
(1982) 10 KL CK 0012
In the High Court Of Kerala
Case No : Appeal Suit No. 27 of 1977

S. Abubaker

APPELLANT

Vs

Life Insurance Corporation of India

RESPONDENT

Date of Decision : 14-10-1982

Acts Referred:

Insurance Act, 1938 — Section 45

Citation : (1986) 59 CompCas 267

Hon'ble Judges : V. Khalid, J;G. Balagangadharan Nair, J

Bench : Division Bench

Advocate : P. Krishnamoorthy and S. Subramony, for the Appellant; S. Easwara Iyer, C. Sankara Menon and E. Subramonian, for the Respondent

Final Decision : Allowed

Judgement

Balagangadharan Nair, J.—The appeal is by the plaintiff in a suit for money due under two policies of life insurance taken out by his deceased father, which has been dismissed by the trial court.

2. The plaintiff's father, Sultan Pillai, died on May 18, 1972. The first of the policies taken by him is represented by the proposal, Ext. B-1, dated December 23, 1970, for Rs. 10,000 and the second by the proposal, Ext. B-3, dated June 8, 1971, for Rs. 5,000. On Sultan Pillai's death, the plaintiff, who is the nominee and assignee of the policies, made a claim for the insurance amounts before the defendant, the Life Insurance Corporation of India (" the Corporation ") As the Corporation did not pay the amounts, the plaintiff brought a suit in 1974 asking for a decree for Rs. 15,000. In defence, the Corporation contended that Sultan Pillai, the assured, had obtained the policies by practising fraud. The fraud consisted in deliberately understating his age by 7 years and in suppressing information about his longstanding diseases, pulmonary tuberculosis for a period of 16 years and piles. He had also occasional attacks of haemoptysis. The assured did not disclose these facts in the personal statements signed by him when making the proposals for the policies. The proposal forms contained

declarations by the assured that the contracts of insurance would be absolutely null and void and that all monies which had been paid in respect thereof would stand forfeited to the Corporation in case the statements given by him along with the further statements made before the medical officer and the declarations relating thereto were found to be untrue. As a consequence, the contracts of insurance were void ab initio. Because of the fraud and the untrue statements made by the assured, no amount was payable under the policies. The plaintiff had no cause of action against the Corporation and was entitled to no decree as claimed.

3. In support of his case, the plaintiff gave evidence as P.W. 4. He called P.W. 1, the medical officer of the Corporation, who had examined the assured at the time of the first policy, attested his personal statement in exhibit. B-1 and prepared the confidential report, exhibit B-1(a), reporting the life to be first class. Two employees of the local mosque, P.Ws. 2 and 3, were examined to prove certain records of the mosque showing the age of the assured. Besides examining its officers as D.Ws. 2, 3 and 6, the Corporation examined three medical officers, D.Ws. 1, 4 and 5, to prove that the assured was suffering from ailments which had not been disclosed to the Corporation. The court below found that the deceased had pulmonary tuberculosis before he made the proposals, exhibits B-1 and B-3, and that he had suppressed this fact in the personal history statements thus rendering the policies void. On the question of age, it held that in view of exhibit A-4 dated April 27, 1971, a communication from the Corporation to the assured accepting his horoscope as proof of the age, it could not repudiate the claim on the ground that the age was understated in the proposals. On the former finding, the court below dismissed the suit but without costs.

4. In the course of their elaborate arguments, counsel for the appellant and the Corporation took us through several decisions and text books on insurance law. Before we consider whether the Corporation was justified in repudiating the policies, we think it best to examine the legal aspects concerning the rights and obligations of the assured and the insurer, especially as counsel told us that they have not been the subject of any decision of this court. Contracts of insurance fall within the category of " uberrima fides " contracts {a term which is convenient though not strictly accurate : Seaton v. Heath [1899] 1 QB 782, 792 (CA)). In such contracts, as one party is in a very strong position to know the material facts and the other party is in a very weak position to discover them, the former is under a duty not only to abstain from making false representations of material facts but also to disclose, in the utmost good faith, such material facts as are within his knowledge to the other party. The principles underlying the duty of disclosure imposed on the assured in an insurance were stated by Lord Mansfield in the following classic passage in Carter v. Boehm [1766] 3 Burr 1905, 1909 :

