ASIAN PAINT INDUSTRIES LTD.
v.
INSURANCE CORPORATION OF CEYLON LTD.

COURT OF APPEAL
W. N. D. PERERA, J. AND
SENANAYAKE, J
C.A. NO. 697/80(P)
D.C. COLOMBO NO. A/1050/M
14 FEBRUARY, 1991

Insurance – Goods lost in burglary – False statements – Misrepresentation – Non-disclosure – Uberrima fides – Notice of burglary.

Held:

Where the insured failed to disclose the disputes that existed between them and the partners of another company operating from the same premises and falsely stated that the premises would be guarded after normal business hours by a watcher employed by the insured, there was non-disclosure and a false statement that went to the root of the basis on which the policy was issued. The insured was lacking in *uberrima fides.*

Even if the suppression was through a mistake yet if the underwriter is deceived the policy is void because the risk run is really different from the risk understood and intended to be run at the time of the agreement.

Notice of the incident should be given to the insurer as soon as possible but where the delay was due to the late receipt of the policy, it is excusable.

Cases referred to:

1. *Carter v. Bocha* (1766) 2 Burr 1909.
2. *Lee v. British Law Insurance Co., Ltd.,* (1972)(2) Lloyd's Rep. 49, 57.
3. *Verelsts Administratrix v. Motor Union Insurance Co., Ltd.,* (1925) 2 K.B. 137.

APPEAL from judgment of the District Judge of Colombo.

S. Mahenthiran for plaintiff-appellant.

A. C. Gunaratne Q.C. with *Miss S. Jayaratne* for defendant-respondent.

Cur adv vult.

26th September, 1991.

SENANAYAKE, J.

The Plaintiff-Appellant instituted this action against the Defendant-Respondent for the recovery of a sum of Rs. 2,25,000/- being the value of goods insured by the Defendant-Respondent on the grounds that the said goods had been forcibly removed by burglars from the premises during the subsistence of the policy of insurance.

The Defendant-Respondent in its answer repudiated liability under the said agreement on the ground that the said loss and damage was brought about by persons lawfully on the premises and not by any burglars after forcible and violent entry into the insured premises.

The Defendant-Respondent further pleaded that the Plaintiff-Appellant did not forthwith give notice of the particulars of the incident to the Defendant-Respondent, that the Plaintiff-Appellant failed to deliver a final statement of particulars of the loss as required by the conditions in the agreement, that the Plaintiff-Appellant has violated the conditions of the agreement relating to the employment of a watcher and that the incident of 02.01.71, was not a theft or house-breaking and theft.

The parties admitted that the Plaintiff-Appellant carried on business of manufacturing paints in the premises bearing No. 267, Galle Road, Colombo 03 and that the said premises of the Plaintiff-Appellant was insured by the Defendant-Respondent on burglary and house-breaking Insurance Policy.

The case proceeded to trial on 14 issues and the learned District Judge on 28.11.80 delivered Judgment dismissing the Plaintiff-Appellant's action.

The learned Counsel for the Plaintiff-Appellant submitted that the learned District Judge had erred in law when he held that the partners of Ceylon Paint Manufacturing Company had a lawful right, to stay in the premises of Asian Paint Industries Ltd. He submitted that they were two different entities. I am unable to accept this submission, though in law the two companies were different legal

entities. But factually the two companies were situated in the same premises 267, Galle Road, Colombo 3. The partnership Ceylon Paint Manufactures had commenced business on 26.10.1969; according to P5 – the Certificate of Registration, the main business was manufacturing of paints. According to P2 the Certificate of Registration – Asian Paint Industries was also a partnership carrying on business at premises 267, Galle Road, Colombo 03 to manufacture paints and allied products and commenced business on 05.04.1967. The only common partner of these two partnerships was Sundervelu Selvaraja. The document P3 is the Certificate of Incorporation of the Asian Paint Industries Ltd., which was incorporated on 10.05.1979, and this Company also was situated at the same premises 267, Galle Road, Colombo 03. The complaint P7 made by S. Selvaraja definitely states that he suspects his business partners of Ceylon Paint Manufacturing Company and he admitted that there was a dispute regarding the partnership and the parties have been enjoined from entering the premises. The Learned District Judge was not incorrect in holding that the partners were legally entitled to be in the premises. The Plaintiff-Appellant was duty bound to disclose these matters in his proposal. He should have disclosed the disputes that existed between the partners of Ceylon Paint Manufacturing Company. In the circumstances I hold that the Learned District Judge has not erred.

