

GAHC010091852009



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : RSA/82/2009

THE LIFE INSURANC CORPORATION OF INDIA and ORS.
HAVING ITS REGD. HEAD OFFICE AT YOGAKSHEMA JEEVAN BIMA MARG,
MUMBAI-21.

2: THEK ZONAL MANAGER

LICI EASTERN ZONAL OFFICE
4 CR AVENUE
CALCUTTA-700072.

3: THE SENIOR BRANCH MANAGER

LICI MORIGAON BRANCH OFFICE
MORIGAON -782105.

4: THE SENIOR DIVISIONAL MANAGER CLAIMS

GUWAHATI DIVISIONAL OFFICE
JEEVAN PRAKASH
S.S. ROAD
GUWAHATI-781001.

5: THE EXECUTIVE DIRECTOR

LICI EandOS
YOGAKSHEMA JEEVAN BIMA MARG
MUMBAI-21

VERSUS

MRS. ASPHIA AHMED
W/O LT. ABDUR RAHMAN FARUKI VILL. C/O ZIA MEDICINE CENTRE
MOIRABARI, MOUZA and P.S. MOIRABARI, DIST. MORIGAON, ASSAM.

Advocate for the Petitioner : MR.B PATHAK

Advocate for the Respondent :

**BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA**

JUDGMENT

Date : 09.10.2023

Heard Mr. B. Pathak, learned counsel for the appellants. Also heard Mr. A. Sattar, learned counsel for the respondent.

2. This appeal under section 100 CPC is preferred against the judgment and decree dated 25.02.2009, passed by the learned District Judge, Morigaon in T.A. No. 02/2007 arising out of judgment and decree dated 05.02.2005, passed by the learned Civil Judge (Senior Division), Morigaon in T.S. No. 15/2003.

3. This appeal was admitted for hearing by order dated 10.06.2009 on the following substantial questions of law:

i. Whether the learned courts below misconceived the provisions of the Section 45 of the Insurance Act, 1938 which entitles an insurer to call a policy in question on the ground that a statement made in the proposal for insurance was inaccurate or false, and such suppressed facts were material to disclose?

ii. Whether the learned courts below misconceived the provisions of Section 19 of the Indian Contract Act, 1872 that when consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is contract voidable at the option of the party whose consent was so caused?

iii. Whether the learned courts below failed to appreciate that the plaintiff had not discharged her burden of proof as contained in Section 103/106 of the

Indian Evidence Act that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence?

4. The facts leading to the decree passed by the learned trial Court is that a suit for declaration and recovery of insured amount due on the insurance policy no. 482223321 was filed by the respondents along with her two minor children, who were arrayed as plaintiff nos.2 and 3 respectively. The predecessor-in-interest of the plaintiffs had taken two LIC policies for Rs.2.00 lakh and Rs.3.00 lakh respectively, and while the policy was in force, he died on 19.05.1999, leaving behind the plaintiffs and two proforma defendants as his legal representatives. The claim made by the plaintiffs was rejected by the defendants/appellants on the ground that the previous policy was not mentioned in the proposal of insurance dated 27.02.1999. The other ground for rejection of the claim was that the predecessor of the plaintiffs was suffering from heart ailment since a long time, which was not disclosed in the prescribed form and resultantly he died of heart attack and accordingly, the appellants, as defendants had contested the suit and prayed for dismissal of the suit with cost.

5. In course of trial, the five following issues were framed:

1. *Whether there is cause of action for the suit?*
2. *Whether the suit is maintainable in its present form?*
3. *Whether the suit is bad-for non-joinder of necessary parties and mis-joinder of parties?*
4. *Whether the plaintiff is entitled for decree for recovery of Rs.3,00,0000/- (Rupees Three lakhs) against the Insurance Policy No.482223321 along with interest @ 18% p.a.?*
5. *To what relief, the plaintiff is entitled to?*

6. In respect of issue nos.1 to 3, the said issues were decided in affirmative and in favour of the plaintiffs. In respect of issue no.4, the plea of the appellants was found acceptable because the relevant column 8 and 9 were not filled up and shown as "No" and "Nil" and accordingly, as the LIC had accepted the policy as well as the premium, the appellants were found liable to pay the insurance amount Rs.3.00 lakh and accordingly, the suit was decreed for the said sum along with interest @10% p.a. The issue no.5 was to the effect that the plaintiffs were entitled to the decree and accordingly, the suit was decreed as indicated above.

