

(1978) 03 CAL CK 0059
In the Calcutta High Court
Case No : A.F.O.D. No. 697 of 1975

The Oriental Fire and General Insurance Co. Ltd.	APPELLANT
Vs	
Sm. Usharani Kar and Others	RESPONDENT

Date of Decision : 02-03-1978

Acts Referred:

Arbitration Act, 1940 — Section 34

Citation : AIR 1978 Cal 206 : 82 CWN 634 : (1978) 1 ILR (Cal) 484

Hon'ble Judges : Janah, J;B.C. Ray, J

Bench : Division Bench

Advocate : Nihar Ranjan Majumdar, for the Appellant; P.K. Dutta, Bijay Basanta Koley and Chitrita Choudhury, for the Respondent

Final Decision : Dismissed

Judgement

Janah, J.—This appeal is by the defendant and it is against an order passed ,by the trial court refusing to stay the suit u/s 34 of the Arbitration Act. The plaintiffs-respondents instituted the suit against the defendant company for recovery of a certain sum of money. The case made out in the plaint was as follows:

Satya Kinkar Kar the predecessor-in-interest of the plaintiffs was the owner of Tata Mercedege Benz Truck No. WBG 6620. The said truck was insured with the defendant company under a comprehensive motor insurance being Policy No. 370/CV/1441. The policy was valid from March 19, 1969 to March 18, 1970. The defendant company in consideration of the premium paid to it by the said Satya Kinkar Kar insured the truck for a sum of Rs. 40,000 against, inter alia, any form of accidental total loss of the truck and also against statutory liability insurance under the Motor Vehicles Act. On May 5, 1969, while the truck was being driven by one Sriram Tewary having driving licence No. ASN/915 which was valid up to November, 1970, it was involved in an accident by colliding against a road side tree near village Douli of Satora-Purulia Boad. The accident occurred as a result of the left wheel coming out of is position. The plaintiffs claimed that the defendant company under the terms and conditions of the policy became liable

to indemnify of the owner for the total loss of the truck. On or about 6/7th May, 1969 late Satya Kinkar duly submitted the claim to the defendant company who deputed one Sri N. K. Dutta, a surveyor to survey and estimate the quantum of loss or damages. The said Sri Dutta assessed the loss of Rs. 31,000 which was accepted by the insured Satya Kinkar, who pressed for settlement of claim at RS. 31,000 In December, 1969, Commercial Investigation Bureau of 38 Chandni Chawk Street, Calcutta, wrote a letter to the deceased Satya Kinkar that they had been appointed by the defendant company to process the claim and sought for certain information. The defendant company having confirmed that they had appointed the said Commercial Investigation Bureau, Satya Kinkar furnished all information which was asked for. But no payment having been received by the deceased for about A year, he sent letters through his lawyer in April and June 1971 demanding payment of sum of Rs. 31,000 as assessed by the defendant's surveyor. The defendant wrote to the lawyer of Satya Kinkar that the claim could not be entertained on the ground that the policy was obtained by untrue statements in -the proposal form and the truck was driven at the time of accident by a person who had no licence to drive the truck. Satya Kinkar Kar having died on the 16th March, 1972, the present suit was filed by the plaintiffs as the heirs and legal representatives of Satya Kinkar on 3rd May, 1972.

2. The defendant Insurance Company on being served with summons appeared and filed an application for stay of the suit u/s 34 of the Arbitration Act 1940 on the ground that the Policy contained an arbitration clause which was a condition precedent to any right of action in respect of the matters relating to the said Policy. The condition relied on by the defendant company being condition No. 8 of the policy is as follows:--

"All differences arising out of this Policy shall be referred to the decision of the 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 calender 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 making of an Award shall be a condition precedent to any right of action against the company, If the company shall disclaim liability to the insured for any claim hereunder and such claim shall not within 12 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 hereunder."

The defendant company contended that it was ready and willing to do all things necessary for conducting the arbitration that might be held under the aforesaid clause. Accordingly, the defendant asserted that the parties must be referred to arbitration under the said clause and an Award must be obtained by the plaintiff

before he can come to Court.

