IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 20.02.2020	Delivered on: 10.03.2020

C O R A M:

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

O.P.No.651 of 2019
& A.No.6034 of 2019

HEFC ERGO GENERAL INSURANCE CO LTD
1st Floor, HDFC House, Backbay Reclamation,
H.T.Parekh Marg, Churchgate,
Mumbai-400 020
Represented by its Power of Attorney holder
Mr.C.J.Charles Vijayachandran. .. Petitioner

/versus/

M/S ROHINI MOVIE PARK RUKMINI
No.43, Sarangapani Street,
T.Nagar, Chennai-600 017
Represented by its Partner. .. Respondent

Prayer:- This Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying, to set aside the award dated 19.04.2019 passed by the Tribunal against the petitioner in M/s.Rohini Movie Park Rukmini V HDFC ERGO General Insurance Co.Ltd.

For Petitioner : Mr.Arvind Pandian, Senior Counsel
for Mr.Thriyambak J.Kannan

For Respondent : Mr.M.S.Krishnan, Senior Counsel
for Mr.K.S.Karthik Raja

O R D E R

This Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996, challenging the Arbitration award dated 19.04.2019, passed in the claim petition filed by the respondent. The petitioner herein is the Insurance company from which the respondent has taken out a Standard Fire and Special Perils Policy for the year 2014-2015 for a period of 12 months commencing from 30.12.2014. The policy covers the respondent property located at 141, Poonamallee High Road, which is the name of Rohini complex. The total sum insured by the respondent for the said property for Rs.37 lakhs with the following break up details:

"a. Building for Rs.15 lakhs

b. Furniture, Fixtures and Fittings (FFF) for Rs.10 lakhs.

c. Other for Rs.12 lakhs."

2. Due to unprecedented rain and flood in Chennai in the month of November and December 2015, entire theater complex damaged completely Rohini theater, which was situated in the ground floor suffered the maximum damage in the flood by around 4.00 p.m., on 02.12.2015. The respondent on

03.12.2015 intimated about the damages to the petitioner. On receipt of the said intimation, the petitioner appointed protocol surveyor and Engineer Pvt. Ltd., (Surveyor) to conduct the survey. The Surveyor visited the site on 09.12.2015 and shared the working assessment dated 28.01.2016 with respondent as Rs.11,94,102/-. After discussing with respondent shared revised assessment with respondent through e-mail dated 29.01.2016 to the tune of Rs.13,07,569/-. The petitioner and the respondent had discussion on 04.04.2016 in the presence of the Surveyor about the assessment of the loss and shared the revised assessment with the respondent and sought for its consent.

3. After considering the depreciation, salvage and under-insurance, full and final settlement of the claim was fixed at Rs.11,77,329/-, after deducting the applicable reinstatement premium of Rs.243/-. The Surveyor report was issued for Rs.11,77,571/- However, the respondent not satisfied with the assessment alleging that it was made arbitrarily and belatedly sought for claim of Rs.59,42,483/- along with interest at the rate of 24% per annum for the delay and additional amount of Rs.60 lakhs as damages.

4. The petitioner on receipt of the respondent's above letter dated 11.07.2016, requesting to accept the assessed amount of Rs.11,77,571/- replied

on 27.07.2016 refuting each and every allegations. Particularly, the petitioner has reiterated that the respondent failed to produce most of the documents necessary for assessment was because they all were away in the flood. The respondent was kept in dark and no transparency regarding settlement of the claim. The petitioner has delayed the settlement of the claim. The petitioner replied to this by way of letter dated 27.07.2016 stating that, the respondent, who opted for market value assessment, though the policy was in reinstatement value based. Only after detailed discussion about Surveyor assessment held on 04.04.2016, the full and final settlement of the claim was arrived. Further, the policy did not cover any consequential loss as claimed in the respondent letter dated 11.07.2016.

5. In the said circumstances, the respondent opted for referring the matter to the Arbitrator to resolve the dispute. Accordingly, by consent, the sole Arbitrator was appointed. Before the Arbitrator, the respondent filed his statement of claim. The petitioner filed his statement of defense. Witnesses were examined on either side and the documents were marked in support of their case.

