

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

+ **OMP(COMM) 569/2016**

Reserved on: 7th November, 2017
Date of decision: 22nd November, 2017

M/S LIFELONG MEDITECH P.LTD Petitioner
Through Mr.Sameer Nandwani and
Ms.Pooja Tandon, Advs.

versus

M/S UNITED INDIA INSURANCE CO.LTD Respondent
Through Mr.A.K. De and Ms.Ananya De,
Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner M/s Lifelong Meditech (P) Ltd. challenging the Arbitral Award dated 16.09.2016 passed by the Sole Arbitrator in case reference No.DAC/935/04/15.

2. The dispute between the parties has arisen out of a Comprehensive Standard Fire & Special Perils Policy No.041100/11/12/11/00000021 for a sum of Rs. 40,61,03,196/- taken by the petitioner from the respondent. The policy was valid from 01.04.2012 to 31.03.2013. Another policy covering stocks i.e. Floater Policy No. 041100/11/12/13/00000018 valid from 01.04.2012 to 31.03.2013 for a total sum of Rs.13 crores was also taken by the petitioner from the respondent.

3. A fire took place in the factory premises of the petitioner on 27.05.2012. On intimation of the same to the respondent, the respondent appointed M/s Sandeep Bharti Insurance Surveyors and Mr.P.R. Ramanathan as Surveyors.

4. A claim of Rs.41,78,43,286/- was lodged by the petitioner with the surveyors. The surveyors submitted an interim survey report dated 03.11.2012 based on which the respondent released an “on account payment” of Rs.10 crores in favour of the petitioner on 15.11.2012. The surveyors submitted their final report on 17.08.2013. The respondent thereafter released further payment of Rs.20,41,60,835/- on 16.12.2013 and Rs.1,88,78,410/- on 09.05.2014.

5. The petitioner was dissatisfied with the above payment and therefore vide its letter dated 20.05.2014 called upon the respondent to pay a further sum of Rs.9,38,84,995/- along with interest. As the payment was not made by the respondent and the dispute persisted, this Court on a petition filed by the petitioner under Section 11(6) of the Act appointed a Sole Arbitrator who has passed the impugned Award dismissing the claim filed by the petitioner.

6. It is an admitted case that the claimant/ petitioner herein had signed three discharge vouchers dated 15.11.2012, 16.12.2013 and 09.05.2014 while accepting the payment made by the respondent. The respondent had therefore contended that in view of the discharge vouchers, the claim of the petitioner could not be entertained. It is important to note here that these alleged discharge vouchers were not produced before Sole Arbitrator by either party. Learned Arbitrator, however held that even if the discharge vouchers are not produced, it

would not, in any manner, effect the defence of the respondent that the claimant/petitioner is bound by the terms of the discharge vouchers under the Principle of Accord and Satisfaction. After relying on various judgments and commentaries, the Sole Arbitrator held that as the discharge vouchers were executed at different points of time between 15.11.2012 to 09.05.2014 and during this period no protest was made by the claimant and further as no evidence had been led by the claimant to prove any undue influence or coercion practiced by the respondent for execution of these vouchers and as the protest letter was filed only 11 days after the third discharge voucher was signed, the claimant had failed to prove that the discharge vouchers were obtained through exercise of undue influence or coercion by the respondent. The Sole Arbitrator also refused to rely upon Circular dated 24.09.2015 issued by Insurance Regulatory and Development Authority of India (hereinafter referred as IRDAI) on the ground that said circular can only apply prospectively. The finding of the Arbitrator on the effect of the discharge vouchers has been summarized by him in paragraph 37 of the Award, which is reproduced herein below:

“37. In view of the above, I have no hesitation to hold as under:

- a. The discharge vouchers cannot be said to have been obtained fraud, coercion, duress or undue influence. The Claimant has failed to establish any fraud, coercion, duress or undue influence in the facts of the instant case.*
- b. The claimant has also failed to establish the allegation of duress due to financial difficulty*

c. *The Circular dated 24.09.2015 issued by Insurance Regulatory and Development Authority of India (IRDAI) is not applicable to the facts of the present case.*

d. *Thus, in the facts of the instant case there was a full and final settlement resulting in accord and satisfaction and hence there does not exist any arbitrable dispute between the parties.”*

