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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P. 879/2012 & IA 1960/2019**

Date of Decision : 1st May, 2019

NATIONAL INSURANCE CO LTD Petitioner

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

versus

M/S SYNERGY STEELS LTD Respondent

Through: Mr.Ravi Gupta, Sr. Adv. with
Mr.Ankit Jain, Mr.Sachin Jain,
Mr.Sarvesh Rai, Ms.Diya
Kapoor, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 10.10.2011 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to the following three Standard Fire and Special Perils policies (hereinafter referred to as 'Insurance Policies') taken by the respondent from the petitioner:-

“(i) Policy No.360300/11/05/16600091 valid from 20.05.2005 to midnight of 19.05.2006 for plant and machinery worth Rs.10 crores

(ii) Policy No. 360300/11/05/16600092 valid from 20.05.2005 midnight to 19.05.2006 for stock and raw materials worth Rs.8.00 crores, and

(iii) Policy No. 360300/11/05/166000093 valid from 20.05.2005 to midnight of 19.05.2006 for Rs.3.00 crores.”

2. Admittedly an explosion took place in the factory of the respondent on 18.08.2005 resulting in loss and damage to the building, plant and machinery as well as stock lying therein.

3. The respondent filed its claim under the Insurance Policies with the petitioner for a sum of Rs. 85,19,652/-.

4. The petitioner appointed M/s Adarsh Associates as "Surveyor".

5. On 11.01.2007, the petitioner paid a sum of Rs. 8,03,072/- to the respondent towards settlement of the claim raised by the respondent. The receipt of such payment bore a rubber stamp stating as under:-

“Being full and final settlement of claim ”

6. The respondent by its letter dated 25.01.2007 claimed the remaining amount from the petitioner and stated that it had given consent for settlement of the claim under duress.

7. In this manner a dispute arose between the parties which was referred to the Arbitrator.

8. The Arbitrator by the Impugned Award has passed the following Award:-

“39. For the reasons stated above and in view of the fact that respondent has not denied the quantum of expenditure incurred by the claimant, I hold that the claimant is

entitled for the amount spent on the repair of crane to the tune of Rs.3,23,000/- and for Megatherm bills No.357 and 383 a sum of Rs.39,68,340/-. For the replacement of spectrometer when purchased actual cost of the same as of the year 2005 on production of voucher from the firm from which spectrometer to be purchased has to be reimbursed by the respondent. The above amounts of Rs.3,23,000/- plus Rs.39,68,340/- plus cost of Spectrometer are awarded in favour of the claimant and against the respondent.

ISSUE NO. 4:

40. If the respondent pay the awarded amounts within three months, then no interest is payable. But in case respondent fails to pay the same within three months then respondent will be liable to pay interest @ 18% p.a. from the date of award till realization on the amount actually spent by the claimant i.e. Rs.3,23,000/- for crane repair and Rs.39,68,340/-. So far as Spectrometer is concerned since the claimant has yet to purchase the same hence no question of granting interest on that.”

9. The learned senior counsel for the petitioner impugns the Arbitral Award firstly on the ground that the respondent having accepted the payment of Rs. 8,03,072/- in full and final satisfaction of its claim was barred from raising any dispute before the Arbitrator. He submits that the Arbitrator has rejected the plea of the petitioner in this regard only on the ground that the petitioner has been unable to prove as to who had put the rubber stamp on the receipt and when. He submits that the issue of the rubber stamp was irrelevant inasmuch as the respondent by its letter dated 25.01.2007 had admitted that the amount had been given as a full and final settlement, though at the

same time contending that this had been agreed to by the respondent under duress. He submits that therefore, the only question before the Arbitrator was whether the payment was received by the respondent under duress or coercion, which the Arbitrator has failed to consider. He places reliance on the judgment of the Supreme Court in ***New India Assurance Company Limited vs. Genus Power Infrastructure Limited***, (2015) 2 SCC 424 to contend that a bald plea of fraud, coercion, duress or undue influence is not enough and the party who sets up such a plea, must establish the same through evidence, which the respondent in the present case had failed to do.

