Oriental Insurance Company Limited vs M/S Narbheram Power And Steel Pvt Ltd on 2 May, 2018

Equivalent citations: AIR 2018 SUPREME COURT 2295, 2018 (6) SCC 534, AIRONLINE 2018 SC 49, (2018) 190 ALLINDCAS 134 (SC), (2018) 190 ALLINDCAS 134, (2018) 2 JLJR 448, 2018 (2) KLT SN 70 (SC), (2018) 2 RECCIVR 909, (2018) 3 ACJ 1777, (2018) 3 ARBILR 1, (2018) 3 BANKCAS 102, (2018) 3 CGLJ 107, (2018) 3 PAT LJR 17, (2018) 4 CAL HN 276, (2018) 5 MAD LJ 350, (2018) 6 SCALE 545, 2019 (134) ALR SOC 19 (SC), (2019) 1 MAH LJ 563, (2019) 1 MPLJ 509, AIR 2018 SC (CIV) 2065

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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. 2268 OF 2018
(@ S.L.P. (C) No. 33621 of 2017)

Oriental Insurance Company Limited Appellant (s)

VERSUS

M/s Narbheram Power and Steel Pvt. Ltd. Respondent(s)

JUDGMENT

Dipak Misra, CJI.

The respondent – M/s Narbheram Power and Steel Pvt. Ltd. – had entered into a Fire Industrial all Risk Policy No. 31150/11/2014/65 in respect of the factory situated on plot Nos. 11 and 13, Gundichapada Industrial Estate, District – Dhenkanal, Odisha. In October 2013, there was a cyclone Reason:

> named as "Phailin" which affected large parts of the State of Odisha. Because of the said cyclone, the respondent suffered damages which it estimated at Rs. 3,93,36,224.00. An intimation was given to the appellant-insurer and it appointed one Ashok Chopra & Company as surveyor which visited the factory premises on 20th and 21st November, 2013. A series of correspondences were exchanged between the respondent and the insurer. On 22.12.2014, the respondent commented on the surveyor s report and requested the appellant to settle its claim. As ultimately the claim was not settled, the respondent sent a communication dated 21.01.2017 intimating the appellant that it had invoked the arbitration agreement and requested it to concur with the name of the arbitrator whom it had nominated.

2. The appellant replied to the said letter repudiating the claim made by the respondent and declined to refer the disputes to arbitration between the parties. As the insurer declined to accede to the request made by the respondent, it filed an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for brevity, „the 1996 Act) for appointment of an arbitrator so that he could, along with the arbitrator nominated by the respondent, proceed to appoint a presiding arbitrator to adjudicate the disputes and differences that had arisen between the parties.

3. The said application was contested by the insurer and the High Court, considering the language employed in Clause 13 of the policy and the reasons advanced while repudiating the claim of the claimant, appointed a retired Judge of the High Court as arbitrator. The said order is under assail by way of special leave in this appeal.

4. We have heard Mr. P.K. Seth, learned counsel for the appellant and Mr. Sachin Datta, learned senior counsel for the respondent.

5. Placing reliance on Clause 13 of the policy, it is urged by the learned counsel for the appellant that once the claim was repudiated and the insurer had disputed or not accepted the liability under or in respect of the policy, no difference or dispute could have been referred to arbitration. It is his further submission that the High Court has adopted an erroneous approach in the interpretation of the said Clause by expressing the view that it suffers from ambiguity and it needs to be purposively read failing which the arbitration clause becomes meaningless. Reliance has been placed on the decisions in General Assurance Society Ltd. v. Chandumull Jain and another 1 , Oriental Insurance Co. Ltd. v. Samayanallur Primary Agricultural Co-op. Bank 2 and United India Insurance Co. Ltd. v. Harchand Rai Chandan Lal3.

