

BOMBAY HIGH COURT

The Baroda Spinning and Weaving Co. Ltd

Vs.

The Satyanarayan Marine and Fire Insurance Co. Ltd

O.C.J. Appeal No. 75 of 1912

(Basil Scott, Kt., C.J. and Batchelor, J.)

19.08.1913

JUDGMENT

Basil Scott, Kt., C.J.

1. One of the conditions in the policy of fire Insurance sued on by the plaintiffs is 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 this policy shall be forfeited."

2. The claim on the defendants was rejected on the 20th of April 1911, but the suit was not commenced till the 14th of August 1911. Upon this ground the suit was dismissed in the lower Court. That such a condition is not unreasonable or opposed to public policy is conceded by the appellants' counsel and can hardly be disputed in view of the remarks of the Judicial Committee in *Home Insurance Company of New York v. Victoria-Montreal Fire Insurance Company*¹ But it is argued that the condition is void as an agreement of the nature described in Section 28 of the Contract Act since it limits the time within which a party to the contract may enforce his rights under the contract by the usual legal proceedings. The section contemplates the suspension permanently or temporarily of the usual remedies for the enforcement of legal rights. It aims at the prohibition of agreements which could only operate so long as rights were in existence. The argument of the appellants' counsel was that the forfeiture clause was equivalent to an agreement that no Court should entertain any suit on the policy unless commenced within three months of the rejection of the claim. The steps in his argument were : Section 3 of the Limitation Act indicates that the law of Limitation cannot be modified by agreement of parties as it can in England ; that there is no distinction under that Act between rights and remedies ; and that a conditional agreement to forfeit rights within the period within which the remedy is not barred by the Limitation Law is a void agreement.

3. I cannot accept the proposition that there is no distinction in India between rights and

remedies. Section 28 of the Limitation Act shows the cases in which the loss of the remedy will destroy the right but that does not cover suits for money such as we are now concerned with. On the other hand the loss of the right always involves the disappearance of the remedy- a very material consideration in the case of a conditional forfeiture of all benefit under a policy.

¹[1907] A.C. 59

4. In my opinion Section 28 of the Contract Act is aimed only at covenants not to sue at any time and covenants not to sue for a limited time, which had given rise to difficulty in England : See the judgment of the Exchequer Chamber in *Ford v. Beech*² *Beech v. Ford*³ *Gibbons v. Vouillon*⁴ *Newington v. Levy*⁵ and the judgments in *Slater v. Jones*⁶ A conditional release or forfeiture was a very different thing from a covenant not to sue, although in order to avoid circuity of action a covenant not to sue was sometimes held to be equivalent in effect to a conditional release. For this reason I share the doubt of Beaman J., as to the correctness of the decision in *Hirabhai v. Manufacturers Life Insurance Coy*,⁷ where the agreement was that-" No suit shall be brought against the Company in connection with the said policy later than one year after the time when the cause of action accrues." As however the condition of forfeiture which we have to deal with here is not in my opinion within the scope of Section 28, I would affirm the decree, and with costs, for the reasons given by the learned Judge for disallowing costs to the successful defendants do not appear to me adequate.

Batchelor, J.

5. This suit was brought by the plaintiff-Company to recover from the defendant-Company a sum of ₹ 4,297-13-6/- as the amount payable by the defendants under a policy of insurance issued by them to the plaintiffs. Numerous defences were raised, but the suit was dismissed by Beaman J. upon a preliminary issue. That issue arose upon clause 12 of the conditions of the policy, which provided, inter alia, 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 this policy shall be forfeited." The facts admittedly are that the plaintiff-Company's claim was made and rejected by the defendants, and that this suit was not commenced until after the expiry of three months after such rejection. The suit was, however, instituted within the period allowed by the law of limitation ; consequently, so far as regards the preliminary issue, the suit is free from objection unless the defendants can successfully rely, as they seek to rely, upon the special terms of clause 12 of the conditions. For the plaintiffs it was contended that the provisions of this clause, as cited above, could not be pleaded in bar of the suit because those provisions constituted a void agreement under Section 28 of the Contract Act. The learned Judge below, though with expressed reluctance, accepted the argument for the defendants holding himself bound to do so by the decision of the Bench in *Hirabhai v. Manufacturers Life Insurance Co*⁸., He accordingly made a decree dismissing the suit, and from that decree the present appeal is brought.

