

(1997) 11 DEL CK 0048

In the Delhi High Court

Case No : Regular First Appeal No. 289/92

Ramsons Southend

APPELLANT

Vs

Division Manager, New India Assurance Co. Ltd. and Others

RESPONDENT

Date of Decision : 01-11-1997

Acts Referred:

Citation : (1998) 1 AD 484 : (1998) 71 DLT 842 : (1998) 44 DRJ 677

Hon'ble Judges : S.N. Kapoor, J;A.B. Saharya, J

Bench : Division Bench

Advocate : Mr. Rajeev Nayar and Mr. Kamal Mehta, for the Appellant; Mr. B.R. Sabharwal and Mr. Y. D. Nagar, for the Respondent

Judgement

S.N. Kapoor, J.—This Regular First Appeal is directed against judgment and decree dismissing suit for recovery of Rs. 64,900/- for loss occasioned on account of burglary. The suit has been dismissed solely on the finding on the issue: "Whether the suit is barred by time?" in affirmative.

2. The plaintiff/appellant, a registered partnership firm, is an authorised dealer of M/s. Raymond's Woolen Mills Ltd., having their showroom at C-1/A Green Park Extension. It has procured multi-peril insurance policy No. 7512100791 for the period 8.11.82 to 8.11.83 from the defendants/respondents in the sum of Rs. 2 lakhs to cover losses on account of (a) fire, lightening; (b) Riot and strike; or (c) theft or any attempt thereof. According to the appellant, there was a burglary or theft in the evening of 16.4.83 at about 5:15 P.M. at the above said shop of the plaintiff. The burglars/culprits opened the door of the shop violently and forcibly and threatened the employees and customers of the plaintiff of dire consequences in case anybody moves from his place. They were carrying revolver and knives and few had covered their faces with clothes. They even beat the employee and customers. After this rein of terror let loose they started loading the car which was parked outside with the cloth rolls. The also took away valuables like gold chain and watches from the person of Purshot-tam Saran, partner of the plaintiff firm apart from watches, pen rings and cash of the

customers and employees and cash of Rs. 900/- from the cash box. They also gave details of the loss. A claim vide letter dated 20th April, 1983 was preferred on account of (disputed) loss due to burglary. It was registered by the defendants/respondents as No. 5120/20/83/9 and M/s. Lakenders Care Claims Corporation, independent surveyor were appointed to survey and assess the loss. The said surveyors on compliance of the requirements submitted their report to the defendants/respondents and confirmed the loss of Rs. 55,000/- in their report. Despite repeated requests and reminders for settling the claim of the plaintiff/appellant and legal notice dated 7th January, 1984 served on the defendants/respondents, the defendants/respondents failed to settle their claim. Instead of settling their claim vide letter dated 19th January, 1984, the respondents repudiated the claim. Thereafter, another legal notice dated 25th September, 1984 was sent calling upon the respondents to re-examine and re-process the claim as repudiation was illegal, wrong and biased and that the claim of the plaintiffs fell within the four corners of the insurance policy. On persistent refusal to honour the policy by the respondents, the plaintiff/appellant led to file this suit for recovery of Rs. 64,900/-.

3. Respondents No. 1 to 3 contested the suit inter alias on the ground that suit was not maintainable. There was no theft in the shop of the plaintiff within the ambit of the insurance policy No. 7512100791 valid from 8th November, 1982 to the noon of 8th November, 1983; for the burglars/culprits had not opened the door of the shop violently and forcibly and had not threatened the customers and employees of the plaintiff was repudiated after considering all the facts and terms and conditions of the policy of insurance. Consequently, the plaintiff/appellant firm was not entitled to recover any damages.

4. On the pleadings of the parties the following issues were framed:

"(1) Whether the suit has been signed, verified and filed by a duly authorised and competent person? OPP

(2) Whether there was any theft or burglary of the insured goods? If so extent of loss suffered by pltf. and the amount to which he is entitled? OPP

(3) Whether the suit is barred by time?

(4) Whether there is no cause of action against the debt?

(5) To what amount, the plaintiff is entitled?

(6) Relief."

Issue No. 1, 2 and 4 were decided in favor of the appellant/plaintiff. Issue No. 3 was decided against the appellant and consequently, issue No. 5 & 6 were also decided against the appellant.

