HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR

(Through Virtual Mode)

Reserved On: 11th of June, 2020.
Pronounced On: 22nd of June, 2020.

MA No.120/2013 c/w
MA No.139/2013
MA No.140/2013

i. Sajad Ahmad Malik
ii. Oriental Insurance Company Ltd.
iii. Divisional Manager, National Insurance Company Ltd.

….. Appellant(s)

Through: -

Mr Hakim Suhail Ishtiaq, Advocate in MA No.120/2013;
Mr N. H. Khuroo, Advocate in MA No.139/2013; and
Mr J. A. Kawoosa, Advocate with Mr Areeb Kawoosa, Advocate in MA No.140/2013.

V/s

i. Divisional Manager, National Insurance Company Ltd. & Anr.
ii. Sajad Ahmed Malik & Anr.
iii. Sajad Ahmad Malik & Anr.

….. Respondent(s)

Through: -

M/s J. A. Kawoosa with Areeb Kawoosa & N. H. Khuroo, Advocates in MA No.120/2013;
M/s Hakim Suhail Ishtiaq & J. A. Kawoosa with Areeb Kawoosa, Advocates in MA No.139/2013; and
M/s Hakim Suhail Ishtiaq & N. H. Khuroo in MA No.140/2013.

CORAM:

Hon'ble Mr Justice Ali Mohammad Magrey, Judge.
Hon'ble Mr Justice Vinod Chatterji Koul, Judge.

JUDGMENT

Per Magrey, J:

I. Common Cause:

01. Since, all these three appeals, filed under Section 17 of the Jammu and Kashmir Consumer Protection Act, 1987, (now repealed in terms of the Jammu and Kashmir Reorganization Act, 2019), arise out of a common order dated 31st of May, 2013 (hereafter referred to as "the impugned order") passed by the erstwhile Jammu and Kashmir State Consumer Disputes Redressal Commission (for short "the Commission") in complaint bearing No.24/2014 titled 'Sajad Ahmad Malik v. Divisional Manager, National

Insurance Company Ltd. & Anr.', therefore, same are taken up together for their disposal under law. The parties to the *lis* shall be referred to as they appeared in the basic consumer complaint filed by the complainant before the Commission, *viz*. Sajad Ahmad Malik as the complainant; National Insurance Company Ltd. as the respondent No.1; and Oriental Insurance Company Ltd. as the respondent No.2.

II. Issue of jurisdiction of this Court:

02. When these appeals were taken up for hearing on 4th of June, 2020, Mr N. H. Khuroo, learned counsel appearing on behalf of the Oriental Insurance Company Ltd., raised an objection as regards the jurisdiction of this Court to hear and decide these appeals in view of the application of the Jammu and Kashmir Reorganization Act, 2019 in the erstwhile State of Jammu and Kashmir; leading to repealing of the erstwhile Jammu and Kashmir Consumer Protection Act, 1987, in terms whereof this Court had the jurisdiction to hear the appeals against the orders passed by the Commission and coming into operation of the Central Consumer Protection Act, 1986. While registering the said objection, this Court heard the learned counsel for the parties; both on maintainability of these appeals *qua* jurisdiction of this Court as well as on merits.

03. Mr Khuroo, in support of his objection regarding jurisdiction of this Court to hear these appeals, has invited the attention of this Court to the Jammu and Kashmir Reorganization Act, 2019, which Act received the assent of the President of India on 9th of August, 2019. The Central Government declared the 31st day of October, 2019 as the appointed day for the purpose of the said Act vide S.O. No. 2898(E). This Act provided for the reorganization

of the erstwhile State of Jammu and Kashmir in the shape of formation of two new Union Territories, *viz.* Union Territory of Jammu and Kashmir with Legislature and Union Territory of Ladakh without Legislature, and for matters connected therewith or incidental thereof. Table-1 of the Fifth Schedule of the Act aforesaid provides the details of the Central Laws made applicable to the Union Territory of Jammu and Kashmir and Union Territory of Ladakh, including the Central Consumer Protection Act, 1986. Likewise, Table-3 of the same Schedule makes mention of such laws, as were prevalent in the erstwhile State of Jammu and Kashmir, which were declared to have been repealed in the Union Territory of Jammu and Kashmir and Union Territory of Ladakh, including the Jammu and Kashmir Consumer Protection Act, 1987. Mr Khuroo, in the aforesaid backdrop, contends that since these appeals have been, admittedly, filed under Section 17 of the erstwhile Jammu and Kashmir Consumer Protection Act, 1987, which Act stands repealed with the application of the Jammu and Kashmir Reorganization Act, 2019, as such, this Court has no jurisdiction to hear these appeals. In order to buttress this argument, the learned counsel has referred to Section 17 of the erstwhile Jammu and Kashmir Consumer Protection Act, 1987, which reads thus:

> ***"Section 17 of the Jammu and Kashmir Consumer Protection Act, 1987***:
>
> *Any person aggrieved by any order by the State Commission in exercise of its powers conferred by sub-clause(i) of clause (a) of section 15 may prefer an appeal against such order to the High Court within thirty days from the date of the order in such form and manner as may be prescribed:*
>
> *[Provided that such appeal shall be heard by not less than two Judges of the High Court:*
>
> *Provided further that the High Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing it within that period:*

Provided also that no appeal shall lie unless the memorandum of appeal is accompanied by a certificate issued by the Chairman, State Commission to the effect that the appellant has deposited 25% of the amount payable under the order.]"

