IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO.375 OF 2024

New India Assurance Co. Ltd. ...Petitioner

V/s.

Shirdi Industries Limited ...Respondent

WITH

INTERIM APPLICATION (LODGING) NO.7794 OF 2024
IN
ARBITRATION PETITION NO.375 OF 2024

Shirdi Industries Limited ...Applicant

In the matter between

New India Assurance Co. Ltd. ...Petitioner

V/s.

Shirdi Industries Limited ...Respondent

Mr. R.S. Vidyarthi *with Mr. Mohit Turakhia i/b. Mr. Asim S. Vidyarthi for the Petitioner and for the Respondent in IAL/7794/2024.*

Mr. Rohan Savant *with Mr. Abirban Sen and Mr. Ranjan Dwivedi for Respondent in ARBP/375/2024 and for the Applicant in IAL/7794/2024.*

CORAM: SANDEEP V. MARNE, J.

JUDGMENT RESERVED ON: 27 NOVEMBER 2025.
JUDGMENT PRONOUNCED ON: 09 DECEMBER 2025

Judgment:

1) Petitioner-Insurance Company has filed the present Petition under Section 34 of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**) challenging unanimous Award of the Three-Member Arbitral Tribunal dated 20 September 2022. By the impugned Award, the Tribunal has awarded a sum of Rs.30,99,555/- in favour of the Respondent alongwith interest @ 12.5% p.a. from 16 August 2016 till realisation. The Arbitral Tribunal has also awarded costs of Rs.29,44,021/- to the Respondent.

2) Petitioner is a nationalised general insurance company. The Respondent is an incorporated entity engaged in manufacturing of various types of wooden boards. The Respondent has its manufacturing plants at Pantnagar (Uttarakhand), Coimbatore (Tamilnadu) and Bhiwandi (Maharashtra). The Respondent availed insurance cover under the Policy named -Industrial All Risk Policy dated 7 February 2015 from the Petitioner, which covered its factory at Pantnagar (Uttarakhand). On 6 April 2015 a fire broke out in Respondent's plant at Pantanagar. The fire took place in the hot press loader and un-loader section of MDF production. Although the main plant was not damaged, there was substantial damage to the parts and components and some damage was also caused to six Platens and there was loss of Hydraulic Oil and Thermic Fluid. On the date of the incident, Respondent informed the Petitioner about the same. As per the provisions under Section 64-UM of the Insurance Act, 1938 (**Insurance Act)** a Surveyor was appointed by the Petitioner for assessment of loss/damage caused to the Respondent. On 8 April 2015, the Surveyor carried out first physical verification of the affected

site. The Surveyor visited the site on 6th and 7th July 2015 for second verification. He thereafter visited the affected site on 13/14th April 2016 for the third time. On 30 May 2016, Surveyor issued final survey report assessing net loss payable by the Petitioner to the Respondent at Rs.39,82,897/-. Petitioner paid to the Respondent sum of Rs.31,91,305/-. The Respondent invoked arbitration clause and a three-member Arbitral Tribunal was constituted by the Respondent comprising of former Chairman and former Assistant General Manager, who in turn nominated the Presiding Arbitrator. The Respondent filed Statement of Claim claiming sum of Rs.55,07,924/- in following terms:-

SR.	Particulars	Org. Amount claimed	Amount allowed	Difference now claimed
a)	Under Insurance	-	-	9,42,760
b)	Platens	12,00,000/-	0	12,00,000
c)	Oil	37,89,756/-	7,35,840/-	30,53,736
d)	VFD AC Drive	2,83,250/-	0	2,83,250
e)	Pressure Tranducer(Transmeter)	28,178	0	28,178
			Total Rs.	55,07,924

3) The Petitioner filed its Statement of Defence. Upon completion of the pleadings, the Arbitral Tribunal in its second meeting opined that appointment of Expert was warranted and proceeded to finalise the points for determination. Petitioner objected to appointment of Expert and the objection was rejected by the Arbitral Tribunal. By order dated 25 March 2018, Arbitral Tribunal appointed Mr. Milind Bhatavdekar, as an Expert. The Expert visited the site of the incident and prepared report dated 31 August 2018. The Expert also participated in the meeting of Arbitral Tribunal. The

Respondent filed affidavit of evidence. Petitioner also examined witnesses. The Expert appointed by the Arbitral Tribunal was also questioned by the Tribunal.

4) The Arbitral Tribunal thereafter made an Award dated 20 September 2022 partly allowing the claim of the Respondent. The Arbitral Tribunal has awarded total sum of Rs.30,99,555/- in favour of the Respondent in respect of following claims:

a) Platens a sum of Rs.9,39,000/-

b) Hydraulic Oil Rs.18,04,807/-.

c) Thermic Fluid Rs.8,47,896/-;

d) VFD AC Drive Rs.2,21,643/-

e) Pressure Transducer (Transmeter) Rs.22,049/-

5) Aggrieved by Award dated 20 September 2022, Petitioner-Insurer has filed the present Petition under Section 34 of the Arbitration Act.

