

(2005) 02 GAU CK 0068
In the Gauhati High Court
Case No : F.A. No. 61 of 1997

Rajesh Kumar Choudhury and Another	APPELLANT
Vs	
United India Insurance Co. Ltd. and Another	RESPONDENT

Date of Decision : 04-02-2005

Acts Referred:

Contract Act, 1872 — Section 17, 19
Insurance Act, 1938 — Section 25, 45

Citation : (2005) 2 GLT 149

Hon'ble Judges : D. Biswas, Acting C.J.; Anima Hazarika, J

Bench : Division Bench

Advocate : B.K. Goswami and T. goswami, for the Appellant; S.S. Sharma, D.K. Bhatra and K.K. Bhatra, for the Respondent

Final Decision : Dismissed

Judgement

A. HAZARIKA, J

1. This appeal at the instance of the plaintiff-appellant is directed against the impugned judgment and decree dated 6.1.1997 passed in Money Suit No. 108 of 1991 by the learned Additional District Judge, Nagaon dismissing the suit.

2. The plaintiff-appellant filed the suit in the court of Assistant District Judge at Nagaon for realisation of Rs. 6,13,596 and for payment of interest @ 18% per annum till payment of the decretal sum, with cost of the suit.

3. The case of the plaintiff-appellant, in brief, as averred in the plaint is that he was running the Chaparmukh Rice Mill, being the owner, which comprises the mill buildings and premises alongwith stock of mill were insured with the United India Insurance Co. Ltd., the defendant at Nagaon Branch, Haiborgaon, Assam bearing policy No. 130101/11/02989 for an amount of Rs. 10,00,000 which was valid from 1.3.89 to 28.2.90 upto 4. P.M. The said policy covered risks including flood and inundation amongst others.

The plaintiff-appellant had further averred that during the subsistence of the

policy there was devastating flood from 31.7.89 to 8.8.89 causing serious loss and damage to the properties of the plaintiff and accordingly he had issued a communication to the company at Haibargaon on 1.8.1989 informing the said devastating flood and its consequential damages suffered and requested to depute its surveyor or representative for spot verification to assess the damages. In pursuance to the said communication dated 1.8.89, the defendant-company had sent its surveyor to survey the spot and to assess the quantum of damage suffered by the plaintiff. The surveyor submitted its report accordingly. But the defendant-company did not make any payment and hence the suit for recovery of amount of Rs. 6,13,596 with interest.

4. The defendant company on receipt of the summons had entered appearance and contested the suit by filing written statement contending inter alia therein, that the suit is bad for misjoinder of parties, suit is false, frivolous and vexatious and the plaintiff has not come up with clean hands, that there is no cause of action for the suit and denied its responsibility and liability to pay the claim amount since it was obtained by concealment and suppression of material fact. Their further plea was that being a lessee the plaintiff has no insurable interest in respect of the mill and its immovable properties. The defendant averred that the plaintiff had misled and obtained the policy of insurance at reduced premium rate showing the mill as small scale industry (tiny sector) which was factually incorrect.

The specific averment made by the defendant was that the plaintiff had his earlier policy of insurance issued by the Oriental Insurance Co. Ltd. But the previous company refused to renew and reinstate the policy of the plaintiff for the second term on the ground of adverse claim. The said fact was suppressed by the plaintiff and approached the defendant company and signed the proposal form concealing those material facts and prayed for dismissal of the suit on this ground alone.

5. The learned Trial Court after going through the pleadings of the parties and on hearing the counsel appearing on behalf of the parties had framed the following issues which are reproduced herein below : -

1. Whether there is any cause of action for the suit ?
2. Whether the suit is bad for misjoinder of parties ?
3. Whether the suit is maintainable ?
4. Whether the plaintiff is entitled to get a decree as prayed for ?
5. To what relief or reliefs the plaintiff is entitled to ?

During the course of the trial the plaintiff examined one witness as PW 1 and exhibited as many as 15 documents in support of his case. On the other hand the defendant has examined two witnesses and exhibited four documents in support of its case.

6. The learned court below while deciding the issue Nos. 2 and 3 has answered in favour of the plaintiff holding that the suit is maintainable and the suit is not bad for misjoinder of parties since to both the defendants were made parties in the suit which do not come within the mischief of misjoinder of parties.

In regard to issue Nos. 1 and 4, the learned court, after detailed discussion, particularly on the point of suppression of material fact and fraud has held that, the materials placed, the documents exhibited and the evidence on record, more particularly the insurance Form Ext. I, at column 9(d)(i) and 9(d)(ii) of the proposal and Ext. "gha" and Ext. "Unga" proved the suppression of material facts and the plaintiff in order to make wrongful gain had fraudulently made the statement at the time of making the policy though he had the knowledge that it was false and hence the plaintiff is not entitled to get a decree as claimed and dismissed the suit.

7. Aggrieved by the judgment and decree dated 6.1.97 passed by the Trial Court, the plaintiff-appellant has preferred the instance appeal.

