

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	27.11.2019
Judgment pronounced on	04.12.2019

CORAM

THE HONOURABLE Mr. JUSTICE **SENTHILKUMAR RAMAMOORTHY**

O.P. No.823 of 2019

and

A.No.7887 of 2019

M/s.Oriental Insurance Co. Ltd.,
Rep. By its Regional Manager,
Regional Office, UIL Building,
IV Floor, No.4, Esplanade,
Chennai – 18.

... Petitioner

Vs.

M/s.Monotech Systems Ltd.
Rep. By its Managing Director,
Third Floor, City Centre,
No.66,Thirumalai Pillai Road,
T.Nagar, Chennai.

... Respondent

Prayer:- Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award dated 09.03.2019 passed by the Arbitral Tribunal.

For Petitioner : Mr.M.V.Swaroop
Assisted by H.S.Hredai

For Respondent : Mr.R.Yashod Vardhan,
Senior Counsel for
Mr.R.Ashwanth

ORDER

The respondent in the Arbitration Proceeding is the Petitioner herein. The dispute arises out of claims that were made under two insurance policies, namely, the Standard Fire and Special Perils Floater Policy dated 06.02.2015(the Floater Policy), which covered risk at 17 locations where the Respondent herein carried on business at the relevant time, and the Standard Fire and Special Perils Policy dated 06.02.2015, which covered risk at the Ambattur unit of the Respondent (the Specific Location Policy), and these two policies are referred to collectively as the Policies in this Order. The Respondent is the insured in both the Floater Policy and the Specific Location Policy and the sum insured in the two policies is Rs.9 crores and Rs.10 crores, respectively, aggregating to Rs.19 crores. The admitted position is that after the unprecedented floods in the year 2015, the Respondent issued an intimation of loss to the Petitioner in respect of the machinery(both new and refurbished) at its Ambattur unit under the Policies. Pursuant thereto, the said machinery was valued at about Rs.17.11 crores. As required by Section 64 UM of the Insurance Act 1938, a loss surveyor was appointed and the said loss surveyor submitted a Final Survey Report dated 02.11.2016 and an Addendum Report dated 17.02.2017 (the Survey Reports). In the Survey Reports, the loss surveyor recommended that the net adjusted loss is a sum of Rs.1,86,79,436/- and the amount recommended by the loss

surveyor was paid to and accepted by the Respondent under protest. This resulted in a dispute between the parties, which was referred to Arbitration. By statement of claim dated 07.05.2018, the Respondent claimed a sum of Rs.4,78,89,860/- towards damage of stocks in the floods under both the Floater Policy and the Specific Location Policy with interest thereon at 18% per annum from 15.11.2015 till the date of payment. In addition, interest was claimed in respect of belated payment of the sum of Rs.1,86,79,436/- at 18% per annum from 15.11.2015 till 10.05.2017. Upon completion of pleadings, the Arbitral Tribunal framed 13 issues(internal Pages 43 to 45 of the Award). Both parties adduced documentary evidence: the Respondent exhibited 14 documents as Ex.C-1 to Ex.C-14 and the Petitioner exhibited 8 documents as Ex.R-1 to Ex.R-8. In addition, the Loss Surveyor was examined as RW-1 by the Petitioner and cross-examined by the Respondent/claimant therein. Upon consideration of the pleadings, evidence and oral arguments, the Arbitral Tribunal pronounced the Arbitral Award dated 09.03.2019 (the Award) through a majority of two Arbitrators and the said Award is impugned herein by filing this Petition under Section 34 of the Arbitration and Conciliation Act,1996(the Arbitration Act).

2. I heard Mr.M.V.Swaroop, the learned counsel appearing on behalf of the Petitioner, and Mr. R.Yashod Vardhan, the learned senior counsel appearing on behalf of the Respondent.

