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

Date of decision: 30/09/2019

+ **FAO (OS) No.196/2019**

NATIONAL INSURANCE CO. LTD. Appellant
Through: **Mr. Amit Kumar Singh, Advocate.**

versus

SYNERGY STEELS LTD. Respondent
Through: **Mr. Ravi Gupta, Senior Advocate**
with **Mr. Ankit Jain, Advocate, Mr. Sidhant Nath, Advocate, Ms. Diya Kapoor, Advocate and Mr. Akshay Pratap Singh, Advocate.**

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

G.S.SISTANI, J. (ORAL)

C.M.No.43697/2019 (exemption)

Exemption is allowed subject to all just exceptions.

Application stands disposed of.

C.M. Nos.43698/2019 (condonation of delay in filing) & 43699/2019 (condonation of delay in re-filing)

These are applications for condonation of delay of 81 days in filing and 7 days in re-filing the appeal.

For the reasons stated in the applications, delay is condoned.

Applications stand disposed of.

FAO (OS) No.196/2019

The present appeal is directed against order dated 01.05.2019 passed by the learned Single Judge in O.M.P. No.879/2012 filed by the appellant under Section 34 of the Arbitration & Conciliation Act 1996 (hereinafter referred to as 'the Act').

Two issues came-up for consideration before the learned Single Judge. The first issue was as to whether the amount received in the sum of Rs.8,03,072/- was in full and final settlement of the respondent's claims against the appellant. This issue was decided against the insurance company/appellant herein by the Arbitrator, which decision was upheld by the learned Single Judge. Counsel for the appellant fairly submits that this issue is not being pressed in the present proceedings.

The second issue is as to whether the boiler exploded by itself upon falling of the magnetic hammer or on account of a fire which then led to the explosion.

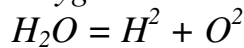
The stand of the respondent before the Arbitrator is as contained in the Statement of Claim, which we reproduce below:-

“A. That the electromagnet had fallen on the crucible top damaging the inner lining of the crucible due to which the copper coil got exposed to the hot molten metal and upper two sets of the copper coil melted.

B. That the copper coils contain water circulation at a pressure of 3 KG/cum to maintain the temperature of copper coil. The copper coils are connected to electric supply and

this electric current is induced into the steel scrap inside the crucible.

C. The melting of copper coils resulted in flushing out of water. This water came into direct contact of the molten metal resulting in decomposition of water into Hydrogen and Oxygen.



D. The generated Hydrogen gas came into the contact with the hot molten metal at a temperature of about 1600°C and an uncontrolled explosion took place resulting into shattering of the roof sheets and damage to the crucible and crate etc caused heavy loss.”

The response of the appellant to the Statement of Claim is in para 4 of their reply, which we reproduce as under:-

“4. That the contents of para 4 of the claim petition, except which are a matter of record are vehemently denied. It is vehemently denied that an explosion took place in the aforesaid factory premises on 18.8.2005. The above loss was caused due to fall of 4.5 ton magnetic hammer inside crucible of induction furnace which was in operation as chain ring of hammer assembly got released from the hook of the crane’s hoist and fell into the crucible. This led to impact damage to the crucible’s refractory material and coils which is not covered under the fire policy (such impact damage can be only covered under a Machinery breakdown insurance policy which was not taken by the insured) It is submitted that the quantum of loss suffered by the claimant has been quantified by the loss assessors appointed by the Respondent Company. It is further submitted that these loss assessors have statutory status and recognized as such under the insurance Act 1938 (as amended). It is further submitted that the loss assessors have assessed the loss of the petitioner company which was duly paid by the respondent company to the petitioner company as full and final settlement of all its claims towards the respondent company. The same was duly

accepted by the petitioner company, it is further submitted that in this factual backdrop it is not open to the petitioner company after receiving the entire amount, to reopen its whole claim towards the respondent company. It is further submitted that if the petitioner company is permitted to reopen its claim in such a fashion especially after settlement of its entire claim to its satisfaction, it will set up a wrong instance and will encourage to other persons to do so. All the contents of para 4 of the claim petition are denied.”

