

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

ARBITRATION APPLICATION NO.314 OF 2014

M/s. Yasho Industries Pvt. Ltd.)
A company incorporated under the)
provisions of Indian Companies Act, 1956)
and having its registered office address at)
Nimish Apartment, Juhu Scheme,)
Road No.5, Vile Parle (West),)
Mumbai - 400 056.)
and Corporate office at 31-H,)
Laxmi Industrial Estate, New Link Road)
Andheri (W), Mumbai - 400 053.) .. Applicant

Vs.

1. The New India Assurance)
Company Limited – Head Office)
New India Building, 87 M.G. Road,)
Mumbai - 400 023.)
2. Mumbai Regional Office-IV)
New India Centre, Centralised)
Claims Hub, 13th Floor,)
17/A Cooperage Road,)
Mumbai - 400 039.) .. Respondents

Mr.S.C. Naidu a/w Mr.Rahul Janwani i/by Mr.Sharan Patole for the applicant.

Mr.Aliabbas Delhiwala i/by M/s.Khaitan & Co. for the respondents.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 12th June, 2015
PRONOUNCED ON : 24th June, 2015.

Judgment :-

. By this application filed under Section 11 of the Arbitration & Conciliation Act, 1996 (for short the said “Arbitration Act”), the applicant has prayed for an appointment of an arbitrator to adjudicate the

disputes, differences, claims etc. between the parties by invoking arbitration agreement recorded in clause 13 of the Insurance Policy. Some of the relevant facts for the purpose of deciding this application are as under :-

2. The applicant had insured its building, plant and machinery and accessories, stocks and stock in process etc. to the tune of Rs.1,08,55,00,000/- for the period from 1st May 2011 to 30th April 2012. On 13th December 2011, a fire broke out at the insured factory of the applicant situated at Vapi, Gujarat. The respondents appointed a surveyor for assessing the losses reported by the applicant. On 18th September 2012, the surveyor issued his Interim Survey Report recommending ad hoc payment by the respondents and further registering that the claim reported by the applicant for the loss under the subject insurance policy was due to the operation of an insured peril during the policy period and that the claim was admissible under the said policy. Under the said Interim Survey Report, the loss was approximately estimated by the surveyor to the tune of Rs.36 crores.

3. It is the case of the applicant that the applicant persistently requested the surveyor to recommend the respondents for ad hoc payment under the Subject Insurance Claim and also directly corresponded with the respondents. On 15th January 2013, the respondents released the ad hoc payment under the Subject Insurance Policy in favour of the applicant to the tune of Rs.19,99,42,048/- subject to the realisation of the balance claim amount. The applicant signed pre-printed discharge voucher dated 15th January 2013.

4. By email dated 6th December 2013 the applicant to the surveyor, the applicant raised their protest against the assessment, as the surveyor had not assessed the loss of stock properly according to the applicant. It was stated in the said email that there were serious differences in the value as well as the rate adopted by the surveyor which was totally unfair. On 18th December 2013, the surveyor shared the final working of assessment of loss by email to the tune of Rs.36,73,27,000/- for consent of the applicant. It is the case of the applicant that the applicant never gave its consent to the assessment of loss arrived by the surveyor towards damage to stock. According to the applicant, the surveyor ought to have valued the stock at Rs.17,08,17,626/- but had valued the stock at Rs.9,77,20,672/-.

5. On 19th December 2013, the surveyor submitted his final Survey Report assessing the gross loss to the tune of Rs.50,94,85,032/- and net loss at Rs.36,72,19,000/- after applying Under Insurance and Deducting Policy Excess on plant and machinery, building, stocks etc.

