REPORTABLE

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **WRIT PETITION (CIVIL) NO. 5605 OF 2008**

Reserved on : 11th December, 2009.

% **Date of Decision** : February 26th , 2010.

SUDARSHAN VOHRA & ANR. .... Petitioners.
Through Mr. Ankur Singhal, advocate.

VERSUS

LIFE INSURANCE CORPORATION OF INDIA .... Respondent.
Through Mr.Mohinder Singh and Ms. Diksha Ahuja, advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ? YES
3. Whether the judgment should be reported in the Digest ? YES

SANJIV KHANNA, J.:

Petitioner no.1-Ms.Sudarshan Vohra had purchased annuity plan under Jeevan Akshay Plan III vide Policy no. 113632069 for a premium of Rs.15 lacs under receipt dated 25th January, 2005 and the petitioner no.2- Ms. Sukesh Vohra had purchased two annuity plans under Jeevan Akshay Plan III vide Policy nos. 113632426 and 114716867 for premium of Rs.17 lacs and Rs.25 lacs respectively under receipts dated 25th February, 2005 and 22nd August, 2005 from the respondent-Life Insurance Corporation of India (hereinafter referred to as the respondent, for short).

2. In July 2007, i.e after more than 2 years of purchase, the petitioners surrendered the three policies for encashment. It is the case of the petitioners that they were given to understand that the surrender value would be calculated @ 95% of the amount payable on death. Thus, they had agreed to forego 5% of the amount payable at the time of death.

3. The respondent by their letter dated 1st December, 2007 issued three cheques in favour of the petitioners, for sums of Rs.13,32,319/-, Rs.20,74,863/- and Rs.14,64,556/- as the surrender value in respect of the three policies. Thus, the petitioners received back a total amount of Rs.45,12,821/- out of the total premium of Rs.57,00,000/- paid by them, causing a loss of Rs.11,87,179/-. This is clear from the table given below :-

Policy No.	**Premium**	**Annuity**	**Surrender Value**	**Loss**
113632069	15,00,000.00	94,350.00	13,32,319.00-94,350.00 = 12,37,969.00	2,62,031.00
113632426	17,00,000.00	1,09,567.00	14,64,556.00 – 1,09,567.00 = 13,54,989.00	3,45,011.00
114716867	25,00,000.00	1,55,000.00	20,74,863.00-1,55,000.00 = 19,19,863.00	5,80,137.00
TOTAL	**57,00,000.00**	**3,58,917.00**	**45,12,821.00**	**11,87,179.00**

4. The petitioners protested by writing letters stating that the surrender value has not been calculated @ 95% of the amount payable at the time of death as was explained to them at the time of surrender of the policies but has been calculated by applying some other formula. It was stated that in case the surrender value had been calculated @ 95% of the amount payable at the time of death they would have suffered a loss of premium of Rs.2,85,000.00 instead of Rs.11,87,179.00. Thus, an excess amount of Rs.9,02,179.00 had been deducted by the respondent. They made complaint to the Ombudsman and the Insurance Regulatory Development Authority but without success.

5. The respondent by their letter dated 28th January, 2008 informed the petitioners that the matter has been examined by the competent authority at the Zonal level and the surrender values of the policies were calculated in terms of the Circular dated 19th January, 2007. As per the said Circular, the calculation is to be made by applying lower of the two formulas stipulated therein i.e. (i) by taking annuity factor and risk factor for age last birthday at surrender and the period from the last policy anniversary till the date of surrender or (ii) by taking 95% of the amount payable on death. It was stated that the payment in the present case was made by applying the first formula. Same stand has been taken before this Court in the counter

affidavit filed by the respondent. However, the counter affidavit filed by the respondent on 4th February, 2009 is completely silent and does not state whether the petitioners were informed about the first formula and that the surrender value would be calculated according to '*whichever is lower*' principle when the petitioners had surrendered their policies in July, 2007. The petitioners in paragraph 4 of the Writ Petition have specifically pleaded that at the time of surrender of the policies they were given to understand that the surrender value would be calculated @ 95% of the amount payable on death and therefore they had agreed to suffer the said partial loss. It is the case of the petitioners that they were never informed about the first formula and the fact that the same would be applicable in case the surrender value calculated by the said formula is lower. The said statement is also made in the letter dated 4th December, 2007 which was written by the petitioners immediately after they received the three cheques vide letter dated 1st December, 2007 for refund.

