s Adarsh and Associates who has computed the loss of profits as per turnover basis. There was some recommendation of 8th January, 2008 (not on record) which requested the interim payment of the sum of Rs. 6 crores to the respondent. The said recommendation is not on record but the parties agree that the same was in the nature of the recommendation.

The first report of the surveyor Adarsh and associates is dated 24th June, 2009. The said surveyor report deals with the submissions advanced/ claim put forward by the respondent in support of the adoption of the output basis in lieu of the turnover basis for assessment of losses. The said report provides the following response to the respondent's contentions which is more or less similar to my independent analysis done above and the same is worth mentioning below :

“(f) That the business interruption policy, both on turn over or output basis, can indemnify only the loss of gross profit, which other wise could be earned by them, during indemnity period, had the loss not occurred and that the gross profit can only be earned after the output is ultimately sold. Thus, the assessment of loss carried out by us, we have taken in to account the above facts, which is the requirement of LOP policy.

(g) Further the insured is under the impression that loss on the basis of ‘output’ can be computed simply by considering the gross profit on the sale value of difference of output, during the actual indemnity period and period of standard output, without actual realization of value from sales, which is a primary requirement/objective of LOP policy, while computing financial loss or gain during any period.

Because of above reasons, it is obvious that had the said incident not occurred, the Insured would have been compelled to either close down manufacturing of various products or reduce output from various plants i.e. CP-1 to CP-5, as followed by them prior to and during actual Indemnity period. Further, no business activity can survive by continuous production and accumulating stocks, without proper off take/sale of finished goods simultaneously.

It was observed that though there was shortfall in turn over as well as output during Indemnity period, when compared with the period standard 'turn over' as well as 'output', but without actually suffering any financial loss on this account in the given circumstances, particularly keeping in view of various facts and provisions under 'other circumstances clause'. It is important to note that at any time during indemnity period, the accumulated stocks in hand, which were available with Insured at the time of commencement of Indemnity period/prior to the incident, did not diminish/extinguish to Nil and therefore, Insured's argument that they had suffered loss due to decline in output or turnover because there was no output from plant CP-2 and 3, due to said incident, did not hold good by any standard and thus Insured's repeated insistence to carry out assessment of loss on output basis had no merit/logic. Further the assessment of loss on any basis would be the same as per the assessment of loss as carried out by us in later part of the report."

"9.3.1.1 Insured also acknowledged that there is no direct correlation of output with turnover in their industry, which is a generic statement and holds good for most of the industry/business activities, particularly where/when market demand is commensurate with the output.

The indemnity period available under the policy is only for 6 months and therefore, various consideration i.e. market trend etc have to be confined only for the period of 6 months which have been duly examined by us for assessment of loss. We have considered actual results, both on turn over & output basis, during entire indemnity period, during which Insured down ward trend prevailed, as also experience by Insured in past during previous 6 years for which graph was submitted by the Insured. Further, we are of the firm opinion that the cycle/trend spanning over 2 to 3 years can not be considered of any advantage to Insured, as argued by the Insured. Irrespective of nature of industry, particularly when the indemnity period, opted under the policy is 6 months, during which the industry has suffered the down trend.

Had the Insured been aware of such facts in advance, they would have arranged the captioned LOP policy with sufficient indemnity period, say even for 3 years and also policy could have been arranged on output basis.

9.3.1.2 We also examined the trend of turnover reflected from the quarterly published results of the other industries furnished by the Insured, we observed general downward trend during the period of last two quarters of financial year 2007-08 during the corresponding indemnity period of the Insured, when compared with the results of corresponding period in previous year of individual industry. Further, are of the opinion that the data pertaining to quarterly results of the other POY industries can not be comparable with the Insured because each industry operates within different parameters i.e. catering to different market segments, range of products and buyers etc.

Thus, we did not find any merit in Insured's argument that polyester industry is cyclic in nature and accumulated stocks are sold once market improves, even if the same exceeds the Indemnity period opted under policy, which is precisely the case in this particular incident.

Conclusion : Therefore, we did not find any merit in Insured's arguments that loss should be assessed on 'output basis' in view of the alternative basis clause attached with policy and further in given circumstances the assessment of loss, as carried out by us on the basis of 'turnover', as primarily provided in the policy, also holds good on output basis.

Note : However still, where ever possible, we have parallelly examined the results of output, during the standard and actual Indemnity period, along with the results of turnover as well as other considerations taken into account to carry out assessment of loss, as discussed in later part of the report."

54. From the reading of the aforementioned excerpts of the report of surveyor M/s Adarsh and Associates, it can be seen that the reasons provided by the surveyor in his report especially ones reproduced above are much in consonance with the legal position, I have discussed above. The surveyor has rightly stated that the loss of profits are recoverable either on turnover or output basis only which could otherwise be earned by them during the indemnity period, had the loss not occurred and that the gross profit can only be earned after the output is ultimately sold at point (f). Likewise, the reasoning at paragraph 9.3.1.1 about the short indemnity period of 6 is also in consonance with the discussion I have done after quoting Riley on Business Interruption Insurance which specifically deals with seasonal or cyclical nature of the business and recommends longer indemnity period to provide ample covers. All this would mean that the logic and reasoning provided by the surveyor Adarsh and Associates were rational in nature and goes in sync with the legal position though there are computation errors as discussed hereinafter.

55. The Surveyor M/s Adarsh and Associates thereafter proceeded to compute the loss of profits on the basis of the turnover method by taking into consideration the maintenance of turnover through the accumulated stocks and proceeding to make the necessary adjustment thereof. As per the surveyor, the total stock in hand as on 1st November, 2007 was 51,598 MT and after making adjustments, the surveyor came to the conclusion that the shortage of the net quantity of the accumulated stocks due to the sale in the indemnity period is 7028 MT. The rate of the gross profit is arrived by the

surveyor is 10.0325% after seeing the gross profit for financial year 2007-2008. The shortfall in the turnover during the indemnity period was shown to be Rs.82,15,69,184/- and the loss of gross profit on the same was computed to be Rs.8,24,23,928/- by the surveyor. However, as per the surveyor M/s Adarsh and Associates, the insured/ respondent could not maintain the desired turnover by disposing off the inventory in hand amount 51,598 MT available at the time of the commencement of the indemnity period. Therefore, the shortage/ reduction of turnover, as worked out as Rs.82,15,69,184/- was not attributable to have occurred due to the incident or damage caused by the incident but due to poor off take/ market conditions, prevailing during the actual/ full indemnity period of 6 months. Thus, as per the surveyor, the shortage of the turnover as per formula which is Rs.82,15,69,184/- did not match with the real business condition of the respondent in as much as the respondent could not even sold its existing stock during the indemnity period which means that there were lack of sales and the reduction in turnover is thus due to lack of sales and crunch in the market and not due to the business interruption caused by the damage due to the incident of fire. Thus, **the surveyor came to the conclusion that the actual turnover realized from sale of 1,96,663 MT of various polyester products during the indemnity period commencing from 30th October, 2007 to 29th April, 2008 tantamount to standard turnover and there was no reduction of turnover during the indemnity period arising out of the incident. The surveyor came to the opinion that the loss of profit suffered by insured during the actual indemnity period is only in respect of the quantity of the stocks**

sold from the accumulated stocks i.e. difference in quantity of the closing stocks held at the time of the commencement and expiry of the indemnity period asnd the insured is placed in the same condition, as it was prior to the said incident and hence fully indemnified.

