Advantage Consumer

Monthly News Letter of Consumer Protection Council, Rourkela

" An aware consumer is an asset to the nation" *Website : www.advantageconsumer.com*

VOLUME – XXXIV **MAY 2022** **ADVANTAGE - V**

Queries & Answers through the Web

(*www.advantageconsumer.com* is the website of Consumer Protection Council, Rourkela. One of the major attractions of the website is that a visitor can ask queries on issues relating to consumer protection. Answers to these queries are made free of cost, by the Chief Mentor of the Council, Sri B. Vaidyanathan.)

Sub: Compensation for undue delay handing over possession.

Dear Sir,

I had booked a housing property in Space Group's Aurum project situated in Rathtala, B.T.Road , Kolkata in the year of May'2015. They had promised to handover in June'2018 with a grace period of 6 months.

This project is now on the verge of completion after 39 months of long delay, though the builder is failing to show it a completed project in WBHIRA (West Bengal Housing Industry Regulatory Authority).

Till June2018 I had paid RS 37,83,173/- to the builder and withheld paying the balance due amount of RS 6.37,139/- (14.41%).As per the sale agreement, Builder has to pay a compensation of 9% per annum of the total paid amount for a period of incurred delay (i.e., 39 months).But the builder is not willing to pay the compensation.

Now the builder is insisting me to take the fit possession of my property by paying the outstanding amount. In this juncture, I feel, I have two ways left. One, I seek help from different legal entities, which I sometime don't dare as these are long time taking phenomenon and also feel that it would be even more cumbersome to execute the decisions of the legal institutions. Second, I seek legal remedy after taking possession/registration by paying the outstanding amount.

Summary of Purchased Property

Name Of the Project:	'Aurum'
Total No of Units	286
Area	2.39 Acres
Launched on	June'2014
Promised possession	June'2018
Registered	WBHIRA (West Bengal Housing Industry Regulatory Authority)
Cost of my unit	RS 44,20,312/-(Cost with tax)
Total Paid	RS 37,83,173/-
Dues till Date	RS 6.37,139/-(14.41%)
Last Payment	Rs 1,61,784, on 11/06/2018
Status of Project in WB HIRA	Under construction
Possession	'Fit Possession'
No of Units Registered	150 (Approx)

I am requesting you to please provide me appropriate advice related to my next course of action. Thanking you for your kind help and eagerness.

Rajan Kumar Bhandari
Jagdalpur
Chattisgarh-494001

Ans:-

- Having paid substantial part of your dues (say, 86%), if you are interested in owning the property, it could be prudent to settle the dues and take possession, so that you can start enjoying the property.
- If the builder is reasonable, and is willing to pay the interest for the period of delay, then that will indeed be good.
- But, since the entire country was affected by Covid, for nearly two years, whether he seeks any concession on that count or any other reason also needs to be considered.
- As far as legal option is concerned, in case of delay in handing over possession, cost escalation, non-adherence to "Terms of Agreement", etc., one can approach the Consumer Court (District Commission, etc.), formed under the Consumer Protection Act, for appropriate relief, within a period of two years from the date of dispute.
- But, unfortunately, our legal systems, including the consumer courts are not known for timely delivery of justice. Hence, such an initiative can be taken when you don't have any other option and/ or you stand to lose little because of inordinate delays.
- It is to be remembered that though the possession of the property is taken, it does not prevent you from seeking legal remedy as stated above, provided the concerned Commission is approached within 2 year from the date of dispute and on valid grounds, even that limitation period can be waived.

Continued from April 2022 issue.....

Insurance Company held right in repudiating the claim filed by the Insured on the ground of suppression of material facts.

NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI

FIRST APPEAL NO. 475 OF 2016

(Against the Order dated 20/01/2016 in Complaint No. 14/2012 of the State Commission Maharashtra)

SMT. SUNITA

W/d. Sandeep Khedekar, R/o. Hiren Plaza No.1,
3rd Floor, near Radhika Mangal Karyalaya
SahakarNagar, Chandrapur. Maharashtra .....Appellant(s)

Versus

HDFC STANDARD LIFE INSURANCE CO. LTD.

