

(2012) 01 DEL CK 0384

In the Delhi High Court

Case No : FAO (OS) 34 of 2012 and FAO (OS) 26 of 2012

The Oriental Insurance Co Ltd

APPELLANT

Vs

Mercury Rubber Mills
 Mercury Rubber Mills Vs The
Oriental Insurance Co Ltd

RESPONDENT

Date of Decision : 25-01-2012

Acts Referred:

Citation : (2012) 8 AD 314 : (2012) 1 ARBLR 292 : (2012) 127 DRJ 650

Hon'ble Judges : Sanjay Kishan Kaul, J;Rajiv Shakhder, J

Bench : Division Bench

Advocate : Darpan Wadhwa and Ms. Manjusha Wadhwa in FAO OS 34/2012 and Mr. S.K. Singal, Partner of the Appellant in FAO OS 26/2012, for the Appellant; S.K. Singal, Partner of the Respondent in FAO (OS) 34/2012 and Mr. Darpan Wadhwa and Ms. Manjusha Wadhwa, Advocate in FAO (OS) 26/2012, for the Respondent

Final Decision : Allowed

Judgement

Sanjay Kishan Kaul, J.—The travails of an individual litigant are writ large in this case where the very purpose of the insured (i.e., M/s. Mercury Rubber Mills, a partnership firm) to take out insurance policies from the insurer(s) (i.e., M/s. Oriental Insurance Company Limited and M/s. National Insurance Company Limited) for covering machinery breakdown and loss of profits on that account from time to time has been defeated.

2. The extract from the Insurance Manual filed by the insurer in respect of such insurance policies shows the objective: with rapid industrialization, the machinery utilized was becoming more complicated with the result that repairs entail delays and complications bringing the entire work to a standstill even when small, but vital parts of machine fail. It was, thus, essential for the industrialists to ensure against such contingency. However, another insurance policy to cover the consequential losses that may be suffered by the individual using the machinery following the breakdown was also necessary and, thus, such kind of

policies came into being.

3. The facts of the present case are that the insured is engaged in the manufacture of power transmission and conveyor belts for various industrial and other uses from rubber and other components having a factory at Rasoi in District Sonapat, Haryana. The insured had been obtaining insurance policies inter alia for covering machinery breakdowns and loss of profits on that account from time to time. Accordingly, as per the insurance policy taken out by the insured, the insurer agreed to pay all the loss of profits which the insured might suffer due to breakdown of its machinery installed in its factory as described in the Schedule to the policy.

4. The insured lodged claims on 25.03.1982 qua the policies in question and a Surveyor was appointed. We may notice that the insured had obtained insurance policy regarding machinery breakdown from the National Insurance Company Limited, while the LOP policy was taken out from the insurer in the present case. Both the companies appointed a Surveyor and the claim with regard to machinery breakdown was settled to the satisfaction of the insured. However, the dispute arose in respect of the claims qua the insurer in the present case under the LOP policy, as against the breakdown of three different machineries the claims paid by the insurer were much less. The details of these claims are as under:

Claim No.

Amount Claimed (in Rs.)

Claim paid by insurer

Machinery Particulars

No. of outage days

Survey Reports

00001

6,70,795/-

53,507/-

Mixing Mill No. 3

233

25.03.82

34-43

00005

2,77,067/-

53,507/-

Mixing Mill No. 2

98

22.03.82

83-104

00017

93,328/-

51,467/-

Mixing Mill No. 5

35

27.03.82

56-73

5. The insurer paid only the claims payable as per it and in view of the arbitration clause existing inter se the parties, the insured filed Suit No. 2279A/1985 on the Original Side of this Court.

6. The insurer, however, resisted reference of disputes to arbitration relying on the inter se communications to claim that there was full and final settlement of the claims and there was no dispute(s) referable to arbitration. The learned Single Judge in terms of an Order dated 09.04.1987 found that whether or not the insured had accepted payments in full and final settlement of claims and had given a valid discharge to the insurer was a question of fact to be decided in the arbitration proceedings and could not be decided by the Court and, thus, allowed the petition and referred the following dispute to arbitration:

Whether the cheques for the abovesaid amounts were received by the petitioner from the respondent in full and final settlement of its above noted three claims? If not, what amount is due to the petitioner from the respondent under the abovesaid claims?

