

(2009) 05 DEL CK 0093

In the Delhi High Court

Case No : Regular First Appeal 607 of 1998

Vijay Kumar Mishra

APPELLANT

Vs

Oriental Insurance Co. Ltd.

RESPONDENT

Date of Decision : 27-05-2009

Acts Referred:

Contract Act, 1872 — Section 28
Penal Code, 1860 (IPC) — Section 380, 454

Citation : (2009) 05 DEL CK 0093

Hon'ble Judges : P.K. Bhasin, J

Bench : Single Bench

Advocate : S.C. Singhal, for the Appellant; V.P. Chaudhary Nitinjya Chaudhary and Sushma, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Bhasin, J.—This is an appeal against the judgment and decree dated 26-08-1998 passed by the Court of Additional District Judge, Delhi whereby the suit filed by the appellant for recovery of Rs. 2,06,260/- against the respondent was dismissed.

2. The appellant-plaintiff(hereinafter referred to as "the plaintiff") had obtained a House Holder's Package Policy (Ex.PW-1/3) from the respondent-defendant(hereinafter referred to as "the defendant") to cover the loss of household articles kept at his rented house No. B-1/39 (Ground Floor), Hauz Khas, New Delhi in the event of any incident of burglary, house breaking or theft etc. taking place there. The insurance policy was for a period of one year from 26-11-85 to 25-11-86. While approaching the defendant for issuing the insurance policy the plaintiff had submitted a list of household articles to the Company and the value of those articles given was Rs. 1,69,710/-. The defendant had accepted the plaintiff's proposal and had agreed to indemnify the plaintiff against loss of the household articles because of burglary, house breaking or theft in his house but limiting its liability to Rs. 1,69,710/-. As per

the plaintiff's case, on 5th January, 1986 his landlord Mr. N.C. Pant with the help of a number of persons forcibly broke into his afore-said premises in Hauz Khas and removed valuable articles. A similar incident again took place on 9th January, 1986 when some more articles were stolen from the house of the plaintiff. In respect of those two incidents the plaintiff had lodged a complaint with Hauz Khas police station and a case under Sections 454/380 of the Indian Penal Code was registered. The defendant was also intimated about the said two incidents by the plaintiff vide his letter dated 10-01-86 (Ex. PW-1/8) since the articles removed from his house by the culprits were covered under the insurance policy and a claim was lodged with it which was registered by the defendant as claim No. 46/00006/86. The depreciated value of the stolen goods was given to be approximately Rs. 1,50,000/-. The defendant, however, rejected the plaintiff's claim vide letter its dated 24th November, 1986(Ex.PW-1/15) and the defendant Company completely disowned its liability under the insurance policy Ex.PW-1/3. The plaintiff thereafter got issued a notice dated 23-07-1987, Ex.PW-1/16, to the defendant through an advocate calling upon the defendant to settle his claim and to pay the claimed amount along with interest @ 18.5% p.a. In response to that legal notice the defendant sent a reply dated 10-10-1988 (Ex.PW-1/17) wherein also it was stated that the claim of the plaintiff had been rejected. Having been left with no other option but to file a suit for recovery the plaintiff filed a suit on 06-11-88 for recovery of Rs. 2,06,260/- which included the sum of Rs. 1,50,000/- being the value of the stolen articles and the rest of the amount was on account of interest. Pendent elite and future interest @ 18.5% p.a. was also claimed.

3. The defendant resisted the plaintiff's claim inter alia on the ground that in view of clause No. 15 of the insurance policy the plaintiff's claim stood abandoned and the defendant stood discharged of its liability since the suit had not been filed within a period of twelve months from 25-08-1986 when it had repudiated its liability. Since the plaintiff had not acknowledged the receipt of this letter of the defendant company and he was writing letters to the company asking about the fate of his claim the defendant wrote another letter dated 24-11-86 to the plaintiff informing him about the rejection of his claim.