Thereafter the assessment of loss has been done by the surveyor by conducting the computation in the following manner:

The total shortage of various products from accumulated stocks, due to sale during indemnity period as worked out in table under para at sl. No.9.3.3 above	7028 MT
Total qty of various products, converted on Common denier sold during the indemnity period ref Annexure – A-3	1,96,663 MT
Total realization, net of excise duty, discounts, brokerage and commissions from sale of various products during indemnity period	Rs.1164,39,49,548
The unit net realized cost from sale of above qty on weighted average basis	Rs.59,207,63/- MT
Therefore, net realizable cost of 7,028 MT of various products, depleted from accumulated stocks during indemnity period @ Rs.59,207,63/MT	Rs.41,61,11,224.00
Loss of gross profit @ 10.0325% of above	Rs.4,17,46,359.00

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The loss of gross profit as per the surveyor's report dated 24th June, 2009 was sum of Rs.4,17,46,359.00 towards the claim no. 1 which is payable by the insurer. This assessment has been done by the surveryor after considering the concerns of the respondents/

insured as per its emails and communications exchanged between them upto the submission of report dated 24th June, 2009.

56. There were certain communications which the respondent/insured wrote to surveyor M/s Adarsh and Associates immediately prior to the submission of report which is email dated 23rd June, 2009 and later communication dated 6th July, 2009 and 30th July, 2009 whereby the respondent communicated its objections on the mode of assessment of the loss of profits by the turnover basis and simultaneously pressed for the application of output basis for the computation of loss of profits. The respondent's email dated 23rd June 2009 reads as under:

"From : Laxmi P Soni [mailto; laxmip, soni@indorama-Ind.com]

Sent : 23 June 2009 09:55

To : 'Adarsh Gupta'

Cc : 'Ravindra S Singhvi'; 'S K Rustagi'; 'Umesh Mathur'; 'Alok Banerjee'

Subject : RE: Final assessment against Your claim under LOP policy, due to fire in control panel room of plant CP-2 & 3, at your Butipuri plant, Loss dtd. 29.10.2007-
RESPONSE FROM INDORAMA

Dear Mr Gupta,

We refer your email dated 19th June, 2009 addressed to our Mr. Umesh Mathur and we have taken note of your views.

We did not receive any communication so far with reasons thereof for your basis of holding our claim bill erroneous :

We had submitted all the data and pattern of production, closing stock and sales turnover on monthly basis for Indo Rama for 6 years and for the POY industry as well.

This pattern clearly speaks that Output basis loss assessment only reflect true indemnity.

We hereby quote a few communication from your side as under :-

Your mail dated 27th March, 2009-Point 3 reads as under :

With regard to your opinion for settlement of loss on output basis, we confirm having apprised you that we see no merit & justification on the alternate basis. Further, please note that even if this basis is adopted, the net result/the loss assessed still works out near to the loss computed by us on turnover basis.

And in your mail dated 13th June – Para 2 reads as under –

WE confirm having apprised you that in the given circumstances the assessment of loss, there is no justification to carry out assessment of loss, on output basis as there are no comparable parameters available to adjust output during indemnity period, as required under 'other circumstances clause'. Further, you are already aware of our opinion & reasons in details. In this respect as well as on various other points raised by you, from time to time. However, where ever found reasonable, we have accepted your views/arguments and considered in our assessment.

And your third mail dated 19th June, 2009- Point 1 reads as under –

We are of the firm opinion that the insurance policy is a legal contract between Insured & Insurer and its terms & conditions are equally applicable and binding on both parties. Further, while you have desired assessment of loss on output basis, under the proviso 'Alternative basis clause', it is surprising that

no concrete reasoning or basis to invoke this clause has been provided by you, whereas the said clause specifically states that the assessment on output basis can be considered 'if found necessary'.

If we read three mails together, the inference is –

A) The loss assessment in Turnover and Output basis will be nearly the same.

THEN KINDLY GIVE ASSESSMENT TON OUT PUT BASIS

B) You do not have comparable parameters available to adjust output during indemnity period, as required under 'other circumstance clause' –

PLEASE LET US HAVE REQUIREMENT FOR THE SAME ENABLING YOU TO ASSESS LOSS ON OUTPUT BASIS. AS STATED ABOVE, ON OUR PART WE HAVE PROVIDED ALL RELEVANT DATA AND PATTERNS.

C) WE HAVE NOT GIVEN ANY CONCRETE REASONING OR BASIS TO INVOKE ALTERNATIVE ACCORDING TO US NO REASONS IS REQUIRED TO BE GIVEN FOR INVOKING ALTERNATIVE CLAUSE. CLAUSE ATTACHED TO THE POLICY MENTIONS INDEMNITY ON OUTPUT BASIS. HOWEVER STILL WE HAD GIVEN YOU SIX YEAR DATA OF SALES/CLOSING STOCK & PRODUCTION AND ALSO INDUSTRY DATA.

Though we are very clear that under the policy contract issued to us we have rights to get the claim on output basis, we hereby submit our observation on your basis of settlement.

1. There is clear reduction of turnover during the indemnity period from the Standard turnover period you have selected. You have NOT considered this reduced turnover mentioning that was large quantity of stock in hand during the indemnity period. We would like to clarify our position as under -

A) There are 4 main products and hundreds of varieties in each products. Sale is also dependent on merge as well. We do not have sufficient stock of desired denier and merge very time. Hence merely stock inventory in aggregate will never give true picture.

B) During the period (May 2007 to November 2007) closing stock had piled up and in that case same logic of having very large quantity of stock for sale should apply-in view of your stand.

