

(1958) 03 PAT CK 0016
In the Patna High Court
Case No : First Appeal No. 211 of 1951

Balkrishna Khirwal

APPELLANT

Vs

The New Indian Assurance Co. Ltd.

RESPONDENT

Date of Decision : 25-03-1958

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 3
Contract Act, 1872 — Section 1, 10, 2
Insurance Act, 1938 — Section 45

Citation : AIR 1959 Patna 102

Hon'ble Judges : N. Untwalia, J;C.P. Sinha, J

Bench : Division Bench

Advocate : B.C. De, S.K. Jha, A.H. Fakhruddin and Prem Shankar Sahay, for the Appellant; K.D. Chatterji, S.N. Bhattacharyya and Chunnilal, for the Respondent

Final Decision : Dismissed

Judgement

N. Untwalia, J.—This is an appeal by the plaintiff against the decision of the learned Subordinate Judge of Singhbhum at Jamshedpur and arises out of a money suit filed by the plaintiff against the New India Assurance Company Limited, a Company having its Head Office at Bombay, the life insurance business of which has been taken over by the Life Insurance Corporation of India. The suit was filed in the year 1950 and the plaintiffs case in short was that the plaintiffs mother, Mt. Syo Bai, widow of late Jokhiram Khirwal, made a proposal on 24-11-1946, in the printed forms of the defendant Company for insurance of her own life for a sum of Rs. 25,000.

The period of the policy proposed was 15 years and the premia were to be paid quarterly, that is to say, every three months. The defendant Company accepted the proposal by its letter dated 7-12-1946, subject to a surcharge of Rs. 187/8/- per annum over the usual rate of premium to which the plaintiffs mother agreed—She paid a sum of Rs. 560/3/-towards the payment of the first quarterly premium to the Secretary of the Defendant Company at Jamshedpur. He granted

a receipt and that concluded the contract between the parties covering the risk of the life of the plaintiffs mother from 21-12-1946. A policy bearing number 162231 was issued by the Defendant Company from its Head Office.

The assured, Syo Bai, died on 9-3-1947, on account of heart failure at mouza Jugsalai in the district of Singhbhum after a brief spell of illness. The plaintiff being the sole surviving heir of his mother, lodged claims with the defendant Company for payment of the amount to which he was: entitled to under the said policy. After certain formalities the plaintiff was asked to procure a succession certificate which he did, but, later the Company backed out and did not pay the claim. The plaintiff also asserted in para. 9 of the plaint that the plaintiffs mother was the owner of half share in the immovable properties worth Rs. 1,30,000 besides cash money and ornaments to the extent of Rs. 40,000 or above. The enquiry set up by the defendant Company in regard to this was a belated one and was not proper.

2. The defendant Assurance Company, "in its written statement, stated inter alia, that the Singhbhum court had no jurisdiction to try the suit as the action was triable at Bombay. The Company did not generally accept the proposal of insurance from a female for her life unless the proposer had independent income of her own to pay insurance premia and with that intent in view a proposal for insurance from a female is accompanied by an additional form containing particulars about the proposal which forms a part of the statement made before the Medical examiner.

Such an additional form accompanying the proposal in this particular case was dated 25-11-1946, wherein the proposer had declared that she had an income of her own to the extent of Rs. 2000/- per year from house rent. Such statement, besides others, formed the basis of the contract of insurance and the proposal was accepted on such basis. The Company admitted that the proposal was accepted with the surcharge as also the fact that the first quarterly premium of Rs. 560/5/- had been paid.

The issue of the policy was also admitted. In paragraph 8 of the written statement it was asserted that from enquiries the Company had learnt that the proposer was suffering from cough, asthma and bronchitis for some years prior to the date of the proposal and that her statement that she did not suffer from those ailments or from other affection of lungs" and her statement that she had an income of her own of about Rs. 2000 from house rent were incorrect and untrue and were made deliberately to induce the Company to accept the proposal.

The stand taken in paragraph 13 of the written statement was that the defendant Company was all along making enquiries to find out how far the statements in the proposal and in the accompanying additional form as to the income of the proposer were correct. The plaintiff refused to give any such information although the insurance was effected at his instance and for the first time by his

pleader's letter dated 2-3-1950, purported to give particulars of properties alleged to belong to the assured. The defendant Company did not believe and did not admit that the assured held any such property or had half share in them.

