

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

% *Reserved on: 19th January , 2023*
Pronounced on: 2nd February, 2023

+ **FAO (COMM) 76/2022**

UNITED INDIA INSURANCE CO. LTD.

Divisional Office 19,
Savitri Chamber-IL,
Local Shopping Complex.
Prashant Vihar, Rohini, Delhi.

..... Appellant

Through: Mr. Vineet Malhotra, Mr. Vishal
Gohri & Mr. Dishant Vashist,
Advocates.

versus

BANSAL WOOD PRODUCT PVT. LTD.

Registered Office at:
25/8, Punjabi Bagh Extn.,
New Delhi-110026.

..... Respondent

Through: Mr. Vineet Malhotra, Mr. Vishal
Gohri & Mr. Dishant Vashist,
Advocates.

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J

CM APPL.23535/2022

1. An application has been filed under Section 5 of the Limitation Act, 1963 read with Section 151 of the Code of Civil Procedure, 1908 for

condonation of delay of 76 days in filing the appeal under Section 37 of Arbitration & Conciliation Act, 1996.

2. It is submitted in the application that the learned Counsel for the appellant on receiving the copy of the impugned judgment dated 13.09.2019, had sought clarifications from the appellant and thereafter had prepared the draft of Appeal which was forwarded to the appellant for necessary corrections. The learned Counsel finalised the Appeal and filed the same before this Court, but there was a delay of 76 days.

3. It has been explained that the Appeal was first filed in the Registry, Delhi High Court on 26.02.2020 vide Diary No.304052/2020. The file was returned with certain objections. The appellant removed the objections and re-filed the appeal, but again further objections were noted. In the mean while, on account of the COVID-19 Pandemic a complete lockdown was imposed in the country from March, 2020, which continued for a long time. The Registry of the Delhi High Court was not returning or accepting the hard copies of the cases and only e-filing was permissible during that period. The appellant made sincere efforts to determine the status of the Appeal, but was unable to get any concrete information. In was only in January, 2021 that the Registry returned the file of the aforesaid Appeal with certain objections. Again, because of lockdown in Delhi due to the second wave of COVID-19, the Registry could not take up the appeal. Thereafter, the file was found not traceable and the appellant was told to file the appeal afresh under the old diary number by indicating it as a re-filing.

4. The appellant re-filed it through e-filing vide diary No.562479 dated 12.08.2021, but certain objections were again noted on 13.08.2021

and on 29.08.2021. Eventually all the objections were removed and the appeal was accepted.

5. The appellant has stated that he suffered from Corona in the month of December, 2020 and remained admitted in the Hospital for many days. Thereafter, the learned counsel for the appellant also suffered from COVID-19. In the second wave of pandemic, the counsel for the appellant was again admitted in the hospital due to COVID-19 and remained in ICU for 20 days. On recovery from COVID-19, he suffered a fracture in his leg and was confined for more than one and half months. It is submitted that for these various reasons there was a delay in refilling the present appeal. A prayer is made that the delay of 76 days in filing the appeal may be condoned.

6. **Submissions heard.**

7. The appellant has explained that the counsel for the appellant was unwell due to which he was unable to instruct his associates or finalise the appeal himself, which resulted in a delay of 76 days.

8. The Arbitration & Conciliation Act, 1996 does not prescribe the period of limitation for filing of Appeal under Section 37 of Arbitration & Conciliation Act, 1996. The period of Limitation is 60 days as prescribed uniformly for all the Appeals including those that are preferred under Section 37 of the Arbitration & Conciliation Act, 1996 by virtue of Section 13 (1-A) of the Commercial Courts Act, 2015, as explained in the case of Government of Maharashtra (Water Resources Department) through Executive Engineer vs. Borse Brothers Engineers and Contractors Private Limited (2021) 6 SCC 460.