5th Floor, Eureka Towers MindplaceComplex
Link Road, MaladWest, Mumbai – 440064. .....Respondent(s)

BEFORE:

HON'BLE MR. JUSTICE R.K. AGRAWAL,PRESIDENT
HON'BLE DR. S.M. KANTIKAR,MEMBER

Dated : 25 Oct 2021

ORDER

R. K. AGRAWAL, J., PRESIDENT

16. A Co-ordinate Bench of this Commission in the case of ***Sanjay Atmaram Patel Vs. Divisional Manager, LIC of India – (Revision Petition No. 1573 of 2012 decided on 14.12.2017),*** while dealing with the question of suppression of material facts with regard to existing policies, has held as under: -

> **" It is trite that the term "material fact" is not defined in the Act and, therefore, it has to be understood and explained by the Courts in general terms to mean as any fact which would influence the judgment of a prudent insurer in fixing the premium or determining whether he would like to accept the risk. Any fact which goes to the root of the Contract of Insurance and has a bearing on the risk involved would be "material". Any fact the knowledge or ignorance of which would materially influence an insurer in making the contract or in estimating the degree and character of risks in fixing the rate of premium is a material fact [See: Satwant Kaur Sandhu Vs. New India Assurance Company Ltd. IV (2009) CPJ 8 (SC)].**
>
> **It is not in dispute that in the present case, the Insured did have two previous insurance policies but failed to disclose this fact at the time of obtaining the policy in question. In our opinion, in the light of the afore-noted settled proposition of law, non-disclosure of earlier policy amounted to suppression of a material fact, particularly in a Mediclaim policy and, therefore, the Insurance Company was justified in repudiating the claim in question. In that view of the matter, we do not find any jurisdictional error in the impugned order, warranting our interference in the Revisional Jurisdiction."**

17. Similarly, the Hon'ble Supreme Court in the case of ***Reliance Life Insurance Company Ltd. Vs. RekhabenNareshbhai Rathod – (2019) 6 SCC 175,*** has laid down the principal that a contractual duty so imposed on the Insured is such that any suppression, untruth or inaccuracy in the statement in the proposal form will be considered as a breach of the duty of good faith and will render the policy voidable by the insurer. In the said case, the spouse of the Complainant obtained a Life Insurance Policy on 10.07.2009 from Max New York Life Insurance Company Ltd. for a sum of □11,00,000/-. Barely two months thereafter, on 16.09.2009, he submitted a Proposal for a Life Insurance Term Plan Policy for an assured sum of □10,00,000/-. Among the questions that the Proposer was required to answer in the Proposal Form was whether he was currently insured or had previously applied for Life Insurance Cover, Critical Illness Cover or Accident Benefit Cover. The answer to these queries was ***"negative"***. The Insured died on 08.02.2010 within the two years of the issuance of the Policies. The claim filed by the Complainant was repudiated by the Insurance Company in terms of Section 45 of the Insurance Act, 1938 on the ground of suppression of material information in the Proposal Form. The Complaint filed by the Complainant was dismissed by the District Forum. However, the State Commission, in appeal, reversed the order of the District Forum relying on a decision of the National Commission in the case of ***Sahara India Life Insurance Co. Ltd. Vs. RayaniRamanjaneyulu – III (2014) CPJ 582.*** The said order was also upheld by the National Commission. Finally, matter went to the Apex Court. The Hon'ble Supreme Court referring to the provisions of Section 45 of the Insurance Act, 1938 and earlier case laws, has held as under: -

> ***"25. The expression "material" in the context of an insurance policy can be defined as any contingency or event that may have an impact upon the risk appetite or willingness of the insurer to provide insurance cover. In MacGillivray on Insurance Law it is observed thus:***
>
> > *"The opinion of the particular assured as to the materiality of a fact will not as a Rule be considered, because it follows from the accepted test of materiality that the question is whether a prudent insurer would have considered that any particular circumstance was a material fact and not whether the assured believed it so..."*
>
> ***Materiality from the insured's perspective is a relevant factor in determining whether the insurance company should be able to cancel the policy arising out of the fault of the insured. Whether a question concealed is or is it not material is a question of fact. As this Court held in Satwant Kaur (supra):***

"Any fact which goes to the root of the contract of insurance and has a bearing on the risk involved would be "material."