3. The learned Judge in the trial court after considering the various contentions raised before him came to the conclusion that in the circumstances of the case the suit should not be stayed u/s 34 of the Arbitration Act. The learned Judge, therefore, rejected the defendant's application for stay. Against the said order the defendant company has come up in appeal.

4. Mr. Majumdar, learned Advocate for the appellant contended that under the conditions of the Policy on which the plaintiff found their claim, arbitration was a condition precedent to the institution of the suit. He contended further that by denying its liability on the ground referred to in its letter dated 5th October, 1971, the company had not taken any plea de hors the contract. He contended that the contract subsisted between the parties but the defendant had no liability by virtue of the terms of the contract. In this connection he drew our attention to Clause 9 of the Policy which is as follows:--

"The due observance of the terms, conditions and endorsements of this Policy in so far as they relate to anything to be done or complied with by the insured and the truth of the statements and answers in the said proposal shall be condition precedent to any liability of the company to make any payment under the Policy."

Mr. Majumdar argued that Clause 9 of the Policy being what it is the repudiation of its liability by the company was under the said clause, and accordingly, under Clause 8 mentioned hereinbefore the making of an award was a condition precedent to the institution of a suit. In support of this contention he relied upon the decisions in *Stebbing v. Liverpool, London and Globe Insurance Co. Ltd.* (1917) 2 KB 433; *Woodall v. Pearl Insurance Co. Ltd.* (1919) 1 KB 593; and *Toller v. Law Accident Insurance Society* (1936) 2 All ER 952. Mr. Dutta learned Advocate appearing on behalf of the respondents contended on the other hand, that the ground on which the liability under the insurance Policy has been repudiated by the defendant invalidates the contract itself. According to him, the repudiation of the claim in the present case goes to the very root of the contract, and if the contract itself goes the arbitration clause contained in the contract also goes. Mr. Dutta submitted that in the present case the defendant shall not be entitled to rely upon the arbitration clause which was a subordinate, clause in the entire contract. He has drawn our attention to the preamble of the Policy which states that the statements in the proposal form shall be the basis of the Policy. Mr. Dutta pointed out that one of the grounds on which company repudiated the claim being that the insured made false statements in the proposal form, the entire basis of the Policy is knocked out. If wrong answers were given in the proposal form, there was no contract at all.

5. In *Toller v. Law Accident Insurance Society Ltd.* (1936) 2 All ER 952, it was pointed out that the classes of cases where the defendant insurance company is denying the existence of a contract is totally different from the class of cases when the defendant while admitting the existence of the contract is relying on

some clauses of it to escape liability. It was explained what was meant by the word "repudiation". Repudiation of a contract may mean that having admittedly made a contract a party decides to break up in such a way that he does not intend to proceed with it. Another use of the word repudiation is where a party says that there was never a contract between the two. In all such cases one has to look at the real intention and not the form in which the repudiation is made.

In *Stabbing v. Liverpool, London and Globe Insurance Co. Ltd.* (1917) 2 KB 433, the applicant Stebbing made a proposal for insurance to the respondent. The proposal contained a declaration by the applicant that the statements made by him were true and the declaration was to form the basis of the contract. There was a clause to the effect that compliance with the condition indorsed upon the policy should be the condition precedent to any liability on the part of the insurer. One of the conditions was that if a false declaration was made in support of a claim all benefits under the policy should be forfeited. The policy also provided that all differences under the policy should be referred to arbitration. The applicant made a claim under the policy and the respondents required that it should be referred to arbitration. Before the Arbitrator the respondent resisted the claim on the ground that the applicant had made untrue statements in the proposal form. The applicant contended that the Arbitrators had no power to determine any matter which called in question the validity of the policy. Arbitrators stated a case as to whether the truth or untruth of the statements of the proposal has been referred to him. It was held that as the respondents were not seeking to avoid the policy but were relying upon the provision that the truth of the statements should be basis of the contract, the answer was in the affirmative. It is on the principle laid down in this case that the learned Advocate for the appellant laid great emphasis in support of his contention that it is open to the defendant to rely upon the arbitration clause contained in the policy. In the present case it appears from the letters dated October 5, 1971. and May 12, 1972 written by the defendant company that the defendants were denying its liability on the ground that the insured had made untrue statements in the proposal form. The preamble to the policy specifically states that the statements made in the proposal form shall form the basis of the policy. That being so, there was a repudiation of the contract which went to the very substance of the whole contract and, therefore, defendant could not rely upon the arbitration clause. In *Jureidini v. National British and Irish Millers Insurance Co. Ltd.* 1915 AC 499, Viscount Halden L.C. dealing with this question said:

"Now, my Lords, speaking for myself when there is repudiation which goes to the substance of the whole contract, I do not see how the person setting up the repudiation can be entitled to insist on the subordinate terms of the contract still in force."

In *Heyman v. Darwins Ltd.* (1942) 1 All ER 337, the House of Lords after a review of all the cases on the subject summarised the law as to the effect of an arbitration clause of a contract in the following words expressed by Simon L.C. :--

"If the respondents were denying that the contract had ever bound them at all such attitude would disentitle them from relying upon arbitration clause which it contains."

In *The Chartered Bank Vs. The Commissioner for the Port of Calcutta*, a Division Bench of this Court had to consider a similar point. The Division Bench after a review of a number of decisions which were cited before it came to the conclusion that under such circumstances it was not open to a party having repudiated the contract to rely upon the arbitration clause contained therein. Where a party repudiates or seeks to avoid liability under the contract by raising allegations which are such as would make the contract void, the contract would perish and along with it the arbitration agreement which is contained in the contract will also perish. When the whole perishes its part must also perish "*Ex nihilo nihil fit*". In the present case the arbitration clause is contained in the same document i.e. the contract itself and not in any separate or independent document. It is seen from the letters dated October 5, 1971 and May 12, 1972 that the defendant company is saying that they have no liability under the policy, as the same was obtained by misrepresentation. So the question is, is there any difference between such a contention and the repudiation of the contract by the party concerned? To us, it does not seem that there is any. The repudiation of liability by the insurance company on the ground mentioned by it tantamounts to saying that it has no obligation any longer due to the fact that the contract was entered into by misrepresentation.

6. Learned Advocate for the appellant contended that in view of the condition No. 8 of the policy which is generally known as *Scott v. Avery* (1856 5 HLC 811) clause, the present suit is not maintainable in the absence of an award by the Arbitrator. A similar point came up for consideration in *N. Dutt v. Caledonian Insurance Co.* (1968) 72 Cal WN 733, where it was held that where reference to arbitration is condition precedent to a right of action upon the policy, the suit will not lie unless the Arbitrator has given an award. But if the Insurance Company repudiates the claim on a ground which goes to the root of the contract, the company would be precluded from pleading the arbitration clause as a bar to an action to enforce the claim. The case of *Scott v. Avery* (1856) 5 HLC 811 was distinguished on the ground that there one of the conditions of the policy was that the sum to be paid for loss, in the first instance, was to be ascertained by a committee. But if a difference should arise between the insurer and the committee relating to settling any loss or to claim relating to the insurance, the difference was to be referred to arbitration, provided always that the insured who refused to accept the amount settled by the committee shall not be entitled to maintain an action on the policy until the matter has been decided by the Arbitrators. But in that case there was no such clause. Similarly, in the present case also there is nothing which requires the loss or damage to be ascertained at the first instance and only if a dispute arises as to the quantum, the matter is to be referred to arbitration. It was held that no general proposition could be laid down that wherever the arbitration award is made a condition precedent to the

institution of a suit, the suit must fail unless an award is made and that the rule is not an absolute one. It can only be made applicable if the words used are wide enough to cover all cases of difference and dispute between the parties. The difference between the parties is not the same thing as the difference as to the ascertainment of damages or loss between them. It was also pointed out that in order to invoke the rule in *Scott v. Avery* the following conditions must be present:--

- (a) The acceptance of the validity and continuance of the policy itself.
- (b) No repudiation by the insurer challenging the substratum of the claim of the insured i.e. challenging the claim on the ground that the plaintiff has no right to claim the damages at all.
- (c) A bona fide difference as to the ascertainment of the quantum or value or amount of damages.
- (d) The difference to be existing difference and relating to the actual loss suffered by the insurer.
- (e) The nature of the difference to be within the scope of the terms of arbitration clause itself.

