IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

ARBITRATION PETITION NO.128 OF 2021
WITH
ARBITRATION PETITION NO.129 OF 2021
WITH
ARBITRATION PETITION NO.130 OF 2021

M/s.Nippon Paper Foodpac Pvt. Ltd. ...Petitioner
Vs.
M/s.National Insurance Co. Ltd. ...Respondent

Mr. Ashwin Shete a/w. Ms. Pooja Yadav, Mr. Abhay Dhadiwal, Ms. Bhoomi Upadhyay i/b. Jayakar and Partners, for the Petitioner.
Mr. Zal Andhyarujina, Senior Advocate a/w. Ms. Maithili Parikh, Mr. Yashesh Kamdar and Mr. Nabeel Malik i/b. Tuli & Co., for the Respondent.

CORAM : C.V. BHADANG, J.
RESERVED ON : 3 OCTOBER 2022
PRONOUNCED ON : 12 OCTOBER 2022

<u>Order</u> :

. All these petitions are filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (Act, for short) for appointment of an Arbitrator. These petitions are between the same parties and involve common questions of law and fact. As such, they are being disposed of by this common order.

2. The brief facts necessary for the disposal of the petition may be stated thus-

The Petitioner is a Private Limited Company erstwhile named as *Modi Federal Limited* in the year 1994 when it was incorporated under the provisions of Companies Act, 1956. The name was subsequently changed to *Plus Paper Foodpac Pvt. Ltd.* and is presently known as *Nippon Paper Foodpac Pvt. Ltd.* since the year 2017. The Petitioner is engaged in the business of manufacture of polycoated paper containers and plastic lids, straws and stirrers, ice cream cups etc. catering to the food services industry.

3. The Respondent is a Public Limited Company engaged in providing insurance services. The Petitioner has major manufacturing facilities/plants at (i) Badlapur, District Thane (ii) Baddi Himachal Pradesh and (iii) Chiplun, District Ratnagiri. The Respondent has issued three insurance policies covering the manufacturing unit of the Petitioner at Badlapur namely (i) Plant and Machinery, (ii) Building and (iii) Stock.

4. A major fire broke out at Badlapur Unit of the Petitioner on 13 November 2012 consequent upon which the Petitioner lodged three separate claims under the aforesaid policies with the Respondent on 14 November 2012.

5. It appears that the Respondent, appointed M/s. Bhatwadekar Insurance Surveyors and Loss Assessors Pvt. Ltd.

(M/s. Bhatwadekar Ltd.) for assessing the loss / damage caused by the fire. The Surveyor issued primary survey report (PSR) on 22 November 2012 stating that the exact estimate of the Petitioner's losses can be determined only after detailed inspection and verification of the losses. The Petitioner informed the Surveyor that the relevant records were destroyed in the fire and would arrange for a back up data.

6. On 28 December 2012, the Respondent appointed M/s. Truth Labs (Forensic Expert) for forensic investigation to determine the cause of fire. On 15 March 2013, the Forensic Expert determined the cause of fire as on account of a short circuit in the transformer in the Badlapur Unit.

7. On 17 April 2013, the Surveyor issued First Interim Survey Report (FISR) in relation to the plant and machinery claim, by which the Surveyor concluded that the fire was accidental in nature and the Petitioner's claim was sustainable. On 4 September 2013, the Surveyor issued an Addendum to FISR recommending 'On Account Payment' (OAP) to the Petitioner to the tune of Rs.6 Crores, in respect of the P & M claim.

8. In March 2014, the Petitioner shifted its manufacturing unit from Badlapur to Baddi and Chiplun. The Respondent appointed a Forensic Expert to examine the intention of the Petitioner behind shifting of the unit and the Forensic Expert on

26 June 2014 opined ruling out any malafide intention behind shifting of the unit.

9. On 25 August 2014, the Respondent made OAP of Rs.5 Crores to the Petitioner in respect of the plant and machinery claim. On 24 February 2015, the Petitioner issued a letter to the Respondent seeking additional OAP of Rs.10 Crores. On 5 June 2015, the Surveyor issued a Second Interim Survey Report (SISR) recommending an additional OAP of Rs.4 Crores.

