

(2002) 01 GAU CK 0044
In the Gauhati High Court
Case No : MA (F) No. 128 of 1995

Hara Mohan Sen and Others

APPELLANT

Vs

Divisional Manager, National Insurance Co. Ltd. and Another

RESPONDENT

Date of Decision : 07-01-2002

Acts Referred:

Arbitration Act, 1940 — Section 39(1)

Citation : (2002) 1 GLT 89

Hon'ble Judges : A.H. Saikia, J

Bench : Single Bench

Advocate : S. Sarma, S.T. Sarma and R. Bordoloi, for the Appellant; M. Bhuyan and H. Das, for the Respondent

Final Decision : Dismissed

Judgement

A.H. Saikia, J.—This appeal was filed by the appellants u/s 39(1) of the Arbitration Act, 1904 assailing the impugned judgment and order dated 20.5.1995 passed by the learned District Judge, Karimganj in Misc. (Arbitration) Case No. 134/91 setting aside the Award of the Arbitrators. The firm of the appellant's M/s Kara Mohan Sen, dealing in goods like stationery, plastic goods, glass bangles, imitation jewelleryes and other goods, etc., was situated at Madan Mohan Road at Karimganj Town. The entire stocks of the goods of the firm was insured with the then Hindustan General Insurance Society Ltd., which was later on taken over by the National Insurance Company vide Notification dated 31.12.1973 (for short "the Insurance Company") by two policies being No. 226793 dated 31.1.1969 for Rs. 10,000 and 226649 dated 30.12.1968 for Rs. 30,000. A devastating fire broke out on 15.11.1969 at Karimganj Bazar and the Petitioners/Appellants' firm was gutted causing damage of goods worth Rs. 26,752 as covered by policy No. 226649 and goods worth Rs. 6441.00 which covered by other policy. The Insurance Company after said fire deputed one Surveyor to assess the loss sustained by the firm of the appellants. And accordingly the Surveyor visited the shop and godown of the appellant's firm

and prepared a list of damage articles and its value. The appellants" submitted a Claim Petition to the Insurance Company for compensation on the basis of the assessment made by the surveyor but the Insurance Company arbitrarily repudiated the claim of the appellants in violation of the terms and conditions of the insurance policy. Thereafter the appellants submitted one application dated 25.8.1970 (Exbt.9) to the Insurance Company for getting the payment of compensation as per terms and condition of the policies but the Insurance Company failed to pay any heed to the said letter. Thereafter the appellants served a legal notice upon the Insurance Company on 11.11.1970 for settlement of the dispute through arbitration as per Clause 18 of the policy. Accordingly an arbitration proceeding was initiated with the appointment of two arbitrators but the claim of the appellants was dismissed by those arbitrators for none prosecution of the proceeding. Ultimately this High Court interfered with in the matter and accordingly two other arbitrators were appointed to settle the dispute and the award dated 11.4.1994 under challenge before the learned District Judge, Karimganj was filed by these arbitrators allowing the Claim of the appellants. The learned District Judge after careful consideration of the award and after hearing the learned counsel for the parties set aside the award dated 11.4.1994 holding Inter alia that the claim of the appellants and the subsequent reference to the arbitration of the same were time barred in terms of Clause 13 of the terms and conditions of the policies.

2. I have heard Mr. S. Sarma, learned counsel appearing for the appellants. Also heard Mr. M. Bhuyan, learned counsel for the Respondents. On perusal of the records including the impugned Judgment of the learned District Judge and upon hearing the learned counsel for the parties, it appears that the moot question in controversy is whether the claims of the appellants are really time barred in terms of Clause 13 of the terms and conditions -of the policy.

3. Therefore, in order to discuss and determine the crucial issue " above noted, it would be convenient and necessary to look into the relevant Clause 13 of the said policy which is quoted as under :

"13. If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the insured or any one acting on his behalf to obtain any benefit under this policy; or, if the loss or damage be occasioned by the wilful act, or with the connivance of the insured; or, if the claim be made and rejected and an action or suit be not commenced within three months after such rejection, or (in case of an arbitration taking place in pursuance of the 18th condition of this policy) within three months after the Arbitrator or Arbitrators or Umpire shall have made their award, all benefit under this policy shall be forfeited".