6. After considering the claim and defense, the Arbitrator passed the

following award in favour of the claimant/respondent:-

> *(a). The respondent had to pay a sum of Rs.25,22,429/- to the claimant.*
>
> *(b). The respondent had to pay interest on Rs.25,22,429/- at the rate of 10% from 11.07.2016 to till the date of filing claim statement.*
>
> *(c). The respondent had to pay the aforesaid amounts to the claimant within two months from the date of receipt of this award, failing which it will carry further interest at 18% per annum on the said amount till the full payment is made.*

7. Aggrieved by the said award, the present petition is filed under Section 34 of Arbitration and Conciliation on the following grounds:-

8. The arbitral award is patently illegal. Tribunal has ignored the vital evidence, regarding the exercise of option by the claimant to assess the damages as per the market value basis. Arbitrator failed to consider the evidence which proved that the claimant was explained about the difference

between the market value and reinstatement value assessment. On explanation given by the insurer, the respondent opted for the market value assessment. The respondent failed to produce evidence contrary to the Surveyor to establish the quantum. The loss alleged to have been suffered by the respondent is over and above the assessment of the Surveyor.

"B. The impugned award fails to accord any reasons as to how the petitioner failed to file any document to show that the respondent has ever accepted to assess the loss on the basis of marked value.

C. It is submitted that assessment of "reinstatement value" is the money incurred by an insured for reinstating the building and/or machinery back to the original state prior to the loss subject to other terms and conditions. On the other hand, the market value of a particular building and/or machinery is calculated by considering the present replacement value after applying suitable depreciation regarding age and life.

D. The Arbitrator has incorrectly assumed that since the Policy refers to settlement to claims by "Reinstatement Value", there could have been no other alternative basis for assessment. There is no

such restriction under the policy.

E. Contrary to the record, the Tribunal on one hand states that the respondent was "persuaded" for settlement of claim on market value basis, while on the other hand, the Tribunal erroneously concludes that the respondent did not give any assent to the same, completely overlooking the meeting on 04.04.2016, and the email of the same date recording the same. This meeting and several emails remain uncontroverted and the respondent failed to produced any evidence to the contrary. Hence, the ignorance of this vital document gives rise to patent illegality in the impugned award and the impugned award is liable to be set aside on this ground alone."

9. The findings of the Tribunal that, the depreciation and under-insurance was calculated by the Surveyor as per the market value assessment are based on conjuncture and surmises.

10. The findings of the Tribunal that, under insurance is not applicable in reinstatement value policy is in correct and untenable. It is settled law that, calculation of under insurance is not done at the time of insurance policy, but at the time of assessment of loss. Tribunal incorrectly assumed that

the depreciation and/or under insurance applied by the Surveyor was wrong because the assessment should have been on the basis of reinstatement value. Tribunal erred in concluding that the respondent is entitled to the entire sum insures under the policy for the loss of property. The said assessment patently go against the terms of the agreement between the parties especially in circumstances where the respondent has not challenged the applicability of depreciation and / or under-insurance in its pleadings.

> *"BB. The Tribunal ignores the fact that it was never the respondent's case that depreciation and/or under insurance was inapplicable. This is established by a bare perusal of the respondent's pleadings at Paragraph No.7 of its Statement claim:*
>
> *"7..... The claimant has been carrying out repair works and maintenance works periodically with replacement of material and parts whenever necessary. Therefore depreciation and under valuation as calculated in the revised settlement is on the higher side"*

11. Assessment of the Tribunal ought to have been on the basis of the

reinstatement value is erroneous, when the parties agreed between them for the assessment to be done on the market value basis.

12. When the loss is assessed as per the Market Value basis the depreciation and under insurance has to be taken into consideration. While so, the Tribunal observation regarding the depreciation and under-insurance is wholly incorrect. The Tribunal finding that the under-insurance is not applicable to the Reinstatement Value policy, is incorrect and untenable. Even in case where there was reinstatement, the respondent would be bearing rateable portion of the loss in case the cost of replacement it seems to more than the sum insured. No witness was produced by the respondent to counter the under-insurance applied by the Surveyor.

13. To buttress his submissions, the Learned Counsel for the petitioner would rely upon the judgment of Hon'ble Supreme Court in ***Sikka Papers Ltd. Vs. National Insurance Company Ltd and others*** reported in ***(2009) 7 SCC 777,*** which is extracted below:

"25.Although on behalf of the complainant,

it was contended that under insurance, if any, must be calculated at the time of issuance of policy and could not be deducted at the time of assessment of the loss but we find it difficult to accept the same. The policy provides that if the sum insured is less than the amount required to be insured, the insurer will pay only in such proportion as the sum insured bears to the amount insured. In accordance with the said provision in the policy if the surveyor applied the pro rata formula and deducted 25.71% from the loss so assessed i.e.Rs.3,71,509.50 from the sum payable as under-insurance, such deduction cannot be faulted."

