IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.3299 of 2011
Date of Decision: 18.12.2015

M/s Shooper's Point

.....Appellant

Vs

M/s United India Insurance Co. Ltd. & others

.....Respondents

CORAM: ***HON'BLE MR. JUSTICE RAJ MOHAN SINGH***

Present: Mr. G.S. Bhatia, Advocate
for the appellant.

Mr. Gopal Mittal, Advocate
for the respondents.

****

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

RAJ MOHAN SINGH, J.

[1]. Plaintiff appellant is in second appeal against the concurrent judgments and decrees passed by the Courts below, dismissing the suit for recovery filed by the plaintiff.

[2]. Plaintiff filed suit for recovery of Rs.17,75,158/- against the defendants on the ground that the plaintiff-firm is running a reputed showroom of readymade garments and shoes at 188, Model Town, Jalandhar. Plaintiff has spent heavy amount on fittings, fixtures, furniture and decorative fittings and has also

MOHMED ATIK
2016.01.12 16:55
I attest to the accuracy and
authenticity of this document

installed air conditioner in order to provide facilities to the customers.

[3]. Plaintiff took comprehensive insurance including fire from the defendants for Rs.45 lacs, i.e. Rs.15 lacs insurance for fittings, fixtures, furniture, electric fittings and air conditioner and Rs.30 lacs for stocks of all kinds of material in the showroom. The insurance was taken for a period from 27.03.2002 to 26.03.2003 midnight. Required premium was also paid vide cover note dated 25.03.2002 and the policy was issued by the defendants.

[4]. Accidently the fire broke out in the showroom of the plaintiff in the intervening night of 14.07.2002 and 15.07.2002 at about 11.30 p.m. Entire stock in the showroom was destroyed. A report was lodged in the Police Station. Defendants were also informed about the fire incident on 15.07.2002 by the plaintiff.

[5]. Defendants appointed M/s A.K. Enterprises as Surveyor for calculating the loss suffered by the plaintiff-firm due to fire. Documentations were done in respect of fittings, fixtures, furniture, decorative fittings, air conditioner etc. along with the evaluation certificate. An approximate loss of stock was assessed as Rs.31 lacs and entire furniture etc. become unsaleable and totally destroyed.

[6]. Against the claim of plaintiff for Rs.45 lacs as the sum

MOHMED ATIK
2016.01.12 16:55
I attest to the accuracy and
authenticity of this document

insured, though the loss was much more but defendants sent an advance receipt of only for Rs.34,82,000/- on 25.03.2003. Plaintiff signed the receipt under protest. Defendants withheld the payment of Rs.34,82,000/- and started pressurizing the plaintiff to receive the amount as full and final settlement without reserving any right to claim more.

[7]. Plaintiff had obtained a C.C. Loan from Oriental Bank of Commerce for running the said business. Though the actual loss was more than Rs.45 lacs, but since the insured sum was only Rs.45 lacs, therefore, the plaintiff was entitled to the balance claim of Rs.10,18,000/- from the defendants towards actual loss.

[8]. Plaintiff alleged that now a sum of Rs.17,75,158/- i.e. Rs.10,18,000/- as Principal amount and Rs.7,57,158/- as interest is due. With this background the suit came to filed.

[9]. Defendants contested the suit on all counts. Defendants alleged that fire broke out on 14.07.2002 and the payment was received by cheque dated 04.03.2003 and the suit was filed on 11.03.2006 and, therefore, suit is barred by limitation. A written consent dated 31.12.2002 was given by the plaintiff and according to the same, satisfaction stood made by making payment of Rs.34,82,000/- pursuant to disbursement voucher dated 04.03.2003.

MOHMED ATIK
2016.01.12 16:55
I attest to the accuracy and
authenticity of this document

[10]. The assessment of loss made by the company on the basis of report of Surveyor is the recognised standard and established mode by which loss could be assessed by the Insurance Company. It was so assessed in the present case. Plaintiff received the amount after full application of mind with his consent. Defendants denied the liability to pay amount as being claimed by the plaintiff.

[11]. After filing replication, following issues were framed by the trial Court:-

> *"1. Whether the plaintiff is entitled to recover Rs.17,75,158/- along with interest as prayed for? OPP*
>
> *2. Whether the suit is barred by limitation? OPD*
>
> *3. Whether the suit is bad for non-joinder of necessary parties? OPD*
>
> *4. Whether the plaintiff is estopped by his own act and conduct from filing the present suit? OPD*
>
> *5. Relief."*

[12]. Both the parties led their respective evidence on the aforesaid issues to prove their case.

[13]. Trial Court dismissed the suit vide judgment and decree dated 14.12.2009 and the plaintiff remained unsuccessful before the lower Appellate Court as the appeal was dismissed vide judgment and decree dated 16.04.2011.

