IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28 .02.2005

Coram:-

The Hon'ble Mr. Justice V.KANAGARAJ

W.P. Nos.18519 & 18520 of 1996

M.Venkatachalapathy ... Petitioner in both the WPs

Vs.

1.M/s. United India Insurance
-Company Limited,
Regional Office,
40-42, Greams Road,
Madras-6.

2.M/s. United India Insurance
-Company Limited,
Divisional Office,
123, Usman Road,
T.Nagar, Madras-17.

3.M/s. United India Insurance
-Company Limited,
Branch Office,
46,Nehru Street, P.B.No.25,
Pondicherry - 605 001.

Respondents 1 to 3 in WP No.18519/96 and Respondents in WP No. 18520/96

4. Tariff Advisory Committee,
(General Insurance), Central Office,
"ADOR" House, 1st Floor,
6K, Dubsash Marg,
Bombay-400 0023.

4th respondent is added as per order dt.12.4.97 passed in W.M.P.No.6595/97 ... 4th Respondents WP No.18519/96

Petitions filed under Article 226 of The Constitution of India praying to issue writs of declaration and mandamus for the reasons stated therein.

For petitioner in both WPs: Mr.G.Masilamani, Senior counsel
For Mr.M.Sriram

For Respondents 1 to 3 in WPNo.18519/96 and Respondents in WP No. 18520/96 : Mr.M.B.Gopalan

COMMON ORDER:-

Among the above two writ petitions filed by the one and the same petitioner as against the same respondents viz., The United India Insurance Company Limited, represented by the Regional Office, Divisional Office and the Branch Office as the respondents 1 to 3, and the Tariff Advisory Committee is the 4th respondent.

2. In the first writ petition above filed in W.P.No.18519 of 1996 the petitioner would pray to issue of a writ of declaration declaring that the condition given in Section-1 relating to depreciation and condition No.3 in private Car 'B' policy are invalid and unenforceable and strike down the said conditions as ultra vires of the Constitution as one opposed to public policy.

3. In the second writ petition filed in W.P.No.18520 of 1996 the same petitioner would pray in a writ of mandamus to be issued directing the respondents herein to pay a sum of Rs.2,22,000/- together with interest from the date of claim viz., 16.5.1996 to the date of payment and also for the damages and loss suffered by him amounting to Rs.49,000/-.

4. In the common affidavit filed by the petitioner in both the writ petitions he would submit that he is the owner of the car bearing registration No.PY-01 B 6579 Premier 118 N.E. which he purchased as new vehicle on 15.11.1993 and the vehicle is covered under valid comprehensive insurance with the respondents Insurance Company particularly the third respondent and is valid for the period in between 15.11.1995 and 14.11.1996.

5. The petitioner would further submit that the vehicle was involved in a road accident when it met with the head on collision with a lorry on 10.5.1996 at Palamaner village

near Chittoor, Andhra Prfadesh in which the driver was killed on the spot and the other occupant such as the petitioner's son sustained grievous injuries and was treated in the hospital; that the vehicle was totally damaged beyond repair; that he brought the vehicle and his son to Madras and made arrangements for inspection of the same by a technician who gave a detailed estimate with reference to the damage caused to the vehicle and intimated the same to the third respondent by telegram dated 12.5.1996; that he submitted the claim petition together with the driver licence of the deceased driver, the Registration Certificate, Insurance Policy, estimate etc., to the third respondent; that he lodged a claim with the second respondent which was also considered by the first respondent.

6. The petitioner would further submit that even though the vehicle was valued at Rs.2,22,000/- for which amount, the premium was paid it was demanded on behalf of the respondent No.3 that he should accept the value of the vehicle was Rs.1,40,000/-; that only thereafter the petitioner's attention was drawn to the various clauses printed in the microscopic type in the insurance policy, which are arbitrary, one-sided, unreasonable, unjust, inequitable and illegal; that these clauses were made known not at the time of receiving the premium but afterwards and they are arbitrary and unreasonable; that the insurance company denies its liability after having accepted the value and receiving the premium therefor; that the insured does not affix his signature accepting the terms mentioned therein particularly drawing his attention to any of the clauses in the insurance policy; that the respondents are aware of the printed conditions may have no application to a given case.

