

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.1708 OF 2015

Tata AIG General Insurance Company LimitedPetitioner

vs

M/s. Manhattan Exports ...Respondent

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Mr. Saurav Agrawal, a/w. Ms. Manvi Adlakha and Mr. Sanjeev Sambasivan, i/b. Phoenix Legal, for the Petitioner.

Mr. Rohaan Cama, a/w. Mr. Shavez Mukri, i/b. India Law LLP, for the Respondent.

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CORAM : S.C. GUPTE, J.

DATED: 24 APRIL 2019

(Oral Judgement):

. This arbitration petition challenges an award passed by a sole arbitrator in a reference arising out of an insurance contract.

2. The Respondent, who carries on business of exports of processed fabric/textile, and who was the claimant before the sole arbitrator, had insured its consignments *inter alia* of textile goods under a policy known as 'Marine Cargo Open Policy'. The period of the policy was from 1 November 2009 to 31 October 2010. This policy *inter alia* covered the voyage of the goods termed as 'Export FOB' voyage, and insured goods in transit "from any place/warehouse in India to any Indian port or airport until placed on board the overseas vessel/aircraft as per 'FOB clause'". It was the Respondent's

case before the arbitrator that they had planned regular shipment of bales of textile for export to various countries between December 2009 and the first week of February 2010. For these shipments, about 3150 bales of textile were transported under various invoices and carting orders from warehouses at different places in India to Punjab State Container Warehousing Corporation's Container Freight Station ('CFS Warehouse') at Jawaharlal Nehru Port for onward shipment. On 31 January 2010, a major fire broke out at CFS warehouse, in which about 450 bales were destroyed and, as a result, the Respondent suffered a loss of over Rs.92 lakhs. The Respondent reported this loss to the Petitioner insurer. The Petitioner appointed surveyors to assess the loss. The Respondent submitted its claims for Rs.92,35,992/- along with documents to the surveyors for assessment of the loss. The surveyors accepted the Respondent's case of loss but sought a confirmation from the Respondent in an amount of Rs.91,04,701/- as the amount of assessed loss. The surveyors, accordingly, issued their report assessing loss of Rs.91,04,701/-. On receipt of the surveyors' report, the Petitioner, from time to time, sought particulars and documents from the Respondent. It was the Respondent's grievance that despite submission of these particulars and documents, its claim was not settled till about November 2010; that for the first time on 25 November 2010, the Petitioner offered an amount of Rs.40 lakhs towards settlement of the Respondent's claim which, after a lot of persuasion and discussion, was raised to Rs.41.50 lakhs. On 26 November 2010, the Petitioner sought a full and final settlement voucher/letter of release of all claims from the Respondent and sent a draft of such voucher/letter, calling for

execution of the same on the Respondent's letterhead, duly signed and sealed by the Respondent. After the Respondent submitted such voucher/letter, the Petitioner released the amount of Rs.41.50 lakhs. Within a week of such payment, the Respondent addressed a protest letter to the Petitioner, requesting for release of the balance amount of Rs.50,85,984/-. The Petitioner, in response, repudiated the claim and raised a dispute. The Petitioner *inter alia* claimed that the Respondent had accepted the sum of Rs.41.50 lakhs as a full and final settlement of its claims after negotiations. In pursuance of an arbitration agreement under Section 11 of the Act, the sole arbitrator was appointed for resolution of these disputes.

3. There were, thus, in essence two issues before the learned arbitrator in the reference. The first was whether the Petitioner owed any liability to the Respondent under the policy or, in other words, whether the latter's claim was covered by the contract of insurance. The second was whether there was a full and final settlement evidenced by the settlement voucher/letter of release duly signed by the Respondent. The learned arbitrator, by his impugned award, held in favour of the Respondent on both these aspects. The arbitrator held that the bales of textile lying at the CFS warehouse were in the course of transit within the meaning of the expression "Export FOB voyage" under the policy schedule. The arbitrator also held that the Respondent had executed the purported release voucher under financial duress and there was no accord and satisfaction, and the Respondent was entitled to its balance claim. So far as the actual quantum of loss was concerned, there was no dispute between the

parties; the quantity of goods lost in fire and their value were not disputed.