7. The insurer preferred an appeal before the Division Bench, which was registered as FAO (OS) No. 61/1987. This appeal remained pending till it was decided on 24.11.2008, i.e., for 21 years. We are informed by the partner of the insured appearing in person that there were at least four occasions when the appeal was dismissed for non-prosecution and restored.

8. A perusal of the Order dated 24.11.2008 shows that the insured also pleaded that the insurer was in a dominant position and with a view to frustrate the legitimate claim of a small-scale industry in respect of the liability under the insurance policy acted in an unreasonable "take it or leave it" manner and that

too after unreasonable delay, the amounts having been paid only in October, 1983. The acceptance of cheques was, thus, pleaded as not to discharge the liability of the insurer. The appeal was finally dismissed on 24.11.2008.

9. The Arbitral Tribunal consisted of three Arbitrators - (i) the Presiding Arbitrator being a retired Judge; (ii) an Insurance Expert, who was an ex-employee of the insurer; and (iii) a Chartered Accountant nominated by the insured. The Arbitral Tribunal has given unanimous Award dated 22.07.2010 awarding an amount of Rs.4,46,682/- to the insured apart from interest at 9% p.a., which has accumulated to Rs.12,25,783/- as on the date of the Award on account of the long period. Apart from this, the fee of the Arbitrators and the stamp duty has been awarded making the total Award of Rs.18,08,073/-.

10. We may note that the Award is a detailed one analyzing the evidence before it with one of the Arbitrators being a specialist in the field. The Arbitral Tribunal found that the machinery breakdown leading to loss of profits related to the period January to March, 1981, while the Surveyor submitted his final report to the insurer in March, 1982, i.e., after 1 year of the incident and the insurer took another 1 year and 6 months in taking a decision to accept the Surveyor's recommendation and convey the company's approval to the insured by its letter dated 10.12.1983. The insured raised its protest from the earlier stage vide its letters dated 15.10.1983 and 29.10.1983 and 19.11.1993. The Arbitral Tribunal, thus, refused to draw any adverse inference against the insured on account of the pre-receipt discharge voucher containing the words "full and final settlement" especially in view of a superior bargaining position of the insurer. In this behalf, the law laid down by the Supreme Court qua the superior bargaining position has also been discussed.

11. The findings of the Arbitral Tribunal qua non-acceptance of the reasoning and conclusion of the Surveyor are contained in paras 37 to 39, which read as under:

37. We are unable to accept the reasoning and conclusion of the surveyor for the following reasons:

- 1) Perusal of the survey report itself shows that the mixing mill actually remained in a broken down condition for 233 days excluding the off days.
- 2) The insured was continuously following up the question of replacement of damaged part with the manufacturer by repeatedly sending reminders by way of letters, telegrams, telephones, as well as by sending his representatives. Please see appendix 4 at page 41 of the survey report in pleadings file.
- 3) The surveyor also took up the matter with the manufacture to have the replacement expedited.
- 4) It was against the interest of the insured to cause or suffer delay as the breakdown would only result in mounting its losses. This factor was referred to by the surveyor himself while emphasizing the urgency upon the manufacture as stated in the survey report itself.

5) It was totally against the logic to cause delay beyond 180 days which was the maximum period of indemnity. It remains completely unexplained why the mixing mill remained in non-working condition for 233 days.

6) It is not before us that it was open to the insurer to take over the job of having the mixing mill repaired to minimize the loss (please see page 83 of the documents file).

7) One of the main reasons for the delay in casting and machining of the broken part which required replacement was that during the relevant period there was acute shortage of electrical power. It is well known that when availability or electrical power falls short of demand, the State steps in to regulate supply of power to different sectors, like agriculture, industry, and domestic consumption as per its policy. Delay was thus beyond the control of manufacturer and the insured as well as the surveyor were duly apprised of this factor and period of delay on this count is to be excluded.

8) The insured sent wrong drawings to the manufacturer. The correct drawings were supplied only when the mistake was pointed out at a later stage. This contributed to the delay.

38. The surveyor in his dated 25.03.1982 thought that the reasonable period which should have been taken in re-commissioning the machinery should have been 30 days vide surveyor's report dated 25.03.1982. Internal page 4. After carefully considering the relevant factors we are unable to accept the assessment of the surveyor. It is arbitrary. In our view, considering the facts and circumstances of the present case, it would be just and fair to take the period of 123 days, or net 120 days after 3 days exclusion.

