IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
07~08~2019	04~09~2019

CORAM:

THE HONOURABLE MR.JUSTICE **N. SATHISH KUMAR**

O.P.No.982 of 2017

HDFC ERGO General Insurance Co.Ltd.,
1st Floor, HDFC House,
165-166, Backbay Reclamation,
H.T. Parekh Marg, Churchgate,
Mumbai 400020.
Represented by its Power of Attorney holder
M.P.Sashidharan Nair. .. Petitioner/Respondent

.Vs.

M/s. Shree Ganesh Fridging &
Cold Storage Pvt. Ltd.,
KH No.55/1, near Umiya Ind. Estate,
Kapsi Khurd Bhandara Road,
Near Pardi, Octroi Naka,
Nagpur 441104. .. Respondent/Claimant

* * *

Prayer: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the Award dated

21.07.2017 passed by the Arbitration Tribunal.

For Petitioner	:	Mr. R. Shankaranarayanan Senior Counsel for M/s.Thriyambak J. Kannan
For Respondent	:	Mr. Yashodvardhan Senior Counsel for M/s.R. Ashwanth

ORDER

Challenging the Award of the Arbitral Tribunal dated 21.07.2017 the present Original Petition is filed.

2. The brief facts leading to file this Original Petition is as follows:

2(a). The Claimant owns and operates Cold Storage. He availed credit facility from HDFC Bank. On the insistence of the Bank, insurance was arranged with the Respondent/Petitioner Insurance Company who had issued Standard Fire & Special Perils Policy No.21112004654140000000 for a sum insured of Rs.8,00,00,000/-. The claimant's cold storage unit including Building, Plant & Machinery, Furniture, Fixtures, Fittings and Stocks were already insured with M/s.

Oriental Insurance Co. Ltd., Nagpur for Rs.16,00,00,000/-. On 08.05.2013 there was an accidental fire in the premises which continued for more than 37 days. The claimant's cold storage units were totally destroyed. The destruction was of building, machinery, stocks and other contents. Besides the entire building, stocks worth Rs.31.02 Crores were also damaged. The fire not only damaged the building above the ground but also the foundation beneath, which cannot even be imagined as being undamaged or safe for putting up a new construction thereon. Instead of settling Rs.3.67 Crores the Respondent/Petitioner has handed over only Discharge Voucher of Rs.2.11 Crores on 15.03.2016. Hence, the claimant preferred the claim for Rs.1,76,91,954/-. The learned Arbitrators after hearing both sides and considered all the materials and evidence have passed an Award of Rs.1,73,32,243/-. Challenging the same, this Petition has been filed.

3. It is the main contention of the learned Senior Counsel appearing for the Petitioner that the policy does not cover the plinth and foundation, but it only covers the building. But the learned

Arbitrators have held that building includes plinth and foundation. It is his further contention that the policy of the Oriental Insurance Co. Ltd., for similar nature which includes plinth and foundation. Whereas the policy of the Petitioner excludes the plinth and foundation. Therefore, it is his contention that when the policy does not cover the plinth and foundation the learned Arbitrators ought to have rejected the Claim.

4. It is the further contention of the learned Senior Counsel that by Officious Bystander Test, Court has to see the intention of the parties. The entire contract has to be interpreted by construction of the entire contract, with the intention of parties to include the plinth and foundation. As found in the contract between the Oriental insurance company and the respondent the same clause should have been found in the present contract. Hence it is his contention that the policy does not cover plinth and foundation, it is only for building. It is his further contention of the learned senior counsel that the finding of the Arbitrators was not based on the merits, in fact, the surveyors report has been ignored by the Arbitrators. The Arbitrators themselves introduced their idea in awarding the damages, which is fundamentally

wrong. Therefore, his contention is that the entire award has to be set aside. Similarly, the Arbitrtors finding that one of the buildings of M/s.Suruchi Spices Pvt.Ltd.,has not damaged and the insurance covered only two buildings is also against the evidence. Further, there is no evidence to assess the damages to plinth and foundation. Hence it is the contention of the learned senior counsel that the entire Award has to be set aside.

