JAMMU AND KASHMIR HIGH COURT

Prithvi Nath Malla

Vs.

Union of India

Civil Revn. No. 152 of 1960

(K.V. Gopalakrishnan Nair, J.)

29.09.1961

JUDGMENT

K.V. Gopalakrishnan Nair, J.

1. In this case the validity of the following clause 12 of the written contract entered into between the petitioner and the Union of India falls for determination :

> "I hereby agree that the President of Republic of India shall be discharged from all liabilities under the contract or otherwise in relation to the subject matter thereof unless an arbitration or a suit where such suit lies, is commenced within six months from the expiration of the period mentioned in the schedule or any extension thereof."

The petitioner instituted a suit for damages against the Union of India on foot of the written contract which contained the clause extracted above. One of the objections taken by the Union of India was that the plaintiff had no cause of action to maintain the suit in view of clause 12 of the contract. The trial Court agreed with the contention of the Union of India. But it did not dismiss the suit because the plaint also contained a claim for return to the plaintiff of the security amount deposited by him with the Union of India which according to the Court below was not hit by the aforesaid clause 12 of the contract. The petitioner aggrieved by the finding of the trial Court that the Union of India was absolved from liability for damages by virtue of clause 12 of the contract has come up in revision to this Court to canvass the correctness of that finding.

2. The main argument of the petitioner's learned counsel is that clause 12 of the contract is void in view of section 28 of the Contract Act. The material part of section 28 is as follows:

> "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."

It is conceded that the agreement in question does not restrict the petitioner absolutely from enforcing his rights under or in respect of the contract by the usual legal proceedings in the ordinary tribunals. But it is contended that clause 12 of the contract limits the time within which the petitioner may enforce his rights by the usual legal proceedings in the ordinary Courts and that to this extent clause 12 is void. This contention does not appear to pay sufficient heed to the actual words of clause 12, nor to the relevant phraseology of section 28 of the Contract Act. What clause 12 says is that if the petitioner does not bring a suit within six months from the expiration of the specified date, the President of Republic of India shall be discharged from all liabilities under the contract. This is quite different from saying that the petitioner shall bring a suit to enforce his rights, only within six months of the specified date.

What section 28 forbids is not extinguishment of the rights or liabilities of a party to a contract on the happening of a specified event but the limiting of the time within which a party may enforce his rights. It is obvious that a party will have no right to enforce, if the rights have already been extinguished under the contract. In such a case there can be no question of the time for the enforcement of the rights being limited. What happens is that the right itself ceases to exist, and if the party brings a suit, it will be devoid of any foundation and, therefore, liable to be dismissed. It is not as if the ordinary period of limitation prescribed by the Limitation Act for instituting a suit is sought to be curtailed by the agreement between the parties. What the agreement purports to achieve is to absolve a party from all liabilities or to extinguish all the rights of a party, if a specified action is not taken by one party against the other within the period stipulated in the contract. To such an agreement section 28 of the Contract Act can have no application. The distinction between the two classes of agreement may perhaps be a fine one but it is nonetheless a fundamental distinction. The agreement in the one case takes it for granted that the right as well as the liability exists, but the time for enforcing it is sought to be limited. While in the other case the parties agree that the right as well as the liability will stand extinguished if a specified event occurs. In the latter case the agreement does not in terms preclude a party from instituting a suit in a Court of Law to enforce his alleged right, although if he does so, his suit will be liable to be dismissed for want of a cause of action, that is to say, for want of a right to found the suit upon. Clause 12 of the contract in question plainly falls in this category of agreements and does not, therefore come within the mischief of section 28 of the Contract Act. This position is amply supported by authorities. The contention based on section 23, Contract Act is also untenable as I shall presently show.

3. In *Baroda Spinning and Weaving Co., Ltd. v. Satyanarayan Marine and Fire Insurance Co. Ltd*[1]*.,* (2), one of the conditions in a policy of fire insurance sued on by the plaintiff was that if the claim be made and rejected, and an action or suit be not commenced within three months after such rejection, all benefit under the policy shall be forfeited. The suit was brought after the expiry of three months subsequent to the rejection of the claim. It was argued on behalf of the plaintiff that the condition in the insurance policy offended against section 28 of the Contract Act and was therefore, void. This contention was rejected and the impugned condition in the insurance policy was held to be valid. Batchelor J. expounded the law as follows:-

[1] ILR 38 Bom 344 : AIR 1914 Bom 225

> "The question is whether the agreement in Clause 12 of the conditions is void under this section. As I understood the argument for the appellants, the learned Advocate General, while admitting what has often been decided, that the Indian Limitation Act operates in

> such a case as this not to extinguish rights but only to bar remedies, contended that for the purposes of this appeal we should look rather to the substantial effect intended by the section than to the precise form of words which the legislature has used. The argument was that, however valid and important in law be the distinction between the barring of a remedy and the extinguishment of a right, yet to the man of business it is much the same thing whether his right be gone or the remedy for enforcing that right be barred, and it was urged that in substance and effect there was no appreciable distinction between saying "I agree that upon the expiry of three months after the rejection of my claim, my rights shall be forfeited" as is said here and saying "as to the time within which I may enforce my right, I agree to limit it to the period of three months, after the rejection of my claim", and this latter covenant would undoubtedly be void under the section.

