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Writ Appeal No.1610 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 14.08.2023

Delivered on : 11.12.2023

CORAM

**THE HONOURABLE MR. JUSTICE R.SURESH KUMAR
AND
THE HONOURABLE MR. JUSTICE K.KUMARESH BABU**

Writ Appeal Nos.1610 of 2019

D.Devendiran ... Appellant

Vs

1.The Zonal Manager,
Life Insurance Corporation of India,
Southern Zone,
LIC Building, Anna Salai,
Chennai – 600 002.

2.The Marketing Manager,
Life Insurance Corp., Of India
Divisional Office II Anna Nagar,
Chennai – 600 040.

3.The Divisional Manager,
Life Insurance Corp., Of India
Divisional Office II Anna Nagar,
Chennai – 600 040.

4.The Branch Manager,
Life Insurance Corporation of India,

Page No.1/18



Writ Appeal No.1610 of 2019

Ponneri Branch, Taluk Office Road,
Ponneri, Thiruvallur District.

... Respondents

PRAYER Writ Appeal filed under Clause 15 of Letter Patent against the order dated 30.10.2018 made in W.P.No.12805 of 2013.

For Appellant : Mr.R.Munuswamy

For Respondents : Mr.R.S.Anandan

JUDGMENT

Mr.K.KUMARESH BABU.,J.

This Intra Court Appeal had been preferred by the unsuccessful petitioner being aggrieved against the order impugned in this Writ Appeal wherein the learned Single Judge had dismissed the Writ Petition as not being maintainable as there was no semblance of legal right to consider the relief of the petitioner.

2. Heard Mr.R.Munuswamy, learned counsel appearing for the appellant and Mr.R.S.Anandan, learned counsel appearing for the respondents.

3. Mr.R.Munuswamy, the learned counsel appearing for the appellant would submit that he was working as an agent in the respondent Cor-



Writ Appeal No.1610 of 2019

poration at the fourth respondent office and he was appointed as an agent under the respondent Corporation in the year 1996 and had continued to work till the date of his resignation which was in the year 2007. During the relationship between the appellant and the respondents, the appellant had been instrumental in procuring customers for the insurance policies that was sold by the respondents. During 2007, the appellant had been offered with a full time job as a Unit Manager in SBI Life Insurance Company Ltd and therefore, he had submitted his resignation as an agent from the re-spondent. According to him, he would be entitled for future commissions on the renewals that are being made by the customers who were brought in by the appellant to the respondent Corporation. However, after his resignation and inspite of various representations, the respondents had refused to pay him such renewal commissions. Therefore, he had approached this Court seeking for a direction to direct the respondents to pay the renewal commissions to the appellant for the premium that has been paid on the Life Insurance policies that were procured at the behest of the appellant. He would submit that the learned Single Judge had erroneously dismissed the Writ Petition holding that there was no legally enforceable



Writ Appeal No.1610 of 2019

right that had been vested with the petitioner to seek such a mandamus as the relationship between the appellant and the respondents are contractual in nature. He would submit that the payment of commission is governed by the statutory provision of the Insurance Act, 1938. He would further submit that Section 44 which has been omitted by an amendment Act of the year 2015 had provided that such commissions on renewal shall be paid to the agent even though he had left the concerned insurance company/corporation and the only reason that on which refusal to be made is fraud being played in such procurement in such sale of insurance policies. He would submit that when that being so, the learned Single Judge ought to have seen that what the appellant seeks to enforce is his statutory right to receive the renewal commissions. Therefore, he would submit that the order passed by the learned Single Judge ought to be interfered with and direction should be issued to the respondents. In support of his claim he had relied upon a Division Bench judgment of the Calcutta High Court in the case of **Rajeev Lohia vs. LIC of India Ltd., & Anr** in **W.P.No.609 of 2004, dated 19.10.2012** and a judgment of a learned Single Judge of this Court made in **W.P.(MD).No.7337 of 2014, dated 23.09.2015** to persuade us to come to a



similar conclusion.

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4. Countering his argument Mr.R.S.Anandan, learned counsel appearing for the respondents would vehemently oppose the claim made by the learned counsel appearing for the appellant. He would submit that even though the claim made by the appellant stems out of the statute, he would submit that such claim could only be proved by way of adducing necessary evidence that he is not covered under proviso (c) to Section 44 of the Insurance Act, which was at the relevant point in existence. He had also relied upon the various judgments to drive home his contentions. According to him, Section 44 of the Insurance Act would be limited by the qualifications that had been prescribed under the proviso. According to him, under proviso (c) of Section 44 even though a person had completed 10 years of service, but if he solicits directly or indirectly for any other company of similar in nature, then he would be disqualified in getting the benefits of the renewal commissions. He would also submit that the appellant herein had been gainfully employed with another competitive insurance company where he solicits customers to buy the policies sold by



Writ Appeal No.1610 of 2019

the competing rival company and therefore, he would be disqualified to receive the renewal commissions. He would further submit that the representations of the appellant had been rejected by the respondents in its communication dated 13.09.2007, that he without challenging the said communication is not entitled to seek for a mandamus as prayed for before this Court. He would also rely upon the clarification issued by the Chief Manager of the Marketing Department wherein a clarification based on Section 44 had been issued indicating that if an agent who had joined any other insurance company in any capacity and directly or indirectly solicits or procures business for that company then he would not be entitled for any payment of renewal commission and therefore, he would pray dismissal of the appeal even on the question of the merits in the appeal.

