

(1938) 03 CAL CK 0033
In the Calcutta High Court

Manufacturers Life Insurance Co. Ltd.	Vs	APPELLANT
Sm. Haridasi Debi and Another		RESPONDENT

Date of Decision : 21-03-1938

Acts Referred:

Married Womens Property Act, 1874 — Section 6

Citation : AIR 1939 Cal 8

Hon'ble Judges : Panckridge, J;Costello, J

Bench : Full Bench

Judgement

Panckridge, J.—This is an appeal from the judgment of Lort-Williams J. who passed a decree for Rs. 18,000 and costs, being the amount claimed by the respondent Sm. Haridasi Debi, in respect of a policy of insurance issued by the appellants on the life of her husband, Kali Prosad Chakravarti, who died on 3rd August 1934. The policy is dated 12th June 1934, and is a whole life policy, the sum insured being payable on receipt and approval of due proof of the death of the insured. The beneficiaries are the insured's wife, the respondent Haridasi Debi, if she survives the insured, otherwise the executors, administrators or assigns of the insured. The premium is a sum of Rs. 194-10-0, payable quarterly. The age of the insured is admitted to be 37 years.

2. On 8th August 1934, the respondent. Haridasi Debi informed the appellants of the death of the insured and subsequently she completed and forwarded the usual claim papers. The cause of the insured's death is stated in these papers to have been "perityphlitis and influenza with a slight-touch of malaria."

3. On 14th September 1934 the appellants received an anonymous letter stating that the beneficiary's claim was fraudulent, that the insured had taken out policies when suffering from an incurable disease, and that there had been false personation at the time of the medical examination. Enquiries were instituted and on 9th October 1934 the appellants informed the claimant that they found that the deceased had made-serious misstatements of fact in his application, and that they must therefore repudiate her claim. There was further correspondence

and the suit was filed on 7th December 1934. The written statement was filed on 17th February 1935 and was subsequently amended under an order granting leave to amend made on 28th April 1936. As amended, the written statement alleges that the insured made certain untruthful statements to the appellants' medical examiner, and made such statements fraudulently, knowing them to be untrue, and with a view to mislead the appellants and to induce them to enter into the contract of insurance. The questions and answers, which, read together, constitute these untruthful and fraudulent statements, are as follows:

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.

4. At a later stage the appellants at the direction of the learned Judge gave further particulars in a letter dated 28th January 1937, in which they stated:

With regard to Clauses 3(a) and 3(b) that Soudamini Devi, paternal aunt of the deceased, suffered from tuberculosis or consumption and hemoptysis from at least April 1930, and was caused to be treated by the assured by amongst others, Dr. Sidheswar Mitra in the years 1930, 1931, 1932 and 1933 and by Kaviraja Satyanarain Dutt and Dhananjoy Bhattacharjee.

5. With regard to Clause 6(c) the letter stated that

the assured Kali Prosad Chakravarty suffered from fainting fits and high blood pressure and was treated by the above Dr. Sidheswar Mitra in 1932 and 1933. The assured also consulted Dr. Amulya Dhan Ghose for such fits and blood pressure from time to time.

6. With regard to Clause 7(a) and Clause 7(b), it is stated

the assured suffered and was treated for malaria, influenza, palpitation and fainting fits by amongst other doctors Dr. Sidheswar Mitra and Dr. Amulya Dhan Ghose within five years before his death.

7. It will be convenient here to deal with a point of a technical nature upon which the decree of Lort-Williams J. is attacked. In June 1936 the suit was called on for hearing, when the appellants raised the objection that it was not maintainable, as no trustee had been appointed u/s 6, Married Women's Property Act, 1874. An adjournment was granted, and on a summons taken out by the respondent Haridasi Debi, the respondent Batukeshwar Bhattacharjee was appointed special

trustee u/s 6. Thereafter the appellants filed an additional written statement submitting that the appointment of the respondent Batukeswar Bhattacharjee was bad, and suggesting that the Official Trustee of Bengal would have been made a party. On 18th December 1936 the Official Trustee applied for directions u/s 25, Official Trustees Act, stating that he was willing to accept the trust on condition that the respondent Haridasi Debi secured him against, any liability for costs and damages to the extent of Rs. 10,000. Lord-Williams J. held that the suit could proceed without impleading the Official Trustee and gave no direction to the appellants. The learned Judge's judgment is not included in the paper-book, but there is a report of it in Sm. Haridasi Debi Vs. Manufacturers Life Assurance Co. Ltd., .