9. It has been explained that there was a delay of 76 days in preparation and of finalisation of the Appeal on account of health issues suffered by the counsel for the appellant. This was followed by the COVID-19 Pandemic which led to nationwide lockdown. The delay in filing the Appeal can to be condoned by way of an exception and not by way of a rule, in the light of the Object of Arbitration & Conciliation Act, 1996. In a fit case where a party has otherwise acted in a *bona fide* manner and not in a negligent manner, a short delay beyond the prescribed period can in the discretion of the court, be condoned as explained in the case of *Borse Brothers* (supra).

10. Considering the reasons as stated in the present case, and since it is always in the interest of justice to decide the matter on merits, the delay of 76 days in filing the appeal is hereby condoned.

11. From the averments made by the Appellant, it is apparent that there has been a delay from March, 2020 till 2021 in re-filing the appeal. However, Hon'ble Supreme Court of India in the case of *Re: Cognizance for Extension of Limitation, Suo Moto W.P.(C) 3 of 2020 decided on 10th January, 2022* has excluded the period from 15.03.2020 till 28.02.2022 while computing the period of limitation on account of the Covid-19 Pandemic. Therefore, the period taken in re-filing is also condoned.

12. The application is allowed accordingly.

FAO (COMM) 76/2022

1. An Appeal under Section 13 of the Commercial Courts Act, 2015 has been filed to challenge the Order dated 13.09.2019 dismissing the Objections under Section 34 of the Arbitration & Conciliation Act, 1996 against the Majority Award dated 19.04.2016 passed by the learned

District Judge (Commercial), New Delhi.

2. The **facts in brief** are that the respondent/claimant being the manufacturer of the BWP Marine and Teak Plywood, obtained an Insurance Policy for its goods from the Appellant Company. A fire broke in the factory premises of the respondent in the intervening night of 26/27.01.2001 at about 11:30 P.M, whereby the goods stored in the premises were burnt. The matter was reported to the Police Station Bahadurgarh, Haryana. The information was also given at the Branch Office of the appellant Company on 27.01.2001, which appointed M/s J.N. Sharma & Company as Surveyor, who visited the Site and prepared their Report.

3. The respondent thereafter filed a claim for a total sum of Rs.65,92,016/- the details of which are given below :

(i)	<i>Stocks as on 25.01.2001:</i>	Rs.68.74.838.75
	<i>Less: fire wood:</i>	<u>Rs. 40,000.00</u>
		Rs.68.34.838.72
(ii)	<i>Less: Stocks as on 27.01.2001:</i>	<u>Rs. 4,06,973.06</u>
	<i>Net stocks lost in fire:</i>	<u>Rs.64,27,865.69</u>
	<i>Rounded off to nearest rupee:</i>	Rs.64,27,866.00
	<i>Add: Loss in r/o bldg. & electrical :</i>	Rs. 1,62,500.00
	<i>Add: Fire brigade charges</i>	Rs. 1,050.00
	<i>Add: Freight charges of ash:</i>	<u>Rs. 600.00</u>
	<i>Total Claim Amount</i>	<u>Rs.65.92.016.00</u>

(Rupees Sixty Five Lakh Ninety Two Thousand and Sixteen only)

4. The respondent issued a Legal Notice dated 02.08.2002 to the Appellant Company and then filed a complaint dated 21.01.2003 before

National Consumers Disputes Redressal Commission (NCDRC) claiming a total amount of Rs.1,33,72,016/-. However, during the pendency of the proceedings, the respondent invoked the Arbitration clause and the matter was referred to the Arbitral Tribunal comprising of Hon'ble Mr. Justice S.K. Mahajan (Retired), Presiding Arbitrator, and Mr. M.S. Rekhi, & Mr. V.S. Chopra, Arbitrators. The learned Majority Tribunal granted to the claimant Rs.64,27,866/- plus Rs.1,00,000/- i.e. Rs.65,27,866/- towards the losses suffered due to the fire. The minority Arbitral Tribunal granted a sum of Rs. 31,59,052/- along with an interest of 12% per annum.

