

(2023) 06 DEL CK 0114

In the Delhi High Court

Case No : Arbitration Petition No. 1279 Of 2022

Pee Empro Exports Pvt.Ltd.

APPELLANT

Vs

United India Insurance Co.Ltd

RESPONDENT

Date of Decision : 12-06-2023

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 8, 11, 11(6), 11(6A), 12(1), 16, 16(1), 21, 34(2)(a)(i), 34(2)(a)(ii), 34(2)(a)(iv), 34(2)(b)(i)
Indian Contract Act, 1872 — Section 7

Citation : (2023) 06 DEL CK 0114

Hon'ble Judges : Chandra Dhari Singh, J

Bench : Single Bench

Advocate : Dinesh Sharma, Akshay Chitkara, Amit Kumar Singh, K. Enatoli Sema, Chubalemla Chang, Prang Newmai

Final Decision : Allowed

Judgement

Chandra Dhari Singh, J

1. The present petition has been filed on behalf of the petitioner under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") in terms of the Arbitration Clause incorporated in the Standard Fire and Special Perils Policy bearing No. 0401001117P110869962 valid from the period 1st November 2017 to 31st October 2018.

FACTUAL MATRIX

2. Petitioner is a private limited company incorporated under the provisions of the Companies Act, 1956 whereas the Respondent is a Public Sector Enterprise providing general insurance services.

3. On 13th June, 2018, a fire broke out in the premises of the Petitioner due to an electric short circuit, which caused considerable loss and damage to the Petitioner, which was claimed as Rs. 11,47,67,511/-. Accordingly, the Respondent appointed a surveyor to assess the damage caused and the claim applicable.

4. On 15th June, 2018, the Surveyor began the process of survey of claim and visited the Petitioner's premises during which the Surveyor and the Respondent sought various documents/information from the Petitioner to substantiate the Claim.

5. On 9th July, 2018, a second surveyor was appointed by the Respondent to assess the Petitioner's Claim. The second surveyor rendered his findings in a report dated 4th March, 2019. A Consent Letter dated 23rd January, 2020 is also on record wherein the Petitioner had agreed to accept their loss being assessed at Rs.9,81,00,000/-. The final survey report was submitted on 10th May, 2020. The claim amount of Rs.8,38,10,920/- was released by the Respondent on 15th September, 2022.

6. Aggrieved by the deficiency in the Claim granted, the Petitioner invoked arbitration in terms of clause 13 contained in the Policy, sent an arbitration notice dated 20th September, 2022, calling upon the Respondent to suggest names of the arbitrator and to appoint them by mutual consent, and to resolve the dispute pertaining to the Claim.

7. Respondent sent a reply dated 26th October, 2022 denying the existence of any arbitrable dispute between the parties and refused to appoint an arbitrator. Aggrieved by the same, the Petitioner has approached this Court praying for the appointment of a sole arbitrator.

SUBMISSIONS

(ON BEHALF OF THE PETITIONER)

8. Learned counsel for the Petitioner submitted that Clause 13 of the Policy Agreement clearly provides for arbitration by a sole arbitrator in cases where any dispute or difference arise between the parties as to the quantum to be paid under the policy.

9. It is submitted on behalf of the Petitioner that on 13th June, 2018, a fire broke out in the premises of the Petitioner due to an electric short circuit, which caused grave loss to the Petitioner and the accident was reported to the Respondent on the same day claiming a loss of Rs. 11,47,67,511/-.

10. It is submitted that the Respondent appointed a surveyor to assess the damage and claim on 14th June, 2018. The surveyor began the process of determining the claim amount and visited the concerned premises to conduct the survey on 15th June, 2018. During the said survey, the surveyor and the respondent sought various documents/information from the petitioner, all of which were duly provided by the petitioner.

11. It has been further submitted on behalf of the petitioner that on 9th July, 2018, the respondent appointed a second surveyor to assess the petitioner's claim. The second surveyor continued the survey and requisitioned documents/information from the petitioner. Learned counsel for the petitioner submitted that

appointment of the surveyor who began a parallel survey is in contravention to the IRDA regulations.

12. It has been further submitted on behalf of the petitioner that the second surveyor rendered his findings in a report dated 4th March, 2019, almost 9 months after the above-mentioned incident of fire and that a copy of the report was never supplied to the petitioner.

