Signing A Blank Discharge Voucher Indicates That A Party Was Acting Under Pressure And Compulsion: Delhi High Court

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IN THE HIGH COURT OF DELHI AT NEW DELHI
C. HARI SHANKAR; J.
O.M.P. (COMM) 496/2020; 5 December 2022
NEW INDIA ASSURANCE COMPANY LIMITED *versus* **KHANNA PAPER MILLS LIMITED**

Petitioner Through: Mr. Tushar Mehta, Solicitor General of India and Mr. Joy Basu, Sr. Adv, with Mr.Saurav Agrawal, Mr. Saurajay Nanda, Mr.Ribhu Garg, Ms.Vani Sharma, Mr.Vinay Misra, Mr. Ravi Sharma and Mr.Kanak Bose, Advs.

Respondent Through: Mr. Sachin Datta, Sr. Adv. with Mr. Viksit Arora, Ms. Ritika Jhurani, Mr. Jishnu Bhradwaj, Advs.

J U D G M E N T

1. The New India Assurance Company Limited ("NIA", hereinafter) seeks, by means of the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 ("the 1996 Act"), to challenge an award dated 2nd January 2020, passed by a learned threemember Arbitral Tribunal in arbitral proceedings between NIA and the respondent-Khanna Paper Mills Limited ("Khanna", hereinafter).

Facts

2. Khanna, which is engaged in the manufacture of pulp and paper, availed of the insurance policy provided by NIA, *vide* Cover Note dated 30th March 2012, valid for the period 1st April 2012 to 31st March 2013, covering a sum of ₹1292 crores, including all movable and immovable assets of Khanna.

3. During the period covered by the insurance policy, a fire broke out in the premises of Khanna on 12th June 2012. Considerable losses resulted. Khanna, thereupon, contacted NIA. M/s. Protocol Surveyor and Engineers Pvt Ltd was appointed as the Surveyor, to conduct a detailed survey of the losses suffered by Khanna. The Surveyor submitted an Interim Survey report on 20th June 2012 and a Final Survey report on 7th March 2013. Admittedly, a copy of the Final Survey Report was provided to Khanna only on 27th June 2013, without its annexures.

4. According to Khanna, the delay in clearance of the claim by NIA placed it in financial duress, in which situation it was compelled to sign a blank Joint Discharge Voucher, in which NIA subsequently filled details. A screenshot of the said blank Joint Discharge Voucher, as filed by Khanna before the learned Arbitral Tribunal may be provided as under:


दि न्यू इंडिया एश्योरन्स कंपनी लिमिटेड
THE NEW INDIA ASSURANCE COMPANY LIMITED
JOINT DISCHARGE VOUCHER
CLAIM NO.
DATE OF LOSS
DATE OF PAYMENT
DISBURSEMENT VOUCHER NO.
DT.
Received from "THE NEW INDIA ASSURANCE COMOPANY LIMITED", the sum of
Rs.
In words Rs.
towards full and final settlement of the fire loss which occurred to the subject matter on dt.
Insured under policy no.
We give the unconditional discharge receipt to the company in full and final settlement of all claims
present or future arising directly / indirectly in respect of the above
One Rupee Revenue stamp
When Amount Exceeds Rs.
Bank Account no :
Name of the bank :
(Bank as per policy)
Name of the Bank representative :
Name of the Bank
Address of the Bank
Signature of the Insured / Insured representative
Daily stamped
Name of the Insured / Insured representative :
Designation of the Insured / Insured representative :
Address of the Insured
For KHANNA PAPER MILLS LTD.
Director

5. The amount paid by NIA to Khanna as per the said Joint Discharge Voucher was ₹1,03,16,42,738/-. This, according to Khanna, was much less than its total entitlement as per the insurance policy of NIA.

6. As the contract between NIA and Khanna contained an arbitration clause, the claims of Khanna were referred to arbitration by a learned three member Arbitral Tribunal, which also conducted a site visit on 25th – 26th April 2017.

Khanna's Claims before the learned Arbitral Tribunal

7. Before the learned Arbitral Tribunal, Khanna quantified the additional payments to which it was entitled under the following heads of claim:

"I. Claim on account of Waste Paper Imported (Newsprint), amounting to Rs. 2,53,45,105/-;

II. Claim on account of Waste Paper Imported (Other), amounting to Rs. 10,74,16,427/-;

III. Claim on account of erroneous application of USD/MT rates & Foreign Exchange rates applicable to the assessed quantity of imported pulp for Newsprint, amounting to Rs. 2,45,13,433/-;

IV. Claim on account of Waste Paper (Local) amounting to Rs. 84,62,181/-;

V. Claim on account of complete exclusion of entire stocks of "Work-in-Progress " (WIP) amounting to Rs. 50,77,26,268.86/-;

VI. Claim on account of Differential Custom Duty, amounting to Rs.3,78,86,829/-;

VII. Claim on account of erroneous calculation of losses to Plant and Machinery, amounting to Rs.16,83,144/-;

VIII. Claim on account of the erroneous valuation of the Debris Removal Expenses, amounting to Rs.1,19,89,719/-;

IX. Claim on account of erroneous valuation of Fire Fighting/Debris Removal .Expenses/Double Deduction, amounting to Rs.25,26,689/-;

X. Claim on account of erroneous disallowance of reversal of CENVAT credit, amounting to Rs.3,03,129/-."

8. Thereafter, the following two additional claims being claimed XI and XII were added *vide* an application under Section 23 of the 1996 Act filed on 14th August 2017.

"XI. Declare and direct that the Respondent is not entitled to deduct more than Rs. 50 lakhs towards "excess" and direct the Respondent to refund the excessive deduction of "excess"; and XII. Direct the Respondent to pay interest in terms of Regulation 9 of the IRDA (Protection of Policyholders' Interest) Regulations, 2002."

The total amount of relief thus sought before the learned Arbitral Tribunal was ₹77,46,29,051.86.

The impugned award

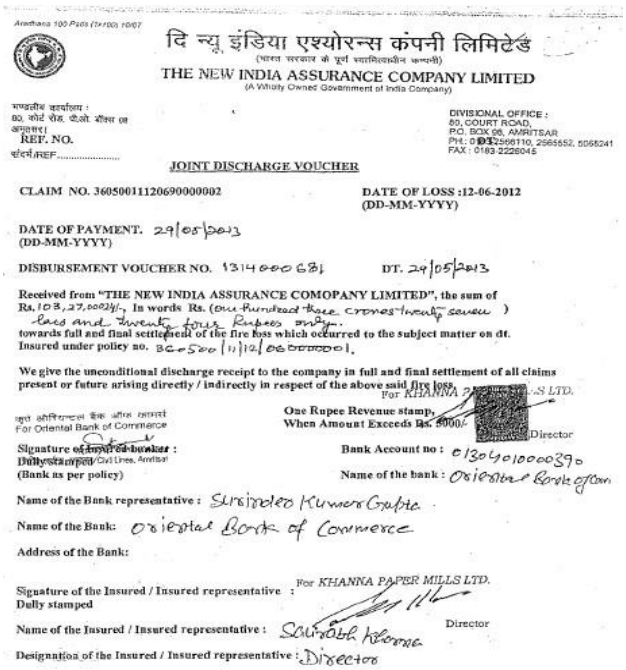
9. The learned Arbitral Tribunal, at the outset, notes the main issue, on which NIA and Khanna had locked horns, as being the effect of the Joint Discharge Voucher dated 29th May 2013 signed by Khanna and countersigned by an official of the bank.

10. The learned Arbitral Tribunal notes Khanna's claim that it had been subjected to severe financial pressure as a result of the failure, on the part of NIA, to make any interim on-account payments to Khanna to compensate the losses suffered by it, despite the making of such payments being a prevalent practice in the industry and

despite Khanna having addressed several representations to NIA in that regard. The lack of any payment for a period of almost one year after the fire had broken out, according to Khanna, left it at the brink of collapse. In the meanwhile, short term loans to the tune of ₹65 crores, which had been extended to Khanna by banks, were also falling due for payment, thereby increasing the financial stress on Khanna. It was in these circumstances, contended Khanna, that it was constrained to sign the blank Joint Discharge Voucher dated 29th May 2013. The coercive circumstances, in which the blank Joint Discharge Voucher came to be signed by Khanna, therefore, were the creation of NIA.

11. Khanna also contended that, as it was not provided with any copy of the Final Survey Report dated 7th March 2013, at the time when it was made to sign the blank Joint Discharge Voucher, it was not in a position to ascertain the correctness of the amount of ₹1,03,16,42,738/- which was paid by NIA to Khanna, or the justifiability of the computation of the said figure. In these circumstances, Khanna requested NIA, *vide* letter dated 3rd June 2013, to provide it the Final Survey Report. The said Final Survey Report, even when provided on 27th June 2013, was without annexures. Nonetheless, on going through the Final Survey Report, Khanna found that it contained several allegedly arbitrary and illegal deductions, principally with respect to the loss suffered by Khanna towards Workin-Progress (WIP), against which no compensation at all had been awarded. It was in these circumstances that Khanna addressed, on 3rd October 2013, a notice to NIA, invoking arbitration. The amount claimed in the said notice was ₹77.61 crores.

12. As against this, NIA contended, principally, that Khanna's claims stood discharged by accord and satisfaction and that, therefore, no dispute survived. NIA contended that the Surveyor had, after properly assessing the loss suffered by Khanna, worked out the amount of loss as ₹103.39 crores, which was adjusted by NIA to ₹103.27 crores and paid to Khanna. NIA placed, on record, a complete and filled Joint Discharge Voucher dated 29th May 2013, signed by Khanna and the official of the bank which, according to NIA, extinguished Khanna's claims by accord and satisfaction. A screenshot of the said Joint Discharge Voucher, as filed by NIA before the learned Arbitral Tribunal may be provided as under:



दि न्यू इंडिया एश्योरन्स कंपनी लिमिटेड
(भारत सरकार की पूर्ण स्वामित्वाधीन कम्पनी)
THE NEW INDIA ASSURANCE COMPANY LIMITED
(A Wholly Owned Government of India Company)

मण्डलीय कार्यालय :
80, कोर्ट रोड, पी.ओ. बॉक्स 08
अमृतसर।
REF. NO.
संदर्भ/REF.....

DIVISIONAL OFFICE :
80, COURT ROAD,
P.O. BOX 08, AMRITSAR
PH.: 0183-2566110, 2565552, 5065241
FAX : 0183-2226045

JOINT DISCHARGE VOUCHER

CLAIM NO. 360500111206900000002 DATE OF LOSS :12-06-2012 (DD-MM-YYYY)

DATE OF PAYMENT. 29/05/2013 (DD-MM-YYYY)

DISBURSEMENT VOUCHER NO. 1314000681 DT. 29/05/2013

Received from "THE NEW INDIA ASSURANCE COMOPANY LIMITED", the sum of Rs. 103,27,00824/-, In words Rs. (One Hundred three crores twenty seven lacs and twenty four Rupees only. towards full and final settlement of the fire loss which occurred to the subject matter on dt. Insured under policy no. 360500/11/12/06000001.

We give the unconditional discharge receipt to the company in full and final settlement of all claims present or future arising directly / indirectly in respect of the above said fire loss.

For KHANNA PAPER MILLS LTD.
Director

पूर्व ओरियन्टल बैंक ऑफ कामर्स
For Oriental Bank of Commerce

One Rupee Revenue stamp, When Amount Exceeds Rs. 5000/-

Signature of Insured / Insured representative : Duly stamped

Bank Account no : 0130401000390

Name of the bank : Oriental Bank of Commerce

(Bank as per policy)

Name of the Bank representative : Surinder Kumar Gupta

Name of the Bank: Oriental Bank of Commerce

Address of the Bank:

Signature of the Insured / Insured representative : Duly stamped

For KHANNA PAPER MILLS LTD.
Director

Name of the Insured / Insured representative : Sanjeev Khanna

Designation of the Insured / Insured representative : Director

13. I may note here that a comparison of the signed blank Joint Discharge Voucher filed by Khanna, with the completed Joint Discharge Voucher filed by NIA reveals that they are the same document, with the details relating to amount of final settlement, which are unfilled in the blank Joint Discharge Voucher filed by Khanna, having been filled in, in the Joint Discharge Voucher filed by NIA.

14. NIA also relied on the following letter dated 3rd June 2013, addressed by Khanna to NIA almost immediately after the clearance of the aforesaid amount of ₹1,03,16,42,738/- on 29th May 2013:

"Khanna Paper Mills Limited
Address:
Fatehgarh Road,
Amritsar-143001 Punjab, India
Ph: +91-183-5067100 to109
Fax: +91-183-5067100/110
E-mail: info@khannapaper.tom

Website: www.khannapaper.com

3rd June 2013

Senior Divisional Manager
New India Assurance Company limited
Court Road
Amritsar

Dear Sir

Sub : **Claim Settlement-Fire Loss Dated 12th June 2012**

With reference to the subject, we are thankful to you for settlement of our claim for Rs.1,03,16,42,738 (Rupees One Hundred Three Crore Sixteen Lacs Forty Two Thousand Seven Hundred Thirty Eight only). We are thankful that our repeated reminders, personal visits and request for settlement before May 31, 2013, was accepted and this enabled us to meet the deadline of the banks. Any further delay would have seriously affected banking relationship and external credit rating.

Our claim was for Rs. 179 Crores but after final discussions with the surveyors, the value of the Work in Progress was reduced to the cost of Pulp and the claim was revised to Rs. 170.71 Crores. However we note that actual settlement has been for Rs. 103.16 Crores.

You are therefore requested to provide us the claim settlement details and the copy of surveyors report so as to enable us to decide about appropriate accounting for the same and to update the matter to our Board, Bankers, Auditors and other statutory authorities.

Yours Faithfully

For Khanna Paper Mills Limited
Sd/-
Sushil Kumar Kabra
CFO"

15. Thus, contended NIA, Khanna had not only failed to lodge any protest regarding the amount paid to it by NIA on 29th May 2013; rather, Khanna expressed gratitude for having been released the said payment.

16. In this context, NIA emphasized that (i) the allegations of having had to agree to a lesser payment than was due to it under duress and coercion was first made by Khanna in its letter dated 24th December 2013 to the reply dated 4th December 2013

of NIA in response to the notice of arbitration issued by Khanna to NIA and (ii) the allegation of having had to sign a blank Joint Discharge Voucher was, in fact, made for the first time in the statement of claim filed by Khanna before the learned Arbitral Tribunal. This itself indicated that the Joint Discharge Voucher, which had been placed on record by NIA, was the actual Joint Discharge Voucher signed by Khanna, which manifested its complete agreement to the payment of ₹1,03,16,42,738/- as representing full and final settlement of its dues against NIA.

17. Apart from this, the other major ground of contest, by NIA, to Khanna's claims in the arbitral proceedings, was with respect to the claim towards loss of WIP which would be addressed, in detail, later in this judgement.

18. The two main issues on which detailed submissions were advanced both before the learned Arbitral Tribunal as well as before me were, therefore, (i) whether Khanna's claims against NIA stood discharged by accord and satisfaction in view of the Joint Discharge Voucher dated 29th May 2013 and (ii) whether Khanna's claim for loss on account of destruction of WIP, as allowed by the learned Arbitral Tribunal, was sustainable.

