IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.01.2024

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THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

W.P.No.2459 of 2020
and
W.M.P.No.2853 of 2020

M/s. LK Insulation and Engineering Service Pvt. Ltd.,
Rep. by its Managing Director,
M.Lakshmikanthan. ... Petitioner

Vs.

1. The Branch Manager,
State Bank of India,
Rasmecc, 208, Anna Salai,
Vignesh Complex, Puducherry.

2. The Branch Manager,
State Bank of India,
Cuddalore -O.T. Branch,
Cuddalore - 607 003.

3. The New India Assurance Co.Ltd.,
No.30, 1st Floor, J.N. Street,
Puducherry -605 001. ... Respondents

Prayer :- Writ petition filed under Article 226 of the Constitution of India praying for issuance of a writ of Mandamus, directing respondents to pay the sum assured i.e Rs.47,50,000/- with interest in respect of Policy No. 711002111010000568 taken with 3rd respondent on 07.09.2011, to the petitioner.

For Petitioner : Mr.S.Mukunth, Senior Counsel for V.Sivakumar

For Respondents : Mr.A.Arockia Sathish for Mr.S.Sethu Raman (for R1 & R2);

Mr.S.R.Sundar (for R3).

ORDER

The writ of mandamus has been filed to direct the respondents to pay the sum assured, i.e., Rs.47,50,000/- with interest in respect of Policy No. 71100211101000000568 taken with 3rd respondent on 07.09.2011, to the petitioner.

2. The petitioner is L.K.Insulation and Engineering Service Pvt.Ltd. The petitioner company commenced its business in the year 2007. Admittedly, the petitioner borrowed loan from the State Bank of India. The Bank sanctioned loan to the tune of Rs.23 Lakhs initially. The 1st respondent Bank has ensured the loan obtained by the petitioner with the 3rd respondent New India Assurance Company Ltd. The insurance was for a period from 7.9.2011 to 6.9.2012. The total premium amount of Rs.16,766/- has been debited from the petitioner's account. There was a tie up between the State Bank of India and the 3rd respondent insurance company.

3. The learned senior counsel, appearing on behalf of the petitioner

would submit that the petitioner company was not aware of the insurance policy entered into between the State Bank of India and the 3rd respondent insurance company. The Thane cyclone hit the coast around Cuddalore and caused great havok in the night of 30/31.12.2011. The petitioner's company is situated in the coastline. An electricity transformer installed in front of the godown-cum-industry was blown away. The transformer fell on the buildings and caused extensive damage to the buildings, machineries and other installations. The godown was totally wrecked. Since the Thane cyclone caused huge damage to the petitioner's company, they could not submit any application to claim the said insurance and they came to know about the insurance policy only at later point of time.

4. The learned Senior Counsel for the petitioner would submit that the petitioner came to know about the insurance policy only in the year 2018, and thereafter, the petitioner company approached the State Bank, who in turn communicated the copy of the insurance policy to the petitioner. The petitioner company approached the 3rd respondent for settling the same issue. However, the insurance company repudiated the client on the ground that the intimation and application itself was submitted beyond the period of one (1) year as contemplated under the terms of the

policy.

5. The learned Senior Counsel for the petitioner would state that the petitioner was not informed about the insurance policy between the State Bank of India and the 3rd respondent. Once they came to know about the policy, immediately, the request was made and on receipt of the copy of the policy and from the State Bank of India, the claim application was submitted. Thus, the respondents are liable to pay the sum assured to the petitioner.

6. The learned counsel for the 3rd respondent insurance company would oppose the said contention by stating that the claim was for the period from 7.9.2011 to 6.9.2012. As per the petitioner, the Thane Cyclone effected the properties belonging to the company only on 30/31.12 2011. However, the insurance company had not received any intimation either from the State Bank of India or from the petitioner company. They have received application from the petitioner company after a lapse of about 7 years, in the year of 2018 and by invoking the terms and conditions of the policy, the applications submitted by the petitioner was not considered.

7. In support of the contentions raised, the 3rd respondent relied on

the conditions stipulated in the policy which reads as under:

"6.*(i) On the happening of any loss or damage the Insured shall forthwith give notice thereof to the Company and shall within 15 days after the loss or damage, or such further time as the Company may in writing allow in that behalf, deliver to the Company*

(a) A claim in writing for the loss or damage containing as particular an account as may be reasonably practicable of all the several articles or items or property damaged or destroyed, and of the amount of the loss or damage thereto respectively, having regard to their value at the time of the loss or damage not including profit of any kind.

