IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

S.C (CHC) Appeal No. 18/2008
HC (Civil) Case No. 26/2006(1)

Muruthawalage Chandrarathne
No. 74/10, Thalgassa Road,
Thibbotuwawa,
Akuressa.

PLAINTIFF

Vs.

Sri Lanka Insurance Corporation Limited
'Rakshana Mandiraya'
No. 21, Vauxhall Street,
Colombo 2.

DEFENDANT

AND NOW (BY AND BETWEEN)

Muruthawalage Chandrarathne
No. 74/10, Thalgassa Road,
Thibbotuwawa,
Akuressa.

PLAINTIFF-APPELLANT

Vs.

Sri Lanka Insurance Corporation Limited
'Rakshana Mandiraya'
No. 21, Vauxhall Street,
Colombo 2.

DEFENDANT-RESPONDENT

BEFORE: B. P. Aluwihare P.C., J.
Anil Gooneratne J. &
Vijith K. Malalgoda P.C., J.

COUNSEL: M.U.M. Ali Sabrey P.C. with
Ruwantha Cooray for Plaintiff-Appellant

Chandana Liyanapatabendi P.C. with
Nirosha Wickremasinghe for the Defendant-Respondent

ARGUED ON: 21.06.2017

DECIDED ON: 14.09.2017

GOONERATNE J.

The Plaintiff-Appellant (the insured) obtained an Insurance Policy to cover his hardware stores, business. The policy bearing No. F/010//FBP/2002/35 inter alia covers loss and destruction due to fire. Policy had been issued for a period of one year from 10.04.2003. It is pleaded that on or about 17.04.2003, his business premises caught fire and completely destroyed his business premises. Loss and damage estimated at Rs. 7,500,000/- This is a direct appeal to the Supreme Court from the Commercial High Court.

The only issue to be decided as submitted to court and with the material pleaded before court, is the question of limitation of the time period, as per the Insurance Policy. It is pleaded that the Respondent Company

processed the Plaintiff-Appellants claim, based on the policy but the Respondent Company rejected the claim as pleaded in paragraph 7 of the Petition of Appeal. It reads thus:

(i) Appellant had instituted the present action by suppressing the material facts.
(ii) No fire had taken place in the premises insured.
(iii) No damages had been done to the Appellant due to the fire within the said premises.
(iv) Appellant had preferred a fraudulent claim to the Respondent.
(v) Appellant had failed to institute the present action within 3 months of the refusal and/or rejection of the Appellant's insurance claim and/or failed to institute the present action within 03 months of the arbitration award and,
(vi) The Appellant had failed to institute the present action within 12 months from the act of damage. Therefore Appellant's claim is prescribed in law.

I cannot find the letter of rejection though the claim was rejected on 24.06.2004. The brief unfortunately does not include such letter. The Plaintiff-Appellant relies on a Judgment pronounced by the Supreme Court bearing Case No. SC Appeal 23/2010: SC minutes of 16.05.2016. In this regard the Plaintiff-Appellant submits that prescription is a matter of evidence which need to be tried at a trial though the learned High Court Judge based her Judgment on three

preliminary issues and delivered Judgment dismissing Plaintiff-Appellant's case, on 05.02.2008.

When I consider the facts of this case I find that the matter had been referred to arbitration earlier and Plaintiff withdrew his claim. Thereafter arbitration proceedings were dismissed on 18.10.2005. Plaintiff urge that prescription is a mix question of fact and law. Further Arbitrator did not make any award, and prescription cannot be counted from the date of the incident. Learned High Court Judge, according to Plaintiff, failed to consider, the fact that instituting action within three months is not possible from the date of the purported refusal of Appellant's claim for the reason, it had been subjected to a matter of arbitration. Plaintiff also urge that learned High Court Judge has erred in interpreting Clause 20 of the Insurance Policy Agreement and the matter was referred to arbitration within three months as in Clause 13 of the Insurance Policy Agreement.

On the other hand the Defendant-Respondent Company had taken up the position that the purported dispute referred to arbitration by the claimant is not a difference that had arisen between parties as to the amount of loss or damage as may be referred to arbitration in terms of the Insurance Policy. Arbitration proceedings were withdrawn by the claimant. In the proceedings before the Arbitration Panel it is recorded that "matter comes up for hearing

today and, however in view of paragraph (1) of the statement of objections as stated in (a) to (e) above the Arbitral Tribunal has no jurisdiction to inquire into the dispute". Thereafter learned counsel for claimant withdrew his case, before the Arbitration Panel.