7. The petitioner would further submit that the question as to whether a vehicle involved in an accident is a total loss or not, vest with the sole discretion of the respondents without any guidelines or instructions to determine the same; that in the accident the petitioner's vehicle though the repairer has provisionally estimated loss at Rs.1,89,453/- subject to further increase which is almost the policy amount that is the value of the car; that the respondents instead of declaring it as a total loss wants to repair the vehicle spending about Rs.2 lakhs in spite of the fact that the vehicle cannot be repaired, but it could only be reassembled part by part; that these clauses of the contract of insurance are liable to be struck down; that the expectation of the Supreme Court reported decisions in AIR 1980 SC 695 and that of the Rajasthan High Court in 1986 ACJ 358 are still in paper; that it is the first respondent who directed the petitioner to deliver the vehicle at M/s. Sundaram Motors for the purpose and reassembling the damages even though the technician of the said motors had already assembled and given a report on 17.5.1996;

that M/s. Sundaram Motors insisted that he should pay a sum of Rs.5000/-towards garage rent/demurrage and the same is still lying; that the respondents are not interested in settling the issue; that the respondents being a statutory corporation and the Public Sector undertaking and an instrumentality of the State is amenable to the jurisdiction of this Court and they cannot refrain from paying the insured amount; that the indifference showed by the respondents is callousness and requires to be reprimanded; that the petitioner has been put to much hardship and inconvenience.

8. Further stating that the respondents cannot have one value for the purpose of premium and another value for payment of compensation namely 'market value'; that the respondents have no other 'market value' at the time that the vehicle is insured and therefore it is established from contending otherwise; that if the value mentioned in the policy is not the 'market value' what sort of value is it? That this amount wilful misrepresentation, fraudulent practice, deceitful and exploitation of bona fide customers; that the clauses which are meant un-qualified powers without any guidelines are ex-facie illegal and requires to be declared as unconstitutional and violative of Articles 14 and 21 of the Constitution of India besides being unjust and opposed to public policy; that fair play is the hall mark of good Government and exploitation by the State is Anathema to 'justice and equity'; that after 6 months the respondents sent a receipt for Rs.1,40,000/- as a full and final settlement to be signed by the petitioner as condition precedent to receive the said amount, which the respondents are not entitled to and it is nothing but a fraudulent, coercion, the petitioner in order to restrain him from recourse to the legal remedies; that the respondents are bound to pay the sum of Rs.2,22,000/- being the value fixed as such the vehicle met with a total loss; that only to wriggle out of the requirement under the policy the respondents are trying to cling on to onerous, one sided unilateral clauses in the policy, which is the subject matter of the second writ petition wherein the writ of declaration is prayed for, on such allegations the petitioner would pray the relief extracted supra.

9. During argument the learned senior counsel appearing on behalf of the petitioner submits that the insurance policy is valid from 15.11.1995 to 14.11.1996 and the accident took place on 10.02.1996, i.e. six months from the date of policy. In Private Car B Policy, depreciation clause is applicable only up to 50% but in this case, it is not applicable since there is a total damage. He has also submitted a copy of the India Motor Tariffs effective from 01.04.1990, where it is stated as follows:

"The Tariff Advisory Committee (hereinafter called 'The Advisory Committee') have laid down rules, regulations, rates, advantages, terms and conditions as contained herein for transaction of motor insurance business in India in accordance with the provisions of Part II B of The Insurance Act, 1938.

This tariff supersedes India Motor Tariffs in force from 01.02.1982. The tariff is effective from 01.08.1989 in respect of all new business/renewals falling due on or after that date.

The tariff is binding on all insurers and any breach of the tariff shall be a breach of the Insurance Act, vide provisions of Sections 64 UC (4) and (5) of The Insurance Act, 1938."

10. He has also pointed out Clause 4 of the tariff which reads as follows:

"Valued Policies: It is not permissible to issue "Agreed Value Policies" except for vintage cars.

