Essar Steel India Limited vs The New India Assurance Co. Ltd on 8 May, 2013

Author: Anoop V. Mohta

Bench: Anoop V. Mohta

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION APPLICATION NO. 18 OF 2013

Essar Steel India Limited,
a company incorporated under the
Companies Act, 1956 and having its

registered office at 27 km, Surat Hazira
Road, Hazira, Surat-394 270, State of
Gujarat and a Corporate office
interalia, at Essar House, 11, K.K. Road,

Mahalaxmi, Mumbai-400 034.

V/s

The New India Assurance Co. Ltd.

having its Head Office at 87, M.G. Road,
Fort, Mumbai-400 001 and having its
Mumbai Regional Office III at New India
Centre, 3rd Floor, 17-A, Cooperage Road,

Mumbai-400 001.

Mr. Pravin K. Samdani, Senior Counsel a/w Mr. Simil Purohit with Mr. C.D. Mehta and Ms. Faiza A. Dhanani i/by Dhruve Liladhar & Co. with for the Applicant-Petitioner.

Mr. Aspi Chinoy, Senior Counsel a/w Mr. Firdosh Pooniwalla with Mrs. tine Abraham i/by Tuli & Co. for the Respondent.

CORAM : ANOOP V. MOHTA, J.
RESERVED ON : 2 MAY 2013

PRONOUNCED ON : 8 MAY 2013.

JUDGMENT:

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The Applicant-Petitioner has invoked Section 11 of the Arbitration and Conciliation Act, 1996 (for short, the Arbitration Act) ssm 2 arbap18.13sxw and prayed as under:-

> "(a) that this Hon'ble Court be pleased to appoint an Arbitrator on behalf of the Respondent to enable the two Arbitrators to appoint a Presiding Arbitrator to adjudicate the disputes and differences between the Applicant and the Respondent regarding the claims raised by the Applicant under the Terrorism Insurance Policy No. 121400/11/09/06/00001 dated 20 th November 2009 between the Applicant and the Respondent."

2 The basic particulars, as per the Applicant-Petitioner, are as under:-

> From 1 September 2008 to 31 August 2009, Megarisk Insurance Policy (for short, "the Megarisk Policy") for Rs.16,187 Crores issued by the Respondent. The Applicant paid a premium of Rs.6,68,57,673/-. In the month of May 2009, an unknown person punctured the pipeline at village Rallegedda and Janbai during the currency of the Megarisk policy. The Applicant submitted an initial claim of Rs.16.87 lakhs for the

property damage while the claim for business interruption was pending for assessment. The Respondent appointed M/s. Cunningham Lindsey International Private Limited as surveyors and loss assessors, who after survey, reported that the puncture to the pipeline was due to a terrorism activity of the area.

Therefore, the Applicant applied for a Terrorism and Sabotage Policy ssm 3 arbap18.13sxw (for short, "the terrorism policy") and submitted the separate Proposal Forms for Hazira and for Vizar, Kirandul and Chitrakonda.

3 On 18 November 2011, the Applicant under the covering letter forwarded premium for the terrorism cover in the sum of Rs.1,87,50,000/-. On 20 November 2009, a terrorism policy issued by the Respondent for the period from 20 November 2009 to 19 November 2010. The sum insured for the property at Rs.13,593.43 crores-for business interruption Rs. 5,475/- crores- totalling to Rs.19,068.43 Crores. On 10 December 2009, the Respondent sought details in order to furnish information sought by the re-insurers. On 16 December 2009/ 31 December 2009, the Applicant furnished the information accordingly.

4 On 23 March 2010, the pumping station at Chitrakonda blown up. This damaged the property and interrupted the business.

On 24 March 2010, the Applicant informed the Respondent of the attack and also about the potential loss. On 22 September 2010, 17 March 2011 and 7 June 2011, the Applicant filed the claims and revised it also. The total property loss was Rs.9.79 crores and the ssm 4 arbap18.13sxw business interruption loss was assessed at Rs.881/- Crores. On 9 September 2011, the Respondent sought to repudiate the claim inter alia on the ground that the Applicant had failed to disclose several incidents between 7 July 2007 and October 2009.

5 On 3 January 2012, the Applicant denied the contents of letter dated 9 September 2011 and state that the Respondent was aware of all the facts. On 18 January 2012, the Respondent once again refuted the Applicant's claim. On 20 November 2012, the Applicant invoked the arbitration clause under the terrorism policy.

On 12 December 2012, the Respondent's response was that in view of the avoidance of policy, there exists no arbitration agreement.

6 On 3 January 2013, the present Application filed, which was replied by the Respondent on 15 March 2013. The Applicant's advocate by a letter sought inspection; the Respondent's advocate confirmed the same. On 5 April 2013, the Applicant filed its rejoinder annexing thereto the correct Proposal Forms and the details furnished to the Respondent, as well as, to the re-insurers. On 29 April 2013, a sur-rejoinder filed by the Respondent.

