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

\+ ARB.P. 524/2019

GINNI FILAMENTS LIMITED ..... Petitioner

Through: Mr. Aseem Chaturvedi, Mr. Shivank Diddi and Mr. Ajay Bhargava, Advs.

versus

SBI GENERAL INSURANCE COMPANY LIMITED ..... Respondent

Through: Mr. Shantanu Tyagi, Ms. Nimrah Sameenalvi and Ms. Vagvi Pandey, Adsv.

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

ORDER

% **20.11.2019**

1. This is a petition filed under Section 11 of the Arbitration & Conciliation Act, 1996 for appointment of an Arbitrator.

2. The facts as noted from the petition are, on December 14, 2017, the petitioner has entered into an insurance policy called "Standard Fire & Special Perils (Material Damage)" bearing Policy No. 151048-0000-02 for a premium of Rs.3,88,663/- with the respondent for availing insurance cover of Rs.85,00,00,000/- from perils such as fire, lightning, explosion/ implosion, aircraft damage, riot/ strike/ malicious damage, storm/ cyclone/ typhoon. On April 29, 2018, a fire broke out at the insured premises at around 12.30 PM as a result of which 11791 bales of cotton were damaged. The preliminary value of the damaged cotton was assessed to be around Rs.

27,00,00,000/-. It is the case of petitioner, the petitioner took adequate and all possible steps to mitigate its loss with a bona fide intention. The petitioner vide email dated April 29, 2018 informed the respondent of the occurrence of the incident and requested for appointment of a surveyor to inspect the premises and process the insurance claim amounting to approximately Rs. 25,00,00,000/-. The respondent appointed M/s Sunglow Insurance Surveyor & Loss Accessor Pvt. Ltd as the preliminary surveyor who inspected the premises on April 30, 2018. A final surveyor was appointed by the respondent, who inspected the insured premises on May 01, 2018. The final observations were given by him in his minutes of meeting dated May 01, 2018.

3. On May 30, 2018, the scrap left behind from the fire being about 1000 metric ton was sold through e-auction for Rs. 29,00,000/- to M/s Om Sai Industries, Mumbai in the presence of the surveyor and Mr. Piyush Parikh of the respondent. However, M/s Om Sai Industries Mumbai lifted only 631 metric ton, which they considered to be good quality burnt cotton worth Rs.27,63,000/-. However, against this amount a payment of Rs. 25,00,000/- only was made by M/s Om Sai Industries. The petitioner in order to minimise its losses sold the remaining 304 metric ton material for a sum of Rs.1,61,000/-. As a result, a total of 935 metric ton salvage cotton was sold for Rs.26,61,000/-. On October 03, 2018, the surveyor submitted its final report. On October 17, 2018, the respondent remitted an amount of Rs.18,74,63,130/- to the petitioner’s account as against a claim of Rs.21,57,78,384/-. On October 25, 2018 the petitioner requested the respondent for a copy of the surveyor's report and reasons for deduction made in the claim amount. The petitioner vide email wrote to the

respondent that the reduced claim amount was received by it under protest without knowledge of the reasons for the deduction and owing to shortfall in funds and financial constraints, and the same should not be treated as full and final settlement of the claim. On October 16, 2018, the respondent shared a copy of the surveyor report dated October 03, 2018 with the petitioner.

4. On January 08, 2019, petitioner sent a letter to the respondent, in order to amicable resolve the disputes, requesting the respondent to make payment of Rs.2,82,65,690/- against the above stated deduction of Rs.2,97,53,357/- claiming that this deduction is unjustified as the same was not discussed with the petitioner and no unburnt cotton bales were retrieved from the insured premises. It was further stated that as per discussions with the respondent on September 04, 2018, the deductions were merely on account of substandard claim due to spontaneous combustion of the cotton bales. On March 27, 2019, the petitioner vide its notice invoked arbitration in accordance with the arbitration clause contained in the policy and nominated a retired Judge of this Court as its Nominee Arbitrator. On April 12, 2019, the respondent denied its liability and all statements and claims made by the petitioner and refused to appoint an Arbitrator. On May 28, 2019, the petitioner responded to the reply of the respondent and once again communicated its intention to commence the arbitration proceedings in furtherance to notice dated March 27, 2019 and called upon the respondent to nominate its nominee arbitrator. On June 03, 2019, the respondent vide its reply denied the existence of any arbitrable dispute under the Insurance Fire Policy capable of submission to arbitration. Accordingly, the present petition has been filed.

