

(1959) 04 PAT CK 0008
In the Patna High Court
Case No : A.F.O.D. No. 258 of 1954

Smt. Benarasi Debi

APPELLANT

Vs

New India Assurance Co. Ltd.

RESPONDENT

Date of Decision : 16-04-1959

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, Order 6 Rule 2
Contract Act, 1872 — Section 13, 7
Evidence Act, 1872 — Section 114
Insurance Act, 1938 — Section 45

Citation : AIR 1959 Patna 540

Hon'ble Judges : K. Dayal, J; K. Ahmad, J

Bench : Division Bench

Advocate : Kailash Roy and B.P. Rajgarhia, for the Appellant; S.N. Bhattacharyya, K.D. Chatterji and Chunilal, for the Respondent

Final Decision : Allowed

Judgement

Ahmad, J.—This appeal arises out of an action for the recovery of a sum due under an insurance policy bearing No. 178335 effected with the defendant-respondents -- The New India Assurance Co., Ltd., hereinafter referred to as "the Company" -- on the life of one Kaluram Choudhury, who was the husband of the present plaintiff appellant.

2. It is not denied that the policy was an endowment policy and the risk covered thereunder amounted to a sum of Rs. 10,000/-. Further it is also admitted that the proposal form (exhibit A) for that policy had been signed on 20-4-1947, and that it was thereafter finally accepted on 14-5-1947, though on condition that the first premium thereunder should be paid within 30 days from the date of that acceptance. It is well established that such a conditional acceptance is in law a counter offer to be completed thereafter into contract by the fulfilment of that condition as required thereunder.

In the present case unfortunately the first premium was not paid within 30 days

from the date of the aforesaid acceptance, namely. 14-5-1947, with the result that the counter offer, as stated, stood automatically withdrawn. Therefore, in order to secure that contract again, as provided in the original proposal form itself, a fresh declaration form of continued good health had to be filled by the assured and then sent to (the Company along with the first premium. This the assured did and thereupon the policy was accepted by the company. The fresh declaration then filed about the continued good health was dated 21-6-1947, and is exhibited on the record as C (1).

The policy thereafter remained in force until 21-6-1949, when there was another default committed and that was in respect of the premium then due. That necessarily led to the policy being lapsed. Again, therefore, in order to revive the policy, as required by the rules of the company as also by the term of the agreement as provided in the proposal form, the assured had to fill up another fresh declaration about his continued good health and then to send it along with that due. This also the assured did and the declaration in this case was 4-11-1949, and that is exhibit C on the record.

Thus, the policy again came into force and remained as such until 15-4-1950 when Kaluram Choudhury died. On his death, the plaintiff, as his nominee, put in her claim for the amount due under that policy. Originally there was certain correspondence between the parties but finally on 14-4-1953, it was followed by the action which has given rise to this appeal.

3. In the ordinary course, the policy being valid and in force on the date when Kaluram Choudhury died, there could have been no difficulty for the plaintiff in getting her claim due thereunder. But it appears that in the course of the correspondence that the company had with the plaintiff, they came to learn that on 26-4-1947, there was one more proposal which had been sent by the assured to the Hindusthan Co-operative Life Assurance Company for the insurance of his life. That was for a sum of Rs. 4,000/- and it had been received, as it appears from the evidence of D. W. 3, in the branch office of that company at Jamshedpur on 12-5-1947.

But that was, as it appears from exhibit E, finally declined by the Hindusthan Co-operative Life Assurance Company. It is however unfortunate that the statements made about this policy in the proposal form of the defendant company (exhibit A) are not at all correct and so far as the subsequent declarations (Exhibit C(1) and C) filed with them are concerned, they are completely silent both as to that policy as also about the decline. Accordingly it is said that the statements made in the proposal form (Exhibit A) of the company as also in the declaration forms subsequently submitted with them for the validity and renewal of the policy were on the one hand inaccurate and false and on the other suppressed facts which were material.

4. The Company, therefore, on the basis of these commissions and omissions have in defence pleaded that the policy for that reason, as agreed upon under

those documents, stands void and as such the plaintiff is not entitled to get any decree for the claim made.

5. The trial court has accepted this plea of the defendant Company and has accordingly dismissed the suit. Hence this appeal.

6. Under common law, some of the broad and well-settled principles operating in the field of insurance are: First that contracts of insurance including the contracts of life assurance are contracts uberrima fides and every fact of materiality must be disclosed, otherwise there is good ground for rescission; and this duty to disclose continues up to the conclusion of the contract and covers any material alteration in the character of the risk which may take place between proposal and acceptance (Looker v. Law Union, and Rock Insurance Co. (1928) 1 KB 554.

In other words, policies of insurance are open to be called into question for misstatements or suppression of material facts: New York Life Insurance Co., Ltd. v. P. S. Gamble ILR 27 Cal 593. It is, however, necessary to note that this principle when applied to marine insurance assumes some greater importance as therein, in view of the special circumstances that are peculiar to that class of insurance, the question of misstatement or suppression of a material fact has to be considered purely from the objective point of view, namely, irrespective of any consideration of the knowledge of true facts on the part of the assured though when applied to the case of other types of insurance including life assurance, the law is inclined to take the view that in that case the knowledge of the true facts on the part of the assured relating to the misstatement or suppression of material facts is in a sense necessary in order to deprive him of the benefit that accrues in his favour under the contract (Halsbury's Laws of England, Volume 18, Article 588).

