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

Reserved on: 27th October, 2021
Pronounced on: 08th April, 2022

\+ **O.M.P. (COMM) 547/2020 & I.As. 10708/2020, 3593/2021**

NATIONAL INSURANCE COMPANY LIMITED ..... Petitioner

Through: Mr. Niraj Singh and Mr. Deepak Jaiswal, Advocates.

versus

DIGITAL WORLD & ANR. ..... Respondents

Through: Mr. Naveen Kumar Chaudhary, Advocate for Respondent No.1.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J.:

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 [*hereinafter referred to as* "***the Act***"] arises out of an arbitral award dated 14th August, 2020 directing the Petitioner [*hereinafter referred to as* "***NIC***"] to pay: *(i)* a sum of Rs. 3,11,94,796/- (which includes principal amount of Rs. 1,93,47,430/-, plus simple interest awarded at Rs. 1,31,02,645/-, less Rs. 12,55,279/- paid under interim award dated 10th March, 2017) along with post-award interest @12% p.a. from 15th August, 2020 till the date of payment, *(ii)* pre-award interest @ 11% p.a. for the period from 1st April, 2014 to 14th August, 2020, amounting to Rs. 1,31,02,645/-, and *(iii)* cost of Rs. 24,77,325/-.

2. NIC impugns the grant of: *(i)* Claim No. 1 against loss to the building; *(ii)* Claim No. 2 towards loss caused to the plant & machinery; *(iii)* Claim No. 4 towards loss caused to stocks; *(iv)* Claim No. 7 awarding interest; and *(v)* Claim No. 9 awarding cost.

3. **BRIEF FACTS:**

3.1. NIC is a Public Sector Undertaking (PSU) engaged in the business of providing various general non-life insurance policies.

3.2. Respondent No. 1– M/S. Digital World [*hereinafter referred to as "**Digital**"*], the Claimant in the Arbitration – is a sole proprietorship of one Mr. Ashok Gupta, engaged in the business of printing digital images on textile/cloth by heat transfer method through computerized machines.

3.3. Respondent No. 2 – Small Industries Development Bank of India (SIDBI) – is a Public Sector Undertaking engaged in the business of promoting, developing and financing in the Micro, Small and Medium Enterprises (MSME) sector.[1] It is, as such, only a *pro-forma* party to the instant proceedings and is not represented through any counsel.

3.4. Digital obtained a Standard Fire and Special Perils Policy from NIC for the period 30th September, 2011 to 29th September, 2012 insuring building, plant & machinery, furniture & fixtures, stock of

[1] After the factory premises of the Claimant got gutted in fire, the entire work of the Claimant came to a standstill and the Claimant became irregular in respect of the credit limits availed from the Respondent No. 2. Consequently, Respondent No. 2 initiated measures to recover their dues and also kept on charging interest on the outstanding dues despite the fact that Claimant suffered losses on account of the fire. The dues of the Respondent No. 2 were settled by a one-time settlement, in which the Claimant had to pay a huge amount towards principal and interest accrued thereon and this was on account of the fact that the Respondent No.1 delayed to settle the insurance amount.

fabrics, and stock in process, situated at D-21, Sector-6, Gautam Budh Nagar, Noida.

3.5. On 26th September, 2012 at about 14:00 hours, employees of Digital heard a blast at the ground floor of the afore-noted premises which resulted in fire and smoke.

3.6. Upon receipt of intimation of the incident, NIC appointed a Statutory Surveyor– M/s Rakesh Kapoor & Company [*hereinafter referred to as the "**Surveyor**"*] to conduct survey and assess the loss, as mandatorily required under Section 64UM of the Insurance Act, 1938 [*hereinafter referred to as the **"Insurance Act"***].

3.7. After physical verification of the documents provided by Digital, the Surveyor submitted its detailed report and assessed net loss towards damage to the building, plant & machinery, furniture & fixture and stocks as Rs. 12,55,279/-.