4. The pleadings of the parties led to the framing of the following issues:

1. Whether the suit filed by the plaintiff is not maintainable in view of the preliminary objection No.2 taken in the written statement? OPD
2. Whether there was any theft or thefts in the premises as alleged by the plaintiff? OPP
3. Whether the claim of the plaintiff is covered under the granted by the policy of insurance? OPP
4. Whether the defendant No. 1 is justified in disclaiming its liability? OPD
5. What was the extent of loss and to what amount, if any, is the plaintiff

entitled? OPP

6. Whether the plaintiff is entitled to any interest, if so, at what rate? OPP

7. Relief.

5. The learned trial Judge decided issues No. 2 & 3 only in favour of the plaintiff while all other issues were decided against him and consequently the plaintiff's suit came to be dismissed. The learned trial Judge while accepting the plaintiff's case that theft had taken place in the house of the plaintiff on 05-01-86 and 09-01-86 and further that the defendant having insured the household articles and having agreed to indemnify the plaintiff against the loss of those articles because of theft, burglary or house breaking the claim of the plaintiff was covered under the insurance policy. However, the suit of the plaintiff was dismissed accepting the defendant's objection that the plaintiff's claim stood abandoned because of his having not filed the suit within a period of 12 months from 24-11-86 when the plaintiff's claim was repudiated by the defendant. In this regard, the learned trial Judge had relied upon clause No. 15 of the insurance policy.

6. Shri S.C. Singhal, learned Counsel for the plaintiff has argued that the effect of a clause in an insurance policy which was exactly similar to clause No. 15 of the insurance policy in question in the present case was considered by a Division Bench of this Court in Ramsons Southend Vs. Division Manager, New India Assurance Co. Ltd. and Others, and it was held that such a clause was void in view of Section 28 of the Contract Act. Mr. Singhal also contended that the learned trial Court has not considered this judgment of this Court.

7. On the other hand, Shri Viresh Pratap Chaudhary, learned senior counsel for the defendant, has contended that upon the failure of the plaintiff to institute the suit for recovery within a period of twelve months from 25/08/86 when his claim was rejected by the defendant Company his very right to sue the defendant for recovery of the claim amount under the insurance policy in question stood extinguished and, therefore, the suit could not have been instituted. It was also contended that the suit had not been filed within a period of twelve months even from 24th November, 1986 when the defendant Company had written second letter to the plaintiff informing him about the rejection of his claim and so the learned trial Court had rightly dismissed his suit which was filed on 06-12-88. In support of this argument Mr. Chaudhary has strongly relied upon a recent judgment of the Supreme Court which is reported as H.P. State Forest Co. v. United India Insurance Co. Ltd. I (2009) ACC 137. Reliance was also placed on two other judgments also of the Supreme Court which are reported as National Insurance Co. Ltd. Vs. Sujir Ganesh Nayak and Co. and another, and The Food Corporation of India Vs. The New India Assurance Co. Ltd. and others, . Mr. Chaudhary also submitted that these judgments also have been relied upon by the Supreme Court in the latest case of H.P. State Forest Co. (supra). Reliance on these judicial pronouncements of the Apex Court was placed by the learned

senior counsel because in all these cases the insurance policies in question had a clause almost similar like clause No. 15 in the present case and the Supreme Court has held that the effect of such a clause was extinguishment of the right of the insured to claim any amount under the insurance policy in case the suit for recovery was not instituted within the stipulated period upon repudiation of the claim by the insurance Company and that such a clause is not hit by Section 28 of the Contract Act. Mr. Chaudhary contended that in all these cases before the Supreme Court the suits for recovery filed against the insurance company were dismissed since they were not filed within the period stipulated in the policies after the repudiation of the insured's claim although the same had been filed within the normal period of limitation of three years as provided under the Limitation Act.

8. Regarding the applicability of the decisions of the Supreme Court cited by Mr. Chaudhary, except the latest one in the case of H.P. State Forest Co. (supra), Mr. Singhal submitted that the clauses of insurance policies in those cases were materially different from clause No. 15 of the policy in the present case and, therefore, these authorities do not help the defendant. Regarding the recent decision of the Supreme Court in the case of H.P. State Forest Co. relied upon by Mr. Chaudhary the submission of Mr. Singhal was that even the facts of this case also are different and so this judgment also does not apply to the facts of the present case and, therefore, this Court should follow the decision of the Division Bench of this Court in Ramsons case (supra).

