

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated 30.11.2017

CORAM

THE HON'BLE DR.JUSTICE ANITA SUMANTH

O.P. No.537 of 2017

1.Hyundai Engineering and Construction Co Ltd.,
represented by
Plot No.5, Astitva Estate,
Kota-Bundi Road,
Near Gurudwara, Ram Nagar,
KOTA 324 008, Rajasthan

2.Gamon India Limited,
represented by
Talim Sangh Premises,
Rawat Bhata Road,
KOTA 324 010, Rajasthan

.. Petitioners

Versus

1.United India Insurance Co. Limited
(Head Office)
24, Whites Road,
Chennai 600 014
Tamil Nadu.

2.United India Insurance Co. Limited,
Divisional Office: 011900
98-A, Dr. Radhakrishnan Salai,
Mylapore, Chennai 600 004.

3.National Highway Authority of India,
(Ministry of Shipping, Road Transport & Highways)
I C - 10, SFS Colony, Talwandi,
KOTA 324 005, Rajasthan

.. Respondents

High Court Scheme praying to declare the arbitrator nominated by the petitioners as the Sole Arbitrator; or in addition, appoint a co-on behalf of the respondents so as to adjudicate all the disputes inter-se between the parties in terms of the Arbitration and Conciliation Act, 1996.

For Petitioners : Mr.Sathish Parasaran

for Mr.A.V.Arun

For Respondents : Mr.N.Vijayaraghavan

ORDER

The petitioners constitute a Joint Venture (JV). The 3rd respondent, the National Highways Authority of India (NHAI) awarded a contract on 29.09.2006 to the JV for the design, construction and maintenance of a bridge across the River Chambal. The work was to be completed within a period of 40 months and was commenced on 05.12.2007 by the JV after hand over of the site to it by NHAI. Upon onset of work, a Contractor All Risk Insurance Policy (CAR policy) dated 5.12.2007 was obtained from the respondent, United India Insurance (Insurer) covering the entire project valued at Rs.213,58,76,000/-. Admittedly the policy contains an arbitration clause at Article 7 thereof.

2. During the construction of the bridge, there was an accident onsite on 24.12.2009 resulting in significant losses. NHAI, vide letter dated 29.12.2009 informed the Insurer about the accident. A detailed submission of claim for a sum of Rs.151,59,94,543/- was submitted by the JV to the Insurer. The Insurer thereafter proceeded to assess the loss by appointing one Mr.S. Ananthapadmanabhan, Suveyor and Loss Adjuster for the purpose. A final report

was submitted by the Surveyor on 28.2.2011 assessing the net loss at a figure of 39,09,92,828/- but concluding that the damage was on account of faulty design and improper execution of project. In addition, a Committee of Experts was set up by the Ministry of Road Transport and Highways, Government of India to enquire into the accident and the committee submitted its report on 07.08.2010. The report is alleged by the JV to be inconclusive and vague. Thereafter and taking into consideration both reports, letter dated 21.4.2011 was issued by the Insurer to the effect that the claim was found unacceptable and accordingly stood repudiated. This letter is the sheet anchor of the defence of the respondents and I will advert to the relevance of the same in due course.

3. To continue with the narration of facts, NHAI, vide letter dated 4.5.2011 conveyed its disagreement with the decision of the Insurer to repudiate the claim. The JV, subsequent to a round of negotiations with the Insurer, appears to have been given an assurance that its claim would be re-opened and re-assessed and vide its letter dated 5.7.2011, referring to the assurances extended by the Insurer, sought to prevail upon it to confirm its decision regarding withdrawal of repudiation at the earliest.

4. The Insurer, vide its letter of even date also confirms and conveys its decision to re-evaluate its repudiation of the claim. The aforesaid letter puts the JV to notice that additional documents will be called for from the JV which may be submitted as and when sought. There appear to have been various rounds of discussions thereafter culminating in letter dated 17.4.2017 from the Insurer reiterating its decision to repudiate the claim.

