

(1928) 02 BOM CK 0015

In the Bombay High Court

Case No : Civil Reference No. 16 of 1927

The South British Insurancse Co. Ltd.

APPELLANT

Vs

J.R. Stenson

RESPONDENT

Date of Decision : 28-02-1928

Acts Referred:

Contract Act, 1872 — Section 7

Citation : AIR 1928 Bom 260 : (1928) 30 BOMLR 745 : (1928) ILR (Bom) 532

Hon'ble Judges : Patkar, J;Baker, J

Bench : Division Bench

Judgement

Patkar, J.—This is a reference made by the Small Causes Court, Bombay, u/s 69 of the Presidency Small Causes Courts Act. The defendant intended to insure his motor car and supplied the particulars in a printed form, Exhibit C, which was agreed to be the sole basis of the contract, The plaintiff Insurance Company issued a policy Exhibit A containing a proviso as follows :-

No insurance shall be held to be fitted until the premium due thereon shall have been paid and accepted in full and that the due observance and fulfilment of the conditions of the Policy, in as 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 Company under this Policy, and in this respect time shall be of the essence of the contract.

2. On October 12, 1925, the defendant received a policy purporting to operate from October 1, 1925, with a demand for the premium. The defendant retained the policy, and failed to pay the premium. The present suit was brought to recover Rs. 78-14-0, the amount due as short period premium.

3. The questions referred for the opinion of this Court are :-

(1) Whether on the facts disclosed in the evidence in this case, there was it completed and binding contract between the parties; and

(2) Whether the defendant was liable to pay the premium sued for.

4. The plaintiffs rely upon the case of *Roberts v. Security Company* (1897) 1 Q.B. 111 where, notwithstanding the provision that no insurance by way of renewal or otherwise should be effected until premium due thereon should have been paid, it was held that the policy constituted a completed contract of insurance, that by the recital in the policy that the premium was paid, the defendants had waived the condition for prepayment of the premium, and therefore the policy had attached. The authority of that case is shaken by the decision in *Equitable Fire and Accident Office Limited v. The Ching Wo Hon* [1907] A.C. 96 where it was held as follows (p. 100) ":-

Their Lordships think that in any case the parties should not be held in equity to be estopped as between themselves from showing that the consideration had not in fact been paid, but in the present case they think that the condition read with the operative part of the instrument negatives any such estoppel; for the only meaning which can be given to the words is that the consideration must be not only expressed to be paid, but actually paid. Their Lordships cannot treat the fact of the executed policy having been handed to the respondents as a waiver of the condition or attach any importance to the circumstance. What was handed to the respondents was the instrument with this clause in it, and that was notice to them, and made it part of the contract that there would be no liability until the premium was paid.

It would, therefore, follow that the handing over of the policy containing the proviso that "no insurance shall be held to be effected until the premium due thereon shall have been paid and accepted in full." would not amount to a waiver of the condition.

5. In *Canning v. Farquhar* (1886) 16 Q.B.D. 727 the proposal was accepted at a specified premium, but upon the terms, that no insurance should take effect till the premium was paid. Before tender of the premium, there was a material alteration in the state of the health of the proposer and the company refused to accept the premium or to issue a policy, and it was held that the nature of the risk having been altered at the time of the tender of the premium there was no contract binding the company to issue a policy.

6. It, therefore, follows that the proviso in the policy that no insurance shall be held to be effected until the premium was paid would exonerate the Insurance Company from any liability under the policy unless the premium was paid and accepted, and that the Insurance Company was not bound to accept the premium. The contract, therefore, would not be complete until the premium was paid and accepted.

