[2024] 5 S.C.R. 285 : 2024 INSC 356

New India Assurance Company Ltd. Through its Manager v. M/s Tata Steel Ltd.

(Civil Appeal No. 2759 of 2009)

30 April 2024

[Surya Kant and K.V. Viswanathan,* JJ.]

Issue for Consideration

A claim for 35.08 crores was filed by the insured after the '20 Hi Cold Rolling Mill' was totally destroyed due to fire. Since running of the company was important, the Insured got a new 6 Hi Cold Rolling Mill installed in its unit and commenced production. Admittedly, based on the interim report of the surveyors, a sum of Rs.4,92,80,905/- was released in favour of the Insured by NIACL-insurer. Thereafter, the Insured gave consent for receiving Rs.20.95 Crores as net adjusted loss. However, the NIACL computed depreciation at 60% and settled the claim on 03.01.2003 stating the loss amount as Rs.7.88 Crores. The issues arising for consideration are as follows: (i) Was the Reinstatement Value Clause part of the policy; (ii) Was NIACL justified in computing loss on depreciation basis and fixing depreciation at 60%; (iii) Is the Insured justified in claiming reinstatement value by placing reliance on the judgment in Oswal Plastic Industries.

Headnotes

Insurance – Reinstatement value clause – Whether the memorandum consisting of the Reinstatement Value Clause was a part of the policy – The Insured contended that the memorandum containing the Reinstatement Value Clause was not part of the policy:

Held: The contention of the insured rejected – This is for the reason that before the NCDRC in the written statement filed by the NIACL it was specifically pleaded that copy of the fire policy was not attached with the Reinstatement Value Clause issued along with the policy, so the answering Respondent-insurer (NIACL) was filing the copy of the policy with complete terms and conditions and clauses along with the written statement – In the replication filed by the Insured, there was no denial of this averment. [Paras 31 and 32]

* Author

Insurance – Computation of loss on depreciation basis – Was NIACL justified in computing loss on depreciation basis and fixing depreciation at 60%:

Held: It emerges clearly that under the main terms of the policy the company was to pay the Insured the value of the property at the time of happening of the destruction (except where NIACL opts to reinstate) – There was a special memorandum attached to the policy – That memorandum was the Reinstatement Value Clause which substituted the basis upon which the amount was payable from the value on the date of destruction to the cost of replacing or reinstating the property i.e. property of the same kind or type but not superior or more extensive than the insured property when new – However, as it transpires the said memorandum ceased to have any force since the Insured was unable and unwilling to replace or reinstate the property – Special Provision 4 (b) of the memorandum applied and rendered the Reinstatement Value Clause ineffective – Also, the Insured under Clause 6(b) of the conditions had an obligation to give NIACL all such further particulars, plans, specifications, books, vouchers and invoices with respect to the claim – It is sufficiently brought out that in spite of the surveyors writing to the Insured repeatedly (on 14.12.1998, 03.05.2002, 24.06.2002 and 07.08.2002), there was no information forthcoming from the Insured about the invoices as proof of the value of the damaged equipment and the cost of the new equipment – Instead, the insured originally undertook that they will reinstate the damaged property; received the on account payment of Rs.4,92,80,905/- and informed NIACL that they have placed order for repair of 20 Hi Cold Rolling Mill – Thereafter by their letter of 16.06.1999, the Insured sought assessment of net adjusted loss at Rs.20.95 Crores – The surveyors of NIACL kept asking for the basic and relevant particulars, the Insured without furnishing the same kept asking for the settlement of the money – NIACL did not completely repudiate the claim – NIACL cannot be faulted for resorting to depreciation method – NIACL was also justified in writing the letter of 12.11.2002 (to increase the depreciation to 60%) because after reviving the demand to reinstate the plant, the Insured failed to furnish the documents required and even admittedly the plant as allegedly reinstated was of 6 Hi Cold Rolling Plant and not 20 Hi Cold Rolling Plant – An additional affidavit was also filed by NIACL before NCDRC to clarify the established practice for computing depreciation – The base figure of Rs. 20.09 crores was kept intact – Insured stood to gain by keeping figure at Rs. 20.09

crores – The depreciation at 60% upheld – Thus, the NIACL rightly ordered the settlement of the claim on 03.01.2003 stating the loss amount as Rs.7.88 Crores and ordering the balance amount of 2.88 crores be paid after adjusting the on account payment. [Paras 57, 58, 59, 66, 68, 69, 70, 71]

Insurance – Is the Insured justified in claiming reinstatement value by placing reliance on the judgment in Oswal Plastic Industries:

Held: No clause similar to the memorandum of reinstatement value clause appears to have existed in Oswal Plastic Industries – Oswal Plastic Industries has no application to the facts of the present case. [Para 75]

Case Law Cited

Oswal Plastic Industries v. Manager, Legal Deptt N.A.I.C.O. Ltd. [2023] 1 SCR 985 **: 2023 SCC OnLine SC 43;** *Sri Venkateswara Syndicate v. Oriental Insurance Co. Ltd.* [2009] 14 SCR 57 **: (2009) 8 SCC 507;** *Dharmendra Goel v. Oriental Insurance Co. Ltd.* [2008] 11 SCR 578 **: (2008) 8 SCC 279;** *Sumit Kumar Saha v. Reliance General Insurance Company Ltd.* [2019] 1 SCR 763 **: (2019) 16 SCC 370 – held inapplicable.**

List of Acts

Insurance Act, 1938; IRDA (Protection of Policyholders' Interests) Regulations, 2002.

List of Keywords

Insurance; Reinstatement value clause; Report of the surveyors; Net adjusted loss; Consumer Complaint; Depreciation; Computation of loss on depreciation basis; Cost of replacing or reinstating the property.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2759 of 2009

From the Judgment and Order dated 05.08.2008 of the National Consumers Disputes Redressal Commission, New Delhi in CC No. 233 of 2000

With

Special Leave Petition (Civil) No. 10001 of 2009 and Civil Appeal Nos. 5242-5243 of 2009

Appearances for Parties

Joy Basu, Sanjay Jain, Sr. Advs., Ms. Nandini Gore, Ms. Sonia Nigam, Akhil Abraham Roy, Mohammad Shahyan Khan, Arvind Thapliyal, Siddhant Grover, Surya Kapoor for M/S. Karanjawala & Co., Vishnu Mehra, Ms. Manjeet Chawla, Ms. Harshita Sukhija, Nishank Tripathi, Yuvraj Sharma, Ms. Palak Jain, Mrs. Manik Karanjawala, Mrs. Usha Pant Kukreti, Advs. for the appearing parties.

Judgment / Order of the Supreme Court

Judgment

K.V. Viswanathan, J.

1. Leave granted in SLP (Civil) No. 10001 of 2009.

2. I.A. No. 48152 of 2022 in Civil Appeal No. 2759 of 2009 is filed by the Respondent [earlier known as M/s Bhushan Steel and Strips Ltd, hereinafter referred to as the "**Complainant**" or the "**Insured**"] seeking change of its name in the proceedings to 'Tata Steel Ltd'. The Complainant/Insured has filed similar IAs in the connected appeals filed by it. It is stated that the name of the Complainant/Insured was changed to 'Bhushan Steel Ltd' in the year 2007. Thereafter while these appeals were pending, the company underwent a Corporate Insolvency Resolution Process and was successfully taken over by 'Tata Steel Ltd' on 27.11.2018 and was renamed as 'Tata Steel BSL Ltd'. Thereafter, it is seen that the Complainant/ Insured further underwent a merger/amalgamation and was finally merged/amalgamated with 'Tata Steel Ltd' w.e.f. 11.11.2021. In view of the said facts, all the applications for change of name are allowed.

3. These are four Civil Appeals arising out of the proceedings in Original Petition No. 233 of 2000 before the National Consumer Disputes Redressal Commission, New Delhi ["**NCDRC**"].

4. Civil Appeal No. 2759 of 2009 has been filed by the New India Assurance Company Limited [hereinafter referred to as "**NIACL**" or the "**Insurer**" or the "**Insurance Company**"] challenging the order dated 05.08.2008 of the NCDRC. By the said order, the NCDRC partly allowed the complaint of the Insured. The NCDRC awarded an amount of Rs.13,15,27,000/- with interest at 10% per annum from the expiry of two months since the submission of survey report dated

11.12.2001, payable to the Insured. The amount already paid by the Insurance Company was ordered to be adjusted and a cost of Rs. 50,000/- was also awarded to the Insured. NIACL, in this Appeal, is aggrieved with the finding that the Complainant's claim must be settled, based on calculating depreciation at the rate of 32% - and not 60%.

