IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.541 OF 2013

Hazel Mercantile Limited ....Petitioner
vs
United India Insurance Co. Ltd. ...Respondent

WITH

ARBITRATION PETITION NO.971 OF 2013

United India Insurance Co. Ltd. ....Petitioner
vs
Hazel Mercantile Limited ...Respondent

WITH

ARBITRATION PETITION NO.972 OF 2013

United India Insurance Co. Ltd. ....Petitioner
vs
Sanman Trade Impex Pvt. Ltd. ...Respondent

WITH

ARBITRATION PETITION NO.989 OF 2013

Sanman Trade Impex Pvt. Ltd. ....Petitioner
vs
United India Insurance Co. Ltd. ...Respondent

.....

Mr. Vivek Kantawala, a/w. Mr. Amey Patil, Mr. Vivek M. Sharma, Mr. Shanay Bafna and Ms. Hetal Jobanputra, i/b. M/s. Vivek Kantawala & Co., for the Petitioner in ARBP/541/2013 and ARBP/989/2013 and for the Respondent in ARBP/971/2013 and 972/2013.

Mr. Aseem Naphade, a/w. Mr. Rahul Mehta, i/b. KMC Legal Venture, for the Respondent in ARBP/541/2013 and ARBP/989/2013 and for the Petitioner in ARBP/971/2013 and 972/2013.

……

CORAM : S.C. GUPTE, J.

DATED: 26 FEBRUARY 2019

P.C.:

. These arbitration petitions are cross-petitions by parties to an arbitration reference challenging the same award. The disputes between the parties arise out of an insurance contract. Two petitions, namely, Arbitration Petition Nos. 541 of 2013 and 989 of 2013, are filed by the insured challenging rejection of parts of their claims by the arbitral forum, whilst the other two petitions, namely, Arbitration Petition Nos. 971 of 2013 and 972 of 2013, are filed by the insurer for having allowed parts of the insured's claims. Though these petitions concern claims filed by two different Petitioners in Arbitration Petition Nos. 541 of 2013 and 989 of 2013, the subject matter of challenge, as also the grounds, being the same, though the amounts involved vary in the two cases, Arbitration Petition No.541 of 2013 is treated as the lead petition and submissions of both parties, i.e. the insured as well as the insurer, are considered mainly with reference to the facts of this petition. The reasoning of the present order, however, does not defer so far as the facts of the other petitions are concerned.

2. The Petitioner Hazel Mercantile Ltd. had stored its goods in a warehouse at Bhiwandi. The warehouse was owned by one Purav Warehouse Company. The Petitioner had obtained an insurance cover of Rs.25 crores from the Respondent-United India Insurance Company Ltd. There were other adjacent godowns, all of which were involved in a major fire, which broke out on 16 February 2006. The fire kept raging for a few days and, according to the Petitioner, smoke continued to emanate from these godowns even after a few months of the incident of fire. The Petitioner claims that there was total loss of goods stored in

the godown as a result of the fire. The Respondent had appointed a surveyor, one Bhatawadekar & Co., for assessment of the loss. The surveyor made visits to the godowns and made a report. In the meantime, however, before his report could come, another insurance company, namely, New India Assurance Co. Ltd., had set up a committee by the name of 'Bhiwandi Claims Co-ordination Committee'. This committee met and took physical stock of goods at all concerned godowns, including the godown of Purav Warehouse, about four months after the incident of fire. The committee *inter alia* made enquiries with warehouse keepers and, based on its investigation, gave its own findings. The committee reported a total shortfall collectively in the pre-accident inventory of all godowns of an average of about 41.1%. The committee came to a conclusion that the respective insurers, including the Respondent herein, should decide the claims assessed by individual surveyors suitably after taking into account this shortfall in the collective inventory of 41.1.%. Bhatawadekar & Co. had reported the net claim payable to the Petitioner in the sum of Rs.9,71,36,881/-, based on actual inspection carried out at site soon after the incident of fire. The report of the committee meant that this claim would have to be reduced by 41.1 per cent. The Petitioner raised several contentions before the Respondent-insurer challenging both reports, i.e. the reports of Bhatawadekar & Co. and of the committee. The Respondent offered a settlement amount of Rs.4,75,73,273/- to the Petitioner. Being dissatisfied with the claim determined by the Respondent-insurer, the Petitioner invoked the arbitration agreement and that is how the reference was made to the arbitral tribunal. The tribunal consisted of three arbitrators. The arbitrators deferred in their award. By the impugned award, the majority arbitrators awarded a sum of Rs.3,59,44,803/- to the Petitioner over and above the sum of Rs.4,75,73,273/- paid by the Respondent to the Petitioner under an interim award. (This interim award was on the basis of the settlement amount offered by the Respondent.) The majority award, as noted above, has been challenged both by the insured and the insurer.