3. Mr.M.V.Swaroop provided an overview of the salient aspects of the case; in particular, he referred to the Floater Policy and the Specific Location Policy and, thereafter, the Survey Reports. After providing such overview, he pointed out that the challenge to the Award is in respect of the findings on four aspects, namely, under-insurance, depreciation/diminution in value, dead stock and salvage. In particular, it was his contention that the amounts deducted under the aforesaid four heads by the loss surveyor were not accepted by the Arbitral Tribunal and that he is aggrieved by the findings in that regard. His first contention was that both the Floater Policy and the Specific Location Policy contain General Conditions and that clause 10 thereof deals with under-insurance. The said clause reads as follows:

"If the property hereby insured shall at the breaking out of any fire or at the commencement of any destruction of or damage to the property by any other peril hereby insured against be collectively of greater value than the sum insured thereon, then the insured shall be considered as being his own insurer of the difference and shall bear a rateable proportion of the loss accordingly. Every item, if more than one of the policy shall be separately subject to this condition."

4. By adverting to the said clause, he submitted that the sum insured of Rs.9 crores under the Floater Policy is required to be apportioned on a proportionate basis as per the value of stock at each of

the 17 locations that are covered under the Floater Policy so as to determine whether there is under-insurance. According to the learned counsel, the loss surveyor undertook this exercise and concluded that there was under-insurance. He further submitted that whenever there is under-insurance, the insured has to bear the difference between the value of assets, at that location, and the apportioned sum insured for that location. Unless such apportionment across the 17 locations is done, he submitted that Clause 10 of the Floater Policy would be rendered otiose. He also pointed out that the following clause in the Floater Policy is critical for computing the liability of the insurer under the Floater Policy:

FLOATER CLAUSE

The following clause shall be attached for floater policy(ies):

“In consideration of Floater Extra charged over and above the policy rate the S.I. in aggregate under the policy is available for any one, more, or all locations specified in respect of movable property.

At all times during the currency of the policy the insured should have a good internal audit and accounting procedure under which the total amount at risk and the locations can be established at any particular time if required.

The changes in the address of locations specifically declared at inception should be communicated.”

By referring to the aforesaid Floater Clause, he submitted that the requirement that the insured should maintain a good internal audit and accounting procedure under which the total amount at risk and the locations can be established at any particular time, if required, indicates that the sum insured under the Floater Policy is required to be apportioned across all 17 locations in proportion to the value of machinery/goods available at each location at the time of occurrence of the contingency. In this connection, he referred to the findings of the Arbitral Tribunal at paragraphs 98 to 101 of the Award, wherein it was held that the resort to apportionment by the loss surveyor and the consequential computation of the entitlement for the Ambattur location as Rs.4 crores is not justified. After referring to the said findings, he contended that this finding is contrary to the terms of the Floater Policy.

5. The second contention of the learned counsel was in respect of dead stock. As regards dead stock, he pointed out that the loss surveyor applied the reasonable yardstick of classifying stock as dead stock, if it is not sold for a minimum of two years. On that basis, the loss surveyor had deducted the value of such dead stock from the amount claimed. On the contrary, he pointed out that the Arbitral Tribunal erroneously rejected the said deduction merely because two or three items of machinery, which were more than two years old, had been sold

previously at a price higher than the purchase price. He further submitted that the burden of proof was on the Respondent to establish that such dead stock could be sold at not less than the purchase price and that the Respondent failed to discharge the burden of proof. Consequently, he contended that the findings of the Arbitral Tribunal at Paragraphs 89 to 92 of the Award are contrary to the Policies and to the evidence on record.

6. The 3rd contention of the learned counsel for the Petitioner was with regard to the deduction towards depreciation/diminution in value. On this aspect, he pointed out that the loss surveyor had applied the reasonable bench mark of 5% diminution in value per year for the old/refurbished machines. However, he pointed out that this deduction was rejected by the Arbitral Tribunal merely because these machines are part of the stock-in-trade or inventory of the Respondent. In other words, he pointed out that the Arbitral Tribunal rejected the deduction made by the loss surveyor entirely on the basis that these are not capital assets and that, therefore, depreciation is not applicable. In this regard, he pointed out that the label, depreciation, may be a misnomer but, in substance, it represents the diminution or reduction in value as a result of the aging of the machinery. Consequently, he submitted that the findings of the Arbitral Tribunal at Paragraph 96 of the Award are patently erroneous.

