IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 1714 OF 2014

JSW Steel Ltd. …Petitioner
vs
ICICI Lombard General Insurance Company Ltd. ...Respondent

Mr.Fredun Devitre, Senior Advocate with Ms.Alpana Ghone, Dharmesh Jain and Aamir Farroqui I/b. Anil T. Agarwal for Petitioner.
Mr.Soli K. Cooper, Senior Advocate with Ms.Ethel Pereira, Yohann Cooper, Aditi Prabhu and Vijay S. Tiwari I/b. Desai Desai Carrrimjee and Mulla for Respondent.

CORAM : S.C.GUPTE, J.

DATE : 19 DECEMBER 2018

ORAL JUDGMENT :

Heard learned Counsel for the parties.

2 This arbitration petition challenges a majority award passed by an arbitral tribunal of three arbitrators. By this award, the majority arbitrators partly allowed the Petitioner's claims, whilst rejecting them partly, under three insurance policies designated as (i) Standard Fire & Special Perils Insurance Policy, (ii) Comprehensive Mega Risk Policy; and (iii) Marine Export Import Insurance (Open) Policy. The Petitioner-claimant challenges the majority award for those parts of its claim which were rejected by the tribunal.

3 The Petitioner is engaged in manufacture of steel and has

plants at various locations, including one at Toranagallu in Vidyanagar, Dist. Bellary, Karnataka. The Petitioner had insured the plant and its operations therein under five different policies of insurance, all issued by the Respondent, including the three policies referred to above and two other policies titled as 'Erection All Risk Insurance Policy (10 MTPA)' and 'Erection All Risk Insurance Policy (Beneficiation Plant II-Phase I)'. It was the case of the Petitioner before the arbitral tribunal that heavy rains at the plant site on 1 October 2009 and flooding caused thereby in the plant resulted in damage to raw materials stocked at the plant as well as to the plant itself. It was the Petitioner's case that as a result, the Petitioner suffered loss which was covered by Standard Fire & Special Perils Policy. It was also the Petitioner's case that apart from the plant, three ports, namely, the ports of Gangavaram, Krishnapatnam and Goa, where stocks of raw material belonging to the Petitioner were awaiting transit to the Torangallu plant, experienced heavy rains on the same day, which resulted in damage to the material lying there. This damage was covered, according to the Petitioner, under the Marine Export Import Insurance (Open) Policy. It was also Petitioner's case that as a result of flood water coming into the pit, where the apron feeder of the plant was located, and filling of slurry caused by rainwater mixing with slush and raw material in the gaps of the drive and electrical/hydraulic motors of the apron feeder, operations of the feeder, and consequently of the plant, were impaired. The Petitioner claimed to have suffered, as a result, business interruption leading to loss of profit and increased cost of working. These claims were purportedly covered under the Comprehensive Mega Risk Policy. The Petitioner intimated its claims to the Respondent, who, after receipt of such intimation, appointed one Cunningham Lindsey International Pvt. Ltd. as a surveyor to assess the damage. It also appointed one Adarsh Associates as a joint surveyor for claims under Standard Fire and Special Perils Policy, Mega Risk Policy and Erections All Risk Policies and one J. Bashir & Associates as a joint surveyor under the Marine Export Import Insurance (Open) Policy. The Petitioner's claims aggregated to a sum of Rs.214.29 crores. The surveyors made the requisite surveys and prepared reports, accepting a part only of these claims. These reports were accepted by the Respondent insurer. Being dissatisfied, the Petitioner invoked the arbitration agreement forming part of the insurance policies and filed in all fourteen claims before the arbitral tribunal. (Though there was no arbitration agreement under the Marine Export Import Insurance (Open) Policy, the parties agreed to take even the claim under this policy before the same arbitral tribunal.)

4 Both parties led oral and documentary evidence before the tribunal. Two of the three arbitrators, by their majority award, firstly, granted five claims of the Petitioner on the basis of an agreement between the parties recorded in the course of the arbitration reference. These were for start up expenses of blast furnace, material damage at site, damage to civil work etc., house keeping and material damage under the all risks 10 MTPA Policy. In addition to these claims, the majority award allowed the claim for loss of stock (bulk raw materials) at site of Rs.10,00,00,000/- (as against the loss of Rs.76,45,19,411/-, later revised to Rs.66,33,54,715/-, claimed by the Petitioner), loss of allowances on account of quality of coal and coke at site in the sum of Rs.3,00,00,000/- (from out of Rs.7,05,42,030/- claimed by the Petitioner) and a sum of Rs.50,00,000/- on account of loss allowance on quality of coal at the ports (against the

Petitioner's claim of Rs.22,63,71,186/-, revised to Rs.22,37,77,643/-). As for the balance claims of the Petitioner, namely, loss of profit, increased cost of working, loss of stock (bulk raw materials) of coal at Gangavaram and Krishnapatnam ports, the claims were rejected. The last two claims, namely, claims for damage to civil works under 10 MTPA project and beneficiation plant-II, the learned arbitrators did not separately allow them, since, according to them, these damages were covered in the agreed amount of damage to civil works referred to above. The rejection, wholly or in part, of its claims as above has been challenged by the Petitioner in the present petition.