10. I have considered the submission made by the learned senior counsel for the petitioner, however, find no merit in the same. Admittedly the respondent had lodged a claim of Rs. 85,19,652/- with the petitioner. On 14.01.2006, the respondent requested the Surveyor to recommend release of atleast 45 lakhs as it had already spent more than Rs. 46 lakhs in carrying out repair / replacement jobs after the explosion. It had further asserted that it was facing a financial crunch due to expenditure of such a huge amount. The respondent had also almost immediately upon receipt of the amount of Rs. 8,03,072/- from the petitioner lodged its protest claiming duress. The Arbitrator, after considering the evidence led before her, has rendered the following findings on this issue:-

“31. Since I have already held that Ex RW1/B is not the document on which claimant gave any endorsement of accord and satisfaction nor made any endorsement of having received amount of Rs.8,03,072/- in full and final settlement of all his claims. Question arises why this

amount was accepted even in part and without protest. Claimant appearing as his own witness has explained in answer to question No.97 as to what sort of force or compulsion was there when he accepted the cheque of Rs.8,03,072/-. He has stated that when he accepted the cheque of Rs.8,03,072/- he needed money and also insurance company was threatening to reject the claims in toto. Therefore, under those circumstances this part payment was accepted. This, what Hon'ble Supreme Court has said in the case of Rashmi Construction(Supra) that respondent public undertaking has upper hand and the claimant due to financial hardship under pressure issued "No demand certificate" In reply to question No.77 Mr. Kathura explained that money was received on 11.01.2007 and immediately thereafter on 25.01.2007 protest was lodged. According to him this was not an after thought. In reply to question No.72 he explained that claimant had been protesting with the insurance company to settle all the claims but when the insurance company did not accept to claimant's request then a written complaint was lodged on 25.01.2007 i.e Ex CW1/23. Therefore, it cannot be said that EX.RW1/8 is a settlement document or that there was no pressure on claimant to accept the amount.

32. For the reasons stated above I decide both the issues against the respondent and in favour of the claimant. I further hold that mere putting of rubber stamp on the receipt Ex. CW1/B without proving when it was affixed and secondly without obtaining unequivocal endorsement from the claimant it cannot be said that claimant received the cheque in full and final settlement of all his claims. In fact due to financial hardship claimant accept part payment. It would not amount to settlement of all claims of the claimant."

11. The above being a finding of fact arrived at by the Arbitrator, which cannot be said to be in any manner perverse or unreasonable,

cannot be interfered with by this Court in exercise of its power under Section 34 of the Act.

12. In *New India Assurance Company Limited* (Supra), the issue before the Supreme Court was whether the respondent therein was entitled to invoke the jurisdiction of the Court under Section 11 of the Act after accepting the compensation and signing the Subrogation Letter. The Court in that case found that the discharge and signing of Letter of Subrogation was voluntary and free from any coercion and undue influence. The said judgment, therefore, would be of no avail to the petitioner.

13. On merit of the claim, the learned senior counsel for the petitioner has placed reliance on Clause III(a) and VIII of the Insurance Policies to submit that the explosion in the factory of the respondent was caused by such reason that the liability of the petitioner was excluded.

14. Clause III(a) and VIII of the Insurance Policies are reproduced hereinunder:-

“III Explosion/Implosion

Excluding loss, destruction of or damage.

a. *To boilers(other than domestic boilers) economizers or other vessels, machinery or apparatus (in which steam is generated) or their contents resulting from their own explosion/implosion.*

xxxxxx

VIII Impact Damage

Loss of or visible physical damage or destruction caused to the property insured due to impact by any Rail/Road

Vehicle or animal by direct contact not belonging to or owned by

- a. the insured or any occupier of the premises or*
- b. their employees while acting in the course of their employment.”*

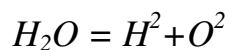
15. On the other hand, the learned senior counsel for the respondent submits that the plea of exception under Clause III(a) was never taken by the petitioner before the Arbitrator.

16. Before the Arbitrator the respondent had claimed the following as the cause of explosion:-

“A. That the electromagnet had fallen on the crucible top damaging the inner lining of the crucible due to which the copper coil got exposed to the hot molten metal and upper two sets of the copper coil melted.

B. That the copper coils contain water circulation at a pressure of 3 KG/cum to maintain the temperature of copper coil. The copper coils are connected to electric supply and this electric current is induced into the steel scrap inside the crucible.

C. The melting of copper coils resulted in flushing out of water. This water came into direct contact of the molten metal resulting in decomposition of water into Hydrogen and Oxygen.



D. The generated Hydrogen gas came into the contact with the hot molten metal at a temperature of about 1600°C and an uncontrolled explosion took place resulting into shattering of the roof sheets and damage to the crucible and crate etc cause heavy loss.”

