
(2007) 09 SHI CK 0015
In the High Court Of Himachal Pradesh

Sunil Kumar

APPELLANT

Vs

United India Insurance Company Ltd. and Others

RESPONDENT

Date of Decision : 17-09-2007

Acts Referred:

Limitation Act, 1963 — Section 14

Citation : (2008) 1 ShimLC 24

Hon'ble Judges : Surinder Singh, J;Deepak Gupta, J

Bench : Division Bench

Judgement

Surinder Singh, J.—The appellant has assailed the judgment and decree passed by the learned Single Judge in Civil Suit No. 65 of 1996 decided on May 23, 2001, whereby the suit was dismissed.

Case of the Plaintiff.

2. The brief facts giving rise to the instant appeal are that the appellant hereinafter called the plaintiff was a sole proprietor of rice mill running under the head and style of "M/s. Vikarant Enterprises", at village Deoli in Tehsil Nalagarh, District Solan, which was financed by Punjab National Bank (proforma defendant). As per the terms and conditions of the financial assistance, the plaintiff and the Bank (proforma defendant) aforesaid got the building, plant, machinery and stock insured with the defendants-United India Insurance Company Limited, Ropar branch (respondents No. 1 and 2), hereinafter called the defendants, covering the risk of earthquake, fire and floods, for which two separate insurance policies were taken, one in respect of the building, plant and machinery and another in respect of stocks of paddy, rice, rice bran, rice husk and bardana etc., lying in the factory premises. The total risk covered was for Rs. 19,00,000/ -. The period of validity of such insurance policies was w.e.f. 24th September, 1992 to 23rd September, 1993.

3. It is an admitted fact that during the intervening night of 16th/17th September, 1993, the factory premises gutted into fire. According to the plaintiff,

on account of devastation of fire, his stock to the tune of Rs. 14,95,000/- got destroyed. Its information was given to the Insurance Company-defendants aforesaid and the necessary claim was lodged. Defendants No. 1 and 2 had deputed their Surveyor to carry out the survey and assess the loss, if any, caused to the plaintiff. The said Surveyor conducted the inquiry on the spot for about three days w.e.f. 18th September, 1993 and submitted his report, but the defendants-Insurance Company did not settle the dispute despite repeated demands. Thus, the plaintiff approached the State Consumer Disputes Redressal Commission, Chandigarh for the Redressal of his grievance. During the pendency of the matter before the State Commission, the defendants No. 1 and 2 repudiated the claim on 22.9.1994. The complaint filed by the plaintiff was dismissed by the Commission on 17th July, 1995, on the ground that the disputed questions were involved in the case. Thus, the plaintiff was left at liberty to approach the Civil Court of its competent jurisdiction.

4. Thereafter the, plaintiff filed the present suit, claiming an amount of Rs. 20,00,000/- with interest for the loss alleged to have been suffered by him in the said fire.

Case of the Defendant

5. The defendants No. 1 and 2 offered the strong resistance to the suit. Though they admitted the insurance of the stocks and the fire to the factory premises of the plaintiff and deputing of the Surveyor by them to assess the loss, but according to them, during the inquiry and investigation by their Surveyor, it came to the notice that the fire was not accidental, but self engineered. In addition, preliminary objections of maintainability of the suit, limitation and estoppel etc. were also taken.

Issues

6. On the pleading of the parties, the learned Single Judge framed the following issues to resolve the controversy;-

1. Whether a fire broke out in the factory premises of the plaintiff on the intervening night of 16th and 17th September, 1993, as alleged? OPR

2. If issue No. 1 is proved in the affirmative, whether any stocks of the plaintiff were destroyed in such a fire, if so, what was the extent of such stocks? OPP.

3. Whether the fire was self-engineered by the plaintiff, as alleged by defendant Nos. 1 and 2 ? OPD 1 and 2.

4. Whether the plaintiff is entitled to any amount as compensation on account of loss sustained due to fire in its godown, if so, to what extent? OPP.

5. In the event of issue No. 4 being proved, whether the plaintiff is entitled to claim any interest, if so, at what rate, from which date and on what amount? OPP.

6. Whether the insurance policy issued by the defendant Nos. 1 and 2 has been

rendered voidable as claimed by the defendants No. 1 and 2? OPD 1 and 2.

7. Whether the plaintiff is estopped from filing the present suit? OPD 1 and 2.

8. Whether the suit is not maintainable in the name of the plaintiff-Firm as alleged? OPD 1 and 2.

8-A. Whether the suit is barred by time in view of the terms of insurance policy? OPD 1.

9. Relief.

Findings on Issues by the Learned Single Judge.

