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

ARBITRATION PETITION NO.297 OF 2009

The Oriental Insurance Company Limited … Petitioner

V/s.

M/s Jindal Vijaynagar Steels Limited …Respondent

Mr. Dinesh Purandare a/w. Mr. Prashant Kamble and Mr. Siddharth Bafna i/b. M/s. Kartikeya and Associates for the petitioner.
Mr. Rahul Narichania, senior advocate a/w. Mr. Devesh Juvekar, Ms. Kavita Brid-Chavan, Mr. Rishabh Jaisani and Ms. Aditi Pawar i/b. Rajani Associates for the respondent.

CORAM : K.R.SHRIRAM, J.
RESERVED ON : 29th NOVEMBER, 2016
PRONOUNCED ON : 4th JANUARY, 2017

P.C.

1 This petition has been filed challenging the Award published by Mr. Justice M.H. Kania (Retd.), Former Chief Justice of India and Mr. Justice A.V. Savant (Retd.), Former Chief Justice of Kerala (*hereinafter referred to as the* "*Majority Award*") under Section 34 of the Arbitration and Conciliation Act, 1996 (*the said Act*). The Minority Award of Mr. R.L. Agrawal has not been challenged.

2 Some time in or about December, 1994 the respondent intended to set up a plant for manufacture of Iron Ingots and other allied products in Bellary District, Karnataka on the basis of a foreign technology which they had acquired from VOEST ALPINE INDUSTRIEANLAGENBAU

GMBH, Austria (*hereinafter referred to as "VAI"*), on the terms and conditions mentioned in an agreement dated 15th July, 1994 that respondent and VAI had entered into for supply of technology, plants, machinery for a total lump sum consideration of Austrian Shilling 118,00,000/-. The major plant unit comprised two Corex plant C-2000 modules for production of hot metal, with a capacity of 0.80 million metric tons per annum each with 100% pellet feed. The two modules were called Corex Module -I and Corex Module-II. The respondent had also entered into a Service Contract with VAI on 15th July, 1994 that provided for advisory services as well as training the respondent's personnel.

3 In relation to the project, the respondent had availed from the petitioner a Marine-cum Erection Insurance Policy No. 111600/000/ 00000/21/95/50043/31 dated 26th December, 1994 (*hereinafter referred to as "the policy"*). This was an all risk policy.

4 The initial period of policy was from 26th December, 1994 to 25th June, 1998, i.e., 42 months including 3 months for testing. On 10th January, 1997 the policy was extended for a period of six months from 26th June, 1998 to 25th December, 1998 and the sum insured was increased from Rs.2,27,912 lakhs to Rs.2,54,602 lakhs. On 26th December, 1998 the insurance of Corex-I module was extended to 25th June, 1999 and on

26th June, 1999 a further extension was taken till 25th December, 1999. The policy covered all risks upto the completion of commissioning and testing. It is provided in the policy that subject to and in consideration of the claimant having paid to the respondent the premium mentioned in the Schedule of the policy and subject to the terms, exclusions, provisions and conditions contained in the said policy or endorsed thereon, the respondent will indemnify the claimant in the matter and to the extent stipulated in the policy. The relevant portion of the "Period of Cover" clause reads as under :

> "*PERIOD OF COVER : The liability of the company shall commence, (notwithstanding any date to the contrary specified in the Schedule) only from the time after the unloading of the property specified in the Schedule from any conveyance at the site specified in the Schedule and shall continue until immediately after the first test operation or test loading is concluded, whichever is earlier, but in no case beyond three months from the day on which after the completion of the erection trial running is made and/or readiness for work is declared by the contractors, whichever is earlier. However, if a part of a plant or one of several machines is/are tested and put into operation, the cover and consequently the liability of the company for that particular part of the plant or machine ceases whereas it continues for the remaining parts which are not yet ready."*

5 On 28th October, 1998, due to heavy rains, which is claimed to be unprecedented and subsequent wetting of raw materials like coal, pellets, limestone, dolomite and quartz, the feed rate of the plant was stopped for 18 hours. Consequently the temperature of the furnace was not picking. Thereafter two more accidents occurred on 29th October, 1998 and 30th October, 1998, which led to the tripping of the oxygen plant and

stoppage of oxygen supply which resulted in failure of the cooling gas compressor. The furnace hearth temperature further deteriorated, which chilled the slag and metal inside the melter gassifier. This caused the dome temperatures to drop suddenly and led to cracks in the dome refractories, thus damaging them. From 30th October, 1998 revival attempts continued till 19th November, 1998. However, the same failed and the solidified hot metal could not be tapped from the plant. Therefore, the decision was taken to excavate the solidified raw material by drilling and controlled blasting. It is this sequence of events which has lead to the damage of the plant and machinery and the purported expenses incurred and/or losses suffered by the respondent.

6 The respondent lodged a claim on the petitioner for Rs.43,46,20,000 on account of the repair expenditure incurred by them, which was later revised to Rs.28,89,20,000. Pursuant to the claim lodged, the petitioner paid to the respondent a sum of Rs.18,69,54,000 in three installments as on account/ad-hoc payments. On 24th March, 1999 a sum of Rs.7,50,00,000/- was paid. On 22nd September, 1999 a sum of Rs.3,00,00,000/- was paid and on 30th March, 2000 a sum of Rs.8,19,54,000/- was paid. No breakdown was given as to what are these payments for.