6. The point involved, though in itself a short one, and not, I think, susceptible of much useful elaboration, cannot be said to be free from difficulty. We have to make our election between two

rival arguments, each of which may be said to possess at least plausibility. As a member of the Bench by which Hirabhai's case was decided, I wish shortly to explain the effect produced on my own mind by the somewhat more thorough argument of which we have had the advantage in this appeal, and by the further consideration which I have been able to give to the question.

²(1848) 11 Q.B. 842

⁴(1849) 8 C.B. 483

⁶(1873) L.B. 8 Ex. 186

³(1848) 7 Hare 208

⁵(1870) L.R. 6 C.P. 180

⁷(1912) 14 BOMBAY LR 741

⁸(1912) 14 BOMBAY LR 741

7. Section 28 of the Contract Act provides 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.

8. The phrase " thus enforce his rights " refers, I understand, to the enforcement " by the usual legal proceedings in the ordinary tribunals."

9. 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 rights, 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. v. Brojo Nath Shaha*⁹ though it must be admitted that that decision is of no direct assistance, since the question of the effect of Section 28 of the

Contract Act on such agreements was not expressly considered.

10. It was conceded in argument that in England the agreement in clause 12 would be perfectly valid; and it cannot, I think, be contended that Insurance Companies in India have less need than such companies in England of the protection afforded by an agreement for the acceleration of legal proceedings to be brought against them. That being so, there is the less reason to suppose that the Legislature intended Section 28 to have the far-reaching effect for which the plaintiffs contend. I am aware that, under the authority of the *Bank of England v. Vagliano Brothers*¹⁰ we must be very cautious how we have recourse to the pre-existing state of the law for the purpose of interpreting

⁹I.L.R.(1909) Cal. 516

¹⁰[1891] [A.C.] 107

Section 28 of the Contract Act; but in deprecating any general practice of that sort Lord Herschell added that "if a provision be of doubtful import, such resort would perfectly legitimate." I infer, therefore, that in this case it is permissible to glance at what was the state of the law in England prior to 1872 when the Indian Legislature undertook the codification of the law of contract. Reference to the authorities will, I think, disclose that there was much complexity in the law as to the validity of a covenant not to sue : see Baron Parke's judgment in *Ford v. Beech*¹¹ It was there held that a covenant not to sue at any time, though not in terms releasing the debtor, yet operated as a release upon the ' principle of avoiding circuitry of action. But a covenant not to sue for a limited time operated only as a covenant, and could not be pleaded as a release : *Thimbleby v. Barron*¹² while a covenant not to sue for a limited time, with a condition suspending the right of action during that time, was construed as a conditional release and could be pleaded in bar of a suit brought within the time : *Walker v. Nevill*¹³ There were also, as the decisions show, other incidental matters of much difficulty in this branch of the law, and I am inclined to think that the genesis of 3.28 is to be found in the Indian Legislature's desire to sweep away the refinements of the then English law and to enact for India a simpler and more suitable rule. The two prohibitions in the section certainly seem to follow the distinction made in the English cases, and, if that is so, the prohibition of the limitation of time within which a party may enforce his rights follows the English doctrine that a covenant not to sue for a limited time does not amount to a release. And if Section 28 be read as a Whole, and compared with the effect of such decisions as I have noticed, it seems a probable inference that the Indian Legislature considered it would be simpler, and therefore more convenient, to brush away the somewhat fine distinctions of the English law by laying down the broad general rule that all agreements should be void which either absolutely restrict a contracting party's right to resort to the Courts or merely limit the time within which the rights should be enforced; in that case the phrase as to limiting the time would necessarily bear the same meaning which it has in the English Court's judgments, the meaning namely, that it is not open to a party to covenant that, while his rights subsist, he will diminish the period within which he shall be at liberty to sue. These considerations, therefore, appear to me to afford an additional reason for the conclusion that the language of Section 28 has been carefully chosen so as to convey the narrower meaning to which alone the words are apt and appropriate.

11. For these reasons I agree that the decree under appeal should be affirmed. I concur also in the order as to costs, as I do not find sufficient materials on the record to justify the order depriving the successful defendants of their costs.

12. It remains only to add a word as to *Hirabhai v. Manufacturers Life Insurance Co.*(1). If appears to me that the case was rightly decided on the view which Chandavarkar J. and I took of the meaning of the agreement; but I recognize that there are difficulties in the way of holding that the words of the agreement there were properly susceptible of that meaning.

¹¹(1848) 11 Q.B. 871

¹³(1864) 3 H. & C. 403

¹²(1838) 3 M. & W. 210