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

\+ **<u>O.M.P. (COMM) 231/2018 & I.A. 7270/2018</u>**

THE ORIENTAL INSURANCE CO.LTD .....Petitioner

Through: Mr Prem Kishore Seth, Adv. (through VC)

versus

M/S PINK CITY EXPRESSWAY PRIVATE LTD

.....Respondent

Through: Mr Abhishek Mishra, Mr Zorawar Singh, Mr Jayant Rastogi and Ms Peehu Singh, Advs.

**CORAM:**
**HON'BLE MR. JUSTICE JASMEET SINGH**

**<u>O R D E R</u>**

% **23.09.2024**

1. This is a petition filed by the petitioner under section 34 of the Arbitration and Conciliation Act, 1996 (*"Act of 1996"*) seeking to set aside the Arbitral Award dated 03.02.2018 passed by the learned Arbitral Tribunal.
2. The facts are that in June, 2008 a Contract project of 6 lanes of Gurgaon-Kothputli-Jaipur section of NH-8 from KM 42.7 to 273 by National Highway Authority of India (*"NHAI"*) was divided into six packages comprising of smaller stretches of different lengths. Since the petitioner is an insurance company, the respondent took Contractors All Risks Policy (CAR) for the period 02.04.2009 to 01.04.2010 for an insured value of Rs 2,400 crores and Advance Loss of Profits Policy (ALOP) for a sum of Rs. 115 crores.
3. The two policies were further extended from time to time till

01.04.2013. These policies were extended as per revised terms communicated to the brokers of the respondent *vide* e-mail dated 28.03.2012.

**4.** Since the respondent suffered losses due to heavy rains in Rajasthan, the respondent lodged a claim for damages to NH-8 road construction project from CH. 107+000 to 144+500 in package 3A and 3B. M/s Protocol Surveyors were deputed to survey and assess the loss. The surveyors submitted their final report on 25.01.2014 assessing the net liability at Rs. 2,45,17,450/-.

**5.** According to the petitioner, the coverage under the policy was subject to 'Section Warranty' which according to the petitioner was ignored by the surveyors, and hence the surveyors were again asked to re-examine their assessment. Thereafter, the surveyors gave their first Addendum on 26.02.2014 wherein the loss was re-assessed at about Rs 2.33 crores and thereafter gave another revised assessment *vide* Addendum dated 27.06.2014, applying the 'Section Warranty' and assed the net loss at Rs. 95,56,920/-. The said amount has been paid by the petitioner to the respondent during the course of arbitration proceedings.

**6.** Since the respondent did not agree to the said amount, the mechanism of arbitration as envisaged in the insurance policy was invoked.

**7.** The Arbitral Tribunal passed an Award on 03.02.2018 holding that the respondent is entitled to a sum of Rs. 3,36,43,866/- and after giving a deduction of the amount already received i.e. Rs. 95,56,920/-, the learned Arbitral Tribunal directed the petitioner to pay a sum of Rs. 2,40,86,945/- along with interest @ 9% from 04.04.2013 till the date of payment as well as interest @ 9% p.a. on Rs. 95,56,920/- from 04.04.2023 till 19.05.2016 along with respondent's share of arbitral fees paid by the respondent to the learned Arbitrators.

**8.** It is stated by Mr Seth, learned counsel for the petitioner that the impugned Award passed by learned Arbitral Tribunal is without any basis and evidences available on record.

**9.** My attention has been drawn to an e-mail dated 28.03.2012 which reads as under:-

V. K. Khattar

Subject: Extension Terms A/c [illegible] City Express for CAR and ALOP Policy

From: [illegible]@orientalinsurance.co.in [mailto:[illegible]@orientalinsurance.co.in]
Sent: Wednesday, March 28, 2012 4:30 PM
To: [illegible]@[illegible].com; [illegible]@[illegible].com
Cc: [illegible].thakur@orientalinsurance.co.in
Subject: Re: Extension Terms A/c Pink City Express for CAR and ALOP Policy
Importance: High

Dear Sir,

Based on the information provided, competent authority has advice below terms for extension period on captioned risk:

1. Extension Period: 12 months
2. Sum Insured CAR: INR 2400 crs
3. Sum Insured ALOP: INR 100 crs
4. CAR Extension Rate: 0.738 per mille (including new STFI and EQ rate)
5. CAR Premium: INR 1,99,01,203/- (incl S Tax)
6. Add on-cover: as per exiting policy
7. Deductible: Normal: 5% of claim amount subject to minimum of Rs. 5 lacs
8. AOG/Collapse: 5% of claim amount subject to minimum of Rs. 25 lacs
9. Condition: Rain Cut damages excluded
10. ~~Section [illegible]~~
11. ALOP Premium: INR 32,80,912/- (incl S Tax)
12. ALOP deductible: 30 days
13. Proper safety measures to be adopted during monsoon season
14. Off-site storage: limited to 10 crs
15.
16. You are requested to send us a cheque/ transfer of amount Rs 19901203 + Rs 3280912 = Rs 2,02,22,115/- for the extension of this CAR and ALOP(CAR) Policy on the above terms and conditions.

