2024:DHC:7513

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

\+ ARB.P. 1209/2023

PAYU PAYMENTS PRIVATE LIMITED .....Petitioner
Through: Mr. Rajeeve Mehra, Sr. Adv. with Mr. V. Anush Raajan and Ms. Tanisha Dhoot, Advs.

versus

THE NEW INDIA ASSURANCE CO LTD .....Respondent
Through: Dr. Amit George, Ms. Gurkaranbir Singh and Mr. Dushyant Kishan Kaul, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGMENT (ORAL)

% 18.09.2024

1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996[1], for reference of the disputes between the parties to arbitration.

2. The disputes arise in the context of two insurance policies, Policy 33 and Policy 34, dated 31 March 2018 executed between the petitioner and the respondent.

3. The petitioner through an insurance broker, Howden Insurance Brokers (India) Pvt Ltd[2], availed two insurance policies, i.e. Package Liability Policy No. 930000361717000033 (Policy 33) for a sum

[1] "the 1996 Act", hereinafter
[2] "Howden", hereinafter

assured of ₹ 20 crores and Package Liability Policy No. 93000036170000034 (Policy 34) for a sum assured of ₹ 6.5 Crores from the respondent Company. The policies were availed to cover various risks associated with cyber and computer related security breaches.

4. On 7 April 2018, the petitioner was informed about some fraudulent transactions on the Core PG Payment Platform, affecting two of its banking partners, the South Indian Bank and the UCO Bank, by one of its merchant partners, Thomas Cook (I) Ltd. On account of the said attack, the petitioner is stated to have suffered losses in excess of ₹ 8,58,12,965.

5. As the cyber attack by the miscreants amounted to "e-theft", within the definition of the expression under Policy 33 and "External Crime Theft" under Policy 34, the petitioner, through Howden, lodged an insurance claim for a total loss of ₹ 8,58,12,965 with the respondent, under both the policies. The claims were lodged by Howden in the form of composite claims in view of the overlapping cause and composite facts.

6. As a result, BDO India LLP[3], was appointed as a forensic investigator to assess the loss that the petitioner had incurred. According to the draft forensic report of BDO under both the policies, the damages incurred by the petitioner were ₹ 2,91,30,467, which was said to be covered under both the policies.

[3] "BDO", hereinafter

7. Despite of the BDO's report and multiple attempts from the petitioner's end towards the settlement of the claims, the respondent did not proceed with any arrangement to settle the claim amount.

8. On 29 June 2021, the petitioner issued a Legal Notice to the respondent requesting for release of the complete insurance claim amount within four weeks.

9. After a delay of over four years, the respondent, *vide* its Repudiation Letters dated 25 October 2022, rejected all the claims under both the policies by relying on the Proclaim Surveyors & Loss Assessors Pvt Ltd's[4] report. In the letters, it was mentioned by the respondent that the cyber-attack occurred in the vulnerable networks of the Banks and not that of the petitioner. Hence, it was stated by the respondent that it did not fall under either of the policies.

10. On 11 January 2023, the petitioner issued a Letter of Protest through which it denied the repudiation and also requested the respondent to withdraw the Repudiation Letters. The petitioner also directed the respondent to furnish the reports mentioned in the Repudiation Letters.

11. The insurance policies were taken in a composite manner and it was for the first time in the repudiation letters that both the policies were separately considered.

[4] "Proclaim", hereinafter

12. As the disputes arose out of the common cause of action under Policy 33 and 34 between the parties, the petitioner addressed a notice to the respondent under Section 21 of the 1996 Act on 22 July 2023 seeking reference of the disputes to a sole arbitrator. The petitioner in the notice proposed names of a former Judge of the Hon'ble Supreme Court, a former Chief Justice of the High Court of Jammu and Kashmir and a former Chief Justice of the High Court of Bombay.

