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pension or grant inasmuch as the entry of the name of the plaintiff in the register would entail the liability of Government to pay to him and not to any one of the other sharers. The present case is not one in which the right to share in the allowance as such is contested amongst the sharers, which would be a different matter altogether. What the plaintiff wants is to have his name entered in the Register in preference to the other sharers, which is admittedly what the expression "doing the work" in the plaint means. Although there is no decided case on this point, I think on a comparison of the Pensions Act with the Watan Act and on a consideration of the cases which have been quoted by the learned advocate for the appellant, that there is little doubt that the view taken by the lower appellate Court is correct, and consequently the appeal must fail, and is dismissed with costs.

Decree confirmed.

B. G. R.

APPELLATE CIVIL.

Before Mr. Justice Patkar and Mr. Justice Barlee.

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July 22.

THE GREAT EASTERN LIFE ASSURANCE CO., LTD., HAVING ITS OFFICE AT BOMBAY (ORIGINAL DEFENDANTS), APPELLANTS *v.* BAI HIRA, WIDOW OF NANDLAL SHIVLAL SATYAWADI (ORIGINAL PLAINTIFF), RESPONDENT.*

Life Assurance—Untrue answer to question in proposal form—Proposal made the basis of contract—Warranty—Condition.

One N. S. applied for a life assurance policy of the appellant Company. The application form expressly provided that the answers given by the applicant were full and true and that the declaration with the answers to be given by the applicant to the medical examiner of the company should be the basis of the policy. The policy when issued also provided that the assurance was granted in consideration of the representations, statements and agreements contained in the application for the policy and which was made a part of the contract.

Held, (1) that the recital in the policy that the representations, statements and agreements in the application should be the basis of the contract made the truth of the statements contained in the proposal a condition of the liability of the insurers;

*Letters Patent Appeal No. 29 of 1928.

(2) that having regard to the express provisions contained in the application and the policy the only question before the Court was whether the disputed statement was false. The Court had not to consider in such a case the materiality or otherwise of the representation made.

Dawsons, Ld. v. *Bonnin*,[1] *Anderson* v. *Fitzgerald*,[2] and *Thomson* v. *Weems*,[3] followed;

(3) that the materiality of the representation would be an element to be considered where the statements made by the assured in his application for a policy of life insurance were not made the basis of the contract but were to be treated merely as representations.

Mutual Life Insurance Co. of New York v. *Ontario Metal Products Co.*[4] and *Joel* v. *Law Union and Crown Insurance Company*,[5] referred to;

(4) that the answer of the assured in his statement before the medical examiner was not false as alleged by the appellant Company.

APPEAL No. 29 of 1928 under the Letters Patent against the decision of the High Court in First Appeal No. 16 of 1928 preferred against the decision of M. G. Mehta, Joint First Class Subordinate Judge at Ahmedabad, in original Suit No. 914 of 1926.

Suit to recover money.

On November 28, 1923, one Nandlal Shivlal Satyawadi applied to the defendant Company for a policy of Life Assurance. The application form provided that the answers given by him were full and true and that the declaration with the answers to be given to the medical examiner of the Company should be the basis of the policy. In reply to the medical examiner the assured stated that he had no particular medical attendant and that he had no other illness of any kind. In reply to question 5 (g) he stated that he had never suffered from indigestion, abdominal pain or discomfort, fistula, piles, rupture, dysentery, sprue, or any other affection of the digestive organs. On the basis of these statements the policy was issued by the Company. The policy expressly provided that the assurance was granted in consideration of the representations, statements and agreements

(1) [1922] 2 A. C. 413.
(2) (1853) 4 H. L. C. 484.
(3) (1884) 9 App. Cas. 671.
(4) [1925] A. C. 344.
(5) [1908] 2 K. B. 863 at p. 885.

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contained in the application for the policy and which was thereby made a part of the contract.