7 The Respondent's case, in short, is as under:-

On 7 August 2009, the Respondent addressed an email to the Applicant requiring information on the recent incidents at Chattisgarh location for terrorism. On 10 August 2009, the Applicant responded that "re Chattisgarh Claim, the loss is under 10 lakhs and unknown persons have damaged a small portion of the pipeline". On 13 August 2008, the Proposal Form submitted by the Applicant to the Respondent for the Insurance Policy covering "Terrorism & Sabotage"

> for Hazira (Gujarat) and Kirandul (Chhatisgarh). On 20 November 2009, the terrorism policy issued covering Hazira in Gujarat & Bailadillsa, Sukma and Kirandul in Chhatisgarh and Chitrakonda in Orissa.
>
> 8 On 23 March 2010, because of the attack on pipeline, the loss caused. In the year 2010-2011, the Respondent in the process of Claim investigation learnt that from 2007-2009 there had been a number of terrorist incidents/attacks on Applicant's Facility in Chattisgarh and Orissa including-
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> April 2008 : 300 Maoists/ Naxalites had attacked and burnt 53 trucks and 3 heavy vehicles at Datewada.
>
> ssm 6 arbap18.13sxw June 2008:- two dozen vehicles and had been set on fire and equipment damaged.
>
> November 2009- Maoists attacked and blew up Applicant's guesthouse.
>
> 9 On 9 September 2011, the Respondent relied on and referred to- (i) the Proposal Form of 13 August 2008 and set out C1 11 and the answers thereto; (ii) the New India's Email of 7 August 2009 and Essars response thereto of 10 August 2009; (iii) the divers incidents of attacks on the Essar Facilities from 2007 to November 2009, disclosure of which had been suppressed by Essar, and stated that "As mentioned earlier, NIA has avoided the Stand Alone Terrorism Policy ab initio and without prejudice to NIA's belief that ESL's non disclosures and misrepresentation were fraudulent and in bad faith, NIA here tenders the return of the premium paid."

10 The Applicant did not dispute the Proposal Form dated 13 August 2008 and the answers to C1 11 thereof as extracted in the letter. The Applicant did not dispute the attacks/incidents from 2007 to 2009.

ssm 7 arbap18.13sxw The Applicant contended that the facts regarding the attacks/incidents were not required to be disclosed in the Proposal Form and subsequently as "at the time of formation of

the insurance contract between ESL and you, you knew or are presumed to know of all the material facts." and further that the said facts "were a matter of common knowledge".

11 The Respondent filed its Affidavit in reply referring to- (i) the Proposal Form dated 13 August 2008 and the Emails dated 7 and 10 August 2009; (ii) the incidents/attacks on Applicant's Facility Plant from 2007-2009 and, (iii) the Criminal Proceedings initiated by the Dantewada Police against the Applicant Manager and the said contractor Mr. Lala for paying protection money/entering into a protection agreement with Maoists, in the Dantewada Criminal Court.

12 In this rejoinder the Applicant has not disputed/denied the Proposal of 13 August 2008, the Emails of 7 and 10 August 2009, the listed incidents/ attacks on Applicant's Facilities from 2007-2009 and the fact that its Manager and contractor had been arrested and charged with paying protection money/ entering into protection ssm 8 arbap18.13sxw agreements with Maoists in the Dantewada Court.

In the Rejoinder the Applicant has for the first time relied on the separate "Proposal Forms" relating to (i) Hazira and (ii) Chattisgarh. However, even in such Chattisgarh Form in response to Cls 11(a) (b) and (c), no information was given about the past terrorist attacks on the Applicant plant/facility from 2007 to 2009.

The Applicant response to C1 11 of that Form was "No such major incidents and no claim lodged in our earlier policies". The Respondent filed its sur-rejoinder denying having received or acted on the Proposal Forms annexed in its Rejoinder Affidavit. The Applicant's Advocates letter says that "the aforesaid two proposal forms were submitted by our clients email of 31 st Dec 2009"- i.e. well after the Policy had been issued in November 2009.

13 Both the Senior Counsel appearing for the respective parties, have read and referred the following Judgments of the Supreme Court and the High Courts.

The authorities cited by the Applicant are as under:-

a) SBP and Co. Vs. Patel Engineering Ltd. & Anr. 1 1 (2005) 8 SCC 618 ssm 9 arbap18.13sxw

b) National Insurance Company Limited Vs. M/s.

Boghara Polyfab Private Limited. 2

c) M/s. Reva Electric Car Company Private Limited Vs. M/s. Green Mobil 3

d) N. Radhakrishnan Vs. Maestro Engineers and Ors. 4

e) Samant N. Balakrishna Vs. George Fernandez and Ors. 5

f) Bombay Gas Company Limited Vs. Parmeshwar Mittal and others. 6

g) Ivory Properties and Hotels Private Limited Vs. Nusli Neville Wadia 7 The Respondent's citations are as under:-

a) Cornhill Insurance Company Limited Vs. L & B Assenheim 8

b) Mithoolal Nayak Vs. Life Insurance Corporation of India 9

c) Satwant Kaur Sandhu Vs. New India Assurance Company Limited.

