IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 12.02.2016

Pronounced on : 10.03..2016

C O R A M

The Hon'ble Mr. **SANJAY KISHAN KAUL**, Chief Justice

Original Petition Nos.657 of 2015

M/s.Jumbo Bags Ltd.,
represented by its Director
Mr.G.S.Anil Kumar
S.K.Enclave
New No.4, Old No.47,
I Floor, Nowroji Road, Chetpet,
Chennai 600 031. ... Petitioner

versus

M/s.The New India Assurance Co. Ltd.,
represented by Regional Manager,
Claims Hub,
Macmillan House, II Floor, "B" Block,
21, Pattulos Road,
Chennai 600 002. ... Respondent

Prayer : Petitions filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, r/w Clause 2 of the Appointment of Arbitrator's Scheme by the Chief Justice of Madras High Court's Scheme, 1996, for appointment of an independent sole Arbitrtor to resolve the disputes between the parties arising out

of the Insurance claim under Policy No.710700/11/13/01/00000035.

For Petitioner : Mr.N.Muthukumaran

For Respondent : Mr.S.R.Sundar

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O R D E R

The present petition has been filed under Section 11 (6) of the Arbitration and Concilation Act, 1996 r/w Clause 2 of the Appointment of Arbitrator's Scheme by the Chief Justice of Madras High Court's Scheme, 1996, for appointment of an independent sole Arbitrator to resolve the disputes between the parties arising out of the Insurance claim under Policy No.710700/11/13/01/00000035.

2. The petitioner company is public limited company engaged in the manufacture of Poly woven bags, having substantial portion of equity shares held by the public. The company has been insuring their manufacturing units covering stocks, plant and machineries and other fixtures for the last 20 years and no prior claim has been made.

3. It is the case of the petitioner that they took insurance coverage for their manufactured goods under the Standard Fire and Special Perils Policy from the respondent/New India Assurance Company, for a total sum of Rs.24.15 Crores, which was subsequently enhanced to Rs.27.15 Crores during the policy period from 01.05.2013 to 30.04.2014, covering the stocks in its Factory units at Ponneri, Athipedu and Cholavaram. The petitioner had already insured plant and machinery along with other fixtures and fittings situated in these three locations with another Insurance Company viz., United India Insurance Company Ltd., for the period from 11.01.2013 to 10.01.2014 for a total sum of Rs.8,82,48,610/-.

4. While so, a fire accident occurred on 23.11.2013 at about 10.30 p.m., at the petitioner's Athipedu factory unit, as a result of which petitioner company had a huge loss due to the damage to stocks, plant and machineries and other fixtures. The petitioner lodged separate claims with the Insurance company.

5. It is the case of the petitioner that the insurance policy issued by the respondent herein covered the petitioner's stocks and stock in process

at its Athipedu factory unit where the fire accident had occurred, for a sum of Rs.11.5 Crores, which was subsequently enhanced by 1 Crore Rupees for each location at the request of the respondent vide its letter dated 15.10.2013 to cover the additional stock of finished goods. The respondent also made an endorsement under the policy for enhancement of the sum insured at all the three locations by 3 Crores in all.

6. Petitioner claims that pursuant to the investigation done by the surveyors by both the Insurance companies and subsequent investigation done by them to ascertain the cause and extent of loss, United India Insurance Company Ltd., had released an initial amount of Rs.70,00,000/- (rupees seventy lakhs) towards claim for damage/loss to the petitioner's plant and machineries, fixtures and fittings. Petitioner submits that they are on the verge of getting the balance claims Policy settled with United India Insurance Company Ltd. On 24.11.2013 and thereafter, petitioner submitted various documents in support of their claim at the instance of the Surveyor appointed on behalf of the respondent herein. Nearly one year after the accident, after several communications for settlement of the claim, the respondent repudiated the petitioner's claim on the ground that

it was not a reasonable, fair and bona fide estimation of loss and alleged that the quantum of loss was exaggerated and supported by manipulated documents. The petitioner submits that without giving an opportunity of hearing, the respondent rejected the petitioner's claim, invoking condition No.8 of the policy conditions.

