(1983) 01 PAT CK 0011

In the Patna High Court

Case No : Civil Revision No. 1076 of 1979

The General Manager, the Oriental Fire and General Insurance Co. Ltd. and another — APPELLANT

Vs

Mahendra Pd. Gupta — RESPONDENT

Date of Decision : 31-01-1983

Acts Referred:
Arbitration Act, 1940 — Section 8, 8(2)
Civil Procedure Code, 1908 (CPC) — Section 115

Citation : (1983) PLJR 727

Hon'ble Judges : S.K. Choudhuri, J;R.N. Prasad, J

Bench : Division Bench

Advocate : Ramchandra Sinha and Mrs. Santosh Singh, for the Appellant;

Final Decision : Allowed

Judgement

S.K. Choudhuri, J

1. This civil revision by the opposite party u/s 115 of the CPC is directed against the judgment and order dated 19th March 1979 passed in Miscellaneous Case no. 21/10 of 1973/78, by the Fourth Additional Subordinate Judge, Monghyr, directing appointment of an arbitrator to settle the difference of the parties and to make the award. This civil revision was placed for hearing before a learned single Judge of this Court, who by his order dated 6th December 1979, has referred this case to Division Bench and that is how it has been placed before us for hearing.

2. It appears that an application u/s 8(2) of the Arbitration Act was filed by the opposite party to this revision application for appointment of an arbitrator to settle the dispute between the parties and to submit his award for compensation which may be payable to him. The relevant facts for decision of this revision application are as follows :--

A taxi cab no. BRN 2232 owned by one Sarbeshwar Prasad Singh was insured with the Oriental Fire & General Insurance Company, the General Manager and the Senior Branch Secretary of which are the petitioners before this Court. An accident took place on 16th May 1971 at 7.30 A.M., between Taxi Cab no. BRN 2232 and the Taxi Cab BRN 9772, when they were running between Monghyr and Kharagpur. It is said that the said accident took place two miles away from Kharagpur when those two cabs were passing Chandawli Asthan. They were said to be running in opposite direction. According to the opposite party the driver of Taxi Cab BRN 2232 was negligent and therefore the accident took place. The owner of Taxi Cab BRN 9772, therefore, filed a claim before the aforesaid Insurance Company. It is not disputed that the Taxi Cab 9772 was not insured with the aforesaid Insurance Company, but, however, Taxi Cab BRN 2232 was insured with the said Company. After the accident, it is alleged that the claimant lodged an information with the Than a regarding the said accident against the owner of Taxi Cab BRN 2232. The claimant thereafter gave his taxi which was damaged in the said accident for survey and assessment of the repair costs and it is said that a sum of Rs. 7,212.50 Paise was assessed as the estimated cost for such repairs. The further allegation was that the accident took place because of rash and negligent driving of Taxi Cab BRN 2232. The further allegation was that the claimant intimated about the accident to petitioner no. 2 the Senior Branch Manager of the Company. The claimant opposite party also several times made demand from the Company to compensate the loss suffered by him on account of the said accident, but no heed was paid by the Company. It is alleged that the Company lastly (vide their Memo dated 6.1.1973) expressed its inability to compensate him. The claimant, therefore, sent a notice dated 23rd March 1973 to the Company requesting appointment of an Advocate of the Bar Association, Monghyr, to act as an arbitrator, or in the alternative to name an arbitrator of their own and inform him accordingly. The Company by their letter dated 2nd April 1973 informed the claimant that there was no scope for referring the matter to arbitration. The claimant, therefore, filed an application u/s 8(2) of the Arbitration Act for appointment of an arbitrator to decide the dispute between the parties, relying upon clause 8 of the conditions attached to the insurance policy of Taxi Cab BRN 2232.

3. The Company appeared and contested the matter. According to them, there was no privity of contract between the claimant who is the owner of Taxi Cab BRN 9772 and the Company as the said taxi cab was not insured with their Company and, therefore, the claimant cannot take advantage of the arbitration clause.

4. The court below after hearing the parties, appointed an arbitrator to decide the dispute between the parties by the impugned order. Hence, this revision has been filed.

5. Learned Counsel appearing on behalf of the petitioners contended that the judgment and the order of the court below are illegal and without jurisdiction inasmuch as it has assumed that the arbitration clause would govern the present

case and the claimant opposite party, would be entitled to take advantage of the said clause.

6. The argument of the learned Counsel for the claimant opposite party, on the other hand, was that the Campany was to indemnify the insured against any claim which may be awarded in favour of a third party and, therefore, the arbitration clause would apply though the claimant was not a party to the insurance policy and the claimant can take advantage of such arbitration clause. In other words, his argument was that the Company is liable to compensate the third party under the policy of insurance read with Section 95 of the Motor Vehicles Act, 1939, in the event of an accident and the arbitration clause being one of the conditions incorporated in the said policy, the claimant third party is entitled to take advantage of it, and, therefore, under the said clause he can get the dispute referred to arbitration.

7. While appreciating the arguments put forward on behalf of the respective parties, it would be apposite to mention that the claimant third party filed the application u/s 8(2) of the Arbitration Act and, therefore, it is necessary to read Section 8 thereof as also the arbitration clause appearing in the insurance policy under condition no. 8 as under :--

8. Power of court to appoint arbitrator or umpire :

(1) In any of the following cases-

(a) Where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen, concur in the appointment or appointments; or

(b) if any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy : or

(c) where the parties or the arbitrators are required to appoint an umpire and do not appoint him; any part may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or in supplying the vacancy.

