

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 23.07.2018	Delivered on 26.07.2018
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CORAM

The Honourable Mr.Justice M.M.SUNDRESH
and
The Honourable Mr.Justice N.ANAND VENKATESH

Original Side Appeal No.120 of 2018

M/s.Tarapore & Co.
"Dhun Building"
No.827, Annal Salai,
Chennai 600 002
Represented by its Partner,
Mr.N.Radhakrishnan Appellant

Vs.

M/s. United India Insurance Co. Ltd.
P.B. No.202,
No.166, Thambu Chetty Street,
Chennai 600 001.Respondent

Prayer : Original Side Appeal is filed under Order XVI Rule 1 of the Code of Civil Procedure, 1908 read with Order 36 Rule 1 of the O.S. Rules read with Clause 15 of the Letters Patent to set aside the Judgment and Decree dated 20.10.2017 in CS. No.763 of 2004.

For Appellant : Mr.Murari Senior Counsel for
Mr.K.K.Murralitharan

For Respondent : Mr.Nageswaran

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J U D G M E N T

(Judgment of the Court was delivered by N.ANAND VENKATESH., J.)

This Original Side Appeal has been filed by the plaintiff aggrieved by the judgment and decree made in C.S. No.763 of 2004, dated 20.10.2016, wherein, the learned single Judge dismissed the suit filed by the appellant for recovery of Insurance Claims made against the defendant.

2.FACTS IN NUTSHELL:

2.1. The appellant company is engaged in the business of execution of large scale Civil and Engineering construction work. The appellant was awarded a contract for construction of Ash ponds for Fly Ash disposal for the Farakka Super Thermal Power Plant at Farakka in June 1987. For the purpose of execution of work, the appellant had to establish a camp at the work site for their men and machinery. In respect of all the said work site, the appellant took a fire policy with the respondent for the period 31.05.1989 to 30.05.1990 covering inter alia, the risks of fire, lightning, explosion, riot, strike and malicious damages. The Insurance was taken to cover a liability of Rs.10,00,000/- and the appellant paid a sum of Rs.3,460/- towards premium to the respondent.

2.2. On 26.03.1990, a mob consisting of 150 to 200 miscreants entered the construction site and demolished the camps and sheds and looted several materials belonging to the appellant. The appellant duly informed the respondent by letter dated 21.01.1991 (Ex.P3) about the said incident and requested the respondent to send their surveyor to the site for assessing the loss. This was also intimated to the respondent's Regional Office by letter dated 24.01.1991 (Ex.P4). The respondent appointed a surveyor to survey the loss and submit his report. In this connection meetings were held between the appellant, respondent and the surveyor. Further, as per the request made by the surveyor, the appellant also submitted a letter dated 23.04.1992, (Ex.P7) along with the claim papers and supporting documents and claimed a sum of Rs.11,50,890.23 being the loss sustained by virtue of the above said incident.

2.3. The appellant did not hear anything from the respondent or from the surveyor and therefore started communicating with the respondent by way of letters and requested the respondent to process the claim papers without any delay. This communication went on for some time. The survey report was also submitted by the surveyor to the respondent and the respondent failed and neglected to settle the appellant's claim. The claim was kept pending for more than 8 years and left with no other option, the appellant issued a legal notice dated 14.08.2002 (Ex.P10) to the respondent, calling upon the respondent to pay the claim amount with interest. The respondent neither replied to the notice nor settled the claim amount. Even the reminder notices did not evoke any response from the respondent. The respondent also did not formally repudiate the claim of the appellant.

2.4. The appellant left with no other option filed the above suit against the respondent for recovery of the claim

amount with interest.

3. The learned single Judge on the basis of the pleadings framed the following issues.

"i. Whether the suit is barred by limitation?

ii. Whether there was abandonment of the claim by the plaintiff as per condition No.10(3) of the policy?

iii. Whether the suit is not maintainable for want of compliance with the requirement found under Section 69 (2) of the Partnership Act?

iv. Whether the reported loss occurred on account of a peril is covered by the policy or whether the reported loss is excluded under Clause 1 (ii) of the policy?

v. Whether there was want of compliance under 64 VB of the Insurance Act and the same has made the policy unenforceable?

vi. Whether the plaintiff is entitled to claim Rs.35,22,478/- with interest and cost?

vii. To what other reliefs the parties are entitled?"

4. The parties were relegated to trial and the appellant as plaintiff examined PW1 and marked Ex.P1 to P16 as documents. The respondent examined the Deputy Manager of the Regional Office as DW1 and marked Ex.D1.

5. The learned single judge on consideration of the materials placed before the Court and after appreciating the oral and documentary evidence, held in favour of the appellant on all the issues except on the issue of limitation and gave a finding that the suit is barred under Article 42(b) of the Limitation Act, 1963. Aggrieved by the same, the present appeal has been filed.