5. The Civil Appeal arising out of SLP(Civil) No. 10001 of 2009 has been filed by the Insured/Complainant. The grievance here is against the dismissal of Misc. Application No. 298 of 2008 in Original Petition No. 233 of 2000 seeking review of the order dated 05.08.2008.

6. Civil Appeal Nos. 5242-5243 of 2009 have been filed by the Insured/ Complainant against the main order dated 05.08.2008 (passed in O.P. No. 233 of 2000) and order dated 29.08.2008 (allowing the application for rectification and correcting the figure awarded to Rs. 13,51,27,000/- instead of Rs. 13,15,27,000/-) respectively.

7. The grievance pleaded by the Insured/Complainant in its connected appeals is that the compensation awarded ought to have been greater because, according to it, the base figure on which the depreciation of 32% was computed should have been Rs.28 Crores and not Rs.20,09,95,000/-. The claim was that, so computing, the amount payable by NIACL should have been Rs. 18.91 Crores.

Brief Summary of Facts:

8. The Insured had taken an insurance policy from NIACL for the entire machinery and equipment of its mill by paying a premium of Rs.62,09,655/-. The policy was for the period 29.09.1998 to 28.09.1999. According to the Insured, due to a fire accident on 12.12.1998, the '20 Hi Cold Rolling Mill' fitted with imported equipment was fully destroyed resulting in a loss of Rs. 35.08 crores. The incident of fire was intimated to NIACL on 12.12.1998 itself. Surveyors 'M/s R.K. Singhal and Company Pvt. Ltd.' and subsequently 'M/s A.K. Govil and Associates' and 'M/s P.C. Gandhi' were appointed by NIACL. A claim for Rs. 35.08 crores was filed on 29.01.1999. According to the Insured, this was based upon the quotations received from various manufacturers of the said machinery and the complete details of cost for replacing and/or repairing the machines.

9. The Insured also pleaded that since the running of the company was important, it got a 6 Hi Cold Rolling Mill installed in its unit and commenced production by spending Rs.29.60 crores apart from excise duties.

10. Admittedly, based on the interim report of the surveyors, a sum of Rs.4,92,80,905/- was released in favour of the Insured by NIACL on 24.03.1999. According to the Insured, after the release of the amount, it placed an order with 'M/s Flat Products Equipments (India) Limited' ["**M/s Flat Products**"] for reinstating the 20 Hi Cold Rolling machine by replacing the totally damaged and partially damaged parts for a total sum of Rs.25 crores, and paid Rs.3,75,00,000/- to M/s Flat Products by way of advance payment. Further, a sum of Rs.47.50 lacs on account of inspection charges of mill housing and Rs. 25 lacs for transportation of mill housing were also paid. According to the Insured, though it lost more than Rs. 25 crores, in view of the persistence from the Insurance Company, vide letter dated 16.06.1999, it gave consent for receiving Rs.20.95 Crores as net adjusted loss to avoid loss of time.

11. According to the Insured, since no response was forthcoming and the balance amount was not released, Consumer Complaint bearing Case No. 233 of 2000 was filed by the Insured before the NCDRC on 30.05.2000.

12. According to NIACL, after receipt of the information about the fire accident on 12.12.1998, NIACL immediately appointed the surveyors and soon thereafter, on the basis of the interim survey report, on-account payments were made. The Joint Surveyors submitted their report on 11.12.2001. The vigilance complaints were also closed on 18.01.2002.

13. According to NIACL, it was only on 27.03.2002 that the Insured informed NIACL about the fact of having already installed a new 6 Hi Cold Rolling Mill and requested them for joint inspection with the surveyors. In the Joint Surveyors' Report of 11.12.2001, the loss was assessed at Rs.19.55 crores on replacement basis and Rs.13.51 crores on depreciation basis. The surveyors, on 03.05.2002, requested the Complainant to furnish several information for which there was no response. It was contended by NIACL that the plea of the Insured in their letter of 27.03.2002 that it had placed an order for cold rolling mill on 11.01.1999 and the same was installed in

September-October, 1999 at the cost of Rs. 31.37 crores and the prayer that the replacement should be treated as reinstatement, is completely unacceptable. The machine installed is 6 Hi Cold Rolling as against the damaged mill which was 20 Hi Cold Rolling. According to NIACL, the claim has been rightly settled at Rs.7.88 Crores.

Proceedings before the NCDRC:

14. Though several other points were argued before us by the Insured, the point canvassed before the NCDRC [and pleaded in the Insured's connected Appeals] related only to the calculation of depreciation. The argument taken by the Insured before the NCDRC was that NIACL was not justified in computing depreciation at 60% while the surveyors in the reports had recommended 32% as depreciation. The NCDRC observed that the effort by the Insured to install a lesser capacity 6 Hi Cold Rolling Mill was an *effort in desperation*. It also found the claim to be genuine. Addressing the issue of depreciation, it held that after the initial recommendation in the Joint Surveyors' Report dated 11.12.2001 of computing 32% depreciation, the surveyors were persuaded by the letter of the Insurance Company dated 12.11.2002 to increase the depreciation to 60%. An additional affidavit was called for from the NIACL to justify the depreciation at 60%. After perusing the affidavit, the NCDRC held that there were no standard guidelines for calculating depreciation and that it had been calculated differently for different units. According to the NCDRC, the affidavit quoted the instances of very high depreciation just to suit the convenience of NIACL. It may be mentioned that the affidavit relied on certain cases where depreciation was computed at a maximum rate up to 75% - 80%. The NCDRC held that the issuance of the letter of the Insurance Company to the Surveyors seeking revision of calculation was issued eleven months after the Joint Surveyors' Report dated 11.12.2001 and that this was not a healthy practice. So holding, it maintained the depreciation at 32% and directed the payments as noted above.

Appeal to this Court:

15. The appeal by NIACL seeks depreciation to be fixed at 60%. The Insured also in its appeals has focused only on the issue of depreciation with the argument being that the base figure on which 32% depreciation was calculated should have been Rs.28 crores and not Rs.20.09 crores. There are no other grounds raised in the memo of the appeal.

16. However, the Insured during the course of submission, while candidly admitting that no other point had been raised in the memo of appeal, relied on the judgment in ***Oswal Plastic Industries v. Manager, Legal Deptt N.A.I.C.O. Ltd.*****, [2023 SCC OnLine SC 43]** to contend that the reinstatement value should have been awarded in full and that in the case of reinstatement value no question of depreciation arises. This argument has been dealt with herein below at an appropriate stage.

Contentions of NIACL:-

17. Appearing for NIACL, learned Senior Counsel Mr. Sanjay Jain contended that the insurance policy had a special condition in the form of Reinstatement Value Clause; that there are two methods of settlement of a claim depending on the nature of the policy, namely, the reinstatement value basis and market value basis (or depreciation basis); that under the Reinstatement Value Clause, the method of indemnity was to be the "cost of replacing or reinstating the same i.e. property of the same kind or type but not superior or more extensive than the insured property when new"; that the reinstatement was to be carried out by the Insured within 12 months or within such further extended time; that para 2 of the Special Provisions provided that until expenditure has been incurred by the Insured in replacing/ reinstating the damaged property, the Insurance Company shall not be liable to pay any amount in excess of the amount which would have been payable under the policy, if the said reinstatement clause had not been incorporated; para 4 of the Special Provisions provided that if the Insured expressed its intention to replace/reinstate the damaged property and the Insured is unable or unwilling to replace the damaged property on the same or another site, the reinstatement clause was to be rendered ineffective.