5. Feeling aggrieved, the present appeal has been filed.

6. As would be evident, the appeal could be confined to the issue on limitation

alone. But the question "Whether the repudiation of the claim of the appellants/ disclaimer dated 19th January, 1984 was sufficient to deem that the appellants had abandoned their claim and they could not file suit for recovery of the claim on 19th January, 1985?", also arose during the course of arguments.

7. Since the respondents argued before Ld. Trial Court as well as before us about limitation based on disclaimer mentioned in clause 9 of the policy, we heard the parties at length to arrive at a just decision of the case and to avoid any prejudice to either of the parties.

8. Learned counsel for the plaintiff/appellant argued that the letter of disclaimer dated 19.1.1984 was neither received on 19.1.1984 nor it could have been received on that date. Consequently, the suit was within time. This submission was rejected by the Ld. Trial Court on the ground that in the plaint the plaintiff/appellant has not alleged that this letter dated 19.1.1984 was received by the plaintiff after 19.1.1984 nor any evidence was produced in this regard.

In this respect, it is worthwhile to reproduce para 14 of the plaint as well as written statement. Para 14 of the plaint reads as under:-

"14. That the cause of action accrued to the plaintiff from 16.4.1983 when the loss occurred and on different dates when the claim was preferred, the surveyor surveyed the loss, parties entered into correspondence .The cause of action finally arose on 19-1-1984 when the defendant Insurance Company disowned and rejected the claim vide letter dated 19-1-1984 and when legal notice dated 25-11-1984 was served by the plaintiff on the defendant company for re-examining the reprocessing the claim."

Para 14 of the written statement reads as under:

"14. Para No. 14 of the plaint is wrong and denied. The plaintiff has no cause of action. Rest of the para is wrong. The suit is barred by limitation as per terms of policy of insurance. This suit has been filed after 12 months of repudiation of the claim."

9.1 In so far as the issue on limitation is concerned, if we go by Law a imitation Article 44(b) is relevant. It reads as under:

Description of suit Period of Time from which limitation period of begins to run
44. (a) ... Three years ... (b) On a policy of The date oft the occurrence insurance when the -do- causing the loss, or where sum insured is pay- the claim on the policy able after proof is denied either partly or of the loss has been wholly, the date of such given to or received denial. by the insurers. 9.2 It is evident that Article 44(b) of the Limitation Act, 1963 provides two kinds of cases. In the first case, date from which period of 3 years begins to run is the date of the occurrence of the loss. This clause would apply only to those cases where the claim under the policy is not denied. Second clause provides for period of time in cases where the claim is repudiated and in such cases the period starts running from the date of disclaimer or repudiation expires after a period of 3

years from that date. If any authority is needed to verify this proposition, one may refer to *Rajendra Kumar Arya Vs. Messrs New India Assurance Co. Ltd.* Unit : The Commonwealth Assurance Co. Ltd., . In that case the suit was brought within 3 years from the date of denial of the claim and suit was held to be validly instituted within the said period of three years from the date of denial of the claim. Since incident causing loss to the appellant took place on 16th April, 1983 and the suit was filed on 18th January, 1985, it is within 3 years. Applying the second part of Article 44 (b), since claim was denied, according to the defendant, on 19th January, 1984, it is within 3 years. Consequently, the suit is not barred by limitation.

10. Now, coming to the arguments advanced by Ld. counsel for the parties based on clause 9, it is desirable to reproduce clause 9 of the policy in its entirety:

"9. If any difference shall arise as to the quantum to be paid under this Policy, (liability being otherwise admitted) such difference shall in dependently of all other questions 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 disinterested persons as arbitrators of whom one shall be appointed in writing by each of the parties within two calendar months after having been required so to do in writing by the other party in accordance with the provisions of the Arbitration Act, 1940, as amended from time to time and for the time being in force. In case either party shall refuse or fail to appoint arbitrator within two calendar months after receipt of notice in writing requiring an appointment, the other party shall be at liberty to appoint sole arbitrator; and in case of disagreement between the arbitrators, the difference shall be referred to the decision of an umpire who shall have been appointed by them in writing before entering on the reference and who shall sit with the arbitrators and preside at their meetings.

It is clearly agreed and understood that no difference or dispute shall be referable to arbitration as hereinbefore provided, if the Company has disputed or not accepted liability under or in respect of this policy.

It is hereby expressly stipulated and declared that it shall be condition precedent to any right of action or suit upon this policy that the award by such arbitrator, arbitrators or umpire of the loss or damage shall be first obtained.

