

(1967) 09 DEL CK 0006
In the Delhi High Court
Case No : Civil Revision No. 5 of 1966

Charanjit Lal Sodhi

APPELLANT

Vs

Caledonian Insurance Company Ltd. and Another

RESPONDENT

Date of Decision : 08-09-1967

Acts Referred:

Citation : (1969) ACJ 12

Hon'ble Judges : T.V.R. Tatachari, J

Bench : Single Bench

Advocate : Vijay Kishan, for the Appellant; Harish Chandra and Suresh Chandra, for the Respondent

Final Decision : Dismissed

Judgement

T.V.R. Tatachari, J.—This Civil Revision was filed against the judgment of Mr. M. L. Jain Additional District Judge, Delhi, dated 30-7-1966, in Miscellaneous Civil Appeal No. 20 of 1966, by which he confirmed the order of Mr. R. K. Synghal, Sub-Judge, 1st Class Delhi, dated 1-2-1966 passed in an application under Sections 33, 5, 11 and 13, of the Arbitration Act;

2. The facts which have given rise to this Revision may be briefly stated:

The Petitioner herein, Charanjit Lal Sodhi had taken a policy of insurance from the 1st Respondent herein, Messrs. Caledonian Insurance Company Ltd., New Delhi on 30-8-1963 to cover the risk of theft of the personal effects of the Petitioner. According to the Petitioner, he lost goods worth Rs. 10,000/- in Bombay on 7.1.1964. He claimed the said amount of Rs. 10,000/- under the policy of insurance from the 1st Respondent. According to the 1st Respondent, the claim was a false one and the Petitioner had not lost any goods. The 1st Respondent, therefore, repudiated the claim of the Petitioner on 19.6.64. Thereupon the Petitioner sent a letter, dated 17-10-1964 to the 1st Respondent informing the latter that he had appointed Mr. D. L. Malhotra, Advocate, Respondent No. 2 as a sole arbitrator to adjudicate the dispute between the

Petitioner and the 1st Respondent replied to the Petitioner that under condition No. 12 of the insurance policy in question, the matter could not be referred to the arbitrator.

3. The Petitioner then filed an application for leave to sue in forma pauperis for the recovery of the amount claimed by him. However, the application for permission to file the suit in forma pauperis was dismissed as withdrawn, on 9-11-1964. After the said withdrawal, the Petitioner, by a letter dated 8-1-1965, informed the 1st Respondent that in furtherance of his earlier letter dated 17-10-1964 Mr. D. R. Malhotra (Respondent No. 2 herein) was appointed the sole arbitrator, and that he would proceed with the arbitration. It was at that stage that the 1st Respondent herein filed an application out of which this civil Revision has arisen, in the Court of the Subordinate Judge, 1st Class, Delhi under Sections 33, 5, 11 and 13 of the Arbitration Act. In that application, the 1st Respondent contended that condition No. 12 of the insurance policy contemplated a reference to arbitration only if any difference arose as to the amount of any loss or damage, but did not contemplate any reference to arbitration when the claim was repudiated in its entirety, and the difference between the parties was thus about the claim itself. The 1st Respondent also contended that it was not open to the Petitioner to resort to arbitration after the dismissal of the suit filed by him, and that the arbitrator, Mr. D. L. Malhotra, appeared as a counsel for the Petitioner in the aforesaid suit, and consequently could not act thereafter as a sole arbitrator. The 1st Respondent, therefore, prayed in his application that the reference to arbitration may be set aside, and that Mr. Malhotra may be directed not to act as an arbitrator.

4. The Petitioner resisted the said application and contended that condition No. 12 of the insurance policy would apply even when the claim itself was repudiated or disputed, and that Mr. Malhotra was competent to act as sole arbitrator.

5. On the above allegations, the learned Subordinate Judge framed 4 issues as under:

- (1) Whether there is a valid reference to the arbitrator?
- (2) Whether there was an agreement? If so, whether the same exists?
- (3) What is the effect of the previous suit filed by the Respondent?
- (4) Whether the arbitrator is interested in the Respondent?

