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IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

ORDER
IN

S.B. Arbitration Application No.42/2015

Classic Enterprises Limited Vs.
United India Insurance Company
Limited

Date of Order ::: 01.04.2016

Present

Hon'ble Mr. Justice Mohammad Rafiq

Mr. Achintya Kaushik, counsel for applicant
Mrs. Archana Mantri, counsel for non-applicant

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//Reportable//

By the Court:-

Applicant Classic Enterprises Limited, a registered company under the Indian Companies Act, 1956, has filed this application under under Section 11 of the Arbitration and Conciliation Act, 1996, seeking appointment of third Arbitrator in terms of Section 1996 of the Arbitration and Conciliation Act, 1996 (for short, 'the Act of 1996'). Applicant obtained insurance policy for its factory situated at Bhiwari, District Alwar, from non-applicant United India Insurance Company Limited, for the period from 01.07.2010 to 30.06.2011, for a sum of Rs.21.67 crores. There took place an incident of fire in the factory premise of applicant on 05.06.2011. Applicant, on the very next date, informed non-applicant about the incident. Non-applicant appointed surveyor and loss assessor. The assessed loss, according to applicant, was covered within the purview of insured sum. The applicant



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raised insurance claim with respondent for a claim of Rs.18,43,50,000/- (Rupees eighteen crore forty three lakh and fifty thousand only). Upon reconciliation, applicant submitted a revised claim bill with non-applicant company on 05.08.2011 for a sum of Rs.16,66,35,435/- (Rupees sixteen crore sixty six lakh thirty five thousand four hundred and thirty five only). However, on 24.02.2012 the surveyor recommended a sum of Rs.6,00,00,000/- (Rupees six crore), as an account payment, which was paid to the applicant. According to applicant, the non-applicant further paid a sum of Rs.3,43,10,310/- (Rupees three crore forty three lakh ten thousand three hundred and ten only) on 03.04.2013 and a sum of Rs.2,22,94,600/- (Rupees two crore twenty two lakh ninety four thousand and six hundred only) on 29.04.2013, respectively, to applicant. Thus, a total sum of Rs.11,66,04,910/- (Rupees eleven crores sixty lakhs four thousand nine hundred and ten only) has been paid to the applicant.

Applicant thereafter raised protests through e-mails on 29.04.2013 and 06.05.2013 regarding payment of balance amount approximately Rs.2,15,01,272 (Rupees two crore fifteen lakh two hundred and seventy two only). Non-applicant called upon the applicant to furnish a receipt on stamp paper a full and final settlement as pre-condition for release of balance amount. Despite furnishing aforesaid receipt on stamp paper, non-applicant has not released the balance amount to the applicant.





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Applicant then on 28.11.2013 sent a letter to the non-applicant regarding due payment. Non-applicant, vide e-mail dated 17.12.2013, approved payment of Rs.1,08,00,000/- (Rupees one crore and eight lakh only) to applicant, which was acknowledged by the applicant vide letter dated 20.12.2013. Applicant, in that letter, also requested non-applicant to clear balance amount and settle the same at the earliest possible. However, non-applicant did not make any other payment thereafter.

Shri Achintya Kaushik, learned counsel for applicant, referred to Clause 13 of the insurance policy, according to which, if any dispute/differences arise regarding quantum of payment, the same shall be referred to sole arbitrator to be appointed in writing by the parties to or if they cannot agree upon a single arbitrator, within thirty days of any party invoking arbitration, the same shall be referred to a panel of three arbitrators comprising of two arbitrators – one to be appointed by each of the parties to the dispute/difference and the third arbitrator to be appointed by such two arbitrators and arbitration shall be conducted in accordance with the provisions of the Act of 1996. Learned counsel for applicant submitted that despite request of applicant, non-applicant failed to make payment of the balance amount, therefore there is a dispute regarding quantum of claim amount to be paid by non-applicant to applicant, which was required to be resolved





