
(1934) 10 BOM CK 0003
In the Bombay High Court
Case No : O.C.J. Suit No. 850 of 1934

The Ocean Accident and Guarantee Corporation Co. Ltd.	APPELLANT
Vs	
D.K. Patkar	RESPONDENT

Date of Decision : 16-10-1934

Acts Referred:

Citation : AIR 1935 Bom 236 : (1935) 37 BOMLR 304

Hon'ble Judges : Rangnekar, J

Bench : Single Bench

Judgement

Rangnekar, J.—This action is brought by the plaintiff insurance company to recover the amount of premium alleged to be due under seven motor accident policies effected by the defendant for a period of one year commencing from May 15, 1933, to May 14, 1934. The defendant is the owner of an omnibus service at Bassein.

2. To the plaint several defences are filed. The first is that it was agreed between the parties that the premium should be paid either by instalments or at any time during the currency of the policies. The second is that the plaintiffs agreed to give to the defendant a rebate of thirty-five per cent, on the full amount of the premium payable by him. The substantial defence, however, to the suit is that there was no concluded agreement between the parties.

3. The material facts are as follows : Messrs. Hardcastle & Co. were the principal agents of the plaintiffs and they appointed one Mr. Amin as their sub-agent, who appointed Messrs. Bright Brothers as sub-agents. Mr. Gupte, who has been examined as a witness on behalf of the defendant, is a partner in Bright Brothers. It appears that the defendant had effected insurance of his motor buses through Gupte in the years 1932 and 1933 with the Universal Insurance Company. Those policies were about to expire, and so in April, 1933, Gupte saw the defendant and told him that he would get better terms if he would allow him to effect insurance with the plaintiffs, of which he was the agent. The defendant agreed. Some days later Gupte went to him with printed forms of proposals. The

defendant gave him the particulars and signed the proposal forms, exhibit A, in blank, Gupte thereafter filled in the particulars and sent them to the plaintiffs, upon which the plaintiffs issued seven policies in respect of twenty-six buses. All the proposals and the policies are in the same form.

4. The proposal form contains several columns, the last of which is headed "premium." At the end of the proposal form is printed the following statement :

I desire to effect with the Ocean Accident and Guarantee Corporation, Ltd., an insurance against risk as set forth above in the terms of the policy used for this class of business and I warrant that the above statements and particulars are correct and complete.

5. Then there is a note at the bottom of the proposal, which is to the following effect:

This insurance will not be in force until the proposal has been accepted by the Corporation.

6. The policies are all in the same form, and I shall only refer to one of them. It is recited in the policy that :-

The company has received a proposal in writing which is hereby declared to be the basis of the contract and is to be deemed and incorporated herein.

Then the policy recites that the insured has paid to the corporation a sum of rupees, figures being mentioned, as premium for the indemnities undertaken, and goes on to state the period during which the policy was to be in force, and then witnesseth that the corporation will keep their insured indemnified subject to certain terms and conditions. One of the provisos states :-

No insurance shall be held to be effected until the premium due thereon shall have been paid and accepted in full, and that the due observance and fulfilment of the conditions of this policy, in so far as they relate to anything to be done or not to be done by the insured, shall be a condition precedent to any liability of the Corporation under this policy, and in this respect time shall be of the essence of the contract.

All the policies in this case are executed by the "Manager for India" of the Corporation, and attested by Hardcastle & Co. It is not in dispute that the policies were sent ultimately to the defendant after they were issued by the plaintiffs.

8. The evidence in the case shows that after getting the policies the defendant sent them to the Deputy Superintendent of Police, Thana, as there was a police regulation that unless the motor buses which were licensed were properly insured, the defendant would not be allowed to carry on his business. After the policies were examined by the police, they were returned to the defendant with whom they remained.

9. Shortly after May, 1933, the principal agents, and in particular Mr. Amin, made

repeated demands for payment of the premium. This is admitted by Gupte. The defendant, however, having made default, the company instructed their solicitors Messrs. Payne & Co. to send him a notice, and on December 22, 1933, Messrs. Payne & Co. called upon the defendant, after stating that the -policies were issued to him, to pay the amount of the premium within seven days, in default of which they stated that the defendant will have to pay interest, and the company would immediately file a suit against him to recover the amount with interest.

