

(1953) 08 MAD CK 0028

In the Madras High Court

Case No : Original Side Appeal No. 74 of 1949

P. Abdul Azeez and Co. and Others

APPELLANT

Vs

New India Assurance Co. Ltd.

RESPONDENT

Date of Decision : 12-08-1953

Acts Referred:

Contract Act, 1872 — Section 39, 4

Citation : AIR 1954 Mad 520 : (1954) ILR (Mad) 747 : (1954) 67 LW 19 : (1953) 2 MLJ 714

Hon'ble Judges : Rajamannar, C.J;Venkatarama Ayyar, J

Bench : Division Bench

Advocate : P.K. Janakiram, for the Appellant; C.N.S. Chengalvarayan, for the Respondent

Final Decision : Dismissed

Judgement

Venkatarama Aiyar, J.—This is an appeal against the judgment of Panchapagesa Sastri J. granting a decree in favour of the plaintiff in C.S. No. 804 of 1943. The defendant, P. Abdul Azeez and Co. is the appellant. Its sole proprietor is one Abdul Azeez. He was doing considerable business in Madras and had large properties, and he had been insuring his properties with the respondent, the New India Assurance Co., Ltd. The suit was to recover a sum of Rs. 37,103-10-0 due from the defendant on account of premia due on various policies issued by the plaintiff to him. The dispute in the suit related only to a sum of Rs. 13,233-15-0 claimed on account of fire policies issued for the years 1946 and 1947 to the defendant. These policies have been marked as Exs. P. 1, P. 15, P. 22, P. 25, P. 35, P. 36, P. 38, P. 39, P. 41 and P. 45. The defendant contested the suit on the ground that it was a condition precedent to the policy taking effect that premia should be paid thereon and as that had not been done no suit should be maintained to recover them. The policies are all of them in the same form, and the relevant clause therein is as follows:

"The company hereby agrees with the assured but subject to the conditions

printed on the back which are to be taken as part of this policy, and to such other conditions as are herein expressed that if the property above described, or any part thereof, shall be destroyed or damaged by fire or lightning after payment of the premium and at any time between the first day of March 1947 and four o'clock (standard time) in the afternoon of the first day of March 1948 or before four o'clock (standard time) in the afternoon of the last day of any subsequent period in respect of which the assured shall pay to the company, and it shall accept the sum required for the renewal of this policy, the company will pay or make good all such loss or damage, to an amount not exceeding in respect of the sum set opposite thereto and not exceeding: in the whole the sum above-mentioned."

Now, the facts found are that the defendant had been doing insurance business with the plaintiff for a number of years and that the practice was that the policies were issued at his request even before the payment of premia, they being subsequently paid. The policies in question had been issued similarly, without prepayment of premium. After the period for which the insurance was effected was over most of these policies were renewed for the subsequent year. The plaintiff had also been making demands all along for the payment of the premia. In answer to these demands the defendant sent the reply, Ex. P. 6, dated 14th September 1948. It runs as follows:

"Re. Premium out standings in respect of Fire, Marine and Accident Policies issued in favour of our firm and in favour of Mr. P. Abdul Azees and Mr. Anwar Azeez.

With reference to your letters dated the 15th July, 4th and 7th ultimo in regard to the premia due to you as stated therein and also for policies issued by you the entire amount on or before the 30th instant, failing which on or before the end of the first week of October 1948 --positively."

It is common ground that the letters dated 14th July and 4th and 7th August referred to in Ex. P. 6 contained demands for the payment of premia which are the subject-matter of this suit. The facts above-mentioned clearly show that notwithstanding the premia were not paid before the policies were issued, the parties throughout acted on the footing that there was a concluded contract of insurance subsisting between them. Panchapagesa Sastri J. who tried the suit held on these facts that the plaintiff must be taken to have waived the payment of the premia and that as all the parties treated the contract as concluded the claim was maintainable. He accordingly granted a decree. The defendant prefers this appeal and disputes the correctness of that decision.

2. Mr. P. K. Janakiram, the learned advocate for the appellant contends that as the prepayment of the premium was a condition precedent to the contract of insurance coming into force and as that condition had not been complied with, there was in law no contract in existence and no claim can be made for recovery of any amounts on the basis of that contract. He relied on the decisions in --

"Equitable Fire and Accident Office Ltd. v. Ching Wo Hong", 1907 AC 96 (A) and -- "South British Insurance Co. Ltd. v. Stenson", AIR 1926 Born 260 (B), in support of his position. In --"1907 AC 96 (A)", the facts were that one Chin? Wo Hong had taken a policy of fire insurance with the appellant company. One of the terms of the policy was that it would become null and void if the insured omitted to give notice of any additional insurance effected on the same goods with another company without the consent of the insurers. In an action to recover the amount mentioned in the policy the appellant company pleaded that the plaintiff had subsequently effected an insurance with the Western Company without their consent and that accordingly the policy issued had become null and void. This contention was rejected. It was found that in fact there was no subsisting policy with the Western Company in favour of the plaintiff because the premium had not been paid as provided in the policy. A contention was raised that as the policy had been delivered to the plaintiff it must be taken that the condition as to prepayment had been waived and that therefore the policy was effective. In rejecting this contention Lord Davey observed:

"Their Lordships cannot treat the fact of the executed policy having been handed to the respondents as a waiver of the condition or attach any importance to the circumstances. What was handed to the respondents was the instrument with this clause in it, and that was notice to them, and made it part of the contract that there would be no liability until the premium was paid."

