

(1991) 07 BOM CK 0008
In the Bombay High Court

Oriental Fire and Genl. Ins. Co. Ltd.

APPELLANT

Vs

Panvel Industrial Cooperative Estates Ltd.

RESPONDENT

Date of Decision : 26-07-1991

Acts Referred:

Contract Act, 1872 — Section 7, 8

Citation : (1992) 2 ACC 623 : (1992) ACJ 503

Hon'ble Judges : P.S. Patankar, J

Bench : Single Bench

Judgement

P.S. Patankar, J.—The only point involved in this appeal is whether there was a concluded contract of insurance between the parties on 24th December, 1973 so as to foist liability upon the insurance company, the appellant herein.

2. A few facts are as follows:

The respondent has constructed 28 sheds at Panvel in 1973. Out of those 28 sheds, shed standing on plot No. 54 was allotted to one Jani who was having partnership business in the name of Synthetic Esters and Chemicals. One V.B. Shaha was working as an agent of the appellant insurance company. On 24th December, 1973, he approached the respondent's Manager for the purpose of insuring those 28 sheds with the appellant. Shaha ascertained the premium and a cheque of Rs. 3,800/- was paid by the Manager of the respondent, In , token thereof, Shaha also signed on counterfoil. On the next day in the morning, the shed which was standing on plot No. 54 caught fire and was damaged extensively. The Manager of the respondent informed this to Shaha immediately and in turn, this was informed to the appellant insurance company. On 29th January, 1974, the Manager of the respondent, for the first time, wrote a letter to Shaha with a copy to the appellant that stamped receipt in respect of the said cheque of Rs. 3,800/- along with cover-note be forwarded. He also asked for the policy of insurance. There was no reply either by Shaha or by the appellant. Therefore, he addressed a letter on 5th March, 1974 to the appellant pointing out that though the cheque of Rs. 3,800/- was given on 24th December, 1973 to

Shaha, it has not been encashed. The stamped receipt was not received by the respondent. It was pointed out that the cheque would otherwise become stale and therefore may be encashed. On 30th April, 1974, the appellant sent a reply to the respondent pointing out that the appellant was unable to accept the risk and, therefore, the cheque of Rs. 3,800/- was returned. The Manager of the respondent again addressed a letter dated 3rd June, 1974 to the appellant pointing out that the letter dated 30th April, 1974 was received on 28th May, 1974 and it was accepted under protest and the respondent was proceeding against the appellant. A notice dated 8th July, 1974 was addressed to the appellant on behalf of the respondent through an advocate and the appellant was called upon to pay Rs. 24,900 towards the damage which was suffered due to fire to the said shed. The appellant in turn replied to the said notice and pointed out that the appellant had not accepted the risk. The cheque was not encashed and it has been returned. It was stated that the appellant's agent, Shaha, has pointed out that the cover-note shall be issued only after inspection of the sheds on the next day and till that time, the risk w\ls not undertaken. Therefore, the appellant declined to pay the loss.

3. As the appellant declined to pay, the respondent filed civil suit for recovery of the said damage from the appellant. In the plaint, the respondent pointed out about the construction of 28 sheds and the payment of premium to Shaha on 24th December, 1973. On 25th December, 1973 fire took place in the shed on plot No. 54. Shaha, the agent of the appellant, promised to send a stamped receipt and a cover-note immediately. However, that was not sent, but the appellant had accepted the proposal and assumed the risk and there was a concluded contract between the parties. It was, therefore, prayed that the appellant was liable to pay the said loss which was ascertained after the respondent appointed a surveyor by name Desai, Architect, in that respect and who submitted a report dated 28th December, 1973 calculating the said loss. The respondent also stated about the correspondence which took place between the parties and the notice which was issued and a reply received. The appellant filed written statement and it was contended that there was no concluded contract. The insurance company had not accepted or assumed the risk. It has denied that Shaha had promised to send a stamped receipt and a cover-note immediately. Cover note was to be sent after inspection of sheds. It was pointed out that the cover-note was not issued and the cheque was also returned and, therefore, there was no acceptance of proposal and consequently the risk.

