Privy Council Appeal No. 11 of 1924.

Surajmull Nagoremull - - - - - - - *Appellants*

v.

The Triton Insurance Company, Limited - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 2ND DECEMBER, 1924.

Present at the Hearing:
LORD SUMNER.
LORD PHILLIMORE.
SIR JOHN EDGE.
SIR LAWRENCE JENKINS.

[*Delivered by* LORD SUMNER.]

The appellants, the plaintiffs below, brought their suit for breach of an alleged contract to "issue policies of insurance covering war risks on goods" shipped or to be shipped by them "at the rate prevailing at the time of the plaintiff firm's declaration of the steamer, by which goods, as aforesaid, were to be shipped" (Plaint para. 3). As developed in further paragraphs, this was founded on (*a*) a written quotation by the defendants of their lowest rate on jute per *Constantinos XII* at ½ per cent. and war risk at 5 per cent., less 10 per cent.; (*b*) an acceptance of this rate by the plaintiffs; and (*c*) an arrangement that the plaintiffs should supply the defendant company with a statement of the approximate amount to be covered. Ultimately there was a declaration for an aggregate amount of £10,870, for which sum the defendants refused to issue a policy, whereon the plaintiffs insured elsewhere at higher premiums and claimed the excess as their damages in the action. There was no loss of the goods at all.

Pearson J., who tried the case, found the contract and breach proved and gave the plaintiffs decree, but the High Court, holding the contract to be insufficiently established, set that decree aside.

On being informed that the alleged contract arose on an acceptance by word of mouth of a letter quoting a rate of premium and on a declaration by word of mouth, not of the name of the steamer by which the goods were to be shipped, but of the expected value of the plaintiffs' goods to be loaded on board of her, and that the breach alleged was the defendants' refusal to issue a policy, their Lordships, struck by the divergence in this case from ordinary underwriting practice as known in this country and by the singularity of an enforceable contract by word of mouth to issue a policy of marine insurance, inquired whether there was no legislation in India corresponding to the Stamp Act, 1891 (54 & 55 Vic. c. 39), sect. 93 (1). Their attention was then drawn by counsel to the Indian Stamp Act, No. 2 of 1899, sect. 7 of which provides that (with exceptions not now material) "no contract for sea insurance shall be valid unless the same is expressed in a sea policy," a provision which re-enacted the original enactment of 1894.

This section had not been pleaded by the defendants in the suit, for their general plea, No. 10.—"Lastly, the defendant company submits that the suit of the plaintiff firm is not maintainable"—cannot be read as raising a specific statutory answer. Their Lordships were informed that the point was not discussed in either Court below. Certainly it passed unnoticed in the judgments, although Richardson J. says "the law has laid it down that agreements of certain kinds shall not be valid at all, unless commemorated in writing with or without formalities. . . . . In India apparently it is not fatal to the plaintiffs' case that there was no contract in writing." Possibly the fact that the High Court's decision was already plainly adverse to the claim may be the explanation of the circumstance, that counsel did not there and then dispel a misapprehension in the learned judge's mind of such capital importance, but the result, at any rate, has been that the effect of this section was not considered until the case come before their Lordships' Board.

The suggestion may be at once dismissed that it is too late now to raise the section as an answer to the claim. No court can enforce as valid, that which competent enactments have declared shall not be valid, nor is obedience to such an enactment a thing from which a court can be dispensed by the consent of the parties, or by a failure to plead or to argue the point at the outset (*Nixon* v. *Albion Marine;* L.R. 2 Ex. 338). The enactment is prohibitory. It is not confined to affording a party a protection, of which he may avail himself or not as he pleases. It is not framed solely for the protection of the revenue and to be enforced solely at the instance of the revenue officials, nor is the

prohibition limited to cases, for which a penalty is exigible. The expression of an agreement for sea insurance, otherwise than in a policy, is a thing forbidden in the public interest. and the statutory insistence on a policy is no mere collateral requirement or prescription of the proper way of making such an agreement. To allow the suit to proceed in defiance of section 7 would defeat the provisions of the law laid down therein. In England this is well-settled law (*Fisher* v. *Liverpool Marine*. L.R. 8 Q.B. 469; L.R. 9 Q.B. 418; *Ionides* v. *Pacific Insurance Co.*. L.R. 6 Q.B. at p. 685 (Blackburn J.); *Xenos* v. *Wickham*. L.R. 2 H.L. at p. 314 (Willes J.)), and there is no ground for construing the Indian Act, expressed in almost identical terms, in any different way. The observations of the High Court in the *Reference under the Stamp Act* (I.L.R. 30 Calc. 565), distinguishing a contract for sea insurance and a policy of sea insurance. seem to have been directed to another point. and the case of *Bhugwandas* (14 A.C. 83) was before the Stamp Act. In their Lordships' view, the contract alleged by the plaintiff was a contract for sea insurance and nothing else, and, not being expressed in a policy, was unenforceable.

