1954 *Present :* **Nagalingam S.P.J. and Fernando A.J.**

A. S. CHATOOR, Appellant, *and* GENERAL ASSURANCE SOCIETY, LTD., Respondent

S. C. 103 Inty.—D. C. Colombo, 27,216 M

Interrogatories—Use thereof to obtain admissions.

Interrogatories may be administered in order to enable the party interrogating to ascertain what the case is he has to meet or what really are the matters in issue.

Plaintiff, an insurance company, instituted action for the recovery of a certain sum of money against the defendant who, at the dates material to the action, held its power of attorney as chief agent in Ceylon. One cause of action

proceeded on the basis that the defendant had authority to effect cover notes and to issue policies of insurance thereon on behalf of the plaintiff company. Without any averment to the contrary and without even a suggestion of impropriety on the part of the defendant in effecting a cover note and issuing certain policies in pursuance of the cover, plaintiff suddenly made allegations of fraud and illegality on the part of the defendant in effecting the cover and issuing the policies.

Held, that, in order to prevent any surprise at the trial, the defendant was entitled to administer interrogatories for the purpose of ascertaining the facts and circumstances upon which the plaintiff made the allegations of illegality and fraud.

APPEAL from an order of the District Court, Colombo.

E. G. Wikramanayake, Q.C., with *Walter Jayawardene*, *K. Shinya* and *M. Hussein*, for the defendant appellant.

N. E. Weerasooria, Q.C., with *S. J. Kadirgamar*, *B. S. C. Ratwatte* and *A. de Vos*, for the plaintiff respondent.

Cur. adv. vult.

December 20, 1954. NAGALINGAM S.P.J.—

This is an appeal from an order of the learned Additional District Judge of Colombo upholding the refusal of the plaintiff company to answer certain interrogatories administered to it by the defendant.

The action was filed by the plaintiff company which carries on business as an Insurer for the recovery of a sum of Rs. 1,358,437·50 against the defendant, who at the dates material to the action held its power of attorney as chief agent in Ceylon. Several causes of action were set out in the plaint of which it is only necessary to notice the first, second and third for the purposes of this appeal.

In the first cause of action the plaintiff company averred that the defendant, acting as its agent, effected a cover note for his own benefit, to the extent of Rs. 3,500,000,in respect of a shipment of rubber, and that in pursuance of the cover effected, the defendant issued three policies of marine insurance to himself under his business name of A. S. Chatoor & Co. and that the plaintiff company became entitled to receive from the defendant premia payable in terms of the said policies of insurance amounting to a sum of Rs. 311,344·50. It would be manifest, having regard to these averments, that the plaintiff company's claim is based on the tacit recognition of the right of the defendant to have effected cover and to have issued the policies on behalf of the plaintiff company.

Under the second cause of action, the plaintiff company sets out that the defendant, after having paid the sum of Rs. 311,344·50 to the plaintiff company's account at its bank as premia due to it in respect of the policies of insurance issued by the defendant, "wrongfully, unlawfully and fraudulently withdrew the said sum and appropriated it to himself".

The plaintiff company proceeded further to set out that "there was fraud and illegality on the part of the defendant in effecting and issuing the said insurance policies".

In the third cause of action, the allegation was that the defendant effected the insurance at the rate of ten per cent., while the true and proper rate should have been 40¼ per cent., and that the defendant in effecting the insurance at the lower rate, did so for his own benefit and "acted fraudulently and/or negligently". Under this cause of action, the plaintiff company claimed the sum of Rs. 1,358,437·50, as the correct premia due to it from the defendant.

The defendant denied the allegations of fraud and illegality in effecting the cover note or issuing the policies and of fraud or negligence in charging the rate of 10 per cent. by way of premia, as well as of wrongfulness, unlawfulness, and fraud in withdrawing the sum of Rs. 311,344·50 paid to the credit of the plaintiff company's account.

In this state of the pleadings it was that the defendant came to administer the interrogatories to the plaintiff company. The only question argued on appeal is whether the plaintiff company was justified in its objection to answer the interrogatories.

It will be convenient at this stage to refer to the interrogatories themselves. They are four in number. I shall deal first of all with the interrogatories 3 and 4 in respect of which I see no reason to differ from the view taken by the learned District Judge.

The third interrogatory is as follows :—

"What are the facts and/or circumstances on which you rely in support of the averment in paragraph 9 of the plaint that there was :

(*a*) fraud, and

(*b*) illegality on the part of the defendant in withdrawing the sum of Rs. 311,344·50 ?"

