
(1937) 07 CAL CK 0026
In the Calcutta High Court

Hemanta Kumar Das

APPELLANT

Vs

Alliantz Und Stuttgarter Life Insurance Co. Ltd.

RESPONDENT

Date of Decision : 28-07-1937

Acts Referred:

Evidence Act, 1872 — Section 77

Citation : AIR 1938 Cal 120

Hon'ble Judges : Williams, J

Bench : Division Bench

Judgement

Williams, J.—This is a claim for Rs. 5,000 and costs upon a 15 years" endowment policy of life assurance, which the assured, one Noot Behari Das, in consideration of natural love and affection has assigned to his son, the plaintiff, in August 1934.. The policy is dated 16th February 1934, and the assured died on 22nd February 1936. The policy was issued subject to the conditions stated therein, and in accordance with the proposal and declaration made by the assured on 8th January 1934, in which it was provided that the declaration and the statements, answers and representations therein contained and in the report of the Company"s medical examiner should be the basis of the contract, and that if any untrue averment should be contained therein, the contract would be void.

2. The defendants resist the claim on the grounds that the proposal contained a number of untrue statements and that it was accepted subject to the further condition that should the proposer"s age be proved to have been above 60 years at his next succeeding birthday, the assurance-should be treated as void ab initio, and that it has been so proved. The alleged untrue statements are (a) that the proposer"s age would be 54 on his next succeeding birthday, whereas he well knew that he had already attained the age of between 67 and 70 years, (b) that he did not suffer and had never suffered from any disease of the urinary organs, (c) that he had not then and never had any difficulty in passing urine, (d) that he did not then suffer and never had suffered from stricture or from diabetes, and (e) that he had never suffered from any other complaint. Further the defendants

say that the proposer made these statements fraudulently, and fraudulently concealed diverse facts materially to be known to them and of which at all material times they were ignorant, namely that he was then suffering from a filarial or some other infection of the scrotum and had so suffered for a considerable period, that he had been constantly afflicted with ulcerine or other sore thereon and had frequently suffered from stricture as also from inconvenience of urine. The onus of proving all these allegations lay upon the defendants.

3. On the question of age, the defendants stipulated in a letter, dated 9th February 1934, that if the age of the proposer were subsequently proved to be above 60 years next birthday, the assurance should be automatically vitiated ab initio. But in accordance with the ninth condition of the policy which provided for proof of birth, the proposer submitted a horoscope, and after this had been carefully scrutinised by the Company's horoscope-reader, his age was admitted on 16th February 1934, and this admission was endorsed as a special provision on the policy. In the horoscope the date of birth is given as 1st Chaitra 1801 Saka (13th March 1880). The defendants called a number of witnesses both on medical point and on that of age. Considering that they have thought fit to make allegations of fraud against a dead man, this evidence is so meagre and so unconvincing that I am bound to say that in my opinion these charges have been made somewhat recklessly and ought never to have been made.

4. They were unable to call any medical witness who had attended upon the assured and their only medical evidence was that of Dr. Sivapada Bhattacharjee who had attended upon a son of the assured. He stated quite frankly that he had no notes and that he could not swear the dates. Sometimes, when attending the son, he had talked to the assured. He saw him during his last illness in 1936 and he then had symptoms of filaria, thickened skin and an enlarged scrotum, but he could not say definitely that he had that disease. He never treated him and did not take particular interest in his condition. He had fever and one day there was difficulty in passing urine. The scrotum was about as big as two langra mangoes and it was inflamed and there was an ulcer on it. He thought that he had known the assured for four or five years prior to his death, but it was only guesswork and; he could not say that he had any infection of the scrotum in 1934. This witness was thoroughly reliable, careful and fair, and it was quite clear from his evidence that he could not give any definite information about the condition of the assured prior to his last illness in 1936. Dr. Hans Fritz Hahndel gave some interesting evidence about the disease of filaria, but it was only relevant to the extent that he thought from the description which was given by Dr. Bhattacharjee and relying on the evidence of the other witnesses that the assured probably had filaria in 1936, and that if he had, this scrotum could not have reached the size stated in two years. But he admitted that it was very hard to say, and that a big scrotum might be due to causes other than filaria, for example, cellulitis. He could not say definitely that the assured suffered from a filarial scrotum. The blood report showed that at that time, January 1936, there

were positively no micro- filaria in the blood but that in his opinion was not conclusive. The patient might have filaria without having it in the blood.