7 In the general conditions, the arbitration clause was contained in condition 7, which reads as under :

> *"If any difference shall arise as to the quantum to be paid under this policy (liability being otherwise admitted), such difference shall independently of all other questions be referred to the decision of an arbitrator, to be appointed in writing by the parties in difference, or if they cannot agree upon a single arbitrator to the decision of two disinterested persons as arbitrators of whom one shall be appointed in written by each of the parties within two calendar months after having been required so to do in writing by the other party in accordance with the provisions of the Arbitration Act, 1940 as amended from time to time and for the time being in force. In case either party shall refuse or fail to appoint arbitrator within two calendar months after receipt of notice in writing requiring an appointment, the other party shall be at liberty to sole arbitrator, and in case of disagreement between the arbitrators the difference shall be referred to the decision of an umpire who shall have been appointed by them in writing before entering on the reference and who shall sit with the arbitrators and preside at their meetings.*
>
> *"It is clearly agreed and understood that no difference or dispute shall be referable to arbitration as herein before provided, if the company has disputed or not accepted liability under or in respect of this policy." It is hereby expressly stipulated and declared that it shall be condition precedent to any right of action or suit upon this policy that the award by such arbitrator, arbitrators or umpire of the amount of the loss or damage shall be first obtained.*
>
> *It is also hereby further expressly agreed and declared that if the company shall disclaim liability to the insured for any claim hereunder and such claim shall not, within three calendar months from the date of such disclaimer have been made the subject matter of a suit in court of law, then the claim shall for all purpose be deemed to have been abandoned and shall not thereafter be recoverable hereunder."*

8 The disputed claim initially filed, was for a sum of Rs.1019.66 lakhs (Rs.10,19,66,000/-) together with interest at 21% per annum from 30th October, 1998 till payment or realisation plus costs of arbitration. Briefly stated, the summary of the claims is as under :

Item	*Description of Claim*	*Amt. (Rs. In lakhs)*
(A)	Difference in VAI charges	730.34
(B)	In-house technical experts	143.28
(C)	Graphite and carbon lumps	106.26
(D)	Imported refractories	6.75
(E)	LC establishment charges	8.08
(F)	Difference of sales tax	0.17
(G)	Difference of castables used and allowed	9.94
(H)	Difference of MRE bills	1.21
(I)	Cast house cleaning	0.16
(J)	Emergency water tank	0.70
(K)	Customs duty	2.60
(L)	Hire charges for dumpers and excavators	0.96
(M)	Argon and Oxygen gas	0.78
(N)	Damage caused during blasting operation	6.87
(O)	Miscellaneous items - tuyers, unions and valves	0.03
(P)	Miscellaneous items – pulleys and tooth belts	0.87
(Q)	Apart from the above there was a totaling error	0.66
	TOTAL	1019.66

In the course of the present proceedings, item (H) – Difference of MRE (M/s. Modern Refractory Erector) bills – was revised from Rs.1.21 lakhs to Rs.6.37 lakhs; thus resulting in an increase of Rs.5.16 lakhs. The total revised claim was, therefore, for Rs.1024.82 lakhs.

9 Mr. Justice M.H. Kania (Retd.) and Mr. Justice A.V. Savant (Retd.), awarded the respondent an amount of Rs.6,39,52,800/- with interest of 12% p.a. from 19th September, 2002, the date of the statement of claim, till the date of the award and further interest of 12% p.a. on the

said amount from the date of the award till the date of the payment ("Majority Award"). However, Mr. R.L. Agarwal awarded the petitioner an amount of Rs.1,39,07,197/- with interest of 12% p.a. from 19th September, 2002 till the date of the award and further interest of 18% p.a. on the said amount from the date of the award till the date of the payment ("Minority Award").

10 A comparative chart of the Majority Award and Minority Award with respect to the disputed claims is given as under :

Item	*Description of Claim*	*Claim amount (Rs.)*	*Minority Award passed by Mr. R.L. Agrawal*	*Majority Award passed by Mr. M.H. Kania and Mr. A.V. Savant, JJ.*
(A)	Difference in VAI charges	7,30,34,000	Rejected	Allowed to the extent of 5,11,23,800
(B)	In-house technical experts	1,43,28,000	Rejected	Rejected
(C)	Graphite and carbon lumps	1,06,26,000	Allowed	Allowed
(D)	Imported refractories	6,75,000	Allowed	Allowed
(E)	LC establishment charges	8,08,000	Allowed	Allowed
(F)	Difference of sales tax	17,000	Allowed	Allowed
(G)	Difference of castables used and allowed	9,94,000	Allowed	Rejected
(H)	Difference of MRE bills	6,37,000	Allowed	Rejected
(I)	Cast house cleaning	16,000	Allowed	Allowed
(J)	Emergency water tank	70,000	Rejected	Rejected
(K)	Customs duty	2,60,000	Allowed	Rejected
(L)	Hire charges for dumpers and excavators	96,000	Rejected	Rejected
(M)	Argon and Oxygen gas	78,000	Rejected	Rejected
(N)	Damage caused during blasting operation	6,87,000	Allowed	Allowed

(O)	Miscellaneous items - tuyers, unions and valves	3,000	Rejected	Rejected
(P)	Miscellaneous items – pulleys and tooth belts	87,000	Rejected	Rejected
(Q)	Apart from the above there was a totaling error	66,000	Rejected	Rejected
	TOTAL	10,24,82,000	1,46,39,155	

Though various points have been taken in the petition, during the course of argument, the petitioner's counsel restricted their arguments only to item (A) and item (C) above.

