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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ O.M.P. (COMM) 88/2022

MS GEO CHEM LABORATORIES PVT. LTD ..... Petitioner

Through: Mr. Rajshekhar Rao, Sr. Adv. with Mr. Dinesh Sharma, Ms. Ritika Jhurani and Mr. Akshay Chitkara, Advs.

versus

UNITED INDIA INSURANCE CO. LTD ..... Respondent

Through: Mr. Amit Kumar Singh, Mr. Apratim Animesh Thakur and Mr. Amrit Kaul, Advs.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

O R D E R

% 23.08.2022

1. The present petition has been filed by the petitioner under Section 34 of the Arbitration and Conciliation Act, 1996 directed against Arbitral order / award dated October 05, 2021 ('impugned order/award', hereinafter) passed by the learned Sole Arbitrator in the matter of disputes, arising out of a *"Professional Indemnity Engineers Architects Interior Decorators Inspection and Testing Policy Insurance Policy"* ('Insurance Policy', hereinafter) bearing No. 0401002717P104915422 issued by the respondent in favour of the petitioner, for the period June 11, 2017 to midnight of June 10, 2018 wherein the sum insured is ₹25,00,00,000/- with a retroactive date of June 12, 2015.

2. At the outset, I may provide a brief factual background of the instant case. The petitioner, a private limited company incorporated in 1964, is

involved in inspection, survey and testing of diverse export, import and locally traded cargo and commodities and its storage spaces, in order to fulfill its obligation as a collateral manager. The scope of work of the petitioner includes warehouse/godown inspection and certification for the suitability of storage facility for various agricultural and non agricultural commodities. The petitioner has to carry out supervision and surveillance of quantity of agricultural/non-agricultural commodities kept at the storage facility nominated by the clients until the same are released. Its clients include various banks and financial institutions. The respondent is a well-known public sector General Insurance Company.

3. The petitioner has been availing insurance coverage for professional indemnity since 2007, which includes indemnity against acts of libel & slander, fraud, dishonesty, negligence, fraud, omissions and errors, as well as loss of documents and breach of confidentiality of clients committed by its employees including own, contractual, casual and outsourced employees, towards its clients' businesses, which include banking organisations.

4. According to the petitioner, it received notices from its clients - RBL Bank, HDFC Bank and DCB Bank, on August 2, 2017, August 8, 2017 and January 18, 2018 respectively, regarding offences committed by its employees in Karnataka. Later, more such notices from IDBI Bank and DCB Bank was received on May 28, 2018 and September 19, 2018 for recovery amounting to approximately ₹25 crore, for offences at Gujarat and Maharashtra. The petitioner commenced investigation into the matter and various FIRs/complaints were filed with the police against suspected/accused persons. The respondent was duly intimated of all such claims from time to time. Further, the occurrence of loss was also duly

reported to the respondent on February 17, 2018.

5. On March 26, 2018, the petitioner sent a letter to the respondent enquiring about the insurance claim. The respondent acknowledged the delay in acting on the claims of the petitioner and also sought some clarifications from the petitioner regarding the claims *vide* email dated March 27, 2018. The petitioner in reply thereto, provided the information /details as sought by the respondent.

6. However, on May 18, 2018, the respondent issued an order of cancellation of the Insurance Policy on the grounds of misrepresentation and concealment of facts. According to the petitioner, the allegations leveled by the respondent in the cancellation order were baseless and were not accompanied by any specific instances that could ostensibly prove the said allegations. Moreover, the respondent did not provide the petitioner with an opportunity of hearing, and no Surveyor was appointed to investigate the claim, in disregard of the IRDA (Protection of Policyholders' Interests) Regulations, 2017 which mandates a Surveyor has to be appointed within a period of 72 hours from the intimation of the insured. The petitioner further addressed a letter to the respondent explaining their case on May 25, 2018, however received no reply.

7. Thereafter, the petitioner filed a writ petition in this Court bearing WP(C) 6218/2018 to set aside the cancellation order dated May 18, 2018. This Court allowed the said petition *vide* order dated March 27, 2019 and directed the cancellation order be treated as a show cause notice and the petitioner be allowed to respond to the same, after which the respondents to take an informed decision in the matter. The petitioner submitted its reply to the show cause notice on April 10, 2019. The respondent being satisfied

with the reply, accepted the liability under the petitioner's policy, restored the Insurance Policy and deputed a Surveyor to assess the quantum of the loss. Further the issue of misrepresentation of the claims on account of HDFC Bank was settled in favour of the petitioner.

