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

+ **O.M.P. 227/2009**

Reserved on: January 31, 2017

Date of decision: March 29, 2017

**BHARAT HEAVY ELECTRICALS LIMITED (BHEL) .... Petitioner**

Through: Mr. Parag Tripathi, Senior Advocate  
with Ms. Mahika Varma, Mr. Surjendu Sankar  
Das and Ms. Avlokita Rajvi, Advocates.

versus

**BAJAJ ALLIANZ GENERAL INSURANCE CO. LTD.**

... Respondent

Through: None

**CORAM: JUSTICE S.MURALIDHAR**

**J U D G M E N T**

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**29.03.2017**

**IA No.5524/2009 (Exemption)**

Allowed, subject to just exceptions.

**O.M.P. 227/2009**

1. This petition by Bharat Heavy Electricals Limited ('BHEL') under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') is directed against the impugned Award dated 27<sup>th</sup> January 2009 passed by the learned sole Arbitrator in the disputes between BHEL and the Respondent, Bajaj Allianz General Insurance Company Limited, arising out of the 'Standard Fire and Special Perils Policy' (Impact Damage) [hereinafter referred to as

‘the policy’] dated 1<sup>st</sup> April 2005.

2. BHEL is stated to be one of the leading manufacturing and engineering public sector enterprises *inter alia* engaged in the business of design, manufacturing and installation services of power generating equipment on turnkey basis for thermal, hydro, gas and nuclear power plants in India and abroad. At one of its major plants in Ramchandrapuram, Hyderabad, BHEL *inter alia* undertakes manufacturing and assembling of turbo generator equipments ranging from 60 MW to 120 MW sets, pumps and heaters etc.

3. On 14<sup>th</sup> March 2005 a tender was floated by BHEL inviting offers for fire, marine and material issued to sub-contractor insurance policy for ten of its major units. Section III A provided for Special Conditions of Contract. Clauses 1 and 2 thereof read as under:

"Clause 1, Scope of Policy: Scope of these specifications cover issuance and servicing of Standard Fire on Special Perils Policy providing cover on ‘All Risks’ basis in the best interest of ‘Insured’ (BHEL) against physical loss or damage to the properties/assets ....

Clause 2, Scope of Cover: Basically ‘All Risks’ as per Tariff and Add ons opted for by units.”

4. The bid submitted by the Respondent company, which is engaged in providing general insurance, on 24<sup>th</sup> March 2005 was accepted by the Petitioner by its letter dated 31<sup>st</sup> March 2005. A declaration was made by the Respondent as part of the Annexure D stating that no deviation had been made in the tender and that the Respondent accepted all specifications without any reservation whatsoever. A separate Memorandum of

Understanding ('MoU') was executed between the Petitioner and the Respondent which provided that "all the stipulations of the tender documents, clarifications and correspondences would be considered part of the contract agreement."

5. For BHEL premises at Ramachandrapuram, Hyderabad, the Respondent issued a policy for total amount of Rs. 531,06,88,196 for a period of two months between 1<sup>st</sup> April 2005 and 31<sup>st</sup> March 2006 which covered the following perils:

- (i) As per the Standard Fire and Special Perils Policy Clauses,
- (ii) Impact Damage due to insured own vehicle/animal.

The document additionally contained the following clauses and endorsements:

"Earthquake, designation of property clause, local authorities clause, reinstatement value clause, terrorism damage exclusion endorsement, impact damage endorsement due to insured own vehicle/animal cover endorsement."

6. Relevant to the present case is the "impact damage clause" which reads as under:

"Impact damage due to Insured's own Rail/Road Vehicles, Forklifts, cranes, stackers and the like and articles dropped therefrom.

Policy may be extended to cover the above subject to the following endorsement wordings:

'In consideration of an additional premium it is hereby agreed and declared that the policy is extended to cover loss and/or damage caused due to impact by direct contact to Insured's property caused by Insured's own Rail/Road Vehicles, Forklifts, cranes, stackers and the

like and articles dropped therefrom.”

