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ing and determining special appeals under the Regulation in the same manner as special appeals under Act VIII of 1859 or as second appeals under Acts X of 1877, XIV of 1882 and V of 1908. A mere change in phraseology cannot make any difference in the result. Special appeals are practically the same as second appeals. I may add that I have not overlooked the change in the wording of section 4 of the present Code as compared with section 7 of Act XIV of 1882. But I am clear that it is only another way of expressing the same thing; the result is the same. I, therefore, overrule the preliminary objection, and hold that a special appeal lies to this Court, and that it lies only on the grounds mentioned in section 100 of Act V of 1908.

On the meri ts the appellant has no case. There is no error of law. The decision of the lower Court is based upon an appreciation of evidence, with which we cannot interfere in this special appeal. I, therefore, confirm the decree of the lower Court with costs.

HEATON, J. :—My consideration of this matter has led me to the same conclusion for substantially the same reasons.

Decree confirmed.

R. R.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

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THE BARODA SPINNING AND WEAVING COMPANY, LIMITED, APPELLANTS AND PLAINTIFFS, *v.* THE SATYANARAYEN MARINE AND FIRE INSURANCE COMPANY, LIMITED, RESPONDENTS AND DEFENDANTS.*

Contract Act (IX of 1872), section 28—Limitation Act (IX of 1908), section 3—Insurance—Agreement in restraint of legal proceedings—Modification of the law of limitation by agreement of the parties—Rights and remedies, distinction between—Conditional release or forfeiture not invalid.

The S. Insurance Co. granted a policy of insurance against fire to the B. Co., on certain property of the latter, the policy containing a clause to the effect that if

* Appeal No. 75 of 1912 : Suit No. 673 of 1911.

a claim were made and rejected and an action or suit were not commenced within three months after such rejection all benefit under the policy should be forfeited.

Damage was caused to the property of the B. Co. thus insured and a claim was made by that company of the S. Insurance Co. which was rejected by the latter. More than three months after such rejection the B. Co. filed a suit against the S. Insurance Co. to recover the amount of their claim.

Held, that there is a distinction between the extinction of a right and the loss of a remedy, that section 28 of the Contract Act was aimed only at covenants not to sue at any time and at covenants not to sue for a limited time, that a conditional release or forfeiture was a very different thing from a covenant not to sue, although to avoid circuity of action a covenant not to sue had sometimes been held equivalent in effect to a conditional release, and that the condition of forfeiture in the policy in question in the suit was not within the scope of section 28 of the Contract Act.

The correctness of the decision in *Hirabhai* v. *Manufacturers Life Insurance Co.*[1], doubted.

Per Batchelor, J. :—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.

ON the 7th of February 1910 the defendant company issued to the plaintiffs a policy for Rs. 10,000 whereby they insured against loss or damage by fire to that extent the buildings, machinery, accessories, stock and stock in process of the plaintiff company's mills at Baroda. By condition XII of the policy of insurance it was *inter alia* provided :—

"...or 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."

The plaintiff company had also insured their property with some 24 other insurance companies in Bombay in a sum in all of Rs. 9,38,000, remaining uninsured to the extent of Rs. 15,000, the total risk being placed at Rs. 9,63,000.

[1] (1912) 14 Bom. L. R. 741.

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According to the plaint filed in this suit on the 11th of October 1910 at about 5-45 p. m. a fire broke out in the card room situated on the ground floor block No. 4 of the plaintiff company's mill owing to friction in a countershaft driving slubbing frames, and the flames made their way through the wooden flooring into the spinning room above extending at the same time throughout the card room, and the spinning and card frame department and the reeling room with underground cellar were destroyed. Information of the fire was at once given by the plaintiff company to the insurance companies concerned, including the defendant company. The loss was surveyed on behalf of these insurance companies with the exception of the defendant company who declined to join in assessing the loss and was adjudged at Rs. 4,28,577 less Rs. 18,892 for salvage proceeds. The proportionate share of the defendant company in this loss amounted to Rs. 4,254-4-0 plus Rs. 43-9-6 as their share of the charges.

The plaintiff company called on the defendant company to pay these sums but the defendant company wrote on the 20th of April 1911 to the plaintiff company alleging that the non-compliance by the latter company with essential conditions of the policy made the latter null and void.

On the 14th of August 1911 the plaintiff company filed the present suit claiming from the defendant company payment of the abovementioned sum with interest and costs.

The defendant company filed a written statement denying liability on various grounds.

