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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: July 16, 2009

Date of Order: August 13, 2009

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13.08.2009

M/S UNITED INDIA INSURANCE CO LTD. ... Petitioner

Through : Mr. V.K. Gupta, Adv.

Versus

KARAM CHAND GOEL

.... Respondent

Through: Mr. Sameer Nandwani, Adv.

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether judgment should be reported in Digest?

JUDGMENT

1. By this application under Section 34, the petitioner has raised objections against the award dated 1st August, 2007 whereby the learned Arbitrator allowed the claim of the respondent to the tune of Rs.51.96 lakhs with interest at the rate of 9% per annum on the award amount and the cost of arbitration.

2. The main objection to the award raised by counsel for the objector is that the award was contrary to the contract and specific provision no.6(b)(ii) of policy whereunder the respondent was barred from raising any claim under

the policy after expiry of 12 months from the date of payment of claims on merits.

3. The brief facts relevant for purpose of deciding these objections are that a fire took place at the factory of the respondent on 13th April, 2001. The building, machinery and stock of the respondent were insured with the petitioner. The petitioner was informed about this fire and the loss suffered by the respondent on 14th April, 2001. The petitioner sent its surveyor and assessor, who visited the premises on 16th April, 2001. The surveyor of the petitioner against the revised claim of Rs.1,21,78,020/- raised by the claimant/respondent assessed the loss and approved the claim of Rs.52,55,660/- on re-instatement basis. This assessment was sent to the insurance company and insurance company approved the assessment. The respondent/claimant vide letter dated 18th September, 2001 gave a consent for the claim as assessed by the surveyor to be full and final settlement of the insurance claim. The claim of Rs.52,55,660/- was made on re-instatement basis whereunder the respondent was required to re-instate the machinery destroyed in fire. Vide letter dated 13th December, 2001, the respondent raised a grievance against the petitioner that the respondent was given an adhoc payment of Rs.20 lakhs only which amount had already been spent by the respondent on re-instatement. He asked the petitioner to pay another amount of Rs.30 lakhs, on account, to enable him to re-instate the other machinery. In the same letter, the respondent/claimant wrote to insurance company that he was not able to re-instate the other machinery due to lack of funds. After this letter the surveyor re-assessed the loss in view of the stand taken by the respondent that it was not able to re-instate

the second machine and he approved a claim of Rs.47,93,851/- considering that the second open end machine loss was to be assessed on the basis of value of the machine and not on the basis of re-instatement. After this re-assessment of loss on the basis of market value, the petitioner has paid balance amount of Rs.47,93,851/- in January, 2002 by way of cheque. The respondent signed a full and final settlement under a disbursement voucher on 5th March, 2002. After receiving this full and final settlement in January, 2002, the respondent/claimant sent a notice to the petitioner on 23rd April, 2004, i.e., after more than 2 years, raising a dispute that the claim of the respondent was settled at a very less amount and that he was coerced to sign the full and final settlement at the time of releasing the payments; first in September, 2001 and then in January, 2002. He also alleged that consent for full and final settlement was given by him under economic coercion. He raised a further claim of Rs.51.96 lakh and invoked arbitration clause and appointed from his side an Arbitrator. The petitioner replied this notice on 21st May, 2004 wherein the petitioner stated that claim of the respondent was barred by time in view of specific condition no. 6(b)(ii) of the policy having been raised after 12 months from the date of payments of the claim on merits. The petitioner also took a stand that the claim raised by the respondent was not tenable. The petitioner did not agree for appointment of an Arbitrator from its side saying that the arbitration clause cannot be invoked. The respondent then moved a petition before this Court under Section 11 of the Arbitration and Conciliation Act and the present Arbitrator was appointed by this Court to go into the claims of the petitioner.

4. Though, the Arbitrator was having before him pleadings and documents and the objections of the petitioner that the claim was barred by clause 6(b)(ii) but the Arbitrator has not given his finding about the claim being barred by clause 6(b)(ii) of the policy. The award is totally silent on this aspect.

5. Counsel for the petitioner, apart from pressing other objections, stressed upon the fact that this claim could not have been entertained by the Arbitrator in view of Clause 6(b)(ii).

