

(1941) 07 CAL CK 0011
In the Calcutta High Court

Western India Life Insurance Co. Ltd.

APPELLANT

Vs

Sm. Asima Sirkar and Others

RESPONDENT

Date of Decision : 16-07-1941

Acts Referred:

Evidence Act, 1872 — Section 114

Citation : AIR 1942 Cal 412

Hon'ble Judges : Derbyshire, C.J;Edgley, J

Bench : Full Bench

Judgement

Derbyshire, C.J.—This is an appeal from a judgment of Panokridge J,, and the decree consequent thereon whereby he adjudged that the plaintiffs were entitled to recover a sum of rupees five thousand and profits from the defendants in respect of Life Insurance Policy No. 28484 issued by the defendants on 11th June 1935. The policy was taken out by Jadunath Sarkar who was a Government Official in the Province of Bengal. The plaintiffs are the widow and children of Jadunath Sarkar. The policy itself was the result of a proposal and declaration made by Jadunath on 14th May 1935, the proposal being accepted the defendant company after a medical examination of Jadunath by their doctor. Jadunath was a Hindu governed by the Dayabhag School of Hindu law, who died intestate on 4th April 1938, the due premiums having been in the meantime paid. The defendants declined to pay the sum payable under the policy on the ground (a) that Jadunath untruly stated in his proposal that no proposal on his life had ever been declined by any Insurance Company whereas in fact a proposal in writing and dated 30th September 1932, was made to the Sun Life Assurance Company of Canada for an assurance on his life, but that the said Assurance Company declined to accept the same and (b) that in Jadunath's personal statement he concealed the fact that this proposal was rejected, and that he also concealed and/or made an untrue statement as to the results of his medical examination with a view to insure his life with the Sun Life Assurance Company of Canada. When the case came up for trial, the plaintiffs' solicitor by a letter dated 22nd May 1940, to the defendants' solicitors raised the plea of waiver as follows:

In continuation of my letter to you dated 26th April last I have to furnish you with the following particulars regarding the question of waiver to be taken up by the plaintiffs at the hearing of this suit viz. - Assuming but not admitting that the life of Jadunath Sarkar had been rejected on 5th October 1932 by the Sun Life Assurance Company of Canada as alleged in para. 4(a) of the written statement the fact of such rejection was communicated to the defendant company by a rejection card duly issued and sent to the defendant company on the 17th day of October 1932 by the Indian Life Assurance Offices Association.

2. There were two other pleas of waiver raised in that letter arising out of matters alleged to have occurred after the death of the deceased. Those second and third pleas were not sustained at the trial and they have not been raised herein. The policy itself contains this clause:

Provided always (1) that the proposal and declaration made by the assured and the personal statement before the medical examiner with declaration made by the life assured dated as specified in the schedule shall be the basis of this contract, it being nevertheless hereby expressly declared that after the expiry of three years from this date, neither error in nor omission from, such proposal, personal statement or declaration, not wilful and in the nature of fraud, shall render this policy void.

3. The proposal referred to contained the following: questions and the answers thereto:

Questions. Answers.

4A. In what com- Sun Life, Rs. 4000 Policy panies have you in- No. 386728 in 1919 for 20 sured your life? years Endowment. North British, 4000 Policy B. What are the No. 56728 in 1919 for 20 policy Nos. and their years. amounts? Bombay Mutual, Rs. 5000 Policy No. 18001 in 1933 for 15 years. Metropolitan, Rupees 3000 Policy No. 3611 in 1933 for 18 years Endowment. Hindustanis. 5000 Policy No. 75151 in 1933 for 15 years. Great Eastern, Rs. 4000 Policy No. 7881 in 1935 for 14 years. 5A. Has any pro- posal or application to insure your life ever been made to any company upon which a policy has not been issued on the plan and for the amount for which you applied? No.

B. Was any medical man Consulted as to insura- bility of No. your life?

C. If so, who and Does not arise, with what results?

4. The declaration contained the following:

I on behalf of myself and of any person who shall have any interest in my policy issued under this policy do hereby solemnly declare that the statements and representations made in this proposal are correct and true to the best of my knowledge and belief, whether written by my hand or not and shall, along with the declaration and statement made before the medical examiner be the basis of the contract between me and the above Life Insurance Co.

