General Assurance Society Ltd.

Vs

Chandumull Jain and Anr.

Civil Appeal No. 886 of 1963

(CJI P. B. Gajendragadkar, K.N. Wanchoo, M. Hidayatullah, V. Ramaswami-I, R. Satyanaryan Raju JJ)

07.02.1966

JUDGMENT

HIDAYATULLAH J. -

This appeal is taken from a judgment of the High Court of Calcutta, July 13 and 14, 1961, by which a Divisional Bench of the High Court, reversing the judgment of a learned single Judge of the some Court, decreed the respondents claim for damages. The circumstances were these. The appellant is a general insurance company. On June 2, 1950 the respondents submitted proposals to the company with a view to insuring certain houses in Dhullian bearing Holding Nos. 274, 274/-A-B-C and D and 273, 273/A-B-C and D, for Rs. 51,000 and Rs. 65,000 respectively against fire and including loss or damage by cyclone, flood and/or change of course of river or erosion of river, landslides and subsidence. The town of Dhulian is situated on the banks of the Ganges and for several years the river had been changing its course and in 1949 a part of the town was washed away. The insurance was obviously effected with this risk in sight. The period of insurance was to be from June 3, 1950 to June 2, 1951. The Company accepted the proposals by two letters (exhibit D) on June 3, 1950 and the letters stated that in accordance with the proposal the assured was held covered under cover notes enclosed with the letters. At the back of these letters of acceptance, there was description of the houses and an endorsement which read :

> "Including Cyclone, Flood and/or loss by change of course of river diluvium and/or Erosion of River Landslide and/or subsidence. It is further noted that there is a thatched building of residence within 50 ft. of the above premises."

Two interim protection cover notes Nos. 18848 and 18850 in respect of the two proposals were filed by the insurance company along with the written statement and they were said to be copies of cover notes sent with the letters of acceptance, but they bore the date June 5, 1950. There is some dispute as to whether they were at all enclosed with the reply showing acceptance of the proposals. Of the two cover notes, which are identical except for details we may ready one only :

> "Messrs. Chandmull Lal Chand, P. O. Dhulian Murshidabad being desirous to effect an Insurance from loss by Fire, for Rs. 51,000 on the following Property viz. :
>
> One Pucca built and roofed bldg. (C. J. Vizandah) holding No. 274, 274A, 274B and 274C occpd. as residence and/or shop for the storage of Hydrogenated G nut oil (vanaspati) and safety matches also situate at Dhulian, Ward No. IV, District Murshidabad.

Incl. Loss or damage by cyclone flood and/or change of course of river and/or Erosion or river, landslides and/or subsidence.

It is further noted that there is a thatched bldg. of residence within 50 ft. of the above premises.

for one year from 3rd June, 1950 to 3rd June, 1951.

The said property is hereby held insured against damage by Fire, subject to the terms of the Applicant's proposal and to the usual Conditions of the Society's policies. It is, however, expressly stipulated that this protection Note cannot, under any circumstances be applicable for a longer period than Thirty Days, and that it is also immediately terminated before that date by delivery of the policy, or if the Risk be declined by the notification of such declinature.

#Prem : Rs. 892-8-0 Fire @ 28 as %Prem : Rs. 382-8-0 Flood and other risks 12 as % ----------Premium : Rs. 1,275-0-0."##

On June 7, the assured sent the premia by cheque. As no policy was received by them, the assured wrote a letter on July 1 (Exhibit A/g) asking for the policy or for extension of the cover notes. This was not done.

On July 6, 1950 the Company wrote to the assured two identically worded letters (except for changes in amounts and numbers of the policies) which read :

"Calcutta 6th July, 1950 ....To M/s. Chandmull Lal Chand, P. O. Dhulian, Murshidabad.Dear Sir, ...##

In accordance with the inspection report lodged with this Co. we cancel the risk from 6th July, 1950 as noted below.

The relative Endorsement is under preparation and will be forwarded to you in due course.