5. The appellant had Filed Objections under Section 34 of the Arbitration & Conciliation Act, 1996 against the Majority Tribunal Award, but it did not meet any success and the Objections were dismissed by learned District Judge, Commercial Court on 13.09.2019. Aggrieved by the said dismissal of the Objections under Section 34 of the Arbitration & Conciliation Act, 1996, the present appeal under Section 37 of the Arbitration & Conciliation Act, 1996 has been filed.

6. The main ground of challenge is that the learned Arbitral Tribunal failed to appreciate and consider the separate statement of claims filed by the claimant. There was a vast difference in the quantity of material and rates of various items mentioned in first Bank Statement dated 31.12.2000 submitted by the Bank prior to the date of loss and the two subsequent statements of claim filed by the Respondent. There were thus two lists giving different costs of stock of Rs.69,07,997/- and Rs.72,88,508/- that were submitted to the Surveyor Company and the Bank after the loss had occurred. The learned Tribunal also failed to appreciate that the obvious reason for the difference in the quantity and rates of items was that the

claimant was unable to substantiate his claim and the figures were changed in order to match the quantity and the total monetary value of the material as made in the Bank Statement. The Surveyor had rightly taken the rate of material and quantity of material as mentioned in the original Bank Statement dated 31.12.2000 to arrive at the valuation of stocks on the date of loss as Rs.35,36,025/-, but it has been erroneously held by the Majority Arbitral Tribunal that the Surveyor's Report was ambiguous and arbitrary and that it was based on surmises and conjectures. The Arbitral Tribunal further committed an error by relying on the statement of stocks submitted on a later date after the date of accident.

7. It is further submitted that material facts and the evidence of the Surveyor has not been considered in the right perspective. In fact, the Surveyor Report and the method of assessment of loss adopted by the Surveyor was never challenged by the respondent/claimant and no suggestion whatsoever was given by the respondent in the cross-examination of the Surveyor, controverting its authenticity, correctness or that the Surveyor did not obtain any Report of any Consultant or Association. The report was rejected by the Majority Arbitral Tribunal solely as the appellant failed to examine any consultant as witness to prove the Report. Irrespective of the surveyor report, the respondent has failed to produce any evidence to prove the quantum of stock lying at the time of fire. It is further submitted that the learned Additional District Judge, Commercial Court also failed to appreciate the Objections on these grounds in the right perspective.

8. It is claimed that the impugned Award suffers from patent illegality; is in conflict with the public policy of India and against the

basic notions of morality or justice. No reasonable person could have come to the conclusion arrived at by the learned Arbitral Tribunal. It is, therefore, stated that the Arbitral Award dated 19.04.2016 and the Order dated 13.09.2019 dismissing the objections under Section 34 of the Arbitration & Conciliation Act, 1996 are liable to be set aside.

9. **Submissions heard.**

10. Section 34 of the Act provides for limited supervisory role of courts for review of arbitral award with the sole objective to ensure fairness of the arbitral proceeding. Intervention of the court is envisaged in only few circumstances, i.e. when *an award is in conflict with the public policy of India*, which includes cases of fraud, breach of Fundamental Policy of Indian law and breach of public morality. The other ground provided under Section 34 is **patent illegality**. It specifically provides that an Award cannot be set aside on the ground of erroneous application of the law or on re-appreciation of a fact.

11. In the decision of Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644, in construing the expression “*public policy*” in the context of a Foreign Award, the Apex Court held that an Award which is in violation of the statute enacted to safeguard the national interest, shall be contrary to the public policy of India and the fundamental policy of Indian law. The contravention of law alone would not attract the bar of public policy as something more than contravention of law is required.

12. It was further observed in Renusagar (supra) that disregarding the orders passed by superior courts would adversely affect the administration

of justice and consequently an Award passed in such disregard to orders of superior courts shall also be a violation of fundamental policy of Indian law.

