

**CEYLINCO INSURANCE COMPANY LTD
VS
RATNAYAKE**

COURT OF APPEAL
AMARATUNGA, J.
WIMALACHANDRA J.
C. A 14/2004 (LG),
D. C. TANGALLA 9507/M
JULY 14, 2004

Prescription Ordinance -Section 9 - Is it Contrary to the provisions of the Prescription Ordinance for parties to agree to limit the period of prescription to a shorter time ?

The Plaintiff - Respondent filed action on 30.08.2000, seeking to enforce a fire insurance contract he had entered with the Defendant, Appellant on 19.10.1998. The Plaintiff Respondent's business was destroyed by fire. He contended that the Defendant Petitioner had on 16.02.1999 rejected his claim. The Defendant in its answer took up the position that the action is prescribed in Law. It was the Defendants position that in terms of clause 20 of the Insurance Policy the Defendants's liability ceases at the expiry of 12 months from the date of the loss and damage, unless, the claim is the subject of a pending case or arbitration and in terms of Clause 18, if the claim is rejected and if no action or arbitration is commenced within 3 months from the date of rejection.

The trial Judge over-ruled the application of the Defendant to try as a preliminary issues, regarding the maintainability of the action, on the basis that Section 9 of the Prescription Ordinance prevails over the terms of the insurance policy. The Defendant sought leave to appeal from the said Order and was granted same.

HELD -

- (i) The parties to a contract have the right to agree with regard to the limitation period and the time period agreed upon by the parties will prevail over the Prescription Ordinance.
- (ii) The Prescription Ordinance will not apply as the parties had agreed on a time period within which action has to be instituted.

- (iii) The plaintiff has not filed this action within 12 months from the date of the fire, more over, he has not filed this action within 3 months from the date of rejection of his claim. The action therefore is time barred.

Application for leave to appeal.

From an order of the District Court of Tangalle, with leave being granted.

I. S. de Silva for the Defendant Petitioner.

Plaintiff-Respondent absent and unrepresented.

cur. adv. vult.

January 13, 2005

WIMALACHANDRA, J.

Leave was granted of consent on 11.02.2004. This is an appeal to set aside the order made by the learned District Judge dated 29.12.2003 overruling the preliminary objections of the defendant- appellant (defendant) and answering the issues numbering 38 to 41 in favour of the plaintiff-respondent (plaintiff).

Briefly, the facts as set out in the petition are as follows :

The plaintiff filed action against the defendant in the District Court of Tangalle seeking to enforce a fire insurance contract he had entered into with the defendant. Admittedly, the plaintiff insured his business premises at No. 181, Tissa Road, Tangalle against fire under a policy of insurance bearing No. AM/TC/593 obtained from the defendant company. The plaintiff states that on or about 19.10.1998 his business premises was destroyed by a fire. The plaintiff filed the District Court action on the basis that the defendant had failed to honour its obligations under the said insurance policy and thus a cause of action had accrued to him to seek the intervention of Court for compensation and damages in terms of the said contract of insurance. The defendant filed answer and took up the position that the plaintiff's action is prescribed and the Court has no jurisdiction to hear and determine the action. The defendant's position was that in terms of clause 20 of the said insurance policy, the defendant's liability ceases at the expiry of 12 months from the date of the loss and damage unless the claim is the subject of a pending case or arbitration and in terms of clause

18 if the claim is rejected for the reasons set out therein and if no action or arbitration is commenced within three months from the date of rejection.

At the trial the following issues were tried as preliminary Issues :

- (38) Does the Court have jurisdiction to hear and determine this action ?
- (39) As set out in paragraph 2(a) of the answer, has the plaintiff failed to institute action within 12 months from the happening of the loss and damages as required by clause 20 of the Insurance Policy?
- (40) As set out in paragraph 2(b) of the answer has the plaintiff failed to institute action within 3 months from the date of rejection of the claim as required by clause 18 of the Insurance Policy?
- (41) If issues 38, 39 and 40 or any one of them are answered in favour of the defendant, is the plaintiff's action liable to be dismissed?

Thereafter the Court directed the parties to tender written submissions. The Court made the order on 29.12.2003 overruling the preliminary objections and answered the aforesaid issues in favour of the plaintiff in the following manner.

Issue No. : 38	-	Yes
39	-	Yes, but it is not a reason to dismiss the action.
40	-	Yes, but it is not a reason to dismiss the action.
41	-	No.