(b) Particulars of all other insurances, if any

The Insured shall also at all times at his own expense produce, procure and give to the Company all such further particulars, plans, specification books, vouchers, invoices, duplicates or copies thereof, documents, investigation reports (internal/external), proofs and information with respect to the claim and the origin and cause of the loss and the circumstances under which the loss or damage occurred, and any matter touching the liability or the *amount of the liability of the Company as may be reasonably required by or on behalf of the Company together with a declaration on oath or in other legal form of the truth of the claim and of any matters connected therewith.*

No claim under this policy shall be payable unless the terms of this condition have been complied with

(ii) In no case whatsoever shall the Company be liable for any loss or damage after the expiry of 12 months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration; it being expressly agreed and declared that if the Company shall disclaim liability for any claim hereunder and such claim shall not within 12 calendar months from the date of the 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."

8. With reference to the clause 6, Hon'ble Supreme Court had also held in the case of ***Himachal Pradesh Forest Co.Ltd., Vs. United Indian Insurance Co.Ltd., reported in (2009) 2 SCC 252,*** that the period of one year, contemplated under the policy, as condition would not violate Section

28 of the Indian Contract Act. In this regard, paragraph 12 and 15 of the above said judgement are relied upon:

"***12.*** *It would be clear from the above prefatory note that the discussion would involve an appreciation of Clause 6(ii) of the policy and Section 28 of the Contract Act. Both these clauses are reproduced below:*

"6(ii) In no case whatsoever shall the Company be liable for any loss or damage after the expiration of 12 months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration: it being expressly agreed and declared that if the Company shall declaim liability for any claim hereunder and such claim shall not within 12 calendar months from the date of the 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."

Section 28

"28. ***Agreements in restraint of legal proceedings void. --*** *Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal*

proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Exception 1. -- ***Saving of contract to refer to arbitration dispute that may arise****.-- This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.*

* * *

Exception 2. -- ***Saving of contract to refer questions that have already arisen****.-- Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration."*

...

15*. In Sujir Ganesh Nayak case[1] this Court was called upon to consider Condition 19 of the policy which was in the following terms: (SCC p. 370, para 5)*

"5. ... 'Condition 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.' "

While construing this provision vis-à-vis Section 28 of the Contract Act and the cases cited above and several other cases, in addition, this is what the Court ultimately concluded: (Sujir Ganesh Nayak case[1], SCC pp. 375-77, paras 16, 19 & 21)

"16. From the case law referred to above the legal position that emerges is that an agreement which in effect seeks to curtail the period of limitation and prescribes a shorter period than that prescribed by law would be void as offending Section 28 of the Contract Act. That is because such an agreement would seek to restrict the party from enforcing his right in court after the period prescribed under the agreement expires even though the period prescribed by law for the enforcement of his right has yet not expired. But there could be agreements which do not seek to curtail the time for enforcement of the right but which provide for the forfeiture or waiver of the right itself if no action is commenced within the

period stipulated by the agreement. Such a clause in the agreement would not fall within the mischief of Section 28 of the Contract Act. To put it differently, curtailment of the period of limitation is not permissible in view of Section 28 but extinction of the right itself unless exercised within a specified time is permissible and can be enforced. 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 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. The clause before this Court in ***Food Corpn, case*** *extracted hereinbefore 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 that 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 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 Act.*

* * *

21. Clause 19 in terms said that in no case would the insurer be liable for any loss or damage after the expiration of twelve months from the happening of loss or damage unless the claim is subject of any pending action or arbitration. Here the claim was not subject to any action or arbitration proceedings. The clause says that if the claim is not pressed within twelve months from the happening of any loss or damage, the Insurance Company shall *cease to be liable. There is no dispute that no claim was made nor was any arbitration proceeding pending during the said period of twelve months. The clause therefore has the effect of extinguishing the right itself and consequently the liability also. Notice the facts of the present case. The Insurance Company was informed about the strike by the strike by the letter of 28-4-1977 and by letter dated 10-5-1977. The insured was informed that under the policy it had no liability. This was reiterated by letter dated 22-9-1977. Even so more than twelve months thereafter on 25-10-1978 the notice of demand was issued and the suit was filed on 2-6-1980. It is precisely to avoid such delays and to discourage such belated claims that such insurance policies contain a clause like Clause 19. That is for the reason that if the claims are preferred with promptitude they can be easily verified and settled but if it is the other way round, we do not think it would be possible for the insurer to verify the same since evidence may not be fully and completely available and memories may have faded. The forfeiture Clause 12 also provides that if the claim is made but rejected, an action or suit must be commenced within three months after such rejection; failing which all benefits under the policy would* *stand forfeited. So, looked at from any point of view, the suit appears to be filed after the right stood extinguished. That is the reason why in* ***Vulcan Insurance case*** *while interpreting a clause couched in similar terms this Court said: (SCC p. 952, para 23)*

'23. ...It has been repeatedly held that such a clause is not hit by Section 28 of the Contract Act....'

