
(2001) 03 BOM CK 0088
In the Bombay High Court
Case No : First Appeal No. 102 of 2000

Deokar Exports Pvt. Ltd.

APPELLANT

Vs

New India Assurance Co. Ltd.

RESPONDENT

Date of Decision : 09-03-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, 11
Contract Act, 1872 — Section 73
Insurance Act, 1938 — Section 64VB
Limitation Act, 1963 — Article 44, 14

Citation : (2001) 2 ACC 364 : AIR 2001 Bom 327 : (2001) 3 ALLMR 1 : (2001) 4 BomCR 526

Hon'ble Judges : T.K. Chandrashekhara Das, J;P.S. Patankar, J

Bench : Division Bench

Advocate : M.A. Utgikar and A.P. Tadmalkar, for the Appellant; M.G. Barve, for the Respondent

Final Decision : Dismissed

Judgement

P.S. Patankar, J.—A few facts--

Sometime in August, 1986, the Appellant imported Onion Dehydration Machinery. This was financed by Maharashtra State Finance Corporation (MSFC). MSFC arranged for Marine-cum-Erection Policy for 18 months period from 12-9-1988. The said policy expired on 12-3-1988. On 25-8-1988, MSFC requested the respondent for renewal of the said policy by letter dated 25-8-1988. Cheque for premium of Rs. 3135/-was also sent. By the said letter, the respondent was asked (i) to renew the policy and (ii) to issue stamped receipt for the premium paid. This was received by the respondent on 26-8-1988. The respondent on 26-8-1988 issued a stamped receipt recording receipt of the premium. On 7-4-1989, the respondent wrote a letter to the appellant pointing out that MSFC, Nasik has deposited an amount of Rs. 3135/-towards the premium for fire policy covering the machinery. A standard form for the fire insurance came to be sent. This was received by the appellant on 16-6-1989. The appellant filled the same

and sent it back to the respondent. It specifically mentions in para 11 that the period of insurance is from 12-3-1988 to 12-9-1989. This was received by the respondent and the fire policy came to be issued on 30-6-1989 covering the risk of fire from 26-8-1988 to 25-8-1989. The policy was sent to MSFC as it was acting on behalf of the appellant.

2. Fire took place on 10-2-1990 and the machinery was damaged. The appellant orally informed this to the respondent and intimated in writing to the respondent on 17-2-1990. By letter dated 18-4-1990, the respondent declined to make payment on the ground that the insurance cover was from 26-8-1988 to 25-8-1989. On the date of the fire, there was no insurance in existence and hence it was not liable.

3. The appellant sent the legal notice to the respondent on 8-1-1991, but there was no reply. The appellant then approached National Consumer Disputes Redressal Commission (for short NCDRC) on 20-8-1991 under the Consumer Protection Act, 1986. However, on 23-9-1992, the said Commission held that there was no deficiency in service on the part of the respondent as according to the respondent on 10-2-1992 the insurance policy was not in force. Therefore, it was dismissed with liberty to the appellant to resort to any other remedy that may be available.

Thereafter the appellant filed an appeal against the said order before the Supreme Court but the Supreme Court declined to interfere by order dated 29-1-1993.

4. The appellant then filed civil suit on 29-4-1993 claiming damages for the loss suffered by the appellant. It was averred that the fire policy was for one year. It was actually issued by the respondent on 30-6-1989. Hence, the contract of insurance came into existence on that day and was valid for one year thereafter. Hence, it was in force from 30-6-1989 to 29-6-1990. The fire had taken place causing damage on 10-2-1990, Therefore, the respondent was liable.

5. On behalf of the respondent, it was contended that the policy has come to an end already. It was in force from 26-8-1988 to 25-8-1989. It was not in force on 10-2-1990. Therefore, there was no liability on the part of the respondent. It was also contended that the suit was barred by limitation and it was bad for misjoinder of necessary parties. It was also contended that the suit was barred by the principles of res judicata.

6. The suit came to be heard by the learned Civil Judge, Senior Division, Nasik. He held that the said Insurance policy was in force on 10-2-1990 as it was for one year commencing from 30-6-1989. Consequently, it was held that the respondent was guilty of breach of contract. The appellant was entitled to recover damages of Rs. 26,91,130/-along with interest at 21% per annum. The contention raised on behalf of the respondent that the suit was bad for non-joinder of necessary party (i.e. MSFC) was negatived. The contention raised on behalf of the respondent that the suit is hit by the principles of res judicata was

also negated. However, the contention raised on behalf of the respondent that the suit was barred by limitation came to be accepted. Hence, the learned Judge by his judgment dated 16-9-1999 dismissed the said suit.

