(1992) 01 NCDRC CK 0048

In the National Consumer Disputes Redressal Commission

SAHEEN SCREEN PRINTS — APPELLANT

Vs

United India Insurance Co. — RESPONDENT

Date of Decision : 08-01-1992

Acts Referred:

Citation : 1992 2 CPJ 582

Hon'ble Judges : S.A.Shah , Leelaben Trivedi , R.K.Shah J.

Final Decision : Complaint dismissed

Judgement

1. BOTH these complaints are against the United India Insurance Company and has arisen out of the damage to their goods under the insurance policy due to heavy rains. That the common question of law and facts are same in both the cases and, therefore, at the request of both the advocates and parties, both the complaints are disposed of by single judgment.

2. IT is not disputed that the complainants have taken insurance from the opposite party on the same date i.e. 3.8.88. The complaint filed by Saheen Screen Prints took an insurance for the sum of Rs. 6 lakhs for the shed having class A & B construction and other materials like tables with wax, fans, tubes, other electrical installations and fittings, stock of cloth colour and chemicals etc. The Insurance was for the period commencing from 5.8.88 to 4.8.89. The complainant of complaint No. 113/91, A-one Screen Printers took the insurance for shed of Class A & B construction with tables with wax, fans, tubes, other electrical installation and fittings and stock of clothes, colour, chemicals etc. commencing from the same period i.e. from 5.8.88 to 4.8.89. The complaint No. 112/ 91 is signed by Hasina Farid Mohammed the owner of Saheen Screen Prints and complaint No. 113/91 is signed by Farid Mohammed Ganibhai Tizoriwala, the owner of A-one Screen Printers. Both the works are adjoining to each other at Danilimda opposite to P.W.D. Guest House bearing Plot No. 64 at Ahmedabad. In para 3 the complainant has averred that on account of heavy rains and thunder and storm lashed the city on 15.6.89 and because of the heavy rain the factory and sheds in question was damaged at large scale by thundering storm and rain

in the night of 15.6.89 whereby the entire shed came down. That the impact of the thunder was high to such an extent that the shed, tables, electric fittings designs and other materials lying in the factory were damaged at large scale. Same are the averments in complaint No.1 13/91. The applicant of complaint No.112/91 has claimed Rs. 4,15,440/- as damages whereas the complainant in case No.1 13/ 91 has claimed Rs. 2,69,727/- as damages. Both the complainants have also claimed for the interest @ 15% from the date of accident till the realisation of the entire amount. In support the complainants have also produced copy of the insurance policy, electricity bill and a letter written by Mr. Bharat J. Mehta wherein Mr. Mehta has complained that the complainants were not sending material to assess the value and has given time to send the same. The complainants in both the matters have replied and the copy of the letter is also produced.

It appears that the Insurance Company repudiated the claim by its letter dated 7.11.89 in following words. "As per the details of Survey report and other papers, we have observed that the claim is not within the scope of the policy cover. Hence we regret our inability to settle the claim."

The repudiation of the claim of both the complainants are in the same wording by the letter of the same date.

3. IN pursuance of our Summons the opposite party has filed its version alongwith affidavit and documents including report of the surveyor and report of Engineer Mr. J J. Mehta. The main contention of the opposite party is that the claim application is barred as per Clause 4 of the conditions of policy since the opposite party has vide letter dated 7.11.89 disclaimed its liability and as the claim having not been made within 12 calendar months from the date of such disclaimer the claim of the applicant for all purposes has been deemed to have been abandoned. The resultant effect is that the application deserves to be rejected. The further contention of the opposite party is that the applicant has not followed the terms of the policy which was issued. On the happening of the alleged loss or damage the insured has not informed the company within 15 days after the alleged loss or damage and hence the policy has become void. With regard to the claim, the opposite party has stated that the same is illegal and excessive. The opposite party has further contended that the claim is beyond the scope of the insurance entered into between the parties. No break-up or detailed particulars with regard to the alleged claim has been stated or shown in the application. The claim is vague and wrong and this being a case of civil nature it does not fall within the purview of the Act and the complainant is not a consumer. That the policy has been taken in the name of Saheen Screen Prints but it is not stated that Hasinaben Faridamohammed Tizoriwala is the owner of the said factory and, therefore, such petition is not maintainable. It has not been shown that at the time of rain these properties were in existence. According to the applicant the shed had fallen down due to heavy rain and speed of wind the claim of the applicant was beyond the scope of insurance policy and hence the

same has been rightly rejected.

