

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

+ **FAO No. 373/2007**

% **1st August, 2017**

THE NEW INDIA ASSURANCE CO. LTD. Appellant

Through: Mr. P.K. Seth, Advocate.

versus

M/S. DEWAN RECLAIM RUBBER Respondent

Through: Mr. Ashim Vachher, Advocate
with Mr. Vaibhav Dabas,
Advocate and Mr. Sumeet,
Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

1. This first appeal filed under Section 37 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'the Act') impugns the judgment of the court below dated 19.5.2007 whereby the objections filed by the appellant/objector under Section 34 of the Act have been dismissed and the Arbitral Award dated 27.3.2006 has been upheld. By the Arbitral Award, the respondent/claimant was awarded a sum of Rs 10,71,706.64/- being an amount of Rs 7,33,962/- towards

principal and a sum of Rs 2,86,244.64/- towards interest at 9% per annum. The amount was awarded in favour of the respondent/claimant on account of appellant/insurance company being held liable to reimburse the losses covered under the insurance policy. The respondent/claimant had sought continuation of the earlier insurance policy which was issued on reinstate value basis and had also paid premium for reinstate basis and not actual basis and thus the Arbitration Tribunal held the policy in question as a reinstate value policy and not actual value policy.

2. The facts of the case are that the respondent/claimant took a fire policy from the appellant covering the risk to the plant and machinery for the period from 10.2.1999 to 9.2.2000 for a total sum insured of Rs.1,66,40,000/-. During the currency of the policy on 26.4.1999 there was a fire in the factory of the respondent/claimant resulting in loss to the respondent/claimant. The appellant deputed a surveyor who assessed the loss to the tune of Rs.13,95,855/- on reinstate value basis and a sum of Rs.7,38,061/- on actual basis. Appellant paid to the respondent/claimant a sum of Rs.6,61,393/- for settlement of the amount of the loss vide the appellant's letter dated

8.6.2000 and which was protested by the respondent/claimant vide its letter dated 1.8.2000. Since the appellant failed to pay the amount claimed by the respondent/claimant, hence the subject claim petition was filed in the arbitration proceedings claiming an amount of Rs.19,29,931.88 along with interest at 24% per annum.

3. Arbitration Tribunal by the impugned Award has held that the subject insurance policy ought to have been issued on reinstate value basis and not on actual value basis inasmuch as respondent/claimant had given a proposal form for reissuance of the policy in terms of the earlier policy which was issued on reinstate value basis and the appellant failed to file before the Arbitration Tribunal the proposal form which would have shown the request of the respondent/claimant for issuance of the policy on reinstate value basis and which was the position for the earlier years insurance policies. The Arbitration Tribunal also held that premium which was paid by the respondent/claimant for the policy was for reinstate value basis and not actual value basis noting that the appellant did not give any details that if the insurance policy was not on reinstate value basis but was on actual value basis then what would have been the premium

payable if not the premium which was actually paid by the respondent/claimant for the subject policy. The Arbitration Tribunal also has held that there is no full and final settlement when the respondent/claimant received the amount under the covering letter dated 8.6.2000 of the appellant. Arbitration Tribunal also held that the disputes in question are covered under clause 13 of the insurance policy which required the disputes to be decided by arbitration.

4. The most relevant paras of the Arbitration Award is para pertaining to discussion on additional issue nos.1 and 2, and these relevant paras of the Award read as under:-

