(1988) 08 BOM CK 0011

In the Bombay High Court

Zilla Sahakari Kendriya Bank Maryadit and another — APPELLANT

Vs

General Assurance Society Ltd. — RESPONDENT

Date of Decision : 25-08-1988

Acts Referred:

Citation : (1990) 69 CompCas 671

Hon'ble Judges : B. Lentin, J;Ashok Agarwal, J

Bench : Division Bench

Advocate : K.L. Desai and D.R. Zaiwalla, for the Appellant; V.R. Chhatrapati and Miss S.P. Nanavati, for the Respondent

Judgement

Agarwal, J.—Taking exception to the dismissal of their suit, the original plaintiffs have preferred the present appeal.

2. Plaintiff No. 1 is a co-operative bank carrying on the business, inter alia, of advancing moneys on pledge of agricultural produce/processed goods, etc. Plaintiff NO. 2 is a co-operative society which, inter alia, advances loans to its members, the farmers producing cotton. It also advances loan to traders on pledge of the agricultural produce of pressed cotton bales. The defendants are insurers carrying on the business of general insurance.

3. The events that led to the filing of the present suit occurred at Anjad, a hamlet in Madhya Pradesh situate some eighty miles from Indore. This village is situate in the vicinity of a cotton producing area. It is a market place for auction sales of ginned and pressed cotton bales. The process of ginning and pressing cotton used to be carried on at Maganalal Nathulal jain Ginning and Pressing Factory at the said village Anjad. Merchants who were members of plaintiff No. 2 society used to purchase cotton form the farmers and used to obtain loans from plaintiff No. 2 on pledge of the cotton bales in favour of plaintiff No. 2 Plaintiff No.2 in turn would obtain advances from plaintiff No. 1 on re- pledging the said cotton bales. The pledged cotton bales used to be stored in the aforesaid Maganlal Nathulal Jain Ginning and Pressing Factory. Between June 20, 1966,

and June 16, 1966, it is the case of the plaintiffs that the plaintiffs took out in their joint names a fire insurance cover in respect of 743 bales of cotton. This was under five insurance policies and two cover notes. The value of the bales was Rs. 3,61,000 and were covered in an amount of Rs. 3,66,000. On the night between the 19th and 20th of June, 1966, the said 743 cotton bales which were stored in the Manganlal Nathulal Jain Ginning and Pressing Factory caught fire. The fire which blazed for about 12 hours from 3 a.m. to 3 p.m. reduced the entire stock barring 13 bales to ashes. The 13 cotton bales were only partly burnt. One shankarlal Chdalal, the manager of Maganlal Nathulal Jain Ginning and Pressing Factory, was prosecuted for arson but was discharged for want of evidence on October 31, 1986. The surveyors of the defendants inspected the site and prepared their survey reports dated April 3, 1967. As the claim of the plaintiffs in respect of the loss sustained on account of the fire was not settled, the plaintiffs filed the present suit. According to the plaintiffs, the said 743 cotton bales which were burnt belonged to six merchants who had pledged the same to plaintiff No. 1 and both the plaintiffs, being the joint beneficiaries under the insurance taken out with the defendants, were entitled to be reimbursed for the loss sustained by them on account of the fire.

4. It may be mentioned that some time during December, 1965, and January, 1966, an anonymous letter was received by the head office of plaintiff No. 1 wherein it was, inter alia, stated that the letter purported to be an intimation of a plan to extort money from the insurance company by setting fire to the cotton bales, It stated that old stocks of cotton bales had been overvalued while pledging the same to plaintiff No. 2 and plaintiff No. 1 and had been insured at an exhorbitant value. A carefully drawn up plan had been hatched to reduce the said bales to ashes, by setting them on fire, to receive the full claim from the insurance company. Such an intimation was given so that the conspiracy of the traders to cause damage to the insurance companies by burning down national produce should not succeed. The defendant resisted the claim of the plaintiffs by denying the suit allegations. It contended, inter alia, that the plaintiffs had been guilty of suppression of material particulars, viz., the aforesaid anonymous letter which was relevant in the matter of taking out the insurance cover. The insurance policy had been taken out in favour of plaintiff No. 1 alone. Control Order and hence could not validly claim a beneficial interest on the strength of the pledge in its favour so as to entitle it to recover the amounts under the insurance policies. the pledges by the merchants in favour of plaintiff No. 2 and by plaintiff No. 2 to plaintiff No. 1 were disputed. The cotton bales had been overvalued while proposing the insurance cover. It was finally contended that the fire in question had been state managed by the plaintiffs themselves or through their agents and that the plaintiffs had thereby forfeited the claim under the policies. The defendants thus, prayed for the dismissal of the suit.