13. Learned counsel for the petitioner submitted that the said report is in favour of the petitioner and the surveyor noted that all the records of the petitioner substantiating the claim were found to be genuine, accurate and authenticated. The said report further stated that the fire was due to short circuit and that no foul play was involved and that the petitioner had taken all the steps to mitigate the damage, and it was due to the petitioner's efforts that the loss was heavily minimised.

14. It has been submitted that despite being aware of the report of the second surveyor, the respondent did not take any steps to process the claim of the petitioner and the petitioner's claim kept languishing. The petitioner, who had suffered a major loss, was facing a financial crisis, as no financial assistance was forthcoming from the respondent.

15. It has been further submitted on behalf of the petitioner that, on 23rd January, 2020, the respondent forcibly procured a consent letter from the petitioner at Rs. 9,81,00,000/-. Learned counsel submitted that the respondent had made it clear that without providing the consent letter, no amount of claim of the petitioner would be released in its favour. Learned counsel further mentioned that the claim had been assessed after almost a year and a half later, and all this while the petitioner was left in lurch facing severe difficulty in reviving their business operations as no "on-account" payment had been released to the petitioner.

16. Learned counsel for the petitioner submitted that due to the respondent's condition of "letter of consent" and the petitioner being in serious financial crunch, the petitioner was left with no other option but to act on the diktats of the respondent. Thereafter, the petitioner furnished a consent letter under duress and coercion. It has also been submitted on behalf of the petitioner that the petitioner has never been privy to the status of claim assessment nor had the report or basis of settlement shared with them by the respondent.

17. Learned counsel appearing for the petitioner submitted that the petitioner discovered that, while the respondent had procured the consent, the surveyor had not even submitted the final report. The first surveyor –Allied Insurance Surveyor & Loss Assessors, rendered their final survey report to the respondent on 10th May, 2020. Learned counsel submitted that the fire was of 13th June, 2018 and nearly two years later, the final report was prepared and submitted the same, which was in utter disregard of the timeline stipulated in the IRDA (Protection of Policyholder's Interests) Regulations, 2017.

18. It has been submitted on behalf of the petitioner that the entire process for claim assessment has been prescribed in Clause 15 of the said regulations, which mandates that the surveyor shall prepare and submit a report within 30 days of appointment, and for large and commercial risks, the report has to be submitted within 90 days.

19. Learned counsel for the petitioner submitted that it took nearly two years for the report to be prepared, which is strange, as the second surveyor who had already verified all records, had already submitted the report a year earlier on 4th March, 2019.

20. It has been further submitted by the learned counsel for the petitioner that while the final survey report was submitted by the surveyor on 10th May, 2020, the respondent did not take any action. In view of this, the petitioner had to address an email dated 13th October, 2020 to the respondent requesting them to settle their claim as they were suffering from financial crisis.

21. Learned counsel submitted that the respondent, despite having received the reports of the surveyor on 4th March, 2019 and 10th May, 2020, did not take any action and hence addressed an email dated 9th March, 2021 to the petitioner seeking clarifications, which were already dealt with in the reports. However, the petitioner, being desperate for the claim amount, duly responded to the queries of the respondent. However, the said exercise gave an indication that the respondent was only attempting to reduce the claim of the petitioner.

22. It has been further submitted that, only after the above-mentioned difficulties, the petitioner had to invoke arbitration as per the clause contained in the Policy, vide arbitration notice dated 20th September, 2022, to resolve the dispute pertaining to claim, thereby invoking arbitration by requesting the Respondent insurance company to suggest names of the arbitrator and their appointment by mutual consent.

23. In view of Clause 13 of the policy, learned counsel submitted that the arbitration clause is clearly attracted since liability under the policy has been admitted by the respondent and the dispute regarding quantification is clearly within the purview of this arbitration clause.

24. It is submitted that after more than 4 years from the incident of loss, the Respondent finally addressed an email dated 5th September, 2022 to the Petitioner informing them that the claim had been approved for a much lesser amount of Rs. 8,38,46,964. The Respondent further asked for discharge voucher duly signed by the Petitioner as a precondition to release of even this reduced amount. It was made amply clear by the Respondent Company that without signing the said discharge voucher, the Petitioner would not receive any amount, as is evident from the e-mail dated 5th September, 2022.