13. The Insurance Policies (Policy 33 and 34) envisage resolution of disputes by arbitration. The arbitration clauses in both the policies read thus:

> **Policy 33**
>
> 11. Where a Claim:
>
> a) Includes both matters covered and matters that are not covered under this policy; or
> b) is made against a person or organisation other than an Insured,
>
> The Company and the Insured shall allocate any amounts incurred by or on behalf of the insured:
>
> (i) based upon the relative legal and financial exposures of an Insured to matter covered and matters not covered by this policy; and
> (ii) in the case of settlement in such claim, based also on the relative benefits to an Insured.
>
> 1. If the Insured and the Company cannot agree on an allocation of amounts incurred by an Insured:
>
> a) The Company, if requested by the Insured, shall submit any disagreement between them regarding the allocation of loss for determination by arbitration. Subject to agreement between the parties, the arbitration panel shall consist of one arbitrator selected by such Insured, one arbitrator selected by the Company, and a third arbitrator selected by

the first two arbitrators in accordance with the provisions of the Arbitration and Conciliation Act, 1996. The arbitration shall be governed by Indian Law and the venue of arbitration shall be within India. The cost of arbitration undertaken in accordance with this section shall be borne by the Company; and

b) It is clearly agreed and understood that no reference to arbitration can be made if the company has either not admitted or has disputed the liability in respect of any claim under or in respect of this Policy.

c) In the event these arbitration provisions shall be held to be invalid then all such disputes or differences shall be referred to the exclusive jurisdiction of the Indian Courts.

d) It is further explicitly agreed and declared that if the Company shall disclaim liability in respect of any claim and is not within 12 calendar months from the date of such disclaimer be made the any subject matter of a suit or proceeding before a court of law or other forum, it shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder.

2. Any allocation or advancement of Defence Costs shall not apply to or create any presumption with respect to the allocation to Loss.

Policy 34

22. **Arbitration Clause:**

a. Any and all disputes or differences which may arise between the **Insured** and the **Insurer** in relation to, connection with or under this Policy, or regarding the or determination of the amount or any amount payable under this Policy, shall be referred to a sole arbitrator to be appointed by the parties to the dispute with in 30 days of any party giving notice of arbitration to the other. If the parties cannot agree upon a sole 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 disputes/difference and the third arbitrator to be appointed by such two arbitrators. The arbitration shall be conducted under and in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and any amendments thereto. The parties agree that the place of arbitration shall be Mumbai in India and the language of the arbitration shall be English.

b. The expenses of the sole arbitrator/ arbitral tribunal shall be shared equally both parties until the time of final adjudication after

> which the costs/expenses of the successful party to the arbitration shall be borne by the unsuccessful party.
>
> c. In the event that these arbitration provisions shall be held to be invalid then all such disputes shall be referred to the exclusive jurisdiction of the Indian Courts.
>
> d. It is hereby expressly stipulated and decide that it shall be a condition precedent to any right of action or suit under this Policy that the award by such sole arbitrator/arbitral tribunal shall be first obtained.

14. The respondent replied to the said Section 21 Notice *vide* letters dated 25 August 2023 and 5 September 2023, rejecting the nomination of arbitrators suggested by the petitioner and instead suggesting another name on their behalf as the sole arbitrator.

15. On having failed to come at a consensus with regard to the constitution of the Arbitral Tribunal, the petitioner has filed the present petition.

Reply on behalf of the Respondent to the Petitioner's Application under Section 11 of the 1996 Act

16. On 2 February 2024, the respondent filed its reply to the petitioner's application under Section 11(6) of the 1996 Act, in compliance with this Court's order dated 15 January 2024. At the outset, it is submitted that the application is untenable on the ground that the respondent has rightly repudiated the claim of the petitioner, as far as Policy 33 is concerned. The respondent reasons that no arbitrable disputes exists between itself and the petitioner *qua* the arbitration clauses contained within both policies, which are stated to be in the nature of quantum only arbitration clauses, prohibiting a

reference to arbitration where the liability of the respondent has not been admitted in respect of Policy 33.

17. The petitioner's averment that the policies are composite has been vehemently opposed, stating that the total cover of ₹6,50,00,000 under Policy 34 has been exceeded by the petitioner's claim of ₹8,58,12,965. Therefore, the Policy 34 being inadequate to shelter the petitioner's claim, prompted it to seek refuge under Policy 33 as well, which the respondent argued to be impermissible.