7. On 9<sup>th</sup> February 2006, a Gas Turbine Rotor (GTR) weighing 50MT, while being moved to the assembly section by lifting beam hooked to crane was lifted to height of approximately 4 metres. While moving to a distance of 20M, the said GTR suddenly slipped from lifting beam and fell on the shop floor. It resulted in substantial damage from the impact of contact with the ground. On the same date, i.e., 9<sup>th</sup> February 2006, BHEL wrote to the Respondent informing it of the above accident and estimating the loss suffered by it at Rs. 21,93,00,000.

8. On receipt of the above letter, the Respondent appointed M/s. Professional Surveyor and Loss Adjusters Private Limited, Secunderabad (hereinafter referred to as ‘the Surveyor firm’) to carry out a survey of damage and submit a report to it. The survey was carried out by Mr. P.K. Narayan, Principal Surveyor and Director of the Surveyor firm. The Surveyors who were stated to be duly licensed by the Insurance Regulatory & Development Authority visited BHEL at the site Ramchandrapuram, Hyderabad and submitted a report on 15<sup>th</sup> March 2006. The report concluded that loss claimed by BHEL did not fall under any of the ‘perils’ insured by BHEL. The claim was recommended to be treated as ‘no claim’. In particular, the report concluded that the loss claimed by BHEL was not covered by the ‘Impact Damage Clause’. On the analysis of the said clause, the report concluded as under:

“On detailed analysis of this clause, as we understand that by operation of this peril losses so suffered are covered under only two situations, i.e., (i) if an insured’s vehicle, crane, fork lift etc. collides with any other insured’s property and the damages so received due to

this impact to these properties are covered and (ii) due to such collision and the property/properties so carried by the falls/dropped due to this impact and the resultant damages so received by the insured's property through the falling/dropped object.”

9. The report concluded thus:

“In this case there is no impact by any other insured's vehicle or crane etc, on the EOT crane of 80 MTs capacity moving along with the rotor and as a result of such an impact, the rotor did not fall down. As per the eye witness statements and our survey carried out within a few hours of the reported occurrence, we did not find any evidence to prove that some other Insured's vehicle or crane has collided and/or hit the EOT crane lifting and carrying the rotor and/or the rotor itself resulting in the rotor falling down.....”

10. Consequent upon the above report, the Respondent by its letter dated 22<sup>nd</sup> March 2006 repudiated the claim of BHEL. It must be noted here that the policy that was issued by the Respondent was a 'Tariff Mandated Policy'. The arbitration clause contained in the said policy contemplated reference to arbitration of 'any dispute or difference' as to the "quantum to be paid under this policy (liability being otherwise admitted)." Thus, arbitration was restricted to dispute as to quantum and not with regard to liability of the Respondent. However, it appears that the parties, with a view to resolving their disputes, negotiated and drew up an arbitration agreement on 12<sup>th</sup> June 2007 agreeing to refer all the disputes to a sole Arbitrator, Mr. K.N. Bhandari, a former Chairman-cum-Managing Director of New India Assurance Company Limited.

11. On 29<sup>th</sup> October 2007 BHEL filed its statement of claim before the learned Arbitrator praying for approximately Rs. 12 crores. The specific

prayer was as under:

“(a) Pass an award, *inter alia* declaring and affirming that the loss suffered by the claimant as a result of the accident occurred on 9<sup>th</sup> February 2006 which severely damaged the 9E GT-Rotor which accidentally fell from EOT Crane is insured and would fall in the peril covered under the Standard Fire and Special Perils Policy bearing No. OG-06-1101-4003-00000032 for the period 1<sup>st</sup> April 2005 to 31<sup>st</sup> March 2006 issued by the Respondent in favour of the Claimant; and

(b) pass any such other award/order as the Hon’ble Arbitrator may deem just and proper under the facts and circumstances of case/claim to do complete justice.”

