(2009) 04 DEL CK 0112

In the Delhi High Court

Case No : Arbitration Petition 144 of 2008

Polytron and Fragrance Industries (P) Limited APPELLANT

Vs

National Insurance Co. Ltd. RESPONDENT

Date of Decision : 27-04-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(4)

Citation : (2009) 159 DLT 534 : (2009) 4 ILR Delhi 793 : (2009) 155 PLR 6 : (2010) 7 RCR(Civil) 276

Hon'ble Judges : Rekha Sharma, J

Bench : Single Bench

Advocate : Prag Chawla, for the Appellant; Somesh Arora and Yash Mishra, for the Respondent

Final Decision : Dismissed

Judgement

Rekha Sharma, J.—By way of present petition u/s 11(4)(a) of the Arbitration & Conciliation Act, 1996, the petitioner seeks appointment of an Arbitrator on behalf of the respondent, allegedly, on the ground that despite notice, respondent had failed to appoint an Arbitrator in terms of Clause 13 of the Contract of Insurance.

2. It is not in dispute that the petitioner who has a factory at B-70, Sector-57, Noida (U.P.) had got the same insured against fire and so also the stocks, plant, machinery and office equipments vide an insurance policy No. 361303/11/03/3100322 issued in its favour by the respondent. It is also not in dispute that a fire broke out in the aforementioned premises on September 13, 2004 resulting in extensive damage to the building, office equipment, plant, machinery and stocks lying therein. The petitioner lodged an insurance claim of Rs. 3,60,60,694/- with the respondent who in order to get the loss assessed appointed a surveyor by the name of Rakesh Kapoor & Co. The surveyor assessed the loss to the tune of Rs. 1,71,23,531/-. Pursuant thereto, respondent offered to pay a sum of Rs. 1,50,72,523/- to the petitioner which it accepted by

way of full and final settlement and also issued a receipt dated March 29, 2006 in token of satisfaction of its claim. However, ten days after having accepted the aforesaid sum of Rs. 1,50,72,523/-, on April 07, 2006 petitioner wrote a letter to the respondent stating therein that it had accepted the lesser amount than that claimed by it, as it was in acute need of funds and had issued the discharge vouchers without prejudice to its right to take recourse to law to recover differential amount, interest and liquidated damages. Hence, it asked the respondent to provide it with details of deduction along with reasons thereof. This letter was followed by a notice to the respondent dated October 26, 2007 alleging therein that the letter of acceptance whereby the petitioner had agreed to receive the sum of Rs. 1,50,72,523/- was obtained from it under duress and coercion by the respondent. Accordingly, by virtue of the notice, petitioner invoked the arbitration clause, informed the respondent that it had already appointed Mr. Atul Datt as its Arbitrator and called upon the respondent to appoint its Arbitrator within the next 30 days, failing which it said that it will take appropriate legal proceedings.

3. On January 03, 2008, the respondent replied to the notice but declined to appoint an Arbitrator on the ground that the claim stood settled between the parties and with that, the contract of insurance also came to an end including the arbitration clause.

4. Let me at this stage reproduce the arbitration clause, on basis of which the petitioner is seeking appointment of an Arbitrator on behalf of the respondent. The same runs as under:-

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 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 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.

5. In view of the aforesaid facts and circumstances of the case, the question that arises for consideration is, whether after having accepted the sum of Rs. 1,50,72,523/- towards full and final settlement of its claim, is it open to the

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/polytron-and-fragrance-industries-p-…

petitioner to contend that it did so under duress and coercion and whether the dispute with regard to quantum of claim in terms of the arbitration clause still subsists between the parties?

6. The answer to the aforesaid question is not far to seek. It is covered by two judgments of the Supreme Court and by a judgment of this High Court.

7. The Apex Court in a judgment rendered in P.K. Ramaiah and Company Vs. Chairman and Managing Director, National Thermal Power Corpn., has held that, "where the full and final satisfaction of a claim was acknowledged by a receipt in writing and the amount was received unconditionally, it resulted in accord and satisfaction by final settlement of the claims and that the subsequent allegation of coercion is an afterthought and a devise to get over the settlement of the dispute, acceptance of the payment and receipt voluntarily given." The Court has further held that, "party having received the amount in full and final settlement of the claim, there is accord and satisfaction and there is no existing arbitrable dispute for reference to the arbitration."

8. In the other case reported as Nathani Steels Ltd. v. Associated Constructions , the Apex Court has held that, "once the parties have arrived at a settlement in respect of any dispute or difference arising under a contract and that dispute or the difference is amicably settled by way of a final settlement by and between the parties, unless that settlement is set aside in proper proceedings, it cannot lie in the mouth of one of the parties to the settlement to spurn it on the ground that it was a mistake and to proceed to invoke the arbitration clause." The Court goes on to say that, "if this is permitted, the sanctity of contract, the settlement also being a contract, would be wholly lost and it would be open to one party to take the benefit under the settlement and then to question the same on the ground of mistake without having the settlement set aside."

9. Insofar as the judgment rendered by this Court is concerned, it was in the case of R.K. Silk Mills (India) Limited v. National Insurance Company Ltd. in 2008 4 AD (Del) 572. The facts of that case and of the present case are nearly identical. The petitioner of that case had also accepted lesser amount than that claimed by it and later alleged that it was constrained to accepting the lesser amount much less than the actual loss suffered by it. In that case also, this Court relied upon the judgments of the Apex Court in P.K. Ramaiah and Company v. Chairman & Managing Director, National Thermal Power Corporation and Nathani Steels Ltd. v. Associated Constructions and held that, "the dispute which could be referable to arbitration could be only one which pertained to the quantum to be paid under the policy and since the quantum stood crystallized, there does not remain any dispute or differences between the parties. It is entirely another matter that the petitioner may state that the agreement that was arrived at between the parties was under some misconception or coercion or undue influence, but that would have to be decided in separate proceedings and cannot be the subject matter of the arbitration as has been clearly indicated in Nathani Steels Ltd. v. Associated Constructions."

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/polytron-and-fragrance-industries-p-…

10. Having regard to what has been held by the Apex Court in the aforementioned two judgments and relying upon the judgment of this Court, with which I agree, I find no merit in the petition.

11. In terms of the arbitration clause, the only dispute that could be referred to arbitration was the one which pertained to quantum to be paid under the policy. The quantum stood crystallized in view of the petitioner having accepted the sum of Rs. 1,50,72,523/- by way of full and final settlement. The receipt dated March 29, 2006 bears testimony to this fact. It is, therefore, not open to the petitioner to contend that the amount was accepted under any kind of duress or coercion from the respondent. At least, the Arbitral Tribunal is not the forum to raise such a dispute. It does not fall within the ambit of the arbitrable dispute. As observed by the Apex Court in Nathani Steels Ltd. v. Associated Constructions (supra), the petitioner may have its remedy elsewhere in some other proceeding but not before the Arbitrators. Again, as said by the Apex Court, if s uch a plea is allowed to be taken after the acceptance of the amount in full and final settlement, the sanctity of the settlement would be wholly lost.

12. In view of what has been noticed above, I hold that there exists no dispute between the parties as can be referred to the Arbitrators in terms of the arbitration clause.

13. For the foregoing reasons, the petition is dismissed.

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/polytron-and-fragrance-industries-p-…