Before Adarsh Kumar Goel, J

VIDYA—*Appellant/Plaintiff*

versus

L.I.C. OF INDIA & ANOTHER—*Respondents/Defendants*

R.S.A. No. 2294 of 1993

17th May, 2004

Insurance Act, 1938—S. 45—Insured committing suicide after two years of taking policy—Claim by nominee—Insurance Company repudiating the policy on the ground that the insured had suppressed material facts fradulently and deliberately by not disclosing that he suffered from mental depression at the time of taking policy—No evidence to show that the deceased was suffering from mental depression—Policy by LIC only after full scrutiny and also by medical examination of its medical expert—Act of committing suicide two years after the policy not enough to infer that deceased was suffering from mental depression—Merely an inaccurate statement about previous visit to a doctor or some ailment no ground to repudiate the policy—No evidence to show that deceased had deliberately made any false statement on material facts or suppressed any material facts—Findings of Courts below liable to be vitiated by erroneous approach of law—Appellant held entitled to decree of claim amount with all accrued benefits under the policy.

Held, that :—

(i) Insurer cannot avoid policy of insurance on mere inaccuracy of a statement at the time of taking of the policy after two years of the policy. Section 45 of the Insurance Act, 1938 incorporates this principle. After two years, policy can be avoided only if second part of section 45 applies. As held by the Apex Court, "The three conditions for the application of the second part of S. 45 are :

(a) the statement 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 policy-holder must have known at the time of making the statement that it was false or that it suppressed facts which was material to disclose.

In the present case, death of insured was after two years and, therefore, the policy could not be repudiated on the only ground that there was any inaccurate or false statement.

(ii) Omission to mention doing of ECG was at best an inaccurate or false statement not on a material matter nor the said statement could be held to have been made fraudulently. It is not even the case of the insurer that the insured suffered from any heart problem or any finding of the ECG disclosed any such problem.

(iii) In view of finding on question No. (ii), insurer failed to discharge burden of proving a case for repudiation of policy. Evidence led by the insurer comprising of Dr. Bhatia, and suicide note do not in any manner prove the case that at the time of taking of policy, the insured suffered from disease of mental depression or any other disease.

(iv) Findings of the Courts below are clearly vitiated by erroneous appraoch to law, there being no legal evidence to show that deceased had deliberately made any false statement on material facts or suppressed any material facts. The Courts below have taken a mere inaccurate statement on a fact other than a material fact as being deliberate false statement on material fact. This view is contrary to the statutory provisions of Section 45 of the Act as well as judgment of the Apex Court in Mithoolal Nayak Vs. Life Insurance Corporation of India, AIR 1962 SC 814 & other principles and decisions.

(v) The appellant is entitled to a decree with future interest under section 34 IPC from the date of filing of the suit i.e.9th July, 1978 till the date of payment at the rate of 6% per annum.

(Para 24)

Karan Nehra, Advocate, *for the appellant*

B.R. Mahajan, Advocate, *for the respondent.*

JUIDGMENT

ADARSH KUMAR GOEL, J.

(1) The appellant-plaintiff filed a suit for recovery of amount of insurance claim for death of Joginder Singh.

(2) Case of the plaintiff is that plaintiff's deceased husband Joginder Singh was insured with the Life Insurance Corporation on 19th March, 1974 under Policy No. 22576229, Ex. P.1 for Rs. 50,000. The plaintiff was the nominee. Joginder Singh died on 13th July, 1976. He had paid stipulated instalments of premium regularly. The plaintiff filed a claim with the LIC but the same was not accepted.

(3) The Insurance Company contested the suit on the ground that the deceased had not disclosed his state of health in answers given to specific questions at the time of insurance and the deceased died by committing suicide, by shooting himself. He was tired on his life on account of some disease which was not disclosed to the Insurance Company. Fraudulent and deliberate suppression of material facts rendered the contract of insurance void and the Corporation, therefore, repudiated the same.

