

IN THE COURT OF APPEAL, FIJI ISLANDS  
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO.ABU0017 OF 2002  
(On appeal from the High Court of Fiji at Suva in  
Civil Action No. 12 J of 1992 B)

BETWEEN:            DEO SHARAN SINGH, PURAN SINGH and  
                              VIJAY SINGH sons of Ganga Prasad  
                              all of Wailevu, Labasa, Cultivators

*Appellants*

AND:                 THE COLONIAL MUTUAL LIFE ASSURANCE  
                              SOCIETY LIMITED

*Respondent*

Coram:               Reddy, P  
                              Kapi, JA  
                              Sheppard, JA

Hearing:             Tuesday, 25 February 2003, Suva

Counsel:             Mr R.P. Singh for the Appellants  
                              Mr S. Parshotam for the Respondent

Date of Judgment:   Friday, 28 February, 2003

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## JUDGMENT OF THE COURT

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This is an appeal from the decision of the High Court (Madraiwiwi J.) given on 22 August 2000, dismissing a claim by the Appellants against the Respondent for \$40,000, that they claimed was payable to them, as the nominated beneficiaries of their mother Subadra, ("the deceased"), who died on 7 May 1986, under Policy No. 2823114(0).

The Respondent denied liability under the policy. It said that the policy had lapsed on 1 October 1985, due to non-payment of premium, when due. It pleaded that the deceased failed to provide proof of her continued good health, which she was required to do under the terms of the policy, for the policy to be reinstated, when the arrears were paid in February 1986. Significantly, the Respondent did not plead that the action was statute barred, either under the Policy, or the Limitation Act. Nor did the Respondent plead that the policy was void because of "non-disclosure" of the state of the deceased's health, in the proposal for insurance or for want of good faith.

On the 22 of April 1997, the following agreed statement of facts and "issues" was filed in Court:

- "1. THAT by the Policy of Insurance No. 2823114(0) made between Subadra daughter of Ram Sarup and the Defendant in consideration of premiums paid and agreed to be paid at the rate of \$242.02 per month, the Defendant agreed to insure the life of the said Subadra in the sum of \$40,000.00, together with such sum or sums as shall accrue to the said Policy by way of bonuses, and upon proof of death of the said Subadra to pay the said sum together with bonuses.***

2. *THAT the said Subadra died on the 7th day of May, 1986.*
3. *THAT the said Policy was effective from 1st November, 1984 and premiums at the rate of \$242.02 per month were paid from time to time against this Policy.*
4. *THAT premiums against the said Policy were not paid on time and they fell into arrears. By letters date 13th December, 1985 and 20th March, 1986, the Defendant wrote to the said deceased informing her of the arrears and the fact of the Policy benefits then no longer being in force and requesting for payment of the arrears.*
5. *ON 14th February, 1986, a payment of \$1,694.04 was made against the said Policy and on 2nd May, 1986, a further payment of \$242.02 was made against the said Policy.*
6. *AT the time payment of these premiums was made, the said deceased did not provide any proof to the Defendant as to her continued good health.*
7. *UPON the death of the said Subadra on 7th day of May, 1986, the Plaintiffs requested for payment of the amount due on the said Policy but the Defendant refused to pay claiming that the Policy had lapsed due to non-payment of premiums.*
8. *THE Plaintiffs are nominated as beneficiaries under the said Policy and are claiming for payment as such.*

#### ISSUES

1. *Whether or not the Policy is lapsed prior to the death of Subadra."*

Neither the Appellants nor the Respondent called any oral evidence. Counsel informed the learned Judge, that nothing could be "achieved by calling oral evidence". They were content to rely on the agreed facts and issues, and documents put in by consent. Written submissions were filed in July 2000. Judgment was given on 22 August 2000.

The learned Judge found that the policy had lapsed in August 1985, and the Respondent reinstated it in September 1985. He found that the prompt payment of the monthly premiums was waived by the Respondent. However, he proceeded to dismiss the Appellants' claim because the action was statute barred, because of Section 4(1)(c) of the Limitation Act. The Action was commenced on 26 June 1992, more than 6 years after the death of the deceased. Although the Respondent did not plead this defence, he said that he could not ignore the provisions of the Act, and had to take judicial notice of it.

The learned Judge also found that the policy of insurance was "void for non-disclosure of Subadra's actual state of health as per clause 1 of the Policy". He dismissed the Action, and made no order as to costs.

The Appellants have appealed against the decision, and the Respondent has filed Respondent's notice under Rule 19(2) of the Court of Appeal Rules.

The Appellants' grounds of appeal are:-

- "1) That the Learned Trial Judge erred in law and in fact in holding that the proceedings were not filed in accordance with Section 4(i)(c) of the Limitation Act Cap. 35.*
- 2) That the Learned Trial Judge erred in law and in fact in holding that the Insurance Policy was void for non-disclosure of the deceased's actual state of health as per clause 1 of the policy"*

The Respondent seeks to uphold the decision of the learned Judge upon the additional ground that the Policy of Insurance had lapsed due to non-payment of premium

when due and that it was not reinstated because of the deceased's failure to provide "proof of her good health".