On May 11, 1924, the assured died of sprue. His widow, Bai Hira, filed the present suit against the defendant Company to recover Rs. 10,780, being the amount due on the Life Policy. The principal defence of the defendant Company was that the policy sued upon was not binding on them as the assured had suppressed the material fact of his having suffered from "Sangrahani." The defendant Company when called upon for particulars added that the deceased had suffered from sprue. The first issue framed by the Court was whether the assured was suffering from sprue or dysentery (the latter word being suggested by the defendant's pleader) before and at the time of his medical examination and his declaration. The Court held that the plea of the defendant Company that the assured had suffered from dysentery was wrongly incorporated in the issue and recorded a finding in the negative on the first issue. On the evidence the Court found that the statement relied upon by the defendant Company was not false and decreed the plaintiff's claim. The defendants appealed to the High Court but the appeal was summarily dismissed by Madgavkar J. under Order XLI, rule 11, of the Civil Procedure Code. The defendants preferred an appeal under the Letters Patent.

Sir Chimanlal Setalvad, with *R. J. Thakor*, for the appellant.

G. N. Thakor, with *P. A. Dhruva*, for the respondent.

PATKAR, J. :—This suit was brought by the plaintiff, the widow of one Nandlal Shivlal Satyawadi, to recover Rs. 10,780 on the life policy of her husband with the defendant Company.

The defendant contended that the policy was not binding on the defendant as the assured suppressed the fact of his having suffered from *Sangrahani*. The learned Subordinate Judge raised an issue whether the assured was suffering from sprue or dysentery before or at the time of the medical examination and his declaration, and found in the negative, and awarded the plaintiff's claim.

The plaintiff's husband made an application to the defendant Company for insurance on his life. It stated :—

"I warrant that the above answers are full and true and that I am now and usually in sound health; and I agree that this declaration, with the answers to be given by me to the Medical Examiner, shall be the basis of the policy and of the interim assurance should any be granted."

On November 19, 1923, the policy, Exhibit 10, was issued, which provides :—

"This assurance is granted in consideration of the representations, statements and agreements contained in the application for this policy which is hereby made a part of this contract."

In his answers to the questions by the medical officer the plaintiff's deceased husband stated that none in particular was his medical attendant, and that he had no other illness of any kind. The defendant Company does not base its defence on answers to these questions Nos. 2 and 3. It relied on the question and answer in 5 (*g*) wherein the deceased stated that he had never suffered from indigestion, abdominal pain or discomfort, fistula, piles, rupture, dysentery, sprue, or any other affection of the digestive organs.

I shall deal in detail with the pleadings of the parties and the specific answer on which the defence is based. It is sufficient at this stage to mention that the answer that the assured never suffered from sprue or dysentery may be taken to be the basis of the denial of the claim by the defendant.

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The learned Subordinate Judge held that where an answer given by the assured to the medical examiner is made the basis of the policy, the falsity of the alleged answer is the only question in view of the expressed condition, warranty and stipulation making it the basis of the insurance contract, and that it is not for the Court to consider whether the answer is a material one, and relied upon the decisions in the cases of *Anderson* v. *Fitzgerald*[1] and *Thomson* v. *Weems*.[2]

It is urged on behalf of the respondent that the policy in the two above-mentioned cases unlike the policy sued upon contained a proviso that if any untrue averment was made the policy was to be absolutely void and all moneys received as premium should be forfeited, and therefore, the materiality of the question and answer did not arise for decision in those cases, but the question arises in the present case, and reliance was placed on the decisions in the cases of *Fowkes* v. *Manchester and London Assurance Association*[3] and *Hemmings* v. *Sceptre Life Association, Limited*,[4] where it was held that the policy and the declaration must be read together and the policy was not avoided by any untrue statement in the declaration unless the statement was material and designedly untrue. I am unable to agree with the contention advanced on behalf of the respondent. The statement in the policy that the policy shall be void and the money paid shall be forfeited is only the legal result of the condition that the proposal and the statements shall be the basis of the contract. In the present case, the declaration and the answers to be given to the medical examiner are agreed to be the basis of the policy. The recital in the policy that the representations, statements and agreements in the application for the policy are made a part of the

