IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 29.10.2021	Pronounced on: 02.11.2021

Coram:

THE HONOURABLE DR. JUSTICE G. JAYACHANDRAN

A.No.2512 of 2021
& C.S.No.604 of 2015

M/s.Bharti AXA General Insurance Co.Ltd.,
II Floor, Metro Plaza,
No.162, Anna Salai,
Chennai -600 002. ... Applicant

/versus/

1. M/s.Shriram EPC Ltd.,
   1st Floor, Northern Wingh,
   Rajah Annamalai Building,
   No.18/3, Rukmani Lakshmipathi Salai,
   Egmore, Chennai – 600 008.

2. M/s.Waterbury Farrel,
   No.200, 1st Gulf Boulevard,
   Brampton, Ontario,
   L6W4T5, Canada.

3. Steel Authority of India Ltd.,
   Salem Steel Plant,
   Salem – 636 013. ... Respondents

Prayer:- This Application is filed under Order XIV Rule 8 Original Side Rules read with Order XIII-A Rule 2 and 3 of Original Side Rules.

(i). This application should not be treated as urgent?

(ii). This Hon'ble Court should not pleased to pass summary judgment dismissing the above C.S.No.604 of 2015 as barred by Limitation?

For Applicant	: Mr.Vishnu Mohan Mr.Gautam S.Raman
For D1	: Mr.M.B.Raghavan
For D3	: Mr.A.Ilango
For D2	: NA

ORDER

This application is filed by the defendants to pass a summary judgment dismissing the suit as barred by limitation.

2. The sole plaintiff in the suit has filed money suit against three defendants namely M/s.Bharti AXA General Insurance Co.Ltd., M/s.Waterbury Farrel and M/s Steel Authority of India Ltd. The plaintiff and the 2nd defendant form a consortium and entered into an agreement with the 3rd defendant for supply and erection of 20 Hi Sendzimir Mill. In the process of the execution of the work, the 2nd defendant has shipped a mill-housing equipment weighing about 140 tonnes from Cannada and the same was received by the plaintiff at Chennai Port and it was transported by road from Chennai Port to Salem by Worldwide Logistics (India) Pvt. Ltd. On 06.05.2010, the Multi Axle Truck carrying the said machinery met with the road accident and as a result, the entire machinery suffered severe damage. The plaintiff along with the 3rd defendant had taken the Marine Insurance Policy with the 1st defendant and the said policy was valid from 09.12.2008 to 08.01.2011. Therefore, immediately after the occurrence of the accident, the plaintiff lodged a claim for a sum of Rs.11,15,01,961/- with the 1st defendant along with the supporting documents. The 1st defendant, after getting report from the surveyor informed the plaintiff vide letter dated 17.05.2011 that the assessed loss is Rs.24,29,450/- but the same is not admissible, in view of the breach of warranties by the plaintiff, while transporting the goods. The plaintiff, by its letter dated 28.06.2011, pointed out that, there had been no breach of warranties on the part of the plaintiff. The contention of the 1st defendant that its surveyors had found breaches of warranty on the part of the plaintiff in lashing, choking and securing the equipment, was baseless, self serving and the equipment had been secured as per the customary practice.

3. Again, 27.07.2011, the plaintiff, in its letter, called upon the 1st defendant to make good the loss which was caused due to the accident and denied the breach of warranty. Further, the plaintiff had produced document to prove that the accident really occurred and the driver of the Multi Axle Truck caused for the accident and he was punished by the District Munsif cum Judicial Magistrate, Sriperumpudur, Kanchipuram. By letter dated 22.08.2011, the 1st defendant requested the plaintiff to produce copies of the documents namely charge sheet, Court judgment and other relating documents pertaining to the accident. Though, all the documents were sent to the 1st defendant, there was no reply from the 1st defendant. Therefore, pre-suit notice was issued to the 1st defendant on 04.06.2012, for which 1st defendant replied on 12.07.2012 repudiating the contract and liability. Hence, the suit is filed specifying the cause of action for the suit before this Court as below at paragraph No.14 of the plaintiff:-

> *"(14) The cause of action for the suit arose Anna Salai, Chennai within the jurisdiction of this Hon'ble Court where the 1st defendant is carrying on its business and had issued the insurance policies on 09.12.2008; on 06.05.2010 the date on which the accident happened to the Equipment, on 07.05.2010 when the plaintiff lodged the claim with the 1st defendant, on 17.05.2011 when the 1st defendant required the plaintiff to furnish further documents, on subsequent dates*

and on 12.07.2012 when the 1st defendant finally repudiated the contract by its reply notice."

