SUPREME COURT OF INDIA

Ruby General Insurance Co. Ltd.

Vs.

Pearey Lal Kumar

(Saiyid Fazal Ali, Bose Vivian JJ)

25.02.1952

JUDGMENT

FAZL ALI J.--This is an appeal by special leave against the judgment of the Punjab High Court upholding the decision of a Subordinate Judge of Delhi relating to a petition filed by the appellant-company under section 33 of the Indian Arbitration Act against the respondents, 503 The material facts are these. On the 22nd April, 1947, the appellant company insured a car belonging to the first respondent and issued a policy which fully sets out the terms and conditions of the agreement relating to the insur- ance. The first respondent left his car in a garage at Lahore and came away to India on the 31st July, 1947.

Subsequently, he learned about the loss of his car, and sent a legal notice dated the 18th March, 1948, through his advocate Mr. A.R. Kapur to the Head Office of the company at Calcutta, claiming a sum of Rs. 7,000 for the loss of the car. On the 10th April, 1948, Mr. Kapur received a letter from the Branch Manager of the Company's office at Amrit- sar asking for information regarding certain matters stated in the letter. This information appears to have been sup- plied on the 30th April, 1948. On the 26th May, 1948, the company's Branch Manager at Amritsar wrote to the first respondent repudiating the liability of the company for the loss of the car on the ground that the loss was "due to communal riots which were going on in the whole of Punjab" and was not covered by the agreement of insurance. A simi- lar letter was written again by the Branch Manager on the 3rd July, 1948, to the first respondent, and another letter was written by one Mr. Rattan Lal Chawla representing him- self to be counsel for the company, to Mr. A.R. Kapur, on the 1st August, 1948. On the 21st November, 1949, the first respondent wrote a letter to the Branch Secretary of the Company's office at Calcutta, stating that his claim was valid and nominating Mr. T.C. Chopra, Assistant Manager, Lakshmi Insurance Company Ltd., Delhi, as arbitrator on his behalf and requesting the company to appoint another person as arbitrator on its behalf. Thereafter, the company pre- sented an application on the 29th December, 1949, in the court of the Senior Sub-judge, Delhi, under section 33 of the Indian Arbitration Act, against the first respondent and Mr. T.C. Chopra, the arbitrator, who is the second respond- ent in this appeal, praying for-- 504 (1) a declaration to the effect that the reference to arbitration and the appointment of respondent No. 2 as sole arbitrator was illegal;

(2) a declaration to the effect that if the respondent No. 2 made any award it would not be binding on the company;and (3) an injunction restraining the respondents Nos. 1 and 2 from taking any proceeding in the matter and the respond- ent No. 2 from making any award.

Upon this petition, notice was issued to the respond- ents, and an injunction was issued directing them not to file any award till the date of the next hearing, which was fixed for 31st January, 1950.

On the 4th February, 1930, the first respondent wrote to the second respondent (the arbitrator) that since no arbitrator had been appointed by the company and since the company had refused to appoint any arbitrator, he (Mr. Chopra) was to act as the sole arbitra- tor. On the 6th February, 1950, Mr. Chopra wrote to inform the insurance company that he had been appointed sole arbi- trator and asked the company to send the statement of its case and to produce all the evidence on the 14th February, 1950. On the 10th February, 1950, the insurance company filed a petition before the Subordinate Judge, Delhi, pray- ing that the respondents be stopped from proceeding further in the matter so that its application under section 33 may not become infructuous. On the 11th February, the Subordi- nate Judge issued notice to the respondents fixing the 17th February as the date of hearing and passed the following order:

"Moreover (till) the decision of this application the arbitrator should not give or pronounce his award but should continue the proceedings." On the 14th February, 1950, the second respondent pronounced his award after making a note to the following effect:- " Mr. G.R. Chopra, the counsel of the defendants, sent a telephonic message at 12 A.M. requesting extension till 1 P.M. I agreed and accordingly I waited for 505 him and the plaintiff with his counsel also waited up to 1 P.M. Nobody turned up on behalf of the defendants. I commenced the proceedings and took the statement of the plaintiff and the documents that he had produced." He made a further note at the end of the award to this effect :-- "As after the giving of the award a notice was served upon me not to give the award, I have not sent any formal letter to the parties informing them of the award and its costs." On the 24th March, 1950, the Subordinate Judge passed an order on the company's application under section 33, dis- missing it and holding that the terms of clause 7 of the agreement "were comprehensive enough to include the points of disputes between the parties now and as such are triable by the arbitrator and not by the court." The Subordinate Judge concluded his order by observing:

"I, therefore, hold that the reference to the arbitra- tion of the differences is perfectly valid and the points raised by the parties to this application with regard to the abandonment of claim and its becoming irrecoverable are to be decided by the arbitrator." The judgment of the Subordinate Judge was upheld in revision by the Punjab High Court and the company has now preferred an appeal to this court by special leave.