25. It is stated that by way of the instant petition, the Petitioner is now seeking to arbitrate for the differential amount between amount claimed and the amount

received. It is submitted that the amount of Rs. 8,38,10,920/- has been unilaterally assessed by the Respondent without even disclosing the basis thereof to the Petitioner. Therefore, the arbitration clause is clearly attracted since liability under the policy has been admitted by the Respondent and the dispute regarding quantification is clearly within the purview of this arbitration clause.

26. Learned counsel for the petitioner submitted that the Respondent sent a reply dated 26th October, 2022 to the Section 21 notice, while accepting the existence of an arbitration agreement, denied any arbitrable dispute between the parties, on account of this discharge voucher. The stand taken by the Respondent is completely untenable since the issue whether the so called "discharge voucher" and "full and final settlement" is vitiated on account of duress, coercion and/or undue influence is itself an issue to be decided by the arbitral tribunal.

27. It is submitted that the Insurance Regulatory and Development Authority (hereinafter referred to as the "IRDA") issued a circular dated 24th September, 2015 clearly stating that signing of the discharge voucher would not disentitle the Policy holder from approaching the judicial forum to seek higher compensation. It is clear from the record that the Petitioner was not even informed about the basis of the assessment of the reduced amount of Rs. 8,38,46,964/- and in such cases there is no question of discharge of liability merely because the discharge voucher did not say "under protest".

28. Reliance has also been placed on a few judgments of the Hon'ble Supreme Court as well as that of this Court to substantiate the arguments advanced, including National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd. (2009) 1 SCC 267, United India Insurance Co. Ltd. v. Maja Healthcare Division (2018) SCC Online Del 7732, Worldfa Exports Pvt. Ltd. v. United India Insurance Co. Ltd. [Arb P. 459/2015 decided on 11.12.2015; Delhi High Court], M/s Mayavati Trading Pvt. Ltd. v. Pradyut Deb Burman (2019) 8 SCC 714 and Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1.

29. It is submitted that it is a settled law that every opportunity should be given to the Petitioner to make good its case before arbitrator and only a prima facie dispute is to be seen at the stage of appointment of arbitrator. In the present matter the difference amount in the quantum of the Claim along with interest is arbitrable and duly covered by the arbitration clause. The Discharge Voucher has been procured by coercion, and therefore such disputed facts may be dealt with by the Arbitrator.

30. Learned counsel for the petitioner submitted that the present case is a textbook case of the insurance company acting unreasonably, arbitrarily, subjecting the petitioner to duress and coercion and abusing its dominant position to leave no option for the petitioner but to sign on the dotted line.

31. In view of the aforesaid, it is submitted that the instant case is a fit case for invocation of Section 11 (6) for appointment of an impartial and independent Sole Arbitrator to adjudicate the dispute between the parties. In the present

case, the existence of the arbitration clause stands admitted and proved. Thus, it is submitted that the instant petition be allowed and an arbitral tribunal ought to be appointed by this Court.

(ON BEHALF OF THE RESPONDENT)

32. Per contra, learned counsel on behalf of respondent vehemently opposed the averments made by the learned counsel for the petitioner and submitted that the present petition has been filed with the sole objective/purpose of harassing the respondent and to coerce it into parting with amounts and monies. The present petition is nothing but an abuse of the process of law.

33. It is submitted that on 13th June, 2018, a fire broke out in the premises of the petitioner. It is alleged by the petitioner that on account of the said fire suffered a loss of Rs.11,47,67,511/- as per its own purpose. On 14th June, 2018, a surveyor was appointed to assess the loss. Learned counsel on behalf of respondent submitted that the petitioner vide letter dated 23rd January, 2020 itself had given its consent to accept Rs.9,81,00,000 in full and final settlement after deducting the realizable salvage value and the policy excesses applicable as per terms and conditions. In furtherance of its act to accept the amount, the petitioner further submitted a no objection certificate from the Karur Vyasa Bank to accept the amount after permissible deductions. The petitioner on 5th September, 2022 submitted an NOC from the bank and executed a discharge voucher for an amount of Rs.8,38,46,964 on the same date.

34. It is pertinent to note that the policy in question contained agreed bank clause. As per the said clause any monies becoming payable under the policy shall be paid by the company to the bank. Upon receipt of such money by the bank, the insurance company would be completely discharged of its liabilities. It is stated that in view of the aforesaid agreed bank clause, the Karur Vyasa Bank had the first charge on the properties of the petitioner. The said bank having executed a no objection to the settlement of the claim for an amount of Rs.8,38,46,964/- and accordingly the claim was settled finally. Based on the NOC given by the Karur Vyasa Bank, discharge voucher was executed by the petitioner on 5th September, 2022 for an amount of Rs.8,38,46,964/-.

