
(1991) 02 GAU CK 0010
In the Gauhati High Court
Case No : First Appeal No. 50 of 1984

New India Assurance Co. Ltd. and Another	APPELLANT
Vs	
Nathmal Bhajanka and Others	RESPONDENT

Date of Decision : 05-02-1991

Acts Referred:

Arbitration Act, 1940 — Section 36

Citation : (1992) ACJ 276

Hon'ble Judges : B.P. Saraf, J

Bench : Single Bench

Advocate : G.K. Talukdar and A.K. Choudhuri, for the Appellant; P.G. Barua and D. Goswami, for the Respondent

Judgement

B.P. Saraf, J.—This appeal by the defendant insurance company is directed against the judgment and decree of the Assistant District Judge, Jorhat decreeing the suit of the plaintiff for recovery of compensation on account of damage to his vehicle which was covered by an insurance policy with the defendant-appellant.

2. The case of the plaintiff, briefly, was that his vehicle, a truck bearing registration No. ASZ 5143, met with an accident on 28.1.1973 and was damaged. The said vehicle was insured with the defendant-appellant. The plaintiff preferred claim but despite several requests and demands the insurance company did not take any action. Under the circumstances, the plaintiff, after giving proper notice to the insurance company, got the vehicle repaired and took delivery of the same on payment of repairing charges amounting to Rs. 21,021.53. The plaintiff also approached the insurance company for arbitration but as it failed to take any effective step to settle the matter by arbitration in terms of the arbitration clause in the insurance policy, the plaintiff filed the suit for recovery of a sum of Rs. 57,995.52 comprising of a sum of Rs. 21,021.53 by way of actual damage to the vehicle, a sum of Rs. 25,500 as compensation for loss of income suffered by him on account of delay in taking delivery of the repaired vehicle by 85 days which, according to him, was caused by the inaction

of the insurance company and interest pendente lite, costs etc.

3. The case was contested by the defendant insurance company. One of its main objections was that in view of the arbitration clause in the policy of insurance, which required reference of dispute to arbitration and made the making of an award a condition precedent for right of action, the suit filed by the plaintiff before making of the award was not maintainable.

4. The learned trial court did not accept the aforesaid contention. On consideration of the facts and circumstances of the case, the trial court exercised its power u/s 36 of the Arbitration Act and dispensed with the arbitration clause and proceeded with the trial. On merits, the learned trial court found that the plaintiff had succeeded in proving the cost of repairs of the damaged vehicle which amounted to Rs. 21,021.53. It was observed that there was no denial by the defence that the aforesaid amount was not paid by the plaintiff to the firms mentioned in the plaint, namely, M/s. Jesraj Jiwanram Pvt. Ltd. (Rs. 16,571.53) and M/s. Viswakarma Body Builders (Rs. 4,450). So far as the compensation for loss of income on account of delay in taking delivery of the repaired vehicle is concerned, the trial court rejected the objection of the insurance company to the effect that the plaintiff was not entitled to any such compensation in view of the specific clauses in the insurance policy referred to as "Clause M.V.C and "Section 1, Loss or Damage". It, however, held the claim of the plaintiff at the rate of Rs. 300 per day to be higher and allowed compensation at the rate of Rs. 150/- per day for 85 days which amounted to Rs. 12,750/-. The court also awarded interest at the rate of 7 per cent from the date of institution of the suit till realisation of the decretal amount. The insurance company has come up in appeal before this Court.

5. Two contentions were advanced by the learned Counsel for the appellant, Mr. G.K. Talukdar. Firstly, it was contended that under condition No. 8 of the insurance policy making of an award was a condition precedent for accrual of cause of action against the insurance company and unless there was an award, no suit was maintainable. The second contention related to award of compensation for loss of income on account of delay in taking delivery of the vehicle from the repairer. It was submitted that the plaintiff is not entitled to get any decree on account of such consequential loss in view of specific clause in the insurance policy prohibiting such claim.

