(2016) 05 CAL CK 0062

In the Calcutta High Court

Case No : Writ Petition No. 2343 of 2002 with W.P. No. 2146 of 2002

Golden Trust Financial Services APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 20-05-2016

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2016) 165 AIC 295

Hon'ble Judges : Nadira Patherya, J.

Bench : Single Bench

Advocate : Mr. Partha Sarathi Sengupta, Senior Advocate and Mr. Arnab Chakraborty, Advocate, for the Petitioners in W.P. 2343 of 2002; Mr. Jayanta Mitra, Senior Advocate and Mr. A. Dutta, Advocate, for the Petitioners in W.P.2146 of 2002; Mr. S.K. Kapoor, Senior Adv

Final Decision : Dismissed

Judgement

Nadira Patherya, J.—By this writ petition the petitioners seek to challenge the letter dated 1st August, 2002 issued by the respondent No. 4.

2. The case of the petitioners is that it is engaged in making the public aware of the numerous insurance schemes and for such purpose deputed persons to introduce people in remote villages to some of the insurance schemes. To extend group insurance amongst the public at large, the petitioners approached New India Assurance with a proposal to extend the insurance coverage not only to the investors but also to its employees, family members and friends of the insured persons and on basis thereof a 50% group discount was given. The said proposal was accepted and 50% group discount given after approval was obtained from the head office. Therefore the workers, family members and friends constitute a group. A Memorandum of Understanding was also entered into between the petitioners and the respondent No. 1 in 1998. Subsequently the said understanding has been cancelled and in proceedings filed before this High Court the same has been stayed. By letter dated 6th January, 1998 the Janata Personal

Accident Insurance Scheme was extended to the group constituted and by virtue of Clause-3 it was made clear that the premium would not be refunded. Therefore the letter dated 1st August, 2002 whereby cancellation notice has been given in respect of policies which exceeds Rs. 1 lakh and five years period is not permissible. In any event the said letter of cancellation is bad as it is in violation of the principles of natural justice and does not assign any reason. The agreement also does not empower the respondent No. 1 to cancel the existing policies. It is under Clause-5 of the policy that the said cancellation is sought to be effected. The petitioner is not aware of Clause-5 of the policy as no copy of the policy was ever given to the petitioner. In fact exercise of such power is arbitrary as it seeks to affect vested rights. Assuming that the decision to cancel is a policy decision the same can be challenged.

3. As held in AIR 1986 SC 1571 para-85 due to inequality of bargaining power the acts of the respondent No. 1 be set aside.

4. The payment made is a one time payment and no refund of premium is possible as per the terms of the policy and as held in (2008) 1 ALT 772 para-21 and AIR (2010) SC 2794 para-8 the order dated 1st August, 2002 be set aside and orders as sought to be passed.

5. In paragraph 8 of the affidavit-in-reply it has been specifically stated that the policy was not given to the petitioner and Clause-5 thereof was not known to it. There is no denial in respect of such statement made. In the affidavit filed by the respondent No. 1 the only reason given for issuance of the letter dated 1st August, 2002 is to reduce problems of future liability and for effective financial management. This however does not find mention in the letter of cancellation. Therefore the letter dated 1st August, 2002 be set aside and orders be passed as sought.

6. Counsel for the respondent Nos. 3 and 4 opposing the said application has admitted that no policy was formally issued to the insured persons. The inclusion of friends was a mistake as friends will not constitute a homogeneous group and it is because of this that the Memorandum of Understanding was also cancelled. A writ petition was filed and order was passed directing non-inclusion of the term "friends". IRDA is the authority which controls the insurance business in India and it is at the directives of IRDA that the letter dated 1st August, 2002 has been issued. It has been specifically stated in the affidavit filed that to meet competition in the field of general insurance that the said letter was issued.

7. Reply has been given to the letter of termination but nowhere has it been stated that the petitioners were not aware of Clause-5 of the policy. Inequality in bargaining power is not to apply to commercial contracts as held in (2009) 4 SCC 357 para-8.

