
(1999) 05 SHI CK 0025
In the High Court Of Himachal Pradesh
Case No : Civil Suit No. 119 of 1995

H.P. Horticultural Produce Marketing and Processing Corporation Ltd.

APPELLANT

Vs

United India Insurance Company Ltd. and Another

RESPONDENT

Date of Decision : 25-05-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 26
Companies Act, 1956 — Section 2(26)
Contract Act, 1872 — Section 20, 28

Citation : AIR 2000 HP 11 : (1999) 3 ShimLC 257

Hon'ble Judges : R.L. Khurana, J

Bench : Single Bench

Advocate : Sharwan Dogra, for the Appellant; Ashwani Sharma, for the Respondent

Final Decision : Dismissed

Judgement

R.L. Khurana, J.—The plaintiff is a limited company incorporated under the Companies Act, 1956. It has a Fruit Processing Plant at Parwanoo in District Solan. In such plant, 18 numbers of Tanks have been installed in the cold storage chamber. Such tanks have the storage capacity of 4.20 lacs litres of apple juice concentrate. Two other tanks with the storage capacity of 50,000 litres of apple juice concentrate have been installed in the pre-cooling chamber outside the cold storage chamber.

2. The complete plant and machinery, tools accessories etc. along with the stock of apple Juice concentrate, Aroma and chemicals whilst lying in the cold storage was insured by the plaintiff for a sum of Rs. 6,24,65,000/- during the period 17-9-1990 to 16-9-1991 vide insurance policy Ex. PW 1/1, covering the following risks :--

1. Fire.

2. Lightening.

3. Explosion/implosion but excluding loss of or damage to boilers (other than domestic boilers) economisers, or other vessels, machinery or apparatus in which steam is generated or other contents resulting from their own explosion/implosion.

4. Impact by rail/road vehicles or animal.

5. Aircraft and other aerial and/or space devices and/or articles dropped therefrom, excluding destruction or damage occasioned by pressure waves caused by such devices.

6. Riot, strike and malicious daniage as per clause printed thereon.

3. Additional premium was paid by the plaintiff to cover the risk of earthquake also, since under the general terms of the policy such risk was not covered.

4. On 26-11-1990 it was noticed that storage tank No. 2 had collapsed on one side causing damage and leakage to the apple juice concentrate. Before the collapse, the tank contained 35, 779 kgs. of apple juice concentrate out of which 27,040 kgs. of juice concentrate was damaged due to leakage. Telegraphic information about the damage and loss was given to the defendants on the same day and a claim for Rs. 8,10,270/-towards the damage and loss was lodged on 4-1-1991. The Surveyors appointed by the defendants after necessary enquiry and investigation, assessed the loss at Rs. 5,42,522,60 paise. However, the Surveyors opined that the defendants were not liable under the policy since the same was not covered under the terms of the policy. In the opinion of the Surveyors the damage and loss had occurred due to metal failure/ fatigue of the stainless steel plate used at the bottom of the storage tank. The claim of the plaintiff was accordingly repudiated by the defendants on 27-3-1992 vide letter Ex. PW 1/6. Hence the present suit for recovery of Rs. 13,93.664.40 paise, that is, Rs. 8,10,270/ as the loss and daniage and Rs. 5.83,394,40 as interest at the rate of 18% per annum from 1-1-1991 to 31-12-1994, came to be filed on 2-1-1995.

5. The defendant while resisting the suit admitted the insurance. It was pleaded that the loss and damage. If any, suffered by the plaintiff was not covered under the terms of the policy of insurance. The plaintiff, therefore, was not entitled to any compensation. Objections as to maintainability of the suit, limitation and the suit not having been filed through a competent and authorised person were also raised.

6. On the pleadings of the parties, the following issues were framed on 19-9-1996 and 7-4-1998 :--

1. Whether the suit has been filed by the duly authorised person on behalf of the plaintiff? OPP

2. Whether the plaintiff is entitled to the amount claimed in the suit? OPP

3. Whether the loss sustained by the plaintiff was not covered by the terms of the insurance policy? OPD

4. Whether the suit is not maintainable? OPD

4-A. Whether the suit of the plaintiff is time-barred as per terms and conditions of the insurance policy, as alleged? OPD

5. Relief.

7. Both the parties have led oral as well as documentary evidence in support of their case. I have heard the learned counsel for the parties and have also gone through the record of the case. My findings on the above issues are as under :--

Issues Nos. 4 and 4-A.