8. Although the various orders made are not appealable, Mr. S.N. Banerjee for the appellants submits that u/s 105, Civil P.C., he is entitled to do what he in fact has done, set forth the alleged errors, defects, and irregularities in them as grounds of objection in his memorandum of appeal. Apparently the only objection to the order appointing the respondent Batukeshwar a special trustee is that the Act contemplates more trustees than one; we suggested that this defect, if it is a defect, might even now be cured by the appointment and addition as plaintiff of another special trustee. Mr. Banerjee then referred to Section 22, Lim. Act, and argued that the suit, if reconstituted in this way, would be barred. This argument is really a confession of the total lack of merits in the appellants' contention, since if claims on the policy are today barred, the appellants cannot say that there is any risk of their being made to pay twice over.

9. Although the order appointing Batukeshwar a special trustee was made ex parte, it was made upon notice, and it would be a monstrous injustice were the respondents' claim now to be defeated by a technical defect in it. Having regard to the opinion we have formed of the merits on the appeal, we are relieved of the necessity of considering the first seven grounds in the memorandum, but we feel constrained to state that we consider that in the circumstances the appellants would have been well advised not to press them. At the hearing the only issue framed was:

Were the representations specified in para. 3 of the written statement or any of them fraudulently made, knowing the same to be untrue?

10. The task of construing provision 4 of the policy, if we had to undertake it, would in our opinion be one of considerable difficulty. The material part is as follows:

Incontestability. This policy is issued in consideration of the application therefor, a copy of which is hereto attached, 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.

11. Then follows a provision that after the policy has been in force for two years,

it shall be incontestable except for fraud or non-payment of premium. The stipulation that the policy is based on statements made by the assured is difficult to reconcile with the qualification that the statements shall in the absence of fraud be deemed representations and not warranties. However this may be, it is clear that in this particular case the appellants have undertaken the burden of showing that the relevant statements were fraudulent and that they can resist the respondents' claim on that and on no other basis. The burden of proof being upon the appellants, their witnesses were called first to prove the falsity of the statements made at the medical examination, and then rebutting evidence was tendered on behalf of the respondents. On the evidence adduced the learned Judge came to the following findings of fact:

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 Kavirajas 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 has 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 no 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 3 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 on behalf of 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.

12. The learned Judge then deals with the question of fraud. After referring to the definition of fraud in Section 17, Contract Act, he considers the evidence of Dr. Banerjee, the appellants' Chief Medical Officer, and observes:

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. Banerjee 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 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.

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.

13. With regard to the absence of the medical examiner from the box the position is as follows : The examiner Dr. S.K. Das Gupta was not available at the time of the trial, and when the appellants sought to procure his attendance, it was found that he was in England where he had proceeded for the purpose of obtaining a London medical degree. It is not suggested that he was in any way unfitted for his duties. The learned Judge next refers to *Joel v. Law Union & Crown Insurance Co.* (1908) 2 K.B. 863 and proceeds:

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, has not been established beyond reasonable doubt.

He then states that the evidence seems to show that if the assured had disclosed then the facts about his aunt, his application would not have been refused though it might have been the subject-matter of further investigation and delay. Relying on *Mutual Life Insurance Co. of New York v. Ontario Metal Product Co. Ltd.* (1925) A.C. 344 the learned Judge holds that in such circumstances non-disclosure did not vitiate the contract. He finally holds that fraud has not been proved and gives judgment for the respondents with costs. Mr. Banerjee contends that, on the learned Judge's findings as to the falsity of the assured's answers and his knowledge of their falsity, his clients were entitled, to judgment. The learned Advocate-General contends that the findings are not conclusive as to the falsity of the answers. First with regard to the assured's paternal aunt, Soudamini, the Advocate-General points out that the learned Judge's finding is that the medical men diagnosed and suspected tuberculosis and were treating the patient accordingly and that this was known to the assured. The respondents submit this does not amount to a finding that Soudamini actually suffered from tuberculosis and that unless this fact is established, it cannot be said that the intention of the assured on this point has been proved. They further say that the evidence shows that tuberculosis cannot be conclusively established without a sputum analysis or an X-ray examination.

14. The appellants' principal witness on this point of the case is Dr. Siddeshwar Mitra, who is an M.B. of Calcutta practising at Rajpur, the place where the insured and his family lived. He has been contemptuously referred to in argument as "a village doctor" but the description is hardly a fair one, for Rajpur is a suburb of Calcutta, and many of the residents are railway season ticket holders travelling daily to Calcutta where they are either in employment, or, like the insured, have businesses of their own. We have read his evidence and have also examined his diaries and prescriptions. He appears to us to be above the average of his class, and we think that the learned Judge rightly relied upon his testimony as that of a careful and competent doctor. He proves beyond question that he began treating Soudamini for haemoptysis, which he diagnosed as a symptom of pulmonary tuberculosis in April 1930. In March 1933 he was called in because Soudamini was suffering from a fractured humerus and again found haemoptysis. He says that on that occasion the insured put before him the report of an analysis showing as a result that Soudamini's sputum contained tubercular bacilli. He says he cannot remember the name of the pathologist who was responsible for the analysis, but that he made a note of the result on one of his prescriptions.

