Privy Council Appeal No. 11 of 1961

The United Marketing Company – – – – – – *Appellants*

v.

Hasham Kara – – – – – – – – – – *Respondent*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 8TH APRIL 1963

Present at the Hearing :
LORD EVERSHED.
LORD HODSON.
SIR TERENCE DONOVAN.
(*Delivered by* LORD HODSON)

This appeal is brought by leave of the Court of Appeal for Eastern Africa at Nairobi granted on 2nd March 1961 against an order of that Court made on the 15th September 1960 dismissing with costs an appeal from the Supreme Court of Kenya at Nairobi given on the 27th April 1959 whereby the appellants (defendants) were ordered to pay to the respondent (plaintiff) the sum of shs. 51,284/25 with interest thereon at the rate of 6 per cent per annum from the date of judgment and further ordering the appellants to pay the costs of the respondent.

The respondent's claim arose in this way. He was the lessee of a shop at 2646 Bazaar Road, Nairobi, which was destroyed by fire together with the bulk of its contents on the night of the 9th/10th April 1956 at a time when no policy of insurance was in force covering the stock in trade and furniture contained in the building.

These contents had been insured with the Jubilee Insurance Company Ltd. under a policy dated the 17th November 1950 for 50,000/- apportioned as follows: stock in trade 40,000/- and furniture 10,000/- at an annual premium of 175/-.

The appellants are a partnership carrying on business in Nairobi as insurance agents and are the chief agents of the Jubilee Insurance Company which is incorporated in Kenya having its head office at Mombasa.

The respondent's case was that the appellants were under a contractual obligation to procure the renewal of the policy on the stock in trade and furniture at his shop to the total value stated above and that since no policy was in force at the time of his loss he was unable to make a claim of shs. 46,270/75 cents under the policy in respect of goods destroyed by the fire being the value of the stock less shs. 3,729/25 cents, the value of goods salvaged.

The issues framed and agreed were :

1. Did the plaintiff employ the defendants as his agents to effect his insurances on his properties ? If so on what terms ?
2. Did the defendants commit any breach of that contract or were they negligent in their performance of it ? If so what damage resulted ?

It is common ground that in 1950 a meeting took place regarding insurance between the respondent and Mr. H. G. Thanawalla, a partner in the appellants' firm, but there was a conflict between them as to the terms of the arrangement which was undoubtedly made on that day.

The respondent said that it was arranged at this meeting that year by year the appellants would renew his policies of which that on the shop was one without any instructions from him and debit his account with the premiums. Mr. Thanawalla said on the other hand that it was not true that he agreed to keep on renewing policies without specific instructions so to do but that the policies were to be renewed on instructions in the ordinary manner. No one else was present at this interview. The respondent went on to say that the arrangement continued and that during the period in question Mr. Thanawalla had been buying goods at his shop and from that time the accounts were squared and any balance due for premiums paid as and when requested by Mr. Thanawalla. This again was denied by Mr. Thanawalla who said that, except on an occasion to be referred to later, he did not advance premiums on behalf of the respondent but that in accordance with the practice of the Jubilee Insurance Cumpany a policy which fell due for renewal was renewed upon payment of the previous year's premium. Thus a year of grace was given before a policy lapsed by reason of non-payment of the premium due. When Mr. Thanawalla was shown a letter of 1st November 1954 written by him instructing the Jubilee Company to renew the policy on the shop for a further year Mr. Thanawalla said that when he wrote that letter, it was true he had no instructions to renew, but when he received a reply dated 16th November 1954 saying that the policy could not be renewed as the previous year's premium had not been paid he telephoned to the plaintiff to send a cheque. The respondent's evidence as to the practice followed was supported by that of his son Amirali Hasham Kara who assisted his father in the business from 1950 to September 1955 and handled the insurance accounts. He confirmed the arrangement as to balancing the shop account for goods sold against the premiums due and said that Mr. Thanawalla had told him on several occasions not to worry about the policies as it was his duty to renew them and added that the policies were renewed without reference to him or his father.

Faced with the conflict of evidence between the respondent and his son on the one hand and Mr. Thanawalla on the other the learned judge was much assisted by what took place at a meeting which took place on the 10th April 1956 immediately after the fire and by the action which Mr. Thanawalla then took.