6. The respondent have filed along with the list of documents dated 8th October, 2009, the calculation sheet on the basis of which refund was made by applying the first formula. They have also filed copy of the Circular dated 19th January, 2007 enclosing therewith letter dated 13th January, 2007. The said letter dated 13th January, 2007 stipulates that the surrender value in case of Jeevan Akshay

and New Jeevan Akshay Plans under the option “Annuity for life with Return of Purchase Price on death” shall be calculated as under:-

> “…. Even then such requests were being considered on merits basis and in certain cases, surrender value was allowed.
>
> x x x x x x
>
> The Surrender Value shall be calculated as :
>
> (F(1) * Annuity per annum + F(2)* Amount payable on death) * F(3)
>
> OR
>
> 95% of the amount payable on death, **which ever is lower**.
>
> Where F(1) is the annuity factor for Age last birthday at surrender for the mode of annuity payment,
>
> F(2) is the Risk Factor for Age last birthday at surrender and
>
> F(3) is the period in months from the last policy anniversary till the date of surrender.
>
> For factor F(1) and F(2), please refer to Annexure A and for Factor F(3), please refer to Annexure B.”

7. Perusal of the calculation sheet providing the surrender value of the policies would show that the first formula is extremely complex and difficult to compute. It is impossible for any layman or even a person associated with the insurance business to calculate the surrender value as per the first formula which at the first instance requires calculation of value of F(1), F(2) and F(3) for computing the

surrender value. For factors F(1), F(2) and F(3) another set of formulas available with the respondent-Corporation have to be applied for the values to be computed. In the case of the petitioner no.1, value of F(1), F(2) and F(3) have been taken as 5.3297, 0.5046 and 1.0576 respectively and in the case of the petitioner no.2, in respect of one of the policy these have been taken as 7.1645, 0.3755 and 1.0510 and in case of the third policy, figures F(1) and F(2) are the same but the figure of F(3) has been taken as 1.0125. The calculations may be justified and correct in terms of the letter dated 13th January, 2007, but the question is whether as per the general principles of uberrimae fidei, the petitioners should have been informed about the said calculation at the time when they wanted to surrender their policies so that they could take a considered or informed decision. In the counter affidavit it is not averred that the petitioners were informed of the exact surrender value by making necessary calculations. Neither is this stand taken in any of the letters written by the respondent to the petitioners, or before the Ombudsman or IRDA.

8. In the additional affidavit filed by the respondent on 9th December, 2009 for the first time, Mr. Rajiv Kumar Banerjee, Branch Manager of the respondent has averred that the agent of the petitioners-Mr.Vikram Kakkar at the time of surrender of the policies

had discussed the matter with them and he was informed that the surrender value would be calculated as per the two formulas and the lower amount would be payable. It is difficult to accept this belated plea raised by the respondent in the affidavit filed in this Court on 9th December, 2009 as the said plea was not taken in any of the earlier correspondences or even in the counter affidavit. However, even if the said plea is accepted I do not think that the stand of the respondents can be considered fair and reasonable which can withstand the legal challenge based on uberrimae fidei raised by the petitioners. Further, Mr. Vikram Kakkar is an agent of the respondent and is paid commission by the respondent on the business procured.

