APPELLATE CIVIL.

Before Mr. Justice Cornish and Mr. Justice King.

1936, December 14.

THE BENGAL INSURANCE AND REAL PROPERTY COMPANY, LIMITED, CALCUTTA (FIRST DEFENDANT), APPELLANT,

v.

VELAYAMMAL (PLAINTIFF), RESPONDENT.*

Life Insurance Policy—Amount due under—Trust in favour of nominee-wife in respect of—Condition—Married Women's Property Act (III of 1874), sec. 6—Effect of—Right to enforce trust—Suit to recover policy amount—Cause of action, where arises—Policy amount, joint family property or self-acquisition of assured, a member of a joint Hindu family—Presumption.

V the widow of a deceased Hindu, sued a Life Insurance Company, having its head office in Calcutta, for the recovery of the money due on a life assurance policy between the deceased and the company. The proposal for the policy was made through the company's agent at Erode. The agent was only authorized to canvass for proposals for insurance and had no authority to accept a proposal. The proposal for the suit policy was accepted by the company at Calcutta. Under the terms of the contract the policy money was payable in Calcutta. The assured died in Bangalore which is foreign territory. It was stated in the declaration, which was expressly incorporated in the policy, that the policy was for the benefit of the assured or his wife. Her right to the benefit depended upon the contingency of her surviving her husband if he died before the named date. The money for the premium was paid by the assured who was receiving money for his personal use from the funds of the joint family of which he was a member. The suit was filed in the Court of the Subordinate Judge, Coimbatore, which decreed the suit overruling the company's objection as to jurisdiction.

* Appeals Nos. 50 of 1935 and 239 of 1934 and Civil Miscellaneous Petition No. 342 of 1936.

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Held: no part of the cause of action arose within the Coimbatore Sub-Court's jurisdiction; but as the company had not been prejudiced by the trial being held within the particular jurisdiction, the decree of the Court below could not be interfered with in appeal by reason of the provisions of section 21, Civil Procedure Code.

Held further: a trust was created in favour of V by operation of section 6 of the Married Women's Property Act (III of 1874), the Official Trustee of Bengal would be the trustee and he alone would be competent to sue for the enforcement of the trust. But under Order VIII, rule 2, Civil Procedure Code, the Company could not be allowed to have the benefit of a defence which it did not raise in its written statement.

The circumstance that a benefit to the wife is of a contingent character does not prevent it from being a benefit within the Married Women's Property Act.

Held also that in the circumstances of the case the policy money did not belong to the joint family and that the widow was entitled to it absolutely.

Where an assured is shown to have had money available from private as well as from joint family sources, the presumption is that the assured paid the premia from his own money.

Case law discussed.

APPEALS against the decree of the Court of the Subordinate Judge of Coimbatore in Original Suit No. 134 of 1933.

PETITION praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to pass an order extending the time granted by the order in Civil Miscellaneous Petition No. 1810 of 1935 for furnishing the succession certificate by three months from the date of the final order in the proceedings for succession certificate in the lower Court.

APPEAL No. 50 OF 1935.

T. R. Venkatarama Sastri (with him *M. Sriramamurti*) for appellant.—As regards the question of jurisdiction; the agent

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of the Insurance Company canvassed for the insurance policy at Erode. He had no authority to accept the proposal which can only be done by the head office at Calcutta. The offer was complete only when it reached the head office. The acceptance also took place at Calcutta. Hence no part of the cause of action arose at Erode. The lower Court had no jurisdiction to entertain the suit; *Appu Thamban* v. *Foulkes*(1), *Mylappa Chettiar* v. *Aga Mirza*(2) and *The National Insurance Co., Ltd., Calcutta* v. *Seethammal*(3).

The plaintiff is not entitled to sue. In the declaration it is mentioned that the benefit under the policy was for the wife of the assured. The declaration should be treated as part of the policy; *Re. Norwich Equitable Fire Assur. Soc., Claim of Royal Insur. Co.*(4). No doubt the benefit conferred is of a contingent character, as the wife gets it only on her surviving the husband if he died before the named date. Still it comes within the purview of section 6 of the Married Women's Property Act; *Fleetwood's Policy, In re.*(5). Here a trust was created for her benefit and the Official Trustee of Bengal would be the trustee and he alone would be competent to enforce the claim; *Lakshmi Ammal* v. *Sun Life Assurance Co., Canada*(6).

