OCD –1

ORDER SHEET

AP/119/2023

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL DIVISION
ORIGINAL SIDE

SHREE SAIBABA PLASTO PRODUCTS PVT. LTD.

VS

NATIONAL INSURANCE COMPANY LIMITED

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date: 15th January, 2025.

Appearance:
Mr. S.N. Ganguly,Adv.
Mr. Rajdeep Bhattacharya, Adv.
.... for the petitioner
Mr. Guddu Singh, Adv.
...for the respondent

The Court:This is an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of an arbitrator in terms of General Condition No. 13 of the Standard Fire and Special Perils Policy bearing no. 101800111710000244.

The petitioner is a company dealing with themanufacture of plastic household goods and furniture.The factory is located at Plot No. D-3(P), EPIP. Complex, Hazipur, Patna, Bihar and the registered office of the company is located at 107/1A, Tollygunge, Kolkata-700026.

The respondent is a Public Sector Undertaking and deals with the business of insurance policies including Standard Fire and Special Perils Policy. The petitioner purchased such a policy for the period 16th August, 2017 to 15th August, 2018.The policy covered risks in respect of buildings, sheds, boundary, plant and machinery, accessories, furniture and fixtures, raw materials, packaging materials lying in the manufacturing unit from fire hazard. The total sum insured was Rs.17,50,00,000/- .

A fire broke out in the insured location on September 13, 2017 at around 11.45 AM. The petitioner immediately informed the Senior Divisional Manager of the respondent by letter dated September 14, 2017. A general diary was also lodged. Investigation was made by the Fire Brigade Authority and Deputy Chief Factory Inspector. The respondent deputed a surveyor to cause a survey with regard to the accident. In the meantime, the petitioner submitted a claim of Rs. 17,78,05,354, to the respondent. It is alleged that the survey report dated January 16, 2020 assessed the loss at Rs.13,18,12,350/-, but the respondent by e-mail dated July 14, 2020, informed the petitioner that the surveyor had amended the earlier assessment and assessed the total loss at Rs. 12,17,52,797/- . The respondent proposed to settle the claim at Rs. 12,17,41,044/- and after deduction of the reinstatement premium, the respondent informed the petitioner that a sum of Rs. 12,14,16,756/- would be released subject to the petitioner executing the discharge voucher in advance.

The respondent paid the amount in two instalments and upon receipt of the second instalment, a protest mail was sent by the petitioner, registering a protest with regard to the quantum paid, which was allegedly lesser than what was assessed at first by the surveyor. According to the petitioner, the amount actually payable would be Rs.13,87,49,842/- and as such Rs.1,73,33,086/- remained unpaid. Accordingly, the notice invoking arbitration was issued to the respondent by the learned advocate for the petitioner on July 23, 2020.The protest mail was not responded to. The petitioner submits that in terms of clause 13 of the insurance policy, the dispute raised by the petitioner as to the quantum paid by the respondent after the second assessment by the surveyor should be adjudicated by an arbitrator. The claim of the petitioner is based on the first assessment of the surveyor. Clause 13 of the policy provides that if any dispute and difference arises as to the quantum to be paid under the policy, such difference will, independent of all other questions, be referred to the decision of the sole arbitrator to be appointed in writing by the parties and if the parties do not agree, the same will be referred to a panel of three arbitrators, one to be appointed by each of the parties and the third arbitrator to be appointed by such two arbitrators,as the presiding arbitrator.

Learned advocate for the insurance company submits that the claim does not survive upon signing of the discharge voucher. The first survey report was a preliminary report, but the second survey report was the final report, on the basis of which the payment was made. The payment in instalmentswere accepted as full and final settlement of the claim. The protest letter could not make any difference as it was an afterthought. The claim was discharged.