5. At the trial, the plaintiffs examined two witnesses on commission, viz., Damodar Purohit, the manager of plaintiff No. 1 bank and Gyaniram Sharam, the accountant of plaintiff No. 2. It examined four of the six merchants who,

according to the plaintiffs, had pledged their cotton bales to plaintiff No. 2, viz., Noormohamed Manshri, partner of Mangilal Motilal (PW-6), Surajmal Lunkar, proprietor of Fulchand Akechand (PW-7) and a member of plaintiff No. 2-society, Surajsingh Omkarsingh Chauhan, partner of Chansing Mohansing (PW-8) and Hussein Tantoojo (PW-9). It also examined Manoharsingh Chauhan (PW-4), who held a dual post, namely, of being an insurance agent of the defendant as also part-time additional manager of plaintiff No. 2. It examined Sudhakar Songirkar (PW-2), the manager of plaintiff No. 2, Devishankar Bhargav (PW-5), an employee of plaintiff No. 2 and Ratnakar Manjrekar (PW-3), agent of plaintiff No. 1. It also examined Kailashchand Jain (PW-1), partner of Manganlal Nathulal Jain Ginning and Pressing Factory.

6. In rebuttal, the defendants examined B.K. Jadhav (DW-1) and J.M. Kapadia (DW-2), the two insurance surveyors who had visited the site of the fire soon after the incident.

7. By the impugned judgment and decree, the learned single judge was pleased to hold that the fire in question had been state-managed and was a result of collusion and conspiracy between the plaintiffs and the merchants. The plaintiffs had thus, forfeited their claim under the insurance policies. The plaintiffs had proved the agreement of pledge between the merchants in favour of plaintiff No. 2 and the re-pledge by plaintiff No. 2 in favour of plaintiff No. 1 only in respect of 75 + 281 = 356 bales of cotton. Plaintiff No. 1 alone had an insurable interest under the insurance policies. Since plaintiff No. 1 did not hold a valid licence under the Cotton Control Order, it could not set up a valid claim to the insurance amount on the strength of the pledge in its favour. The plaintiffs were guilty of suppression and/or non-disclosure of the anonymous letter rendering the insurance cover void. The plaintiffs had also failed to take proper safety measures for the storage of the cotton bales. They being negligent were not entitled under the insurance policies. Pursuant to the aforesaid findings, the suit of the plaintiffs was dismissed with costs. Aggrieved by the said decree, the plaintiffs have preferred the present appeal.

8. Mr. Desai, learned counsel appearing in support of the appeal, in his characteristic persuasive manner, submitted that the learned single judge had erred in arriving at the finding that the fire that took place on the night between the 19th and 20th of June, 1966, had been the result of a conspiracy and collusion between the plaintiffs and the merchants who had pledged the cotton bales. According to him, there was no evidence either direct or circumstantial to hold that the said fire had been stage-managed, depriving the plaintiffs of their legitimate claim. In our judgment, there is no merit in the aforesaid contention for the following reasons :

