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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.592 OF 2013

New India Assurance Co. Ltd.Petitioner

vs

M/s. Ampoules & Vials Manufacturing Co. Ltd. ...Respondent

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Ms. Swapnila Rane, a/w. Ms. Vanita Kakar, i/b. Kachwala & Partners, for the Petitioner.

Mr. Prakash Shinde, a/w. Ms. Swati Deshpande, i/b. MDP & Partners, for the Respondent.

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CORAM : S.C. GUPTE, J.

DATED: 30 NOVEMBER, 2018

P.C.:

. Heard learned Counsel for the parties. This arbitration petition challenges an award passed by a sole arbitrator in a reference arising out of a fire insurance policy. The award is challenged *inter alia* on the ground that the composition of the arbitral tribunal was not in accordance with the agreement of the parties.

2. The claim of the Respondent, who was the claimant before the sole arbitrator, arose under a fire insurance policy issued by the Petitioner, the Respondent before the arbitrator. The insurance contract had an arbitration clause. During the subsistence of the policy, fire took place at the Respondent's factory at Tarapur MIDC. On the date of the

fire, the possession of the factory premises was with Canara Bank, in whose name the policy was issued by the Petitioner. Canara Bank sent a claim form in respect of the loss ensued by the fire, requesting for survey and other formalities. The loss tentatively stated in the bank's letter was of Rs.1.50 crores. When a duly completed insurance form was filed by Canara Bank, the estimate of loss given by it was of Rs.2 crores towards the loss of movables, whilst the loss in respect of immovable property was stated to be of Rs.40 lakhs. The competent authority of the Petitioner approved the claim of about Rs.1.59 crores. It was the case of the Respondent that the loss ensued was in the sum of Rs.3.55 crores and since only about Rs.1.59 crores was paid towards the loss, the arbitration agreement under the policy was invoked by the Respondent. The Petitioner repudiated any liability under the insurance policy claiming inter alia that a discharge voucher was signed by both Canara Bank and the Respondent, acknowledging full and final satisfaction of their claim under the policy and there was, in the premises, no liability on the part of the Petitioner to compensate the Respondent any further. That is how disputes arose between the parties.

3. The arbitration agreement between the parties forming part of the insurance policy is quoted below:-

“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 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 hereinabove 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.”

4. Whilst invoking this arbitration agreement, the Respondent first addressed a letter dated 14 July 2012. This letter was replied by the Petitioner on 30 July 2012 repudiating any liability on its part and claiming that there is no dispute or difference between the parties referable to arbitration. The Respondent, thereafter, addressed a letter dated 21 August 2012 to the Petitioner appointing one M.M. Dutt, Global Insurance Surveyor, as its arbitrator, and calling upon the Petitioner to either concur in his appointment as a sole arbitrator or to appoint their own arbitrator in accordance with the arbitration agreement. The Petitioner refused to accept Mr. Dutt as the sole arbitrator or appoint its own arbitrator. Mr. Dutt, in the premises, appears to have proceeded to act as a sole arbitrator and passed the impugned award, directing the Petitioner to pay a sum of about Rs.1.67 crores along with interest.

5. There are two insurmountable difficulties in the way of the Respondent as a decree holder. In the first place, Mr. Dutt could never

have proceeded with the arbitration reference as a sole arbitrator. The arbitration agreement between the parties, which is noted above, required the parties, in the event of any dispute or difference as to the quantum paid or payable under the policy, to appoint a sole arbitrator. If the parties could not agree to a single arbitrator within thirty days of any party invoking the arbitration agreement, the reference had to be made to a panel of three arbitrators, comprising of two arbitrators, one to be appointed by each of the parties to the dispute or difference, and the third arbitrator to be appointed by such two arbitrators. Obviously, there was no agreement between the parties as to any single arbitrator. In the premises, the Respondent proceeded to appoint its arbitrator. It was for the Petitioner to appoint its own arbitrator and then the two arbitrators to have appointed the third arbitrator. In case the Petitioner failed to appoint its own arbitrator, there would be a resultant failure of appointment in accordance with the appointment procedure agreed between the parties, in which case, under sub-section (6) of Section 11, it was for the Respondent to apply to this Court to take the necessary measures for securing the appointment. The Court would have then appointed a second arbitrator and he along with Mr. Dutt would have appointed a third arbitrator. This procedure, which is the only procedure open to the parties under the agreement, consistent with the provisions of Part I of the Arbitration and Conciliation Act, 1996, alone would have ensured composition of a proper arbitral tribunal. (There is nothing to suggest that the agreement between the parties, insofar as the composition of the arbitral tribunal is concerned, was in conflict of the provisions of Part I of the Arbitration and Conciliation Act, 1996, from which the parties could not derogate.) The composition of the arbitral

tribunal in the present case, where Mr. Dutt, the appointee of the Respondent, proceeded to act as a sole arbitrator, was, in the premises, not in accordance with law.

6. The second difficulty is on account of a dispute having been raised by the Petitioner as to the liability itself. The arbitration agreement between the parties clearly provides for arbitration only in respect of a dispute or difference as to the quantum of the claim to be paid under the insurance policy; the liability itself must be an admitted matter so far as the Petitioner is concerned. The arbitration agreement, not only makes it clear in its very opening clause, but expressly underlines this position by providing a separate paragraph, which states as follows:

“It is clearly agreed and understood that no difference of dispute shall be referable to arbitration as hereinabove provided, if the Company has disputed or not accepted liability under or in respect of this policy.”

In the present case, the liability was admittedly disputed by the Petitioner *inter alia* on the ground that there was accord and satisfaction and complete discharge of the liability upon signing of a discharge voucher by Canara Bank and the Respondent. That was the basis, on which the arbitration itself was contested by the Petitioner. The arbitrator, thus, had no jurisdiction to adjudicate the dispute, which involved repudiation of liability altogether on the part of the Petitioner insurer.

7. Learned Counsel for the Respondent submits that the Petitioner in fact participated in the arbitration reference. Participation

in an arbitration reference does not, in every case, signify submission to the jurisdiction of the arbitrator. A party may participate in the reference only to contest the arbitrator's jurisdiction and that is precisely what has happened in the present case.

8. In the premises, as noted above, on account of (i) the composition of the arbitral tribunal not being in accordance with the agreement and (ii) the decision being not contemplated by or falling within the submission, the impugned award is liable to be set aside.

9. Accordingly, the arbitration petition is allowed by setting aside the impugned award dated 25 April 2013. There shall, in the circumstances of the case, be no order as to costs.

(S.C. GUPTE, J.)