

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

+ **O.M.P. (COMM.) 129/2017**

Reserved on: 2nd April, 2018
Date of decision : 17th July, 2018

NATIONAL INSURANCE CO LTD Petitioner

Through: Mr.Sudhir Nandrajog, Sr. Adv.
with Mr.Kishore Rawat and
Mr.L.K.Tyagi, Advs.

versus

SHARP MENTHOL LTD Respondent

Through: Mr.Saurabh Kirpal, Mr.Nikhil
Rohatgi, Mr.B.Dhawan Rohatgi,
Mr.Shashank Khurana, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the Arbitral Award dated 21st July 2011 (hereinafter referred to as the 'Impugned Award') passed by the Arbitral Tribunal comprising of three Arbitrators. The Impugned Award directs the petitioner herein to pay to the respondent an amount of Rs.3,70,46,874/- with pre-award as well as future interest.

2. The respondent company being a manufacturer of Menthol crystals, Menthol powder and other essential oils from Crude Mentha Oil (CMO), sought insurance of their factory for Fire and allied perils located

at C-15, SMA Co-operative industrial Estate, Delhi-110033. The said factory was insured for Fire and Allied perils vide two separate Fire Policies; (a) Fire Insurance Policy “C” No. 360800/11/330101/97 issued by the petitioner, which was co-insured with Oriental Insurance Co. Ltd, with the petitioner’s share at 60%, (b) Fire Insurance Policy “C” Cover No. 471571 dated 22.1.1998 issued by Oriental Insurance Co. Ltd. with no co-insurers. The Impugned Award is passed in Arbitral Proceedings in which Fire Insurance Policy “C” No. 360800/11/330101/97 (herein after referred to as ‘Fire Policy’) forms the subject matter.

3. The aforesaid Fire Policy issued by the petitioner insured the respondent for an amount of Rs. 18,40,00,000/- for a period ranging from 13th October 1997 to 12th October 1998. The breakup of the Items insured is given below:

<i>Sr. No.</i>	<i>Item</i>	<i>Sum Insured Rs.</i>
1.	<i>“On Building”</i>	<i>1,00,00,000</i>
2.	<i>“On F.F. Fittings and electrical & Sanitary fittings electrical installation office equipments and machines”</i>	<i>30,00,000</i>
3.	<i>“On Plant, Machinery & its accessories tools and Lab equipments etc”</i>	<i>1,00,00,000</i>
4.	<i>“On Stock of raw material of various type, semi-finished and finished goods, goods in process and packing material etc.”</i>	<i>16,00,00,000</i>
5.	<i>“On D.G.Sets”</i>	<i>10,00,000</i>
	<i>Total</i>	<i>18,40,00,000</i>

4. On the other hand the policy issued by Oriental Insurance Co. Ltd. insured the respondent for an amount of Rs.3,00,00,000/- for a period ranging from 22nd January 1998 to 22nd January 1999. The policy insures Stock of raw material of various types of semi finished and unfinished goods, goods in process, packing material used in manufacture of Menthol. Therefore, the respondent was insured for an Amount of Rs 19 crores with respect to 'Stocks' under both the policies in the ratio of 16:3.

5. It is the case of the respondent that on 16th June 1998 at about 3.45 p.m. when the factory was working normally, the workers in the distillation/filtration section of the plant noticed heavy smoke accompanied with flames coming out from the storage-cum-mixing tank. On noticing the fire, the workers raised an alarm and started fighting the fire with the help of fire extinguishers. Simultaneously, the fire room of the Fire Brigade was informed about the same and ultimately the fire was brought under control at 6.00 pm on the same day and was extinguished soon thereafter. This fire led to damage of the goods and stock of the respondent.

6. Since the stocks lying in the insured's factory premises were insured both by National Insurance Co. Ltd. and Oriental Insurance Co. Ltd. by separate policies, the above two insurers independently appointed the following two pairs of Surveyors to assess the loss on their behalf. The assessment of loss on stocks was carried out jointly by all 3 surveyors mentioned below:

<i>Name of Insurers</i>	<i>Surveyors appointed</i>
<i>a) National Insurance Co. Ltd.,</i>	<i>i) General Insurance</i>

<i>Divisional Office No.XIX, Delhi-110033</i>	<i>Surveyors B-605, Ram Vihar, Sector-30, Noida- 201 303 (U.P.)</i> <i>ii) Mehta & Padamsey Surveyors (P) Ltd., 7, Jantar Mantar Road, New Delhi-111 001</i>
<i>b) Oriental Insurance Co. Ltd., Divisional Office No.XI, Delhi- 110 033</i>	<i>i) General Insurance Surveyors B-605, Ram Vihar, Sector-30, Noida (U.P.)</i> <i>ii) R.N.Sharma & Co. FD-33, Vishakha Enclave, Pitampura, Delhi-110034</i>

7. Before advertizing further, the manufacturing process adopted by the respondent, as explained by the Joint Survey Report, is reproduced as under:

“3. The manufacturing process involves conversion of Crude Menthol Oil to Menthol Crystals/Powder and D.M.O. (Dementholised Mentha Oil). The Crude Mentha Oil which is the input raw material, is distilled in distillation columns (4 nos. installed at the Insured’s Plant under reference). After distillation, the distillate is chilled in refrigeration tanks, where the process of crystallization is initiated and completed. The solution containing the Crystals is centrifuged to separate the Crystals from the D.M.O. While the Crystals are subject to natural drying in trays; the D.M.O. is sieved to separate the menthol powder from clear solution of D.M.O, Both the products, namely D.M.O. and Menthol Powder are subjected to recycling for higher yield.”

8. The Surveyors in their Joint Survey Report assessed the loss suffered by the respondent as under:

“X SUMMARY OF LOSS ASSESSED/ADJUSTED LOSS

<i>Item of loss</i>	<i>As per Physical Verifications</i>	
	<i>Assessed Loss Rs.</i>	<i>Adjusted Loss Rs.</i>
<i>1. Building</i>	<i>251208</i>	<i>251208</i>
<i>2. Plant & Machinery</i>	<i>1360559</i>	<i>787464</i>
<i>3. Stocks (as per physical verification)</i>	<i>8865821</i>	<i>7825328</i>
<i>Total</i>	<i>10477588</i>	<i>8864000</i>

9. The respondent being aggrieved of the assessment of the loss suffered on account of stocks, raised a dispute which has been adjudicated by the Arbitral Tribunal by its Impugned Award.

