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

% Judgment reserved on : 18th May, 2022
Judgment delivered on: 04th July, 2022

\+ **ARB.P. 180/2022**

FRESENIUS MEDICAL CARE INDIAPRIVATE LIMITED…
.... Petitioner

versus

KERRY INDEV LOGISTICS PRIVATE LIMITED ..... Respondent

\+ **ARB.P. 181/2022**

FRESENIUS MEDICAL CARE DIALYSIS SERVICE INDIA PRIVATE LIMITED .....Petitioner

Versus

KERRY INDEV LOGISTICS PRIVATE LIMITED . .... Respondent

Advocates who appeared in this case:

For the Petitioner: Dr. Amit George, Mr. Amrit Singh, Ms. Aakriti Dwivedi, Mr. Amol Acharya, Mr. Rayadurgam Bharat and Mr. P Harold, Advocates.

For the Respondent: Dr. R. Sunitha Sundar, Advocate

CORAM:-
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

JUDGMENT

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SANJEEV SACHDEVA, J.

1. By these petitions under Section 11 (6) of the Arbitration & Conciliation Act, 1996, petitioner seeks appointment of the respondent's nominee on the Arbitral Tribunal to adjudicate the disputes between the parties.

2. In ARB. P. 180/2022 and ARB. P. 181/2022~~0~~, petitioner seeks appointment of the nominee of the respondent to Arbitral Tribunal pursuant to the Warehousing &Logistics agreement dated 15.03.2019 and 01.11.2018 respectively.

3. The terms and conditions of both the agreements are nearly identical and the factual matrix giving rise to the claims is also identical. The issues arising for consideration in the two petitions are common. Consequently, both the petitions are being disposed of by a common judgment.

4. Petitioner, as well as Respondent, entered into the respective Warehousing & Logistics Agreements whereby respondent was to provide third-party Logistics and Warehousing Services.

5. While providing such services on 08.07.2020, a fire broke down at the warehouse leading to the loss of the petitioner's stocks and assets stored therein.

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6. Disputes are alleged to have arisen between the parties. Respondent denied any liability under the agreements for the damage caused and declined to compensate the petitioner because of which the petitioner invoked arbitration in both the agreements by two independent notices.

7. Petitioner requested for reference of the disputes to a Sole Arbitrator. However, respondent denied its liability and declined to consent to appointment of an Arbitral Tribunal and also failed to appoint its nominee arbitrator to the Arbitral Tribunal because of which petitioner has filed these petitions seeking appointment of the nominee arbitrator on behalf of the respondent.

8. The arbitration clause is nearly identical. In agreement dated 15.03.2019, it is numbered as Clause 16 and in agreement dated 01.11.2018, it is numbered as Clause 17. They are in *pari materia* and as such for the sake of brevity Clause 16 is reproduced herein:-

> *"16. APPLICABLE LAWS AND DISPUTE RESOLUTION*
>
> *All disputes or differences whatsoever which shall at any time hereafter (whether during the continuance of this Agreement of upon or after its discharge or termination) arise between the Parties, touching or concerning this Agreement or its construction or effect or the rights, duties, obligations, responsibilities and liabilities of the Parties hereto or any of them, under or by virtue of this*

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Agreement or otherwise or as to any other matter in any way connected with or arising out of or in relation to the subject matter of this Agreement, shall be at the first instance be resolved by conciliatory talks between the authorized representatives of the Parties. For any reason if resolution of the same is not achieved through the said conciliatory talks, then, within thirty (30) days of such failure, the same shall be referred to resolution through arbitration. The arbitration shall be in accordance with the subject to the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modifications or re-enactments thereof for the time being in force and (unless the Parties concur on the appointment of single arbitration) the Service Provider shall be entitled to appoint one arbitrator at its own cost and the Fresenius entitled to appoint one arbitrator at its own cost. The two arbitrators shall in turn appoint a third arbitrator, at a cost to be shared in equal proportion by both the Parties. The award of the arbitrators' panel shall be final and binding on the Parties. The seat of the arbitration shall be at New Delhi and all the proceedings will be conducted in English and the court of competent jurisdiction at New Delhi shall have the exclusive jurisdiction."