39. The surveyors have taken the number of working days in the month at 30 days for the purpose of calculating the average production per day. We are unable to accept this approach. In every month, there are off days, which have to be excluded from the period for the purpose of the present calculations. Therefore, it is fair and reasonable to take the average number of days in a month at 25 days.

(Emphasis supplied)

12. The Award was under the Indian Arbitration Act, 1940 (for short, "the said Act"). The Award was filed in Court and registered as CS (OS) No. 326/2011. The insured filed objections under Sections 30 and 33 of the said Act, which were registered as IA No. 7309/2011.

13. In terms of the impugned order dated 20.09.2011, the objections have been partly allowed. The Award has been partially set aside on account of the findings contained in the Award in para 37(8) that the insured sent wrong drawings to the insurer and the correct drawings were supplied only when the mistake was pointed out at a later stage, which contributed to the delay. Since this finding had not been assailed by the insured, learned Single Judge found that there was

no reason to conclude that the period of outage could be taken as 123 days or 120 days after 3 days? exclusion. The drawings as per the Surveyor's report were furnished by the insured on 10.08.1981 and the supply was effected on 07.10.1981, while the repairs were completed on 19.10.1981 in relation to Mixing Mill No. 3. The learned Single Judge found that the outage period could have been treated as between 10.08.1981 and 19.10.1981, which comes to 70 days and after excluding 1 day per week towards weekly off with 3 days exclusion period, the net outage came to 60 days. Thus, the Award in relation to Mixing Mill No. 3 was modified and the claim allowed to the extent of 60 working days as against 120 days.

14. We have two appeals preferred before us, one by the insured and one by the insurer. The insured is aggrieved by the interference with the Award, while the grievance raised by the insurer is that the fundamental issue of there being full accord and satisfaction has not been even discussed in the impugned order.

Full Accord and Satisfaction:

15. As far as the grievance of the insurer is concerned, we put to the learned counsel that the impugned order is an oral order and despite this, if something had escaped the attention of the learned Single Judge while dictating the Order qua a grievance urged, the learned counsel should have approached the learned Single Judge to remedy the position. This has admittedly not been done. Learned counsel, however, pressed for a finding on this issue, despite there being no adjudication before the learned Single Judge.

16. We find this procedure strange to say the least. However, keeping in mind the long delay in this matter, we have examined even this grievance. It is not as if the Arbitral Tribunal did not examine this issue. Issue No. (III) recorded in para 14 clearly deals with this aspect. It is in this context that the aspect of unfair and unreasonable contract and the superior bargaining power has been discussed. We have no doubt that in a situation like this, the insurer does have a superior bargaining position as the insured having already suffered a loss is faced with "take it or leave it" position.

17. We may also notice the contemporaneous stand of the insured on receipt of the amounts from the insured contained in the letter dated 15.10.1983. The letter reads as under:

15th October, 1983

The Senior Divisional Manager

The Oriental Fire & General Insurance Company Ltd.,

D.I. III, 4E/14, Jhandewalan Extn.,

New Delhi - 110055.

Dear Sir,

Sub : Payment of claims under Engineering Policy No. 80 / 00034.

As desired in your letters of approval dated 12.10.83, we return herewith all the three loss vouchers for Rs.53,507/-, Rs.51,467/-. In respect of claims no. 2130/302/44/55/81/00001, 00005 and 00017 respectively, duly stamped and signed, although the details of the amounts are neither known to us nor mentioned in your approval letters.

Please arrange for early remittance along with the working of the calculations of these amounts enabling us to verify the same.

Thanking you.

Yours faithfully,

For Mercury Rubber Mills,

PARTNER

Encl. : as above.

(Emphasis supplied)

18. It is, thus, crystal clear that the insured was not even aware of the basis of calculation and, in fact, requested for the necessary information. There can, thus, be no question of any unequivocal acceptance of the amount merely because when the cheques were received, the endorsement did not say that the same was under protest.