Yours faithfully, (Sd.)/- Illegible Ag. Manager and Underwriter.##

Nature of Alteration :

The above cover note is cancelled by the General Assurance Society Ltd. as from 6th July, 1950."

On July 15, 1950 the assured wrote to say that they held the Company bound because although there was no erosion by the river when the proposals were submitted and accepted, the Company was trying to get out of the contract when the river was eroding the banks. They ended this letter by saying :

"Now when the erosion and/or change of course of river and/or subsidence have commenced, it is quite impossible to take any precautionary measure or to reinsure the same with any other office of Insurance at this stage."

On July 17, 1950 the Company prepared an endorsement for the policies cancelling the risk and sent the endorsements to the assured. The endorsement read :

#" ....##

> "In the name of :- Messrs. Chandmull Lal Chand, P. O. Dhulian, Murshidabad.
>
> It is hereby declared and agreed that as from 6th July 1950 the insurance by this policy is cancelled by The General Assurance Society Ltd., Calcutta, and a refund premium of Rs..... is hereby allowed to the assured on a pro rata basis.
>
> # (Sd)/- Illegible Ag. Managar & Underwriter.Calcutta,....."##

In reply the latter said that as the risk had already "commenced" and "taken place", there could be no cancellation as there was no time left for the assured to take precautionary measures by reinsuring. In reply the Company referred to condition 10 of the Fire policy under which the Company claimed to cancel the policy at any time. Condition 10 of the Fire Policy read :

> "10. This insurance may be terminated at any time at the request of the Insured, in which case the Society will retain the customary short period rate for the time the policy has been in force. This insurance may also at any time be terminated at the option of the Society, on notice that effect being given to the Insured, in which case the Society shall be liable to repay on demand a ratable proportion of the premium for the unexpired terms from the date of the cancelment."

In reply the assured wrote on August 2 that the condition did not apply to any risk except that of fire and could not, in any event, protect the Company after the risk had commenced. On 13th and 15th August the houses were washed away. After unsuccessfully demanding payment under the policies, the assured filed the present suit on the Original Side of the Calcutta High Court. It was dismissed with costs by G. K. Mitter J. but on appeal the claim was decreed to the extent of Rs. 1,10,000 with costs, the decretal amount to carry interest at 3% per annum. The High Court certified the case as fit for appeal and the present appeal has been filed by the Company.

Before we deal with the question in dispute we may say a few words about the position of the Ganges river in relation to the Dhulian town in general and the insured houses in particular. The town of Dhulian is situated on the bank of the river which, for several years, has been changing its course and eroding the bank on the side of Dhulian. In 1949 there was much erosion and the river had come as close as 1 1/2 to 2 furlongs from the town and a few of the godowns lying close to the bank had been washed away. There is ample material to show what the condition of the river in relation to the insured houses was between June 2, 1950 when the proposal for insurance was made and August 13/15 when the houses were washed away, with particular reference to the 18th June, 1950 when one P. K. Ghose (D. W. 2) visited Dhulian to make local inquiries on behalf of the Company and the 6th July when the Company cancelled the risk and withdrew the cover. The evidence comes from both sides but is mostly consistent. Lalchand Jain (P.W. 1) for the assured stated that on the 2nd of June the houses were 400/450 feet away from the bank of the river. (Q. 73) and on that date there was no erosion because the river was quite calm (Q. 132). This continued to the second week of June (Q. 136). The river began to rise in the 3rd week of June but there was no erosion (Q. 137). Erosion began by the end of June (Q. 142) and the current was then swift (Q. 144) and the right bank started to be washed away. Houses within 10 - 50 feet of the bank were first