5 Mr.Devitre, learned Senior Counsel appearing for the Petitioner, submits that the Petitioner's major claim for loss of stock (bulk raw material) at site has been substantially rejected by the arbitral tribunal in an impermissible manner. Learned Counsel submits that the challenge court under Section 34 of the Arbitration and Conciliation Act, 1996 ("Act") is expected to consider whether the award agrees with the conscience of the court or shocks it. Learned Counsel submits that the term 'conscience' adverted to in this behalf implies 'commercial conscience' of the court; the court must assess whether the award or rejection of a claim is commercially tenable at all. In other words, according to Counsel, assessment of impossibility or perversity of the conclusion must be made from a commercial standpoint. On merits, it is submitted that the assessment of loss or damage by the majority arbitrators indeed contains an impossible conclusion. It is submitted that ever since inception of the plant as also the insurance contract between the parties, weight of raw materials lying at site at any given point of time was always gauged by a volumetric

assessment made by the Petitioner's valuers and assessors. With effect from at least 2002, such assessment was done by Quality Services and Sales ('QSS'). Learned Counsel submits that the weight assessment thus carried out was duly accepted by all parties throughout. It is submitted that though initially quantities of raw materials brought to site and sent to the plant were measured by actual weighment at site, towards the end of each month, these quantities were corrected in the records after volumetric assessment carried out by QSS by the end of each month. Learned Counsel submits that QSS had accordingly carried out volumetric assessment of weight both before and immediately after the insured event. Learned Counsel submits that this being the only available authentic record of quantity, which could sustain a claim for loss or damage under the subject insurance policy, the arbitrators were bound to accept this record. Learned Counsel submits that instead, what the majority arbitrators appear to have done is to have made some kind of a hybrid assessment of loss or damage. In the first place, the entire volumetric assessment and figures based on such assessment over the last many years were completely disregarded and instead, uncorrected weighment figures from the site were taken into account for assessing the quantity of raw materials, which was lying at site immediately before the insured event. On the other hand, so far as the post-event quantities of raw materials at site were concerned, the arbitrators went on to accept the volumetric assessment of QSS but without the density of the goods considered by QSS and worked out the total weight of raw materials based on volumes assessed by QSS but by applying densities found by another assessor and valuer appointed by the Respondent insurer to such volumes. In other words, learned Counsel submits, the pre and post event weights of raw material, the difference in which would obviously be a measure of loss or damage as a result of the insured event, were not calculated in a uniform manner or on a uniform principle. Whereas the original uncorrected weighment figures prior to the event were taken into account for working out weights of raw materials immediately before the insured event, the post event figures were derived from an admitted volumetric assessment but by disregarding densities of goods considered in such assessment and instead, by making use of density figures from an altogether different report. Learned Counsel submits that the figures of loss or damage worked out by the arbitrators by these means are wholly unrealistic and commercially untenable and incapable of giving any true estimate of loss or damage. Insofar as the claim of loss of profits is concerned, it is submitted that contrary to the mandate of the insurance policy, which required the insurer to take into account economic loss caused by the insured event, the arbitrators made their assessment of loss or damage only with reference to physical damage caused to the plant and machinery. Learned Counsel submits that this would be a wholly unacceptable and impossible interpretation of the contract of insurance. So also, as far as the claim of the Petitioner for loss of raw materials at the ports is concerned, learned Counsel submits that the arbitrators, for rejecting the claim, came to a conclusion which was either an impossible view, or a view which no fair or judiciously minded person could have arrived at.