6. On 27th December 2013, the applicant addressed a letter to the respondents informing that the applicant had taken a loan from the bank of Rs.15 crores for a period of two years. The said bank had sanctioned an additional loan of Rs.6.5 crores towards working capital requirements. The applicant informed that the applicant had paid back a sum of Rs.5 crores but still a sum of Rs.10 crores plus interest was yet to be paid to the bank. The applicant had incurred interest of Rs.320.84 lacs for a period of two years towards Rs.15 crores loan. The applicant had also taken unsecured loan and the same was also to be paid back by the applicant. The applicant attached a copy of the

sanctioned letter issued by the Saraswat Bank dated 26th December 2011 and informed that the applicant had to pay back Rs.10 crores to the bank on or before 28th December 2013 and if there was any default beyond the period of 15 days by the applicant from 28th December 2013, the bank would classify the account of the applicant as NPA (Non Performing Assets).

7. The applicant further informed that once the account of the applicant becomes NPA, no bank would give the applicant any loan in their lifetime and as a result thereof, the applicant would have no option other than to close their business which would also cause a loss to their reputation in the market. The applicant further informed that the bank was behind the applicant and had written to the respondents also and made them to know the status of the claim of the applicant. Due to such reasons, the applicant was continuously requesting the surveyor to submit his report which was not submitted for more than 9 months. The applicant requested the respondents to settle their claim on or before 13th December 2013 to enable the applicant to pay to the said bank in time and to avoid their account becoming as NPA.

8. The applicant requested the respondents to consider the request of the applicant and not to disappoint the applicant in such difficult time. The applicant also requested that if the claim could not be sanctioned in a short period, the respondents shall pay on account payment of 75% of the claim amount and requested the respondents to help the applicant to overcome the difficult time. The Saraswat Bank had granted a loan to the applicant on 26th December 2011 immediately after the fire took place in the premises of the applicant.

9. On 27th January 2014, the applicant sent another email to the respondents informing that due to delay in settlement of the insurance claim, the applicant was suffering a lot and was almost on the verge of being classified as defaulter by the bank. The applicant informed that the applicant had already spent around Rs.35 crores towards reinstatement of the damaged properties and lost another Rs.16 crores worth goods in the devastating fire. The applicant informed that the applicant had taken loan from the bank for a period of one year assuming that the claim would be received on or before December 2013. The applicant on one hand was facing shortage of working capital which was affecting their operations and on the other hand, the bank was pressurizing the applicant for repayment of loan. The applicant once again requested the respondents to expedite the settlement and sanction on account payment of Rs.14 crores as and by way of temporary relief.

10. On 11th February 2014, the applicant addressed another letter to the respondents and once again requested the respondents to expedite the settlement and to pay ad hoc payment of Rs.14 crores immediately which would help the applicant in their financial crisis. The applicant once again informed about the bank loan and that the bank was pressurizing the applicant for repayment of the loan. The applicant was also incurring heavy interest costs. On 24th March 2014, the Saraswat Bank addressed a letter to the respondents in which the bank recorded about their visit to the office of the respondents in the month of December 2013 and had informed the respondents about the situation of the account of the applicant. In the said email, the said bank informed the respondents that if the bank would not receive

insurance claim by 28th March 2014, the account of the applicant would become NPA and their future growth would be hampered. The bank requested the respondents to release their claim within the same week and do the needful.

11. On 28th March 2014, the Saraswat Bank sent another email to the respondents requesting to advise about the status of the pending insurance claim of the applicant as it was the last working day of that financial year. The respondents were informed that if the claim was not received on that day, their account would be in a serious problem. The bank requested the respondents to release their claim on the same day itself.

12. In response to the said email dated 28th March 2014, the respondents by email dated 1st April 2014 replied to the bank and informed that the claim stood approved and they had advised to the operating office to arrange for remittance of the claim amount. In the first week of April 2014, the applicant signed 'Settlement Intimation Voucher' which was on the letter head of the respondents acknowledging the receipt of the sum of Rs.16,70,55,826/-. On the said undated Settlement Intimation Voucher, a note was appended 'Please affix Rubber Stamp & Signature on revenue stamp.' The Saraswat Bank affixed their Rubber Stamp and had also signed the Settlement Intimation Voucher. It is the case of the applicant that only after the applicant had signed the Settlement Intimation Voucher, the respondents released the said amount directly in favour of the Saraswat Bank which acknowledged the receipt of the said amount.