7. The last contention was with regard to salvage. As regards salvage, he pointed out that the Arbitral Tribunal arbitrarily and unreasonably reduced the deduction from 22% to 10%. In support of his submissions, he referred to extracts from MacGillivray on Insurance Law, wherein the learned author stated that the correct measure of indemnity is the difference between the value of the damaged property before and after the loss. By referring to the said commentary, he contended that, in this case, there was no evidence with regard to the value of the property at the time of the accident or at any time proximate thereto. He also referred to a judgment of the National Consumer Disputes Redressal Commission, New Delhi in **HARSOLIA vs. NATIONAL INSURANCE COMPANY LTD, 2005 (1) CPC 53 (the Harsolia case)**, wherein it was held that the insurer's liability is limited to the actual loss which is, in fact, proved and that a contract of insurance is a contract of indemnity and is not intended to enable the insured to make profits. He also relied upon the judgment of this Court in **INDIA MOTOR PARTS AND ACCESSORIES (p) LTD vs. COMMISSIONER OF INCOME TAX, 1996 60 ITR 531(MAD)**, wherein it was held that the sale of a solitary item for a higher price cannot be the basis for deciding on the market value of the whole class of items. He also relied upon the judgment of the Court of Appeals in **LEPPARD vs. EXCESS INSURANCE CO. LTD. (1979) 1 W.L.R. 512 (the Excess Insurance case)**, wherein it was held that the

insured may recover compensation for loss incurred and nothing more. He concluded his submissions by referring to and relying upon the judgment of the Hon'ble Supreme Court in **OIL AND NATURAL GAS CORPORATION LIMITED vs. WESTERN GECO INTERNATIONAL LIMITED, (2014) 9 SCC 263.**

8. In response, the learned senior counsel, Mr.R.Yashod Vardhan, made his submissions. As regards the contention on under-insurance, he submitted that under-insurance should be computed on a location-specific basis by taking into consideration only the location/s where the contingency occurs. For example, as regards the Ambattur unit, he submitted that it should be examined whether the sum insured under the Floater Policy is less than the total value of the machinery in Ambattur. If the sum insured is less than the total value of machinery, there is under-insurance; otherwise not. When interpreted in this manner, he submitted that clause 10 is not rendered otiose. He also referred to the Floater Clause in the Floater Policy which states that it applies to one, more or all locations. According to the learned senior counsel, this establishes that the Floater Policy may be used in respect of any of the 17 locations that are covered by the Floater Policy and that that is the object and purpose of the Floater Policy.

9. As regards dead stock, he submitted that the Respondent was trading in not only refurbished machines but also new machines. In this connection, he referred to the Minority Award at Paragraph 1.3.1 and to the Survey Reports and pointed that the learned Arbitrators appraised the available evidence, in a reasonable manner, and concluded, on that basis, that the deduction towards dead stock is not justifiable. Therefore, he submitted that no interference is warranted as regards this finding. In response to the contention on depreciation/diminution in value, he pointed out that only the purchase price was taken into consideration by the Arbitral Tribunal and not the cost of refurbishment or the historical sale price, which would have been included a profit. Therefore, he submitted that any diminution in value was also factored in the decision. Finally, in respect of salvage, he pointed out that all the three Arbitrators concurred that 10% is reasonable and that the said finding is not liable to be interfered with.

10. By way of rejoinder, the learned counsel for the Petitioner submitted that the Minority Arbitrator held that the apportionment should be done based on premium, whereas it should have been done on the basis of the value of the machinery at each location. With regard to dead stock, he submitted that 38% profit was realised historically in respect of sale of both new and refurbished machinery and not only in respect of

machinery that was not sold for not less than two years. As regards diminution in value, he submitted that the loss surveyor had resorted to the 5% per year diminution in value only for refurbished machines and not for new machines. He concluded his submissions by pointing out that the Respondent did not discharge the burden of establishing the value of the machines on the date of occurrence of the contingency or on a date proximate thereto. For all these reasons, he submitted that the Award is liable to be set aside.

