



A CRITICAL ANALYSIS OF LAW RELATING TO LIFE INSURANCE BUSINESS IN INDIA

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ABSTRACT

Yakshaprashna in Mahabharata – “What is the most wonderful thing in the world?” – *Yaksha* asked *Yudhishtira* in the Epic ‘*Mahabharata*’. *Yudhishtira* replied, “The most wonderful thing in the world is that men seeing every day the dead being carried to the burial ground, still imagine that they are eternal”. Death is a sublime theme of reflection and is a natural phenomenon. Therefore, one should not be distressed for what is inevitable and unavoidable, observed Shri Krishna in the *Bhagvad Geeta*¹.

Man is exposed to various risks to his person and interests, not just from the cradle but from the time of his conception itself. If man is engaged in business, he has to struggle against many more risks. These risks, while many of them are natural, some arise out of his economic activities which have to be overcome. The instinct of human beings to survive has moved him to create appropriate means of handling these hazards. The present economic progress is ample proof of the measure of his success in this endeavor. Insurance has earned the place of pride as the financial source of industry and commerce.

INTRODUCTION :

Insurance is one form of risk management and is used primarily to hedge against the risk of a contingent, uncertain loss. Insurance is defined as a reasonable transfer of the risk of loss, from one entity to another, in exchange for payment. Insurance is basically an arrangement where the losses experienced by some are extended among many who are exposed to similar risks. It is a protection against financial loss that may occur due to an unforeseen event.³ The transaction involves the insured assuming a guaranteed and known, relatively small loss in the form of payment to the insurer in exchange for the insurer's promise to compensate or indemnify the insured in the case of a large, possibly a shocking loss. The insured enters into a contract called an insurance policy which gives detail about the conditions and circumstances under which the insured will be compensated.

LIFE INSURANCE POLICIES AS PROPERTY :

A policy of Life Insurance is a movable property and it is also an actionable claim, the transfer of which is regulated by Section 38 of the Insurance Act, 1938 -

- The General Clauses Act, 1897 defines in Section 3(36); the term ‘Movable Property’ shall mean property of every description except immovable property,
- Whereas section 3(26) of the same Act defines ‘Immovable property’

¹ *The Beginning* (Life Insurance Compendium 1999-2000)(The Insurance Time, Calcutta, India) at page 3

as include land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth',

- Further, a contractual right to receive or recover a debt, money or

damages for a breach of contract is *a chose in action* under the English Law coming under the category of personal property. The Transfer of Property Act adopts the expression 'actionable claims' in the place of '*chose in action*' but the expression has been defined as – 'A claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property or to any beneficial interest in movable property not in possession, actual or constructive, which the Civil Court recognizes as affording grounds for relief, whether such debt or beneficial interest be exist, accruing, conditional or contingent'.²

The mere deposit of a policy will not create any charge in favour of the person with whom it is deposited. Where, therefore, a policy is offered as security for loan, a written instrument in the nature of an assignment will be necessary. A loan within the surrender value of the policy is an investment approved under Section 27A of the Insurance Act, 1938.³

The 'assignment' of a Life Insurance policy means the act of transferring the rights of property in the policy from one person to another. The person who transfers his right is called the 'assignor' and the person whom the right is transferred is called the 'assignee'.

Thus, apart from security in case of death, retirement etc., the Life Insurance policy also provides as a facility for raising loan and hence proved as a real purpose of being a property.

RIGHTS UNDER LIFE INSURANCE POLICIES:

Following are the various rights of the insured on his/her life insurance policy, exercise of these rights etc.

Right of assignment - The term 'assignment' ordinarily means a transfer of property by writing as distinguished from one by 'delivery'. The 'Assignment of a Life Insurance policy' means the act of transferring the rights of property in the policy from one person to another. The person who transfers his right is called the 'assignor' and the person whom the right transferred is called the 'assignee'.

Right of nomination - The proposer is the person with whom the contract of insurance is made and in most of the cases the proposer is also the life assured. While proposing for insurance, the proposer would normally designate himself as the person to whom the proceeds of the resulting policy shall be

payable and in accordance with the wishes of the proposer, the amount secured by the policy shall be payable to the proposer or his estate.⁴

The life assured, when he himself is the policy holder, is competent during his lifetime to transfer the policy to any person in accordance with the procedure prescribed by law. But in the absence of any law, he may not be competent to designate a person to receive the policy money on his death. But Section 39 of the Insurance Act, 1938 enables him either at the time of effecting the insurance or any time subsequent thereto to nominate any person to receive the policy money in the event of his death. A nomination may be changed or cancelled by an endorsement or by a will.

