IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	21.10.2019
Judgment pronounced on	25.10.2019

CORAM

THE HONOURABLE Mr. JUSTICE **SENTHILKUMAR RAMAMOORTHY**

O.P. No.618 of 2019
and
Application No.5502 of 2019

The Oriental Insurance Company Limited
Regional Office – 2, No.4,UIL Building,
Esplanade 4th Floor,
Chennai – 600 108.
rep. by its Regional Manager,
RO Chennai, Mr.M.S.Sekar ... Petitioner

Vs.

M/s.Suryadev Alloys & Power Private Limited
rep. by its Managing Director,
No.497 & 497, Isana Building, 8th Floor,
Poonamallee High Road,
Arumbakkam, Chennai- 600 108. ... Respondent

Prayer:- Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award dated 03.04.2019 passed by the Arbitrator and allow the claims of the Petitioner before the Arbitral Tribunal.

For Petitioner : Mr.Ajai Prakash Srivatsav

For Respondent : Mr.V.Ramesh for
Mr.R.Ashwanth

ORDER

The respondent in the Arbitration is the Petitioner herein. The Respondent is the insured in an Industrial All Risk(IAR) Policy issued by the Petitioner on 17.04.2014. The period of insurance was from 16:00 hours on 11.04.2014 to the midnight of 10.04.2015. As per the policy, the location of the risk was the Coal based Electric Generation Station Unit I & II, 298/2, New Gummudipoondi and the block description was 80 M.W. coal based thermal power plant. The insurance policy, inter alia, covered both material damage(MD) and business interruption(BI). On 19.06.2014, the steam turbine of Unit – II suffered a breakdown necessitating repair by BHEL Hyderabad, the original equipment manufacturer. For this purpose, the turbine was sent to BHEL for inspection and repair. This resulted in an interruption in the business of Unit – II for a period of 40 days and the unit was re-started on 29.07.2014. The loss that was caused by the said incident was notified to the Petitioner on 26.06.2014 and the Respondent made claims both with regard to material damage and business interruption. The material damage claim was settled in full and there is no dispute relating thereto. As regards the business interruption claim, the Petitioner paid a sum of Rs.91,65,866/- to the Respondent on the basis of the Final Survey Report of the Loss Surveyor, Associated Surveyors and Consultants, and refused to pay the remainder of the claim made by the Respondent. Therefore, the said dispute was referred to Arbitration as per the arbitration clause, namely, Clause- 12 of the General Conditions of the Policy. In the said Arbitration Proceedings, the Respondent made a claim for a gross sum of Rs.9,58,61,067/-. After setting off the sum of Rs.91,65,753/-, which was paid by the Petitioner to the Respondent, the Respondent claimed the balance net sum of Rs.8,66,95,314/- with interest thereon at 15% per annum from 01.01.2015 till 19.09.2018, which aggregates to a sum of Rs.4,83,83,111/- and interest at 15% per annum on Rs.91,65,753/- from 01.01.2015 till the date of payment, namely, 18.12.2017, which amounts to a sum of Rs.40,79,388/-. In this manner, an aggregate sum of Rs.13,91,57,813/- was claimed. Upon completion of pleadings, the Arbitral Tribunal framed 9 issues. Both parties adduced documentary evidence whereby the Respondent exhibited 19 documents, Exs.C1 to C-19, and the Petitioner exhibited 16 documents, Exs.R1 to R16. The Loss Surveyor/MLOP Surveyor was examined as a witness. Upon consideration of the pleadings, evidence and the oral and written arguments, the Arbitral Tribunal pronounced the Award dated 03.04.2019, whereby the Petitioner was directed to pay a sum of Rs.9,37,53,228/- to the Respondent on or before 15.05.2019, failing which the said amount shall carry interest at the rate of 18% per annum from 16.05.2019 until payment in full. The said Award is challenged in this Petition.

2.I heard the learned counsel for the Petitioner and the learned counsel for the Respondent.