11. The records were examined and the oral submissions of both sides were considered carefully. Upon perusal of the Award, I find that the findings with regard to under-insurance are based on a reasonable interpretation of clause 10 of the General Conditions of the Floater Policy as also the Floater Clause. In this regard, it should be borne in mind that the Floater Policy was drafted by the Petitioner/Insurance Company and, therefore, any ambiguity should be resolved in favour of the insured and not the insurer by applying the interpretive rule of *contra proferentem*, as held by the Hon'ble Supreme Court, in the context of an insurance contract, in paragraphs 9-13 of **Industrial Promotion and Investment Corporation of Orissa Ltd. v. New India Assurance Company Ltd. (2016) 15 SCC 315**. With specific reference to clause 10, as correctly contended by the learned

senior counsel for the Respondent, the said clause would not be rendered otiose if it is interpreted as being applicable on a location-specific basis as regards the Floater Policy subject to the condition that it would be applied to all the locations wherein the contingency occurs and this is precisely how the Arbitral Tribunal interpreted it. Another important facet is that the Floater Policy does not stipulate that the sum insured should be apportioned across the 17 locations, proportionately, on the basis of the value of machinery at each location. In the absence of such stipulation, can such a term as to apportionment be implied? In my view, implying such term would be contrary to the Floater Clause, which indicates that a higher premium is paid for the Floater Policy, and more importantly, that the sum insured (SI) would be available in aggregate for one, more or all locations. In addition, the test of business efficacy, which is a test of necessity, is also not satisfied in this case because the Floater Policy is, undoubtedly, workable without implying such term. The judgments of the Hon'ble Supreme Court in **Nabha Power Ltd. v. Punjab State Power Corporation Ltd. (2018) 11 SCC 508** and **Adani Power (Mundra) Ltd. v. Gujarat Electricity Regulatory Commission 2019 SCC Online SC 819** may be referred to in this context. Therefore, the findings of the Arbitral Tribunal, in this regard, are not liable to be interfered with.

12. The findings of the Arbitral Tribunal that the deduction in respect of the dead stock is not justified is based on an appraisal of available evidence. Such evidence was available in the form of the sales data of machines, including machines that were sold after two years. Consequently, there is no justification for interfering with the said findings in a petition under Section 34 of the Arbitration Act on the ground that the evidence, in that regard, is insufficient.

13. The rejection of the 5% per year depreciation by the Arbitral Tribunal is based on a correct understanding of the accounting principle that the concept of depreciation is not applicable to stock-in-trade or inventory and only applies to capital assets. As regards the submission of the learned counsel for the Petitioner that the label, depreciation, was merely a mis-description or misnomer, as correctly pointed out by the learned senior counsel for the Respondent, in any case, only the purchase price was taken into consideration and not the value addition or refurbishment cost. Consequently, even the diminution in value is indirectly factored in the decision of the Arbitral Tribunal and a case is not made out for interference under Section 34 with this finding. As regards salvage, in the absence of fixed standards or bench marks, the application of the rate of 10% is not unreasonable and does not warrant interference under Section 34 of the Arbitration Act. The principles laid down in cases such as the **Harsolia case** and the **Excess Insurance**

case, which were relied upon by the learned counsel for the Petitioner, to the effect that a contract of insurance is a contract of indemnity and that, consequently, such contracts enable recovery of loss and not profits are, without doubt, sound and established principles but they do not advance the cause of the Petitioner because the Respondent was directed to be indemnified for loss and not in respect of loss of profits by the Arbitral Tribunal.

14. For the reasons set out above, I do not find any reason to interfere with the Award. Consequently, the petition to set aside the Award dated 09.03.2019 is dismissed. As a corollary, the Respondent is entitled to the sum deposited by the Petitioner in fixed deposit pursuant to the interim order dated 21.10.2019 in A.No.7887 of 2019, without providing a security in this regard, along with interest accruals thereon, and to initiate execution proceedings for the remainder of amounts due and payable as per the Award. Accordingly, A.No.7887 of 2019 is disposed of by directing the Registrar General of this Court to encash the fixed deposit and pay the proceeds thereof, along with interest accruals, to the Respondent. No costs.

04.12.2019

Speaking order
Index : Yes
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SENTHILKUMAR RAMAMOORTHY, J.
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