K. V. Ramachandra Ayyar for first respondent.—Part of the cause of action arises also where the proposal was made. This was at Erode where the assured also lived. The offer was complete when the proposal was handed to the company's agent at Erode; *Bowden* v. *London, Edinburgh, & Glasgow Assur. Co.*(7). The cause of action arises also at the place where the assured died; *Vishvendra Thirtha* v. *National Insurance Co., Ltd.*(8). Even if the lower Court had no jurisdiction to try the suit, the appellate Court should not interfere unless the defendant satisfies the Court that he was prejudiced by the trial and there was a consequent failure of justice. [Section 21, Civil Procedure Code, and *Bengal Provident and Insurance Co.* v. *Kamini Kumar Choudhury*(9) were referred to.] That the widow cannot sue and that the Official Trustee of Bengal alone can sue is a new defence. It was not pleaded in the written statement or before the lower Court. So the Company should not

(1) (1919) 10 L.W. 445.
(2) A.I.R. 1920 Mad. 177, 180.
(3) (1933) 65 M.L.J. 455.
(4) (1887) 57 L.T. 241.
(5) [1926] 1 Ch. 48.
(6) (1933) I.L.R. 57 Mad. 536.
(7) (1892) 61 L.J. Q.B. 792.
(8) (1917) 41 I.C. 392.
(9) (1918) 44 I.C. 694.

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be permitted to raise it now. [Order VIII, rule 2, Civil Procedure Code, Order XIX, rule 15, of the English Supreme Court Rules and *Robinson's Settlement, In re. Gant* v. *Hobbs*(1) were referred to.] The Official Trustee can only recover it for the widow. The failure to implead him is a formal defect and it can be set right by adding him as a party to the appeal if necessary.

APPEAL No. 239 OF 1934.

K. Bhashyam Ayyangar and *V. C. Viraraghavan* for appellant.—The assured was the senior member and of right the manager of the joint family. He invested the family funds for insuring his life. So the policy should be deemed to be an acquisition for the benefit of the family. After his death, the surviving coparcener is entitled to the money covered by the policy; *Oriental Government Security Life Assurance, Ltd.* v. *Vanteddu Ammiraju*(2) and *Srinivasa Iyengar* v. *Thiruvengadathaiyangar*(3).

K. V. Ramachandra Ayyar for respondent.—The assured's mother was managing the family property. She was giving him some money for his personal use. The assured utilised a portion of it to pay the insurance premium. So the amount due under the policy was his self-acquisition and the joint family has no claim to it; *Lachmeswar Singh* v. *Manowar Hossein*(4). The assured was also borrowing from other persons to meet his expenses. In such circumstances, the presumption should be that the insurance premium was paid from his own private resources; *Balamba* v. *Krishnayya*(5).

Cur. adv. vult.

The JUDGMENT of the Court was delivered by CORNISH J.—The appellant in Appeal Suit No. 50 is the Bengal Insurance and Real Property Company, having its head office in Calcutta. It was sued by the plaintiff, the widow of one Sengottiah Goundan, to recover the money due on a life

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(1) [1912] 1 Ch. 717, 728.
(2) (1911) I.L.R. 35 Mad. 162.
(3) (1914) I.L.R. 38 Mad. 556.
(4) (1891) I.R. 19 I.A. 48; I.L.R. 19 Cal. 253.
(5) (1913) I.L.R. 37 Mad. 483 (F.B.).

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assurance policy between her husband and the Company. The proposal for this policy was made through the Company's agent at Erode on 24th August 1927. The proposal was accepted by the Company on 8th September 1927. Thereupon a half year's premium became payable within five days from the date of the Company's notice of acceptance of the proposal. But this premium not having been paid, a fresh certificate of health, as required by the Company's notice (Exhibit XXIII), had to be furnished by the assured to the Company. This he did on 22nd January 1928, and the declaration or certificate is Exhibit I. It stated that he was at the time in good health, and that since his medical examination on 30th August 1927 he had not consulted any medical man or suffered from any illness. The policy was issued on 5th May 1928. In a little over three months, namely, on 16th August 1928, the assured died of pernicious anaemia.