The answer to that interrogatory is, in my opinion, furnished by the very paragraph itself. It sets out the fact that the defendant acting as the plaintiff's agent and having effected insurance on its behalf, paid into the account of the plaintiff company the premia due to it in respect thereof ; but that thereafter the defendant withdrew the amount from the bank without any authority from the plaintiff company. The inference is obvious that the defendant's action was not only wrongful and unlawful but also fraudulent having regard to the facts. The objection of the plaintiff company is therefore entitled to prevail.

The fourth interrogatory was as follows :—

"What are the facts and/or circumstances on which you rely in support of the averment in paragraph 10 of the plaint that the defendant firm effected the insurance at 10 per cent. :

(*a*) for their own benefit,

(*b*) fraudulently,

(*c*) negligently ?"

In regard to this interrogatory too, the answer is furnished by the averments in paragraph 10 of the plaint. The plaintiff has averred that the true and proper rate at which the premia should have been charged was 40¼ per cent. and inasmuch as the insurance was effected for the benefit of the defendant himself he had charged a low rate of 10 per cent.,

from which circumstances it cannot be denied an inference of fraud or negligence on the part of the defendant would flow. In this instance too there is no reason to disturb the order of the learned District Judge.

The first and second interrogatories however are on a different footing. Those two interrogatories run as follows :

" 1. What are the facts and/or circumstances on which you rely in support of the averments in paragraph 9 of the plaint that there was :

(*a*) fraud, and

(*b*) illegality on the part of the Defendant in effecting the policies ?

" 2. What are the facts and/or circumstances on which you rely in support of the averment in paragraph 9 of the plaint that there was :

(*a*) fraud, and

(*b*) illegality on the part of the defendant in issuing the policies ? "

The foundation for those two interrogatories is paragraph 9 of the plaint. Towards the end of that paragraph for the first time the plaintiff company alleges " that there was fraud and illegality on the part of the defendant in effecting and issuing the said policies ". It may be remarked that the term " effecting the policies " used in the first interrogatory has reference to the issue of the cover note.

The averments set out in respect of the first cause of action, as indicated earlier, proceeded on the basis that the defendant as agent had authority to effect the cover notes and issue the policies of insurance on behalf of the plaintiff company. Without any averment to the contrary and without even a suggestion of impropriety on the part of the defendant in effecting the cover or issuing the policies, the plaintiff company suddenly plunges into making an allegation of fraud and illegality on the part of the defendant in effecting the cover and issuing the policies. These two interrogatories are therefore intended to serve the purpose of ascertaining the facts and circumstances upon which the plaintiff company has made these allegations of illegality and fraud, with a view to prevent any surprise at the trial.

Mr. Weerasooria contends that if there are no facts set out in the plaint from which an inference of fraud or illegality, in effecting the cover or issuing the policies, can be drawn, it will be open to the defendant to resist any issues of fraud or illegality being framed or tried at the trial. He relied upon the case of *Silva v. Periacarupen Chettiar* [1] where at the trial Counsel took the plea *ore tenus* at bar that the decree upon which the opposite side had based its case had been procured by fraud although no fraud had been set out in the pleadings. Wijeyewardene C.J., delivering the judgment of the Court, said :

" We are further of opinion that if evidence was going to be led on the question of fraud, it should have been pleaded and specific details given. "

[1] *(1949) 40 C. L. W. 10.*

While this case is an authority for the proposition contended for by Mr. Weerasooria, it also illustrates the grave risks that a party may run by evidence of fraud being permitted to be led. Besides, it is possible that an application may be made for amendment of the pleadings by the plaintiff where an objection is taken to the framing of an issue of fraud, and should an amendment be allowed at the stage, even on terms, apart from the circumstance that unnecessary delay would thereby ensue,—delay which from the defendant's point of view may be unwelcome—the defendant certainly would have no opportunity of administering interrogatories should it become necessary at that stage to do so, for once the trial has begun, interrogatories cannot under our procedure be permitted. Furthermore even if Mr. Weerasooria's contention be correct, which as I have indicated, does not reflect the true position, it does not follow that the existence of one remedy negatives the existence of any other remedy.