19. To facilitate understanding of the controversy, I deem it appropriate, first, to address these two issues. In this context, I proceed to deal with the award of the learned Arbitral Tribunal on the issues, the rival contentions before me and my decision thereon, as under.

Re: Whether all claims of Khanna against NIA stood discharged by accord and satisfaction in view of the Joint Discharge Voucher dated 29th May 2013

20. As already noted hereinbefore, Khanna contended that the Joint Discharge Voucher dated 29th May 2013, though signed by it, did not result in extinguishing of all its claims by accord and satisfaction. The reason was that, according to Khanna, the Joint Discharge Voucher had been signed under compulsion in view of the situation of financial duress in which Khanna found itself at the time. Moreover, the Joint Discharge Voucher, as signed by Khanna was, in its submission, blank, indicating that Khanna's signature on the Joint Discharge Voucher had been obtained not only under financial duress but also under coercion. As Khanna, at that time, had not been provided with the Final Survey Report dated 7th March 2013, it was unaware of the basis of computation of the amount of ₹1,03,16,42,738/-. It was for this reason, according to Khanna, that it could not immediately protest at having been paid an amount less than what was due to it.

21. The financial duress in which Khanna found itself on 29th May 2013 was, according to it, attributable to various factors, i.e. the delay on NIA's part in releasing on account payments to Khanna for almost a year, despite repeated requests by Khanna in that regard, and the loans taken by Khanna to replace the stocks destroyed in fire, which had fallen due for payments in the interregnum.

22. The Final Survey Report, even when it was made available to Khanna on 27th June 2013, it was pointed out, contained only 70 pages, and was not accompanied with the annexures thereto, which ran into almost 1200 pages. The said annexures were made available to Khanna only when NIA was directed to do so, by the learned Arbitral Tribunal, *vide* order dated 10th February 2014.

23. In support of the aforesaid submissions, Khanna placed, on record, a copy of the blank Joint Discharge Voucher[1] purportedly signed by it, communications with banks indicating extending of short-term loans by the banks to Khanna, and communications with NIA requesting for interim on account payments and also for being provided a copy of the Final Survey Report.

24. Responding to Khanna's submissions, NIA contended, before the learned Arbitral Tribunal, that all submissions of Khanna, with respect to duress and coercion, as well as to having been compelled to sign a blank Joint Discharge Voucher, were afterthoughts. NIA placed, on record, a completely filled Joint Discharge Voucher dated 29th May 2013[2] which, according to NIA, was the actual Joint Discharge Voucher signed by Khanna acknowledging its satisfaction to the amount paid to it by NIA. The falsity of Khanna's allegations of duress and coercion, and of having been made to sign a blank Discharge Voucher, submitted NIA, was apparent from the fact that the first allegation found place, for the first time, in the letter dated 24th December 2013 of Khanna in reply to NIA's communication dated 4th December 2013, and the second allegation was raised, for the first time, in the statement of claim filed by Khanna before the learned Arbitral Tribunal. Till 24th December 2013, therefore, there was no allegation of any financial duress or coercion having compelled Khanna to accept an amount less than what was due to it, and, till the filing of the statement of the claim before the learned Arbitral Tribunal, no allegation of Khanna having had to sign a blank Joint Discharge Voucher ever figured.

25. The NIA also contested, on facts, Khanna's contention that it was suffering from financial duress on 29th May 2013, when it signed the Joint Discharge Voucher. However, as that is a pure question of fact, which is outside the scope of a Court exercising jurisdiction under Section 34 of the 1996 Act, I do not propose to enter into that arena.

26. NIA also sought to contend, before the learned Arbitral Tribunal, that, having failed to produce, in the witness box, Mr. Surinder Kumar Gupta from the Oriental Bank of Commerce (OBC), who also signed the Joint Discharge Voucher, Khanna had failed to prove its allegation that the Joint Discharge Voucher was blank when signed.

27. Additionally, NIA placed reliance on the judgment of the Supreme Court in ***United India Insurance Company Ltd v. Antique Art Exports Pvt. Ltd.***[3] and this Court in ***Worldfa Exports Pvt. Ltd. v. United India Insurance Company Ltd.***[4]

Findings of the learned Arbitral Tribunal

28. The learned Arbitral Tribunal, dealing with the aforesaid rival contentions observes, at the outset, that NIA had "pertinently, not addressed or controverted in its pleading, the fact that the fact that the said document filed by the claimant at page 1285 (the blank so called joint discharge voucher) was blank when signed by the claimant and did not contain any details regarding the date of payment, amount of payment, signatures of the respondent officials and voucher reference no.". Further, observes the learned Tribunal, NIA had merely examined the surveyor as RW-1, and had not led any evidence with respect to the signing of the Joint Discharge Voucher.

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[1] Refer para 4 *supra*
[2] Refer para 12 *supra*
[3] 2019 SCC Online SC 504
[4] 2015 SCC OnLine Del 13951

As against this, CW-1 Saurabh Khanna, whose evidence was led by Khanna, specifically averred, in paras 19 and 21 of his affidavit in evidence, that he was coerced to sign the blank Joint Discharge Voucher, as he was informed that no money would be released till he did so.

29. Extensive reliance has been placed by the learned Arbitral Tribunal, on the judgment of the Supreme Court in ***National Insurance Company Ltd. v. Boghara Polyfab Pvt. Ltd***[5] which, in turn, relied on the earlier decision in ***United India v. Ajmer Singh Cotton and General Mills***[6]. From a perusal of the said decision, observes the learned Arbitral Tribunal, the following propositions emerged:

"i. That if the Joint Discharge Voucher has been signed by the Claimant under financial stress and the signing of the same is used as a condition precedent by the insurance company to release even the admitted amount, the same is vitiated by coercion and there can be no accord and satisfaction; and

ii. Separately, the practice of making insured parties/parties in lower bargaining positions sign undated discharge vouchers for sums lesser than their claim amounts is itself a collusive practice by government agencies/companies that is to be frowned upon."

30. The learned Arbitral Tribunal holds, on a comparative consideration of the evidence laid by the NIA and Khanna as noted in para 28 *supra* that Khanna had "in fact demonstrated that it signed the alleged blank, undated, unfilled Joint Discharge Voucher under duress". Thereafter, the learned Arbitral Tribunal proceeds to examine the contention of Khanna that it was suffering, at the time of signing the joint discharge voucher, from financial duress, thus:

"In this regard, it is imperative to note that admittedly, the Claimant had written to the Respondent to release on-account payments on 12.07.2012 and 04.04,2013, and informing it about the STLs taken from the Banks. Furthermore, pertinently, during the meeting held on 18.06.2012 [**Ex. CW-1/R4, Vol. A, p. 22-36**), the Claimant in its Agenda for the Meeting @ p, 29 has averred that:

"The insurance company and surveyors have already made their initial visit and the higher authorities of insurance company has given their reassurance that they will release the on-account payment equivalent to 50% of assessed loss within 2-3 months."

53. A similar statement is made by the Claimant in its Letter dt. 19.06.2012 to the Banks wherein it is specifically stated (Ex. **CW1/R5,** Vol. A, p. 37) that the Claimant would settle the loan whenever it's able to get on account payment from the Respondent against the claim. Admittedly, the Respondent has not responded to the said communications, nor has it led evidence to demonstrate that no such assurance of making on account payments was made.

54. While there may be some force in the Respondent's submission that the STLs advanced to the Claimant were not for a period of 6 months(further extended by 3 months) as claimed by the Claimant, the fact remains that STLs were taken by the Claimant under the belief (mistaken or otherwise) that the Respondent would he releasing on account payments, which the Claimant would use to repay the bank loans. Moreover, even if the STLs (sanctioned in June and July 2012), were for a period of one year, they would have been due for repayment in June 2013, and the Claimant hadn't received any update regarding the payment of the same till as late as 25.05.2013. The said circumstances, clearly establish that at the time the undated Joint Discharge Voucher was signed, the Claimant had not received any payment from the Respondent for more than 11 months and therefore was coerced into signing a Blank document (without the date or details of the amount) as a condition precedent

[5] (2009) 1 SCC 267
[6] 1999 6 SCC 400

to receiving even the amount admitted by the Respondent as due. Thus, in tribunal's view, the present case falls squarely under the illustration quoted above from ***Polyfab***[5], and there had been no accord and satisfaction leading to discharge of the arbitration clause."

31. The plea of delay, on the part of Khanna, in providing requisite details, holds the learned Arbitral Tribunal, could not be pleaded by NIA as a ground of defence, in view of Regulation 9(2) of the IRDA (Protection of Policyholders' Interests) Regulations, 2002 ("the IRDA Regulations"), which read thus:

"(2) Wherever the insured is unable to furnish all the particulars required by the surveyor, or where the surveyor does not receive the full cooperation of the insured, the insurer or surveyor, as the case may be shall inform in writing the insured about the delay that may result in the assessment of the claim. The surveyor shall be subjected to the code of conduct laid down by the Authority while assessing the loss and shall communicate his findings to the insurer within 30 days of his appointment with a copy of the report being furnished to the insured, if he so desires. Where, in special circumstances of the case, either due to its special and complicated nature, the surveyor shall under intimation to the insured, seek on extension from the insurer for submission of his report. In no case shall a surveyor take more than six months from the date of his appointment to furnish his report."

32. On the anvil of Regulation 9(2) of the IRDA Regulations, the learned Arbitral Tribunal holds that, as Khanna had appointed the Surveyor on 13th June 2012, the report ought to have been submitted by the Surveyor at the very latest by 12th December 2012, whereas it was submitted only on 7th March 2013. "The said impermissible delay in assessing the loss by the respondents/surveyor", holds the learned Arbitral Tribunal, coupled with the fact that no on account payment had been made to the claimant, despite its requests, clearly establishes that the said undated blank Joint Discharge Voucher was signed under financial duress.

33. The learned Arbitral Tribunal holds against NIA that, despite not having been provided the complete Final Survey Report, Khanna had, in its communication dated 24th December 2013 to NIA, clearly alleged that the Joint Discharge Voucher was signed under duress and coercion. This was immediately after NIA claimed discharge of its liability to Khanna by accord and satisfaction and could not, therefore, be said to be belated.

34. The fact that Khanna was able to place on record a blank Joint Discharge Voucher signed by him, observes the learned Arbitral Tribunal, could only be explained by NIA having got Khanna to sign such a blank Joint Discharge Voucher. NIA was unable to provide any alternative satisfactory explanation in that regard, either through evidence or otherwise. The learned Arbitral Tribunal holds, in this connection, thus:

"59. ... *Per contra* it is our opinion that the only explanation for the Claimant having in its possession the Document filed as the Blank so-called Joint Discharge voucher, at Vol. IV @ p.1285, is that the Claimant was provided only with a Blank document to sign. The Respondent has been unable to explain, through evidence or otherwise, how a document which is in the pro-forma format of the Respondent, could be in the possession of the Claimant, unless that was the document that was provided to the Claimant at the time of signing."

35. The aforesaid facts, coupled with the fact that Khanna had never been provided any copy of the Final Survey Report, holds the learned Arbitral Tribunal, defeated the case of discharge of Khanna's claims by accord and satisfaction, that NIA had sought to build up.

36. The decision in ***United India Insurance***[3], on which NIA sought to place reliance, was held to be distinguishable as, in that case, there was a specific communication from the insured to the insurer, acknowledging that it had been paid the amount due to it. No such communication, holds the Arbitral Tribunal, was forthcoming in the present case.

Submissions of NIA

37. Mr. Tushar Mehta, learned Solicitor-General, appearing on behalf of NIA, submitted that all disputes between Khanna and NIA stood concluded and settled by accord and satisfaction in view of the Joint Discharge Voucher dated 29th May 2013, which had been signed both by Khanna and Mr. Surinder Kumar Gupta, a representative of OBC. He submits that Khanna had led no evidence to support its contention either that the Joint Discharge Voucher, at the time it was signed by Khanna, was blank, or that NIA had in any manner coerced Khanna into accepting payment less than what was due to it. The plea of duress and coercion, submits the learned SG, was belied by the fact that, immediately after the Joint Discharge Voucher was signed, Khanna, *vide* letter dated 3rd June 2013, thanked NIA for having released ₹103.16 crores to Khanna against its claim. No objection, regarding the amount released, was raised at that time. Nor was it sought to be contended that the Joint Discharge Voucher was signed under duress or coercion or that it was blank when signed.

38. Mr Mehta submits that Khanna could not seek to rely on the fact that the Final Survey Report had not been made available to it on 29th May 2013, when it signed the Joint Discharge Voucher. Providing of the Final Survey Report was not required for Khanna to allege coercion, if such coercion had actually existed.

39. The learned SG emphasizes the delay on Khanna's part in raising any protest. He points out that it was for the first time in the letter dated 24th December 2013, by way of response to NIA's letter dated 4th December 2013, that Khanna objected to the amount released to it. Even in the said letter, there was no specific allegation of coercion. Khanna merely relied on a judgment of the Supreme Court in ***Boghara Polyfab***[5]. As against this, the plea of the Joint Discharge Voucher having been blank when it was signed by Khanna was, on the other hand, he points out, raised for the first time in the Statement Of Claim filed before the learned Arbitral Tribunal. The earliest objection was, therefore, taken more than six months after the Final Survey Report had been provided to Khanna. Khanna could not, contends the learned SG, take refuge behind the plea that it had not been provided the annexures to the Final Survey Report, as, in its Statement Of Claim, the said objection was raised by Khanna though it still did not have, with it, the annexures to the Final Survey Report.

40. The learned SG submits that the objections of duress and coercion, as raised by Khanna, were completely bereft of material particulars. Khanna had not disclosed the identity of the person who had subjected it to coercion. Even in the affidavit in evidence of Mr. Saurabh Khanna as CW-1, there was a mere bald averment of duress and coercion without any detail. In view of the mandate of Order VI Rule 4 of the CPC, such an allegation of duress and coercion, bereft of particulars, was of no evidentiary value whatsoever.

41. Pointing out that the Joint Discharge Voucher was signed not merely by Khanna but also by Mr. Surinder Kumar Gupta, the representative of OBC, the learned SG submits that Khanna did not lead his evidence or produce him in the witness box.

Thus, Khanna did not lead the best evidence possible to establish its case that the Joint Discharge Voucher, when signed, was blank.

42. As against this, the allegations, the affidavit in evidence of CW1 Saurabh Khanna merely alleged misrepresentation.

43. The learned SG also relied on the following part of the crossexamination of CW-1 which, according to him, demolished Khanna's plea that the Joint Discharge Voucher was blank when it was signed by Khanna:

"Q.446 Did you inform the banks of the amounts that you expected to get from the insurance company and, if so, what figure?

Ans. I do not remember, however, whenever we met the bank officials we conveyed to them that we were expecting full claimed amount i.e. approx. Rs.170 Crores from the insurance company."

Q.447 I suggest to you that by April, 2013, you were aware that the surveyor had not recommended to the insurance company for payment of the full claimed amount. What have you to say?