(4) The trial Court dismissed the suit upholding the plea of the Insurance Company that the contract of insurance was validly repudiated on account of suppression of material facts by deceased Joginder Singh at the time of taking the Insurance Policy. Finding of the trial Court has been affirmed in appeal. Hence this second appeal.

(5) Learned counsel for the appellant submitted that the appeal involved substantial question of law as to interpretation of Section 45 of the Insurance Act, 1938 which debarred the Insurance Company from calling in question the policy of insurance after two years on the ground of inaccurate or false statement in any document unless the insurer shows that such a statement was on material matter or suppressed facts fraudulently knowing the same to be false. It was submitted that since the courts below have recorded the finding of validity of repudiation of policy without proper interpretation of Section 45, the same was vitiated.

(6) Learned counsel for the respondents submitted that findings recorded by the Courts below was a pure finding of fact and did not call for interference in second appeal.

(7) I have considered the rival submissions and perused the record of the case.

(8) I am of the view that substantial questions of law do arise for consideration in this appeal which can be formulated as under :—

(i) Whether the Insurer could avoid the policy of insurance on the plea that truth of every statement was the basis of contract without showing that the questions were properly explained to the insured ?

(ii) Whether ommission to mention doing of ECG amount to fraudulent suppression of a material fact ?

(iii) Whether the insurer discharged the burden of proving that a case under second part of Section 45 of the Act for repudiating the policy was made out ?

(iv) Whether findings of the courts below are vitiated by erroneous approach to the law ?

(v) What relief the appellant is entitled to ?

(9) Before proceeding to deal with the above questions, it is necessary to have a look at the findings of the Courts below. Relevant discussion of the trial Court in this regard is in paras 8 to 15. Reference has been made to letter of repudiation sent by the insurer Ex. DW-11/2 dated 5th April, 1978. The said letter refers to columns Nos. 4 and 6 of the proposal for assurance dated 19th March, 1974 and states that answers to the questions were false as the deceased had suffered from mental depression before submitting a proposal which was not disclosed. The said columns reproduced in the letter dated 5th April, 1978 are as under :—

	Questions	Answers
4(a)	What has been your usual state of health ?	Good
(d)	Have you consulted a medical practitioner within the last five years. If so, give details	No

6. Have you ever suffered from any of the following ailments?

(a) Giddiness, fits, neurasthenia, neuralgia, paralysis, insanity, nervous break down or any other disease of the brain or the nervous system ? — No

(b) Fainting attacks, pain in chest, breathlessness, palpitation or any disease of the heart. — No

(10) The trial court referred to evidence of Dr. Y.S. Bawa, DW-2 who medically examined the deceased when he submitted the proposal for his insurance. He had given his report Ex. D. 3. A reference to the said report shows that according to the doctor, the deceased was healthy and did not suffer from any disease. The insurer also relied on evidence of Dr. S. Chatrath, DW-3 to the effect that he had taken ECG of the deceased on 26th September, 1972, 29th Dec., 1973, 10th January, 1974, 4th March, 1974 and 13th March, 1974. Further, reference is to the evidence of Dr. JL. Bhatia, DW-7 to the effect that the deceased visited the said doctor on 4th September, 1974, 21st January, 1975 and 19th March, 1975. Reference was also made to a written note Ex. DW-13/1 to the effect that the deceased had killed himself on account of some disease which was not detected by the doctors. In para 14, the trial court held that the deceased had deliberately made false statement and suppressed material facts in the personal statement Ex. D.2. The same discussion had been repeated in paras 12 to 20.

(11) In my view, findings recorded by the courts below are vitiated by erroneous approach in law. In letter of repudiation Ex. DW-11/2, case of the insurer is that the deceased suffered from mental depression and since that was not mentioned, the policy was liable to be repudiated. No evidence has been led about the deceased suffering from mental depression at the time of taking the policy. Act of his committing suicide two years after the policy, was not enough for inferring that he was suffering from mental depression. Admittedly, Dr. Y.S. Bawa, DW-2 who medically examined the insured had not found any such symptom. Dr. Chatrath, DW-3 only refers to taking of ECG and does not prove mental depression. ECG is done to see