4. MR. B.J. Mehta had observed that SC folding type shed supported by wooden costs or walies were found rotten and affected by moisture and exposed to soil. The bottom end of all the wooden supports had already weakened due to permanent moisture and white-ants. Maximum wind speed recorded on 15th June, 1989 mid-night was 48 kms/hr, as per certificate issued by Vedhshala, Naranpura, Ahmedabad and the cause of alleged loss or damage to the property was due to horizontal force of wind and heavy rainfall. Thus according to the opposite party there is no liability of the insurer under the policy since the policy does not cover the aforesaid type of risk. Mr. M.C. Desai, the learned Advocate appearing on behalf of the opposite party has raised three contentions. 1. that admittedly the complaint has not been filed within 12 months from the date of disclaimer and, therefore, the right of the claimant is forfeited. The claimant is deemed to have abandoned his/her right and no action can be taken after the said date. 2. that Clause 4 of the policy is not against the public policy and is legally enforceable in view of the judgment of the Bombay High Court, Gujarat High Court and Supreme Court which are binding to the Commission. That the alleged damage is not covered in the policy since the same occurred to the complainant on account of heavy rains and rotten poles as stated in the written statement and, therefore, the insurance company is not liable. 3. That the claim is exaggerated and has not been substantiated by relevant evidence nor it is proved that the complainant is the owner of the said business by producing evidence though asked for by the surveyor.

The first contention of Mr. Desai was hotly contested and, therefore, we will reproduce the relevant part of Clause 4 to properly appreciate the respective contention of the parties. Relevant part of Clause 4 of the policy reads as under: "4(i) "No claim under this policy shall be payable unless the terms of these conditions have been complied with. (ii) The Company reserves the right to treat the claim as no claim if no information/ documents are submitted by the insured within a period of months from the date of loss. (iii) 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 the subject of 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 the disclaimer have been made the subject-matter of 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"

5. IT is not disputed by the complainant that the Insurance Company in both the cases disclaimed its liability by the letter dated 7.11.89 and that the present complaints have been filed on 21.2.91 i.e. much beyond the period of 12 months. IT is not disputed that the period of limitation for filing a suit for damages is 3 years from the date of loss and repudiation. Mr. K..F.

Ambakhutwala, learned Advocate for the opposite party therefore vehemently argued that the said Clause 4(iii) is against the provisions of Section 28 of the Indian Contract Act and against public policy and is void and the claimant cannot be non-suited since he has filed the claim within three years.

6. THEREFORE the principal question that arises for our consideration is whether Clause 4(iii) of the policy which is one of the conditions of a contract between the parties is void and contrary to the provisions of Section 28 of the Contract Act. Section 28 of the Contract Act the caption reads as under: "Agreements in restraint of legal proceedings void" and the body of the caption reads as under: "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 time within which he may thus enforce his rights, is void to that extent."

(emphasis supplied) The crux of the point therefore is whether Clause 4(iii) of the policy restricts the complainant to enforce his rights by prescribing time limits.

Mr. Desai has forcefully argued that the present clause nowhere limits/restricts the complainant from enforcing of his rights. According to Mr. Desai, the said Clause in clear terms provides that if the suit is not filed within 12 months by the assured he will be deemed to have abandoned his claim for all purposes and nothing shall be recoverable thereafter. Mr. Desai therefore draws our attention that in the instant case by not filing a suit within 12 months the complainant is deemed to have abandoned his claim altogether for all purposes and there is no question of any limitation or enforcement of his right after his abandonment.