The bales which were the subject-matter of the fire were old, having been purchased during the period between February, 1964, and December, 1965. this is clear from exhibit "A" annexed to the plaint. It has come in evidence that the value of the cotton bales diminish by passage of time. Though the four out of the six merchants examined at the trial disputed the claim of the defendants that they were not in sound financial position to redeem the pledged bales and the bases were not readily saleable, it is apparent from the evidence of the merchant, Noormohammed Ansari, partner of Mangilal Motilal, that he had not been able to sell his cotton bales despite best efforts in that behalf and he had only one offer for the purchase of his bales. He, as also the other merchants, claimed that they were financially well off and did not deem it profitable to sell the bales on account of the difference in the price offered and the price expected and that it was still in their interest to hold on to the goods despite the interest payable on the pledge amounts and the storage charges. The said claim is falsified by the evidence of PW-2, Sudhakar Songirkar, the manager of plaintiff No. 2-society. He admitted having sent notices issued by the second plaintiff to the six merchants calling upon them to release their goods within ten days failing which proceedings will be launched against them. According to him, the reason given by the six merchants for not having the goods released was that they did not have the money then and that they would release them when they had the money. He, therefore, knew that the financial situation of the said six merchants was not good. Though the merchants did not pay even after the notices, the second plaintiff did not auction the goods because they represented that there was a drought which had resulted in their moneys being blocked and that they should be given more time to pay. He deposed to the four post-dated cheques at exhibit "4" issued by the merchants being dishonoured on presentation. He also stated that under the agreement (exhibit "9") arrived at between the merchant, Fulchand Akechand, and the plaintiffs, it was agreed that the money would be paid in two installments and in the meantime, the merchants would replace the existing pledged bales with good quality bales as the price of the existing pledged bales had gone down and it was necessary to substitute them with bales of newer cotton. The price had gone down from Rs. 250 to Rs. 300 per candy. The merchants, however did not made payment by June 25, 1966, as required under the agreement. The existing bales pledged were also not replaced. The value of the bales of the other five merchants had also deteriorated in the same fashion. Having regard to the aforesaid deposition and to the fact that none of the merchants had produced their books of accounts though called upon to do so shows that the pledged bales were old and depreciated and not saleable and that the merchants were not in a sound financial condition to redeem them.

The next circumstance that requires mention is that despite the long outstanding dues from plaintiff No. 2 to plaintiff No. 1 and from the six merchants to plaintiff No. 2, no legal action had been taken to recover the amounts due under the agreements of pledge. PW-3, Ratnakar Manfrekar, the agent of plaintiff No. 1-bank, claimed that the value of the pledged bales had not gone down. When confronted with the statement, (exhibit 8) which recited that the goods had been depreciated in their value, he tried to explain that the same was prepared with the intention of demanding a heavy margin from the traders. He, however, admitted that in January, 1966, both the plaintiffs were very anxious that the six merchants should redeem their bales. We are not quite impressed with the explanation sought to be tendered on behalf of the plaintiffs for their inaction to take legal proceedings, viz., that the same would adversely affect the co-operative movement. It is apparent that the relations between plaintiffs Nos. 1 and 2 as also the six merchants were more than cordial and it was more than what meets the eye that had prompted the inaction to seek legal recourse to recover the dues under the pledged bales.