heart problem. There is nothing to show that the deceased had heart problem. ECG may be got done only for satisfaction or out of curiosity. DW-7 Dr. J.L. Bhatia was TB and Chest Specialist and he had examined the deceased six months after the policy. Dr. Bhatia was not able to diagnose any disease and he got X-ray done and gave treatment for TB on which there was no response. Evidence of Dr. Bhatia does not relate to the time of taking the policy. This evidence is not enough to prove that the deceased was suffering from any disease at the time of taking of policy. Mental depression or anxiety assumed by the said witness cannot by itself be termed as a disease which the insured would have thought necessary to be material to be disclosed or absence of which can be said to be deliberate suppression of any material fact. Note Ex. D13/A, even if taken to be genuine reflects the state of mind of the deceased at the time of writing of the note and not at the time of the taking the insurance policy. The evidence led by the defendant, thus, does not discharge the burden placed on an insurer under the law in terms of section 45 of the Act. Finding recorded by the courts below on validity of repudiation under Issue No. 11 is clearly perverse.

(12) An attempt has been made by the learned counsel for the insurer to support the finding of concealment of material fact by referring to answers given to question Nos. 4 and 6 in the personal statement Ex. D.2. In this regard, it is to be noted that mere inaccuracy of a statement cannot be a ground for repudiating the policy after two years.

(13) Failure to disclose should be of a fact if a person considers a fact to be material. This case highlights attitude of insurer which a court can hardly afford to approve being contrary to public policy. Once a person gets a policy of life insurance and pays the premium, no insurer can be allowed to get away from its obligation to honour the commitment under the policy of paying assured sum to the nominee. If such plea of an insurer is to be upheld, taking of life insurance policy will become meaningless. Courts have frowned upon such an attitude in a number of cases and the spirit of the statute is also in that direction. If an insurer wants to avoid obligation under the policy on mere inaccuracy of a statement, there has to be clear evidence that consequences were explained to the insured. Judicial notice can be taken of the fact that insured merely signs on the dotted lines on the persuasion of the agent.

(14) Though, in 19th century, freedom of contract was the rule, courts developed devices for refusing to implement certain agreements on the ground of inequality of bargaining power. Legislation also interfered in many cases to prevant a party to the contract from taking unfair advantage of the other. It has been realised that freedom of contract is a social ideal only by assuming equality of bargaining power. Freedom of contract has little value where a consumer does not have any realistic opportunity to bargain, as rightly observed by John R. Paden in "the Law of Unjust Contracts' published by Butterworths in 1982 at pages 28-29" :

> ".........Unconscionability represents the end of a cycle commencing with the Aristotelian concept of justice and the Roman law laesio enorims, which in turn formed the basis for the medieval church's concept of a just price and condemnation of usury. These philosophies permeated the exercise, during the seventeenth and eighteenth centuries, of the Chancery Court's discretionary powers under which it upset all kinds of unfair transactions. Subsequently, the movement towards economic individulaism in the nineteenth century hardened the exercise of these powers by emphasizing the freedom of the parties to make their own contract. While the principle of pacta sunt servanda held dominance, the consensual thoery still recognized exceptions where one party was overborne by a fiduciary, or entered a contract under duress or as the result of fraud. However, these exceptions were limited and had to be strictly proved.
>
> It is suggested that the judicial and legislative trend during the last 30 years in both civil and common law jurisdiction has almost brought the wheel full circle. Both Courts and Parliaments have provided greater protection for weaker parties from harsh contracts. In several jurisdictions this included a general power to grant relief from unconscionable contracts, thereby providing a launching point from which the Courts have the opportunity to develop a modern doctrine of unconscionability. American decisions on Article 2.30Z of the UCC have already gone some distance into this

new arena......" The expression "laesio enormis" used in the above passage referes to "laesio ultra dimidium vel enormis" which is Roman law meant the injury sustained by one of the parties to an onerous contract when he had been overreached by the other to the extent of more than one-half of the value of the subject matter, as for example, when a vendor had not received half the value of property sold, or the purchaser had paid more than double value. The maxim 'pacta sunt servanda' referred to in the above passage means 'contracts are to be kept'.

