IN THE HIGH COURT OF MADHYA PRADESH

AT INDORE

BEFORE

HON'BLE SHRI JUSTICE SUBODH ABHYANKAR

ARBITRATION APPEAL No. 8 of 2018

UNITED INDIA INSURANCE CO. LTD. AND OTHERS
Versus
RATLAM SYENTHETIC ROPE MANUFACTURING COMPANY THROUGH SMT. REKHA AND OTHERS

Appearance:
Shri Sudhir Dandvate, learned counsel for the appellant.
Shri A S Kutumble, learned Senior Advocate with Shri Khen Chand Raikwar, learned counsel for the Respondent [CAVEAT].
None for the respondent No.3

Reserved on :28.8.2024
Pronounced on :14.11.2024

JUDGMENT

1] This Arbitration Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 has been filed by the appellant-United India Insurance Co. Ltd., against the order dated 14.11.2017, passed by the District Judge, Ratlam in Misc.Civil Case No.22/2007 (old No. 17/2004) whereby, the Award passed by the Arbitrator dated 13.9.2004, has been affirmed and the application filed by the appellant u/s.34 of the Act of 1996, has been rejected.

2] The questions which have fallen for the consideration of this court are as under :-

1.Whether the arbitration clause could have been invoked in the present case.

2.Whether the arbitration tribunal could have proceeded further after one of the arbitrators left the proceedings midway?

<u>FACTS OF THE CASE</u>.

Shorn of details, the facts giving rise to the present appeal are that the respondents no.1 and 2 had obtained a fire policy from the appellants United India Insurance Co. Ltd., covering their stocks, lying in the premises of the Respondent factory. The policy was valid for the period 13.5.1989 to 12.5.1990. During the policy period, a claim was put forth by the respondents, alleging fire in their premises, which resulted in damages. The appellant appointed surveyor/investigator and found that the fire was deliberate, and repudiated the claim vide their communication dated 24.12.1991. Copy of the repudiation letter has also been placed on record. Being dissatisfied by the decision of repudiation, the respondents filed a regular civil suit for recovery of Rs.24,12,500/-/.

During the pendency of suit, the respondents no.1 and 2 moved an application for joining their financer Punjab National Bank, as one of the Defendants. The said application was allowed by the trial court, and the financer of the respondents no.1 Punjab National Bank was also added as one of the defendants. The newly added defendant (Punjab National Bank) moved an

application, that since the policy contained an arbitration clause , the matter be referred for arbitration. In spite of opposition by the appellant, the said application was allowed, and the matter was referred to the Arbitration.

The trial court directed the parties to appoint one arbitrator each. Thus, the arbitration tribunal was constituted with three arbitrators, viz., one appointed by the appellants, one by the respondent/insured, and one by the PNB, who was admittedly the non-signatory of the agreement.

The arbitration tribunal vide their award dated 13.9.2004, allowed the claim of the respondent against the appellant and directed for payment of Rs. 24,12,500 with interest to the respondent no.1 Smt Rekha & respondent no.2 Prakiran Being aggrieved of the same, the appellant filed an application u/s.34 of the Arbitration and Conciliation Act, 1996, and by order dated 14.11.2017, the trial court rejected the objections. Hence this appeal.

REGARDING SUBMISSION OF APPELLANT

3] Shri S.V. Dandwavte, learned counsel for the appellant/Insurance Company has submitted that not only that the Arbitration Tribunal itself was not properly constituted, in fact, even as per the Arbitration Agreement between the parties, it was not a dispute which could be referred to the Arbitration Tribunal.

4] Shri Dandavate has drawn the attention of this Court to Clause 13 of the insurance policy which inter alia provides that if any difference arises between the parties as to the quantum to be paid under the policy, liability being otherwise admitted, only such difference shall, independently of all other questions, be referred to the decision of an arbitrator to be appointed in writing by the parties in difference. Thus, it is submitted that admittedly, as it was a case of repudiation of the entire claim of the respondent No.1 Ratlam Syenthetic Rope Manufacturing Company by the appellant insurance company, and there was no dispute regarding quantum of compensation, it could not have been referred to the Arbitrator.

