

ALCUTTA HIGH COURT

Girdharilal Honuman Bux

Vs

Eagle Star and British Dominions

(Greaves ,J.)

15.06.1923

JUDGMENT

Greaves, J.

1. The Plaintiffs insured with the Defendant Company under two policies, dated the 4th November 1920 and. 28th February 1921, loose jute at Kissengunge in the District of Purneah.

2. The insurances were effected subject to the terms and conditions endorsed or otherwise expressed on the policies.

3. Both policies contained a condition (No. 13) which so far as material is to this effect:

If the claim be made and rejected and an action or suit be not commenced within three months after such rejection or (in case of arbitration taking place in pursuance of the 18th condition of this policy) within three months after the arbitrator or arbitrators or umpire shall have made their award, all benefit under this policy shall be forfeited. For the purpose of these proceedings the following facts are admitted as correct by both parties to the suit. The jute insured under the policies was destroyed by fire on the 7th June 1921, the plain-tiffs submitted their claims under the policies on the 14th June 1921 the claims were rejected by the defendant Company on the 30th July 1921, and this suit was commenced on the 5th May 1922. The following issue of law arises in the suit: Have the Plaintiffs by reason of their failure to commence this suit within three months of the rejection of their claim forfeited, under the provisions of condition 13 of the policies, all benefits under the said policies and, if so, is the suit maintainable?

4. The Court being of opinion that the case may be disposed of on this issue of law only, it is agreed by the parties that this issue shall be tried first.

5. It is contended on behalf of the Plaintiffs that condition 13, as set out above, is void under the provisions of Sections 23 and 28 of the Indian Contract Act, 1872, as an attempt to curtail the period of limitation for a suit on the policies, namely, the period of three years prescribed under Article 86 of the Limitation Act.

6. Section 23 of the Indian Contract Act provides that the consideration or object of an agreement is lawful unless, amongst other things, it is of such a nature that if permitted, it would defeat the

provisions of any law. Section 28 provides, amongst other things that every agreement which limits the time within which any party thereto may enforce his rights by the usual legal proceedings is void to that extent. The question for our decision is whether a provision in a policy of insurance that all benefit thereunder shall be forfeited if a suit is not commenced within a certain time, which falls short of the period allowed by law for the institution of such a suit, amounts to limiting the time within which a party may enforce his rights under a contract within Section 28 and defeats the provisions of Article 86 of the Limitation Act.

7. In *Hirabai v. Manufacturers Life Insurance Co*¹. it was held that a provision in a policy which was said to amount in substance to an agreement that if no suit was brought within a year, neither party should have any rights as against the other, and which was said to amount to a waiver of the right of the respective parties if a suit was not brought within a year, did not offend against the provisions of Section 28 of the Contract Act.

8. In *Baroda Spinning and Weaving Co. Ltd, v. Satyanarayan Marine and Fire Insurance Co. Ltd*². it was held that a provision in a policy of insurance identical with the provision in suit did not offend against Section 28 which was aimed only at covenants not to sue at any time or for a limited time; and was not aimed at a provision extinguishing rights in certain events. Batchelor, J., at P. 356 states : "As I understand the matter what the Plaintiff was forbidden to do was to limit the time within which he was to enforce his rights; what he has done is to limit the time within which he has any rights to enforce; and that appears to me to be a very different thing," and he refers to *South British Fire and Marine Insurance Co. v. Brojo Nath Shaha*³ where the policy in suit provided that no suit should be sustainable unless brought within six months but where this provision, although referred to was not discussed.

9. It is stated in the 2nd Ed, of Sir F. Pollock's book on the Indian Contract Act at P. 174 that Section 28 merely affirms the common law. If this is correct, it is noticeable that a provision to the effect of the one in suit in insurance policies has been stated to be a reasonable provision. *Home Insurance Co. of New York v. Victoria-Montreal Fire Insurance Co*⁴.

