Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION APPLICATION NO. 42 OF 2017

Neil Extrulamipack Pvt Ltd …Petitioner
Versus
New India Assurance Co Ltd …Respondent

Mr Sachin Datta, Senior Advocate, *Mr Dinesh Sharma, Ms Ritika Jhurani, Mr Karan Vyas, for the Petitioner.*
Mr Asim Vidyarthi, *for the Respondent.*

CORAM: G.S. PATEL, J
DATED: 17th April 2017

PC:-

1. Heard.

2. The application arises from an Insurance Policy issued by the Respondent. It was a Standard Fire and Special Perils Policy for the period 12th July 2014 to 11th July 2015. It was in respect of the Petitioner's building, plant, machinery, electrical installations and stocks at its plant at Survey No. 61, Gat No. 304, Village Dhansar, Palghar, Maharashtra. The Petitioner had such policies before this period too.

3. According to the Petitioner there was a fire on the night of 10th July 2015, early morning of 11th July 2015. This was within the insurance period, if only just. The sum insured was Rs. 65.95 crores. This was enhanced on 25th May 2015 by Rs. 10 crores to Rs. 75.95 crores.

4. The fire in question occurred, the Petitioners say, at 3.40 am on the night of 10th July 2015/morning of 11th July 2015. There was extensive loss and damage. It left their entire factory gutted. The fire was not brought under control for an entire day. The Petitioners promptly reported the fire to the Respondent. The Respondent's representatives visited the site the very next day and on 11th July 2015 appointed one Mr Navin Jain as a Surveyor to assess the damages in complaint and claim. The Petitioner put in a claim for Rs. 85.60 crores. The details are set out in the Petition.

5. The Surveyor made several visits and sought documentation. There is some correspondence annexed to this Petition, but little turns on it. The Petitioners' case is that they could not provide complete documentation as much of even this was lost in the reported fire.

6. On 11th July 2016, the Respondent wrote to the Petitioner completely repudiating the policy. It did so on the basis of an investigation report which found that the claim was exaggerated and fraudulent. I am not required to examine the sufficiency of these reasons.

7. The arbitration agreement in question is in Clause 13 of the policy and it reads thus:

> "13. 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 provisions of the Arbitration and Conciliation Act, 1996.
>
> 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.
>
> It is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action of suit upon this policy that the award by such arbitrator/arbitrators of the amount of the loss or damage shall be first obtained."

8. These clauses are by now common. They have received attention from Courts in several cases.

9. In the Affidavit in Reply, the application is opposed on the basis that once the insurance company has repudiated its liability, that is to say, not merely raised a dispute about the quantum of the claim, the second portion of the arbitration clause would operate and the dispute would cease to be arbitrable. In other words, the only arbitrable dispute under such an insurance policy is a dispute about quantum and nothing else. The third part of this arbitration clause is of course what is well known as a *Scott v Avery* clause and this too has been interpreted in the past.

10. A very similar situation arose before SJ Kathwalla J in Essar *Steel India Ltd v The New India Assurance Co Ltd*. By his decision in that matter,[1] SJ Kathawalla J clearly held that a repudiation of a policy by the insurance company — and the arbitration agreement before him was exactly the same as the one I have before me — would result in the dispute not being arbitrable and there being no valid arbitration agreement at all. Mr Datta on behalf of the Petitioners sought to distance himself from this judgment on the ground that in *Essar Steel* the repudiation by the insurance company was *ab initio*, i.e., that it did not come after an assessment of quantum. To my mind this makes no difference. To accept Mr Datta's argument would be to read additional words into the clause and in particular into the second part of it. I should then be required to say that the dispute would be arbitrable if the repudiation was after a claim had been made and surveyed or assessed, but would not be referable to arbitration if it was before that time. I should be required to adjudicate the validity or correctness of the repudiation and to examine the cause on merits. I do not think any such interpretation is even legitimate, let alone prudent.

