
(2019) 02 DEL CK 0543

In the Delhi High Court

Case No : Civil Miscellaneous No. 16560 Of 2015 In First Appeal From Order
(Original Side) No. 156 Of 2015

Indo-Rama Synthetics India Ltd

APPELLANT

Vs

Iffco Tokio General Insurance Co. Ltd

RESPONDENT

Date of Decision : 11-02-2019

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 31, 31(3), 34, 34(2), 34(4)
Insurance Act, 1938 — Section 64U, 64UM(3)

Citation : (2019) 3 R.A.J.53 : (2019) 2 ArbLR 250

Hon'ble Judges : S. Ravindra Bhat, J;A.K. Chawla, J

Bench : Division Bench

Advocate : C.S. Vaidyanathan, Abhimanyu Bhandari, Roohina Dua , Cheitanya Madan, Saurav Agrawal, Trinath Tadakamalla, Ishaan Chhaya, Hitabhilash Mohanty, Aaryan Pareek, Rashi Goswami

Final Decision : Dismissed

Judgement

S. Ravindra Bhat, J

1. M/s Indo Rama Synthetics Ltd (hereafter "Indorama" or "the appellant") is aggrieved by the decision of a learned single judge who accepted the objections of the respondent-insurer (hereafter "IFFCO Tokio" or "the insurer") against an award, under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter "the Act").

2. Brief facts of the present case are that the Indorama is a company which has its registered office at Nagpur, Maharashtra and Corporate office at Gurgaon, Haryana. It manufactures Polyester Staple Fibre, Partially Oriented Yarn, Fully Drawn Yarn, Draw Texturized Yarn and Polyester Chips. IFFCO Tokio, an insurance company, through its Nagpur branch issued to Indorama a "Fire Loss of Profit Policy" dated 28th February, 2007 referred to hereafter as the ("LOP Policy") and a "Standard Fire and Special Perils Policy" dated 31st March, 2007- (referred to as "the MD Policy"). Both policies were couched in accordance with

the policy phraseology statutorily mandated by the Tariff Advisory Committee (hereinafter referred to as the "TAC") set up under Section 64U of the Insurance Act, 1938 to stipulate policy expressions for all general insurance companies.

3. The MD Policy covers the insured for the risk of physical damage/loss to its property insured caused by the specific risks listed in that policy. The LOP covered the hazard of the loss of profits on account of the business interruption due to the consequence of a fire. The LOP policy provided the mode of the computation of loss of profit- by providing the methods of arriving at the loss of profit. That policy also contained the definition "indemnity period" for which the LOP loss was to be covered.

4. On 29th October, 2007, during the currency of the insurance policies, a fire broke out in Control Panel Room (in plant CP2 and CP3) of Indorama's Polyester plant-I and four sets of control panels were gutted or destroyed. Due to this fire, plants CP2 and CP3 which had previously manufactured Polyester Staple Fibre (PSF), Partially Oriented Yarn (POY), Fully Drawn Yarn (FDY), Draw Texturized Yarn (DTY) and Polyester Chips came to a halt. That manufacturing activity was hindered from the two plants for 238 days. However, the maximum indemnity period was 6 months, so the disruption of business is involved in terms of the policy document was for 182 days after which Indorama purchased three sets of control panels to operationalize the remaining three PSF draw lines. IFFCO Tokio's position was that, on the date of the fire, Indorama had a stock in hand of 52,000 MT (metric tonnes) of the said items which was sufficient to meet any sale requirement for a substantially long period.

5. After the occurrence of fire, Indorama informed IFFCO Tokio of the fire and the damage caused. On this, the insurer appointed one Adarsh Gupta of M/s Adarsh Associates, New Delhi, as Surveyor, to assess the loss under the MD and LOP policies. He visited the site to inspect it on 31-10-2007. By a letter dated 7th December, 2007, Indorama filed a provisional loss of profits claim (under the Fire Loss of Profit Policy) for Rs. 25 crores on the basis of reduction in output from Plants CP2 and CP3 for two months, i.e. up-to 31st December, 2007 which is the alternative basis provided under the loss of profit policy as against the turnover basis of computing the loss of profits.

6. On 08-01- 2008, while the survey and assessment of the loss was on, Adarsh Gupta submitted his interim report to the insurer recommending an on-account payment of Rs. 6 crores to be made to Indorama. He assessed the LOP loss on the basis of turnover at about Rs. 5,11,31,567/- and the MD (Material Damage) loss at about Rs. 2,24,82,332/-. The Surveyor applied the "turnover method" while calculating loss of profits due to business interruption as a result of fire in LOP policy. In this interim report, the Surveyor recorded that Indorama made a claim based on the alternative basis clause which was contained in the policy seeking payment under the LOP Policy on the basis of loss of output instead of loss of turnover; nevertheless he applied the turnover method.

7. By a letter dated 10-03- 2008, Indorama objected to the method of claim assessment by the Surveyor and demanded Rs. 60.33 crores till 2008 on 17th March, 2008. The Surveyor responded to this letter stating that no single party had a right to apply the alternative basis clause. On 28th July, 2008, after completion of indemnity period of 6 months, Indorama submitted its final claim under the LOP method, on the basis of reduced output from Plants CP2 and CP3 during the period November, 2007 to April, 2008 to the tune of Rs. 72,94,16,362/- (seventy-two crores ninety-four lakhs sixteen thousand three hundred and sixty two). With regard to loss under the MD policy, Indorama had earlier submitted a revised claim for Rs. 6,42,72,550/- net of salvage as against which the Surveyor arrived at an assessment of Rs. 2,24,82,332/-.

8. On 24th June, 2009, the Surveyor Adarsh Gupta submitted a final report in which the business interruption claim under the LOP Policy was assessed at Rs. 4,17,46,359/-. On 6th July, 2009, Indorama wrote to the Surveyor asserting that the output basis should have been adopted. Later, by an Addendum Report of 10th September, 2009, the Surveyor upwardly revised assessment of the said business interruption loss to Rs. 5,11,31,567/-.

On 26th September, 2009, the Surveyor submitted his final report for the material damage i.e. MD claim under the Material Damage Policy as Rs. 2.24 cr. against the claim of Rs. 6.4 crores made by Indorama. On 6th November, 2009, the insurer wrote to Indorama informing it that in terms of the Surveyor's report, the assessed loss towards the loss of profit was Rs. 5,11,31,567/- and MD loss was Rs. 2,24,82,332/-. Indorama, on 8th February, 2010, approached the Insurance Regulatory and Development Authority (IRDA), Hyderabad, with a request to appoint a second Surveyor under Section 64UM(3) of the Insurance Act, 1938. Nothing apparently transpired on that request.

9. On 25th June, 2010, Indorama on its own appointed Mr. R. Srivatsan of M/s Professional Surveyors & Loss Adjusters Pvt. Ltd. as its own Surveyor to assess the loss under the MD and LOP Policies. By his reports dated 25th and 30th October, 2010, Mr.Srivatsan calculated the claim under the MD Policy as Rs. 3,37,99,883/- and the claim under the LOP Policy as Rs. 35,79,42,559/-. He also dealt with the report of Adarsh Gupta, Surveyor in his affidavit dated 3rd August, 2011 before the tribunal. By letter dated 1st November, 2010, Indorama submitted Mr.Srivatsan's report to IFFCO-Tokio and sought a payment of the loss of profit claim and material damages claim in accordance with the said report and at the same time Indorama also invoked arbitration in view of the disputed position between the parties. In view of arbitration clause, the Arbitral Tribunal was appointed consisting of three retired Judges.

10. After taking into consideration rival contentions of the parties, the contract between them and the materials presented before it, and upon applying the settled principles involved in contracts for insurance, rights of the insured and the applicability of the principle of contra proferentum, the Arbitral Tribunal arrived at the following findings:

(a) With respect to assessment under the LOP Policy, that the appropriate method for assessing and / or computing the losses suffered by the Appellant / Claimant as a result of interruptions and interference of business during the fire affected period, would be the 'Alternative Basis Clause' under the Policy, being the "Output" method and not the "Turnover" method, being the other mode of computation under the Policy. The Arbitral Tribunal therefore, awarded Rs. 34,70,55,231/- (Rupees Thirty-Four Crores to the Claimant under the LOP Policy. To so conclude, the tribunal held that

(i) The main object and intention of the contract of insurance is to indemnify the loss as per the terms of the policy. It would defeat the object and intent of the contract to hold that it was entered into with an absolute and unchallengeable right to the Respondent to assess the loss in the manner in which it liked and arrive at the quantum as it calculates and determines.

(ii) The Parties had agreed for two methods of computation, turnover basis or alternative basis clause. The object and intent of such clauses is to really indemnify the claimant for the loss which has been immense, as admitted by the witness for the Respondent as well as the Respondent.

(iii) IFFCO-Tokio was wrong in saying that the terms "whenever found necessary" stipulated in the policy meant whenever found necessary by the Surveyor.

(iv) The tribunal, while considering the claim, could determine if it was necessary to use the Alternative Basis Clause or the mechanism provided by the parties in the contract.

(v) In respect of the LOP Policy, for loss assessment, it was necessary to apply the alternative basis clause, which was the policy's real object and intent.

(b) With respect to assessment under the MD Policy, the Tribunal awarded damages to the tune of Rs. 3,73,99,883/- (Rupees Three Crores Seventy-Three Lacs Ninety-Nine Thousand Eight Hundred Eighty-Three Only)

(c) With respect to the issue of interest, the learned Arbitral Tribunal awarded interest to the claimant at the rate of 9% payable with effect from 1st July 2008 till the actual date of payment of damages by the insurer.

11. IFFCO-Tokio challenged the tribunal's award before this Court under Section 34 of the Act by O.M.P. No.1036 of 2012, on the ground that it was against public policy. By the impugned judgment, in the aforesaid Petition under Section 34 of the Act, the learned single judge set aside the award granted under the LOP Policy together with the interest awarded at the rate of 9%, and has therefore partly set aside the Arbitral Award. The learned single judge remanded the award back to the learned Arbitral Tribunal for re-computation basis the 'turnover' method of computation instead of the 'output' method decided by it.

Contention of parties

12. Mr. C.S. Vaidyanathan, learned senior counsel for the appellant, urged that

the tribunal's decision was reasoned and had considered the terms of the two policies. Given these factors, that the court to visualize a different point of view leading to a contrary conclusion did not empower it to set aside an award. Unless a patent error of law can be demonstrated, the courts cannot interfere with the findings of an arbitral tribunal.

13. It is argued that the impugned judgment has ignored the settled position in law as enunciated and laid down by the Supreme Court with respect to the unambiguous limited scope of interference under Section 34 of the Act, by erroneously substituting the considered plausible view which was arrived at by the Arbitral Tribunal after appreciating the entire factual matrix, conduct of the parties, the contractual context, evidence pleaded and proved before it with respect to the appropriate mode of assessment / computation, with that of its own. It is urged that in interfering with a pure finding of fact, by overlooking that when a court is applying the "public policy" test to an arbitration award, it is not empowered to sit in appeal over an arbitral award by reassessing or re-appreciating the evidence. Counsel relied on the decision in *Associated Builders v Delhi Development Authority* (2015 (3) SCC 49) which held that a possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator / arbitral tribunal, as the case may be, is the ultimate master of the quantity and quality of evidence to be relied upon when it delivers the arbitral award. It is also urged that the public policy violation mandating interference under section 34 of the Act is exceptionally specific and limited, such as where the arbitral Tribunal has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute, or the award should be so unfair and unreasonable as to shock the conscience of the court and not otherwise, and which is indisputably not the case at hand. Counsel points out that the tribunal made a detailed, speaking and reasoned award, which was passed by it after taking into consideration the rival contentions of the parties, the contractual context including intention and object thereof, the nature of Indorama's business, understanding between the parties including the conduct of the parties, the evidence led, pleaded and proved before the learned tribunal, and upon applying the settled principles involved in contracts for insurance, rights of the insured and the applicability of the principle of *contra proferentum*. It is therefore urged that the award fulfilled the essential criteria prescribed under Section 31 of the Act, and there was no express bar on the face of the Arbitral Award mandating interference in the hands of the learned Single Judge under Section 34 of the Act.

14. It is urged that learned single judge further also lost sight of the legal position that an award under section 34 of the Act can be set-aside on the ground of public policy, only if such an award is against justice or morality.

An award can be said to be against justice only when it shocks the conscience of the court. In this context, counsel cited *P. R. Shah, Shares & Stock Brokers Pvt. Limited v B.I-I.H. Securities Pvt .Limited* [(2012) 1SCC 594], was relied on,

where it was held that:

"An award can be said to be against justice only when it shocks the conscience of the court. An illustration of this can be given. A claimant is content with restricting his claim, let us say to Rs.30 lakhs in a statement of claim before the arbitrator and at no point does he seek to claim anything more. The arbitral award ultimately awards him 45 lakhs without any acceptable reason or justification. Obviously, this would shock the conscience of the court and the arbitral award would be liable to be set aside on the ground that it is contrary to "justice"."