3.The learned counsel for the Petitioner pointed out that the Policy was admittedly a single policy with regard to the coal based thermal power generation station of the Respondent herein. In order to substantiate the submission, he referred to the I.A.R. Policy(Ex.C2). With regard to the material damage portion of the claim, he pointed out that the Loss Surveyor quantified the admissible claim in a sum of Rs.2,64,000/- as against the claim of Rs.14,08,076/ and that the Respondent herein accepted the said payment as full and final settlement thereof. Accordingly, he submitted that the dispute is confined to the second claim relating to business interruption, which is a loss of profit claim. In this connection, he pointed out that it is the requirement under the Insurance Act that claims above a certain threshold are required to be assessed by a licensed loss surveyor. In this case, the Loss Surveyor carried out the necessary inspection and determined the loss in respect of the business interruption at Rs.91,65,753/-. On the basis of the said quantification and recommendation, full payment was made to the Respondent. By referring to the statement of claim, he pointed out that the Respondent made contradictory claims in respect of business interruption. In specific, he referred to Paragraph 19 of the statement of claim before the Arbitral Tribunal and pointed out as to how contradictory claims of Rs.9,32,97,428/- and Rs.9,58,61,067/- were made with regard to the losses arising out of business interruption. He further submitted that in the Final Report dated 07.10.2017 of the Loss Surveyor, namely, Associate Surveyors and Consultants, at page 69, the consumption loss of the thermal power plant was adverted to and, on that basis, the Loss Surveyor made appropriate deductions while quantifying the admissible claim. He further submitted that the Respondent was responsible for transportation delay, assembly delay and attemperator repair related delay. In the aggregate, he submitted that there was a delay of 6 days on the above account which is entirely attributable to the Respondent. Therefore, he submitted that the Loss Surveyor deducted the said six day delay period from the 40 day business interruption period so as to arrive at the permissible business interruption period of 34 days. Similarly, he pointed out that the Respondent had taken a single policy in respect of the coal based thermal power plant at Gumudipoondi and, therefore, the Loss Surveyor had correctly reckoned the gross profit of both units and thereby arrived at the Excess/Deductible for the stipulated 14 day period.

The said policy deductible aggregates to a sum of Rs.9,80,09,270/-. Accordingly, he submitted that the Loss Surveyor deducted the said sum from the overall loss of profit for the interruption period, namely, Rs.10,95,43,350/-. On this basis, he submitted that the Loss Surveyor correctly arrived at the losses on account of business interruption, namely, a sum of Rs.91,65,753/- which was duly paid to the Respondent. In these facts and circumstances, he submitted that the Arbitral Tribunal disregarded the terms of the Policy and Endorsement and by so disregarding the contract, awarded a total sum of Rs.9,37,53,228/- to the Respondent with interest thereon. On account of disregarding the terms of the Policy and Endorsement, the learned counsel submitted that the Arbitral Award is liable to be set aside as per the law laid down in **Oil and Natural Gas Corporation Ltd vs. SAW Pipes Ltd, AIR 2003 Supreme Court 2629,** wherein, at paragraph 14, the Hon'ble Supreme Court held as follows:-

> "14.Result is—if the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the contract, it would be patently illegal, which could be interfered under Section 34. However, such failure of procedure should be patent affecting the rights of the parties."

He also handed over a brief note of written submissions wherein he reiterated his oral submissions and, in particular, pointed out that 8.40% auxiliary consumption, transmission loss of 3.03% and 20% power consumption of Steel Plant was not duly deducted in the claim made by the Respondent. He further pointed out that the Arbitral Tribunal erroneously proceeded on the basis that the subject matter of insurance is two separate 80 M.W. coal based thermal power plants, whereas the Arbitral Tribunal ought to have proceeded on the basis of the terms of the insurance policy and not on the basis that the Petitioner was aware that there were two separate 80 M.W. coal based thermal power units. As stated above, he also pointed out that the deduction of 6 days on account of the transportation delay, assembly delay and attemperator repair related delay was correctly done by the Loss Surveyor and should not have been interfered with. By making the above submissions, the learned counsel concluded by reiterating that the Award is, therefore, liable to be set aside because it is contrary to and in disregard of the terms of the Policy.

4.In response and to the contrary, the learned counsel for the Respondent opened his submissions by pointing out that the 40 day interruption period is an admitted fact. He further submitted that it is also the admitted position that the loss occurred only in Unit-II and that Unit –

I was not affected. After setting out this background, he dealt with the two contentious issues relating to the calculation of the business interruption related loss of profit claim. The first of these issues relates to the deduction of six days from the admitted interruption period of 40 days on account of transportation delay, assembly delay and attemperator repair related delay. In this connection, he referred to Paragraphs 37 to 43 of the Award and pointed out that the Arbitral Tribunal carefully considered the evidence in this regard. In particular, he pointed out that the Arbitral Tribunal closely examined the Final Report of the Loss Surveyor and concluded that there is no evidence to show that the turbine and rotor were actually ready at BHEL on the date when the Respondent's vehicle reached BHEL in order to transport the said turbine and rotor. Similarly, with regard to the assembly related delay, he pointed out that the Loss Surveyor had not stated as to which items were assembled in such a manner as to cause delay. As regards the attemperator repair related delay, he pointed out that the Loss Surveyor had not explained when the delay occurred or how it elongated the over all interruption period. Therefore, he submitted that the conclusion of the Arbitral Tribunal that these alleged delays cannot be attributed to the Respondent is a reasonable conclusion based on appraisal of evidence and, therefore, cannot be interfered with under Section 34 of the Arbitration Act.

