APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

1931

May 26.

GNANA SUNDARAM AND OTHERS

v.

THE VULCAN INSURANCE CO., LTD.*

Insurable interest—Contract for purchase of immoveable property—Insurance by Purchaser—Fire after contract of sale—Purchaser's rights under policy—Legal and beneficial interest in property—Transfer of Property Act (IV of 1882), s. 54.

A person has an insurable interest in a thing where he possesses some relation to or concern in the subject of the insurance; which relation or concern, by the happening of the perils insured against may be so affected as to produce a damage, detriment, or prejudice to the assured.

A person who has made an agreement for the purchase of immoveable property, although he does not thereby obtain a legal interest in or charge upon the property within s. 54 of the Transfer of Property Act, nevertheless has an insurable interest in the property, and can recover under a policy of insurance of the property the loss suffered by him on account of the property being destroyed or damaged by fire.

Castellain v. *Preston*, 11 Q.B.D. 380 ; *Graham Joint Stock Shipping Co.* v. *Merchants Marine Insurance Co.*, (1924), A.C. 294 ; *Lucena* v. *Crauford*, 2 Bos. & P. (N.R.) 269 ; *P. Samuel, Ltd.* v. *Dumas*, (1924) A.C. 431—*referred to.*

Hay for the appellants.

Moore for the respondent.

PAGE, C.J.—On the 16th of October 1928 the plaintiff No. 1 insured a certain house and premises, Nos. 5—7, Rosebank Road, Rangoon, with the defendant company for Rs. 12,000. It was a term of the policy that in the event of a fire damaging or destroying the premises the defendant company should not be liable for a sum "exceeding, in any case, the amount of the insurable interest therein of the insured at the time of the happening of such

* Civil First Appeal No. 61 of 1931 from the judgment of the Original Side in Civil Regular No. 424 of 1930.

fire". The policy expired on the 12th October 1929, but was renewed for a further term from the 12th of October 1929 to the 12th of October 1930.

On the 19th of April 1930 the house was destroyed by fire, and the present suit is brought to recover the loss claimed by the plaintiffs under the policy of insurance.

Now, it appears that on the 16th of August 1929 the plaintiffs had assigned all their right, title and interest in 5—7, Rosebank Road, Rangoon, to the 1st defendant by a registered deed of conveyance, and subsequently upon the same day the first defendant had entered into an agreement with the plaintiffs whereby the plaintiffs as vendors "agreed to purchase the said properties upon the following terms and conditions :—

(1) That the purchasers (that is the first defendant) hereby agree to sell and the vendors hereby agree to purchase the properties mentioned in the schedule hereunder written for the sum of Rs. 7,500 (Rupees seven thousand and five hundred) on or before the 31st December 1929.

(2) That if the vendors fail to purchase the said properties for the said sum of Rs. 7,500 on or before the 31st day of December 1929, then this agreement shall be deemed to have been determined and the vendors shall have no claim either on this agreement or on the said properties and the vendors shall immediately, that is, on the 31st December 1929, vacate and give possession of the northern corner room in house Nos. 5—7, Rosebank Road, Rangoon, which is now in their occupation."

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It is alleged on behalf of the plaintiffs that on the 30th of December 1929 it was further agreed that the vendors should be given an extension of time until the 30th of June 1930 within which to purchase the property.

The defendant company does not dispute that it is liable to the plaintiff No. 1 under the policy if it is proved that at the time of the fire she possessed an insurable interest in the premises.

On behalf of the plaintiffs it is contended that the effect of the two documents of the 16th of August 1929 read together was that a mortgage was created between the plaintiffs and the first defendant. In the alternative the plaintiffs contend, upon the footing that the documents are independent of each other and an out-and-out conveyance was created in favour of the first defendant, that by reason of the terms of the subsequent agreement the plaintiffs at the time of the fire were possessed of an insurable interest in the premises.

Now, the test to be applied to determine whether a mortgage had been created was laid down by the Privy Council in *Jhanda Singh* v. *Wahid-ud-din and others* (1) to be "the intention of the parties to the instruments. That intention, however, must be gathered from the language of the documents themselves viewed in the light of the surrounding circumstances." Applying that test to the two documents executed on the 16th August 1929 I am of opinion that they do not create a mortgage, but must be read as two instruments independent of each other. From the terms of the conveyance to the first defendant, it is, in my opinion, clear that the first defendant, who was at that time a creditor of the

(1) (1916) I.L.R. 38 All. 570 at p. 574.

plaintiffs for a substantial amount, was anxious to obtain some payment in satisfaction of his outstanding claims, and was prepared to take a conveyance of this property and in consideration of the execution of the conveyance to treat as satisfied all the outstanding liability of the plaintiffs to him amounting at that date to Rs. 8,748-2.

