

(1964) 05 CAL CK 0013
In the Calcutta High Court
Case No : Award Case No. 5 of 1961

New India Assurance Co. Ltd.

APPELLANT

Vs

Dalmia Iron and Steel Ltd.

RESPONDENT

Date of Decision : 19-05-1964

Acts Referred:

Arbitration Act, 1940 — Section 30, 33
Evidence Act, 1872 — Section 115

Citation : AIR 1965 Cal 42

Hon'ble Judges : S.P. Mitra, J

Bench : Single Bench

Advocate : Amal C. Sirkar, for the Appellant; A.C. Bhabra, for the Respondent

Final Decision : Dismissed

Judgement

S.P. Mitra, J.—This is an application for setting aside the award of an umpire. The petitioner took, out an Insurance Policy from the New India Assurance Co. Ltd. in respect of an International Harvester or Motor Tractor Crane. The Policy was issued on June 4, 1959. On December 19, 1959, the petitioner informed the Insurance Co. that the Harvetser had met with an accident. The claim forms were sent by the Insurance Co. and were submitted by the petitioner duly filled in There were disputes and differences between the parties as to the quantum of loss suffered by the petitioner. The Insurance policy contained an arbitration clause. In terms of the arbitration agreement, the petitioner appointed its arbitrator. The respondent failed to appoint its arbitrator within time. An application was made to this Court and ultimately, through the intervention of the. Court, another arbitrator was appointed. The two arbitrators thereupon selected their umpire. The present application is directed against the umpire's award. The umpire, it appears, has awarded:

(a) Rs. 12,200/- on account of costs of repairs;

(b) Rs. 16,500/- in respect of the claim made in paragraph 17 of the Statement

of Claim; and

(c) Rs. 11,300/- for costs of and incidental to the reference,

2. The award of Rs. 16,500/- arises out of a claim for hiring cranes to replace the damaged crane while the sanction for repairs was being withheld by the insurer.

3. Mr. A. C. Sircar, learned counsel for the petitioner, has urged before me that this award of Rs. 16,500/- should never have been made by the umpire. Firstly, this is an award with regard to a dispute which never arose before reference to arbitration, and, secondly under the policy of insurance (Section I), the Company had no liability for consequential damages.

4. Learned counsel for the respondent does not dispute that the claim arising out of hiring charges was made only in the Statement of Claim submitted to the arbitrator appointed by the insured, In other words, the dispute with respect to this claim did not arise before the single arbitrator entered into the reference. The same Statement of Claim, was also filed before the two arbitrators and the umpire subsequently. Learned counsel's main contention is that it is no longer open to the petitioner to object to the award of Rs. 16,500/- inasmuch as the petitioner allowed the claim to be raised before the arbitrators and the umpire without objection and participated in the adjudication of this dispute by the arbitrators and the umpire (vide paragraph 20 of the affidavit-in-opposition of Satish Chandra Gupta affirmed on the 20th April 1964).

5. My attention has been invited to the relevant documents in this connection. I find that the claim relating to hiring charges has been made in paragraphs 15, 16, 17 and 19 of the Statement of Claim. These paragraphs have been dealt with in paragraphs 9 and 13 of the counter-statement but no objection as to the jurisdiction, of the arbitrators or the umpire to entertain this claim has been taken.

6. Then on the 22nd July, 1961, issues were raised before the arbitrators and the umpire who were all sitting together and were settled. From paragraph 14 of the petition I find that the second issue was as follows: "Is the claimant entitled to claim the sum of Rs. 40,903.60 nP. as pleaded in paragraph 17 of the statement of claim?" There was no protest on behalf of the petitioner either as to the framing of Issue No. 2 or the determination thereof. Thereafter, I am told, evidence was led on behalf of both the parties and recorded by the arbitrators and the umpire. It was only on the 5th March, 1963, when arguments were being heard that learned counsel appearing for the Insurance Company for the first time submitted to the arbitrators and the umpire that the claim concerning hiring charges was not covered by the insurance policy. In fact this submission of learned counsel for the petitioner cannot be said to be a protest against the jurisdiction, but in fact was a defence on merits.

