

Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Bhugwandass v. The Netherlands India Sea and Fire Insurance Company of Batavia, from the Court of the Recorder of Rangoon, delivered 1st December 1888.

Present :

LORD FITZGERALD.

LORD HOBHOUSE.

LORD MACNAGHTEN.

SIR RICHARD COUCH.

[*Delivered by Sir Richard Couch.*]

The Appellant in this case brought a suit against the Respondents, for specific performance of a contract of insurance. The Recorder of Rangoon, in whose Court it was brought, dismissed the suit, with costs, and this appeal is from that judgement.

In March 1885 one John Macrory, a ship-builder and owner of a vessel called the *Copeland Isle* then lying in Rangoon river, applied to the Plaintiff, a merchant carrying on business at Rangoon, and also at Calcutta and Bombay, to charter that vessel. The evidence of the Plaintiff, who was examined as a witness, was as follows :—

“ I said to Macrory that if an open cover were given to me free of particular average I would charter the vessel. When the charter-party was drawn and brought to me by Macrory and Sutherland (one of the brokers who arranged the charter) I said, ‘ Where is the open cover ? ’

56369. 126.—12/88.

A

Then Mr. Macrory gave me this open cover, with these five others. When I got these the charter-party was signed by me. I shipped goods on the *Copeland Isle*, I shipped my own goods, 6,220 bags of rice. This is a copy of the charter-party. Subsequently I went to Messrs. Finlay Fleming, Messrs. Strang Steel, and Messrs. Gladstone Wyllie's, for policies on the covers. I got policies from all, except from Messrs. Gladstone Wyllie. I went to Gladstone Wyllie's and saw Mr. Bertram. I went three times to them before I wrote to them. Once I saw Mr. Bertram, and twice Mr. Gordon. I showed Bertram the open cover, and asked him for policies for Rs. 10,000, for 1,000 bags of rice, and Rs. 5,000 for disbursements. Mr. Bertram said, 'We have given a policy to a 'chetty.' That was, I believe, for Rs. 17,500. I said, 'I have no concern with the chetty's 'policy. I want the policy for my goods.' Bertram said he would not give one. I then went to Gordon, who was the then manager of Gladstone Wyllie's. Gordon said, 'I cannot give 'a policy, go to Mr. Macrory.' I went that day or the next day with Macrory to Gordon. Macrory asked Gordon to give the policy, as the ship was to be cleared. He spoke for a long time, and so did I. We both pressed Gordon to give one, but he said he would not. Then I said, 'If you do not give one I will send the customary notice.' Afterwards I addressed a letter to Gladstone Wyllie as the agents of the Defendants' Company."

The open cover was in these terms:—

“Rangoon, 9th March 1885.

“Netherlands India Sea and Fire Insurance
Company of Batavia.

“Dear Sir,

“We hereby consider you insured under an open cover, to the extent of rupees fifteen

thousand only, on rice per *Copeland Isle*,
 Captain ———, Rangoon to Bombay.

“ Premium, 2 per cent.

“ Free of war risks.

“ Average f. p. a.

“ Policy to be applied for before the ship sails,
 and vessel to be towed by steamer to sea.

“ Yours faithfully,

“ Gladstone Wyllie & Co.,

“ J. R. BERTRAM,

“ Agents in Rangoon.

“ To R. Macrory, Esq.”

(On the back.) “ J. MACRORY.”

The letter to Gladstone Wyllie as the Defendants' agents above mentioned, was dated the 31st March 1885, and requested them to declare policies of insurance on 1,000 bags of rice, value Rs. 10,000, and on disbursement of the vessel from Rangoon to Bombay Rs. 5,000, and it enclosed Government promissory notes for Rs. 300 for the premium. Gladstone Wyllie & Co. replied by letter dated the 1st April 1885, saying, “ As “ we did not grant you an open cover by the “ *Copeland Isle*, we regret we cannot issue a “ policy, and we return Rs. 300 in Government “ currency notes which you sent us.” On the 1st April the Plaintiff again wrote, stating that Macrory had transferred the open cover to him, and enclosing it with the Government notes, to which Gladstone Wyllie & Co. replied on the 2nd April that they could not recognize the transfer by Macrory of the open cover, and that they never entered into any engagement to grant the Plaintiff a policy for Rs. 15,000.

Although the Plaintiff at the interviews with Bertram and Gordon, and in his letter of the 31st March, asked for two policies, he appears not to have insisted upon having the insurance in that way, and the Defendants' agents did not

take the ground that the open cover did not bind them to give a separate policy for disbursements, but absolutely refused to issue any policy. Their Lordships think the Defendants cannot say that the Plaintiff was not willing to take a policy on rice for Rs. 15,000. Whether upon such a policy he could recover the disbursements or the Rs. 4,000 advanced on account of freight it is not now necessary to determine. In his plaint he has simply asked for a policy of insurance in terms of the open cover.

When the Defendants' agents refused to issue a policy to the Plaintiff, he endeavoured to obtain an insurance on the cargo uninsured from other offices in Rangoon and Bombay, but did not succeed. The *Copeland Isle* proceeded on her voyage to Bombay on or about the 1st April 1885, and was totally lost in a cyclone on the following 10th of June.

