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+ **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgement reserved on **09.08.2021**
Judgement pronounced on **09.09.2021**

+ **FAO(OS) (COMM) 94/2021 & CM No.21232/2021**

THE ORIENTAL INSURANCE CO. LTD.Appellant
Through: Mr. Sanjeev Sindhvani, Senior Advocate
with Mr. Abhishek K. Gola, Advocate.

versus

DIAMOND PRODUCT LTD.Respondent
Through: Mr. Vineet Kumar, Advocate.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MR. JUSTICE TALWANT SINGH

RAJIV SHAKDHER, J :

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Preface: -

1. This is an appeal preferred under Section 37 of the Arbitration Act, 1996 (in short “1996 Act”) read with Section 13 of the Commercial Courts Act, 2015 against the judgment dated 21.05.2021, passed by the learned Single Judge, in O.M.P. (COMM.) No. 147/2018. Via the impugned judgment, the learned Single Judge has sustained the award dated 03.11.2017, passed by the Arbitral Tribunal, comprising Hon'ble Mr. Justice (Retd.) S.P. Arora, Hon'ble Mr. Justice (Retd.) K.S. Gupta and Mr. R.K. Sharma.

2. It is important to note, at the very outset, that, when the matter was taken up for hearing for the first time, on 19.07.2021, both the sides represented by counsel, indicated to us, that, the only issue which arises for consideration in the instant appeal concerns the loss of stock, in terms of money, quantified by the Arbitral Tribunal. The Arbitral Tribunal has pegged the total loss towards closing stock suffered by the respondent, at Rs. 4,42,36,337/-.

3. Accordingly, the appellant has been directed to pay Rs. 2,08,76,700/-, after adjusting the loss, towards stock, arrived at by the surveyor, appointed by the appellant. It would be relevant to note that, the loss towards closing stock adverted to by the Arbitral Tribunal, comprised raw material, semi-finished goods and finished goods.

Background facts: -

4. Before we proceed further, it may be relevant to etch out the broad contours of the case, which led to the dispute obtaining between the parties, being referred to the Arbitral Tribunal.

4.1. The respondent, which is, apparently, in the business of manufacturing and selling footwear and footwear components, on 20.03.2008, obtained the Standard Fire and Special Perils policy from the appellant. The policy period spanned between 20.03.2008 and 19.03.2009. The total sum assured under the

policy initially, was 24,25,00,000/-, which was enhanced to Rs. 27,25,00,000/- w.e.f. 30.06.2008 and covered the following assets of the respondents, albeit, on a reinstatement value basis.

Property Covered	Sum Insured
	Rs.
Raw Material, Semi-Finished & Finished Stock	6,00,00,000
Furniture, Fixtures & Fittings, ACs and Computers, etc.	25,00,000
Buildings	11,00,00,000
Plant & Machinery	10,00,00,000
Total	27,25,00,000

4.2. On 14.12.2008, a fire broke out in one of the two units of the respondent i.e. the unit located at village Moginand, Kala Amb, Nahan Road, District Sirmour, H.P. (hereafter referred as “Kala Amb Unit”). It is not in dispute that, the aforementioned policy purchased by the respondent concerned the Kala Amb Unit.

4.3. The fire, inter alia, caused damage to the building, plant and machinery, stocks, furniture, fixtures and fittings etc. Intimation about the incident was communicated to the appellant by telephone, which was followed by a letter dated 15.12.2008. The incident was also reported by the respondent to the closest police station located in Kala Amb and the fire department.

4.4. Fire brigades were pressed into service to douse the fire which had occurred in the Kala Amb Unit of the appellant. The appellant appointed an entity going by the name Aditi Consultant Pvt. Ltd., as the surveyor. The surveyor's representative made its first visit to the Kala Amb Unit on 16.12.2008, which was followed by several visits, and an inspection of the damage caused to the building and other property. On 10.01.2009, the respondent submitted its provisional claim to the surveyor. At this stage, the

respondent had pegged its loss at Rs. 13,21,56,318/-. The provisional claim was submitted in the form, prescribed for the purpose.