6 Before we assess the merits of the Petitioner's contentions broadly referred to above, a few salient facts may be noted. The insurance policies, which we are concerned with in the present petition, do cover loss or damage caused to the Petitioner by heavy rains/floods. On 29

September 2009, it started raining heavily in and around Bellary District. The Petitioner's plant was located at Toranagallu in Bellary District. On 1 October 2009, during evening time, heavy rains incessantly lashed the District and adjacent areas. These incessant rains, continuing for almost 4/5 days since before 1 October 2009, led to heavy flooding or inundation of large swathes of land in Bellary District causing largescale loss of life and property. The total rainfall recorded on 1 October 2009 of 135.55 mm was the highest recorded in Toranagallu in previous ten years. As a result of these heavy rains/floods, extensive damage was caused, according to the Petitioner, to (a) raw materials lying at the plant site (by way of physical loss); (b) materials lying at plant site (by way of deterioration of quality); (c) the plant and machinery at site including an equipment called “apron feeder”, which operated the conveyor belt for movement of materials within the plant, (by way of impairment of functioning); (d) other equipments (by way of physical damage); (e) civil works under construction (by way of physical damage); (f) roads and other areas (by way of physical damage); and (g) operations of the blast furnace (as a result of its having to be shut down and restarted). Simultaneously, with such loss or damage at the plant site, the Petitioner's stocks of imported raw materials stored at the ports of Goa, Gangavaram and Krishnapatnam, also were lost or damaged. Oral telephonic intimation of such loss or damage was given on the very day, i.e. 1 October 2009, by the Petitioner to the Respondent insurer. This was followed up by a mail sent to the latter. On the very next day, i.e. on 2 October 2009, the Respondent's representatives and surveyors, one Cunningham Lindsey International Pvt.Ltd. ('CLIP'), reached the plant and started carrying out survey. Between 3 October 2009 and 6 October 2009, the Petitioner caused detailed intimations to be sent to the Respondent about the loss suffered by the former, requesting the latter to register its claims under the respective policies. On 5 October 2009, QSS carried out a survey of the stocks lying at the plant in the presence of representatives of CLIP for assessment of the loss suffered by the Petitioner. Another agency, SGS, who was appointed by CLIP, also carried out a survey. It is the Petitioner's case that unknown to the Petitioner, SGS appears to have submitted two reports to CLIP, one of which alone was disclosed to the Petitioner. CLIP chose not to accept the measurements carried out by SGS or rely on any of its reports. It is submitted that neither of the reports was tendered in evidence or was accepted in the arbitration reference, though one of the two reports was on record (without having been proved for its contents) as an attachment to another document on record. After carrying out the survey, on or about 10 October 2009, QSS submitted its report. It is the case of the Petitioner that the Respondent and its representatives failed and neglected to decide the Petitioner's claims and kept on demanding irrelevant data, causing an indefinite delay in assessment of the claims. In the premises, by a letter dated 19 February 2010, the Petitioner invoked the arbitration agreement and nominated its arbitrator to decide the disputes. The Respondent nominated its arbitrator. The two arbitrators appointed the third arbitrator and accordingly, the panel of arbitrators came to be constituted. The arbitral tribunal, as noted above, by its majority award, partly rejected the Petitioner's claim and awarded a total sum of about Rs.17 crores along with interest as against its claim of over Rs.126 crores. The third arbitrator concurred and agreed with the majority award in respect of all claims except two. By his dissenting award, the third arbitrator awarded a total sum of Rs.35,78,27,305/- along with interest, accepting these two claims.

Partly, as noted above, the majority award directs payment of certain claims on the basis of an agreement reached between the parties, and partly allows three claims of the Petitioner for (i) loss of stock (bulk raw materials) at site, (ii) loss of allowances on account of quality of coal and coke at site and (iii) loss of allowance on account of quality of coal at Ports, in the sums, respectively, of Rs.10 crores, Rs.3 crores and Rs.50 lakhs, whilst rejecting altogether its four claims for (i) loss of profit, (ii) increased cost of working, (iii) loss of stock (bulk raw materials) of coal at Gangavaram Port and (iv) loss of stock (bulk raw materials) of coal at Krishnapatnam Port. Claims for damage to civil works (i) under 10 MTPA Project, and (ii) at beneficiation plant-II were not separately allowed as they were said to be included in the broader claim of damage to civil works, etc. which was awarded on agreement between the parties.

7 At the hearing of the petition, learned Counsel for the Petitioner made detailed submissions on three particular claims of the Petitioner which were rejected, or only partly allowed, by the majority arbitrators. The first is the Petitioner's claim for loss of raw materials at the plant site under the Standard Fire & Special Perils Insurance Policy; the second was the claim for loss of profit and increased cost of working under the Comprehensive Mega Risk Policy; and the third was the Petitioner's claim for loss of stock (bulk raw materials) at the ports of Krishnapatnam and Gangavaram. These claims and the arbitrators' assessment of the same are considered separately in the following paragraphs.