“Additional Issue No 1 & 2

We propose to first take up additional issue 1 and 2. Pursuant to the proposal given an amount of Rs 54,774.00 (Rupees Fifty Four Thousand Seven Hundred Seventy Four only) was paid towards premium by the claimant. Cover note dated 10.02.1999, covering the risk to the plant and machinery for the period from 10.02.1999 to 09.02.2000 for an amount of Rs 1,66,40,000.00 (Rupees One Crore Sixty Six Lakh Forty Thousand Only) was issued by respondent No.2, Ghaziabad Office of respondent No.1, insurance company. Claimant alleges that on finding that cover note was not issued on “reinstate basis”, letter dated 17.02.1999 followed by letter dated 04.03.1999 were sent to the respondents to rectify that error in the cover note. Claimant further alleges that in the policy, later on received, similar error had crept in and for rectification thereof letters dated 18.03.1999 and 23.03.1999 were sent to the respondents. In the meanwhile fire occurred on 26.04.1999. It was pointed out by Sh. Ashim Vachhar for claimant that in the proposal form for issue of policy commencing from 10.02.1999 the claimant had categorically mentioned that policy is to be renewed on reinstate basis” and premium amount of Rs 54,774.00 (Rupees Fifty Four Thousand Seven Hundred Seventy Four Only) was calculated on “reinstate basis”. It was further pointed out that the policies for previous years since 1994 were purchased on “reinstate basis”. Attention was invited

to paras 5 & 9 of the statement of claims and the copies of policies for previous years placed on the file. In corresponding paras 5 & 9 of the reply on merit the respondents have denied as wrong the averments made in paras 5 & 9 of the statement of claims in regard to claimant having mentioned in proposal form for issue of policy on “reinstate basis” and amount of Rs 54,774.00 (Rupees Fifty Four Thousand Seven Hundred Seventy Four Only) having been paid on reinstate basis. **Original proposal form, which was with the respondents, would have shown if it was mentioned therein that the policy was to be renewed on “reinstate basis” or not. For failure to produce the original proposal form by the respondents, an adverse inference has to be drawn against them. Further, respondents have failed to disclose how much amount of premium was payable to cover the risk of Rs 1,66,40,000.00 (Rupees One Crore Sixty Six Lakh Forty Thousand Only) to plant and machinery for one year on “reinstate basis”.** In absence thereof, there is no reason to disbelieve the claimant that premium of Rs 54,774.00 (Rupees Fifty Four Thousand Seven Hundred Seventy Four Only) paid was on reinstate basis. Respondents do not seriously dispute that the policies for previous years issued to the claimant were on “reinstate basis”. Copies of insurance policies placed on file would also show that the fire policies for the previous years were purchased on “reinstate basis”. To be only noted that the error in not issuing cover note/policy on “reinstate basis” was brought to the notice of insurance company even before fire took place by writing letters dated 17.02.1999, 04.03.1999, 18.03.1999 and 23.03.1999 by the claimant. In this back drop omission to mention in cover note/Policy of their having been issued on “reinstate basis” must be held to be due to inadvertence on the part of insurance company as alleged. Additional issue No.1 therefore is, answered in favour of the claimant.

Coming to additional issue No.2, the submission advanced by Shri P.K. Seth for respondents was that in essence the claimant has prayed for a decree of declaration of its having purchased the policy on “reinstate basis” and it not being a quantum dispute is beyond the scope of Arbitration Clause No.13. At this stage, it will be profitable to refer to the decision in **Vulcan Insurance Company Ltd. Vs. Maharaj Singh & Another** (1976) 2 SCR 62, which was rendered with reference to clause 18 which is similar to clause 13 of the policy in this case. Point which arose for consideration before their Lordships of the Supreme Court, was whether in view of repudiation of liability by the appellant under clause No. 18 of insurance policy, a dispute was raised which could be referred to Arbitration. It was held:-

“If the rejection of the claim made by the insured be on the ground that he had suffered no loss as a result of the fire or the amount of loss was not to be extent claimed by him, then and then only, a difference could have arisen as to the amount of any loss or damage within the meaning of clause 18.”

In the present case the respondents deny that they are liable to pay any amount over and above Rs 6,61,393.00, already paid to the claimant. Applying the ratio of the said decision, this raises quantum dispute, which is arbitrable under clause No.13 of the policy. Accordingly, additional issue No.2 is decided against the respondents.” (emphasis added)

5.(i) No fault whatsoever can be found with the aforesaid findings and conclusions of the Arbitration Tribunal inasmuch as it is fact that the earlier policies for the earlier periods were taken by the respondent/claimant on reinstate value basis and not the actual value basis. Also, the proposal form which was submitted by the respondent/claimant to the appellant was a reinstate value basis proposal and the appellant deliberately failed to file the form which would have shown that the policy was to be issued on reinstate value basis and not on actual value basis and which was mistakenly done by the appellant. Also it is relevant to note that the appellant admittedly failed to give what would be the value of the insurance premium on actual value basis if not the premium which was admittedly paid by the respondent/claimant on reinstate value basis.

