
(2002) 01 GUJ CK 0001
In the Gujarat High Court
Case No : First Appeal No. 2150 of 1996

United India Insurance Co. Ltd.

APPELLANT

Vs

M.D. Pahochiya

RESPONDENT

Date of Decision : 23-01-2002

Acts Referred:

Arbitration Act, 1940 — Section 20, 20(1)

Citation : AIR 2002 Guj 249 : (2002) 22 GLH 512 : (2002) 1 GLR 258

Hon'ble Judges : Y.B. Bhatt, J; M.H. Kadri, J

Bench : Division Bench

Advocate : P.V. Nanavati, for the Appellant; L.M. Chhablani, for the Respondent

Final Decision : Allowed

Judgement

Y.B. Bhatt, J.—This is an appeal by the Insurance Company - the original defendant u/s 39 of the Arbitration Act, 1940, challenging the judgment and order passed by the trial Court on an application made by the respondent-original applicant u/s 20 of the said Act. The appeal arises on account of the fact that the trial Court, by the impugned judgment and order, allowed the application of the respondent-applicant and directed that the dispute be referred to the chosen and designated arbitrator as a sole arbitrator to resolve the disputes between the parties by passing the necessary award.

2. The appellant-Insurance Company has challenged the said impugned judgment and order passed by the trial Court on a number of grounds. In order to appreciate such contentions, it is necessary to observe and take note of certain factual aspects of the matter. The respondent-applicant was the owner of a truck which was insured with the appellant-Insurance Company. The truck suffered a fire and substantial damage in respect of which the respondent-applicant preferred a claim with the appellant-Insurance Company. This claim was processed and a substantial amount of the claim was passed in favour of the respondent-applicant. The record indicates that though the respondent had claimed a substantial amount, only a part of the claim to the extent of Rs.

2,68,000/- was passed and in fact paid to the respondent-applicant. However, the insured felt that a further amount as claimed by him was still due to him, and therefore, preferred an application to the trial Court for settlement of the dispute, and also prayed for passing a money decree in respect of such difference claimed by him.

3. It is pertinent to note that the application presented by the respondent to the trial Court is designated as Special Arbitration Suit No. 28 of 1989. There is no dispute that the trial Court regarded this to be an application u/s 20 of the Arbitration Act, 1940, and such application was numbered and registered as a suit by virtue of Sub-section (2) of Section 20 of the said Act.

4. It is also pertinent to note that the relief sought in the said application/ suit were as under :

(i) That the defendant-Insurance Company be directed to produce in Court the Insurance Policy referred to in the said prayer clause.

(ii) That on the said policy being produced, the Court may be pleased to appoint one Hussainbhai Abdulbhai Hukka as the sole Arbitrator to settle the dispute.

(iii) In the alternative, the respondent applicant also prayed that the Court be pleased to pass a money decree for Rs. 1,39,200/- as also Rs. 571/- by way of notice charges.

(iv) It was also prayed that the defendants be directed to pay the applicant - plaintiff a sum of Rs. 1,65,000/- together with interest at the rate of 18% per annum from the date of the accident viz., 29th May, 1988 till realisation, and also deliver possession of the burnt truck to the applicant-plaintiff.

5. As aforesaid, the trial Court treated this application as an application u/s 20 of the Arbitration Act, numbered it as a suit and ultimately by the impugned order directed the dispute to be referred to the sole arbitration of the Arbitrator designated by the applicant plaintiff viz., Hussainbhai Abdulbhai Hukka.

6. Learned Counsel for the appellant-insurer has taken a number of grounds in the Memo of Appeal and has also sought to challenge the impugned judgment and order by raising various oral contentions before us. However, on the particular facts of the case, we do not consider it necessary to deal with each of such contentions for the simple reason that the present appeal can be decided by considering the main and substantial contention raised by the Counsel for the appellant.

