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.653 of 2019
& A.No.6035 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 HOTELS MADRAS PVT LTD
No.43, Sarangapani Street,
T.Nagar, Chennai-600 017
Represented by its Director. .. 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 Hotels Madras Pvt. Ltd Vs 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 by the Insurance company challenging the Arbitration award dated 19.04.2019, which partly allowed the respondent claim to the tune of Rs.2,72,74,817/- with interest at the rate of 10% from (13.12.2016) the date of legal notice, till the date of filing of the claim statement and 18% interest for any delay in payment of the award amount after two months from the date of receipt of the award.

2. The brief facts of the case is that the respondent is a private limited company running a hotel by name "The Checkers Hotel" at No.161, Anna Salai. The petitioner Insurance company issued a Standard Fire and Special Perils Policy to the respondent for a period of 12 months commencing from 05.06.2015 for total sum insured Rs.7,00,00,000/-. The policy covers the respondent property located at No.161, Anna Salai, Little Mount, Saidapet, Chennai for total sum insured of Rs.7,00,00,000/- with the following break up details:-

"a. Building including plinth foundation and super structure for Rs.2.9 crores;

b. Plant and Machinery including air condition plant, fitting chillers ducts, accessories, deep freezer, cold

storage etc. For Rs.2.8 crores;

c. Furniture, Fixtures and Fittings (FFF) for Rs.1.3 crores."

3. Due to unprecedented rain and flood in Chennai in the month of November and December 2015, the building, plant and machinery, furniture, fixtures and fittings of the respondent hotel under insurance of the petitioner completely damaged on 02.12.2015 at around 11.00 a.m. The respondent intimated about the damage and made a claim vide letter dated 03.12.2015, which according to the petitioner received only on 07.12.2015. On the basis of the claim letter, the petitioner appointed protocol surveyor and Engineer Pvt. Ltd., (Surveyor) on 08.12.2015. The Surveyor visited the insured premises on 09.12.2015. Interim survey report dated 29.12.2015 was submitted by the Surveyor with the following observation:-

"a. The loss occurred on 01.12.2015 – 02.12.2015 due to flood/inundation;

b. The damaged items were the building, plant and machinery, and FFF;

c. The estimated loss was Rs.4,70,82,740/-;

d. Detailed physical verification would be carried out on affected items. However, an estimated liability would be around Rs.2,50,00,000/-;

e. On the basis of the damage assessed, the Surveyor recommended an On-Account payment of Rs.10,00,000/- to the Respondent;

f. Detailed assessment on other aspects such as Assessment of Loss, Salvage etc. would be dealt with in the Final report after receipt of requisite documents from the Respondent."

4. On the same day, the Surveyor has also issued another Interim Survey Report with the revised claim bill of Rs.5,90,89,142/- submitted by the respondent. The Surveyor recommended a sum of Rs.35 lakhs including Rs.10 lakhs already recommended be released. On 04.04.2016, there was a meeting between the petitioner and the respondent to discuss various aspects of the claim. The representative of the respondent requested for the Market Value assessment. On the basis of the revised claim after adjusting the depreciation, salvage and under insurance, the Surveyor submitted its assessment on 23.04.2016 valued the total loss as Rs.67,92,046/-. The respondent was not satisfied with the assessment

and hence sought for Rs.5 crores towards full and final settlement, which the petitioner declined. After exchange of legal notices, by consent Arbitrator was appointed. Before the Arbitrator, the respondent made the following claim:-

> *"1. To direct the Respondents to pay a sum of Rs.5,66,87,580/- towards full and final settlement of the claim made by the claimant pertaining to damage caused to the claimant due to rains and floods on 02.12.2015;*
>
> *2. To direct the Respondents to pay a sum of Rs.2,00,00,000/- towards compensation towards the loss/damages incurred by the claimant due to loss of business.*
>
> *3. To direct the Respondents to pay interest at the rate of 24% per annum on the total claim amount of Rs.7,66,87,580/- from the date of cause of action i.e., 02.12.2014 to the date on which the award is made.*
>
> *4. Award further interest i.e., post award interest at the rate of two percent higher than the current rate of interest prevalent on the date of award to the date of payment as provided under Section 31 (7) (b) of the Arbitration and Conciliation (Amendment) Act, 2015."*

5. The defense of the insurer was that, on the basis of the Interim Survey Reports of the Surveyor, the Respondent was required to submit all relevant documents for the Surveyor to complete its assessment on the claim. In this regard, on 04.04.2016, there was a meeting between the Petitioner and the Respondent in Mumbai to discuss various aspects of the claim. During this meeting, the differences between Market Value assessment and Reinstatement Value assessment were explained to the Respondent's representatives in detail. In furtherance to the meeting the Respondent's representatives requested for Market Value assessment. According the Market Value for the loss was assessed taking note of depreciation and under-insurance.

