The Vulcan Insurance Co. Ltd.

Vs

Maharaj Singh and Another

Civil Appeal No. 2228 of 1972

(A.Alagiriswami, P.K. Goswami, N.L. Untwalia JJ)

03.10.1975

JUDGMENT

UNTWALIA, J. -

1. This appeal by special leave was filed by the Vulcan Insurance Co. Ltd. The general insurance business of the company was nationalised during the pendency of this appeal and, therefore, in place of the original appellant was substituted United India Fire and General Insurance Company Ltd. by order February 28, 1975 passed in C.M.P. No. 84/1975. For the sake of facility hereinafter in this judgment by the appellant would be meant the original appellant company. The respondent No. 1 in the appeal is Maharaj Singh, sole proprietor of Khatauli Manure Mills, Khatauli, district Muzaffarnagar. Respondent No. 2 is Punjab National Bank.

2. Respondent No. 1 carries on a business of manufacturing bone manure, etc. in this mills at Khatauli. He entered into an arrangement with respondent No. 2 for taking advance of money on the security of the factory premises, machineries and the stock of goods. A mortgage deed was executed by him in favour of the respondent bank for that purpose. The bank insured the mortgage properties from time to time with this appellant company under three insurance policies, the terms governing the same being identical.

3. A fire is said to have broken out in the factory premises of respondent No. 1 in the night between February 28, 1963 and March 1, 1963. The bank informed the insurance company about the fire. Thereupon representatives of the bank and the insurance company and some surveyors visited the factory premises on March 1, 1963 and after. Respondent No. 2 claimed the due to fire he had suffered a loss of Rs. 24,800 on account of damage to the fixed assets and Rs. 2,73,004.40 due to damage caused to the stock of goods. Eventually M/s. R. K. Bhandari & Sons, surveyors of the insurance company wrote a letter dated April 26, 1963 to respondent No. 1 informing him that they had assessed the total damage caused to him due to fire at Rs. 4,620. They, however, added at the end of their letter :

> This is without prejudice to the terms and conditions of the policy and without any commitment of liability on the part of the insurance company.

Further correspondence between the parties ensued and ultimately the appellant intimated to respondent No. 1 by its letter dated July 5, 1963 :

> Referring to the previous correspondence relating to the above mentioned claim, we regret to inform you that we repudiate the claim under the above mentioned policies.

Respondent No. 1 seems to have written a letter dated July 22, 1963 to the appellant, to which it sent a reply dated July 29, 1963 categorically stating :

> We are advised to repudiate your claim inter alia under Clause 13 of the fire policies. We regret that survey report and any other reports, cannot be furnished to you.

4. Respondent No. 1 thereupon wrote a letter dated October 1, 1963 to the insurance company informing it that since it had repudiated his claim under Clause 13 of the insurance policy a difference had arisen between the parties and hence respondent No. 1 proposed to appoint one Shri K. N. Bannerjee as the sole arbitrator, to decide the disputes as per the arbitration agreement incorporated in the policies. He said further that if the company was not agreeable to the appointment of Shri Bannerjee as the sole arbitrator, he may be treated as a nominee of respondent No. 1 and the company may appoint its own. In reply to the said letter dated October, 1, 1963 the company wrote a letter dated October 10, 1963 to respondent No. 1 that since it had repudiated his claim the arbitration clause in the policies was rendered inoperative and no arbitration proceeding could be commenced by appointment of any arbitrator.

5. Respondent No. 1 in the first instance filed the application under Section 20 of the Arbitration Act, 1940 - hereinafter called the Act, 1940 - hereinafter called the Act, on January 20, 1964 in the court at Muzaffarnagar in Uttar Pradesh. The appellant and, inter alia, took an objection to the jurisdiction of that court to entertain the application. In view of a special clause in the policies excluding the jurisdiction of courts other than the court at Delhi, the Muzaffarnagar court allowed that objection and directed the return of the application by its order dated May 1, 1964. Respondent No. 1 refiled it on May 19, 1964 in the Delhi court. Appellant resisted it.

6. On reading Clauses 13, 18 and 19 of the insurance policies which are in identical terms and on appreciation of the other materials in the case the trial Court at Delhi dismissed the application holding that the dispute arising out of the repudiation of the liability under Clause 13 by the insurance company was within the scope of the arbitration agreement contained in Clause 18 and a reference to arbitration could be made, but, as per Clause 19, the petition was barred by limitation.