2 AIR 2009 SC 170 3 AIR 2012 SC 739 4 (2010) 1 SCC 72 5 AIR 1969 SC 1201 6 AIR 1998 Bom. 118 7 2011(2) Bom. C.R. 559 8 Lloyd's List Law Reports Vol.58.-27 9 2 S.C.R. (1962) Supp. 571 10 (2009) 8 SCC 316 ssm 10 arbap18.13sxw

d) Contship Container Lines Limited Vs. D.K. Lall & Ors.

e) Sea Lark Fisheries Vs. United India Insurance Company and Another 12

f) P.C. Chacko and Another Vs. Chairman, Life Insurance Corporation of India and Others. 13

g) India Household and Healthcare Limited Vs. LG Household and Healthcare Limited.

14 The extracts of the following books are also filed by the Respondent's counsel.

a) COLINVAUX'S LAW OF INSURANCE, Eighth

Edition by Robert Merkin.

b) MacGillivray & Parkington on INSURANCE LAW

relating to all risks other than marine, Eighth Edition, General Editor MICHAEL PARKINGTON.

15 The basic letter dated 9 September 2011, by which the Respondent relinquished/terminated the contract, mainly on the foundation of suppression of specific informations, sought for. The Petitioner denied those facts, as suppression of facts and/or the 11 (2010) 4 SCC 256 12 (2008) 4 SCC 131 13 (2008) 1 SCC 321 14 (2007) 5 SCC 510 ssm 11 arbap18.13sxw material information, as the Stand Alone Terrorism Policy was a subsequent different policy than the earlier one.

16 The strong reliance was also placed on the following incidents treating it to be the suppression of facts:-

> "This specific request for information was met by your response of 10 August 2009; "re Chhattisgarh Claim, the loss is under Rs.10 lacs and unknown persons have damaged a small portion of the pipeline". Your answer was in relation to the damage occasioned on 31 May 2009, but it failed to disclose other incidents, and the position was therefore misrepresented. You should also have disclosed other incidents, including:-
>
> 1) The incident on 7 July 2007 involving your slack flow station at 101KP.
>
> 2) The incident in April 2008 involving your iron ore beneficiation plant in Chhattisgarh.
>
> 3) The incident in June 2008 involving your iron ore beneficiation plant.
>
> 4) The incident on 21 May 2009 involving damage to the pipeline at 19KP.
>
> 5) The incident on 3 June 2009 involving personnel and equipment entrusted with the repair to the pipeline damage caused on 31 May 2009.
>
> 6) The incident of 4 June 2009 involving damage to the pipeline.
>
> 7) The incident on the night of 3 and 4 November

> 2009 at Chitrakonda, which you withheld from those at NIA that you knew to be working on your request for a Stand Alone Terrorism Policy, even though this incident was clearly the motivation for ESL to finally proceed with the Stand Alone Terrorism Policy in November 2009 after a period of inactivity on the subject in September and October 2009."

17 The learned Senior counsel appearing for the Respondent has resisted this Application, basically on the ground that their exits no insurance contract between the parties as it is void ab-initio in view of non-disclosure of the material facts, apart from complexity and criminality involved in the transaction between the parties.

18 The relevant observations of the Supreme Court, as relied by the learned Senior counsel appearing for the Respondent, are as under:-

a) Satwant Kaur Sandhu (Supra):-

19. In United India Insurance Co. Ltd. V. M.K.J. Corpn. (1996) 6 SCC 428, this Court has observed that it is a fundamental principle of insurance law that utmost faith must be observed by the contracting parties. Good faith forbids either party from non-disclosure of the facts which the party privately known, to draw the other into a bargain, from his ignorance of that fact and his believing the contrary [Also see Modern Insulators Ltd. V. Oriental Insurance Co. Ltd. (2000) 2 SCC 734.] ssm 13 arbap18.13sxw

20. MacGillivray on Insurance Law (10th Edn.) has summarised the assured's duty to disclose as under:-

> "..... the assured must disclose to the insurer all facts material to an insurer's appraisal of the risk which are known or deemed to be known by the assured but neither known nor deemed to be known by the insurer. Breach of this duty by the assured entitles the insurer to avoid the contract of insurance so long as he can show that the non-disclosure induced the making of the contract on the relevant terms."

21. Over three centuries ago, in Carter V. Boehm (1558- 1974) All ER Rep 183: (1766) 3 Burr 1905, Lord Mansfield had succinctly summarised the principles necessitating a duty of disclosure by the assured, in the following words:(All ER pp. 184 H-185 I) Insurance is a contract of speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trusts his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist. The keeping back of such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived, and the policy is void; because the risque run is really different from the risque understood and intended to

be run at the time of the agreement..... The policy would be equally void against the underwriter if he concealed.....Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of the fact, and his believing the contrary."

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b) Contship Container Lines Limited (Supra)

"37. In United India Insurance Co. Ltd. v. M.K.J. Corpn.

