IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

The Hon'ble Justice Sabyasachi Bhattacharyya

A.P. No. 392 of 2012

ORIENTAL INSURANCE COMPANY LIMITED
VS
M/S. SARADA RANI ENTERPRISES

For the petitioner	:	Mr. Chayan Gupta, Adv. Mr. Sanjay Paul, Adv. Ms. Jaita Ghosh, Adv
For the respondent	:	Mr. Suddhasatva Banerjee, Adv. Mr. Dwip Raj Basu, Adv. Mr. Aritra Basu, Adv. Mr. Ritoban Sarkar, Adv.
Hearing concluded on	:	15.07.2024
Judgment on	:	19.07.2024

Sabyasachi Bhattacharyya, J:-

1. The present challenge has been preferred under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as, "the 1996 Act") against an award passed by a three-member Arbitral Tribunal. The matter arises out of a claim made by respondent/claimant for insurance in view of loss suffered due to damage to cement bags stored for the purpose of its business by the respondent, due to waterlogging of its godowns.

2. Learned counsel for the petitioner/insurance company argues that the arbitral tribunal discarded two reports, one by the insurer's surveyor and another by an independent surveyor appointed by the court, and

ultimately granted an award of Rs. 60,00,000/- solely on the basis of Exhibit "T", which is a letter dated January 7, 2005 issued by the clamant/respondent to the present petitioner/insurance company. It is argued that the unilateral claim of the respondent does not comprise of proof of the claim and as such, the award is perverse.

3. Secondly, it is argued that the claim made in the letter dated January 7, 2005 was vague and contradictory. Although in the said letter a particular number of damaged cement bags were mentioned, of a much lesser amount than the claim made in its statement of claim, it was contended by the respondent/claimant that 2988 metric tonne (mt) cement was damaged.

4. Moreover, the claimant has made different claims insofar as the quantum of damages is concerned at various points of time, which are mutually contradictory.

5. Thus, it is argued that the claim should have been rejected due to lack of evidence.

6. Learned counsel for the petitioner submits that the tribunal based its findings on a co-ordinate Bench decision of this Court in *Gambhirmull Mahabirprasad vs. The Indian bank Ltd and another* reported at *AIR 1963 Cal 163*, where a quotation was used from *Halsbury's Laws of England*, third edition. It is submitted that the entire quotation was not reproduced. Moreover, as per the said quotation, the court had the power to make a guess-work up to a certain extent only if the nature of the claim was such that it was not quantifiable, such as in respect of pain and suffering, loss of expectation of life, etc. In the present

case, the claim was be adjudicated merely by calculating the number of damaged cement bags and the price thereof. Thus there was no scope of guess-work at all. Hence, the award is assailed on the ground of palpable illegality and patent perversity.

7. Learned counsel for the petitioner submits that this Court does not have the power under Section 34(4) of the said Act, to refer the matter to the tribunal for the purpose of re-writing an award, since the defect is incurable.

8. Learned counsel places reliance on the provision of Section 34(4) and cites *I-Pay Clearing Services Private Limited vs. ICICI Bank Limited* reported at *(2022) 3 SCC 121* as well as *Dyna Technologies Private Limited Vs. Crompton Greaves Limited* reported at *(2019) 20 SCC 1* where the Supreme Court consistently held that Section 34(4) could only be utilised when there was a gap in the reasoning process of the tribunal and not otherwise.

9. Thus, it is argued that the impugned award ought to be set aside.

10. Learned counsel for the respondents argues that in view of the materials available before the tribunal, the tribunal was justified in passing an award on the basis of the claim made by the respondent. It is submitted that the claim was contemporaneous with the loss and, as such, was a valid basis of the award.

11. Learned counsel submits that *Gambhirmull's* case is apt on the issue and was rightly relied on by the arbitral tribunal.

12. In the absence of better evidence, the tribunal was justified in resorting to reasonable guess-work.

13. Learned counsel for the respondent next cites *Muddasani Venkata Narsalah vs. Muddasani Sarojana* reported at *(2016) 12 SCC 288* for the proposition that where there is no effective cross-examination of the claimant's witness, the effect is that the statement of the claimant has not been disputed. In the present case, the claimant's witnesses proved the letter-in-question without objection. Moreover, the stock statement and stock ledger were also proved. Thus, there was sufficient basis for passing the award, as there was no contradiction to the letter.

