

(2010) 12 KL CK 0149

In the High Court Of Kerala

Case No : Writ Petition (C) No. 1024 of 2010

Max New York Life Insurance Co. Ltd.

APPELLANT

Vs

Insurance Ombudsman and Others

RESPONDENT

Date of Decision : 14-12-2010

Acts Referred:

Finance Act, 1994 — Section 65(105), 66, 67(2), 67(3)
Finance Act, 2008 — Section 65(105)

Citation : (2011) 1 ILR (Ker) 276 : (2011) 1 KLJ 416 : (2011) 22 STR 387

Hon'ble Judges : T.R. Ramachandran Nair, J

Bench : Single Bench

Advocate : E.K. Nandakumar, A.K. Jayasankar Nambiar, K. John Mathai, P. Benny Thomas and P. Gopinath, for the Appellant; S.B. Premachandra Prabhu, for Amicus Curiae, J. Jayachandran and K.L. Narasimhan, S.C., TAC/IR and DA for 3rd Respondent, for the Respondent

Final Decision : Dismissed

Judgement

T.R. Ramachandran Nair, J.—This writ petition is filed by the Petitioner challenging the order passed by the Insurance Ombudsman, viz. the first Respondent herein. The award passed by the Ombudsman has been produced as Ext.P-7. The Petitioner is an insurance company incorporated under the Companies Act, 1956 and is duly licensed to carry life insurance business under a valid registration certificate issued by the Insurance Regulatory Development Authority.

2. The second Respondent herein is a policy holder. The policy in question is a life insurance policy. It is a twenty year level term plan and Ext.P-1 is the copy of the policy document. The date of the policy is 30-6-2006 and the mode of payment of the premium amount is annual. The schedule shows that the model premium payable is Rs. 4,810.

3. The dispute between the parties arose in the following circumstances: In terms of the policy the premium was being collected from 22-6-2006 which

instalment was the first one. This amount was collected in subsequent years. By a notice dated 24-5-2009, Ext.P-2, the Petitioner required the second Respondent to pay service tax of Rs. 495.43 along with the premium amount and the net amount is shown as Rs. 5,305.43. This was objected to by the second Respondent by sending Ext.P-3 letter after remitting the amount. The Petitioner sent a further reply explaining the various aspects as per Ext.P-4 stating that the premium due for base policy is Rs. 5,305.45 (Rs. 4810.00 + 1.03% of service tax) and the total amount due is Rs. 5,305.45. Thereafter, the second Respondent approached the Ombudsman by filing a complaint, a copy of which is produced as Ext.P-5. The written version of the Petitioner is produced as Ext.P-6 and after hearing the parties, the award has been passed.

4. The view taken by the Ombudsman as evident from the award Ext.P-7 is that the model premium payable is Rs. 4810. Service Tax was enforced by the Finance Act, 1994, in 2004. Therefore, even in 2004 the policy was exigible to service tax and was being paid by the insurer. It would show that the gross amount will include the service tax payable also. When the total amount is agreed as Rs. 4810, it can only be presumed that the premium was fixed as inclusive of tax and all the expenses and hence the liability to pay tax was with the service provider.

5. Heard learned Counsel for the Petitioner Shri Jayasankar Nambiar, Shri S.B. Premachandra Prabhu, learned Amicus Curiae and the second Respondent who appeared in person. Even though the additional third Respondent, viz. the Insurance Regulatory and Development Authority was served notice, no counter-affidavit has been filed.

6. Learned Counsel for the Petitioner submitted that Finance Act, especially Section 66 and other relevant provisions will show that it is a destination based consumption tax. Reliance is placed on the decision of the Apex Court in All India Federation of Tax Practitioners and Others Vs. Union of India (UOI) and Others, laying down the said legal position. Therefore, the same has to be passed on to the consumer. In the absence of an express provision prohibiting the passing on of the tax to the consumer, the tax can be passed on to the consumer. The same is an implied term of the contract between the parties. It is pointed out that there cannot be any estoppel against the law and the tax is sought to be collected in terms of the provisions of the Finance Act alone. In the year 2006 the Company decided not to pass on the tax liability and from 2009 onwards they took a policy decision in the matter. The tax component is sought to be collected in addition to the premium amount. My attention was invited to the proceedings of the Insurance Ombudsman, Bhubaneswar in a similar matter wherein the view taken is that the service tax liability is that of the consumer.