11 The petitioner's arguments are summarized as under :-

(a) Alleged negligence or contributory negligence of the Respondent and VAI;

(b) VAI was a co assured. VAI should have lodged a claim under the policy to recover its costs. Respondent should not have lodged it;

(c) Work was under VAI's contractual responsibility;

(d) No proof of payment to VAI hence VAI could not have charged for it;

(e) Contravention of FERA/FEMA regulations;

(f) To disregard Mr. Pawan Kumar Kedia (Respondent's witness) evidence; and

(g) Challenge to Majority Award of claim in respect of Graphite and Carbon Lumps expenses.

(a) Alleged negligence or contributory negligence of the Respondent and VAI :

12 It was submitted by the petitioner that under the contract between VAI and the respondent, VAI was required to take precautionary and safety measures as were contemplated in their agreement. VAI in its own report, which is at Exhibit C-13, confirms (a) that the moisture contents of coal and additives were not monitored and (b) no provisions were made for securing uninterrupted power supply. The service contract at Exhibit C-8 stipulates with respect to coal and additives that the moisture contents to be maintained below 5% and coal driving equipment should be provided to ensure the same. It was submitted that inspite of the specific clause, VAI, who is co-insured and who was directly responsible for the due execution of the control, run and commissioning of the plant failed to observe these conditions. The coal driving system was not operational and inspite of the same wet coal and iron ore with high moisture content was fed into the furnace.

It was also submitted that the Service Contract also clearly set out the duty of VAI to ensure the existence of operation of emergency power systems which mandated provision for uninterrupted power supply through three generators in addition to the power that might be obtained from the power grid and no emergency power system was provided. It was also submitted that VAI's own report confirms that due to the absence of uninterrupted power supply from the power grid and the absence of captive power back up in the form of generators, continuous/uninterrupted power supply could not be insured. The lack of power supply arrangement, which was the responsibility of VAI, led to the stoppage of the driving system as also the tripping of oxygen. These were unequivocal acts of negligence that is contributory negligence of VAI, which was a co-insured and hence the claim was not payable. The counsel for the petitioner also submitted that the claim made by the respondent included a sum of Rs.7,30,334,000/- paid to VAI as consultation charges in the course of repair and restoration of the plant as a consequence of the accident and as VAI was a co-insured and cause of the accident was negligence of VAI, i.e., feeding the wet coal to the furnace alongwith break-down of the magnetic resonance feeder and the stoppage of oxygen, etc., the claim was not payable.

13 These submissions of the petitioner should be viewed with reference to the terms and conditions in the policy. The policy provided as under :

> *GENERAL EXCLUSIONS*
>
> *The Company will not indemnify the insured in respect of the loss, damage or liability directly or indirectly caused by or arising out of or aggravated by-*
>
> *a) War, invasion, act of foreign enemy, hostilities or war like operations …... war be declared or not), civil war, rebellion, revolution, insurrection, …. civil commotion military or usurped power, martial law, conspiracy, …..., commandeering a group of malicious person or persons action on behalf of or in connection with any political organisation, requisition or destruction or damage by order of any Government dejure*

or de facto or by any public, municipal or local authority;
b) Nuclear reaction, nuclear radiation or radioactive contamination;

c) Willful act or willful negligence of the Insured or of his responsible representative;

d) Cessation of work whether total or partial
In any action, suit or other proceedings where the company allege that by reason of the provisions of Exclusion (a) above any loss, destruction, damage or liability is not covered by this insurance the burden of proving that such loss, destruction, damage or liability is covered shall be upon the Insured."

(Emphasis supplied)

As per this clause, the petitioner would not indemnify the respondent, i.e., insured in case of a "willful act" or "willful negligence" of the respondent. The term "willful" is an adjective which precedes the word "negligence" or the word "act". Therefore, even for the sake of argument we accept that there was negligence on the part of VAI or even the respondent, mere negligence is not a good defence. The negligence has to be willful and the onus is on the petitioner to prove (a) there was negligence and (b) that negligence was willful. It does not appear that the petitioner's case was willful negligence on the part of the respondent and it also does not appear that it was even raised before the Arbitral Tribunal. Even in the court while arguing this petition, an attempt was made to argue willful negligence for the first time in rejoinder.

14 Nothing was shown during the course of arguments by the petitioner substantiating "willful" negligence. Indisputably the damage caused to the Corex module was due to heavy rains which was beyond the

control of the respondent. In fact, the petitioner's own witness, Mr. D. Nagraj Kumar, Assistant Manager of the petitioner has categorically admitted in his cross examination that the accident of 30th October, 1998 was occurred due to circumstances beyond the control of the respondent. So also the petitioner's second witness, Mr. Srinivasan, the Surveyor representing Mr. S. Sunder Raman and Associates Pvt. Ltd. from Chennai admits that the accident was due to the circumstances beyond the control of the insured and that there was no negligence on the part of the insured and neither was there any contributory negligence. Paragraphs 45 and 46 of the award read as under :