4.5. The surveyor recommended the release of interim payment in favour of the respondent, and, accordingly, in March 2009, Rs. 2,50,00,000/- were paid to the respondent.

4.6. On 10.08.2009, the respondent scaled down its claim to Rs. 12,02,31,749/-. The surveyor submitted its final report on 18.03.2010. Apparently, on 04.05.2010, the respondent was called upon to submit a consent letter in the background of the report submitted by the surveyor. The said communication required the claimant to accept the loss, which had been assessed in the survey report, as Rs. 5,46,72,292/-. In response thereto, the respondent dispatched a letter on 05.05.2010, whereby the respondent consented to the assessment of loss made by the surveyor.

4.7. The appellant, for some reason, was not satisfied with the manner in which the respondent's letter dated 05.05.2010 was framed, and hence the respondent was called upon by the appellant to send a fresh consent letter. The draft of the fresh consent letter was sent by the appellant via email dated 01.09.2010.

4.8. Having received the draft of the consent letter, the respondent dispatched a fresh consent letter dated 03.09.2010. Via this consent letter, the respondent facially agreed to the quantification of the loss assessed by the surveyor, which, as indicated above, was assessed at Rs. 5,46,72,292/-, albeit, without reservations.

4.9. In other words, the respondent agreed that, if the balance amount is paid, keeping in mind the said figure, it would constitute the full and final settlement in respect of its claim lodged with the appellant. The said letter concluded with the averment that, the respondent had already received Rs. 2,49,89,484/-.

5. The appellant, however, was not satisfied, it appears, with the consent letter, dated 03.09.2010, forwarded by the respondent. The appellant, therefore, called upon the respondent to furnish a fresh consent letter, which was similar in content, with the exception that, it contained averment, to the effect, that, the respondent undertook not to agitate its claim before any court, consumer forum, commission or any other authority in future. The letter dated 06.12.2010 was, thus, accompanied by a discharge voucher dated 06.12.2010, which sought to affirm the fact that the respondent's claim had been settled with the payment of Rs. 5,46,72,292/-; this was quite clearly a pre-receipt document as the balance amount (after adjusting the money which had already been released in favour of the respondent), i.e., Rs. 2,96,59,810/- was paid to the respondent, vide cheque dated 09.12.2010.

5.1. The respondent was unhappy, and perhaps, felt coerced into accepting a lesser amount in respect of the claim lodged by it. Being aggrieved, the respondent served upon the appellant, a notice dated 13.12.2010. Via this notice, the respondent, inter alia, lodged a protest concerning the quantification of the loss/damage. This led to the arbitration proceedings being triggered. The respondent filed an application under Section 11 of the 1996 Act before this court. The court, vide order dated 31.05.2011, allowed the respondent's application. The Arbitral Tribunal was, accordingly, constituted, which led to the passing of the award dated 03.11.2017.

5.2. As noted, at the outset, insofar as the loss qua stocks was concerned, the Arbitral Tribunal directed the appellant to pay to the respondent Rs. 2,08,76,700/-. Besides this, the Arbitral Tribunal also directed the appellant to pay interest @ 15% per annum on the balance amount i.e. Rs. 2,96,59,810/- for the period spanning between 05.05.2010 and 12.12.2010.

5.3. The interest amount was quantified at Rs. 27,05,950/-. Thus, the total amount which the Arbitral Tribunal awarded in favour of the respondent was

Rs. 2,35,82,650/- along with interest @ 9% per annum from the date of the award till receipt of the awarded amount. Besides this, the appellant was also directed by the arbitral tribunal to pay the respondent's share of the arbitrator's fee and expenses incurred towards the lawyer's fee, which was pegged at Rs. 75,000/-. A direction was also issued to the appellant to pay to the respondent the stamp duty on the award, which was incurred by the respondent.