13. On 16th April 2010, the applicant addressed a letter to the respondents placing on record that the applicant had not agreed with the assessment of the stock and that since the applicant was hard pressed for funds and that the claim was already got delayed, the applicant had given their consent except for stock. In the said letter, the applicant also placed on record that the surveyor had insisted the applicant to submit their consent which the applicant had refused to submit as the surveyor has assessed the stock arbitrarily and without any basis. However upon insisting, the applicant had submitted their consent except for stock as the applicant was in urgent need and report was already getting late. The applicant also placed on record a gross delay on the part of the respondents and the surveyor in processing the claim of the applicant. The applicant had received an amount of Rs.16,71,04,246/- only after 27 months from the date of fire and after 12 months of their submission of documents. The applicant had suffered a loss substantially. The applicant requested the respondents to pay balance claim of Rs.7,30,96,954/- and Rs.5,07,57,159/- towards interest due to delay in settlement and Rs.6.70 crores towards loss of business. The applicant also made a complaint to the Grievance Department of the respondents which registered the grievance by acknowledging the receipt of the said grievance vide email dated 16th April 2014.

14. The applicant issued a legal notice on 3rd September 2014 to the respondents and invoked arbitration clause recorded in clause 13 of the Insurance Policy and called upon the respondents to give their consent to appoint one of the three retired Judges of the Supreme Court as an arbitrator and if the names were not agreeable, the applicant had

nominated Mr. Justice S.P.Kurdukar, Former Judge of the Supreme Court as their arbitrator.

15. The respondents vide their advocate's letter dated 10th October 2014 contended that the agreement stood discharged and since there was accord and satisfaction of the claims made by the applicant, the respondents refused to appoint an arbitrator. The applicant thus filed this application under Section 11 for appointment of an arbitrator.

16. Mr. Naidu, learned counsel appearing for the applicant invited my attention to various correspondence referred to aforesaid and also the pleadings filed by both the parties and submits that the applicant had taken a loan of Rs.15 crores from Saraswat Co-operative Bank Limited immediately after fire took place at the insured factory of the applicant. The respondents had taken signature of the applicant on the pre-printed discharge voucher dated 15th January, 2013 while releasing ad-hoc payment of the applicant. The respondents had obtained signature of the applicant on the undated voucher before releasing any amount under the final survey report submitted by the surveyor. He submits that the applicant had all throughout opposed the under valuation of atleast stock before surveyor by exchanging various correspondence which are on record of this proceeding. The Saraswat Co-operative Bank Limited was also pressurizing the applicant for repayment of the loan availed of by the applicant.

17. It is submitted that the applicant had spent substantial amount for reinstating the properties and had lost Rs.17 crores of stock. Saraswat Co-operative Bank Limited was threatening the applicant of

classifying the account as NPA unless the applicant would have made the immediate payment of the dues of the said bank. The applicant had brought these facts to the notice of the respondents with a request to release ad-hoc payment till any further steps were taken by the respondents. He submits that even the Saraswat Co-operative Bank Limited had exchanged correspondence with the respondents and inquired about the status of the claims made by the applicant. The respondents had informed the Saraswat Co-operative Bank Limited about the status of the claim made by the applicant.

18. Learned counsel appearing for the applicant then submits that the payment released by the respondents was directly in favour of the Saraswat Co-operative Bank Limited on behalf of the applicant which itself indicates that there was tremendous pressure from the Saraswat Co-operative Bank Limited for repayment of their dues against the applicant. The respondents however after almost 27 months from the date of loss had issued the discharge voucher vide its letter dated 2nd April, 2014 for much lower final offer of Rs.16,70,55,826/-. As against, total claim made by the applicant for Rs.50,94,85,032/- the respondents offered only Rs.36,69,97,874/-. The applicant was under constant financial duress and also the coercion made by the respondents with malafide intentions. He submits that the applicant accordingly placed on record true and correct facts on 16th April, 2014 when the amount was released by the respondents to the bank on behalf of the applicant which was much lower than the legitimate claims of the applicant.

