IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMMERCIAL ARBITRATION APPLICATION NO. 65 OF 2022

M/s. Mallak Specialities Pvt Ltd. .. Applicant

Versus

The New India Assurance Co.Ltd. .. Respondent

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Mr. Siddhar Jain i/b Adv. Ramprakash Pandey a/w Ms. Sarita Yadav for the Applicant.
Mr.Rushab Vidyarthi a/w Mr. Asim Vidyarthi, Mr. Shasvat Vidyarthi and Mr. Parth Parikh & Ms. Ishita Bhole i/b. Mr. A.S. Vidyarthi for Respondent

CORAM: BHARATI DANGRE, J.
DATED : 30th NOVEMBER, 2022

JUDGEMENT:-

1 By the present application filed under Section 11 of the Arbitration and Conciliation Act, 1996, the applicant, an Export Company engaged in the field of manufacturing speciality chemicals, pigments, colorants, seek appointment of Sole Arbitrator or an Arbitral Tribunal for adjudicating it's claim.

The relief is sought in the wake of the clause contained in the insurance policy taken by the applicant from the New India Assurance Company Ltd, the respondent and the background in which the dispute has arisen, is set out in the Application.

2 The applicant, a Star Export House has taken insurance policy from the respondent and insured itself against various domains. A specific Standard Fire and Special Perils policy was taken by the applicant company on payment of premium and the

property insured was described in the Schedule was insured against any destruction or damages by any of the perils specified during the period of insurance mentioned in the schedule, which contemplated that the Company shall pay to the insured the value of the property at the time of happening of it's destruction or the amount of such damage or at it's option, reinstate or replace such property or any part thereof.

Such a policy contemplated events like Storm, Cyclone, Hurricane, Typhoon, Tempest, Tornado, Flood and Inundation.

3 The Applicant contend that due to heavy rains which lashed the region on 6/8/2019, the factory of the applicant situated in MIDC- Mahad, District- Raigad submerged and resulted in destruction of the insured material. On suffering huge loss because of the rains, the applicant claiming to have complied with the provisions of the policy agreement, raised a claim to the tune of Rs. 13,05,19,494/- before the Competent Authority of New India Insurance Company Ltd.

4 The applicant claim that the respondent forwarded a Surveyor for assessment of loss suffered by the applicant on account of the flood, and the Surveyor demanded the requisite documents for preparation of survey and assessment of loss, which was complied with. Once again, the Surveyor visited the site on 3/9/2019 to quantify the damage, but the allegation of the applicant is, thereafter no steps were taken by the Surveyor. The Applicant, therefore, requested the Surveyor to expedite the process of release of insurance claim. In the application, the applicant states that several reminders/emails were forwarded for

taking appropriate steps, but for reasons best known to respondents, the matter did not progress further. It is then alleged that the respondent repudiated the claim of the applicant through letter dated 14/1/2021, despite the fact that the Surveyor had assessed an amount of Rs.2,05,73,525/- payable to the applicant. This act on part of the respondent to repudiate the insurance amount is manifestly arbitrary, and high handed action is, the claim in the application.

5 In the background of the aforesaid facts and events, the applicant plead that disputes have arisen between the parties, whereby substantial amounts are due and payable by the respondent to the applicant in respect of the subject contract work, and therefore, in the wake of Clause No.13 of the policy agreement(s) dated 13/03/2019, the applicant through the application seek the following relief.

"That this Hon'ble Court may please appoint a fit and proper person as Sole Arbitrator or an Arbitral Tribunal for adjudicating all the claims of the Applicant with direction to the appointed Arbitrator/Arbitral Tribunal to make and publish the Award as per the provisions of Arbitration and Conciliation Act, 1996;"

