

(1940) 11 CAL CK 0012
In the Calcutta High Court
Case No : Suit No 775 of 1939

Sm. Asima Sarkar and Others

APPELLANT

Vs

The Western India Insurance Co. Ltd.

RESPONDENT

Date of Decision : 19-11-1940

Acts Referred:

Citation : (1940) 11 CAL CK 0012

Judgement

Panckridge, J.—The Plaintiffs in this case are the widow and personal representatives of Jadunath Sirkar who died on the 4th April, 1938. The deceased was a gentleman of some position, being the Deputy Director of Agriculture for this Province. The suit is brought in respect of an insurance policy No. 28484 issued by the Defendants on June 11th, 1935, for a sum of Rs. 5,000 and profits. It is not denied that the policy was taken out by the deceased, and his death is also admitted. Therefore prima facie the liability of the Defendants has matured.

2. The Defendants, however, have resisted the claim of the Plaintiffs on various grounds but at the trial their opposition has been limited to this:-- They complain that the deceased made an incorrect statement in answer to a question contained in the proposal form. The proposal form was signed by the deceased on the 14th May, 1935, and there is the customary stipulation in it that the statement and the representations made in it are to be the basis of the contract between the assured and the Company.

3. The question which the assured is said to have answered incorrectly is the following:--Has any proposal or application to insure your life ever been made to any Company upon which a policy has not been issued on the plan and for the amount for which you applied?

4. The assured answered that question in the negative.

5. In answer to the question "In what Companies have you insured your life? " he gave a list of policies one of which is a policy taken out in 1919, the Insurance

Company being the Sun Life Assurance Company of Canada.

6. The Defendants resisted the claim on the ground that the assured suppressed the fact that he had on October 5th, 1932, attempted to obtain a further insurance policy from the Sun Life Company and that his proposal had been rejected on medical grounds. The Plaintiffs were not at first willing to admit that the deceased had made this proposal in 1932, and the situation was rendered more difficult by the fact that the original proposal form had been sent in the ordinary course of routine to the Insurance Company's Head Office at Montreal. It was, however, obtained from Canada and the doctor who made the examination and upon whose recommendation the Sun Life Company declined to accept the proposal has been called. He was not acquainted with the deceased personally but by reason of the signature on the proposal made to the Defendants and the fact that the particulars as to name, profession and residence correspond exactly on both forms leave one in no doubt that the person whose proposal was rejected in 1932 is the same Jadunath Sirkar who in May, 1935, informed the Defendants that no proposal of his for life insurance had ever been declined by any Company. No explanation has been furnished of how the deceased came to make this untrue statement and I will assume that even if a satisfactory explanation was forthcoming which was consistent with the deceased's bona fide, nonetheless the Defendants would be entitled to refuse to pay on the policy. The re-joinder made by the Plaintiffs through the Defendant's refusal to pay has been raised at a late stage of the suit in certain letters, and the rejoinder consists of the allegation that the Defendants have waived their right to refuse to pay on the ground of false statement in the proposal form to which I have referred.

7. The letter of May 22nd, giving particulars of the waiver refers to two incidents and a suggestion has been made as to a third incident which is not mentioned in the letter.

8. With regard to two out of the three sets of circumstances which it is said constitute waiver, I am of opinion that the Plaintiffs fail. In the letter the Plaintiffs have relied on certain incidents and correspondence subsequent to the death of the assured.

9. It is in evidence that after the death of the deceased on April 4th, 1938, the female Plaintiff's brother informed the Insurance Company of the assured's death, and in due course the customary claim papers were completed.

10. A succession certificate was taken out but early in June, 1938, the Defendants communicated with another insurance Company and obtained the information from that Company that they were refusing to pay on a policy which the assured had taken out with them on the ground that in the proposal form the assured had withheld material information regarding his life having been rejected in October, 1932, by the Sun Life Assurance.

11. The Defendants verified the fact of this rejection with the Sun Life Assurance

and received their confirmation on July 4th, 1938.

12. On August 15th, 1938, the Defendants wrote to the female Plaintiff's brother a letter saying that they noted the Succession Certificate would be sent to them in due course and concluded their letter by stating as follows:--

On receipt of the same we shall proceed in the matter and will arrange to return it to Sm. Asima Sirkar, widow of J.N. Sirkar after doing the needful with regard to the same.

13. The succession certificate was received shortly after and was returned to the widow on August 23rd, 1938.

14. On September 3rd, 1938, the Defendant's manager wrote to the widow stating that the claim papers had been placed before the Directors and that they had decided to reject the claim on the ground that the deceased had withheld the information with regard to his unsuccessful proposal to the Sun Life Assurance in 1932.

15. I do not think by merely writing a letter stating that they were doing "the needful," whatever that may mean, with regard to a succession certificate, the Defendants can be held to have waived their right to object to the policy and the learned Counsel for the Defendants drew my attention to the fact that there is a specific provision in the policy that no agent has power on behalf of the Company to make or modify any contract which ensures a standard rate of premium or waive any forfeiture or to bind the Company by refusing or rejecting the proposal. I am inclined to think that the letter written by the manager without the authority of the board would be ineffective even if its terms amounted to waiver, and I am prepared to accept the evidence of Mr. Joshi, Defendant Company's manager, that when the letters of the 15th and 23rd of August were written the Board had not come to a decision with regard to paying or refusing the claim.

16. The impleaded incident is based on some correspondence which passed between the Defendants and the Sun Life Assurance in May, 1935, while the assured's proposal to the Defendants was under consideration.

