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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 05th January, 2018
Pronounced on: 17th January, 2018

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ARB.P. 347/2017

NAGARJUNA AGRICHEM LIMITED

..... Petitioner

Through : Mr.Saurav Agarwal, Mr.Trinath
Tadakamala, Mr.Debarshi Dutta,
Ms.Shifa Nagar and Mr.Sushal
Tiwari, Advs.

versus

THE ORIENTAL INSURANCE CO. LTD.

..... Respondent

Through : Mr.Amrit Singh and Mr.Arjun
Masters, Advs.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. The brief facts as alleged by the petitioner are:

a) On 31.03.2012 the petitioner took "Fire policy"-Standard Fire and Special Peril Policy. This policy contained an arbitration clause "12". It is also known as material damage policy as it insures the materials that get damaged in fire incident. On payment of additional premium, the petitioner also took coverage of Consequential Loses of Profit for the same period so as to insure the petitioner against loss of profit in business arising as a result of

damage to equipments. The consequential losses of profit policy is dependent upon, based upon, conditional upon and arises upon the Fire policy, because both the policies were issued on the same date and for same period having sequential numbers.

b) On 30th June, 2012 at about 9:30 a.m. an explosion took place followed by a devastating fire in Block No 5 of the Petitioner's Plant.

c) On 2nd July, 2012 the Petitioner informed the Respondent about the fire at its Plant and requested the Respondent to depute a Surveyor for assessing the loss. Subsequently, the Respondent appointed an Insurance Surveyor for the purpose of surveying and assessing the loss under the Policies. Thereafter, there were several rounds of correspondence and meetings from time to time between the Petitioner and the Surveyor in the assessment process of loss under the Policies.

d) On 20th August, 2015 the Petitioner had submitted a final claim bill for the loss covered under the Policies amounting to Rs. 10.68 crores. Besides personal requests the Petitioner wrote a letter to the Respondent seeking early settlement of the Claim.

e) On 29th March, 2016 the Surveyor submitted the Final Survey and Assessment Report to the Respondent. On 19th May, 2016 the Survey Report was provided to the Petitioner without Annexures.

f) On 6th December 2016 the respondent issued a purported Discharge Voucher wherein numbers of the Policies were mentioned and then sent to the Petitioner for signatures, however,

no amount had been added towards the loss of profit suffered by the Petitioner.

g) On 3rd January and 3rd March, 2017 the Petitioner was constrained to pursue the Respondent and sent emails to the Respondent seeking the annexures to the Final Survey Report.

h) On 19th April, 2017 the Petitioner sent a letter invoking the arbitration agreement to refer the disputes on quantum of claims to arbitration.

i) On 12th May, 2017 the Petitioner received a reply from the Respondent wherein the Respondent rejected the Petitioner's request for arbitration on the ground that there is no arbitrable dispute qua the quantum of the claim under the Policies.

2. It is submitted by learned counsel for the petitioner that the fire policy dated 1st April, 2012 bearing No.462890/11/2013/4 (the mother policy) covering the period from 1st April 2012 to 31st March 2013 contains an arbitration clause viz., clause 13 noted as below:

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 30days 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 provisions of the Arbitration and Conciliation Act, 1996.

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.

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 of the amount of the loss or damage shall be first obtained.

3. Admittedly after taking the main policy of Fire the petitioner had also taken the consequential loss of profit policy on the same day, numbered 462890/11/2013/5 dated 1st April, 2012 extending from 1.4.2012 to 31.3.2013. The Consequential Loss (Fire Tariff) Regulations issued by the Tariff Advisory Committee provided for the scope of the Consequential Loss (Fire Insurance) policy viz. *it would be applicable for all risk covered under Standard Fire and Special Perils Policy (Fire Policy) of AIFT.*

4. Admittedly the Consequential Loss of Profit Policy is issued only if an insured has already taken a Material Damage policy (i.e. a Standard Fire & Special Perils Policy) to cover physical loss to the business, plant, machinery, stocks, etc. Now if such material damage results in interruption of the insured's business causing loss of profit to the Insured, during the indemnity period, the

Insurance Company shall indemnify loss of such profit. In essence, a loss of profit policy acts as an additional cover that does not stand on its own footing but rather stands on top of a Material Damage Policy (i.e. the Standard Fire & Special Perils Policy). This purpose and intent is evident from the insuring clause in the Loss Of Profit Policy, Annexure A, Section III Draft Policy Form, Schedule & Conditions the wording of which is in consonance with the Consequential Loss (Fire) Tariff issued by the Tariff Advisory Committee, and it runs as under:

"In consideration of the insured named in the Schedule hereto having paid to [the Insurer)....(hereinafter called the Company), the premium mentioned in the Schedule, the Company agrees (subject to the Special Conditions and Exclusions contained herein or endorsed or otherwise expressed hereon and also to the Conditions and Exclusions contained in the Fire Policy covering the interest of the insured in the property at the premises) ...". [Emphasis supplied]

Hence the conditions and exclusions contained in Fire Policy are all applicable to Consequential Loss of Profit Policy, including arbitration clause.

5. In *Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc.* (2013) 1 SCC 641.

"78. In India, the law has been construed more liberally, towards accepting incorporation by reference. In the case of Owners and Parties Interested in the Vessel M.V. "Baltic Confidence" & Anr. v. State Trading Corporation of India Ltd.

& Anr. [(2001) 7 SCC 473], the Court was considering the question as to whether the arbitration clause in a Charter Party Agreement was incorporated by reference in the Bill of Landing and what the intention of the parties to the Bill of Landing was. The primary document was the Bill of Landing, which, if read in the manner provided in the incorporation clause thereof, would include the arbitration clause of the Charter Party Agreement.

6. In *General Assurance Society Ltd. V. Chandumull Jain & Anr.* (1996) 3 SCR 500 it was held:

12. ... *Even if no terms are specified, the terms contained in a policy customarily issued in such cases, would apply.: There is ample authority for the proposition. In Corpus Juris Secundum (Vol. 44, p. 953) the following occurs:*

"Where the contract to insure or issue a policy of fire insurance does not specify the terms and conditions of the policy, it is a general rule that the parties will be presumed to have contemplated a form of policy containing such conditions and limitations as are usual in such cases.....

... It will be presumed that they contemplated such form of policy, containing such conditions and limitations as are usual in such cases, or have been used before between the parties. ...

7. Hence per regulations above, the terms of the Fire (Material Damage) policy shall be applicable *mutatis mutandis* to the Consequential Loss Policy and hence the arbitration clause viz. Clause 13 in Material Loss Policy shall also be fully applicable to

the Loss of Profit Policy. The legal notice dated 19th April, 2007 thus rightly invokes the arbitration clause qua the loss of its profit thereby requesting the insurance company/respondent to appoint an arbitrator.

8. The respondent in its reply dated 8.5.2017 though did not deny the arbitration clause or its liability under the policy but denied the quantum & hence argued the arbitration clause is not applicable and there is no need to refer the dispute to the arbitrator.

9. A bare perusal of the response dated 8th May, 2017 of the respondent to the legal notice dated 19th April, 2017 would reveal the respondent did not deny applicability of the arbitration clause but alleged since nothing is payable under loss of profit, per report of surveyor, so arbitration clause would be inapplicable. The respondent relied upon *Essar Steel India Ltd. V. New India Assurance Co. Ltd.* 2016 SCC Online Bom 9472 wherein in similar arbitration clause, the Court held as under :

7. In my view, a reading of clause 8.12 establishes that the words used therein are plain and unambiguous. Clause 8.12 repeatedly asserts that there would be no arbitration where liability had been disputed. Arbitration was restricted to only those situations where liability had been accepted. Clause 8.12 therefore emphatically negated any arbitration where liability had been disputed. This intention had been repeatedly worked into the words of the clause.

8. Therefore, Clause 8.12 of the Policy expressly excludes any arbitration where liability is denied.

In view thereof, the moment liability is disputed or denied, arbitration stands excluded. Whether denial of liability is the only defence or whether it is coupled with others (e.g. quantum) matters little. Once liability had been disputed, arbitration is out of the picture. Disputing liability is anathema to arbitration. The two were mutually exclusive.

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20. ... Once liability is denied, challenging the quantum is immaterial since, on principle, the insurance company has refused to pay a penny. This being so, a without prejudice statement made that the quantification of loss had also not been supported cannot be stretched to suggest that the dispute is one relating to quantum. ...

10. The respondent thus argued, for reasons above, since the company had disputed the liability, the matter cannot be referred to the arbitration.

