ORIGINAL CIVIL.

Before Mr. Justice Leach

1933

June 14.

A. N. GHOSE
v.
THE RELIANCE INSURANCE COMPANY
AND ANOTHER.*

Insurance policy—Clause as to non-liability of company after 12 months from date of loss—"Pending action", meaning of—Right to sue, limitation of—Extinguishment of liability after a certain period—Limitation Act IX of 1908), Sch. I, Art. 86—Contract Act (IX of 1872), ss. 23, 28.

A fire insurance policy contained this clause: "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 unless the claim is the subject of pending action or arbitration."

Under this policy certain stock-in-trade was insured. It was destroyed by fire and the suit against the company for damage caused by the fire was filed a year and eight months after the occurrence. In the interval nothing was done except that the company was informed of the fire, claim forms were filled in and sent, the company investigated the cause of the fire and the amount of damage and a formal letter of demand was sent to the company. The company relied on the clause set out above.

Held, that (1) the word "action" referred only to legal proceedings and did not include the investigation by the company which in any case was concluded over twelve months before the institution of the suit; (2) the clause did not prohibit the insured from suing after twelve months, but extinguished the liability of the company under the circumstances; (3) the clause did not offend against Art. 86, Sch. I of the Limitation Act; (4) it was not contrary to public policy and did not defeat the provisions of any law.

Baroda Spinning and Weaving Company v. *Satyanarayan Marine and Fire Insurance Company*, I.L.R. 38 Bom. 344; *G. Rainey* v. *Burma Fire and Marine Insurance Company*, I.L.R. 3 Ran. 383; *Giridharilal* v. *Eagle Star Insurance Company*, 27 C.W.N. 955—*referred to.*

Banerjee for the plaintiff.

Clifton for the defendants.

LEACH, J.—One Abdul Latiff Salay Mohamed, who carried on business at Moulmeingyun, insured his

* Civil Regular Suit No. 624 of 1932.

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stock-in-trade with the defendant companies under two policies, each for Rs. 15,000. The building in which the goods were stored was destroyed by fire on the 5th March 1931. The suit was filed on the 8th November 1932 to recover the sum of Rs. 12,000 the amount of damage alleged to have been caused by the fire. The insured was adjudicated an insolvent in Insolvency Case No. 6 of 1931 of the District Court of Myaungmya and the plaintiff was appointed receiver of his estate.

The insurance companies resist the claim on the following grounds :

1. It was a condition of the policies that the defendants 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 was filed more than twelve months after the fire and there had been no reference to arbitration.

2. It was a further condition of the policies that if the building containing the insured property became unoccupied for a period of more than 30 days the insurance should cease to attach as regards the property unless the insured obtained the sanction of the company signified by endorsement upon the policy. It was averred that the building containing the insured property was unoccupied for a period of more than 30 days in or about the month of February 1931 without the sanction of the defendant companies.

3. The actual loss did not amount to Rs. 12,000 and in any event the plaintiff could only recover from each of the defendant companies half of the actual loss sustained.

By consent I framed the following issues :

1. Are the defendant companies excused from liability under the policies in suit by reason of the fact that the suit was not instituted until after the expiration of twelve months from the date of the fire, there being no arbitration pending ?

2. Was the building containing the insured property unoccupied for more than 30 days in or about the month of February 1931 ?

If so, was the sanction of the defendant companies obtained in that behalf ?

3. If the answer to the second issue is in the affirmative, are the defendant companies free from liability under the policies ?

4. If the defendant companies are liable under the policies, to what relief is the plaintiff entitled ?

It was agreed that the first issue should be taken as a preliminary issue.

The agents of the defendant companies are Messrs. Blackwood, Blackwood & Company, Rangoon, who were informed of the fire by telegram and letter as soon as it occurred. Messrs. Blackwood, Blackwood & Company accordingly sent the insured two claim forms which they requested should be filled up and returned at an early date. On the 16th March 1931 they wrote to the insured reminding him that the claim forms had not been sent in. The claim forms were eventually submitted, although when has not transpired. But nothing turns on this. On the 22nd June 1931 the plaintiff wrote to Messrs. Blackwood, Blackwood & Company informing them that the insured had been adjudicated an insolvent and that he had been appointed the receiver of the insolvent's estate in which capacity he was entitled to receive payment of the insurance money. On the 30th September 1932 the plaintiff wrote a formal letter of demand to the insurance companies, giving them notice that legal proceedings would be instituted should the demand for payment not be complied with. Nothing further appears to have happened until the suit was instituted on the 8th November 1932. Soon after the fire the insurance companies sent their assessor to investigate the cause of the fire and estimate the amount of damage. The assessor completed his investigations by the 6th June 1931.

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The decision on the first issue depends on the construction which is to be placed on the following clause which appears in both policies :

" 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 unless the claim is the subject of pending action or arbitration."