9. Law of contract is not only about creating liabilities or obligations but also to respond to social aspects of a contract and its impact. Contracting parties are expected to observe certain standards of behaviour. These are terms implied by law and are generally regarded as non consensual i.e imposed by law. Contracts of insurance, by law, requires uberrimae fidei i.e. utmost good faith and duty to make full disclosure of material facts when the fact is known to one party alone. Referring to the law of contracts relating to insurance, Chitty on Contracts, Vol.II, has observed:

> "In Insurance law, "the duty which arises is threefold: a duty to disclose material facts; a duty not to misrepresent material facts; and a duty not to make fraudulent claims.

> Although there have been suggestions in the past that the first of these duties is founded upon an implied term of contract, the weight of authority is to the effect that the duty to disclose, as well as the duty not to misrepresent, material facts are obligations imposed by law."

10. It was observed in ***Banque keyser Illman SA v Skandia (UK) Insurance Co. Ltd*** (1990) 1QB. 65,771-772 that as far as insurance contract is concerned, the duty of the parties are as under:

> "Subject to what follows, the duty is upon the assured, and the insurer, to disclose every material fact to the other party..... So far as the insurer's duty is concerned, a fact is material and must be disclosed to the assured if it is relevant to the nature of the risk sought to be covered, or to the recoverability of a claim under the policy which a prudent assured would take into account in deciding whether or not to place the risk with the proposed insurer."

11. Thus this principle of ubberimae fidei applies not only to the insured but equally to the insurance company. In ***United India Insurance Company Ltd versus M.K. J. Corporation*** (1996) 6 SCC 428, the insurance company sought to deny the claim for damages to goods by relying upon statutory tariff advisory committee advise which was deemed to be part of the policy. Relying upon the said report it was submitted that the insurance policy excluded cover for damages resulting from total or partial cessation of work. However, this exclusion was not specifically incorporated in the terms of the policy. The Supreme Court observed that the recommendation of the advisory committee was a material fact which the insurance company ought to have disclosed to the insured at the time when contract was

concluded. The insurance company could not avoid the policy. It was held:

> **"6.** It is a fundamental principle of Insurance law that utmost good faith must be observed by the contracting parties. Good faith forbids either party from concealing (non-disclosure) what he privately knows, to draw the other into a bargain, from his ignorance of that fact and his believing the contrary. Just as the insured has a duty to disclose, "similarly, it is the duty of the insurers and their agents to disclose all material facts within their knowledge, since obligation of good faith applies to them equally with the assured".
>
> **7.** The duty of good faith is of a continuing nature. After the completion of the contract, no material alteration can be made in its terms except by mutual consent. The materiality of a fact is judged by the circumstances existing at the time when the contract is concluded. In the present case, the introduction of the Tariff Advisory Committee document materially affects the terms of the policy, resulting in the denial of the very indemnity of claim. And this was what the appellant sought to do, at the stage of clearing of the complaint. The Commission rightly rejected the appellant's plea. Notwithstanding this, on behalf of the appellant, it was insisted that the instructions of the Tariff Advisory Committee form part of the contract. Admittedly, the appellant-insurer had not incorporated the above-quoted clause as part of the policy undertaken with the insured. Consequently, the insured is not bound by this exclusionary clause of liability since the appellant-insurer, admittedly, had undertaken liability for the riot or strike, damage due to riot or strike."

12. Again in ***Modern Insulators Ltd versus Oriental Insurance Company Ltd.*** **AIR 2000 SC 1014** the exclusion clause which was mentioned in the contractual document but was not communicated to the insured was not applied and the insurance Company was directed to pay up, inter alia, holding

> **"5.** The appellant also urged before the National Commission that only the cover note and the schedule of the insurance policy were supplied and other terms and conditions including the exclusion clause were not

communicated. According to the appellant the above document supplied did not contain the exclusion clause. The said exclusion clause runs as follows:

> "In the case of second-hand/used property the insurance hereunder shall, however, cease immediately on the commencement of the test."