8. Both these issues being correlated and inter-connected are being taken up together.

The case of the defendants is that in view of the condition laid down in Clause 6(ii) of the insurance policy Ex. PW 1/1 the present suit is neither maintainable nor is within time. The said clause reads :

"In no case whatsoever shall the Company be liable for any loss or damage after the expiration of 12 months from the happening of the loss or damage unless the claim is subject to pending action or arbitration. It being expressly agreed and declared that if the company shall disclaim liability for any claim hereunder and such claim shall not within 12 calendar months from the date of disclaimer have been made the subject-matter of a suit in a Court of law then the claim shall for the purpose be deemed to have been abandoned and shall not thereafter be recoverable hereunder."

9. The learned counsel for the plaintiff on the other hand has contended that the condition contained in Clause 6(ii) of the insurance policy Ex. PW 1 /1 is rendered void by virtue of Section 28 of the Contract Act. 1972, and that the suit having been filed within three years of the date of repudiation of the claim is maintainable and within time.

10. In Pearl Insurance Co. v. Atma Ram, AIR 1960 Punjab 236, the Full Bench of Punjab High Court was faced with a similar condition as is contained in Clause 6(11) of the insurance policy Ex. PW 1/1 in the present case. The question posed for determination by the Full Bench was whether Clause 19 of the policy (which is similar to Clause 6(ii) in the present case) was rendered void by virtue of Section 28 of the Contract Act, 1872.

While upholding the validity of the clause, the Full Bench held :--

".....As a result of the above discussion, on principle and authority the validity of a clause similar to Clause 19 must be upheld principally on following grounds :

(1) The primary duty of a Court of law is to enforce a promise which the parties

have made and to uphold the sanctity of contracts into which the parties have an unfettered right to enter provided they are not opposed to public policy or are not hit by any provision of the law of the land.

(2) The object and exigencies of insurance are such that promptitude in asserting or enforcing a claim and also in its settlement was of the essence. The Insurance Companies would thus be justified in putting a time-limit within which the claim must be enforced : otherwise all rights under the policy would come to an end.

(3) A clause of this nature does not provide a different period of limitation from the one prescribed by the Indian Limitation Act. Notwithstanding the existence of the clause, it is open to the insured to maintain an action within three years as prescribed by the Limitation Act subject to the Company waiving the clause although under the Limitation Act the suit must be dismissed if instituted after the expiry of the prescribed period and the waiver is wholly ineffective.

(4) A contract may contain within itself the elements of its own discharge express or implied for the determination in certain circumstances.

(5) as the clause does not limit the time within which the insured could enforce his rights and only limits the time during which the contract will remain alive it is not hit by the provisions of Section 28 of the Contract Act.

11. The above ratio laid down by the Full Bench of the Punjab High Court was approved and upheld by the Supreme Court in *National Insurance Co. Ltd. Vs. Sujir Ganesh Nayak and Co. and another*, It was observed as under :--

".....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 offending 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 rights but which provide for the forfeiture or 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."

12. In the present case, admittedly the claim regarding loss and damage was

lodged by the plaintiff with the defendants within 12 months of the happening of loss and damage. Such claim was repudiated by the defendants on 27-3-1992 vide letter Ex. PW 1/6. Therefore, in terms of Clause 6(ii) the plaintiff could have enforced the claim against the defendants by way of a suit within 12 months from such repudiation. In other words, the claim could have been enforced till 26-3-1993. The present suit was filed on 2-1-1995, for enforcement of the claim, that is, about two years after the expiry of the period prescribed under Clause 6(ii). On the failure of the plaintiff to enforce the claim within the period stipulated in Clause 6(ii) of the Insurance policy Ex, PW 1 /1, the forfeiture clause came into play and the right of the plaintiff to enforce the claim stood extinguished.

13. The suit filed by the plaintiff, therefore, is neither maintainable nor the same can be said to be within time. The two issues are decided in favour of the defendants.

Issue No. 1.

14. The present suit has been filed by the plaintiff through its then Managing Director Shri K. K. Gupta.

No evidence has been led by the plaintiff either to show that Shri K. K. Gupta was the Managing Director of the plaintiff at the relevant time or that he had the authority and was competent to file the suit for and on behalf of the plaintiff. Even Shri K. K. Gupta has not stepped into the witness box.