Heard the parties.The petitioner relies on a prescribed form of a discharge voucherin the affidavit-in-reply, which provides that execution of the voucher would not foreclose the right of the policy holder to seek higher compensation before any judicial fora or any other fora established by law. Contents of such discharge voucher was communicated by the Insurance Regulatory Development Authority of India,to all CEOs of the General Insurance Company. According to the petitioner, the discharge voucher was executed under pressure. The petitioner relies on a decision of the Hon'ble Apex Court in the matter of SBI General Insurance Co. Ltd.vs.KrishSpinning, reported in 2024 SCC Online SC 1754, in support of the contention that the referral Court is only required to see whether there is an arbitration agreement under clause 13 of the Insurance Policy and whether the petitioner had raised any dispute by invoking the arbitration clause. According to the Apex Court, the issue ofaccord and satisfaction of the claim, should not be adjudicated by the referral court and the same should be left to the learned Arbitrator, for a decision. The referral Court should not go beyond the enquiry as to the existence of the arbitration agreement. The Hon'ble Apex Court in the said decision considered a matter arising out of similar facts and circumstances.

The relevant paragraphs of the decision of the Hon'ble Apex Court with regard to accord and satisfaction and whether the execution of discharge voucher amounts to discharge andsatisfaction, are quoted below:

> "92. *The position that emerges from the aforesaid discussion of law on the subject as undertaken by us can be summarised as follows:-*
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> *i. There were two conflicting views which occupied the field under the Arbitration Act, 1940. <u>While the decisions in Damodar Valley (supra) and Amar Nath (supra) took the view that the disputes pertaining to "accord and satisfaction" should be left to the arbitrator to decide, the view taken in P.K. Ramaiah (supra) and Nathani Steels (supra) was that once a "full and final settlement" is entered into between the parties, no arbitrable disputes subsist and therefore reference to arbitration must not be allowed.</u>*
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> *ii. Under the Act, 1996, the power under Section 11 was characterised as an administrative one as acknowledged in the decision in Konkan Railway (supra) and this continued till the decision of a seven-Judge Bench in SBP & Co. (supra) overruled it and significantly expanded the scope of judicial interference under Sections 8 and 11 respectively of the Act, 1996. The decision in Jayesh Engineering (supra) adopted this approach in the context of "accord and satisfaction" cases and held that the issue whether the contract had been fully worked out and whether payments had been made in full and final settlement of the claims are issues which should be left for the arbitrator to adjudicate upon.*
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> *iii. The decision in SBP & Co. (supra) was applied in BogharaPolyfab (supra) and it was held by this Court that the Chief Justice or his designate, in exercise of the powers available to them under Section 11 of the Act, 1996, can either look into the question of "accord and satisfaction" or leave it for the decision of the arbitrator. However, it also specified that in cases where*

the Chief Justice was satisfied that there was indeed "accord and satisfaction", he could reject the application for appointment of arbitrator. The prima facie standard of scrutiny was also expounded, stating that the party seeking arbitration would have to prima facie establish that there was fraud or coercion involved in the signing of the discharge certificate. The position elaborated in BogharaPolyfab (supra) was adopted in number of a subsequent decisions, wherein it was held that a mere bald plea of fraud or coercion was not sufficient for a party to seek reference to arbitration and prima facie evidence for the same was required to be provided, even at the stage of the Section 11 petition.

iv. The view taken by SBP & Co. (supra) and BogharaPolyfab (supra) was seen by the legislature as causing delays in the disposal of Section 11 petitions, and with a view to overcome the same, Section 11(6-A) was introduced in the Act, 1996 to limit the scope of enquiry under Section 11 only to the extent of determining the "existence" of an arbitration agreement. This intention was acknowledged and given effect to by this Court in the decision in DuroFelguera (supra) wherein it was held that the enquiry under Section 11 only entailed an examination whether an arbitration agreement existed between the parties or not and "nothing more or nothing less".

v. Despite the introduction of Section 11(6-A) and the decision in DuroFelguera (supra), there have been diverging views of this Court on whether the scope of referral court under Section 11 of the Act, 1996 includes the power to go into the question of "accord and satisfaction". In Antique Art (supra) it was held that unless some prima facie proof of duress or coercion is adduced by the claimant, there could not be a referral of the disputes to arbitration. This view, however, was overruled in Mayavati Trading (supra) which reiterated the view taken in DuroFelguera (supra) and held that post the 2015 amendment to the Act, 1996, it was no more open to *the Court while exercising its power under Section 11 of the Act, 1996 to go into the question of whether "accord and satisfaction" had taken place.*

vi. The decision in VidyaDrolia (supra) although adopted the view taken in Mayawati Trading (supra) yet it provided that in exceptional cases, where it was manifest that the claims were exfacie time barred and deadwood, the Court could interfere and refuse reference to arbitration. Recently, this view in the context of "accord and satisfaction" was adopted in NTPC v. SPML (supra) wherein the "eye of the needle" test was elaborated. It permits the referral court to reject arbitration in such exceptional cases where the plea of fraud or coercion appears to be ex-facie frivolous and devoid of merit.