35. It is submitted that the petitioner's plea of fraud, coercion, duress, or undue influence is wholly misconceived inasmuch as the aforesaid narration of facts unequivocally establish that the claim of the petitioner is an afterthought.

36. It has been further submitted by the learned counsel for the respondent that the issue involving adjudication of the allegations made out by the petitioner concerns the signing of discharge voucher under coercion and duress. This point remains a central question of the dispute, only in light of the allegations of presence of criminal elements like duress, and coercion in obtaining signatures on the discharge voucher. This ought not to be adjudicated in Arbitration. Learned counsel for the respondent submitted that as such the allegations go down to the root of the matter. On this sole disability, the present claim petition

ought not to be adjudicated for the fact that it involves serious questions of criminal liability affecting the dispute in question.

37. It has been submitted by the learned counsel for the respondent that the allegation of the petitioner with respect to signing of full and final settlement of the claim under coercion, duress and under the threat of repudiation of the settlement needs to be seen in light of the factual matrix of the present case as well as in juxtaposition to the judgments rendered by the Hon'ble Supreme Court on different occasions.

38. It has been further submitted on behalf of the respondent that vide letter dated 23rd January, 2020, the petitioner willingly gave its consent for accepting Rs. 9,81,00,000/-. The same was thereafter modified as the claim amount and the petitioner willingly without any duress accepted the settlement and executed a discharge voucher evincing its intention to accept a sum of Rs. 8,38,46,964/-. Thereafter, alongwith an email dated 12th September, 2022, it supplied cancelled cheque alongwith NOC from the bank. It has been also submitted on behalf of the respondent that the claim was settled in accordance with agreed bank clause and the petitioner willingly submitted NOC from Karur Vyasa Bank.

39. Learned counsel submitted on behalf of the respondent that, the policy unequivocally states that the goods were hypothecated to Karur Vyasa Bank and in view of the aforesaid agreed value clause, monies due under the policy was required to be paid to the bank. The said money was paid to the bank and the bank executed NOC. Once the bank has no objection to the settlement amount, the insured considering the aforesaid clause does not have any right to seek an enhanced amount.

40. The learned counsel for the respondent during their course of arguments, relied upon the judgements including that of Union of India v. Master Construction Co. (2011) 12 SCC 349, Oriental Insurance Co. Ltd. v. Mercury Rubber Mills (2012) 127 DRJ 650, New India Assurance Co. Ltd. v. Genus Power Infrastructure Ltd., (2015) 2 SCC 424, United Insurance Co. Ltd. v. Maja Healthcare Division (2018) SCC Online Del 7732, and Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1.

41. In light of the aforesaid submissions, it is submitted that the present petition may be dismissed in as much as the facts presented by the petitioner do not make out an arbitrable dispute, and hence cannot be referred to arbitration.

QUESTION FOR ADJUDICATION

42. Heard learned counsels appearing on behalf of both the parties and perused the records.

43. I have given thoughtful consideration to the submissions made by the parties. The only issue before this Court is whether the instant dispute as pleaded by the petitioner can be referred to arbitration notwithstanding the Discharge Voucher given by the petitioner.

ANALYSIS

44. The governing mechanism for any dispute arising between the parties in the instant case would be the Standard Fire and Special Perils Policy since the Petitioner has sought the invocation of the arbitration clause which has been provided within the same.

45. The relevant clause that has been relied is Clause 13 of the Policy which pertains to arbitrability of dispute between the parties in the instant case. The said clause has been reproduced hereunder:

"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 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."

46. From a bare perusal of the above, it is evident that the aforesaid clause provides that once the Respondent company has accepted its liability, any dispute or difference arising qua the quantum to be paid under this policy shall independently of all other questions be referred to the decision of a sole arbitrator to be appointed in writing by the parties. Therefore, there exists a valid arbitration agreement between the parties and the question of quantum of claim is expressly stated in the agreement as one that can be decided in the course of arbitration.

47. For a better appreciation of the case at hand, it is now pertinent to peruse and analyse the provisions of law invoked in the instant petition before delving deeper into the facts of the case.