7. These arguments were opposed by Shri S.B. Premachandra Prabhu, by relying upon the whole concept of Life Insurance, the conditions generally adopted and the principles applicable in this regard. It is pointed out that the principles under the Contract Act are applicable, and hence the terms of contract cannot be varied

unilaterally.

8. Learned Counsel for the Petitioner also invited my attention to the term in the policy under the heading "General Provisions" and the specific heading "Governing Laws and Jurisdiction" stating that "the policy is governed and construed according to the laws of the Republic of India and the Parties shall be subject to the exclusive jurisdiction of the courts/forums/commissions/ or such other bodies at New Delhi for all matters relating to this policy".

9. A reading of the notice issued and the pleadings of the parties and the award show the following: The policy herein started in the year 2006, the date of proposal being 22-6-2006. The policy commenced on 30-6-2006. The premium amount is annual and the amount fixed as premium is Rs. 4,810. The company in para 3 of the writ petition, has stated that the premium payable comprised of different components, viz. (i) a risk charge for extending insurance cover to the customer, (ii) expenses which mainly include: (a) the acquisition costs such as agent commission, commission for generating and issuing the policy, underwriting cost etc. and (b) the maintenance costs such as expenses incurred in connection with maintenance of the policy, namely, issuing reminder letters, premium notices, executing requests received from customers post policy issuance, expenses incurred in settling claims, etc. The service tax is attracted only on the risk charge component of the premium. It is also stated in para 5 of the writ petition that although the levy of service tax on life insurance service was introduced by amendments in the Finance Act, 1994, with effect from 2004, the Petitioner company decided to absorb the same itself and not to pass on the incidence of tax to its customers. They took a policy decision in the year 2009 to recover service tax from all its customers. Therefore, evidently, the renewal premium notice Ext P-2 was issued after the policy decision was taken in 2009. As already noticed, the net amount is noted therein as Rs. 5305.45. In reply to Ext. P-3, what is stated in Ext. P-4 is that the premium due for base policy is Rs. 5305.45. In the complaint Ext. P-5 the second Respondent specifically pleaded in para 1 that levy of Rs. 495.43 in the form of service tax was not loaded at the time when the policy becomes effective, though such service tax was there. It is also pleaded that at the time when he joined, service tax on the premium was there and borne by the insurer and the altogether amount (premium + Service tax + other levies, if any = 4810.00), as per their agent was acceptable to him and accordingly the proposal was submitted and the insurer accepted it and the policy became effective. It is pleaded that Ext. P-2 amounts to violation of the terms of the contract. As the policy was effective from 22-6-2006, any decision taken by the insurer to impose service tax from May 1, 2009 will not apply to him.

10. In the objections filed by the Petitioner, it is maintained that the service tax is payable by the insured.

11. Along with the additional counter-affidavit filed the second Respondent has produced Ext. R-2(b), copy of the payment acknowledgment dated 30-6-2008

issued to him by the Petitioner. Therein, in the Note item 10 reads as follows:

Service Tax is applicable on the risk cover & fund related charges u/s 65(105) (xx) of Finance Act, 1994 as amended by Finance (No. 2) Act, 2004 and Section 65(105)(zzzzf) of Finance Act, 2008, is deducted from the funds at the applicable rates.

12. Learned Counsel for the Petitioner mainly relied upon the decision of the Apex Court in All India Federation of Tax Practitioners and Others Vs. Union of India (UOI) and Others, wherein the concept of "service tax" has been emphasised in para 7 as follows:

In the light of what is stated above, it is clear that Service Tax is a VAT which in turn is destination based consumption tax in the sense that it is on commercial activities and is not a charge on the business but on the consumer and it would, logically, be leviable only on service provided within the country. Service tax is a value added tax.

It is therefore contended that it has to be borne by the customer.

13. The Ombudsman relied upon Section 67(2) of the Finance Act which reads as follows:

Where the gross amount charged by the service provider for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as with the addition of tax payable is equal to the gross amount charged.

