Moosajees Ltd.

v.

Insurance Corporation of Ceylon

COURT OF APPEAL.
VYTHIALINGAM, J. AND VICTOR PERERA, J.
S.C 312/71(F)—D.C. COLOMBO 70932.
SEPTEMBER 21, 1978.

Contract of insurance—Breach of warranty—Effect—Action required to be instituted within three months of claim being rejected—Duty of insurer to inform assured in clear language that claim rejected—No penal consequence otherwise—Construction of language used by insurer.

The plaintiff sued the defendant claiming a sum of Rs. 186,421.70 on a policy of insurance in respect of certain property damaged by fire. The defendant denied liability *inter alia* on the ground that the action had not been instituted within 3 months after the claim had been rejected as required by the Policy.

The defendant had written a letter D1 to the plaintiff on the plaintiff making its claim informing the plaintiff that there was no liability on the part of the defendant on account of certain warranties contained in the policy having been violated. The preliminary issue of law in respect of this question was heard by the learned trial judge who answered the same against the plaintiff and dismissed its action. The plaintiff appealed.

Held

What the defendant did by the letter D1 was to inform the plaintiff that because of the breach of the warranties there was no longer a valid contract of insurance imposing any liability on the defendant Corporation. It was not a rejection of the plaintiff's claim as such and in a case such as this where there was a highly penal consequence flowing from rejection of a claim, it was the duty of the defendant to inform the plaintiff in clear and precise language that the claim had been rejected. Accordingly, the provision in the policy that "if the claim be made and rejected and an action or suit be not commenced within three months after such rejection ..... all benefit under this policy shall be forfeited" had no application and the action although not brought within three months of the said letter D 1 was not out of time.

Per Vythialingam, J :

(a) "A warranty in a contract of insurance is a condition or contingency and unless that be performed there is no contract. It is perfectly immaterial for what purpose a warranty is introduced but being inserted the contract does not exist unless it be literally complied with. A substantial performance is not enough. If there is a warranty nothing tantamount will do or answer the purpose ; it must be strictly performed as being part of the agreement."

(*b*) "In contracts of insurance where the language used by the insurer is ambiguous the Courts will lean in favour of that interpretation which favours the assured".

APPEAL from the District Court, Colombo.

C. Ranganathan, Q.C., with *B. C. F. Jayaratne*, for the plaintiff-appellant.

E. R. S. R. Coomaraswamy, with *E. R. S. R. Coomaraswamy (Jnr.)*, for the defendant-respondent.

Cur. adv. vult.

October 31, 1978.

VYTHIALINGAM, J.

The plaintiff-appellant filed this action against the defendant-respondent for the recovery of a sum of Rs. 186,421.70 said to be due on a policy of insurance in respect of certain property which had been damaged by fire. The defendant denied liabilities on various grounds and at the trial on 10.2.1971 defendant's Counsel raised two issues as follows :—

" (7) Did the defendant on or about 12.12.1968 repudiate liability and refuse to pay the claim of the plaintiff ?

(8) If so, (*a*) is the claim of the plaintiff forfeited and (*b*) can the plaintiff have and maintain this action ? "

These issues were tried as preliminary issues of law and after hearing Counsel for both sides the trial Judge answered issue 7 and 8 (*a*) in the affirmative and 8 (*b*) in the negative and dismissed plaintiff's action with costs. The plaintiff has appealed from this order. These issues are said to arise on the defendant's pleading in paragraph 13 (*a*) (iii) of the answer which is as follows :—

" (*a*) The aforesaid insurance policy No. F. 36340 contained *inter alia*, the following conditions and/or warranties..

.....

(iii) If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the insured or anyone acting on his behalf to obtain any benefit under this policy ; or if the loss or damage 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 the case of an 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".

For the purposes of this appeal we are only concerned with the provision in regard to the bringing of the action within three months of the rejection of the claim there having been no arbitration proceedings. The fire occurred on or about the 19th June, 1968 and on 16th July, 1968, the plaintiff forwarded to the defendant proof of the loss and made a claim to be indemnified and paid the sum of Rs. 186,421.70 in respect of the said loss or damage. On 12th December, 1968, the defendant wrote to the plaintiff the letter D1 which I will quote in full as it is the crux of the case.