3.8. Aggrieved with this assessment, Digital filed a complaint before National Consumer Dispute Redressal Commission, New Delhi. During the course of adjudication of the said complaint, parties agreed to refer their disputes to arbitration, and a sole Arbitrator was appointed.

3.9. Before the Arbitral Tribunal, Digital made the following claims:

CLAIM NO.	*AMOUNT CLAIMED*
Claim No. 1 – For loss of land and building due to fire accident based on report dated 15th January, 2013 of Mr. Rajesh Rastogi annexed to the Statement of claim as Annexure C-8.	*Rs. 34,15,000/-*
Claim No. 2 – For loss of plant and machinery due to fire accident based on the report of Brij Mohan Gupta and Associates dated 28th June, 2018 annexed to the statement of claim as	*Rs. 2,75,00,000/-*

Annexure C-9.	
Claim No. 3 – For loss of furniture and fitting	*Rs. 3,87,000/-*
Claim No. 4 – For loss of stocks based on the details of stock and invoices annexed to the Statement of Claim.	*Rs. 38,33,877/-*
Claim No. 5 – On account of excess payment made to the Respondent No. 2 on account of delay in settlement of quantum of claim by the Respondent No. 1.	*Rs. 87,03,000/-*
Claim No. 6 – On account of payments made to the various agencies including expenses of generators and security guards based on details of charges made to various agencies annexed to the statement of claim as C-11.	*Rs. 16,98,701/-*
Claim No. 7 – On account of interest on the claims @ 13.5% per annum along with additional interest at 2% per annum under Regulation 9(6) of the IRDA on the total loss in favour of the Claimant to be awarded.	
Claim No. 8 – Mental harassment and agony.	*Rs. 25,00,000/-*
Claim No. 9 – Legal Expenses.	*Rs. 5,00,000/-*

4. The Arbitral Tribunal passed the impugned Award on 14th August, 2020, awarding claims as under: -

CLAIM NO.	*AMOUNT AWARDED*
Claim No. 1 – Damage to the building	*Rs. 2,00,000/-*
Claim No. 2 – Depreciated value of Plant & Machinery	*Rs. 1,81,60,056/-*
Claim No. 3 – Loss of Furniture & Fixtures	*Rs, 16,639/-*
Claim No. 4 – Loss of stock & fabric and other material belonging to the Client of the Respondent No. 1.	*Rs. 9,70,735/-*
Claim No. 7 – Pre-award interest @ 11% p.a. for the period 01.04.2014 to 14.08.2020	*Rs. 1,31,02,645/-*
Claim No. 9 – Costs	*Rs. 24,77,325/-*
TOTAL	*Rs. 3,49,27,400/-*

CLAIM-WISE CONTENTIONS AND ANALYSIS

CLAIM NO. 1 (TOWARDS LOSS CAUSED TO THE BUILDING)

5. *Petitioner's Contentions:*

Mr. Niraj Singh, counsel for the Petitioner contends that while dealing with Claim No. 1, the Arbitral Tribunal ignored the fact that immediately after the fire, the Statutory Surveyor physically verified the premises and observed that only 384 sq. ft. of the ceiling required plastering. After carrying out physical verification, applying depreciation and deducting salvage, the loss was assessed as Rs. 56,000/- towards the expenses on plastering, white wash and door frame. However, a sum of Rs. 2,00,000/- has been allowed by the Tribunal on broad estimation towards Claim No. 1, whereas the loss calculated by the Arbitral Tribunal by taking entire ceiling of 1097 sq. ft., for plastering, white wash and door comes to Rs. 1,11,814/- only. The amount awarded is without any evidence, and thus liable to be set aside under Explanation 1(ii) of Section 34(2) as well as Section 34(2A) of the Act.

6. *Analysis:*

6.1. Under this claim, Digital raised a claim for a sum of Rs. 34,15,000/- on the basis of the report of Mr. Rajesh Rastogi – Chartered Engineer and Structural Designer. The Arbitral Tribunal however awarded only Rs. 2,00,000/-.

