

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : **17.08.2016**

CORAM:

**THE HONOURABLE MR.JUSTICE A.SELVAM
and
THE HONOURABLE MR.JUSTICE P.KALAIYARASAN**

**O.S.A.No.258 of 2011,
Cross.Obj.No.88 of 2014
and M.P.No.1 of 2011**

O.S.A.No.258 of 2011

1. The National Insurance Co., Ltd.,
Rep. by its Chairman & Managing Director
No.3, Middleton Street,
Kolkatta - 700 071.
2. The National Insurance Co., Ltd.,
Rep. by its Divisional Manager
2nd Floor Mamanji Centre,
S-7, Thiru.Vi.Ka Indl. Estate,
Guindy, Chennai - 600 032. Appellants

Vs.

1. M/s. Shriram Investments Ltd.,
Now known as Shriram Transport
Finance Co., Ltd.,
Rep. by its Director,
S.Venkatakrisnan, Mookambika Complex,
No.4, Lady Desika Road,
Mylapore, Chennai - 600 004.
2. Mr.Justice R.Balasubramanian (Retd.)
No.5, Tiger Varadachari Road,
First Street, Kalakshetra Colony,
Besant Nagar, Chennai - 600 090.Respondents

Original Side Appeal under Section XXXVII of Arbitration and Conciliation Act, 1996 r/w Clause 15 of Letters Patent and Order XXXVI Rule 1 of Original Side Rules, against the Order, dated 01.07.2011 made in O.P.No.199 of 2009.

Cross Obj.No.88 of 2014

M/s. Shriram Investments Ltd.,
Now known as Shriram Transport
Finance Co., Ltd.,
Rep. by its Executive Director
P.Sridharan,
Mookambika Complex,
No.4, Lady Desika Road,
Mylapore, Chennai - 600 004.

.... Cross-objector

Vs.

1. The National Insurance Co., Ltd.,
Rep. by its Divisional Manager
2nd Floor Mamanji Centre,
S-7, Thiru.Vi.Ka Indl. Estate,
Guindy, Chennai - 600 032.

2. National Insurance Co., Ltd.,
Rep. by its Divisional Manager
No.3, Middleton Street,
Kolkatta - 700 071.

3. Mr.Justice R.Balasubramanian (Retd.)
No.5, Tiger Varadachari Road,
First Street, Kalakshetra Colony,
Besant Nagar, Chennai - 600 090.

....Respondents

Cross Objection filed under Order XLI Rule 22 CPC read with Order XXXVI Rule 2 of Original Side Rules against the Order, dated 01.07.2011 made in O.P.No.199 of 2009.

For appellants : Mr.N.Vijaya Raghavan

For Cross Objector : Mr.Vijay Narayanan, Senior counsel
for Mr.Srinath Sridevan

For respondents : Mr.Vijay Narayan, Senior counsel
for Mr.Srinath Sridevan for R1
in O.S.A.No.258 of 2011

R2 in O.S.A.No.258 of 2011
and R3 in Cross Obj.No.88 of 2014
- Arbitraror

Mr.N.Vijayaraghavan for R1 and R2
in Cross. Obj.No.88 of 2014

COMMON JUDGMENT

(Judgment of the Court was delivered by
P.KALAIYARASAN, J)

These Original Side Appeal and Cross Objection are directed against the Order of the learned single Judge, dated 01.07.2011 made in O.P.No.199 of 2009.

2. The petitioner in the Original Petition filed Original Side Appeal, challenging the order, confirming the Award, wherein the petitioner was directed to pay the claims. The Cross-Objection was filed by the first respondent in the Original Petition, as far as reduction of interest rate.

3. The facts of the case in brevity so as to understand the dispute between the parties are as follows :

(i) The appellant / petitioner is the Insurance Company. The first respondent / claimant is financing purchase of trucks - new

and or old commercial vehicles. The claimant entered in to a business deal with the appellant to ensure that there is insurance coverage for the vehicle without any interruption. The Insurance company and the claimant entered into a Memorandum of Understanding, dated 05.03.2002. Under the arrangement, the Insurance company provided to the claimant cover note books to be filled and issued by them, so as to commence the insurance cover. The Insurance company had authorised the claimant to issue the cover notes. The cover note is in triplicate. Duly filled up first copy of the cover note would be given to the owner of the vehicle; the second copy would be forwarded to the Insurance company to issue a regular policy and the third copy would be with the claimant. The Insurance company, on receipt of the cover note, would issue an insurance policy for a period of one year. The risk would be covered from the date mentioned in the cover note.