The plaintiff's claim to recover the money was resisted by the Company on two principal grounds: the written statement alleged (1) that the policy was made void by the fraudulent suppression of a material fact by the assured, viz., his disease, of which he must have been aware at the time when he made his declaration of good health on 22nd January 1928; and (2) that the trial Court at Coimbatore had no jurisdiction over the suit as no part of the cause of action had arisen within the limits of that Court's jurisdiction.

There is no evidence that the assured was ill when he made the declaration or that he was suffering then from the ailment which was so

soon to be fatal to him. The doctor who examined him in August 1927 certified the assured as a first class life for insurance. This witness says that he had never seen a case of pernicious anaemia ; but he has read about this ailment and he stated that he saw none of its symptoms in the assured when he examined him. The widow of the assured (P.W. 2) says that her husband was in good health until about a month and a half before his death. He was then advised to go to Bangalore for a change, and he died in Bangalore. The doctor who attended him there has not given evidence. He gave the certificate that assured was under his treatment for pernicious anaemia and that he died of this disease. This information is expanded in a later letter to the effect that the assured was under his treatment from 29th July till his death. But there is no evidence when this ailment seized the assured. Reference has been made to standard medical books, from which it appears that pernicious anaemia is an insidious complaint which may run its course rapidly within a period of six to twelve weeks. Upon this state of the facts it is impossible to hold that the defendant Company has succeeded in showing that the assured knew that he had this disease, or, indeed, that he had it, in January 1928 when he signed the declaration of his good health, or even in April when he paid the premium.

The learned Advocate for the appellant briefly referred to the question whether the plaintiff's suit might not be barred by article 85 of the Limitation Act, the suit having been brought more than three years after the proof of the death of the assured. But he very fairly conceded that it

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was difficult to maintain this position in the face of Exhibit XII. This document is a clear admission by the Company of the claim and is sufficient to save the bar of time. We are of opinion that the suit is not time-barred.

The main argument turned on the question of jurisdiction. The lower Court held that a part of the cause of action arose within its jurisdiction inasmuch as the offer of the assured was made at Erode. Undoubtedly the making of an offer may be part of the cause of action in a suit upon a contract which has resulted from that offer. But the material question is, where was the offer made? For until a proposal is received there is no complete offer; *Appu Thamban* v. *Foulkes*(1), *Mylappa Chettiar* v. *Aga Mirza*(2) and *The National Insurance Co., Ltd., Calcutta* v. *Seethammal*(3). The defendant Company's agent at Erode was only authorized to canvass for proposals for insurance. This is apparent from the instructions to agents which are printed at the top of the proposal forms with which the agents were supplied. These instructions inform the agent that he should see that the proponent answers all questions in the form properly in order to avoid correspondence and consequent delay in finally disposing of the proposal. From this it is clear that the agent had no authority to accept the proposal. All he had to do was to see that the proposal form was correctly filled up and to send it to the head office in Calcutta for disposal there. Until the proposal reached the head office there was no offer. The offer was made in Calcutta; it

(1) (1919) 10 L.W. 445. (2) A.I.R. 1920 Mad. 177, 180

(3) (1933) 65 M.L.J. 455.

was accepted in Calcutta ; and under the terms of the contract the policy money was payable in Calcutta. The cause of action arose entirely in Calcutta. We do not think that any particle of a cause of action in Erode can be extracted from the circumstance that when the half-yearly premium became payable, the Company, instead of sending its demand to the assured, directed its local agent to collect the money from him.

