Bombay High Court
Insure Policy Plus Services ... vs The Life Insurance Corporation Of ... on 22 March, 2007
Equivalent citations: 2007 (109) Bom L R 559, 2007 79 SCL 583 Bom
Author: F Rebello
Bench: F Rebello, A V Mohta
JUDGMENT F.I. Rebello, J.

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1. The 1st Petitioner, a Company registered under the Companies Act, is engaged inter alia in the business of assignment of life insurance policies issued by the 1st respondent. The 2nd petitioner is the Director and shareholder of 1st petitioner. The 1st respondent is the statutory corporation established under Section 3 of the Life Insurance Corporation Act, 1956 which hereinafter shall be referred to as the Life Insurance Act. The respondent No. 2 is the statutory authority established under Section 3 of the Insurance Regulatory & Development Authority Act, 1999 which hereinafter shall be referred to as IRDA. According to the petitioners, their business involves acquiring life insurance policies from the policy holders by paying value consideration to the policy holder. An Insurance policy would be assigned by the policy holder to the 1st petitioner in lieu of valid consideration. The assignment will be registered and recorded in the books of the 1st respondent. The 1st petitioner would further assign the said insurance policy to a third party for consideration. The said further assignment would again be registered and reflected in the books of the 1st respondent. This business of assignment of life insurance policy is important and essential characteristics of the life an insurance contracts. A life insurance policy is the personal movable property of the policy holder. The assignment of policies has led to the business of acquisition of life insurance policies the world over and has been prevalent including in India for a considerable period of time. In U.K. the current size of the business is estimated to be 2 billion sterling pounds (approximately Rs. 15,000 crores). The size of U.S. Market is estimated at 134 billion dollars. European market has an exclusive Endowment Fund of over 300 million pounds. The 1st petitioner understood that such business was legally permissible in India, by virtue of the provisions of Section 38 of the Insurance Act. Before commencing business the 1st petitioner had discussed with the 1st respondent who confirmed that the business of assignment of insurance policies was legally permissible in India. The first petitioner before incorporation was a partnership firm carrying on business in the name of Policy Plus International. The 1st petitioner was incorporated in April, 2003 for carrying on the said business and has spent a sum of Rs. 358.90 lakhs. The 1st petitioner has also spent Rs. 183.14 lakhs on software development, marketing and administrative functions. The 1st respondent during the said period of 3 years, recorded the assignment of life insurance policies which were assigned to the 1st petitioner or assigned by the 1st petitioner in favour of some other person, without any demur or objection. Sometime in January/February, 2003 several branches of the 1st respondent in the Nasik Division, refused to accept notices of assignments lodged by the 1st petitioner. The 1st petitioner addressed various communications to officers of respondent No. 1, complaining about this refusal by the Page 0565 Nasik Division to accept the notices of assignments lodged by the 1st petitioner. Pursuant to this correspondence the Regional Manager(Marketing) of the 1st respondent addressed letters to the Senior Divisional Manager of the Nasik Division and quoted from the opinion of their legal department, which had opined that the assignment of life

insurance policy was permissible under Section 38 of the Insurance Act, 1938. Inspite of this the Nasik Division refused to accept the notices of assignment. On 22nd October, 2003 the 1st respondent issued a Circular, directing that the assignment in favour of companies trading in insurance policy should be declined. In one of the letters addressed to the 1st petitioner, it was stated that the assignment was not permissible in favour of the companies who were only trading in insurance business.

2. Apart from the provisions of Section 38 of the Insurance Act, it is set out that the policy is movable property and the policy holder being the sole owner of that property, has right to deal with it in any manner which benefits him/his family. The policy holder enjoys full ownership and control over the Life Insurance Policy and the assignment can be way of purchase, sale or natural love and affection. Inspite of correspondence, various authorities of the 1st respondent have continued to refuse registration of assignment made in favour of Respondent No. 1. Apart from the petitioner No. 1, the policy holders also have addressed communications to respondent No. 1. The petitioners also addressed complaints to the 2nd respondent about the behaviour of respondent No. 1 to refuse to register the assignment of Life Insurance Policies. The respondent No. 2 by letter of 3rd March, 2004 after examining the provisions of the Insurance Act, 1938, has opined, that the respondent No. 1 should register the assignment of policies. Relying on the said letter of 3rd March, 2004 the respondent No. 1 was requested to register the assignments. The respondent No. 1, however, refused to assign the insurance policies. After the petition was filed the respondent No. 1 has issued another Circular on 2nd March, 2005 reiterating what was set out in the Circular dated 22nd October, 2003.

3. It is the petitioners case that merely because the petitioners have no insurable interest in the life of the assured, does not make the assignment in favour of the petitioners bad in law. The 1st respondent permits assignment of life insurance policies in favour of banks and financial institutions, who hold it as a security. The banks and financial institutions do not have any insurable interest in the life of the assured. When the contract of life insurance is entered into by a party with the 1st respondent, there has to be insurable interest in the life of the assured, the same however, can never mean, that the holder of the life insurance policy cannot of his own free will, assign it to a person who has no insurable interest in his life. It is also pointed out that 1st respondent is only a registering authority which registers the assignment of life insurance policies.

The petitioners by this petition, have sought a declaration, that the Insurance policies issued by respondent No. 1 are tradeable and assignable freely in accordance with the provisions of Insurance Act, 1938 and that the Circular dated 22nd October, 2003 and/or 2nd March, 2005 and the actions of 1st respondent in refusing to register the assignment of life insurance policies Page 0566 in favour of the 1st petitioner are illegal, null and void, being violative of the provisions of the Insurance Act, 1938 and ultra vires Article 14 and 19(1)(g) of the Constitution of India. The petitioners have also sought by way of writ of certiorari, to quash the two circulars as also a writ of prohibition from taking any action whatsoever against the petitioners, their servants and officers. Relief has also been prayed for by way of a writ of mandamus, to issue directions to respondent No. 1, to register the assignments and other inter-connected reliefs, both by way of writ of prohibition and writ of mandamus.