8. Subsequently, the respondent on the representation of the petitioner appointed M/s Third Eye Insurance Surveyors as the Surveyor to assess the claims of the petitioner under the insurance policy on November 13, 2019. Further, on November 20, 2019, the respondent sent four files pertaining to the claim to the Surveyor for assessment which were sought from the petitioner vide email dated March 27, 2018. It is stated that the petitioner came to know of these events through an email dated March 02, 2020 addressed to them from the respondent. It is the case of the petitioner that the Surveyor has been conducting the survey in utter disregard of the timelines prescribed under the IRDA (Protection of Policyholders' Interests) Regulations, 2017, which contemplate that a Surveyor is to be appointed within 72 hours of lodging of claim and the Surveyor is to reach out to the insured within a period of 48 hours and requisition for documents/records within 7 days. Moreover, the entire process of survey has to be completed within a period of 30 days. In the instant case, while the Surveyor was appointed in November 2019, the petitioner received no communication in that regard, and it was made aware as to this appointment only on February 03, 2020. In the meanwhile, the banks initiated arbitration proceedings against the petitioner which have reached an advanced stage. Pertinently, the Surveyor, in its preliminary survey report dated August 19, 2020, had recommended a loss reserve of ₹13.50 crore.

9. Aggrieved by the wrongful deprivation of their legitimate claim and

the inordinate delay in claim assessment, the petitioner exercised their right under the insurance policy of invoking arbitration *vide* arbitration notice dated August 31, 2020, whereby the respondent was requested to suggest the names of arbitrators to appoint a sole arbitrator with mutual consent. The respondent replied to the Arbitration notice on October 06, 2020 wherein they resisted arbitration on the ground that the liability has neither been admitted nor denied. Subsequently, the petitioner filed an Arbitration petition in this Court under Section 11 of the Arbitration and Conciliation Act, 1996 on October 14, 2020. This Court while finding that there was an inordinate delay in assessing the claim of the petitioner, in the interest of justice, directed the respondent to complete the entire claim process involving the Surveyor's investigation and its own decision with respect to its liability / lack thereof under the policy in question within a period of three weeks which expired on December 11, 2020. However, on December 15, 2020 the respondent on behalf of the Surveyor, sought 4 months' time to complete the assessment, which time was granted by this Court vide order dated January 28, 2021. The petitioner, aggrieved by the said order, preferred an SLP bearing number 3794/2021 whereby the Supreme Court directed this Court to dispose of the matter, preferably within four weeks from May 11, 2021. Subsequently, this Court, *vide* judgment dated May 24, 2021 referred the matter for arbitration and appointed Justice Indu Malhotra (Retd.) as the sole arbitrator. The respondent filed an SLP in the Supreme Court challenging the order Dated May 24, 2021, which was dismissed vide order dated August 09, 2021.

10. On May 30, 2021, the Surveyor submitted an addendum report and subsequently also submitted Final Survey Report dated June 03, 2021.

However, neither the addendum nor the report was communicated to the petitioner. Subsequently, the respondent issued a repudiation letter dated June 17, 2021, repudiating the claim of the petitioner, that too after the initiation of the arbitration proceedings, on grounds of alleged breach of condition no. 4 and 13 of the insurance policy. It is the case of the petitioner that the repudiation is *ex facie* wrong, based on false assumptions, arbitrary and contrary to statutory provisions.

11. On July 02, 2021, the respondent moved an application under Section 32 of the Arbitration and Conciliation Act, 1996 with a prayer to terminate the arbitral proceedings under section 32 (2) of the Arbitration and Conciliation Act, 1996. The learned Arbitrator, *vide* the impugned order / award terminated the arbitration proceedings and allowed the application. The petitioner, aggrieved by the impugned order / award, preferred the present application.

