IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

TUESDAY, THE 23rd DAY OF OCTOBER 2018

THE HON'BLE MR. JUSTICE C.SARAVANAN

O.P. No.344 of 2018

In the matter of Arbitration and Conciliation Act, 1996
and
In the matter of Arbitration dispute arising under and in connection with the Standard Fire and Special Perils Policy bearing Policy No.710904/11/15-/02/00000001 in favour of Commissioner of Customs A/c M/s.Kailash Shipping Services Private Limited

Kailash Shipping Services Private Limited,
rep. by its Authorised Signatory,
Mr.G.Suryanarayanan,
having its Registered Office at
#16, Ground Floor, Cenatoph Road,
Teynampet, Chennai-600 018. ... Petitioner

-Versus-

1. M/s.The New India Assurance Co. Ltd.,
rep. by the Branch Manager,
City Branch, Poonamalle High Road,
Periamet, Chennai-600 084.

2. The Commissioner of Customs (Bonds),
Customs House, Rajaji Salai,
Chennai-600 001. ... Respondents

Original petition praying that this Hon'ble Court be pleased to:-

a) appoint an independent sole arbitrator to adjudicate the disputes arising between the petitioner and the respondent in connection with or relating to the Standard Fire & Peril

Insurance Policy dated 17.04.2015.

b) directing the respondents to pay the cost of this petition.

This Original Petition coming on this day before this court for hearing, the court made the following order:-

Certain dispute have arisen between the parties in respect of certain claims made by the petitioner with the 1st respondent insurance company.

2. It is a case of the 1st respondent that the present case is not arbitrable and therefore the petition filed for appointment of arbitrator in terms of Section 11(6) of the Arbitration and Conciliation Act, 1996 is liable to be dismissed.

3.The relevant clause 13 relating to Arbitration it reads as under:-

> "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 by the parties to or if they cannot agree upon a single arbitrator within 30 days of any party invoking arbitration, they 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

arbitrators, one to be appointed by such two arbitrators and arbitration shall be conducted under and in accordance with the provision other 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 condition precedent to any right of action or suit upon this policy that the award by such arbitrator/arbitrators of the amount of the loss or damage shall be first obtained".

V. **RIOT, STRIKE AND MALICIOUS DAMAGE:**

Loss of or visible physical damage or destruction by external violent means directly caused to the property insured but excluding those caused by

a) Total or partial cessation of work or theretardation or interruption or cessation of any process or operations or omissions of any kind

b) permanent or temporary dispossession resulting from confiscation, commandeering, requisition or destruction by order of the Government or any lawfully constituted Authority.

c) Permanent or temporary dispossession of any building or plant or until or machinery resulting from the unlawful occupation by any person of such building or plant or unit or machinery or prevention of access to the same.

d) Burglary, housebreaking, theft, larceny or any such attempt or any omission of any kind of any person (whether or not such act is committed in the course of a disturbance of public peace) in any malicious act.

TERRORISM DAMAGE EXCLUSION WARRANTY:

This policy excludes loss, damage, cost or expense of whatsoever nature directly or indirectly caused by, resulting from or in connection with any act of terrorism regardless of any other sequence to the loss.

For the purpose of this exclusion, an act of terrorism means an act or series of acts, including but not limited to the use of force or violence and /or threat thereof, of any person or group(s) of persons, whether acting alone or on behalf of or in connection with any organization (s) or government (s) or unlawful associations, recognised under unlawful (prevention) Amendment Act, 2008 or any other related and applicable national or state legislation formulated to combat unlawful and terrorist activities in the nation for the time being in force, committed for political, religious, ideological or similar purposes including the intention to influence any Government and/or to put the public or any section of the public in fear for such purposes.

This exclusion also includes loss, damage, cost or expense of whatsoever nature directly or indirectly caused by, resulting from or in connection with any action taken in controlling, preventing, suppressing or in any way relating to the above.

4. The respondent has resisted the petition on the ground that the dispute cannot be referred for arbitration in view of specific language in clause 13 wherein 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. The facts of the case leading to the invocation of the arbitration clause are discussed hereinafter.

5. The petitioner was issued with a license to operate a Public Bonded Warehouse under provisions of the Customs Act, 1962 by the Deputy Commissioner of Customs (Bonds-Sea). In the said Public Bonded Warehouse, the petitioner is required to receive and store imported goods Under Section 49/ 60 of the Customs Act, 1962 duty free.

6. After the imported goods are moved into Public Bonded Warehouse, importers can file Ex-Bond Bill of Entry for home consumption and clear the imported goods for home consumption

on payment of necessary customs duty and charges.

7. In the event of any loss or destruction to the imported goods warehoused in the petitioner's bonded warehouse, the petitioner has to indemnify the Government of India represented by the Deputy Commissioner of Customs (Sea-Imports) insofar as the duty payable thereon.

