**IN THE SUPREME COURT**
**OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA**

*In the nature of an Appeal to the Supreme Court under Article 128 of the Constitution read with provisions of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996.*

**Ranjith Sumanasekera**
No. 411/20, Attygalla Mawatha,
Welikada,
Rajagiriya.

**Plaintiff – Appellant**

**SC/CHC/Appeal No. 53/2008**
HC (Civil) No. 184/04(1)

*v.*

**AIA Insurance Lanka PLC**
[Previously known as the "Eagle Insurance Company Limited" and during the High Court proceedings, cited under that name.]
No. 75, Kumaran Ratnam Mawatha,
Colombo 2.

**Defendant – Respondent (re-named)**

**Before:** **Yasantha Kodagoda, PC, J.**
**Mahinda Samayawardhena, J.**
**K. Priyantha Fernando, J.**

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| **Appearance:** | Rohan Sahabandu, PC with Chathurika Elvitigala, Sachini Senanayake and Pubudu Weerasuriya, instructed by Tudor Dias Ranasinghe for the Plaintiff – Appellant.<br><br>Dr. Romesh De Silva, PC, Maithri Wickremesinghe, PC, Sugath Caldera and Vasanthakumar Niles, instructed by Julius & Creasy for the re-named Defendant – Respondent (re-named). |
| **Argued on:** | 12th December 2024 |
| **Written Submissions tendered on:** | For the Plaintiff - Appellant on 28th February 2013 and 19th February 2025.<br>For the re-named Defendant – Respondent (re-named) on 3rd September 2013 and 22nd July 2025. |
| **Judgment delivered on:** | 2nd April 2026 |

**JUDGMENT**

**Yasantha Kodagoda, PC, J.**

**Introduction**

1) This Appeal (SC/CHC Appeal 53/2008) and SC/CHC Appeal 28/2011 were listed together for hearing. At the commencement of the hearing, learned President's Counsel for the Appellant and Respondents (in both matters) urged this Court to hear counsel in this matter and deliver Judgment, and that the parties in SC/CHC Appeal 28/2011 will abide by the Judgment. [This Court has noted that, though the Plaintiff – Appellant in both matters is the same, there are two different Defendant – Respondents.] Accordingly, this Court heard counsel in SC/CHC 53/2008, and this Judgment relates to that matter. On the application of learned counsel, two separate Judgments were not prepared. I wish the readers of this Judgment to note that this is not a 'consolidated Judgment'. Nevertheless, in view

of the undertaking given, parties in SC/CHC Appeal 28/2011 shall be bound by the principles of law and findings contained in this Judgment, to the extent such facts resemble the facts of this Appeal.

2) The case in the in the High Court of the Provinces (holden in Colombo) [commonly referred to as the 'Commercial High Court of Colombo'], was between Ranjith Sumanasekera (Plaintiff) and Eagle Insurance Company Limited (Defendant). Following trial, the case for the Plaintiff was dismissed. Thereupon, the Plaintiff filed an Appeal to this Court, citing Eagle Insurance Company Limited as the Defendant - Respondent. While the Appeal was pending before this Court, by Motion dated 3rd March 2016, this Court was informed that the name of the Defendant – Respondent company had been changed twice, and that the present name of the Defendant company is "AIA Insurance Lanka PLC". Accordingly, without objection from the Appellant, the Respondent was renamed as "AIA Insurance Lanka PLC". Therefore, this Judgment relates to the Appeal between Ranjith Sumanasekera the Plaintiff – Appellant and AIA Insurance Lanka PLC the Defendant – Respondent (re-named).

**Case for the Plaintiff – Appellant**

3) On or about 7th November 2002, the Plaintiff had sought from the Defendant company, a life insurance policy referred to at that time as "*Dashaka*". In furtherance of that objective, the Plaintiff had presented a proposal (application) dated 13th December 2002 to the Defendant, in order to obtain that life insurance policy. He answered truthfully to the questions in the application form of that insurance policy (the 'proposal' - "V1"). The proposal was accepted by the Defendant. Accordingly, the Plaintiff obtained a "*Dashaka*" life insurance policy bearing No. 803233 ("P9" = "X"). That life insurance policy commenced on 7th November 2002 and was to end on 6th November 2017, with a primary benefit of Rs. 1,000,000/= for the insured Plaintiff. In respect of this policy, the Plaintiff paid a monthly insurance premium of Rs. 19,886/= ("P15").