7. The other broad principle is that where there is a specific recital made in the policy to the effect that the proposal shall be the basis of the contract then the truth of the statements contained in the proposal apart from the question of materiality is by itself sufficient to constitute a condition of liability of the insurer and thus a good ground for avoiding the contract; that means, in such, a case the question of materiality does not arise as laid down in Dawsons Ltd, v. Bonnin (1922) 2 AC 413. It follows, therefore, that in a case where the statements made by the assured in his application for a policy of life insurance are not made the basis of the contract but are to be treated merely as representations, the materiality of the representation is an element to be considered (as is evident from the decision in Mutual Life Insurance Co. of New York v. Ontario Metal Products Co. (1925) AC 344).

7a. The third broad principle is that the collateral conditions such as these provided in a contract for insurance though initially in the nature of warranties operate in the case of insurance as absolute conditions, non-compliance with which voids the contract of insurance,

8. The fourth important rule is that the right of the claimant to demand payment

cannot be enforced until he has done all the things which by the terms of the policy under which the right is asserted are made conditions precedent to the liability of the insurer.

9. But these principles, so far as we are concerned, are relevant only to the extent they are consistent with the terms of the statute enacted, on that subject. namely, the Insurance Act 1938. Thereunder Section 45 provides a special provision for a case where a statement made in the proposal for insurance or in any other document leading to the issue of the policy is challenged on the ground of inaccuracy or falsehood after an expiry of two years from the date on which it was effected: That reads:

"45. "Policy not to be called in question on ground of misstatement after two years". No policy of life insurance effected before the commencement of this Act shall after the expiry of two years from the date of commencement of this Act and no policy of life insurance effected after the coming into force of this Act shall, after the expiry of two years from the date on which it was effected, be called in question by an insurer on the ground that a statement made in the proposal for insurance or in any report of a medical officer, or referee, or friend of the insured, or in any other document leading to the issue of the policy, was inaccurate or false, unless the insurer shows that such statement was on a material matter or suppressed facts which it was material to disclose and that it was fraudulently made by the policy-holder and that the policy-holder knew at the time of making it that the statement was false or that it suppressed facts which it was material to disclose;

Provided that nothing in this section shall prevent the insurer from calling for proof of age at any time if he is entitled to do so, and no policy shall be deemed to be called in question merely because the terms of the policy are adjusted on subsequent proof that the age of the life insured was incorrectly stated in the proposal,"

In the present case the policy was obviously effected after the aforesaid Act had come into operation. Therefore, it is not denied that in such a case it is the latter provision in the section that will apply and not the former. That being so, the decision of this case has to rest exclusively on the terms of this section though in the application of that section to the facts of the case the principles of common law, as stated above, may also be kept in view so far as they are not repugnant to the terms of that section.

In other words, in a case like this where the objection on the ground of inaccuracy or falsehood has been admittedly taken after the expiry of two years from the date on which the policy was effected, there is a heavy onus laid on the defendant Company to establish three things (1) that the false statements were on a material matter; (2) that the policy-holder knew at the time of making them that the statements were false, Manufacturers Life Insurance Co. Ltd. Vs. Sm. Haridasi Debi and Another, and (3) that they were fraudulently made.

10. Now before I enter into any detailed discussion of these points, it would, I think, be useful if I mention here first the exact statements made in exhibit A which are said to be false as also the relevant extracts of Exts. C(1) & C which are said to be responsible for suppressing true facts. In Exhibit A, namely, the proposal form of the defendant Conn pany, there are three specific columns given therein about proposals of Companies other than the one for which that form is filled up. They are to be found in columns 7. 8 and 9(a). Column 7 reads:

"Is any proposal on your life about to be made to any other company or companies? If so, to what company and for what amount?"

The answer to this question, as stated therein, reads: "No." As against that column 8 provides as follows:

8. Have you ever been Insured in this or any other company ? If so, give details. Company. Amount, Kind of Policy & number of Policy, Year when taken. Whether accepted as proposed at ordinary rates.

Yes. Hindusthan Co. 4000/- Proposed in April ; policy not yet received. 1947 Yes.

The answers as they stand recorded in this column No. 8. are as to item. No. 1, yes; as to item No. 2, Hindusthan Co., as to amount, Rs. 4,000/-; as to kind of policy and number of policy, Proposed in April policy not yet received; as to year when taken, 1947; and as to whether accepted as proposed at ordinary rates, yes.

11. Lastly column 9(a) reads:

"Has a proposal on your life or application for revival of old policy to this or any other Insurance Company ever been formally or informally withdrawn or dropped?"

The answer thereto is noted as "No".

12. This proposal form (exhibit A), it is not denied as also is evident from its contents, had been attested by one B. K. Taunk. He is described therein as Insurance Organiser with his address at New India Assurance Company Ltd., Jamshedpur Branch. Lastly, therein there is a special clause also to the effect that:

"I Kaluram Choudhury do hereby declare that I have read the prospectus of this company and agree to the terms and conditions thereof. I further declare that the above statements and answers are true in every particular and agree that this statement and declaration along with further statement to be made before the Medical Examiner and declaration relative thereto shall be the basis of the contract between me and The New India Assurance Company Limited, and that if any untrue averment be contained therein the contract of Assurance shall be absolutely null and void and all moneys which shall have been paid in respect thereof shall be forfeited."