9. The defence raised by the learned counsel for the respondent in these is that there a Deed of Subrogation-cum-Assignment was executed by the petitioner in favour of HDFC Egro General Insurance Company Ltd. and in consideration thereof, said insurance company has paid the entire amount to the petitioner and thus there is no surviving claim of the petitioner against the respondent and as such no

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reference can be made to Arbitration.

10. Further, it is contended on behalf of learned counsel for the respondent that the arbitration clause provides for settlement of disputes arising *"between the parties"*.

11. It is contended that as there is an assignment in favour of the insurance company petitioner cannot maintain the petitions and further since the insurance company is not a party to the arbitration agreement there can be no arbitration between the insurance company and the respondent.

12. Learned Senior Counsel appearing for the petitioner disputes the said contention and submits that the agreement between the petitioner and the insurance company is merely an agreement of subrogation and there is no complete assignment of the debt in favour of the insurance company.

13. He submits that since there is a subrogation, the petitioner is liable to undertake all steps for recovery of the amount and thereafter apply the same towards the settlement amount and retain the balance. He further submits that the insurance company has also given an undertaking that they are not independently seeking to enforce any rights under the agreement and the claim, if any, would be in the name of and on behalf of the petitioner.

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14. For the purposes of completion, it would be necessary to refer to the terms and conditions of the subrogation agreement signed between the Petitioner and the Insurance Company. It reads as under:-

> *"To*
> *HDFC ERGO General Insurance Company Ltd*
> *1st Floor, HDFC House, 165-166 Backbay Reclamation,*
> *H.T. Parekh Marg, Churchgate, Mumbai 400 020*
>
> *In consideration of HDFC ERGO General Insurance Company (HDFC ERGO) having paid to Fresenius Medical Care India Pvt. Ltd. a sum of 392,628,068 ("Second & final Settlement Amount") in full and final settlement of our Claim number C299920010487 under Policy number 2999202071835602000 (the "Policy") for the Incident, we on behalf of ourselves and our successors and permitted assignees hereby subrogate and assign all of our rights and remedies in relation to the Incident to HDFC ERGO as under:*
>
> 1. *We hereby confirm that HDFC ERGO has become subrogated to, and we hereby assign, all of our rights and remedies arising from, consequent to or in relation to the Incident to HDFC Ergo and we hereby grant HDFC ERGO full power to take and use all lawful ways and means to recover all losses arising from the Incident from any person or entity (including Kerry lndev Logistics India Pvt Ltd and/or associated or group companies) that HDFC ERGO may in its sole discretion determine to be liable for the Incident.*
>
> 2. *In furtherance of the subrogation and assignment at paragraph 1 above, we also hereby further assign and transfer all our rights to make and*

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progress any claim and to this end we authorise HDFC ERGO to file and institute any suits, complaints, actions or proceedings before any court of law, tribunal or any other adjudicatory authority against any person or entity that HDFC ERGO may determine to be liable for the Incident <u>in our sole name, or HDFC ERGO's sole name, or both names as HDFC ERGO</u> in its sole discretion deems fit.

3. *We undertake to provide HDFC ERGO with all cooperation and assistance in relation to the foregoing, including by the provision of documentation and information as requested, the review and execution of any documents (including filings), the provision of access to personnel and the release of personnel to provide evidence as HDFC ERGO may in its sole discretion deem necessary.*

4. *We undertake not to release or exonerate any person or entity or enter into any compromise in relation to the foregoing with any person or entity without HDFC ERGO's prior written approval.*

5. *We confirm that we will not independently exercise any rights or remedies arising out of or in relation to the Incident against any person or entity against which/whom suits, complaints, actions or proceedings, are or have been instituted or may be instituted under this Deed, without the prior written consent of HDFC ERGO.*

6. *<u>We agree that any recovery in fact made shall first be applied to the Settlement Amount paid by HDFC Ergo</u>*

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and the costs incurred by HDFC Ergo in connection with or as a result of any proceedings. Any balance remaining shall be paid to us in accordance with Clause 5 of the Loss Adjustment and Settlement Section of the Policy.

As witness we set out hands this [28th] day of [June] 2021.