Mr Khuroo pleads that in view of the mandate of Section 17 coupled with the fact that there is no 'Saving Clause' in the Jammu and Kashmir Reorganization Act, 2019, which Act repealed the erstwhile Jammu and Kashmir Consumer Protection Act, 1987, and by application of Central Consumer Protection Act, 1986, all the cases arising out of the orders/ judgments passed by the erstwhile Jammu and Kashmir State Consumer Disputes Redressal Commission, including the present appeals, are now required to be transferred to the National Consumer Disputes Redressal Commission for their disposal under law. It is also pointed out by Mr Khuroo that just like the pending services matters covered under Section 28 and 29 of the Administrative Tribunals Act, 1985 were transferred to the Central Administrative Tribunal, all the pending appeals arising out of the orders/ judgments of the erstwhile Jammu and Kashmir State Consumer Disputes Redressal Commission are also required to be transferred to the National Consumer Disputes Redressal Commission.

04. Mr J. A. Kawoosa, learned counsel representing the National Insurance Company Ltd., vehemently resisted the objection raised by Mr Khuroo regarding continuation of hearing of these matters which are, admittedly, pending for hearing before this Court prior to the repealing of the Jammu and Kashmir Consumer Protection Act, 1987. Mr Kawoosa pleads that although the Parliament, while enacting the Jammu and Kashmir Reorganization Act, 2019 has, in terms of Fifth Schedule; Table-2, repealed the Jammu and Kashmir State Consumer Disputes Redressal Commission,

but, in terms of the Jammu and Kashmir Reorganization (Removal of Difficulties) Order, 2019 dated 30th of October, 2019, passed vide S.O. No.3912(E), it has saved the pending legal proceedings by declaring that the Acts repealed in the manner provided in Table-3 of the Fifth Schedule shall not affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid. The learned counsel has, in this behalf, taken us to Clause (d) of Section 13 of the Jammu and Kashmir Reorganization (Removal of Difficulties) Order, 2019, which Clause is reproduced hereinbelow, *verbatim et literatim*:

> *"(d) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid."*

Mr Kawoosa contends that in view of the aforesaid Clause incorporated by the Central Government in the aforesaid order, the pending proceedings/ appeals which have been filed before this Court in terms of Section 17 of the erstwhile Jammu and Kashmir Consumer Protection Act, 1987 and are pending adjudication before the enactment of the Jammu and Kashmir Reorganization Act, 2019, have been saved by providing that it shall be construed as if this Act had not been passed with respect to such proceedings.

05. Mr Hakim Suhail Ishtiaq, learned counsel appearing on behalf of the complainant, besides adopting the arguments advanced by Mr Kawoosa on the issue on maintainability of these appeals before this Court, has also

argued that the pending legal proceedings before this Court stand saved by application of Section 6 of the General Clauses Act, 1897.

06. Let us first deal with the issue regarding maintainability of these appeals *qua* jurisdiction of this Court to decide and hear these appeals. Admittedly, these appeals arise out of the common order passed by the erstwhile Jammu and Kashmir State Consumer Disputes Redressal Commission in terms of Section 17 and have remained pending for adjudication before this Court for the last more than seven years. During the pendency of these appeals, the Parliament passed the Jammu and Kashmir Reorganization Act, 2019; thereby leading to formation of two new Union Territories out of the erstwhile State of Jammu and Kashmir, *viz.* (i) Union Territory of Jammu and Kashmir with Legislature; and (ii) Union Territory of Ladakh without Legislature. With the enactment of the aforesaid Act; while certain Central Laws were made applicable to both the new Union Territories, various laws that were in vogue in the erstwhile State of Jammu and Kashmir were repealed, details whereof have been provided in the Act itself. In that context, among others, the Jammu and Kashmir Consumer Protection Act, 1987, as was applicable in the erstwhile State of Jammu and Kashmir prior to the enactment of the Jammu and Kashmir Reorganization Act, 2019, came to be repealed and the Central Consumer Protection Act, 1986 was made applicable to both the new Union Territories. It, needs, must be said here that although in Table-1 of the Fifth Schedule to the Jammu and Kashmir Reorganization Act, 2019, the Central Consumer Protection Act, 1986, was made applicable to the Union Territory of Jammu and Kashmir and Union Territory of Ladakh, but, the said Act of 1986, too, stands repealed by the Parliament on 9th of August, 2019 and a new Act, namely, the Consumer

Protection Act, 2019 enacted and made applicable to the aforesaid two Union Territories.

07. Having regard to the above factual backdrop *vis-a-vis* the change in the scheme of law/ forums that has taken place with the enactment of the Jammu and Kashmir Reorganization Act, 2019, coupled with the arguments advanced by the parties on this issue, it is not possible for us to accept the contention of Mr Khuroo that in absence of a 'Saving Clause', the pending proceedings as well as the jurisdiction of this Court cannot be deemed to have been saved, primarily on three counts. First, the Central Government has already passed the Jammu and Kashmir Reorganization (Removal of Difficulties) Order, 2019, Clause (d) to Section 13 whereof clearly saves the pending legal proceedings. A bare perusal of this Clause, as is reproduced in paragraph No. 04 of this judgment, makes it explicitly axiomatic that the competent authority has already saved those investigations or legal proceedings or remedies in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment acquired/ accrued/ incurred under any law so repealed or in respect of any offence committed against any law so repealed by declaring that it shall be deemed as if the Act (i.e., the Jammu and Kashmir Reorganization Act, 2019 herein this case) had not been passed. Second, the general principle is that an Act of the Legislature which brought about a change in the scheme of law/ forum would not affect pending actions/ proceedings, unless the intention to the contrary was clearly shown in the Act of the Legislature itself. Since, the amending Act does not so envisage, it has to be concluded that the pending appeals/ proceedings (before the enactment of the Jammu and Kashmir Reorganization Act, 2019) would not be affected in any manner. Third, Section 6(c) and (e) of the General Clauses Act, 1897,

categorically envisage that the amendment of a Statute which is not retrospective in operation does not affect pending proceedings, except where the amending provision/ Act, expressly or by necessary intendment, provides otherwise. Apart from this, it is a cardinal principle of law that when a *lis* commences, all rights and obligations of the parties get crystalized on that date and the mandate of Section 6 of the General Clauses Act, 1897 simply ensures that pending proceedings under the unamended provision/ Act remain unaffected. This view of ours is fortified by the law laid down by the Hon'ble Apex Court of the country in the judicial dictum titled ***'Videocon International Ltd. V. Securities & Exchange Board of India'***; passed in Civil Appeal No.117 of 2005.

