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IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Date of Decision: 30th September, 2021*

+ **O.M.P. (COMM) NO.27/2020**

**M/S POYSHA PACKAGING PRIVATE
LIMITED AND ANR.**

..... Petitioner

Through: Mr M.N. Singh, Advocate.

Versus

**THE ORIENTAL INSURANCE CO. LTD.
& ANR.**

..... Respondents

Through: Mr P.K. Seth, Advocate.

**CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU**

[Hearing Held Through Videoconferencing]

VIBHU BAKHRU, J. (ORAL)

1. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter the 'A&C Act') impugning an arbitral award dated 11.09.2019 (hereafter the 'impugned award') rendered by the Arbitral Tribunal constituted by Justice (Retd) Sh. K.S. Gupta as the Sole Arbitrator.

2. The petitioners challenge to the impugned award is limited to the extent that the Arbitral Tribunal has not awarded *pendente lite* interest.

3. The petitioner is engaged in the business of manufacturing

flexible packaging material such as laminated material in rolls and pouch form, since the year 2006.

4. The petitioner obtained two Standard Fire and Special Perils Policies from the respondent company on 18.01.2012. The said policies covered the risk of damages and loss for plant and machinery and stocks (raw material, semi-finished material and finished material) from the specified perils mentioned in the said policies.

5. On 03.11.2012, a fire broke out in the factory premises of the petitioner resulting in extensive damage to the buildings, furniture, fixtures and fittings as well as to the plant and machinery and stocks. It is stated that three employees of the petitioner also lost their lives as a result of the injuries sustained due to the said incident.

6. On 04.11.2012, the petitioner informed the respondent regarding the incident of the fire and the respondent company appointed the Surveyors. The petitioner made a claim of ₹1,88,45,120/- against loss to Plant and Machinery; a claim of ₹2,84,04,063/- as loss to Buildings, Furniture, Fittings and Fixtures; and a claim of ₹9,61,29,217/ on account of loss to stocks.

7. The Surveyor (T.K. Chakraborty) submitted the report on 14.12.2013 assessing the loss in respect of the building, fittings, fixtures and furniture at ₹1,92,91,288/-. Subsequently, on 12.02.2014, the Surveyor submitted the report assessing the loss in respect of stocks at ₹9,34,40,173/-. And on 18.02.2014, the Surveyor submitted his report assessing the loss in respect of plant and machinery at

₹1,58,70,533/-.

8. The petitioner claims that the respondent did not communicate the reports furnished to the petitioner. However, it sought consent of the petitioner to appoint another agency for inspection. The respondent thereafter, appointed one Sh R.C. Bajpai, who proceeded to re-examine and re-assess the claims. The question whether Sh R.C. Bajpai could be appointed to re-assess the claims is a subject matter of dispute between the parties. The petitioner claimed that it had consented to appointment of an inspection agency and not for re-assessment of the claims.

9. Sh R.C. Bajpai submitted three reports assessing the losses at figures much lower than as assessed by the Surveyor (T.K. Chakraborty). Based on the report submitted by Sh R.C. Bajpai, the respondent released an amount of ₹1,53,90,151/- towards loss to building, furniture, fixture and fittings; ₹6,90,35,447/- against loss of stocks; and ₹1,16,02,392/- as damage to plant and machinery. The said amounts were released to the bank on various dates.

10. According to the petitioner, the payments made by the respondents were less than its entitlement and in any event, the investigator (Mr RC Bajpai) appointed by the respondent was not authorised to reassess the claims as assessed by the Surveyor. In view of the disputes, the petitioner invoked the agreement to refer the dispute the arbitration.

11. The parties concurred with the appointment of Justice (Retd)

Shri K.S. Gupta as the Sole Arbitrator and he was so appointed.

12. Before the Arbitral Tribunal, the petitioner, *inter alia*, sought the difference in the amount claimed in respect of the policies and the amounts as released by the respondent along with interest. The prayers made by the petitioner in its Statement of Claims are set out below:

“i) award a sum of Rs.4,73,86,982/- (Rupees Four crore Seventy Three lakh Eighty Six thousand Nine hundred and Eighty Two only) towards balance amount of insurance claims together with interest@ 15% p.a. from 01.09.2018 pendent lite and till the date of payment, in favour of claimants and against the respondents;

ii) award a sum of Rs.7,12,90,349/- (Rupees Seven crore Twelve lakh Ninety thousand Three hundred and Forty Nine only) being the interest amount as per details mentioned in para No.27 of the Statement of Claim, in favour of claimants and against the respondents;

iii) award a sum of Rs.19,12,000/- (Rupees Nineteen lakh Twelve thousand only) towards value of salvage with interest @ 15% p.a. from 10.09.2018 till the date of payment by the respondents to the claimants; and

iv) award cost of proceedings in favour of claimants and against the respondents.