5. Thereafter on 29.5.2017, the JV invokes the arbitration clause in the policy, nominating one Dr.V.R.Agarwal as the Arbitrator and called upon the Insurer to either accept the nomination made by it or nominate its Arbitrator within 30 days from receipt of the letter.

6. In reply, the Insurer, quoting condition No.7 of the Policy rejects the reference to arbitration and consequent nomination of the Arbitrator, as against which, the present petition has been filed by the JV.

7. Heard Mr.Sathish Parasaran, appearing for Mr.A.V.Arun, for the petitioner and Mr. N.Vijayaraghavan, appearing for the respondent.

8. The parties agree that the Policy provides for the resolution of disputes by Arbitration with certain exceptions and Article 7 is extracted hereunder:

7. If any 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 an arbitrator to be appointed in writing by the parties in difference, or if they cannot agree upon a single arbitrator to the decision of two disinterested persons as arbitrators of whom one shall be appointed in writing by each of the parties within two calendar months after having been required so to do in writing by the other party in accordance with the provisions of the Arbitration Act, 1940, as amended from time to time and for the time being in force in case either party shall refuse or fail to appoint arbitrator within two calendar months after receipt of notice in writing requiring an appointment the other party shall be at liberty to appoint sole arbitrator and in case of disagreement between the arbitrators, the difference shall be referred to the decision of an umpire who shall have been appointed by them in writing before entering on the reference and who shall sit with the arbitrators and preside at their meetings.

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 or suit upon this policy that the award by such arbitrator, arbitrators or umpire of the amount of the loss or damage shall be first obtained.

It is also hereby further expressly agreed and declared that if the Company shall disclaim liability to the insured for any claim hereunder and such claim shall not within 3 calendar months from the date of such disclaimer have been made the subject matter of a suit in a court of law, then the claim shall for all purpose be deemed to have been abandoned and shall not thereafter be recoverable hereunder.'

(emphasis by underlining supplied)

9. The sole objection raised by Mr. Vijayaraghavan is that Article 7 providing for the appointment of an Arbitrator is liable to be invoked only where the liability to pay is admitted by the Insurer. Reliance in this context is placed on the 2nd paragraph of Article 7, underlined in the extract above. Thus, where the dispute falls within the ambit of the exceptions provided, that is, if the company has disputed the very liability to pay, there is no arbitrable dispute and consequently, no reference to arbitration. He would rely on the following judgment/decisions that, according to him, settle the law in this regard.

(i) In *The Vulcan Insurance Co. Ltd. Vs. Maharaj Singh and another* (1976 (1) SCC 943), the Full Bench of the Supreme Court considered an identical situation and the issue framed by the Supreme Court at paragraph 8 is as follows:

'Really only one point need be decided in this appeal and that is this-whether in view of the repudiation of liability by the appellant under Clause 13 of the Insurance Policy, a dispute was raised which could be referred to arbitration?'

The Bench answers the issue as follows:

'Although the surveyors in their letter dated 26-4-1963 had raised a dispute as to the amount of any loss or damage alleged to have been suffered by respondent No. 1, the appellant at no point of time raised any such dispute. The appellant company in its letter dated the 5th and the 29th July, 1963 repudiated the claim altogether. Under clause 13 the company was not required to mention any reason for rejection of the claim nor did it mention any. But the repudiation of the claim could not amount to the raising of a dispute as to the amount if any loss or damage alleged to have been suffered by respondent No. 1. If the rejection of the claim made by the insured be on the ground that he had suffered no loss as a result of the fire or the amount of loss was not to the extent claimed by him, then, and then only, a difference could have arisen as to the amount of any loss or damage within the meaning of clause 18. In this case, however, the company repudiated its liability to pay any amount of loss or damage as claimed by respondent No. 1. In other words, the dispute raised by the company appertained to its liability to pay any amount of damage whatsoever. In our opinion, therefore, the dispute raised by the appellant company was not covered by the arbitration clause.'

10. The above judgment has been applied in several subsequent decisions of the High Courts. The Bombay High Court In **Tainwala Personal Care Products Pvt. Ltd., Mumbai Vs. Royal Sundaram Alliance Insurance Co. Ltd., Mumbai (2012(4) MR LJ 597)**, holds 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 kvm ARBAP232_08 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.