7. In this context, it was submitted that Exh: 1 before the trial Court was undoubtedly and admittedly an application u/s 20 of the Arbitration Act, 1940, no matter how profuse the prayers contained there may have been. There is no controversy that one of the main prayers was to refer the dispute to the sole arbitration of the Arbitrator designated in the application. In this context, it is necessary to refer to the provisions of Section 20 of the said Act.

"20. Application to file in Court arbitration agreement :- (1) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties or if otherwise, between the applicant as plaintiff and the other parties as defendants.

(3) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants requiring them to show cause within the time specified in the notice why the agreement should not be filed,

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise or where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.

(5) Thereafter, the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable."

A plain reading of Section 20 indicates that before the Court can grant such an application, four essential conditions must be satisfied viz., (i) that there is a valid and subsisting agreement between the parties, (ii) that such agreement was entered into between the parties before the institution of a suit with respect to the subject-matter of the agreement or any part of it, (iii) that a difference to which the agreement applies has arisen, and (iv) that the application is made to a Court having jurisdiction in the matter to which the agreement relates. This is precisely the view expressed by the Supreme Court in the case of *Wazirchand Mahajan and Another Vs. Union of India (UOI)*, .

8. One of the essential conditions which require to be satisfied before the Court can entertain such application, let alone grant the same, is that the applicant should file in the Court such arbitration agreement or at the very least a contract or agreement which contains an arbitration clause. There is no dispute that the arbitration clause upon which reliance is placed by the respondent-plaintiff is a clause contained in the insurance policy. There is no dispute that the policy and/or a copy thereof was not filed by the respondent-applicant along with the application. There is no dispute that even during the proceedings before the trial Court, the respondent-applicant did not file or produce either original nor a copy of the policy. It is only during the course of hearing of the present appeal that we

find that a copy of the policy is on the record of the case. However, further inquiry indicates that the policy has merely been produced by the Insurance Company along with a list for production of documents. This copy of the insurance policy has not been proved according to the rules of evidence, and is therefore, not exhibited. We may only note in passing that it could have been proved and exhibited in a number of ways available to the plaintiff-applicant viz., by examining himself and producing the original policy, examining an officer of the Insurance Company for furnishing proof and identification of the policy in question or a copy thereof, or requiring the defendant-Insurance Company to produce the policy by issuing a notice of production as contemplated by Civil Procedure Code. However, none of these avenues have been availed of by the plaintiff.

9. In this context it also requires to be noted that the defendant has by Exh. 35 made a specific application to the Court setting out with reference to the pleadings of the parties, that this is a contested matter, which in the opinion of the Insurance Company, cannot be decided without recording oral evidence in the matter, and therefore, prayed that the matter be decided only after evidence is recorded in the matter. The trial Court dealt with this application by passing an order only to the effect that the same shall be decided along with the final hearing of the suit. However, while deciding the suit finally, the trial Court apparently lost sight of the fact that this application was undecided. Even otherwise, it requires to be noted, as observed in the judgment and order (Para 5), "the parties have not led any oral evidence, but they relied upon the documentary evidence". In this fact situation, we are only required to take note of the fact that the Insurance policy, which is alleged to contain the arbitration clause has not been proved as per the rules of evidence, and is therefore, not evidence before the Court. In this situation, it could not possibly be said that it is this arbitration agreement, on the basis of which the plaintiff seeks the direction of the Court, "that the agreement be filed in Court" in terms of Sub-section (1) of Section 20, and on the basis of which the dispute can be referred to arbitration. (Para 9)

10. To summarise, therefore, we find that the very fundamental basis of making an application u/s 20 of the Act is missing. There are many other infirmities with the impugned judgment and order which, as aforesaid, we need not discuss in detail in view of our above finding recorded on the vital point. In the premises aforesaid, the impugned judgment and order are clearly illegal and unsustainable, and are therefore, quashed and set aside. Consequently, this appeal is allowed with no order as to costs. Decree accordingly.