10. The defendant took this letter to Gupte through whom, as I have stated, he had put through the business with the plaintiffs, and told him that he was surprised to receive the letter, as it was agreed at the time of the contract that he was to be at liberty to pay the premium either by instalments or within one year, and asked him what he was to do in the matter. Gupte then told him not to worry about the matter, but leave the notice with him, and that he would attend to it and put the matter right. The defendant accordingly left the notice with Gupte and went away. Gupte thereupon saw Mr. Amin, and reminded him of the arrangement made at the time of the agreement. According to Gupte, Amin asked him to send a reply to the notice but not to refer therein to the terms as to rebate or commission of thirty-five per cent. Thereupon Gupte went to Messrs. Daphtary, Fereira & Diwan and under his instruction the latter wrote a letter, which is dated January 5, 1934. The letter on the face of it is written on behalf of the defendant. This letter, in my opinion, is a clear acknowledgment of the liability to pay the premium under the policies and contains a promise to pay the same.

11. Some time after the letter of January 5 was sent to Payne & Co., the defendant went to Gupte to find out what had happened. Gupte told him that everything was all right, but that he should send a sum of Rs. 500 to the plaintiffs. Accordingly the defendant sent a cheque for Rs. 500 dated January 25 but post-dated to February 2 to Bright Brothers, and Gupte endorsed it to the plaintiffs. The plaintiffs realised the amount in the beginning of February, 1934, and credited the amount in their account to the defendant.

12. Not having received the balance, the plaintiffs again instructed Messrs. Payne & Co. to write to the defendant, which they did on April 19. In that letter the plaintiffs repudiated the alleged arrangement as to the time when payment was to be made, forthwith demanded the payment of the balance and threatened to take further action. This letter was written to Messrs, Daphtary, Fereira & Diwan, and they on April 20 sent a copy of that letter with a covering letter to Gupte. Gupte says that he did not show it to the defendant, but the fact remains that neither Gupte nor the defendant did anything further in the matter, and the letter remained unanswered. On June 5 the defendant sent another cheque for Rs. 500 post-dated to June 21, but before the cheque could be cashed the plaintiffs instituted this suit on June 15 claiming the balance, which, according to them, remained unpaid in respect of the premiums under the policies. The cheque was cashed and realised by the plaintiffs on June 22. On July 16 an ex parte decree

was made against the defendant. Proceedings were taken further in the matter whereupon correspondence ensued between the parties, as a result of which on August 14, 1934, the ex parte decree was set aside, and the suit was ordered to be retried.

13. In view of the fact that Mr. Rodrigues has fairly conceded that upon the evidence the first two defences are not sustainable, it is not necessary to discuss the evidence in the case in detail.

14. I may, however, briefly refer to the same. As to one year's credit, the arrangement was between Gupta and the defendant and the plaintiffs are not bound by it. Gupta admits that he had no authority from the plaintiffs to enter into any contract of insurance on any terms. The point, however, is not now material. As to the rebate or commission of thirty-five per cent., there is only one conclusion to which I can come on the evidence, and that is that the plaintiffs never agreed to allow any rebate or commission to the defendant. This is admitted by Gupta and the defendant in their evidence before me, and the correspondence and the affidavits of Gupta and the defendant leave no doubt on the point. The evidence shows that Gupta was not the agent of the plaintiffs but was a sub-agent for canvassing insurance business on certain terms, and that he was employed by the defendant to effect his insurance policies as his agent. It was undoubtedly arranged between Gupta and the defendant that the defendant should pay the premium within one year and that the defendant should get a commission of thirty-five per cent, Gupta was to get forty per cent, commission from the plaintiffs and it was out of this that he agreed to allow thirty-five per cent, to the defendant. The arrangement between Gupta and the defendant, therefore, is not binding on the plaintiffs.

15. Then the only other question which is relevant is, whether the defendant is bound by the letter of January 5. In my opinion he is. The evidence shows he asked Gupta to attend to the letter of December 22 and authorised him to do everything necessary in the matter and as regards the demand made by the plaintiffs Gupta agreed to do so. This would make Gupta the agent of the defendant in the matter and would authorise him to send a reply to the plaintiffs, if necessary, on behalf of the defendant. Apart from that I find it difficult to accept the evidence of Gupta and the defendant on the point. I do not think it likely that a business-man in Gupta's position would take the serious step of instructing the solicitors to send a reply on behalf of the defendant unless authorised by the defendant to do so, and no reasonable and satisfactory explanation is given by Gupta as to why he did not inform the defendant of the letter of Payne & Co. of April 19. Nor can I believe the defendant when he says that Gupta told him he had squared up the matter and it was not necessary to send a reply to the letter of December 22. Admittedly there are disputes between Gupta and the plaintiffs and the latter suggest that it is Gupta who is fighting this litigation.