4. In his challenge to the impugned award, Mr. Agrawal, learned Counsel for the Petitioner, makes three submissions. It is, firstly, submitted that the loss claimed by the Respondent in the reference was not covered by the subject policy. Learned Counsel submits that the goods stored at the CFS warehouse were not in transit. Learned Counsel submits that at the most they could be termed as goods awaiting transit. Learned Counsel submits that storing of the goods at the CFS warehouse near the Port was a business or commercial decision on the part of the Respondent so as to enable it to conveniently export the goods. But the FOB voyage, so far as the goods are concerned, had not really commenced, when the goods were destroyed by fire in the CFS warehouse. It is, secondly, submitted that there was indeed an accord and satisfaction so far as the Respondent's claim under the insurance policy is concerned, when the Respondent signed the settlement voucher. Learned Counsel submits that the voucher was prepared and executed by the Respondent after a negotiated settlement. Learned Counsel, in the premises, submits that there was no arbitrable dispute between the parties, which could be referred to arbitration. It is, thirdly, submitted that the arbitration clause forming part of the policy did not envisage reference to arbitration of any dispute arising on account of non-acceptance of liability by the insurer in toto. It is submitted that the only difference as to the quantum of liability, on the basis that such liability was not disputed in principle by the insurer, was arbitrable.

5. Before we take up the real challenge to the award based on (i) the construction of the contract and (ii) the case of full and final settlement, we may conveniently dispose of the third submission of the Petitioner based on construction of the arbitration clause. What is submitted by learned Counsel is that the insurer had disputed its liability in principle, that is to say, it had questioned the very coverage of the claim of loss under the subject policy of insurance. Admittedly, however, there is no contention raised in this behalf before the learned arbitrator. If the Petitioner did not contest the arbitrator's jurisdiction to entertain the claim on a correct construction of the arbitration agreement and allowed the arbitrator to adjudicate the disputes on merits, the Petitioner can be said to have waived its right to object to the award on the same ground later in its challenge petition. The question is essentially of construction of the arbitration agreement and coverage of a particular claim within its terms. It is a mixed question of law and facts. It cannot be raised for the first time in a challenge petition. There is, accordingly, no merit in it.

6. Coming now to the merits of the claim of loss, namely, whether it was covered by the subject insurance policy, learned Counsel for the Petitioner relies on the policy schedule. Learned Counsel submits that under this policy schedule, the interest insured is “upon consignment said to contain textile, engineering goods and general merchandise pertaining to the insurer's trade”. The policy covered conveyance of goods “by covered road vehicle and/or by closed railway wagon and then “by air freight and/or by first class

steamer, as per Institute Classification Clause.” The voyage, admittedly, in this case, “Export FOB” voyage, included transit of goods “from any place/warehouse in India to any Indian port/airport until placed on board the overseas vessel /aircraft as per FOB Clause”. The terms of cover included *inter alia* what is known in the trade parlance as “Institute Cargo Clause (A).” It is submitted that Institute Cargo Clause (A) provides in clause 8 what is known as a transit clause. Learned Counsel refers to the following relevant sub-clauses of Clause 8 in this behalf:

- “8.1 This insurance attaches from the time the goods leave the warehouse or place of storage at the place named herein for the commencement of the transit, continues during the ordinary course of transit and terminates either
 - 8.1.1 on delivery to the Consignees' or other final warehouse or place of storage at the destination named herein,
 - 8.1.2 on delivery to any other warehouse or place of storage, whether prior to or at the destination named herein, which the Assured elect to use either
 - 8.1.2.1 for storage other than in the ordinary course of transit or
 - 8.1.2.2 for allocation or distribution,
 - or
 - 8.1.3 on the expiry of 60 days after completion of discharge oversee of the goods hereby insured from the overseas vessel at the final port of discharge,
- whichever shall first occur.”

Learned Counsel submits that when the goods were lost in fire, they were not in transit within the meaning of these clauses.

