

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment delivered on: 24.03.2017

+ **O.M.P. (COMM) 123/2017 and IA Nos. 3230/2017 & 3231/2017**

**THE ORIENTAL INSURANCE COMPANY
LIMITED**

..... Petitioner

versus

H.P. COTTON TEXTILE MILLS LTD.

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Udyan Srivastava and Ms Swetha
Sree.

For the Respondent : Mr Abhinav Vashisht, Senior Advocate
with Ms Shantha Devi Raman, Ms Priya
Singh Thakur and Mr Arbaaz Hussain.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

IA No. 3230/2017

1. Allowed, subject to all just exceptions.
2. The application is disposed of.

O.M.P. (COMM) 123/2017 and IA No. 3231/2017

3. The Oriental Insurance Company Limited (hereafter 'the OICL') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning an arbitral award dated 19.10.2016 (hereafter 'the impugned award') passed by the arbitral tribunal comprising of Justice S.N. Sapra (Retired), Mr Kumar Bakhru and Justice Deepak Verma (Retired), as presiding arbitrator. The impugned

award was rendered in the context of the insurance claims made by the respondent on account of loss suffered during a civil agitation. The arbitral tribunal had considered the disputes and awarded an aggregate sum of ₹4,60,34,008/- along with interest (pre reference, *pendente lite* and future) in favour of the respondent.

4. Briefly stated, the necessary facts to consider the present controversy are as under:-

4.1. OICL is a public sector non-life insurance company. The respondent is a company, *inter alia*, engaged in the business of manufacturing and sale of Hosiery yarn, industrial and sewing threads, etc. The respondent's industrial undertaking is located in Hisar, Haryana and it had undertaken multiple insurance policies from OICL in respect of building, plant & machinery and general store items.

4.2. The respondent claimed that on 14.09.2010, at around 9:30 a.m., a violent mob of 2000-2500 miscreants forcibly entered its premises in Hisar and caused severe damage to the office equipments, electronic items, plant & machinery, furniture and computers and also set fire to the stocks that were insured as well as looted cash from the cashier. The said incident occurred during *Jat Aarakshan* agitation. It is claimed that although fire tenders were called, they did not arrive in time due to security reasons. It is further claimed that the factory staff and other workers attempted to douse the fire after the mob had left.

4.3. The information as to the occurrence of the above incident was communicated to OICL on 14.09.2010 and the Deputy General Manager of OICL deputed M/s B.S. Chawla & Co. (hereafter 'the Surveyor') for

surveying and assessing the damage. The Surveyor visited the insured premises on 15.09.2010 and also on subsequent dates. It is claimed that all relevant documents including Financial Statements, Bank Statements, Stock Registers and Quality wise cotton stock position were duly provided to the Surveyor.

4.4. The respondent submitted its duly completed claim form for a total sum of ₹7,55,42,057/- on 24.09.2010. The said claims were assessed and the Surveyor submitted its report to OICL on 27.05.2011 assessing the loss incurred by the respondent at ₹3,72,79,000/-.

4.5. It is claimed that under the IRDA guidelines, OICL was required to convey its decision to the respondent within 30 days of the submission of the Surveyor's report. However, OICL failed to do so.

4.6. Thereafter, OICL appointed one Mr B.C. Goyal on 19.07.2011 to verify the records of the respondent. Mr B.C. Goyal had submitted his report on 01.08.2011, *inter alia*, making certain observations regarding entries in the respondent's claim receivable account. He pointed out that the claim receivable shown by the respondent in its account was in variance with the loss claimed or assessed.

4.7. Thereafter, by a letter dated 05.01.2012, Mr B.C. Goyal was appointed to "verify all records". He once again demanded various documents from the respondent which were earlier submitted to the Surveyor.

4.8. Mr B.C. Goyal submitted his final report on 28.02.2012 reassessing the loss at ₹1,75,88,739/-. The said report was also sent to the Surveyor for observations and clarification. It is stated that the Surveyor did not find

anything substantial in the re-assessment except an error (totalling error) of ₹2,08,170.57.