5.4. The appellant, being dissatisfied with the award, assailed the same by way of a Section 34 petition under the 1996 Act. The Single Judge, for the reasons given in the impugned judgment, repelled the challenge.

6. In support of the appeal, arguments were advanced by Mr. Sanjeev Sindhwani, learned Senior Advocate, while the respondent was represented by Mr. Vineet Kumar, Advocate.

Submissions made on behalf of appellant:

7. Broadly, the submissions advanced by Mr. Sindhwani can be paraphrased as follows:

- i. Both the Single Judge and Arbitral Tribunal failed to take into account the fact that, no stock register, books of account were submitted by the respondent. Therefore, the value of the closing stock, which was taken as Rs. 5,98,12,000/-, by the Arbitral Tribunal and sustained by the learned Single Judge, had no basis and was not backed by the relevant evidentiary material. The evidence produced by the respondent was in the form of the certificate/opinion dated 09.12.2011, given by its statutory auditor, Mohit Parekh & Co. The proprietor of the said concern i.e., Mr. Mohit A. Parekh, in his testimony, had categorically stated that, the stock register was not maintained and that stock inventory was collated in the form of excel sheets. In other words, the respondent had failed to produce any evidence whatsoever to substantiate its claim for loss of stock. This is

evident if one were to peruse the following observations made in the surveyor's report

“We asked from the insured through various letters regarding stock related information/documents/details from time to time but they could not provide the following:-

1. Location-wise details of Raw materials, WIP and Finished goods.
2. Stock records maintained & copy of [the] stock register
3. Details of Production for last 6 months and standard production mix of raw materials and consumption: chart from April to the date of [the] incident”

- ii. Since the respondent was unable to produce the relevant documentary material, which would establish the stock, that was available, at the Kala Amb Unit at the time when the fire took place, the surveyor adopted certain tried and tested parameters to assess the loss of stock.
- iii. Both the Arbitral Tribunal and the learned Single Judge moved away from the parameters adopted by the surveyor in assessing the loss of stock and instead relied upon the manufacturing and trading account to arrive at the figure of closing stock.
- iv. The Arbitral Tribunal as also the learned Single Judge ignored the fact that the stock statements submitted by the respondent to its banker i.e., the Bank of India (BOI) were neither backed by the physical verification of the stock nor were any records produced for verification by the bank. Despite this lacunae, undue weight was given to the fact that the loss calculated by the respondent was based on stock statements furnished to BOI. The surveyor's well-reasoned report ought to have been given due weight by the Arbitral Tribunal. The surveyor, being an expert, his report ought not to have been given short shrift as has been done both by the Arbitral Tribunal and the learned Single Judge. [See *Indo-Rama Synthetics India Ltd. v. IFFCO Tokio General Insurance Company Ltd.*, 2019 SCC OnLine Del 7026]

- v. The Arbitral Tribunal and the learned Single Judge have accepted the purported loss assessed by the respondent as gospel truth, based on the misconceived assumption that it was far lesser than that what emerged from the reconstruction of the accounts. In this context, emphasis was laid on the following observations made by the learned Single Judge in paragraph 32 of his judgment.

“32.Since the respondent had submitted a claim for Rs.5 ,98, 12,000/-, the Tribunal accepted the said value as the same was less than the closing stock as determined on the basis of a manufacturing and trading account drawn up by assuming the gross loss at 2.41 % of the sale value.”