13. In the decision of Associate Builders v. DDA, (2015) 3 SCC 49, the law as stated by the Supreme Court in Renusaga (supra) was reiterated by observing that it would be against the fundamental principles of Indian law to disregard the binding force of a superior court's decision.

14. The Supreme Court in the decision of Ssangyong Engineering and Construction Company Limited v. NHAI, (2019) 15 SCC 131, traced the scope of the 2015 Amendments based on the Law Commission Report and the statement of Objects and Reasons to provide judicial interpretation of the term “*fundamental policy of Indian law*” and held that the expression “*fundamental policy of Indian law*” is relegated to the understanding of this expression as was defined in the case of Renusagar (supra).

15. The Supreme Court in the decision of Vijay Karia v. Prysmian Cavi E Sistemi SRL, (2020) 11 SCC 1 reaffirmed these principles and explained as under:

“Fundamental policy of Indian Law as has been held in Renusagar(Supra) must amount to a breach of some legal principle or legislation which is so basic to Indian law that it is not susceptible of being compromised. “Fundamental Policy” refers to the core values of Indian public policy as a nation, which may find expression not only in statutes but also time-honoured, hallowed principles which are followed by the courts”.

16. Patent illegality on the other hand pertains to departure of an arbitral tribunal in giving due regard to the inviolable rules of procedure.

17. In Sumitomo Heavy Industries Limited vs. ONGC Ltd. (2010) 11 SCC 296 the Hon'ble Apex Court has observed that if the umpire on the facts has taken one construction on the clauses of the Agreement which according to him was the correct one, then it would not make the Award perverse merely because another construction could have been preferred in respect of said clause.

18. In the decision of Mc Dermott International Inc. Vs. Burn Standard Co. Ltd. (2006) 11 SCC 181, a reference was made to the decision of U.P. State Handloom Corpn. Ltd. vs. Asha Lata Talwar 2009 SCC OnLine All 624, wherein it was observed that under Section 34 of the Arbitration & Conciliation Act, 1996 there is a departure from the scheme of Section 16 in the 1940 Act where perhaps the court was given wider amplitude of powers. The Apex Court interpreted the scope of interference under Section 34 and observed that the court cannot correct errors of the arbitrators. It can only quash the Award leaving the parties free to begin the arbitration again if it is desired. The scheme of the provisions aim at keeping the supervisory role of the court at a minimum level and this can be justified as parties to the agreement, make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.

19. The Supreme Court, in its judgment in National Highway Authority of India vs. M. Hakeem (2021) 9 SCC 1, referred to **Redfern and Hunter on International Arbitration (6th Edn.)** in regard to setting aside of an award and reaffirmed that while entertaining appeals under Section 34 of the Arbitration & Conciliation Act, 1996 the court is not actually sitting as a Court of appeal over the award of the Arbitral Tribunal and therefore,

the court would not re-appreciate or re-assess the evidence. It was concluded in *M. Hakeem* (supra) by the Apex court that the position of law stands crystallized today. The findings of facts as well as of law, of the Arbitrator/ Arbitral Tribunal are ordinarily not amenable to interference either under Section 34 or Section 37 of the Act. The scope of interference is only where the finding of the Tribunal is either contrary to the terms of the contract between the parties, or ex facie, perverse, that interference by this Court is absolutely necessary. The Arbitrator/ Tribunal is the final arbiter on facts as well as in law, and even errors, factual or legal, which stop short of perversity, do not merit interference under Sections 34 or 37 of the Act.

20. In *Dyna Technologies (P) Ltd. vs. Crompton Greaves Ltd.* (2019) 20 SCC 1, it was observed that only when there is complete perversity in the reasoning provided by the Arbitral Tribunal, an Award can be challenged under the provisions of Section 34 of the Arbitration & Conciliation Act, 1996.