7. In the particulars in Exhibit C which was the sole basis of the contract between the parties, there is no specific agreement by the defendant to pay the insurance premium. On the other hand, the proviso in the policy says that no insurance shall be held to be effected until the premium due thereon shall have

been paid and accepted in full. No protection note was given in this? case, and it cannot be, said that the issue of a protection note was consideration for an implied agreement to pay the insurance premium. In some cases there may be an obligation to pay the premium upon the issue of the policy : see *General Accident Insurance Corporation v. Cronk* (1901) 17 T.L.R. 233; but there must be express agreement to pay the premium or there must) be evidence from which the agreement to pay premium may be inferred. There was no express agreement to pay the premium in the proposal Exhibit C, on the other hand according to the policy issued by the plaintiffs, the contract was not to hi complete until the premium was paid and accepted, It would, therefore, follow that there was no contract but only a counter offer, and the intending insurer was not bound to accept the premium, and therefore, the insured was not bound to pay the premium. The contract was to come into force only when the premium was paid and accepted. la order to convert a proposal into a promise, the acceptance must be absolute and unqualified u/s 7 of the Indian Contract Act. I may refer in this connection to the casa of *Allis Chalmers Co. v. Fidelity and Deposit Company of Mary-land* (1916) 114 L.T. 433. The case would have been different it an unconditional agreement to pay the premium was expressly made in the proposal form, or could be inferred by necessary implication from the defendant's conduct.

8. Under the proviso in the policy, it was agreed that time shall be the essence of the contract. It was, therefore, open to the plaintiffs to call upon the defendant to pay the premium at once or within a reasonable time, or in the alternative to forfeit the policy. It may be that the defendant might have taken advantage of the admissions in the letters of the plaintiff company which are alleged to amount to a waiver of the condition of payment of the premium, but the plaintiff cannot take advantage of the statements made in the letters in their own favour in order to enforce a liability which the defendant has not agreed to undertake.

9. I think, therefore, that the answer to both the questions referred to this Court is in the negative.

Baker, J.

10. This is a case stated by the Small Cause Court, Bombay, u/s 69 of the, Presidency Small Causes Courts Act, The facts are that the plaintiffs, the South British Insurance Company, Limited, sued to recover from the defendant Rs. 78-14-0 as the amount due by him for the premium on the insurance policy of his motor car. The defendant denied the liability as there was no contract of insurance.

11. The case was originally argued before the 2nd Judge who decided that no contract had come into existence and dismissed the suit. Against this decision the plaintiffs applied to the Full Court and obtained a rule. When the rule was argued before the Full Court consisting of the Acting Chief Judge, who was the same Judge who had previously decided the suit as 2nd Judge, and the acting

"2nd Judge, there was a difference of opinion, the Acting Chief Judge upholding his previous decision and the 2nd Judge holding that the plaintiffs' suit should be decreed. The Judges having differed the following questions have been referred for the opinion of this Court:-

(1) Whether on the facts disclosed in the evidence in this case there was a completed and binding contract between the parties,

and

(2) Whether the defendant was liable to pay the premium sued for?

12. The facts are simple. The defendant, on September 30, 1925, proposed to the South British Insurance Company, Limited, to insure his car and signed the proposal form. No protection note was issued. On October 12, 1925, a policy dated October 2, 1925, was issued to the defendant by the company with a letter in the usual form asking for a cheque for Rs. 101-13-0 for the premium due thereon. The defendant, however, in spite of repeated reminders, did not send any cheque, and ultimately on March 29, 1926, wrote to the plaintiffs that he had changed his mind about insuring his car. The plaintiffs replied that as the company had been under risk as from October 1 last they would cancel the policy as from date on his paying the short period premium amounting to Rs. 78-14-0. As the defendant refused to pay the amount the present suit was instituted.

13. The case is one of an unusual character. Although there are numerous cases in which suits have been brought by the persona insured against insurance companies it is very rare for an insurance company to sue for the recovery of a premium. The ordinary way in which the insurance company can enforce the payment of premium is the forfeiture of the policy. Ordinarily speaking there would be no contract between the parties until the premium was paid. The terms of the policy, which is at page 16 of the typed paper-book, are of importance. In paragraph 1 it is recited that the defendant has paid or has promised to pay to the company the sum of Rs. 101-13-0 as premium for such insurance for the period from October 1, 1925, to October 1, 1926, and it is expressly provided in the policy that 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 fulfillment of the conditions of the 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 company under this policy, and in this respect time shall be of the essence of the contract. In view of this proviso, the company would not be liable unless and until the premium was paid and as time is of the essence of the contract the premium must be paid within a reasonable time.