4. The suit came to be heard by the learned Civil Judge, Senior Division, Alibag, who framed various issues in view of the pleadings of the parties. He held that the respondent has proved that it had constructed 28 sheds on different plots and shed on plot No. 54 was insured. The learned Judge took the view that as the premium was accepted by the agent of the appellant on 24th December, 1973, there was assumption of risk by the appellant in view of Section 64-VB of Insurance Act, 1938. The learned Judge took the view that there is no provision in the Insurance Act regarding the cover-note and, therefore, it was not proved

by the appellant that it was necessary to issue the same prior to assumption of risk. He further held that the cheque was issued on behalf of the respondent and it was done after ascertainment of the premium and was also countersigned by the agent of the appellant. The said cheque was not returned by the appellant for more than four months. This was done even though the appellant was given intimation in respect of the fire immediately. Therefore, according to the learned Judge, this conduct impliedly showed that there was concluded contract of insurance between the parties. The learned Judge further held that Shaha, the agent of the appellant, promised to send a stamped receipt along with cover-note immediately from Poona covering the risk from 24th December, 1973 and, therefore, the appellant had accepted the proposal of the respondent. The learned Judge also held that the respondent proved that there was damage to the shed on plot No. 54 to the tune of Rs. 24,900/- in view of the report submitted by its architect, Mr. Desai. In the result, the suit was decreed.

5. Being aggrieved, the defendant has preferred this appeal. Mr. P.M. Pagnis, learned advocate appearing on behalf of the appellant, submits that there can be no concluded contract of insurance merely because the cheque towards premium was handed over to the agent, Shaha, of the appellant. Further, it was an error to hold that there was acceptance of the contract because of the alleged conduct, i.e., retaining of the cheque by the appellant for more than four months or that the assurance given by Shaha to send the stamped receipt regarding the cheque. He contends that unless the appellant or its agent inspects the sheds and issues cover-note till that time there was no acceptance or assumption of risk. He contends that issuance of cover-note is a well-established practice in the insurance law and it is an interim contract for a particular time generally by which the insurance company assumes the risk for the time being and thereafter either issues the policy or declines to issue the same. If the policy is issued then the risk is continued and if it is not then the risk is declined from that date. He contends that unless the subject-matter of the risk is inspected by the appellant, there can be no assumption of risk. The learned Judge has erred in interpreting the provisions of Section 64-VB. He contends that in view of the provisions of the Contract Act, 1872 it was necessary that the proposal should be accepted and thereafter only it can be called as a concluded contract. He points out that there is a standard form of proposal and every assured has to fill the same giving details so enable the insurer to accept the risk. Since it has not been done, there is no acceptance of risk on behalf of the appellant and concluded contract.

6. Mr. J.C. Rajani, learned advocate appearing on behalf of the respondent, supports the decree and contends that as the premium was accepted by Shaha, there was acceptance of proposal and assumption of risk on the part of the appellant. He contends that the premium was accepted after its ascertainment and Shaha was acting as an agent of the appellant and, therefore, there was a concluded contract between the parties and also assumption of risk in view of Section 64-VB.

7. In view of the submission, the focal point involved is whether there was concluded contract of insurance or not? My answer is No.

8. In my view, mere payment of premium amount and its acceptance by agent cannot amount to a concluded contract of insurance. The reliance of the learned Judge on Section 64-VB in that respect is not correct. The section is as follows:

64-VB. (1) No insurer shall assume any risk in India in respect of any insurance business on which premium is not ordinarily payable outside India unless and until the premium payable is received by him or is guaranteed to be paid by such person in such manner and within such time as may be prescribed or unless and until deposit of such amount as may be prescribed is made in advance in the prescribed manner.

(2) For the purposes of this section, in the case of risks for which premium can be ascertained in advance, the risk may be assumed not earlier than the date on which the premium has been paid in cash or by cheque to the insurer.

Explanation. -- Where the premium is tendered by postal money order or cheque sent by post, the risk may be assumed on the date on which the- money order is booked or the cheque is posted, as the case may be.