Claim for loss of stock at site :

8 It was the case of the Petitioner that several raw materials, including lumps and fines of coal and coke of various degrees, iron ore including iron refines, dolomite, DRI, FRE, pellets, sinter, quartzite, mill scale, manganese ore, limestone and other similar raw materials, used to be stored at the plant site in the open throughout the year. These were supplied to various parts of the plant for the manufacturing process as and when required. These raw materials were stacked in heaps/stacks and were recovered with the help of stacker/reclaimer units installed at the stock yards and fed to the plant through a conveyor system as and when required. It was submitted that as a result of heavy rains and flooding/inundation at the site, a large quantity of raw materials was washed away or lost. The original estimation of such loss in the sum of Rs.76,45,19,411/- was later revised by the Petitioner to Rs.66,33,54,715/-. The surveyors assessed the total shortfall in quantity at 36,763 MT at a gross value of Rs.6,79,12,162/-. Deducting 5% as loss applicable to act of God perils from it, the net loss was worked out by the surveyors to Rs.6,45,16,554/-. The arbitrators broadly accepted the surveyors' assessment but were of the view that there were minor errors in assessment of loss, for example, in respect of products such as mill scale. Considering these, the arbitrators awarded a round figure of Rs.10 crores towards this claim, i.e. for loss of raw materials at site.

9 The major dispute between the parties pertains to assessment of loss in terms of quantities in metric tonnes. The Petitioner's case broadly is that the arbitrators have wrongly, that is to say, in an impermissible manner, assessed the loss in terms of weight in metric tonnes. It is submitted that weight of raw materials received at plant site was always

recorded in oracle computer system in the plant. When the raw materials were issued to the plant for manufacturing process, they were likewise weighed at a belt weigher and weights were recorded manually. Based on these measures, net weights of raw materials at site used to be worked out. These weights were subject to several errors and liable to be revised/reconciled. It is submitted that for this purpose stocks of raw materials were also physically measured by QSS between 25th and 27th of each month. The measurement was a volumetric measurement. QSS would measure the volumes and making use of respective densities of raw materials work out the weights. These were updated by adding new receipts and deducting new issues of materials upto the end of each month to get the figures of stocks at the end of each month. The weighment data maintained at the plant and the measurements found by QSS (updated as above) were reconciled every month. It is submitted that there would be some difference between the two, but that would be negligible compared to the overall volume of materials handled; it was always within an acceptable margin of error for any measuring system. It is submitted that accordingly, updated and reconciled data pertaining to the quantity of raw materials at site was available as of the date of the flooding/inundation. It is submitted that QSS also assessed the quantity of materials existing at site after the event of flooding/inundation by the same method, i.e. by volumetric assessment. The loss in terms of quantity in metric tonnes was then calculated by comparing the two figures, that is to say, the figures of quantity prior to the event of flooding and the figures immediately after the event. The arbitrators did not accept the assessment of QSS either for pre-event or for post-event quantities. The reasons for such non-acceptance were stated by the arbitrators in the award. According to the arbitrators, the raw materials were stacked in heaps. A heap, as per common knowledge, had roughly an ovoid footprint, tapering as it rose. According to QSS, by measurement of length, breadth and height of the heaps, volumes of different raw materials could be worked out. These would be based on dimensions of a virtual rectangular box. Due to, however, their irregular shapes, no particular heap of raw material would actually fill all parts of that virtual rectangular box. If one were to compare actual shapes of the heaps with the virtual rectangular box considered for such measurement, one would find several spaces within the rectangular box unoccupied. These would have to be deducted from the whole to arrive at the correct cubic content of the heaps. The arbitrators found that this was not done. One particular witness (Shrinivas), who was an employee of Inspectorate Griffith, the agency engaged to measure the quantities, explained in his evidence that if quantities were to be assessed by a conventional method making use of volumetric measurement, stock piles would have to sub-divided into known geometrical shapes "by imaginary assumption" and then allowances would have be made for irregular shapes. Another witness of the Respondent deposed that vacant spaces within the virtual rectangular box would have to be visually assessed and deducted. The arbitrators were of the view that none of this was explained, or deposed to, by any QSS representative in his evidence; but even if one were to assume that such visual assessment and corresponding deduction of areas of unoccupied spaces were actually carried out, measurement by this method could only give a rough and ready assessment of the cubic content of the heaps. The arbitrators compared the actual weighment method to this volumetric assessment. After considering the evidence of the parties before them, the arbitrators were of the view that actual weighment method would have a much better accuracy. The arbitrators noted the evidence of one witness (Gandhi) that though actual weighment method might have some inaccuracy, it would be nowhere near as unsatisfactory as the volumetric assessment made by QSS which was by "tape measure and pole method". The arbitrators were of the view that for assessment of loss suffered by the claimant, actual weighment method must, therefore, be preferred. Rejection of the tape measure and pole method and preference instead of the actual weighment method, by themselves, cannot be termed as impossible views or views, which no fair or judiciously person could arrive at or views which might shock the conscience of the court even in a commercial sense. The arbitrators had before them two methods of measuring quantities of stocks at site. They had the oral evidence of witnesses on the relative merits of these two methods. Based on their assessment of such relative merits on an analysis of the material placed before them, if the arbitrators were to hold that one particular method should be preferred over the other, it certainly denotes a possible view based on pragmatic considerations. There is nothing shocking or illegitimate about it. Besides, there was one more important factor which appears to have weighed with the arbitrators for rejecting the volumetric assessment by QSS. There was a huge difference in actual weighment figures and reconciled figures of QSS for the period upto September 2009 compared to the period thereafter, namely, of about 1,74,261 tonnes between April 2008 and March 2009 and about 2,46,705 tonnes between April 2009 to September 2009 as against the difference of only 7269 tonnes for the period between October 2009 and March 2010. There was no explanation either in the correspondence or in the evidence for such huge difference. This was one of the reasons why the arbitrators found the assessment of weight of raw materials by the volumetric method of QSS as unreliable and the rejection of the claim based thereon by the assessors as right.

