

(1995) 07 KL CK 0057
In the High Court Of Kerala
Case No : A.S. No. 140 of 1987

Sujir Ganesh Nayak and Company

APPELLANT

Vs

National Insurance Co.

RESPONDENT

Date of Decision : 27-07-1995

Acts Referred:

Contract Act, 1872 — Section 18, 28
Limitation Act, 1963 — Section 4

Citation : AIR 1996 Ker 49 : (1996) 85 CompCas 531

Hon'ble Judges : K.G. Balakrishnan, J;B.N. Patnaik, J

Bench : Division Bench

Advocate : T.P. Kelu Nambiar P.G. 1966 Rajagopalan and P.C. Sasidharan, for the Appellant; S. Parameswaran N. Chandrababu, M.C. Sen and Sreelal N. Warriar, for the Respondent

Final Decision : Allowed

Judgement

K.G. Balakrishnan, J.—This is an appeal preferred by plaintiffs in O.S. No. 105/80 on the file of Sub-Court, Quilon against the dismissal of the suit filed for realisation of money due under a contract of insurance. The appellant is a registered partnership firm carrying on import manufacture and export of cashew nuts. Its Head Office is at Quilon and there are four factories Situated at Kunnikode, Mulavana, Perumpuzha and Ayathil. The appellant entered into two contracts of insurance with the first respondent National Insurance Co., Ltd. The period of the first policy was originally for a period of twelve months from 1.11.1976 and the second policy was for a period of twelve months from 2-5-1977. These two policies were fire policies both containing "riot and strike endorsement". During the months of January and February 1977, there was no work in the factories owned by the appellant due to non a availability of raw cashew nuts. The work could be started only on 10th March, 1977. The workers of the factories were not paid salary for the period during which the factories remained closed. It is alleged that the Industrial Tribunal Alleppey in I.D. No. 1/1977 held that workers need not be paid only when there was no work. It

seems that the workers were not paid salary and they started agitation for payment of salary for the period during which the factories remain closed. The workers in the four factories resorted to strike and the appellants case is that these striking workers obstructed the movement of goods and the appellant could not remove this obstruction. An attempt was made to settle the dispute before the District Labour Officer, Quilon. The appellant approached the Government to get sufficient police protection for removing the goods from the factory premises. According to the appellant the strike by workers continued till the second week of June, 1977. Till that time the kernels from the cashew nuts were lying in the premises of the factory and due to exposure these kernels got damaged. During the period when the strike was going on, the appellant informed the first respondent as to what steps they should take to avail the payment under the policies taken by the appellant.

The appellant did not receive any reply and on 5th May, 1977 a reminder was sent to the first respondent. The first respondent by letter dated 10th May 1977 informed the appellant that the loss sustained by the appellant was not coming under the purview of the policy. The appellant requested the first respondent to get the damages assessed. The first respondent, then deputed one surveyor by name K.V. Rao to assess the actual extent of damage suffered, by the appellant. The surveyor conducted the survey in the second week of June, 1977. The appellant requested the first respondent to make payment under the two insurance policies. The appellant wrote to the Divisional Manager of the company of Cochin, and the Southern Regional Office manager was also contacted by the appellant. On 22.9.1977 the appellant received a letter from the Southern Regional Office Manager of the first respondent that the claim was not entertainable in view of condition No. 5(1)(b) of the policies. The appellant contended that it was thought that the first respondent would act reasonably and not arbitrarily and therefore the suit was not filed immediately after the repudiation. Later the appellant filed this suit.

The first respondent filed a written statement denying their liability. It was contended that the damage if any sustained by the appellant on account of the strike of workers will not come under the "riot and strike damage" and malicious damages cover made in the policies. In view of condition No. 5(1)(b) attached to the policy, the appellant was not entitled to get damages. It was contended that the appellant did not take timely and effective steps to avoid the damage to processed goods. The survey was conducted without prejudice to the rights of the respondent. The surveyors report is not binding on the first respondent. In view of clause 19 of the policy, the suit is not maintainable. The goods had been damaged by inherent vice and not due to any external factors affecting them. The first respondent also contends that the suit was barred by limitation.

2. The court below framed 12 issues including the two additional issues. Under issue No. 1 the court below held that the plaint claim was not covered by two policies and under issue No. 7 it was held that the suit was barred by limitation.