6) Mr. Vidyarthi, the learned counsel appearing for the Petitioner would submit that the Arbitral Tribunal has erred in allowing the claims without any rationale. That the Arbitral Tribunal has erroneously disregarded the opinion of two domain Experts and has proceeded to allow the claims without any independent evidence. So far as the claim for Hydraulic Oil and Thermic Fluid is concerned, he would submit that the Arbitral Tribunal has erroneously rejected the testimony of Surveyor sanctioning 20% claim in respect of the Hydraulic Oil and Thermic Fluid. Without any logic the Arbitral Tribunal proceeded to appoint an Expert. That even Expert

recommended sanctioning of claim upto only 25%. However, the Arbitral Tribunal discarded the opinion of Surveyor and Expert and proceeded to award imaginary figure of 70% without there being any basis/rationale. That disregarding even opinion of Expert appointed by it would clearly constitute a patent illegality in the Award. Mr. Vidyarthi would further submit that by appointing an Expert, the Arbitral Tribunal disturbed the scheme of Section 64-UM of the Insurance Act, which envisages appointment of second Surveyor only by Insurance Regulatory and Development Authority of India (IRDAI). That no request was made by the Respondent for appointment of second Surveyor/Expert. He would rely upon judgment of the Apex Court in ***Sri Venkateshwara Syndicate Vs. Oriental Insurance Company Ltd. & Anr.***[1] in support of his contention that even Surveyor's report is not binding on the insurer, who can settle any claim on an amount different than the amount assessed by the Surveyor.

7) So far as the claim for Platens is concerned, Mr. Vidyarthi would further submit that the Arbitral Tribunal did not have the benefit of collecting any first-hand evidence of the site and proceeded to blindly accept the recommendations of the Expert in absence of any evidence on record. That the Surveyor had measured the proximate distance of VFD power supply and AC Drive and opined that same were situated at a distance from the place where fire took place. However, the Arbitral Tribunal ignored this fact based on evidence. That therefore sanction of claim towards VFD AC drive is also erroneous. Mr. Vidyarthi would rely upon the judgment in ***Khatema***

[1] (2009) 8 SCC 507

Fibers V/s. New India Assurance Company Ltd. and Another[2] in support of his contention that the Arbitral Tribunal has erred in branding Surveyor's report/ conduct as ad-hoc. That therefore the report of the Surveyor could not have been brushed aside by the Arbitral Tribunal. He would rely upon judgment of the Apex Court in *S.S. Cold Storage India Pvt. Ltd. V/s. National Insurance Company Limited*[3]. He would submit that the impugned Award clearly falls within the observations made by the Supreme Court in *PSA SICAL Terminals Pvt. Ltd. V/s. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin and Others*[4] wherein the test propounded in *Ssangyong Engineering and Construction Company Limited V/s. NHAI*[5] has been considered.

8) Mr. Viidyarthi would further submitted that since Expert was appointed by the Arbitral Tribunal under Section 26 of the Arbitration Act, the opinion expressed by the Expert could not have been discarded altogether and the Arbitral Tribunal could not have foisted its own opinion for awarding 70% claim for Hydraulic Oil and Thermic Fluid. On above broad submissions, Mr. Vidyarthi would pray for setting aside the Arbitral Award.

9) The Arbitration Petition is opposed by Mr. Savant, the learned counsel appearing for the Respondent. He would submit that the Arbitral Tribunal has rendered a well considered Award after based on material on record. The Award of the Arbitral Tribunal does not fall foul of any of the enumerated grounds under Section 34 of the

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2 2021 SCC OnLine SC 818
3 Civil Appeal No.2042 of 2012 decided on 8 August 2023
4 2021 SCC OnLine SC 508
5 (2019) 15 SCC 131

Arbitration Act. That by filing the present Petition, the Petitioner cannot urge before this Court to take a view different than the one taken by the Arbitral Tribunal. So far as Surveyor's opinion is concerned, Mr. Savant would submit that Section 64-UM of the Insurance Act provides for appointment of Surveyor in respect of loss exceeding to Rs. 20,000/-, report of the Surveyor is not binding either on the insured or insurer and that the same cannot be treated as sacrosanct nor the same is conclusive. That for legitimate reasons, Surveyor's report can be departed as held by the Apex Court in ***Sikka Papers Limited V/s. National Insurance Company Limited and Ors.*** [6]. He would also rely upon judgment of the Apex Court in ***New India Assurance Company Limited V/s. Pradeep Kumar***[7].

10) Mr. Savant would further point out discrepancies in the Surveyor's report. That he did not prepare any report during first site visit on 8 April 2015 nor signed joint inspection report prepared on 6 and 7 July 2015. That third site visit was paid by the Surveyor after delay of 13 months and 23 days. That instead of checking six Platens, which were damaged, the Surveyor checked only two and rejected the claim for Platens. That therefore the Arbitral Tribunal had justifiable reasons to depart from report submitted by the Surveyor. That the Expert appointed by the Arbitral Tribunal under Section 26 of the Arbitration Act is not akin to second Surveyor as contemplated under the Insurance Act. That the Arbitral Tribunal has recorded cogent reasons for not accepting opinion of Surveyor for 20% claim or of Expert for 25% claim. That the Arbitral Tribunal has considered various critical points and has thereafter proceeded to award 70% claim

6 (2009) 7 SCC 777

7 (2009) 7 SCC 787

for Hydraulic Oil and Thermic Fluid. That any deviation from findings recorded by the Arbitral Tribunal would amount to re-appreciation of evidence by this Court, which is not permissible under Section 34 of the Arbitration Act. In support of his contention that the Arbitral Tribunal has power to appoint Expert to acquaint itself with true and correct facts, Mr. Savant would rely upon judgments of this Court in ***Mahavirchand V/s. Akshay Kumar***[8], ***Zenobia Poonawala (Nee Jinwalla) V/s. Rustom Ginwalla and Others*** [9] and ***Sagarmal Chunnilal and Anr. V/s. Mr. Bhagwandas S. Gupta and Ors.***[10].