7. Learned counsel for the petitioner/claimant submits that as the discharge vouchers had not been filed by the respondent before the Sole Arbitrator, no reliance could have been placed on the same. He further contends that with every release of payment it was a pre-condition imposed by the respondent that a discharge voucher in form of full and final payment has to be executed by the claimant. It is for this reason that even in the present case as many as three discharge vouchers were executed, though, admittedly the payment was also released in three trenches. He further referred to the answer of question No.6 put to Sh. Vijay Sharma, witness of the respondent, during his cross-examination wherein he admits that if the claimant would not have signed the discharge vouchers, the respondent would not have released any amount to it. Answer to question No.6 and 8 put to the witness are reproduced herein below:

“Q.6: If the claimant would not have signed the discharge voucher, would the respondent release any amount to the claimant?

A. *No.*

Q.8: If the claimant would have protested during the time of release of interim payment, would the respondent pay the same or pay any future amounts?

A. I have already replied that discharge and acknowledgement is required for making any payment. If the claimant would have protested, there was no question of getting an acknowledgement and therefore, the Respondent would not have made payment."

8. As far as the Circular dated 24.09.2015 of IRDAI is concerned, learned counsel for the petitioner submits that the circular was, in fact, an admission of the fact that Insurance Companies are misusing such discharge vouchers to claim full and final settlement against the aggrieved policy holders and that execution of such vouchers does not foreclose the right of the policy holder to seek higher compensation before any judicial fora or any other fora established by law. He submits that this circular was therefore relevant for adjudicating the dispute in hand.

9. On the other hand, learned counsel for the respondent submits that the Arbitrator having appreciated the evidence led before him, this Court in exercise of its power under Section 34 of the Act would not sit in Appeal over such findings. He further submits that non-production of discharge vouchers before Sole Arbitrator would have no effect as the execution of the same had been admitted by the claimant/petitioner.

10. I am unable to agree with submission made by the learned counsel for the respondent. Though, it is correct that in exercise of its limited jurisdiction under Section 34 of the Act, this Court would not sit in Appeal over the findings of the Sole Arbitrator, however, at the same

time if an Arbitral Tribunal takes into account some irrelevant evidence for decision which it arrives at or ignores vital evidence in arriving at its decision, the Award can certainly be interfered with. In the present case, the following glaring facts were ignored by the Sole Arbitrator:

- a. The discharge vouchers were not produced before the Sole Arbitrator. Therefore, the terms of the same were also not before the Sole Arbitrator. The Sole Arbitrator proceeded by an assumption that the discharge vouchers would contain full and final settlement. Though, it is true that the petitioner/claimant had admitted the execution of said discharge vouchers, in my opinion, in the absence of the production of the documents itself, terms of such documents could not have been assumed.
- b. The Arbitrator failed to appreciate that admittedly there were three discharge vouchers in this case. Which amongst these would actually be a full and final settlement of the claim? Admittedly, even after execution of the first and second discharge vouchers on 15.11.2012 and 16.12.2013, the respondent yet made a further payment of Rs.1,88,78,410/- which is a substantial amount on 09.05.2014. If the first and second discharge vouchers were not full and final settlement of the claim, then how was the third discharge voucher a full and final settlement? This was not explained by the respondent and certainly has not been discussed by the Sole Arbitrator.
- c. As the payment was admittedly made after the first and second discharge vouchers, they could not have been treated as full and

final settlement of the claim. Therefore, the only document which could be relied upon by the respondent as a full and final settlement was the third discharge voucher executed on 09.05.2014. Admittedly, within 11 days thereof the petitioner has lodged his protest. Therefore, the finding of the Sole Arbitrator that no protest was lodged for a period of 1½ years, taking the first discharge voucher executed on 15.11.2012 to be of relevance, is totally unfounded and arbitrary.