- vi. The Arbitral Tribunal and the learned Single Judge has not dealt with the reasons spelt out by the surveyor in his report while assessing the loss in respect of stock.
- vii. A contract of insurance is a contract of indemnity. The onus to prove the loss was on the respondent. The respondent was required to prove the loss suffered on account of damage to the stock. The Arbitral Tribunal and the learned Single Judge appear to have given undue benefit to the respondent, even though it did not maintain production records. The reasoning given by the Arbitral Tribunal that, because production record was not available, the deduction in quantities to the extent of 20% made by the surveyor had no basis, was specious.
- viii. The Arbitral Tribunal appears to have rejected the conclusion reached by the surveyor on the sole ground that, the surveyor had adopted different methodology to assess the stock/damage to raw material, semi-finished goods and finished goods, largely, based on stock statements, the veracity of which was doubted by the surveyor. It was submitted that this could not have been the basis for rejecting a well-articulated report and assessment made by the surveyor. This approach adopted by the Arbitral Tribunal exhibits complete non-application of mind. Since the stock

comprised raw material, semi-finished goods and finished goods, they have been assessed differently for calculation of loss. However, the learned Single Judge ignored this aspect of the matter. In making a deduction of 20% in respect of quantity loss due to fire, the surveyor, inter alia, took into account various factors such as:

- a) No records had been furnished by the respondent concerning wise inventory.
 - b) Stock registers were not maintained.
 - c) The respondent i.e. the insured has lodged an item-wise claim of raw material, semi-finished goods and finished goods despite no such details having been made available in the stock statement furnished to BOI.
 - d) The stock statement submitted to the bank remained unverified.
 - e) The purchases substantially exceeded the sales between April 2008 and August 2008
 - f) There is a stark variation in the consumption pattern in the raw material and manufacturing expenses to the turnover as is apparent from a perusal of the balance sheet for the year ending on 31.03.2008 and the provisional manufacturing and trading account generated as on 14.12.2008. There is a high fluctuation in gross profit rates.
- ix. The learned Single Judge and the Arbitral Tribunal gave undue weight to the fact that the depreciation had not been factored in by the surveyor while assessing the loss in respect of the stock available at the Kala Amb Unit of the respondent. Although the respondent had claimed of gross profit rate of 20% while lodging its claim, the Arbitral Tribunal has allowed the claim, and in doing so, has factored in a loss at the rate of 2.41%.

Submissions advanced on behalf of the respondent:

8. Mr. Vineet Kumar, on the other hand, largely relied upon the award as well as the judgment of the learned Single Judge in response to the submissions made on behalf of the appellant.

8.1. Besides this, Mr. Kumar submitted that the challenge to the award has to be made within the ambit of law i.e., the provisions contained in Section 34 of the 1996 Act. The Arbitral Tribunal, having perused the material and evidence on record, had rightly concluded that, the surveyor had unilaterally and in a whimsical manner reduced the quantities of stock. The surveyor had made ad hoc deductions, based on surmises and conjectures, which was noticed by the Arbitral Tribunal, and therefore, the Arbitral Tribunal has correctly evaluated the loss towards stock, in line with the Accounting Standard-2 (in short 'AS-2'), issued by the Institute of Chartered Accountants of India (ICAI) by adopting the manufacturing cum trading account route and preparing it, keeping in mind the date when the incident of fire had occurred at the Kala Amb Unit.

8.2. The undue emphasis laid, on behalf of the appellant, that the respondent had not maintained and/or failed to produce stock and production registers misses the point that there are various methods available to calculate the actual loss caused to stock that was available to the respondent at the Kala Amb Unit at the day of the fire. It is in this context that, recourse was taken to the audited balance sheet and profit and loss accounts and sale and purchase vouchers, based on which a manufacturing and trading account was prepared, which, in turn, helped in assessing the stock that would have been available on the day when the incident of fire took place at the respondent's Kala Amb Unit.

8.3. The respondent had, thus, produced documents before the surveyor, as also a detailed audit report, prepared by its statutory auditor, i.e., Mohit Parekh and Co. (C.A.) to enable the surveyor to arrive at the actual loss caused due to fire.

