National Insurance Co. Ltd vs Sujir Ganesh Nayak & Co. & Anr on 21 March, 1997

Equivalent citations: (1997) 2 CPJ 1, AIR 1997 SUPREME COURT 2049, 1997 AIR SCW 1871, (1997) 4 JT 179 (SC), 1997 (4) SCC 366, 1997 (3) SCALE 228, 1997 (3) ADSC 677, (1997) 3 SCR 202 (SC), 1997 ADSC 3 677, 1997 (4) JT 180, (1997) 2 CPR 21, 1997 (3) SCR 202, (1997) 2 RAJ LW 177, (1997) 2 TAC 206, (1997) 2 RECCIVR 518, (1997) 1 ACC 537, (1997) 2 MAD LJ 17, (1997) 1 MAD LW 836, (1997) 26 CORLA 261, (1997) 3 ICC 73, (1997) 3 SCALE 228, (1997) 89 COMCAS 131, (1997) 2 CIVLJ 261, (1997) 2 CPR 306, (1997) 2 CURCC 241, (1997) 2 KER LT 54, (1997) 4 SCJ 196, (1997) 4 SUPREME 615, (1997) ACJ 816

Bench: K.S. Paripoornan, Sujata V. Manohar

PETITIONER:
NATIONAL INSURANCE CO. LTD.

Vs.

RESPONDENT:
SUJIR GANESH NAYAK & CO. & ANR.

DATE OF JUDGMENT: 21/03/1997

BENCH:
K.S. PARIPOORNAN, SUJATA V. MANOHAR

ACT:

HEADNOTE:

JUDGMENT:

J D G M E N T AHMADI, CJI:

Special Leave granted.

The respondent No.1 Sujir Ganesh Nayak & Company is a registered partnership with its head office at Quilon carrying on business in import and export of Cashew. It has

four factories at Kunnikode, Mulavana, perumpuzha and Ayathil for processing cashew. The respondent No.1 obtained two fire policies from the appellant Insurance Company dated 5.1.1976 and 2.5.1977 both for a period of twelve months, and for the amount of Rs. 6,00,000/- and Rs. 1,20,000/- respectively. Both the policies had a Riot and strike Endorsement to the following effect:

"Riot & Strike Endorsement-In consideration of the payment of the sum of Rs.... additional premium, it is hereby agreed and declared that notwithstanding anything in the written policy contained to the contrary the insurance under the policy shall extend to cover Riot and strike damage which for the purpose of this endorsement shall mean (subject always to the special conditions hereinafter contained). Loss of or damage to the property insured directly caused by:-

1. The act of any person taking art together with others on any disturbance of the public peace (whether in connection with a strike or lock-out or not) not being an occurrence mentioned in condition 6 of the special condition thereof.

2. The action of any lawfully constituted authority in suppressing or attempting to suppress any such disturbance or in minimising the consequences of any such disturbances.

3. The willful act of any striker or locked out worker done in furtherance of a strike or in resistance to a lock-out.

4. The action of any lawfully constituted authority in preventing or attempting to prevent any such act or in minimising the consequences of any such act."

The Special condition No.5 (i) (b) which is relevant for the determination of the appellant's case is as under:

"SPECIAL CONDITIONS For the purposes of this endorsement but not otherwise there shall be substituted for the respectively numbered Condition of the policy the following:-

CONDITION 5.

(i) This insurance does not cover :-

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(a)       ...       ...       ...
(b)  Loss or  damage resulting from
total or  partial cessation of work
or the retarding or interruption or
cessation   of   any   process   or
operation.
(c)       ...       ...       ...
(d)       ...       ...       ...
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(e) ... ...

> The workers of the respondent No.1 raised a demand for hike in wages during the period there was no work and this demand led to a strike. The matter was taken up by the District Labour officer for conciliation and was thereafter dealt with by the Labour Commissioner as well as by the Minster for Labour. The striking workers physically obstructed the movement of goods . By a letter dated 28.4.1977, the respondent No.1 informed the appellant that the staff members and labour in its factories have gone on strike from 26.3.1977 and that the striking workers have restricted the movement of the goods lying in the baskets are exposed to the risk of deterioration and damage. By a letter dated 10.5.1977, the appellant communicated to the respondent No.1 that the loss sustained by the respondent No.1 was not covered by the policy. The respondent No.1 by a letter dated 17.8.1977 asked the appellant for an advance Payment of Rs. 4,00,000/- and by another letter dated 25.8.1977 asked for payment of Rs. 4,28,827.01p. By the letter dated 22.9.1977, appellant reiterated that in view of condition 5(i)(b) of the Riot and strike Endorsement, the Insurance Company had no liability for the loss incurred by the respondent No.1. On 25.10.1978, the respondent No.1 served a legal notice. The suit for recovery of the claim was filed on 2.6.1980.

