

***HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU**

+A.S.No.33 of 2006

% 22-12-2017

The New India Assurance Co. Ltd.,
Rep., by its Divisional Manager,
Tadepalligudem.

... Appellant/
Defendant

Vs.

M/s. Varsha Aqua Farm Sarvasiddi,
S.Rayavaram Mandal,
Visakhapatnam,
Rep., by its Managing Partner.

... Respondent/
Plaintiff

! Counsel for the appellant: Sri Kota Subba Rao

Counsel for the Respondent: Sri G.V.Gangadhar

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> Head Note:

? Cases referred:

¹ 2004(5) ALT 534

² 1998 (8) SCC 559

³ 2004 (3) SCC 155

⁴ 2007 (15) SCC 58

⁵ 2016 (11) SCC 313

⁶ 2000 (3) SCC 250

⁷ AIR 1998 SC 3085

⁸ 2004(5) ALT 534

⁹ AIR 1989 SC 1769= 1989 (3) SCC 476

¹⁰ (1976) 1 SCC 943

¹¹ AIR 1997 SC 2049 = 1997 (4) SCC 366

HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU**AS.No. 33 of 2006****JUDGMENT:**

This is an appeal filed by the appellant/insurance company against the judgment and decree dated 15.07.2005 passed in O.S.No.2 of 1999 by the Senior Civil Judge, Tadepalligudem.

For the sake of convenience, as this is a first appeal, the parties are referred to as plaintiff and defendant.

The facts of the case, in brief, are that the plaintiff is a registered firm, which carries on business in prawn culture in Visakhapatnam District. The plaintiff entered into a contract with the defendant/insurance company for insuring their crop of prawn in 10 tanks for a sum of Rs.20,86,000/-. During the course of their business, the prawn in all the tanks got affected by disease and the entire crop died. The loss according to the plaintiff was to a tune of Rs.15,53,249.94 ps. The claim was submitted by the plaintiff but the same was repudiated by the Insurance Company on 14.11.1996. As the claim was repudiated, the plaintiff got issued a legal notice and filed the present suit claiming the said sum with interest. The defendants denied the entire claim including interest and stated that the plaintiff did not inform them of the loss within the time stipulated and also that there was non-disclosure of material facts etc.

An additional written statement was also filed wherein it was pleaded that the disputed claim should have been made the subject matter of the suit within 12 calendar months from the date of disclaimer. As the same was not done, the claim is not maintainable and is deemed to be abandoned.

Based on the above pleadings, the Court framed the following four issues:

- (a) whether the plaintiff is entitled to the suit amount.
- (b) whether the plaintiff is not entitled to claim interest.
- (c) to what relief.
- (d) whether the claim is treated as abandoned as per the terms and conditions of the policy.

For the plaintiffs, three witnesses were examined and for the defendant one witness was examined. Exs.A.1 to A.19 were marked for the plaintiff, while Exs.B.1 to B.8 were marked for the defendant.

After a full trial, the Court granted a decree for Rs.6,62,989.34ps. along with interest at 18% p.a. from the cause of action till the date of decree and further interest at 11% p.a. till realisation. Proportionate costs were also awarded. Questioning the said judgment and decree, the present appeal is filed by the Insurance Company.

Heard Sri Kota Subba Rao, learned counsel for the appellant and Sri G.V.Gangadhar, learned counsel for the respondents.

The two essential questions that were argued during the course of hearing were (a) about the registration of the partnership firm during the pendency of the suit and the bar under Section 69 of the Indian Partnership Act, 1932 (for short 'the Act'); (b) whether the suit which is filed one day after the stipulated period is a "claim abandoned" under clause 15.

Issue (a): Section 69 of the Act is to the following effect:

69. Effect of non-registration:

(1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm:

(2) No suit to enforce a right arising from a contract shall be instituted in any court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of firms as partners in the firms.