8.4. The respondent had provided the following information/material to calculate the stock damaged in the fire at its Kala Amb Unit:

- a) Itemized cost sheet
- b) Audited Balance Sheet
- c) Details of Sale and Purchase account

8.5. Besides this, in calculating the cost/value of the inventory, the respondent had taken recourse to the First In First Out (FIFO) formula in line with AS-2, issued by the ICAI. In sum, the route adopted, to calculate the value of the closing stock, was the manufacturing and trading account.

8.6. The surveyor's approach of making an ad hoc deduction of 20% of the claimed quantity of raw material available at the Kala Amb Unit of the respondent on the day of the fire was both arbitrary and without basis, and hence, this approach was rightly rejected by the Arbitral Tribunal.

8.7. Furthermore, the surveyor had failed to consider the entire quantity of sole and uppers, etc, while assessing the semi-finished goods. The investigator appointed by the appellant, in this behalf, put at rest, the doubts created by the surveyor, as regards transfer of stock from the respondent's Delhi Unit to Kala Amb Unit.

8.8. The surveyor also erred in making an ad hoc deduction of 20% from finished goods, once again, on surmises and conjectures. The surveyor wrongly deducted gross profit at the rate of 50.81% from sales revenue calculated at net factory price to arrive at the value of finished goods for the financial year ending on 31.03.2008.

9. On the other hand, the respondent had worked out his claims qua loss on finished goods by applying the gross profit rate of 20%, which was the rate that the respondent regularly applied while providing the valuation of closing stock to its banker, i.e., BOI. The surveyor in calculating the gross profit rate at

50.81% had made a serious error in not factoring in depreciation. Depreciation being a part of the cost of production was required to be factored in, to calculate gross profit for the year ending on 31.03.2008. The Arbitral Tribunal noted that, had the depreciation been factored in, for the financial year ending on 31.03.2008, the respondent, would have instead of earning profit would have suffered a loss @ 2.41%.

9.1. Therefore, no fault can be found with the reasoning of the Arbitral Tribunal, which is that, in the absence of records relating to production and stock, the value of stock available at the time of fire could only be ascertained by taking recourse to the manufacturing cum trading account route.

9.2. The Arbitral Tribunal, having weighed and appreciated the material placed before it, arrived at the correct conclusion, in valuing the stock which, according to it, was lost in the fire that had occurred in the Kala Amb Unit on 14.12.2008. The appellant, having failed to demonstrate that, there is patent illegality in the award, should not be permitted to unsettle the same, based on an unsustainable argument, which is, that, the surveyor, being an expert, his report ought not to be interfered with, even though serious flaws were found in the method adopted by the surveyor while ascertaining the value of the stock which was damaged on account of the fire.

Analysis and Reasons:

10. We have heard the learned counsel for the parties and perused the record, which includes the judgment of the learned Single Judge. As noted right, at the outset, the only issue, which arises for consideration, is, as to whether the Arbitral Tribunal had committed patent illegality in assessing the loss which the respondent had suffered, qua the stock, which was available, at its factory on the day of the fire?

10.1. In this context, it is important to note that, there is no dispute that on account of the fire, apart from the damage caused to the building, furniture, fixtures, and the stock, the record available at the respondent's Kala Amb Unit was gutted.

10.2. The main thrust of the submissions advanced by Mr. Sindhvani is that, since stock and production registers were not produced, the methodology adopted by the surveyor to ascertain the value of the stock which would have been available in the normal course on 14.12.2008, when the incident of fire took place at the respondent's Kala Amb Unit, ought to have been accepted. In this context, Mr. Sindhvani drew our attention to the testimony of Mr. Mohit A. Parekh i.e. the proprietor of the statutory auditor of the respondent. The testimony of Mr. Mohit A. Parekh when perused closely would reveal the following:

- a) Stock registers, in the traditional sense, were not maintained by the respondent.
- b) The respondent, maintained stock inventory, in the form of excel sheets, on a month to month basis, which was produced for examination of statutory auditor both, at the time of the audit, and before finalization of the audited accounts.
- c) When asked to explain, what he meant by excel sheets, the answer received was that excel sheets concern stock inventory in their regular form.
- d) To a specific question, whether the respondent maintained the production record such as the record of purchases made and the record concerning raw material, semi-finished and finished goods, the answer received was, that at the time of the annual audit, relevant records required for the said purpose, along with a summary, were produced for scrutiny. It was stated that the summary of this record was incorporated in the audit report. In support of this assertion, reliance was placed by him on the audited accounts for the

financial year ending on 31.03.2008, along with supporting evidence, concerning the purchase of raw material, sales, quantities produced including semi-finished goods produced annually.

10.3. A perusal of the testimony of Mr. Mohit A. Parekh shows that, although the stock register was not maintained in its traditional form, the stock inventory was available in excel sheets, which was produced for the scrutiny of the auditor at the time of conduct of the audit as well as before finalization of the audited accounts.

10.4. A perusal of the testimony also shows that it was not as if no record was maintained, as was sought to be portrayed, by Mr. Sindhwani. Mr. Parekh's testimony reveals that the details concerning cash book, bank book, ledger, etc. were made available to the auditor. Likewise, quantitative details of opening and closing stock of raw material and finished goods were also produced before the auditor.

11. Therefore, what comes through is: that because a fire had occurred, and given the fact that stock register and production register was not available (as is perhaps traditionally found with some concerns, if not all), the Arbitral Tribunal took recourse to the manufacturing and trading account, to ascertain the value of the stock that would have been available at the respondent's factory had the incident of fire not occurred.

11.1. While doing so, the Arbitral Tribunal rejected the assessment, made of the loss concerning the closing stock, by the surveyor, for various reasons, including the arbitrary deductions made qua quantities of raw material and finished goods. The Arbitral Tribunal was particularly concerned with the gross profit rate adopted by the surveyor, which, as indicated above, was pegged that 50.81%. The gross profit rate, arrived at by the surveyor, was, undoubtedly, incorrectly calculated, as while calculating the same, depreciation on building, plant and machinery [i.e., Rs. 1,32,80,291/-] was not factored in. Mr. Sindhwani

has failed to rebut the point that, if depreciation was factored in, then instead of gross profit, a gross loss @ 2.41% would have been recorded for the financial year ending on 31.03.2008, as per the audited balance sheet of the respondent.

11.2. In sum, the Arbitral Tribunal after weighing the pros and cons of the material placed before it, which included the surveyor's report, for good reason, adopted the manufacturing and trading account route to calculate the value of the stock which would have been available on 14.12.2008, i.e., on the date of the fire.

11.3. The manufacturing and trading account route is a method, where the opening stock of the year-in-issue, is taken into account, which is nothing, but the closing stock of the previous year (in this case, it would be the closing stock available as on 31.03.2008, consisting of raw material, semi-finished goods and finished goods).

11.4. To this figure, purchases (including stock transfers) are added, as also the manufacturing expenses. The aggregate of the opening stock, purchases (including stock transfers, manufacturing expenses [i.e., cartage inward freight inward, etc.]) is adjusted against gross profits/gross loss and sales (including stock transfer). The net result would be the value of the closing stock, which ought to be available at the end of the period in issue. The period for which the manufacturing and trading account was prepared, as is revealed from the record, spanned between 01.04.2008, i.e., the beginning of the accounting year and ended with the date when the incident of fire occurred i.e. 14.12.2008.

11.5. Therefore, quite correctly, the Arbitral Tribunal picked up, from the audited balance sheet of the respondent, which had been submitted to its banker as well i.e. BOI, the closing stock of raw material, semi-finished goods and finished goods, as on 31.03.2008, which became the opening balance as on 01.04.2008. To the opening stock, as on 01.04.2008, which was the closing stock for 31.03.2008, manufacturing expenses under various heads were added.

