

CALCUTTA HIGH COURT

National Fire and General Insurance Co. Ltd

Vs.

Union of India

Award Case No. 138 of 1954

(P.B. Mukharji, J.)

18.05.1955

JUDGMENT

P.B. Mukharji, J.

1. This is an application by the National Fire and General Insurance Company Limited to set aside the Award dated 20-3-1954.

2. The dispute arises in respect of a claim for loss of jute by fire at a godown at Beldanga on 30-8-1952 at about 9 P.M. The jute was insured with the applicant-Company under two different Fire Insurance Policies Nos. 1/1/2175 and 1/1/ 1854 respectively for Rs. 4,000/- and Rs. 13,200/- . Under Policy No. 1354 dated 25-9-1951 there were two insured, namely Joti Krishna Chakravorty and the Union of India in its Rehabilitation. Finance Administration, both of whom are respondents to this application. The Union of India became interested in the policy in this way. Respondent Chakravorty who was a refugee from Eastern Pakistan took a loan of Rs. 12,000/- from the Government of India in its Rehabilitation Finance Administration and partly with his own fund augmented with the loan started a business in jute in Beldanga and it was in that connection that the Government of India appeared as a co-insured interested in the jute under the policy because the jute was charged with the liability to pay the Government loan. Under Policy No. 2175 dated 28-6-1952 respondent Chakravorty was alone the insured for Rs. 4,000/-. The respondent Union of India does not appear to contest this application. The opposition comes from respondent Chakravorty.

3. Each of the said policies contained as Arbitration clause. The material part of the Arbitration clause is in the following terms :

"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 persons as Arbitrators.

In case of disagreement between the Arbitrators, the difference shall be referred to the decision of an Umpire who shall have been appointed by them in writing before entering on the reference and who shall sit with the Arbitrators and preside at their meetings. The costs of the reference and of the Award shall be in the discretion of the Arbitrator, Arbitrators or Umpire making the Award.

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."

4. The parties failed to agree upon a single Arbitrator to decide all their differences and disputes. The respondent, Chakravorty appointed Mr. H. Datta, an Accountant, as Arbitrator. The Union of India who was a party to one of the insurance policies aforesaid, when requested to appoint an Arbitrator, wrote on 14/17-8-1953 to say : "The administration is unwilling to appoint any arbitrator from their side since Shri Jyoti Krishna Chakravorty has appointed his Arbitrator." The insurance company appointed Mr. A.C. De as their Arbitrator. The two Arbitrators appointed one Mr. P.K. Ghosh as Umpire. On of about 25-8-1953 the arbitration proceedings started. By 14-3-1954 the Arbitrators disagreed and the dispute was referred to the Umpire. The Umpire made his Award on 20-3-1954. The material portion of the Award of Umpire is as follows :

"(a) The National Fire and General Insurance Co. Ltd. do pay to Jyoti Krishna Chakravorty in full settlement of his claim under Policy No. 1/1/1854 the sum of Rs. 12,342/-.

(b) The National Fire and General Insurance Co. Ltd. do pay to Jyoti Krishna Chakravorty in full settlement of his claim under Policy No. 1/1/2175 the sum of Rs. 3,695/8/-.

(c) The National Fire and General Insurance Co. Ltd. do pay to Jyoti Krishna Chakravorty the sum of Rs. 6,582/- as the costs of the Reference and this my Award."

5. The Award is now challenged on divers grounds set out in paras 13 and 14 of the petition. When these grounds are analyzed, they boil down to objections to the Award under the following heads :

(i) Failure to appoint an Arbitrator by the Union of India vitiated the Award.

(ii) The only jurisdiction of the Arbitrators or the Umpire under the arbitration clause contained in the insurance policies was to decide the amount of loss or damage and not the liability to pay such amount or who should pay the amount and to whom. Therefore it is contended that the Umpire exceeded his jurisdiction when he directed applicant to pay to the respondent Chakravorty.

