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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.08.2021

CORAM :

THE HON'BLE MR.SANJIB BANERJEE, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE P.D.AUDIKESSAVALU

O.S.A.No.107 of 2020

M/s.Oriental Insurance Company Ltd.,
represented by Regional manager,
Regional Office 2, No.4, UIL Building,
4th Floor, Esplanade, Chennai 108
rep. By its Regional Manager,
R.O. Chennai, Mr.M.S.Sekar ... Appellant

Vs

M/s.Suryadev Allos & Power Pvt. Ltd.,
rep. By its Managing Director
No.497 of 498, 8th Floor,
Isana Building, Poonamalle High Road,
Arumbakkam, Chennai ... Respondent

Appeal filed against the Fair and Decretal Order of this Court dated 25.10.2019 in O.P.No.618 of 2019.

Prayer in O.P.No.618 of 2019:

Original Petition praying that this Hon'ble Court be pleased to:

a)set aside the award dated 03/4/2019 passed by the learned Arbitrators and allow the claims of the Petitioner before the Arbitral Tribunal;

b)award costs to the petitioner.

For Appellant : Mr.H.S.Hredai

For Respondent : Mr.V.Ramesh for R.Ashwathi



J U D G M E N T
(made by the Hon'ble Chief Justice)

The appellant complains of a larger compensation having been awarded by the Arbitral Tribunal than was warranted and the failure of the Arbitration Court to, in effect, modify the award.

2. For a start, it must be recorded that no modification of an arbitral award is possible within the scope of the activities that a court may perform under Section 34 of the Arbitration and Conciliation Act, 1996. Under such provision, the court may set aside an award or refuse to set aside an award or even partly set aside an award in respect of any head of claim or the like; but the court cannot modify the award. The prayer of the appellant here must be regarded as one for modification since the petitioner does not question the factum of loss suffered by the respondent insured or the quantum that has been awarded by the Arbitration Court on account of such loss.

3. In assailing the award, the appellant says that it is patently illegal since the arbitrator acted in derogation of a term of the contract and complains that the Arbitration Court did not correct the position despite it being evident that the ground was squarely urged before such court.

4. It is necessary to first refer to the order impugned dated October 25, 2019 passed on the appellant's petition under Section 34 of the Act. A two-fold submission was made on behalf of the appellant herein: that a larger sum was deductible from the quantum of assessed loss than was done by the arbitrator; and, that the surveyor calculated the loss suffered at two units, though the claim was only in respect of the loss suffered at one unit of the relevant factory.

5. The agreement between the parties provided that 14 days of standard gross profit would be deducted from the quantum assessed as loss and it would be only such reduced sum that the insurance company would have to pay to the insured. On the first count, the appellant asserts that the gross profit of the manufacturing facility at the location ought to have been taken into consideration to ascertain the quantum that ought to have been deducted. On the second count, the appellant says that though the surveyor mistakenly indicated the loss by calculating the perceived loss at both the units, the arbitrator and the court of the first instance erred in not interfering with the roughly double the amount having been awarded as damages.



6. The Arbitration Court dealt with the contentions, inter alia, at paragraphs 7 and 8 of the impugned judgment and order. The court referred to the specific discussion as to the quantum that could be deducted in terms of the policy. According to the Single Bench, the Arbitral Tribunal noticed that the total combined turnover of units I and II had been taken into account to arrive at the deductible amount of Rs.9.80 crore; and that by taking into account the standard turnover of both units, the deductible amount had been almost doubled.

7. Paragraph 65 of the award, which is relevant for the present discussion, has been quoted in the impugned judgment and order. At such paragraph, the Arbitral Tribunal recorded as follows:

"Therefore it is clear that even the understanding of the respondent (the appellant herein) is that Unit II's figures alone must be taken into account for working out the loss. But what has happened is that Loss of Profit is computed for Unit II but excess is deducted on gross profit of both units. On one unit's loss of profit of interruption period the surveyor has applied GP of both Units' for excess period".

8. In the award, the discussion on such ground is found between paragraphs 61 and 65 thereof. At paragraph 61 of the award it is recorded that the surveyor's final bill had provided a loss of Rs.12,93,25,395/-, but it was based on Units I and II combined although the loss was suffered only at Unit II.

9. The award went on to record that there were two power plants of 80 MW each and the two power plants had been installed at different times. The arbitrator found that both the plants had recordings of the output and other data to show the consumption of fuel and power generation by such units. The Arbitral Tribunal found that there was no serious rebuttal of the statements contained in paragraph 16 of the statement of claim and the fact of loss of generation from Unit II was expressly admitted by the appellant insurance company. The Arbitral Tribunal observed that the two 80 MW power plants (Units I and II) were installed at different times and operated independently, so much so that while the second unit broke down the first unit was working and producing power. It is apparent from paragraph 61 of the award that the Arbitral Tribunal was alive to the fact that the loss had to be calculated only in respect of the second unit and, as such, the Arbitral Tribunal reasoned that the gross profit that ought to be deducted in terms of the contract would also be only in respect of the second unit.



10. It is clear that the issue that the appellant raises now engaged the attention of the Arbitral Tribunal and the Arbitral Tribunal reduced the quantum of deduction that could be applied and accepted the surveyor's quantification to award compensation only in respect of Unit II. The Arbitration Court also noticed such aspect and opined that it was only logical that when a claim in respect of one unit had been made and the insurance amount was being ascertained, the deduction should be restricted to the gross profit attributable to the unit and not the gross profit of the entire plant. This was a possible view of the relevant terms in the contract and merely because the court may think that the other view was more appropriate, will not impel the court to set aside the award on such ground. In any event, as the trial court has observed, the award is clear in that it allows both the deductible component and the compensation to be confined to the second unit and the figures pertaining to the entire unit being found to be irrelevant in such context.

11. Even if a mistake has been made by the Arbitral Tribunal in such regard, it will not amount to patent illegality. If a term of contract is capable of two meanings and one of the two is chosen by the Arbitral Tribunal, the court in seisin of the challenge thereto cannot upset the award. At any rate, the award does not appear to have resulted in any manifest miscarriage of justice. It must also be remembered that the authority exercised under Section 34 of the Act has more to do with correcting errors of justification, rather than errors within the purview of the Arbitral Tribunal's authority.

12. Since the impugned judgment has dealt with the grounds urged and has given reasons for its findings, the same does not call for any interference. It is elementary that an arbitrator may make an error in law but such error would not be rectified unless, as a consequence, there is grave miscarriage of justice or serious prejudice.

13. The only ground urged by the appellant does not hold any water. The order impugned has appropriately dealt with the challenge fashioned by the appellant herein. The relevant order dated October 25, 2019 does not call for any interference, particularly since the award has already become capable to be implemented.



14. O.S.A.No.107 of 2020 is dismissed. Consequently,
C.M.P.No.5017 of 2020 is closed. There will be no order as to
costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

The Sub Assistant Registrar,
Original Side,
High Court, Madras-104.

+1cc to Mr.M.V.Swaroop, Advocate Sr.38626

O.S.A.No.107 of 2020

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srg 11/08/2021