Mithoolal Nayak

Vs

Life Insurance Corporation of India

C.A. No. 224 of 1959

(S. K. Das, K. Subha Rao, Raghuvar Dayal JJ)

15.01.1962

JUDGMENT

S. K. DAS, J. -

This is an appeal on a certificate granted by the High Court of Madhya Pradesh under Art. 133(1)(a) of the Constitution. The appellant is Mithoolal Nayak, who took an assignment on October 18, 1945 of a life insurance policy on the life of one Mahajan Deolal for a sum of Rs. 25,000/- in circumstances which we shall presently state. Mahajan Deolal died on November 12, 1946. Thereafter, the appellant made a demand against the respondent company for a sum of Rs. 26,000/- and odd on the basis of the life insurance policy which had been assigned to him. This claim or demand of the appellant was repudiated by the respondent company by a letter dated October 10, 1947, which in substance stated that the insured Mahajan Deolal had been guilty of deliberate mis-statements and fraudulent suppression of material information in answers to questions in the proposal from and the personal statement, which formed the basis of the contract between the insurer and the insured. On the repudiation of his claim the appellant brought the suit out of which this appeal has arisen. The suit was originally instituted against the Oriental Government Security Life Assurance Co. Ltd., Bombay, which issued the policy in favour of Mahajan Deolal on March 13, 1945. Latter, on the passing of the life Insurance Corporation Act, 1956, there was a statutory transfer of the assets and liabilities of the controlled (life) business of all insurance companies and insurers operating in India to a Corporation known as the Life Insurance Corporation of India. By an order of this Court made on February 16, 1960, the said Corporation was substituted in place of the original respondent. For brevity and convenience we shall ignore the distinction between the original respondent and the said Corporation and refer to the respondent in this judgment as the respondent company. The Suit was decreed by the learned Additional District Judge of Jabalpur by his judgment dated May 7, 1949. The respondent company then preferred an appeal to the High Court of Madhya Pradesh. This appeal was heard by a Division Bench of the said High Court and by a judgment dated August 28, 1956, the appeal was allowed and the suit was dismissed with costs. It is from that appellate judgment and decree that the present appeal has been brought to this Court.

We now proceed to state some of the relevant facts relating to the appeal and the contentions urged on behalf of the appellant. Mahajan Deolal was a resident of village Singhpur, Tehsil Narsinghpur. It appears that he was a small landholder and possessed several acres of land. Sometime in December, 1942, Mahajan Deolal submitted a proposal through one Rahatullah Khan, an agent of the respondent company at Narsinghpur, for the insurance of his life with the respondent company for a sum of Rs. 10,000/- only. Mahajan Deolals age at that time was about 45 as stated by him. In the proposal form which was submitted to the respondent company, Mahajan Deolal mentioned the name of one Motial Nayak, by profession a doctor, as a personal friend who best knew the state of