7. On appeal by respondent No. 1 the Delhi High Court has held - (1) Clause 18 does not include in its scope all kinds of differences or disputes that may arise between the parties in respect of the subject-matter of the insurance policies. The scope of Clause 18 is restricted to differences as to the amount of loss or damage, (2) Yet reference to arbitration is not ousted and the arbitration clause covers the dispute even if the company has repudiated the claim in toto. (3) The arbitration Clause 18 is inoperative unless the conditions contained in Clause 19 are satisfied and (4) the condition aforesaid was satisfied because respondent No. 1 had commenced the arbitration on the date when he issued the notice dated October 1, 1963; as such, his claim was the subject of a pending arbitration within the meaning of Clause 19. The High Court, therefore, set aside the order of the trial Court and remanded the case to it for appointment of arbitrators under Section 20 of the Act. Hence this appeal by the insurance company.

8. It appears in this case that arguments have been advanced on either side in the courts below as also in this Court widening the scope of the matters in issue resulting in the missing of the crucial point in controversy. Really, only one point need be decided in this appeal and that is this - whether in view of the repudiation of liability by the appellant under Clause 13 of the insurance policy, a dispute was raised which could be referred to arbitration ? Incidentally in this judgment reference will be made on the other question as to whether the claim of respondent No. 1 and the proceeding

commenced by him were barred by Clause 19.

9. In order to discuss and determine the questions which fall for determination in this appeal it is necessary to read the relevant clauses of the insurance policies :

> 13. If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the insured or anyone acting on his behalf to obtain any benefit under this policy; or, if the loss or damage be occasioned by the wilful act, or with the connivance of the insured; or the insured; or, if the claim be made and rejected and an action or suit be not commenced within three months after such rejection, or (in case of an arbitration taking place in pursuance of the 18th condition of this policy) within three months after the Arbitrator or Arbitrators or Umpire shall have made their award, all benefit under this policy shall be forfeited.
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> 18. If any difference arises as to the amount of any loss or damage 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 person as Arbitrators ....

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> And 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 if disputed shall be first obtained.
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> 19. In no case whatever shall the company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration.

10. The correspondence between the parties makes it clear that at one time the surveyors had assessed the damages at Rs. 4,620 in their letter dated April 26, 1963. But the said assessment was, in express terms, without commitment of any liability on the part of the insurance company. The company, however, completely repudiated the liability under Clause 13.

11. Although the surveyors in their letter dated April 26, 1963 had raised a dispute as to the amount of any loss or damage alleged to have been suffered by respondent No. 1, the appellant at no point of time raised any such dispute. The appellant company in its letter dated July 5 and 29, 1963 repudiated the claim altogether. Under Clause 13 the company was not required to mention any reason of rejection of the claim nor did it mention any. But the repudiation of the claim could not amount to the raising of a dispute as to the amount of any loss or damage alleged to have been suffered by respondent No. 1. If the rejection of the claim made by the insured be on the ground that he had suffered no loss as a result of the fire or the amount of loss was not to the extent claimed by him, then and then only, a difference could have arisen as to the amount of any loss or damage within the meaning to Clause 18. In this case, however, the company repudiated its liability to pay any amount of loss or damage as claimed by respondent No. 1. In other words, the dispute raised by the company appertained to its liability to pay any amount of damage whatsoever. In our opinion, therefore, the dispute raised by the appellant company was not covered by the arbitration clause.

12. As per Clause 13 on rejection of the claim by the company an action or suit, meaning thereby a legal proceeding which almost invariably in India will be in the nature of a suit, has got to be commenced within three months from the date of such rejection; otherwise, all benefits under the policy stand forfeited. The rejection of the claim may be for the reasons indicated in the first part of Clause 13, such as, false declaration, fraud or wilful neglect of the claimant or on any other ground disclosed or undisclosed. But as soon as there is a rejection of the claim and not the raising of a dispute as to the amount of any loss or damage, the only remedy open to the claimant is to commence a legal proceeding, namely, a suit, for establishment of the company's liability. It may well be that after the liability of the company is established in such a suit, for determination of the quantum of the loss or damage reference to arbitration will have to be resorted to in accordance with Clause 18. But the arbitration clause, restricted as it is by the use of the words "if any difference arises as to the amount of any loss or damage", cannot take within its sweep a dispute as to the liability of the company when it refuses to pay any damage at all.

