

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.02.2018

CORAM

THE HONOURABLE MR. **JUSTICE M.M.SUNDRESH**

O.P.No.552 of 2013

The Oriental Insurance Company Ltd.,
Represented by its Chief Regional Manager,
Corporate Business Regional Office,
Rosy Towers, IInd Floor, No.7,
Nungambakkam High Road,
Uthamar Gandhi Salai,
Chennai-600 034.

..Petitioner

Vs.

1.M/s Rarefield Shipping Pvt. Ltd.,
Represented by its Authorised Officer,
J.C. House, 6th Floor,
72, Rajaji Salai, Chennai-600 001.

2.Mr.A.W.J.Fernandez,
Consulting Average Adjuster &
Risk Management Consultant
M/s Creative Marine Insurance
Consultants Pvt. Ltd., Sole Adjudicator,
405, Vyapar Bhavan, 49, P D'Mello Road,
Carnac Bunder, Mumbai-400 009.

.. Respondents

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the Award dated 25.06.2012 passed by the second respondent in favour of the first respondent.

For Petitioner : Mr.N.Vijayaraghavan for
M/s M.B.Gopalan Associates

For respondents : Mr.T.V.Badri Narayanan for R1

ORDER

The petitioner is the Insurer and the first respondent is the Assured. The contract was for a Vessel. The first respondent made a claim, which was repudiated by the petitioner. Thereafter, the first respondent sent a communication stating that it would take appropriate action as per law. The petitioner appointed an expert whose Report was found against the first respondent. Then, the petitioner made a request to M/s Creative marine Insurance Consultants Private Limited, Mumbai, to give its opinion. A communication was sent by the aforesaid concern stating that instead of giving an opinion, it would act as an Adjudicator. It is needless to state that it was the petitioner, who sought for technical opinion as against the Surveyor's Report submitted earlier. The proposal given by the concern viz., M/s Creative marine Insurance Consultants Private Limited, Mumbai, was accepted by both the authorities along with terms and conditions mentioned therein to act as an Adjudicator. The specific terms speaks about the scope of adjudication, methodology, agreement between the parties for adjudication, requirements and stipulations. The following clauses would be relevant.

“3.5.The Adjudicator may, (but shall not be bound), to take any oral evidence or cross examine any Parties or other persons for purposes of arriving at an equitable

resolution of the dispute.

3.6.The Adjudicator may, (but shall not be bound) to make an Award on the basis of Rule A of the Rules of Practice, of the Association of Average Adjusters of the United Kingdom (by virtue of the Policy being subject to English law and Practice), and the Insurer agrees to accept such recommendation of the Adjudicator.

4.1.The Adjudicator shall not be entitled to award interest for any perceived or actual delay in claim settlement process or award any exemplary damages or similar compensation for whatever reason, other than what is strictly liable under the relevant Policy of Insurance.

4.2.The Adjudicator shall neither be entitled to make any interim award, or nor be entitled to make any recommendation for any other relief other than opine on the aspect of liability under the Contract and the quantum thereof.

5.1.It is presumed that it is the intention of both Parties to resolve the dispute through adjudication by jointly appointing the undersigned as Sole Adjudicator and in order to ensure that the award of the Adjudicator shall be binding on both Parties.”

“1. Both Parties agree to jointly appoint the Adjudicator to study all aspects of the Claim with a view to issue an Award on aspects of liability and the quantum thereof within the framework of the Policy of Insurance, and in accordance with the terms of this Agreement.

2.The procedure to be followed by the Adjudicator would be the “Inquisitorial system” in preference to the

“adversarial” system. The Adjudicator is empowered to follow any procedure based on the inquisitorial system, with a view to eventually arrive at an early and equitable solution to the potential dispute, to enable it to be brought to closure.

3.The Adjudicator shall examine technical, commercial, insurance and legal issues of the Claim and shall be entitled to seek clarifications and/or documents from either or both Parties, or consult with a domain Expert (as the Adjudicator's sole cost), in case he desires to do so.

4.Neither party shall bring forth any objection after the Adjudicator has been appointed by the Parties, that the Adjudicator had in the past, received remuneration for services rendered to either or both Parties, in any capacity whatsoever, including that he had knowledge of the dispute and/or held discussions on the Claim with either or both Parties, and/or that he is biased or is otherwise prejudiced in any manner, and/or that he is incompetent in any capacity whatsoever, to adjudicate the dispute.

5.The Adjudicator shall have the right to personally discuss any issue pertaining to the claim alone with either Party, or jointly with both the Parties, and such conduct shall not be constructed as misconduct on the part of the Adjudicator, as the Parties do hereby expressly state that they have no objection to such procedure as that they wish to resolve the dispute within the shortest possible time and minimum cost, without formal dispute resolution or litigation

procedures.