An 'Agreed Value Policy' is a policy which undertakes in the case of a total loss to pay a specified sum as the value of the vehicle insured and which does not take into account the current market value of such vehicle."

11. Learned senior counsel for the petitioner submits that the above tariff is a private and confidential one and the respondents ought not have produced the same before the Court. It is submitted that there is no basis for the valuation of the vehicle by the respondents.

12. Learned counsel for the petitioner submits that the effective remedy is available under Article 226 of The Constitution of India. The respondents being a statutory corporation and public sector undertaking and an instrumentality of the State are amenable to the jurisdiction of this Court under Article 226 of The Constitution of India. It is further stated that the terms and conditions of the policy was not given to the petitioner and he has not signed the same and the conditions are illegible and unreadable, which cannot be put

against him. Having accepted the premium paid by the petitioner, the respondents want to verify whether the value is correct or not. They are entitled to revalue the vehicle at the time of damage.

13. Learned senior counsel for the petitioner submits that when the respondents are raising dispute, they should issue notice to the petitioner invoking arbitration clause and without invoking the same, they cannot say that arbitration clause is there and the petitioner cannot file a writ petition. Even after filing this writ petition, the respondents have not issued any notice. He has relied on Section 8 of the Arbitration and Conciliation Act and submits that the person who disputes should go for an arbitration and the respondents cannot go for the same and now, they cannot put the arbitration clause against the petitioner. Even though the petitioner has sent a letter on 21.11.1996 expressing his willingness to receive the amount of Rs.1,40,000/- as demanded by the respondents, there was no reply from them. Therefore, the arbitration clause will not prevent the petitioner from further prosecuting the writ petition.

14. There will be an arbitration clause accepted by both the parties. Even assuming that this is a binding condition, the party who is disputing should apply to the court to refer the matter to the civil court. But the respondents have not done so.

15. Learned senior counsel appearing for the petitioner relied on 1985 ACJ 734 (New India Assurance Company Ltd. Vs. Gauri Shanker Sharma), wherein it is held as follows;

> "It would be a fraud on the insured if the insurance company first insures the insured for a heavy amount by taking premium to that extent and, when the contingency of death or injury or damage to property happens, then comes with the jugglery or trickery of taking defence that though they have taken the premium of more amount or accepted the amount but the legislature has provided the limit of the liability and to commit this sort of trickery not to pay the compensation for which they have taken the premium. The legislature can never intend nor encourage much less protect and in no case provide shelter or limit to play such a tactics and trickery. In fact, the insurance company should not try to take such defence of jurisdiction before the Tribunal and they should volunteer to make payment by which a

situation is created where insured persons get the amount of insurance sitting at their homes without being compelled or dragged to file claim petitions in the Tribunal and then undergo the ordeal for litigation for decades and decades, together. It would only add insult to injury to an injured person or a person or persons who have lost either his parents or whose property has been damaged, to enter into this litigation for long period and stand in the queue for knowing their fate of the trickery and jugglery after waiting decades together, when the price and value of the money goes too down and the spiral of the price index goes high making it virtually of no use."

16. Pending disposal of the writ petition, the interim order came to be passed on 18.02.1997 and the order reads thus:

"The petitioner is seeking for a direction to the respondents to pay the admitted amount of Rs.1,40,000/- to the petitioner with interest from 12.05.1996. Learned counsel for the respondents has no objection to deposit what has been determined as market value by the surveyor which comes to Rs.1,40,000/- but not the interest portion of it. His submission placed on record. The respondents - M/s. United India Insurance Company Limited is directed to pay the admitted amount of Rs.1,40,000/- without interest, within two weeks from today (18.02.1997). Post after three weeks."