8. We have heard Shri B.K. Goswami, senior counsel for the appellant and Shri S.S. Sharma, counsel appearing for the respondent.

The point for determination emerges in this appeal are ; -

(a) Whether the impugned judgment and decree are erroneous ?

(b) Whether the plaintiffs claim is vitiated by exerting fraud ?

(c) Whether the defence plea of exerting fraud by the plaintiff in getting the insurance policy had been proved ?

9. In order to appreciate the points raised in the appeal, we have perused the plaint, written statement and material evidence on record including the document exhibited and proved. The evidence on record would show that the plaintiff has claimed the relief on the basis of policy (vide Ext. I), in this context, it is necessary to bear in mind that the plaintiff had filled up the insured form bearing policy No. 130101/11/02989 for an insured sum of Rs. 10,00,000 (Rupees ten lakh) only which was valid from 1.3.89 to 28.2.90 up to 4 P.M. The proposal, as is evident from the third page thereof brought on record, a set of questions in column No. 9 have all been answered, in a manner that conveys an impression that the plaintiff was justified in filling up the policy in column No. 9. It would therefore, be necessary to reproduce the said questions and the answers given under, column No. 9. The same reads as follows : -

QUESTIONS ANSWERS (9) (a) Is the proposer at present or has been insured on the property now proposed for insurance ? Yes

(6) Has the proposer ever sustained any loss by fire or other perils ? Yes

(c) Has the proposer made any claim under insurance policy ? Yes

(d) (i) Has any company declined any proposal or cancelled any insurance ? No

(d) (ii) Required special terms or refused renewal thereof. Does not arise

10. Upon perusal of the aforementioned proposal Form filled up in the manner stated by the plaintiff, it is clear that these sets of questions are pertinent and material for purposes of enabling the defendant-respondents to either accept or reject the proposal. The most important questions in so far as this case is concerned are question Nos. 9(d)(i) and 9(d) (ii). These are questions, which point to the fact as to whether any company declined any proposal or cancelled any insurance and required special terms or refused renewal thereof.

11. Now the question arises as to whether the plaintiff-appellant has acted bona fide or suppressed the material facts in regard to filling up the columns as indicated above. The evidence on record, more particularly, the evidence of PW1 would show that he had stated in cross examination that, "previously we had policy with Oriental Insurance. Thereafter, we took the policy from United India, although there was no refusal to issue policy to us. It is not correct that Oriental Insurance Co. refused policy and despite such refusal we took policy from United India by concealing the fact".

12. On the other hand, the said fact had been refuted by the defendants. The defendant had examined one Prabhat Chandra Sharma as DW1 and Shri Sandip Kumar Chanda as DW2. The evidence on record, more particularly Ext. "kha" dated 18.12.89, Ext. "gha" dated 25.10.89 and Ext. "Unga" dated 4.9.90 would show that there was suppression of material facts. The relevant portion of Ext. Unga, is reproduced below, which read as follows : -

"After the 2nd claim, the insured intended to reinstate the policy for the 2nd time, but it was not allowed by us.

However, due to bad claim experience, we did not invite the renewal of the aforesaid policy. Incidentally, renewal of other policies viz. House holders Insurance, cash in transit Insurance etc. were also not invited by us due to bad claim experience under the said policies."

Therefore, the claim on which the decree is sought for are suppression of material facts and the burden of proof of the said facts have been duly discharged by the defendant-respondents.

13. It was expected therefore that the plaintiff had to correctly answer the questions by using "Yes" against question No. 9(d) (i) and then to have given details as required in the column No. 9(d) (ii) quoted above. Instead he answered all these questions by using the word "No" and "Does not arise".

14. Thus, judged by the standard laid down in Section 17 of the Contract Act, the policy holder was clearly guilty of a fraudulent, suppression of material facts, when he filled up the policy which he must have known were deliberately false and hence the policy issued to him relying on those statements was vitiated and the principle underlying the Explanation to Section 19 of the Contract Act would not come in aid of the plaintiff.

Therefore, the first question is answered accordingly holding that the judgment and decree passed by the learned trial Court is not erroneous.

15. The next question that arises for consideration is as to whether the plaintiff's claim is vitiated by exerting fraud ? The materials on record and manner of filling up the form of policy, more particularly, column Nos. 9(d)(i) and 9(d) (ii) and the evidence on record vide Ext. "kha" and "ga", whereby the clarification was sought for from the Oriental Insurance Co. Ltd. regarding refusal of reinstatement of policy and the reply at Ext. "gha" and "Unga" has made it clear that the renewal of policy of the plaintiff with the Oriental Insurance Co. Ltd. were refused by the company and those documents were not challenged by the plaintiff-appellant by making any suggestion to D.W. I Situated thus, the learned senior counsel Shri B.K Goswami strenuously argued that the question of suppression of material facts would not come in the way since the surveyor had assessed the damage and submitted its report and the said report has been accepted on 4.12.1995 without any objection and now it is too late to advance the argument that the plaintiff has exerted fraud and prayed for allowing the appeal.