SUBMISSIONS

12. Mr. Rajshekhar Rao, learned Senior Counsel appearing on behalf of the petitioner submits that the award is liable to be set aside under Section 34 of the Arbitration and Conciliation Act, 1996 as it is in conflict with the basic notion of justice. The award ignores the relevant documents and decides the whole matter on assumptions, presumptions and surmises. According to him, the learned Arbitrator failed to appreciate the purport of the order dated August 09, 2021 of the Supreme Court, whereby both parties were permitted to raise all pleas regarding the inapplicability of the arbitration clause and repudiation letter before the learned Arbitrator.

13. He states that the learned Arbitrator did not deal with the non-adherence of the guidelines stipulated in the IRDA (Protection of

Policyholders' Interests) Regulations, 2017. The Surveyor was appointed after a delay of nearly two years. After delayed appointment of the Surveyor, it took another 1.5 years to complete the survey. This inordinate delay caused by the respondent reeks of arbitrariness and abuse of dominant position. Had the Surveyor acted in accordance with law, the survey should have been completed by February 12, 2020.

14. That apart, it is his submission that the learned Arbitrator has failed to appreciate that a plain reading of the arbitration clause clearly reveals that the dispute shall be arbitrable in case the respondent has accepted its liability. The respondent having received the intimation of the claims after conducting elaborate enquiry resorted to denying its liability by cancelling the policy *vide* letter dated May 18, 2018 and the same has been observed by this Court in order dated March 27, 2019. The relevant extract of the said order is reproduced below:

> *"4.The learned counsel appearing for the respondent submits that the principal reason for cancelling the policy is the failure on the part of the petitioner to tntly disclose all material facts in its proposal form dated 02.06.2017. It is stated that the said form indicated that there was an approximate loss ofRs. 6 Crorefor the year 2016-17, on account of dishonesty. However, the petitioner did not disclose that it had already suffered a loss of Rs. 17.5 Crore for which a claim had been made. It is also stated that prior to that date, the petitioner had lodged a claim of Rs. 8.6 Crore with another insurance company.*
>
> *5. Insofar as the allegation that the petitioner had not disclosed the loss of Rs. 17.5 Crore is concerned, the learned counsel*

appearing for the petitioner submits that the same came in the petitioner's knowledge on 08.08.2017 and, therefore, the question of disclosing the same in the proposal form did not arise. He further submits that insofar as claim of Rs. 8.36 Crore is concerned, the same was made on an approximate basis."

15. That apart, he states that the learned Arbitrator failed to consider the fact that the respondent had rescinded the cancellation order and accepted its liability and appointed the Surveyor for assessing the quantum of loss to be indemnified to the petitioner. The language of the arbitration clause suggests that arbitration can only be precluded when there is denial of liability. The denial of liability was sought to be done by the respondent *vide* its cancellation letter dated May 18, 2018. The letter of cancellation has been set aside by this Court and the act of denial of liability by the respondent has been declared invalid. Thereafter, the respondent accepted the representation of the petitioner and appointed the Surveyor for assessment of claim. In terms of the paragraph 3 of the arbitration clause contained in the Insurance Policy, it clearly follows that when there is a denial of liability, it is a pre-requisite that the said denial of liability is first set aside by a competent court. The same has been done in the instant case *vide* order dated March 27, 2019 of this Court. Now the only question which remains is of quantum of the claim. The aforementioned proposition has been upheld in ***Vulcan Insurance Co. Ltd. v. Maharaja Singh, (1976) 1 SCC 943,*** wherein the Supreme Court has held that if the wrongful denial of liability has been set aside by the Court, there cannot be any challenge to arbitration proceedings.

16. Mr. Rao further states that the learned Arbitrator did not consider that the issue of misrepresentation while obtaining the insurance policy has been

settled between the parties and the respondent is estopped from re-agitating the same at different stages of the claim.

17. It is also his submission that the learned Arbitrator did not appreciate the unique factual matrix of this case which makes it amply clear that the issue of liability was decided by the respondent even before appointment of the Surveyor.