7. Petitioner claims that the cause of fire is covered under the policy conditions and it is on the basis of this, that the other Insurance company namely United India Insurance Company Ltd has paid the interim amount of Rs.70,00,000/- as claimed by the petitioner before them. Thus, the petitioner submits that the allegation of the respondent herein that the accident is doubtful is only a pretext to avoid their liability. According to the petitioner, the primary issue involved in this petition is the quantum of claim made by the petitioner and the quantum assessed by the Surveyor deputed by the respondent herein. The petitioner submits that since the allegation of the respondent is on the premise that the documents and materials submitted by the petitioner-company are grossly exaggerated and manipulated, the same may be adjudicated by an independant arbitrator.

8. The respondent in their counter affidavit denied the averments made in the original petition stating that the dispute is not in relation to the quantum of the claim, but one of total repudiation, which is not within the ambit of Arbitration Clause -13 of the Policy conditions, which reads as under:

> *''13.If any dispute or difference shall arise as to the quantum to be paid under the policy (liability being otherwise admitted) such difference shall independently of all other questions be referrred 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 provisions of the Arbitration and Concilliation 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 the case of the respondent that only when the liability of the Insurance company is admitted and then arises a dispute with regard to the quantum that the Arbitration Clause can be invoked. In this case, there is no quantum dispute as the same is evident from the letter of the petitioner

dated 07.07.2015 which refers to total repudiation. The invocation of Arbitration Clause does not arise at all, as in a case of total repudiation, the policy does not provide to resolve the issue in terms of the Arbitration Clause.

9. The crucial question for determination in the present petition which emerges is as to whether in view of the total repudiation of the particular claim, the petitioner can still seek the remedy of arbitration for adjudication of the disputes or whether arbitration as a remedy stands excluded.

10. Learned counsel for the petitioner referred to the claim granted by the other Insurance Company viz., United India Insurance Company towards the loss and damage to the plant and machinery which were insured with them. To repudiate the plea of the respondent herein repudiating the claim in its entirety lodged with them qua the insured stocks with them, petitioner seeks to rely on the observations of the Surveyor appointed by United India Insurance Company in its interim report dated 14.02.2014 to claim that the loss had been opined as one

falling within the purview of the Insurance Policy issued by the United India Insurance Company and then only, interim payment of Rs.70 Lakhs was made towards the damage caused to plant and machinery. However, the Surveyor appointed by the respondent herein in the final report dated 08.10.2014, has advised the respondent-Insurance Company to invoke Clause-8 of the Insurance Policy, which reads as under:

> ''8.If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof or if any fraudulent means devices are used by the insured or anyone acting on his behalf to obtain any benefit under the policy or if the loss or damage be occasioned by the willful act, or with the connivance of the insured, all benefits under this policy shall be forfeited.''

11. Learned counsel for the petitioner submitted that whether there is a fraud or not which would entitle forfeiture of the benefits under the policy was alleged to be itself disputed. According to the him, since the entire dispute revolves around the allegation of exaggerated and fraudulent claim, the said dispute would be arbitrable in terms of Condition-13 of the Policy.

12. On the other hand, the stand of the learned counsel for the respondent is that in a matter relating to Insurance Policy, the Clauses must be construed strictly and Clause-13 is explicit in its terms. Reference to arbitration is possible only when a dispute or difference arises in respect of the quantum under the policy (liability being otherwise admitted). Thus, no dispute which is repudiated completely is liable to be referred to arbitration, which aspect is further crystal clear in view of the second part of Clause-13, thus emphasising that no difference or dispute would be referable to arbitration, if the respondent has disputed or not accepted the liability under or in respect of the policy.