5. That was signed by Jadunath in the presence of the medical examiner. In the personal statement in answer to a question if he ever suffered from diabetes he said "No". There was a further declaration as follows:

I the undersigned applicant for insurance (Jadunath Sarkar) do solemnly declare that according to the best of my knowledge and belief, I am now in good health, that my age does not exceed that mentioned above and that I have fully and faithfully answered all such questions as have been put to me by the Medical Examiner and I hereby covenant and agree that this declaration shall be the basis of the contract between myself and the Company and if any untrue averment is contained herein or if any of the facts required to be set forth in the proposal and in the personal statement be not truly stated all moneys which shall have been paid up on account of the assurance made in consequence hereof shall be forfeited and the Assurance itself be absolutely null and void.

6. Put shortly, the contention of the defendants appellants is that the answers to questions NOB. 5-A, B and C given in the proposal were untrue and untrue to the knowledge of Jadunath. It is not disputed that on 30th September 1932, Jadunath applied to the Sun Life Assurance Company of Canada for a life Insurance Policy and it is not denied that no such policy was ever issued upon that application. That in itself is sufficient to show that the answer to question No. 5A, was untrue. But it is said that the answers were not "wilful and in the nature of fraud" to use the words of the policy itself. Evidence has been given by Dr. Kumode Nath Ghose of Calcutta to the effect that on 30th September 1932, at the instance of the Sun Life Assurance Company he examined Jadunath for the purpose of ascertaining whether the Sun Life Assurance Company would accept Jadunath's proposal. Dr. Ghose's evidence is that he found slight trace of sugar in Jadunath's urine, that in order to further assure himself he took another sample of urine from Jadunath, and that he again found sugar. He made his report accordingly to the Sun Life Assurance Company. A little time after that Jadunath came to the house of Dr. Ghose - to use his own words: "He came to me two or three times to my house and he tried his best to convince me that he was not passing sugar. He was very anxious to have a policy from the Sun Life. But I convinced him later on by taking two or three samples of his urine and examining it in his presence, that he was passing sugar. Then he dropped his proposal." He also says : "He (i.e. Jadunath) came and informed me that his life had not been accepted because he was informed by the company that he was passing sugar in his urine."

7. Now, the learned Judge has made no adverse comments upon Dr. Ghose's evidence and I see no reason to disbelieve it. It is clear from that evidence that Jadunath's answer to question No. 5B "Was any medical man consulted as to insurability of your life? - No" was not correct as also the answer to question No. 6C "If so, who and with what results - Does not arise". The rejection of a proposal to effect a life insurance is not a thing that a man is likely to forget, and when he goes to the length of trying to persuade the doctor who examined him

for the Insurance Company, that he was not suffering from any untoward symptoms in the way that Jadunath did, it is impossible to think that when Jadunath gave his answers to questions Nos. 5A, B and C he did not know that what he said was untrue. Those answers were untrue and they were untrue to the knowledge of Jadunath. Jadunath is dead and cannot speak for himself; we have to do the best we can under the circumstances and however unfortunate the result may be for Jadunath's family, the conclusion must be arrived at that Jadunath's answers were wilfully untrue and as he was proposing to obtain through them a policy of insurance on his life, that they were in the nature of fraud. That being so, the basis of the contract of insurance had according to the terms of the policy gone, and the insured and his representatives had no rights under it.

8. But it is said that the company - the Western India Life Insurance Co. Ltd. - knew about 17th October 1932, that is to say, a short time after the proposal, that these answers were untrue, but that they continued to accept the premiums payable under the policy down to the death of the deceased and that they thereby waived their right to insist that the basis of the policy had gone. The learned Judge has upheld that plea of waiver. The plea is based, as the letter of 22nd May 1940 sets out, on a statement that a rejection card was sent on 17th October 1932, by the Indian Life Assurance Offices Association to the defendant company. It is necessary to explain what a "rejection card" is and how it comes into existence. There is an institution in Calcutta called the Calcutta Claims Bureau. This institution is run by a number of European Insurance Companies who are, if I may use the word, the constituents of the Bureau. In addition to these European Companies, there is another member which is called the Indian Life Assurance Offices Association. The Indian Life Assurance Offices Association has as its constituents a number of Indian Insurance Companies. The Indian Life Assurance Offices Association has its head quarters in Bombay, but has a branch in Calcutta.