(1) (1853) 4 H. L. C. 484.
(2) (1884) 9 App. Cas. 671.
(3) (1863) 3 B. & S. 917.
(4) [1905] 1 Ch. 365 at p. 369.

contract makes the truth of the statements contained in the proposal, apart from the question of materiality, the condition of the liability of the Insurance Company. The truth of the statements is the basis or foundation of the contract. The law on this point is clearly laid down in the case of *Dawsons, Ld.* v. *Bonnin,*[1] where the fact that an inaccurate answer was given to a question in the application form, although in itself of no materiality, was held to invalidate the policy of insurance, because the accuracy of the assured's answers was made a basic condition of the contract. It was observed (p. 432) :—

"What, then, does the sentence quoted mean? I cannot think that it amounts to nothing more than a statement that the proposal initiated the transaction and led to the grant of the policy. That fact sufficiently appears from the recital of the proposal ; and the addition of an express stipulation that the proposal shall be treated as incorporated in the policy and shall be the basis of the contract, is plainly intended to have some further effect. 'Basis' is defined in the Imperial Dictionary as 'the foundation of a thing; that on which a thing stands or lies'; and similar definitions are to be found elsewhere. The basis of a thing is that upon which it stands, and on the failure of which it falls; and when a document consisting partly of statements of fact and partly of undertakings for the future is made the basis of a contract of insurance, this must (I think) mean that the document is to be the very foundation of the contract, so that if the statements of fact are untrue or the promissory statements are not carried out, the risk does not attach. No doubt the stipulation is more concise in form than those which were contained in the policies which fell to be construed in *Anderson* v. *Fitzgerald*[2] and *Thomson* v. *Weems*,[3] in each of which cases the policy contained an express provision to the effect that if anything stated in the proposal was untrue, the policy should be void; but I think that the effect is the same as if those words had been found in the present policy. Indeed, it is remarkable that in *Anderson* v. *Fitzgerald*[2] Lord Cranworth referred to the above-mentioned provision, as to the avoidance of the policy if any of the statements in the proposal should be untrue, as a provision making those statements the basis of the contract; and in *Thomson* v. *Weems*,[3] Lord Blackburn said : 'But I think when we look at the terms of this contract, and see that it is expressly said in the policy, as well as in the declaration itself, that the declaration shall be the basis of the policy, that it is hardly possible to avoid the conclusion that the truth of the particulars . . . is warranted'. Lord Esher, in *Hambrough* v. *Mutual Life Insurance Co. of New York*,[4] uses the word 'basis' in the same sense.

[1] [1922] 2 A. C. 413.
[2] (1853) 4 H. L. C. 484.
[3] (1884) 9 App. Cas. 671.
[4] (1895) 72 L. T. 140.

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"Upon the whole, it appears to me, both on principle and on authority, that the meaning and effect of the 'basis' clause, taken by itself, is that any untrue statement in the proposal, or any breach of its promissory clauses, shall avoid the policy; and if that be the contract of the parties, it is fully established, by decisions of your Lordships' House, that the question of materiality has not to be considered."

On the other hand where the statements made by an insured upon his application for a policy of life insurance are not made the basis of the contract but are to be treated merely as representations, the materiality of the representation is an element to be considered. See *Mutual Life Insurance Co. of New York* v. *Ontario Metal Products Co.*[1] As observed in *Joel* v. *Law Union and Crown Insurance Company*,[2] not even the most skilled doctor after the most prolonged scientific examination could answer such a question with certainty and a layman can only give his honest opinion on it. In that case, however, the declaration did not state that the answers to the medical officer were to form the basis of the contract. Having regard to the warranty in the present case that the answers given to the medical officer shall be the basis of the policy, the Court has only to consider whether the disputed statement is false, and it is not necessary to go into the question whether it is a material one. In Halsbury's Laws of England, Vol. XVII, page 551, it is laid down as follows:—

"The effect of such a stipulation is that the assured is held to warrant the truth of the declaration, and if it states anything untrue, whether to the knowledge of the assured or not, and whether material or not, the contract is avoided. Thus, if the declaration which is made the basis of the insurance contains a statement that the life assured has not been attacked by a certain illness, and the statement is untrue, the policy is avoided, however slight the illness may have been, at any rate unless it was of such a nature that he could not be reasonably aware of it, and the declaration cannot be fairly considered as including latent and unknown disease."