They were lying at a place of storage, prior to the destination, which was not a storage in the ordinary course of transit. Learned Counsel also relies on clause 9 of the Institute Cargo Clauses, which is in the following terms :

“9 If owing to circumstances beyond the control of the Assured either the contract of carriage is terminated at a port or place other than the destination named therein or the transit is otherwise terminated before delivery of the goods as provided for in Clause 8 above, then this insurance shall also terminate unless prompt notice is given to the Underwriters and continuation of cover is requested when the insurance shall remain in force, subject to an additional premium if required by the Underwriters, either

9.1 until the goods are sold and delivered at such port or place, or, unless otherwise specially agreed, until the expiry of 60 days after arrival of the goods hereby insured at such port or place, whichever shall first occur, or

9.2 if the goods are forwarded within the said period of 60 days (or any agreed extension thereof) to the destination named herein or to any other destination, until terminated in accordance with the provisions of Clause 8 above.”

Learned Counsel submits that the goods allegedly lost in fire were under two categories. The first being covered under four invoices, shipment for which was not yet contracted by the Respondent, whilst the second involves goods, which were returned by the ship on account of short shipment and were lying in the CFS warehouse without any concrete shipment schedule. Learned Counsel submits that the contract for carriage of these goods was, thus, terminated at a port/place other than the final destination of the

goods or before delivery of goods as provided in clause 8 above and, accordingly, the insurance stood terminated. Learned Counsel submits that any continuation of cover in respect of goods in such a case is subject to a prompt notice given to the underwriters and a specific continuation of the cover subject to payment of additional premium, if any, *inter alia* required by the underwriters.

7. On the other hand, what learned Counsel for the Respondent submits and what was pointed out before the learned arbitrator is that the Respondent was only into the business of export and did not have any local business; it was its case that it had received verbal orders from buyers from Mozambique for printed textiles and was exporting bales of printed textile to these buyers. The evidence before the arbitrator showed that the Respondent had purchased grey fabric from different places and sent it to job workers in different parts of the country for printing. After the printing work was done, the goods were transported to the port for shipment to the consignees in Mozambique under invoices and packing lists as per verbal orders, with instructions to the Respondent's Custom House Agent ("CHA") to procure shipping bills and arrange for custom clearance and stuffing orders for the goods. It is submitted that the evidence showed that the custom officers had even examined the goods and their value and made due endorsements of clearance on the invoices and packing lists. Thereafter, whilst awaiting their placement on board, as per availability of ships/vessels and the CHA obtaining stuffing orders for stuffing the bales in container/s for being placed on board the ships for transport to the destination port, the

goods lying at the CFS warehouses were destroyed in fire. The goods were, thus, stored in the CFS warehouse in the ordinary course of their transit and, thus, their loss in the course of such transit was indeed covered by the Institute Cargo Clauses forming part of the insurance contract.

8. The arbitrator, in his impugned award, accepted the Respondent's evidence that the goods were stored in the CFS warehouse in the ordinary course of transit. The arbitrator held that it was undisputed that the Respondent had procured the bales from different places in India and brought them to the CFS warehouse for the purpose of being placed on board overseas vessels for shipment to foreign countries. The arbitrator observed that it was not in dispute that during the period of cover, i.e. from 1 November 2009 to 30 October 2010, and more particularly upto the date of the fire, i.e. 31 January 2010, the Respondent had brought to the CFS warehouse 3150 bales for such exports and that at the time of the fire, 450 bales out of these were lying at the warehouse. The arbitrator observed that it was further undisputed that these 450 bales were in all under six invoices produced at Exhibit C-11. Out of these, goods covered by four invoices were awaiting shipment, whilst goods covered by the remaining invoices, though placed for shipment, were returned on account of short shipment, i.e. for want of space on board the ship, and were brought back to the CFS warehouse. The arbitrator did consider Clause 8 of the Institute Cargo Clauses and, in particular, Sub-clauses 8.1.2 and 8.1.2.2 forming part of Clause 8. Having regard to these clauses as well as the evidence produced by the

parties before him, the arbitrator held that on the date the goods were lost, the duration of transit had continued. The arbitrator held that the goods were in transit as per “Export FOB”; and such transit would continue until they were placed on board the overseas vessel and were, accordingly, covered by the insurance contract.

