(1900) 01 CAL CK 0003

In the Calcutta High Court

New York Life Insurance Company APPELLANT

Vs

Phoebe Stella Gamble RESPONDENT

Date of Decision : 10-01-1900

Acts Referred:

Citation : (1900) ILR (Cal) 593

Hon'ble Judges : W. Maclean, J;Macpherson, J;Hill, J

Bench : Full Bench

Judgement

Maclean, C.J.—This is a suit to recover from the defendant-company a sum of Rs. 10,500, the amount assured on five policies on the life of the plaintiff''s late husband, one John Frederick Gamble, a master mariner, which policies were effected with the defendant-compile in the month of October 1893. John Frederick Gamble who, for several years, had been resident in Calcutta, died in England in the month of April 1894 of disease of the kidneys. The policies are granted by the company "in consideration of the agreements, statements, representations, and warranties submitted to its officers at the Home Office in the City of New York in the written applications for the policies, which are hereby referred to and made part of this contract. "

2. For these policies John Frederick Gamble made application to the company on the 16th and 18th of September 1893. On the 19th September he set sail for England. The applications were in writing in the form usually adopted by the company and were signed by John Frederick Gamble. The portions of such applications, material for the purpose of the decision in the ease, are question 9 and the answers thereto. Question 9 runs as follows:

A.--Has any proposal or application to insure your life ever been made to any company or agent, upon which a policy has not been issued, or upon which a policy has been issued at a higher rate than that applied for?

B.--If so, state full particulars, to what company, when, and etc.

3. The answer is: "Yes, I applied to the Sun Life Insurance Company but was not

examined. I am applying to the London and Lancashire." The answer says nothing about an application to the Positive Life Assurance Office, which undoubtedly had been made by Gamble. The application contains the following agreement by Gamble: "I do hereby agree as follows:

(1) That the statements and representations contained in the foregoing application, together with those made to the Medical Examiner by me, shall be the basis of the contract between me and the New York Life Insurance Company; that I hereby warrant the same to be full, complete, and true, whether written by my own hand or not; this warranty being a condition precedent to and a consideration for, the policy which may be issued hereon.

(2) That, inasmuch as only the officers at the Home Office of said company in the City of New York, have authority to determine whether or not a policy shall issue on any application, and as they act on the written statements and representations referred to, no statements, representations, or information made or given by or to the person soliciting or taking this application for a policy or by or to any other person, shall be binding on said company or in any manner affect its rights, unless such statements, representations, or information be reduced to writing and presented to the officers of the said company at the Home Office in this application."

4. John Frederick Gamble was examined by the Medical Examiner of the defendant-company, a certain Dr. Dey, on the 18th September 1893, and on that day he undoubtedly signed the declaration made to the Medical Examiner Dr. Dey. (Exhibit E).

5. By that declaration he declared that he had not, since childhood, had disease; of the kidneys or disease of the urinary organs; and in answer to the question "Give full particulars of any illness you may have had since childhood," he replied, "except a few attacks of biliousness, I had no other illness," and in reply to another question When were you last confined to the house by illness? "he declared," I was never confined to the house. "In reply to question 4" Are you subject or predisposed to dyspepsia? "he answered" No; and in reply to question 6, "Have you ever been seriously ill? "he answered" No; "and to question 7," Name and residence of your usual medical attendant, "ha replied" no fixed medical attendant; "and in reply to the question "Have you consulted any other medical man, if so, when and for what?" he answered "No." Upon that application and declaration, the life was accepted and the policies in question were granted.

6. As. I have stated, John Frederick Gamble died in England in the following April of disease of the kidneys. A claim was subsequently made against the company by his "widow, the present plaintiff, as the person entitled to the benefit of the assurance for the amount mentioned in the policies. The company appear to have had their suspicions aroused as to the truth of the statements in the applications and declaration, and in consequence two interviews took place on the 6th and 8th October 1894 at the office of the company in Calcutta,.between

the plaintiff and Mr. Anderson, the defendant''s manager in Calcutta, and their solicitor Mr. Robertson. I shall have to refer, later on to these interviews somewhat more in detail, but for the moment, it is sufficient to say that the plaintiff was then told that her claim would not be admitted, and that the company regarded the transaction as a dishonest, if not a fraudulent, one.