> "With reference to the above-mentioned claim we wish to inform you that there is no liability on the part of the Corporation as the loss Assessors Messrs. Aitken Spence & Co. Ltd. have informed us that warranties Nos. 16 and 17 have been violated".

The averment in paragraph 13 (*a*) (iii) reproduces word for word clause 13 of the Policy which is headed "Forfeiture". The plaintiff brought this action on 16.6.1969 clearly more than three months after it had received the letter D1. Mr. Ranganathan for the plaintiff submitted that D1 was not a rejection of the plaintiff's claim and therefore, clause 13 does not apply and secondly, even if it was a rejection of the plaintiff's claim, the defendant by its conduct had waived its right to claim that the benefits under the Policy had been forfeited as the action was not brought within three months of the rejection of the claim.

The trial Judge states in his judgment that "I cannot agree that repudiation and rejection mean two different things. In my view repudiating the plaintiff's claim clearly amounts to a rejection of the plaintiff's claim and both mean one and the same thing". In regard to waiver he merely says that the conduct of the defendant did not amount to a waiver of their rights under the clause. The question for decision in this appeal is whether the letter D1 is a rejection of the plaintiff's claim within the meaning of clause 13 of the policy. By D1 the defendants inform the plaintiff that there is no liability on their part as the loss assessors had informed them that warranties No. 16 and 17 had been violated. Warranty No. 16 relates to the availability of a fire engine and the holding of fire drills and warranty No. 17 relates to the positioning of a fire-extinguisher on the right hand side of every door providing access from the open air.

A warranty in a contract of insurance is a condition or contingency and unless that be performed there is no contract. It is perfectly immaterial for what purpose a warranty is introduced but being inserted the contract does not exist unless it be literally complied with. A substantial performance is not enough. If there is a warranty nothing tantamount will do or answer the purpose; it must be strictly performed as being part of the agreement. So that what the defendants have done by the letter D1 is to inform the plaintiff that because of the breach of the two warranties there is no longer a valid contract of insurance imposing any liability on them. It is not a rejection of the plaintiff's claim as such.

Moreover where there is a highly penal consequence flowing from the rejection of the claim it is the duty of the defendant to inform the plaintiff in clear and precise language that the claim has been rejected. I do not say that the identical words must be used. But they must not leave the matter in doubt or leave it to the plaintiff to interpret the words used and come to his own conclusions. In contracts of insurance where the language used by the insurer is ambiguous the courts will lean in favour of that interpretation which favours the assured. Here the plaintiff may well have thought that he could satisfy the defendant that there was no breach of the two warranties.

Moreover the conduct of the defendant clearly shows that until a late stage in the case they did not understand D1 to be a rejection of the claim. The plaint was filed on 16.6.1969 and in the answer dated 8.9.1969 although the defendant has set out clause 13 in full nowhere did it take up the specific position that the plaint was not filed within three months of the rejection of the claim. Trial commenced on 25.2.1970 when issues were raised and counsel for the defendants raised issues 4, 5 and 6 relating to the violation of the warranties No. 16 and 17 only. No issues were raised in regard to the plaint being out of time at all. Thereafter evidence was led on the 26th and 27th July, 1970.

It was only on 10.2.1971 when trial was resumed that issues 7 and 8 were raised. This clearly shows that it was not in the contemplation of the defendants that the claim has been rejected by D1. If it were otherwise it would have placed this matter in the forefront of its case and raised these issues at the very commencement of the trial. I do not think that the defendant can be allowed to lull the plaintiff into a false sense of security by using ambiguous language. I hold that D1 is not a rejection of the plaintiff's claim and that plaint is in time.

I allow the appeal and set aside the order of the District Judge and answer issue No. 7 and 8(*a*) in the negative and 8(*b*) in the affirmative. The case will now be proceeded with on the other issues raised in the case. Plaintiff will be entitled to costs of this appeal.

VICTOR PERERA, J.—I agree.

Appeal allowed.