rajshree

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL ARBITRATION PETITION (L) NO.32981 OF 2023

C.S. Construction	]	..	Petitioner
vs.			
New India Assurance Co. Ltd.	]	..	Respondent

Mr.Aseem Naphade a/w Nikhil Mehta and Rahul Mehta i/b KMC Legal for the Petitioner.
Mr.Vineet Sawant a/w Bomi Patel, Catakam Viswesh Kumar and Adyasha Das i/b Tuli & Co. for the Respondent.

CORAM : BHARATI DANGRE, J

DATE : 14th AUGUST, 2024.

P.C. :

1] The present Petition filed under Section 37 of the Arbitration and Conciliation Act, 1996, raise a challenge to the order dated 16.10.2023 passed by the Arbitral Tribunal under Section 19 of the Arbitration and Conciliation Act, 1996, thereby, upholding the objection raised by the Respondent that the dispute or difference regarding liability in respect of the alleged loss and damage caused to the Plant and Machinery is non-arbitrable.

The impugned order is passed by the Arbitral Tribunal, nominated to decide the dispute between the claimant M/s. C.S.Construction and New India Assurance Company Limited/the Respondent, arising out of All Risk Policy(ARP), as the Respondent-New India Assurance, denied the liability to pay for the alleged loss and damages caused to the Plant and Machinery.

2] I have heard the learned counsel Mr.Aseem Naphade i/b KMC Legal Venture, for the Petitioner/original claimant, whereas, the Respondent is represented by Mr.Vineet Sawant i/b Tuli & Co.

The brief facts giving rise to the present Petition are culled out in brief as below :

(a) The Claimant availed an insurance policy from the Respondent, titled as "Contractor's All Risks Insurance Policy", covering period from 05.08.2020 to 04.02.2022.

The insurance was taken for an amount of Rs.38,81,86,419/-, for which a sum of Rs.9,95, 490/- was paid as premium. As per the policy, the location of the contract site was Bhandara District, Mohadi Taluka, Maharashtra 441909.

Clause 7 of the Policy contained the arbitration clause.

(b) In or around August, 2020, the Claimant's contract site was damaged due to flooding and heavy rainfall for 3-4 days. The Claimant intimated the Respondent/Insurance Company about this damage.

(c) On 22.10.2020, an email was addressed by the Claimant to the Respondent lodging its claim which included the claim towards Plant and Machinery. Pursuant to the claim, the Surveyor appointed by the Respondent, Ashok & Co., Surveyors and Loss Assessors, submitted the report, setting out the estimated loss and this Report quantified the Claimant's loss towards Plant and Machinery.

(d) On 08.01.2021 the second Surveyor Vijaykumar Saokar vide his email addressed to the Claimant, instructed to delete the claim towards Plant and Machinery since according to the Surveyor , the Plant and Machinery was not covered in the Insurance Policy.

(e) This prompted the Claimant to revise its claim and on 09.01.2021 the Claim submitted to the Respondent towards Plant and Machinery was deleted.

However, once again on 07.03.2022, after the lapse of more than one year the Claimant lodged its claim with the Respondent which included the claim towards Plant and Machinery.

(f) On 31.03.2022, the Respondent settled the claim of the Claimant to the tune of Rs.2,05,41,895/- and it is to be noted that it excluded the claim of Plant and Machinery.

3] On 21.04.2022, the Claimant addressed a notice to the Respondent invoking arbitration, though the Claimant acknowledged the receipt of Rs.2,05,41,895/- under protest and projected that its total claim was in the tune of Rs.6,87,51,396.94, which included the claim towards Plant and Machinery for Rs.51,57,180.54.

On 18.05.2022, the Respondent, denied the claim raised for differential amount to the tune of Rs.4,82,09,501.94 alongwith interest, by stating that it was a Non-Standard claim, where wet risk excess is applicable and informed that the subject claim was settled by recovering difference of premium for 3 years.

The response to the Arbitration notice specifically asserted as under :

> "We would like to inform you that , based on actual spot survey and loss assessment done by the independent surveyor in your presence, the company, after legal deductions has settled your claim under "On Contractors All Risk Insurance Policy" for full and final amount of Rs.2,05,41,895/- and the same has been transferred to the account which was also acknowledged in the notice."

4] It is the case of the Claimant that at no point of time, the

Respondent repudiated the Claim of the Claimant towards Plant and Machinery, which was expressly covered in the Claimant's notice dated 21.04.2022.

Since the dispute arose and a consensus was reached for referring it to the Arbitral Tribunal, the Claimant filed its claim before the Tribunal for an Award in the sum of Rs.4,82,09,502/- which included a claim on the amount of Rs.1,30,13,531/- towards loss and damages caused to the Plant and Machinery with interest at the rate of 24% p.a. with effect from the date of invocation of arbitration till its realisation.