6. On issue No. 1 the learned Subordinate Judge held that the reference was unilateral and was not, therefore, a valid reference. He also observed that this was conceded during the arguments by the Learned Counsel for the Petitioner. On issue No. 2 the learned Subordinate Judge took the view that since the 1st Respondent repudiated the entire claim, the dispute between the parties was as to whether the Petitioner had actually suffered any loss due to theft etc. and that such a dispute was not covered by condition No. 12 in the insurance policy. According to the learned Subordinate Judge, condition No. 12 applied only to a

dispute as to the amount of the loss or damage. On issue No. 3, the learned Subordinate Judge held that the withdrawal of the application for leave to sue in forma pauperis, was not a bar to the Petitioner's resorting to the arbitration clause, if he could otherwise do so. Lastly, on issue No. 4 the learned Subordinate Judge held that since Mr. Malhotra was counsel for the Petitioner in the previous suit filed in forma pauperis in respect of the same claim under the insurance policy, he was interested in the Petitioner, and therefore was not a fit person to be appointed as an arbitrator. In the result, Mr. D.L. Malhotra the arbitrator appointed by the Petitioner, was removed and the reference of the dispute to him for arbitration was set aside by the learned Subordinate Judge.

7. Against that judgment and order, the Petitioner preferred Miscellaneous Civil Appeal No. 20 of 1966 to the Court of the Additional District Judge Delhi. The learned Additional District Judge pointed out regarding issue No. 1 that no plea was taken by the 1st Respondent that the reference was unilateral, that the issue should not, therefore, have been framed, and that the finding of the trial Court on issue No. 1 has, therefore to be disregarded. As regards the scope of condition No. 12 of the insurance policy (issue No. 2) the learned District Judge agreed with the view taken by the learned Subordinate Judge. On issue No. 3, however, the learned Additional District Judge held that the factum on the Petitioner having brought a regular suit for recovery of the amount, and his having not insisted on a reference to the arbitrator of the dispute, amounted to a clear waiver of the right to refer the dispute to the arbitrator, impliedly. He, therefore, decided issue No. 3 against the Petitioner. On issue No. 4 the learned Additional District judge agreed with the view taken by the learned Subordinate Judge. In the result, the appeal was dismissed. It is against this judgment and order of the learned Additional District Judge that the present Civil Revision was referred to this Court.

8. Mr. Vijay kishan, the Learned Counsel for the Petitioner stated before me that he does not propose to contend under issue 4 that the arbitrator was not interested in the Respondent, and that in case his other contentions are accepted, any other arbitrator might be appointed. As already stated, issue No. 1 was not pursued even before the learned Subordinate Judge. Thus, only the points involved in issues Nos. 2 and 3 survive, and the Learned Counsel for the Petitioner addressed arguments only on the said two points.

9. The first contention of Mr. Vijay Kishan was that under condition No. 12 of the insurance policy, the claim of the Petitioner is required to be referred to arbitration even though the Respondent repudiated or denied the entire claim of the Petitioner. The relevant portion of condition No. 12 of the insurance policy runs as follows:

If any difference arises as to the amount of any loss or damage, such difference shall independently of all such questions be referred to 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, of whom one shall be appointed in writing by each of the parties within two calendar months after having been required so to do in writing by the other party. In case either party shall refuse or fail to appoint an arbitrator within two calendar months after receipt of notice in writing requiring an appointment, the other party shall be at liberty to appoint a sole arbitrator ; and in case of disagreement between the arbitrators the difference shall be referred for decision to an Umpire who "hall have been appointed by them in writing before entering on the reference and who shall sit with the arbitrators and preside at their meetings.

* * * *

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.

* * * * *

10. The contention on behalf of the Respondent was that condition No. 12 contemplates only a difference between the parties arising as to the amount of any loss or damage, and that when the difference between the parties is not merely as to the amount, but as to whether any loss or damage had actually occurred, condition No. 12 has no application, and no reference to arbitration can be made under the said condition. But this contention, in my opinion, overlooks or ignores the other part of condition No. 12, wherein it is provided that the difference between the parties as to the amount of any loss or damage shall independently of all other questions be referred to the decisions of an arbitrator, and that it shall be a condition precedent to any right of action or suit upon the policy that the award by the arbitrator, arbitrators or umpire regarding the amount of the loss or damage shall be first obtained. The words "shall independently of all other questions be referred" in the first part of the condition also show that the award as to the amount of loss or damage should be first obtained independently of all other points of difference between the parties. The condition No 12 has to be read and interpreted as a whole and in a harmonious manner. The first part of condition No. 12 extracted above provides for reference to arbitration regarding any difference as to the amount of any loss or damage, and such difference has to be referred to arbitration independently of all other questions. The second part of the condition No. 12 extracted above provides that an award regarding the amount of loss or damage should be first obtained as a condition precedent to any right of action or suit upon the policy. Reading the two parts together, the effect would be, in my opinion, that if any difference arises between the parties, the aggrieved party should first obtain an award regarding the loss or damage, and it is only after the said award is obtained, that the right of action or the right to file a suit regarding other differences between the parties, if any, would arise. Whereas in the present case, one of the parties disputes the entire claim and not merely the quantum of the loss on damage