48. The primary argument that is essential to this dispute is whether it can be referred to arbitration since the contract containing the arbitration agreement is contended to have been extinguished on account of the Discharge Voucher that has been submitted by the Petitioner.

49. This Court in *Roshin Lal Gupta & Sons Pvt Ltd. v. Delhi Tourism & Transportation Corporation & Anr.* (2009) SCC OnLine Del 502 has relied on the 21st Edition of "Russell on Arbitration" in adjudicating a similar petition, wherein the underlying contract was extinguished and the parties sought recourse to arbitration, and had stated as under:

"6. Russell on Arbitration [21st Edition] has examined just the very question raised by learned counsel for the appellant who claims that since the contract in which the clause was contained was brought to an end by his client because, according to him, the other party was in breach, therefore, along with the contract, the arbitration agreement contained therein has also ceased to exist. There, it stated thus, at Page 32.

"it would be a bizarre outcome if the arbitration clause did not survive discharge of the contract by breach, as the arbitration clause was agreed by the parties for the very purpose of providing the means by which disputes about the contract, including breach, would be determined. The first part of the answer is that the arbitration clause is treated as a separate and independent agreement which generally survives the termination of the underlying contract. This is known as the doctrine of separability.

Similarly, with regard to termination of a contract by breach or frustration it was held in *Heyman v. Darwins Ltd.*, (1942) A.C. 356 that termination by breach of performance obligations does not bring the contract's dispute resolution procedure to an end, and is entirely within the scope of the arbitration agreement.

I may add that as held in *Astro Vencedor Compania Naviera SA v. Mabanaft GmbH*, (1970) 2 Lloyd's Rep. 267, "the court should if the circumstances allow lean in favour of giving effect to the arbitration clause to which the parties have agreed. (See Russell on Arbitration, 21st Edition, Page 32)"

7. In the same context, Russell on Arbitration also states that, "the reasoning behind the doctrine of separability was, therefore, that the arbitration clause constitutes a self contained contract collateral or ancillary to the underlying or "main" contract." Under the doctrine of implied terms, it has long been held that an arbitration agreement can continue to be implied as one of the terms of the relationship between the parties after the formal expiry of an agreement between them containing an arbitration clause: typically, this is found in leases and partnership deeds. [see Russell on Arbitration, 21st Edition, page 34]."

50. It is pertinent to note that an arbitration clause pertains to the resolution of disputes arising out of the contract, and thus in accordance with the aforementioned i.e. the Doctrine of Severability, the arbitration clause would be deemed as a separate and severable clause and thus, the arbitration agreement would subsist even after the contract between the parties had extinguished and the same has been statutorily recognised under Section 16(1) of the Act. The Hon"ble Supreme Court in *National Agricultural Coop. Marketing Federation India*

Ltd. v. Gains Trading Ltd., (2007) 5 SCC 692, held that:

"6. The respondent contends that the contract was abrogated by mutual agreement; and when the contract came to an end, the arbitration agreement which forms part of the contract, also came to an end. Such a contention has never been accepted in law. An arbitration clause is a collateral term in the contract, which relates to resolution disputes, and not performance. Even if the performance of the contract comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract. (Vide *Heyman v. Darwins Ltd.* [1942 AC 356 : (1942) 1 All ER 337 (HL)] , *Union of India v. Kishorilal Gupta & Bros.* [AIR 1959 SC 13] and *Naihati Jute Mills Ltd. v. Khyaliram Jagannath* [AIR 1968 SC 522] .) This position is now statutorily recognised. Sub-section (1) of Section 16 of the Act makes it clear that while considering any objection with respect to the existence or validity of the arbitration agreement, an arbitration clause which forms part of the contract, has to be treated as an agreement independent of the other terms of the contract; and a decision that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. The first contention is, therefore, liable to be rejected."