7. Being aggrieved the appellant has filed this appeal and the respondent aggrieved by the findings recorded against it has filed cross-objections.

8. In view of the contentions raised by the learned counsel, the following points arise for our consideration :--

(i) Whether the suit is barred by limitation?

(ii) Whether it is hit by the principles of res judicata ?

(iii) Whether the suit is bad for nonjoinder of the necessary party ?

(iv) Whether the insurance policy was in existence on the date of fire i.e. 10-2-1990 ?

(v) What order?

Our findings are :--

(i) The suit is within limitation, (ii) to (iv) No.

(v) Appeal dismissed. Cross-objections partly allowed.

9. While dealing with the question of limitation, the learned Judge of the trial Court held that the appellant was not entitled to get the benefit of Section 14 of the Limitation Act, 1963 as it cannot be said that the respondent has approached the National Consumer Disputes Redressal Commission bona fide or in good faith. He held that the appellant has deliberately chosen the said Forum which was not competent one. The learned counsel for the respondent tried to support this reasoning. On the contrary, the learned counsel for the appellant has relied upon the judgment of the Apex Court reported in Saushish Diamonds Ltd. Vs. National Insurance Co. Ltd., . and contended that the suit was within limitation.

10. We may note that on 10-2-1990, fire broke out and the machinery was damaged. The respondent was immediately informed orally by the appellant. However, the respondent was informed in writing on 17-2-1990. Correspondence followed between the "parties. The respondent declined to pay the claim of the appellant on 18-4-1990. The appellant approached the said NCDRC on 20-8-1991. The same was decided by the said forum on 23-9-1992. It came to be rejected on the ground that considering the contention of the respondent there was no deficiency in service. Therefore, it has no jurisdiction and appellant can avail of any other remedy available. Article 44(b) of the Limitation Act, 1963 provides three years limitation from the date of occurrence causing loss or where the claim on the policy is denied the date of such denial. Section 14 deals with exclusion of time of proceeding bona fide in Court without jurisdiction. Section 14(1) is as under :--

"14. Exclusion of time of proceeding bona fide in Court without jurisdiction.-- (1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it."

Considering the above position, it cannot be accepted that the resort by the appellant to the said forum of NCDRC was not in good faith or bona fide or it was deliberately chosen knowing full well that it was incompetent to deal with it. The order passed by the said Forum shows that the appellant has approached the said Forum bona fide and hence the respondent was permitted to avail of any other remedy available. At the most, it may be said that the further steps by the appellant of going before the Apex Court by filing S.L.P, was not in good faith. However, in view of Section 14(1) of the Limitation Act, the appellant is entitled for exclusion of the period from 20th August, 1991 to 30-9-1992. The learned counsel for the respondent has rightly relied upon the judgment in the matter of Saushish Diamonds Ltd. Vs. National Insurance Co. Ltd., . In the said case, precisely the same position concurred. The appellant had approached the National Commission for Consumer Redressal. The said Commission in its order held that the Insurance Company has repudiated the claim. Hence, the relief cannot be granted by it. This order came to be challenged before the Apex Court. It was observed as under :--

"..... Under these circumstances, the Commission rightly relegated the parties to a civil action. It is true that limitation has run out against the appellant during the pendency of the proceedings. Therefore, the time taken between the date of the filing of the claim before the Commission and the date of its disposal, namely, 28-9-1995 would be considered by the Civil Court for exclusion u/s 14 of the Limitation Act, 1963."

In view of the above position, we hold that the suit filed by the appellant was within limitation.

11. It is next contended that the appellant has approached NCDRC making the same claim and the claim came to be dismissed by the said Forum. Therefore, it is contended that this suit is hit by the principle of res judicata. We find that the learned trial Judge has rightly negated this contention. We have already pointed out that the said Forum dismissed the application filed by the appellant in view of the conclusion reached by the respondent that the said insurance policy was not in force on 10-2-1992 and hence it cannot be said that there was any deficiency in service. Therefore, it was held that the said Forum was having no jurisdiction and it came to be dismissed on that limited ground giving liberty to this appellant to pursue any other remedy available. Considering this position, the provisions of Section 11 of C.P.C. are not attracted as the question regarding the liability of the respondent to pay damages under the Insurance Policy, was

not decided.

