

(1961) 12 GAU CK 0005
In the Gauhati High Court
Case No : First Appeal No. 1 of 1956

New India Assurance Co. Ltd.

APPELLANT

Vs

Sulochana Chowdhurani

RESPONDENT

Date of Decision : 12-12-1961

Acts Referred:

Insurance Act, 1938 — Section 15, 45

Citation : (1961) 12 GAU CK 0005

Hon'ble Judges : G. Mehrotra, C.J.; S.K. Dutta, J

Bench : Division Bench

Advocate : S.M. Lahiri and K.M. Lahiri, for the Appellant; A.K. Mukherjee, J.C. Medhi, S.N. Choudhury and A.K. Ghose, for the Respondent

Judgement

S.K. Dutta, J.—This is an appeal by the Defendant against the judgment and decree of the Subordinate Judge, Lower Assam Districts at Dhubri by which a money suit for recovery of Rs. 1,00,000/- under an insurance policy effected with the said Defendant, namely the New India Assurance Company Limited (hereinafter referred to as the Company), was decreed in favour of the Plaintiff. The Plaintiff's case in short is that her adopted son Kumar Jagadindra Narayan Choudhury, Zemindar of Rupshi, took out a life insurance policy bearing No. 251927 R dated the 13th October 1949 from the Defendant Company for a sum of Rs. 1,00,000/- to be paid by the Defendant Company together with bonus on the expiry of fourteen years, or on the death of the insured whichever was earlier. The insured made the proposal on the 7th of August, 1949 and submitted his personal statement on the 10th of August, 1949. The proposal was accepted and the policy was issued on the 13th October, 1949 after a medical examination of the insured by a doctor of the Company, and on payment of the due premium. Kumar Jagadindra Narayan Choudhury was a Hindu governed by the Dayabhaga School of Hindu Law and he died intestate on 26th August, 1950.

The Plaintiff is the adoptive mother and the sole heir of the deceased. The Defendants declined to pay the sum payable under the policy on the ground that

the proposal and the personal statement contained statements which were incorrect and untrue and that the deceased suppressed facts material to the insurance. It was alleged in the written statement that the answers given by the deceased in reply to questions Nos. 6(a) and 7(a) in the personal statement were incorrect and false and that the deceased was a heavy drinker and suffered from disorders of the nervous system such as hepatitis and hallucinosis and nervous weakness. Consequently, answers to question No. 11 in the proposal were also false. It was further alleged that the answers given by the deceased to the questions Nos. 12 and 13 in the personal statement were also false and that the deceased was taking medical treatment for serious disorders for a considerable period. The above questions and answers were as follows:

Questions: Answers: 6(a) In what quantity and in Nothing use except what form do you use, or a peg of whisky have you ever used -- a day or so. Alcoholic Drinks, Bhang, Daggar, Ganja, Charas, Opium, or Cocain? 7. Have you suffered? If so how often, when and with what result from -- (a) Giddiness, fits, paralysis, insanities, nervous break-down, or any other disease of the brain or nervous system? No. 11.(a) Are you in a sound state of health? Yes. (b) Are you of sober and temperate habits? Yes. 12. When did you consult a medical man last and for what complaint? No occasion. 13. State name and address of your usual medical attendant. None in particular.

2. The declarations made by the deceased show that the answers given by the deceased were made the basis of the contract.

3. The allegation made in the written statement that the deceased suffered from serious nervous disorders such as hepatitis and hallucinosis and nervous weakness is not pressed before us. On the other hand, evidence was led to prove that the deceased suffered from Delirium Tremor (hereinafter called D.T.) in order to show that he was a heavy drinker. Two other issues were raised at the trial viz. regarding jurisdiction and the Plaintiff's right to file the suit. These are not pressed before us. The only important question which has to be decided is whether the deceased was accustomed to heavy drinking.

