New India Assurance Co. Ltd. vs Central Bank Of India And Ors. on 23 August, 1984

Equivalent citations: AIR1985CAL76, AIR 1985 CALCUTTA 76, (1985) ARBI L.R. 159

ORDER

Pratibha Bonnerjea, J.

1. This is an application under Section 33, 5 and 12 of the Arbitration Act for declaration that there is no arbitration agreement in existence between the parties, the reference made by the respondent No. 1 is invalid and for restraining the respondents Nos. 3 and 4, the joint arbitrators from proceeding with the arbitration.

2. On 4th December 1973, the petitioner had issued a Miscellaneous Accident Policy bearing No. 533490425 in favour of the respondent No. 2 herein covering the risk of burglary and house breaking in respect of stock-in-trade stored in the godown No. 57, Diamond Harbour Road, Calcutta for a period of 12 months from 1-12-73 and 1-12-74. The sum insured was Rs. 1,40,000/-. Clause 12 of the said policy contained an arbitration agreement as follows : --

> "If any dispute shall arise as to whether the company is liable under this policy or as to the amount of its liability the matter shall, if required by the company be referred to the decision of two neutral persons as Arbitrators one of whom shall be named by each party or of an umpire who shall be appointed by the said Arbitrators before entering on the reference; and in case the Insured or his legal personal representatives shall neglect or refuse for the space of two calendar months after request in writing from the company so to do to name an Arbitrator the Arbitrator of the company may proceed alone and no action or proceeding shall be brought or prosecuted on the policy until the award of the Arbitrator, Arbitrators or umpire has been first obtained"

3. This policy also contained an agreed Bank Clause No. 4 which is as follows : --

> "That any adjustment, settlement, compromise or reference to arbitration in connection with any dispute between the company and the insured or any of them arising under or in connection with the policy if made by the Bank shall be valid and binding on all parties insured hereunder, but not so as to impair the right of the Bank to recover the full amount of any claim it may have on other parties insured hereunder....."

4. By another policy bearing No. 533490537 dated 31-12-1974, the said earlier policy was renewed for 12 months up to December 1975. This policy also contained the agreed Bank Clause set out above. According to the petitioner by mistake the "Agreed Bank Clause" was sent with the policy and as such it did not form part of the contract. During the subsistency of the policy, loss was caused to the respondent No. 2 in October 1974 and a claim was lodged with the petitioner which was numbered as claim No. 3130/74/025/BP. Another loss was caused on 7-11-74 and the claim submitted was numbered as claim No. 3130/75/005/BP. According to the petitioner the surveyor appointed for the purpose of assessing the loss, submitted a report on 28-8-75 recording that the alleged claims were without any merit It is further alleged in the petition that a second surveyor was appointed but the respondent No. 2 did not produce its books of accounts to substantiate its claims. By letters dated 25-5-79 and 13-10-79 the Bank, the respondent No. 1 requested the petitioner to settle the claims but the petitioner did not consider the same in view of the surveyor's report The respondent No. 1 again gave a reminder to the petitioner dated 13-3-81 and informed the petitioner that it, had appointed its arbitrator and requested the petitioner to appoint its own arbitrator.

5. The petitioner by letter dated 26-3-81, alleged that under the arbitration agreement, the petitioner has the option to go to arbitration or not It was also contended that the policies were issued in the joint names of the Bank and the respondent No. 2 and as such the Bank alone could not appoint an arbitrator and that the reference started by the Bank was not valid without prejudice to the petitioner's right to challenge the reference, the petitioner appointed its own arbitrator. Thereafter the joint arbitrators held nine sittings and the petitioner attended the same. It was argued before the arbitrators that until and unless, the petitioner would exercise its option, the arbitration, agreement would not come into existence. Hence this application.

6. In the affidavit-in-opposition, the respondent Bank denied the allegations that the respondent No. 2 failed to co-operate with the surveyor. All other allegations were also specifically denied. It was further alleged that by virtue of the agreed Bank clause, the respondent Bank has an independent right to make the reference and the reference is perfectly valid and binding on the parties.

7. As the petitioner alleged that the agreed Bank clause was sent with the two policies by mistake and it did not form part of the contract I directed this issue to be tried on evidence. The witness examined on behalf of the petitioner to prove this fact frankly admitted that he knew nothing about this transaction. I, therefore, hold that the petitioner failed to prove that the agreed Bank clause was inserted by mistake and that the terms contained in the Bank clause are the agreed terms of the two policies.

8. The counsel for the petitioner submits that under the arbitration clause the petitioner has the 'option' and/or the discretion to make the reference or to refuse to do so. This is a contingency which must happen before the arbitration clause becomes operative. Therefore, unless the 'option' is exercised by the petitioner, the arbitration agreement does not come into existence. Moreover, it is only the petitioner who has the right to make the reference. The contract also suffers from lack of mutuality. According to Section 2(a) of the Arbitration Act, an arbitration agreement must give mutual rights to the parties to make the reference. The present arbitration clause is bad from this

point of view. In any event, it will not be operative unless option is exercised The reference made by the Bank is invalid. In support of his contention the petitioner's counsel relies on (Union of India v. Bharat Engineering Corporation). In this case the arbitration clause was : --

> "In the event of any dispute or differences between the parties..... the contractor, after 90 days of his presenting his final claim on disputed matters, may demand in writing that the disputes or differences be referred to arbitration, such demand for arbitration shall specify the matters which are in question, dispute or difference and only such dispute or difference of which the demand has been made and no other, shall be referred to arbitration".