> *45. Apart from the above, the two witnesses of the Respondent, (i) Mr. S. Srinivasan, the Surveyor representing Mr. S. Sunder Raman and Associates Pvt. Ltd., from Chennai and (ii) Mr. D. Nagraj Kumar, Assistant Manager of the Respondent at Bangalore, categorically admit that the accident of 30th October, 1998 was caused due to circumstances beyond the control of the Claimant and the circumstances were unforeseen. Mr. Nagraj Kumar is categoric in his answers to questions nos.33-35 in his cross examination as under :*
>
> *33. [Shown Exhibit R-9 clause 1.11 and last sentence of clause 3.9 of Exhibit R-8]*
>
> *Q. Having been shown the above documents and having reflected overnight, do you agree that both the surveyors had come to the conclusion that the events were accidental in nature and beyond the control of the Claimant?*
>
> *A. I agree.*
>
> *34. Q. Please tell is the company's (Respondent's) opinion any different?*
>
> *A. The company's opinion was not any different and that is why the claim was settled.*
>
> *35. [Shown paragraph 2, page 51 of Exhibit R-3]*
>
> *Q. In view of the fact that you accept that the joint surveyors, and company's opinion being not different, and both have accepted that the*

incident was accidental in nature and beyond the control of the Claimant, do you agree that the respondent by making payment of Rs.18 crore and odd, has accepted that there was some liability of the Respondent?

(Mr. Desai objects)

(Per Arbitrators : Objection upheld.)

(Mr. Advani reframes the question)

Q. Do you agree that the incident was accident in nature and beyond the control of the Claimant, the Respondent company has accepted liability for some payment thereof?

A. The company agrees that the incident was accidental in nature. I agree that the company (Respondent) was of the view that the incident, which resulted in the damage, was beyond the control of the Claimant. The company accepted some liability merely on the basis of the surveyor's opinion.

46. Similarly, Mr. Srinivasan in his evidence admits that the accident was due to circumstances beyond the control of the insured and that there was no negligence on the part of the insured. His answers are as follows :

51. [Shown paragraph 10(A) of the written statement at page 45 of the compilation of pleadings]

Q. Do you agree with the statement appearing in paragraph 10(A)?

A. The said statement is incorrect.

52. [Shown paragraph 10(C) of the written statement at page 45 of the compilation of pleadings]

Q. Do you agree with the statement made therein?

A. I would not be able to comment emphatically on this issue.

53. [Shown paragraph 3.9 at page 53 of the Compilation tendered by Mr. Nagraj (RW-1), namely, Interim Report dated 8.2.1999]

Q. In view of your conclusions that these events were accidental in nature and beyond the control of the insured, would it be correct to say that there could be no question of any contributory negligence on the part of the Claimants?

A. There does not seem to be any willful negligence on the part of the Claimants.

54. Q. I am asking you specifically about the contributory negligence on the part of the Claimant, in view of your conclusion in 3.0 at page 53?

A. Although there were difficulties existing in the system, the Claimants were not aware of the same.

55. Q. Mr. Advani repeats his earlier question?

A. There is no contributory negligence.

In view of the above, the Majority Award has rightly come to a finding that there is no negligence/contributory negligence on the part of the respondent. This is a finding of fact and appreciation of evidence is entirely within the domain of the arbitrators. The Apex Court in ***Associate Builders vs. Delhi Development Authority***[1] in paragraph 33 has held as under :

> *33. ...... A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious then he is the last word on facts."*

It should also be noted that I do not find even the Minority Award having come to a finding that there was negligence or contributory negligence or willful negligence on the part of the respondent/insured. There cannot be reappraisal of evidence in a petition under Section 34 of the said Act challenging an award and therefore, we will have no choice but to accept that the Tribunal has rightly held on the basis of available evidence that there was no negligence/contributory negligence on the part of the respondent.

1. (2015) 3 SCC 49

15 It was submitted by Mr. Narichania, senior counsel that negligence of the insured, per se does not constitute a defence under the insurance policy. Mr. Narichania in support of his submissions referred to a passage from **Arnould's Law of Marine Insurance and Average, Seventeenth Edition, pg 905,** which reads as under :

> *"on the point of negligence/contributory negligence provides that "unless otherwise the policy provides, the mere fact that the loss, though proximately caused by some insured peril, has been brought about by negligent acts or omissions of the assured himself or his employees or agents does not constitute any bar to the recovery by the assured".*

Mr. Narichania also relied upon a judgment of the Queen's Bench Division in ***Global Tankers Inc. vs. Amercoat Europa N.V. and Trust ("The Diane")***[2] in which Justice Kerr in paragraph 13 has held as under :

> *"13 …… the fact that this liability arose from the negligence or error of judgment of their inspector provides no defence to the insurers under the policy. It is a basic principle of the law of insurance that negligence by the assured which causes a loss incurred under the policy is no defence to the insurer in the absence of some special provision to the contrary, for example Trinder Anderson & Co v/s Thames Mersey Marine Insurance Co. (1898) 2 Q.B., 114 at p. 123 et sequitur. If liability under the warranty had resulted from some willful act or default by Mr. Walker for which Amercoat were responsible, then the position might be different, but this is in no way suggested. It follows that Amercoat were liable to the owners under the warranty and that the insurers are consequently bound to indemnify Amercoat against this liability".*

In view of the above, the insurer cannot avoid the payment on the ground of insured's alleged negligence, save and except when the insurer proves that the negligence was willful. It was also pointed out by

2. (1977)1 LLR 61,66

Mr. Narichania that point of willful negligence was not argued before the Arbitral Tribunal and this was not disputed by the petitioner's counsel.

In my view, in such a case it cannot be even argued in the present petition.

