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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
DECIDED ON : 8th AUGUST, 2017

+ **FAO(OS)(COMM) 142/2017 & CM APPL. 25107/2017 & 25108/2017**

THE ORIENTAL INSURANCE COMPANY LIMITED

..... Appellant

Through: Mr. Udyan Srivastava, Advocate.

VERSUS

H.P.COTTON TEXTILE MILLS LTD. Respondent

Through: Mr. Abhinav Vashisht, Sr. Advocate
with Ms. Shantha Devi Raman, Mr.T.S. Ahuja, Ms.
Priya Singh and Mr.Arihant Jain, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J. (OPEN COURT)

1. The present appeal is directed against a judgment dated 24.03.2017 of the learned Single Judge rejecting a challenge to the majority award dated 19.10.2016 passed by the Chairman of the Arbitral Tribunal (hereinafter 'Tribunal') and one of its members.

2. Briefly, the material facts are that the Oriental Insurance Company Limited (hereinafter 'the OICL') is a public sector non-life insurance company. The respondent is engaged in the business of manufacturing and sale of Hosiery yarn, industrial and sewing threads, etc; it is located in Hisar (Haryana). It had undertaken multiple insurance policies from OICL in respect of building, plant and machinery, and general store items.

3. The respondent claimed that on 14.09.2010 at around 09.30 a.m., a violent mob of 2000-2500 miscreants forcibly entered in its premises and caused severe damages to the office equipments, electronic items, plant and machinery, furniture and computers and also set fire to the stocks that were insured; they also looted cash from the cashier. The said incident occurred during “Jat Aarakshan agitation”.
4. Information as to the occurrence of the incident was conveyed to OICL on 14.09.2010. Deputy General Manager of OICL deputed M/s. B.S.Chawla & Company (hereinafter ‘the Surveyor’) for surveying and assessing the damages. The surveyor visited the premises on 15.09.2010 and on subsequent dates. All the relevant documents including Financial Statements, Bank Statements, Stock Registers and Quality wise cotton stock position were made available to the surveyor.
5. The respondent submitted its duly completed claim for a total sum of ₹7,55,42,057/- on 24.09.2010. The claims were assessed and the surveyor submitted its report to OICL on 27.05.2011 assessing the loss to the tune of ₹3,72,79,000/-.
6. OICL thereafter appointed one Mr. B.C.Goyal on 19.07.2011 to verify the records of the respondent. Mr. B.C.Goyal submitted his report dated 01.08.2011 and pointed out that claims receivable shown by the respondent in its account were in variance with the loss claimed or assessed. By a letter dated 05.01.2012, Mr. B.C.Goyal was appointed to ‘verify all records’. In his final report submitted on 28.02.2012, he reassessed the loss at ₹1,75,88,739/-. When the

surveyor was confronted with the said report, he did not find fault with the report submitted by him except an error of ₹2,08,170.57/-. OICL informed the respondent regarding approval of the claim to the tune of ₹1,71,74,139/-; it was not acceptable to the respondent. The arbitration clause was invoked. In terms of the interim award dated 31.05.2013, a sum of ₹1,28,70,138/- was paid to the respondent on 02.07.2014. In the impugned award, the Tribunal accepted the respondent's claim No.1 for a sum of ₹3,70,70,829/-; ₹67,53,739/- for claim No.2 and ₹21,74,233/- for claim No.3 on account of difference between the salvage value assessed and actually realized. Claim No.5 for removal of debris was to be computed at 1% of the value (which was computed at ₹65,207/-); claim for ₹35,207/- was also allowed. The Tribunal did not accept the respondent's claim for the loss of cash of ₹6,37,776/-.

7. The appellant challenged the findings of the Tribunal under Section 34 of the Arbitration and Conciliation Act, 1996. The said petition was dismissed by the impugned order of the learned Single Judge.