C) You are aware that CP 4 was under stabilization process during the period of standard turnover (selected by you) and CP 5 also just commenced production 2-3 months back. You will appreciate that production can be doubled immediately but sales takes some time.

D) These variation clearly indicate that there is NO NATURAL justice in getting the loss settled on Turnover basis.

You yourself have denied in your point 2.0 that turnover is not the right indemnity basis considering the actual turnover as standard turnover. Please note that stock levels had risen during the standard turnover period (selected by you) whereas the stock levels had reduced during the indemnity period.

YOU HAVE ALSO TAKEN U TURN IN YOUR BASIS OF SETTLEMENT FROM YOUR INTERIM REPORT FOR ON ACCOUNT PAYMENT WHEREAS YOU HAVE RECOMMENDED FOR REDUCTION OF TURNOVER FOR NOV 06 AND DEC 06 AND NOW (WITHOUT ANY CHANGE OF ANY FACTOR INCLUDING STOCK LEVEL) YOU HAVE JUST NOT CONSIDERED THE REDUCTION OF TURNOVER FROM STANDARD TURNOVER.

2. In calculating status of accumulating stock you have reduced the closing stock for the brunt stock twice-once in closing stock and again in point 4-refer table of

Point 1.0. This will revise the stock Qty for sale to 19228 MT.

3. The Production of PSF 3 having higher cost of production (more power and steam) and less sales realization (the detailed note was submitted to you) had not contributed to Gross Profit. Rs.6 lost in a product with sales price of Rs.59.2 per KG is more than Gross Profit rate derived by you and hence cannot be reduced straightway with its adjustment.
4. The Alternative Clause attached with OUR policy provides indemnity on Output basis which may be substituted for the term Turnover basis. So it is clear from this clause attached to the policy that basis of indemnity granted in the policy is on Output basis. This is further strengthened under Memo 1 attached to the above clause.

Moreover we had been told by ITGI two three time that they have asked to give loss assessment on three basis – Turnover basis; turnover basis with stock accumulation clause and on Output basis. We still await your working for other two options-turnover and output.

We await your feedback and confirmation in this regard.
With Regards

L.P. Soni
Vice President (Finance)
Indo Rama Synthetics (I) Ltd.
Dr.Gopal Das Bhawan
26 Barakhamba Road
New Delhi-110001
India
M : 9313436485”

57. Further, the email dated 6th July 2009 written by respondent to the Surveryor M/s Adarsh and Associates reads as under:

"From : Umesh Mathur (<mailto:umesh.mathur@Indorama-Ind.com>)
Sent : 06 July 2009 17 : 33
To : 'Adarsh Gupta'
CC : 'Ravindra S Singhvi' : 'Laxmi P Soni'; S K Rustagi
Subject : RE : Assessment of loss under LOP policy loss
dt. 29.10.2007 –A/c INDORAMA

Dear Mr. Gupta,

We acknowledge receipt of your recent mail dated 27th June 09 addressed to Mr.Soni with a copy to me & were surprised on your comments like unwarranted time.

....

You are mentioning that you were compelled to divert lot of unwarranted time in scrutinizing mammoth data. Please note that we have furnished the data as demanded by you and it was given to you almost 8 months back. So if it is mammoth data, it is as per your own demand. You should have appreciated that we had compiled the daily production and common denominator for sales and production data at least 2 – 3 times (especially for common denominator) since the same was not clear to you. Even the closing stock of 33950 MT as on 30th April 2008 was never submitted by us. The correct closing stock as on 30th April 2008 is 32370 MT. You were given this data after adjusting 1580 MT burnt stock. But you have taken the closing stock of 33950 MT and then deducted again 1580 MT. This simple wrong application of figure shows the casual approach adopted by your office in assessing our claim. This resulted in reducing our claim amount.

Further, most of the time, delay of months together has taken place at your end after submission of data for one reason or other and not for the change of consultants. So far as your fees concerned we are not aware of the system of payment of fees hence we refrain to make comment on your observation. We know one thing that data was submitted to you in May 2008 and July 2008 and our claim was lying unattended at your end for the reasons best

known to you. Please note that your office is responsible for such inordinate delay and we are entitled to receive interest for the same.

However we hereunder give our response to your various observations

1. kindly refer our mail dated 23.06.2009 viewing your few communications, we await your observation for the same. You had confirmed that claim on Output and Turnover basis will be same and also stated that in absence of comparable parameter you could assess the loss on Output basis. Please note that we have submitted all the required information/data to you and at no point of time you have indicated that such information/data is insufficient for computing the claim on output basis. On the other hand, now you are saying that data submitted by us is mammoth data.

2. We are very clear that no basis is required for opting for Alternative clause and its invoking in the event of claim. It is sole discretion of Insured whenever he finds it necessary since he has opted it in the policy. Nevertheless we had submitted all the data and pattern of production closing stock and sales turnover on monthly basis for Indo Rama for six years and for the POY industry as well.

This pattern clearly speaks that Output basis loss assessment only reflect true Indemnity. So we had provided you sufficient data for consideration of loss on output basis.

Moreover Alternative basis clause attached to policy provides indemnity on output basis (kindly re read the attached clause of the subject policy given to us) & so we had requested you to work out assessment on output basis.

3. Alternative basis clause provides for sale value of output & it does not specify actual realization from sale of

output. The actual realization from sales is the turnover and has no relation with output or sales value of output. Hope that this difference is well understood by you/your office.

4. You have again mentioned that computation either on turnover or output basis would remain same. In that case we had requested to you in our mail dated 23/06/09 to give computation on output basis but you have ignored the same.

5. You have mentioned that we have lately stated that there is large variety of product range. Pl. Note that this is untrue because you had asked denier wise data & you were fully aware of range of products. Even we have submitted daily production report denier wise for each product for six months in the month of May 2008, this data clearly indicate the variety of denier, merge and filaments being produced in each CP line for each product. It clearly negates your statement that you were not aware of large variety of the product range.

We have given you the natural and factual statement that it takes time to sell the products where the capacity has been doubled in immediate past and hence the true indemnity picture cannot be arrived at the turnover basis but on output basis only. This also shows you are deliberately considering only those data which reduces our claim and not the complete data to arrive at a logical conclusion.

6. Thanks for considering the reduction of turnover for the month of November and December for on account payment of Rs.6 Crores which you have CONSIDERED FIT AT THAT TIME. We feel that we have right to know about what specific parameters have made you change your stand of rejecting the claim on reduction of turnover altogether after completion of full indemnity period and analyzing various data/information for the said period.