19. Learned counsel submits that the said undated discharge voucher was issued by the respondents and the applicant was coerced to

sign the same. The respondents had also taken signature of the Saraswat Co-operative Bank Limited on the said voucher which clearly indicates that there was coercion upon the applicant to sign such undated discharge voucher and the same was also signed under economic duress. In support of this submission, learned counsel appearing for the applicant invited my attention to the judgment of Supreme Court in case of ***National Insurance Company Limited vs. Boghara Polyfab Private Limited (2009) 1 SCC 267*** and in particular paragraphs 17, 18, 21, 23, 24, 26 to 28 and would submit that since the applicant was coerced to accept the payment by the respondents which was much lower than the amount due to the applicant and since the applicant was under economic duress, there was no accord and satisfaction of the claims made by the applicant. The learned designate of the Hon'ble Chief Justice has thus power to appoint an arbitrator.

20. Learned counsel appearing for the applicant also placed reliance on the judgment of this court in case of ***National Insurance Company Limited vs. Opera Clothing*** decided on 13th March, 2015 in Arbitration Petition No.778 of 2012 and in particular paragraphs 74 to 82 and submits that the said judgment which has dealt with the issue of accord and satisfaction squarely applies to the facts of this court.

21. Mr.Delhiwala, learned counsel for the respondents on the other hand invited my attention to some of the paragraphs from the arbitration application and also the rejoinder filed by the applicant. The learned counsel also relied upon some of the correspondence exchanged between the parties and also the discharge voucher signed by the

respondents. It is submitted by the learned counsel that there was no coercion, undue influence or economic duress on the applicant before the applicant accepted the payment in the month of April 2014 and while signing the discharge voucher. He submits that the applicant has already received and acknowledged the entire payment due to the applicant in full and final settlement on its claim and there was thus accord and satisfaction of the claims made by the applicant. The arbitration clause thus does not survive. The present application filed under section 11 for appointment of an arbitrator is thus not maintainable.

22. Learned counsel submits that the applicant had not lodged any protest on the discharge voucher which was signed by the respondents. He submits that the applicant has also not pleaded any fraud, coercion or economic duress on the part of the respondents in the pleadings. He submits that there was no financial stress on the applicant. In support of this submission, learned counsel invited my attention to the director's report showing financial condition of the applicant. He submits that the export turn over of the applicant had substantially increased in the year in which the applicant had made a claim under the insurance policy. He submits that the gross profit of the applicant also had increased and thus there was no question of any financial stress on the applicant.

23. Learned counsel for the respondents then submits that as against the loan of Rs.15 crores obtained by the applicant, the respondents had already paid more than Rs.19 crores to the applicant and thus there could not have been any pressure upon the applicant from Saraswat Co-operative Bank Limited. He submits that the loan was

availed by the applicant on 26th December, 2011 and the respondents had already paid on account payment to the applicant on 21st January, 2013.

24. In the alternate, learned counsel appearing for the respondents submits that if the designate of the Hon'ble Chief Justice comes to the conclusion that the allegations made by both the parties require further evidence before coming to the conclusion that there was accord and satisfaction or not or whether there was any coercion or economic duress upon the applicant, the learned designate shall direct the applicant to lead oral evidence before appointing any arbitrator.

In support of this submission, learned counsel for the respondents placed reliance on the following judgments of the Supreme Court :-

- (i) ***New India Assurance Company Ltd. vs. Genus Power Infrastructure Ltd.*** 2014(4) ARBLR 421(SC), (Paragraphs 4 to 9)
- (ii) ***Bishundeo Narain and Anr. vs. Seogeni Rai and Jagernath***, AIR 1951 SC 280 (Paragraphs 27 to 33)
- (iii) ***National Insurance Company Limited vs. Boghara Polyfab Private Limited (2009) 1 SCC 267*** (Paragraphs 17,18, 21, 23, 24, 26 to 28).