6. The relevant condition in the insurance policy is condition No. 8, which reads as follows:

8. All differences arising out of this policy shall be referred to the decision of an Arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single Arbitrator, to the decision of two Arbitrators, one to be appointed in writing by each of the parties within one calendar month after having been required in writing so to do by either of the parties or in case the Arbitrators do not agree, of an Umpire appointed in writing by the Arbitrators

before entering upon the reference. The Umpire shall sit with the Arbitrators and preside at their meetings and the making of an award shall be a condition precedent to any right of action against the company. If the company shall disclaim inability to the insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained then the claim shall for all purposes to be deemed to have been abandoned and shall not thereafter be recoverable hereunder.

(Emphasis supplied)

7. The submission is that in view of the aforesaid clause the suit instituted by the plaintiff before making of the award was not maintainable and ought to have been dismissed outright by the court below. In support of the submission the learned Counsel relied on a decision of the Kerala High Court in *The Vanguard Fire and General Insurance Company Limited, Madras-I Vs. N.R. Sreenivasa Iyer, Trivandrum*, and a decision of the Calcutta High Court in *The New Great Insurance Company of India Ltd. Vs. United Equipments and Stores (Pvt.) Ltd.*,

8. In reply, Mr. P.G. Barua, counsel for the respondents, submits that such a clause which purports to oust the jurisdiction of the court cannot be given effect to. The further submission of learned Counsel is that in no event such a clause can be construed as absolute bar to the power of the court to entertain a suit in all cases. In support of this submission reliance is placed on Section 36 of the Arbitration Act, 1940 which vests a discretionary power in the court to dispense with such a condition and entertain the suit.

9. I have considered the rival submissions of the counsel for the parties. A clause like the one referred to above which makes making of an award a condition precedent to the right of action is not uncommon or unknown in the field of contract. Such clause has also been subject-matter of judicial determination in very many cases. The leading case on the subject is *Scott v. Avery* (1856) 5 HLC 811, where the validity of such a clause was upheld. Such provision in the agreement is often termed as a "Scott v. Avery clause". Referring to such a clause, in *Heyman v. Darwins Ltd.* 1942 AC 356 Lord Wright observed (at p. 377) as follows:

contract, either instead of, or along with, a clause submitting differences and disputes to arbitration, may provide that there is to be no right of action save on the award of an arbitration followed by an award a condition to any legal right of recovery on the contract. This is a condition of the contract to which the court must give effect unless the condition has been "waived", that is, unless the party seeking to set it up has somehow disentitled himself to do so.

10. In *The Vanguard Fire and General Insurance Company Limited, Madras-I Vs. N.R. Sreenivasa Iyer, Trivandrum*, on consideration of a large number of decisions on the subject, the Kerala High Court held that if the making up of an award is a condition precedent for the accrual of a cause of action to the plaintiff,

then that condition has to be fulfilled before a suit can be instituted. To the same effect is the decision of the Calcutta High Court in *The New Great Insurance Company of India Ltd. Vs. United Equipments and Stores (Pvt.) Ltd.*,

11. However, the question that arises for consideration is whether a clause making an award of the arbitrator as condition precedent commonly known as Scott v. Avery clause, can be said to be an absolute bar to the institution of a suit or such a clause only puts fetters on the right of the parties to institute a suit in the court which can be removed by the court in appropriate cases. To find a correct answer to this question, it may be appropriate to refer to Section 36 of the Indian Arbitration Act which gives discretion to the court in suitable cases to order that the Scott v. Avery clause in any agreement shall cease to have effect. Section 36 reads as follows:

36. Power of court, where arbitration agreement is ordered not to apply to a particular difference, to order that a provision making an award a condition precedent to an action shall not apply to such difference.-Where it is provided (whether in the arbitration agreement or otherwise) that an award under an arbitration agreement shall be a condition precedent to the bringing of an action with respect to any matter to which the agreement applies, the court, if it orders (whether under this Act or any other law) that the agreement shall cease to have effect as regards any particular difference, may further order that the said provision shall also cease to have effect as regards that difference.