(1996) 6 SCC 428, this Court declared good faith as the very essence of a contract of insurance in the following words: (SCC p. 431, paras 6-7) "6. It is a fundamental principle of insurance law that utmost good faith must be observed by the contracting parties. Good faith forbids either party from concealing (non-disclosure) what he privately knows, to draw the other into a bargain, from his ignorance of that fact and his believing the contrary.

Just as the insured has a duty to disclose, 'similarly, it is the duty of the insurers and their agents to disclose all material facts within their knowledge, since obligation of good faith applies to them equally with the assured'.

7. The duty of good faith is of a continuing nature. After the completion of the contract, no material alteration can be made in its terms except by mutual consent. The materiality of a fact is judged by the circumstances existing at the time when the contract is concluded."

c) Sea Lark Fisheries (Supra) "17. Where there has been a suppression of fact, acceptance of the policy by an officer of the insurance company would not be binding on it. The Division Bench of the High Court, in our opinion, having regard to the statutory provisions, has rightly held that the plaintiff suppressed the material fact. Moreover, in view of the statutory rules, the court would have no other option but to hold that the vessel was not seaworthy."

d) P.C. Chacko and Another (Supra)

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"17. The purpose for taking a policy of insurance is not, in our opinion, very material. It may serve the purpose of social security but then the same should not be obtained with a fraudulent act by the insured. Proposal can be repudiated if a fraudulent act is discovered. The proposer must show that his intention was bona fide. It must appear from the face of the record. In a case of this nature it was not necessary for the insurer to establish that the suppression was fraudulently made by the policy-holder or that he must have been aware at the time of making the statement that the same was false or that the fact was suppressed which was material to disclose. A deliberate wrong answer which has a great bearing on the contract of insurance, if discovered may lead to the policy being vitiated in law."

> "5. The well-settled law in the field of insurance is that contracts of insurance including the contracts of life assurance are contracts uberrima fides and every fact of materiality must be disclosed otherwise there is good ground for rescission. And this duty to disclose continues up to the conclusion of the contract and covers any material alteration in the character of the risk which may take place between proposal and acceptance."

The Supreme Court, referring to Section 34 of the Insurance Act, also held that the misstatement by itself is not the reason for rescission of the policy unless the same is material in nature. The reference was also made to Sections 17, 18 and 25 of the Contract Act and thereby reiterated that ssm 16 arbap18.13sxw the formation defects renders the contract voidable. The concept of "void" and "voidable" are settled.

e) Mithoolal Nayak Vs. Life Insurance Corporation of India (Supra)-

> "The three conditions for the application of the second part of s. 45 are -
>
> (a) the statement must be on a material matter or must suppress facts which it was material to disclose;
>
> (b) the suppression must be fraudulently made by the policy-holder; and
>
> (c) the policy-holder must have known at the time of making the statement that it was false or that it suppressed facts which it was material to disclose.

In most of the above cases, the observations made by the Supreme Court are in the matters, where the trial was concluded.

19 The reliance was also placed by the learned Senior counsel appearing for the Respondent on the following portion of the books:-

1) COLINVAUX'S LAW OF INSURANCE (Supra)

"6-75 Nature of avoidance, Where the assured has

misrepresented, or failed to disclose, a material fact, the insurer's remedy is avoidance of the contract; it is not open to the insurer to affirm the contract but to deny a claim under it. [Anderson v Fitzgerald (1853) 4 H.L. Cas.

ssm 17 arbap18.13sxw 484; Biggar v Rock Life [1902] 1 K.B. 516.] Avoidance takes effect ab initio, so that the contract is treated as never having existed. [Brit Syndicates Ltd v. Italaudit SpA [2006] Lloyd's Rep. I.R. 487.] There is thus a total failure of consideration, and the assured is entitled to a return of his premium. [West v National Motor and Accident Insurance Union [1955] 1 All E.R. 800.]"

> 2) MacGillivray & Parkington on INSURANCE LAW relating to all risks other than marine (Supra) "Avoidance of the policy, of Course, results in it being set aside ab initio, the repayment of any losses and the return of any premiums paid under it." [Cornhill Ins. Co. V. Assenheim (1937) 58 LI.L.R. 27, 31 per Mackinnon J.;
>
> Standard Accident Ins. Co. V. Pratt, 278 P. 2d, 489 (Cal., 1955); Marks V. First Fed. Ins. Co. (1963) 6 W.I.R.. 185.] The premiums are recoverable only on the footing that the insurers have never been at risk under the void contract of insurance; the assured has a quasi-contractual action for money paid against a total failure of consideration. [Feise V. Parkinson (19=812) 4 Taunt. 640: Anderson V. Thornton (1853) 8 Ex. 425, 427-428; Marine Insurance Act 1906, s. 84(3)] The losses are repaid as money paid over under a mistake of fact; had the insurers known of the non-disclosure at the time they need not have paid them."