4.9. Thereafter, OICL informed the respondent that its claim was approved for ₹1,71,74,139/-. However, the said amount was also not disbursed till the respondent signed a discharge voucher accepting the aforesaid amount in full and final settlement of its claims.

4.10. The same was not acceptable and in view of the disputes, the respondent invoked the arbitration clause and appointed Justice S.N. Sapra (Retired), former Judge of this court as its nominee arbitrator. OICL appointed Sh Kumar Bakhru, Former Director & General Manager, New India Assurance Co. Ltd., as their nominee arbitrator. Both the arbitrators were unable to concur on appointment of a presiding arbitrator and therefore, the respondent moved this court under Section 11 of the Act and Justice Deepak Verma (Retired), former Judge of the Supreme Court was appointed as the presiding arbitrator.

5. The claims made by the respondent before the arbitral tribunal are set out below:

"30. CLAIMS:

Claim – 1

The Claimant claims the sum of Rs.3,70,70,829/- (Rs.3,72,79,00/- as assessed by the first Surveyor M/s B S Chawla less the sum of Rs.2,08,171/- acknowledged by him to be totalling mistake)

Claim – 2

The claimant claims Rs. 67,53,739/- (Rs.95,20,739/- minus Rs.5,00,000/- towards salvage as per estimate of the claimant

minus Rs.22,67,000/- allowed in Survey Report of M/s Chawla & Co.,) towards building repair cost.

Claim – 3

That the claimant claims a sum of Rs. 21,74,233/- towards salvage amount wrong deducted in excess by the surveyor.

Claim – 4

That the claimant claims Rs. 6,36,776/- towards loss of cash in the incident due to the miscreants.

Claim – 5

The claimant claims a sum of Rs.65,207/- (Rs. 95,207 – Rs. 30,000) towards debris removal cost not allowed by the Surveyor.

The Claimant also claims Rs. 2,73,19,968/- being interest @ 18% p.a., on the sum of Rs. 4,67,00,784/- from 1.12.2010 i.e, 2,1/2 months after the date of loss up to 31.01.2014 along with pendent-lite and future interest till realization, for the reason of inordinate delay in payment contrary to IRDA Rules and Regulations.

The Claimant claims costs of the present arbitration proceedings comprising of the fees paid to the Hon'ble Tribunal and the fee paid by the Claimant to its Counsel for preparation and contesting the present case."

6. The arbitral tribunal passed an interim award dated 31.05.2013 in favour of the respondent mainly on account of the amounts admittedly payable by OICL. In terms of the said interim award, OICL paid a sum of ₹1,28,70,138/- to the respondent on 02.07.2014.
7. The presiding arbitrator and Justice S.N. Sapra made the impugned award (by majority) while Mr Kumar Bakhru entered a dissenting award.
8. In the impugned award, the arbitral tribunal accepted the respondent's claim that the appointment of Mr B.C. Goyal to "verify all

records” was illegal and without authority of law and was made by an officer who was not competent to appoint him. It was also held that Mr B.C. Goyal acted beyond his mandate and scope of work.

9. The arbitral tribunal also examined separate items which had resulted in assessment of loss. One of the principle items was salvage value. Whereas the Surveyor had assessed the salvage value at ₹1.25 crore after physical inspection, Mr B.C. Goyal had assessed the same at ₹2,50,48,440/-. Mr B.C. Goyal had not only increased the quantity of salvage from 247 MT to 384 MT but also estimated the rate of salvage at ₹60 per kg whereas the Surveyor had valued the salvage at ₹45 per kg. The arbitral tribunal found that the increase in the rate of salvage as well as the retrievable quantity was without any basis or reasoning. In so far as the discrepancy between the claims receivable reflected in the balance sheet of the respondent and the loss claimed/ assessed was concerned, the same was found to be of no consequence. The arbitral tribunal found that the notes to accounts had expressly provided that the amount of claims receivable was subject to the final settlement with OICL. Mr B.C. Goyal also admitted that if the complete note to Balance Sheet/auditor's report was considered, there would not be any discrepancy as reported by him. The arbitral tribunal considered the above and held that interim report of Mr B.C. Goyal stood "demolished", and reflected that his appointment was therefore, unwarranted and *malafide*.