10 Having found the actual weighment method to be preferable, the arbitrators had to arrive at individual figures of quantities of stocks both pre and post the event. The arbitrators had before them the contemporaneously recorded data of actual weighment of stocks of raw materials both when received in the stock yard and when sent to the plant for manufacturing process. The arbitrators used such actual weighment data recorded for a total period of 18 months prior to the event, that is to say, between 1 April 2008 and 30 September 2009. This data, considered without its revision/reconciliation based on volumetric assessment of QSS, would have given the quantity of stock at site just before the event purely by actual weighment method. The arbitrators considered the submissions of the parties on the accuracy of this data. The arbitrators noted that none of the Petitioner's witnesses had deposed about any loss of raw materials in the course of handling or because of pilferage or malfunctioning of any weighing equipment at any time. The arbitrators noted that the Petitioner's own evidence was that the log books maintained at the plant would have recorded if any weighing equipment had not been functional. The arbitrators noted that yet no log books had been produced. The arbitrators, accordingly, saw no reason why the decision of the surveyors to assess the raw materials on the basis of actual weighment figures available at site should not be upheld. Besides, since the arbitrators were of the view that the only reliable data for assessing the loss was the actual weighment figures recorded at site, they did not deem it be possible to work out the

figures of loss or damage without taking into account such recorded figures; there was no other reliable data available to the surveyors for working out the loss or damage. As much as the method for assessment of actual quantities, namely, the actual weighment method, even the actual quantities worked out on the basis of that method by the arbitrators cannot, thus, be faulted on the ground of perversity or impossibility. Acceptance of quantities based on actual weighment recorded at site throughout 18 months immediately preceding the insured event, by disregarding the revision or reconciliation based on volumetric assessment of QSS, which the arbitrators did find fault with in terms of reliability or accuracy, may certainly be termed as a fair and judicious assessment, sustaining a possible decision.

11 Having worked out pre-event quantities, the arbitrators had to calculate the post-event quantities, to arrive at the difference between the two which could be termed as actual physical loss caused by the event. As far as these latter quantifies are concerned, there were admittedly no weighment figures available at site. The arbitrators noted that, in the premises, weights could be assessed only by volumetric assessment, since volumes could always be measured at site, and were indeed measured immediately after the event, and correct figures of density of individual raw materials could then be applied to such volumes, for working out the weights of raw materials existing at site by mathematical calculations. Weight being a function of volume and density, assessment of weights based on correct volumes and densities was indeed possible. The arbitrators, as much as the surveyors, disregarded the assessment of volumes of stocks by SGS, since that assessment was admittedly carried out