7. THAT this was one of the sacred terms of a contract between the parties and the complainant has accepted this decision that if she does not enforce her right in Court by filing a suit she will be deemed to have abandoned her right and once the right has been abandoned the question of considering the limit of period does not arise. According to Mr. Desai the limitation is only applicable for filing a suit if the right exists but if the right is abandoned whether the limitation is for one year or 10 years makes no difference. This proposition of Mr. Desai is no doubt startling but Mr. Desai gets the support to his proposition by citing several binding authorities and the first authority is the decision of the Division Bench of High Court of Bombay in case of Baroda Spinning and Weaving Co. Ltd. v. Satyanarayana Marine and Fire Insurance Co. Ltd. reported in AIR 1914 Bombay 225. In that case a fire insurance policy was taken and the policy contained a Clause No. 12 similar to the present Clause which reads as under: "Amongst other terms it was agreed between the parties under Clause 12 that if, after a claim had been made and rejected the insured should not institute any proceedings within three months from the date of such rejection, he is to forfeit all benefits under the policy. It was conceded that this suit was not instituted within three months from the date of the rejection of the plaintiffs'' claim. The plaintiffs therefore relied upon Section 28 of the Contract Act and contended

that, that Section makes every agreement of the kind contained in Clause 12 and relied upon by the defendant is void." The Hon''ble Justice Beaman-J. observed that "This contention unfortunately for the plantiffs appears to me to be covered by authority which is binding upon me; Hira Bhai v. Manufacturers Life Insurance Company. The case there was much stronger because the words of the clause relied upon by the Company undoubtedly on the face of them were restricted to limitation. The agreement was that no suit should be brought upon the policy after the expiration of one year after the cause of action accrued. The learned Judges of the appeal Court apparently found no difficulty in coming to the conclusion that such an agreement was not within the scope or intention of Section 28, Contract Act and neither conflicted with it in principle nor in language. The reason of the decision, which is of a broadly general character appears to be; first, that clauses of this kind in policies of insurance need not be interpreted literally but with special reference "to the object and exigencies of insurance;" secondly, that although in form agreements of this kind appear to limit the period within which suits can be brought to enforce rights under the policy, they in substance amount to a waiver of the rights of the insured subject to the condition, and, therefore, go much further than merely barring the remedy. The decision, therefore, appears to me to be of a general character and to support the defendants'' contention here that the particular clause upon which he relies is not void by reason of anything contained in Section 28, Contract Act. The language of the clause in this case is far more favourable to the defendants having regard to the reasoning which seems to have commended itself to the learned Judges in the case of Hira Bhai v. Manufacturers Life Insurance Company, for here the insured agreed that on failure to institute proceedings within three months of the rejection of his claim he will forfeit all the benefits for which he might otherwise be entitled under the policy; and the use of such language might give some colour to the distinction upon which the learned Judges rely for taking all contracts of this kind out of the scope and intention of Section 28. I feel to be binding upon me. It is enough for me to say that after having given the reasoning of the learned Judges in that case my fullest and most careful attention, I am of opinion, with the greatest deference, that there is room for very grave doubt whether the case was rightly decided; for there can, I think, be no doubt at all but that it does decide the contention upon which the plaintiffs here mainly reply, and as it is a decision of this Court it is binding upon me. I must, therefore, hold however, reluctantly, that the condition in Clause 12 is not void under Sec. 28, Contract Act."

Here in this case also there is a clear provision in a mandatory language that if the suit is not filed within 12 months the complainant will be deemed to have abandoned his claim and shall not thereafter be recoverable hereunder. We also have the same feeling as it was to Justice Beaman in that case. However, his case has thereafter been cited and followed by various Courts including the Supreme Court as presently mentioned. Dt. 9.1.1992

8. THE next decision relied upon by Mr. Desai is in the case of Hindustan Ideal

Insurance Company Ltd. v. Jamnadas & Co. in first appeal No. 648 of 1967 decided by the Division Bench of the Gujarat High Court on 4.7.1973. In that case the policy contained Clause 13 which reads as under: "If the claim be in any respect fraudulent; or if any false declaration be made or used in support thereof or if any part 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 willful act, or with the connivance of the insured; of if the claim be made and rejected and 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."