17. The petitioner on the other hand, claimed the following to be the reason for the damage:-

“4. That the contents of para 4 of the claim petition, except which are a matter of record are vehemently denied. It is vehemently denied that an explosion took place in the aforesaid factory premises on 18.8.2005. The above loss was caused due to fall of 4.5 ton magnetic hammer inside crucible of induction furnace which was in operation as chain ring of hammer assembly got released from the hook of the crane’s hoist and fell into the crucible. This led to impact damage to the crucible’s refractory material and coils which is not covered under the fire policy (such impact damage can be only covered under a Machinery breakdown insurance policy which was not taken by the insured).....”

18. As there was a dispute on the very cause of the accident in the factory of the respondent, the Arbitrator adjudicated the same and held as under:-

“34. Respondent has denied claims of the claimant primarily on the basis of the report submitted by the surveyor Mr. A.K. Gupta, Insurance Surveyor appointed by M/s Adarsh Associates appeared as RW-2. According to Mr. A. K. Gupta explosion precedes the damage. According to him electro magnate weighing 4.5 ton fell upon the crucible of induction furnace due to slipping of hook of the crane that was holding the electro magnate used to feed scrap into the furnace. Felling of electro magnate caused damage to the induction furnace and explosion took place thereafter. He has denied that explosion is simultaneous combustion and/or explosion because of steam. According to Mr. A.K. Gupta, RW2 both the reasons and explosion are excluded as per the exclusion clause of fire and explosion. According to Mr.AK.Gupta, RW2 damage to the crane, crucible and spectrometer was beyond the scope of the fire policy. The

explosion and the resultant loss to induction furnace was caused due to fall of 4.5 ton magnetic hammer upon the crucible of induction furnace, which was in operation. The magnetic hammer fell inside the furnace because its holding chains of the hoist, got released from the hooks, as it was allowed to rest on scrap protruding outside the induction furnace crucible whilst in operation. This led to impact damage top the crucible's refractory material and coils which is not covered under the fire policy. When subjected to cross examination he admitted that the surveyor who visited the site had prepared the site notice and when asked vide question No.18 whether he brought the site note he replied it was not required to be filed. When suggested that his report was based on those notes he denied by saying he also visited the site after other man's visit. After seeing the record he could not tell when did visited the site. Vide question No.24 it was suggested to him that the diameter of electro magnate is 1800mm. Mr. Gupta RW2 could not deny the same. In order to cover up the same he said because electro magnate was inside the furnace it was not required to be measured. In fact in reply to question No.22 he said diameter of electro magnate (hammer) was 4.5 to 5.0 ft and according to him induction furnace opening was about 1400mm i.e equal to 4.5 ft. Mr.Ravi Gupta contended that since hammer was 1800mm and electro magnate was 4.5 ft(1500mm) it could not have gone inside the furnace. In reply to question No.24 Mr.A.K.Gupta RW2 tried to say that hammer in this case was stuck on the mouth of the furnace. Partially it was in the mouth of furnace and partially it was tilted inside the furnace, which reply is contrary to his own report. Mr. Ravi Gupta counsel for the claimant contended that if the report of the surveyor is looked into and in particular para 5.3 wherein surveyor has stated that hammer released immediately above the furnace, fell inside the crucible and damaged the refractory mass of crucible, extensively. Therefore, the answer to question No.22 that hammer was partially on the mouth and partially tilted is contrary to his

own report. In reply to question No.25, RW2 Mr. Gupta admitted that when electro magnate fall on the crucible top, then the same would damage the top of block of white heat cement casting, top ring and refractory lining. Damage to the refractory lining would cause a direct contact of outside water cooled copper coil of crucible with the metal inside and the water got leaked. In reply to question No.27 he also admitted that inside flowing water instantaneously turn into steam producing a violent explosion. After having admitted the same he tried to say that there may be time lag to turn flowing water into steam which will cause explosion. The reason for denial according to RW2 is that damage due to collapse or release of hammer is not covered by the policy. According to him loss occurred due to collapse which subsequently cause break down of the hammer and furnace. In reply to question No.31 he stated that facts stated by him in paras 5.2 and 5.3 were based on the information given by the claimant as well as by other independent agencies which are on record. He could not deny the fact that loss was communicated to him immediately. Nor he could deny the procedure explained by the claimant which caused the explosion as admitted by him in answer to question No.25 and 27. He also could not deny loss to the spectrometer when put vide question No.409 nor denied that he was asked to visit the factory premises in order to inspect the spectrometer. He could not prove that he also visited the site at any time. He admitted that he was not concerned with the payment made to the company. In reply to question No.54 when claimant suggested the cause of damage he try to cover up by saying that after the fall of hammer there was damage to 20MT induction furnace. According to him contact of molten water cooled metal to the copper cable was consequential event. How he made this assessment has not been explained by him. His saying that he visited the site not proved, that means his report is based on the inspection done by somebody else. The person has not step into the witness box. His is only guess