12. On 10<sup>th</sup> December 2007 the Respondent filed its reply to the statement of claim. It was submitted by the Respondent that Tariff Advisory Committee’s guidelines prevailed over the contract between the parties and that the terms and conditions of the tender or MoU have no relevance for the purpose of determining the rights and obligations of the parties.

13. After pleadings were completed, the parties filed their respective affidavits by way of admission/denial of documents. The learned Arbitrator on 19<sup>th</sup> May 2008 framed the followed issues:

(i) Whether the Tariff Rules and Regulations are mandatory and binding on both the parties?

(ii) Whether the policy needs to be read in conjunction with the tender documents and MoU?

(iii) Whether the loss, as claimed, is covered under the policy?

(iv) Relief if any?

14. Thereafter both the parties filed their respective affidavits of evidence.

An application was filed on 27<sup>th</sup> December 2007 by the Respondent under Section 16 of the Act for a declaration that certain references to the tender and MoU were extraneous and unarbitrable and that certain paragraphs from the statement of claim should be expunged.

15. The learned Arbitrator by the impugned Award dated 27<sup>th</sup> January 2009 came to the following conclusions:

- (i) The area of dispute was in respect of scope and meaning of the policy and interpretation of what constitutes an impact damage.
- (ii) The Tariff Rules and Regulations may be mandatory on the insurer but were not binding on the insured.
- (iii) A policy even if issued in breach of the tariff would not render it automatically void on the ground that it did not conform to the tariff prescribed.
- (iv) All risks as per tariff and add ons were opted for by the Petitioner.
- (v) All the documents executed between the parties consistently referred to the 'Standard Fire and Special Perils Policy' which is a tariff document. No evidence was adduced to show that the policy documents issued did not conform to the Standard policy document mandated by the tariff or to establish that the additional covers sought by the Petitioner were not incorporated in the policy issued by the Respondent.

(vi) The Respondent offered and issued to the Petitioner a Standard Fire and Special Perils Policy which was duly accepted by the latter without any protest or suggestion that the policy issued was not in accordance with the tender.

(vii) Even if the scope of the policy as proposed by the Petitioner in the tender were to be considered to be a part of the policy, neither any pleading with reference to any particular clause or clauses of the tender nor any plausible reasoning had been put forth before the Arbitral Tribunal that the same would alter, add or amend the scope of any particular condition or conditions of the policy or the impact clause which would then make the claim payable. It was concluded: 'the specified perils with the standard policy do not include the contingency, which has given rise to the present claim.'

(viii) The parties did not appear to have visualized such an eventuality while contracting and therefore, it was not open to the Petitioner to rewrite the contract of insurance after the event and accommodate what was not visualized by the parties while proposing and/or entering into the contract.

(ix) The policy being clear and unambiguous, constituted a binding contract between the parties. In the absence of any ambiguity therein, there was no need to refer to the tender document and the MoU. Notwithstanding the above, even 'if the policy is to be considered with reference to the tender document and the MoU the result would

be the same' that policy document even when read in conjunction with the tender document and the MoU has no material bearing on the scope and terms of the policy and more particularly that of the impact clause.

(x) The interpretation of the impact damage clause by the Surveyor was erroneous. No material was produced by the Petitioner to support the above contentions, and no explanation has been furnished to support the view that impact damage clause covered the claim.

(xi) The Petitioner failed to show that the proximate cause of the loss fell within the peril insured. In any event, 'even if one has to stretch the scope of the wider impact clause as it is worded, the cause of loss cannot be brought within the purview of the impact clause'.

16. Mr Parag Tripathi, learned Senior Counsel appearing for the Petitioner, submitted that the learned Sole Arbitrator grossly erred in interpreting the word 'impact' occurring in the 'Impact Damage Clause'. The said expression was not limited to 'collusion'. It would include the loss due to vibration or even on account of faulty application of force. Reliance was placed on the meaning of the expression 'impact' in the Modern Law of Insurance, McGee, Third Edition, 2011.