51. This Court in *Shrishti Infrastructure Development Corporation Ltd. v. Ircon International Limited*, 2022 SCC OnLine Del 2383 held that an arbitration agreement that is embedded within a contract would always be considered as a separate and severable clause, and despite a reference being made by the court the arbitrator is free to decide on their jurisdiction including the existence of the arbitration agreement in accordance with the kompetenz-kompetenz principle, which has been recognized under Section 16 of the Act. This Court has held that:

"16. Therefore, insofar as reference to arbitration is concerned, keeping in view the position of law as expatiated in the aforementioned rulings, this court is of the view that : firstly, an arbitration agreement embedded in a contract is always considered a separate and severable clause, with a standing of its own; by reason of which, supersession of an arbitration agreement must not be lightly inferred. Secondly, in consonance with the overarching principle viz. 'when in doubt, do refer' whereby the extant, preponderant legal view is that if there is an arbitration agreement between the parties, which is sought to be negated by a party by citing other provisions of a contract, which requires interpretation of the contract, courts must lean towards referring the matter to arbitration. And thirdly, despite reference being made by court, the arbitrator must be left free to decide on his/her own jurisdiction including the existence of the arbitration agreement, as permissible under section 16 of the A&C Act which enshrines the kompetenz-kompetenz principle."

52. The Hon"ble Supreme Court in *Vidya Drolia and Others v. Durga Trading Corporation*, (2021) 2 SCC 1 has held that the in view of the clear legislative mandate of the Act, and the Doctrine of Severability and kompetenz-kompetenz

principle, it is the Arbitral Tribunal which is the preferred first authority to adjudicate all questions of non-arbitrability and the Court has merely been conferred with the power of "second look" with regards to the same. The Hon"ble Supreme Court has held that:

"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.

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?"

53. The question of whether an Arbitral Tribunal is competent to rule on its own jurisdiction on the kompetenz-kompetenz principle, including on the existence or validity of the arbitration agreement is no longer res integra and the answer is in the affirmative. It has further laid down that the very purpose of the kompetenz-kompetenz principle is to minimize judicial interference in arbitral proceedings. The Hon"ble Supreme Court in Uttarakhand Purv Sainik Kalyan Nigam Limited vs. Northern Coal Field Limited, (2020) 2 SCC 455, has held that:

"7.11. The doctrine of "kompetenz-kompetenz", also referred to as "compétence-compétence", or "compétence de la recognized", implies that the Arbitral Tribunal is empowered and has the competence to rule on its own jurisdiction, including determining all jurisdictional issues, and the existence or validity of the

arbitration agreement. This doctrine is intended to minimise judicial intervention, so that the arbitral process is not thwarted at the threshold, when a preliminary objection is raised by one of the parties. The doctrine of kompetenz-kompetenz is, however, subject to the exception i.e. when the arbitration agreement itself is impeached as being procured by fraud or deception. This exception would also apply to cases where the parties in the process of negotiation, may have entered into a draft agreement as an antecedent step prior to executing the final contract. The draft agreement would be a mere proposal to arbitrate, and not an unequivocal acceptance of the terms of the agreement. Section 7 of the Contract Act, 1872 requires the acceptance of a contract to be absolute and unqualified [Dresser Rand S.A. v. Bindal Agro Chem Ltd., (2006) 1 SCC 751. See also BSNL v. Telephone Cables Ltd., (2010) 5 SCC 213 : (2010) 2 SCC (Civ) 352. Refer to PSA Mumbai Investments Pte. Ltd. v. Jawaharlal Nehru Port Trust, (2018) 10 SCC 525 : (2019) 1 SCC (Civ) 1]. If an arbitration agreement is not valid or non-existent, the Arbitral Tribunal cannot assume jurisdiction to adjudicate upon the disputes. Appointment of an arbitrator may be refused if the arbitration agreement is not in writing, or the disputes are beyond the scope of the arbitration agreement. Article V(1)(a) of the New York Convention states that recognition and enforcement of an award may be refused if the arbitration agreement "is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made".

54. In the present case, Clause 13 of the Policy between the parties contains a valid arbitration agreement, and neither of the parties has disputed the validity and existence of the arbitration clause. Therefore, considering the aforementioned discussion and bearing in mind the precedents laid down by the Hon"ble Supreme Court, it can be reasonably concluded that the arbitration agreement between the parties under Clause 13 would be deemed to be existent and a separate agreement under the Doctrine of Severability, and the arbitration agreement would not have extinguished along with the contract between the parties.

55. The issue with regard to whether the Petitioner"s claims would be maintainable on account of the Discharge Voucher that has been submitted by the Petitioner must be adjudicated by the Arbitral Tribunal, in accordance with the judicial mandate of the Amendments to the Act which purports to minimise judicial intervention in arbitration proceedings. This would also be in accordance with the kompetenz-kompetenz principle.