- d. Answers to question Nos.6 and 8 of the witness of the respondent itself clearly shows that no payment would have been released to the petitioner without execution of the discharge vouchers. It is to be seen that the petitioner has already suffered a loss due to fire which stands admitted by the respondent inasmuch as the claim was finally sanctioned. The claim was not for a small amount but a very large amount. The fire had taken place in the factory premises of the petitioner/claimant. Therefore, the facts on record clearly show that the petitioner/claimant had no option but to execute such discharge vouchers without which no payment would have been released in its favour and it would have been forced to initiate lengthy legal proceedings for recovery of the amount.
- e. The Sole Arbitrator has completely missed the purport of Circular dated 24.09.2015 issued by IRDAI. The question was not whether the said circular would apply retrospectively or not but one of the recognition of general trade practice whether

discharge vouchers are being wrongly used by the Insurance Companies to claim full and final discharge against the policy holders. Where the regulatory body itself recognises such mal-practice, Sole Arbitrator could not have ignored the same.

11. The Arbitrator, while relying upon the judgment of Supreme Court in *Union of India v. Master Construction Company*, (2011) 12 SCC 349, failed to appreciate that in that case Supreme Court had analysed the terms of the certificate issued by the contractor at the time of receiving the payment on account of the final bill and found that No Claim Certificate was given voluntarily and the contract stood discharge voluntarily.

12. In the case of *New India Assurance Company Limited v. Genus Power Infrastructure Limited*, (2015) 2 SCC 424, the Supreme Court again analysed terms of the letter of subrogation, which was on a stamp paper, accepting the amount in full and final settlement of the claim under the policy. The Court found that there was no protest or demur raised around the time or soon after the letter was signed.

13. The above two cases were, therefore, clearly distinguishable inasmuch as the terms of the discharge vouchers had not been filed before the Arbitrator. As there were three discharge vouchers executed over a period of 1 ½ years and the witness of the respondent had clearly admitted that no payment would have been released without the petitioner having executed such discharge vouchers, in my opinion, the present case was clearly covered under illustration (iv) given in paragraph 52 by the Supreme Court in *National Insurance Company*

Limited v. Boghara Polyfab Private Limited, (2009) 1 SCC 267. The same is reproduced herein below:

“52xxxxxx

(iv) An insured makes a claim for loss suffered. The claim is neither admitted nor rejected. But the insured is informed during discussions that unless the claimant gives a full and final voucher for a specified amount (far lesser than the amount claimed by the insured), the entire claim will be rejected. Being in financial difficulties, the claimant agrees to the demand and issues an undated discharge voucher in full and final settlement. Only a few days thereafter, the admitted amount mentioned in the voucher is paid. The accord and satisfaction in such a case is not voluntary but under duress, compulsion and coercion. The coercion is subtle, but very much real. The 'accord' is not by free consent. The arbitration agreement can thus be invoked to refer the disputes to arbitration.”

14. In view of the above, the finding of the Sole Arbitrator regarding the discharge vouchers having fully and finally settled the claim of the petitioner/ claimant cannot be sustained.

15. My above finding, however, is not sufficient to set aside the Award passed by the Sole Arbitrator inasmuch as the Sole Arbitrator, inspite of his above finding on the discharge vouchers, has proceeded to examine the claim of the petitioner/claimant on its own merit. As the Sole Arbitrator has dismissed the claim made by the petitioner on merit, the same has been challenged before me on all heads of claim. I shall now be examining each heads of claims separately.