Counsel for the appellant submits that his case is duly supported by the report of the surveyor and also by the report of the inspector. Counsel submits that the learned Arbitrator and the learned Single Judge have erred in not appreciating this. He submits that since the learned Single Judge has failed to take into account that the Arbitrator did not take note of Clause III(a) of the insurance policy, this court would be within its jurisdiction to set-aside the illegality writ large on the face of the record.

Mr. Ravi Gupta, learned senior counsel for the respondent however submits that this court, while dealing with an appeal under Section 37 of the Act, would not go into factual aspects which have been duly decided by the learned Arbitrator and thereafter have been examined by the Single Judge.

We have heard counsel for the parties.

We deem it appropriate to reproduce Clause III(a) of the insurance policy which is relied upon by the appellant:-

“III Explosion/Implosion

Excluding loss, destruction of or damage.

a. To boilers (other than domestic boilers) economizers or other vessels, machinery or apparatus (in which steam is

generated) or their contents resulting from their own explosion/implosion.”

Learned Single Judge has reached a conclusion that the appellant had neither raised this defence nor relied upon Clause III(a) either in response to the Statement of Claim or during the arguments before the Arbitrator. Counsel has however contended that being an integral part of the policy, the same can be raised even at this stage. He also submits that even if the reply to the Statement of Claim was not happily worded, the consistent stand of the insurance company has been that the respondent is not entitled to any claim with respect to the explosion of the boiler.

A careful examination of Clause III(a) would show that the loss, destruction or damage to boilers would stand excluded from the insurance policy in case the loss, destruction or damage is caused to their contents resulting from their own explosion or implosion. It is thus contended that in the absence of destruction to the boiler by fire, no claim could have been allowed.

To answer this submission, Mr. Ravi Gupta reiterates the stand taken by respondent before the Arbitrator. Further explanation has also been given which has been duly accepted by the Arbitrator and also by the learned Single Judge. The Single Judge has extensively relied upon the stands of both the parties before the Arbitrator and thereafter upon the operative part of the Award where this has been dealt with. A portion of para 34 of the Award is relevant and we deem it appropriate to reproduce the same hereunder:-

“34. Respondent has denied claims of the claimant primarily

on the basis of the report submitted by the surveyor Mr. A.K. Gupta, Insurance Surveyor appointed by M/s Adarsh Associates appeared as RW-2. According to Mr. A. K. Gupta explosion precedes the damage. According to him electro magnate weighing 4.5 ton fell upon the crucible of induction furnace due to slipping of hook of the crane that was holding the electro magnate used to feed scrap into the furnace. Felling of electro magnate caused damage to the induction furnace and explosion took place thereafter. He has denied that explosion is simultaneous combustion and/or explosion because of steam. According to Mr. A.K. Gupta, RW2 both the reasons and explosion are excluded as per the exclusion clause of fire and explosion. According to Mr.AK.Gupta, RW2 damage to the crane, crucible and spectrometer was beyond the scope of the fire policy. The explosion and the resultant loss to induction furnace was caused due to fall of 4.5 ton magnetic hammer upon the crucible of induction furnace, which was in operation. The magnetic hammer fell inside the furnace because its holding chains of the hoist, got released from the hooks, as it was allowed to rest on scrap protruding outside the induction furnace crucible whilst in operation. This led to impact damage top the crucible's refractory material and coils which is not covered under the fire policy.... ”

Learned Arbitrator has relied upon the report of the surveyor Sh. A.K. Gupta/RW-2. The Arbitrator had taken note of the fact that according to Sh. A.K. Gupta the explosion preceded the damage. He had also explained that electro magnet weighing 4.5 ton fell upon the crucible of induction furnace due to slipping of hook of the crane that was holding the electro magnet which was used to feed scrap into the furnace. He denied that explosion was simultaneous combustion and explosion because of steam. Also, according to Sh. Gupta both the reasons and explosion were excluded as per the exclusion clause and

thus the claim was beyond the fire policy. However as noticed by the Arbitrator, this witness could not withstand cross-examination even to the extent of proving that he actually visited the site. Some of the relevant paras, which we would like to highlight are as under:-