much after the event, by which time additional stocks would have been added to existing stocks, and diverse quantities would have been issued from stock piles to process areas, since the plant was running all this while. The arbitrators, therefore, went by the volumes of stocks actually assessed by QSS immediately after the event. Assessment of such volumes being in keeping with the claimant's own case, there could be nothing to object so far as the correctness of the volumes is concerned. The bone of contentions between the parties is the measures of density used for calculating the weights of stocks from the volumes assessed by QSS. As for the measures of density, the arbitrators noted that the evidence on record showed that at least until a month before the event of flooding, densities of raw materials stored at the plant assumed by QSS were those that were provided by the Petitioner. In other words, QSS never claimed to have measured the densities themselves; densities were a matter given by the Petitioner. The arbitrators then noted the Petitioner's evidence that it had not ascertained actual densities of raw materials from time to time, but always took constant density figures throughout. The Petitioner's witness (Khera) had stated that whenever a new raw material was introduced, its density was measured and since not much variation in density would be expected, it was kept constant for subsequent receipts. The arbitrators noted that the witness' statement that no variation would be expected was made on the basis of what was told to him by the Petitioner's technical personnel but no technical person was called or examined in this behalf. The arbitrators, in the premises, instead preferred bulk densities worked out by SGS to those applied by QSS. They accepted the evidence of the Respondent's witness (Gandhi) that densities were measured by both QSS and SGS in the same way, that is to say, by filling raw materials in containers of measurable volumes and then weighing them and working out bulk densities based on such data of volume and weight. The arbitrators accepted the Respondent's evidence that though methods used by SGS and QSS were same, accuracy itself depended upon the location from where samples were collected, how composite samples were prepared and how containers were filled, all this depending on the experience of the person preparing the samples. The arbitrators, in the premises, accepted densities assessed by SGS, since they were based on measurements carried out on actual materials taken from the site after the event. The arbitrators accepted the assessors' assessment by applying the densities reported by SGS to the volumes measured by QSS and derived the weights of the post-event stocks lying at site based on such assessment. This, again, can very well be termed as a possible view of the material placed by the parties before the arbitrators. There is nothing inherently wrong or shocking about such assessment. Learned Counsel for the Petitioner submits that the report of SGS, which was placed by the Respondent before the arbitral tribunal, was not proved; no witness was examined for its correctness. SGS had indeed carried out the entire analysis of weight based on measurements of volume and density. The Respondent's evidence broadly showed that. Formal rules of evidence, which are applied in courts of law, do not bind arbitrators. Based on the material placed before them, which included the report of SGS working out weights based on measurements of volumes and densities, if the arbitrators were to accept the figures of density in the report and prefer them over QSS figures, which were merely nominal or notional and, admittedly, not actual, no serious fault can be found with such assessment. It cannot be said that the arbitrators' conclusion in this behalf is supported by no evidence. As long as there is some evidence, which is capable of supporting the arbitrators' finding, the challenge court does not have to make any further inquiry. Sufficiency of evidence for sustaining a particular finding is, without doubt, within the province of the arbitrators and not for the challenge court to assess under Section 34 of the Act.

Claim for loss of profit and increased cost of working :

12 Coming now to the second important aspect of the challenge, namely, non-consideration of economic loss caused by the insured event and assessment of loss or damage only to the extent of physical damage caused to the plant and machinery, it is important to note at the very outset that the only question involved here is of interpretation of the contract of insurance. The controversy effectively concerns whether the loss or damage covered under the policy of insurance envisages only physical loss or damage to the property of the insured within the premises described in the schedule or does it include loss or damage arising from inability of any part of the plant to operate normally. The insured property described in the policy was covered in three sections. Section-I covered "*all permanent and temporary property of the insured and/or for which they have an insurable interest and/or may otherwise be interested in case of fortuitous and accidental physical loss or damage covered under this policy whilst contained in the premises as specified in the schedule*". Section-II included all machinery and equipment including electrical or electronic machinery of the insured's plan including spare parts within the expression "*property of the insured*". Section-III, which is pivotal for deciding the controversy on this issue, provided indemnification of the insured "*in respect of loss of gross profits, the loss actually sustained during the indemnify*

period resulting from a reduction in turnover including any increased cost of working due to an interruption of the insured's business following loss or damage to any property and/or assets insured and recoverable under Section-I".

13 The submission of the insurer is that loss of profits resulting from reduction in turnover due to interruption of the insured's business, referred to in Section-III, must be the result of "*loss or damage to any property and/or assets insured and recoverable under Section-I*". Accordingly, it is submitted that any event leading to interruption of business and resultant reduction in turnover must be occasioned by "*fortuitous and accidental physical loss or damage*" covered under Section-I. The insured contends otherwise. According to the insured, the occasion for interruption in the insured's business could be any loss or damage to property or assets and this loss or damage includes any loss or damage occasioned by any property or asset being prevented from operating normally or optimally by reason of the insured event. The machinery we are concerned with in the present case is the apron feeder used for conveying raw material from the stock yard to process areas in the plaint. As we have noticed above, the slurry formed by rain water mixed with raw materials and earth being stuck in the apron feeder drive and motors, its functioning was impaired leading to sluggish movement affecting the rate of delivery of materials and this resulted in loss of profit and increased cost of working. It is submitted that though for making the apron feeder operational, what was required was only removal of water from the pit and cleaning and drying of the apron feeder, which was but a minor repair job and did not involve any large sum of money, and in that sense, there was

no physical damage to the apron feeder, due to flooding of rain water and mixing of the same with earth and residue of raw material causing a slurry, which filled the apron feeder and its motors, the performance of the apron feeder was impaired, affecting the plant operations. Any business interruption resulting from this damage, which led to reduction in turnover and caused loss of profit, is covered under Section-III.