It is also hereby further expressly agreed and declared that if the Company shall disclaim liability to the Insured for any claim hereunder and such claim shall not, within 12 calendar months from the date of such disclaimer have been made the subject matter of such a suit in a court of law, then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder."

During the course of arguments following other incidental questions also arose; (a) Whether clause 9 is purely an arbitration clause and is confined to the appellant's claim to arbitration? (b) If point (a) is decided in negative, whether

part 4 of clause 9 is hit by Section 28 of the Contract Act? (c) If point No. (b) is decided in affirmative what is the date of effective disclaimer to pinpoint the date from which period of 12 calendar months would start running? (d) Whether letter dated 19th January, 1984 could be presumed to have been admittedly served on 19th January, 1984.

11. A question arises about effective date of denial of claim in interpretation of Article 44(b) as well as disclaimer in clause 9 of the policy. We are not oblivious to the fact that there could be difference in approach in matters of interpretation of a Statute and a policy of insurance. But in the present case it is not likely to make much difference.

12. Ex. PW-1/6 i.e. letter dated 19th January, 1984 repudiating the claim of the respondent reads as under:

THE NEW INDIA ASSURANCE CO. LTD.

(A subsidiary of the General Insurance Corporation of India)

Ref. 5120/MLA-rks/

(REGISTERED A.D.)

Dated : 19th January, 1984

M/s. Ramsons Southend,

C-1/A, Green Park Extn.

Main Mehrauli Road,

NEW DELHI.

Dear Sirs,

Re: Claim No. 5120/20/89/9 - Policy No.

7512100791 - alleged robbery on 16-4-83.

The above loss has been carefully processed and we regret to inform you that the claim does not fall within the purview of the policy and Therefore we repudiate our liability and are filing away the papers as "No Claim" which kindly note.

Thanking you and assuring you of our best attention.

Yours faithfully,

sd/-

SR. DIVISION MANAGER

A carbon copy of the above mentioned letter, filed by the respondents, Divisional Manager, The New India Assurance Co. Ltd., is available at page-231 of the trial

court record.

15. From the persual of para 14 of the plaint, it is apparent that two dates have been mentioned which gave rise to the cause of action: first, which arose on 19.1.1984 "when the defendant insurance company disowned and rejected the claim of the plaintiff/appellant vide letter dated 19.1.1984" and secondly, "when legal notice dated 25.11.1984 was served on the defendants/respondents for re-examining and re-processing the claim". In any case in view of subsequent notice sent by the appellant and reasons of disclaimer given subsequently by the respondents, it cannot be said that the cause of action arose finally on 19.1.1984. If appellant's plea is properly understood, it arose on account of rejection of claim vide letter dated 19.1.1984 on the date of the receipt of this letter. There is nothing whatsoever in para 14 of the plaint to hold that this letter was actually received by the plaintiff/appellant on 19.1.1984 itself and on that very day finally the cause of action accrued to the plaintiff/appellant. This conclusion drawn by the Trial Court is certainly erroneous. There is no dispute in between the parties that the disclaimer was made vide letter dated 19.1.1984. That letter was sent by Regd. AD post. The onus was on the respondents to prove that the claim in suit was abandoned.

16. In this regard, one has to further examine the matter in the light of the evidence. The respondents have not produced any acknowledgement or even postal receipt of sending the letter dated 19.1.1984 by Regd. AD Post to show that this letter dated 19.1.1984 was actually sent on 19.1.1984 itself. However, the appellants have produced this letter in Court. As such, its receipt is not in dispute.

17. u/s 114 of the Indian Evidence Act "The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, with reference to the facts of the particular case". But, would we raise a presumption that a Regd. AD letter sent on 19.1.1984 was delivered on the same date? We feel that this has to be answered in an emphatic "No". Having due regard to common cause of natural events and postal business, in their relation to the facts of this case, it could not be expected that the registered letter would have been delivered on the same day. In Delhi we may dream and aspire for such efficient service, but the fact remains that it cannot be delivered on the same day.

18. In this regard, we must refer to Section 27 of the General Clauses Act, 1897 also. Section 27 reads as under :

"27 Meaning of service by post - Where any [Central Act] or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression "serve" or either of the expression "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-

paying and posting by registered post, a letter containing a document, and unless the contrary is proved, to have been effected at the time at the letter would be delivered in the ordinary course of post".

