

(1953) 02 BOM CK 0001
In the Bombay High Court
Case No : O.C.J. Suit No. 732 of 1952

Vijayakumar Motilal

APPELLANT

Vs

New Zealand Insurance Co. Ltd.

RESPONDENT

Date of Decision : 16-02-1953

Acts Referred:

Contract Act, 1872 — Section 11, 18

Citation : AIR 1954 Bom 347 : (1954) 56 BOMLR 341

Hon'ble Judges : Desai, J

Bench : Single Bench

Advocate : K.T. Desai and A.H. Mehta, for the Appellant; Purshottam Tricumdas and P.N. Bhagwati, for the Respondent

Judgement

1. This is a suit to recover a sum of Rs. 71,000 on a contract of fire insurance on certain cotton bales which were destroyed by fire at Lasoor on 23-4-1952.

2. The plaintiff is the owner of various businesses carried on in the names and style of Narandas Chunilal and Chunilal Motilal including that of a cotton ginning and pressing factory at Lasoor in Hyderabad State. The business of the factory is carried on in the name of Narandas Chunilal. The Head Office of the plaintiff is at Jalna in Hyderabad State.

The businesses were managed by the plaintiff's adoptive mother Tarabai till her death in April 1952. After her death these businesses are being managed by the plaintiff's natural mother Mahabalkumari. The plaintiff also owns a textile mill at Gadag.

When the suit was filed the plaintiff was a minor. He attained majority before the suit came on for hearing and the suit was thereafter continued by him.

The defendants are an insurance company incorporated in New Zealand and have a branch office in Bombay. The parties were known to one another as the textile mills at Gadag were insured against risk of fire with the defendants through Messrs. Navinchandra Jethabhai who are the chief agents in Bombay of the

defendants. The firm of Navinchandra Jethabhai were authorised to accept insurance business on behalf of the defendants.

3. It is the plaintiff's case that on Saturday, 22-3-1952, the plaintiff's Bombay office received a letter from the Jalna Head Office asking the Bombay office to effect insurance on certain cotton bales lying in the compound of the plaintiff's factory at Lasoor, in a sum of Rs. 2,00,000. The letter was stated to have been received in Bombay in the afternoon of 22-3-1952, and immediately thereafter Joshi, the plaintiff's representative in Bombay, went to the office of Navinchandra Jethabhai and proposed an insurance of these cotton bales.

Messrs. Navinchandra Jethabhai, according to the plaintiff, accepted the said proposal made on behalf of the defendants and insured the cotton bales for Rs. 2,00,000 covering the risk on the said bales from 22-3-1952, to 22-3-1953.

According to the plaintiff Messrs. Navinchandra Jethabhai at the time stated that as it was Saturday afternoon the cover note would be sent by post to Jalna on Monday, March 24. Particulars of this contract were asked for and the plaintiff through his attorneys stated that the interview of March 22 took place between Joshi the manager of the plaintiff in Bombay and Laxmichand an employee of the firm of Navinchandra Jethabhai. On March 26 the Jalna office received the cover note sent by Navinchandra Jethabhai on behalf of the defendants.

The cover note stated that the cotton bales at Lasoor were insured against risk of fire as from 22-3-1952, until 22-3-1953, and that a premium of Rs. 2,666-11-3 was to be paid by the plaintiff on or before 21-4-1952. It is the plaintiff's case that In the meantime a fire broke out at the Lasoor factory on March 23 in the afternoon at 4-30. There was no fire brigade at Lasoor. A fire brigade from Aurangabad was sent for and the fire was extinguished in the early morning of March 24.

Intimation of the fire was received by the plaintiffs Bombay office from the Head Office at Jalna on the evening of March 24 by a telegram and the defendants were given intimation of the fire on the morning of March 25 at about 11-30.

The defendants declined all liability to the plaintiff in respect of this insurance. Correspondence ensued between the parties in the course of which the plaintiff offered to pay the amount of the premium, but the defendants declined to accept the same on the ground that they had declined all liability under the contract of insurance.