12. The learned counsel for the respondent then contended that the suit ought to have been dismissed in view of the nonjoinder of the necessary party. According to the learned counsel for the respondent. MSFC should have been joined as a necessary party to the present suit. As it was not made a party, the suit ought to have been dismissed. It is not possible to accept this. We find that the learned trial Judge is right in holding that the suit was not bad for nonjoinder as MSFC cannot be said to be a necessary party. There is no dispute that MSFC was only a financier. It was financed the transaction of purchase of machinery by this appellant. It was acting as an agent of the appellant. When the machinery was damaged by fire, the real claimant was the appellant and the claim was against the respondent. There was no claim against MSFC. The claim of the appellant arose because the respondent has undertaken to pay the loss in case of fire to the machinery belonging to the appellant. There was no liability of MSFC under the said insurance policy. Hence, MSFC was not a necessary party.

13. The learned counsel for the respondent contended that the trial Court has committed an error in coming to the conclusion that the policy was in force on 10-2-1990. He submitted that it was an error to hold that the appellant came to know about the acceptance of the proposal when the policy was issued on 30-6-1989 and, therefore, assumption of risk will start to run from 30-6-1989 and as the policy was for one year, it was in existence on 10-2-1990. He submitted that the trial Court has committed an error in relying upon the judgment of the Apex Court reported in Life Insurance Corporation of India Vs. Raja Vasireddy Komalavalli Kamba and Others, and the other delivered by one of us (P. S. Patankar, J.), reported in Oriental Fire and General Insurance Co. Ltd. Vs. Panvel Industrial Co-operative Estates Ltd., . He submitted that those judgments have no application in the present case date of assumption of risk has nothing to do with the date of conclusion of the contract or the issuance of the policy. The learned counsel for the respondent supported the reasoning given by the trial Court and also relied upon the two Judgments cited above.

14. First we shall examine the two judgments on which the trial Court has relied upon (cited above). In the Apex Court judgment of the Life Insurance Corporation of India Vs. Raja Vasireddy Komalavalli Kamba and Others, , the question was relating to the life insurance. In the said case, one Raja Vasireddy died on January 12, 1961. He had filed the proposal on 27th December, 1960. He was also medically examined on that day. Two cheques for two premiums were issued by him. The cheques were accepted without demur or qualification. One was encashed by the Life Insurance Corporation on 29th December, 1960. The other was initially dishonoured but it came to be honoured on 11-1-1961. On 16-1-1961, the widow of Raja Vasireddy made a claim. However, the Corporation denied its liability. According to the Corporation, those amounts realised of the cheques were put by the Corporation in the Suspense Account and not adjusted towards the premium. The policy was not issued though prepared. Therefore, it

was contended that there was no acceptance of the terms of the insurance cannot and the proposal cannot be said to have been accepted. In the light of those facts, the question arose whether there was a concluded contract of insurance or not. The Supreme Court laid down that the expression underwrite signifies accept liability under. Acceptance must be signified by some act or acts agreed upon by the parties. It was held that as there was no acceptance as contemplated by Section 7 of the Contract Act, there was no concluded contract of insurance. It was held that mere receipt and retention of premium even for a long time is not acceptance and cannot give rise to a contract. In view of this, the Apex Court reversed the judgment of the High Court. It was observed as under (Para 15 of ACJ: Para 14 of AIR) :--

"15. Though in certain human relationships silence to a proposal might convey acceptance but in the case of insurance proposal, silence does not denote consent and no binding contract arises until the person to whom an offer is made says or does something to signify his acceptance. Merely delay in giving an answer cannot be construed as an acceptance, as, prima facie, acceptance must be communicated to the offerer. The general rule is that the contract of insurance will be concluded only when the party to whom an offer has been made accepts it unconditionally and communicates his acceptance to the person making the offer. Whether the final acceptance is that of the assured or insurers, however, depends simply on the way in which negotiations for an insurance have progressed. . . ."

14A. In the case of Oriental Fire and General Insurance Co. Ltd. Vs. Panvel Industrial Co-operative Estates Ltd., , Section 64-VB of the Insurance Act, 1934 and Sections 7 and 8 of the Contract Act, 1872 were considered. The question related to fire insurance. In that case, agent accepted the cheque towards the premium covering the sheds and also promised to issue cover note after inspection of the premises. No proposal form was submitted by the insured. The premises caught fire and extensively damaged. One of the questions involved was whether mere payment of premium amount and its acceptance by the insurance agent can amount to concluded contract of insurance. It was answered in the negative. Section 64-VB(1) was considered and it was observed (at p. 110) :--

