

**IN THE HIGH COURT AT CALCUTTA
ORIGINAL CIVIL JURISDICTION
COMMERCIAL DIVISION**

The Hon'ble Justice Sabyasachi Bhattacharyya

**AP-COM/344/2024
[Old Case No. AP/455/2023]**

**M/s TRS Lift and Shift Services Pvt. Ltd.
Vs
Reliance General Insurance Company Limited**

For the petitioner : Mr. Rudraman Bhattachariya, Adv.
Mr. Shaunak Ghosh, Adv.
Mr. Rajib Mullick, Adv.
Ms. A. Saha, Adv.

For the respondent : Ms. Aasia Hasan, Adv.
Mr. Pathik Choudhury, Adv.

Hearing concluded on : 26.06.2024

Judgment on : 04.07.2024

Sabyasachi Bhattacharyya, J:-

1. The present application under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as, "the 1996 Act") arises out of an insurance contract between the parties. The petitioner purchased a crane, regarding which an insurance policy was issued by the respondent company on July 30, 2019.
2. On August 16, 2019, the said vehicle/crane was destroyed completely by fire. The petitioner filed an insurance claim on November 7, 2019.
3. On December 31, 2019, the surveyor appointed by the insurance company issued a final report, coming to a conclusion that the loss suffered was to the tune of Rs. 42,71,000/-. On December 30, 2022,

an addendum report was authored by the insurance surveyor, observing that the loss suffered amounted to Rs. 61,10,750/-.

4. On January 30, 2021, the respondent/insurance company allegedly admitted in a written communication the claim of the petitioner partially, upon which the petitioner invoked the arbitration clause in the agreement between the parties regarding the dispute in respect of the quantum payable by the insurer, by issuance of a notice under Section 21 of the 1996 Act on November 8, 2022, suggesting names of two alternative arbitrators. Subsequently another letter was issued on December 19, 2022 by the petitioner, altering one of the names of the proposed arbitrators, who had not agreed to the nomination.
5. On February 15, 2023, the claim of the petitioner was repudiated in its entirety by the respondent.
6. The learned counsel for the petitioner claims that although repudiation of the entire claim is otherwise not amenable to arbitration under the relevant clause, in the present case, there were repeated reports by the surveyor appointed by the insurance company itself, admitting partially the claim of the petitioner. The respondent had even communicated such partial admission by its letter dated January 30, 2021. The liability to pay was never denied by the insurance company-respondent at any point of time and the bone of contention was restricted only to the quantum of claim payable.
7. After the arbitration clause was invoked under Section 21 on November 8, 2022 and several correspondence having occurred thereafter, the respondent, merely to dislodge the reference to

arbitration, repudiated the entire claim. It is argued that such *post facto* repudiation would not deter the matter from being referred to arbitration.

8. Learned counsel submits that as per the Insurance Regulatory and Development Authority of India (Protection of Policyholders' Interests) Regulations, 2017, notified on June 22, 2017, the insurer has to reject a claim under the policy within a period of 30 days from the receipt of the final survey report and/or additional information/documents of the additional survey report, as the case may be. In the present case, the repudiation came much thereafter. The final survey report was published on December 13, 2019 with an addendum dated December 30, 2020 whereas the purported repudiation came on February 15, 2023, only in response to the notice under Section 21.
9. It is argued that, upon receipt of the Section 21 notice by the respondent on November 11, 2022, the arbitral proceeding had already commenced. Hence, once a notice was received, the arbitration is deemed to have commenced and cannot be resiled from. In support of such contention, learned counsel appearing for the petitioner cites *Milkfood Ltd Vs. GMC Ice Cream (P) Ltd* reported at (2004) 7 SCC 288.
10. The decisions cited by the respondent, it is argued, are on the issue of non-arbitrability of total repudiation of claim. In the present case, however, the respondent had admitted partially the claim of the petitioner. Learned counsel contends that in the case of *Vidya Drolia and Others Vs. Durga Trading Corporation* reported at (2021) 2 SCC 1,

the Supreme Court held that where the matter requires examination of oral and documentary evidence, it has to be necessarily referred to arbitration for full trial. The question of whether there was repudiation or not can thus be decided only by the arbitral tribunal.