9. The Calcutta Claims Bureau operates in this way: whenever one of its constituent members has occasion to reject a proposal of life insurance, it sends particulars of the rejection to the Claims Bureau which makes a note of it and then issues to each of its constituents a card on which are certain particulars relating to the rejected proposal. The card itself is pink in colour and ruled out into certain rectangles. Each card is given a serial number which is put on the left-hand top corner. In the next rectangle at the top are words indicating the name of the person whose proposal has been rejected. The full name was not put down in this rectangle in 1932; for instance in the case of this particular rejected proposal with the Sun Life Assurance Company (which was a constituent member of the Claims Bureau) was this word "Sir" which is a short for "Sirkar" and underneath "Jadunath". In the next rectangle at the top right-hand corner is the date of the rejection and immediately below the name of the person rejected is the date of his birth. In the adjoining rectangle under the date of the rejection is an Index number which indicates the name of the company to whom the

proposal had been made and by whom it has been rejected. It is obvious that this rejection card is intended to give information of the rejection to the constituent members but not to disclose too much to any person who has no right to it. The constituent member knows from a key which is provided which is the Insurance Company that is indicated in the last rectangle in the middle row and each member can, if so minded, get into touch with the rejecting company and ascertain the circumstances of the rejection.

10. It is said by the plaintiffs here that a rejection card was received by the Western India Life Insurance Company on 17th October 1932, that the defendant company, namely, the Western India Life Insurance Company, knew or had the means of knowing about that time of his rejection, and that by taking the premiums thereafter they waived their rights under the policy. It is necessary at this stage to realise what is meant by waiver and what are the conditions necessary for its operation. There is a passage in the Treatise on the Law of Evidence by the late Woodroffe J. and the late Mr. Syed Ameer Ali, Edn. 9, by the late Woodroffe J. at page 760 as follows:

A waiver is an intentional relinquishment of a known right, or such conduct as warrants an inference of such relinquishment; and there can be no waiver unless the person against whom the waiver is claimed had full knowledge both of his rights and of the facts which would enable him to take effectual action for their enforcement. The burden of proof of such knowledge is on the person who relies on the waiver. A presumption of waiver cannot be rested on a presumption that the right alleged to have been waived was known.

11. That passage is founded upon judgment of Ashutosh Mookherjee, J. in *Dhanukdhari Singh v. Nathima Sahu* ("07) 11 C.W.N. 848. The passage in the judgment of Ashutosh Mukerjee J. is founded on a number of English cases and in particular, that in *Earl of Darnley v. Proprietors &c of the London, Chatham, and Dover Railway* (1867) 2 H.L. 43 in that particular case there was an agreement between two parties giving power to a third to make, within a certain time, an award on a matter in difference between them. One of the parties not knowing that the award had been made beyond the specified time, took up the award and paid for it. It was held that his doing that did not amount to a waiver of the condition as to the time for making the award which was contained in the agreement. At p. 57 Lord Chelmsford, the Lord Chancellor, said this:

Assuming that the solicitors knew at that time that Clutton had not made his award till then, and that when they heard in June from Oakley that "the award as to crossings etc., had been waiting to be taken up for some months" they also knew that it had not been in existence until after the time fixed by the agreement; yet I cannot think that their act in receiving it and paying Clutton's charges can have the effect of waiving all objection in point of time. A waiver must be an intentional act with knowledge.