21. The Hon^{ble} Supreme Court in the case of *MMTC Ltd. vs M/s Vedanta Ltd.* (2019) 4 SCC 163 has also held as under:

"12. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the Court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the Court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the Court under Section 34 and by the Court in an appeal under Section 37, this Court must

be extremely cautious and slow to disturb such concurrent findings. "

22. In a recent judgement in Haryana Tourism v M/S Khandari Beverages Ltd., Civil Appeal No.266/2022 decided by the Supreme Court on 11.01.2022 that while considering an Appeal under Section 34 of the Arbitration & Conciliation Act, 1996, the court can only consider those limited grounds which are available under Section 34 of the Arbitration & Conciliation Act, 1996 and cannot re-appreciate the merits of the case as in a regular appeal.

23. In the present case, the only ground of challenge to the Award by the Appellant is that Surveyor's Report giving the estimate of losses caused to the respondent due to damage of his stocks in a fire at his factory, has been discarded without any basis. While the learned Arbitral Tribunal considered the list of stocks but did not accept the methodology for calculating the damages. However, as is evident from the Award, the learned Arbitrator has considered the Surveyor's Report in detail and had given cogent reasons for coming to a different finding in regard to the calculation of the value of the stock after considering the Bank Statements and other documents which had also been considered by the Surveyor while making an assessment of the stock value.

24. Similar facts as in present case, came up for consideration in Oriental Insurance Co. Ltd. vs. Diamond Product Ltd. 2021 SCC OnLine Del 4319 before the Co-ordinate Bench. The question for consideration was whether the Arbitral Tribunal had committed a patent illegality in assessing the loss which the respondent had suffered qua the stock which was available at its factory on the day of fire and rejecting the assessment

of the loss made by the Surveyor. What came through was that because of the fire and given the fact that stock register and production register was not available. The Arbitral Tribunal after weighing the pros and cons of the material placed before it including the Surveyor's Report, for good reasons took recourse to the manufacturing and trading account and opening and closing stock of the raw material and finished goods produced before the Auditor to ascertain the value of the stock that would have been available at the respondent's factory had the incident of fire not occurred in order to assess the losses. The objections under Section 34 of Arbitration & Conciliation Act, 1996 were rejected on the ground that the Arbitral Tribunal had weighed the material placed before it to reach the conclusion about the value of the closing stock. The argument that the Award suffered from patent illegality in ignoring the Surveyor's Report was over turned and held to be untenable by observing that no doubt the weight ought to be given to the Surveyor's Report, but it cannot be held that the conclusions reached by Surveyor, cannot be put to test.

25. Reference may also be made to Oriental Insurance vs. Amira Food (India) Ltd. 2010 (166) DLT 27 and New India Assurance Co. Ltd. vs. Pradeep Kumar (2009) 7 SC, wherein it was observed that although the assessment or loss approved by the Surveyor is a pre-requisite for payment or settlement of claim by the insurer, yet the Surveyor's Report is not the last and final word. Surveyor's Report may be basis of foundation for settlement of claim by the insurer, but is neither conclusive nor can it be held sacrosanct. This being so, the contention that the Surveyor's Report could not have been rejected, was over turned.

26. We find that the Arbitral Tribunal had given adequate reasons as to

why it had resorted to adopting the manufacturing and trading account route instead of Surveyors Report, in arriving at the value of the stock. The learned District Judge in the impugned Order had considered the challenge to the Surveyor's Report and concluded that the value of stocks had been correctly assessed by the learned Arbitral Tribunal.

27. It is now well established that domestic awards can be challenged on the ground of patent illegality only if such an error go to the root of the award. Mere erroneous application of the law, or appreciation of evidence, does not call for interference of the Award on the ground of patent illegality or perversity. The Court cannot re-appreciate the evidence to overturn an Arbitral Award, which is essentially not within the scope of Section 34 or Section 37 of the Arbitration & Conciliation Act, 1996.

28. In view of above, we find no merit in the present appeal, which is hereby dismissed.

(NEENA BANSAL KRISHNA)
JUDGE

(SURESH KUMAR KAIT)
JUDGE

FEBURARY 2, 2023

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