(1936) 04 CAL CK 0016

Calcutta High Court

Case No: Suit No. 1990 of 1935

Mayadas Bhagat		APPELLANT
	Vs	
Commercial Union Assurance Co., Ltd.		RESPONDENT

Date of Decision: April 6, 1936

Judgement

Monair, J.

On the 12th November, 1935, a suit was filed by Maya Das Bhagat against the Commercial Union Assurance Co., Ltd., and Lloyds Bank, Ltd., for a declaration that the settlement effected between the Defendant Company and the Defendant Bank in respect of the amount due under the Plaintiff''s policy of insurance with the Defendant Company was not binding on the Plaintiff and for a decree for the amount claimed by the Plaintiff under the said policy of insurance. The Defendant Company have brought the present application supported by the Defendant Bank for an order that the plaint be rejected on the ground that it discloses no cause of action and is barred by limitation and res judicata.

2. The plaint alleges that on January 22nd, 1930, the Plaintiff insured his stock-in-trade at Srinagar in Kashmir with the Defendant Company for Rs. 20,000, and assigned the insurance policy to the Defendant Bank as additional security for the Plaintiff''s overdraft account.

3. One week later, on January 29th, a fire occurred on the Plaintiff''s premises and the goods covered by the policy were destroyed to the value, as alleged, of Rs. 18,370. Intimation of the fire and of the loss was given to the Defendant on January 30th. and the Defendant Company took possession of the salvaged stock on the same date.

4. That on the 12th February the Defendant Company informed the Plaintiff that it had appointed an assessor to investigate the loss, and on the 18th February the Plaintiff gave particulars in writing of the loss.

5. On the 10th March the Plaintiff refused to accept a sum of Rs. 7,500 at which the assessor was said to have valued the loss.

6. The Plaintiff then alleges that a dispute had arisen as to the amount of loss which entitled him under the policy to seek arbitration.

7. The Defendant Company refused to join in the arbitration and the Plaintiff''s arbitrator on the 27th October, 1930, awarded the Plaintiff Rs. 18,370 for the loss of goods and Rs. 1,000 for costs.

8. Paragraph 8 of the plaint summarises proceedings in the Kashmir Courts, from 25th November, 1930, to July 1934. The Plaintiff applied before the District Judge to file the award. His application was refused but on appeal the High Court remanded the matter to the District Judge for trial. The District Judge again refused to file the award, and the High Court dismissed an appeal from the order of the District Judge on 17th July, 1934.

9. On July 1st, 1934, the Plaintiff owed the Defendant Bank Rs. 2.279/8/5, and in August, 1934 the " agent and representative of the Defendant Company and of the Defendant Bank, while acting as the agent and representative of both the Defendants, wrongfully collusively and in fraud of the Plaintiff purported to settle the Plaintiff''s claim under the said policy of insurance for the sum of Rs. 2,279/8/5....."

10. The Plaintiff then alleges that by this " wrongful collusive and fraudulent act" he had suffered loss and damages amounting to Rs. 16,090/7/7.

11. Paragraph 14 of the plaint is as follows:

The cause of action arose partly in Calcutta where the Defendants carry on business and where the proposal for insurance was communicated and accepted and where the said policy was issued and insurance effected and partly in Srinagar where the loss and damage occurred and where the settlement was fraudulently and collusively effected as aforesaid and arose against the Defendant Company on the 20th January, 1930, and on the 27th October, 1930, No part of the cause of action against the Defendant Company is barred by limitation by reason of the proceedings taken as referred to in paragraph 8 of the plaint.

12. The prayers are for a declaration that the said settlement is not binding on the Plaintiff and for a decree for the sums alleged as loss and damage.

13. The application is supported by an affidavit and the Plaintiff has filed an affidavit in opposition; but at the outset it was contended; by the Plaintiff that on an application of this nature the Court is not entitled to look into affidavits and that the application must be decided on the plaint alone.

14. Mr. Isaacs for the Defendant Company contends that he is entitled in any event to refer to the plaint and the documents mentioned in the plaint and in arguing his

case he has referred to the plaint, the policy of insurance and the judgments of the Kashmir Courts before whom the matter has already been agitated.

15. Reference has been made during the arguments to Or. 25 of the Rules of the Supreme Court in England and to cases decided under those Rules, more especially to Or. 25, r. 4 of the R. S. C, which provides that the Court or a Judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in case of the action or defence being shown by the pleadings to be frivolous or vexatious the Court may order the action to be stayed or dismissed or judgment to be entered accordingly, as may be just.