6. Before the Arbitrator, on behalf of insured and insurer, witnesses were examined. After considering the claim and the defense, the Arbitrator had partially allowed the claim and passed an award as below:-

"(a) The Respondent had to pay a sum of Rs.2,72,74,817/- to the Claimant;

(b) The Respondent had to pay interest of Rs.2,72,74,817/- at the rate of 10% from 13.12.2016, the date of legal notice, till the date of filing claim

statement;

(c) Respondent had to pay the aforesaid amounts to the Claimant within 2 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.

(d) Both the parties had to bear their own costs."

7. This award of the Arbitrator is challenged by the Insurance company on the following grounds:-

a. The Award is contrary to law, and is in conflict with the public policy of India. The Tribunal has, contrary to the documents on record erroneously concluded that the Petitioner has not chosen to have its claim assessed on Market Value basis."

b. The Arbitrator has failed to consider the documents and records, which indicates that the claimant agreed for assessment on Market Value, though the policy was on Reinstatement Value basis. The impugned award failed to accord reason as to how the petitioner (Insurance company) failed to file

document to show that the respondent has ever accepted to assess the loss on the basis of Market Value.

c. The Arbitrator had erroneously concluded that the respondent did not give any consent for Market Value assessment, whereby it has completely over looked the meeting between the claimant and the Insurance company on 04.04.2016 and the e-mail correspondence of the same date recording the meeting out come.

d. Ignorance of these vital document by the Arbitrator has let to patent illegality of the impugned award.

8. The contention of the petitioner is that there is difference between the Market Value assessment and the Reinstatement Value assessment. Reinstatement Value assessment means 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.

9. Though the policy was on Reinstatement Value basis, since the representatives of the claimant asked for Market Value assessment, during the meeting held on 04.04.2016, as per the policy terms, the loss was assessed as per the Market Value basis.

10. 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.

11. 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."

12. 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 Rs.4,13,45,928/- for the loss of property. It then proceeds to deduct: (a)Rs.35,00,000/- being the sum already paid by the Petitioner; and (b) Rs.1,05,71,111/- towards Salvage. The balance sum is directed to be paid by the Petitioner to the Respondent is thus assessed as Rs.2,72,74,817/-. The Tribunal has completely overlooked the fact that the

Petitioner had in total paid the entire assessed amount of Rs.67,89,154/- (after deduction of reinstatement premium) hence the applicable deduction ought to have been Rs.67,89,154/- and not Rs.35,00,000/-.

13. 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 disrecording the Surveyor's assessment, the Tribunal has fixed the quantum of loss without any basis.

14. 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."

15. 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.

16. The prime contention of the petitioner is that, the claimant/respondent insured the property building, plaint, machinery, furniture, fixture and fittings for a total sum of Rs.7 crores. Though the value of the building, plant machinery, furniture, fixture and fittings for more than Rs.7 crores, these properties were insured for under value. No doubt the insurance was subject to Reinstatement Value policy, but the claimant during the meeting with the insurance officials and the Surveyor on 04.04.2016 requested the insurer for the Market Value settlement of the claim. 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.

17. Thus, the attack on the arbitral award is based on the findings of the Arbitrator that conversion of the policy from Reinstatement Value basis to the Market Value basis is without any consent by the respondent and the insurer cannot deduct the depreciation and under- insurance, when the policy is for Reinstatement Value.

18. 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 conditions:-

"(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."

19. 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.

20. 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.

21. Further 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.

22. Based on 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. In the interim survey report dated 29.12.2015, the Surveyor has estimated the loss at Rs.4,70,82,740/-. In the second interim report, the revised claim bill presented by the claimant for Rs.5,90,89,142/- and has stated that based on their survey / inspection, till date, the under right liability is likely to be arrived at Rs.2,50,00,000/-. They recommended to pay Rs.35 lakhs including Rs.10 lakhs already recommended to be released as on account payment to the

insured. The claimant through e-mail dated 24.02.2016 has informed the insurance company that in spite of submitting all the details and claim related papers as required by the Insurance Company nearly two months back, delay in settlement of claim is regrettable.