4. Reply has been filed on behalf of respondent No. 1 by Sudhanshu Shekhar, Assistant Secretary (Marketing/CRM). It is set out that on the petitioners own admission the purported transfers/assignments are sought only with a view to further transfer and assign the said policies and, therefore, it is evident that the petitioners do not have any insurable interest in the life insured, which is the essence of a valid contract of a life insurance policy. Insurable interest, it is submitted, is a pecuniary interest arising from the relationship of the party obtaining the insurance, either as creditor or security for the assured, or from ties of blood or marriage to him as will justify a reasonable expectation of advantage or benefit from the continuance of his life or a loss arising out of the extinction of such life. Every contract of life insurance must have a reasonable ground founded upon the relations of parties to each other, to expect some benefit or advantage from the continuance of the life of the assured. In the absence of such reasonable ground, the contract is a mere wager as such policies have a tendency to create a desire for the event and, therefore, independently of any statute on the subject, ought to be condemned as being against the public policy. The assignments which the petitioners seek to register are mere wagering contracts in the absence of any insurable interest in the lives assured and such contracts are expressly declared to be null and void under Section 30 of the Indian Contract Act. The major distinguishing factor is risk of loss. In insurance, the assured is moved to effect a policy by the risk of loss and does not create the risk of loss by the contract itself, as in the case of a pure wager. The sole objective of the 1st petitioner in seeking registration of the assignment is to trade in the policy further, by selling, assigning and transferring the policy. The petitioner No. 1, therefore, cannot be said to be interested in the continued life of the life assured. The experience of the 1st Respondent since 1956, is that life insurance policies are invariably taken for the benefit of the life assured and/or members of his family and whenever the 1st respondent has received requests for registering transfers or assignments, it has invariably been in favour of near and dear ones for love and affection or as collateral security in respect of loans and advances taken by the policy holders. In the case of a bank, which advances a loan against a life insurance policy, the bank/financial institution has insurable interest in the continuance of the life of the assured since the responsibility for paying premium continues with the policy holders and the security continues to be valid and enforceable for the entire duration of the policy. The 1st respondent manuals, instructions and directions recognising transfers and assignments of life insurance policies have been framed to deal with such kind of transfers and assignments, as life insurance policies are securities under the Public Debts Act.

Page 0567 The petitioners comparison with conditions prevailing in other countries is totally unwarranted and unjustified in fact and in law. The 1st Respondent is incorporated as a Statutory Corporation under the provisions of the Life Insurance Corporation Act, 1956, which was enacted for public welfare and as a measure of social security. Under Section 6 of the Act, it is the duty of the 1st respondent to carry on business and exercise its powers to ensure that life insurance business is developed, to the best advantage of the community. The policies issued, by the 1st respondent, are a measure of social security for the family members of the life assured. Though in some parts of the world the policies are assignable, in some States in Canada trafficking in life insurance policies is not only prohibited but is also an offence punishable under the law. All those countries have very effective social security schemes available to financially disadvantaged families and dependence on the proceeds of the life insurance policies is not significant. Various policies have been issued by the 1st respondent, which contain an express prohibition of the transfer or assignment thereof, even if it

is in favour of a family member or a bank. Section 38 of the Insurance Act, it is submitted, is merely a procedural provision and cannot control substantive right of policy holders of the life assured. The policy which has lapsed can be revived only in accordance with the terms of the policy and revival is at the sole discretion of the 1st respondent. The challenge to the scheme dated 22nd January, 2003 and also subsequent Circular it is submitted, is misconceived as such circular has been issued by the 1st respondent in exercise of its powers, duties and functions to safeguard the interests of the policy holders, which is a statutory obligation cast upon the 1st respondent. Implementing public policy and laws enforced in India in discharge of the 1st respondents statutory obligations for the protection of the policy holders cannot be the subject matter of any challenge as formulated by the petitioners. Life Insurance coverage is against disablement or in the event of death of the insured, economic support for the dependants and social security for their livelihood. Reference is then made to what is known as "viatical policies. From the reply filed by the petitioners it would be clear that such policies are not being issued by respondent No. 1.

5. On behalf of respondent No. 2 no reply has been filed. However, learned Counsel has submitted written submissions and contended that he would address the Court based on the documents which are on record. The stand of Respondent No. 2 from the written submissions is that, under the law as it stands, the insurance policies are assignable and the law does not lay down any limitation on such assignments and does not prohibit trading of life insurance policies by way of assignment of policies. If any change has to be brought about, it should be by amending Section 38 of the Insurance Act. Assignment of policy it is submitted considering Section 30 of the Indian Contract Act cannot be termed as a wagering contract. The issue was discussed as an agenda item in a meeting of the Executive Committee of Life Insurance Council held on 9th January,2004 which was attended amongst others by the M.D. of the Respondent No. 1 where most members felt that free trading of policy should be allowed as in U.K. and Australia and if any restrictions are to be brought on such assignments, the same has to be by way of amendment to Section 38 of the Insurance Act. In fact the respondent No. 1 Page 0568 by communication of 29th March, 2004 have sought amendment to the provisions of various Acts. This, it is submitted, is an acknowledgement by Respondent No. 1, that the law as of today is that the policies are assignable.

6. A long time ago Romilly, M.R., in Strokes v. Cowan (1860) 30 LJ Ch.882, observed that "Policies of insurance" "must be considered to be securities for money." The amount payable under a policy of insurance is a debt due from the insurer to the insured on the happening of a certain event or the lapse of a certain time, and the policy is the security for such debts charged upon the property or the stocks or funds of the insurer. A Policy of life insurance represents money due and owing to the assured at his death, and it forms part of his estate. A policy of life insurance can be said to be an actionable claim within the meaning of Section 3 of the Transfer of Property Act and is not a mere right to sue. In a policy of life insurance the sum insured is certain, the premium, or the consideration for its payment is certain and the time when its payment is to become due is certain to come. Even the present value of the policy which is called the surrender value can be calculated. A policy of insurance is a present contract in the hands of the assured of which he has a present right to the benefit although the fruits are to be enjoyed in future. A life assurance policy as such would be property. (Coitton, L.J. in Tucan (1888) 40 Ch. D 5 remarked "It was contended that the policies did not come within the term property but in my opinion, they may be considered as acquired by

purchase during his life. They are contracts by which the policy holder has a right to recover certain sums of money from the insurance office in certain events, and the premium which he pays may be considered as an investment so as to obtain for him a benefit of the policy holder." Life policies are now construed not as contracts of indemnity but to pay a certain sum in a certain event depending on the duration of human life.

7. We may now examine the nature of Life Insurance Policies issued by Respondent No. 1 under Life Insurance Corporation Act, 1956. As the preamble states, it is an act to provide for the nationalisation of Life Insurance in India by transferring all such business to a Corporation established for the purpose and to provide for the regulation and control of the business of the Corporation and for matters connected therewith or incidental thereto. The Statement of objects and reasons sets out, that it was to ensure absolute security to the policy-holder in the matter of his life insurance protection, to spread insurance much more widely and in particular to the rural areas, and as a further step in the direction of more effective mobilisation of public savings. The Life Insurance Corporation is set up, with a share capital provided entirely by the Central Government which will undertake life insurance business in India as a monopoly and into this Corporation will be integrated all the Insurance Companies now engaged in life business, as also the organisations functioning under the control of State Government and conducting such business for the benefit of the public. The objects and reasons clause therefore broadly indicates that the object was to ensure absolute security to the policy holder in the matter of his life insurance protection, to spread insurance much more widely and in particular in the rural areas, and more effective mobilisation of public savings and to conduct such business for the benefit of the public.