6. Learned senior counsel for the respondent, per contra, would contend that the order passed by the High Court is absolutely impregnable and in the obtaining factual matrix, the view expressed by the High Court cannot be found fault with. He would further urge that the letter of repudiation,

when appositely understood, does not relate to disputation and non-acceptance of the liability under or in respect of the policy but, in fact, amounts to denial of the claim that basically pertains to the quantum. Learned counsel has drawn a distinction between liability and refusal of the claim not having been substantiated. To bolster the submissions, he has placed reliance on The Vulcan Insurance Co. Ltd v. Maharaj Singh AIR 1966 SC 1644 AIR 2000 SC 10 (2004) 8 SCC 644 and another 4 , Chloro Controls India Private Limited v. Severn Trent Water Purification Inc. and others 5 , A. Ayyasamy v. A. Paramasivam and others 6 , M/s. Jumbo Bags Ltd v. M/s. The New India Assurance Co. Ltd 7 and Essar Steel India Limited v. The New India Assurance Co. Ltd8.

7. To appreciate the rival submissions, it is necessary to scan and scrutinize the arbitration clause, that is, Clause 13 of the policy. The said Clause reads as follows:-

> "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 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 arbitrator, 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.
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> (1976) 1 SCC 943 (2013) 1 SCC 641 (2016) 10 SCC 386 2016-2-L.W.769 MANU/MH/0542/2013 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." (Emphasis supplied)

8. When we carefully read the aforequoted Clause, it is quite limpid that once the insurer disputes the liability under or in respect of the policy, there can be no reference to the arbitrator. It is contained in the second part of the Clause. The third part of the Clause stipulates that before any right of action or suit upon the policy is taken recourse to, prior award of the arbitrator/arbitrators with regard to the amount of loss or damage is a condition precedent. The High Court, as the impugned order would show, has laid emphasis on the second part and, on that basis, opined that the second part and third part do not have harmony and, in fact, sound a discordant note, for the scheme cannot be split into two parts, one to be decided by the arbitration and the other in the suit.

9. Before we address the factum of repudiation and its impact on the Clause, we think it appropriate to discuss the authorities cited by the learned counsel for the parties. In General Assurance Society Ltd. (supra), the Constitution Bench, while dealing with the contract of insurance, has opined that such a contract is entered into on the basis of commercial transactions and while interpreting the

documents relating to a contract of insurance, the duty of the court is to interpret the words in which the contract is expressed by the parties because it is not for the court to make a new contract, howsoever reasonable.

10. In Oriental Insurance Co. Ltd. (supra), a two-Judge Bench has opined that insurance policy has to be construed having reference only to the stipulations contained in it and no artificial far-fetched meaning could be given to the words appearing in it.

11. In United India Insurance Co. Ltd. (supra), the Court has ruled that the terms of the policy shall govern the contract between the parties and they are bound to abide by the definitions given therein. That apart, the expression appearing in the policy should be given interpretation with reference to the terms of the policy and not with reference to the definitions given in any other law because the parties have entered into the contract with eyes wide open.

12. The aforesaid principles are in the realm of settled position of law. The natural corollary of the said propositions is that the parties are bound by the clauses enumerated in the policy and the court does not transplant any equity to the same by rewriting a clause. The Court can interpret such stipulations in the agreement. It is because they relate to commercial transactions and the principle of unconscionability of the terms and conditions because of the lack of bargaining power does not arise. The said principle comes into play in a different sphere.

13. In this context, reference to the authority in Deep Trading Company v. Indian Oil Corporation and others9, would be instructive. A three-Judge Bench was dealing with the right of the respondent No. 1 therein to appoint the arbitrator after expiry of the time period. The Court referred to Clause 29 of the agreement that provided for procedure for appointment of the arbitrator. After referring to the authorities (2013) 4 SCC 35 in Datar Switchgears Ltd. v. Tata Finance Ltd. and another10 and Punj Lloyd Ltd. v. Petronet MHB Ltd.11, the Court held:-

> "19. If we apply the legal position exposited by this Court in Datar Switchgears to the admitted facts, it will be seen that the Corporation has forfeited its right to appoint the arbitrator. It is so for the reason that on 9-8-2004, the dealer called upon the Corporation to appoint the arbitrator in accordance with the terms of Clause 29 of the agreement but that was not done till the dealer had made application under Section 11(6) to the Chief Justice of the Allahabad High Court for appointment of the arbitrator. The appointment was made by the Corporation only during the pendency of the proceedings under Section 11(6). Such appointment by the Corporation after forfeiture of its right is of no consequence and has not disentitled the dealer to seek appointment of the arbitrator by the Chief Justice under Section 11(6). We answer the above questions accordingly."