19. But it is not possible in ordinary course of the postal business that a letter sent on 19.1.1984 itself would be delivered on the same day, specially when there is no evidence in the shape of receipt of registration of the letter and its posting on 19.1.1984 itself, leaving aside other requirements of Section 27 of the General Clauses Act. We feel that the time would start running under the Limitation Act and also under clause 9 only after service of letter of disclaimer and not before that. Since in ordinary course the suit was not barred under Article 44(b), a heavy burden lay on the respondents to establish that the period would start running for the purpose of part 4 of clause 9 of the policy with effect from 19.1.1984 itself.

20. Now, we proceed to examine two other facets of clause 9 relating to the meaning of words "within 12 calendar months". One relates to the question of exclusion or inclusion of 19th January, 1984 for the purpose of counting the period of 12 months and second, relates to the number of days in a calendar month. This question arose, for the Ld. Trial Court proceeded on the assumption that 19th January, 1984 could not be excluded for the purpose of counting 12 calendar months. In case we apply Section 9 of the General Clauses Act, then 19th January, 1984 being terminus ad quo has to be excluded.

21. In this regard the submission of the appellant is that Section 9 of the General Clauses Act give effect to the principle that in reckoning the period, the "terminus ad quo" i.e. closing day is included. Section 9 also embodies a principle of equity. Section 9 of the General Clauses Act reads as under:

"9. Commencement and termination of time - (1) In any [Central Act] or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use of including the last in a series of days or any other period of time, to use the word "or"

(2) This section applies also to all [Central Acts] made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887."

22. A bare perusal of Section 9 would indicate that it applies only to Central Acts and Regulations. In this regard one has to note that ordinarily terms of any contract would not be interpreted with the application of General Clauses Act, though in appropriate cases its principles could be extended.

23. Now, the question relating to length of calendar month in relation to the phrase "within 12 calendar months" is required to be seen. The Ld. Trial Court observed that one month consists of 30 days. In this way, 12 months would consist of 360 days. If the period of 360 days is computed with effect from 19th

January, 1984, it would expire on 13th January, 1985 and even if the period of 12 months was treated equivalent to 365 days (one year) even then the period would expire on 18th January, 1985 and after 18th January, 1985 the claim, in terms of the policy, would stand abandoned and suit filed after 18th January, 1985 will not be maintainable.

24. According to the Black's Law Dictionary, 6th Ed., the terms "calendar days", "calendar months", "calendar year" and "month" mean as under:

"Calendar days. A calendar day contains 24 hours; but "calendar days" may be synonymous with "working days." *Sherwood Vs. American Sugar Refining Co.* C.C. A.N.Y., 8 F.2d 586, 588. The time from midnight to midnight. *Lanni Vs. Grimes*, 173 Misc. 614, 18 N.Y. 2d 322, 327. So many days reckoned according to the course of the calendar.

Calendar month. Period terminating with day succeeding month, numerically corresponding to day of its beginning less one. *State Vs. Jones*, 208 Neb. 641, 305 N.W.2d 355, 358.

Calendar year. The period from January 1 to December 31 inclusive. Ordinarily calendar year means 365 days except leap year, and is composed of 12 months varying in length.

Month. Word "month", unless otherwise defined, means "calendar month", or time from any day of any of the months as adjudged in the calendar to corresponding day, if any, if not any, to last day, of next month..."

25. According to the Chambers Dictionary, word "month" reads thus:

"Month. one of the twelve conventional divisions of the year, or its length."

26. It was observed in *South British Fire & Marine Insurance Co. Vs. Brojo Nath Shah*, 2nd 36 Calcutta 517 that since in England the word "month" in a contract means "lunar month", there was no reason why the interpretation of an ordinary word in a contract in English should bear a different signification in than in England. But here in the present case, the word "month" is qualified by the word "calendar". It could not be lunar month of 28 days and a calendar month, civil or solar, is the month in the Gregorian calendar. Therefore, one has to refer to Gregorian calendar for the purpose of ascertaining months and in that case it could not be less than 365 days. According to Section 25 of the General Clauses Act "month" shall mean a month reckoned according to the British calendar. Accordingly, calendar month means only Gregorian calendar month and no other month.