² P. S. Madhyastha and *et al*, *Legal Aspects of Life Insurance*, (Reprint August 2006) (Insurance Institute of India, Mumbai) at page 104.

³ K.S.N.Murthy & Dr. K.V.S.Sarma, *Modern Law of Insurance in India* (4th ed. 1995) (LexisNexis Butterworths India, New Delhi) at page 137

⁴ P. S. Madhyastha and *et al*, *Legal Aspects of Life Insurance*, (Reprint August 2006) (Insurance Institute of India, Mumbai) at page 120.

Loss of policies - If the policy be lost or destroyed, a suit may nevertheless be instituted to recover the money secured thereby provided that secondary evidence of its terms may be adduced. The insurer will ordinarily issue a duplicate policy where the original is irretrievably lost, damaged or mutilated. A duplicate policy confers on its owner the same rights and privileges as the original policy.

BENEFITS OF LIFE INSURANCE:

There are various benefits of the life insurance contract and are as below:

From economic perspective, life insurance eliminates worry and improves production – In order to eliminate the speculative element and reduce violent fluctuations in the losses shared from year to year, it is necessary to apply the principle of large numbers to the insurance operation. The basic principle is that larger the number of separate risks of a like nature combined into one group, the less uncertainty there will be incurred within a given period.⁵

Although life insurance serves indirectly to increase the productivity of the community by eliminating worry and increasing initiative, its direct economic function is to change uncertainty into certainty and thus enable the insured to transfer the hazard of premature death to the insurer at the lowest possible cost.

Life insurance encourages savings – A policy of saving can yield only a small amount at the start, while a policy of insurance from its beginning guarantees the full face value and thus safeguards the policyholder against failure through early death, to have sufficient time to save adequately through other channels. For instance, if one is able to save Rs.500 annually, it will take nearly twenty years to accumulate a fund of Rs. 10,000, assuming that the accumulations are safely invested annually at 4 percent, compound interest.

Yet, the resolution of the head of the family to protect the home with such a savings fund contingent upon his surviving the full period and might be defeated by death before the savings have reached any appreciable sum. To depend entirely on saving as a means of providing for the future of the family is, to say the least, a highly uncertain policy to pursue. The first requisite in providing for the future support of dependents is absolute certainty, and this can be secured only by using life insurance as a protection against the possible failure to continue the annual accumulations to the savings fund because of early death. Through life insurance the suggested fund of Rs.10, 000 can be assured in any case.

PRIVATIZATION OF LIFE INSURANCE BUSINESS IN INDIA

The Indian life insurance business before nationalization -

Life insurance began in 1871 with the 'Bombay Mutual' as the first Life Insurance Company in India. From 1900 to 1912, during the *Swadeshi* movement, the Indian entrepreneurs introduced their own insurance companies to drive away the English insurance companies, or companies which were exclusively owned by the British shareholders. Many life insurance offices were established with totally Indian capital. Thereafter, there was mushroom growth of life insurance companies, which could be controlled by the Indian Life Assurance Act, 1912. The Government of India was under a statutory obligation according to this law, to the performance of life insurance companies in India till 1914 are published.⁶

The small insurance companies could not withstand the losses after the First World War. Only a few survived the economic slump in the post-war period.

S.C. Sen, a special officer, was appointed to study and investigate the insurance business and report to the Government. Thereafter, under the chairmanship of N.

⁵ K.C.Mishra and C.S.Kumar, *Life Insurance : Principles and Practice*,(2009) (Cengage Learning India Pvt. Ltd., New Delhi) at page 7.

⁶ Madabhishi Sridhar, "The second phase of reforms in Insurance sector : conflicts and controversies", (April 2007), *The ICAI Journal of Insurance Law* 15.