work that damage to induction furnace was caused when molten water cooled metal came in contact with copper coil. Explosion was subsequent event. Whereas claimant has in no uncertain words explained that because of electro magnet fell upon the top of the crucible it caused damage to the top block of white heat cement casting, top ring and refractory lining resulting into direct contact of outside water cooled copper coil of crucible with the metal inside and the water got leaked resulting into steam causing violent explosion. This process has been in a way admitted by Mr. A.K. Gupta RW2 when he replied to question nos. 24,25,26 & 27. In view of the same and the fact that he could not prove that he himself visited the site and seen the position at site his report is based on the inspection note of another man. That man has not entered witness box. Therefore no much important can be attached to the testimony of Mr. Gupta, RW2. Moreover, in view of admission made in reply to above question in can safely be concluded that the damage caused due to fall of magnetic hammer caused explosion, it cannot be said that the explosion was a subsequent event.”

19. The Arbitrator has further relied upon the report of the factory inspector which corroborated the version of the respondent. The Arbitrator further holds that the surveyor report filed by the petitioner cannot be relied upon as it has not been proved.

20. The above again being a finding of fact arrived at by the Arbitrator upon consideration of the evidence led by the parties before her, deserves no interference from this Court.

21. A reading of the above pleadings of the parties as well as of the findings of the Arbitrator would infact show that the plea of exclusion on basis of Clause III(a) as contended by the learned senior counsel

for the petitioner before this Court was never taken before the Arbitrator. Before the Arbitrator the petitioner had denied the very factum of an explosion. Its case before the Arbitrator was that it was a damage to machinery not covered by the fire policy or excluded due to Clause VIII as it was caused by impact of the hammer falling on the crucible of induction furnace.

22. As far as the exclusion under Clause VIII is concerned, a bare reading of the said Clause would show that what is excluded is the loss caused to the property insured due to impact of any "Rail/Road Vehicle or Animal". It was not the case of the petitioner that the damage to the factory of the respondent was caused by impact of any Rail/Road Vehicle or any Animal. It was admitted that the damage was caused due to the fall of the electromagnetic hammer which resulted in the sequence of events resulting in the eventual loss. Therefore, Clause VIII had no application.

23. As far as Clause III(a) is concerned, apart from the fact that the same was not pleaded by the petitioner before the Arbitrator, in any case, was not applicable.

24. The learned senior counsel for the petitioner next contended that the respondent by its letter dated 31.08.2005 had lodged a claim of only Rs. 5 lakhs towards spectrometer replacement of part and repair. It was only later that the respondent revised its claim to a higher amount, which the surveyor in its report dated 08.09.2006 considered and rejected for the following reasons:-

“9.2.2 Insured claimed Rs.34,13,286/- incl. taxes (net of 10% discount) towards replacement cost of 1 no spectrometer as per qtn No.DEL/85161/LECO, dated 08.12.2005 of M/s Leco Instruments India pvt. Limited, Noida without actually carrying out repairs/replacement. The loss for the above equipment has not been considered as the said equipment was kept in QC/R&F lab situated away from the scene of accident and neither the same was shown to us at the time of survey nor we find any reason for the same getting damaged, reportedly due to shockwaves etc as stated by the insured. Further, insured has not provided any expert opinion/report of service engineers of manufacturers/suppliers etc to apprise us to prove nature and extent of damage reasons thereof and why the said equipments cannot be repaired.”

25. Learned senior counsel for the petitioner submits that the respondent never challenged the Surveyor's Report, however, still the Arbitrator has awarded the claim of the respondent towards replacement cost of the Spectrometer. He submits that in terms of Section 64(U)(M) of the Insurance Act, 1938, the Surveyor's Report is to be given due importance and there have to be strong and sufficient reasons to not agree with the same.