7. The position therefore is that the petitioner at no material time objected to the jurisdiction of the arbitrators or the umpire to investigate the claim made in

paragraph 17 of the Statement of Claim. There was no application to this Court either u/s 33 of the Arbitration Act as to whether the arbitrators or the umpire had jurisdiction to go into the matter. The question that arises for my consideration, therefore, is whether the petitioner should be allowed to agitate this matter on this application now that the award has been made.

8. The Judicial Committee observed in *Chowdhri Murtaza Hossain v. Mt. Bibi Bechunnissa*, 3 Ind App 209 at p. 220 (PC):

".....that the appellant, having a clear knowledge of the circumstances on which he might have founded an objection to the arbitrators proceeding to make their award, did submit to the arbitration going on; that he allowed the arbitrators to deal with the case as it stood before them, taking his chance of the decision being more or less favourable to himself; and that it is too late for him, after the award has been made, and on the application to file the award, to insist on his objection to the filing of the award,"

9. In *Macaura v. Northern Assurance Co, Ltd.* 1923 AC 619 the owner of a timber estate sold the whole of the timber thereon to a company in consideration to fully paid-up shares in the company. Subsequently he insured the timber against fire by policies effected in his own name with several insurance companies. The greater part of the timber was destroyed by fire. The owner sued the insurance company to recover the loss. But the actions were stayed and the matter was referred to arbitration in pursuance of the conditions contained in the policies. The claimant was the sole share-holder in the company and was also to a large extent a creditor of the company. The arbitrator held that the claimant had no insurable interest in the goods insured and disallowed the claim. The House of Lords held in this case (1) that the claimant had not either as share-holder or creditor any insurable interest in the goods and (2) that the claimant having allowed the point of insurable interest to be raised before the arbitrator without objection, it was not open to him to call in question the authority of the arbitrator to entertain it. In *Donald Campbell and Co. v. Jeshraj Giridharilal* AIR 1920 PC 123 a question arose as to defective appointment of a sole arbitrator. The Judicial Committee was of opinion that the defect (absence of notice u/s 9(b)) would have been fatal to the authority of the person appointed as sole arbitrator but for the fact that any objection on this head was waived by the party concerned, namely, the appellants. They had rested their case on their contentions as to the invalidity of any arbitration in the place in which it was held and they could not according to their Lordships of the Judicial Committee be permitted to rely on a defect in procedure which could have been remedied at once if they had raised the point.

10. In *Union of India (UOI) Vs. K.P. Mandal*, , the arbitration clause in a contract for execution of certain work by A with the Government of India prescribed that except as otherwise provided in the contract, all questions and disputes arising out of or relating to the contract would be referred to the arbitration of the Superintending Engineer of the Circle for the time being. Disputes arose between

the parties and the Government appointed one M as an arbitrator to adjudicate on the claim made by it against A and informed A about the "appointment. Both the parties knew that M was not competent to act as arbitrator according to the qualification laid down by the arbitration clause. A not only submitted to the arbitration of M. on the Government's claim but also put forward a counter-claim against the Government for adjudication by the same arbitrator; he took part in the proceedings from the beginning to the end; he agreed to extensions of time for filing the award; and when the award went against him sought to set aside the award on the ground, that M was not competent to act as arbitrator. Our Appellate Court (Chakravarti C. J. and Lahiri, J.) has held that the rule of estoppel binds A and prevents him from contending that M was not qualified under the terms of the agreement to arbitrate in the dispute.

11. All the cases cited above, establish the principle that if a party allowed "an arbitrator to proceed with the reference without objecting to his jurisdiction or competence, it would not be subsequently heard to say that the award should be set aside on the ground that the arbitrator was not competent to decide the dispute in question. In the instant case, as I have already pointed out, no objection was raised to the jurisdiction of the arbitrators and the umpire; and it is now being urged that the award with respect to hiring charges should not be allowed to stand. This contention of the petitioner, therefore, has to be overruled on grounds of waiver or estoppel or acquiescence or absence of protest or objection.

