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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ARB.P. 640/2017 & IA No. 1352/2018**

PRABHAT ZARDA (I) PVT.LTD Petitioner

Through: Aman Vachher and Mr Ashutosh
Dubey, Advocates.

versus

NEW INDIA ASSURANCE CO.LTD Respondent

Through: Mr Abhishek Kumar, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

% **06.04.2018**

1. The petitioner has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying that an arbitrator be appointed to adjudicate the disputes between the parties.
2. The petitioner has availed a Standard Fire and Special Perils Policy dated 01.04.2012 (Policy No.32310211120100000001 – hereafter 'the Policy') issued by the respondent company (New India Assurance Co. Ltd.).
3. The petitioner claims that on 10.01.2013 at around 2.35 PM, a fire broke out in the factory premises of the petitioner company, which resulted in substantial damage to the stocks, moveable as well as the factory of the petitioner. The petitioner also filed a report before the Police Authorities on 11.01.2013.
4. Thereafter, on 26.02.2013, the petitioner preferred a claim under the

Policy. The said claim was rejected by the respondent company by a letter dated 03.03.2015. Thereafter, the petitioner issued a notice dated 16.02.2015 invoking the arbitration clause. The petitioner's request for appointment of an Arbitrator was also denied on 15.03.2016 on the ground that since the respondent company had repudiated its liability, the disputes were not referable to arbitration.

5. The Policy contains an arbitration clause, which is set out 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 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.”

6. It is apparent from the above that the disputes and differences between the parties will be referred to arbitration only if the respondent company accepts the liability but there is a dispute as to its quantum. In the

present case, the respondent company has denied any liability to pay against the Policy.

7. The learned counsel appearing for the petitioner had also pointed out that the reply filed on behalf of the respondent company indicates that the surveyor had assessed the damages at ₹1,68,41,124/-. He, therefore, submitted that the disputes between the parties relate to the quantum of the respondent's company liability and an arbitrator is required to be appointed to decide the same. This Court does not find the aforesaid contention to be merited, as it is apparent from the respondent company's letter dated 03.03.2015 that the respondent company had repudiated the entire claim and not accepts its liability. The operative part of the said letter reads as under:-

“From the above it is clear that you have violated the condition no.8 of the policy which states – **“If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof or if any fraudulent means or devices are used by the Insured or any one acting on his behalf to obtain any benefit under the policy or if the loss or damage be occasioned by the wilful act, or with the connivance of the Insured, all benefits under this policy shall be forfeited”**. Keeping in view of the fact that you have non-complied as also failed to disclose the material facts relevant thereby committing breach of the condition no.8 of the standard fire and special perils policy. The breach as committed is fundamental in nature. Accordingly the claim stands repudiated by the Competent Authority and there is no liability of the insurers under the subject claim.”

8. The reliance placed by the petitioner on the reply filed by the respondent company is also misplaced. Although, the respondent company had stated that the surveyor had addressed the damages at ₹1,68,41,124/-, it had also asserted that the respondent company accepted no part of the said

liability and it had repudiated the entire claim in terms of Clause 8 of the Policy.

9. In view of the aforesaid stand of the respondent company, it is clear that the disputes raised by the petitioner cannot be referred to arbitration. The learned counsel appearing for the petitioner earnestly contended that the stand of the respondent company is erroneous and amounts to breach of the terms of the Policy. He submitted that it is not open for the respondent company to deny its liability.

10. This Court is not called upon to address the said controversy and it would be open for the petitioner to institute appropriate proceedings in this regard. However, it is clear that once the respondent company had denied its liability *in toto*, the disputes cannot be referred to arbitration. This is so as the arbitration clause expressly provides that any dispute or difference as to the quantum to be paid under the Policy (liability being otherwise admitted) would be referred to arbitration. In the present case, the respondent company has (rightly or wrongly) denied its liability and, therefore, the said dispute is not arbitrable. In the circumstances, the appointment of an arbitrator would serve little purpose.

11. The learned counsel appearing for the petitioner states that in terms of the arbitration clause, it will be necessary for the petitioner to first obtain an award for the quantum of damages before instituting any suit or any other action. The last limb has to be read in the context of the entire clause. Since, it is expressly provided that no difference or dispute shall be referable to arbitration if the respondent company has disputed or not accepted the liability in respect of the Policy, it would serve no purpose to appoint an

arbitrator.

12. The petition is, accordingly, dismissed. The pending application also stands disposed of.

VIBHU BAKHRU, J

APRIL 06, 2018/MK