27. It would be worthwhile to reproduce Section 28 of the Contract Act here for the purpose of interpretation of clause 9 of the policy in relation to its validity in the light of Section 28 of the Contract Act. Clause 9 of the policy has already been referred to earlier. Section 28 of the Contract Act reads as under:

28. Agreement in restraint of legal proceedings void - Every agreement, by which

any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the within he may thus enforce his rights, is void to that extent."

Exception 1. - Saving of contract to refer to arbitration dispute that may arise - This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Suit barred by such contracts - When such a contract has been made, a suit may be brought for its specific performance; and if a suit, other than for such specific performance, or for the recovery of the amount so awarded, is brought by one party to such contract against any other such party, in respect of any subject which they have so agreed to refer, the existence of such contract shall be bar to the suit.

Exception 2. - Saving of contract to refer questions that have already arisen - Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arise, or affect any provision of any law in force for the time being as to reference to arbitration."

28. Learned counsel for the parties referred to some case law on the point of interpretation of the provisions nearly similar to the provisions contained in clause 9. In *The Food Corporation of India Vs. The New India Assurance Co. Ltd. and others*, , Justice R.M. Sahai concurring with the majority observed in para 3 of the judgment as under:

"27. In *Rehmatunnisa Begum Vs. Price* AIR 1917 PC it was observed as general principle that, no man can exclude himself from the protection of the courts". The rational obviously is to ensure protection against fair dealing even between unequal bargaining parties. The intention and objective being clear the courts' primary responsibility is to construe and interpret it in a manner so as to advance the objective and protect the interest of the party who might be frustrated by too technical and expensive approach in such matters. Further it is trite saying that the courts should lean in favor of construction which keeps the remedy alive, that is if two constructions are possible then the one favouring continuance of the suit is to be preferred than the one barring the remedy. Even though the phraseology of Section 28 is explicit it and strikes at the very root by declaring any agreement curtailing the normal statutory period of limitation to be void the courts have been influenced by the distinction drawn by English Court in extinction of right by agreement and curtailment of limitation... The occasion to draw such distinction flows from the anxiety of the courts to interfere as less as possible in agreements unless it is unconscionable or against public policy etc. Where statutory prohibition is placed on agreements and they are declared to be

void the provision has to be construed strictly and applied restrictively confining to only those situations which are squarely covered in it. It is for this reason that any agreement which was not specifically covered in Section 28 was not held to be valid. When this Court observed in *The Vulcan Insurance Co. Ltd. Vs. Maharaj Singh and Another*, , that clause like 19, in that, case was not vocative of Section 28 it, obviously, meant that where filing of suit within specified time agreed between parties is made dependent on any consideration precedent then such agreement would not be void. And probably, rightly, as then it is not an agreement curtailing limitation but providing for doing one or other thing and filing the suit only after condition precedent was complied."

29. In *Sujir Ganesh Nayak and Co., Quilon Vs. National Insurance Co. Ltd., Calcutta and Another*, , clause 19 of the contract of insurance reads as under:

"5. Clause 19 of the contract of insurance reads as follows:

"In no case whatever shall the Company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration."

30. A similar question arose in that case "whether clause 19 of the contract of insurance prohibited filing of the suit after expiration of twelve months of the happening of loss or damage. The Division Bench of Kerala High Court, after referring the *Pearl Insurance Co. Vs. Atma Ram*, , *The Secretary, Taluka Agricultural Produce Co-operative Marketing Society Ltd. Vs. The Custodian, New India Assurance Co. Ltd. and Another*, and *The Food Corporation of India Vs. The New India Assurance Co. Ltd. and others*, , took the following view in paragraph 12 of judgment:

"12. In the instant case, Clause 19 of the contract of insurance only states that the insured shall enforce his claim before the expiration of twelve months of the date of happening of the damage. It does not expressly prohibit the insured from filing a suit beyond that period. Under the Limitation Act, there is a specific article for filing a suit for damage due under the contract of insurance curtailing the period of limitation will be hit by Section 28 of the Contract Act. If Clause 19 of the contract of insurance is construed in such a way, it limits the period of limitation to twelve months from the date of happening of the loss or damage and it would seriously prejudice the rights of the insured. The insurer can very well defeat the claim of the insured by rejecting the claim after the period of 12 months from the date of happening of the loss. Under Article 44 (b) of the Limitation Act, the period of limitation runs from the date of rejection of the claim. Therefore, it is clear that Clause 19 of the contract of insurance only prescribes the period during which the claim to be preferred by the insured before the insurance company and it does not, in any way, curtail the period of limitation Act for filing suit of that nature."