5. A reply has been filed by the respondent wherein an objection has been raised on the maintainability of the present petition as their does not exist any dispute between the parties, inasmuch as all claims under the Fire Policy being settled and contract being discharged by accord and satisfaction. That apart, it is stated that all claims under the Fire Policy for the incident on April 29, 2019 stand extinguished and discharged. As such, no dispute exists for reference to arbitration. It is also stated that the petitioner vide letter dated September 05, 2018, had itself sought for the settlement of claim for INR 18.75 crores (net). The said letter reads that *"Further to discussions held on 4th September, 2018, claim-settlement amount of Rs. 18.75 crores (Net) after deductibles (including salvage and excess deductibles) was agreed upon. PI settle the claim and remit the claim amount at the earliest."* It is stated in response to the enquiry by the surveyor of the particulars of the Claim Settlement Amount, the petitioner vide email dated September 10, 2019, itself clarified that *"Regarding balance deductibles of Rs.283 Lacs represent deduction on account of settlement amount as discussed with insurer during the meeting on 4th September, 2018, which was attended by Mr. Pushan Mahapatra and Mr. Amitava Gupta from the Insurance Company and Mr. Shishir Kaipuria and Mr. S. Singhvi from Ginni Filaments Limited. This settlement amount of Rs. 1875 lacs was finalized during this meeting."*

6. In substance, it is the case of the respondent that the petitioner has received and accepted claim settlement amount without any demur or protest and also provided the discharge voucher to the respondent. After receipt of claim settlement amount, the petitioner vide letter dated October 25, 2018 merely requested for a copy of the Final Report and reasons for deduction as

an afterthought. At this stage, the petitioner did not raise any concern regarding the discharge voucher being obtained under duress, coercion or undue influence. Thereafter, even when the petitioner on studying the Final Report with a mere intent to conjure its claims addressed a letter dated January 08, 2018, the petitioner did not present an *iota* of concern that any form of coercion, duress or undue influence was exerted by the respondent so as to compel the petitioner to accept the claim settlement amount and execute the discharge voucher. The petitioner merely disputed the Claim Settlement Amount for the first time after more than two months of receipt of the claim settlement amount and execution of the discharge voucher, on the ground of being dissatisfied with the reasons for deduction given in the Final Report as opposed to coercion and undue influence. A reference is also made to a notice dated March 27, 2019 of the petitioner invoking the arbitration. However, nowhere in the notice invoking arbitration, the petitioner alleged that any form of coercion, duress or undue influence was exerted by the respondent in obtaining the discharge voucher. According to them, it is only in the reply dated May 28, 2019 to the response dated April 12, 2019 of the respondent, that the petitioner raised the ground of undue influence and coercion for the first time after a period of approximately six months of receipt of the claim settlement amount and execution of the discharge voucher.

7. That apart, it is also the stand of the respondent that the subject matter of the alleged dispute is not arbitrable. In this regard, it is stated that there does not exist any dispute under the Fire Policy and all rights and liabilities under the said Policy stood discharged. In other words, it is stated that the dispute sought to be raised by the petitioner, cannot be referred to arbitration

because of the pre-condition of invocation of dispute resolution clause under the Fire Policy has not been satisfied. This aspect is further clarified by the respondent by stating that in order, for a dispute to be referred to arbitration under the Fire Policy, the following two pre-conditions as laid down by the Supreme Court need to be satisfied:-

(a) The liability of the insurer under the Fire Policy should be admitted clearly and unequivocally. There can be no arbitration when there is no admission of liability; and

(b) The dispute should pertain only to a quantum of amount for which the liability has been admitted above.

In the present case both the conditions are not satisfied as the respondent has never accepted the liability under the Fire Policy for the dispute sought to be raised by the petitioner.

8. The learned counsel for the petitioner would reiterate the stand taken by the petitioner in the claim petition and states that post amendment in the year 2015, the only issue needs to be seen by this Court is, the existence of an arbitration clause for adjudication of the dispute between the parties. In this regard, he has drawn my attention to the judgment of the Supreme Court in ***M/s Mayavti Trading Pvt. Ltd. v. Pradyuat Deb Burman Civil Appeal No. 7023/2019 decided on September 05, 2019.*** He submits that the respondent as against a claim of Rs.21,57,78,384/-, having paid an amount of Rs.18,74,63,130/-, cannot contend that there is no admission or acceptance of the liability under or in respect of the policy and the same cannot be referred to arbitration, shall not apply to the facts of this case. It is his endeavour to point out, a letter dated March 27, 2019 written by the petitioner to the respondent wherein they made a claim for the difference of