Materiality of a fact also depends on the surrounding circumstances and the nature of information sought by the insurer. It covers a failure to disclose vital information which the insurer requires in order to determine firstly, whether or not to assume the risk of insurance, and secondly, if it does accept the risk, upon what terms it should do so. The insurer is better equipped to determine the limits of risk-taking as it deals with the exercise of assessments on a day-to-day basis. In a contract of insurance, any fact which would influence the mind of a prudent insurer in deciding whether to accept or not accept the risk is a material fact. If the proposer has knowledge of such fact, she or he is obliged to disclose it particularly while answering questions in the proposal form. An inaccurate answer will entitle the insurer to repudiate because there is a presumption that information sought in the proposal form is material for the purpose of entering into a contract of insurance.

26. Contracts of insurance are governed by the principle of utmost good faith. The duty of mutual fair dealing requires all parties to a contract to be fair and open with each other to create and maintain trust between them. In a contract of insurance, the insured can be expected to have information of which she/he has knowledge. This justifies a duty of good faith, leading to a positive duty of disclosure. The duty of disclosure in insurance contracts was established in a King's Bench decision in Carter v. Boehm (1766) 3 Burr 1905, where Lord Mansfield held thus:

"Insurance is a contract upon speculation. The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the under-writer into a belief that the circumstance does not exist, and to induce him to estimate the risk, as if it did not exist."

It is standard practice for the insurer to set out in the application a series of specific questions regarding the applicant's health history and other matters relevant to insurability. The object of the proposal form is to gather information about a potential client, allowing the insurer to get all information which is material to the insurer to know in order to assess the risk and fix the premium for each potential client. Proposal forms are a significant part of the disclosure procedure and warrant accuracy of statements. Utmost care must be exercised in filling the proposal form. In a proposal form, the applicant declares that she/he warrants truth. The contractual duty so imposed is such that any suppression, untruth or inaccuracy in the statement in the proposal form will be considered as a breach of the duty of good faith and will render the policy voidable by the insurer. The system of adequate disclosure helps buyers and sellers of insurance policies to meet at a common point and narrow down the gap of information asymmetries. This allows the parties to serve their interests better and understand the true extent of the contractual agreement.

The finding of a material misrepresentation or concealment in insurance has a significant effect upon both the insured and the insurer in the event of a dispute. The fact it would influence the decision of a prudent insurer in deciding as to whether or not to accept a risk is a material fact. As this Court held in Satwant Kaur (supra) "there is a clear presumption that any information sought for in the proposal form is material for the purpose of entering into a contract of insurance". Each representation or statement may be material to the risk. The insurance company may still offer insurance protection on altered terms.

27. In the present case, the insurer had sought information with respect to previous insurance policies obtained by the assured. The duty of full disclosure required that no information of substance or of interest to the insurer be omitted or concealed. Whether or not the insurer would have issued a life insurance cover despite the earlier cover of insurance is a decision which was required to be taken by the insurer after duly considering

all relevant facts and circumstances. The disclosure of the earlier cover was material to an assessment of the risk which was being undertaken by the insurer. Prior to undertaking the risk, this information could potentially allow the insurer to question as to why the insured had in such a short span of time obtained two different life insurance policies. Such a fact is sufficient to put the insurer to enquiry.