**CLAIM TOWARDS COST OF NEEDLE ASSEMBLY
MACHINE OF Rs.66,22,393**

16. This claim of the petitioner has been rejected by the arbitrator relying upon the findings of the Surveyors who had come to the conclusion that the claim has to be disallowed for the entire Needle Assembly Machine based on the exclusion from liability contained in Clause 7 of the policy condition. Clause 7 of the policy reads as under:

"7. Loss, destruction or damage to any electrical machine, apparatus, fixture or fitting arising from or occasioned by over-running, excessive pressure, short circuiting, arcing, self-heating or leakage of electricity from whatever caused (lightning included) provided that this exclusion shall apply only to the particular electrical machine, apparatus, fixture or fitting so affected and not to other machines, apparatus, fixtures or fittings which may be destroyed or damaged by fire so set up."

17. Learned counsel for the petitioner submits that the arbitrator has failed to appreciate that in an insurance contract where there is any ambiguity or terms which are capable of two possible interpretation, one being beneficiary to the insured should be accepted. He further submits that arbitrator has committed an error by merely relying upon the recommendation of the surveyors in support of rejection of its claim.

18. I have considered the submission made by the learned counsel for the petitioner, however, I am unable to accept the same. Clause 7 of the policy clearly mentions where loss or destruction to any electric machine or apparatus is caused by over running, excessive pressure etc., the policy would not cover such a loss. It is correct that the proviso to Clause 7 limits the exclusion only to that particular machine or apparatus and does not extend to the exclusion of other machines which may be destroyed or

damaged by fire, in the present case, the Needle Assembly Machine was found to be one unit by the Surveyor. The Arbitrator records that no cogent reason has been given by the petitioner for challenging the said finding of the Surveyor. Even before me no such reason could be given. A machine may contain various parts. The purpose of Clause 7 is not to confine the exclusion to a part of the machine but to the whole machine itself. There is no ambiguity in Clause 7 which would require any interpretation or application of principle of interpretation as was sought to be contended by the learned counsel for the petitioner.

19. In view of the above, the challenge to the Arbitral Award, as far as the claim with respect to the Needle Assembly Machine is concerned, is rejected.

**CLAIM IN RESPECT OF DEDUCTION BY THE HEAD
OFFICE OF THE RESPONDENT AGAINST
RECOMMENDATION OF SURVEYOR OF RS.1,51,05,165/-.**

20. This claim was surmised on the fact that from the amount recommended by the Surveyor, the respondent had proposed a deduction of Rs.1,51,05,165/-, which was accepted by the Surveyor in its final report without any notice or opportunity on hearing given to the claimant/petitioner. The petitioner placed reliance on Regulation 9(3) of the Insurance Regulatory and Development Authority (Protection of Policyholders' interest) Regulations, 2002 (IRDA Regulation). The same is quoted herein below:

“9. Claim procedure in respect of a general insurance policy

(1) xxxxxxxxxxxxxx

(2) xxxxxxxxxxxxxx

(3) *If an insurer, on the receipt of a survey report, finds that it is incomplete in any respect, he shall require the surveyor under intimation to the insured, to furnish an additional report on certain specific issues as may be required by the insurer. Such a request may be made by the insurer within 15 days of the receipt of the original survey report:*

Provided that the facility of calling for an additional report by the insurer shall not be resorted to more than once in the case of a claim.”

21. It is contended that though the above Regulation was cited before the Arbitrator, he has not considered the same. It is further contended that in answers to question Nos.12 and 13, Mr.Sandeep Bharti, Surveyor, who was brought as a witness by the respondent, clearly admitted that the mode of calculation by the respondent “was also acceptable”. It is therefore, contended that the Surveyor did not say that its earlier calculation was incorrect. In view of above answer, it is submitted that the deduction made by the respondent was arbitrary.

22. Learned counsel for the respondent, on the other hand, submits that though it may be correct that intimation to the petitioner was necessary when the respondent had proposed a deduction to be made from the initial report of the Surveyor, same was inconsequential. He submits that before the Arbitrator complete calculation with respect to the claim amount was submitted and as recorded by the arbitrator in the impugned award, no infirmity could be pointed out by the petitioner in the same.