6. The National Commission asked the parties to file affidavit to prove that the exclusion clause was duly communicated to the appellant. We have been taken through the affidavits filed and we find in the affidavit of the appellant the letter received by the appellant from the Branch Manager of the respondent was referred to wherein it was confirmed that the appellant was supplied only with a cover note and the schedule of the policy. So the other terms and conditions containing the above exclusion clause were not communicated. In the reply affidavit filed by the respondent it was not specifically mentioned that the exclusion clause was also communicated to the appellant.

7. The National Commission was of the view that "it is equally the responsibility of the respondent to call for these terms and conditions even if they were not sent by the appellant as alleged, to understand the extent of risks covered under the policy and the associated aspects".

8. It is the fundamental principle of insurance law that utmost good faith must be observed by the contracting parties and good faith forbids either party from non-disclosure of the facts which the parties know. The insured has a duty to disclose and similarly it is the duty of the insurance company and its agents to disclose all material facts in their knowledge since the obligation of good faith applies to both equally."

13. The test to determine materiality of a fact/information is whether a reasonable man would be influenced by it in deciding whether or not to enter into a contract. (Ref. ***Satwant Kaur Sandhu Vs. New India Assurance Co. Ltd.*** (2009) 8 SCC 316;- material information would mean all important, essential and relevant information; ***Bhawany Rai versus LIC*** AIR 1984 MP 126; ***Pan Atlantic Insurance versus Pine top Insurance Company Ltd.***

(1994) 3 All.E.R. 581 (HL). In the present Writ Petition, merely disclosing the formula, which in turn required reference to other formulas available only with the respondent cannot be regarded as a good and material disclosure by the respondent. On the basis of incomplete information no one can make calculations of the amount refundable unless first there is an access to, and knowledge of the formula to compute values F1, F2 and F3. Formula to compute values F1, F2 and F3 were material facts available with the respondent but these were not disclosed. Thus, even if it is presumed and accepted that the formula without Annexures A and B was communicated to the petitioners, this was not sufficient as the formula itself required disclosure of the said annexures. The figures to be taken and calculated for the purpose of F(1), F(2) and F(3) were within the knowledge and had to be calculated by the respondent. It was the obligation of the respondent to inform and disclose material facts and disclose calculation or value of factors F1,F2 and F3. Failure to disclose the formula applicable to compute F1, F2 and F3 and their values under the first formula, a material fact violates the principle of uberrimae fidei.

14. Insurance policies are also taken by laymen who to a large extent abide by and follow the advice given and recommendations made by the insurance companies or agents appointed by the insurance companies. Insurance is a service industry and interest of

common man cannot be ignored. Common man does not know or understand the intricate mathematical calculations. They are not expected to know nor do they have the capability to undertake the said exercise. Commercial expediency and business considerations may require formulation and calculation by a complex formula but in such cases the insured should be specifically informed about the exact and full amounts which shall be deducted or be paid and not mere formulas and mathematical equations. Insured in the present case is not a corporation or a business enterprise. The insurance company has the duty, responsibility and obligation to be clear, candid and transparent, especially when it is aware that a gullible insured will get confused, spoofed or beguiled to suffer a substantial monetary loss. Thus, merely telling and informing a complex formula, which a laymen cannot understand in all cases is not sufficient. The insured should be given the right to make an informed choice in simple and lucid words which he can understand. It was the obligation of the respondent to inform and disclose material facts as to the total surrender value under the first formula.

15. The policies were surrendered in July, 2007 and the cheques were dispatched only in November, 2007. The delay shows that the respondent themselves took about 4 months to compute the amount payable under the said formulas. Even for the respondent it required

skill of and calculation by proficient experts in their office. The respondent may not have misrepresented or made a fraudulent statement but they have certainly failed in their duty to disclose the material and relevant facts as to the surrender value payable to the petitioners under the formula.