- (iii) Under Policy No. 1854 payment could only be made to both the insured mentioned therein and therefore the Award is bad on the ground that it directs payment to be made to only one of the insured, namely, respondent Chakravorty.
- (iv) Lump sum Award of costs to the extent of Rs. 6,582/- without separate allocation of costs of the Reference before the Arbitrators and before the Umpire vitiates the Award.
- (v) Partiality and partisanship of the Arbitrator H. Datta particulars whereof are set out in detail in para 14 of the petition vitiate the Award of the Umpire.

6. The allegations of partiality and partisanship against arbitrator H. Datta being questions of fact, the matter was set down for trial on evidence on the disputed facts of alleged partiality and partisanship. When the matter came up for evidence on this point, learned Counsel Mr. Niren De, appearing For the applicant company, did not choose to call any witness to prove such allegations. Such allegations therefore not being proved, must be rejected as a ground For the setting aside of the Award.

7. Mr. De's wisdom in not calling the evidence on this point was sound and commendable. There are two main reasons which in my opinion justify that course. The first reason is that all these alleged acts of partiality and partisanship took place while the arbitration proceedings were going on before the Arbitrators and the applicant company in spite of them stood by. An applicant who stands by a partial Arbitrator knowing him to be partial all the time, and takes his chance of the Award turning out to be favorable to him in spite of such partiality cannot be permitted to put forward such grounds if the Award ultimately turns out against him. The principle is that an Arbitrator has always to be fair, disinterested and impartial and law does not permit any speculation or gamble on this fundamental requisite of an Arbitrator and if the applicant does speculate or gamble on this point, he does so at his peril. The policy of the law as much as its principle require that an applicant should at once bring to the notice of the Court the partiality of an Arbitrator so that such proceedings may not be allowed to continue. This principle applies of course only in the case of Known partiality and not in those cases when the partiality is discovered subsequently to the Award when different principles would apply. The second reason is that the partiality of an Arbitrator in the present proceedings cannot vitiate the Award when was not made by the Arbitrators at all but was made by an independent Umpire. In fact, the two Arbitrators differed without making any Award whatsoever. What the two Arbitrators did is stated in their letter of 4-3-1954 to the insurance company and the respondents, Chakravorty and the Union of India :

"Please take notice that we have disagreed on the proper Award in the above case and submitted it, to the Umpire P.K. Ghosh for his decision and Award."

The Arbitrators therefore did not express any view in writing except to say that they have disagreed. There is no allegation of any partiality against the Umpire who alone is responsible For the Award. Indeed, the terms of the arbitration clause in the insurance policy are material also

in this respect where it stipulates that the Umpire has to be present throughout the proceedings along with the two Arbitrators. For these two reasons I would, in any event, have rejected the allegations of partiality against one of the Arbitrators as in no way vitiating the award of the Umpire even if there were evidence to support the applicant's allegations of partiality against one of the Arbitrators. Such evidence could under no circumstances of this case have helped the applicant to set aside the Award of the Umpire.

8. I propose now to examine the other grounds on which the applicant seeks to set aside the Award. They are grounds of law and not of facts.

9. The first of such grounds is that the Union of India should have appointed an Arbitrator of its own. As will be recalled, the Union of India said that as the co-insured respondent Chakravorty had already appointed his Arbitrator, the Union of India was unwilling to appoint any other. On the grounds stated by the Union of India it is clear that the Union of India did accept Chakravorty's Arbitrator as their Arbitrator also. The Union of India did not appoint any Arbitrator of their own because of the express reasons stated by the Union that respondent Chakravorty had appointed his. That is the first answer to these objections. The other answer is that the terms of the Insurance Policy do not in my judgment contemplate appointment of three Arbitrators, which will be the case if applicant's contention were to be accepted. Interpretation of the Arbitration clause is necessary to support this conclusion. Now who is to appoint an Arbitrator under this Arbitration, clause ? That Arbitration clause expressly says, "An Arbitrator to be appointed in writing by the parties in difference." Who are the "parties in difference" ? There was no difference between the two respondents Chakravorty and the Union of India. They were not 'parties in difference'. In fact, both these respondents, being the insured under the Policy, form one party. The other party in difference with them is the Insurance Company. The true interpretation of this Arbitration clause is that the Arbitrators who are only to decide the difference as to the amount of loss or damage were to be appointed by parties differing on the amount of loss or damage. There was no difference as between the two respondents as to the amount of loss or damage. For these two reasons I am of the opinion that the Award in this case cannot be set aside on the ground that the Union of India did not appoint an Arbitrator.