4) As an additional benefit arising out of obtaining the "*Dashaka*" life insurance policy, the Plaintiff became entitled to certain other benefits in respect of critical illnesses care, which benefits scheme was called "*Surath Prathilabha*" (Surath Survival Benefits). This supplementary benefits scheme was to be valid until 6th

November 2014. In terms of the "*Surath Prathilabha*" scheme, the insured (Plaintiff) was entitled to obtain from the insurer (Defendant) a sum up to Rs. 1,500,000/= for any critical illnesses listed in the scheme. Such critical illnesses included coronary artery (bypass) surgery. The benefit would accrue in the form of a reimbursement of expenditure involved, if the policy holder survives the critical illness and the ensuing surgery.

5) On 20th August 2003, the insured Plaintiff had suffered a heart attack (myocardial infarction). He was urgently admitted to the Durdans Heart Surgical Centre (Pvt.) Ltd. (*Durdans Hospital*). Cardiologist Dr. Pramod Ranatunga examined him and a coronary angiogram investigation was conducted. It transpired that there were blocks in three main coronary arteries of the Plaintiff ("P11" and "X1"). Therefore, a decision was taken to immediately subject the Plaintiff to a coronary bypass surgery. Accordingly, on 21st August 2003, a Surgeon Dr. Y.K.M. Lahie had performed a coronary bypass surgery on the Plaintiff.

6) Employees of the Durdans Hospital had informed these developments to the insurer. There is no evidence presented by either party as to whether or not agents of the Defendant visited the hospital while the Plaintiff was receiving treatment at the hospital. Following successful surgery, on 1st September 2003, the Plaintiff was discharged from hospital. On that occasion, the Plaintiff had settled the hospital bills using his personal funds ("P12A", "P12B" and "P12C").

7) Thereafter, the insured Plaintiff had submitted to the insurer (Defendant) a perfected insurance claim dated 5th September 2003 (Critical Illness Claim Form - "V3") under the "*Surath Prathilabha*" critical illness benefits scheme. He claimed a sum of Rs. 1,500,000/=.

8) In response, by a letter dated 23rd September 2003 ("P14" = "X3"), the Claims Manager (Life) of the Defendant company, informed the Plaintiff that, since the Plaintiff had when and for the purpose of obtaining the "*Dashaka*" life insurance policy, suppressed (not disclosed) certain material facts, a decision had been taken to terminate the life insurance policy No. 803233 and to also reject the claim of Rs. 1,500,000/= presented under the supplementary benefits scheme. The alleged suppression of material facts identified by the Defendant company were that, at

the time of submitting the insurance proposal, the Plaintiff had been suffering from Diabetes Mellitus and had been insulin dependent.

9) The Plaintiff denies that there was any material misrepresentation of facts or suppression of any information in the proposal submitted by him to the Defendant. Furthermore, according to the Plaintiff, as at the time he submitted the insurance policy, he was not suffering from Diabetes. Nor was he insulin dependent. He had answered the questions in the proposal truthfully. It was merely 2 months prior to suffering a heart attack, that he had got to know (for the first time) that he was suffering from Diabetes.

10) Furthermore, according to the Plaintiff, following the submission of the proposal and prior to issuing the insurance policy, the Defendant had required the Plaintiff to submit himself for a medical examination at a medical clinic called *Medi-Calls* and undergo several tests at that clinic. He had complied with that requirement. The Plaintiff claims that the Defendant had, when taking a decision to issue the "*Dashaka*" insurance policy, taken into consideration the reports submitted to it by *Medi-Calls.*

11) As at the time his claim was denied and the life insurance policy was terminated by the Defendant, the Plaintiff had paid all premium installments, which amounted to Rs. 178,974/=.

12) In view of the foregoing, having forwarded a letter of demand (through an Attorney-at-Law) ("P16" = "X4"), and upon receiving a response from the Defendant's Attorney-at-Law denying liability ("P17" = "Y2"), on 1st September 2004, the Plaintiff instituted legal proceedings against the Defendant.