25. A perusal of the record indicates that there is no dispute that clause 13 of the Standard Fire and Special Perils Policy provides for an arbitration agreement. The respondents have not disputed the existence of the arbitration agreement. It is however the case of the respondents that since the applicant has accepted the payment and had signed discharge voucher in full and final settlement of its claim, there was complete accord and satisfaction of the claims and thus there being no

dispute between the parties, no arbitrator can be appointed by the designate of the Hon'ble Chief Justice.

26. I have perused the judgments of Supreme Court relied upon by the parties referred to aforesaid. Following principles of law can be culled out from the aforesaid judgments of Supreme Court and this court :-

“(a) If an issue raised as to whether the contract and/or transaction is concluded by recording satisfaction of the rights and obligation of the parties by receiving the final payment without raising any final objection, in an application under section 11 of the Arbitration and Conciliation Act, 1996, the Chief Justice or his designate may decide such issue if necessary by taking evidence or leave that issue open with a direction to the arbitral tribunal to decide the same. If the Chief Justice or his designate chooses to examine the said issue and decide it, the arbitral tribunal cannot examine the said issue.

(b) A bald plea of fraud, coercion, duress or undue influence is not enough and the party who sets up such a plea must prima facie establish the same by placing material before the Chief Justice or his designate. The Chief Justice or his designate has to consider the relevant averments in the arbitration application while even examining such issue and if takes a prima facie view in favour of the applicant, issue can be left open to be adjudicated upon by the arbitrator.”

27. In case of ***National India Assurance Company Ltd.(supra)***, Supreme Court has adverted to its earlier judgment in case of ***Chairman & Managing Director, NTPC Ltd. vs. Rashmi Constructions, Builders & Contractors***, AIR 2004 SC 1330 in which the Supreme Court has held that the public sector undertakings would have an upper hand where a contractor has made huge investments, he cannot afford not to take from the employer the amount under the bills, for various reasons which may include discharge of his liability towards the banks, financial institutions and other persons. The public sector would not ordinarily release the money unless a "No-Demand Certificate" is signed. Each case, therefore, is required to be considered on its own facts.

28. This court in case of ***National Insurance Company Limited vs. Opera Clothing*** has considered the issue of accord and satisfaction and the normal practice followed by the public sector of insisting advance discharge voucher from the claimant before releasing any payment. This court has adverted to the judgment of Supreme Court in case of ***National Insurance Company Limited vs. Boghara Polyfab Private Limited***. In the said judgment it is held by the Supreme Court that the procedure of obtaining of undated receipts-in-advance in regard to regular routine payments by government departments and corporate sector is an accepted practice. However such procedure of obtaining undated receipt acknowledging receipt of a sum smaller than his claim in full and final settlement, as a condition for releasing an admitted lesser amount, is unfair, irregular and illegal and requires to be deprecated. This court has also adverted to the judgment of this court in case of ***Dai-ichi Karkaria Private Ltd. vs. Oil & Natural Gas Commission Bombay and another*** reported in ***1991(4) Bom.C.R.631*** on the issue of economic duress and has deprecated the practice of the public undertaking to insist for discharge voucher in advance before referring any payment to the claimant.

29. A perusal of the correspondence on record prima facie indicates that the applicant had raised protest about the valuation of the stock by surveyor which according to the applicant was much more. For more than 27 months of the fire in the factory of the applicant which caused loss to the applicant, the respondents had not settled the claim of the applicant finally. The applicant had borrowed substantial amount from Saraswat Co-operative Bank Limited immediately after such fire took

place in the factory of the applicant. The applicant had brought this fact to the notice of the respondents while making a claim and while requesting the respondents to process the claims at the earliest in view of the pressure of the said Saraswat Co-operative Bank Limited upon the applicant.