The appellants contested the suit inter alia on the ground that the suit was barred by limitation as well as by condition No. 19 of the policy and on the ground that the claim made by the respondent No.1 was not covered by the policy. Condition 19 of the policy which was set up by way of defence runs as under:

> "Condition No. 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."

On behalf of the respondent No.1, it was contended that Condition No. 19 was hit by section 28 of the contract act Inasmuch as it seeks to shorten the time within which legal action can be commenced from that provided under the law of limitation. Further, the respondent No. 1 reiterated that the claim was covered by the two policies. The Trial Court, vide its judgment dated 30th June, 1986, observed that condition No. 19 was not hit by section 28 of the contract Act and further that the suit was otherwise barred by limitation as the claim was repudiated by the letter dated 10.5.1977 and the suit filed on 2.6.1980 was after a lapse of more than three years from the date of such repudiation . The Trial Court also found that the damage was not covered by the Insurance Policy in view of the special Condition 5(i)(b) of the Riot and Strike Endorsement. In appeal, the High Court allowed the claim holding that the condition No. 19 could not limit the period during which the suit was to be filed and that it simply required the respondent No.1 to make its claim known within the period of 12 months from the happening of the loss or damage. It also reversed the finding of the Trial Court that the claim was not covered by the two policies. so far as limitation is concerned, the High Court further observed that the letter dated 10.5.1977 could not be read as a letter of repudiation of claim as by then no claim whatsoever was preferred by the respondent No.1 and

further that in any case the last date of three years from 10.5.1977 fell within the summer vacation and the suit filed on 2.6.1980 on reopening of the Court was within limitation.

In the present appeal, the appellant contended that condition No. 19 extinguishes the right of the assured as the suit was not filed within 12 months from the day when the loss or damage had occurred. It is further reiterated in the appeal that special Condition 5(i)(b) of the Riot and Strike Endorsement excludes the claim of the respondent No.1 from the scope of two Insurance Policies.

Section 28 of the contract Act may be quoted now before going into further discussion :

> "Section 28. 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."

On a plain reading of the relevant part of this provision it seems clear that if the agreement seeks to shorten the time from that prescribed by law, it would fall within the mischief of this provision. Before the High Court, the appellant relied on a full Bench decision of the Punjab High Court in Pearl Insurance Company V. Atmaram (AIR 1960 Punjab 236) Where in it was held that such a clause did not limit the time within which the insured shall enforce his rights but only limited the period during which the contract will remain alive and hence such a clause was not hit by section 28 of the contract Act. The respondent No.1 on the other hand placed reliance on Secretary, Taluka Agricultural Produce Cooperative Marketing Society Ltd. V. New India Assurance Company Limited(1989 ACJ 26) wherein the High Court of Karnataka held that the period of limitation despite such a Condition of twelve months was three Years as provided for in Article 44 of the Limitation Act. The High Court followed the decision of this court in Food Corporation of India V. New India Assurance Co. (19994) 3 sec 324, wherein the real nature of the restriction placed by section 28 was examined and the effect of such a clause in reducing the period of limitation was considered. Before us, two other decisions cited were, The Vulcan Insurance Co. Ltd. V. Maharaj Singh and Another, (1976) 1 SCC 943; and The Baroda spinning & Weaving Co. Ltd. V. The Satyanarayan Marine & Fire Insurance Co. Ltd., 1913(15) Bombay Law Reporter 948. In the letter case, the Clause in question read thus:

> "12. Forfeiture -- If the claim be made and rejected and an action or suit be not commenced within three months after such refection all benefit under this policy shall be forfeited."

The clause meant nothing more than this, namely, if the suit is not filed within three months of rejection of the claim, the rights under policy will be forfeited. The Bombay High Court following certain English decisions held that the contract Act as the Clause did not restrict the limitation but merely extinguished the right.

In Baroda Spinning & Weaving Co. Ltd. (supra), in the High Court of Bombay the five insurance policies provided that 'if the claim be made and rejected and action or suit cannot be commenced

within three months after such refection all benefits under the policy shall be forfeited'. On the suit being filed three months after the rejection of the claim the High Court held that the said condition was not within the scope of section 28 of the contract Act since that section spoke about enforcement of a subsisting right and not a right which stood extinguished on the repudiation of the claim and the action not having been commenced within a period of three months. In taking this view the High Court referred to an earlier decision in Hirabhai v. Manufacturers Life Insurance Company (1912) 14 B.L.R 741 wherein the clause was:

> "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."