31. In the *National Insurance Co. Ltd. Vs. Sujir Ganesh Nayak & Co.*, JT 1997 (4) SC 179, a clause similar to the clause referred in *Sujir Ganesh Nayak & Co. Vs.*

National Insurance Co. Ltd. (supra) was considered by the Hon"ble Supreme Court. That clause/condition reads as under:

"5. The appellants contested the suit inter alias on the ground as well as by Condition No. 19 of the policy and on the ground that the claim made by the respondent No. 1 was not covered by the policy. Condition 19 of the policy which was set up by way of defense runs as under:

"Condition NO. 19 - In no case whatever shall the company be liable for any loss or damage after the expiration of 12 months from the happening of loss or the damage unless the claim is the subject of pending action or arbitration."

32. The Supreme Court after considering numerous cases, including The Vulcan Insurance Co. Ltd. Vs. Maharaj Singh and Another, , The Food Corporation of India Vs. The New India Assurance Co. Ltd. and others, , The Baroda Spinning and Weaving Co. Ltd. Vs. The Satyanarayan Marine and Fire Insurance Co. Ltd., , Pearl Insurance Company Vs. Atmaram (supra) and Secretary, Taluka Agricultural produce Cooperative Marketing Society Ltd. Vs. New India Assurance Co. Ltd. (supra) observed in paragraph 19 as under:

"19. 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 seek to curtail the time for enforcement of the right but which provides 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 the 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. We may now apply it to the facts of this case."

33. Thereafter, referring to the facts of the case, the Court found that there was no dispute that neither claim was made nor any proceeding was pending during the said period of 12 months.

34. However, with regard to constructions of insurance policy in The General Assurance Society Ltd. Vs. Mohd. Salim, , a Division Bench of Allahabad High Court referred to Halsbury"s Laws of England with approval in para 49 as under:

"49. According to Para. 440 of Halsbury's Laws of England, Vol. 23, whether of the locality of the property insured, or of the circumstances affecting the subject-matter or the incidence of the peril is in general sufficient if it is substantially accurate in other words a misdescription must be material if it is to affect the validity of the policy."

35. In the light of above case law and the different clauses referred to therein and clause 9, we must note three concepts of limitation, extinction of right on account of non-filing of claim with the insurance company and in case of dispute in seeking arbitration and still further not filing the suit and deemed abandoned in the circumstances mentioned in the concerned clause.

36. In this connection, let us revert back to clause 9 in its entirety. We will start with the presumption that clause 9 was never intended to violate provisions of Section 28 of the Contract Act. If we treat clause 9 simply as an arbitration clause, then Exception I to Section 28 of the Contract Act relating to saving of contract to refer to arbitration dispute that may arise would protect the said clause. In case we treat it as a contract extinguishing right to enforce any liability under the insurance cover, then again the provision under clause 9 would not be hit by Section 28 of the Contract Act. It is evidence that first part of clause 9 refers to arbitration in case of difference as to quantum to be paid under the policy. The second part clearly provides that no difference or dispute shall be referable to arbitration if the company has disputed and not accepted liability under or in respect of the said policy. Thus, the second part excludes possibility of reference if the company has disputed or not accepted liability under or in respect of the policy. In part three, it expressly stipulates and declares that "it shall be condition precedent to any right of action or suit upon this policy that the award by such arbitrator, arbitrators or umpire of the loss or damage shall be first obtained." Without fulfilling this condition in absence of any disclaimer no suit could be filed without seeking arbitration meaning thereby that the right to suit does not arise and cause of action does not exist till this condition is fulfilled. This is a condition precedent. In so far as the fourth part is concerned, if it is to be read as part and parcel of the entire clause 9 and due emphasis is laid on the words "also", "further" "hereunder", "then" and the phrase "then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder". If due emphasis is given to words "also", "further" and "here-under", it would have to be held that this part is confined to arbitration proceedings as part and parcel of clause 9. Then, it would not be hit by Section 28 of the Contract Act. What militates against this kind of interpretation is that this part seeks that the insured must make his claim "the subject matter of a suit in a court of law" and if it is not made, "then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder". In these three conditions it is to be made a subject matter of a suit in a court of law, meaning thereby that the suit has to be filed. It has further to be read along with part 2, which provides an exception to the arbitration clause in case of dispute or non-acceptance of liability under the policy. In the case of