23. 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.

24. 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.

25. 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.4,70,82,740/- as per the Surveyor appointed by the insurance company.

26. 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 indemnified only around Rs.65 lakhs as against the loss of Rs.4,70,82,740/-. 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.

27. 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 Ex.C2, Ex.C3 and Ex.C4, the Arbitrator has held that the claimant is entitled for Rs.4,13,45,928/- for the loss of the property, which was insured under the petitioner. After deducting a sum of Rs.35 lakhs already paid and a sum of Rs.1,05,71,111/- towards salvage as calculated by the Surveyor a sum of Rs.2,72,74,817/- is fixed as money payable by the petitioner/Insurance Company to the claimant.

28. In the petition, it is contended that the Arbitrator has arrived this figure without any basis. The fact the petitioner was paid a sum of Rs.67,89,154/- after deduction of reinstatement premium not take note by the arbitrator. The

inconsistency in the plea of the petitioner can be seen from their own statement, which is raised under ground DD of the petition. It is an admitted fact that the insurance policy was the reinstatement policy. The claimant had never given any consent in writing that it can be converted into Market Value policy, despite that 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, they agreed for conversion.

29. 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.

30. It is the admitted case of the Insurance Company that the interim survey report was initially estimated the loss to the insurer as Rs.4,70,82,740/-.

They have also recommended "on account payment" of Rs.10 lakhs to the respondent. Subsequently, the second interim report they have revised the estimated loss as Rs.5,90,89,142/- and recommended Rs.35 lakhs to be released as on account payment. All of a sudden, after four months, the Surveyor has made assessment of loss based on Market Value policy after deducting the depreciation, under-insurance and salvage. The total loss has been assessed at Rs.67,92,046/-.

31. 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 around Rs.5,90,89,142/-. Now under the Market Value policy, he has been paid only Rs.67,92,046/- the difference is nearly Rs.5 crores. Will any insurer will opted for reinstatement policy and pay the premium not only prior to the incident, but even after the incident under the reinstatement policy and will agree for a Market Value policy 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. 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.

32. 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.67,92,046/- towards full satisfaction as against Rs.5,90,89,142/- loss.

33. 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.67,92,046/- is nowhere near the estimated loss of Rs.4,70,82,740/- 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.

34. 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.2,72,74,817/-. The claimant has insured his property for Rs.7 crores. Based on the Surveyor's report Ex.R.3 dated 25.07.2016 the loss during the flood was Rs.4,13,45,921/-. before depreciation. The Arbitrator has taken that as the loss to

be compensated and after deducting sum of Rs.35 lakhs already paid and the salvage amount of Rs.1,05,71,111/-. A sum of Rs.2,72,74,817/- has been fixed as loss payable. If the Insurance Company has made further payment besides Rs.32,92,046/- that amount could be deducted. However, in absence of the the documents to show the said payment, the Arbitrator has recorded that the petitioner/Insurance Company is willing to settle Rs.32,92,046/- to the claimant.

35. 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.

36. 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 persuaded to accept the Market Value policy to settle the claim faster, such persuasion and acceptance is under duress and it is not a valid consent. When the claimant has made very 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 either should have 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.67,89,154/- against the estimated loss of Rs.4,70,82,740/-

37. 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.

38. 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.

39. 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. He had been expecting the Insurance Company to settle the claim at the earliest.

40. 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. In fact, in this case when the insurer has fixed the loss as Rs.67,89,154/-, the insured has specifically refused to accept the proposal.

41. The Arbitrator has taken note of the sequence of the event and the correspondence between 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.

42. 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. The Hon'ble Supreme Court had observed 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"

43. The Arbitrator has 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.***

44. 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.

45. 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 fall under any of the reason 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..”*

46. 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 an insite 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])...

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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."

47. In the given case, contention of the insurance company is in fact contrary to the public policy. The case of the petitioner is that 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.

48. 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 and also not consider the interim survey report, which has assessed the loss to the tune of Rs.4,70,82,740/- and estimated liability for the Insurance Company at Rs.2,50,00,000/-.

49. It is also contended by the petitioner that the Tribunal has acted like a, Court of equity which is expressed 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, in the view of this Court the conduct of the Insurance Company is an act contrary to the public policy and their own terms of agreement.

50. 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.653 of 2019
& A.No.6035 of 2019

10.03.2020