This clearly is an authority for the position that by the mere fact of the delivery of the policy the company cannot be held to have waived the condition that it should come into force only on payment of the premium, in that case it must be mentioned that the Western Company itself had repudiated its liability. It is this fact that distinguishes that case from the present. It might further be observed that there was a finding in that case that both the parties had treated the contract as non-existent. With reference to this Lord Davey observed:

"Whether under these circumstances the appellant company can resuscitate an instrument which the parties to it agree in treating as void for the purpose of avoiding its own liability, is open to question."

This observation shows that where the parties themselves agree to treat the contract as effective different considerations might arise.

3. In -- The South British Insurance Co. Ltd. Vs. J.R. Stenson, ", the suit was by the insurance company for recovering premium on a policy which provided that no insurance shall be held to be effected until the premium due thereon shall be paid and accepted in full. It was established that the policy had been issued and that demands were also made by the company for payment of premium. Patkar and Baker JJ. held that these facts were insufficient to establish waiver, that the policy did not come into effect and that the suit was not maintainable. It may be mentioned that the terms of the policy in the above case are different from those of the policies with which we are concerned. There is a later judgment of the

Bombay High Court reported in --" The Ocean Accident and Guarantee Corporation Co. Ltd. Vs. D.K. Patkar, . There also the suit was by the Insurance company for payment of premium. The defence was that there was no concluded contract between the parties and that was based on the fact that there, had been no prepayment of the premium as provided in the policy. Rangnekar J. states the law on the subject thus:

"A contract of insurance like any other contract is completed by an offer made by one party to the other and accepted by the latter, and secondly, prepayment of the premium is not in law a condition" precedent to the contract of insurance. "But it is also a common practice of all insurers, except marine, to stipulate that the contract shall not begin to take effect until the premium has been paid. It is well established that the court will not enforce a contract of insurance where there is such a stipulation in, the policy until the premium has been paid. This is clear from -- "Equitable Fire and Accident Office Ltd. v. Clung Wo Hong" (A). But even in cases where there is such a stipulation,, it is competent for an insurer to waive the condition and the court will readily infer such a waiver."

Then the learned Judge refers to the cases reported in -- "Armstrong v. Turquant", (1857) 9 Ir. C. L. B. 33 (D) and -- "General Accident Insurance Corporation v. Cronk", (1901) 17 T.L.R. 233 (E) and finally comes to the conclusion on the facts that the condition had been waived and that the suit was maintainable.

4. The law on the subject is stated in Halsbury's Laws of England, Hailsham Edition, Vol. 13, paragraphs 650 and 551 at page 449 thus:

"As soon as the contract is signed, the assured becomes liable to pay the premium, but his failure to pay it does not in itself absolve the insurers from the liability which they in turn have undertaken under the contract. In the event of a loss, therefore happening before payment, they must pay the amount due under the contract, unless the contract otherwise provides.

In practice, prepayment of the premium is usually made a condition precedent to liability, in the case not only of the first premium, but also of the renewal premiums. The assured is then precluded from recovering for a loss which happens before the premium is paid. Any such condition, however, may be waived."

In Porter on the Law of Insurance the position is thus stated:

"But where it is a condition in the policy that the policy shall not be binding until the premium, is paid, it is competent for insurers to waive the condition, and the court will readily infer a waiver."

5. The law therefore is well settled that a contract of insurance, like other contracts, is concluded by offer and acceptance. If there is a stipulation that the liability will attach itself under the contract only if the premium is paid that will be a condition precedent to the policy taking effect. But that is a condition

inserted for the benefit of the insurer and that can be waived. On this statement of the law we have no doubt that the learned Judge has come to the correct conclusion on the facts that there has been a waiver of the condition. It was the defendant who offered to take the policies. When repeated demands were made on him for payment of premia, he did not repudiate his liability to pay them. On the other hand, he expressly agreed in Ex. P. 6 to pay them. He also renewed those very policies. These facts lead to the irresistible conclusion that the condition had been waived and that there was a concluded contract of insurance between the parties.

6. On this finding the appeal fails and is dismissed with costs.