14. In this regard, a reference to the authority in Newton Engineering and Chemicals Limited v. Indian Oil Corporation Limited and others12 is fruitful. In the said case, there was an express, clear and unequivocal arbitration clause between the parties which provided that disputes shall be referred to the sole arbitration of the Executive Director (2000) 8 SCC 151 (2006) 2 SCC 638 (2013)

4 SCC 44 (Northern Region) of the respondent Corporation and if the said authority was unable or unwilling to act as the sole arbitrator, the matters shall be referred to the person designated by such ED (NR) in his place who is willing to act as the sole arbitrator. The arbitration clause further provided that if none of them is able to act as an arbitrator, no other person should act as a sole arbitrator and if the office of the said authority ceases to exist in the Corporation and the parties are unable to arrive at any agreed solution, the arbitration clause would not survive and has to be treated having worked its course. The Court, interpreting the clause, expressed the view that in such a situation, the Court has no power to appoint an arbitrator for resolution of the disputes.

15. In The Vulcan Insurance Co. Ltd (supra), a three-Judge Bench was interpreting Clauses 13, 18 and 19 of the policy involved therein. For proper appreciation, we think it appropriate to refer to the Clauses of the policy that arose for consideration in the said authority. They read as follows:-

> "13. If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the insured or anyone acting on his behalf to obtain any benefit under this Policy; or, if the loss or damage be occasioned by the wilful act, or with the connivance of the insured; or, if the claim be made and rejected and an action or suit be not commenced within three months after such rejection, or (in case of an arbitration taking place in pursuance of the 18th condition of this Policy) within three months after the Arbitrator or Arbitrators or Umpire shall have made their award, all benefit under this Policy shall be forfeited.
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> x x x
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> 18. If any difference arises as to the amount of any loss or damage 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 ....
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> * * * And 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 if disputed shall be first obtained.
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> 19. In no case whatever shall the company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration." In the said case, the company repudiated its liability to pay any amount of loss or damage as claimed by the claimant.

The Court opined that the dispute raised by the company appertained to its liability to pay any amount of damage whatsoever and, therefore, the dispute raised by the appellant company was not covered by the arbitration clause. The Court scanned the anatomy of Clauses 13 and 18 and then

referred to the decision in Scott v. Avery 13 naming the clause to be Scott v. Avery clause and quoted a passage from Russel on Arbitration which is to the following effect:-

> "Even a clause of this type, however, is not absolute in effect: where the court orders that the arbitration agreement cease to have effect in relation to a particular dispute, it has a discretion to order further that the Scott v. Avery clause cease to have effect too. (Vide pp. 57, 58 of Russel on Arbitration, Eighteenth Edn.).
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> In the said case, reliance was placed on Viney v.
>
> Bignold14 wherein it had been held that the determination of the amount by arbitration was a condition precedent to the right to recover on the policy and if any action was brought without an award obtained in arbitration, it was not maintainable. The other decision that was pressed into service was Caledonian Insurance Company v. Andrew Gilmour15.
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> The Court commented that the said decision was dealing with a case that contained a comprehensive arbitration clause and (1856) 25 LJ Ex 308 : 5 HLC 811 : 4 WR 746 (1888) 20 QBD 171,172 1893 AC 85 : 9 TLR 146 : 57 JP 228 justified the applicability of Scott v. Avery as a bar to the maintainability of action without an award.

16. The three-Judge Bench noted that in O'connor v. Norwich Union Fire and Life Insurance Society 16 , the decision in Viney v. Bignold (supra) was distinguished and went on to reproduce a passage from Holmes, J.:-

> "Now, if it was a term of the contract that a difference of this kind was to be settled by arbitration, I should not hesitate to stay the action ....
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> * * * But there is no provision in the plaintiff s policy that such a controversy as has arisen is to be referred to arbitration. There is a carefully drawn clause, by which it is agreed that the amount to be paid, as distinguished from liablity to pay anything, is to be settled by arbitrators, and that no action can be commenced until they shall have determined such amount. One result of this clause may be to render two proceedings necessary where there is a dispute as to the amount of the loss as well as a denial of all liability; but this ought not to be a ground of complaint to either of the parties who have made it a term of the contract;" After reproducing the said passage, the Court concurred with the said view.
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> (1894) 2 Irish LR 723 : 28 Irish LT 95

