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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

(IN ITS COMMERCIAL DIVISION)

COMMERCIAL ARBITRATION APPLICATION NO.130 OF 2024

S D Fine-Chem Limited,
a public company incorporated under the provisions of the Companies Act, 1956 and having its registered office at 315-316, T.V. Industrial Estate, 3rd Floor, Worli, Mumbai-400 030 **...Applicant**

Versus

New India Assurance Company Limited,
a public listed company incorporated under the provisions of the Indian Companies Act, 1913 and having its regional office at Mumbai Regional Office II, 2nd Floor, Jeevan Seva Building, S.V. Road, Santacruz West, Mumbai 400 054 **...Respondent-Insurance Company**

Mr. Gopal Machiraju*, with Ms. Krusha Maheshwari, i/b Mr. Sriram Sridharan, for the Applicant.*
Mr. Bomi Patel*, with Mr. Sarthak Behera, Ms. Brinda Singh, Ms. Nimisha Shukla i/b Tuli & Co, for the Respondent-Insurance Company.*

CORAM : Dr. Neela Gokhale, J.
RESERVED ON: 14th December 2024
PRONOUNCED ON: 20th December 2024

JUDGMENT:-

1) The short question that arises for determination pertains to the arbitrability of the dispute between the parties.

2) The Applicant seeks appointment of a Sole Arbitrator or a panel of three Arbitrators for the adjudication of the disputes that have arisen between the parties out of the Standard Fire & Special Perils Policy ('Policy') dated 21st September 2015.

The Factual Matrix:

3) The Applicant is a Public Limited Company registered under the Companies Act, 1956 engaged in the business of manufacturing lab and commodity chemicals. The Respondent is the Insurance Company.

3.1) The Applicant purchased an insurance policy, the total insured value of which was Rs.55,75,00,000/- (Rupees Fifty-five Crores and Seventy-five Lakhs only). The Applicant paid one time premium of Rs.4,31,788/- (Rupees Four Lakhs Thirty-one Thousand Seven Hundred & Eighty-eight only).

3.2) In September 2016, there were heavy rainfalls and storms in Tarapur and the Applicant's plant was damaged. The Applicant informed its insurance broker and requested for appointment of a surveyor to visit the plant. One M/s. B.G. Bangard & Company was appointed as a surveyor. The Surveyor visited the factory premises and by its letter dated 10th October 2016 submitted a preliminary survey report to the Respondent-Insurance Company.

3.3) Correspondences were exchanged back and forth between the surveyor and the Applicant. The surveyor sought certain documents from the Applicant and an estimate of loss suffered. It was alleged in one of the letters of the surveyor that the Applicant had caused delay in informing the Insurance Company regarding the estimate of the loss. The Applicant by letter dated 9th November 2016 had conveyed the details as required by the surveyor. By letter dated 24th December 2016, the surveyor gave final opportunity to the Applicant to comply with certain requirements failing which the file shall be closed as 'No Claim' on the ground that the Applicant was not interested in pursuing the same. According to the Applicant, all necessary details were provided to the surveyor.

3.4) The Applicant also sent several reminders to the Respondent-Insurance Company for finalization of its claim. However, the Insurance Company continued sending e-mails to the Applicant seeking further details.

3.5) By its letter dated 2nd July 2018, the Respondent-Insurance Company repudiated the claim on the ground that the surveyor had reported a delay on the part of the Applicant in intimating the insurers about the loss which was in breach of Clause 6(i) of the General Conditions of the Policy.

3.6) The Applicant disputed the opinion of the surveyor and requested the Respondent-Insurance Company to review the surveyor's report in view of the clarification given by the Applicant in its letter dated 16th July 2018.

3.7) The Respondent-Insurance Company appointed Mr. J.H. Parikh as 2nd surveyor and continued the assessment of the Applicant's claim. During the period between 2018-2023, there were continuous correspondences between the parties in respect of the claim and finally, by an e-mail dated 14th June 2023, the 2nd surveyor conveyed the assessment of the loss and confirmed the admissible claim amount to be Rs.1,09,43,852/- (Rupees One Crore Nine Lakhs Forty-Three Thousand Eight Hundred & Fifty-two only). The Applicant communicated its approval to the calculation of the claim amount by e-mail dated 15th June 2023.

3.8) By an e-mail dated 28th November 2023, the Respondent-Insurance Company communicated to the Applicant that their claim was processed and finalized. Despite the e-mail confirmation, the claim was not settled by the Respondent-Insurance Company and hence, by notice dated 25th January 2024, the Applicant invoked the Arbitration Clause in the Policy. The Respondent-Insurance Company did not reply and hence, the present Arbitration Application.