The case came on for hearing before Mr. Justice Beaman when *inter alia* the following issue was raised :—

6. Whether the plaintiffs' claim having been rejected by the defendant by letter of 20th April 1911, the plaintiff has not forfeited all benefits under the said policy by virtue of provisions of clause 12 of the conditions of the policy ?

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On the application of counsel for the defendant company this issue was tried as a preliminary issue and on it the learned Judge gave the following judgment in favour of the defendant company.

BEAMAN, J. :—The preliminary issue I am asked to try arises upon clause 12 of the conditions of the policy upon which the plaintiffs are suing. Amongst other terms it is agreed between the parties under clause 12 that if, after a claim had been made and rejected, the insured should not institute any proceedings within three months from the date of such rejection he is to forfeit all benefits under the policy. It is conceded that this suit was not instituted within three months from the date of the rejection of the plaintiffs' claim, and I may observe that this is only one of the several technical defences upon which the claim is resisted.

The plaintiffs have been compelled to rely mainly upon section 28 of the Contract Act. It is contended that that section makes every agreement of the kind contained in clause 12 and now relied upon by the defendant company void. This contention, unfortunately for the plaintiffs, appears to me to be covered by authority which is binding upon me: *Hirabhai* v. *Manufacturers Life Insurance Co.*[1] The case there was much stronger because the words of the clause relied upon by the company undoubtedly on the face of them were restricted to limitation. The agreement was that no suit should be brought upon the policy after the expiration of one year after the cause of action accrued. But the learned Judges of the Appeal Court apparently found no difficulty in coming to the conclusion that such an agreement was not within the scope or intention of section 28 of the Contract Act and neither conflicted with it in principle nor in language.

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The reason of the decision, which is of a broadly general character, appears to be: first, that clauses of this kind in policies of insurance need not be interpreted literally but with special reference "to the object and exigencies of insurance"; secondly, that although in form agreements of this kind appear to limit the period within which suits can be brought to enforce rights under the policy, they in substance amount to a waiver of the rights of the insured subject to the condition, and, therefore, go much further than merely barring the remedy. The decision, therefore, appears to me to be of a general character and to support the defendants' contention here that the particular clause upon which he relies is not void by reason of anything contained in section 28 of the Contract Act. The language of the clause in this case is far more favourable to the defendants having regard to the reasoning which seems to have commended itself to the learned Judges in the case of *Hirabhai* v. *Manufacturers Life Insurance Co.*[1], for here the insured agrees that on failure to institute proceedings within three months of the rejection of his claim he will forfeit all the benefits to which he might otherwise be entitled under the policy and the use of such language might give some colour to the distinction upon which the learned Judges rely for taking all contracts of this kind out of the scope and intention of section 28. It is not for me to state critically all the reasons that might be adduced against the conclusion, which I feel to be binding upon me. It is enough for me to say that after having given the reasoning of the learned Judges in that case my fullest and most careful attention I am still of opinion, with the greatest deference, that there is room for very grave doubt whether the case was rightly decided; for there can, I think, be no doubt at all but that it does

[1] (1912) 14 Bom. L. R. 741.

decide the contention upon which the plaintiffs here mainly rely, and as it is a decision of this Court it is binding upon me. I must, therefore, hold, however reluctantly, that the condition in clause 12 is not void under section 28 of the Contract Act.

The only other ground upon which the plaintiffs were able to argue that the case ought not to be defeated under that clause was that on the face of it it is a forfeiture clause and that the time specified ought not to be regarded as of the essence of the contract. I am unable to accede to that argument. Rightly or wrongly clauses of this kind are usually inserted in policies of insurance for a reason which widely commends itself to the business interests directly involved, *viz.*, that all claims of these kinds ought to be made at the earliest possible date and in any case while they are still fresh. If then contracts of the kind are permissible at all, notwithstanding section 28 of the Contract Act, it would appear that their only value could lie in their being literally enforcible. If the insurer and the insured notwithstanding Article 86 of the First Schedule to the Limitation Act and section 28 of the Contract Act may agree that the insured is only to sue within three months of the final rejection of his claim by the insurer, then it appears to me idle to say that the Courts may give the go-bye to the period so fixed and substitute for it any other period which they may deem reasonable. The law must in all cases be presumed, at any rate in Courts of law, to be reasonable. So that it would amount to this, that the period prescribed by the law of limitation would always be a reasonable period and once the actual terms of the limiting agreement were overstepped it would be impossible to make any distinction between the relations of the parties under such an agreement and under the general law of limitation. Lastly, I am to observe upon this defence that the plaintiffs have not