The view taken was that the clause was intended to convey that if no suit was instituted within a year than neither party shall be regarded as having any subsisting right against the other to enforce the contract. The correctness of this view was doubted as it was felt that the clause did not operate as a release of forfeiture of the rights of the assured but was intended to limit the time for filing of the suit and fell within the mischief of section 28 of the contract Act and was therefore void. Batchelor J. who was party to the decision in Hirabhai's case also agreed that the view taken in that case was difficult to sustain. It would seem from these two decisions that unless the language of the clause in a contract is susceptible of the meaning that it releases or forfeits the rights on the expiry of the stipulated period the same would fall within the net of section 28 if the clause merely restricts the period within which action should be commenced.

However, strong reliance was placed on the decision of this Court in Vulcan Insurance Case (supra) in which clause 19 of the policy was verbatim the same as in the present case. Relying on that clause this Court observed in paragraph 23 as under:

> "We do not propose, as it is not necessary, to decide whether the action commenced by respondent No.1 under section 20 of the Act for the filling of the arbitration agreement and for appointment of the arbitration agreement and for appointment of arbitrators was barred under clause 19 of the policy. It has been repeatedly held that such a clause is not hit by section 28 of the contract Act and is valid".

Counsel for the respondent contended that the observation was clearly in the nature of an obiter dicta and did not lay down the correct law. That was a case in which respondent No.1 had entered into a contract with respondent No.2 for taking advances of the security of the factory Premises, plant, machinery, stock-in-trade, etc. A mortgage was executed by him in favour of the respondent-bank. The bank insured the mortgage properties from time to time with the appellant-company under different insurance policies, the terms whereof being same . Afire broke out in the factory premises and the insurance company was duly informed . The surveyor estimated the loss at Rs. 4620/- without prejudice to the terms and conditions of the policy . After some correspondence, the appellant-insurance company repudiated the claim under the terms of the policy. Thereupon respondent No.1 wrote to the insurance company that since it had repudiated the claim , a difference had arisen between the parties and appointed a sole arbitrator to decide the dispute. At the same time it mentioned that if the insurance company desired to nominate an

arbitrator it may do so . The insurance company however took the stand that since it had repudiated the claim, the arbitration clause in the policy was rendered inoperative and no arbitration proceedings could legally be initiated. This led to the respondent No.1 filing an application under section 20 of the Arbitration Act, 1940. The application was contested. The trial court held that on the repudiation of the claim under clause 13, the dispute fell within the scope of the arbitration clause 18 but was barred by limitation in view of clause 19. on appeal, the Delhi High Court held that clause 18 was restricted in its scope and did not attract all kinds of disputes and differences yet reference to he arbitration is not ousted and the arbitration clause remains operative unless barred by clause 19 and in the instant case it was not barred since respondent No.1 had commenced the arbitration process which was pending when the time ran out. The High Court, therefore, reversed the trial court order and remanded the case for appointment of arbitrators. The insurance company carried the matter to this court. While dealing with the submissions at the Bar, this court paragraph 8 of the judgment observed that only one point need be decided, namely, whether in view of the repudiation of the liability under clause 13, a dispute was raised which could be referred to arbitration ? It also said that incidentally reference will be made to the other question as to whether the proceedings were barred by clause 19 of the policy? This court answered the first point in the negative and hence no decision was necessary on the second point but the court answered it only incidentally. This is also clear from the observation extracted earlier.

The next case we would like to notice is the Food Corporation of India (supra); the abridged factual matrix is that it, as principal, had appointed millers for procuring, hulling and supplying rice on certain conditions. On behalf of these millers the respondent insurance company executed fidelity Insurance Guarantee in favour of the appellant hereunder the former undertook to indemnify the latter for any loss suffered by the appellant by reason of branch of agreement. Under the terms of the guarantee when the appellant found that it had suffered losses on account of breach of terms and conditions of their respective contracts by the millers it made demands on the insurance company to indemnify it. These demands were made well before the expiry of six months from the date of termination of the contract with the concerned miller. The insurance company did not satisfy the demands which led the appellants to file suits to recover the losses. Those suits were decreed in favour of the appellants against the respondents including the insurance companies. The insurance companies filed appeals in the High Court which were allowed holding that the terms of the guarantee concerned in each case did not entitle the appellant to sue the insurance companies after 'six month' period from the date of termination of the respective contracts with the rice millers. The matter was therefore carried in appeal to this Court.