3. The insured challenges the award mainly on the ground that there was no justification for a general deduction on the total claim assessed by the surveyor Bhatawadekar & Co. Learned Counsel submits that this reduction is based on no evidence. Learned Counsel submits that the arbitrators considered an across the board reduction of 20% instead of 41.1%, as recommended by the committee, which again was purely by way of a thumb rule and there was no occasion for even this reduction; even this reduction is based on no evidence. Learned Counsel also challenges the award on the ground that the overall reasoning of the award denotes fundamental contradictions going to the root of the matter, and making the award amenable to challenge as an impossible view.

4. The award is objected to by the Respondent-insurer on the ground that there was no occasion for the arbitrators to order reduction of claims to the extent only of 20%, when the committee appointed by the insurers, after spot inspection and upon consideration of material supplied by warehouse keepers, had come to a firm estimate of 41.1%.

5. The impugned award exhibits a lot of adhocism and

application of thumb rules without there being any evidentiary basis for such assessment. The Petitioner's claim was for a sum of Rs.14,62,74,078/- on the ground of total loss of goods at site; the claim was denied by the insurer. There were two reports before the arbitrators in addition to other oral and documentary evidence placed by the parties, one by the insurer's surveyors, Bhatawadekar & Co., and the other by the committee. The arbitrators considered whether the insurer could rely on the report of the committee; and whether the final survey report of Bhatawadekar & Co. should be accepted. So far as the committee is concerned, their assessment was objected to by the Petitioner *inter alia* on the ground that (i) the committee was formed at the instance of another insurer, namely, New India Assurance Co. Ltd. and not the Respondent, (ii) there was no proper opportunity to the Petitioner for participation either in the formation or in the deliberations of the committee; no information was ever shared by the committee or the Respondent regarding these deliberations with the Petitioner, and (iii) the committee was constituted and its report was relied on without any basis; the insurance policy never contained any clause with regard to consideration of opinion of any such committee for assessing claims arising under the insurance policy. The arbitrators were of the opinion that none of these grounds was legally tenable. The arbitrators observed that the committee had comprised of qualified licensed surveyors; it was appointed for assessing the quantity of goods destroyed in the fire; and no specific clause was required under the insurance policy for appointment of such committee. Whether or not the committee was lawfully constituted and it carried out its deliberations properly and whether or not its conclusions were in accordance with the facts and circumstances of the case, it was really for the arbitrators to assess the damage caused by the insured event, namely, the fire that took place on 16 February 2006. The committee was surely not an adjudicative body. The arbitrators could at best have relied on the committee's report as a piece of evidence. One particular member of the committee was examined before the arbitrators by the insurer. He was also cross-examined by the claimant's Counsel. After considering the evidence of this particular member, the arbitrators were of the view that the report of the committee could only be partially considered. The arbitrators held that they were not inclined to rely totally on the report prepared by the committee on which evidence had been led, but "having no other option, were relying on the evidence of the only qualified and licensed surveyor, who has been submitted to examination by the Respondent". The arbitrators were of the view that technically, the best person, on whose report this case could have been decided, was Bhatawadekar, the surveyor who had initially surveyed the loss, but that since neither the claimants nor the Respondent tendered him in evidence, there was no option before the arbitrators but to rely on, as they did, the report of the committee. The arbitrators were of the view that the assessment seeking reduction to the extent of 41.1% by the committee should not be completely allowed for the reasons that : (a) the committee had visited the fire affected godowns after a period of four months from the date of the fire, and (b) the committee had come to a finding based wholly on a volumetric analysis. For these two reasons, without actually assessing the evidentiary value of the report as a statement of facts, the arbitrators granted an ad-hoc reduction of 20%, instead of 41.1% recommended by the committee. The committee's assessment itself was on a notional basis, that is to say, on the total capacity of the godowns involved in the accident for storage of goods on the basis of storage methods purportedly reported by warehouse keepers. (The warehouse keepers themselves were not examined in the reference.) Based on overall figures, an average of 41.1.% reduction in the stock claimed to be lying in the godowns for all parties was suggested by the committee. All this was clearly notional and there was no factual analysis for individual warehouses or claims. On top of it, despite having accepted its unreliability, the arbitrators simply reduced the percentage suggested in the committee's report to 20% without any reasons bearing on such percentage.