(b) VAI was a co-assured. VAI should have lodged a claim under the policy to recover its costs. Respondent should not have lodged it :

16 It was submitted by the petitioner that VAI charges cannot be claimed as VAI was co-insured and VAI should have lodged a claim under the policy. It was also argued that the respondent should have made VAI party to the arbitration proceedings as the claim proceeds on the footing that money was required to be paid to VAI and this money be paid by the petitioner. It was submitted that as VAI was a co-insured it was necessary and proper for them to be made party to the arbitration proceedings.

17 It is an admitted position that Petitioner has paid Rs.2.58 crores to the Respondent towards VAI charges. If it was the case of petitioner that respondent was not entitled to lodge this claim and only VAI should have or VAI should have been made party to the arbitration proceedings, then the petitioner would not have paid any sums to the respondent at the first instance. There is no explanation provided as to why this amount was paid in the first place. Even the Surveyors have passed the claim. The court was also informed by Mr. Narichania that this defence was

not taken before the Arbitral Tribunal in the pleading filed by the petitioner.

18 In my view, this plea has been taken as an afterthought to evade liability and cannot be considered at this stage.

<u>(c) Work was under VAI's contractual responsibility and (d) No proof of payment to VAI hence VAI could not charge for it :</u>

19 The counsel for the petitioner submitted that the total lump sum amount agreed to be paid to VAI including its advisory service was Austrian Shilling 118 million. While marking a claim for the amount of Rs.7.3 crores the respondent has shown proof of payment of approximately Rs.7.4 crores. It was also submitted that VAI had not complied with its contractual responsibility and, therefore, there is no right to recover any advisory service charges from the petitioner. It was also submitted by the petitioner that the respondent had to prove that the amount paid to VAI was in excess of the total lump sum amount of Austrian Shilling 118 million and in view of absence of evidence it would amount to unjust enrichment in the hands of the respondent as it would amount to being reimbursed for the money that it was contractually obliged to pay. The counsel for the petitioner submitted that the Minority Award has dealt with all aspects of this claim and it correctly interprets the position in law to the effect that granting of an award which is contrary to the terms of the

contract is itself illegal and against the mandate of the Arbitration Act.

20 It was also submitted that the principle of law within contract of indemnity requires that payment can be asked only when there is an actual payment and the actual loss suffered by the insured can be made good only after payment was made. The petitioner relied upon the judgment of this court in ***NOY Vaillensia Engineering SPA vs. Jindal Drugs Ltd.***[3] Mr. Purandare, counsel for the petitioner submitted that Majority Award failed to appreciate that the respondent has not produced any evidence to show and/or suggest that they had made the payment of the amount to VAI.

21 On the first part, i.e., VAI's contractual responsibility, it was submitted by Mr. Narichania that the petitioner had not raised this issue in their pleadings and consequently no issue was also framed on this aspect. Therefore, the Petitioner, at this stage, cannot raise this argument and it should be rejected. This was not disputed by the counsel for the petitioner.

I agree with Mr. Narichania. Therefore, I am not inclined to consider this ground of objection raised by the petitioner.

22 As regards the petitioner's submissions that there is no evidence that the respondent has paid to VAI, as per the finding of the Majority Award, which is based on the documents and evidence, the

3. (2006) 5 Bom. 155

respondent have paid a sum of Rs.733.92 lakhs to VAI. The following evidence is also sufficient to establish that the payments have been made to VAI :

"Compilation C-2- Documents related to VAI

a) Page no. 1 of the said compilation gives a brief statement of the payments made to VAI by the Respondent and the payment required to be made.

b) Page no 2 to 282 of the said compilation are invoices substantiating the statement at page no. 1 of the compilation.

c) The aforementioned document have been proved before the Tribunal.

Compilation C-7 - assessment on VAI Service Charges

a) The total amount claimed (before the commencement of the Arbitration) was Rs.18,67,90,025.

b) The amount assessed (before the commencement of the Arbitration) was Rs.2,60,78,282/-.

Compilation C-5 Petitioner's own letter dated 18th February, 2000 at page 17& 20; para (H)-

"The surveyors have allowed VAI expert fees. As per the Surveyors based on the verification of bills and invoices the insured have actually incurred Rs. 18.679 crores……………. They have included the expert fees associated with start up and commissioning as such expert fees included in the sum insured under the MCE policy is towards erection, testing and commissioning of the plant for regular operation. Thus on this basis they have recommended Rs.2.5905 crores against the insureds claim of Rs.20.11 crores in substantiation of which they have submitted proof of payment of Rs.18.679 crores. This seems to be reasonable."

Mr. Pawan Kumar Kedia's evidence; (Respondent's witness) Para 5, Page no 142 of Compilation of Document Submitted by Petitioner (Volume II);– Examination in Chief-

"*……I confirmed from the concerned department that the services were rendered by the contractor and on this basis I prepared this statement*"
"*The amount referred to at page no 1 of compilation C-II (documents in support of VAI claim) were paid by the Claimant*"

"*Per Tribunal- the statement and the aforesaid documents are taken on record on the footing that the evidentiary value, if any will be determined after hearing the evidence and arguments.*"

<u>Mr. Pawan Kumar Kedia's evidence; (Respondent's witness) page no 150 of Compilation of Document Submitted by Petitioner (Volume II);– Examination in Chief-</u>

"All these goods and services were paid for by the Claimant. However I think that payment of approximately Rs.2 cr is still pending in respect of the services rendered by VAI".

<u>Mr. Avdesh Mittals evidence; (Respondent's witness) Page no 279 of Compilation of Document submitted by Petitioner (Volume II);- Cross – examination – question 105-</u>

Q 105 : I put it to you that your Claim for recovery of VAI service charges on the insurance company is also false?

