Sterling General Insurance Co. Ltd.

Vs

Planters Airways Pvt. Ltd.

Civil Appeal No. 535 (N) of 1974

(K. K. Mathew, P. N. Bhagwati, N. L. Untwalia JJ)

19.12.1974

JUDGMENT

MATHEW, J. -

1. This appeal, by special leave, is directed against an order of a learned Judge of the Calcutta High Court allowing an application filed under Section 37(4) of the Arbitration Act, 1940 (hereinafter called the Act) for extension of time to refer the matter to arbitration.

2. The facts are these. The appellant is a company doing business in general insurance. The respondent carries on business as a common carrier of goods. The respondent had taken out three transit policies of insurance renewable every year. The policy which is relevant for the purpose of the present appeal is Freight Policy No. CL/REP/257 taken by the respondent in January, 1969 from the appellant against risk of loss or damage to any goods or merchandise during transit.

3. In June, 1971, the respondent declared to the appellant that it had received for transit a consignment of 185 packages of general merchandise alleged to be of the total value of Rs. 1,10,000 (approx.) for transportation from Calcutta to a various places in Assam and Tripura and paid the requisite premium on the value of goods and the goods stood insured under the said policy. According to the respondent, on the evening of June 29, 1971, the consignment of 185 packages was loaded in truck No. WGH-8261, and the truck left Calcutta on the same day for Gauhati. It is alleged that the owner of the truck informed the respondent that after the truck reached Barasat on the night of June 29, 1971 there was a robbery and neither the truck, nor the driver, nor the merchandise could be traced. On July 1, 1971, the respondent sent letters to the officer-in-charge of Jorabagan Police Station, the Assistant Commissioner of Police, Intelligence Branch, Lall Bazar, Calcutta-1 and the Deputy commissioner of Police, Intelligence Branch intimating them that the truck which left Calcutta on June 29, 1971 had not reached Beniagram at the scheduled time and that the truck, the driver, the assistant and the merchandise could not be traced. A copy of the letter sent to the Assistant Commissioner of Police, Lall Bazar, Calcutta was sent to the appellant and it was received by the appellant on July 2, 1971. On July 1, 1971 and September 21, 1971 the respondent lodged the claim for loss with the appellant on the basis that the loss was covered by the policy. On July 3, 1971, the appellant sent a letter to the respondent calling upon the respondent to furnish the particulars as regards the name and address of the owner of the vehicle, the name and address of the driver and other particulars. On September 21, 1971, the respondent informed the appellant by a letter that the information and the records asked for in the letter dated July 3, 1971 were already supplied to Mr. A. L. Chopra, the agent of the appellant on July 5, 1971 when he called upon the respondent for that purpose. On October 10, 1971, the appellant wrote to the respondent informing that until the report of the investigation by the police was produced by the

respondent, it would not be possible for the appellant to proceed further in the matter. The appellant received a copy of the investigation report by the police at Barasat on May 12, 1972. The report was to the effect that the alleged episode of robbery was false. On this basis, the appellant sent to the respondent a letter dated August 4, 1972 stating the contents of the investigation report of the police at Barasat and asking for the investigation report of Jorabagan police and Lall Bazar Police. Thereafter the appellant intimated the respondent by letter dated February 16, 1973 disclaiming its liability under the freight policy as regards the loss of the consignment of 185 packages. On receipt of the letter, the respondent wrote to the appellant on March 30, 1973 asking for the grounds on which the appellant disclaimed its liability. The appellant sent a letter after two months on May 30, 1973, stating that it had nothing to add to what had been stated in its letter dated February 16, 1973. Thereafter, the respondent took the advice of solicitors and counsel. On August 17, 1973, the respondent filed the application before the High Court under Section 37(4) of the Act for extension of time for referring the dispute to arbitration till a date 15 days after the order of the High Court. In the application, the respondent stated the reasons for the delay in filing the application in court after receiving the letter dated May 30, 1973. In answer to the application the appellant contended that section 37(4) of the Act had no application, that the court had no jurisdiction to extend the time and that even if the court had jurisdiction, there were no valid grounds for extension.

4. The application came up for hearing before a learned Judge and he passed the order extending the time to refer the dispute to arbitration within a fortnight from January 14, 1974.

5. The question that arises for consideration is whether the High Court had power to extend the time and if it had power, whether it exercised its power properly in extending the time for preferring the claim to arbitration. That will depend upon a correct interpretation of the relevant clauses of the policy and of Section 37(4) of the Act.