10. According to the Petitioner, the Surveyor had concluded and finalised the assessment of loss under the Building Policy and the Stock Policy. However, the assessment of the damage under the Plant and Machinery Policy was not yet finalised and informed the Respondent that as the record was burnt, a forensic audit was required.

11. In October 2015, the Respondent appointed M/s. KPMG Assurance and Consulting Services LLP (KPMG) for an independent forensic analysis of the plant and machinery claim.

12. On 22 March 2017, KPMG issued their first report (first KPMG report) under the plant and machinery policy concluding as under-

(i) Although the Petitioner claimed loss of 11 Korean machines, the Inward Register revealed only 9 machines on the site.

(ii) Two Korean machines were found at Baddi Unit.

(iii) The serial numbers of the two Korean Machines were sequential to the machines sold at the insured premises to a scrap dealer.

(iv) The Petitioner did not cooperate with the KPMG and did not provide the Fixed Assets Register to KPMG which they had provided to the Surveyor.

(v) On review of the Petitioner's accounting system Tally, there was an entry in June 2011 which was pertaining to transfer of machinery of Rs.3.29 Crores from the insured premises to the Baddi Unit which was not revealed to KPMG.

13. It appears that the Surveyors sought comments of the Petitioner on the report of the KPMG and after submission of the same, the Surveyor issued final survey report (FSR) on 25 October 2018 disagreeing with the findings in the first KPMG report in relation to the plant and machinery claim.

14. It appears that the Respondent entered into correspondence with the Surveyor regarding the discrepancies in the final survey report (FSR) of the Surveyor and the first KPMG report.

15. In July / August 2019, the Petitioner appointed Mr. Sen as a Consultant.

16. On 19 January 2021, KPMG issued supplementary Memorandum (second KPMG report) dated 22 March 2017. The

Respondent concluded that the claim of the Petitioner was in violation of the general conditions (GC-1 and 6) of the insurance policy. The Respondent therefore issued a repudiation Letter dated 12 July 2021. After this, the Petitioner issued a notice dated 29 July 2021 invoking the arbitration clause to which a reply was issued by the Respondent on 4 August 2021 while repudiating the claim / liability and seeking refund of the OAP of Rs.5 Crores paid to the Petitioner under the plant and machinery policy. This has led the Petitioner to file the present petitions.

17. On 30 October 2021, the Respondent stated that the condition precedent for invocation of the arbitration has not been satisfied since the Respondent has not accepted any liability under the subject policies. The facts aforesaid are narrated from Arbitration Petition No.128/2021 and the facts in the other two petitions are on similar lines. In short, the invocation of the arbitration clause is opposed by the Respondent on the ground that the liability itself having been denied, the arbitration clause cannot be invoked.

18. The Respondent has filed reply. It is contended that the referral of the dispute to Arbitration is contemplated only where liability is not disputed and the dispute is only about quantum, unlike in the present case, where the liability is disputed and is repudiated as per letter dated 12 July 2021.

19. I have heard the learned counsel for the parties. Perused record.

20. It is submitted by the learned counsel for the Petitioner that there is a valid and subsisting arbitration clause contained in the policy of insurance. It is submitted that the said agreement cannot be disowned on the spacious ground of liability being disputed. It is submitted that in so far as the plant and machinery policy is concerned, there was OPA of Rs.5 Crores in the year 2013 and only after the Petitioner sought to place reliance on the said circumstance, that a civil suit is filed in the year 2021 for recovery of the same. It is submitted that the Surveyor's report would clearly indicate that the Surveyor had found that the Respondent was liable. It is submitted that the discrepancies in the KPMG report were referred to the Surveyor and even properly explained and in any event, the dispute is essentially about quantum, even assuming that there was shifting of two Korean machines to the 'Baddi' Plant. He pointed that it is for the learned Arbitrator/s to decide on the quantum of the claim. He submitted that the report of the Surveyor appointed by the Respondent would bind the Respondent at this stage and the reference of the dispute to the Arbitrator/s cannot be refused. On behalf of the Petitioner, reliance is placed on the decision of the Supreme Court in *(i) The Vulcan Insurance Co. Ltd. Vs. Maharaj Singh and Anr.*[1], *(ii) D. Papiah Vs. Mysore State Transport*