6. Surprisingly, the arbitrators also considered, in the same breath, a case of under-insurance, which was claimed at the rate of 23.23%, favourably to the insurer. The arbitrators, after considering the particular clause concerning under-insurance in the policy, namely, Clause No.10, noticed that the stock statements provided by the claimants at all locations reflected a total quantity of stock in the sum of Rs. 34,96,73,890/-, though the total sum insured was admittedly Rs.25 crores. Considering the ratio of the total quantity of stock claimed by the Petitioner and the insured value of the stock, the arbitrators were of the view that a reduction of 23.23% of the total claim should be ordered on account of under-insurance. The arbitrators held that this reduction was applied as per the findings of Bhatawadekar in his report dated 29 September 2007, even though Bhatawadekar was not examined by the Respondent to justify the reduction of 23.23%. The arbitrators observed that the principle of under-insurance had to anyway apply and, therefore,

the Respondent was justified in making an overall reduction at the rate of 23.23% of the total claim. To rely on the exact amount for which allowance was to be made on account of such under-insurance, the arbitrators relied on an annexure to Bhatawadekar's report which, as noticed above, reflected the claimant's stock statements concerning the stock lying at all locations in the aggregate sum of Rs.34,96,73,890/-.

7. This assessment by the learned arbitrators has led to a very peculiar situation. The committee's assessment of an across the board reduction of 41.1%, which was made the basis for reducing the claims generally, was expressly on the footing that the physical stock at the godowns claimed by the insured was more than the actual physical quantity assessed by a volumetric assessment. The committee had observed that in normal course, two drums were stored one above the other, though, at a few places, a third layer of drums was stored horizontally above the second layer. This was on the basis of the committee's visit to different warehouses mentioned in floater policies. Based on this analysis, the committee had observed that considering the number of drums that could be stored at ground level and assessing the total storage capacity of all affected godowns at 2.5 times of this number, the total number of drums/carboys that could be stored at the godowns worked out to 5300, and, thus, the total quantity of drums/carboys had been overstated by 41.1%. Based on this assessment, the committee came to the conclusion that the claims assessed by the assessors should be reduced by 41.1%. (The committee had applied this shortage to all godowns, which were affected.) In other words, the reduction of the Petitioner's claim by a uniform percentage of 41.1%, was essentially on

the footing that the goods stored in the godowns were in fact less than what was claimed by the insured. On the other hand, the claim of under-insurance is precisely on a reverse footing, namely, that the actual stock at site was more than what was disclosed by the Petitioner by 23.23%. In other words, the Petitioner's claim got reduced by a notional volumetric assessment, on account of there being 'less quantity than what was claimed', the claim got further reduced on account of under-insurance on the basis that there was actually 'more quantity than what was claimed' and disclosed for insurance. These are clearly contradictory findings. They cannot stand together; the one undermines the other.

8. The award accordingly cannot be sustained. The assessment made by the arbitrators is neither supported by evidence nor is informed by any cogent or logical analysis. It exhibits partly an impossible view and partly a view which no fair or judiciously minded person would, or, at any rate, should, take of the material placed before the tribunal.

9. Neither the reduction of claims on a uniform percentage of 41.1% as suggested by the committee nor reduction of 20% applied by the arbitrators can be said to be supported by evidence or reason having any bearing on the issue. Besides, as noted above, under-insurance, on the footing that what was actually stored at the godowns was more than what was claimed, and reduction of claim, on the footing that what was actually stored was less than what was claimed, could not have been found simultaneously.

10. In the premises, the impugned award of the majority

arbitrators cannot be sustained. All challenge petitions, accordingly, succeed and the impugned award dated 12 March 2013 is set aside.

(S.C. GUPTE, J.)