(15) The same principle ought to be invoked in a situation like the present one where the insured takes an insurance policy after undergoing full scrutiny by the insurer and also by medical examination of a medical expert of the choice of the insurer. In such a situation, repudiating a policy merely by an inaccurate statement about previous visit to a doctor or some ailment having no material bearing on the matter, cannot be liberally permitted.

(16) Above is the legal position as disclosed by the case-law on the point. (17) In **Joel** *versus* **Law Union and Crown Insurance Company (1),** it has been observed :—

"Now no reasonable man would deem it material to tell in an insurance company of all the casual headahces he had had in his life, and, if he knew no more as to this particular headache than that it was an ordinary casual headache, there would be no breach of his duty towards the insurance company in not disclosing it. He possessed no knowledge that it was incumbent on him to disclose, because he knew of nothing which a reasonable man would deem material or of a character to influence the insurers in their action. It was what he did not know which would have been of that character, but he cannot be held liable for non-disclosure in respect of facts which he did not know.

Insurers are thus in the highly favourable position that they are entitled not only to *bone fides* on the part of the applicant, but also to full disclosure of all knowledge possessed by the applicant that is material to the risk.

(1) 2 K.B. King's Bench Division 863

And in my opinion they would have been wise if they had contended themselves with this. Unfortunately the desire to make themselves doubly secure has made them depart widely from this position by requiring the assured to agree that the accuracy, as well as the *bone fides,* of his answers to various questions put to him by them or on their behalf shall be a condition of the validity of the policy. This might be reasonable in some matters such as the age and percentage of the applicant, or information as to his family history, which he must know as facts. Or it might be justifiable to stipulate that these conditions should obtain form a reasonable time-say during two years-during which period the company might verify the accuracy of the statements which by hypothesis have been made *bona fide* by the applicant. But insurance companies have pushed the practice far beyond these limits, and have made the correctness of statements of matters wholly beyond his knowledge, and which can at best be only statements of opinion or belief conditions of the validity of the policy. For instance, one of the commonest of such questions is, Have you any disease ?' Not even the most skilled doctor after the most prolonged scientific examination could answer such a question with certainly, and a layman can only give his honest opinion on it. But the policies issued by many companies are framed so as to be invalid unless this and many other like questions are correctly-not merely truthfully-answered, though the insurers are well aware that it is impossible for any one to arrive at anything more certain than an opinion about them. I wish I could adequately warn the public against such practices on the part of insurance offices. I am satisfied that few of those who insure have any idea how completely they leave themselves in the hands of the insurers should the latter wish to dispute the policy when it falls in. In the case of the question to which I have referred, if if can be shown, even by the aid of the contemporaneous examination of the medical referee of the office itself, that the insured had at the time some disease, the policy is void. The disease may have been unknown, and even undiscoverable; it may have been transient, and have had no effect on his future life, or on the cause of his death. These things are

immaterial. If the company choose to dispute the policy, and establish a single inaccuracy in these statements, which are thus conditions, the policy is void, and made usually all that has been paid thereon is forfeit. Hence I fully agree with the words used by Lord St. Leonards in his opinion in the case of Anderson V. Fitzgerald(I) to the effect that in this way provisions are introduced into policies of life assurance which, 'unless they are fully explained to the parties, will lead a vast number of persons to suppose that they have made a provision for their families by an insurance on their lives, and by payment of perhaps a very considerable proportion of their income, when in point of fact, from the very commencement, the policy was not worth the paper upon which it was written.'

Under these circumstances it is plainly the duty of the Court to require the insurers to establish clearly that the insured consented to the accuracy, and not the truthfulness, of his statements being made a condition of the validity of the policy. No ambiguous language suffices for this purpose. The applicant can be and is called on to answer all questions relevant to the matter in hand. But this is merely the fulfilment of a duty-it is not contractual. To make the accuracy of these answers a condition of the contract is a contractual act, and, if there is the slightest doubt that the insurers have failed to make clear to the man on whom they have exercised their right of requiring full information that he is consenting thus to contract, we ought to refuse to regard the correctness of the answers given as being a condition of the validity of the policy. In other words, the insurers must prove by clear and express language the animus contrahendi on the part of the applicant; it will not be inferred from the fact that questions were answered, and that the party interrogated declared that his answers were true. This is only what a witness does when he declares he has given true evidence." (Underling supplied).