Page 0569 The scheme of the Life Insurance Act came up for consideration before the Supreme Court in LIC of India and Anr. v. Consumer Education and Research Centre and Ors. . The issue arose on Prof. Manubhai Shah and another applying for policies under Table 58. Similarly some others had also sought for convertible term insurance plans for different amounts. The agents presented proposals to L.I.C. and promised to cover under Table No. 58, nine crores uninsured households. This was turned down by L.I.C. and as such the parties moved the High Court. The High Court held that part of the conditions under Table 58, as subversive of equality and, therefore, constitutionally invalid. In the appeal preferred, the Supreme Court was pleased to hold that in issuing a general life insurance policy of any type, public element is inherent in prescription of terms and conditions therein. The Court held that the terms and conditions of the contract, if unreasonable, unfair or irrational, would be amenable to judicial review. Dealing with offering insurance on life, it was observed that insurance being a social security measure, it should be consistent with the constitutional animation and conscience of socio-economic justice adumbrated in the Constitution. Life Insurance coverage it was held is against disablement or in the event of death of the insured, economic support for the dependants. At the relevant time a monopoly existed in the Life Insurance Corporation to carry on the business of Life Insurance Corporation and isue policies by virtue of Section 30 of the L.I.C. Act. Payments were guaranteed by the Central Government.

8. An amendment to the Act, came to be introduced by Act 41 of 1999, which introduced Section 30A, whereby the exclusive privilege of carrying on life insurance business given to the Corporation,

ceased from the commencement of the Insurance Regulatory and Development Authority Act, 1999, hereinafter known as Insurance Regulatory Act. The Corporation which was carrying on life insurance business in accordance with the provisions of the Insurance Act, 1938, ceased to have monopoly on Life Insurance business. Consequent thereupon various private companies are in the business of issuing life insurance policies. Under Section 43 of the Life Insurance Act, only certain provisions were made applicable. There was power conferred to apply other Sections as set out therein. Section 30A as introduced by an amendment, however provides, that the provisions of the Insurance Act are applicable for carrying on business of life insurance. An argument has been advanced as to the effect of Section 30A on Section 43, to the extent the provisions of the Insurance Act are applicable to the Corporation. We shall answer that subsequently.

9. It is submitted by the 1st Respondent Corporation, that life insurance policies issued by the 1st respondent are a measure of social security. Under Section 26 of the L.I.C. Act, once in every two years an investigation has to be carried out by actuaries into the financial condition of the Corporation and they have to submit the report to the Government. Under Section 28 of the L.I.C. Act, 95% of any surplus which emerges as a result of the investigation undertaken under Section 26, shall be allocated to or reserved for the life insurance policy holders. After meeting the liabilities of the Corporation under Section 9, the reminder shall be paid to Page 0570 the Central Government or if the Government so directs, utilised for such purpose and in such manner, as the Central Government may determine. Under Section 28A if profit accrues from any business then after making provision for reserve and other matters for which provision is necessary or expedient, the balance of such profit shall be paid to the Central Government. The Corporation, therefore, as an undertaking of the Central Government operates, by giving part of its profits to the Central Government. The Supreme Court in L.I.C. of India (supra), itself had made it clear in pars.20, that the insurer is free to evolve a policy based on business principles and conditions before floating a policy to the general public by offering insurance on the life of the insured. In support of the contention that it is a social measure reliance is placed on the provisions of Section 6, 24, 26, and 37 of the Life Insurance Act as also Section 10(1)(d) of the Income Tax Act, 1971. It is submitted that the sum received under a life insurance policy, including a sum allocated by way of bonus on such policy is exempt from Income Tax. This is a benefit given to insured persons or their dependents in furtherance of the intention to treat life insurance policies as a measure of social security. However, persons trading in life insurance policies will not only derive windfall gains from such trading but will also claim exemption from Income Tax. Reliance is next placed on Section 60(kb) of the Code of Civil Procedure, 1908 to contend that all moneys payable under a policy of insurance on the life of the judgement debtor are declared to be free from attachment and sale in the execution of any decree of a Civil Court. At this stage itself it may be pointed out, that for life insurance policies issued by the private sector also, the provisions of Section 10(1OD) of the Income Tax Act and Section 60(kb) of the Code of Civil Procedure, 1908 applyand those policy holders and assignees derives the same benefit. If the Government has stood as guarantor for the policies issued by L.I.C. that was considering the monopoly created in favour of the Corporation. The Corporation by virtue of Section 28 and 28A was also bound to part with part of the profits in favour of the Government. Consequent to private entry in the business of life insurance it will no longer be possible to contend that the Corporation carries on business of issuing policies as a measure of social security.Like other companies in the business, it is carrying on business, though it may issue policies, whose coverage

may be for sections of society, to whom the Private Companies may not pander. All these dealing in the business of life insurance, are governed by the provisions of the Insurance Act and subject to the authority of the Regulatory Authority under the Insurance Regulatory Act. After Section 30A being introduced into the Life Insurance Act, and coming into force of the Insurance Regulatory Act, business of Life Insurance can be carried on by any company or corporation in terms of the Insurance Regulatory Act. It cannot, therefore, be said that the policies issued by Respondent No. 1 are as a measure of social security.

10. We will now examine the contention, as to whether there is a requirement that there must be insurable interest at the time the policy is taken and also at the time of subsequent assignment and if there be no insurable interest, would the same amount to wager and such policies would, therefore, be against public policy. The law on what amounts to a wagering contract in India, is no longer res integra, considering the judgment of Supreme Court in Page 0571 Gherulal Parakh v. Mahadeodas Maiya and Ors. . The Supreme Court observed that the law as to what constitutes a wagering contract is well settled. The law was expressed thus:

To constitute a wagering contract, there must be proof that the contract was entered into upon terms that the performance of the contract should not be demanded but only difference in prices should be paid. There should be common intention between the parties to the wager that they should not demand delivery of the goods but should take only the difference in prices on the happening of an event.

It is contracts of this nature, where performance is not demanded and only difference in price to be paid, which have been held to constitute a wagering contract. The Supreme Court quoted Sir William Anson with approval for the definition of wager "as a promise to give money or moneys worth upon the determination or ascertainment of an uncertain event" and held that it accurately brings out the concept of wager declared void by Section 30 of the Contract Act. An interesting question was considered whether what is void can be equated with what is forbidden by law. The Supreme Court once again quoted from Sir William Ansons on law of contract as under:

...the law may either actually forbid an agreement to be made, or it may merely say that if it is made the Courts will not enforce it. In the former case it is illegal, in the later only void; but inasmuch as illegal contracts are also void, though void contracts are not necessarily illegal, the distinction is for most purposes not important, and even Judges seem sometimes to treat the two terms as inter-changeable.

The learned Author then proceeds to observe as under:

Wagers being only void, no taint of illegality attached to a transaction, whereby one man employed another to make bets for him; the ordinary rules which govern the relation of employer and employed applied in such a case.