5. In support of his contention he has also relied upon the following judgments:-

1. *Nabha Power Limited v. Punjab State Power Corporation Ltd.(PSPCL) and another* ***[(2018) 11 SCC 508]***

2. *Satya Develpers Pvt.Ltd., vs. Rearey Lal Bhawan Association and others* ***[225(2015) DLT 377 : MANU/DE/3076/2015]***

3. *Oriental Insurance Co. Ltd., vs. Sony Cheriyan* ***[(1999) 6 SCC 451]***

4. *Ssangyong Engineering & Construction Co. Ltd.*

vs. National Highways Authority of India (NHAI) ***[2019 SCC Online SC 677]***

6. The learned Senior Counsel appearing for the Respondent/claimant would contend that the plea that, the building does not include plinth and foundation has raised first time before this Court. No such plea has been raised by the Petitioner Insurance Company before the Arbitral Tribunal. It is his further contention that the building includes plinth and foundation. The Policy of the Petitioner/Respondent does not exclude the plinth and foundation specifically. Exclusion has to be specific. When the building included, the building means it includes the plinth and foundation. Therefore, it cannot be stated that policy did not cover to the plinth and foundation. It is his further contention that the Insurance Policy is strictly construed since the contract of preferendum applied to the insurance company. It is his further contention that the Tribunal has not rejected the entirety of the experts evidence. Only in certain aspects it has rejected and rest of the evidence were considered and analysed and passed the Award. Hence, it is the contention of the learned

Senior Counsel that merely on the basis of the poor drafting of the sentence it cannot be said that the entire evidence has not been analysed. Hence it is his contention that the Award cannot be set side and prayed for dismissal of the petition.

7. The learned counsel for the Respondent relied upon the following judgments to support his arguments:

1. Jai Narain Parasrampuria (dead) and others ***[(2006) 7 SCC 756]***

2. Associate Builders vs. Delhi Development Authority ***[(2015) 3 SCC 49]***

8. The dispute originally raised to decide the issue in respect of quantum payable as indemnity for fire accident. Admittedly there is no dispute with regard to the fire policy issued by the Petitioner. Only at the time of settlement of insurance, insurnace company has paid only a sum of Rs.2.11 Crores instead of entire claim made by the claimant including plinth and foundation. The following issues were framed by the Arbitrators.

1. *Whether the Plinth & Foundation of the building can be excluded from loss assessment as recommended by the Surveyor and adopted by the Respondent in the claim settlement?*

2. *What would be the fair lifespan of the building and what depreciation is to be adopted in calculating the market value and the loss?*

3. *What would be the claim amount payable by the Respondent to the Claimant for total loss of Building due to fire?*

4. *Whether the claimant is entitled to interest and if so, the period?*

5. *Whether the claimant is entitled to damages/compensation claimed by them?*

9. No dispute in the policy No.21112004654140000000 has issued by the Petitioner to the Respondent for a sum of Rs.8 Crores. Similarly, the Respondent also obtained another insurance policy from the

Oriental Insurance Company for a sum of Rs.45.50 Crores. The policy issued by the Oriental Insurance Company was for the period from 31.03.2013 midnight to 30.03.2014 midnight, which indicate as follows:

> *"The Insurance under this policy is subject to warranties & Clauses otherwise stated herein:*
>
> *1.Agreed Bank Clause*
> *2.Terrism Damage Cover Endorsement*
> *3.Endorsement - Earthquake (Fire and Shock) - Add on cover*
> *4. Designation of Property Clause*
> *5. Local Authorities Clause*
> *6. Class of Constriction*
> *7. Plinth and Foundation*
> *8. Endorsement - spontaneous combustion - Add on cover"*

10. Whereas policy issued by the Petitioner reads as follows:

> *"CLAUSES, CONDITIONS, WARRANTIES, EXCLUSIONS & EXTENSIONS*
>
> - *Agreed Bank Clauses*
> - *Designation of property clause*
> - *Reinstatement value policies*
> - *Local authorities clause*

- *Earthquake (fire and shock)*
- *Terrorism Exclusion Warranty"*

11. Learned Senior Counsel for the Petitioner would contend that since the policy of HDFC does not contain the Plinth and Foundation as contained in the Oriental Insurance Company policy, it has to be held that the policy did not cover plinth and building. According to him, when the two sets of contract entered into between the parities in the business transaction, harmonius construction of the contract has to be seen. According to him when two contracts have entered in the same field, intention of the parties has to be gathered from reading the contracts. When one contract specifically does not contain the plinth and foundation, it has to be inferred that the plinth and foundation has excluded in the contract.