10. The Arbitral Tribunal in its Impugned Award has held that though in the Joint Inventory conducted on 17/18.06.1998, that is, immediately after the fire, it had been agreed that there were 628 drums lying in Godown No.1 and 2 which contained Crude Menthol Oil (CMO)/ Dementholized Oil (DMO) and were unaffected, it had further been

agreed that samples would be drawn from these drums so as to verify their contents, however, this was never done. The respondent vide its letters dated 27.10.1999 and 15.11.1999 claimed that these drums did not contain CMO/DMO but in fact contained Terpene which had NIL value and therefore, called upon the Surveyors to draw samples and have the same chemically analysed. The Surveyors, however, refused to carry out such sampling and tests, which, in the opinion of the Arbitral Tribunal was a violation of the duties and responsibilities of Surveyors and loss Assessors as mandated in Regulation 13(2)(vi) of the Insurance Surveyor and Loss Assessor (Licencing, Professional Requirement and Code of Conduct) Regulations issued by the Insurance Regulatory and Development Authority (IRDA). The Arbitral Tribunal therefore, allowed the claim of the respondent for the entire quantity of 10400 kg of CMO @ Rs.385/- per kg, totalling to Rs.40,04,000/- and 29,600 kg of CMO in storage tank @ Rs.385/- per kg having cost of Rs.1,13,96,000/-. The relevant findings of the Arbitral Tribunal on this issue are reproduced herein below:

“11. There is no denial, on part of the Respondent, that the fire did not break out in the factory and the goods of the Claimant have not been destroyed in the fire, which is also clear from the DD No. 23 A dated 16.06.1998 P.S. Jahangir Puri and DD No. 32 B dated 16.06.1998 P.S. Jahangir Puri placed at page no 10 and 9 of the documents respectively produced by the claimant and also letter dated 12.8.1998 written by the Division Officer (Fire) Delhi Fire Services which is Annexure -5 at page no. 11 wherein it has been written under paragraph no. 3 which is reproduce as under for facility: “Fire was in Menthol Factory, area approx. 2600 Sq Meters where

Menthol periment oil, mixing tanks, filter process, filing pumps, vacuum pumps, S. S. pump, weighing machine, water pumps, C. C. T. V. camera, Telephone instruments, spare parts tools, motors, record rooms, electric fitting etc burnt and building structure are damaged by light and water. No injury at fire scene." In view of the above, it is clearly proven, that due to the fire Menthol product has been burnt and destroyed and for the loss sustained by the claimant due to the fire must be made good by the Insurance Company because the policies of the Insurance are taken in good faith and the company must maintain that good faith. It is also observed that in their Joint Survey Report itself, the Surveyors have written at page no. 23, that, "The assessment of loss worked out by us as shown in this report was discussed with the insured orally. Unfortunately, they have not agreed with us. Hence, this Report may be treated as our independent report, based on the fair assessment of loss." Upon further going through the contents of the said Joint Survey Report along with annexures & attachments thereof, in great detail, we find that the same is based on conclusions arrived at without following proper procedure and collecting the evidence. The said Joint Surveyor Report, in our considered and joint opinion, is inconclusive, based upon no evidence and based entirely upon speculation, imagination, surmises and without any legal basis.

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13. The first part of the dispute raised by the Claimant pertains to the Joint Inventory Report signed jointly by the Managing Director of the Claimant Company and the Surveyors. We observe that the same was signed on 18.6.1998, just two days after the date of loss. In view of the 628 drums involved, it is not possible to have tested the contents thereof. Sh. Deepak Bhan, Surveyor & Loss Assessor of M/ s. General Insurance Surveyors (RW-2) admitted during cross examination that it was never agreed that quantities lying in the drums as unaffected stock would

be ascertained on the basis of average of stock statement submitted to bankers, contrary to the contention of the Claimant and the details mentioned in the Joint Survey Report. He also admitted that no samples were taken to confirm the contents in the said drums. He further stated that it was the joint responsibility of both the Insured and the Surveyors to draw samples, which we do not agree with. He also admitted having received the letters dated 27.10.1999 (CEX/P-12) and 15.11.1999 (CEX/P-14) from the Claimant wherein the Claimant had expressly advised the Surveyors that the material contained in the 628 drums lying in their Godowns I & II, which had been designated as CMO/DMO in the aforesaid Joint Inventory Report dated 18.6.1998 was in actual fact a residue named Terpene of nil value and invited the Surveyors to ascertain the same by drawing samples therefrom and chemically analyzing the same.

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The Surveyors were given the task of assessing the loss and it was their responsibility to draw samples from the said drums and ascertain the nature of contents thereof. Also, according to Sec. 13(2)(vi) of the Insurance Surveyors and Loss Assessors (Licencing, Professional Requirements and Code of Conduct) Regulations, issued by the Insurance Regulatory & Development Authority (IRDA) one of the duties and responsibilities of a Surveyor and Loss Assessor is the, "estimating, measuring and determining the quantum and description of the subject under loss." In a loss involving chemical products, the "description of the subject under loss" is determined by ascertaining the physical & chemical properties of the said chemical products. It was therefore the expressed duty & responsibility of the Surveyors to draw samples from the said drums and determine the nature of their contents, which the Claimant had advised them was Turpene and not CMO/DMO. However, during the entire period from the date of loss on 16.6.1998 till 18.2.2000 when they issued their Joint Survey