### **APPELLANTS' GROUND 1 : LIMITATION ACT**

This defence was not pleaded by the Respondent. Nor was it an agreed issue. If the Respondent intended to rely on it, it should have been pleaded. (See Order 18 Rule 7(1)(c) High Court Rules.) It is settled law that in actions on contract, when a party wishes to take advantage of the Statute of Limitation it must be pleaded.

Halsbury's Laws of England, (4<sup>th</sup> Edition) Vol 36, para 48 says:-

*"The Defendant must in his defence plead specifically any matter which he alleges makes the action not maintainable, or which, if not specifically pleaded, might take the plaintiff by surprise, or which raises issues of fact not arising out of the statement of claim. Examples of such matters are performance, release, any relevant statute of limitation, fraud, or any act showing illegality."*

In Dawkins v Penrhym (1878) 4 App. Cas. 51 at p.59 Lord Cairns, L.C. said:-

*"It cannot be predicated that the defendant will appeal to the Statute of Limitations for his protection; many people, or some people at all events, do not do so; therefore you must wait to hear from the defendant whether he desires to avail himself of the defence of the Statute of Limitations or not."*

In our view the same considerations apply to limitation under clause 6 of the Policy of Insurance. It should have been pleaded, or raised in the statement of agreed issues.

This ground of appeal succeeds.

## GROUND 2 : NON-DISCLOSURE

The learned trial Judge said:-

*"...Furthermore, the policy is void for non-disclosure of Subadra's actual state of health as per clause 1 of the policy and judgment is given in favour of the defendant."*

Clause 1 of the policy provides:-

*" 1 PROPOSAL AND DECLARATION AND PERSONAL STATEMENTS – The Society relies on the truth of the statements made in the Proposal and Declaration and the Personal Statements made in connection with this Insurance, and if the Insurance hereby granted shall have been obtained through any misrepresentation or concealment, this Policy shall be void, and all moneys paid in respect thereof shall be forfeited to the Society"*

The proposal for insurance, made by the deceased was not produced. There was no evidence that as at the date of proposal the deceased was in bad health or suffered from any particular ailment. The only evidence before the Court on the issue was the letter of 16 July 1986 from the Medical Superintendent of Labasa Hospital which read:--

*"This lady who was a known Diabetic, hypertensive, Ischaemic heart disease and Cardiac failure, died in this hospital on 7th May, 1986."*

There was no evidence about the state of the deceased's health when the proposal was made, and the policy issued. In his Judgment at page 4, the learned Judge says:-

*"....The medical superintendent at Labasa Hospital in a letter issued after Subadra's death stated she was a diabetic and had a heart condition of longstanding."* (emphasis added)

The word "longstanding" does not appear in Dr Krishnan's letter.

If the Respondent wished to rely on this defence then it should have been pleaded and made an issue in the case. It was not pleaded, and it was not an agreed issue for adjudication by the Court. The Appellants had no notice of this defence. In the circumstances, it was not open to the learned Judge to reject the Appellants' claim on this ground.

#### **DID THE POLICY LAPSE? – RESPONDENT'S NOTICE**

Clause 2 of the Policy provides that premiums must be paid within one(1) month from their respective due dates. Clause 3 of the Policy reads:-

*" 3 NON-FORFEITURE PROVISION – If after this Policy shall have been in force for two years, and two years premiums shall have been paid hereunder, default be made in payment of any Premium. This Policy shall not become void until its Surrender Value, after deduction of any existing debt by way of loan and interest, or overdue premium or premiums and interest, shall become insufficient to pay one quarterly premium computed according to the mode adopted by the Society, and if a Claim arise hereunder during the continuance of such default and before forfeiture through the exhaustion of the Surrender Value, the amount hereby insured will be payable, subject to the deduction of any existing debt as hereinbefore referred to"*

Where two years premium is paid, the policy acquires a surrender value, and upon non-payment of any premium, the policy does not become void until the surrender value has been used up on payment of any premium arrears and other debts, including interest. If the policy has not acquired a surrender value, then non-payment of any premium on the due date, renders the policy void. That is the essential difference between a policy that has acquired a surrender value and one that has not. In this case the policy did not have a surrender value.

The premium was \$242 per month, payable on the first day of each month. The deceased paid the premiums due between 1 November 1984 and 1 September 1985. No premiums were paid on the due date for October, November, December 1985. On 13 December 1985, the Respondent wrote to the deceased informing her that the policy benefits were "no longer in force owing to non-payment" of premiums. The letter invited the deceased to "make application for reinstatement of the lapsed policy by forwarding the premiums now". But no payments were made between 1 of October 1985 and 14 February 1986.