.....

...

3. Evidently on a plain reading of the aforesaid clause, it is evident that it is only when the insurer has admitted its liability but there is a dispute or difference in respect of the quantum to be paid under the policy that the dispute would be arbitrable. In the present case, the insurer has not admitted its liability and on the contrary has repudiated any liability by its letter dated 18 February 2008.

This aspect is covered by a Judgment of the Supreme Court in The Vulcan Insurance Co. Ltd. vs. Maharaj Singh and another, AIR 1976 SC 287 where the Supreme Court held thus :-
.....”

11. Similar conclusions have been arrived at by the Karnataka High Court in ***E-Spring Building Systems (I) Private Limited, Bangalore Vs. Regional Manager, Tataaig General Insurance Company Limited, Bangalore*** (2006 3 ACJ 1488) and the Patna High Court in ***Bhajanka Cold Storage Vs. Oriental Fire and General Insurance Company Limited*** (1998 1 PLJR 51).

12. The Chief Justice of this Court, in the case of ***Jumbo Bags Vs New India Assurance Company Limited*** (2016 3 CTC 761) considers an identical clause and, in conclusion, rejects the prayer for appointment of an arbitrator. In the course of the discussion, the amendment to the Arbitration Act in 2015 was considered. The impact of sub-section (6A) of section 11 which restricts the scope of judicial intervention in deciding a petition under Section 11 was also noted and discussed.

13. Since, in *Jumbo Bags* (supra), the invocation of the arbitration agreement and reply of the respondent were on 7.7.2015 and 15.7.2015

respectively, both dates being prior to the amendment to the Act introduced in October 2015, the Chief Justice considered the question of whether the law prior to amendment in 2015 or post amendment would apply, holding after as follows:

'13.....

While considering an application under Section 11 of the Act, the Chief Justice or his designate would not embark upon an examination of the issue of arbitrability or appropriateness of adjudication by a private forum, once he finds that there was an arbitration agreement between or among the parties, and would leave the issue of arbitrability for the decision of the Arbitral Tribunal. If the Arbitrator wrongly holds that the dispute is arbitrable, the aggrieved party will have to challenge the award by filing an application under Section 34 of the Act, relying upon sub-section (2)(b)(i) of that section.

The submission thus was that the issue of arbitrability should be left to the decision of the arbitral tribunal and the observations made are stated to be in consonance with the principles laid down in SBP and Co. v. Patel Engineering Ltd. And another reported in (2005-8 SCC 618).

14. Another area of concern, over which submissions made by the learned counsel for the parties, was in the context of the amendments made with effect from 23.10.2015 to the Arbitration and Conciliation Act, incorporating Section 11(6-A) and Sections 26 and 21, which read as under:

“11(6-A): The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.

26.....

21. Commencement of arbitral proceedings:- Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

The aforesaid has become relevant as [Section 11\(6-A\)](#), notwithstanding any judgment, decree or order, sought to confine the role of the Court to only examination of the existence of an arbitration agreement. However, this was not to be applied to arbitral proceedings which had already commenced under the pre-existing [Section 21](#) of the Act. The said provision stipulated that the commencement of such arbitral proceedings would be from the date on which the request for that dispute to be referred to arbitration was received by the respondent. In the facts of the present case, the request for appointment was made by the petitioner on 07.07.2015 and it was replied to by the respondent on 15.07.2015, with this Court admitting the petition and issuing notice on 18.08.2015. It was thus submitted that the provisions of [Section 11\(6-A\) of the Act](#) could not be invoked in the present case. This was so, as in my view, the learned counsel for the respondent was conscious of the damage to the line of arguments he had advanced which would be done by this provision.'

The conclusion of the Chief Justice is at paragraph 24 as below and should be read and understood in the light of his earlier observations at paragraphs 13 and 14 extracted above indicating clearly the restraint imposed on judicial intervention by the insertion of sub-section (6A).

'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.'