14. The learned counsel for the petitioner submitted that, the Tribunal erroneously proceeds on an independent enquiry to determine the quantum of loss without any basis or reasoning for the assessment. For example, the Tribunal concludes that the Respondent is entitled to entire sum insured under the policy i.e., Rs.37 lakhs for the loss of property. It then proceeds to deduct: Rs.11,77,571/- being the sum already paid by the Petitioner. The balance sum is directed to be paid by the Petitioner to the Respondent is thus assessed as Rs.25,22,420/-

15. When the claimant himself has not challenged the applicability of depreciation and / or under-insurance in its pleadings, the Tribunal has acted contrary to the pleadings and the evidence placed before it. The reasons attributed by the Tribunal for arriving at quantum assessment are contrary to the text of the contract between the parties. The Tribunal has acted like a Court of equity, which is expressly barred under the Act. Ignoring vital evidence and disregarding the Surveyor's assessment, the Tribunal has fixed the quantum of loss without any basis.

16. In this regard, the Learned Counsel for the petitioner would rely upon the judgment of Hon'ble Supreme Court in ***Bachhaj Nahar Vs. Nilima Mandal and Another*** reported in ***(2008) 17 Supreme Court Cases 491***, which is extracted below:-

> *"23.It is fundamental that in a civil suit, relief to be granted can be only with reference to the prayers made in the pleadings. That part, in civil suits, grant of relief is circumscribed by various factors like court fee, limitation, parties to the suits, as also grounds barring relief, like res judicata, estoppel, acquiescence, non-joinder of caused of*

action or parties, etc., which require pleading and proof. Therefore, it would be hazardous to hold that in a civil suit whatever be the relief that is prayed, the court can on examination of facts grant any relief as it thinks fit. In a suit for recovery of rupees one lakh, the court cannot grant a decree for rupees ten lakhs. In a suit for recovery possession of property 'A', court cannot grant possession of property 'B'. In a suit praying for permanent injunction, court cannot grant a relief of declaration or possession. The jurisdiction to grant relief in a civil suit necessarily depends on the pleading, prayer, court fee paid, evidence let in etc."

17. The learned Senior Counsel appearing for the Petitioner would submit that, the Arbitration award is contrary and conflicting with the public policy, contra to the terms of the policy and the agreement between the parties regarding the mode of assessment of loss. The Arbitrator has applied his own methodology without any evidence either to establish the quantum of loss alleged to have been suffered or quantum of indemnity.

18. The prime contention of the petitioner is that, the claimant/respondent insured the property building, furniture, fixture and fittings

and others for a total sum of Rs.37 lakhs. Though the value of the building, furniture, fixture and fittings was more than Rs.37 lakhs, these properties were insured for under value. The policy was Reinstatement Value policy but the claimant during the meeting with the insurance officials and the Surveyor on 04.04.2016 requested the insurer to settle the claim under Market Value Assessment. The representative of the claimant, who participated in the discussion on 04.04.2016 in his deposition before the Arbitrator has admitted that there was no error in the e-mail dated 04.04.2016. We have not pointed out any errors in the e-mail since we wanted fast, speedy closure of the claim that was pending for more than 5 months by then. This consent given by the respondent for claim on Market Value basis totally over looked by the Arbitrator.

19. Thus, the attack on the arbitral award is on the findings of the Arbitrator that conversion of the policy from Reinstatement Value basis to the Market Value basis without consent by the respondent and the insurer cannot deduct the depreciation and under-insurance, when the policy is for Reinstatement Value. Both these conclusion of the arbitror is erroneous and contrary to evidence and law accordingly to the petitioner. Therefore the award is against public policy.

20. Before adverting to the merits of the case, it is necessary to look into the terms and conditions of the insurance policy.

Clause 6: General condition:-

> *"(6) (i) on happening of any loss or damage the insured shall forthwith give notice thereof to the Company and shall within 15 days after the loss or damage, or such further time as the Company may in writing to allow in that behalf, deliver to the Company*
>
> *(a) A claim in writing for the loss or damage containing as particular an account as may be reasonably practicable of all the several articles or items or property damaged or destroyed, and of the amount of the loss or damage thereto respectively, having regard to their value at the time of the loss or damage not including profit or any kind.*
>
> *(b) Particulars of all other insurances, if any*
>
> *The insured shall also at all times at his own expense produce, procure and give to the Company all such further particulars, plans, specification, books, vouchers, invoices, duplicates or copies thereof, documents, investigation reports*

(internal/external), proofs and information with respect to the claim and the origin and cause of the loss and the circumstances under which the loss or damage occurred, and any matter touching the liability or the amount of the liability of the Company as may be reasonably required by or on behalf of the Company together with a declaration on oath or in other legal form of the truth of the claim and of any matters connected therewith.

No claim under this Policy shall be payable unless the terms of this condition have been complied with."

21. In this case, admittedly after the flood damaged the properties of the claimant on 02.12.2015, the very next day the claim intimation has been sent. Though the petitioner states that, it was received only on 07.12.2015, even that it is well within 15 days time mentioned in clause 6 as stated above.