16. In addition to the above reasoning, it cannot be disputed that the respondent, being a public authority or instrumentality of State is required, even in contractual matters, to be just and fair and not act in an arbitrary manner. It owes a public duty to act reasonably. In ***Life Insurance Corporation of India versus Consumer Education and Research Centre*** (1995) 5 SCC 482, the Supreme Court had observed :-

> "20 It is true that life insurance business as defined under the Insurance Act, is business effecting contracts of insurance upon human life.....Thereby, the contract of insurance is hedged by bilateral agreement on human life on payment of premia (premium) subject to the covenants thereunder.
> 21. x x x x x
> 22. x x x x x
> 23 Every action of the public authority or the person acting in public interest or any act that gives rise to public element should be guided by public interest. It is the exercise of the public power or action hedged with public element that becomes open to challenge. If it is shown that the exercise of the power is arbitrary, unjust and unfair, it should be no answer for the State its instrumentality, public authority or person whose acts have the insignia of public element to say that their actions are in the field of private law and they are free to prescribe any

> conditions or limitations in their actions as private citizens simpliciter do in the field of private law. Its actions must be based on some rational and relevant principles. It must not be guided by irrational or irrelevant considerations. Every administrative decision must be hedged by reasons."

17. Recently again in ***United India Insurance Company versus Manu Bhai Dharamasinhbhai Gajera*** (2008) 10 SCC 404 the Supreme Court emphasized that Article 14 of the Constitution of India encompasses within its fold the obligation on the part of the State instrumentalities to act fairly and this equally applies to contractual fields specially when the bargaining power is unequal or the contract is not negotiated but is a standard form contract between unequals. Referring to Article 14 of the Constitution of India as also Section 23 of the Contract Act, it was observed as under:-

> "Existence of the jurisdiction of the superior courts of India upon invoking Article 14 of the Constitution as also Section 23 of the Contract Act to strike down a clause in the contract which the court feels to be unconscionable having regard to the unequal bargaining power of the parties is not in question, but the said provisions would have no application for the purpose of modifications, alterations or additions of a term in the contract. There cannot furthermore be any doubt whatsoever that each case must be considered on its own facts which would obviously lead to the conclusion that by reason thereof the court shall not read into the contract an automatic renewal clause in a contract of insurance if there does not exist any."

18. In ***Delhi Development Authority versus Joint Action Committee*** (2008) 2 SCC 672 it has been held that the terms of the contract can be altered or modified but this cannot be done unilaterally unless there is a provision in the contract itself or in the law. However, if a contracting party intends to modify the terms of the

contract it is obligatory on its part to bring the same to the notice of the other side.

19. For the reasons stated above, it is also held that this Court while exercising writ jurisdiction can interfere with the unreasonable stand taken by the respondent which was against the mandate laid down in Article 14 of the Constitution of India and law of Insurance. An element of public character is inherent in life insurance contracts and to that extent the actions of the respondent Life Insurance Corporation can be tested on the touchstone of justness and fairness. The Supreme Court in ***Life Insurance Corporation of India versus Consumer Education and Research Centre*** (Supra) has observed:

> ***"***The actions of the State, its instrumentality, any public authority or person whose actions bear insignia of public law element or public character are amenable to judicial review and the validity of such an action would be tested on the anvil of Article 14.While exercising the powers under Article 226, the Court would be circumspect to adjudicate the disputes arising out of the contract depending on the facts and circumstances in a given case. But, the distinction between public law and private law remedy is now narrowed down. The actions of the appellants bears public character with an imprint of public interest element in their offers with terms and conditions mentioned in the appropriate table inviting the public to enter into contract of life insurance. It is not a pure and simple private law dispute without any insignia of public element."