14. The sole issue which arises in the present case is whether the impugned award was based on valid evidence and whether the same was perverse or not.

15. The evidence available before the arbitral tribunal primarily comprised of four documents. The first was a letter dated January 7, 2005 (Exhibit 'T') which indicated that the claimant was entitled to an amount in excess of Rs.60,00,000/-. The second document was a subsequent letter dated March 29, 2005, where the petitioner claimed an amount of Rs. 1,13,27,208/- as on that date.

16. The third document was a report by the insurance's surveyor, one Kanak Chowdhury and Associates. The said report assessed the loss at Rs. 8,68,611/- and the gross amount at Rs. 9,39,740/-. The tribunal chose not to rely on the same on two grounds. First, that it was not proved in evidence, for which the same could not be looked into. Secondly, it was not accepted by the claimant itself.

17. The other document which was available on record was a report authored by the court appointed surveyor one Manabandra Chatterjee, who assessed the claim at Rs 77,40, 562/-. Although the said report was accepted by the claimant, it was disbelieved by the Arbitral Tribunal on cogent reasons.

18. Insofar as the report authored by the insurance's surveyor Kanak Chowdhury and Associates is concerned, the arbitral tribunal was justified in refuting the same, it having not been proved in evidence, as opposed to two other documents which were formally proved. Moreover, the claimant itself having refused to accept the same, it cannot fall back upon the assessment made therein.

19. The Arbitral Tribunal considered the court-appointed surveyor's reported at length and devoted several paragraphs to the same. Ultimately, the said report was discarded on several cogent grounds. The author of the said report, namely, Manabandra Chatterjee had taken the rate of the cement bags from the records of the claimant. However, he was assigned to do the job after one year and seven months and had chosen an alternative method of assessment of the loss. The calculation was made purely on the basis on the godown area, general system of loading and unloading and stacking of cement bags and information and photograph as well news as published in the newspapers regarding rain water inundation. In the witness box, questions were put by the members of the tribunal to the said surveyor regarding authenticity of the report *vis-a-vis* his finding as to the quantum of damaged cement bags, in answer to which the

surveyor admitted that there was no document to show that the bags found to be damaged during his inspection where so damaged by inundation. Moreover, he admitted that he did not get any account of the damaged bags/stock before inundation or the assessment of the loss by a Chartered Accountant or Bank.

20. In such view of such matter, the probative value of the same was doubted and the report was not accepted by the tribunal, with sufficient justification in the opinion of this court.

21. The stock statement, stock ledger and stock register, which were exhibited through the claimant's witness, only proved the quantum of stock of cement lying in the godown on October 7, 2004 but did not throw any light on the question of existence of the damaged quantity of stock affected due to rain water inundation, as covered by the policy. On such finding, the tribunal refused to hold the said documents to be insufficient for the purpose of arriving at a conclusion regarding the liability of the insurer. Such refusal, thus, is also based on sound reasoning.

22. Thus, what remained were two letters, one dated March 29, 2005 and the other Exhibit 'T', a letter dated January 7, 2005, both written unilaterally by the claimant/respondent.

23. There is no justifiable basis why the tribunal chose the letter dated January 7, 2005 as the sole basis of granting the claim. The letter itself is vague in as much as it mentions the entitlement of the claimant to be in excess of Rs.60,000/-, not specifically quantifying the exact amount of damages. Moreover, the number of damaged bags

as indicated therein and the consequential quantity of cement do not tally at all with the exorbitant claim of 2988 mt., which was originally claimed by the claimant to have been damaged.

24. That apart, the claimant has made various claims at various points of time insofar as the amount is concerned. For example, it claimed Rs, 1,13,27,208/- as on March 29, 2005 and again Rs. 1,03,35,738/-, whereas the original claim was of a much higher amount.

25. In view of such inherent contradiction in the claims of the claimant, no reliance can be place at all on its unilateral claim as embodied in the letter dated January 7, 2005.