4. The 1st defendant, on receipt of the suit summon, had filed the written statement denying the averments and raising the preliminary issue on limitation.

5. The suit was filed in the year 2015 before the Commercial Court came into force. On constitution of Commercial Division in this High Court, pursuant to the Commercial Courts Act came into force and the dispute was determined as Commercial Dispute on 14.08.2020.

6. In the said circumstances, the above application is filed under Order XIII-A Rule 2 & 3 of C.P.C as amended under the Commercial Courts Act, praying for passing of summary judgment dismissing the suit on the ground of limitation.

7. The affidavit filed along with this application states that, the damage to the Mill Housing Equipment caused on 06.05.2010 during transit from Chennai to Salem. The cargo was insured with the 1st defendant under the Policy of Insurance. On receipt of the intimation of the accident, the surveyor of the 1st defendant surveyed the cargo and submitted the report. Since there was breach of warranties, the claim of the plaintiff was repudiated by the 1st defendant vide letter dated 17.05.2011.

8. The Limitation to file suit as per Article 44(b) of Limitation Act is three years. Whereas, the suit was presented on 10.07.2015, which is beyond the period of limitation. The subsequent correspondences, after 17.05.2011, will not save the limitation or extend the limitation for the plaintiff to lay the suit. Hence, the summary judgment dismissing the suit is prayed.

9. In response to this application, the defendant had filed counter, wherein, it is stated that, the application is not filed in the appropriate format as contemplated under Order XIII-A and therefore, it has to be dismissed. Without prejudice to the said plea, it is contented that the letter of the 1st defendant dated 17.05.2011 is not a letter informing the repudiation of claim, but only an intimation of claim assessment. The 1st defendant, on 09.08.2011 sought for further details and the plaintiff duly replied on 16.08.2011. On 22.08.2011, the defendant wrote a letter to the plaintiff to produce further documents. Therefore, claim was kept live seeking submission of the further documents by the plaintiff. There was no rejection or repudiation of the claim by the 1st defendant. Due to non-compliance, the 1st defendant request to settle the claim. A legal notice was issued on 04.06.2021 calling upon the 1st defendant to pay Rs.11,15,01,961/- to the said notice. The 1st defendant replied through its counsel on 12.07.2012 repudiating the claim. The limitation commenced only from the date of reply i.e., 12.07.2012. Since the suit was presented on 10.07.2015 and leave to suit was granted on 14.07.2015, the suit is well within the period of limitation. Even otherwise limitation is a mixed question of law and facts. It is a triable issue and therefore, summary judgment cannot be passed. The application is devoid of merits.

10. The cordial knot of the case to determine limitation is the date of repudiation of claim. Article 44 of the Limitation Act reads as below:-

44.(a) On a policy of insurance when the sum insured is payable after proof of the death has been given to or received by the insurers.	Three years	The date of the death of the deceased, or where the claim on the policy is denied, either partly or wholly, the date of such denial.
(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.

11. In this case, on 17.05.2011, the 1st defendant has informed the plaintiff that the report of the surveyor indicates breach of warranties and therefore, in view of the breach, the claim of the plaintiff is not tenable under the policy. To the said letter, the plaintiff has responded through the letter dated 28.06.2011, wherein, the plaintiff has reminded the 1st defendant about the offer of settlement of the claim on a de-rated basis for Rs.24,00,000/- and had denied the allegation about the breach of warranty. The Paragraph No.7 of the plaintiff's response reads as below:-

> *"7. We wish to place on record the communication from your company with an offer to settlement of the claim on a de-rated basis for Rs.24 lakhs, which we had disputed since it was not a full settlement. Now we have received your letter denying the claim in total. In view of the above mentioned points, we deny as baseless all of your allegations about the breach of any warranty whatsoever and also implore upon you to consider the actual value of replacement of the cargo as the insured value and hereby call upon you to settle our claim in full."*

12. The subsequent correspondences from the 1st defendant also reiterated the repudiation of the claim expressed in its letter dated 17.05.2011 and there is no document to show that the 1st defendant, at some point of time, thereafter, expressed his intention to re-consider the repudiation.