08. The next contention of Mr Khuroo that all the appeals pending before this Court arising out of the orders/ judgments passed by the erstwhile Jammu and Kashmir State Consumer Disputes Redressal Commission have to be transferred to the National Consumer Disputes Redressal Commission on the same lines as has been done in the case of the pending service matters which stand transferred to the Central Administrative Tribunal is also devoid of any merit. In view of the present constitutional set up of Jammu and Kashmir and Ladakh, introduced in terms of the Constitutional (Application of Jammu and Kashmir) Order, 2019 (C.O. 272) dated 5th August, 2019 read with the Declaration made by the President of India under Article 370(3) of the Constitution in terms of Notification G.S.R. 562€ (C.O.273) dated 6th August, 2019; the relevant provisions of the Jammu and Kashmir Reorganization Act, 2019 (No.34 of 2019), particularly the Fifth Schedule appended thereto; the provisions of the Central Administrative Tribunals Act, 1985, particularly Sections 14,28 and 29 thereof; the judgment of the Supreme

Court in ***'L. Chandra Kumar v. Union of India'***, (1997) 3 SCC 261; and the Notification No. G.S.R. 317(E) dated 28th May, 2020, issued in exercise of the powers conferred by sub-section (7) of Section 5 of the Administrative Tribunals Act, 1985, by the Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training), New Delhi, specifying Jammu and Kashmir as the places at which the Benches of the Central Administrative Tribunal shall ordinarily sit for the Union Territory of Jammu and Kashmir and Union Territory of Ladakh, read with notification No. G.S.R. 318(E) dated 28th May, 2020 issued by the said Ministry in exercise of the powers conferred by sub-section(1) of Section 18 of the said Act relating to the jurisdiction of the Jammu Bench of the Tribunal, the jurisdiction to hear service petitions as a Court of first instance lies with the Central Administrative Tribunal constituted under the provisions of the Administrative Tribunals Act, 1985. Section 28 thereof clearly mandates that on and from the date from which any jurisdiction, power(s) and authority becomes exercisable under the Act by a Tribunal in relation to recruitment and matters concerning recruitment to any service or post or service matters concerning members of any service or persons appointed to any service or post, no Court, except the Supreme Court or any Industrial Tribunal, Labour Court or other authority, constituted under the Industrial Disputes Act, 1947, or any other corresponding law, for the time being in force, shall have/ or be entitled to exercise any jurisdiction, power(s) or authority in relation to such recruitment or matters concerning such recruitment or such service matters. Likewise, Section 29 envisages that every suit or other proceeding pending before any Court or other authority immediately before the date of establishment of a Tribunal under the Act, being a suit or proceeding the cause of action whereon it is based is such that it would have been, if it had arisen

after such establishment, within the jurisdiction of such Tribunal, shall stand transferred on that date to such Tribunal. From a plain reading of the Sections aforesaid, it is discernible, beyond any shadow of doubt, that there is an express provision in the shape of these Sections requiring the pending service matters to be transferred from this Court/ or from any other Court to the Central Administrative Tribunal with the application of the Administrative Tribunals Act, 1985, thus, the rigors of Section 6(c) and (e) of the General Clauses Act, 1897, will not come in the way of these pending service matters. However, in the case of the appeals arising out of the orders/ judgments passed by the erstwhile Jammu and Kashmir State Consumer Disputes Redressal Commission and pending before this Court for adjudication, there is no such explicit provision; either in the amending Act, i.e., the Jammu and Kashmir Reorganization Act, 2019 or in the new applicable Act, i.e., the Consumer Protection Act, 2019; requiring these matters to be transferred to the National Consumer Disputes Redressal Commission and, as such, in terms of Section 6(c) and (e) of the General Clauses Act, 1897, these pending proceedings are to be deemed to have been saved as if the amending Act had not been passed.

09. The upshot of the above discussion leads us to the undisputable conclusion that all the pending proceedings/ appeals arising out of the orders or awards passed by the erstwhile Jammu and Kashmir State Consumer Disputes Redressal Commission are to continue to be heard and decided by this Court as if the unamended provision/ Act is still in force. Therefore, the question raised by Mr Khuroo regarding jurisdiction of this Court to hear and decide these pending appeals shall stand answered accordingly. We, however, make it clear here that all the fresh proceedings concerning consumer complaints/ grievances as well as the appeals thereon shall be dealt with as

per the mode and method prescribed in the newly changed scheme of law in the Union Territory of Jammu and Kashmir and Union Territory of Ladakh, i.e., the Consumer Protection Act, 2019, as provided in the Jammu and Kashmir Reorganization Act, 2019.

10. We now proceed to scrutinize and decide the facts/ merits of the main case, as put forth by the learned counsel for the respective parties, hereinbelow.