18. Adverting to the impugned judgment, learned Senior Counsel contended that the findings that (i) the insurer, out of sheer desperation, bought the 6 Hi configuration; (ii) the depreciation rate as calculated by the NIACL was erroneous; and (iii) NIACL's letter to the surveyor asking for a revised calculation was not a healthy practice, are all erroneous findings which are completely untenable. According to learned Senior Counsel, the Insured in violation of the undertaking did not take any steps for reinstatement; that there was no delay on the part of the Insurance Company and in fact on account payment of Rs. 4,92,80,905/- had been released as early as

on 24.03.1999; that the NCDRC overlooked the fact that the Insured did not comeback to the Insurance Company with any information for about 08 months and only on 26.11.1999, followed by another letter of 10.02.2000 asked for extension of time limit for reinstatement of the insured property; that the same was accommodated by the NIACL and on 07.03.2000, an extension of 12 months was given and which time limit period was also not adhered to; that the Insured after receiving the interim payment claimed that Rs. 3.75 crores were advanced to M/s Flat Products and the said vendor neither repaired the insured property nor replaced the same; that nearly two years later on 28.06.2001, M/s Flat Products informed the Insured that they had lost their expertise and, as such, the delay could not be attributed to the NIACL; that the Insured informed the NIACL about having installed a 6 Hi Cold Rolling Mill (as against the insured property of 20 Hi Cold Rolling Mill), on 27.03.2002, without revealing the date of actual installation and without giving any comparable specification, which unilateral act cannot be termed as "an act of sheer desperation" as termed by the NCDRC.

19. It is submitted by the learned Senior Counsel that under the aforesaid circumstances, the Reinstatement Value Clause was rendered inoperative. However, the Insurance Company gave another opportunity to act in good faith and provide necessary specification and particulars, which were not provided for, in spite of the undertaking in the letter of 09.07.2002. Hence, by no stretch of imagination could the delay be attributable to the Insurance Company.

20. Insofar as the percentage of depreciation was concerned, it was contended that the NCDRC erroneously disregarded the affidavit filed by the Insurance Company clarifying the standard practice. On the finding about the practice adopted by the Insurance Company as "not being a healthy practice", Mr. Sanjay Jain submitted that the NIACL gave ample opportunities to provide cogent material and it is only upon their failure to furnish the necessary documents, as obligated in the policy, that NIACL was constrained to settle the claim on market value basis by applying the necessary percentage of depreciation. It was contended that in the report of 11.12.2001, the joint surveyors, while arriving at the depreciation rate of 32%, did not have any material. Therefore, it was a prudent act on the part of the NIACL to arrive at a calculation on the basis of market value with the applicable rates of depreciation, after informing the

surveyors that the reinstatement method was not an option any longer. The learned Senior Counsel submitted that the claim was finally assessed by the surveyors, who in their survey report dated 07.12.2002 and after computing the balance life of ten years arrived at the depreciation rate of 60%. Hence, NIACL's conduct in accepting that report could not be said to be arbitrary. It was argued that there was no disagreement on the surveyor's report.

21. The learned Senior Counsel emphasized that even today, the Insured has no definite proof available with regard to the actual age of the mill and as to when it was procured from its vendor; or under what circumstances and condition the same was procured and other essential details. In this background, the assessment made by the surveyors, who are experts, could not be said to be illegal or untenable. The learned Senior Counsel further submitted that the recommendation of depreciation at 32% was at the stage when no material was forthcoming and was not supported by any cogent material and clarity on this aspect emerged only on the report of 07.12.2002. According to the learned Senior Counsel, ground (D) in Civil Appeal Nos.5242-5243 of 2009 records an admission of the Insured about the NCDRC rightly proceeding on depreciation basis.

22. Learned Senior Counsel submitted that there was no ambiguity and hence there is no room for the applicability of doctrine of *contra proferentem*. The survey report of 11.12.2001 was prepared at a premature stage with all relevant disclaimers. Alternatively, it was submitted that under Section 64 UM (2) of the Insurance Act, 1938, the NIACL was entitled to differ from the recommendation of the surveyor.

23. Learned Senior Counsel strongly refuted the reliance placed in the convenience compilation, by the Insured on the judgment in ***Oswal Plastic Industries* (*supra*)**. Learned Senior Counsel contended that ***Oswal Plastic Industries* (*supra*)** was not a case with the Reinstatement Value Clause as a special condition. Learned Senior Counsel contended that unlike in ***Oswal Plastic Industries* (*supra*),** Clause 9 had no application to the facts of the present case. That in any event documents were not provided by the Insured to NIACL. Dealing with Regulation 9(3) of the IRDA (Protection of Policyholders' Interests) Regulations, 2002 ["**IRDA Regulations**"], learned Senior Counsel submitted that the joint surveyors report dated 07.12.2002 was for all intents and purposes the original surveyors report and as

such Regulation 9(3) assuming it to be mandatory had no application. Alternatively, it was contended that Regulation 9(3) is only directory.

24. Insofar as the cross appeal is concerned, the learned Senior Counsel contended that the claim for the base figure as Rs. 28 crores is absolutely unjustified, there being no cogent material to support the same. In fact, the stand of the Insured was that its vendor M/s Flat Products had expressed its inability due to loss of expertise and the same was conveyed two years after receiving the advance. For all these reasons, the learned Senior Counsel prayed that the appeal of NIACL be allowed and the appeals of the Insured be dismissed.

Contentions of the Insured/Complainant: -

25. Mr. Joy Basu, learned Senior Counsel appearing for the Insured, at the very outset, contended that the memorandum containing the Reinstatement Value Clause was never part of the policy document issued by the NIACL. This memorandum, according to the learned senior counsel, was never received by the Insured. Without prejudice to the same, it is contended that Clause 9 of the conditions in the policy has to be read in conjunction with the Reinstatement Value Clause. Since, as per para 4, the Reinstatement Value Clause got extinguished, Clause 9 of the conditions became applicable.

26. Learned Senior Counsel submitted that in terms of Clause 9 where reinstatement/repair is not possible, the surveyor's assessment of reinstatement has to be complied with. Learned senior counsel relied on the judgment in ***Oswal Plastic Industries*** ***(supra)***. Learned Senior Counsel contended that the interpretation of Clause 9 was laid down only by the ***Oswal Plastic Industries*** ***(supra)*** judgment in January, 2023 and as such the Insured should be allowed to canvass the argument based on ***Oswal Plastic Industries*** ***(supra)***. According to learned Senior Counsel, the inability/failure to reinstate as contemplated in the last part of the Clause 9 is the failure of the NIACL. Learned Senior Counsel further contended that it is only with the hope of an expedited settlement that the Insured accepted the lower figure of Rs. 20.95 Crores. Calculating on reinstatement basis, the surveyors in their report of 11.12.2001 arrived at the figure of Rs. 19.55 crores without application of any depreciation. According to the Insured, the amount further due is Rs.11,80,87,699/-.

27. Alternatively, it is submitted by the learned Senior Counsel that even if the market value basis is to be applied, depreciation has to be calculated on the sum insured of Rs. 80 crores. To support this plea, learned Senior Counsel relied on ***Dharmendra Goel vs. Oriental Insurance Co. Ltd. (2008) 8 SCC 279***. Further, without prejudice, it is contended that if depreciation was not to be calculated on the sum insured, then the depreciation has to be calculated on the cost of the new locally sourced 20 Hi Cold Rolling Machine which would cost Rs. 25 crores plus taxes totaling Rs 28 crores. Further, it is contended that the depreciation rate was 32% as mentioned by the surveyors in their report of 11.12.2001 and NIACL has not adduced any reasons for deviating from the recommendation of the surveyors. Learned Senior Counsel submitted that the surveyor's response of 07.12.2002 was "a reluctant response from an embarrassed surveyor" to the letter of NIACL dated 12.01.2002 which, according to the learned senior counsel, was a letter by the insurer asking the surveyors to compute maximum depreciation. In any event, according to the learned Senior Counsel, the doctrine of *contra proferentem* applied and the interpretation in favour of the Insured should have been adopted. It was argued that there was a breach of Regulation 9(3) of the IRDA Regulations. So contending, the learned senior counsel prayed that the appeal of NIACL be dismissed and the cross appeals of the Insured be allowed.

Questions before this Court:

28. In the above background, the questions that arise for consideration are as follows:

i. Was the Reinstatement Value Clause part of the policy?

ii. Was NIACL justified in computing loss on depreciation basis and fixing depreciation at 60%?

iii. Is the Insured justified in claiming reinstatement value by placing reliance on the judgment in ***Oswal Plastic Industries (supra)***?

iv. To what reliefs are the parties entitled?

Discussion and Reasons:

29. At the outset, it is important to set out the crucial clauses of the policy in question.

New India Assurance Company Ltd. Through its Manager v. M/s Tata Steel Ltd.