Under issue No. 2 the court held that the plaintiff had sustained damage and the quantum of damages would come to Rs. 4,21,039.51 and under issue No. 3 it was held that the plaintiff had not taken vigilant and effective steps to mitigate the damages but had taken some steps to reduce the extent of damage.

3. The counsel on either side argued elaborately and following points arise for consideration in this appeal.

i) Whether the suit is barred by limitation?

(ii) Whether the appellant company is entitled to claim any amount on the basis of the two policies taken by them?

(iii) To what reliefs?

4. Point No. 1: The court below held that the suit was barred by limitation on two grounds. Firstly, it was based on clause 19 of the contract of insurance and secondly on the ground that the suit was filed three years after the repudiation of claim by insurance company. 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 for twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration.

Based on the above clause, it was contended that the suit was barred as it was filed only in 1980 much after the period mentioned in clause 19 of the contract. The appellant's counsel contended that clause 19 does not prohibit the filing of the suit after the expiration of twelve months of the happening of the loss or damage but only stipulates that the claim should have been filed by the insured within a period of 12 months of the date of happening of the loss or damage. It is also contended by the appellant that even if it is assumed that clause 19 restricts the period of limitation for filing the suit, the same is opposed to Sec. 28 of the Indian Contract Act.

5. The counsel for the respondent - Insurance Company relied on a Full Bench decision of the Punjab High Court reported in Hazara Singh Hakim Singh Vs. The State, where a similar contention was raised by the Insurance Company and the Full Bench accepted that view and held that a similar clause found in that contract was not opposed to Section 28 of the Indian Contract Act. It was held that the clause did not limit the time within which the insured shall enforce his rights but only limited the period during which the contract will remain alive and, therefore, it was not hit by the provisions of Sec. 28 of the Indian Contract Act.

6. A contrary view was expressed in a decision reported in The Secretary, Taluka Agricultural Produce Co-operative Marketing Society Ltd. Vs. The Custodian, New India Assurance Co. Ltd. and Another, where the insured goods were destroyed by fire and the trial court found that the suit having been filed after twelve months of the occurrence of the loss was time barred as per clause 19 of that

contract. The High Court reversed that finding and held that the period of limitation is three years from the date of occurrence causing loss or the date on which the claim is denied by the insurance company, as per Article 44 of the Limitation Act.

7. In a recent decision of the Supreme Court reported in *Food Corporation of India v. New India Assurance Co.* (1994 (8) SCC 324) the Supreme Court was of the view that a clause restricting the period of limitation to file suit would be hit by Sec. 28 of the Indian Contract Act. That was a case where the Food Corporation of India appointed millers for procuring, hulling and supplying rice on certain conditions. The insurance company on behalf of these millers executed Fidelity Insurance Guarantee in favour of the appellant guaranteeing honest accounting and refund of money received by the millers for supplying rice to the appellant. The insurer undertook to indemnify the appellant for any loss suffered by the appellant by reason of any breach of the miller of any term or condition of the agreement, "subject, however, that the Corporation shall have no rights under this bond after the expiry of (period) six months from the date of termination of the contract. Since there was breach of agreement, the appellant Corporation placed demand with the Insurance company concerned for payment of those amounts due as per the Fidelity Insurance Guarantee well before the expiry of the period of six months from the date of, termination of the contract with the rice miller. But such demands were not made good by the Insurance Company. There upon the appellant filed suit against the insurance company in a Civil Court. The trial court decreed the suit. The High Court allowed the appeal of the insurer on the ground that the terms of the Fidelity Insurance Guarantee did not entitle the Corporation to file a suit against the insurer after the expiry of six months from the date of termination of the contract entered into between the Corporation and the miller. The Supreme Court allowed the appeal.

8. In paragraph 8 of the judgment at page 335, His Lordship Justice R.M. Sahai while concurring with his brother Judges held that,

From the agreement it is clear that it does not contain any clause which could be said to be contrary to Section 28 of the Contract Act nor it imposes any restriction to file a suit within, six months from the date of determination of the contract as claimed by the company and held by the High Court. What was agreed was that the appellant would not have any right under this bond after the expiry of six months from the date of the termination of the contract. This cannot be construed as curtailing the normal period of limitation provided for filing of the suit. If it is construed so it may run the risk of being violative of Section 28 of the Contract Act. It only puts embargo on the right of the appellant to make its claim known not later than six months from the date of termination of the contract.