Then I come to the declaration forms (exhibits C(1) and C). They for the purpose of this case are practically the same. In both of them it is only column 3 which has been relied upon in support of the defence case. That says:

"3. That my occupation and my mode of life have been the same as stated in my last proposal for assurance with the Company and no Company has since then postponed or declined to assure my life, or offered me a policy on a plan different from that applied for of subject to any conditions different from those which apply to first class lives."

Further in each of these declaration forms also there is a special clause given. In the case of exhibit C(1) it reads:

"I further declare and agree that this declaration shall along with my proposal for assurance form the basis of this contract between myself and The New India Assurance Co. Ltd. and if any part of this declaration is untrue, the policy shall be null and void and I shall not be entitled to claim refund or repayment of any premia paid in respect of the policy."

While that in exhibit C says:

"I further declare and agree that the revival will be on the basis of this declaration and if any part of this declaration is untrue, the revival shall be inoperative and the policy shall stand lapsed as if there had been no revival and I shall not be entitled to claim refund or repayment of any premia paid after such revival."

Lastly these declaration forms too like the proposal form stand attested by the same common witness, namely, Mr. B. K. Taunk, It is on these facts that the application of law as embodied in Section 45 of the Indian Insurance Act and the plea as set up in defence in this case have to be weighed and judged. In other words, the crucial question to be decided in this case is whether on the facts of the case the defendant Company have been able to establish successfully that the aforesaid statements made in the proposal form (exhibit A) are "false or inaccurate" and those in the declaration forms (exhibits C(1) and C) are such as "suppressed facts which it was material to disclose", as contemplated by Section 45

The answer to this question on the facts of this case has to be founded on the requirements of Section 45, which, as already stated above, are three in number. The first point is whether the inaccuracy or falsehood which are said to be found in connection with exhibits A, C(1) and C at all relate to matters which are material. I think on this question the finding has to be given in favour of the defendant Company and it has to be held that the falsehood or suppression as alleged is about matters material as contemplated in the field of life insurance.

The authorities say that any fact which tends to suggest that the life insured is likely to fall short of the average duration is a material fact (*Thomson v. Weems* (1884) 9 A. C. 671), and rightly so for after all life assurance is nothing but a

scientific assessment of an average duration of life, and that is not possible unless all correct data about the life are diligently and faithfully made available to the company. Therefore, it follows that any fact the knowledge or ignorance of which would materially influence an insurer in making the contract or in estimating the degree and character of the risk or, in fixing the rate of premium is material (*London Assurance v. Mansel* (1879) 11 Ch. D. 363).

That being so, it cannot be denied that the declinature of a life insurance proposal made by one Company is a fact material for other companies when they have to deal with any other proposal coming to them from the same person. In (1879) 11. Ch. D. 363) *Teasel, M. R.*, if I may say so with all respect, lucidly in answering the question "whether this is a material fact" observed as follows:

"I should say, no human being acquainted with the practice of companies or of insurance societies or underwriters could doubt for a moment that it is a fact of great materiality, a fact upon which the offices place great reliance. They always want to know what other offices have done with respect to the lives."

Further in the same judgment while dealing with concealment, the learned Judge opined:

"....if a man purposely avoids answering a question, and thereby does not state a fact which it is his duty to communicate, that is concealment. Concealment properly so called means non-disclosure of a fact which it is a man's duty to disclose, and it was his duty to disclose the fact if it was a material fact."

Here if the proposal for the insurance sent by the assured to Hindusthan Co-operative Life Assurance Company was in fact declined as is alleged by the defendant Company then I think there is no doubt that it was incumbent on the assured to make his statements in the documents, referred to above, in a manner unequivocally consistent with that fact but! of course subject to the condition that he was in the know of it. In the proposal form (exhibit A) the statement made that the policy was accepted by the" Hindusthan Co-operative Life Assurance Company as proposed at ordinary rates was definitely contrary to the declinature made by that Company on 12-5-1957, and as such untrue in material respects.

Likewise, the complete absence of any reference of that policy and more so its declinature in the subsequent declarations (exhibits C{1} and C) made on 21-6-1947, and 4th November, 1949, amounts to a concealment relating to a fact material. It is true that concealment as used in the insurance field means the designed and intentional withholding of any fact, material to the risk, which the assured in honesty and good faith ought to communicate. But can it be said that if a man knows a fact, but does not disclose it, even when he should, he is not doing it designedly?

It is, however, useful to be noted in this connection that had this case been judged purely from the point of view of common law then in that case the

question of materiality would not have arisen, for, as stated above, both under the proposal form as also under the declaration forms the question of falsehood and concealment both have been unequivocally made therein the basis of the contract entered thereunder. But in view, however, of the fact that this is a case which is exclusively controlled by Section 45 of the Indian Statute, the question of materiality thereunder has to be proved and that unquestionably by the defendant Company.

13. Then the next point that comes for consideration is whether the assured knew at the time when the aforesaid proposal and declaration forms were filled up and got signed by him that the statements made thereunder were in fact in any respect false or such as amounted to concealment. This part of the case has been canvassed at the bar under three sub-heads:

(i) Whether there had been in fact any declinature made by the Hindusthan Co-operative Life Assurance Company on the proposal made by the assured;

(ii) That even if there was such a declinature, had that fact been ever brought to the knowledge of the assured; and

(iii) Whether the statements that were recorded in the aforesaid proposal and declaration forms in a language (in this case English) which the assured admittedly did not know were even read over and explained to him either by the person who on his behalf had filled up those forms or by any other; otherwise in the absence of that fact can it be said that he had knowledge about their contents simply because he had endorsed his signature thereon in Hindi with a note that he had done it after knowing and understanding the same.