20 The Apex Court in India Household and Healthcare Limited (Supra) referring to Section 11 has observed as under:-

> "10. It is also no doubt true that where existence of an arbitration agreement can be found, apart from the existence of the original agreement, the Courts would construe the agreement in such a manner so as to uphold the arbitration agreement. However, when a question of fraud is raised, the same has to be considered differently. Fraud, as is well known, ssm 18 arbap18.13sxw vitiates all solemn acts. A contract would mean a valid contract; an arbitration agreement would mean an agreement which is enforceable in law."
>
> "14 Thus, as and when a question in regard to the validity or otherwise of the arbitration agreement arises, a judicial authority would have the jurisdiction under certain circumstances to go into the said question."
>
> "15 Fraud, as is well known, vitiates all solemn acts. (See Hamza Haji V. State of Kerala (2006) 7 SCC 416, Prem Singh V. Birbal (2006) 5 SCC 353 and Jai Narain

Parasrampuria v. Pushpa Devi Saraf (2006) 7 SCC 756."

21 This Court (Dr. D.Y. Chandrachud, J.), in Ivory Properties and Hotels Private Limited (Supra), after referring to the Judgments so cited by the learned Counsel appearing for the Respondent, held as under:-

> 16..... Now, it is necessary for the Court to emphasize that it is not every stray allegation of fraud which would lead to the consequence of a refusal on the part of the Court to refer parties to arbitration. The law certainly is not that on an isolated or stray reference to fraud without material particulars that the jurisdiction to refer parties to arbitration would stand ousted. Essentially, it is for the Court to determine whether having regard to the nature of the allegations and the context in which allegations of fraud have been levelled parties must not be referred to arbitration. The pleadings have to be scrutinized and each case must turn on a judicious exercise of power by the Designated Judge. .....It is not possible to accept the contention of the applicant that the allegation of fraud could at the highest be considered only ssm 19 arbap18.13sxw in an application under Section 8 and not in the context of an enquiry under Section 11 of the Act. Sections 8 and 11 are complementary and it would be anomalous to hold that while the Court before which an application under Section 8 is moved, can decline to refer the parties to arbitration where there are serious allegations of fraud, such a course would not be open to the Chief Justice or his designate while exercising the jurisdiction under Section 11.

22 An Insurance policy is a commercial contract. The proposal, offer, negotiation of terms and conditions, finalization, acceptance and execution of the documents, all are integrated and inter-connected part of the agreement. It governed by the law, the Policy, the usage and the practice in the field/market. The contract clauses in case of dispute needs to be tested on the anvil of the other relevant elements like "clear or vague terms", "breaches of the clause or clauses by which party" and "its effect and results/consequences".

The parties entitlement and their respective rights, obligations and defence read with the claims or counter claims are depend upon the respective facts. In case of allegations and/or counter allegations, the supporting material, proof, evidence are always necessary to be looked into by the Court and/or Quasi Judicial and/or Judicial Tribunal. All the above basic principles of law, including the usages and practices need to be followed by all the concerned.

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23 Above all, the foundation of any dispute resolution and/or

settlement of dispute is depends upon the facts and circumstances of each case, which goes to the root of any decision. Mere assertion by one party, even of "Fraud", "misrepresentation", "suppression of material facts and information", are not sufficient to conclude and/or accept the case as pleaded, unless other side against whom the allegations are made concede and/or accept those averments and there is no challenge to the averments and/or the allegations and/or there is a clear admission which is also always subject to "the doctrine of rebuttal". The Contract which is alleged to be void ab-initio, needs to be tested again on the terms and conditions and the facts and circumstances of the case. The contract which is voidable itself means, there is an option provided to one party to accept and/or deny the terms and its consequences. The contract between the two parties, therefore, if based upon the peculiar terms and conditions, in a given case, both the parties can waive their respective objections and/or mandatory terms and conditions also, provided it should not be against the provisions of law and/or policy. The doctrines of "burden of proof", "evidence", "assessment/appraisal of evidence/ ssm 21 arbap18.13sxw documents", "usage", "practice", "waiver", "estoppel", "pre and post relevant information and material", "mitigation of losses", "breaches of respective obligations" all are relevant till the end of conclusion of litigation and/or dispute. Therefore, there cannot be any dispute that the present commercial contract is also governed by these provisions of law. We have to consider the facts and circumstance of this case to test the rival contentions so raised by the parties, but only for the purpose of deciding Section 11 Petition for an appointment of Arbitrator/ Tribunal as contemplated under the Agreement between the parties.

24 There is no dispute with regard to the physical existence of Arbitration clause and so also the jurisdiction of this Court to entertain the present Petition. The submission as recorded above by the learned Senior counsel appearing for the Respondent is that there exists no agreement in law, as the agreement itself is void ab-initio.

Therefore, there is no question of dissecting the Arbitration clause from the main contract and/or invoking "the doctrine of severability and/or separation" to proceed with the matter, as there exists no Arbitrable dispute. The Applicant's learned Senior counsel opposing ssm 22 arbap18.13sxw these propositions on all counts.

