

AP/759/2022

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

M/S. SATYANARAYAN TEA COMPANY PRIVATE LIMITED
Versus
NEW INDIA ASSURANCE COMPANY LIMITED

BEFORE:

The Hon'ble CHIEF JUSTICE PRAKASH SHRIVASTAVA

Date: 8th December, 2022.

Appearance:
Mr. Sarosij Dasgupta, Adv.
...for the petitioner
Mr. Saumalya Ganguli, Adv.
...for the respondent.

The Court: This application under Section 11 of the Arbitration & Conciliation Act, 1996 has been filed for appointment of arbitrator to resolve the dispute between the parties.

Learned counsel for the applicant has submitted that the arbitration agreement in the form of the insurance policy being Annexure-C was executed which contained the following arbitration clause :

“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 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 3 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 has been pointed out by the learned counsel for the applicant that since the dispute had arisen, therefore, the applicant had served the notice dated 7th September, 2022 in terms of Section 21 of the Act invoking the arbitration clause but in spite of service of notice, no response was received till the date of filing of AP. Subsequently, the reply was received by the applicant.

Learned counsel for the respondent has raised a preliminary objection about maintainability of the application under Section 11 of the Act in view of the fact that the insurance claim of the applicant was rejected as “no claim”.

Having heard the learned counsel for the parties and on perusal of the record, it is noticed that *vide* communication dated 11th November, 2021, the respondent had rejected the claim of the applicant holding that the claim was not tenable and treating the claim to be “no claim”.

The similar arbitration clause and same issue relating to appointment of arbitrator under Section 11 of the Act where the insurance company had repudiated the claim, had come up before the Madras High Court in the matter of *M/s. Jumbo Bags Ltd. -vs.- M/s. The New India Assurance Co. Ltd.*, reported in 2016-2-L.W. 769 wherein the Madras High Court had reached to the conclusion that remedy of arbitration is not available when the claim is repudiated in toto. The Madras High Court in this regard has held as under :

“25. Now turning to the arbitration clause, there are two parts of it, which make the position abundantly clear. As to what can be referred to arbitration is specified in the initial sentence of Clause-13 itself - the quantum to be paid under the policy. This expression is specifically circumscribed by the stipulation "liability being otherwise admitted." Thus, unless the insurance company admits that in principle they are liable, though the payment may be of a lesser amount, that aspect has to be determined in arbitration. Interpreting the contract to make any part of it otiose cannot be accepted, as a meaning must be given to the words used in the contract. If the plea of the petitioner was to be accepted, the aforesaid phrase "liability be otherwise admitted" would become superfluous/otiose. If at all there was any doubt, that stands removed by the second paragraph of Clause-13, which stipulates that it is "clearly agreed and understood" that no difference or dispute would be referable to arbitration, if the company had "disputed or not accepted the liability", under or in respect of the policy. It is not relevant as to why the respondent-Insurance company has disputed or not accepted the liability, though Clause-8 provides that if it is a fraudulent claim, the same can be rejected and all benefits under the policy forfeited. It is the view of the respondent-company that this is a case of fraudulent claim, which is liable to be rejected. Thus, once the company is of the view that they are not liable to pay a penny not on the issue of quantification, but on a concept, the arbitration Clause would stand excluded.

26. It may be noted that the rejection is on the basis of a clause of policy- Clause-8. Further, though not directly relevant, it is not a mere ipse dixit of the respondent, but it is based on the final report of the Surveyor appointed by the respondent-Insurance company. The interim report of the Surveyor deputed by another Insurance Company viz., "United India Insurance Company", in relation to another claim lodged by the petitioner although arising out of the same accident, under which part payments have been made by that Company thus cannot support the case of the petitioner. The policies are different. One is for plant and machinery and the other is for stocks insured by the respondent herein. If there is absence of proof of existence of stock at sight or it is felt that the claim for stocks is fraudulently made, the payment made towards loss to the plant and machinery would not automatically entitle the insured to make a

claim in relation to stocks also. It cannot be lost sight of that we are dealing with an Insurance policy.

27. The catena of Judgments referred to aforesaid show how insurance contracts are to be read. The words in the contract would have to be read as they are and it is not for this Court to re-construct and take its own import of the contract on something not agreed to by the parties (*General Assurance Society Ltd. Vs. Chandumull Jain and another* (AIR 1966 SC 1644).

28. In *The Vulcan Insurance Co. Ltd* case cited supra, the question of repudiation of a claim and its arbitrability in the context itself was examined. The dispute which is not referable to arbitration, being not covered by the clause cannot be over the subject matter of arbitration, and the remedy of the insured in this case is only to institute a suit.

