

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date of Reservation	13.11.2019
Date of judgement	18.12.2019

CORAM

THE HONOURABLE MR.JUSTICE R.SUBBIAH
and
THE HONOURABLE MRS. JUSTICE T.KRISHNAVALLI

OSA No.287 of 2018
and
CMP No.13424 of 2018

M/s.United India Insurance Co. Ltd.,
P.B.No.202, NO.166,
Thambu Chetty Street,
Chennai-600 001. : Appellant/Defendant

Vs.

M/s.Tarapore & Co.,
Dhun Building,
No.827, Anna Salai,
Chennai-600 002.
represented by Partner
Mr.N.Radhakrishnan : Respondent/Plaintiff

Prayer: Original Side Appeal filed under Order XXXVI Rule 1 of
Original Side Rules r/w Clause 15 of the Letters Patent
against the judgement and decree, dated 20.10.2017 passed in
C.S.No.762 of 2004 on the file of the Original Side of this
Court.

For Appellant : Mr.Nageswaran

For Respondent : Ms.Preeti Mohan
for Mr.K.K.Muralitharan

J U D G M E N T

T. KRISHNAVALLI, J

This Appeal is directed against the judgement and
decree, dated 20.10.2017 passed in C.S.No.762 of 2004 on the
file of the Original Side of this Court.

2.The case of the plaintiff is that they are doing
engineering contractors engaged n the business of execution of
large scale civil and engineering construction work and during

the course of their business, they had undertaken construction of Ash ponds for fly ash disposal for Farakka Super Thermal Power Plan, M/s.National Thermal Power Corporation at Farakka and the plaintiff to protect their machinery, equipment and materials at the worksit, took a Burglary and House Breaking policy with the defendant for a period from 31.05.1989 to 30.05.1990 and the policy was for coverage of the machinery at the work spot and the insured value was Rs.10,00,000/- and a sum of Rs.5,000/- was paid as premium and on 26.03.1990 a mob consisting of 150-200 miscreants entered the construction site of the plaintiff with lethal weapons, damaged and demolished camps, sheds and looted several materials belonging to the plaintiff and they informed the defendant by their letter, dated 22.01.1991 regarding the damage to the machinery, camps and sheds as well as theft of items in the vehicles and machinery and the claim was made for a sum of Rs.9,098,144/- and a surveyor was appointed and meetings were held between the plaintiff, defendant and the surveyor in February, 1991 and the Surveyor visited the camp site and the plaintiff sent a legal notice, dated 14.08.2002 setting out the factual position and calling upon the defendant to pay a sum of Rs.9,08,144/- with interest and the defendant sent a letter dated 05.11.2002 repudiating the claim on the ground that premium was not paid within time and further stated that the policy does not cover liability in respect of act of riot, strike, commotion caused by the employees or persons employed in the business of the insured and as the incidents complained were caused by the plaintiff's employees, the defendant was not liable to pay the suit claim. Hence, the suit for recovery of Rs.9.08.144/- with interest.

3.The defendant filed a written statement contending that the suit is barred by law of limitation, having been filed beyond the period prescribed under Article 44(b) of the Limitation Act, 1963 and as per the policy condition No.10(3), the rights of the plaintiff to claim has been abandoned and the incident took place as early as 1990 and the claim form had been submitted in 1992 and no action is taken by the plaintiff nearly two years and no suit was filed by the plaintiff within three years from the date of cause of action and the date of disclaimer is 05.11.2002 and the plaint has been verified only during August 2004 and as such no suit was filed within 12 calender months from the date of disclaimers, as per the Policy condition No.10(3) and by virtue of the enhancement in the pecuniary jurisdiction of this court, the suit is also liable to be transferred to the file of the City Civil Court, Chennai and in the report dated 01.12.1999 filed by the Licensed Surveyors appointed by the defendant, it is clearly stated that the materials alleged to have been stolen were brought from other sides and that the purchase vouchers were not available and even as per First Information Report, the alleged mob which caused the rampage, destruction of property and loss to the plaintiff were employees of the plaintiff and this will clearly attract policy exclusion

class No.1(ii) of the policy and there is also violation of Section 64 VB of the Insurance Act and therefore, the defendant is not liable to pay any amount and prayed for dismissal of the suit.

4.This court after hearing on either side, decreed the suit filed by the plaintiff, directing the defendant to pay a sum of Rs.16,86,306/- together with interest on the principal amount of Rs.9,098,144/- at 18% pm, from the date of plaint till the date of realisation. Aggrieved by the said judgement, the defendant as appellant is before this court.

5.Heard both sides and perused the materials available on record.

6.The points for consideration to be decided in this appeal are as follows:-

"1.Whether the respondent has violated the terms and conditions of the policy which will dis-entitle them from making the claim against the appellant Insurance Company?

2.Whether the respondent/plaintiff is not entitle to maintain the suit by virtue of the bar under section 69(2) of the Indian Partnership Act 1932?

3.Whether the claim made by the respondent/plaintiff is barred under the Limitation Act?

