
(1937) 03 CAL CK 0026
In the Calcutta High Court

Haridasi Debi and Others

APPELLANT

Vs

Manufacturers Life Assurance Co. Ltd.

RESPONDENT

Date of Decision : 11-03-1937

Acts Referred:

Contract Act, 1872 — Section 17

Citation : AIR 1937 Cal 510

Hon'ble Judges : Lort-Williams, J; Lord Williams, J

Bench : Division Bench

Judgement

Lort-Williams, J.—The plaintiffs sue the defendant company upon a policy of insurance for Rs. 18,000 and interest,, effected upon the life of Kali Prasad Chakrabarty in favour of his wife, plaintiff 1. The plaint was admitted on 8th December 1934. The defendant company resists the claim on the ground of fraud, which was the only issue raised by counsel on behalf of the company, namely "Were the representations specified in para. 3 of the written statement or any of them fraudulently made knowing the same to be untrue?" The allegation of fraud was added to the written statement by a somewhat belated amendment made by leave on 28th April 1936, when the suit was already in the peremptory list for hearing. The policy was issued on 12th June 1934, and the assured died on 3rd August 1934. The premium was Rupees 194-10-0 payable quarterly, the assured having been accepted as a first-class life, after examination by a doctor appointed by the company. The company's agent reported that he had known the applicant for about three months, that he was in thoroughly good health, that his general reputation as to character and morals was good and that he unqualifiedly recommended him for insurance at ordinary rates. The medical examiner reported inter alia that his blood pressure was normal. Previously, on 31st May 1934 the assured had applied for insurance to the Crown Life Insurance Company in two sums of Rs. 40,000 and Rs. 10,000, respectively, and policies for these sums were issued to him, after examination and recommendation by two doctors appointed by that company, and acceptance as a first-class life. The premiums were Rs. 392 and Rs. 98, respectively, payable quarterly. Claims in

respect of these insurances are still pending. Certain provisions and options formed part of the contract made between the assured and the defendant company. Provision 4 is as follows:

Incontestability. This policy is issued in consideration of the application therefor and of the statements and agreements therein contained, and together with the application constitutes the entire contract and is based on statements made by the insured, which shall, in the absence of fraud, be deemed representations and not warranties. After this policy has been in force during the life time of the insured for two years from its date of issue, it shall be incontestable except for fraud or non-payment of premium, etc.

2. These statements were in the handwriting of the medical examiner and were made in answer to printed questions on the application form. They were, *inter alia*, as follows, and these were the only statements which counsel for the defendant company sought to rely upon at the trial.

3. (a) Has any member of your family ever suffered from Consumption or Insanity? No.; (b) Have you lived in the same house or been associated in any way with a case of Tuberculosis within two years? No.

6. Have you ever had or consulted a medical practitioner for: (a) Fits, Convulsions, or disease of Brain or Nervous System? No.

7. (b) What Physician or Physicians, if any, not named above have you consulted or been treated by within the last five years, and for what illness or ailment? (Give full details; if none, so state) None.

3. A great deal of evidence both medical and otherwise, has been given on each side, which it is unnecessary for me to recapitulate in detail. It will be sufficient to state the result. There is evidence to show that a maternal aunt of the assured, who lived with him in the same house, was under occasional or periodical but not regular medical treatment by doctors and Kavirajes for haemoptysis or spitting of blood which was diagnosed as indicative of pulmonary tuberculosis, from the end of April 1930 to the end of November 1933. For part of the time the evidence is both oral and documentary. This aunt died in April 1934 at a very advanced age, she was probably about 80-84 years old. There is no evidence to show what she died of, except a statement made at the burning ghat-that she had died of malaria. For several years prior to her death, she had been in failing health, and had suffered a good deal from malaria, cholera, dyspepsia and stomach troubles, and other minor ailments to which old people are susceptible. That the medical men suspected and diagnosed tuberculosis, and were treating the patient accordingly was known to the assured. There is evidence to show that the assured occasionally had fainting fits, which were probably caused by blood pressure, and this according to the evidence of the witness Dr. Amulyadhane Ghose, was probably due to over-indulgence in food and drink. The assured was a tall stout man of a type susceptible to blood pressure, and there is not sufficient evidence to establish that his blood pressure