14. The evidence on the point that the proposal made by the assured on 20-4-1947, with the Hindusthan Co-operative Life Assurance Company was declined consists of the oral testimony of two witnesses, namely, D. Ws. 2 and 3 and of the entries made in three documents, namely, exhibits E, P and G. D. W. 2 is one D. Mukherjee. He has described himself as the Supervisor in the Calcutta Office of the Hindusthan Co-operative Life Assurance Company. In his evidence he deposed:

"Proposal No. EJ 679 dt. 26-4-47 by one Kaluram Choudhary was declined to be accepted by our office. It was because of adverse medical report by Dr. S. K. Roy whose writing I know and who is since dead"

Further in cross-examination he added:

"Our Company is a member of Indian Life Offices Association. I think the defendant is also a member of the same. Whenever any proposal is not accepted we have to send rejection cards to the Association. I cannot say that such rejections are circulated among all the member Companies of that Association."

The other witness, D. W. 3, is one P. C. Patra. He has described himself as an accountant of the Hindusthan Co-operative Life Assurance, Jamshedpur Branch.

He in his evidence stated:

"I did not know any Kaluram Choudhary personally but a proposal from a person of that name had been received in our office on 12-5-47. That proposal was rejected by our company and we received Ext. F from our Head Office."

These statements of the two witnesses get full corroboration from the document (exhibit E) wherein the note made at the end is: "Declined. Sd. Illegible. 17-5-47." And on merit also I think there is little in the cross-examination of these two witnesses which can be reasonably taken as a ground for holding that what they stated in the witness-box was not true. Then there is a letter (exhibit F) dated 20-5-1947, which seems to have been addressed by the head office to the Divisional Superintendent, Jamshedpur, in pursuance of the declinature already made on 20-5-1947.

Therein the specific statement made is: "We regret we cannot make any offer on the above proposal". The claim of D. W. 2 is that on receipt of this letter (exhibit F) the Branch Office at Jamshedpur in its own turn communicated that information to Kaluram Choudhary through a letter, the copy of which has been brought on the record as exhibit G. It is dated 23-5-1947. In view of these facts, I think there is no reasonable escape from the conclusion that there was a proposal made by Kaluram Choudhary for the insurance of his life with the Hindusthan Co-operative Life Assurance Company and that the same was finally rejected by that Company on 17-5-1947. In other words, on merit the finding on this point has to be given in favour of the defendant Company.

15. The plaintiffs case, however, in this connection is that though it is true that this proposal did not finally mature but the reason for this was not that it was declined by the Company on 17-5-1947, but that it was withdrawn by the assured himself on 30-4-1947. In proof thereof the plaintiff has brought on the record a receipt dated 1-5-1947, which is said to acknowledge therein the delivery of that letter. That is exhibit 2 on the record and reads:

"Received a letter dated 30-4-1947 from Shree Kalooram Chaudhary of Sakchi Bazar, Jamshedpur, informing therein his unwillingness to insure his life with the Hindusthan Co-operative Insurance Society Ltd., Calcutta."

16. Mr. S. N. Bhattacharyya appearing for the defendant Company has vehemently challenged the genuineness of the document and has further drawn our attention to the fact that there is no averment made in the plaint about it. Therefore, according to him, it deserves no consideration. In my opinion, there is no substance in either of these two contentions. The receipt (exhibit 2) is signed by one Mr. C. R. Ghose. It is perhaps he, as it appears from exhibit E, who was chiefly instrumental in securing this proposal form from Kaluram Choudhary, though it is true that the canvasser mentioned in the proposal was not he himself but his wife.

Further D. W. 3 has admitted in his evidence that at that time Mr. C. R. Ghose

was the special agent of Hindusthan Co-operative Life Assurance Company and that even now he is in the service of that Company though at present as its local organiser. Then it is not denied that there was no delay on the part of the plaintiff in filing this receipt in the Court. That was already filed on 18-1-1954, and thereafter exhibited on 1-2-1954. In these circumstances I think, it was necessary on the part of the defendant Company to put Mr. C. R. Ghose in the witness box and to assist the Court by his statement on the question as to when and under what circumstances that receipt had been issued by him. That not having been done, an adverse inference has to be drawn against the defendant Company, and so far as the signature of Mr. C. R. Ghose on that receipt is concerned, that has not been denied by D. W. 3, though it is true that he has tried to explain it by saying: "We have no knowledge of any letter mentioned in Ext, 2 and so no such letter could be produced." But that isolated explanation alone cannot altogether negative the claim that Kaluram had sent a withdrawal letter to the Company through Mr. Ghose. It may be that the letter when received by Mr. Ghose was either retained by him in the branch office at Jamshedpur or that though thereafter it was sent to the Central Office, the same was not thereafter properly preserved there. For these reasons I think the claim of the plaintiff that ultimately the assured had withdrawn the proposal as alleged cannot be rejected. Then on the question that there is no averment made in the plaint about this story of withdrawal, it has to be noted that the plea about declinature was raised for the first time by the defendant Company in defence. Therefore, any material relevant to meet that defence could be validly relied upon by the plaintiff in the course of evidence and that without any amendment of the plaint to that effect.