4. Based on these facts the case of the plaintiff in the plaint was that

"a valid and binding contract of insurance was completed and concluded on 22-3-1952, when Messrs. Navinchandra Jethabhai on behalf of the defendants accepted the insurance of the cotton bales lying at the Lasoor factory,"

and that as expressly stated in the cover note the risk had commenced from 22-3-1952. It was only because March 22 was a Saturday that the cover note

was made out and despatched on March 24. The plaintiff submitted that under the contract of insurance between the parties he has become entitled to recover from the defendants the amount of the loss caused by the fire.

5. The defendants in their points of defence denied their liability to the plaintiff on various grounds, one of them being that a fraud had been practised on them.

They denied that the plaintiff's representative Joshi went to the office of Navinchandra Jethabhai on 22-3-1952. They denied that there was any agreement of insurance at all on March 22 as alleged by the plaintiff. According to the defendants it was only at about 11 on the morning of March 24 that Joshi telephoned to Jethabhai Damji, the proprietor of Navinchandra. Jethabhai, at his residence at Mulund and informed Jethabhai that he had received a letter from the Jalna office dated 22-3-1952, asking him to get the cotton bales lying in the factory at Lasoor insured in a sum of Rs. 2,00,000 as from the date of the letter, viz., March 22, and asked Jethabhai to send the cover note in respect of the said insurance to the Jalna office of Narandas. Chunilal on the same day. This Jethabhai agreed to do.

Joshi again had conversation with Jethabhai on the telephone on the same day at about 5 p. m. when he was informed that the cover note was ready and would be despatched on the same day; and it was in fact posted on the same day to Jalna. According to the defendants the Bombay office knew about the fire before Joshi proposed the insurance to Navinchandra Jethabhai on. 24-3-1952.

Thereafter Joshi saw Jethabhai at his office on March 25 and gave him a telegram and intimated to him that he had received the telegram from the Jalna office giving information of the fact of the fire at Lasoor. Jethabhai thereupon asked Joshi to produce the letter dated March 22 on the basis of which the insurance had been effected from that date. Joshi promised to hand over the letter but did not do so till March 26, and when he brought the letter it was not dated 22nd but was dated March 21. It was the defendants' case that in fact no such letter dated March 22 had been sent by the Jalna office to the Bombay office of the plaintiff and that the letter dated March 21 was subsequently got up by the plaintiff in order to support the false claim made by him.

The defts. further alleged that the plff. and/or Tarabai &/or the Bombay office of Narandas Chunilal and/or Joshi knew of the fact of the fire before Joshi proposed the insurance to Navinchandra Jethabhai on 24-3-1952, and that the fact of the fire had been effectively concealed from Jethabhai. The defendants also alleged that in any event it was the duty of the plaintiff and/or his agents to disclose the said fact to Jethabhai when the proposal was made.

The defendants also contended that the plaintiff or his agents were guilty of misrepresentation and fraud in the matter of obtaining the contract of insurance and that under the circumstances the defendants were entitled to avoid the same which they did by their letter of March 27.

Another contention raised by the defendants was that the plaintiff was a minor at the date of the contract and the contract of insurance was therefore void and unenforceable.

The defendants also relied on Clause 13 of the usual printed form of policy issued by the defendants which is mentioned in the cover note as forming part of the contract between the parties. I shall fully state this contention of the defendants later on in my judgment.

The defendants also contended that there was another misrepresentation made by the plff., viz., that he was solely entitled to the bales of cotton insured with the defendants when in fact he had already sold the same before the date of the contract of insurance.

6. (His Lordship after dealing with the evidence, concluded that the defendants had succeeded in establishing that Joshi had on March 24 knowledge of the fact of the fire when he instructed Jethabhai to effect insurance on the bales of cotton at Lasoor and issue the cover note in question, and then proceeded): It was further argued on behalf of the defendants that it was not really incumbent on the defendants to establish as a positive fact that Joshi had knowledge of the occurrence of the fire when the contract of insurance was arrived at on March 24 and that, for the defendants to succeed, it would suffice if they show that Joshi must be "deemed to have known" of the occurrence of the fire when the insurance was effected on March 24, 11 a.m.