N. Sircar, a Commission was constituted to draft a bill based on the analysis of suggestions in the report of S. C. Sen. In 1937, a draft bill was prepared which was approved as the Insurance Act, 1938. Insurance law evolved comprehensively during 1928 to 1956. The Insurance laws were modified during this period to develop new products, to attract new customers and introduce professionalism in the business. The insurance business expanded to include different varieties of marketable products and the companies made huge profits between 1935 and 1956, which required from time to time modifications and alterations in the law because of peculiar nature of insurance business and professional competency was felt essential to be introduced. For making it pr

The Insurance Act, 1938 :

The insurance law was further strengthened and consolidated in 1938, with five parts and eight schedules. It has given power to direct, advice, caution, prohibit, investigate, search, prosecute, seize, fine, amalgamate, authorize, register and liquidate the insurance companies, if they failed to pursue their objectives. The new Act gave some sort of stability and certainty besides a possibility of constant regulation. Though the Insurance Act, 1938 provided comprehensive regulatory mechanism, the LICI Act, 1956 itself contained internal regulatory measures. Except postal Life Insurance, no other organization was allowed to engage in Life Insurance. This imposed strong checks on insurance companies both foreign and domestic, which led to discontinuation of several foreign companies in India.

Values of nationalist struggle and market demands:

With the nationalist struggle and demand for *Swadeshi* governance, the Indian companies consolidated their business with less interference from foreign business undertakings. As the business expanded, heavy funds were collected as premium and huge funds were available with insurers. The State felt that there was no control over the funds that were with the insurance companies and their misutilization. In 1945, the government appointed the Committee under the Chairmanship of Cowasji Jahangir to study the existing situation and suggest remedies. This resulted in regularization of investments. The object of the Committee appointed in 1945 was to study the insurance business and to suggest possibility of controls to find the remedy in the situation arising out of misutilization.⁷

RULES OF ESTABLISHMENT OF PRIVATE LIFE INSURANCE COMPANIES IN INDIA:

Following are the requirements to be complied with, by a private life insurance company interested to carry its business in India:-

Minimum capital requirement -

A private life insurance company must have minimum capital of Rs. 100 crores. The promoter may have 26 percent to 40 per cent of the paid-up capital but no other entity shall hold more than one per cent equity in the company.⁸

Life and General Insurance Business -

No new private life insurance company, either Indian or foreign would be allowed to transact both life and general insurance business. The most important condition recommended was that all foreign entrants shall float an Indian subsidiary and enter into joint-ventures with Indian companies.

Percentage of Foreign equity -

The foreign equity in Indian firms shall be restricted to 26 percent and Indian foreign companies shall not be allowed to participate in insurance sector unless they enter into joint ventures with Indian parties.

⁷ Madabhishi Sridhar, "The second phase of reforms in Insurance sector : conflicts and controversies", (April 2007), *The ICAI Journal of Insurance Law* 16.

⁸ Rajiv Jain, *Insurance Law and Practice* (2nd ed.2006)(Vidhi Publishing Ltd., New Delhi) 1.9.

Participation of Co-operative sector -

The Co-operative sector also has been allowed to enter into insurance market. Each State shall permit Co-operative society to transact business. General insurance business may be conducted by the Co-operative Society both at State and National levels.

3.1 IMPLEMENTATION OF WTO'S OBLIGATIONS IN INDIA:

India is a founder member of the GATT(1947); it actively participated in the Uruguay Round Negotiations, and is a founder member of the WTO. India strongly favours the multilateral approach to trade relations and grants Most Favoured Nations treatment to all its trading partners, including some who are not members of WTO.

India participated actively in the last Ministerial Conference held in Singapore. Within the WTO, India is committed to ensuring that the sectors in which the developing countries enjoy a comparative advantage are adequately opened up to international trade, and also that the Special and Differential Treatment Provisions for developing countries under the different WTO Agreements are translated into specific enforceable special consideration, in order that developing countries are facilitated in their developmental efforts, India feels that the multilateral system would itself gain if it adequately reflected these concerns of the developing countries, so as to create the necessary environment to enable developing country members to catch up with their developed country counterparts.

Since 1999, the Indian insurance market has undergone major structural changes. The government monopoly was dissolved; private companies were permitted to operate in India. When economic reforms were thought of in India

way back in 1991 one of the priority sectors for privatization and reforms considered by the Government was insurance sector.⁹ Following are the impacts in various fields in India, according to the WTO agreement:-

- decrease of peak and average tariffs on manufactured products and
- commitments to phase out the quantitative limitations over a period as these were considered non-transparent measure in any country's policy structure.