Report, the Surveyors chose not to draw samples from the said 628 drums for chemical analysis. In the light of the above discussion, it cannot be said that the Claimant never objected the line of action of the Surveyors as it is clear that the Claimant such actions on part of the Surveyors were very much objected and impeached by the claimant at every available point of time. The Claimant had also offered taking of the samples of the stock to come to a real conclusion, but the sample was never taken by the Surveyors. So the claimant cannot be blamed for not offering to give the samples of the stock and which was the basic duty of the Surveyors which they did not discharged by them. Even the Joint Final Surveyor Report Ex. RW2/6 has not been accepted by the Claimant, wherein on page 23 we find the remarks that, "The assessment of loss worked out by us as shown in this report was discussed with the insured orally. Unfortunately, they have not agreed with us. Hence, this Report may be treated as our independent report, based on the fair assessment of loss". Moreover, the joint inspection was only regarding the unaffected stock and not of the affected stock. Upon careful consideration of facts and the evidence on record, we are of the view that the Surveyors deliberately chose not to carry out the chemical analysis of the said material and carried out their assessment on basis of a hastily tabulated Joint Inventory Report dated 18.6.1998, which was not based on sound facts and therefore unreliable and we hereby reject the said Joint Inventory Report. At the same time, we agree with the Claimant's contention that the residual material in the drums was Turpene and not CMO and that the said quantity of CMO was destroyed in fire and hereby allow the cost of the entire quantity of 10,400 kgs of CMO in distillation columns @ Rs.385/kg having a cost of Rs.40,04,000/- and 29,600 kgs of CMO in the storage tanks @ Rs.385/kg having a cost of Rs.1,13,96,000/-, which was destroyed in fire as claimed by the Claimant."

11. A reading of the above findings would show that the only basis of making of the Award in favour of the respondent is the denial of the Surveyors to carry out the sampling and test of the contents of 628 drums that were reported unaffected in the Joint Inventory Report dated 18.06.1998.

12. As far as the refusal of the Surveyors to carry out such sampling and chemical analysis is concerned, the learned senior counsel for the petitioner, in my opinion rightly so, submitted that the Arbitral Tribunal has failed to consider that the Joint Inventory Report dated 18.06.1998 was signed by the respondent without any protest or demure. The respondent sought to challenge the said report for the first time only by its letter dated 27.10.1999, which is 16 months after the signing of the Joint Inventory Report. During this entire period these 628 drums had remained in possession of the respondent and therefore, there was absolutely no way of verifying that the contents of these drums had not been tampered with. Learned senior counsel for the petitioner, therefore, rightly contented that the Surveyors cannot be faulted for not agreeing to conduct the sampling and chemical analysis of the contents of these drums at this belated stage. This issue of delay in making of the request by the respondent for sampling and chemical analysis of the contents of the drums has not been adverted to by the Arbitral Tribunal. In my opinion, this was one of the most crucial aspects of the claim.

13. Learned senior counsel for the petitioner has also drawn my attention to the cross-examination of Mr.Sanjay Singhal, Managing Director of the respondent, specifically to the following:

“Q. When the joint inventories were prepared and it was signed by you along with the Surveyors did you object or protest to the Surveyors that they had not included all the items available at the site.

A. YES. I did

Q. Can you show any letter to that effect?

A. I did not make anything in writing.

Vol. The contents in the drums were not taken into consideration while preparing the joint inventory.

Q. When the Surveyors had not taken the contents of the drums in the said inventories did you make any note in the inventory itself which was signed by you that the contents were not considered by the Surveyors.

A. NO. I did not make any objection in writing at that time. However, subsequently we had been on every meeting it was agreed that the Surveyor that we should ascertain what is the product in the drums. Because it was a lengthy process and each drum has to be tested and two hours of test is required on each drum which was carried out. We were told to do the testing of each drum and submit it to them to ascertain what product is there in it. That fact has never been recorded by them.

Question by Arbitral Tribunal

Did you carry out the test.

A. We carried out the test jointly with the Surveyors but it was not reduced into writing.

Objected to beyond pleadings.

Objections shall be considered at the relevant staged.

Q. When this test was carried out in the presence of the Surveyors, as you said above, was not reduced in writing did you ever bring this to the notice of the Surveyors or the Insurance Company in writing that the Surveyors have not recorded the test result in writing.

A. We have given them a letter

Q. Please show.

A. Letter dt 15.11.1999 has been shown by the witness to the Ld. Counsel for the Respondents which is already placed at Page 147 of the case file.

Q. I put it to you that in this letter dated 15.11.1999 there is no mention of the test being conducted and that the Surveyors have not put the same in writing. Is it correct or not?

A. The fact of the testing by Mr. Bhan was completely ignored in the letter given to us by Mr.Mehta Padamsee dt.1.11.1999. In replying to that letter we had categorically stated to them that the Surveyors should have carried out this test by themselves and which was ignored in the letter dt 1.11.1999 by the Surveyors.

Q. You said that the test was conducted and thereafter the Surveyors did not put in writing. Did you file that report with the Insurance Company or the Surveyors with regard to the test conducted?

A. The report of the test was to be filed by the Insurance Surveyor Mr. Bhan and not by us.

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() I got conducted the test in our own Laboratory in the presence of Mr. Shan the Surveyor. The Laboratory situated within the premises of our company.*

() I do not remember the date of starting the tests in the Laboratory and I even don't remember how longer the tests continued.*

() The test started immediately after the fire broke in our factory.*

() All the records of the test were in writing which were handed over to the Surveyor permanently.*

() We did not get any acknowledgement of the handing over the record of the test to the Surveyor.*

Q. Whether at any stage you had written either to the Insurance Company or to the Surveyor that these test reports have been handed over to the Surveyor.

A. There was no reason for me to write it so."

14. A reading of the above cross-examination of the witness would show that the witness was taking contrary plea while answering the questions. In any case, if the witness of the respondent was to be

believed, that the contents of the 628 drums had in fact been tested not only in his presence but also in the presence of the Surveyor Mr.Bhan at the respondent's laboratory, there was no justification for the respondent not to have produced these test results. His statement that such report had been handed over to the surveyor cannot be believed in the absence of any particulars regarding when and where and to whom such report was handed over and without any written acknowledgment of receipt thereof. In any case, this matter was to be considered by the Arbitral Tribunal. A reading of the Impugned Award would show that these facts have not been adverted to by the Arbitral Tribunal in its Impugned Award.

