

(2022) 12 GAU CK 0041
Gauhati High Court
Case No: Arb.P. No. 3 Of 2022

M/S Sohum Shoppe
Pvt Ltd,

APPELLANT

Vs

United India
Insurance Co. Ltd

RESPONDENT

Date of Decision: Dec. 27, 2022

Acts Referred:

- Arbitration And Conciliation Act, 1996 - Section 7, 11, 11(5), 12, 16

Hon'ble Judges: N. Kotiswar Singh, J

Bench: Single Bench

Advocate: G.N. Sahewalla, M. Sahewalla, D. Senapati, S. Katakey, S. Todi, R. Goswami, B.J. Ghosh, P. Borthakur

Final Decision: Disposed Of

Judgement

1. Heard Mr. G.N. Sahewalla, learned Senior counsel assisted by Mr. M. Sahewalla, learned counsel for the petitioner. Also heard Mr. R. Goswami,

learned counsel appearing for the respondents.

2. The present petition has been filed seeking appointment of an Arbitrator by invoking Section 11(5) of the Arbitration and Conciliation Act, 1996

after the respondents declined to refer the dispute for arbitration in terms of the Compact Insurance Policy No.1310002618P113591521 entered

between the parties.

3. The petitioner is a private Limited Company incorporated under the provisions of Companies Act, 1956 engaged, amongst others, in the business of

running a chain of multi branded Retail Shops across the entire North East India and having several shopping malls.

4. The respondent No.1 is engaged in the business of General Insurance providing general insurance policies including industrial all risk policy.

5. According to the petitioner, the business activities of the petitioner was covered by Insurance policy underwritten by the respondent No.1 effective

from 23.01.2017 upto 22.01.2018, which was renewed from time to time by paying requisite premium. According to the petitioner, the said Insurance

policy is composite one which includes various policies including Standard Fire and Special Perils Policy, Burglary and House Breaking Policy,

Electrical and Mechanical Appliances Policy, Money Insurance Policy, Electronic Equipment Cover, etc.

6. It has been submitted that the petitioner had been paying all the due premiums as per the aforesaid Insurance Policy.

According to the petitioner, while the said Insurance Policy was subsisting, certain persons damaged the property of the petitioner situated at

Naharlagun, Arunachal Pradesh for committing burglary. They looted many stocks and money kept inside the shop belonging to the petitioner

damaging various fixture and furniture, in connection with which an F.I.R. was lodged. Necessarily, the petitioner informed the respondent No.1 about

such a damage and loss caused. Accordingly, a Surveyor was appointed as required by the respondents who assessed the damage to the extent of

Rs.6,03,23,851/- against the claim of the petitioner which was to the tune of Rs.12.44 crores only. The petitioner sought settlement of the claim in

terms of the Insurance Policy.

However, to the dismay of the petitioner, the petitioner received a letter dated 31.10.2019 issued by the respondent No.1 communicating the petitioner

about the cancellation of the Comprehensive Policy of Insurance and informing that as per instruction of the competent authority of the Insurance

Company, shops cannot be covered by Compact Policy and accordingly, the Compact Policy has to be cancelled with immediate effect and the

premium will be refunded.

7. It is the plea of the petitioner that if the respondents had accepted the premiums, it would indicate that the business activities of the petitioner were

covered by the Insurance Policy, otherwise, they would not have accepted the premiums.

Be that as it may, according to the petitioner, the said cancellation was to avoid any payment by the Insurance Company.

In the meantime, Covid-19 Pandemic broke out which compelled the petitioner to agree to a reduced amount of settlement, however, without prejudice to the petitioner's claim.

8. According to the petitioner, though the petitioner received the reduced amount of Rs.1,82,59,249/-, the petitioner would be entitled to adequate amount in terms of the Insurance Policy.

9. It is submitted that the said Insurance Policy contains an Arbitration clause under Clause 15 of the General Conditions of the Policy which provides for arbitration and accordingly, the petitioner wrote to the authorities to refer the dispute to be adjudicated by an Arbitrator. However, the respondents have declined to do so.

10. Having no other alternative, the petitioner has approached this Court by filing this petition for appointment of an arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996.

11. This petition, however, has been resisted by Mr. R. Goswami, learned counsel for the respondent Insurance Company contending that there is no Arbitration Agreement contained in the Insurance Policy.

Mr. Goswami contends that Condition No.15 of the Insurance Policy per se is not an arbitration agreement as understood in the context of Section 7 of the Arbitration and Conciliation Act, 1996, as amended.

12. It has been submitted by Mr. Goswami that there is no separate Arbitration Agreement in the Insurance Policy. The said Condition No.15 of the Insurance Policy cannot be said to be Arbitration Agreement within the meaning of the Arbitration and Conciliation Act, 1996.

Mr. Goswami submits that mere use of word Arbitration does not mean existence of Arbitration Clause, unless there is a specific arbitration agreement contained in the agreement between the parties to refer any dispute for arbitration.

13. Mr. Goswami submits that what Condition No. 15 merely provides is that all aspects as to Arbitration agreement, appointment of arbitrator/s,

terms of reference, award, its effect etc. will be in accordance with the provisions of Arbitration and Conciliation Act, 1996 (with amendments, if any), however, without providing any specific provision for settlement of disputes by Arbitration. He submits that thus, in absence of specific arbitration clause, mere recital of Condition No.15 will not amount to providing of any forum for arbitration.