7. We were told by ITGI executives that they have asked you to submit all the 3 types of assessment i.e. turnover basis, turnover with application of accumulation of stock clause and on output basis. Since, your theory of assessing the claim only on accumulated stock basis was communicated to us in May 2009 itself we could not meet and convince underwriters. In the month of January 2009 till April 2009 you have indicated in several meetings with us and Insurance company (as impression given to us) that claim has been settled on reduction of turnover. Accumulation of stock clause will not be considered since you were having the stock in hand during the entire Indemnity period. Now in the month of May you have again taken U-turn of assessing the loss for Consumption of accumulated stocks only. These deviations indicate that the loss assessment is not based on sound footings and as per the provisions stated in the policy document given to us.

In view of the above, you will appreciate that inspite of submitting complete data/details our claim has not been appropriately assessed by you.

Thanks & Regards

Umesh Mathur
IndoRama
New Delhi”

58. There was another communication dated July 30, 2009 written by the respondent to the petitioner raising the concerns on the mode of the assessment of losses adopted by the surveyor M/s Adarsh and Associates. The said letter dated July 30, 2009 reads as under:

“July 30, 2009
Iffco Tokio General Insurance Co. Ltd.
Iffco Tower
4th and 5th Floors
Plot No.3, Sector-29

Gurgaon-122001

Kind Attn : Shri H.O. Suri, Executive Director
Reg : FLOP Claim dt. 29.10.2007

Dear Sir,

This is an reference to our various meetings on the above subject matter with you and your team including the last meeting on Friday 24th July 2000 wherein Shri Vishal Lohia, Whole Time Director, Indo Rama and Shri S.Narayana, MD, ITGI were also present.

In this regard, as discussed and desired we would like to give our views/comments against Surveyor's report received through email on 30th June 2009 as under :

A) Basis for Assessment of Loss

Your office had issued Fire Loss Of Profit Policy (FLOP) dated 28/02/2007 with six months Indemnity Period to our Company. The said policy besides having normal clauses had certain add-on clauses which are as under :

1. Return of premium clause
2. Alternative clause
3. Accumulation of stock clause

The abovesaid clauses were essentially included in the Policy around 4/5 years ago by your company to meet our specific requirements and risk profile of our business. Indo Rama is a petrochemical plant & to meet our specific requirement the policy document was tailor-made to suit our business requirements. For the policy under consideration the abovesaid clauses were inserted in the policy based on our request communicated to ITGI wide our renewal letter No.IRSL/BDB/INS/ dated 28/02/07 while renewing the FLOP policy. Same was agreed by your office by incorporating the abovesaid clauses in the Policy.

As per abovesaid provisions Indo Rama had launched interim claim bill dt. 7th Dec' 07 for Rs.25 Crs. towards loss for 2 months on Output basis for CP 2 and 3 requesting for on account payment. The surveyor had recommended interim payment of Rs.6 Crores being loss in Turnover for the months of November and December 2007 vis a vis the Standard Turnover (May to October 2007)

Subsequently we had lodged our Final Claim Bill dt. 28th July, 2008 on Output basis for Rs.72.94 Crs. after invoking the alternative and departmental clauses for the loss caused by fire in control panels of CP 2 & 3 with the following justification as quoted therein –

“We have preferred our claim on Output basis which is the alternative to the turnover basis. As the policy documents has been issued by the insurer & alternative basis clause has been added to as an attachment which confers absolute rights on the insured to choose the methodology of settlement for each and every claim under the policy. The insurer/Surveyor does not have any authority to invoke this clause and it is the sole prerogative of the insured. Based on this the words “whenever found necessary” should be interpreted to mean “whenever found necessary by the insured”. This is as per well accepted principle of “Rule of Contra Preferenium.”

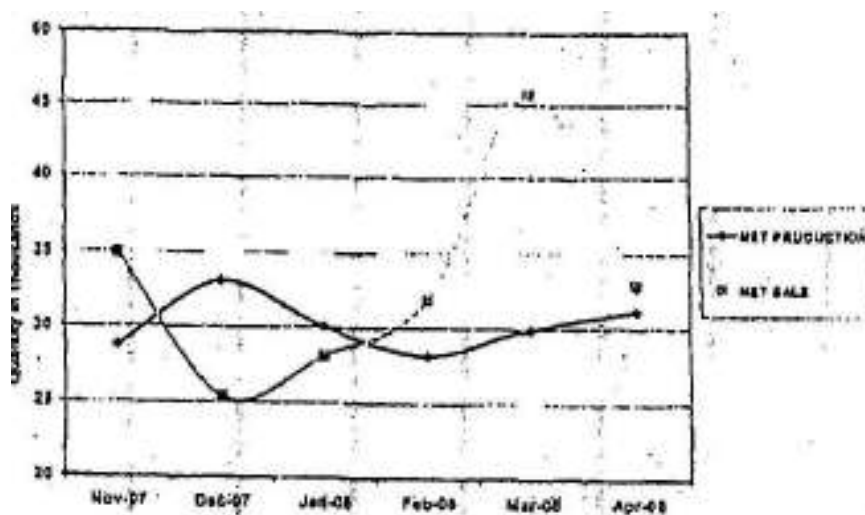
Further, in order to substantial our view point we have submitted a detailed explanation/justification along with details of Production, Sales & Closing Stock details including the Bar Chart etc. for the last 6 years (since 2003) to Surveyor. On perusal of all the said details following points emerged :

1. Production is relatively much more stable during the entire period even after increase in capacity in year 2007-08.
2. Sales do not follow any pattern & follows the waives which can be very steep. Sales are driven by various factors & cannot be predicted. It does not have any

relation with the inventory, season or any affinity to a particular period in a year or fixed interval.

Even the Sales during the 6 months indemnity period- Nov' 07 to April' 08 was varying. (Refer table & chart below).

MONTH	NET PRODUCTION	NET SALE	CHANGE IN SALES OVER PRECEDING MONTH (%AGE)
NOV-07	28688	34889	0
DEC-07	33095	25434	-27
JAN-08	30049	28050	10
FEB-08	28198	31667	14
MAR-08	29998	45760	44
APR-08	31172	32840	-28



- Closing stock level was around 60000 MT in April 2003 when the capacity of plant was half to the current

capacity but within next three months the stock level was almost NIL. Further, Inventory level in the month of January 2008 for more than 55000 MT when the capacity was doubled as of April 2003 after expansion & installation of CP 4 & 5, and thereafter also Stock levels were reduced to less than 5000 MT after good volume of sales in next couple of months.