9. In order to appreciate the rival submissions clause no.15 of the insurance policy in question in the present case and the relevant clause in the judgment of the Division Bench of this Court relied upon by the learned Counsel for the plaintiff as also the relevant clauses in the policies in questions in the decisions relied upon by the learned senior counsel for the defendant need to be noticed. Clause No. 15 of the insurance policy in the present case is re-produced below:

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 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.

10. The relevant clause of the insurance policy in Ramsons Southend case(supra) decided by the Division Bench of this Court and strongly relied upon by Mr. Singhal is clause no.9 and the same reads as under:

Clause 9: If any difference shall arise as to the quantum to be paid under this Policy, (liability being otherwise admitted) such difference shall independently 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 which 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 before been appointed by them in writing 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 herein before provided, if the Company has disputed or not accepted liability under or in respect of this policy.

It is hereby expressly stipulated and declared and 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.

The trial Court had dismissed the suit but the Division Bench in appeal filed by the plaintiff held that this clause no.9 had the effect of curtailing the normal period of limitation of three years under the Limitation Act for filing a suit for recovery by the insured and so that clause was hit by Section 28 of the Contract Act and was void. After holding so the suit of the plaintiff-insured was decreed by the Division Bench.

11. Now, I come to the decisions of the Supreme Court relied upon by the learned senior counsel for the defendant. The relevant clause of the insurance policy in the case of Food Corporation of India(supra) reads as under:

We THE ANAND INSURANCE COMPANY LIMITED further agree that the guarantee herein contained shall remain in full force and effective upto and inclusive of the 15.2.1971 the date referred to above...however, that the corporation shall have no rights under this bond after the expiry of (period) six months from the date of the termination of the contract.

Rejecting the argument raised on behalf of the insured that this clause was hit by Section 28 of the Contract Act the Supreme Court held as under:

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 had 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 contract. It is in keeping with the principle which has been explained in English decisions and by our own Court that the insurance companies should not be kept in dark for long and they must be apprised of their liabilities immediately both the facility and certainty. The High Court erroneously construed it as giving up the right of enforceability of its claim after six months. Since the period is provided under the agreement the appellant had to move within this period asserting its right and apprising the company of the breach or violation by the miller to enable it either to pay or to persuade the miller to pay itself. It does not directly or indirectly curtail the period of limitation nor does it anywhere provide that the corporation shall be precluded from filing suit after expiry of six months. It can utmost be construed as a condition precedent for filing of the suit that the appellant should have exercised the right within the period agreed to between the parties. The right was enforced under the agreement when notice was issued and the company was required to pay the amount. Assertion of right is one thing than enforcing it in a court of law. The agreement does not anywhere deal with enforcement of right in a court of law. It only deals with assertion of right. The assertion of right, therefore, was governed by the agreement and it is imperative as well that the party concerned must put the other side on notice by asserting the right within a particular time as provided in the agreement to enable the other side not only to comply with the demand but also to put on guard that in case it is not complied it may have to face proceedings in the court of law. Since admittedly the Corporation did issue notice prior to expiry of six months from the termination of contract, it was in accordance with the Fidelity Insurance clause and, therefore, the suit filed by the appellant was within time.

12. The relevant clause of the insurance policy in the National Insurance Co.'s case (supra) reads 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.

In this case also the Supreme Court rejected the contention raised on behalf of the claimant that such a clause was violative of Section 28 of the Contract Act. The relevant observations of the Supreme Court are reproduced below:

The clause before this Court in Food Corporations case extracted herein before can instantly be compared with the clause in the present case. The contract in

that case said that the right shall stand extinguished after six months from the termination of the contract. The clause was found valid because it did not proceed to say that to keep the right alive the suit was also required to be filed within six months. Accordingly, it was interpreted to mean that the right was required to be asserted during that period by making a claim to the Insurance Company. It was therefore held that the clause extinguished the right itself and was therefore not hit by Section 28 of the Contract Act. Such clauses are generally found in insurance contracts for the reason that undue delay in preferring a claim may open up possibilities of false claims which may be difficult of verification with reasonable exactitude since memories may have faded by then and even ground situation may have changed. Lapse of time in such cases may prove to be quite costly to the insurer and therefore it would not be surprising that the insurer would insist that if the claim is not made within a stipulated period, the right itself would stand extinguished. Such a clause would not be hit by Section 28 of the Contract Act.