5. The defendants called no other medical witnesses. They refused to call Dr. Nandalal Roy who had been their medical examiner of the assured at the time when the policy was issued. Their attitude was difficult to justify, because though they had ceased to employ him, they made no charge against him, even of negligence. Eventually he was called as a Court witness. Instead, they sought to support this meagre and unconvincing medical evidence with that of some illiterate and ignorant neighbours of the assured who had been discovered by the Superintendent for Investigation, a retired Inspector of Police, and whose evidence was so unreliable and so paltry as to be almost farcical in its insufficiency. Amritlal Kundu had no conception of the difference between personal knowledge and the talk of the neighbourhood. He lived rent-free in his nephew's workshop and had no regular wages. His evidence amounted to little more than local gossip. He said that he had not seen the assured for three years before his death. He had disease of the scrotum because he died of it. He used to walk with his legs apart and his dress used to be lifted up. From that it could be understood that he had a big scrotum. It was about the size of a football when last he saw him. He saw it once when he was sitting down through a gap in his dhoti. It had been growing for 15 or 16 years. When a man suffers from disease in that locality, the entire locality comes to know about it. He was distantly related to the assured, but he was poor and the assured was rich and did not care for him. Suresh Chandra Das was earning Rs. 10 to Rs. 17 a month. He also said that the assured suffered for 15 or 16 years from a disease of the scrotum and could not walk. But he went much further than Kundu and described the scrotum as being about 18 inches wide during the last five or six years. Previous to that it was 8 to 12 inches wide. The assured was a very good man; he was not a man to tell lies; he could not speak ill of him.

6. Another neighbour, Purendra Nath Sen, said that when the assured walked past his house it could be noticed that his scrotum was large. He had noticed that for 3 or 3½ years by guess. The insured was a very stout man. Nanigopal Banerjee had been a partner of the assured for ten years until 1924. Between that date and 1935 he said he saw him only once. About 15th November 1935, he complained of difficulty in passing urine and that his scrotum was big and that there was a sore on it. The witness said that he did not see the scrotum but noticed it was abnormally large. His physical condition was quite good. He sometimes complained of fever. He came to the office every day and the witness never knew him to be laid up. He was a heavily built man. He was a man that anybody could trust. Pramathanath Pramanik is an Honorary Magistrate and head of the community to which the assured belonged. His evidence was taken on commission. On being pressed very hard with leading questions about the health of the assured, he said that he knew nothing about it; the assured had no physical deformity or defect. He was quite healthy. On being asked point-blank whether he had observed anything unusual about the scrotum of the assured, he

said he thought that it was little bigger than ordinary. One could notice it when he walked. But he had never seen it and could not say when or for how long he had noticed it.

7. Rakhal Das Pramanik presumably was an unwilling witness for the defendants. He said that he did not notice anything unusual about the assured, and did not notice his physical condition. Ram Chunder Chatterjee is the agent for the defendants who introduced the proposal to the Company and the assured to the medical examiner. He filled up the proposal form, which must have entailed talking to the accused for some time. All the questions in the form had to be translated from English into Bengali, yet he noticed nothing about the abnormal condition of the scrotum of the assured, which if the evidence of the witnesses was to be believed was patent to every eye. That this witness had noticed nothing abnormal about the scrotum of the assured was admitted by Meherchand Puri, the officer-in-charge of the Claims Department of the defendant Company. The witness himself was completely silent both on this point and on the point of age which, it was alleged, had been so grossly understated. Obviously it was the agent's duty to take particular care not to introduce proposals containing untrue statements. The only explanation which he gave to the defendants was that the assured was sitting down when he saw him. This explanation was accepted by the defendants and he is still in their employ. Dr. Nandalal Roy's evidence, if believed, shows that the agent brought the assured to the dispensary and therefore had every opportunity of seeing him walk. The agent himself was silent on this point also.

8. That completed the evidence on this point given on behalf of the defendants, and the only medical man Dr. Nandalal Roy who examined the assured on behalf of the Company, for the purpose of ascertaining his medical condition at the time of the proposal had not been called, though he had been subpoenaed by the defendants and was present in Court, and though learned Counsel on behalf of the defendants had stated that he proposed to call him.

9. Mr. Puri stated that the defendants had a strong impression that he had acted negligently and for that reason had dispensed with his services as a medical examiner. He had examined many other cases for the Company and there had never before been any cause for complaint against him. Owing to the statements in the death claim that the assured had died of "ulcer on the scrotum with fever", that the immediate cause of death was "pneumonia" and that the specific name of the disease was "septic ulcer and pneumonia", the chief medical officer of the Company had strong suspicions about the genuineness of the claim and an investigation was ordered. But no information was sought from Dr. Sen named in the personal statement as the regular medical attendant of the assured, nor from those persons who had signed the personal friends' report, nor from Dr. K. K. Roy who had attended the assured during his last illness and had signed the medical certificate of death. And Dr. Nandalal Roy was not examined, nor was any information or explanation asked for from him. Mr. Puri admitted that it was

the express duty of the medical examiner to examine the private parts of the proposer, and that Dr. Roy had passed the life only as "fair (acceptable with an extra charge)".