THE defendant company raised an alternate contention alongwith other contentions that the suit was not filed within 3 months as provided in Clause 13, the suit was liable to fail. THE Division Bench relying upon certain decisions quoted therein observed as under: "For the reasons stated above we hold that, it is open to the defendant company to rely on Clause 13 of the policy for the purpose stated above and in that view of the matter the findings of the learned Civil Judge to the contrary cannot be sustained."

Mr. Desai in his written argument has quoted the decision of Bombay High Court reported in 1974 Bombay 228 and AIR 1949 Cal. 390 which according to him supports the view taken by the Bombay High Court. Mr. Desai has also relied upon the decision of THE Vulcan Insurance Co. Ltd. v. Maharaj Singh and Another reported in AIR 1976 SC 287. In this case a similar Clause No. 19 of the policy was relied upon which reads as under: "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."

This authority is not directly on point. However in para 23 of the judgment the lordship has observed as under: "It has been repeatedly held that such a Clause is not hit by Section 28 of the Contract Act and is valid; vide - THE Baroda Spinning and Weaving Co. Ltd. v. THE Satyanarayan Marine and Fire Insurance Co. Ltd., (AIR 1914 Bom. 225), Dawood Tar Mahomed Bros. v. Queensland Insurance Co. Ltd., AIR 1949 Cal. 390 and the Ruby General Insurance Co. Ltd. v. THE Bharat Bank Ltd. (AIR 1950 Punj. 352."

THE case between Pearl Insurance Co. v. Atma Ram reported in AIR 1960 Punj. 236, a decision of the Full Bench is also of a valuable assistance. In that case alongwith other contentions a contention was raised that Clause 19 of the policy is void by virtue of Section 28 of the Indian Contsact Act. THE observations of the Full Bench in para 9 are important where they have made a distinction between the extinguishment of a contract and limiting the right or time to enforce the right. According to the Full Bench if the right is extinguished the question of enforcing the right does not arise. THE Full Bench has observed as under: "As a result of the above discussion, on principle, and authority the validity of a clause similar to CI.. 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. (1) (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 its 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 Sec. 28 of the Contract Act.

In view of the aforesaid decisions, some of which are binding to us, we reluctantly come to the conclusion that the complainant having abandoned his rights by not filing the suit or taking any action (complaint) within 12 months from the date of repudiation his right having been extinguished, the provisions of Section 28 of the Contract Act are not attracted, and therefore, the complaint is not maintainable before us since the right to file a suit having been lost on account of Clause 4(iii) of the policy. The next contention of Mr. Desai that the impugned loss which has occurred on account of rain is not covered under the terms and conditions of the policy and, therefore, also the complaint is liable to be rejected. Whether the damage is on account of storm of inherent defect in structure or on account of rain are the questions which can be properly decided by taking oral evidence and giving opportunity to the party to produce full evidence. In the instant case neither the complainant nor the opposite party had adduced any oral evidence and the evidence on record is not sufficient to properly decide this issue. We, therefore, do not deal with the same. Such questions can only be dealt by the Civil Court. Secondly, we have already held that the complaint is not competent having been filed after 12 months. It is not necessary to decide this issue also.

9. THE third contention that the complainant has not provided any loss or damage by producing sufficient evidence and, therefore, he is not entitled for damage cannot be accepted. It is true that the complainant has not produced the relevant evidence like accounts books, purchase of property, the stock register and several other supporting facts and documents. But there is an evidence of

the report of the surveyor who is an independent person and the Court can definitely assess the damages considering the report of the surveyor and that is one piece of evidence which might help the Court to arrive at an estimate of loss or damage to the complainant. But since the complaint has been dismissed being filed after 12 months from the date of rejection of the claim, we do not think it necessary to deal with the issue of damages.

10. IN the result, we pass the following order. ORDER The complaint is dismissed on the grounds stated above. Under the circumstances there will be no order as to costs. Complaint dismissed.