6.2. The Arbitral Tribunal observed that Digital is not entitled to the amount assessed by Mr. Rastogi as it has not opted for reinstatement or replacement of the insured property. By referring to calculation made by the Surveyor in Schedule 1A of their report, it was further observed that Digital is not entitled for the value of the entire building. Nevertheless, it was held that the Surveyor should not have

restricted the plastering expenses for 384 sq. ft. only, and instead, should have taken the entire area of ceiling (i.e.,1097 sq. ft).

6.3. The Arbitral Tribunal has taken into consideration the Surveyor Report (i.e. exhibit RW 1/3 which is strongly relied upon by NIC). However, it was disregarded by relying upon the judgment of Supreme Court in ***Sikka Papers Ltd. v. National Insurance Co. Ltd. & Ors***.[2] Indeed, Surveyor's report is not the last word and for legitimate reasons the same can departed from. In the instant case the Arbitrator has reasoned that the Surveyor was a Mechanical Engineer and not a Civil or a Structural Engineer. During the course of his examination, he admitted that he did not get done a detailed structural analysis of the building before submitting his final report. In such circumstances, it has been concluded that the report was based on visual inspection and not on examination of the structure. The entire ground floor of the building was affected by the high intensity of fire, and for that reason, there was muck all around, water on the floor, and cement plaster had peeled off. The Surveyor had observed that the fire had travelled from the ground floor to first floor through the stairs. In sub-para 8.10 of the report, he had observed that the soot of fire had travelled from ground floor to first floor through stairs and caused damage. Yet, the amount towards white wash expenses and towards plaster of ceiling was reduced, and 54% of the claim was deducted towards depreciation. The Arbitral Tribunal held that the deduction was impermissible and unjustified as the entire building had been destroyed. The Surveyor failed to appreciate that depreciation is an

[2] 2009 7 SCC 777.

estimate which aims to distribute the cost of the building throughout its estimated life, and reliance thereon was irrelevant, when only a part of the building was damaged.

6.4. Further, assessment of loss was not done for the first floor. The Surveyor had also not consulted a Structural Engineer to find out whether some damage had been caused to the structure on the ground floor, which required repairs in addition to plaster of ceiling. In such circumstances, Arbitral Tribunal held that some amount is payable to Digital on account of repairs to the structure of the ground floor, staircase and first floor. A broad estimate of Rs. 2 lakhs inclusive of Rs. 1,11,814/- was assessed as loss to the building on account of the damage caused by fire. This assessment, arrived at on the basis of fact finding, after analysing the facts and surveyor report, is reasonable, and call for no interference.

CLAIM NO. 2 (TOWARDS LOSS CAUSED TO PLANT & MACHINERY)

7. *Petitioner's Contentions:*

7.1. Mr. Niraj Singh contended that the Arbitral Tribunal failed to appreciate that Mr. Brij Mohan Gupta was appointed by Digital after 1361 days of the incident of fire and his appointment was contrary to law, as under Section 64UM(3) of the Insurance Act, only IRDA can appoint a second surveyor and not the insured or the insurer. In this regard, reliance was placed upon ***New India Assurance Co. Ltd. v. Protection Manufacturers Pvt. Ltd***.[3]

[3] (2010) 7 SCC 386 at paragraph 28 & 43.

7.2. The insurance policy was issued on reinstatement value basis, however, since Digital decided not to reinstate the property, the only alternate left with the Surveyor was for settlement of loss on market value basis, after applying depreciation. However, Mr. Brij Mohan Gupta calculated loss on invoice value.

7.3. The General Exclusion Clause (being Clause 7 of the policy) specifically excludes the loss and damage to any electrical machine, apparatus, fixture or fitting arising from or occasioned by over-running, excessive pressure, short circuit, arching, self-heating or leakage of electricity from whatsoever cause.