17. Reading of the above order, the learned senior counsel would submit that without prejudice to the parties, the interim order was passed, that at that time, the the other side have not stated anything about the arbitration clause. The dispute is only for the remaining amount. He has also relied on Oomor Sait H.G. Vs. O.Aslam Sait (2001 (3) CTC 269)wherein it is held that

"...mere existence of arbitration clause does not create an embargo on civil court to continue proceeding pending before such Court. Civil Court is not prevented from proceeding with suit despite an arbitration clause if dispute involves serious questions of law or complicated questions of fact adjudication of which would depend upon

detailed oral and documentary evidence. 1996 Act does not deviate from position in 1940 Act regarding discretion of Civil Court to refer or not to refer dispute to arbitration."

18. Article 226 of The Constitution of India cannot be taken over by arbitration clause since the same is a constitutional remedy and arbitration is legislatory exercise.

19. The learned counsel appearing on behalf of the respondents would submit that at the time of proposal for insurance of a motor vehicle, the proposer is required to state his estimated value of the vehicle; that when the insured seeks insurance by an indemnity policy for the value which is estimated to be the value of the goods/property sought to be insured, the insurer has no say in the matter since the liability is only to indemnify the actual loss on the basis of the value on the date of loss during the period of insurance subject to a maximum of the sum insured represented by the Insured's Estimated Value.

20. The learned counsel would further submit that in the present case, it was found that the cost of repairs would exceed the market value of the vehicle if treated as a total loss, the petitioner was offered settlement on total loss basis as is the method adopted in settlement of all claims.

21. The Insured's estimated value is Rs.2,20,000/- being a contract of indemnity, the insurer is liable to pay only the market value not exceeding the sum insured. The fixation of market value will be done only with the guidance of the qualified surveyor in accordance with the provisions of the Insurance as a part of loss assessment exercise. The amount offered by the United Insurance represents the market value of the vehicle covered by the policy.

22. The learned counsel for the respondents refers to condition No. 3 of the United India Insurance Co. Ltd., (Private Car 'B' Policy, which reads as follows:-

"3. The Company may at its own option repair reinstate or replace the Motorcar or any part thereof and/or its accessories or may pay in cash the amount of the loss or damage and the liability of the company shall not exceed the actual value of the parts damaged or lost less depreciation plus the reasonable cost of fitting and shall in no case exceed the insured's estimate of the value of the Motor Car (including accessories thereon) as

specified in the Schedule or the value of the Motor Car (including accessories thereon) at the time of the loss or damage whichever is the less."

23. The learned counsel for the respondents would cite a judgment reported in THE GENERAL ASSURANCE SOCIETY LTD., Vs. CHANDMULL JAIN AND ANOTHER (1966 A.C.J 267), wherein it is held as follows:-

"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 basis 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.

24. The learned counsel for the respondents would also cite a judgment reported in 2004 4 LPJ - 49 = 2004 1 JT - 1092, wherein it is held:

"18. In this connection, a reference may be made to series of decisions of this Court wherein it has been held that duty of the Court to interpret the document of contract as was understood between the parties. In the case of GENERAL ASSURANCE SOCIETY LTD., Vs. CHANDMULL JAIN REPORTED IN

1966 (3) SCR 400 - 509 AND 510, it was observed as under:

> "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".

Similarly, in the case of ORIENTAL INSURANCE CO.LTD Vs. SAMAYANALLUR PRIMARY AGRICULTURAL CO-OP BANK, reported in IX (1999) SLT 594 = (1999) 8 SCC 543 - PARA 3 (546- f, it is observed as under:

> "The insurance policy has to be construed having reference only to the stipulations contained in it and no artificial far-fetched meaning could be given to the words appearing in it".

25. In consideration of the facts pleaded and upon hearing the learned senior counsel for the petitioner and the learned counsel appearing on behalf of the respondents what could be assessed by this Court in both the above writ petitions is that in the first writ petition above, the petitioner has prayed for a declaration declaring that the condition given in Section-1 relating to depreciation and condition No.3 in Private Car 'B' policy are invalid and unenforceable and strike down the said condition as ultra vires of the Constitution and one opposed to public policy. In the second writ petition in W.P.No.18520 of 1996 the same petitioner would pray for a writ of mandamus directing the respondents to pay a sum of Rs.2,22,000/- together with interest from the date of claim viz., 16.5.1996 to the date of payment and also for the damages and loss to Rs.49,000/-.