17. Reliance was placed upon a few paragraphs of the Fifth Edition of MacGillivray on Insurance Law by the learned counsel for the respondent. The said passage reads thus:-

> "There is a rule of law that parties cannot by their private contract oust the jurisdiction of the court; but it has been held that parties to a contract may nevertheless agree that no cause of action shall arise upon it until any matter in dispute between them shall have been determined by arbitration and then only upon the arbitrators award." On behalf of the respondent, the following passage was taken aid of:-
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> "As a rule, where the amount of the loss or damage is the only matter which the parties refer to arbitration, then if the insurers repudiate any liability on the policy there is no obligation on the assured to arbitrate as to the amount before commencing an action on the policy."

18. It is apt to mention here that the Bombay High Court in Eagle Star and British Dominions Insurance Company v. Dinanath and Hemraj17 had interpreted identical Clause 13. The High Court had eventually ruled:-

> "But in clause 13 there are various contingencies set out which if established entitle the insured to bring an action without an award having been made by arbitrators. One of these contingencies is „if the claim be made and rejected which if established ILR 47 Bom 509 : AIR 1923 249 : 25 Bom LR 164 gives a right of action, the period of limitation provided for the suit being fixed at three months from the date of the rejection. While it is also provided that where arbitration takes place in pursuance of Condition 18 of the policy, three months time should be allowed for a suit to be brought after the award has been made. Therefore it is quite obvious that a right of action accrued after the company rejected the claim. Naturally that question would have first to be decided by suit as under clause 18 that question could never have been referred to arbitration." This Court in The Vulcan Insurance Co. Ltd (supra) approved the view of the Bombay High Court.

19. At this stage, we may state, in brief, the factual score in The Vulcan Insurance Co. Ltd. case. In the said case, the respondent therein had filed an application under Section 20 of the Arbitration Act, 1940 in the Court at Muzaffarnagar in Uttar Pradesh. As objection was taken to the jurisdiction of that Court, the respondent re-filed it in the Delhi Court. The trial court at Delhi dismissed the application holding that the dispute arising out of the repudiation of the liability under Clause 13 by the insurance company was within the scope of the arbitration agreement contained in Clause 18 and a reference to arbitration could be made, but, as per Cause 19, the petition was barred by limitation. On an appeal being preferred, the Delhi High Court reversed the judgment by opining that Clause 18 was restricted to differences as to the amount of loss or damage; that reference to arbitration was not ousted and the arbitration clause covered the dispute even if the insurance company had repudiated the claim in toto; that the Arbitration Clause 18 was inoperative unless the conditions contained in Clause 19 were satisfied; that the condition mentioned therein was satisfied because the Respondent No. 1 had commenced the arbitration on the date when he issued the notice dated October 1, 1963; and that his claim was the subject of a pending arbitration within the meaning of Clause 19. Being of this view, the High Court had allowed the appeal. Dislodging the

judgment of the High Court, this Court ultimately held:-

> "24. But in this case on a careful consideration of the matter we have come to the definite conclusion that the difference which arose between the parties on the company s repudiation of the claim made by Respondent 1 was not one to which the arbitration clause applied and hence the arbitration agreement could not be filed and no arbitrator could be appointed under Section 20 of the Act. Respondent 1 was ill-advised to commence an action under Section 20 instead of instituting a suit within three months of the date of repudiation to establish the company s liability." It is our obligation to mention here that though the respondent has placed reliance upon the said authority, yet the same does not assist him. On the contrary, it dispels the perception of ambiguity in Part II and Part III of the arbitration clause as perceived by the High Court. That apart, it throws light on the issue of repudiation.

20. We may presently refer to the decision of the Madras High Court in M/s. Jumbo Bags Ltd. (supra). In the said case, learned Chief Justice was interpreting Clause 13 of the policy conditions. Referring to The Vulcan Insurance Co. Ltd. (supra), he has held thus:-

> "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 :-
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> "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.

21. In Essar Steel India Limited (supra), the learned Single Judge of the Bombay High Court was dealing with a situation where the insurer had taken the stand that the policy was void ab initio. Repelling the said stand, the learned Single Judge held that the disputes could be referred to arbitration since the plea advanced by the owner could be decided by the arbitrator. We do not intend to dwell upon the correctness of the said decision as the issue involved in the present case is quite different.