The plaintiffs allegation that the assured was the owner of half share in the Immovable properties worth Rs. 1,30,000 and had cash money and ornaments to the extent of Rs. 40,000 was also not admitted in paragraph 16 of the written statement wherein it was further stated that the defendant Company accepted in good faith the statement made in the proposal and if they were discovered to be untrue, the defendant company would be entitled to discharge the claim. In mat view of the matter the plaintiffs claim was denied and the Company's liability under the policy was not accepted.

3. The learned Subordinate Judge framed six issues in the case and answered four of them in favour of the plaintiff but two of them against him. The first issue as to whether the court had jurisdiction to try the suit was answered in favour of the plaintiff. The third issue as to the independent income of Mt. Syo Bai at the relevant date when the proposal had been made, was also answered in favour of the plaintiff and it was held by the trial court that Syo Bai had an independent income of her own at the time when her life was insured and the statement about this made in the proposal form was correct.

The fifth issue framed was as to whether Syo Bai was actually examined by the doctor or she was falsely impersonated by somebody else when the proposal form was filled up and which was finally accepted by the defendant Company and it was decided against the defendant. The fourth issue was whether the defendant company was induced by misrepresentation and fraud to accept the proposal for insuring the life of the deceased Mt. Syo Bai and the Court below decided this issue also against the defendant Company. The second issue was as follows: "Were the statements made in die proposal for insuring the life of deceased Mt. Syo Bai correct"? Under this issue the court below held that it did not find any substance in the defendant's contention that the reply given by the proposer in respect of her health was a misrepresentation of fact. But the court below, while discussing this issue, gave effect to the contention on behalf of the defendant Company, based upon the evidence of P. W. 10, Bridhi Chand Agarwalla, that Jokhi Ram had four issues from Syo Bai, that the proposer had made an incorrect statement in the proposal form and its accompanying form as respects her number of children, dead or living, and hence the contract was void and unenforceable. Taking this view of the matter on a point which was not specifically pleaded, the court below answered the sixth issue against the plaintiff to the effect that he was not entitled to any relief in the suit.

4. Mr. B. C. De, learned counsel appearing for the appellant urged at the first instance only two points in support of the appeal. His first contention was that the fraud and misrepresentation which had been pleaded in the plaint was different than one found by the learned Subordinate Judge and it was not permissible to plead one kind or fraud and to find another. His second contention

was that the statement of Bridhi Chand Agarwalla (P. W. 10) to the effect that Jokhiram had four issues from Syo Bai was not correct or in any event was not such a material statement which would entitle the defendant company to avoid the contract.

5. Mr. S.N. Bhattacharyya learned counsel appearing for the defendant-respondent, apart from combating the contentions put forward on behalf of the appellant, tried to support the decision of the court below by attacking its findings on the issues decided against the defendant company. He urged that the third issue as to the independent income of Syo Bai had been wrongly decided against the defendant. He also contended that the assured was suffering from cough, asthma etc. at the time of making the proposal of insurance and her statements to the contrary in her proposal forms were false.

He also tried to argue that the statement of the assured as respects her age as given in the proposal form was also inaccurate to the extent of at least three or four years, if not more. Refuting the contentions put forward on behalf of the appellant learned counsel for the respondent contended that the plea taken in the written statement was a general one and would cover the specific plea of inaccurate statement as respects the number of children of the assured as also about her age.

Secondly, even if the plea was not specifically taken, it was open to the defendant company to defeat the plaintiff's claim on a statement of the plaintiff's witness because the matter went to the root of the contract of insurance. Lastly, he contended that the Statement at the time of the proposal for the insurance policy formed the basis of the contract and if found incorrect would make the contract void irrespective of the question of materiality or immateriality.

6. The law governing insurance contracts is well settled in England and has been followed in India by many High Courts.

But no case of this Court was cited at the Bar. I would, therefore, like to discuss first the question of law arising in this appeal, as, in my opinion, the answer to this question is necessary for the decision of the other points involved in the case as also for the ultimate decision of the appeal itself.

