

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.02.2017

CORAM

THE HONOURABLE DR. JUSTICE G. JAYACHANDRAN

S.A.No. 457 of 1999

1. Malik Barsha (died) ...Appellant/Respondent/Plaintiff
2. Jarina Bee
3. Sadik Batcha
4. Farook Batcha
5. Nasim Begam
6. Minor Shabna Begam
rep by guardian/mother
second appellant.

Appellants 2 to 6 brought
on record as LRs of the
deceased sole appellant vide
order dated 21.09.2000 in
C.M.P.No.12651/2000 by KPSJ

...Appellants

Vs.

United India Insurance Co. Ltd.,
rep by Branch Manager,
Kallakurichi.

...Respondent/Appellant/Defendant

Prayer:- This Second Appeal is filed under Section 100 of Civil Procedure Code against the Judgement of the learned Principal District Judge, Villupuram in A.S.No.116 of 1998 dated 24.12.1998 reversing the judgment and decree dated 03.02.1997 made in O.S.No.102 of 1996 on the file of learned Subordinate Judge, Kallakurichi.

For Appellants : Mr.R.Muralidharan

For Respondent : No appearance

JUDGMENT

This appeal is directed against the judgment of the lower appellate Court reversing the findings of the trial Court in the suit for recovery of money, based on the insurance policy.

2. Brief fact leading to this appeal is that :- The appellant herein is the owner of the vehicle bearing registration No. TMV1699. He had insured his vehicle with the respondent company, which was in force up to 27.12.1991. While so, on 07.01.1991, the lorry met with an accident and the same has not been disputed by the respondent. The dispute arose, when the claim for a sum of Rs.44,500/- was made towards the insurance amount for the damages caused to the lorry in the accident. The request of the vehicle owner was initially rejected by the Insurance Company on the ground that he has not followed the terms of the insurance policies which restricted the vehicle owner carrying the passengers, since the vehicle i.e., lorry is only meant for carrying goods. This fact was contested by the vehicle owner stating that the vehicle is to be used for carrying goods. For loading and un-loading coolies were accompanied along with the driver and cleaner. In the course of such affairs the vehicle met with the accident and the damages were caused. This could be seen from Ex.A.7 dated 10.01.1992.

3. Further the respondent Insurance Company has written a letter to the vehicle owner on 10.10.1991 stating that the rejection of the claim made, by the Dispsence Officer, Cuddalore is in order and therefore there is no reason to take a different stand and accordingly, the claim made by the vehicle owner was returned. Since the respondent declined to entertain the claim application, the appellant has laid a suit for recovery of money for s sum of Rs.44,500/- towards cost incurred to repair his lorry and interest thereon. This suit was filed on 04.04.1994. The said suit was contested by the Insurance Company on the ground that the persons injured in the accident were not coolies, but they were traveling in the lorry to attend a conference at Kallakurichi and about 50 persons were traveled in the lorry at the time of accident which is in violation of the Insurance Policy conditions and apart from that, the claim is barred by limitation, since it was filed after three years of the accident.

4. The trial Court, after examining the witnesses and evidence has held that in the said accident, only five persons were injured and it is not believable to say that nearly 50 persons were travelled in the vehicle. Accepting the evidence of P.W.2, the trial Court held that the accident took place only during the transport of goods and the persons, who were injured, were coolies and regarding limitation, the trial Court has rejected the plea of the defendant holding that the suit for recovery of money is well within limitation. Aggrieved by that, the Insurance Company has preferred first appeal and the first

appellate Court relied upon the Clause 7 of the insurance policy marked as Ex.D.1 and observed that the later part of Clause 7 debars the claimant to file suit in a Court of law behind 12 calender months from the date of disclamation by the Insurance Company. Taking 10.10.1997 as the date of disclamation by the Insurance Company, the first appellate Court has held that the claim is barred by limitation as agreed by the parties to the insurance policy and the plaintiff is not entitled for any claim based on the insurance policy. Aggrieved by that, the lorry owner who is the plaintiff has filed this second appeal.

5. At the time of admission this Court has formulated the following substantial question of law:-

1. Whether the findings of the first appellate Court are sustainable in view of the fact that the claim by the plaintiff has been made in time in view of Exhibits under Exs.A6, A7 and A.11?
2. Whether the reasons given by the first appellate Court in reversing the judgment of the trial Court are sustainable in law?