11) So far as sanctioning of the claim covering Platens is concerned, Mr. Savant would submit that the Arbitral Tribunal has sanctioned the same by relying on opinion and evidence of the Expert. That the Surveyor has not examined four out of six Platens. That the Petitioner did not produce any material to dislodge Expert's evidence relating to Platens.

12) So far as sanction of claim for VFD power supply and AC Drive is concerned, Mr. Savant would submit that the Arbitral Tribunal has awarded the said claims after recording a finding of fact that VFD power supply and AC Drive were damaged due to fire. He would submit that the award of claim towards Pressure Transducer (Transmeter) also does not warrant any interference in exercise of power under Section 34 of the Arbitration Act.

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8 2011 (6) Mh.L.J.170

9 2023 (3) Mh.L.J.

10 2017 SCC OnLine Bom 4985

13) On above broad submissions Mr. Savant would pray for dismissal of the Petition.

14) Rival contentions of the parties now fall for my consideration.

15) Respondent raised various claims before three-member Arbitral Tribunal with regard to its grievance of non-sanction of the entire claim amount by the Petitioner-Insurer. The Arbitral Tribunal decided the six claims raised by the Respondent in following manner:-

Sr.No.	Particulars	The Arbitral Tribunal has allowed /disallowed the Claim of the Claimant as follows:-	The Respondent has already paid to the Claimant the following amounts:	The Balance amount due for the Respondent to the Claimant in respect of the following items:
A)	Under Insurance	NIL (Not allowed)-Rejected	NIL	NIL
B)	Platens	Rs.9,39,000/-	NIL	Rs.9,39,000/-
C) -(i)	Hydraulic Oil	Rs.18,04,807/-	In respect of items C(i) & C(ii)- Rs.7,35,840/-	Rs.19,16,863/-
C)-(ii)	Thermic Fluid	Rs.8,47,896/-		
D)	VFD AC Drive	Rs.2,21,643/-	NIL	Rs.2,21,643/-
E)	Pressure Transducer (Transmeter)	Rs.22,049/-	NIL	Rs.22,049/-
	Total	Rs.38,35,395/-	Rs.7,35,840/-	Rs.30,99,555/-

16) Petitioner has raised an objection to the Arbitral Tribunal appointing an Expert, who, according to Petitioner, acted as second surveyor. It is contended that appointment of second surveyor was impermissible under the scheme of Section 64-UM of the Insurance

Act as the second surveyor can be appointed only by IRDAI and not by the Arbitral Tribunal. Reliance is placed on judgment of the Apex Court in ***Sri Venkateshwara Syndicate*** (supra). However, in that judgment, the Apex Court has deprecated appointment of multiple Surveyors for securing a tailormade report for benefiting the insurer. The Apex Court has also highlighted the legal position that an insurer can reject Surveyor's report. In the present case, the Arbitral Tribunal has not appointed a second surveyor as erroneously sought to be suggested by the Petitioner. It has appointed an Expert. The Arbitral Tribunal has exercised powers under Section 26 of the Arbitration Act, which provides thus:-

> 26. **Expert appointed by arbitral tribunal.**
>
> (1) Unless otherwise agreed by the parties, the arbitral tribunal may—
>
> (a) appoint one or more Experts to report to it on specific issues to be determined by the arbitral tribunal, and
>
> (b) require a party to give the Expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.
>
> (2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the Expert shall, after delivery of his written or oral report, participate in an oral hearing where the parties have the opportunity to put questions to him and to present Expert witnesses in order to testify on the points at issue.
>
> (3) Unless otherwise agreed by the parties, the Expert shall, on the request of a party, make available to that party for examination all documents, goods or other property in the possession of the Expert with which he was provided in order to prepare his report.

17) Thus, the Arbitral Tribunal can appoint an Expert to report to it on specific issues to be determined by the Tribunal. Power

of appointment of Expert can be exercised by the Arbitral Tribunal suo moto as has been done in the present case. Appointment of the Expert was not at the behest of any particular party and the Arbitral Tribunal proceeded to appoint the Expert because it felt need for Expert's opinion in the peculiar facts and circumstances of the present case.

18) Even otherwise, facts of the case clearly required appointment of Expert since the report of Petitioner's Surveyor has ultimately been found to have been prepared in a perfunctory manner. Petitioner's Surveyor conducted first inspection on 8 April 2015, but did not prepare even a list of damaged items nor recorded area affected by fire nor prepared a report. After three months, Petitioner's Surveyor paid second visit to the site on 6 th / 7th July 2015 but refused to sign joint verification report. Thereafter correspondence ensued between Petitioner, Respondent and Surveyor, after which the Surveyor visited the site for the third time after substantial delay on 13 and 14 April 2016. Surveyor's report was based on the last visit paid by him. In view of the above position, the Arbitral Tribunal rightly exercised powers under Section 26 of the Arbitration Act for appointment of the Expert.

19) The main challenge to the arbitral Award by the Petitioner is in respect of sanction of 70% claim in case of loss of Hydraulic Oil and Thermic Fluid. It is contended that award of 70% claim towards loss of Hydraulic Oil and Thermic Fluid by the Arbitral Tribunal is contrary to even Expert's opinion. It is therefore contended that even if appointment of Expert by the Arbitral Tribunal is to be treated as valid, the Tribunal ought to have accepted the Expert's opinion for sanction of 25% claim towards loss of Hydraulic Oil and Thermic Fluid and

that the Arbitral Tribunal has arbitrarily decided whimsical figure of 70% for awarding claim towards loss of Hydraulic Oil and Thermic Fluid.