15. It is argued the impugned judgment erred in failing to appreciate that in any event, the following broad guidelines and criteria given by the Insurance Institute of India in "IC-57 Fire and Consequential Loss Insurance" applicable to the 'output' method for computing losses, was satisfied in the facts and circumstances of the present case; counsel relied on the following stipulations:

"When one or more standard products are manufactured where each unit of production can be said to earn a regular proportion of gross profit.

a. Where there is efficient cost accounting system to determine the overall cost per unit of production.

iii. Factory is working at a constant rate of production, sales show a definite seasonal tendency or are liable to irregular fluctuations.

iv. Where there is appreciable time lag between production and sales, there can't be interruption of production without any immediate or corresponding reduction in turnover"

16. It was argued that the tribunal scrutinized the insurance contracts entered into between the parties and after analyzing the intent and object thereof, and upon assessing the understanding and conduct of the parties made its award. Counsel urged that the learned Single Judge lost sight of the settled and indisputable legal position as recently reiterated by this court in National Highways Authority of India v M/s. Lanco Infratech Ltd. ILR 2014 (2) Del 1187 that that the terms of the contract can be express or implied, and the conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of a contract is purely within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and thus, the arbitral tribunal did not misdirect itself in passing the award by taking into consideration the conduct of the parties. It was argued that to protect Indorama, parties had agreed, expressly to incorporate the "Alternative Basis Clause" being the "output" method for computing the losses alongside the standard "turnover" method, and on the basis of which, the premium payable by it was computed and paid by it. The single judge, it is submitted, failed to notice that the reason for inclusion of this clause was Indorama's varying sales from time to time as the industry / markets have cyclic

ups and downs. Hence, to cater to this cyclic demand as contra distinct to a continuous stable demand, the production in any case has to be kept constant in order to cater to the upward cycle in the demand whenever it happens which is difficult to predict. Accordingly, the production/output remains constant and accumulation of stocks if any during a downward sale cycle gets depleted over a period of time when the markets pick up. Therefore, due to the cyclical nature of sale and demand, Indorama sought protection in terms of the insurance cover based on actual production/output rather than turnover. The tribunal carefully scrutinized and interpreted the contract, in the context of the parties' pleadings, submissions on their behalf and the evidence presented before it. The tribunal's decision based on the 'Alternative Basis Clause' as an "output" method as appropriate to compute the losses suffered by the appellant was an agreed condition by the parties. The learned Single Judge failed to appreciate that a contract of insurance covers a contingency, which necessarily amounts to a loss attributable to the insured and therefore, is distinct and separate from the realm of ordinary contract.

17. Learned senior counsel submitted that the accepted legal position is that different formulae can be applied in different circumstances and the question as to whether damages ought to have been computed by taking recourse to one or the other methods or formulae dependent upon the facts of a case, fall within the domain of the tribunal; the court could not interfere on the pretext of public policy, and substitute its understanding and views as an error of law. Counsel relied on *Steel Authority of India Ltd. v Gupta Brother Steel Tubes Ltd.* [(2009) 10 SCC 63], where it was held that an error by the arbitrator relating to interpretation of contract, is an error within the tribunal's exclusive jurisdiction and is not an error on the face of the award; it is not amenable to correction by the Courts. It was further held that the legal position is no more *res integra* that the Arbitrator having been made the final arbiter of dispute resolution between the parties, the award is not open to challenge on the ground that tribunal reached at a wrong conclusion.

18. Learned counsel urged that the single judge erred in not appreciating that the Tribunal had placed reliance on the "output method" to calculate the losses suffered by it, which was an alternative basis clause in the contract, and which was agreed between the parties to be invoked "whenever found necessary". Thus, the decision of the tribunal upholding the "output" method as the appropriate method for computation was well within the contract entered into between the Parties and indeed, a plausible interpretation that does not render the award unjust and unreasonable. The tribunal was fully entitled to take that view as a plausible one; Counsel relied on *Rashtriya Ispat Nigam Limited v. Dewan Chand Ram Saran* [(2012) 5 SCC 306] where the court held as follows:

"43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or

that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the tribunal. The legal position in this behalf has been summarized in paragraph 18 of the judgment of this Court in *Sail v. Gupta Brother Steel Tubes Ltd.* (supra) and which has been referred to above. Similar view has been taken later in *Sumitomo Heavy Industries Limited, v. ONGC Limited* reported in 2010 (11) SCC 296 to which one of us (Gokhale J.) was a party. The observations in paragraph 43 thereof are instructive in this behalf. This paragraph 43 reads as follows:

"...The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him as the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in *Kwality Mfg. Corpn. V. Central Warehousing Corpn* 2009 (5) SCC 142. The Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding." "

19. It was submitted that the learned Single Judge failed to appreciate that the appointment of Shri R. Srivatsan (CW3) as the Surveyor was acceptable to both parties as is evident from the letter of the Respondent dated 6th September 2010. In addition, the learned single judge overlooked that after analyzing the material placed before the learned tribunal, the Srivatsan Report was upheld by the learned Arbitral Tribunal, which demonstrates that the quantum of loss stands fully established twice over both by the Surveyor Shri R. Srivatsan (CW3) as well as the tribunal. It is further submitted that even the initial surveyor Shri Adarsh Gupta did not at any stage question the loss of quantum of Indorama's output. Counsel stressed that the Surveyor appointed by IFFCO-Tokio herein was completely unreliable and unworthy of credit, which further corroborates in view of the various self-contradictory stands taken by it, as also ascertained by the learned Tribunal. It is submitted that in passing the award, the tribunal categorically observed one such fallacious statement made by the surveyor to the extent that both, the turnover and output methods would lead to the same result, which was subsequently contradicted by the said Surveyor, by stating that the results may vary if calculated by both the methods. Reliance was placed by the counsel on the extract of the findings of the tribunal in Para 68.25 of the award, are as under:

"...Therefore, it could easily be seen that there is no cross examination on the actual figures given by CW-3 in his report dated 25.10.10. Thus, the irresistible

inference is that the respondent has accepted them as being correct and there is no need to analyze those details. When that is the factual position, the argument on behalf of the respondent that the policy is a contract of indemnity and if the alternative basis clause is applied, it would result in unjust enrichment by the claimant is not sustainable."

20. Learned senior counsel faulted the reasoning given in the impugned judgment to the extent that there were no averments pertaining to the appellant's financial health being suspect and thereby an order directing the insurer to part with the awarded amount was not necessary as clearly untenable. It is submitted that on the contrary, a loss which has accrued and whereby a contractual liability was admitted by the insurer is a contractual obligation on the part of the insurer and therefore, needs to be duly released and compensated. It is submitted that the award gives detailed and cogent reasons on the conclusions reached after applying its mind to the entire gamut of documents and submissions placed before it. The correctness of the reasons and appraisal of evidence cannot be challenged under Section 34 of the Act. It is submitted that the "Alternative Basic Clause" is a self-explanatory expression, which has been misconstrued in the impugned judgment. The trigger of "wherever found necessary" is fully satisfied in the facts and circumstances of the present case and the Alternative Basis Clause must be applied. The Learned Arbitral Tribunal applied its mind and reached the conclusion that alternative basis clause should be applied. The significant reasons, which necessitated the application of the said clause being deployed for calculating Indorama's loss, are that Indorama's production is usually and normally constant and stable while its sale is cyclical. Secondly, it continues to produce and run its machines on a 24 x 7, 365 days basis. The major products (PSF, POY and DTY) are produced in different varieties such as merge and denier, etc. The reason the appellant does this is because it needs to maintain a very high level of stock so that it can to meet the demand of any customer as and when it occurs. Thirdly, there is a significant time lag between production and sales. Fourthly the accumulation of stock if any gets depleted rapidly as sales trends are erratic in nature. Fifthly, the goods produced by Indorama are non-perishable goods, and can be stored for long periods of time. Sixthly, Indorama specifically by a letter dated 28.02.2007, requested for the inclusion of this clause in the policy, which brought in equity to the contract. Seventhly, as there are ups and downs in the sales trend of the appellant's products and any excess accumulation balances out in the next upward cycle, it sought protection based on the actual production rather than the turnover. Therefore, in the present case, Indorama invoked the "alternative basis clause", since in the present case its output was affected and not the turnover; it suffered huge losses due to the fire and thereby application of this clause forwards the real intent and nature of the contract as was correctly held by the tribunal.

21. It was argued that the ambiguity, if one could term it that, arose, because the only criterion for the application of the clause are the words "whenever found necessary". The condition does not indicate clearly whether it is the insured and /

or the insurer who is entitled to elect the substitution of the term "output" for "turnover" is necessary. It also fails to make clear in unequivocal terms exactly what, if any, circumstances must exist in order for the application of the clause to be found "necessary". It is urged in this context that it is a settled proposition of law that in the case of ambiguity in an insurance contract, the same has to be construed "contra proferentem" i.e. against the party who had drawn out the document. The Supreme Court ruling in *United India Insurance Co. Ltd. v Pushpalaya Printers* [2004 (3) SCC 694] is relied on. It was held that any ambiguity in an insurance contract should be resolved by interpretation in favour of the insured.

22. Learned senior counsel submitted that the "alternative basis clause" is a just and equitable clause which could even benefit the insurer since in the event the turnover method is applied and during the indemnity period the turnover is high the claim would reflect and inflated figure of compensation to be awarded. In the said context, the output method deletes the aberrations, which might creep in and thereby gives the correct picture of the loss suffered.

23. Counsel submitted that the impugned judgment based its findings erroneously (while re-adjudicating the issues) on a sole arbitration case titled *Coalex Pty. Ltd. Vs. Commercial Union Assurance Co. of Australia Ltd.* which was neither cited by any of the parties nor came up for consideration at any stage before the court. In this said context, it was essential that the parties be given an opportunity to address the court about applicability or otherwise of *Coalex Pty. Ltd.* (supra) more so as to when the said precedent became the singular premise on which the objections under Section 34 of the Act were allowed and the unanimous Award was set aside. It is argued that *Coalex Pty. Ltd.* (supra) is clearly distinguishable but unfortunately *Indorama* never had the opportunity to highlight the distinguishing factors before the learned single Judge being completely oblivious that *Coalex Pty. Ltd.* (supra) would be the determinative line between affirming the award and setting aside of the same. If that judgment was of seminal importance, an opportunity should have been given to the parties to make their submissions. In effect, it amounts to denying of an opportunity resulting in an inability on the appellant's part to present its case before the learned single judge. Counsel argued that on merits, importantly, the terms in the insurance policy in *Coalex Pty. Ltd.* were entirely different, from the terms of the policy issued in this case.

24. Arguing on behalf of the insurer, *IFFCO-Tokio*, Mr. Gourab Banerjee, learned senior counsel, submitted that there were no less than 20 unreasoned decisions or "findings" which had rejected its arguments. He referred to paras 67.18, 67.28, 67.29 of the award. Counsel stated that these were instances where the Tribunal has rejected all the contentions of the insurer/objector and without any exception accepted all the contentions of *Indorama* without assigning any reasons. It was argued that not merely are there stray observations made by the tribunal on various aspects which demonstrate the lack of reasons but further

that the decisions on the main points of contentions which form the basis of the ultimate decision of the arbitral tribunal to award the claims in favour of the respondent were also lacking; they were bereft of reasons. Counsel relied on paragraph 65.12 and 66 of the award and stated that till paragraph 65.12 the detailed discussion of the disputed point on the interpretation of "wherever found necessary" was recorded. Thereafter the arbitral tribunal proceeded to decide the said point by merely observing that "it is court which considers necessary to go in to the alternative basis clause on the mechanism provided by the parties under the contract" without indicating any reasons why it felt compelled to adopt the alternative basis clause and without answering the import of "wherever found necessary". The decision - to accept the output method, according to Mr. Banerjee is based on no reason and affects the tribunal's ultimate conclusions, and grants Indorama's claims. This, submits IFFCO-Tokio, goes to the root of the matter to invalidate the award as unreasoned and non-speaking.

25. Mr. Banerjee argued that the impugned award was contrary to the fundamental policy of insurance law which is that a contract of insurance is one for indemnity. The award proceeds on the basis that the intent of the policy is to indemnify the insured for the losses suffered, thereby adopting an approach departing from the that principle. Mr. Banerjee argued that the impugned award proceeds to analyse Indorama's claim based on output basis of the methodology on the strength of the surveyor report who has been appointed to compute the loss of profits 3 years after the incident at the instance of the insured company. It was argued that in preferring the output basis to compute loss of the profits due to business interruption occurred by fire, the tribunal merely cited intent of the parties and the object of the contract and further that the computation shown by IFFCO-Tokio was on higher side. The tribunal failed to assess the parties' positions and the surveyor reports of both the parties on an application of the indemnity principle. Counsel urged that the insured/Indorama cannot profit out of the insurance. Nevertheless, the tribunal did not return any finding as to how the computation made by the insurer's surveyor failed to indemnify Indorama and further how only the latter's surveyor's computation really indemnified it. Counsel submitted that the tribunal merely found faults with the report of the surveyor (M/s. Adarsh and Associates) without considering how, if it did not indemnify for the loss of profits suffered by Indorama. Therefore, the single judge correctly set aside the award.