7. The parties led their evidence and upon hearing the learned Counsel for the parties and upon going through the evidence on record, the learned Single Judge held that the factory premises gutted into fire during the intervening night of 16th/17th September, 1993 and there was no cogent evidence on record that the fire was self-engineered thus it was held that some stocks was lying in the factory premises, which according to the Surveyor of the Insurance Company was worth Rs. 3,10,043/-, but plaintiff was not held entitled for the same/on account of the findings on issues No. 7 and 8-A the conclusion of which was as under:

In the present case, admittedly, the claim regarding the loss and" damage was lodged by the plaintiff with the defendants No. 1 and 2 within the period of twelve months as stipulated in Clause 6(ii) of the insurance policy Ext. DW1/A. Such claim was repudiated by the defendants on 22.9.1994 vide letter Ex. PW3/J. In terms of Clause 6(ii) the plaintiff could have enforced the clause against the defendants No. 1 and 2 by way of a suit within 12 months from such repudiation failing which the plaintiff would be deemed to have abandoned the claim and such claim would not thereafter be recoverable. Once the plaintiff has failed to enforce the claim by way of a suit within one year of the repudiation of the claim, he is estopped from enforcing the claim since he would be deemed to have abandoned such claim. The present suit, as stated above, was filed on 2.7.1996, that is, about one year and ten months of the repudiation of his claim by the defendants No. 1 and 2.

Consequently, the suit was dismissed.

Contention in Appeal before us.

8. Having felt aggrieved by the impugned judgment and decree, the plaintiff assailed it in appeal precisely on the ground that the learned Single Judge has based his decision on the erroneous appreciation of facts that the mandate of provision of Section 28 of the Contract Act, 1872, will not apply to the present case. It was further contended that the claim had been preferred and made the subject-matter of a pending action in a Court of law within a period of twelve months from the happening of the loss and damage and it was subject to the pending action before the State Consumer Disputes Redressal Commission,

which fact was not rightly appreciated in the right perspective by the learned Single Judge. Therefore, the findings on aforesaid issues against him deserves to be reversed and prayed for the acceptance of the appeal.

Submissions before us

9. We have heard the learned Counsel for the parties and have carefully examined the evidence on record.

10. Shri J.S. Bhogal, learned Senior Advocate, for the plaintiff (appellant) has forcefully argued that the provision of Section 28 of the Contract Act, as amended, would apply to a pending case and holding the clause of the agreement as bar that Insurance company is not liable for the loss after expiration of the twelve months after happening of the loss defeat the provision of the Limitation Act, therefore, it is void. Even otherwise, the claim was filed within the limitation. Therefore, the learned Single Judge ought to have decreed the suit. In the alternative, it is prayed that the plaintiff should have been given the benefit of Section 14 of the Limitation Act and the time spend by him before the State Consumer Commission, Chandigarh should not be taken into account while counting the period of limitation.

11. On the other hand, Shri Ashwani Kumar Sharma, learned Counsel for respondents has supported the impugned judgment and decree and urged that the stipulation of the insurance policies that unless an action or suit was commenced within the period specified therein after the rejection of a claim of the insured by the insurer, all benefits under the policies would cease.

12. The Insurance Policy Ext. DW1/A is admitted by the parties.

Our Findings

13. To appreciate the rival contentions, it would be beneficial to extract Clause 6 (ii) of the Insurance Policy Ext. DW1/A, which reads as under:

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.

13. In National Insurance Co. Ltd. Vs. Sujir Ganesh Nayak and Co. and another, , the Apex Court interpreted Clause 19 of the Insurance Policy, which was verbatim to that of Clause 6(ii) of the Insurance Policy Ext. DW1/A reproduced above. While upholding the judgment of Full Bench of the Punjab and Haryana High Court, it was held 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 right 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. Thus, in brief, seems to be the settled legal position. Thereafter, there has been an amendment in Section 28 of the Contract Act, which has been reproduced by the learned Single Judge and we may also would like to reproduce the same to have the clear understanding in the matter:

Every agreement:

(a) by which any party thereto is restricted 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; or

(b) which extinguishes the rights of any party thereto or discharges any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his right, is void to that extent.

14. Thus the bar which was created the agreement that vanishes by the amendment quoted above. But the instant suit was filed on 2.7.1996. The cause of action has been pleaded to have first accrued on 17.9.1993 when the fire incident took place, then on 22.9.1994 when the respondents repudiated the claim. Finally on 17.7.1995 when the claim of the plaintiff was dismissed by the Punjab State Consumer Commission. The amendment in Section 28 above came into effect on and w.e.f. 8th January, 1997 with no retrospective effect. In view of National Insurance Co. Ltd. v. Sujir Ganesh Nayak & Company and Anr."s case supra, the similar clause was held to be valid. Based upon it the Division Bench of Madras High Court also held in The Oriental Insurance Company Limited, United India Building 4th Floor, Esplanade, Madras - 108 Vs. Karur Vysya Bank Limited Karur, that Section 28 amended by Amendment Act of 1997 is prospective in nature.

15. In our considered opinion, the law as in force on the day of filing of the suit, would govern the relief claimed. In the instant case the claim was thus filed

beyond the period of twelve months from its repudiation.