(3) Any refund of premium which may become due to an insured on account of the cancellation of a policy or alteration in its terms and conditions or otherwise shall be paid by the insurer directly to the insured by a crossed or order cheque or by postal money order and a proper receipt shall be obtained by the insurer from the insured, and such refund shall in no case be credited to the account of the agent.

(4) Where an insurance agent collects a premium on a policy, of insurance on behalf of an insurer, he shall deposit with, or despatch by post to, the insurer, the premium so collected in full without deduction of his commission within twenty-four hours of the collection excluding bank and postal holidays.

(5) The Central Government may, by rules relax the requirements of Sub-section (1) in respect of particular categories of insurance policies.

In my view, the object of the said section is to secure advance payment of premium by the insurance company before the assumption of risk. Section 64-VB (1) places a prohibition upon the insurer that unless and until it receives the payment of premium or the same is guaranteed to be paid in a particular manner and within a particular time as may be prescribed in advance, there can be no assumption of risk on the part of the insurer. Subsection (2) of the said section lays down that risk may be assumed not earlier than the date on which the premium has been paid in cash or by cheque to the insurer in case of those risks for which premium can be ascertained in advance. The Explanation further makes it clear that the premium may be tendered by postal money order or by cheque sent through the post and the risk may be assumed on the date on which the said money order is booked or the cheque is posted. In my view, Sub-section

(2) is an enabling provision for the insurer. The contract between the insurer and the assured may be concluded later on. However, the insurer can assume the risk from the date when the money order is booked or the cheque is posted towards the premium. The phrase "risk may be assumed not earlier than" in subsection (2) and the phrase "may be assumed" used in the Explanation thereof clearly indicate this. Neither Sub-section (2) nor the Explanation means that the risk attaches immediately on payment of premium and the insurer undertakes the risk. Sub-section (4) further says that premium on the policy can be collected by the agent of the insurer and places an obligation upon him to deposit or despatch by post the said amount to the insurer and he has to send the said premium in full without deducting his commission within 24 hours of the collection excluding bank and postal holidays. Therefore, in my view, this section does not lay down that payment and acceptance of the premium meant that there was concluded contract. Therefore, the contention of Mr. Rajani cannot be accepted in this respect. It is also not possible for me to accept that merely because there was ascertainment of premium by Shaha, the agent of the appellant, and the cheque was paid by the respondent, would mean that there was a concluded contract. In my view, the learned Judge has also erred in holding that there was implied contract in view of the conduct of the appellant in retaining the said cheque for over a period of four months or because no steps were taken by the appellant in returning the cheque even though intimation of fire and loss was given to it immediately. In fact the said cheque was not even encashed by the appellant, and was returned. Therefore, mere retaining of the cheque has not passed on any benefit to the appellant. In the entire deposition of Shaha at Exh. 22, he has not stated that he would be sending the stamped receipt and cover-note immediately or he had undertaken the same on 24th December, 1973. In fact, he has deposed that he would be giving cover-note after the proposal form is duly filled in and he inspected the site. He had stated that in the absence of filling of the proposal form by respondent and inspection of site by him, he could not have issued the cover-note. I find that there is no cross-examination on this aspect. Evidence of Shaha thus showed that he was to issue a cover-note subject to inspection of the sheds. Therefore, there was no unqualified acceptance and risk cannot attach. The matter was still under negotiation and no binding contract resulted. Even there was no interim contract for limited period in the form of cover-note. Therefore, it is not possible for me to accept the contention of Mr. Rajani that the risk was accepted by the appellant impliedly and there was an implied contract between the parties.