12. The Apex Court in ***Nabha Power Limited Case*** (supra) has considered the English Judgments and has held as follows:

> "*49. We now proceed to apply the aforesaid principles which have evolved for interpreting the terms of a commercial contract in question. Parties indulging in commerce act in a commercial sense. It is this ground rule which is the basis of*

The Moorcock test of giving 'business efficacy' to the transaction, as must have been intended at all events by both business parties. The development of law saw the 'five condition test' for an implied condition to be read into the contract including the 'business efficacy' test. It also sought to incorporate 'The Officious Bystander Test' [Shirlaw vs. Southern Foundries (1926) Ltd.,[(1939) 2 KB 206 : (1939) 2 All ER 113 (CA)]]. This test has been set out in B.P. Refinery (Westernport) Proprietary Limited vs. The President Councillors and Ratepayers of the Shire of Hastings [1977 UKPC 13 : (1977) 180 CLR 266 (Aus)] requiring the requisite conditions to be satisfied: (1) reasonable and equitable; (2) necessary to give business efficacy to the contract; (3) it goes without saying, i.e., The Officious Bystander Test; (4) capable of clear expression; and (5) must not contradict any express term of the contract. The same penta-principles find reference also in Investors Compensation Scheme Ltd. vs. West Bromwich Building Society [(1998) 1 WLR 896 : (1998) 1 All ER 98 (HL)] and Attorney General of Belize and Ors. vs. Belize Telecom Ltd. and Anr. [(2009) 1 WLR 1988 (PC)]. Needless to say that the application of these principles would not be to substitute this Court's own view of the presumed understanding of commercial terms by the parties if the terms are explicit in their expression. The explicit terms of a contract are always the final word with regards to the intention of the parties. The multi-clause contract inter se the parties has, thus, to be understood and interpreted in a manner that any view, on a particular clause of the contract, should not do violence to another part of the contract. "

13. The above judgment is based on the two contracts in respect of the court. The above judgment has stated how to apply "the Officious Bystander Test" and to give the "business efficacy" to the transaction. The fact remains in this case is insurance contract is between the parties. The insurance contract is the contract of preferendum. It should be strictly viewed since the very object itself to give insurance cover to the parties of the contract. On perusal of the contract there is no exclusion of plinth and building. Though several clauses incorporated merely the plinth and foundation was not included in the contract, it cannot be said that the plinth and foundation of the building has been totally excluded from the contract.

14. In this regard the Apex Court in ***Jai Narain Parasrampuria case*** (supra) has held as follows:

> *"72. In 'Words and Phrases, Permanent Edition, Volume 19A, it is stated :*
>
> *"The word "building" necessarily embraces the foundation on which it rests; and the cellar, if there be one, under the edifice, is also included in the term "house" or*

"building". If there be a cellar, the word "building" includes it, unaffected by the height above the foundation Benedict v. Ocean Ins. Co., 31 N.Y. 389, 394""

15. In ***Satya Develpers Pvt. Ltd., case*** (supra) it is held as follows:

"29. ... ...

(a) ... ...

(b) Businesslike Interpretation. It is an accepted canon of construction that a commercial document, such as an insurance policy, should be construed in accordance with sound commercial principles and good business sense, so that its provisions receive a fair and sensible application. (See also the words of Lord Diplock in Antaios Cia Navieras SA v. Salen Rederierna AB, The Antaios (1984) 3 All ER 229 at 233, (1985) AC 191 at 201 cited at (7)(iv) by Longmore LJ: If a "detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense".)"