22. The insurance policy is a Reinstatement Value policy wherein, the insurer indemnify the insured the cost of replacing or reinstating on the same site or any other site with the property of same kind or type but not superior to or more expensive value within the insured property. Unless expenditure has

been incurred by the insured for replacing or reinstating the property destroy or damage, the Company is not liable for payment in excess of the amount, which would not have been payable under the policy, if this memorandum has not been incorporated.

"*Reinstatement Value Policies*

It is hereby declared and agreed that in the event of the property insured under Building cover, Furniture, Fixture & Fittings cover within the policy being destroyed or damaged, the basis upon which the amount payable under (each of the said terms of) the policy is to be calculated shall be cost of replacing or reinstating on the same site or any other site with property of the same kind or type but not superior to or more extensive than the insured property when new as on date of the loss, subject to the following Special Provisions and subject also to the terms and conditions of the policy except in so far as the same may be varied hereby.

Special Provisions

The work of replacement or reinstatement(which may be carried out upon another site and in any manner suitable to the requirements of the insured subject to the liability of the Company not being thereby increased) must be commenced and

carried out with reasonable dispatch and in any case must be completed within 12 months after the destruction or damage or within such further time as the company may in writing allow, otherwise no payment beyond the amount which would have been payable under the policy if this memorandum had not been incorporated therein shall be made.

Until expenditure has been incurred by the insurred by the insured in replacing or reinstating the property destroyed or damaged the Company shall not be liable for any payment in excess of the amount which would have been payable under the policy if this memorandum had not been incorporated therein.

If at the time of replacement or reinstatement the sum representing the cost which would have been incurred in replacement or reinstatement if the whole of the property covered had been destroyed, excess the sum insured thereon or at the commencement of any destruction or damage to such property by any of the perils insured against by the policy, then the insured shall be considered as being his own insurer for the excess and shall bear a rateable proportion of the loss accordingly. Each item of the policy (if more than one) to which this memorandum applies shall be separately subject to the foregoing provision.

This Memorandum shall be without force or effect if the insured fails to intimate to the Company within 6 months from the ate of destruction or damage or such further time as the Company may in writing allow his intention to replace or reinstate the property destroyed or damaged. (b). the insured is unable or unwilling to replace or reinstate the property destroyed or damaged on the same or another site.

23. This clause also mandates the insured to intimate the company within 6 months from the date of destruction or damage or such further time as the company made in writing allow his intention to replace or reinstate the property destroy or damage. The petitioner relying upon e-mail communication would state that the claimant has agreed for the conversion of the policy from Reinstatement Value policy into Market Value basis. It is specifically contended by the petitioner that the difference between these two modes of assessment was explained to the representative of the claimant. On the basis of the intimation given by the claimant, the Insurance Company has appointed the Surveyor and pursuant to that they have conducted survey on 09.12.2015.

24. Perusal of the final survey report dated 18.05.2016 (Ex.R.2) we find the insured has estimated the loss as Rs.59,42,483/-. Surveyor has estimated the loss at Rs.11,77,571/-. In this report the surveyor has mentioned the basis of their assessment of loss:-

> *(i) The damaged items claimed by the insured verified and found in order, hence recommended.*
>
> *(ii). The rates have been taken as per estimate provided by the insured. The rates as per estimate were verified from local market & found in order & hence considered.*
>
> *(iii). The insured have not provided us the purchase invoices and based on the verifications carried out; we have deducted 10% towards rate/qty. Variation being fair and reasonable.*
>
> *(iv). As the Policy of Insurance is subject to Re-instatement value clause & as the insured has expressed their desire to settle claim on market value basis & hence suitable depreciation is applied.*

25. In the final assessment report, the Surveyor value of the FFF loss in the flood after 5% rate variation is Rs.25,45,050.00 (with depreciation) and

the value of the building loss Rs.10,49,750/- after 5% rate variation. The loss under other heads is assessed as Rs.17,30,900/- after deducting 5% rate variation. To this assessed loss of total sum of Rs.54,25,700/-, the petitioner has offered Rs.11,77,511/-, after deduction of 75% towards depreciation and 61.54% for under insurance for building, 14.03% for under insurance of FFF and others.