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the same ways to meet it which they intended to use against the other technical defences set up against them. Whatever may have been the conduct of the agents and representatives of the defendant company and however that conduct may have affected their defence under clause 10 of the conditions, it is conceded that for the purposes of this argument no evidence of conduct would be relevant to or could possibly affect the decision; for on the 20th of April the defendant company, whether honourably or dishonourably, did flatly reject the plaintiffs' claim and thereafter it was for the plaintiffs to comply with the condition set forth in clause 12. I have come to this conclusion with the utmost reluctance because, after having heard the case opened and considered the principal defences set up by the defendant company, it was impossible to doubt in reference to those defences that the attitude and conduct of this defendant company from first to last have been most dishonest and unfair to the plaintiffs, and speaking for myself nothing would give me greater pleasure than if the Appeal Court, should this question be taken there, were to hold that the decision I have come to upon this preliminary issue is wrong and so re-open the case for further trial upon its merits. In case, however, it should stop here I have only to add that I am sure that were all the pleadings and the opening statements and arguments of counsel fully communicated to the public, the public would be very reluctant to have further dealings with this Swadeshi Company.

Having regard to the fact that I am now about to dismiss the suit not in accordance with my own conviction but merely because I feel myself bound by the decision of a superior Court, and having regard to the very strong opinion I have just expressed, an opinion formed I admit only upon the material so far laid before me, I shall, in dismissing the suit of the plaintiffs

upon this preliminary issue, leave each party to bear their own costs.

The plaintiffs appealed.

Strangman (Advocate General) with *Kanga*, for the plaintiff appellants.

Bahadurji with *Desai*, for the defendant respondents.

Refers to Bunyon on Fire Insurance, page 86 et seq., condition X at page 107.

The fire took place on the 11th of October 1910, the claim was made on the 18th of February 1911, the claim was rejected on the 20th of April 1911 and the plaint was filed on the 14th of August 1911.

As to costs, refers to *Civil Service Co-operative Society* v. *General Steam Navigation Company*[1]; *Cooper* v. *Whittingham*[2]; *Edmund* v. *Marteli*[3]; *Granville and Co.* v. *Firth*[4]; *Elms* v. *Hedges*[5]; technical defence is no ground for depriving a party of his costs.

At Common Law lapse of time does not affect contractual rights. Such rights are of a permanent and indestructible character unless either from the nature of the contract or from its terms it be limited in point of duration: see Anson, page 326.

Public policy means policy of the law. Modern decisions while maintaining the duty of the Court to consider public advantage have tended to limit the sphere within which this duty has been exercised. The modern view of the subject is expressed by Jessel, M. R., in *Printing and Numerical Registering Company* v. *Sampson*[6]:—

"You have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract": see Anson, page 202.

(1) [1903] 2 K. B. 756.
(2) (1880) 15 Ch. D. 501.
(3) (1907) 24 T. L. Rep. 25.
(4) (1903) 19 T. L. Rep. 213.
(5) (1906) 95 L. T. 145.
(6) (1875) L. R. 19 Eq. 462 at p. 465.

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The agreement is that the rights under the agreement shall cease to exist if a claim is rejected and no suit is filed thereafter within three months: if then the rights under the contract are extinguished the plaintiff has no cause of action.

C. A. V.

SCOTT, C. J.:—One of the conditions in the policy of fire insurance sued on by the plaintiffs is 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."

The claim on the defendants was rejected on the 20th of April 1911, but the suit was not commenced till the 14th of August 1911. Upon this ground the suit was dismissed in the lower Court. That such a condition is not unreasonable or opposed to public policy is conceded by the appellants' counsel and can hardly be disputed in view of the remarks of the Judicial Committee in *Home Insurance Company of New York* v. *Victoria-Montreal Fire Insurance Company*[1]. But it is argued that the condition is void as an agreement of the nature described in section 28 of the Contract Act since it limits the time within which a party to the contract may enforce his rights under the contract by the usual legal proceedings. The section contemplates the suspension permanently or temporarily of the usual remedies for the enforcement of legal rights. It aims at the prohibition of agreements which could only operate so long as rights were in existence. The argument of the appellants' counsel was that the forfeiture clause was equivalent to an agreement that no Court should entertain any suit on the policy unless commenced within three months of the rejection of the claim. The steps in his argument were: section 3 of the Limitation Act indicates that the law of limitation cannot be modified by agree-

[1] [1907] A. C. 59.

ment of parties as it can in England; that there is no distinction under that Act between rights and remedies; and that a conditional agreement to forfeit rights within the period within which the remedy is not barred by the Limitation Law is a void agreement.