20) There is no dispute to the position that the Surveyor appointed by the Petitioner had recommended sanction of only 20% of claimed quantity of Hydraulic Oil and Thermic Fluid. After fire incident, the Respondent claims to have purchased 16,800 liters of Hydraulic Oil valued at Rs.25,78,296/- and 8400 liters of Thermic Fluid valued at Rs.12,11,280/- aggregating Rs.37,89,576/- for restart of the plant by replacing the lost/ damaged Hydraulic Oil and Thermic Fluid. Petitioner's Surveyor however, assessed the quantum of lost Hydraulic Oil and Thermic Fluid on only 20% of quantity claimed by the Respondent. The Surveyor gave following reasons for assessing only 20% of quantity of lost Hydraulic Oil and Thermic Fluid.

> 14.04.13 For the quantity of Hydraulic Oil and Thermic Fluid claimed as having been lost due to burning or drainage, it is well evident that as the Hot Press was under operation at the time of the subject fire incident and operational and supervisory staff was present on the shop floor and therefore there was enough opportunity for immediate stopping of the circulation of the Thermic Fluid and Hydraulic Oil etc., besides cutting of the electrical power supply and as such the loss due to drainage or burning could be minimized. Further during our visit, we did not observe the spillage of the oil in and around the fire place. The insured has claimed the thermic fluid and hydraulic oil on very much higher side. Thus keeping in view the extent of damage, we have considered 20% of the quantity being claimed by the insured.

21) The Arbitral Tribunal has not agreed with the Surveyor's assumptions and has recorded following findings in the arbitral Award:-

> (vi) The Surveyor has allowed the claim on ad-hoc and arbitrary basis of 20% in case of both Hydraulic Oil and Thermic Fluid of the quantum and amount claimed by the Claimant. The basis for this 20% cannot be understood and there does not seems to be even any semblance of cogent reasoning by the Surveyor in this regard. The Surveyor's statements seem to be made in a perfunctory and casual manner. In fact, the correspondence, documents on record and, contents of the Surveyor's Report, taken with the evidence seem to be at significant variance, in conflict and contradiction. It is difficult for the Arbitral Tribunal to agree with the observation and findings of the Surveyor in awarding compensation to the Claimant in respect of Hydraulic Oil and Thermic Fluid on the basis and quantum as set out in the Survey Report. A question would arise as to why only 20% and why not some other percentage, whether more or lesser. This itself makes the ad-hocism and arbitrariness apparent, obvious and patent.

22) As observed above, the Arbitral Tribunal had appointed an Expert, who recommended that the lost quantity of Hydraulic Oil and Thermic Fluid could be assessed only on 25% of the quantity claimed by the Respondent. The Expert's opinion in his report is as under:-

> B. HYDRAULIC OIL :
> Based on the inspection of the power pack, the valve block with the valve arrangement etc. as also knowing the fact that the power to the plant was indeed switched off as soon as the fire was noted, the u/s concurs with the loss adjuster that not more than 25% of the claimed quantity could have leaked and burnt.
>
> xxx
>
> Considering all this we are of the opinion that:
>
> 1. Turning the valve off was not feasible as mentioned by the Loss adjuster.
>
> 2. Large quantity of oil may have been burnt in fire as the pumping system could have remained on for long time.
>
> 3. Insured may have replaced all the Thermic fluid after the accident but whether it was due to burning or due to other reasons generally when large oil is burnt and partially old oil (with some degradation due to normal use over the years) remains within the system, it is not advisable to add fresh oil into the old degraded oil.

> 4. However even if replacement is done for the entire quantity the insurance policy held by you does not address such costs to be fully reimbursed.
>
> Under such circumstances it was only a call to be taken-based on the circumstances at site and as observed.
>
> The loss adjuster has taken a call that~25% of the claimed quantity was reasonable compensation and considering the system volume etc.
>
> U/s is not convinced that the valve could have been closed immediately as contended by the loss adjuster. In spite of their suggestion (that valve should /could have been closed) they have still allowed 25% of the Thermic fluid quantity as what could have burnt.

23) The Arbitral Tribunal has not agreed with the Expert's assessment of only 25% loss of Hydraulic Oil and Thermic Fluid by recording following reasons:-

> (vii) The Expert appointed by the Arbitral Tribunal has admitted of certain presumptions, obviously due to great passage of time and lack of data which limited the Expert's understanding and analysis. However, the Expert has found favour albeit at a different percentage (erroneously or otherwise) with the final conclusions in awarding compensation by the Surveyor in the said Final Survey Report. It also must be appreciated that a survey report by a Surveyor is recommendatory and ought to be based on some sound principles of assessment and verification of loss/damage.
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> (viii) The Arbitral Tribunal is also unable to accept the conclusions of the Expert as regards the percentage of 25% in view of its observations and findings set out earlier. The Arbitral Tribunal is unable to accept the conclusion of the Surveyor with regard to the percentage of 20% in case of both Hydraulic Oil and Thermic Fluid.

