United India Insurance Co.Ltd. vs Hyundai Engineering And Construction ... on 21 August, 2018

Equivalent citations: AIR 2018 SUPREME COURT 3932, (2018) 10 SCALE 72, (2018) 2 WLC(SC)CVL 390, (2018) 4 RECCIVR 828, (2018) 4 TAC 11, (2018) 5 ALLMR 961, (2018) 5 ARBILR 13, (2018) 5 BOM CR 499, 2019 (135) ALR SOC 34 (SC), (2019) 193 ALLINDCAS 120, (2019) 1 ACJ 734, AIRONLINE 2018 SC 137

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Bench: D.Y. Chandrachud, A.M. Khanwilkar, Dipak Misra

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REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8146 OF 2018
(Arising out of SLP(C) No.4260/2018)

United India Insurance Co. Ltd. & Anr. …..Appellant(s)

:Versus:

Hyundai Engineering and Construction
Co. Ltd. & Ors. ....Respondent(s)

JUDGMENT

A.M. Khanwilkar, J.

1. The conundrum in this appeal is whether clause 7 of the subject Insurance Policy dated 5th September, 2007 posits unequivocal expression of the intention of arbitration or is hedged with a conditionality? The learned Single Judge of the High Court of Judicature at Madras vide impugned judgment had held that post amendment of the Arbitration and Conciliation Act, 1966 (for short, "the Act"), with effect from 23rd October, 2015 by insertion of sub-section 6A in Section 11 of the Act, the limited mandate of the Court is to examine the factum of existence of an arbitration agreement. No more and no less. The learned Single Judge placed reliance on the two-Judge Bench decision of this Court in Duro Felguera, S.A. Vs. Gangavaram Port Limited,1 and another decision of

its own High Court in Jumbo Bags Ltd. Vs. New India Assurance Co. Ltd.2 The appellants, however, placed reliance on a three-Judge Bench decision of this Court in Oriental Insurance Company Limited Vs. Narbheram Power and Steel Private Limited,3 where this Court had an occasion to construe a similar clause of an insurance policy as in the present case. Relying on this decision, it is urged that the impugned judgment cannot be countenanced and that the High Court ought to have dismissed the original petition filed by the respondents under Sections 11(4) & 11(6) of the Act read with Rule 2 of the Appointment of Arbitrators (2017) 9 SCC 729 2016 SCC OnLine Mad 9141 : (2016) 3 CTC 761 : (2016) 2 LW 769 (2018) 6 SCC 534 by the Chief Justice of Madras High Court Scheme, 1996, to declare the arbitrator nominated by the respondents herein as the sole arbitrator; or in addition, appoint one arbitrator on behalf of the appellants herein so as to adjudicate all the disputes inter se between the parties in terms of the Act.

2. Shorn of unnecessary facts, be it noted that the respondent Nos.1 and 2 constitute a Joint Venture ("JV"). Respondent No.3 awarded a contract on 29th September, 2006 for design, construction and maintenance of a bridge across the River Chambal, which was to be completed within a period of 40 months and was commenced on 5th December, 2007 by the JV after respondent No.3 handed over the site to it. After commencement of the work, a Contractor All Risk Insurance Policy ("CAR Policy") dated 5th December, 2007 was obtained from the appellants covering the entire project, valued at Rs.2,13,58,76,000/-. The policy contained clause 7, which reads thus:

> "7. 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 a condition precedent to any right of 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 hereunder and such claim shall not within 3 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 purpose be deemed to have been abandoned and shall not thereafter be recoverable hereunder." (emphasis supplied)

3. During the construction of the bridge, on 24th December, 2009, an accident occurred causing significant loss to the contractor. A detailed claim for a sum of Rs.1,51,59,94,543/- was submitted by the JV to the appellants, in response to which the appellants appointed one Mr. S. Ananthapadmanabhan, Surveyor and Loss Adjuster, for assessing the loss caused to the contractor. A final report was submitted by the Surveyor on 28th February, 2011 assessing the loss as Rs.39,09,92,828/-, however, with the finding that the damage was on account of the faulty design and improper execution of the project and not payable under the policy. Besides the stated report, a Committee of Experts was set up by the Ministry of Road Transport and Highways, Government of India, to enquire into the accident which then submitted its report on 7th August, 2010.

