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

Pronounced on: 20.12.2023

+ **O.M.P. (COMM.) 353/2022 and IA No.13435/2022**

NEW INDIA ASSURANCE CO. LTD. Petitioner

Through: Mr. Abhishek Gola, Adv.

versus

M/S. GILL ACQU HYDRO POWER

GENERATION COMPANY PVT. LTD. Respondent

Through: Mr. Yogendra Aldak, Ms. Bhavya Shukla, Mr. Pranav Mundra, Ms. Rashi Srivastava and Mr. Agrim Arora, Advs.

CORAM:

HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

1. The present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996, assailing an arbitral award dated 26.04.2022, in respect of disputes arising out of Erection of All Risk/Storage Cum Erection Policy bearing no.31120044150400000001, issued in favour of the respondent by the petitioner for the period 10.08.2015 to 30.04.2016, extended from time to time vide various endorsements.
2. The project insured by the respondent is a hydro power plant, located at Madhopur Beas Link Canal of UBDC system in Pathankot area of Gurdaspur District of Punjab.



3. The respondent's plant is based on a pit type turbine system which means that the generator, gear box and shaft are below water level.
4. Vide the impugned award, the following claims have been awarded

S. No.	Particulars of Claims	Amount claimed (Rs.)	Amount Awarded (Rs.) (Excluding interest and costs)
A.	<i>Claim on account of Cost of Labour Supply, Diesel, Dewatering Pumps Grouting & Towards Civil Works Repair</i>	1,76,10,937/-	1,34,94,555/-
B.	<i>Claim on account of cost of Dismantling, Cleaning & Repair Services</i>	1,27,00,000/-	1,26,58,396/-
C.	<i>Sum of claims(A+B)</i>		2,61,52,951/-
D.	<i>Amount awarded (applying 10% deduction as per the Insurance Policy) (C-10% of C)</i>		2,35,37,655/- (2,61,52,951-26,15,295)

5. It can be seen that after ascertaining the entitlement of the respondent/claimant to the tune of Rs. 2,61,52,951/-, the operative portion of the impugned award after interpreting the applicable "excess" clause, held as under:

"As per the terms of the insurance policy dated 19.08.2015 which was effective from 10.08.2015, there is an excess clause for Acts of God Claims (as per Memo 6) to the extent of 10% of the claim amount subject to a maximum of INR 5,00,00,000/-. In the instant case, I have found the Claimant's entitlement to be INR 2,61,52,951/-; thus, 10% of the awarded claim amount i.e., INR 26,15,295/- is liable to be deducted towards Act of God (EEL) clause as clearly stated on page 3 of the policy. Thus, after deduction of this amount the Claimant is entitled to recover and awarded a sum of INR 2,35,37,655/- (Two Crores Thirty Five Lacs Thirty Seven Thousand Six Hundred Fifty Five Only)."

6. The relevant portions of the impugned award where the issue of applicable "excess" has been discussed are reproduced hereunder:



“1.19. Turning back to the question as to what was the minimum excess clause, the Respondent's reliance on the Held Cover Letter dated 10.08.2015 showing the deductibles of 5% of the claim amount subject to the minimum of INR 75,00,000/- is misplaced. In view of the report in Chandumull Jain (supra) it is well settled that the cover note operates only during the time the policy of the insurance is issued. The Hon'ble Supreme Court explained that the purpose of issuing cover note is only to provide a temporary cover during the time the insurer makes its enquiries and either agrees to accept the risk or declines to agree for the insurance. The terms and conditions of the contract between the insured and the insurer would be governed by the policy of the insurance. The relevant paras of the report of the Hon'ble Supreme Court are extracted hereunder:-

“11. A cover note is a temporary and limited agreement. It may be self contained or it may incorporate by reference the terms and conditions of the future policy. When the cover note incorporates the policy in this manner, it does not have to recite the term and conditions, but merely to refer to a particular standard policy. If the proposal is for a standard policy and the cover note refers to it, the assured is taken to have accepted the terms of the policy. The reference to the policy and its terms and conditions may be expressed in the proposal or the cover note or even in the letter of acceptance including the cover note. The incorporation of the terms and conditions of the policy may also arise from a combination of references in two or more documents passing between the parties. Documents like the proposal, cover note and the policy are commercial documents and to interpret them commercial habits and practice cannot altogether be ignored. **During the time the cover note operates, the relations of the parties are governed by its terms and conditions, if any, but more usually by the terms and conditions of the policy bargained for and to be issued. When this happens the terms of the policy are incipient but after the period of temporary cover, the relations are governed only by the terms and conditions of the policy unless insurance is declined in the meantime. Delay in issuing the policy makes no difference. The relations even then are governed by the future policy if the cover notes give sufficient indication that it would be so "**