"A. It is not at all false. The Claimant has already made the full payment and the Respondents have made part payment to the Claimant"

<u>Mr. Srinivasan evidence; (Petitioner's witness) Page no 483 of Compilation of Document submitted by Petitioner (Volume II);- Cross – examination – question 74-</u>

74 [Shown the first sentence in paragraph 14 of the Written Statement at page 50-"The claim, on the basis of technicians from VAI, and French experts, is not substantiated by any documents"]

(Q) I put it to you that the above statement is not correct because the documents substantiated the VAI claim were furnished to you?

(A) The documents were submitted.

<u>Mr. Srinivasan's evidence; (Petitioner's witness) Page no 526 of Compilation of Document submitted by Petitioner (Volume II);- Cross – examination – question 190 and 191-</u>

190 (Q) can you tell us, by looking at any record, what was the amount claimed by the Claimant for the VAI services?

A. VAI's claim was for Rs.18,67,90,025/-.

191 (Q) Did the Claimants supply you invoices and other evidence justifying the total amount?

A. Yes, they did."

23 Moreover, Insurance Policy is a contract of indemnity and not a contract of liability. In a contract of indemnity, the insured only needs to show that his liability to pay is absolute and has arisen.

The Hon'ble Bombay High Court in ***Gajanan Moreshwar Parelkar vs. Moreshwar Madan Mantri***[4] has held that

> *"….. it is true that under English common law no action could be maintained until actual loss had been incurred. It was very soon realized that an indemnity might be worth very little indeed if the indemnified could not enforce his indemnity till he had actually paid the loss. ……. I have already held that sections 124 and 125 of the Indian Contract Act are not exhaustive of the law of indemnity and that the courts here would apply the same equitable principles that the courts in England do. Therefore, if the indemnified has incurred a liability and that liability is absolute, he is entitled to call upon the indemnifier to save him from that liability and to pay it off."*

The Majority Award has also taken into consideration the judgment of ***Re: Law Guarantee Trust and Accident Society Ltd, Liverpool, Mortgage, Co's case***[5], wherein it was held that

> "*….. The court held that this did not make a difference and that the reinsurer was entitled to recover from the reinsuring office payment on the policy of reinsurance although it had not made payment upon the original policy of insurance.*"

24 The Majority Award has categorically held that the respondent has made a payment of Rs.226.99 lakhs to VAI in September 1999 and a further payment of Rs.506.93 lakhs in April 2000 and that a balance of Rs.2 crores is still payable. The Tribunal also observed that the question before them was not whether the actual payments were made but if in a contract of insurance the Petitioner was liable to indemnify the Respondent.

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4. AIR (29) 1942 Bombay 302, 304
5. 1914-15 ALL.E.R. REP .1158

25 As regards the petitioner's reliance on *NOY Vaillensia Engineering* (Supra), that judgment also does not support the petitioner's arguments of “pay to be paid” applies to contract of indemnity. In paragraph 15 of the judgment it is held as under :

> “……. *Unless in law there is a contract of indemnity, there is no question of asking any payment from the person who is under an obligation to indemnify unless, actual payment is made, ……*”.

26 The Majority award has with reasons held in the affirmative that the petitioner is liable to indemnify the respondent. The reasons have been given in paragraph 49 and 50 of the Majority Award and they read as under :

> *“49. In our view Mr. Advani's contentions must be accepted for the following reasons : (i) We can not consider a plea which is not raised in the pleadings. We may reproduce sub sections 2 and 3 of Section 28 of the 1996 Act, which reads as under : “(2) The arbitral tribunal shall decided ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so. (3) In all cases, the arbitral tribunal shall decided in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.” (ii) Apart from the above, a perusal of Volume C-2 would show at page 1 that VAI charges were revised to Rs.989.21 lakhs. From the summary at page 2 of Volume C-2, it is quite clear that in September, 1999, the Claimant made a payment of Rs.226.99 lakhs to VAI. A further payment was made to VAI in April, 2000 to the tune to Rs.506.93 lakhs (Total 733.92 lakhs). It is true that a balance of approximately Rs.200 lakhs is still payable. (iii) In our view, the question before us is not whether the Claimant has made actual payments to VAI of the entire amount claimed from the Respondent. But the real question is whether in a contract of insurance like the one before us viz., of indemnification, Respondent is liable to indemnify the Claimant. In our view the answer is in the affirmative. (iv) At any rate, the above discussion appears to be clearly academic since the Claimant has already paid a large portion of the amount payable to VAI, leaving only a small balance payable. All that needs to be ensured is that, even accepting Mr. Desai's contention, we do not award to the Claimant an amount higher than the two payments referred to at page 2 of Vol. C-2 viz., Rs.226.99 lakhs paid in September, 1999 plus Rs.506.93 lakhs paid*

in April, 2000 which totals to Rs.733.92 lakhs. (v) We must also make it clear that there is no evidence before us to consider Mr. Desai's contention regarding the violation, if any, of the Foreign Exchange Management Act, (FEMA) 1999. One does not know whether, in fact, the requisite permission under the FERA or the FEMA was applied for and, if so, whether it was granted or not. (vi) In any case, in view of the statutory bar contained in Section 49(3) of the FEMA, there is no merit in the contention. (vii) We may add that, even assuming that permission under the FERA or FEMA was required, it would be so at the stage of the Claimant making the balance payment, if any, in foreign exchange to VAI experts. Claimant may as well have paid the VAI experts in Indian currency or may have applied for permission to the Reserve Bank of India if it wanted to make the payment in foreign exchange. (viii) However, these factors are not relevant for deciding the Claimant's entitlement to this claim if, on merits, we hold that the Claimant has established its claim. (ix) We wish to further observe that, the question as to whether the Claimant will face any problem at the time of execution of this award, is not relevant for considering the Claimant's entitlement to a particular claim. Hence, we reject Mr. Desai's contention.