12. If the plea of waiver which is specifically pleaded is to succeed in this case, it

must be shown that the premiums were taken intentionally with knowledge of the untrue statements in the proposal. In my view means of knowledge here would not be enough in order to satisfy the plea of waiver. In that connexion I refer to the case in *Mackintosh v. Marshall* (1843) 11 M. & W. 116. There the owner of a ship sailing from St. John's Newfoundland, asked for an insurance upon that vessel sometime towards the end of January 1842. The vessel had already sailed. The statement of the shipowner was that the vessel was to sail at the end of the month of December 1841. The broker who procured the insurance from the defendant, the underwriter, showed the underwriter a letter setting out the passage that the vessel, the *Elizabeth*, was to sail at the end of the month (i.e. December) and also put before him a copy of Lloyd's sailing list from Newfoundland which was described as being a duplicate, the original being on the vessel to be insured, the *Elizabeth*. The vessel had actually sailed on the 27th, four days before the end of the month; "if the underwriter had looked on the back of the Lloyd's sailing list which was put before him he would have seen that the vessel had sailed on the 27th. But he did not examine the back of the list and accepted the risk. The risk of course was greater the earlier the vessel had sailed. It was held that the underwriter was not bound by the insurance and in giving judgment Alderson Rule at page 127 said:

I think, the moment it appeared that the party was communicating a letter, which clearly stated that the vessel was to sail subsequently to 27th December, before the Jury could consider the defendant to have been bound by the list at Lloyd's they ought to have had affirmative evidence that he actually did see it, and not merely that he might. There is: no evidence to shew that.

13. The waiver then must be intentional with knowledge. What was the knowledge of the defendant company with regard to the untrue statements of Jadunath relating to the rejection of his proposal by the Sun Life Assurance Company? The card relating to Jadunath's rejection was undoubtedly issued to the constituent members of the Claims Bureau in October 1932. That is the evidence of Mr. Archer. One can presume that each of those cards in the ordinary way would reach each constituent member, although there is always the possibility that through some mischance or slackness on the part of someone concerned with sending out cards, it may be overlooked. But the evidence of Mr. Archer is that the cards with regard to Jadunath's rejection went out in October 1932. In the ordinary way one of those cards would reach not the Western India Life Insurance Company, but the Indian Life Assurance Offices Association. No witness was called from the Indian Life Assurance Offices Association to state that a rejection card relating to Jadunath was sent to the Western India Life Insurance Company, but the Western India Life Insurance Company being a constituent of the Indian Life Assurance Offices Association would in the ordinary way, if all went well, get not one of the cards issued by the Calcutta Claims Bureau, but a similar one issued by the Indian Life Assurance Offices Association. But again there is always the possibility of one not reaching some constituent of the Indian Life Assurance Offices Association including the Western India Life

Insurance Co. But in the ordinary course of things, one would, if all went well, reach the defendant company somewhere about October 1932. Now the defendant company say that they had no card relating to Jadunath's rejection. It is a contest whether a thing usually done was in the ordinary course of business done or whether, as the defendants say, they did not get a card. Panckridge J., heard the evidence of Mr. Joshi, who was the office manager of the defendant company. Mr. Joshi impressed him unfavourably, so that he came to the conclusion that in spite of what Mr. Joshi said about the card not being in possession of the defendant company, the defendant company had it. Now, the opinion and finding of a Judge who sees the witnesses and hears their testimony are not lightly to be set aside by an appellate Court which only considers the record of the evidence. Two things, however, have impressed me with regard to the question of the defendant company's possession of the pink card. The first is that on receipt of the present proposal at their head office in June 1935, the defendant company wrote a letter to the Sun Life Co., on 27th May 1935. It was headed "Your Pol. No. 386723." It will be remembered that in the proposal form, Jadunath had stated that he had insured with the Sun Life Assurance Co. for rupees 4000 being Policy No. 386723 of 1919. The defendant company wrote on 27th May 1935 to the Sun Life Assurance Co.'s office in Bombay with regard to that Policy as follows:

We are considering a proposal from the above gentleman (Jadunath Sarkar) who, we understand, is insured with you under your Pol. No. 386723. The party has been medically examined for us, and we have the medical report before us. We shall, therefore be much obliged, if you will kindly let us have an extract from your medical report and personal statement on the life mentioned, stating therein the decision of your Board.