1 *(1976) 1 SCC 943*

Appellate Tribunal and Ors.[2]*, (iii) United India Insurance Company Limited and Anr. Vs. Hyundai Engineering and Construction Company Limited and Ors.*[3]*, (iv) Pravin Electricals Private Limited Vs. Galaxy Infra and Engineering Private Limited (2021)*[4] *and (v) Mohammed Masroor Shaikh Vs. Bharat Bhushan Gupta and Ors.*[5]

20. Mr. Andhyarujina, the learned Senior Counsel for the Respondent, placing reliance on the arbitration clause, has submitted that the said agreement / clause operates only where the liability is not disputed and the issue is only about the quantum unlike in the present case where the liability is disputed. It is submitted that the liability has been specifically denied / repudiated vide repudiation letter dated 12 July 2021 and thus, the dispute cannot be referred for arbitration. The learned counsel submitted that the Surveyor's report is not final. It is submitted that the Petitioner is not rendered remediless and can opt for the ordinary remedy if so advised. However, the dispute cannot be referred to arbitration in view of the specific arbitration clause as contained in the policy of insurance. The learned counsel has taken me through the report of the Surveyor as well as the first and second report of the KPMG in order to submit that the liability has been repudiated justifiably.

2*(1976) 1 SCC 953*

3*(2018) 17 SCC 607*

4 *(2021) 5 SCC 671*

5*(2022) 4 SCC 156*

21. On behalf of the Respondent, reliance is placed on the decision of the Supreme Court in *(i) Vulcan Insurance Co. Ltd. Vs. Maharaj Singh and Anr.* [6]*, (ii) New India Assurance Co. Ltd. Vs. M/s. Ampoules & Vials Manufacturing Co. Ltd.* [7]*, (iii) Essar Steel India Ltd. Vs. The New India Assurance Co. Ltd.* [8]*, (iv) New India Assurance Company Ltd. Vs. Pradeep Kumar* [9]*, and (v) United India Insurance Company Limited and Anr. Vs. Hyundai Engineering and Construction Company Limited and Ors.* [10]

He, therefore, submitted that the petition be dismissed.

22. I have carefully considered the rival circumstances and the submissions made. Although the gist of the rival submissions have been set out above, I propose to elaborate on the same, wherever necessary. The only issue is whether in the circumstances, on account of the repudiation of the liability, the arbitration clause, would become inoperative in this case ?

23. In order to appreciate the rival submissions, it would be necessary to reproduce the arbitration clause as contained in Clause 13 of the Standard Fire and Special Perils Policy (Material Damage) as under.

---

6 *(1976) 1 SCC 943*

7 *2018 SCC Online Bom 5845*

8 *2016 SCC Online Bom 9472*

9 *(2009) 7 SCC 787*

10 *(2018) 17 SCC 607*

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 of suit upon this policy that the award by such arbitrator / arbitrators of the amount of the loss or damage shall be first obtained.

24. The contention on behalf of the Respondent is that once the liability was repudiated as per letter dated 12 July 2021, denying / repudiating the liability in view of GC-1 and 6 of the policy, the arbitration clause cannot spring into action. The General Condition Nos.1 and 6 may be reproduced as under-

> *1. This policy shall be voidable in the event of misrepresentation,mis-description or non-disclosure of any material particular.*
>
> *6.(i) On the happening of any loss or damage the insured shall forthwith give notice thereof to the Company and shall within 15 days after the loss or damage, or such further time as the Company may in writing allow in that behalf, deliver to the Company.*
>
> *(a) A claim in writing for the loss or damage containing as particular an account as may be reasonably practicable of all the several articles or items or property damaged or destroyed, and of the amount of the loss or damage thereto respectively, having regard to their value at the time of the loss or damage not including profit of any kind.*

(b) Particulars of all other insurances, if any. The insured shall also at all times at his own expense, produce, procure and give to the Company all such further particulars, plans, specification books, vouchers, invoices, duplicates or copies thereof, documents investigation reports (internal / external), proofs and information with respect to the claim and the origin and cause of the loss and the circumstances under which the loss or damage occurred, and any matter touching the liability or the amount of the liability of the Company as may be reasonably required by or on behalf of the Company together with a declaration on oath or in other legal form of the truth of the claim and of any matters connected therewith.