10. In *Porter's Laws of Insurance*, 6th Ed., P. 195, it is stated that insurers may lawfully limit the time within which an action may be brought to a period less than that allowed by the statute of limitation and that the true ground, on which the clause limiting the time of claim rests and is maintainable, is that, by the contract of the parties the right to indemnity in case of loss and the liability of the Company therefor do not become absolute, unless the remedy is sought within the time fixed by the condition in the policy.

11. In view of the decisions referred to above with which I respectfully agree, I am not prepared to say that condition 13 in the policies in suit infringes the provisions of Section 28 of the Indian Contract Act and if it does not infringe Section 28, I do not think that it can be said to infringe Section 23 of that Act.

12. I would accordingly answer the issue in the affirmative and hold that the suit is not maintainable.

13. I desire to say with all respect to the Chief Justice that I do not understand his order referring the matter to this bench which has appointed to try the issue raised in Paras. 16 and 17 of the

written statements which is substantially the issue of law which we have tried. It is of course open to him to appoint a special bench of two Judges to try a suit but having done so it is not, I think, open to him in any way to fetter the discretion of the bench as to how the suit shall be tried. It is for the bench and the bench alone to decide how the suit is to be tried, that is to say, whether issues of fact and law are to be tried together or whether the issues of law shall be tried first. This is in accordance with the provisions of Order 14, Rule 2 of the Civil Procedure Code as I understand then and it is not suggested that the matter comes before us under Rule 6 of that order. I have no doubt that the Chief Justice did not desire to fetter the discretion of the bench in trying the suit, but the manner in which the matter comes before us under his order is to say the least unfortunate.

14. The defendants will be entitled to their costs to be taxed as of a hearing under scale No. 2.

Buckland, J.

15. Though this bench has been appointed to try an issue referred to in the petition praying for its appointment at the hearing the whole case has been treated as being before us and we have been asked under Order 14, Rule 2, C.P.C.; to settle and try an issue of law on which the case may be disposed of and to postpone settlement of issues of fact, and to this we have acceded.

16. As has already been pointed out, the decision in *Hirabai v. Manufacturers Life Insurance Co*⁵. is open to considerable doubt and the correct view was, I think, expressed by Batchelor, J., in *Baroda Spinning and Weaving Co. Ltd. v. Satyanamyam Marine and Fire Insurance Co. Ltd*⁶. in the passage which my learned brother has cited. The proposition advanced on behalf of the Plaintiffs that the condition offence against the Indian Contract Act in that it curtails the period of limitation for a suit on the policy, and the argument addressed to us, exclude the proposition that what is affected by the condition are the rights of the Plaintiffs if not enforced within the time which the condition prescribes. The contention may therefore fairly be tested by assuming that the condition provides that if its terms are not complied with a part, let us say one-half, of the benefit under the policy shall be forfeited. To such a condition the learned Counsel was unable to apply his argument which fails to meet the general test of applicability to every degree of the circumstances in which it is put forward.

17. The point which we have to decide was referred to in *Atlantic Shipping and Trading Co. v. Louis Dreyfus and Co*⁷. It arose in connection with the commencement of arbitration proceedings within a stipulated time. In his speech Lord Dunedin observed : "Now if it were illegal to arrange that a claim should not be good, unless made within a certain time, I should understand the argument, but as it is admitted that it is perfectly legal to make such a stipulation-it is done, e.g., every day in insurance policies- then why should it be bad because it is tacked on to a provision for arbitration instead of to an action at law?" It has not been contended that the law in India though codified, differs from English law in this respect.

18. I agree that the suit is not maintainable and that it should be dismissed with costs on scale No. 2.

Cases Referred.

1(1912) 14 Bom. L.R. 741
2(1913) 38 Bom. 344
3(1909) 36 Cal. 516
4 (1907) A.C. 59
5(1912) 14 Bom. L.R. 741
6(1913) 38 Bom. 344
7 (1922) A.C. 250