If, however, the proposal has been completed at other than normal rates or under a Scheme of Assurance other than proposed, a true copy of the report of the medical examination and of the personal statement of the proposed may kindly be supplied.

14. In answer to that the Sun Life Assurance Co., wrote back a letter on 5th June 1935, stating among other things:

I would like to state that the copies of proposal and the medical report are not available at this office. The proposal was for a policy of Rs. 4000 on endowment 20 plan and was submitted in November 1919. It was accepted by our head office at ordinary rates and without a lien.

15. It was evident, therefore, that the defendant company were concerned with the previous proposal of Jadunath with the Sun Life Assurance Co. which Jadunath had disclosed to them and the results of it. It is difficult to think that if they went to that trouble to enquire from the Sun Life Assurance Co. about the 1919 policy, they would have neglected to enquire about the proposal rejected by the same company in 1932, if they had known of that proposal; that is one

matter that struck me, which the learned Judge did not refer to in his judgment and apparently did not consider. There is another matter to which the learned Judge did not refer and apparently did not consider which seems to me to bear on the question whether the defendant company got a pink card relating to Jadunath's rejection. The Hindusthan Co-operative Insurance Co., which carries on business and has its head office in Calcutta was, like the Western India Life Insurance Co., a member of the Indian Life Assurance Offices Association in Bombay. It was a constituent of that Association in the same way that the defendant company was. Jadunath had, as he stated in his answer to question No. 4 of the proposal form in the present case, insured with the Hindusthan Co-operative Insurance Co. 1933 for a sum of Rs. 5000. Apparently, that proposal was accepted by the Hindusthan Co-operative Insurance Co. Now, the Hindusthan Company was due to receive a pink card relating to Jadunath's rejection from the Indian Life Assurance Offices Association in 1932 in just the same way that the defendant company were. It is noteworthy, and there is no question as to this, that they insured the deceased Jadunath's life and what is more they paid upon the policy on Jadunath's death. A representative from the Hindusthan Company, Sachidananda Das Gupta was called. His evidence was as follows:

Q. Was Jadunath Sarkar insured with your company?

A. Yes.

Q. Is Hindusthan Insurance Co. a member of the Indian Life Offices Association, Bombay?

A. Yes.

Q. Have you paid the claim of Jadunath Sarkar?

A. Yes.

Q. Did you receive any card from the Indian Life Offices Association?

A. I can answer the question after consulting the file. (Referring to the file) our record does not show that we received a rejection card before we took the risk of the policy?

16. Later he said in answer to a question:

Q. If you had received the rejection card then you would not have written to the Association complaining?

A. Certainly not.

17. Now, it is said that the usual course of business indicates that the defendants received that card. The defendants say that they never got it. In the same way the Hindusthan Co-operative Insurance Company who were due to get the card never got it. That suggests to my mind that there is doubt as to whether cards relating to Jadunath were sent out by the Indian Life Assurance Offices

Association as assumed.

18. Panckridge J. in his judgment in criticising the evidence of Mr. Joshi said that he had not produced the file. The file was the sum total of the cards which the defendant company received from the Indian Life Assurance Offices Association, presumably kept in some sort of a file. Mr. Joshi was not bound to produce the whole of that file. He was bound to produce the card relating to Jadunath but not the others. If it had been desired that he should produce the whole of the cards, an order could have been made to that effect. None was made. Panckridge J. criticised Mr. Joshi's evidence because Mr. Joshi did not appear to be very willing to produce the other cards, although he did offer to do so. In my opinion that criticism is not well-founded. He was bound to produce Jadunath's card, if he had it, but he was not bound to produce the others. Panckridge J. criticised Mr. Joshi because he had not examined the serial numbers on the cards. I do not see that it was necessary to examine the serial numbers. If he examined the cards and found that there was none relating to Jadunath, it seems to me that that was enough. It may be that there was something in Mr. Joshi's mind which he was troubled about which produced an unfavourable impression upon Panokridge J. But after reading the evidence of Mr. Joshi, it does not appear to me that he either did anything that was unreasonable or refused to do anything that was reasonable. There is no evidence that the Indian Life Assurance Offices Association sent out cards relating to the rejection of Jadunath; having regard to the fact that the Hindusthan Co-operative Insurance Company did not receive such card and the fact that the defendant company deny having one and subsequently wrote to the Sun Life Assurance Company about the previous policy and not about the rejection, I come to the conclusion notwithstanding Panckridge J.'s strictures upon Mr. Joshi and the adverse inference that he drew as to his credibility from his behaviour on the whole that the evidence of Mr. Joshi is correct.