26. The case of the petitioner is that his new car bearing registration No.PY-01 B 6579 Premier N.E. was purchased on 15.11.1993 and insured for comprehensive insurance with the third respondent for one year period from 15.11.1995 to 14.11.1996; that the said car met with a major accident on 10.5.1996 at Chittoor in which the vehicle was totally damaged and on submitting a claim petition together with all necessary documents to the third respondent the grievance of the petitioner is that even though the vehicle was insured with the third respondent for the value of Rs.2,22,000/- for which amount the premium was paid the third respondent compelled the petitioner to accept a far less amount of Rs.1,40,000/- citing various clauses in the policy thus denying its liability having accepted the value and on receipt of the premium and hence the

petitioner has come forward to file both the above writ petitions, the first one challenging a particular clause relating to depreciation and praying to declare the same unenforceable and ultra vires of the constitution as one opposed to public policy and in the second writ petition the writ petitioner seeking a direction to pay a sum of Rs.2,22,000/- together with interest and for damages. The main arguments advanced on the part of the learned senior counsel appearing for the petitioner is that regarding assessment of the value or damage caused to the vehicle there is no proper guidelines and instead of declaring it as a total loss and pay the amount for which the premium was paid advancing a different theory of market value a far less compensation is offered to be paid thus adopting double standards which according to the learned senior counsel is a fraudulent practice, deceitful act and exploitation of bona fide customers and those clauses give unqualified powers and since exfacie illegal and violative of Articles 14 and 21 of the Constitution of India besides being opposed to public policy, they are liable to be struck down. Further the strong case of the petitioner is that the respondents are bound to pay a sum of Rs.2,22,000/- for which they paid premium citing a Division Bench judgment of the Rajasthan High Court reported in (supra) 1985 ACJ 734 wherein it is strongly held that it would be a fraud on the insured if the insurance company first insures insured for a heavy amount by taking premium to that extent and, when the contingency arises coming with the jugglery or trickery of taking defence not to pay compensation for which they have taken the premium. It is further held therein that in fact, the Insurance company should not try to take such defence of jurisdiction before the Tribunal and they should volunteer to make payment and see that the insured persons get the amount of insurance without being compelled or dragged to file claim petitions in the Tribunal and undergo the ordeal for litigation for decades and decades together. It would only add insult to injury to an insured person.

27. It is a case in which the admitted amount of Rs. 1,40,000/- without interest has been ordered to be paid to the petitioner by means of an interim order made by this Court on 18.2.1997, subject to the outcome of the above writ petitions.

28. On the part of the respondents the learned counsel appearing on their behalf would exhort that the insurer has no say in the matter of the proposal made or in stating the estimated value of the vehicle and the liability of the respondents is only to indemnify the actual loss on the basis of the value on the date of loss during the period of insurance, subject to the maximum; that in the case in hand it was found that the cost of repair would exceed the market value if treated

as a total loss; that the insurer is liable to pay only the market value and the fixation of the market value will be done by a certificate as a part of loss assessment exercise.

29. The learned counsel would also cite some decisions mentioned supra wherein it is held that the loss or damage shall in no case exceed the insured estimate of the value of the Motor Car or it should be held that the duty of the court to interpret the document of contract as was understood between the parties. In another case it would be held that the insurance policy has to be construed having reference only to the stipulations contained in it and no artificial order with far fetched meaning could be given to the words appearing in it. An analytical approach of the facts and circumstances of the case in hand would only show that though on the part of the petitioner in the first writ petition has come forward to allege that either the conditions stipulated relating to depreciation and such other conditions in the policy or not worth being imposed nor have they be exploited or explained at the time of taking the policy of insurance and having imposed such conditions the respondents insurance company has only committed fraud on the insured having first accepted and assured for a heavy amount for taking the premium and having collected such premium for such amount in cases of total damage of the vehicle dragging to the effect that the insurance company is not bound to pay the amount of value of the vehicle for which the premium was collected but it can have its own estimated value by such means a second value assessed on the vehicle of the said amount paid which is accepted by the insured is unacceptable either in law or in equity.