13) In the case filed in the Commercial High Court, the Plaintiff alleged that the decision of the Defendant (insurer) to terminate the "*Dashaka*" life insurance policy was unlawful and the denial of his insurance claim under the "*Surath Prathilabha*" supplementary benefits scheme was also unlawful.

14) The Plaintiff prayed that in the foregoing circumstances, causes of action had arisen for him (insured) to sue the Defendant (insurer) in the Commercial High Court to –

a) obtain a declaration from Court that the primary insurance policy "*Dashaka*" No. 803233 (which had been wrongfully terminated by the Defendant) was valid and effectual,
b) secure his claim of Rs. 1,500,000/= from the supplementary benefits scheme "*Surath Prathilabha*", and
c) secure damages in a sum of Rs. 50,000,000/= in respect of the wrongful and unlawful termination of the "*Dashaka*" insurance policy.

**Case for the Defendant – Respondent**

15) The position of the Defendant (as contained in his Answer dated 15th February 2005) was, whether or not the Plaintiff had ever suffered from or received treatment for diabetes and/ or was passing sugar in his urine, were material factors that had a bearing on the decision of the Defendant pertaining to the issuance of the "*Dashaka*" life insurance policy and the "*Surath Prathilabha*" supplementary benefits scheme.

16) In this regard, when perfecting the application from, the Plaintiff was obliged by law and in fact, to disclose the truth. In response to a specific question contained in the proposal (application form), the Plaintiff had falsely stated that he had never suffered from or received treatment for Diabetes. Furthermore, he had stated that he was not passing sugar in urine.

17) It was relying on the answers provided in the application for the insurance policy submitted by the Plaintiff, and in the belief that he did not have Diabetes and was not passing sugar in urine, that the Defendant issued the "*Dashaka*" insurance policy No. 803233 to the Plaintiff and accorded to him the "*Surath Prathilabha*" supplementary benefits scheme.

18) Following the claim being submitted by the Plaintiff, the Defendant became aware that the Plaintiff had been suffering from Diabetes Mellitus, had been passing sugar in his urine, and had also been insulin dependent at the time he submitted the application for the "*Dhashaka*" insurance policy. Therefore, when submitting the application form, the Plaintiff had suppressed or misstated the truth to the Defendant (insurer).

19) Furthermore, the Plaintiff had been guilty of non-disclosure of material facts and had not revealed the cause for his critical illness (heart attack) and had fraudulently misstated or had made an incorrect declaration.

20) In view of the foregoing, the Defendant alleged that the Plaintiff had failed to exercise *uberrimae fidei* in his dealings with the Defendant, and had not acted *bona fide*.

21) Therefore, the Defendant pleaded that the Defendant company was entitled to repudiate the claim of the Plaintiff and it did so. Furthermore, for the same reason, the Defendant terminated the "*Dashaka*" life insurance policy. The Defendant claimed that in view of the foregoing, the Plaintiff was not entitled to any benefit under the insurance policy "*Dashaka*" or the "*Surath Prathilabha*" supplementary benefits scheme.

22) In view of the foregoing, the Defendant sought the dismissal of the Plaint.

**Reasoning of the learned High Court Judge and findings**

23) Following a consideration of the evidence given by the Plaintiff, and in particular the evidence given under cross-examination (particularly evidence relating to "V1" to "V13"), the learned Judge of the High Court by her Judgment dated 22nd September 2008, has concluded that the position contained in the application seeking the insurance policy, contained false information that the Plaintiff (at the time of perfecting the application) was not suffering from Diabetes, was not passing sugar in the urine, and had never obtained treatment for Diabetes. Therefore, the learned Judge of the High Court has concluded that the Plaintiff was 'guilty' of such material misrepresentation. Thus, she held that the Plaintiff has failed to exercise *uberrima fidei* towards the Defendant.

24) On a consideration of the evidence elicited from the Plaintiff (under cross-examination) and documents "V1" to "V13" tendered to Court on behalf of the Defendant (which as I have commented elsewhere was through the Plaintiff himself), the learned Judge of the High Court has concluded that, the insurer (Defendant) had issued the insurance policy in issue, verily believing in the truth of the information provided by the Plaintiff in the application form. Therefore,

upon the realization of the truth that the Plaintiff had fraudulently misstated facts, not disclosed the cause for the heart attack, and had not exercised *uberrima fidei*, the Defendant was entitled to repudiate both insurance policies (sic) issued to the Plaintiff. [It must be noted that the Defendant had issued only one insurance policy to the Plaintiff ("*Dashaka*"), and the other ("*Surath Prathilabha*") was a supplementary benefits scheme.]