The study/pattern of six years of abovesaid date clearly indicate that –

- Polyester industry is cyclic industry and not seasonal.
- Whatever is produced is ultimately gets sold in due course of time.
- Sales are cyclic whereas production is relatively stable

The above facts and features clearly states that Output is more consistent than sales and hence it is logical and essentially correct to assess the loss on Output basis.

The claim lodged by us is as per department clause of the policy as CP-wise profits-CP 2 & 3 per se are ascertainable, and therefore, loss for CP 2 & 3 per se has been claimed. We had also submitted CP-wise-product wise production and sales etc. to support our claim.

Inspite of our giving all explanations, documentary evidence and justifications to the surveyor that our loss should be assessed on Output basis, the surveyor refused to accept the same and finalized the loss assessment on Turnover basis wide his report dt. 13th June' 2009. Unfortunately Surveyor has wrongly interpreted the policy term & provisions and has denied the settlement on Output basis in contravention to the underline spirit of policy.

In view of the above, it can be concluded that we have been deprived off our rightful claim and surveyor has erred in his approach by not accepting the settlement on Output basis. Moreover, even by calculating loss on Turnover basis, the Surveyor has not followed the established practice & had even changed his stand. While doing

interim loss assessment, shortfall in Turnover was the basis to allow on-account payment while the same was not considered in the final assessment.

2. OUR OBSERVATION ON ASSESSMENT ON TURNOVER BASIS

Without prejudice to our right to get the claim on output basis, we would like to bring to your notice the errors in the loss assessment made by surveyor as under –

- a. Surveyor had changed his stand in final assessment of loss as against the interim assessment. Earlier reduction of turnover was considered as the basis for allowing interim/on account payment. (shortfall in November and December 2007 from the Standard Turnover – May 07 to October 07). Whereas, in final assessment reduction in turnover (14300 MT apprx.) during indemnity period (November 07 to April 08) has not been considered while assessing the claim. Loss was assessed on reduction of stock basis only.
- b. Surveyor has assessed the Loss by considering depletion of stock in hand during the indemnity period for 7028 MT. Even while calculating the loss quantity he had reduced the stock of 1580 MT (stock burnt on 02.01.2008) twice resulting in reduction in claim by 1580 MT. The closing stock figures considered our already after adjustment of stock fire claim and we had submitted all the requisite figure to him. Same are reproduced again for your perusal as under :

MONTH	OP STOCK	NET PRODUCTION	NET SALE	CL. STOCK
NOV-07	51597	28685	34889	45393
DEC-07	45393	33095	25434	53055
JAN-08	53055	30049	28050	55054

FEB-08	55054	28196	31867	51382
MAR-08	51382	29996	45760	35618
APR-08	34038	31172	32840	32370

The above table clearly shows stock adjustment made in Closing stock as on 31st March & opening stock of 1st April' 08 by 1580 MT.

- c. We were transparent in reducing our claim by 9040 MT towards the probable producing of RSF 3 after repair of one panel. As the plant was run for few days on half capacity, the production quantity was of sub-standard quality (yellow) resulting in low realisation. Moreover the operational cost-power, fuel etc and waste was also very high loading to almost Nil contribution. Since it was not economical to run the plant at half capacity, the production was stopped. These factors have cost us more than 10% (equal to Gross Profit rate arrived by Surveyor) and hence it was not economical to run the plant. All these facts were informed to the Surveyor and he was convinced about increase in cost for running of PSF but he did not gave any rebate/relief for the same in his assessment whereas surveyor has reduced 9040 MT from the claim quantity while calculating the loss assessment.

Moreover this line is giving trouble even till today and the root cause is affect of fire heat, water and boot damage and we are in a process to replace it.

We summarise our concern as under :

1. We had invoked Alternative clause under the policy and had submitted our interim and final claim bill on output basis for CP 2 and 3 department.

2. In spite of our submitting all the required information, details, justification and documentary evidence for assessing our claim on Output basis, surveyor has erroneously assessed the loss on turnover basis.
3. Surveyor in his loss assessment offer (on turnover basis) dated 13th June 2009 had made following errors –
 - Has changed his stand in final assessment and gave his assessment on depletion of stock in hand only. Shortfall in Turnover (14300 MT apprx.) during indemnity period was not considered whereas during interim payment same basis was followed.
 - In his assessment he has wrongly deducted 1580 MT burnt stock twice
 - No allowance is given towards increased cost of production and reduced sale price of PSF 3 production (9040 MT) which exceeds even the Gross Profit rate.

We have lodged the claim under the policy terms and conditions. Output basis of settlement with departmental clause (since profit of CP 2 & 3) is ascertainable however, surveyor has not followed the spirit and provisions of the policy and taken a different view to assess the loss. We request you to look into our concerns and insure proper justice to our claim of Rs.72.94 Crs. without further delay.

Hoping for an early resolution from your end.

Thanking you

Yours truly

For Indo Rama Synthetics (I) Ltd.

Sd/-
L P Soni
Vice President – Finance.”

59. From the combined reading of the aforementioned communications dated 23rd June, 2009, 6th July, 2009 and 30th July, 2009, broadly the concerns emerging from the respondent as regards the computation done by the surveyor on turnover basis can be summarized as under:

- a) That the surveyor has changed his position towards considering the reduction of turnover while computing losses at the time grant of the interim payment towards the claim vis a vis the final assessment report submitted on 24th June, 2009. This has been explained by the respondent by stating that earlier the surveyor had considered 14,300 MT as reduction of turnover (shortfall in the month of November and December 2007 from the standard turnover which was May 2007 to October 2007) and whereas in the final assessment of losses, the said reduction of 14,300 MT was considered and the loss was assessed on the basis of the reduction of the accumulated stock only.
- b) The surveyor has assessed the value of the stock sold during the indemnity period as 7028 MT after making adjustment between the stock in hand at time of the commencement of the indemnity period and its expiry thereof. In the said calculation, the reduction of 1580 MT of the stock which was burnt has been deducted twice. Thus, the computation of losses as per the report of the surveyor of 24th June 2009 was not correct as the

assessment deducts the value of the burnt stock twice from the accumulated stock.