26. The summary of Final assessment reads as below:-

Sl. No	*Description*	*Claimed (Rs.)*	*Recommended*	*Depreciation*	*Salvage*	*assessed*	*UI*	*Assessed loss*
1.	FFF	2,679,000.00	2,545,050.00	1,908,787.50	31,813.13	604,499.38	0.00	604,449.38
2.	Building	1,105,000.00	1,049,750.00	5,24,875.00	0.00	524,875.00	61.54	201,875.00
3.	Other -Panels	1,822,000.00	1,730,900.00	1,298,175.00	15,000.00	417.725.00	14.03	359,118.81
	Other-DG Set	336,483.00	319,658.85	239,744.14	7,991.47	71,923.24	14.03	61,832.52
	Total	**5,942,483.00**	**5,645,358.85**	**3,971,581.64**	**54,804.60**	**1,618,972.62**		**1,227,275.70**
							Add 1% towards debris removal (as per policy)=	12,272.76
							Assessed loss=	1,239,548.46
							Less Policy Excess=	61,977.42
							Net Assessed Loss=	1,177,571.03

27. The terms of insurance policy is for "Reinstatement Value Basis." There is no clause, which gives unilateral discretion to the insurance company to change the same into "Market Value Basis". Assuming that the conversion is permissible with the consent of the insured, any modification to the written

agreement ought to have been in writing. It is the self serving statement of the official of the Insurance company that the claimant was explained about the difference between the reinstatement policy and Market Value policy and the representative of the claimant agreed for the Market Value policy. No oral statement contrary to the written document can be relied upon unless proved otherwise.

28. The Learned Senior Counsel appearing for the insurance company would submit that, if the claimant wanted the assessment to be made under reinstatement policy, he should have been replaced and reinstated the damaged property and should have claimed reimbursement for the reinstatement, which according to the insurance policy shall not exceeded the sum insured. Such reinstatement should also be within 12 months from the date of damage. There is no evidence let in by the claimant that he has reinstated the damage property. Therefore, the conclusion of the Arbitrator that denial of the claim on the ground that the policy has been converted from reinstatement policy into Market Value policy is incorrect is against public policy.

29. This Court is of the view that, the stand taken by the insurance company is in fact against the public policy. Having collected premium on a

specific term that they will indemnify the loss to the insured on the basis of reinstatement policy as explained in clause under the reinstatement policy, the present assessment made under the Market Value policy without written consent of the insured is against the public policy. The consent alleged by the insurer is denied and also found to be incorrect. The claimant had lost his property worth of Rs.55 lakhs even as per the Surveyor report.

30. It is contended by the Insurance company that on 04.04.2016, after explaining the difference between the Reinstatement Value policy and Market Value policy, the claimant agreed for the Market Value basis. There is no evidence to show that the claimant was made to know that, if he opt for Market Value assessment, he will be paid less than Rs.12 lakhs as against the loss of Rs.55 lakhs. The letter of the claimant dated 24.02.2016, which is much prior to the alleged date of consent for conversion, clearly indicates that the petitioner herein has delayed the payment demanding the details one after another. There is no piece of evidence to show that when the claimant demanded settlement of claim, he was informed that under reinstatement policy, they should restore the property and make claim within 12 months.

31. The petitioner/Insurance company has assessed the loss based on

the Market Value policy assessment. Whereas, the Arbitrator has held that claimant had to be settled on the basis of Reinstatement Value and the assessment based on the Market Value is incorrect. Based on the Surveyor report, the Arbitrator has held that the claimant is entitled for the total sum insured ie., Rs.37 lakhs for the loss of the property, which was insured under the petitioner. After deducting a sum of Rs.11,77,571/- already paid.

32. In the petition, it is contended that the Arbitrator has arrived this figure without any basis. It is an admitted fact that the insurance policy was a reinstatement claim policy. The claimant had never given any consent in writing that it can be converted into Market Value policy. Without written consent the Insurance Company has assessed the loss based on the Market Value policy. For which, they say that the claimant was explained about the difference between the two policies and on 04.04.2016 in the meeting held at Mumbai and the claimant agreed for conversion.

33. It is the further contention of the petitioner is that under the Reinstatement Value policy, the expense incurred by the insurer for the reinstating building or the machinery back to the original state prior to loss, subject to other terms and conditions will be paid. In this case, immediately

after the loss, the Insurance Company has been informed and they have sent their Surveyor to assess the damage. There is no record to show neither the company nor the surveyors informed the insured that they have to first restore the damages and then claim the loss.

34. It is the specific case of the petitioner that the claimant was explained about the difference between the Reinstatement Value policy and Market Value policy, after hearing the explanation and knowing the difference, the claimant accepted the Market Value policy. From the material placed by the petitioner we see the monitory difference between these two policies is huge and wide. Under the Reinstatement Value policy, the claimant has to restore the damaged property and claim for reimbursement. Then in this case as per the terms of the policy, if the claimant had restored the damaged property he would have been paid the full sum insured. Now under the Market Value policy, he has been paid only Rs.11,77,571/- the difference is nearly Rs.25 lakhs. Will any insurer will opted for reinstatement policy and pay the premium and will agree for a Market Value policy detrimental to his interest is the question considered by the Arbitrator. The Arbitrator has found that there is no material evidence to show that the claimant free and fairly agreed for such conversion. The relevant

portion of the deposition also extracted and relied by the arbitrator to reason his findings. In view of this Court, the conclusion of the Arbitrator is justifiable and supported by records. It is not on surmises or against any public policy.