5] The Respondent filed its statement of defence and raised two objection viz. A) Clause 7 regarding arbitration under the Contract, on its strict interpretation covers the disputes as to quantum to be paid under the policy, only if liability is accepted and if the Insurance Company has disputed or not accepted the liability under or in respect of the policy, such dispute or difference in respect of liability is not arbitrable and B) Neither the proposal at Annexur-1 to the Application claims the insurance cover for the Plant and Machinery, nor the policy at Exhibit C-2 covers such risk.

6] On 21.10.2022, the New India Assurance Co. Ltd. filed an Application under Section 16 of the Arbitration and Conciliation Act, 1996, claiming that the Tribunal do not have jurisdiction to entertain the Claimant's claim towards Plant and Machinery ("P&M") and hence the claim of Rs.1,30,13,531/- raised in the statement of claim, it falls outside the scope of the Policy and, therefore, cannot be subject matter of adjudication in the arbitration proceedings.

Since the Statement of Claim included the claim for loss to the Plant and Machinery, it was pleaded that the Tribunal lack jurisdiction to adjudicate upon the same and, therefore, the Arbitral Tribunal was requested to pass a direction/order/award declaring that it had no jurisdiction to entertain , hear or adjudicate the Claimant's claim on Plant and Machinery for Rs.1,30,13,531/- and any interest thereon since the same is excluded from the Policy.

7] The Claimant responded to the said Application by stating that the Contractors of Risk Policy covers contract works, Plant and Machinery and third party liability under one head; 'CAR Policy'.

It was also pleaded that the quantum dispute, which is the subject matter of the arbitration proceedings comprised of a contract work, Plant and machinery and third party liability and it was covered under the One Dispute Clause i.e. Clause 7 and since Policy did contemplate segregating of the claims under the contract work, Plant and Machinery and third party liability, the objection was unsustainable.

It was specifically pleaded on behalf of the Claimant that while making payment of amount of Rs.2,05,41,895/-, the Respondents had never repudiated the claim towards Plant and Machinery under the CAR Policy, and it was so, since the Policy operated as a whole.

8] Since the Respondent, under Section 16 of the Arbitration and Conciliation Act, raised a jurisdictional plea that the Claimant's claim towards loss of Plant and Machinery was outside scope of the arbitration clause, the Tribunal considered the said issue in the wake of following decisions placed before it :-

(i) (1976) 1 SCC 943 The Vulcan Insurance Co. Ltd. vs. Maharaj Singh & Another.
(ii) (2014) 9 SCC 246 Harsha Constructions vs. Union of India & Ors.
(iii) (2018) 6 SCC 534 Oriental Insurance Company Limited vs.

Narbheram Power and Steel Pvt. Ltd.

9] Dealing with the argument of Mr. Naphade, the Arbitral Tribunal observed that repudiation of the claim would not amount to raising of dispute as to the amount of any loss or damage alleged to have been suffered by the Respondent.

The objection of Mr. Naphade came to be considered in the wake of the law laid down by the Apex Court in the case of Vulcan Insurance Co. Ltd.(*supra*) , where the Insurance Company repudiated the claim under Clause 13 of the Policy for the loss and damage caused due to fire, which broke out in the factory of Respondent No.1 and the Court formulated a question as to whether in view of repudiation of liability by the Appellant under Clause 13 of the Insurance Policy, a dispute was raised, which could be referred to arbitration.

Reproducing the observation of the Apex Court in Para 13, 18 and 19, the Tribunal recorded that repudiation of the claim could not amount to raising of a dispute as to the amount of any loss or damage alleged to have been suffered.

Further by relying upon the observations of the Apex Court in case of Oriental Insurance Company (*supra*) where Clause 13 of the Policy fell for consideration, by reproducing Para 23 to 25 of the said decision, the Tribunal derived a conclusion that the first objection raised on behalf of the Claimant is answered through the authoritative pronouncement of the two decisions and whether it is the case of repudiation of contract or denial of liability, the effect is the same that the dispute becomes non arbitrable.

The contention of Mr. Naphade that there is a difference between the case of repudiation of the contract and denial of liability was specifically rejected as it was noted that the parties had unequivocally agreed that the dispute or difference arising out of denial or non acceptance of liability, shall not be arbitrable.

Holding that it was not open to the Arbitrator to decide the issues which are not arbitrable and even if an Award is passed it would be bad in law, the first objection that since the Insurance company did not repudiate the claim, and therefore, it become arbitrable, was rejected.