14. In the present case, the invocation of the arbitration clause is on 29.5.2017 and the rejection of the same by the respondent, on 14.6.2017, both post amendment. There is no dispute in regard to the dates. Thus, in deciding this petition I am enjoined to apply the provisions of 11(6A) which cast a limited mandate upon me solely to ensure the existence of an arbitration clause, leaving all other disputes including the applicability thereof, to the decision of the arbitral tribunal. The mandate imposed is to be exercised *'notwithstanding the decision, decree or order of any Court'* making it apparent that legislature intended that even those issues that have hitherto been settled might call for re-appreciation in the context of Alternate Dispute Resolution mechanisms, by the Tribunal under section 16 of the Act.

15. The Supreme Court, in the case of ***Duro Felguera, SA Vs. M/s. Gangavaram Port Limited*** in Arbitration Petition No.31 of 2016 dated 10.10.2017 considered the impact of insertion of sub-section (6A) to section 11 concluding that the Court will, in considering a petition under section 11, consider the existence of the arbitration agreement alone - nothing more, nothing less.

16. Legislative Policy is also targeted towards minimizing judicial intervention of the Court at the stage of appointment of arbitrator. The 246th report of the Law Commission deals with the **Scope and Nature of Pre-Arbitral Judicial Intervention** at paragraph 28 onwards as follows;

Part I arbitrations and section 45 in the case of Part II arbitrations. sections 8, 45 and also section 11 relating to “reference to arbitration” and “appointment of the tribunal”, directly affect the constitution of the tribunal and functioning of the arbitral proceedings. Therefore, their operation has a direct and significant impact on the “conduct” of arbitrations.

.....

33. *It is in this context, the Commission has recommended amendments to sections 8 and 11 of the Arbitration and Conciliation Act, 1996. The scope of the judicial intervention is only restricted to situations where the Court/Judicial Authority finds that the arbitration agreement does not exist or is null and void. In so far as the nature of intervention is concerned, it is recommended that in the event the Court/Judicial Authority is prima facie satisfied against the argument challenging the arbitration agreement, it shall appoint the arbitrator and/or refer the parties to arbitration, as the case may be. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the arbitral tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not prima facie. The amendment also envisages that there shall be a conclusive determination as to whether the arbitration agreement is null and void. In the event that the judicial authority refers the dispute to arbitration and/or appoints an arbitrator, under sections 8 and 11 respectively, such a decision will be final and non-appealable.*

17. In the light of the discussion above, this petition is allowed as I am of the prima facie view that an arbitration agreement exists in the present case. The question is reserved for decision as a preliminary issue by the Arbitrator in terms of Section 16 of the Act, prior to proceeding with the arbitration on merits, if at all.

18. I thus appoint Mr. Justice P. Jyothimani, Former Judge, High Court of Judicature, Madras to act as an Arbitrator in the matter. He is requested to enter

upon reference, issue notice to the parties and adjudicate upon the disputes inter se. The learned Arbitrator may endeavour to dispose the matter expeditiously and in any event within a period of six months from the date of first sitting. He is at liberty to fix his remuneration as well as schedule of expenses and both parties shall bear the same equally.