6 The said prayer above, is justified by raising the following grounds:

> *"(a) the Respondent refused to appoint any arbitrator and resolve the matter through arbitration which is the utter the violation of clause 13 of the Policy agreement(s) despite of clear notice, thereby, relinquishing their right to do so. Thus, the Applicant*

most humbly prays the Hon'ble High Court to appoint Mr. Praveen Kumar Jain (Advocate) as sole arbitrator for resolution of disputes between the parties;

b) the Respondent has wrongfully repudiated the genuine claims of the applicant, when the cause of loss is flood which is covered under the policy agreements, which is in utter violation of principles of natural justice and equity and therefore, to resolve all the disputes arose between the parties a sole arbitrator is required to be appointed by this Hon'ble Court;

c) the Respondent admitted the cause of loss, still just to escape from their liability to make payment to the Applicant for the losses suffered the Applicant do not want to release the payment on one pretext or the other;

d) the only dispute between the parties is regarding the loss suffered by the Applicant, else the surveyor has given specific findings in his report that the Applicant has suffered loss due to heavy flood and the same has not been denied by the Respondent;

e) the Respondent has disbursed the insurance amount to other parties as well for the loss suffered by flood occurred on 06.08.2019, however, due to some unknown reasons the Respondent is not willing to release the amount claimed by the Applicant. Furthermore, it is humbly requested that the Hon'ble High Court may ask the Respondent to provide the details of the insurance disbursed by them to other parties for the loss suffered due to the above flood;"

7 Heard learned counsel Mr. Siddharth Jain for the applicant, who while arguing the case of the applicant and construing the Clause No.13 as an 'arbitration agreement' would rely upon the

latest decision of the Apex Court in case of *Babanrao Rajaram Pund Vs. Samarth Builders and Developers and anr,* (*2022) 9 SCC 691*, to submit that when there is a discernable intention of the parties in the agreement to refer disputes to arbitration, then an application under section 11 is maintainable. He would submit that deficiency of specific words in agreement, which otherwise fortifies the intention of the parties to arbitrate their disputes, cannot legitimize annulment of the arbitration clause. He would also rely upon the decision of the Apex Court in case of *Gurmel Singh vs. Branch Manager, National Insurance Company Ltd 2022, SCC Online SC 666*.

In short, his submission is that since the dispute has arisen between the parties, it must be made over to the arbitrator in the wake of the respondent, Insurance Company disputing the quantum of compensation, and he would support his submission by relying upon a decision of the Hon'ble Apex Court in case of *State of Tripura vs. Province of East Bengal 1950, SCC 794* throwing light upon the manner in which the word 'liability' contemplated in the Arbitration Clause will have to be construed.

8 Per contra, the learned counsel Mr. Rushab Vidhyarthi appearing for the respondent would submit that on 9/12/2021, when the applicant invoked the arbitration clause, the respondent responded by raising a cloud over the existence of an 'Arbitration Agreement', by submitting that reference to arbitration can be made under the said clause only when the insurance policy is accepted and there exist a dispute about the quantum to be paid, however in the present case, the admitted

position being the insurance company had repudiated, the claim fully as 'No Claim' and the liability was disputed by the company, based on the observations of the Surveyor and chemical analyzer.

The learned counsel would further submit that the manner in which the arbitration clause is worded in the insurance policy would leave no room for doubt that the insurance company has denied the liability, and since the dispute do not pertain to quantum of the compensation/liability, the remedy of arbitration cannot be invoked.

The learned counsel would invite my attention to the statutory framework contemplated in the Insurance Act, 1938 and would rely upon the decision of the Apex Court in case of *New India Assurance Company Ltd vs. Pradeep Kumar, (2009), 7 SCC, 787,* to submit that a surveyor's report is not the last and final word and it is not so sacrosanct, that it cannot be departed from nor it is conclusive. This view, according to him, has been subsequently followed in *Khatema Fibers Ltd vs. New India Assurance Company Ltd and anr, 2021, SCC online SC 81,* by relying upon the arbitration clause which is clearly indicative of the intention of the parties. The learned counsel would submit that in absence of a dispute raised by the applicant/claimant being an Arbitrable dispute, there is no reason for referring it to the Arbitrator and the relief sought for appointment of a sole arbitrator to resolve the dispute, has to be necessarily turned down.

9 Heard the respective counsel for the applicant and the

respondent and perused the copy of the application along with its annexures, which include the 'Standard Fire and Special Peril Policy (Policy)' dated 13/3/2019.

