

APPELLATE CIVIL

Before Mr. Justice Ziaul Hasan and Mr. Justice A. H. deB.
Hamilton

THE ASIAN ASSURANCE COMPANY, LIMITED (DEFENDANT-APPELLANT) *v.* ASA RAM (PLAINTIFF-RESPONDENT)*

1939
December,
12

Insurance—Life Insurance Policy—Untrue statements contained in the proposal—Liability of insurance company, how far affected by untrue statements in the proposal.

Where according to the terms of a policy of Life Insurance the representations, statements and agreements in the proposal for the policy are made part of the contract, and a declaration was made along with the proposal for life insurance that if any untrue avowment is contained in the declaration or in the proposal or if it shall hereafter appear that any information has been withheld then the said contract shall be void and all moneys which shall have been paid on account of the assurance shall be forfeited, *held*, that by the terms of the policy the liability of the company ceases when it is found that any of the statements contained in the declaration or the proposal were untrue. *Great Eastern Life Assurance Company v. Bai Hira* (1), *Lakshmishankar Kanji Rawal v. Gresham Life Assurance Society, Limited* (2) and *Condogianis v. Guardian Assurance Company, Limited* (3), relied on.

Messrs. *J. Jackson* and *Shyam Manohar*, for the appellant.

Messrs. *Bhawani Shankar* and *Bijai Shankar*, for the respondent.

ZIAUL HASAN and HAMILTON, JJ.:—This is a second appeal against a decree of the learned District Judge of Lucknow.

On the 18th July, 1933, Mst. Sundara Devi, wife of the plaintiff-respondent Asa Ram, got her life insured with the defendant company, namely, the Asian Assur-

*Second Civil Appeal no. 30 of 1937, against the order of W. Y. Madeley, Esq., I.C.S., District Judge of Lucknow, dated the 13th November, 1936.

(1) (1931) A.I.R., Bombay, 146. (2) (1932) A.I.R., Bombay, 582.
(3) (1921) A.I.R., P.C., 195.

ance Company, Ltd. She died on the 11th September, 1934. On her death the plaintiff, to whom the policy had been assigned, applied to the company for the money but the company refused to pay. Thereupon the suit which has given rise to this appeal was brought by the plaintiff for recovery of Rs.2,700 with future interest. Defendant No. 2 impleaded in the suit is the agent in Lucknow of the first defendant company. He supported the plaintiff's claim and claimed exemption from costs. The defendant company admitted that Sundara Devi was insured for Rs.2,500 under a policy dated the 30th August, 1933, but contended that under the terms of the policy in question it became void on account of certain untrue statements made in the declaration of the assured. It was also contended that the assured practised fraud on the company by various statements made by her. Five issues were framed by the trial court on the pleas raised by the defendant No. 1, but subsequently owing to a statement made by the defendant's pleader, only the following two issues were retained and the others were struck off:

(1) Did the policy become void on account of fraud practised by the plaintiff, defendant No. 2, and the assured?

(2) To what relief and against which of the defendants is the plaintiff entitled?

Finding on issue No. 1, that no fraud had been proved the learned Civil Judge decreed the plaintiff's suit and on appeal by the defendant company the decree was upheld by the learned District Judge.

It appears that on the 18th February, 1936, the pleader for the defendant company made the following statement:

"I rely on the elements of fraud as alleged in paragraph 15 of my written statement clauses (a), (b), (d), (e), (h) and paragraphs 16 and 18. I give up all other elements alleged before."

1939

THE ASIAN
ASSURANCE
COMPANY,
LIMITED,
ASA RAM

Ziaul Hasan
and
Hamilton,
Jf.

1939

THE ASIAN
ASSURANCE
COMPANY,
LIMITED
v.
ASA RAM

Ziaul Hasan
and
Hamilton,
J.J.

Paragraph 15 of the written statement referred to in the pleader's statement is as follows:

"The policy in suit was obtained from the answering defendant by making to it in form of proposal, form D, a declaration and also otherwise the following misrepresentations and by concealing from it many material facts:

(a) That the age of the assured was only 25 years.

(b) That the assured consulted a physician six months before the date of her proposal and that too for fever only.

(c) That the assured was the married wife of the plaintiff and had been married for seven years.

(d) That on no occasion and for no diseases or injuries the assured ever received any medical advice.

(e) That the assured never suffered from any serious disease.

(f) That the assured never had any abortions and that she was not pregnant at the time of proposal.

(g) That the assured was literate.

(h) That the assured had only one sister aged 18 years."

It will thus appear that the pleader for the defendant company gave up the pleas contained in clauses (c), (f) and (g) of paragraph 15 of the written statement and relied only on clauses (a), (b), (d), (e) and (h) as constituting fraud. The learned counsel for the appellant company however relies on paragraph 14 of the written statement, which is as follows:

"According to the terms of the policy in suit no liability can attach to the answering defendant and the policy is to become void, if any untrue statement is found to be contained in the declaration (Form D) of the assured or in her proposal or if it should appear that any information has been withheld,"

and argues that the defence contained in this paragraph, which is totally independent of fraud, was never given up and that though the learned trial court held that where according to the terms of the policy the representations, statements and agreements in the application for the policy are made part of the contract, the company

is liable only if those representations and statements are true, and though some of the statements made by the deceased lady have been found to be untrue, the learned Judge wrongly held that as no fraud was proved, the plaintiff was entitled to the money claimed. The learned counsel has drawn our attention to the following declaration contained in Ex. A-32:

"I do hereby declare that the above answers and statements are true and that I have not withheld or concealed any information and I do hereby agree that this declaration together with the proposal shall be the basis of the contract to be made . . . and that if any untrue averment is contained in this declaration or in the said proposal or if it shall hereafter appear that any information has been withheld then the said contract shall be void and all moneys which shall have been paid on account of the assurance shall be forfeited."