16. The substantial question, however, in the case is whether there was a

concluded contract between the plaintiffs and the defendant. Mr. Rodrigues on behalf of the defendant has addressed before me a very careful argument relying upon certain authorities, to which I shall refer in detail presently. He says that where a policy contains a stipulation of the nature that there is in the present policies, on the authorities on which he relies there is no concluded contract of insurance between the parties until the premium is paid.

17. This contention is met on behalf of the plaintiffs in this way. They say that there was a concluded agreement between the parties having regard to the proposal forms signed by the defendant, which contained an implied promise on behalf of the defendant to pay the premium, and as the proposal was the basis of the contract and part of it, condition as to pre-payment of premium was waived by the parties. Then they say that the recital in the policies that the respective premium was paid of itself amounts to waiver of condition. Lastly, they contend that the conduct of the parties and the correspondence show that the condition was waived and both the parties understood that there was a concluded agreement between them under which the risk attached to the plaintiffs under the policies and the defendant became liable to pay the premium. The facts on which for the purpose of this contention the plaintiffs rely are : (1) Demands made by them from time to time for payment of the premium, (2) the acknowledgment of liability by the defendant in the correspondence, (3) the defendant's promise to pay the premium contained in his letter of January 5, (4) the fact of the part payment made by the defendant and the credit allowed to him to pay, (5) the fact that the plaintiffs never threatened to forfeit the policies or contended that they had lapsed or would lapse, and (6) the defendant's conduct in treating the policy as a perfect and completed instrument from the very beginning and his representations to the police in that behalf.

18. 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, pre-payment of the premium is not in law a condition precedent to the contract of insurance. But it is almost 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, Limited v. The Ching Wo Hong* [1907] A.C. 96. 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, That, I think, is clear from *Armstrong v. Turquand* (1857) 9 Ir. C.L.R. 32. It is equally clear that such waiver may be established either by the evidence of an express agreement or may be inferred from the surrounding circumstances of the case.

19. Even when there is a stipulation or a condition like the one in the policies in the present case, if the assured undertakes to pay the premium or promises to pay it, the contract between the parties becomes a completed or concluded

contract. In connection with this principle I may refer to *General Accident Insurance Corporation v. Cronk* (1901) 17 T.L.R. 233, which seems to me to be almost similar to the case before me. The facts in that case were that the defendant filled up a proposal form for a policy of insurance against claims in respect of driver's accidents. The proposal form provided that if the risk was accepted the defendant would pay the premium when called upon to do so. The risk was accepted by the insurance company and a policy was issued. It was argued in that case, as it has been argued before me, that the proposal form although originally was an offer on the part of the defendant, the execution of the policy was not merely acceptance of that offer but was a counter-offer by the plaintiffs which required acceptance of the defendant in order to complete the contract. The judgment of the Court was delivered by Wills J. It is a short judgment and I might usefully cite it here. It is as follows :-

.. the defendant in his proposal undertook, if the risk was accepted by the plaintiffs, to pay the premium. That meant that as soon as the risk was accepted he became liable to pay the premium ; and it did not mean, as was contended on his behalf, that before he could be asked for the premium he must approve of the policy tendered to him. He must be taken to have applied for the ordinary form of policy issued by the company. If the wrong form of policy was tendered to him he, no doubt, had the right to insist on receiving the correct one. But the fact that the wrong form of policy was tendered to him did not relieve him from the obligation to accept the policy for which he did apply or from the obligation to pay the premium.