affected in the last week of June (Q. 180). At that time the insured houses were 400/450 feet away. Even on July 15, 1950 the distance between these houses and the river was 250 feet (Q. 179). Surendranath Bhattacharjee (P.W. 2), Overseer and Inspector, Dhulian Municipality stated that the erosion started four or five days after Rathajatra which took place on or about June 20, 1950. Bijoy Kumar (P.W. 4), Retired Superintending Engineer is an important witness. He submitted three reports exhibits, F, G and H, to the Government on May 27, 1949, November 4, 1949 and September 11, 1950. In these reports he gives a description of the scouring of Dhulian town on August 5, 1950. He said nothing about the state of affairs in the first week of July which he would undoubtedly have said if erosion had already begun then. With his report submitted on September 11, 1950, he sent a letter of 9th August, in which he said that he had visited Dhulian Bazar on August 5, 1950 and found that the scouring of the compound of the Police Station at the junction of the Ganges and Bagmari rivers had begun a fortnight earlier and that scouring must have been at the rate of 20 - 25 feet per day. From the evidence it is possible to form an opinion about the state of the river on or about July 6, 1950. To that we shall come later.

The learned single Judge at the trial held that condition 10 of the policy applied to all the risks covered by the policy and not the risk from fire only. Although the policy was not ready, the proposal not having been declined during the period of the cover note, the learned Judge held, the policy was bound to issue and the extent of the protection would thus be according to the company's usual terms and subject to the conditions in the policy. Relying, therefore, upon the dicta of the Judicial Committee in the Sun Fire Office v. Hart & Ors. ((1889) 14 A.C. 98.), the learned Judge gave a wide meaning to condition 10 and held that the Company was within its rights in cancelling the policy as and when it did. The learned Judge pointed out that the condition was a usual provision in a policy of fire insurance and an assurer cancelling the policy under that condition, need give no reasons and every defence was open to him and the reasons, if given, could not be examined in a court of low. Finally, the fact that no reasons were given or that the report of Ghose did not support Dangali, the Manager, was held to be immaterial because reasons like motives were held to be immaterial. The suit was accordingly dismissed with costs. An appeal under the letters patent was filed against the judgment of the learned single Judge.

The appeal was heard by P. B. Mukharji and S. K. Datta JJ. The judgment on appeal was delivered by Mukharji J. In dealing with the cancellation of the policy the learned Judge considered the matter with and without condition 10. He first considered whether condition 10 of the policy at all applied. The learned Judge gave eight reasons why it did not. To those reasons we will come presently. The conclusion of the learned Judge was that the policy had not come into existence and did not govern this contract of insurance. As the cover note was only for a month and its terms had ceased to be operative, a contract of insurance absolute for one year was spelled out from the letter of acceptance which was said to govern the relations of the parties between July 3, 1950 (the date of the expire of the cover note) and July 6, 1950 (when the policy was cancelled) and till 13/15th August, 1950 when the houses were washed away. Condition 10 was thus held to be not applicable. However, assuming that it did, the learned Judge held that it was unreasonable and the concellation having been done when the loss had already commenced or became so proximate that it could be said that to have almost commenced, the Company could not allowed to invoke it. In reaching this conclusion the decision of the Judicial Committee was not accepted and the width of the condition was cut down. In the result the claim of the assured was decreed in the sum of Rs. 1,10,000 with costs in the appeal and the suit.

There is a preliminary question of fact to which the courts below have addressed themselves. It is whether the cover notes accompanied the letters of acceptance of the proposals. The learned single

Judge seems to imply that they did and the Division Bench holds that they did not. This has led to a divergence of opinion on whether condition 10 of the Fire Policy which enables determination of the policy at will on the both sides, at all operated. How this finding leads to a discussion on the applicability of condition 10, is a very important circumstance and we shall now attempt to do, what we have not done yet, namely, analyse the reasons given in the two decisions of the High Court.