13. Now coming to the wide subject matter of case laws cited on different aspects, reliance by respondent is as under:

I. Non - Arbitrability of Dispute:

(a)*In the case of The Vulcan Insurance Co. Ltd., vs. Maharaj Singh And Another – (1976-1 SCC 943),* wherein under somewhat similar circumstances, in the case of a fire in the Factory premises of the insured, the insurance company repudiated the claim entirely. An arbitration application was filed under Section 20 of the Arbitration Act, 1940,

wherein such repudiation was held not amounting to be raising of the dispute as to the amount of loss or any damage. In this context, reference was made to the treatise of ***Macgillivray on Insurance Law, Para-18, 5th edition,*** on the basis of the law laid down in ***Scott v. Avery (1856) 25 LJ Ex 308)***. As a rule, where the amount of the loss or damage is the only matter which the parties refer to arbitration, then if the insurers repudiate any liability on the policy, there is no obligation on the assured to arbitrate as to the amount before commencing an action on the policy.

(b) In ***Tainwala Personal Care Products Pvt. Ltd.,vs. Royal Sundaram Alliance Insurance Co. Ltd., reported in (2012(4) Mh.L.J 597),*** a learned single Judge opined that in view of the reading of a similar clause, it was quite clear that only when the insurer had admitted his liability that there is a dispute or difference in respect of the quantum to be paid in respect of the policy, then the dispute would be arbitrable, while relying on ***Vulcan Insurance Co. Ltd*** case supra.

II. Construction and interpretation of Insurance Contract:

Learned counsel for the respondent has laid emphasis on the fact that the subject matter in the case on hand is an insurance contract and the principles of interpretation of such insurance contracts must thus apply.

(a) In ***General Assurance Society Ltd., vs. Chandumull Jain and Another (1966(3) SCR 500)***, it was held that while interpreting documents relating to a contract of insurance, the duty of the court is to interpret the words in which the contract is expressed by the parties, because it is not for the court to make a new contract, however reasonable, if the parties have not made it themselves.

(b)In ***Oriental Insurance Co. Ltd., vs. Sony Cheriyan reported in (1999 (6) SCC 451)***, it has been held in paragraph-17 as under:

> *''17. The insurance policy between the insurer and the insured represents a contract between the parties. Since the insurer undertakes to compensate the loss sufferred by the insured on account of risks covered by the insurance policy, the terms of the agreement have to be strictly construed to determine the extent of liability of the insurer. The insured cannot claim anything more than what is covered by the insurance policy. That being so, the insured has also to act strictly in accordance with the statutory limitations or terms of the policy expressly set out therein.''*

(c) Reliance was also placed on the decision in ***United India Insurance Company vs. Harchand Rai chandan Lal (2004(8) SCC 644)*** and reference was made to paragraph-14 as under:

''14. Therefore, it is settled law that the terms of the contract has to be strictly read and natural meaning be given to it. No outside aid should be sought unless the meaning is ambiguous.''

and on (d)***Polymat India P Ltd and Another vs. National Insurance Co. Ltd and Others (2005(9) SCC 174)***, wherein it has been observed that Insurance contracts should be construed strictly.

(d) In ***Vikram Greentech India Ltd, vs. New India Assurance Company Ltd (2009(5) SCC 599)***, it has been held as under:

''16. An insurance contract, is a species of commercial transactions and must be construed like any other contract to its own terms and by itself. In a contract of insurance, there is requirement of uberimma fides i.e. good faith on the part of the insured. Except that, in other respects, there is no difference between a contract of insurance and any other contract.

17. The four essentials of a contract of insurance are, (i) the definition of the risk, (ii) the duration of the risk, (iii) the premium and (iv) the amount of insurance. Since upon issuance of insurance policy, the insurer undertakes to indemnify the loss suffered by the insured on account of risks covered by the insurance policy, its terms have to be strictly construed to determine the extent of liability of the insurer.