4) Mr. Gopal Machiraju, learned counsel appeared for the Applicant and Mr. Bomi Patel, learned counsel represented the Respondent-Insurance Company. Heard both the counsel and have perused the documents on record with their assistance as well as the written submissions submitted by both the counsel.

Submissions of Mr. Machiraju for the Applicant:

5) He drew my attention to the Arbitration Clause in the Policy, which reads as thus:

> *"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 provision 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 condition precedent to any right of action or suit this policy that the award by such arbitrator/arbitrators of the amount of the loss or damage shall be first obtained."

5.1) The main thrust of Mr. Machiraju's submission was that since the Respondent-Insurance Company had processed and finalized the Applicant's claim, the dispute was perfectly arbitrable, and Second Part of Clause 13 of the Policy was not applicable. He brought to my attention the e-mail dated 28th November 2023 sent by the Insurance Company to the Applicant, which reads as thus:

"Date: 11/28/2023 05:10 PM

Dear customer,

> *Claim No 14060011160190000024*
>
> *Date of accident 21/09/2016*
>
> *We are happy to inform you that your claim has been processed and finalized by us."*

He further submitted that no such e-mail was sent by the Respondent-Insurance Company after the 1st surveyor rejected the Applicant's claim on the ground of delay. He pointed to the 2nd surveyor's report calculating the admissible claim to be Rs.1,09,43,852/-, which was never denied by the Respondent-Insurance Company. He further stated that not once after the recommendation of the 2nd surveyor was received, did the Respondent-Insurance Company ever repudiate the claim and in fact by e-mail dated 28th November 2023 conveyed that the claim was processed and finalized.

5.2) Mr. Machiraju also pointed to the Insurance Regulatory and Development Authority of India (Protection of Policyholders' Interests) Regulations, 2017 ('IRDA Regulations'). Clause 15(8) of the IRDA Regulations required that in case the insurer decided to reject a claim, it shall do so within a period of 30 days from the receipt of the final survey report. Clause 15(10) of the IRDA Regulations provides that if the claim is not settled within 30 days, the insurer is liable to pay interest at the rate of 2% above the bank rate from the date of receipt of last relevant document from the claimant by the insurer till the date of actual payment. Mr. Machiraju stated that the 2nd surveyor's report was issued on 14th June 2023 and the communication in respect of the successful finalization of the claim was issued on 28th November 2023. Thus, he contends that there was no rejection within the prescribed time and in fact, the claim was admitted. He thus, submits that the claim itself was not disputed by the Respondent-Insurance Company. The dispute, if at all, was related only to the quantum of the claim making the same arbitrable. He thus urged the Court to appoint an Arbitral Tribunal to adjudicate upon the dispute.

5.3) He placed reliance upon the following decisions of the Supreme Court as well as the other High Courts:

i) *TRS Lift and Shift Services Pvt. Ltd. v. Reliance General Insurance Company Limited*[1]

ii) *Payu Payments Private Limited v. The New India Assurance Co Ltd.*[2]

iii) *Vidya Drolia v. Durga Trading Corpn.*[3]

iv) *SBI General Insurance Co. Ltd. v. Krish Spinning*[4]

Submissions of Mr. Bomi Patel for the Respondent:

6) At the very outset, Mr. Bomi submitted that the dispute was not arbitrable. The Respondent-Insurance Company had clearly repudiated the claim and hence, the Second Part of Clause 13 of the Policy would apply.

6.1) He submitted that the Applicant's reliance on the e-mail dated 28th November 2023 was misplaced since the said e-

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1 2024 SCC OnLine Cal 6424

2 2024 SCC OnLine Del 6777

3 (2021) 2 SCC 1

4 2024 SCC OnLine SC 1754

mail was automated. He also said that nowhere in the said e-mail had the Respondent-Insurance Company admitted the liability and hence cannot be construed as such. He also contended that because of the Applicant's delay in furnishing necessary documents and making required compliances, the 1st surveyor had rejected its claim. He further submits that the dispute between the parties being non-arbitrable, the Applicant is at liberty to pursue other remedies under civil law. He thus urged the Court to reject the Application. He placed reliance on the following decisions of the Supreme Court and the High Courts of Chennai and Mumbai:

i) *The Vulcan Insurance Co. Ltd. v. Maharaj Singh & Anr.*[5]

ii) M/s. Jumbo Bags Ltd. v. M/s. The New India Assurance Co. Ltd.[6]

iii) Oriental Insurance Company Limited v. Narbheram Power And Steel Private Limited[7]

iv) *M/s. Mallak Specialities Pvt Ltd v. The New India Assurance Co. Ltd.*[8]

Analysis:

7) It is settled law that Section 11 of the Arbitration and Conciliation Act, 1996 ('Act') is to give effect to the mutual intention of the parties to settle their disputes by arbitration in situations where the parties fail to appoint an arbitrator(s).