Ans. I disagree.

Q.448 After the banks received the money from the insurance company, did the banks communicate to you that the amount of Rs. 103 Crores is much less than the full claimed amount?

Ans I do not remember.

Q.449 Shown page 1297 of list of documents filed with the SOC (letter dated 25.05.2013 from the Claimant to the CMD of the Respondent). This letter was intact dispatched on 27.05.2013 at 1509 hours by registered post, is that correct?

Ans It may be so. The postal receipt is a part of the letter.

Q.450 I suggest to you that on 27.05.2013, you were well aware that the payment was likely to be made in the next one or two days and was infact made on 29.05.2013. What have you to say?

Ans. I do not agree.

Q.451 On which date did you sign the allegedly blank joint discharge voucher (at page 1285 of the list of documents with the SOC)?

Ans I do not remember the exact date.

Q.452 I suggest to you that OBC, being a PSU bank, will not sign on a blank document like joint discharge voucher. What have you to say?

Ans. I disagree.

Q.453 Shown document at Annexure R-2 at page 54 of the Statement of Defence (marked as **CW-1/R-8)** which is a joint discharge voucher. I put it to you that you signed this joint discharge voucher. What have you to say?

Ans. I had signed the document when it was blank as is available at page 1285 of the list of documents with the SOC, marked as **CW-1/R-7.**

Q.454 I put it to you that the bank first signed the joint discharge voucher, thereafter you signed the same and filled up the amount in the joint discharge voucher (CW-1/R-8) and handed it back to the insurance company. What have you to say?

Ans I was informed that without signatures, money will not be paid. I, therefore, asked the bank to sign it, I also signed it. It was blank at that time. There were no signature of the official

of the insurance company at that time on the said document. Officials of the insurance company were present at that time in our office and they took this blank document with them.

Q.455 Who informed you that without signatures, money will not be paid?

Ans. Mr Sunil Mahajan, Divisional Manager of the insurance company had told me that money will not be paid unless I sign it.

Q.456 When did he tell you this and where?

Ans. He said this in our office but I do not remember the exact date.

Q.457 When did you receive the money?

Ans. 30.05.2013 by RTGS when the money was credited in our account.

Q.458 After you received the sum of Rs.103 crores approx., when did you protest about the fact that you were pressurized into signing a blank joint discharge voucher?

Ans. The amount was not mentioned in the joint discharge voucher. When the money was credited to our bank, we immediately protested orally to the insurance company as to how only Rs.103 Crores have been paid instead of Rs.170 Crores. A letter was written on 03.06.2013.

Q.459 I suggest to you that the issue regarding signing of a blank joint discharge voucher was only raised for the first time when the Statement of Claim was filed in March, 2014. What have you to say?

Ans. I do not agree."

44. The reliance, by the learned Arbitral Tribunal, on the delay in issuance of the Final Survey Report is also, submits the learned SG, misguided, as delay was attributable only to Khanna not providing the requisite details in time, despite several reminders by the Surveyor.

45. The learned SG also relied upon the audited financial statements of Khanna to contend that the plea of Khanna that it was under financial stress was incorrect. Besides, submits the learned SG, Sections 19 and 19A of the Indian Contract Act, 1872 made a contract executed without free consent merely voidable and not void *ipso facto*. As such, the objection against want of free consent had necessarily to be raised at the first available opportunity.

46. The learned SG sought to contend that the case was fully covered in favour of NIA by the judgment of the Supreme Court in ***United India Insurance***[3]. The learned Arbitral Tribunal had distinguished the said decision by an erroneous finding of fact to the effect that while, in the said decision, the insured had accepted, in writing, the amount contained in the Joint Discharge Voucher, no such letter of acceptance existed in the present case. This finding was erroneous on facts in view of letter dated 3rd June 2013, written by Khanna to NIA.

For all these reasons, the learned SG submitted that the finding, in the impugned Award, that the claim of Khanna against NIA stood discharged by accord and satisfaction, could not sustain.

Submissions of Khanna

47. Arguing on behalf of Khanna, Mr. Sachin Datta, learned Senior Counsel, submitted that no occasion for interference with the impugned arbitral award, within the narrow confines of Section 34 of the 1996 Act, could be said to exist in the present case. He impressed, on this Court, the confines of Section 34, particularly citing, for

the said purpose, the judgment of the Supreme Court in ***Ssangyong Engineering & Construction Co. Ltd. v. NHAI***[7]. The learned Arbitral Tribunal, he submitted, had found, on a meticulous analysis of facts, that Khanna was, at the time of signing the joint discharge voucher on 29th May 2013, suffering from financial duress, as a result of the short term loans taken by it from banks, which had to be repaid by June 2013. Mr. Datta also relied on the positive finding of fact, by the learned Arbitral Tribunal that, at the time when the joint discharge voucher was signed by Khanna, it was, in fact, blank. At that time, Khanna was not even aware of the amount which had been awarded to it by NIA. The learned Arbitral Tribunal also found, on facts, that there was no delay in the raising of objections, by Khanna, to the amount released to it under the joint discharge voucher. In these circumstances, the learned Arbitral Tribunal had correctly held that the claim of Khanna against NIA could not be said to have been discharged by accord and satisfaction, and the said decision did not call for interference by this Court under Section 34 of the 1996 Act.

48. Mr. Datta drew attention to communications dated 4th April 2013 and 25th May 2013, from Khanna to NIA, requesting NIA to expedite assessment of Khanna's claims. Adverting to the letter dated 3rd June 2013, Mr. Datta submitted that there was no acknowledgment or acceptance by Khanna, in the said letter, of the correctness of the amount of compensation released to it. Rather, submits Mr. Datta, the letter expressed surprise at Khanna having been released only ₹103 crores against the total amount of ₹170 crores claimed by it and sought a copy of the final survey report of NIA only so as to ascertain the basis of the release of the said reduced amount. This final survey report, points out Mr. Datta, was admittedly provided to Khanna only on 27th June 2013, on which occasion, too, the annexures to the final survey report were not provided.

49. Mr. Datta further submitted that there was no categorical and positive denial, by NIA, of Khanna's assertion that the joint discharge voucher was blank when signed by Khanna. He relies on the decisions of the Supreme Court in ***Gian Chand & Bros v. Ratan Lal***[8]***, Jaspal Kaur Cheema v. Industrial Trades Link***[9] and the decision of this Court in ***Suzuki Motors v. Suzuki (India) Ltd.***[10], to contend that any assertion of fact, which was not specifically denied, was deemed to have been admitted. Mr. Datta placed considerable emphasis on the fact, by the learned Arbitral Tribunal, that there was no explanation, forthcoming from NIA, as to how Khanna had, in its possession, a blank joint discharge voucher. This fact, it was submitted, could be explained only by accepting Khanna's contention that, in fact, Khanna had been made to sign on a blank joint discharge voucher. No other explanation being forthcoming in this regard, Mr. Datta submits that the impugned award was unexceptionable.

50. On the aspect of evidence which had emerged during trial before the learned Arbitral Tribunal on the issue of the joint discharge voucher, Mr. Datta pointed out that the respondent had, Saurabh Khanna, CW-1, in his affidavit in evidence, clearly deposed that the Joint Discharge Voucher was blank when signed. He submits that this deposition could not be shaken in cross examination and relies, for this purpose, on questions 446, 447, 450, 452 to 459 (reproduced in para 43 *supra*) and 460 of the record of cross examination of CW-1, which may be reproduced thus:

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[7] (2019) 15 SCC 131
[8] (2013) 2 SCC 606
[9] 2017) 8 SCC 592
[10] 2019 SCC OnLine Del 9241

"Q.460 I suggest to you that the letter written on 03.06.2013, page 1298 of Statement of Claim was for the purpose of deciding the appropriate accounting and to update the matter to Board, bankers, auditors and other statutory authorities and was not by way of protest as mentioned in answer to Q. 458. What have you to say?

Ans. I cannot comment on the language of the letter. However, it was to know as to why our claim has been reduced."

51. Mr. Datta submits that, during cross examination of CW-1, it was never suggested that the discharge voucher dated 29th May 2013 was not blank when signed. Rather, he submits that, question 454 (reproduced hereinabove) as posed by NIA to Khanna, indicated that NIA was attempting to suggest that Khanna was handed over a blank discharge voucher and had itself filled in the details before signing it, which was patently absurd.

52. As against CW-1, whose evidence had been led by Khanna, and who had specifically deposed that the joint discharge voucher was blank when signed, Khanna contended that NIA did not lead any evidence, whatsoever, to support its assertion to the contrary. Even if it were to be assumed that the initial onus to prove that the joint discharge voucher was blank when signed rested on Khanna, Mr. Datta submitted that, once Khanna had led the evidence in that regard, and the testimony of CW-1 on that issue remained unshaken in cross-examination, the onus shifted to NIA to prove that the joint discharge voucher was not blank when signed.

53. The surveyor, who was the only witness of NIA, did not testify with respect to the joint discharge voucher. In these circumstances, Mr. Datta submits that the learned Arbitral Tribunal could not be faulted, either on facts or in law, in holding that the joint discharge voucher, at the time when it was signed by Khanna, was in fact blank.

54. To emphasise the fact that there was no acquiescence, by Khanna, to the settlement of its claim for an amount of ₹103.16 crores as granted under the joint discharge voucher, Mr. Datta points out that no basis for the said figure had been made known to Khanna at or prior to 29th May 2013. Even as on 25th May 2013, on which date Khanna wrote to NIA seeking to know the status of its claim, Khanna was never informed that the claim was being settled at ₹103.16 crores. There could, therefore, submits Mr. Datta, be no question of Khanna agreeing to the said amount on 29th May 2013, without having, at that date or even prior thereto, been informed of the said amount or the basis of its computation. For the proposition that, in such circumstances, there was no question of accord and satisfaction, Mr. Datta relies on the judgment of this Court in ***Oriental Insurance Co. v. Mercuary Rubber Mills***[11].

55. The position in law, submits Mr. Datta, stands crystallised by the judgments of the Supreme Court in ***Boghara Polyfab***[5] and ***Oriental Insurance Co. Ltd. v. Dicitex Furnishing Ltd***[12], as well as by the judgment of this Court in ***Worldfa Exports***[4]***.*** Mr. Datta has emphasised, on facts, the financial circumstances in which his client was placed on 29th May 2013, to demonstrate that it had signed the joint discharge voucher under financial duress.

56. Mr. Datta also placed reliance on a circular dated 7th June 2016 issued by the IRDA, in which Insurance Companies were directed to ensure that discharge

[11] (2012) 127 DRJ 650
[12] (2020) 4 SCC 621

vouchers, when signed, were complete in all respects. The said circular, read with the earlier circular dated 24th September 2015 issued by the IRDA, submits Mr. Datta, reserved the right of the insured to contest the amount of compensation released, even after signing of a discharge voucher.

Analysis

57. At the outset, it is necessary to understood the scope of interference with arbitral awards, as conferred by Section 34 of the 1996 Act.

58. Section 34(2)(a)(iv) of the 1996 Act, as it stood prior to its amendment by the Arbitration and Conciliation (Amendment) Act 2016, expressly envisaged interference with an arbitral award, insofar as the merits of the award were concerned, only where

(i) the award dealt with a dispute which was not contemplated by, or falling within the terms of the submission to arbitration, or

(ii) the award contained decisions on matters beyond the scope of the submission to arbitration.

59. Apart from this, the only other provision which envisaged interference with an arbitral award, on the merits of the award, was Section 34(2)(b)(ii), which permitted such interference where the arbitral award was "in conflict with the public policy of India". In this regard, the explanation to the said clause clarified that an award would be treated as in conflict with the public policy of India if

(a) its making was induced or affected by fraud or corruption,

(b) the award was violative of Section 75 or

(c) the award was violative of Section 81 of the 1996 Act.

60. However, the Explanation was specifically "without prejudice to the generality of" Section 34(2)(b)(ii). The generally wide scope and ambit of the expression "public policy of India" was not, therefore, compromised by the Explanation. The scope of interference with arbitral awards, on merits, under the pre-amended Section 34 had, therefore, to be restricted to cases where the award was in conflict with the "public policy of India". In this regard, guidelines are to be found in the judgments of the Supreme Court in ***ONGC Ltd. v. Saw Pipes Ltd***[13]. and ***Associate Builders v. DDA***[14]. Both these decisions advocate a wide interpretation of the expression "public policy of India". Read together, they hold that an arbitral award would be contrary to the public policy of India if it was (i) contrary to fundamental policy of Indian law or (ii) contrary to the interest of India or (iii) contrary to justice or morality or (iv) patently illegal.

61. Thus was introduced, by judicial fiat, the concept of patent illegality, as a ground to interfere with an arbitral award, though the said ground did not find express place in Section 34 as legislatively enacted.

62. "Patent illegality" was also regarded as a ground for interfering with arbitral awards in ***McDermott International Inc.* v. *Burn Standard Co. Ltd***[15] and ***D.D.A. v. R.S. Sharma & Co.***[16]. ***McDermott***[15] held that, if the arbitrator had "*gone contrary to*

[13] (2003) 5 SCC 705
[14] (2015) 3 SCC 49
[15] (2006) 11 SCC 181
[16] (2008) 13 SCC 80

or beyond the express law of the contract or granted relief in the matter not in dispute, the award would be "patently illegal". ***R.S. Sharma***[16] further widened the expression by holding that an award which was

(i) contrary to substantive provisions of law, or

(ii) contrary to the provisions of the Arbitration and Conciliation Act, 1996, or

(iii) *against the terms of the respective contract, or*

(iv) *patently illegal*, or

(v) prejudicial to the rights of the parties, would be vulnerable to interference under Section 34(2).

63. "Patent illegality", therefore, unquestionably visits an award which is contrary to the contract between the parties. This is but obvious, as the arbitral tribunal is a creature of the contract between the parties, and it is well settled that no court, or other judicial or quasi-judicial authority, can go behind the contract, or statute, to which it owes its existence.

64. The Arbitration and Conciliation (Amendment) Act, 2016 introduced, with effect from 23rd October 2015, Explanations 1 and 2 in Section 34(2) and sub-section (2A) in Section 34 of the 1996 Act. These provisions read thus:

"*Explanation 1.* - For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if – (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 of section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice

Explanation 2. - For the avoidance of any doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the fact of the award.

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence."

65. By this amendment, the legislature departed, somewhat, from the view expressed, in the decisions cited hereinabove, with respect to the scope of expression "public policy of India". The expression "public policy of India" was, by Explanation 1, restricted only to cases where the award was

(i) induced or affected by fraud or corruption,

(ii) violative of Section 75,

(iii) violation of Section 81,

(iv) in contravention with the public policy of Indian law, or (v) in conflict with the most basic notions of morality or justice.

66. Thus, a new expression "fundamental policy of Indian law" came to be introduced in Section 34, while entering a note of caution that, in examining whether

the award was in contravention with the fundamental policy of Indian law, the court would not review the merits of the dispute.