III. Facts leading to the filing of these appeals:

11. The facts leading to the filing of these appeals, as emerge from a plain reading of the complaint filed by the complainant before the Commission, are that the complainant owned a residential building at Gogji Bagh, Srinagar, which he had insured with both; the National Insurance Company Ltd. (for rupees thirty-one lacs) and the Oriental Insurance Company Ltd. (for rupees thirty-five lacs). On 23rd of September, 2002, it is stated that the Station House Officer, Police Station Rajbagh, approached the complainant at his shop situated at Hazuri Bagh, Srinagar, and asked him to accompany him to his aforesaid residence at Gogji Bagh, Srinagar. On reaching the locality, the complainant claims to have come to know that some terrorists had sneaked into his house in order to disrupt the election process scheduled to be held on the next day. The complainant was told by the security forces to enter the insured building, but he refused to do so, whereafter, as stated, some security personnel, who tried to enter the building, were fired upon by the terrorists hiding inside the house which sparked off a gun battle. In the ensuing action, which lasted for more than two days, the insured building sustained heavy damage and, on 24th of September, 2002, the insured

building was blasted and razed to ground leading to the elimination of the two trapped terrorists. A case, in this behalf, was registered under FIR No. 128/2002 in Police Station, Rajbagh, Srinagar. Accordingly, the complainant claims to have, through written intimation, approached both the Insurance companies to depute Surveyors on the spot, which request was turned down. On 15th of October, 2002, it is stated that the National Insurance Company Ltd. deputed one Mr G.R. Bhat, Investigator, to the spot, who, after making spot inspection, asked for certain documents from the complainant, including, copy of the FIR, house building permission and ownership proof thereof, Fire Brigade report, final Police report, etc. The complainant claims to have arranged all the documents, except for the final Police report and delivered the same to the said Investigator. The Oriental Insurance Company Ltd., however, as per the complainant, did not depute any Surveyor to the spot, instead, a communication dated 30th of September, 2002 was addressed by the said Company to the complainant on 30th of September, 2002, thereby informing him that the policy stood terminated from the date of its inception. The complainant, thereafter, on 25th of October, 2002, claims to have sent a reminder to the Oriental Insurance Company Ltd., requesting them to depute a Surveyor on spot, but the same was, on 11th of November, 2002, again responded to by the Company with the same observation that the policy was terminated at the request of the complainant. The complainant has proceeded to state that, although, he repeatedly approached the National Insurance Company Ltd. seeking information about the assessment of loss, but all his requests fell in deaf ears, constraining him to address a legal notice to the Company, which notice, too, did not yield any result. It is submitted by the complainant that during this entire period when the Surveyor was not deputed to assess the loss, he got the loss estimated on his own by hiring the services

of M/S ZI Engineers, who estimated the loss at Rs. 30,91,573/- (rupees thirty lacs, ninety one thousand, five hundred and seventy three only). Since, both the Insurance Companies failed to settle the claim of the complainant despite repeated requests and lapse of considerable period of time, therefore, the complainant claims to have approached the then Jammu and Kashmir State Consumer Disputes Redressal Commission, Srinagar, by way of a complaint filed in terms of the erstwhile Jammu and Kashmir Consumer Protection Act, 1987, wherein he prayed for the grant of following relief(s) in his favour:

A) *A sum of Rs. 35,00,000/ as principal amount on account of the actual loss suffered by the complainant, to be shared proportionately by the Insurance Companies;*

B) *Interest @ 15% at quarterly rates, on the aforesaid amount payable from the date of loss till the date of final payment;*

C) *A sum of Rs. 2,00,000/- as compensation on account of mental agony suffered by the complainant due to the deficient service of the Insurance Companies in delaying the settlement of the claim; and*

D) *A sum of Rs, 1,00,000/- as litigation expenses.*

The Commission, after summoning both the Insurance Companies and recording evidence of the parties, in terms of order dated 31st of May, 2013, allowed the complaint filed by the complainant by awarding an amount of Rs. 13,93,323/- (rupees thirteen lacs, ninety three thousand, three hundred and twenty three), assessed by the Surveyor as damage to the house of the complainant; coupled with Rs. 1,00,000/- (rupees one lac) as compensation for the loss of earnings thereupon and agony undergone by the complainant all these years; Rs. 7,000/- (rupees seven thousand) as cost of litigation, thereby bringing the total liability to Rs 15,00,000/- (rupees fifteen lacs). The Commission directed that the said amount be shared by both the Insurance Companies in ratable proportions, i.e., National Insurance Company Ltd. Rs. 7,00,000/- (rupees seven lacs)

and Oriental Insurance Company Ltd. Rs. 8,00,000/- (eight lacs), to be paid or deposited within six weeks from the date of the award. The complainant, being dissatisfied with the said order of the Commission, insofar as it did not award the claimed amount of Rs 38.00 lacs alongwith interest thereupon @15% to him, has filed the appeal bearing MA No.120/2013 seeking enhancement of compensation in his favour. Likewise, the National Insurance Company Ltd. has filed MA No.139/2015, whileas the Oriental Insurance Company Ltd. has filed MA No. 140/2015; both seeking setting aside of the order passed by the Commission *qua* their respective liability.

IV. Submissions of the counsel for the parties:

12. Mr Hakim Suhail Ishtiaq, learned counsel appearing on behalf of the complainant, submits that the Commission, while passing the impugned order, has not appreciated the evidence on record in its true and correct perspective insofar as it has granted the compensation in favour of the complainant. It is submitted that in view of the evidence available on record before the Commission as well as the loss suffered by the complainant, coupled with the nature of claim made in the complaint, the complainant was entitled to a much higher amount of compensation than the one granted by the Commission and, therefore, the amount awarded by the Commission deserves to be enhanced in relation to the claim made by the complainant. It is pleaded that all the material and relevant information, as sought by the insurer, was furnished by the complainant in the proposal form. It is contended that the complainant 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.