18. The endeavour of the court must always be to interpret the words in which the contract is expressed by the parties. The court while construing the terms of policy is not expected to venture into extra liberalism that may result in re-writing the contract or substituting the terms which were not intended by the parties. The insured cannot claim anything more than what is covered by the insurance policy. ***(General Assurance Society Ltd. Vs. Chandumull Jain***

and another (AIR 1966 SC 1644), Oriental Insurance Co. Ltd. Vs. Sony Cheriyan (1999) 6 SCC 451) and United India Insurance Co. Ltd. Vs. Harchand Rai Chandan Lal (2004)8 SCC 644).

Petitioner's reliance:

(a)Learned counsel for the petitioner, however, has placed strong reliance on the Judgment in ***Essar Steel India Limited vs. The New India Assurance Co. Ltd., (MANU/MH/0542/2013)***, where mere existence for arbitration clause in the insurance policy was held to be enough to refer the disputes to arbitration. This Judgment was however sought to be distinguished by the learned counsel for the respondent on the ground that it was a Stand Alone Terrorism Policy, where the Arbitration Clause No.18 read as under:

*''**18.Arbitration:***

If the insured-and-Underwriters fail to agree in whole or in a part regarding any aspect of this policy, each party shall, within ten (10) days after the demand in writing by either party, appoint a competent and disinterested arbitrator and the two chosen shall before commencing the arbitration select a competent and disinterested umpire.

The arbitrators together shall determine such matters in which the insured and underwriters shall so fail to agree and shall make an award thereon and the award in writing of any two (2), duly verified, shall determine the same, and if they fail to agree, they will submit their differences to the umpire.

> *The parties to such arbitration shall pay the arbitrators respectively appointed by them and bear equally the expenses of the arbitration and the charges of the umpire.''*

In the aforesaid case, the High Court of Bombay held that the stand of the Insurance company that the policy is *void ab initio* itself is arbitrable and hence referred the matter to arbitration, since the arbitration clause provides for the same, and it would be the arbitrator who would examine the validity of the policy.

The other aspect in this context emphasised by the learned counsel for the respondent was that the policy taken with United India Insurance Company covered only fixed assets such as buildings, plant and machinery and fixtures, while the policy taken with the respondent in the present case was a declaration policy covering stocks (current assets) alone due to the risks covered thereunder.

(b). In another Judgment pointed out by the learned counsel for the petitioner in ***Arasmeta Captive Power Company Private Limited and Another vs. Lafarge India Private Limited (AIR 2014 SC 525)***, the following observations are made:

"40. We will be failing in our duty if we do not take note of another decision in ***Booz Allen and Hamilton Inc. v. SBI Home Finance Limited and others (2015) 5 SCC 532)*** *on which Mr. Ranjit Kumar has heavily relied upon. He has drawn our attention to paragraph 34 where the Court has dealt with the meaning of the term "arbitrability" and stated that arbitrability has different meanings in different contexts. The Court enumerated three facets which relate to the jurisdiction of the Arbitral Tribunal. In sub-para (ii) of the said paragraph it has been stated that one facet of arbitrability is whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the "excepted matters" excluded from the purview of the arbitration agreement. On a careful reading of the said judgment we find that the learned Judges have referred to paragraph 19 of* ***SBP & Company*** *(supra) and thereafter referred to Section 8 of the Act and opined what the judicial authority should decide. Thereafter the Court proceeded to deal with nature and scope of the issues arising for consideration in an application under Section 11 of the Act for appointment of the arbitrator and, in that context, it opined thus:*

> *While considering an application under Section 11 of the Act, the Chief Justice or his designate would not embark upon an examination of the issue of arbitrability or appropriateness of adjudication by a private forum, once he finds that there was an arbitration agreement between or among the parties, and would leave the issue of arbitrability for the decision of the Arbitral Tribunal. If the arbitrator wrongly holds that the dispute is arbitrable, the aggrieved party will have to challenge the award by filing an application under Section 34 of the Act, relying upon sub-section (2)(b)(i) of that section.*