6. Clause 1 of the policy states that notice of any accident, Loss or damage affecting the insurance shall be given to the Company at the earliest possible date and not later than 30 days from the date of the accident, loss or damage. Clause 2 of the policy provides that in the event of any loss or damage covered by the insurance the insured shall produce and give to the Company all evidence as may be reasonably required by the company. Clause 9 provides that if the insured shall make any claim knowing the same to be false or fraudulent as regards the amount or otherwise, the insurance shall become void and all claims thereunder shall be forfeited. Clause 11 states that all differences arising out of the contract shall be referred to the decision of an arbitrator to be appointed in writing by the parties or if they cannot agree upon a single arbitrator, to the decision of two arbitrators, one to be appointed in writing by each of the parities within one calendar month after having been required in writing so to do by either of the parties. It further provided that the making of an award by the arbitrator or arbitrators shall be a condition precedent to any right of action against the company. Clause 12 which is the material clause for the purpose of this case reads :

If the Company shall disclaim liability to the Insured for any claim hereunder and such claim shall not within three calendar months from the date of such disclaimer have been preferred to arbitration under the provisions herein contained, then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder.

7. Section 37(4) of the Act reads as follows :

Where the terms of an agreement to refer future differences to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an

arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the agreement, and a difference arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.

8. It was not seriously contended that Section 37(4) of the Act was not applicable to the agreement embodied in the policy in question and the High Court had no jurisdiction to extend the time. The only contention pressed on behalf of the appellant was that in the circumstances of the case, there would be no undue hardship to the respondent if the time for preferring the claim to arbitration is not extended and, therefore the High Court went wrong in exercising the discretion by extending the time.

9. There are no decisions of this Court or of the High Courts concerning the relevant considerations to be taken into account in exercising the jurisdiction for extending time under Section 37(4) of the Act. Section 16(6) of the English Arbitration Act, 1934 which is practically the same as Section 27 of the English Arbitration Act of 1950 is in pari materia with Section 37(4) of the Act. Therefore, the interpretation placed by English Courts upon Section 16(6) and Section 27 of the respective Acts has great persuasive value.

10. The English Courts originally took a very strict and narrow view of the words "Undue hardship". In Steamship Co. of 1912 v. Anglo-American Grain Co. ((1958) 2 Lloyd's Rep 341), Lord Parker, C.J. said :

It has been said, over and over again by this Court, that there must be very special circumstances for extending the time. Of course, if a valid claim is barred, there is hardship, but that is not what is provided for by the clause, and before this Court can extend the time they must be satisfied that the hardship amounts in the particular case to undue hardship . . . .

In Watney, Combe, Reid & Co. v. E. M. Dower & Co. Ltd. ((1956) 2 Lloyd's Rep 129, 131), Lord Goddard, C.J. said :

I desire to say in the clearest possible terms that the mere fact that the claimant is barred cannot be held to be an undue hardship, which is what the section requires to be found by the court before it extends the time. The section does not mean that this Court can take out of the contract the provision which will bar the claim if it is not pursued in time. They have no power to do that. The only thing they have power to do is to extend the time if undue hardship is caused. One can visualise certain cases of undue hardship.

11. In F. E. Hookway & Co. Ltd. v. H. W. H. Hooper & Co. ((1950) 2 All ER 842), where the buyers made an application for extension of time under Section 16(6) of the English Act of 1934, Denning, L.J. observed that the extent if delay is a relevant circumstance to be considered, that if the delay is not on account of the fault of the buyer, it would no doubt, be an undue hardship on him to hold the clause against him, but, if the delay is his own fault, the hardship may not be undue as it may be a hardship which it is due and proper that he should bear. He further said that another relevant circumstance was whether there was evidence of any loss on any sub-contracts and claims by sub-buyers or any complaints by them and if there was evidence of such loss or claims, then the court would take a lenient view of the delay and hold that, notwithstanding it, there was undue hardship on the buyer.

12. In Stanhope Steamship Co. Ltd. v. British phosphate Commissioners ((1956) 2 Llyod's Rep 325), Singleton, J., in delivering the judgment said :

What, then, is the meaning of "undue hardship ?" "Undue", it is said by Mr. MacCrindle, means something which is not merited by the conduct of the claimant. That may be right. If the result of claimant's being perhaps a day late is so oppressive, so burdensome, as to be altogether out of proportion to the fault, I am inclined to think that one may well say that there is undue hardship. Both the amount at stake and the reasons for the delay are material considerations.