" Insurance is a contract upon speculation. The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the

insured only : the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risque as if it did not exist. The keeping back such a circumstance is a fraud, and, therefore, the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived, and the policy is void; because the risque run is really different from the risque understood and intended to be run at the time of the agreement.....The, policy would be equally void against the underwriter if he concealed.....The governing principle is applicable to all contracts and dealings. Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary. "

5. Subsequent judicial pronouncements have repeated the ideal of good faith. MacGillivray and Parkington on Insurance Law, 7th edition, thus summarises the assured's duty in paragraph 617 :

" the assured must disclose to the insurer all facts material to an insurer's appraisal of the risk which are known or deemed to be known to the assured, but not known or deemed to be known to the insurer. "

6. The same work observes (in paragraph 623):

"Innocent omissions. If a fact is material and within the knowledge of the assured or his agent, the assured is under an absolute duty to disclose it. There is a long line of decisions from Lord Mansfield's judgment in *Carter v. Boehm* [1766] 3 Burr 1905, 1909, itself where it has been said that an insurer can avoid the insurance in the absence of fraudulent intent on the part of the assured. Mistake or forgetfulness affords no defence. " It is well-established law," said Cockburn C.J. in *Bates v. Hewitt* [1867] LR 2 QB 595, 607 " that it is immaterial whether the omission to communicate a material fact arises from indifference or a mistake or from it not being present to the mind of the assured that the fact was one which it was material to make known ". "

7. In paragraph 624, it is pointed out that while the questions put by insurers in their proposal forms may either enlarge or limit the applicant's duty of disclosure as a general rule, the fact that particular questions relating to the risk are put to the proposer does not per se relieve him of his independent obligation to disclose all material facts.

8. The duty of disclosure thus attaches to material facts. A " material fact" has been defined as any fact which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk. (Paragraph 583). Paragraph 582, which is also relevant, reads :

" If the policy contains a recital that the proposal therein referred to shall be the basis of the contract, the truth of the statements contained in the proposal is

thereby made a condition of the liability of the insurers, and any inaccurate answer will entitle the insurers to repudiate liability apart from any question of materiality. The rules concerning warranties in insurance law then govern any mis-statement. In the case of an ordinary misrepresentation, however, or if the insurers are limited by contractual terms to avoiding the policy only in cases of material omissions or misrepresentation, then in order to repudiate liability under the policy they must show that the mis-statement concerned material facts."

9. In this context, we might refer to the following observations of Lord Shaw in the Privy Council case, *Condogianis v. Guardian Assurance Company Ltd.* AIR 1921 PC 195 (headnote) :

" Where in a contract of insurance the case is one of express warranty, if in point of fact the answer to a question in the proposal form is untrue, the warranty still holds, notwithstanding that the untruth might have arisen inadvertently and without any kind of fraud. Secondly, the materiality of the untruth is not in issue ; the parties having settled for themselves--by making the fact the basis of contract and giving warranty --that as between them their agreement on that subject precluded all inquiry into the issue of materiality."

MacGillivray and Parkington have this to say on " Materiality : general rule " :

" With small exceptions, a warranty is independent of all questions of materiality. If a warranty is not fulfilled, the insurer can repudiate the contract, whether or not the fact warranted affected the risk or in any way influenced the insurer when he took it. One object of having a warranty is to avoid the difficulty faced by an insurer who has to satisfy the court that a misrepresentation or concealment concerned a fact material to the risk and induced him to take the risk." (Paragraph 721).

