



2024:DHC:841



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 05th February, 2024

+ ARB.P. 1362/2023

M/S ADITYA THERMOPACK PVT. LTD. Petitioner

Through: Mr. Manu Aggarwal & Ms. Ishita
Pandey, Advocates.

versus

THE ORIENTAL INSURANCE CO. LTD. Respondent

Through: Mr. Yashish Chandra & Mr. Aryan
Dev Pandey, Advocates.

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CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

1. The petitioner has approached this Court under Section 11 of the Arbitration and Conciliation Act, 1996 [“the Act”], for appointment of an arbitral tribunal to adjudicate disputes between the parties under an insurance policy entitled “Standard Fire & Special Perils Policy” dated 02.01.2019 [“the Policy”].

2. By way of the aforesaid Policy, the petitioner took out insurance with the respondent-company for various risks, including fire, in respect of its factory located in Greater Noida. The period of insurance was from 02.01.2019 to 01.01.2020.

3. The Policy document contains an arbitration clause (Clause 13 of General Conditions) which provides for arbitration of disputes as to the

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quantum payable under the Policy, by arbitration of a sole arbitrator mutually appointed by the parties, failing which by a panel of three arbitrators.

4. The relevant facts for the present purposes are that the petitioner raised a claim under the Policy on 26.03.2019, arising out of damage caused due to a fire, to its stocks, plant and machinery, office equipment, furniture, fittings and fixtures, building, etc. The claim was for approximately ₹22 crores.

5. The respondent approved an interim settlement in the sum of ₹2,38,31,512/- in respect of the plant and machinery claim. The petitioner signed a discharge voucher to this effect on 17.05.2022.

6. The claim was sought to be finally settled by the respondent in the sum of ₹7,35,13,868/-. The respondent claims that the petitioner issued another discharge voucher dated 15.11.2022 for the said final amount as well. The contents of the said communication are a matter of dispute, and are dealt with later in this judgment.

7. As the parties were not able to resolve the disputes, the petitioner invoked arbitration by its counsel's communication dated 09.08.2023. The respondent, by its counsel's communication dated 07.09.2023, resisted the petitioner's request *inter alia* on the ground that the claim had been finally settled. There was some further correspondence between the parties, but they were unable to arrive at a consensus, which has led to the present proceedings.

8. I have heard Mr. Manu Aggarwal, learned counsel for the petitioner, and Mr. Yashish Chandra, learned counsel for the respondent.

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9. Although Mr. Chandra raised a preliminary objection as to the territorial jurisdiction of this Court, he did not press the objection in view of the fact that the registered office of the respondent is admittedly within the jurisdiction of this Court.

10. The substantive objection pressed by Mr. Chandra relates to the “full and final settlement” of the claims between the parties. This is based upon the discharge vouchers issued by the petitioner on 17.05.2022 and 15.11.2022.

11. The discharge voucher dated 17.05.2022 reads as follows:-

“Received Rs.2,38,31,512/- on 17th of May 2022 From THE ORIENTAL INSURANCE COMPANY LIMITED, the sum of Rupees Two Crore Thirty Eight Lac Thirty One Thousand Five Hundred Twelve Only in full and final settlement of the loss and/or damage caused through the accident to Plant & Machinery insured under Policy No. 234000/11/2019/426 of the said company and accident which occurred on 26-03-2019. We give the discharge receipt to the Company in full and final settlement of all our claims only for Plant & Machinery present of future arising directly/indirectly in respect of the said accident.”

12. The discharge voucher dated 15.11.2022 is in the following terms:-

“Received _____ Day of _____ 200_____ From THE ORIENTAL INSURANCE COMPANY LIMITED, the sum of Rs.7,35,13,868 (In words: Rupees seven crore thirty five lakhs thirteen thousand eight hundred sixty eight only) under protest against our claim under Policy No. 234000/11/2019/426 of the said company and accident which occurred on or about 26.03.2019. I/We give the discharge receipt to the Company of said amount against our claim under protest¹.”

