
(1990) 12 KL CK 0001
In the High Court Of Kerala
Case No : A.S. No. 267 of 1990

Rosamma Joseph

APPELLANT

Vs

United India Insurance Co. Ltd.

RESPONDENT

Date of Decision : 12-12-1990

Acts Referred:

Arbitration Act, 1940 — Section 2, 34, 36

Citation : (1991) 2 ACC 659 : (1991) ACJ 524

Hon'ble Judges : U.L. Bhat, J;T.V. Ramakrishnan, J

Bench : Division Bench

Advocate : P.G. Parameswara Panicker, for the Appellant; C.K. Syed Mohammed and M.P.M. Aslam, for the Respondent

Final Decision : Dismissed

Judgement

U.L. Bhat, J.—Plaintiff, owner of a lorry, filed a suit claiming Rs. 2,79,500/- from the insurer as compensation for damage caused to the lorry in an accident on 19.1.1984. Insurer raised various contentions seeking to absolve itself from the liability and also contended that the suit is not maintainable in law inasmuch as plaintiff had not obtained an award preceding the filing of the suit. The trial court upheld this contention and dismissed the suit as not maintainable. Hence this appeal.

2. Exh. B-1 is the insurance policy. Condition No. 8 of the policy states, inter alia, as follows:

If any difference shall arise as to the quantum to be paid under this policy being otherwise admitted such difference shall independently of 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....

(Emphasis added)

The condition further stipulates:

It is clearly agreed and understood that no difference or dispute shall be referable to arbitration, as hereinbefore provided, if the company has disputed or not accepted liability under or in respect of this policy.

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 on the amount of the loss or damage shall be first obtained.

(Emphasis added)

The trial court, on a consideration of condition No. 8, held that any dispute regarding quantum of money to be paid under the policy has to be referred for arbitration and it shall be a condition precedent to any right of action or suit upon the policy that the award by such arbitrator, arbitrators or umpire on the amount of the loss or damage shall first be obtained. Correspondence prior to the suit would show that insurer offered to pay compensation of Rs. 94,500/- on the basis of valuation made by the surveyor. But the plaintiff was not satisfied with the offer. Thus it is clear that prior to the suit there was dispute as to the quantum to be paid under the policy. Going by the terms of condition No. 8 of the policy plaintiff could not file a suit without obtaining an award from arbitrator, arbitrators or umpire. It is not the plaintiffs case that prior to the suit insurer had disputed or not accepted the liability under or in respect of the policy. Liability was accepted, but there was a dispute regarding the quantum of compensation payable.

3. The question is whether in the light of the above terms and conditions mutually agreed upon, the suit would be not maintainable. The decision of K.K. Mathew, J. (as he then was) in *Vanguard Fire & General Ins. Co. Ltd. v. Sreenivasa Iyer* 1963 KLT 415, is a direct authority to hold that the suit not preceded by an award is not maintainable. The learned Judge in that case dealt with an identical condition in the policy of insurance and held:

If the making of an award is a condition precedent for the accrual of a cause of action to the plaintiff, then that condition has to be satisfied before the plaintiff can acquire a cause of action; and if a suit is instituted before that, it is a good defence to the maintainability of the action itself. A distinction has always been made between cases where the arbitration and the award are made conditions precedent to the right of action itself and where they are merely collateral agreements. In the latter case if a suit is instituted in violation of the collateral agreement, the only consequence is that the suit will be liable to be stayed at the instance of the defendant u/s 34 of the Arbitration Act. But where a suit is instituted when the making of an award is a condition precedent to the accrual of a cause of action in favour of the plaintiff, before the making of the award, such a suit is also liable to be dismissed if a defence is taken to that effect, the reason being that the plaintiff has no cause of action, until the award is made. (Para 5)

XXX XXX XXX Defence put forward that the suit was not maintainable is perfectly legal and must succeed and that the defendant was entitled not only to have applied for a stay, but also to have demurred to the action as being premature and prayed for a dismissal of the same....The suit was not maintainable because the plaintiff had no cause of action until after an award has been made....It is also material that the defendant could have applied for stay, because that will not preclude the defendant from relying upon the defence which he has to the suit. It follows that the existence of such a clause quite apart from any right to stay the proceeding constitutes a defence to any proceedings brought before the publication of the award. (Para 19)

Going by the above observations it is clear that the suit filed without a preceding arbitration or award is bad for want of cause of action and would not be maintainable. We find that this proposition has been accepted in *Calcutta Insurance Ltd. Vs. Food Corporation of India and Others*, and *The New Great Insurance Company of India Ltd. Vs. United Equipments and Stores (Pvt.) Ltd.*, as also *Prataprai Manmohandas Vs. Sheo Narayan Balal and Co.*,

4. Learned counsel for the appellant placed reliance on the observations of a Division Bench of this court in *Govindji Jevat and Co. and Others Vs. Cannanore Spinning and Weaving Mills Ltd.*, Defendant in that case contended that arbitration and award preceding the suit were a condition precedent for the maintainability of the suit. The Division Bench considered the agreement between the parties and held that arbitration and award were not agreed to be a condition precedent for the institution of the suit and therefore "the decision of Mathew, J. as such may not apply to the present case; and it is not necessary for us to consider further whether that decision is correct in so far as cases falling under the Indian Arbitration Act are concerned". However, the Division Bench proceeded to consider the observations of the Bombay High Court in *Prataprai Manmohandas Vs. Sheo Narayan Balal and Co.*, and the observations of the Madras High Court in *Belli Gowder v. Joghi Gowder* AIR 1951 Mad 683, to express the view that the Arbitration Act in so far as it relates to arbitration agreements coming within the definition in Section 2 thereof is exhaustive and it must then follow that the remedy of parties to such an arbitration agreement lies within the Act itself. The Division Bench also observed that their attention has not been drawn to any provision in the Arbitration Act under which a suit can be dismissed for not resorting to the arbitration agreement and the remedy of the appellants lies u/s 34 of the Act. These observations were made in the context of the earlier finding that the agreement between the parties did not make a prior arbitration and award as a condition precedent for maintainability of the suit. If the agreement between the parties contains an arbitration clause as defined u/s 2 of the Arbitration Act and in spite of which one of the parties approached the civil court, the remedy of the other party is certainly only u/s 34 of the Arbitration Act. We do not consider these observations as indicating a line of thought that even where the contract contains not merely an arbitration agreement but an arbitration agreement coupled with the requirement of