6. The learned counsel for the appellant, by referring the judgment of the Hon'ble Supreme Court as well as the Hon'ble High Court, submitted that there cannot be contract against the statutory right and if there is any such contract, it shall be voidable in the light of Section 28 of the Indian Contract Act and also submitted that the judgment relied upon by the lower appellate Court to reject the plaintiff's claim is on the different footing. The terms of agreement referred by the Hon'ble Supreme court to hold that Section 28 of Indian Contract Act will not apply, is not identical to the term found in Clause 7 of the insurance policy, which has been relied by the lower appellate Court. Pointing out that the exclusion of Section 28 of the Indian Contract Act will apply only, if no claim is made within the period of one year and coupled with condition in Clause 19 referred in "Sujir Ganesh Nayak's case", where the condition reads that, "in no case whatever shall the company be liable for any loss of damage after the expiration of 12 calender months from the date of happening of loss or the damage, unless the claim is subject matter of pending action or arbitration". Whereas Clause 7 of Ex.D.1 imposes blanket bar on resorting to civil remedy if no suit is filed in a Court of law within a period of 12 calendar months from the date of disclaim. Therefore the learned counsel for the appellant emphasizes that term found in Clause 7 of Ex.D.1 has restricted absolutely from resorting to civil remedy which is contrary to the law of limitation and therefore such Clause is voidable and the lower appellate Court ought not have rejected the claim for this reason. This Court is fully in agreement with the submission

made by the learned counsel for the appellant.

7. To fortify the conclusion, it is sufficient to extract the following observation of the Hon'ble Supreme Court in "AIR 2009 Supreme Court 1407" wherein similar issue came up and the Apex Court after reading the Clause found in the insurance agreement in the light of Section 28 of Contract Act observed as below :-

"19. The clause before this Court in Food Corporation 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 the 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 claim 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."

8. So, the principle behind restraining the insurer to make his claim beyond certain the agreed period is to avoid fake claim. The reason for such restriction in making claim is that if belated claim made after the sufficient period, the Insurance Company will be deprived of the opportunity to verify the veracity of the claim. In this case factually the accident took place on 07.01.1991. The vehicle owner has made his claim immediately on 02.05.1991 which has been received and recorded by the respondent-company under D.O. Claim No.012400/025/91. This is referred in the subsequent letter of the vehicle owner dated 22.08.1991 marked as Ex.A.6. It is also admitted fact that the accident did occur and the vehicle was damaged in the said

accident. While so, initially the Insurance Company denied the claim on the ground that the vehicle owner has violated the insurance terms by carrying passengers in the transport vehicle, subsequently, it relied upon the Clause 7 of the insurance policies to deprive the claim of the vehicle owner.

9. The clause 19 of Agreement which the Hon'ble Supreme Court held not violative of Section 28 of Indian Contract Act reads as below:-

"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".

Whereas the clause 7 of Ex.D.1, reads as below :-

"7. 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 person as arbitrators of whom one shall be appointed in writing by each of the parties within two calendar months after having been required to do so 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 been appointed by them in writing before entering on the reference and who shall sit with the arbitrators and preside at the 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 that it shall be a condition precedent to any right of action or suit upon this Policy

that award by such arbitrators or umpire of the amount 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 twelve 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."

10. The trial Court, rightly rejected the plea of the Insurance Company however the lower appellate Court without considering the bar under Section 28 of Indian Contract Act and the difference in the terms of contract found in clause 7 of Insurance Policy Ex.D.1 and the Clause 19, (extracted above) in the agreement which the Hon'ble Supreme Court has held in favour of the Insurance Company, applied the said judgment which is factually not similar. Therefore, judgment of the the lower appellate Court is liable to be set aside and the trial Court judgment has to be restored. Since the rejection of the claim was made known to the plaintiff vide Ex.A.9 dated 10.10.1991 and the suit for money claim has been laid on 04.04.1994 which is well within a period of limitation and the reason given by the lower appellate Court for rejecting the suit, is non sustainable.

11. In the result, the lower appellate Court's judgment is set aside and judgment of the trial Court is restored. Hence, the appeal is allowed. No order as to costs.

Sd/-

Assistant Registrar

//True Copy//

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Sub Assistant Registrar

To

1. The Principal District Judge, Villupuram.
2. The Subordinate Judge, Kallakurichi.

+1cc to Mr.Muralidharan, Advocate, S.R.No.8465

GJI (CO)

RS(24/02/2017)

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