11. A perusal of record would reveal the respondent is falsely alleging that it had disputed the liability. Admittedly the petitioner has raised a claim for loss of profit under the Consequential Loss Policy but the surveyor has rejected it after investigation and had given a report. I would like to refer to contents of the Surveyor's report dated 29th March, 2016 & it notes:

“6.0 Insured's claim :

Insured initially submitted their provisional BI claim at Rs.16.65 crore, on estimation basis. However, subsequently, after our detailed discussions had with them they submitted their revised claim at Rs.10.68 crore, net of policy excess, as under :

*Shortfall in output qty of various finished
goods, during the indemnity period 721.36 MT*

<i>Gross profit (sale price less variable cost)</i>	<i>Rs.10,78,32,611.00</i>
<i>Less policy excess i.e. 7 days gross profit</i>	<i><u>Rs.82,04,655.00</u></i>
<i>Net loss of gross profit</i>	<i>Rs.9,96,27,956.00</i>
<i>Add : Loss for increased cost of working</i>	<i>Rs.71,76,500.00</i>
<i>Total</i>	<i>Rs.10,68,04,456.00</i>

Or say

Rs.10.68 crore

7.6.3 Output :

...xxx

From above it is observed that the output achieved during the actual indemnity period was more than the corresponding indemnity period in previous year, as such, no shortfall/loss was suffered by Insured on this account.

7.6.4 : Increased cost of working

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In view of the above, it may be seen that even if there is some merit in insured's above claim for Increased Cost of Working, the same would not be payable, being within excess clause.

8.0 ADEQUACY OF SUM INSURED:-

We ascertained the Insured's annual turnover wef 1.7.2011 to 30.06.2012, net of excise duty, taxes, commission & freight etc, as per details compiled in enclosed Annexure-'A-3' and based upon the same the adequacy of insurance have been worked out by us, as under:-

Turnover (net of duty, discounts and brokerage etc) during the period of 12 months i.e. 01.07.11to 30.06.12, ref Annexure- A-3

Rs. 640,79,01,135.00

Gross Profit @ 23.359%

Rs.149,68,21,626.12

Sum insured available

Rs. 180,00,00,000.00

Coverage therefore

Adequate

10.0 GENERAL:-

Material damage proviso:

In view of circumstances of loss and nature & extent damage caused due to reported incident of explosion/ fire, we have apprised Underwriters that the said loss was accidental in nature and falls within purview of the material damage policy. As the liability under material damage policy is admissible, the consequential loss arising out of the aforesaid incident is also maintainable under business interruption policy, held by Insured.

10.2 Our above observations/views were periodically apprised to Insured including the basis of assessment of above loss, leading to Nil liability of Underwriters.

10.3 The Insured's audited balance sheet for financial years 2011-12, is enclosed.

10.4 This report is issued without prejudice and is subject to policy terms and conditions upon which this claim has been made."

12. A bare perusal of the Surveyor's report reveal the claims raised by the petitioner were though *admissible* but the surveyor found no amount was payable for loss of profit to the petitioner. Thus, what the respondent had denied is only the quantum & not its liability to pay for loss of profit, hence Essar Steel India Ltd. (supra) would not apply. The term "Liability" means *duty or obligation* whereas quantum means *the amount*. Thus the arbitration clause would certainly be applicable in view of above.

13. In *Jindal Stainless Ltd. V. Damco India Pvt. Ltd.* Arb.P.347/2016 decided on 14th December, 2016 this Court held as under :

16. The contention that the question as to the legality and the validity of the arbitration agreement must be decided by the Court while appointing an arbitrator is not sustainable. Plainly

the earlier decisions to the said effect are no longer be applicable because by virtue of Section 11 (6A) of the Act, the role of the Courts while considering an application under Section 11 is now confined to examining the existence of the arbitration agreement.

14. Thus, in view of the submissions and the law discussed above the arbitration clause would apply even to Consequential Loss Policy, hence Mr.Aftab Alam, Retired Judge, Supreme Court of India is hereby appointed as a sole arbitrator to arbitrate the dispute in this matter. The question qua applicability of the arbitration agreement or admissibility of claim may be raised by the respondent before the learned arbitrator. The fee be paid as per the fee schedule of Delhi International Arbitration Centre. Necessary declaration(s) be made.

15. The petition stands disposed of.

16. No order as to costs.

JANUARY 17, 2018
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YOGESH KHANNA, J