9. The assessment of the learned arbitrator in this behalf is clearly a possible view of the material placed before him by the parties. It also exhibits a pre-eminently possible construction of the subject insurance contract. Learned Counsel for the Petitioner submits that storage of goods at the CFS warehouse was a commercial decision on the part of the insured and at the stage when the goods were lost, there was no shipping contract in place in support of the Respondent's case of transit. Relying on the judgment of the Supreme Court in **New India Assurance Co. Ltd. vs. Hiralal Ramesh Chand**¹, learned Counsel submits that the onus is on the insured to plead and prove the loss and its coverage under the policy. The ingredients of such proof, namely, the Respondent's position as the assured, his insurable interest, the type or kind of insurance policy and its relevant terms, duration of the cover, and the nature of risk/loss, were not really matters of contest. The only contest was on whether the risk/loss was covered by the policy. That really turned on whether or not the goods were in transit when they were destroyed in fire. The voyage of the goods covered by the policy terminated on delivery to any warehouse or place of storage, whether prior to or at the destination, for storage other than in the ordinary

¹ (2008) 10 Supreme Court Cases 626

course of transit; such delivery in the ordinary course of transit did not result into termination. The key question to be considered, accordingly, was whether the delivery and storage of the bales lost in fire at the CFS warehouse at the port could be said to be in ordinary course of transit. It is but natural that between the time of delivery at the port, and the actual placing on board an overseas vessel, the goods would have to be kept at some port or private warehouse or place of storage. Whilst in such storage, the goods could certainly be said to be in ordinary course of transit. Were the delivery and storage at the CFS warehouse of that nature? That was the real question. On the facts alleged by learned Counsel for the Petitioner, it is possible to say that the goods were kept at the CFS warehouse simply for storage whilst awaiting a future transit and not in ordinary course of transit. But it is equally possible, on the basis of the material placed by the parties before the learned arbitrator, to say that the goods were sent to the Port for shipment and were lost whilst the CHA of the Respondent was arranging for their shipment by procuring a shipping bill and obtaining stuffing orders for stacking the bales in container/s for being loaded on board the overseas vessel bound for the destination port. It is not for this Court to choose between these two alternative views. Even if one were to hold that the view proposed by the Petitioner is a more possible or probable view, that is no ground to set aside the impugned award. So long as the view expressed by the learned arbitrator is indeed a possible view and not an impossible view or a view which no fair or judiciously minded person would take or a view which would shock the conscience of the court, it is not for the challenge Court under Section 34 of the Act to set aside the

award. As noted above, the arbitrator's award in this behalf is indeed supported by evidence. It is not an award based on no evidence. No relevant or germane material or circumstance is disregarded by the learned arbitrator or non-relevant or non-germane circumstance or material is considered by him to arrive at his award. As regards the contract of insurance, the view of the arbitrator that the voyage covered by the contract of insurance did not end at the port, that is to say, the CFS warehouse at the port, and did continue till the goods were placed on board the overseas vessel and that their storage at the CFS warehouse was in the course of transit and covered by the transit clause forming part of the Institute Cargo Clauses is also a reasonable construction of the subject contract. So far as the construction of the contract as also assessment of evidence is concerned, the arbitrator is the final authority. Even if he were to make a mistake in such construction or assessment, so long as such mistake does not entail an impossible view or a view which no fair or judiciously minded person would take or a view which would shock the conscience of the court, there is nothing for the challenge Court to interfere with it. The award, in the premises, does not warrant any interference.