(2) If the appointment is not made within fifteen clear days after the service of the said notice, the court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have like power to act in the reference, and do make an award as if he or they had been appointed by consent of all parties.

(Emphasis supplied).

The arbitration clause appearing in the insurance policy (i.e. Condition no, 8) reads thus :--

B 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 disc aim liability 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 be deemed to have been abandoned and shall not thereafter be recoverable here-under.

Arbitration agreement'' under the Arbitration Act has been defined to mean ''a written agreement to submit present or future difference, to arbitration, whether an arbitrator is named therein or not''. Therefore, it is clear that an arbitration agreement is contract between the parties who have entered into it.

8. u/s 8 of the Arbitration Act quoted above, it is only the parties to the arbitration agreement, who can take advantage of the arbitration agreement and it is they who can make an application u/s 8 for appointment of one or more arbitrators as provided therein. A third party to the said arbitration agreement cannot by any stretch of imagination take advantage of the said arbitration clause and get it enforced. Under the general law the persons can take steps for enforcement of the arbitration clause who are the parties to that agreement. Strong reliance was placed by learned Counsel for the opposite party on the clause under which the Company is to indemnify the insured against all sums which the insurer shall legally be liable to pay in respect of the amount awarded in favour of a third party. This again is an agreement between the insured and the insurer, which is subject to the limits of liability prescribed u/s 95 of the Motor Vehicles Act. Therefore under the third party risk, the third party has to get an award against the insured and it is only if he succeeds in getting a claim against the insured that the insurer has to indemnify the insured under the said third party risk. Merely because of such right of the third party, which has been given to him under the provisions of the Motor Vehicles Act, he does not get the right to enforce the arbitration agreement to which he is no party.

9. Two cases were cited at the Bar. It is worth mentioning them here namely, Khwaja Muhammad Khan v. Husaini Begum [(19.0) 32 Allahabad 4.0] a decision of the Privy Council, and Tweddle v. Atkinson (9 Weekly Report 781) : (1861) 1 B & S. 393. These two cases have reference in a single Judge decision of the Bombay High Court in the case of British India General Insurance Co., Ltd. Vs. Janardan Vishwanath Naik, . It will be appropriate 10 read the head note of the

Bombay case :--

Where a clause in a motor insurance policy has given power to the insurance company to enforce the legal rights of the insured against a third party in the name of the insured, the clause is merely an agreement between the insurer and the insured and does not add to the rights of either party against a third person. From the clause it cannot be deduced that a third party equally has a right to sue the company. Similarly it the policy provides that the insurance company shall indemnify the insured against his legal liability in respect of death of, or bodily injury to the passengers, the clause is for the benefit of the insured and does not make the passanger a beneficiary under an implied trust. This being so, the passenger who is a stranger to the contract of insurance cannot sue the insurance company for money payable under the policy.

About the aforesaid two cases referred to in the Bombay decision, it has been stated therein that, in 32 Allahabad 410, ''there was a marriage contract in which again the beneficiary was expressly named and the ratio decidendi was that the strict rule in (1861) 1B and S 393 was not appropriate to Indian marriage contracts''. Therefore, the aforesaid two cases relied upon at the Bar do not support the contentions of the learned Counsel for the parties.

Some of the observations as noted in the placitum (c) and (d) in the case of Alice Marie Vandepittee v. The Preferred Accident Insurance Company of New York AIR 1933 PC 11 were also relied upon by learned Counsel for the petitioner. They read as follows :--

(c) ''''On equitable principles only a person who is a party to a contract can sue on it. The law knows nothing of a just quaesitum terio arising by way of contract. Such a right may be conferred by way of property, as for example, under a trust, but it cannot be conferred, on a stranger to a contract as a right to enforce the contract in personam. But a party to a contract can constitute himself a trustee for a third party of a right under the contract and thus confer such rights enforceable in equity on the third party. The trustee then can take steps to enforce performance to the beneficiary by the other contracting party as in the case of other equitable rights. The action should be in the name of the trustee; if however he refuses to sue, the beneficiary can sue, joining the trustee as a defendant. In such cases again the intention to constitute the trust must be affirmatively proved: the intention cannot necessarily be inferred from the mere general words contained in a contract such as an insurance policy.

(d) "The idea of a person being the cestui que trust under the insurance contract is objectionable since the doctrine of the equitable interest of a beneficiary under a contract of a third party relates to benefits under the contract. Whereas in an insurance serious duties and obligations rest on any person claiming to be insured which necessarily involve consent and privity of contract.

10. Thus the aforesaid Bombay decision and the observations quoted from the aforesaid Privy Council decision support the contention of the learned Counsel for

the petitioner. Thus in view of the discussions made above, it is manifest that the arbitration clause which was entered into between the insured and the insurer cannot be taken advantage of by a third person and the said third person cannot, in case a dispute arises with regard to his claim against the insured, take advantage of the said arbitration clause and get such dispute referred to arbitration. The view that I have taken also (sic) support from the decision, though obiter, in Des Raj Pahwa and another v. The Concord of India Insurance Co. Ltd., Calcutta AIR (38) 1951 Pun 114.In the result, this revision application is allowed and the judgment and order of the court below are hereby set aside. In the circumstances of the case, I would make no order as to costs.