To return to the evidence. About the open cover, Macrory said (omitting passages which it is not necessary to read) :—

“ I remember this open cover. I got it for the charterer, Bhugwandass. I was to see if an insurance could be effected on the cargo before he would sign the charter-party. I made it over to Bhugwandass, and endorsed it. . . . I made all the covers over to him on his signing the charter-party. . . . I saw Mr. Gordon when I first got this open cover. . . . I asked Mr. Gordon if he would take a risk, as I could get a charter if he would take a risk. I did not say that I only wanted it to show to other Companies, and not as an undertaking to issue a policy. . . . Mr. Bertram was present in Gordon's room when I had the conversation with Mr. Gordon, and immediately after I got the open cover . . . I went out of Gordon's room with Bertram. I got the open cover from Bertram in his room. I talked to Bertram there about the ship and the money I had expended

on her, and the condition she was in. I said that if I could get an insurance I could effect a charter. I mentioned Bhugwandass as the charterer. . . . I asked Gordon whether he would insure a part of the cargo, or as much as he could take. When he said he could take up to Rs. 15,000, I asked for an open cover to that effect. I think the open cover was taken out of a book. I do not remember who put the stamp on."

Mr. Gordon was not examined as a witness, and there was a satisfactory explanation of this omission. Mr. Bertram was examined and said:—

"I am an assistant in the firm of Messrs. Gladstone Wyllie & Co., in Rangoon. The firm are the agents of the Defendants' Company in Rangoon. I saw Macrory on the 9th March 1885 with reference to the vessel the *Copeland Isle*. He came to me personally at half-past two. . . . He asked me for a chit to show the other insurance offices that we were prepared to take insurance on the *Copeland Isle*; of course that had reference to what had previously taken place when the matter was arranged by Mr. Gordon. . . . I heard Gordon tell Macrory that he would be willing to take a risk up to Rs. 15,000 on the vessel for the Defendant Company. . . . At this second interview Macrory asked if we would give him a letter to show to Steel's and to Finlay's so that they could see that we were willing to take insurance on the vessel. I gave him a paper. This (the open cover) is the paper I gave. I used this form because he wanted something definite to show to people, mere word of mouth not being sufficient. I chose an open cover form because it was the most convenient thing we had, and it was much easier for me to fill up this form than to write an open letter. . . . We said that we were prepared to accept

a risk on the *Copeland Isle* to the extent of Rs. 15,000. Nothing was said about giving an open cover or a policy. Gordon said this. . . . We knew at the time Macrory had no rice to ship.”

Mr. John Anderson, a witness for the Plaintiff, whose firm are agents for several Marine Insurance Companies in Rangoon, said :—

“An open cover is issued generally before the shipment of the goods to be insured. After the goods are shipped the party producing the open cover gets a policy on payment of the premium. I do not know if we ever had a case of the kind, but our firm would issue a policy to the person producing the open cover to us, notwithstanding the open cover had been issued in another person’s name.” On cross-examination he spoke to the same effect.

Mr. John Borland, another witness for the Plaintiff, whose firm at Rangoon also are agents for several Marine Insurance Companies, said,—

“If we issued an open cover to A, and afterwards B shipped the cargo, we should have no objection to issuing the policy to B.” And on cross-examination,—“I have many times issued an open cover to a man who has not an insurable interest. If Macrory came to us and told us he could not get a charter unless he got open covers on the cargo to be shipped, we would issue open covers to him, and look to him for the premium until we had intimation that the cargo had been shipped by some one else, and that the open cover was held by the shipper.”

Upon the evidence in the suit their Lordships have come to the conclusion that the open cover was given to Macrory in order that he might give it to the charterer of the vessel, and that it was a proposal to insure. Although addressed to Macrory, it could not have been intended for

his acceptance, as it was known that he was not going to ship the rice. When he handed it to Bhugwandass it was a subsisting proposal capable of being accepted by him, and when Bhugwandass went to Gladstone Wyllie's and showed Bertram the open cover, and asked him for policies, there was an acceptance of the proposal so as to make a binding contract with Bhugwandass to insure and issue a policy in terms of the open cover. The asking for two policies did not prevent the acceptance being sufficient, as Bertram absolutely refused to give any policy.

The letter of the 1st April 1885, refusing to issue a policy, and of the 2nd April, refusing to recognize the transfer to Bhugwandass of the open cover, have been noticed. It is to be observed that neither in the interviews with Bhugwandass, nor in the letters, was it said that the paper given to Macrory was not intended to be an open cover. Indeed, in the letter of 2nd April it is so called. It was argued by the learned Counsel for the Respondents that the contract became complete when the charter-party was signed, and the proposal to insure was acted upon. It is not necessary for their Lordships to give any opinion upon this contention, as they hold that the acceptance by Bhugwandass was made whilst the offer to insure was subsisting, and was sufficient to complete the contract. The Plaintiff is entitled to specific performance, and their Lordships will humbly advise Her Majesty to reverse the decree of the Recorder's Court, and to make a decree that the Defendants or their agents do make and issue a policy of insurance in terms of the open cover, and for the amount therein mentioned, and do pay the costs of the suit. The Respondents will pay the costs of the appeal.