Fire Policy "C"

In consideration of the insured name in the schedule hereto having paid to the New India Assurance Company Limited (hereinafter called the company) the premium mentioned in the said schedule. THE COMPANY AGREES (subject to the Condition and Exclusions contained herein or endorsed or otherwise expressed hereon) that it after payment of the premium the property Insured described in the said schedule or any part of such property, be destroyed or damaged by:

1. Fire

……

6. ….. During the period of Insurance named in the said schedule or of any subsequent period in respect of which the insured shall have paid and the Company shall have accepted the premium required for the renewal of the policy the Company will pay to the insured the value of the property at the time of the happening of its destruction or the amount of such damage or at its opinion reinstate or replace such property or any part thereof.

Conditions

……

6. (i) On the happening of any loss or damage the insured shall forthwith give notice thereof to the company and shall within 15 days after the loss or damage or such further time as the Company may in writing allow in that behalf, deliver to the company;

a. A claim in writing for the loss or damage containing as particular an account as may be reasonably practicable of all the several articles or items or property damaged or destroyed, and of the amount of the loss or damage thereto respectively, having regard to their value at the time of the loss or,

b. Particular of all other insurance, if any:

> The insured shall also at all times at his own expense produce, procure and give to the company all such further particulars, plans, specifications, books, vouchers, invoices, duplicates or copies thereof, documents investigation reports (internal/external), proof and information with respect to the claim and the origin and cause of the insured perils and the circumstances under which the loss or damage occurred, and any matter touching the liability or the amount of the liability of the Company as may be reasonably required by or on behalf of the Company together with a declaration on Oath or in other legal form of the truth of the claim and of any matter connected therewith.
>
> No claim under this policy shall be payable unless the terms of this condition have been complied with.

30. Two other important clauses viz., Clause 9 of the Conditions and the memorandum containing the Reinstatement Value Clause are extracted below at the appropriate place in the discussion.

Answer to Question No (i) :-

31. There was a debate at the Bar as to whether the memorandum consisting of the Reinstatement Value Clause (extracted later in the judgment) was a part of the policy. The argument was raised by senior counsel for the Insured who contended that the memorandum containing the Reinstatement Value Clause was not part of the policy. We reject this contention at the outset. This is for the reason that before the NCDRC in the written statement filed by the NIACL, in para 3, it was specifically pleaded as under:

> "The copy of the fire policy at pages 13 to 22 is a true copy of the policy issued by the Respondent. However, the Reinstatement Value Clause issued along with the policy is not attached to the same. The answering Respondent is filing herewith the copy of the policy with complete terms and conditions and clauses as Annexure R-1 to this written Statement."

32. In the replication filed by the Insured, there was no denial of this averment. Hence, we reject the contention of the Insured that the

memorandum of the Reinstatement Value Clause was not the part of the policy. There are other factors which establish that the Reinstatement Value Clause was part of the Policy. They are discussed hereinbelow. Issue (i), set out above, is answered in favor of NIACL.

Discussion of Question No. (ii) :-

33. Coming back to the clauses in the insurance policy, it will be seen that the assurance in the opening clause of the policy was that NIACL will pay to the Insured the value of the property at the time of the happening of its destruction OR the amount of such damage OR at its option, reinstate or replace such property or any part thereof. In the conditions, it was incorporated that the Insured was at all times at its own expense to produce, procure and give to NIACL all such further particulars, plans, specifications, books, vouchers, invoices, duplicates or copies thereof, documents, investigation reports (internal/external), proof and information with respect to the claim and all matters provided for in Clause 6. It is also stipulated that no claim under this policy was payable unless the terms of this condition was complied with.

34. Clause 9 of the Conditions states that if NIACL, at its option, reinstate or replace the property damaged or destroyed, or any part thereof, instead of paying the amount of loss or damage, or join with any other company or Insurance in so doing, NIACL shall not be bound to reinstate exactly or completely but only as circumstances permit and in reasonably sufficient manner, and in no case shall NIACL be bound to spend more in reinstatement than it would have cost to reinstate such property as it was at the time of occurrence of such loss or damage nor more than the sum insured by the Company thereon. Clause 9 reads as follows:

> "9. If the company at its option, reinstate or replace the property damaged or destroyed, or any part thereof, instead of paying the amount of the loss or damage, or join with any other company or insurance, in so doing, the company shall not be bound to reinstate exactly or completely but only as circumstances permit and in reasonably sufficient manner and in no case shall the company be bound to spend more in reinstatement than it would have cost to reinstate such property as it was at the time of the

occurrence of such loss or damage nor more than the sum insured by the Company thereon,

If the Company so elect to reinstate or replace an property the insured shall at his own expense furnish the company with such plans, specifications, measurements, quantities and such other particulars as the company may require, and no acts done, or caused to be done, by the company with a view to reinstatement or replacement shall be deemed an election by the Company to reinstate or replace.

If in any case the Company shall be unable to reinstate or repair the property hereby insured, because of any municipal or other regulations in force affecting the alignment of streets or the construction of buildings or otherwise, the Company shall, in every such case, only be liable to pay such sum as would be requisite to reinstate or repair such property if the same could lawfully be reinstated to its former condition."

35. To the policy is attached the memorandum of the Reinstatement Value Clause which reads as follows:

REINSTATEMENT VALUE CLAUSE

Attached to and forming part of policy No.

It is hereby declared and agreed that in the event of the property Insured under (Items Nos. of) the within policy being destroyed or damaged, the ***basis upon which the amount payable under each of the said items of the policy is to be calculated, shall be the cost of replacing or reinstating on the same, i.e. property of the same kind or type but not superior or more extensive than the insured property when new*** subject to the following Special Provisions and subject also to the terms and conditions of the policy except manner as the same may be varied hereby.

SPECIAL PROVISIONS

1. The work of the replacement or reinstatement (which may be carried out upon another site and in any manner suitable to the requirements of the insured

subject to the liability of the Company not being thereby increased) must be commenced and carried out with reasonable dispatch and in any case must be completed within 12 months after the destruction or damage or within such further time as the company may (during the said 12 months) in writing allow; otherwise no payment beyond the amount which would have been payable under the policy if this memorandum had not been incorporated therein shall be made.

2. Until expenditure has been incurred by the Insured in replacing or reinstating the property destroyed or damaged the company shall not be liable for any payment in excess of the amount which would have been payable under the policy if this memorandum had not been incorporated therein.

3. If at the time of replacement or reinstatement the sum representing the cost which would have been incurred in replacement or reinstatement if the whole of the property covered had been destroyed exceeds the sum insured thereon at the breaking out of any fire or at the commencement of any destruction of or damage to such property by any other peril insured against by this policy, then the Insured shall be considered as being his own insurer for the excess and shall bear a rateable proportion of the loss accordingly. Each item of the policy (it more than one) to which this Memorandum applies shall be separately subject to the foregoing provision.

4. This Memorandum shall be without force or effect if:

   (a) The Insured fails to intimate to the company within 6 months from the date of destruction or damage or such further time as the Company may in writing allow, his intention to replace or reinstate the property destroyed or damaged.

   (b) The Insured is unable or unwilling to replace or reinstate the property destroyed or damaged on the same or another site.

36. The memorandum of the Reinstatement Value Clause stipulates that it was declared and agreed that in the event of the property Insured under the policy being destroyed or damaged,

a. The basis upon which the amount payable under each of the said items of the policy is to be calculated, shall be the cost of replacing or reinstating on the same, i.e. property of the same kind or type but not superior or more extensive than the insured property **when new** subject to the following Special Provisions and subject also to the terms and conditions of the policy except manner as the same may be varied hereby.

b. The Special Provisions stipulate that the work of the replacement or reinstatement must be commenced and carried out with reasonable dispatch and in any case must be completed within 12 months after the destruction or damage or within such further time as the company may (during the said 12 months) in writing allow; otherwise no payment beyond the amount which would have been payable under the policy if this memorandum had not been incorporated therein shall be made.

c. Until expenditure has been incurred by the insured in replacing the property destroyed or damaged, the company shall not be liable for any payment in excess of the amount which would have been payable under the policy if this memorandum had not been incorporated therein.

d. If at the time of replacement or reinstatement the sum representing the cost which would have been incurred in replacement or reinstatement if the whole of the property covered had been destroyed exceeds the sum insured thereon at the breaking out of any fire or at the commencement of any destruction of or damage to such property by any other peril insured against by this policy, then the Insured shall be considered as being his own insurer for the excess and shall bear a rateable proportion of the loss accordingly. Each item of the policy (if more than one) to which this memorandum applies was to be separately subject to the following provisions.

e. This Memorandum was to be without force or effect if

   i. The Insured fails to intimate to the company within 6 months from the date of destruction or damage or such further

time as the Company may in writing allow, his intention to replace or reinstate the property destroyed or damaged.

ii. The Insured is unable or unwilling to replace or reinstate the property destroyed or damaged on the same or another site."

