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

Present :

The Hon'ble Justice Shekhar B. Saraf

AP 449 of 2021

JHAJJAR K. T. TRANSCO PRIVATE LIMITED

VS

THE ORIENTAL INSURANCE COMPANY LIMITED

For the petitioner	:	Mr. Anirban Ray, Adv. Ms. Urmila Chakraborty, Adv. Mr. Sabarni Mukherjee, Adv.
For the respondent	:	Mr. Shuvasish Sengupta, Adv. Mr. Rajesh Singh, Adv.

Last Heard on : January 18, 2023
Judgement on : January 31, 2023

Shekhar B. Saraf, J.:

1. The petitioner, Jhajjar K. T. Transco Private Limited, in the instant application [being A.P. 449/2021] under Section 11 of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as 'the Act'] is a company incorporated under the provisions of the Companies Act, 1956 and is an 'existing company' within the meaning of the Companies Act, 2013.

2. The respondent, Oriental National Insurance Company Limited, is a nationalised insurance company within the meaning of the Companies Act, 2013 and having its office at CBU, 7, Red Cross Place, Kolkata 700001. The respondent is governed by the Insurance Act, 1938 and the Insurance (Amendment) Act, 2002 and the Rules framed thereunder.

3. The instant application has been filed under Section 11 of the Act for appointment of an arbitrator for adjudication of disputes that have arisen between the parties.

Relevant Facts

4. The petitioner obtained an Insurance Policy, being Industrial All Risk Policy bearing No. 311800/11/2015/410 from the Respondent for (1) 400/220kv, 2*315MVA & 220/132kv, 2*100MVA substation at Kabulpur, Rohtak, Haryana (hereinafter referred to as 'the substation'). The tenure of the policy was from March 20, 2015 Midnight to March 19, 2016 Midnight.

5. On February 18, 2016, a gang of villagers entered the substation and caused damage to the facility. The same was reported to the respondent and requests were made to appoint the surveyor of the respondent for assessment of loss suffered by the petitioner vide emails dated

February 20, 2016, February 29, 2016 and March 4, 2016. Pursuant to such requests, the respondent appointed a surveyor, namely, M/S. Rohit Kumar & Company.

6. The surveyor filed a report dated July 4, 2018, wherein the loss suffered by the petitioner was assessed at Rs. 1,59,60,206/-.

7. The petitioner executed an indemnity bond dated February 3, 2018 in favour of the respondent for a sum of Rs. 1,49,63,531/-. The petitioner further also issued a letter of subrogation in favour of the respondent.

8. The petitioner duly executed two discharge vouchers dated December 20, 2018 and February 25, 2019 in favour of the respondent clarifying that full and final settlement has been discharged in favour of the petitioner. Furthermore, the financiers of the petitioner, being State Bank of India, issued a no-objection certificate in favour of the respondents stating that it had no objection if the amounts were directly paid to the petitioner.

9. The petitioner, vide two letters, both dated June 7, 2019 requested the respondent for review of the said claim and raised protests against the quantification of the assessment reported by the surveyor as well as determined by the respondent. The petitioner also expressed that they received an even lesser amount than what the surveyor had assessed.

The petitioner further sent an email dated June 18, 2019 requesting the respondent to look into the matter urgently.

10. The respondent replied vide email dated June 26, 2019 and stated that they were working on the same and would revert shortly. However, since no such response was received, the petitioner invoked the arbitration clause vide letter dated August 7, 2019.

11. The respondent replied vide letter dated August 13, 2019 and requested the petitioner to reconsider their reference to arbitration. They further annexed the survey report (dated July 4, 2018) and supplementary survey reports (dated November 9, 2018 and November 28, 2018) whereby the net liability stood at Rs. 1,59,60,206/-.

12. The respondent further, vide letter September 5, 2019 indicated that they disagreed with the petitioner since full and final settlement had been reached after the amount was paid with some deductions (being Rs. 1,49,63,531).