67. "Patent illegality" was engrafted as a separate ground to vitiate an award, by Section 34(2A), but was not included within the ambit of the expression "public policy of India". Thus, "patent illegality" continued to remain a ground for a valid challenge to an arbitral award and, in addition, the award was also liable to be interfered with, if it was found to be in contravention with the fundamental policy of Indian law.

68. Eight decisions, rendered in the context of the amended Section 34, are of relevance. They are ***Ssangyong***[7]**,** ***South East Asia Marine Engineering & Constructions Ltd. (SEAMEC) v. Oil India Ltd.***[17]**,** ***Project Director NHAI v. M. Hakeem***[18]**,** ***State of Chhattisgarh v. Sal Udyog Pvt. Ltd.***[19]**,** ***NHAI v. P Nagaraju***[20]**,** ***Delhi Airport Metro Express v. Delhi Metro Rail Corporation Ltd.***[21]**,** ***PSA Sical Terminals Pvt Ltd v. Board of Trustees***[22] and ***IOCL v. Shree Ganesh Petroleum***[23]**.**

69. ***Ssangyong***[7] held, *inter alia*, that an arbitral award was susceptible to interference on the ground that it had overlooked an issue of importance if the issue was such that, had it been dealt with, the whole balance of the award would have been altered and its effect would have been different. ***SEAMEC***[17], even while endorsing the view propounded in earlier decisions, that the mere possibility of an alternative interpretation to the contractual covenants, different from that accorded thereto by the arbitral award, would not constitute a legitimate basis to interfere therewith, held, significantly, that the Section 34 court was justified in examining "whether the interpretation provided to the contract in the award of the tribunal *was reasonable and fair*, so that the same passes muster under Section 34 of the Arbitration Act". "Reasonability" and "fairness" in the manner in which the Arbitral Tribunal had interpreted the contractual covenants, thereby, became a relevant consideration, for the Section 34 court.

70. ***Sal Udyog***[19] is an example of a case in which the Supreme Court found the interpretation, by the learned Arbitral Tribunal, of the relevant clauses of the agreement to be unacceptable and "patently illegal" by an incisive examination of the contractual clauses. Insofar as the concept of "patent illegality", as a ground to interfere with the arbitral awards, under the amended Section 34 of the 1996 Act, is concerned, paras 43 to 45 of the report in ***PSA Sical***[22] are relevant, and may be reproduced thus:

"43. It will thus appear to be a more than settled legal position, that in an application under Section 34, the court is not expected to act as an appellate court and reappreciate the evidence. The scope of interference would be limited to grounds provided under Section 34 of the Arbitration Act. The interference would be so warranted when the award is in violation of "public policy of India", which has been held to mean "the fundamental policy of Indian law". A judicial intervention on account of interfering on the merits of the award would not be permissible. However, the principles of natural justice as contained in Section 18 and 34(2)(a)(iii) of the Arbitration Act would continue to be the grounds of challenge of an award. The ground for interference on the basis that the award is in conflict with justice or morality is

[17] (2020) 5 SCC 164
[18] (2021) 9 SCC 1
[19] (2022) 2 SCC 275
[20] 2022 SCC OnLine SC 864
[21] (2022) 1 SCC 131
[22] 2021 SCC OnLine SC 508
[23] (2022) 4 SCC 463

now to be understood as a conflict with the "most basic notions of morality or justice". It is only such arbitral awards that shock the conscience of the court, that can be set aside on the said ground. An award would be set aside on the ground of patent illegality appearing on the face of the award and as such, which goes to the roots of the matter. However, an illegality with regard to a mere erroneous application of law would not be a ground for interference. Equally, reappreciation of evidence would not be permissible on the ground of patent illegality appearing on the face of the award.

44. A decision which is perverse, though would not be a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. However, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality.

45. To understand the test of perversity, it will also be appropriate to refer to paragraph 31 and 32 from the judgment of this Court in ***Associate Builders***[14], which read thus:

"31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

(i) a finding is based on no evidence, or (ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or

(iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

32. A good working test of perversity is contained in two judgments. In ***Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons***[24], it was held:

"7. … It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."

In ***Kuldeep Singh v. Commr. of Police***[25], it was held:

"10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."

71. ***IOCL***[23] examined, in depth, once again, Section 34 of the 1996 Act, having noted the law earlier enunciated in that regard. Paras 33, 42 to 46 and 53 of the report in that case read thus:

"33. The arbitral award is liable to be set aside insofar as the same deals with disputes with regard to the lease agreement which are not contemplated by the arbitration clause in the dealership agreement and/or in other words, do not fall within the terms of the submission to arbitration. The arbitral award is thus liable to be set aside under Section 34(2)(*a*)(*iv*) of the 1996 Act. The decision enhancing the lease rent is patently beyond the scope of the submission to arbitration. Moreover, the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the lease agreement dated 20-9-2005.

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[24] 1992 Supp (2) SCC 312
[25] (1999) 2 SCC 10

42. In ***Associate Builders***[14], this Court held that an award could be said to be against the public policy of India in, inter alia, the following circumstances:

42.1. When an award is, on its face, in patent violation of a statutory provision.

42.2. When the arbitrator/Arbitral Tribunal has failed to adopt a judicial approach in deciding the dispute.

42.3**.** When an award is in violation of the principles of natural justice.

43.4. When an award is unreasonable or perverse.

43.5. When an award is patently illegal, which would include an award in patent contravention of any substantive law of India or in patent breach of the 1996 Act.

42.6. When an award is contrary to the interest of India, or against justice or morality, in the sense that it shocks the conscience of the Court.

43. An Arbitral Tribunal being a creature of contract, is bound to act in terms of the contract under which it is constituted. An award can be said to be patently illegal where the Arbitral Tribunal has failed to act in terms of the contract or has ignored the specific terms of a contract.

44. However, a distinction has to be drawn between failure to act in terms of a contract and an erroneous interpretation of the terms of a contract. An Arbitral Tribunal is entitled to interpret the terms and conditions of a contract, while adjudicating a dispute. An error in interpretation of a contract in a case where there is valid and lawful submission of arbitral disputes to an Arbitral Tribunal is an error within jurisdiction.

45. The Court does not sit in appeal over the award made by an Arbitral Tribunal. The Court does not ordinarily interfere with interpretation made by the Arbitral Tribunal of a contractual provision, unless such interpretation is patently unreasonable or perverse. Where a contractual provision is ambiguous or is capable of being interpreted in more ways than one, the Court cannot interfere with the arbitral award, only because the Court is of the opinion that another possible interpretation would have been a better one.

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53. In ***Satyanarayana Construction Co. v. Union of India***[26], a Bench of this Court of coordinate strength held that once a rate had been fixed in a contract, it was not open to the arbitrator to rewrite the terms of the contract and award a higher rate. Where an arbitrator had in effect rewritten the contract and awarded a rate, higher than that agreed in the contract, the High Court was held not to commit any error in setting aside the award."

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63. Rewriting of a contractual covenant has been held, in ***N.H.A.I. v. Bumihiway DDB (JV)***[27], to be against the law of the land, and fatal to the award. The decisions in ***Union Territory of Pondicherry v. P.V. Suresh***[28]**,** ***Shree Ambica Medical Stores v. Surat People's Co-operative Bank Limited***[29]**,** ***IFFCO Tokio General Insurance Co. v Pearl Beverages Ltd.***[30]**,** ***Tata Consultancy Services v. Cyrus Investments (P) Ltd.***[31] and ***Maharashtra State Electricity Distribution Co. v. Maharashtra Electricity Regulatory Commission***[32]**,** to which allusion is already to be found in para 2.6 hereinabove, also hold that clauses of a commercial contract cannot be rewritten by a court or arbitral tribunal."

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[26] (2011) 15 SCC 101
[27] (2006) 10 SCC 763
[28] (1994) 2 SCC 70
[29] (2020) 13 SCC 564
[30] (2021) 7 SCC 704
[31] (2021) 9 SCC 449
[32] (2022) 4 SCC 657

72. Findings of fact and law, returned by the arbitral tribunal, are of various kinds. In respect of all findings, the scope of interference under Section 34 is limited. It would not be far from the legal truth to state that findings of arbitral tribunal that involve interpretation of contractual provisions would merit interference only where the learned Arbitral Tribunal effectively re-writes the contract or where the interpretation accorded by the arbitral tribunal to the concerned contractual provisions militate against other contractual provisions, for which one may refer to the recent decisions of this Court in ***Calcom Cement India Ltd. v. Binod Kumar Bawri***[33] and ***GMR Ambala v NHAI***[34] respectively.

73. In all other cases, the Section 34 court is expected, normally, to defer to the interpretation accorded by the learned Arbitral Tribunal to the provisions of the contract before it. Where findings of fact returned by the learned Arbitral Tribunal are concerned, they would merit interference only, and only, where the findings are perverse. Perversity, as already noted, attaches to findings which either exclude relevant evidence from consideration, or rely on irrelevant evidence, or are such as no person, acquainted with facts, could reasonably be assumed to arrive at. Where the finding is a possible one, based on the material before the learned Arbitral Tribunal, the Section 34 court would forbear from interference. Equally, where the facts available before the learned Arbitral Tribunal could lend itself to two conclusions, and the learned Arbitral Tribunal prefers one, the Section 34 court, even if prefers the other, would not substitute its subjective satisfaction for the subjective satisfaction of the learned Arbitral Tribunal.

Application of the above principles to the present issue

74. Viewed thus, in my considered opinion, no case for interference with the decision of the learned Arbitral Tribunal on the aspect of discharge of Khanna's claim against NIA on the basis of accord and satisfaction, can be said to exist. Most fundamental, in this conclusion of mine, is the fact that NIA, in fact, has not been able, either before the learned Arbitral Tribunal or even before this Court, to explain as to how Khanna placed, on record, a blank discharge voucher signed by it. The finding of the learned Arbitral Tribunal on this aspect, in para 59 of the impugned award is reproduced in para 32 *supra*, is, in my view, unexceptionable.

75. It is not Khanna's case, mercifully, that the blank discharge voucher placed on record by Khanna was a fabrication. Nor did NIA seek to contend that Khanna had somehow purloined the blank discharge voucher from its possession and use it to its unholy advantage. Even if, therefore, the filled in joint discharge voucher which NIA placed on record were to be taken into account, the absence of any explanation, from NIA, to the possession of the signed joint discharge voucher filed by Khanna, can lead to only one inference, which is that Khanna *was made*, initially, to sign a joint discharge voucher, which was later filled in.

76. This single aspect, in my view, considerably tilts the scale, in the present case, in favour of Khanna, insofar as the aspect of discharge of Khanna's claim by accord and satisfaction is concerned.

77. I am not inclined to accept Mr. Mehta's submission that, after the signing of the joint discharge voucher, Khanna wrote to NIA acknowledging its acceptance of the

[33] 2022 SCC OnLine Del 3453
[34] 2022 SCC OnLine Del 3122

amount of ₹103.27 crores, released to it under joint discharge voucher. The letter dated 3rd June 2013, in my view, does not lend itself to any such interpretation. A holistic reading of the said letter makes it clear that Khanna had not accepted, either expressly or by necessary implication, in the said letter, the amount of ₹103.27 crores as representing full and final settlement of its dues against NIA. Rather, in the said letter, Khanna queried of NIA regarding the basis of computation of the said amount and, in order to ascertain whether the reduction, by NIA, from Khanna's original claim was, or was not justified, sought a copy of the final survey report. The final survey report was provided only on 27th June 2013. Even then, it was provided without its annexures. Any document, which cites annexures and is provided without the said annexures, cannot be said to have provided at all, in law.

78. The learned SG sought to emphasize the position, in law, that any allegation of duress or coercion is required to be raised at the first available opportunity, failing which it cannot be accepted. He also sought to place reliance, in this context, on Sections 90 and 91 of the Contract Act. Sections 90 and 91 of the Contract Act apply to concluded contracts, and cannot, therefore, apply to a case such as this. Insofar as the learned SG submits that the allegation of coercion and duress ought to have been raised immediately following the act of coercion or duress, the proposition, while well founded in law, may not apply directly to the facts of the present case. If, in fact, a party is found to have executed a document under duress, that duress does not stand effaced merely because of delay in pleading it. Delay in pleading coercion or duress, no doubt, would dilute the strength of the plea; however, if, on facts, coercion or duress is found to have actually existed, they cannot be wished away merely because the party delayed in raising the plea.

79. In the present case, the learned Arbitral Tribunal has found, on facts, that Khanna was under financial duress when it signed the joint discharge voucher on 27th May 2013. These findings, predicated on material on record, cannot be revisited under Section 34 of the 1996 Act, as they cannot be said to suffer from perversity, as understood in law. While this aspect of financial duress is by itself sufficient to sustain the finding of the learned Arbitral Tribunal that Khanna's claims did not stand extinguished by accord and satisfaction, the additional fact that Khanna had been made to sign a blank discharge voucher is of no little significance. Getting an insured to sign a blank discharge voucher is a practice which has been specifically deprecated by the Supreme Court in ***Boghara Polyfab***[5]. It partakes, even by itself, of the nature of coercion. It cannot be expected that an insured would, willy nilly, and of its own volition, sign a blank discharge voucher, even before being told the amount which is being released to it.

80. The signing of a blank discharge voucher, even by itself, indicates that the party was acting under pressure and compulsion. Grains of the elements of duress and coercion, therefore, vest even in such act.

81. ***Boghara Polyfab***[5]***,*** especially the passages on which the learned Arbitral Tribunal placed reliance in the present case, clearly indicates that, the signing of a discharge voucher does not, in every case, extinguish the claim of the insured to a higher amount. Undoubtedly, this principle would have to be applied keeping in mind the facts of the case before the court, or the learned Arbitral Tribunal. Where a discharge voucher is voluntarily signed and, on facts, found to actually evince full and final settlement of the claim of the insured, it may not be possible for the insured, later, to rake up the issue and seek a higher amount. The issue of whether the joint

discharge voucher actually amounts to a full and final settlement of the claim of the insured is, however, again a pure finding of fact which, absent perversity, is impervious to challenge under Section 34 of the 1996 Act.

82. The letter dated 3rd June 2013, properly read, itself indicates that Khanna had not fully and finally accepted the amount of ₹103.16 crores as its claim for the loss suffered by it in fire. The basis of the said claim had not even been made known to Khanna at that point of time. I am entirely in agreement with the findings of the learned Arbitral Tribunal that, where the final survey report had itself not been provided to Khanna, it could not be said that Khanna had acquiesced to the amount found to be payable thereunder. A party can acquiesce only to something which is within its knowledge. Khanna, at the time of signing the joint discharge voucher on 29th May 2013, had not even been made known the amount which was being paid to it, let alone the basis on which the said amount had been worked out. Even if it were to be assumed that the amount had been made known to Khanna at that point of time, it is not in dispute that the basis of computation of the amount was not made known. It would be unfair and unrealistic to hold that Khanna could be bound down to an amount, the basis of computation of which was never made known to it at that point of time.