7. Exts. C and C (1) are the proposal form submitted by Mt. Syo Bai to the New India Assurance Company Limited with endorsement thereon. The form is an usual one. The declaration signed by Syo Bai is printed at p. 52 of the paper book and reads as follows:

"I Syo Bai do hereby declare that I have read the Prospectus of this Company and agree to the terms and conditions thereof. I further declare that the above statement and answers were true in every particular and agree that this statement and declaration along with further statement to be made before the Medical Examiner and declaration relative thereto shall be the basis of the

contract between me and the New India Assurance Company Limited, and that if any untrue averment be contained there in the contract of Assurance shall be absolutely null and void and all moneys which shall have been paid in respect thereof shall be forfeited."

Ext. 3 is the personal statement of life of Mt. Syo Bai submitted to the Company bearing her signature (Ext. 2) and therein it will be found under item No. 3 of her statement that she had children, two living, and one dead. Under item No. 7(b) she said that she did not suffer from cough asthma, pneumonia, etc. Ext. 4 is the additional form for completion by a female proposer and under item No. 6 of the said form which bears her signature (Ext. 2(a)) she declared that she had an income of Rs. 2000 from house rent. Exts., 3 and 4 are the statements made before Dr. Dalai, the Medical Examiner of the Company. In Ext. 3 also a declaration signed by the assured would be found and it is reiterated in this declaration also that this declaration together with the proposal for assurance shall be the basis of the contract to be made between the proposer and the Company.

It would be noticed, therefore, that the correctness and truth of each and every item in Exts. C 3 and 4 were the basis of the contract between the-assured and the Company. In *Newcastle Fire Insurance Company v. Macmorran and Co.* (1815) 5 Dow 255 : 3 ER 1057 it has been held that it is the first principle of the law of insurance that when a thing is warranted to be of a particular nature or description it must be exactly such as it is represented to be, otherwise the policy is void, and there is no contract. In that case a Cotton and Woollen Mill was insured as being of one class and turned out to have been of another class at the time the mill was burnt.. Lord Eldon sitting in House of Lords observed as follows at page 261: "for if the Mill was warranted as being of the first class, it must be such as it is warranted to be, unless there is something to oust a warranty, otherwise there is no contract."

8. In *Anderson v. Fitzgerald*. (1853) 4 HLG 484: 10 ER 551 it was held that the representation being a part of the contract, its truth, not its materiality, was in question.

9. In *Condogianis v. Guardian Assurance Co. Ltd.* AIR 1921 PC 195 a case from Australia, Lord Shaw held as follows:

"The case accordingly is one of express warranty. If in point of fact the answer is untrue, the warranty still holds, notwithstanding that the untruth might have arisen inadvertently and without any kind of fraud. Secondly, the materiality of the untruth is not in issue; the parties having settled for themselves by making the fact the basis of the contract, and giving a warranty -- that as between them their agreement on that subject precluded all inquiry into the issue of materiality."

10. I would only make a reference to three more English cases, namely, *Thomson v. Weems* (1884) 9 AC 671 *Hambrough v. Mutual life Insurance Co. of New York* (1895) 72 LT 140 and *Dawson v. Bonnin*, (1922) 2 AC 413. In

Dawson's case the earlier authorities of the English Courts were reviewed by the House of Lords and I would quote below a passage at p. 433 from the speech of Viscount Cave:

"Upon the whole, it appears to me, both on principle and on authority, that the meaning and effect of the "basis" clause, taken by itself, is that any untrue statement in the proposal, or any breach of its promissory clauses, shall avoid the policy; and if that be the contract of the parties, it is fully established, by decisions of your Lordships" House, that the question of materiality has not to be considered."

These English authorities have been followed in India in the cases of Light of Asia Insurance Co. Ltd. Vs. Karatoya Debi, , Vaman Ganesh Kolhatkar v. Western India Life Insurance Co. Ltd. AIR 1954 Nag 325 and The Great Eastern Life Assurance Co. Ltd. Vs. Bai Hira, . Mr. B. C. De also relied upon the last mentioned" Bombay case. I fail to understand how this case helps the appellant on the question of law at issue. The case was decided in favour of the widow of the assured on facts found in her favour, but the principle of law laid down there was the same discussed above- That is to say, where the statements made by an assured upon her application for a policy of life insurance are made the basis of the contract the materiality of the representation is not an element to be considered. On the other hand, if such statements are not the basis of the contract but mere representations, the materiality of the representation is an element to be considered.