The second discharge voucher (dated 15.11.2022) is also accompanied by a letter of the same date, which reads as follows:-

¹ Emphasis supplied.



“Dear Sir,

This refers to your email dated 27.10.2022 conveying your approval of our claim only for an amount of Rs.7,35,13,868 as full and final settlement which could not be instantly replied by us due to some medical emergency of one of the family members.

*At the outset, we state that **we are not at all satisfied with the settlement made by you and hence we do not accept the amount offered by you as full & final settlement of our claim**². The surveyor appointed by you has not assessed the loss correctly and made unwarranted, unjustified & arbitrarily deductions while assessing our loss meagrely at Rs. 7,35,13,868.*

*As already, inordinate delay has been caused in processing & settlement of claim, we request you in the meantime, to make the payment of the approved amount less on account payment already made by you of Rs.2,38,31,512 for which, **we are herewith submitting the demanded signed discharge voucher under protest**³. We shall submit detailed justification in support of our claim in due course of time.*

Kindly process the payment as approved by you urgently to tide over the financial difficulties being faced by us.”

13. Mr. Chandra draws my attention to the judgments of the Supreme Court in *NTPC Limited v. SPML Infra Limited*⁴ and *United India Insurance Company Limited vs. Antique Art Exports Private Limited*⁵ to submit that once a contractual claim has been discharged by full and final settlement, there remain no arbitrable disputes for reference to an arbitrator.

14. Before dealing with the aforesaid judgments, it may be observed that the discharge voucher issued on 15.11.2022 – which is when the claim was, even upon the respondent’s showing, finally settled – expressly states that it is issued “under protest”. The accompanying

² Emphasis supplied.

³ Emphasis supplied.

⁴ (2023) 9 SCC 385.

⁵ (2019) 5 SCC 362.

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communication dated 15.11.2022 also makes it clear that the petitioner was not satisfied with the settlement and states that the amount offered has not been accepted as the full and final settlement of the petitioner's claim.

15. Mr. Chandra submits that, upon a holistic reading, the claims ought to be treated as finally settled, because the discharge voucher was indeed signed by the petitioner and the petitioner also gave its bank account details, into which the balance amount was credited by the respondent on 02.01.2023.

16. However, I am of the view that a holistic reading of the said document points to the contrary conclusion. As noted above, the petitioner's protest is in black and white. The respondent was on notice that the amount had not been accepted as full and final settlement. The amount was in fact transferred approximately six weeks later, despite these communications.

17. In light of these factual findings, I find that the petitioner has made out a case for reference to arbitration, even within the parameters laid down by the Supreme Court in the judgments cited by Mr. Chandra.

18. The judgment in *NTPC limited*⁶, in the context of a petition under Section 11 of the Act, cites the Court's earlier judgment in *Vidya Drolia v. Durga Trading Corpn.*⁷ and *BSNL v. Nortel Networks (India) (P) Ltd.*⁸, and holds as follows:-

⁶ Supra (note 4).

⁷ (2021) 2 SCC 1.

⁸ (2021) 5 SCC 738.

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“Eye of the needle

25. The abovereferred precedents crystallise the position of law that the **pre-referral jurisdiction of the Courts under Section 11(6) of the Act is very narrow and inheres two inquiries**⁹. The primary inquiry is about the existence and the validity of an arbitration agreement, which also includes an inquiry as to the parties to the agreement and the applicant's privity to the said agreement. These are matters which require a thorough examination by the Referral Court. The secondary inquiry that may arise at the reference stage itself is with respect to the non-arbitrability of the dispute.