I cannot accept the proposition that there is no distinction in India between rights and remedies. Section 28 of the Limitation Act shows the cases in which the loss of the remedy will destroy the right but that does not cover suits for money such as we are now concerned with. On the other hand the loss of the right always involves the disappearance of the remedy—a very material consideration in the case of a conditional forfeiture of all benefit under a policy.

In my opinion section 28 of the Contract Act is aimed only at covenants not to sue at any time and covenants not to sue for a limited time, which had given rise to difficulty in England: see the judgment of the Exchequer Chamber in *Ford* v. *Beech*[1]; *Beech* v. *Ford*[2]; *Gibbons* v. *Vouillon*[3]; *Newington* v. *Levy*[4]; and the judgments in *Slater* v. *Jones*[5]. A conditional release or forfeiture was a very different thing from a covenant not to sue, although in order to avoid circuity of action a covenant not to sue was sometimes held to be equivalent in effect to a conditional release. For this reason I share the doubt of Beaman, J., as to the correctness of the decision in *Hirabhai* v. *Manufacturers Life Insurance Co.*[6], where the agreement was that—"No suit shall be brought against the Company in connection with the said policy later than one year after the time when the cause of action accrues." As however the condition of forfeiture which we have to deal with here is not in my opinion within the scope of section 28, I would affirm

(1) (1848) 11 Q. B. 852 at p. 871.
(2) (1848) 7 Hare 203.
(3) (1849) 8 C. B. 483.
(4) (1870) L. R. 6 C. P. 180 at p. 191.
(5) (1873) L. R. 8 Ex. 186.
(6) (1912) 14 Bom. L. R. 741.

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the decree, and with costs, for the reasons given by the learned Judge for disallowing costs to the successful defendants do not appear to me adequate.

BATCHELOR, J.:—This suit was brought by the plaintiff company to recover from the defendant company a sum of Rs. 4,297-13-6 as the amount payable by the defendants under a policy of insurance issued by them to the plaintiffs. Numerous defences were raised, but the suit was dismissed by Beaman, J., upon a preliminary issue. That issue arose upon clause 12 of the conditions of the policy, which provided, *inter alia*, 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". The facts admittedly are that the plaintiff company's claim was made and rejected by the defendants, and that this suit was not commenced until after the expiry of three months after such rejection. The suit was, however, instituted within the period allowed by the law of limitation; consequently, so far as regards the preliminary issue, the suit is free from objection unless the defendants can successfully rely, as they seek to rely, upon the special terms of clause 12 of the conditions. For the plaintiffs it was contended that the provisions of this clause, as cited above, could not be pleaded in bar of the suit because those provisions constituted a void agreement under section 28 of the Contract Act. The learned Judge below, though with expressed reluctance, accepted the argument for the defendants holding himself bound to do so by the decision of the Bench in *Hirabhai* v. *Manufacturers Life Insurance Co.*[1] He accordingly made a decree dismissing the suit, and from that decree the present appeal is brought.

The point involved, though in itself a short one, and not, I think, susceptible of much useful elaboration,

[1] (1912) 14 Bom. L. R. 741.

cannot be said to be free from difficulty. We have to make our election between two rival arguments, each of which may be said to possess at least plausibility. As a member of the Bench by which *Hirabhai's case* was decided, I wish shortly to explain the effect produced on my own mind by the somewhat more thorough argument of which we have had the advantage in this appeal, and by the further consideration which I have been able to give to the question.

Section 28 of the Contract Act provides as follows :—

"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."

The phrase "thus enforce his rights" refers, I understand, to the enforcement "by the usual legal proceedings in the ordinary tribunals".