The facts that are undisputed are that the suit was filed on 14.11.1997, whereas the registration of the firm as per Exs.A.1 and A.18 was on 15.07.1998. Admittedly, the registration of the firm was after the suit was instituted. The plaint that was filed was returned with an objection about the lack of registration on 19.11.1997. It appears that after the registration, the objection was complied with and the plaint was re-presented on 27.07.1998. The delay was also

condoned and the suit was registered. The lower Court relied upon the judgement reported in ***Samyuktha Cotton Trading Company V. Bheemineni Venkata Subbaiah and Others***¹, wherein it was held by this Hon'ble Court that such a suit is not barred under the provisions of Section 69 of the Act. The Court held that subsequent registration would cure the initial defect. The lower Court, however, did not see the judgments reported in ***Delhi Development Authority V. Kochhar Construction Work and Another***², ***Firm Ashok Traders and Another v. Gurumukh Das Saluja and Others etc.***³. The later judgments on this subject are ***Purushottam and Anr. v. Shivraj Fine Art Litho Works and Ors.***⁴ and ***Umesh Goel vs. Himachal Pradesh Cooperative Group Housing Society Ltd.***⁵, wherein the Hon'ble Supreme Court held that the registration of a firm after filing of the suit will not cure the initial defect. In ***Delhi Development Authority and Purushottam's*** cases (2 and 4 supra), the Hon'ble Supreme Court held that the defect was fatal and the plaint is "void ab initio".

M/s. Haldiram Bhujawala & Another v. M/s. Anand Kumar Deepak Kumar & Another⁶ which appears to support the present respondent is a case of a passing off action in tort and a common law action. Hence, the Supreme

¹ 2004(5) ALT 534

² 1998 (8) SCC 559

³ 2004 (3) SCC 155

⁴ 2007 (15) SCC 58

⁵ 2016 (11) SCC 313

⁶ 2000 (3) SCC 250

Court held that non-registration was not a bar. Similarly, ***Raptakos Brett & Co. Ltd v. Ganesh Property***⁷ was a case of eviction under a lease and also the general law of the land. It was held that the suit was partly barred (for enforcing the contract) and partly not barred. The question is actually left undecided in that case, as not surviving for consideration. The relevant portion is at paras 30 and 31:

30. We, prima facie, find substance in what is contended by Dr. Singhvi for the respondent. It is obvious that even if the suit is filed by an unregistered partnership firm, against a third party and is treated to be incompetent as per Section 69 Sub-section (2) of the Partnership Act, if pending the suit before a decree is obtained the plaintiff puts its house in order and gets itself registered the defect in the earlier filing which even though may result in treating the original suit as still born, would no longer survive if the suit is treated to be deemed to be instituted on the date on which registration is obtained. If such an approach is adopted, no real harm would be caused to either side. As rightly submitted by Dr. Singhvi that, Order 7 Rule 13 of the CPC would permit the filing of a fresh suit on the same cause of Action and if the earlier suit is permitted to be continued it would continue in the old number and the parties to the litigation would be able to get their claim adjudicated on merits earlier while on the other hand if such subsequent registration is not held to be of any avail, all that would happen is that a fresh suit can be filed immediately after such registration and then it will bear a new number of a subsequent year. That would further delay the adjudicatory process of the court as such a new suit would take years before it gets ready for trial and the parties will be further deprived of an opportunity to get their disputes adjudicated on merits at the earliest and the arrears of cases pending

⁷ AIR 1998 SC 3085

in the court would go on mounting. It is axiomatic to say that as a result of protracted litigation spread over tiers and tiers of court proceedings in hierarchy, the ultimate result before the highest court would leave both the parties completely frustrated and financially drained off. To borrow the analogy in an English poem with caption "death the leveller", with appropriate modifications, the situation emerging in such cases can be visualised as under : "upon final court's purple alter see how victor victim bleed". All these considerations in an appropriate case may require a re-look at the decision of the two member Bench of this Court in 1989 (3) SCC 476 : (AIR 1989 SC 1769) (supra). However, as we have noted earlier, on the facts of the present case, it is not necessary for us to express any final opinion on this question or to direct reference to a larger Bench for reconsidering the aforesaid decision. With these observations we bring down the curtains on this controversy. Point No. 2, therefore, is answered by observing that it is not necessary on the facts of the present case in the light of our decision on the first point to decide this point one way or the other. Point No. 2 is, therefore, left undecided as not surviving for consideration.

Point No. 3 :

31. As a result of the aforesaid discussion, it is held that the suit as filed by the respondent was partly barred Under Section 69 Sub-section (2) of the Partnership Act but was partly not barred and consequently the decree passed by the Trial Court as confirmed by the High Court is held to have remained well sustained and calls for no interference in the present appeal.