10. The next point is the most important point of objection relating to the ambit of the Arbitration Clause. It is contended before me on behalf of the applicant that the Arbitration Clause in this case in the Fire Insurance Policy is confined only to the difference about "the amount of any loss or damage" and, therefore, the Arbitrators or the Umpire had no jurisdiction to make an Award directing payment or determining the liability of payment of any particular party or to whom payment was to be made.

11. There is a well known Arbitration Clause and is a very familiar and standard form in numerous Insurance Policies. The language of the Clause as quoted elsewhere in the judgment makes it quite clear that what was intended to be arbitrated upon by that Clause was the

difference about "the amount of loss or damage" and nothing else. The Clause also followed the standard pattern by making such Award as to the amount a condition precedent to any right of action or suit on the Policy. That would seem to include that the Arbitrators would only decide the quantum of loss and a suit or action on the Award For the recovery of the same could only be made after the Award had quantified the amount of loss. It follows that the Award itself will not direct payment of the amount of loss that it may determine. On an interpretation of this Arbitration Clause, therefore, I accept the contention of the applicant-company that such a clause invests the arbitrators with the jurisdiction only to decide the quantum of loss or damage and nothing more. But this conclusion does not help the applicant.

12. The question still remains whether on the facts of this case there was a larger submission than that represented by the Arbitration Clause in the Policy itself. I am of opinion in this case there was. I shall begin by noticing the words, "independently of all other questions" in the Arbitration Clause. Those words indicate that although there was a special stipulation in the Insurance Policy itself that the amount of loss or damage was alone to be the subject of arbitration, that does not deter the parties from submitting to the jurisdiction of the Arbitrators the other question of the liability to pay the amount and who should pay to whom. All that the Arbitration Clause framed in that language means is that independently of all other questions, the question of difference about the amount of loss or damage must be submitted to arbitration. It does not mean that this clause prohibits other questions from being submitted to the Arbitrators along with the question of quantum. It is clear, however, from the language of the Arbitration Clause in the case as quoted above that this Clause itself does not submit the question of liability to pay to the Arbitrators.

13. The question then is how else was the liability to pay submitted in this case to the Arbitrators. For that purpose the first statement referring the dispute to the Arbitrators is material. It is curious that the petition does not annex a copy of that important statement to the Arbitrators by the respondent Chakravorty. That, however, appears as Annexure-"A" to the affidavit of respondent Chakravorty affirmed on 20-6-1954. In that petition before the Arbitrators, respondent Chakravorty calls himself the first party, the Insurance Company the second party, and the Government the third party. The petition is headed "re : payment of claims of the first party under Policy No. 1/1/2175 (Fire) and Policy No. 1/1/1854 (Fire) of the second party". Expressly, therefore, respondent Chakravorty in that statement was claiming payment under those two policies. After setting out the facts leading to the destruction of the jute by fire, respondent Chakravorty in para 11 of this petition before the Arbitrators states.

"So the claims of the first party For the full amount of the aforesaid Fire Insurance Policies are truly and justly payable by the second party to the first party".

In that paragraph respondent Chakravorty also claimed damages for suspension of business, rents of the godowns and payment of interest to the Govt. loan and the wages For the employees For

the delay caused by what he describes as 'willful laches and deliberate default of the Insurance Company'. These incidental claims amounting to Rs. 9,235-8-0 as particularized in his petition were abandoned except for a small sum by agreement of parties before the Arbitrators and need not be considered. In that para 11 the respondent Chakravorty also claims that the Insurance Company must pay to him the costs of this arbitration.