8. Learned counsel for the appellant urged that the Single Judge erred in not giving due weightage to the loss assessed by B.C.Goyal, appointed as investigator with the approval of the concerned authority. The said report was based upon verification of all records related to the claim. The appellant was not bound by the report of the surveyor. It was for the respondent to negate all the discrepancies shown in the final report of the investigator. It was not permissible to suspect the evidence of the investigator; he had visited the spot after his

appointment on 05.01.2012. The salvage could be identified following trail of sale and purchase between the respondent and the buyer. The denial of depreciation of 60% on the assessed amount under the heading 'Building' was erroneous. Depreciation is always applicable on all cases where reinstatement basis is not followed. Learned counsel for the respondent refuting the contentions urged that no illegality or irregularity exists in the impugned award and the judgment.

9. The loss suffered by the respondent due to 'Jat Aarakshan' agitation is not under challenge; its quantum is in controversy. Soon after the incident on 14.09.2010, M/s. B.S.Chawla & Company was deputed to survey and assess the damage. The surveyor visited the spot on several dates and checked all the relevant documents. To the total claim of ₹7,55,42,057/- lodged by the respondent, the surveyor assessed it to be ₹3,72,79,000/-. This report seemingly was not acceptable to the appellant. After a considerable delay, they opted to appoint B.C.Goyal on 19.07.2011 to verify the record of the respondent. No plausible explanation has been offered by the appellant as to what prompted it to appoint B.C.Goyal when the report furnished by M/s.B.S.Chawla & Company was not suspect. Admittedly, the surveyor's report was never disputed or rejected. The surveyor had an occasion to visit the spot immediately after the incident and to verify all the records at the spot. Contrary to that B.C.Goyal lost valuable time before visiting the spot to make proper assessment of the actual loss suffered by the respondent. His regular appointment took place on 05.01.2012 to 'verify all records' and the

final report reassessing the loss at ₹1,75,88,739/- came to be submitted on 28.02.2012. Apparently, Mr.Goyal was not able to inspect the salvage at the spot. The preferential treatment to the report submitted by Mr.Goyal over the surveyor's report without credible reasons cannot be justified, merely because it suited the appellant. None from M/s.B.S.Chawla & Company was examined as a witness. In the proceedings before the Tribunal, M/s.B.S.Chawla & Company was not confronted with the loss assessed by him. The very fact that the loss was assessed at ₹3,72,79,000/- instead of ₹7,55,42,057/- lodged by the respondent speaks volume of the fairness of the report given by the surveyor and cannot be faulted.

10. The Tribunal has given cogent and detailed reasons as to why the claims lodged by the respondent were acceptable and permissible. The Tribunal had also examined the separate claims as raised by the appellant. One of the principal items was salvage value which was assessed by the surveyor at ₹1.25 crore after physical inspection. It was, however, assessed as ₹2,50,48,440/- by Mr.B.C.Goyal who not only had increased the quantity of salvage from 247 MT to 384 MT but also estimated its rate @ 60 per kg instead of 45 per kg estimated by the surveyor. The Tribunal rightly was of the view that the value of salvage as well as the retrievable quantity was without any basis or reasoning specially when he had no occasion to inspect the salvage at site, due to the fact that his visit was delayed by 16 months. Regarding discrepancy between claims receivable, reflected in the balance-sheet of the respondent and the loss claimed / assessed, the 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 in his testimony admitted that if the complete note to the balance-sheet / auditor's report was considered, there would not be any discrepancy as reported by him.

11. The Tribunal committed no error in assessing the cost of repair / replacement of the building at ₹67,53,739 (₹95,20,739/- less ₹5,00,000/- towards salvage as per claimant's estimate minus ₹22,67,000/- allowed in the surveyor report of M/s.B.S.Chawla & Company already claimed in claim I). The first surveyor M/s.B.S.Chawla & Company had assessed it at ₹95,20,739/- but wrongly deducted 60% towards depreciation. Since the loss was estimated on repair basis and not on renovation basis, there was no scope for accounting for any depreciation as claimed by the appellant. The appellant's contention to provide 60% depreciation on the assessed loss to the 'building' is untenable as the loss on the building was estimated on repair basis.