7. The appellants preferred an appeal under section 96 CPC against the judgment and decree passed by the learned Civil Judge (Senior Division), Morigaon in T.S. No. 15/2003. It appears that the learned first appellate Court had not framed any points for determination. However, the issues framed by the learned trial Court were revisited by the learned first appellate Court. The evidence was re-appreciated and all the issues were once again decided in favour of the plaintiffs and against the appellants and accordingly, the appeal was held to be devoid of any merit and the suit was dismissed by the learned District Judge, Morigaon in T.A. No. 2/2007.

8. The aggrieved appellants have filed this appeal under section 100 CPC. As already indicated above, the appeal was admitted for hearing by formulating substantial questions of law. In course of hearing, it was observed that although there are three plaintiffs in the suit in the first appeal as well as in the second appeal, only the plaintiff no.1 was arrayed as the sole respondent. The plaintiff nos.2 and 3, who were minors and represented by plaintiff no.1 were not arrayed as respondents either in the first appeal or in this second

appeal. Accordingly, vide order dated 19.12.2019, the learned counsel for the appellants was asked to answer the query of the Court regarding non-joinder of necessary parties. Therefore, the order dated 19.12.2019 of this Court is sufficient compliance of the provision of proviso to Rule 2 of Order XLI CPC of putting the appellant to notice to contest this appeal on the said ground.

9. The learned counsel for the appellants has submitted that as the first appeal was decided in the absence of the plaintiff nos.2 and 3, there was no necessity to implead the said plaintiff nos.2 and 3 as respondents in this appeal. Moreover, it is submitted that as per the LIC policy, the registered nominee was the respondent, who was the mother of the plaintiff nos.2 and 3, who at that time were minors. Accordingly, it is submitted that the interest of the minors would be taken care of by the sole respondent, who is the nominee and therefore, any decree passed in favour or against the plaintiff no.1 in this second appellate proceedings would naturally bind the plaintiff nos.2 and 3. Thirdly, it has been submitted that in view of the provision of Rule 4 of Order XLI CPC, it was permissible to challenge the decree in the absence of all the plaintiffs or the defendants and accordingly, it is submitted that the present appeal would not be bad for non-joinder of plaintiff nos.2 and 3.

10. In support of his submissions on the third point, the learned counsel for the appellants has placed reliance in the case of *Azgar Barid (Dead) by LRs & Ors. v. Mazambi @ Pyaremabi & Ors., (2022) 0 Supreme (SC) 155 : AIR 2022 SC 1304*.

11. The present age of the plaintiff nos.2 and 3 is not known. Nonetheless, their predecessor-in-interest had died on 19.05.1999 and the suit was filed on 09.07.2003. In the plaint, the prayer was for passing a decree for recovery of

the insured amount of Rs.3.00 lakh against insurance policy no.482223321 with interest @ 18% p.a. The said suit was decreed for an amount of Rs.3.00 lakh as prayed for, however with the interest of 10% p.a. The learned trial Court had not passed the decree only in favour of the sole respondent, but the decree was jointly and severally passed in favour of all the three plaintiffs. Therefore, in the considered opinion of the Court, even if the decree passed against the sole respondent is set aside for some reason, the decree which has been passed in favour of the plaintiff nos.2 and 3, having not been challenged, has become perfected by efflux of time because the period of limitation for assailing the said decree had already expired.

12. Moreover, insofar as the appellate proceedings before the learned first appellate Court is concerned, the challenge has been made only against the decree of the sole respondent, the same principle would follow and that the decree insofar as the plaintiff nos.2 and 3 are concerned has remained un-assailed. Therefore, as the common decree in favour of the plaintiff nos.2 and 3 had not been assailed before the learned first appellate Court, the challenge to the decree in favour of the sole respondent would not be maintainable either on facts or in law.