29. If a contra view is to be taken, it would amount to creation of an arbitration clause over a subject matter where there is no such clause. It has already been noticed that the Surveyor in a detailed report found various errors qua the stocks with mismatch of quantity, doubtful purchase from doubtful new suppliers, bogus transport bills, absence of matching of ledger accounts, inward register not having genuine entries, provision of false documents for part of purchase etc. The details of this are not required to be gone into in these proceedings. Suffice to say, clause-8 was advised and was invoked by the respondent for rejection of the claim in toto as a fraudulent claim.

30. The parties to the contract had specifically agreed both positively and by exclusion in the Arbitration Clause that only if the Insurance company finds that the claim exists, albeit of a different amount or a lesser amount, would the question of arbitration apply and in such a situation where the claim is rejected as fraudulent etc., recourse to arbitration is not available. The arbitration clause has specifically been thus excluded in such a situation and this is in consonance with the principle of *Uberrima Fides* applicable to an Insurance Policy Good faith on the part of the insured. The principles in this behalf have been explained in [Vikram Greentech India Ltd, vs. New India Assurance Company Ltd](#) (2009(5) SCC 599).

31. Learned counsel for the respondent has rightly distinguished the Judgment in *Essar Steel Company Limited* case which had a separate nature of policy and the Insurance Clause itself was very different since the plea of the policy being void ab initio was found to be an arbitrable dispute. This view of the Bombay High Court in its own facts is quite apparent from the judgment in *Tainwala Personal Care Products Pvt. Ltd.*, case supra. The learned Single Judge observed that it was evident that it is only when the Insurer had admitted his liability that there is a dispute or difference in respect of the quantum to be paid under the policy that the dispute would be arbitrable.

32. I am of the view that the remedy of arbitration is not available to the petitioner herein in view of the arbitration clause specifically excluding the mode of adjudication of disputes by arbitration, where a claim is repudiated in toto. The remedy would thus only be of a civil suit in accordance with law.”

Learned Counsel for the respondent has also pointed out the judgment of the Bombay High Court in the matter of *Tainwala Personal Care Products Pvt. Ltd., Mumbai -vs.- Royal Sundaram Alliance Insurance Co. Ltd., Mumbai* reported in 2012 SCC Online Bombay 701 wherein considering the judgment of the Supreme Court in the matter of *Vulcan Insurance Co. Ltd. -vs.- Maharaj Singh* reported in (1976) 1 SCC 943, the Bombay High Court in similar circumstances has taken the following view :

“3. Evidently on a plain reading of the aforesaid clause, it is evident that it is only when the insurer has admitted its liability but there is a dispute or difference in respect of the quantum to be paid under the policy that the dispute would be arbitrable. In the present case, the insurer has not admitted its liability and on the contrary has repudiated any liability by its letter dated 18 February, 2008. This aspect is covered by a Judgement of the Supreme Court in *The Vulcan Insurance Co. Ltd. v. Maharaj Singh*, (1976) 1 SCC 943 : AIR 1976 SC 287 where the Supreme Court held thus :

12. But as soon as there is a rejection of the claim and not the raising of a dispute as to the amount or any loss or damage, the only remedy open to the claimant is to commence a legal proceeding, namely, a suit for establishment of the company's liability. It may well be that after the liability of the company is established in such a suit for determination of the quantum of the loss or damage reference to arbitration will have to be resorted to in accordance with Clause 18. But the arbitration clause, restricted as it is by the use of the words “if any difference arises as to the amount of any loss or damage”, cannot take within its sweep a dispute as to the liability of the company when it refuses to pay any damage at all.

In the Judgment in *General Assurance Society Ltd. v. Chandmull Jain* AIR 1966 SC 1644 the Supreme Court observed that if a cover note incorporated by reference the terms and conditions of a future policy, it does not have to recite the terms and conditions, but merely to refer to a particular standard policy. In the present case, the cover note does not incorporate by reference the terms and conditions of a standard policy. But what is more important is that even if Clause 13 of the Standard Policy were to be regarded as being incorporated in the cover note, no reference to arbitration could arise unless the insurer admits its liability. In the present case, the insurer has repudiated liability. ”

The arbitration clause provides for the remedy of arbitration in case if the dispute is about quantum to be paid under the policy but in view of the above judgment when the claim itself is repudiated or held to be “no claim”, the arbitration clause cannot be attracted.

Hence, the prayer made for appointment of arbitrator under Section 11 of the Act cannot be granted.

Thus, AP/759/2022 is rejected, however, with liberty to the applicant to avail such other remedies as available under the law.

(PRAKASH SHRIVASTAVA, C.J.)