18. The respondent submitted that no liability exists upon itself to cover the petitioner's alleged losses under Policy 34, as the reasons for the repudiation of the same are within the policy's terms and conditions. Notwithstanding this, the respondent in its reply to the petitioner's arbitration notice had proposed the name of learned retired Justice S. Muralidhar as its nominee arbitrator.

19. The reply relies on the respondents Repudiation Letters dated 25 October 2022 to emphasise upon the respondent's unequivocal denial of any liability towards the claims raised under Policy 34, buttressing this with a reference to the law laid down in ***United India Insurance Co Ltd v Hyundai Engineering and Construction Co Ltd***[5] with respect to those disputes falling under the excepted category of the arbitration clause.

20. It was submitted that the court's power under Section 11 of the

[5] **2018 17 SCC 607**

1996 Act are constrained to the enquiry into the *prima-facie* existence of an arbitration clause, with the power to decline prayers for reference of a disputes to arbitration where its subject matter appears to be outside of the scope of the arbitration clause.

21. While relying on the BDO report of September 2018 and the FSRs dated 31 August 2021, it was denied that acts falling under the definitions of E-theft under Policy 33 and that of External Crime under Policy 34 were committed against the petitioner. The BDO report has been stated to have highlighted discrepancies in data that was encountered as the petitioner allegedly did not facilitate the review, which has been highlighted in both the report itself as well as the FSR.

Rejoinder by the Petitioner to the Reply filed by Respondent

22. On 02 March 2024, the petitioner filed a rejoinder to the respondent's reply. It was submitted that the rejection of its claims in their entirety by the respondent, despite the BDO report recording the admissibility of partial claims to the tune of ₹ 2,91,30,467 on account of losses suffered by the man in the middle[6] attack under Policy 33, the quantum of which is disputed by the petitioner, is the subject matter of challenge amenable to arbitration under Policy 33.

23. The law laid down in ***United India Insurance*** was distinguished from the facts of the present dispute on account of the

[6] MiTM", hereinafter

respondent issuing two policies for covering the same liabilities arising out of the same cause of action, one of which includes an arbitration clause for disputes relating to rejected claims. Furthermore, the composite nature of the cause of action along with the commonality of facts in dispute makes the arbitration in both policies composite and inseparable. It was submitted that the arbitration clause in Policy 34 is widely worded to cover the disputes arising in Policy 33.

Reasons

24. Dr. George, learned Counsel for the respondent, submitted that the arbitration clause in Policy No. 33 cannot be used as a ground to refer the dispute to arbitration, as the respondent has repudiated the petitioner's claim and a consequence is that the arbitration clause itself does not apply.

25. He submits that this category of case is an exception to the general enunciation of the law in ***SBI General Insurance Co Ltd v Krish Spinning***[7], as recognised in the said decision itself. He has placed reliance on paras 35 to 37 and 135 of the decision in ***SBI General Insurance*** *supra*, which read thus:

> "35. Clause 13 of the insurance policy issued in favour of the respondent contains the following arbitration clause:
>
> > "13) If any dispute or 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 a sole arbitrator

[7] **2024 SCC OnLine SC 1754**

> 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 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 provision of the Arbitration and Conciliation Act, 1996.
>
> It is clearly agreed and understood that no dispute or difference shall be referrable to arbitration as hereinbefore proved, if the Company has disputed or not accepted liability under or in respect of this policy. It is hereby expressed stipulated and declared that it shall be a condition precedent to any right of action or suit upon this Policy that the award by such arbitrator/arbitrators of the amount of the loss or damaged shall be first obtained"

36. A preliminary objection was raised on behalf of the appellant that the arbitration clause as contained in the insurance policy referred to above is not attracted in the present case as there is no admission of liability on the part of the appellant, whereas the said arbitration clause envisages reference to arbitration only in cases where liability is admitted and there is a dispute as regards the quantum of liability.

37. However, we find no merit in the aforesaid submission of the appellant. It is evident from the record that the appellant had admitted its liability with respect to the first claim and had even disbursed an amount of Rs 84,19,579/- in pursuance of the signing of the advance discharge voucher by the respondent. Thus, it is clearly a case of admission of liability by the appellant. However, the quantum of liability is in dispute as the amount claimed by the respondent is at variance with the amount admitted by the appellant. Thus, the dispute being one of quantum and not of liability, it falls within the ambit of the conditional arbitration clause as contained in the insurance policy.