9. Mr. P.M. Pagnis invited my attention to statement of law as contained in certain paragraphs from Halsbury "s Laws of England, 4th Edn., Volume No. 25. He has invited my attention to these paras in view of the observations made by the learned Judge that the appellant has failed to show any provision from the Insurance Act, 1938 providing for issuance of cover-note for acceptance of risk by appellant. It may be noted that the law of insurance is mainly developed by commercial practices. The Insurance Act supplements them and does not

supplant them. The well established practices are recognised by courts and followed. If a statutory provision prohibits any practice, then only it can be said to be illegal and cannot be followed. This is not the position in the case of cover-note. It is a practice followed by insurance companies. Para 384 points out that in practice it is universal to require the proposer to fill up and sign a standard form of proposal. The standard form usually contains particulars of the insurance which are required to be disclosed. This is an offer and it is required to be stated in clear and unambiguous language so as to decide whether to accept the risk or not to accept it. It is a contract of uberrima fides and therefore it is to be done in precise nature and there should be full disclosure. The assured has to disclose all the material facts which would affect the acceptance of risk by the insurer. The disclosure can be made to the agent of the insurer even orally. Therefore, if full and accurate disclosure is made orally by the proposer to the agent, the duty of disclosure is discharged and the insurers cannot subsequently repudiate the policy on the ground that they were not informed personally. Para 398 deals with necessity for offer and acceptance. It is as follows:

A contract of insurance, like any other contract, is created where there has been an unqualified acceptance by one party of an offer made by the other. So long as the matter is still under negotiation there is no contract, although it is open to the parties, pending conclusion of the negotiations, to enter into an interim contract of a limited nature, for example in the form of a cover-note. If the contract is created otherwise than by acceptance of a written proposal it must be shown that there has been agreement on the fundamentals of the insurance proposed, namely, the subject-matter of the insurance, the amount of the insurance unless this is unlimited, the nature of the risks insured against, the period for which the insurance is to last and the rate of premium to be charged, although the exact amount may have to be calculated.

Para 402 deals with cover-notes and says that the usual form in which interim insurance, meant for a limited period, is granted is by a document known as a cover-note. Normally a cover-note incorporates the terms and conditions of the insurers' standard form of policy, either by express reference or by reference to a signed proposal which in terms incorporates the standard form. The cover-note is superseded by the subsequent issue of a policy. The rights and liabilities of the parties in respect of any loss which happens during the currency of the cover-note shall be determined with reference to the terms of the cover-note.

10. In the present case, the evidence shows that there is standard form of proposal and admittedly no such proposal form was filled by the respondent. Therefore, it is clear that the appellant was not knowing about the precise nature of the risk which was required to be undertaken. It is also not the case of the respondent that agent was given all the information in that respect orally. There was no full disclosure of all the material facts on the part of the respondent to enable the appellant to accept the risk. Further, the evidence of Shaha shows that he was not ready to issue the cover-note unless he inspected the site to

enable him to know the nature of the risk. There is no pleading or evidence to show that there was an agreement between the parties on the fundamentals of insurance proposed particularly regarding the nature of the risk, the period of insurance and the rate of premium. In my view, therefore there was no acceptance on the part of the appellant. Similarly, it is the recognised practice to issue cover-notes which ordinarily incorporate the terms and conditions of policy, though it is a stop gap arrangement. In my view, therefore, it was not correct on the part of the learned Judge to hold that as there is no provision in the Insurance Act, 1938, in respect of cover-note, it cannot be considered to be a requirement. The evidence of Shaha also shows that he was authorised to issue cover-notes and it is an admitted fact that neither Shaha nor the appellant has issued such a cover-note. In view thereof, I hold that there was no acceptance of risk on the part of the appellant even for time being.

11. Mr. Pagnis has invited my attention to two judgments of the Supreme Court regarding the provisions contained in the Contract Act regarding offer and acceptance and " contends that it was necessary that there should have been acceptance on the part of the appellant so as to have a concluded contract. He further contends that mere acceptance of premium by Shaha cannot be a positive act indicative of an intention to create a contract. Two relevant sections of the Contract Act are Sections 7 and 8. They are as follows:

Section 7. In order to convert a proposal into a promise, the acceptance must --

(1) be absolute and unqualified;

(2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but if he fails to do so, he accepts the acceptance.

Section 8. Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.