26. **As a general rule and a principle, the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. As an exception to the rule, and rarely as a demurrer, the Referral Court may reject claims which are manifestly and ex facie non-arbitrable**¹⁰. Explaining this position, flowing from the principles laid down in Vidya Drolia, this Court in a subsequent decision in Nortel Networks held: (Nortel Networks case, SCC p. 764, para 45)

“45. ... 45.1. ... While exercising jurisdiction under Section 11 as the judicial forum, the Court may exercise the prima facie test to screen and knockdown ex facie meritless, frivolous, and dishonest litigation. Limited jurisdiction of the Courts would ensure expeditious and efficient disposal at the referral stage. At the referral stage, the Court can interfere “only” when it is “manifest” that the claims are ex facie time-barred and dead, or there is no subsisting dispute.”

27. **The standard of scrutiny to examine the non-arbitrability of a claim is only prima facie**¹¹. Referral Courts must not undertake a full review of the contested facts; they must only be confined to a primary first review and let facts speak for themselves. This also requires the Courts to examine whether the assertion on arbitrability is bona fide or not. **The prima facie scrutiny of the facts must lead to a clear conclusion that there is not even a vestige of doubt that the claim is non-arbitrable. On the other hand, even if there is the slightest doubt, the rule is to refer the dispute to arbitration**¹².

28. **The limited scrutiny, through the eye of the needle, is**

⁹ Emphasis supplied.

¹⁰ Emphasis supplied.

¹¹ Emphasis supplied.

¹² Emphasis supplied.



***necessary and compelling**¹³. It is intertwined with the duty of the Referral Court to protect the parties from being forced to arbitrate when the matter is demonstrably non-arbitrable. It has been termed as a legitimate interference by Courts to refuse reference in order to prevent wastage of public and private resources. Further, as noted in Vidya Drolia, if this duty within the limited compass is not exercised, and the Court becomes too reluctant to intervene, it may undermine the effectiveness of both, arbitration and the Court. Therefore, this Court or a High Court, as the case may be, while exercising jurisdiction under Section 11(6) of the Act, is not expected to act mechanically merely to deliver a purported dispute raised by an applicant at the doors of the chosen arbitrator, as explained in DLF Home Developers Ltd. v. Rajapura Homes (P) Ltd. [2021] 16 SCC 743, paras 22, 26].”*

Upon a consideration of the facts of the case, the Court held that the parties had finally settled their disputes and therefore reversed the decision of this Court to appoint an arbitral tribunal.

19. Similarly, in *United India Insurance Company Limited*¹⁴, the Supreme Court noted that the discharge voucher had been signed by the petitioner under Section 11 of the Act, without any demur or protest and the claim had been finally settled. In this judgment also, the Court noted that these are questions of fact, to be decided in the circumstances of each case.

20. In the fact of the present case, having regard particularly to the protest placed on record while issuing the second discharge voucher, it is not appropriate to reject the petitioner’s claim at this pre-reference stage by exercising the limited “*eye of the needle*” jurisdiction mandated by the Supreme Court. This is not a case where the petitioner’s claims are *ex-facie* barred, leaving not a vestige of doubt as to their arbitrability.

¹³ Emphasis supplied.



21. Learned counsel for the parties submit that, despite the contractual provision for a three member tribunal, the disputes may be referred to a sole arbitrator under the aegis of Delhi International Arbitration Centre, Shershah Road, New Delhi-110503 [“DIAC”].

22. For the aforesaid reasons, the petition is allowed and is disposed of with the following directions:-

- a. The disputes between the parties are referred to arbitration of Hon’ble Ms. Justice Mukta Gupta, former Judge of this Court [Tel:- 96507-88600].
- b. The arbitration will be held under the aegis of DIAC, and will be governed by the Rules of DIAC, including as to the remuneration of the learned Arbitrator.
- c. The learned Arbitrator is requested to make a declaration in terms of Section 12 of the Act prior to entering into the reference.

23. It is made clear that all rights and contentions of the parties, including with regard to the arbitrability of the claims, particularly, claims regarding the petitioner’s plant and machinery, are left open for adjudication before the learned Arbitrator.

PRATEEK JALAN, J

FEBRUARY 5, 2024

‘pv’/

¹⁴ Supra (note 5).