6. Clause 6(b)(ii) of the contract (policy) between the parties reads as under:-

“6.

(b)

(ii) In no case whatsoever shall the Company be liable for any loss or damage after the expiry 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.”

7. Counsel for the respondent submitted that the period of 12 months as laid down in the policy was contrary to the law of limitation and this clause of the policy would fall within the mischief of Section 28 of the Contract Act and was therefore void.

8. The issue raised by the petitioner regarding clause 6(b)(ii) and the plea taken by the respondent about the clause being hit by Section 28 has been set at rest by the Supreme Court in **National Insurance Company Ltd. vs. Sujir Ganesh Nayak & Company** AIR 1997 SC 2049. The Supreme Court has reiterated this legal position **Himachal Pradesh State Conference Company Ltd. vs. Union of India Insurance Company Ltd.** (2009) 2 SCC 252 wherein it was pleaded before the Supreme Court that the law laid down in AIR 1997 SC 2049(supra) Supreme Court was not a good law and the Court should re-consider the position. The Supreme Court observed as under:

"11. We see from the order of the Commission that it has relied upon Sujir Ganesh Nayak case to hold that the complaint could not be entertained as being time-barred. The counsel for the appellant had, however, argued before the Commission as also before us, that as Section 28 of the Contract Act had undergone significant amendments, the aforesaid judgment required a reappraisal. This submission had been rejected by the Commission by observing that it was bound by the judgment in Sujir Ganesh Nayak case and that the appellant could agitate the question as to its correctness before the Supreme Court. The matter was, accordingly, adjourned by us to enable the parties to find out if the amendment had, indeed, been made and, if so, to what effect. During the resumed hearing, the learned counsel for the appellant candidly admitted that the amendment had been made but had thereafter been repealed and the matter would, thus, have to be examined under Section 28 of the Contract Act, as originally placed. We have, accordingly, chosen to deal with this matter under that provision.

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13. In *Sujir Ganesh Nayak* case 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 provisions was not hit by Section 28 as the right itself had been extinguished.

14. Mr. Sharma has, however, submitted that in view of the observations in some paragraphs in *Food Corpn. Of India* case, the observations in *Sujir Ganesh Nayak* case were liable to reconsideration. We, however, find no merit in this plea for the reason that in *Sujir Ganesh Nayak* case, *Food Corpn, of India* case has been specifically considered and *Vulcan Insurance Co. case* too had been relied upon.

15. In *Sujir Ganesh Nayak* case the Court was called upon to consider Condition 19 of the policy which was in the following terms: (SCC p.370, para 5)

“5. ‘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.’ “

While constraining this provision vis-à-vis Section 28 of Contract Act and the cases cited above and several other cases, in addition, this is what the Court ultimately concluded: (*Sujir Ganesh Nayak* case, SC pp.375-77, paras 16, 19 & 21)

“16. From the case law referred to above the legal position that emerges is that an agreement which in effect seeks to curtail the period of limitation and prescribes a shorter period than that prescribed by law would be void as offending Section 28 of the Contract Act. That is because such an agreement would seek to restrict the party from enforcing his right in court after the period prescribed under the agreement expires even though the period prescribed by law for the enforcement of his right has yet not expired. But 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. This, in brief, seems to be the settled legal position. We may now apply it to the facts of this case.

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19. The clause before this Court in Food Corpn. Case extracted hereinbefore 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.

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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)

'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 Corpn. Case has been considered in Sujir Nayak case, no further argument remains in the present matter, as Clause 6(ii) and Condition 19 are, in their essence, pari material."

9. In view of the above legal position upheld by Supreme Court recently, I consider that the Clause 6(b)(ii) was binding between the parties and the respondent's claim raised after 12 months of the final amount he received under the settlement was not entertainable and could not have been considered by the Arbitrator. The award of the Arbitrator is liable to be set aside on this sole ground. I, therefore, hereby set aside the award.

August 13, 2009
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OMP 609/07

SHIV NARAYAN DHINGRA J.

Page 8 of 8