amount between Rs.21,57,78,384/- minus Rs.18,74,63,130/-. In other words, the petitioner has disputed payment of Rs.18,74,63,130/- by the respondent to the petitioner. It is his submission that the petitioner having challenged the quantification of the amount granted by the respondent under the policy, it is not a case where the respondent has denied the liability under the policy. According to him, much reliance placed by the learned counsel for the respondent on the judgment of the Supreme Court in the case of ***United India Insurance Company Limited and Another v. Hyundai Engineering and Construction Company Limited and Others (2018) 17 SCC 607*** is misplaced as the same shall not be applicable in the facts of this case, inasmuch as, in the said case, there was a complete repudiation of the claim made by the respondent company, hence the Supreme Court decided the issue in favour of the insurance company, by holding that there cannot be any arbitration in cases where the insurance company disputes or does not accept the liability under or in respect of the Policy. He states, in the case in hand some part of the claim having been accepted, and the dispute is on the balance amount this petition need to be allowed and an Arbitrator need to be appointed.

9. On the other hand, learned counsel for the respondent would submit that the arbitration clause would not get triggered unless there is an admission / acceptance of liability by the respondent. He also relied upon the judgment in the case of ***United India Insurance Company Limited and Another (supra)*** in support of his submission. That apart, he also relied upon the judgment of the Calcutta High Court in the case of ***Kohinoor Steel Pvt. Ltd. v. Bajaj Allianz Insurance Company 2011 SCC OnLine Cal 3252*** as also the judgment of the Supreme Court in the case of ***Garware Wall***

Ropes Ltd. vs. Coastal Marine Construction & Engineering Ltd. Civil Appeal No. 3631/2019 decided on April 10, 2019, more specifically paras 36 and 37 wherein a reference was made by the Supreme Court to its judgment in the case of ***United India Insurance Company Limited and Another (supra),*** wherein the Supreme Court has reiterated the conclusion arrived at by it that there cannot be any arbitration in cases where the insurance company disputes or does not accept liability.

10. Having heard the learned counsel for the parties, the only issue which arises for consideration is, as contended by the learned counsel for the respondent that the arbitration clause shall not get triggered unless the insurer admits or accepts the liability. There is no dispute that post 2015 amendment, the scope under Section 11 of the Arbitration & Conciliation Act, 1996 is that the Court shall confine itself to the examination of the existence of an arbitration agreement. There is also no dispute that there is an arbitration clause in this agreement, in terms of Clause 13, which I reproduce as under:-

> *"**13. <u>ARBITRATION</u>***
>
> *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 dispute or difference 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."

11. There is no dispute that the petitioner had raised a claim for Rs.21,57,78,384/- as against which, the respondent has paid an amount of Rs.18,74,63,130/-. This is primarily for the reason that it is the case of the respondent that the claim was settled only for those bales, which were damaged and which got segregated from the bales, which were not damaged, whereas it is the case of the petitioner that they have clearly informed the surveyors that no unburnt cotton bales could be retrieved. Rather, it was informed to the petitioner that on account of spontaneous combustion, claim has been substandard. Be that as it may, the dispute raised by the petitioner is with regard to a difference of amount between the claim made and amount received. It is the respondent's own case, that arbitration clause gets triggered, if the liability of the insurer under the Fire Policy is admitted and the dispute pertains to only quantum of amount. Both the conditions have been fulfilled. Hence, an arbitration clause gets triggered. So, the judgment as relied upon by the learned counsel for the respondent in the case of ***United India Insurance Company Limited and Another (supra)*** or for that matter of the Calcutta High Court in ***Kohinoor Steel Pvt. Ltd. (supra)*** shall not be applicable in the facts of this case, inasmuch as in ***United India Insurance Company Limited and Another (supra)*** the facts clearly demonstrates that whole of the claim of the respondent therein was repudiated by the insurance company.

12. Similar was the position in the case of ***Kohinoor Steel Pvt. Ltd. (supra)*** wherein the claim with regard to damage to crain was repudiated on the ground that it did not fall within the scope of the insurance policy.

13. Suffice it would be to state, it is not the case of the respondent that the claim does not fall within the insurance policy. So, the only submission made by the counsel for the respondent is without merit, the same is rejected.

14. In view of my aforesaid discussion, the present petition needs to be allowed. I deem it appropriate to appoint Ms. Justice Reva Khetrapal, a retired Judge of this Court as a sole Arbitrator, who shall conduct the proceedings under the aegis of the Delhi International Arbitration Centre (DIAC) and the rules made thereunder. Learned counsel for the parties shall be within their rights to appear before the learned Arbitrator for preliminary hearing, after taking prior appointment on her mobile numbers (9871300030 / 9810167225).

15. Copy of the order be sent to Ms. Justice Reva Khetrapal and Coordinator, DIAC.

16. Petition is disposed of.

V. KAMESWAR RAO, J

NOVEMBER 20, 2019/*ak*