5. We have considered the competing submissions of the respective counsels appearing on either side and perused the materials placed on record.

6. At the outset we are inclined to agree with the contentions raised by



Writ Appeal No.1610 of 2019

the learned counsel appearing for the appellant that the learned Single Judge had committed an error in holding that there is no semblance of legal right to the appellant to maintain the Writ Petition. This is because of the reason that the claim of the appellant herein is based on the mandate that had been provided by a statutory enactment namely the Insurance Act 1938. What the appellant seeks to remedy before this Court is his statutory right for which a petition under Article 226 of the Constitution of India is wholly maintainable and on that ground alone, the order impugned before us would have to be set aside.

7. Even though the learned Single Judge had not dealt with the Writ Petition on merits and had dismissed the same only on the question of alternative remedy and maintainability, we do not propose to remit the matter back to the learned Single Judge to be decided on merits, for the simple reason that it is almost 16 years that the appellant had knocked this Court of justice for a relief.

8. Coming to the issue of the eligibility of the appellant to receive the



renewal commission, it could be seen that such a claim is governed by Section 44 of the Insurance Act 1938 which had been omitted by the Insurance Laws (Amendment) Act 2015 (5 of 2015) with retrospective effect from 26.12.2014. The lis involved in this writ petition relates to when the provision was there in the statute. For better appreciation, the said provision is extracted hereunder:-

Section 44:- Prohibition of cessation of payments of commission.- (1) Notwithstanding anything to the contrary contained in any contract between any person and an insurance agent providing for the forfeiture or stoppage of payment of renewal commission to such insurance agent, no such person shall, in respect of life insurance business transacted in India, refuse payment to any insurance agent of commission due to him on renewal premium under the agreement by reason only of the termination of his agreement, except for fraud; Provided that?

a) such agent ceased to act for the insurer concerned after the Central Government has notified in the Official Gazette that it is satisfied that the circumstances in which the said insurer is placed are such as to justify the agents ceasing to act for him; or?

b) such agent has served the insurer continually and exclusively in respect of Life Insurance business for at least five years and policies assuring a total sum of not less than Rupees fifty thousand effected through him for the insurer were in force on a date one year before his ceasing to act as such agent for the



Writ Appeal No.1610 of 2019

insurer and that the commission on renewal premium due to him does not exceed four per cent in any case or;

c) such agent had served the insurer continually and exclusively for at least ten years and after his ceasing to act as such agent he does not directly or indirectly solicit or procure insurance business for any other person.

9. Before venturing any further we would at the outset look upon the judgments that had been relied upon by the learned counsel appearing for the appellant. The learned counsel appearing for the respondents had relied upon various judgments of various High Courts of which the certain judgments are made by a learned Single Judge of the respective Court and we do not propose to even look at them as they have no binding value on a Division Bench, even though it could only be looked into to support the arguments of the learned counsel. However he had also relied upon four Division Bench judgments, two of Kerala High Court and one of Calcutta High Court and one of our High Court. Firstly, we will analyse the judgments of the Division Bench that had been placed before us as:-

a) Division Bench of the Kerala High Court, in the case of ***Baby John, vs. LIC of India*** made in W.A.No.2172 of 2001 dated 31.07.2012:-



Writ Appeal No.1610 of 2019

On analysis of the aforesaid judgment, it could be seen that the Division Bench of the Kerala High Court after extracting the provisions of Section 44 of the Insurance Act, 1938, had on facts found that the appellant therein had after the cessation of the agency with the Life Insurance corporation had been soliciting/procuring insurance business for other person.

b) Division Bench of the Calcutta High Court, in the case of ***Rajeev Lohia vs. LIC of India*** made in ***W.P.No.609 of 2004 dated 19.10.2012:-***

In the aforesaid judgment, the Division Bench of the Calcutta High Court again after extracting the provision of Section 44 had factually found that the appellant therein was appointed as officer in an Insurance company and therefore, he cannot be said to be soliciting business directly or indirectly so as to disentitle him to receive the renewal commission and had infact allowed the appeal and directed the payment of renewal commission. In the present case on hand, the appellant had also been appointed as an officer (Unit Manager) on a regular pay scale with the SBI Life Insurance Company and therefore, this judgment would only enure to the benefit of the



appellant.

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c) Full Court Judgment of the Kerala High Court in the case of ***Vin-
cen Mathew vs. LIC of India & Ors.***, reported in ***2016 (4) KLT page 401
(FB)***

Here again on analysis of the provision of Section 44, the Court had specifically found that the appellant therein had been soliciting for an another insurance company after a cessation from a Life Insurance Corporation and found him to be ineligible to receive the renewal commissions.

d) Division Bench of our High Court in the case of The Executive ***Director (Marketing), LIC of India vs. Jerald Innocent Babu*** made in ***W.A.(MD).No.1109 of 2016, dated 27.07.2017:-***

In the case, Division Bench of this Court having considered the facts of that case had held that the claim of the agent would not fall under Section 44 proviso (c), but fall under Section 44 proviso (b) and therefore set aside the order passed by the learned Single Judge, but however directed the Life Insurance Corporation to consider the case of the agent therein as per proviso (b) to Section 44 of the Insurance Act 1938.