7.The Adjudicator may, (but shall not be bound), to take any oral evidence or cross examine any of the Parties or other persons, for purposes of arriving at an equitable resolution of the dispute. Both Parties shall co-operate in arranging for such persons on whom they have control to appear before the Adjudicator for which the respective concerned Party shall bear the costs and expenses of doing so, or in the alternative to obtain written explanations/clarifications, if so required by the Adjudicator.

10.The Adjudicator on his joint appointment by both parties shall call upon the Parties to produce such documents and evidence they have to substantiate their respective points of view which they shall produce within 7 days, failing which the Adjudicator may make reasonable assumptions (which shall not be questioned by either or both Parties), in order to publish his Award within the stipulated time.

14.As the Award of the Adjudicator would be legal and binding on both the Parties, either Party, has right to move the appropriate Court of jurisdiction in Chennai, to give judicial sanction for the findings of the Adjudicator as given in his Award, and serve the judgment on that Party.”

Thus, the adjudication process was specifically made to be “Inquisitorial system”. Thereafter, a detailed Award was passed on merit by the second respondent after getting external aids of technical aspects. Suffice it is to

state that the proceedings were conducted by treating it as “Inquisitorial system” as against his normal “adversarial” system. Accordingly, the award was passed in favour of the first respondent. This award is sought to be challenged by the petitioner on the primary ground that it was only an opinion sought for and therefore, it cannot be termed as an Award.

2. The learned counsel appearing for the petitioner would submit that even a perusal of the record would show that what is sought for is only an opinion. The opinion has been sought for from an expert behind the back of the petitioner. There was no examination of expert, who gave the opinion. Therefore, there is no award in the eye of law. In support of his contention, he made reliance on the following decisions.

1. BHARAT BHUSHAN BANSAL V. U.P. SMALL INDUSTRIES CORPORATION LTD., KANPUR ((1992) 2 Supreme Court Cases 166); and
2. JAYANTILAL HIRALAL PATEL V. DHANLAXMI KANTILAL PATEL AND OTHERS ((2012) SCC Online Bom. 1120).

3. The learned counsel appearing for the first respondent would submit that the second respondent has made it very clear that he did not agree with the Report relied upon by the petitioner. It was the petitioner, who sought for the opinion earlier. The second respondent was appointed

along with the terms and conditions imposed by his consultancy by an agreement between the parties. As the Award was made on merit and being inquisitorial no interference is required.

4. By way of reply, the learned counsel appearing for the petitioner would submit that even the perusal of the Award it appears that it was passed by the consultancy and not by the second respondent.

5. The documents especially with respect to the agreement for reference between the parties are not in dispute. The agreement clearly states that reference is for resolving the dispute in the polity to be dealt with by the sole Adjudicator in lieu of litigation. It is imperative to place hereunder the caption in the agreement is recorded.

“Agreement for reference of an dispute arising under a Marine Hull & Machinery Insurance Policy to a sole Adjudicator in lieu of litigation.”

6. The agreement also says that a claim is made. The fact that there was no clause for resolving the dispute in the original policy has been taken note of. As noted earlier, the procedure to be followed by the Adjudicator was specifically made as “Inquisitorial system”. The adjudicator was at liberty to examine technical, commercial, insurance and

legal issues of the claim. He was also given liberty to discuss any issue jointly or separately.