12. A plain reading of this section makes it clear that the effect of a clause which makes an award a condition precedent to the bringing of an action with respect to any matter can be nullified by the court by an order passed under this section. The court, thus, has very wide power u/s 36 to order that an arbitration agreement shall cease to have effect in relation to any dispute. It has also the power to order that any clause which operates as a condition precedent to the bringing of an action with respect to any matter to which the agreement applies, shall likewise also cease to have effect. This section, in effect, gives the court a discretion, in suitable cases, to treat such a clause as mere arbitration clause. In *The Vanguard Fire and General Insurance Company Limited, Madras-I Vs. N.R. Sreenivasa Iyer, Trivandrum*, also it was held by the Kerala High Court (at p. 276) as follows:

Under Section 36, no doubt, it is open to the court to set aside the conditions in the agreement as to the operation of the Scott v. Avery clause. If the court were to pass an order dispensing with that clause it is open to the court to entertain the suit or proceed with it as if the provision for arbitration were only a collateral one....

13. Considering the various judgments referred to above and the provisions of Section 36 of the Arbitration Act, I am of the opinion that a Clause like the Scott v. Avery clause does not oust the jurisdiction of the court. It only puts fetters on the right of a party to the agreement to institute a suit until the condition

precedent is fulfilled. This position is clear from Section 36 of the Act which empowers the court to order that such a clause shall cease to have effect in particular cases. It appears that the legislature has also made it clear that *Scott v. Avery* clause is neither an absolute bar to the jurisdiction of the courts to entertain a suit nor it can have the effect of ousting the jurisdiction of the courts. Such a clause, in effect, only puts fetters on the right of the parties to the agreement to institute a suit, which, in appropriate cases, can be removed by the court by passing an order u/s 36 of the Act and in that event a suit shall be maintainable despite the existence of such a clause in the agreement.

14. In the instant case, the admitted position is that the trial court found that it was due to inaction on the part of the insurance company that the difference could not be decided by arbitration for long time and on consideration of the entire facts and circumstances of the case, exercised its power u/s 36 of the Arbitration Act and for ends of justice dispensed with the arbitration clause. In my opinion, the aforesaid action of the trial court, in view of the facts and circumstances of the case, is just and proper and cannot be assailed. In that view of the matter, the court having passed an order u/s 36 of the Act, the suit was maintainable. The contention of the learned Counsel for the appellant in this regard, therefore, is not tenable.

15. The next contention of the learned Counsel for the appellant is that the learned trial court was not justified in decreeing a sum of Rs. 12,750/- by way of compensation at the rate of Rs. 150/- per day for 85 days on account of loss of income suffered by the plaintiff due to delay in taking delivery of the repaired vehicle. It is submitted that such loss, even if any, is consequential loss and the plaintiff is not entitled to get any compensation on that account in view of the clear provision in the insurance policy prohibiting any such claim.

16. I have considered the submission and perused the insurance policy. Also heard the learned Counsel for the respondents. I am satisfied that the plaintiff is not entitled to get any decree for an amount of Rs. 12,750 being loss of income due to delay in taking delivery of the vehicle from the repairer. That portion of the decree, therefore, shall stand modified. So far as the balance part of the decree is concerned, there does not appear to be any serious dispute between the parties. The claim appears to have been proved by the plaintiff to the satisfaction of the court. I do not find any justification to interfere with the same. That part of the judgment and decree is, therefore, affirmed. As a result the decretal amount is reduced from Rs. 37,745.52 to Rs. 24,994.52. Subject to the aforesaid modification, the judgment and decree are affirmed.

17. In the result, the appeal is partly allowed. I make no order as to costs.