disclaimer of liability, the matter would not be referred to arbitration, and if there is no reference to arbitration in part 4 of clause 9 if there is specific reference to make the claim subject-matter of a suit in court of law, then it appears difficult to accept the proposition that in part 4 the assertion of right to claim arbitration is only referred to and only that would be deemed to be abandoned. Moreover, if this part related to reference to arbitration then the term "reference" and phrase "shall not thereafter be referred to" or "referable to arbitration hereunder" would have been used and "not recoverable hereunder". Recovery could be of the amount of the claim alone and not of the claim in arbitration. Should it mean, Therefore, that part 4 is hit by Section 28 of the Contract Law. We would not like to just jump to the conclusion without further examining it.

37. Undisputedly, in this case, the claim has been filed by the appellant/plaintiff within the stipulated time and the respondent/defendant has disclaimed the liability under the insurance policy. It is to be seen that fourth part of clause 9 provides for two kinds of consequences in case of disclaimer of liability and non-filing of a suit within 12 months from the date of such disclaimer. Firstly, the claim shall for all purposes be deemed to have been abandoned. Second, the claim shall not thereafter be recoverable.

38. Now, let us appreciate the distinction between limitation, deemed abandoned, extinction of right. With reference to clause 9. Abandonment or deemed abandonment would relate to (a) enforcement of right to claim recovery of the amount in arbitration; (b) enforcement of right in Court; and (c) enforcement of the rights (a) and (b) both. According to the Black's Law Dictionary, the terms "abandonment", "extinguishment" and limitation" mean as under

"Abandonment. The surrender, relinquishment, disclaimer, or cession of property or of right. Voluntary relinquishment of all right, title, claim and possession, with the intention of not reclaiming it. State Vs. Bailey 97 396, 235 A.2d 214. 216. The giving up of a thing absolutely, without reference to any particular person or purpose, as vacating property with the intention of not returning, so that it may be appropriated by the next comer or finder. The voluntary relinquishment of possession of thing by owner with but without vesting it in any other Or. 626, 10 P.2d 356, 357. The relinquishing of all title, possession, or claim, or a virtual, intentional throwing away of property.

Term includes both the intention to abandon and the external act by which the intention is carried into effect. In determining whether one has abandoned his property or rights, the intention is the first and paramount object of inquiry, for there can be no abandonment without the intention to abandon. Roebuck Vs. Mecosta County Road Commission, 59 Mich. App. 128, 229 N.W.2d 343, 345. Generally, "abandonment" can arise from a single act or from a series of acts. Holly Hill Lumber Co. Vs. Grooms, 198 S.C. 118 S.E. 2d 816, 821.

This is not an essential element of act, although the lapse of time may be

evidence of an intention to abandon, and where it is accompanied by acts manifesting such an intention, it may be considered in determining. *Ullman ex rel. Erama Vs. Payne*, 127 Conn. 239 A.2d 286, 287.

"Abandonment" differs from surrender in that surrender requires agreement, and also from forfeiture, in that forfeiture may be against the intention of the party alleged to have forfeited."

"Extinguishment. The destruction or cancellation of a right, power, contract, or estate. The annihilation of a collateral thing or subject in the subject itself out of which it is derived.

"Extinguishment" is sometimes confounded with "merger", though

there is a clear distinction between them. "Merger" is only a mode of extinguishment, and applies to estates only under particular circumstances; but "extinguishment" is a term of general application to rights, as well as estates. "Extinguishment" connotes the end of a thing, precluding the existence of future life therein; in "mergers" there is a carrying on of the substances of the thing, except that it is merged into and becomes a part of a separate thing with a new identity. *Mcroberts Vs. Mcroberts*, 177 okl. 156P.2d 1175, 1177."

"Limitation. Restriction or circumspection; settling an estate or property. A certain time allowed by a statute for bringing litigation. The provisions of state constitution are not a "grant" but a "limitation" of a legislative power. *Ellerbe Vs. Davit*, 193 S.C. 332 , 8 S.E.2d. 518 ; *Mulholland Vs. Ayers*, 109 Mont. 558, 99 P.2d 234, 239."