4. It may be noted that the Kumar never said in his statement that he was a teetotaler. His statement was that he used to drink a peg or so a day. If the Kumar was accustomed to heavy drinking this was a material fact requiring disclosure as it would have guided the insurer in determining whether to take the risk and if so at what premium and on what condition. If such a fact was not disclosed it would amount to suppression of a material fact. But the burden of proving non-disclosure or misrepresentation is on the insurer and it has to be seen how far the Company discharged this burden. The Company examined several witnesses to prove that the deceased was accustomed to heavy drinking.

(After discussing evidence His Lordship proceeded);

5-25. From the evidence discussed above, I do not think that there are materials to hold that the Kumar was a habitual hard drinker. The Company's doctor said

that if a person took alcohol daily he would not be considered as one not sober and intemperate unless the habit was of taking alcohol excessively. In this view of the matter, the Kumar's statement that he was a man of sober and temperate habit was not proved to be false.

26. Although it was alleged in the written statement that the Kumar suffered for a long period from various disorders of the nervous system, this was not pressed at the trial. On the other hand the Company's doctor deposed that after examining the main aspects, he found the Kumar's health satisfactory. In outward appearance also the Kumar had a sound health and even the solicitor deposed that the Kumar's health appeared to him to be quite sound. The medical certificate Ext. D (9) shows that the Kumar died of a cerebral attack of malignant malaria at Rupshi in Assam. Dr. D.N. Banerji attended the Kumar during his last illness. He gave the medical certificate Ext. D(9) and deposed that he suspected the case to be of cerebral malaria and advised the Manager of the Rupshi estate to bring Dr. Ganguly.

Dr. Ganguly deposed that he found the Kumar in an unconscious state with high fever and came to the conclusion that it was a case of cerebral malaria. Dr. Ganguly brought Dr. P. Nandi who was then the Civil Surgeon at Dhubri. Dr. Nandi examined the Kumar and formed the same opinion as that of Dr. Ganguly. Dr. Nandi deposed that the case of the Kumar was one of cerebral malaria and explained that by "cerebral malaria" he meant malignant type of malaria. It is clear that the Kumar's death was not due to some disease which could be the result of excessive drinking.

27. In answer to Question No. 12 in the personal statement, the deceased wrote "no occasion". The question was -- "When did you consult a medical man last and for what complaint?" This question apparently meant that the proponent should disclose if he had any serious illness requiring consultation with a physician. It could not possibly mean that the proponent should mention if he called in a doctor even for a minor ailment. When no serious illness of the Kumar before taking out the policy could be proved, the above answer to Question No. 12 cannot be said to be false.

28. I may now proceed to consider Section 45 of the Insurance Act, 1938, although in the present case, in view of the above findings, the interpretation of this section is not so important. This section says:

No policy of life insurance effected before the commencement of this Act shall, after the expiry of two years from the date of commencement of this Act and no policy of life insurance effected after the coming into force of this Act shall, after the expiry of two years from the date on which it was effected, be called in question by an insurer on the ground that a statement made in the proposal for insurance or in any report of a medical officer, or referee, or friend of the insured, or in any other document leading to the issue of the policy, was inaccurate or false, unless the insurer shows that such statement was on a

material matter or suppressed facts which it was material to disclose and that it was fraudulently made by the policy-holder and that the policy-holder knew at the time of making it that the statement was false or that it suppressed facts which it was material to disclose.

29. In the present case, the policy was effected the 13th October, 1949. The Company repudiated the policy on 7th May, 1952 by a letter Ext. 31. It is submitted by the learned Counsel for the Plaintiff Respondent that the above section would apply in this case and that it would be necessary for the Company to prove not only that the statements were false but also that the statements were on material matter and were fraudulently made and that the policy-holder knew that the statements were false. Thus, the burden is much heavier on the insurer in the present case than in a case where the Company calls into question the policy before two years from the date when it was effected.

30. Mr. Lahiri appearing on behalf of the Company submits that the above section would not apply in the present case. His contention is that this section will apply only when the policy has been in force for two years. In the present case, the policy, as said above, was effected on 13th October, 1949 and the Kumar died on 26th August, 1950. The policy was not in force for two years. Mr. Lahiri's contention however, cannot be accepted. The language of Section 45 of the Insurance Act is clear and unambiguous and there is no manner of doubt that the period of two years runs from the date on which the policy is effected. As such, Section 45 of the Insurance Act becomes applicable to the present case.