18. The respondent appointed the Surveyor only for the "assessment of loss", which is a question pertaining to quantum and is amenable to arbitration. The respondent cannot in this case take the stand that liability has been denied because the process adopted by them in this case has been a deviation from the regular procedure in as much as the question of liability was decided initially itself by the respondent as opposed to having been done subsequent to the submission of the final survey report. The respondent having been satisfied with the response of the petitioner in the representation filed on April 10, 2019, chose to appoint the Surveyor for assessment and is now estopped from taking the stand that no decision has been taken on the liability. Had the respondent not been satisfied with the representation and explanation of the petitioner, it would have upheld the order of cancellation and not appointed the Surveyor. The peculiar chronology of events in this case establishes that the question of liability was decided in the first instance itself.

19. He also states that the learned Arbitrator did not consider the preliminary objection raised by the petitioner regarding the maintainability of the application u/s 32 of the Arbitration and Conciliation Act, 1996. According to him, the application filed by the respondent was not maintainable in as much as a plain reading of Section 32(2) of the

Arbitration and Conciliation Act, 1996 indicates that it essentially contemplates situations where it is not necessary to enter an award for settlement of the disputes or where the same becomes impossible. In terms of Clause (a) of Section 32(2) of the Act, an arbitral proceeding would come to an end with the claimant withdrawing his claim unless it is necessary to enter into a final award at the instance of the respondent. Clause (b) of Section 32(2) of the Act contemplates circumstances where parties by consent seek termination of the arbitral proceedings. This may arise where the parties have resolved their difference or no longer seek to obtain an arbitral award. Clause (c) of Section 32(2) of the Act contemplates the situation where continuing the arbitral proceedings has become unnecessary or has been rendered impossible. It is submitted that in the instant case, none of these situations apply. Essentially, the respondent challenged the jurisdiction of the learned Arbitrator under section 32, which may only be done in terms of Section 16 of the Act.

20. That apart, the respondent could not have denied the liability without affording a hearing to the petitioner, as directed in the order dated March 27, 2019.

21. He states that the learned Arbitrator failed to appreciate that the judgments relied upon by the respondent are not applicable to the instant case inasmuch as the Supreme Court in ***Vidya Drolia and Ors. v. Durga Trading Corporation, Civil Appeal No. 2402 of 2019,*** has held in paragraph 40 that the decisions of ***Oriental Insurance Company Ltd. v. Narbheram Power and Steel Private Limited, Civil Appeal No. 2268 of 2018*** and ***United India Insurance Co. Ltd. and Anr. v. Hyundai Engineering and Construction Co. Ltd., (2018) 17 SCC 607,*** which are being relied upon by

the respondent herein are to be restricted to the facts and circumstances of those cases. Moreover, the arbitration clause does not oust the jurisdiction of the Arbitrator in the instant case as once the rejection of liability has been set aside by the Court, which order has attained finality, the only question that remains is of quantum, which can be adjudicated in arbitration. In any event, in light of the order dated August 09, 2021 of the Supreme Court, even if the respondent seeks to dispute liability at this stage on the basis of the Final Survey Report, the validity of the same has to be adjudicated in the present proceedings.

22. It is the submission of Mr. Rao that the learned Arbitrator did not consider that the order of cancellation being set aside would amount to order of repudiation being cancelled, inasmuch as, the same pleas were raised in both cases. At first, the petitioner had to undergo one round of litigation for setting aside the order of cancellation, then the respondent issued the repudiation letter on the same grounds which would mean that the petitioner would have to undergo another round of litigation to challenge the alleged repudiation letter and only then be entitled to invoke arbitration, which is absurd.

23. He also states that the impugned order/award does not deal with the various arguments and contentions raised by the petitioner at all. The minimum requirement of law is that the award itself should disclose as to what are the documents taken into consideration, what are the documents upon which reliance is placed by the Arbitral Tribunal in reaching the conclusion and why the materials and arguments made by the other party is not to be accepted.

24. On the other hand, Mr. Amit Kumar Singh, learned counsel appearing

for the respondent would justify the impugned order / award passed by the learned Arbitrator on an application under Section 32 of the Arbitration and Conciliation Act, 1996, as the same, according to him is in accordance with the arbitration clause of the Insurance Policy and the law laid down by the Supreme Court. He relies upon the following arbitration clause in the Insurance Policy:

> *"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 to 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 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 or umpire of the amount of the loss or damage shall be first obtained.*
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> *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."