On that day the respondent and his son called on Mr. Thanawalla at his office having received information from the latter's clerk to the effect that the policy had not been renewed. Two of the defendants' witnesses were present namely the Mukhi of the Ismailia Community and the Kamadia of the same Community. These witnesses were at all times unaware that there was any trouble about the insurance claim which the respondent was making. At this interview according to all these persons with the exception of Mr. Thanawalla himself the latter reassured the respondent and told him that he was fully covered, that he himself was flying to Mombasa to see the Manager of the Jubilee Insurance Company and that he had written a letter to the Company on behalf of the respondent. According to these four persons nothing was said at the meeting to the effect that the policy was not in force and the impression left in everyone's mind was that Mr. Thanawalla was intent on satisfying the respondent that his property was fully covered by insurance and he need not worry about payment of his claim. Mr. Thanawalla's subsequent action is significant. He made arrangements to fly to Mombasa but before his departure he paid into the account of the Jubilee Company the sum of shs. 439/50 which included shs. 176/– in respect of the premium on Policy No. M.B. 4762, the policy in question. This he did without telling anyone of his intention so to do. According to a witness from the Jubilee Insurance Company, Mr. Gulamali Dewji Murji, this payment of shs. 176/– was accepted by this Company as renewing the policy up to the 17th November 1954, but according to Mr. Thanawalla his object in making the payment was to be able to say when he got to Mombasa that the previous year's premium had been paid so that he could ask the company to renew up to before the fire and thus the claim could be settled.

The learned judge was satisfied that in making this payment on the 10th April 1956, Mr. Thanawalla was under the impression that it would

renew the policy up to 17th November 1955, and enable the respondent's claim to be considered having regard to the practice of the company in giving a year of grace where insurances were effected through an agent. In any event in the opinion of the learned judge the action of Mr. Thanawalla in making this payment supported the version given by the other witnesses as to what took place at the meeting on the 10th April 1956. Judgment was accordingly entered for the respondent for shs. 46,270/75 with interest and costs as claimed, the figure being arrived at by deducting shs. 3,729/25 the value of the salvaged goods from shs. 50,000 the figure for which the stock and the furniture had been insured.

On appeal to the Court of Appeal of Eastern Africa after a full hearing and exhaustive argument the judgment below was affirmed the Court seeing no reason for differing from the finding of the learned judge in favour of the respondent. These are the concurrent findings of fact which the appellants are asking their Lordships to disturb.

A subsidiary question, whether or not there was any consideration moving from the respondent to support the contract, was decided in favour of the respondent and the appellants have not pressed their argument that this decision was erroneous. Similarly the appellants no longer maintained that they were not the agents of the respondent.

They have however before their Lordships sought to maintain in face of the concurrent findings against them that the agreement relied upon by the respondent was not proved and in addition sought to raise as a ground of appeal not relied upon in either Court that, even if they were wrong as to the agreement, damages could not be more than nominal since the respondent was in breach of a condition of the policy of insurance, that condition being in these terms :—

> " 7. Warranted that the insured keeps and during the currency of the policy shall keep a complete set of books of account and stock sheets or stock books, showing a true and accurate record of all business transactions and stock in hand, and such books shall be locked in a fireproof safe, or removed to another building at night, and all times when the premises are not actually open for business."

Before hearing the appeal their Lordships considered a petition by the appellants for leave to adduce further evidence consisting of documents which have come to light since the making of the order of the Court of Appeal for Eastern Africa.

These documents are five in number. The first three are a letter and carbon copies of letters relevant to the transaction under consideration in this case which were found in a table which Mr. Thanawalla used at his office either at the back of a drawer or in a drawer where they were not expected to be. The last two documents are delivery books which would be required to prove that the originals of the copy letters reached their destination.

Their Lordships dismissed this petition being of opinion that assuming the further evidence to be apparently credible and that it would have an important influence on the result of the case it was not shown that it could not have been obtained with reasonable diligence for use at the trial.

Upon the main appeal the appellants have been constrained to rely on the sixth proposition relating to concurrent findings of fact which is to be found in the case of *Srimati Bibhabati Devi v. Kumar Ramendra Narayan Roy* [1946] A.C. 508 at page 521 where Lord Thankerton delivering the judgment of the Board reviewed its practice in rejecting appeals against considering concurrent findings of fact. The proposition reads :—

> " 6. That the practice is not a cast-iron one, and the foregoing statement as to reasons which will justify departure is illustrative only, and there may occur cases of such an unusual nature as will constrain the Board to depart from the practice."

The appellants main argument was that the respondent's case was on the face of it improbable and was inconsistent with the written documents

available in the case which received scant if any consideration from the learned judge who tried the case or from the Court of Appeal in Eastern Africa.

These documents it is said show that the course of dealing between the parties was consistent with the case put forward on behalf of the appellants as to the agreement made in September 1950 and inconsistent with the case put forward on behalf of the respondent.

Granted that the agreement proved was an unusual one from a commercial point of view in that it required an insurance agent to meet premiums as they fell due out of his own resources without instructions or amendment of particulars leaving him to recoup himself by balancing his account with the respondent at intervals, it may be explained by the close relationship which at all material times existed between Mr. Thanawalla and the respondent and perhaps some defects in the education of the respondent to which reference is made in the evidence of his son.