Therefore, in order to convert a proposal into a promise, the acceptance must be absolute and unqualified. It may be expressed in some usual form or may be implied from the conduct. In the present case, there was no proposal form submitted by the respondent. The sheds were not inspected. Therefore, it cannot be said that there was any absolute and unqualified acceptance. Supreme Court in Life Insurance Corporation of India v. Raja Vasireddy Komalavali Kamba 1984 ACJ 345 (SC), has observed as follows:

Though in certain human relationships silence to a proposal might convey acceptance but in the case of insurance proposal, silence does not denote consent and no binding contract arises until the person to whom an offer is made

says or does something to signify his acceptance. Mere delay in giving an answer cannot be construed as an acceptance, as, prima facie, acceptance must be communicated to the offeror. The general rule is that the contract of insurance will be concluded only when the party to whom an offer has been made accepts it unconditionally and communicates his acceptance to the person making the offer. Whether the final acceptance is that of the assured or insurers, however, depends simply on the way in which negotiations for an insurance have progressed. See in this connection statement of law in MacGillivray and Parkinson on Insurance Law, Seventh Edition, page 94, paragraph 215.

It is held that mere receipt and retention of premium even for a long time is not acceptance and cannot give rise to a contract. It is a case dealing with life insurance and the assured had given two cheques in respect of two premiums which were encashed by the Life Insurance Corporation. They were accepted without demur or qualification. However, those amounts were put by the Corporation in the suspense account and not adjusted towards the premium. The policy was not issued, though prepared and, therefore, it was contended that there was no acceptance of the terms of insurance and the proposal cannot be said to have been accepted. In the light of those facts, the question arose whether there was a concluded contract of insurance or not? The Supreme Court laid down that the expression "underwrite" signifies "accept liability". Acceptance must be signified by some act or acts agreed upon by the parties. It was held that as there was no acceptance as contemplated by Section 7 of the Contract Act, there was no concluded contract of insurance. Mr. Pagnis then relied upon *R. Ratilal and Co. Vs. National Security Assurance Co. Ltd.*, . The main question involved was whether unstamped cover-note can be admitted in evidence and can be relied upon by parties so as to bind the other. The Supreme Court observed as follows.

The terms "letter of cover" are well-known in trade. A letter of cover no doubt contains a contract of insurance but it is not a policy of insurance in the common understanding of that word in the trade. It is well-known that in order to obtain an insurance against the risk of fire the assured has first to send a proposal to the insurer and then the insurer takes a little time in making enquiries as to whether it would accept the proposal and undertake the obligation of covering the risk. It issues a policy only after it is satisfied that it would be a prudent business proposition to do so. Experience of trades people has, however, shown that some kind of protection for the interim period when the insurer is making the enquiries is necessary. This protection is given by what is called a "letter of cover". It is expressly a contract granting insurance for the period between its date and until a policy is prepared and delivered if one is eventually issued or otherwise upto a date mentioned in it.

The Supreme Court approved the well recognised practice in the insurance trade regarding issuance of cover-note or letter of cover. Mr. Pagnis is, therefore, right in contending that as the cover-note was not issued, it cannot be said that there

was any acceptance of risk on the part of the appellant. In my view, therefore, there was no implied or express acceptance of the alleged proposal by the appellant. There was no positive conduct on the part of appellant indicating such acceptance. Acceptance of cheque towards premium or keeping the cheque for 4 months would not amount to implied acceptance by conduct. In fact, the cheque was not encashed and it was returned by the appellant shows that it was not ready to undertake the risk until the subject-matter of risk was inspected. In my view, therefore, there is nothing to show that there was anything positive constituting the acceptance of the proposal.

12. Further in my view, if it is held that there was acceptance on the part of appellant merely because cheque towards premium was paid, without any further positive conduct on the part of appellant, then it may lead to M/s chief and malpractice and is fraught with danger of depriving the insurance company by collection between the agent and assured.

13. Therefore, as there was no binding or concluded contract between the parties, the respondent was not entitled to recover any damages from the appellant.

14. In the result, I allow the appeal and set aside the judgment and decree dated 30th July, 1977 passed by the Civil Judge, Senior Division, Alibag, in Special Civil Suit No. 1 of 1976 and dismiss the said suit. The appeal is allowed with costs.