8. The petitioner was therefore, required to obtain an insurance policy making the Deputy Commissioner of Customs (Sea-Imports) as the beneficiary to protect the interest of the revenue of government of India against any loss on the customs duty or other charges payable to the Customs Department.

9. Under these circumstances, the petitioner had obtained a Standard Fire and Special Perils Policy bearing policy No. 710904/11/15/02/00000001 from the 1st respondent.

10. On account of incessant rain and consequent floods during November 2015 to December 2015 which ravaged the city, the petitioner's aforesaid Public Bonded Warehouse was flooded with water and damaged the goods stored therein even though

petitioner claims to have taken steps to stop the ingress of flood water into the warehouse.

11. After the water receded, inspection was carried and attempt was made to salvage the goods. However, only some of the goods could be salvaged and bulk of the goods stored were either partially or fully damaged with no salvage value at all. Under these circumstances, the petitioner filed insurance claim before the first respondent.

12. The surveyor appointed by the first respondent inspected the Public Bonded Warehouse of the petitioner on 8.12.2016 and instructed the petitioner to clear certain goods which were partially damaged to minimise the loss.

13. Therefore, some of the goods were cleared on payment of Customs duty. The first respondent by the letter dated 7.3.2016 agreed to pay a sum of Rs.1,50,00,000/- (Rupees One Crore Fifty Lakh Only) as interim compensation and agreed to pay the balance after completion of complete survey and preparation of survey report. Under these circumstances, the petitioner requested the second respondent to give a no objection to receive the above claim amount.

14. On 1.11.2016, the petitioner was called by the first respondent and handed over a pre-printed payment voucher along with a covering letter and the statement of calculation for an amount of Rs.54,20,879/- (Rupees Fifty Four Lakh Twenty Thousand and Eight Hundred and Seventy Nine). It was stated that on the petitioner signing the aforesaid letter, the amount would be released in full and final settlement of all claims.

15. On receipt of the amounts, petitioner claims to have reimbursed the amounts to the respective importers whose goods were warehoused with it by way of debit notes/cheques etc.

16. By letter dated 21.11.2016, the petitioner requested the first respondent to reopen the claim to settle the balance amount which were not paid towards the customs duty paid by the importers.

17. The petitioner also submitted relevant documents to substantiate this claim on certain goods which were not considered for payment by the first respondent.

18. The first respondent reopened the claims and issued settlement voucher dated 17.7.2017 for a sum of Rs.52,69,914/- (Fifty-Two Lakhs Sixty Nine Thousand Nine Hundred Fourteen only) and made further transfer through online.

19. Thereafter, the petitioner received another sum of Rs.13, 21,085/- along with a covering letter and pre-printed voucher for the amount for payment made directly to on of the importer.

20. Though the 1st respondent has paid different amounts between March 2016 to December 2017 totalling a sum of Rs.2,70,22,174/- no explanation was given for not settling Rs.80,87,580/- which is the balance amount to be paid.

21. Meanwhile, the second respondent sought for clarification regarding customs duty payable in respect of seven consignments for which the importer had not paid the customs duty.

22. By letter dated 05.04.2017, the 2nd respondent stated that benefit of Section 23(2) of the Customs Act for remission of duty was not available to warehoused goods to one of the

importer.

23. Though, petitioner claims to have approached the first respondent to settle the customs duty, the first respondent refused to acknowledge the same.

24. The petitioner therefore sent a legal notice. The 1st respondent for the first time came out arising with an allegation that the dispute is not referable to an arbitrator as the petitioner has violated clause 12 of the insurance policy.

25. According to the 1st respondent, the petitioner ought to have taken necessary steps for remission of duty. It was further submitted that the petitioner has not taken proper steps for consignment and has thus violated General Conditions No.12 of the policy.

26. By letter dated 26.1.2018, the first respondent finally responded and stated that no arbitration clause exist to resolve the dispute raised by the petitioner regarding the customs duty component.

27. The petitioner submitted that reimbursement of the duty component is not barred under the arbitration clause.

28. The 1st respondent has accepted the liability and settled the claim in respect of item Nos.1 to 18, 26, 27 and 30. Item Nos.19 to 25 on which, no duty was paid, the 1st respondentwas not settled by the 1st respondent. With respect to 21 consignments of Exide industries, they had paid the customs duty for removal from the petitioner's bonded warehouse. However, even before the goods could be removed the rain flooded the public bonded warehouse and destroyed them in the warehouse.

29. Heard, Mr.Mr.P.R.Krishnaraj, learned counsel for the petitioner and Mr.A.S.Subramanian, learned counsel for the respondents.