In his order the learned Judge has observed that the plaintiff has failed to institute the action within twelve months from the date of the fire as required by clause 20 of the Insurance Policy and has also not filed the action within three months from the date of rejection of his claim in terms of clause 18 of the Insurance Policy. However, the learned Judge held that the provisions of section 9 of the Prescription Ordinance prevails over the terms of the said insurance policy.

Admittedly, the fire took place on 19.10.1998. The Plaintiff submitted his claim on the insurance policy on 07.12.1998 and the defendant by its letter dated 16.02.1999 rejected the claim of the plaintiff. Thereafter the plaintiff instituted this action against the defendant on 30.08.2000.

The insurance policy Am/TC/593 has clauses 18 and 20 which read as follows :-

Clause 18 - FRAUD :

If the claim be in any respect fraudulent, or if any false declaration be made, or used in support thereof if any fraudulent means or devices are used by the insured, or one acting on his behalf to obtain any benefits under this policy or if the loss or damages be occasioned by the wilful act, or with the connivance of the insured or 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 an arbitration taking place in pursuance of the 19th condition of this policy) within three months after the arbitrator, arbitrators or umpire shall have made their award all benefit under this policy shall be forfeited.

Clause 20 - TIME LIMIT FOR COMPANY'S LIABILITY

In no case whatever shall the Company be liable to 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.

It will be seen that in terms of clause 18 if the claim is rejected on the ground of fraud and if no action is filed or arbitration is commenced within three months from the date of rejection of the claim, all benefits under the said policy is forfeited. In terms of clause 20 the defendant will not be liable for any loss and damage after the expiry of 12 months from the happening of loss and damage unless the claim is the subject of pending action or arbitration. In the instant case it is to be noted that there is no other pending case or arbitration proceedings under the said Insurance Policy with regard to the loss or damage sustained by the plaintiff as a result of the said fire to the said premises.

Is it contrary to the provisions of the Prescription Ordinance for parties to enter into an agreement to limit the period of prescription to a shorter time period or curtail the period of prescription that is provided in the Prescription Ordinance? On such an occasion does the time period agreed upon by the parties prevail over the provisions of the Prescription Ordinance?

In this regard C. G. Weeramantry in his book "The Law of Contracts" volume II at page 797 states thus :

"It is not contrary to public policy for parties to enter into an agreement 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."

The learned Counsel for the defendant also cited Chitty on "Law of Contract" 27th edition at 1366, on the question of whether it is open to parties to an agreement to stipulate in the agreement that legal proceedings be commenced within a shorter period of time than provided in the Limitation Act.

Chitty on Contract, 27th edition at page 1366 in paragraph 28-084 states as follows:-

"Agreement of the parties- It is open to the parties to a contract to stipulate in the contract that legal or arbitral proceedings shall be commenced within a shorter period of time than that provided in the Limitation Act 1980. Such stipulations are not uncommon in commercial agreements and their effect may be (depending on the precise wording of the stipulation) to bar or extinguish any right of action, or to deprive a party of his right to have recourse to particular proceedings, e.g. arbitration, after the expiration of the agreed time limit. It is also open to the parties to agree that one party shall be released from liability or the other party's claim shall be extinguished or become barred unless a claim has been presented within a stipulated period of time."

It appears that the parties to a contract have the right to agree with regard to the limitation period and the time period agreed upon by the parties will prevail over the Prescription Ordinance. In the circumstances both parties to the contract of insurance are bound by the terms set out in the Policy of Insurance with regard to the period of limitation. Therefore in this case the Prescription Ordinance will not apply as the parties had agreed on a time period within which the action had to be instituted.

In this case the plaintiff is suing on the fire insurance policy. Accordingly, the cause of action accrues to the plaintiff on the occurrence of fire causing loss and damage to the plaintiff and not on the rejection of the claim. In any event he has failed to file action within three months from the rejection of his claim by the defendant. Admittedly, the fire took place on 19.10.1998. The defendant by letter dated 16.02.1999 rejected the plaintiff's claim. The plaintiff filed this action on 30.08.2000. Accordingly the plaintiff has not filed this action within twelve months from the date of the fire. Moreover, he has not filed this action within three months from the date of rejection of his claim by the defendant which was 16.02.1999. Since the plaintiff has failed to file the plaint within the stipulated period of time the plaintiff's action is time barred.

I therefore allow the appeal and set aside the order of the learned District Judge dated 29.12.2003, but without costs.

AMARATUNGA, J.— I agree.

Appeal Allowed.