20. In the present case the position is very much the same. I have referred to the proposal which the defendant signed. The defendant made the offer contained in the proposal. The last column of the proposal form shows the amount of the premium which he had to pay. He warranted the statements and particulars in the proposal to be correct and complete, and he expressed a desire to effect an insurance with the plaintiffs against risks set forth in the proposal in the terms of the policy issued for this class of business. The note at the foot of the proposal was to the effect that the insurance was not to be in force until the proposal was accepted by the plaintiffs. Upon that the plaintiffs executed and issued to him a policy which stated that the proposal was the basis of the contract and part of it. Upon these facts it must follow that the defendant impliedly undertook and promised to pay the premium if the company issued to him the policy in the common form, an ordinary policy issued in this particular kind of insurance, and accepted the risk.

21. It is said that the policy was a counter-offer. Having regard to the proposal, I do not agree. But assuming it was a counter-offer, even so the defendant kept the policy and used it as an effective policy in connection with his business and thereby must be deemed to have accepted the counter-offer.

22. Then it is said that the proposal was signed in blank by the defendant. That makes no difference in principle. Admittedly Gupte was the defendant's agent to

effect the policy. He brought the printed proposal form to the defendant and the defendant signed the same leaving it to Gupte to fill in the particulars in the respective columns. It is difficult to see how the defendant can escape the liability arising on the proposal which he signed. The same result must follow even if Gupte was not his agent, unless the defendant makes out a case of fraud or mistake or any similar ground entitling him to be relieved of the consequences of his signature.

23. It is further said that in *General Accident Insurance Corporation v. Cronk* there was an express promise in the proposal itself to pay the premium, and there is none here. That is correct. But that, I think, makes no difference to the principle. The promise to pay may be express or implied. Apart from the defendant's implied promise to pay the premium, the conduct of the parties from the outset shows that the stipulation in the policy was waived by the plaintiffs and this waiver was accepted and acquiesced in by the defendant. I have summarised the evidence, both oral and documentary, which, in my opinion, is one-sided. The plaintiffs at no time stated to the defendant that unless the premium was paid the policy would lapse or would be forfeited or that the insurance will not be in force. From the beginning they treated the policy as if it was in force and only demanded the premium in default of which they threatened a suit. There are, first, the demands made by the plaintiffs for the payment of the premium. These were followed by their letter of December 22. The defendant's letter of January 5 is an acknowledgment of the liability to pay the premium and contains a promise to pay it. Even if this letter is not binding on the defendant, there is the payment of Rs. 500 which was accepted by the plaintiffs. Then there is a fresh demand by the plaintiffs on April 19 followed by a further payment of Rs. 500. It is true it was after the suit, but that makes no difference to the principle. The only point is whether the stipulation in the policy was intended to be operative or was waived by the plaintiffs, and I have no hesitation in holding that it was waived and that the defendant undertook to pay the premium. The conduct of the parties and the correspondence between them is only consistent with this conclusion.

24. This brings me to the other answer made by the plaintiffs to the defence. I have already pointed out that where there is a stipulation as in the policies here, the mere execution of a policy and its delivery to the assured will not make the contract a concluded contract. The plaintiffs say that even when there is such a stipulation or condition in a policy, if the policy recites that the premium was paid at the time of the execution of the policy, though it was in fact not paid, then there is a waiver of the stipulation and the contract becomes a concluded contract and binding on both parties. This contention was accepted in *Roberts v. Security Company* [1897] 1 Q.B. 111.

25. In that case the facts were that there was a proposal for an insurance of the goods against loss by burglary, and the proposal was accepted by the insurer who executed a policy under the signatures of two directors and the secretary of

the company. The policy recited that the premium had been paid for an insurance against loss by burglary from December, 1895, to January, 1897, and purported to insure the plaintiffs' goods accordingly. There was a provision in the policy that no insurance by way of renewal or otherwise should be held to be effected until the premium due thereon has been paid. Upon the night of December 26, or early in the morning of December 27, there was a burglary and the plaintiffs sustained a loss. The policy remained with the insurers and no premium was in fact paid. Upon these facts the Court of Appeal held that the policy constituted a complete contract of insurance and that by the recital therein the defendants had waived the condition for pre-payment of the premium, and therefore the risk under the policy attached.

26. Mr. Rodrigues relies upon *The South British Insurance Co. Ltd. Vs. J.R. Stenson*, . He further says that the authority of *Roberts v. Security Company* is shaken by the decision of the Privy Council in *Equitable Fire and Accident Office, Limited v. The Ching Wo Hong*.