26. On the other hand, learned senior counsel for the respondent has drawn my attention to the Statement of Defence filed by the petitioner before the Arbitrator as also to the final written arguments of the petitioner before the Arbitrator to contend that the petitioner had not challenged the claim of the respondent for the Spectrometer on any of the grounds that had been taken by the Surveyor in its report. The claim of the respondent was disputed only on the primary ground of full and final settlement as also cause of damage. He submits that in

any case, the Surveyor Report was not proved before the Arbitrator and therefore, no reliance can be placed by the petitioner on the same.

27. I have considered the submissions made by the learned counsels for the parties. A perusal of the final argument filed by the petitioner before the Arbitrator would show that the plea now taken before this Court by the petitioner was not taken before the Arbitrator. Before the Arbitrator only the defence of the maintainability of the claim on execution of full and final settlement and the reason for the damage itself had been urged.

28. Though, reliance was placed by the petitioner on the Surveyor's Report, the Arbitrator has held that no reliance can be placed thereon for the following reason:

"35. First visit was made by Mr. Rajiv Juneja who made the site note. He visited on 23.08.2005. Mr. Gupta says he also visited the site but no dates given. Even after looking into the record he could not tell when he visited the site nor he could explain how does he says there is time lag to turn flowing water into steam. In fact Mr. A.K. Gupta RW2 has based his report on the basis of inspection of other agencies. The other agency was Factory Inspector whose report corroborates the version of the claimant. Claimant in reply to question No. 91 has explained that fall of hammer resulted damage to the crucible top and explosion are simultaneous. Thereafter no question was put to claimant in this aspect.

36. Supreme Court in the case of "Sikka Papers Limited vs National Insurance Co Limited & Ors reported in 2009(7) SCC 777" says that surveyor's report is not the last word, admittedly there has to be reason to depart from the same. In this particular case Mr. Gupta, RW2 has not

been able to prove through record that he actually visited the site. His report is based on someone else visit. In fact his report is based on Mr.Juneja's inspection who has not step into the witness box nor those inspection notes have been proved on record. Hence, no reliance can be placed on Surveyor's report.

So far as loss is concerned, claimant has placed on record the vouchers for getting the crane repaired for Rs. 3,23,000/- ExCW1/10 and Megatherm bills Rs. 39,68,340/- Ex CW1/7 & CW1/8 and the quotation received from Leco Instrument India Pvt Limited dated 08.12.2005 for replacement of Spectrometer which submitted along with claim vide Ex CW1/9. Respondent has not denied the above amounts and vouchers produced. The only denial by the respondent is that explosion took place after the furnace was damaged, which defence, the respondent has failed to substantiate."

29. As far as the enhancement of the claim amount is concerned, the Arbitrator observed as under:

"38. I find no force in this argument of the counsel for respondent because claimant has explained that earlier claim was based on estimates which is also apparent from the letter dated 31st August 2005. In that letter total cost was approximate based on estimate. But when actually crane was repaired the actual amount spent has been claimed. Similarly for induction furnace, crucible top water cooled cable, coil, assembly amount of Rs.39,68,340/- has been spent as per bill No.383 dated 25.10.2005. That is why amount claimed is on the basis of actual expenses incurred. So far as spectrometer is concerned, it is the quotation which has been received on the basis of which amount has been claimed."

30. The claim of other items has not been challenged by the petitioner as far as their quantification is concerned. As far as the spectrometer is concerned, the Arbitrator has held that the

spectrometer when purchased by the respondent, actual cost of the same as of the year 2005, on production of voucher from the firm from which spectrometer will be purchased, has to be reimbursed by the petitioner.

31. The counsel for the respondent is not aware as to whether the respondent has indeed lodged a claim after passing of the Award for the said equipment before the petitioner and if so for what amount. The Arbitrator, also had no occasion to deal with the said question while passing the Impugned Award. The said Award can therefore, at best be considered as granting a declaratory relief in favour of the respondent that it is entitled to such claim and cannot be denied the same for the reason of full and final settlement or the cause of the damage. The petitioner, however, would be entitled to dispute the claim, if at all made by the respondent pursuant to the Award, on the ground of its valuation.

32. No other ground is urged by the petitioner.

33. The petition is disposed of in the above terms, with no order as to cost.

NAVIN CHAWLA, J

MAY 1, 2019/rv