APPELLATE CIVIL.

Before Sir Sydney Robinson, Kt., Chief Justice, and Mr. Justice May Oung.

1924
Feb. 13.

S. S. HAMEED & CO.
v.
THE UNIVERSAL FIRE INSURANCE COMPANY.*

Fire insurance—Defence of cancellation of policy with an alternative technical defence based on the conditions of the policy—Policy of insurance remaining with the assurers—Duty of the assured to acquaint themselves with the conditions in the policy.

Held, that a plea that the policy of fire insurance was not in existence at the time of the fire and that there was no contract of insurance at all, coupled with an alternative plea that, if there was a contract, then by reason of certain conditions precedent to the attaching of the liability, the defendants would not be liable, is not contrary to the law of India.

Held further, that the plaintiffs having had a protection note issued to them by the defendants which set out the fact that the protection note was issued subject to the conditions attached to the policy of insurance, it was the bounden duty of the plaintiffs to get into their hands the policy from the defendants and make themselves acquainted with the conditions in question.

In re Coleman's Depositories, Limited, (1907), 2 K.B., 798—*followed.*

Hing Nam Hip Kee v. *The Batavia Sea and Fire Insurance Co.*, 6 L.B.R., 123—*referred to.*

The facts material for purposes of this report are set out in the judgment of the learned Chief Justice reported below.

Paget (with him *P. B. Sen*)—for the Appellants.

Das (with him *R. M. Sen*)—for the Respondents.

ROBINSON, C.J.—There has clearly been a good deal of hard swearing in this case on one side or the other, or on both. The claim is on an alleged fire insurance on a grocery shop at Pegu effected by the plaintiffs in Rangoon.

According to the plaint, the plaintiffs proposed to the managing agent of the defendant-company to

* Civil First Appeal No. 43 of 1923 against the Decree of this Court on the Original Side in Civil Regular No. 370 of 1922.

1924

S. S. HAMEED & CO. v. THE UNIVERSAL FIRE INSURANCE COMPANY.

ROBINSON, C.J.

insure their grocery shop at Pegu against fire, and the second defendant as managing agent accepted the proposal, the premium being Rs. 300. It is alleged in the plaint that plaintiffs paid Rs. 300, and defendants gave them an interim protection note, No. 5240, "which was to remain in force as policy for twelve months from the 7th July 1921 to the 7th July 1922." The fire took place on the 26th February 1922. It is alleged that, on receiving information of the fire, plaintiffs made a personal report to the second defendant who promised to write to his Head Office to pay the amount of the insurance. Plaintiffs made frequent demands thereafter, but were put off from time to time by the second defendant. They claim the full amount of the policy, Rs. 15,000.

Defendants admit the proposal to insure, and its acceptance. They state that on the 7th July a protection note was issued, plaintiffs undertaking to pay the premium in a day or two. As the premium was never paid, they allege that by a letter dated the 4th August 1921, they cancelled the protection note. They admit that plaintiffs made a verbal report of the fire, but alleged that they were at once informed that the protection note had been cancelled long before.

The defence is that there was no policy of insurance in force at the time of the fire, and further that, as no claim containing the details of the loss had been submitted in writing with fifteen days of the fire, they were absolved from all liability. There is a clause in the conditions of the Company's policy forms requiring such a statement of the loss, and setting out that no claim under the policy shall be payable unless the terms of this condition have been complied with.

1924

S. S. HAMEED & Co. v. THE UNIVERSAL FIRE INSURANCE COMPANY.

ROBINSON, C.J.

It is thus clear that the parties are in direct conflict as regards the original proposal, and from that point onwards in almost every detail of fact in the case.

According to the evidence of the plaintiffs' principal clerk, V. Subbaya, their case was that there were negotiations prior to the 7th July when the protection note was issued, because they rely on an entry (Exhibit D 2) in their account books, showing an expenditure of Rs. 25, for a visit to Pegu. Subbaya alleges that the second defendant and his clerk came and told him that they must be paid their expenses to go to Pegu to inspect the property before they would insure it. According to the defendants, it was the plaintiffs who came to the defendants' place of business and there made a proposal which the defendants immediately accepted as they showed that they had previously insured their shop in another company. Defendant 2 alleges that, on a promise to pay the premium in a day or two, he at once issued the protection note in his office. According to Subbya, the second defendant, accompanied by another man, came to plaintiffs' premises, and the second defendant told him that he was to pay the premium to the man with him. This man is described by the witness as a Bengali gentleman. He says that the next day this man came to his office and he paid him the premium, and that the man then gave him the protection order, Exhibit A, and signed his name across two half-anna stamps affixed to the back of the document.