4. The appellants took into account both these reports and vide communication dated 21st April, 2011, intimated the respondents that the claim put forth by the JV, was found to be not payable, and accordingly, stood repudiated. The said communication reads thus:

> "UNITED INDIA INSURANCE COMPANY LIMITED Divisional Office:010700 Post Box No.4528 Ist Floor, Silingi Building Gram UNDIVSEVEN 134, Greams Road Phone:28290845/846 Chennai-600 006 Telefax:044-28290844 Ref.:010700/CAR Claim/2011 21st April, 2011 REGISTERED POST WITH ACKNOWLEDGE DUE M/s National Highways of Authority of India 1-C-10 SFS Colony Talwandi, Kota Rajasthan-324 005 Dear Sirs Kind Attn: Mr. Anoop Kulshreshtha, Project Director Re: Claim under Contractor s All Risk Policy No.011900/44/07/03/60000001- Our Claim No.010703/44/09/03/90000007-Collapse of Cable Stayed Bridge at Kota, Rajasthan.
>
> We refer to the above claim lodged by you under your Contractor s All Risk Policy in respect of collapse of portion of bridge under construction on 24.12.2009.
>
> You are aware that immediately on intimation of the occurrence, our Company had deputed Mr. S Ananta Padmanabhan, a duly licensed and well experienced civil engineer surveyor for detailed survey as required by Insurance Act. The surveyor had visited the site on various occasions and was in contact and correspondence with you when various particulars, information and records were obtained. Besides enquiries with you the surveyor had also made other enquiries for information including the Government, Police Authorities and gathered reports of the respective agencies. After detailed survey, the surveyor had submitted his Final Report dated 28.2.2011 in respect of the claim.

Besides the Survey Report, it also found that the occurrence was the subject matter of enquiry by a Special Committee constituted by the Ministry of Road Transport and Highways, Govt. of India which had also submitted a detailed report dated 7.8.2010.

We find that there had been a collapse of the lateral span P3-P4, P4 Pylon and main span structures from S1-S10 segments which fell into the river.

On a careful study of the records it is found that the collapsed portion was affected entirely due to faulty design, besides defective workmanship and materials in execution of the project. A few of the relevant factors are observed as under:-

In execution of the project it is found that the junction at Pylon P4 was most critical and vulnerable which had to be handled with due care and diligence. An instable equilibrium had been caused at this junction, due to shearing of the slab in the lateral span P3-P4 about 15 mts. From the P4 junction, which caused the tilting of the pylon, dragging with it the spans P3-P4, P3-P2 and Piers P3, P4. The release of restraints on the movement of the bearings at P4 had not been performed in manner necessary, contributing to a massive failure. Lack of coordination and planning between various consultants and failure to properly oversee the execution had been found.

There had been change of allocation of work among various joint venture partners which had played a key role in the quality of workmanship. Even at the affected P4 location, construction of Pier P4 was the responsibility of Hyundai Engg. & Construction Co. Whereas it was found to have been carried out by Gatnmon India.

There had also been change in the sequence of operations in construction to make up for lost time, which adversely affected the stability of the P4 joint. The summary of the findings of the Enquiry committee is that the collapse was caused, inter alia, by

1) absence of stability devices during construction,

2) shortfall in design and 3) deficient workmanship.

The Enquiry Committee have more particularly observed that

a) the contractors are responsible for all during the structure to reach a vulnerable stage, without taking adequate precautions with respect to stability and robustness of the partially completed structure and shortfall in the design.

b) Since they have been shortfalls at the design responsibility also lies with.

The available records and documents clearly reveal that the loss has occurred due to faulty design and defective workmanship.

We find that national Highways Authority of India have in fact initiated action by issue of show cause notice against the Contractors.

The Kota Police had lodged FIR against various employees of the Contractors/Sub contractors and submitted final report which supports the above observations.

The policy does not cover the loss in the above circumstances. In fact the policy specifically excludes any loss/damage caused by faulty design, defective workmanship/material. Further, the revelations of the expert body and the surveyors indicate willful acts/negligence in execution of work of such nature resulting in the occurrence. In view of the above, we regret to inform you that the claim is found to be not payable and accordingly stands repudiated.