10. Thus the defendants refused to make any definite charge against Dr. Nandalal Roy, yet refused to ask him either for explanation or information or to call him as a witness. In these circumstances I ordered him to be called as a Court witness. He said that he made a thorough examination of the assured on 8th January 1934. He put to him the questions contained in the " personal statement " and was satisfied, so far as he could ascertain by examination, that his answers were true and correct. He examined his private parts. There was absolutely no sign of an enlarged scrotum. Urine was passed in his presence. There was no trace of filaria or elephantiasis. In his opinion the question about " any other health complaints " is not intended to refer to simple headaches, cold or slight fever, or similar minor illness. This interpretation is correct. Such a question must be read in a fair and commonsense way: Connecticut Mutual Life Insurance Co. v.(1881) 6 Moore A C 644 ; and must be construed contra proferentes : Joel v. Law Union & Crown Insurance Co. (1908) 2 K B 863 per Fletcher Moulton L J. at p. 896, Anderson v. Fitzgerald (1853) 4 H L C 484 per Lord St. Leonards at p. 507, In re Etherington and Lancashire & Yorkshire Accident Insurance Co. (1909) 1 K B 591 per Vaughan Williams L.J. at p. 596. Moreover, as was said by Fletcher Moulton L.J. in (1908) 2 K B 8632 , the duty of the proposer is a duty to disclose and this necessarily depends on the knowledge he possesses. In cross examination by learned Counsel on behalf of the defendants, the evidence of Dr. Nandalal Roy was not even challenged, but for the first time in the history of this case it was suggested somewhat vaguely that the witness had been duped by some one who had personated the assured. No such case had been raised in the written statement of the defendants or by any of the witnesses. It struck me as being a final desperate attempt somehow to justify the somewhat unusual course which had been adopted and pursued by the defendants throughout, and to lend some air of consistency to it however slight.

11. On behalf of the plaintiff Dr. Keshab Krishna Roy was called. He is a homeopathic physician and surgeon and attended to the assured during his last illness and signed the death claim and medical certificate of death. The total duration of the last illness was about a month. He first attended on 5th February 1936 when he found the patient suffering from fever and ulceration of the sorotum. Two recent reports, a blood examination report and a urine examination report, were shown to him. They indicated nothing but inflammation. He suspected diabetes. The scrotum was swollen and enlarged about 7 by 5 inches in size. There was thickening of the skin and there were indications of haja. The patient said that he had scratched the scrotum and the witness suspected infection through the nail producing cellulitis. The blood report was consistent with cellulitis, There was high fever. Pneumonia came on about 19th and this was followed by death on 22nd February 1936. There was no

indication of filaria and he never thought of it. It was never suggested by anyone, nor by any other doctor who was in attendance on the patient, Dr. Dharendra Nath Roy, who was ill and unable to attend the hearing. It was not a case of filarial scrotum, nor of elephantiasis, but of ulceration of the scrotum. The swelling was due to cellular infiltration caused by inflammation and this was due to infection. Bejoy K. Chakravarty is an owner of collieries and house properties, a man of substance. He had known the assured very intimately for 30 to 35 years. He never heard him complain about any urinary trouble, or trouble in passing urine, and he never noticed that he had a big scrotum or that there was anything unusual about his dhoti. He never knew him to suffer from any illness worth mentioning until his last. Suresh Chandra Bhattacharjee is a Post Master and had signed one of the private friends' report which was submitted to the defendant Company. He had known the assured since 1924 fairly well. He had never known him to suffer from any illness, and had never noticed any physical deformity or peculiarity, or that he had a big scrotum or anything protruding. He was of very active habits.

12. On the question of age some of the witnesses gave some amusing but not very reliable evidence. Many Indians have but vague ideas about their ages, but the witness Kundu was quite sure, and said his was 56, and the assured was at least 20 years older. He had no horoscope, and could not give the year of his birth. He arrived at his age by guesswork. Thus, he knew that he was 56 because he was 12 in 1300 (1893), and he knew that because it was 44 years ago. It is 44 years ago because this year is 1344 (1937). Every one in Kasaripara knows that the age of the assured was 73 or 74 years. Such evidence is obviously of little value. Suresh Chandra Das was equally unconvincing. He had no horoscope but said that his age is 59, and the assured was older by 13 or 14 years. He arrived at the conclusion because he (Suresh) was 19 when he was married, and that was 40 years ago. He knew that it was 40 years ago because 19 from 59 leaves 40. His eldest boy is about 25. Before his birth two daughters were born and died. There were two years between each. His wife was 10 or 11 when he married her, and his first child was born when she was 13 or 14 years of age. When it was pointed out to him that according to his statements he was 22 when his first child was born and that was 28 years ago, which would make him 50 now, he said that he was an ignorant man and had made mistakes in calculation which he had arrived at by guess. The rest of the oral evidence on this point was, if possible, of still smaller value. Nanigopal Banerjee and Purendranath Sen, though asked by learned Counsel for the defendants, could give no information. Pramathanath Pramanick said that he was about 64 and the assured was older than he by about seven or eight years by guess. He could not say how old the assured was when he died, and he was not pressed in cross-examination to say how he knew his own age. Apparently he had no horoscopes and did not know the date of his birth. He admitted his memory was defective. Dr. Nandalal Roy, in his medical report in answer to the question "Does he show any signs of degeneration or premature death", had stated that the proposer was bald and