8. Reliance is placed on AIR 1965 SC 1288 and AIR 1966 SC 1644 for the proposition that the termination clause in the Insurance Policy which governs the parties must be effected. The parties in a contract of insurance must be bound by

its terms.

9. Reliance is also placed on (2010) 11 SCC 296 paras-34 to 36, 1994 (4) SCC 104 page-118 paras-25 and 26, (2007) 10 SCC 33 paras- 21, 23 & 31, (2011) 10 SCC 543 para 55 have been cited for the proposition that no public law element is involved. Reliance is also placed on (2004) 2 SCC 150 para-20.

10. (2008) 1 ALT 772 is distinguishable as it was a homogenous group and not a heterogeneous group as in the instant case. The extension of the scheme to friends makes the group heterogeneous and therefore the said decision is not an authority for heterogeneous group.

11. AIR 2010 SC 2794 and AIR 1986 SC 1571 relied on are distinguishable as it was in the realm of labor law and therefore different consideration was to apply. In an employment contract the meaning to be given is restricted from a commercial contract as held in (2010) 9 SCC 437 paras 15/24.

12. In reply it has been submitted by counsel for the petitioners that the policy was never given and this has been specifically stated in the affidavit-in-reply, therefore the petitioner was not aware of Clause-5 of the policy and this has been accepted as no argument has been advanced in respect thereof. AIR 1965 SC 1578 is relied on and assuming that the petitioners were aware of the policy no letter could have been issued as no such power was vested in the authorities and the exercise of power is without any basis. No reason for the said acts will appear from the letter dated 1st August, 2002 or the affidavit filed. Therefore it is violative of Article 14 of the Constitution and Section 23 of the Contract Act.

13. AIR 1965 SC 1288 is distinguishable as it was decided therein that the dispute between two private parties could be terminated. It was a decision taken in a suit therefore can have no application to the facts of the instant case. Clause-5 of the policy is unilateral and does not entitle the insured to terminate. Therefore for lack of mutuality it is an accepted position of law that Article 14 is operative. Non-recording of reason and opinion was not considered in AIR 1965 SC 1288. On similar grounds AIR 1966 SC 1644 is also distinguishable as it was a decision given in a suit between two private parties by the Court in exercise of powers while deciding such right of private parties.

14. In paragraph 17 of the said decision it has been specifically stated that either party was empowered to cancel but in the instant case this is not so. Another distinguishable feature is that in the instant case the State is involved. Therefore for lack of mutuality the letter dated 1st August, 2002 is unjustified. Validity of Clause-5 is a pure question of law and can be argued as invalid when put up as a defence.

15. (2009) 4 SCC 357 is distinguishable as it was considering Clause-25A(7) vis-a-vis Sections 31(8) and 38 of the 1996 Act. In (2010) 11 SCC 296 the perversity of the award was being considered therefore the said decision is not applicable as Article 14 is to apply. AIR 1986 SC 157 aids the petitioner. (2007)

10 SCC 33 was a case of tender and was not in any way connected with an insurance policy. Similarly (2011) 10 SCC 543 is not applicable as no attempt is being made by anyone to alter terms which point came up for consideration before the Supreme Court. (2004) 2 SCC 150 so also (1994) 4 SCC 104 is not to apply. It is the State action which is to be considered and as held in (2008) 10 SCC 404 and (1995) 5 SCC 482 the same must be guided by fairness and reasonableness. Therefore orders be passed as sought.

16. Having considered the submissions of the parties the petitioners have challenged the letter of termination dated 1st August, 2002 on the ground that the same is unilateral and in violation of the terms of the policy.