The result of this agreement as mentioned earlier was restricted, as GATT was only an agreement and there was no enforcing agency to strictly implement the clauses and punish the country which breaks the clauses. Thus the effect was partial. However, with WTO coming into effect, the competition from imports for the domestic firms has amplified. Hence, it is very clear that only those firms that have competitive advantage would be able to continue to exist in the long run and those firms which are weak would lose colour in the process.

The globalization of trade in services is an important objective of India as a signatory to the agreement establishing the WTO. The WTO W/120 sectoral classification list¹⁰ divide financial services into (a) all insurance and insurance related services and (b) banking and other financial services. The former is further divided into life, accident and health insurance services; non-life insurance services; reinsurance and retrocession; insurance intermediation; and services auxiliary to insurance.¹¹

⁹ Dr. G Bharathi, "World Trade Organization - Understanding its Implications for India" available at http://www.indianmba.com/faculty_column/fc203/fc203.html accessed on 16/07/2011.

¹⁰ It is pertinent to note that the W/120 differs from the CPC in the following ways (among others):

(a) accident and health insurance are included in "life" insurance instead of "non-life" insurance, as in the CPC; (b) reinsurance and retrocession, which were not specifically mentioned in the CPC and were part of a residual category "other insurance services n.e.c.", have been separated out

¹¹ Dr. G Bharathi, "World Trade Organization - Understanding its Implications for India" available at http://www.indianmba.com/faculty_column/fc203/fc203.html accessed on 16/07/2011.

Trade Related Intellectual Property Rights (TRIPS) -

An intellectual property right related to any creation of human mind which gets legal recognition and protection such that the creator of the intangible is protected from illegal use of his creation. TRIPS is an agreement over the protection of this intellectual property rights. This agreement includes many categories of property such as Patents, Copyrights, Trademarks and Geographical indications, Designs, Integrated circuits and Trade secrets.

Since the law for these intangibles vastly varied between countries, goods and services traded between countries which incorporated these intangibles faced harsh risk of infringement. Therefore the agreement stipulated some fundamental uniformity of law among all trading partners. This required appropriate amendment in the domestic Intellectual Property Right laws of each country. Since this process is not a easy one, a time period of 10 years was given to the developing countries.

As a result, in India there was a requirement of amendment to the Patents Act, 1970, Trade and Merchandise Mark Act, 1999 and the Copyright Right Act, 1957. Besides these main laws, further related laws also required changes.

The main effect of this is on industries such as pharma and bio-technology, because now with the law in place, it is not possible to reverse engineer the existing drugs and formulae, change the process and produce the same product.

Now, new investment in fresh research is required. This is quite a burden for undersized industries and there is a possibility that they are thrown out of business due to competition. Besides these, the technology transfer from abroad is expected to become costly and difficult.¹²

In India; strict execution of law is very important, otherwise there could be disastrous effect on the revenue of industries which invest millions of rupees in research and development if their products get infringed.

Agreement on Agriculture (AOA) –

The Agriculture is one of the most secured sectors in all the countries without any exceptions, and therefore an agreement on the agricultural issues have always been debated strongly by all the countries involved in trade in agriculture. The agreement on agriculture deals with market access, Export subsidies and government subsidies.

Agreement on Sanitary and Phyto-sanitary Measures (SPM) -

This agreement refers to limiting exports of a country if they do not comply with the international standards of germs/bacteria etc. If the country suspects that allowing of such products inside the country would result in the spread of disease and pest, then there is every right given to the authorities to obstruct the imports.

Indian standards in this area are already legislated and therefore there is no need to change the law, but the problem is that of strict implementation of the laws. There is an urgent need to teach the exporters regarding the changing scenario and standards at the international arena, and look at the possible outcome and losses to be incurred if the stipulations are not followed. Therefore, to meet the standards some operational changes are required in the industries such as food processing, marine food and other packed food that is being currently exported from India.¹³

¹² Dr. G Bharathi, “World Trade Organization - Understanding its Implications for India” available at http://www.indianmba.com/faculty_column/fc203/fc203.html accessed on 16/07/2011

¹³ Dr. G Bharathi, “World Trade Organization - Understanding its Implications for India” available at http://www.indianmba.com/faculty_column/fc203/fc203.html accessed on 16/07/2011.