It is not in dispute that the applicant was insured with the respondent Insurance company and the fact reveal that on 5/8/2019, heavy rain lashed the region which resulted in water gushing in it's premises allegedly causing loss to the material stored in the premises. The applicant lodged a claim seeking reimbursement of the losses valued in the sum of INR 13,05,19,394 -. The application is accompanied with the final survey report dated 8/12/2020, addressed by the surveyor K. Kishore and Associates to the Regional Manager New Assurance Company Ltd. The said report is submitted with reference to the subject mentioned therein:

> *"Sub: Reported Loss Due to Water Logging/Inundation in the Factory of M/s Mallak Specialities Pvt. Ltd. Located At C-103, MIDC, MAHAD, Dist-Raigad-402301 on 06.08.2019 Between 03:00 PM To 4.00 P.M Claim Under Policy Number- 11060011180100001750 and 175."*
>
> The report proceed to state that the surveyor visited the location on 9/8/2019 and other subsequent days for survey and assessment of loss if any caused to the insured due to reported water loding/Inundation. The insured had submitted certain documents and papers and the effected location was described at M/s. Mallak Specialties pvt ltd. C-103, MIDC- Mahad, Dist- Raigad. The sum insured and risk covered under the standard fire and special perils policy was described as under:

"On Stocks, Stock in Process, Raw Materials, Finished and Semi Finished Goods pertaining to the insured trade and Stocks Held in Trust or on commission and stocks lying in open outside the factory premises but inside the compound".	***Amount in Rs.*** *28,00,00,000.00/-*

The observations and opinion of the surveyor was contained in the report which is reproduced as under:

"Our Observation and Opinion:-

At the time of survey, we visited areas in the factory and found effect of water logging and inundation. On the basis of Management Explanations, Tahsildar Panchnama, Newspaper Reports and our physical inspection, we can conclude that cause of loss is heavy rainfall and consequent inundation on 06.08.2019 between 03.00.PM to 4.00 PM. In the factory of Insured which caused damage to Boundary Wall, Plant & Machinery and Stock."

Certain other observations in the said report read as under:

"At the time of our inspection, no violation of policy terms and conditions, warranties and liability were observed except the followings:-

1. Insured has not allowed us and cooperated in salvage disposal. This is violation of General Condition No.7 of Standard Fire and Special Peril Policy which read as under:

On the happening of loss or damage to any of the property insured by this policy, the Company may-

a) enter and take and keep possession of the building or premises where the loss or damage has happened.

b) take possession of or require to be delivered to it any

property of the Insured in the building or on the premises at the time of the loss or damage,

c) keep possession of any such property and examine, sort, arrange, remove or otherwise deal with the same,

d) sell any such property or dispose of the same for account of whom it may concern.

The insured shall not in any case be entitled to abandon any property to the Company whether taken possession of by the Company or not.

2. Insured has exaggerated claim amount by claiming many items which does not fall within the purview of the Policy. These are as under:-

-CETP, UPS, Electro Magnetic Flow Meter etc. Claim of Rs. 23,32,860.00 was submitted of some other location which not covered in the Policy.

-Cement Bags wash out is claimed which is practically not possible since it was in closed area."

In paragraph 16, the surveyor submitted his conclusion and recommendation to the following effect :

16. <u>Conclusion and Recommendation</u>

The discussions under paras above established that the occurrence of water logging and inundation on 06.08.2019 in the insured's factory is true but liability would not exist under the policy in view of points mentioned in Para 13 above. We recommend repudiation of claim on the basis of above observations. The Final Survey Report prepared without prejudice to the rights of the Insured & Insurer in terms of policy conditions & warranties."

10 The New India Assurance Company i.e. respondent addressed a communication to the applicant with reference to the report of the surveyor dated 14/8/2019 and highlighted on

three issues mentioned in the report:

"1. ***Surveyor was not allowed and there was no cooperation during salvage disposal. This is violation of General Condition No.7 of Standard Fire and Special Peril Policy which read as under:-***

2. Claim amount was exaggerated by claiming many items which fall within the purview of the Policy.

3. Besides above, Books of Account shows different figures in different statements on same dates."

11 At the end, the insurance company communicated to the applicant as under:

"Based on the observations in the Survey Report and the recommendation of Surveyor as well as M/s. Presto Chemtech's Chemical Analyzer appointed, there is no liability under the Policy.