31. Next, the question arises when the repudiation takes place. This will depend on the circumstances of each case. In the present case, the Kumar died on 26th August, 1950. The Company was informed about it by a letter dated 31st August 1950 and the Company called for certain informations by a letter dated 6th September, 1950 (vide Ext. D/2). The claim forms were also sent to the Plaintiff (vide Ext. D/3). Some more particulars were called for by a letter dated 13th September, 1950 (vide Ext. D/4). The Plaintiff was informed that if the insured died intestate, letters of Administration or a Succession Certificate would be necessary. The Plaintiff took a Succession Certificate. By a letter dated 16th March 1951 (Ext. D/I) the Company informed the Plaintiff that the claim was under consideration. Then ultimately by a letter dated 7th May 1952 the Company repudiated the claim.

Thus it will be seen that the Company kept the matter pending till 7th May 1952 when they repudiated the claim and hence they called the policy into question only on 7th May 1952, within the meaning of Section 45 of the Insurance Act. It is, therefore, necessary for the Company in the present case to prove that the statements were not only false but also that those statements were on material matter and were fraudulently made and that the policy-holder knew at the time of making them that they were false. But we have found that the Company in the instant case even failed to prove that the Kumar made any false statement or suppressed any relevant fact. In these circumstances the question of discharging

the heavier burden u/s 45 of the Insurance Act does not arise.

32. In the result, this appeal fails and it is dismissed with costs.

Mehrotra, C.J.

33. I have had the advantage of reading the judgment of Dutta, J. and I agree with his conclusions. This appeal must be dismissed. The facts are set out fully in his judgment. Kumar Jagadindra Narayan Choudhury took out the life insurance policy bearing No. 251927 R dated the 13th October 1949 from the Appellant company for a sum of Rs. 1,00,000/- and the Plaintiff Respondent claimed the amount after the death of the insured. The Defendant-Appellant repudiated the liability on the ground that the proposal and the personal statement contained statements which were incorrect and untrue and the insured suppressed material facts in his personal statement. In paragraph 2(f) of the written statement the Defendant-Appellant company stated that they have received information that in particular the statement in the proposal that the proposer was of sober and temperate habits and that the statement in answers to question No. 6A in the personal statement were incorrect and false and the assured was a confirmed heavy drinker given to excessive drinking.

The Defendant company further stated that the answer to question 7A in the personal statement was incorrect and false and that the assured was suffering for a long period prior to the proposal from serious disorders of the nervous system such as Hepatitis and Hallucinoses and nervous weakness. The correctness in answers to questions 12 and 13 in the personal statement was also challenged and it was asserted in the written statement that the insured was taking treatment for serious disorders for a considerable time prior to the proposal and had consulted medical men for various complaints and had deliberately suppressed these facts as well as the names of the medical attendants.

34. Mainly the answer given by the insured in reply to questions Nos. 6(a) and 7(a) in the personal statement was challenged. The answer to question No. 11 in the proposal form was also alleged to be false and further the answer given by the deceased to questions Nos. 12 and 13 in the personal statement were also alleged to be false. (35) It will be necessary to set out the questions and answers:

Questions Answers 6(a) In what quantity and Nothing use in what from do you use, or except a peg have you ever used Alcoholic of whisky a day. Drinks, Bhang, Daggarr, Ganja, or so. Charas Opium or Cocaine? 7 Have you suffered? If so, how often, when and with what result from (a) Giddiness, fits, pavalvisis, insanities, nervous break down, or any other disease of the brain or nervous system? No. 11.(a) Are you in a sound state of health? Yes. (b) Are you of sober and temperate habits? Yes. 12. When did you consult a medical man last and for what complaint? No occasion. 13. State name and address of None in your usual medical attendant. particular.