No claim under this policy shall be payable unless the terms of this condition have been complied with

(ii) In no case whatsoever shall the Company be liable for any loss or damage after the expiry of 12 months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration; it being expressly agreed and declared that if the Company shall disclaim liability for any claim hereunder and such claim shall not within 12

calendar months from the date of the disclaimer have been made the subject matter of a suit in a court of law then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder.

25. Before adverting to the facts, it would be worthwhile to notice the legal position as obtaining so far as the nature, scope and ambit of the powers exercisable under Section 11 of the said Act, particularly, in the context of a similar clause contained in an insurance policy / contract. It may be mentioned that a similar arbitration clause can be found in such insurance policies/ contracts.

26. For the sake of convenience, Clause 13 can be divided in three parts. The last part of the arbitration clause which requires obtaining of an arbitration award as a condition precedent to any right of action or a suit upon the policy is popularly referred to as 'Scott Vs. Avery' clause. The scope and ambit of the said clause, fell for consideration of the Hon'ble Supreme Court in the context of an application for appointment of an arbitrator under Section 20 of the Arbitration Act, 1940 (old Act) in Vulcan Insurance Company (supra). The Hon'ble Supreme Court has *inter alia* held that the 'Scott Vs. Avery' Clause would be rendered inoperative, where the dispute is not covered by the arbitration

clause and consequently, cannot be referred to arbitration. It can thus be seen that the said clause would be operative only where the dispute is otherwise covered by the arbitration clause and the same can be referred for arbitration. Thus, in my humble view, reliance placed by the Petitioner on the said clause is misplaced.

27. Principally, the question which is required to be considered in this case is whether the dispute can be referred to arbitration in terms of the first and second part of Clause 13, the liability being repudiated by the Respondent – Insurer.

28. On behalf of the Respondent, strong reliance is placed on the decision of the Supreme Court in *Oriental Insurance Company Ltd. Vs. Narbheram Power and Steel Private Limited*[11]. In that case, a similar ground was raised on behalf of the Appellant – Insurance Company placing reliance on the repudiation of the liability. The High Court considered the language employed in Clause 13, appointed an arbitrator which order was subject matter of challenge before the Supreme Court. The Hon'ble Supreme Court in the facts and circumstances of that case, found that it was not a case where mere allegations of fraud was relied upon to avoid the arbitration. It was also not the stand taken that certain claims pertains to excepted matter and hence not arbitrable. The three Judge Bench of the Hon'ble Supreme Court relying upon the earlier decision in *Vulcan Insurance Co. Ltd.* (supra) found that the matter could not have

11 (2018) 6 SCC 534

been referred for arbitration and therefore the appeal was allowed and the order appointing an arbitrator was set aside. In a subsequent decision in *Hundai Engineering Limited* a three Judge Bench of the Hon'ble Supreme Court placing reliance on the decision in *Narbheram Ltd* had allowed the appeal setting aside the order appointing an arbitrator.

29. At this stage, it is necessary to make a reference to the decision of the Supreme Court in *Vidya Drolia and others Vs. Durga Trading Corporation*[12]. In that case, a Coordinate Bench of the Hon'ble Supreme Court after considering several judgments holding the field, including the one in *Narbheram Ltd.*(supra), *Hundai Engineering Ltd.* (supra) and *Garware Wall Ropers Ltd* (supra) has culled out the principles which are germane in such case. That was a case where a reference was made to the Larger Bench. The Supreme Court in para 244 has culled out the principles as under-

> *244.1. Section 8 and 11 of the Act have the same ambit with respect to judicial interference.*
>
> *244.2. Usually, subject matter arbitrability cannot be decided at the stage of Section 8 and 11 of the Act, unless it is a clear case of deadwood.*
>
> *244.3. The Court, under Section 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has*

12 (2021) 2 SCC 1

established a prima facie (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.