83. The finding of financial duress which was being suffered by Khanna on 29th May 2013, and the fact that Khanna had to sign a blank joint discharge voucher, read with the fact that, despite representations by Khanna to NIA, even prior to 29th May 2013, and thereafter, the final survey report was made available to Khanna only on 27th June 2013, without its annexures, read together, defeat any possibility of interference, by this Court, with the impugned award of the learned Arbitral Tribunal, insofar as its finding that the claim of Khanna against NIA did not stand discharged on account of accord and satisfaction, is concerned.

84. I, therefore, concur with the finding of the learned Arbitral Tribunal that the claims of Khanna against NIA, as urged before the learned Arbitral Tribunal, could not be said to stand discharged by accord and satisfaction.

Re: Claim V of Khanna - Towards loss of WIP

85. Khanna claimed, in its statement of claim, that it had suffered loss of work in progress (WIP) to the tune of ₹50.77 crores. WIP, according to Khanna, in its statement of claim, was merely the difference between the quantity of goods purchased and the quantity of goods released for sale. In its ERP (Enterprise Resource Planning) software record the quantity purchased was reflected as "batch certification" whereas the quantity released for sale was reflected as "batch released". The difference between "batch certification" and "batch released", therefore, submitted Khanna, represented its WIP.

86. I deem it appropriate to reproduce, *in extenso*, the observations and findings of the learned Arbitral Tribunal with respect to Khanna's claims for loss against WIP as contained in paras 96 to 111 of the arbitral award, as under:

"96. Under Claim V, the Claimant has claimed Rs. 50.77 crores on account of the loss of its Works-in-Progress (WIP) (to the tune of 17387 MT of WIP), a claim which had been disallowed in its entirety by the Surveyor and the Respondent. The main ground for the disallowance of the said claim in its entirety by the Surveyor, was that the Claimant had not provided the Surveyor with any documentation to substantiate the same, despite repeated requests. Both parties however, are ad idem on the fact that stock under the head of WIP is

covered under the IAR Policy. Both parties, are also, are *ad idem* on the fact that WIP is an inevitable incidence of the manufacturing process. A logical corollary of the same is therefore, that WIP had infact been generated by the Claimant. It is also logical that given the intensity of the fire on 12.06,2012, some of such WIP must have been lost/destroyed in the said fire.

97. The Claimant's case, in brief, is simply that WIP is the difference between the produced quantity of goods and the released quantity - and thus arriving at the amount of WIP generated by the Claimant is a mathematical balancing, The reasons (or all quantity produced not being converted into finished goods are numerous- such as lack of orders, lack of cutting capacity, the produced quantities not being in a saleable form; slow moving stock and the like. As per the Claimant, the said quantity produced is reflected in its ERP record under the head "Batch Certification", while the stock sold is reflected under the head "Batch Release". It is stated that it is this difference between the "Batch Certification" and "Batch Release" that constitutes WIP, and the same details are clear from the ERP records, which had been provided to the Respondent. To support its Claim, the Claimant has relied on, apart from the ERP itself (Record for the months of March- May 2012 is annexed as Exhibit D to CW - 1 Evidence Affidavit @pp. 8-301), the following documents:

(i) Bank Stock Statement (Claimant's Documents, Vol. II, pp. 348-378 @p.475) (latest Statement as on 31.05.2012 reflecting WIP worth Rs, 62.83 crores odd);

(ii) Audited Balance Sheets (Claimant's Documents, Vol. II, PP. 476-86*)* (Balance. Sheet as on 31.03.2012 reflecting WIP value of Rs. 61.11 crores odd);

(iii) Provisional Trading Account (Claimant's

Documents, Vol. II, pp. 487·89) (reflecting WIP as on 11.06.2012 to be 28,924 MT. worth Rs. 48.26 crores odd);"

(iv) CA Certificate (Claimant's Documents, Vol. III, .P. 750) (reflecting the WIP stock on the date of the fire as 28,942 MT, worth Rs. 48.26 crores);

(v) Account Monitoring Report dated 31.03.2011 [Exhibit E to CW-1 Evidence Affidavit, pp. 342 @p. 379] {reflecting the WIP stock as on 31.3.2011

to be worth ₹63.28 crores)

98. CW-1 in his Evidence Affidavit has also explained the said manufacturing process and generation of WIP in para 63 of his Evidence Affidavit as follows:

"63. I say that the process which is followed by the claimant for conversion of Raw material into the Finished good is detailed herein below:

- *The Claimant produces various types of finished goods such as Newsprint, Board and paper, The raw material is purchased from vendors in India and as well as abroad depending on the manufacturing requirements. This raw material usually consists of Waste Paper (Local), Waste Paper (imported) and Pulp. The raw material* is *mixed with substances such as bleaching and washing chemicals which may include sodium sulphite, hydrogen peroxide and sodium hydrosulphite and caustic soda lye, soap noodles etc. for whitening and purification*

- *This mixture is then put in the pulper for grinding and the pulp is generated.*

- *The Claimant has installed at its premises 4 major machines, which includes 2 machines for production of board, 1 for paper and 1 for newsprint. The said pulp which is generated is transferred to the relevant machine depending on what the final product is. The relevant machine converts the pulp into Paper/board/Newsprint in the form of Reels. At this stage, the Claimant issues a certificate to the effect "Batch Certificate" and a corresponding entry is made in the ERP system.*

- *After formation of the Jumbo Reel, depending on the orders received and demand in the market, the said jumbo reel is subjected to two other processes.*

- *Usually, the customers either order for paper in the form of reels or in the form of sheets. The re-winder machine/sheeter machine cuts the jumbo reels into smaller reels and/or sheets, which are then subsequently dispatched to the customer, On dispatch of the goods, the claimant issues a certificate "Batch release" and a corresponding entry is made in the ERP System of the Claimant.*

Therefore, this difference between the "Batch Certification" and "Batch Release" is work-in-progress and the value of the same can be adjudged from the ERP record so maintained by the Claimant and duly verified to be absolutely accurate in the Final Survey Report. Furthermore, a sample of the ERP record will reflect that for all raw material which is subjected to the manufacturing process detailed above, a corresponding entry is made in the ERP system by the Claimant, therefore the ERP system keeps a comprehensive and updated record of all stock operations including WIP."

99. From the above, it is evident that the produced goods are the "jumbo reels" of Newsprint, Board or paper (what is certified in the ERP as "Batch Certificate"). The finished goods however, are the smaller diameter, cut-to-order and dispatched products out of the said jumbo reels (What is certified as "Batch Release"). Prima facie, this appears to be a verifiable process through the ERP system.

100. However, given that the Respondent has disallowed the claim in its entirety, the same would have only two possible implications for the point of view of the Respondent- i.e., either that no such WIP was lost, or that no information regarding the same was supplied to the Surveyor. This particular averment of the Respondent shall be dealt with subsequently.

101. The Respondent has initially taken the second line of argument, as stated above. The Respondent has also taken issue with the Claimant allegedly repeatedly changing its stance regarding what constitutes the WIP. It has claimed that in its initial Claim Bill dated 19.06.2012 (Annexure 42 to the Final Survey Report, Claimants Documents, Vol. III @ p. 781), the Claimant had claimed WIP as "material kept for repulping", the lost quantity of which was described as 17,387 MT, amounting to Rs.51 crores. It has further averred that the Interim Survey Report dated 20.12.2012 {Ex. RW 1/1 of RW-1's Evidence Affidavit@internal p.11}, has noted that the Insured has stated that the "Material for Re-pulping" is

- *.."the in-house generated waste/rejection during/after paper production*
- *This is used directly in Pulper*
- *This can be either in the form of Rejected Reels of paper and/or sheets and/or loose paper"*

At internal page 24 of the said Interim Report, the provisional liability for the said "Material Kept for Re-pulping" has been assessed at 75% (till completion of verifications and is likely to he further adjusted) as Rs.38.25 crores. It Is the Respondent's case that the Surveyor had accordingly, vide Letter dated 20.06.2012 **(SOD, Annexure R-5, pp. 60-64 @p,62 para 16)** requested the claimant to provide: "A statement giving details in following format separately for all types of Raw materials and Materials Kept of (sic) Re-pulping". The Respondent states that it was only on 01.09.2012, in its Reply to the Letter dated 20.06.2012 **(SOD, Annexure R-6, pp. 65·72 @p.68 para 16),** that Claimant for the first time terms the said material kept for re-pulping as "Works in progress", thus:

"16, ... Regarding material kept for repulping, it is stated that, in fact it is work in progress. All the raw material issued for production are transferred to Work in progress. After the production, some material not meeting the quality standards are rejected which are either sold as a second quality or in case of major defect, it is sent for repulping, Certain materials for which immediate orders are not available are also kept as work in progress. These

materials are kept in the stock yard which fully got burnt. The detail of work in progress, from year 2009-10, 2010-11 to march 2012 and as on date of loss is enclosed, which is a system generated statement.

As per the Respondent, it was thus only in its Second. Claim Bill dated 01.09.2012 (Ex. **RW-I/3A (colly))** that the claim for material kept for repulping was re-described as "Work in progress comprising newsprint, paper & board kept for repulping or selling at reduced price." As per the respondent, even in the Final Claim Bill dated 02.02.2013, the claim (although reduced to Rs.36.17 crores) is for "Work in progress comprising newsprint, paper & board kept for re-pulping or selling at reduced price". Thus, as per the Respondent, during the claim settlement period, Claimant always categorized WIP as primarily material kept for re-pulping. Further, it is stated that this new definition of WIP, being the Batch Certification minus Batch release was taken in the proceedings before this Tribunal, and that too underwent various edits by the Claimant.

102. The Respondent has further asserted that the Surveyor was right in rejecting the said claim, as there were, in any event, no documentation forthcoming from the Claimant to substantiate its claim. In particular, the Respondent relies on Letters issued by the Surveyor to the Claimant, dated 20.06.2012 (reproduced above), 15.09.2012 **(Annexure R-7, SOD,** @ p. 73), which in para 11 states:

"11. *Please note that despite our repeated requests, the basis of arriving at Quantities of Work in progress has not been provided till date. Moreover, no documentary evidence has been made available in support of the your claim towards WIP. Also, there is no reflection of these stocks in your ERP system."*

As per the respondent, the same request is repeated in para 9 of its letter dated 22.09.2012 **{Annexure R-8, SOD,@ p.74),** As per the Respondent, the Claimant hasn't provided any such details except for purportedly bald assertions in its Letters dated 01.10.2012 **(Annexure R-9, SOD,@ p.76)** that the complete record of WIP is available in the ERP system.

103. The Surveyor has dealt with the Claim of WIP on Internal pages 59-60 of the Final Survey Report **(Claimant's Documents-, Vol. I, pp. 81-82).** It is pertinent to note *firstly* that unlike all the other Claims, in his analysis of the claim on WIP, the Surveyor has not provided any Annexures – not even the details provided by the Claimant along with its Letter dated 01.09.2012, which were later produced as **Ex. RW 1/3A (Colly)** during the cross examination of RW-1 in response to Q.313. The entire assessment of the Surveyor is clearly done in a completely perfunctory manner. All that is stated is the justification of the Claimant towards the said loss, which dearly indicates, as has been noted earlier, the reasons for generation of WIP, and also the fact that such WIP is "shifted to the Open Stock Yard due to lack of storage space in the Production Area and stored there. These WIP stocks are then either sold as seconds OR on receipt of matching orders OR repulped," In his comments on the same, the Surveyor has rejected the claim on the single ground that the Insured was allegedly unable to provide records towards:

- *"Batch wise generation of records of such WIP quantities*
- *Date wise movement records of such WIP quantities from Production to Storage Yard*
- *Consumption Date of such WIP quantities directly consumed in the pulper Production logs stating the reasons and quantity of such rejection, if any."*

This statement is made despite noting that "insured are maintaining Overall Stocks & Production data in the ERP System." The main reason for rejection, or not relying on the ERP data is that "no separate records of such WIP are maintained." The Surveyor has also made a bald statement that on the production floor of each machine, there are facilities to recycle any production - wastage, and "nominal production wastage is re-cycled on a daily basis within the plant. This clearly indicates that the Surveyor appears *to* only be concerned with

WIP being the "waste" that is repulped, and hence did not even look into the question of the clear difference between Batch Certification and Batch Release as seen in the ERP.

104. Further, it is clear that it is not the Claimant's case that the ERP has separate WIP data – simply because of the manner in which the data is generated. The Claimant's case is that an analysis /balancing of the said ERP data would reflect WIP. There is a clear difference between Batch Certification and Batch Release, which is unaccounted for (after taking into account the stocks of WIP saved) and the only way to explain the said unaccounted stock is that the same was WIP which was destroyed during the fire. The site visit conducted by the Tribunal also demonstrated that it would not be possible to store such massive quantities of product on the production floor and that the same is being stored by the Claimant in the Yard, which was gutted by the fire on 12.06.2012. Thus, we find no merit in the Respondent's submission that the relevant records were not provided by the Claimant in order to assess the loss on account of WIP. Given that the Surveyor's only reason to reject the claim on WIP is the alleged lack of information forthcoming from the Claimant, which has been rejected hereinabove, there is no reason to delve further into the Respondent's objections to the Claimant's claim. Thus we find that the Surveyor had wrongly rejected the Claimant's claim on account of WIP.

105. Even otherwise, we find that CW-l had been subjected to rigorous cross-examination on the aspect of WIP and had cogently and logically justified the Claimant's Claim. The understanding of WIP has dearly withstood cross-examination thus:

"Q.97 In what form does the packaging board come out of the paper machine ?

Ans. Jumbo Reel.

Q.98 What is Jumbo Reel?

Ans. It's big roll of board/paper.

Q.99 Usually what would be the diameter and height of such a jumbo reel?

Ans. Diameter is around 1.5 meters.

Q.100 What is the length of the roll?

Ans. Each machine has a different deckle. PM1 is 3.1 meters, PM2 is 2.4 meters. That is the length of the roll.

Q.101 What is the length of the roll in PM4 and PM5?

Ans. PM4 is 4.5 meters, PM5 is 6.6 meters.

Q.102 In PM1 where is the jumbo reel stored?

Ans. It is stored at various locations - paper machine floor, storage yard etc.

Q.103 When the jumbo reel is produced in PM1, in which physical location in the factory is it so produced?

Ans. In PM1.

Q.107 How are the jumbo reels stacked on the machine floor?

Ans. Horizontally.

Q.108 What do you do with jumbo reels ?

Ans. All the jumbo reels go to the rewinder where are cut into shorter diameter and width.

Q.109 After cutting the jumbo reels, what is the next step?

Ans. We store them in the waste paper yard or the paper machine floor. These rolls are stored vertically in the waste paper yard.

Q.110 Where does the cutting of jumbo reels take place?

Ans. It is not possible to cut the jumbo reels. They are first Rewound and made into smaller diameter reels. Those smaller diameter reels are either cut or rewound again as per size. These are various sheeters installed in each paper machine.

Q.111 Where does the cutting of the smaller diameter reels take place in respect of each of the paper machines?

Ans. It is quite flexible. Sheeter specifications are usually same for all. Depending upon the stock level, we take a decision to cut these reels.

Q.113 After the smaller diameter reels are cut, are they packaged at the same location?

Ans. Packaging is only done for those reels for which we have direct reel order. They are packaged at a location nearest to the cutting machine.