These two cases are thus not applicable to the facts of this case. This case is a case for enforcing a 'contract' of insurance with the defendants. Hence, the lower Court committed an error in relying upon ***Samyuktha Cotton Trading Company v. Bheemineni Venkata Subbaiah and***

Others⁸, which relied on **Raptakos Brett & Co. Ltd's** case (7 *supra*). The facts in **Raptakos Brett & Co. Ltd's** case are clearly distinguishable and the judgment is clear. It was not an action to enforce a contract. The Court did not notice that **Shreeram Finance Corporation v. Yasin Khan and Others**⁹ is directly on the point. It was clearly held that a suit is not maintainable even if the firm is registered after the suit is filed. Therefore, this Court holds that as the action in this case is to enforce a right arising from a contract; the suit filed by the unregistered firm is *void ab initio*. Subsequent registration will not cure this initial and fatal defect in this case.

Issue (b): The second point urged is about the repudiation of the claim and the filing of the suit within 12 months there from.

Sri K.Subba Rao, learned counsel for the appellant relies upon clause 15 of Ex.B.1 and states that the claim is abandoned. The clause reads as follows:

“It is also hereby 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 a suit in a court of law, then the claim, shall for all purposes be deemed to

⁸ 2004(5) ALT 534

⁹ AIR 1989 SC 1769= 1989 (3) SCC 476

have been abandoned and shall not
thereafter be recoverable hereunder.”

(emphasis supplied)

The third part of the clause states that a suit should be filed within 12 calendar months from the date of the disclaimer. Sri Subba Rao's contention is based on the literal and plain language of the clause, which states that the suit should be filed within 12 months from the date of the disclaimer. Admittedly, the date of the disclaimer is 14.11.1996-Ex.A.3. Therefore, the suit that is filed on 14.11.1997 is barred since according to Sri K.Subba Rao, the suit should be filed on or before 13.11.1997.

The learned counsel for the respondent submits that the clause should be interpreted practically. He states that unless he is aware of the repudiation, the time does not begin as also the cause of action. Therefore, his interpretation is that only after he receives the letter of repudiation, he is entitled to file the claim. The lower Court also held that unless the letter dated 14.11.1996 is received by the defendant, it cannot be said that the claim is waived.

Therefore, the Court held that the suit filed on 14.11.1997 cannot be treated as abandoned.

If the letter and spirit of clause is examined, it is clear to the effect that it should be filed within 12 calendar months from the 'date' of repudiation. This is the crux of the argument of the learned counsel. This is an agreed term of

the contract and the Court cannot vary the same. The primary rule in the interpretation of contracts is the plain language interpretation which the learned counsel for appellant relies upon. He also argues that the integrity of the contract should be upheld and therefore, submits that the suit filed on 14.11.1997 is after the abandonment of the claim.

The validity of such clauses (which are popularly called “**Scott vs. Avery**” clause as per the leading case on the subject) which prescribe the period within which the claim is to be lodged have been upheld by the Hon’ble Supreme Court in a series of judgments starting from **The Vulcan Insurance Co. Ltd. V. Maharaj Singh and Another**¹⁰, including **National Insurance Co. Ltd. V. Sujir Ganesh Nayak and Co. and another**¹¹, wherein section 28 of the Indian Contract Act, as amended, is also considered and such a claim was upheld. The relevant portion of the judgment wherein such clauses were upheld and the rationale for the existence of such clauses is explained is reproduced hereunder.

16. 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

¹⁰ (1976) 1 SCC 943

¹¹ AIR 1997 SC 2049 = 1997 (4) SCC 366

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.

19. 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.

(emphasis supplied)

This Court finds **considerable** strength in the submission of the learned counsel on this issue. Even if the plaintiff received the letter dated 14.11.1996, a few days later he still had ample time to file the suit. By filing the suit on 14.11.1997 the plaintiff has run foul of this clause. The clause is clear and admits of one interpretation only.

Therefore, this Court holds that the suit filed has to be dismissed on the ground (a) that the firm is not registered as on the date of filing of the suit and the bar of Section 69 of the Act squarely applies as they are seeking to enforce a contract. (b) the claim is deemed to have been abandoned in

view of clause of which says that the suit should be filed within 12 months.

For both these reasons, the appeal is allowed. In view of the fact that only these issues are urged, nothing further survives for consideration. No order as to costs.

Consequently, miscellaneous petitions, if any, pending in this appeal shall stand closed.

D.V.S.S. SOMAYAJULU, J

Date: 22.12.2017

KLP

Note: L.R.Copy be marked.