7. Nothing more was heard of the matter by the company, until nearly two years after, namely, on the 28th of September 1896, when a, Mr. Cranenburgh, a pleader of the Presidency Magistrate''s Court, wrote, on behalf of the plaintiff, to Mr. Anderson, the letter (Exhibit 2), in which he demanded immediate payment of the amount due on the policies with interest, and stated that, in default of immediate payment, proceedings would be taken for recovery of the money. The defendants'' solicitor at once replied repudiating liability on the policies, but this suit was not instituted until the 22nd of April 1897.

8. I will now refer to paragraph 8 of the plaint which is in the following terms: "The defendant-company''s forms connected with the said application for the said policies Nos. 566820, 566821, and 566822, including the printed form of application for insurance, and the printed form of declarations to the Medical Examiner of the defendant-company were brought to the house of the said John Frederick Gamble on the 18th September 1893, by one Chunee Lall Bose, who was employed by the defendant-company as a canvasser, and a native doctor, whose name the plaintiff does not recollect, who was employed by the defendant-company to examine the said John Frederick Gamble and to take the 3aid declarations. The said form of application was then and there filled upland signed by the said John Frederick Gamble and was retained by the said Chunee Lall Bose. The said native doctor then examined the said John Frederick Gamble in a separate room, and when the examination was finished the said form of declarations to the Medical Examiner was signed by the said John Frederick Gamble, but to the best of the plaintiff''s recollection and belief without being filled Up, but being retained by the said native doctor to be filled up by him and forwarded to the defendant-company''s office. The said native doctor made notes in a note book of his, as the plaintiff believes the result of his examination of the said John Frederick Gamble, and of the information obtained to enable him to fill up the said form of declarations. The said John Frederick Gamble had by him at the time a statement drawn up by himself sometime previously of an illness, from which he had suffered during the years 1888-1891, and of which he had been cured by one Dr. D''Mello, by some medicine invented by the latter, and this statement the said John Frederick Gamble showed to the said native doctor then and there, and informed him what it was, and the said native doctor then and there read it (a copy of the said statement is annexed hereto and marked B), and the plaintiff prays that it may be taken as part of her plaint; the said statement had been drawn up by the said John Frederick Gamble by way of a puff or commendation of the medicine with Which the said Dr. D''Mello had treated and cured him as aforesaid, and which the said Dr. D''Mello intended to patent."

9. In their defence the defendant-company state that the policies were granted upon the faith of the statements and representations made to the defendants by the assured, both in his application and in his declaration to the Medical Examiner, and they rely upon the warranty contained in his applications; they charge that certain of those statements and representations were untrue; they deny in toto the allegations in paragraph 8 of the plaint; and do not admit that their Medical Examiner ever examined the assured. I may dispose of the latter point at once by saying that it has not been insisted, upon.

10. The case came on for trial before Mr. Justice Ameer Ali, and after lasting many days the learned Judge gave judgment in favour of the plaintiff. Hence the present appeal by the company.

11. Passing by, for the moment, the question of whether or not it is open to the plaintiff, in the face of the contract between her late husband and the company, to adduce evidence in support of the allegations in paragraph 8 of the plaint, and taking it that the plaintiff is bound by the terms of the contract between Gamble and the company, I will, first, consider whether the statements and representations made by the assured, both in his applications and declaration to the Medical Examiner, were, or were not, true. I need not go into this question much in detail, for substantially, it has not been denied by the respondents that certain of such statements and representations, sufficient to vitiate the policy, were, in fact, untrue. There cannot, I think be any reasonable doubt, that, at the time of making the applications, the assured was suffering from disease of the kidneys and urinary organs; that he had been subject to dyspepsia from 1888 to 1891; that he had suffered from the illness described in Exhibit B to the plaint; that he had been frequently confined to the house through illness, and had also been in hospital; that he had consulted several medical men, and especially a certain Dr. D''Mello and that he had made an application to insure his life in the Positive Government Security Life Insurance Company, and had been examined by the said company''s Medical Examiner, of which he says nothing in answer to question 9 in the application.

12. As regards the disease of the kidneys and urinary organs, it is urged that this was a latent disease, and that there is nothing to show that the assured was conscious of its existence at the time he made the representations, and, in support of this reliance is placed upon a passage in the judgment of Lord Watson in the case of Thomson v. Weems (1884) L.R 9 A C 671, 694 where that most learned and distinguished Judge says: "Both these authorities relate to internal disease, of the existence of which the person affected is unconscious, and which medical examination cannot detect, until he is in extremis or, it may be, until life is extinct; and the only point arising for decision was, whether a particular query or statement was so expressed as to include latent and unknown, as well as apparent and known diseases."