had false teeth and that he supposed his age to be 55 or 56 years.

13. Three documents were put in evidence on behalf of the defendants. (a) A certified extract from the register of deaths at Nimtolla Burning Ghat concerning Radharani Dassi of 97/2/1, Baranoshi Ghosh. Street, wife of one Noot Behari Das, who died in 1933. Her age was stated to be 61, and Hemanta Kumar Das, son, of the same address, was the informant. (b) A certified extract from the register of births of ward No. 6 showing that a daughter was born to one Noot Behari Das of 97/2/1, Baranoshi Ghosh Street, on 24th March 1892. The informant was one Noot Behari Das. These extracts were produced by a clerk in the health department of the Corporation of Calcutta, who had no personal knowledge about the entries and could not vouch for their correctness. No attempt was made to identify the persons named therein. It was suggested on behalf of the defendants that these entries refer to the assured and his daughter and wife, and show that he could not have been of the age stated by him. In my opinion they cannot be accepted without evidence of identification, and are not sufficient in law without such evidence of identification to establish the defendants' case. As was held in *Draycott v. Talbot* (1718) 1 E R 1501, entries of the names of persons in a register of births or deaths or marriages cannot be positive evidence of the birth, death or marriage of such persons unless their identity is fully proved; see also Woodroffe's Law of Evidence, Edn. 9 at page 394. (c) A certified copy of the entry of registration of a deed presented by one Noot Behari Das of 66, Simla Street, Calcutta, in August 1891 at the Calcutta Registry Office, which purported to have been executed by Bhairamani Dassi of 97, Baranoshi Ghosh Street. This copy of the entry is admissible in evidence under Sections 74 and 77, Evidence Act, as proof of the entry, but not of the contents of the deed: see Woodroffe's Law of Evidence, Edn. 9, page 570.

14. Again, there was no attempt to give any reliable evidence of identification. The evidence of Suresh Chandra Das was on this point obviously hearsay and inadmissible. At that date he could not have been more than about four years of age, 12 according to his own unreliable estimate. It was argued on behalf of the defendants that this evidence shows that the assured presented a deed for registration in 1891, when according to his personal statement he must have been a minor, and that a minor cannot so present. This contention is unsound: Section 35 (3) (b), Registration Act, provides that if any person by whom the document purports to be executed appears to the registering officer to be a minor, the officer shall refuse to register it. But Section 32 provides that a document may be presented for registration by a person claiming under it. A minor so claiming is entitled to present it for registration: *Chittoori Chinnammi Vs. Immanni Venkayamma and Others*, ; *Venkatapayya v. Nayani Venkataranga Rao* AIR 1929 P C 24 per Lord Phillimore at page 222, and per Lord Atkin at page 224 [in arguments].

15. On behalf of the plaintiff, Bejoy K. Chakrabutty said, at the time of his wife's death in 1933 the assured told him that he was about 54 or 55 years old. Suresh

Chandra Bhattacharjee said that his age was 54, and the assured was three or four years older. The witness passed the entrance examination at the University and had verified his age from the records.

16. After a careful consideration of the whole of this evidence, I am not satisfied that the defendants have succeeded in discharging the onus of proof which lay upon them. I do not believe the witnesses called on their behalf who gave evidence about the age of the assured. Their evidence was wholly unreliable. Nor, in my opinion, is the deficiency cured by the documentary evidence tendered which is insufficient and inconclusive. The medical evidence falls far short of what should be required, specially where charges of fraud are made, but also with respect to the allegation that the statements made by the assured were untrue. In my opinion the most that can be said for the defendants is that there were grounds for suspicion which were a legitimate subject for inquiry, but they were not justified, in view of the facts ascertained, in resisting the plaintiff's claim, and certainly not in recklessly launching charges of fraud against the assured. There must be judgment for the plaintiff with costs.