15. Learned counsel for the respondent has submitted that even in the Joint Inventory Report dated 18.06.1998, it had been reported that these drums contained CMO/DMO. He submits that there is vast difference in the value of CMO/DMO and therefore, it had been agreed that the Surveyor would be carrying out a joint sampling and chemical analysis of the contents of these drums so as to arrive at a correct valuation of the loss suffered by the respondent. He submits that admittedly such sampling and analysis was not done by the Surveyors and therefore, the Arbitral Tribunal was right in awarding the claim in favour of the respondent.

16. I am unable to agree with the submission of the learned counsel for the respondent. The Surveyors in their final report dated 18.02.2000 have not made the assessment of the loss of stock suffered by the respondent on the basis of contents of the 628 drums. The Joint Survey Report, for the purpose of assessing the loss has made valuation on the

basis of physical examination of the affected and unaffected tanks. The Surveyors took the physical measurement of the dimension of the tanks and the height to which the tanks were filled at the time of fire based on the telltale ring marks seen on the internal wall of the affected tanks. The Surveyors further refused to rely upon the books of account produced by the respondent on the ground that the respondent, during the inspection immediately after the fire, had informed the Surveyors that they are not maintaining any stock record/register whereby separate quantity of DMO/CMO could be worked out at any given time. The value of the unaffected stocks later submitted by the respondent was found to be unreliable as the respondent had changed the description/ nomenclature and quantities of some of the high value items of the stock at their end and there was also a difference between actual cost price as per the record and the cost price taken by the respondent in its calculation. The Surveyors further took note of the fact that till 27.10.1999 the respondent had maintained the position that they were maintaining the cash book, general ledger, purchase register and sales register in the computers, however, all supporting records up to financial year 1997-98 had been burnt to ashes whilst lying in the servant room located in the factory. The Surveyors, on the basis of the Insured's available records including balance sheet for the previous years and stock statements submitted to the bank, worked out the valuation of the entire stock at Rs.16,13,13,903/-. It was only on 27.10.1999 that the respondent claimed that they were also maintaining stock registers for raw materials and finished goods in the computers pertaining to the period of 01.04.1998 onwards. The Surveyors thereafter conducted an analysis of the stock registers for raw

materials and also finished goods and came to the conclusion that the same cannot be relied upon and seems to have been generated by the respondent later only for the purpose of inflating its claim.

17. The Surveyor's in their report refused to place reliance on the Stock Register produced by the respondent, observing as under:

“From the above analysis, it may be observed that the Insured claims to have been maintaining separate head in the Stock Register for insignificant items of Raw Material, such as Pipe ita oil, Terane, Basil Oil, Anethole and Spearmint oil, but they have not found it logical and appropriate to bifurcate the stocks of Menthol Crystals & Menthol Powder into two distinct items of inventory, especially, when the said two items of stocks, together constitute 21.66% of the total purchases made from 01.04.1998 to 16.06.1998 in monetary terms.

Further, after detailed analysis, and discussions, with the Insured, we were constrained to conclude that the so called Stock Registers shown to us by the Insured were just to notionally satisfy the requirement of maintenance of Stock Records. The reasons as to why these Stock Registers were not found representative of the actual stock position of the Insured are as under:

i) The quantities shown to have been received as per the Stock Register for the various items of Raw Materials have been picked up by the Insured from the purchase vouchers/bills. It was found that most of the purchases made by the Insured, are on “cash basis”. Therefore, the documents in support of the purchases made appear to have been generated by the Insured internally, and hence cannot be largely corroborated from third party evidences. Despite this, we have placed reliance upon these purchases, as there was nothing at our disposal to prove that the same had been fabricated.

ii) *The quantities shown to have been issued by the Insured, in these Stock Registers were not supported by any document/records whatsoever. The figures taken by the Insured in the column of “Issues”, therefore are unauthenticated.*

d. The quantities received and issued are the only two primary components, which determine whether we could take the records shown to us by the Insured as a genuine Stock Register. As we could not place reliance upon the quantities issued, irrespective of whether we take the quantities received as correct or not; the basic character of the Stock Registers is lost. Hence, the Stock Registers claimed to have been maintained by the Insured, are not acceptable as truly representing the stock position.”

18. This portion of the Surveyors Report has again not been discussed and in fact not even been adverted to by the Arbitral Tribunal in its Impugned Award.

19. In any case, in my opinion, the Arbitral Tribunal has not given any finding on whether the stock register produced by the respondent could be relied upon for awarding its claim. The Arbitral Tribunal has, as noted above, allowed the claim only on the sole basis that the Surveyors refused to carry out the sampling and chemical analysis of the contents of the 628 drums. In my opinion, this itself could not have been sufficient to prove the claim of the respondent for the loss of the stock.

20. The Supreme Court, in ***United India Insurance Co. Ltd. and Ors. v. Roshan Lal Oil Mills Ltd. and Ors.*** (2000) 10 SCC 19, while setting aside an order passed by the National Consumer Disputes Redressal Commission, held as under:

“7. The appellant had appointed joint surveyors in terms of Section 64-um (2) of the Insurance Act, 1938. Their report has been placed on the record in which a detailed account of the factors on the basis of which the joint surveyors had come to the conclusion that there was no loss or damage caused on account of fire, was given and it was on this basis that the claim was not found entertainable. This is an important document which was placed before the Commission but the Commission, curiously, has not considered the report. Since the claim of the respondent was repudiated by the appellant on the basis of the joint survey report, the Commission was not justified in awarding the insurance amount to the respondent without adverting itself to the contents of the joint survey report specially the factors enumerated therein. In our opinion, non-consideration of this important document has resulted in serious miscarriage of justice and vitiates the judgment passed by the Commission. The case has, therefore, to be sent back to the Commission for a fresh hearing.

21. In ***Sikka Papers Ltd v. National Insurance Co. Ltd.*** (2009) 7 SCC 777, Supreme Court held that though it is true that the Surveyor’s report is not the last word but then there must be legitimate reasons for departing from such report. In the present case, as discussed above, I find that no legitimate reason has been given by the Arbitral Tribunal for its refusal to accept the Surveyor’s report.