19. I am of the opinion therefore and so find, that at all material times the defendant company was not in possession of the rejection card relating to Jadunath. That being so, the defendant company not having the means of knowledge still less what is essential to the plaintiffs' case of waiver, the actual knowledge of Jadunath's rejection by the Sun Life Assurance Company in 1932 after medical examination, it cannot be said that they waived their rights to insist that the basis of the policy had gone by reason of the untrue statements made by Jadunath. For that reason I am of the opinion that this appeal must be allowed. The appellants will get the costs of the appeal but there will be no costs in the Court below.

Edgley, J.

20. I agree that this appeal must be allowed. In this case, the initial onus lay upon the defendant company to show that they were legally entitled to avoid the contract. In my view, they were able to discharge this onus by showing that in 1935 Jadunath Sarkar had omitted to state certain material facts when he made

his proposal for insuring his life. The defendant company were also able to show that they were not affected by the proviso to the policy that "after the expiry of three years from this date, neither error in nor, omission from such proposal, personal statement or declaration, not wilful or in the nature of fraud shall render this policy void." In other words, they proved that certain material information had been wilfully withheld from them by Jadunath and that his conduct in this respect was in the nature of fraud. This being the case, the onus was then thrown upon the plaintiff to show that the defendant company had waived their right to annul the policy.

21. With regard to this point, Mr. Banerjee on behalf of the plaintiffs argues that it is sufficient for his purpose to show that a rejection card said to have been issued by the Indian Life Assurance Offices Association reached the defendant company. In order to do this, Mr. Banerjee attempts to show that this rejection card must have reached the Western India Life Insurance Co., Ltd., in the ordinary course of business. Now the ordinary course of business is a relevant fact u/s 16, Evidence Act, and u/s 114 of that Act the Court may presume that the ordinary course of business is followed. This presumption, however, cannot arise unless the course of business has been proved or admitted. In my view, the evidence which was given in this case was quite insufficient for the purpose of showing that a rejection card must have reached the Western India Life Insurance Co., Ltd. in the ordinary course of business. It is true that Mr. Archer gave evidence to the effect that these rejection cards are distributed to the constituents of the office in which he is employed. There was, however, no satisfactory evidence as to the manner in which these cards are re-distributed by the Indian Life Assurance Offices Association, which was one of the constituents of the Calcutta organization. Further, it was not shown what happened to these cards after they had been received in the various offices to which they were finally distributed, whether the system which was followed was such that the absence of a card, which a constituent office was entitled to receive, would be immediately detected and whether a requisition would be made for it as a matter of course. With regard to this matter, Panckridge J. states in his judgment:

In my opinion having regard to the relations which must exist between the Association and those who are its members if it is a fact that the cards were not sent out, it was for the defendants to call evidence to that effect from the Association.

22. In my view, the learned Judge has wrongly placed the onus upon the defendants with regard to this particular point. Having regard to the circumstances of the case the onus to prove the course of business lay with the plaintiffs and not with the defendants. Mr. Joshi's answers certainly show that his office was entitled to receive rejection cards but I am not prepared to hold that his evidence indicates that the rejection card relating to the proposal to the Sun Life Co. in 1932 was actually received by the defendants. It is certainly significant that, when the Western India Life Insurance Co. Ltd., wrote to the Sun

Life Assurance Co. of Canada on 27th May 1935, they made no reference to the rejection of Jadunath's application by the latter company in 1932; and the letter addressed by the Hindusthan Co-operative Insurance Society Ltd. to the Indian Life Assurance Offices Association on 7th November 1938 also indicates that the particular company had not received the rejection card which is supposed to have been issued by the Indian Life Assurances Association on 17th October 1932. Having regard to this evidence and the circumstances to which I have referred, I am of opinion that the plaintiffs have not succeeded in discharging the onus which lay upon them to show that the rejection card had actually been received by the defendant company.

