(1951) 04 CAL CK 0024

Calcutta High Court

Case No: Arbitration Case No. 4 of 1951

Shyamlal Agarwalla		APPELLANT
	Vs	
Union Life and General Insurance Co. Ltd.		RESPONDENT

Date of Decision: April 25, 1951

Acts Referred:

- Arbitration Act, 1940 - Section 9, 9(6)

Citation: (1952) 2 ILR (Cal) 195

Hon'ble Judges: S.R. Das Gupta, J

Bench: Single Bench

Advocate: S. Sen, for the Appellant;Jitendranath Ghosh, for the Respondent

Final Decision: Dismissed

Judgement

S.R. Das Gupta, J.

This is an application on behalf of the Union Life & General Insurance Co., Ltd., inter alia for a declaration that the reference to arbitration of Sri Gangaprasad Lohia was and is invalid, that the said arbitrator had no jurisdiction to arbitrate with regard to the disputes and that the purported award made by him be declared invalid and the same be set aside. The matter arises in this way.

2. Under a policy of insurance, dated December 24, 1948, a motor car, belonging to the Respondent Shyamlal Agrawalla, was insured with the Petitioner for the sum of Rs. 4,000. Under Clause 8 of the said policy, it was provided that the truth of the statements and answers in the proposal should be condition precedent to any liability of the insurance company. There was an arbitration clause in the said agreement, the material portion of which runs as follows:

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 being required in writing so to do by either of the parties or in case the arbitrators do not agree to an umpire appointed in writing by the arbitrators before entering upon the reference.

3. By a letter, dated March 31, 1949, the Respondent informed the Petitioner that his motor car was stolen and made a claim for the sum of Rs. 4,000. The Petitioner contended that the Respondent in the proposal form had made a false declaration as to the year of the manufacture of the said car, because the year of the manufacture of the said car was mentioned in the proposal form as 1940, but in fact the year of the manufacture of the said car was 1937. The Petitioner, therefore, contended that it had no liability whatsoever under the said policy and the said policy was void and/or voidable and the Petitioner avoided the same. By a letter, dated March 23, 1950, written by Sushil Kumar Ghosh, solicitor for the Respondent, to the Petitioner, the said Susil Kumar Ghosh informed the Petitioner that his client was prepared to go to arbitration and nominated Sri Gangaprasad Lohia of No. 161/1/1, Harrison Road, Calcutta, as arbitrator on the one side and he on behalf of his client called upon the Petitioner to nominate its arbitrator within seven days from the date of receipt of the said letter. In reply to the said letter the Petitioner, on May 1, 1950, through its lawyer wrote a letter to the Respondent, wherein it was alleged that the said insurance was void ab initio and that the arbitration clause had no application and that the Petitioner was within its rights in declining liability in toto as it had already done.

4. In the meantime, on April 19, 1950, the said Sushil Kumar Ghosh wrote on behalf of the Respondent to the said Gangaprosad Lohia nominating the said Gangaprosad Lohia as the sole arbitrator and asking him to call a meeting of the parties.

5. A copy of the said letter was forwarded to the Insurance Company and in reply thereto the Insurance Company, on May 6, 1950, wrote a letter to the said Sushil Kumar Ghosh, wherein the Company reiterated that in terms of the conditions of the proposal form and the declarations made therein the insurance agreement was absolutely void, having no basis to stand upon and the arbitration clause had no application whatsoever and the arbitrator said to be appointed by the said Sushil Kumar Ghosh had no jurisdiction or right to proceed in the matter and any decision given by him will be completely ineffective and without any binding force on the Insurance Company. It was further alleged that the reference and the appointment were also otherwise invalid in law, unwarranted and premature. Thereafter, on May 15, 1950, the arbitrator, Gangaprosad Lohia, gave notice to the parties that the first meeting to be held by him as the sole arbitrator was fixed for Monday the 22nd instant at 2 p.m. at 161/1, Harrison load, Calcutta, and asked the parties to attend without fail with all relevant papers, documents and witnesses at the appointed time.

6. On May 19, 1950, the Insurance Company, in answer to the said notice, caused a letter to be written to the said arbitrator, wherein it was alleged that as the Respondent had made a false and fraudulent declaration in the proposal regarding the year of make of the car, the Company was denying the very existence and validity of the contract which was void ab initio and that there was no dispute arising out of the policy which could be referred to arbitration. It was also alleged that the appointment of the arbitrator and the reference were also otherwise invalid in law and the Insurance Company denied the competency of the said Gangaprosad Lohia to act as arbitrator in the matter not to speak of as the. sole arbitrator. Lastly, it was alleged that the notice given by the said Gangaprasad Lohia was too short to enable the Company to prevent the threatened arbitration by appropriate legal proceedings and therefore the Company could at that stage only dispute his jurisdiction and competency to take up the arbitration and the validity of the appointment.