37. It is very clear from the above that the original terms of the policy which provided for payment by NIACL of the value of the property at the time of the happening of its destruction or the amount of such damage was varied and the basis was changed. The changed basis under the Memorandum of the Reinstatement Value Clause was that the amount payable was to be calculated based on the cost of replacing or reinstating the same, i.e. property of the same kind or type but not superior or more extensive than the insured property when new.

38. It is also clear that in view of the Reinstatement Value Clause, the question of NIACL on the facts of the present case opting to reinstate or replace under Clause 9 of the conditions of the policy does not arise and with the same reasoning, the question of the applicability of Clause 9 itself cannot arise.

Relevant Facts as they unfolded:-

39. At this stage, it is important to deal with the correspondence that was exchanged between the parties to bring out as to how under the Reinstatement Value Clause, it was the Insured who attempted to reinstate or replace the property which was destroyed. As will be clear from the sequence of the events, it was the Insured who was either unable to or unwilling thereafter to reinstate the property. Let us see how the facts unfolded. On 12.12.1998 i.e., the date of the fire, the Insured intimated NIACL and requested for the surveyors to be deputed. On 14.12.1998, the surveyors wrote to the Insured requesting for various information including year wise capitalization, balance sheets of the previous two years, copy of the original invoices of affected items as well as fresh proforma invoice and the logbook and any other maintenance record. In the reply of 18.12.1998, crucial information with regard to the original invoice as well as proforma invoice were not furnished. An interim survey report was prepared on 04.02.1999 by the three surveyors in the joint report and that report had the following disclaimer:

> "Based on the physical inspection carried out and limited information made available by the Insured till then, the above surveyors submitted their joint survey report on 22nd December 1998. Subsequently, the underwriters appointed P.C. Gandhi & Associates as another joint surveyors. The joint surveyors visited the insured factory jointly and severally on various dates and carried out detailed physical inspection of the subject machine besides carrying out protracted discussions with the Insured official accompanied by Supplier/Manufacturers of the Mill."

40. The interim survey report noticed that the claim was for Rs.35 Crores and the effective claim excluding excise duty was Rs.30.28 crores. Dealing with the assessment of loss, in Para 14, it was mentioned in the report that the Insured lodged their claim based on the price breakup given by manufacturers which included cost of supply, installation and commissioning but excluded excise, sales tax, transportation and civil works. The report mentioned that the price break-up given was accepted in general at that stage and that comparable cost could not be possible from an alternative source. Most importantly, in Para 14 (1.4), it was provided as under:

> "Policy provides for Reinstatement clause and Insured have confirmed verbally that they would reinstate the damages without any delay. At this stage, reasonable depreciation and salvage are adjusted for considering conservative on Account Payment."

41. This clause also reinforces the fact that Reinstatement Value Clause proving for reinstatement by the Insured was part of the policy. So finding at Para 15, the surveyor in their interim report concluded as under:

> "It may be noted that while assessing the provisional loss, substantial margin has been kept, even after considering the depreciation etc. Based on the limited verification carried out till now, we are of considered opinion that the minimum loss on Reinstatement Value Basis is like to be around Rs. 1500 lacs and the maximum loss on Reinstatement Value Basis after more detailed verifications has been estimated at around Rs. 2500 lacs.

> In consideration of the Insured's request for an On Account Payment, should be Underwriters so desire, they may consider an On Account Payment of upto Rs. 720 Lacs at this stage."

It was clearly mentioned that the report was issued without prejudice, and subject to terms and conditions of the relevant insurance policy.

42. This report was followed by a letter issued by the Insured on 10.02.1999.

> "We undertake that reinstatement of damaged property on account of fire loss caused on 12.12.1998, shall be carried out by us within the stipulated time as per fire policy No.1132160705785. We confirm that suggestions given in the TAC and LPA report will be complied with during the reinstatement of the mill."

On 24.03.1999, on account payment of Rs. 4,98,80,905/- was made.

43. Thereafter, on 10.06.1999, the Insured wrote to M/s Flat Products placing an order for repair of the '20 Hi Cold Rolling Mill' and paying them an amount of Rs. 3.75 crores as 15% advance. It transpires that on 06.10.1999, the Chief Vigilance Officer of NIACL addressed a letter to the General Manager, NIACL furnishing a report about an anonymous complaint received stating that the fire was due to arson and that there has been inflated assessments resulting in approval of huge on account payments. The report concluded that there was no indication that the fire was due to arson but there were indications that the loss could have been assessed for highly inflated amount. The Chief Vigilance Officer sounded a note of caution to the following effect:

> "Therefore, adequate precautions should be taken before a final decision is taken in respect of the claim. We would like to suggest that an opinion of technical expert in the concerned field may be taken regarding extent and assessment of loss in order to arrive at the actual loss sustained by the claimant. You may also examine the feasibility of having into depth technical investigation into various objects of the claim."

44. When matter stood thus on 16.06.1999, the Insured wrote to the surveyors stating as under:

> "However, against contract price of Rs. 25 crores, we agree and confirm to the assessment of the net adjusted loss of Rs. 20,95,00,000/- (Indian Rupees Twenty Crores Ninety Five Lakhs Only) after taking into account the items of salvage & excess as applicable under the terms and conditions of the policy."

45. On 27.10.1999, the Insured wrote a letter to NIACL (inter alia referring to the earlier letters of 21.08.1999, 05.10.1999 & 12.10.1999) stating that in spite of the expiry of ten months, the claim amount has not been settled, and that the supplier was asking them to make further payment otherwise the work would not start. So stating a request was made for the settlement of the claim at the earliest. This was followed by another letter of 26.11.1999 stating that since the claim had not yet been settled they could not progress in the reinstatement of the mill. They also sought extension of 24 months for the reinstatement of the mill.

46. The Insured also wrote a letter of 16.12.1999 referring to their earlier letter of 23.07.1999 to the effect that the original invoices in respect of Cold Rolling Mill were not available with them; that their supplier M/s Flat Products has confirmed that the sale bill of the 20 Hi Cold Rolling Mill is not available with them; they furnished a letter of M/s Mukand Limited, Thane dated 09.12.1999 addressed to M/s Flat Products confirming that two number of Mill Housings were supplied by them to M/s Precision Equipment, a sister concern of M/s Flat Products; a letter of M/s Flat Products dated 09.12.1999 that two numbers of SENDZIMIR were sold to M/s Jawahar Metal Industries Pvt. Limited, the previous name of the Insured and that housing for these mills were procured from M/s Mukand Ltd. vide their invoice dated 23.03.1988 and 09.01.1989.

47. In substance, no concrete information was forthcoming from the Insured, and while claiming that the invoices were not available certain indirect evidence in the form of certificates for part supply were attempted to be furnished. Most importantly these certificates were of dates which were after the fire.

48. Another letter of 10.02.2000 repeating the same request for payment was made by the Insured. The NIACL responded by their letter of 07.03.2000 granting extension of 12 months for reinstatement of the damaged mill. All these clearly indicate that the Reinstatement Value

Clause was part of the policy and that the Insured had agreed to reinstate in accordance with the said clause. Thereafter, the Insured wrote a letter dated 28.04.2000 clearly setting out the following:

> "This has reference to the correspondence in connection with the above referred claim. After detailed discussions on various occasions with the loss assessors appointed by you, we accepted the settlement arrived at by the surveyor on repair loss basis. As desired by the surveyors, we gave a letter of acceptance vide letter dated 16.6.99 for the assessment of the net adjusted loss of Rs. 20.95 Crores after taking into account the items of salvage and excesses as applicable under the terms of the policy (copy enclosed). It is regretted that even after releasing on account payment of Rs. 5 Crore on 24th March, 1999 the matter is lying pending for the last about 1½ year in spite of our various meetings with you and also various letters written from time to time."