5] It is further submitted by Shri Dandwate that in such circumstances, it was not proper for the District court itself to refer the parties to the Arbitrators, as there was no dispute between the parties regarding quantum of the compensation. It is also submitted that since the Arbitrator appointed by the appellant/Insurance Company, Shri H.R.Choudhary had already sent a letter dated 02.9.2004, to the other Arbitrators, that he is relinquishing the post of Arbitrator, in such circumstances, the remaining only two Arbitrators could not have passed the Award which was clearly in violation of S.10 of the Act of 1996, which provides that the number of Arbitrators cannot be even. Thus, it is submitted that it was incumbent upon the respondents to appoint a fresh Arbitrator on behalf of the appellant through the Court or

the Arbitrators could also have made an application to get the Arbitrator appointed through the court, however, instead, both the Arbitrators of the respondents no.1 & 3, have proceeded with the case and have passed the arbitral Award, which cannot be sustained in the eyes of law, as the Arbitral Tribunal was not properly constituted. Thus, it is submitted that the impugned order is liable to be set aside.

6] Counsel for the appellant has further submitted that even on merits of the case, the respondents had claimed a total sum of Rs. 24,12,500/- and both the Arbitrators had passed the Award exactly to the tune of Rs. 24,12,500/-, even allowing the claim in respect of the loan obtained by the respondent no.1 from the MPFC, and the interest which the respondent no.1 was paying to the MPFC on their loan.

7] Shri Dandavate has also drawn the attention of this Court to the agreement Dated 08/03/2002, between the respondents No.1, 2 and the respondent no.3/Punjab National Bank in which, they have agreed that if any Award is passed in their favour, respondent no.3 shall be entitled to get the amount of 35% from the insurance company. Thus, it is submitted that both the arbitrators of the aforesaid respondents were biased and on this count also, the impugned order is liable to be set aside.

8] In support of his submissions, Shri Dandwate has relied upon the decision rendered by the Supreme Court in the cases of ***United India Insurance Co. Ltd. and another vs. Hyundai***

Engineering and Construction Co. Ltd. And others reported as 2019 ACJ 734 equivalent (2018) 17 SCC 607; Associate Builders vs. Delhi Development Authority reported as ***(2015) 3 SCC 49***; ***Oriental Insurance Co. Ltd vs. Narbheram Power and Steel Pvt. Ltd.*** reported as ***(2018) 6 SCC 534& 2018 ACJ 1777*** and ***M/s Mayavati Trading Pvt. Ltd. vs. Pradyuat Deb Burman*** reported as (2019) 8 SCC714 {Civil Appeal no. 7023 of 2019}.

REGARDING SUBMISSION OF RESPONDENTS NO.1 AND 2

9] On the other hand, Shri A.S.Kutumbale, learned senior counsel assisted by Shri K.C. Raikwar,counsel appearing for the respondents no.1 & 2, has opposed the prayer and it is submitted that no case for interference is made out. Counsel has also drawn the attention of this Court to the order passed by the Disrict court dated 24.02.1999 in civil suit no 4B of 1997 where, in the civil suit was filed by the respondents no.1 & 2, the appellant-Insurance Company did not object to the appointment of the Arbitrator, and otherwise also when the aforesaid order was challenged by the Insurance Company in Civil Revision No.476/1999, the same was dismissed by this court vide order dated 16.3.2000, holding that the petitioners have not even cared to file the policy on record. Thus, it is submitted that the order passed by the District Court dated **24.02.1999**, has already attained the finality, and is binding on the parties, hence the

respondents cannot be faulted for the ignorance of the Insurance Company.

10] Learned Senior counsel has also submitted that although there was an agreement between the respondents no.1 & 2 and the respondent no.3/Punjab National Bank **(Annexure A/7)** however, the same is based on a decree (not filed on record) passed in favour of the respondent no.3, and since the respondents no. 1 & 2 already owed the amount to the respondent no.3, it was fair on their part to enter into an agreement to share the amount of arbitration award if any, passed in their favour. Counsel has also submitted that the Award has been passed by the Presiding Officer Shri O.P. Agrawal and Jayant Bohara, who was also the other Arbitrator, and in such circumstances, it cannot be said that it was decided by the even number of the Arbitrators.

11] In support of his submission that an award can be passed by the even number of arbitrators also, learned senior counsel for the respondents no.1 & 2 has relied upon the decisions rendered by the Supreme Court in the case of ***Narayan Prasad Lohia vs. Nikunj Kumar Lohia*** reported as *AIR 2002 SC 1139*.

12] Heard the learned counsel for the parties and perused the record.

As has already been obsereved by this court regarding the questions involved in the case at hand, which have been answered by this court in seriatim, as under:-

Q.No. 1. Whether the arbitration clause could have been invoked in the present case.