(18) This principle has been recognised under Section 45 of the Act which is as under :—

"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 ir was fraudulently made by the policy holder and that the policy holder knew at the time of making it that the statement was false or that it suppressed facts which it was material to disclose." (Underlying supplied).

(19) In Banerjee's Law of Insurance, Fourth Edition, published by the Law Book Company (P) Limited, Allahabad, it has been observed as under :—

"The object of the section is in line with the modern tendencies of life insurance companies of having inclined towards the formation of insurance contracts without any warranty clause. Its object may also be gathered from the observations of the Select Committee thus" : 'If the insurer does not discover and question the falsity of any such statement in two years, he ought not to be allowed to take cover behind it thereafter. We have expected from the protection afforded by the clause, cases in which the insurer can show that the false statement was fraudulently made with knowledge and concerned a material error."

(20) Interpreting the above provision., the Apex Court in **Mithoolal Nayak** *versus* **Life Insurance Corporation of India (2),** in para 8 observed as under :—

"The three conditions for the application of the second part of S. 45 are :

(a) the statement must be on a material matter or must suppress facts which it was material to disclose ;

(2) AIR 1962 S.C. 814

(b) the suppression must be fraudulently made by the policy-holder ; and

(c) the policy-holder must have known at the time of making the statement that it was false or that it suppressed facts which was material to disclise."

(21) In **Life Insurance Corporation of India** *vs.* **Shakuntala Bai (3),** it was observed :—

"But the insurance companies, including the Life Insurance Corporation of India, are very clever. They make it a condition of the contract of insurance that the truth of every one of the statements made by the insurer in the proposal, personal statement etc. constitutes the basis of the contract, so that there is a warranty by the insured that all statements made by him are true and if they are not true the Contract is void..........

Thus, the introduction of the 'basis' clause into a contract of insurance makes materiality of the assured's misstatements immaterial for the purpose of avoidance of the contract by the insurer. Thus is the insurer placed in a highly advantageous position. Thus is the insured placed in a vulnerable position. The advantage to the insurer is greater because the questions which the assured answers in his personal statement before the Insurance Company's Medical Officer are questions framed by the insruer. The great advantage the insurer derives from the basis clause, in my view, carried with it the plain duty on the part of the insurer to explain the implication of the clause fully to the insured and further to explain each of the questions of which answers are sought in the personal statement. Utmost good faith and candour from the insured can only go hand in hand with fair explanation and honourable dealing from the insurer. If the insurer wants to repudiate a policy on the ground of misstatement by the insured he must establish to the satisfaction of the Court that he acted fairly and honourably to the insured by explaining properly the implication of the declaration to be signed by the insured and the range or amplitude of the questions required to be answered."

(3) AIR 1975 Andhra Pradesh 68

(22) In **Smt. Dipashri** vs. **Life Insurance Corporation of India and others (4),** it was observed :—