6. The learned senior counsel Mr. Murari, appearing on behalf of the appellant made the following submissions:

6.1. The appellant had taken two policies, one being the Fire policy, covered under by this appeal and another policy towards Burglary and house breaking. For the incident that took place on 26.03.1990, claim was made by the appellant under both the policies independently. The respondent appointed a surveyor for giving a report under both the policies. Insofar as the Burglary policy is concerned, based on the surveyor's report, the respondent repudiated the claim by their letter dated 05.11.2002. Aggrieved by the same, the appellant filed C.S. No.762 of 2004 before this Court praying for the recovery of the

claim amount along with interest and this court by judgment and decree dated 20.10.2017, decreed the suit as prayed for. As on today, this judgment and decree has not been challenged and it has become final.

6.2. The learned senior counsel submitted that the appellant was expecting the respondent to respond insofar as the Fire policy is concerned. The reason being that the incident was common, the surveyor appointed was common under both the policies and the surveyor also submitted the survey report separately for both the policies to the respondent. The respondent also issued a repudiation letter insofar as the Burglary policy is concerned and therefore it is natural that the appellant was expecting the respondent to either accept the claim made by them or repudiate like it was done in the Burglary policy.

6.3. The learned senior counsel submitted that the learned single Judge has found all the issues in favour of the appellant and declined the relief only on the ground of limitation. The learned senior counsel submitted that Article 44 (b) of the Limitation Act, cannot be put against the appellant since the respondent who was expected to either accept the claim or repudiate the claim, was remaining silent for reasons best known to them. Therefore, the respondent cannot take advantage of their silence and put it against the appellant on the ground of limitation. This is more so, when the respondent had chosen to send a letter repudiating the claim insofar as the Burglary policy is concerned.

7. The learned counsel Mr. Nageswaran, appearing on behalf of the respondent made the following submissions:

7.1. The learned single Judge was right in denying the relief to the appellant since in the absence of a repudiation of claim by the respondent, the appellant should have approached the Court within three years from the date of occurrence and in this case, the appellant has admittedly approached the Court after nearly 14 years.

7.2. The appellant has not proved that they are a registered partnership firm and therefore the suit itself is

barred under Section 69(2) of the Indian Partnership Act, 1932. In order to substantiate the said submission, the counsel relied upon the following judgments: i) Gandhi and Co. V. Krishna Glass Pvt. Ltd. reported in AIR 1987 Bombay 348, ii) Ahtashmuddin Vs. Vocational Education Society and another reported in (2004) 13 Supreme Court Cases 753 and iii) Delhi Development Authority Vs. Kochhar Construction Work and another reported in (1993) 8 Supreme Court Cases 559.

7.3. The evidence of the witness examined on the side of the appellant and Ex.D1 which is the First Information Report registered on the basis of the complaint made by the appellant, it is clear that the employees of the appellant firm had taken away the material for non payment of wages/salary and there was no violation or forcible entry and therefore the very claim is beyond the scope of the policy terms and conditions. Any claim which does not fall within the terms and conditions need not be paid by the respondent. In order to substantiate this submission, the learned counsel relied upon the following judgments: i) Suraj Mal Ram Niwas Oil Mills Private Limited Vs. United India Insurance Company Limited and another reported in (2010) 10 Supreme Court Cases 567 ii) Chaudhary Ship Breakers Vs. Commissioner of Customs, Ahmedabad reported in (2010) 10 Supreme Court Cases 576.

7.4. The learned counsel further contended that the sum insured by the appellant was only Rs.10,00,000/- and whereas, the claim made by the appellant in the suit is Rs.11,50,890.23 and no claim can be made more than the sum insured and on this ground alone, the claim made by the appellant is liable to be rejected.

7.5. The learned counsel further submitted that under the policy, the Insurance Company must be informed about the loss or damages within 15 days from the date of incident and whereas in this case, the incident was informed only after 10 months and therefore, the appellant is not entitled to raise any claim. The learned counsel for the respondent further contended that the appellant has not proved the damages incurred by it and therefore, not entitled for any amount under the policy.

8. The points for consideration in this appeal are:

i) Whether the claim made by the appellant is barred under the Limitation Act?

ii) Whether the appellant is not entitled to maintain the suit by virtue of the bar under Section 69(2) of the Indian Partnership Act, 1932?

iii) Whether the appellant has violated the terms and conditions of the policy which will disentitle them from making the claim against the respondent Insurance Company?

9. In this case, admittedly there was a violent incident which occurred on 26.03.1990, as a result of which the appellant suffered losses. It is also an admitted fact that the appellant made independent claims under a Burglary policy and a Fire policy. This is apparent from the letter written by the appellant to the respondent on 22.01.1991 and 24.01.1991 (Ex.P3 and Ex.P4). The minutes of the meeting held between the appellant and the respondent dated 10.02.1991 and 12.02.1991 (Ex.P5) also establishes this fact.