14 The arbitrators had to interpret the relevant clause in the insurance contract dealing with 'insured property', i.e. the three sections referred to above. The arbitrators considered judgments relied upon by the claimant on this issue as well as a publication of Insurance Institute of London cited before them. The publication describes "damage" and "loss" in different contexts of individual claims. It, however, asserts in general terms that "damage" must be damage to tangible property, as opposed to pure economic loss (which is generally not thought to be insurable on its own). The publication goes on to say that there must be 'physical alternation or change in the characteristics of the property' rendering it less useful or valuable and/or which requires some remedial work or expenditure of money to restore the property to its former useable condition. This damage need not be permanent; as long as there is physical alteration, for example, surface contamination or defacement needing to be cleaned, it can still constitute "damage". The claimant relied on these last observations in the publication. Apropos of these observations, a footnote is added below them, which *inter alia* cites the judgment of a learned Single Judge of the Queens Bench Division (Commercial Court) in **Losinjska Plovidba Vs. Transco Overseas Ltd and**

others[1]. In this case, the learned Judge, whilst referring to the meaning of the word "damage", referred to as relevant consideration, the question whether or not there has been "injury impairing value and usefulness" of the property and/or need for work and expenditure of money to restore the property to its former useable condition. The other authority of court cited was the case of **M.V. Elisabeth & Others Vs. Harwan Investment and Trading Pvt. Ltd.**[2], dealing with the word "damage" appearing in Section 443 of the Merchant Shipping Act, 1958. In that case, the Supreme Court, whilst construing the expression "damage" under Section 443, held that it was wide in terms and not necessarily confined to physical damage; damage could not only be caused by physical contact of the ship such as in collusion but also by breach of contract or acts of commission or omission on the part of the carrier or his agents or servants by reason of negligent operations or management of the vessel.

15 Considering this material placed before them, the majority arbitrators held that the slurry alleged to have been stuck in the apron feeder had to be removed and the apron feeder cleaned but that no claim for such repairs of the apron feeder had been made. The arbitrators held that this was supportive of the fact that there was no evidence of breakage of any machine part in the apron feeder or any rent in a cable; nothing had to be replaced or repaired or mended and there was not even the use of a special material in the claiming process. The arbitrators held that once the cleaning process was complete, the apron feeder was back in operation. Upon these facts, the arbitrators held that there was no "damage" to any part of the plant and under the terms of the relevant policy, the insurer

1 (1995) 2QB 395
2 (1993) Supp. (2) SCC 433

could not be held liable to the insured in respect of any claim for loss of profit or increased cost of working as a result of the alleged impairment in functioning of the apron feeder. The minority arbitrator, on the other hand, held that the expression “damage” was not capable of any precise sense; there would be numerous circumstances, which might comprehend the expression “damage”. The minority arbitrator held that considering the facts and circumstances established in the present case and applying the principles laid down in the decisions cited before the tribunal, the apron feeder equipment and wagon tippling operation station could be said to have suffered 'damage' as contemplated under Section-III of the policy. The minority arbitrator thereupon went to consider the quantum of loss of profit and increased cost of working and awarded a sum of Rs.16,18,67,305/- towards the same.

16 The views expressed by the majority arbitrators and the minority arbitrator on the interpretation of the word “damage” appearing in Section-III of the description of the insured property, are both possible views. It may well be that the view taken by the minority arbitrator appears to be the better of the two. In fact, if I were hearing this matter as a court of first instance, or even an appellate court, I might have in all probability concurred with the view of the minority arbitrator. But that is not my mandate sitting as a challenge court under Section 34 of the Act. As the Supreme Court has held in **Associate Builders Vs. Delhi Development Authority**[3], though the arbitral tribunal is required to decide the controversy before it in accordance with the terms of the contract, if the tribunal were to construe the terms of the contract in a reasonable manner,

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3 2014(4) Arb. L.R. 307(SC)

the award could not be set aside on the ground of erroneous construction of contract. As the Supreme Court put in **Associate Builders**, “construction of any term of a contract is primarily for the arbitrator to decide and unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do”, there is nothing for the challenge court to interfere with. The Supreme Court, in this behalf, has quoted observations in **McDermott International Inc. Vs. Burn Standard Co. Ltd.**[4], which reiterate that interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. The court has also quoted the following observations in **MSK Projects (I)(JV) Ltd. Vs. State of Rajasthan**[5], in this behalf :

> “If the arbitrator commits an error in construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not alloted to him, he commits a jurisdictional error.”