The next question is whether the answer of the assured in his statement before the medical examiner

[1] [1925] A. C. 344. [2] [1908] 2 K. B. 863 at p. 885.

to question No. 5 (*g*) was false as alleged by the defendant. The answer to this question depends on the pleadings of the parties. It is urged on behalf of the appellant, the Insurance Company, that the evidence of Dr. Bhagat and Dr. Parikh shows that the assured was suffering from sprue or dysentery or diarrhoea or mucus collitis or any other disease connected with the intestines. It is urged, on the other hand, on behalf of the plaintiff-respondent that the case put forth by the defendant Company was that the assured was suffering from sprue, and the evidence in the case does not establish that the assured was suffering from that disease. It appears from Exhibit 15 that according to the view of the Insurance Company the assured had attacks of sprue for which he was treated by competent medical men, and which was diagnosed as such by them, and he died also from the same disease. Though the defendant according to the letter Exhibit 13 was not prepared to disclose the source of its information at that stage, Mr. Merchant, the branch manager of the defendant Company, in his evidence Exhibit 38 stated that before they received the claim papers of the plaintiff they gathered information that the deceased was suffering from sprue, and in the cross-examination stated that they gathered the information from Dr. Bhagat. Dr Bhagat, Exhibit 40, when examined is not questioned on this point. In the written statement paragraph 4 it is stated that the deceased had suppressed the fact of his having suffered from *Sangrahani*. It is urged on behalf of the plaintiff that *Sangrahani* means sprue. On the other hand, it is urged on behalf of the defendant that it means dysentery or costiveness alternately with diarrhoea. The defendants' pleader on being questioned by the Court stated in Exhibit 20 that their case was that the deceased was

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suffering from sprue, that is from the disease of stools. It is, therefore, urged on behalf of the plaintiff that the only case put forward by the defendant was that the deceased was suffering from sprue. The issue raised by the Court included dysentery. The learned Judge held that the word dysentery, which in Gujarati is called *mardo*, was wrongly included in the issue, and the only question to be considered was whether the deceased was suffering from sprue. It is clear on the pleadings that there was no allegation that the deceased was suffering from diarrhoea which is merely a symptom, or was suffering from any other affection of the digestive organs. Dr. R. L. Parikh who attended the deceased during his illness was a junior practitioner, and the question as to the disease from which the deceased was suffering has to be decided on the opinion of the medical gentlemen from the prescriptions prescribed by Dr. R. L. Parikh which have been produced in the case. It is unnecessary to consider how these prescriptions were secured by the defendant Company. It is not suggested that they are not genuine. Dr. Bhagat, Exhibit 40, states that he had never examined the assured medically though he saw him frequently, and from the prescriptions he was of opinion that the deceased was suffering from anaemia and diarrhoea or dysentery of a chronic nature and may have been suffering from sprue. He admitted that in sprue there is generally no fever, on the other hand, the temperature is below normal, whereas the prescriptions show that the deceased was suffering from fever. He admitted that calomel could not be given under any circumstances, but calomel appears to have been prescribed. He could not positively say that the prescriptions were for sprue necessarily. From the prescriptions it was difficult for him to say that it was a case of sprue. His opinion is based on 17 prescriptions