36 Mr. Lahiri's contention is that as the answers given by the deceased to the questions referred to above were made the basis of the contract, it is not necessary for the company to prove that the answers were material to the inquiry. If the answers are proved to be false or if the Plaintiff Respondent fail to prove that the answers were correct the policy will be void and unenforceable. He has further contended that it was for the court to decide whether the answer of the insured that he was of sober and temperate habits was correct or not. If the insured was not of sober and temperate habits, the answer will be obviously false and the policy will be void and unenforceable against the company. Even without proving that the insured was given to excessive alcoholic drink, if the court is of opinion that he cannot from the facts proved be said to be of sober and temperate habits, the company was entitled to repudiate the liability.

37. There are some broad principles which emerge out of the consideration of various authorities and examination of the common law operating in the field of insurance. Firstly the contracts of insurance including the contracts of life assurance are contracts *uberrima fides* and every fact of materiality must be disclosed otherwise there is good ground for rescission of the contract. The duty to disclose material facts continues right up to the conclusion of the contract and also implies any material alteration in the character of the risk which may take place between proposal and acceptance. If there are any misstatements or suppression of material facts, the policy can be called in question. In the case of life insurance policies however, it is found necessary that the assured must also have knowledge of the true facts relating to the mis-statement or suppression of material facts necessary in order to deprive him of the benefit that accrues in his favour under the contract. It is equally well settled that when there is a specific recital made in the policy to the effect that the proposal shall be the basis of the contract, then the truth of the statements contained in the proposal apart from the question of materiality is by itself sufficient to constitute a condition of liability of the insurer and is a good ground for avoiding the contract, as laid down in *Dawsons Ltd. v. Bonnin* (1922) 2 AC 413.

38. Section 45 of the Insurance Act, 1938 reads as follows:

No policy of life insurance effected before the commencement of this Act shall after the expiry of two years from the date of commencement of this Act and no policy of life insurance effected after the coming into force of this Act shall, after, the expiry of two years from the date on which it was effected, be called in question by an insurer on the ground that a statement made in the proposal for insurance or in any report of a medical officer, or referee, or friend of the insured, or in any other document leading to the issue of the policy was inaccurate or false, unless the insurer shows that such statement was on a material matter or suppressed facts which it was material to disclose and that it was fraudulently made by the policy-holder and that the policy-holder knew at the time of making it that the statement was false or that it suppressed facts which it was material to disclose:

Provided that nothing in this section shall prevent the insurer from calling for proof of age at any time if he is entitled to do so, and no policy shall be deemed to be called in question merely because the terms of the policy are adjusted on subsequent proof that the age of the life insured was incorrectly stated in the proposal.

This section is attracted in cases where the policy has been effected, before the commencement of the Act after the expiry of two years from date of the commencement of the Act. In cases where the policy has been effected after the coming in force of the Act, it cannot be called in question by an insurer after the expiry of two years on the ground that a statement made in the proposal for insurance or in any report of a medical officer, or referee, or friend of the insured, or in any other document leading to the issue of the policy, was inaccurate or false unless the insurer shows that such statement was on a material matter or suppressed facts which it was material to disclose and that it was fraudulently made by the policy-holder and that the policy-holder knew at the time of making it that the statement was false or that it suppressed facts which it was material to disclose.

This section modifies the common law in so far as the policy is sought to be challenged on account of misstatement or suppression of facts in any document after the expiry of two years from the date of the commencement of the Act in cases where the policy was effected prior to the Act and if the policy has been called in question after two years of its being effected in cases where the policy has been effected subsequent to the coming in force of the Act. In either of these two cases the insurer has to prove that: (1) misstatement was on a material matter or that the suppression was of material facts, (2) it was fraudulently made by the policy-holder and (3) the policy-holder knew at the time of making it that the statement was false or the facts which were suppressed were material to disclose.