22. The next challenge of the petitioner is to the award of Rs.2,72,61,144/- in favour of the respondent towards the loss of 55,863 kg of Menthol Powder in the fire. The Joint Surveyors in their final report dated 18.02.2000 have noted that initially the respondent had claimed that the Menthol Powder was lying in the room on the rear right

corner of the factory, however, subsequently in the claim bill, the respondent claimed that it was lying in the affected process block on the floor. The relevant noting of the Surveyors in this regard is reproduced herein below:

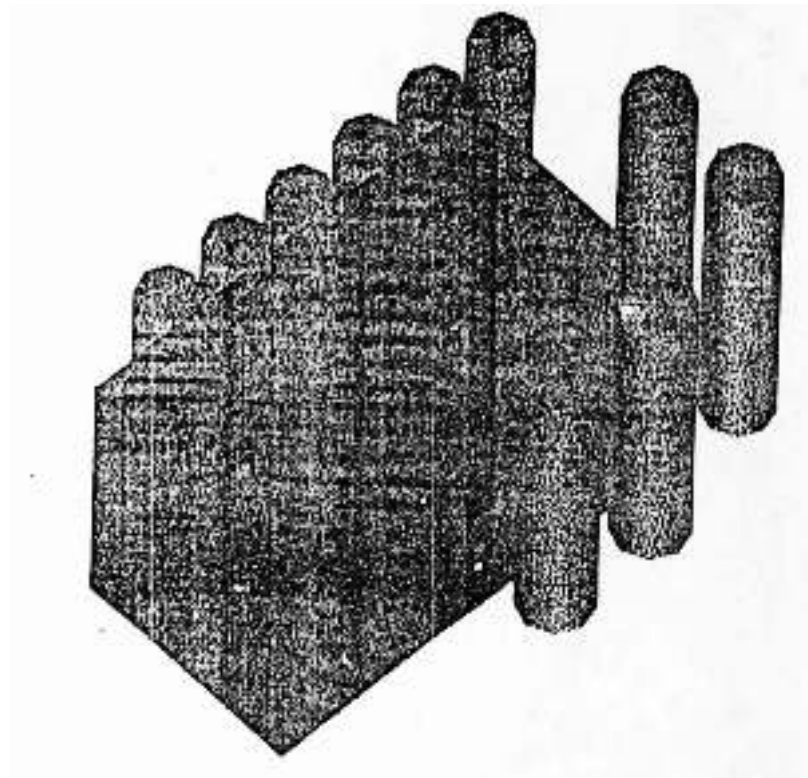
“2. The menthol powder, claimed by the Insured as burnt, was initially reported to be lying in the rooms at the rear right corner of the factory; but subsequently, when the claim bill was received; the Insured submitted that the stock of 'Menthol Powder' was lying in the affected process block on the floor. In view of the changing stand 01 the Insured and the quantum involved, we have had to deal with this part 'of the claim at length.

While we were jointly inspecting these rooms, we expressed that the rooms clearly showed signs of being used as restrooms/night shelter by the workers, and not as contended by the Insured, namely for storage of menthol powder. At this stage we wrote to the Insured requesting them to submit a layout drawing indicating therein the location where the menthol powder, alleged to have been completely destroyed in the fire, was stored in the factory. Subsequently, when the Insured submitted their formal claim bill alongwith the drawing, the menthol powder was shown marked as lying in the process block. The shift of stand, as regards the location of the stock of menthol powder, allegedly completely destroyed in the fire, and shown as lying in the process block, is indicated in the enclosed drawing (marked E-1) provided by the Insured. The claim bill submitted by the Insured, wherein the stock of menthol powder, allegedly completely destroyed in the fire, amounting to Rs.2,72,61.142/- and its location, was not in line with the verbal disclosures made by the Insured at the time of our survey. During initial inspection of the fire affected premises, the Insured informed us 'that the menthol powder was destroyed while lying in the rooms at the rear right corner of the factory, as has been mentioned earlier in the report. At this stage of the claim, the Insured 'had

submitted their claim bill alongwith part of the documents requested by us. Since we had to source the balance of documents from the Insured, and also to carry out verification of accounts and related documents, for which Insured's co-operation was necessary, we chose to focus our work on verification of records rather than dealing with the aspect of loss/location of menthol powder. This was done primarily to ensure that we continue to receive Insured's cooperation and to be able to solicit balance information/records. At this stage, we deferred dealing with the changing stands of the Insured viz. the alleged loss on account of menthol powder in terms of quantum as well as location where such stock was lying.

3. After carrying out detailed verification of records and getting Insured's definite stand in writing on the alleged loss of menthol powder in terms of the quantity and its location, we have carried out detailed analysis of correctness of Insured's contention in terms of physical properties of the stocks, volumetric analysis and 3D space analysis etc. Our analysis and observations in this regard are elaborated as follows :-

- a) Regarding the availability of space for storage of menthol powder in the process area one can readily recognize the constraint on space in the process area. The Insured's contention to store such an enormous quantity of menthol powder in the process block (refer shaded area indicated in drawing **Marked E-1**, where the stock of menthol powder was allegedly stored), and considering that the process block temperature is highly adverse for storage of such material, we like to draw attention to huge quantity of barrels which were found stored along the boundary wall on three sides of the factory as shown in picture below:*



b) *During the course of survey of the barrels and the nature of contents in them, the Insured for the purpose of keeping the value of unaffected stocks after the fire on the lower side, contended that the barrels contained De-mentholised Mentha Oil (DMO) which is of considerably lower monetary value than Crude Mentha Oil (CMO); their rates being Rs.202.56 per kg and Rs.379.53 per kg respectively. The total stock of contents of these 2173 nos. barrels was jointly inventorised at 419040 kgs. If evaluated at the rate of De-mentholised Mentha Oil, as per Insured's contentions, the inventory of stock in barrels would work out to Rs.84880742/-. If one compares the value of this inventory in barrels, amounting to Rs.84880742/- with the inventory of menthol powder allegedly stored in the process block, as claimed by the Insured at Rs.27261144 /-, and considering that the volume of storage space occupied by the barrels was over 7000 cft, as compared to the storage space allegedly used for storage of menthol powder in the process block, estimated at 3165 cft (considering a stacking efficiency of 70%); it leads to the obvious question of the*

prudence in deciding to utilize the area inside the process block which is at an elevated temperature for storage of high value stock for which such temperatures are highly detrimental in contrast to utilizing lower temperature area outside for storage of low value inventory of De-mineralised Mentha Oil in barrels (as contended by the Insured).