out of 85, and his opinion is that the patient was suffering from either diarrhoea, dysentery or sprue, though he is certain that they disclosed the case of intestinal trouble of diarrhoetic nature. Dr. Manilal Parikh, Exhibit 41, says that the patient must be suffering from intestinal trouble. It may be diarrhoea, dysentery, sprue, collitis or any other disease connected with the intestines. The deceased had made a statement to the medical officer that he was not suffering from any other affection of the digestive organs, and if the case of the Company was based on the falsity of that statement, the matter would have been different. According to the Pursis, Exhibit 20, and the letter Exhibit 15, the defendant's case was based upon the falsity of the statement made by the assured that he was not suffering from sprue. I am unable to draw an inference from the evidence of Dr. Bhagat and Dr. Parikh, Exhibits 40 and 41, that the statement made by the assured that he was not suffering from sprue is false. The doctors are not positive in their inferences from the prescriptions, and their opinions are indecisive and halting. The falsity of the statement involving forfeiture of the policy must be established by clear and unambiguous evidence. It is difficult to hold on the evidence in the case that the assured knew that he was suffering from sprue, and made a false statement to the medical officer that he was not suffering from sprue. Though the case of the defendants is principally based on the falsity of the statement that the assured was not suffering from sprue, the evidence is not sufficient even to prove affirmatively that the deceased was suffering from dysentery, even if an inquiry on that point is admissible not in view of the pleadings of the parties but on account of the frame of the issue. The medical officer Dr. Bhagat is very hesitating in his opinion. All

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that he is certain of is that the prescriptions disclose the case of intestinal trouble of diarrhoetic nature, and not necessarily diarrhoea or dysentery but it may be mucus collitis.

On the whole I think that the view taken by the lower Court is right and this appeal must be dismissed with costs.

BARLEE, J. :—The suit, out of which this appeal has arisen, was filed by Bai Hira, widow of Nandlal Shivlal Satyavadi, against the Great Eastern Life Assurance Company to recover Rs. 10,790 with costs and interest alleged to be due under a life policy of Rs. 10,000 on her husband's life.

The admitted facts are that on October 29, 1923, the deceased Nandlal made a proposal for a life assurance to the defendant Company and filled in a proposal form. It included a warranty that the answers given by him were full and true and he agreed that " this declaration, with the answers to be given by me to the Medical examiner, shall be the basis of the Policy." Amongst the questions put to him by the Medical examiner were :—

" Who is your ordinary Medical attendant? When and for what illness consulted? "

Answer :—" None in particular."

" What other illness of any kind have you had, and when? By whom were you attended? "

Answer :—" None."

" No. 5(*g*)—Have you ever suffered from indigestion, abdominal pain or discomfort, fistula, piles, rupture, dysentery, sprue, or any other affection of the digestive organs? "

Answer :—" Nil."

On the strength of those answers the policy was given. Nandlal died on May 11, 1924. His widow, the plaintiff, applied to the Company for the money due under the policy and was met with a refusal. From the letter at page 53 of the printed book we find that the Company informed her that they were convinced that some of the material facts had not been disclosed by the deceased and consequently that the assurance granted was void. The plaintiff through her pleader inquired what those material facts were; and at page 57 we have their reply dated July 15, 1925, that they were relating to the history of a previous illness. Finally, by their letter at page 61, they said that, according to their information, the assured had had attacks of sprue for which he had been treated by competent medical men.

The widow then filed a suit in the Court of the Joint First Class Subordinate Judge at Ahmedabad. In their written statement the defendant pleaded that the deceased had suppressed the fact of his having suffered from "Sangrahani" and when called on for particulars added, on December 9, 1926, that the deceased had suffered from sprue, i.e., from "the disease of stools." The pleading was in Gujarati, but the English word "sprue" was used. Issues were framed. On the first issue, "was the assured suffering from 'sprue' or dysentery before or at the time of his Medical examination and his declaration," the finding of the trial Court was in the negative, and the plaintiff obtained a decree against which the Company has appealed.

The evidence in the case produced by the company to prove their allegations consists of a number of prescriptions written by one Dr. R. L. Parikh in 1921-22. Dr. Parikh was dead at the time of the trial and the company called two medical men, who read the prescriptions

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and gave their opinion as to the disease from which the deceased had suffered in the year 1921-22. In all there are about 80 prescriptions and Dr. Bhagat, who is a principal witness for the defence, says that the majority of the prescriptions indicated that the assured had got intestinal troubles causing diarrhoea, dysentery or mucus collitis and anaemia. It is now admitted that the number of such prescriptions was 16. In answer to a direct question he said that the patient might have been suffering from sprue. He was subjected to a lengthy cross-examination. And the result is given by the learned Subordinate Judge at page 9 of his judgment, that the doctor was not able to say definitely that the deceased was suffering from sprue, but that he had been suffering from diarrhoea, dysentery or sprue. "I cannot say," he deposed, "that they (the prescriptions) are for sprue necessarily. They disclose diarrhoea or dysentery of a long period but not of a serious nature."