23. Arbitrator has rejected this claim observing as under:

“47. I have considered the submissions made by the parties in this regard. It is an admitted position that the Respondent has reduced an amount of Rs.1,51,05,165/- from the amount assessed by the Surveyors. Although, the Surveyor report is very relevant and material but yet the Respondent insurer could always have different view with regard to assessment made by the Surveyors provided the aforesaid dissent is based on valid, strong and sound reasons. In this regard, Mr. Vijay Sharma, RW1 who is the Regional Manager of the Respondent company has elaborately stated in his evidence the reasons which led to reworking of the amount at the Head Office and thereby arriving at a different amount of Rs. 1,51,05,165/-. I have no reason to doubt the said reasoning. I rather find that the reworking is based on sound principle, which is also accepted to be so by Mr. Sandeep Bharti, RW2. (Surveyor). The witness has also stated in his evidence that while process and finalizing amount payable to the Claimant at the Head Office of the Respondent, the amount of assessment was reworked adopting a different method which is also a normal practice, and the amount of assessment was reworked out to be Rs.32,39,58,291/-. The said witness was also cross examined and he had deposed that Head Office of the Respondent consulted the Surveyor on the working but of the claim and that the mode of calculation adopted by the Head Office of the Respondent was also acceptable. Neither during the cross examination of the said witness nor during the time of final arguments, it could be shown by the Claimant that the reasoning and mode of calculation adopted by the Head Office of the Respondent as wrong and erroneous. The Claimant was unable to prove that the reasoning given by the Respondent while differing with the recommendations of the surveyor is wrong. Therefore, the aforesaid claim of the Claimant also is rejected.”

24. Having considered the above finding of the Arbitrator, I find no infirmity with the same. In the present case, even if it is assumed that there was violation of Principle of Natural Justice and/or violation of Regulation 9(3) of the IRDA Regulation, the same would not ipso facto result in allowing the claim of the petitioner. The Arbitrator, taking into account the evidence led before him has found that the petitioner could not prove that the mode of calculation adopted by the respondent was wrong or erroneous. On the other hand, Arbitrator has found the work to be based on sound principle. In fact, no submission was made before me to show how the calculation adopted by the respondent was incorrect or unreasonable. In view of the above, challenge to the Award as far as denial of this claim, cannot be accepted.

**CLAIM TOWARDS EXCISE DUTY REVERSAL CHARGES
OF Rs.12,20,931/-**

25. The Arbitrator has rejected the above claim observing as under:

“50. I have considered the submissions made by the parties. The Surveyor RW2 on oath has stated that the said claim is an afterthought as the same was neither claimed in the claim bill nor did the Claimant submit the break up details with documentary support. The claim made by the Claimant at page 83 of the documents filed by the Claimant as well as Exhibit RW2/3 clearly show that there is no such Claim as Excise duty reversal charges. The said Surveyor in his cross examination has clearly deposed that excise duty reversal was not claimed by the Claimant in the claim bill. He had also stated that such excise duty reversal if any was required to be

certified by the Excise authorities. This fact is not disputed. Admittedly in the instant case no such certificate was either produced or filed by the Claimant to the Surveyor or before me during the proceedings. The official certificate is not available on record, which according to the Surveyor is mandatory for granting such claim and hence, I am of the view that the said amount cannot be allowed in favour of the Claimant.”

26. Learned counsel for the petitioner contends that the finding of the Arbitration is perverse as he has not only ignored the documents filed before him but has also not considered the relevant provision of Excise Manual which provides that such duty reversal can be claimed by the petitioner by merely making an entry in the CENVAT Credit Account maintained by him and does not require any certificate from the Excise Department. He further submits that the Arbitrator has failed to take note of email dated 22.07.2013 addressed by the petitioner to the Surveyor raising a claim towards reversal of Excise Duty on an asset. He submits that the finding of the Arbitrator that such claim was not raised before the Surveyor is, therefore, contrary to the documents produced before the Arbitrator and in ignorance of the same.

27. On the other hand, learned counsel for the respondent submits that the email dated 22.07.2013 had been filed by the petitioner only after conclusion of the evidence led by the respondent. There was no reference of this email in either Statement of Claim or the evidence led by the claimant. In any case, the said claim has been rejected on the ground that the same was an afterthought.