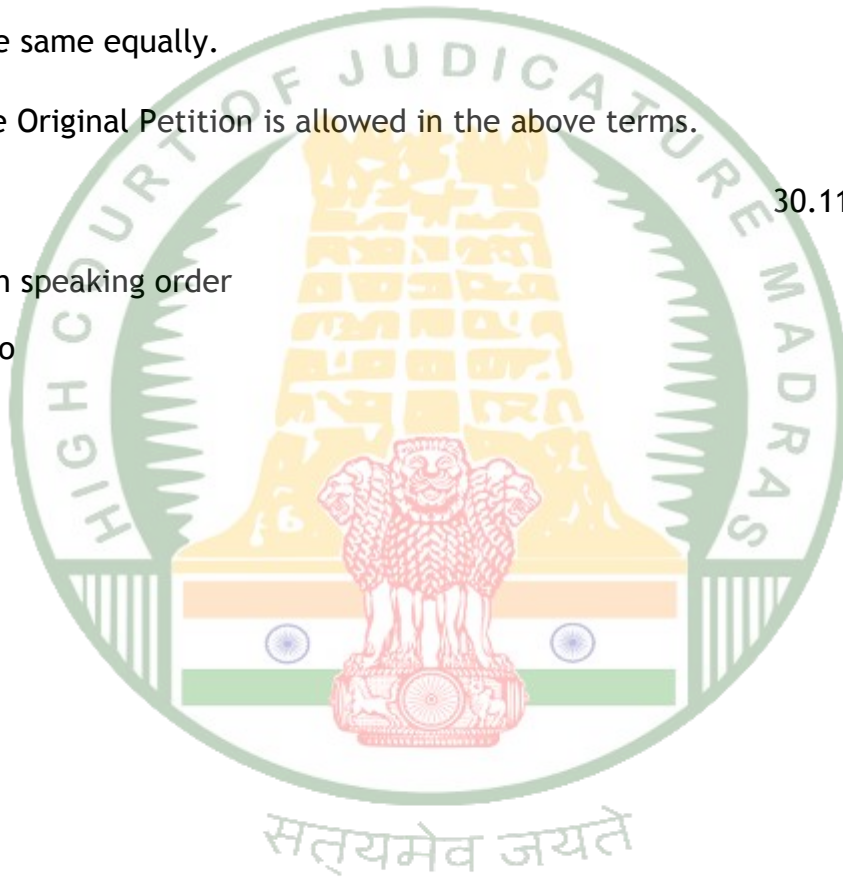
19. The Original Petition is allowed in the above terms.

30.11.2017

Speaking/Non speaking order

Index: Yes/No

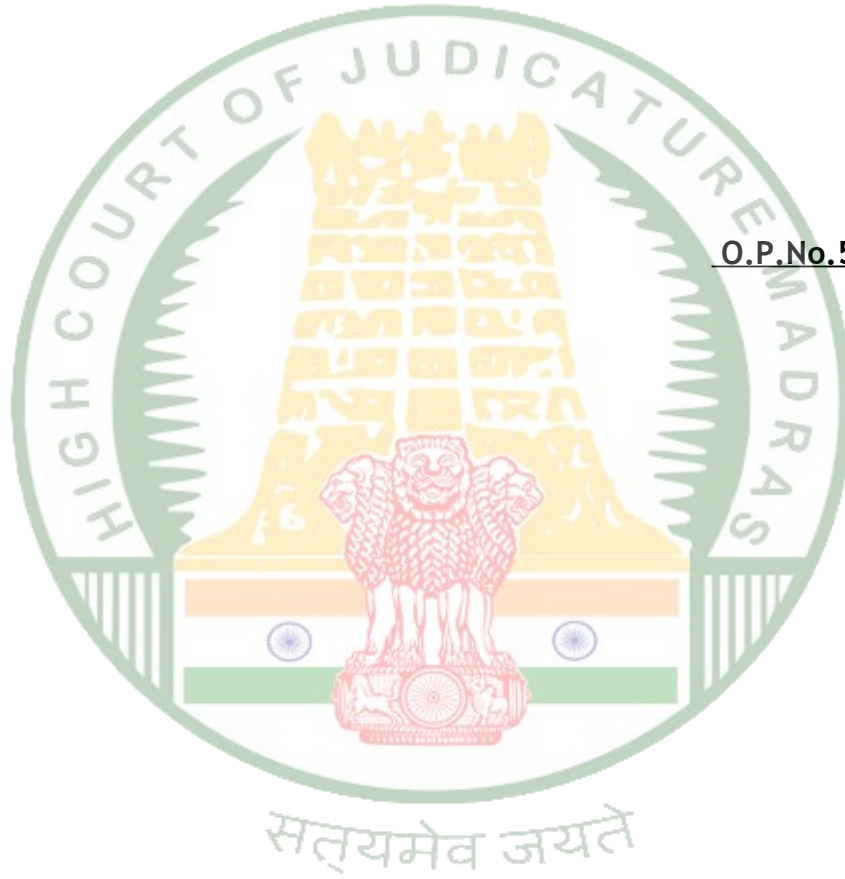
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