MOHMED ATIK
2016.01.12 16:55
I attest to the accuracy and
authenticity of this document

[14]. The appellant has formulated following substantial questions of law in para No.8 of the grounds of appeal:-

"i). Whether the limitation for filing the suit by the plaintiff, is covered by the provisions of the Limitation Act, 1963 or by Clause 11 of the Insurance Policy.

ii) Whether clause 11 of the Insurance Policy, in respect of curtailing the period of limitation is void in view of Section 28 of the Contract Act?

iii) Whether the Courts below are justified in holding that the claim of the appellant in respect of loss to the fixtures, furniture, fittings, etc. is not made out, especially when the Fire report and the Surveyor Report, proved on record that the entire furniture, fittings, fixtures, etc. were damaged and burnt in the fire?

iv) Whether the finding of the Courts below that the suit of the plaintiff is not maintainable in view of the fact that the plaintiff did not receive the amount of Rs.34,82,000/- under protest, is sustainable, especially when it has been proved on record that the aforesaid amount was received by the appellant under protest (Exhibit P.17)?

v) Whether instead of repudiating the claim of the appellant (in respect of the balance amount), the Insurance Company was required to refer the matter to Arbitrator, in terms of Clause 11 of the Insurance Policy?

vi) Whether the judgments and decrees passed

MOHMED ATIK
2016.01.12 16:55
I attest to the accuracy and
authenticity of this document

by the Courts below are perverse?"

[15]. I have heard learned counsel for the parties and have perused the record with the assistance of the counsel for both the sides.

[16]. The report of Surveyor is on account of assessment made in respect of fittings, fixtures is not of much variance. The loss of stock i.e. garments and footwears is on the larger side. The claim of insured amount over the stock has to be appreciated in the light of evidence led by the parties and conditions of Insurance Policy Ex.D-3.

[17]. As per Insurance Policy Ex.D-3, Insurer has to claim the insured amount within 12 calendar months. The parties to the Policy agreed in the following manner:-

> *"It is also hereby expressly agreed and declared that 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 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.*"

[18]. The approval of the claim was sent by the Insurance Company to the plaintiff on 24.03.2003 Ex.P-16, intimating that the claim of Rs.34,82,000/- has been approved and advance settlement intimation voucher was sent to the plaintiff for his

MOHMED ATIK
2016.01.12 16:55
I attest to the accuracy and
authenticity of this document

signatures and counter-signed by the Banker. The intimation further revealed that till date the Insurance Company had not received the same and, therefore, a request was again sent to the plaintiff to send the said voucher duly signed by him and counter-signed by the Banker so as to enable the company to release the cheque.

[19]. Thereafter the protest letter was signed by the plaintiff on 25.03.2003 Ex.P-17. Insurance Company issued letter dated 26.03.2003 Ex.P-18, informing the plaintiff that since the plaintiff had submitted the discharge voucher to the Branch Office of the Insurance Company on 25.03.2003, under the norms, the Company do not accept any conditional discharge and the Company further reiterated that the claim of the plaintiff was approved only after obtaining his written consent and, therefore, once again request was made to the plaintiff to give the advance unconditional and clean discharge on the disbursement voucher being annexed with the letter so that Company may release the payment of claim to the plaintiff.

[20]. The consent letter Ex.D-2 dated 31.12.2002 was admitted where consent was given by the plaintiff that the plaintiff gives the consent to the assessment of loss due to fire broke on 14.07.2002 for Rs.34,90,000/-. The consent was signed by Rajiv Sood partner of the plaintiff/firm.

MOHMED ATIK
2016.01.12 16:55
I attest to the accuracy and
authenticity of this document

[21]. The present suit came to filed on 11.03.2006. The consent was given on 31.12.2002 in a sum of Rs.34,90,000/-. As per condition No.11 of the Policy the claim must have been filed upto 31.12.2003 or from the date of protest upto 25.03.2004. The filing of suit on 11.03.2006 is clearly time barred.

[22]. Learned counsel for the appellant while referring to Ex.P-16 to Ex.P-18 contends that these letters cannot be read in the context of consent letter Ex.D-2 as the letters issued by the Insurance Company asking for unconditional voucher was the result of undue influence and dominant bargain.

[23]. Learned counsel for the appellant further contends that limitation not to be counted as 12 months as per clause 11 of the agreement, but the same is of three years. Learned counsel further contends that at that juncture there was inequality in bargaining between the parties due to dominant character of the Insurance Company and if the contractual transaction is judicially tested, the real import of terms and conditions can come to fore. The inequality of bargaining power is the result of great disparity in the economic strength of both the contracting parties and such inequality was the result of circumstances in which plaintiff was placed. The principle of unconscionable bargain is applicable in the present case due to inequality in the

MOHMED ATIK
2016.01.12 16:55
I attest to the accuracy and
authenticity of this document

bargaining power of the plaintiff.

[24]. According to learned counsel for the appellant, the Court can strike down unfair and unreasonable contract or unfair or unreasonable clause in the contract entered into between the parties who are not equal in bargaining power.