10. Accordingly, the arbitral tribunal accepted claim No. 1 for a sum of ₹3,70,70,829/-.

11. The arbitral tribunal also accepted claim No.2 relating to cost of repair/replacement of building which was assessed at ₹95,20,739/-. The

said amount had been reduced by deducting depreciation. The arbitral tribunal found that since the loss had been assessed on repair basis and not on renovation basis, there was no scope for accounting for any depreciation.

12. The arbitral tribunal accepted claim No. 3 and held that the respondent was entitled to receive a sum of ₹21,74,233/- on account of difference between the salvage value assessed and actually realised.

13. Claim No. 5 for removal of debris was to be computed at 1% of the value (which was computed at ₹65,207/-). The arbitral tribunal found that the reduction in the said amount to ₹30,000/-, was arbitrary and without justification. Accordingly, the arbitral tribunal allowed the claim for the balance amount - ₹35,207/-.

14. However, the arbitral tribunal did not accept the respondent's claim for loss of cash of ₹6,37,776/- as it held that the respondent had failed to provide sufficient proof for the said loss.

Submissions

15. Mr Srivastava, learned counsel appearing for OICL contested the impugned award mainly on two fronts. First of all, he contended that the arbitral tribunal had proceeded erroneously in considering that Mr B.C. Goyal was appointed as a second surveyor. He submitted that although the arbitral tribunal was correct that appointment of a second surveyor without sufficient reason would be invalid, the arbitral tribunal failed to recognise that Mr B.C. Goyal was appointed as an investigator and not as a surveyor. He submitted that appointment of Mr B.C. Goyal for further investigation was necessary as he had in his initial report pointed out discrepancies

between the amount of loss assessed and the claims receivable reflected in the balance sheet. He earnestly contended that if the report of Mr B.C. Goyal was taken into account, the claims made by the respondent would not survive.

16. Secondly, he referred to the dissenting note (award) made by Mr Bakhru in respect of claim No.2. He submitted that the claim submitted by the respondent for loss under the heading 'Building', in fact, consisted of three components: (a) Building, (b) Furniture Fitting Fixture (FFF) and (c) Removal of Debris. He submitted that the Surveyor had segregated the said claim submitted by the respondent as ₹1,09,94,888/- on account of loss of Building and ₹37,63,566/- as loss on account of FFF and removal of debris. From the aforesaid sum, the Surveyor had made adjustment of an aggregate amount of ₹14,74,149/- which included ₹9,39,899/- as overstated estimate; ₹3,10,500/- on account of floor which was not found damaged; and ₹2,23,750/- on account of partially damaged road. He submitted that in the circumstances, the amount of ₹95,20,739/- as assessed on account of loss of building, was only an estimate and not the actual loss suffered. He contended that the actual loss could be finally determined only after the respondent had carried out the necessary repairs. He further submitted that the damage had been estimated on the market value basis and in the given circumstances, the arbitral tribunal had erred in disallowing any adjustment on account of depreciation at the rate of 60% on the damage so assessed. Mr Abhinav Vashisht, learned senior counsel appearing for the respondent countered the submissions made by Mr Srivastava.

17. I have heard the learned counsel for the parties.

18. At the outset, it is necessary to observe that none of the contentions advanced on behalf of OICL were supported by any document on record. OICL had neither produced the report of the Surveyor which it sought to assail nor the report of Mr B.C. Goyal, on which heavy reliance was placed by OICL. Although, it was contended on behalf of OICL that in terms of the agreement between the parties, the loss was to be settled on Reinstatement Value (RIV) basis but the insurance policies were not produced. In my view, the present petition is liable to be dismissed on this ground alone.