17. Mr Tripathi placed extensive reliance on the decision of the Supreme Court in *United India Insurance Co. Ltd v. Pushpalaya Printers (2004) 3 SCC 694*. According to him, there could be situations where the direct contact may be faulty, insufficient or in excess of the desired contact whose

impact may cause an accident. He also referred to the decision of the Supreme Court in ***General Assurance Society Ltd. v. Chandmull Jain*** AIR 1966 SC 1644 and the recent decision in ***Industrial Promotion and Investment Corporation of Orissa Ltd. v. New India Assurance Co. Ltd.*** AIR 2016 SC 3908. He submitted that there was no difference between a contract of insurance and any other contract, and that it should be construed strictly without adding or deleting anything from the terms thereof. If there was an ambiguity in the wording of the policy it had to be resolved against the party who prepared it.

18. It was submitted by Mr Tripathi that even if it was assumed, without admitting, that the law in question did not fall within the ‘impact damage’ clause, this was a comprehensive insurance policy covering ‘all risks’ which was defined in Black’s Law Dictionary in 7<sup>th</sup> Edition, 1999 as: “Insurance that covers every kind of insurable loss except what is specifically excluded.” Reference was made to the decision in ***Amrit Lal Sood v. Kaushalya Devi Thapar*** (1998) 3 SCC 744.

19. Mr Tripathi pointed out that both the Surveyor’s report as well as the Award failed to give meaning to the complete Impact Damage Clause particularly the phrase “articles dropped therefrom.” It is contended that the Award is opposed to the public policy and fundamental policy of Indian Law since no reasons were provided by the Arbitrator as to why the loss was not covered under the ‘impact damage clause’. Further the Arbitrator blindly accepted the Surveyor’s report which was neither sacrosanct nor binding. The Arbitrator had neither analysed nor provided any reasons to agree with

the Surveyor's conclusion. Reliance is placed on the decision in ***New India Insurance Co. Ltd. v. Pradeep Kumar (2009) 7 SCC 787.***

20. According to Mr Tripathi, the Award was contrary to the terms of the contract and, therefore, patently illegal and against public policy. He referred to decisions in ***ONGC v. Saw Pipes Ltd. (2003) 5 SCC 705; Rajasthan State Mines and Minerals Ltd. v. Eastern Engineering Enterprises (1999) 9 SCC 283; Hindustan Zinc v. Friends Coal Carbonisation (2006) 4 SCC 445*** and ***Associate Builders v. Delhi Development Authority (2015) 3 SCC 49***

21. None appeared for the Respondent despite pass-over at the time of final hearing. Nevertheless, the reply filed by the Respondent on 7<sup>th</sup> September, 2009 has been examined. In the reply, it is *inter alia* submitted that the grounds for interference with an Award under Section 34 of the Act is extremely limited. It is submitted that the Award of an Arbitrator is final and conclusive as long as the Arbitrator acted within the four corners of the law and adhered to the principles of fair play.

22. At the outset, it is necessary to recapitulate the legal position as regards the limited scope of interference by the Court with an arbitral Award under Section 34 of the Act. A long line of decisions including the one in ***Associate Builders v. Delhi Development Authority (supra)*** have emphasised that even in the matter of interpretation of contracts the view of the Arbitral Tribunal should normally prevail unless it is shown to be such that no reasonable person would adopt such a view or that it is shocking to the judicial conscience.

23. The crux of the issue in the present case is the interpretation of the word 'impact' in the 'Impact Damage Clause'. Is it limited, as held by the learned Arbitrator, to a direct impact by way of collision?

24. In the Modern Law of Insurance, McGee, Third Edition, 2011 the word 'impact damage' was defined as under:

"39.16. Impact Damage: Where a building policy provides cover for impact damage the Ombudsman has taken a broad view of what amounts to impact. In one somewhat unusual case one of the complainant's ponies escaped from its paddock and fell through the solar cover of the swimming pool. The pony also damaged the lining of the pool in its attempts to climb out. The Ombudsman held that this was impact damage because it could be said to be caused by the impact of the pony's hooves on the lining."