(ii) In order to implement the Memorandum of Understanding, the claimant deposited with the Insurance company, Rs.8 lakhs as initial deposit to cover the premium payable in respect of the policy to be issued by the Insurance company. The claimant made further deposits to cover the premium payable in future from time to time. The Insurance company had deputed the staff

members to the claimant's office for issuing policies for the cover notes issued by the claimant as well as the renewal policies. The system was functioning satisfactorily and in December 2004, the Insurance company informed the claimant that they did not have enough cash in their account to meet the premium payable on the policies to be issued in respect of 750 cover notes issued by the claimant and therefore, requested the claimant to execute a indemnity bond with a support deposit of Rs.25 lakhs as future deposit. the claimant executed an indemnity bond and also deposited Rs.25 lakhs as demanded. The parties agreed to cancel the Memorandum of Understanding w.e.f 15.03.2005 and a document was also entered into. It was agreed in that document that the cover notes given by the Insurance company shall not be utilised after the cancellation of the MOU; that the entire transaction must be reconciled within one month.

(iii) The dispute between the parties arose and the Insurance company approached the Hon'ble Chief Justice under Section 11 of the Arbitration and Conciliation Act, 1996, for appointment of Arbitrator. The sole Arbitrator was appointed. The claimant filed a claim petition making the following claims.

(iv) The Insurance company confirmed by letter 25.06.2005, the balance available to the credit of the claimant as on 31.03.2005 to be Rs.1,91,02,499/-. Thereafter, on 30.06.2006, confirmed the amount standing to the credit of the claimant is Rs.173.41 lakhs. The Insurance company, by letter dated 15.06.2005 stated that the claimant has to return 149 cover leaves. Those cover leaves were already returned to the Insurance company, after obtaining acknowledgments and the claimant is not in possession of any unused cover note books or leaves with them. Having confirmed the balance available to the credit of the claimant as on 30.06.2006, the payment and expense of a further deposit along with indemnity bond is unwarranted.

(v) The claimant sent 766 policies on various dates to the Insurance company for cancellation under acknowledgment and the Insurance company is bound to reimburse the premium paid on it, which amounts to Rs.82,75,405/-. In respect of 687 covers issued either for a fresh policy or for renewal, the Insurance company debited Rs.81,85,588/- in the claimant's account. But the Insurance company had not issued the policies at all and therefore, the claimant is entitled to the said amount debited from his account. The claimant asked for cancellation of 302 Insurance policies and

though the Insurance company accepted the request for cancellation, did not refund the premium, which comes to Rs.31.68 lakhs.

(vi) The Insurance company contrary to the tariff condition adjusted a sum of Rs.91,39,884/- from the claimant's deposit available with them, towards the difference in premium for a short period and pro-rata premium collected for the same policy for the balance period. The said debit entry is only an after thought and made for the first time by the Insurance company by their letter, dated 27.06.2000, only after the dispute arose between the parties.

(vii) The Insurance company had not settled about 600 claims of the insured, as a result of which the claimant is not able to recover his dues from them to the tune of Rs.2.40 crores and the loss is estimated at Rs.3 crores. There is also a loss of at least Re.1 crore in profit on account of the Insurance company having not paid money due to the claimant. The claimant also filed work sheet quantifying the interest payable by the Insurance company and also towards cost of the Arbitrator.

(viii) The Insurance company resisted the claims that there were several reported incidents of cover notes being issued recklessly without availability of adequate premium; that various amount claimed in the claim petition is also beyond the scope of Arbitration; that about 150 cover leaves were found missing; that neither the claimant nor the Insurance company ever sat together and reconciled the accounts; that the reconciliation for want of details had become a difficult task; that some of the cover notes were anti-dated and that the claimant had committed breach of obligation.

4. The learned Arbitrator recorded the procedure to be adopted in conducting the Arbitral proceedings, after deliberations of the learned counsel on either side. The learned Arbitrator framed 8 issues and after analysing the documents placed before the Tribunal with reference to the Memorandum of Understanding entered into between the parties on 05.03.2002, passed a decree in favour of the claimant as far as the Claim Nos. 1 to 4 with interest at 18% from 16.04.2005.

5. The Insurance company preferred Original Petition under Section 34 of the Arbitration and Conciliation Act, 1996 and

the learned single Judge after analysing the Award with reference to the Memorandum of Understanding and documents, dismissed the petition. However, the learned single Judge reduced the interest rate from 18% to 12%. Against the said order, present Original Side Appeal and Cross Objection are filed.

6. The learned counsel appearing for the appellant contends that the Award of the learned Arbitrator is clearly opposed to public policy, as there was gross violation of basic principles of natural justice in concluding that oral evidence was not adduced; that the finding of the learned Arbitrator is as if the insurer alone had failed to adduce oral evidence to prove the defence; that the learned single Judge has completely misdirected his approach and concluded as if the insurer alone is under obligation to let in oral evidence, whereas there was no such requirement or obligation on the claimant and that the approach of the learned Arbitrator is nothing but unethical.