In my opinion, however, the distinction which beyond question exists, is vital in the construction of the section. 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 is to have any rights to enforce; and that appears to me to be a very different thing. This seems to have been the view which was tacitly accepted by the Calcutta High Court in the *South British Fire and Marine Insurance Co. of New Zealand v. Brajanath Shaha*[2]*,* though it must be admitted that that decision is of no direct assistance, since the question of the effect of Section 28, Contract Act, on such agreement was not expressly considered." *Haji Shakoor Gany v. H.E. Hinde and Co., Ltd*[3]*.,* dealt with a provision in a bill of lading which stipulated that

> "in any event, the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered"

Blackwell J. followed the principle of the decision in AIR 1914 Bombay 225 (2) (supra) and held that the impugned provision in the bill of lading was not hit by section 28 of the Contract Act and was valid. In *Ramji Karamsi v. The Unique Motor and General Insurance Co. Ltd*[4]*.,* Bhagwati J. stated the position in the following words:-

> "It is only when a period of limitation is curtailed that section 28, Contract Act, comes into operation. It does not come into operation when the term spells out an extinction of the right of the plaintiff to sue or spells out the discharge of the defendants from all liability in respect of the claim."

4. In ILR 36 Cal 516 a Bench of three Judges of the Calcutta High Court held that the stipulation in a policy of Marine Insurance that "in case any suit or action shall be

[2] ILR 36 Cal 516 [4] AIR 1951 Bom 347
[3] AIR 1932 Bom 330

commenced against the said Company after the expiration of six months next after
such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced," was

valid. No doubt this decision does not contain any discussion regarding section 28 of the Contract Act. It, however, appears to have been assumed by the learned Judges that the agreement did not suffer from any legal infirmity.

5. In *Girdhari Lal Honuman Bux v. Eagle Star and British Dominions Insurance Co. Ltd*[5]*.,* a Division Bench of the Calcutta High Court had to construe the following condition in the insurance policy put in suit:

> "If the claim be made and rejected and an action or suit be not commenced within three months after such rejection.....all benefit under this policy shall be forfeited."

The suit was brought after the stipulated period of three months after the rejection of the claim. The defendant Insurance Company attempted to non-suit the plaintiff on the ground of the aforesaid condition in the policy of insurance. The plaintiff called to his aid section 28 of the Contract Act in an attempt to get the condition in the insurance policy declared void but the Court relying upon AIR 1914 Bombay 225 (2) held that section 28 of the Contract Act did not affect the condition and that the suit was not maintainable.

6. In *Dawood Tar Mahomed Bros. v. Queensland Insurance Co. Ltd*[6]*.,* Mc. Nair J. considered the following clause in a fire insurance contract :

> "In no case whatever shall the Company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage....."

The suit was instituted by the policy holder after the time specified in the aforesaid condition and he pleaded that the condition was void in view of section 28 of the Contract Act. This contention was repelled by the learned Judge who pointed out that the effect of the condition was that the plaintiff was not limited as to the time within which he might bring a suit but that the restriction was on the time during which the Company would accept the liability for loss.

7. In *G. Rainey v. Burma Fire and Marine Insurance Co. Ltd*[7]*.,* a Division Bench of the Rangoon High Court pointed out the distinction between an agreement which fell within the mischief of section 28 of the Contract Act and one which was outside the pale of its mischief, as follows:

> "'Conditions which clearly and distinctly limit the period within which a suit may be brought are distinctly conditions that are void by reason of the special provision of Section 28, but there is undoubtedly a marked distinction between

[5] AIR 1924 Cal 186 [7] AIR 1926 Ran 3

[6] AIR 1949 Cal 390

> a condition which so limits the time within which a suit may be brought to enforce rights, and one which provides that there shall no longer be any rights to enforce. A man may contract, that on the happening of a certain event, he shall lose all his rights. It cannot be said that such a condition is one that limits the period within which he may seek relief in the ordinary Courts and that therefore it is void condition."