16. Next comes the question as to whether the appellant-plaintiff is entitled to take the benefit of Section 14 of the Limitation Act, which reads as under:

14. Exclusion of time of proceeding bona fide in Court without jurisdiction.- (1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature is unable to entertain it.

(3) Notwithstanding anything contained in Rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provision of Sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the Court under Rule 1 of that Order, where such permission is granted on the ground, that the first suit must fail by reason of a defect in the jurisdiction of the Court or other cause of a like nature.

Explanation: For the purposes of this Section,-

(a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;

(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;

(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.

17. The intention of the legislature in enacting Section 14 is that if a litigant has been with due diligence prosecuting some other proceedings in good faith, than the time spent by him on prosecuting these proceedings should be excluded while computing the period of limitation. Section 14 of the Limitation Act postulates the following conditions for its operation:

(i) the plaintiff should have been prosecuting another civil proceedings which he relies upon, with due diligence;

(ii) two proceedings, the former and the latter, should be founded on the same cause of action; and

(iii) the former proceeding must have been prosecuted in good faith in a Court which from defect of jurisdiction or other cause of like nature is unable to entertain it.

18. In the present case, the admitted facts as proved on record are that after the fire in question took place on 16th/17th September, 1993, the present plaintiff filed a complaint before the State Consumer Disputes Redressal Commission, Chandigarh on 5.9.1994. During the pendency of the dispute, the respondents have repudiated the claim of the plaintiff on 22.9.1994. The complaint of the plaintiff was dismissed by the Commission on 17.7.1995, on the ground that contested questions of fact were involved in the case. Liberty was given to the plaintiff to approach the competent Civil Court, In case the period from 5.9.1994 to 17.7.1995 is excluded than the suit which was filed on 2.7.1996 would be within limitation. There can be no matter of doubt even after the Insurance Company repudiated the claim, Consumer Commission could have decided the matter, however, the Consumer Commission did not decide the matter, only on the ground that disputed question of facts were involved. The repudiation took place on 22.9.1994. Limitation in the agreement is twelve months from the date of repudiation. If the period from 22.9.1994 to 17.7.1995 is excluded, than the claim would definitely be within limitation.

19. In our considered opinion, the appellant-plaintiff had not given up his claim at any stage. He was only prosecuting the claim before the Consumer Court. This was being done under legal advice. The claim was being prosecuted with due diligence. As already stated above, the same was rejected by the State Consumer Disputes Redressal Commission, Chandigarh, only on the ground that the claim involves disputed questions of fact. Thus, the plaintiff has proved that he has been prosecuting some other proceedings, based on the same cause of action, i.e. damage suffered by him, in the fire. The Consumer Commission could have heard and decided the matter and the only reason why it did not decide the matter was that disputed questions of law were involved. Therefore, in our opinion, the appellant who was not at fault was entitled to claim the benefit of Section 14 of the Limitation Act.

20. Keeping in view the aforesaid discussions, we partly allow the appeal. Even though we uphold the decision that the limitation was only 12 months and the amendment to Section 28 of the Act had no retrospective effect yet, we are of the view that the plaintiff is entitled to the benefit of Section 14 of the Limitation Act as aforesaid. Therefore, the learned Single Judge erred in rejecting the claim of the plaintiff. The fire in question took place in 1993 and the plaintiff has been pursuing his claim for the last 14 years.

21. The learned Single Judge while deciding Issues No. 2 and 4 has come to the conclusion that stocks" of the plaintiff were destroyed in the fire. Though the plaintiff has claimed that the stocks of the value of Rs. 14,95,000/- destroyed in the fire, however, there is no cogent proof of this fact. The defendants have stated that the loss of the stock was to the extent of Rs. 3,10,043/-, which is

borne out from the report Ext. DW4/A proved by defendant's Surveyor Mr. N.S. Sidhu. The plaintiff has failed to show how the assessment, of the Surveyor in respect of quantum of loss is incorrect.

22. On reappraisal of evidence, we have found that the learned Single Judge has rightly held that there is no proof that the plaintiff was in any manner guilty of engineering the fire and has rightly decided Issue No. 4 against the defendants.

23. In our opinion, the plaintiff is, therefore, entitled to recover a sum of Rs. 3,10,043/-. Keeping in view the present bank rate of interest, the plaintiff is also entitled to simple interest at the rate of 7.5% per annum, on this amount, from the date of institution of the suit i.e. 2.7.1996, till the payment/deposit of the said amount.

Conclusion

24. In view of the above discussion, we set-aside the judgment and decree of the learned trial Judge and partly allow the appeal. A decree for Rs. 3,10,043/- is hereby passed in favour of the plaintiff and against the defendants No. 1 and 2. Plaintiff shall also be entitled to interest at the rate of 7.5% per annum on this amount from 2nd July, 1996, the date of institution of the suit till date the payment/deposit of the decretal amount. In view of the peculiar facts and circumstances of the case, the parties are left to bear their own costs.