14. Heard the learned counsel for the parties and perused the materials on record.

15. It goes without saying that before this Court invokes its jurisdiction under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of an Arbitrator, it is sine qua non that there should be an arbitration clause in the agreement between the parties which specifically provides for resolution of dispute by arbitration. In absence of an arbitration clause, obviously, the Court does not have the jurisdiction to appoint any Arbitrator and direct the parties to resolve the dispute by way of arbitration. Therefore, it is necessary to examine as to whether there is any Arbitration clause/agreement in the contract between the petitioner and the respondents, for in the event, there is no arbitration agreement as contended by the learned counsel for the respondents, the question of appointment of an Arbitrator by this Court does not arise.

For this purpose, we will examine Clause 15 of the Insurance Policy which has been relied on by the petitioner for reference of the dispute for arbitration.

Clause 15 of the agreement reads as follows,

“15. All aspects as to arbitration agreement appointment of arbitrator/s, terms of reference, award, its effect etc. will be in accordance with the provisions of Arbitration and Conciliation Act, 1996 (as amendments, if any).”

16. Apart from the aforesaid Clause 15, there is no other clause in the agreement which specifically mentions that any dispute arising between the parties will be referred to arbitration.

17. It has, however, been submitted by learned Senior counsel for the petitioner that in view of the aforesaid Clause 15, it can be clearly inferred that any dispute has to be resolved through arbitration as, otherwise, there was no need to include the aforesaid Clause 15, and Clause 15 which is a part

of the contract between the parties which cannot be considered to be redundant inasmuch as any specific clause of the contract cannot be ignored

and all such attempts must be made to give effect to all the provisions of the terms of the contract.

18. Relying on the decision of the Honâ€™ble Supreme Court in Visa International Limited Vs. Continental Resources (USA) Limited, (2009) 2 SCC

55, learned Senior counsel for the petitioner submits that an arbitration clause is not required to be stated in a particular form and the intention of the

parties is to refer the dispute to the arbitrator can be clearly ascertained from the terms of the contract. Learned Senior counsel for the petitioner

accordingly, has submitted that the respondents cannot be allowed to take advantage by claiming that there is no specific arbitration clause inasmuch

as the same can be clearly inferred from Clause 15 as mentioned above.

19. Learned Senior counsel for the petitioner has also sought to rely on the principle of contra proferentem rule, according to which, when two views

are possible, the one which is beneficial to insured is to be accepted.

In support of this contention, learned Senior counsel for the petitioner has relied on the decision of Honâ€™ble Supreme Court in Bharti Axa General

Insurance Co. Ltd. Vs. Priya Paul, (2020) 12 SCC 167 and Manmohan Nanda Vs. United India Assurance Company Limited and Anr., (2022) 4 SCC

582 and accordingly, it has been submitted that even if the arbitration agreement is not mentioned in clear terms, yet, it is easily inferable from the

aforesaid Clause 15.

20. We have also considered the submissions advanced by the respondents that there is no specific Clause in the Agreement which provides for

settlement of disputes by way of arbitration.

21. While considering the submission advanced by the respondents, we are also of the view that Clause 15 cannot be totally ignored. It cannot be said

that Insurance policy does not mention anything about arbitration.

If the submission of the learned Senior counsel for the petitioner is to be accepted, based on contra contra proferentem rule, certainly, it can be

inferred that the Insurance Policy also provides for arbitration in view of Clause 15 referred to above.

22. However, in the opinion, of this Court, it may not be necessary to finally determine as to whether there is any valid Arbitration Clause in the Insurance Policy so as to refer the dispute between the parties to arbitration or not at this stage, an arbitrator also has the jurisdiction to decide on the issue of existence of an arbitration clause on the principle of "Kompetenz-Kompetenz" as also held in N.N. Global Mercantile (P) Ltd. Vs. Indo Unique Flame Ltd., (2021) 4 SCC 379.

23. That apart, it may also be mentioned that Section 16 of Arbitration and Conciliation Act, 1996 provides that the Arbitral Tribunal may rule its own jurisdiction, including ruling of any objections with respect to the existence or validity of the arbitration agreement.

Therefore, whether the Insurance Policy contains any Arbitration Clause in the context of specific Clause 15 referred to above, the Arbitral Tribunal can certainly decide in terms of Section 16 of the Arbitration and Conciliation Act, 1996.

24. Under the circumstances, this Court without deciding definitively as to whether the Insurance Policy contains arbitration clause or not, in the light of rival contentions discussed above and also in view of the presence of Clause 15 of the Insurance Policy which makes a reference that all aspects as to arbitration agreement, appointment of arbitrator/s, terms of reference, award, its effect, etc. will be in accordance with the provisions of Arbitration and Conciliation Act, 1996 (as amendments, if any), the matter is referred to arbitrator for his decision as to whether there is indeed an arbitration clause by which the disputes arising out of the agreement between the parties can be resolved by arbitration, if so it can proceed with the arbitration.

25. Accordingly, this Court appoints Hon^{ble} Mrs. Justice Anima Hazarika, a retired Judge of this High Court to act as the sole Arbitrator subject to her willingness and disclosure and/or absence of any impediment as contemplated under Section 12 of the Arbitration and Conciliation Act, 1996.

26. The Registry of this Court will furnish a copy of this order to Hon^{ble} Mrs. Justice Anima Hazarika, (Retired) for doing the needful.

27. Parties will appear before the learned Arbitrator within a period of one month from today and the learned Arbitrator will proceed in accordance

with law.

28. With the above observations and directions, the present petition stands disposed of.