4. A bare perusal of the last portion of the aforesaid Clause 13 goes to show that if the claim be made and rejected and an action or suit be not commenced within three months after such rejection, all benefits under this policy shall be forfeited.

5. Advancing the arguments Mr. Sarma, learned counsel for the appellants, vehemently contended that the appellants had already initiated action by serving the letter dated 28.5.1970 (Exbt. 9) by which the request was made to the insurer to make payment of the claim and as such the Exbt. 9 was itself an action taken under this Clause 13 and thereby the claim was not time barred as held by the learned District Judge.

6. Refuting the contention put forward on behalf of the appellants, Mr. Bhuyan, learned counsel for the Insurance Company, forcefully argued that mere sending a communication in the shape of a letter on 25.8.1970 cannot be said to be an "action" taken by the appellants to get the benefit of limitation of three months as prescribed under Clause 13..

7. On perusal of records, it appears that the claim filed by the appellants was repudiated by the Insurance Company on 28.5.1970. As per Clause 13 an action has been taken before 27.8.1970 within a period of three months from such repudiation but, in the instant case, an application dated 25.8.1970 was submitted on behalf of the appellant to the Insurance Company which was duly acknowledged. The said letter dated 25.8.1970 was claimed on behalf of the appellants to be the "action" taken in terms of Clause 13 of the Insurance Policy. In order to define and explain the term "action" Mr. Bhuyan, learned counsel for the Respondents referred the Dictionary meaning of the said term relying on the various definition enumerated in different legal dictionaries as follows:

"Halsbury's Law of England, 4th Edition Vol. 37 - In paragraph 17 the action has been defined as under :

"Action" means any civil proceedings commenced by Writ or in any other manner prescribed by rules of Court. It has a wide signification as including any method prescribed by those rules of invoking the Court's jurisdiction for the adjudication or determination of a lis or legal right of claim or any justiciable issue, question or contest arising between two or more persons or affecting the status of one of them. In its natural meaning "action" refers to any proceeding in the nature of a litigation between a plaintiff and a defendant. It includes any civil proceedings in which there is plaintiff who sues, and a defendant who is sued, in respect of some cause of action, as contrasted with proceedings, such as statutory proceedings which are embraced in the word "matter".

Black's Law Dictionary at page 26 defines "action" as under :

"Action". Conduct; behaviour; something done; the condition of acting; and act or series of facts.

Terms in its usual legal sense means a suit brought in a court; a formal complain within the jurisdiction of a court of law. Pathman Const. Co. v. Knox County Hospital Ass'n Ind.App. 326 NE 2d 844,853. The legal and formal demand of one's right from another person or party made and insisted on in a court of justice. An ordinary proceeding in a court of justice by which one party

prosecutes another for the enforcement or protection * of a right, the redress or prevention of a wrong, or the punishment of a public offense. It includes all the formal proceedings in a court of justice attendant upon the demand of a right made by one person of another in such court, including an adjudication upon the right and its enforcement or denial by the court.

Stroud's Judicial Dictionary, 4th Edition, Vol. 1 at page 45 the term action has been explained as follows :

"This a generic term, and means a litigation in a civil court for the recovery of individual right or redress of individual wrong, inclusive, in each proper legal sense, of suits by the Cron (Bradlaugh v. Clarke 8 App. Cas, 354)"

8. To bolster his submissions further, Mr. Bhuyan, learned counsel relied on a decision of Apex Court In The Vulcan Insurance Co. Ltd. Vs. Maharaj Singh and Another, In the said citation the Apex Court had the occasion to deal with the Clause 13 of the Insurance Policy which is exactly similar to the present provision of Clause 13 as already referred to herein above and held that the "action" as mentioned in Clause 13 meant a legal proceeding which almost invariably in India would be the nature of a suit and for establishment of Companies liability a legal proceeding, normally a suit, was required to be instituted within the period of three months from the date of the rejection of the claim. In paragraph 12 the Apex Court held as under :