alleged by the other party. The aggrieved party has still to obtain an award regarding the quantum of the alleged loss or damage, and then only resort to such legal action as might be open to him regarding the other differences between the parties. The question then is as to whether the arbitrator has also to, in such a case, go into the question as to whether there was any loss or damage at all, or whether he has to confine himself to a determination of the quantum of the loss or damage. Obviously, when one of the parties alleges that there was no loss or damage at all, i.e. that no loss or damage had occurred, the arbitrator has necessarily to decide the said aspect, and in case he comes to the conclusion that there was some loss or damage, he has to give his award regarding the quantum of the loss or damage. The consideration by him of the question as to whether any loss or damage had occurred, is only an earlier step in the process of the determination on the quantum of the loss or damage. In other words, the arbitrator has to decide and give his award both on the question as to whether there was any loss or damage, and the question as to the quantum of the loss or damage, if any. The words "if any difference arises as to the amount of any loss or damage" in the first part of condition No. 12 are wide enough to include a case of some loss or damage as well as a case of no loss or damage. Condition No. 12, therefore, in my opinion, covers a case like the present one

11. In *The Great American Insurance Co. Ltd. Vs. Bodh Raj, Westen, C.J. and Harnam Singh, J.* had to interpret a similar condition, and the learned Judge interpreted the condition in a similar manner and took the same view as the one taken by me above.

12. *Falshaw, C3.* also took a similar view on the interpretation of similar condition in *Great American Insurance Co. Ltd. Vs. Dina Nath,*

13. On the other hand, Mr. Harish Chandra, the Learned Counsel for Respondent relied upon the decision in *Newzealand Insurance Company v. Nagpal Hosiery Factory*. AIR 1955 P&H 133 A similar condition was construed in the said decision by Bhandari, C.J. and Dulat, J. and the learned Judges held that where the arbitration clause is confined only to differences touching the amount of loss or damages and does not extend to differences concerning the liability of the company, the question relating to the liability is not within the scope of the arbitration agreement. In that case an application u/s 20 of the Arbitration Act, praying that the agreement to refer the dispute to arbitration contained in an insurance policy, be filed in Court, the trial court directed that the question of loss or damage arising out of the policy should be referred to an arbitrator. The said decision of the trial Court was upheld on appeal by a learned single Judge of the High Court. Against that decision, a Letters Patent Appeal was filed. It was in that Letters Patent Appeal that the above mentioned view was taken by the Division Bench. In taking the view that the dispute which had arisen between the parties was not within the scope of the arbitration agreement, the learned Judges observed as follows:

There is a further reason also for holding that the arbitration agreement should not be filed in such a case, and that is that the Court would not be justified in referring the minor question of loss or damage to the arbitration and not taking any action whatever in regard to the major question of the liability of the company. It would also "be extremely inconvenient if a part of the dispute between the parties were to be litigated in Court and another part were to be decided by an arbitrator.

The above consideration seems to have weighed with the learned Judges in arriving at the conclusion that the dispute in that case was not within the scope of the arbitration clause. With great respect to the learned Judges, I am not able to agree with the view taken by them. As already stated, when the parties themselves make a provision in the arbitration clause that the reference to the arbitration regarding the amount of any loss or damage is a condition precedent for any right of action or suit upon the policy, it is not for the Court to refuse to refer the question of loss or damage to arbitration. As already stated by me above, the entire arbitration clause should be taken into consideration and a harmonious construction should be placed upon the words used in the clauses. Further the words in the condition are wide enough to include a case of some loss or damage as well as a case of no loss or damage. The learned Judges in the aforesaid decision did not consider the matter from that stand point.

14. The Learned Counsel for the Respondent also relied upon the decision in *The Eagle Star and British Dominions Insurance Company Vs. Dinanath and Hemraj*, . In that case also a clause, similar to the one in the instant case had to be construed. The learned Judges of the Bombay High Court took the view that the arbitration clause in the insurance policy did not cover the dispute in that case as the insurance company, inter alia, repudiated the claim in its entirety. The learned judges relied upon the decision in *Jureidine v. National British and Irish Millers Insurance Company Ltd.* 1915 A.C. 499 In *Jureidine's* case, the repudiation was to the effect that the contract itself was void, and consequently it was held that the insurance company having repudiated the contract itself, could not again rely upon the arbitration clause in the contract. In the Bombay case, as in the instant case, with which I am concerned, the insurance company did not repudiate liability on any ground which "went to the root of the contract, and did not contend either that the contract was never entered into or that it was void or illegal or was vitiated by fraud, etc. The company merely pleaded that no loss or damage had occurred, and that the case was not covered by the terms or condition in the policy. The learned Judge of the Bombay High Court overlooked this aspect, and their decision, in my opinion, cannot, therefore, be of any guidance on the point in question.