Against the sum total of these components, applicable gross loss @ 2.41% was adjusted. Likewise, the value of the sales (including stock transfer) was also adjusted. The net result was the value of the closing stock, which, in the normal course, would have been available on 14.12.2008. Mr. Sindhwani, during the arguments, did not raise any dispute about the amounts mentioned under various heads of manufacturing and trading account.

11.6. That being the position, in our opinion, the Arbitral Tribunal was right in concluding that, although, the manufacturing and trading account showed that the closing stock, as on 14.12.2008, was Rs. 6,25,08,799/-, however, since the respondent while lodging its claim had pegged the value of the closing stock at Rs. 5,98,12,000/-, the value of the closing stock had to be scaled down to that figure i.e. Rs. 5,98,12,000/-. The respondent could not have been compensated, for more than, the claimed amount.

11.7. From this figure of Rs. 5,98,12,000/-, the Arbitral Tribunal reduced the stock, which had been saved, and the value put by the Arbitral Tribunal on 5% of the dead stock. The saved stock was valued at Rs. 1,32,47,435/- while the dead stock was valued at 5% of the amount available, after deducting the value of the saved stock from the value of the stock available on 14.12.2008.

11.8. As noted above, the value of the closing stock available as on 14.12.2008, according to the Arbitral Tribunal, was Rs. 5,98,12,000/- from which the value of saved stock i.e., Rs. 1,32,47,435/- was deducted. The net figure, i.e., Rs. 4,65,64,565/- was adjusted against the dead stock, which was valued, at Rs. 23,28,226/-, i.e., @ 5% of the adjusted stock, i.e., Rs. 4,65,64,565/-. Thus, the total loss quantified by the Arbitral Tribunal was pegged at Rs. 4,42,36,337/-.

12. Mr. Sindhwani did not question, either the value of the saved stock or the dead stock, as set out by the Arbitral Tribunal. In fact, it was the case of the respondent that, the Kala Amb Unit was commissioned in November 2007 [as set out in the statement of claim filed before the Arbitral Tribunal], and

therefore, there was no possibility of dead stock being found at the Kala Amb Unit, given the fact that the fire occurred within 13 months of the said unit being set up.

12.1. As observed, at the very outset, since the adjusted loss of stock, arrived at by the surveyor, was pegged at Rs. 2,33,59,637/-, the Arbitral Tribunal directed the appellant to pay the balance amount, i.e., Rs. 2,08,76,700/- [Rs. 4,42,36,337/- (-) Rs. 2,33,59,637/-].

13. In our view, no fault can be found with the approach adopted by the Arbitral Tribunal. The argument of Mr. Sindhwani that the bankers of the respondent i.e. BOI were unsure of the stock statements made available by the respondent to its auditors, does not impress us, as parts of the record have been picked up to demonstrate that the respondent had no system in place, whereby, a verifiable assessment of the closing stock could be made.

13.1. In this regard, it is important to note that Mr. Sindhwani relied upon the report of K. C. Maheshwari & Associates, which had conducted a stock audit at the respondent's Kala Amb Unit. A perusal of the report would show that, while K.C. Maheshwari & Associates reported that, in the absence of the stock record, reconstruction was not feasible; the production activity was ongoing and that respondent was furnishing, to the bank, a list of inventory, along with monthly stock statements, in the form of excel sheets, which gave item wise quantity and rates of the material.

13.2. Furthermore, the very same report also records that, the material was dispatched by the respondent, through reputed and authorized transporters, and that no specific fund diversion was noticed. In particular, against the query, as to whether there was 'proper categorization and valuation of stocks/comments on inventory and receivable norms accepted at the time of sanction and actual position', the report pertinently records "found in order".

14. Therefore, the contention advanced on behalf of the appellant, that the reliance on the stock statements, submitted by the respondent to BOI, was inherently flawed, is a submission, which does not find favour with us. At the end of the day, the Arbitral Tribunal has weighed the material placed before it, based on which, it has reached a conclusion as regards the value of the closing stock; an aspect which is completely within the domain of the Arbitral Tribunal.