And so far as the decision in AIR 1949 278 (Privy Council) is concerned and which in this connection has been relied upon by Mr. Bhattacharyya, that does not in my opinion lay down any rule contrary to this view. Therefore, looked at either from the point of view of procedure or merit, the story of withdrawal as set up by the plaintiff, seems to be true. But even that being so, it cannot necessarily follow from it that, the story or declinature, as alleged, is altogether false. After all it is quite probable that though the proposal was withdrawn on 30-4-1947, yet the Company on their side did not drop the matter then and there but continued to investigate into it in the usual course and finally on 17-5-1947, came to the conclusion that on merit itself it was not worth accepting.

17. Therefore, the controversy now boils down to the point whether the declinature even if made as claimed was ever thereafter brought to the knowledge of the assured as is the case set up by the defendant Company. The main evidence on this point relied upon by the defendant Company consists of the two letters (exhibits F and G) and the oral testimony of D. W. 3. So far as document (exhibit F) is concerned, that at best only proves that the final order of the Company about the declinature had been communicated by the Central Office to the branch office at Jamshedpur.

But it is said that thereafter the branch office in its own turn communicated that matter to the assured by a letter which was sent by post. D. W. 3 in his evidence has claimed that exhibit G is the office copy of that letter. That is dated 23-5-1947, and there is a note made therein to the effect that the copies of that letter had been forwarded to Mrs. L. Devi, C/o Mr. C. R. Ghose and to Mr. C. R. Ghose also. The testimony of D. W. 3 about this exhibit G is as follows:

"That proposal was rejected by our company and we received Ext. F from our Head Office. We had sent a letter accordingly by post to the proposer. Mr. C. P. Banerjee was then Superintendent of my office and I know his signature. This office copy of that letter bears his signature (marked Ext. G). We enter issue of such letters in our despatch register. S. K. Bose is our despatch assistant and I know his writing. The entry dated 26-5-47 in our Despatch register is in his writing."

But there are some strong criticisms levelled against this deposition. The first is that so far as the witness himself is concerned, he does not assert that exhibit G is a true copy of the letter which was sent to the assured nor does he affirm as to the procedure followed in his office for maintaining the office copies of the outgoing letters. Lastly he does not claim that he had himself posted that letter to the assured or that it was he who had handed over the same to the peon of the Company for posting the same.

It is said that what he directly proves only comes to this that exhibit G bears the signature of Mr. C. P. Banerjee and the despatch register (exhibit H) that of Mr. S. K. Bose, As for the rest of his statements to the effect that the letter was sent to the assured or that exhibit G is the copy of that letter, it is said that they seem to be only his inferences from those facts. In my opinion, there appears to be sufficient force in this contention & on this evidence it is difficult to hold that what has been proved as exhibit G is really the copy of the letter which is claimed to have been sent to the assured or that the letter even if intended to be sent was ever in fact delivered to the post office.

The best persons who could have thrown light on these points were Mr. C. P. Banerjee and Mr. S. K. Bose. Neither of them has been examined in this case nor the bearer who, it is said, had posted that letter. There is no explanation brought on the record to prove that Mr. C. P. Banerjee or Mr. S. K. Bose or the bearer is not available now for giving evidence in the court. That being so, here also I think an adverse inference may be drawn against the defendant company for not producing the best evidence in this case. Further, so far as the despatch register is concerned, that, is also not now available. It appears that at a certain stage after the disposal of the suit in the trial court the same had been taken out by the company and thereafter in spite of reminders to them by the High Court office they have failed to produce the same in this Court; as such, it could not be printed or included in the paper book. Therefore, now in appeal this point has to be considered independent of the despatch register (exhibit H). Mr. Bhattacharyya, however, relying on the decisions in *Skilbeck v. Garbett* (1845)

115 E. R. 706 and Ward v. Lord Londesborough (1852) 13 S E. R. 900 has tried to convince us that even what has been stated by D. W. 3 is by itself sufficient to establish in law that the letter was posted, and that exhibit G is the office copy of that letter.

I think this argument as to the former point could be valid in law only if there had been evidence that the letter was in fact delivered to the post office. Here even if it be conceded that a letter having the contents of exhibit G had been written by the office and that the same was meant to be despatched by post to the assured, there is nothing to connect that letter with the post office. So far as D. W. 3 is concerned, he just takes it for granted that it must have been sent though he himself is not a witness to that fact and the Bearer who took it to the post office has not been examined.

That being so, no presumption can be drawn in this case to the effect that it was in fact posted as provided in Section 114 of the Evidence Act. In (1845) 115 E. R. 706 there is a reference to the decision in Hetherington v. Kemp 1815 4 Camp. 193. In that case the relevant passage on "this point reads:

"....the plaintiffs evidence of sending a letter was that this letter was put down on a table, where, according to the usage of his counting-house, letters for the "post were always deposited; and that a porter carries them from thence to the post office. But the porter was not called, and there was no evidence as to what had become of the letter after it was put down upon the table."

17a. Lord Ellenborough held that more was necessary, and said:

"Some evidence must be given that the letter was taken from the table in the counting-house, and put into the post office. Had you called the porter, and he had said that although he had no recollection of the letter in question, he invariably carried to the post office all the letters found upon the table, this might have done.""

This authority, in my opinion, is of no assistance to the defendant Company on the facts of this case. On the contrary, it goes against them. And so far as the decision reported in (1852) 138 E. R. 900 is concerned, there the facts were entirely different. In that case it was not denied that the letter had been received, and all that was in controversy was whether the same had been issued under the authority of the Company. Therefore, that decision is not relevant for the purposes of this case. Thus, the argument advanced by Mr. Bhattacharyya that the evidence as it stands is sufficient to prove the posting or that Exh. G is the true copy of that letter has to be rejected.