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135. The existence of the arbitration agreement as contained in Clause 13 of the insurance policy is not disputed by the appellant. The dispute raised by the claimant being one of quantum and not of liability, prima facie, falls within the scope of the arbitration agreement. The dispute regarding "accord and satisfaction" as raised by the appellant does not pertain to the existence of the arbitration agreement, and can be adjudicated upon by the arbitral

tribunal as a preliminary issue."

26. Dr. George also placed reliance on the judgment of the Supreme Court in ***Oriental Insurance Co Ltd v Narbheram Power and Steel Pvt Ltd***[8] and ***United India Insurance,*** emphasising the following passages from these two decisions:

Oriental Insurance Co Ltd

> "The respondent, M/s Narbheram Power and Steel Pvt. Ltd., had entered into a Fire Industrial All Risk Policy No. 31150/11/2014/65 in respect of the factory situated on Plots Nos. 11 and 13. Gundichapada Industrial Estate, District Dhenkanal, Odisha. In October 2013, there was a cyclone named as "Phailin" which affected large parts of the State of Odisha. Because of the said cyclone, the respondent suffered damages which it estimated at Rs 3.93,36,224.00. An intimation was given to the appellant insurer and it appointed one Ashok Chopra & Co. as surveyor which visited the factory premises on 20-11-2013 and 21-11-2013. A series of correspondences were exchanged between the respondent and the insurer. On 22-12-2014, the respondent commented on the surveyor's report and requested the appellant to settle its claim. As ultimately the claim was not settled, the respondent sent a communication dated 21-1-2017 intimating the appellant that it had invoked the arbitration agreement and requested it to concur with the name of the arbitrator whom it had nominated.
>
> 2. The appellant replied to the said letter repudiating the claim made by the respondent and declined to refer the disputes to arbitration between the parties. As the insurer declined to accede to the request made by the respondent, it filed an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for brevity "the 1996 Act") for appointment of an arbitrator so that he could, along with the arbitrator nominated by the respondent, proceed to appoint a presiding arbitrator to adjudicate the disputes and differences that had arisen between the parties.
>
> 3. The said application was contested by the insurer and the High Court, considering the language employed in Clause 13 of the policy and the reasons advanced while repudiating the claim of the claimant, appointed a retired Judge of the High Court as arbitrator. The said order is under assail by way of special leave in this

[8] **2018 6 SCC 534**

appeal.

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7. To appreciate the rival submissions, it is necessary to scan and scrutinise the arbitration clause, that is, Clause 13 of the policy. The said clause reads as follows:

> "13. If any dispute or difference shall arise as to the quantum to be paid under this policy (liability being otherwise admitted) such difference shall independently of all questions be referred 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 Conciliation 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 hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator/arbitrators of the amount of the loss or damage shall be first obtained."
>
> (emphasis supplied)

8. When we carefully read the aforequoted Clause 13, it is quite limpid that once the insurer disputes the liability under or in respect of the policy, there can be no reference to the arbitrator. It is contained in the second part of the clause. The third part of the clause stipulates that before any right of action or suit upon the policy is taken recourse to, prior award of the arbitrator/arbitrators with regard to the amount of loss or damage is a condition precedent. The High Court, as the impugned order would show, has laid emphasis on the second part and, on that basis, opined that the second part and third part do not have harmony and, in fact, sound a discordant note, for the scheme cannot be split into two parts, one to be decided by the arbitration and the other in the suit."

United India Insurance Co Ltd

"11. The other decision heavily relied upon by the High Court and also by the respondents in ***Duro Felguera S.A. v. Gangavaram Port Ltd.***[9], 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***, following the exposition in ***Vulcan Insurance Co. Ltd. v. Maharaj Singh***[10] , 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***, 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

[9] **(2017) 9 SCC 729**
[10] **(1976) 1 SCC 943**

> 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***[11] 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*** *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*."