the health and habits etc. of the insured. This Motilal Nayak, be it noted, is a brother of the appellant, the evidence in the record showing that the two brothers lived together in the same house. When the proposal for insurance of his life was made by Mahajan Deolal in December 1942, he was examined by a doctor named Dr. D. D. Desai. This doctor submitted two reports about Mahajan Deolal; one report, it appears, was submitted with the proposal form through the agent of the respondent company; another report was sent in a confidential cover along with a letter from the doctor. In this letter (Ex. D-22) the doctor explained why he was submitting two medical reports. In substance he said that the report submitted with the proposal form at the instance of the agent, Rahatullah Khan, was not a correct report and the correct report was the one which he enclosed in the confidential cover. In that report Dr. Desai said that Mahajan Deolal was anaemic, looked about 55 years old, had a dilated heart and his right lung showed indications of an old attack of pneumonia or pleurisy. The doctor further said that the general health of Mahajan Deolal was very much run down and he was a total physical wreck. The doctor opined that Mahajan Deolal's life was an uninsurable life. It appears that nothing came out of the proposal made by Mahajan Deolal for the insurance of his life in December, 1942. The evidence of the Inspector of the respondent company shows that on receipt of Dr. Desai's reports, the respondent company directed that Mahajan Deolal should be further examined by the Civil Surgeon, Hoshangabad and District Medical Officer, Railways at Jabalpur. Mahajan Deolal could not, however, be examined by the two doctors aforesaid and according to the rules of the respondent company the proposal lapsed on the expiry of six months for want of completion of the medical examination as required by the respondent company. Then, on July 16, 1944, a second proposal was made through the same agent of the respondent company for the insurance of the life of Mahajan Deolal, this time for a sum of Rs. 25,000/-. The Inspector of the respondent company said in his evidence that this second proposal was made at the instance of the same agent, Rahatullah Khan, inasmuch as the proposal of 1942 had not been rejected but had only lapsed. It appears that at the time of the first proposal in 1942 Mahajan Deolal had paid a sum of Rs. 571/- and odd towards the first premium due in case the proposal was accepted. In the personal statement accompanying the second proposal of July 16, 1944, it was stated that an earlier proposal for insuring the life of Mahajan Deolal was pending with the respondent company. Now, in the proposal form (Ex. D-11) there was a question (question no. 13) to the following effect :

> "Have you within the past five years consulted any medical man for any ailment not necessarily confining you to your house ? If so, give details and state names and addresses of medical man consulted."

The answer given to the question was - "No". This answer, according to the case of the respondent, was false and deliberately false, because, according to the evidence of one Dr. P. N. Lakshmanan, Consulting Physician at Jabalpur, Mahajan Deolal was examined and treated by the said doctor between the dates September 7, 1943, and October 6, 1943, when the doctor found that Mahajan Deolal was suffering from anaemia, oedema of the feet, diarrhoea and panting on exertion. We shall advert in greater detail to the evidence of Dr. Lakshmanan at a later stage. In his personal statement accompanying the second proposal Mahajan Deolal answered in the negative question 12(b), the question being as to when he was last under medical treatment and for what ailment and how long. In the same personal statement with regard to questions, for example, question nos. 5(a); 5(b) etc., as to whether he suffered from shortness of breath, anaemia, asthma etc., Mahajan Deolal gave negative answers. The contention on behalf of the respondent company was that these answers in the personal statement were also deliberately false and constituted a fraudulent suppression of material particulars relating to the health of the insured. With regard to the second proposal and the personal statement accompanying it, Dr. Motilal Nayak, brother of the appellant, gave a friend's