25 It is necessary to quote clauses 10, 11, 17 and 18, which reads as under:-

> "10. FALSE OR FRAUDULENT CLAIMS If the Insured shall make any claim knowing the same to be false or fraudulent, as regards amount or otherwise, this policy shall become void and all claims and benefit hereunder shall be forfeited."
>
> "11. MISREPRESENTATION If the Insured has concealed or misrepresented any material fact or circumstance relating to this Insurance, this Insurance shall become void. If the Insured is unsure what constitutes material fact(s) or circumstance(s), they should consult their broker or agent."

> "17. LAW AND JURISDICTION This Policy shall be governed by and construed in accordance with the law of the Reupublic of India and, except as provided under the Arbitration clause, the Courts of the Republic of India shall have exclusive jurisdiction to adjudicate any dispute."

18. ARBITRATION If the Insured-and-Underwriters fail to agree in whole or in part regarding any aspect of this Policy, each party shall, within ten (10) days after the demand in writing by either party, appoint a competent and disinterested arbitrator and the two chosen shall ssm 23 arbap18.13sxw before commencing the arbitration select a competent and disinterested umpire.

The arbitrators together shall determine such matters in which the Insured and Underwriters shall so fail to agree and shall make an award thereon and the award in writing of any two (2), duly verified, shall determine the same, and if they fail to agree, they will submit their differences to the umpire.

The parties to such arbitration shall pay the arbitrators respectively appointed by them and bear equally the expenses of the arbitration and the charges of the umpire."

The Applicant's case is totally different. There is no admission on record and/or the case of admission and/or even no submission made that there exists no Arbitration Clause and/or the contract in question is void ab-initio. There are serious disputes raised on various facets by both the parties by referring to various documents placed on record including the clauses, apart from the factual disputes. This itself means, there is a dispute/ issue raised with regard to the validity and existence of Arbitration clause and/or the agreement between the parties.

27 Those disputes need to be taken note of by the designate to decide the present Petition. However, the scope of

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Section 11 of the Arbitration Act, is quite limited, so also the jurisdiction to decide the disputes/conflicts revolving around "fraud"

> "misrepresentation", "suppression of facts and/or material information", apart from the merits. The Judge designate, should not be the final Arbitrator to the arbitral dispute in the present case, at this stage itself.

28 The main contention "right to avoid" even if any, is nothing but a remedy for the breach of clauses and the duties as provided under the contract. Therefore, any such avoidance clause needs to be read with the other clauses of the agreement. Such clause just cannot be read in isolation by overlooking the other clauses, as well as, the doctrines of law as recorded above.

29 The suppression of pre and post relevant information and/or material as sought to be contended by the learned counsel appearing for the parties are also relevant factor which need to be adjudicated by the Arbitral Tribunal at the end of conclusion of litigation and/or dispute. I am inclined to observe the "allegations"

that itself are not sufficient to dismiss the Petition. The submission, ssm 25 arbap18.13sxw as per the Respondent that the contract for want of non disclosure of relevant material and/or information, goes to the root of the matter and made the contract void ab-initio, is not acceptable. The Applicant never admitted the same at any point of time.

30 The Judgments so cited by the learned Senior counsel appearing for the Respondent with regard to law of insurance/ policy in a matter of "fraud" and/or "misrepresentation" and/or "suppression of facts" are based upon the facts and circumstances of each case.

Most of the citations so relied and referred are after the due trial. The conclusion so provided and/or reiterated by the Supreme Court and/or the High Court, need no further discussion but just cannot be accepted as a foundation to declare that every such agreement between the parties is void ab-initio, as sought to be contended by the Respondent. The Judgments so cited and as observed in Ivory Properties and Hotels Private Limited (Supra), itself required that the Court needs to determine the nature of the allegations and the supporting material; the pleadings have to be scrutinized. Each case must be considered on the proved material, by the designated Judge, subject to the facts and circumstances of the case.

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31 Admittedly, there was "Megarisk Insurance Policy" issued

by the Respondent on 1 September 2008 for one year. Pending the policy period, an unknown person punctured the pipeline at village Rallegedda and Janbai. Therefore, the Applicant prayed for the damaged property, pending the claims for the business interruption loss. The Surveyor report was given that the incident of puncture of the pipeline was not by unknown person, but due to terrorism. There is no dispute that it was by unknown person. The Applicant, therefore, applied for the terrorism policy and submitted the separate proposal forms for Hazira and for Vizar, Kirandul

and Chitrakonda.

The Applicant, accordingly forwarded premium for terrorism cover policy on 18 November 2009. Admittedly, the terrorism policy issued by the Respondent for the period from 20 November 2009 to 19 November 2010, for the first time. This itself means, there was no terrorism policy till 20 November 2009. The Megarisk Insurance policy and the surrounding facts and the information so provided by the Applicant, were well within the knowledge of the Respondent and its officials. The concept and purpose of Megarisk policy and the terrorism policy, admittedly, different and has different purpose to ssm 27 arbap18.13sxw achieve. The terms and conditions are admittedly not inter-linked and inter-connected. As noted, the reason for taking the terrorism policy was because the Respondent refused to grant the claim so raised, based upon the Megarisk Insurance Policy. The parties have been dealing with the subject on the clear commercial terms and conditions.