39. Mr. Lahiri contended that Section 15 is not attracted to the policies effected alter the coming in force of the Act, unless the policy has remained in force for two years. In brief his contention is that if the insured dies within two years of the date when the policy was effected, the section will not be attracted at all. I do not think that such an interpretation is warranted by the plain language of the section. The latter part of this section places a bar on the right of the insurer to repudiate the liability under the contract unless he proves certain facts. If he does not question the correctness of the statement for two years the legislature thought that the insurer should not be allowed to challenge the correctness of the statements made in the documents. The only question relevant for considering the applicability of Section 45 is when can on the facts of the present case it be said that the policy was called in question by the insurer and as pointed out by my brother Dutta, J. in his judgment, in the present case it is amply clear that the insurer called in question the policy after the expiry of two years from the date on which this policy was effected.

Section 45 to a great extent mitigates the rigours of the rule that the most trivial misrepresentation within the ambit of the warranty might still be good enough defence for the insurance company to refuse payment on the policy. Reliance has been placed by Mr. Lahiri on the case of *All India General Insurance Co. Ltd. and Another Vs. S.P. Maheswari*, in support of his contention that Section 45 is not attracted in cases where the insured dies within two years of the date on which the policy was effected. Cases where the insured dies within two years of the date on which the policy was effected but the policy itself is called in question after the expiry of two years were not considered in this case. The assured did die in this case within six months of the taking out of the policy. But it does not appear from the facts of this case that the policy in fact was called in question after the expiry of two years. This case therefore is of no assistance to the Appellant.

40. It will be convenient at this stage to examine some of the cases referred to at the bar.

41. Case of *Condogianis v. Guardian Assurance Co. Ltd.* AIR 1921 PC 195. This was a case of fire insurance. In answering the question -- "Has proponent ever been a claimant on a fire insurance company in respect of the property now proposed or any other property?" etc., the answer given was "Yes". 1917 "Ocean". Literally this answer was correct. But the insured had suppressed the fact that in 1912 he had made Anr. claim against the Liverpool and London and Globe Co. in respect of the burning of a motor-car owned by him. There was a clause in the policy that the proposal was the basis of the contract. Thus there was an express warranty and their Lordships held that if in point of fact the answer to a question in the proposal form is untrue, the warranty still holds, notwithstanding that the untruth might have arisen inadvertently and without any kind of fraud and further that the materiality of the untruth was not in issue in that case as the parties had expressly contracted making the fact as the basis of the contract.

Reliance was placed on the following observation by Lord Eldon in the case of *Newcastle Fire Insurance Co. v. Macmorran* (1815) 3 Dow 255:

It is a first principle in the law of insurance, on all occasions, that where a representation is material it must be complied with -- if immaterial, that immateriality may be inquired into and shown; but that if there is a warranty it is part of the contract that the matter is such as it is represented to be. Therefore the materiality or immateriality signifies nothing.

Their Lordships further held in this case that though the answer was true still the question must mean that the insurer was asked to give all the occasions in which he had made a claim. It was observed by their Lordships as follows:

In a contract of insurance it is a weighty fact that the questions are framed by the insurer, and that if an answer is obtained to such a question which is upon a fair construction a true answer, it is not open to the insuring company to

maintain that the question was put in a sense different from or more comprehensive than the proponent's answer covered. Where an ambiguity exists, the contract must stand, if an answer has been made to the question on a fair and reasonable construction of that question. Otherwise the ambiguity should be a trap against which the insured would be protected by Courts of law.*** But upon the other hand the principle of a fair and reasonable construction of the question must also be applied in the other direction, that is to say, there must also be a fair and reasonable construction of the answer given; and if on such a construction the answer is not true, although upon extreme literalism it may be correct, then the contract is equally avoided.

In the view which we have taken that Section 45 of the Insurance Act applies to the present case, this case of not much assistance to the Appellant.

42. The next case referred to is Light of Light of Asia Insurance Co. Ltd. Vs. Karatoya Debi, This case only illiterates the pro position that if the answers given in the proposal are made the basis of the contract of insurance, the untruth of the statement will avoid the policy irrespective of the question of its materiality. No objection can be taken to this proposition of law.