It was further argued that in any event the head office at Jalna knew or must be deemed to have known of the occurrence of the fire many hours before 11 a.m. on March 24 and that it cannot be said that the fact had come to their knowledge too late for them to give information of the fact to Joshi in Bombay.

7. Reliance was placed in this connection on the following passages from Welford and Otter-Barry's Treatise on Fire Insurance (4th, edn.) at pages 133-4:

"The duty of making disclosure is not confined to such facts as are within the actual knowledge of the assured; it extends to all material facts which he ought in the ordinary course of business to have known, and he cannot escape the consequences of not disclosing them on the ground that he did not know them. There is, however, no duty to disclose facts which the assured did not know, and which he could not be reasonably expected to know at any material time.

The question whether the non-disclosure of a fact which the assured does not know avoids the policy, on the ground that he ought to have known it, depends upon the following rules namely:--.....

(2) Where the fact is known to an agent or the assured, the avoidance of the policy depends upon whether it is the agent's duty to communicate it to his principal. An agent who is entrusted with the care or management of the subject-matter of the insurance is under a duty to his principal to communicate to the principal any material facts affecting the subject matter which come to his

knowledge, if, therefore, the principal fails to make full disclosure of all material facts within the knowledge of such agent the policy is liable to be avoided on the ground of concealment.

The principal cannot excuse himself for his failure to do so by showing that he himself, by reason of his agent's failure to communicate them to him, was unacquainted with the facts which were not disclosed to the insurers. The insurers are entitled to contract on the basis that the agent has performed his duty, and that all material facts connected with the insurance have been by him communicated to the principal. It is, therefore, immaterial to consider the cause of the agent's failure to perform his duty; the policy is equally avoided whether his failure has been wilful or unintentional....."

Reference was also made by learned counsel for the defendants to Macgillivray on Insurance Law (3rd edn.), pages 553-4, where the statement of the law on the subject is as follows:

"The material date up to which full disclosure must be made is the moment when a binding contract is concluded."

"Any information received up to that time must be communicated to the insurer with due diligence, and by the customary methods of communication. On the one hand, the assured must not delay making the communication, but, on the other, he is not bound to make any extraordinary effort or to incur any extraordinary expense.

It has been questioned whether if, say, a proposal of fire insurance is made by letter the assured is bound to telegraph any change of circumstances which may occur after the despatch of the letter, but before the time when in due course it would be received and a cover note issued. Communication by telegraph cannot now be deemed an unusual or expensive method of communication, and the applicant would undoubtedly make use of it if his own interests depended on a prompt communication. On principle, therefore, it would seem that in ordinary cases a proposer ought to telegraph any information which might influence the insurer in dealing with the risk."

8. The law of fire insurance in England is derived mainly from decisions of Courts and treatises of text-book writers. That was also the position in England in respect of the law of Marine Insurance till 1907 when the Marine Insurance Act came into force. The general principles of the law of fire insurance in England are mostly derived from cases relating to marine insurance and principles which have long commended themselves and recognised by English jurists. The Indian Insurance Act, 1938, mainly deals with the law relating to the business of insurance and does not deal with any general principles of the law of fire insurance.

In the absence of any legislative enactment on the subject, our Courts in India have in dealing with the topic of fire insurance relied so far on general rules of

the law of contract and our own decisions and to a large extent on judicial decisions of Courts in England and opinions of English jurists.

9. It is rather surprising that there is no direct authority of any Court in India -- none has been cited before me -- on the question of the duty of the assured to disclose material facts which the assured is in law "deemed to know". The rule is one of manifest justice. If the assured ought in the ordinary course of his business to have knowledge of certain facts material to the contract of insurance, can he be permitted to rely merely on his "de facto" ignorance of the fact which may be due to negligence of himself or his agents? The underlying principle clearly indicates that in such a case the assured must for the purpose of disclosure be regarded as having known the fact in question.