was due to any specific disease. There is evidence that the assured had consulted or had been attended by one or more medical practitioners occasionally during the five years immediately prior to the date of his application, for such ailments as influenza, malaria, asthma, palpitation and blood pressure, and on one occasion in November 1933 for a fainting fit due to blood pressure. There is no evidence to show that the assured died of any of such ailments, and certainly not of tuberculosis. Several medical men attended to him either at the time of, or during the period of three weeks immediately prior to his death. No definite diagnosis could be arrived at, but the probable cause of death was stated to be suspected peritonitis or perityphlitis due to the bursting of an abdominal abscess. After very careful consideration I have come to the conclusion that I must accept this positive evidence, rather than the negative evidence given on behalf the plaintiffs and I am satisfied that these facts were known to the assured and that his relative statements, therefore, were not strictly speaking and literally true. But the crucial question to be decided is whether he made these statements fraudulently knowing them to be untrue, which is the only issue which has been raised on behalf of the defendant company. Fraud is defined in Section 17, Contract Act, as follows:

"Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into contract: (1) The suggestion as to a fact, of that which is not true by one who does not believe it to be true; (2) the active concealment of a fact by one having knowledge or belief of the fact; (3) a promise made without any intention of performing it; (4) any other act fitted to deceive; (5) any such act or omission as the law specially declares to be fraudulent.

Explanation.-Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

4. The onus of proving fraud in this case is upon the defendant company. Even if it had not been, the learned counsel appearing for the company at the beginning of the trial expressly accepted the burden and announced that he proposed to begin, whereupon he proceeded to open his case and call his witnesses. No issue was raised by him on the question of onus. In spite of these facts he sought at the end of the trial to contend that the onus of proving that the assured did not act fraudulently lay upon the plaintiffs. This contention I rejected for the reasons given above. Upon the question of fraud the evidence of the witness Dr. Dwijendra Nath Banerjee is important. He was, at the material time in 1934, Chief Medical Officer of the defendant company in Calcutta, and one of the medical examiners. He said that if he had known the facts about the aunt of the assured he would hardly have passed the application on his own responsibility and would have made a further investigation, and he thought that he would have

referred the matter to headquarters before issuing a policy. He said also that if he had known about the fainting fits, and upon further investigation had found that these came on suddenly, and that the assured at such times did not take care of himself, he would have rejected his application without hesitation. The solicitors however, who acted on behalf of the defendant company, in a letter of 5th November 1934 repudiating liability, stated that had the questions been truly answered the company would have either rejected the proposal or accepted it at higher rates. Dr. Banerji also said that it was the duty of the medical examiner to explain definitely to the applicant the exact meaning of the questions in the application form, and he admitted that the correctness of the answers depended upon how the examiner explained those questions. For example, he said that he would not expect fainting fits to be mentioned by an applicant unless they were a common occurrence and the applicant had them habitually or quite often, and they were serious, and a medical practitioner had to be consulted very often about them and they were due to disease. He admitted that to enable the applicant to answer such a question properly, some such explanation must be given to him by the medical examiner, and that it was necessary that similar explanation should be given of all the other questions.

5. Neither the agent nor the medical examiner has been called, and there is no evidence that any such necessary explanations were given to the assured. The application form is in the handwriting of the medical examiner. The judgments of the learned Judges in *Joel v. Law Union and Crown Insurance Co.* (1908) 2 K B 863 are illuminating both on the point about the necessity of giving a proper explanation to the applicant, and about proving that such an explanation was in fact given, and as regards the onus of proof in such circumstances. It may well be that the medical examiner held the same opinion as the Chief Medical Officer about fainting fits, and explained to the assured that it was not necessary to mention those occasional fits which have been described in the evidence. Similarly, he may have informed the assured that it was not necessary to mention his aunt's illness, having regard to the fact that there was nothing to show that she died of tuberculosis and that she was not treated regularly for this disease. It may well be that having regard to the natural reluctance to admit that a relative has suffered from tuberculosis, the assured had reasonably persuaded himself or been persuaded that the existence of this disease, in view of the medical evidence, had not been established beyond reasonable doubt.