50. In support of this item (A) of the claim, a large number of documents have been produced by the two witnesses of the Claimant CW-1 Mr. P.K. Kedia, General Manager (Commercial) and CW-2 Mr. Avdhesh Mittal, formal Assistant Manager (Commercial). They run into several volumes as stated in para 22 above. They contain the relevant details of the foreign technicians who were involved in the work of repairs and revival, with the nature of the job, the date on which the work was performed, etc. Similarly, details have been furnished in respect of the foreign technicians, their date of arrival in India and further journey from Mumbai to Bangalore and from Bangalore to the site of the plant. It is not necessary to burden this award with each and every minute detail of every technician and workman with the date and the nature of the work done by him. Admittedly, the Claimant was interested in reviving its plant and did everything possible to do so expeditiously. As stated earlier, the Respondent has denied this claim. Mr. Desai has two more objections :- (i) There are some minor discrepancies in the dates of the travel of some of the foreign technicians, if the said dates are compared with the dates of the work of repair/revival at the site. Mr. Advani explains that the said minor discrepancies may be due to the change in the dates of the actual travel as against the dates mentioned in the bill from the travel agent when the booking was done. However, having considered the rival submissions and perused the material produced, we think that the interests of justice would be met by disallowing 15% of the amount claimed, due to these discrepancies. (ii) Mr. Desai further contended that some of the VAI experts may not have been strictly associated with the work of repair/revival of the damages plant Module-I and may have been associated with Module-II. Mr. Advani's reply was that there was no other work at the site excepting *the repair/revival of Module-I. He relied upon the evidence of Respondent's Surveyor Mr. Srinivasan. However, we think it proper to disallow a part of the amount claimed under this head of expenditure on VAI experts on the ground that some of them may not have been strictly associated with the technical/engineering works of repairs/revival and, hence, we disallow 15% of the claim under this head. The major and substantial part of VAI experts and technicians, were undoubtedly engaged in the work of repairs and revival of the damaged plant. Obviously, it was in the interest of the Claimant to expeditiously repair and revive the plant so that the Claimant could go ahead with the production. In this view of the matter, we reject (15%+15%) 30% of this claim of Rs.730.34 lacs and grant the rest of the claim as under :*

Claimed	*Rs. 7,30,34,000/-*
Less : 30%	*Rs.2,19,10,200/-*
Granted	*Rs.5,11,23,800/-*
	=========

Therefore, in view of paragraph 33 in *Associate Builders* (Supra) quoted earlier, I am not inclined to interfere on this point also.

(e) Contravention of FERA/FEMA regulations;

27 Mr. Purandare submitted that the respondent must establish that they had paid the foreign technicians viz., the VAI experts after obtaining the requisite permission under the Foreign Exchange Management Act, 1999 and in the absence of any such material even if the claimant had made the payments to VAI experts, the claimant would not be entitled to recover the same under the policy.

28 At the outset, it should be noted that the Arbitrators have in no uncertain terms noted that they can consider a plea which is not raised in the pleadings. It should also be noted that the petitioner has not raised this

ground in any of his correspondence with the respondent and no issues were also frames in that regard.

29 A plea not pleaded in the pleadings cannot be canvassed during oral arguments. In absence of pleadings no issue could be framed and in absence of issue no evidence has been led. The petitioner had not even called upon respondent to produce FERA/FEMA permission. No notice was also served to produce. The petitioner has taken up this point for the first time during the oral arguments before the Arbitrators. Mr. Purandare submitted that it was a question of law. Whether permission under FERA/FEMA was required would be a question of law, but whether it was obtained, if required, is not a question of law. If it had been raised in the pleadings, the respondent could have proved by producing the permission. In absence of pleadings to that effect or cross examination, there was no occasion for the respondent to provide FERA/FEMA permission. Paragraph 49 of the Majority Award quoted above deals with this aspect as well. In view of the *Associate Builders* (Supra), I am again not inclined to interfere on this ground as well.

(f) Petitioners submission to disregard evidence of Mr. Pawan Kumar Kedia (Respondent's witness) :

30 During the opening arguments, it was submitted on behalf of the petitioner that in view of the objections of the respondent's counsel to

question no.85 in cross examination of the respondent's witness, the entire evidence of the respondent's witness – Mr. Pawan Kumar Kedia should be disregarded. The counsel made this submission since it is recorded "Mr. Advani states that Mr. Kedia is only an employee of the Claimant and his statement in evidence cannot be regarded as binding on Claimants".

31 I do not agree with the counsel for the petitioner. On a holistic reading of the question and the objections and the answer, the intention of Mr. Advani, the respondent's counsel's submission appears to be that the statement was made only with respect to the particular question and not with respect to the entire evidence of Mr. Pawan Kumar Kedia. In any event, Mr. Narichania submitted that this plea or argument was not taken before the Arbitral Tribunal and the petitioner's counsel did not disagree. A plea not raised before the Arbitral Tribunal cannot be agitated at the stage of challenging the award under Section 34 of the said Act. Hence I am not inclined to accept this ground as well.