14. It is, however, contended that; the company have waived this proviso by their letter of October 12, 1925, which, after reciting the amount due for the premium, says :-"I shall be pleased to receive your cheque for this amount at your convenience." In subsequent letters they continued to ask for the money until it was finally demanded by return on March 23, 1926. It is further

contended that by the acceptance of the policy and retaining it the defendant accepted the contract and is bound to pay the premium.

15. So far as regards the delivery by the company of the policy to the defendant without the payment of the premium the case is covered by the authority quoted by the learned trial Judge, in *Equitable Fire and Accident Office, Limited v. The Ching We Hong* (1907) A.C. 96 In that case the question was whether a policy for insurance was void by reason of the insured having omitted to give notice of any additional insurance effected on the same goods with another company without the consent, of the insurer; and the second policy was one under which no premium was ever paid. It was held that the policy was not avoided by omission to give notice of an additional insurance which, on the true construction of its terms, never became effective, by reason of the premium not having been paid. In that case the second insurance policy had. been handed over to the insured, but it was held, at page 100 :-

Their Lordships cannot trout the fact of the executed policy having been handed to the respondents as a waiver of the condition or attach any importance to the circumstance. What was handed over to the respondents was the instrument with this clause in is (i. e. there shall be no insurance until the premium is paid), and that was notice to them, and made it part of, the contract that there would be no liability until the premium was paid. It is not a question of conditional execution, but of the construction of what was executed.

16. Again, in *Canning v. Farquhar* (1886) 16 Q.B.D. 727 it was held that a proposal for insurance may be accepted in all its terms but with the statement that there shall be no insurance till the first premium is paid. Hence there is no contract but only a counter offer and the intending insurer may refuse a tender of the premium it" there has meanwhile been a material change in the facts constituting the risk to be insured against. These cases would seem for snow that the mere handing over of the policy would not constitute a contract until the premium had been paid, but would amount only to a counter offer. It is true that the case of *Roberts v. Security Company* (1897) 1 Q.B. 3 quoted by the lower Court, seems to lead to a contrary conclusion, but that has been doubted in the Privy Council case quoted above in *Equity Fire and Accident Office, Ltd. v. The Ching-Wo Hong*, On the authorities, therefore, I am of opinion that in view of the proviso in the insurance policy itself that it should not be effectual unless the premium was paid, the fact of the policy being handed over to the defendant is not a waiver of the conditions and what was handed to the defendant was an instrument containing this clause which amounts to a notice to him that there would be no liability until the premium was paid.

17. As regards the question of waiver by the letter of October 12, 1925, although in the event of a suit by the insured against the company, it might be contended that they were estopped by reason of this letter and the subsequent letters from contesting their liability, I do not think that they can make use of these letters in their own favour under the general principle of law, that a party cannot use his

own admission in his own favour. Prima, facie no liability would rest on the company under the insurance policy unless and until the premium had been paid. It was open to them under the clause in the policy that "time shall be of the essence of the contract" to call upon the defendant to pay the premium immediately or within a reasonable time or to forfeit the policy. But the company cannot take advantage of their waiver and compel the defendant to pay the premium if he does not wish to do so. The statement by the company in March 1926 that they had been under risk since the date of the policy appears to be a statement made to suit the particular circumstances of the case, If the insured had claimed under the policy without having paid the premium, I have no doubt that they would have denied their liability.

18. I agree with the view expressed by the acting Chief Judge that there can be no contract until there is actual payment of the premium as provided by the policy.

19. In these circumstances I am of opinion that both the questions referred by the Small Cause Court should be answered in the negative.