24) The Arbitral Tribunal has thereafter proceeded to allow claim of the Respondent to the extent of 70% claim of loss of Hydraulic Oil and Thermic Fluid. The Arbitral Tribunal has recorded detailed reasons for doing that, which are as under:-

(xi) After consideration of the submissions by the Claimant and Respondent and, their respective pleadings, documents, evidence including depositions by witnesses before the Arbitral Tribunal, the Arbitral Tribunal hereby holds that:

(a) That as regards Hydraulic Oil, it is the Claimant's own contention and not been displaced by the Respondent or the Surveyor that the Claimant added 16,800 liters of Hydraulic Oil, which was valued by the Claimant at Rs.25,78,296/- @ Rs. 149/- per liter, and after including Excise, VAT, CST, other charges amounting to a total of Rs. 17,64,137.65 and Rs.8,14,156.35 = Rs. 25,78,296/-. This has been supported by various documents. On the other hand, in the remarks column of the relevant portions of Annexure (VI) 1 of the said Final Survey Report, the arbitrariness and ad-hoc in reasoning of the Surveyor becomes more than apparent

(b) The Arbitral Tribunal considering the extent of fire and the nature of damage as described by the Surveyor himself, inter alia, and in paragraph 10 of his said Final Survey Report, agrees that the fire was extensive, fairly wide spread, temperatures were very high and, the fire was fully extinguished after a period of about two hours.

(c) The Arbitral Tribunal is of the considered view that based on the records, documents and evidence, it is fairly reasonable to assume and conclude that a very substantial portion / most of the quantity of the Hydraulic Oil in the pipes, as well as, in the tanks would have drained out / leaked out, flown away. Surprisingly, there is no record from the Surveyors team (excluding presence of the maker, signatory and deponent of evidence RW-2 on behalf of the Respondent) on their very First Visit on 8th April 2015 (immediately 2 days after the fire on 6th April) to controvert this. It is also surprising that the Respondent too has maintained a very studied silence on this amongst other aspects.

(d) Also, it is an admitted position that the Claimant was 'induced' or in the words of the Surveyor himself 'persuaded', to restart the plant within a period of 7 days, which the Claimant did on or before 11th April 2015 and informed the concerned parties i.e. the Surveyor and the Respondent on 13th April 2015. Surprisingly, the next physical visit of the Surveyor was after a good period of time had elapsed - i.e. on 6th and 7th July 2015 (Second Visit) when as per the request of the Surveyor, the Claimant's said MDF plant was shutdown for inspection by the Surveyor. The Surveyor cannot take advantage and benefit of his own

casualness, lack of diligence, professionalism and promptitude in the matter and, nor can the Respondent too take advantage of this.

(e) In the circumstances, based on the pleadings, documents, records and evidence the Arbitral Tribunal is inclined to partially accept and as reasonable, the claim of the Claimant as regards Hydraulic Oil to the extent of 70% against 100% claimed by it, and as against the 20% assessed by the Surveyor and paid by the Respondent. This difference between 20% and 70% is what the Arbitral Tribunal has decided to award as reasonable, the Claimant in respect of its claim with regard to Hydraulic Oil.

(f) That as regards Thermic Fluid too, it is the Claimant's own contention and which has not been displaced or disproved by the Respondent or the Surveyor that the Claimant added 8,400 liters of Thermic Fluid which was valued by the Claimant at Rs. 12,11,280/- @ Rs. 140/- per liter, and after including Excise, VAT, CST, other charges amounting to a total of Rs. 7,53,445/- and Rs. 4,57,835 = Rs. 12,11,280/-. This has been supported by various documents. On the other hand, in the remarks column of Annexure (VI) 1 at Sr. Nos. 16 and 17 of the said Final Survey Report (Exhibit R-Exh.7), the arbitrariness and ad-hoc reasoning of the Surveyor becomes more than apparent, obvious and is identical to that in respect of the Surveyor's remarks for Hydraulic Oil ("same as above").

(g) The Arbitral Tribunal considering the extent of fire and the nature of damage as described by the Surveyor himself, inter alia, and in paragraph 10 of his said Final Survey Report, agrees that the fire was extensive, fairly wide spread, temperatures were very high and, the fire was fully extinguished after a period of about two hours.

(h) The Arbitral Tribunal is of the considered view that based on the records, documents and evidence, it is fairly reasonable to assume and conclude that a very substantial portion / most of the quantity of the Thermic Fluid in the pipes, as well as, in the tanks would have drained out / leaked out, flown away. Surprisingly, there is no record from the Surveyors team (excluding presence of the maker, signatory and deponent of evidence RW-2 on behalf of the Respondent) on their very First Visit on 8th April 2015 (immediately 2 days after the fire on 6th April) to controvert this. It is also surprising that the Respondent too has maintained a very studied silence on this amongst other aspects.

(i) Also, it is an admitted position that the Claimant was 'induced' or in the words of the Surveyor himself 'persuaded', to restart the plant within a period of 7 days, which the Claimant did on or before 11th April 2015 and informed the concerned parties i.e. the Surveyor and the Respondent on 13th April 2015. Surprisingly, the next physical visit of the Surveyor was after a good period of time had elapsed - i.e. on 6th and 7th July 2015 (Second Visit) when as per the request of the Surveyor, the Claimant's said MDF plant shutdown for inspection by the Surveyor. The Surveyor cannot take advantage and benefit of his own casualness, lack of diligence, professionalism and promptitude in the matter and, nor can the Respondent too take advantage of this.

(j) In the circumstances, based on the pleadings, documents, records and evidence the Arbitral Tribunal is inclined to partially accept and as reasonable, the claim of the Claimant as regards Thermic Fluid to the extent of 70% against 100% claimed by it, and as against the 20% assessed by the Surveyor and paid by the Respondent. This difference between 20% and 70% is what the Arbitral Tribunal has decided to award as reasonable, to the Claimant in respect of its claim with regard to Thermic Fluid.