32 Therefore, it is necessary to note the clauses of proposal for the terrorism risk insurance which provide for: location of risk, policy period for terrorism cover, the nature of risk, building, contents and business interruption values to the insurers, the description of surrounding area, the description of the location, description to the security location at the insured and lastly description of the past history at location to be insured. The clause 11 reads as under:-

> "11. Description of past history at location(s) to be insured:
>
> No such major incidents and no claim lodged in our earlier policies.
>
> a) Give full particulars of any incidents or threats in the past 5 years:
>
> b) Description steps taken to deal with them and to prevent recurrence.
>
> c) List all property loss for last 5 years: (Terrorist Losses only):
>
> ssm 28 arbap18.13sxw Sub clause (c) of Clause 11 provides that "List all property loss for last 5 years: "terrorist Losses only". The earlier Megarisk policy itself was issued by the Respondent and its claim based upon the alleged incidents was denied, treating it to be terrorism act, the Applicant sent proposal for the terrorism policy. The requirement was that details should be provided of the list of properties lost for last for 5 years, because of terrorists act or action/ terrorism. The material particular they wanted even as per this agreement/proposal was for loss caused because of terrorism. The Applicant submitted the details/particulars. The Respondent knowing fully the effect of such terrorism policy, after due scrutiny and due verification and having knowledge of the nature of business and even the earlier Megarisk policy, issued the terrorism policy in question. The requisite premium was paid accordingly. The averments have been made supported by the documents that they have complied with the requisite informations as demanded by the Respondent. The Respondent's case after survey that earlier incident was terrorism act/activities.

33 In view of incident of 23/24 March 2010, at Pumping Station at Chitrakonda, the Applicant invoked/ lodged their claim.

ssm 29 arbap18.13sxw The Respondent by letter dated 9 September 2011, mentioned that:-

> "As mentioned earlier, NIA has avoided the Stand Alone Terrorism Policy ab initio and strictly without prejudice to NIA's belief that ESL's non-disclosures and misrepresentations were fraudulent and in bad faith but, NIA hereby tenders the return of the premium paid."

The Applicant denied again and ascertained that they made the full and frank disclosure of all the material facts. There was nothing deliberate and/or there was no misrepresentation. It was specifically pointed out that the Insurer cannot repudiate liability to identify ESL on the ground of non-disclosure or misrepresentation of facts unless it is material fact. That resulted into the dispute/conflict between the parties arising out of agreement and the Arbitration clause in question.

34 The right to avoid, therefore, as noted already, just cannot be adjudicated as sought to be contended in Section 11 Petition at this stage itself. The contract, even if it is void ab-initio, need to be adjudicated and/or declared and/or decided by the competent Court or the tribunal. The Respondent unilaterally cannot repudiate and/or terminate the contract on the basis of information and/or material collected by them and/or on such foundation, specifically when the ssm 30 arbap18.13sxw Applicant invoked those clauses of the contract in view of the incidence and/or as the cause of action arose. The Applicant is denying the case of suppression of facts and/or non-disclosure of material information and/or fraud and/or any action in bad faith.

The documents/ averments so placed on record including the clauses referred by the learned counsel appearing for both the counsel, I am inclined to observe that the dispute so raised by interpreting the particular clauses of the policy and the clauses of the agreements required to be resolved after due trial by the Arbitral Tribunal.

35 The following facts if proved, definitely dilute the case of right to avoid and/or the contract being void ab-initio. Those facts are; there was no misrepresentation and or disclosure, facts were not material, there was no inducement of any kind, the act was in good faith and the breach of duty had been waived. The insurer or its agent have actual knowledge of the facts. They had reasonable time to decide before accepting the proposal.

36 The commercial contract, like this, if governed by all the provisions of the Contract Act, Insurance Act, the Trade practice and ssm 31 arbap18.13sxw procedures, itself means that the Applicant's rights must be adjudicated by the Arbitral Tribunal first pass final award accordingly.

The action of Respondent in the present case is that they have denied the claim of the Applicant by taking such unilateral final decision, based upon the disputed and/or "alleged material and/or suppression of facts". In my view, such commercial contract just cannot be interpreted and/or accepted, even in view of the law as referred and cited by the learned Senior counsel appearing for

the Respondent.

Unless decided and declared after due trial, to say that the contract itself is void ab-initio, is nothing but concluding the issue without giving opportunity to the other side/ Applicant, which in my view is impermissible at least, at this stage of the proceedings/ dispute. The opportunity required to be given to both the parties to raise their claim, as well as, the counter-claim with the supporting documents and materials.

37 The contract is void ab-initio, therefore, there is no question of entertaining Section 11 Petition as submitted, in the present facts and circumstances, is unacceptable. As noted already, one particular clause and/or clauses just cannot be read in isolation.

ssm 32 arbap18.13sxw The Judge designate under Section 11, cannot overlook all the doctrines and accept the case of the Respondent. Let it be by the Arbitral Tribunal.