The signature on the back of Exhibit A is M. Khoreshee, not a Bengali name. Now the entry of the Rs. 25, expenses to Pegu does not indicate that it was expenses paid to the defendants, and it may quite well have been expenses for a visit of

inspection by one of the partners of the plaintiff-firm to their Pegu shop. It seems probable to me that this entry was seized on as an afterthought, and that it was paid to the defendants is false. Had there been negotiations, had there been a demand for expenses to go to Pegu to inspect the premises, and had this amount been paid, we should have had the fact stated at once, and the entry in the accounts would have indicated the purpose for which it was paid and to whom it was paid. That it was an afterthought would seem to be indicated by the fact that the entry was put in only at the very end of Subbaya's evidence and during his re-examination.

On the other hand, the version of the defendants appears to me to be far more probable and to be in accordance with their usual practice. There are many instances in the books of protection orders being cancelled for non-payment of premium. It is in evidence that protection orders are frequently issued before any premium was paid, and I see no reason to doubt the allegation of the second defendant that it was issued, as he alleges, on the 7th July.

The story as to the second defendant being accompanied by a Bengali gentleman and his telling the plaintiffs to pay the premium to this Bengali genleman appears to me to be cetainly untrue, as is the story that the premium was paid without any receipt being received or demanded. The plaintiffs have had dealings with Insurance Companies for several years before this, and Subbaya has also had personal dealings with such companies. They must be aware that regular forms of receipt are issued when premia are paid. The defendants habitually issue such receipts and produce a book of forms showing that they do so. It is hard to believe that a firm, which keeps such accounts as the plaintiffs

1924

S. S. HAMEED & CO. v. THE UNIVERSAL FIRE INSURANCE COMPANY.

ROBINSON, C.J.

do, would pay a sum of Rs. 300, without any receipt to show that payment had been made.

A witness, Labay, is produced to corroborate Subbaya as regards the payment to this Bengali gentleman. He happened to be in plaintiffs' shop to pay a bill; he was asked to wait, and says he saw Rs. 300, counted out in his presence and paid to a Bengali Baboo. He mentions that three of the partners were present; yet none of them come forward to give evidence. I cannot believe for a moment that, if this man had been a Bengali gentleman, Subbaya would not have noticed that the name he signed at the back of the protection note was not a Bengali name. The witness, Labay, is a casual witness as, indeed, all the other witnesses for the plaintiffs are, and in my opinion plaintiffs have not merely failed to prove that Rs. 300 was paid in this manner but that the whole story they put up is untrue.

The next question is whether the protection note was cancelled by the defendants as alleged by them by the letter of the 4th August.

The onus of proving this is clearly on the defendants. When the premium was not paid as promised, they would, no donbt, in the ordinary course of business, have cancelled the protection note, and their action therefore is probable and in accordance with what would be the ordinary course of business.

The letter appears in a press-copy book and its proper place. There is no reason to suppose from the appearance of the book that a page has been inserted, and, if the letter was not issued, the only explanation of the press letter book would be that they had completely recopied the original press letter book for the purpose of inserting this letter,

which was really never sent, in its proper place. I can see no reason to assume anything of the kind.

It has been urged that a letter like this, cancelling a protection note, would certainly have been sent by registered post, and we are referred to several similar letters, dated the 14th July, which were sent by registered post. On examining these letters, I find that they were for persons residing at Kemmendine, Pazundaung and Taikkyi.

These might well be sent by post as the addressees lived at a considerable distance from defendant's office, and one of them outside Rangoon altogether. On the other hand, I find several other similar letters which are addressed to persons living in Rangoon, but which are not sent by registered post. There is one sent on the 25th August to Chinniah Chetty, Esq. That letter appears from the peon-book to have been sent by hand. Defendants produced their peon-book showing this letter to have been delivered on the 5th August, and the acknowledgment column contains an entry "S.S.H. & Co.," and underneath initials. As these initials now exist, they are "S.V.," but it is obvious that they were originally something else and that the letter "V" has been written over the second letter of the initials. The first downward stroke of the "V" is made with considerable pressure and is placed exactly over the letter that was originally there. After carefully examining the original letter with a magnifying glass, I have personally little doubt that the initials were, as first written, "S.P." with a flourish forming a circle around them. This peon-book, no doubt, remained in the possession of the defendants. There was no affidavit of documents called for, and no inspection of documents made; but unfortunately there is on the record no

1924

S. S. HAMEED & CO. v. THE UNIVERSAL FIRE INSURANCE COMPANY.

ROBINSON, C.J.

examination of any person as to when the alteration was first noticed.

Lahiri, the personal clerk of the second defendant, states that he typed the letter and press-copied it; that he despatched it; that he wrote the entry in the peon-book; and that he gave it to the peon to deliver. He says the peon reported to him that the letter had been delivered, and showed him the signature in the peon-book. Cross examination proceeded, but he was not asked if the signature was then in the condition that it is in now. The whole of his cross-examination on this point reads—"I did not know the signature of the pliantiffs. But I saw "S.S.H. & Co." with an initial under it in the peon-book and so thought it was signed by the plaintiffs."