Tracing the law of wager in ancient India and considering the common law of England, the Supreme Court observed, that the common law of England and that of India, have never struck down

contracts of wager on the ground of public policy; indeed they have always been held to be not illegal notwithstanding the fact that the statute declared them void. Even after the contracts of wager were declared to be void in England, collateral contracts were enforced till the passing of the Gaming Act of 1892, and in India, except in the State of Bombay, they have been enforced even after the passing of the Act 21 of 1848, which was substituted by Section 30 of the Contract Act. The moral prohibitions in Hindu Law texts against gambling were not only not legally enforced but were allowed to fall into desuetude. In practice, though gambling is controlled in specific matters, it has not been declared illegal and there is no law declaring wagering illegal. Indeed, some of the gambling practices are a perennial source of income to the State. In these circumstances the Court observed that it is not possible to hold that there is any definite head or principle of public policy evolved by Courts or laid down by precedents Page 0572 which would directly apply to wagering contracts.

Proceeding further the Court then observed as under:

Even if it is permissible for Courts to evolve a new head of public policy under extraordinary circumstances giving rise to incontestable harm to the society, we cannot say that wager is one of such instances of exceptional gravity, for it has been recognized for centuries and has been tolerated by the public and the State alike. If it is has any such tendency, it is for the legislature to make a law prohibiting such contracts and declaring them illegal and not for this Court to resort to judicial legislation.

From the law on Wagering contracts as declared by the Supreme Court, it would be clear that the head of public policy is not available to strike down a contract on the ground that a contract of wager is against public policy.

In Rattan Chand Hira Chand v. Askar Nawaz Jung , the Supreme Court was examining the concept of public policy under Section 23 of the Indian Contract. On facts there it was found that a part of the contract was to influence governmental authorities by expending all amounts necessary for that purpose. The Court held that such a clause could not be severed from the rest of the contract and whilst considering public policy, observed as under:

It cannot be disputed that a contract which has a tendency to injure public interests or public welfare is one against public policy. What constitutes an injury to public interests or welfare would depend upon the times and chimes. The social milieu in which the contract is sought to be enforced would decide the factum, the nature and the degree of the injury. It is contrary to the concept of public policy to contend that it is immutable, since it must vary with the varying needs of the society. What those needs are would depend upon the conscious value Judgment of the enlightened Sections of the Society. Those values may sometimes get incorporated in the legislation, but sometimes they may not....

This proposition, considering the judgment in Gherulal Parakh (supra) will be of no assistance to extend the public policy doctrine to a contract of life insurance which is alleged, amounts to a wagering contract, if assigned to a person having no insurable interest.

11. We may now consider some judgments, cited at the Bar, as to how the law on insurable interest is understood in the United States.

In The Aetna Life Insurance Company v. David France and Lucetta P. 94 US 1876, one Andrew J. Chew had taken out a policy, with a stipulation and agreement that the money shall be payable to Lucetta, his sister. On death of Andrew, Lucetta took out an action on failure by the Insurance Company to honour the terms of the policy. One of the issues raised was, want of insurable interest in Lucetta France The Court held that when a brother takes out a policy on his own life, for the benefit of his sister, it is totally immaterial what arrangement they choose to make between them about the payment of the Page 0573 premiums. The policy is not a wager policy. While deciding the issue, the Court held "As held by us in the case of the Ins. Co. v. Schaefer, just decided, any person has a right to procure an insurance on his own life and to assign it to another, provided it be not done by way of cover for a wager policy...."

Learned Counsel for the Respondent Corporation, therefore contends that there must be an insurable interest in the assignee and the assignment should not be by way of wager. Reliance for that is placed in the judgment in Basil F. Warnock v. George Davis 104 US 771. The insured Henry L. Crosser had assigned the policy in favour of the Scotia Trust Association for nine tenths of the amount due and payable on the policy. The consideration was the Trust paying the premiums on the policy. On Crossers death, nine/tenth was paid to the Trust and the balance to the widow. Proceedings were initiated to recover the rest. One of the contentions raised was, that the policy could be assigned for the sums lent or advanced but not assignable for any other purpose. The Association it was, submitted had no insurable interest. The issue was what was insurable interest. Justice Field delivering the opinion observed: "It is not easy to define with precision, what will constitute an insurable interest, so as to take the contract out of the class of wager policies. The Court held "It may be stated generally however, to be good interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation or benefit due from the continuance of life.... But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such problems have tendency to create a desire for the event. They are, therefore, independently of any statute on the subject condemened as being against public policy.

The assignment of a policy to a party not having an insurable interest is as objectionable the taking out of a policy in his name. Nor is its character changed because it is for a portion merely of the insurance money. To the extent in which the assignee stipulates for the proceeds of the policy beyond the sums advanced to him, he stands in the position of one holding a wager policy...."

The Judgment in Aetna Life Ins. Co. (supra) (supra) and Warnock v. Davis (supra) came up for consideration before the U.S. Supreme Court in Grigsby v. Russel 222, US 149. The issue arose on an interpleader suit brought by the Insurance Company as to whether proceeds of the policy should be paid to his administrator or to an assignee. Justice Holmes, writing the opinion observed:

The very meaning of an insurable interest is an interest in having the life continue and so one that is opposed to crime. And, what perhaps is more important, the existence of such an interest makes a roughly selected class of persons who by their general relations with the person whose life is insured are less likely than criminals at large to compass his death.

Page 0574 The Court then proceeded to observe:

But when the question arises upon an assignment it is assumed that the objection to the insurance as a wager is out of the case.

The Court then held:

But this being so, not only does the objection to wagers disappear, but also the principle of public policy referred to at least in its most convincing form. The danger that might arise from a general license to all the insure whom they like does not exist.

Obviously it is very different thing from granting such a general license, to allow the holder of a valid insurance upon his own life to transfer it to one whom he, the party most concerned, is not agreed to trust. The law has no universal cynic fear of the temptation opened by a pecuniary benefit accruing upon a death.

The Court then noted that life insurance has become one of the best recognised forms of investment and self compelling saving and so far as reasonable safety permits, it is desirable to give to life policies the ordinary character of property. Further dealing with the issue of insurable interest, the Court held:

To deny the right to sell except to persons having such an interest is to diminish appreciably the value of the contract in the owners hand.

W. Warnock (supra) was considered, as also Connecticut Mutual Life Ins. Co. v. Schaefer 94 US 457, where the Court had held "On the other hand it has been decided that a valid policy is not avoided by the cessation of the insurable interest, even as against the insurer, unless so provided by the policy itself." The Court then noted that the law in England and the preponderance of decisions of the States in U.S. A. are on the same side as the view taken by the Court and did not approve of the view in Warnock v. Davis.