26. The award was, according to the senior counsel, premised on the basis that the LOP was not an indemnity policy but one of reimbursement; which is based on an erroneous proposition of a fundamental principle of law and its application was contrary to settled law and public policy of India. The award recompensed Indorama by an amount which was much more than the loss actually suffered by it. The basic premise of an insurance contract is that the insured has to be put in a position it was before the loss occurred. It is thus argued that in the award the tribunal not only ignored but also expressly rejected such a fundamental principle of insurance law. This deviation resulted in unjustified profits by Indorama,

exhibiting perversity in the award. Reliance is placed on *Amravati District Central Cooperative Bank Ltd. v. United India Fire & General Insurance* (2010) 5 SCC 294.

27. Reliance is also placed on the Tariff Advisory Committee's (TAC) General Regulation 1 on Consequential Loss (Fire) Insurance Section 1 which reads as under:

"Policy to constitute contract of Indemnity: Every policy shall constitute a contract of indemnity only."

28. The TAC was formed under Section 64U of the Insurance Act, 1938 ("the 1938 Act") to prescribe the terms and conditions and premium rates as well as wordings of insurance policies, when the insurance policy was issued to the Indorama, it was mandated by law to issue it only in accordance with the LAC's prescribed wording. The policy was in fact issued in the mandated form, and was a policy of "indemnity only" as required by law and by the TAC's regulations. It is submitted that it has also held in several judgments that contracts of insurance are contracts of indemnity except in the case of life insurance, personal accident and sickness or contracts of contingency insurance. The following cases were relied upon : *United India Insurance Co. Ltd. v. Kantika Colour Lab*, (2010) 6 SCC 449. *State of Orissa v. United India Insurance Co. Ltd.*, (1997) 5 SCC 512; *Union of India v. Sri Sarada Mills Ltd.*, (1972) 2 SCC 877.

29. It is further argued that the award was contrary to express terms of the contract, the TAC mandated wording and specifications. His submission is that the policy is issued in accordance with the Tariff Advisory Committee's prescribed wordings of "Consequential Loss (fire) Tariffs (paragraph 4.1 of the petition). As stated above, the TAC is set up under Section 64U of the Insurance Act 1938 to stipulate policy wordings for all general insurance companies, and the policy was issued by the insurer solely in accord with the TAC phraseology. It is urged that each specification in the TAC document deals with a separate set of circumstances. For e.g. "Specification A" covers insurance of gross profit on turnover basis which has with it its own set of definitions, "Specification B" on the other hand covers insurance of gross profit on output basis exclusively with its own set of definitions and terms, "Specification C" is entitled to a difference basis and provides cover on the basis of reduction in turnover, again with its own set of definitions.

30. It was urged that the impugned award faulted the surveyor's report for basing itself on one-line conclusions; however, the award was found on the basis of the answers provided by the insurer in the cross examination. It was that the criticism or non-acceptability of surveyor's report did not however, lead to the conclusion that the turnover basis was considered as the real indicator of the loss of profits (on account of business interruption) should not be selected and the computation arrived at by Indorama was the correct indicator towards indemnification. It was argued that the said approach and conclusion by mere ipse dixit of Indorama's surveyors and finding faults in the report of M/s. Adarsh

and Associates ignores the principle of law relating to indemnification. The arbitral tribunal returned faulty findings on the adoption of the output method instead of the turnover method without giving cogent reasons of preferring one method to the other. The entire case of the parties was dependent upon the finding as to which method of computation was the best indicator towards indemnification in the circumstances like the present one. Therefore, the impugned award was clearly a non-speaking one and ignored settled principles of law justifying interference by the single judge.

31. Pointing out that the only rationale to uphold the output method appeared to be that Indorama's business was cyclical in nature. It was argued that the arbitral tribunal accepted such reasoning without any evidence on record. The mere fact that IFFCO-Tokio did not cross examine the respondent's witness on the computation proposed by them does not lead to a conclusion as a matter of consequence that the method of computation adopted by the respondent is correct. It was argued by IFFCO-Tokio that its challenge was to the inapplicability of the particular method of computation of loss of profit and as such the cross examination on the actual computation or finding inaccuracies was inconsequential when its position was that the said method ought to not have been applied at all in the particular circumstances of the present case. It was further submitted that though in the cross-examination the insurer did not produce anyone or examine Indorama's witnesses with respect to calculation, that was mainly because its challenge throughout was about the method adopted by Indorama towards its output claim instead of the turnover basis, the method stressed by it which was appropriate in the facts and circumstances of the present case.

32. Mr. Banerjee also submitted that IFFCO-Tokio had appealed the single judge's decision to the extent it remitted the matter, without furnishing any cogent reason. Counsel pointed out that the entire analysis in the impugned judgment showed that the tribunal had committed patent error in appreciation of law and the findings; however, the single judge held, for no apparent reason, and quite contrary to the record that the surveyor's report was based on a wrong calculation inasmuch as it recorded the wrong standard turnover period. This observation, it was submitted, was without any reasoning or basis on the record. He therefore urged that this court should set aside the direction to remit the matter for reconsideration, and instead uphold the setting aside of the award.

Analysis and conclusions

33. The impugned judgment is unusually lengthy and proceeds on a rather elaborate discussion of the issues. However, despite its prolixity, the single judge clearly faulted the tribunal in certain fundamentals. Firstly, the impugned judgment held that the tribunal's decision on the "alternative basis" condition and the recourse to it, was not warranted because it was not reasonable- i.e. based on any objective premise. Secondly, and equally importantly, the learned single judge held the award to be unsupported by law, in its application of law

and legal principles and the analysis of the conditions of the contract. The relevant observations in this regard as follows:

"The discussion done by the tribunal in paragraph 69.4 and 69.5 by the arbitral tribunal further show that the tribunal observed that it is not acceptable in law that the principle of indemnity is intrinsic to all insurance contracts and the insured cannot be allowed to make a profit out of the insurance. The arbitral tribunal paragraph 70 onwards started discussing the various case laws along with the submission of the parties and simultaneously rejecting or accepting the said submissions and proceeded to observe in paragraph 77.3 and 77.4 that the object and intent of the alternative basis clause is to really indemnify the claimant for the loss and the tribunal again reiterated that it is necessary to apply alternative basis clause and is the real object and intent of the policy. In between tribunal also observed in paragraph 75.1 that the tribunal is on the interpretation of the contract and thus the opinion of the witness on behalf of the insurance company cannot be of any assistance. At this stage, it is suffice to say that it is difficult to find any interpretation to the contract/insurance policy rendered by the arbitral tribunal in the award. So far, the award is merely the reproduction of the position of the parties, case laws, contentions, reproduction of the clauses of the policy document and evidence of the parties. There is no interpretation which has been found in the award of the interplay between the clauses of insurance policy document upto paragraph 77.4. The award merely adopts the inferences of the cross examination of the surveyors and forms the opinion of the tribunal on the basis of the answers to the questions when the said questions are not purely factual in nature. I shall discuss this in detail while commencing my discussion immediately after I complete my analysis of the award with respect to first claim.

From paragraph 77.5 onwards, the learned arbitral tribunal proceeded to discuss the computation of the loss given by CW3. Mr. Srivatsan, surveyor of the respondent. After making certain corrections in the computation in paragraph 77.6, the arbitral tribunal proceeded to observe that the actual loss is quantified at Rs. 34,70,55,231/- and proceeded to award the said sum at paragraph 80.32. At this stage, I would discuss the points which fall for consideration with respect to challenge of claim No. 1 preferred by the petitioner. I shall discuss the award with respect to other claims along side my discussion under the respective heads.

28. The entire reading of the award for the Claim No. 1 leaves several questions unanswered or not explained with cogent reasons in law and the reasons whatsoever are existing are contrary to the well settled principles of law governing the insurance including the principle of indemnity and proximate cause existing in the law of insurance which has led to this court to examine the said questions as no useful purpose would be served by adjourning the matter for supply of additional reasons under Section 34(4) of the Act as the entire approach of the tribunal and the mindset reflected from the reading of the reasons that are existing in the award seems to be flawed and contrary to the

well settled principle of law. Therefore, this court is proceeding to examine the said questions. The said questions are:

a) When it is desirable to adopt the alternative basis method in assessment of losses of business interruption in consequence of the damage arising out the incident of fire. The tribunal answers this question by observing that it is the point for the tribunal determination and the tribunal deems it necessary to apply the said method merely due to the reason that valuation of the loss on the output basis comes on higher side than that of the turnover basis, secondly that it is in the nature and purpose of the policy to indemnify the insurer and thus it would be in consonance with the purpose and nature of the policy to adopt such method. Thirdly, the tribunal though nowhere categorically observed that the business of the respondent is cyclical in nature but by approving the report of CW3 and analyzing the cyclical nature of business in certain paragraphs but by not returning the findings on the same in effect implicitly approved the said reasoning as well. Thus, all these reasons according to the learned Arbitral Tribunal enabled the Tribunal to depart from the turnover approach.

I find that the said reasons are either no reasons in law to justify the adoption of the alternative basis method for computation of the consequential loss and/or in the alternative the said reasons are not in consonance with the fundamental policy of law of insurance which is that the insurance contract is always a contract of indemnity and the insured cannot benefit out of the payments made towards the indemnification. I find that merely because the value of sum to be recompensed to the insured is higher when computed by one method or the other can never be the basis for preferring one method over the other. The true test according to me is that which of the two methods would truly and realistically indemnify the insured. The enquiry from the said standpoint is completely missing in the impugned award contrary the public policy and settled principles of law relating to insurance and thus perverse which would also affect the future grant of the claims in the business interruption insurance contracts as well. Likewise, it cannot be the nature of the policy and/or purpose of the policy to recompense higher sum to the insured. The indemnity policy never mean that invariably the view which benefits the insured with higher sum is to be preferred over and above the insurer till the time the decision on the question which of indemnity is determined or ascertained.

The third reasoning which is a sub silentio finding on the cyclical nature of the business of the respondent is also nowhere firstly answering the question as to how the respondent could not be adequately indemnified by way of loss of turnover basis which is the first method for assessment of the losses. Even assuming for the argument that the cyclical nature of the business is per se an answer to the question why the respondent could not adequately indemnified by any other method, still it would be reflected on facts of the case in the later paragraphs of the judgment when the evidence is analyzed that the said plea of the respondent about the cyclical nature of business does not advance the case

of the respondent towards the applicability of the output basis as a method to assess the loss of profits in consequence of the damage arising out of the incident. In view of the same, I would answer this question in my discussion.

b) Whether the business interruption insurance or loss of profit insurance in consequence to the damage arising out of the fire is a contract of indemnity. The answer to this question is essential in as much as the Arbitral Tribunal at paragraph 69.4 and 69.5 has while rejecting the submission of the petitioner that it is a contract of indemnity observed that it is not acceptable in law. As the tribunal has not given any reasoning as to why it is not acceptable in law. I shall be proceeding to analyze the terms of the policy document and also the legal position as to whether the business interruption insurance or loss of profit insurance is a contract of indemnity or not.

c) Whether the desirability and adoption of the method for the assessment of the loss of the profit on account of the business interruption in consequence to damage arising out of the incident of fire is a pure question of fact or mixed question of fact and law. The answer to this question is also essential in as much as the arbitral tribunal proceeded to answer the said question by merely placing reliance of the stand of the rival parties and contentions advanced by them and finding faults of the testimony and cross examination of one side over the other. The arbitral tribunal did not conduct any analyses as to why it is legally desirable to adopt the alternative basis or output basis in order to indemnify the respondent as against the reduction of turnover basis. I find that the said question is not merely dependent upon the pleadings or evidence of the parties but is on the other hand is a mixed question of fact and law as the desirability of the method to be adopted for computation of the losses has to be ultimately tested upon the touchstone of the well settled principle of law of insurance which is indemnity principle and other principles which is that the insurance indemnifies for the losses for the proximate cause of the perils insured and not others. In that way, the question of desirability and adoption of the method for assessment of the loss is a mixed question of fact and law and not pure question of fact.

d) Which method for assessing the consequential loss of profit in the facts of the present case and as per the legal principles evolved by the courts governing the field is applicable to the present case which can be said to be indemnify the respondent. I shall answer this question after objectively analyzing the terms of the policy and legal position. This is due to the reason that though the tribunal observed that it has given some interpretation and justification for the adoption of the method or basis for computation of the consequential loss of the profits in the present case but did not as a matter of fact provide any such interpretation and nor discussed legally on the same."