7. On June 3, 1950, the Company, through its pleader, caused another letter to be written to the arbitrator, wherein it was stated that the Company did not submit to his jurisdiction to enter upon the arbitration at all and that he should not, therefore, undertake this useless and unnecessary labour. But the arbitrator went on giving notices to both the parties and copies of minutes of the arbitration proceedings were supplied to the parties including the Insurance Company. The said arbitrator ultimately made his award and the present application is by the Insurance Company to set aside the said award.

8. The only question to be considered by me is whether the appointment of the sole arbitrator is valid. Mr. Sen, appearing on behalf of the Petitioner contends that it is invalid because under the arbitration agreement the appointment by his client can be made within a month and the Respondent appointed his arbitrator as sole arbitrator before the month expired, which, he cannot do. According to Mr. Sen, the provisions of Section 9, on which Mr. Ghosh relies, and under which the Respondent had purported to act can only supplement and not override the terms of the Arbitration agreement. The material portion of Section 9 of the Arbitration Act reads as follows:

Where an arbitration agreement provides that a reference shall be to two arbitrators, one to be appointed by each party, then, unless a different intention is expressed in the agreement * * * * if one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid for fifteen clear days after the service by the other party of a notice in writing to make the appointment, such other party having appointed his arbitrator before giving the notice, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent.

9. Mr. Sen relies on the words unless a different intention is "expressed" and he contends that either Section 9 does not at all apply or the notice u/s 9 could be given only after the expiry of a month from the date when his client was required by the Respondent to appoint its arbitrator.

10. Mr. Ghosh, on the other hand, contends that Section 9 would apply unless the parties by the contract provided that a different course should be adopted in the event of one of the parties failing to nominate its arbitrator. Once Section 9 applies, then, upon expiry of fifteen days after service of notice, as contemplated in that section, a, party is entitled to appoint a sole arbitrator, whether or not a longer time is provided in the arbitration agreement for the parties to appoint their arbitrator. In any event Mr. Ghosh contends that the Petitioner by his conduct had waived and/or abandoned his right to appoint an arbitrator.

11. In my opinion, Section 9 cannot override, but can only supplement, the agreement between the parties. In my opinion, the Petitioner had the right to nominate its arbitrator within a month from the date when it is called upon by notice in writing by the other side to do so. That is contractual right which could not be taken away. If after the expiry of a month, after being called upon to do so, the Petitioner failed to appoint its arbitrator then and then only the other party would be entitled to serve it with fifteen days notice u/s 9 of the Arbitration Act, because it is only then that the Petitioner can be said to have failed to make the appointment and it is only then that Section 9 would become applicable. Before a party can act u/s 9 there must be a failure on the part of other party to appoint an arbitrator. In this case, there cannot be any failure on the part of the Petitioner until and unless a month expires from the date when the other party gives notice calling upon it to make the appointment. That being the position, the present appointment of sole arbitrator, in my opinion, must be deemed to have been made without any notice u/s 9, because the time to give such notice had not arrived when the appointment was made. In other words, such appointment could not be made in terms of Section 9 before the expiry of the month fixed by the contract and fifteen days as contemplated in Section 9 of the Arbitration Act.

12. But the question is, can the opposite party take advantage of this position and question the validity of the appointment of the sole arbitrator when it had expressed itself quite clearly that arbitration agreement had no application and the arbitrator had no jurisdiction to proceed with the matter and thus in effect refused to make its own appointment.

13. In the letter, dated May 1, 1950, written on behalf of the Petitioner, in answer to the letter, dated March 23, 1950, written to the Petitioner by the Respondent''s solicitor calling upon the Petitioner to make its appointment, all that is said is that in the facts and circumstances of the case the arbitration clause had no application and the Petitioner is within its rights to decline liability in toto as it has already done. In effect, the case of the Petitioner is that the arbitration clause is not applicable