13] Since the entire case has its edifice on the Arbitration Agreement between the parties, which is contained in the insurance policy dated 13.5.1989 (Annexure A/1), it would be apt to refer to the relevant para 13 of the same, which reads as under:-

> "13. If any 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 an arbitrator to be appointed in writing by the parties in difference, or if they cannot agree upon a single arbitrator to the decision of two disinterested persons as arbitrators of whom one shall be appointed in writing by each of the parties within two calendar months after having been required so to do in writing by the other party in accordance with the provisions of the Arbitration Act 1940, as amended from time to time and for the time being in force. In case either party shall refuse or fail to appoint arbitrator within two calendar months after receipt of notice in writing requiring an appointment, the other party shall be at liberty to appoint sole arbitrator and in case of disagreement between the arbitrator and in case of disagreement between the arbitrators the difference shall be referred to the decision of an umpire who shall have been appointed by them in writing before entering on the reference and who shall sit with the arbitrators and preside at their meetings."

14] A perusal of the aforesaid clause would clearly reveal that the dispute, which could be referred to the Arbitration was only in respect of the quantum to be paid under the policy, and not all the disputes under the policy could be referred to the Arbitration. In other words, when the liability is accepted by the Insurance Company, and the dispute is in relation to the quantum of

compensation, only such dispute could be referred to the **Arbitration** and not others.

15] So far as the decision relied upon by the counsel for the appellant in the case of ***United India Insurance Co. Ltd. and another (supra)*** is concerned, the relevant paras of the same read as under:-

> **"10.**The clause similar to the subject Clause 7 of the Insurance Policy came up for consideration before a three-Judge Bench of this Court in *Oriental Insurance Co. Ltd.* [*Oriental Insurance Co. Ltd.* v. *Narbheram Power and Steel (P) Ltd.*, (2018) 6 SCC 534 : (2018) 3 SCC (Civ) 484] After analysing the legal principle expounded in a host of decisions, including the decision in *Jumbo Bags Ltd.*[*Jumbo Bags Ltd.*v.*New India Assurance Co. Ltd.*, 2016 SCC OnLine Mad 9141 : (2016) 3 CTC 769 : (2016) 2 LW 769] , the Court opined as follows : (*Oriental Insurance Co. Ltd. case*[*Oriental Insurance Co. Ltd.* v. *Narbheram Power and Steel (P) Ltd.*, (2018) 6 SCC 534 : (2018) 3 SCC (Civ) 484] , SCC p. 547, paras 23-24)
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> > "*23*. It does not need special emphasis that an arbitration clause is required to be strictly construed. Any expression in the clause must unequivocally express the intent of arbitration. *It can also lay the postulate in which situations the arbitration clause cannot be given effect to. If a clause stipulates that under certain circumstances there can be no arbitration, and they are demonstrably clear then the controversy pertaining to the appointment of arbitrator has to be put to rest.*
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> > *24*. In the instant case, Clause 13 categorically lays the postulate that if the insurer has disputed or not accepted the liability, no difference or dispute shall be referred to arbitration. …"
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> (*emphasis supplied*)
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> While adverting to the observation in paras 28 and 32 of*Jumbo Bags Ltd.* [*Jumbo Bags Ltd.*v.*New India Assurance Co. Ltd.*, 2016 SCC OnLine Mad 9141 : (2016) 3 CTC 769 : (2016) 2 LW 769] , the Court observed thus : (*Oriental Insurance Co. Ltd. Case* [*Oriental Insurance Co. Ltd.* v. *Narbheram Power and Steel (P) Ltd.*, (2018) 6 SCC 534 : (2018) 3 SCC (Civ) 484] , SCC pp. 545-46, para 19)
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> > "*19*. We may presently refer to the decision of the Madras High Court in *Jumbo Bags Ltd.* [*Jumbo Bags Ltd.* v. *New India Assurance Co. Ltd.*, 2016 SCC OnLine Mad 9141 : (2016) 3 CTC 769 : (2016) 2 LW 769] In the said case, the learned Chief Justice was interpreting Clause 13 of the policy conditions. Referring to *Vulcan Insurance Co. Ltd.* [*Vulcan Insurance Co. Ltd.* v. *Maharaj Singh*, (1976) 1 SCC 943] , he has held thus : (*Jumbo Bags Ltd. case* [*Jumbo Bags Ltd.* v. *New India Assurance Co. Ltd.*,

2016 SCC OnLine Mad 9141 : (2016) 3 CTC 769 : (2016) 2 LW 769] , SCC OnLine Mad para 28)

'*28*. …The dispute which is not referable 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 institute a suit.'