This being the state of the evidence the learned Subordinate Judge held that it had not been proved by the defendant company that the deceased was suffering from sprue or dysentery or that the answers given by him on this point to the medical examiner of the company were false.

In appeal there are two questions for decision, (1) whether defendant had to prove that the answers given were false to the knowledge of the assured, or merely that they were false, (2) whether in fact they were false.

The first point admits of a very short answer. It is determined by the case of *Dawsons, Ld.* v. *Bonnin*,[1] (followed in *Mutual Life Insurance Co. of New York* v. *Ontario Metal Products Co.*[2]) in which it was decided that an inaccurate answer given to a question in the

[1] [1922] 2 A. C. 413.

[2] [1925] A. C. 344.

application form although in itself immaterial invalidates a policy of insurance when the accuracy of the assured's answers is made a basic condition of the contract. The authorities cited on the other side by Mr. Thakor are not applicable to a proposal in the present form. In *Fowkes* v. *Manchester and London Assurance Association*[1] and *Hemmings* v. *Sceptre Life Association, Limited*,[2] the policy contained a clause to the effect that if any statement in the declaration was untrue (which declaration was considered a part of the policy) or if the assurance should have been effected by any wilful misrepresentation, concealment or false averment whatsoever, the policy granted in respect of such an assurance should be absolutely null and void; and it was held that the declaration and policy had to be read together and that their combined effect was that the policy was not avoided by any untrue statement in the declaration which was not designedly untrue. In other words the clause in the policy, it was held, explained and limited the warranty in the proposal. But in the present case there is no such limitation, and the declaration must be interpreted in accordance with the Court's ruling in *Dawsons, Ld.* v. *Bonnin*,[3] cited above.

On the merits, it has been contended for the appellant company that the learned Subordinate Judge was wrong in confining his consideration to the question of sprue, and that the company was entitled to succeed since it was clearly proved that the assured was suffering from some sort of severe intestinal disease, which he had concealed from the company in making his proposal. That he did conceal from the company, intentionally or otherwise, the fact that he had suffered within the preceding eighteen months from an intestinal disease

(1) (1863) 3 B. & S. 917. (2) [1905] 1 Ch. 365.
(3) [1922] 2 A. C. 413.

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must be conceded; and it would have been open to the company to plead that that concealment was enough to entitle them to avoid the policy. But I agree with the lower Court that they did not as a matter of fact defend the case on this ground. In the written statement they used the general word "Sangrahani," which according to dictionary means, "dysentery, costiveness alternately with diarrhoea." But, when asked for further particulars, they pleaded definitely that the deceased was suffering from sprue.

Now, the company, it must be assumed, was acting on competent legal and medical advice and when they used the word "sprue" they must be understood to have meant that the assured was suffering from the specific disease known by that name and to have restricted their defence to this plea. Accordingly, I agree with the lower Court that the evidence went no further than showing that the assured had suffered from one of several intestinal diseases of an allied nature and it was not sufficient to establish the defence which the company chose to set up, and would dismiss the appeal with costs.

Appeal dismissed.

R. G. R.

APPELLATE CIVIL.

Before Mr. Justice Baker.

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July 24.

SHAMJI GHELABHAI AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS v. JAMNADAS MEGHAJI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Indian Easements Act (V of 1882), section 20—Grant of easement under writing—Parties bound by the terms of the writing.

An owner of a large piece of land at Ghatkopar divided it into several plots for building purposes and sold them to different individuals. It was stipulated in each sale deed that the purchaser was bound to keep open a passage 15 feet wide at the edge of his plot for the use of the other purchasers.

*Appeal No. 212 of 1928 from Appellate Decree.