(2008) 11 DEL CK 0232

Delhi High Court

Case No: FAO (OS) No. 61 of 1987 and C.M. No. 13531/07

The Oriental Insurance Co. Ltd.	APPELLANT
Vs	
Mercury Rubber Mills	RESPONDENT

Date of Decision: Nov. 24, 2008

Acts Referred:

- Arbitration Act, 1940 - Section 20

Citation: (2008) 4 ARBLR 599

Hon'ble Judges: Mukul Mudgal, J; Manmohan, J

Bench: Division Bench

Advocate: Manjusha Wadhwa, for the Appellant; Partner of party-in-person, for the Respondent

Final Decision: Dismissed

Judgement

Mukul Mudgal, J.

This is an appeal from the judgment dated 09.04.1987 passed by the learned Single Judge of this Hon''ble Court in Suit No. 2279-A/85 wherein the petition filed by the Respondent herein was allowed and the dispute existing between the parties was referred to arbitration to ascertain what amount was due to the Respondent from the Appellant, under the contract of insurance.

2. M/s. Mercury Rubber Mills, the Respondent had entered into contract of insurance with the Oriental Insurance Co. Ltd. vide policy No. 2130/302/02211/44/05/80/00034 dated 29.12.1980. The appellant had agreed to pay to the Respondent all losses of profit which the Respondent might suffer due to the breakdown of its machinery installed at its factory premises situated at 35th K.M. milestone, G.T. Karnal Road, Rasoi, District Sonepat, Haryana.

3. The insurance policy had an arbitration Clause which reads as under:

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 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.

It is clearly agreed and understood that no difference or dispute shall be referable to arbitration as herein before 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 condition precedent to any right to action or suit upon this policy that the award by such arbitrator, arbitrators or umpire of the amount of the loss or damage shall be first obtained.

It is also hereby further expressly agreed and declared that if the Company shall disclaim liability to the insured for any claim here under and such claim shall not, within 12 calendar months from the date of such disclaimer have been made the subject matter of a suit in a court of law, then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder.

4. It is alleged that the machinery of the Respondent broke down during the life of the insurance policy and vide letters dated 12/13th February, 1982, the Respondent submitted the following three claims with the Appellant in respect thereof:

(1) Claim No. 2130/302/44/55/81/00001 for Rs. 6,70,795/-

(2) Claim No. 2130/302/44/55/81/00005 for Rs. 2,77,067/-

(3) Claim No. 2130/302/44/55/81/00017 for Rs. 93,328/-

5. Vide letter dated 29th October 1983, the Respondent requested the Appellant to hand over three cheques in respect of the above said three claims to the bearer of the letter and further requested that the details of the calculation of the amount to be paid be also sent alongwith the same. By the letter of the same date, the Appellant sent three cheques to the Respondent stating that the cheques were being sent in full and final settlement of the claims of the Respondent.

6. The Respondent encashed the cheques and vide letter dated 19th November 1983 wrote to the Appellant that there appeared to be a mis-calculation in regard to the claims and requested the Appellant to have the matter reconciled. The Respondent requested to the Appellant to refer the matter to arbitration in terms of the Arbitration in Clause of the Policy. The Appellant however declined to do so, on the ground that the Respondent having accepted the payment against the said three claims the dispute stood settled and no dispute subsisted for being referred to arbitration which led to the Respondent filing the petition and an application u/s 20 of the Arbitration Act. On the pleadings of the parties following issue was framed on 20th March, 1986, Whether any referable disputes arise between the parties

7. The learned Single Judge vide his judgment dated 9th April, 1987 held as follows:

In this view of the matter the following dispute exists between the parties and is to be referred to arbitration:

Whether the cheques for the above said amounts were received by the petitioner from the respondent in full and final settlement of its above noted three claims If not, what is due to the petitioner from the respondent under the above said claims.

8. The learned Counsel for the Appellant contended that the claims of the Respondent were fully satisfied and no dispute remained between the parties to warrant reference to arbitration, as per the Arbitration clause. Reliance has been placed on behalf of the Appellant on the decisions in cases of Kapur Chand Godha Vs. Mir Nawab Himayatalikhan Azamjah, Union of India (UOI) Vs. Gangadhar Mimraj and Another, and Amrit Banspati Co. Ltd. Vs. Union of India (UOI), . In support of the abovementioned view the Counsel for the Appellant had also relied upon some documents to support her contention that a full and final settlement of the claims of the Respondent had been made.