11. Mr. De relied upon three English cases, namely, Davies v. National Fire and Marine Insurance Co. of New Zealand (1891) AC 485 Fair v. Motor Traders Mutual Insurance Society Ltd. (1920) 3 KB 669 and Provincial Insurance Co. Ltd. v. Morgan (1933) AC 240.

12. The first of these three cases is a case of Fire and Marine Insurance and after going through the whole case I could not follow which principle decided in this case was helpful to the appellant. The case was decided on its own facts.

It was further observed that where payment of a risk is resisted by insurers on the ground of misrepresentation, the onus is on them to prove very clearly that such misrepresentation, has been made. Nowhere in this judgment I could get a clause of the insurance contract in that case which showed that the declarations or the statements of the proponent were the basis of the contract. The case, therefore, is of no help to us in deciding the point at issue in the present case.

13. In (1920) 3 KB 869 the facts were that the plaintiff was the proprietor of two motor taxicabs and he. while signing the proposal for insuring the taxi-cabs with the defendants made a declaration that the taxi-cabs were to be driven in one shift per 24 hours for public hire. A shift lasted for about 8 hours. In August, 1918, one of the taxi cabs was being repaired, the other cab was driven for a short time in two shifts in August.

Thereafter each cab was driven in one shift only. On 7-11-1918, an accident happened to the same taxi-cab (i.e., the one which had been driven in two shifts in August) while being driven in one shift and it was damaged to the extent of about ? 121. The plaintiff brought the action to recover that sum from the defendant under the policy. The defendant contended that as the statement in the-proposal that the cab was only to be driven in one shift per 24 hours was made the basis of the contract, this averment having been broken, the policy became void.

Rowlatt, J. at the first instance held that the effect of the statement in the proposal that the cab was to be driven only in one shift per 24 hours was that the defendant was only to be liable when the cab was being driven per shift in 24 hours, and was not liable when the cab was being driven in more than one shift; that it was merely a limitation of the risk and that the fact that the cab had been driven in two shifts in the previous August did not render the policy void.

He accordingly gave judgment for the plaintiff for the sum claimed., The defendant appealed, Bankes L. J. with whom Warrington and Scrutton L. JJ. agreed, while dismissing the appeal held that the answer was the descriptive of risk and not a warranty. The ratio of the case is to be found in the following passage:

"The question is whether we are to construe the question and answer, as the defendants contended, as a warranty, the effect of which would be that in August, when the cab was driven in two shifts per day, the policy came to an end; or whether we are to construe them, as Rowlatt J. has construed them, as words descriptive of the risk indicating that whilst the cab is driven in one shift per 24 hours the risk will be covered, but that if in any one day of 24 hours the cab is driven in more than one shift, the risk will no longer be covered and will cease to attach until the owner resumes the practice of driving the cab in one shift only. In my opinion, having regard to the nature of the question, it is impossible to construe the answer thereto as a warranty."

14. The case of the Provincial Insurance Company decided by the House of Lords is one similar to the last case. In this case the respondents, who were coal merchants effected a policy of insurance with the appellants in respect of a motor lorry. The respondents declared and warranted that the questions asked therein were fully and truthfully answered and agreed that this declaration and the answers-should be the basis of the contract between themselves and the appellants.

In answer to two questions they declared that the vehicle would be used for delivery of coal and coal would be carried by the lorry in question. The appellants accepted the proposal in April, 30, and the policy was to remain in force until April, 1931. On August 25, 1930, the lorry had been used until noon solely for delivering coal but in the afternoon the truck was also used for carrying and delivering timber along with coal. After the respondents had delivered the timber

and were on their way to deliver the coal, which the truck was carrying, a collusion took place between the motor lorry and" a motor car.

Damage was done to the lorry and to the car and two persons were injured. On these facts the Arbitrator awarded that the appellants were liable to indemnify the respondents against the damage done to the lorry and to the motor car and to the persons injured in the accident. On hearing the special case Rowlatt J. upheld the award of the Arbitrator. The Court of appeal dismissed the appeal and the matter was taken to the House of Lords on a further appeal.