13. Mr J. A. Kawoosa, the learned counsel representing the National Insurance Company Ltd., submits that the impugned order passed by the Commission is contrary to law as well the facts of the case. It is submitted that the Company had insured the residential building and household goods of the complainant situated at Gogjibagh, Srinagar, on 23rd of September, 2002, for one year under Policy Nos. 421001:11:02:31:01377 and 421001:48:02;36:1143, respectively, on the principle of 'Utmost Good Faith'. It is pleaded that, on 24th of September, 2002, a joint operation was conducted by the security forces to nab the terrorists who were hiding in the house of the complainant as also to rescue three police personnel who were trapped by the terrorists in the said house and the surrounding area. In the cross firing between the security forces and the terrorists, the house of the complainant got damaged resulting in registration of FIR No. 128/2002 in Police Station, Rajbagh, Srinagar, under Sections 302, 307, 120-B of the erstwhile Ranbir Penal Code (RPC); 3 POTA; and Section 7 of the Indian Arms Act. The Company, as stated, deputed M/S Scientific Investigators to conduct investigation regarding the circumstances under which the property in question was got insured on 23rd of September, 2002, and, in the meantime, a Surveyor was also deputed by the Company to assess the loss. It is contended that the Investigator submitted his report on 26th of February, 2003, clearly stating therein that the complainant was aware of the presence of two terrorists in his house and, it is for this reason, he had got the property insured with the National Insurance Company Ltd. as well as with the Oriental Insurance Company Ltd. Thereafter, it is stated that the matter was taken up with the Senior Superintendent of Police (SSP), Srinagar, for providing Police investigation report. On 8th of February, 2005, the Company claims to have received the said Police investigation report which revealed that the

complainant had prior knowledge of the presence of two terrorists in his house on 22nd of September, 2002 and, for this reason, he had insured his house with the National Insurance Company Ltd. as well as with the Oriental Insurance Company Ltd. Besides, it is further submitted that the concerned Police authorities even recommended that the claim/ insurance policies of the complainant be cancelled as the same have been obtained fraudulently and by concealing material facts like presence of two terrorists in the premises in question prior to taking of the insurance cover. It is averred that after considering the entire claim on its merits, the Company found that the complainant had obtained insurance cover fraudulently and by concealing material facts, as such, the claim was repudiated. It is argued that since the insured was in know of the fact that two terrorists were hiding in his house and that the said house will be targeted by the security forces anytime, he, immediately, effected insurance of his house as well as household goods with two different Insurance Companies for Rs. 31 lacs and Rs. 35 lacs, without disclosing the said material fact to the Insurance Companies, thereby concealing the most material and vital fact before them. The learned counsel contends that the complainant was duty bound to disclose all the material facts, including prior occupation of the premises in question by the terrorists and obtaining insurance cover from two Insurance Companies, while insuring the property, which he did not, thus, violated conditions Nos. 1 and 8 prescribed in the terms and conditions of the Policy. It is specifically pleaded that had the complainant informed the Company about the presence of terrorists in his house, the Company would not have insured the property. Mr Kawoosa submits that all these facts, which were material and had a direct bearing on the result of the proceedings, were vehemently raised and argued by the Company before the Commission, but the Commission, without

considering the same, allowed the complaint and passed the order impugned, as such, the order impugned deserves to be set at naught.

14. Mr N. H. Khuroo, learned counsel for the Oriental Insurance Company Ltd., would submit that the complainant did not approach the Company with *bonafide* intentions in securing the insurance contracts with regard to his premises as the house proposed to be insured had been occupied by the terrorists a few days earlier to the date when the insurance contracts were secured by the complainant. It is submitted that this important and material fact was suppressed by the complainant before both the Company. It is pleaded that the contract of insurance is based on utmost good faith and that the person proposing for having insurance cover is supposed to reveal all necessary information related to the property to be insured at the time of making the proposal, which, in the instant case, was suppressed by the complainant deliberately and intentionally with a view to commit a fraud upon the Company. It is argued that the parties to the contract, in law, are supposed to be fair to each other in order to understand the nature of the property to be made the subject matter of the contract enabling them to analyze the positive and negative factors of the contract to be executed, but, in the case on hand, the complainant deliberately and intentionally suppressed the material information regarding occupation of his residential house by the terrorists, thereby depriving the Company of making the right and correct assessment of the positive and negative aspects of the contract. It is contended that the Commission has, in law, erred in taking the view that the concealment of this fact by the complainant before the Company, at the time of making the proposal for having the insurance cover against his residential house, cannot be said to be the suppression of the material fact. Mr Khuroo pleads that in

the present case, the disclosure of the factum of occupation of the residential house of the complainant by the terrorists was of great importance keeping in view the nature of the contract, the risk involved thereunder and the liability undertaken by the Company under such insurance contract. It is contended that had the Company being in know of this material fact, surely, it would have declined to enter into any such contract in such a situation. Thus, as per the learned counsel, the suppression of this material information/ fact by the complainant before the Company makes the contract *void ab initio* and not enforceable under law.

15. The next contention of Mr Khuroo is that the Commission, again, erred in law in fixing the liability upon the Company under the so-called insurance contract which had not even got concluded. It is pleaded that although the complainant, through his brother-in-law, had deposited the premium amount along with the proposal, but a formal contract between the parties was yet to be concluded at the time of incident. It is submitted that it is beaten proportion of law that unless and until the proposal is not accepted by the other side; in writing, under the signatures of the competent authority and to be communicated to the proposer, it is deemed that no contract has yet come into force. In the instant case, as per the learned counsel, the Company had only received the proposal and premium amount, but no formal contract had been executed between the parties as is required under law. Mr Khuroo argues that this argument was categorically raised and pleaded by the Company before the Commission, supported by the law laid down by various Courts of the Country, but, surprisingly, the Commission, while rejecting the said arguments and ignoring the case law so submitted, passed the impugned order.