9. In paragraph 18 at page 338 of the judgment His Lordship Justice Venkatachala held that,

Since the restriction says that the Corporation shall have no rights under the

bond after the expiry of six months from the date of termination of the contract, the rights of the Corporation under the contract continue to exist for six months beyond the period during which the contract could be in force unless the dues of the Corporation under the contract are paid or satisfied in the manner provided for in the clauses of the bond itself, as could be seen therefrom. Therefore, what is envisaged by the restriction is that the Corporation, if wants to exercise or enforce the rights given to it under the Fidelity Insurance Guarantee Bond, it could present before the Insurance Company, the claim for its loss under the contract entered into with the rice miller even up to the period of six months from the date of termination of the contract and not beyond. None of the clauses nor the restriction in the bond to which we have adverted, require that a suit or legal proceeding should be instituted by the Corporation for enforcing its right under the bond against the Insurance Company within a period of six months from the date of termination of the contract.

10. The view expressed by the Full Bench of the Punjab High Court was dissented on the ground that the Court had not taken into consideration the fact that under the English law there was no provision like Section 28 of the Indian Contract Act and the Supreme Court was of the view that the various English decisions were not appropriate for deciding the effect of Section 28 for the construction of a similar clause in the insurance agreements.

11. 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 damages due under the contract of insurance. Any clause in 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 is to be preferred by the insured before the insurance company and it does not, in any way, curtail the period of limitation prescribed under the Limitation Act for filing a suit of that nature.

12. The court below found that the suit filed by the plaintiff-appellant was barred by time even under Article 44(b) of the Limitation Act. The court below was of the view that the period of limitation is to be counted from 10.5.77, the date on which the first respondent denied the liability and the suit having been filed on 2.6.1980 was held to be barred by limitation.

13. This finding of the court below is not correct for various reasons. Firstly, it

may be noticed that on 10.5.1977 there was no denial of claim as such by the first respondent. Ext. A5 is the letter issued by the first respondent wherein it is stated that the loss sustained by the appellant would not come under the purview of the condition of the policy and "riot and strike" damage and "malicious" damage cover given. The reference in Ext. A5 is said to be a letter sent by the appellant on May 1977. It is important to note that prior to Ext. A5 letter by the first respondent, appellant had not preferred any claim before the insurance company. They only intimated that the strike was going on in the factory and they were unable to lift the goods from the premises of the factory and on Ext. A4 letter the appellant wanted to know as to what steps are to be taken in the matter. The insurance company even before a proper claim, declined their liability without any basis. Ext. A5 can never be treated as a document by which the insurance company rejected the claim of the appellant. The rejection of claim arises only when there is a proper claim by the insured.

14. Even if it is assumed that Ext. A5 is a proper repudiation of claim by the insurance company, the suit is filed within time. The last date on which the suit should have been filed was 9.5.1980 and that date fell in summer vacation and the civil court remained closed and the suit was filed on the reopening day. By virtue of Section 4 of the Limitation Act, the suit was filed in time. So, in any view of the matter, the suit was perfectly within time and the court below erred seriously in holding otherwise.

15. Point No. 2: Exts. A1 and A2 are the two insurance policies taken by the appellant. The case of the appellant is that there was a strike by workers in the four factories owned by the appellant and these workers prevented the appellant from removing the finished products from the factory premises and therefore the appellant could not keep the kernels in tins and these kernels of cashew nuts got damaged and the appellant sustained heavy loss. It is also the case of the appellant that all possible steps were taken to prevent the loss but because of the defiant and adamant attitude taken by the workers nothing could be done to mitigate the loss. The appellant contended that steps were taken to settle the disputes but no settlement could be reached even at the instance of the officials of the Labour department. The appellant approached the Government as well as the High Court for getting police protection. By the time the goods were ultimately removed from the factory premises, they were partly damaged and as per Ext. A 20 survey report the appellant is alleged to have sustained damage to the extent of Rs. 4,21,039.51 and this report was accepted by the court-below.

16. The court below declined to grant relief on the ground that as per the special condition 5 (i)(b) the loss is not covered by the insurance policy. Special Condition 5(i)(b) reads as follows:

Loss or damage resulting from total or partial cessation of work or the retarding or interruption or cessation of any process or operation

Special conditions 5(i) (a) to (e) are various circumstances under which there will

not be any cover by the insurance policy. So it was argued by the respondent insurance company before the court below that the loss if any sustained by the appellant was due to the total or partial cessation of work or the retarding or interruption or cessation of any process or operation and therefore, such loss is not covered by the insurance policies. This plea was accepted by the court-below.