4.Whether the Judgment passed by the single Judge is correct?

5.Whether the O.S.A. is bound to be altered?;

6.To what relief?

Point No.1

7.It is admitted fact that there was a violent incident, which occurred on 26.03.1990 and as a result of which, the respondent/plaintiff suffered losses and the respondent/plaintiff make independent claims under a Burglary policy and a fire policy. To prove it, Exs.P3 and P4 letters written by the respondent/Plaintiff to the appellant/defendant and Ex.P5 Minutes of the meeting held between the appellant and respondent on 10.02.1991 and 12.02.1991 were produced on the side of the respondent/plaintiff.

8.In this case, the Appellant Insurance Company appointed a Surveyor to inspect the premises and file a report under both the policies and on the basis of the surveyor's report, the Insurance Company repudiated the claim of the plaintiff and respondent/plaintiff sent notices Exs.P10 to P12 requesting the appellant/defendant to pay the claim amount.

9.It is admitted on the side of the appellant Insurance Company that the Insurance Company appointed a

surveyor and the surveyor filed his report. But the surveyor's report was not filed. No explanation was given on the side of the appellant/defendant as to why the surveyor's report was not filed by appellant/defendant. It is admitted on the side of the defendants that only on the basis of the surveyor's report, the Insurance company repudiated the claim of respondent/plaintiff. Hence, adverse inference can be drawn as against the appellant/defendant.

10.The learned counsel for the appellant/defendant argued that as per the policy condition, the incident was not reported to the Insurance Company within 15 days and hence, the respondent/plaintiff is not entitled to claim any amount. But the appellant/defendant has not raised the plea in their written statement. It is settled law that no plea, no evidence. Hence, at this stage, the appellant/defendant cannot raise the above contention. Further, the Insurance Company entertained the claim under both the policies on the basis of the surveyor's report. Hence, the Insurance company is estopped to raise the plea at this stage.

11.Further, the learned counsel for the appellant/defendant submitted that the incident is not covered under the policy and hence, they are not liable to pay any amount to the plaintiff. The respondent/plaintiff through Ex.P7 stated that the nature of loss and damages and the persons involved in the incident and also the loss incurred under various heads. On careful perusal of Ex.P7, it reveals that the claim came within the policy. When the appellant/defendant filed the surveyor's report, it will definitely show the nature of loss and damages. But the Appellant/Defendant failed to file the surveyor's report. Hence, it is held that adverse interference can be drawn. Further, no contra evidence let in on the side of the Appellant/Defendant to show that the incident is not covered under the policy. There is no contra evidence let in on the side of the Appellant/Defendant to show that there was violation of policy condition by the Respondent/Plaintiff.

12.In so far as the damages suffered by the Respondent/Plaintiff is concerned, the evidence of PW1 and Ex.P7 claim form clearly show that the damages suffered by the Respondent/Plaintiff. As per the policy, the sum insured was only Rs.10,00,000/- and Respondent/Plaintiff cannot make any claim beyond the sum insured and hence, it is held that the Respondent/plaintiff is entitled for the claim under the policy. Hence the argument put forth on the side of the Appellant/Defendant that the accident was not reported to the Insurance company within 15 days as required under the policy and the claim is not covered under the policy and hence Respondent/Plaintiff is not entitled to the claim amount is not at all acceptable.

13. Accordingly, the point No.1 is answered in favour of the respondent/plaintiff.

Point No:2:

14. The learned counsel for the appellant/defendant that the suit is not maintainable for want of compliance under section 69(2) of the Indian Partnership Act, since, there is no document to show that the respondent/plaintiff is a partnership firm and the person, who has signed and verified is a partner in the partnership firm. But on the other hand, it is submitted on the side of the respondent/plaintiff that the Appellant/Insurance company having issued the policy and had correspondence with the plaintiff is estopped from disputing the existence of the firm.

15. In this case, the plaintiff produced Ex.P2 policy issued in the name of the plaintiff firm. Further, the plaintiff produced Ex.P7, P8, P10 to P11 and P13 to prove that Radhakrishnan signed as partner for the plaintiff's firm. Thus, after verification, the Insurance company issued the policy in the name of the firm. For several correspondences made by Radhakrishnan as a partner of the plaintiff firm and status of Radhakrishnan was not disputed by the Insurance company in their correspondences and legal notice. Hence, at this stage the Appellant/Defendant is estopped from denying that there is no document to show that the plaintiff is a partnership firm. It is not the case of the Insurance Company that they issued a policy to an unregistered firm. The Insurance company must have satisfied themselves that the respondent/plaintiff is a registered firm and only thereafter issued an insurance policy. It is unfortunate that, on the one hand the Insurance company accepts premium on the policy from the respondent/defendant and on the other hand denies the claim on the ground that the respondent/plaintiff is not a registered firm. This stand taken by the Insurance company is liable to be rejected. The judgement cited by the learned counsel for the Insurance company, in this regard, will not have any application to the facts of this case.