19. The question what amounts to full accord and satisfaction is a vexed one and has received attention of the courts in various pronouncements. In M/s. IRCON International Limited v. Shri Krishna Trading Co. & Anr., 2007 (4) Arb. LR 479 = 2007 (10) AD (Del) 309, one of us (Sanjay Kishan Kaul, J.) has discussed various pronouncements on this aspect and the legal principle enunciated in that behalf. We reproduce the relevant para 24 as under:

24. The legal position in respect of as to how such a No-Claim Certificate has to be appreciated has been discussed in Pandit Construction Company v. Delhi Development Authority and Anr., 2007 (3) Arb LR 205 (Del), a judgment of this Court. It was found that often endorsements are made on the final bill as "accepted in full and final". The judgment of the Apex Court in Bharat Coking Coal Ltd v. Annapurna Construction, 2003 (3) R.A.J. 44 (SC) was averted to where the Supreme Court has observed that merely because a party had accepted the final bill, the same would not mean that it was not entitled to any other claim. In order for the claim to be presumed to be fully settled, it should unequivocally be stated so that no further claims would be raised and thus the Supreme Court held that in the absence of such a declaration, the contractor must be held not to be estopped and precluded from raising any claim. This Court held that in view thereof, the settlement must be recorded in clear and unambiguous terms.

20. A similar discussion is also recorded in Mecon Limited Vs. Pioneer Fabricators (P) Ltd., . The relevant paras 16 and 17 read as under:

16. The aspect of such a no claim certificate was examined in Pandit Construction Company v. Delhi Development Authority and Anr., 2007 (3) Arb LR 205 (Del) which is a judgment of this Court where it was found that often endorsements are made on the final bill as "accepted in full and final". The judgment of the Apex Court in Bharat Coking Coal Ltd v. Annapurna Construction, 2003 (3) R.A.J. 44 (SC) was averted to where the Supreme Court has observed that merely because a party had accepted the final bill, the same would not mean that it was not entitled to any other claim. In order for the claim to be presumed to be fully settled, it should unequivocally be stated so that no further claims would be raised and thus the Supreme Court held that in the absence of such a declaration, the contractor must be held not to be estopped and precluded from raising any claim. This Court held that in view thereof, the settlement must be recorded in clear and unambiguous terms. Learned Counsel for the respondent has also referred to the judgment of the Division Bench of the Bombay High Court in Ravindra Anant Deshmukh Vs. City and Industrial Development Corporation of Maharashtra Ltd., where it was held that a no demand certificate obtained as a condition precedent for scrutiny of bill cannot constitute accord and satisfaction and a cause for refusing to refer dispute to arbitration. A reference has also been made to the observations in two judgments of the Supreme Court. The first is Bharat Coking Coal Ltd v. Annapurna Construction's case (supra) which has already been referred to. The second judgment is: Chairman and M.D., N.T.P.C. Ltd. Vs. Reshmi Constructions, Builders and Contractors, . It would be useful to reproduce the observations made in paras 27 and 28 of the said judgment, which are as under:

27. Even when rights and obligations of the parties are worked out the contract does not come to an end inter alia for the purpose of determination of the disputes arising there under, and, thus, the arbitration agreement can be invoked. Although it may not be strictly in place but we cannot shut our eyes to the ground reality that in the cases where a contractor has made huge investment, he cannot afford not to take from the employer the amount under the bills, for various reasons which may include discharge of his liability towards the banks, financial institutions and other persons. In such a situation, the public sector undertakings would have an upper hand. They would not ordinarily release the money unless a "No Demand Certificate" is signed. Each case, therefore, is required to be considered on its own facts.

28. Further, *necessitas non habet legem* is an age-old maxim which means necessity knows no law. A person may sometimes have to succumb to the pressure of the other party to the bargain who is in a stronger position.

17. Learned Counsel for the respondent has referred to Jiwani Engineering Works (P.) Ltd. Vs. Union of India (UOI), wherein the learned single Judge has recognized the well known and notorious fact that unless a no claim certificate is

issued by the contractor, the payment of final bill would not be made. Learned senior counsel for the petitioner on the other hand has referred to the judgment of the learned single Judge of this Court in Double Dot Finance Limited Vs. Goyal MG Gases Limited and Another, . The aspect of coercion and duress has been discussed in para 9 of the said judgment.

21. It is no doubt true that the aforesaid discussion is in the context of building contracts where the contractor is in need to receive money due, but the principle would be no different in the facts of the present case where the insured is waiting for its payment from the insurer already having suffered losses. The denial of payment at the relevant time, in fact, defeats the very purpose of taking out such policies and the insured, in the present case, has grievously suffered on this account for three decades. The insured was, in fact, asking for details even while accepting the cheque as is apparent from the letter dated 15.10.1983 and, thus, there can be no question of any final accord or satisfaction so as to make the insured ineligible for making a claim against the insurer.

22. We are, thus, in complete agreement with the view adopted by the Arbitral Tribunal that there was no final accord and satisfaction given by the insured to the insurer.