Sd/-

Signature of Insured

DULY AUTHORISED TO SIGN FOR AND ON BEHALF OF Fresenius Medical Care India Pvt. Ltd."

(underlining supplied)

15. The Deed of Subrogation between the Petitioner and Insurance company shows that it is not an assignment simplicitor but a deed of subrogation cum assignment. The insurance company has been given the right to sue either in the name of the petitioner or its own name or in the joint names. In the instant case the Petitions have been filed in the name of the Petitioner and have been filed with the consent of the insurance company.

16. Further, clause 6 of the agreement shows that any recovery made has to be first applied towards the settlement amount and the balance if any remaining is to be retained by the Petitioner. If it was an assignment then the balance would also belong to the insurance company and there would not have been any stipulation about the

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Petitioner retaining the same.

17. Reference may also be had to the judgment of the constitution bench of the Supreme Court in *Economic Transport Organization Delhi Vs. M/s Charan Spinning Mills Pvt. Ltd. (2010) 4 SCC 114*, wherein the Supreme Court has summarized the principle of subrogation and held as under:-

> *"17. The term "subrogation" in the context of insurance, has been defined in Black's Law Dictionary thus:*
>
> > *"The principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy."*
>
> *18. Black's Law Dictionary also extracts two general definitions of "subrogation". The first is from Dan B. Dobbs' Law of Remedies (2nd Edn., § 4.3 at 404) which reads thus:*
>
> > *"Subrogation simply means substitution of one person for another; that is, one person is allowed to stand in the shoes of another and assert that person's rights against the defendant. Factually, the case arises because, for some justifiable reason, the subrogation plaintiff has paid a debt owed by the defendant." The second is from Laurence P. Simpson's Handbook on the Law of Suretyship (1950 Edn., p. 205) which reads thus:*
> >
> > *"Subrogation is equitable assignment. The right*

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comes into existence when the surety becomes obligated, and this is important as affecting priorities; but such right of subrogation does not become a cause of action until the debt is fully paid. Subrogation entitles the surety to use any remedy against the principal which the creditor could have used, and in general to enjoy the benefit of any advantage that the creditor had, such as a mortgage, lien, power to confess judgment, to follow trust funds, to proceed against a third person who has promised either the principal or the creditor to pay the debt."

19. "Right of subrogation" is statutorily recognised and described in Section 79 of the Marine Insurance Act, 1963 as follows:

79. Right of subrogation.-

(1) Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss.

(2) Subject to the foregoing provisions, where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the assured in and in respect of the subject-matter insured as from the

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time of the casualty causing the loss, insofar as the assured has been indemnified, according to this Act, by such payment for the loss."

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22. In Banque Financiere de la Cite v. Parc (Battersea) Ltd., the House of Lords explained the difference between subrogations arising from express or implied agreement of the parties: (AC pp. 231 F-232 A)

"... there was no dispute that the doctrine of subrogation in insurance rests upon the common intention of the parties and gives effect to the principle of indemnity embodied in the contract. Furthermore, Your Lordships drew attention to the fact that it is customary for the assured, on payment of the loss, to provide the insurer with a letter of subrogation, being no more nor less than an express assignment of his rights of recovery against any third party. Subrogation in this sense is a contractual arrangement for the transfer of rights against third parties and is founded upon the common intention of the parties. But the term is also used to describe an equitable remedy to reverse or prevent unjust enrichment which is not based upon any agreement or common intention of the party enriched and the party deprived. The fact that contractual subrogation and subrogation to prevent unjust enrichment both involve transfers of rights or something resembling transfers of rights should not be allowed to obscure the fact that one is dealing with radically different institutions. One is part of the law of contract and the other part of the law of restitution."