16. The other point raised by the learned counsel representing the Oriental Insurance Company Ltd. is that assuming for the sake of arguments, but not admitting, that with the submission of proposal and acceptance of premium amount without a contract being formally concluded, as is required in law, a contract was in existence between the parties, still the Company could not have been held liable for the claim as the so-called contract of insurance had got terminated at the instance of the complainant himself. To bring home this argument, it is submitted that the brother-in-law of the complainant, on behalf of the complainant, on 23rd of September, 2002, had earlier approached the Company at its Branch Office, Anantnag, for having the insurance cover against the residential house of the complainant and, it is the same brother-in-law of the complainant, who had made a written application to the Company to cancel the policy from its very inception and refund the premium amount deposited by him. Besides, in the said application, it is also the case of the Company that it was requested that the claim raised by the complainant under the so-called insurance contract be treated as withdrawn. In pursuance of this request, the Company cancelled the so-called insurance policy from its inception and refunded the premium of Rs.3,240/- (rupees three thousand, two hundred and forty) vide 'Payees Account Cheque' of even date to the complainant and forwarded to him under written communication dated 30th of September, 2002 by registered post. The said cheque issued by the Company towards refund of the premium, at the request of the complainant, was got credited to his account which fact stands confirmed by the officials of the Punjab National Bank, Badami Bagh, Srinagar. Mr Khuroo pleads that these facts have been confirmed and admitted by the complainant in his cross-examination before the Commission, when he was examined as his own witness in the complaint and that in view of the

request of the complainant for cancellation of the contract, refund of premium amount to the complainant and the acceptance of the said request by the Company, the Company was to be exonerated from any liability under the claim. The Commission, however, as per the learned counsel, has erred in rejecting this submission made on behalf of the Company, while passing the impugned order, therefore, the impugned order is liable to be set aside.

V. Discussion:

17. Having heard the learned counsel for the parties, gone through the record of the Commission and after considering the matter, we, at the outset, feel that it is necessary for us to preface our analysis on the common and basic issue raised by both the Insurance Companies *qua* challenge to the order passed by the Commission. This issue pertains to the nature of the disclosure made by the insured/ complainant in the proposal form and its impact on the entire process of invitation and acceptance of the offer. In the 'proposal form', against the Column 'Premises used by the proposer as', the complainant/ insured had mentioned 'residence' and had concealed the fact that the premises were being occupied by the terrorists. Likewise, there is one more Column prescribed in the proposal form wherein information is sought by the Insurer from the Insured as to whether any other Company has insured the premises in question as well. In respect of this Column, the insured has answered in the negative. The fact that the insured had simultaneously approached the Oriental Insurance Company Ltd. for insuring the same premises with them as well has, now, been admitted. There, thus, was evidently a non-disclosure of the earlier cover for insurance held by the insured. The second aspect of the case which merits to be noticed is that the repudiation of the claim by the National Insurance Company Ltd. was on the

ground that there was a non-disclosure of material facts on the part of the insured in not disclosing that the premises in question, at the time of insurance, were occupied by the terrorists and that the insured held a prior insurance cover with the other Insurance Company. Both the Insurance Companies stated that if this was to be disclosed in the proposal form, they would have evaluated the matter accordingly together with the terms for the acceptance of the covers. However, before a non-disclosure can be utilized as a ground to repudiate, it must pertain to a realm where it can be found that the non-disclosure was of a circumstance or fact which would have affected the decision of the insurer regarding whether or not to grant a cover.

18. The fundamental principle is that the process of insurance is governed by the doctrine of '*uberrima fidei'*. This postulates that there must be complete good faith on the part of the insured. The insured must disclose to the insurer all facts material to an insurer's appraisal of the risk which are known or deemed to be known by the assured, but neither known or deemed to be known by the insurer. Breach of this duty, on part of the insured, entitles the insurer to avoid the contract of insurance so long as he/ she can show that the non-disclosure induced the making of the contract on the relevant terms. The relationship between an insurer and the insured is recognized as one where mutual obligation of trust and good faith are paramount.

19. The Insurance Regulatory and Development Authority of India, by a notification dated 16th of October 2002, issued the Insurance Regulatory and Development Authority (Protection of Policyholders' Interests) Regulations, 2002. The expression 'proposal form' is defined in Regulation 2(d), thus:

> *"2(d) "Proposal form" means a form to be filled in by the proposer for insurance, for furnishing all material information required by the insurer in respect of a risk, in order to enable the insurer to decide whether to accept or decline, to undertake the risk, and in the event of acceptance of the risk, to determine the rates, terms and conditions of a cover to be granted.*
>
> *Explanation: "Material" for the purpose of these regulations shall mean and include all important, essential and relevant information in the context of underwriting the risk to be covered by the insurer."*

Regulation 4 deals with 'proposals for insurance' and is in the following terms:

> *"4. Proposal for insurance: (1) Except in cases of a marine insurance cover, where current market practices do not insist on a written proposal form, in all cases, a proposal for grant of a cover, either for life business or for general business, must be evidenced by a written document. It is the duty of an insurer to furnish to the insured free of charge, within 30 days of the acceptance of a proposal, a copy of the proposal form.*
>
> *(2) Forms and documents used in the grant of cover may, depending upon the circumstances of each case, be made available in languages recognised under the Constitution of India.*
>
> *(3) In filling the form of proposal, the prospect is to be guided by the provisions of Section 45 of the Act. Any proposal form seeking information for grant of life cover may prominently state therein the requirements of Section 45 of the Act.*
>
> *(4) Where a proposal form is not used, the insurer shall record the information obtained orally or in writing, and confirm it within a period of 15 days thereof with the proposer and incorporate the information in its cover note or policy. The onus of proof shall rest with the insurer in respect of any information not so recorded, where the insurer claims that the proposer suppressed any material information or provided misleading or false information on any matter material to the grant of a cover."*

What emerges from the above provision of law is that Regulation 2(d) specifically defines the expression 'proposal form' as a form which is filled up by a proposer for insurance to furnish all material information required by the insurer in respect of a risk. The purpose of the disclosure is to enable the insurer to decide whether to accept or decline to undertake the risk. The disclosures are also intended to enable the insurer, in the event that the risk is accepted, to determine the rates, terms and conditions on which a cover is to be granted. The explanation defines the expression 'material' to mean

and include all important, essential and relevant information for underwriting the risk to be covered by the insurer.

20. 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. The law is that the opinion of the particular insured 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 insured believed it so. Materiality, from the insured’s perspective, is a relevant factor in determining whether the concerned Insurance Company should be able to cancel the policy arising out of the fault of the insured. Whether a question concealed is or is not material is a question of fact. 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 or not to accept the risk is a material fact. If the proposer has knowledge of such fact, he/ she 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.

21. Apart from the above, it is well settled legal position that the 'Contracts of Insurance' are governed by the principle of utmost good faith. The duty of mutual and fair dealing requires all parties to a contract to be fair and open to each other in order to create and maintain trust between them. In a Contract of Insurance, the insured can be expected to have information of which he/she has knowledge. This justifies a duty of good faith, leading to a positive duty of disclosure. It is standard practice for the insurer to set out, in the application, a series of specific questions regarding the subject of insurance 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 and 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 he/she 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 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 the process of insurance has a significant effect upon both the insured and the insurer in the event of a dispute. The fact which would influence the decision of a prudent insurer in deciding as to whether or not to accept a risk is a material fact.

22. This issue of 'material fact' or 'good faith', in relation to the concept of insurance, has been, many a times, discussed by Hon'ble the Supreme in its various judicial dictums. We may, for the purpose of ready reference and to support our view, take note of some of such decisions.

23. In case titled ***'Satwant Kaur Sandhu v. New Indian Assurance Company Limited'***; (2009) 8 Supreme Court Cases 316, at Paragraph Nos. 22, 23 and 25, while dealing with the issue of 'material fact', the Apex Court of the country has held that:

> *"22. The term "material fact" is not defined in the Act and, therefore, it has been 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".*
>
> *23. As stated in Pollock and Mulla's Indian Contract and Specific Relief Acts:*
>
> > *"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."*
>
> *25. The upshot of the entire discussion is that in a Contract of Insurance, any fact which would influence the mind of a prudent insurer in deciding whether to accept or not to accept the risk is a "material fact". If the proposer has knowledge of such fact, he is obliged to disclose it particularly while answering questions in the proposal form. Needless to emphasize that any inaccurate answer will entitle the insurer to repudiate his liability because there is clear presumption that any information sought for in the proposal form is material for the purpose of entering into a Contract of Insurance."*

24. In the case of '***Oriental Insurance Company Limited v. Mahendra Construction'***; AIR 2019 Supreme Court 2182, the Hon'ble Supreme Court has, at Paragraph No.11, observed as under:

> *"11. In our view, this line of reasoning of the NCDRC is flawed. Insurance is governed by the principle of utmost good faith, which imposes a duty of disclosure on the insured with regard to material facts. In MacGillivray on Insurance Law3 the rule concerning duty of disclosure is stated in the following terms:*
>
> *"[Subject to certain qualifications considered below], the assured must disclose to the insurer all facts material to an insurer's appraisal of the risk which are known or deemed to be known by the assured but neither known or deemed to be known by the insurer. Breach of this duty by the assured entitles the insurer to avoid the*

contract of insurance so long as he can show that the non-disclosure induced the making of the contract on the relevant terms…"

Elaborating on the principle, in Life Insurance Corporation of India v Smt. G M Channabasamma4, this Court has held:

"7...It is well settled that a contract of insurance is contract uberrima fides and there must be complete good faith on the part of the assured. The assured is thus under a solemn obligation to make full disclosure of material facts which may be relevant for the insurer to take into account while deciding whether the proposal should be accepted or not. While 3 Twelfth Edition, Sweet and Maxwell (2012) 4 (1991) 1 SCC 357 making a disclosure of the relevant facts, the duty of the insured to state them correctly cannot be diluted…"

In LIC of India v Asha Goel5, a two-judge Bench of this Court held thus:

"12…The contracts of insurance including the contract of life assurance are contracts uberrima fides and every fact of material (sic material fact) must be disclosed, otherwise, there is good ground for rescission of the contract. The duty to disclose material facts continues right up to the conclusion of the contract and also implies any material alteration in the character of the risk which may take place between the proposal and its acceptance. If there are any misstatements or suppression of material facts, the policy can be called into question. For determination of the question whether there has been suppression of any material facts it may be necessary to also examine whether the suppression relates to a fact which is in the exclusive knowledge of the person intending to take the policy and it could not be ascertained by reasonable enquiry by a prudent person." (Emphasis supplied)

In Satwant Kaur Sandhu v New India Assurance Co. Ltd6, a two-judge Bench of this Court held that under a contract of insurance, the insured is under a "solemn obligation" to make a true and full disclosure of information asked for in the proposal form:

"18…Nonetheless, it is a contract of insurance falling in the category of contract uberrimae fidei, meaning a contract of utmost good faith on the part of the assured. Thus, it needs little emphasis that when an information on a specific aspect is asked for in the proposal form, an assured is under a solemn obligation to make a true and full disclosure of the information on the subject which is within his knowledge. It is not for the proposer to determine whether the information sought for is material for the purpose of the policy or not. Of course, the obligation to disclose extends only to facts which are known to the applicant and not to what he ought to have known. The obligation to disclose necessarily depends upon the knowledge one possesses. His opinion of the materiality of that knowledge is of no moment…" (Emphasis supplied)

It was further held there is a clear presumption that any information sought in the proposal form is a "material fact":

"25. The upshot of the entire discussion is that in a contract of insurance, any fact which would influence the mind of a prudent insurer in deciding whether to accept or not to accept the risk is a "material fact". If the proposer has knowledge of such fact, he is obliged to disclose it particularly while answering questions in the proposal form. Needless to emphasise that any inaccurate answer will entitle the insurer to repudiate his liability because there is clear presumption that any information sought for in the proposal form is material for the purpose of entering into a contract of insurance."

Information regarding insurance claims lodged by the respondent for his excavator in the preceding three years was a material fact. The burden of establishing that the insured made a false representation and suppressed material facts lies on the insurer. The insurer has placed on the record the best possible evidence in support of the plea that there was a misrepresentation and a suppression of material facts. The mere disclosure of a previous insurance policy did not discharge the obligation which was cast on the respondent, as the proposer, to make a full, true and complete disclosure of the claims which were lodged under the previous policy in the preceding three years. The proposal form contained a specific question regarding claims lodged in the preceding three years. The respondent was under a bounden duty to disclose that the excavator was previously insured with another insurer and that a claim for damage to the excavator on 12 April 2005 had been settled. It was only in the affidavit of evidence dated 6 January 2017, that the respondent disclosed that New India Assurance Company Limited had paid an amount of Rs 36.66 lakhs by cheque on 23 September 2005. This material fact was suppressed from the proposal form."

25. In ***'LIC v. Smt. G. M. Channabasemma***'; AIR 1991 SC 392, the Hon'ble Supreme Court has held that it is well settled that in a Contract of Insurance, there must be complete good faith on the part of the insured and that the insured is under a solemn obligation to make full disclosure of the material facts before the insurer which may be relevant for the insurer to take a final decision as to whether the proposal should be accepted or not.

26. Looking at the case on hand in the above settled legal perspective, what requires to be stated is that the Insurance Companies had, among others, sought information with respect to the use of the premises as well as about any previous insurance policy(ies) obtained by the complainant/ insured. 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 an insurance cover despite the occupation of the premises by the terrorists and there being simultaneous cover of insurance is a decision which was required to be taken by the insurer after duly considering all relevant facts and circumstances. Both; occupation of the premises in question by the terrorists prior to the relevant date as well as the simultaneous insurance cover with the other Insurance Company, were material to the 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, chosen to obtain two different insurance policies with regard to the same premises. Such a fact is sufficient to put the insurer to enquiry.

27. Learned counsel, appearing on behalf of the insured/ complainant, submitted that all the material and relevant information, as sought by the insurer, was furnished by the proposer in the proposal form.

However, having gone through the entire material evidence on record, it is sufficient for us to hold that the information which was sought by the insurer, in the shape of occupation of the premises at the time of insurance and simultaneous insurance cover with other Insurance Company, was indeed material to its decision as to whether or not to undertake a risk. The proposer, while making a declaration, was aware of the fact that if any of the statements so made by him was untrue; or inaccurate; or if any information material to the proposal was not disclosed, the insurer may cancel the contract and forfeit the premium.

28. We are, also, not impressed with the submission of the learned counsel for the insured/ complainant 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. Accordingly, we are of the view that the failure of the insured/ complainant to disclose the occupation of the premises by the terrorists as well as the existence of the simultaneous policy of insurance obtained from the other Insurance Company with regard to the same premises entitled the insurer to repudiate the claim under the policy.

29. Having scanned and scrutinized the evidence adduced by the parties before the Commission as well as the law governing the subject, as discussed hereinabove, we are of the considered view that the Commission has erred in arriving at the conclusion so reflected in the impugned order, which is not only contrary to evidence on record, but also the law governing

the subject. That being so, the order impugned, being full of legal infirmities, cannot withstand the test of judicial scrutiny, as such, is declared as illegal.

VI. Result:

30. For the reasons which we have adduced hereinabove, we are of the view that the Commission was in error in allowing the complaint filed by the complainant. We, accordingly, set aside the impugned order dated 31st of May, 2013, passed by the Commission, as a necessary corollary whereof, the appeals filed by the National Insurance Company Ltd., being MA No. 140/2013, and the Oriental Insurance Company Ltd., being MA No. 139/2013, shall stand ***allowed***; whileas the one filed by the complainant, being MA No. 120/2013, shall stand ***dismissed***. The consumer complaint filed by the complainant before the Commission shall also stand ***dismissed***, accordingly.

31. Award amount, if any deposited, before this Court be returned to the concerned Insurance Company through cheque(s).

32. Registry to place a copy of this judgment on each of these appeals. It shall also send down the records of the Commission with utmost dispatch, alongwith a copy of this judgment.

(Vinod Chatterji Koul)
Judge

(Ali Mohammad Magrey)
Judge

SRINAGAR
June 22nd, 2020
"TAHIR"

i. *Whether the Order is speaking?* *Yes/No.*
ii. *Whether the Order is reportable?* *Yes/ No.*