25) Due to the foregoing, the learned Judge of the High Court has arrived at the conclusion that the Plaintiff was not entitled to the relief prayed for in the Plaint. Accordingly, the learned Judge of the High Court has dismissed the Plaintiff's action.

**Submissions made on behalf of the Plaintiff – Appellant**

26) Learned President's Counsel for the Plaintiff – Appellant submitted that, upon the Plaintiff submitting the proposal (application) seeking the "*Dashaka*" insurance policy (which application related to both the primary insurance policy and the supplementary benefits scheme), the Defendant had required the Plaintiff to submit himself to a medical examination and undergo several tests at a private medical clinic ("*Medi-Calls*") stipulated by the Defendant. The Defendant had decided to issue the insurance policy "*Dashaka*" to the Plaintiff only after *Medi-Calls* had submitted its reports to the Defendant and the Defendant had considered those findings. Therefore, the decision by the Defendant to grant the insurance policy to the Plaintiff was founded upon a consideration of the reports relating to such examination and tests issued by *Medi-Calls,* as well. Furthermore, though the Defendant had listed those Reports, the results of such medical examination and tests conducted by *Medi-Calls* were not released to the Plaintiff, nor were they revealed during the trial. This, he submitted, was indicative of the contents of those reports issued by *Medi-Calls* being in favour of the Plaintiff.

27) Learned President's Counsel also submitted that, at the trial, for the purpose of disproving the case of the Plaintiff, the Defendant had failed to tender any evidence on its behalf. Therefore, the evidence of the Plaintiff that, at the time he presented the application for the insurance policy, he did not have Diabetes and that he did not know that he had Diabetes or that he was passing sugar in his urine, remained unchallenged. Citing from *Siabo v. New India Insurance Co. Ltd. (39 NLR*

*153)*, learned President's Counsel submitted that the burden of proving non-disclosure, was upon the insurance company.

28) Learned President's Counsel for the Plaintiff–Appellant criticized the Judgment of the High Court on the basis that it failed to set out any reasoning for the rejection of the Plaintiff's evidence. Learned Counsel further emphasized that the only evidence pertaining to Diabetes was to the effect that the Plaintiff was suffering from the disease at the time of the coronary bypass surgery, and not that, at the time of completing the application form, the Plaintiff was either suffering from Diabetes or was aware that he had such condition. Learned President's Counsel criticized the Judgment alleging that the learned Judge of the High Court had not considered that aspect of the case.

29) In these circumstances, learned President's Counsel for the Plaintiff – Appellant submitted that the Judgment of the High Court should be set-aside by this Court, and the High Court should be directed to enter decree as prayed for by the Plaintiff.

**Submissions made on behalf of the Defendant – Respondent**

30) Learned President's Counsel for the Defendant – Respondent submitted that it is settled law that a contract of insurance is a contract *uberrima fidei* (of utmost good faith). Therefore, before the insurance contract is entered into, both parties were obliged to volunteer to each other all the information which is material. He further submitted that the applicant seeking an insurance policy is under a legal duty to reveal to the insurer all material facts, whether or not the insurer questions the applicant regarding such facts. Failure to make such disclosures entitles the insurer to avoid the contract of insurance. In this regard, learned President's Counsel quoted from *Carter v. Boehm, [3 Burr (1905)].*

31) Learned President's Counsel further submitted that the failure on the part of the Plaintiff – Appellant to disclose to the Defendant – Respondent that he was diabetic, extended beyond the violation of the duty of *uberrima fidei.* It was not an 'innocent misrepresentation'. He submitted even an 'innocent misrepresentation' would be sufficient to render the contract of insurance void. He submitted further that in this instance, the Plaintiff – Appellant was 'guilty' of fraud, which entitled

the Defendant – Respondent to declare void the contract of insurance even under the normal law of contract.