13. Accordingly, as the decree passed against the plaintiff nos.2 and 3 for a sum of Rs.3.00 lakh with 10% interest p.a. has been perfected without any challenge, the present appeal is found to be hit by non-joinder of necessary parties because in the absence of the plaintiff nos.2 and 3, the challenge by the appellants against the concurrent finding by both the learned Courts below would not be maintainable because the decree is a joint and/or common decree.

14. The submissions of the learned counsel for the appellants was that the

sole respondent, being the mother and natural guardian of plaintiff nos.2 and 3, the interest of both the plaintiff nos.2 and 3 would be adequately taken care of by the mother, i.e. the sole respondent, appears to be attractive, but the factual matrix is to the effect that the decree in respect of the said minor children have become absolute and perfected without any challenge.

15. In the present case, the respondent has been impleaded in her individual name and not in a representative capacity to represent the interest of plaintiff nos.2 and 3. Therefore, the Court is unable to accept that the sole respondent would be legally authorized to represent the interest of the plaintiff nos.2 and 3, who are not arrayed as co-respondents in this case.

16. One of the submissions made by the learned counsel for the appellants was that the LIC only recognizes the sole respondent because she is the only nominee of the LIC policy and therefore, the interest of the plaintiff nos.2 and 3 would not be adversely affected if the appeal is decided *qua* the sole respondent, who is the sole respondent, i.e. the plaintiff no.1 and being the nominee would be otherwise having power to distribute the proceeds of the decree with plaintiff nos.2 and 3. In this case, the right of the nominee to receive the LIC proceeds is not in question. The plaintiff nos.2 and 3 had joined their mother, i.e. the plaintiff no.1/sole respondent as co-plaintiff and had obtained a decree. The right of the decree holder cannot be accepted to be subjected to the prevailing right of the nominee of the LIC policy. Therefore, the said contention of the learned counsel for the appellants is not accepted as the right of the plaintiff nos.2 and 3 has been fructified in form of a decree.

17. Insofar as the provision of Order XLI, Rule 4 CPC is concerned, the said provision of law merely enables any one or more co-plaintiff or co-defendant to

prefer an appeal independently and the Court would have power to interfere with the decree or affirm it only at the instance of either one or more co-plaintiff or the co-defendant. However, the said provision cannot be read to mean as if the co-plaintiff or the co-defendant, in whose favour a decree has been passed is not a necessary party in the appellate proceedings. Merely because, more than one person had joined as plaintiffs or defendants, it does not make the other co-plaintiff or the co-defendant an agent of the other co-plaintiff or the co-defendant. Therefore, the sole respondent, not being a recognized agent or power of attorney holder in respect of her minor children, i.e. plaintiff nos.2 and 3 and she has not been representing them either in the suit or in the first appeal or before this second appellate Court in a representative capacity for them, the said plea of the learned counsel for the appellants also does not hold good. The case of *Azgar Barid (Dead) by LRs (supra)* is also not an authority on the point that a co-plaintiff or the co-defendant is not a necessary party in the appellate proceedings and that even if the decree is a joint decree, all the decree-holder need not be impleaded in appeal.

18. In view of discussions above, the Court finds that the present appellate proceedings is bad for non-joinder of plaintiff nos.2 and 3 as necessary parties as the decree obtained in their favour has attained finality without any challenge to the same either in the first appellate Court or before this second appellate Court.

19. Therefore, the Court does not find any necessity to decide any of the three substantial questions of law as formulated by order dated 10.06.2009 in view of the fact that the decree against the plaintiff nos.2 and 3 has already attained finality.

20. Accordingly, this appeal fails and the same is dismissed.
21. The concurrent judgment and decree passed by the learned Courts below stands affirmed.
22. Let the appellate decree be prepared.
23. In the meanwhile, the Registry shall send back the LCR to the respective Courts below.
24. Parties are left to bear their own cost.

JUDGE

Comparing Assistant