14. What requires to be emphasised in para 11 of this petition of respondent Chakravorty before the Arbitrators is that he made a distinct claim before the Arbitrators that the Insurance-Company was liable to pay the full amount of the loss which was set out there and what was expressly submitted to the Arbitrators was not merely the question of quantum of loss or damage but also the liability to pay the same and who should pay to whom. In answer to this petition the Insurance Company filed their statement before the Arbitrators. Not a word was said there that the Arbitrators had no jurisdiction to decide the question of liability to pay which looms so large as an objection today on this application. Analyzing this insurance Company's answer before the Arbitrators, certain facts become clear beyond doubt. The main objections taken are, first, that the claim before the Arbitrators is bad for misjoinder and non-joinder of the Union of India and, therefore, was not maintainable and should be rejected; secondly, that the amount of loss was only Rs. 853-4-0 as stated in the survey report; and, thirdly, that the Arbitrators had no jurisdiction to deal with the incidental claims amounting to Rs. 9,235-5-0.

It will thus be seen that although in this answer of the Insurance Company before the Arbitrators, the Company takes a point of jurisdiction in respect only of the incidental claims for Rs. 9,235-5-0 yet it does not take what it now calls the more important point of jurisdiction that the Arbitrators cannot decide as to who is liable to pay the amount and to whom. In fact, the Insurance Company joins issue before the Arbitrators as to how much is payable by them, far from taking the point that its liability to pay cannot at all be determined by the Arbitrators. What the Insurance Company says in para 14 of its answer is, "It denies liability to pay anything in excess of Rs. 853-4-0 to the parties as stated in the said survey report and the second party was always ready and willing to pay the same to the respective parties". If the point of liability to pay was beyond the jurisdiction of the Arbitrators, then the Insurance Company should not have joined issue on this point but should have taken the point that the Arbitrators had no jurisdiction whatever to decide it.

15. Then again it is said that the non-joinder of the Union of India covers this point. Now as I have said, the Insurance Company did take the point of non-joinder of the Union of India." That is taken in paras 1 and 2 of the Insurance Company's answer before the Arbitrators. It is therefore, necessary to examine this contention. In the first place, there is no substance or merit in this contention because both in the statement of respondent Chakravorty before the Arbitrators as well as in the Insurance Company's answers thereto before the Arbitrators, Government of India was expressly a party described as a third party. What the Government of India did, and I think very rightly, was that they did not appear before the Arbitrators For the simple reason that respondent Chakravorty was already represented. Although the Government of India did not

appear before the Arbitrators. It is clear from the records that it was kept informed and was under notice at every stage what was happening. They were asked to appoint an Arbitrator and they did not do so. That was before the arbitration started. In fact, the Government of India was a consenting party in the order dated 21-12-1953 extending time for making the award by the Arbitrators. When the Arbitrators disagreed, both the Arbitrators intimated that fact to the Government of India that they had disagreed and that they were referring the matter to the Umpire. Then again when the Umpire made his award he intimated by his letter dated 22-3-1954 to the Government of India that he had made and published his award. The Government of India did not intervene at any stage which they could have done if they wanted to. Thereafter the Umpire also gave notice not only to the two respondents but also to the Government of India by his letter dated 9-4-1954 that he had sent the award with all documents to the Registrar of this High Court for taking necessary steps for filing the award. Then again the Registrar also gave notice to both the respondents as well as the Government of India that the award of the Arbitrators had been filed on 3-5-1954 and that the Court would proceed to pronounce judgment on such award on 14-6-1954. This notice was given by the Registrar on 3-5-1954. No opposition from the Government of India came at any stage of the proceedings. After all, the point that under the terms of Policy No. 1854 the amount was payable both to the Union of India and the respondent Chakravorty and that it should not be paid only to respondent Chakravorty, in its ultimate analysis means that respondent Chakravorty could not give a valid discharge from the liability under the Policy. As I have shown from the facts of this case, this could only be disputed by the Union of India that the money should not be paid to respondent Chakravorty, but the Union of India takes no such objection even to this application to which it is a party and, therefore, payment by the Insurance Company of the amount awarded to respondent Chakravorty alone will be a sufficient discharge For the Insurance Company to which no objection can be taken now by the Union of India. For these reasons, I am of the view that there is no substance or merit in the contention that the arbitration proceedings or the proceedings before the Umpire were bad for non-joinder of the Union of India. The fact remains that the Union of India was joined but it did not take any part in such proceedings. Then the question arises that the Insurance Company by its answer before the Arbitrators having raised the issue of nonjoinder of the Union of India submitted thereby that very point for decision by the Arbitrators or the Umpire.