report, in which he said that Mahajan Deolal's health was good and that he had never heard that Mahajan Deolal suffered from any illness. It is worthy of note here that Dr. Motilal Nayak himself took Mahajan Deolal to Dr. Lakshmanan for treatment at Jabalpur in September-October, 1943. On receipt of the second proposal in July, 1944, Mahajan Deolal was examined by Dr. Kapadia, who was the District Medical Officer of the Railways at Jabalpur. Dr. Kapadia reported that Mahajan Deolal was a healthy man and looked about 52 to 54 years old. He recommended that Mahajan Deolal might be given a policy of fourteen years. In his report Dr. Kapadia noted that Mahajan Deolal had stated that he had suffered from pneumonia four or five years ago, and that he had also cholera some years ago. No mention, however, was made of anaemia, asthma, shortness of breath etc. On December 29, 1944, Mahajan Deolal made a further declaration of his good health and so also on February 12, 1945. On March 13, 1945, the policy was issued by the respondent company. It contained the usual terms of such life insurance policies, one of which was that in case it would appear that any untrue or incorrect averment had been made in the proposal form or personal statement, the policy would be void. The first premium due on the policy was taken from the amount which was already in deposit with the respondent company in connection with the proposal made in 1942. Then, on May 22, 1945, Mahajan Deolal wrote a letter to the respondent company in which he said that his financial condition has become suddenly worse and that he would not be able to pay the premium for the policy. He requested that the policy by cancelled. In the meantime the premium for 1945 not having been paid, the policy lapsed. Then, on October 28, 1945, Mahajan Deolal made a request for revival of the policy, but a few days before that, namely on October 18, 1945, the policy was assigned in favour of the appellant, by an endorsement made on the policy itself. This assignment was duly registered by the respondent company by means of its letter dated November 1, 1945 in which the respondent company said that it accepted the assignment without expressing any opinion as to its validity or effect. The respondent company also made an enquiry from the appellant as to whether the latter had any insurable interest in the life of the insured and what consideration had passed from him to the insured. To this the appellant replied that he had no insurable interest in the life of Mahajan Deolal except that the latter was friend and he (the appellant) had purchased the policy for a sum of Rs. 427.12 nP. being the premium paid by him so far, because Mahajan Deolal did not wish to continue the policy. On his request for a revival of the policy Mahajan Deolal was again medically examined, this time by one Dr. Belapurkar. Later on February 25, 1946, he was examined by Dr. Clarke. The policy was then revived on payment of all arrears of premium, these arrears having been paid by the present appellant. On receipt of the revival fee, the policy appears to have been revived some time in July, 1946. We have already stated that Mahajan Deolal died in November, 1946. The certificate of Dr. Clarke, who was the medical attendant at the time when Mahajan Deolal died, showed that the primary cause of death of Mahajan Deolal was malaria followed by severe type of diarrhoea; the secondary cause was anaemia, chronic bronchitis and enlargement of liver. In the certificate which Dr. Clarke gave there was mention of certain other medical practitioners who had attended Mahajan Deolal at the time of his death. One of such medical practitioners mentioned in the certificate was Dr. Lakshmanan. On receipt of this certificate the respondent company got into touch with Dr. Lakshmanan and discovered from him that Mahajan Deolal had been treated in September-October, 1943, by Dr. Lakshmanan for ailments which, according to the doctor, were of a serious nature.

Several issues were tried between the parties in the trial court. But the four questions which were argued in the High Court and on which the fate of the appeal depends were these :-

> (1) Whether the policy was vitiated by fraudulent suppression of material facts by Mahajan Deolal ?

(2) Whether the present appellant had no insurable interest in the life of the insured, and if so, can he sue on the policy ?

(3) Whether the respondent company had issued the policy with full knowledge of the facts relating to the health of the insured and if so, is it estopped from contesting the validity of the policy ? and

(4) Whether in any event the appellant is entitled to refund of the money he had paid to the respondent company ? These are the four questions which have been agitated before us and we shall deal with such of them as are necessary for deciding this appeal.

So far as the first question is concerned, the learned trial Judge found that though Mahajan Deolal had given a negative answer to question no. 13 in the proposal form and to questions nos. 5(a), 5(b), 5(f) and 12(b) in the personal statement, these answers though not strictly accurate, furnished no grounds for repudiating the claim of the appellant by the respondent company, in as much as s. 45 of the Insurance Act, 1938 (4 of 1938) applied and the answers did not amount to a fraudulent suppression of material facts by the policy-holder within the meaning of that section. The learned trial Judge found that the ailments for which Dr. Lakshmanan treated Mahajan Deolal in September-October, 1943, were of a casual or trivial nature and the failure of the policy-holder to disclose those ailments did not attract the second part of s. 45 of the Insurance Act. The High Court came to a contrary conclusion and held that even applying s. 45 of the Insurance Act, the policy-holder was guilty of a fraudulent suppression of material facts relating to his health within the meaning of that section and the respondent company was entitled to avoid the contract on that ground.

On behalf of the appellant it has been argued before us that the finding of the learned trial Judge on this question was the correct finding and that the High Court was wrong in arriving at a contrary finding on this question in view of the evidence given in the case. The judgment of the High Court is a judgment in reversal and the appellant has a right of appeal under Art. 133(1)(a) of the Constitution in as much as the value of the subject matter of the dispute in the court of first instance and still in dispute is more than Rs. 20,000/-. We have, therefore, allowed learned counsel for the parties to take us through the evidence in the case. On a consideration of that evidence we have come to the conclusion that the finding of the High Court is the correct finding.