32) The Plaintiff – Appellant knowing well that he was suffering from Diabetes and was insulin dependent for four (4) years (as at the time the proposal was perfected and submitted), had declared specifically that he was not diabetic and he was not passing sugar in his urine. Learned President's Counsel relied on "V9" issued by the Medical Administrator of the Durdans Hospital, that according to the Bed Head Ticket, *"the patient was on diabetic drugs for the last 5 years"*. Furthermore, according to "V8(vi)" issued by the Consultant Cardiac Surgeon who operated on the Plaintiff – Appellant, which contained the question "*Is there anything in the patient's habits or personal medical history which would have increased the risk of coronary artery disease?*" the surgeon had answered "*Insulin dependent diabetes mellitus*". Due to these reasons, learned President's Counsel submitted that, there was no doubt that the Plaintiff – Appellant had been suffering from Diabetes for 5 years prior to the surgery, and that his condition of 'insulin dependent Diabetes mellitus' increased the risk of the coronary artery disease.

33) In view of the foregoing, learned President's Counsel for the Defendant – Respondent submitted that the Plaintiff – Appellant was 'guilty' of deliberately falsifying a material fact which was directly relevant to the matter in respect of which he made the claim, namely the coronary artery disease.

34) Learned President's Counsel for the Defendant – Respondent submitted that according to the Plaintiff's own admission, the Plaintiff had filed actions against another five (5) insurance companies, in respect of non-settlement of his claims submitted to such other insurance companies. In all the actions, the total amount claimed was Rs. 9,000,000/=. The total amount of damages claimed by the Plaintiff from the Defendant was Rs. 51,500,000/=. Such an amount of money was being claimed by the Plaintiff – Appellant for the coronary bypass surgery which cost him only Rs. 500,000/=.

35) In view of the foregoing, learned President's Counsel for the Defendant – respondent submitted that the learned Judge of the High Court had quite rightly and lawfully dismissed the case of the Plaintiff – Appellant, and therefore this Appeal against the Judgment of the High Court must be dismissed.

**The law, its application, analysis of evidence, and conclusions reached by Court**

36) A useful starting point would be to briefly consider the applicable law. It is undisputable that, a contract for insurance is one of utmost good faith (*uberrima fidei*). Famously, the following passage from the opinion of Lord Mansfield in ***Carter v. Boehm**, [(1766) 3 Burr. 1905]* illustrates this principle clearly:

> *"Insurance is a contract upon speculation. The special facts, upon which the contingent chance is to be computed, lie more commonly in the knowledge of the insured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risque as if it did not exist. The keeping back of such a circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without fraudulent intention; yet still the underwriter is deceived, and the policy is void; because the risque run is really different from the risque understood and intended to be run at the time of the agreement … Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact, and his believing the contrary."*

37) It must be accepted that the foregoing passage is well accepted as reflecting the applicable law (which is based on English common law). However, the component of the passage "… *Although the suppression should happen through mistake, **without fraudulent intention**; yet still the underwriter is **deceived**, and the policy is void; …*" contains a highly debatable assertion. In common law, a party (victim) is said to have been 'deceived' only when the other party (offender) has engaged in making an incorrect (false) representation while entertaining a fraudulent or dishonest intention, and not otherwise. Fraudulence or dishonesty are necessarily intentional cognitive phenomena which drives the offender to make such false representation. Therefore, where a genuine mistake had occurred due to sincere ignorance or due to some other genuine reason, notwithstanding the applicant having entertained due diligence and having acted in *good faith* when perfecting an application (proposal) for an insurance policy, whether it can be said that there has been absence of *uberrima fidei,* and therefore the ensuing insurance contract is necessarily void on the footing that the insurer had been deceived, is in my view an arguable point.

38) Nevertheless, that is irrelevant in so far as, the determination of this Appeal is concerned. The position of the Defendant – Respondent is that, the Plaintiff – Appellant had knowingly withheld information that he was diabetic, that he was passing sugar in his urine, and that he was insulin dependent. Thus, if the allegation by the Defendant – Respondent against the Plaintiff - Appellant is correct, the Plaintiff – Appellant had in fact acted in a fraudulent manner and had intentionally withheld relevant information which the Defendant – Respondent sought from him. If so, when calculating the risk it was undertaking, the Defendant – Respondent had in fact been deceived into believing that the Plaintiff – Appellant was not suffering from Diabetes, which is undisputedly a material fact. Thus, there exists a basis recognized by law for the insurer to declare that the contract of insurance is void.