The points that were urged on behalf of the appellant in this appeal are these: -- (1) that the arbitration clause had ceased to be opera- tive and the question as to the existence and validity of the arbitration agreement was triable by the court under section 33 of the Arbitration Act and not by the arbitrator;

and (2) that the award was invalid and not binding on the appellant, because it was pronounced in spite of the order of the court dated the 11th February, 1950, directing the arbitrator not to pronounce his award.

506 Clause 7 of the policy of insurance rims as follows :--- "All differences arising out of this policy shall 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 arbi- trators one to be appointed in writing by each of the parties within one calendar month after having been required in writing so to do by either of the parties or in case the arbitrators do not agree of an umpire appointed in writing by the arbitrators before entering upon the reference. The umpire shall sit with the arbitrators and preside at their meeting and the making of an award shall be a condition precedent to any right of action against the company. if the company shall disclaim liability to the insured for any claim hereunder and such claim shall not within twelve calendar months from the

date of such disclaimer have been referred to arbitration under the provisions herein con- tained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder." It will be noticed that this clause provides among other things that if the company disclaimed liability to the insured for any claim under the policy and such claim was not within twelve calender months from the date of such disclaimer referred to arbitration, then the claim should be deemed to have been abandoned and was not recoverable. The case of the company is that it disclaimed liability for the loss of the car on three successive occasions, namely, on the 26th May, 1948, the 3rd July, 1948, and the 1st August, 1948. The first respondent however did not take any action in regard to the appointment of an arbitrator until the 21st November, 1949, i.e, until more than 12 months after even the last disclaimer by the company. For this reason, the claim put forward by the first respondent must be deemed to have been abandoned and he cannot recover anything from the company. On the other hand. the case of the first respond- ent, which 507 is set out in. his affidavit dated the 17th February, 1950, is that there was never any valid disclaimer by the company of its liability. The position that he took up was that the Branch Manager of the company had no authority to disclaim the liability, and it could have been disclaimed only by a resolution of the company. Now these being the respective contentions of the parties, the question is whether the point in dispute fell to be decided by the arbitrator or by the court under section 33 of the Arbitration Act. Section 33 is to the following effect:-- "Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits:

Provided that where the Court deems it just and expedi- ent, it may set down the application for hearing on other evidence also. and it may pass such orders for discovery and particulars as it may do in a suit." The question to be decided is whether the point on which the parties are in dispute is a difference "arising out of the policy" in terms of clause 7 of the policy. The test for determining such a question has been laid down in a series of cases and is a simple one. The test is whether recourse to the contract by which the parties are bound is necessary for the purpose of determining the matter in dispute between them. If such recourse to the contract is necessary. then the matter must come within the scope of the arbitrator's jurisdiction. In the present case, both the parties admit the contract and state that they are bound by it. Indeed, the appellant-company, in order to make good its contention, is obliged to rely and does rely on that part of clause 7 of the policy which states that if the company should disclaim liability and the claim be not referred to arbitration within 12 months of such disclaimer, the claim shall be deemed to have been abandoned. Evidently, the company cannot succeed without calling in aid this clause and 508 relying on it. Again, the first respondent does not say that he is not bound by the clause but states that the matter was referred to arbitration before any valid disclaimer was made. The position therefore is that one party relying upon the arbitration clause says that there has been a breach of its terms and the other party, also relying on that clause, says that there has been no breach but on the other hand the requirements of that clause have been fulfilled. Thus, the point in dispute between the parties is one for the decision of which the appellant is compelled to invoke to his aid one of the terms of the insurance agreement. It is thus clear that the difference between the parties is a difference arising out of the policy and the arbitrator had jurisdic- tion to decide it, the parties having made him the sole judge of all differences arising out of the policy.

A large number of cases were cited before us on behalf of the parties, but it is unnecessary to refer to them, since the question which arises in this appeal is a simple one and is covered by the statement of law which is to be found in the decision of this Court in A.M. Mair & Co. v.Gordhandass Sagarmull C), and in a series of English author- ities, some of which only may be

referred to. In Heyman v.

Darwins, Ltd. (2) the law on the subject has been very clearly stated in the following passage :- "An arbitration clause is a written submission, agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made. If the dispute is as to whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void ab initio (because, for exam- ple, the making of such a contract is illegal)the arbitra- tion (1)[1950] S.C.R. 792. (2) [1941] 1 A.E.R.337,343 509 clause cannot operate, for on this view the clause' itself is also void.