13. The Arbitral Tribunal accepted the petitioner’s contention that the respondent could not, in the given facts and circumstances, appoint another agency to re-assess the losses. Following the decisions of the Supreme Court in *Venkateswara Syndicate v. Oriental Insurance Co.*

Ltd. & Ors.: (2009) 8 SCC 507 and *New India Assurance Co. Ltd. v. Luxtra Enterprises Ltd. & Ors. : 2019 (7) SCALE 206*, the Arbitral Tribunal held that a second surveyor could not be appointed without any cogent reasons. Accordingly, the Tribunal held that the petitioner was liable to the difference between the loss as assessed by the Surveyor (T.K. Chakraborty) and as disbursed by the respondent. The Arbitral Tribunal found that the difference in the amounts as assessed by the surveyor and that as disbursed by the respondent worked out to be ₹2,44,04,726 towards stocks; ₹42,68,141/- in respect of plant and machinery; and ₹39,01,137/- in respect of building, furniture, fittings and fixtures. Thus, aggregating a total amount of ₹3,25,74,004/-.

14. The petitioner had claimed interest on the amounts withheld and had quantified the pre-reference interest at ₹7,12,90,349/-. This was computed at the rate of 15% per annum on ₹14,34,14,968/- (amount of loss claimed by the petitioner) as successively reduced by the amounts as disbursed by the respondents on various dates.

15. The Arbitral Tribunal did not accept that the petitioner was entitled to the difference between the amounts claimed and disbursed but only entitled to the difference between the loss as assessed by the Surveyor (quantified at ₹12,86,01,994/-) and the amounts as disbursed by the respondent. The Arbitral Tribunal also held that since the petitioner had not established the rate of interest as charged by the Nationalized Banks during the relevant period, its claim for interest at the rate of 15% per annum could not be allowed. The Arbitral Tribunal was of the view that interest at the rate of 9% per annum was

reasonable and accordingly, awarded a sum of ₹3,21,42,427/- as interest for the period prior to disbursement. The relevant extract of the impugned award indicating the computation of the aforesaid amount is set out below:-

- “(i) Interest on claim on stocks and plant & machinery as per survey reports (total being Rs.10,93,10,706/- @ 9% p.a. from 1.5.2014 to 9.3.2017 (rounded off to 34 months) Rs.2,78,74,230/-
- (ii) Interest on claim of building & FFF (as per survey report amount being Rs.1,92,91,288/- @ 9% p.a. from 1.5.2014 to 16.11.2016 (29 ½ months) – Rs.42,68,197/-.”

16. In addition, the Arbitral Tribunal also computed the amount of interest for the balance amount remaining unpaid from the date of disbursement till 31.08.2018 at ₹38,26,218/-. The calculation of the said amount is reproduced below:-

- “(a) Interest on balance claim on Stocks and plant & machinery of Rs.2,86,72,867/- @ 9% from 10.03.2017 to 31.8.2018 (rounded off to 17½ months) – Rs.37,63,313/-.
- (b) Interest on balance claim of building & FFF of Rs.39,01,137/- from 17.11.2016 to 31.8.2017 (21 ½ months) @ 9% p.a. – Rs.62,950/- ”

17. Thus, the Arbitral Tribunal computed the total amount of interest payable as ₹3,59,68,645/- (₹3,21,42,427 + ₹38,26,218) and

awarded the said amount in favour of the petitioner. The operative part of the impugned award reads as under:-

“In view of my finding on said issues 1 to 6, award of Rs.3,25,74,004/- towards balance amount of claims and Rs.3,59,68,645/- towards interest is passed in favour of claimant No.1 and against respondent insurance company. Claimant No.1 is further entitled to the share of arbitrator's fee paid by it, lawyer's fee, which is assessed at Rs.50,000/- and stamp duty paid on the award from the insurance company. Respondent insurance company is allowed 4 weeks' time to pay the awarded amount after receipt of intimation of claimant No.1 having paid the deficient stamp duty. If the amount is not paid within this period the claimant No.1 will be entitled to *pendente lite* and future interest on former two amounts @ 11 % p.a. from 18.9.2018, on which the date statement of claim was received till realization, from the respondent insurance company.”

18. The petitioner is aggrieved by the award to the limited extent that the Arbitral Tribunal did not award any *pendente lite* interest in favour of the petitioner.

19. It is material to note that the Arbitral Tribunal has also reasoned that a person deprived of the use of money to which he is legally entitled, has a right to be compensated for the deprivation. The Arbitral Tribunal has also held that interest rate of 9% per annum is reasonable. Accordingly, the Tribunal has awarded a sum of ₹3,59,68,645 as pre-reference interest. However, it is evident that the Arbitral Tribunal has ignored the petitioner's prayer in the Statement of Claims *qua* the *pendente lite* interest. The said claim has not been

considered by the Arbitral Tribunal. Plainly, rejection of such a claim would be inconsistent with the reasoning of the Arbitral Tribunal as noted above.

20. In *Sayeed Ahmed & Co vs State of U.P.: (2009) 12 SCC 26*, the Supreme Court had observed, albeit in a different context, that *the difference between pre-reference period and pendente lite interest has disappeared in so far as award of interest is concerned*. Although it may be open for the Arbitral Tribunal to award interest for the pre-reference period and yet deny *pendente lite* interest, the same is required to be informed by reason.

21. In this case, there is no plausible reason for the Arbitral Tribunal to have not awarded *pendente lite* interest after concluding that the petitioner was entitled to interest as it was deprived of the use of money.

22. In view of the above, the Arbitral Award in respect of the petitioner's claim to the extent that it does not grant *pendente lite* interest to the petitioner, is set aside.

23. The petition is allowed in the aforesaid terms.

VIBHU BAKHRU, J

SEPTEMBER 30, 2021

Aj/pkv

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