49. It is very clear from this letter that the Insured accepted the net adjusted loss of Rs.20.95 Crores and a letter accepting the same dated 16.06.1999 was given to the surveyor. Thereafter, the Insured, getting no response, on 30.05.2000, filed the Consumer Complaint No. 233 of 2000 for the following reliefs:

a) Rs. 15.95 crores on account of balance claim for fire loss.

b) Interest @ 18% from 16.06.1999 till its actual payment.

c) Rs. 73 lacs on account of inspection and transportation charges.

d) Damages @ Rs. 3 crores per month since August, 1999 till the release of payment as prayed for under claim (a).

50. From the written statement, apart from the other facts, it was set out that on 06.10.1999, the Chief Vigilance Officer has suggested that the opinion of technical expert be taken before taking the final decision in the matter. Thereafter, further complaints were received resulting in the appointment of M/s J. Basheer & Associates who submitted their report on 10.04.2000. It was also averred that on 26.07.2000, the CBI approached NIACL with respect to some complaint filed by the Respondent and in that context, the CBI had called the officials of NIACL on 26.07.2000, 20.03.2001, 29.03.2001. Earlier on 16.04.2000,

the CBI requisitioned the Respondent's claim file pertaining to the case. It was averred that on 18.09.2000, NIACL appointed M/s Allianz Zentrum Fur Technik GmBH, Germany who gave their opinion on 26.10.2000. Since that report was not based on physical examination, Allianz was called to do a physical examination and the detailed report came on 10.07.2001. On 11.12.2001, according to NIACL, the Joint Surveyors submitted their report where they assessed the loss of the damaged mill at 19.55 crores on replacement basis and 13.51 crores on depreciation basis. It was only on 18.01.2002, the Chief Vigilance Officer closed the complaints received.

51. It was averred in the Written Statement that on 27.03.2002, the Insured for the first time informed NIACL that they had already installed a new Cold Rolling Mill. An undated letter was annexed purportedly informing the same facts. NIACL averred that the said undated letter was not received. The NIACL submitted that the said letter of 27.03.2002 was sent to the surveyors. In pursuance thereof, the surveyors wrote a letter dated 03.05.2002 requesting for the following information:

i. Copy of the order placed with M/s Flat Products.

ii. Copy of the quotation submitted by M/s Flat Products prior to placement of the order and copy of the inquiry floated by them.

iii. Whether the interest of any financial institutions or banks or any of the sister concerns or private companies exists in the new Mill or not? If yes, please submit relevant documents.

iv. Certificate of the Chartered Accountant confirming date of capitalization for the said Mill. The certificate should endorse all the invoices forming part of the Mill capitalization. One set of invoices may be submitted along with the certificate.

52. There was no response resulting in the surveyors writing another letter of 24.06.2002. On 09.07.2002, the insured sought two week's time to submit the information. With no information forthcoming, on 07.08.2002, once again the surveyors wrote to the Insured. Thereafter, it was submitted that till date the mill has not been reinstated. NIACL submitted that the claim that, at the cost of Rs.31.37 crores, the cold rolling mill was installed, is absolutely incorrect. It was averred that Cold Rolling Mill installed by the complainant is a 6 Hi Cold Rolling Mill whereas the damaged mill was 20 Hi Cold Rolling Mill and that

the two mills are of different models and that 6 Hi Cold Rolling Mill cannot be treated as reinstatement. So contending, it was pleaded that the surveyors had submitted their report on 11.12.2001 in which they had assessed the Insured's loss at Rs.13.51 crores on depreciation basis and Rs.19.55 crores on reinstatement basis and that the Insured has not submitted any document/material for reinstatement.

53. It is also important to note that on 28.06.2001, M/s Flat Products, with whom the insured was on talks with for reinstatement, had written to the Insured clearly indicating in that letter as follows:

> "…. In the meantime, the specialists and designers who were engaged for the manufacturing/repairs of 20 Hi 1250mm wide mill for cold rolling mild steel have left our company and we are now not in position to repair/supply your 20 Hi, 1250mm wide mill for Cold Rolling Mild Steel. This fact was also made known to the Inspecting team from Germany by our Director, Sh. D.D. Sengupta, to survey the loss of the aforesaid machine."

NIACL Letter to Surveyors:-

54. On 12.11.2002, NIACL wrote to the surveyors stating that the insured are unable to produce invoices to establish the cost and age of the mill affected in the said occurrence that considerable time has elapsed and since the Insured has not been able to establish and substantiate its claim, NIACL may consider the claim on depreciated value basis taking into account the maximum depreciation applicable to such mill. The surveyors were asked to have the workings on the above lines.

Response of the Surveyors:-

55. In response, on 07.12.2022, the surveyors wrote to the NIACL stating that in spite of several reminders the Insured as on date had not submitted any clarification/details and as such the matter had remained pending. As requested by the NIACL, an alternative assessment by considering maximum depreciation was submitted with the recommendation of 60% depreciation fixing loss at Rs.7.90 Crores.

56. It was explained that in the report of 11.12.2001, the depreciation was adjusted to 32% considering the average life of the mill as 25 years.

That is 32% on overall for a period of usage of eight years at 4% per year. Eight years were arrived at since the mill was installed in 1989 and the fire was happened in 1999. The balance life of mill was taken as 17 years. In the letter it was clarified that as the machine was running at its optimum capacity, it was their opinion that the residual life as per the calculations should be 40% thereby implying applicable depreciation of 60% and that when 60% depreciation is considered the sum insured is deemed to be adequate. The residual life was taken as less than 10 years. On 03.01.2003, the NIACL addressed a letter to Insured stating that the loss amount as sanctioned would be Rs. 7.88 crores and since Rs. 5 crores (after deducting TDS) has already been paid, the balance amount would be Rs. 2.88 crores.

Answers to Question No. (ii):

a) Adoption of the Depreciation Method

57. From what has been discussed above, it emerges clearly that under the main terms of the policy the company was to pay the Insured the value of the property at the time of happening of the destruction (except where NIACL opts to reinstate). There was a special memorandum attached to the policy. That memorandum was the Reinstatement Value Clause which substituted the basis upon which the amount was payable from the value on the date of destruction to the cost of replacing or reinstating the property i.e. property of the same kind or type but not superior or more extensive than the insured property when new. However, as it transpires the said memorandum ceased to have any force since the Insured was unable and unwilling to replace or reinstate the property. Special Provision 4 (b) of the memorandum applied and rendered the Reinstatement Value Clause ineffective.

58. It is also amply clear that once we revert back to the original policy with its conditions, the Insured under Clause 6(b) of the conditions had an obligation to give NIACL all such further particulars, plans, specifications, books, vouchers and invoices with respect to the claim. It is also set out that no claim under the policy was to be payable unless the terms of these conditions were duly complied with. It is sufficiently brought out that in spite of the surveyors writing to the Insured repeatedly (on 14.12.1998, 03.05.2002, 24.06.2002 and 07.08.2002), there was no information forthcoming from the Insured about the invoices as proof of the value of the damaged equipment

and the cost of the new equipment. Instead, the Insured originally undertook that they will reinstate the damaged property; received the on account payment of Rs.4,92,80,905/- (i.e. Rs.05 Crores minus TDS) and informed NIACL that they have placed order for repair of 20 Hi Cold Rolling Mill to M/s Flat Products and paid them Rs. 3.75 crores. Thereafter by their letter of 16.06.1999, the Insured sought assessment of net adjusted loss at Rs.20.95 Crores. After this, without showing any progress merely letters were written repeatedly asking for early settlement. The scenario was while the surveyors of NIACL kept asking for the basic and relevant particulars, the Insured without furnishing the same kept asking for the settlement of the money.