Besides these major agreements there are several other agreements such as agreement on market access, which propagates free market access to products and reduction of tariff and non-tariff barriers; agreement to have safeguard measures if there is an import flow and it is liable to affect the domestic industries in the transition economies.

The trading countries are permitted to impose an Anti-Dumping Duty (ADD) against imported products if the charge of Dumping is claimed against them. The requirement is to prove that the product is being sold at a price, which results in substantial injury to the domestic industries. There are several cases in which the duty is imposed but it still remains to be established by the Dispute Settlement Tribunal in case the other trading party opposes the duty imposed as "unfair". However, the proposal always should come from the representatives of the industries affected; this may result in a problem, as voice of small industries may remain unheard in the process.

Service sector -

The service sector accounts for about 40 percent of India's GDP, 25 percent of employment and 30 percent of export earnings. Recognizing the importance of the service sector in achieving higher economic growth, the government is giving added emphasis to improving services such as telecommunications, shipping, insurance, roads, ports and air transport. The foreign direct investment regime has been liberalized to attract foreign investment in the services sector. However, a path of gradual liberalization has been adopted so as to have wider acceptability of the reform process.

India actively participated in the Uruguay Round services negotiations and made commitments in 33 activities as compared to an average of 23 for developing countries. India also participated in the spill-over negotiations. In basic telecommunication services, India has undertaken commitments in the areas of voice telephone service for local and long-distance (within the service area), cellular mobile services and other services such as circuit switched data transmission sources, facsimile services, private leased circuit services as per details given in the schedule of commitments. India also participated in the recently concluded financial services negotiations and improved its offer by enhancing the annual limit for foreign bank branches from 8 to 12 and withdrawing India's MFN exemptions relating to banking services.

While developed countries have surplus capital to invest, most of the developing countries have surplus of skilled, semi-skilled and unskilled workers. There is a large number of well-qualified professionals capable of providing services abroad available. As developed countries have a comparative advantage in exporting capital intensive services, similarly developing countries have a comparative advantage in exporting labour intensive services involving movement of persons. While GATT recognizes "movement of natural persons" as one of the modes for supply of services, the commitments undertaken by the developed countries have very little to offer to the developing countries in terms of opening their markets or facilitating the administrative arrangements or providing national treatment in the area of movement of natural persons.

In Article IV of GATT, there is a clear obligation to increase the participation of developing countries in trade in services. Therefore, in order to achieve required balance in GATT and increase the participation of developing countries in trade in services as per Article IV of GATT, the developed countries should undertake a higher level of commitments on movements of natural person's mode and other areas of export interest to the developing countries.

Environment -

With the rapid increase in the international trade and consequent increase in cross-border movement of products, the linkage between trade and environment has become a relevant issue for the international community. GATT/WTO being the chief trade body addressing international trade issues has taken cognizance of it. Already certain Agreements within WTO, such as the Agreement on Technical Barriers to Trade, and the Agreement on Sanitary and Phytosanitary measures have addressed environmental issues to some extent.

Information Technology -

During the Singapore Ministerial Conference, a Ministerial Declaration on Trade in Information Technology Products was adopted. This Declaration aims to expand world trade in information technology products. India participated in the negotiations on the Agreement from the early stages and after examination of the implications of the proposed agreement and extensive discussions with trading partners joined as a participant on 1st April 1997. India is committed to phasing out the import tariffs on the products covered by the Information Technology Act, 2000 as scheduled.¹⁴

CONCLUSION

The research always has the purpose of innovating new conclusions from the analyzed data. In this chapter the researcher is concluding the finding of her study on the basis of analysis of material and data screened in accordance with the hypotheses evolved in the initial chapter. Hence, the study will attempt to give conclusions in comprehensive manner. The research in general is always useful for the society, public, academicians, students, legislators and this research also definitely help the various stakeholders in the life insurance field. This chapter also gives suggestions to the concerned members of the life insurance sector like life insurance companies, regulatory bodies etc. In the form of this research, the researcher focuses on the future legal challenges before the life insurance players in the world market.

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