35. This Court hold that no person will agree for a conversion which is obviously detrimental to his interest, if he had been properly explained about the difference. In this context, the mail of the claimant dated 24.02.2016 gains significance. He has informed the Insurance Company that it is regretful to note that even after two months and after submission all details and papers relating to claim, they are delaying the settlement of the claim. For this the Insurance Company has not informed the claimant that under the insurance policy he should reinstate the damaged property and make a claim and without reinstatement, they will not settle. Instead, they have called the claimant to Mumbai for negotiations and contrary to the terms of the insurance policy, had forced the claimant to receive Rs.11,77,571/- towards full satisfaction as against claim of sum insured Rs.37 lakhs.

36. The Arbitrator has taken note of all these facts and has rightly

pointed out that when the parties have agreed for Reinstatement Value policy, and paid the premium, the question of depreciation and under-insurance never arise. The e-mail communication from the Insurance Company to confirm and accept Rs.11,77,571/- is nowhere near the loss of Rs.55 lakhs assessed by the Surveyors immediately after the occurrence. There is not a piece of documents to show that the Insurance Company has asked the claimant to first reinstate the property and claim the damages as per the insurance policy. There is not a piece of documents to show that the claimant has expressed his difficulty to reinstatement and opting for Market Value assessment. In fact as per the terms of agreement, the insurer has 12 months time to reinstate either in the same site or a different site.

37. Taking advantage of the distress situation of the insured, the Insurance Company has not only delayed the process but has assessed the loss under the Market Value assessment contrary to the agreement and without specific consent of the insurer. Precisely, for the said reason, the Arbitrator has gone into the assessment made by the Surveyors regarding the loss, the value of the salvage and the amount they already paid to the claimant under 'on account payment' and has arrived at loss to be compensated and directed to pay balance

Rs.25,22,429/-. The claimant has insured his property for Rs.37 lakhs. Based on the Surveyor's report Ex.R.2 dated 18.05.2016 the loss during the flood was Rs.54,25,700/- before depreciation. The Arbitrator has taken that as the loss to be compensated and after deducting sum of Rs.11,77,571/- already paid. A sum of Rs.25,22,425/- has been fixed as loss payable.

38. The learned counsel appearing for the petitioner would submit that under Reinstatement Value without replacing or reinstating the machinery and property, money cannot be paid and in this case even if the claimant has reinstated the property, since it is beyond 12 months period that cannot be taken into account.

39. This above contention is untenable in view of the fact at the first instance/inception the claimant has not given his written consent for conversion. Second, compensating the loss on the presumption that the claimant has accepted for Market Value policy itself is contrary to the written agreement. Further even assuming that the claimant was accepted the Market Value policy to get the claim settled faster, such persuasion and acceptance is under duress and it is not a valid consent. When the claimant has made clear

during the month of February, that even after 2 months from the incidents the Insurance Company is making inordinate delay in payment, at least, at this juncture, the Insurance Company should have either informed that under the terms of the policy they cannot pay without reinstatement or should have informed that if the claimant agree for the Market Value assessment they will pay only Rs.1,77,571/- as against the estimated loss of Rs.54,25,700/-

40. The learned counsel appearing for the petitioner has circulated a print out regarding FAQ released by the Insurance Regulatory and Development Authority, wherein some of the frequently asked question relating to insurance are extracted. The difference between Market Value assessment and Reinstatement Value assessment is explained as below:-

> ***How does one fix the sum insured?***
>
> *Generally, there are two methods. One is Market Value (MV) and the other is Reinstatement Value (RIV). In the case of a loss, depreciation is levied on the asset depending on its age. Under this method, the insured is not paid amount sufficient to buy the replacement.*
>
> *In the RIV method, the Insurance Company*

will pay the cost of replacement subject to ceiling of S.I. Under this method, no depreciation is levied. One condition is that the damaged asset should be repaired/replaced in order to get the claim. It may be noted that RIV method is allowed only for FIXED ASSETS and not for other assets like stocks and stocks in process.

41. Yet another question regarding obligation of the insured, the response is as below:-

In case of loss, what are the obligations of the insured?