The law in the U.S.A. ever since from Grigsby is, that though there has to be an insurable interest when the policy is taken out, there is no requirement of insurable interest at the time of transfer of assignment. This view has been followed ever since. We may make reference to the case of Frances II, Butterworth and M.E. Turner, Co-Trustees of A.C. Butterworth v. Mississippi Valley Trust Company and Mississippi Valley Trust Company, Lexsee 240 SW 2D 676, of the Supreme Court of Missoori. One Butterworth had a certain policy of term life insurance issued by Fidelity Mutual Life Insurance Company. The policy was assigned by Butterworth to one G. Locke Tarlton. Tarlton by another assignment assigned the policy to himself, O.E. Sehaefer and the Trust Company as

Trustees. G.Locke Tarlton died testate. Butterworth purported to assign his interest in the policy to the Trust Company and M.E. Turner, as Trustees of the Butterworth Trust. On November 5, 1947 Asa C. Butterworth died testate and the policy became payable. On December 15, 1947 the Trust Company as co-trustee of the Tarlton Trust, collected the amount of the policy and accrued dividends. The proceedings were initiated at the instance of the heirs of Butterworth. One of the contentions urged was that Tarlton Trust had no insurable interest in Butterworth and that Page 0575 Tarlton Trust was engaged in a wager transaction contrary to public policy. The Court stated thus:

Simply stated, it is widely held to be against public policy to permit the temptation to speculate in human life by means of the beneficiary securing a contract of insurance in which the beneficiary may profit solely by the death of the insured. A man may not take out insurance on the life of one not so connected with him as to make the continuance of the life of the insured a matter of interest and concern to him.

The Court then held :

The wager life insurance contract rule, which plaintiffs assert has here ben violated, applies where a policy has been taken out by, and the premiums paid by a person who has no insurable interest in the life of the insured, or when it has been assigned for speculative purposes.

While holding that there must be an insurable interest at the time when the policy was taken in so far as assignment is concerned the Court held that:

An insurable interest in the insured by the assignee of a policy of life insurance is not essential to the validity of the assignment if the party to whom it was issued in good faith had an insurable interest, and if the assignment was in good faith and not made to cover up a gambling transaction.

12. Considering the law in India and England as noted in Gherulal Parakh (supra), wagering contracts have been held not to be against the public policy and in the United States it has been held after Grisby (supra) that insurable interest mut exist when the initial contract is entered into, but for subsequent assignments there is no requirement of insurable interest. Apart from what has been said is insurable interest in the various opinions cited above, it may be stated generally, as any reasonable expectation of pecuniary benefit to one person from the continued life of another, creates an insurable interest. We agree with the view taken by Holmes J. in Grigsby, as that is in accordance with the provisions of Section 38 of the Insurance Act, which makes no exceptions to assignment or transfer. This would only be subject to any other law in force which bars such transfer or assignment or a term of the policy itself. The contention, therefore, urged that assignment of life insurance policy amounts to wager as there is no insurable interest and, therefore, against public policy has to be rejceted.

13. The respondent No. 1 has also pointed out that they have issued and are issuing several policies, which are non-transferable. This was in support of the contention that Section 38 is not mandatory. The petitioners have referred to the Seven (7) types of policies enumerated by the L.I.C. which

cannot be assigned. The petitioners point out, that all the 7 policies referred to by respondent No. 1 which are not assignable, have nothing to do with the policy, but because of the specific prohibition in the specific statute which prohibits the assignment of such policies. In the written submissions the petitioners have pointed out, to 8 policies including the seven referred to by Respondent No. 1 which are not assignable and the Page 0576 reasons thereof. The policies issued in favour of the minors cannot be assigned as minors cannot contract. Similarly the other policies cannot be assigned in view of the provisions of Contract Act 1872. The policy for handicapped dependents is governed by the provisions of Section 80DDA of the Income Tax Act, 1961. It is, therefore, clear that the policies issued by the respondent No. 1 and which are not assignable are because the law itself, requires that such policies cannot be assigned. The argument, therefore, to contend that Section 38 is not mandatory relying on these policies would be of no assistance.

14. We may now turn to the next contention as to whether Section 38 is a substantive provision as contended by the petitioners or is merely procedural, as contended on behalf of the Respondents. We may gainfully reproduce the relevant portion of Section 38 of the Insurance Act, 1938 which reads as under:

38. Assignment and transfer of insurance policies.--(1) A transfer or assignment of a policy of life insurance, whether with or without consideration, may be made only by an endorsement upon the policy itself or by a separate instrument, signed in either case by the transferor or by the assignor or his duly authorized agent and attested by a least one witness, specifically setting forth the fact of transfer or assignment.

(2)...

(3)...

(4)...

5. Subject to the terms and conditions of the transfer or assignment, the insurer shall, from the date of the receipt of the notice referred to in sub-section (2), recognise the transferee or assignee named in the notice as the only person entitled to benefit under the policy, and such person shall be subject to all liabilities and equities to which the transferor or assignor was subject at the date of date of the transfer or assignment and may institute any proceedings in relation to the policy without obtaining the consent of the transferor or assignor or making him a party to such proceedings.

(6) ...

(7) Notwithstanding any law or custom having the force of law to the contrary, an assignment in favour of a person made with the condition that it shall be inoperative or that the interest shall pass to some other person on the happening of a specified event during the lifetime of the person whose life is insured and an assignment in favour of the survivor or survivors of a number of persons, shall be valid. We may also gainfully reproduce relevant portion of Section 39 of the Insurance Act, 1938 which reads as under:

39. Nomination by policy holder.-

(1)...

(2)...

(3)...

Page 0577 (4) A transfer or assignment of a policy made in accordance with Section 38 shall automatically cancel a nomination:

Provided that the assignment of a policy to the insurer who bears the risk on the policy at the time of the assignment, in consideration of a loan granted by that insurer on the security of the policy within its surrender value, or its re-assignment on repayment of the loan shall not cancel a nomination but shall affect the rights of the nominee only to the extent of the insurers interest in the policy.

On behalf of the petitioners it is submitted that on a true and correct interpretation of Section 38, a holder of a life insurance policy, has a statutorily conferred vested right to assign that policy either with or without consideration. It is further submitted that the assignment of policy between assignee and assignor is complete by virtue of Section 38(1), even before any notice is given to LIC under Section 38(2). The purpose of giving such a notice to the Insurance Company is only to intimate to the Insurance Company that insurance policy issued by it had been assigned so that the insurance company can record the same in its own record.

On the other hand on behalf of the Corporation it is submitted that Section 38 of the Insurance Act, is not a substantive provision but is procedural and recognizes that the terms of the contract of insurance must also be given effect to. It is submitted that Section 38 of the Insurance Act, recognises that the term of the contract of insurance which fasten liabilities and equities upon the policy holder, must be given effect to, and the aim, purport and effect of Section 38 is purely procedural and does not govern any substantive rights. It only enables a transfer/assignment but does not create a right to transfer. Dealing with Section 38(7) it is submitted that it governs transfer/assignment in cases, where the balance proceeds have to be paid back to the life assured or to his or her heirs and does not deal with other cases of validity except to the extent set out in Section 38(7). It is submitted that Section 38(5) recognises that the contract provisions must also be given effect to.