The plaintiff's advocate has put forward three contentions with regard to this clause : (1) The words " pending action " do not refer to a suit, but to any steps which the company might take in the investigation of the claim. (2) The clause is void by reason of the provisions of Art. 86 of the Limitation Act. (3) The clause is also void because it contravenes s. 23 and 28 of the Indian Contract Act. I will deal with these contentions in the order set out.

In my opinion the words " pending action " do contemplate a pending suit. In clause 13 of the first defendant company's policy we find the provision that " 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." Clause 18 deals with reference to arbitration of questions regarding the amount of loss or damage. The clause with which I am now concerned follows immediately after the arbitration clause. There are similar clauses in the second defendant company's policy. It seems to me that the word " action " must refer to legal proceedings. Mr. Bannerji argues that it embraces the steps taken by the defendant companies' assessor. I cannot accept this as being correct, but even if it were correct, the plaintiff would not be within the

period referred to in the clause. The assessor's investigations had been completed nearly 18 months before the suit was filed.

The plaintiff's advocate's contention based on Art. 86 of the Limitation Act is this. The Article provides a period of three years in which a policy-holder may institute a suit to recover what is due on the policy ; the clause in question limits this period, and is therefore void. The clause does not say that a suit shall not be brought after twelve months. It merely says that the company shall not be under liability in certain circumstances.

S. 23 of the Indian Contract Act deals with what considerations and objects are lawful and what are not. The consideration or object of an agreement is lawful "unless it is forbidden by law, or is of such a nature that if permitted it would defeat the provisions of any law, or is fraudulent ; or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy."

S. 28 provides :

" 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."

Mr Bannerji argues that the clause offends against both these sections. In the first place he says it is against public policy. That is his objection under s. 23. He then says that the clause limits the time in which he may enforce his rights, and is therefore contrary to the provisions of s. 28. A similar question was raised in the case of *G. Rainey and one* v. *The Burma Fire and Marine Insurance Company, Limited* (1). There the policy contained the

(1) (1925) I.L.R. 3 Ran. 383.

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condition that if a 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 another condition of the policy, within three months after the arbitrator or arbitrators or umpire shall have made their award, "all benefit under this policy shall be forfeited." It was contended that this clause offended against s. 28. The Court rejected this contention on the ground that the condition was not one limiting the time within which a policy-holder might enforce his rights, but one by which the policy-holder had contracted that on the happening of a certain event he should lose all his rights. The clause was, therefore, not void by reason of the provisions of s. 28 of the Contract Act. In the case of *The Baroda Spinning and Weaving Company, Limited* v. *The Satyanarayan Marine and Fire Insurance Company, Limited* (1) the Bombay High Court came to a similar decision.

Bachelor J. put the case in the following words :

> "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."

The Calcutta High Court took the same view in *Giridharilal Hanumanbux* v. *Eagle Star and British Dominions Insurance Company, Limited* (2). 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 twelve months. If it did that, it would, in my opinion, be void, but it is a case where the parties have agreed that

(1) (1913) I.L.R. 38 Bom. 344. (2) (1923) 27 C.W.N. 955.

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in certain circumstances theinsurance company shall be under no liability under its 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 s. 28 of the Contract Act. For the same reasons I hold that it does not offend against Art. 86 of the Limitation Act. I also hold that the clause is not contrary to public policy and does not defeat the provisions of any law. The decision of the preliminary issue being against the plaintiff the suit must be dismissed with costs.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

1933

June 28.

S.P.K.R.R.M CHETTYAR FIRM AND ANOTHER *v.* THE ADMINISTRATOR-GENERAL OF BENGAL.*

Mortgage by deposit of title-deeds—Transfer of Property Act (IV of 1882), *s.* 58 *(f)—Memorandum of a mortgage already created—Reference in promissory note to deposit of title-deeds—"Declare, create, assign or limit"—Registration Act (XVI of* 1908), *s.* 17.

Where a debt and the deposit of title-deeds have been proved, and the Court can infer from the form of the deposit that it was intended to create a security on the property, the transaction is a mortgage within s. 58 (*f*) of the Transfer of Property Act, and it takes precedence over a subsequent registered mortgage in favour of another creditor.

Ex parte Hooper, 19 Ves. J. 477 ; *Ex parte Langston*, 17 Ves. J. 227 ; *V.E.R.M.A.R. Firm* v. *Ma Joo Teen*, I.L.R. 11 Ran. 239—*referred to.*

Where a document is merely a record of the transaction that had already taken place, and was not intended by the parties to be the repository in which the bargain between them was contained, it does not come within the ambit of s. 17 (*1*) of the Registration Act.

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* Civil First Appeal No. 157 of 1932 from the judgment of this Court on the Original Side in Civil Regular No. 401 of 1931.