19. The arbitral tribunal had taken note of the admission that a second surveyor could have been appointed only by the Head Office of OICL and not by the Divisional Manager. The arbitral tribunal also noted that Mr B.C. Goyal was stated to have been appointed by a letter dated 19.07.2011 whereas in the cross-examination of the Divisional manager of OICL (RW-1), it was admitted that he was appointed on her oral instructions and not by any letter. In the circumstances, the arbitral tribunal's conclusion that the appointment of Mr B.C. Goyal was unauthorised, cannot be faulted.

20. The contention that Mr B.C. Goyal was not appointed as a surveyor but only as an investigator, is also unpersuasive. He was called to verify all records of the respondent and, in fact, had proceeded to completely reassess the loss as assessed by the Surveyor and not merely verify the records. Thus, notwithstanding the submission that Mr B.C. Goyal was appointed as an investigator, it cannot be disputed that he had proceeded to reassess the loss as a surveyor, which was clearly beyond his mandate.

21. Be that as it may, the arbitral tribunal had also examined the separate claims as raised by OICL. The principal claim was with regard to loss of

stocks. The arbitral tribunal noted that the Surveyor had assessed the salvage value of stocks at ₹1.25 crore (₹1.1 crore for raw materials and ₹15 lacs for Stock in Progress) and thus assessment was made after physical inspection and taking consent from the Head Office of OICL. Contrary to this, Mr B.C. Goyal had assessed the salvage value at ₹2,50,48,440/- by not only estimating the retrievable quantity at 384 MT instead of 247 MT assessed earlier but also by taking the rate of salvage at ₹60 per kg instead of ₹45 per kg as assessed by the Surveyor. Admittedly, the report of Mr B.C. Goyal was sent to the Surveyor who had responded by reiterating that the salvage value as assessed by the Surveyor, was most “fair and reasonable” and had also been discussed with the Head Office as indicated in the status report dated 04.10.2010. The arbitral tribunal reasoned that the report of Mr B.C. Goyal could not be relied upon as he had not seen the salvage at site at the material time but had claimed that he visited the factory 16 months after the date of incident.

22. This court is unable to find any infirmity in the above finding that would warrant any interference by this court.

23. The contention that the arbitral tribunal has grossly erred in not accounting for the depreciation on the assessed loss to the building and, therefore, the arbitral tribunal's finding in that regard was perverse or patently illegal, also cannot be accepted. The arbitral tribunal had reasoned that the loss on building was estimated on repair basis - the amount required to repair the loss caused to the building - and not on renovation basis. Therefore, the arbitral tribunal held that the depreciation on the amount assessed for repairing the building was not permissible. This Court is unable to accept the said conclusion to be perverse or patently illegal. It

is relevant to note that in the statement of defence, OICL had also agreed that the Surveyor had assessed the “cost of repairs” to be ₹95,20,739/-.

24. As noted earlier, OICL has not produced any material on record which would indicate that the decision of the arbitral tribunal is contrary to the terms of the policy.

25. At this stage, it is also relevant to mention that the scope of examination under Section 34 of the Act is very limited and notwithstanding that the decision of the arbitral tribunal may be erroneous, the same cannot be interfered with unless the court finds that any of the grounds under Section 34(2) of the Act have been established. In order to warrant any interference with an arbitral award on the ground of public policy - that is, under Section 34(2)(b)(ii) of the Act - it will be necessary for the party assailing the award to establish that the award is fundamentally flawed, patently illegal and is based on a view that no reasonable person could accept. If the view expressed by the arbitral tribunal is a plausible one, the same cannot be interfered with.

26. In the given facts, this court is unable to accept that any of the findings, as assailed on behalf of OICL, are perverse or patently illegal.

27. In view of the above, the present petition and the pending application are dismissed.

VIBHU BAKHRU, J

MARCH 24, 2017
pkv/MK/RK