And again : (SCC OnLine Mad para 32)

'*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.'

We concur with the said view."

(*emphasis supplied*)

11. The other decision heavily relied upon by the High Court and also by the respondents in *Duro Felguera* [*Duro Felguera S.A.* v.*Gangavaram Port Ltd.*, (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] , will be of no avail. Firstly, because it is a two-Judge Bench decision and also because the Court was not called upon to consider the question which arises in the present case, in reference to Clause 7 of the subject Insurance Policy. The exposition in this decision is a general observation about the effect of the amended provision and not specific to the issue under consideration. The issue under consideration has been directly dealt with by a three-Judge Bench of this Court in *Oriental Insurance Co. Ltd.* [*Oriental Insurance Co. Ltd.* v.*Narbheram Power and Steel (P) Ltd.*, (2018) 6 SCC 534 : (2018) 3 SCC (Civ) 484] , following the exposition in *Vulcan Insurance Co. Ltd.* v.*Maharaj Singh* [*Vulcan Insurance Co. Ltd.* v. *Maharaj Singh*, (1976) 1 SCC 943] , which, again, is a three-Judge Bench decision having construed clause similar to the subject Clause 7 of the Insurance Policy. In paras 11 and 12 of *Vulcan Insurance Co. Ltd.*[*Vulcan Insurance Co.Ltd.* v.*Maharaj Singh*, (1976) 1 SCC 943], the Court answered the issue thus : (SCC pp. 948-49)

"*11*. Although the surveyors in their letter dated 26-4-1963 had raised a dispute as to the amount of any loss or damage alleged to have been suffered by Respondent 1, the appellant at no point of time raised any such dispute. *The appellant company in its letters dated 5-7-1963 and 29-7-1963 repudiated the claim altogether. Under Clause 13 the company was not required to mention any reason of rejection of the claim nor did it mention any. But the repudiation of the claim could not amount to the raising of a dispute as to the amount of any loss or damage alleged to have been suffered by Respondent 1. If the rejection of the claim made by the insured be on the ground that he had suffered no loss as a result of the fire or the amount of loss was not to the extent claimed by him, then and then only, a difference could have arisen as to the amount of any loss or damage within the meaning of Clause 18*. In this case, however, the company repudiated its liability to pay any amount of loss or damage as claimed by Respondent 1. In other words, the dispute raised

by the company appertained to its liability to pay any amount of damage whatsoever. In our opinion, therefore, the dispute raised by the appellant company was not covered by the arbitration clause.

12.As per Clause 13 on rejection of the claim by the company an action or suit, meaning thereby a legal proceeding which almost invariably in India will be in the nature of a suit, has got to be commenced within three months from the date of such rejection; otherwise, all benefits under the policy stand forfeited. The rejection of the claim may be for the reasons indicated in the first part of Clause 13, such as, false declaration, fraud or wilful neglect of the claimant or on any other ground disclosed or undisclosed. But as soon as there is a rejection of the claim and not the raising of a dispute as to the amount of any loss or damage, the only remedy open to the claimant is to commence a legal proceeding, namely, a suit, for establishment of the company's liability. It may well be that after the liability of the company is established in such a suit, for determination of the quantum of the loss or damage, reference to arbitration will have to be resorted to in accordance with Clause 18.*But the arbitration clause, restricted as it is by the use of the words 'if any difference arises as to the amount of any loss or damage', cannot take within its sweep a dispute as to the liability of the company when it refuses to pay any damage at all*."

(emphasis supplied)

Again in para 22, after analysing the relevant judicial precedents, the Court concluded as follows : (SCC p. 952)

"*22*. The two lines of cases clearly bear out the two distinct situations in law. A clause like the one in *Scott* v. *Avery* [*Scott* v. *Avery*, (1856) 5 HLC 811 : 10 ER 1121] bars any action or suit if commenced for determination of a dispute covered by the arbitration clause. *But if on the other hand a dispute cropped up at the very outset which cannot be referred to arbitration as being not covered by the clause, then* *Scott* v. *Avery* [*Scott* v. *Avery*, (1856) 5 HLC 811 : 10 ER 1121] *clause is rendered inoperative and cannot be pleaded as a bar to the maintainability of the legal action or suit for determination of the dispute which was outside the arbitration clause*."