18. In the alternative, Mr. Bhattacharyya has also tried to convince us that after all in the case of declaration (exhibit C) sufficiently long time had already elapsed between 4-11-1949, when that had been filled up and 26-4-1947, when the proposal was made to the Hindusthan Co-operative Life Assurance Company. Therefore, it can be reason-ably presumed that in that long interval the assured

must have made enquiries about that proposal form and thus must have come to know that it was finally rejected. But this argument ignores the existence of the withdrawal letter dated 30-4-1947.

If the proposal had already been withdrawn on that day, as I think was withdrawn, then there was no occasion left for Kaluram Chaudhary to make any further enquiry into it thereafter. And as for the proposal form (exhibit A) and the declaration form (exhibit C(1)) it is enough to say that in their case this argument can in no case prevail for the former was written long before the proposal was made to the Hindusthan Co-operative Life Assurance Company and the latter was written soon thereafter.

Thus, looked at from any point of view, the onus as contemplated by Section 45 of the Insurance Act, 1938 and as affirmed in *Kulla Ammal (died) and Others Vs. The Oriental Government Security Life Assurance Co. Ltd.*, has not been discharged in this case by the Company. Therefore, the finding given by the trial court that the information about the aforesaid declinature had been communicated to and reached the assured has to be reversed.

19. Lastly, Mr. Kailash Roy, in connection with the question of knowledge, has also raised the contention that what had been stated in English in the proposal form (exhibit A) and the declaration forms (exhibits C(1) and C) were never read over or explained to the assured. His case is that initially those forms when they were got signed by Kaluram Choudhary in Hindi were blank and that though subsequently the writer may have filled them up but he never, read over or explained those statements recorded in English to him. It is not denied that Kaluram Choudhary did not know English as is evident from the evidence of D. W. 4, who deposed:

"Kaluram did not understand English and I had put the questions in Hindi and the answers were also given by him in Hindi."

It is, however, to be noted that this statement relates to the medical form with which we are not concerned here. What we are speaking about at present are exhibits A, C(1) and C. They were admittedly all filled up in English and that by the same person, namely, one Mr. B. K. Taunk, who has described himself in all of them as the Insurance Organiser with his address at New India Assurance Company Ltd., Jamshedpur Branch. D. W. 1 in his evidence has admitted that Mr. B. K. Taunk is still the organiser of that Company at Jamshedpur. Unfortunately the defendant Company have not taken the least trouble to put him in the witness box nor have they tendered any explanation as to why he was not examined as a witness in this case.

Plaintiffs witness No. 1 in his evidence had already asserted long before the defendants evidence began that the form (exhibit C) was blank when it was brought to Kaluram Choudhury for signature and that Kaluram Chaudhury had signed it while it was so blank. Therefore, it was all the more incumbent on the part of the defendant Company to prove that Mr. B. K. Taunk had explained those

forms to Kaluram Choudhury in Hindusthani and that Kaluram Choudhury had signed them after having understood their full import. This not having been done, Mr. Bhattacharyya had to fall back in this connection on the solitary circumstance that in each of them the signature of Kaluram Choudhury is accompanied with a specific statement in Hindi along with it that "Samaj Kar Sahi Kiya."

This, according to Mr. Bhattacharyya, is in any case sufficient at least to discharge the initial onus which lay on the Company to establish that these forms had been explained to him and that he had signed them after having understood their full import; and it is on this ground that Mr. Bhattacharyya has tried to distinguish the authorities in *Kulla Ammal (died) and Others Vs. The Oriental Government Security Life Assurance Co. Ltd.*, and *Indian Equitable Insurance Co. Ltd. Vs. Onkarappa*, , relied upon by Mr. Kailash Roy in support of his argument on this part of the case. In my opinion, a phrase like the one referred to above from an illiterate person or as a matter of fact from any person who does not know the language of the form in which it is written is by no means sufficient to establish that in fact he had signed those forms after having understood their full import nor this phrase can be a valid ground for distinguishing the authorities referred to above.

It is a well-established rule of law that in the case of a person who is illiterate or who is not in a position to read the contents of a document, the contract cannot be imposed upon him simply because he has endorsed his signature thereon unless further it is proved that he did that after understanding the contents of the same. In other words, the rule of law is that the pen must go with the mind and unless both the elements are present it cannot be said that the document is his. In this case it is true that on each of the aforesaid forms there is the signature made by Kaluram Choudhury and that along with the signatures there is also an endorsement to the effect that "Samaj kar Sahi Kiya."

They, however, can at best only prove that those particular portions of the forms were written in the pen of Kaluram Choudhury but not that they had been written after Kaluram Choudhury had fully understood their contents which were admittedly all written in English, The claim made therein to the effect that "Samaj Kar Sahi Kiya" may be as mechanical as the signature itself. In the case of such a person, in order to bind him with the knowledge of what is stated in documents like these, it is necessary that the party on whom lies the initial onus to prove that fact must give some independent evidence to support the conclusion that the same had been signed by him after he had fully understood their import as laid down in *Kulla Ammal (died) and Others Vs. The Oriental Government Security Life Assurance Co. Ltd.*, and *Indian Equitable Insurance Co. Ltd. Vs. Onkarappa*, , referred to above. In *Joel v. Law Union and Crown Insurance Co.* (1908) 2 K. B. 863 Fletcher-Moulton L. J. has elaborately discussed this question of onus in the case of an insurance policy and has finally come to the conclusion that

"....it is plainly the duty of the Court to require the insurers to establish clearly that the insured consented to the accuracy, and not the truthfulness, of his statements being made a condition of the validity of the policy. No ambiguous language suffices for this purposeTo make the accuracy of these answers a condition of the contract is a contractual act, and, if there is the slightest doubt that the insurers have failed to make clear to the man on whom they have exercised their right of requiring full information that he is consenting thus to contract, we ought to refuse to regard the correctness of the answers given as being a condition of the validity of the policy. In other words, the insurers must prove by clear and express language the animus contrahendi on the part of the applicant; it will not be inferred from the fact that questions were answered, and that the party interrogated declared that his answers were true."