Q.114 Is there a separate designated packaging area for each of the units PM1, PM2, PM4 and PM5?

Ans. Yes.

Q.115 After packaging of the cut smaller reels, what is the next step?

Ans. They are stored in finishing house awaiting to be despatched.

Q.116 Are there any smaller reels which are cut but not packaged?

Ans. Yes.

Q.128 Are some jumbo reels shifted to the waste paper yard?

Ans. Sometimes.

Q.129 Is this usual? Ans. No.

Q.130 What is shifted from the paper machine to the waste paper yard?

Ans. Smaller diameter reels.

Q.131 In what circumstances are these smaller diameter reels shifted to the waste paper yard?

Ans. Lack of orders, mismatch in sheeter production, better servicing to customer, bad market situation.

Q.132 Are these smaller diameter reels resold?

Ans. Yes.

Q.133. Are any proportion of these smaller diameter reels sent for repulping and reintroduced in the manufacturing process?

Ans. No.

Q.134 Are these smaller diameter reefs more valuable than the waste papers stored in the waste paper yard?

Ans. Yes.

Q.135 Is there any protection from the weather available to the smaller diameter reels which are stored in the open yard?

Ans. Yes.

Q.137 When the jumbo reels are produced are they weighed?

Ans. Yes.

Q.138 Is there any certification at this stage?

Ans. Yes.

Q.139 Do you at the stage of weighing the jumbo reels after they are produced record the weight in your ERP?

Ans. Yes, batch certification.

Q.141 For batch certification, 1s any physical copy of certificate generated?

Ans. Yes, it is all automated through ERP system.

Q.142 Did you generate such certificates from your ERP system and supply them to the Surveyor?

Ans. Yes, all relevant information was given to the Surveyor in soft copy.

Q.143 Were hard copies supplied to the Surveyor?

Ans. I think so.

Q.144 After jumbo reels are rewound into smaller diameter reels, are they weighed?

Ans. Yes.

Q.145 Is there any terminology used in ERP identifying the weight of smaller diameter reels at this stage?

Ans. I have to check. However, it is not needed as the system can do that.

Q.285 Please see Q. 145. Are you in a position to answer the same now?

Ans. There is no terminology used in ERP identifying the smaller diameter reels as that is not required.

Q.146 After the smaller diameter reels are cut, are they actually and physically weighed?

Ans. Yes. They are weighed.

Q.147 I suggest to you that in fact in the regular course smaller diameter reels which are cut are not actually weighed but the weight can be derived from diameter, GSM and width.

Ans. We do both.

Q.148 Is this weight recorded in the ERP and under what heading?

Ans. I have to check.

Q.286 Please see Q. 148. Are you in a position to answer the same now?

Ans. The weight is recorded at the time of dispatch and is so recorded in the ERP.

Q.149. Are the smaller diameter reels shifted to the open waste yard before or after cutting?

Ans. Rewinder makes jumbo reels into small reels. Smaller reels are sent to waste paper yard.

Q.150 Are all smaller reels sent to the waste paper yard?

Ans. It depends upon the market situation, order position. Based on that, decision is taken whether to store it in waste paper yard or to keep in the paper machine area for further processing.

Q.l51 Under which heading in your ERP system, it is shown how much of the smaller reels are being sent to the waste paper yard?

Ans. I have to check.

Q.287 Please see Q. 151. Are you in a position to answer the same now?

Ans. After entry of batch certification in the ERP, goods sent for dispatch are entered in ERP system as batch release. Difference between the batch certification and batch release is the weight of WIP which is reflected in the ERP system.

Q.152 Before dispatching the goods, that is after packaging, will it be correct to say that you will be weighing the goods ready for dispatch?

Ans. Yes.

Q.153 Is there any terminology used in your ERP identifying the weight of the goods which are despatched?

Ans. They are entered in ERP. But I do not know the terminology

Q.154 Is it correct that in your ERP, you use the term "batch release"?

Ans. Yes.

Q.155 Can you explain at which stage of the process "batch release" takes place?

Ans. When the goods are ready for dispatch, they are

entered under the heading "batch release".

Q.156 You have made a claim under the head "WIP" (work in progress). Can you please tell us what is meant by this term?

Ans. WIP means work in progress. So material whichever has been manufactured and not yet ready for dispatch means work in progress.

Q.157 According to you, all the WIP *is later sold. Is that correct?*

Ans. Yes.

Q.158 According to you in page 36 of your affidavit statement, the Surveyor misunderstood when he thought that the WIP was to be subjected to repulping.

Ans. Yes

Q.348 Are jumbo reels are part of WIP?

Ans Yes.

Q.349 After the jumbo reels are cut into smaller reels, does it continue to be WIP?

Ans Yes.

Q.350 When the smaller reels are packed, do they continue to be WIP?

Ans After the smaller reels are packed, they become finished goods.

Q.351 Is a batch release certificate issued, if so when?

Ans I will have to check and revert

Q.391 With reference to Q. 351, as to whether batch release certification is issued and if so, when, can you answer the question now?

Ans When material is getting ready for finishing/ dispatch, we do batch release in ERP.

Q.358 Is the difference between batch certification and batch release, treated as the work in progress for which you have made a claim in this arbitration?

Ans Yes

Q.377 Is there any separate godown for WIP (board, paper and Newsprint) which you can point out on this map?

Ans It is a continuous process. We have little bit storage between production and finishing the process. So major WIP is stored in waste paper yard.

Q.378 Is it your answer that there is no separate godown for WIP on the premises?

Ans I repeat my answer to Q. No. 377. It is a continuous process. We have little bit storage between production and finishing the process. So major WIP is stored in waste paper yard."

106. Moreover the Surveyor has also, in response to Questions 209 and 210 of RW-l's cross examination admitted that the ERP data captured all the movement of the raw material at all stages of the manufacturing process and that the production data of the goods manufactured in the factory was obtained from the ERP record as provided by the Claimant. He has further admitted (in response to Q. 212 and 213) that there are in fact various intermediate stages of production before raw materials get converted into finished goods and that as soon as any raw material is subject to manufacturing process, it is transformed into WIP and that if jumbo reels or smaller diameter reels (which are not yet converted into finished goods) are lost in fire, such loss would he covered under the Insurance policy. He has further admitted (response to Q.215) that smaller diameter reels (which are not yet converted into finished goods) would form part of WIP and [response to Q.217) that The jumbo reels which have not been subject to "cutting", would form part of WIP. However, inexplicably, in response to *Q.* 211, he states:

"Q211. Would it also be correct to say that data was also obtained from the ERP record with regard to various intermediate stages of production?

Ans. No. It is not correct because our assessment of loss does not include any kind of produced / finished goods"

107. RW-1 has also, inexplicably, claimed ignorance of the terms "batch certification" and "batch release" and stated that the same were not present in the ERP (response to Q. 205-208), which *is* contrary to the record. He continued to insist that no *separate* records of WIP movement was provided - even though the same can clearly be ascertained from the *analysis* of the ERP data. We find that RW-1 failed to analysis the ERP data provided - which is the only reason the said claim was rejected. In fact, RW-1's evasive response to Q. 158-160 and the Tribunal's questions regarding his physical inspection of the site, would also clearly demonstrate that the Surveyor simply did not even initiate the process of assessing the WIP claim, by even physically Inspecting the premises for the said claim. The said cross-examination is reproduced herein below:

"Q.158 Would it be correct to say that factually, no physical verification or inspection was conducted to ascertain the existence of more than 700MTs of WIP stated to have been saved in the fire and as set out in the table at paragraph 10.3 of the· final survey report (page 60 of Volume I of Claimant's documents)?

Ans No. It is not correct as we physically inspected every nook and corner of the insured plant, but could not ascertain the existence of any WIP stocks because of the insured's inability to provide relevant records.

0.159 How much WIP did you physically find upon inspection in the aftermath of fire?

Ans As stated earlier, in the absence of any relevant records pertaining to WIP stocks, we did not find any WIP stocks in the aftermath of fire.

0.160 Do you mean to say that upon physical inspection, you could not find any WIP anywhere in the factory?

Ans I mean to say that the physical inspection, during the course of insurance survey, is based on the insured providing necessary records which establish the existence of stocks to be inspected. In this case, since no such records were provided by the insured, we could not physically verify the WIP.

Per Tribunal:

Q. Did you enquire from the Claimant as to where was the saved WIP stock as mentioned in para 10.3 of the final survey report and if so what was the explanation?

Ans Yes, we enquired from the insured as to where was the saved WIP stock and the insured could never lead us to any such place and show us such saved WIP stock.

Q. Was this observation made in your report?

Ans No."

108. Furthermore, we find that RW-I has also attempted to assert that the WIP claim was given up by the Claimant itself. RW-1 was questioned on his Letter dated 12.12.2012, wherein no further details qua WIP have been sought, the implication being that by that date he had already decided to disallow the said claim (q.224). In response, RW·I asserts that *"during our visit between 5th December to 9th December, 2012, the insured's team dealing with the claim gave us this understanding that they will not be pursuing the WIP part of the claim",* yet somehow this aspect has not been mentioned in the Final Survey Report or anywhere in either the SOD, or communications/documents on record. Thus, we find glaring inconsistencies in the testimony of RW-1, and find that the Claimant has proved that in fact WIP was generated, and destroyed in the fire and that all such records had been provided to the Surveyor, which failed to analyse the same, and has perfunctorily refused the said claim.

109. The Respondent has also raised other grounds objecting to the Claimant's claim, namely, the use of the terms "batch conversion" in the ERP and a column titled "MOV" in the derivative chart of ERP annexed by the Claimant along with its Evidence Affidavit. However, we find that the said terms have been satisfactorily explained by CW -1 during cross examination in response to question 367 (per tribunal, on MOV) and Q. 418422 (on Batch conversion). Moreover, we find that such objections are a smokescreen used by the Respondent, to attempt to cover for the fact that in fact, the Surveyor, abdicated his duty to properly examine the Claimant's claim under WIP because he failed to properly analyse the ERP data with respect to the same.

110. In terms of relief, we find that although the Claimant has raised a Claim of 50.77 crores towards WIP, in its Final Claim Bill (which was what the Surveyor was to base his assessment of loss on) dated 02.02.2013, the said claim had been reduced to 36.17 crores. The explanation given by the claimant for the same is that it was forced to do the same, because it was told that its claim would only he allowed if the same is reduced and the books manipulated to reflect the amount of Rs.36.17 crores as opposed to the original Rs.51 crores claimed under WIP. The same I find to be a rather serious allegation, without any substantiation -and neither is the same pleaded in the SOC. Thus, I find that it would be appropriate for the Claimant to receive only the amount claimed in the Final Claim Bill, i.e, and amount of Rs. 36.17 crores towards WIP.

111. Thus, Claim V is decided in favour of the Claimant, and it is decided that the Claimant is entitled to an amount of Rs. 36.17 crores on account of loss due to destruction of its WIP."

Submissions of NIA

87. The learned SG, appearing for NIA raises, as his first contention to contest the impugned Award insofar as it allows Khanna's claim towards loss of WIP, that Khanna was repeatedly changing the basis of its claim. It is submitted that (i) in email dated 19th June 2012, Khanna had informed that "material kept for re-pulping 17,387 empty approx", valued at ₹51 crores, was lost in fire, (ii) the interim survey report dated 20th June 2012 of the surveyor recorded Khanna's case to be that 17,387 empty rejected manufactured paper, kept in the open stockyard for re-pulping, had been lost in the fire, (iii) in the letter dated 1st September 2012, Khanna referred to rejected manufactured paper as the WIP, (iv) in the claim form dated 1st September 2012, submitted by Khanna, the WIP was said to comprise "newsprint, paper and board kept for re-pulping or selling at reduced prices", (v) in the final survey report dated 7th March 2013, it was noted that Khanna was referring to rejected goods kept for re-

pulping/selling as seconds as the WIP and (vi) before the learned Arbitral Tribunal, the WIP was stated to be the difference between the quantity of goods produced and the quantity of goods released for sale. Khanna, therefore, was alternately referring, at various stages when it claimed loss on account of WIP, to material kept for re-pulping and to finally produced goods, by the said appellation. In this context, the learned SG sought to point out that, in its final survey report dated 7th March 2013, the surveyor rejected Khanna's claim for compensation against loss of WIP on the ground that no separate record of WIP stock was maintained by it and no records, for movement of WIP from the production buildings to the open stockyard was given. This, contends the learned SG, constituted a valid reason for rejecting Khanna's claim for loss on account of WIP, which could not have been revisited by the learned Arbitral Tribunal.

88. Reverting to his contention that Khanna was prevaricating on the nature of the WIP, the learned SG submitted that while, till the arbitral proceedings, WIP, as according to Khanna, referred to rejected goods, the impugned Award notes Khanna's contention that WIP was in the nature of smaller reels of manufactured paper not yet ready for dispatch, which could be worked out by subtracting the "Batch Released" figure from the "Batch Certification" figure. On this aspect being brought to the attention of CW-1 in cross examination, the learned SG points out that his answer was that Khanna could "have used a better language to explain WIP". CW-1 Saurabh Khanna acknowledged being unable to explain this discrepancy, as the "WIP" phrase was used by the finance department. The learned SG relied, for this purpose, on questions 295 and 296 as posed to CW-1 and his responses thereto, which read thus:

"Q.295 Is it your case that you used the phrase "re-pulping" because of some pressure from the Surveyor?

Ans. Our Finance Department has used this phrase and I cannot comment on it.

Q.296 I suggest to you that 7 days after the fire, the Claimant described WIP as material kept for re-pulping and today as an afterthought you are blaming the Finance Department for misusing the phrase. What have you to say?

Ans. I disagree. The Finance Department could have explained it better."

A new claim, according to Section 64UM of the Insurance Act, 1938 was required to be first assessed by an IRDAI License Surveyor, before it could be cleared. That process of assessment, submits Mr. Mehta, could not have been conducted by the learned Arbitral Tribunal.

89. Mr. Mehta submits that, though the discrepancy between the nature of the WIP claim, as raised in the pre-arbitral communications and deliberations vis-a-vis the claim as postulated by Khanna before the learned Arbitral Tribunal, was specifically underscored by NIA in its submissions in arbitration and noted in the impugned Award, the learned Arbitral Tribunal has not returned any finding thereon. In this context, Mr. Mehta has drawn attention to para 103 of the impugned Award, which faults the surveyor for having only treated WIP as waste which was re-pulped, without "looking into the question of the clear difference between Batch Certification and Batch Released as seen in the ERP". The learned SG submits that the entire argument of WIP being an amount derivable by subtracting Batch Released from Batch Certification being an argument which was raised for the first time before the learned Arbitral Tribunal, the surveyor could not have possibly examined that issue. The

learned SG also characterized the findings of the learned Arbitral Tribunal, based on the site visit conducted on 26 April 2017, as presumptuous.