10. Coming now to the purported accord and satisfaction or full and final settlement of the claim, it needs to be noted at the very outset that at no stage prior to the execution of the settlement voucher by the Respondent, the insurer had disputed its liability in principle. It appears that the insurer never took up a position that the loss claimed by the Respondent was not covered by the terms of the policy of insurance. The record of the case indicates that ever since

the claim was lodged and was assessed by the assessors and valuers in favour of the Respondent, the Petitioner insurer simply kept delaying the matter calling for particulars and documents from time to time. The correspondence in this behalf does indicate that the Respondent was time and again trying to impress upon the insurer to settle the claim at the earliest, making it clear all the while that it was in severe financial circumstances with an urgent and pressing need for release of its claim. In the face of this correspondence, which appears to be merely a one way traffic, the Petitioner's sending of a draft settlement voucher insisting on its execution by the Respondent clearly appears to be a condition for release of the claim proposed by the Petitioner. The evidence on record, in particular the cross-examination of the insurer's witness, does indicate that it was as a matter of policy that the Petitioner did not release payment to the insured unless and until the latter had executed a discharge voucher/release letter. Collection of such discharge voucher is admitted to be its regular process by the Petitioner's witness. It is admitted by this witness that the discharge voucher was executed exactly as per the draft sent by the Petitioner and that the Petitioner had called upon the Respondent to furnish such release deed/discharge voucher on the latter's letterhead duly signed and sealed with an understanding that it would not send any amount including the partial claim of Rs.41.50 lakhs, if such release/discharge was not executed. It was clearly admittedly to be a pre-condition for releasing of any payment whatsoever. In the premises, the arbitrator's conclusion that the execution of the discharge voucher/release letter was a matter of economic duress and was executed only by reason of the insurer

having made it as a pre-condition for settlement of the dues, is clearly a reasonable conclusion. It exhibits a pre-eminently possible view and not a view which is either impossible or such as no fair or judiciously minded person would take.

11. So far as the plea of full and final settlement or accord and satisfaction is concerned, the legal position has been succinctly explained by the Supreme Court in **National Insurance Company Limited vs. Boghara Polyfab Private Limited**². In the first, and foremost, place, any discharge of a contract by an agreement signed by both parties or by execution of a full and final discharge voucher/receipt signed by a party implies an agreement or discharge voucher which is validly and voluntarily executed. In other words, the consent of the party to such agreement or voucher must be a free consent and not a consent vitiated by any of the factors which render it void or voidable. As the law of contract stands, these factors are mistake of fact on part of both parties (Section 20), unlawful consideration or object (Section 24), want of consideration (Section 25), restraint of trade or marriage (Sections 26 and 27), restraint of trade (Section 28), uncertainty (Section 29) and wager (Section 30) which make an agreement void, and coercion (Section 15), undue influence (Section 16), fraud (Section 17) and misrepresentation (Section 18) which make it voidable. To these classical factors, which are a matter of statute, our Courts have added one more particular factor, sometimes referred to as “economic duress”, particularly in the context of government contracts and insurance cases. The Supreme

² (2009) 1 Supreme Court Cases 267

Court in **Central Inland Water Transport Corporation Ltd. vs. Brojo Nath Ganguly**³ expounded the principle in a different context, that is to say, otherwise than in relation to commercial transactions. It affirmed that the Courts would not enforce and would, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between the parties who are not equal in bargaining power. The Court did not elaborate on bargains of this type. By way of illustration it referred to the case of inequality of bargaining power as a result of the great disparity in the economic strength of the contracting parties, where the weaker party, being in a position to obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. The Court went on to observe that it “*will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or forms or rules may be*”. Though the court in that case cautioned that this principle would not apply where both parties were businessmen and the contract was a commercial transaction, the principle has been over the years applied to the cases of a contractor dealing with a giant corporation or instrumentality of the State signing discharge or satisfaction whilst seeking to recover his legitimate dues or an insured (even if a businessmen) seeking to recover from an insurance company monies due under a policy of insurance. An elaborate discussion on this issue is to be found in

3 (1986) 3 SCC 156; 1986 SCC(L&S) 429 ;(1986) 1 ATC 103

Boghara Polyfab case (supra). The Supreme Court in that case considered particularly the cases of insurance claims in **United India Insurance vs. Ajmer Singh Cotton & General Mills**⁴, **National Insurance Co. Ltd. vs. Nipha Exports (P) Ltd.**⁵ and **National Insurance Co. Ltd. vs. Sehtia Shoes**⁶ in the context of discharge vouchers signed as a result of coercive bargaining compelled by circumstances and applied the principle for enabling the insured to avoid their consent under the signed vouchers.