17 Applying this law, I cannot persuade myself to hold that the majority arbitrators have taken an impossible view or a view which no fair or judiciously minded person would take. Even if I were to treat this as an error in the construction of the contract, it is still an error within the jurisdiction of the arbitrators; it does not amount to wandering outside the contract or committing any jurisdictional error. It squarely falls within the power or authority of the arbitrators. The view taken by the arbitrators is a possible view; the arbitrators have construed the contract in a reasonable manner and not in an impermissible manner as understood by law. There

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4 (2006) 11 SCC 181

5 (2011) 10 SCC 573

is accordingly no warrant to interfere with it.

Claim for loss of goods at the Ports :

18 As for the claims for loss of goods at the ports, the majority arbitrators considered the claims port-wise, and they are accordingly considered below.

19 The surveyors had rejected the claim for loss of stock bulk raw materials at Krishnapatnam Port on the ground that there had been no heavy rains at the port on the particular day when the loss was said to have occurred due to heavy rains. The arbitrators noted that the onus of proving that there was heavy rainfall at Krishnapatnam Port on 1 October 2009 leading to loss of stocks lying there was on the Petitioner. The arbitrators noted that this was particularly so having regard to the fact that the surveyors had, first, in their correspondence and, then, in their survey reports, refused to accept this position. The arbitrators considered the evidence produced by the Petitioner in this behalf. The arbitrators held that the evidence of the claimant's witness (Simhadri) did not establish that there was any heavy rainfall at Krishnapatnam Port on 1 October 2009. The arbitrators noted that the witness, on his own admission, was not in Krishnapatnam on that day; he had admitted in his cross-examination that he had not collected any meteorological data from the Port Authorities for the period between 1 October 2009 to 5 October 2009; the witness had also admitted that he had not been instructed by his management to collect such data. The arbitrators noted that the best evidence that there was heavy rainfall would have been a certificate from

Meteorological Department of Krishnapatnam Port. The arbitrators observed that no correspondence was produced by the Petitioner showing that it had made any application to the Port Authorities for a certificate of the rainfall on 1 October 2009 and the outcome of any such application. The arbitrators rejected the Petitioner's Counsel's submission that there was admission of heavy rainfall by the Respondent's witness (Gandhi). The arbitrators observed that if the relevant paragraph, which was alleged to contain such admission, were to be read in full, it would be clear that there was no such admission by the witness. The arbitrators, accordingly, held that the claim for loss of goods on account of heavy rainfall at Krishnapatnam Port was not established.

20 As for the loss of goods claimed at Gangavaram Port, the arbitrators noted that the fact that there was heavy rainfall at Gangavaram Port on 1 October 2009 was not really in dispute and that it was reasonable to assume that part of raw material lying in stacks at the Port would have been drained away. The arbitrators noted that what was questioned was the quantity of each of these raw materials which were washed away. The arbitrators noted that an employee of the Petitioner's own surveyors, who had measured the stocks at the Port (Inspectorate Griffith India Pvt. Ltd.), had given evidence. The arbitrators noted from his cross-examination that short delivery certificates from Port Authorities at Gangavaram Port were not produced by the Petitioner. After quoting the relevant part of the witness's cross-examination, the arbitrators noted that though the surveyors had asked the Petitioner to obtain such short delivery certificates, the latter did not do so. The arbitrators drew an adverse inference that this was not done for the reason that such certificates would not have

supported the Petitioner's claim. The arbitrators considered one more factor in this behalf. The surveyors had expressly addressed communications to the Petitioner noting *inter alia* that a quantity of cargo had still remained on board two vessels and asked that the delivery thereof be taken after intimation to them so that they could remain present and record the details of that delivery but that the Petitioner had not complied with that request. In the absence of the best evidence of the alleged shortfall, which would have been short delivery certificates from the Port Authorities, this was how the arbitrators considered the evidence produced by the Petitioner. The arbitrator, on such consideration, observed that they were not satisfied with the genuineness of the Petitioner's claim for loss of goods at Gangavaram Port and, accordingly, rejected the claim.

21 These are indeed possible views. Whether or not there was loss of goods on account of heavy rains on 1 October 2009 and what was the extent of loss, if any, were matters of fact. The arbitrators have duly assessed the evidence and come to a possible view. The arbitrtors' award in this behalf cannot be termed as a view which no fair or judiciously minded person could have taken on the basis of the material or a view that would shock the conscience of the Court. No interference is, accordingly, warranted with even this part of the award.

22 Accordingly, there is no merit in the challenge to the impugned award. The arbitration petition is, in the premises, dismissed. No order as to costs.

(S.C. GUPTE, J.)