39) In insurance contracts, there is a duty cast on both parties to the contract to disclose what is known and what is material to the other party's decision to be taken. The concealment of a material circumstance known to one party, imposes upon that party a legal consequence, that is for the opposing party to avoid fulfilling obligations arising from the policy. Therefore, it is a legal duty to be honest and straightforward, and to make a full disclosure of all relevant material. As also held by Justice S. Thurairaja in ***Lakshman De Fonseka v. Eagle Insurance Co. Ltd.*** *(SC CHC Appeal No. 25/2011, SC Minutes of 14th June 2024), "it is required for the insured to reveal material details as to the exact nature, extent and potential of the risks transferred to the insurer. To this extent, there is a duty of disclosure, which stemmed from the principle of uberrimae fidei, on a proposer who has knowledge of such material facts relating to the risks. Such facts may be relevant to the insurer in deciding whether or not to undertake the risk, and the premiums subject to which they may decide to undertake the risks … This duty is at times referred to as the 'Pre-Contractual Duty of Disclosure'. While the duty is bilateral,* ***there is no requirement to disclose what either party did not or could not know****. A party can be in breach of this duty where a party misrepresents a material fact or when such party remains silent as to a material fact and fails to disclose the same in effecting the policy*". [Emphasis added by me.]

40) In this matter, whether or not the Plaintiff – Appellant was suffering or had suffered from Diabetes, whether or not he was passing or had passed sugar with his urine, and whether or not he was insulin dependent, are material facts beyond debate. That is because the insurance policy proposal application form "V1" contained specific questions in that regard. Thus, it is beyond debate that these

facts were in fact 'material facts', which the Plaintiff – Appellant was obliged by law to answer truthfully.

41) There are two more questions of legal significance to be answered. They are -
    a) whose duty was it to prove on a balance of probabilities that the afore-stated legal duty had been violated? and,
    b) whether such legal duty had been discharged to the standard of proof required by law or whether such duty had been neglected?

42) In terms of section 103 of the Evidence Ordinance, the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person (a shift in the burden of proof). As to which party is required to prove the existence or the absence of *uberrima fidei* is not a matter specifically provided in the black letter of the law. It is the Defendant – Respondent who wishes the Court to believe that the Plaintiff – Appellant did not exercise *uberrima fidei* towards the Defendant – Respondent, when it presented "V1" (the application form) and thereby sought to obtain the "*Dashaka*" insurance policy together with the "*Surath Prathilabha*" supplementary benefits scheme. Thus, it was certainly not the duty of the Plaintiff – Appellant to prove that when perfecting "V1" by which he applied for the "*Dashaka*" insurance policy and the "*Surath Prathilabha*" supplementary benefits, he did not have Diabetes or did not pass sugar in his urine or was not insulin dependent. In terms of section 103 of the Evidence Ordinance, the burden of proving absence of *uberrima fidei* lay on the Defendant – Respondent.

43) In a civil action, the legal duty of proving a party's case must be discharged on a balance of probability (also referred to as a 'preponderance of evidence'). Thus, the Defendant – Respondent was required by law to prove on a balance of probabilities that the Plaintiff when perfecting and submitting the application form ("V1") had not exercised *uberrima fidei* towards the Defendant. Thus, it is now necessary to consider and determine whether the Defendant – Respondent had on a balance of probabilities proved that the Plaintiff – Appellant had acted contrary to the principle of *uberrimae fidei* towards the Defendant – Respondent.

44) The Defendant – Respondent did not present any evidence at the trial. It thus appears that, the Defendant – Respondent relied on evidence it sought to elicit

from the Plaintiff – Appellant to discharge the burden of proof which was cast on the Defendant – Appellant. To consider whether the Defendant – Respondent was successful in achieving that objective, it would be necessary to consider the evidence led at the trial, and in particular the evidence given by the Plaintiff – Appellant when he was subjected to cross-examination.