38 The issue of criminality sought to be contended are another facet, which according to the learned senior counsel appearing for the Respondent is relevant to dismiss the present Application, as the Court/ Designated Judge could not be in a position to adjudicate and/or decide the Criminal issue. The pendency of criminal matters against the Applicant and/or its officers, even otherwise, just cannot be gone into by this Court and/or any other Tribunal except the Court as provided under the law. The Criminal cases are pending though arising out of and/or related to the properties of the Applicant and/or action and/or inaction of the officers, in my view, in no way debarred the Judge designate under Section 11 to decide the right of the Applicant to get their claim adjudicated as per the commercial Arbitration clause in question. The law of insurance and the purpose and object of it and the obligations of both the parties, just cannot be denied merely because of some criminal cases are pending, even though related with the properties/ ssm 33 arbap18.13sxw officers/ parties in question. It is settled that the Civil proceedings, as well as, the Criminal proceedings can run simultaneously. There is no bar. An appropriate order can be obtained at the relevant stages by the concerned parties. The clauses so referred and relied even by the learned counsel appearing for the parties, no way prohibit and/or debar either of the parties, to raise or invoke the clauses in such situation.

The authorities so cited in no way decided and/or declared that once the Criminal cases and proceedings are initiated against the persons like Applicant and/or its officers, there is a bar and/or such Arbitration proceedings and the claims so raised arising out of the Arbitration Agreement, needs to be rejected, at this stage itself.

40 As already observed, I am not deciding the rights and the rival contentions between the parties arising out of and/or criminal proceedings pending of the incidents is recorded. But, I am of the view that the Designated Judge under Section 11, in the facts and circumstances of the case, is entitled to pass appropriate order. There is no question of rejecting such application, at this stage itself. The ssm 34 arbap18.13sxw alleged "undisclosed Criminal Activities" of providing alleged "protection money" and that the Applicant has a close nexus with the Maoists and/or Nexalites operating in various parts of the area, are not relevant factor for denying the rights and/or claims of

the Applicant. There was no such clause in the agreement and/or in the policy and/or even the proposal whereby it was required and/or a condition precedent to make such declaration about alleged criminal activities. The Respondent, therefore, just cannot be insisted and/or denied the right of the Applicant saying that they failed to disclose about all these activities. The contention that their inaction and/or failure to provide the protection money and/or such similar reasons, the incident happened and therefore, the Applicant is not entitled to the claim and/or this amounts to suppression of facts and/or non-

disclosure of the facts and therefore, entitled to declare the policy/ contract ab-initio void in unacceptable. The Applicant, first of all in no way under any sort of obligation to disclose such activities specifically when, it was not the requirement of the terms and conditions of the terrorism policy. The Applicant in fact has been denying all these allegations and the activities also. The Respondent, as alleged, first of all, has to prove the same and/or at least place ssm 35 arbap18.13sxw material on record which will be subject to all sort of tests as available under the law, as recorded above.

41 The Court/Designated Judge, therefore, at this stage not in a position to dissect and/or accept the case only of the Respondent basically when all the allegations/ counter allegations required evidence, proof and decision of the Competent Court and/or Tribunal.

Ultimately, if the Respondent's case is made out, the Tribunal may reject the claim of the Applicant on all counts or pass such award.

The Court just cannot deny the right and/or render the party remediless, though there exists a Arbitration Clause. I am inclined to observe that there exists Arbitration clause between the parties, which is sufficient to consider the prayer of Applicant to appoint the Arbitrator/ Tribunal.

42 However, it is made clear that the observations so provided in the present Petition, is just to decide Section 11 Application. The findings just cannot be read and referred and/or relied by the parties while putting their respective case, before the Arbitral Tribunal or the Court. The learned Arbitral Tribunal is at ssm 36 arbap18.13sxw liberty to proceed in accordance with law.

43 The Applicant had nominated Mr. Justice Arun Kumar, (the former Judge of the Supreme Court of India), but now, on instructions, nominating Mr. Justice B.P. Singh, (the former Judge of the Supreme Court of India), as their Arbitrator. The learned counsel appearing for the Respondent, on instructions, without prejudice to their rights, has suggested to nominate Mr. Justic Aftab Alam, (the former Judge of the Supreme Court of India) as their Arbitrator. All the concerned to take steps, accordingly.

44 Resultantly, the following order:-

ORDER

a) The Applicant's nominated Arbitrator is Hon'ble Mr. Justice B.P. Singh, (the former Judge of the Supreme Court of India). The Respondent's Arbitrator is Hon'ble Mr. Justic Aftab Alam, (the former Judge of the Supreme Court of India).

b) All the concerned to take steps accordingly.

c) The Petition is allowed accordingly.

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d) There shall be no order as to costs.

45 The learned counsel appearing for the Respondent requested to stay the effect and operation of this order passed in the open Court. The learned counsel appearing for the Applicant is opposing the same. However, considering the facts and as the Application was duly contested by both the parties, I am inclined to stay the effect and operation of this Judgment for 12 weeks from today. The order accordingly.

(ANOOP V. MOHTA, J.)