13. Mr. S. N. Andley, learned Counsel for respondent No. 1 submitted that in view of the last part of Clause 18 which makes the award of an arbitration a condition precedent to any right of action or suit, it should be held that even when there is a repudiation of liability, the matter has to go to the arbitration first. In support of such a submission, learned Counsel placed reliance upon certain decisions of the courts in India as also in England. We shall presently show that on the facts and in the circumstances of this case, none of them is of help to respondent No. 1.

14. A clause like the last part of Clause 18 making the award a condition precedent to any right of action or suit first came up for consideration in the case of Scott v. Avery ((1856) 25 LJ Ex 308 : 5 HLC 811 : 4 WR 746) and since then such clauses are commonly called Scott v. Avery clauses. Generally it has been found that if the arbitration clause in a comprehensive language taking within its ambit any kind of dispute arising under the policy, then obtaining of an award by arbitration is a condition precedent to the starting of any other legal proceeding. A clause like Scott v. Avery has repeatedly been held to be a valid one.

> Even a clause of this type, however, is not absolute in effect : where the court orders that the arbitration agreement cease to have effect in relation to a particular dispute, it has a discretion to order further that the Scott v. Avery clause cease to have effect too. (Vide pages 57, 58 of Russel on Arbitration, Eighteenth Edition)
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> The said statement of the law, however, has been made with reference to Section 25(4) of the English Arbitration Act, 1950. The corresponding provision in our Act is contained in Section 36. But the apart, when an arbitration clause is not operative on the dispute raised, as in this case, then it is wholly unreasonable, almost impossible, to hold that still the parties have to obtain an award before starting any legal proceeding. What dispute will be referred to arbitration ? The dispute raised is not within the purview of arbitration. Reading Clauses 13 and 18 together it must be held that on the rejection or repudiation of the claim by the insurer, the insured is under an obligation to start a legal proceeding within three months of such rejection, and hence obtaining of an award in such a case cannot be a condition precedent. It is not possible to go to arbitration for determination of the said dispute. Clauses similar to the ones contained in Clauses 13 and 18 in this case were the subject-matter of consideration before the House of Lords in the case of Jureidini v. National British and Irish Millers Insurance Company, Limited (1915 AC 499 : 84 LJ KB 640 : 31 TLR 132). The claim made by the insured was rejected by the insurer as being

> fraudulent. When the former brought an action the latter resisted it on the Scott v. Avery clause. The House gave a unanimous opinion that the repudiation of the claim on a ground going to the root of the contract precluded the company from pleading the arbitration clause as a bar to an action to enforce the claim. The matter put in that form in some of the speeches of the Law Lords does not seem to have received full approval of the House in later decisions including the one in Heyman v. Darwins Ltd. ((1942) 1 All ER 337 : 1942 AC 356) as it would appear from the speech of Lord Macmillan at page 346. But the real ratio of the decision which remains unshaken even till today is to be found in the speech of Lord Parmoor at page 508 when his Lordship said that since no difference had arisen which could be converted by arbitration Clause 17 and the company had raised an issue on which, if it had succeeded, the insured would have lost all benefit under the policy, the arbitration clause had no application.

15. Learned Counsel for respondent No. 1 placed reliance upon some decisions of the English courts in support of his contention that in spite of the repudiation of the liability by the appellant his client could not commence any legal proceeding without going to arbitration. Only two may be noticed here : In Viney v. Bignold ((1888) 20 QBD 171, 172) it was held that the determination of the amount by arbitration was a condition precedent to the right to recover on the policy and if any action was brought without an award obtained in an arbitration it was not maintainable. It should, however, be noticed that the language of arbitration Clause 21 in that case was wide enough to cover any dispute and from the facts stated in the judgment it is nowhere to be found that the dispute raised by the company was not covered by the arbitration clause. If the dispute is such that can go to arbitration then no action or suit can be commenced without obtaining an award. But the condition of obtaining an award prior to any action or suit can never be attracted if the dispute raised cannot be referred to arbitration and has got to be determined in a legal proceeding. The other case is the decision of the House of Lords in Caledonian Insurance Company v. Andrew Gilmour (1893 AC 85 : 9 TLR 146 : 57 JP 228). That was again a case of a comprehensive arbitration clause and thus justifying the application of the Scott v. Avery clause as a bar to the maintainability of an action without an award.