Reliance was placed on Sub-section (3) of Section 67 also which reads as follows:

Gross amount charged for taxable service shall include any amount received towards taxable service before, during or after provision of such service.

The crucial questions herein therefore are whether the premium initially collected can safely be presumed to include service tax or not and whether, as vehemently argued by the learned Amicus Curiae and the second Respondent the insurer cannot vary the terms of the contract of insurance unilaterally.

14. In this context, the general principles applicable as far as the insurance policies, especially life insurance policies, are relevant. In the "Principles of Insurance Law" by M.N. Sreenivasan, 9th Edition, under the Chapter "Proposal and Policy" (Chapter 6) various principles have been explained. Under the heading "Proposal", it is stated that "one of the requirements for the formation of a contract of insurance is the mutual agreement between the insured and insurer. There must be an offer by one and an unqualified acceptance of it by the other". The word "policy" which is derived from the Italian "Polizza" is the formal document which evidences the contract of insurance which has been formed by the mutual agreement between the parties. In fact, as far as life insurance policies are concerned, there are standard policy forms which, now, has to be approved by the Controller of Insurance under the Insurance Regulatory and

Development Authority Act, 1999 which includes the rates, and terms and conditions, etc.

15. The general principles for construing a contract of insurance was laid down by a Constitution Bench of the Apex Court in the decision in General Assurance Society Ltd. Vs. Chandumull Jain and Another, . It was held thus in para 11:

A contract of insurance is a species of commercial transactions and there is a well-established commercial practice to send cover note even prior to the completion of a proper proposal or while the proposal is being considered or a policy is in preparation for delivery... Documents like the proposal, cover note and the policy are commercial documents and to interpret them commercial habits and practice cannot altogether be ignored... 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 *uberima fides*, i.e. good faith on the part of the 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 assured, a positive act on his part by which he recognises or seeks to enforce the policy amounts to an affirmation of it.

In para 12, it was further held thus:

The four essentials of a contract insurance are, (i) the definition of the risk, (ii) the duration of the risk, (iii) the premium and (iv) the amount of insurance. (Macgillivray on Insurance Law (5th Edn.) Vol. I, Para 656, page 316... 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.

16. Going by the contentions of the parties, it will have to be ascertained what should be the importance that can be attached to the word "premium". In fact, it cannot be disputed that the policy contains the terms of the contract between the insurer and the insured. There will be terms, conditions and exceptions in the policy.

17. Under the Chapter "Terms, Conditions and Exceptions of Policy", viz. Chapter 7, the learned Author terms "Premium" as follows:

Premium is the consideration which the insured pays to the insurer for agreeing to undertake the risk. *Sun Insurance Officer v. Clank* (1911) Rep 495 (HL). It may be a single lump sum or a series of periodical payments payable as per terms of the contract. With regard to "Life Insurance" in Chapter I, at page 47, the components of Premium are explained thus:

The gross or office premium to be charged is made up of (1) net or pure premium, and (2) the amount added to it known as the loading.

The net premium is determined from the rate of mortality and the rates of interest expected to be earned on the premiums collected over the period of the policy. This will be just sufficient to pay claims that arise as indicated by the mortality table.

But the insurer has also to incur expenses for carrying on the business, like salaries, rents, commission to agents, medical fees, taxes, etc. He must also make provision for the mortality and interest rates assumed turning out to be under-estimates, bonus for with-profit policies, profit for the insurer and for unforeseen contingencies, etc. The proportionate levy in respect of this on each unit of premium is the loading.

Hence, it is evident that the amount added to premium as loading includes taxes. Chapter 9 is on "Utmost good faith" and in sub-heading 2, viz. Utmost Good faith and Non-disclosure, reliance is placed on the decision of the Apex Court in *P.C. Chacko and Another Vs. Chairman, Life Insurance Corporation of India and Others*, wherein the statement of law explained in *All India General Insurance Co. Ltd. and Another Vs. S.P. Maheswari*, was approvingly referred to in para 17, which reads as follows:

A Division Bench of the Madras High Court in *S.P. Maheswari's* case (*supra*) upon taking into consideration the history of insurance laws in United States of America, in England and in India stated:

(10) One great principle of insurance law is that a contract of insurance is based upon utmost good faith *Uberrima fides*; in fact it is the fundamental basis upon which all contracts of insurance are made. In this respect there is no difference between one contract of insurance and another. Whether it be life or fire or marine the understanding is that the contract is *uberrima fides* and though there may be certain circumstances from the peculiar nature of marine insurance which require to be disclosed, and which do not apply to other contracts of insurance, that is rather an illustration of the application of the principle than a distinction in principle. From the very fact that the contract involves a risk and that it purports to shift the risk from one party to the other, each one is required to be absolutely innocent of every circumstance which goes to influence the judgment of the other while entering into the transaction.