34. The Single judge also observed, on the issue as follows:

"30. As noted above that the impugned award based the finding in paragraph 67 for awarding the sum of Rs.34,70,55,231/- in the claim no. 1 as loss of profits

computed on output basis by observing that the valuation of the loss when computed on output basis is coming to be higher than that of the turnover basis. Further, the learned arbitral tribunal also rejects the submissions of the petitioner herein/respondent therein in paragraph 69.5 that the business interruption insurance/FLOP policy is a contract of indemnity by observing that "it is not acceptable in law". Likewise on the facts of the case, the claimant's surveyor/Mr. R. Srivatsan/CW3 during his cross examination in answer to the questions 62 and 69, 72, 73, 74 also maintained the position that the business interruption insurance/FLOP is not the indemnity policy but is policy driven by the definitions and can provide higher and smaller loss as per definitions. All this clearly goes on to show that the arbitral tribunal by making the observations that the computation of the loss which is higher in valuation is required to be preferred over the computation and simultaneously rejecting the plea that the indemnity principle is intrinsic to all insurance contracts has in effect mixed up with the concept of the indemnity underlying the insurance contracts and/or has tampered with the same. The question then arises as to whether the policy of the business interruption insurance/FLOP is a contract of the indemnity. The respondent though in the written submissions argued that this question is non issue as the respondent maintains the position is that the business interruption insurance is the contract of indemnity. I find that the said submission of the respondent is misconceived as the respondent fails to realize that the arbitral tribunal renders the contradictory findings in paragraph 69.5 as noted above. Further, the arbitral tribunal proceeds to approve the report of the surveyor Mr. Srivatsan who computes the losses under the policy document on the premise as if the said policy is not of indemnity but to provide maximum amount to the respondent which is clear from his cross examination reproduced below. Thus, the arbitral tribunal clearly gave a nelson's eye to the principle of indemnity and approved the report of the surveyor who computes the losses on erroneous premise and belied and also renders finding that it is not acceptable in law that the indemnity principle is intrinsic to all insurance contracts. Under these circumstances, the change of the position by respondent today that it also believes that the business interruption insurance policy is a contract of indemnity does not absolve the court's duty to examine as to whether the arbitral tribunal applied the principle of indemnity or not. Thus, the issue of indemnity indeed arises for consideration in the present case on account of non application of the said principle by the tribunal and rendering contradictory findings on the same. I find that both in law as well as on the facts of the present case, the business interruption policy is the contract of indemnity and my reasons for arriving at the said finding are as follows:

a) The business interruption insurance contracts or fire loss of the profit policy like other contracts of insurance are no exception to the applicability of the principle of indemnity. The said policies are clearly aiming at indemnifying the insured and not to allow the insured to earn more than the suffering of the loss. This due to the reason that the term consequential loss of profit as a term itself

suggests that there has to be an establishment of the loss of the profit on account of the business interruption as a result of the damage. Thus, the establishment of the loss is a condition precedent. There are number of the case laws indicating that the business interruption insurance is a contract of indemnity."

35. The single judge then cited some decisions (*City Tailor v. Montague Evans*, 1921 LLJ, 394, *Coalex (supra)*; *Castellain v. Preston* (1882) 11 QBD 350 and then proceeded to state as follows:

"The above analysis became necessary in order to show that the contract of business interruption insurance is a contract of indemnity. Otherwise, there are several judgments passed by our own Supreme Court in the field of insurance law approving the same very principle which is fundamental to the insurance law. (For Reference please see *Union of India v. Sri. Sarda Mills*, (1972) 2 SCC 877 and *United India Insurance Co. Ltd. v. Kantika Colour Lab*, (2010) 6 SCC 449)

b) Upon the facts of the case, Wood J. in *Coalex (supra)* observed that the reading of the policy suggests that there are clear indicators as to indemnity by employment of the language "actual loss" and the words "to indemnify" used in the policy document besides other. In facts of the present case, from the reading of the clauses of the policy document as done above, it is clear that there are clear indicators that insurance policy in the present case is intended to indemnify the insured. The clause like deduction from the increased costs of working of any sums saved during indemnity period is also present in the policy document of the present as in the case of *Coalex (supra)* which is indicator as to indemnity based on actual loss. It has been discerned above upon the plain reading of the clauses of the policy document that the loss which is recoverable is arising out of the interference or interruption of business resulting from the damage. The policy document provides for the indemnity period which is again an indicator that the insurance policy/FLOP is intending to indemnify the insured and not to provide any higher valuation of the loss of the profits.

On facts, even the claimant/respondent's witness Mr. Alok Banerjee took the position that the company should be reimbursed the actual losses as it has incurred while answering the cross examination to the following questions:

"Q. Please turn to Q. No. 91, can you tell the Hon'ble Tribunal what do you mean by the term "more beneficial"?

A. By the term "more beneficial" I meant that the company should be reimbursed for the actual losses it has incurred.

...

Q. From your answer to question No. 91 will it be correct to infer that more beneficial according to you would mean indemnity?

A. Yes, the actual losses ought to be indemnified."

From the above discussion, it is beyond cavil of doubt that the business interruption insurance or FLOP is a contract of indemnity as a matter of law like other insurance contracts and the said position is also clear from the construction of the policy and the attendant circumstances as the respondent also took the same position.

Thus, to say that the principle of indemnification has no application either from the claimants/respondents surveyor's end or finding from the tribunal's finding on the facts of the present case is factually and legally incorrect and against the fundamental policy of law involving the insurance contract rendering the award contrary to public policy as per the provisions of Section 34 of the Arbitration and Conciliation Act, 1996.

Desirability and Adoption of Mode of the Assessment of Loss of Profits

31. The question now arises as to which of the mode of assessment of loss of profits/method of computation of the loss of profits is applicable to the facts of the case and when it is desirable to apply the alternative basis of assessment of the loss of profits as per specification J which reads that "whenever found necessary". I have already answered one of the connected question that may also aid in the answering the larger question on desirability which is the desirability and adoption of the method of assessment of loss of the profit is a mixed question of fact and law and not merely the question of fact. The arbitral tribunal in paragraphs 65.12, 66 and 67 of the impugned award proceeded to adopt the alternative basis of assessment of loss of profits merely because the tribunal found it necessary on facts and in the said enquiry, the tribunal analyzed the facts, pleading presented before it and evidence adduced by the parties on that basis came to the conclusion that it is desirable to adopt the alternative basis method of computation of losses in the facts of the fact of the case. I find that the said question is not merely dependent upon the pleadings or evidence of the parties but is on the other hand is a mixed question of fact and law as the desirability of the method to be adopted for computation of the losses has to be ultimately tested upon the touchstone of the well settled principle of law of insurance which is indemnity principle and other principles which is that the insurance indemnifies for the losses for the proximate cause of the perils insured and not others. In that way, the question of desirability and adoption of the method for assessment of the loss is a mixed question of fact and law and not pure question of fact.

32. The first limb of the question which is required to be answered is that how this desirability is required to be determined. In tribunal's view, it is the tribunal to determine whether it is necessary to go to the alternative mechanism provided by the parties in the contract as per the finding of paragraph 66 are no reasons in law, the tribunal in paragraph 67.6 observed that it finds it very necessary to go to the alternative basis clause for the assessment of loss. I find that the said discussion done in paragraph 66 to 67.6 and thereafter towards the necessity to adopt the alternative assessment of loss of profits as per specification J is not

objective assessment of desirability to adopt the alternative basis approach for assessment of losses. Nor the reasonings provided thereafter by the tribunal either in the form of criticism to the testimony of surveyor of the petitioner M/s Adarsh and Associates or the other reasoning as to higher valuation in case the computation is made on output basis is an answer to the said question or provide any reason for adopting the alternative approach. This court is thus proceeding to determine the said question as the parties dispute the desirability of the adoption of alternative mode of assessment in the present case by seeing as to how the necessity or desirability of the adoption of the mode of assessment is determined.

33. In order to answer the question as to when it is desirable to adopt the alternative basis of assessment of losses, it is always upon the court or tribunal to answer "whenever found necessary" as per the clause where there exists a dispute between the parties as to whether it is necessary to adopt the alternative basis of assessment of losses or not. For adopting the said view that it is jury question or decision of the tribunal, no further legal analysis is necessary to be done as it is obvious that once there exists a dispute, it is for the court or tribunal to answer the said question. The tribunal view which is deciding the desirability on the necessity to adopt the alternative basis of assessment of losses in business interruption loss cases must however adopt a judicious approach. The said judicious approach must have some objectivity in it which reflects the necessity to compute the loss of profits by adopting an alternative mode of assessment. The said objectivity in the decision of "whenever found necessary" would only come when the tribunal provide the reasons for adopting the said approach which are justifiable in facts and law and not the ones which are unconnected thereto. Thus, it is though correct that it is for the court or tribunal to determine the desirability of adopting the alternative mode of assessment of losses but the said determination must adopt some judicious approach.

34. The said judicious approach can be adopted by the tribunal by analyzing the host of the factors including construing the policy document, comprehending the requirements of adopting and preferring one particular method of assessment of loss of profits over the other, understanding the nature of business of the claimant company and the tenability of the pleas raised or position taken by the parties whether correct or incorrect, discussing the pre-requisites for the applicability of particular approach or method and whether one particular method of assessment of loss of profits is befitting or justifiable in the given circumstances or not. All this enquiry is missing from the tribunal's decision making in the present case in the impugned award on the basis of which it can be said that the tribunal has adopted any such judicious approach in preferring one particular method of assessment of loss of profit over the other. That is also the reason why I do not agree with the contention of the learned senior counsel for the respondent Mr. Tripathi that the tribunal has adopted one of the two plausible views. In my view, the tribunal has not even justified while adopting a

view as to why it is adopted that particular view and also whether it is plausible one in the given case or not when the dispute was raised before it that it is not plausible in the given facts by the petitioner herein. Such a case like the present one is not the case of two views about the matter but is the case involving the reasons which contrary to well settled principles of law relating to insurance contracts and the settled principles governing its operation."

36. The single judge further reasoned why the output-based claim could not have been accepted, and why the tribunal's approach was unreasonable in failing to consider built up stocks:

".... From the reading of the cross examination of the respondent's witness, it is clear that the respondent clearly maintained the position that the sales of the output are not foreseeable and there is no answer by the respondent in evidence whether the respondents conduct business trend analysis in order to forecast the length of the business cycle. Rather, the respondent merely maintains the stand that the sales are cyclical and erratic but are not foreseeable which can be seen from answers to questions 82 to 84 and 89 and 90.

Once it is the respondent's own case that the sales of the production are not foreseeable or are erratic in nature and there exists no cycle as such for sales. Further, there exists no evidence on the record on the basis of which it can be said that output produced is likely to be disposed of during the said indemnity period, it cannot be said the literature and the authorities cited by the respondent would aid the case of the respondent in the peculiar facts of the present case where the indemnity period is of 6 months from the date of the damage coupled with the fact that the respondent itself has taken the position that the saleability of the stock is not foreseeable in future and it would be guess that the fluctuation of the business will work out within the 6 months. In simple words, the respondent is unable to show the results of its business is affected during the indemnity period of 6 months from the date of the damage due to occurrence of the incidence of fire by merely computing a shortage of the output during the period and multiplying the same with the rate of the gross profit with certain adjustments as per the formula terming it as if it is a lost gross profit for the indemnity period. The said computation is contrary to the respondent's own case that the sales are not foreseeable and erratic in nature. Though, it is altogether different matter that as per the respondent's own saying that the respondent could have produced more during the indemnity period but for the incident of fire and the result in the business should have been realized in the future when the production is sold of which is not foreseeable as per the respondent. But the insurance policy shall not indemnify for the affect on the results of business with no foreseeable future which shall fall outside the purview of the indemnity period. Thus, in the given facts of the case, terms of the policy especially the definition of the indemnity period and the position taken by the respondent that the business of the respondent is cyclical in nature, the claim of the respondent on the output basis does not reflect that the results of the

business are affected during the indemnity period and therefore the applicability of the alternative basis clause is undesirable. (Emphasis Supplied)

e) Furthermore, as discussed in the previous head of concepts that the seasonal nature of the business requires a special consideration by the insured for the selection of the duration of indemnity period which is clear from reading of Rileys on Business interruption insurance and that the insurance containing 6 months indemnity period for seasonal nature of business when the effect on the business is to be realized in the next six months would contribute little or nothing. The same principle is applicable to the present case afortiori without any variance. The submission of the respondent that it is upon the respondent's insistence the clause relating to alternative basis of the assessment of the loss of profits was added in the insurance policy as per the communication dated 28th February, 2007 in view of the cyclical nature of the business requires examination at this stage. If the submission of the respondent is to be accepted then the respondent was conscious of its nature of the business and implication on the indemnification of the loss arising from the occurrence of any incident and thus could have equally insisted for the larger indemnity period in the policy so as provide adequate cover to the cyclical nature of the business conducted by it as advised by the authorities on the subject. Having not done so and keeping the indemnity period intact which is 6 months from the date of the occurrence of the damage, the respondent with open eyes undertook the insurance policy on its own peril and entered into such an agreement. In such a case in order to claim the indemnity under the policy, the respondent's claim has to fall within the ambit of the cover provided by the policy which is by establishing the consequential loss of profits by showing that the results of the business is affected within in the indemnity period and computing the lost gross profit during the indemnity period and not by merely showing shortage of the production unconnected with its likely affect on the business within the indemnity period which would lead to the computation of loss of profits outside the purview of the indemnity period. The claim of the said nature would not be indemnified by the insurance policy as the respondent never took due care and consideration while opting for indemnity period and consciously chosen the indemnity period which delimits the liability of the insurance company/petitioner herein. (Emphasis supplied)

f) I have also gone through the evidence shown by the respondent in order to support the plea the sales pattern do not follow pattern but the production is more stable which is mentioned in the form of details of the production, sales, closing stock details including bar charts for at least 6 years. Even if all these evidences are to be believed and the respondent position is to be assumed as correct that the sales do not follow any pattern and are not foreseeable but the production is more stable, still the manner in which the policy of business interruption insurance in the present is couched in the present case does not permit the indemnification of the losses on the mere shortage of the output without showing its consequential effect on the sales/ business of the respondent company within the indemnity period. Such evidence of showing the causal link

between the production and its affect on the results of the business is clearly missing in the present case and thus even if the respondent has shown such evidence to support the plea of applicability of the output basis would not aid the case of the respondent.