11. The decision of Anoop V Mohta J in *Essar Steel India Ltd v New India Assurance Company*[2] cited by Mr Datta is one that SJ

1 2016 SCC Online Bom 9472

2 Arbitration Application No. 18 of 2013 decided on 8th May 2013.

Kathawalla J considered in paragraphs 3.7, 4.11 and 15 of his subsequent decision. In particular, Kathawalla J noted that the arbitration clause in the 2013 *Essar Steel* case before Mohta J was entirely different from the one before him. The arbitration clause before me is exactly the one that Kathawalla J had before him, and I am bound, therefore, to follow his decision and reasoning. As Kathawalla J also noted, the difference in the two clauses was also noted by the Madras High Court in *Jumbo Bags Ltd v The New India Assurance Co Ltd*.[3] This was the clause that Mohta J had before him:

> **18. ARBITRATION**
>
> If the Insured and Underwriters fail to agree in whole or in part regarding any aspect of this Policy, each party shall, within ten (10) days after the demand in writing by either party, appoint a competent and disinterested arbitrator and the two chosen shall before commencing the arbitration select a competent and disinterested umpire.
>
> The arbitrators together shall determine such matters in which the Insured and Underwriters shall so fail to agree and shall make an award thereon and the award in writing of any two (2), duly verified, shall determine the same, and if they fail to agree, they will submit their differences to the umpire.
>
> The parties to such arbitration shall pay the arbitrators respectively appointed by them and bear equally the expenses of the arbitration and the charges of the umpire."

3 2016 (3) CTC 769 : 2016-2-LW 769; Original Petition No. 657 of 2015.

As will be seen, this is an entirely different clause and nothing at all like the arbitration clause before me today or the one that Kathawalla J considered. I am bound by the decision of SJ Kathawalla J and will necessarily have to follow it. Mr Datta's argument that a repudiation on a mere *ipse dixit* of the insurance company is no valid repudiation at all is not one that has any application to the facts of this case. In the repudiation letter, the Respondent set out the very many reasons for its repudiation, including non-submission of necessary documents, incorrect statements as to offices and office addresses and so on. This was on the basis of a report commissioned by the insurance company from an investigator, one Ram Gopal Verma.

12. Mr Datta then travelled to the *Jumbo Bags* decision to canvas an even wider proposition, viz., that once there is a contract of insurance, any repudiation to be valid must precede the lodging of a claim. The observations in this judgment are indeed contrary to what Mr Datta canvasses. Paragraphs 24 to 26 are material, and this is how they read:

> 24. The existence of disputes inter se the parties is undoubted. If the mode of arbitration is prescribed for settlement of disputes, then that should be the mode as it is a chosen Forum by the parties and every endeavour has to be made to give effect to the alternative dispute resolution mechanism agreed upon. **However, it cannot be that if the arbitration clause does per se specifically exclude arbitration and the circumstances in which such exclusion is made is undisputed, still the matter would have to be referred to the arbitrator to**

determine whether that is the mode for adjudication of disputes.

25. Now turning to the arbitration clause, there are two parts of it, which make the position abundantly clear. As to what can be referred to arbitration is specified in the initial sentence of Clause-13 itself — the quantum to be paid under the policy. This expression is specifically circumscribed by the stipulation "liability being otherwise admitted." **Thus, unless the insurance company admits that in principle they are liable, though the payment may be of a lesser amount, that aspect has to be determined in arbitration. Interpreting the contract to make any part of it otiose cannot be accepted, as a meaning must be given to the words used in the contract. If the plea of the Petitioner was to be accepted, the aforesaid phrase "liability be otherwise admitted" would become superfluous/otiose. If at all there was any doubt, that stands removed by the second paragraph of Clause-13, which stipulates that it is "clearly agreed and understood" that no difference or dispute would be referrable to arbitration, if the company had "disputed or not accepted the liability", under or in respect of the policy. It is not relevant as to why the Respondent-Insurance company has disputed or not accepted the liability, though Clause-8 provides that if it is a fraudulent claim, the same can be rejected and all benefits under the policy forfeited.** It is the view of the Respondent-company that this is a case of fraudulent claim, which is liable to be rejected. **Thus, once the company is of the view that they are not liable to pay a penny not on the issue of quantification, but on a concept, the arbitration Clause would stand excluded.**