On 14 February 1986, either the deceased or someone on her behalf, paid \$1694.14 into the Respondent's Labasa office, being seven months premium, for October 1985 to April 1986 inclusive. One further premium was paid in May 1986 by the deceased's bank, only five days before the deceased died.

The Appellant wrote to the Respondent on 18 August 1989. The relevant part of that letter reads:-

*"We write to you as beneficiaries of the above Policy. According to your Labasa Office, Colonial Mutual is not liable to pay out the claim on this Policy for the reason that the Policy lapsed.*

*The first notification that Subadra our mother received from your office informing her that the Policy lapsed and the benefits on this Policy are no longer in force due to non-payment of premiums, was on 20/3/86.*

*However, we had paid all the premium arrears upto April, 1986 at your Labasa Office vide receipt No. 101883 on the 14/2/86. Further payments of premium was paid through our Bankers ANZ Banking Groups Limited, Labasa on 2/5/86. You will notice that after receiving the later payment of \$242.22 brings the premium upto date to May, 1986.*

*We cannot recall as to whether our mother signed a reinstatement form with your officer at Colonial Mutual Sales Office at Labasa. It was only on the 14th February, 1986 that upon enquiry of your Sales Clerk at Labasa to your office in Suva that the Policy had lapsed and the benefits therein are no longer in force.*

*Your Labasa Office should have informed our mother Subadra the procedure of reinstating the Policy. For your Labasa office knew that the Policy had lapsed when we came to pay the premiums on 14/2/86.*

*Therefore we hereby request you for the release of the claim, and also would be grateful if you could advise us as to the delay.*

*Sir your sympathetic and early attention to the above will be highly appreciated."*

It is clear from the above letter that on 14 February 1986, the day the arrears were paid, the deceased was told that the policy had lapsed "and the benefits therein are no longer in force".

On the 27 October 1989, the Respondent replied to the Appellants' letter of 18 August 1989. The Respondent pointed out that payment of arrears was "not on its own sufficient to reinstate the policy to its original state with full benefits" but that in terms of the policy, a formal application for reinstatement was required, including a statement of good health to the satisfaction of the Respondent, from the deceased.

Clause 4 of the Policy reads:-

***“ 4 REVIVAL IN EVENT OF LAPSE – If this Policy shall have lapsed owing to non-payment of any premium, it may be revived on proof being furnished to the satisfaction of the Society of the continued good health of the Life Insured and payment of the arrears of premium with interest thereon at the rate fixed by the Society”***

According to the Respondent no such application or statement was received. Dealing with the Appellants' complaint that the procedure for reinstatement should have been explained to the deceased on 14 February 1986, the Respondent said:-

***“In your letter you stated that our Labasa Office should have informed you of the reinstatement procedures. It is difficult to ascertain what was or should have been said then as it is now a couple of years after, but perhaps you are not aware that the requirement of a statement of health from the Life Insured for reinstatement purposes of the policy is clearly written on the policy document. There is therefore no acceptance ..... that the policy owner was not informed of that requirement for the reinstatement of the lapsed policy.”***

The Appellants who could have testified as to what was said at the Labasa office on 14 February, 1986 did not give evidence.

The deceased could not furnish proof of good health, because, in February 1986 she was critically ill. Dr Krishnan's letter of 16 July 1986 talks of the deceased as a “known diabetic; hypertensive, Ischaemic heart disease and Cardiac failure” patient. The deceased died on 7 May 1986. The ailments did not suddenly visit upon her after 14 February, 1986 as Mr Raman Pratap Singh, Counsel for the Appellants, appeared to suggest.

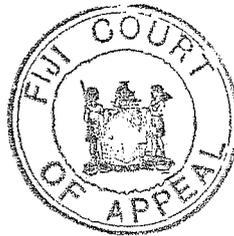
The Policy lapsed on 1 October 1985. It was never revived. The payment of arrears on 14 February 1986, was not by itself sufficient to revive the Policy. When the deceased paid the arrears she knew that the policy had lapsed. We do not see any basis for a finding that the Respondent at any time waived payment of premiums on due date, or waived proof of good health.

The learned Judge should have dismissed the Plaintiffs' claim, because the Policy of Insurance under which the claim was made had lapsed before the deceased's death.

We uphold both the Appellants' grounds of appeal. We also uphold the Respondent's notice. In the result the appeal has to be dismissed.

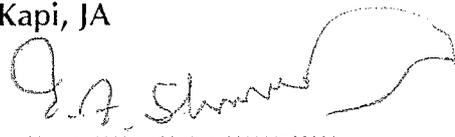
ORDER

This appeal is dismissed with costs to the Respondent, which we fix at \$750.00.



  
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Reddy, P

  
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Kapi, JA

  
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Sheppard, JA

Solicitors:

Messrs Kohli & Singh, Suva for the Appellants  
Messrs Parshotam & Co., Suva for the Respondent