25. In Colinvaux's Law of Insurance, Eighth Edition, 2009, it was observed:

"The basic rule for the construction of any contractual document, including a contract of insurance, is said to be that words must be given their natural and ordinary meanings, a point which has been restated in a variety of forms over the years. The starting point is that the terms and conditions of a policy must be construed literally and according to their natural and ordinary meaning, even though the result is harsh and technical...In construing policies the ordinary rules of grammar must be observed. The ordinary and natural meaning approach has to some extent been superseded by the factual matrix analysis, discussed above."

26. From the above literature on the law of insurance it appears that the learned Arbitrator has adopted an unduly narrow interpretation of the word 'impact'. The said interpretation is also contrary to the law explained in the decision in *United India Insurance Co. Ltd v. Pushpalaya Printers (supra)*, which appears to have not been noticed by the learned Arbitrator.

27.1 The facts in that case were that the Respondent filed a complaint in the District Consumer Disputes Redressal Forum (District Forum) under Section 12 of the Consumer Protection Act, 1986 ('CPA') and prayed for settlement of insurance of Rs.75,000/- along with 18% interest per annum. There the question was whether the damage caused due to vibration from the operation of bulldozer was not an incident of impact 'by any road vehicle', in terms of Clause 5 of the insurance policy?

27.2 In the said case, the Respondent Complainant stated that the damage was caused to its printing press building on account of a bulldozer being driven on the road close to the building for the purpose of road construction. The claim was dependent on the interpretation of Clause 5 of the insurance policy which contained the word 'impact'. The District Forum took the view that the damage caused to the building was not due to forcible contact but due to the consequential effect of vibration on account of operating of a bulldozer by the side of the Complainant's printing press building. It was held by the District Forum that such damage was, therefore, not covered.

27.3 The State Commission reversed the order of the District Forum and granted relief to the Respondent. The National Commission concurred with the view of the State Commission that the word 'impact' had to be construed liberally and in its wider sense.

27.4 Thereafter in *United India Insurance Co. Ltd v. Pushpalaya Printers (supra)*, the Supreme Court observed as under:

“In order to interpret this clause, it is also necessary to gather the intention of the parties from the words used in the policy. If the word

"impact" is interpreted narrowly the question of impact by any rail would not arise as the question of a rail forcibly coming to the contact of a building or machinery would not arise. In the absence of specific exclusion and the word "impact" having more meanings in the context, it cannot be confined to forcible contact alone when it includes the meanings "to drive close", "effective action of one thing upon another" and "the effect of such action", it is reasonable and fair to hold in the context that the word "impact" contained in clause 5 of the insurance policy covers the case of the respondent to say that damage caused to the building and machinery on account of the bulldozer moving closely on the road was on account of its "impact".

27.5 In light of the above decision, the approach of the learned Arbitrator in adopting a narrow construction of the word 'impact' occurring in the Impact Damage Clause in the policy in question cannot be countenanced. It is not a reasonable interpretation to take.

28. The view of the learned Arbitrator also overlooks that the policy was one that provided 'all risk insurance' which is defined in The American Jurisprudence, Second Edition, Volume 45, 1982 as under:

“505. "All risk" insurance; blanket crime insurance:

A policy of insurance insuring against "all risks" is to be considered as creating a special type of insurance extending to risks not usually contemplated, and recovery under the policy will generally be allowed, at least for all losses of a fortuitous nature, in the absence of fraud or other intentional misconduct of the insured, unless the policy contains a specific provision expressly excluding the loss from coverage. Generally, however, there must be a fortuitous event to impose liability under an "all risk" policy; it does not cover losses occasioned by ordinary circumstances, or wear and tear."