- c) The floor area in the process block, where the menthol powder was allegedly stored, and damaged in the fire, did not show any signs of such stock after the fire, as can be seen in the photographs enclosed.*
- d) We were therefore inclined to conclude that no stocks of menthol powder claimed as lying on the floor of the affected process area, had in fact burnt/ damaged in the fire.*

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*2.9 As regards the Insured's claim of **55863 Kgs** (valued at Rs.27261144/- by the Insured) of Finished Menthol Powder (reportedly in plastic bags/drums) lying in the affected process area of the factory, we have to state as follows:*

a) The first visitors to the site from the Insurance Company and the Surveyors (M/s R N Sharma & Co.) did not find evidence of any such material at the site, including burnt remnants of bags/drums etc.

b) The material is not inflammable and is only slightly soluble in water.

c) The fire lasted for about 2 hours only. Such a large quantity of about 55863 Kgs of this relatively non-hazardous material, could not have been burnt totally, leaving no trace of its former existence, in a fire of this magnitude and duration. The entire quantity could also not have been dissolved in water, as the material is only slightly soluble in water.

d) During our subsequent visits to the factory after the fire, we found that there used to be no storage of

such raw materials in gunny &/or plastic bags &/or drums within the affected process block. It indicates that it was not the practice of the Insured to store such bags in this area.

e) This material has a melting point of about 41⁰ C maximum. In summer, the ambient temp in Delhi goes above 40⁰C on some days. Coupled with this, the heat generated in the process block, will increase the temp. in the process block further. Under these conditions would it be prudent for the Insured to keep the material in bags within the process area.

f) They have front-open shed just outside the process block, where we found that the material in bags being stored during our subsequent visits. This place of storage is appropriate for the storage of such material, and not the process block.

g) The space within the working block was extremely limited due to the installations of various process vessels, tanks etc., and the free space available was barely adequate for movement of workers.

h) The place in the process block, where the said material in bags/drums was reportedly kept, is located right in front of the vessels (in which the fire originated) and is so small and also close to the door, that any storage of material here would block the movement of men and materials in and out of the process block.”

23. A reading of the above quoted Surveyors Report would indicate that the only reason for rejecting the claim of the respondent was the shifting of the stand of the respondent with respect to the stock of Menthol Powder and the view expressed by the Surveyors to the prudence of storage of Menthol Powder at the process area.

24. On the other hand, the Arbitral Tribunal in its Impugned Award states that the reasoning given by the Joint Surveyors is not correct and thereafter on basis of the assessment carried out by the Income Tax Authority, has awarded an amount of Rs.2,69,25,966/- in favour of the respondent. The relevant findings of the Arbitral Tribunal in this regard are reproduced herein below:

“14. The second part of the dispute raised by the Claimant pertains to the loss of 55,863 kgs Menthol Powder packed in plastic bags/plastic drums and under storage in the affected premises, which as claimed by the Claimant was totally burnt and destroyed, but which was partially allowed by the Respondent. The Respondent has contended that as per the contents Of the Joint Survey Report the said loss is not payable on account of the following reasons,

- (a) The fire affected area did not show evidence of the said material having been burnt, the same having been non-inflammable and no-non soluble in water.*
- (b) The high temperature in the process block did not merit its being stored therein.*
- (c) The fire lasted for about two hours and it was not possible for such a large quantity of the said material to have been destroyed in that time frame.*
- (d) During subsequent visits by the Surveyors, the said product was found to be stored elsewhere in the factory premises.*
- (e) Space in the process block was limited and did not warrant storage of the said material therein.*

We do not find merit in the aforesaid averments of the Respondent due to the following reasons,

- (i) The devastation caused by the Fire lead to the buckling of the roof & walls of the building as also steel distillation columns. It is entirely possible that given the flammable nature of the materials present in the affected process block, the resulting temperatures*

were extremely high, leading to the burning and destruction of such a large quantity of Menthol Powder in the space of two hours, given its physical and chemical properties. RW-2 admitted during cross examination that he could not ascertain the time taken for such a quantity of the said material to be burnt.

(ii) The large quantity of water used in the fire fighting operations, deployed at high pressure would certainly be responsible for the washing away of the burnt material, even if non soluble in water. In order to find evidence of residual material in the process block, the Surveyors should have taken samples therefrom and chemically analysed them for such evidence. However according to the testimony of RW-2 no such samples were taken. Hence the contention of the Respondent that no evidence of the said material having been burnt in the process block is without any basis.

(iii) It has been confirmed from textual evidence of chemical industry that the storage temperature did allow the storage of the product, without harming its 'physical and chemical properties.

(iv) The reasons relating to paucity of space in the process block and the change in storage area subsequent to the fire are also without merit and may be attributed to ease of operation on part of the Claimant.

Moreover, it is also relevant to observe here and also as admitted by the Managing Director of the Claimant Company, Shri Sanjay Singhal, that the entire loss was considered by the Income Tax officer for the assessment year of 2000 to 2001 and specifically asked the claimant vide questionnaire of 12.11.02 for furnishing complete details of loss on sale of fixed assets and details of fire claim. The said questionnaire dated 12.11.02 is Ext.P 38. A

reply to this questionnaire was given through the C.A. of the Claimant company vide letter dated 16.12.02 and the incident of fire loss sustained on account of fire and the necessary book entries carried out. The income tax authorities accepted the loss on account of this fire and gave assessment order was ext P 40. It is pertinent to mention that no cross examination of the Shri Singhal was done by the respondent. The income tax authority is a quasi judicial authority and its finding has a persuasive value. This also clinches the issue of the loss in favour of the claimants." Based on the reasons mentioned hereinabove, we allow the loss of the entire quantity of 55,863 kgs of Menthol Powder @ Rs.482/kg amounting to a sum of Rs.2,69,25,966/-."