15. If the doctor's evidence is believed, it carries the matter no further from the point of view of Soudamini's condition, because in the absence of the pathologist we cannot say what weight can be given to his analysis, but it is of considerable

importance, by reason of the light it throws on the state of mind of the insured, when he answered the questions. The Advocate-General argued that because the learned Judge did not refer to this incident, he must have disbelieved Dr. Mitra on the point. In our opinion if Dr. Mitra had seemed to him to be telling a false story, the learned Judge would have said so. In the absence of a finding adverse to Dr. Mitra we are willing to accept his evidence, and we think there is no ground for supposing that the endorsement on the prescription mentioning the sputum report is not bona fide and genuine. Dr. Mitra's evidence is corroborated by that of Dhananjoy Bhattacharji, a Kabiraj who was consulted by the insured as to Soudamini's condition, which he diagnosed as phthisis. Dhananjoy also mentions the sputum report and says that the insured requested him to get Soudamini admitted into a special tuberculosis ward in the Astanga Ayurvedic Hospital. This however was not possible, as at the date the hospital was in the course of construction. Dr. Amulya Chandra Ukil, senior visiting physician in charge of the Chest Department in the Medical College Hospital and a specialist in tuberculosis, gave as his opinion that Soudamini's case was correctly diagnosed as a case of tuberculosis and properly treated as such. He said however that for "unimpeachable proof" a sputum examination was necessary. We consider that the witnesses to whom we have referred proved in the sense in which that term is used in the Evidence Act, that Soudamini suffered from tuberculosis and that the insured believed that she so suffered.

16. Even if the nature of the disease is capable of more cogent proof scientifically, we think that having regard to the extent of his knowledge and having regard to his belief, the insured's answers on the point are prima facie fraudulent. A man who knew that medical practitioners had diagnosed the disease from which his aunt was suffering as tuberculosis, and who had arranged for her treatment on the basis of that diagnosis, could not possibly as an honest man give a negative answer to questions 3(a) and 3(b) when we remember that the old lady died only a month or so prior to the date when the answers were given. Even if the diagnosis were mistaken the answers would still be fraudulent, since they would amount to active concealment of a fact by one having knowledge or belief of the fact within the meaning of Section 11, Contract Act. Much has been said as to the necessity for an explanation of the questions; the learned Judge refers to Dr. Banerjee's evidence on the point but it is clear that what Dr. Banerjee had in mind are cases where the proposers are unacquainted with the English language, and that he was thinking of translation rather than of explanation: see his answers to Q. 37 and Q. 38.

17. It is not suggested in this case that the insured was not perfectly well acquainted with English, and it is manifest that the necessity for explanation must depend on the nature of the particular question. A question containing terms of art, of whose meaning a proposer may be ignorant, Ought obviously to be explained. We should have thought that it would not be necessary to explain to a proposer that family included a paternal aunt living in the same house. However, even if honest misunderstanding is possible as to that, how could the

question have you lived in the same house or been associated with a case of tuberculosis" within two years have been made clearer: than it already was in the particular circumstances by an explanation?

18. The learned Judge relied on *Joel v. Law Union & Crown Insurance Co.* (1908) 2 K.B. 863. There a proposer was asked "what medical men have you consulted? when? and for what?" The proposer gave the names of two doctors, whom she had consulted for colds and measles respectively. She did not state that eight years before the proposal she had consulted a third doctor for severe influenza followed by nervous depression. The jury found that she-foolishly but not fraudulently concealed this, and that the fact was one which it; was material for the company to know. The Court gave judgment for the company, but on appeal a new trial was ordered, because the jury had not been properly-directed as to the possibility of her having, orally disclosed this fact to the medical examiner, and so supplemented her written-answers. In this case we think it is inconceivable that the insured informed the medical examiner about his aunt and was nevertheless told by the examiner that in the circumstances he could give a negative-answer to the question.

19. As to the practical effect of the failure to disclose the facts concerning Soudamini, the learned Judge has referred to *Mutual Life Insurance Co. of New York v. Ontario Metal Product Co. Ltd.* (1925) A.C. 344. Neither in that case nor in the case just referred to were the answers made the basis of the policy, and it is conceded that in the case before us the appellants must show that the answers are both untrue and fraudulent. There the insured had answered "none" to a question as to the physicians or practitioners who had prescribed for, or treated him, or had been consulted by him during the preceding five years. In fact a doctor, who had been attending his wife, had at his request given him some tonic injections. The medical examiner stated that even if this fact had been disclosed, he would still have sent up the case with a recommendation for its acceptance. The Judicial Committee held upon the evidence that the facts, had they been disclosed, would not have influenced a reason, able insurer to refuse the risk or alter the premium.