10. Paragraphs 5.01 and 5.02 in *The Law of Insurance*, by Raoul Colinvaux, 4th edition, which deal with *uberrima fides* and the effect of non-disclosure are worth reproduction :

" While a fraudulent statement by one party by which the other is induced to enter into a contract will always entitle the latter to repudiate the contract, mere non-disclosure does not usually do so unless it amounts to fraud. In the case of certain contracts, however, the law demands a higher standard of good faith between the parties, and " there is no class of documents as to which the strictest good faith is more rigidly required in courts of law than policies of assurance. As the underwriter knows nothing and the man who comes to him to ask him to insure knows everything, it is the duty of the assured, the man who desired to have a policy, to make a full disclosure to the underwriters without being asked of all the material circumstances, because the underwriters know nothing and the assured knows everything. This is expressed by saying that it is a contract of the utmost good faith--*uberrima fides*". Moreover, this utmost good faith is required not only from the assured but also from the insurer, and the insurer is, therefore, under a similar duty of disclosure. The doctrine applies

substantially to all kinds of insurance, including life insurance.

Where the assured conceals something he knows to be material, such concealment is fraud. But in any case the effect of mere non-disclosure on an insurance contract is to some extent the same as the effect of fraud : the party aggrieved, when the matter comes to his knowledge, may choose either to carry on with the contract or not. It is voidable at the election of the aggrieved party, as opposed to that class of contract which is void by operation of law.

The duty to disclose is not an implied term of the contract itself. Unlike fraud or a breach of condition, non-disclosure never by itself gives rise to a claim for damages. Avoidance of the whole contract is the only remedy. Once the aggrieved party, (i) knows all the facts, and (ii) has had a reasonable time in which to make up his mind, he must make his election once and for all. He need not exercise it, however, until he does know all the facts ; being put on enquiry is not sufficient. Thus where, although the assured has suppressed or misrepresented a fact, he discloses it to the insurance office before they pay a claim, they cannot after payment recover back the money. Similarly, where the insurers receive notice that the risks insured against have been misrepresented, concealed or incompletely disclosed and accept further premiums on the same policy, they lose their right to avoid it.

Either party may apply to the court for a declaration as to whether the policy is binding, but the remedy is a discretionary one. While it will be granted where the insurers have made a definite assertion denying the validity of the policy, it will be refused where the office might obtain possession, on the death of the life insured, of material information which they could not for the moment obtain."

11. We might as well make a passing reference to Banerjee's Law of Insurance, volume 1, third edition, commentaries u/s 45 of the Insurance Act, Synopsis 5 (Contract of insurance, proposal and acceptance), 6 (Proposal form, its importance), 7 (Declaration form and medical report, their importance) and 8 (Effect of non-disclosure and misrepresentation). On the nature of insurance contract, the duty to disclose material facts and the test of material facts, the effect of concealment and other relevant aspects, All India General Insurance Co. Ltd. and Another Vs. S.P. Maheswari, , and Lakshmi Insurance Co. Ltd. v. Bibi Padmawati [1961] 31 Comp Cas 96 ; AIR 1961 Punj 253, which were quoted during the hearing, contain detailed discussion. As the above extracts from the leading text books are adequate, we think it needless to load the judgment with passages from those decisions.

12. It remains now to consider Section 45, Insurance Act, 1938, which reads as follows :

" No policy of life insurance effected before the commencement of this Act shall after the expiry of two years from the date of commencement of this Act and no policy of life insurance effected after the coming into force of this Act shall, after the expiry of two years from the date on which it was effected, be called in

question by an insurer on the ground that a statement made in the proposal for insurance or in any report of a medical officer, or referee, or friend of the insured, or in any other document leading to the issue of the policy, was inaccurate or false, unless the insurer shows that such statement was on a material matter or suppressed facts which it was material to disclose and that it was fraudulently made by the policyholder and that the policyholder knew at the time of making it that the statement was false or that it suppressed facts which it was material to disclose:

Provided that nothing in this section shall prevent the insurer from calling for proof of age at any time if he is entitled to do so, and no policy shall be deemed to be called in question merely because the terms of the policy are adjusted on subsequent proof that the age of the life insured was incorrectly stated in the proposal."