13. It is thus clear that the Supreme Court in these cases was considering the effect of the relevant clauses and particularly the portions highlighted by me and had held that these stipulations in the policies do not have the effect of curtailing the normal period of limitation provided under the Limitation Act for filing of suit for recovery of money but such clauses have the effect of extinguishing the very right of the insured to recover money under the policy if suit is not filed within the period stipulated in the policy and so are violative of not Section 28 of the Contract Act.

14. There is no doubt that apparently clause no.15 of the insurance policy in the present case is not exactly similar to the above quoted clauses in cases of Food Corporation of India and National Insurance Co. inasmuch as in the clauses in policies of those cases it was not provided that on the expiry of period of twelve months after the repudiation of the claim of the insured by the insurance company the insured would be deemed to have abandoned his claim and claim amount would not be recoverable thereafter if no suit for recovery is filed within that period of twelve months and that difference in the policies in question in other cases referred to above and clause no.15 of the policy in the present case was considered by the Division Bench of this Court in Ramsons case(supra) to be a feature which distinguished the case before it from the said cases decided by the Supreme Court missing in the policies in other cases which were before the Supreme Court and relied upon by the trial Court in the present case. According to the submission of Mr. Singhal the Single Judge Bench of this Court is bound by the decision of Division Bench of this Court and so I should follow the Division Bench ruling of this Court in the Ramsons" case (supra). On the other hand, it had been argued on behalf of the respondent by learned senior counsel Mr. Chaudhary that the decision of the Division Bench of this Court is contrary to the law laid down by the Hon"ble Supreme Court in the judgments cited by him. Mr. Chaudhary also submitted that even if there was some difference in the relevant clauses of the policies in those cases and the clause no.15 of the policy in the

present case that fact would now not make any difference since in the latest decision of the Supreme Court in the case of H.P. State Forest Company(supra) the relevant clause of the insurance policy in question was exactly similar to clause No. 15 in the present case and even this clause has been held by the Supreme Court to be not hit by Section 28 of the Contract Act.

15. The relevant clause of the insurance policy in the case of H.P. Forest Company Ltd. (supra) was as follows:

6(ii) 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.

I have gone through the this judgment relied upon by Mr. Chaudhary and I find that the same squarely applies to the present case. The above-quoted clause of the insurance policy has been held to be *pari materia* with the disputed clause in the Case of (supra) even though in that clause there was no stipulation that if no suit is filed within twelve months from the date of repudiation of the claim of the insured the claim of the insured shall be deemed to have been abandoned and claim amount shall not be recoverable thereafter. The Supreme Court has relying upon its earlier decisions in the cases of National Insurance Co.(supra) and Food Corporation of India(supra) has held that even such a clause in the insurance policies is not hit by Section 28 of the Contract Act. It would be profitable to reproduce that part of the judgment where this aspect of the matter was considered and decided and the relevant paras are reproduced below:

7. It would be clear from the above prefatory note that the discussion would involve an appreciation of Clause 6 (ii) of the Policy and Section 28 of the Contract Act. Both these clauses are reproduced below:

6(ii) 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.

Section 28. Agreements 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 time within which he may thus enforce his

rights, is void to that extent.

Exception 1 ? 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.

Savings of contract to refer questions that have already arisen.

Exception 2 ? 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 arisen, or affect any provision of any law in force for the time being as to references to arbitration.

8. In Sujir Nayak's case (supra) to which primary reference has been made by the learned Counsel for the parties while dealing with an identical situation where a contract contained a provision prescribing a period of limitation shorter than that prescribed by the Limitation Act, it was held that the contractual provision was not hit by Section 28 as the right itself had been extinguished.

9. Mr. Sharma has, however, submitted that in view of the observations in some paragraphs in Food Corporation of India's case, the observations in Sujir Nayak's case were liable to reconsideration. We, however, find no merit in this plea for the reason that in Sujit Nayak's case, Food Corporation of India's case (supra) has been specifically considered and Vulcan Insurance Company's case (supra) too had been relied upon. In Sujir Nayak's case, this Court was called upon to consider Condition 19 of the policy which was in the following terms:

Condition 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.