Thanks & Regards,

Alok Srivastava
Sr Divisional Manager
DO-4, UGF 8,11,13
Barakhamba Road
New Delhi-110001
08107 67544

**10.** He states that the learned Arbitral Tribunal has misunderstood the extension of the policy as stated in Ex. C2/7 which is the e-mail dated 28.03.2012 of the petitioner. The first policy was issued without applying 'Section Warranty' clause but when the policy was extended, it was categorically mentioned that 'Section Warranty as attached' meaning that the extended policy was with the section warranty.

**11.** Mr Seth also relies upon the evidence of PW-2/Deepak Kumar Babuta who was an Insurance Agent and more particularly on para 8 regarding the e-mail which reads as under:-

> *"8. I state that the Respondent vide its e-mail dated 28.03.2012 categorically enlisted the terms for extension of the said Policies and also mentioned the premium amount to be paid for the extension of 12 months. Copy of the e-mail dated 28.03.2012 is annexed and exhibited herewith as Exhibit C2/7. I state that the premium paid for availing the said Policies was INR 2,44,87,327/- (Rupees Two Crore Forty Four Lakh Eighty Seven Thousand Three Hundred Twenty Seven only) for a period of three years whereas, the premium calculated for extension of the said policies for a period just one year was INR 2,26,49,536/- (Rupees Two Crore Twenty Six Lakh Forty Nine Thousand Five Hundred Thirty Six only). The premium ·for extension of CAR Policy was INR 1 ,88, 76,487/- (Rupees One Crore Eighty Eight Lakh Seventy Six Thousand Four Hundred Eighty Seven only) and the premium for extension of ALOP Policy was INR 37,73,049/- (Rupees Thirty Seven Lakh Seventy Three*

*Thousand Forty Nine only).”*

**12.** Hence, he states that the said e-mail was duly admitted and exhibited showing that the ‘Section Warranty’ was applicable.

**13.** Mr Seth also draws my attention to Annexure – 1 which reads as under:-

> “*Annexure 1*
>
> *Section Warranty for Road Projects, Internal/acsess roads of hydel power projects*
>
> *It is agreed and understood that otherwise to the terms, exclusions, provisions and conditions contained in the policy or endorsed thereon, the insurers shall only Indemnity the insured for loss, damages or liability directly or indirectly caused to or by embankments, cuttings & benchings, ditches canals or road works if these embankments, cuttings & benchings, ditches, canals or road works are constructed in sections not exceeding in total the length stated below, Irrespective of the state of completion of the Insured works, the indemnification for any loss event shall be limited to the cost of repair of such sections*
>
> *Maximum Length of section:*
>
> *a) 1000 meters X 3 unconnected sections for flood prone areas and hilly regions and any two unconnected sections separated By a distance of 250 meters from each other*
>
> *b) 1000 meters X 5 unconnected sections for other areas and any two unconnected sections separated By a distance of 500 meters from each other*
>
> *c) 150 meters X 3 unconnected sections for internal & access roads of hydel power projects and any two unconnected sections separated By a distance of 50 meters from each other*”

**14.** *Per Contra*, Mr Mishra, learned counsel for the respondent states that this e-mail was never accepted by the respondent and a copy of the extension which was endorsed by the petitioner shows that there was no ‘Section Warranty’. He further states that the last line shows that all other terms and conditions remain unaltered.

**15.** He further draws my attention to the endorsed extended policy which does not contain 'Section Warranty'.

**16.** I have heard learned counsel for the parties.

**17.** It is a well-settled position of law that the scope of interference as mandated under Section 34 of Act of 1996 is very narrow and limited. In order to adjudicate the matter related to the interpretation of the contract, determination of facts and appreciation of evidence, the learned Arbitrator is the best authority. In this regard, reliance is placed on ***Associate Builders v. DDA, (2015) 3 SCC 49*** wherein the Hon'ble Supreme Court *inter alia* held as under:-

> *"33. It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score [ Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows:"General, you have a sound head, and a good heart; take courage and you will do very well, in your*

*occupation, in a court of equity. My advice is, to make your decrees as your head and your heart dictate, to hear both sides patiently, to decide with firmness in the best manner you can; but be careful not to assign your reasons, since your determination may be substantially right, although your reasons may be very bad, or essentially wrong". It is very important to bear this in mind when awards of lay arbitrators are challenged.] . Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd. [(2012) 1 SCC 594 : (2012) 1 SCC (Civ) 342] , this Court held : (SCC pp. 601-02, para 21)*