We shall presently consider the evidence, but it may be advantageous to read first s. 45 of the Insurance Act, 1938, as it stood at the relevant time. The section, so far as it is relevant for our purpose, is in these terms :

"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 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.

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It would be noticed that the operating part of s. 45 states in effect (so far as is relevant for our purpose) that no policy of life insurance effected after the coming into force of the 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; the second part of the section is in the nature of a proviso which creates an exception. It says in effect that if 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 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, then the insurer can call in question the policy effected as a result of such inaccurate or false statement. In the case before us the policy was issued on March 13, 1945, and it was to come into effect from January 15, 1945. The amount insured was payable after January 15, 1968, or at the death of the insured, if earlier. The respondent company repudiated the claim by its letter dated October 10, 1947. Obviously, therefore, two years had expired from the date on which the policy was effected. We are clearly of the opinion that s. 45 of the Insurance Act applies in the present case in view of the clear terms in which the section is worded, though learned counsel for the respondent company sought, at one stage, to argue that the revival of the policy some time in July, 1946, constituted in law a new contract between the parties and if two years were to be counted from July, 1946, then the period of two years had not expired from the date of the revival. Whether the revival of a lapsed policy constitutes a new contract or not for other purposes, it is clear from the wording of the operative part of s. 45 that the period of two years for the purpose of the section has to be calculated from the date on which the policy was originally effected; in the present case this can only mean the date on which the policy (Ex. P-2) was effected. From that date a period of two years had clearly expired when the respondent company repudiated the claim. As we think that s. 45 of the Insurance Act applies in the present case, we are relieved of the task of examining the legal position that would follow as a result of inaccurate statements made by the insured in the proposal form or the personal statement etc. in a case where s. 45 does not apply and where the averments made in the proposal form and in the personal statement are made the basis of the contract.

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 it was material to disclose.

The crucial question before us is whether these three conditions were fulfilled in the present case. We think that they were. We are unable to agree with the learned trial Judge that the ailments for which Mahajan Deolal was treated by Dr. Lakshmanan in September-October, 1943, were trivial or casual ailments. Nor do we think that Mahajan Deolal was likely to forget in July, 1944, that he had been treated by Dr. Lakshmanan for certain serious ailments only a few months before that date. This brings us to a consideration of the evidence of Dr. Lakshmanan. That evidence is clear and unequivocal. Dr. Lakshmanan says that Dr. Motilal Nayak brought the patient to him at Jabalpur. We