11. Learned counsel for the respondent/insurance company controverts such allegation and argues that there is no quantum dispute in the present case as is evident from the letter dated February 15, 2023, which is a total repudiation. Once the claim is repudiated in its entirety, the arbitration clause, which only contemplates quantum disputes, cannot be invoked.
12. Learned counsel cites the final report of the surveyor according to which the fire broke out due to engine failure, which is not covered by the insurance policy.
13. Previously a complaint was filed before the State Consumer Disputes Redressal Commission, West Bengal by the petitioner bearing Complaint Case No. CC/1/2022, which was dismissed on July 26, 2022.
14. Learned counsel for the respondent/insurer cites *Himani Alloys limited Vs. Tata Steel Limited reported at (2011) 15 SCC 273* for the proposition that an admission should be categorical. Unless the admission is clear, unambiguous and unconditional, the discretion of the court should not be exercised to deny the valuable right of a defendant to contest the claim.
15. Citing *Vulcan Insurance Co. Ltd. v. Maharaj Singh, reported at (1976) 1 SCC 943*, it is argued that if any false declaration is made or

fraudulent means are used by the insured or if the loss or damage be occasioned by the willful act or with the connivance of the insured, the claim may be rejected and all benefits under the policy shall be forfeited.

16. Next placing reliance on *M/s Jumbo Bags Ltd. Vs. M/s The New India Assurance Co. Ltd.*, reported at 2016-2-L.W.769, learned counsel argues that the Madras High Court held therein that only the dispute as to quantum payable under the insurance policy can be the subject-matter of arbitration.
17. Citing *Oriental Insurance Company Limited Vs. Naveram Power Steel Private Ltd* reported at (2018) 6 SCC 534, it is argued that clauses in insurance policies must be construed strictly. The duty of the court is to interpret the words in which the contract is expressed by the parties but it is not for the court to make out a new contract, howsoever reasonable.
18. Lastly, the judgment of *United India Insurance Co. Ltd. v. Hyundai Engg. & Construction Co. Ltd.* reported at (2018) 17 SCC 607 is cited in support of the same proposition.
19. The question which arises broadly in the present case is whether the dispute raised by the petitioner falls within the purview of the arbitration clause in the insurance contract between the parties. Two cardinal questions need to be answered to decide such question:
 - i) Whether the liability has been admitted by the insurer at all; and

ii) Whether repudiation of the claim in its entirety after a notice is issued under Section 21 of the 1996 Act can preclude the matter from being referred to arbitration.

- 20.** To answer the first question, we are to look into the documents annexed to the parties.
- 21.** The first relevant document after the insurance claim was made by the petitioner on November 7, 2019 is the so-called “Final Report” of the surveyor appointed by the respondent-insurer dated December 31, 2019. In the said document, the loss suffered by the petitioner was quantified at Rs. 42,71,000/- .
- 22.** An addendum report filed by the insurance surveyor on December 30, 2022, almost one year later, shows that the loss was calculated at Rs. 61,10,750/-.
- 23.** All the above documents are annexed to the affidavit-in-opposition of the insurance company itself.
- 24.** In a communication annexed at page 49 of the writ petition, dated January 30, 2021, it is seen that the claim of the petitioner was partially admitted by the insurance company.
- 25.** Thus, there are at least three documents on record which show that the insurance company quantified the loss suffered by the petitioner, albeit differently at different points of time.
- 26.** The arbitration clause was invoked by the issuance of a notice under Section 21 of the 1996 Act on November 8, 2022. The said notice was received by the respondent on November 11, 2022. Still, the respondent did not make any whisper that it was repudiating the

entire claim of the petitioner. Hence, at the juncture when the arbitration clause was invoked by issuance of a notice under Section 21 and the same was received by the respondent, there was no whisper of repudiation of the entire claim; rather, partial admission of the claim of the petitioner was apparently made by the respondent by its letter dated January 30, 2021, which was backed up by a final report and an addendum report.

- 27.** Section 21 of the 1996 Act provides that unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which the request of that dispute to be referred to arbitration is received by the respondent.
- 28.** In the present case, there is no agreement otherwise between the parties and, such, the arbitral proceedings commenced on and from November 11, 2022, when the petitioner's notice under Section 21 of the 1996 Act was received by the respondent/insurance company.
- 29.** Once the arbitral proceeding commences, it does not lie in the mouth of the respondent to say that the commencement of the proceedings was itself bad, since at the juncture when it commenced there was no repudiation of the entire claim but only a dispute as to the quantum payable, which squarely comes within the purview of the arbitration clause.
- 30.** Apart from the fact that the repudiation was issued long after the stipulated period on thirty (30) days as per Clause 15, Item 8 of the Insurance Regulatory And Development Authority of India (Protection of policy holders' interest) Regulations 2017, the fact remains that

such repudiation appears to be an afterthought, after the respondent having already admitted the liability to meet the claim in principle, although differing at various points of time as to the quantum payable.