13. The Learned Counsel appearing for the plaintiff replying upon the letter dated 22.08.2011 sent by the 1st defendant to the plaintiff would submit that, the 1st defendant by calling for the documents had indicated reconsideration of its decision dated 17.05.2011. These two paragraphs of the 1st defendant letter dated 22.08.2011 reads as below:-

> *"1.Please do let us have the copy of documents with*

you for our perusal, however, we would like to submit that since the loss had taken place whilst the goods were in transit the claim would fall to be considered under the Terms, Coverage, Conditions, Exceptions, Warranties of the marine cover for the goods.

2. Please provide us with the copy of the charge sheet on the driver of the container laden lorry along with the court judgment as well as any other relevant documents available with you pertaining to the said accident."

14. Though, these two paragraphs read in isolation, gives an impression that the 1st defendant called for documents for clarification, however Paragraph No.6 of the letter put the rid to the issue, which clearly indicates that, the decision communicated in the letter dated 17.05.2011 stands confirmed. The said paragraph is extracted as below to understand the intention of the 1st defendant as on 22.08.2011.

"*6.We once again inform you that the surveyours had assessed the loss for an amount of Rs.24,29,450/- on the basis of documents submitted to us as well to other Government Authorities* <u>*but because of the breach of warranties applicable to the policy, the same was not admissible and hence the decision was communicated vide our letter dated 17th May, 2011.*</u>" *(Emphasis added)*

15. Thereafter, the plaintiff has caused notice through his Lawyer and received a reply from the 1st defendant. According to the Learned Counsel appearing for the plaintiff the reply of the 1st defendant dated 12.07.2012 through his lawyer received by the plaintiff is the date for computing limitation. According to him, the repudiation of claim was made only through this reply notice.

16. The said plea is not found appropriate since the earlier communications between the parties, which were extracted above would show otherwise. Ever since 17.05.2011, the 1st defendant had not admitted the liability and expressly repudiated the same on the ground that there is breach of warranty by the plaintiff. In spite of repeated request from the plaintiff, the 1st defendant had never changed his stand. The letter of the plaintiff also indicate that, they are aware of the fact that the 1st defendant has repudiated the claim through the letter dated 17.05.2011. What the plaintiff was requesting in their letters, is to reconsider the same. These correspondence will not stop running of limitation. Even according to the plaintiff, it is specifically stated in the plaint that, after the reply dated 22.08.2011, the 1st defendant had not re-considered his stand regarding the repudiation of the claim. While so, the exchange of notice through his counsel after 8 months will not give a fresh lease of limitation. Therefore, this Court holds that the date of repudiation of the claim is 17.05.2011. The time of reckon limitation starts from 18.05.2011.

17. Order XIII-A of C.P.C as amended under the Commercial Court Act 2015, empowers the Court to pass summary judgment to dismiss the plaint, if there is no real prospect of succeeds. Though the application for a summary judgment not in the appropriate format as required, Court never give primacy to format at the cost of substance.

18. The 1st defendant both in his written statement as well as in the counter affidavit in this application, had taken a preliminary objection regarding maintainability of the suit on the ground of limitation. By no stretch of imagination, the prospect of the plaintiff succeeding the case will get improved if the parties are allowed to let oral evidence. Article 44(b) of the Limitation Act, prescribes 3 years limitation for filing the suit from the date of repudiation of the claim. In the instant case, the factum of repudiation by the 1st defendant consistently mentioned as 17.05.2011. Whereas, the plaint is presented along with the leave to sue petition on 10.07.2015. For the said reason, this Court is of the view that the plaintiff has no prospect of succeeding the suit, which is hopelessly barred by the limitation.

19. In the result, the ***Application No. 2512 of 2021 is Allowed***. Consequently, the Civil Suit No.604 of 2015 is dismissed. No costs.

02.11.2021

Index : Yes
Internet : Yes/No.
bsm

Dr.G.Jayachandran,J.

bsm

Pre-delivery order in
A.No.2512 of 2021
in C.S.No.604 of 2015

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