The next circumstance which, in our view, is a telling circumstance is the receipt of the anonymous letter by the head office of plaintiff No. 1 which gave a pre-warning in respect of a design to set fire to the pledged bales. The said letter warned of the impending false claim which was likely to be made against the insurance company in respect of the price of the old depreciated bales which had been stored apart for being set on fire. Apart from the fact that the said letter had not been disclosed to the defendants while taking out the insurance cover, it cannot be a mere coincidence that the facts stated in the said letter were later discovered as true. The mere fact that the manager of the ginning and pressing factory, Shankarlal Chdalal, had been discharged for want of evidence in a criminal prosecution can be no bar to arriving at a finding that the fire in question was not accidental but was deliberate and at the instance of and as a result of the collusion between the plaintiffs and the merchants. The evidence of the surveyors of the defendants, Bhalchandra Jadhav and Jagdish Kapadia, who had visited the site almost immediately after the fire and their survey report dated April 3, 1967, disclosed their findings that this was a case of arson and not of an accidental fire. Despite the receipt of the anonymous letter, it is intriguing that no special efforts were made by the plaintiffs or by Kailaschand Jain (PW-1), the owner of the ginning factory to secure the safety of the pledged bales. It was sought to be explained by the plaintiffs'' witnesses that there was no place to store the pledged bales inside the ginning factory premises as the season had not yet ended. It is clear from the evidence of Kailashchand Jain (PW-1) that in 1966, the season had ended in May, 500 to 600 out of 1,500 to 1,600 cotton bales had been shifted inside, that 200 bales other than the 743 bales belonging to the plaintiff were lying in the factory compound and it was only the 743 bales which had been shifted to the rear of the factory premises and no the other bales belonging to the said merchants. The witness was not able to assign any special reason why these 743 bales had not been shifted inside and why 500/600 bales had been taken inside. In December, 1965, and January, 1966, the witness had received information that the bales in the factory compound would be set on fire. When the season ended in May, 1966, 200 bales other than the 743 bales belonging to the plaintiffs were lying in the factory compound. Yet, only the 743 bales which were of the previous year were shifted by him to the rear of the compound and this was after he had received information about the possible fire. The other bales which were newer were not so shifted and were sorted separately within the factory. He admitted that there was place within the workers'' quarters to store additional bales at that time. He admitted that the shifting of the 743 bales to the rear was effected in February, 1966, and the bales of no other merchants were so shifted and the 200 bales of the plaintiffs were made to lie where they were in the open compound. The evidence of PW-2, Songirkar, also reveals that the bales owned by plaintiff No. 2 had been shifted to the boiler house. By saying that the 743 bales had been stored separately and were properly looked after, he meant that they were so stored that no bullock cart would collide against them. It is apparent from the above evidence and the situation in which these 743 bales were stored that the said storing was effected only to facilitate their destined end, viz., of being destroyed by arson. the place where the bales were stored was at an isolated place and at a safe distance from the building premises and this is yet an additional circumstance to hold that this was not a case of accidental fire but a deliberate act of arson. The further circumstance which needs mention is the utter lack of steps undertaken to safeguard the goods from fire. It may also be mentioned that after the receipt of the anonymous letter, instead of increasing the number of watchmen to ensure the safety of the cotton bales, they were reduced from five or six to only two.

The further circumstance is in respect of the utter inadequacy of the steps undertaken to extinguish the fire. The first person who noticed the fire was the watchman, Ramlal, since deceased. His statement at exhibit 27 indicates that while on his rounds on the night between the 19th and 20th at about 3 a.m., he saw smoke and noticed one bale in the middle of the corner of the stock of the bales towards the west burning. He, therefore, shouted, attracting the presence of 5 to 10 persons. The fire, however, spread quickly because of the wind. Some of the bales were salvaged. Though he was there till 6 a.m., no tanker had arrived and no arrangement had been made to bring water. PW-1, Kailashchand Jain, the owner of the factory who was informed of the fire by Ramlal did not ask for any explanation. When confronted with the suggestion that this fire was not accidental but was deliberately lit, he answered. "How can I say that it was deliberately lit ?" When confronted with the suggestion that the fire was lit as a result of the conspiracy between the plaintiffs'' officers and the six merchants and the employees of the factory, all that he stated was, "I do not know ; I was not a party to any such conspiracy." He denied the suggestion that because he was a party to the conspiracy, he took no steps to protect the 743 bales despite notice from the police in that behalf.

9. The evidence of PW-2, Songirkar, the manager of plaintiff No. 2, reveals that on seeing the fire, he went to the house of the chairman of plaintiff No. 2 to inform him of the fire. He also telephoned the office of the first plaintiff at Khargone and its head office at Dharwani.

10. The evidence of PW-3, Ratnakar Manjrekar, the agent of plaintiff No. 1-bank, shows that immediately on his learning of the fire, he rather than making efforts to summon the fire brigade, sent a telegram to the defendants informing of the fire. Since he had not mentioned the number of bales which had caught fire in the first telegram, he sent a second telegram specifying the number as 743 bales

having caught fire. Having appraised the evidence of the aforesaid witnesses, Songirkar and Manjrekar, we have good reason to hold that their efforts were directed more in the direction of making a claim against the insurers rather then taking steps to have the fire extinguished. Though it is true that the condition No. 1 in the fire insurance policy does require information regarding fire to be conveyed forthwith, the same would not justify the promtness in furnishing the said information in preference to the efforts to have the fire extinguished.