(*emphasis supplied*)

12. From the line of authorities, it is clear that the arbitration clause has to be interpreted strictly. The subject Clause 7 which is in pari materia to Clause 13 of the policy

> considered by a three-Judge Bench in *Oriental Insurance Co. Ltd.* [*Oriental Insurance Co. Ltd.* v. *Narbheram Power and Steel (P) Ltd.*, (2018) 6 SCC 534 : (2018) 3 SCC (Civ) 484] , is a conditional expression of intent. Such an arbitration clause will get activated or kindled only if the dispute between the parties is limited to the quantum to be paid under the policy. The liability should be unequivocally admitted by the insurer. That is the precondition and sine qua non for triggering the arbitration clause. To put it differently, an arbitration clause would enliven or invigorate only if the insurer admits or accepts its liability under or in respect of the policy concerned. That has been expressly predicated in the opening part of Clause 7 as well as the second paragraph of the same clause. In the opening part, it is stated that the "(liability being otherwise admitted)". This is reinforced and restated in the second paragraph in the following words:
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> > "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."
>
> Thus understood, there can be no arbitration in cases where the insurance company disputes or does not accept the liability under or in respect of the policy.
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> *(emphasis supplied)*

16] In the present case, it is an admitted fact that the Insurance Company had already denied the claim, and thus, it was not a case where there was any dispute existed between the parties regarding the quantum of the compensation to be paid by the appellant-*Insurance Company to the Ratlam Syenthetic rope manufacturing company*, hence, the matter was not required to be referred to the Arbitration. And even if it was referred to the Arbitrator by the order of the court, the Arbitrators also could not have traveled beyond the scope of the Arbitration clause no.13 (supra). Whereas, a perusal of the Arbitral Award would clearly reveal that even the Arbitrators have noted in **issue no.5** that the claimants have given evidence that *the Insurance Company has*

repudiated their claims arbitrarily on false complaint by unknown person. In such circumstances, it is apparent that the Arbitration Tribunal has traveled beyond the scope of Arbitration clause to grant relief to the claimants, which cannot be sustained in the eyes of law and is liable to be set aside.

Q. No. 2. Whether the arbitration tribunal could have proceeded further after one of the arbitrators left the proceedings midway?

17] It is also found that the arbitration tribunal consisted of three arbitrators by the order of the court, and if one of the Arbitrators had left the arbitration proceedings midway, it was incumbent upon the remaining two Arbitrators to get the third Arbitrator appointed through the court or to direct the parties to get the third Arbitrator appointed through the court, instead, both the Arbitrators have proceeded with the Arbitration and have passed the award, which procedure, in the considered opinion of this court could not have been adopted by the arbitrators, as the mandate was for the appointment of the three arbitrators. And thus, on this ground also, the Award passed by the arbitration tribunal being *non-est* in the eyes of law, is liable to be set aside.

18] Whereas, it is also found that the Arbitrator was appointed by the court on behalf of the Respondent no.3 Punjab National Bank, despite it was not a party to the Insurance policy between the appellant-United India Insurance Company and the respondent No.1, and only because a subsequent agreement was

entered into between the respondent no.1- Ratlam Syenthetic Rope Manufacturing Company and the respondent no.3- Punjab National Bank, it cannot be said that the Punjab National Bank was competent to contest the dispute between the appellant and the respondent no.1, when it was not a signatory to the Insurance policy. It is found that the objections raised by the appellant before the arbitration tribunal were rejected on the ground that the arbitrators were appointed by the order of Vth ADJ, Ratlam, and the Civil Revision filed against the said order has also been dismissed by the High Court. This finding is apparently perverse as it is a settled position of law as also enshrined u/s.16 of the Act of 1996 that an arbitral tribunal is competent to rule on its jurisdiction even when the objection has been raised by a party who has acquiesced to appointment of arbitrator.

19] Thus, the appellant has clearly made out a case for interference, and this Court is of the considered opinion that the Award and the impugned judgment passed by the learned Judge of the district court under Section 34 of the Act of 1966, clearly falls within the category of sub-clause (iv) & (v) of Clause (2) of Section 34 of the Act, which provides for the dispute not contemplated by the Arbitration, and secondly, on the ground of composition of the Arbitral Tribunal which was not in accordance with the agreement of the parties.

20] So far as the decision relied upon by the learned senior counsel for the respondents no. 1 & 2 in the case of ***Narayan***

Prasad Lohia (supra) is concerned, that even two arbitrators can pass the award, is distinguishable on facts and is of no help to the respondents.

21] In view of the same, the appeal stands ***allowed*** and the impugned order dated14.11.2017 is hereby set aside.

22] Parties shall bear their own costs.

23] Accordingly, the petition stands **allowed.**

(SUBODH ABHYANKAR)
JUDGE

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