Now, if the matter rested there, the first defendant, in order to obtain a sum of money in liquidation *pro tanto* of the debts that the plaintiffs owed to him, would have been compelled to go to the trouble and expense of selling the property in the open market; and in order to avoid such a troublesome method of obtaining money out of the plaintiffs the first defendant agreed with the plaintiffs that if they would pay him Rs. 7,500 within the next few months he was prepared to return the property; and in that way he would at any rate receive Rs. 7,500 in satisfaction of the Rs. 8,748-2-0 that was payable to him by the plaintiffs.

For these reasons, in my opinion, the two documents of the 16th August 1929 must be read independently of each other. It follows, therefore, that the only interest that the plaintiffs possessed at the time of the fire was such an interest as they had acquired under the later agreement of the 16th of August 1929.

This appeal has proceeded upon the footing that there had been an extension of time granted by the first defendant to the plaintiffs within which to purchase the property, for otherwise the present issue would not have arisen, inasmuch as *ex concessis*, if no extension of time had been granted, on the 30th of April the agreement would have expired, and the plaintiffs would have had no interest whatever in the premises.

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In the events that have happened, however, it must be taken that on the 19th April 1930 the plaintiffs were entitled to the benefit of the later agreement into which they had entered on the 16th of August 1929. This agreement was not registered, and it is common ground that as it was a mere agreement to sell it was not necessary that it should be registered. Such an agreement comes within the ambit of section 54 of the Transfer of Property Act which provides that "a contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not of itself create any interest in or charge on such property." It follows, therefore, that by reason of the terms of this agreement the plaintiffs did not acquire any legal interest in or charge upon the property which was the subject matter of the insurance. Upon that footing the learned trial Judge, who heard and determined as a preliminary issue the question whether the plaintiffs possessed any insurable interest in the property at the time of the fire, held that the plaintiffs had no insurable interest, and dismissed the suit.

Now, what is an insurable interest in a policy of fire insurance? In *Lucena* v. *Craufurd* (1) Lawrence, J., observed :

"A man is interested in a thing to whom advantage may arise or prejudice happen from the circumstances which may attend it ; . . . . . and whom it importeth that its condition as to safety or other quality should continue. Interest does not necessarily imply a right to the whole or part of the thing, nor necessarily and exclusively that which may be the subject of privation, but having some relation to, or concern in, the subject of the insurance ; which relation or concern, by the happening of the perils insured against, may be so affected as to produce a damage, detriment or prejudice to the person insuring. And where a man

(1) 2 Bos. & P. N.R.) 269.

is so circumstanced with respect to matters exposed to certain risks and dangers as to have a moral certainty of advantage or benefit but for those risks and dangers, he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction."

In *Castellain* v. *Preston and others* (1) Bowen, L.J., laid down that :—

"only those can recover who have an insurable interest, and they can recover only to the extent to which that insurable interest is damaged by the loss. In the course of the argument it has been sought to establish a distinction between a fire policy and a marine policy. It has been urged that a fire policy is not quite a contract of indemnity, and that the assured can get something more than what he has lost. It seems to me that there is no justification in authority, and I can see no foundation in reason, for any suggestion of that kind. What is it that is insured in a fire policy? Not the bricks and the materials used in building the house, but the interest of the assured in the subject-matter of insurance, not the legal interest only, but the beneficial interest."

See also *Graham Joint Stock Shipping Co.* v. *Merchants Marine Insurance Co.* (2) ; *P. Samuel & Co., Ltd.* v. *Dumas* (3).

Now, under the agreement of the 16th of August 1929 the plaintiffs were possessed of something more than a mere option to purchase the premises. The agreement was a concluded contract under which the parties thereto agreed that the premises should be purchased by the plaintiffs for Rs. 7,500 and at the time of the fire the plaintiffs were in a position to obtain specific performance of this agreement. In these circumstances I am of opinion that the plaintiffs did possess an insurable interest in these premises at the date when the fire took place. The result is, in my opinion, that, although the learned Judge was

(1) (1883) 11 Q.B.D. 380 at p. 397. (2) (1924) A.C. 294.
(3) (1924) A.C. 431.

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right in holding that the only interest that the plaintiffs possessed at the time of the fire was such interest as they had obtained under the contract of purchase, the learned Judge, with all respect, was wrong—as I understand his judgment—in thinking that an insurable interest is synonymous with a legal interest, and for that reason holding that, inasmuch as the plaintiffs at the time of the fire did not possess an interest in or charge upon the property within section 54, they could not, and did not, possess an insurable interest in the premises.

The decree of the trial Court must be set aside, and the case remanded to the Original Side to determine what loss, if any, the plaintiffs or any of them sustained by reason of the premises being destroyed by fire.

The costs of the trial and the costs of the appeal will be costs in the cause.

MYA BU, J.—I agree.