The letters of acceptance state that the "relative cover" in each case was enclosed. These letters were dated June 3, 1950 and stated that the assured was covered against risk from June 3, 1950 to June 3, 1951 and the endorsement at the back of the letters has been reproduced by us earlier. That endorsement did not state any terms and it did not refer to the terms or conditions of any policy. The cover notes, of which one has also been reproduced in full, held the property insured for a period of 30 days only "subject to the terms of the applicants' proposal and to the usual conditions of the Societies policies". The learned single Judge held that the letters of acceptance incorporated and attracted by reference the terms and conditions of the cover notes and through them the terms and conditions of the policy and further held that the relationship could be declined within 30 days under the terms of the cover note but if not so declined, the relationship would be governed by the terms and conditions of the policy for the whole of the period of insurance. In reaching this conclusion the learned single Judge held that the cover notes must have accompanied the letters of acceptance and in this way condition 10 was allowed to play its part.

The Divisional Bench took a different view of the matter. The learned Judges noted that the letters of acceptance spoke of risk for a whole year and stated that the "relative covers" were enclosed. The cover notes, it was pointed out, bore the date 5th June and must have been sent later than June 3rd, the date of the acceptance of the proposals. The learned Judges observed that the "relative cover" ought to have been a cover for a whole year and if it was for a month only it could not be a "relative cover" because the letter of acceptance undertook the risk for the whole year. Next they held that as the cover notes did not accompany the letters of acceptance, there was no notice to the assured that the terms and conditions of any policy would govern the contract. They found fault with the word 'policies' in the phrase 'usual conditions of the Societys policies' because the word indicated a plurality of policies and not a standard policy. They commented that the standard fire policy applied condition 10 to fire risk and not to risk by flood, cyclone etc. They found the expression 'the said properties are hereunder held insured for damage by fire' insufficient to cover other risks although they admitted that the cover notes spoke of loss or damage by flood, cyclone etc. They next pointed out that the words of the cover note were not "all the conditions of the policy" but only "usual conditions" and by referring to books on the law of insurance they concluded that condition 10 which gave a right to either party to terminate the policy at will, could not be considered a 'usual' condition. They observed that this was not a condition usually included in English policies and appeared to be in vogue in colonial and underdeveloped countries. They felt that if the fire policy was extended to cover risk of flood, etc., the new risks should have been made expressly subject to condition 10 just as fire risk was made subject to it and that by merely extending a fire policy to cover other risks, the assured was made to amend and construe each separate clause. Holding condition 10 to be unreasonable they held that the company could not cancel the policy on the 6th July because till then there was no policy in existence and the cover note which referred to the policy had automatically worked itself out. They finally held that the cancellation, in any event, was after the risk had commenced and could not be upheld. For these reasons the claim was decreed. The Trial Judge had found that there was no attempt to fix the amount of damages but the Divisional Bench reconsidered the matter and gave its own findings.

Although the Divisional Bench went into a detailed discussion (some of which was perhaps not

altogether necessary) the problem of liability in this case was well-scanned by counsel appearing for the parties. They argued the case under three distinct heads which are :

(a) Did condition 10 apply to the facts;

(b) If it did, how is it to be construed; and

(c) Was the cancellation of the policy valid in law ?

We shall consider the matter under these three broad heads.

The application of condition 10 depends on how far the terms of the policy can be said to be incorporated in this contract of insurance between the parties. The facts relating to the formation of the contract are clear except on the one point relating to the cover notes, and that, in our opinion, has been given undue prominence by the Divisional Bench. It makes no essential difference whether the cover notes accompanied the letters of acceptance or were sent two days later. It is possible that the letters of acceptance themselves were sent on June 5. It often happens that two letters delivered at the same time bear different dates. The letters of acceptance referred to 'relative covers', but the word 'relative' is not to be stretched too far. Its use here is an instance of unnecessary legalese and it does not add to the purport of communication that a cover note was being sent. It is obvious that if in the period during which the cover note was operative there was refusal to insure, the assured could not have demanded a policy or insisted that there was insurance without a policy, standard or otherwise, and not subject to any conditions by reason of the acceptance. The cover notes could have been sent later without impairing the effect of the reference to them in the letters of acceptance. By the fortuitous chance of omission to enclose the cover notes the assured did not get any additional rights under the letters of acceptance. Insurance of property is not a bet but a well-known commercial deal. Acceptance of the proposal read with the cover notes clothed the assured with a right to demand a policy in relation to the kind of insurance he had bought and he could only claim to be covered against risk in the manner laid down in the policy. To avoid this consequence the learned Additional Solicitor-General, arguing on the behalf of the assured, faintly suggested that the endorsement at the back of the letter of acceptance was cover note and it did not refer to any policy. This position was clearly unsustainable. The cover notes were an integral part of the acceptance of the proposals and the two had to be read together.