It has been held that in a suit to recover money payable on an insurance policy the cause of action arises at the place where the assured died ; *Vishvendra Thirtha* v. *National Insurance Co., Ltd.*(1). But this will not help the plaintiff ; for the assured died in Bangalore, and Bangalore, including the Civil and Military Station, is foreign territory : *Hayes, In re*(2). We think that no part of the cause of action arose within the Coimbatore Sub-Court's jurisdiction. But even so, section 21, Civil Procedure Code, provides that an appellate Court shall not allow an objection on the ground of want of jurisdiction of the Court of first instance, notwithstanding that the objection has been taken at the earliest opportunity, unless there has been a consequent failure of justice. This means that before an appellate Court will interfere on the ground of the lower Court's want of jurisdiction the defendant must show that he has been prejudiced by the trial being held within the particular jurisdiction : *Bengal Provident and Insurance Co.* v. *Kamini Kumar Choudhury*(3). The appellant's learned Advocate has not suggested that his client has

(1) (1917) 41 I.C. 392. (2) (1888) I.L.R. 12 Mad. 39.
(3) (1918) 44 I.C. 694.

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been prejudiced or handicapped by the fact of the trial having taken place in Coimbatore instead of in Calcutta.

These conclusions would suffice to dispose of the appeal had not the plaintiff's pleader in the course of his argument in the trial Court, for the purpose of repelling the claim made by the second defendant to the policy money, raised the question of a trust created in favour of the plaintiff by operation of section 6, Married Women's Property Act. The learned Subordinate Judge pursued this argument at some length in his judgment, though the topic was not the subject of an issue, and came to the decision that section 6 had no application.

Section 6 enacts that a policy of insurance effected by a married man on his own life and expressed on the face of it to be for the benefit of his wife, shall enure and be deemed to be a trust for the benefit of the wife. One looks in vain in Exhibit XI, which is described as the policy, and the schedule attached to it, for an expression of the policy being intended for the benefit of the assured's wife. This is to be found in the declaration. If the declaration is part of the contract of insurance, it will be part of the policy; for a contract of insurance if created by any binding means is a policy to all intents and purposes : *Re. Norwich Equitable Fire Assur. Soc., Claim of Royal Insur. Co.*(1). But Exhibit XI states that the declaration is part of the policy, so there is no doubt that this document is incorporated in and is part of the policy. In the declaration it appears that in answer to question 12—" Name of the nominee or

(1) (1887) 57 L.T. 241.

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nominees who would receive the sum assured", the assured had stated :—"Self or wife, Velayammal". This shows that the wife was intended to have a benefit from the policy. According to the terms of the policy the money was payable in the event of the assured surviving 11th April 1943 or at previous death. Obviously he could not receive payment if he died before that date, but his wife could. It is true that her right to the benefit depended upon the contingency of her surviving her husband if he died before the named date. But the circumstance that a benefit to the wife is of a contingent character does not prevent it from being a benefit within the Married Women's Property Act; *Fleetwood's Policy, In re*(1). If there was a trust, as in our judgment there was, for the benefit of the wife in the event which happened, it would follow from section 6 that the Official Trustee of Bengal would be the trustee, and he alone would be competent to sue for the enforcement of the trust: *Lakshmi Ammal* v. *Sun Life Assurance Co., Canada*(2).

But, as already observed, the point about the application of section 6 of the Married Women's Property Act arose somewhat adventitiously. The defendant Company did not plead it as a defence to the maintainability of the suit by the plaintiff. It ought to have done so, if it had intended to rely upon it. Order VIII, rule 2, Civil Procedure Code, requires that the defendant shall raise by his pleading all matters which show that the suit is not maintainable. The rule follows Order XIX, rule 15, of the English Supreme Court Rules. With reference to this latter rule it was

(1) [1926] 1 Ch. 48. (2) (1933) I.L.R. 57 Mad. 536.

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observed by BUCKLEY L.J. in *Robinson's Settlement, In re Gant* v. *Hobbs*(1) :

"The effect of the rule is, I think, for reasons of practice and justice and convenience to require the party to tell his opponent what he is coming to the Court to prove. If he does not do that the Court will deal with it in one of two ways. It may say that it is not open to him, that he has not raised it and will not be allowed to rely on it; or it may give him leave to amend by raising it, and protect the other party if necessary by letting the case stand over."

The defendant Company could only have relied upon this defence to the maintainability of the suit by obtaining leave to amend its pleadings. Not having done that the Company cannot be allowed, by reason of the accident that the plaintiff's pleader argued the question of the applicability of section 6, Married Women's Property Act, to have the benefit of a defence which it did not plead. The plaintiff's learned Advocate has suggested that the Official Trustee should be made a party. It is not necessary in this case, because all that the Trustee would have to do would be to receive the money from the Company and, after deducting his charges, pay it to the beneficiary.