- c) No allowance was given towards the increased cost of production and reduced sale price of PSF 3 production which is 9040 MT and on the contrary reduced 9040 MT of the stock on the basis of the probable production of output by PSF 3 on the basis that the said production remained stopped from the said panel despite the repair.
- d) That there are 4 main products and hundreds of varieties in each products. Sale is also dependent on merge as well. We do not have sufficient stock of desired denier and merge every time. Hence, merely stock inventory in aggregate will never give true picture.
- e) The surveyor M/s Adarsh and Associates computed the loss of profits on the premise whether the same are computer either on turnover basis or output basis shall provide same results with minor variation. The said point is not relevant in view of my finding that it is turnover basis which is appropriately applicable in the present case for assessment of loss of profits. Still, the same is reproduced herein in order to enlist the concerns of the respondent.

60. These were certain concerns which were raised by the respondent qua the report of the surveyor while computing and assessing loss of profits on the turnover basis as infirmities in his report. Besides, the above infirmities, the respondent also simultaneously in its communications kept on pressing for invocation of output basis of computation of assessment of losses as against

turnover basis on the same lines as discussed above whereby the respondent took the position that the loss of the production would give clear picture and there exists a time lag between the production and sales and in the output method there is no need to see its relation with the sales and the computation is done purely on output which is incorrect and even the output method requires the correlation of the manufacture with the sales during the indemnity period as a result of the business are required to be affected during the said period. The said pleas of the respondent have already been answered by me under the head of the discussion relating to desirability of the mode of the assessment of the loss of profits. At this stage, I am considering the concerns relating to the turnover basis of the assessment emerged from the respondent so as to consider and evaluate the report of the surveyor M/s Adarsh and Associates.

61. The said concerns of the respondent were tried to be addressed by M/s Adarsh and associates by giving his addendum report dated 10th September, 2009 whereby the surveyor had revised the sum of loss to Rs. Rs.5,11,31,567/- by impliedly admitting that the surveyor had taken into consideration 1580 MT of the stock twice while making the deductions in the calculation. The surveyor also stated that he has taken into consideration the concerns of the respondent wherever it deemed appropriate. I have gone through both the reports of surveyor M/s Adarsh and Associates and the reasoning stated by him in his report in order to answer and address the concerns of the petitioner. Though certain reasonings and logic contained in the report were sound and practicable as per the legal

position, however I find that the closer look of the report would show that while doing computation even in his report dated 24th June, 2009, the surveyor assessed the reduction in turnover by considering the standard turnover for the period May 2007 to October 2007 as according to him standard turnover would be a period 6 months immediately prior to the date of loss. On that basis, the surveyor assessed the reduction in the turnover to be Rs.82,14,69,184-/. Whereas as per the definition contained in the policy of standard turnover in the formula, standard turnover means “the turnover during that period in the twelve months immediately before the date of the damage which corresponds with the indemnity period”. The said definition has also been provided in the authorities on the subject including in Riley on Business Interruption Insurance as the formula provided in the policy is the hybrid policy based on the insurance policies and formulas provided in UK. As per Riley, standard turnover can be derived by looking at the period corresponding the indemnity period in the previous year. In the words of the author, it has been observed thus:

“3.9 Standard Turnover

The standard turnover, as its name implies, is the standard against which comparison is to be made in order to ascertain the shortage in turnover resulting from an incident. It is the turnover during the period in the 12 months immediately before the date of the incident which corresponds with the indemnity period, that is, which corresponds with the period of interruption within the selected maximum period.

For example, if the turnover were affected during the period from the middle of February to the end of August the

standard turnover would be that for the same six and a half months in the preceding year. **If turnover were affected during the nine months September to the following May inclusive, the standard turnover would be that for the corresponding months of September to May, 12 months previously. This method of comparison against the same calendar period in the 12 months preceding the incident provides for the seasonal fluctuations which in greater or less degree affect a large proportion of businesses.** It also uses the most up-to-date pre incident figures suitable for purposes of comparison and calculation of the loss of turnover. The definition of standard turnover is, however, qualified by the other “circumstances clause”, which provides for adjustments to be made for trends of the business and for variations in or other circumstances affecting the business either before or after the incident.” (Emphasis supplied)

62. In the present case, the indemnity period was 1st November, 2007 to 30th April, 2008 as per surveyor, yet the surveyor chose the standard turnover between May to October 2007 and thus made an erroneous comparison to arrive at the reduction in turnover vis a vis actual loss and leading to incorrect. The said computation is thus ex facie unsustainable and cannot be upheld on the face of it as the plain reading of the definition of the standard turnover in the policy document does not permit such computation. In such an event, even assuming at the highest that the concerns of the respondent has been addressed on the report of the surveyor M/s Adarsh and Associates, still the computations done by M/s Adarsh and Associates do not reflect the results and lead to correct assessment as per the policy terms. As such, the said computation and assessment of the losses are required to be done again in order to arrive at the correct figures of loss of profits payable to the

respondent on turnover basis. That is the reason why I cannot simply uphold the report of the surveyor M/s Adarsh and Associates even if I try to reconcile the concerns of the respondents by answering them on my own.

63. It is equally noteworthy to mention that I have found that the turnover basis of assessment of loss of profits arising out the damage resulting from the incident of fire is an appropriate mode for assessment in the present case as it provides fair indemnification by assessing the loss during the indemnity period. That by itself does not mean that the report of the surveyor in a given case may not be erroneous and in the alternative I have to follow the other report of the surveyor Mr. Srinivatsan based on different methodology which is output basis instead of the turnover basis. As the case of the respondent was before the arbitral tribunal was also twofold, first being that the output method is the appropriate mode of assessment and secondly that the surveyor M/s Adarsh and Associates had not made the correct computation of losses as per turnover basis, therefore it was upon the respondent to provide the correct computation of loss of profits on turnover basis as per formulae after comparison with the actual sales which the respondent could have done during the indemnity period and making other adjustments including other circumstances clause etc as per the policy document. Having not done so, the respondent cannot simply state that if the report of M/s Adarsh and Associates is not correct, therefore the report of the other surveyor should be upheld. Accordingly, the calculation of the loss of profits as per turnover basis in the present

case requires the examination of the competing stands of the parties including the concerns pointed out by the respondent. The computation of loss of profits is required to be done by the surveyor M/s Adarsh and Associates yet another time after considering the Annual turnover, standard turnover and gross profit as per the definitions provided in the formula along with the other ingredients in the policy document and proceed to make all other adjustments permissible under the policy document and thereafter compare the reduction of the turnover with the actual loss of profits which ought to have been incurred during the indemnity period.