39. It may be mentioned that this part 4 proceeds to provide that to keep the right alive the suit was also required to be filed within a period of one year. Thus, clause 9 bars, in case of disclaimer of the liability under the insurance cover, firstly, the right to enforce arbitration; and secondly, prescribes period of filing of the suit within a period of one year also. This is strictly in contract with the intention of the clause dealt with in the case of *Food Corporation of India Vs. New India Assurance Co. Ltd. & Ors.* (supra). So, the observations made in the *Food Corporation of India Vs. New India Assurance Co. Ltd. & Ors.* (supra) as well as in paragraph 22 of the *National Insurance Co. Ltd.* (supra) are not applicable to the facts of the present case. Moreover, fourth part does not refer to bar confined to arbitration clause and to enforce arbitration clause only. Enforcement of right to arbitration protected by Explanation u/s 21 since it refers to filing of the suit also within a period of one year, the clause is hit by the main provisions of Section 28 of the Contract Act.

40. It is further notable that the abandonment itself is based on the restriction of one year's period provided by fourth part of clause 9. Consequently, it intends to prescribe a period of limitation for filing the suit from the date of disclaimer in violation of Section 28 and according it is hit by Section 28 of the Contract Act. Part 4 provides two kinds of consequences in case of disclaimer of liability and

non filing of a suit within 12 calendar months from the date of such disclaimer: (i) then the claim shall for all purposes be deemed to have been abandoned; (ii) the claim shall not thereafter be recoverable. No party would be forced to abandon his claim, without express consent or conduct, by a deeming provision to make his claim unenforceable.

41. In the aforesaid facts and circumstances and the foregoing discussion, we are of the definite opinion that suit is neither barred by limitation provided u/s 44(b) of the Limitation Act nor it falls within the mischief of abandonment under Clause 9 of the Insurance policy.

42. Since the finding on issue No. 3 is being set aside and it is held that the claim in suit is neither abandoned nor barred by time, the decision on issues No.5 and 6 also is reversed. On merits, the learned Trial Court gave the following finding:

"There was theft/burglary of the insured goods and in that incident the plaintiff had suffered the loss of at least Rs. 55,000/- which, according to the terms of the policy, he was entitled to get from the defendants. Issue No. 2 is decided accordingly."

This finding has not been challenged before us. The plaintiff, Therefore is entitled to recover this amount of Rs.55,000/- for the loss of goods under the Insurance Policy.

43. In addition, the plaintiff/appellant has also claimed a sum of Rs. 9,900/- as interest at the rate of 18 per cent per annum, from the date of loss for withholding the payment, by notice Ex. PW-1/5 dated 25th November, 1984. It has to be seen as to whether it is a commercial transaction. The term "commercial transaction" is explained in Explanation II of Section 34 of the CPC, in the following terms:

34. (1) ...

Explanation I: ...

Explanation II: For the purposes of this section, a transaction is a commercial transaction, if it is connected with the industry, trade or business of the party incurring the liability.]"

44. Compensation for the loss under the Insurance Policy is undoubtedly connected with the business of parties. In such a case, the rate of interest to be awarded can exceed 6 per cent per annum, and in absence of any contractual rate, the plaintiff is entitled to claim interest at a rate at which monies are lent or advanced by the nationalised banks in relation to commercial transactions.

45. In B.S. Rajput Vs. M/s. The Cellar and another, , a Division Bench of Karnataka High Court took the view that where receipts do not provide for payment of interest on the basis of notice demanding interest, the party would be entitled to receive interest, the party would be entitled to receive interest at

the "current rate" as defined in clause (b) of Section 2 of the Interest Act, 1978. Where claim for interest at 18 per cent per annum, which was normal rate of interest, was not disputed by both the parties, award of interest at the rate of 18 per cent per annum from the date of final bill was held not to be an error apparent on the face of record. In the present case, the plaintiff claims interest at the rate of 18 per cent per annum. The rate of interest has not been disputed in the reply Ex. PW-1/D2 sent to the notice dated 25th November, 1984. Consequently, this rate of interest has to be treated and presumed to be current rate of interest at that time. Accordingly, the plaintiff is entitled to interest from the date of notice i.e. 25th November, 1984 till the date of filing of the suit, during pendency of the suit and till realisation at the rate of 18 per cent per annum on the principal sum of Rs. 55,000/46.

Accordingly, the impugned judgment and decree dated 25th April, 1992 is hereby set aside. The suit is decreed accordingly for recovery of Rs. 55,000/- with interest at the rate of 18 per cent per annum from 25th November, 1994 to the date of realisation. The appeal is allowed with costs throughout.