The answers of the respondents in the proposal form were held to be descriptive of the risk and it was held that the answers did not indicate that the lorry was to be used exclusively for carrying coal and at the time of the accident it was covered by the insured risk as it was being used for carrying coal. The principles laid down in 1920 3 KB 669 and in another case of Roberts v. Anglo Saxson Insurance Association (1927) 96 LJ KB 590 to the effect that a description as to the use to which a vehicle was to be put was descriptive of the character of the risk rather than a warranty that that particular use and no other use was the one to which the vehicle was confined, was approved. Lord Wright referring to the cases of (1922) 2 AC 413 and (1884) 9 AC 671 observed as follows : --

"On the other hand it is clear law that in insurance a warranty or condition (because these words are used as equivalent in insurance law, which in that respect differs in its use of the terms from the law of "sale of goods), though it must be strictly though reasonably construed. In the present case the appellants do not allege that there was any concealment or misrepresentation nor do they complain of any of the other answers. The relevant answer, which I have quoted above, docs, I think, refer to the future and is, in my opinion, of a promissory nature and is apt to create a warranty or condition."

His Lordship further observed:

"The appellants could certainly, if they wished, have taken the right to treat the policy as avoided for any breach of warranty or condition, "however trivial or immaterial, but to do so they must have used clear words."

Lord Wright agreed that the clause in question was not a warranty and he further agreed that it was defining or describing the risk covered by the policy. It will be noticed, therefore, that this case is, rather, against the appellant and affirms the view I have expressed above.

15. The result of the review of these authorities is to my mind clear and is this. If any of the statements in the proposal form or the declaration form accompanying the proposal form made by the assured and which have been made the basis of the contract are found to be untrue, the contract of insurance would be void and unenforceable in law, irrespective of the question whether the statement concerned is of a material nature or not. Mr. De contended that the proposition laid down by the English authorities in relation to these insurance contracts

should not be imported and followed in India.

His contention was that Section 10 of the Indian Contract Act, which provides that all agreements are contracts if they are made by the free consent of the parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void, makes it clear that if a contract is for a lawful consideration and with a lawful object and is not expressly declared to be void by the Contract Act, cannot be held to be void in India.

I am unable to accept this contention also. Section 2(g) provides : "An agreement not enforceable by law is said to be void". The last paragraph of Section 1 provides :

"Nothing herein contained shall affect the provisions of any Statute, Act or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act".

Reading the two provisions last quoted along with the provisions of Section 10 it is abundantly clear to me that the incidence of any insurance contracts in India are on the same footing as in England and the agreement is not enforceable by law if the basis of the agreement is broken. In that view the agreement becomes void and is covered by Section 10 also.

16. It is, therefore, necessary in this case to find out which of the statements are alleged to be untrue or are really untrue or can be found to be untrue. As stated above, the Insurance Company in its written statement challenged only two statements of the assured in the proposal and the declaration forms as false, incorrect and untrue -- (i) her statement that she did not suffer from cough, asthma etc. or other affection of lungs and (ii) her statement that she had income of her own of about Rs. 2000 from house rent.

On reading the written statement as a whole I am definitely of the opinion that there is even no general averment in the written statement challenging any other statement of the assured as untrue in any manner. In that view of the matter, relying upon the cases of AIR 1930 57 (Privy Council) , AIR 1945 64 (Privy Council) Jaigobind Misir and Others Vs. Nagesar Prasad and Others, , and Rajendra Prasad Singh Vs. Governor-General in Council and Another, , I hold that the truth or otherwise of any other statement cannot be investigated in this case and no amount of evidence is admissible to prove or disprove the same.

Even if evidence has come on record accidentally, the court is not called upon to look into, such evidence and test the correctness or otherwise of such statement. Mr. Bhattacharyya relied upon the case of AIR 1929 303 (Privy Council) and submitted that since the statements were the basis of the contract, which was sought to be enforced, the plaintiff cannot enforce the contract even if the statements are found to be untrue on a piece of evidence which came out accidentally during the course of the trial.

In that case, however, the fact which accidentally came to light was that the

plaintiff appellant had no title to the property in question as he had sold and conveyed the property to a Company in the year 1920, before the commencement of the action, in the year 1923. It was also held that the plea set up on behalf of the defendant was a plea of non-admission of the plaintiff's title which cast upon the plaintiff the burden of proving his title.