15. From these submissions what has to be answered are the following question: (1) Whether Section 38 is a substantive provision as contended by the petitioners or (2) Whether Section 38 is merely procedural and is governed by the terms of the contract as contended on behalf of the respondent Corporation.

At this juncture we may mention that in so far as Regulatory Body under the Insurance Regulatory and Development Authority Act is concerned a meeting was held of the Executive Committee of the Life Insurance Council on 9th January, 2004 to consider such an issue, the Managing Director of

the petitioner was present. Most of the members felt that free trading of policies should be allowed as in UK and Australia and that if at all any restrictions are to be brought on such assignment, the same has to be by way of amendment to Section 38 of the Insurance Act, 1938. Respondent Corporation, themselves had by a communication dated 29th March, 2004 addressed to the Chairman of the Insurance Regulatory and Development Authority in Page 0578 reply to the letter dated Marc 3, 2004 from the Insurance Regulatory and Development Authority had intimated the proposed amendment to various Acts, including amendment to Section 38 by providing a specific provision so as to bar certain actions of assignments. Similarly, amendments to the Contract Act as also the Income Tax Act to disallow exemption of life insurance proceeds in the hands of the assignees as also amendment to the Transfer of Property Act 1882 were proposed.

16. Whilst examining the true import of Section 38 we may point out, that one of the contentions raised by the petitioners was, that the effect of permitting assignment would be a unilateral novatio of contract of insurance, converting it into a fixed deposit and thereby giving no protection to the widows and/or dependants of the life insured. It is also set out that if it is held that the provisions of Section 38 are not procedural, but substantive that would result in windfall gains to the petitioners and subsequent assignees. We shall now examine the various sub-sections of Section 38. Section 38(1) unequivocally provides the procedure by which assignment of a policy of life insurance can be done. The contract of insurance issued by the insurer is a contract between the insured and the insurance company. Sub-section (2), then sets out, that once a transfer or assignment is made in the manner prescribed by Section 38(1), the transfer or assignment is complete and effectual on the execution of the endorsement or by a separate instrument. However,such transfer or assignment is not binding as against the insurer until and unless intimation in writing of the transfer or assignment in the prescribed manner, has been delivered to the insurer. Sub-section (3) determines the priority of claims, on the Insurance Policy by operation of law. Therefore, if the insured had effected the transfer or assignment and had given notice to the insurer. that would be determinative as to who is entitled to the moneys payable under the policy of insurance. Once the notice is received, by virtue of Sub-section (4), the insurer is bound to record the fact of transfer or assignment together with the date thereof and the name of the transferee and the assignee and on request, grant a written acknowledgment of the receipt of such notice which will be conclusive evidence that the insurer had received the notice. The only limitation evidenced by the said Section to transfer are the terms and conditions of the transfer and necessarily the terms of policy itself. By virtue of sub-section (5) the Statute itself mandates that the insurer recognises the transferee or assignee named in the notice as the only person entitled to the benefit under the policy and such person would be subject to all liabilities and equities. The latter part of this sub-section makes it clear that once the notice is served and the company recognises the transfer or assignment, it is the transferee or assignee who can institute any proceedings without obtaining the consent of the transferor or assignor or making him a party to the proceedings. Sub-section (6) provides for some other contingencies. Section 39(4) is further indicative of the mandatory character of Section 38 when it provides that transfer or assignment of policy made in accordance with Section 38 shall automatically cancel the nomination. The existing nomination by operation of law, ceases and the rights in the policy flow to the assignee or the transferee. Page 0579 In Bai Lakshmi v. Jaswantlal Tribhuvandas and Anr. AIR (34) 1947 Bom.369 the learned Division Bench was pleased to observe as under:

The implication clearly is that the assignment would not be revocable and that it would create an interest in the assignee which the assignee herself would be able to assign.

In Ninkileri Lahshmikutty Kettilamma v. Thekka Madathil Vishnu Nambisan AIR 1939 Madras 411, the insurer had assigned the policy to his wife by endorsement. In execution of a decree, the value of the policy was sought to be attached. The learned Division Bench of the Madras High Court was pleased to hold that an endorsement operated as present transfer giving absolute interest to assignee, giving her an absolute interest under the same. There was a reverter clause. The Court, however, held that the operation of the reverter clause would not be applicable as the assured had expired during the life time of the assignee. The Court held as under:

The result is that so long as the transferees interest exists, she has the whole interest and when the defesance clause comes into operation, the interest of the person who takes under the defesance clause is equally an absolute interest.

It would be clear from the judgments of this Court and of the Madras High Court that on transfer or assignment and on the procedure being complied, it is the assignee alone who has absolute interest in the same. It is true that the effect of the transfer or assignment would be a novatio of the contract, but such a novation is expressly recognised by law. By operation of law the insurer is bound to accept the transfer and/or endorsement, if notice is given to the insurer and the procedure followed. Considering the terminology of the Section, it is not open to the insurer, to dispute the right of the insured to transfer or assign the policy and/or the right of the assignee pursuant to the transfer or assignment to have interest in the policy. The judgments referred to would make it clear that once the transfer or assignment is effected and noted, it is the assignee alone, in the terms of the transfer deed who has complete interest. In fact the definition of the Policy holder under sub-section (2) of Section includes a person to whom the whole of the interest of the policy-holder in the policy is assigned once and for all, but does not include the assignee thereof whose interest in the policy is defeasable or is for the time being subject to any condition. The Insurance Act, therefore, treats the assignee as the policy holder if the policy is assigned once and for all. We are, therefore, of the considered opinion that once the insured transfers or assigns the policy in favour of the assignee the assignment is complete between them. The provisions of the Section leave no doubt that the insurer has no choice but to accept the transfer or assignment as the case may be if the procedure required by Section 38 has been followed, but subject to the terms of the policy. We have no hesitation in holding that Section 38 is substantive and not procedural. The position in law, therefore, would be that the interest in the policy earlier held by the assignor is transferred to the assignee with all benefits attached thereto. The assignment becomes binding on the insurer recording the fact of such transfer or assignment. The submission, therefore, advanced on behalf of the respondent No. 1 herein that Section 38 is merely procedural is devoid of merit.

Page 0580 In so far as the terms of contract of the insurance, in our opinion is a separate question. If the assignee derives benefits in terms of the contract the assignee would be bound to comply with the terms of the contract. Even otherwise as a policy holder, the assignee is bound by the terms of the policy. The petitioner in fact do not dispute the contention that assignment would be subject to the terms and conditions of the policy.