12. The findings of the Tribunal are based upon fair appreciation of the evidence adduced before it and need no intervention. The findings of the learned Tribunal cannot be termed perverse or suffering from patent illegality. The scope of examination under Section 34 of the Arbitration and Conciliation Act, 1996 ('the Act') is very limited; the findings of the Arbitral Tribunal cannot be interfered with unless the Court finds that any of the grounds under Section 34(2) of the Act have been established. No material exists to infer that the award is fundamentally wrong, patently illegal, or is based on a view that no reasonable person could accept.

13. In ‘*Shakti Nath & Ors. vs. Alpha Tiger Cyprus Investment No.3 Ltd. & Ors.*’ in FAO(OS)(COMM) 53/2017 decided on 08.05.2017, this Court held :

“A survey of the several judgments reveals that Section 34 authorizes a very narrow jurisdiction to set aside the arbitral tribunal’s award. Firstly, the court does not act as if it were an appellate court, re-visiting the evidence and undertaking an extensive factual review of the merits of the dispute with the mandate to cure or correct the errors (Ref Sumitomo Heavy Industries v ONGC Ltd 2010 (11) SCC 296 and Kwaliti Manufacturing Corporation v Central Warehousing Corporation 2009 (5) SCC (Civ) 406). The Court can set aside an award if it finds that the tribunal has made an error on the face of the contract, or provided a “patently illegal” interpretation of the law. Equally, if the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction (Ref MSK Projects (I) (JV) Ltd. v. State of Rajasthan 2011 (10) SCC 573; G. Ramachandra Reddy v Union of India 2009 (6) SCC 414; McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181 and Renusagar Power Co. Ltd. v. General Electric Co. 1984 (4) SCC 679). In Mc Dermott International (supra), the Supreme Court clarified the Court’s inherent limitation by reason of Section 34 in such matters:

“112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope

and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. (See Pure Helium India (P) Ltd. v. ONGC [(2003) 8 SCC 593] and D.D. Sharma v. Union of India [(2004) 5 SCC 325]).

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award.”

24. Unless the Tribunal commits a patent error of law in adjudicating upon a question submitted to it, the Court will not intervene (J.G. Engineers Pvt. Ltd v Union of India 2011 (5) SCC 758). The expression “patently” illegal was explained as an error “which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice.” (Union of India v. Col. L.S.N. Murthy 2012 (1) SCC 718). J.G. Engineers (supra) said that patent illegality is one which goes “..to the very root of the matter and not a trivial illegality..” The Supreme Court had recognized the high threshold of error of law in Mc Dermott International, (supra) where it was emphasized that the illegality should go to “the root” of the matter.

Oil and Natural Gas Commission v Western Geco 2014 (9) SCC 263 outlined what is contrary to “public policy” in an award, warranting interference under Section 34:

"all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country." In particular, a court could assess whether a tribunal: (i) has applied a "judicial approach", i.e. has not acted in an arbitrary manner; (ii) has acted in accordance with the principles of natural justice, including applying its mind to the relevant facts; and (iii) has avoided reaching a decision which is so perverse or irrational that no reasonable person would have arrived at it.."

The law was succinctly re-visited and the correct principles re-stated in a recent decision reported as Associate Builders v Delhi Development Authority 2015 (3) SCC 49."

14. In the light of the analysis by the Tribunal of the circumstances with respect to the claims under the insurance policies, the Court is unpersuaded by the appellant's view.

15. For the above reasons, this Court is of the opinion that there is no merit in the appeal and is accordingly dismissed.

**S.P.GARG
(JUDGE)**

**S. RAVINDRA BHAT
(JUDGE)**

AUGUST 08 , 2017 / tr