16. Accordingly, the point No.2 is answered in favour of the respondent/plaintiff

Point No:3

17. The learned counsel for the appellant/defendant argued that as per clause 10(3) of the policy, the suit was not filed within 12 months from the date of repudiation of the claim and hence, the suit is barred by limitation. But on the other hand, the learned counsel for the respondent/plaintiff submitted that the clause 10(3) of policy is in complete contravention with section 28 of the Contract Act and hence the suit is well within time as per the Limitation Act and as per Article 44 of Limitation Act, the plaintiff is entitled to

file the suit within 3 years from the date of repudiation and hence, the suit is not barred by the limitation.

18.The appellant has sought to contend that the clause would not be hit by Section 28, in view of the fact that prior to an amendment to the provision introduced in 1997, the only restriction contained was in relation to clauses that restricted a party's remedy, or the time within which he may enforce his rights.

19.The respondent's contention is that the attempt of the appellant to urge that Clause 10(3) is valid, as the amendment to Section 28 dealing with extinguishment of rights and discharge of liability was introduced only in 1997, after the contract is made is without any basis, as the condition imposed by Section 10(3) effectively seeks to "limit the time within which a party may enforce his rights", which even according to the provision contained in Section 28 of the Contract Act 1872, even prior to the amendment, was void. The Appellant is seeking to overcome this position by relying on the word 'abandonment' contained in Clause 10(3), to effectively contend that what the clause does is not to extinguish the claim, and not limit the time. This contention is however based on a selective and misleading interpretation of the words contained in Clause 10(3). While Clause 10(3) does contain the word "abandoned" and states that the claim shall be deemed to be not recoverable, it is pertinent to refer the earlier portion of Clause 10(3), which contains the words "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". This would clearly indicate that while the clause uses the word 'abandoned' what is sought to refer to is the time within which a Suit must be filed in Court. This is nothing but a stipulation that seeks to fix a shorter time period than that provided under the Limitation Act, 1963, and is consequently invalid and void.

20.As can be seen from the wording of this clause, while it makes a reference to 'abandonment', it also clearly stipulates that a Suit must be filed on the claim in a Court of law, within a period of 12 months from the disclaimer. Therefore, and effectively, this clause seeks to fix a time frame for the filing of a Suit, shorter than that envisaged under the Limitation Act, 1963, which Article 44(b) provides for a period of 3 years from the date of occurrence of the loss, or when the claim on the policy is denied either wholly or partly, the date of such denial. Such a clause would consequently be in violation of section 28 of the Indian Contract Act, 1872, which clearly provided that such a stipulation would be void. It was held in AIR 1997 SC 2049 (National Insurance Company Ltd vs. Sujir Ganesh Nayak and Company) that the curtailment of period of limitation is not permissible. Also this is a decision wherein the repudiation made was immediately, prior to the date of the amendment,

unlike the present case the repudiation was 10 years after the occurrence of the incident, and the cause of action for the Suit arose after the date of the amendment. There was no occasion for the Court to consider the impact of the amendment, in a case the repudiation occurred after the amendment.

21. In 2017-LW 898 (Union of India and another Vs. M/s. Indusind Bank Ltd., and another), the Hon'ble Supreme court has in fact categorically drawn out the difference between a right and a remedy, and has held that assertion of right is one thing than enforcing it in a court of law, thereby confirming that the remedy available to a party is sacrosanct and it cannot be taken away by an agreement.

22. Thus it is clear that after amendment of Section 28 of the Contract Act both curtailment of the period of limitation for specific period and extinction of the right itself are not permissible and if there is any clause to that effect in an agreement it would be barred by the provisions of the amended Section 28. In view of the above discussion, Clause 10(3) of the insurance policy in this case is hit by the provisions of the amended Section 28 of the Contract Act.

23. At this juncture it is hereby, to refer Article 44 of Limitation Act:

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 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.

24. When in respect of a provisions, Rules and Acts are available, only the Act prevails over the Rules. In this case, as per clause 10(3) of the policy, the suit will be filed within 12 months from the date of repudiation. But as per Article 44 of Limitation Act, the suit will have to be filed within 3 years from the date of repudiation.

25. In this case, as per Ex.P8 the Insurance company repudiated the claim of the plaintiff on 05.11.2002 and the respondent/plaintiff filed the suit in August 2004. Hence as per Article 44(b) of the Limitation Act, the Respondent/Plaintiff filed the suit within 3 years from the date of repudiation. Therefore, the plaintiff filed the suit within time. Therefore, it is held that the suit is not barred by limitation. Accordingly, Point No.3 is answered against the

26.In the result, the OSA fails and the same is dismissed, confirming the impugned judgment passed by the learned single Judge of this court in C.S.No.762 of 2004, dated 20.10.2017. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CCC)

//True copy//

Sub Assistant Registrar

smn/er/cs

To

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

+1cc to Mr.Nageswaran, Advocate SR.No.105175

+1cc to Mr.K.K.Muralitharan, Advocate SR.No.105699

OSA No.287 of 2018
and
CMP No.13424 of 2018

CNR(CO)
GMY(07/02/2020)

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