have already referred to the fact that Dr. Motilal Nayak had himself made a false statement in his friend's report dated July 17, 1944, when he said that he had never heard that the insured had suffered from any illness. It is impossible to believe that Dr. Motilal Nayak would not remember that he had himself taken the insured to Jabalpur for treatment by Dr. Lakshmanan who was an experienced consulting physician. Dr. Lakshmanan said that when he first examined Mahajan Deolal on September 7, 1943, he found that his condition was serious as a result of the impoverished condition of his blood, and that Mahajan Deolal was suffering from anaemia, oedema of the feet, diarrhoea and panting on exertion. The doctor asked for an examination of the blood. The pathological report supported the diagnosis that Mahajan Deolal was suffering from secondary anaemia meaning thereby that anaemia was due to lack of iron and malnutrition. Dr. Lakshmanan further found that from the symptoms disclosed the disease was a major one. Mahajan Deolal had also cardiac asthma which was a symptom of anaemia and due to dilatation of heart. Dr. Lakshmanan saw the patient again on September 9, 1943, and then again on September 16, 1943. On October 6, 1943 Mahajan Deolal himself went to Dr. Lakshmanan. On that date Dr. Lakshmanan found that anaemia had very greatly disappeared. In cross-examination Dr. Lakshmanan admitted that the anaemia, dilatation of heart and cardiac asthma from which Mahajan Deolal was suffering constituted a passing phase which might disappear by treatment. He further admitted that he did not mention cardiac asthma in his letter addressed to the respondent company. We have given our very earnest consideration to the evidence of Dr. Lakshmanan and we are unable to hold that the ailments from which Mahajan Deolal was then suffering were either trivial or casual in nature. The ailments were serious though amenable to treatment Mahajan Deolal's son gave evidence in the case and he said in his evidence that though Dr. Lakshmanan prescribed some medicine, his father did not take it. He further said that his father was a strict vegetarian. This evidence was given by the son with regard to what the doctor had said that he prescribed fresh liver juice made at home according to his directions three times a day. He also prescribed iron sulphate in tablet from with plenty of water. The son further said that during his stay at Jabalpur his father felt weakness, though he used to move about freely and was never confined to bed. The son tried to make it appear in his evidence that his father was suffering from nothing serious. Dr. Lakshmanan said in his evidence that his fees for visiting a patient at Jabalpur were Rs. 16/- per visit. We agree with the High Court that if Mahajan Deolal was not suffering from any serious ailment, he would not have been taken by his physician, Dr. Motilal Nayak from his village to Jabalpur nor would he have consulted Dr. Lakshmanan, a consulting physician of repute, for so may days on payment of Rs. 16/- per visit. No doubt, Mahajan Deolal's son now tries to make light of the illness of his father but Dr. Lakshmanan's evidence shows clearly enough that in September-October, 1943. Mahajan Deolal was suffering from a serious type of anaemia for which he was treated by Dr. Lakshmanan. Mahajan Deolal could not have forgotten in July, 1944, that he was so treated only a few months earlier and furthermore, Mahajan Deolal must have known that it was material to disclose this fact to the respondent company. In his answers to the questions put to him he not only failed to disclose what it was material for him to disclose, but he made a false statement to the effect that he had not been treated by any doctor for any such serious ailment as anaemia or shortness of breath or asthma. In other words, there was a deliberate suppression fraudulently made by Mahajan Deolal. Fraud, according to s. 17 of the Indian Contract Act, 1872 (IX of 1872), means and includes Inter alia any of the following acts committed by a party to a contract with intent to deceive another party or to induce him to enter into a contract -

> (1) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true; and
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> (2) the active concealment of a fact by one having knowledge or belief of the fact.

Judged by the standard laid down in s. 17, Mahajan Deolal was clearly guilty of a fraudulent suppression of material facts when he made his statements on July 16, 1944, statements which he must have known were deliberately false. Therefore, we are in agreement with the High Court in answering the first question against the appellant.

We may here dispose of the third question Learned counsel for the appellant has argued before us that Mahajan Deolal was examined under the direction of the respondent company by as many as four doctors, namely, Dr. Desai, Dr. Kapadia, Dr. Belapurkar and Dr. Clarke. It is further pointed out that Mahajan Deolal had correctly disclosed that he had suffered previously from malaria, pneumonia and cholera. Dr. Kapadia, it is point out, was specifically asked to examine Mahajan Deolal in view of the conflicting reports which Dr. Desai had earlier submitted. On these facts, the argument has been that the respondent company had full knowledge of all facts relevant to the state of health of Mahajan Deolal and having knowledge of the full facts, it was not open to the respondent company to call the policy in question on the basis of the answers given by Mahajan Deolal in the proposal form and the personal statement, even though those answers were inaccurate. Learned counsel for the appellant has referred us to the Explanation to s. 19 of the Indian Contract Act in support of his argument. We are unable to accept this argument as correct. It is indeed true that Mahajan Deolal was examined by as many as four doctors. It is also true that the respondent company had before it the conflicting reports of Dr. Desai and it specially asked Dr. Kapadia to examine Mahajan Deolal in view of the reports submitted by Dr. Desai. Yet, it must be pointed out that the respondent company had no means of knowing that Mahajan Deolal had been treated for the serious ailment of secondary anaemia followed by dilatation of heart etc. in September-October, 1943 by Dr. Lakshmanan. Nor can it be said that if the respondent company had knowledge of those facts, they would not have made any difference. The principle underlying the Explanation to s. 19 of the Contract Act is that a false representation, whether fraudulent or innocent is irrelevant if it has not induced the party to whom it is made to act upon it by entering into a contract. We do not think that that principle applies in the present case. The terms of the policy make it clear that the averments made as to the state of health of the insured in the proposal form and the personal statement were the basis of the contract between the parties, and the circumstance that Mahajan Deolal had taken pains to falsify or conceal that he had been treated for a serious ailment by Dr. Lakshmanan only a few months before the policy was taken shows that the falsification or concealment had an important bearing in obtaining the other party's consent. A man who has so acted cannot afterwards turn round and say : "It could have made no difference if you had known the truth." In our opinion, no question of waiver arises in the circumstances of this case, nor can the appellant take advantage of the Explanation to s. 19 of the Indian Contract Act.