Every insured is expected to behave as though he is uninsured. Take all precautions to prevent/aggravate the loss. Inform Insurance Company who have to be given an opportunity to inspect the damages. Inform fire brigade who will assist to put out the fire. During fire fighting, any damage caused to other insured property caused by water, will be paid by Insurance Company. Extend cooperation to Surveyor while inspecting and assessing the loss. If arrival of surveyor is likely to be delayed, then, take photos / and shift unaffected assets to a place of safety. Give completed claim form

and documents as required by Insurer, in support of your claim. After repairs / replacement, submit bills to Insurer.

42. It is to be noted that at the time of entering Insurance Policy Agreement dated 05.06.2015, the parties had equal bargaining power. The insurer has decided to opt for Reinstatement Value Policy and the Insurer accepted the same and had collected the premium under the Reinstatement Value Policy. After the damage and loss occurred due to flood on 02.12.2015, the insured has lost his bargaining power. After intimating about the flood and loss, he had been expecting the Insurance Company to settle the claim at the earliest.

43. In the said context, the claimant has urged for early settlement, but has not accepted for Market Value settlement as contended by the petitioner. Therefore, in the absence of explicit consent for conformation of the policy from Reinstatement Value Policy into Market Value Policy, which is obviously detrimental to the interest of the claimant/petitioner cannot be presumed as claimed by the petitioner. The silence by itself cannot be equated to consent. The consensus *ad idem* between the parties in respect of conversion

into market value assessment never arrived. This could be seen from the below answer given by the P.W.1 during the cross examination.

> ***Q.31***. *I put it to you that you had categorically informed the surveyor and the Insurance Company that the Claimant were willing to accept a market value assessment as opposed to a reinstatement value assessment. Do you agree?*
>
> ***A.*** *No. The claimant has only agreed to any method that would ensure swift settlement of the claim. The Insurance Company in its own merit and experience deemed that the market value assessment would help settle the claim faster. Hence we agreed to that method only because the Insurance Company orally guaranteed that they would settle the claim faster.*
>
> ***Q: 32***. *I put it to you that in light of the Claimant agreeing the market value assessment, as admitted by you herein, there can be no quarrel with the settlement provided by the Insurance Company. Do you agree?*
>
> ***A.*** *I vehemently deny"*

44. The Arbitrator has taken note of the sequence of the event and the

correspondence between the insurer and the insured. He had rightly observed that the insurer had tried to persuade the insurer to accept the Market Value assessment, since it will be more advantage for the insurer and not to the insured. Award based on this observation cannot be termed as surmise and conjunction. It is based on the record and pleadings.

45. The contention of the learned counsel that the Surveyor report has been totally ignored by the Arbitrator is also not correct. In fact, the Arbitrator has taken the Surveyor report regarding the value of the property lost in the flood. While the Valuer has deducted depreciation and under-insurance, the Arbitrator has held that in case of Reinstatement Value Policy depreciation and under-insurance cannot be taken note and deducted. In ***Sri Venkateswara Syndicate Vs. Oriental Insurance Company Limited and another*** reported in ***(2009) 8 SCC 507*** held that the Surveyor report has persuasive value and cannot be rejected, if it is prepared in good faith and with due application of mind. It is the observation of the Hon'ble Supreme Court that,

> *"35. In our considered view, the Insurance Act only mandates that while settling a claim, assistance of a surveyor should be taken but it does not go further and say that the insurer would be*

bound by whatever the surveyor has assessed or quantified; if for any reason, the insurer is of the view that certain material facts ought to have been taken into consideration while framing a report by the surveyor and if it is not done, it can certainly depute another surveyor for the purpose of conducting a fresh survey to estimate the loss suffered by the insured.

36. In the present case, the insurer has stated in the counter-affidavit filed before the National Commission and even before us, why the appointment of second surveyor was necessitated and also has given valid reasons for appointing the second surveyor and also has assigned valid reason for not accepting the report of the joint surveyor. The correspondence between the insurer and the surveyors would indicate the particulars differed by the insurer for differing with the assessment of loss made by the surveyors.

37. The option to accept or not to accept the report is with the insurer. However, if the rejection of the report is arbitrary and based on no acceptable reasons, the courts or other forums can definitely step in and correct the error committed by

the insurer while repudiation the claim of the insured. We hasten to add, if the reports are prepared in good faith, with due application of mind and in the absence of any error or ill motive, the insurance company is not expected to reject the report of the surveyors"

46. The Arbitrator has also taken note of the explanation given by the Hon'ble High Court about under-insurance in ***I.C.Sharma Vs. Oriental Insurance Company Limited*** reported in ***(2018) 2 SCC 76.***

47. The finding of the Arbitrator is that when the parties have agreed for Reinstatement Value policy assessment, the insurer cannot arbitrarily converted the same into Market Value assessment and apply the principle of under-insurance.