The submission thus was that the issue of arbitrability should be left to the decision of the arbitral tribunal and the observations made are stated to be

in consonance with the principles laid down in ***SBP and Co., v. Patel Engineering Ltd., and Another reported in (2005-8 SCC 618).***

14. Another area of concern, over which submissions were made by the learned counsel for the parties, was in the context of the amendments made initially vide the Arbitration and Conciliation (Amendment) Ordinance, 2015 with effect from 23.10.2015 which was subsequently substituted by the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016) which was published in the Gazette on 01.01.2016 to the Arbitration and Conciliation Act, 1996 incorporating Section 11(6-A) which reads as under:

> *"**11(6-A):** The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section(5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement."*

In the aforesaid context, a reference may be made to Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 which reads as under:

> *"26.Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."*

The aforesaid provisions are to be read along with Section 21 of the Arbitration and Conciliation Act, 1996 which reads as under:

> *"21. Commencement of arbitral proceedings:- Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."*

The aforesaid has become relevant as Section 11(6-A), notwithstanding any judgment, decree or order, sought to confine the role of the Court to only examination of the existence of an arbitration agreement. However, this was not to be applied to arbitral proceedings which had already commenced under the pre-existing Section 21 of the Act. The said provision stipulated that the commencement of such arbitral proceedings would be from the date on which the request for that dispute to be referred to arbitration was received by the respondent. In the facts of the

present case, the request for appointment was made by the petitioner on 07.07.2015 and it was replied to by the respondent on 15.07.2015, with this Court admitting the petition and issuing notice on 18.08.2015. It was thus submitted that the provisions of Section 11(6-A) of the Act could not be invoked in the present case. This was so, as in my view, the learned counsel for the respondent was conscious of the damage to the line of arguments he had advanced which would be done by this provision.

15. To buttress the aforesaid line of submissions, learned counsel for the respondent referred to the Judgment of the Hon'ble Supreme Court in ***Milk Food Ltd vs. GMC Ice Cream Pvt. Ltd., (2004-7-SCC 288),*** where the expressions "commencement of arbitration proceedings" and "commencement of proceedings before an arbitrator" were sought to be distinguished, being two different expressions. Service of notice for appointment of an arbitrator was to be the relevant date for the purposes of commencement of arbitration proceedings.

16. The observations made in ***State of West Bengal vs. Amritlal Chatterjee (2003(10)SCC 572), UP State Sugar Corporation Ltd., vs. Jain***

Construction Co. Ltd., (2004(7) SCC 332) and ***Parwani Builders vs. Western Coalfields Limited and Others (2010(15)SCC-729)*** expressed similar views qua the commencement of arbitral proceedings.

17. In ***Parwani Builders vs. Western Coalfields Limited (2010)15 SCC 729)*** relating to proceedings initiated under the 1940 Act, but concluded after its repeal, it was held that the 1996 Act would not apply.

18. The stand of the learned counsel for the petitioner on the other hand was that there is a distinction between an arbitration proceedings with intervention of the court and without intervention of the court. The position reflected in ***Milk Food Ltd vs. GMC Ice Cream Pvt. Ltd.,*** cited supra as canvassed by the learned counsel for the respondent was thus urged to apply only when the arbitration is without the intervention of the court. It was thus submitted that in the very same judgment, it had been observed that the expression "commencement of arbitration proceedings" depended upon the facts of each case and there could not be any single conclusive test to determine the commencement. A notice to concur is an essential step and thus, the arbitration proceedings cannot be said to have

commenced in a practical sense, till the tribunal charged with authority is duly constituted. This is stated to be the reason why the English Arbitration Act, 1996 makes provision under Section 14 that commencement would take place from the date when notice to concur is served.

19. The aforesaid fact is however clarified by the learned counsel for the respondent was what the petitioner had relied upon were actually extracts from the dissenting view of the learned Judge and thus, there could be no doubt about the initiation of proceedings at the relevant date of applicability of the Act, which is prior to 23.10.2015.