56. Furthermore, Section 11(6) has been significantly narrowed down by the said Amendment. The Supreme Court in BSNL v. Nortel Networks (India) (P) Ltd. (2021) 5 SCC 738 has upheld the aforementioned, wherein it has held that:

"27.3. Issues which must be left to the Arbitral Tribunal to decide are whether the claim made falls within the arbitration clause (for example, a matter which is reserved for final decision of a departmental authority, and is "excepted" or

excluded from arbitration); merits of the claims involved.

28. In *Union of India v. Master Construction Co.* [Union of India v. Master Construction Co., (2011) 12 SCC 349 : (2012) 2 SCC (Civ) 582] this Court held that the issue whether a discharge voucher, or no-claims certificate, or settlement agreement had been obtained by fraud, coercion, duress, or undue influence, must be determined by the appointing authority at the Section 11 stage, when a prima facie determination as to whether such a dispute was raised bona fide and genuine must be made. If the dispute prima facie appears to be lacking in credibility, the matter would not be referred to arbitration. A bald plea of fraud, coercion, duress, or undue influence was not sufficient, unless the party who sets up such a plea was able to prima facie establish it, by placing material on record.

Post-amendment position

29. The 1996 Act was amended by the Arbitration and Conciliation (Amendment) Act, 2015 which came into force with effect from 23-10-2015. The said Amendment was based on the recommendations of the 246th Report of the Law Commission of India. The 2015 Amendment Act made three significant changes:

29.1. It replaced the Chief Justice of the High Court as the appointing authority for exercising the default power of appointment in the case of domestic arbitrations, by the High Court concerned; and, in respect of international commercial arbitrations, the default power would be exercised by the Supreme Court, in place of the Chief Justice of India.

29.2. It inserted sub-sections (6-A) and (6-B) in Section 11, which reads as:

"11. Appointment of arbitrators.—(1)-(6) ***

(6-A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.

(6-B) The designation of any person or institution by the Supreme Court, or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court."

Sub-section (6-A) by a non-obstante clause provided that notwithstanding any judgment, decree or order of any court, the scope of examination at the Section 11 stage, would be confined to the existence of the arbitration agreement. The effect of the amendment was that if the existence of the arbitration agreement was not in dispute, all other issues would be left for the Arbitral Tribunal to decide. This was in reinforcement of the doctrine of kompetenz-kompetenz, which empowers the tribunal to rule on its own jurisdiction, including any

objections with respect to the validity of the arbitration agreement; and thereby minimise judicial intervention at the pre-reference stage.

29.3. Sub-section (6-B) was inserted to provide that the designation of any person or institution, by either the Supreme Court or the High Court, as the appointing authority under Section 11, would not be regarded as a delegation of judicial power.

31. Sub-section (6-A) came up for consideration in *Duro Felguera, S.A. v. Gangavaram Port Ltd.* [*Duro Felguera, S.A. v. Gangavaram Port Ltd.*, (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764], wherein this Court held that the legislative policy was to minimise judicial intervention at the appointment stage. In an application under Section 11, the Court should only look into the existence of the arbitration agreement, before making the reference. Post the 2015 Amendment, all that the courts are required to examine is whether an arbitration agreement is in existence — nothing more, nothing less : (SCC pp. 759 & 765, paras 48 & 59)

48. Section 11(6-A) added by the 2015 Amendment, reads as follows:

“11. (6-A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement.”

From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect—the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple—it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.

59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in *SBP & Co.* [*SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618] and *Boghara Polyfab* [*National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117]. This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists—nothing more, nothing less. The legislative policy and purpose is essentially to minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected.”

57. In the said *BSNL v. Nortel Networks (India) (P) Ltd*, (*Supra*) judgment, the

Hon"ble Supreme Court while referring to *Vidya Drolia v. Durga Trading Corpn* (Supra) and held as under:

"45. In a recent judgment delivered by a three-Judge Bench in *Vidya Drolia v. Durga Trading Corpn.* [*Vidya Drolia v. Durga Trading Corpn.*, (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , on the scope of power under Sections 8 and 11, it has been held that the Court must undertake a primary first review to weed out "manifestly ex facie non-existent and invalid arbitration agreements, or non-arbitrable disputes". The prima facie review at the reference stage is to cut the deadwood, 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 that the subject-matter is not arbitrable, that reference may be refused.