Tested, therefore, from this point of view, it cannot be said that here the initial onus that lay on the Company was at all discharged. Further it has to be remembered that in law a warranty has to be strictly and literally complied with. Therefore, it all the more imposes a heavy responsibility on the part of the person in whose favour that warranty has to operate that it should be got only when it has been fully understood and comprehended especially in a case where the strict rule of uberrima fides as in the case of insurance has to be observed and respected.

After all the doctrine of uberrima fides, as observed in some cases, is not a one way traffic but is equally binding on both sides. But it is true that the burden of adducing evidence is neither absolute nor constant. On the contrary, it is of a shifting character which keeps the onus changing as and when evidence on behalf of the parties in a case is recorded as observed by the Privy Council in AIR 1949 278 (Privy Council) . Here, however, there is no independent evidence worth the name to prove that the statements recorded in English were ever read over and explained to the assured or that the assured had at any point of time got the knowledge about the contents and implications of those forms and much less at the time when those statements were actually recorded and got signed by the assured.

That being so, it is enough for the plaintiff to say that the initial onus that lay on the Company has not been discharged and that without any further proof of the fact that though the assured had the knowledge of the contents of the documents yet he was not guilty of any concealment or falsehood in getting the same recorded, and as such any question of shifting of the onus on the facts of this case does not arise for consideration at all.

20. Mr. Bhattacharyya, however, in order to tide over this difficulty has drawn our attention to two other principles of law. In support of the first, he has laid reliance on *Howatson v. Webb* (1907) 1 Ch. D. 537 *Mackillican v. Compagnie Des Messageries Maritimes De France* ILR 6 Cal 227 and *East and West Life Insurance Co. Ltd. Vs. Kolla Venkiah and Others*, . The former deals with the question of non est factum and the one next to it relates to the binding character

of an acceptance, even when some of the terms of the offer have not been understood as the same were in a language not known to the acceptor and which he did not care to get read over as often happens in the case of railway tickets printed in a language not known to the buyer.

But on the facts of this case we are not concerned either with the question of non est factum or with the case based on an acceptance where the offer due to negligence is not fully known or understood. They stand on considerations altogether different, and, so far as the last case is concerned, that has been referred to and distinguished in *Kulla Ammal (died) and Others Vs. The Oriental Government Security Life Assurance Co. Ltd.*, . Therefore, these authorities are of no assistance to demolish the rule of law as stated above.

21. Secondly Mr. Bhattacharyya has raised the plea that notwithstanding the fact that Mr. B. K. Taunk was then in the employ of the Company as their insurance organiser but in the matter of filling up those forms his role was that of the agent of the assured and not that of his employer, and, therefore, for the default, if any, on the part of Mr. B. K. Taunk in the course of that agency, it was the principal, i. e. the assured who was to suffer and not the Company. Perhaps in making this submission, the learned counsel was making reference to the rule of law as laid down in *Newsholme Bros. v. Road Transport and General Insurance Co.* (1929) 2 KB 356.

But there the point at issue was as to how far the knowledge of the true facts in a case like this on the part of such a writer of the form could be imputed to the Company, and not the question that even if the assured, who is illiterate or does not know the relevant language, is made to sign a blank form or as a matter of fact any form, the terms and implications of which are not known to him he is none the less bound by it as if he knew all its contents fully well. That being so, that; principle is also of no avail here,

22. In the result, therefore, the irresistible conclusion that we have to come on the facts of this case is that though factually there was a declinature as alleged by the defendant Company but in terms of knowledge of the assured it never came into existence nor he was ever in the know of the fact that the statements recorded in the forms referred to above were untrue or false or such as suppressed material facts. If that is so, which I think is so, then any non-compliance of the terms and conditions imposed therein can in no way be raised in this case as a valid ground for avoiding the liability arising thereunder,

23. Then comes the third factor, namely, the one that even if the statements made in the forms were in part or whole inaccurate or false on such as suppressed facts which it was material to disclose, can it be said that the same had been done by the assured fraudulently? There is no controversy that if a man is in the know of a fact and if he knowingly withholds it or states a fact contrary to it notwithstanding that in law or contract he is bound to disclose the same, the reasonable presumption is that the motive underlying that is

fraudulent, namely, the one of making illegal gain which in the absence thereof he could not have achieved.

In other words, if the information, which should have been disclosed by the applicant, has been concealed by the assured, the contract may be avoided on the ground that in effect a fraud has been practised on the insurer. Mr. Bhattacharyya relying on this principle has drawn our attention to the decisions in *Peek v. Gurney* (1873) 6 HL 377 affg. (1871) 13 Eq 79 and *The King v. Kysant* (Lord) (1932) 1 KB 442 and has contended that as the assured was in the know of the declinature, therefore the presumption is that the statements of the proposal form (Exhibit A) and declaration forms (Exhibits C(1) and C) had been got recorded in them fraudulently by the assured.