13. This section is a statutory recognition of what are described as indisputable clauses that used to be inserted in insurance proposals by insurance companies. In the present case, the insurer, the Corporation, is calling in question the policies more than two years after they were effected, thus bringing into play the second part of Section 45. The conditions for the application of this part are, as explained by the Supreme Court in *Mithoolal Nayak Vs. Life Insurance Corporation of India*, , (a) the statement of the policyholder must be on a material matter or must suppress facts which it was material to disclose, (b) the suppression must be fraudulently made by the policy-holder, and (c) the policyholder must have known at the time of making the statement that it was false or that it suppressed facts which it was material to disclose. In view of this decision, we do not think it necessary to quote any of the other cases cited by counsel on the point. As the repudiation of the policies was made more than two years after they were effected, the burden of proof is on the Corporation to establish the above three conditions. Counsel for the Corporation did not deny its burden in this regard but pointed out that there was no reference to Section 45 in the proceedings in the court below and that although the Corporation had pleaded the necessary facts in the written statement, Section 45 had not been mentioned in issue No. 1 which bears on the repudiation of the policies. He also pointed out that the court below had no occasion to discuss the evidence with reference to Section 45. He submitted that if we felt that the evidence fell short of the standards required by the second part of Section 45, we should remand the case to enable the Corporation to supplement its evidence. However, he made it clear that he was making this submission without prejudice to his stand that the evidence already given by the Corporation is adequate enough to discharge its burden. He reinforced these submissions by contending that the plaintiff has not even pleaded in the memorandum of appeal that the elements of Section 45 had not been established or even so much as referred to its provisions. The Corporation had in paragraphs 7 and 11 of its written statement pleaded the alleged fraud and mis-statement of the assured and the consequent invalidity of the policies. Issue No. 1 which concerns the alleged fraud and

suppression of information and issue No. 2 which concerns the validity of the policies are sufficiently comprehensive and we cannot agree that the omission to mention Section 45 has or could have prejudiced the Corporation in its defence. Counsel also did not tell us what further evidence the Corporation would have been in a position to call if Section 45 had been specifically mentioned in the issues. We, therefore, reject the request for remand and proceed to consider the evidence, which we might repeat, counsel contended, was sufficient to support the defence under the second part of Section 45.

14. Exhibit B-1 is the proposal for the first insurance policy and it is signed by Sultan Pillai. It contains a declaration, *inter alia*, that the statements and answers are true in every particular and that the statements and the declaration along with the further statements to be made before the medical examiner and the declaration relative thereto shall be the basis of the contract of assurance between him and the Corporation and that if any untrue averments are contained therein, the contract would be absolutely null and void. He had signed it with the endorsement: " read and understood "

18. It is witnessed by a Development Officer of the Corporation. This is obviously in compliance with the sub-joining note that " If the answers to the questions in the form are given in vernacular or if the answers to the questions are given in English but the proposer signs in vernacular, then the proposer should declare in his own handwriting above his own signature that all questions were explained to him and that his replies were given after fully and properly understanding the same. " (The answers to the questions in the proposal are recorded in English). Further below this note, the Development Officer of the Corporation has signed a declaration that he had fully explained the questions to the proposer and that he had truthfully recorded the answers given by the proposer. Attached to this form is another form headed " Personal statement". In column 4(a) against the entry, " what has been your usual state of health", the answer recorded is "good". Column 6 is headed " Have you ever suffered from any of the following ailments " with a direction to answer " yes " or " no ". As against Clause (b) which relates to " persistent cough, asthma, pneumonia, pleurisy, spitting of blood, tuberculosis or any other infection of lungs " the answer that is recorded is " no ". Below the various columns is a declaration by the proposer that the answers had been given by him after fully understanding the questions and the same are true in every particular and that he had not withheld any information and that he agreed that the declaration together with the proposal shall be the basis of the contract between him and the Corporation. The medical officer (P.W. 1), who examined the assured the same day, has certified under the above declaration that the proposer had signed in his presence after admitting that all the answers had been correctly recorded. Below this certificate is a declaration signed by Sultan Pillai that the above questions were explained to him fully by the Development Officer (named), that the answers thereto had been recorded by him and that he had affixed his signature after satisfying himself that they had been correctly recorded. Below this is a declaration by the person in whose