Hence we are closing our file as "No claim".

12 This was once again responded to by the applicant but ultimately on 10/12/2021 the applicant chose to invoke arbitration clause, for settlement of claim by stating that inaction on any part of the Insurance Company in not releasing the legitimate and justified claim has constraint them to invoke them the Arbitration clause 13 and the Arbitrator was also named. The respondent company was requested to accept the nomination of the sole Arbitrator or propose a name at their end. It was accompanied with a repudiation letter dated 14/1/2021.

The said notice was responded to by the Insurance Company by taking a specific stand that in view of clause no.13 arbitration is not maintainable since the liability under the policy is disputed.

13 In order to determine the pivotal issue that has arisen between the parties, as to whether the dispute that has arisen between the parties can be referred for Arbitration and whether clause 13 in the insurance policy would cover the dispute, it is necessary to reproduce clause 13, contained in the standard policy:-

> *"If any dispute or difference shall arise as to the quantum to be paid under this policy (liability being otherwise admitted) such difference shall independently of all other questions be referred to the decision of a sole arbitrator to be appointed in writing by the parties to or if they cannot agree upon a single arbitrator within 30 days of any party invoking arbitration, the same shall be referred to a panel of three arbitrators, comprising of two arbitrators, one to be appointed by each of the parties to the dispute/difference and the third arbitrator to be appointed by such two arbitrators and arbitration shall be conducted under and in accordance with the provision of the Arbitration and Conciliation Act, 1996.*
>
> *It is clearly agreed and understood that no difference or dispute shall be referable to arbitration as hereinbefore provided, if the Company has disputed or not accepted liability under or in respect of this policy.*
>
> *It is hereby expressly stipulated and declared that it shall be condition precedent to any right of action or suit this policy that the award by such arbitrator/ arbitrators of the amount of the loss or damage shall be first obtained."*

14 A careful reading of the aforesaid clause would make it apparent that if any dispute or difference would arise as to the quantum to the paid under the policy, the question shall be referred to a Sole Arbitrator or panel of three Arbitrators as the

case may be, however if the Company has disputed or not accepted the liability under or in respect of the policy, there shall be no reference to Arbitration.

The issue therefore arises, whether the dispute which has arisen between the parties could be referred for Arbitration, which ultimately would depend upon an assertion whether the insurer has disputed/not accepted the liability in respect of the policy.

15 The sequence of events in the background would clearly reveal that on the claim being staked by the applicant under the Policy of Insurance, a surveyor was appointed to carry out the inspection and for ascertainment of the claim of Rs. 8 Crores, which was raised under the Insurance Policy. The applicant was directed to submit certain documents to the surveyor and the surveyor carried out an inspection and assessed the loss, which was made subject to adjustment of Salvage value. The applicant was directed to submit the Salvage value of the rawmaterial and packing material. The assessment of loss carried out by the surveyor and communicated to the applicant by communication dated 7/11/2020 is less of the Salvage value and a clear cut remark on the said report is given to that effect.

16 The final survey report was submitted by the surveyor on 8/12/2020 to the Insurance Company and this report came to be submitted after receipt of the papers and documents by the insured i.e. the applicant.

I have extensively quoted the report and I need not repeat its contents but suffice it to note that in paragraph 13, the

objection is raised by the surveyor on two points, namely, insured has not allowed and cooperated in Salvage disposal which amounted to breach of general condition no.7 of the policy and secondly the insured has exaggerated the claim amount, by claiming many items which do not fall within the purview of the policy.

17 At the end of the report, the conclusion portion is set out in clause 16 and it is evident that the surveyor clearly recorded that, the incident of Water Logging and Inundation occurred on 6/8/2019, in the insured factory but it is clearly stated, that the liability would not exist under the Policy, in view of the non-cooperation of the applicant in Salvage disposal and exaggeration of the claim by including many items which do not fall within the purview of the policy. The Surveyor hence recommended repudiation of the claim on the basis of the observations.

Based on the final report of the Surveyor, the Insurance Company communicated to the applicant its view and closed the file as “No Claim” by underlining that there is no liability under the Policy.