If. however, the parties are at one in asserting that they entered into a binding contract, but a difference has arisen between them as to whether there has been a breach by one side or the other, or as to whether circumstances have arisen which have discharged one or both parties from fur- ther performance, such differences should be regarded as differences which have arisen 'in respect of,' or 'with regard to,' or 'under' the contract, and an arbitration clause which uses these, or similar expressions, should be construed accordingly." In Macaura v. Northern Assurance Co. (1), the appellant had insured a large quantity of timber against fire and the greater part of the timber having been de- stroyed by fire, he sued the insurance company to recover the loss but the action was stayed and the matter was re- ferred to arbitration in pursuance of the conditions con- tained in the policy. The arbitrator held that the claimant had no insurable interest in the goods insured and disal- lowed the claim. One of the points raised in the case was that the arbitrator had no jurisdiction to decide the mat- ter, but that contention was rejected by Lord Sumner in these words:- "The defendants do not repudiate the policy or dispute its validity as a contract; on the contrary, they rely on it and say that according to its terms, express and implied, they are, relieved from liability: see Stebbing's case(2), Woodall v. Pearl Assurance Co.(3)..... It is a Fallacy to say that they assert the policy to be null and void." In Stebbing v. Liverpool and London and Globe Insurance Company Limited(2), to which reference was made by Lord Summer, the policy of insurance contained a clause referring to the decision of an arbitrator "all differences arising out of this policy ". It also (1) [1925] A.C. 619. (3) [1919] 1 K.B. 593, (2) [1917] 2 K.B. 433, 66 510 contained a recital that the assured had made a proposal and declaration as the basis of the contract, and a clause to the effect that compliance with the conditions indorsed upon the policy should be a condition precedent to any liability on the part of the insurers. One of the conditions provided that if any false declaration should be made or used in support of a claim all benefit under the policy should be forfeited. In answer to a claim by the assured, the insurers alleged that statements in the proposal and declaration were false. When the matter came before the arbitrator, the assured objected that this was not a difference in the arbitration and that the arbitrator had no power to deter- mine whether the answers were true or not, or to determine any matters which called in question the validity of the policy. In holding that the arbitrator had jurisdiction to decide the matter, Viscount Reading C.J. observed as fol- lows:- " If the company were seeking to avoid the contract in the true sense they would have to rely upon some matter outside the contract, such as a misrepresentation of some material fact inducing the contract, of which the force and effect are not declared by the contract itself. In that case the materiality of the fact and its effect in inducing the contract would have to be tried. In the present case the company are claiming the benefit of a clause in the contract when they say that the parties have agreed that the statements in question are material and that they induced the contract. If they succeed in escaping liability that is by reason of one of the clauses in the policy. In resisting the claim they are not avoiding the policy but relying on its terms. In my opinion, therefore, the

question whether or not the statement is true is a question arising out of the policy." The main contention put forward on behalf of the appel- lant is that the points in dispute fall outside the juris- diction of the arbitrator, firstly because the existence of the arbitration agreement is challenged, and secondly, because the sole object of the application under section 33 of the Arbitration Act is tO have the 511 effect of the arbitration agreement determined. In our opinion, neither of these objections is sound. How can it be held that the existence of the arbitration agreement is challenged, when both parties admit that the clause in the policy which contains that agreement binds them. It is neither party's case that there is no arbitration agreement in the policy. On the ,:other hand, both parties admit that such agreement exists, and each of them relies on it to support its case. It is true that the appellant contends that the arbitration agreement has ceased to be applicable, but that contention cannot be sustained without having recourse to the arbitration agreement. It is said that the agreement no longer subsists,but that is very different from saying that the agreement never existed or was void ab initio and therefore is to be treated as non-existent.

Again, no question of determining the effect of the arbitration agreement arises, because there is no dispute between the parties as to what it means. The language of the arbitration clause is quite clear, and both,parties construe it in the same way. The real question between them is whether the first respondent has or has not complied with the conditions of the agreement. But this question does not turn on the effect of the agreement. This is the view which has substantially been taken by the High Court, and in our opinion it is correct.

The second point urged before us is that the award is invalid, since it was made in spite of the court's injunc- tion directing the arbitrator not to pronounce any award.

This point however does not, in our opinion, fall within the scope of this appeal. The application under section 33 of the Arbitration Act, which is the subject of this appeal, was filed before the award was pronounced. In that applica- tion, there is no reference to the award; nor is there any reference to the circumstances which are now stated to invalidate the award and which happened after the applica- tion was filed. The learned counsel for the appellant made an application before us praying for the amendment of the petition under section 38 by introducing certain 512 additional facts and adding a prayer for declaring the award to be invalid, but it was rejected/by us. It should be stated that as early as the 24th March, 1950, the Subordi- nate Judge in dismissing the appellant's petition under section 33, made the following observations :-- "During the pendency of the arbitration proceedings the arbitrator pronounced the award..... The award has now been filed in the court of S. Mohinder Singh, Sub Judge, 1st class, Delhi. Any objection against the award can be filed there. In this application in which there is no prayer for setting aside the award, which exists, I do not think it proper to decide the question of the validity of the award." In our opinion, the Subordinate Judge correctly indi- cated the course which it was open to the appellant in law to adopt for the purpose of questioning the validity of the award, but not having taken that course and not having made any application in the courts below for amending the petition under section 33, the company cannot ask this court to go into the validity of the award by widening the scope of the original petition. This court is always in favour of shortening litigation, but it would be a very unusual step to allow the petition under section 33 to be amended now and to decide a question involving investigation of facts with- out having the benefit of the judgments of the courts below.

In the result, the appeal fails and is dismissed with costs.

Appeal dismissed.

Agent for the appellant: Ganpat Rai.

Agent for respondent No. 1.: S.D. Sekhri.

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