Submissions of Khanna

90. Mr. Dutta, arguing on behalf of Khanna, echoes the finding of the learned Arbitral Tribunal that the surveyor was unjustified in observing that no separate records of WIP were maintained by Khanna, without taking into account the fact that the WIP quantity could easily be derived from the ERP record by subtracting the "Batch Released" figure from the "Batch Certification" figure. The sanctity of the ERP record, points out Mr. Dutta, has never been questioned. Mr. Dutta has also relied on the response of the surveyor as RW-1, during cross examination, to question no.158 posed to him, which reads thus:

"Q.158 Would it be correct to say that factually, no physical verification or inspection was conducted to ascertain the existence of more than 700MTs of WIP stated to have been saved in the fire and as set out in the table at paragraph 10.3 of the final survey report (page 60 of Volume I of Claimant's documents)?

Ans No. It is not correct as we physically inspected every nook and corner of the insured plant, but could not ascertain the existence of any WIP stocks because of the insured's inability to provide relevant records."

91. Mr. Dutta also underscores the findings, of the learned Arbitral Tribunal, in paras 106 to 108 of the impugned Award, highlighting the inconsistencies in the deposition of the surveyor in cross examination. CW-1 Saurabh Khanna in his affidavit in evidence, submits Mr. Dutta had clearly explained the manufacturing process and the manner in which WIP was generated. Para 30 of the written submissions filed by Khanna after conclusion of hearing sought to explain the manner in which WIP was worked out, thus:

"30. The Arbitral Tribunal has dealt with the findings of the surveyor on WIP at Paras 103-104 of the award (Pages 57-59 of the Petitioner's documents) and has noted that the entire assessment is clearly done in a perfunctory manner. Further, the Arbitral Tribunal noted that the Respondent's case was that the WIP records could be deduced from the ERP record itself through an analysis. It is submitted that the Respondent has installed at its premises 4 major machines, which includes 2 machines for production of board, 1 for paper and 1 for newsprint. The said pulp which is generated is transferred to the relevant machine depending on what the final product is. The relevant machine converts the pulp into Paper/board/ Newsprint in the form of Jumbo Reels. At this stage, the Respondent issues a certificate to the effect "Batch Certificate" and a corresponding entry is made in the ERP system. After formation of the Jumbo Reel, depending on the orders received and demand in the market, the said jumbo reel is subjected to two other processes. Usually, the customers either order for paper in the form of reels or in the form of sheets. The re-winder machine/sheeter machine cuts the jumbo reels into smaller reels and/or sheets, which are then subsequently dispatched to the customer. On dispatch of the goods, the Respondent issues a certificate for "Batch release" and a corresponding entry to this effect is made in the ERP System. The difference between Batch certificate and Batch Release is the value of WIP. This analysis was never carried out by the surveyor, even though the Respondent had provided the entire ERP record and also provided the calculation, which was filed in the arbitral proceedings as well."

92. Mr. Dutta has also sought to justify the Award, by the learned Arbitral Tribunal, of ₹36.17 crores against Khanna's claim towards loss of WIP by submitting that while, initially, the claim towards loss of WIP was reckoned on the basis of unsold finished goods which were valued at ₹50.77 crores, on the insistence of the surveyor, the claim

was reduced to ₹36.17 cores at pulp value. This figure, it is submitted, was borne out by the provisional trading account of Khanna supported by the certificate of its chartered accountant. Mr. Dutta submits that the documents filed by Khanna, read with the ERP record which was filed before the learned Arbitral Tribunal, could easily work out the quantity of WIP. This quantification, it is sought to be submitted, being derived from the ERP record, could not be questioned.

93. In these circumstances, submits Mr. Dutta, no case for interference with the findings of the learned Arbitral Tribunal, insofar as it has allowed Khanna's claim for loss of WIP in the fire, can be said to exist.

94. The possibility of WIP having been lost in the fire which took place on 12th June 2012 cannot be gainsaid. It is difficult to believe that there was no WIP which was destroyed in the fire. The final survey report dated 7th March 2013, too, does not hold that there was no WIP loss in the fire which took place on 12th June 2012. The surveyor has rejected Khanna's claim, essentially on the ground that requisite data had not been produced by Khanna, on the basis of which the claim could be awarded. The learned SG has, in this context, adverted to the communications addressed by the surveyor to Khanna, in which data was sought which, according to him, were not answered.

95. In order to be entitled to any award towards loss on account of WIP, it goes without saying that Khanna would not only have to establish that such loss took place, but would also have to establish the quantity of WIP which was lost. The onus, in respect of both of these aspects, would rest with Khanna, being the claimant. Even if, therefore, one were to presume that some amount of WIP must have been lost in the fire which took place on 12th June 2012, unless and until the quantity of WIP could be definitively ascertained, no award of any amount could have been made in favour of Khanna by the learned Arbitral Tribunal, as it is well settled that an arbitral tribunal cannot proceed on assumptions and presumptions. Even if, therefore, the fact of loss of WIP in the fire which took place on 12th June 2012 were to be taken as incontrovertible, that fact alone would not entitle Khanna to an award towards such loss of any amount whatsoever, unless and until such amount could definitively be found by the learned Arbitral Tribunal to represent the loss which took place. No amount can be granted by an arbitral tribunal gratis, or as a matter of charity. Damages, if granted, have to be capable of positive quantification.

96. That exercise, unfortunately, has not been conducted by the learned Arbitral Tribunal in the present case. Indeed, in the entire impugned Award, no justification for the decision of the learned Arbitral Tribunal to award, to Khanna, ₹36.17 crores towards loss of WIP in the fire, is to be found. A reading of para 110 of the impugned Award, in fact, clearly reveals that the learned Arbitral Tribunal has not applied its mind to Khanna's entitlement to ₹36.17 crores towards loss in WIP. If the learned Arbitral Tribunal was to award ₹36.17 crores, the impugned Award should at least have contained the reasoning, if not the calculation, on the basis of which the figure of ₹36.17 crores could be arrived at. Clearly, the impugned Award is lacking in this respect.

97. I felt it necessary to advert to the findings of the learned Arbitral Tribunal on the aspect of the WIP loss, as, in my view, a reading of the said findings makes it clear that the decision to award, to Khanna, ₹36.17 crores towards WIP is completely bereft

of reasons. If one were to go, para to para, from paras 96 to 111 of the impugned award, the following position emerges:

(i) Para 96, to the extent it is relevant, merely notes the fact that WIP was an inevitable incidence of the manufacturing process and gives voice to the opinion of the learned Arbitral Tribunal that some WIP must have been destroyed in the fire which took place on 12th June 2012.

(ii) Para 96 sets out initially the basis of Khanna's claim against loss in WIP, which is that, by subtracting, from the figure of "batch certification", the figure of "batch released", one would be able to arrive at WIP. Learned SG has emphasised the fact that the claim for WIP as thus urged before the learned Arbitral Tribunal was completely contrary to the claim for WIP as contained in the notice invoking arbitration and even in the statement of claim filed by Khanna in the arbitral proceedings. I would advert to that aspect of the matter somewhat later.

(iii) Even if it were to be assumed that the difference between the figure of "batch certification" and "batch released" represents WIP, the corollary would be that, in order to claim loss towards WIP on 12th June 2012, the "batch certification" and "batch released" figures as on 12th June 2012 ought to have been found mentioned in the impugned award. They are not, however, forthcoming.

(iv) Rather, the only two pieces of evidence, on which Khanna relied, to support its claim for loss on account of WIP, which relate to the WIP as on the date of fire i.e. 12th June 2012, were the bank stock statement as on 31st May 2012 and the Provisional Trading Account as on 11th June 2012. There was a vast difference between the figures of WIP reflected in these two statements. The bank stock statement reflects the figure of WIP as on 31st May 2012 to be worth ₹62.83 crores, whereas the provisional trading account reflected the WIP to be ₹48.26 crores. Though Khanna also relied on a CA certificate reflecting the WIP as on 11th June 2012 to be ₹48.26 crores, the CA was not produced in the witness box, so that this discrepancy could be resolved.

(v) Significantly, the claim of Khanna towards WIP loss by fire as well as the amount awarded by the learned Arbitral Tribunal towards such loss, were considerably deviant from both these figures. Khanna claimed ₹50.77 crores in its final claim bill and reduced the claim, before the learned Arbitral Tribunal, to ₹36.17 crores. Neither of these figures can be treated as even proximate to the WIP loss as reflected in the bank stock statement or the provisional trading account on which Khanna relied. The learned Arbitral Tribunal proceeded to award neither the figure contained in the bank stock statement, nor the figure contained in provisional trading account nor the figure contained in the final claim bill raised by Khanna, but, rather, the claim of ₹36.17 crores, for which there is no material whatsoever even as per para 110 of the impugned award. Effectively, the learned Arbitral Tribunal has merely awarded Khanna whatever it sought.

(vi) Para 98 deals with the affidavit in evidence of CW-1 which again states that the WIP could be worked out as the difference between the figures of "batch certificate" and "batch released".

(vii) Para 99 explains what WIP is.

(viii) Para 100 merely holds that disallowance of Khanna's claim in its entirety would mean that either no WIP was lost or that no information regarding loss of WIP was

provided to surveyor, none of which could be accepted. This paragraph, too, therefore does not explain in any manner the the final award of loss towards WIP, by the learned Arbitral Tribunal, of ₹36.17 crores.

(ix) Paras 101 and 102 set out the stand of NIA on the claim of Khanna towards loss of WIP.

(x) Paras 103 to 106 criticise the approach of the surveyor, and the manner in which he had proceeded to reject Khanna's claim for loss of WIP.

(xi) Paras 107 and 108 hold that there were glaring testimonies in the evidence of RW-1.

(xii) Para 109 rejects the NIA's contention to a column titled "MoV" in the derivative charge of ERP annexed by Khanna which is not of particular significance.

(xiii) Thereafter, para 110 proceeds to deal with the relief to be granted to Khanna. The learned Arbitral Tribunal notes that Khanna originally raised a claim of ₹50.77 cores towards WIP in its final claim bill, and that, before the learned Arbitral Tribunal the claim was reduced to ₹36.17 crores. The learned Arbitral Tribunal does not provide any analysis as to whether the amount of ₹50.77 crores was correct, or not. In the entire impugned award, one does not find any finding that, by subtracting the figure of "batch released" from the figure of "batch certification" as on the date of fire i.e. 12th June 2012, one would arrive either at the figure of ₹50.77 crores or ₹36.17 crores. While, therefore, holding that the correct method of assessing loss towards WIP in the fire was subtracting the figure representing the "batch released" from the "batch certification", that exercise has not been carried out by the learned Arbitral Tribunal or, if it has, does not stand reflected in any paragraph of the impugned award.

(xiv) Instead, in a manner which, with greatest respect to the learned Members to the learned Arbitral Tribunal, the law cannot countenance, the learned Arbitral Tribunal has proceeded, without even examining the correctness thereof, to award to Khanna, its claim of ₹36.17 crores.

(xv) Clearly, the manner in which the award of ₹36.17 crores was granted by the learned Arbitral Tribunal cannot sustain on facts or in law. It is completely unreasoned. Para 110 of the impugned award notes the submission of Khanna that it had reduced the original claim of ₹50.77 crores to ₹36.17 crores only because it was forced to do so by NIA. That submission has been rejected by the learned Arbitral Tribunal in the impugned award. Having done so, it is not possible to understand how the learned Arbitral Tribunal proceeded to award ₹36.17 crores towards WIP loss.

98. For these reasons, I am of the opinion that the decision of the learned Arbitral Tribunal to award ₹36.17 crores to Khanna, cannot sustain.

99. I am of the opinion, with greatest respect to the learned Members of the Arbitral Tribunal, that the various contentions made by the parties before the learned Arbitral Tribunal have not been adequately addressed. Mr. Mehta is correct in his contention that there is no clear finding by the learned Arbitral Tribunal on NIA's objection to Khanna having changed its stance with respect to the nature of the WIP which was allegedly lost in the fire. Equally, I find myself in agreement with Mr. Mehta in his criticism of the observation, by the learned Arbitral Tribunal in para 101 of the impugned order, to the effect that the surveyor had not considered the fact that the quantity of WIP lost in fire could easily have been reckoned by subtracting, from the

Batch Certification figure, the Batch Release figure. Mr. Mehta has submitted, quite correctly, that this precise manner of working out the WIP did not find place in the communications addressed by Khanna to NIA prior to institution of the arbitral proceedings or even in the notice dated 3rd October 2013 under Section 21 of the 1996 Act, whereby Khanna initiated arbitral proceedings.

100. Before examining the correctness of Khanna's contention that the quantity of WIP lost could be worked out by subtracting the "Batch Release" figure from the "Batch Certification" figure, the learned Arbitral Tribunal ought to have first examined whether it was open to Khanna to so urge, without having raised such a plea in its Section 21 notice dated 3rd October 2013. It is trite that that arbitral proceedings commence with the notice issued under Section 21 of the 1996 Act. It is not open to a party, therefore, to make out, in its statement of claim before the learned Arbitral Tribunal, a case totally different from that which was urged in the Section 21 notice. According to Mr. Mehta, the claim towards loss of WIP, as set up by Khanna in its statement of claim before the learned Arbitral Tribunal, was completely alien, in nature, character and computation, to the claim as urged in its communications with NIA at the pre-arbitral stage. Mr. Mehta has sought to contend, relying on Section 64 of the Insurance Act that a fresh claim would first have to be assessed by the surveyor, before it could form subject matter of dispute in arbitration. This aspect would also required to be examined by the learned Arbitral Tribunal.

101. It was only, therefore, if the learned Arbitral Tribunal were to hold, in the first instance, that it was open to Khanna to urge, before it, that it was entitled to claim WIP loss on the basis of the difference between the "Batch Certification" and "Batch Release" figures, as purportedly found place in its ERP record, that the learned Arbitral Tribunal could proceed further to examine on facts whether the said claim was actually supported by the said figures.

102. In the present case, the learned Arbitral Tribunal appears to have concentrated on what it felt to the errors in the approach of the surveyor in his final survey report. Even if it were to be assumed that the surveyor, in his final survey report, had, without due justification, rejected Khanna's claim for WIP loss in the fire, that would not, *ipso facto*, entitle Khanna to its claim. The learned Arbitral Tribunal would, thereafter, have to clearly set out the basis for awarding the amount that it ultimately chose to award. At the cost of repetition, that exercise is wanting in the impugned Award. Admittedly, the only paragraph of the impugned Award which deals with the actual amount to be awarded to the learned Arbitral Tribunal is para 110. All that is to be found in para 110 is the fact that, while Khanna initially claimed ₹50.77 crores, it had subsequently reduced its claim to ₹36.17 crores at the insistence of the surveyor. The claim of ₹50.77 crores is not supported by any of the data on which Khanna sought to rely. The learned Arbitral Tribunal proceeded to award, not ₹50.77 crores, but ₹36.17 crores. There is no discussion, in the impugned Award, as to how the figure of ₹36.17 crores represents the actual WIP loss suffered by Khanna in the fire. The learned Arbitral Tribunal, if it found that Khanna was entitled to WIP loss in the fire that gutted its premises, was empowered to award only the actual amount of such loss, and not any amount either above or below that amount.