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23. An "assignment" on the other hand, refers to a transfer of a right by an instrument for consideration. When there is an absolute assignment, the assignor is left with no title or interest in the property or right, which is the subject-matter of the assignment. The difference between "subrogation" and "assignment" was stated in Insurance Law by MacGillivray &Parkington (7th Edn.) thus:

> *"Both subrogation and assignment permit one party to enjoy the rights of another, but it is well established that subrogation is not aspecies of assignment. Rights of subrogation vest by operation of law rather than as the product of express agreement. Whereas rights of subrogation can be enjoyed by the insurer as soon as payment is made, an assignment requires an agreement that the rights of the assured be assigned to the insurer. The insurer cannot require the assured to assign to him his rights against third parties as a condition of payment unless there is a special clause in the policy obliging the assured to do so. This distinction is of some importance, since in certain circumstances an insurer might prefer to take an assignment of an assured's rights rather than rely upon his rights of subrogation. If, for example, there was any prospect of the insured being able to recover more than his actual loss from a third party, an insurer, who had taken an assignment of the assured's rights, would be able to recover the extra money for himself whereas an insurer who was confined to rights of subrogation would have to allow the assured to retain the excess.*
>
> *Another distinction lies in the procedure of*

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enforcing the rights acquired by virtue of the two doctrines. An insurer exercising rights of subrogation against third parties must do so in the name of the assured. An insurer who has taken a legal assignment of his assured's rights under statute should proceed in his own name .... "

24. The difference between subrogation and assignment was highlighted by the Court of Appeal thus in James Nelson & Sons Ltd. v. Nelson Line (Liverpool) Ltd.I-: (KB pp. 222-23)

"... The way in which the underwriters come in is only by way of subrogation to the rights of the assured. Their right is not that of assignees of the cause of action; ... Therefore, they could only be entitled by way of subrogation to the plaintiffs' rights. What is the nature of their right by way of subrogation? It is the right to stand in the shoes of the persons whom they have indemnified, and to put in force the right of action of those persons; but it remains the plaintiffs' right of action, although the underwriters are entitled to deduct from any sum recovered the amount to which they have indemnified the plaintiffs, and although they may have provided the means of conducting the action to a termination. It is not a case in which one person is using the name of another merely as a nominal plaintiff for the purpose of bringing an action in which he alone is really interested; for the plaintiffs here have a real and substantial interest of their own in the action."

25. The difference between assignment and subrogation was also explained by the Madras High

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Court in Vasudeva Mudaliar v. Caledonian Insurance Co.Ii thus: (AIR p. 160, paras 4-5)

> *"4.... In other words, arising out of the nature of a contract of indemnity, the insurer, when he has indemnified the assured, issubrogated to his rights and remedies against third parties who have occasioned the loss. The right of the insurer to subrogation or to get into the shoes of the assured as it were, need not necessarily flow from the terms of the motor insurance policy, but is inherent in and springs from the principles of indemnity.*
>
> *5. Where, therefore, an insurer is subrogated to the rights and remedies of the assured, the former is to be more or less in the same position as the assured in respect of third parties and his claims against them founded on tortious liability in cases of motor accidents. But it should be noted that the fact that an insurer is subrogated to the rights and remedies of the assured does not ipso jure enable him to sue third parties in his own name. It will only entitle the insurer to sue in the name of the assured, it being an obligation of the assured to lend his name and assistance to such an action. By subrogation, the insurer gets no better rights or no different remedies than the assured himself. Subrogation and its effect are, therefore, not to be mixed up with those of a transfer or any assignment by the assured of his rights and remedies to the insurer. An assignment or a transfer implies something more than subrogation, and vests in the insurer the assured's interest, rights and remedies in respect of the subject-matter and substance of the insurance. In such a*

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case, therefore, the insurer, by virtue of the transfer or assignment in his favour, will be in a position to maintain a suit in his own name against third parties."

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31. If a letter of subrogation containing terms of assignment is to be treated only as an assignment by ignoring the subrogation, there may be the danger of the document itself becoming invalid and unenforceable, having regard to the bar contained in Section 6 of the Transfer of Property Act, 1882 ("the TP Act", for short).

***** ***** *****

34. A "debt" refers to an ascertained sum due from one person to another, as contrasted from unliquidated damages and claims for compensation which require ascertainment/assessment by a court or tribunal before it becomes due and payable. A transfer or assignment of a mere right to sue for compensation will be invalid having regard to Section 6(e) of the TP Act. But when a letter of subrogation-cum-assignment is executed, the assignment is interlinked with subrogation, and not being an assignment of a mere right to sue, will be valid and enforceable.