16. In O'connor v. Norwich Union Fire and Life Insurance Society ((1894) 2 Irish LR 723 : 28 Irish LT 95) the decision in the case of Viney v. Bignold (supra) was distinguished and the Scott v. Avery clause was held to be inapplicable because the dispute raised was not covered by the arbitration clause. Holmes, J. pointed out at page 728 :

> Now, if it was a term of the contract that a difference of this kind was to be settled by arbitration, I should not hesitate to stay the action . . . .

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> But there is no provision in the plaintiff's policy that such a controversy as has arisen is to be referred to arbitration. There is a carefully drawn clause, by which it is agreed that amount to be paid, as distinguished from liability to pay anything, is to be settled by arbitrators, and that no action can be commenced until they shall have determined such amount. One result of this clause may be to render two proceedings necessary where there is a dispute as to the amount of the loss as well as a denial of all liability; but this ought not to be a ground of complaint to either of the parties who have made it a term of the contract;

17. We agree with this.

18. Mr. Andley placed reliance upon paragraphs 1983 to 1986 at pages 964 and 965 of the fifth edition of MacGillivray on Insurance Law. On the basis of the decision in Scott v. Avery (supra) as also certain other decision it is said in paragraph 1983 :

> There is a rule of law that parties cannot by their private contract oust the jurisdiction of the court; but it has been held that parties to a contract may nevertheless agree that no cause of action shall arise upon it until any matter in dispute between them shall have been determined by arbitration and then only upon the arbitrators' award.

The discussion in paragraph 1986 relates to whether arbitration is a condition precedent or is merely a collateral agreement. But the relevant paragraph which applies on all fours to the facts of the case on hand, as pointed out by Mr. F. S. Nariman, Counsel for the appellant, is paragraph 1987 at page 966 :

> As a rule, where the amount of the loss or damage is the only matter which the parties refer to arbitration, then if the insurers repudiate any liability on the policy there is obligation on then assured as to the amount before commencing an action on the policy.
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> To the same effect is to be found the statement of the law at pages 328 to 332 in the fourth edition of Walford & Otter-Barry's Fire Insurance.

19. Following the decision of the House of Lords in Jureidini's case (supra) a Bench of the Bombay High Court in Eagle Star and British Dominions Insurance Company v. Dinanath and Hemraj while interpreting an identical Clause 13 said at page 521 :

> But in Clause 13 there are various contingencies set out which if established entitle the insured to bring an action without an award having been made by arbitrators. One of these contingencies is "if the claim be made and rejected" which if established gives a right of action, the period of limitation provided for the suit being fixed at three months from the date of the date of the rejection. While it is also provided that where arbitration takes place in pursuance of Condition 18 of the policy, three months' time should be allowed for as suit to be brought after the award has been made. Therefore it is quite obvious that a right of action accrued after the company rejected the claim. Naturally that question would have first to be decided by suit as under Clause 18 that question could never have been referred to arbitration.

We approve the law so enunciated by the Bombay High Court.

20. Mr. Andley placed reliance upon some decisions of the High Courts in India in support of his contention. We briefly refer to four of them. In Great American Insurance Co. Ltd. v. Bodh Raj (AIR 1953 Punj 50 : ILR 1953 Punj 460 : 54 Punj LR 497) some observation by Harnam Singh, J. with whom Weston, C. J. agreed in paragraph 16 do not seem to be quite accurate although on facts as found in paragraph 17 the case was rightly decided. The decision of Falshaw, J. in Great American Insurance Co. Ltd. v. Dina Nath (AIR 1957 Punj 152 : 27 Com Cas Ins 4) again relates to the dispute which was held to have, on the facts of the case, fallen in the arbitration clause. It would appear from the facts of the case decided by Mathew, J. Vanguard Fire and General Insurance Company Limited, Madras v. N. R. Sreenivasa Iyer, Trivandrum (AIR 1953 Ker 270 : ILR (1963) 1