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“12. But the policy which is issued contains more than these essentials because it lays down and measures the rights of the parties and each side has obligations which are also defined. In a policy against fire the purpose is not so much to insure the property but to insure the owner of the property against loss. The policy not only defines the risk and its duration but also lays down the special terms and conditions under which the policy may be enforced on either side. Even if the letter of acceptance went beyond the cover notes in the matter of duration, the terms and conditions of the proposed policy would govern the case because when a contract of insuring property is complete, it is immaterial whether the policy is actually delivered after the loss and for the same reason the rights of the parties are governed by the policy to be, between acceptance and delivery of the policy. Even if no terms are specified the terms contained in a policy customarily issued in such cases, would apply.....”

(emphasis supplied)

This view was reiterated by the Hon'ble Supreme Court in Pushpalaya Printers (supra) and by the Hon'ble Bombay High Court in Central Bank of India (supra). In view of the foregoing discussion there is no manner of doubt that the policy of insurance having been issued much earlier to the loss suffered by the Claimant, the Respondent is not entitled to rely on the Held Cover Letter. Similarly, the Respondent making the deductibles applicable under the policy as 5% of the claim amount subject to minimum of INR 75,00,000 /EEL for AOG retrospectively since the inception of the policy on 16.08.2016 is completely illegal. It goes without saying that the Respondent is bound by the original terms of the policy which laid down the deduction of 10% subject to a maximum of INR 5 Crores for AOG since the inception of the policy w.e.f. 10.08.2015 which terms and conditions were extended by the first and second endorsement upto 30.07.2016 plus six months maintenance period i.e., until 30.01.2017.”

7. In the above background, the petitioner has challenged the impugned award primarily assailing the findings of the learned arbitrator regarding the deductibles which would be applicable under the subject Insurance Policy.



While the petitioner has urged some other grounds in the petition, the petitioner has restricted the challenge to the above aspect in its oral arguments as well as in its written submissions.

8. It is contended by learned counsel for the petitioner that prior to the issuance of the insurance policy, the under-writing office of the petitioner sent an EAR Calculation vide an e-mail dated 31.07.2015, and subsequently issued a “Risk Held Cover Letter” dated 10.08.2015, wherein the mandatory deductible pertaining to excess was stated to be 5% of the claim amount for “Act of God” (EOG) Perils subject to a minimum of Rs.75,00,000/-. It has been further contended that this deductible is based on and arising out of the Memo 8 and Serial No.11 of the rate schedule of the “All India Tariff on Contractors All Risk Insurance” which covers AOG Perils and prescribed the minimum deductible to be Rs.5,00,000/-. It is submitted that vide circular dated 14.03.2011, issued by the Head Office, Mumbai of the petitioner, the deductible amount mentioned in the tariff was increased to 15 times of the minimum amount i.e. Rs.75,00,000/-.

9. Accordingly, the broker of the respondent is stated to have been duly intimated before issuance of the policy vide e-mail dated 31.07.2015 about the excess amount applicable to the policy in question i.e. 5% of the claim amount subject to a minimum of Rs.75,00,000/- for AOG/ Major Peril/collapse/testing period, with a sub-note that:

“Our approval is subject to adherence of all the terms, conditions and endorsement applicable under EAR Policy’ ‘our approval No. is HO/ENGG/2015/14311.”

10. This excess clause is stated to have again mentioned in the Held Cover Letter dated 10.08.2015.



11. Accordingly, the surveyor in the addendum survey report dated 15.06.2018 applied the applicable excess to the tune of Rs. 75,00,000/- on the gross loss assessed i.e. Rs.71,59,840/- and accordingly processed the claim of the respondent as “No Claim” on which basis, the petitioner repudiated the claim vide letter dated 30.06.2018.