Our finding on the first question makes it unnecessary for us to decide the second question, namely, whether the present appellant merely gambled on the life of Mahajan Deolal when he took the assignment on October 18, 1945. The contention of the respondent company was that appellant had no insurable interest in the life of Mahajan Deolal and when he took the assignment of the policy on October 18, 1945 he was merely indulging in a gamble on Mahajan Deolal's life; the contract was therefore, void by reason of s. 30 of the Indian Contract Act. On behalf of the appellant, however, the contention was that s. 38 of the insurance Act provided a complete code for assignment and transfer of insurance policies and the assignment made in favour of the appellant by Mahajan Deolal was a valid assignment in accordance with the provisions of s. 38 aforesaid. The High Court, it appears, proceeded on the footing that from the very inception the policy was taken for the benefit of the appellant on the basis of a gamble on the life of Mahajan Deolal; it said that the appellant and his brother, Dr. Motilal Nayak, knew very well that Mahajan Deolal was not likely to live very long and when the policy was taken out in 1944, it was really for the benefit of the present appellant,

who soon after took an assignment on payment of the premium already paid by Mahajan Deolal and such arrears of premium as were then outstanding. It is unnecessary for us to give our decision on these contentions; because if Mahajan Deolal was himself guilty of a fraudulent suppression of material facts on which the respondent company was discharged from performing its part of the contract, the appellant who holds an assignment of the policy cannot stand on a better footing than Mahajan Deolal himself. It was argued before us that if the policy was valid in its inception, that is to say, if it was in fact effected for the use and benefit of Mahajan Deolal, who undoubtedly had an insurable interest in his own life, it could not afterwards be invalidated by assignment to a person who had no interest but who merely took it as a speculation. Out attention was drawn to several decisions on this question, American and English, noticed in para 502 of MacGillivray on Insurance law (fourth Edition). We consider it unnecessary to examine those decisions or to go into the question posed therein. That question must be left to be determined in a case where it properly arises. As we have stated earlier, on our conclusion on the first question, the appellant is clearly out of Court and can not claim the benefit of a contract which had been entered into as a result of a fraudulent suppression of material facts by Mahajan Deolal.

This brings us to the last question, namely, whether the appellant is entitled to a refund of the money he had paid to the respondent company. Here again one of the terms of the policy was that all moneys that had been paid in consequence of the policy would belong to the company if the policy was vitiated by reason of a fraudulent suppression of material facts by the insured. We agree with the High Court that where the contract is bad on the ground of fraud, the party who has been guilty of fraud or a person who claims under him can not asked for a refund of the money paid. It is a well-established principal that courts will not entertain an action for money had and received, where, in order to succeed, the plaintiff has to prove his own fraud. We are further in agreement with the High Court that in cases in which there is stipulation that by reason of a breach of warranty by one of the parties to the contract, the other party shall be discharged from the performance of his part of the contract, neither s. 65 nor s. 64 of the Indian Contract Act has any application.

For the reasons given above we have come to the conclusion that there in no merit in the appeal. The appeal is accordingly dismissed with costs.

Appeal dismissed.

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