handwriting the answers are recorded--in this case the Development Officer--that he had explained the questions to the proposer, that the proposer's answers had been recorded by him and that he had affixed his signature after satisfying himself that the answers had been correctly recorded. Exhibit B-1(a) is the confidential report of the medical officer, P.W. 1, in which he has stated that the proposer's lung was healthy in every respect and that his life was first class. Exhibit B-3 is the proposal and the personal statement of Sultan Pillai for the second insurance policy. It contains the personal statement as in the first policy and a further personal statement regarding health (which appears to be required for an additional proposal). These statements contain declarations and answers as in exhibit B-1 and have been signed by Sultan Pillai. The witness in these latter records is D. W. 2, an agent of the Corporation, through whom the proposal was made and who had recorded the answers of the proposer. In exhibit B-3 as in exhibit B-1, the assured had stated that he had not suffered from any disease, to wit tuberculosis. If Sultan Pillai had been suffering from tuberculosis as alleged by the Corporation, the statement in exhibits B-1 and B-3 that he was not suffering from that disease would be clearly a mis-statement and if he was aware of it, a fraudulent statement. That it was a material fact is obvious and was not disputed by the plaintiff also. The importance of the proposal and the personal statement need not be particularly emphasised as they form the very basis of the contract. The more important question on which parties were divided on this aspect is whether Sultan Pillai was suffering from tuberculosis and whether he had knowledge about it at the dates of exhibit B-1 or B-3.

19. There is no direct evidence but the Corporation has called some evidence from which it contends that the inescapable conclusion is that he was so suffering. We shall refer to those items of evidence. D.W. 1, who was the professor and director of surgery in the Medical College Hospital, Trivandrum, proves the report, exhibit B-2, sent by him to the Corporation embodying the details of the case-sheet of Sultan Pillai, who was an in-patient in the hospital. They show that he was discharged on February 9, 1972, and readmitted on May 11, 1972. The witness explains the details in the other pages of the case-sheet--Exhibit I-4--but he has no personal knowledge about them except that he says that the first case-sheet was prepared by Dr. P. K. Prabhakaran (D. W. 5). The witness operated on Sultan Pillai for cancer of the bladder from which Sultan Pillai died in the hospital itself. D. W. 5 examined by D.W. 1 was then a post-graduate student and was working in the Medical College Hospital. In the case-sheet, exhibit A-4, he has in a note to the Urologist made on January 6, 1972, stated that it was an old case of bacuataria and pulmonary tuberculosis, that he had undergone anti-tuberculosis treatment and that he was being directed for favour of cystoscopy. D; W. 5 has deposed that these remarks were written on the information given by the patient. In cross-examination, it was elicited that the patient did not tell him the age of the disease and that he did not also take specific interest in the details. D. W. 4, the then Superintendent of the T. B. Hospital, Pulayanarkota (Trivandrum), has produced the case-sheet, exhibit A-1

relating to Sultan Pillai. It shows that he was admitted on October 29, 1971, and was discharged on November 2, 1971, with the advice to visit the T. B. centre. He was vomitting blood and, according to the witness, it was an important symptom of T. B. and that was why he was so advised. The case-sheet further records that it was a known case of T. B. for 16 years. The witness had not examined Sultan Pillai but he has deposed that the above details were made by the duty doctor and the doctor attending on him, that the history of the disease is recorded from the statement made by the patient and that at the hospital he was treated for T. B.