[25]. The suit has been dismissed primarily on the ground of limitation. The plaintiff has not produced on record any bill or voucher etc. to show that the stock was lying with the Surveyor of the Company. The documents on record shows that the claim of the plaintiff was fully satisfied by the defendants with his consent. Clause 11 of the Insurance Policy Ex.D-3 specifically provides that it was expressly agreed between the parties that 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 a suit, then, the claim shall for all purposes be deemed to have been abandoned and shall not be recoverable.

[26]. Claim disbursement voucher is Ex.D-1 which is dated 04.03.2003. Consent letter is Ex.D-2 which is dated 31.12.2002. The filing of suit on 11.03.2006 is patently beyond limitation of three years of receiving amount of Rs.34,82,000/- as per Ex.D-1.

[27]. In order to show unconscionable bargain also, the

MOHMED ATIK
2016.01.12 16:55
I attest to the accuracy and
authenticity of this document

plaintiff has to prove that his consent was not voluntary in nature. There is no material produced on record to show that the consent of the plaintiff was on account of any coercion or undue influence.

[28]. The agreement which curtails the period of limitation would be void, but the agreements which may provide for forfeiture or waiver of right itself, if no action is commenced within the period stipulated by the agreement would not fall within Section 28 of the Contract Act (for short 'the Act'). If the claim is not pressed within 12 months from the happening of an event of loss or damage, insurer shall cease to be liable. If the claim is made, but rejected an action should be commenced as per the clause and such a clause is not hit by the Section 28 of the Act. The clause does not curtail time for enforcement of right, but it provides a clause for forfeiture or waiver of right itself, if no action is commenced within the stipulated time.

[29]. The arguments raised by the learned counsel for the appellant that the payment of Rs.34,82,000/- was made only on 25.03.2003 and, therefore, cause of action accrues to the plaintiff on that day and filing of suit on 11.03.2006 is within limitation. However, the perusal of consent letter Ex.D-2 shows that the plaintiff gave his consent on 31.12.2002 and payment of amount of Rs.34,82,000/- on 25.03.2003 is a consequential

MOHMED ATIK
2016.01.12 16:55
I attest to the accuracy and
authenticity of this document

action and limitation has to be computed from the date of consent itself.

[30]. Learned counsel for the appellant refers to ***National Insurance Co. Ltd., vs. Surjit Ganesh Nayak and Co. & Anr., 1997(2) RCR (Civil) 518*** to contend that prescribing limit by agreement contrary to the Limitation Act or any other law amounts to curtailing the right to sue when the right actually subsists under the law and such condition offends Section 28 of the Act and is, therefore, void.

[31]. According to Section 28 of the Act, 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 ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

[32]. Reading of the relevant part of the provisions prescribes that if the agreement seeks to curtail the time from that prescribed by law, then it would fall within the mischief of this provision, but if the clause does not limit the time, within which the insured shall enforce his rights, but limit the period during which the contract will remain in force, therefore, such a clause is not hit by Section 28 of the Act.

[33]. In the instant case, the facts are apparent that from the date of consent even if, period of three years for filing suit for

MOHMED ATIK
2016.01.12 16:55
I attest to the accuracy and
authenticity of this document

recovery is to be computed, the filing of suit on 11.03.2006 is beyond time. Therefore, such a proposition of law does not arise as per skeleton reading of dates and facts involved in the present case. The interpretation of law as sought by the appellant on the basis of precedents in considered opinion of this Court is not necessary to be discussed when facts are apparent on record and do not give rise to any such interpretation.

[34]. Substantial questions of law as formulated by the appellant do not arise inasmuch as that even, if interpretation of clause 11 of the Insurance Policy is to be taken for consideration, apparently the suit came to be filed only after period of three years from the date of consent. Limitation cannot be computed from the date of making payment of Rs.34,82,000/- as the said payment was pursuant to the consent recorded by the plaintiff on record. The cause of action if, any accrued to the plaintiff was from the date of consent and not thereafter. Therefore, question Nos.(i) and (ii) do not arise at all.

[35]. Question No.(iii) is a question of fact and there is no material on record to substantiate the same. Question No.(iv) is only a question of fact and that too has its own meaning in the context of Ex.P-16 to Ex.P-18, if read in conjunction with

MOHMED ATIK
2016.01.12 16:55
I attest to the accuracy and
authenticity of this document

consent letter Ex.D-2.

[36]. The discussion made under question Nos.(i) and (ii) is sufficient to meet the question No.(v) as well. The present suit is a simpliciter case of computing limitation from the date of accrual of cause of action that admittedly accrued to the plaintiff, when he gave his consent. Filing of suit beyond period of three years is barred by limitation and that has been done in the present case. Question No.(vi) does not arise at all inasmuch as that the findings recorded by the Courts below are not proved to be result of perversity or misreading of evidence in any manner.

[37]. In my considered opinion, no exception can be made in the present case on the basis of arguments raised at the Bar.

[38]. Consequently, there is no scope of interference in the present appeal and the same is accordingly dismissed.

December 18, 2015 **(RAJ MOHAN SINGH)**
Atik **JUDGE**

MOHMED ATIK
2016.01.12 16:55
I attest to the accuracy and
authenticity of this document