The question is whether the agreement in clause 12 of the conditions is void under this section. As I understood the argument for the appellants, the learned Advocate General, while admitting—what has often been decided—that the Indian Limitation Act operates in such a case as this not to extinguish rights, but only to bar remedies, contended that for the purposes of this appeal we should look rather to the substantial effect intended by the section than to the precise form of words which the Legislature has used. The argument was that, however valid and important in law be the distinction between the barring of a remedy and the extinguishment of a right, yet to the man of business it is much the same thing whether his right be gone or the remedy for enforcing that right be barred, and it was urged that in substance and effect there was no appreciable distinction between saying 'I agree that upon the expiry of three months after the rejection of my claim, my rights shall be forfeited,' as is said here, and saying 'as to the time

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within which I may enforce my rights, I agree to limit it to the period of three months, after the rejection of my claim'; and this latter covenant would undoubtedly be void under the section. In my opinion, however, the distinction, which beyond question exists, is vital in the construction of the section. 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. This seems to have been the view which was tacitly accepted by the Calcutta High Court in the *South British Fire and Marine Insurance Co.* v. *Brojo Nath Shaha*[1] though it must be admitted that that decision is of no direct assistance, since the question of the effect of section 28 of the Contract Act on such agreements was not expressly considered.

It was conceded in argument that in England the agreement in clause 12 would be perfectly valid; and it cannot, I think, be contended that Insurance Companies in India have less need than such companies in England of the protection afforded by an agreement for the acceleration of legal proceedings to be brought against them. That being so, there is the less reason to suppose that the Legislature intended section 28 to have the far-reaching effect for which the plaintiffs contend. I am aware that, under the authority of the *Bank of England* v. *Vagliano Brothers*[2], we must be very cautious how we have recourse to the pre-existing state of the law for the purpose of interpreting section 28 of the Contract Act; but in deprecating any general practice of that sort Lord Herschell added that "if a provision be of doubtful import, such resort would be perfectly

(1) (1909) 36 Cal. 516. (2) [1891] A. C. 107.

legitimate." I infer, therefore, that in this case it is permissible to glance at what was the state of the law in England prior to 1872 when the Indian Legislature undertook the codification of the law of contract. Reference to the authorities will, I think, disclose that there was much complexity in the law as to the validity of a covenant not to sue: see Baron Parke's judgment in *Ford* v. *Beech*[1]. It was there held that a covenant not to sue at any time, though not in terms releasing the debtor, yet operated as a release upon the principle of avoiding circuity of action. But a covenant not to sue for a limited time operated only as a covenant, and could not be pleaded as a release: *Thimbleby* v. *Barron*[2]; while a covenant not to sue for a limited time, with a condition suspending the right of action during that time, was construed as a conditional release and could be pleaded in bar of a suit brought within the time: *Walker* v. *Nevill*[3]. There were also, as the decisions show, other incidental matters of much difficulty in this branch of the law, and I am inclined to think that the genesis of section 28 is to be found in the Indian Legislature's desire to sweep away the refinements of the then English law and to enact for India a simpler and more suitable rule. The two prohibitions in the section certainly seem to follow the distinction made in the English cases, and, if that is so, the prohibition of the limitation of time within which a party may enforce his rights follows the English doctrine that a covenant not to sue for a limited time does not amount to a release. And if section 28 be read as a whole, and compared with the effect of such decisions as I have noticed, it seems a probable inference that the Indian Legislature considered it would be simpler, and therefore more convenient, to brush away the somewhat fine

(1) (1848) 11 Q. B. 871. (2) (1838) 3 M. & W. 210.
(3) (1864) 3 H. & C. 403

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distinctions of the English law by laying down the broad general rule that all agreements should be void which either absolutely restrict a contracting party's right to resort to the Courts or merely limit the time within which the rights should be enforced; in that case the phrase as to limiting the time would necessarily bear the same meaning which it has in the English Court's judgments, the meaning namely, that it is not open to a party to covenant that, while his rights subsist, he will diminish the period within which he shall be at liberty to sue. These considerations, therefore, appear to me to afford an additional reason for the conclusion that the language of section 28 has been carefully chosen so as to convey the narrower meaning to which alone the words are apt and appropriate.

For these reasons I agree that the decree under appeal should be affirmed. I concur also in the order as to costs, as I do not find sufficient materials on the record to justify the order depriving the successful defendants of their costs.

It remains only to add a word as to *Hirabhai* v. *Manufacturers Life Insurance Co.*[1] It appears to me that the case was rightly decided on the view which Chandavarkar, J., and I took of the meaning of the agreement; but I recognize that there are difficulties in the way of holding that the words of the agreement there were properly susceptible of that meaning.

Attorneys for the plaintiffs: *Messrs. Bhaishankar, Kanga and Girdharlal.*

Attorneys for the defendants: *Messrs. Hiralal & Co.*

Decree confirmed.

H. S. C.

[1] (1912) 14 Bom. L. R. 741.