13. The petitioner also attempted reconciliation vide letters dated August 2, 2021 and September 27, 2021 wherein they requested payment of Rs. 89,03,148/- as a means to end the dispute. Failure to make such payments by the respondent induced the petitioner to resort to arbitration. The time period stated in the letter dated August 2, 2021

for reconciliation expired on October 4, 2021. Subsequent to the same, the instant petition has been filed.

Rival Submissions

14. Mr. Anirban Ray, learned counsel appearing on behalf of the petitioner made the following submissions:

    a. The question regarding whether the discharge vouchers, letter of indemnity and letter of subrogation ended the dispute is an adjudication of law and fact. This adjudication should not be usurped by the Court at this stage but should be referred to an arbitrator;

    b. The discharge vouchers contain the term 'on account payment' and therefore cannot be treated as instruments for full and final settlement;

    c. The letters of subrogation and indemnity were not filled up and were purportedly signed on a particular date of 2019. They cannot be treated as admission of settlement between the parties. Even if they can be, the question of whether they should be must be left to an arbitrator;

d. A circular of the Insurance Regulatory and Development Authority of India (hereinafter referred to as 'IRDA') dated September 24, 2015 mentions that discharge vouchers do not exclude the rights of policy seekers to seek higher compensation before forums established by law. Even the later circular dated June 8, 2016 is in furtherance of the previous circular dated September 24, 2015. The later circular merely mentions that the practice of discharge vouchers would continue subject to certain conditions. The right to seek higher compensation does not stand extinguished;

e. The petitioner relied upon ***Pravin Electricals Private Limited v. Galaxy Infra and Engineering Private Limited ([2021] 5 SCC 671)*** and ***Vidya Drolia v. Durga Trading Corporation ([2021] 2 SCC 1)*** to substantiate the proposition that only in rare cases would the courts interfere with regard to arbitrability and the instant case is not one of those cases;

f. The instant case is fraught with coercion and such circumstances have been recognised in ***National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., ([2009] 1 SCC 267)***;

g. The Apex Court in ***Vidya Drolia (supra)*** does not direct courts to look into whether there is a live claim, but only adjudicate upon the non-arbitrability of the subject matter or dispute. Furthermore, the

Court lays down the proposition that 'when in doubt, do refer'. Therefore, this matter should be referred to an arbitrator.

15. The respondent made the following arguments:

a. The petitioner received the payments on January 16, 2019 and March 28, 2019. There has been execution of discharge vouchers and letters of subrogation and indemnity. The bank has also given a no-objection certificate. The first request for extra-amount was made two and a half-months post receiving the money, that is, for the first time on June 7, 2019. The claims have been accorded and satisfied. The letter invoking arbitration does not contain any averment of coercion, duress or undue influence. Only the petition contains such averments. These are indicative of mala fide intentions and attempts of gaining a windfall;

b. The IRDA circular of June 8, 2016 forecloses the right of the petitioner to raise the current dispute as it allowed for the practice of full and final discharge vouchers;

c. Mere bald pleas of fraud, coercion, duress or undue influence would not be enough and some material has to be placed before the court to establish a prima facie case. Only then would a petition for appointment of an arbitrator be entertained and allowed. Reliance was placed on ***New India Assurance v. Genus Power***

Infrastructure Limited ([2015] 2 SCC 424) and ***United India Insurance Company Limited v. Antique Art Exports Private Limited ([2019] 5 SCC 362)*** for the said contention;

d. Placing reliance on ***Vidya Drolia (supra)***, it was asserted that there remains no live and arbitrable dispute to be referred to an arbitrator.