43. The next case referred to is Balkrishna Khirwal Vs. The New Indian Assurance Co. Ltd., This case also lays down that 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. Another case in this volume is Smt. Benarasi Debi Vs. New India Assurance Co. Ltd., Dealing with Section 45 of the Insurance Act. Ahmad, J. has said that in that case the policy was effected after the Act and therefore the latter part of the Section 45 was attracted. That being so, the decision of that case had to rest exclusively on the terms of the section though in the application of the section to the facts of the case the Principles of common law as stated above may be kept in view.

In this case where the objection on the ground of inaccuracy or falsehood has been admittedly taken after the expiry of two years from the date on which the policy was effected, there was a heavy onus laid on the Defendant company to establish three things -- (1) that the false statements were on a material matter: (2) that the policy-holder knew at the time of making them that the statements were false: and (3) that they were fraudulently made. It is clear from the reading of this case that the Section 45 will be attracted if the policy has been called in question after the expiry of two years of the date on which the policy was effected and before the insurer can avoid the policy he has to establish the three facts set out in this judgment.

44. Reliance is placed on the case of Thomson v. Weems (1884) 9 A.C. 671. The insured in this case received a printed form of proposal containing questions.

Question No. 7(a) was -- "Are you temperate in your habits?" an question No. 7(b) was -- "Have you always been strictly so: The answer given by the insured to question No. 7(a) was -- "Temperate" and the answer given by him to question No. 7(b) was -- "Yes". Along with the proposal there was a declaration signed by the insured that the statements were true and that the assured agreed that this declaration should be the basis of the contract. After the decease of the insured claim was made on the basis of the aforesaid policy with the company but the company refused payment on the ground that the answer was false. It was held by the House of Lords that the declaration was an express warranty, that the answer was true and on the evidence the House of Lords came to the conclusion that the averment as to temperance was untrue and the policy was thus null and void.

The facts of that case are distinguishable. As observed by Lord Watson the case required decision on two points one the question of law and the other the question of fact. The question of law was with regard to the construction of the warranty and the question of fact was as to whether the answers were true or not. In dealing with the first question his Lordship held that it was an express and essential condition of the contract that the policy shall be null and void in the event of the averment made by the assured in his proposal as to his habits, implied in his answer to that question proving to be false. The doctrine of warranty as applied to any such stipulation in a contract of insurance is the same in Scotland as that in England. It was however further held that the warranty being express the question will still remain for consideration as to what must be held to be the subject matter of the warranty. That is a point to be determined in each case, according to the just construction of the question and answer taken per se. The question is to be interpreted according to the ordinary and natural meaning of the words used, if that meaning be plain and unequivocal and there be nothing in the context to qualify it. But if the words used are ambiguous, they must be construed *contra pro ferentes* and in favour of the assured. His Lord ship held that the answer clearly showed that the insured gave out that he was temperate in his habits and that he had always been strictly so. This was a statement of fact and not merely assertion of the opinion or belief entertained by the assured with regard to that fact. The assured has thus warranted not only that the assertion was true according to his belief but true in point of fact.

The following passage at page 695 as also apposite:

I, believe it to be useless to attempt a precise definition of what constitutes "temperate habits", or "temperance", in the sense in which these expressions are ordinarily employed. Men differ so much in their capacity for imbibing strong drinks that quantity affords no test; what one man might take without exceeding the bounds of moderation, Anr. could not take without committing excess. In judging of a man's sobriety, his position in life, and the habits of the class to which he belongs must, in my opinion, always be taken into account; because it is the custom of men engaged in certain lines of business to take what is called

refreshment, without any imputation of excess, at times when a similar indulgence on the part of men not so engaged would be to say the least, suspicious. But I do not think that the habits of a particular locality ought to be taken into account, or that a man, who would be generally regarded as of temperate habits, ought to escape from that imputation because he is no worse than his neighbours.

After considering the evidence Lord Watson observed as follows

It seems to me to be the fair result of the evidence that the assured was in the habit of taking more drink than was good for him, that he was frequently affected with drink on occasions when all except himself were sober; that his indulgence to excess had become so apparent that several of his friends remonstrated with, him on the subject, and that instead of repudiating the charge, he admitted it and promised amendment.