12. The aforesaid submissions have been controverted by the learned counsel for the respondent who submits that there is no infirmity in the award and that the policy schedule issued by the Petitioner on 19.08.2015 itself clearly states that for AOG perils, the applicable excess would be 10% of the claim amount subject to a minimum of testing period excess and a maximum of Rs. 5 crores. It is further submitted that the policy schedule is the central contract between the insurance company and insured which encapsulates the entire understanding and terms of insurance as concluded between the parties, therefore, the deductible as mentioned in the insurance policy schedule should be considered as agreed, accepted and binding on the parties. Learned counsel for the respondent has also contended that the award passed by the learned arbitrator deals with this issue extensively and has tendered cogent findings in support thereof, which cannot be interfered with in a Section 34 petition. In this regard, reliance has been placed upon the judgments in the case of *Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd*¹, *Parse Kente Collieries Limited v. Rajasthan Rajya Vidyut Utpadan Nigam Limited*² and *Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation Limited*³.

¹ (2019) 20 SCC 1

² (2019) 7 SCC 236

³ (2022) 1 SCC 131



Analysis and Conclusion

13. Having perused the record and having considered the submissions of respective counsel for the parties, I find no merit in the contentions raised on behalf of the petitioner.

14. Admittedly, the petitioner had issued an insurance policy in favour of the respondent for the period 10.08.2015 till 30.04.2016, wherein the deductible for AOG perils was prescribed to be 10% of the claim subject to a minimum of testing period excess and a maximum of Rs.5 Crores. The policy period was further extended vide endorsements dated 03.05.2016 and 08.07.2016. The endorsements specifically mention that “all other terms and conditions remain unaltered”.

15. Subsequently, on 12.07.2016, there was heavy rainfall at the project site due to which there was a sudden excessive increase in water levels, causing damage to the respondent’s equipments. It is against this loss that the claim was preferred by the respondent. Post the occurrence of loss, the insurance policy was extended vide an endorsement dated 16.08.2016 wherein it was sought to be provided that the applicable excess would be 5% of the claim amount subject to a minimum of Rs.75,00,000/- for AOG Perils.

16. The very fact that it was only in the endorsement in the policy issued post the occurrence of loss, that the petitioner included an additional clause with respect to deductibles being subject to a minimum of Rs.75,00,000/- for AOG Perils, gives credence to the contention that for the period prior thereto, this stipulation cannot be read into the policy in question.

17. The impugned award also rightly holds that the attempt to retrospectively insert this stipulation in the policy is completely illegal. It



was completely impermissible for the petitioner, after the occurrence of loss, to introduce new terms and conditions. The claim under the policy for the period in question would necessarily have to be governed by the extant policy terms and conditions, as on the date of loss.

18. It has also been rightly noted in the impugned award that the terms of the risk held cover letter, which stipulate excess to be 5% of the claim amount subject to a minimum of Rs.75,00,000/-, could not be construed as overriding or superseding the conditions of the policy itself. Reliance has rightly been placed on *General Assurance Society Ltd. vs. Chandumull Jain* (1966) 3 SCR 500 as also in *United India Insurance Company Ltd. vs. Pushpalaya Printers* (2004) 3 SCC 694, which clearly holds that the purpose of the cover note is only to provide a temporary cover during the time the insurer makes its enquiry and either agrees or declines to accept the risk, until the insurance policy is issued.

19. The insurance policy itself, and the terms and conditions expressly referred to in the said policy constitutes the concluded contract between the parties.

20. No fault whatsoever can be found in the reliance placed by the impugned award on *Chandumull Jain* (supra) and *Pushpalaya Printers* (supra) in the facts and circumstances of the present case.

21. The reliance sought to be placed by the petitioner on the rate schedule incorporated in the “All India Tariff on Contractor’s All Risks Insurance” and circular dated 14.03.2011 also cannot be countenanced.

22. It is not permissible for the insurance company to introduce alien terms and conditions by seeking to place reliance on administrative



circulars/instructions which do not find mention in the policy and with regard to which the insured had not been put to notice.