59. Fortunately for the Insured, NIACL did not completely repudiate the claim. Instead faced with the letters of the Insured dated 16.06.1999 admitting to the value at Rs.20.95 Crores and the letter of M/s Flat Products of 28.06.2001 throwing up their hands and informing the Insured about them having lost their expertise, NIACL resorted to settling the claim under the opening clause of the policy by agreeing to pay the Insured the value of the property at the time of the happening of the destruction. (Depreciation Method)

60. We are not in a position to fault NIACL for resorting to this method of settlement.

b) Quantum of Base Figure: -

61. NIACL also applied depreciation at the rate of 60% on the figure of Rs.20.09 Crores. Whether this was a correct percentage of depreciation was really the only dispute that was adjudicated before the original forum. The Insured has a two-fold case to challenge the basis of settlement adopted by NIACL before this Court. First, they contend that the base figure should have been Rs.28 Crores based on the figure they say M/s Flat Products was to charge them for reinstating the 20 Hi Cold Rolling Mill and after adding taxes to the figure of Rs. 25 crores, they arrive at a base figure of Rs. 28 crores. This contention is totally untenable for the following reasons.

a. Firstly, by their letter of 16.06.1999, they categorically agree and confirm to the assessment of the net adjusted loss at Rs.20.95 Crores.

b. Secondly, there was no proof forthcoming from the Insured. Since no invoices were furnished to state that the value of the

property on the date of the loss was Rs. 25 crores, the post incident certificates produced along with the letter of 09.12.1999 of M/s Mukand Limited and the letter of M/s Flat Products dated 09.12.1999 attempting to make a remote connection with the value of the damaged property do not inspire any confidence. In any event, they are not invoices depicting the value of the property at the time of its installation.

c. In any event, the surveyors, based on their expertise, having assessed the value at Rs.20.09 Crores, there is no reason to countenance the submission that the base figure on which the depreciation should have been calculated was Rs. 28 crores.

c) Percentage of Depreciation: -

62. The next facet of the submission is that even if the value was to be taken as Rs.20.09 Crores of the property, the depreciation should have been computed at 32% as was mentioned in the report of the surveyors dated 11.12.2001. No doubt in the 11.12.2001 report of the joint surveyors while calculating depreciated value basis, 32% was taken by the surveyors but even this report carried a number of disclaimers. First of all, the surveyors state that the report is issued without prejudice and they extract the interim survey report of 04.02.1999. The surveyors set out in para 5.21 as follows:

> "Loss Assessment on Depreciation Basis
>
> (a) It is understood that Insured have not yet completed repairs/reinstatement. The delay in the process was Insured's desired to have additional fund to proceed with repairs, which of course is not warranted under the policy.
>
> (b) Insurer had several issued to be resolved before advising us in November 2001 to proceed with final assessment of loss.
>
> (c) Pending reinstatement, we have assessed the loss on depreciated value basis under summary of assessed loss."

63. As is clear from the above, the NIACL has several issues to be resolved before advising the surveyors to proceed with the assessment in November, 2001 and that pending reinstatement they

had assessed the loss on depreciated value basis. After this report of 11.12.2001, it was the Insured who tried to open the matter again by writing a letter of 27.03.2002 stating that they had already installed a new Cold Rolling Mill. Strangely, this was after the admitted letter of 28.06.2001 by M/s Flat Products stating that they are not in a position to repair the 20 Hi Cold Rolling Mill since the experts have left the company. However, by the letter of 27.03.2002, the Insured wanted to treat the purported installation of 6 Hi Cold Rolling Mill as a valid reinstatement to stake a claim on reinstatement value basis. This claim of the NIACL is that particulars were sought for on 03.05.2002 and 24.06.2002 and the Insured on 09.07.2002 sought two weeks' time to submit the information, but nothing was forthcoming, resulting in the surveyors writing to the Insured again on 07.08.2002. It was in this background that NIACL wrote the letter of 12.11.2002 in the following terms:

> "With reference to the above, we have noted that the insured are unable to produce invoices to establish the actual cost and age of the Mill affected in the said occurrence.
>
> As considerable time has elapsed and since the insured has not been able to establish and substantiate their claim, we may consider the claim on depreciated value basis taking into account the maximum depreciation applicable to such Mill. As such, we request you to let us have our working on the above lines to enable us to put up the matter to the competent authority for their consideration."

64. Learned Senior Counsel Mr. Joy Basu for the Insured argued that this letter was an attempt to goad the surveyors and that the response of surveyors dated 07.12.2002 was a reluctant response from an embarrassed surveyor. We are not prepared to countenance the submission of Mr. Joy Basu, learned Senior Counsel. In fact, the Insured is fortunate that there was no total repudiation for non supply of relevant documents.

65. In fact the sequence of events shows the following; soon after the claim, there was an interim survey of 04.02.1999 where minimum loss on reinstatement value basis was estimated to be around Rs.15 crores and maximum loss on reinstatement value basis was estimated to be Rs.25 crores. An on-account payment of Rs. 7.20

crores was recommended. Thereafter, it is interesting to note that from the 11.12.2001 report that between December, 1998 and July 1999 there were talks and inspections with suppliers/manufacturers and the officials of the Insured. It further appears that the loss assessment exercise was complete by July, 1999 and the report was held back due to investigation by other agencies. This is clear from the following preliminary portion of the 11.12.2001 report:

> "1.00 INSTRUCTIONS
>
> Instructions were received from New India Assurance Co. Ltd. Regional Office II, New Delhi on 13.12.98 by R.K. Singhal & Company Private Ltd. to survey and assess the damage to Insured's 20 HI Rolling Mill due to a fire that broke out in Insured's factory in the evening of 12th December. Accordingly Mr. R.K. Singhal visited Insured's factory on 13th December 98 and carried out a preliminary inspection of the subject machine. A.K. Govil & Associates were subsequently co-opted as joint surveyors by Regional Office vide their Facsimile of 16th December. Their representatives visited Insured factory on 17th December in order to carry out the necessary inspection. Based on the physical inspection carried out and limited information made available by the Insured till then, the above surveyors submitted their join preliminary survey report on 22nd December 1998. Subsequently the underwriters appointed P.C. Gandhi & Associates as another joint surveyors. The joint surveyors visited the Insured factory jointly and severally on various dates and carried out detailed physical inspection of the subject machine besides carrying out protracted discussions with the Insured official accompanied by Suppliers/ Manufacturers of the Mill.
>
> **Accordingly, matter was discussed with insurers several occasions and loss assessment exercise was almost complete by July -1999.**
>
> We understand that insurer had received some complaint concerning subject loss and the matter went into investigations by various agencies one after another.

> Insurer had also referred some matters to us and necessary information and assistance were extended to the insurer as well as concerned agencies.
>
> Insurer have now advised us in the month of November 2001 to submit final loss assessment report.
>
> In view of the above, this final survey report is issued without prejudice and is based on documents submitted by the insured and physical verification carried out by us.
>
> We have in our "Interim Survey Report" dated 04.02.1999 discussed the following in details.
>
> The above details are not being repeated and final survey report may therefore be read in conjunction with our earlier report."
>
> [Emphasis Supplied]

66. This is important because nowhere the 11.12.2001 report makes any reference to the 28.06.2001 letter of M/s Flat Products expressing their inability to reinstate the plant. There is a reference in Para 6.3 of the 11.12.2001 report to a meeting at the plant site on 19.06.2001 wherein the surveyors were given to believe that the Insured still desires to reinstate the mill. However, this was on condition that they will do so only after receiving further payment. Based on the inspection and negotiations that were carried out up to July, 1999, summary of assessed loss in para 5.23 was drawn up. This was fixed for replacement/repair at Rs.19.55 Crores (after deductibles like salvage etc). What is crucial is also that on this figure itself depreciation at 32% was worked out. The base figure was arrived at on reinstatement basis only and the same was adopted for the depreciation basis also. No doubt, depreciation was worked at 32%. This discussion is significant since the grievance of the Insured is that the NIACL ought not to have written the letter of 12.11.2002. We reject this contention. The NIACL was justified in writing the letter of 12.11.2002 because after reviving their demand to reinstate the plant, the Insured failed to furnish the documents required and even admittedly the plant as allegedly reinstated was of 6 Hi Cold Rolling Plant and not 20 Hi Cold Rolling Plant. In this scenario, one cannot fault the NIACL for writing the letter of 12.11.2002 particularly when the report of 11.12.2001 was before the new offer for reinstatement

by the Insured's letter of 27.03.2002. Admittedly the report was based on discussions that took place till July, 1999

67. In fact, the surveyors, after receiving the letter of 10.11.2002 should have reassessed the value on depreciated value basis which would be to value the loss as per the opening clause of the policy i.e. arrive at the value of the property at the time of happening of its destruction. This was not done and in the response of 07.12.2002 the base value was kept at Rs.20.09 Crores and applied depreciation at 60% on the following justification:

> "As the machine was running at its optimum capacity, we are of the opinion that its residual life should not have be less than 10 years i.e. residual life as per our above calculation should be 40% thereby implying maximum applicable depreciation of 60%"

68. The Insured has stood to gain by keeping the base figure at Rs.20.09 Crores as value for the depreciated basis also. That was a value arrived at by the surveyors based on their expert assessment.