45. Mr. Lahiri further contended that even if Section 45 of the Insurance Act applied to the present case, on the proof of the fact that the insured was an excessive drinker it will be presumed from the circumstances that the statement was on a material matter and that it was fraudulently made by him and that he knew at the time of making it that the statement was false. The extent to which he was given to drinking was a material fact affecting the decision of the insurer to accept or refuse his proposal and further if he had full knowledge of the fact that he had suffered from delirious tremor, the answer to question No. 11(a) will be obviously false to his knowledge. It cannot be doubted that the question whether the insured was of sober and temperate habits is a question of fact which this Court will have to determine on the evidence on the record and it will not depend on the belief of the insured and in order to come to that conclusion the evidence will have to be examined.

It is not seriously contended nor has it been established by evidence on the record that the insured ever suffered from any of the diseases mentioned in question No. 7(a). As to question No. 6(a) the answer was that he used alcoholic drinks and the quantity was a peg of whisky a day or so. The correctness of his answer to the question whether he was of sober and temperate habits will also have to be examined in the light of his answer to question No. 6(a) wherein he had admitted that he was not a teetotaler and used alcoholic drinks though only a peg of whisky a day or so. My brother Dutta J. has very elaborately dealt with the evidence produced by the parties. On the evidence of S.A. Franklyan and Ellis Jashua, two employees of the Grand Hotel where the insured stayed occasionally in Calcutta, the Defendant has sought to prove that the insured was used to heavy drinking and thus it is urged that the insured cannot be regarded as of sober and temperate habits. Apart from the inherent improbabilities in the statements of these two witnesses, their evidence to my mind, does not establish that the averment of the insured that he was of sober and temperate habits was incorrect. The best evidence would have been of the persons who had occasion to see the insured in the 300 Club where mostly according to the evidence of

Franklyan and Jashua the insured used to drink. Nobody has been produced from that Club. The other employees of the Grand Hotel whose duty hours were in the night, have not been produced. In view of the medical evidence, the statement of Franklyan that he saw the insured suffering from delirious tremor cannot be believed. Dr. Roy who is said to have attended the assured in the hotel, has not been produced.

46. Mr. Lahiri has very strenuously contended that no adverse inference can be drawn from the failure of the Company to produce these witnesses and if the positive statement of Franklyan and Jashua is accepted, the Company has clearly proved that the averment made by the insured was false. As I have already indicated apart from the circumstances pointed out by my brother, the best evidence available has not been produced and that is a circumstance which will discredit the testimony of these two witnesses. The medical evidence in the case is clear that the cause of death of the insured was cerebral Malaria, a disease which cannot result from excessive drinking. That circumstance though not conclusive is a relevant circumstance to show that the insured was not a heavy drinker. The Company has tried to produce direct evidence to prove that on one occasion he suffered in Shillong from delirious tremor. Dr. J.N. Gupta and Dr. Bimal Kanti Roy have been examined to show that the insured had attacks of delirious tremor in Shillong due to excessive drinking.

Dr. J.N. Gupta's evidence even if accepted, to my mind, does not prove that the insured suffered from delirious tremor due to excessive drinking. The only reason given by him to infer that the insured was a heavy drinker was that whenever he went to Shillong Club he found the insured drinking and carrying a glass. His visits to Shillong Club were casual. He never stayed late in the night though according to him the insured used to stay till late in the night and the fact that he found the insured drinking and moving about with a glass in his hand does not necessarily lead to the inference that he was a heavy drinker and does not disprove that he used to take whisky one or two pegs a day. Dutta J. has dealt with the evidence of Dr. Roy and his evidence does not inspire much confidence. On a careful consideration of the evidence I am of opinion that the Appellant has failed to prove that the answers given or the statement made by the insured were false and that he suppressed material facts. As the statements made by him are not proved to be false, the question whether they were material and were within the knowledge of the insured and that he stated those facts fraudulently does not arise. In the result therefore, this appeal must be dismissed with costs.