93. Thus, the position after the decisions in Mayavati Trading (supra) and VidyaDrolia (supra) is that ordinarily, the Court while acting in exercise of its powers under Section 11 of the Act, 1996, will only look into the existence of the arbitration agreement and would refuse arbitration only as a demurrer when the claims are ex-facie frivolous and non-arbitrable."

The Hon'ble Apex Court held that the scope of enquiry of the referral Court would be restricted to weeding out ex-facie non-arbitral and frivolous disputes. The question of accord and satisfaction was a mixed question of law and fact. The decision with regard to accord and satisfaction would come exclusively within the domain of the arbitral tribunal. Relevant paragraph is quoted below :-

"**114.** In view of the observations made by this Court in In Re : Interplay (supra), it is clear that the scope of enquiry at the stage of appointment of arbitrator is limited to the scrutiny of prima facie existence of the arbitration agreement, and nothing else. For this reason, we find it difficult to hold that the observations made in VidyaDrolia (supra) and adopted in NTPC v. SPML (supra) that the jurisdiction of the referral court when dealing with the issue of "accord

> and satisfaction" under Section 11 extends to weeding out ex-facie non-arbitrable and frivolous disputes would continue to apply despite the subsequent decision in In Re : Interplay (supra)."

In this case the petitioner has contended that immediately after the second payment was made, a protest was lodged on July 13, 2020. The petitioner had accepted the quantum and requested for "on account payment". In the notice invoking arbitration as well, the petitioner's learned advocate enumerated the dispute and suggested the name of a sole arbitrator. The respondent did not accept the request for reference of the dispute to arbitration on the ground that the dues had been fully and finally settled and the factum of accord and satisfaction of the claim would be available from the discharge voucher and the conduct of the petitioner.

The decision of the Hon'ble Apex Court is relevant. The pleadings indicate that the petitioner did not accept 'accord and discharge' in the instant case. The petitioner has relied upon certain documents and communications indicating that protest was lodged to the second survey report. Moreover, the petitioner has also relied on certain circulars of the insurance regulatory commission which were communicated to all the CEOs of the insurance company.In prescribed format of the discharge voucher, a specific right was reserved to the insured to approach any Court or fora for settlement of any dispute with regard to the claim and execution of the discharge voucher which would not be a waiver on the part of the insured to the claim originally made.

The petitioner alleged coercion, that the discharge voucher was signed under pressure. These are issues to be proved by leading evidence.

This Court finds that the arbitration agreement is in place. This Court also finds that the notice invoking arbitration was issued. Clause 13 provides that the parties may agree to a sole arbitrator. The insurance company did not disagree to the existence of the arbitration clause.The company submitted that the claim was settled. The fact that a sole arbitrator shall be appointed in terms of clause 13 is not dispute. Part cause of action arose within the jurisdiction of the court.The objection of the respondent and the contention that the payment was accepted by the petitioner as full and final settlement of the claim is a disputed question, which is kept open to be decided by the learned Arbitrator.

In such circumstances, this Court finds that in terms of the contract, a sole arbitrator can be appointed and under such circumstances, the application is disposed of by appointing Mr. Jishnu Chowdhury, learned Senior Advocate as the sole arbitrator to arbitrate upon dispute. The learned Arbitrator shall comply with the provisions of Section 12 of the Arbitration and Conciliation Act, 1996. The learned Arbitrator shall be at liberty to fix his remuneration as per the Schedule of Arbitration and Conciliation Act, 1996.

(SHAMPA SARKAR, J.)

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