7. The learned Senior counsel appearing for the first respondent per contra contends that the learned Arbitrator proceeded the Arbitration proceeding after setting out the procedure adopted in conducting the Arbitral proceedings, after hearing both

sides and the Award has been passed on the basis of the available documents placed before him. It is further contended that fixation of interest was a matter within the jurisdiction of the Arbitrator and the interest was fixed by the learned Arbitrator in accordance with the provisions of the Act and there is no ground to vary the same.

8. As per the Memorandum of Understanding, dated 05.03.2002, the Insurance company authorised the claimant to issue the cover notes and for that, the claimant deposited amounts from time to time with the Insurance company towards premium payable and the Insurance company issued policies. The main dispute now in question are with respect to claim Nos.1 to 4.

9. Claim No.1 relates to the amount confirmed by the Insurance company standing to the credit of the claimant with them, i.e., Rs.173.41 lakhs as on 30.06.2006.

10. Claim No.2 is with respect to the deposit of Rs.25 lakhs as additional deposits, when there was sufficient balance available with the Insurance Company.

11. Claim No.3(a) is with respect to the premium amount for cancellation towards 766 return policies, for a sum of Rs.82,75,405/-; claim No.3(b) is non-issuance of policies for 687 cover notes, which comes to Rs.81,85,588/-; claim No.3(c) is non-refund of premium even after acceptance of the request for cancellation of 302 insurance policies, which comes to Rs.31.68 lakhs.

12. Claim No.4 is the difference in premium for a short period and a pro-rata premium collected for the same policy for the balance period, which is contrary to the tariff condition and made after the dispute arose, which comes to Rs.91,39,884/-.

13. As far as claim No.1, the Tribunal took the credit balance available in the cash deposit amount as on 31.07.2006 as Rs.1,70,78,888/- as disclosed from the letter of the Insurance company and the Insurance company in their written statement also affirmed the same. The Tribunal also discussed about the disputed adjustments between the parties on the basis of the documents.

14. As far as claim No.2, the learned Arbitrator gave liberty to the Insurance company to proceed against the claimant,

to recover the amount if Insurance company is forced to face claims in the future on cover notes issued without adequate cash premium deposit. With such liberty, decreed claim No.2.

15. Regarding claim Nos.3(a), 3(b) and 3(c), the Tribunal refers a Tabular statement of the claimant giving all details of the policies, including payment voucher number, its date and the premium paid. The Award further says that the Insurance company never responded to the said letter of the claimant, dated 28.07.2006 and the details annexed thereto. It also cited exchange of letters between the parties. However, it concluded that the Insurance company having accepted the receipt of 766 policies from the claimant, the burden is on the Insurance company to show how they have met all those claims or dealt with the same. Even for the argument of the Insurance company that refund must be only proportionate to the remaining period of the Insurance policy, the Tribunal pointed out that they have not placed any documentary or oral evidence showing the unexpired period of each policy, which was sought to be cancelled. Therefore, the Tribunal decreed the above claims.

16. Regarding claim No.4, the Tribunal cited the letter sent by the Insurance company, dated 01.11.2006, wherein the Insurance company, after exercise arrived at a figure of Rs.91,39,884/- exclusive of service tax and the calculation has also been verified by the CAT and the details will be sent to the claimant shortly. The Tribunal has pointed out that nothing has been brought to its notice as referred to in the letter which had been sent to the claimant at all. The further finding of the Tribunal is that the Insurance company had not made known what is the type of exercise it had done as claimed and no document has been produced to show the details of the policies issued, the period covered thereon and the premium collected. The Tribunal considering the grant of claim No.1 while holding that the claimant had made out a case on claim No.4, has not granted any monetary relief to the claimant.

17. The main gravamen of the appellants is that the Insurance company was not given reasonable opportunity to let in oral or documentary evidence. The proceedings recorded on 12.09.2008 by the Arbitral Tribunal is as follows :

"Mr.N.C.Vijairagavan appears for the claimant.

The claimants letter, dated 11.09.2008

authorising Sri.N.C.Vijairagavan to represent them in this arbitral proceedings is filed. It is taken on record Mr.N.Vijairagavan, Learned counsel appears for the Insurance Company. Mrs.Vani Narayanan, Vice President of the Claimant and M.U.Balasundara Rao, General Manager of the claimant are also present. Mr.S.Krishnan, Deputy Manager of the Insurance Company is also present. Learned counsel on either side deliberated before me the procedure to be adopted in conducting the arbitral proceedings. Stating that the code of civil procedure need not be necessarily followed, both the learned counsel submit that there is no scope to let in any oral evidence at all. However, in the course of the proceedings if a need arises to let in evidence on any particular fact or issue then with the leave of this Tribunal, they may be permitted to let in oral evidence. It is also their further submission that de-horse the submission made by them as indicated above, if the Tribunal directs them to let in oral evidence on any issue then they will definitely do so. Both the learned counsel also fairly stated that all the documents marked by either side may be marked by consent except the documents to which either of them is not a party or both of them are not parties. Such of those documents, learned counsel on either side submitted, may

be addressed by them during the course of the Arbitral proceedings either at its face value or by examining any witness connected with the document. In my considerable opinion, the submission made by the Learned counsel on either side as indicated above deserve acceptance and accordingly, it is accepted."