13. I much question whether those observations can apply to the case of disease of the kidneys or disease of the urinary organs, of which, when it had reached

such a stage as in Gamble''s case, it seems unlikely that the patient could be quite ignorant when he made his applications and declaration, and in this connection, it must be remembered that the witness Dr. Mohendra Nath Banerjee, in answer to the following question from the Court: "Could all the symptoms you have put down there have been known to the man himself" replied, "The symptoms of Bright''s disease should be known to him. The, quantity of urine would be abnormal, and in the acute stage of the disease, he would pass blood and there are various Mother things. I did not see him in an acute stage."

14. The plaintiff tells us that her husband suffered from dyspepsia, and there cannot, I think, be any doubt, in the face of Exhibit B to the plaint, a document which, admittedly, was signed by Gamble, that the declaration that, with the exception of a few attacks of biliousness, he had no other illness, and was never confined to the house, were absolutely untrue. It is again very difficult for the plaintiff to explain away the negative answer to the sixth question in the declaration made to the Medical Examiner: "Have you ever been seriously, ill? "

15. It is urged that the answers to questions 7 and 8 in that declaration are sufficiently accurate, and that, "inasmuch as the words used are ambiguous, they must be construed contra proferentem and in favour of the assured," adopting the language of Lord Watson in the case to which I have referred. The contention is, that, as in answer to question 7, the applicant said he had no fixed" medical attendant, not perhaps a very ingenuous answer--the question, Have you consulted any other medical man?" must mean a medical man other than a fixed medical attendant and, as he had no "fixed" medical attendant, he was truthful and justified in saying that he had not consulted any other medical man. This argument is replete with casuistry, and seeing that we are dealing with a case of a person applying for an insurance on his life, a situation demanding from him the disclosure of all material facts within his knowledge, it does not impress me favourably.

16. The same species of reasoning applies to his answer to question 9 of the application, in which answer he says nothing about his application to the Positive Life Insurance Office, the argument being that the words "upon which a policy has not been issued," mean "a policy which has been refused." I do not propose to go into this, as to my mind the misstatements and misrepresentations made by the assured are amply sufficient to warrant the company in avoiding the policy.

17. If, then, the matter rested here, the defendants are bound to succeed. But it is urged for the plaintiff, first, that it is open to her to show that Gamble signed the declaration to the Medical Examiner before it was filled up: and that in consequence, he is not responsible for the contents of that declaration and is not bound by it; and secondly, that he showed to the Medical Examiner his written statement to Dr. D''Mello, and that the Medical Examiner must be taken to have known of the contents of that statement, and that the knowledge thus acquired by the Medical Examiner must be imputed to the company.

18. I am unable to take that view, having regard to the agreement of the assured with the company. He agreed that the statements and representations contained in his application, "together with those made to the Medical Examiner by me," should be the basis of the contract between the parties. He warranted them to be full, complete, and true, whether written by his own hand or not, and that the warranty was to be a condition precedent to, and a consideration for, the policy which might be issued thereon.

19. Now the plaintiff says she is entitled to resile from all this, to show that Gamble did not state what under his own signature he declared to be true, and yet to hold the company liable on the policy brushing aside and treating, as of no import whatever, the statements and representations which form the very basis of the contract.

20. But Gamble''s agreement did not stop here; there is another and an extremely important feature in it. He agreed for the reason which is recited, that no statements, representations, or information made or given by, or to any person soliciting or taking the application for the policy, or by or to any other person, shall be binding on the company, or in any manner affect its rights unless such statements, representations, or information be reduced to writing and presented to the officers of the said company at the Home Office, in the application.

21. This being the bargain between the two contracting parties, are we to say that all this means nothing, that these terms were not binding on the assured, and that they are to be treated as against him as so much waste paper? I think not. The object of such clauses is obviously to provide against a case of the very class which is now set up by the plaintiff; to prevent those claiming under the assured from going behind his written declarations which are the very basis of the contract. If it were otherwise, it is difficult to see how any certainty in contracts of this class would be afforded to the assuring company, or how, in many cases, as in the present case, heavy and prolonged litigation between the assured and the company is to be avoided.]?or my own part, I should have thought and think that, when the company had put in the contract between the parties, and shown, as they did, that, in important particulars, many of the statements and representations made by the assured were untrue, there would have been an end of the plaintiff''s case. The learned Judge, however, in the Court below, has thought otherwise, and has allowed the plaintiff to go into evidence in support of her allegations in paragraph 8 of her plaint, and has not noticed the argument as to whether or not she was entitled to do so in the face of the contract between the parties.