20. The proposal for the first insurance was made in December, 1970, and that for the second was made in June, 1971. There is no contemporaneous record that Sultan Pillai was suffering from tuberculosis at the date of either of these policies. Exhibit X-4, however, shows that on January 6, 1972, he had told D.W. 5 that his tuberculosis was an old one. Exhibit X-1 contains a statement that it was 16 yearsold but the doctor who made the record has not been examined. It is admitted by P. W. 4 (the plaintiff) that Sultan Pillai had been treated in the T. B. Hospital at Pulayan-arkotta for vomitting blood. This confirms the treatment at the T. B. Hospital which, D. W.-4 swears with reference to the records, was for tuberculosis. In the light of the admission of P.W. 4 about the treatment received by Sultan Pillai at the T. B. Hospital and the statement made by Sultan Pillai to P. W. 5, there can be no doubt that he was suffering from tuberculosis and that it was an old case, although there is no evidence about its age. It appears to us safe on these materials to hold that Sultan Pillai was suffering from tuberculosis not only on October 29, 1971, when he was admitted in the Tuberculosis Hospital and on February 6, 1972, when D. W. 5 examined him but also for some time in the past.

21. We do not, however, feel it safe to predicate that Sultan Pillai was suffering from tuberculosis at the time he signed the proposals, exhibits B-1 and B-3, as we are afraid that it would be a mere conjecture to do so on the evidence of D. W. 5 that it was an old case especially as none of the doctors--P.W. 1, D.W. 1, D.W. 4 or D.W. 5--has been asked the implication of the expression " old case ".

22. Even if assuming in favour of the Corporation that it is permissible to infer that Sultan Pillai was suffering from tuberculosis some time before October 29, 1971, or January 6, 1972, there must be further evidence that at the date of the proposals in any event at the date of the first proposal--he knew or must have known that he was so suffering so as to hold that he was making a false statement or suppressing a material fact. On this aspect there is no evidence whatever. The Corporation has not called any evidence that Sultan Pillai had taken treatment for tuberculosis or had knowledge that he was suffering from that disease before the proposals were made. While it is true that tuberculosis might be a creeping disease which does not develop overnight and that it has some extraordinary symptoms, it would be unsafe and conjectural to predicate any knowledge of it on Sultan Pillai's part. D. W. 4 has deposed that although

coughing of blood is an important symptom of tuberculosis, it could be due to other diseases as well and D. W. 1 has stated that usually tuberculosis will take time to manifest itself. Of external symptoms or clinically noticeable symptoms, there could have been none at the date of the proposal for P. W. 1, the Corporation's medical officer, who then examined him had not only certified that the case was first class and that the lungs were healthy in every respect but has also deposed that there were no patent symptoms while it is possible that he had latent symptoms. In the light of these items of evidence we are inclined to hold that even if Sultan Pillai was suffering from tuberculosis, there is no material to hold that he was aware of its existence on the dates of exhibits B-1 and B-3 so as to find him guilty of fraud or mis-statement when giving the personal statements. It follows that the Corporation was not entitled to avoid or repudiate the policies.

23. The written statement alleges that Sultan Pillai had also suppressed the piles from which he was suffering but there is absolutely no evidence that he was then subject to that disease. No question of avoiding the policies on this account, therefore, arises for consideration.

24. On the alleged mis-statement of age, the finding of the court below is against the Corporation. Counsel for the Corporation nevertheless sought to contest that finding on the strength of Sultan Pillai's age as given in exhibit B-5, a gift deed executed by him in favour of the plaintiff in 1968. Exhibit B-5 describes him as 54 and if it be correct, the statement that he was only 49 at the time of exhibits B-1 and B-3 was wrong to his knowledge. The date or even the year of his birth is not in evidence except what is disclosed by the certificate, exhibit A-1, which itself is not known to have been prepared from any authoritative sources. However that be the Corporation had accepted Sultan Pillai's age as stated in his horoscope produced by him before the Corporation. This is clear from exhibit A-4, the communication sent by the Corporation on April 27, 1971. The alleged mis-statement about the age will not, therefore, avail the Corporation to renounce the policies.

25. On the former finding, we cannot uphold the decision of the court below. We, therefore, reverse the judgment and decree of the court below and grant the plaintiff a decree for Rs. 15,000 with interest at 6% from the date of suit to the date of realisation. The appeal is thus allowed but in the circumstances without costs.