Parties proceeded to trial on 27 issues and issue Nos 20, 21 & 26 had been suggested by the Defendant-Respondent to be tried as preliminary issues as they involve questions of law. Issue Nos. 20, 21 & 26 read thus:

20. Has the Plaintiff failed to commence this action within 3 months of the rejection of the Plaintiff's claim?

21. Has the plaintiff failed to commence this action within 3 months of the award of the arbitration?

26 Is the Defendant not liable to make any payment to the Plaintiff for the reasons pleaded in paragraph 21 of the Answer?

Though the Plaintiff party takes up the position that the Plaintiff objected to trying the preliminary issues as it contains mix questions of law and fact, the record does not indicate so. Objection of Plaintiff has not been recorded in the journal entry of 24.07.2007. No proceedings of the day is also made available to court to examine whether Plaintiff objected to try the above issues as preliminary issues. However in the written submissions filed in the High Court, Plaintiff party discuss that position very extensively with reference to case law. The law on the point is settled that only pure questions of law should be tried as

preliminary issues in terms of Section 147 of the Civil Procedure Code. Vide *Pure Beverages Ltd. Vs. Sunil Fernando 1997 (3) SLR 202; 2001(3) SLR 56.*

I think this is a matter that need further discussions on the subject. Section 6 of the Prescription Ordinance states the period of prescription for contracts, agreements, etc. is 6 years. Insurance policy suggest a short period. There is nothing to say that the insurance policy itself is illegal, or against public policy. Therefore parties concerned are bound by terms of the insurance policy. It is not a contract 'in restrain' which is contrary to public policy.

Professor Weeramantry on Law of Contracts Vol II Pg. 797 reads thus "It is not contrary to public policy for parties to enter into agreements not to plead limitation, such an agreement is valid and enforceable in English Law if supported by consideration, whether it be made before or after the limitation period has expired. The same observation holds good for our law. Except that such an agreement need not be supported by consideration". In the case of *Hatton National Bank Ltd. Vs. Helenluc Garments Ltd. and others,* reported in 1999 (2) SLR 365 Wijetunge J. held that the Prescription Ordinance would not operate as a bar to the Plaintiff suing them for recovering of the money due under a guarantee.

The 2nd to the 6th defendants had in the guarantee made by them agreed to waive the plea of prescription. Such an agreement is valid and enforceable whether it is made before or after

the period of limitation. Hence, the plaintiff is entitled to pursue the action against those defendants.

I will at this point discuss whether the case relied upon by the Plaintiff party, S.C. Appeal 23/2010 has any bearing to the case in hand on a comparison of material points.

(1) The case in hand is a direct appeal to the Supreme Court. S.C. 23/2010 is not so, but a case where leave was granted by the Supreme Court from the judgment of the High Court, and to the High Court was an appeal from the District Court.

(2) Both cases deal with a Fire Insurance Policy. The several clauses are somewhat identical to each other notwithstanding the fact that the case in hand the Defendant is a government agency. In both cases it was alleged that the premises were destroyed by fire.

(3) In S.C 23/2010 there was an absence of a letter of rejection of the claim made by the. The case in hand, it was not so, though the letter of rejection was not available in the brief, the Plaintiff party itself refer to the letter of rejection dated 24.06.2004. This is a vital matter to distinguish the two cases. Plaintiff party relies on the letter of rejection to prosecute his case before the Arbitrators Panel and in the High Court. Such a notification is essential to prosecute one's case. On this alone the two cases could be distinguished.

(4) Connected to above, in S.C. 23/2010 it is stated in the said case that rejection of claim by insurer and notification are matters to be determined only after allowing parties to establish those facts and call witnesses to give evidence. It is also said that High Court Judge failed to allow parties to make submissions.

In the case in hand parties were not prevented in making submissions. If that be the case it is a breach of natural justice. Nor is it recorded in the brief that the Plaintiff applied to court to lead evidence. I have dealt with that position earlier in this Judgment.

In view of (1) to (5) above the case in hand is very easily distinguishable from the case S.C. 23/2010. To me it seems to be an afterthought of the learned counsel for Plaintiff-Appellant to have submitted to court the copy of above S.C 23/2010. I see no legal basis to arrive at a conclusion that both cases are similar factually. Nor can I hold that there was a breach of the rules of natural justice.

In all the above circumstances I hold that the learned High Court Judge has correctly dealt with the case. As such I affirm the Judgment of the High Court and dismiss this appeal with costs.

Appeal dismissed with costs.

JUDGE OF THE SUPREME COURT

B. P. Aluwihare P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

Vijith K. Malalgoda P.C., J.

I agree.

JUDGE OF THE SUPREME COURT