16. The learned Arbitrators are also the expert engineers, held that the building include Plinth and Foundation. The Arbitrations have interpreted the contract in a reasonable manner. When the arbitrators reasonably interpreted the contract and which is plausible view, such

view cannot be interfered merely because some other view is also possible. When the contract does not specifically include the plinth and foundation, the Arbitrators reasonably interpreted the contract in terms of the contract, the same cannot be interfered. The Apex Court is also in its judgment held that building also includes foundation on which the building raised. Such being the position, now the insurance company cannot canvas such point before this Court for the first time. Though it is now settled by the Apex Court in ***Lion Engineering Consultants v. State of Madhya Pradesh and others*** **[2018 (16) SCC 758]** that any plea which has not raised in the beginning can be raised under Section 34 of the Arbitration and Conciliation Act. But the fact remains that the Insurance Company has not taken the issue before the Tribunal.

17. Be that as it may. The Contract placed before this Court does not exclude it specifically. In order to exclude certain items in the insurance contract there must be specific exclusion. Admittedly, there is no specific exclusion of plinth and foundation in the contract. Therefore, the contention of the learned senior counsel that the plinth

and foundation has not covered in the contract cannot be countenanced. Insurance contract should be strictly construed to determine in the extent of insurer's liability. This has been held by the Apex Court in the ***Sony Cheriyan's case*** (supra), that since the Insurer undertakes to compensate the loss suffered by the insured on account of risks covered by the insurance policy, the terms of agreement have to be strictly construed to determine the extent of liability of the insurer.

18. It is the contention of the learned counsel for the Petitioner that the Arbitrators have ignored the expert evidence and they themselves formed their opinion and passed Award which is not according to law. There is no dispute with regard to damage of the building by fire. In fact the dispute is only with regard to the quantum of Award. Rs.2.11 crores have already been paid by the Petitioner. The dispute is only with regard to the quantum claimed towards damage to the plinth area and foundation. Though it appears as if the report of expert was totally ignored and the learned arbitrators have taken independent view without any materials, on a careful perusal of

the entire Award this Court is of the view that the entire report of the surveyors has not been rejected.

19. The Arbitrators being the technical persons, have commented upon the surveyors as to the nature of inspection and manner which should have been conducted. Para 14 to 18 and 22 of the Award the Arbitrators in fact commented upon the nature of the inspection conducted by the surveyors. In para 23 of the award also they commented upon their work and in para 26 of the Award the Tribunal has recorded that only the large extent the findings of the structural engineers for failure to conduct a test after excavation and inspection of the complete foundation or atleast 50% of the area and in fact relied upon the rest of the report and found that loss has recommended in the survey report is payable to the claimant. Therefore, merely because the Tribunal in their language has held that enquiries reveal in the instant case and taking into account all the available inputs, the foundation cast may work out to 20% of the cost of the building, cannot be construed to mean that the Tribunal without any evidence on its own enquiry come to such a finding. The entire

finding of the Tribunal clearly indicate that they have commented upon the manner in which the two structural engineers have conducted survey. In fact, ignoring certain portion of the evidence and report, the Tribunal has considered the remaining report and accepted the finding in the survey report for loss in the plinth and foundation. Further the nature of the building constructed, the area and extent were not in dispute. Therefore this Court is unable to countenance the contention of the learned Senior Counsel that there is no evidence available before Tribunal to come to such a finding. In view of the same the Original Petition is liable to be dismissed and accordingly the same is dismissed.

20. In the Result, the Original Petition is dismissed. No costs.

04.09.2019

Index : Yes / No
Internet: Yes
Speaking/Non-speaking order
ggs
Copy to:
M/s. Shree Ganesh Fridging & Cold Storage Pvt. Ltd.,
KH No.55/1, near Umiya Ind. Estate,
Kapsi Khurd Bhandara Road,
Near Pardi, Octroi Naka, Nagpur 441104.

N. SATHISH KUMAR, J.
ggs

Pre-delivery order in:
O.P.No.982 of 2017

04.09.2019