Under the fidelity Insurance Guarantee the concerned insurance company had undertaking to make good the loss upto the specified limit when claimed by the appellant, of course subject to the restriction "that the Corporation shall have no rights under this bond after the expiry of (period) six months from the date of termination of the contract, i.e., the contract with the rice miller. On a plan reading of this restriction clause, it is clear that if the appellant desired to enforce its rights under the contract, if should do so within 'six months' of the termination of the contract and if it failed to do so its right under the contract would extinguish. It was therefore, imperative for the appellant to lodge its claim with the insurance company within the period of six months to assert its rights failing which the right would stand forfeited. This Court, therefore, held that the suits were barred under

the restriction adverted to since they where admittedly filed after the rights stood extinguished on the expiry of six months after the insurance company repudiated the demands.

Sahai, J. who wrote a separate but concurring judgment extracted the clause of the Fidelity Insurance Guarantee (which we have extracted earlier) and then posed the question 'what does it mean? What is the impact of Section 28 of the Contract act on such clause? pointing out the said section 28 was a departure from the English law (there is no such statutory bar in English law) the learned Judge observation that:

> "Even though the phraseology of section 28 is explicit and strikes at the very root by declaring any agreement curtailing the normal statutory period of limitation to be void the courts have been influended by the distinction drawn by English Courts in extinction of right by agreement and curtailment of limitation".

Referring to the language of the various terms of the agreement, the learned judge holds in paragraph 8 thus:

> "From the agreement i is clear that it does not contain any clause which could be said to be contrary to Section 28 of the Contract Act nor it impose any restriction t file a suit within six months from he date of determination of the contract as claimed by the company and held by the High Court. What was agreed was that the appellant would not have any right under this bond after the expiry of six months from the date of the termination of the contract. This cannot be construed as curtailing the normal period of limitation provided for filing of the suit. If it is construed so it may run the risk of being violative of Section 28 of the Contract Act. It only puts embargo on the right of the appellant to make its claim known not later of contract. It is in keeping with the principle with has been explained in English decisions and by our own court that the insurance companies should not be kept in dark for long and they must be apprised of their liabilities immediately both for facility and certainty. The High Court erroneously construed it as giving up the right of enforceability of its claim after six months."

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 a 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 provides for the forfeiture or waiver of the right itself if no action is commenced with in 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 ca 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.

Now let us first notice the view expressed by the High Court in the impugned judgment. The finding on this issue is available in para 12 of the judgment which runs as under:

> "In the instant case, clause 19 of the contract of insurance only states that the insured shall enforce his claim before the expiration of twelve months of the date of happening of the damage. It does not expressly prohibit the insured from filing a suit beyond that period. Under the Limitation Act, there is a specific article for filing a suit for damages due under the contract of insurance. Any clause in the contract of insurance curtailing the period of Limitation will be hit by Section 28 of the contract of insurance is construed in such a way, it limits the period of limitation to twelve or damage and it would seriously prejudice the rights of the insured. The insurer can very well defeat the claim of the insured by rejecting the claim after the period of 12 months from the date of happening of the loss."

The High Court started with the analysis as to whether the clause restricts the period of limitation or extinguishes the right but ultimately rest its conclusion on the finding that the contract is unconscionable-a ground which is not contended for by the parties. The high Court further proceeds to say:

> "Under Article 44(b) of the Limitation Act, the period of limitation runs from the date of rejection of the claim. Thereafter, it is clear that clause 19 of the contract of insurance only prescribes the period during which the claim is to be preferred by the insured before the insurance company and it does not, in any way, curtail the period of limitation prescribed under the Limitation Act for filing a suit of the nature."

The clause before this Court in Food Corporations 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 hat 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 Contract Act. Such clause are generally found in insurance contracts for the reason the 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.

Keeping the above legal distinction in mind we may not consider the facts of the present case. The two insurance policies were both for a period of twelve months and bore a 'Riot and Strike' endorsement convering damage caused by riot and strike to the property of the insured. On account of the strike in the unit from 26.3.1977, the production had come to a halt and as the management was not allowed to remove the goods the unit suffered heavy damage and loss for which a claim was made which claim was rejected by the insurer. The insured served notice and then filed a suit. One of the grounds on which the suit was contested by the insurance company was based on the language of clause 19 and 12 extracted earlier.

Clause 19 in terms said that in no case would the insurer be liable for any loss or a 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 of damage, the insurance company shall cease to be liable. There is not 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 letter of 28.4.1977 and by letter dated 1.5.1977. The insured was informed that under the policy it had not liability. this was reiterated by letter dated 22.9.1977. Even so more than twelve months after on 25.10.1977 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 Volcan Insurance case (supra) while interpreting a clause couched in similar terms this court said: " It has been separately held that such a clause is not his 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.

For the foregoing reasons, we allow this appeal, set aside the decree, order and judgments of the courts below and direct that the suit shall stand dismissed with no order as to costs throughout.