10. While construing this provision vis-?-vis Section 28 of the Contract Act and the cases cited above the several other cases, in addition, this is what the Court ultimately concluded:

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 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 Contract Act. This, in brief, seems to be the settled legal position. We may now apply it to the facts of this case.

19. The clause before this Court in Food Corporation case extracted hereinbefore can instably be compared with the clause in the present case. The contract in that case said that the right shall stand extinguished after six months from the termination of the contract. The clause was found valid because it did not proceed to say that to keep the right alive the suit was also required to be filed within six months. Accordingly, it was interpreted to mean that the right was required to be asserted during that period by making a claim to the Insurance Company. It was, therefore, held that the clause extinguished the right itself and was therefore not hit by Section 28 of the Contract Act. Such clauses are generally found in insurance contracts for the reason that undue delay in preferring a claim may open up possibilities of false claims which may be difficult of verification with reasonable exactitude since memories may have faded by then and even ground situation may have changed. Lapse of time in such cases may prove to be quite costly to the insurer and therefore it would not be surprising that the insurer would insist that if the claim is not made within a stipulated period, the right itself would stand extinguished. Such a clause would not be hit by Section 28 of the Contract Act.

21. Clause 19 in terms said that in no case would the insurer be liable for any loss or damage after the expiration of twelve months from the happening of loss or damage unless the claim is subject of any pending action or arbitration. Here the claim was not subject to any action or arbitration proceedings. The clause says that if the claim is not pressed within twelve months from the happening of any loss or damage, the Insurance Company shall cease to be liable. There is no dispute that no claim was made nor was any arbitration proceeding pending during the said period of twelve months. The clause therefore has the effect of extinguishing the right itself and consequently the liability also. Notice the facts of the present case. The Insurance Company was informed about the strike by the letter of 28.4.1977 and by letter dated 10.5.1977. The insured was informed that under the policy it had no liability. This was reiterated by letter dated 22.9.1977. Even so more than twelve months thereafter on 25.10.1978 the notice of demand was issued and the suit was filed on 2.6.1980. It is precisely to avoid such delays and to discourage such belated claims that such insurance policies contain a clause like clause 19. That is for the reason that if the claims are preferred with promptitude they can be easily verified and settled but if it is the other way round, we do not think it would be possible for the insurer to verify the same since evidence may not be fully and completely available and memories may have faded. The forfeiture Clause 12 also provides that if the claim is made but rejected, an action or suit must be commenced within three months after such rejection; failing which all benefits under the policy would stand forfeited.

So, looked at from any point of view, the suit appears to be filed after the right stood extinguished. That is the reason why in Vulcan Insurance case while interpreting a clause couched in similar terms this Court said : (SCC p. 952, para 23)

It has been repeatedly held that such a clause is not hit by Section 28 of the Contract Act.

Even if the observations made are in the nature of obiter dicta we think they proceed on a correct reading of the clause.

In the light of the fact that Food Corporation's case has been considered in Sujir Nayak's case, no further argument remains in the present matter, as Clause 6(ii) and Condition 19 are, in their essence, *pari materia*.

(emphasis laid)

16. In view of this decision of the Supreme Court the submission of learned Counsel for the plaintiff that clause No. 15 of the policy in the present case is materially different from the clauses of the policies in the cases of Food Corporation of India(supra) and National Insurance Company(supra) cannot be accepted. I am also of the view that with the pronouncement of this judgment of the Supreme Court in the case of H.P. State Forest Co.(supra) the judgment of the Division Bench of this Court in Ramson's case(supra) stands impliedly overruled and, therefore, the plaintiff cannot get any benefit now from that decision. Consequently, it has to be held that the plaintiff's claim under the insurance policy in question stood abandoned on the expiry of period of twelve months from the date of the repudiation of the plaintiff's claim by the defendant because of his having failed to file the suit within that period of twelve months as provided under Clause 15 of the insurance policy and his right to claim anything from the defendant stood extinguished.

17. No other point has been urged from either side.

18. This appeal is accordingly dismissed.