22. In A. Ayyasamy (supra), a two-Judge Bench was concerned with the issue as to whether the plea of fraud can be adequately taken care of by the arbitrator. Sikri. J., analyzing the facts, opined:-

> "28. We, therefore, are of the opinion that the allegations of purported fraud were not so serious which cannot be taken care of by the arbitrator. The courts below, therefore, fell in error in rejecting the application of the appellant under Section 8 of the Act. Reversing these judgments, we allow these appeals and as a consequence, application filed by the appellant under Section 8 in the suit is allowed thereby relegating the parties to the arbitration." Chandrachud J., in his concurring opinion,

after referring to many an authority and literature in the field of arbitration, came to hold:-

"53. The Arbitration and Conciliation Act, 1996, should in my view be interpreted so as to bring in line the principles underlying its interpretation in a manner that is consistent with prevailing approaches in the common law world.

Jurisprudence in India must evolve towards strengthening the institutional efficacy of arbitration. Deference to a forum chosen by parties as a complete remedy for resolving all their claims is but part of that evolution. Minimising the intervention of courts is again a recognition of the same principle." He has further held that the mere allegation of fraud in the factual scenario was not sufficient to detract the parties from the obligation to submit their disputes to arbitration keeping in view the letter and spirit of the 1996 Act. The decision, in our considered view, is not applicable to the case at hand.

23. Though the learned counsel for the respondent has referred to the case of Chloro Controls India Private Limited (supra), yet the same need not be analyzed as it is not an authority remotely relevant for deciding the lis in the present case.

24. 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.

25. 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. The thrust of the matter is whether the insurer has disputed or not accepted the liability under or in respect of the policy. The rejection of the claim of the respondent made vide letter dated 26.12.2014 ascribes the following reasons:-

"1. Alleged loss of imported coal is clearly an inventory shortage.

2. There was no actual loss of stock in process.

3. The damage to the sponge iron is due to inherent vice.

4. The loss towards building/sheds etc. are exaggerated to cover insured maintenance.

5. As there is no material damage thus business interruption loss does not triggered."

26. The aforesaid communication, submits the learned senior counsel for the respondent, does not amount to denial of liability under or in respect of the policy. On a reading of the communication, we think, the disputation squarely comes within Part II of Clause 13. The said Part of the Clause clearly spells out that the parties have agreed and understood that no differences and disputes shall be referable to arbitration if the company has disputed or not accepted the liability. The communication ascribes reasons for not accepting the claim at all. It is nothing else but denial of liability by the insurer in toto. It is not a disputation pertaining to quantum. In the present case, we are not concerned with regard to whether the policy was void or not as the same was not raised by the insurer. The insurance-company has, on facts, repudiated the claim by denying to accept the liability on the basis of the aforesaid reasons. No inference can be drawn that there is some kind of dispute with regard to quantification. It is a denial to indemnify the loss as claimed by the respondent. Such a situation, according to us, falls on all fours within the concept of denial of disputes and non-acceptance of liability. It is not one of the arbitration clauses which can be interpreted in a way that denial of a claim would itself amount to dispute and, therefore, it has to be referred to arbitration. The parties are bound by the terms and conditions agreed under the policy and the arbitration clause contained in it. It is not a case where mere allegation of fraud is leaned upon to avoid the arbitration. It is not a situation where a stand is taken that certain claims pertain to excepted matters and are, hence, not arbitrable. The language used in the second part is absolutely categorical and unequivocal inasmuch as it stipulates that it is clearly agreed and understood that no difference or disputes shall be referable to arbitration if the company has disputed or not accepted the liability. The High Court has fallen into grave error by expressing the opinion that there is incongruity between Part II and Part III. The said analysis runs counter to the principles laid down in the three-Judge Bench decision in The Vulcan Insurance Co. Ltd (supra). Therefore, the only remedy which the respondent can take recourse to is to institute a civil suit for mitigation of the grievances. If a civil suit is filed within two months hence, the benefit of Section 14 of the Limitation Act, 1963 will enure to its benefit.

27. In view of the aforesaid premised reasons, the appeal is allowed and the order passed by the High Court is set aside. In the facts and circumstances of the case, there shall be no order as to costs.

.....CJI.

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

May 02, 2018