28. Learned Counsel appearing on behalf of the insurer submitted that where a warranty has been furnished by the proposer in terms of a declaration in the proposal form, the requirement of the information being material should not be insisted upon and the insurer would be at liberty to avoid its liability irrespective of whether the information which is sought is material or otherwise. For the purposes of the present case, it is sufficient for this Court to hold in the present facts that the information which was sought by the insurer was indeed material to its decision as to whether or not to undertake a risk. The proposer was aware of the fact, while making a declaration, that if any statements were untrue or inaccurate or if any matter material to the proposal was not disclosed, the insurer may cancel the contract and forfeit the premium. Mac Gillivray on Insurance Law formulates the principle thus:

> *"... In more recent cases it has been held that all-important element in such a declaration is the phrase which makes the declaration the "basis of contract". These words alone show that the proposer is warranting the truth of his statements, so that in the event of a breach this warranty, the insurer can repudiate the liability on the policy irrespective of issues of materiality."*

29. We are not impressed with the submission that the proposer was unaware of the contents of the form that he was required to fill up or that in assigning such a response to a third party, he was absolved of the consequence of appending his signatures to the proposal. The proposer duly appended his signature to the proposal form and the grant of the insurance cover was on the basis of the statements contained in the proposal form. Barely two months before the contract of insurance was entered into with the Appellant, the insured had obtained another insurance cover for his life in the sum of Rs. 11 lakhs. We are of the view that the failure of the insured to disclose the policy of insurance obtained earlier in the proposal form entitled the insurer to repudiate the claim under the policy.

30. We may note at this stage, that the view which was taken by the NCDRC in the present case was contrary to its earlier decision in Vidya Devi (supra). In that case, the NCDRC upheld the repudiation of an insurance claim under a life insurance cover by the LIC on the ground of a non-disclosure of previous insurance policies. In taking this view, the NCDRC relied on its earlier decision in Chandarana (supra). Subsequently in Sahara India (supra), the NCDRC took a contrary view. Having noticed its earlier decisions, the NCDRC did not even attempt to distinguish them. Indeed, the earlier decisions were binding on the NCDRC. This line of approach on the part of the NCDRC must be disapproved.

31. Finally, the argument of the Respondent that the signatures of the assured on the form were taken without explaining the details cannot be accepted. A similar argument was correctly rejected in a decision of a Division Bench of the Mysore High Court in VK Srinivasa Setty v. Messers Premier Life and General Insurance Co. Ltd. MANU/KA/0032/1958: AIR 1958 Mys 53 where it was held:

> *"Now it is clear that a person who affixes his signature to a proposal which contains a statement which is not true, cannot ordinarily escape from the consequence arising therefrom by pleading that he chose to sign the proposal containing such statement without either reading or understanding it. That is because, in filling up the proposal form, the agent normally, ceases to act as agent of the insurer but becomes the agent of the insured*

and no agent can be assumed to have authority from the insurer to write the answers in the proposal form.

If an agent nevertheless does that, he becomes merely the amanuensis of the insured, and his knowledge of the untruth or inaccuracy of any statement contained in the form of proposal does not become the knowledge of the insurer. Further, apart from any question of imputed knowledge, the insured by signing that proposal adopts those answers and makes them his own and that would clearly be so, whether the insured signed the proposal without reading or understanding it, it being irrelevant to consider how the inaccuracy arose if he has contracted, as the Plaintiff has done in this case that his written answers shall be accurate."

32. For the reasons which we have adduced, we are of the view that the SCDRC was in error in reversing the judgment of the District Forum. The NCDRC has similarly erred in affirming the view of the SCDRC. We, accordingly, allow the appeal and set aside the impugned judgment and order of the NCDRC dated 20 February 2015. The consumer complaint filed by the Respondent shall stand dismissed."

18. Respectfully following the decisions of the Hon'ble Supreme Court and the Co-ordinate Bench of this Commission as well as for the reasons stated above, we do not find any illegality in the impugned order passed by the State Commission holding that there was no deficiency in service on the part of the Insurance Company in repudiating the claim filed by the Complainant on the ground of suppression of material facts. Consequently, the First Appeal is dismissed as devoid of any merits. ■

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