Insurers reserve their right to rely upon any further or other materials/terms in support of the above conclusion and the above circumstances are not exhaustive of the basis for the above decision. Thanking You Yours faithfully Sd/-

Senior Divisional Manager Copy to:

> 1) M/s Hyundai Engineering & Construction Co. Ltd & Gammon India Ltd., Chambal Bridge Project. Behind Tilam Sangh, Rawat Bhata Road, Kota Rajasthan- 324010.
>
> 2) Regional Office-Technical-Engineering Dept.
>
> 3) Head Office-Technical-Engineering Dept. Regd. & Head Office: 24, Whites Road, Chennai-600 014." (emphasis supplied)

5. The JV nevertheless entered into correspondence with the appellants to reopen and re-assess its decision of repudiation of the claim. Finally, the appellants informed the respondents that it was unable to "reconsider" the claim which has already been repudiated. The said communication reads thus:

> "UNITED INDIA INSURANCE COMPANY LIMITED HEAD OFFICE 24, WHITES ROAD CHENNAI CIN:U93090TN1938GOI000108 Ref:No.UIIC/ENGG/CLAIMS/17-18/01 Dt:17.04.2017 To KA: Mr. Anupam Gupta The Project Director M/s National Highways Authority of India Project Implementation Unit A-575, Talwandi, Kota (Rajasthan)-324005 Subject: CAR Insurance Policy No.011900/44/07/03/60000001.
>
> Settlement of Contractors claim No.010703/44/096/03/90000007.
>
> Dear Sir, We refer to your letter Ref:17011/27/2006-Kota/CAR/RJ- 05/3909 dt. 18.01.2017 and Contractor letter Ref: HZ-6718, dated 04.02.2017 and also the subsequent meeting held at our office Chennai. On perusal of the documents provided, we find that no further points have emerged in support of the claim.

In view of the above we regret our inability to reconsider the claim which was repudiated.

Yours faithfully

(D. Nagalakshmi)
Dy. General Manager
CC: KA: Mr. Haeng Kwon Kang
The Chief Project Manager

Hyundai Engineering & Construction Co. Ltd. Chambal Bridge Project, Behind Tilam Sangh Rawat Bhata Road, Kota Rajasthan-324 010" (emphasis supplied)

6. As a sequel, the JV vide its letter dated 29th May, 2017 informed the appellants that disputes had arisen between the appellants and the JV and in view thereof it was invoking the arbitration clause No.7 contained in the Insurance Policy and had nominated Dr. V.K. Agrawal as its Arbitrator. The appellants were also called upon to either accept the name of the sole arbitrator or nominate its own arbitrator within 30 days from the date of receipt of the communication. Eventually, respondent Nos.1 & 2 filed a petition under Sections 11(4) & 11(6) of the Act before the High Court of Judicature at Madras being O.P. No.537/2017.

7. The said petition was resisted by the appellants. It was urged that the subject clause 7 of the policy was hedged with a pre-condition expressly predicating that no difference or dispute shall be referable to arbitration, if the appellants disputed or did not accept its liability under or in respect of the policy. In other words, in case of repudiation of the claim by the appellants, the remedy of the insured was to file a suit within 3 months of such disclaimer. It was asserted that the appellants had repudiated the liability vide letter dated 21st April, 2011. That is an indisputable fact. The communication sent by the appellants on 17th April, 2017 was a mere reiteration and confirmation of the repudiation already communicated vide letter dated 21st April, 2011. It was specifically denied that the said letter dated 17th April, 2017 was a final repudiation for the purpose of calculating limitation as alleged by the applicants (respondent Nos.1 & 2). It was urged that the dispute raised was not one of quantum to be paid under the policy but on the very factum of alleged loss not covered under the policy. By virtue whereof, the agreement specifically excluded making a reference to arbitration.

8. Notwithstanding the stand taken by the appellants, the learned Single Judge of the High Court by the impugned judgment allowed the petition filed by respondent Nos.1 & 2 and appointed Mr. Justice P. Jyothimani, Former Judge, High Court of Judicature, Madras to act as an Arbitrator in the matter, having opined that arbitration agreement existed in the form of clause 7 of the Insurance Policy, by relying mainly on the decision in Duro Felguera, (supra) and Jumbo Bags Ltd., (supra).

9. We have heard Mr. P.P. Malhotra, learned senior counsel appearing for the appellants and Ms. Meenakshi Arora, learned senior counsel appearing for the respondents.