(ii) Such findings of fact cannot be interfered with by the court which hears objections under Section 34 of the Act inasmuch as the findings and conclusions are neither illegal nor perverse. I therefore

find no reason to interfere with the impugned judgment and the Award which has upheld the findings and conclusions in the Award with respect to the policy having wrongly been issued on actual value basis instead of reinstate value basis.

6.(i) Learned counsel for the appellant argued that it was not within the jurisdiction of the Arbitration Tribunal to change the terms of the policy, and once the policy was only on actual value basis, then, the Arbitration Tribunal has clearly erred in acting against the insurance contract by granting the reinstate value amount.

(ii) The argument urged on behalf of the appellant is in fact in pursuant to Section 92 of the Evidence Act, 1872 which provides that once the contract between the parties is proved in terms of the Section 91 of the Evidence Act, then, there can be no evidence led to contradict the written contract of the insurance. This argument of the appellant is however misconceived because the First Proviso to Section 92 of the Evidence Act provides that there is an exception to Section 92 of the Evidence Act with respect to finality of the terms of the contract once it is proved that there is a mistake of fact with respect to contents of the document. Also, benefit in this regard can

be taken of Section 95 of the Evidence Act and which provides that if language used in the document is plain in itself, but is unmeaningly to the reference to existing facts then evidence may be given to show that language used in the document was in a peculiar sense. In this case, language used in the document was in the peculiar sense of having to be taken as reinstate value basis and not of actual value basis which was given by mistake and with respect to which aspect the respondent/claimant immediately protested on receiving the cover note itself. The letters of the respondent/claimant to the petitioner in this regard are dated 17.2.1999, 4.3.1999, 18.3.1999 and 23.3.1999. All these letters were written much prior to the occurring of the incident of fire in the premises of the respondent/claimant on 26.4.1999. Accordingly I hold, and especially in view of the findings and conclusions of the Award which have been reproduced above, that the policy in question though issued on actual value basis was issued under a mistake and the policy in question actually has to be taken on a reinstate value basis in terms of first Proviso to Section 92 of the Evidence Act read with Section 95 of the Evidence Act. First Proviso to Section 92 and Section 95 of the Evidence Act read as under:-

“Section 92.Exclusion of evidence of oral agreement.- xxxxx

Proviso (1).-Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, [want or failure] of consideration, or mistake in fact or law:

Section 95.Evidence as to document unmeaning in reference to existing facts.-When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.”

7. In my opinion the next argument urged on behalf of the appellant that there was a full and final settlement on the respondent/claimant receiving the amount of Rs 6,61,393/- as per the covering letter dated 8.6.2000 is also an argument without any substance for the reason that neither this letter of the appellant dated 8.6.2000 shows that the amount was paid by the appellant and received by the respondent/claimant in full and final settlement and nor has the respondent/claimant signed any full and final settlement voucher. In fact, the respondent/claimant after receiving of the amount in terms of the letter dated 8.6.2000 has continuously protested with the first protest letter being dated 1.8.2000. There are also subsequent letters thereafter written by the respondent/claimant to the appellant which show that amounts received were not in full and final settlement. I therefore hold that the Arbitration Tribunal as also the court below has rightly held that there was no full and final

settlement between the parties as alleged by the appellant to have happened in view of the letter dated 8.6.2000 of the appellant.

8. I also reject the argument of the disputes not being covered under Clause 13 of the policy inasmuch as this argument is covered while dealing with the first issue inasmuch as the argument urged on behalf of the appellant is taking that policy is on actual value basis and once it is held that policy is of reinstate value basis, then, disputes covered under that policy will admittedly fall within the scope of Clause 13 of arbitration clause in the policy.

9. There is no merit in the appeal. Dismissed.

AUGUST 01, 2017
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VALMIKI J. MEHTA, J