20. We do not think there are materials upon -which a similar finding can be come to in this case. Dr. Banerjee, who passed the proposal as a. first class life, says he would have required a further examination to be made if he had known about Soudamini, and even had that examination been favourable, he would not have taken the responsibility of passing the insured without reference to the Head-Office in Canada. The learned Judge has referred to a letter written on the appellants" behalf on 5th November 1934, in which it is stated that had the questions been truly answered, the company would either have rejected the proposal or accepted the same at higher rates. Acceptance at higher rates is of course tantamount to refusal of the proposal actually made; for we are concerned with the appellants" liability on the policy which the insured obtained, not with their liability on some hypothetical policy which he might have obtained

had his answers been accurate.

21. The remaining questions, which the appellants say were answered untruthfully and fraudulently, can be more briefly dealt with. The appellants no longer rely on the fact that the insured answered "no" to the question:

Have you ever had or consulted a medical practitioner for fits, convulsions or diseases of the nervous system?

22. It is conceded that unless it can be shown that it was explained to the insured that fits" included fainting fits, he might reasonably have considered that only epileptic fits were intended. The contest before us has been concerned with his answer none" to the question as to the physician or physicians he had consulted or been treated by in the last five years. Dr. Mitra proves from his diary and prescriptions that he treated the insured on two occasions in 1930, once for malaria and once for influenza. He treated him again for malaria in 1931 and again for influenza in 1932. This witness also proves that he was called in to see the insured in June 1932, and found him suffering from throbbing in the chest due to high blood pressure. The doctor did not prescribe on that occasion, and only advised his patient to take regular doses of a certain proprietary medicine. More important is a visit of 2nd November 1933. On that occasion the doctor was sent for, and he says he found the insured in a dead-faint and frothing at the mouth. He examined his blood pressure and the result appears from the following entry in his diary "fit, high blood pressure, systolic 175, diastolic 120." Dr. Banerjee says that had he known that the insured was subject to fits of this nature, he would have rejected his application "without any hesitation."

23. One of the respondents" witnesses, Dr. Das, also states that he attended the insured during the period in question for influenza, dyspepsia, and diarrhoea, all of which he describes as minor maladies"; The evidence of Dr. Amulya Dhone Ghose, who like Dr. Mitra practises at Rajpore, is that during the last three or four years before his death the insured complained to him of asthma and difficulty in breathing, and also stated to the witness that he was suffering from palpitation of the heart and sometimes became unconscious. Dr. Ghose advised total abstinence from alcohol and a vegetable diet.

24. It is clear that the learned Judge saw no reason to disbelieve these witnesses. We think having regard to the state of things that their evidence discloses that it is inconceivable that the answer "none" can have been honestly given, and we also think it is inconceivable that the true facts were described to the medical examiner, and that the latter thereupon told the insured that in spite of them a negative answer was permissible. We consider that the evidence directly concerned with Soudamini"s health and the insured"s condition of itself entitles the appellants to judgment, but at the same time there are circumstances connected with the proposal that throw considerable light on the insured"s state of mind.

25. The application for the policy in suit was made on 12th May 1934. On 31st

May 1934 the insured applied for a whole-life policy in the Crown Insurance Company for Rupees 40,000. To the question "within the last year have you ever occupied the same house, room or office, as that occupied by a person affected with tuberculosis?" The insured answered "no". To the question, "what physician or physicians, if any, not named before, have you consulted or been examined by within the last five years and for what reason (give full details, if none, so state), the insured answered, "Had no necessity of, consulting any doctor."

26. Subsequently the insured requested that the value of the policy should be increased to Rs. 50,000 and accordingly a policy for this amount was issued. The premiums payable in respect of the policy in suit and the crown policy amount to Rs. 684 per quarter. There is no definite evidence as to the financial position of the insured except that he had some landed property and a business in Bow Bazar Street, known as the Oriental Scientific Apparatus Co. The respondents however have not sought to argue that the amount of the policies is not out of all reasonable proportion to the insured's means. At the time of his death he had a wife and eight minor children. While these circumstances would make it proper and reasonable for him to provide against the risk of death, they would at the same time make it all the more difficult for him to find annual premiums of between Rs. 2500 and Rs. 3000. We have no doubt that the answers given to the appellants were untrue and fraudulent, in the sense that they were made with knowledge of their falsity, and were designed to induce the appellants to accept the life of the insured on terms which they would have declined, had they known the truth. In these circumstances the appeal must be allowed and the decree set aside with costs here and in the trial Court.

Costello, J.

27. I agree.