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through arbitration in terms of Clause 13 of the insurance policy. Applicant therefore on 18.02.2014, invoked arbitration clause and nominated Shri O.P. Agarwal, Director of M/s. R.L. Agarwal Surveyors Private Limited, Surveyors and Loss Assessors to be the sole Arbitrator in the matter and called upon the non-applicant to give its consent within thirty days from the date of the receipt of the said arbitration notice. However, Shri Shiv Vyas, the counsel for non-applicant, sent a letter to applicant on 24.03.2014, intimating about nomination of Shri N. Veeraraghavan as the nominee arbitrator for non-applicant. In the same letter, it was requested that Shri O.P. Agarwal, nominee arbitrator of applicant, may be asked to interact with nominee arbitrator of non-applicant for appointment of third arbitrator with mutual consent. Applicant accordingly asked his nominee arbitrator to do so. However, applicant received communication on 01.07.2014 from his nominee arbitrator Shri O.P. Agarwal, intimating that two respective nominee arbitrators had not been able to reach a consensus on the name so as to appoint third arbitrator. Hence this application.

Mrs. Archana Mantri, learned counsel for non-applicant, submitted that the answering-respondent has appointed Shri N. Veeraraghavan as nominee arbitrator reserving all rights and defences including validity of the reference and maintainability of any further claim because the





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claim of applicant has been settled by them as they have made total payment of Rs.12,74,04,910/- in favour of applicant. The applicant, however, vide letter dated 29.04.2013 informed the non-applicant that a sum of Rs.2,15,01,272/- is still payable to him, they having not made assessment regarding loss of building and plant and machinery. That letter was followed by another letter dated 06.05.2013 reiterating aforesaid facts and by invoking arbitration clause under para no.13 of the insurance policy, with the request to non-applicant for appointment of arbitrator to settle the issue. The competent officer of non-applicant, on instruction from its head office, appointed Mr. Alok Shankar as surveyor and loss assessor. Non-applicant, after consulting the applicant, further paid a sum of Rs.1,08,00,000/- for the loss of machinery as full and final payment of all dues, to the applicant on 29.04.2013. Applicant, vide letter dated 29.04.2013 objected thereto, and vide letter dated 06.05.2013 again invoked the arbitration clause no.13 of the insurance policy and requested the non-applicant to appoint arbitrator to settle the issue. Non-applicant has already made payment of Rs.12,74,04,910/-+Rs.2,15,01,272/-+Rs.1,08,00,000/- to applicant, thus a total sum of Rs.15,97,06,182/-, as against Rs.16,66,35,435/-, as full and final settlement of the dues to the applicant and no further amount is payable to the applicant. The prayer is therefore made that application be





dismissed.

Clause 13 of the insurance policy would be relevant for the purpose of deciding present application, which reads as under:-

“13. If any dispute or difference shall arise as to the quantum to be paid under this policy (liability being otherwise admitted) such difference shall independently of all other questions be referred to the decision of a sole arbitrator to be appointed in writing by the parties to or if they cannot agree upon a single arbitrator within 30 days of any party invoking arbitration, the same shall be referred to a panel of three arbitrators, comprising of two arbitrators, one to be appointed by each of the parties to the dispute/difference and the third arbitrator to be appointed by such two arbitrators and arbitration shall be conducted under and in accordance with the provisions of the Arbitration and Conciliation Act, 1996.”

It would be evident from aforesaid clause that at the first stage, the parties had the option to refer the dispute to sole arbitrator to be appointed by them in writing. Evidently, no such option was exercised by the parties jointly. The applicant, after invoking the arbitration clause on 18.02.2014, nominated Shri O.P. Agarwal, Director of M/s. R.L. Agarwal Surveyors Private Limited, Surveyors and Loss Assessors, to be its nominee arbitrator, and called upon non-applicant to give its consent within 30 days from the date of receipt of said arbitration notice. Non-applicant, through his counsel, sent a letter to applicant intimating about nomination of Shri N. Veeraraghavan as its nominee arbitrator for them, asking applicant to





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require Shri O.P. Agarwal, nominee arbitrator of applicant, to interact with nominee arbitrator of non-applicant, for appointment of third arbitrator. This was in conformity with later part of arbitration clause, which envisaged that if the parties cannot agree upon a single arbitrator within 30 days of any party invoking arbitration, the same shall be referred to a panel of three arbitrators, comprising of two arbitrators, one to be appointed by each of the parties to the dispute/difference and the third arbitrator to be appointed by such two arbitrators and arbitration shall be conducted under and in accordance with the provisions of the Arbitration and Conciliation Act, 1996.