103. While, therefore, the impugned Award, insofar as it awards ₹36.17 crores to Khanna against WIP loss stated to have been suffered by it in the fire which occurred on 12th June 2012, cannot sustain, the matter, in my opinion, would required to be re-examined by the learned Arbitral Tribunal after considering all the contentions of both

the parties, including the merits of NIA's contention that Khanna's claim before the learned Arbitral Tribunal towards WIP loss was liable to be rejected as it was completely different, in character, from the claim towards WIP loss as made by Khanna in its pre-arbitral communications to NIA as well as in its notice invoking arbitration. In case the learned Arbitral Tribunal finds the claim to have been maintainable, then the learned Arbitral Tribunal would have to examine whether the material on record made out the claim of Khanna in the arbitral proceedings.

104. For this purpose, I deem it appropriate to relegate the parties to *de novo* arbitration on this aspect, in case Khanna so chooses. Else, the impugned Award, insofar as it awards ₹36.17 crores to Khanna towards WIP loss in the fire, would stand set aside.

Re: Claims I - IV relating to destruction of raw material, indigenous as well as imported

105. The dispute related only to the computation of the amount to be awarded against the loss suffered by Khanna. There was no dispute that loss was suffered. Equally, there is no dispute about the quantity of loss suffered. The dispute was only with respect to the manner in which the amount to be awarded was to be worked out. Khanna contended that the loss had to be worked out on the basis of the value of the replacement raw material, which had to be sourced by it to make up for the raw material lost in fire. NIA contended, *per contra*, that the loss would have to be reckoned on the basis of the cost price of raw material which was lost in fire. NIA recompensed Khanna for the loss of raw material, but on the basis of the cost price of the raw material. The difference between this amount, and the amount worked out by Khanna on the basis of the replacement value of the raw material constituted subject matter of Claims I to IV, with Claim I relating to imported new print, Claim II relating to other imported paper, Claim III relating to imported pulp and Claim IV relating to local waste paper.

106. Additionally, NIA had reduced, from the damaged stock quantity of raw material, 1% to 2%. The justification of the said reduction was also, therefore, subject matter of dispute in Claims I to IV.

107. On the first aspect, i.e. the aspect of the manner in which the loss was to be computed, the learned Arbitral Tribunal noted, initially, the judgment of this Court in ***Oriental Insurance Company Ltd v. Ram Asrey Pandey***[35], which held that an insurance contract was a contract of indemnity. The learned Arbitral Tribunal observed that the purpose of granting insurance against loss suffered was to indemnify the person and to place him in the position in which he would have been, had he not suffered the loss.

108. Having so observed, the learned Arbitral Tribunal proceeded to refer to the terms of the IAR policy and, in this context, reproduced Clauses 5, Annexure I, general conditions and the special conditions forming subject matter of IAR policy, thus:

"i. "5: Sum Insured

a) **The policy in so far as it relates to Buildings, Machinery Furniture, Fixtures, Fittings & Electrical Installations shall be on Reinstatement Value basis only, while the Stocks shall be covered on Market Value basis**. However, the facility of declarations for stocks shall not be available under the IAR Policy.

[35] ILR (2007) I Delhi 45

b) The Policy shall be subject to condition of average. However, Under Insurance on each item of the schedule will be ignored if it does not exceed 15% threat."

ii. Annexure I-Industrial All Risks Policy

"Section 1- Material Damage:

...the insurer will pay to the insured the value of the property at the time of the happening of its accidental physical loss or destruction (being hereinafter termed accidental physical loss or destruction or damage) **or at its option reinstate or replace such property or any part thereof"**

Provided that the liability of the Insurer in respect of any on loss or in the aggregate in any one period of insurance shall in no case exceed:

i. **As regards buildings, plants and machinery, furniture fixture fittings etc. the cost of replacement or reinstatement on the date of replacement or reinstatement** subject to the maximum liability being restricted to the sum insured in respect of that category of item under the policy.

ii. **As regards stocks, the market value of the same** not exceeding the sum insured in respect of that category of item under the policy".

iii. General Conditions:

"**8. If the Company, at its option, reinstate or replace the property damages or destroyed, or any part thereof Instead of paving the amount of the loss or damage...the Company shall not be bound to reinstate exactly or completely but only as circumstances permit and in a reasonably sufficient manner**, and in no case shall the Company be bound to expend more in reinstatement than it would have cost to reinstate such property as it was at the time of the occurrence of such lass or damage nor more than the sum insured by the Company thereon."

iv. Special Conditions to Section I

1. "Sums Insured

It is a requirement of this insurance that the sums insured stated in the Schedule shall not be less than the cost of reinstatement as if such property (except for stocks) were reinstated on the first day of the Period of insurance **which shall mean the cost of replacement of the insured items by new items in a condition equal to but not better or more extensive than its condition when new."**

2. **Basis of loss settlement**

In the event of any loss destruction or damage the indemnification under this section shall be calculated on the basis of reinstatement or replacement of the property lost destroyed or damaged, subject to the following provisions:

2.1 Reinstatement or replacement shall mean:

1. where property is lost or destroyed, the rebuilding of any buildings or the replacement of any other property by similar property, in either case in a condition equal to bur not better or more extensive than its condition when new

2. where property in damaged, the repair of the damage and the restoration of the damaged portion of the property to a condition substantially the same as but not better or more extensive than its condition when new."

109. The learned Arbitral Tribunal holds that, while Clause V of the IAR policy envisaged coverage of stocks, under the policy, on market value basis, Section (I) to the IAR policy read with Special Condition 2 applicable to stocks indicated that indemnification of loss stocks "shall be calculated on the basis of reinstatement or

replacement of the property lost destroyed or damaged". Thus, holds the learned Arbitral Tribunal, Khanna would be entitled to be reimbursed the loss suffered by it on account of raw material destroyed in the fire on replacement/reinstatement basis. The closest alternative to the replacement value of the stocks, holds the learned Arbitral Tribunal would be the value of the stocks on the date of fire, i.e. 12th June 2012. In this context, the learned Arbitral Tribunal has also relied on the admission by RW-1 in the cross-examination that there was no real difference between "market value" and "reinstatement value".

110. It is on this basis that the learned Arbitral Tribunal has proceeded to award Claims I to IV of Khanna, as raised before the learned Arbitral Tribunal.

111. Though no oral arguments were advanced by Mr. Mehta on Claims I to IV of Khanna as held by the learned Arbitral Tribunal in the impugned award, NIA has, in its written submissions, contested the said award. The only submission of NIA, in that regard, is that Khanna had not led evidence to prove that the quality of waste paper which was destroyed was the same as the quality which was replaced. NIA has sought to contend that there was large variation in the grades and quality of waste paper imported and that "no records of these grades/sub-grades were available so as to determine what was replaced was the same quality as what was burnt".

112. The learned Arbitral Tribunal has dealt with this aspect in paras 89, 90 and 93 of the impugned award, which read thus:

"89. Having admitted that the destroyed stocks were to be indemnified on the market value, and having admitted that the details of the purchase of the destroyed stock after the fire had been provided to the Respondent, it is completely impermissible for the Respondent to base the assessment on historical acquisition cost. We find force in the Claimant's submission that in p. 47 of the Final Survey Report itself, the seeming difficulty in synchronizing the quality parameters with the rates has been dealt with by holding that the analysis can be done on the basis of the total quantity of imported paper, irrespective of the grades. The Final Survey report has also taken into account the consumption trend and rate trend of imported waste paper prior to the fire and has noted that the High Rate period was August - October 2011, while the low rate period was November - December 2011 and February 2012. It *is* the Claimant's case that the imported waste paper rate again started increasing from March 2012, which has also been duly noted by the Surveyor. In our view the Respondent has tried to raise an irrelevant consideration regarding the alleged nonavailability of information regarding the quality of paper destroyed, and purchased after the fire. Moreover, since the Surveyor had information regarding the purchase orders/invoices placed closest to the date of the fire, the same should have been used to determine the prevailing rate.

90. Therefore, we are in agreement With the Claimant that the Final Survey Report has erred in the prevailing rate taken to assess the loss in terms of raw material destroyed. Furthermore, practice it is established that the indemnification is to be on reinstatement value of the stocks, it follows that the exchange rate to be .used Is the rate as on the date of the fire (i.e. Rs. 56.05 per USD) and not the historical rate of Rs. 51.93 per USD.

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93. It is clear that no reference point has been taken by the Surveyor to surmise that the raw material prior to the fire itself was lost to the said extent from the Book Value. During his Crossexamination as well, RW-1 has not been able to explain the basis for reaching the said figure, except to baldly state (in response to Q. 421) that the said amount is based on para 10.4 (which. as stated above - does not provide any reasoning for quantifying the said loss at the said percentages, and (in response to Q.422), that the said conclusion is based on "unwritten industry protocols." In the absence of any material whatsoever with respect to the

said protocols which led the surveyor to conclude losses of 1% and 2% over book value of the storks, one can only conclude that the said figures are completely arbitrary, which is impermissible."

113. The assessment made by the learned Arbitral Tribunal, in the afore-extracted paragraphs from the impugned award, is a realistic assessment. There is no real contest to the said manner of assessment either in the oral arguments or in the written submissions tendered by NIA.

114. Nor has NIA, either orally or in writing, questioned the decision of the learned Arbitral Tribunal to reject NIA's reduction of the quantity of raw material lost by 1% to 2%.

115. In that view of the matter, there is no justification, within the limited peripheries of Section 34 of the 1996 Act, to interfere with the impugned award, insofar as it allows Claims I to IV of Khanna. The award to the said extent, therefore, stands upheld.

Re: Claim XII – Claim of Khanna for additional interest @ 2% above the prevailing the bank rate under Section 9 of IRDA Regulations

116. Khanna claimed, as Claim XII before the learned Arbitral Tribunal, interest on the amount awarded to it, @ 2% over and above the bank rate of interest relying, for the said purpose, on Regulations 9(5) and 9(6) of the IRDA Regulations. These regulations read thus:

"9(5) On receipt of the survey report or the additional survey report, as the case may be, an Insurer shall within a period of 30 days offer a settlement of the claim to the insured. If the insurer; for any reasons to lie recorded in writing and communicated to the insured, decides to reject a claim under the policy, it shall do so within 30 days from the receipt of the survey report or the additional survey report; as the case may be.

9(6) Upon acceptance of an offer of settlement as stated in subregulation (5) by tile insured, the payment of the amount due shall be made within 7 days from the date of acceptance of the offer by the insured. In case of delay in the payment, the insurer shall be liable to pay interest at a rate which is 2% above the bank rate prevalent at the beginning of the financial year in which the claim is reviewed by it."

117. The impugned award, qua Claim XII of Khanna, has awarded interest @ 2% above the bank rate by invoking, for the purpose, Regulation 9(6) of the IRDA Regulations.

118. NIA had contended before the learned Arbitral Tribunal that Regulation 9(6) was not applicable, as it applied in the case of delay in making payment beyond seven days from the date of acceptance of settlement. The settlement in the present case having been accepted on 29th May 2013, and the amount remitted on 31st May 2013, Khanna contended that there was no delay on his part, as would attract the provision of penal interest contained in Regulation of 9(6) of the IRDA Regulations.

119. In dealing with this contention, the learned Arbitral Tribunal has held, in para 157 of the impugned award, thus:

"157. While the plain reading of the said Clause 9(6) would seem to indicate that the specific interest stated therein is applicable only in cases where there has been a delay of more than 7 days between acceptance of offer of settlement and payment of the said amount, it is also clear from the facts of the present case that there has been a clear Violation of Clause 9(5) on both counts: The, delay of almost 3 months in finalizing the Survey Report, and also a delay in making the offer of settlement after submission of the survey report, all of which lead

to the Claimant being forced to sign the Blank purported Joint Discharge Voucher; as has been discussed above. The claimant, in such a situation cannot he left remediless."

120. Any finding of the learned Arbitral Tribunal which is contrary to the applicable contractual provisions cannot sustain, on the anvil of the law laid down in the decisions already cited in para 62 and 72 *supra*. Regulation 9(6) clearly applies only where there was delay of more than seven days between the acceptance of settlement and remittance of the amount to the insured. The learned Arbitral Tribunal has noted the fact that, in the present case, the terms of settlement had been accepted, by execution of the Joint Discharge Voucher on 29th May 2013, and the payment, in terms thereof, had been made to Khanna within a week thereof on 31st May 2013. Even so, the learned Arbitral Tribunal has nonetheless invoked Regulation 9(6) on the ground of delay, on NIA's part, in finalizing the survey report and in making the offer of settlement after submission of the survey report.

121. Neither of these considerations constitutes a basis for charging higher penal interest under Regulation 9(6). The only ground on which higher penal interest can be charged under Regulation 9(6) is where there is a delay between the finalization of the terms of settlement and remittance of the amount thereunder to the insured, beyond the period of seven days therefrom. Admittedly, no such delay had occurred. Regulation 9(6) did not, therefore, apply.

122. It was completely impermissible, on the part of the learned Arbitral Tribunal, to conflate Regulations 9(5) and 9(6) and thereby incorporate, into Regulation 9(6), the provisions of Regulation 9(5). The two provisions operate in independent spheres. The learned Arbitral Tribunal has not even sought to hold, as a principle of law, that the two provisions could be conflated. Nonetheless, it has chosen to do so, only on the reasoning that Khanna could not be left remediless having been forced to sign the blank Joint Discharge Voucher.

123. This would amount to the learned Arbitral Tribunal doing charity beyond the expressed statutory terms, which is completely impermissible in law and constitutes a patent error which would vitiate the arbitral award in terms of Section 34 of the 1996 Act.

124. The learned Arbitral Tribunal has also proceeded to rely on two decisions of the IRDA in the cases of United India Insurance Company and the New India Insurance Company Ltd, neither of which was provided to NIA before the impugned order was passed. Even on this ground, therefore, the decision of the learned Arbitral Tribunal qua Claim XII of Khanna cannot sustain.

125. The impugned award in respect of Claim XII of Khanna is, therefore, set aside.

126. There has been no challenge, by NIA, to the impugned award qua Claims VII, VIII, IX and X, XI of Khanna. Claim XII of Khanna was rejected by the learned Arbitral Tribunal.

Conclusion

127. In that view of the matter, the present petition is disposed of in the following terms:

(i) The findings of the learned Arbitral Tribunal on the preliminary issue relating to the claim of Khanna having been discharged by accord and satisfaction, is upheld. It

is, therefore, held that the claims of Khanna before the learned Arbitral Tribunal were not discharged by accord and satisfaction.

(ii) The impugned award, *qua* Claims I – IV of Khanna is upheld.

(iii) The impugned award, qua Claim V is quashed and set aside and remanded, for which purposes, the parties would be at liberty to institute fresh arbitral proceedings for reconsideration of the said claim.

(iv) Claim VI was never awarded by the learned Arbitral Tribunal.

(v) The impugned award qua Claims VII – X is upheld, in the absence of any challenge by NIA.

(vi) The impugned award, qua Claim XI is upheld, as the said claim was rejected and Khanna has not chosen to challenge the award.

(vii) The impugned award, qua Claim XII is quashed and set aside.

128. This petition along with miscellaneous applications, if any, stand disposed of in the aforesaid terms with no order as to costs.