20. ***In LIC of India v. Asha Goel,*** (2001) 2 SCC 160**,** it was observed :

> "10**.** Article 226 of the Constitution confers extraordinary jurisdiction on the High Court to issue high prerogative writs for enforcement of the fundamental rights or for any other purpose. It is wide and expansive. The Constitution does not place any fetter on exercise of the extraordinary jurisdiction. It is

left to the discretion of the High Court. Therefore, it cannot be laid down as a general proposition of law that in no case the High Court can entertain a writ petition under Article 226 of the Constitution to enforce a claim under a life insurance policy. It is neither possible nor proper to enumerate exhaustively the circumstances in which such a claim can or cannot be enforced by filing a writ petition. The determination of the question depends on consideration of several factors like, whether a writ petitioner is merely attempting to enforce his/her contractual rights or the case raises important questions of law and constitutional issues, the nature of the dispute raised; the nature of inquiry necessary for determination of the dispute etc. The matter is to be considered in the facts and circumstances of each case. While the jurisdiction of the High Court to entertain a writ petition under Article 226 of the Constitution cannot be denied altogether, courts must bear in mind the self-imposed restriction consistently followed by High Courts all these years after the constitutional power came into existence in not entertaining writ petitions filed for enforcement of purely contractual rights and obligations which involve disputed questions of facts. The courts have consistently taken the view that in a case where for determination of the dispute raised, it is necessary to inquire into facts for determination of which it may become necessary to record oral evidence a proceeding under Article 226 of the Constitution, is not the appropriate forum. The position is also well settled that if the contract entered between the parties provide an alternate forum for resolution of disputes arising from the contract, then the parties should approach the forum agreed by them and the High Court in writ jurisdiction should not permit them to bypass the agreed forum of dispute resolution. At the cost of repetition it may be stated that in the above discussions we have only indicated some of the circumstances in which the High Court have declined to entertain petitions filed under Article 226 of the Constitution for enforcement of contractual rights and obligation; the discussions are not intended to be exhaustive. This Court from time to time disapproved of a High Court entertaining a petition under Article 226 of the Constitution in matters of enforcement of contractual rights and obligation particularly where the claim by one party is contested by the other and adjudication of the dispute requires inquiry into facts……."

11. The position that emerges from the discussions in the decided cases is that ordinarily the High Court should not entertain a writ petition filed under Article 226 of the Constitution for mere enforcement of a

> claim under a contract of insurance. Where an insurer has repudiated the claim, in case such a writ petition is filed, the High Court has to consider the facts and circumstances of the case, the nature of the dispute raised and the nature of the inquiry necessary to be made for determination of the questions raised and other relevant factors before taking a decision whether it should entertain the writ petition or reject it as not maintainable. It has also to be kept in mind that in case an insured or nominee of the deceased insured is refused relief merely on the ground that the claim relates to contractual rights and obligations and he/she is driven to a long-drawn litigation in the civil court it will cause serious prejudice to the claimant/other beneficiaries of the policy. The pros and cons of the matter in the context of the fact-situation of the case lshould be carefully weighed and appropriate decision should be taken. In a case where claim by an insured or a nominee is repudiated raising a serious dispute and the Court finds the dispute to be a bona fide one which requires oral and documentary evidence for its determination then the appropriate remedy is a civil suit and not a writ petition under Article 226 of the Constitution. Similarly, where a plea of fraud is pleaded by the insurer and on examination is found prima facie to have merit and oral and documentary evidence may become necessary for determination of the issue raised, then a writ petition is not an appropriate remedy."

21. The relief which should be granted to the petitioners is required to be modulated as the petitioners have encashed the cheques which were sent by the respondent. The payments were made in December 2007. Keeping in view the bank rate of interest prevailing during this period from December 2007 till today, the petitioners are given the option to surrender the amounts paid by the respondent along with simple interest @8% p.a. w.e.f. 1st December, 2007 till the date they return the said amount. The petitioners will have the option to repay the said amount within two months from the date of judgment and in case the said payment is made, the policies will be revived. If the

petitioners do not make the said payment along with the interest it would be treated that they have accepted the refund and cancellation of the policies.

In the facts and circumstances of the case, there will be no order as to costs.

(SANJIV KHANNA)
JUDGE

FEBRUARY 26 , 2010.
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