> *"21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim*

*against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at."*

**18.** The issue in controversy was duly recorded by this Court *vide* Order dated 07.09.2018 which reads as under:-

> *"Issue notice to the respondent to be served through speed post and courier, returnable on 31st October, 2018.*
>
> *Learned counsel for the petitioner submits that there was no dispute that annexure R-2 referred to by the Arbitral Tribunal in paragraph 51 of its Award, formed a part of the policy document. The only dispute was whether clause 5 providing for "Section Limit" had been deleted or not from annexure R-2. The Arbitral Tribunal has therefore, erred in holding that annexure R-2 did not form part of the policy document as a whole and has failed to adjudicate whether Clause 5 of the same had been deleted by the parties or not.*
>
> *In view of the submission made, there shall be a stay on the enforcement of the Award, subject to the petitioner depositing 50% of the awarded amount within a period of four weeks from today."*

**19.** In this regard, para 51 of the impugned Award passed by the learned Arbitral Tribunal reads as under:

*"51. By yet another email dated 20.5.2014 the Surveyors seem to have been advised by Respondent that the policy No. 215600/44/2010/007 issued from 15.4.2009 is subject to Section Warranty, the wording of which was provided to Surveyors by same email dated 20.5.2014 and they were required to make adjustment in the quantum of assessed loss which they did and submitted Addendum II Report dated 27.6.2014. This report shows only the amounts finally ascertained section-wise but does not specify how and which sections are selected for this assessment nor does it show the details as to how the assessment is worked out. Respondent also has not filed the details. The section warranty does not appear in the policy which was effective from 15.4.2009, nor in the extension of period of insurance endorsement dated 11.4.2012. This is confirmed by Surveyors. For the reasons earlier given the two endorsements dated 22.3.2013 and 25.2.2014 are rejected but, surprisingly, the reference to applicability of Section Warranty does not appear even in those endorsements. The Section Warranty was thus never a part of the policy or was ever endorsed on it. The Section Warranty filed by Respondent is not part of the policy. It is not part of the policy conditions either, because the conditions have printed nos. 1 to 16 and Section Warranty is at page 1. Further the terms and conditions are shown as Annexure R-1 and the Section Warranty is shown as Annexure R-2. Both*

*are thus separate documents. They both thus are required to be shown as part of the policy. In view of the above discussion, the Section Warranty is not part of policy nor has been endorsed upon it. The terms and conditions of the policy state that subject to the exclusions and conditions contained in policy or endorsed on it, if during the period of insurance the insured property be lost, damaged or destroyed by any cause other than those specifically excluded hereunder in a manner necessitating replacement or repair, the Company will pay or make good all such loss or damage. Thus the terms/ conditions which are not in the policy nor properly endorsed on it cannot be taken on record or applied in the present case. The Section Warranty is thus to be held as not applicable to the case and no deductions can be made on that account."*

**20.** In the present case, admittedly, the Section Warranty was struck off from the insurance policy. It is this insurance policy which was extended by the parties as shown by the endorsement of the petitioner.

**21.** As per para 8 of the evidence of Mr Babuta, the e-mail dated 28.03.2012 was only indicating of the premium required to be paid for extension. There is no document before me to show that the said e-mail was unconditionally accepted by the respondent.

**22.** The learned Arbitral Tribunal has rightly held that the 'Section Warranty' was never a part of the insurance policy and also not in the extension of the policy. The said finding is a finding of fact duly arrived by the learned Arbitral Tribunal after analysing the evidence led by the parties available on record. The only reliance placed by the petitioner is on the e-mail dated 28.03.2012 which in view of the discussion of the learned Arbitral Tribunal in paragraph 51 reproduced above shows that the insurance policy had never been accepted with the 'Section Warranty' clause. Hence, I am unable to agree with the contention of the learned counsel for the petitioner.

**23.** As already noted above, the Arbitrator is the best interpreter of the Contract and the quality of evidence led before the Arbitral Tribunal. This Court exercising jurisdiction under section 34 of Act of 1996 does not sit in appeal over the Award unless the Award passed by the Arbitral Tribunal falls under the mentioned grounds available under the said section. In the present case, the impugned Award does not suffers from any illegality and hence no interference is required.

**24.** For the said reasons, the present petition is dismissed.

**25.** In this view of the matter, it is directed that the amount lying deposited with this Court along with accrued interest shall be released to the respondent within two weeks from the date of the release of this order. Further, the respondent is at liberty to file its execution petition, if so advised.

**26.** The petition is disposed of.

**JASMEET SINGH, J**

**SEPTEMBER 23, 2024/sr**

*(Corrected and released on 08.10.2024)*

*Click here to check corrigendum, if any*