10. It is further an admitted fact that a surveyor was appointed to inspect and file a report under both the policies and the same is apparent from the letter written by the surveyor on 11.09.1992 (Ex.P8).

11. For reasons best known to the respondent company, based on the surveyor's report, the respondent company repudiated the claim only insofar as the Burglary policy is concerned and remained silent insofar as the Fire policy. The appellant firm was regularly following up with the respondent by sending various notices (Ex.P10, P11 and P12), requesting the respondent to pay the claim amount.

12. In this case, the respondent has entertained the claim under both the policies and appointed a common surveyor. Having entertained the claim, the respondent cannot be permitted to turn around and take a technical plea that the incident was not

reported within 15 days as required under the policy. This plea was not even taken in the written statement and for the first time this plea is attempted to be argued in this appeal. This argument has to be outright rejected since the claim was already entertained by the respondent and no such plea was taken in the written statement and was made an issue in the suit.

13. The next argument of the learned counsel for the respondent that the incident is not covered under the policy, also deserves to be rejected, since the respondent has not even chosen to file the surveyor's report under this policy. Adverse inference is drawn against the respondent for non disclosure of the surveyor's report about the incident. The claim form, along with the covering letter (Ex.P7) clearly explains the nature of loss/damages and the people involved in the incident and also the loss incurred under various heads, this prima facie brings the claim within the policy and the respondent has not let in any contra evidence to discredit the claim made by the appellant. The learned single Judge has specifically dealt with this issue and has given a finding in favour of the appellant and we are in agreement with the said finding of the learned single Judge.

14. There is no quarrel with regard to the settled law that the terms and conditions of the policy must be complied with for the purpose of making a claim. The judgments cited by the learned counsel for the respondent in this regard, does not apply to the facts of this case.

15. Insofar as the damages suffered by the appellant, the evidence of PW1 and the claim made under Ex.P7 clearly shows the damage suffered by the appellant and the respondent has not let in any evidence to discredit the same. The respondent has not even bothered to file the surveyor's report in this regard. However, it must be borne in mind that the sum insured was only Rs.10,00,000/- and the appellant cannot make any claim beyond the sum insured. The learned counsel for the respondent is right in submitting that no claim can be made beyond the sum insured. That does not automatically make the entire claim made by the appellant unsustainable since the claim can always be limited to the sum insured. Therefore, ultimately if this Court finds that the appellant is entitled for the claim under the policy, this Court can limit it to the sum insured and decree the suit accordingly.

16. Insofar as the submissions made by the learned counsel for the respondent regarding the bar under Section 69(2) of the Partnership Act, 1932, is concerned, the learned single Judge has dealt with the said issue independently and has held as follows:

"It is contended on the side of the defendant that the suit is not maintainable for want of compliance with the requirement found under Section 69 (2) of the Partnership Act, 1932. The specific argument of the defendant is that there is no document to show that the plaintiff is a partnership firm and the person who has signed and verified the plaint is a partner in the plaintiff firm. The learned Senior counsel appearing for the plaintiff per contra contends that the defendant having issued the policy and had correspondences with the plaintiff is estopped from disputing the existence of the firm. The Insurance policy, Ex.P.2 has been issued in the name of the plaintiff firm. Several correspondences addressed by the plaintiff to the defendant and to the Surveyor with a copy to the defendant, namely, Ex.P.7, Ex.P.8, Ex.P.10, Ex.P.11 and Ex.P.13 are found signed by Mr.Radhakrishnan as a partner for the plaintiff firm. It is also pertinent to note that the defendant has nowhere brought this issue during cross-examination of the plaintiff. Thus the defendant only after verification issued the policy in the name of the firm. For several correspondences made by Radhakrishnan as a partner of the plaintiff firm, the constitutionality and the status of Radhakrishnan as a partner has never been disputed by the defendant in their correspondence and legal notice. Therefore, the above belated contention of the defendant is not sustainable and this issue is answered in favour of the plaintiff."

17. We are in complete agreement with the findings of the

learned single Judge. It is not the case of the respondent company that they issued a policy to an unregistered firm. The respondent must have satisfied themselves that the appellant is a registered firm and only thereafter issued an insurance policy. It is unfortunate that, on the one hand the respondent company accepts premium on the policy from the appellant and on the other hand denies the claim on the ground that the appellant is not a registered firm. This stand taken by the respondent company is liable to be rejected. The judgments cited by the learned counsel for the respondent in this regard, will not have any application to the facts of this case.