In those circumstances, the evidence, though it came out accidentally, was admissible to show that the plaintiff had no title in the suit property. In my opinion, the present case is distinguishable clearly from the facts of the Privy Council case. True it is that this is not a case where the defendant is attempting to avoid the contract on the ground of fraud and misrepresentation and, therefore, the argument of Mr. De that one cannot plead one kind of fraud and find another is also not apposite.

But, at the same time the plaintiff is not called upon in such a case to prove that each and every statement made by the assured was correct nor it is open to the defendant Company to take advantage of an accidental statement made by the plaintiff's witness on the question as to how many children Syo Eai had. The plaintiff himself was examined after P.W. 10 but he neither deposed in his examination in chief nor was asked any question in cross-examination.

Therefore, the solitary statement of P.W. 10, which statement was challenged as not correct by a petition filed later, after the close of the argument, cannot be looked into to hold that the statement of Syo Bai in regard to the number of children given birth by her, was untrue. Mr. Bhattacharya further submitted that the matter was within the special knowledge of the plaintiff or his mother, the company had no means to know the correctness or otherwise of the statement made by her and therefore, the defendant was entitled to rely upon the statements of P-W. 10.

I am not prepared to accept this contention also for "two reasons. Firstly, the Company in this case held enquiries about the statements made by the assured and relied upon only two statements of hers as being untrue. Secondly, the Company did not take care to amend its written statement even when P.W. 10 deposed in cross-examination on the question of the alleged number of children. I, therefore, hold that the plaintiff cannot be non-suited on the ground on which he has been defeated by the learned Subordinate Judge.

17. For the same reason Mr. Bhattacharyya was not permitted by the Court to advance any detailed arguments on the question that Syo Bai had incorrectly stated her age at the time of the proposal. The few materials which he placed before us on this question are, in my opinion, not such which require a detailed discussion here as they were of a flimsy character and would not justify a view that the statement of Syo Bai as to her age at the time of the proposal was wrong.

18. Mr. Bhattacharya referred to the evidence of Dr. D.N. Mukherji (D.W.I) and submitted on the basis of his evidence that the finding of the learned

Subordinate Judge that the statement of Mrs. Syo Bai before the doctor that she was not suffering from cough, asthma etc., was not a mis-statement of fact, is not correct.

Having perused the evidence of the doctor and Ext. A (27), a letter from the said doctor to the Branch Secretary of the Company at Jamshedpur written on 5-1-1948. I am not prepared to disagree with the finding of the learned Subordinate Judge and hold in agreement with him that the statement of Mrs. Syo Bai regarding her health, especially as to whether she was suffering from cough, asthma etc., on the date of the proposal was not incorrect.

19. The finding of the learned Subordinate Judge that there was no false personification of Syo Bai before the Medical Examiner of the Company has not been challenged before us. But, as stated above, the finding to the effect that Syo Bai had her personal income to the extent of Rs. 2000 per year has been very seriously challenged and this seems to be the real difficulty in the way of the plaintiff to succeed in this case. Item No. 6 of Ext. 4 reads as follows :

Q -- "Have you any income of your own? If so, how much and from what source."

A -- "Yes about Rs. 2000 from house rent." (Note : In paper-book at p. 43, 200 is a mistake for 2000).

20. As stated above, it would appear from paragraph 9 of the plaint that the defendant Company was not accepting this statement of the deceased as correct and yet the only fact pleaded by the plaintiff in his plaint was that the plaintiff's mother was the owner of half share in the immovable properties worth Rs. 1,30,000 besides cash money and ornaments to the extent of Rs. 40,000 or above. This fact was denied in paragraph 16 of the written statement. Certain interrogatories were required to be answered by the plaintiff on an application under Order 11, Rule 1, CPC and interrogatory No. 15 is as follows :

"Is there any document under which Mrs. Syo Bai became entitled to half share in the properties averred in the plaint? If so, please specify the same fully and the right under which and the circumstances under which she became entitled to half share."

Interrogatory No. 16 reads as follows :

"In whose possession are the monies and ornaments said to be worth Rs. 40,000 referred to in paragraph 9 of the plaint. How, when and from whom, did the deceased acquire them?"

Interrogatory No. 19 reads as follows :

"What amount of cash did the said deceased, Mrs. Syo Bai have at her death and where was it kept? Was it bearing any income? If so, what are the particulars? What has become of the cash?"