Period of Outages:

23. The partner of the insured appearing in person drew our attention to the report of the Surveyor, which has recorded the list of dates. The details for delayed repairs of the Mixing Mill are recorded in Appendix 4 to the report of the Surveyor as under:

Appendix - 4

Reasons for delayed Repairs of Mixing Mill 14" x 36" (Mill No. 3) damaged on 13.1.81 and Replacement of Damaged Part received on 16.10.81.

15.1.81 - On 15.1.81, Insured were advised for earliest Procurement of the Replacement of the damaged Leg.

21.1.81 - On 21.1.81, Insured sent Telegram to M/s. Sunrise Industries Railway Road, Sirhind to refer to the visit of their Rep. Shri N.H. Ansari, who had delivered to them Drawing of the Leg to be supplied and to let them have confirmation if the work had been done at their Foundry and information on Weight and Cost.

30.1.81 - On 30.1.81, Insured further reminded the Suppliers.

29.1.81 - On 29.1.81, Sunrise Industries replied under their letter No. SRI:9:742:1980, dated 29.1.81 that needful would be done on Top priority basis, but progress depended upon normal flow of Electricity, they supply of which of late had become very very irregular as they were hardly getting 4 to 5 hrs. in the night at Low Voltage / Fluctuations and that they were doing their best to Charge

the Foundry complete.

16.3.81 - On 16.3.81, Insured reminded the Suppliers under their letter No. MRM/339/LOP/80-81/5312.

31.3.81 - On 31.3.81, Insured were reminded.

5.4.81 - On 5.4.81, Insured replied that they were still awaiting dispatch details and that Leg had been cast and being machined when their Rep. visited Sirhind to expedite.

11.4.81 - On 11.4.81, Insured were reminded under my letter No. LOP/1100/139/XII/D-III/MRM, dated 11.3.81 that Mixing Mill No. 3 was awaiting Repairs for nearly 3 months. It was further stated that if the Machine had not been insured under L.O.P. Policy, it was doubtful if the Manufacturing Unit would have allowed their production to suffer for such a long period.

24.4.81 - On 24.4.81, Insured replied under their letter No. MRM/339/MB/(LOP)/80-81/00363, dated 24.4.81, that they were depending on Original Suppliers of the Machine due to pattern and size patent and that they were reminding through Trunk Calls and visits to Sirhind.

25.4.81 - On 25.4.81, Insured replied under their letter No. MRM/RW/81-82/679, dated 25.4.81, that their Rep. Shri Naimul Haq visited Sirhind on 22.4.81 for the fourth time and that one Leg of Mixing Mill 16" x 2" would be supplied soon and that other Leg of Mill 14" x 36" would take another 3 weeks due to Shortage of Raw Materials and that earlier casted ... (illegible).

28.7.81 - On 28.7.81, Insured replied under their letter No. MRM/81-81/1899 dated 28.7.81, that Partner/Manager of Suppliers, S/Shri Jagdish Bimbhraw and Mehta on their last visit to Delhi had stated that Frame would be supplied by 6.7.81, which had not been received.

31.7.81 - On 31.7.81, Suppliers from Sirhind replied under their letter No. SRI/9/391/81-82, dated 31.7.81 that on their checking minutely in the drawing provided by the Insured, they had found that Dimensions did not agree/tally with the pattern and that they had tapped other makers as well, but failed to find pattern fully compromising with the dimensions detailed in the Insured Drawing. They sent the drawing to the Insured for re-check / verification and stated that on return they would produce a new pattern at the Insured Cost.

16.10.81 - On 16.10.81, New Frame was received at Rasoi with Suppliers Invoice No. 45, dated 7.10.81 for Rs.4,680/-.

19.10.81 - After Repairs, Machine was commissioned on 19.10.81.

17.3.82 - As this case had taken a very long time in Procurement of the Replacement of damaged part, I visited Sirhind on 17.3.82 (after receiving the required papers viz. Claim Bill and filled in Claim Form from the Insured) and discussed this case with Shri Satish Chandra, Rep. of the Manufacturers. He

informed me that due to acute Shortage of Main Power Supply, their manufacturing work was very much delayed and supply orders had been piled up. It was further found from their Records that correct Drawings / Details were furnished by the Insured Rep. personally on 10.8.81 and that Supply was effected on 7.10.81.