11. In view of the aforesaid discussion, we have no hesitation in endorsing the finding arrived at by the learned single judge that the fire in question was not accidental but was state-managed by the plaintiffs, their employees or their agents, the owners and the employees of the factory where they were stored and the merchants who had owned the same. In our view, this would be the irresistible conclusion that will have to be arrived at in view of all the facts and circumstances appearing in the case. Since no party can be permitted to take advantage of its own wrong, the plaintiffs would not be entitled to recover any amount under the fire insurance policies. once this issue is answered against the plaintiffs, the other issues which were pressed into service in the appeal pale into insingnificances as the answer to the issue would be sufficient to non-suit the plaintiffs. However, a reference to a few of the submissions advanced by Mr. Desai may be made.

12. Mr. Desai submitted that the non-disclosure of the anonymous letter was of no consequence as the same was known or at least deemed to have been known by the defendants-insurers. He pointed out that the hamlet Anjad had a population of only 14,000. The anonymous letter had been forwarded to the Anjad office of plaintiff No. 1 as also the police station and was known to all. The insurance agent who had taken out the insurance policies was the agent of the defendants as also the part-time manager of plaintiff No. 2. The knowledge of the agent was, therefore, the knowledge of the defendant-insurers. According to Mr. Desai, the learned single judge had erred in not dealing with this aspect of the assertions advanced on behalf of the plaintiffs. In our judgment, there is no merit in the aforesaid contention of Mr. Desai. As rightly pointed out by Mr. Chhatrapati, appearing on behalf of the defendants, the plaintiffs had not raised a specific plea that the defendants knew or would be deemed to have known of the anonymous letter. Consequently, no issue in that behalf had been raised. Barring the evidence of the surveyors'' report which could at best be in the nature of hearsay evidence, there was no evidence in respect of the knowledge of the anonymous letter by the defendants. It would not be open to the plaintiffs to raise the said plea in this appeal. moverover, the point of time at which the plaintiffs were required to disclose the said anonymous letter was prior to the taking out of the insurance policies. If the said knowledge could be attributed at a point of time subsequent to the drawing up on the insurance policies, the same would not come in the way of the defendants to avoid their liability on the ground of non-disclosure of material information. The fact that the said anonymous letter was a relevant factor for determining whether to accept or not

to accept the insurance cover or to determine the premium payable, cannot be disputed. Though it is true that PW-4, Manoharsingh, was both the insurance agent of the defendants as also the part- time manager of plaintiff No. 2, there is nothing on record to show that he knew of the anonymous letter and that too prior, in point of time, to the taking out of the insurance cover. Over and above the non-disclosure of the anonymous letter, the plaintiffs can also be held guilty of not disclosing the fact that the bales in question were old and not saleable, that the merchants who had pledged those bales had not been able to sell the same despite efforts and that they were in no financial state to redeem the same. These were also factors which were relevant for determining the risk of the insurance cover. The said information not having been disclosed would also entitle the defendants to avoid their liability arising out of the said insurance policies.

13. The further contention advanced by Mr. Desai was in respect of the finding arrived at by the learned single judge that barring 275 bales, the plaintiffs had failed to prove the pledged by the six merchants in favour of plaintiff No. 2 and the re-pledge by plaintiff No. 2 in favour of plaintiff No. 1. Though not of much consequence, we are of the view that, having regard to the evidence of Gangaram Sharma, the accountant of plaintiff No. 2, whose evidence was recorded on commission and the books of accounts of plaintiff No. 2, the cash book and the ledger (exhibit A-1 to A-10), stock registers (exhibits A-11 to A-26) and the pledge account of the six merchants (exhibits A-27 to A- 32), it must be held that the pledge by the six merchants in favour of plaintiff No. 2 is duly proved. Similarly, the said evidence read along with the pledge account of Plaintiff No. 1 in the books of plaintiff No. 2 (exhibits A-33 and A-34), the pledge-loan register of plaintiff No. 1 (exhibits A-36 to A-47) and the corresponding register (exhibits A-48 to A-60) would show that the re-pledge by plaintiff No. 2 in favour of plaintiff No. 1 is duly proved. We are not inclined to attach much significance to the concession of the counsel appearing on behalf of the plaintiffs to the fact that all the pledge agreements had not been duly proved as, in our view, it is not quite clear in what circumstances and in respect of which part of the evidence the said concession was reported to have been made. If the said concession had been made without reference to the evidence of the witnesses whose evidence had been recorded on commission, the same would not bind the plaintiffs. It could thus be held that the plaintiffs have succeeded in proving the agreement of pledge by the six merchants in favour of plaintiff No. 2 and by plaintiff No. 2 in favour of plaintiff No. 1.