and, therefore, there is no question of the Petitioner, appointing an arbitrator. In the letter, dated May 6, 1950, written on behalf of the Petitioner the same contention was repeated. It is true that in the said letter it was also stated that the reference and the appointment are also otherwise invalid in law, unwarranted and premature. But it is clear that the Petitioner had no intention of making its own appointment and the Petitioner had expressed itself quite clearly that it was not going to make its own appointment. If that is so, then, can it not be said that the Petitioner had waived and/or abandoned its right to make its own appointment and can the Petitioner in such circumstances after the award has been made challenge the said award on the ground that the appointment of the sole arbitrator by the Respondent was invalid having been made before the expiry of the month within which the Petitioner was entitled to make its own appointment. In my opinion, the Petitioner cannot in such circumstances be allowed to contend that the appointment of the sole arbitrator is invalid, on the ground that the said appointment was made before expiry of a month from the date when it was called upon to make its appointment and on the ground that notice given u/s 9 of the Arbitration Act was invalid inasmuch as the said notice was given before expiry of the said month. The object of Section 9(6), in my opinion, is to give a party a chance to make its own appointment and the provision'' for fifteen clays'' notice has been made in the said section with that object. But then, if one of the parties makes it quite clear that it is not going to make its own appointment, then in my opinion, the absence of a notice or a valid notice u/s 9(b) cannot be set up by such party as a ground for setting aside the award. In fact, the proviso to Sub-section (b) of Section 9 of the Arbitration Act gives a further opportunity to a party, who had not made its appointment to move the court and the court may under the said proviso set aside the appointment of a sole arbitrator made under Clause (6) of Section 9 or may allow further time to the defaulting party to appoint an arbitrator or may pass such other order as it thinks fit. But if, as in this case, a party has. expressed itself quite clearly that it is not going to appoint an arbitrator and, if before the award is made, such party has not availed itself even of the opportunity given by the proviso to Sub-section (b) of Section 9, then it cannot, after the award has been made, ask to set it aside on the ground that the notice given u/s 9(b) of the Arbitration Act was invalid and, therefore, the appointment of a sole arbitrator was also invalid> The decision of the Judicial Committee in Donald Campbell and Company v. Jeshraj Girdhari Lal A.I.R (1920) (P.C.) 123, 128, to some extent supports the view which I have taken in this matter. In that case the appointment of a sole arbitrator was made without giving notice in writing and it was held that any objection on this ground was waived. Their Lordships observed as follows:

It was not necessary that the appointment as sole arbitrator should be in writing, but the failure to give the notice in writing prescribed by Section 9(6) would have been fatal to the authority of Mr. Pearson as sole arbitrator but for the fact that any objection on this head was waived by the Appellants. They, of course, knew that no

notice in writing to appoint their arbitrator to act along with Mr. Pearson had been sent to them. They knew that he was proceeding as sole arbitrator. They objected to his proceeding with the arbitration on the ground of jurisdiction and construction of the agreement and on the ground that there was now no matter in dispute with regard to the shipments. Not a word was said by them as to any defect in his appointment as arbitrator. All the facts on this head were within their knowledge, and if they had raised the objection as to the failure to give the notice in writing it could have been cured in a week. The Appellants rested their case on their contentions as to the invalidity of any arbitration in Calcutta and they cannot now be permitted to rely on a defect in procedure which could have been remedied at once if they had raised the point.

14. Mr. Sen contended before me that in the said case not a word was said by the Appellants as to any defect in the appointment of the arbitrator but in the present case the Petitioner had in its letter written to the Respondent and also to the arbitrator, dated May 19, 1950, and May 19, 1950, respectively, raised an objection regarding the validity of the appointment of the arbitrator. In the first place, it seems to me that the said decision lays down the proposition that an objection on the ground of want of notice before the appointment of the sole arbitrator can be waived and it would depend on the facts and circumstances of each particular case whether it can be said that there has been such waiver. In the second place, on the facts and circumstances of the present case, it appears that in the letter dated May 1, 1950, written on behalf of the Petitioner in answer to the Respondent''s solicitor''s letter calling upon the Petitioner to make its appointment, all that was said, was that the arbitration clause has no application and that the Company was within its rights to decline liability in toto and that it had already done so, suggesting thereby that there was no question of appointment of an arbitrator. The said letter was written more than a month after the letter, dated March 23, 1950, was written by the Respondent''s solicitor calling upon the Petitioner to make its appointment. In the subsequent letters, dated May 6, 1950, written to the Respondent''s solicitor, and May 19, 1950, written to the arbitrator, it had no doubt been said that the reference and the appointment of the arbitrator were otherwise invalid but there was no definite suggestion that the said appointment was made before the time for the Petitioner to make its appointment had expired or that he was willing to make his own appointment. If the Petitioner had stated that there was failure to give notice on proper notice u/s 9(b) then, to use the expression of their Lordships of the Judicial Committee, the same could have been remedied at once. The Petitioner, on the other hand, was all along relying on its contention that the arbitration clause had no application and in effect declined to go to arbitration. The Petitioner was fully aware of what was happening before the arbitrator and the arbitrator served the Petitioner with the notice of meetings and the Petitioner was supplied with the copies of the minutes of the proceedings before the arbitrator but the Petitioner never suggested that it was willing to appoint its, arbitrator or that there was failure

to give notice on proper notice u/s 9(b) of the Arbitration Act. In the circumstances, I have come to the conclusion that the Petitioner cannot may be permitted to rely on defect in procedure which could easily have been remedied. That being so, in my opinion, the application fails and must be dismissed with costs.

15. There will be judgment in terms of the award with costs of filing the award. Interest on judgment six per cent.