“34. ... When suggested that his report was based on those notes he denied by saying he also visited the site after other man’s visit. After seeing the record he could not tell when did visited the site. Vide question No.24 it was suggested to him that the diameter of electro magnate is 1800 mm. Mr. Gupta RW2 could not deny the same. In order to cover up the same he said because electro magnate was inside the furnace it was not required to be measured. In fact in reply to question No.22 he said diameter of electro magnate (hammer) was 4.5 to 5.0 ft and according to him induction furnace opening was about 1400 mm i.e equal to 4.5 ft. Mr. Ravi Gupta contended that since hammer was 1800 mm and electro magnate was 4.5 ft (1500 mm) it could not have gone inside the furnace. In reply to question No.24 Mr. A.K. Gupta RW2 tried to say that hammer in this case was stuck on the mouth of the furnace. Partially it was in the mouth of furnace and partially it was tilted inside the furnace, which reply is contrary to his own report. Mr. Ravi Gupta counsel for the claimant contended that if the report of the surveyor is looked into and in particular para 5.3 wherein surveyor has stated that hammer released immediately above the furnace, fell inside the crucible and damaged the refractory mass of crucible, extensively. Therefore, the answer to question No.22 that hammer was partially on the mouth and partially tilted is contrary to his own report. In reply to question No.25, RW2 Mr. Gupta admitted that when electro magnate fall on the crucible top, then the same would damage the top of block of white heat cement casting, top ring and refractory lining. Damage to the refractory lining would cause a direct contact of outside water cooled copper coil of crucible

with the metal inside and the water got leaked. In reply to question No.27 he also admitted that inside flowing water instantaneously turn into steam producing a violent explosion. After having admitted the same he tried to say that there may be time lag to turn flowing water into steam which will cause explosion. The reason for denial according to RW2 is that damage due to collapse or release of hammer is not covered by the policy. According to him loss occurred due to collapse which subsequently cause break down of the hammer and furnace. ... ”

We find some other portion of the cross-examination of Mr. Gupta also damaging to the case of the appellant, which is reproduced as under:-

“34. ... He could not prove that he also visited the site at any time. He admitted that he was not concerned with the payment made to the company. In reply to question No.54 when claimant suggested the cause of damage he try to cover up by saying that after the fall of hammer there was damage to 20MT induction furnace. According to him contact of molten water cooled metal to the copper cable was consequential event. How he made this assessment has not been explained by him. His saying that he visited the site not proved, that means his report is based on the inspection done by somebody else. The person has not step into the witness box. His is only guess work that damage to induction furnace was caused when molten water cooled metal came in contact with copper coil. Explosion was subsequent event. Whereas claimant has in no uncertain words explained that because of electro magnet fell upon the top of the crucible it caused damage to the top block of white heat cement casting, top ring and refractory lining resulting into direct contact of outside water cooled copper coil of crucible with the metal inside and the water got leaked resulting into steam causing violent explosion.... ”

The purpose of highlighting these portions of the cross-examination of Sh. A.K. Gupta/RW2 was that the witness of the insurance company could not withstand cross-examination and the Arbitrator reached the correct conclusion by observing :

“Therefore no much important can be attached to the testimony of Mr. Gupta, RW2. Moreover, in view of admission made in reply to above questions in (sic, it) can safely be concluded that the damage caused due to fall of magnetic hammer caused explosion, it cannot be said that the explosion was a subsequent event. ”

Other things apart, the foregoing are purely factual matters and this court cannot examine the same in the present proceedings under Section 37 of the Act since the scope of interference under Section 37 of the Act is very narrow.

We accordingly find no merit in the appeal. Dismissed.

C.M. No.43696/2019

In view of the order passed in the appeal, the application stands disposed of.

G.S.SISTANI, J

ANUP JAIRAM BHAMBHANI, J

SEPTEMBER 30, 2019/Ne