25. Learned senior counsel for the petitioner has based his reliance on the Joint Surveyors Report to contend that the case set up by the respondent that Menthol Powder was stored in the process area could not be believed. On the other hand, learned counsel for the respondent has submitted that the Arbitral Tribunal constituted of experts and therefore, their opinion on this issue cannot be challenged by way of a petition under Section 34 of the Act.

26. In my opinion, once the loss of Menthol Powder was reported immediately after the fire, merely because the respondent shifted its stand with respect to the location of the same, was not sufficient to deny the claim of the respondent. It was not the case of the Joint Surveyors that no such stock of Menthol Powder could have been stored in the premises of the respondent and, therefore, destroyed in the fire. It was also not the case of the Surveyors that in the inspection carried out immediately after

the fire, Menthol Powder was found stored in some other location as well. As noted above, the only objection of the Joint Surveyors was to the location of this powder and their opinion that it would not be prudent for an industrial unit to store such powder in the process area of the factory. This opinion of the Joint Surveyors having been considered by the Arbitral Tribunal and rejected, it would not be open for this Court to reconsider the same while exercising its power under Section 34 of the Act.

27. As held by the Supreme Court in *Sikka Papers* (Supra), Surveyor's report is not the last word and can be departed from for legitimate reasons.

28. In *National Insurance Company Ltd. v. Oriental Structural Engineers Ltd.*, 2012 (131) DRJ 178, this Court had upheld an Arbitral Award where the Arbitral Tribunal had given cogent reasons for departing from the Surveyor's report.

29. In view of the above, the finding of the Arbitral Tribunal, so far as it relates to loss of Menthol Powder in fire, cannot be faulted. This finding, would thereafter lead to the question of valuation of the said loss. As noted above, the Arbitral Tribunal has based its Award on the basis of the acceptance of computation of the loss by the Income Tax Officer and the books of accounts produced by the respondent before the Surveyors. As far as the books of accounts are concerned, as noted above, the Surveyors had refused to rely upon the same giving various reasons. The Arbitral Tribunal has not considered these reasons or given any finding as to whether the books of accounts produced by the respondent can be

relied upon. Merely because the Income Tax Authority has accepted the claim filed by the respondent, it cannot be said that the same was binding on the Arbitral Tribunal or that the claim of the respondent was proved thereby.

30. Another important issue that would have a bearing on this case is that, as noted earlier, there were two distinct insurance policies taken by the respondent; one from the petitioner and other from the Oriental Insurance Company Limited. There were two sets of Surveyors appointed by the Insurance Companies. It is the case of the petitioner herein that the Surveyors appointed by the Oriental Insurance Company Limited also arrived at the same conclusion of loss with respect to the stock. The same was settled by the respondent with Oriental Insurance Co. Ltd. based on the Joint Survey Report and therefore, in the submission of the petitioner, the respondent cannot challenge the Surveyors Report in the present case. This submission of the petitioner was rejected by the Arbitral Tribunal holding as under:

“10. The Counsel for the Respondent has also argued that the Claimant is estopped now to put forward any claim because they have accepted the amount paid by the Oriental Insurance Co. Ltd. to the tune of Rs.12,73,325/- and the same is based upon the Joint Survey Report of the surveyors as full and final settlement. On the other hand, the Counsel for the Claimant Sh. Arvind Sharma argued that the same is just a settlement with the Oriental Insurance Co. Ltd. in relation to another Contract of Insurance, which is separate and distinct from the Contract of Insurance, which is the subject of dispute before us and any settlement made vide another distinct and separate Contract has no bearing on the proceedings before this Arbitral Panel. We have considered the

arguments of both the parties and have also gone through the case file. We find that, as discussed vide para (1) hereinabove, the said factory was insured for Fire and allied perils vide two separate Fire Policies, (a) Fire Insurance Policy "C" No. 360800/11/330101/97 issued by the Respondent, which was co-insured with Oriental Insurance Co. Ltd, with the Respondent's share being 60% and (R/P-1) (b) Fire Insurance Policy "C" Cover No.471571 dated 22.1.1998 issued by Oriental Insurance Co. Ltd., Divisional Office XI, Delhi, with no co-insurance. The dispute being adjudicated by us pertains to the Insurance Contract vide Fire Insurance Policy "C" No. 360800/11/330101/97 issued by the Respondent (R/P-1). The Claimant has separately dealt with the Insurer in the aforesaid other Insurance Contract vide Fire Insurance Policy "C" Cover No.471571 dated 22.1.1998 issued by Oriental Insurance Co. Ltd., Divisional Office XI, Delhi and has fully and finally settled with them in respect of the liability arising out of the same, which has no bearing on the present disputes before us, contrary to that argued by the Respondent in their written arguments submitted to this Arbitral Panel. National Insurance Company Ltd. has been constituted under Companies Act and is governed by a Licence issued under The Insurance Act, 1938. The policy taken by the Insured and given by the Insurer is also statutory and governed by the provisions of the Indian Contract Act 1872. The Fire Policy "C" was taken under the said Act and the rights and liabilities shall be governed by the Policy itself. According to Condition no. 13 of the Policy if there is any difference arising as to quantum to be paid under the policy (Liability being otherwise admitted) such difference shall independently of all other questions be referred to the decisions of a single Arbitrator or an Arbitral Panel to be appointed in writing by the parties to the dispute. Now in the present case, there is a difference of quantum in the payment of Insurance Claim to be paid and the invoking of the Arbitration Clause, according to the Policy Clause is referable for the Arbitration and