It was held in this case that there was no arbitration agreement in existence because the definition of arbitration agreement in Section 2(a) of the Act did not contemplate a contingent agreement or an agreement to agree in the future. Moreover an arbitration agreement has to be "mutual". The clause gives rise to an option to be exercised by the Union of India and only when the option is exercised it results in a valid arbitration agreement with mutual rights to make the reference. In Russel on Arbitration, 20th Edn. page 38 this case has been thoroughly discussed under the heading 'mutuality'. After analysing the agreement very closely it was observed in paras 12 and 13 at page 43 :--

> Para 12 : "It is however, submitted that in the present context there is nothing to compel the conclusion that because Union of India clause is an option (even if it were) therefore it cannot be an arbitration agreement within the meaning of the. relevant statutes".
>
> Para 13 : "It is submitted that the Union of India clause is plainly an arbitration agreement' that it is valid, that it is completely unilateral and that the only mutuality it confers on the non-privileged party is the inevitable one that once the privileged party has chosen to arbitrate the non-privileged party can and must ipso facto arbitrate also".

9. The petitioner's counsel also relies on (1983) 1 All ER 382 at 385-386 (Westfal Larsen & Co. A/S v. Ikerigi Compania Naviera S. A In that case the agreement was:--

> "..... either party may elect to have the dispute referred to the arbitration of a single arbitrator in London ..... such election shall be made by written notice by one party to the other not later than 21 days after receipt of a notice given by one party to the other of a dispute having arisen under this charter". It was contended in that case that there was no existing or binding agreement to arbitrate. It was an agreement to agree or a contract of option. It conferred right on one party to arbitrate only and lacked mutuality. It was held:--
>
> "..... I am satisfied that the objection is not well founded. The proviso is not an agreement to agree because on a valid election to arbitrate no further agreement is

> needed or contemplated It is no doubt, true, that by this clause the parties do not bind themselves to refer future disputes for determination by an arbitrator and in no other way. Instead the clause confers an option, which may but need not be exercised I see force in the contention that until election is made there is no agreement to arbitrate but once the election is duly made (and the option is exercised) I share the opinion of the High Court of Delhi in Bharat case that a binding arbitration agreement comes into existence".

Relying on the above case it is contended on behalf of the petitioner, that as the 'option' has not been exercised and the appointment of arbitrator was without prejudice to the petitioner's right to challenge the validity of the reference. The arbitration agreement did not come into existence and as such the reference made by the respondent Bank is invalid

10. It is to be noted that by its letter dated 26-3-81, the petitioner alleged that the appointment of the arbitrator made by the Bank alone was bad as the policies were issued in the joint names of the Bank and the respondent No. 2. According to the petitioner, the appointment of arbitrator ought ot have been made jointly by the respondents Nos. 1 and 2. A careful reading of this letter will reveal that the petitioner was challenging the validity of the reference on the ground that the arbitrators had no jurisdiction because the appointment was not made jointly. That was the only ground of challenge. In this letter, it was not alleged by the petitioner that it was appointing its arbitrator without prejudice to its right to contend subsequently that it had not exercised its option. Therefore the submission of the petitioner's counsel that 'option' was not exercised is not correct. The petitioner has exercised its option and without prejudice to its right to challenge the reference made by the Bank alone on the ground mentioned above.

11. The agreed Bank clause has been set out earlier.

12. Relying on this clause, the counsel for the respondent Bank contends that under this clause, only the Bank has the right to refer and as such the reference made by the Bank without joining the respondent No. 2 is perfectly valid and binding on the parties. This right of the bank is independent of the petitioner's 'option' reserved under the arbitration agreement Therefore, the reference made by the Bank pursuant to the agreed Bank clause cannot be challenged by the petitioner.

13. It has been pointed out above that the Union of India clause has been interpreted differently in Russel on Arbitration and in 1983(t) A. E. R. 382. In Russel on Arbitration the Delhi High Court's view has been dissented from whereas the said view has been accepted in the case relied on by the petitioner's counsel. The view taken in Russel that in spite of option clause, the arbitration agreement remains valid will find support in the decisions reported in AIR 1929 Sind 83 (Chetoomal Bulchand v. Shankerdas Girdharilal) and AIR 1926 Sind 27 (Mulchand Sobhraj v. Radhakishin Parumal). I respectfully agree with the view taken in Russel and the cases mentioned above. In my opinion, in the Union of India clause, the parties by agreement conferred unilateral right on one party to make the reference at its discretion. The same is the case here. There is valid arbitration agreement between the parties but both the parties have agreed that when future disputes will arise it is only the privileged party who will have the right to make the reference, but the privileged party

can also render the arbitration agreement infructuous by not exercising its option. This 'option' does not negative the existence of the arbitration agreement but only restricts its enforceability. If the privileged party alone can refer the dispute, it can do so only on the basis of the advance consent by the other party recorded in the agreement that the reference would be by the privileged party alone. This unilateral right to make the reference flows from the agreed term in the contract.

14. In the present case I have already held that the petitioner has exercised its option by appointing its arbitrator. Assuming it has not, still the reference is valid. I have also held that there is an existing and binding arbitration agreement and under the Bank clause, Bank alone has the right ot make the reference. The petitioner's option to make the agreement infructuous by not exercising its option was curtailed by the agreed Bank clause. Hence there is no lack of mutuality, in this agreement and reference is lawful.

15. In that view of the matter, I declare that Clause 12 of the policies concerned contain valid and subsisting arbitration agreement between the parties and the reference made by the Bank under the agreed Bank clause No. 4, invests the arbitrators, the respondents Nos. 3 and 4 with jurisdiction to decide the disputes referred to them. In the premises, interim order, if any, stands vacated The time to make the award by the joint arbitrators is extended for six months from date. Each party to pay and bear its own cost of this application.