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10. In all the above cases, according to us, the provision of Section 44 had not been analysed properly. Section 44 is an enabling provision with three provisos being attached to it. Proviso to an enabling provision is to except something out of the enactment or to qualify something enacted therein and that the proviso should be within the purview of the enabling provision. A fair construction will be when the principle provision namely the enabling provision is clear, a proviso cannot expand or limit it. It is a well established principle that the proviso is subordinate to the enabling provision and a proviso cannot enlarge an enabling provision. A proviso cannot also be repugnant to the enabling provision. It is also worthwhile to take note of the order of Hon'ble Apex Court in a recent judgment in the case of ***V.Senthil Balaji vs. State rep., by Depy Director and Ors.***, reported in ***2023 SCC Online SC 934***, wherein the Hon'ble Supreme Court had held that it is a well settled that the proviso has to be understood from the language used in the main provision and not in vice versa.

11. In the present case, Section 44 of the Insurance Act, 1938, incorporated a provision, opening with a *non obstante* clause. The said



Writ Appeal No.1610 of 2019

clause provided for payment to an insurance agent, commission due to him on renewal premium under the agreement which contained forfeiture/stoppage of payment of renewal commission to an insurance agent, when such an agreement is terminated. The only condition assigned under the said enabling provision to refuse payment of commission on renewal premium is fraud.

12.Three provisos have been appended to the enabling provision, we are concerned with proviso (c) which had provided that even though an agent had been serving continuously and exclusively for 10 years and on cessation of his agency, he should not directly or indirectly procure insurance business for any other person. The said proviso according to us expands the reason for refusal under the enabling provision by adding a further category of person which would be excluded from payment of commissions on renewal premium.

13.In effect the said proviso limits the applicability of the enabling provision namely it excludes a person who would be otherwise entitled to the benefit of the enabling provision.



Writ Appeal No.1610 of 2019

14. In that context, we are of the firm view that proviso (c) to Section 44 is clearly expanding the enabling provision of Section 44. Therefore, in view of the discussions made above, the proviso (c) is repugnant to Section 44 of the Insurance Act, 1938.

15. As we have held that proviso (c) is repugnant to Section 44, the submissions made by the learned counsel for the respondents cannot be countenanced. We hold that the appellant is entitled to receive the commission on renewal premium which he had been procured in favour of the respondents.

16. Be that as it may, on the facts of this case, the respondents had not produced any material to show that the appellant is soliciting directly or indirectly in procuring business of insurance in his present concern. The appellant in his letter of resignation of the agency had specifically indicated that he had been appointed on a regular basis as Unit Manager in SBI Life Insurance Corporation. It is not the case of the respondents that job description of the post of Unit Manager is a one, which the appellant would have to necessarily solicit in the interest of the new concern against the interest of the respondent. In that context, we have already extracted the



Writ Appeal No.1610 of 2019

Division Bench of the Calcutta High Court wherein this factual aspect had been analysed for academic purpose, even though we have held that the proviso (c) is repugnant to enabling provision of Section of 44 it cannot be put against him to deny.

17. A contention has been raised by the learned counsel appearing for the respondents, that the request of the appellant has been rejected and he had not chosen to challenge it till date, but has sought for a direction, which is on the face of it is not maintainable. It may be true that the claim of the appellant in the present Writ Petition without challenging the order of rejection may not be maintainable, but now that we have held that proviso (c) to Section 44 of the Insurance Act 1938 is repugnant, it cannot be put against him to deny his rightful claim and therefore, in our view such rejection is *non est* and therefore now cannot be put against him.

18. In view of the aforesaid findings and reasonings, we find that the order impugned in the Writ Appeal is erroneous and therefore, it is set aside as a sequel the prayer sought for by the appellant is allowed and the respondents are directed to consider the case of the appellant and make the necessary payment of the commissions on renewal of premiums procured by



Writ Appeal No.1610 of 2019

the appellant during his relationship with the respondent corporation and pay the same thereafter within a period of eight weeks. It is also clear that the appellant would also be entitled for further/future commissions on renewal premiums as applicable under law.

19. Accordingly, the Writ Appeal is allowed and the order im-
pugned in this Writ Petition is set aside. However, there shall be no order as to costs.

(R.S.K.,J.)

(K.B., J.)

11.12.2023

Index: Yes/No

Speaking Order/Non Speaking Order

Neutral Citation: Yes/No

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WEB COPY



Writ Appeal No.1610 of 2019

R.SURESH KUMAR., J.
and
K.KUMARESH BABU.,J.

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Writ Appeal Nos.1610 of 2019



WEB COPY



Writ Appeal No.1610 of 2019

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