In view of the my reasoning and analysis done above, It can be said that the computation of loss of profits by alternative basis method or the output method is clearly undesirable in the present case in the manner suggested by the respondent as it would take into consideration entire shortage of the output which has no connection with the affect on the results of the business within the indemnity period when the policy requires otherwise.

IV. Loss of profits are payable under the business interruption Insurance which are proximately caused by the perils insured - As I have discussed this concept in earlier head is that the fundamental rule governing the law of the insurance relating to perils be it marine or fire or the business interruption insurance which is that the loss payable under the insurance is one which is proximate cause of the peril insured. In simple words, the loss has to be direct consequence of the peril insured and not the remote one. In the present case, if one examines the terms of the policy, it can be seen that the policy clearly provides that what is payable is the loss resulting from business interference or interruption in consequence of the damage to the property etc. due to peril insured which is fire. Thus, the expression "in consequence of" or "resulting from" has to be interpreted as direct consequence of the peril as against the remote one. Accordingly, the loss of profit which has the direct nexus with the peril insured would be recoverable under the policy as against any other loss. Applying the said principle to the facts of the present case would show that the loss of profits which have the affect on the results on the business within the indemnity period as per the terms of the policy would be called as losses which are direct consequences of the perils insured as per the policy and are recoverable under the policy as they would be in real sense of term the loss resulting from the business interruption as a consequence of damage due to fire. On the contrary, the losses which do not have the bearing on the business during the validity of the policy or indemnity period but would be dependent upon future events including the demand in the market or business cycle would not be in the peculiar terms of the present policy can be categorized as the proximate cause of the perils insured and more so when the definition of the indemnity period insist the showing the affect on the results of the business. This is due to reason that had this been within the contemplation of the parties to cover such losses as direct consequences of the insured events to the extent sought by the respondent, then the policy period or indemnity period should have sufficient covered such events within the terms of the policy which is missing in the present case. Therefore, the computation of the lost profit on the basis of the reduction of turnover by considering the reduced turnover during the indemnity period which reflects the effect on the business during the indemnity period are clearly recoverable under the policy as a direct consequence of the business

interruption due to fire as against the losses based on the shortage of output/produce which has no connection with the likely effect of the same on the business within the indemnity period. This is additional reasoning as to why the claim presented by the respondent is hypothetical in nature and thus cannot be considered in terms of the present policy. (Emphasis Supplied)

V. Testing the loss of profits on the principle of indemnity - It is also noteworthy to mention that the business interruption insurance is the contract of indemnity where the insured has to indemnify the actual loss suffered. The use of the expressions "during which the results of the business are affected" also indicate that there has to be some harm or loss to the business as a consequence to damage on account of incident of fire. Thus, the loss to fall cause business interruption has to be in actuality or closer to reality during the indemnity period in comparison to the previous year business depending upon the definition of the indemnity period.

It is also pertinent to mention that in the present case, the damage has caused the loss in terms of the reduction in turnover coupled with some kind of output loss which would have likely effect on the business in future as per respondent's case. It is not the case of the respondent that its turnover was not at all affected during the indemnity period. This is due to the reason that the respondent has already been paid the interim payment about Rs. 6 Crores as indemnification on the basis of the report of surveyor M/s Adarsh and Associates on 8th January 2008 which was premised on reduction of turnover basis towards FLOP and material damage. On the contrary, the case of the respondent is that due to certain factors which are like the sales of the respondents business are fluctuating but the production is constant and cyclical nature of business having no nexus with that of the sales, the alternative mode of assessment of loss of profits should be adopted. I have already arrived at the finding above that the consideration of the entire shortage of the output and multiplying the same with the rate of gross profit would not give the lost gross profit during the indemnity period but would include presumptive/hypothetical loss of profits without the insured making those sales in the indemnity period or showing the effect of such lost output on business in anticipation that the insured company is likely to sell the products in future with no certain period and thus the same will have no affect on the business of the insured during the indemnity period which is a condition precedent in the formula to be read with along with the definition of indemnity period and the terms of the operative clause of the policy. Now, if one weighs the computation of loss of profits done on both these modes on the touchstone of the principle of indemnity and ascertain which of the loss of profits would truly indemnify the insured in the given terms of the policy and the facts and circumstances of the case, the answer would again not be so difficult and would lean towards the loss of profits on the reduction of turnover basis which would at least show some affect on the business during indemnity period which is in fact a kind of loss recoverable in terms of the policy over and above the output basis where the computation is made on presumptuous basis. The reason is very

simple and plain which is again that the insurance including the business interruption insurance is seeking to indemnify the loss and in the case of business interruption insurance a loss of particular kind which is a loss arising out of the business interruption in consequence of the damage due to incident of fire. Thus, the said loss has to have some nexus with the business interruption and that is why the definition of indemnity period insists the effect on the business during the said period. Once, the said effect on the business is shown during the indemnity period, then the loss computed as per formula would become the loss arising out of the business interruption. That is why, when in the case like the present one where we have the computation of loss of profits on the basis of loss of turnover available with us which has been done by the surveyor M/s Adharsh and Associates, to which the respondent does not dispute to the extent that the turnover of the respondent did not fall at all during the indemnity period (but merely protest on some mistakes in the calculation in the said report) which is a reflection on the effect on the business during the indemnity period as against another computation which though higher in sum but does not reflect such picture on its likely effect on the business, one has to prefer the approach which has the effect on the business as against the one which has not for obvious reasons which are that business interruption insurance is a contract of indemnity and would indemnify only those losses arising out of the business interruption and given the terms of the policy only ones which have the effect on the business during the indemnity period (Emphasis supplied)"

37. It is therefore evident that the single judge gave many reasons for setting aside the award. The court proposes to analyse the soundness of those reasons, but keeping in mind the limitations imposed by the Act, i.e. that sans patent illegality or manifest unreasonableness (in the approach or findings) perversity or findings that no reasonable man can, placed in like situations, return, the remit under Section 34 does not extend to interdicting an arbitral award.

38. The fundamental fault which the single judge found with the award was that in it, the impugned judgment discerned an approach which negated that the policy in question was a contract of indemnity. The relevant discussion in the award is as follows:

"69. In pr.3.23(a) it is submitted:

"3.23 In addition to the submissions above as to why the Claimant's contentions to the alternative basis clause is wrong. It is the Respondent's submission that:

(a) The contract of Insurance (the MD and LOP policies) are policies of indemnity, and must be interpreted and applied bearing in mind that the Claimant/Insured is only ever entitled to indemnity of its actual loss under the policy and no more; and

69.1. The Oxford Concise Dictionary {8th Edition) at pg.600 gives the meaning of Indemnity as compensation for loss occurred; security against loss.

69.2. In pr.3.23 (b), it is submitted:

"(b) If the alternative basis clause is interpreted in the manner insisted by the Claimant, it would lead to the Claimant being unjustly enriched and getting more than what is payable by way of Indemnity"

69.3. The Id. counsel for the respondent is begging the question.

69.4. In pr.3.24, it is submitted:

"3.24 The Respondent submits that the principle of indemnity to all insurance contracts-as an insured cannot make a profit out of its loss. The Insured in this case the Claimant is entitled to be compensated only with respect to the losses and nothing further."

69.5. This is clearly not acceptable in law.

70. In pr.3.25, the statement of the principle in Halsbury's Laws of England (4th Edition) , is quoted:

"3.25 The principle of Indemnity and its applicability to Insurance contracts has been discussed in the following cases:

"The happening of the event does not of itself entitle the assured to payment of the sum stipulated in the policy; the event; must, in fact, result in a pecuniary loss to. the assured, who then becomes entitled to be indemnified subject to the limitations of his contract' He cannot recover more than the sum insured for that sum is all that he has stipulated for by his premiums and it fixes the maximum liability of the insurers. Even within that limit, however, he cannot recover more than what he establishes to be the actual amount of his loss. The contract being one of indemnity only, he can recover the actual amount of his loss and no-more, whatever may have been his, estimate of what his loss would be likely to be, and whatever the premiums he may have paid, calculated on the basis of that estimate."

39. It is evident that the tribunal clearly felt that the object and purpose of the policy in question was not to indemnify the insured. The position of the insurer however, was that the policy was essentially one of insurance and therefore of indemnity, not in the least that it dealt with the contingency of pecuniary loss in the event of fire or other covered peril; therefore, as a policy of insurance, it was one for indemnification of the particular risk agreed to be covered, in the manner stipulated by the contract. The tribunal's premise was on what it perceived to be was the object of the contract, as is evident from its statement that

"Therefore, we have to construe the contract on the basis of intention and object of the contract along with the demonstrable purpose of the parties in entering into the contract."

40. The judgment of the Supreme Court in Economic Transport Organization v. Charan Spinning Mills 2010 (4) SCC 114, observed that

"A contract of insurance is a contract of indemnity. The loss/damage to the goods covered by a policy of insurance, may be caused either due to an act for which the owner (assured) may not have a remedy against any third party (as for example when the loss is on account of an act of God) or due to a wrongful act of a third party, for which he may have a remedy against such third party (as for example where the loss is on account of negligence of the third party). In both cases, the assured can obtain reimbursement of the loss, from the insurer."

41. Similarly, in the decision in Kantika Colour Lab (supra) underlined this aspect:

"19. Contracts of Insurance are generally in the nature of contracts of indemnity. Except in the case of contracts of Life Insurance, personal accident and sickness or contracts of contingency insurance, all other contracts of insurance entitle the assured for the reimbursement of actual loss that is proved to have been suffered by him. The happening of the event against which insurance cover has been taken does not by itself entitle the assured to claim the amount stipulated in the policy. It is only upon proof of the actual loss, that the assured can claim reimbursement of the loss to the extent it is established, not exceeding the amount stipulated in the contract of Insurance which signifies the outer limit of the insurance company's liability. The amount mentioned in the policy does not signify that the insurance company guarantees payment of the said amount regardless of the actual loss suffered by the insured. The law on the subject in this country is no different from that prevalent in England; which has been summed up in Halsbury's Laws of England - 4th Edition in the following words:

"The happening of the event does not of itself entitle the assured to payment of the sum stipulated in the policy; the event must, in fact, result in a pecuniary loss to the assured, who then becomes entitled to be indemnified subject to the limitations of his contract. He cannot recover more than the sum insured for that sum is all that he has stipulated for by his premiums and it fixes the maximum liability of the insurers. Even within that limit, however, he cannot recover more than what he establishes to be the actual amount of his loss. The contract being one of indemnity only, he can recover the actual amount of his loss and no more, whatever may have been his estimate of what his loss would be likely to be, and whatever the premiums he may have paid, calculated on the basis of that estimate."

42. The tribunal, this court notices, had earlier remarked, that CW-3 had not been cross examined about the figures in his report of 25th October 2010 and that "the irresistible inference" was that the insurer had accepted their correctness; further that :

"When that is the factual position, the argument on behalf of the respondent that the policy is a contract of indemnity and if the alternative basis clause is applied, it would result in unjust enrichment by the claimant is not sustainable."

43. Clearly, the tribunal, without any reasoning or appreciation of the correct position in law, brushed aside a fundamental tenet of insurance law, i.e. that

every policy embodies a contract of indemnity, no more no less.