The appellants asked that, in the event of the respondents succeeding upon this ground, they should not be allowed any costs, since the suit had proceeded throughout on the questions of fact in the case. For such a course there is authority (*Home Marine Insurance Co.* v. *Smith*, 1898 1 Q.B. 836). The respondents, however, had defended the claim on the merits and not on the failure to satisfy the statute, for obvious business reasons. They were entitled to have their Lordships' judgment on the whole of the case and to ask to have the appeal dismissed with costs, if they could support the judgment of the High Court, upon the grounds on which it was given. Their Lordships therefore proceed to examine the facts without restating them at length.

The transaction alleged rested on conversations, except for the one letter which quoted a rate of premium against war risk. There is always considerable difficulty when one of a number of mercantile transactions of a type usually recorded in writing has to be proved by word of mouth, for experience shows that in such cases the most honest and careful witnesses, recalling to memory only the result of the conversations, tend to give evidence of what they think they must have heard and said to produce such a result rather than to state from actual memory of them the very words that were used. This difficulty the appellants themselves deliberately increased, and for no good purpose, by postponing the issue of their writ and the prosecution of the suit in a wholly indefensible manner. It is familiar enough that in country cases all over India claimants intentionally defer the commencement of suits till they are all but time-barred—a practice so deeply rooted, that it is useless to protest against it—but it is with equal surprise and regret that their Lordships notice the extension of this evil practice to mercantile transactions in

Calcutta. The conversations in question took place in November and December, 1916, and the cause of action, if any, was complete before the end of the year; nevertheless, the suit was not begun till the 8th December, 1919; the written statement was not delivered till the middle of 1921, and the case was only brought to trial on the 31st July and 1st August, 1922. This interval of five years and a half was not, however, allowed to dim the definiteness, with which the partners and employees in the plaintiffs' firm spoke to conversations in the ordinary course of business, relating to a matter, which had little about it that was out of the common, yet it is on the extent to which these witnesses can be trusted that the success of their claim depends. Witnesses, who speak after such an interval, as a rule remember either too little or too much. Here it is excessive recollection that is the vice of the plaintiffs' case. The question being whether any contract of insurance relating to war risks ever was agreed at all, three separate witnesses swore to separate agreements upon the subject; the first when a quotation for a war risks premium was first asked for and before it was given; the second when it was given by word of mouth and before it was put into writing; the third when, for the first time, something approaching a declaration that could give rise to a specific insurance was made to the defendants. It was this last agreement that was ultimately relied on.

The case was put thus. A letter containing a quotation of a war risks premium having been sent by the plaintiffs on the 30th November, the defendants' representative, without awaiting the receipt of a declaration of interest, called on the plaintiffs' senior partner at his private house to ask him "to let them know the approximate amount the insurance would be with regard to the goods of the steamer *Constantinos XII*, because they wanted to reinsure." The enquirer was referred to the office and there "after calculation a Babu handed over a figure in pounds." It was on a slip of paper containing an approximate number of bales and "the approximate amount" in pounds sterling. The amount given was £16,000, but it is impossible to say that this is a specification of "the amount or amounts insured." The plaintiffs produced a press copy of a letter of the same date, in which they purported to inform the defendants that they confirmed their war and marine declarations of that date, but neither Court below believed that this letter was genuine. When written declarations were subsequently made a few days later, the actual amounts were only £9,300 and £1,570. The quotation had meantime been withdrawn and the defendants refused to insure at the rate quoted on the 30th November, as they had since heard from London that current rates were now much higher, a point vital to the possibility of reinsuring the line. Accordingly, the earlier amount, approximately given, did not satisfy the statutory requirements of a sea-policy, and the latter amounts were not an acceptance of the rate of premium offered, for it had in the meantime been withdrawn. It was no longer a "subsisting proposal

capable of being accepted," as in the case of *Bhugwandas* (14 A.C. 83).

It may be conceded that, in the ordinary course, the plaintiffs would wish to cover the war risk as well as the marine risk on their shipments. Possibly, the war risk cover would not be immediately pressing; it might suffice, if it was effected before the ship cleared the Suez Canal, but, naturally, the covers would both be arranged before the ship sailed from Calcutta and most conveniently with the same insurers. Naturally, also, the plaintiffs would require policies in the ordinary way, that is, documents that could be attached to bills of exchange or transferred to purchasers by separate assignments. On the other hand, it is certain that the defendants' representative could not really have meant, whatever he might be careless enough to say, that he was willing to cover £16,000 or even £10,870 then and there, without knowing the current rate of premium on that day, since the line, which the defendant company could take on war risks, was strictly limited and any excess must be covered in Europe. It is, therefore, in the last degree improbable that the transaction alleged should have been completed without the issue of regular cover notes from the office, and the probability is that, the defendants having withdrawn from the negotiation in time, the plaintiffs' whole endeavour has been to hold them to a quotation which was out of date, and to make up for the absence of ordinary documents by an exaggerated account of quite unimportant inquiries. Their Lordships think that the learned judges of the High Court were fully warranted in disbelieving the plaintiffs' case. They do not think it necessary to discuss the question whether the damages claimed could have been said to flow from a breach of the contract alleged, if it had been made and was enforceable, but they express no opinion in favour of that contention. They will humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

SURAJMULL NAGOREMULL

v.

THE TRITON INSURANCE COMPANY, LIMITED.

DELIVERED BY LORD SUMNER.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C. 2.

1924.