

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 23.01.2018

CORAM

THE HONOURABLE DR.JUSTICE ANITA SUMANTH

O.P. No.653 of 2017

M/s.Subhashri Bio Energies (P) Ltd.,
represented by its Managing Director,
Mr.S.Durairaju,
S/o.Maivazhi Subbaraya Ananthar
No.67, Goundampalayam,
Kumaramangalam Post,
Tiruchengode Taluk,
Namakkal District 637 205,
Tamilnadu

.. Petitioner

-VS-

1. Indian Overseas Bank,
represented by its Assistant General
Manager,
Fairlands, Salem Branch,
5th Cross, Brindavan Road,
Fairlands, Salem 636 016.
2. Universal Sompo General Insurance Co.
Ltd.,
represented by its Branch Head,
Tristar, 3rd Floor,
No.655-662, Avinashi Road,
Coimbatore 641 037.
3. Universal Sompo General Insurance Co.
Ltd.,
represented by its Zonal Claims Manager,
Zonal Office,
Flat No.103, Vajram Towers,
1st Floor, Door No.44, Halls Road,
Egmore, Chennai 600 008.
4. Universal Sompo General Insurance Co.Ltd.,
represented by its Chairman and Managing Director,
Registered and Corporate Office,

Unit 401, 4th Floor, Sangam Complex,
127, Andheri Kurla Road, Andheri (East),
Mumbai 400 059,
Maharashtra.

.. Respondents

Prayer: Petition filed under Section 11(6) of Arbitration & Conciliation Act, 1996 as amended by the Arbitration and Conciliation (Amendment) Act, 2015 praying to appoint an Arbitrator to resolve the dispute between the parties by invoking Clause 13 of (B) General Conditions of Standard Fire and Special perils Policy dated 24.07.2016 for the year 2016-2017 by the respondents.

For Petitioner : Mr.R. Dhanaram

For Respondent : Mr.F.B.Benjamin George
for R1
Ms.R.Vijaya Kamala
for R2 to R4

ORDER

This petition seeks appointment of an Arbitrator to resolve disputes between the parties by invoking Clause 13 of General Conditions of Standard Fire and Special Perils Policy dated 24.07.2016.

2. Heard Mr.R.Dhanaram, learned counsel appearing for the petitioner, Mr.F.B.Benjamin George, learned counsel appearing for the first respondent and Ms.R.Vijaya Kamala, learned counsel appearing for respondents 2 to 4.

3. Learned counsel appearing for the applicant as well as R2 to R4 do not question the existence of an arbitration clause. However, Ms.R.Vijaya Kamala would point out that the clause for arbitration would apply only in the event that the liability was admitted and only the quantum was disputed.

4. In almost identical circumstances, I have, in O.P.No.537 of 2017, vide order dated 30.11.2017, passed after taken into consideration the judgments of the Supreme Court in i) *The Vulcan Insurance Co. Ltd. Vs. Maharaj Singh and another*, (1976 (1) SCC 943), ii) *Jumbo Bags Vs New India Assurance Company Limited* (2016 3 CTC 761) and iii) *Duro Felguera, SA Vs. M/s.Gangavaram Port Limited* in Arbitration Petition No.31 of 2016 dated 10.10.2017, appointed a learned Arbitrator stating as under:

'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 reappreciation 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;

'28. The Act recognizes situations where the intervention of the Court is envisaged at the pre-arbitral stage, i.e. prior to the constitution of the arbitral tribunal, which includes sections 8, 9, 11 in the case of 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.'

5. As far as the present case is concerned, invocation of arbitration clause is on 27.03.2017 and the rejection of the same by the respondent on 10.04.2017, both dates being post the amendment the Arbitration Act with effect from 23.10.2015. The conclusion arrived at by me in the aforesaid matter is equally applicable here.

6. Mr. Abhijat Bal, Advocate, Delhi High Court, having office at A-443, II Floor, Defence Colony, New Delhi, (Mob: 9811800833) is appointed as the nominee of respondents 2 to 4.

7. Mr. Justice Akbar Ali, Former Judge of this Court is appointed as the nominee of the applicant at its suggestion. A third umpire is to be appointed by both learned Arbitrators in accordance with the arbitration clause and such appointment shall be made by the learned

Dr.ANITA SUMANTH,J.

Arbitrators within four (4) weeks of receipt of the order. The Tribunal so constituted shall enter upon reference and adjudicate the disputes inter se the parties. They may, after issuing notice to the parties and upon hearing them, pass an award as expeditiously as possible, preferably within a period of six months from the date of receipt of the order. The learned Arbitrators are at liberty to fix their remuneration and other incidental expenses.

8. As far as R1 is concerned, admittedly, he is not a party to the agreement and the impleadment or otherwise of R1 to the proceedings to arbitration is reserved to be decided by the Tribunal upon a request being made in this regard, in accordance with law.

9. The Original Petition is ordered in the above terms.

23.01.2018

msr/sl

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OP.No.653 of 2017