However, on perusal of the case record, we did not find the aforesaid survey report exhibited by the plaintiff appellant, nor do we find the evidence of the surveyor who was alleged to survey the loss sustained by the plaintiff in record.

16. In support of his argument the learned senior counsel has cited a case reported in Life Insurance Corporation of India Vs. Smt. G.M. Channabasemma, The case relates to Insurance Act, wherein, their lordships has held that the burden of proof lies on the Life Insurance Corporation of India if allegation is made that the policy has been obtained by fraudulent misrepresentation and suppression of material facts and in the said case it was held that LIC has failed to discharge the burden and, thus, the appeal was dismissed.

The case relates to Section 25 of the Insurance Act 1938, wherein their lordships has held that a contract of insurance is contract uberrima fides and there must be complete good faith on the part of the assured. The assured is, thus, under a solemn obligation to make full disclosure of material facts which may be relevant for the insurer to take into account while deciding, whether the proposed should be accepted or not. This fact would definitely go against the plaintiff, which we do hereby agree that the policy has been obtained by suppressing the material facts and hence the claim of the plaintiff is vitiated by exerting fraud.

17. To counter the argument advanced by Shri Goswami, learned advocate for the appellant, Shri S.S. Sharma, advocate contended that the policy was obtained by playing a fraud on the company. The fraud is perpetuated which has been proved by Ext. "gha" and Ext. "Unga" and in view of the evidence of DW1 and DW2, the defendant has proved beyond any doubt that the policy was obtained by fraud and hence the defendant-company was right to repudiate the claim. The surveyor's report is of no assistance because if the entire matter

based on concealment of facts which is voidable, the subsequent report made by the surveyor is also voidable and when the entire matter is voidable, no claim can stand under the law. In support of his argument Shri Sharma has referred the following decisions, viz,.

1. (1995) 2 BC 602, Life Insurance Corporation of India v. Swarnalata Sahu.
2. AIR 1973 Mad. 147. The Vanguard Investments Ltd., Madras v. The Indian Mutual General Insurance Society Ltd., Madras.
3. Life Insurance Corporation of India Vs. Smt. G.M. Channabasemmma,

The cases referred by Shri Sharma relates to Sections 25 and 45 of the Insurance Act and Sections 17 and 19 of the Contract Act which supports the case of the defendants.

Relevant portion of the case reported in (1995) 2 BC 602 (LIC v. Swarnalata Sahu) is quoted below : -

"Fraud, according to Section 17 of the Contract Act, means and includes, inter alia, and of the following acts committed by a party to a contract with intent to deceive another party or to induce him to enter into a contract ; (i) the suggestions as to a fact of that which is not true by one who does not believe it to be true, (ii) the active concealment of a fact by one having knowledge or belief of the fact. The principle underlying the Explanation to Section 19 of the Contract Act is that a false representation, whether fraudulent or innocent, is irrelevant if it has not induced the party to whom it is made to act upon it by entering into a contract."

18. The last question/point for determination relates, as to whether the defence plea of exerting fraud by the plaintiff in getting the insurance policy had been proved ?

From the facts stated hereinabove, the defendant Insurance Company has proved that the policy was obtained by fraud vide Columns 9(d)(i) and 9(d) (ii) of the proposal form. Ext. "gha" and "Unga" have also justify that the policy was obtained by fraud and no relief can be granted to the plaintiff. Because, these were inferences, which were clearly justified and correctly raised by the learned trial court to hold that the policy was unconscionable, be it called fraud or collusion or whatever else. In our view, the conclusion of the trial court were warranted by the materials exhibited and evidence on record.

19. Before parting with the judgment, it would be appropriate to state herein that we have laid emphasis on Section 17 of the Contract Act in deciding the case at hand.

The word "fraud" has been defined u/s 17 of the Contract Act which includes such act, which intends to deceive another party and also any other act fitted to deceive. In order to constitute fraud, such acts should have been done by the party to the contract or by any other person with his connivance and with intent

to deceive the other party to enter into contract. The party so aggrieved can avoid the said contract on the grounds of fraud. It would be appropriate to quote Lord Denning in *Lazarus Estates Ltd. v. Beasley* (1956) 2 QB 702 at page 712 -

"No judgment of a Court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels every thing.

In the said case the Parker, L J had stated that, "proof of fraud in the making of the declaration is merely proof of the quality of the act or its motive. Nevertheless, that quality, if proved, vitiates all transactions known to the law of however high a degree of solemnity.

On perusal of the cases referred to above, we do not find any legal infirmity in the decision of the learned court below for any interference by the Court.

20. Therefore, we hold that, there is no merit in this appeal and it fails. The impugned judgment and decree of the learned court below is hereby affirmed. The appeal is dismissed. In view of the facts and circumstances of the case, there shall be no order as to costs.