"In my view, the object of the said section is to secure advance payment of premium by the Insurance Company before the assumption of risk. Section 64-VB(1) places a prohibition upon the insurer that unless and until it receives the payment of premium or the same is guaranteed to be paid in a particular manner and within a particular time as may be prescribed in advance, there can be no assumption of risk on the part of the insurer. Sub-section (2) of the said section lays down that risk may be assumed not earlier than the date on which the premium has been paid in cash or by cheque to the insurer in case of those risks for which premium can be ascertained in advance. The Explanation further makes it clear that the premium may be tendered by postal money order or by

cheque sent through the post and the risk may be assumed on the date on which the said money order is booked or the cheque is posted. In my view, Sub-section (2) is an enabling provision for the insurer. The contract between the insurer and the assured may be concluded later on. However," the insurer can assume the risk from the date when the money order is booked or the cheque is posted towards the premium. The phrase "risk may be assumed not earlier than" in Sub-section (2) and the phrase "may be assumed" used in the Explanation thereof clearly indicates this. Neither Sub-section (2) nor the Explanation means that the risk attaches immediately on payment of premium and the insurer undertakes the risk. Therefore, in my view, this section does not lay down that payment and acceptance of the premium meant that there was concluded contract. "

It was held that there was no unqualified acceptance and risk cannot attach as the matter was still under negotiation and no binding contract resulted. In our opinion. the question involved in the present appeal was not at all for consideration in either of these cases. The question that was considered was when the contract of insurance is said to be concluded. Hence they have no application here. In the present case the question is on what date the risk can be assumed so assumed here. The legal provision makes it clear that it can be assumed even from a prior date of conclusion of the contract or issuance of the policy. The only limitation put is by Section 64-VB(1) and (2) on such assumption which is as under :

"64-VB. No risk to be assumed unless premium is received in advance-- (1) No insurer shall assume any risk in India in respect of any insurance business on which premium is not ordinarily payable outside India unless and until the premium payable is received by him or is guaranteed to be paid by such person in such manner and within such time as may be prescribed or unless and until deposit of such amount as may be prescribed, is made in advance in the prescribed manner.

(2) For the purposes of this section, in the case of risks for which premium can be ascertained in advance, the risk may be assumed not earlier than the date on which the premium has been paid in cash or by cheque to the insurer."

Clearly, this is an enabling provision. The said section is already paraphrased in the case of Oriental Fire and General Insurance Co. Ltd. Vs. Panvel Industrial Co-operative Estates Ltd., and quoted above. We approve this.

15. Therefore, in the present case, the date of issuance of policy 30-6-1989 is immaterial from the point of view of assumption of risk. The risk came to be assumed on 25-8-1988. It was in force till 25-8-1989. The policy was sent to M.S.F.C., which was acting as agent of the appellant. It never raised any objection to the same. Whether MSFC sent it in turn to the appellant or not is not relevant. If there is any negligence on the part of the said MSFC and consequently the appellant has suffered loss then it will have to sue MSFC on that ground. In addition, we find that even the proposal filed by the appellant on

16-6-1989 was for the period 12-3-1988 to 12-9-1988 (Clause 11). It was signed by the appellant. The learned trial Judge has rightly considered the admissions of the plaintiff's witness No. 1 and concluded that it can be assumed that appellant had sufficient knowledge about the terms and conditions of the policy and the contents of the proposal form which was signed and submitted by him after the premium was paid by MSFC.

16. The date of conclusion of a contract of insurance or issuance of the policy is different from the acceptance or assumption of risk. Section 64-VB only lays down broadly that insurer cannot assume risk prior to the date of receipt of the premium. Rule 58 of the Insurance Rules, 1939 speaks about advance payment of premiums in view of subsection (1) of Section 64-VB which enables the insurer to assume the risk from that date onwards. If the proposer did not desire a particular date, it was possible for the proposer to negotiate with the insurer about that term. Precisely, therefore, the Apex Court in the matter of L.I.C. AIR 1984 SC 1014 (cited supra) has said that final acceptance is that of the assured or insurer depends simply on the way in which negotiations for insurance have progressed. In the present case, the Insurance policy clearly mentioned that it was for a period of one year from 26-8-1988 to 25-8-1989 and neither the appellant nor his agent MSFC has controverted it. Hence, the said term be accepted. It was irrelevant whether it was sent to the appellant or not. However, it was sent to MSFC which was acting as agent for the appellant. Further generally, fire policy was for one year. Rule 59 of Insurance Rules, 1939 deals with relaxation and Rule 59(i) suggests that generally fire policy is for one year. In the present case, the fire policy was issued by the insurer for a period of one year and the premium of Rs. 3135/- was paid by the MSFC on 26-8-1988. It has assumed the risk from that date onwards for one year i.e. 25-8-1989. Hence, it cannot be said that policy was not in force on 10-2-1990. Therefore, the view taken by the learned trial Judge in this respect was not correct. We answer the point in the negative,

17. In view of the above discussion, we pass the following order :--

The appeal is dismissed. Cross-objections are partly allowed.