It is therefore evident that being a contract described as having utmost good faith, the parties will have to disclose to each other all the new information. Once the proposal has been accepted, it cannot be said that all the conditions applicable have not been incorporated also. A liability like this, cannot be said to be an implied condition in a policy document.

18. Now we will come to the general principles with regard to life insurance. The Apex Court in *Life Insurance Corporation of India Vs. Vishwanath Verma and others*, held thus with regard to a life insurance policy:

Although there is no statutory definition of life insurance, but it has been defined

as a contract of insurance whereby the insured agrees to pay certain sums, called premiums, at specified times, and in consideration thereof the insurer agrees to pay certain sums of money on certain conditions and in specified way, upon happening of a particular event contingent upon the duration of human life.

19. The general principles of contract are therefore applicable with regard to a policy of life insurance also. The learned author, under Chapter 44 "Formation of Life Insurance Contract" has given the specific features of a life insurance contract, relying upon the decision in *Lakshmi Insurance Co. Ltd. Vs. Bibi Padma Wati*, which reads as follows:

A broad analysis of the policy will show that a life insurance contract is like other types of insurances (1) an aleatory contract, (2) a unilateral contract, (3) a conditional contract and (4) a contract of adhesion, but not (5) a contract of indemnity. It is also sometimes described in its nature as aleatory, executory, synallagmatic, conditional and personal and except as to life and accident, that it is one of indemnity.

20. "Aleatory Contract" is explained thus: An aleatory agreement is one in which there is an element of chance or uncertainty, as for instance a wagering contract. Depending upon chance, a party to such an agreement may receive a return out of all proportion to the value which he gives. In ordinary contracts, each party expects to give and to receive from the other party fairly equivalent values in exchange, as for example, in the purchase of goods. It is called as a "Unilateral contract", since only the insurer makes an enforceable promise. The life insurance contract is also a "Conditional Contract" because the promise of the insurer is conditioned on the timely payment of premiums subsequent to the first by the insured. This is a condition precedent to the continuance of the contract under its original promise. These conditions are termed as of two types, viz. either precedent or subsequent. A condition precedent must be satisfied before legal rights and duties are created or continued whereas a condition subsequent must be fulfilled in order to prevent the extinguishment of rights and duties already created by a contract. On payment of premium a condition precedent has been satisfied. A life insurance contract is said to be a contract of adhesion meaning thereby that the terms of the contract are not arrived at by mutual negotiations between the parties as in the case of ordinary contracts. The Insurer has various types of policies to suit various needs and a person who applies for a policy of life insurance must accept one of these which may be most suitable to him.

21. In the light of these principles, it is evident therefore that once there is proposal and acceptance a valid contract has been created. Evidently, the first step is the proposal for insurance and the parties have agreed the terms and when the second Respondent tendered the first premium, he has fulfilled his part of the contract and on acceptance the terms have become absolute and unqualified. The same is self evident from Ext.P-1 wherein it is specified that "This Policy is subject to the terms and conditions stated herein and the

Schedule". Evidently, at that point of time the Petitioner had not put any additional conditions for payment of any extra amount above Rs. 4,810 to meet the service tax element. It is evident therefore that there had been consensus arrived at on the terms of the policy, as found in Ext.P-7 award, to include every items within the Premium Amount of Rs. 4,810.

22. The Petitioner contends that initially they decided not to impose the service tax liability but in 2009 they decided to impose it. Therefore, the question is whether without any express provisions in the policy document, the same can be done. The only clause relied upon is that the policy is governed and construed according to the laws of the Republic of India and the parties shall be subject to the exclusive jurisdiction of the courts/forums/commissions/or such other bodies at New Delhi for all matters relating to the policy. That will not be of any help as far as the claim now raised is concerned, in the light of the principles discussed already.