It is clearly not to the defendants' advantage to make a palpable alteration in the signature acknowledging the receipt of this important letter. After the book had been made an exhibit, it may easily have been inspected from time time by the plaintiffs and Subbaya; but it is impossible to say by whom the alteration was made. It was important for plaintiffs to destroy evidence of the proof of the receipt of this letter of cancellation, and that is all that can be said on the matter.

If I am right in thinking that the initials originally read "S.P." it is important to remember that the son of one of the partners, who is also a partner, bears the name of S. P. Mohamed Hussein and, according to the plaintiffs' evidence, he was one of the three partners who were present in Rangoon, attending the business in July.

It is alleged that none of the partners were in Rangoon in August; but I cannot believe that. It is incredible that all the four partners should have been away from Rangoon at the same time, especially

when, from the evidence of Subbaya, no single clerk was allowed to handle money or even to receive a letter.

On behalf of the defendants we have evidence showing that the whole of their conduct was in strict accord with the ordinary course of business. I have held that the premium was never paid. Such a letter would therefore ordinarily be written. There is the sworn testimony of Lahiri that he typed this letter and took a press copy of it ; that he entered it in the peon-book and gave it to the peon ; that he received a report from the peon that the letter had been delivered and that he saw the initials acknowledging receipt in the book.

The peon has given evidence, and he states that he delivered the letter at the plaintiffs' place of business He identifies Subbaya as the man to whom he gave the letter and who signed for it.

It is clear from the cross-examination of Subbaya that the defendants did not know to whom the letter had been delivered, and the peon was asked to point out the man to whom he delivered it if he could, and he pointed out Subbaya. Whether the peon really remembers to whom he delivered the letter and who signed for it is a matter of doubt. But, having regard to the circumstances, the ordinary course of business, the evidence that has been produced and the conduct of the parties in the case, I see no reason to differ from the learned trial Judge that the defendants have proved sufficiently to transfer the onus and that the plaintiffs have failed o rebut the evidence on this point. I would, therefore, hold that it has been proved that the protection note was duly cancelled, and that is sufficient for the decision of this appeal.

A further point was taken, based on clause 10 of the conditions of the policy.

1924

S. S. HAMEED & Co. v. THE UNIVERSAL FIRE INSURANCE COMPANY.

ROBINSON, C.J.

It is urged on the strength of certain passages in well-known commentaries on fire insurance law that the defendants, having taken the position that the policy had been cancelled, have either waived or are estopped from raising technical defences based on the conditions of the policy. The authorities for this proposition cited in these commentaries are American authorities, and it is strange that there is no English authority, apparently taking the same view; at least we have been referred to none. A plea that the policy was not in existence at the time of the fire and that there was no contract of insurance at all, coupled with a plea that, if there was, then by reason of certain conditions precedent to the attaching of any liability the defendants would not be liable, is not contrary to the law of India.

Plaintiffs' case is that, when making an oral claim and reporting the loss to the defendants, they were told that defendants were referring the matter to their Head Office. If that be the true fact, it is clear that no question of waiver would arise.

It is further urged that, as the defendants knew that no policy had been issued, it was their bounden duty to bring to the notice of the plaintiffs the action that was required of them, for plaintiffs would have been in complete ignorance of the terms of the policy. Plaintiffs knew that they were entitled to a policy; they never demanded the issue of a policy; and they never took any steps to make themselves aware of what the conditions of the policy were although the protection note, which they had, sets out that it was issued subject to the conditions attached to the policy.

I should hesitate to hold in this case that there was any waiver of this term, and reference may be made to *In re Coleman's Depositories, Limited*,

(1), Fletcher Moulton, L.J., said—"Moreover, I see nothing to prevent an adequate performance of the conditions precedent at the date when, so far as the Court is aware, the policy might have been obtained by the employer if he had chosen to ask for it;" and later he said—"The doctrine that there is some duty on the part of the assurers to get the policy into the physical possession of the assured, and that the rights of the parties under the policy depend on the date at which this is effected, is to me so bewildering, and so foreign to any principles of law applicable to written contracts, and so unlike anything to be found in previous decisions as to the liabilities of parties under contracts such as these, that I am unable to follow it."

That this was a condition precedent I have held in *Hing Nam Hip Kee* v. *The Batavia Sea and Fire Insurance Co.* (2), in which I referred to the case of *Roper* v. *Lendon* (28 L.J.R. Q.B., 260).

I there was no waiver, failure to comply with this condition is fatal to the plaintiffs' claim; but it is not necessary for me to decide that definitely in the present instance.

I would confirm the decree of the Court below and dismiss this appeal with costs throughout.

MAY OUNG, J.—I concur.

(1) (1907) 2 K.B., 798. (2) (1910-11) 6 L.B.R., 123.