23. In the circumstances, the conclusions arrived at in the impugned award is unexceptionable.

24. There is also merit in the contentions raised by learned counsel for the respondent to the effect that the plea regarding applicability of the rate schedule, forming part of the “All India Tariff on Contractor’s All Risks Insurance”, having not been raised in the arbitration proceedings, the petitioner is, therefore, precluded from raising the said plea/s for the first time in these proceedings. In this regard, reliance has been rightly placed on the judgment of the Supreme Court in the case of **Hyder Consulting (UK) Ltd. v. Governor, State of Orissa**, (2015) 2 SCC 189.

25. The limited scope of interference under Section 34, has been reiterated in a catena of judgments, including in the recent case of **Hindustan Construction Co. Ltd. v. National Highways Authority of India**⁴ which holds as under:-

“26. The prevailing view about the standard of scrutiny- not judicial review, of an award, by persons of the disputants' choice being that of their decisions to stand-and not interfered with, [save a small area where it is established that such a view is premised on patent illegality or their interpretation of the facts or terms, perverse, as to qualify for interference, courts have to necessarily chose the path of least interference, except when absolutely necessary]. By training, inclination and experience, judges tend to adopt a corrective lens; usually, commended for appellate review. However, that lens is unavailable when exercising jurisdiction under Section 34 of the Act. Courts cannot, through process of primary contract interpretation, thus, create pathways to the kind of review which is forbidden under Section 34. So viewed, the Division Bench's approach, of appellate review, twice removed, so to say [under Section 37], and conclusions drawn by it, resulted in displacing the majority view of the tribunal, and in many cases, the unanimous view, of other tribunals, and

⁴ (2023) SCC Online SC 1063



substitution of another view. As long as the view adopted by the majority was plausible-and this court finds no reason to hold otherwise (because concededly the work was completed and the finished embankment was made of composite, compacted matter, comprising both soil and fly ash), such a substitution was impermissible.

27. For a long time, it is the settled jurisprudence of the courts in the country that awards which contain reasons, especially when they interpret contractual terms, ought not to be interfered with, lightly. The proposition was placed in State of UP v. Allied Constructions:

“[..] It was within his jurisdiction to interpret Clause 47 of the Agreement having regard to the fact-situation obtaining therein. It is submitted that an award made by an arbitrator may be wrong either on law or on fact and error of law on the face of it could not nullify an award. The award is a speaking one. The arbitrator has assigned sufficient and cogent reasons in support thereof. Interpretation of a contract, it is trite, is a matter for arbitrator to determine (see Sudarsan Trading Co. v. The Government of Kerala, (1989) 2 SCC 38 : AIR 1989 SC 890). Section 30 of the Arbitration Act, 1940 providing for setting aside an award is restrictive in its operation. Unless one or the other condition contained in Section 30 is satisfied, an award cannot be set aside. The arbitrator is a Judge chosen by the parties and his decision is final. The Court is precluded from reappraising the evidence. Even in a case where the award contains reasons, the. interference therewith would still be not available within the jurisdiction of the Court unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law”

28. This enunciation has been endorsed in several cases (Ref McDermott International Inc. v. Burn Standard Co. Ltd). In MSK Projects (I) (JV) Ltd v. State of Rajasthan it was held that an error in interpretation of a contract by an arbitrator is “an error within his jurisdiction”. The position was spelt out even more clearly in Associate Builders (supra), where the court said that:

“[..] if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do.””



26. **In Konkan Railway Corpn. Ltd. v. Chenab Bridge Project⁵**, it has been held as under:-

“ 19. Therefore, the scope of jurisdiction under Section 34 and Section 37 of the Act is not akin to normal appellate jurisdiction. It is well-settled that courts ought not to interfere with the arbitral award in a casual and cavalier manner. The mere possibility of an alternative view on facts or interpretation of the contract does not entitle courts to reverse the findings of the Arbitral Tribunal In Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., this Court held : (Dyna Technologies case, SCC p. 12, paras 24-25)

“24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.

25. Moreover, umpteen number of judgments of this Court have categorically held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act.”

⁵(2023) 9 SCC 85



2023 : DHC : 9209



27. In the facts of the present case, no infirmity is found in the impugned award, much less of the kind which warrant interference in exercise of the jurisdiction of Section 34 of the Arbitration and Conciliation Act, 1996.

28. The present petition, alongwith all pending applications, is accordingly, dismissed.

SACHIN DATTA, J

DECEMBER 20, 2023/cl