14. The next question that was raised in the appeal was in respect of the construction and interpretation of the insurance policies issued by the defendants in favour of the plaintiffs. It was submitted by Mr. Desai, appearing on behalf of the plaintiffs, that the insurance policies as also the cover notes were taken out in the joint names of plaintiff No. 1 and plaintiff No. 2. Hence, both the plaintiffs had an insurable interest in the policies. Even though plaintiff No. 1 did not hold a valid licence under the Cotton Control Order, the same would not come in the

way of passing a decree in favour of plaintiff No. 2 as it did possess a valid licence and also had an insurable interest in the insurance policies. Mr. Chhatrapati, learned counsel appearing on behalf of the defendants, however, submitted that it was plaintiff No. 1 alone who was insured under the policies. The fact that plaintiff No. 2 had paid the premium or the fact that the insurance policies were intended to accrue for the benefit of both the plaintiffs would not be relevant and it was only the policies themselves that would determine the party in whose favour the insurance policy was taken out.

15. The policies (exhibits O to S) mention that they are in favour of plaintiff No. 1 a/c. plaintiff No. 2. It the policies were to be in favour of both the plaintiffs, the words a/c. Anjad Co- operative Marketing Society Ltd., would be redundant. The said policies are subject to the bank mortgage clause. Having regard to the clauses of the said policies as also the bank mortgage claues attached thereto, we are satisfied that the only beneficiary under the policy can be plaintiff No. 1 and it would not be open to go into the oral evidence adduced in the case to arrive at any contrary findings. Once it is held that plaintiff No. 1 alone has an insurable interest in the policies, no relief can be granted in its favour as plaintiff No. 1 does not hold a valid licence to hold cotton bales on pledge. The said pledges in favour of plaintiff No. 1 being against the statutory provisions of law, viz., the Cotton Control Order, plaintiff No. 1 would cease to have an insurable interest in the policies. The claim of the plaintiffs is thus liable to be rejected on this ground also.

16. The claim of the plaintiffs is liable to be rejected also on the ground that the plaintiffs have failed to prove that they had sustained any loss on account of the fire which loss alone the defendant insurance company was liable to make good. Though evidence has been led with regard to one suit having been filed by plaintiff No. 2 against the merchant, Fulchand Akechand, prior to the fire and certain other suits which were filed after the fire, no evidence has been led in order to show what action was taken by plaintiff No. 1 against plaintiff No. 2 to recover the amounts advanced under the pledges in it favour. Since plaintiff No. 1 alone had been found to have an insurable interest and no positive evidence has been led as to the extent of the loss suffered or for that matter any loss suffered by plaintiff No. 1 on account of the fire in question, no liability can be fastened on the defendants who could only be liable to indemnify such loss as may be found to have been suffered by plaintiff No. 1. It is true that there is no positive evidence to show that plaintiff No. 1 had been paid the amounts due to it under the pledge agreements between plaintiff NO. 1 and plaintiff No. 2. However, this not being a matter of conjecture, on relief can be granted on account of the failure to adduce proper evidence with regard to the loss sustained by plaintiff No. 1 in respect of the agreement of pledge between plaintiff No. 1 and plaintiff No. 2. This is specially so because the relations between plaintiffs Nos. 1 and 2 are shown to be extremely cordial.

17. In view of the foregoing conclusions, we are inclined to uphold the decree

passed by the learned single judge though on grounds different from the ones that had commended themselves to him.

18. In the result, we find no merit in the present appeal and the same deserves to be dismissed and is hereby dismissed with costs quantified at Rs. 20,000.