A contract of insurance is a species of commercial transactions and there is as well-established commercial practice to send cover notes even prior to the completion of a proper proposal or while the proposal is being considered or a policy is in preparation for delivery. A cover note is a temporary and limited agreement. It may be self-contained or it may incorporate by reference to the terms and conditions of the future policy. When the cover note incorporates the policy in this manner, it does not have to recite the terms and conditions, but merely to refer to a particular standard policy. If the proposal is for a standard policy and the cover note refers to it, the assured is taken to have accepted the terms of that policy. The reference to the policy and its terms and conditions may be expressed in the proposal or the cover note or even in the letter of acceptance including the cover note. The incorporation of the terms and conditions of the policy may also arise from a combination of references in two or more documents passing between the parties. Documents like the proposal, cover note and the policy are commercial documents and to interpret them commercial habits and practice cannot altogether be ignored. During the time the cover note operates, The relations of the parties are governed by its terms and conditions, if any, but more usually by the terms and conditions of the policy bargained for and to be issued. When this happens

the terms of the policy are incipient but after the period of temporary cover, the relations are governed only by the terms and conditions of the policy unless insurance is declined in the meantime. Delay in issuing the policy makes no difference. The relations even then are governed by the future policy if the cover notes give sufficient indication that it would be so. In other respects there is no difference between a contract of insurance and any other contract except that in a contract of insurance there is a requirement of uberrima fides i.e., good faith on the part of assured and the contract is likely to be construed contra proferentem that is against the company in case of ambiguity or doubt. A contract is formed when there is an unqualified acceptance of the proposal. Acceptance may be expressed in writing or it may even be implied if the insurer accepts the premium and retains it. In the case of the assured, a positive act on his part by which he recognises or seeks to enforce the policy amounts to an affirmation of it. This position was clearly recognised by the assured himself, because he wrote, close upon the expiry of the time of the cover notes, that either a policy should be issued to him before that period had expired or the cover note extended in time. In interpreting documents relating to a contract of insurance, the duty of the court is to interpret the words in which the contract is expressed by the parties, because it is not for the court to make a new contract, however reasonable, if the parties have not made it themselves. Looking at the proposal, the letter of the acceptance and the cover notes, it is clear that a contract of insurance under the standard policy for fire and extended to cover flood, cyclone etc. had come into being.

The letters of acceptance clearly mentioned that cover notes were being sent. The contract of insurance was based upon the cover notes for the period covered by the cover notes. Nothing happened in the 30 days during which the cover notes operated. It is true that the letters of acceptance showed that the risk was covered for the whole year and not for 30 days. This was an unfortunate way of expressing that the acceptance of the proposal would operate in the first instance for 30 days during which the company would be free to decline the policy. The four essentials of a contract of insurance are, (i) the definition of the risk, (ii) the duration of the risk, (iii) the premium, and (iv) the amount of insurance. See Macgillivray on Insurance Law (5th Edn.) Volume I, paragraph 656, page 316. But the policy which is issued contains more than these essentials because it lays down and measures the rights of the parties and each sides has obligations which are also defined. In a policy against fire the purpose is not so much to insure the property but to insure the owner of the property against loss. The policy not only defines the risk and its duration but also lays down the special terms and conditions under which the policy may be enforced on either side. Even if the letter of acceptance went beyond the cover notes in the matter of duration, the terms and conditions of the proposed policy would govern in case because when a contract of insuring property is complete, it is immaterial whether the policy is actually delivered after the loss and for the same reason the rights of the parties are governed by the policy to be, between acceptance and delivery of the policy. Even if no terms are specified the terms contained in a policy customarily issued in such cases, would apply. There is ample authority for the proposition. In Corpus Juris Secundum (Vol. 44, p. 953) the following occurs :

> "Where the contract to insure or issue a policy of fire insurance does not specify the terms and conditions of the policy, it is a general rule that the parties will be presumed to have contemplated a form of policy containing such conditions and limitations as are usual in such cases...."