16. The rule which is called in aid in similar applications under our CPC is Or. 7, r. 11, which provides that a plaint shall be rejected,

(a) where it does not disclose a cause of action.

17. In explaining the meaning of " cause of action " Lord Watson said in Mt. Chand Kour v. Partab Singh L.R. 15 I. A. 156: s. c. I, L. R. 16 Cal, 98 (1888):

The cause of action has no relation whatever to the defence which may be set up by the Defendant nor does it depend upon the character of the relief prayed for by the Plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action or in other words to the ''media'' upon which the Plaintiff asks the Court to arrive at a conclusion in his favour.

18. It is contended on behalf of the applicant that the Indian rule is wider than the English.

19. The English rule is entitled:

Proceedings in lieu of demurrer

and in this connection it is interesting to refer to the words of Lord Moulton in Seth Kanhya Lal v. National Bank of India Ltd. L. R. 40 I. A. 56: s. c. 17 C. W. N. 541 (1913). There the Respondent Bank pleaded that the " suit as framed will not lie " and it was admitted " that this plea is in substance identical with the more usual form of plea, namely that the plaint discloses no cause of action."

20. The District Judge heard an argument on the preliminary plea and decided in favour of the Defendant and dismissed that portion of the claim which related to the recovery of money.

21. The Chief Court dismissed an appeal from that order, and from that decision an appeal was taken to the Privy Council. At page 62 of the report, Lord Moulton says:

Both the District Judge and the Chief Court have clearly stated that the decisions which they have given are based on the allegations in the plaint, and that for the purposes of such decisions these allegations mast be taken to be true in fact. This is a necessary consequence of the nature of the plea, and the same understanding

must apply to the present judgment. In asking the Court to decide an issue like the present (which is essentially a demurrer by whatever name lit may be called) the Defendants must be taken to admit for the sake of argument that the allegations of the Plaintiff in his plaint are true modo et forma In so doing they reserve to themselves the right, to shew that these allegations are wholly or partially false in the farther stages of the action, should the preliminary point be overruled, but so far as the decision on the preliminary point is concerned everything contained in the plaint mast be taken to be true as stated.

22. It will be seen that the noble and learned Lord refers to proceedings under the Indian rule as in the nature of demurrer and stresses the fact that the allegations in the plaint must be taken to be true. There is no suggestion that the Defendant is entitled on the preliminary plea to refer to anything outside the plaint. In the result the appeal was allowed and the case was remitted to the Chief Court to be sent to the District Judge to hear and determine.

23. The English decisions under Or. 25, r. 4 of the R. S. C. [Attorney-General of the Duchy of Lancaster v. L. & N. W. Ry. (1892) 3 Ch. 274 and Republic of Peril v. Peruvian Guano Co. [1887] 36Ch.Div. 489] lay it down in unmistakable language that the Court in arriving at a decision on the preliminary point is not entitled to go outside the pleading, and in my opinion the Court is similarly restricted in deciding an application under Or. 7, r. 11 of the Code of Civil Procedure.

24. Assuming this to be so Mr. Isaacs argues that the plaint in suit sets out the legal effect of the policy and the judgments of the Kashmir Courts.

25. In my view reference may be made to the policy which is in terms incorporated in the plaint, but the effect of the judgments appears to me to have been deliberately withheld and the draftsman has confined himself to setting out the mere outcome of the litigation at each stage. In my opinion the Court is not justified in taking into consideration the judgments of the Kashmir Courts for the purpose of deciding this application.

26. Finally, Mr. Isaacs contended that the Court under its inherent jurisdiction was entitled to look not merely at the pleadings but even at the affidavits and he relied on the statements to that effect in the English decisions.

27. The answer is that this application in form comes under Or. 7, r. 11, and must be confined to the narrower horizon which has been prescribed for arriving at a decision under that rule.

28. The main grounds on which the plaint is attacked are three:

(1) That the matters set out have already been decided by the Kashmir Courts;

(2) That the suit is barred by limitation under the terms of the policy; and

(3) That the suit is barred by limitation under the statutory law of limitation in India.

29. If I am right in my decision that the Court is not entitled to look at the judgments of the Kashmir Courts I am debarred from arriving at any conclusion on the question of res judicata, but as this matter may go further and my decision may not be upheld I record my finding on the arguments that have been addressed to me on this point.

30. It is necessary first to set out the material clauses of the policy of insurance-

Cl. 10.

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 farther time as the Company may in writing allow in that behalf, deliver to the Company

(a) A claim in writing for the loss and damage containing as particular an account as may be reasonably practicable of all the several articles or items of 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.