5 (1976) 1 SCC 943

6 (2016) 2 LW 769

7 (2018) 6 SCC 534

8 In CARAP No.65 of 2022 dtd. 30/11/2022.

Even in cases where the procedure to appoint an arbitrator as agreed upon by the parties fails, the Courts have been vested with the power to appoint arbitrators upon a request of a party, to resolve the deadlock between them.

8) In the case at hand, the deadlock itself is whether the dispute is 'arbitrable'. The First Part of Clause 13 of the Policy, containing the arbitration clause provides for arbitration in case a dispute arises as to the quantum to be paid under the Policy, qualifying that the liability to pay is otherwise admitted. The Second Part of the Clause clarifies that no dispute shall be referable to arbitration if liability under the Policy itself is not admitted. In this lies the dispute between the parties.

9) The Applicant contends that the claim is admitted while the Respondent-Insurance Company insists upon its repudiation. Being conscious that the scope of examination under Section 11(6-A) of the Act is confined to the existence of an arbitration agreement based on Section 7 of the Act, judicial scrutiny in the merits of the matter is narrow. To ascertain existence of an arbitration clause in the present matter, it is necessary to delve into the factual matrix. The Respondent-Insurance Company insists that the claim stands repudiated on the ground that *firstly,* there was a delay on the part of the Applicant in complying with certain requirements; *secondly*, the 1st surveyor clearly rejected the claim on the same ground of delay and breach of condition 6(i) of the General Conditions of Policy; *thirdly,* appointment of a 2nd surveyor *per se* does not amount to acceptance of the claim;

and *lastly*, the e-mail of 28th November 2023 being an automated e-mail cannot be regarded as acceptance of liability.

10) The Supreme Court in its decision in the cases of the *Vulcan Insurance Co. Ltd.* (*Supra*) and *Oriental Insurance Company Ltd. (Supra)* has undoubtedly held that the parties are bound by the terms and conditions agreed under the Policy and the arbitration clause contained in it. The subject matter in the said decisions were also related to the arbitrability of the dispute on the basis of the Second Part of the arbitration clause in the Policy. The Supreme Court held the language used in the Second Part to be absolutely categorical and unequivocal inasmuch as it stipulates that it is clearly agreed and understood that no difference or disputes shall be referable to arbitration if the company has disputed liability. In those cases, however, the Supreme Court overturned the impugned judgment in which the High Court concerned had held the disputes to be arbitrable on the ground that there was an incongruity between Part II and Part III of the arbitration clause. It was in this context that the Supreme Court had struck down the impugned decisions therein.

11) Similarly, the facts in the cases of *M/s. Mallak Specialities Pvt. Ltd.* (*Supra*) and *M/s. Jumbo Bags Ltd.* (*Supra*) are distinct from the facts in the present matter. In the case at hand, the e-mail dated 28th November 2023 clinches the issue in respect of admissibility of the claim. The contents of the e-mail clearly convey that the Applicant's claim was

processed and finalized. The explanation of the Respondent-Insurance Company that this e-mail was automated and hence, cannot be relied upon is unacceptable. The Respondent-Insurance Company is responsible for any communication emanating from its computer system and delivered successfully to the recipient. Moreover, in paragraph 60 of its counter-affidavit, the Respondent-Insurance Company has all but admitted the e-mail. Thus, *prima facie*, the debate regarding acceptance of liability no longer survives.

12) Mr. Machiraju's contention that there was no such e-mail originating from the Respondent-Insurance Company at the time of recommendation of rejection of claim by the 1st Surveyor is also justifiable. Moreover, the Respondent-Insurance Company agreed and proceeded to appoint the 2nd surveyor to re-assess the damage, which also reveals that the Respondent-Insurance Company had not accepted the 1st Surveyor's report. The belated claim of repudiation thus, is not credible.