17. The Defendants made enquiries of the Sun Life Assurance with regard to the policy issued by them in 1919, the existence of which has been disclosed in the assured's proposal form and they asked the extracts of medical report and personal statement.

18. The Sun Life Assurance wrote back replying that the documents in question were not available in the office but if absolutely essential they could be obtained from the Head Office. To this the Defendants replied in a letter which begins as follows:--"We thank you for your letter of the 5th June along with an extract from personal statement and medical report on the above life." What is suggested is that this refers to the medical report and personal statement in connection with the abortive proposal of 1932 but there is no reference whatever

to the incident of 1932 in the correspondence nor is there any reference to the number of the policy which had been assigned in anticipation of the medical report being received, and the letter of the Sun Life Assurance of the 5th June, 1935, does not appear to contain any enclosures, and although one of the employees of Sun Life Assurance had sworn that his Company ought to have in ordinary course of events apprised the Defendants of the 1932 proposal, I do not think that they did so, and I think that the letter of June 10th, 1935, from the Defendants, which is on a printed form, was not intended to acknowledge any statement or any medical report, and these words were not erased through inadvertence.

19. That disposes of the two sets of circumstances on which the Plaintiffs rely.

20. Now the case with regard to the third set of circumstances is formulated in this way in their letter of the 22nd May, 1940. "Assuming but not admitting the life of Jadunath Sirkar being rejected on the 5th of October, 1932, by the Sun Life Assurance Co. of Canada as alleged in para. 4 (a) of the Written Statement, the fact of such rejection was communicated to the Defendant Company by a rejection card duly issued and sent to the Defendant Company on the 7th of October, 1932, by the Indian Life Assurance Offices Association."

21. The position with regard to the rejection card has been very clearly explained by a gentleman named Mr. Archer who is employed by an institution called the Calcutta Claims Bureau. It appears that the Bureau has as its clients various insurance Companies who are members of the All India Association of Life Offices. When an insurance Company refuses a life it reports the fact to the Bureau and the Bureau distribute pink cards to its other clients whose names appear on the card register. The pink cards are serially numbered and contain the name of the unsuccessful proposer but not the reason for refusing his proposal. In addition to the Insurance Companies, there is an institution in Bombay known as the Indian Life Assurance Offices Association. This Bombay Association accordingly receives one of the pink cards from the Bureau and it is the duty of the Bombay Association in its turn to distribute cards and notify the rejection of which notice has been received from Calcutta, to various insurance Companies in Bombay of which the Defendants are one.

22. Now Mr. Archer has proved to my satisfaction that the Sun Life Insurance Company reported the fact of the rejection of the 1932 proposal to the Bureau, and I am also satisfied that the Bureau immediately thereon sent out its pink cards to the institutions on the register including the Bombay Association. Therefore if the system was working properly it was to be expected that the Defendants would receive a card in the same terms from the Bombay Association.

23. The Defendants deny receipt of a card in respect of the rejection of 1932 but I am not prepared to accept it although they denied it.

24. Mr. Rai Mahadeb Joshi, the office manager, has given evidence before me, and he, I regret to say, has made a most unfavourable impression on me. His

head office is at Satara in the Bombay Presidency, and he says he has looked into his file to see if there is any card such as is suggested, and he has discovered that there is no such card but he has not produced the files nor has he given any reasonable explanation to account for this fact.

25. I have seldom met a case in which a stronger inference is to be drawn against a party who withholds relevant evidence.

26. Another point is that it is admitted that the cards are serially numbered, so, if Mr. Joshi, as he said, examined the files and the assured's card is not amongst them, there must be a lacuna in the serial number but the witness pretends that it is not within his recollection whether there is lacuna or not.

27. Another significant point is that admittedly in 1932 there was no system of registering or indexing the cards but in 1938 such a system came into being. It naturally occurs to one as extremely probable that the reason for the new system coming into being was that it was found that the assured's card had been received by the Defendants and that owing to want of check or index its existence has been overlooked. Mr. Joshi admits that there must have been some incident which prompted the persons in charge of the office to introduce an indexing system but he professes to have forgotten what the incident was, although he was willing to pledge that it was not an incident of the nature such as is suggested. No one has been called from the Bombay Association to say that the cards were not sent out.

28. In my opinion having regard to the relation which must exist between the Association and those who are members, if it is a fact that the cards were not sent out it was for the Defendants to call evidence to that effect from the Association. From all these facts and having regard to the ordinary course of business, I have no doubt that the cards were sent out, and having regard to the extremely shifty character of Mr. Joshi's evidence I do not believe him when he says that the cards were not received. He was asked if he was willing to obtain the files by telegram and he said that he was so willing if the Court directed it. When invited to do so, without the direction of the Court he did, it is true, say that he would take the course suggested but his demeanour clearly indicated that it was one which was extremely disagreeable to him.

29. In my opinion the Plaintiffs, although they have no direct evidence on the point, have satisfied me that when the policy was issued the Defendants had in their possession a card which informed them of the rejection of 1932. Whether they issued the policy inadvertently or whether they did that with a motive is a question with which I am not concerned, and in my judgment the possession of the card and the means by which it was obtained is sufficient ground for holding that they waived the right to object to the fact that the assured had not disclosed the refusal of Sun Life Assurance to accept the policy. In these circumstances there will be a decree for the amount of the claim and costs. Certified for two Counsel. Certificate under sec. 205 withheld.