Interrogatory No. 20 reads as follows :

"What are the details of the cash and the ornaments referred to above? Where, from whom and when, did the deceased acquire the cash?"

Interrogatory No. 21 reads as- follows :

"What became of the cash and the ornaments after the death of Mrs. Syo Bai? To whom did they pass?"

The answers given by the plaintiff to the above interrogatories ran as follows -

"15. The plaintiff objects to answer this question as the same relates exclusively to evidence adducible by the plaintiff who is not bound to disclose the same at this juncture."

"16. The cash and ornaments devolved on the plaintiff. The ornaments were given to her by her husband. The cash represented gifts from her husband and savings from income from house rent."

"19. Syo Bai had Rs. 7015 in her box at the time of her death. It did not bear any income. The cash devolved on the plaintiff after her death."

"20. Details of ornaments are given below :

Gold. Tagri-2. Pachheli, 6, Kara Chhar-4. Sankali-1, Rings, 2, Kanthi-1, pearl ring 2, pearl pachheli-6, and pearl sakali-1, Silver-Shat- 1 pair, kari, 2f and Pajeni-2.

Major portion of the cash was accumulated by her from her income of the house rent."

"21 : The cash and ornaments devolved on the plaintiff."

21. In court the story was developed in evidence. The story told by P.W. 10, Bridhi Chand Agarwalla is that late Jokhiram father of the plaintiff, had two wives. From his first wife he had two sons, Kanhaiya Lal and Bisheshwar Lal and the second wife was Mrs. Syo Bai, from whom was born Balkrishna, the plaintiff. In or about the year 1939 there was a partition of the properties among the plaintiff and his brothers and the plaintiff got properties worth rupees sixty to seventy thousand and in that partition it is said, Syo Bai also got properties worth rupees thirty to thirty five thousand.

He further deposed that in the Juasalai house, in which the plaintiff is residing, the share of Syo Bai was half and she used to get half the rent. She had also half share in the Cbaibassa properties, which is a house in the Municipality of Chaibassa. To the same effect is the evidence of Chouth Mal Purohit (P.W.II). The plaintiff was examined as P.W.14 in the case and his evidence on the point is as follows :

"My father left behind extensive properties. There was Butwara in the family. On partition myself and my mother jointly got half share in Jugsalai house as well as the house at Chaibassa. The price of both the houses at the time of partition was more than one lac of rupees. At present the price of the house has increased."

"My mother was to get half the rent received by me. At the time of insurance a sum of Us. 400 used to be received as house rent. Out of this Rs. 200 per month was received by me and another Rs. 200 per month was received by my mother as her share."

* * * * * "The taxes were not paid in the name of my mother as I used to maintain her and she had only a life interest."

In cross-examination, the plaintiff was confronted with Exts. H and H(1), petitions filed before the Chaibassa Municipality by the plaintiff and his brothers, Kanhaiya Lal and Bisheshwar Lal. The plaintiff had to admit in cross-examination ;

"I have not mentioned in mutation petition filed in Jugsalai Notified Area Committee or in Chaibassa Municipality that my mother had any share in the houses."

22. Jokhiram admittedly died in 1928 as would appear from Ext. 3, the personal statement of Mrs. Syo Bai "at the time of making the proposal for the policy. Syo Bai, therefore, had no interest in the property as she would have got if her husband would have died after the coming into force of the Hindu Womens' Rights to Property Act of 1937. But, of course, under the Hindu Law as it existed even without that Act she was entitled to a share equal to that of her son on partition.

A memorandum of partition was drawn up as it appears from the evidence of some of the P.Ws. but it was held inadmissible in evidence by the Court below, and no attempt was made in this Court on behalf of the plaintiff-appellant to show that the said document was wrongly rejected from evidence. The position, therefore, remains on the evidence of the P.Ws. that there was a partition or family arrangement in or about the year 1939 between the plaintiff on the one hand and his two step brothers on the other.

It also appears that the two brothers from the first wife of Jokhiram got half share in the properties left by Jokhiram and the plaintiff got half share. But there was no coparcenary between Syo Bai and the plaintiff and there could be no question of allotting half share in the properties left by Jokhiram jointly to the plaintiff and his mother.