45) However, prior to that, it is necessary to consider the manner in which the Plaintiff had, in December 2002, perfected the application form (proposal – "V1"), by which he sought and obtained the "*Dashaka*" life insurance policy and the "*Surath Prathilabha*" supplementary benefits. I shall re-produce herein the applicable questions contained in the application form ("V1") together with the corresponding answers provided by the Plaintiff.

i. Are you in good health at present? – *Yes.*

ii. Are you now under medical observations or undergoing any treatment? – *No.*

iii. Details of illnesses & Treatments:

(a) In the past five years have you (If yes, give details) -

i. Consulted any doctor? *Yes – 2002 February & July – For the purpose of obtaining insurance policies* (When answering questions put to him under cross-examination, the Plaintiff has elaborated that, apart from subjecting himself for medical examinations in order to obtain insurance policies, he had not consulted a doctor for any other purpose.)

ii. Undergone X-ray, ECG, Blood Tests or any other medical investigations? *Yes – 2002 February & July – For obtaining insurance policies.* (This answer is to be understood as amounting to medical tests he had to undergo to obtain two other insurance policies.)

(b) Have you ever suffered from or received any treatment for –

i. Diabetes or Sugar in Urine? *No.*

46) To put things simply, the issues the learned High Court Judge was required to determine were as follows:

a) *When providing the afore-stated answers to questions contained in "V1", did the Plaintiff – Appellant provide false / incorrect information?*

b) *Were the answers given by the Plaintiff – Appellant in violation of the legal principle which he was required by law to comply with, that being uberrimae fidei?*

47) Under examination-in-chief, the Plaintiff has categorically stated that when he applied for the "*Dashaka*" insurance policy (by submitting the proposal (application form - "V1"), he was not suffering from Diabetes. Nor did he know that he was suffering from that disease. He has emphasized that he perfected the application form truthfully and honestly. He has also explained that on a requirement imposed by the Defendant, at a clinic stipulated by the Defendant (*Medi-Calls*) he subjected himself for a medical examination and gave samples including a blood sample for certain tests to be conducted. He has also testified that, though he requested, he did not receive copies of those reports. It would thus be seen that, in the testimony given by the Plaintiff under examination-in-chief, there no evidence which was favourable to the Defendant.

48) Under cross-examination, the Plaintiff has reiterated his position that by the year 2002, to the best of his knowledge, he was in good health. According to him, during a period of five (5) years preceding his having obtained the insurance policy "*Dashaka*", apart from subjecting himself for a medical examination to enable him to obtain an insurance policy from Union Assurance Limited, he had not consulted a doctor. Nor has he taken any medication. However, he has admitted that for a period of two (2) months prior to the bypass operation, he took medication for Diabetes. Explaining what happened which necessitated him to obtain medicine, the Plaintiff has stated that, following his having observed that a wound he had in his body was taking an unusual length of time to heal, he had examined his blood using a glucometer he had at home since 2000 (which belonged to his mother-in-law). The meter read 120 units. Thus, he had realized that he was having Diabetes, and therefore, without consulting a doctor, he had started taking the medicine Metformin, twice a day. He has insisted that he commenced taking Metformin (a pharmaceutical for the treatment of Diabetes) merely 2 months prior to the bypass surgery.

49) Shown the application form (dated 26th February 2002) submitted by the Plaintiff to Union Assurance Limited for the purpose of obtaining an insurance policy from that insurer ("V1"), the Plaintiff has admitted that in response to a question contained in that application form as to the name of the doctor of the applicant, the Plaintiff had given the name of Dr. C.E. Puvimanasingham. He has qualified that answer by stating that Dr. Puvimanasingham was his 'family doctor'. However, according to him, he has not obtained any treatment from Dr. Puvimanasingham for over 10 years. He has consulted Dr. Puvimanasingham for approximately 25 to 30 years prior to perfecting "V1", and has stated so in that application form. The Plaintiff has denied that there exists a contradiction in that regard between the contents of "V1" and "V2".

50) Shown "V3" (the Critical Illness Claim Form) submitted by the Plaintiff to the Defendant for the purpose of obtaining the insurance claim, the Plaintiff has admitted that in response to the question "*Who is your usual doctor?*" the Plaintiff had answered "*Dr. Puvimanasingham*". However, he has denied that there is any contradiction between the contents of "V1" and "V3".