12. The Supreme Court particularly frowned upon the practice of government departments and economically advantaged corporations in taking discharge vouchers from their counter-parties, as a condition for releasing an admitted lesser amount, i.e. an amount less than the latter's claims, in the following words (Para 49) :

“49. Obtaining of undated receipts-in-advance in regard to regular/routine payments by government departments and corporate sector is an accepted practice which has come to stay due to administrative exigencies and accounting necessities. The reason for insisting upon undated voucher/receipt is that as on the date of execution of such voucher/receipt, payment is not made. The payment is made only on a future date long after obtaining the receipt. If the date of execution of the receipt is mentioned in the receipt and the payment is released long thereafter, the receipt acknowledging the amount as having been received on a much earlier date will be absurd and meaningless. Therefore, undated receipts are taken so that it can be used in respect of subsequent payments by incorporating the appropriate date. But many a time, matters are dealt with so casually, that the date is not filled even when payment is made. Be that as it may. But what is of some concern is the routine insistence by some government departments, statutory corporations and government companies for issue of

4 (1996) 6 SCC 400

5 (2006) 8 SCC 156

6 (2008) 5 SCC 400

undated “no-due certificates” or a “full and final settlements vouchers” acknowledging receipt of a sum which is smaller than the claim in full and final settlement of all claims, as a condition precedent for releasing even the admitted dues. Such a procedure requiring the claimant to issue an undated receipt (acknowledging receipt of a sum smaller than his claim) in full and final settlement, as a condition for releasing an admitted lesser amount, is unfair, irregular and illegal and requires to be deprecated.”

13. The Court did not give an exhaustive list of transactions where discharge of contract by accord and satisfaction could be so awarded, but did mention the cases of a government contractor and an insured in the following words (Para 52) :

(iii) A contractor executes the work and claims payment of say rupees ten lakhs as due in terms of the contract. The employer admits the claim only for rupees six lakhs and informs the contractor either in writing or orally that unless the contractor gives a discharge voucher in the prescribed format acknowledging receipt of rupees six lakhs in full and final satisfaction of the contract, payment of the admitted amount will not be released. The contractor who is hard-pressed for funds and keen to get the admitted amount released, signs on the dotted line either in a printed form or otherwise, stating that the amount is received in full and final settlement. In such a case, the discharge is under economic duress on account of coercion employed by the employer. Obviously, the discharge voucher cannot be considered to be voluntary or as having resulted in discharge of the contract by accord and satisfaction. It will not be a bar to arbitration.

(iv) An insured makes a claim for loss suffered. The claim is neither admitted nor rejected. But the insured is informed during discussions that unless the claimant gives a full and final voucher for a specified amount (far lesser than the amount claimed by the insured), the entire claim will be rejected. Being in financial difficulties, the claimant agrees to the demand and issues an undated discharge voucher in full and final settlement. Only a few days thereafter, the admitted amount mentioned in the voucher is paid. The accord and satisfaction in such a case is not

voluntary but under duress, compulsion and coercion. The coercion is subtle, but very much real. The “accord” is not by free consent. The arbitration agreement can thus be invoked to refer the disputes to arbitration.

14. The learned arbitrator has, in the present case, reasonably applied these principles and held that there was no discharge by free consent and, as noted above, such assessment does exhibit a possible view of the material placed before him. The view, as I have explained above, does not merit any interference under Section 34 of the Act.

15. There is, in the premises, no infirmity with the impugned award. The arbitration petition is, accordingly, dismissed. The amount of Rs.49,54,701/- deposited by the Petitioner in pursuance of the impugned order passed by this Court on 15 November 2016 shall be released by the Prothonotary and Senior Master along with accrued interest in favour of the Respondent.

(S.C. GUPTE, J.)