The Plaintiff-Appellant in the proposal form had categorically stated that the premises would be guarded after normal business hours by a watcher employed by the insured. Whereas this statement was false to the knowledge of the Plaintiff-Appellant. He had not employed a watcher. A watcher had been employed by the landlord Fonseka who had employed him to look after his interest and not that of the insured. This statement being false it is a condition which goes to the root of the Plaintiff-Appellant's statement; the contract being a contract *uberrima fides* the utmost good faith is required.

In a burglary insurance an important question relates to security. When the Plaintiff-Appellant stated that he employed a watcher in the night, this was factually false, when he stated that he was the sole occupier this too was false. He had failed to disclose that Ceylon Paint Manufacturing Company was also occupying the said premises

and it is false when he stated that Asian Paint Industries Ltd., was occupying this premises for one year. The document D^6 signed by the Plaintiff-Appellant stated that the Asian Paint Industries Ltd., commenced functioning since 10th May 1990. The Plaintiff-Appellant though he agreed to the declaration of the proposal being the basis of the contract between him and the Company he was lacking in *uberrima fides* when he made a patently false statement, and there was non-disclosure of material facts.

Lord Mansfield in *Carter v. Bocha* [1] stated "Insurance is a contract upon speculation. The special facts, upon which the contingent chance is to be computed lie more commonly in the knowledge of the insured only, the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that circumstances do not exist to induce him to estimate the risk as if it did not exist. The keeping back of such circumstance, is a fraud, and therefore the policy is void. Although the suppression should happen through mistake without any fraudulent intention yet the underwriter is deceived and the policy is void because the risk run is really different from the risk understood and intended to be run at the time of the agreement. The governing principle is applicable to all contracts and dealings. Good faith forbids either party by concealing what he privately knows to draw the other to a bargain from his ignorance of that fact and his believing the contrary.

The principle is followed even today. In *Lee v. British Law Insurance Co., Ltd.*[2] CA Karminski, L.J. stated at page 57 "full disclosure is the very essence of the contract."

It was the duty of the Plaintiff-Appellant to disclose to the Defendant-Respondent all material facts within his actual knowledge. Good faith therefore requires that he should not by his silence mislead the Defendant-Respondent into believing that the risk as proposed differs to their detriment from the risk which they will actually run.

The Learned Counsel for the Plaintiff-Appellant also submitted that the Learned District Judge had wrongly decided issue No. 3. He submitted that there was no breach of the condition of the policy, in

failing to inform the Defendant-Respondent about the incident till 15.01.1971. His submission was that the Plaintiff-Appellant was issued the Policy only on 01.03.1971, therefore he was unaware of the conditions contained in the policy. There had been a delay in sending the policy to the Plaintiff-Appellant. The Learned Counsel cited *Verelsts Administratrix v. Motor Union Insurance Company Ltd.*[3]. The incident occurred on 14.01.1923 – the insured was killed in a motor accident in India. Knowledge of her death reached her personal representative in England within a month but the personal representative did not know of the existence of the policy of insurance till January 1924. Notice was given to the Insurance Company as soon as possible thereafter. The Insurance Company repudiated liability on the ground that notice was not given "as soon as possible" within the meaning of the condition. Lord Roche held "that in considering whether notice was given as soon as possible within the meaning of the condition, all existing circumstances must be taken into account, including the available means of knowledge of the insured's personal representative of the existence of the policy and the identity of the insurance Company and that the arbitrator to whom the dispute had been submitted was entitled to find that notice had been given as soon as possible".

In the instant case the Plaintiff-Appellant was not aware of the condition as he received the Policy only on 01.03.1971, I accept the submission of the learned Counsel, that the learned District Judge has erred in deciding Issue No. 3. The Plaintiff-Appellant had given notice in the circumstances as soon as possible.

Though the Learned District Judge had erred in answering issue No. 3 he has very carefully considered the evidence. He had the benefit of hearing and seeing the witnesses. He had not been impressed by the evidence of the Plaintiff-Appellant. I am of the view that he had considered the entirety of the evidence very carefully and come to a correct finding of fact. I do not see any reason to interfere with the judgment and decree and dismiss the appeal with costs fixed at Rs. 1500/-.

W. N. D. PERERA, J. – *I agree.*

Appeal dismissed.