14.1. The argument advanced on behalf of the appellant that patent illegality was committed and that the loss on account of stock was determined, without application of mind, or material on record is, completely, untenable. While there can be no doubt that, weight ought to be given to the surveyor's report, we are, however, unable to agree that the conclusion reached surveyor, cannot be put to test. As noted by the Arbitral Tribunal, the surveyor had committed, inter alia, serious errors in making arbitrary deductions qua quantities of raw material and finished goods and in ascertaining the rate of gross profit. The rate of gross profit [as observed by us hereinabove] arrived at, was an astronomical figure, of 50.81% only because the surveyor had, somehow, forgotten to factor in depreciation, while calculating the production cost.

14.2. The Arbitral Tribunal, to our minds, has given adequate reasons as to, why it had resorted to adopting the manufacturing and trading account route in arriving at the value of the stock, which, according to it, ought to have been available on the date when the incident of fire took place.

15. Therefore, for the very same reason, we find that the judgment of the Division Bench of this Court in the matter of *Indo Rama* case is distinguishable. That was a case wherein, inter alia, a loss of profit claim, on account of fire, was lodged by the insured, based on a policy purchased to cover such a loss. The Arbitral Tribunal, in that case, accepted the claim for loss of profit, lodged by the insured, which was arrived at, based on the loss of output method instead of loss of turnover, propounded by the surveyor. The insured

put to use the output loss methodology, by taking recourse to the 'alternative basis clause', available in the policy. The court found fault with the approach of the Tribunal, as, according to it, it had failed to give independent reasons for adopting the output method for calculating the loss of profit. According to the court, the Arbitral Tribunal, in that case, did not indicate in the award as to why it preferred one view over the other.

16. As observed hereinabove, the facts obtaining, in the instant case, are distinguishable from the facts, which obtained in the **Indo Rama case**. It is not, to our minds, the ratio of the judgement rendered in the **Indo Rama** case that the report of the surveyor cannot put to test. The surveyor is an expert produced by the appellant, i.e., the insurer. Like the report of any other expert, the report of the surveyor can be analysed by an adjudicatory forum and for good reason, the adjudicatory forum can disagree with the conclusion arrived at by the surveyor. The Arbitral Tribunal, in the instant case, has given enough and more reasons, as to why it chose to ignore the methodology adopted by the surveyor in calculating the loss claimed by the respondent on account of damage to its stock.

16.1. Therefore, Mr. Sindhwani's submission, that there was patent illegality in the framing of the award, is not borne out from the record. It is, now, well-established that domestic awards can be challenged on the ground of patent illegality only if it is one, which appears, on the face of the award, and is such, which goes to the root of the matter. Mere erroneous application of the law, or appreciation of evidence, does not call for interference of the award on the ground of patent illegality. The Court cannot set aside the award by reappreciating the evidence, which is taken into consideration, by an Arbitral Tribunal. It cannot be said, in the instant case, that the Arbitral Tribunal, did not take into account, the surveyor's report, while reaching its conclusion. In our view, the objections raised by the appellant, to the award, do not meet the bar

set, both, by the 1996 Act, and the law enunciated by the Supreme Court in *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*¹, (2019) 15 SCC 131 for bringing it within the ambit of the expression ‘patent illegality’.

Conclusion:

17. Thus, for the foregoing reasons, we are not inclined to interfere with the impugned award and/or the judgment of the learned Single Judge.

18. The appeal is, accordingly, dismissed. Pending interlocutory application(s) shall stand closed.

19. However, the parties will bear their own costs.

RAJIV SHAKDHER, J.

TALWANT SINGH, J.

SEPTEMBER 09, 2021

[Click here to check the corrigendum, if any](#)

¹ “37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. ...”