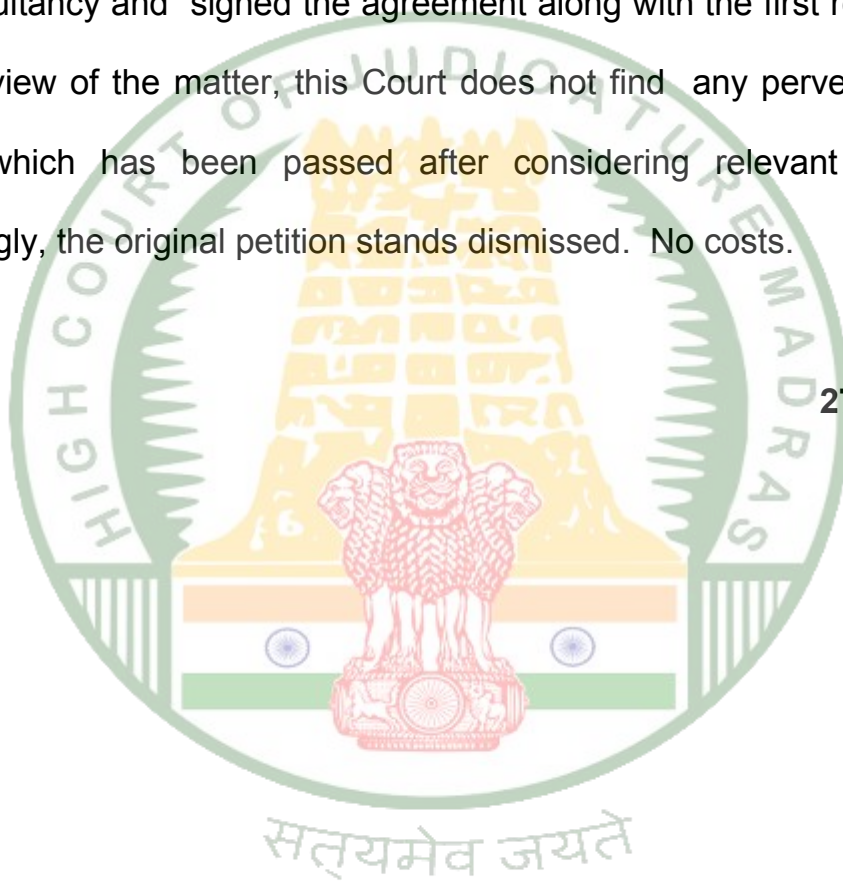
7. Thus, having accepted the same, it is not open to the petitioner to contend to the contrary. The petitioner did not ask for any other procedure to be followed. The agreement clearly mentions that the decision would be called as Award of the Adjudicator. Clause 14 of the agreement has to be read to execute the Award passed in favour of any one of the parties. Therefore, the contentions raised by the learned counsel appearing for the first respondent cannot be countenanced. The decision relied upon by the learned counsel for the petitioner are not applicable to the case. We are not concerned with the existence of the arbitral agreement, but on an interpretation of the document admittedly signed by the parties. As stated above, the clauses mentioned in the agreement are very specific. The agreement was meant to resolve the dispute once for all. Therefore having accepted the procedure and the nature of the adjudication, it is not open to the petitioner to contend to the contrary.

8. The other contention of the learned counsel appearing for the petitioner also liable to be rejected. The petitioner did not raise any objection at the relevant point of time as stated above merely because the

second respondent refers the Tribunal as “we”, it cannot have an impact on the adjudication made *per se*. After all we are not dealing with the case where male fides involved, though the agreement itself specifies that the parties are barred in raising such plea. It is the petitioner, who approached the consultancy and signed the agreement along with the first respondent. In such view of the matter, this Court does not find any perversity in the award, which has been passed after considering relevant materials. Accordingly, the original petition stands dismissed. No costs.

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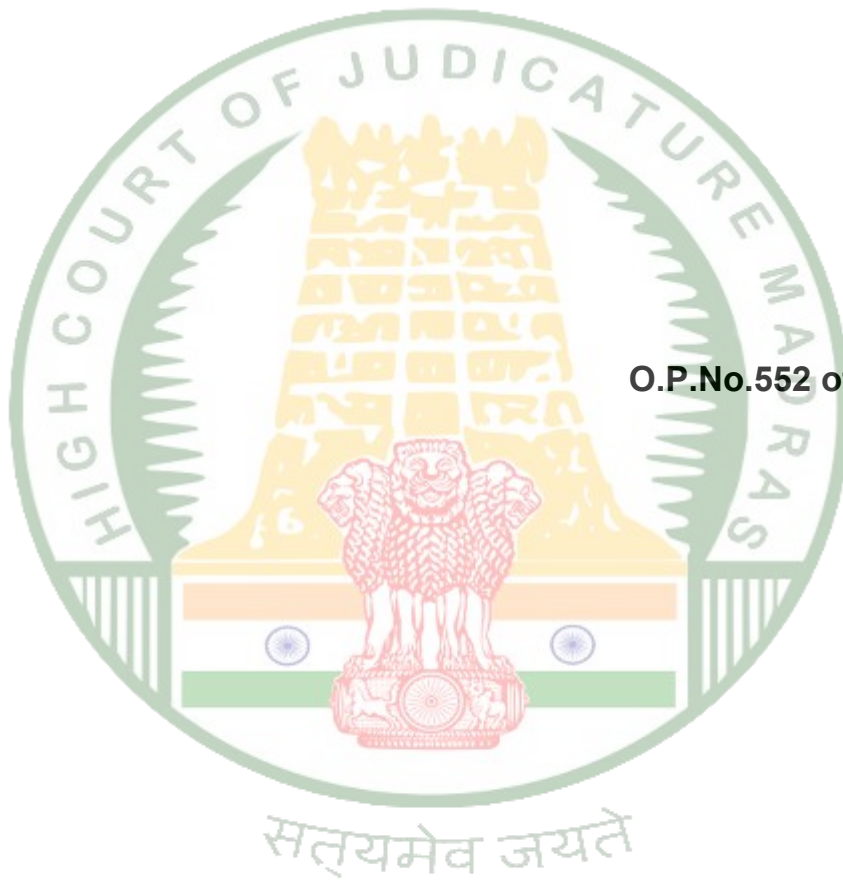
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M.M.SUNDRESH,J.

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