> "It was not necessary for the deceased to disclose trivial ailments like fever, flue or dysentery. There is nothing to warrant the conclusion that the deceased had consulted Medical Practitioner within five years prior to the taking out of the policy. The concept of consultation with the Medical Practitioner is entirely different from securing medical certificate on the ground that the person is down with fever. The perusal of the proposal from leaves no manner of doubt that it is not each and every petty ailment which has to be disclosed by the proposer and what is required to be disclosed is a serious ailment. The deceased was not suffering from any serious ailment and was a young man of 41 years age at the time of taking out of the polciy. The Medical Practicioner on the panel of the Corporation had examined him and in these circumstances, it is futile for the Corporation to claim that the deceased was suffering from any serious ailment. In my judgment, the non-disclosure of the fact that the deceased was suffering from fever or down with flue on some occasion is not material matter and, therefore, the failure to disclose the same cannot be construed as suppression of the relevant fact. As laid down by the Supreme Court, it is not suppression of the fact which is sufficient to attract second part of S. 45 of the Insurance Act but what is required is that such suppression should be fraudulently made by the policy holder. The expression 'fraudulently' cannotes deliberate and intentional falsehood or suppression and some strong material is required before concluding that the policy holder had played a fraud on the Corporation. In my judgment, on the facts and circumstances of the present case, it is impossible to come to the conclusion that the deceased had suppressed any material facts and such suppression was done fraudulently. The Corporation cannot deny its liability by raising hopeless defence that the deceased was suffering from fever, flue and dysentery from time to time. In my judgment, the second part of S. 45 of the Insurance Act is not, at all, attracted to the facts of the case and it is not open for the Corporation to

(4) AIR 1985 Bombay 192

repudiate the contract. The petitioner is entitled to the claim under the policy along with the bonuses and other benefits accrued thereon."

(23) In **Satya Rani** *versus* **Life Insurance Corporation of India (5),** it was observed :—

"Adverting to the other two policies they were obtained two years prior to the death of the deceased. It was strenuously argued by Shri D.V. Sehgal, advocate, appearing for the LIC that from the history-sheet of the patient as shown in Exhibit DW-6/4, and as contained in the PGI record, it is clear that the deceased was a known case of hypertension for the last 7 years, and, therefore, it should be held that it was necessary for the insured to mention the disease in the proposal from as also in his personal statement and since this relates to a material fact, the decision of the lower appellate court regarding these two policies should also be upheld. I am not a one with the learned counsel. Mere hypertension is such a disease which may be continuous is such a disease which may be continuous or intermittent and that by itself may not be considered material for disclosing in the proposal form or in the personal statement."

(24) Now I proceed to answer the questions, formulated in the earlier part of the judgment, as under :—

(i) Insurer cannot avoid policy of insurance on mere inaccuracy of a statement at the time of taking of the policy after two years of the policy. Section 45 of the Insurance act, 1938 incorporates this principle. After two years, policy can be avoided only if second part of section 45 applies. As held by the Apex Court. "The three conditions for the application of the second part of S. 45 are :

(a) the statement 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 policy-holder must have known at the time of making the statement that it was false or that it suppressed facts which was material to disclose."

(5) 1987 Company Cases 64 (P&H)

In the present case, death of the insured was after two years and, therefore, the policy could not be repudiated on the only ground that there was any inaccurate or false statement.

(ii) Omission to mention doing of ECG was at best an inaccurate or false statement not on a material matter nor the said statement could be held to have been made fraudulently. It is not even the case of the insurer that the insured suffered from any heart problem or any finding of the ECG disclosed any such problem.

(iii) In view of finding on question No. (ii), insurer failed to discharge burden of proving a case for repudiation of policy. As held above, evidence led by the insurer comprising of Dr. Bhatia, DW-7 and suicide note DW-13/1 do not in any manner prove the case that at the time of taking of policy, the insured suffered from disease of mental depression or any other disease.

(iv) Findings of the courts below are clearly vitiated by erroneous approach to law, there being no legal evidence to show that deceased had deliberately made any false statement on material facts or suppressed any material facts. The courts below have taken a mere inaccurate statement on a fact other than a material fact as being deliberate false statement on a material fact. This view is contrary to the statutory provisions of Section 45 of the Act as well as judgment of the Apex Court in Mithoolal Nayak (supra) and other principles and decisions referred to in the earlier part of the judgment.

(v) The appellant is entitled to a decree with future interest under section 34 IPC from the date of filing of the suit i.e. 9th July, 1978 till the date of payment at the rate of 6% per annum. Interest was allowed by Bombay High Court in Dipashri's case (supra) also.

(25) For the above reasons, this appeal is allowed. Decree of the courts below is set aside and suit of the plaintiff is decreed for the policy amount with all accrued benefits, with costs throughout with interst at the rate of 6% per annum from the date of filing of suit till realisation.

R.N.R.