- 31.** Thus, as on the date of invocation of the arbitration clause, the liability of payment of insurance claim was *prima facie* admitted in principle. The only dispute was relating to quantum.
- 32.** Hence, the first question is answered in the affirmative. The insurer appears to have admitted the liability to pay the claim of the petitioner, although spinning out different figures of the sum payable at various points of time.
- 33.** Insofar as the second issue is concerned, although there is no specific bar in the insurance company repudiating the entire claim even subsequent to the commencement of arbitration, it is arguable as to whether such repudiation can at all be entertained, in view of the said stand of the respondent being contrary to its previous admissions. I must hasten to mention here whether there was any clear-cut admission of the liability to pay on the part of the respondent, to be fair, is arguable and cannot be conclusively decided by this Court under Section 11 of the 1996 Act, since such exercise is by its very nature administrative and not adjudicatory.
- 34.** However, for the limited purpose of ascertaining as to whether the matter needs to be referred to arbitration, the materials on record are sufficient to indicate that the repudiation of the claim came only after the commencement of arbitral proceedings by receipt of the notice

under Section 21 of the 1996 Act by the respondent and the dispute pertains to the quantum of the insurance claim payable, which comes fully under the purview of the arbitration clause.

35. Repudiation of the liability to pay in its entirety post-commencement of arbitration does not vitiate the reference itself and can at best furnish food for thought for the arbitral tribunal if the issue is raised before it. The issues as to whether there was an admission of liability on the part of the insurer and, if so, whether subsequent repudiation post-invocation of the arbitration clause can efface the same are to be dealt with on facts and law by the arbitrator upon assessment of evidence adduced by the parties.
36. The decisions cited by the respondent primarily pertains to the non-arbitrability of disputes relating to insurance contracts other than disputes relating to the quantum. However, those are not germane at this stage, since it is for the arbitrator to decide as to whether the insurance company admitted in principle the liability to pay and the dispute only pertains to quantum or whether the insurer is permitted to repudiate the claim taking a contrary stand subsequently after commencement of the arbitration proceeding.
37. As to the respondent's reliance on *Himani Alloys limited (supra)*, the same was rendered in the context of Order XII Rule 12 of the Code of Civil Procedure and for such purpose it was held that an admission should be categorical. In the present case, we are not dealing with a judgment on admission but merely considering whether there is *prima facie* admission of liability to pay on the part of the insurance

company, sufficient to invoke the arbitration clause. Hence, the standard applicable to Order XII Rule 12 is not attracted in the present case. The very arguability of the issue as to whether there was any such admission of liability renders the dispute fit to be referred to arbitration, leaving it for the arbitrator to decide on merits upon consideration of the relevant materials and evidence.

- 38.** There is no doubt that, as laid down in *Milkfood Ltd. (supra)*, the arbitral proceedings commence once notice under Section 29 is received.
- 39.** Another facet of the matter which is required to be considered is whether this court, under Section 11 of the 1996 Act, is the appropriate authority to decide on merits as to the question of whether the dispute pertains only to quantum or a repudiation of the entire claim, deciding in the process the ancillary issues such as whether there was any unequivocal admission of liability to pay on the part of the respondent and whether post facto repudiation by the insurance company, contrary to its previous stand, that too after commencement of the arbitral proceedings, is permissible in law.
- 40.** Section 16 of the 1996 Act recognizes the *kompetenz-kompetenz* principle. The arbitral tribunal is clothed with the jurisdiction under the said provision to rule on its own jurisdiction on all issues, including objections with respect to the existence or validity of the arbitration agreement but not limited thereto.

41. Hence, it is best left to the arbitrator, as and when appointed, to decide on such issues instead of the court, sitting in administrative jurisdiction under Section 11, to enter into such dispute at all.
42. Section 5 of the 1996 Act, in no uncertain terms, provides that notwithstanding anything contained in any other law for the time being in force, in matters governed by Part I, no judicial authority shall intervene except where so provided in the said Part.
43. Seen in such context, there is no doubt that the matters in issue are best left to be tried on evidence by the arbitrator. Suffice to say that at this juncture, there is sufficient *prima facie* material to indicate that the dispute related all along to the quantum of claim and the liability of the insurance company to pay the claim was apparently admitted in principle by the insurance company by its written communication and dated January 30, 2021 and the preceding final report dated December 31, 2019 and addendum report dated December 30, 2022.
44. Hence, the dispute is required to be referred to arbitration, *prima facie* coming within the arbitration clause of the insurance contract.
45. In such view of the matter, AP-COM/344/2024 [Old Case No. AP/455/2023] is allowed on contest, thereby appointing Mr. Siddhartha Banerjee, (Mobile No: 9830298922), a member of the Bar Association, as the sole arbitrator to resolve the disputes between the parties, subject to obtaining a disclosure from the said learned Arbitrator under Section 12 of the Arbitration and Conciliation Act, 1996 upon both sides having consented to the appointment of a sole arbitrator. The learned Arbitrator shall fix his own remuneration in

consonance with the provisions of the 1996 Act, read with its Schedules.

- 46.** It is made clear that the disputes between the parties have not been entered into on merits by this Court and it will be open to the learned Arbitrator to decide on all issues, including his own jurisdiction, without being influenced in any manner by any of the observations made herein.
- 47.** There will be no order as to costs.
- 48.** Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)