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***, 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

[11] **(1856) 5 HLC 811**

admitted)". This is reinforced and restated in the second paragraph in the following words:

> "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.

13. The core issue is whether the communication sent on 21-4-2011 falls in the excepted category of repudiation and denial of liability in toto or has the effect of acceptance of liability by the insurer under or in respect of the policy and limited to disputation of quantum. The High Court has made no effort to examine this aspect at all. It only reproduced Clause 7 of the policy and in reference to the dictum in ***Duro Felguera*** held that no other enquiry can be made by the Court in that regard. This is misreading of the said decision and the amended provision and, in particular, misapplication of the three-Judge Bench decisions of this Court in ***Vulcan Insurance*** and in ***Oriental Insurance***."

(emphasis supplied)

27. I am unable to agree with the submissions of Dr. George. For the first instance, the paragraphs from the judgment in ***SBI General Insurance***, on which Dr. George placed reliance, do not clearly say that, where the claim of the claimant in the arbitral proceedings relates to the respondent's liability to pay insurance, the referral court cannot refer the disputes to arbitration.

28. Dr. George seeks to place reliance on the observation of the Supreme Court, in the passages from ***SBI General Insurance*** extracted *supra*, that the disputes raised by the claimant was of quantum and not of liability. He submits that it was for this reason that the Supreme Court found the disputes to fall within the scope of the arbitration agreement. Were the dispute also to include the aspect

of liability, the matter would not be arbitrable and could not have been referred to arbitration.

29. It is a well settled principle of interpretation of judicial authorities, permeating Article 141 of the Constitution as well, that a judgment of a Court is an authority for what it says, and not for what may logically be said to flow from it. No corollary can be read into a judgment of the Supreme Court. The Court can only read the judgment as elucidating what is specifically stated therein.

30. There is nothing in the decision in ***SBI General Insurance*** which holds that, where the claim of the insured party also relates to the liability of the insurance company, the dispute would not be arbitrable because of the exclusionary covenant in the insurance clause.

31. That apart, the argument of Dr. George, at the highest, is a challenge to the arbitrability of the dispute. The Supreme Court, in ***SBI General Insurance,*** has clearly held, *inter alia* in para 120 of the decision, that any question of arbitrability or non-arbitrability of the dispute has to be relegated to the arbitral tribunal. It is not possible, therefore, for this Court after ***SBI General Insurance***, to accept Dr. George's contention, as doing so would amount to this Court returning a finding that the dispute is not arbitrable as the respondent has repudiated the petitioner's claim, which it cannot do, under Section 11(6).

32. Whatever be the merit of Dr. George's submission, it cannot be countenanced by a court exercising jurisdiction under Section 11(5) or 11(6) of the 1996 Act after ***SBI General Insurance***.

33. Apropos the decisions in ***Oriental Insurance*** and ***United India Insurance***, these are both decisions which were rendered at a time when ***SBI General Insurance*** had yet to be pronounced. They pertain to an era in which the scope of examination by a Section 11 court was radically different from the scope as it exists now.

34. In both these decisions, the High Court proceeded to refer the dispute to arbitration. In ***Oriental Insurance,*** a specific plea was raised before the High Court that, as the Insurance Company had repudiated the claimant's claim, the High Court could not have appointed an arbitrator. The High Court, nonetheless, went ahead to do so. The Supreme Court found that the High Court could not have referred the dispute to arbitration in view the wording of the clause in that case.

35. It is interesting to note the exact wording of the relevant portion of the arbitration clause which was in consideration in ***Oriental Insurance***. At the cost of repetition, it may be reproduced thus:

> "It is clearly agreed and understood that no difference or dispute shall be referable to arbitration as hereinabove provided, if the company has disputed or not disputed liability under or in respect of this policy."

36. Thus, the clause under consideration before the Supreme Court

in ***Oriental Insurance*** provided that, if the company had disputed or not accepted liability, no difference or dispute would *be referable to arbitration*. In other words, the repudiation by the Insurance Company of its liability towards the claimant rendered the dispute raised by the claimant non-arbitrable.

37. It was in these circumstances that the Supreme Court found that the High Court could not have referred the dispute to arbitration. In other words, the Supreme Court held that the High Court should have rejected the plea for reference of the dispute to arbitration, treating the dispute as non-arbitrable in nature.