The question to be decided was whether the evidence adduced on behalf of the plaintiff was sufficient to hold that on such partition or family arrangement between the brothers, the mother, namely, Syo Bai, got her one fourth separate share. The circumstances are overwhelming against this position. Firstly, there is no document of partition on record to show that Syo Bai was allotted her one fourth share separately.

Secondly, Exts. H and H(1), 11 and 12 contradicted this position. Ext. H is a petition dated 2-2-1943, filed by the plaintiff before the Chairman, Chaibassa Municipality, wherein he stated that the Chaibassa house in question came to his share and possession according to the family arrangement in the year 1939 with

his two brothers, who had since no title and concern with the holding in question.

The statement was supported by the other two brothers of the plaintiff in the petition filed on the same day before the Chaibassa Municipality, which is Ext. H(1) on the record. Ext. 11 is a true copy of the two petitions, Exts. H and H(1), with a copy of the order of the Chairman therein showing that the above statements were accepted after enquiry and mutation as prayed was ordered. Ext. 12 is a document filed and exhibited on behalf of the plaintiff showing similar statements and orders in respect of the Jugsalai house in question before and by the Jugsalai Notified Area Committee. It is also important to note that if really Syo Bai was allotted her one fourth share separately in the properties left by her husband, her share on her death would devolve on all the three sons of Jokhram irrespective of the question whether they were from the first wife or the second.

But, from the answers given by the plaintiff to the interrogatories as quoted above, it would appear that the plaintiff has succeeded to the entire cash and ornaments including the savings from the alleged cash income from the house rent. In this state of affairs it is difficult to believe the evidence of the P.Ws. that on partition Mrs. Syo Bai was allotted any separate share. P.Ws. 3, 5, 6, 8 and 12 were examined to say that Syo Bai had half share in the rent which was being collected.

It would, however, appear from Ext. 7 series, the rent receipts granted by the plaintiff that he only was receiving the rents from the tenants and nowhere it is mentioned in those receipts that rent was payable to the extent of half to his mother. Ext. 5 was drawn up by P.W. 3, who is the Manager of Credit Agricole Co, and this is an agreement of lease executed by the plaintiff in favour of Bihar Provincial Co-operative Bank of which the said Company is a section.

It is important to note that the lessor shown in Ext. 5 is only the plaintiff and that finishes the entire oral evidence on the point, which is not only unsupported by any documentary evidence but is contradicted by the documents produced on behalf of the plaintiff. In this state of affairs I hold that for one reason or the other Syo Bai was not allotted any share in the two houses in question, half the rental income of which is said to be her income.

If she had no separate share in the two houses which were allotted to the share of the plaintiff only her statement in Ext. 4 to the effect that she had Rs. 2,000 as her own income from house rent was false. It appears to me that that statement was made, as, without that, the defendant Company would not have agreed to insure the life of the female.

23. The learned Subordinate Judge, while discussing issue No. 3, has committed two errors. Firstly, he has wrongly observed that according to the Hindu Law in a family governed by the Mitakshara Law a widow inherits an equal share to that of one of her sons.

It may be said that what he meant was that a mother gets an equal share to that of a son on partition. But, then the difficulty in upholding his judgment on this point is that he has nowhere found that on partition Mrs. Syo Bai was allotted one fourth separate share in the properties left by Jokhram or that Syo Bai had half share in the two houses, one at Jugsalai and the other at Chaibassa. He had simply found that Syo Bai had an independent income of her own at the time when her life was insured.

But it does not stand to reason how that finding" could be arrived at without the pre-requisite finding that she had half separate share in the two houses which were fetching rent income. In this view of the matter, the finding of the learned Subordinate Judge on issue No. 3 has got to be reversed. Thus, the basis of the contract in question is shaken and I hold that the agreement is not enforceable by law and is, therefore, void.

24. The result, therefore, is that the decree of the learned Subordinate Judge is affirmed but, on different grounds, as discussed and stated above. The appeal is dismissed, but in the circumstances of the case there will be no order as to costs.

C.P. Sinha, J.

25. I entirely agree and have nothing to add except to state that, even after the shares are defined, two persons, though not coparceners may decide to have a common joint management of the property without actual partition by metes and bounds. In the present case, though the mother of the plaintiff was entitled to share in the properties left by the husband on a partition between the sons, there is no reliable evidence to show that she was given a share as fully discussed, by my learned brother.