The arbitration Clause 13, referred to above, agreed to by both the parties, satisfies the requirement of Section 7 of the Act of 1996. Sub-section (1) of Section 10 of the Act of 1996 provides that the parties are free to determine the number of arbitrators, provided that such number shall not be an even number. Sub-section (2) of Section 10 provides that failing the determination referred to in sub-section (1), the arbitral tribunal shall consist of a sole arbitrator. Sub-section (2) of section 11 provides that subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. Sub-section (3) of section 11 provides that failing any agreement referred to in sub-section (2), in an arbitration with three





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arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator, who shall act as the presiding arbitrator. Sub-section (6) of Section 11 provides that where, under an appointment procedure agreed upon by the parties, (a) a party fails to act as required under that procedure; or (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure, a party may request the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court, to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

Clearly, in the present case, the arbitration clause in the first instance enables the parties to refer the dispute for decision to sole arbitrator and if they cannot agree upon a single arbitrator within thirty days of any party invoking arbitration clause, the same shall be referred to panel of three arbitrators, two of whom were to be appointed by the applicants and non-applicants, respectively, to the dispute/difference, and the third arbitrator to be appointed by such two arbitrators. As is evident from the facts noted above, two arbitrators, despite deliberation, failed to reach at a consensus to appoint third arbitrator and, therefore, present application for appointment of third arbitrator, deserves to be allowed.





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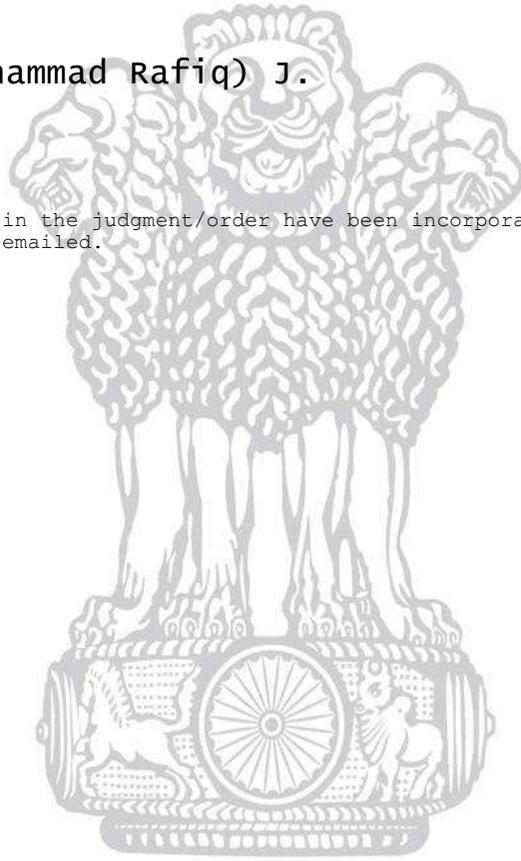
Consequently, present application deserves to succeed and is accordingly allowed. Mr. Justice Sunil Ambwani, former Chief Justice of this Court, R/o E-190, Ground Floor, Kalkaji, Opposite Nehru Place, Police Station Road, New Delhi - 110 019 (cellphone number 09415238954), is appointed as third Arbitrator. His fee would be payable as per the Manual of Procedure for Alternative Dispute Resolution, 2009, of this court, as amended from time to time.

(Mohammad Rafiq) J.

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All corrections made in the judgment/order have been incorporated in the judgment/order being emailed.

Giriraj Prasad Jaiman
DR



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