18. In another proceedings recorded on 06.10.2008, it is recorded by the Arbitral Tribunal thus :

"It is further submission of the learned counsel on either side that on the available materials and in the context of the submissions made by them the Tribunal may decide the case in accordance with law. Recording the submission the proceedings stand closed to await the pronouncement of the Award."

19. Thus, both the parties agreed for a procedure to be adopted in conducting the Arbitral proceedings. In that both the parties made clear that there is no scope to let in any oral evidence and the documents can be marked by consent and if a need arose to let in any oral evidence, that can be done with the permission of the Tribunal. Therefore, the parties have not been shut out from letting any oral evidence. Even before passing an Award, both the

parties agreed to decide the case on the available materials and in the context of the submissions made by the Tribunal.

20. As already pointed out, the Arbitral Tribunal, took decisions on all the four claims referred above only on the basis of the documents and the fact that the Insurance company has not established its onus.

21. The Tribunal has rightly passed the Award on the basis of the available documents and neither lack of reasonable opportunity nor unethical way of conducting the proceedings does arise. The Award is not hit by any of the grounds mentioned in Section 34 of the Arbitration and Conciliation Act, 1996, much less ground of public policy.

22. From any angle, it cannot be said that the Award suffers from error apparent on the face of the record or the Arbitrator has not followed the statutory legal provisions.

23. The scope of interference of the Court is also very limited. Once the Arbitrator has applied its mind to the matter before him, the Court cannot reappraise the matter, as if it was an

appeal and even if two views are possible, the view taken by the Arbitrator will prevail.

24. As far as the Cross-objection with respect to interest is concerned, though the Arbitrator fixed 18% interest, the learned single Judge reduced it to 12%, basing on the decision of the Hon'ble Supreme Court in *United India Insurance Co., Ltd., v. M.K.J.Corp.*, reported in (1996) 6 SCC 428.

25. The Hon'ble Supreme Court in ***United India Insurance Co., Ltd., v. M.K.J.Corp.***, reported in **(1996) 6 SCC 428**, has held as follows :

"The next question is what rate of interest the insured- respondent is entitled to get? In common parlance, when the insured-respondent is deprived of right to enjoy his money or invest the money in business, necessarily the loss has to be compensated by way of payment of interest by the insurance company. We are informed that as per the directions of the Government of India the appellant-insurance company has no option but to invest the money in the securities specified by the Government of India under which the insurance company is securing interest on investment at the rate of

11.3% per annum. Under these circumstances, the appellant- insurance company is liable to pay interest at 12% per annum from January 1, 1991 till date of payment. It is then contended that as per the policy, the respondent is entitled to consequential loss as per the independent policy. The Commission no doubt did not give any independent reason for the same but all the claims were heard and disposed of together. Under these circumstances, we are of the view that the claims must be deemed to have been rejected."

26. The learned Senior counsel appearing for the first respondent also cited our Supreme Court Judgment in **Hyder Consulting (UK) Ltd., v. State of Orissa**, reported in **(2015) 2 SCC 189**, for the proposition that Section 31 (7) (a) of the Arbitration and Conciliation Act gives the Arbitral Tribunal the discretion to include the interest in the sum, for which the Award was made. Section 31 (7) (a) provides that interest to be imposed at such rate as the Arbitral Tribunal deems reasonable.

27. The Arbitrator has to decide on facts and circumstances of the case to grant interest. The above Judgment in **United India Insurance Co., Ltd., v. M.K.J.Corp.**, reported in

(1996) 6 SCC 428 was lost cite off by the Tribunal and the same was not taken to its notice. Therefore, the learned single Judge in exercise of powers under Section 34 of the Arbitration and Conciliation Act, corrected the perversity of the Award in fixing the interest rate.

28. For the aforesaid reasons, this Court do not find any reason to interfere with the order of the learned single Judge and therefore, Original Side Appeal and the Cross Objection are liable to be dismissed.

In fine, both the Original Side Appeal and Cross Objection are dismissed, confirming the Order of the learned single Judge, 01.07.2011 made in O.P.No.199 of 2009. No costs. Consequently, connected miscellaneous petition is closed.

(A.S.,J.) (P.K.,J)
17-08-2016

Index:Yes / No

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**A.SELVAM,J.
AND
P.KALAIYARASAN,J.**

tsvn

**Common
Judgment in
O.S.A.No.258 of 2011
and
Cross.Obj.No.88 of 2014**

17-08-2016