Analysis

16. In ***New India Assurance (supra)***, the Apex Court was deciding whether a dispute, wherein accord and satisfaction was alleged to have been gained out of coercion and duress, can be referred to arbitration. The Apex Court refused to send the matter to arbitration. The relevant extracts which were to act as guiding factors in similar disputes are herein produced below:

> *'7. The question that arises is whether the discharge in the present case upon acceptance of compensation and signing of subrogation letter was not voluntary and whether the claimant was subjected to compulsion or coercion and as such could validly invoke the jurisdiction under Section 11 of the Act. The law on the point is clear from following decisions of this Court. In National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd. [(2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] in paras 26 and 51 it was stated as under: (SCC pp. 284-85 & 294)*

"26. When we refer to a discharge of contract by an agreement signed by both the parties or by execution of a full and final discharge voucher/receipt by one of the parties, we refer to an agreement or discharge voucher which is validly and voluntarily executed. If the party which has executed the discharge agreement or discharge voucher, alleges that the execution of such discharge agreement or voucher was on account of fraud/coercion/undue influence practised by the other party and is able to establish the same, then obviously the discharge of the contract by such agreement/voucher is rendered void and cannot be acted upon. Consequently, any dispute raised by such party would be arbitrable.

* * *

51. The Chief Justice/his designate exercising jurisdiction under Section 11 of the Act will consider whether there was really accord and satisfaction or discharge of contract by performance. If the answer is in the affirmative, he will refuse to refer the dispute to arbitration. On the other hand, if the Chief Justice/his designate comes to the conclusion that the full and final settlement receipt or discharge voucher was the result of any fraud/coercion/undue influence, he will have to hold that there was no discharge of the contract and consequently, refer the dispute to arbitration. Alternatively, where the Chief Justice/his designate is satisfied prima facie that the discharge voucher was not issued voluntarily and the claimant was under some compulsion or coercion, and that the matter deserved detailed consideration, he may instead of deciding the issue himself, refer the matter to the Arbitral Tribunal with a specific direction that the said question should be decided in the first instance."'

The Apex Court found that there was accord and satisfaction, without there being any fraud and coercion, thereby disallowing the Section 11 application under the Act.

17. In ***United India Assurance (supra)***, the Apex Court was dealing with a similar situation. It concluded along similar lines of ***New India Assurance (supra)***. The relevant extracts are mentioned below:

> '***15.*** *From the proposition which has been laid down by this Court, what reveals is that a mere plea of fraud, coercion or undue influence in itself is not enough and the party who alleged is under obligation to prima facie establish the same by placing satisfactory material on record before the Chief Justice or his Designate to exercise power under Section 11(6) of the Act, which has been considered by this Court in New India Assurance Co. Ltd. case [New India Assurance Co. Ltd. v. Genus Power Infrastructure Ltd., (2015) 2 SCC 424 : (2015) 2 SCC (Civ) 130] as follows : (SCC p. 429, para 9)*
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> *"9. It is therefore clear that a bald plea of fraud, coercion, duress or undue influence is not enough and the party who sets up a plea, must prima facie establish the same by placing material before the Chief Justice/his designate."*
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> ***16.*** *In the instant case, averment was made for the first time after 11 weeks of the settlement of claim and release of discharge voucher in the petition filed by the respondent seeking appointment of arbitrator*

of undue influence/coercion being used by the appellant in signing the papers on dotted lines is reproduced as under:

"(xiii) It is stated that the respondent occupying a bargaining position as an insurer coerced and forced the petitioner to sign on dotted lines on a pre-signed standard discharge voucher. The petitioner facing severe financial distress gave in to the pressure tactics of the respondent and was made to sign a purported discharge voucher dated 24-6-2016 for an amount of Rs 2,20,36,840 (Rupees two crores twenty lakhs thirty-six thousand, eight hundred forty only) as against the claim of Rs 5,12,49,241 (Rupees five crores twelve lakhs forty-nine thousand two hundred forty-one only) as a precondition for release of money.

* * *

(xvii) It is stated that the petitioner vide its letter dated 27-7-2016 rescinded the purported discharge voucher as illegal and void as it was forced or coerced into signing the same in the face of extreme financial duress. The petitioner vide the said letter dated 27-7-2016 called upon the respondent to pay the balance amount of Rs 2,92,12,401 (Rupees two crores ninety-two lakhs twelve thousand four hundred and one only) on account of loss suffered by the petitioner as result of fire. The petitioner also claimed an interest @ 18% p.a. from the date of incident as well as on the paid amount till date of payment i.e. up to 6-7-2016."