13. In Liberian Shipping v. A. King & Sons ((1967) 1 All ER 934), the facts were these. A vessel was lost on a voyage charterparty in Centrocon form containing an arbitration clause under which any claim had to be made in writing and the claimant's arbitrator had to be appointed within three months of final discharge. A fire occurred on board the vessel during loading. Both the owners and the charterers had claims against each other. The time limit was to expire on June 26, 1966. The parties were negotiating and, after considerable correspondence, a meeting between both parties was arranged for June 27, 1966, with a view to settlement. The meeting did not result in a settlement. The charterers first realised that time had expired when the owners sought an extension of it by consent, nine days after the expiry. The charterers had not contributed to the delay on the part of the owners in relation to the arbitration clause. The charterers did not consent to the time being extended. The owners applied under Section 27 of the Arbitration Act, 1950, for an extension of time on the ground that "undue hardship" would otherwise be caused to them. Their claim amounted to about 33,000 pounds. The master granted an extension of time, but on appeal the judge refused it. On further appeal the Court by a majority said that if the time were not extended, undue hardship would be caused to the owners since they would be deprived of what might be a valid claim for 33,000 pounds by a delay of only a few days due to excusable inadvertence, that the charterers would not in any way be prejudiced by time being extended and so the Court would exercise the discretion conferred by Section 27 of the Arbitration Act, 1950, and would extend the time. In the course of his judgment Lord Denning, M.R. observed that in the past the courts had been inclined to emphasize the word "undue" and to say that if a man does not read the contract and is a day or two late, it is a "hardship" but it is not an "undue hardship", because, it is his own fault but that the interpretation was narrow. He said that these time-limit clauses used to operate most unjustly on claimants for, they found their claim barred by some oversight and it was to avoid that injustice the Legislature intervened so as to enable the courts to extend the time whenever "in the circumstances of the case undue hardship could otherwise be caused". He also said that the word "undue" in the context simply means excessive hardship greater than the circumstances warrant and that even if a claimant has been at fault himself, it is an undue hardship on him if the consequences are out of proportion to his fault. He further stated that even if a claimant makes a mistake which is excusable, and is in consequence a few days out of time, then if there is no prejudice to the other side, it would be altogether too harsh to deprive him of all chance for ever of coming and making his claim and that is all the more so, if the mistake is contributed or shared by the other side. He then observed :

It was said that this was a matter for the judge's discretion. True enough. We have, however, said time and again that we will interfere with a Judge's discretion if satisfied that the discretion was wrongly exercised. In any case the judge was not exercising an unfettered discretion. He felt himself fettered by the trend of the authorities to give the words "undue hardship" a narrow meaning. I think that we should reverse that trend and give the words their ordinary meaning, as Parliament intended. It would be "undue hardship" on the owners to hold them barred by the clause.

In the same case, Salmon, L.J. said that the arbitration clause put it out of the power of the court to

grant any relief to a claimant who had allowed a few days to run beyond the period specified in the clause even although (sic) the delay could have caused no conceivable harm to the other side. He said that it would be hard and unjust if a man with a perfectly good claim for thousands of pounds worth of damage for breach of contract inadvertently allowed a day or two to do got by was deprived of the right to be compensated for the loss which he had suffered, even though the other party had not been in any way affected by the delay and might perhaps have been guilty of a deliberate breach of contract and that it was to remedy this hardship and injustice that the Legislature intervened to alter the law. He further said :

This enactment was a beneficent reform, liberalising the law in an admittedly narrow sector of the commercial field. I have heard it said that when people have spent their lives in chains and the shackles are eventually struck off, they cannot believe that their claims are no longer there. They still feel bound by the shackles to which they have so long been accustomed. To my mind, that factor may explain the court's approach in some of the cases to the problem with which we are now faced.

He then summed up his conclusion follows :

In considering this question the court must take all the relevant circumstances of the case into account; the degree of blameworthiness of the claimants in failing to appoint an arbitrator within the time; the amount at stake, the length of the delay; whether the claimants have been misled, whether through some circumstances beyond their control it was impossible for them to appoint an arbitrator in time. In the last two circumstances which I have mentioned, which do not arise here, it is obvious that normally the power would be exercised; but those are not the only circumstances and they are not, to my mind, necessary circumstances for the exercise of the power to extend time. I do not intend to catalogue the circumstances to be taken into account, but one very important circumstance is whether there is any possibility of the other side having been prejudiced by the delay. Of course, if there is such a possibility, it might be said that it is no undue hardship on the owners to refuse an extension of time because, if the hardship is lifted from their shoulders, some hardship will fall on the shoulders of the charterers, and, after all, the delay is the owner's fault.

14. Therefore, we will have to take a liberal view of the meaning of the words "undue hardship". "Undue" must mean something which is not merited by the conduct of the claimant, or is very much disproportionate to it.