hence, it is a Statutory Arbitration. Therefore, the arguments of the Counsel for the Respondent is not accepted regarding the estoppel because there is no estoppel against the Statute which has been held in "AIR 1979 Supreme Court 1725 in CIT v. B. N. Bhattacharjee, as under "The soul of estoppel is equity, not facility for inequity. Nor is estoppel against statute permissible because public policy animating a statutory provision may then become the casualty." Halsbury has noted this sensible nicety where a Statute, enacted for the benefit of a Section of the Public, imposes a duty of positive kind, the person charged with the performance of the duty cannot by estoppel, be prevented from Exercising his Statutory Powers. Estoppel only applies to a contract inter Parties and it is not competent to Parties to a contract to estopped themselves or anybody else in the face of an act. So even if, any settlement has been done by the Claimant with Oriental Insurance Co. Ltd. in another Insurance Contract distinct from the Contract under reference to us and got the payment as a settlement, the Claimant is not estopped from invoking the Arbitration Clause against National Insurance Co. Ltd., being his statutory right. Hence, the argument of the Counsel for the Respondent that after taking the said amount of settlement from The Oriental Insurance Co. Ltd. under another Insurance Contract, the Claimant is estopped from going to Arbitration against National Insurance Co. Ltd. is untenable and hereby rejected as the Claimant has rightly invoked the Arbitration Clause against National Insurance Co. Ltd. under the Insurance Policy "C" No.360800/11/330101/97 issued by the Respondent."

31. In my opinion the Arbitral Tribunal is not right in its above conclusion. The acceptance of the surveyors assessment/report by the respondent as far as its claim against Oriental Insurance Company is concerned, was an important and relevant factor to be considered while

adjudicating the claim made by the respondent. The respondent should have been called upon to explain why the same assessment was accepted by it with respect to the Oriental Insurance Company Limited, while it was not accepted with respect to the petitioner, especially as claim in both the policies pertained to the loss suffered by the respondent on account of loss of stock in the fire. There was no question of estoppel against statute being set up by the petitioner and the Arbitral Tribunal has completely misapplied the said principle to the facts of the present case.

32. In view of the above, the Arbitral Award, in so far as it assesses the claim of Menthol Powder lost in fire at Rs.2,69,25,966/- cannot be sustained and is set aside. While it is true that this Court in exercise of its power under Section 34 of the Act, would not act as a Court of appeal, an Award based on no evidence cannot be sustained.

33. The petitioner has further challenged the Award of compound interest @ 12% awarded by the Arbitral Tribunal in favour of the respondent.

34. In ***Hyder Consulting (UK) Ltd. vs. Governor, State of Orissa*** (2015) 2 SCC 189, the Supreme Court has discussed the Arbitral Tribunal's power to award post-award interest as follows:

“21. In the result, I am of the view that S.L. Arora case is wrongly decided in that it holds that a sum directed to be paid by an Arbitral Tribunal and the reference to the award on the substantive claim does not refer to interest pendent lite awarded on the “sum directed to be paid upon award” and that in the absence of any provision of interest upon interest in the contract, the Arbitral Tribunal does not have the power to award interest upon interest, or compound interest either for the pre-award period or for

the post-award period. Parliament has the undoubted power to legislate on the subject and provide that the Arbitral Tribunal may award interest on the sum directed to be paid by the award, meaning a sum inclusive of principal sum adjudged and the interest, and this has been done by Parliament in plain language.

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26. *Section 31(7)(a) of the Act deals with grant of pre-award interest while clause (b) of Section 31(7) of the Act deals with grant of post-award interest. Pre-award interest is to ensure that arbitral proceedings are concluded without unnecessary delay. Longer the proceedings, the longer would be the period attracting interest. Similarly, post-award interest is to ensure speedy payment in compliance with the award. Pre-award interest is at the discretion of the Arbitral Tribunal. While the post-award interest on the awarded sum is mandate of the statute – the only difference being that of rate of interest to be awarded by the Arbitral Tribunal. In other words, if the Arbitral Tribunal has awarded post-award interest payable from the date of award to the date of payment at a particular rate in its discretion then it will prevail else the party will be entitled to claim post-award interest on the awarded sum at the statutory rate specified in clause (b) of Section 31(7) of the Act i.e. 18%. Thus, there is a clear distinction in time period and the intended purpose of grant of interest.”*

35. In **Hyder Consulting (UK) Ltd. vs. State of Orissa**, 2016 (6) SCC 362, Supreme Court held that the High Court had erred in modifying the rate of interest awarded by the Arbitrator, who had awarded interest @ 18% with quarterly rest.

36. I, therefore find no merit in the objection of the petitioner to the award of interest in favour of the respondent.

37. The petitioner has lastly challenged the award in so far as it restricts the deduction on account of extra premium charged by the petitioner only to the year in which the fire took place. The Arbitral Tribunal has given the following reasons for Award on this account:

“15. The third part of the dispute raised by the Claimant pertains to deduction of Rs.5,47,926 / - as penalty towards incorrect rating of Premium as prescribed by the Tariff Advisory Committee (TAC), on part of the Respondent at the time of issuance of Policy. During the cross examination of Sh.T.C.Gupta, Senior Divisional Manager of the Respondent Company (RWI) has admitted during cross examination that it was not correct for the Respondent to change the consideration during the subsistence therefore not demand extra premium on account of their own oversight at the time of issuance of the Policy. In National Insurance Co. Ltd. v/s. New Bharat Rice Mills, the Honourable National Consumer Disputes Redressal Commission has held that, "The State Commission is right in its conclusion that the Insurance Company could only claim extra premium for the subsisting and operative policy of the current year and not for the lapsed policies of the previous years." We therefore allow a deduction of Rs.1,82,642/-, being the extra premium for the year in which the loss took place, in lieu of Rs.5,47,926/- deducted by the Respondent and hereby award the excess amount of Rs. 3,65,284/- (being the difference of Rs.5,47,926/- and Rs.1,82,642/-) to the Claimant.”

38. I do not find any reason for interference as far as the above finding of the Arbitral Tribunal is concerned.

39. In view of the above, the Impugned Award, in so far as it grants the claim of the respondent for the loss of Crude Mentho Oil (CMO) suffered in the fire as also for the loss suffered on account of Menthol

Powder, is set aside while upholding the remaining claims granted in the Impugned Award.

40. The petition is partially allowed in the above terms, with no order as to cost.

NAVIN CHAWLA, J

JULY 17, 2018/vp