30. The learned counsel for the first respondent relied on the following decisions:

i. **Oriental Insurance Company Limited Vs. Narabheram Power and Steel Private Limited** (2018) 6 SCC 534

ii. **Kohinoor Steel Pvt. Ltd., Vs. Bajaj Allianz Insurance Company** 2011 SCC Online Cal 3253

31. The respondent has contested the maintainability of the petition on the ground that the petitioner has violated clause /condition No.12 of the policy and therefore the petitioner was not entitled to raise a dispute. Learned counsel for the Respondent in the light of the decision of the Honourable Supreme Court in **Oriental Insurance Company Limited Vs. Narabheram Power and Steel Private Limited** (2018) 6 SCC 534, wherein dealing with a similar clause as in Clause 13, The Court held as follows:

> "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 reasons 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 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 The Vulcan Insurance Co. Ltd (supra). Therefore, the only remedy which the respondent can take recourse to is to institute a civil suit for mitigation of the grievances. If a civil suit is* *filed within two months hence, the benefit of Section 14of the Limitation Act, 1963 will ensure to its benefit."*

32. A similar clause was there in **Kohinoor Steel Private Limited** case as well. The Calcutta High Court also refused the prayer for appointment of an arbitrator under Section 11 (6) of the Arbitration and Conciliation Act, 1996.

33. Both these cases deal with a situation prior to the amendment to the Arbitration and Conciliation Act, 1996. Arbitration and Conciliation (Amendment) Act, 2015 with effect from 23 October, 2015 has made drastic changes in the scheme of the Arbitration and Conciliation Act, 1996.

34. Clause (6-A) to the Act, specifically now mandates that notwithstanding anything in any judgement, decree or order of any Court the court has to merely confine to the examination and existence of an arbitration agreement.

35.Though not cited, in **United Insurance Co Ltd. Versus Hyundai Engineering and Construction Co Ltd and others,** dated 21.8.2018 in Civil Appeal No. 8146 of 2018, the Hon'ble Supreme Court while dealing with Clause 7, which read identically, held as follows:-

> "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 aswell 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.*

36.Therefore, the Hon'ble Supreme Court held that the decision in **Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729** cannot be applied blindly. There the claim was repudiated by the insurance company as the loss occured due to faulty design and defective workmanship. However, here the claim was entertained and partly settled.

37. Though, the view taken in the three decisions of the Hon'ble Supreme Court appear to be in favour of the respondent, I am of the in view that they are distinguishable on facts as the claim was enteretain ans partly settled. Therefore, the ration in **Duro Felguera, S.A. v. Gangavaram Port Ltd.**, (2017) 9 SCC 729 is applicable to the facts of the present case.

38.The Honourable Supreme Court in **Duro Felguera, S.A. v. Gangavaram Port Ltd.**, (2017) 9 SCC 729 held that "*The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in* **SBP and Co. [SBP and Co. v. Patel Engg. Ltd.**, (2005) 8 SCC 618] and **Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.**, (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] .

39. It further held that "*This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration*

agreement exists nothing more, nothing less. The legislative policy and purpose is essentially to minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected."

40. I therefore allow the petition in the light of the above decision of the Hon'ble Supreme Court in **Duro Felguera, S.A. v. Gangavaram Port Ltd.**

41. Respondent has failed to exercise the power to appoint an arbitrator and has ceded its power in favour of the Court to appoint an arbitrator under Section 11(6) of the Act in the light of the decision of the Hon'ble Supreme Court in **North Eastern Railway v. Tripple Engg. Works,** (2014) 9 SCC 288 which followed several other earlier pronouncement **Deep Trading Co. v.Indian Oil Corpn.** [(2013) 4 SCC 35 : (2013) 2 SCC (Civ) 449]., **Punj Lloyd Ltd.[Punj Lloyd Ltd. v. Petronet MHB Ltd.,** (2006) 2 SCC 638] which in turn had followed a two-Judge Bench decision in **Datar Switchgears Ltd. v. Tata Finance Ltd.** [(2000) 8 SCC 151].

42.Clause 13 of the policy contemplates arbitration by a sole arbitrator the parties agree to and in the event of any failure each party's entitled to appoint an arbitrator each who in turn would appoint a presiding arbitrator.

43. In my view, ends of justice would be met if the cases referred for resolution of dispute before sole arbitrator to be appointed by an order of this court.

44. I therefore, appoint Honourable Mr. Justice K.Gnanaprakasam (Retired), High Court, Madras residing at Ah.196, 3rd Street, 8th Main Road, Shanthi Colony, Anna Nagar, Chennai-40, as a sole arbitrator to resolve the dispute between the parties.

45. Learned arbitrator may enter upon reference within a period of one month from the date of communication of this order and pass an award within a period of 12 months from the date of first hearing.

46. The learned arbitrator may conduct the proceedings under the aegis of Madras High Court Arbitration Centre and in accordance with the Madras High Court Arbitration Rules.

47. Accordingly, this petition is allowed. No costs.

Sd/-C.S.N.J

23.10.2018

//Certified to be a true copy//

Dated this the day of 2019

jj 31/01/2019 COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.