7.4. The Arbitral Tribunal failed to take note of Clause 7 and wrongly awarded a sum of Rs.1,22,38,251/- towards the damages caused to the machine/equipment lying at the First Floor of the premises which were not damaged directly or proximately due to the fire. The Arbitral Tribunal took note that the loss caused to machinery kept on first floor was on account of "Electric Surge", but wrongly relied upon the judgment of ***Oriental Insurance Co. Ltd. v. Mitra and Ghosh Publisher***,[4] and allowed the claim.

7.5. The Surveyor assessed the loss at Rs.11,60,7947/- after carrying out physical verification and inspection of plant & machinery, immediately after the loss, and applying the depreciation formula on the basis of market value. The report of Surveyor ought to be given due importance, yet, in complete disregard to the same, as well as to the policy terms and conditions, Tribunal relied upon the report of Mr. Brij Mohan Gupta and allowed claim of Rs.1,51,40,555.35/- towards

[4] AIR 2009 Cal. 268.

the loss caused to plant & machinery, although the assessment made by Mr. Brij Mohan Gupta was for Rs. 1,41,94,281/- only.

7.6. The Arbitral Tribunal erred in awarding claim with respect to blanket unit for machinery at Serial No. 1, 4 & 8 for an amount of Rs. 30,19,500/-. In fact, in Para 4.3.22 of the Award, the Tribunal has already included the claim with regard to machinery at Serial No. 1, 4 & 8 and thus a sum of Rs. 30,19,500/- was awarded in excess, without any cogent reason. Therefore, it is liable to be set aside.

7.7. The amount awarded by the Tribunal for Rs. 30,19,500/- is without any evidence and therefore liable to be set aside under explanation 1(iii) to Section 34(2) Section 34(2A) of the Act.

7.8. The Arbitral Tribunal failed to take note of the fact that Mr. Brij Mohan Gupta had also deducted Rs. 9,46,285.40/- as 'under insurance' at the rate 6.24% and thus erred in not deducting 'under insurance' while awarding the claim.

8. *Analysis:*

8.1. Digital claimed a sum of Rs. 2,75,00,000/- on account of loss of plant and machinery, based upon the report of Mr. Brij Mohan Gupta & Associates who had assessed the loss towards plant and machinery for Rs.1,41,94,281/-. The Arbitral Tribunal has however allowed claim of Rs.1,81,60,056.33 towards loss caused to plant and machinery. The Arbitral Tribunal held that the fire was the proximate cause for loss caused to the machinery kept at first floor and thus allowed the claim in respect of such machinery and made reference of the judgment of ***Oriental*** (*supra*).

8.2. The primary challenge to the award of claim under the afore-noted head is founded on the general exclusion clause of the policy. At the outset, it must be noted that challenge on this count is being urged for the first time and this plea was not taken before the Arbitral Tribunal. It is then deemed to be given up. Moreover, application of exclusion clause requires factual determination. Respondent disputes applicability of Clause (a), as the pertains to Act of God, and whereas in the instant case, the cause of loss is incident of fire. In these circumstances, since the Petitioner did not raise the plea earlier, they cannot be permitted to raise the same for the first time under Section 34.

8.3. As regards the contention based on ‘‘under insurance’’, again it must be noted that Petitioner has not made any foundational claim before the Arbitral Tribunal. This objection can be determined only if there is a factual foundation determination as to whether indeed there was ‘under insurance’ or not. The Respondent is entitled to contend that there was no ‘under insurance’. They have in fact contended that for the purpose of ‘under insurance’, value of the plant and machinery has to be seen at the time of renewal of the policy, which, in the instant case, was done in September 2011. Respondent No. 1 has placed on record audited balance sheets reflecting the value of plant and machinery as Rs. 2,79,19,303.44/- as on 31st March, 2011, being less than the sum insured and, therefore, there is no case of ‘under insurance’. The Petitioner had charged premium and possessed all the documents to determine the value of plant and machinery as in September 2011. Yet, no such document was placed on record to

show ‘under insurance’. Thus, there being no pleading in the written statement or written arguments to this effect before the Arbitral Tribunal, the Petitioner cannot be permitted to raise the plea of ‘under insurance’ at this stage.