6. In failing to disclose the facts about his aunt he may have been foolish, because the evidence seems to show that his application would not have been refused on that account, though it might have been the subject of further investigation and delay. In a contract such as this where the applicant's statements were to be treated as representations and not warranties, it is not sufficient, in the absence of fraud, to vitiate the policy to show that the matters concealed or misrepresented would merely have caused delay in issuing the policy while a further investigation was being made: *Mutual Life Insurance Co., New York v. Ontario Metal Products Co., Ltd.* (1925) A C 344.

7. Similarly, I have little doubt that the medical examiner might have told the assured that he need not mention those minor ailments for which he had received medical treatment on a few isolated occasions during the preceding five years. Such questions as are usually asked in forma of application for insurance are often somewhat embarrassing and cannot always be reasonably expected to be answered with strict and literal truth. They must often be read with some limitation and qualification to make them reasonable, and they must always be read in a fair and commonsense way, having regard to all the circumstances: *Connecticut Mutual Life Insurance Co. of Hartford v. Kate Douglas Moore* (1881) 6 A C 644. Foolishness, however, is a very different thing from fraud. It is true that the contract of life insurance is one *uberrima fidei*. But as Fletcher Moulton, L.J. said in *Joel v. Law Union and Crown Insurance Co.* (1908) 2 K B 863:

There is a point here which often is not sufficiently kept in mind. The duty is a duty to disclose, and you cannot disclose what you do not know. The obligation to disclose, therefore, necessarily depends on the knowledge you possess. Your opinion of the materiality of that knowledge is of no moment. If a reasonable man would have recognized that it was material to disclose the knowledge in question, it is no excuse that you did not recognize it to be so. But the question always is: Was the knowledge you possessed such that you ought to have disclosed it?

8. Later at p. 885 he said:

But insurance companies have pushed the practice far beyond these limits, and have made the correctness of statements of matters wholly beyond his knowledge, and which can best be only statements of opinion or belief, conditions of the validity of the policy. For instance, one of the commonest of such questions is: "Have you any disease?" Not even the most skilled doctor after most prolonged scientific examination could answer such a question with certainty, and a layman can only give his honest opinion on it. But the policies issued by many companies are framed so as to be invalid unless this and many other like questions are correctly-not merely truthfully-answered, though the insurers are well aware that it is impossible for anyone to arrive at anything more certain than an opinion about them. I wish I could adequately warn the public against such practices on the part of insurance offices. I am satisfied that few of those who insure have any idea how completely they leave themselves in the hands of the insurers, should the latter wish to dispute the policy when it falls in. In the case of the question to which I have referred, if it can be shown even by the aid of the contemporaneous examination of the medical referee of the office itself that the insured had at the time some disease, the policy is void. The disease may have been unknown, and even undiscoverable; it may have been transient, and have had no effect on his future life, or on the cause of his death. These things are immaterial. If the company choose to dispute the policy, and establish a single inaccuracy in these statements which are thus made conditions, the policy is void, and usually all that has been paid thereon is forfeit.

Hence I fully agree with the words used by Lord St. Leonards in his opinion in *Anderson v. Fitzgerald* (1853) 4 H L C 484 at p. 607 to the effect that in this way provisions are introduced into policies of life assurance which, unless they are fully explained to the parties, will lead a vast number of persons to suppose that they have made provision for their families by an insurance of their lives, and by payment of perhaps a very considerable proportion of their income, when in point of fact, from the very commencement, the policy was not worth the paper upon which it was written.

9. That was a case in which it was claimed that the statements made by the assured were part of the basis of the contract and amounted to warranties. In the present case the position is wholly different; the only issue is one of fraud, and, especially in the absence of both, agent and medical examiner, it is not possible to say that the assured acted fraudulently in answering the questions as he did. The defendant company having failed to discharge the onus of proving that the assured acted fraudulently, there must be judgment for the plaintiffs with costs, including reserved costs.