13) Another submission of Mr. Machiraju relating to Clause 15(8) and Clause 15(10) of the IRDA Regulations that it is incumbent on the insurer to decide rejection of a claim within a period of 30 days, is also pertinent. In fact, Clause 15(10) of the IRDA Regulations further provides for payment of interest if the claim is not settled within 30 days. Thus, the IRDA Regulations themselves mandate decision of rejection of a claim within a specific time period. The Respondent-Insurance Company failed to decide upon a 'rejection' within the said

period and in fact, after a period of five months from the receipt of final survey report, e-mailed confirmation of finalization of the claim to the Applicant. This further strengthens the case of the Applicant that its claim was accepted by the Respondent-Insurance Company.

14) Paragraphs 35 to 38 of the decision in the *SBI General Insurance Co. Ltd.* (*Supra*) also deal with similar facts and the Supreme Court clearly held that the dispute being one of quantum and not of a liability falls within the ambit of conditional arbitration clause as contained in the insurance policy.

15) In *Vidya Drolia* (*Supra*), the Supreme Court in paragraph 154 of the decision dealt with the question of 'Who decides Arbitrability?'. It is reaffirmed by the Supreme Court that the scope of the judicial review and jurisdiction of the Court under Sections 8 and 11 of the Act is identical but extremely limited and restricted. The general rule and principle in view of the legislative mandate is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The Court has been conferred power of "Second Look" on aspects of non-arbitrability post the award in terms of Section 34 of the Act. The Supreme Court has further held that the Court may interfere at Section 8 or Section 11 stage when it is manifestly and *ex facie* certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The Court

by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; or when facts are contested. The *Vidya Drolia (Supra)* decision settles the law that this is not the stage for the Court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the arbitral tribunal but to affirm and uphold the integrity and efficacy of arbitration as an alternative dispute resolution mechanism.

16) Juxtaposed the facts in the present case with the legal position settled by the Supreme Court, the conduct of the Respondent-Insurance Company in *firstly* appointing a 2nd surveyor and accepting his report computing the admissible claim; *secondly*, issuing an e-mail conveying that the claim is processed and finalized; *thirdly*, failing to decide upon rejection of the claim within the limitation period stipulated by the IRDA Regulations and *lastly*, conveying repudiation of the claim belatedly and as an afterthought only in response to the present proceedings, raises sufficient and reasonable doubt as to the repudiation of the claim. The Respondent-Insurance Company disputes the e-mail admitting liability on an explanation that the e-mail was automated and did not intend to convey acceptance of claim. However, the issues regarding acknowledgment of its liability by the Respondent-Insurance Company by way of the controverted e-mail and other material on record must be addressed by the arbitral tribunal based on the facts, law and evidence presented by the parties. The Applicant has made out a *prima facie* case that

the dispute is arbitrable. There is no deadwood to be cut as referred to by the Supreme Court in *Vidya Drolia* (*Supra*).

17) In view of the foregoing discussion and the settled position of law, I deem it appropriate to pass the following order:

ORDER

1. Mr. Naushad Engineer, Senior Advocate is appointed as a Sole Arbitrator to enter reference and adjudicate the disputes between the parties out of the Standard Fire & Special Perils Policy ('Policy') dated 21st September 2015. The seat of the arbitration shall be Mumbai.

2. The learned Sole Arbitrator shall forward a statement of disclosure as per the requirement of Section 12(1) of Arbitration and Conciliation Act 1996 to the Prothonotary and Senior Master of this Court to be placed on record of this Application with a copy forwarded to both the parties.

3. At the first instance the parties shall appear before the learned Arbitrator within a period of ten days from the date of uploading of this order or on such date that may be fixed by the Sole Arbitrator.

4. All contentions of the parties on merits of the disputes are expressly left open.

5. The fees payable to the Arbitral Tribunal shall be in accordance with the Bombay High Court (Fee payable to the Arbitrator) Rules, 2018 which shall be borne by the parties in equal proportion.

6. The Application is disposed of in the above terms. There will be no order as to costs.

7. Office to forward a copy of this order to the learned Sole Arbitrator on the following address:

"Mr. Naushad Engineer, Senior Advocate,
Office No.1D/E Lentin Chambers,
Dalal Street, Fort,
Mumbai 400 001"
Mobile No. 98210 47087
Email ID: nrechambers@gmail.com

8. Needless to say, all contentions of the parties are left open to be advanced before and determined by the arbitral tribunal.

(Dr. Neela Gokhale, J)

SHAMBHAVI NILESH SHIVGAN

Digitally signed by SHAMBHAVI NILESH SHIVGAN
Date: 2024.12.20 16:08:19 +0530