* * *

17. *It is true that there cannot be a rule of its kind that mere allegation of discharge voucher or no claim certificate being obtained by fraud/coercion/undue influence practised by other party in itself is sufficient for appointment of the arbitrator unless the claimant who alleges that execution of the discharge agreement or no claim certificate was obtained on account of fraud/coercion/undue influence practised by the other party is able to produce prima facie evidence to substantiate the same, the correctness thereof may be open for the Chief Justice/his Designate to look into this aspect to find out at least prima facie whether the dispute is bona fide and genuine in taking a decision to invoke Section 11(6) of the Act.'*

18. However, ***United India Assurance (supra)*** has been effectively overruled in ***Mayavati Trading Private Limited v. Pradyuat Deb Burman ([2019] 8 SCC 714)***. The Apex Court in ***Mayavati Trading (supra)*** in no uncertain terms held that:

'***10.*** *This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgment [United India Insurance Co. Ltd. v. Antique Art Exports (P) Ltd., (2019) 5 SCC 362 : (2019) 2 SCC (Civ) 785] , as Section 11(6-A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been*

laid down in the judgment in Duro Felguera, SA [Duro Felguera, SA v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] — see paras 48 & 59'

[Emphasis Added]

19. The Apex Court in ***Mayavati Trading (supra)*** has prescribed a very limited role of the courts in deciding applications under Section 11. The decision is particularly relevant in the factual matrix of the instant case. However, this decision was followed by another decision by the Apex Court in ***Vidya Drolia (supra)*** which has expanded the role of Courts to some extent, if not entirely. Both these judgements are three-judge benches and ***Vidya Drolia (supra)*** does not differ from ***Mayavati Trading (supra)***. Thus, they are to be read conjunctively.

20. In ***Pravin Electricals (supra)***, the Apex Court has given an adept understanding of the law set down in ***Vidya Drolia (supra)***. Relevant excerpts of Pravin Electricals (supra) are extracted below:

'***15.*** *Dealing with "prima facie" examination under Section 8, as amended, the Court then held: (Vidya Drolia case [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , SCC pp. 110-11, para 134)*

"134. Prima facie examination is not full review but a primary first review to weed out manifestly and ex facie non-existent and invalid arbitration agreements and non-arbitrable disputes. The prima facie

review at the reference stage is to cut the deadwood and trim off the side branches in straightforward cases where dismissal is barefaced and pellucid and when on the facts and law the litigation must stop at the first stage. Only when the court is certain that no valid arbitration agreement exists or the disputes/subject-matter are not arbitrable, the application under Section 8 would be rejected. At this stage, the court should not get lost in thickets and decide debatable questions of facts. Referral proceedings are preliminary and summary and not a mini trial. This necessarily reflects on the nature of the jurisdiction exercised by the court and in this context, the observations of B.N. Srikrishna, J. of "plainly arguable" case in Shin-Etsu Chemical Co. Ltd. [Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd., (2005) 7 SCC 234] are of importance and relevance. Similar views are expressed by this Court in Vimal Kishor Shah [Vimal Kishor Shah v. Jayesh Dinesh Shah, (2016) 8 SCC 788 : (2016) 4 SCC (Civ) 303] wherein the test applied at the pre-arbitration stage was whether there is a "good arguable case" for the existence of an arbitration agreement."

18. *The Bench finally concluded: (Vidya Drolia case [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , SCC pp. 120-21, paras 153-55)*

"153. Accordingly, we hold that the expression "existence of an arbitration agreement" in Section 11 of the Arbitration Act, would include aspect of validity of an arbitration agreement, albeit the court at the referral stage would apply the prima facie test on the basis of

principles set out in this judgment. In cases of debatable and disputable facts, and good reasonable arguable case, etc. the court would force the parties to abide by the arbitration agreement as the Arbitral Tribunal has primary jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability.