12. Secondly, whether or not the claim based on the hiring of a Harvester comes within the scope of the Insurance Policy is a matter of construction of the Policy itself which, to my mind, is within the province of the arbitrators and the umpire to decide. Reference may in this Connection be made to the case of *Willesford v. Watson*, reported in (1873) 8 Ch App 473. Here the lease of a mine contained an agreement to refer disputes between the lessors and three lessees to arbitrators or their umpire, pursuant to the provisions of the Common Law Procedure Act), 1854. The lessees sank a shaft, and through the shaft drew minerals from an adjoining mine. The lessors filed a bill to restrain the lessees from so doing. Two of the three lessees applied for an order to Stay proceedings in the suit, and that the matter might be referred to arbitration, It was held, inter alia, that the Court would not decide but would leave it to the arbitrators to decide "whether the matters in dispute between the parties were within the agreement to refer.

13. In the present application also, it seems to me that, it was for the arbitrators or their umpire to decide upon construction of the terms of the Policy of Insurance" whether the claim made in paragraph 7 of the Statement of Claim came within the scope of the Policy. If the arbitrators or their umpire have gone into the question and determined the same in a particular way, it is not open to this Court to disturb or interfere with that determination except, on the facts herein, in the case of an error of law apparent on the face of the record. The Judicial Committee in *Champsey Bhara and Co. v. Jivraj Balloo Spinning and*

Weaving Co. 50 Ind App. 324 at p. 331: (AIR 1923 FC 65 at p. 69) has explained that an error in law on the face of the award means, that you can find in the award or a document actually in-corporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. In the present case, no such problem has arisen. In the body of the umpire's award, for instance, there is no statement or indication as to how the relevant terms in the Policy of Insurance have been construed by him. If such a statement or indication was there, different considerations might have arisen.

14. Mr. Sircar, learned counsel for the petitioner, in his reply to the point of absence of objection contended that, this was not a case where the arbitrators or their umpire proceeded with the reference without any protest whatsoever. Learned counsel relies on the minutes of the 5th March, 1963, to contend that counsel for the Insurance Company pointed out to the arbitrators and their umpire that the claim in paragraph 17 of the statement of claim did not arise out of the policy of insurance. As I have already said this is not an objection to jurisdiction, But assuming that, it is such an objection it was made practically at the last stage of the proceedings when evidence had already been gone into and costs were incurred to a considerable extent for purposes of determination of Issue No. 2 raised in the proceedings. If objection is to be taken, in my view, it must be taken at the earliest possible opportunity or at any rate, at an early stage of the proceedings. Reference may in this connection be made to Russel on Arbitration, 17th Edition, at pp. 174 and 352. Failure to object at an early stage acts as an estoppel. It was observed by Mookerjee, J. in *Gurdeo Singh v. Chandrika Singh* ILR 36 Cal 193 at p. 208:

".....It is only when a Judge or Court has no jurisdiction over the subject-matter of the proceeding or action in which an order is made or a judgment is rendered, that such order or judgment is wholly void, and that the maxim applies that consent cannot give jurisdiction in all other cases, this objection to the exercise of the jurisdiction may be waived, and is waived when not taken at the time the exercise of jurisdiction is first claimed....."

15. Mr. Sircar has also argued before me that in this case there, was inherent lack of jurisdiction of the arbitrators or their umpire regarding the claim for hiring charges and such, consent or absence of protest or objection does not help the respondent at all. It is well settled that whether the arbitrator acts within his jurisdiction or not depends solely upon the clause of reference (vide 50 Ind App 324 at p. 332 : (AIR 1923 PC 66 a. In the instant case the arbitration clause appears to be fairly wide. It covers "all differences" arising out of this policy. I am therefore unable to accept the contention of learned counsel for the petitioner that so far as Issue No. 2 was concerned there was inherent lack of jurisdiction of the arbitrators or their umpire.

16. Learned counsel for the respondent has relied, on the case of *Player v. Anglo Saxon Insurance Association*, reported in (1930) 38 Lloyd's List LR at p. 62 for the

proposition that the umpire in this case has correctly awarded damages to respect of hiring charges of the insured. Having regard to the view I have taken in this matter, as to the other points involved in this application I do not express any opinion on this question.

17. For reasons aforesaid this application is dismissed with costs.