Even if the observations made are in the nature of obiter dicta we think they proceed on a correct reading of the clause."

In the light of the fact that ***Food Corpn. case*** *has been considered in* ***Sujir Nayak case****, no further argument remains in the present matter, as Clause 6(ii) and Condition 19 are, in their essence, pari materia.*"

9. In the case of Union of ***India Vs. IndusInd Bank Ltd. & others, reported in (2016) 9 SCC 720***, Hon'ble Supreme Court observed as follows:

"33. In H.P. State Forest Co. Ltd. v. United India Insurance Co. Ltd. [H.P. State Forest Co. Ltd. v. United India Insurance Co. Ltd., (2009) 2 SCC 252 : (2009) 1

SCC (Civ) 490] this Court had to decide whether Clause 6(ii) of an insurance policy was hit by the unamended Section 28. This clause reads as follows : (SCC pp. 257-58, para 12)

> *"6. (ii) In no case whatsoever shall the Company be liable for any loss or damage after the expiration of 12 months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration : it being expressly agreed and declared that if the Company shall declaim liability for any claim hereunder and such claim shall not within 12 calendar months from the date of the 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."*

After a copious reference to Food Corpn. [Food Corporation of India v. New India Assurance Co. Ltd., (1994) 3 SCC 324] and Sujir Ganesh Nayak case [National Insurance Co. Ltd. v. Sujir Ganesh Nayak & Co., (1997) 4 SCC 366] , this Court held that such clauses would not be hit by Section 28.

34. Considering that the respondents' first argument *has been accepted by us, we do not think it necessary to go into the finer details of the second argument and as to whether the aforesaid clauses in the bank guarantee would be hit by Section 28(b) after the 1997 Amendment. It may only be noticed, in passing, that Parliament has to a large extent redressed any grievance that may arise qua bank guarantees in particular, by adding an Exception (iii) by an amendment made to Section 28 in 2012 with effect from 18-1-2013. Since we are not directly concerned with this amendment, suffice it to say that stipulations like the present would pass muster after 2013 if the specified period is not less than one year from the date of occurring or non-occurring of a specified event for extinguishment or discharge of a party from liability. The appeals are, therefore, dismissed with no order as to costs."*

10. Relying on the above decisions, the learned counsel for the 3rd respondent would state that the petitioner is not entitled for the relief as their claim is belated and at this length of time, the insurance company may not be in a position to consider the application.

11. The learned counsel for the State Bank of India would also oppose the contentions of the petitioner by stating that the petitioner had not approached the Bank, despite the fact that they had knowledge about

the insurance policy. The insurance premium amount had been debited from the account of the petitioner and the loan application would indicate about the term policy. The insurance policy had been sent to the address of the petitioner and therefore, the statement of the petitioner that they had no knowledge about the insurance policy is incorrect. The State Bank of India communicated the copy of the policy in the year of 2018, only at the request of the petitioner and mere communication would not confer any right to claim the insurance sum as per the policy, unless, the application is submitted within the time limit as prescribed in the policy.

12. Considering the arguments, this Court is of the considered opinion that there is no dispute between the parties that the insurance policy existed. The unfortunate incident occurred during the policy period. However, the petitioner failed to submit an application within the period of one year as per the policy conditions. The statement of the petitioner that they were not aware of the policy is unacceptable since the premium amount had already been debited from the accounts of the petitioner. More so, at the time of borrowing loan from the State Bank of India, the term policy has been intimated. Despite the fact that the respondents have acted and communicated the policy in time, the petitioner failed to submit claim

application within the period of one year as contemplated under the terms and conditions of the policy. First time, in the year 2018, after a lapse of seven years from Thane Cyclone, the application was filed. Such belated applications cannot be entertained. Even the general period of limitation under the limitation Act, that is 3 years, lapsed. That being so, there is no reason to entertain the writ petition for the purpose of granting the relief as such sought for in the present writ petition. Accordingly, the writ petition stands dismissed.

13. Accordingly, the writ petition stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

29.01.2024

Index : Yes
Speaking Order
Neutral Citation : Yes
(sha)

To

1. The Branch Manager,
State Bank of India,
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S.M.SUBRAMANIAM. J.,

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