We now turn to Appeal Suit No. 239, the appeal of the second defendant. He is the younger and undivided brother of the assured, and claims that as the money for the one and only premium paid was furnished from the joint family funds the policy money must be regarded as an acquisition for the joint family, and he, the surviving coparcener, is entitled to it. His learned Advocate has argued that the assured being the eldest brother was by right the manager, and that a

(1) [1912] 1 Ch. 717, 728.

manager cannot take money from the family funds for his own aggrandisement. What the position would have been had the assured been the managing member of this family, it is not necessary to decide. The cases cited, *Oriental Government Security Life Assurance, Ltd.* v. *Vanteddu Ammiraju*(1) and *Srinivasa Iyengar* v. *Thiruvengadathaiyangar*(2), leave the question of a manager's power to insure his life, paying the premium from the family money, for the benefit of some members only of the joint family, in some uncertainty. But the evidence is that the assured was not the manager. His mother, who has given evidence as D.W. 1, has said that she had been managing the family property since her husband's death seventeen years ago. It is not unlikely that the assured, who was only twenty-three years of age when he died, would have been content to leave his mother in the management. She says that she used to pay money to the assured for his personal expenses, and that she paid him Rs. 175 (the amount required for the half-yearly premium) for insuring his life. Her further story that she paid this money to him in the presence of the Company's agent has been disbelieved by the learned Subordinate Judge, and indeed it is noteworthy that no question was put by the defence to the agent to confirm this assertion. She does not pretend that the assured told her that he wanted to insure his life to make some additional provision for the family. His statement in the declaration shows that he had no such intention. The question then is, whether any profit made out of money paid to a

(1) (1911) I.L.R. 35 Mad. 162. (2) (1914) I.L.R. 38 Mad. 556.

member of a joint family by the manager for his personal use, which he is free to spend as soon as he receives it, must, because he chooses to invest it for some purpose which is clearly not intended to be for the benefit of the family, be deemed to be a family acquisition. A profit made by the member of a joint family from the enjoyment of joint property without detriment to it is his separate self-acquired property; *Lachmeswar Singh* v. *Manowar Hossein*(1). When money is given to a member of a family by the manager from family funds to be spent by him for his personal use, it seems to us that any profit made by him can hardly be said to be in detriment of the joint property.

But apart from these considerations there is his mother's own evidence that the assured was borrowing money from other persons, and that after his death she defended four suits by creditors in respect of such loans. She successfully pleaded in those suits that the debts incurred by the assured were not for the purpose of the family. Now as it appears that the assured was obtaining money for his needs from other sources, and as the evidence does not establish that the sum of Rs. 175 received from his mother was in fact utilized to pay the premia, we think that we are justified in applying the presumption, which SANKARAN NAIR J. in *Balamba* v. *Krishnayya*(2) said would arise where an assured is shown to have money available from private as well as from joint family sources, namely, that the premia for a policy on his life would be paid

(1) (1891) L.R. 19 I.A. 48; I.L.R. 19 Cal. 253.
(2) (1913) I.L.R. 37 Mad. 483 (F.B.).

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from the man's own money. We accordingly hold that the policy money did not belong to the joint family and that they have no claim to it. And as there is nothing in the declaration by the assured to show that he intended his wife to have only the limited estate of a Hindu widow in the policy money, she is entitled to it absolutely.

The result is that the appeals are dismissed and the decree of the lower Court stands. The first defendant, the Company, will pay the plaintiff her costs in Appeal Suit No. 50, and the second defendant will pay her costs of the appeal in Appeal Suit No. 239. The plaintiff's costs in the lower Court including court-fee will be paid by the first defendant. The second defendant will pay his own costs in the lower Court. The plaintiff having sued as a pauper and succeeded in her suit, we direct her to pay the court-fee to Government.

At the time when judgment was delivered the plaintiff had not obtained a succession certificate. She has since procured it, and she has filed a petition for leave to produce it. The petition is allowed.

V.V.C.