27. As to *South British Insurance Co. v. Stenson*, if I had felt that the decision in that case governed the case before me, then whatever my own view about it might be, I should have followed it. I am, however, relieved from the necessity of examining that decision as I find the facts there were different from those in this case.

28. As to *Equitable Fire Accident Office, Limited v. The Ching Wo Hong*, in the first place, the finding which their Lordships of the Privy Council accepted was that both the parties had treated the policy as non-existing, and that the insurance company had always repudiated their liability under the policies and the respondents did not seek to enforce it. That being the finding, it was not necessary to go into the question whether the policy was evidence of a concluded contract, and the opinion expressed by their Lordships as to whether the contract was concluded or not seems to me with respect obiter. No doubt any opinion whether obiter or otherwise expressed by their Lordships is entitled to great weight. But it seems to me that all that their Lordships held was that mere delivery of an executed policy cannot amount to a waiver of the condition contained in a stipulation of this nature, for no importance can be attached to it by itself. I respectfully agree. Their Lordships did not treat the issue of the policy as a counter-offer as was done in the *Bombay* case. Then their Lordships referred to *Roberts v. Security Company* and pointed out that the words in that policy were different from those they had to consider. Their Lordships observed as follows (p. 101) :-

It is enough for their Lordships to say that the words of the instrument in that case were different from those which their Lordships have to construe, and they are relieved from saying whether they would otherwise have been prepared to follow it.

The policy often contains a condition that the insurance shall not commence until

the premium is paid ; but if the policy recites that the premium has been paid, the company may be taken to have waived the right to insist that prepayment of the premium was a condition precedent to the commencement of the risk.

In support of this statement *Roberts v. Security Company* is cited in footnote (1) as an authority. The foot-note then goes on to state as follows :-

The correctness of this decision was doubted in *Equitable Fire and Accident Office, Limited v. The Ching Wo Hong* on the ground that in equity the acknowledgment of the receipt of the purchase-money has no binding effect, and that it is provided by the Judicature Act, 1873 (36 & 37 Vict. c. 66), Section 25 (11), that where the rules of law and equity differ the rules of equity should prevail. It may, perhaps, be doubted whether these reasons are satisfactory. In some cases there is an obligation to pay the premium upon the issue of the policy ; see *General Accident Insurance Corporation v. Cronk*.

29. I am not, therefore, prepared to accept the contention that the authority of *Roberts v. Security Company* is finally shaken by the Privy Council decision. Apart from this the facts in the case before me go much further than those in the Privy Council case as well as in the Bombay decision.

30. I have, therefore, reached the conclusion upon the facts established in this case that the stipulation if effective was clearly waived by the conduct of the plaintiffs and acquiesced in by the defendant. Indeed it seems to me to be clear on the evidence that the parties intended that the contract should come into force from the time the policies were issued. Mr. Rodrigues argues that the payment of Rs. 500 may amount to pro tanto waiver. It is difficult to understand the argument. It is clear that the payment was made under the general liability to pay the total premium and accepted on account and the balance was demanded. That being so, if there was a waiver, it was a complete waiver as regards the stipulation of the promise to pay the premium in full. Having regard to the conclusion to which I have come, I do not propose to discuss the evidence as regards the exact position which Mr. Gupte had with reference to the plaintiffs. There is no evidence before me to show that Gupte had any general authority except in terms from his clients or to offer any contract of insurance on any terms to them. I think, therefore, the defence fails.

31. It may be stated that at one time there was some small dispute as regards the exact amount of premium due. But the parties now agree to the figure.

32. [After answering the issues his Lordship concluded].

33. In the result, there will be a decree in favour of the plaintiffs for Rs. 1,290-5-0 with interest at nine per cent, on Rs. 2,290-5-0 from December 22, 1933, to February 2, 1934, on Rs. 1,790-5-0 from February 3 to June 21, 1934, and on Rs. 1,290-5-0 from June 22, 1934, to judgment. Interest on judgment at six per cent.

34. Mr. Rodrigues says that in this case each party should be ordered to pay his

own costs. I regret I am unable to accept the application, and I do not see why the ordinary rule should not be followed. Therefore, the defendant must pay the plaintiffs' costs.

35. Counterclaim dismissed with costs.

36. Liberty to the plaintiffs to withdraw the amount deposited by the defendant in Court and to appropriate the same towards satisfaction of the decretal amount.