25. Therefore, in terms of the arbitration clause of the Insurance Policy, it is a condition precedent for the invocation of the arbitration process between the parties that the respondent Company must admit its claim liability. However, admittedly in the present case, since the assessment of documents and examination of the claim was still in process by the Surveyor, the question of acceptance of claim liability by the respondent Company had not arisen.

26. Further, since the occurrence leading to the claim had happened due to the fraudulent activities of the employees of the petitioner itself, it was not possible for the respondent Company to admit to the claim liability before the Surveyor submitted its Final Assessment Report after thorough investigation.

27. Therefore it is his submission, in terms of the arbitration clause of the insurance policy, which is a condition precedent for invocation of the arbitration process between the parties, the respondent herein must admit its claim liability. However, in the present case since the assessment of the document and examination of the claim was still in process by the Surveyor, the question of acceptance of claim liability by the respondent had not arisen. According to Mr. Singh, the petitioner invoked the arbitration clause of the insurance policy without duly assisting the Surveyor in completing its assessment of the occurrence and determination of the claim liability of the respondent. The petitioner thereafter approached this Court by way of an

Arbitration Petition being Arb. Pet. 479/2020 filed under Section 11 (6) of the Arbitration and Conciliation Act, 1996, seeking appointment of an Arbitrator in terms of the arbitration clause in the Insurance Policy.

28. This Court, *vide* order dated November 20, 2020, directed the respondent to ensure that the Surveyor carries out investigation in a time-bound manner and thereafter take an informed decision. The respondent was given three weeks' time to to do the same. Thereafter, the respondent filed an application seeking extension of time, stating that the Surveyor would require at least four months to complete the survey. This Court allowed the application and *vide* order dated January 28, 2021 directed the survey process to be completed without fail by April 15, 2021. It was thereafter, the respondent company was to take decision with regard to its liability.

29. Being aggrieved by the order dated January 28, 2021, petitioner approached the Supreme Court by way of a Special Leave Petition, being SLP No. 3794/2021. The Court dismissed the petition *vide* order dated March 05, 2021 and called upon this Court to dispose of the matter in accordance with law, preferably within four weeks after the matter was listed on May 11, 2021.

30. Subsequently, *vide* status report dated May 06, 2021, the Surveyor informed the respondent about its inability to complete the survey process on account of non-cooperation of the petitioner. Thereafter, during the course of hearing of Arb. Pet. 479/2020, the respondent drew the attention of this Court to the Judgment in the case of ***United India Insurance Co. Ltd. and Anr. (supra)*** where the Supreme Court has held that the arbitration clause must be interpreted strictly and any expression in the clause must

unequivocally expressed the intent of the arbitration. Further the arbitration clause can also lay postulate, in which situation the arbitration clause cannot be given effect to.

31. According to Mr. Singh, it was held, if a clause stipulates that under certain circumstances there can be no arbitration, then the issue pertaining to the appointment of an Arbitrator has to be put to rest. He also submits that the same position of law was reaffirmed in ***Gareware Wall Ropes Limited v. Coastal Marine Constructions and Engineering Limited (2019) 9 SCC 209,*** wherein this Court has held that such a conditional arbitration clause would not exist in law until the pre-requisite condition is duly fulfilled. In fact, he lays stress on the fact that keeping in view the position of law, the counsel for the petitioner had submitted before the Court that in case respondent repudiated the claim of the petitioner, it would be open for the company to approach the Tribunal to seek termination of the arbitration proceedings.

32. It was based on such concession and considering the reasonable time for completion of survey, the final order dated May 24, 2021 appointing the learned Sole Arbitrator was passed with a categorical direction that in case the respondent repudiated the claim of the petitioner, consequence in law as per ***United India Insurance Co. Ltd. and Anr. (supra)*** and other judgments would follow. Subsequently, the Surveyor on May 30, 2021 has submitted its final report wherein he has concluded that the petitioner has suppressed material facts and has intentionally breached the principle of *uberrimae fidei* and given the blatant suppression of material facts, the Surveyor recommended repudiation of the claim. As a consequence, the respondent *vide* letter dated June 17, 2021 has repudiated the claim of the petitioner on

the ground of suppression of material facts and non-submission of relevant documents. So, Mr. Singh says, it was under these circumstances, an application under Section 32 of the Arbitration and Conciliation Act, 1996 was filed seeking a prayer for termination of the arbitral proceedings. As the arbitration proceedings were not maintainable, the said application has been decided by the learned Arbitrator *vide* the impugned order / award. He states the learned Arbitrator has rightly terminated the arbitration proceedings by accepting the application filed by the respondent herein. He states, the parties have been granted liberty to pursue their claims and disputes before the appropriate Court or *fora* in accordance with law and gave the benefit under Section 14 of the Limitation Act, 1963. He seeks the dismissal of the appeal.