46. The upshot of the judgment in *Vidya Drolia* [*Vidya Drolia v. Durga Trading Corpn.*, (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] is affirmation of the position of law expounded in *Duro Felguera* [*Duro Felguera, S.A. v. Gangavaram Port Ltd.*, (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] and *Mayavati Trading* [*Mayavati Trading (P) Ltd. v. Pradyut Deb Burman*, (2019) 8 SCC 714 : (2019) 4 SCC (Civ) 441] , which continue to hold the field. It must be understood clearly that *Vidya Drolia* [*Vidya Drolia v. Durga Trading Corpn.*, (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] has not resurrected the pre-amendment position on the scope of power as held in *SBP & Co. v. Patel Engg. Ltd.* [*SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618]

47. It is only in the very limited category of cases, where there is not even a vestige of doubt that the claim is ex facie time-barred, or that the dispute is non-arbitrable, that the court may decline to make the reference. However, if there is even the slightest doubt, the rule is to refer the disputes to arbitration, otherwise it would encroach upon what is essentially a matter to be determined by the tribunal."

58. Therefore, the scope of the Court"s power while hearing a Section 11 petition is to test whether or not a valid arbitration agreement exists on the basis of the facts and law. Only when the Court is certain that a valid arbitration agreement does not exist or that the subject matter is not arbitrable, then a referral may be refused, and this is strictly applicable to a very limited category of cases. However, if there is even the slightest doubt, the rule is to refer the dispute to arbitration, and otherwise, it would encroach upon what is essentially a matter to be determined by the tribunal.

59. Further, a close reading of the clause 13 reveals that only when the Respondent company has accepted its liability, any dispute or difference arising qua the quantum to be paid under this policy shall independently of all other questions be referred to the decision of a sole arbitrator to be appointed in writing by the parties. In the instant case, the existence of liability has not been disputed by the Respondent Company, therefore, prima facie the dispute

regarding the quantum of claims can be determined by an arbitrator. This is more so since there exists a valid arbitration agreement between the parties and the question of quantum of claim is expressly stated in the agreement as one that can be decided in the course of arbitration.

60. It is also clear that the issues pertaining to the quantum of claim that is accruable to the Petitioner and whether the Petitioner's claims would be maintainable on account of the Discharge Voucher are to be decided by the Arbitral Tribunal under the kompetenz-kompetenz principle and any decision by this Court would be deemed as going into the merits of the dispute, which is not at all warranted under law. Thus, these issues are not being dealt with in the instant petition under Section 11(6) of the Act.

61. Hence, in light of the foregoing discussion and analysis, this Court is of the opinion that if there is a valid existing arbitration agreement between the parties, and there is denial of the existence of any arbitrable dispute by one of the parties and refusal to appoint an arbitrator then the Court, in line with the letter and spirit of the Act as well as the doctrine of kompetenz-kompetenz, must lean towards referring the matter to arbitration.

62. Therefore, in the facts and circumstances of this case, this Court refers the dispute raised herein to an Arbitral Tribunal. Hence, the following Order:

ORDER

(i) Mr. Rajeev Saxena, Advocate is appointed as the Sole Arbitrator to adjudicate the disputes between the parties which have arisen under the said Policy;

(ii) The learned Sole Arbitrator, before entering the arbitration reference, shall ensure the compliance of Section 12(1) of the Arbitration and Conciliation Act, 1996;

(iii) The learned sole arbitrator shall be paid fees as prescribed under the Delhi International Arbitration Centre (DIAC) (Administrative Cost and Arbitrators Fees) Rules, 2018 as amended on 15th November, 2022;

(iv) At the first instance, the parties shall appear before the learned tribunal within 10 days from today on a date which may be mutually fixed by the learned sole arbitrator;

(v) All contentions of the parties including that of maintainability are expressly kept open.

63. In the aforesaid terms, the instant petition stands allowed.

64. It is made clear that any observations made herein shall have no bearing whatsoever on the merits of the case arising from the set of facts and circumstances of this case, in the course of any proceedings before any other Court.

65. A copy of the Judgment be forwarded to the learned sole arbitrator on the

following address:

Mr. Rajeev Saxena, Advocate

708, Lawyers" Chambers Block – III,

Delhi High Court

Phone No.: +91-9810811180

e-mail ID: saxsonslawco@gmail.com

66. The judgment be uploaded on the website forthwith.