There may be more than one remedy available, or more than one method of attack open, to a party. While undoubtedly the defendant can take objection at the trial to any issue of fraud or illegality in effecting cover or issuing policies, the existence of such a right does not prevent the defendant seeking to administer interrogatories in order to ascertain particulars of the fraud and illegality pleaded for the purposes of enabling him to get ready to meet those allegations at the trial and to prevent his being taken by surprise and being prejudiced thereby.

No authority which could be regarded as in point, establishing the contrary, has been cited, but reliance has been placed upon an observation of Smith, Lord Justice, in the case of *Kennedy v. Dodson* [1] where the following was given expression to :—

> " In my opinion the legitimate use and the only legitimate use of interrogatories is to obtain from the party interrogated admissions of facts which it is necessary for the party interrogating to prove in order to establish his case ; "

and it has been urged that it is not competent to the defendant to administer interrogatories for the purpose of obtaining particulars. I do not think that the language used by the learned Judge was intended to have such a general import, for it is a well known rule that a judgment should not be extended beyond the necessities of the facts of the case.

In that case with which the learned Judge was dealing, an attempt that was made by means of interrogatories to obtain information regarding not the transaction the subject matter of the action but of other transactions said to have taken place over a period of about 20 years prior to the date of the action,—information which would not have been necessary in order to establish the case of the party interrogating but which may have been remotely relevant. It was in those circumstances that that pronouncement was made by the learned Judge. This case was referred to in the case of *Wijesekere v. Eastern Bank* [2] where Nihill J. observed :

> " In judging an interrogatory a stricter test of relevancy (than the broad sense in which relevancy is defined in the Evidence Ordinance)

[1] *(1895) L. R. 1 Ch. 334 at p. 341.* [2] *(1941) 43 N. L. R. 109.*

is required. It must be relevant to a fact in issue or as leading up to a matter in issue on the action."

It will be noticed that the learned Judge was dealing with the question of relevancy of interrogatories and not with the question whether the legitimate use of interrogatories is to obtain admissions. In both these cases, it will however be apparent, that the problem raised by issues 1 and 2 had not to be adjudicated upon.

It cannot however be doubted that there is another function, and a proper function which interrogatories can and do perform, and that is to enable the party interrogating to ascertain what the case is he has to meet or what really are the matters in issue.

The case of *Ashley v. Taylor*[1] was one where there was an allegation in the statement of claim that the defendants had advertised a worthless mine by means of private newspapers and circulars containing false statements, and that the plaintiff was thereby induced to take shares. The defendants administered interrogatories asking for the grounds on which the plaintiff alleged that the mine was worthless and that he should set out the particular papers by which he had been deceived. These interrogatories were held to be proper as they were simply directed to show what was the material facts upon which the issues in the case would be raised.

The case of *Lyon v. Tweddell*[2] was one for a dissolution of partnership between two surgeons on the ground that the defendant had so behaved and conducted himself towards the plaintiff in the presence of many of the patients of the partnership as to make it impossible for the plaintiff to carry on practice with him. An interrogatory by the defendant calling upon the plaintiff to set forth the particulars and circumstances of the occasions on which the defendant had so behaved and conducted himself was allowed.

In the case of *Benbow v. Low*[3] which laid down the proposition that where the object of the interrogation is to obtain particulars of the evidence on which the opponent relied to establish his case, the interrogation would be disallowed, there is an interesting observation of James L.J. :—

> "It appears to me the question is whether this is really asking to see the brief of the other side in order to know exactly what is the evidence they are going to produce, which is not permitted, or whether it is a question which comes within the exceptional instance which has been referred to, where a man says, 'Give me particulars of the misconduct which you allege against me', which I always thought was an exceptional and particular case . . . . If a man says, 'I am entitled to recover an estate because you have committed breaches of covenants', the other party is entitled to ask, 'Tell me what breach of covenant I have committed'."

The present case falls within this dictum.

[1] (*1878*) *38 Law Times 44.*

[2] (*1879*) *L. R . 13 Ch. 375.*

[3] (*1880*) *L. R. Ch. 93.*

Having regard to the principles underlying these cases, I think that these two interrogatories, Nos. 1 and 2, are entirely proper and that the plaintiff should have been ordered to answer them.

I would therefore set aside the order of the learned District Judge in regard to Interrogatories 1 and 2 and direct that the plaintiff company should answer them. They will be answered within such time as may be fixed by the learned District Judge after receipt of the record by him.

As each party has been partly successful, I think the proper order to make with regard to costs is that both in the District Court and on appeal each party should bear his own costs.

FERNANDO A.J.—I agree.

Appeal partly allowed.