" 12. As per Clause 13 on rejection of the claim by the company an action or suit, meaning thereby a legal proceeding which almost invariably in India will be in the nature of a suit, has got to be commenced within three months from the date of such rejection; otherwise, all benefits under the policy stand forfeited. The rejection of the claim may be for the reasons indicated in the first part of Clause 13, such as false declaration, fraud or wilful neglect of the claimant or on any other ground disclosed or undisclosed. But as soon as there is a rejection of the claim and not the raising of a dispute as to the amount of any loss or damage, the only remedy open to the claimant is to commence a legal proceeding, namely, a suit, for establishment of the company's liability. It may well be that after the liability of the company is established in such a suit, for determination of the quantum of the loss or damage reference to arbitration will have to be resorted to in accordance with Clause 18. But the arbitration Clause, restricted as it is by the use of the words "if any difference arises as to the amount of any loss or damage", can not take within its sweep a dispute as to the liability of the company when it refuses to pay any damage at a11."

9. Reliance was also placed in another decision of the Apex Court reported in National Insurance Co. Ltd. Vs. Sujir Ganesh Nayak and Co. and another, wherein the Apex Court held that the Clause in the Insurance policy providing shorter period than prescribed by law for filing of claim from occurrence does not curtail limitation and not hit by Section 28 .of the Contract Act and on any suit filed after expiry of stipulated period is time barred. In paragraph 17 of the said

decision the Apex Court held as follows :

"From the case law referred to above the legal position that emerges is that an agreement which in effect seeks to curtail the period of limitation and prescribes a shorter period than that prescribed by law would be void as of tending Section 28 of the Contract Act. That is because such an agreement would seek to restrict the party from enforcing his right in Court after the period prescribed under the agreement expires even though the period prescribed by law for the enforcement of his right has yet not expired. But there could be agreements which do not seek to curtail the time for enforcement of the right but which provides for the forfeiture of waiver of the right itself if no action is commenced within the period stipulated by the agreement. Such a Clause in the agreement would not fall within the mischief of Section 28 of the Contract Act. To put it differently, curtailment of the period of limitation is not permissible in view of Section 28 but extinction of the right itself unless exercised within a specified time is permissible and can be enforced. If the policy of insurance provides that if a claim is made and rejected and no action is commenced within the time stated in the policy, the benefits flowing from the policy shall stand extinguished and any subsequent action would be time barred. Such a clause would fall outside the scope of Section 28 of the Contract Act. This, in brief, seems to be the settled legal position..."

10. Having regard to the above cited judicial pronouncements of the Apex Court and upon hearing the learned counsel for the parties, I am of the considered view that the term "action" appeared in Clause 13 definitely indicates to a legal action by way of a Civil Suit or proceeding and the Exbt. 9, I.e., the letter dated 25.8.1970 in no occasion could be the substitute of legal proceeding. That being the position, I find enough force on the submissions advanced on behalf of the Respondents and unhesitatingly hold that the learned District Judge was absolutely correct and justified in holding that the claim of the appellants and subsequent reference to the arbitration were time barred not being initiated within three months from the date of rejection of the claim and the appellants are not entitled to any benefits under the policy in terms of Clause 13 of the Insurance Policy.

11. At this juncture, Mr. Sarma, learned counsel for the appellants pleaded that the appellants insured their properties against the damage, destruction and loss thereof to be occurred due to accident of fire etc. and continued to pay their premium to the Insurance Company year after year with full sense of security that the event of such unfortunate happenings, the Insurance Company would immediately come to the rescue by making prompt payment of the insured money. Thus, it was highly expected that the Insurance Company which received the premium continuously, to make prompt payment of the insured amount. But in the instant case, said expectation has been frustrated due to denial of the insured money. In support of his this submission, Mr. Sarma, learned counsel referred to a decision of this Court in the Oriental Fire & General Insurance

Company Ltd., Divisional Officer, Guwahati v. Dotco, Badarpur, Cachar reported in (1989) 2 GLR 399.

12. It is true that it is the duty and obligation of the Insurance Company to fulfil the expectation of the insured but in the same breath it is also incumbent on the part of the insured to take appropriate steps in appropriate time in terms of the terms and conditions which have been mutually agreed upon to abide by. In the instant case, as already placed on record, herein above, the appellants failed to act in terms of Clause 13 of the Insurance Policy. As such, there is no scope to grant any relief to the appellants. I find no reason to upset the impugned Judgment dated 20.5.1995.

13. In the result, the present appeal fails. However, parties are to bear their own costs.