See also Richards on Insurance (5th Edn.) Vol. 3, p. 1296, paragraph 390. In Eames v. Home Insurance Co. (24 L.ed. 298.) the Supreme Court of the United States observed :

> "If no preliminary contract would be valid unless it specified minutely the terms to

> be contained in the policy to be issued, no such contract could ever be made or would ever be of any use. The very reason for sustaining such contracts is, that the parties may have the benefit of them during that incipient period when the papers are being perfected and transmitted. It is sufficient if one party proposes to be insured, and the other party agrees to insure, and the subject, the period, and the amount and the rate of insurance is ascertained or understood, and the premium paid if demanded. It will be presumed that they contemplate such form of policy, containing such conditions and limitations as are usual in such cases, or have been used before between the parties. This is the sense and reason of the thing, and any contrary requirement should be expressly notified to the party to be affected by it."

In General Accident Insurance Corporation v. Cronk ((1901) 17 T.L.R. 233.), it was also ruled that a person making a proposal must be taken to have applied for the ordinary form of policy by the company. It is only when there is a condition precedent that the policy must be delivered that the assurer is not on the risk otherwise he is. See Macgillivray (Vol. 1, p. 325, paragraph 675). In such a case acceptance is merely an intimation that the assurer is willing to issue a policy but there will be no binding contract (ibid. paragraph 679, page 328). In the present case, there was no such condition precedent and the company was on risk throughout. As insurance was asked for on the policy of the company the usual policy would have issued and as the insurance was from June 3, 1950 the policy would have related back to that date. The issuance of the policy does not add to contract. The incipient terms and conditions of the contract later merge in the policy and the terms and conditions then become express.

The attempt of the assured in this case, therefore, has been to establish that the cover notes having expired, did not bind the parties and the reference to the policy being in the cover notes and not in the letters of acceptance, the terms and conditions of the policy were not attracted. We are satisfied that this is not the true position. The letters of acceptance expressly mentioned the cover notes and cover notes expressly mentioned the policy. Therefore both during the period of 30 days when the cover notes operated and also therefore, the terms and conditions of the policy governed the relationship between the parties. We have already held that as there was only one standard fire-policy, the use of the plural word 'policies' made no difference and the delay in sending the cover notes, if any, was also immaterial. The terms and conditions of the usual policy accordingly governed the relations of the parties, and made condition 10 applicable.

It was, however, contended that the policy itself never came into existence, because it was cancelled before it was issued and the endorsement of cancellation was engrossed and incorporated with the making of the policy. It was argued that condition 10 would not come into operation at all, because the policy itself was cancelled before it was engrossed. In other words, the contention is that condition (10) could not operate between the parties till the policy was signed and delivered to the assured and as this never happened the cancellation was improper. This argument is scarcely open, because, the assured is obviously basing his suit on the policy. In his plaint he invoked the policy. The assured cannot sustain the suit except by basing it upon the policy, because unless one reads the policy and the terms on which it was effective, mere reading of the proposals and the letters of acceptance would not give any terms. Further when a contract of insuring property is complete, it is immaterial whether the policy is delivered or not for the rights of the parties are regulated by the policy which ought to be delivered. In this way also the terms and conditions of the standard fire-policy would apply even though the policy was not issued.