17. The appellant, on the other hand contended that in view of the "riot and strike endorsement" made in the policies, the first respondent is liable to indemnify the loss as it is clearly covered by the policies. Under the riot and strike endorsement, it is made clear that in consideration of the payment of additional premium the insurance company agreed that notwithstanding anything in the written policy contained to the contrary fee insurance under the Policy will extend to cover riot and strike damage and for the purpose of tins endorsement four types of "Riot and Strike" are mentioned in the endorsement. Under clause 3 of the Riot and Strike endorsement it is mentioned that willful act of any striker, or locked-out worker done in furtherance of a strike or in resistance to lock-out will also come under the purview of Riot and Strike endorsement. So it is clear that if there was any wilful strike by any workers and if the management had to lock-out the company in furtherance of such strike and if any loss is resulted from such strike or lock-out, the insurance company is bound to indemnify the loss sustained by the company as per "Riot and Strike endorsement" in the policy.

18. The special conditions under 5(i) are in a way exceptions to the riot and strike endorsement. The contention of the first respondent is that in view of the special condition 5(i)(b) if there was any partial cessation of work or interruption of work and any loss is resulted from such cessation or interruption of work, the riot and strike endorsement has no application. We are unable to accept this contention. From a reading of the special conditions it is clear that what the contracting parties intended was that if any loss is caused due to cessation of work or interruption of work and for that reason loss is caused, that will not he covered by the policy. If the cessation or interruption of work can be directly attributed to the strike by worker"s, that will not exclude the liability of the insurance company. If such an interpretation is accepted, under no circumstances, the loss if any sustained by the insured due to riot and strike can be said to be under the cover of the insurance policy. Ordinarily the strike by the workers will cause cessation or interruption of work. If the loss sustained due to such cessation or interruption of work is not covered by the policy, the special Conditions will have an over-riding effect on the riot and strike endorsement. Therefore, in our view, the special conditions stated in clause 5(i)(b) is not applicable, to the facts of the case. Here the loss sustained by the appellant is directly attributable to the strike by the workers. If the cessation or interruption of work was caused by any breakdown of machinery or other reasons, such loss would not be covered under the policy.

19. It is well accepted that in a contract of insurance if the terms of the same are

ambiguous or doubtful, it is to be interpreted in favour of the insured. That has been held by the Supreme Court in General Assurance Society Ltd. Vs. Chandumull Jain and Another, . It has been observed in Para 11 at page 1649 that,

In other respect there is no difference between a contract of insurance and any other contract except that in a contract of insurance there is a requirement of uberrima fides i.e., good faith on the part of the assured and the contract is likely to be construed contra proferentem that is against the company in case of ambiguity or doubt.

20. We are of the view that the loss sustained by the appellant was due to strike by the workers and because of the riot and strike endorsement made in the policy, the first respondent, insurance company is liable to make good the loss sustained by the appellant.

21. Lastly the counsel for the respondent contended that the suit was not maintainable in view of the clause 18 of the insurance contract. It was contended that the dispute, if any, between the parties ought to have been referred to the arbitrator instead of filing a suit. This contention is liable to be rejected for two reasons clause 18 states that, "if any difference arises as to the amount of any loss or damage such difference shall independently of all other questions be referred to the decision of the arbitrator...." This is a case where the dispute between the parties was not with regard to the quantum of damages only. When there was any difference between the parties to the contract with regard to the amount of any loss or damage such matter could be referred to the arbitrator, Secondly, this plea was not raised by the respondent in the written statement. No issue was also framed by the trial court. The respondent shall not be allowed to raise this question of maintainability at the appellate stage. The question as to want of jurisdiction or maintainability of the suit should be raised at the earliest point of time. Therefore, the objection of the respondent regarding maintainability of the suit on the ground of Sec. 18 of the insurance agreement is not sustainable.

22. Point No. 3: The appellant filed the suit claiming damages to the extent of Rs. 4,29,827.01 with 12% interest from the date of the suit till realisation. The claim is based on Ext. A 20 survey report. It is proved that the appellant sustained damage to the above extent. In the result, we decree the suit for Rs. 4, 29, 827/- with interest at 6% p.a. from the date of the suit till realisation. The appellant is also entitled to get cost throughout from the first respondent insurance company.

The appeal is allowed to the extent indicated above.