69. Dealing with the grievance that 60% depreciation had no basis, the NCDRC called for an additional affidavit from NIACL. The NIACL in the affidavit set out as follows:

> "2. There are no written guidelines for computing depreciation @ 4% per year. However, there is established practice to calculate the depreciation in the case of old machinery @ 5% per year upto maximum of 75% - 80%. The Surveyors M/s. P.C. Gandhi and Associates assessed the claim of M/s. Transpek Industries Ltd. by computing the depreciation of 75%. In the case of M/s. Modem Denim Ltd. the Surveyor applied the depreciation of 50% for 10 years usage considering 20 years machine line. Copy of Surveyor's letter dated 20th December, 2006 is Exhibit R-1. The copy of the Surveyor's report dated 19th March 2003 with respect to M/s. Transpek Industries Ltd. is Exhibit R-2 hereto. The copy of the Surveyor report dated 25th February, 2003 with respect to Modem Denim Ltd. is Exhibit R-3 hereto."

70. The surveyors had offered justification in their response dated 07.12.2002 for providing depreciation at the rate of 60%. The

Additional Affidavit also clarifies the established practice. It should not be forgotten that the base figure of Rs.20.09 crores was kept intact. We set aside the finding of the NCDRC that the practice adopted in the instant case was not a healthy practice by the NIACL. We uphold the percentage of depreciation at 60%. We have not disturbed the base value of Rs.20.09 crores as no arguments on that score were advanced by the NIACL.

71. In view of the above discussion, the NIACL rightly ordered the settlement of the claim on 03.01.2003 stating the loss amount as Rs.7.88 Crores and ordering the balance amount of 2.88 crores be paid after adjusting the on account payment.

Question No.(iii) - Applicability of the Judgment in *Oswal Plastic Industries* *(supra)*

72. The only other question that remains to be answered is the argument based on the judgment in ***Oswal Plastic Industries*** ***(supra)***. Firstly, no factual foundation was placed to raise this submission. Even in the Civil Appeals of the Insured the only ground was based on the correct base figure and the applicable rates of depreciation. In fact, the Insured in ground (D) in Civil Appeal 5242-5243 of 2009 admitted that the NCDRC rightly proceeded to determine the compensation on depreciation basis. Ground (D) reads as follows:

> "Because the Hon'ble National Commission rightly proceeded on the premise that reinstatement of the machine is no longer possible and that the compensation to the appellant is therefore to be determined on depreciation basis, i.e., value of the machine on the date of loss."

73. Further in the case of ***Oswal Plastic Industries*** ***(supra)***, as is clear from para 2 of the said judgment, it appears the policy was on reinstatement value basis. The complainant there claimed that he had purchased the machinery to replace the damage in machinery at the cost of 1,34,07,836/-. However, the surveyor had assessed the loss on reinstatement basis 29,17,500/-. The NCDRC had awarded compensation on depreciated basis. Before this Court, the complainant relied on Clause 9 of the conditions, particularly the second para, which Clause 9 was similar to the Clause 9 in the present case. Even the Insurance Company contended as follows:

> **12.** It is submitted that as rightly observed by the NCDRC that the goods insured were to be replaced on "as is basis" i.e., if the machinery is an old machinery, it is to be replaced by an old machinery and therefore, as the actual reinstatement has not been done by the complainant or by the insurance company and the money is to be paid to the insured on reinstatement basis, one has to find out the value of the machinery on replacement basis i.e., the value of the old machinery, which can be calculated only through deducting the value of the depreciation from the current value of the machinery.

74. It appears that even the Insured does not appear to have disputed that the payment ought to have been on reinstatement basis and the money is to be paid on reinstatement basis. Further, no clause similar to the memorandum of reinstatement value clause appears to have existed in ***Oswal Plastic Industries*** ***(supra).***

75. In any event, independent of the above, no argument was raised in the NCDRC and even in the memo of appeal here based on second para of Clause 9. At the stage of final arguments in the appeals, we are not prepared to permit this ambush argument by allowing the Insured to mechanically rely on ***Oswal Plastic Industries*** ***(supra)*** without establishing the factual similarity by laying an appropriate foundation in the courts below. Hence, ***Oswal Plastic Industries*** ***(supra)*** has no application to the facts of the present case.

IRDA Regulations

76. In so far as the argument based on Regulation 9(3) of the IRDA (Protection of Policyholders' Interests) Regulations, 2002, we find there is no breach thereof. Regulation 9(3) of the IRDA reads as follows:

> **9. Claim procedure in respect of a general insurance policy**
>
> xxx
>
> (3) If an insurer, on the receipt of a survey report, finds that it is incomplete in any respect, he shall require the surveyor under intimation to the insured, to furnish an additional report on certain specific issues as may be required by the insurer. Such a request may be made by the insurer within 15 days of the receipt of the original survey report.

> Provided that the facility of calling for an additional report by the insurer shall not be resorted to more than once in the case of a claim.

77. This clause has no application to the facts of the present case. As has been illustrated above, the second report of 11.12.2001 was based on negotiations held up to July, 1999. Thereafter there were several developments including the Insured's claim to first give up reinstatement and then reintroduce the claim for reinstating the mill. Several letters were written for furnishing crucial documents which were not forthcoming from the Insured. Learned Senior Counsel, Mr. Sanjay Jain contends that NIACL could have repudiated the claim for non supply of documents. Be that as it may, we are not called upon to decide that issue at this stage since NIACL has on its own settled the claim by their letter of 03.01.2003. When NIACL, on the facts of the present case, wrote the letter for assessing on depreciation basis, it is not a case of a clarification being sought in an incomplete report. Hence, on the facts of the present case, we do not find any violation of the Regulation 9(3). In the absence of any ambiguity we also do not find scope for applying the doctrine of *contra proferentem.*

78. A feeble argument was sought to be advanced to the effect that the depreciation should have been calculated on the sum insured. The judgments in ***Sri Venkateswara Syndicate v. Oriental Insurance Co. Ltd*** ***2009 (8) SCC 507*** and on ***Dharmendra Goel*** ***(supra)*** as well as ***Sumit Kumar Saha v. Reliance General Insurance Company Ltd.,*** ***(2019) 16 SCC 370*** cited by the Insured have no application to the facts of the present case. In ***Dharmendra Goel*** ***(supra)*** and ***Sumit Kumar Saha*** ***(supra),*** the claimants never conceded for settlement of the claim at a value lesser and different from the sum insured as in the present case. Hence, there can be no case that the sum insured should be taken as the basis for calculating depreciation.

79. As far as ***Sri Venkateswara Syndicate*** ***(supra)*** is concerned, this Court had held that the insurance company cannot go on appointing surveyors one after another so as to get a tailor-made report to the satisfaction of the officer concerned of the insurance company; and that if for any reason, the report of the surveyors is not acceptable, the insurer has to give valid reason for not accepting the report. This case has no applicability to the facts of the present matter.

80. In this case, as discussed hereinabove, the Insurer was fully justified in writing the letter dated 12.11.2002 to the Surveyor requesting them to re-assess the settlement amount. It was only the final response by the surveyors on 07.12.2002 that gave a clear picture as to the base figure and the applicable rates of the depreciation since the method of settlement was to be the depreciation basis and not reinstatement basis.

81. In view of the above, all the findings to the contrary recorded by the NCDRC are held to be erroneous and are herewith set aside.

Conclusion

82. For the above reasons, we allow Civil Appeal No. 2759 of 2009 of NIACL and set aside the order of the NCDRC in O.P. No. 233 of 2000 dated 05.08.2008. We hold that the claim was rightly settled by the NIACL letter dated 03.01.2003 which determined the loss amount payable at Rs.7.88 crores after applying 60% depreciation. We dismiss Civil Appeal arising out of SLP (Civil) No. 10001 of 2009 and Civil Appeal Nos. 5242-5243 of 2009 filed by the Insured-respondent. Consequently, the Original Complaint OP No.233 of 2000 before the NCDRC will stand dismissed. No order as to costs.

Headnotes prepared by: Ankit Gyan

Result of the case:
Appeals disposed of.