> 26. It may be noted that the rejection is on the basis of a clause of Policy — Clause-8. **Further, though not directly relevant, it is not a mere *ipse dixit* of the Respondent, but it is based on the final report of the Surveyor appointed by the Respondent – Insurance company.** The interim report of the Surveyor deputed by another Insurance Company viz., "United India Insurance Company", in relation to another claim lodged by the Petitioner although arising out of the same accident, under which part payments have been made by that Company thus cannot support the case of the Petitioner. The policies are different. One is for plant and machinery and the other is for stocks insured by the Respondent herein. If there is absence of proof of existence of stock at sight or it is felt that the claim for stocks is fraudulently made, the payment made towards loss to the plant and machinery would not automatically entitle the insured to make a claim in relation to stocks also. It cannot be lost sight of that we are dealing with an Insurance policy."

(*Emphasis added*)

13. As the emphasized portions show, it makes no difference *when* the repudiation is effected. That cannot alter the plain wording of the arbitration clause, and I must decline Mr Datta's invitation to read into that clause additional words of limitation applicable to a repudiation. That seems to me to be an invitation to jurisprudential and judicial misadventure. The policy's wording is completely unambiguous: once there is a denial of liability, the possibility of arbitration is altogether excluded. In taking such a policy and in issuing it, what parties evidently agreed to, and there is no other way to see this, is that the only disputes that they could legitimately refer to arbitration would be disputes as to quantum.

14. Mr Datta is at some pains to point out that of the two dozen or so claims said to have made, almost all but one have been recommended by the Surveyor, and it is on a dispute on only one that the entire policy has been purportedly repudiated. Again this makes no difference at all. In the words of Kathawalla J, we cannot interpret these in any other way without doing considerable violence to the language or stretching the law beyond permissible limits.

15. The argument based on Section 11(6A) also does not assist the Petitioners. As we have seen, this was taken both before SJ Kathawalla J in *Essar Steel* and before Sanjay Kishan Kaul CJ (as he then was) in the Madras High Court in *Jumbo Bags*. In both cases, this sub-section was held to be of no assistance to the Petitioner. It is true that after the amendment to the Arbitration Act, sub-clause 6A says that a court must confine itself to seeing whether there exists an arbitration agreement, but this is, as it turns out, an argument that is more against the Petitioners than for them. There indeed exists an arbitration clause: but it exists only for a narrowly defined class or band of disputes and no further. What Mr Datta asks of me is that I should altogether elide the restrictions or limitation in the arbitration clause and merely see if there is *some* arbitration clause. That cannot be the intent of Section 11(6A). I do not think it is possible to expand the scope of Section 11(6A) in a manner that would result in reading out entire portions of the contract in question or of reverting the statutory position to a stage before its amendment.

16. The Application is dismissed.

17. The Petitioners are directed to register the Application in the Commercial Division.

18. Under the amended Code of Civil Procedure, 1908, as effected by the Commercial Courts, Commercial Division And Commercial Appellate Division Of High Courts Act, 2015, costs would ordinarily have to be awarded to the Respondent against the Petitioner on the general principle enunciated in the amended Section 35(2) of the CPC, viz., that the unsuccessful party pays the successful party (or, in other words, costs follow the event). Under the proviso to Section 35(2), I am to give reasons for *not* awarding costs. My reasons are these: that there was a fire is undisputed. The only question is whether the loss was injured. Even without an examination of the merits of the claim, it would be inequitable to add to those losses by imposing costs. In any case, the Petitioners have made no claim before me for an award of money, but only canvassed the validity and applicability of an arbitration clause. Hence, no costs.

(G. S. PATEL, J.)