8.4. As regards plea of ‘under insurance’, founded on the report of Mr. Brij Mohan Gupta, the Court finds the same to be misconceived. No doubt, the Tribunal has relied upon the report of Mr. Brij Mohan Gupta, however, in his report, there is no reasoning for making the deduction. The Tribunal was, therefore, justified in ignoring the said deduction. Merely because the said report has been relied upon for the purpose for assessing the loss caused to plant and machinery, it does not mean that every aspect of the said report had to be necessarily adopted.

8.5. That apart, the chart prepared by the Surveyor reflects the value of the plant and machinery for the year 2012, which was purchased by Respondent No.1 during the years 2008, 2009 and 2010. This calculation would even otherwise not be relevant for the purpose of determining the question of ‘under insurance’, as the pertinent date for the same would be the date of renewal of the policy. Furthermore, the Surveyor appointed by the Petitioner had adopted a different formula for assessing the loss payable to Respondent. He had treated the plant and machinery as obsolete and thereafter deducted depreciation/ repair value of the machine. The risk covered for the plant and machinery was Rs. 2,80,50,000/- (Two Crore Eighty Lakh Fifty Thousand only) and against the said amount, the Surveyor has approved a claim of Rs. 11,60,000/- only. The stand taken by the

Petitioner on the plea of 'under insurance' is, therefore, completely unjustified. On the contrary, the reasoning given for assessment of the loss, disregarding the report of the Surveyor, and accepting the reasoning of Mr. Brij Mohan Gupta, is justified. The Court finds no reason to interfere on this ground.

8.6. As regards the blanket units, for the machine, the Arbitral Tribunal took into account the depreciated values thereof for the machines against Serial Nos. 1, 4 and 8 as calculated on the basis of invoice value, less depreciation. Since Mr. Brij Mohan Gupta has only considered loss caused to the machine referred in the report of Surveyor, the claim of Rs. 30,19,500/- has been awarded towards the damage caused to blanket units on the ground. This factual determination, arrived at on the basis of the material placed on record, calls for no interference as well.

CLAIM NO. 4 (TOWARDS LOSS TO STOCK OF FABRICS AND OTHER MATERIAL)

9. *PETITIONER'S CONTENTIONS:*

9.1. Mr. Singh contends that the Surveyor in its report assessed the loss towards stocks for an amount of Rs. 2,22,362/- in Schedule 1-D wherein he also observed that the claim for loss of stock of fabric was not supported by material evidence and even the stock register was not produced by Digital before the Surveyor. Digital failed to provide supporting material from its clients to confirm that the stock belonged to the client. The Arbitral Tribunal also rejected the deduction made by the Surveyor on account of dead stocks and salvage yet awarded this claim.

10. *Analysis:*

Arbitral Tribunal has allowed a claim of Rs. 9,70,735/- on the reasoning that the Surveyor had made a physical inspection of inventory of stocks, as provided by Digital, and hence the quantity of stocks indicated by the Surveyor in his assessment of loss of stocks in Schedule 1-D was found to be correct. The Arbitral Tribunal had held that the deduction made by Surveyor of 10% on account of old/dead stocks and 20% on account of salvage is not correct in view of the fact that the fabrics had been damaged in the fire. Tribunal also noticed that the Surveyor had been furnished with the stock position, as per its VAT returns. Digital had also furnished the stock statement to the bank, wherein value of the raw material, the value of stock in process; finished products; and of stores/spares etc were shown. Noticing all these documents, the Arbitral Tribunal observed that the reasoning given by the Surveyor to disregard those figures could not be accepted and accordingly assessed the loss for stock of fabric by taking the quantity of each category of fabric physically inspected by the Surveyor as correct and multiplying the same with the rate claimed by Digital as noted by the Surveyor in Schedule 1-D of the report. On this basis, the total loss for stock of fabric was assessed as Rs. 9,70,735.00/-. Since this was the case of incidence of fire, and the fabric became dead and old stock, the Surveyor could not have reduced the assessment by 10% on account of old or dead stock, and another 10% for approximation. The fabric which had been damaged in fire could not be salvaged to the extent of 20%. The reasoning given by the Tribunal is, therefore completely justified and calls for no

interference.