30. However the conditions particularly regarding the depreciation are borne by the policy and it is relevant to consider whether the insurance company is entitled to have such conditions promulgated in the policy which depends on the reasonableness of the conditions imposed and since only agreeing them the petitioner has entered into the agreement with the insurance company and therefore on such flimsy grounds that either they are not clearly visible nor permanently made known they could be sought to be declared ultra vires and therefore the conditions need not be compared with the outcome thus becoming liable only to be struck down is not acceptable in the sense that it is only to the choice of the petitioner that he entered into the agreement with the respondent Insurance Company and since there is no compulsion for having accepted the policy based on the conditions imposed, it is difficult to justify the claim of the petitioner and therefore the prayer of the petitioner in the first writ petition to declare the conditions in the policy relating to depreciation as indicated in the prayer column as unenforceable, invalid and ultra vires

of the Constitution cannot sustain and hence it is only desirable to conclude that the petitioner being a party to the contract application of the terms and conditions cannot be normally questioned and hence he is not entitled to the relief of declaration as sought for in the W.P.No.18519 of 1996.

31. However so far as the prayer in the second writ petition in W.P.No.18520 of 1996 relating to the relief of mandamus to pay a sum of Rs.2,22,000/- together with interest and for damages at Rs.49,000/- is concerned, this Court is of the opinion that the petitioner has justifiable reasons to offer that since the respondents are agreeing parties for the payment of premium of a fixed sum and simply stating that at the time of taking the policy the value is voluntarily mentioned by the insured for which they volunteer to pay the premium and it is not the market value and hence they would assess the market value in their own way and would pay the compensation only in accordance with such assessment and not the amount for which the premium was paid by the insured is quite unreasonable in the sense that as though for the amount of policy taken on the vehicle or for the premium paid, the respondents are not responsible nor have they got control over the said fixation of the value of the vehicle are totally a deceitful defence put up on the part of the respondents, which cannot be accepted.

32. The respondents, once having accepted the value of the vehicle for the purpose of payment of premium and further accepting the very payment of premium itself for certain months, are estopped from denying the same and they have to honour their commitments and hence so far as the claim of the petitioner for a sum of Rs.2,22,000/- based on the policy taken and the premium paid are concerned and since there is no much controversy regarading the total damage caused to the vehicle, it should be decided that the petitioner is entitled to the relief sought for in the second writ petition and the same is ordered accordingly.

In result,

(i) W.P.No.18519 of 1996 does not merit acceptance and the same is liable to be dismissed and is dismissed accordingly.

(ii) W.P.No.18520 of 1996 succeeds and is allowed. The respondents particularly the third respondent is directed to pay the sum of Rs.2,22,000/- (Rupees Two lakhs and Twenty two thousand only) together with simple interest at 6 per cent per annum from the date of filing of the writ petition till the date of payment coupled with a sum of Rs.49,000/- towards damages and loss suffered by the petitioner minus Rs.1,40,000/- which had been

already paid to the petitioner.

(iii) It is further directed that the payments indicated above shall be made within a period of two months from the date of receipt of the copy of this order.

(iv) There shall be no order in both the writ petitions as to costs.

ks

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

Copies to the:-

1.M/s. United India Insurance
-Company Limited,
Regional Office,
40-42, Greams Road,
Madras-6.

2.M/s. United India Insurance
-Company Limited,
Divisional Office,
123, Usman Road,
T.Nagar, Madras-17.

3.M/s. United India Insurance
-Company Limited,
Branch Office,
46,Nehru Street, P.B.No.25,
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4. Tariff Advisory Committee,
(General Insurance), Central Office,
"ADOR" House, 1st Floor,
6K, Dubsash Marg,
Bombay-400 0023.

+ 2 ccs to Mr.M.B.Gopalan, Advocate SR No. 9732 and 9733
+ 1 cc to Mr.M.Sriram, Advocate SR No. 9359

common order in
W.P.Nos.18519 & 18520/96

JRG(CO)
SR/14.5.2005