15. Keeping in view these principles, it had to be seen whether in the facts and circumstances of this case, there was reasonable and sufficient ground for not preferring the claim to arbitration within the time specified in Clause 12 of the policy and whether there would be "undue hardship" to the respondent if time is not extended.

16. It may be recalled that it was on July 1, 1971 and September 21, 1971 that the respondent lodged its claim with the appellant to recover the loss suffered. Thereafter, various letters passed between the parties. Ultimately, on February 16, 1973, the appellant wrote the letter to the respondent stating that the claim papers submitted in connection with the claim had been scrutinized by the appellant but that it was unable to accept liability for the loss. The respondent then wrote a letter to the appellant on March 30, 1973 complaining about the uncertain language used in the letter dated February 16, 1973 and calling upon the respondent to point out specifically under which clause of exclusion of liability in the policy did the appellant disclaim the liability. The appellant kept quiet for two months and then on May 30, 1973, sent a letter stating that it had nothing further

to add to what had been stated in its letter dated February 16, 1973.

17. The respondent was having dealings with the appellant in the business of insurance from 1958 onwards and in no instance was the claim made by the respondent rejected by the appellant. The conduct of the respondent in enquiring of the appellant the grounds on which the claim was rejected was quite reasonable. It was only after the grounds of rejection were known that the respondent could have decided whether to resort to arbitration or not. If the grounds of rejection would come within the clause of exclusion of liability under the policy, it would serve no purpose to incur the expense and hardship involved in resorting to arbitration. The appellant did not give the reason for disclaiming liability even in its letter dated May 30, 1973. We do not think that there was any lack of promptness on the part of the respondent in waiting for the reply to its letter dated March 30, 1973. And, in the first week of June, 1973, the respondent made over the papers to the solicitors viz., M/s. Banerji & Co. for the purpose of taking necessary steps for referring the dispute to arbitration in terms of the arbitration clause in the policy. On or about June 15, 1973, the respondent received the written opinion from the solicitors wherein they stated that since the letter of the appellant disclaiming liability was vague and since the appellant gave no reason for rejection of the claim even in their letter dated May 30, 1973, the appellant might rely upon Clause 12 of the policy of insurance and contend that the reference to arbitration would be beyond time. The solicitors, however, advised that in view of the delay on the part of the appellant and its failure to specify any reason for the disclaimer, the respondent might take steps for nominating an arbitrator and proceed with the reference. When the written opinion was received from the solicitors, the respondent had some doubt, because the solicitors did not give a definite opinion. So, it instructed the solicitors to take the opinion of Counsel. After preparing the necessary case for the opinion, the solicitors briefed Counsel for opinion, on June 28, 1973. The opinion of Counsel was to the effect that the respondent should apply for extension of time under Section 37(4) of the Arbitration Act and that was received by the solicitors on July 16, 1973. The respondent was informed of the opinion of Counsel and it received a copy thereof on July 18, 1973. After gathering the facts from the records mentioned in the opinion of the Counsel the respondent instructed the solicitors to take steps for filing a petition for extension of time. It, however, took some time to gather the facts indicated in the opinion of Counsel. On July 25, 1973 the respondent's solicitors sent the brief to Counsel to draft the petition and the petition was received by them on July 30, 1973. Thereafter it took some time to prepare a statement from available records.

18. In the facts and circumstances of this case, we think the High Court exercised its discretion properly in extending the time. The conduct of the respondent was reasonable. It took all steps it could when it knew about the alleged robbery to inform the police and the appellant. The fact that the Barasat police reported that the case was false does not necessarily mean that the respondent tried to practise any fraud upon the appellant. The respondent had filed a suit against the owner of the truck in question in July, 1972 for recovery of the amount of loss. The respondent also paid the claims arising out of the loss of goods which were transported through the truck. All these go to show the bona fides and reasonableness of the conduct of the respondent. Both the amount at stake and the reasons for delay are material in considering the question of undue hardship. We do not think that any material prejudice would be caused to the appellant by extending the time. There would be undue hardship if time is not extended, as the consequences of non-extension would in any event be excessive and out of proportion to the fault of the respondent, if any, in not being prompt. We do not say that the mere fact that a claim would be barred would be undue hardship. But considering the amount involved and the reasons for the delay, we think it would be undue hardship to the respondent if time is not extended.

19. We dismiss the appeal but in the circumstances, it is necessary that further time should be given to the appellant to nominate an arbitrator. We, therefore, extend the time by one month from the date of this judgment to enable is appellant to nominate its arbitrator. We also think that this is a fit case in which the parties should suffer their own cost of the application in the high Court and of the appeal here.

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