8. In *A.N. Ghose v. Reliance Insurance Co*[8]*.,* Leach J. construed a provision in a policy of fire insurance which stipulated that the company should not be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage, unless the claim was the subject of pending action or arbitration. The suit by the policy-holder was filed more than 12 months after the fire, and there had been no reference to arbitration. The Company resisted the claim but the plaintiff contended that the provision in the policy of fire insurance was in contravention of section 28 of the Contract Act and Article 86 of the Limitation Act and that it was opposed to public policy. These contentions were negatived. After reviewing the case law on the subject his Lordship stated:

> "These cases do not deal with the actual clause with which I am now concerned, but I consider that the same reasoning applies. It is not a case of the clause stating that the insured shall not have the right to sue after 12 months. If it did that, it would, in my opinion, be void, but it is a case where the parties have agreed that in certain circumstances the insurance company shall be under no liability under the policy. The policy holder is not prohibited from bringing a suit, but having brought it the insurance Company is entitled to say : "We are under no liability by reason of the provisions of the policy." I, therefore, hold that the clause in question does not contravene the provisions of Section 28, Contract Act. For the same reasons I hold that it does not offend against Article 86, Limitation Act. I also hold that the clause is not contrary to public policy and does not defeat the provisions of any law."

9. In *Ruby General Insurance Co. Ltd. v. The Bharat Bank Ltd.*[9]*,* Kapoor, J. construed a clause in a fire insurance policy which was in similar terms to that construed in AIR 1934 Rangoon 15 (supra). He also held that the clause was valid and was not hit by the provisions of section 28 of the Contract Act.

10. The Full Bench of the Punjab High Court in *Pearl Insurance Co. v. Atma Ram*[10]*,* exhaustively discussed the authorities on the point and held that a provision in an agreement similar to the one now in question before me was valid and was not hit either by section 28 or by section 23 of the Contract Act. On the question of public policy a recent decision of the Supreme Court in *Gherulal Parakh v. Mahadeodas Maiya*[11]*,* was cited. The following quotation from the judgment of the Supreme Court is apposite:-

> "Public Policy or the policy of the law is an illusive concept; it has been described as "untrustworthy guide", "variable quality", "uncertain one",

[8] AIR 1934 Ran 15
[9] AIR 1950 EP 352
[10] AIR 1960 Pun 236 (FB)
[11] AIR 1959 SC 781

> "unruly horse", etc.; the primary duty of a Court of Law is to enforce a
> promise which the parties have made and to uphold the sanctity of contracts which form the basis of society, but in certain cases, the Court may relieve them of their duty on a rule founded on what is called the public policy; for want of better words Lord Atkin describes that something done contrary to public policy is harmful thing but the doctrine is extended

> not only to harmful cases but also to harmful tendencies; this doctrine of public policy is only a branch of common law, and, just like any other branch of common law, it is governed by precedents; the principles have been crystallized under different heads and though it is permissible for Courts to expound and apply them to different situations, it should only be invoked in clear and incontestable cases of harm to the public; though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is advisable in the interest of stability of society not to make any attempt to discover new heads in these days."

It is not necessary to say more to show that the provision of the contract now in question cannot be held to be opposed to public policy under section 23, of the Contract Act.

11. In view of the current of judicial decisions noticed above it is difficult to say that the provision in the contract in the instant case is void either under section 28 of the Contract Act or under section 23 of it. It was, however, urged that most of the decisions cited above relate to insurance policies and cannot properly be invoked in the case of a contract for supply of goods as in the instant case. I must point out that the principle of law laid down in the decisions already cited will apply equally to all contracts and is not peculiar to the contract of insurance. In fact AIR 1932 Bombay 330 (supra) related to a bill of lading. *Western India Prospecting Syndicate Ltd. v. Bombay Steam Navigation Co. Ltd*[12]*.,* is another case which dealt with a condition in a bill of lading and Shah C.J. applied the same principle of law to that also. It is well to notice in this connection the speech of Lord Dunedin at *Atlantic Shipping and Trading Co., Ltd. v. Louis Dreyfus and Co*[13]. The arbitration clause before the House of Lords in that case was to the following effect:

> "A claim must be made in writing and claimants' arbitrator appointed within three months of final discharge and where this provision is not complied with the claim shall be deemed to be waived and absolutely barred."

Said Lord Dunedin:

> "It goes on however, to say that if the claim is not made and the arbitration started within a certain time the claim is to be held to be abandoned. Now, if it were illegal to arrange that a claim should not be made 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

[12] AIR 1951 Sau 83

[13] pp.255, 256 of (1922) 2 AC 250

> 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? All it comes to is this : I stipulate that you shall settle your differences with me by arbitration and not by action at law, and I stipulate that you shall state your differences and start your arbitration within a certain time or you shall be held to have waived your claim."

12. I do not think that there is any force in the contention that the principle of law laid down, for instance in AIR 1914 Bombay 225 (2) (supra) will not apply to the instant case. It follows from the foregoing that the Court below was right in holding that clause 12 of the contract between the parties in the present case has deprived the plaintiff petitioner of his right to maintain an action for damages against the respondent. The revision, therefore, fails and is dismissed with costs.
Revision dismissed.