44. Earlier, the tribunal had examined whether the contra proferentum rule applied to the policy, in respect of interpretation of the condition with respect to output basis. This rule was described by the Supreme Court, in the judgment reported as *General Assurance Society v Chandmull Jain & Ors.*, AIR 1966 SC 1644, saying it to be applicable to insurance contracts, where "there is no difference between a contract of insurance and any other contract except that in a contract of insurance there is a requirement of uberrima fides i.e. good faith on the part of the assured and the contract is likely to be construed contra proferentem that is against the company in case of ambiguity or doubt." McGillivray's Insurance Law explains the rule as follows:

"The contra proferentem rule of construction arises only where there is a wording employed by those drafting the clause which leaves the court unable to decide by ordinary principles of interpretation which of two meanings is the right one. "One must not use the rule to create the ambiguity - one must find the ambiguity first." The words should receive their ordinary and natural meaning unless that is displaced by a real ambiguity either appearing on the face of the policy or, possibly, by extrinsic evidence of surrounding circumstances.....But a clause is only to be contra proferentem in cases of real ambiguity. One must not use the rule to create ambiguity. One must find the ambiguity first. Even where a clause by itself is ambiguous if, by looking at the whole policy, its meaning becomes clear, there is no room for the application of the doctrine."

45. Indorama, the insured, in this case, argued the ambiguity in the interpretation of the alternative basis clause, and then applied the contra proferentum rule. However, after a detailed discussion, the tribunal did not accept Indorama's contentions; (interestingly it also did not accept IFFCO-Tokio's contentions) - with respect to the right to apply the alternative method condition, but instead held that:

"65.12, In the light of the above, the contention of Mr. Abhimanyu Bhandari, Ld. Counsel for the Claimant that it is the prerogative of the claimant to invoke the alternative basis clause or the contention of the Ld. Counsel for the Respondent, Mr. D. Varadarajan, that it is the right of the respondent to determine the applicability of the alternative basis clause is difficult to accept.

6.6. It is for the Court or the Tribunal, while considering the claim, to determine whether it is. Necessary to go to the alternative basis clause on the mechanism provided by the parties in the contract."

46. The single judge held that this approach was erroneous, faulting the tribunal for an injudicious approach. Pertinently, it was held that the tribunal should have analyzed the "host of the factors including construing the policy document, comprehending the requirements of adopting and preferring one particular method of assessment of loss of profits over the other, understanding the nature of business of the claimant company and the tenability of the pleas raised or

position taken by the parties whether correct or incorrect, discussing the pre-requisites for the applicability of particular approach or method and whether one particular method of assessment of loss of profits is befitting or justifiable in the given circumstances or not. All this enquiry is missing from the tribunal's decision making in the present case in the impugned award on the basis of which it can be said that the tribunal has adopted any such judicious approach in preferring one particular method of assessment of loss of profit over the other."

47. This court concurs with the learned single judge, on the above observations and general approach. Having held that the contra proferentum rule was inapplicable, the tribunal was obliged to discern - on a scrutiny of the bargain between the parties, i.e. the internal aids within the policy, to find out the true meaning of "whenever found necessary". The tribunal instead, adopted a rule of construction bereft of any authority which was that the term "whenever found necessary" meant whenever found necessary by it (i.e. the tribunal). This implied that the parties had made a provision in a contractual document, apart from the dispute resolution mechanism, which provided discretion (not guidance) to the tribunal or arbitrator in its (or her) sole discretion.

48. The single judge, in the opinion of this court, correctly found that the award was silent on two important aspects i.e. why the turnover basis contained in the policy was inapplicable; and why the alternative (output) basis contained in the policy applied. Also, crucially, the tribunal did not furnish reasons to uphold the calculation offered by the insured company (Indorama's) surveyor. The sole basis for the tribunal to hold that the assessment output basis is inapt, was that the assessment arrived at by applying the turnover basis is "far less" than the assessment arrived at by applying the output method:

"67. The necessity to assess the loss on the alternative basis clause has arisen because if the turnover basis is adopted the value arrived at is far less than the value that is arrived at by calculating the loss on the basis of alternative basis clause i.e. on output basis. Adarsh Gupta-RW I has stated in his evidence that whatever method is adopted - either turnover or alternative basis, the result is the same. However, RW-I stated that there are no parameters to assess the loss if one applies the alternative basis clause. If that is correct his statement that the result will be the same may not be accurate. Mr. G. Srinivasan- RW2 - stated to be an expert agreed with the view taken by RW1."

49. It is evident that the rationale that the value arrived at by adopting the turnover basis "is far less" can hardly be a reason- let alone a reason that can stand scrutiny in law. The clause that appropriately indemnifies the insured is the one to be used, given the terms of the policy and the surrounding circumstances. However, the tribunal as a matter of fact favoured the higher assessment of loss, which per se is contrary to the principle of insurance law that as a contract of indemnity its object is to place the insured in as close or as proximate a position as it would have been if the event (i.e. the hazard that was the matter of coverage) had not occurred.

50. The single judge considered Riley on Business Interruption Insurance, 9th Edition, Sweet and Maxwell (hereinafter referred to as 'Riley or Riley on Business Interruption'), which he stated was "an authority on the subject recognizes the said option in the hands of the insured to convert the computation of the assessment of loss of profits to output basis but only when the wordings of the policies allow the same". The relevant discussion on the authority and why the impugned judgment held the award erroneous for adopting the output method is apparent from the following extract:

"Riley on Business Interruption Insurance, 9th Edition, Sweet and Maxwell (hereinafter referred to as 'Riley or Riley on Business Interruption'), which is an authority on the subject recognizes the said option in the hands of the insured to convert the computation of the assessment of loss of profits to output basis but only when the wordings of the policies allow the same. The learned author in fact discusses the wordings of the clauses wherein such options are available to the insured in the business interruption insurance policies. The learned author observes as under:

"(c) Option to convert to output Some policy wordings allow for the calculation of the loss following an incident to be based on the loss of production suffered. The calculation of the output loss follows very much along the lines of the reduction in turnover calculation including application of the other circumstances clause. Two example wordings are given below :

? "In respect of any lost insured under Section 1 of this Policy the Insured shall have the option to convert the basis of settlement from Turnover to output or such other basis as may more realistically measure the loss. For this purpose output shall mean the sale value of materials produced by the Insured in the course of the Business as the Premises provided that only one basis shall be operative in connection with any one loss".

? "At the option of the Insured, the term Output may be substituted for the term Turnover, provided that only the meaning of Output or the meaning of Turnover shall be operative in connection with any one event resulting in interruption if the meaning of Output be used the Accumulated Stock Clause shall be inoperative and the following memo shall be added at the end of the definition of Rate of Gross Profit :

'If during the Indemnity Period, goods, shall be manufactured or processed other than at the Premises for the benefit of the business either by the Insured or by others on behalf of the Insured, the sale or transfer of such goods shall be brought into account in arriving at the Output during the Indemnity Period.'
"Output shall mean the sale or transfer value, as shown in the Insured's books of goods manufactured or processed by the Insured, to which such adjustment shall be made as may be necessary to provide for the trend of the business and for the variation in other circumstances affecting the business either before or after the Incident or which would have affected the business had the Incident not

occurred, so that the figures thus adjusted shall represent as nearly as may be reasonably practicable the results which but for the Incident would have been obtained during the relative period after the Incident."

The main argument in favour of this alternative basis of cover is that it can provide a more accurate assessment of the loss suffered by an Insured in a business which seeks to maximize its output from the plant in which it has invested. Its application can prove difficult, however, if there are a number of processes involved and only one is halted by an incident. If the production process is lengthy, or stocks of finished product are held strategically, the impact on turnover will be delayed and, a bit like ripples on a pond, will be less pronounced as they spread out.

Against this type of cover, are the arguments that a loss of production may not actually result in a loss of turnover, either within the maximum indemnity period, or actually result in a loss of turnover, either within the maximum indemnity period, or at all. Thus no loss may actually be suffered. The clause also provides an opportunity for the insured to select against the Insurer. If there is a demonstrably greater reduction in turnover on the traditional basis insurers will be required to pay the higher figure. If, however, the turnover loss is less than on the output basis, insurers will pay on the (higher) output figures. In reality the provisions of the standard business interruption wording are sufficiently flexible to address both the above issues and thus this type of cover is generally only available as per of an engineering breakdown cover and, even then only rarely included."

41. From the above reading of the excerpts from Riley on Business Interruption insurance, it is clear that peculiar to the wordings of the policy, there lies an option in the hands of the insured to insist the computation on particular method of assessment of loss of the profits. However, if one sees the wordings of the specification J on the facts of the case, it can be seen that the wordings of the alternative basis clause nowhere gives any option in the hands of the respondent but on the contrary reads "whenever found necessary". Therefore, the said necessity either are to be based on the agreement on both the sides and if not then, the decision to the same vests with the competent authority or court or tribunal where such dispute is pending. That is an additional reason for me to arrive at the finding that the decision on the desirability and need for the adoption of the alternative method of the assessment lies with the court or tribunal based on judicious considerations."

51. Again, the single judge remarked, on the peculiar wording of the policy and the expression whenever found necessary that operation of the alternate basis clause had to "be either be determine on the basis of the consensus or satisfaction of both the parties and if the parties dispute the said position, the said determination shall be done by the court/ tribunal or any authority seized of the dispute by adopting the judicious approach on the basis of the sound judicial principles and keeping the terms of the policy and legal position in mind." The

single judge also held that there was nothing in the policy empowering the insured to insist that one method had to be preferred over another.

52. The surveyor had initially calculated the loss on the basis of turnover, and provided for Rs. 4,17,46,359/- which he subsequently revised to Rs. 5,11,31,567/- (through an addendum dated 10-09-2009). The discussion by the tribunal on this aspect is interesting reading, especially why according to it, the surveyor's approach cannot be accepted. The tribunal's approach and findings are illustrated by the following extracts:

"67.26. In his addendum issued on 10.09.2009, revising the loss from Rs.4,17,46,359/- to Rs.5,11,31,567/-, the details of dosing, quantity of finished goods, at the time of commencement and expiry of indemnity period are given in two tables:

Table I : During Standard Indemnity period i.e. 01.05.2007 to 31.10.2007

Sl.No.

Particulars

Qty (MT)

1.

Opening balance as on 01.05.2007

34928

2.

Add: Total qty produced/output during 01.05.2007 to 31.10.2007

231334

3.

Sub Total (1+2)

266262

4.

Qty sold during the above period

214664

5.

Closing stock as on 31.10.2007 i.e. at the time of commencement of Indemnity period (3-4)

51598

Table I: During actual indemnity period i.e. 01.11.2007 to 30.04.2008

Sl.No.

Particulars

Qty (MT)

1.

Opening balance as on 01.11.2007

51598

2.

Add: Total qty produced/output during above period

181193

3.

Sub Total (1+2)

232791

4.

Less: Total qty sold during indemnity period

198841

5.

Total qty of closing stocks as on 30.04.2008 i.e. after expiry of Indemnity period i.e. 3-4

33950

6.

Less: total qty burnt due to fire on 02.01.2008

1580

7.

Net qty of closing stocks, after adjustment of burnt qty

32370

67.27. It is significant to notice here that the RW1-Surveyor has given the output during the Indemnity period as 181193 MT. Mr.Srivatsan, CW-3, the Surveyor appointed by the claimant has arrived at the output during the indemnify period at 181380 MT.

67.28. Having given these details in tables 1 and 2 in the addendum 10.09.2009, Mr.Adarsh Gupta has determined only the shortage of net quantity at 8608 MT and on that basis, he gives a revised assessment of loss in the following terms:

3.0 Revised Assessment of loss:-

Keeping in view of our above submission/verification in respect of insured's representation on above account, we have carried out revised assessment of loss, for the shortfall of total qty. of 8,608 MT of finished goods from accumulated stocks in hand, due to sale during Indemnity period, as under :-

Total shortage of finished goods from accumulated stocks due to sale during Indemnity period as worked out in table in para 2.6 above

8608 MT

Total qty of various products, converted on common denied, sold during the Indemnity period, ref Annexure A-3, attached with above referred survey report dated 24.06.2009

1,96,663 MT

Total realization, from sale of above qty of finished stocks net of excise duty/ discounts/brokerage/commissions during Indemnity period

Rs.1164,39,49,548

The net unit realized cost on weighted average basis as already worked out in our report dated 24.06.2009

Rs.59,207.63/- MT

Therefore, net cost realizable from sale of 8608 MT of finished stocks, depleted from accumulated stocks during Indemnity period at Rs.59,207.63 MT

Rs.50,96,59,279/-

Rate of gross profit for FY 2007-08 as worked out in our above referred survey report dated 24.06.2009

10.0325%

Therefore, loss of gross profit @ 10.0325% of Rs.50,96,59,279/- i.e. net cost realizable from sale of 8,608 MT during Indemnity period

Rs.5,11,31,567/-

This is not sustainable."