22. I will therefore--though in the view I take it is not strictly necessary--now deal with that evidence, premising that in my opinion the plaintiff''s story ought to be most carefully analysed, and that she ought not to succeed unless, in the face of the documents signed by Gamble, her case be established by clear and cogent testimony. I am bound to say that her story strikes me at the outset as a

somewhat suspicious one, and that suspicion is not diminished by the consideration that it has never even been suggested until the filing of the plaint, although some two-and-a-half years before that date the plaintiff had been virtually told that the claim was a dishonest one, and that it would not be admitted. We hear nothing of this story at the interviews in October 1894, when the plaintiff''s claim was challenged, nothing of it during the long silence between that date, and Mr. Cranenburgh''s letter two years later, nothing about it in that letter, and nothing about it until after Dr. D''Mello''s death.

23. I will now pass to a consideration of the evidence, with the view of ascertaining and determining what really took place at the interview of the 18th of September 1893, for this is the crucial question, and in dealing with this evidence, it is necessary to bear in mind that the witnesses are speaking to an event which occurred nearly six years before the date when they were giving their evidence, a circumstance to which any discrepancies in that evidence may not unfairly be attributed. Dealing first with the question of whether or not the declaration was filled in when Gamble signed it, the plaintiff can tell us but little. She merely says that her husband sat at the desk and took up the pen to write something, but she did not know what he wrote. This, to my mind, carries her case no way at all, whilst all that the witness James Bay can say in his evidence-in-chief, is that, on the date in question, Mr. Gamble signed some papers in his presence, and that is all that he can say about the forms, though, no doubt, in answer to a question by the Court, the question being "Besides making any notes in the pocket-book, did the doctor write on any forms;" he said, "No, I only saw Mr. Gamble sign some papers."''

24. If this evidence stood alone it would, not justify us in concluding: that the answers in the declaration had not been filled in by the doctor before Gamble signed it, quite apart from the positive evidence of Dr. Dey, who distinctly says that the declaration was signed in his presence, after he had filled up the form, which would be in accord with the usual practice in such cases.

25. In dealing with the evidence I am not unmindful of the fact that the learned Judge in the Court below enjoyed the great advantage of seeing the witnesses, and so far as anything turns upon their demeanour, we must be cautious in not differing from the opinion of the learned Judge who tried the case. The learned Judge appears to have formed a very favourable impression of the plaintiff as a witness, and an equally unfavourable one of Dr. Dey he says that he utterly disbelieves the doctor. So far as one can judge from the way the latter gave his answers, as we see them in print before us, this sweeping denunciation might appear somewhat unmerited, but, upon the demeanour of the witness, the Judge in the Court below is in a position to form an opinion which we are not. No doubt in answer to questions repeated by the Court, as to his recollection of what passed on the occasion, the doctor said that he remembered very little about the case, though there is force in his observation that it was very difficult to remember when the transaction took place so long ago. But, taking the evidence

of the plaintiff and the witness Bay, who is in a somewhat humble position in life, I think that it is impossible to hold that the plaintiff had substantiated that the declaration was filled in after Gamble had signed it.

26. I now pass to the question as to whether Gamble''s statement to Dr. D''Mello was shown to Dr. Dey. The plaintiff, in her evidence-in-chief,. says: "The doctor took this paper in his hand and looked at it; whether he read it he looked at it and turned it over. I said that does not matter."

To the Court--Q.--Do you believe he read it?

A.--Yes, he looked at it and turned it over.

To Mr. Gregory.--I did not hear the doctor say much. On the paper being shown, he said to my husband. "I am examining you, it''s all right, and he returned the paper to him.. And in cross-examination she says:

Q.--Was there anything untrue in the statement?

A.--Not untrue, but exaggerated. Made to appear bad, when it was not quite so bad.

Q.--Merely the symptoms of the illness were exaggerated, nothing more

A.--No, nothing more. I did not hear any of the answers of my husband to the questions put by the doctor Baboo.