17. Undoubtedly the petitioner no.1 and the respondent nos. 2 and 3 entered into a memorandum of understanding dated 30th December, 1998 whereby insurance cover was extended under the group Janata Personal Accident Insurance to the investors, family members, field workers and their family members and friends. In May 1999 the respondent no. 2 cancelled the memorandum of understanding which was stayed by order dated 6th July, 1999. It is subsequent thereto, i.e., in August 2002 and more specifically by its letter dated 1st August, 2002 the respondent no. 4 by invoking Condition 5 of the policy sought to cancel policies of over 5 years with sums insured of more than Rs. 1 lac.

18. Condition 5 of the policy invoked is set-out here in below:-

"The Company may at any time by notice in writing cancel this policy provided the company shall in that case return to the insured the then last paid premium less prorata part thereof or the portion of the current insurance period which shall expire."

19. By the said condition the company has retained to itself the right to cancel the policy by a notice in writing without the insured being entitled to exercise such powers. It has also been admitted by the respondent nos. 2 and 3 that no copy of the policy was given to the parties. If this be true then the petitioners would never have knowledge of Condition 5 of the policy or its terms, and would render the notice of termination bad, but Clause 5 of the Policy has been set out in the letter of Termination.

20. In the letter dated 1st August, 2002 it is stated that the cancellation is based on a decision taken to cancel the subject policies. This decision has been explained in the affidavit-in-opposition filed by the respondent no. 2. The policy decision taken was in view of formidable competitors and the requirements of the Insurance Regulatory and Development Authority (IRDA).

21. To the impugned letter dated 1st August, 2002 a reply was given wherein Clause 5 was under challenge as being unconscionable, unfair and unreasonable.

22. It is true that the policy was not given by the respondent no. 2 to the petitioners but the petitioners also at no point of time called upon the respondent

no. 2 to hand over the policy. In the reply too the petitioners have not called upon the respondent no. 2 to hand over the policy or expressed being unaware of Clause 5 of the Policy.

23. The defence taken by the respondent is of policy decision and being a policy decision it should be left to the Authorities to take their own decision as they understand best the commercial benefits and workings.

24. In fact, a contract of insurance is a commercial transaction and the terms and conditions must be given effect to and the parties held to their bargain. An insurance company issues a policy and agrees to protect the insured on receipt of sums for any loss or damage to be suffered. Therefore, all the terms and conditions of the policy will have to be looked into to understand the insertion of Clause 5 which cannot be read in isolation. It is also necessary to consider whether cover note was issued or not and if in the cover note the said Clause 5 was mentioned then the petitioner being ignorant of Clause 5 does not arise. In a contract of insurance no public law element is involved unless the statutory provisions are violated and when no public element is involved as held in (2004) 2 SCC 150 no writ will lie. In the instant case there is no violation of statutory provisions.

25. The petitioner has sought to rely on AIR 1986 SC 1571, but the said decision is distinguishable as the said decision was dealing with a service contract and in Paragraph 89 of the said decision it has been specifically stated that inequality will not apply to commercial contracts and transactions. Therefore, the said decision is not to apply to the facts of the instant case.

26. AIR 2010 SC 2794 and 2008 (1) ALT 772 are also not applicable to the facts of this case as reason has been assigned.

(2008) 10 SCC 404 is distinguishable on facts as it was a case of renewal of policy and the plea of policy decision was not taken therein as in the instant case. There is no dispute with the principles laid down but the same will not apply in the instant case.

(1995) 5 SCC 482 is a decision before the IRDA Act of 1999 came into existence and did not consider the issue of policy decision taken on the directives of IRDA and, therefore, is distinguishable on facts.

27. For all the said reasons, therefore, this application merits no order and is dismissed.

W.P. No. 2146 of 2002 :

28. The letter dated 1st August, 2002 was received by the writ petitioners from M/s. Golden Trust Financial Services Ltd. and a reply given by the petitioners too. Therefore, it cannot be alleged that they were not aware of the said letter or its contents. For the reasons assigned for dismissal of W.P.2343 of 2002 for the same reasons this writ petition is also dismissed.

29. Urgent certified photocopy of this order, if applied for, be made available to the parties upon compliance with all requisite formalities.