29. The other major ground on which the impugned Award has been assailed

is that the learned Arbitrator failed to follow the *contra proferentem* rule. In terms thereof if there was an ambiguity in the wording of the policy it had to be resolved against the party who prepared it. The following passage from McGillivray on 'Insurance Law' explains the rule:

"The *contra proferentem* rule of construction arises only where there is a wording employed by those drafting the clause which leaves the court unable to decide by ordinary principles of interpretation which of two meanings is the right one. "One must not use the rule to create the ambiguity - one must find the ambiguity first." The words should receive their ordinary and natural meaning unless that is displaced by a real ambiguity either appearing on the face of the policy or, possibly, by extrinsic evidence of surrounding circumstances."

30. In the same book, the circumstances in which the rule may be deployed have been explained as under:

"But a clause is only to be *contra proferentem* in cases of real ambiguity. One must not use the rule to create ambiguity. One must find the ambiguity first. Even where a clause by itself is ambiguous if, by looking at the whole policy, its meaning becomes clear, there is no room for the application of the doctrine. So also where if one meaning is given to a clause, the rest of the policy becomes clear, the policy should be construed accordingly."

31. In *United India Insurance Co. Ltd v. Pushpalaya Printers* (*supra*), the Supreme Court also explained the rule thus:

"It is also settled position in law that if there is any ambiguity or a term is capable of two possible interpretations one beneficial to the insured should be accepted consistent with the purpose for which the policy is taken, namely, to cover the risk on the happening of certain event. Although there is no ambiguity in the expression "impact", even otherwise applying the rule of *contra proferentem*, the use of the word "impact" in clause 5 in the instant policy must be construed against the appellant. Where the words of a document are ambiguous, they shall be construed against the party who prepared the document.

This rule applies to contracts of insurance and clause 5 of the insurance policy even after reading the entire policy in the present case should be construed against the party who prepared the document."

32. Thus even applying the *contra proferentem* rule in the present case, the expression 'impact' in the policy in question ought to have been interpreted in a manner favouring the claimant i.e. the Petitioner.

33. The other ground that Mr Tripathi urged was that the learned Arbitrator overlooked the words, 'articles dropped therefrom' occurring in the relevant clause. In the Surveyor's report, the following two instances were cited to illustrate the scope of the 'Impact Damage Clause':

“(i) If an insured's vehicle, crane, fork lift etc. collides with any other insured's property and the damages so received due to this impact to these properties are covered and

(ii) due to such collision and the property/properties so carried by the falls/dropped due to this impact and the resultant damages so received by the insured's property through the falling/dropped object”.

34. Indeed the said interpretation appears to have ignored the phrase "articles dropped therefrom" occurring in the clause. If so considered it would have included the loss as a result of the GTR suddenly slipping from the lifting beam.

35. It is not possible to accept the submissions on behalf of the Respondent that no part of the impugned award can be said to be opposed to the fundamental policy of Indian Law. The interpretation adopted by the learned Arbitrator is contrary to the express provisions of the contract. The learned

Arbitrator appears to have based his conclusion only on the Surveyor's report on interpretation of impact damage clause, which was not necessarily binding on the learned Arbitrator. In this context the following observations of the Supreme Court in *New India Insurance Co. Ltd. v. Pradeep Kumar* (*supra*) are relevant:

"In other words although the assessment of loss by the approved surveyor is a prerequisite for payment or settlement of claim of twenty thousand rupees or more by insurer, but surveyor's report is not the last and final word. It is not that sacrosanct that it cannot be departed from; it is not conclusive. The approved surveyor's report may be the basis or foundation for settlement of a claim by the insurer in respect of the loss suffered by the insured but surely such report is neither binding upon the insurer nor insured."

36. The Court is satisfied that the impugned Award is indeed contrary in terms of the contract and is liable to be set aside being patently illegal against the fundamental policy of Indian law.

37. Consequently, the impugned Award to the extent it rejects the claim of the Petitioner damages is hereby set aside. It will be open to the Petitioner to seek a fresh arbitration and for that purpose avail the benefit of Section 43 (4) of the Act.

38. The petition is disposed of in the above terms, but in the circumstances, with no orders as to costs.

**S.MURALIDHAR, J**

**MARCH 29, 2017**

*Rm/rd*