18. The only other issue that remains to be answered is the crucial issue of limitation. In this case admittedly, the appellant had two separate policies with the respondent company. Both the policies were invoked for a common incident. A common surveyor was also appointed covering both the policies. The surveyor on completion of his survey, has submitted the report independently under both the policies. The respondent company after receipt of the surveyor's report repudiated the claim under the Burglary policy. This became a subject matter of challenge in C.S. No.762 of 2004 and this Court by judgment and decree dated 20.10.2017 decreed the suit in favour of the appellant.

19. For reasons best known to the respondent, in the Fire policy, the claim was neither accepted nor repudiated and the respondent chose to remain silent.

20. It will be useful to extract Article 44 (b) of the Limitation Act hereunder:

Description of Suit	Period of Limitation	Time from which period begins to run
44 (b) On a policy of insurance when the sum insured is payable after proof of the loss has been given to or received by the insurers	Three years	The date of the occurrence causing the loss, or where the claim on the policy is denied, either partly or wholly, the date of such denial

21. A plain reading of the Article 44 (b) extracted herein above, contemplate two different situations. The first situation is a case where the limitation of three years runs from the date of the occurrence causing the loss. The second situation is a case where the limitation starts running from the denial of the claim either wholly or in part.

22. The purpose and effect of the law of limitation are:

i) A plaintiff with a valid cause of action should pursue it with reasonable diligence.

ii) By the time a stale claim is litigated, a defendant might have lost evidence necessary to disprove the claim.

iii) Litigation of a long-dormant claim may result in more hardship than justice.

The purpose of the statute of limitation is not to destroy the rights but it is founded on public policy fixing a life span for the legal remedy for the general welfare.

23. In the present case admittedly, a common claim was made for a single incident independantly under both the policies. A common surveyor was appointed by the respondent company and he submitted independant reports under both the policies. The respondent chose to repudiate the claim under one policy and remain silent under the other policy. The appellant filed two independant suits in C.S. No.762 of 2004, regarding the claim on the Burglary policy and C.S. No.763 of 2004 regarding the Fire policy, on the same day. The respondent raised the plea of limitation in both the suits. Insofar as the suit in C.S. No.762 of 2004 is concerned, the plea of limitation was rejected on the ground that the suit was filed within three years from the date of repudiation. However, in the present case, the learned single Judge chose to dismiss the suit on the ground that since there is no repudiation by the respondent, the limitation must be calculated from the date of occurrence and therefore, the suit filed beyond three years from the date of occurrence is barred by limitation.

24. We are not in agreement with the finding of the learned single Judge in this regard. Limitation is always a mixed question of fact and law. On a common incident, the appellant

was found to be within limitation under one policy and was non suited with regard to the other policy, as beyond limitation. This goes against the very purpose of the law of limitation. Infact, the respondent company cannot get into an advantageous position for their inaction and stoic silence maintained by them. It is very unfortunate that the respondent Insurance company of such a high repute chose to take advantage of its own inaction and then turn it against the appellant on the ground of limitation. The respondent kept the appellant guessing till the end and made the appellant believe that the claim is under process in both the policies and chose to repudiate the claim under one policy and remain silent under the other policy. This Court will not permit any party to take advantage of his own wrong and defeat the genuine claim made by the other party. The object and purpose of law of limitation is not to defeat lawful claims. It only ensures that the claimant is vigilant enough to pursue his remedy. It reminds us the maxim "Vigilantibus Et Non Dormientibus Jura Subveniunt" which means that the law assists those that are vigilant with their rights, and not those that sleep there upon. In this case, the appellant company was vigilant enough to follow up the claim with the respondent and the present suit in our considered view is not barred by limitation.

25. The findings of the learned single Judge on the issue of limitation is hereby set aside and we hold that the suit has been filed within limitation.

26. Thus, we find all the issues in favour of the appellant and answer the points for consideration accordingly.

27. The appellant is entitled to claim only the sum insured which is Rs.10,00,000/- and the appellant is not entitled to Rs.11,50,890.23 claimed by them in the suit.

28. The Original Side Appeal is allowed on the following terms:

(a) The Judgment and decree of the learned single judge made in C.S. No.763 of 2004, dated 20.10.2017, is hereby set aside, insofar as the findings given under issues 1 and 2 touching upon Limitation.

(b) The respondent is directed to pay to the appellant a sum of Rs.10,00,000/- along with interest at the rate of 7.5% from 05.03.1993 till the date of the filing of the suit and thereafter at the rate of 6% till the date of realization.

(c) The parties shall bear their own costs.

Sd/-
Assistant Registrar (CS-IX)

//True Copy//

Sub Assistant Registrar

rkp

Copy to:

The Sub. Asst. Registrar
Original Side,
High Court,
Madras.

+1cc to Mr.NAGESWARAN, Advocate, S.R.No. 50276
+1cc to Mr.K.K.MURRALITHARAN, Advocate, S.R.No. 50273

Judgment in
Original Side Appeal No.120 of 2018

NRI (CO)
TR(06/08/2018)

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