48. It is to be noted that the scope of interfering the arbitral award is very limited. The Hon'ble Supreme Court time and again has declared that arbitration award cannot be set aside if it does not falls under any of the reasons enumerated under Section 34(2) of the Act. It is open for the Court to interfere arbitration award and set aside the same in the following circumstances:-

*"**(a)** fundamental policy of Indian law; or*

(b) *the interest of India; or*

(c) *justice or morality*

(d) *The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court.*

(e) *It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India..”*

49. In ***Ssangyong Engineering & Construction Co.Ltd. Vs. National Highways Authority of India (NHAI),*** the Hon'ble Supreme Court has detailed at length about the power of the Court under Section 34(2) of the Act. The Hon'ble Supreme Court has referred the following two judgments rendered by the High Court of Singapore, which gives any insight about the term “public policy.” Hence the same is extracted below:-

*“**BAZ V. BBA and Ors., [2018] SGHC 275**, the High Court of Singapore Stated:*

156. From the outset, it is important to reiterate that the public policy ground for setting aside or refusal of recognition/enforcement is very

narrow in scope. The Court of Appeal has held that the ground should only succeed in cases where upholding or enforcing the arbitral award would "shock the conscience", or be "clearly injurious to the public good or.. wholly offensive to the ordinary reasonable and fully informed member of the public", or violate "the forum's most basic notion of morality and justice" ***(PT Asuransi Jasa Indonesia (Perser) V Dexia Bank SA [2007] 1 SLR(R) 597 ("PT Asuransi") at [59]). In Sui Southern Gas Co Ltd V Habibullah Coastal Power Co (Pte) Ltd [2010] 3 SLR 1 ("Sui Southern Gas"),*** *the High Court stated that to succeed on a public policy argument, the party "had to cross a very high threshold and demonstrate egregious circumstances such as corruption, bribery of fraud, which would violate the most basic notions or morality and justice" (at[48]). The 1985 UN Commission Report states at para 297 that the term public policy "comprised the fundamental notions and principles of justice", and it was understood that the term "covered fundamental principles of law and justice in substantive as well as procedural respects". The 1985 UN Commission Report further explains that Art 34(2)(b)(ii) of the Model Law "was not to be interpreted as excluding instances or events relating to the manner in which an award was arrived at."*

157.It is clear that errors of law or fact, per se, do not engage the public policy of Singapore under Art 34(2)(b)(ii) of the Model Law when they cannot be set aside under Art 34(2)(a)(iii) of the Model Law (PT Asuransi at [57]), with the exception that the court's judicial power to decide what the public policy of Singapore is cannot be abrogated (AJU v AJT[2011] 4 SLR 739 ("AJU v AJI") at [62])...

xxxxxxxxx

159....This balance is generally in favour of the policy of enforcing arbitral awards, and only tilts in favour of the countervailing public policy where the violation of that policy would "shock the conscience" or would be contrary to "the forum's most basic notion of morality and justice". In determining whether the balance tilts towards the countervailing public policy, it is important to consider both the subject nature of the public policy, the degree of violation of that public policy and the consequences of the violation."

50. In the given case, contention of the insurance company is in fact

contrary to the public policy. The petitioner case is contrary to the written insurance policy. Taking advantage of the distress situation of its client, forcing the insured to receive compensation, is unreasonable and contrary to the own assessment of loss. Quoting depreciation and under-insurance, which is not applicable for Reinstatement Value policy is against law and public policy.

51. The Arbitrator who has gone into all these facts in details has arrived at just conclusion. The Insurance Company in this petition has contended that Arbitration Tribunal has proceeded in violation of the contract and survey report. In fact it is the Insurance Company, which has violated the contractual term.

52. It is also contended by the petitioner that the Tribunal has acted like a, Court of equity which is expressly barred to do under the Act. It is settled principle of law that application under 34 of Arbitration Act cannot be treated as a regular appeal. The award should suffer any of the ground enumerated under Section 34 (2) of the Arbitration Act. Though the petitioner contend that the award is against the public policy and the Arbitrator has acted as Court of equity, both the contentions are not based on record. In fact, the

conduct of the Insurance Company in the view of this Court is an Act contrary to the public policy and their own terms of agreement.

53. Hence, this Court finds that the Original Petition filed is frivolous. Just to delay the payment and deprive the lawful claim of the claimant the petition is filed. In the result, this ***Original Petition is dismissed*** with cost of Rs.50,000/-. Consequently, connected Application is closed.

10.03.2020

Index : Yes
Internet :Yes/No.
Speaking Order / Non-Speaking Order
rpl

Dr.G.JAYACHANDRAN,J.

rpl

Pre-delivery order in
O.P.No.651 of 2019
& A.No.6034 of 2019

10.03.2020