20. The relevant submissions of the learned counsel for the parties have been examined.

I. Whether the amended provisions as per the Arbitration and Conciliation (Amendment) Act, 2015 will apply?

There can be little doubt, in the context of the pleas advanced on the issue of reference of disputes to arbitration as to whether the issue proceeds under the unamended Act or the amended Act does have an impact. The

introduction of Section 11(6-A) of the Arbitration and Conciliation (Amendment) Act, 2015 thus seeks to restrict the scope of scrutiny by the court only in the case of existence of an arbitral agreement. Thus, in a sense, whether the particular aspect would fall within the scope of the arbitration clause or not, or whether arbitration would be the appropriate remedy itself would be issues to be placed before the arbitrator. However, while introducing this amendment, Section 26 makes it quite clear that unless the parties agree, the provisions of the principal Act would continue to apply and those provisions would be applicable only to the arbitral proceedings commenced on or after 23.10.2015.

21. In the aforesaid context, what becomes relevant is as to what is meant by the commencement of the arbitral proceedings. Section 21 makes it abundantly clear that commencement of the arbitral proceedings is the date on which the request for disputes to be referred to arbitration is received by the respondent. The law in this behalf is quite explicit in view of the observations in ***Milk Food Ltd., vs. GMC Ice Cream Pvt. Ltd.,*** cited supra, distinguishing the two expressions "commencement of an arbitration proceedings" and "commencement of proceedings before an

Arbitrator''. In this context, there is no quibble over the dates of the petitioner herein invoking the arbitration clause, i.e., on 07.07.2015 and the reply of the respondent on 15.07.2015. In fact, the original petition was admitted and notice issued prior to the amendment of the Act. Thus, *ex facie,* these amended provisions would not come into play in the present case.

22. The endeavour of the petitioner to make a distinction between the two expressions in the context of whether the arbitration is with or without the intervention of the court and relying upon the minority view is of little help. In my view, what is most relevant is that Section 21 of the Principal Act leaves little to doubt that the arbitral proceedings would commence on the date of receipt of the request for arbitration, which date had already passed and thus, Section 26 introduced by the amended Act equally clearly stipulated that nothing contained in the amended Act would have force of law for such arbitrations which have already commenced, unless the parties otherwise agree.

23. I am thus of the view that the plea made by the petitioner has to be rejected and the present proceedings have to be governed by the unamended Act.

II. Whether the Arbitration Clause *per se* excludes that adjudicatory mode for the claim made?

24. The existence of disputes inter se the parties is undoubted. If the mode of arbitration is prescribed for settlement of disputes, then that should be the mode as it is a chosen Forum by the parties and every endeavour has to be made to give effect to the alternative dispute resolution mechanism agreed upon. However, it cannot be that if the arbitration clause does *per se* specifically exclude arbitration and the circumstances in which such exclusion is made is undisputed, still the matter would have to be referred to the arbitrator to determine whether that is the mode for adjudication of disputes.

25. Now turning to the arbitration clause, there are two parts of it, which make the position abuntantly clear. As to what can be referred to arbitration is specified in the initial sentence of Clause-13 itself – the

quantum to be paid under the policy. This expression is specifically circumscribed by the stipulation "liability being otherwise admitted." Thus, unless the insurance company admits that in principle they are liable, though the payment may be of a lesser amount, that aspect has to be determined in arbitration. Interpreting the contract to make any part of it otiose cannot be accepted, as a meaning must be given to the words used in the contract. If the plea of the petitioner was to be accepted, the aforesaid phrase "liability be otherwise admitted" would become superfluous/otiose. If at all there was any doubt, that stands removed by the second paragraph of Clause-13, which stipulates that it is "clearly agreed and understood" that no difference or dispute would be referrable to arbitration, if the company had "disputed or not accepted the liablity", under or in respect of the policy. It is not relevant as to why the respondent-Insurance company has disputed or not accepted the liability, though Clause-8 provides that if it is a fraudulent claim, the same can be rejected and all benefits under the policy forfeited. It is the view of the respondent-company that this is a case of fraudulent claim, which is liable to be rejected. Thus, once the company is of the view that they are not liable to pay a penny not on the issue of quantification, but on a concept,

the arbitration Clause would stand excluded.