10. The clause similar to the subject clause 7 of the Insurance Policy came up for consideration before a three- Judge Bench of this Court in Oriental Insurance Company Limited (supra). After analysing the legal principle expounded in a host of decisions, including the decision in Jumbo Bags Ltd. (supra), the Court opined as follows:

> "23. It does not need special emphasis that an arbitration clause is required to be strictly construed. Any expression in the clause must unequivocally express the intent of arbitration. It can also lay the postulate in which situations the arbitration clause cannot be given effect to. If a clause stipulates that under certain circumstances there can be no arbitration, and they are demonstrably clear then the controversy pertaining to the appointment of arbitrator has to be put to rest.
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> 24. In the instant case, Clause 13 categorically lays the postulate that if the insurer has disputed or not accepted the liability, no difference or dispute shall be referred to arbitration....." (emphasis supplied) While adverting to the observation in paragraphs 28 and 32 of the Jumbo Bags Ltd. (supra), the Court observed thus:
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> "19. We may presently refer to the decision of the Madras High Court in Jumbo Bags Ltd. In the said case, the learned Chief Justice was interpreting clause 13 of the policy conditions. Referring to Vulcan Insurance Co. Ltd., he has held thus: (Jumbo Bags Ltd. case, SCC OnLine Mad para 28) „28. ...The dispute which is not referable to arbitration, being not covered by the clause cannot be over the subject-matter of arbitration, and the remedy of the insured in this case is only to institute a suit. And again : (SCC OnLine Mad para 32) „32. I am of the view that the remedy of arbitration is not available to the petitioner herein in view of the arbitration clause specifically excluding the mode of adjudication of disputes by arbitration, where a claim is repudiated in toto. The remedy would thus only be of a civil suit in accordance with law. We concur with the said view." (emphasis supplied)

11. The other decision heavily relied upon by the High Court and also by the respondents in Duro Felguera (supra), 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 Company Limited (supra), following the exposition in Vulcan Insurance Co. Ltd. Vs. Maharaj Singh and Anr.4, which, again, is a three-Judge Bench decision having construed clause similar to the subject clause 7 of the Insurance Policy. In paragraphs 11 & 12 of Vulcan Insurance Co. Ltd. (supra), the Court answered the issue thus:

> "11. Although the surveyors in their letter dated April 26, 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 letter dated July 5 and 29, 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.
>
> (1976) 1 SCC 943 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 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 paragraph 22, after analysing the relevant judicial precedents, the Court concluded as follows:

> "22. The two lines of cases clearly bear out the two distinct situations in law. A clause like the one in Scott v. Avery 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." (Emphasis supplied)
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> 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 Company Limited (supra), 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 pre-

condition 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 concerned policy. 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 admitted)". This is reinforced and re-stated 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 herein before 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 21st April, 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 (supra) 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, mis- application of the three-Judge Bench decisions of this Court in Vulcan Insurance Co. Ltd. (supra) and in Oriental Insurance Company Ltd. (supra).

14. Reverting to the communication dated 21st April, 2011, we have no hesitation in taking the view that the appellants completely denied their liability and repudiated the claim of the JV (respondent Nos.1 & 2) for the reasons mentioned in the communication. The reasons are specific. No plea was raised by the respondents that the policy or the said clause 7 was void. The appellants repudiated the claim of the JV and denied their liability in toto under or in respect of the subject policy. It was not a plea to dispute the quantum to be paid under the policy, which alone could be referred to arbitration in terms of clause 7. Thus, the plea taken by the appellants is of denial of its liability to indemnify the loss as claimed by the JV, which falls in the excepted category, thereby making the arbitration clause ineffective and incapable of being enforced, if not non-existent. It is not actuated so as to make a reference to arbitration. In other words, the plea of the appellants is about falling in an excepted category and non-arbitrable matter within the meaning of the opening part of clause 7 and as re-stated in the second paragraph of the same clause.

15. In view of the above, it must be held that the dispute in question is non-arbitrable and respondent Nos.1 & 2 ought to have resorted to the remedy of a suit. The plea of respondent Nos.1 & 2 about the final repudiation expressed by the appellants vide communication dated 17th April, 2017 will be of no avail. However, whether that factum can be taken as the cause of action for institution of the suit is a matter which can be debated in those proceedings. We may not be understood to have expressed any opinion either way in that regard.

16. Accordingly, we allow this appeal and set aside the impugned judgment and order and further dismiss the original petition No.537/2017 filed by respondent Nos.1 & 2 before the High Court of

Judicature at Madras, with liberty to the said respondents to take recourse to a civil suit for mitigation of its grievances, if so advised. We are not expressing any opinion either way on the merits of the issues to be answered in the said proceedings.

17. The appeal is allowed in the aforementioned terms with no order as to costs.

.....CJI.

(Dipak Misra) .....J. (A.M. Khanwilkar) .....J. (Dr. D.Y. Chandrachud) New Delhi;

August 21, 2018.