It was next contended that the expression "usual conditions of the Society's policies" could not be

read to include condition 10 which was not a usual condition where it gives a right to terminate the policy at will to the company. This is not correct. Such a condition is mentioned in almost all the books on the law of Insurance. See Halsbury's Laws of England (3rd Edn.) Vol. 22, page 245 paragraph 474; Macgillivray on Insurance Law (5th Edn.) Volume 2, page 963, paragraph 1981; Welford and Otter-Barry's Fire Insurance (4th Edition.) pages 178, 179; and Richards on Insurance (5th Edn.) Volume 3, page 1759, paragraph 531. In The Sun Fire Office v. Hart and Others ((1889) 14 A.C. 98.) such a condition is not only mentioned but also discussed. An identical condition in a fire policy was also mentioned and discussed in a decision of this court reported as in The Central Bank of India Ltd. v. Hartford Fire Insurance Co. Ltd. (A.I.R. (1956) S.C. 1288.). There was thus nothing unusual in the inclusion of such a condition in the policy and the reference to the usual conditions would, therefore, include a reference to condition (10).

This condition gives mutual rights to the parties to cancel the policy at any time. To the assurer it gives a right to cancel the policy at will. It was contended that such a condition was so unreasonable that it could not be allowed to stand. It was argued on the authority of Sze Hai Tong Bank Ltd. v. Rambler Cycle Co. Ltd. ((1959) A.C. 576.) that the extreme width of the condition must be cut down by an implied limitation which was that the main object and intent of the contract should not be allowed to be defeated and that object and intent was insuring of the property against floods and cancellation of the policy when floods had started would defeat the main object and intent of the contract. This argument mixes up two situations. The first is a question of pure principle. There is nothing wrong in including such a mutual condition for the cancellation of the insurance. An assured may like to invoke such a condition when the policy is found to differ from the policy he agreed to accept or it contained a term of condition to which he did not agree. He may not accept the same policy from another company to which he did not make a proposal. He may invoke this condition if the company transfers its assets and business to another. Just as the assured may like to terminate the policy without assigning any reasons and at his will, the assurer may also do likewise.

Such a clause was considered by the Privy Council in Sun Fire Office v. Hart ((1889) 14 A.C. 98.). That was a case of a policy of insurance against fire. Certain fields of sugar cane were insured against fire. After insurance 3 fires happened and an anonymous letter was received that more fires would take place. The policy contained a condition that the insurers might terminate the policy by notice 'by reason of such change, or from any other cause whatever' and the insurers cancelled the policy under that condition. The object of such a condition was stated by Lord Watson to be -

> "... to enable the insurers to release themselves from their contract during its currency, leaving it is full vigour down to the time of notice. The words in which the power of determination is expressed, taken by themselves, are very wide and comprehensive. According to their primary and natural meaning, they import that, in order to justify the exercise of the power, nothing is required except the existence of a desire, on the part of the insurers, to get rid of future liability, whether such desire be prompted by causes which prevent the policy attaching, or by any other cause whatever."

In dealing with the further question whether any reasons should be assigned and if so assigned whether they should be such as must satisfy a court of law, it was further observed :

> "The question remains whether the clause gives the insurers the right to act upon their own judgment, or whether they are bound, if so required, to allege and prove to the satisfaction of a Judge or Jury, not only that a desire exists on their part, but that

> they have reasonable grounds for entertaining it. If the determination of the policy would be for the advantage of its business, that would obviously be a reasonable ground for the office desiring to put an end to it; and a priori, one would suppose that the insurers themselves must be the best if not the only capable judges of what will benefit their business. An insurance office may deem it prudent, and resolve to limit its outstanding engagements, and, unless the words of the clause clearly imply the contrary, it cannot be presumed that the parties meant to make such a question of Prudent administration the subject of inquiry in a court of law."