31. Sub-cl. (5) is immaterial and there follows a provision laying upon the insured the duty of providing all information as to origin and cause of the fire together with a declaration on oath of the truth of the claim.

32. The final paragraph of this clause is important:

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

33. CI. 11 entitled the Company on the happening of any loss to take possession of the damaged property without incurring any liability.

34. CI. 12 provides that "all benefit under the policy shall be forfeited " in certain events, including the following :

If the claim be made and rejected and an action or suit be not commenced within 3 months after such rejection or (in case of an arbitration taking place in pursuance of the 17th condition of this policy) within 3 months after the arbitrator or arbitrators or umpire shall have made their award.

35. Cl. 17 provides that if any difference arises as to the amount of any loss or damage, such difference shall independently of all other questions be referred to arbitration.

36. And by that clause there is an express stipulation that it shall be a condition precedent to any right of action or suit upon the policy that the award of the arbitrators of the amount of loss or damage, if disputed, shall be first obtained.

37. Finally by condition 19 the Company is absolved from all liability after the expiration of 12 months from the beginning of the loss or damage unless the claim is the subject of pending action or arbitration.

38. The policy in addition contained what is known as the " Calcutta Fire Insurance Association''s agreed Bank Clause " para. 4 of which provides that any adjustment or settlement in connection with a dispute between the Company and the insured, if made by the Bank, shall be valid and binding on all parties insured there under.

39. Before considering whether the matters now in issue arc res judicata it is necessary to refer to the judgments of the Kashmir Courts.

40. The District Court held on the first issue that it had jurisdiction to try the suit. The insured admitted that he did not submit any claim within 15 days in compliance with cl. 10 of the policy and the Court held that the Company had insisted on and had not waived compliance with this provision. The Company''s offer to settle the claim for Rs. 7,500 was ex gratia and was not based on any actual estimate of the loss, nor was it made after the claim of the insured had been submitted. In consequence there was no difference between the parties as contemplated by cl. 17 of the policy and the matter was not fit for reference to arbitration within the meaning of that clause.

41. The Court further found that the arbitrator had exceeded his authority and had been guilty of many irregularities which invalidated the award and that since its pecuniary jurisdiction was limited to Rs. 10,000 there was no jurisdiction to entertain the suit.

42. The High Court of Kashmir on appeal held that the District Court had jurisdiction because the matter had been sent to it on remand; that admittedly no notice had been sent in conformity with cl. 10 and no extension of time had been granted. In the circumstances they dismissed the appeal without considering the other findings of the trial Court.

43. From the above it will be seen that the Kashmir Courts had both come to a decision that the failure of the insured to give the notice contemplated by cl. 10 of the policy invalidated the arbitration proceedings and disentitled the insured to recover the amount found by the arbitrator.

44. In the trial Court witnesses were examined and comment was made on the irregular manner in which the arbitrator had assessed the damage, yet in the present suit the Plaintiff is claiming the exact amount of the award, including the costs thereof, after deducting the payment made by the Company in settling his overdraft with the Defendant Bank. In my opinion it is abundantly clear that the insured having failed to obtain the amount of his award in Kashmir is now seeking to recover the same sum on the same grounds in the Courts of British India.

45. Certified copies of the judgments of the Kashmir Courts have been produced and under sect 14 of the CPC prima facie they are conclusive as judgments of a foreign Court of competent jurisdiction. Moreover the Kashmir Court was the forum chosen by the insured and he contended throughout that it was a Court of competent jurisdiction. Furthermore he has himself referred to those proceedings in his plaint without any suggestion that they were without jurisdiction. I have already pointed out that those judgments were pronounced after receiving evidence and going into the merits of the case. They are accordingly conclusive of the matters adjudicated upon between the parties and in my opinion these are the same matters which are directly and substantially at issue between the parties in the present suit.

46. Mr. Surita refers to sec. 11 of the CPC and contends that the proceedings in Kashmir were not a suit and he relies on the case of Rajmall v. Marut Shivram I. L. R. 45 Bom. 324 (1920); but the provisions of sec. 13 of the CPC declare that a foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties except in certain circumstances which do not apply to this case. The definitions in sec. 2, sub-secs. (5), (6) and (9) of the Code are in my opinion conclusive that the judgments of the Kashmir Courts are foreign judgments and in Guru Charan Sarkar v. Uma Charan Sirkar 26 C. W. N. 940 (1921) a Division Bench of this Court has held that arbitration proceedings would be included within the word " suit" in sec. 11 of the Code and that matters which had been fully dealt with in those proceedings could not be re-opened in a subsequent suit.