26. It may be noted that the rejection is on the basis of a clause of Policy -- Clause-8. Further, though not directly relevant, it is not a mere *ipse dixit* of the respondent, but it is based on the final report of the Surveyor appointed by the respondent-Insurance company. The interim report of the Surveyor deputed by another Insurance Company viz., "United India Insurance Company", in relation to another claim lodged by the petitioner although arising out of the same accident, under which part payments have been made by that Company thus cannot support the case of the petitioner. The policies are different. One is for plant and machinery and the other is for stocks insured by the respondent herein. If there is absence of proof of existence of stock at sight or it is felt that the claim for stocks is fraudulently made, the payment made towards loss to the plant and machinery would not automatically entitle the insured to make a claim in relation to stocks also. It cannot be lost sight of that we are dealing with an Insurance policy.

27. The catena of Judgments referred to aforesaid show how insurance contracts are to be read. The words in the contract would have to be read as they are and it is not for this Court to re-construct and take its own import of the contract on something not agreed to by the parties (***General Assurance Society Ltd. Vs. Chandumull Jain and another (AIR 1966 SC 1644)***

28. In ***The Vulcan Insurance Co. Ltd*** case cited supra, the question of repudiation of a claim and its arbitrability in the context itself was examined. The dispute which is not referrable to arbitration, being not covered by the clause cannot be over the subject matter of arbitration, and the remedy of the insured in this case is only to insitute a suit.

29. If a contra view is to be taken, it would amount to creation of an arbitration clause over a subject matter where there is no such clause. It has already been noticed that the Surveyor in a detailed report found various errors qua the stocks with mismatch of quantity, doubtful purchase from doubtful new suppliers, bogus transport bills, absence of matching of ledger accounts, inward register not having genuine entries,

provision of false documents for part of purchase etc. The details of this are not required to be gone into in these proceedings. Suffice to say, clause-8 was advised and was invoked by the respondent for rejection of the claim in toto as a fraudulent claim.

30. The parties to the contract had specifically agreed both positively and by exclusion in the Arbitration Clause that only if the Insurance company finds that the claim exists, albeit of a different amount or a lesser amount, would the question of arbitration apply and in such a situation where the claim is rejected as fraudulent etc., recourse to arbitration is not available. The arbitration clause has specifically been thus excluded in such a situation and this is in consonance with the principle of *Uberrima Fides* applicable to an Insurance Policy – *Good faith on the part of the insured*. The principles in this behalf have been explained in ***Vikram Greentech India Ltd, vs. New India Assurance Company Ltd (2009(5) SCC 599)***.

31. Learned counsel for the respondent has rightly distinguished the Judgment in Essar Steel Company Limited case which had a separate

nature of policy and the Insurance Clause itself was very different since the plea of the policy being void ab initio was found to be an arbitrable dispute. This view of the Bombay High Court is in its own facts is quite apparent from the judgment in ***Tainwala Personal Care Products Pvt. Ltd.,*** case supra. The learned Single Judge observed that it was evident that it is only when the Insurer had admitted his liability that there is a dispute or difference in respect of the quantum to be paid under the policy that the dispute would be arbitrable.

32. I am of the view that the remedy of arbitration is not available to the petitioner herein in view of the arbitration clause specifically excluding the mode of adjudication of disputes by arbitration, where a claim is repudiated in toto. The remedy would thus only be of a civil suit in accordance with law.

33. For all the reasons aforesaid, the Original Petition is dismissed, leaving the parties to bear their own costs. Liberty is granted to the petitioner to pursue the remedy of a civil suit in accordance with law.

(S.K.K., CJ.)

Wesite:yes
Index:yes

10.03.2016

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The Hon'ble The Chief Justice

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O.P. No.657 of 2015

10.03.2016