38. To the same effect is the judgment in ***United India Insurance***. Para 13 of the said report in that case identifies "the core issue" as whether the communication from the insurance company to the insured "falls in the excepted category of repudiation and denial of liability in toto or has the effect of acceptance of liability by the insurer under or in respect of the policy and limited to disputation of quantum". The Supreme Court has faulted the High Court for having made no effort to examine this aspect.

39. Both these decisions, therefore, were rendered at a time when the High Court, exercising jurisdiction under Section 11 of the 1996 Act, could enter into the arena of arbitrability of the dispute. That, indeed, was the law as it prevailed in several decisions prior to ***SBI General Insurance,*** including, notably, ***Vidya Drolia v Durga***

Trading Corporation[12].

40. The decision in ***SBI General Insurance***, however, has resulted in a paradigm shift in the scope of examination by a Section 11 court. As of today, *a Section 11 court cannot examine the aspect of arbitrability of the dispute.*

41. If this Court were to accept the submissions of Dr. George, and hold that the dispute that the petitioner seeks to be referred to arbitration cannot be referred because of the repudiation of the petitioner's claim by the respondent, it would amount to a finding that the petitioner's claims have, by reasons of their repudiation by the respondent, been rendered non-arbitrable. Such a finding would amount to this Court pronouncing on the arbitrability of the dispute while acting as a referral court. That this Court cannot do, in view of the law laid down in ***SBI General Insurance***, particularly para 120 thereof.

42. It may be noted that the Supreme Court has, in para 114 of the report in ***SBI General Insurance,*** left no scope for doubt on this aspect at all, by observing that "the scope of enquiry at the stage of appointment of arbitrator is limited to the scrutiny of *prima facie* existence of arbitration agreement, *and nothing else"*.

43. Article 144 of the Constitution enjoins on all authorities in the country, judicial as well as executive, to act in aid of the Supreme

[12] **(2021) 2 SCC 1**

Court.

44. I am not, therefore, inclined to accord, to the decision in ***SBI General Insurance***, any interpretation which would dilute the intent of the said decision, which is to minimise the scope of examination at a Section 11 stage and to relegate as many issues in controversy as possible to the Arbitral Tribunal for decision.

45. In that view of the matter, the submission of Dr. George that the dispute raised by the petitioner cannot be referred to arbitration in view of the exception contained in Clause 11 of Policy No. 33 cannot be accepted.

46. No other substantial issue arises for consideration.

47. Clearly, there exists a dispute between the parties. Though Dr. George also sought to contend that the petitioner was seeking, perforce, to invoke Policy No. 33, while paying premium only under Policy No. 34, so as to obtain a larger amount from the insurance company– which Mr. Mehra, learned Senior Counsel for the petitioner refutes –these are aspects which would have to be argued before the learned Arbitral Tribunal. They clearly fall outside the ambit of the jurisdiction of this Court under Section 11 of the 1996 Act.

48. The arbitration clause in Policy no. 34 envisages, in the first instance, reference of the dispute to a sole arbitrator and on that effort not being fruitful in 30 days, contemplates arbitration by a three-

member arbitral tribunal.

49. The Section 21 notice issued by the petitioner seeks reference of the dispute to a sole arbitrator.

50. Dr. George, at this juncture, submits that, without prejudice to the contentions that he has raised before this case, and without prejudice to all the defences that he can raise before the arbitral tribunal, both the disputes may be referred to an arbitral tribunal comprising three members.

51. With consent of parties, each of the party is permitted to appoint its nominee arbitrator and inform the opposite party, within two weeks. The said nominee arbitrators would thereafter proceed to appoint a third arbitrator thereby bringing into existence an arbitral tribunal which would arbitrate on the dispute.

52. All questions of facts and law including the arbitrability of the dispute and the issue of repudiation that has been raised before this Court shall remain open to be agitated before the learned Arbitral Tribunal.

53. The petition stands disposed of in the above terms.

C. HARI SHANKAR, J.

SEPTEMBER 18, 2024/*dsn*

Click here to check corrigendum, if any