The following propositions (in stating some of which I have strictly adhered to the language used in the English Marine Insurance Act) should, I venture to think, govern the present decision:

(1) The assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.

(2) The term "circumstance" in this connection Includes any communication made to, or information received by, the assured.

(3) Except circumstances which the assured is, under general principles of law, not bound to disclose, where an insurance is effected for the assured by an agent, the agent must disclose to the insurer--

(a) Every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him: and

(b) Every material circumstance which the assured is bound to disclose, unless it comes to his knowledge too late to communicate it to his agent.

(4) In the case of loss of the subject-matter of the insurance, an agent, whose duty it is to keep his principal informed, is bound to send him Information of the loss by telegram or telephone when it is practicable to do so. This is in every case a question of fact and must depend on the circumstances of the particular case. In any case reasonable means of communication must be availed of though it is not necessary that extraordinary steps need be taken or vigilance of extraordinary nature should be exercised.

(5) The duty to disclose continues till the contract is concluded; and a contract is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not.

10. Based on the general principles that a contract of insurance requires utmost

good faith on the part of the assured and the duty to disclose material facts extends not merely to facts which the assured in fact knows but also all the facts and circumstances which he is "deemed to know", the argument was strongly urged before me that there is ample evidence in this case to show that the fact of the fire must have come to the knowledge of the plaintiff's head office at Jalna even at the latest in sufficient time to acquaint Joshi in Bombay of that fact before the contract of insurance was concluded on March 24.

11. (His Lordship, after considering the evidence in the light of these principles, held that both the head office of the plaintiff at Jalna and Joshi must be deemed to have had knowledge of the fact of the fire before Joshi gave instructions to Jethabhai on March 24 and the defendants were entitled to repudiate their liability on the ground of non-disclosure of this material fact).

It was next argued by learned counsel for the defendants that the proposal for insurance contained a representation to the effect that the goods in question were the sole property of Narandas Chunilal. It was pointed out from the evidence that the letters and telegram which form part of Ex. 4 clearly established that the 192 bales in question had been sold by the plaintiff to Navinchandra Pranalal and that the plaintiff had no interest in the goods destroyed save that of an unpaid vendor.

The fact that the plaintiff obtained a cover note by stating that the goods were solely his property amounted, so it was argued, to a misrepresentation. It was further argued that this amounted to giving false description of the goods.

I really fail to see how describing the goods rightly or wrongly as the sole property of Narandas Chunilal can be said to be a "description of goods". Description of goods must affect the goods themselves. It may be in respect of quality, quantity or various other factors but every one of the factors must affect the goods themselves.

It is true that the description of the subject-matter of insurance forms the basis of the contract. Proper description of the subject-matter of the contract would certainly be essential for the purpose of identification of the goods. All that is required of the assured is that the description should be adequate; that is, it must substantially describe the property which is to be insured. I am unable to see how a statement as to the ownership of the goods or the nature and extent of the interest of the assured in the subject-matter can be called "description of the goods insured."

It is true that a policy of insurance can be vitiated by any breach of warranty, fraud or misrepresentation. But failure on the part of the assured to disclose the nature of his interest in the goods cannot be said to amount to a breach of warranty. All that is required is that the assured should have insurable interest in the subject-matter. Even the interest of a bailee is sufficient to establish an insurable interest and it is not disputed that an unpaid vendor of the goods has an insurable interest in the property which is the subject-matter of the contract

of insurance.

I am supported in this view, which I am inclined to take, by a decision cited before me by Mr. K. T. Desai learned counsel for the plaintiff. That was the case of -- "Gilbert v. National Insurance Co.", (1848) 12 Ir 143 (A). In Welford and Otter-Barry on Law of Fire Insurance (4th edn.) at page 174 the statement of the law is as follows--

".....It is not, as a general rule, necessary for the assured to describe the nature or extent of his interest in the property insured. Hence, if he describes himself as its owner, the validity of the policy is not affected, provided that this description, though not strictly accurate, substantially defines his relation to the property. Thus, during the period between the date of the contract for the purchase of the property insured and the date of completion, both the vendor and the purchaser may describe themselves as owner."