26. Moreover, it defies all principles of jurisprudence as to how the unilateral claim of the claimant, which does not even qualify as pleadings supported by due verification/affidavit, could be equated with proof of such claim. The said claim was even contradicted by the claimant itself in various other places, including a subsequent letter.

27. Thus, in the absence of any proof whatsoever, in spite of the liability being admitted in principle by the insurer, the Arbitral Tribunal acted in a palpably perverse fashion in granting the claim of Rs. 60,000/- without any material basis. The letter of the claimant, even though contemporaneous with the loss, could not be elevated to the plane of proof of such claim.

28. The reliance on *Gambhirmull's* case by the Tribunal was also misplaced. The learned Single Judge, in the said judgment, while referring to *Halsbury's Laws of England*, was merely contemplating a situation where the damages could not be assessed with any

mathematical accuracy. As opposed thereto, in the present case, the assessment did not lack accuracy but was entirely baseless, without any foundational evidence at all.

29. Moreover, in the said judgment, what was being considered was claims which are, by their very nature, were incapable of being assessed with accuracy, such as in respect of pain and suffering, loss of exception of life and loss of a chance of winning a prize. Such circumstances are completely different from the present case. In the instant *lis*, the claim made by the claimant was a fully quantifiable amount. The claimant had to prove the exact number of damaged cement bags, the amount of cement in each of such bags and the price of such bags. In view of the petitioner having failed to prove the most important component out of those, being the number of damaged bags, there was no occasion for the Arbitral Tribunal to grant any amount to the claimant whatsoever. Thus, this is not a situation where an exact figure cannot be arrived at and the tribunal is compelled to resort to reasonable guess-work, but a case where the Tribunal, relying on no materials basis whatsoever, arbitrarily granted an amount to the claimant. The very absence of any basis vitiates the award by patent perversity.

30. An argument is sought to be advanced by the respondents as to this Court having power under Section 34(4) to refer the matter to the Tribunal to give an opportunity to resume the Arbitral Proceeding in order to eliminate the grounds for setting aside the arbitral award. However, it has been settled by the Supreme Court in the judgments

of *Dyna Technology (supra)* and *I-Pay Clearing Services (supra)* that the grounds contemplated in Section 34(4) refer not to cardinal jurisdictional errors but to mere dearth of reasoning on the part of the Tribunal. The present case is not one where there was a technical defect or scarcity of reason, for which an opportunity might have been given to the Tribunal to cure such defect.

31. The defect in the present case in incurable, since there was no material at all before the Tribunal to grant any amount of compensation to the claimant. The amount granted is without any material basis whatsoever and based arbitrarily on the unilateral claim made in a correspondence by the claimant, which has no legal footing at all.

32. Thus, the impugned award is patently perverse and militates against the fundamental policy of Indian Law. It defies basic notions of justice, being vitiated by patent illegality appearing on the face of the award.

33. In such view of the matter, A.P. No.392 of 2012 is allowed on contest, thereby setting aside the impugned award dated February 2, 2011 and signed on March 6, 2012.

34. There will be no order as to costs.

35. Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)

Later

After the above order, learned Counsel for the petitioner points out that vide an interim order dated March 11, 2021 passed in connection with AP/392/2012, the petitioner was directed to secure a sum of Rs. 97,46,400/- by way of cash security payable to the Registrar, Original Side, of this Court which was to be put in an interest bearing fixed deposit account. The Registrar, Original Side was to monitor the said account for the purpose of keeping record of the periodic entries in the said amount.

In view of the above order allowing the application under Section 34 of the 1996 Act, the petitioner is granted leave to withdraw the said sum along with interest accrued thereon, deducting the necessary expenses incurred by the Registrar.

As an when approached by the petitioner for such withdrawal, the Registrar, Original Side shall disburse the said amount of Rs. 97,46,400/- along with interest, if any, accrued thereon, after deducting the necessary expenses, in favour of the petitioner through its authorised representative(s).

A copy of the order and the receipt of payment handed over by learned Counsel for the petitioner today be kept on record.

(Sabyasachi Bhattacharyya, J.)