(Emphasis supplied)

24. It is, thus, the submission of the insured that it was not as if the drawings provided by the insured were incorrect, but that the dimensions did not agree or tally with the pattern and the drawings were sent for re-check / verification so that on return, they would produce a new pattern at the insured cost.

25. The learned Single Judge, however, appears to have been perused, while calculating the period of outage days, by the last portion of Appendix 4 where certain dates were mentioned qua supply of drawings.

26. In our considered view, there is merit in the grievance of the insured that this aspect did not call for any interference from the learned Single Judge. The Arbitral Tribunal did not irrationally compute the period of outage days as is apparent from paras 37 to 39 extracted aforesaid while coming to the conclusion that a period of 120 days of outage days against a maximum of 180 days should be taken into account. It is not the function of the Court to sit as a court of appeal to do a second round of mathematical calculation as a court while considering such objections does not sit as a court of appeal to re-appraise evidence and the material on record. Thus, even if the Court would have taken a different view from that of the Arbitral Tribunal or would have come to a different conclusion of the material available before the Arbitral Tribunal, there is no cause for interference unless the Award is totally perverse as observed by the Division Bench of this Court in *DDA v. Bhagat Construction Co. (P) Ltd. & Anr.*, 2004 (3) Arb. LR 481 . The Supreme Court has cautioned that in the absence of an award being absurd, reasonableness is not a matter to be considered by the Court as appraisal of evidence by an arbitrator is not ordinarily a matter for the Court. Reliance is placed on the judgments of the Apex Court in *Food Corporation of India Vs. Joginderpal Mohinderpal*, and *Gujarat Water Supply and Sewerage Board Vs. Unique Erectors (Gujarat) (P) Ltd. and Another*, . In fact, in *Sudarsan Trading Co. Vs. Government of Kerala and Another*, , the Supreme Court observed that insofar as the interpretation of a contract is concerned, the same is a matter for the arbitrator on which the Court cannot substitute its own decision. Thus, so long as the view taken by the arbitrator is plausible, though perhaps not the only correct view, the award cannot be examined by the Court.

27. The partner of the insured also canvassed before us that in the rejoinder filed by the insurer before the learned Single Judge, the correctness of the claim of the insured for outage of 120 days with respect to Mixing Mill No. 3 was admitted. This factual position was not disputed by learned counsel for the insurer, but he claimed that the same was a typographical error. However, what

is more material plea is that in para 37(6) of the Award, the clause of the insurance policy whereby it was open to the insurer to take over the job of repairs to minimize the loss has been discussed. The said clause reads as under:

h. In the event of an accident to any insured machinery likely to give rise a claim under this policy, the Company shall have the right to take over and control all necessary repairs and replacements.

Undisputedly, this clause was not invoked by the insurer, which could have been the eventuality, if there was dissatisfaction with the manner of repairs being got done by the insured itself.

28. We also find merit in the contention of the insured that too much emphasis cannot be made only on a part of the finding given by the Arbitral Tribunal without reading of the other findings as recorded in para 37, especially in the context of Appendix - 4 to the report of the Surveyor which establishes that the insured had made all endeavours necessary. On finding that the time taken was long, on visit, the Surveyor was informed by the representative of the manufacturer that the delay was on account of shortage of man-power supply, their manufacturing work, thus, being hampered and consequently the supply of orders had piled up. Along with this, the aspect of correction of drawing was noticed. The Arbitral Tribunal taking an overall conspectus of both these aspects and other aspects calculated the period of outages as 120 days against what could have been a maximum of 180 days, while the actual outages was 223 days. There was no occasion to substitute this finding of the Arbitral Tribunal by a different finding of the learned Single Judge by re-working out the calculation.

29. We are, thus, of the considered view that the learned Single Judge ought not to have substituted its own calculations and re-appraise the Surveyor's report as a piece of evidence to come to a different conclusion on the period of outage days to calculate the amount payable under the policy and no interference was called for on that behalf.

30. Learned counsel for the parties having only assailed the impugned award and judgment on the aforesaid two aspects and no other plea having been urged, we dismiss the appeal of the insurer being FAO (OS) No. 34/2012 with costs of Rs.10,000/- and allow the appeal of the insured being FAO (OS) No. 26/2012 with costs of Rs.10,000/-. The amount to be paid by the insurer to the insured within one month from today, failing which, it will carry interest @ 15% per annum from today, i.e., 25.01.2012 till the date of realization.