The learned Judges of the Divisional Bench did not follow the decision of the Judicial Committee because they found it unacceptable. But a similar view of an identical condition was taken by this Court in the Hartford Fire Insurance Co. case (A.I.R. 1956 S.C. 1288.). case. Sarkar J. there pointed out that a clause in this form was a common term in policies and must therefore be accepted as reasonable and that the right to terminate at will cannot, by reason of the circumstances, be read as a right to terminate at will cannot, by reason of the circumstances, be read as a right to terminate for a reasonable cause. In that case the Hartford Office insured certain goods against fire between March 20, 1947 and March 1948 in the town of Amritsar. The policy was extended to loss by riot or civil commotion. Riots occurring in July 1947 in the Punjab, a godown in Bakarwana Bazar in Amritsar where insured goods were stored was looted and some goods were lost. The Hartford Office was informed and on August 7, 1947 they wrote saying that the goods be removed to a safe place or the policy would stand cancelled after August 10, 1947, under condition 10 which was similar to condition 10 here. On August 15, 1947, the goods were lost by fire. The Hartford Office was held to be protected by the said condition. The reason of the rule appears to be that where parties agree upon certain terms which are to regulate their relationship, it is not for the court to make a new contract, however reasonable, if the parties have not made it for themselves. The contract here gave equal rights to the parties to cancel the policy at any time and the assurers could therefore invoke the condition to cancel the policy.

It was contended (and it has been so held by the Divisional Bench) that this cancellation was ineffective, because risk had already commenced and the policy could not be cancelled after the liability of the company began. As a general proposition, this is perfectly right. Condition 10 is intended to cancel the risk but not to avoid liability for loss which has taken place or to avoid risk which is already turning into loss. It is obvious that a fire policy cannot be cancelled after the house has caught fire. But it is equally clear that unless the risk has already commenced or has become so imminent that it must inevitably take place, such a clause can be invoked. If property is insured against flood, it is not open to the insurance company to send couriers on motor cycles ahead of the floods to cancel the policy. But if it is thought that a particular dam was not quite safe, the insurance company will be entitled to cancel the policy against flood before the dam has actually started to crumble or has crumbled. Cancellation is reasonably possible before the liability under the policy has commenced or has become inevitable and it is a question of fact in each case whether the cancellation is legitimate or illegitimate.

In the present case, it was always clear that the Ganges would get into the floods in the rainy season, but it was not clear that it would begin to erode the bank in such a way that these houses, which were at a distance of 400/500 feet from the bank would inevitably be washed away. The question thus is whether the cancellation was done after liability of the assurer under the policy had commenced or the loss had become inevitable. Here we must look at the evidence which was summarized earlier.

We are concerned with two dates in particular and they are June 18, 1950 when Ghose visited Dhulian and July 6 when the policy was cancelled. The houses according to Lalchand Jain (P.W. 1) were 400/500 feet away when the proposal was made. The river remained calm till the second week of June. It only began to rise in the third week of June. Thus on June 18, when Ghose visited the place, there was no flood and no erosion. Ghose's report has not been produced but he could have only estimated the possibility of loss and no more. Even in the third week of June there was no erosion and it began by the end of June. Even on July 15 the distance between the river and the houses was 250 feet (see Q. 179). As the rate of erosion was about 20/25 feet per day (vide Bijoy Kumar P.W. 4) the houses were 400/500 feet away even on July 6. In these circumstances, it cannot be said that the loss had commenced or that it had become so certain as to be inevitable or that the cancellation was done in anticipation and with knowledge of inevitable loss. The cancellation was done at a time when no one could say with any degree of certainty that the houses were in such danger that the loss had commenced or became inevitable. There is no evidence to establish this. This case, therefore, falls within the rule of the Sun Fire Office ((1889) 14 A.C. 98.) and the Hartford Fire Insurance Co. (A.I.R. 1956 S.C. 1288.) cases. The assurers were, therefore, within their rights under condition 10 of the policy to cancel it. As the policy was not ready they were justified in executing it and cancelling it. The right of the plaintiff to the policy and to enforce it was lost by the legal action of cancellations.

In the result the appeal must succeed. It is allowed. The decree passed by the Divisional Bench is set aside and the judgment of G. K. Mitter, J. dismissing the suit is restored. Although costs must follow the event, we think in the special circumstances of this case we should make no order about costs.

Appeal allowed.

</html