28. I have considered the submissions made by the counsel for the parties. Admittedly, the email dated 22.07.2013 was filed by the petitioner only after the conclusion of cross-examination of the witness produced by the respondent. It is also important to note that the said email was not filed as an additional document before the Arbitrator but was simply filed as a part of the application seeking production of the records from the respondent. The said document was, therefore, not produced in evidence before the Arbitrator and in my opinion, therefore, cannot be relied upon. Equally, the finding of the Arbitrator that claim for Excise Duty reversal could not be granted in the absence of a certificate from the Excise Authorities, cannot be stated to be perverse or in violation of the statutory provision. It may be true that the assessee may make an entry of such reversal in his book of accounts, however, once the claim in this regard is made to a third party like Insurance Company who insist on proof of the same and production of the necessary certificate from the Excise Department, denial of the claim on non-production cannot be said to be arbitrary or perverse. In fact, in the petition filed before me, there is no ground for challenging the Arbitral Award on the plea of non-consideration of this email dated 22.07.2013.

29. In view of the above, I find no merits in the challenge to the Arbitral Award as far as the rejection of this claim is concerned.

Claim Towards Slow Moving Dead Stock @ 1.5% Of The Stock Value Of Rs.12,45,957/-

30. Learned counsel for the petitioner has submitted that the respondent had arbitrarily deducted 1.5% of the stock value towards slow

moving/dead stock. This was challenged before the Arbitrator, however, the Arbitrator has also rejected the said claim without appreciating the evidenced led before him. It is submitted that the books of account produced by the petitioner before the Surveyor showed no entry towards dead stock or slow moving stock, therefore, such deduction could not have been made.

31. The finding of the Arbitrator on this claim is in paragraph 57 of the Award which is quoted herein below:

“57. I find that the Surveyor in the report has stated that a reasonable amount of 1.5% of the stock value is considered for deduction for slow moving/dead stock. This is the categorical finding recorded by the Surveyor who was the expert in the field. I also agree with the argument of the Counsel for the Respondent that the Surveyor is also aware of the nature and practice of the industry and therefore capable of taking reasonable and conscious decision regarding the extent of deduction to be made on account of slow moving/dead stock. The Counsel for the Claimant has not been able to show the relevant books of accounts have been produced by the Claimant to substantiate this claim. In the absence of proof of the claim, the claim is found to be not tenable.”

32. As far as this claim is concerned, question number 19 to 22 put to Mr.Sandeep Bharti Surveyor are relevant and are reproduced herein below:

“Q.19 What do you mean by dead stock?

A. It is that stock which is not sold in normal course of business and gets accumulated in due course of time in the industry.

Q.20 Is there any provision in the books of the claimant for the dead stock/slow moving stock?

A. Since majority of their records got burnt, they were not able to produce their complete set of books of accounts and stocks.

Q.21 What was the basis for taking 1½ % of the dead stock in your survey report?

A. It is as per industry norms, keeping in view the manufacturing product of the claimant.

Q.22 I put it to you that you have taken the percentage of 1½ % on the basis of assumption and the same is not based on any rationality. What do you have to say?

A. I deny the suggestion.”

33. The Arbitrator has appreciated the evidence led before him, specially the evidence of the Surveyor and has placed reliance on the same. It, therefore, cannot be said that the finding of the Arbitrator is based on no evidence or on surmises. In the case of **Associate Builders v. Delhi Development Authority**, (2015) 3 SCC 49 Supreme Court explained the limit of challenge to an Arbitral Award on the ground of it being in conflict with "Public Policy of India" in the following words:-

“33. It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. 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. In P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd. [(2012) 1 SCC 594 : (2012) 1 SCC (Civ) 342] , this Court held: (SCC pp. 601-02, para 21)

“21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.”