9. The Respondent contended that the present appeal had been pending hearing for the last over 21 years. He further contended that the appellant, being in a dominant position, with a view to frustrate legitimate claims of the Small Scale Industries (SSI) - having admitted the liability under the Insurance Policy, acted in unreasonable take it or leave it manner, that too after unreasonable delays after the occurrence / survey of accident / claims during 1981, without providing the details of calculations of the arbitrarily paid (26/29th October, 1983) amounts of Rs. 53,507/-, 53,507/- and 51,467/- for the three claims of different loss-amounts of Rs. 6,70,795/-, 2,77,067/- and 93,328/- , respectively.

10. The Respondent further contended that mere acceptance of the cheques and their encashment does not mean that the cheques were accepted in discharge of the whole claim and that the fact that the Respondent while returning the vouchers and thereafter while claiming cheques had been asking the Appellant to furnish the details of calculation for verification by the Respondent shows that the amounts had not been accepted in full and final settlement of the claim. It had been further

contended that the dispute as to whether or not the Respondent had accepted the above said three cheques in full and final settlement of their claims is itself an dispute which has to be decided by the arbitrator and not by the court.

11. In our view, the findings of the learned Single Judge of this Court that the claims of the Respondent arose out of the contract between the parties under the above said policy and whether or not the Respondent had accepted the above said three payments in full and final settlement of their claim and had given valid discharge to the Appellant is an issue and dispute which has to be decided by arbitration in terms of the arbitration clause and cannot be decided by the court and this view of the learned Single Judge doe not all for any interference. It has been rightly held that whether or not the acceptance was in full and final settlement of this claim of the Respondent is itself a difference about the quantum payable to the Appellant and hence covered by the Arbitration Clause.

12. The Arbitration Clause in simple and plain language lays down that if any difference arises, with regard to the quantum of payment to be made under the policy, such dispute may be referred to the Arbitration provided that:

(i) There is a liability.

(ii) The Company has admitted such liability. The machinery of the Respondent broke down during the term of the insurance policy and the Appellant has no way denied their liability to pay the claims of the Respondent. What is being contended in the various proceedings and also in the present appeal is the amount which is due to the Respondent from the Appellant under the above said claims. Therefore, the view of the learned Single Judge for referring the matter to Arbitration cannot be faulted, as it has been specifically laid down in the Arbitration Clause of the Insurance Policy that any difference with regard to the quantum of payment to be made arising out of any claim is to be necessarily referred to Arbitration provided that the liability to pay the same is accepted by the Insurer.

13. The Court has to ascertain in the all the abovementioned circumstances whether there is accord and satisfaction in the case and the dispute is arbitrable or not. The position of law has been made aptly clear by the Hon''ble Supreme Court in the case of National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd., wherein it was held that those cases are also arbitrable where either full and final settlement is alleged but there is substance in the allegation of coercion/undue influence or there were no documents confirming discharge of contract.

14. In the present case, the Appellant has contended that there is a full and final settlement with regard to the claims of the respondent and has also relied upon certain documents. The learned Counsel for the appellant has also relied upon various judgments to strengthen her contention. We are prima facie of the opinion that there is some merit in the allegations of coercion and undue influence. However, we do not deem it necessary to either go into the said allegations or on

the merits of the judgments as relied upon by the appellant as, according to the Arbitration Clause in the Insurance Policy, any difference with regard to claim is to be referred to arbitration. Thus, in our view, to ascertain whether the documents confirms discharge of contract, evidence is required to be led before the arbitrator.

15. Thus, the dispute with regard to the full and final settlement of the three claims and as to whether any amount is due to the Respondent from the Appellant under the above said claims is referred to Arbitration to be decided accordingly as per the merits of the case.

16. In view of the above findings the appeal is dismissed and stands disposed of alongwith pending applications. The arbitrators as per the arbitration clause shall be nominated by both parties within six weeks from today and the parties to appear before the said arbitrators along with the statement of claim on any day fixed by the arbitrators within six weeks of the appointment of the arbitrators. The arbitrators will render their award not later than four months from the date of their first sitting.