Ker 545 : 1963 Ker LT 415) that Condition 7 of the policy was couched in a wide language so as to cover the dispute and the difference including the one as to liability, which arose between the parties. In such a situation on a consideration of various authorities including the one in the case of Viney v. Bignold (supra) the learned Judge said at page 275 column 1 :

This condition may either mean that the arbitrators have to decide the question whether there is any liability at all under the contract or that they have to decide the quantum of that liability. In either case an award by the arbitrators is a condition precedent to any right of action. There is no difference between a case where the arbitrators have to decide the question of the liability itself and a case where he has to decide the question of the quantum of that liability. In both cases if the contact makes the decision of the arbitrators a condition precedent that has to be fulfilled before a suit can be instituted.

21. In Charanjit Lal Sodhi v. Messrs. Caledonian Insurance Co. Ltd. (1969 Accidents Claims Journal 12), a learned Single Judge of the Delhi High Court seems to have gone wrong in treating dispute raised by the insurer as one falling under the arbitration clause. The company had said that the insured has made a false claim. The learned Judge thought that even the restricted arbitration clause covering only the difference as to the amount of any loss or damage was "wide enough to include a case of some loss or damage as well as a case of no loss or damage".

22. The two lines of cases clearly bear out the two distinct situations in law. A clause like the one in Scott v. Avery bars any action or suit if commenced for determination of a dispute covered by the arbitration clause. But if on the other hand a dispute cropped cropped up at the very outset which cannot be referred to arbitration as being not covered by the clause, then the Scott v. Avery clause is rendered inoperative and cannot be pleaded as a bar to the maintainability of the legal action or suit for determination of the dispute which was outside the arbitration clause.

23. We do not propose, as it is not necessary, to decide whether the action commenced by respondent No. 1 under Section 20 of the Act for the filling of the arbitration agreement and for appointment of arbitrators was barred under Clause 19 of the policy. It has been repeatedly held that such a clause is not hit by Section 28 of the Contract Act and is valid; vide : Baroda Spinning and Weaving Company, Limited v. Satyanarayan Marine and Fire Insurance Company Limited (AIR 1949 Cal 390 : ILR (1945) 1 Cal 638); Dawood Tar Mahomed Bros. v. Queensland Insurance Co. Ltd. and Ruby General Insurances Co. Ltd. v. Bharat Bank Ltd (AIR 1950 East Punj 352). Clause 19 has not prescribed a period of 12 months for the filing of an application under Section 20 of the Act. There was no limitation prescribed for the filing of such an application under the Indian Limitation Act, 1908 or the Limitation Act, 1963. Article 181 of the former did not govern such an application. The period of three years prescribed in Article 137 of the Act of 1963 may be applicable to an application under Section 20. Nor are we concerned in this case to decide whether the time taken by respondent No. 1 in prosecuting his application in Muzaffarnagar court could be excluded under Section 14(2) of the Limitation Act, 1963. Nor do we propose to decide whether the application under Section 20 could be defeated on the ground of the extinction of the liability of the company under Clause 19. We may, however, observe in passing that in view of the decision of this Court in Wazirchand Mahajan v. Union of India ((1967) 1 SCR 303, 308 : AIR 1967 SC 990) if the difference which had arisen between the parties was the one to which the arbitration clause applied then the application under Section 20 of the Act could not be dismissed on the ground that the claim would not ultimately succeed either on facts or in law. The matter will have to be left for the decision of the arbitrator. Without any discussion we may just state that the High Court is not right in its view that respondent No. 1's claim was not barred under Clause 19 because of the provision of

law contained in Section 37(3) of the Act.

24. But in this case on a careful consideration of the matter we have come to the definite conclusion that the difference which arose between the parties on the company's repudiation of the claim made by respondent No. 1 was not one to which the arbitration clause applied and hence the arbitration agreement could not be filed and no arbitrator could be appointed under Section 20 of the Act. Respondent No. 1 was ill-advised to commence an action under Section 20 instead of instituting a suit within three months of the date of repudiation to establish the company's liability.

25. For the reasons stated above, we allow this appeal, set aside the judgment and orders of the courts below and dismiss respondent No. 1's application filed under Section 20 of the Act. Since he fails on technical grounds, in the circumstances of the case, we shall direct the parties to pay and bear their own costs throughout.

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