This argument, however, is obviously based on the premise that the assured had the knowledge about the declinature but this very premise, as already stated, is not sustainable. Therefore, on that ground alone the allegation about fraud in this case has to fail.

24. Further I may reiterate here that the assured had already withdrawn his proposal from the Hindusthan Co-operative Life Assurance Company on 30-4-1947, and, therefore, it may be that for that reason he bona fide thought that the declinature was due to his withdrawal and not for any other reason. In other words, the suppression, if any, in Exts. C(1) and C was not wilful but made either inadvertently Or under honest belief.

25. Lastly, I think that so far as the wrong statement in the proposal form (Exhibit A) is concerned, that appears to me to have been very probably filled up subsequently; and that I say for two reasons: firstly, for the reason that the writings in column 8 are in different inks and pen and as this form was all along in the custody of the Company, it was not difficult for them that they thereafter got it done to suit their own convenience. Therefore, unless this variation in the ink and the pen is explained, which in this case, I think, has not been done, no reliance can be placed on those suspicious entries.

Secondly it is very strange to find that though the proposal to the Hindusthan Co-operative Life Assurance Company was sent on 26-4-1947, and that was finally declined on 17-5-1947, but in Exhibit A, which was filed on 20-4-1947, there is a specific note made therein that the same had already been accepted. I think on 20-4-1947 there was no occasion nor any valid reason for making such a statement. Therefore, this fact further lends support to the view that that particular statement had been added therein subsequently. In this state of evidence, therefore, it cannot be said that the impugned statements had in fact been made fraudulently. In that view of the matter also, therefore, the defence set up by the Company has to fail.

26. Lastly, Mr. Bhattacharyya has Vehemently contended that in any view of the matter, at least the factum of withdrawal, if not the declinature, could have been mentioned in Exhibits C(1) and C which were obviously filled up much later

thereafter. In support of this contention reliance has been placed by him on the decisions in (1929) 2 KB 356 *Biggar v. Rock Life Assurance Co.* (1902) 1 KB 516 *Kesave Seethamma v. Bombay Life Assurance Co.* AIR 1954 Mys 134 *V. G. Kolhatkar v. Western India Life Insurance Co., Ltd.* AIR 1954 Nag 325 *E.M. Muthappa Chettiar Vs. Venus Assurance Co. Ltd. and Others*, and *East and West Life Insurance Co. Ltd. Vs. Kolla Venkiah and Others*, .

True it is, as already stated, that in a contract of insurance, every fact of materiality has to be disclosed and that without any equivocation but to hold as to what is material, each fact has to be judged on its own merit and that in the light of principles as already stated. No authority has been brought to our notice to show that as a rule the factum of withdrawal also is an element which can be said to be as material as declinature or in any sense a material fact in which the word "materiality" is used in the insurance law. Further so far as the declaration forms (Exhibits C(1) and C) are concerned, there is no mention in either of them that the factum of withdrawal was also to be recorded. That being so, any non-disclosure of the withdrawal in the forms (Exhibits C(1) and C) cannot be in this case validly relied upon as the breach of a warranty given in those declarations.

A warranty as we know, in law is a promise or a covenant by deed made by the bargainer for himself and his heirs to warrant or secure the bargainee and his heirs against all men in the enjoyment of an estate or other things granted. Here it is true that the declaration forms (Exhibits C(1) and C) were also accepted as the basis of contract but in none of them, as already stated, there is any stipulation about withdrawal. Lastly this point of withdrawal was not raised at any stage at the trial. For these reasons the finding on this point also has to be given against the respondents.

27. Before, however, I close the case, it has to be noticed that there is some discussion in the judgment under appeal on behalf of the plaintiff on the point of waiver also. This is founded on the contention that even if there was a declinature made by the Hindusthan Co-operative Life Assurance Company, that fact, as admitted by D. W. 2, had already been communicated to the Indian Life Offices Association and they in their turn it is said must have circulated it to all their constituent members including the defendant Company who, it is not denied, were also one of them. As such that fact was within the knowledge of the defendant Company, and, therefore, if they entered into or revived the contract in spite of that knowledge, they are deemed to have waived it.

As a proposition of law, I think, this contention is unassailable, as laid down in *Western India Life Insurance Co. Ltd. Vs. Sm. Asima Sirkar and Others*, , and had it been proved in this case that the Indian Life Offices Association had in their turn communicated the factum of declinature to all the members including the defendant Company and that as a result thereof the defendant Company were already in possession of that fact before they had the policy renewed on the basis of the declarations made in Exhibits C(1) and C then that fact would have undoubtedly in law amounted to a waiver on the part of the defendant Company

of their right to object on the ground that the assured had not declared the rejection of the proposal made to Hindusthan Co-operative Life Assurance Company.

Here, however, there is no evidence that in fact the Indian Life Offices Association had for-warded the factum of rejection to all their members and that the defendant company as a result thereof were already in possession of that fact when the policy was renewed by them on the basis of the declarations made in Exhibits C(1) and C. Therefore, this contention of waiver as raised by the plaintiff cannot be accepted, but as the defendant Company have already failed to establish the point of knowledge and fraud as contemplated by Section 45 of the Insurance Act, their defence has to be rejected.

28. Accordingly for the reasons set forth above, the judgment of the trial court has to be set aside, the suit has to be decreed and the appeal allowed with costs throughout.

Dayal, J.

29. I agree.