47. Mr. Surita next contended that the Kashmir Courts had jurisdiction but that they exceeded their jurisdiction in deciding the applicability of cl. 10 of the policy. But under Sch. II, para. 21 of the CPC the Court is bound to be satisfied that the matter has been properly referred to arbitration and in this connection they were bound to enquire into the questions that arose under cl. 10.

48. The next question that arises is in regard to limitation under the policy, i.e., under the terms to which the parties to the contract of assurance have themselves agreed.

49. Under cl. 12 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, within three months of the award, all benefit under the policy is to be forfeited.

50. Mr. Surita relies on the word " action " which is used again in cls. 17 and 19 and contends that this word is wider than " suit" and refers to any proceedings, including arbitration proceedings, in prosecution of his claim, and he contends that he commenced an action within the meaning of cl. 12 in the Kashmir Courts. I cannot agree with this contention. The Defendant Company is an English Company and I have no doubt that the word " action " is used in the policy as being the word defined in sec. 225 of the Judicature Act 1925 as a civil proceeding commenced by

writ or in such other manner as may be prescribed by rules of Court " and corresponding in meaning to the word " suit" in India.

51. This is clear when we look at cl. 17 which provides that if there is any difference as to the amount of loss it shall be a condition precedent to any right of action or suit upon this policy that an arbitrator''s award of the amount of the loss be first ascertained.

52. An action on the policy cannot include proceedings to enforce the award. It is not clear when a claim was made, but assuming it was made, it was rejected when the Company on the 11th July, 1930, refused to arbitrate on the ground that they had received no notice in compliance with cl. 10, and no suit was brought within three months of such rejection.

53. The Company is also entitled to avoid liability under the provisions of cl. 19 of the policy.

54. The Plaintiff has made serious allegations in his plaint in regard to the adjustment that took place between the Defendants. Fraud and collusion are alleged without any attempt to support those allegations by particulars and the pleading is undoubtedly imperfect in that respect, but the only question pertinent is whether the Defendants are entitled to rely on cl. 4 of the agreed Bank clause and maintain that the settlement once effected cannot be called in question by the insured. The meaning of the clause is clear; it is one of the terms to which they have agreed, and in my opinion they are bound by it and the settlement is conclusive of the dispute.

55. Finally it is contended by the Defendants that the suit must on the face of it fail under the Indian Statute of Limitation.

56. It is agreed that Art. 86 applies and under that Article a suit must be brought within three years from proof of loss.

57. The Plaintiff in para. 14 of his plaint alleges that his cause of action arose on the 29th January, 1930, and the 27th October, 1930.

58. The 29th January, 1930, was the date of the fire and 27th October, the date of the arbitrator''s award.

59. The suit was not instituted until the 12th November, 1935, more than five years after the cause of action arose on the Plaintiffs'' own allegation.

60. To save limitation Mr. Surita contends that he should be entitled to deduct under sec. 14 of the Limitation Act the time during which he has been diligently prosecuting another civil proceeding against the Defendant, namely the proceedings in Kashmir.

61. But here the Plaintiff has to contend with a number of difficulties, for sec. 14 requires that the proceeding shall be founded upon the same cause of action and the Plaintiff in order to avoid the plea of res judicata is bound to contend that the cause of action was different.

62. Again there was no " defect of jurisdiction or other cause of a like nature " to which the Plaintiff can attribute his failure in the Kashmir Courts. Those Courts decided against him on the merits.

63. Finally the Bombay High Court has held See Chanmalpa v. Abdul Wahed, I. L R 35 Bom. 139 (1910) that the word " Court " in sec. 14 applies only to Courts in British India and does not include a foreign Court such as a Court in a Native State. That decision has been followed by the Lahore High Court in the case of Hari Singh v. Muhammad Said I. L. R. 8 Lah 64 (1926), and in my opinion its authority is in no way weakened by the decision of the Privy Council in Ramdutt Ramkissen v. E. D. Sassoon 33 C. W. N. 485 (P. C.) (1929), where the ratio decidendi was as I understand it that an arbitrator might take into consideration the principles of the Limitation Act and exclude from the period of limitation time spent in a previous in fructuous arbitration.

64. The present suit is in my opinion clearly barred by limitation both under the provisions of the policy and under the general law of limitation. In the result the plaint must be rejected and the Plaintiff must pay the costs as of one day''s hearing. The Bank are also entitled to costs as of one day''s hearing.