23. While construing the policy Ext.P-1 which was contracted in 2006 it is clear that the service tax element has not been levied apart from the premium amount, as an extra item to be payable by the second Respondent. The levy of service tax was introduced in 2004. The contention by the company that tax liability should be read into the contract, cannot therefore be accepted in the absence of any specific clause. In fact, in ground D of the writ petition, it has been stated that the service tax payable to the Government has already been paid by the Petitioner company and it is only in accordance with the statutory scheme that the Company seeks to pass on the burden to the consumer. Unlike in other transactions one thing that is evident here is that the payment of amount is covered by the terms of the policy document. Therefore, the contract was complete when the parties mutually agreed for the terms as evident from Ext.P-1 wherein the premium amount has been fixed as Rs. 4,810. The second Respondent was led to believe also that there is no other liability for him by way of any additional amount. As rightly pointed out by the second Respondent and learned Amicus Curiae that once the terms have thus been agreed upon and the premium amount has been fixed, it cannot be varied unilaterally by the Company. It has been specifically pleaded by the second Respondent in Ext.P-5 that the amount of Rs. 495.43 in the form of service tax was not loaded at the time when the policy became effective, though service tax was there. The premium amount of Rs. 4,810, according to the second Respondent, include service tax which was finalised as per the calculation of the agent of the Petitioner which was acceptable to him and accordingly the proposal was submitted. The Ombudsman in Ext.P-7 award has stated that it was not specifically mentioned by the Petitioner in the reply that at the time of submitting the proposal, premium was not arrived at as inclusive of service tax and other expenses, by the agent. This is significant. No other evidence has been led in to the contrary.

24. The Ombudsman relied upon Sections 67(2) and 67(3) of the Finance Act

and it was concluded that if a gross amount is collected, the value of the service has to be treated as the amount less the service tax payable.

25. Evidently, as already noticed, at the time of issuance of policy the liability to pay service tax was there. As rightly held by the Ombudsman, Rs. 4,810 was fixed as total premium which was agreed to be realised. This amount was being collected by way of annual premium subsequently also.

26. The Ombudsman was therefore of the view that the premium was fixed as inclusive of tax and all the expenses. From the circumstances pointed out above, it cannot be said that the view taken therein is wrong. What is important is the proposal and the terms agreed upon by the parties evidently through the agent which was accepted by both parties. The representation made to the Petitioner is important, as he had to remit the amount for the entire period of twenty years.

27. Even though learned Counsel for the Petitioner submitted that the principle of estoppel will not apply here, I am afraid the said contention cannot be accepted. The parties have, with open eyes, agreed for the terms of the policy and thereafter the premiums are being collected accordingly also. Clearly, consensus was arrived at and the second Respondent has really been led to believe that all the terms were fully agreed upon and accepted and his liability is only to pay the annual premium at Rs. 4,810 and no other extra amount. Now in Ext.P-4 communication, premium due for base policy is shown as Rs. 5,305.45, inclusive of service tax, which amounts to a variation of Schedule to Ext.P-1 policy.

28. In Ext.R-2(b) produced along with the counter-affidavit which is the payment acknowledgment dated 30-6-2008, it has been clearly stated in the Note as item 10 that service tax is deducted from the funds at the applicable rates. The same is also significant.

29. Therefore, I find that the second Respondent is entitled to succeed. Even if two interpretations are possible, an interpretation which favours the conditions of the policy as agreed to the parties alone can be taken, especially in the light of the principles stated by the Apex Court in *General Assurance Society Ltd. Vs. Chandumull Jain and Another*, . In para 11 their Lordships further held as follows:

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.

I respectfully follow the same.

For all these reasons, the writ petition is dismissed. This Court had passed an interim order dated 12-1-2010 which was subsequently extended. Any extra amount collected from the second Respondent will be adjusted towards the future premiums. I place on record the appreciation for the valuable assistance rendered by Advocate Shri S.B. Premachandra Prabhu as *Amicus Curiae*. No costs.