(g) Challenge to Majority Award of claim in respect of Graphite and Carbon Lumps expenses.

32 The Arbitrators, both Majority and Minority, have concurred on the reasoning for awarding the said claim and have granted Rs.1.06 crores to the respondent. The counsel for the petitioner submitted that there is no evidence except from the respondent's witness that the graphite lumps

were used in the repair and reconstruction of the damaged furnace. The counsel submitted that it was necessary to have considered that the burden of proving that material which has been brought to replace the destroyed material was actually used. It was submitted that the witnesses of the respondent were not those who were on site and as such did not have first hand personal knowledge of what material was imported and what was actually used and to that extent was used in the furnace as a replacement. The counsel also submitted that the Tribunal ought to have considered that to justify and sustain the claim it was incumbent upon the respondent to show documentary evidence of the fact of import of granite and carbon lumps into the factory premises and produce the necessary repair logs and other documents to show its use.

33 The Majority Award has given reasons in paragraphs 54, 55 and 56 as to why they were satisfied that graphite and carbon lumps were imported and used and why that amount of Rs.1.06 crores was payable. Paragraphs 54, 55 and 56 read as under :

> *"54. Claim (C) – Graphite and Carbon lumps Rs.1,06,26,000/-.*
>
> *The claim is for Rs.106.26 lacs as stated in para-45(c) of the claim. According to the Claimant, the expenditure incurred on graphite and carbon lumps is part of the project cost as they are used for formation of base in the furnace. Due to chilling of the plant, for the reasons explained earlier, the material inside the furnace got solidified which was removed through controlled blasting which was approved by the Respondent on 5th December, 1998 see C-1/Pg. 12. Since the graphite and carbon lumps formed the base inside the furnace and was damaged while removing the material by resorting to controlled blasting, the same*

had to be replaced. The desired quality of these graphite and carbon lumps were not available in India and were required to be imported. Thus, the whole graphite and carbon base of the Corex was replaced by the imported material which cost the Claimant Rs.106.26 lacs. The relevant invoices and other documents were submitted to the Respondent and have been produced on record. Respondent had, initially, simply denied the claim by saying that the Claimant was itself responsible for the damage to the furnace and other accessories. This is stated in para-28 (wrongly numbered as 27 of the written statement). In the additional written statement, however, Respondent stated that it had allowed the claim of reimbursement charges in respect of "tap hole clay and LPG" required for plugging the tap hole after every tapping during the normal operation of the Corex furnace. But the Respondent denied the claim for the import of graphite and carbon lumps on the ground that it may have been imported for future consumption. Claimant denied this contention and said that the said items were used during the start-up and in view of the wording of memo – 3 in policy C-15, which gives the basis of loss settlement, the Claimant is entitled to recover the full amount. Respondent has not paid anything to the Claimant under this head.

55. In para-10 of his affidavit, CW-1, Mr. P.K. Kedia, has justified this claim on the basis of the invoices and the documents in support of the expenses incurred for replacement of the graphite and carbon base of the Corex plant. He stated that he had personally checked and verified the said invoices and documents. Witness stated that the payments made in respect of this claim were supported by the authentic documents. The same were signed by Mr. R. Mahajan, Vice President (Material and Management) of the Claimant, who had also signed purchase orders. Mr. Kedia, relied upon memo – 3 namely "Basis of Loss Settlement clause" in the policy C-15. Witness denied Respondent's suggestion that the item was imported for future use and stated that it was used for the start-up of the plant which cost was covered under the policy.

56. Respondent's witness Mr. Srinivasan admits in paras-207 and 208 of his cross examination that during re-commissioning of the furnace, start-up expenses would again be involved and says that it would be included in the erection cost. In paras-244 to 247 of his cross examination, he admits that after re-laying the damages refractories, they are required to be dried before the furnace can be taken up for recharging and re-commissioning. Following the repairs during re-start-up operation, the base of carbon lumps is required to be built up in the furnace before charging various raw materials required in the Corex process. When questioned about the claim of Rs.106.26 lacs under this head for graphite and carbon lumps, he expressed a doubt as to whether the quantum claimed was correct but conceded that he would not be in a position to say that the quantum claimed was incorrect. In view of the above evidence, once it is conceded that the accident of 30th October, 1998 had occurred due to circumstances beyond the control of the Claimant and that there was neither any negligence nor contributory negligence on the part of the Claimant, it is difficult to see how the

> *expenditure incurred for restoring the furnace to its original position can be denied to the Claimant. The fact that certain items were imported is substantiated by the documentary evidence on record. The "ipse dixit" of the Respondent's witness Mr. Srinivasan has not been substantiated on the point that the quantum claimed was excessive. In the circumstances, this claim of Rs.106.26 lacs must be allowed in toto. Accordingly, we allow this claim."*

Even in the Minority Award the reasons have been given and the reasons are identical to the reasons given by the Majority Award.

34 The Arbitrator, as per the Apex Court in *Associate Builders* (Supra) as could be seen from paragraph 33 quoted above, being ultimate master of the quantity and quality of evidence while delivering his arbitral award and that an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind cannot be held invalid.

35 In view of the aforesaid, in my view, the petition requires to be dismissed. The petition is hereby dismissed with costs.

36 The petitioner to pay a sum of Rs.2 lakhs as cost to the respondent by way of cheque drawn in favour of the advocate on record for the respondent and this amount has to be paid within eight weeks from today.

(K.R. SHRIRAM, J.)