arbitration and award preceding the suit, the remedy of the defendant is only u/s 34 of the Arbitration Act. For one thing that question did not directly arise for consideration before court and the court observed that it was unnecessary for them to consider the correctness of the decision of Mathew, J. in Vanguard Fire & General Insurance Co.'s case 1963 KIT 415. For another thing, the decision did not advert to the impact of Section 36 of the Arbitration Act. In cases where it is provided that an award shall be a condition precedent to the bringing of an action, Section 36 empowers the court to order that the agreement shall cease to have effect as regards any particular difference and to order that the said provision shall also cease to have effect as regards that difference. It is clear that as long as the court does not pass any such order, the clause rendering an award a condition precedent to a suit shall stand.

5. The decision of Mathew, J. in Vanguard Fire & General Insurance Co.'s case 1963 KLT 415, came up for consideration before the Supreme Court in The Vulcan Insurance Co. Ltd. Vs. Maharaj Singh and Another, . The contract in that case contained only a pure and simple arbitration agreement regarding dispute as to quantum or extent of loss or damage. The agreement did not refer to any dispute regarding liability. The Supreme Court therefore held that the dispute raised by the insurer was not covered by the arbitration clause. The court proceeded to consider the plea of limitation based on the conditions in the contract. In the course of the discussion the Supreme Court adverted to the decisions of English courts which were considered by Mathew, J., as also other decisions and observed in para 22 as follows:

The two lines of cases clearly bear out the two distinct situations in law. A clause like the one in Scott v. Avery (1856) 5 HLC 811, 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 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.

We notice that the arbitration clause in Scott v. Avery (1856) 5 HLC 811, is couched in a comprehensive language stipulating award by an arbitrator as a condition precedent. In our view the Supreme Court has not only disapproved the view taken by Mathew, J. but approved it in the above-quoted observation. We are therefore bound to follow that view.

6. Since the contract between the parties stipulated arbitration and award as a condition precedent for instituting a suit and since the suit was not preceded by arbitration and award, it must follow that the suit is not maintainable. However, learned counsel for the appellant invited our attention to Section 36 of the Arbitration Act and prayed that the court may order that the provision in the contract shall cease to have effect regarding the dispute. Section 36 states, inter alia, that where it is provided 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 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. It is true that Section 36 confers on the court power to issue orders as indicated therein. Plaintiff in the trial court did not seek to invoke the power of court under this provision.

This provision also was considered in *Vanguard Fire & General Insurance Co.* 's case 1963 KIT 415. Mathew, J. observed that:

The effect of the *Scott v. Avery* clause can be nullified by applying to the court for setting aside that clause.

The learned Judge also quoted the following observations in *Russel on Arbitration*, 16th Edn., page 86:

Where a court orders that an arbitration agreement shall cease to have effect in relation to a dispute, it may also order that any *Scott v. Avery* clause in force between the parties (whether contained in the arbitration agreement or not) shall likewise cease to have effect. This section in effect gives the court a discretion in suitable cases to treat the *Scott v. Avery* clause as a mere arbitration clause.

There is power to make such an order:

(1) Where the authority of an arbitrator or arbitrators or umpire is revoked by leave of the court. This would seem to cover any case where either the *Scott v. Avery* clause is contained in a submission proper and leave is given to revoke this, or it is contained in an agreement to submit and leave is given to revoke a submission made pursuant to the agreement.

(2) Where the whole arbitral Tribunal is removed by the court, i.e., for misconduct or delay.

(3) Where the dispute involves charges of fraud.

It is quite unnecessary for us to consider whether the three circumstances in which according to *Russel* the court may pass an order contemplated u/s 36 are exhaustive. It is sufficient to say that no such order was sought by the plaintiff in the trial court and no specific reason or ground is urged before us to persuade us to exercise the power u/s 36. Learned counsel for the appellant suggested that since the suit has been filed that itself would be a reason to exercise the power. If we accept this proposition, it will mean that defence can be nullified in every suit by the plaintiff invoking Section 36. That cannot be. No other ground is urged before us to persuade us to invoke the power u/s 36.

7. Learned counsel for the appellant submitted that defendant has waived the right to challenge the maintainability of the suit and therefore the suit must be deemed to be maintainable. Learned counsel at one stage stated that the plea

regarding non-maintainability of the suit was raised only belatedly by way of amendment to the written statement. We found on verification that this statement is not correct. The plea is seen raised even in the original written statement. Learned counsel thereupon submitted that para 4-A of the written statement which contains this plea could have been a subsequent insertion. Curiously appellant did not make available to the court her copy of the written statement to verify if para 4-A is absent in her copy. There is absolutely no material available to persuade us to hold that any fraud was perpetuated on the court by surreptitious interpolation of para 4-A in the written statement. That being so, the contention that the plea must be deemed to have been waived has to fail.

8. We decline to interfere and accordingly dismiss the appeal.