5.As regards the second contentious issue, namely, whether the deductible applied by the Loss Surveyor is correct and whether the gross profit of both Units - I and II could be combined to calculate the deductible, he, once again, referred to the discussion and analysis in the Award. In specific, he pointed out that the Arbitral Tribunal took into account the fact that the basis of indemnity in Section 2 of the Policy is the loss of gross profit due to reduction in turnover. He further submitted that the Petitioner herein had agreed to indemnify the short fall in turn over as a consequence of the loss due to the business interruption. By referring to Paragraphs 51 to 65 of the Award, he pointed out that both parties agreed that the Excess/deductible in respect of the business interruption arising out of MLOP is 14 days of standard gross profit. However, he submitted that the Loss Surveyor erred in taking into consideration the loss of profit for Unit – II as Rs.10,71,75,000/- and, thereafter, deducting a sum of Rs.9,80,09,269/- based on the standard units available for sale per day based on 325 days working during 2014 – 2015 of both Units I & II. In other words, he pointed out that, on the one hand, the loss of generation was confined to Unit – II wherein the loss occurred and, on the other, the standard turnover was computed by taking into account the turnover of both Units I & II. As a consequence, he pointed out that the deduction had doubled. He further submitted that all these aspects were carefully considered by the Arbitral Tribunal, which consisted of insurance industry experts and upon such consideration, the Arbitral Tribunal came to the considered conclusion that the interpretation of the Petitioner with regard to the insurance policy is unwarranted and unjustified and defeats the indemnity. Therefore, he submitted that no case is made out to interfere with the Award and that the Petition is liable to be dismissed.

6.The records were examined and the oral and written submissions of both sides were considered carefully. The short question that arises for consideration is whether the Award is liable to be interfered with with regard to the two contentious aspects of the Award, namely, the rejection by the Arbitral Tribunal of the deduction of 6 days from the business interruption period and the manner of computation of the Excess/Deductible by the Petitioner. As regards the deduction of 6 days on account of transportation delay, assembly delay and attemperator repair related delay, it is evident from Paragraphs 37 to 43 of the Award that the learned Arbitrators carefully considered the Survey Report of the MLOP Surveyor and concluded that there is no evidence that the said delays could be attributed to the Respondent as correctly contended by the learned counsel for the Respondent. Upon examination of the discussion and analysis of the Arbitral Tribunal, in this regard, I find that the said analysis and conclusion does not warrant interference because it is based on a fair and reasonable appraisal of the relevant Survey Report.

7.This leads to the next contentious issue with regard to the Excess/Deductible. Once again, the Arbitral Tribunal examined the Policy. In particular, the Arbitral Tribunal noticed that the policy description and the location of the risk is specified therein as "coal based electric generation station unit – I & II". The Arbitral Tribunal further noticed that the block description specifies that it is a 80 M.W. coal based thermal power plant and not a consolidated 160 M.W. coal based thermal power plant. In this connection, the Arbitral Tribunal further took note of the fact that the I.A.R. Endorsement Schedule dated 21.04.2014 further stated that "the property covered under within mentioned policy is two units of 80 M.W. coal based thermal power plant and not as stated in the policy". On the above basis, the Arbitral Tribunal concluded that the Petitioner herein had issued the policy in such a manner that it covered two 80 M.W. power plants separately and distinctly and not in a combined fashion. The said conclusion is based on a reasonable interpretation of the Policy and Endorsement Schedule thereto and cannot be faulted. With specific reference to the policy deductible arrived at by the MLOP Surveyor, the Arbitral Tribunal noticed that the MLOP Surveyor had reckoned only the loss of generation of power in Unit - II. However, as regards the standard turnover, the Arbitral Tribunal noticed that the total combined turnover of Units I & II had been taken into account so as to arrive at the policy deductible of Rs.9,80,09.270/- and that by taking into account the standard turnover of both Units, the Excess/Deductible had virtually doubled. The finding at Paragraph 65, in this regard, is particularly pertinent and reads as under:

> "....But what has happened is that Loss of Profit is computed for Unit-II but Excess is deducted on Gross Profit of both units. On one Unit's Loss of Profit of interruption Period the Surveyor has applied GP of both Units for Excess Period."

8.According to the Arbitral Tribunal, by wrongly taking into consideration the standard turnover of both units in arriving at the deductible for the loss of profit, the Petitioner had effectively eliminated 28 days as excess instead of 14 days, as specified in the Policy. On this basis, the Arbitral Tribunal concluded that the Petitioner had mis interpreted the policy and thereby defeated the promise to indemnify for the interruption period less excess period. The above conclusions of the Arbitral Tribunal are based on a fair and reasonable interpretation of the Policy read with the Endorsement Schedule and I see no reason to interfere with the same under Section 34 of the Arbitration Act. The judgment relied upon by the learned counsel for the Petitioner, namely, **Oil and Natural Gas Corporation Ltd vs. SAW Pipes Ltd,** states that the Arbitral Award may be interfered with if it is contrary to contract or in disregard of the contract. The Award, in this case, is not contrary to or in disregard of the contract. On the other hand, as stated above, it is based on a fair and reasonable interpretation of the contract.

9.In view of the foregoing reasons, the Petition to set aside the Arbitral Award is dismissed. Consequently, the connected Application is closed.

25.10.2019

Speaking order
Index: Yes
Internet: Yes

SENTHILKUMAR RAMAMOORTHY, J.
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Pre Delivery order
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