64. As the present case is a peculiar one wherein the calculation of the losses presented before this court by one party's surveyor is found to be erroneous and the other party did not lead any evidence to this effect by presenting the corresponding the computation on the same turnover basis and kept on raising the concerns on the computations done by the surveyor. I am left with no option but to remand the case back to the learned arbitral tribunal to consider the limited aspect of the computation of loss of profits on the turnover basis on the basis of the computation of loss of profits to be presented by both the parties before the tribunal.

65. It is well settled principle of law that the court acting under Section 34 of the Act 1996 has the power to remand the award either in part or in whole depending upon the facts as to whether the issues on which the award rests are interlinked with the other aspects involved or not. Wherever, the part of the award can be severed from the other issues decided by the tribunal, which the court finds in accordance with the law, the power of remand or setting aside is

exercise only to the extent of the part of the award which is found to be unsustainable.(Kindly see the judgment passed in the case of ***Rajesh Tiwari v. Motilal Oswal Financial Services Ltd., Mumbai and Another***, (2013) 3 Mah LJ 523 : (2013) 2 AIR Bom R (NOC 26) 8 by Bombay High Court laying down the said position of law, and also in ***Rajendra A. Shah (H.U.F.) (Constituent) v. Angel Capital and Debt Market Ltd.***, (2013) 1 Mah LJ 385 and ***Saroj Bala v Rajive stock Brokers Ltd.***, 2005 (4) AD (Delhi) 266 and ***Bhasin Associates v. NBCC***, ILR (2005) 2 Del 88 which lays down that power to set aside an award when exercised by the Court would leave a vacuum if the said power was not understood to include the power to remand the matter back to the arbitrator).

66. In the present case, **I find that the approach of the arbitral tribunal so far as applying the legal principles in order to find out the appropriate method as to assessment of loss of profits/ business interruption arising out damage resulting from fire was totally flawed and patently illegal and contrary to well settled principles of law. As such, I have chosen to discuss the concepts and legal principles and applied the same to the facts of the case in order to ascertain the appropriate method which is applicable in the present case for assessment of loss of profits in the present case is found to be turnover basis as the parties disputed before the arbitral tribunal as well as before this court as to the applicability of the basis/ mode of computation of the loss of profits. This has been done so that atleast one issue as to applicability of correct method of the assessment of loss of profits as per the policy document should be put to rest.**

Thereafter, I have also found that on the issue of the computation of loss of profits in claim No. 1, it is the petitioner's surveyor who has submitted its report presenting the computation of the loss of profits on the turnover basis, the respondent merely disputed the said report of surveyor M/s Adarsh and associates and on the contrary presented the report of another surveyor computing the losses on the output basis which may not be helpful in the present situation. The case of the respondent was twofold before the tribunal first being that the report of the petitioner surveyor is faulty and the appropriate method of the assessment of loss of profits is output basis or alternative basis clause. Yet, the respondent chose to present only one computation of losses before the arbitral tribunal as per output method and could have furnished the alternative computation on turnover basis as well. In the absence of the same and considering that the respondent has its own concerns on the report of the petitioner surveyor and I have also found the computation errors in the report of the surveyor M/s Adarsh and association, I am left with no option but to remit the case back to the arbitral tribunal. Remitting back the case on the aspect of the computation of loss of profit is essential as the computation of the loss of profits on turnover basis also requires the addressing of the concerns of the respondents after hearing the parties alongside arriving at the correct computation of loss of profits during the indemnity period on the basis of the consideration of stands of both the parties. Therefore, no useful purpose would be served in the exercise of the option to adjourn the matter under Section 34 (4) of the Act in the present case as I am already setting aside the award on merits in relation to claim No. 1 by interfering with the award as

the impugned award was against the public policy and thus required to be interfered with. It is only for the limited purpose of arriving at the correct computation of loss of profits on turnover basis which is a question interlinked with claim No. 1, I am remitting back the matter to the arbitral tribunal so that the arbitral tribunal may arrive at the correct computation after considering the computation of loss of profits to be presented by both the parties on turnover basis. Accordingly, the impugned award granting the sum of Rs.34,70,55,231/- towards claim No. 1 is set aside holding that the turnover basis of assessment of loss of profits is appropriate mode of assessment of loss of profits in terms of the policy during the indemnity period. The matter is further remitted back to the arbitral tribunal for further consideration of the computation of the loss of profits on turnover basis as per the fresh computations to be provided by both the parties and/ or their respective surveyors. The parties are at liberty to provide any additional evidences and documents in support of the said computations. All the pleas are available to the parties in relation to challenge the correctness or otherwise of the said computation of loss of profits.

Claim No.2: Claim under the material damage policy

The claim No. 2 of the respondent comprised of the indemnity arising out of the material damage arising out of the incident of fire. The respondent made the provisional claim of Rs.6,99,51362-/. The surveyor M/s Adarsh and Associates in his interim report requested for the release of sum of Rs.6 crores to the respondent for the loss of profit and material damage. On 26th September, 2009, the final report was submitted by surveyor M/s Adarsh and Associates on the

material damage policy. The surveyor has assessed the loss of Rs.22,48,23,32.00 which is payable by the petitioner to the respondent. The said basis of assessment of the loss by the surveyor was assailed by the respondent by contending that the surveyor has unnecessarily not considered the following expenses while arriving at the loss:

“80.6. The Surveyor declined to consider various expenses incurred by the claimant.

- i) Rs.1,15,85,025/- incurred for total 21 nos. electric (AC) motors (i.e. 7 nos. each for 3 sets for 3 PSF draw lines) of different capacities, replaced due to technical consideration and which were not installed in the control panel room and hence not damaged due to the said incident.
- ii) Rs.13,51,586/- for encoders/control panels, required for the above digital motors.
- iii) Rs.9,65,419/- for 3 set of ACB for PCC Panels, not installed in the involved control panel room.
- iv) Rs.5,14,537/- for control processor, installed in plant.
- v) The cost of various other accessories including base plates & couplings for installation and connecting motors with drive rollers at each station, which were not affected by the aforesaid incident and cable trays etc., now provided over head instead of laying cables in under ground trenches.”

67. Likewise, it was the case of the respondent that the surveyor in his report had also deducted 32 % amount from the cost of the new panels and equipments to adjust the improvement/ higher capacity of the panels and for costs of spares including in cost of such equipments. To this effect, the respondent appointed the surveyor Mr.