35. The principles relating to subrogation can therefore be summarised thus:

(i) Equitable right of subrogation arises when the insurer settles the claim of the shoes of the assured and enforce the rights of the assured against the wrongdoer.

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(ii) *Subrogation does not terminate nor puts an end to the right of the assured to sue the wrongdoer and recover the damages for the loss. Subrogation only entitles the insurer to receive back the amount paid to the assured, in terms of the principles of subrogation.*

(iii) *Where the assured executes a letter of subrogation, reducing the terms of subrogation, the rights of the insurer vis-à-vis the assured will be governed by the terms of the letter of subrogation.*

(iv) *A subrogation enables the insurer to exercise the rights of the assured against third parties in the name of the assured. Consequently, any plaint, complaint or petition for recovery of compensation can be filed in the name of the assured, or by the assured represented by the insurer as subrogee-cum-attorney, or by the assured and the insurer as co-plaintiffs or co-complainants.*

(v) *Where the assured executed a subrogation-cum-assignment in favour of the insurer (as contrasted from a subrogation), the assured is left with no right or interest. Consequently, the assured will no longer be entitled to sue the wrongdoer on its own account and for its own benefit. But as the instrument is a subrogation cum-assignment, and not a mere assignment, the insurer has the choice of suing in its own name, or in the name of the assured, if the instrument so provides. The insurer becomes entitled to the entire amount recovered from the wrongdoer, that is, not only the amount that the insurer had paid to the assured, but also any amount received in excess of what was paid by*

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it to the assured, if the instrument so provides."
(underlining supplied)

18. As noticed hereinabove, in the present case, the agreement executed between the Petitioner and the Insurance Company is not a simplicitor assignment of the debt but a subrogation in favour of the Insurance Company. As explain by the Constitution Bench of the Supreme Court in *Economic Transport Organization Delhi (supra)* subrogation does not terminate nor puts an end to the right of the assured to sue the wrongdoer and recover the damages for the loss. It only entitles the insurer to receive back the amount paid to the assured, in terms of the principles of subrogation. In the present case, right has been retained by the Insured i.e. the petitioner to retain any excess amount recovered after applying the amount recovered towards the amount received from the Insurance Company.

19. Reliance placed by learned counsel for the respondent on the judgment of the Supreme Court in *Oberoi Forwarding Agency Vs. New India Assurance Company Ltd. (2000) 2 SCC 407,* to contend that the document is an assignment and as such the petitioner has ceased to have any right to invoke arbitration, is misplaced for the reason that the Constitution Bench of the Supreme Court in *Economic Transport Organization Delhi (supra)* specifically held that the principle in *Oberoi Forwarding Agency (Supra)* was not correctly

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decided, as it held a "subrogation-cum-assignment" as a mere "assignment".

20. Clearly, the agreement between the Petitioner and the Insurance Company is not a mere assignment but a subrogation-cum-assignment. Consequently there is no merit in the objection raised by the Respondent to the reference of disputes to an Arbitral Tribunal.

21. Learned Senior Counsel for the petitioner submits that, keeping in view of the nature of dispute and the quantum involved, instead of appointing a three member tribunal, a Sole Arbitrator be appointed as the Arbitral Tribunal to adjudicate the disputes between the parties.

22. Petitioner had proposed the name of Ms. Justice Indu Malhotra (former Judge of the Supreme Court) as their nominee arbitrator.

23. Keeping in view of the facts and circumstances of the case, nature of disputes involved and the quantum of claim, both the petitions are allowed appointing Ms. Justice Indu Malhotra (former Judge of the Supreme Court) as the Sole Arbitrator to adjudicate the claims and counter-claims (if any), arising between the parties in both the petitions.

24. The question raised by the respondent with regard to extinction of the right of the petitioner to claim any amount from the respondent because they have received the settlement amount from the Insurance

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Company is left open to be decided by the Arbitral Tribunal, if so raised before it.

25. The fee of the Arbitral Tribunal for each of the Petitions shall be in accordance with Schedule-IV of the Arbitration & Conciliation Act, 1996.

26. Petitions are allowed in the above terms.

27. Order *Dasti* under the signatures of the Court Master.

SANJEEV SACHDEVA, J

JULY 04, 2022/rs

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