CLAIM NO. 7 TOWARDS THE RATE OF INTEREST

11. *Petitioner's Contentions:*

Mr. Niraj Singh contends that the Arbitral Tribunal wrongly awarded interest @ 11% p.a. and failed to appreciate that the award of interest is only to compensate for loss and not to be punitive or unconscionable for undue enrichment. The Arbitral Tribunal failed to appreciate that Digital, under a one-time settlement, got a heavy concession rebate from SIDBI and therefore is not entitled for interest over and above @ 7% p.a. Digital has obtained a capital subsidy benefit of Rs. 1 Crore and therefore the additional interest of 2% p.a. should be payable. The Arbitral Tribunal erred in awarding 12% on Rs. 3,11,94,796/- after the date of Award, which also included interest component of Rs. 1,93,47,430/-. This finding of the Tribunal amounts to grant of interest-on-interest, which is patently illegal and against the fundamental public policy of Indian law.

12. Analysis:

Digital claimed interest @ 13.5% p.a. along with additional interest @ 2% p.a., against which the Arbitral Tribunal awarded interest @11% p.a. till the date of award and a further post-award interest @12% p.a. The award of interest on the interest component, is on the basis of the judgment of the Supreme Court in ***Hyder Consulting v. State of Orissa***,[5] wherein the Supreme Court held that the word 'sum' in Section 31(7)(b) of the Act,

[5](2015) 2 SCC 189

would include not only the principal amount but also the pre-award interest awarded by the principal. The Court finds the said reasoning to be in consonance with the judgment of the Supreme Court and finds no ground to interfere. As regards the rate of interest it must be noted that as against Digital's claim for 13.5% alongwith additional interest @ 2% per annum, only @11% has been awarded, which is reasonable and justified and calls for no interference.

CLAIM NO.9 (TOWARDS LITIGATION COST AND EXPENSES)

13. *Petitioner's Contentions:*

13.1. Mr. Niraj Singh argues that the Arbitrator wrongly awarded a sum of Rs. 24,77,325/- towards litigation cost as Digital in its statement of claim, only prayed for Rs. 5,00,000/-. It is settled law that relief not prayed for cannot be granted. The Arbitrator failed to take note of the fact that both the parties had agreed to equally share the arbitral fee and therefore, Respondent No. 1 is not entitled for Rs. 16,50,000/- towards arbitral fee.

13.2. The Arbitral Tribunal failed to take note of the fact that the contract of insurance is required to be strictly interpreted. In terms of insurance policy, as "Excess Clause" specifically excludes first 5% of each and every loss arising out of (other than AOG) perils indemnified under the policy. The Surveyor in its report had deduct 5% towards Excess Clause. The Arbitral Tribunal therefore should have deducted 5% of the loss quantified from the awarded amount as per the policy, as the law in this regard is well settled.

14. *Analysis:*

Arbitral Tribunal directed NIC to pay Rs. 24,77,325/- towards cost. Having succeeded in the arbitration, Respondent No.1 was entitled to cost of arbitration which included fees paid to the Arbitral Tribunal, fee paid to the counsel as well as other miscellaneous expenses. The Petitioner has relied upon certificate of its Chartered Accountant certifying the amount incurred for arbitration. The Tribunal rejected part of the expenses which were found to be vague and without any basis. The rest of the amount awarded, is within the meaning of cost as defined under the explanation to Section 31(8) of the Act and, therefore, the Court finds no reason to interfere in the same.

CONCLUSION

15. In view of the foregoing, there is no merit in the present petition. Accordingly, the same is dismissed, along with pending applications.

SANJEEV NARULA, J

APRIL 08, 2022
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