1939
 THE ASIAN
 ASSURANCE
 COMPANY,
 LIMITED
 v.
 ASA RAM
 Ziaul Hasan
 and
 Hamilton,
 JJ.

We are of opinion that the defendant company is entitled to put up this agreement in defence even though no fraud has been found to be proved. The learned counsel for the plaintiff-respondent argues that no issue having been framed by the trial court on the allegations contained in para. 14 of the written statement, those allegations must be deemed to have been withdrawn. We are not prepared to accept this contention. It is true that no issue was framed on the plea raised in para. 14 but the judgments of both the courts below show that the matter was argued on behalf of the defendant company and the mere omission of the court below to frame an issue on the point can not be taken to mean that the plea was withdrawn. The learned Judge of the trial court himself remarked:

"I think having regard to the above terms it is not necessary to prove in the case before me that the false statement was fraudulent. Law Journal, Vol. 32, Queen's Bench does not apply to the facts of this case because there is no such condition here that there should be *fraudulent concealment or designedly untrue statements*. In the 2 King's Bench Division the declaration was not to the effect

1939

THE ASIAN
ASSURANCE
COMPANY,
LIMITED

v.
ASA RAM

Ziaul Hasan
and
Hamilton,
JJs.

as it is in this case. So these rulings do not fully apply and the rulings cited by defendant No. 1's learned counsel are more applicable to the facts of this case. Thus we have to see if the statements made are true or false and the point of materiality does not arise.

still be decreed the plaintiff's suit on the ground that no fraud or wilful misrepresentation was proved. We are clearly of opinion that by the terms of the policy in question the liability of the company ceased when it was found that any of the statements contained in the declaration or the proposal were untrue. In Ex. A-32 it was stated in answer to question No. 3 that no medical advice was sought but Ex. A-34, the out-patient register of Mulchand Rastogi Aushdhalaya, shows that the lady was under medical treatment off and on from the 22nd November, 1932, up to the 23rd April, 1933. Then, a statement was made in Ex. A-32 that the proposer had only one sister while the evidence of the plaintiff himself and that of D. W. 3 and D. W. 4 prove that she had three sisters living at the time. Similarly the number of brothers given in Ex. A-32 is one but the plaintiff's own evidence shows that the lady had three brothers. We do not also agree with the remarks of the courts below that the evidence of Dr. Curtis, who put the questions contained in Ex. A-32 to the lady, was necessary to prove that the lady, who was practically illiterate, correctly understood the questions put to her. Her husband, the plaintiff, admits in his examination not only that he was present when the questions were put to the deceased by Miss Curtis and answered some of the questions himself but also that the entries as contained in Ex. A-32 were correct. In these circumstances it cannot be argued with reason that the lady did not understand the questions put to her which were simple enough or that the medical examiner did not correctly record the answers.

We are of opinion that in view of the law as laid down in *Great Eastern Life Assurance Company v. Bai Hira*

(1), *Lakshmishankar Kanji Rawal v. Gresham Life Assurance Society, Limited* (2) and *Condogianis v. Guardian Assurance Company, Limited* (3) and having regard to the terms of the policy in question, the plaintiff is not entitled to sue upon the policy.

The appeal is therefore allowed and the plaintiff-respondent's suit dismissed. In view however of the special circumstances of the case and of the fact that no wilful fraud or misrepresentation on the part of the assured has been proved, we order parties to bear their own costs in all the courts.

1939
THE ASIAN
ASSURANCE
COMPANY,
LIMITED
v.
ASA RAM

*Ziaul Hasan
and
Hamilton,
JJ.*

Appeal allowed.

FULL BENCH

Before Mr. Justice G. H. Thomas, Chief Judge, Mr. Justice Ziaul Hasan and Mr. Justice A. H. deB. Hamilton

BABA NARAIN BHARTHI (PLAINTIFF-APPLICANT) v. TRUST MANDIR NAGESHAR NATH JI MAHADEO, THROUGH BABU HAZARI LAL, SECRETARY (DEFENDANT-OPPOSITE-PARTY)*

1939
December,
19

Civil Procedure Code (Act V of 1908), section 115 and Order XXXIII, rule 2—Pauper application refused—Revision, if lies against the order on application for permission to sue as pauper—Plaintiff suing on behalf of idol in representative capacity—Plaintiff can be allowed to sue as pauper if not possessed of sufficient property of waqf to pay court-fee—Plaintiff's personal property immaterial.

Per Full Bench—An order on an application for permission to sue in forma pauperis is not revisable by the Chief Court unless there has been an exercise of jurisdiction not vested by law or failure to exercise a jurisdiction so vested or an exercise of jurisdiction illegally or with material irregularity. Durga Prasad v. Gur Dularey (4), Asa Ram v. Mst. Gendo (5), and Badri Nath v. Ram Chandra (6), referred to and discussed.

Per Bench—When a plaintiff sues in a representative character such as a mutawalli, trustee, or a shebait, unless it

*Section 115 Application no. 169 of 1936, for revision of the order of Pundit Kishen Lal Kaul, Civil Judge of Fyzabad, dated the 31st of August, 1936.

- (1) (1931) A.I.R., Bombay, 146. (2) (1932) A.I.R., Patna, 587
(3) (1921) A.I.R., P.C., 195. (4) (1938) I.L.R., 14 Luck., 116.
(5) (1935) I.L.R., 10 Luck., 265. (6) (1939) I.L.R., 14 Luck., 442.