53. The arbitral award is peppered with similar, stipulative conclusions founded on no reason whatsoever. Similarly, in faulting the surveyor for not dealing with the claimant (appellant's) complaint, in its letter of 30 July 2009, that a figure of 9040 MT of "probable production" was reduced, the tribunal faults the surveyor for not answering the complaint in unjustified exclusion of such figure and (Paras 67.34- 67.36) without elaborating how, rejects the Surveyor's explanation as "presumptive" or "specious reasoning" and concludes that "67.37. This is in clear violation of the terms of the policy." Similar instances are found in several parts of

the award.

54. No doubt, an arbitral tribunal has considerable autonomy in its approach; it is not bound by strict rules of evidence, nor is it held to the same standards as courts of first instance are in relation to procedural laws, evidentiary rules or even with respect to interpretation of law. Nevertheless, arbitral tribunals have to furnish reasons, which explain with minimal cogency, the mental reasons, which lead to a particular conclusion. In commercial disputes, party autonomy in preferring arbitration does not absolve arbitral tribunals of liberating themselves from the rudimentary bounds of providing with some clarity the pathway of their minds to the conclusions they record, and their analysis of on the basis of materials provided to them as well as the submissions of the parties. In the present instance, the instances of stipulative and unreasoned rejection of the Surveyor's report and evidence, and equally stipulative deductions without any reasoning why Indorama's surveyor's report is acceptable (apart from the fact that it prefers the out-put method- deemed by the tribunal on the basis of an equally a priori reasoning), injects the award with an unacceptable element that renders it fatal.

55. The surveyor (RW-1, Adarsh Gupta) in the report first discussed Indorama's contentions. The first argument by Indorama was that had the right to invoke the Alternative basis clause because (i) the policy was primarily issued on the basis that there were adverse market conditions resulting into poor sales the entire indemnity period of 6months. Indorama had urged that its output was nearly constant, whereas the POY industry had cyclic ups and downs "and the period of cycle is not fixed and therefore the production and sales have no correlation." Indorama stated that the accumulation of stocks get depleted within couple of months once market picks up irrespective of any period and in support, reliance was placed on a bar chart showing stock position variation for April, 2003 to Feb. 2009, enclosed as Annexure-'D-1'. Details of monthly stock position for previous 5 years too were relied on by Indorama. Furthermore, it relied on some data of POY industries showing comparative figures between previous and current year, to show market condition of POY. It also stated that there was no declining trend of sales, during the indemnity period, (to rely on which it enclosed Annexure-'D-3'). Indorama relied on the "Departmental clause" to say that during indemnity period, from the affected Plants i.e. CP -2 &CP-3 only figures had to be considered, instead of comparing with the total output of all the five plants, resulting reduction into output during the indemnity period.

56. The insurer's Surveyor then discussed why the alternative method could not be accepted:

"The said clause stipulates that the term 'turnover' may be replaced with 'output', whenever found necessary, which means that both parties shell agree- to the above basis. However in this particular case, substituting term 'turnover' with 'output' is neither found necessary nor is warranted because of various provisions of the policy, as discussed below.

It is an acknowledged fact that the net loss of any business activity, computed either on turnover or on output basis during any given period, should give same results and also it is well established that the turnover is the best index for calculating loss/ profit, arising out of any business activity, which has also been agreed by Insured.

Further The output neither does pay the costs nor does it generate the profit and any financial loss or gain is only dependent on turnover. Therefore in given circumstances, the loss can be best assessed on 'turn over' basis, because of following reasons, discussed below:-

a) That prior to the incident, due to poor market conditions which prevailed prior to the indemnity period & resulted in accumulation of large qty of 51,598 MT of closing balance of finished stocks in hand, the plant CP-1 was already closed/run on reduced, capacity, prior to indemnity period. We ascertained that from plant CP-1, the production of ROY & FDY .was completely stopped w.e.f. May 2007, whereas the PSF, the main product; was stopped from November 2006 itself.

b) Due to accumulation of such large Qty. of finished goods and lack of any proper storage space in the factory, we during our visits to Insured's plant, after the said loss, we observed that the accumulated finished stocks, were stored In open area, at both sides of the lanes, inside the factory compound had the said loss not occurred then as per Insured's claim bill, they would have produced 95,664 MT of various polyester products (as shown below, which is, after ignoring the full improved production capacity during indemnity period, by plant CP-4, compared to the standard indemnity period) from plant CP-2 & 3. By adding the said qty to the closing qty. of finished stocks in hand, after the expiry of actual indemnity period (after adjustment of quantity sold during indemnity period), would lead to total qty. of 1,29,614 MT as closing balance of finished stocks in hand, at the time of expiry of indemnity period, as follows:-

Qty. of closing stocks as on 30.04.2008

33,950.00 MT

Add: Standard output from CP-2 & 3, as discussed above

98,100.00

Less: output during indemnity period, from CP-2 & 3, ref Insured's claim bill

2,436.00

95,564.00 MT

Thus total qty of finished goods in hand, at the time of expiry of indemnity period as per Insured's claim, on output basis

1,29,614.00 MT

Thus we are of the considered opinion that that the above results on output

basis, cannot be adopted for assessment of loss, because total quantity of 1,29,614 M.T., ascertained above as closing balance of finished stocks, at the time of expiry of indemnity period i.e. on 30.04.08, is neither in line with insured's trade nor logical in any manner.

Further in case of any basis adopted for assessment of loss, whether on turn over or output basis, it is required to take in to account that at the time of commencement of indemnity period the qty. of finished stocks were at 51,598 MT. For the purpose of assessment of loss under LOP policy, had the aforesaid loss not occurred, the closing stocks at expiry of indemnity period, has to be considered at the same level, as opening stocks at the time of commencement of indemnity period, which is not true on above basis.

c) That production capacity had increased by commissioning of 2 new plants CP-4 & 5 with in almost 1 year, prior to said incident. There was poor demand/ off take of polyester products during the indemnity period of 6 months, followed after the incident and Insured could not maintain standard turn over, in spite of having stocks in hand. Thus the assessment of loss on output basis would' only lead to consideration in increase of accumulation of finished stocks, at the end of indemnity period and if the same is restricted to the same level as at the time of commencement of indemnity period, then the end result on either basis i.e. On turn over or output basis, will remain the same. Further the entire polyester industry, in general was feeling pinch due to general, down trend/ poor market response, due to which the total qty of stocks of finished goods sold during the indemnity period, were far less then the stocks sold during 6 months prior to commencement of indemnity period (i.e. the period of standard turnover), In spite of having sufficient finished stocks in hand.

d) That the net sale price realized by Insured, during the indemnity period was lower then the price realized during 6 months immediately prior to incident considered as standard Indemnity Period as well as the rate of gross profit earned during FY. 2007-08 (in which majority of Indemnity period, falls) had considerably reduced, when compared to rate of GP earned in previous FY 2006-07.

e) That out of 4 nos. affected. PSF draw lines, the-1 no. PSF draw line, was repaired and successfully commissioned by makers service engineers on 04.02.2007, i.e. little over two months after commencement of indemnity period, but insured did not run, the same draw line to achieve output during the remaining period of 4 months during actual indemnity period and instead, insured had deducted the expected about 9040 MT of various products which could have been produced from repaired 1 no. draw line PSF-3, during the remaining period of indemnity period, to account for the same from the total qty of shortfall in output claimed. Therefore there is no logic or basis for assessment of loss on output as claimed by Insured.

f) That the business interruption policy, both on turn over or output basis, can

indemnify only the loss of gross profit, which otherwise could be earned by them, during indemnity period had the loss not occurred and that the gross profit can be only earned after the output is ultimately sold. Thus, the assessment of carried out by us, we have taken in to account the above facts, which is the requirement of LOP policy.

g) Further the insured is under the impression that loss on the basis of "output" can be computed simply by considering the gross profit on the sale value of difference of output during the actual indemnity period and period of standard output, without actual realization of value from the sales, which is a primary requirement/objective of LOP policy, while computing financial loss or gain during any period.

Because of the above reasons, it is obvious that had the said incident not occurred, the insured would have been compelled to either close down manufacturing of various products or reduce output from various plants i.e. CP-1 to CP-5, as followed by them prior to & during actual indemnity period. Further, no business activity can survive by continuous production and accumulating stocks, without proper off take/sale of finished goods simultaneously.

It was observed that though there was shortfall in turnover as well as output during indemnity period, when compared with the period of standard "turn over" as well as "output" but without actually suffering any financial loss on this account. In the given circumstances, particularly keeping in view of various facts and provisions under "other circumstances clause" it is important to note that at any time during the indemnity period the accumulated stocks in hand, which were available with the insured at the time of commencement of the indemnity period/prior to the incident, did not diminish/extinguished to Nil and therefore, insured's argument that they had suffered loss due to decline in output or turnover because there was no output from plant CP 2 & 3 due to the said incident, did not hold good by any standard and thus insured's repeated insistence to carry out assessment of loss on output basis had no merit/logic.

9.3.1.1 Insured also acknowledged that there is no direct co-relation of turnover in their industry; which is a generic statement and holds goods to most of the industry/ business activities, particularly where/ when market demand commensurate with the output.

The indemnity period available under the policy is only for 6 months and therefore, various considerations i.e. market trend etc. have to be confined only for the period of 6 months, which have been duly examined by us for assessment of loss, we have considered actual results, both on turn over & output basis, during entire indemnity period, during which Insured down ward trend prevailed, as also experienced by Insured in past during, previous 6 years for which graph was submitted by the Insured. Further, we are of the firm opinion that the cycle/ trend spanning over 2 to 3 years, cannot be considered of any advantage to insured, as argued by the insured, irrespective of nature of industry, particularly

when the Indemnity period, opted under the policy is 6 months, during which the industry, has suffered the down trend. Had the insured been aware of such facts in advance, they would have arranged the captioned LOP policy with sufficient indemnity period, say even for 3 years and also policy could have been arranged on output basis.

9.3.1.2 We also examined the trend of turnover, reflected from the quarterly published results of the other industries furnished by the Insured, we observed general downward trend during the period of last two quarters of financial year 2007-08 during the corresponding indemnity, period of the Insured, when compared with the results of corresponding period in previous year of individual industry. Further, are of the opinion that the data pertaining to quarterly results of the other POY industries, cannot be comparable with the insured, because each industry operates within different parameters i.e. catering to different market segments, range of products and buyers etc.

Thus, we did not find any merit in Insured's argument 'that polyester industry is cyclic in nature and accumulated stocks are sold once market improves, even if the same exceeds the indemnity period opted under policy, which is precisely the case, in this particular incident.

Conclusion: Therefore, we did not find any merit in insured's arguments that loss should be assessed on 'output basis' in view of the alternative basis clause attached with policy and further in given circumstances the assessment of loss, as carried out by us on the basis of 'turnover', as primarily provided in the policy, also holds good on output basis.

Note: However still, where ever possible, we, have parallelly examined the results of output, during the standard-and -actual indemnity period, along with the results of turnover as well as other considerations taken into account, to carry out assessment of loss, as discussed in later part of the report."

57. The surveyor noted that loss of profits were recoverable either on turnover or output basis only which could otherwise be earned by the insured, Indorama during the indemnity period, had the loss not occurred and that the gross profit could be earned after the output was ultimately sold. Similarly, the rationale in the Surveyor's report (about the short indemnity period of six months) accords with the discussion in Riley on Business Interruption Insurance which deals with business that is seasonal or cyclical in nature and advises longer indemnity period for adequate cover. These disclose that the rationale given by Adarsh and Associates (IFFCO-Tokio's surveyors) were sound and reasonable.

58. M/s Adarsh and Associates also computed loss of profits on the basis of the turnover method by taking into consideration the maintenance of turnover through the accumulated stocks; it went on to make the necessary adjustment thereof. According to the surveyor, the total stock in hand as on 1st November, 2007 was 51,598 MT. After adjustments, the surveyor concluded that the shortage of the net quantity of the accumulated stocks due to the sale in the

indemnity period was 7028 MT. The rate of the gross profit arrived at by the surveyor was 10.0325% after considering the gross profit for financial year 2007-2008. The shortfall in the turnover during the indemnity period was shown to be Rs. 82,15,69,184/- and the loss of gross profit on the same was computed to be Rs. 8,24,23,928/- according to the surveyor. M/s Adarsh and Associates, also stated that Indorama could not maintain the desired turnover by disposing off the inventory (51,598 MT) available at the time of the commencement of the indemnity period. Therefore, the shortage/ reduction of turnover, was determined to be Rs. 82,15,69,184/- and was not attributable to the incident but due to market conditions, prevailing during the actual/ full indemnity period of 6 months. The surveyor, therefore said that the shortage of the turnover (Rs. 82,15,69,184/-) did not match with the real business conditions of the insured as it could not sell its existing stock during the indemnity period; this meant that there was shortage or lack of sales and reduction in turnover. This was due to lack of sales and crunch in the market and not due to the business interruption caused by the damage due to the incident of fire. The Surveyor concluded that the actual turnover realized from sale of 1,96,663 MT of various polyester products during the indemnity period commencing from 30th October, 2007 to 29th April, 2008 amounted to standard turnover and there was no reduction of turnover during the indemnity period arising out of the incident. The surveyor, in saying so, was of the view that the loss of profit suffered by Indorama during the indemnity period was only in respect of the quantity of the stocks sold from the accumulated stocks i.e. difference in quantity of the closing stocks held at the time of the commencement and expiry of the indemnity period and further that the insured was placed in the same condition, as it was prior to the said incident and hence fully indemnified.