18 The Surveyor’s report which in any case is not binding upon the Insurance Company clearly recommended repudiation of the claim, on the basis of the observations made in the report and as a consequence of this, the Insurance Company repudiated the claim by categorizing it as “No Claim”.

From the perusal of the above, it is evidently clear that the Insurance Company never disputed the quantum but disputed its

liability in respect of the policy drawn by the applicant, thus making the dispute non-arbitrable in the wake of the policy.

The reliance placed by the learned counsel for the applicant upon the decision of National Insurance Company Ltd (Supra) do not take the case of the applicant any further, in the wake of the specific wording in the clause, which is sought to be invoked as 'Arbitration Clause'.

19 True it is that, the form of Arbitration Agreement is not specified in the Act and whether there exist an Arbitration Agreement has to be discerned from the intention of the parties. The test to determine so would be the intention of the parties for making a reference for Arbitration. Deficiency of words in the agreement, which otherwise fortify intention of the parties to arbitrate their disputes cannot legitimize annulment of Arbitration Clause and therefore what is important for appointment of an Arbitrator, by construing a clause in an agreement to be an Arbitration Clause is the intention of the parties which is to be gathered from the clause itself as well as the surrounding circumstances.

20 An identical clause in an Insurance Policy came up for consideration before the Hon'ble Apex Court in case of *Oriental Insurance Company Ltd vs. Narbheram Power and Steel Pvt. Ltd., (2018) 6 SCC, 534*. While construing clause no. 13 contained in the policy, their Lordships of the Hon'ble Apex Court by referring to the catena of decisions, has observed as under:

"24. In the instant case, Clause 13 categorically

lays the postulate that if the insurer has disputed or not accepted the liability, no difference or dispute shall be referred to arbitration. The thrust of the matter is whether the insurer has disputed or not accepted the liability under or in respect of the policy. The rejection of the claim of the respondent made vide letter dated 26/12/2014 ascribes the following reasons:

"1. Alleged loss of imported coal is clearly an inventory shortage.

2. There was no actual loss of stock in process.

3. The damage to the sponge iron is due to inherent vice.

4. The loss towards building/sheds, etc. are exaggerated to cover insured maintenance.

5. As there is no material damage thus business interruption loss does not get triggered."

25. The aforesaid communication, submits the learned Senior Counsel for the respondent, does not amount to denial of liability under or in respect of the policy. On a reading of the communication, we think, the disputation squarely comes within part II of Clause 13. The said part of the clause clearly spells out that the parties have agreed and understood that no differences and disputes shall be referable to arbitration if the company has disputed or not accepted the liability. The communication ascribes reason for not accepting the claim at all. It is nothing else but denial of liability by the insurer in toto. It is not a disputation pertaining to the quantum. In the present case, we are not concerned with regard to whether the policy was void or not as the same was not raised by the insurer. The insurance company has, on facts, repudiated the claim by denying to accept the liability on the basis of the aforesaid reasons. No inference can be drawn that there is some kind of dispute with regard to quantification. It is a denial to indemnify the loss as claimed by the respondent. Such a situation, according to us, falls on all fours within the concept of denial of disputes and non-acceptance

> *of liability. It is not one of the arbitration clauses which can be interpreted in a way that denial of a claim would itself amount to dispute and, therefore, it has to be referred to arbitration. The parties are bound by the terms and conditions agreed under the policy and the arbitration clause contained in it. It is not a case where mere allegation of fraud is leaned upon to avoid the arbitration. It is not a situation where a stand is taken that certain claims pertain to excepted matters and are, hence, not arbitrable. The language used in the second part is absolutely categorical and unequivocal inasmuch as it stipulates that it is clearly agreed and understood that no difference or disputes shall be referable to arbitration if the company has disputed or not accepted the liability. The High Court has fallen into grave error by expressing the opinion that there is incongruity between Part **II** and Part **III**. The said analysis runs counter to the principles laid down in the three-Judge Bench decision in Vulcan Insurance Co. Ltd. Therefore, the only remedy which the respondent can take recourse to is to institute a civil suit for mitigation of the grievance. If a civil suit is filed within two months hence, the benefit of section 14 of the Limitation Act, 1963 will enure to its benefit."*

21 The aforesaid enunciation of law in the above manner revolving around the identically worded clause in an Insurance Policy leave no scope for me to reach any other conclusion and I find myself fortify in recording a conclusion that in the present case since the Insurance Company has not accepted the liability under the Policy and having been repudiated the claim by denying to accept the liability.