10] Answering the second issue as to whether, as a matter of fact the the insurance policy covered the claim in respect of Plant and Machinery, the Tribunal observed that, it is a matter which will be appreciated on the evidence being laid, but specifically by applying the doctrine of “useless formality theory” i.e. wasting the valuable time of the Tribunal, a finding is recorded that, if the dispute itself is non arbitrable, even if it is established that in fact the claim of loss and damage caused to the Plant and Machinery is covered, it cannot be entertained by the Tribunal and instead the Tribunal can concentrate on the real issues.

In wake of this observation, the Tribunal passed the following order :.

> “Conclusion :
> In view of the aforesaid position, the objection raised by the respondent that the dispute or difference regarding liability in respect of the alleged loss and damage caused to the Plant and Machinery becomes non-arbitrable, is upheld and accordingly, an interim award is passed to reject the claim to the extent it relates to the alleged loss and damage caused to the Plant and Machinery on 28-8-2020 due to heavy rains and flooding. Needless to mention that we have not gone into the merits of this issue and claim and it shall be open for the claimant to adopt any other forum to claim such relief, as is available in law. For rest of the claims the arbitration proceedings shall continue.”

11] Mr. Naphade has placed before me the notes of evidence filed on behalf of the Claimant and also the cross-examination of this witness. Similarly, the notes of evidence of Vijaykumar Saokar i.e. RW 1 is also placed on record, but in my opinion, it is not necessary to refer to the said evidence at this stage, as the Tribunal has merely decided a jurisdictional issue, holding that the claim as regards the alleged loss and damage caused to the Plant and Machinery is non arbitrable and the interim Award is passed to reject the claim to the extent it relates to the claim of loss and damage caused to the Plant and Machinery, due to heavy rains and flooding.

The Tribunal has clarified that it had not gone into the merits of the issue and it shall be open for the Claimant to adopt any other forum for such relief as available in law and for the rest of the claims the arbitration proceedings shall continue.

12] As regards the objection of Mr. Naphade that for ouster of jurisdiction of Arbitral Tribunal based on Clause 7 of the Insurance Policy, two requisites must be satisfied viz. i] the Respondent has to deny its liability and ii] the Respondent has to resists the Claimant's attempt to refer the dispute to arbitration, in case of Vulcan Insurance Co. Ltd. (*supra*) , the Apex Court has held that if the rejection of the claim made by the Insurer is on the ground that he had suffered no loss as a result of the fire or the amount of loss was not to the extent claimed by him , then and then only, a difference could be said to have arisen as to the amount of any loss or damage, within the meaning of Clause 18. It was further held that if the company repudiated its liability to pay any amount of loss or damage, it would become non arbitrable.

Mere 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, is what the Apex Court has observed.

13] Only such difference or dispute shall be referable to arbitration, if the company has disputed or not accepted liability under or in respect of the policy and in a case of repudiation of contract or denial of liability, the disputes becomes non arbitrable and as the position of law has been declared in Vulcan Insurance Co. Ltd. (*supra*). The repudiation of claim could not have amounted to raising of a dispute and the argument that the Respondent has not repudiated the claim towards Plant and Machinery, in no way is suggestive that it was admitted.

In response to the notice invoking arbitration, the Insurance Company clearly denied the claim for differential amount, as it was a non standard claim.

14] It is the trite position of law that while dealing with the Contract of Insurance, since such Contract is entered into on the basis of commercial understanding, while interpreting any clause in such a contract, the Court shall give effect to the words in the Contract and it shall not create or attempt to create a new Contract and the insurance policy has to be construed having reference only to the stipulations contained therein and no far fetch meaning shall be accorded to the words used therein.

In the wake of aforesaid settled position of law and particularly when the claimant himself was satisfied that the policys did not cover claim towards Plant and Machinery, it deleted the claim on 09.01.2021, but as an afterthought, after more than one year, once again pressed it into service, which has been rightly objected to by the Insurance Company, on the ground that it is not arbitrable and in the Policy, in relation to the Contract against Plant and Machinery, the column has been left blank, thereby, indicating that the same was never covered under the Policy.

The final Surveyor appointed for assessing the loss of Claimant, informed the Claimant that its claim towards Plant and Machinery is not covered and the Claimant agreed to delete the same from the claim and sent the claim with deduction.

15] In fact, on receipt of the sum of Rs.2,05,41,895/- the Claimant executed Discharge Voucher though under protest, but then chose to invoke arbitration under Clause '7' of the general conditions of the policy and the Respondent only denied its liability towards claim of Plant and Machinery and since there is denial of liability on the ground that it is not covered by the Policy, the Arbitral Tribunal has rightly entertained the Application filed under Section 16 of the Arbitration and Conciliation Act, by passing the impugned order.

Upholding the same, the Commercial Arbitration Petition is dismissed.

[BHARATI DANGRE, J.]