59. The surveyor then determined the total shortage of various products from 7028 MT accumulated stocks, due to sale during indemnity period as worked out in a table (at total qty of various products, converted on 1,96,663 MT Common denier sold during the indemnity period). The total realization, net of excise duty, discounts, Rs. 1164,39,49,548 brokerage and commissions from sale of various products during indemnity period The unit net realized cost from sale of above Rs. 59,207,63/- MT qty on weighted average basis Therefore, net realizable cost of 7,028 MT of was Rs. 41,61,11,224.00 various products, depleted from accumulated stocks during indemnity period @ Rs. 59,207,63/MT loss of gross profit @ 10.0325% of above Rs. 4,17,46,359.00 = the loss of gross profit as per the surveyor's report dated 24th June, 2009 was sum of Rs. 4,17,46,359.00 towards the claim no.1 which is payable by the insurer. This assessment has been done by the Surveyor after considering the concerns of the respondents/ insured as per its emails and communications exchanged between them till the submission of report dated 24th June, 2009.

60. In the opinion of this court, the reasoning of the surveyor and the conclusions that agency gave to justify the figure worked out by it have not been set aside for any- much less cogent or sound reasons. The tribunal had rejected

these reasons, including the deposition of the Surveyor and - without assigning reasons, accepted Indorama's Surveyor's estimates.

61. The duty to back findings by reasons, is enacted by Section 31 (3) of the Act; the Supreme Court underlined this aspect in *M/s Anand Brothers P Ltd v Union of India* 2014 (9) SCC 212:

"Section 31(3) of the said Act obliges the arbitral tribunal to state the reasons upon which it is based unless the parties have agreed that no reasons be given or the arbitral award is based on consent of the parties. There is, therefore, a paradigm shift in the legal position under the new Act which prescribes a uniform requirement for the arbitrators to give reasons except in the two situations mentioned above. The change in the legal approach towards arbitration as an Alternative Dispute Resolution Mechanism is perceptible both in regard to the requirement of giving reasons and the scope of interference by the Court with arbitral awards."

62. *Mc Dermott International Inc v Burn Standard Ltd.*, 2006 (11) SCC 181 had earlier remarked on the insistence of the law that arbitrators and arbitral tribunals should assign reasons for their conclusions. Ordinarily, courts would not review the reasoning given by tribunals; however the evolving standards of scrutiny under Section 34 now admits of an important eventuality, where awards can be interfered with if they are perverse, or show lack of judicial approach. This was underlined in *ONGC Ltd. v. Western Geco International Ltd.*, 2014 (9) SCC 263 when the Supreme Court held that

"35. What then would constitute the "fundamental policy of Indian law" is the question. The decision in *ONGC [ONGC Ltd. v. Saw Pipes Ltd.]*, (2003) 5 SCC 705] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression "fundamental policy of Indian law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The first and foremost is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a "judicial approach" in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the for a concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not

actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

38. Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated *audi alteram partem* rule one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law.

39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of *Wednesbury* principle [*Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.*, (1948) 1 KB 223: (1947) 2 All ER 680 (CA)] of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.

40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest."

63. In *Associate Builders* (supra) the Supreme Court applied the above principle and further stated:

"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 a finding is based on no evidence, or an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or ignores vital evidence in arriving

at its decision, such decision would necessarily be perverse. A good working test of perversity is contained in two judgments. In *H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons*, 1992 Supp (2) SCC 312 at p. 317, 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*, (1999) 2 SCC 10 at para 10, 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."

It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score[1]. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In *P.R. Shah, Shares & Stock Brokers (P) Ltd v BHH Securities (P) Ltd*, (2012) 1 SCC 594, this Court held:

"21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34 (2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34 (2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at."

It is with this very important caveat that the two fundamental principles which

form part of the fundamental policy of Indian law (that the arbitrator must have a judicial approach and that he must not act perversely) are to be understood."

64. This court is of the considered opinion that the award - though elaborate, is bereft of independent reasoning why the output method, insisted upon, for calculating the loss in this case was necessary. The approach of the tribunal - on this aspect was, if one may say so, oracular. Equally, its rationale to reject the Surveyor's calculations, which were based on reasons, is stipulative; the tribunal nowhere indicates why one view is to be preferred over another. The award compiles contentions of the parties, and rejects the Surveyor's report. These findings clearly fall within the zone of what has been termed by the Supreme Court as "perverse or so irrational that no reasonable person would have arrived at the same". They are accordingly set aside.

65. The insurer, IFFCO-Tokio has cross objected on the limited ground of remand. After noticing all the defective reasoning and holding that the calculations by M/s Adarsh Associates were apparently in accord with law, the single judge, inexplicably did a volte face, holding that despite Indorama's inability to show before the tribunal how the Surveyor's report was incorrect, the conclusions drawn by that agency was not necessarily correct. To hold this the single judge concluded that the standard turnover period ought to have been, but was not exactly one year before the indemnity period. The single judge's conclusions on this aspect are as follows:

"...62. In the present case, the indemnity period was 1st November, 2007 to 30th April, 2008 as per surveyor, yet the surveyor chose the standard turnover between May to October 2007 and thus made an erroneous comparison to arrive at the reduction in turnover vis a vis actual loss and leading to incorrect. The said computation is thus ex facie unsustainable and cannot be upheld on the face of it as the plain reading of the definition of the standard turnover in the policy document does not permit such computation. In such an event, even assuming at the highest that the concerns of the respondent has been addressed on the report of the surveyor M/s Adarsh and Associates, still the computations done by M/s Adarsh and Associates do not reflect the results and lead to correct assessment as per the policy terms. As such, the said computation and assessment of the losses are required to be done again in order to arrive at the correct figures of loss of profits payable to the respondent on turnover basis. That is the reason why I cannot simply uphold the report of the surveyor M/s Adarsh and Associates even if I try to reconcile the concerns of the respondents by answering them on my own.

63. It is equally noteworthy to mention that I have found that the turnover basis of assessment of loss of profits arising out the damage resulting from the incident of fire is an appropriate mode for assessment in the present case as it provides fair indemnification by assessing the loss during the indemnity period. That by itself does not mean that the report of the surveyor in a given case may not be erroneous and in the alternative I have to follow the other report of the

surveyor Mr. Srinivatsan based on different methodology which is output basis instead of the turnover basis. As the case of the respondent was before the arbitral tribunal was also twofold, first being that the output method is the appropriate mode of assessment and secondly that the surveyor M/s Adarsh and Associates had not made the correct computation of losses as per turnover basis, therefore it was upon the respondent to provide the correct computation of loss of profits on turnover basis as per formulae after comparison with the actual sales which the respondent could have done during the indemnity period and making other adjustments including other circumstances clause etc as per the policy document. Having not done so, the respondent cannot simply state that if the report of M/s Adarsh and Associates is not correct, therefore the report of the other surveyor should be upheld. Accordingly, the calculation of the loss of profits as per turnover basis in the present case requires the examination of the competing stands of the parties including the concerns pointed out by the respondent. The computation of loss of profits is required to be done by the surveyor M/s Adarsh and Associates yet another time after considering the Annual turnover, standard turnover and gross profit as per the definitions provided in the formula along with the other ingredients in the policy document and proceed to make all other adjustments permissible under the policy document and thereafter compare the reduction of the turnover with the actual loss of profits which ought to have been incurred during the indemnity period.

64. As the present case is a peculiar one wherein the calculation of the losses presented before this court by one party's surveyor is found to be erroneous and the other party did not lead any evidence to this effect by presenting the corresponding the computation on the same turnover basis and kept on raising the concerns on the computations done by the surveyor. I am left with no option but to remand the case back to the learned arbitral tribunal to consider the limited aspect of the computation of loss of profits on the turnover basis on the basis of the computation of loss of profits to be presented by both the parties before the tribunal.

65. It is well settled principle of law that the court acting under Section 34 of the Act 1996 has the power to remand the award either in part or in whole depending upon the facts as to whether the issues on which the award rests are interlinked with the other aspects involved or not. Wherever, the part of the award can be severed from the other issues decided by the tribunal, which the court finds in accordance with the law, the power of remand or setting aside is exercise only to the extent of the part of the award which is found to be unsustainable. (Kindly see the judgment passed in the case of Rajesh Tiwari v. Motilal Oswal Financial Services Ltd., Mumbai and Another, (2013) 3 Mah LJ 523 : (2013) 2 AIR Bom R (NOC 26) 8 by Bombay High Court laying down the said position of law, and also in Rajendra A. Shah (H.U.F.) (Constituent) v. Angel Capital and Debt Market Ltd., (2013) 1 Mah LJ 385 and Saroj Bala v Rajive stock Brokers Ltd., 2005 (4) AD (Delhi) 266 and Bhasin Associates v. NBCC, ILR (2005) 2 Del 88 which lays down that power to set aside an award when exercised by

the Court would leave a vacuum if the said power was not understood to include the power to remand the matter back to the arbitrator)."

66. What is apparent from the extracted reasoning of the single judge is that he was of the opinion that on account of difference or variation in the standard operation period (which constitutes the reference base for calculation of loss), in the surveyor's calculation the award needed interference and that the tribunal should reconsider the issue to that limited extent. On this aspect, the court notices, firstly, that the insured, i.e. Indorama never once objected on this score: neither its statement of claim, nor written submissions before the tribunal (which are part of the record in this appeal) spelt out this aspect. Secondly, in Para 8.2 (b) of the Surveyor's standard output and the period shown is as follows:

"b) Standard output from CP 2&3 during November 2006 to April 2007 98,100 MT"

67. The Surveyor has adopted the same period as the standard output period - indeed relied on the same figure of 98,100 MT. In the circumstances, this court is of opinion that there was no error which required correction. Lastly, the structure of Section 34 of the Arbitration and Conciliation Act, does not permit a court to remand or remit an issue or controversy to any arbitral tribunal; this aspect was emphasized by the Supreme Court, in its ruling reported as *Kinnari Mullick and Ors. vs. Ghanshyam Das Damani* 2018 (11) SCC 328

"13. On a bare reading of this provision, it is amply clear that the Court can defer the hearing of the application filed Under Section 34 for setting aside the award on a written request made by a party to the arbitration proceedings to facilitate the Arbitral Tribunal by resuming the arbitral proceedings or to take such other action as in the opinion of Arbitral Tribunal will eliminate the grounds for setting aside the arbitral award. The quintessence for exercising power under this provision is that the arbitral award has not been set aside. Further, the challenge to the said award has been set up Under Section 34 about the deficiencies in the arbitral award which may be curable by allowing the Arbitral Tribunal to take such measures which can eliminate the grounds for setting aside the arbitral award. No power has been invested by the Parliament in the Court to remand the matter to the Arbitral Tribunal except to adjourn the proceedings for the limited purpose mentioned in Sub-Section 4 of Section 34. This legal position has been expounded in the case of *McDermott International Inc.* (supra). In paragraph 8 of the said decision, the Court observed thus:

8..... parliament has not conferred any power of remand to the Court to remit the matter to the arbitral tribunal except to adjourn the proceedings as provided under Sub-section (4) of Section 34 of the Act. The object of Sub-section (4) of Section 34 of the Act is to give an opportunity to the arbitral tribunal to resume the arbitral proceedings or to enable it to take such other action which will eliminate the grounds for setting aside the arbitral award.

(Emphasis supplied)

14. In any case, the limited discretion available to the Court Under Section 34(4) can be exercised only upon a written application made in that behalf by a party to the arbitration proceedings. It is crystal clear that the Court cannot exercise this limited power of deferring the proceedings before it suo moto. Moreover, before formally setting aside the award, if the party to the arbitration proceedings fails to request the Court to defer the proceedings pending before it, then it is not open to the party to move an application Under Section 34(4) of the Act. For, consequent to disposal of the main proceedings Under Section 34 of the Act by the Court, it would become functus officio. In other words, the limited remedy available Under Section 34(4) is required to be invoked by the party to the arbitral proceedings before the award is set aside by the Court."

68. Kinnari (supra) is now clearly an authority on the point that courts cannot remit an issue unless a written application or request is made by the party wishing for it. In this case, neither was followed. As a result, the award by the tribunal ought to have been set aside, based on the findings recorded by the single judge.

69. For the above reasons, the impugned judgment, to the extent it remits the issue of calculation to the tribunal, cannot be sustained; it is accordingly set aside. The insurer's cross objection therefore succeeds; Indorama's contentions fail and consequently, its appeal is dismissed. There shall be no order on costs.