R. Srivatsan, CW3. The said surveyor assessed the loss which is payable by the petitioner to the respondent towards material damage is to the tune of Rs.3,73,99,883. The arbitral tribunal after appreciating the evidence of the parties came to the conclusion that the surveyor M/s Adarsh and Associates and the witnesses appearing on his behalf are not able to give the any explanation justifying the deductions made in the loss. It has been observed by the arbitral tribunal that the M/s Adarsh and Associates has made the deduction in the assessment of the loss towards the cost of the purchase of the 21 AC drives of Rs.1,15,85,025/- which were earlier DC drives on account of installation new cyclo-converters on account of the replacement of plant and machinery. The said AC drives were purchased on account of the change of technology of cyclo convertors which earlier supplied by some M/s Toyo Denki of Japan and now the said cyclo convertors were purchased from M/s Siemens. Under these circumstances, the DC motors attached thereto also required to be changed with that of the AC motors. As per the surveyor M/s Adarsh and Associates, the said deduction/ non consideration of the expense from the loss is done due to the reason that the said loss/ expense caused to the respondent is not as a direct consequence of the incident of fire but is a result of the change in technology. Thus, the respondent was not obligated to purchase the AC motors due to the incident of fire. On the contrary, the respondent surveyor came to the conclusion that the said expense was obligated to the respondent as the respondent changed the machinery/ cyclo convertors made by one manufacturer to that of other and the technological variation and compatibility as a

consequence caused the expense to purchase the AC motors in lieu of DC motors. The arbitral tribunal approved the version of the respondents surveyor and held that the said deduction by the surveyor M/s Adarsh and Associates is unwarranted. Therefore, the arbitral tribunal proceeded to accept the loss assessment submitted by the surveyor of the respondent to the tune of Rs.3,73,99,883-/-.

68. Mr. Neeraj Kishan Kaul, learned Senior counsel for the petitioner has challenged the award by reading out the grounds contained in the petitioner which are merely disputed question of facts. It has been argued by Mr. Kaul, the learned arbitral tribunal accepted the report of the respondent who has given his report after 3 years of the loss and thus the said report ought not have been given any credence. Likewise, it was argued that the equipment which was purchased by the respondent was outside purview of the cover provided by the policy and the said aspect has not been appreciated by the tribunal and as such the impugned award so far as the claim no. 2 is liable to be interfered with.

69. I have considered the submissions of Mr. Kaul on the challenge in relation to the claim No. 2 and also gone through the written submissions filed by the petitioner on the point. I have seen that the challenge laid by the petitioner are all disputed question of facts and the petitioner has failed to point out any infirmity in the impugned award that leads to conclusion that while granting the award of claim No. 2, the arbitral tribunal has contrary to the fundamental policy of law or public policy. It can also not been said that the award of the claim No.2 on material damage is so perverse in nature that no reasonable man can arrive at the said view. The view taken by the

arbitral tribunal by inclusion of the expense incurred by the respondent towards the purchase of the AC motors on account of the purchase of the new equipment containing new technology can be said to be a consequence or obligation arising out of the loss due to material damage arising out of the fire. It was due to the damage of the earlier plant or machinery, which has the respondent to purchase the new cyclo-convertors and in turn the AC motors. Thus, the cause of the installation of the new technology cannot be altogether divorced from the cause of the loss on account of the material damage. The said causes are interlinked and related to each other. Thus, the view adopted by the learned arbitral tribunal on this claim is plausible and cannot be interfered with. Therefore, the award of Rs. 3,73,99,883 so far as the claim no. 2 is concerned is upheld and the challenge laid by the petitioner in this respect is rejected.

Competence of Surveyor and Departmental Clause:

On both these aspects, the decision has been arrived at by the arbitral tribunal in favour of the petitioner as in the view of the arbitral tribunal that the competence of the surveyor of the petitioner cannot be questioned and the departmental clause cannot be said to be operational in the present case. The petitioner still chose to comment on the appointment of the surveyor by the respondent in its written submissions by stating that the said surveyor gave its report after 3 years of the loss and had also not carried out the site survey till that time and thus this court should not consider his report. I find that the said challenge by the petitioner at the stage is merely disputing the position from the arbitral award. No arguments were addressed by either counsel on the challenging the surveyor report of the

respondent and thus the said comments in the written submissions of general nature do not lay any serious challenge to the said findings of the arbitral tribunal which allows this court to interfere with them. Accordingly, the said challenge by the petitioner on the findings of the arbitral tribunal to the extent of the competence of the surveyor is also rejected as baseless.

Interest

The petitioner has also challenged the finding of the interest which has been awarded by the arbitral tribunal to the tune of 9 % per annum on both the loss of profits claim as well as the material damage claim by contending the starting point of the accrual of the interest was wrongly stated by the tribunal as 1st July, 2008 when the liability of the petitioner company shall commence from 24th June, 2009 which was time, when the final report of the surveyor was submitted. In the said circumstances, as per the petitioner, the arbitral tribunal cannot proceed to award the interest on the sum awarded from the date prior to the assessment of the sum of loss. I find that what is payable by the petitioner to the respondent is the amount towards the actual loss suffered by the respondent. As per the terms of the policy, the petitioners surveyor was obligated to submit the report earlier than the date of 24th June, 2009. This was due to the reason that strictly going by the terms of the policy, the insurance company was liable to any claim raised within the period of one year from the incident. In such circumstances, the petitioner surveyor himself took time to submit his final report towards the assessment of losses causing delay in resolution of dispute. Thus, I find that the

challenge of the petitioner to the award of the interest devoid of any merit. As such, the said challenge is also rejected.

70. In view of the aforementioned discussion held under different heads, the findings on the different claims can be summed up as under:

- A) The impugned award granting the sum of Rs.34,70,55,231/- towards claim No.1 is set aside holding that the turnover basis of assessment of loss of profits is appropriate mode of assessment of loss of profits in terms of the policy during the indemnity period. The matter is further remitted back to the arbitral tribunal for further consideration of the computation of the loss of profits on turnover basis as per the fresh computations to be provided by both the parties and their respective surveyors. The parties are at liberty to provide any additional evidences and documents in support of the said computations. All the pleas are available to the parties in relation to challenge the correctness or otherwise of the said computation of loss of profits.
- B) The award of Rs.3,73,99,883/- so far as the claim No. 2 is concerned is upheld and the challenge laid by the petitioner in this respect is rejected.
- C) The challenge so far as the award of interest of 9 % Per annum from 1st July, 2008 as held by the arbitral tribunal is also rejected.

71. The learned Tribunal is requested to dispose of the matter on point (A) expeditiously, by giving full opportunity to the parties. Parties

to take steps in accordance with law. The parties are also at liberty to settle the matter.

(MANMOHAN SINGH)
JUDGE

JANUARY 20, 2015