Applying these principles we are of the view that the rule in *Scott v. Avery* (1856) 5 HLC 811 clause cannot be applicable to the present case.

7. Let us now come to the question whether the defendant by its conduct is precluded from claiming that the matter should be referred to arbitration. The accident occurred on May 5, 1969. The claim was lodged by the insured on or about May 6, 1969. On May 19, 1969 the defendant deputed and authorised one Sri Nanda kumar Datta, a surveyor to estimate the quantum of loss and the compensation payable in respect of the truck. The surveyor estimated the loss at Rs. 31,000 and the same was accepted by the insured. The insured received a letter dated December 26, 1969, from one Commercial Investigation Bureau of 38, Chandni Chowk Street, Calcutta, in which it was stated that the said Bureau had been appointed by the defendant to process the claim. On receipt of the said letter the insured wrote to the defendant company for confirmation that the said Bureau had been appointed by the defendant company as alleged in the said letter. The defendant company in its turn replied in the affirmative and requested the insured to furnish such information to the said Bureau as may be required by them. The insured offered full co-operation in this behalf and in the meantime made demands for a settlement of the claim by payment of the aforesaid amount of Rs. 31,000. In spite of such demands the defendant company kept completely silent for a period of about one year and half. It is only on October 5, 1971, that the defendant for the first time refused to make any payment on the ground that the insured made untrue statements in the proposal form, and that the person who was driving the truck at the time of accident did not possess any driving licence. The defendant did not at any stage prior to the filing of the application u/

s 34 inform the insured or his heirs and legal representatives, the plaintiffs, that the defendant was willing to go to arbitration. The insured fraying died on the 16th March, 1972 the plaintiffs filed the present suit on the 3rd clay of May, 1972, i. e. only 2 days prior to the last date of limitation. In these circumstances if the suit is stayed and the parties are compelled to go to arbitration the plaintiffs will at once be faced with the bar of limitation. In Shalimar Paints Ltd. Vs. Omprokash Singhania, , it has been held that if there is a possibility of the claim in the suit being barred, if referred to arbitration, stay of the suit can be refused. Stay should not be refused as a matter of course in every ease but it depends on the facts of each ca.se. In Anderson Wright Ltd. Vs. Moran and Company, , the Supreme Court has painted out that apart from the other conditions necessary for granting a stay u/s 34, it is also necessary that the applicant should satisfy the court that not only he is but also was at the commencement of the proceedings ready and willing to do everything necessary far the proper conduct of the arbitration, and further that the court must be satisfied that there is no sufficient reason why the matter should not be referred to arbitration in accordance with arbitration agreement. In the present case the trial court exercised its discretion against granting an order for stay. The appellant has not stated anywhere that the trial court has not properly exercised its discretion. In the circumstances of the case, we are of the opinion that the trial court has rightly exercised its discretion in refusing to stay the suit.

8. There is also another reason why the order of the trial court refusing to stay the suit must be upheld. In the present case the appellant repudiated its liability to pay damages or compensation ten the insured on the allegation that he made untrue statements in the proposal form. The allegation is that by making untrue declaration the insured induced the insurance company to issue a policy in his favour. The plaintiff No. 1 being the widow and the other plaintiffs being the sons and daughters of the insured are entitled to have the honour of their deceased husband and father vindicated by a public trial in open court. In such a case the arbitrator is not the proper forum to have a decision on such allegations, In this view we are supported by the decisions in Babulal Singhania Vs. Pirudan Ojha, ; Raymon Engineering Works Ltd. Vs. Union of India (UOI), and Abdul Kadir Shamsuddin Bubere Vs. Madhav Prabhakar Oak, .

9. For the reasons mentioned above, it must be held that the trial court was right in refusing to pass an order for stay of the suit. This appeal, therefore, fails and it is accordingly dismissed with costs.

10. In the circumstances, we direct the trial court to dispose of the suit within this year, if not impossible. Let the records the sent to the trial court by Special Messenger at the costs of the respondents, as prayed for.

B.C. Ray, J.

11. I agree.