34. It is with this very important caveat that the two fundamental principles which form part of the fundamental policy of Indian law (that the arbitrator must have a judicial approach and that he must not act perversely) are to be understood.”

34. Once the Arbitrator has appreciated the evidence led before him, this Court cannot sit in an appeal over it and re-examine the facts to find out whether a different decision can be arrived at. In view of the above, the challenge to the Arbitral Award, so far as rejection of the claim of the petitioner towards deduction for slow moving/dead stock, cannot be sustained.

**CLAIM TOWARDS DEDUCTION ON ACCOUNT OF
TECHNOLOGICAL ADVANCEMENT OF Rs.1,66,00,000/-**

35. Learned counsel for the petitioner has submitted that the respondent had made arbitrary deduction on account of technological advancement against the value of the machine and the challenge against the said deduction has been arbitrarily rejected by the Arbitrator merely relying upon the report of the Surveyor. Placing reliance on the judgment of Supreme Court In *New India Assurance Company Limited v. Pradeep Kumar*, (2009) INSC 713, *United India Insurance Co. Ltd. v. M/s Pushpalaya Printers* (2004) 3 SCC 694 and *M/s Suraj Mal Ram Niwas Oil Mills. V. United India Insurance Co. Ltd.*, (2010) 10 SCC 567, it is contended that the 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.

36. There is no doubt on the above proposition of law, however, I find that in the present case the Arbitrator has taken into account that the machine, that was destroyed in fire, was no longer available in the market due to which the petitioner claims to have purchased a machine of higher capacity. Arbitrator, therefore, found that the proportionate deduction made by the Surveyor because of the purchase of high capacity machine was justifiable and cannot be said to be erroneous or fallible or not based on reason. It is therefore, not the case where the Arbitrator has simply relied upon the report of the Surveyor. It is a case where the Arbitrator finds the report of the Surveyor to be correct and as following a reasonable approach. In my opinion, therefore, the above referred

judgments would be of no assistance to the objection raised by the petitioner. The same is, therefore, rejected.

CLAIM TOWARDS WRONGLY CHARGED
DEPRECIATION ON NON REINSTATED PLANT AND
MACHINERY OF RS.83,24,032/-

37. Learned counsel for the petitioner submits that by taking a fewer numbers of years as life of the plant and machinery, higher value of depreciation was arrived at by the Surveyor. This was contrary to the Schedule II-Useful Lives to compute depreciation under the Companies Act, 2013. It is submitted that in support, this provision having been drawn to the attention of the Arbitrator and a calculation sheet being given showing the overcharging of depreciation amount, the arbitrator has rejected the said claim, in an arbitrary manner.

38. On the other hand, learned counsel for the respondent submits that barring producing the extract of the above referred provision of the Companies Act and a chart based on such provision, there was neither any pleading nor any evidence led by the petitioner to show the life of the machine, in form of any brochures or material from the manufacturers or otherwise and therefore, the finding of the Surveyor, in this regard, has been rightly relied upon by the Arbitrator.

39. Finding of the Arbitrator with regard to the above claim is in paragraph 63 of the Arbitral Award, which is quoted herein below:

“63. I have heard the parties in this regard. It has been contended by the Claimant that the deduction on account of depreciation of non-reinstated machines should have been

taken as recommended by the Companies Act or following the depreciation or the basis of life span of the machines as per the certificate given by its manufacturer. However, no reason or calculation as to how the depreciation charged in respect of the Machines in question was on higher side is submitted nor the calculation in terms of the provisions of Company Law has been placed on record by the Claimant. The Surveyor RW2 has deposed that the depreciation was taken on the basis of operational life of the Machinery and equipment based upon its usage and maintenance and also relied on internal page 17 to 26 of the Joint Final Survey Report. I have not found any reason for forming a contrary view. Therefore, in the absence of any basis or calculation to show that the deduction made on account of depreciation of non-reinstated plant and machinery was on the higher side, this claim stands rejected as being not tenable.”