25) Thus, the Arbitral Tribunal has recorded detailed reasons as to why the assessment of loss of Hydraulic Oil and Thermic Fluid could not be restricted to 20% as suggested by Surveyor and 25% as suggested by Expert. As held by the Apex Court in ***Sri Venkateshwara Syndicate*** (supra) Surveyor's report is not binding even on insurer. The question of same being binding on Arbitral Tribunal therefore does not arise. Same view is taken by the Apex Court in ***M/S New India Assurance Co. Ltd Vs M/S Luxra Enterprises Pvt. Ltd.***[11] In ***Khatema Fibers V/s. New India Assurance Co. Ltd.***[12] the Apex Court has held that though Surveyor's report is not the final word, there must be cogent and sufficient material to discard the same. In the present case,

[11] 2019 (6) SCC 36
[12] 2021 SCC Online SC 818

the Arbitral Tribunal has recorded a finding that Surveyor's assessment and recommendations were made in a perfunctory and casual manner. So far as Expert's assessment is concerned, the Arbitral Tribunal has observed that by the time he was appointed, substantial time had passed. The Arbitral Tribunal took into consideration admitted position of purchase of Hydraulic Oil of Rs.25,78,296/- and Thermic Fluid of Rs.12,11,280/- for restart of the plant. Once purchase of such quantity of Hydraulic Oil and Thermic Fluid was proved before the Arbitral Tribunal and once it is established that the said quantity was necessary for restart of the plant, sufficient material became available before the Arbitral Tribunal for guessing that the actual quantum of Hydraulic Oil and Thermic Fluid lost in the incident of fire would be higher than 20% as assessed by Surveyor and 25% as assessed by the Expert. It is well established position of law that in a given case, the Arbitral Tribunal is entitled to apply rough and ready formula or can arrive at figure even by guess work. This position is well settled by the judgment of Apex Court in ***M/S Msk Projects (I)(Jv) Ltd vs State Of Rajasthan & Anr***[13] in paragraphs 38 to 41 as under:-

> 38. In common parlance, "reimbursement" means and implies restoration of an equivalent for something paid or expended. Similarly, "compensation" means anything given to make the equivalent. (See State of Gujarat v. Shantilal Mangaldas 30, Tisco Ltd. v. Union of India 31, GDA 25 and HUDA v. Raj Singh Rana 24.) However, in Dwaraka Das v. State of M.P. 32 it was held that a **claim by a contractor for recovery of amount as damages as expected profit out of contract cannot be disallowed on ground that there was no proof that he suffered actual loss to the extent of amount claimed on account of breach of contract.**
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> 39. In A.T. Brij Paul Singh v. State of Gujarat 33, while interpreting the provisions of Section 73 of the Contract Act, 1972, this Court held that damages can be claimed by a contractor where the Government is proved to have committed breach by improperly

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> rescinding the contract and for estimating the amount of damages, the court should make a broad evaluation instead of going into minute details. It was specifically held that where in the works contract, the party entrusting the work committed breach of contract, the contractor is entitled to claim the damages for loss of profit which he expected to earn by undertaking the works contract. Claim of expected profits is legally admissible on proof of the breach of contract by the erring party. It was further observed that: (SCC pp. 64-65, para 10)
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> "10.... What would be the measure of profit would depend upon the facts and circumstances of each case. But that there shall be a reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by way of damages if the other party to the contract is guilty of breach of contract cannot be gainsaid."
>
> (emphasis supplied)
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> 40. In BSNL v. Reliance Communication Ltd. 34 this Court held as under: (SCC p. 428, para 53)
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> "53. Lastly, it may be noted that liquidated damages serve the useful purpose of avoiding litigation and promoting commercial certainty and, therefore, the court should not be astute to categorise as penalties the clauses described as liquidated damages."
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> 41. This Court further stated in ONGC Ltd. v. Saw Pipes Ltd. 13: (SCC p. 740, para 64)
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> "64.... This section is to be read with Section 74, which deals with penalty stipulated in the contract, inter alia (relevant for the present case) provides that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of breach is entitled, whether or not actual loss is proved to have been caused, thereby to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named. Section 74 emphasises that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach."
>
> *(emphasis added)*

26) Thus, in every case, a claim cannot be rejected on the ground that there was no concrete proof of sufferance of actual loss to the extent of claimed amount. The Division Bench of this Court has

held in ***Mahanagar Gas Limited V/s. Babulal Uttamchand and Co. Mumbai***[14] held in paragraph 16 as under:

> 16. Thus, it is clear from the dicta of the Apex Court reproduced above that the claim for damages by a party is admissible once it demonstrates that the other party has committed breach of the fundamental terms of the contract. In the Government contracts which are undertaken by the contractor for earning profits, it is implicit that once there is breach, the object of earning profit is nullified. Once such fundamental breach occurs, the party is presumed to have suffered loss of profit. In the case of MSK Project India (supra) the Apex Court has categorically laid down that the claim by contractor for damages as expected profit out of contract, cannot be disallowed on the ground that there was no proof that he has suffered actual loss. The Apex Court in the case of A. T. Brij Paul Singh vs. State of Gujrat, held that in case of Government contract where the Government commits breach by improperly rescinding the contract the Court should carry out a broad evaluation regarding the damages instead of going into minute details. In the present case the respondent had made a claim for loss of profit. The Arbitrator was not expected to go through the minute details to ascertain the exact figure of damages. **The Arbitrator applied rough and ready formula to arrive at the damages payable. Once the Arbitrator arrives at a figure, even by guesswork, the Court may not interfere with it, if it is not unreasonable**.
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> *(emphasis added)*