16. Taking, therefore, respondent Chakravorty's first statement before the Arbitrators and the Insurance Company's answers to such statement it is clear to my mind that they together submitted to the Arbitrators the question of liability to pay and that who should pay to whom although such question of liability was not within the scope of the original Arbitration Clause in the Insurance Policy. Submission to arbitration in such cases is not necessarily contained in the Policy itself but may easily be enlarged, and in fact was enlarged in the facts of this case, by inclusion of this question of liability to pay in the statements before the Arbitrators. Both these statements, one by respondent Chakravorty and the other by Insurance Company, being' in writing before the Arbitrators together constitute a valid arbitration agreement within the meaning of Section 2(a), Indian Arbitration Act. The award, therefore, as quoted above, must

have determined by necessary implication that the Union of India had no liability because it makes no award against it and because it held that the only liability to pay was that of the Insurance Company and that the right to obtain such payment belonged to respondent Chakravorty and not to the Union of India.

17. Mr. De realized this difficulty that perhaps respondent Chakravorty's statements before the Arbitrators and the applicant company's answers thereto before the Arbitrators together might constitute further submission to the Arbitrators of the question of the liability to pay and tried to repel that effect by relying on a particular recital in the Award which says

"Whereas differences arose between the said Jyoti Krishna Chakravorty and the National Fire and General Insurance Co. Ltd. as to the amount of any loss or damage under the said two policies".

Mr. De's reliance on this recital in the Award was to support his contention that only the differences about the amount of loss was submitted to the jurisdiction of the Arbitrators and that is how the Arbitrators themselves and the Umpire later understood their own scope and ambit, notwithstanding the fact that respondent Chakravorty's statement before the Arbitrators and the insurance company's answer thereto included also the liability to pay as one of the points for decision by the Arbitrators. It is a technical point and if that recital stood by itself Mr. De's point of technicality would have acquired a considerable force. But Mr. De's difficulty is that this is not the only recital in the Award of the Umpire. This technicality is met therefore by other technicalities. I will briefly discuss the other recitals to show their total effect on this point. The first material recital runs in these terms :

"And whereas on the 30th day of August 1952 a fire occurred in the premises in the said policies mentioned and claims were thereupon made against the said insurance company For the alleged loss and damage by the said fire". This recital immediately precedes the recital on which Mr. De relied. Now, this recital expressly states that claims have been made against the insurance company for loss and damage. Then follows the recital on which Mr. De relied which spoke only of "the differences" as to the "amount of any loss or damage" quoting almost the language of the arbitration clause. But then this was followed again by another material recital on this point which is in these terms :

"And whereas the said disputes and differences were referred to two duly appointed Arbitrators".

Mark the words here "disputes and differences". This is not merely the differences as to the amount. The recital could easily have said "the said difference as to the amount" as being referred to the two Arbitrators. But it does not do so. It includes the other word "disputes". The first recital which I have quoted as material shows one of the disputes to be the claim made against the insurance company for loss and damage. I am therefore unable to hold that the

recitals in this case are such as include only the quantum of loss and not the question as to who was liable to pay the amount. It is needless to add that recitals will not control the operative part of an Award unless there is ambiguity. The operative part of the Award as quoted elsewhere in the judgment, far from being ambiguous, is explicit and clear beyond any doubts. Reading therefore the Award as a whole and reading all the recitals together, I am satisfied that the question of liability to pay was also a submission before the Arbitrators and the Umpire.