15. Section 2 (26). Companies Act, 1956, defines "Managing Director" as under :--

" "managing director" means a director who, by virtue of an agreement with the company or of a resolution passed by the company in general meeting or by its Board of Directors or, by virtue of its memorandum or articles of association, is entrusted with substantial powers of management which would not otherwise be exercisable by him, and includes a director occupying the position of a managing director, by whatever name called :

Provided that the power to do administrative acts of a routine nature when so authorised by the Board such as the power to affix the common seal of the company to any document or to draw and endorse any cheque on the account of the company in any bank or to draw and endorse any negotiable instrument or to sign any certificate of share or to direct registration of transfer of any share, shall not be deemed to be included within substantial powers of management :

Provided further that a managing director of a company shall exercise his powers subject to the superintendence, control and direction of its Board of Directors." .

16. Assuming Shri K. K. Gupta was the Managing Director of the plaintiff at the relevant time, the onus was on the plaintiff to show the powers of management held by him either by virtue of an agreement or of a resolution passed by the

plaintiff in general meeting or by its Board of Directors or by virtue of its memorandum or article of association. In the absence of evidence showing the authority of Shri K. K. Gupta to file the suit for and on behalf of the plaintiff, it is held that the suit has not been filed by a duly authorised person. The issue is decided against the plaintiff.

Issue No. 3.

17. The plaintiff while lodging the claim for loss and damage had given the possible cause of loss as sinking of floor due to aftereffects of earthquake resulting in tilting of the storage tank cause tear and leakage of apple juice concentrate.

18. The Surveyors appointed by the defendants have given the cause of loss and damage as under :--

"10. We would like to categorically state that the stainless steel comprising the bottom of the tank has been slightly folded due to metal fatigue/inadequate design thickness causing a 60 mm long and 2 mm wide tear through which some material could have leaked. The above does not constitute a collapse by any standard. The tank is maintaining its cylindrical shape and is still standing on all 6 legs though tilted to one side to an extent of about 6" out of plumb vertically from the top point.

11. As such, in our view, the failure and damage is due to inadequate design thickness of the tank or due to metal fatigue on the bottom side of the tank."

19. Assuming the cause of loss and damage as given by the Surveyors of the defendant in their report Ex. DW I/A as correct, it is significant to note that DW 2 Shri S. C. Sharma, Branch Manager has admitted to the following facts :--

"It is correct that at the time of insurance, the property sought to be insured is duly checked and verified. It is correct that as per the policy and practice of the Insurance Company before any plant, machinery or building is insured, inspection with regard to its condition and structure is carried out and offer of insurance is accepted only after the Company is satisfied therewith."

20. Therefore, it can be safely presumed that at the time of insurance, the storage tanks must have been checked and inspected by the defendants. Having once found the storage tanks to be in order, it is not open to the defendants to find fault with the same by pointing out any manufacturing defects therein.

21. One of the risks covered is explosion/ implosion. The term "Explosion" has been defined in Webster's Comprehensive Dictionary (1996 Edition) as meaning : the act of exploding rapid combustion or other similar process usually causing a loud noise. According to the same dictionary "Implosion" means : a bursting inward, sudden collapse.

22. While covering the risk by explosion/ implosion the only exclusion made in the insurance policy Ex. PW 1 /1 is "loss of or damage to boilers (other than

domestic boilers), economisers or other vessels, machinery or apparatus in which steam is generated or other contents resulting from their own explosion/implosion."

23. There is nothing on the record to show that the explosion/implosion of the storage tank falls within the ambit of the above exclusion clause. The defendants would be liable and the claim would be covered by the insurance policy once it is shown that the loss and/or damage was suffered as a result of explosion/implosion due to any reason except the one falling under the exclusion clause.

24. On the facts and in the circumstances of the case, it can be safely held that the loss/damage sustained by the plaintiff was duly covered by the terms of the insurance policy Ex. PW 1 /1. The issue is decided in favour of the plaintiff .

Issue_No._2.

25. The Surveyors appointed by the defendants vide report Ex. DW 1/A have assessed the loss at Rs. 5,42,522,60 paise as against the claim of the plaintiff to the tune of Rs. 8,10,270/-. However, in view of the findings recorded under issues No. 4 and 4-A above, the plaintiff is held not entitled to any amount. The issue is decided against the plaintiff.

26. As a result of the findings recorded under issues Nos. 1,2,4 and 4-A above, the suit of the plaintiff fails and the same is dismissed leaving the parties to bear their own costs.