15. I am, therefore, of the opinion that the lower courts erred in holding that the condition in the insurance policy does not cover the dispute that has arisen between the parties.

16. On the views expressed by me regarding the decisions of the Division Benches reported in AIR 1955 P&H 133 and *The Eagle Star and British Dominions Insurance Company Vs. Dinanath and Hemraj*, , the proper course would be to refer the matter to a larger Bench. But, it is needless to adopt that course in the view I am taking on the question of interference in Revision u/s 115 of the Code of Civil Procedure, which is considered in the last paragraph.

17. The next contention of Mr. Vijay Kishan was that the lower Appellate Court erred in holding that the filing of the petition for leave to sue in forma pauperis and the withdrawal thereof by the Petitioner herein amounts to a waiver of the right to refer the dispute to arbitration under condition No. 12 in the insurance policy. For a proper appreciation of this contention, a few facts have to be stated. The Petitioner filed an application for leave to sue in forma pauperis for the alleged claim. Notice was given to the Respondent, and the Respondent company filed its counter-affidavit opposing the granting of the leave. It was at that stage that the Petitioner withdrew the application, and the petition, was dismissed as withdrawn. The question is as to whether the said filing of the application to sue in forma pauperis and the withdrawal thereof constitutes a waiver of the right of the Petitioner to refer the dispute in question to arbitration. It is true that a right to make a reference to an arbitrator can be waived by any of the parties. But, to constitute waiver, there must be a clear and unequivocal expression or conduct of the party giving up or waiving his right to refer the dispute to arbitration. In my opinion, the filing of the application in forma pauperis and the withdrawal of the same does not show or necessarily imply that the Petitioner had waived his right to refer the dispute to arbitration. It may be noted that he had originally written a letter to the Respondent that he had appointed an arbitrator. The Respondent replied to him that the dispute was not one which could be referred to arbitration. The Petitioner thereupon without withdrawing or cancelling the appointment of the arbitrator, filed the application for leave to sue in forma pauperis, and withdrew the same subsequently. He, thereafter, wrote to the Respondent that the arbitrator appointed by him would proceed with the arbitration. It was then that the Respondent filed the application u/s 33 of the Arbitration Act for setting aside the reference. From the said sequence of events or steps taken by the Petitioner, it cannot be said that they show or necessarily imply that he had waived his right to refer the dispute to arbitration.

18. But, Mr. Harish Chandra, the Learned Counsel for the Respondent contended that even if the lower Court was wrong in its interpretation of the relevant condition in the insurance policy and on the question of waiver, it cannot be said to have exercised jurisdiction not vested in it or exercised jurisdiction with material irregularity to call for interference u/s 115 of the Code of Civil Procedure, with an order of the lower Court on the ground that it was erroneous or contrary to law. In the present case, the application before the lower Court was for the super-cession or setting aside of the reference to arbitration. The lower Courts, on a misconstruction of the condition in the insurance policy, and on an erroneous view that the Petitioner herein had waived his right to refer the

matter to arbitration, superceded the reference to arbitration. A civil Court can determine the validity or the effect of an arbitration agreement u/s 33 of the Arbitration Act. The lower Courts, had, therefore, jurisdiction to decide the question as to whether the reference could be made under condition No. 12 of the insurance policy or not. It cannot, therefore, be said that the lower Courts exercised jurisdiction not vested in them or acted with material irregularity in exercising their jurisdiction. Though they erred in their interpretation of the condition in the insurance policy and on the question of waiver, as held by me above, they cannot be said to have exercised jurisdiction which was not vested in them or acted with material irregularity in the exercise of their jurisdiction. Therefore, even though I am of the view that the lower Courts erred in their conclusions on the two questions involved in the case, I cannot but dismiss the Revision Petition, as there is no ground to interfere with the orders of the lower Courts u/s 115 of the Code of Civil Procedure. The Civil Revision is accordingly dismissed. In the circumstances of the case, I make no order as to costs.