30. A perusal of such correspondence prima facie indicates that the said Saraswat Co-operative Bank Limited had threatened the applicant to convert the account of the applicant as NPA which would have caused further financial crises upon the applicant. A perusal of the record further prima facie indicates that the said Saraswat Co-operative Bank Limited had also exchanged correspondence with the respondents enquiring about the status of the claims made by the applicant. It is not in dispute that even while releasing the ad-hoc amount in favour of the applicant by the respondents, the signature of the applicant was taken on the ad-hoc payment voucher. Even when the final payment was released, the signature of the applicant was taken on the undated discharge voucher with an endorsement that the amount referred therein was in full and final settlement. A perusal of the said voucher clearly indicates that the same was on the letterhead of the respondents with a note that the claimant shall put its rubber stamp thereon alongwith signature. The said voucher also indicates that the same was also acknowledged and signed by Saraswat Co-operative Bank Limited. It is not in dispute that the respondents had released the said payment directly to the Saraswat Co-operative Bank Limited on behalf of the applicant.

31. A perusal of the record clearly indicates that for more than 27 months, the respondents had not released the claim amount of the

claimant fully. The applicant was in my prima facie view under economic duress and coercion and thus had signed such discharge voucher. In my prima facie view, thus there was no accord and satisfaction of the claims made by the applicant in full and final settlement as canvassed by the respondents. In my view the issue as to whether there was any accord and satisfaction or whether there was any economic duress and coercion is kept open which can be decided by the learned arbitrator. The principles of law laid down by the Supreme Court and this court which is summarized aforesaid squarely applies to the facts of this case. I am respectfully bound by the judgment of Supreme Court and of this court.

32. Insofar as submission of the learned counsel for the respondents that there was no financial stress suffered by the applicant in view of the ad-hoc payment by the respondents to the applicant and in view of the increase in turn over of the applicant is concerned, in my prima facie view there is no merit in this submission of the learned counsel for the respondents. The applicant had taken a loan from Saraswat Co-operative Bank Limited. The liability of the applicant towards the said Saraswat Co-operative Bank Limited and other creditors was prima facie much more than the amount received by the applicant from the respondents. Be that as it may, the applicant had already spent substantial amount for reinstating its factory and had taken substantial loan after such fire having taken place in the said factory premises of the applicant. A perusal of the record prima facie indicates that the applicant was suffering from financial stress and there was economic duress and coercion upon the applicant for accepting the amount by signing discharge voucher. In my view if the applicant would not have signed the

discharge voucher, the respondents would not have released even the said amount to the applicant or directly to Saraswat Co-operative Bank Limited on behalf of the applicant.

33. Under clause 13 of the Standard Fire and Special Perils Policy in question, if there is no agreement on the name of the sole arbitrator, the matter is required to be referred to the panel of the three arbitrators. The applicant has already nominated Shri Justice S.P.Kurdukar, former judge of Supreme Court as its nominee. The respondents have not nominated any arbitrator. The nominee arbitrator on behalf of the respondents will have to be thus appointed in this application. I, therefore, pass the following order :-

- (a) Shri Justice Pramod D.Kode, former Judge of this Court, having his address at Flat No.702, 7th Floor, Building No.56/B, Chintamani Judges Co-operative Housing Society Limited, Behind Anik Bus Depot, Pratiksha Nagar, Sion Koliwada, Mumbai – 400 022 is appointed as the nominee arbitrator on behalf of the respondents.
- (b) The learned arbitrator nominated by the applicant and the learned arbitrator appointed by this order shall appoint a presiding arbitrator in accordance with the provisions of Arbitration and Conciliation Act, 1996.
- (c) Issues raised by the respondents whether there was any accord and satisfaction on the claims made by the applicant or not and as to whether there was any economic duress or coercion upon the applicant or not shall be decided by the arbitral tribunal and the said issue is kept open.

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34. Arbitration application is disposed of in the aforesaid terms.
No order as to costs.

R.D. DHANUKA, J.