I do not think that apart from special questions or considerations it is incumbent on the assured to disclose the nature or extent of his interest in the subject-matter of the insurance. The assured is not required spontaneously to disclose his title to the property insured. The present contention urged by learned counsel for the defendants must, therefore, fail.

12. It was next argued that the subsequent fabrication of the letter alleged to have been addressed by the Jama office of the plaintiff to Bombay office on 21-3-1952, was a fraudulent means or device used by the plaintiff to obtain benefit under the contract of insurance.

Reliance was placed on condition 13 of the usual printed form of the policy of fire insurance issued by the defendants which was incorporated in the contract contained in the cover-note. Condition 13 is as under--

"13. If the claim be in any respect fraudulent or If any false declaration be made or used in support thereof or if any fraudulent means or devices are used by the insured or anyone acting on his behalf to obtain any benefit under this policy; or if the loss or damage be occasioned by the wilful act or with the connivance of the insured; or if the claim be made and rejected and an action or suit be not commenced within 3 months after such rejection or (in case of an arbitration taking place in pursuance of the 18th condition of the policy) within three months after the arbitrator or arbitrators or umpire shall have made their award all benefit under this policy shall be forfeited."

Based on this condition the argument was that if the letter of March 21 be held to be fabricated all benefit claimed by the plaintiff under the contract of insurance became forfeited and the plaintiff was not entitled to the claim preferred by him against the insurers. There is considerable force in this argument.

There is nothing to prevent the parties to a (Contract from extending the consequences of fraudulent conduct and particularly so in a contract which calls

for the utmost good faith between the parties. This should of course be done in language of clarity to make it quite apparent that such was the intention. Now, the language used in Condition 13 is sufficiently clear on the point. In my opinion the use of the letter of March 21 by the plaintiff, which was a fabricated letter, would amount to a fraudulent means or device used to obtain benefit under the contract of insurance. On the findings already recorded by me the suit is liable to be dismissed also on this ground.

13. It was lastly argued by learned counsel for the defendants that the contract in suit was a contract by a minor and that u/s 11, Contract Act such a contract was void.

Reliance was placed on the well-known case of -- "Mohori Bibee v. Dharmodas Ghose", 30 Cal 539 (PC) (B), in which their Lordships of the Privy Council took the view that a minor was incompetent to contract, and therefore, a minor's contract was void and not merely voidable.

The proposition laid down by their Lordships of the Privy Council being in general terms would have led to startling results if very strictly applied. For in that case, instead of guarding the interest of minors over whom the law throws its aegis of protection, it would have done incalculable harm to their rights and caused much hardship. Pushed to a logical conclusion the Privy Council decision would have made it impossible for a minor to get benefit under or enforce any contract entered into by him even when the consideration had been wholly received by the other contracting party. But no such difficult position has arisen, since Courts in India have, as a rule, in effect, confined the application of the Privy Council ruling only to cases where a minor is charged with obligations and the other contracting party seeks to enforce those obligations against the minor.

In -- The Great American Insurance Co. Ltd. Vs. Madanlal Sonulal, , it was held that a plaintiff-minor for whose benefit a contract of fire insurance was made by his guardian was entitled to sue on the contract. Mr. Purshottam, learned counsel for the defendants, tried to distinguish that case by saying that here the contract was not entered into by a guardian of the minor but was entered into by an agent of the minor. Now, there is evidence before me that till April 1951 Tarabai, the adoptive mother of the plaintiff and his natural guardian, was managing the business of the plaintiff.

In my opinion it necessarily follows that Joshi who entered into this contract of insurance did so on behalf of the guardian of the minor. This is, therefore, a contract entered into not by the; minor himself but by the guardian of the minor through an agent, and for the benefit of the minor. The contention of the defendants that the plaintiff is not entitled to sue on the ground of his minority at the time of the contract must, therefore, be negated.

14. In the result the suit will be dismissed with costs.

15. Suit dismissed.