33. Having heard the submissions made by Mr. Rajshekhar Rao, learned Senior Counsel appearing for the petitioner and Mr. Amit Kumar Singh, learned counsel appearing for the respondent, the issue which falls for consideration is in a very narrow compass inasmuch as whether the learned Arbitrator has rightly terminated the arbitration proceedings in view of the fact that the issue is not arbitrable as respondent has repudiated the claim based on the Surveyor's report and given the nature of the arbitration clause as it is only with respect to the quantum of claims and where the liability is admitted, that the proceedings are maintainable and and not when the respondent has not accepted its liability with respect to the insurance claim.

34. The law in this respect is quite well settled in terms of the judgments in the cases of ***United India Insurance Co. Ltd. and Anr. (supra)*** and ***Gareware Wall Ropes Limited (supra)***.

35. I find that the learned Arbitrator has posed for herself a question that

needs examination in paragraph 38 in the following manner:

> *"38. Given this position of law. the Tribunal has to examine whether the Insurance Co. has denied liability under the Policy, which would make the dispute a non arbitrable one, or whether the dispute exists merely with respect to the quantum to be paid under the Policy."*

36. In support of its contention that the arbitral proceedings are maintainable, the plea on behalf of the petitioner was that the notice of cancellation was issued by the insurance company on May 18, 2018, which has been quashed and set aside by this Court *vide* order dated March 27, 2019 would amount to (i) that the denial of liability has been set aside by a Court of competent jurisdiction and all that remains to be adjudicated are the disputes pertaining to the quantum to be paid under the policy and (ii) the insurance company would now be estopped from raising issues with respect to misrepresentation and non-disclosure in the letter of repudiation dated June 17, 2021.

37. The learned Arbitrator on this submission was of the following view:

> *40. The Claimant's argument does not consider the .entirety of the Delhi High Court's Order dated 27 March 2019. It is no doubt true that the Delhi High Court had set aside the notice of cancellation dated 18 May 2018, but it is pertinent to note that this was done in the context of the fact that the Claimant had not been given an -- opportunity of refuting the allegations made against it by the-Insurance Co. The Delhi High Court had, in fact, granted liberty to the Insurance Co. to take a decision with respect to the Policy, after the Claimant had been provided an opportunity of making a representation with regard to the allegations made against it. This is evident from the following paragraphs of the Delhi High Court's Order dated 18 May 2018:*
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> > *"6. It is apparent from the above that the respondent has premised its action on certain allegations against the petitioner, <u>for which no effective opportunity was granted to the</u>*

petitioner to meet the same. In view of the above, the decision of the respondent to cancel the policy is set aside.

7. Considering that it is the respondent's case that the order dated 18.05.2018 was to serve as a show cause notice, this court considers if apposite to permit the petitioner to respond to the same. The petitioner shall also consider the averments made by the respondent in Its counter affidavit and furnish the response within a period of two weeks from today. The respondent may take an informed decision and pass an appropriate order after affording the petitioner an opportunity to be heard." (Emphasis Supplied)

41. The Order passed by the Delhi High Court cannot be interpreted to mean that the question of liability has been finally decided by a court of competent jurisdiction. The Order can also not be taken to mean that the grounds of misrepresentation and non-disclosure were struck down, and were no longer available to the Insurance Co. Since the Insurance Co. was specifically granted liberty to take an informed decision, it cannot be said that the Insurance Co. was estopped or barred from taking up the points of non-disclosure and/or misrepresentation as grounds to deny liability under the Policy.

I am, therefore, unable to accept the Claimant's contention regarding the Delhi High Court's order dated 27 March 2019, and accordingly reject the twofold argument i.e. that the question of liability has been finally decided by a court of law, and by virtue of the said order, the Insurance Co. would be barred from taking up the points of non-disclosure. misrepresentation etc in support of its repudiation."