23. Even if it be assumed, however, that the card had been received by the Western India Life Insurance Co., Ltd., I am of opinion that this fact would not be sufficient for the purpose of establishing the plaintiffs' case. It would merely show that the defendant company had a document in their office which if it had been consulted might have indicated to them that an application for the insurance of Jadunath's life had been rejected by the Sun Life Assurance Co. in 1932. The question which requires consideration in connexion with this matter is whether this knowledge was actually, present in the minds of those responsible for the affairs of the defendant company in 1935. Mr. Banerjee states that if the card had actually been received, his clients would be entitled to succeed having regard to the provisions of Section 19, Contract Act, the relevant portion of which is in the following terms:

When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

* * * * * Exception. - If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of Section 17 the contract nevertheless is voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

24. On this point, Mr. Banerjee's argument is that, if the card had been received, the Insurance Company had the means of ascertaining with ordinary diligence that a previous proposal had been rejected by the Sun Life Assurance Company of Canada. In my view, however, this section cannot apply in the present case where the Insurance Company are relying on the terms of a defeasance clause within the contract itself. The conditions demanded by this defeasance clause have been fulfilled and the defendant company are, therefore, entitled to annul the policy unless the plaintiffs are able to prove that the company had waived their rights. With regard to the question of waiver, I entirely agree that strict proof is required and that the burden of proof lies upon the person who alleges it. It is not sufficient merely to prove that the Insurance Company had the means of knowing that a previous proposal for insurance had been rejected by another company; but it is also essential to show that they actually had this knowledge at all material times and that they knowingly condoned the conduct of the assured

in furnishing them with incorrect information. In my opinion, this matter is covered by the principle laid down by Cockburn C.J. in *Bates v. Hewitt* (1867) 2 Q.B. 595. In that case the learned Chief Justice observed at page 604:

No proposition of insurance law can be better established than this, viz., that the party proposing the insurance is bound to communicate to the insurer all matters which will enable him to determine the extent of the risk against which he undertakes to guarantee the assured.

25. His Lordship then went on to say:

I do not mean to say that, if the insurer choose to neglect the information which he receives, he can take advantage of his, wilful blindness or negligence, if he shuts his eyes to the light, it is his own fault, provided sufficient information as far as the assured is concerned, has been placed at his disposal. If, indeed, the insurer knows the fact, the omission on the part of the assured to communicate it will not avail as a defence in an action for a loss; not because the assured will have complied with the obligations which rested on him to communicate that which was material but because it will not lie in the mouth of the underwriter to say that a material fact was not communicated to him, which he had present to his mind at the time he accepted the insurance.

26. The principle which appears to have been adopted in this case is that possession of the means of knowledge will not be sufficient to constitute waiver by the insurer but that actual knowledge of the material fact must be proved. This principle was also followed by the Court of appeal in *London General Insurance Company v. General Marine Underwriters' Association* (1921) 1 K.B. 104. It follows, therefore, that the onus lay upon the plaintiffs not only to show that the rejection card had been received by the defendant company but that these cards were consulted by that company in the ordinary course of business at the time when proposals for insurance were received. The letter written by the Hindusthan Co-operative Insurance Society Ltd., to the Indian Life Assurance Offices Association on 7th November 1938, to which reference has already been made, seems to show that in that office at any rate these cards could not have been consulted as a matter of general routine when applications for insurance were received. Further, Mr. Joshi's evidence seems to indicate that until 1938, even if these cards were received in the office of the Western India Life Insurance Co. Ltd., it is unlikely that any regular and systematic use was made of them. In fact, it was not until 1938 that a register was introduced for the purpose of facilitating reference to these rejection cards. It follows, therefore, that in any view of the case the plaintiffs have failed to discharge the onus which lay upon them and the defendants are entitled to succeed in this appeal.