Q.--Do you still suggest that Dr. Rajendra read through the statement and then filled up the form as it is?

A.--He looked at it. He may have glanced or he may have read

The Court.--You think he read it?

A.--Yes, be had a look at it.

27. Taking her answer as a whole the witness is, I think, very hesitating saying that the doctor read the statement.

28. Ray says:

Q.--Did you hear what transpired?

A.--About insuring his life. They were talking about having his life insured. He spoke of having his life insured, and the doctor Baboo took notes in his pocket-book. Mr. Gamble showed him some papers. I don''t know if could identify the papers now. The doctor Baboo read the paper. His reply was;--" I am examining you and I can see; your being ill four years back does not signify, so long as you are in health now." That is not a very definite statement, and does not amount to much more than that the doctor read some paper. In cross-examination he says:

Yes, hut I had not read it. I had seen it with Mrs. Gamble in her hands. That was when she was going to the company backwards and forwards. Then it was that I saw this paper.

Q.--I asked you if you had ever seen it before that occasion when the doctor was there?

A.--No, I had not.

Q.--How did that come to be produced on that occasion?

A.--Mrs. Gamble referred to her husband, and he drew it out of a drawer and showed it to the doctor. Yes, I recollect that after all these years. She said something to the effect "Jack show that paper to the doctor," or some words to that effect. I don''t remember if she said anything about what the paper was.

29. He says that Dr. Day was some 10 or 1.5 minutes reading it all through, the plaintiff says, five minutes or so. Dr. Dey denies that the ever saw the paper. But apart from Dey''s evidence, to my mind, neither the evidence of the plaintiff nor of Mr. Bay is sufficiently convincing to warrant us in finding that the written statement to Dr. D''Mello was ever read by Dr. Dey, even if it were ever shown to him. It is almost incredible that if it had been so shown and read, the plaintiff should, under the circumstances, have kept back the fact for so long a time from the company. I am quite unable to accept the story now set up by the plaintiff and I have formed a very adverse opinion as to the honesty of her ease, and the honesty of the transaction on the part of her late husband. The other witnesses called do not appear to have thrown much light on this part of the case. I think it is a very fair inference from all the circumstances of the case, that this story about the statement to Dr. D''Mello having been shown to Dr. Dey on the 18th September 1893 is a mere afterthought, consequent upon the plaintiff''s knowledge acquired at the interview of October 8, 1894, that statement had reached the hands of the company. As I have pointed out nothing was heard of this story until after Dr. D''Mello''s death.

30. In the view I take, it is not very important to deal minutely with the evidence as to what took place at the interviews of the 6th and 8th October 1894, nor to express any opinion as to whether, or not, Mr. Anderson and Mr. Robertson were well advised in seeking or having those interviews. That the plaintiff, at those interviews, signed the Exhibits "No. 12 and No. 13 cannot be questioned, though she alleges that at the time she was quite stunned and confused, and that they were not voluntarily made by her. As regards Exhibit No. 12 the plaintiff admits that she did make the statements in that paper to Mr. Anderson, and goes on to say that those statements are in point of fact true, one of those statements being that her husband had been eighteen years in India, and that during that period he had never been attended by any doctor. This obviously is incorrect, and I am unable to place any credence upon the plaintiff''s statement that her answer to question 9 in Exhibit No. 1a was given, because Mr. Anderson said she must agree with everything her husband had said. Except as going to the credibility of the plaintiff, it does not appear to me that what she stated on the 6th or 8th October is of much materiality upon the real issue of fact" which we

have to decide, namely, as to what occurred on 18th of September a 1893.

31. I may notice in passing, that in the letter of the 28th of September 1896, written about two years afterwards, Mr. Cranehburgh says nothing about the plaintiff being stunned or confused at the interviews in October 1894, he rather implies that she was quite able to take care of herself, and that she easily saw through the so-called ruse of Mr. Anderson.

32. It is unnecessary, having regard to my opinion on the case, to decide whether the declarations made, by Gamble to the London and Lancashire and Positive Offices were admissible in evidence in this case, though the inclination of my opinion having regard to the issues involved is that they were.

33. Upon these grounds the claim of the plaintiff absolutely fails; her suit must be dismissed with costs and she must pay the costs of this appeal.

Macpherson, J.

34. I agree.

Hill, J.

35. I also agree.