17. Learned Counsel for the respondent No. 1. has submitted that the petitioners business of trading in life insurance policy is speculative and is defeasive of the essence of a contract of insurance reducing it to mere fixed deposit and is detrimental to the interest of the policy holder, whose share in the surplus under Section 28 of the L.I.C. Act is taken away by traders like the petitioners herein. The Legislature when it provided for transfer or assignment has not treated it as a security for protection of widows or dependents of the life assured. On the contrary, an Insurance policy as understood both in this Country and other countries following the common law as well as the U.S. is that the life insurance has become one of the best recognised forms of investment and self compelled saving. It has been held to be property. Courts have held that so far as reasonable safety permits, it is desirable to give life insurance policies the ordinary characters of property (See Grigsby). Ordinarily in commercial matters unless our Statute specifically provides otherwise, the law as recognised internationally should ordinarily be considered as the true interpretation of similar law in our country. The effect of an assignment is that it operates to completely divest the assignor of any right under it. The social concept had been developed, considering that the business carried on by the respondent No. 1 before Section 30A was introduced in the L.I.C. Act, was by virtue of the monopoly created in its favour by the L.I.C. Act. It is in that context that the Supreme Court considered the matter in L.I.C. of India (supra). By virtue of Act 41 of 1999, that exclusive privilege has ceased and private players have been allowed in this field of business. It is no doubt true that the respondent No. 1 continues to be a body under the control of the Union of India and as such would have to carry on its business not only as a prudent business person, but in furtherance of the objectives with with the respondent No. 1 was created and conferred legal personality. In our opinion, therefore, it is irrelevant, whether on account of our interpretation the policy becomes a mere fixed deposit. The assignee on the death of the original insured may be entitled to windfall gains is immaterial. The Assignee is the policy holder. The respondent No. 1 is bound to follow the terms of the policy. A party like the petitioner would be in the business only in the event its profits are ensured. The private operators in the business of Life Insurance as pionted out at the terms of argument accept such assignments. It is only Respondent No. 1 which is refusing to accept assignments in favour of compnies like the petitioners.

An Insurance Company issues policies with terms and conditions and in full knowledge of the provisions of Section 38. The Respondent No. 1 itself was accepting assignment of policies until the impugned circular. In our opinion, therefore, whether the other policy holders would be denied a share in the surplus or assignee is entitled to windfall gains after having held that the provisions of Section 38 are substantive and mandatory, is irrelevant.

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18. It is next submitted that Circular dated 22nd October, 2003 intimates the policy decision of the L.I.C. that lapsed policy will not be revived at the behest of an Assignee. The respondent No. 1 has reproduced a clause forming part of this policy. The same reads as under: "Revival of Discontinued Policies: If the Policy has lapsed, it may be revived during the life time of the Life Assured, but within a period of 5 years from the date of the first unpaid premium and before the date of maturity, on submission of proof of continued insurability to the satisfaction of the Corporation and the payment of all the arrears of premiums together with interest at such rate as may be prevailing at

the time of payment fixed by the Corporation from time to time compounding half yearly. The Corporation reserves the right to accept or decline the revival of discontinued policy. The revival of a discontinued policy shall take effect only after the same is approved by the Corporation and is specifically communicated to the Proposer/Life Assured."

Before answering the issue we may refer to Section 113 of the Insurance Act. Section 113 considering Section 43(1) of the Life Insurance Act was not applicable to Respondent No. 1. The Central Government has, however, conferred the power to issue notifications to make the provisions applicable therein. Once, Section 30A was enacted the respondent No. 1 is bound to carry the insurance business in accordance with the provisions of the Insurance Act. Even though Section 43 has not been repealed, the effect of Section 30A would necessarily necessitate that the respondent No. 1 carries on business in the manner provided by the Insurance Act, 1938 which includes Section 113 of the Act. This would be an indication that the law itself envisages that the monies paid by the insured even if the policy lapses, in the event the insurer had paid premium for atleast three consecutive years acquires a guaranteed surrender value to which the surrender value is to be added the subsisting bonus. Section 38 does not bar assignment of such policy as the assignee becomes the policy holder and would be entitled to the surrender value. Section 113(2), mandates that the Policy which has acquired a surrender value shall not lapse, but shall be kept alive to the extent of the paid up sum insured and includes revisonary benefits. The only bar is that such a policy which is kept alive, would not be eligible to participate in profits declared distributable after the conversion of the policy as paid up policy.

The clause reproduced is purely a contractual term. Parties, therefore, would be bound by the terms of the contract. It is accepted by the respondent No. 1 themselves that in terms of the clause in the policy, the discretion to revive the lapsed policy is with respondent No. 1. The exercise of discretion is to be regulated by uniform principles which must be consistently followed. Any exercise of power of discretion cannot be arbitrary or unreasonable or based on extraneous consideration, more so in the case of a body which would be State or other authority under Article 12 of the Constitution of India. The insured or assignee would only be entitled to revival of policy, if the insured otherwise complies with the other requirements of the policy. The lapsed policy necessarily cannot be transferred or assigned, until it is revived. Until revived it will have only a surrender value. The terms of the contract are not Page 0582 extinguished but are enforceable. To that extent the revival would be subject to the terms and conditions of the policy. An argument has been advanced, that if the policy which has been lapsed is revived by using the life assured as a front by a trading company, the 1st respondent would be denied the right otherwise available, to terminate the policy on payment of surrender value. In case of death it would take the life assured out of the surplus or the insurance pool. In our opinion the choice is of the insured to either apply for reviving the policy or taking its surrender value. If the insured decides to apply for revival, such revival would be subject to the clause in the policy. Respondent No. 1 is bound by the policy. It is immaterial whether a company like the petitioner advance money to an insured to revive the policy. That would be totally extraneous to the terms of the policy.

From the terms in the contract of insurance, it is next submitted it would be clear that the revival of lapsed policy is based on the health and family history, habits and occupation of the assured and

hence the decision of the LIC not to allow revival of a lapsed policy at the behest of an assignee like the petitioners, is a decision based on contract and, therefore, immune from challenge. The clause for revival is a term of the policy or a term of the contract between the insurer and the insured. The Policy can be revived only in the hands of the policy holder. It cannot be said as an illustration that in case of an assignee who is a policy holder by virtue of law, such a clause would not apply or that inspite of the clause it is open to the respondent No. 1 to take a policy decision not to revive the lapsed policies if it is done at the instance of the party like the petitioner. The clause is a term of contract between the insured and respondent No. 1. The respondent No. 1 can refuse to exercise discretion only in terms of the terms of the contract. An arrangement between a person like the petitioner No. 1 and the insured may be to advance money for revival of the policy. The contract between the petitioner and the insured can only be looked into by Respondent No. 1, if in terms of its contract with the insured, it has a discretion to do so. Otherwise the respondent No. 1 will have to confine itself to the terms of the policy.