40. A reading of the above would show that the Arbitrator has come to the conclusion that surveyor report, so far as it relates to operational life of the machinery and equipments based upon it usages and maintenance, could not be shown to be unreasonable. It may be correct that the computation in terms of the provision of Companies Act has been placed before the Arbitrator, however, merely on that ground the finding of the Arbitrator cannot be upset by this Court in exercise of its power under Section 34 of the Act specially when, apart from making a reliance on the above mentioned provision, no other document or material has been shown as to the nature of the machine, and/or the amount of the depreciation claimed in the books of account etc. As stated above, the Arbitrator has relied on the deposition of Surveyor with regard to the above claim and I find no reason to interfere with such findings.

CLAIM OF INTEREST IN DELAY IN SETTLEMENT/PAYMENT

41. The petitioner has relied upon Regulation 9(6) of the IRDA Regulation. The same is quoted herein below:-

“9.Claim procedure in respect of a general insurance policy-

1. xxxx
2. xxxx
3. xxxx
4. xxxx
5. xxxx
6. *Upon acceptance of an offer of settlement as stated in sub-regulation (5) by the insured, the payment of the amount due shall be made within seven days from the date of acceptance of the offer by the insured. In the case of delay in the payment, the insurer shall be liable to pay interest at a rate which is 2 per cent above the bank rate prevalent at the beginning of the financial year in which the claim is reviewed by it.”*

42. Relying upon the above, it is contended that the petitioner was entitled to interest on the delayed payment inasmuch as the report of the Surveyor had been received by the respondent in August 2013, whereas the payment of Rs.20,41,60,835/-was released only on 16.12.2013 and the remaining amount of Rs.1,88,78,410/- was released only on 09.05.2014 i.e. much beyond the period of 7 days as stipulated in Regulation 9(6) quoted above.

43. Learned counsel for the respondent has drawn my attention to paragraph 27 of the Statement of Defence filed before the Arbitrator which shows that even after the Surveyor Report, the petitioner could not show the documents which would satisfy that they had made payment to

vendors. These documents were produced only under the cover of emails dated 13.12.2013 and 18.03.2014 and immediately after completion of formalities like NOC from Banker with whom the property in question was endorsed, payment had been released in favour of the petitioner on 16.12.2013 and 09.05.2014 respectively. It is therefore, submitted that there was no delay on part of the respondent in releasing the amount of claim in favour of the petitioner.

44. The Arbitrator has rejected the said claim. His findings are in paragraph 67 of the Award, which is quoted herein below:-

“67. I have considered the submissions. Even though there was a delay in release of amount of claim, the delay was not on account of any lapse on the part of the Respondent. It was incumbent on the Respondent to follow certain procedure of conducting survey and making proper assessment of loss before the amount is released. For the purpose of enabling expeditious settlement, it was for the Claimant to produce all the relevant documents/materials in time before the Surveyor. It is seen from the records that the initial payment of Rs.10 crores was received by the Claimant within a period of less than six months, despite delay in submission of the requisite documents by the Claimant for finalization of survey report which could be finalized only in August 2013 i.e., after 14 months. The payment of Rs. 10 crores within five months of the fire i.e. much prior to the finalization of Survey Report, was made only with a view only to help the Claimant. Therefore, the delay in payment / settlement was not occasioned by the delay caused by the respondent but by the Claimant. It is settled law that no person can take advantage of his own wrong. Hence, the claim put forth by the claim on account of interest for delayed payment does not merit consideration.”

45. The Arbitrator has, therefore, found that the delay in releasing the payment was due to failure of the petitioner to produce the relevant documents/material in time before the Surveyor. The Arbitrator has come to a finding that the delay in releasing the amount of claim was not on account of any lapse on the part of the respondent. I, therefore, find no merit in the said claim of the petitioner on this head or the finding of the arbitrator to be perverse in any manner.

46. In view of the above, I find no merit in the present petition and same is accordingly dismissed with no order as to cost.

NOVEMBER 22, 2017/vp

NAVIN CHAWLA, J

नस्यमेव जयते