22 In *United India Insurance Company Ltd and another Vs. Hyundai Engineering and Construction Company Ltd (2018), 17 SCC, 607,* clause no.7 contained in the policy similarly worded as clause no. 13 in the case before me came up for

consideration before the Hon'ble Apex Court and while deliberating upon the said clause, the Hon'ble Apex Court has held as under:

> ***"12.*** *From the line of authorities, it is clear that the arbitration clause has to be interpreted strictly. The subject clause 7 which is in pari materia to clause 13 of the policy considered by a three-Judge Bench in* ***Oriental Insurance Company Limited*** *(supra), is a conditional expression of intent. Such an arbitration clause will get activated or kindled only if the dispute between the parties is limited to the quantum to be paid under the policy. The liability should be unequivocally admitted by the insurer. That is the pre-condition and sine qua non for triggering the arbitration clause. To put it differently, an arbitration clause would enliven or invigorate only if the insurer admits or accepts its liability under or in respect of the concerned policy. That has been expressly predicated in the opening part of clause 7 as well as the second paragraph of the same clause. In the opening part, it is stated that the "(liability being otherwise admitted)". This is reinforced and re-stated in the second paragraph in the following words:*
>
> *"It is clearly agreed and understood that no difference or dispute shall be referable to arbitration as herein before provided, if the Company has disputed or not accepted liability under or in respect of this Policy."*
>
> *Thus understood, there can be no arbitration in cases where the insurance company disputes or does not accept the liability under or in respect of the policy.*
>
> ***13.*** *The core issue is whether the communication sent on 21st April, 2011 falls in the excepted category of repudiation and denial of liability in toto or has the effect of acceptance of liability by the insurer under or in respect of the policy and limited to disputation of quantum. The High Court has made no effort to examine this aspect at all. It only reproduced clause 7 of the policy and in reference to the dictum in* ***Duro***

> ***Felguera*** *(supra) held that no other enquiry can be made by the Court in that regard. This is misreading of the said decision and the amended provision and, in particular, mis-application of the three-Judge Bench decisions of this Court in* ***Vulcan Insurance Co. Ltd.*** *(supra) and in* ***Oriental Insurance Company Ltd.*** *(supra).*
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> ***14.*** *Reverting to the communication dated 21st April, 2011, we have no hesitation in taking the view that the appellants completely denied their liability and repudiated the claim of the JV (respondent Nos.1 & 2) for the reasons mentioned in the communication. The reasons are specific. No plea was raised by the respondents that the policy or the said clause 7 was void. The appellants repudiated the claim of the JV and denied their liability in toto under or in respect of the subject policy. It was not a plea to dispute the quantum to be paid under the policy, which alone could be referred to arbitration in terms of clause 7. Thus, the plea taken by the appellants is of denial of its liability to indemnify the loss as claimed by the JV, which falls in the excepted category, thereby making the arbitration clause ineffective and incapable of being enforced, if not non-existent. It is not actuated so as to make a reference to arbitration. In other words, the plea of the appellants is about falling in an excepted category and non-arbitrable matter within the meaning of the opening part of clause 7 and as re-stated in the second paragraph of the same clause."*

23 In the wake of the aforesaid authoritative pronouncement and applying the principle of law following the same and applying to the facts in hand, where it can be clearly seen that the Insurance Company has disputed and not accepted the liability under the policy, the dispute is not arbitrable, as it do not revolve around the quantum to be paid under the Policy.

In light of the above, the application seeking appointment

of an Arbitrator for adjudication of the claims of the Applicant, pursuant to invocation of the Arbitration clause for settlement of claim under the Fire Policy is not maintainable. The Application seeking appointment of Arbitrator is Rejected.

No order as to costs.

(SMT. BHARATI DANGRE, J.)

Ashish Mhaske