27) By strenuously relying on judgment of the Apex Court in ***S.S. Cold Storage India Pvt Ltd.*** (supra), Mr. Vidyarthi would contend that approach of the Courts and Tribunals in discarding the report of Surveyor and applying its own knowledge to technical aspects is frowned upon by the Apex Court. In ***S.S. Cold Storage India Pvt. Ltd.*** the Apex Court has surveyed exposition of law relating to existence of multiple reports of Surveyors and Experts in paragraph 15 of the judgment as under:-

> 15. The proper approach in a case of the present nature where there are multiple reports of Surveyors and Experts has been outlined in a catena

[14] 2013 (2) Mh.L.J.

of decisions of this Court. Presently, we wish to advert to the decisions cited by the parties.

a. United India Insurance Company Limited vs. Kantika Colour Lab and Others(2010)6 SCC 449, where this Court held that simply the happening of a covered event did not entitle the insured to claim reimbursement of the amount stated in the policy, and that only upon proof of actual loss could the insured claim
reimbursement to the extent the same were established.

b. United India Insurance Co. Ltd. and Others vs. Roshan Lal Oil Mills Ltd and Others (2000) 10 SCC 19, where this Court remanded the matter back to the NCDRC as due consideration was not placed on the joint survey report of the relevant incident on the basis of which the insurer had repudiated the claim of the insured; and that non-consideration of this important document resulted in a serious miscarriage of justice and vitiated the judgment of the NCDRC.

c. Sikka Papers Limited vs. National Insurance Company Limited and Others (2009) 7 SCC 777, where this Court observed that a Surveyor's report was not the final word, and that there must be legitimate reasons for departing from such a report.

d. Sri Venkateswara Syndicate vs. Oriental Insurance Company Limited and Another(2009) 8 SCC 507, where this Court expounded on the duties of a Surveyor, and the due importance to be given to his assessment. It was also observed that an insurance company was not bound by a Surveyor's report, but also could not go on appointing Surveyors one after the other so as to get a tailormade report to its satisfaction. Further, in the case that it did appoint a second Surveyor, satisfactory reasons for the same needed to be provided. It was also laid down that if the Surveyor's reports were prepared in good faith and with due application of mind - in the absence of any error or ill motive - the insurer was not expected to reject the same, and in the event of an arbitrary rejection of a Surveyor's report, the courts could intervene and correct the error committed by the insurer while repudiating the claim of the insured.

e. New India Assurance Company Limited vs. Pradeep Kumar (2009) 7 SCC 787, where it was observed that a Surveyor's report was not the last and final word. Further, it was not that sacrosanct that it could not be departed from, and that though it could be the foundation/basis of the settlement of a claim, it was not binding upon the insurer or the insured.

> f. New India Assurance Co. Ltd. vs. Luxra Enterprises (P) Ltd (2019) 6 SCC 36 and New India Assurance Co. Ltd. vs. Sri Buchiyyamma Rice Mill (2020) 12 SCC 105, where this Court relied on Sri Venkateswara Syndicate (supra) to observe that a Surveyor's report may be rejected only due to the report containing inherent defects, it being arbitrary, excessive, and exaggerated, or any such cogent reasons before the appointment of another Surveyor.
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> g. National Insurance Company Ltd. vs. Hareshwar Enterprises (P) Ltd and Others (2021) SCC OnLine SC 628, where this Court, relying on Pradeep Kumar (supra), observed that while the assessment of loss by an approved Surveyor was a prerequisite for settlement of the claim, it was not the last and final word. Further, it was not that sacrosanct so as not to warrant a departure if necessary. Further, the report was not binding either party, and could be taken on as evidence until more reliable evidence was brought on record to rebut the contents of the Surveyor's report.
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> h. Khatema Fibres Ltd. vs. New India Assurance Company Ltd.,(2021) SCC OnLine SC 818 where this Court, while discussing the scope of the expression deficiency, stated that the appellant should be able to establish either that the Surveyor did not comply with the code of conduct in respect of its duties, responsibilities, and other professional requirements or that the insurer acted arbitrarily in rejecting the whole or a part of the Surveyor's report. It also reiterated the dicta of Pradeep Kumar (supra) as discussed hereinabove. Further, this Court held that a consumer forum, which was primarily concerned with an allegation of deficiency in service, cannot subject the Surveyor's report to forensic examination. Once it was found that there was no inadequacy in the quality, nature and manner of performance of the duties and responsibilities of the Surveyor, and that the report is not based on adhocism or vitiated by arbitrariness, then the jurisdiction of the forum to go further would stop.
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> (Emphasis added)

The Apex Court has thereafter highlighted grant of relative weightage to the report of the Surveyor and reports of Loss Assessor and Experts. Despite availability of report of Loss Assessor and Experts (though not obtained in close proximity to the date of the incident) the NCDRC in that case had proceeded to allow application to inspect the pipes for

obtaining Expert's report thereon. The Apex Court has found flaw with NCDRC's approach in recording findings of virtual field impressions of pipes few days before delivery of judgment. The Apex Court held in paragraphs 22 and 23 as under:

> 22. In the instant case, the Appellant has placed on record reports of the Loss Assessor, and those of the Experts. No doubt, the said reports were not obtained in close proximity to the date of the incident of gas leak but at this juncture, we may remind ourselves that it was the NCDRC which vide NCDRC which, vide its order dated 11th May, 2009, had allowed an application of the Appellant seeking permission to inspect the pipes, which were cut and kept in the custody of the Surveyor, for obtaining Experts' reports thereon. It is in pursuance thereof that the Experts submitted their reports. **If inspection and subsequent reports at such distance of time were not to be of any worth, it defies logic as to why, in the first place, the application was allowed.** Next, if the reports of the Experts did not qualify to be considered only because they had a belated look at the pipes, on the same analogy the observations made by the NCDRC on **visual impression** thereof a few days before delivery of judgment is liable to be discredited and invalidated on the self-same ground of delay. **We thus find the approach of the NCDRC to be flawed.**
>
> 23. As Judges, we are not Experts in the field of refrigeration of cold storages to opine **on our own which of the two versions is correct and acceptable**. This also applies to the members of the NCDRC. We are aghast to find that the members, who heard the Complaint, have made observations **as if they were Experts sitting in appeal** on the reports of the Loss Assessor and the Experts. Within our limited jurisdiction, we are only entitled to draw inferences from the materials on record including the aforementioned reports, which the Respondent could not discredit, and say upon applying the test of preponderance of probabilities as to which of the two versions is more probable. Be that as it may, we intend to rely on certain general observations made in the reports which the NCDRC did not discard with cogent reasons. Since the contents of the Surveyor's Report and those reports placed on record by the Appellant conflict with each other, we have thought it prudent to separate the grain and the chaff.
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> (Emphasis added)

28) However, in my view the judgment in ***S.S. Cold Storage India Pvt. Ltd*** (supra) rendered in the facts of that case would have no application to the present case. In the present case, the Petitioner had not disputed the documentary evidence of purchase of particular quantity of Hydraulic Oil and Thermic Fluid. It was also not disputed that the said quantity was required for restart of the plant. The Arbitral Tribunal has not attempted to apply its own technical knowledge nor has sat over findings of Surveyor or Expert as an appellate authority. The Arbitral Tribunal found that there was no basis for restricting the assessments by Surveyor and Expert. Thus, no cogent material was available before the Arbitral Tribunal for believing the assessment of loss of quantum of Hydraulic Oil and Thermic Fluid made by Surveyor and Expert. Once purchased quantity of the oil and fluid and use thereof for restart of the plant was established, the Tribunal had some material to believe that the entire quantity oil and fluid might have been lost in the fire incident. Though the Tribunal could have been justified in allowing 100% claim, it has restricted the same to 70%, Therefore, the judgment in ***S.S. Cold Storage India Pvt. Ltd.*** would have no application to the facts of the present case.

29) In view of the above position, no serious flaw can be found in the approach of the Arbitral Tribunal in awarding claim for 70% quantum of Hydraulic Oil and Thermic Fluid. The award thus not suffer from patent illegality nor is in conflict with public policy of India so far as claim for loss of Hydraulic Oil and Thermic Fluid is concerned.

30) So far as the claim for Platens is concerned, the same is allowed by the Arbitral Tribunal based on the opinion of the Expert. The Surveyor had rejected the claim for six Platens observing that there was no evidence of any damages to the Platens on account of fire incident. Admittedly, the Surveyor had not even inspected all the six damaged Platens, but had inspected only two Platens. The Surveyor further opined that damages to six Platens might have been caused 'during commissioning of the plant'. There was no material to record such finding. On the other hand, the Expert appointed by the Arbitral Tribunal suggested conduct of certain technical tests for assessment of damage to the Plant. Admittedly, no such technical tests were carried out by the Surveyor. The Arbitral Tribunal found the conduct of the Surveyor to be unprofessional and unjustifiable. The Arbitral Tribunal also took note of the fact that six Platens were replaced on the stocks available with Respondent. The Arbitral Tribunal also took note of the Expert's opinion that the fire could damage the Platens.

31) I have found the reasonings adopted by the Arbitral Tribunal for allowing claims towards six damaged Platens to be fully justiciable. The findings recorded by the Arbitral Tribunal cannot be termed as perverse in any manner.

32) So far as sanction of claims relating to VFD AC Drive and Pressure Transducer (Transmitter) is concerned, Mr. Vidyarthi has fairly not pressed any grounds during the course of his oral submissions though his written notes of arguments do cover objections to the said claims as well. I am of the view that sanction of the claims relating to VFD AC Drive Power Supply and Pressure Transducer

(Transmeter) are well supported by the material available before the Arbitral Tribunal. There is no warrant for interference in the said findings.

33) It is also noted that the Arbitral Tribunal has deducted 21.75% amount in respect of claims of Respondent relating to plant and machinery i.e. Platens, VFD AC Drive and Pressure Transducer (Transmeter).

34) Considering the overall conspectus of the case, I am of the view that none of the grounds enumerated under Section 34 of the Arbitration Act are made out by the Petitioner for maintaining a valid challenge to the impugned Award of Arbitral Tribunal. Findings recorded by the Arbitral Tribunal do not suffer from the vice of perversity. There is no patent illegality in the impugned Award. The findings recorded by the Arbitral Tribunal do not conflict public policy of India nor are in contravention to the fundamental policy of Indian Law. In that view of the matter, Arbitral Award is unexceptionable deserving dismissal of the Arbitration Petition. Considering the facts and circumstances of the case, I am not inclined to award any further costs in favour of the Respondent considering the fact that the Arbitral Tribunal has already awarded substantial costs in favour of the Respondent.

35) Resultantly, the Arbitration Petition is **dismissed** without any further order as to costs. Interim Application stands disposed of.

[SANDEEP V. MARNE, J.]