244.4 The court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above i.e. "when in doubt, do refer".

244.5 The scope of the court to examine the prima facie validity of an arbitration agreement includes only;

244.5.1 Whether the arbitration agreement was in writing? or

244.5.2. Whether the arbitration agreement was contained in exchange of letters, telecommunication, etc.?

244.5.3. Whether the core contractual ingredients qua the arbitration agreement were fulfilled?

244.5.4. On rare occasions, whether the subject-matter of dispute is arbitrable?

It can thus be seen that the Court has to refer the matter to arbitration or to appoint an arbitrator, as the case may be. Unless the party has established a prima facie (summary findings case), the case of non existence of valid arbitration agreement by summarily showing a strong case. It has been held that Court should refer the matter if the validity of the arbitration agreement cannot be determined on a prima facie basis. That is, 'when in doubt, do refer'.

30. The scope of examination of the prima facie validity of an arbitration agreement includes only (i) whether the arbitration agreement was in writing or was contained in any exchange of letters etc. and (ii) whether the core contractual ingredients qua the arbitration agreement were fulfilled? It is only on rare occasions, where the subject-matter of dispute is a 'deadwood', that the Court can dwell on the arbitrability of the dispute?

31. It is significant to note that in both in *Narbheram Limited* (supra) and *Hundai* (supra) on such prima facie examination of the material produced by the Respondent, resisting the appointment of an arbitrator, a Co-ordinate Bench of the Hon'ble Supreme Court in *Vidya Drolia* (supra) has in para 203 held that the decisions in *Narbheram Ltd.* (supra) and *Hundai* (supra) have to be confined to the facts of that case.

32. Coming to the present case, the record discloses that there was material to show that the incident of fire was accidental in nature and the Surveyor had assessed the damage and

recommended On Account Payment (OAP). An OAP of Rs.5 Crores was also made in respect of P & M Policy. It is only recently that the Respondent has filed a suit for its recovery. Applying the principles as laid down in Vidya Drolia, I find that a case of referral of the dispute to arbitration is made out. It is necessary to emphasise that the Supreme Court has held that even where there is a doubt the Court should refer the matter to arbitration.

33. The other decisions on which reliance is placed on behalf of the respondent are distinguishable on facts. I would, however, hasten to add that all the rival contentions including arbitrability of the dispute are left open to be considered by the learned Arbitrator.

34. We are presently governed by the law laid down by the Supreme Court in Vidya Drolia.

35. A perusal of Clause 13 shows that it essentially contemplates appointment of a sole arbitrator. It is only when the parties do not agree upon the single arbitrator, the dispute is required to be referred to a panel of three arbitrators. Considering the fact that principally the clause provides for reference of the dispute to sole / single arbitrator, following order is passed.

ORDER

(i) Shri. Justice R. M. Savant, Former Judge of this Court is appointed as a Sole Arbitrator to adjudicate the dispute between the parties.

(ii) The learned Sole Arbitrator, before entering the arbitration reference, shall forward a statement of disclosure as per requirement of Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act, 1996, to the Registrar (Judicial-I) of this Court.

(iii) At the first instance, the parties shall appear before the prospective Arbitrator within a period of four weeks from today on a date which may be mutually fixed by the learned Sole Arbitrator.

(iv) The fees payable to the Arbitral Tribunal shall be as prescribed under the Bombay High Court (Fees payable to Arbitrators) Rules, 2018 and shall be borne by the parties in equal proportion.

(v) Rival contentions of the parties including on merits of the matter are expressly kept open.

(vi) The petitions are disposed of in the above terms, with no order as to costs.

(vii) Office to forward a copy of this order to the learned Arbitrator on the following address:

"Shri. Justice R. M. Savant (Retired)

Flat No.3, 10th Floor, Atur Terraces
Co.Op. Housing Society Ltd.
Capt. Prakash Pethe Marg, 19-A,
Cuffe Parade, Mumbai – 400 005.
Office : Unit No.32, 3rd Floor,
'Shanti' Building, 6, Banaji Street,
Fort, Mumbai – 400 001.
Mobile No. 9619555152
Email : rajendramsavant07@gmail.com

C.V. BHADANG, J.