18. For these reasons I hold that the statement in writing of respondent Chakravorty before the Arbitrators and the Insurance Company's own written answer before the Arbitrators to such statement together constitute a further Arbitration Agreement valid within the meaning of Section 2(a), Arbitration Act apart from the Arbitration Clause in the Policy itself and that such agreement submitted the question of who was liable to pay whom to the jurisdiction of the Arbitrators and the Umpire and the Umpire rightly decided it.

19. The last point relates to the lumping of the costs. This point was not pressed by Mr. De appearing For the applicant insurance company. It is, however, necessary to state my decision on this point. On questions of costs, if the arbitration clause itself makes any provision then that provision is supreme and effect should be given to it unless the parties have altered the same by further agreement. Now, in this case, the arbitration clause says :

"The costs of the Reference and of the Award shall be in the discretion of the Arbitrators or Umpire making the Award".

Costs therefore were committed to the discretion of the Arbitrators or the Umpire in this case. As I have already said, the Arbitrators differed without making any award at all and referred the whole matter to the Umpire. They did not express themselves at all on costs. The Umpire in his award awarded Rs. 6,582/- "as the costs of the Reference and this my Award". To my mind, he was competent to make this Award because he sat with the Arbitrators throughout the proceedings and therefore he was quite a competent judge to say how much costs should be allowed not only of "the Reference" but also "this my Award". For him it was one continuous process beginning with the Arbitrators with whom he was sitting and ending with his award. That being so there was no need for him to say how much he allowed For the costs while he was sitting with the Arbitrators and how much thereafter. Having regard to the terms of the Arbitration clause in this case, I am of the opinion that this Award of costs is unexceptionable. This point of objection was inspired perhaps by the observations of Alberstone, C.J. *in Re : 'Gilbert v. Wright'*, and by the observations made in the case of *'Robinson v. Henderson'*, and Section 276 (B).

In the former case it was stated that an Umpire should in his Award separate the sum which he awards to himself for his charges from the sum which he awards to the Arbitrators for their charges. Lord Alverstone observes :

"As a matter of principle an Arbitrator ought not to act in such a way as to deprive a person of his right to challenge the charge which he made for his services".

In the latter case, the Award directed that a lump sum should be paid to the Arbitrators for "preparing the agreement of reference and their Award, and for their charge, trouble and attendance upon a reference and arbitration and certain costs". It was held that the Award was void for uncertainty on the ground that it did not define the particular allowance to be paid to the Arbitrators. These principles have no application to the present case. This is not a question of Arbitrators' fees or remunerations. There is no uncertainty in this case before me for which the award of costs can be said to be vitiated. The Arbitrators in this case made no Award at all. They only differed and the whole matter came up before the Umpire. The Umpire sat with the Arbitrators all along the reference, and therefore there was nothing for him to allocate and separate as to how much was the cost before the Arbitrators only and how much before him. So far as his umpirage is concerned, it covered the entire process from when he sat with the Arbitrators till the time he made the Award. The whole of this process was Reference before him on the facts of this case. It is necessary to emphasize here that all the hearing took place before the Arbitrators with the Umpire sitting with them and when the hearing had concluded before the Arbitrators and the Arbitrators differed and referred the matter to the Umpire, the Umpire thereafter had no further sitting or hearing but relied upon the Reference that he heard and listened to while he sat with the Arbitrators so that his Award was the result as much of the hearing that he had while the matter was going on before the Arbitrators. Therefore, having regard to the express language of the Arbitration agreement that the "costs of the Reference and of the Award... shall be in the discretion of the Umpire making the Award", the lump sum charge of costs that the Umpire made in this case was not only justified but was the only feasible course because no allocation or separation of costs at different stages of the proceedings could possibly be made in such a situation. I cannot therefore say that the Umpire in this case who had complete discretion in the matter by the express terms of the arbitration clause, exercised such discretion wrongly. I therefore also uphold his Award on costs.

20. This disposes of all the objections in this application. As each of the objections has failed, I dismiss this application with costs.

Application dismissed.

¹(1904) 20 TLR 164

²(1817) 6 M