154. Discussion under the heading "Who Decides Arbitrability?" can be crystallised as under:

154.1. Ratio of the decision in Patel Engg. Ltd. [SBP & Company v. Patel Engg. Ltd., (2005) 8 SCC 618] on the scope of judicial review by the court while deciding an application under Sections 8 or 11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective effect from 23-10-2015) and even post the amendments vide Act 33 of 2019 (with effect from 9-8-2019), is no longer applicable.

154.2. Scope of judicial review and jurisdiction of the court under Sections 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.

154.3. The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of "second look" on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.

154.4. Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably "non-arbitrable" and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.

155. Reference is, accordingly, answered."

19. *Ramana, J. in a separate concurring opinion, after referring to the case law, summed up his conclusions as follows: (Vidya Drolia case [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , SCC p. 162, para 244)*

"244. Before we part, the conclusions reached, with respect to Question 1, are:

244.1. Sections 8 and 11 of the Act have the same ambit with respect to judicial interference.

244.2. Usually, subject-matter arbitrability cannot be decided at the stage of Section 8 or 11 of the Act, unless it is a clear case of deadwood.

244.3. The court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.

244.4. The court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above i.e. "when in doubt, do refer".

244.5. The scope of the court to examine the prima facie validity of an arbitration agreement includes only:

244.5.1. Whether the arbitration agreement was in writing? or

244.5.2. Whether the arbitration agreement was contained in exchange of letters, telecommunication, etc.?

244.5.3. Whether the core contractual ingredients qua the arbitration agreement were fulfilled?

244.5.4. On rare occasions, whether the subject-matter of dispute is arbitrable?"'

21. Summarising the legal principles and analysis of law conducted above, the following is established:

I. The Apex Court has limited the legal determination to a prima facie ascertainment of

(i) the existence of a legal and binding arbitration agreement, and/or

(ii) whether the subject matter is arbitrable.

II. The Court has not contemplated entering into merits of a dispute to decide if accord and final satisfaction has been reached.

Conclusion

22. The request to appoint a surveyor and payment of damages was first made vide email dated February 20, 2016. The surveyor filed a report almost after 30 months of the said request. However, this report was not made available to the petitioner until August 13, 2019 which was after the letter of the petitioner invoking arbitration.

23. There is certainly a huge gap between the request raised and receipt of report of surveyor. The petitioner did not have a copy of the survey report until much later. Additionally, the payment was made much later (on January 16, 2019 and March 28, 2019), which was after discharge vouchers were signed and executed on December 20, 2018 and February 25, 2019.

24. There is a reasonable apprehension that the payment was made subject to signing of the vouchers after a belated period from the mishap which

caused damages. The element of coercion though indicative, are not entirely illusionary.

25. Furthermore, there is merit to the argument that the later circular dated June 8, 2016 is in furtherance of the previous circular dated September 24, 2015. The later circular merely mentions that the practice of discharge vouchers would continue subject to certain conditions. The right to seek higher compensation, even after signing of discharge vouchers, does not stand extinguished as per the circular dated September 24, 2015. Therefore, resort can be made to any forum for the adjudication of such a right. There is a live claim that needs adjudication.

26. Regardless, this Court, in light of the ratio of ***Mayavati Traders (supra)*** does not need to go into the question of whether actual accord and full satisfaction was reached. Paying due consideration to Section 11(6-A), the arbitration agreement is undisputedly existent. There is enough factual material for this Court to resist its interference at this stage and refer the matter to arbitration.

27. Accordingly, I appoint the Hon'ble Justice Indira Banerjee (Reitred), Supreme Court of India, as the sole arbitrator to resolve the dispute between both the parties.

28. In light of the above, the petition (being A.P. 449/2021) is disposed of.

29. An urgent photostat-certified copy of this order, if applied for, should be made available to the parties upon compliance with requisite formalities.

(Shekhar B. Saraf, J.)