So far as the documents are concerned their Lordships do not think it necessary to analyse them in detail but express the view that they are not necessarily inconsistent with the practice stated by the respondent to have been followed. Their Lordships have in mind by way of illustration letters sent by the Jubilee Insurance Company to the respondent by way of reminder that premiums were due although on the 10th April 1956, the appellants admittedly (without telling anyone) paid a premium to the company which they had never received from the respondent, and documents which show that the appellants liked to get the money from the respondent before they paid premiums due. One document however deserves notice for it is relied upon as showing that the evidence of the respondent about the interview of the 10th April 1960 is inaccurate. On the 4th July 1956 the respondent appears to have written to the Aga Khan as his spiritual father a letter in which he gives an account of his misfortune arising from the fire at his shop and the history of his claim. In this letter which was put in evidence but not put to the respondent in cross-examination he appears to have said that he knew at the time of the interview on the 10th April 1956 at Mr. Thanawalla's office that the policy in question had not been renewed. This is in apparent contradiction to his evidence at the trial. If this letter had been used in cross-examination of the respondent it no doubt might have affected the learned judge's conclusion as to what took place at the interview on that day, but it would not as it seems to their Lordships place Mr. Thanawalla in any better position nor affect the final conclusion that Mr. Thanawalla was accepting the responsibility for payment of premiums as his. Their Lordships are of opinion therefore that the appellants fail to show that there are any documents which could be said to show that there has been such a substantial miscarriage of justice that the concurrent findings of fact ought to be reversed. On the contrary they are of opinion that these documents do not go any distance towards destroying the respondent's case.

The second ground of appeal, depending on the allegation that the respondent was in breach of a condition of his policy, is said to be established by his own evidence that he kept stock books, that the stock books relating to the goods destroyed by fire were left on the shelf in the shop which caught fire—that the books were burned and that usually they took their books to their homes at night and put them in the safe but on this night they were left in the shop.

Their Lordships are of opinion that the appellants should not be allowed to take this point at this stage. In the first place the point could have been met by evidence that if the claim had been made against the company under a subsisting policy the company would not rely on the breach of the condition or possibly by some other evidence. Their Lordships would not depart from their practice of refusing to allow a point not taken before to be argued unless satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated would have supported the new plea. *Connecticut Fire Insurance Company v. Kavanagh* [1892] A.C. 473 at page 480, and *Archambault v. Archambault* [1902] A.C. 575.

Even if the facts were beyond dispute and no further investigation of fact were required, their Lordships would not readily allow a fresh point of law to be argued without the benefit of the judgments of the judges in the Court below. In this case the appellants have relied in support of their submission that there was a breach of condition on two South African cases, *Lewis Ltd. v. Norwich Union Fire Insurance Co. Ltd.* [1916] S.A.R. Appellate Div. 509 and *Sacks v. Western Assurance Co.* [1907] Rep. of High Court, Transvaal 257, which on similar facts support their submission, but their Lordships are not prepared to say that the point is too plain for argument to be required upon it. The arguments and judgments in these two cases indicate that at any rate in the United States of America there are conflicting decisions on this topic and no direct authority in this country was available so far as the researches of the appellants were able to show. Accordingly their Lordships would not even if the question were a bare question of law entertain the submission that the respondent's claim is to be defeated by reason of his breach of a condition of his contract of insurance with the Jubilee Company and they would follow the guidance given by Lord Birkenhead L.C. in *North Staffordshire Railway Company v. Edge* [1920] A.C. 254 at page 263, when he said " The efficiency and the authority of a Court of Appeal, and especially of a final Court of Appeal, are increased and strengthened by the opinions of learned judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the Courts below." The Lord Chancellor went on to say that there might be very exceptional cases where new matters might be considered, but their Lordships do not regard this case as requiring such exceptional treatment.

Accordingly their Lordships will humbly advise Her Majesty that this appeal be dismissed, subject to a variation in the amount of damages which by an oversight have been wrongly assessed.

The case presented by the respondent was at all times limited to compensation for the loss of his stock in trade although the plaint covered loss of furniture also. Under the policy the stock in trade was insured for 40,000/- and the furniture for 10,000/-. The evidence of Mr. Patel accepted by the learned judge as the basis of the assessment of damages related to stock in trade only and gave its value on 9th April 1956 as shs. 50,611/12. The value of the salvaged goods was given by another witness as approximately 3,729/25 and judgment was entered for the amount claimed 46,270/75 (as being a reasonable sum) with interest and costs. Since the claim, save in the formal pleadings, never in fact related to the furniture, the ceiling of the policy, which was subject to an average clause, was 40,000/- and not 50,000/- and the amount of damages must be altered from the sum awarded to 37,035/-, with interest at the rate fixed by the learned judge.

Notwithstanding this variation in the figure of damages, which their Lordships think must in justice be made, the appellants must pay the respondent's costs of this appeal and of the petition for leave to adduce further evidence.

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In the Privy Council

THE UNITED MARKETING COMPANY

v.

HASHAM KARA

DELIVERED BY
LORD HODSON

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