Apart from the mandatory requirement of Section 113, how to conduct their business would be that of the insurer. It may be open to the insurer to provide terms of contract as to revival, transfer or assignment as long as the term is not unfair, unreasonable or irrationalor contrary to the provisions of the Insurance Act. Standard Form Contracts entered into by public bodies would be subject to judicial review as held by the Supreme Court in L.I.C. of India & Anr. (Supra). The Supreme Court, quoted with approval, the observations of Lord Denning in Gillespie Bros and Co. Ltd. v. Roy Bowlas Transport Ltd. 21 (1973) 1 All ER 1993 as under:

When it gets to this point, I would say, as I said many years ago,...there is the vigilance of the common law which, while allowing freedom of contract watches to see that it is not abused. It will not allow a party to exempt himself from his liability at common law when it would be quite unconscionable for him to do so.

The Supreme Court referred to various judgments, where the terms of contract including conditions of service had been struck down and then held, that it had no hesitation to hold that in issuing a general life insurance policy of Page 0583 any type, public element is inherent in prescription of terms and conditions therein. It is for the Respondent No. 1 to carry on its business and provide terms governing the contract subject to what we have stated above. Reliance was placed by the petitioner in the judgment of the supreme court in Balco Employees Union (Regd.) v. Union of India and Ors. and more specifically to paragraphs 42, 44 and 45. It is not necessary to go into the detailed facts of the case. The Government was a shareholder in a company and decided to disinvest to the extent of 51%. That decision was challenged by the Union. It is in that context that the Supreme Court held it is neither within the domain of the Court nor the scope of judicial enquiry to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. In our opinion the issue does not arise in this matter. We are in the realm of contract. The insurance policy apart from contractual terms is governed by the provisions of the Insurance Act. The question really would be, is it open to a Company like the respondent No. 1 to unilaterally vary the terms of the contract by imposing conditions not forming part of the contract to the disadvantage of the insured. In our opinion once there be a contract and there is no provision in the contract to vary the terms unilaterally, it would not be open to respondent No. 1 to, under the guise

of "policy decision" to refuse to register a transfer or assignments, which otherwise is legally valid under Section 38. In our opinion the respondent No. 1 is bound by the terms of its contract with the insurer and the subsequent assignee as a policy holder. That contention, therefore, must also be rejected.

19. A further submission is made that even if the insured expired, the policy in the hands of the transferee, would be allowed to run up to its maturity and it would confer on the petitioners, unjust monetary gains at the expenses of families of the lives assured. We presume that once the policy has been transferred to the assignee it is the assignee who becomes the policy holder. Such policy holder would be bound by the terms of the policy including the effect of the death of an insured. If such assignee seeks to claim benefit inspite of the death of the original insured, in our opinion, to that extent, the assignee would only be entitled to the benefits as on the day of the death of the original insured when the policy becomes payable in terms of the contract. That submission is also liable to be rejected.

20. It is next submitted that circular dated 2nd March, 2005 seeks to protect policy holders, their families and dependents from the detrimental effects of trading in life insurance policies of the 1st Respondent. The Circular of 2nd March, 2005 issued by the 1st respondent, proceeds on the footing that the business carried on by companies like the petitioner is in the nature of speculation and wagering, in as much as, none of the subsequent assignees would have either the means or the inclination to find out whether the life assured was still alive. As a consequence, even if the insured dies a premature death, the policy would continue in circulation by means of such trading until its date of maturity and the maturity value would be denied to Page 0584 the family members. Such trading, it is set out offends the very essence of life insurance contract and in that context, the policy had been laid down, that such polices should not be registered in the books of the Corporation. We are afraid that this would be contrary to the statutory provisions of Section 38. As long as there is no provision in the contract, barring such assignment and such a term is otherwise not void, the Respondent No. 1 is bound by the provisions of Section 378 of the Insurance Act. It is not open to respondent No. 1 to impose such a term which if imposed otherwise may be void. It is not open to respondent No. 1 to impose on the insured terms and conditions not provided in the contract or not permissible under the provisions of the Insurance Act. Section 30A of the Insurance Act makes it mandatory for the Corporation to carry on its business in terms of the Insurance Act. The effect of the policy would be clearly contrary to Section 38(4) of the Insurance Act. As we have held the Section to be mandatory, once the insured complies with the requirement of Section 38(2), the respondent No. 1 is bound in terms of Section 38(5) to recognise the transferee or assignees named in the notice by operation of law. It is not open to the respondent No. 1 to issue any policy decisions or directions which are contrary to Section 38. The Circulars to the extent that they seek not to register the policies even if they comply with the requirement of Section 38, would be contrary to the mandatory provisions of Section 38(4) of the Insurance Act and consequently the Circulars would have to be struck down.

21. Petitioners had sought to contend that respondent No. 1 is subject to the general supervision and control of the Insurance Regulatory and Development Authority (IRDA). The IRDA it is submitted had issued a directive on March 3, 2004 to direct the respondent No. 1 to register the assignment

without looking into the nature of the business of the financial company which has sought registration. We had served notice on IRDA. After hearing IRDA and perusing the record, it is clear that no directive has been issued as required by the provisions of the Insurance Regulatory and Development Authority Act and that being the case it is not necessary for us to go into the various arguments canvassed before us on that aspect.

22. In the course of the arguments respondent No. 1 had referred to the issuance of policies to persons who are ill and elderly and the effect on the insurance industry and the business done in such policies like the petitioners. The petitioners point out that in business parlance such policies are known as viatical policies and such policies are not sold by insurance Companies in India including by respondent No. 1. Though in the oral arguments it is debateable whether such policies are issued or not, the fact remains that insurance companies like the Respondent No. 1 require a health check by the person seeking the policy before issuing a policy. The decision to issue a policy to a person who is sick is the sole prerogative of the Respondent No. 1. It is, therefore, not necessary for us to go into those contentions as it is the prerogative of the respondent No. 1 as to what business it should carry on and what should be the terms and conditions under which the policy should be issued. There is no mandate on respondent No. 1 under the provisions of the Life Insurance Corporation Act that it is bound to carry on such business. That question however, is left open for consideration in an appropriate case, if it arises.

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23. The Respondent No. 2 has not filed any reply. Earlier across the bar written submissions were submitted. On behalf of respondent No. 2 learned Counsel had argued that unless there is amendment to Section 38 it is not open to respondent No. 1 not to register assignments. After the matter was kept for judgment further submissions have been filed and judgments annexed which were earlier not referred to in the oral arguments. In our opinion the further submissions do not in any way add or depart from what was earlier argued at the bar. In so far as the judgments are concerned, the respondent No. 1 has replied to the same. We have referred to the some of judgments to the limited extent as necsssary and to the extent required.

24. We are clearly, therefore, of the opinion that the impugned circulars of 22nd October, 2003 and 2nd March, 2005 are illegal and null and void. 25. In the light of that, petition made absolute in terms of prayer clauses (a) (ii). It is further made clear that the insurance policies issued by respondent No. 1 are transferable and assignable in accordance with the provisions of the Insurance Act, 1938 and in terms of the contract of life insurance. Rule also made absolute in terms of prayer clauses (b) and (c). Petition is also made absolute in terms of prayer clause (d). In the circumstances of the case there shall be no order as to costs.