38. It was further contended that the appointment of a Surveyor amounts to admission of liability in light of the fact that the respondent has taken itself a stand before this Court that there is no need to appoint a Surveyor in the light of denial of liability by way of cancellation notice dated May 18, , 2018. On this plea, learned Arbitrator in paragraph 43 has held as under:

43. The issue of whether the appointment of a Surveyor would

amount to admission of liability, or a waiver by the Insurance Company, has been considered by a 3 judge bench of the Supreme Court in Sonell Clocks v The New India Assurance Co. Ltd.(2018) 9 SCC 784, in which it was held:

> *"23. The Respondent has also invited our attention to the fact that in Galada's case (supra), this Court has had no occasion to consider the efficacy of Insurance Surveyors and Loss Assessors (Licensing, Professional Requirements and Code of Conduct) Regulations, 2000, which came into effect from 14th November, 2000. For the claim in Galada's case (supra) arose in 1998 and the repudiation took place in 1999. By virtue of the Regulations, it is mandatory to appoint a Surveyor on receipt of intimation about the loss; and the Surveyor so appointed has to discharge his responsibilities and duties specified in the Regulations while submitting its report.*
>
> *24. Thus, the appointment of a Surveyor by the Respondent after receipt of Intimation of the loss from the Petitioner, In the context of the present insurance policy, coupled with the 2000 Regulations and in particular an express stand taken in the repudiation letter dated 18th February, 2005 sent by the Respondent to the Petitioner after consideration of the Surveyor's report, it cannot be construed to be a case of waiver on the part of the Respondent.*
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> *25. The Petitioner would then contend that the Respondent did not take a plea that the Surveyor was appointed because of statutory obligation. Such a plea is raised for the first time before this Court. Even this submission does not commend us. For, that plea has been taken as an additional factor to distinguish the decision in Galada's case (supra). The party is not expected to state the provisions of law In its pleading. The fact that such obligation flows from the Regulation in that sense, is a mixed question of fact and law. The fact remains that the Respondent had appointed a Surveyor to enquire into the entire matter and submit its report. The Surveyor expressly recommended that the claim was not payable on account of the infringement of Clause 6 of the general conditions of the policy.*
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> *26. We also find no merit in the grievance made by the Petitioner that the Commission did not consider the issue of*

waiver for which the Petitioner was granted liberty to file review petition by this Court. We say so because we find that the Commission considered the said Issue as the singular issue and after analysing relevant aspects concluded that there was nothing to indicate that the Respondent insurer had intentionally or consciously relinquished or waived its right to reject the claim on delayed intimation of Joss, by appointing a Surveyor to assess the Joss claimed by the insured. For the above reasons, the argument that the Commission has not analysed the said issue, as has been done by us, will make no difference to the conclusion recorded by it."

39. Even the plea on behalf of the petitioner that the Surveyor in his preliminary survey report dated August 19, 2019 recommended an amount of ₹13.50 crore and for this reason it must follow that the Surveyor has accepted the liability under the policy, was rejected by the learned Arbitrator by stating the following in paragraph 46 of the impugned order / award:

> *"46. Even assuming that the Preliminary Survey Report and the Final Survey Report contained an assessment of quantum, it is settled law that the assessment made by the Surveyor is not necessarily binding on the Insurance Company. The position in law is that though the reports hold substantial evidentiary value, the Surveyor's findings are not binding on the Insurer, and the Insurer can take a different stand in case justifiable reasons exist (Sri Venkateswara Syndicate v Oriental Insurance Co. Ltd. [(2009) 8 SCC 507]. Therefore, what is relevant for the purposes of interpreting the arbitration agreement contained at Clause 15 of the Policy is the decision taken by the Insurance Co. in its letter dated 17 June 2021."*

40. Further the learned Arbitrator has also examined the contents of the repudiation letter dated June 17, 2021 and by referring to the judgment in the ***United India Insurance Co. Ltd. and Anr. (supra)*** in paragraph 48 was

of the following view:

> *"48. On reading of the aforesaid letter, it is evident that the Insurance Co. has refused to admit the claim of the Claimant, and has repudiated the claim by denying liability under the Policy. The unequivocal stand of the Insurance Co is that it is not liable to make any payments whatsoever under the terms of the Policy, on account of breach of the conditions contained therein. The repudiation of the claim is absolute and denies liability in toto. It does not amount to a partial admission of a claim where the Insurance Co. has agreed to consider some payments under the Policy. In such circumstances, as held by the Supreme Court in United India v Hyundai Engineering [AIR 2018 SC 3932], the arbitration agreement contained in Clause 15 of the Policy would not get "activated', "kindled', "enlivened' or "invigorated' as the "precondition and sine qua non for triggering the arbitration clause", i.e. an admission of liability under the Policy, has not been fulfilled."*

41. And finally in paragraph 49, the learned Arbitrator stated as under:

> *"49. The Tribunal holds that since the arbitration agreement is limited in its scope only with respect to the quantum of claims, where liability is admitted by the Insurance Co., the dispute in the present case would not be arbitrable. The Insurance Co. has clearly repudiated its liability, hence the disputes cannot be adjudicated through arbitration. Given the limited scope of the arbitration agreement, the Tribunal would have no jurisdiction to adjudicate on the disputes which have arisen between the parties, and finds it unnecessary to proceed any further in terms of Section 32 of the Arbitration & Conciliation Act, 1996."*

42. The plea regarding the conduct of the respondent as urged by Mr. Rao, was also taken before the learned Arbitrator, inasmuch it has breached and violated the timeline set out by the IRDA (Protection of Policyholders' Interests) Regulations, 2017 at each stage of the assessment process. In

other words, the submission is that the respondent has grossly delayed the appointment of the Surveyor and taking a final decision regarding its claim. In this regard, learned Arbitrator in paragraph 51 has stated as under:

> *"51. Considering the language of Clause 15, the Tribunal is not empowered to examine these contentions once the Insurance Co. has denied liability under the Policy. The Madras High Court decision in the case of Jumbo Bags v New India Insurance 2016 (3) CTC 769, which was subsequently cited with approval by the Supreme Court judgments, states that the grounds and reasonableness of the Insurer's repudiation have no relevance in cases containing arbitration agreements similar to the ones contained in Clause 15. The Tribunal therefore finds itself unable to entertain or adjudicate upon the pleas in relation to the conduct of the Insurance Co. while assessing the claims and the correctness of the grounds taken by the Insurance Co. to repudiate the claim under the Policy. The Claimant would of course be at liberty to raise all these points before an appropriate forum vested with jurisdiction to adjudicate on the issue of liability under the Policy. The Insurance Co. has taken the grounds of non-disclosure and misrepresentation to repudiate the claim pursuant to Clause 13 of the Policy, and has also relied on Clause 4 of the Policy to reject the claim on the ground that the Claimant did not provide information/assistance and documentation in relation to the claims raised by the RBL, IDBI and DCB banks. For the reasons stated above, the Tribunal is not adjudicating the correctness or otherwise of these issues, and is leaving all contentions open to be adjudicated by the appropriate court/fora."*

43. Finally I find that Mr. Singh is justified in relying upon the stand taken by the learned counsel for the petitioner before this Court in the Arb. Pet. being no. 479/2020 wherein this Court in order dated May 24, 2021 has noted as under:

> *"24. Referring parties to arbitration would not prejudice UII in any manner, in view of the fair stand taken by Mr. Sachin Datta*

that in the event UII ultimately repudiates the claim of GCL, the consequences in law, as per the judgment in United India Insurance (supra) and other judgments, would follow. Thus, the argument that UII would be made to suffer the arbitration proceedings for a non-arbitrable dispute and the same would be against public policy, does not carry weight.

44. In other words, the counsel for the petitioner himself has conceded that if the claim is repudiated, then the consequence in terms of the judgment of the Supreme Court in ***United India Insurance Co. Ltd. and Anr. (supra)*** shall follow, i.e., the arbitrability can only be with regard to the quantum of claim and not the liability *per se*.

45. In view of my above conclusion, which is as per the law laid down by the Supreme Court in view of clear arbitration clause, I do not see any merit in the petition. The petition is dismissed. No costs.

V. KAMESWAR RAO, J.

AUGUST 23, 2022*/jg*