51) Shown "V4" (Application form submitted by the Plaintiff to Union Assurance Limited, dated 8th February 2002), the Plaintiff has admitted that, to the question as to who his doctor is, he has replied that the name of his doctor is Dr. Puvimanasingham. To the question "*How long has he been your doctor?*" the Plaintiff has said "*for 25 years*". In response to a question as to why the Plaintiff did not provide that information in "V1", he has said that the application form was perfected by an insurance agent, and that he did not put that question to him.

52) Shown "V8-i" and "V8-ii" (a prescription issued by the Durdans Hospital (on the occasion of the Plaintiff being discharged from hospital, to enable the Plaintiff to obtain medicine), the Plaintiff has accepted that the prescription contained in "V8-ii" *inter alia* a reference to 'mixtard insulin', which is taken to control Diabetes. "V8-i" and "V8-ii" requires the Plaintiff to take Metformin. The Plaintiff has said that insulin was given to facilitate the healing of the surgery wound. He has admitted that after the surgery, he started to take the prescribed medicines.

53) Shown "V8-vi", the Plaintiff has denied that it was one of the documents he submitted to the Defendant, upon the Defendant requiring him to submit documents relating to the surgery performed at the Durdans Hospital.

54) It is thus clear that the Defendant – Respondent had not been successful in proving through the documents shown to the Plaintiff – Appellant and the corresponding answers given under cross-examination, that the Plaintiff – Appellant when perfecting "V1" had not exercised *uberrimae fidei* towards the Defendant – Respondent. Nor has the Defendant – Respondent been successful in establishing that the Plaintiff – Appellant had uttered falsehood or misrepresented facts to the High Court.

55) Learned President's Counsel for the Plaintiff - Appellant submitted that, the Defendant – Respondent had decided to issue the "*Dashaka*" insurance policy, only after it considered the reports directly submitted to it by *Medi-Calls*. Therefore, he submitted that the Defendant – Respondent had decided to issue the insurance policy to the Plaintiff – Appellant upon a consideration of the reports and test results issued by *Medi-Calls*. While that position is distinctly possible, it must be noted that, in terms of the applicable law, that the insurer caused the applicant to be examined and tested at a place of the insurer's choice, and considered the reports and results emanating from such examination and tests, does not absolve the applicant from revealing the truth and the whole truth to the extent questioned by the insurer. The requirement of satisfying the *uberrima fidae* obligation remains with the applicant (who later became the insured). Thus, that the Plaintiff – Appellant was examined by *Medi-Calls* and several tests were conducted by that clinic, does not absolve the duty cast on the applicant of an insurance policy to exercise an absolute good faith approach towards the insurer and reveal the truth in respect of the questions put to him.

56) However, I have also taken into consideration the following questions of fact:

i. *If in fact the Plaintiff – Appellant knew or had reason to believe that he was suffering from Diabetes and / or that he was passing sugar with his urine or that he was insulin dependent, would he (particularly being the Managing Director of a private hospital) have gone ahead to have himself examined by a medical clinic selected by the Defendant – Respondent, and undergone several tests including blood and urine tests?*

ii. *Furthermore, under such circumstances, even after the examination and test results were directly forwarded by Medi-Calls to the Defendant – Respondent, would the Plaintiff – Appellant have gone ahead with his plan of obtaining an insurance policy from the Defendant – Respondent?*

In my view, the obvious answer to both these questions is *'No'*.

Thus, the answers to these two questions clearly give rise to an inference that as at the time the Plaintiff – Appellant perfected the application form (proposal) – "V1", he was unaware that he was suffering from Diabetes and / or was passing sugar with his urine. This circumstance supports the inference that the Plaintiff – Appellant did not intentionally state falsehoods in "V1".

57) I have also addressed my mind as to the probable reason as to why the Defendant did not produce at the trial (as evidence on behalf of the Defendant) the examination and test reports relating to the Plaintiff issued by *Medi-Calls*. Had those reports revealed that as at the time the examination and tests being carried out (in late 2002), the Plaintiff was suffering from Diabetes, he was passing sugar in his urine and that he was insulin dependent, that would have significantly strengthened the case of the Defendant that the Defendant had engaged in misrepresentation and / or suppression and / or had stated falsehood in the proposal for the insurance policy. In fact, such an outcome may have resulted in either the Defendant having decided not to issue the "*Dashaka*" insurance policy with or without the supplementary benefits scheme or having decided to increase the premium. However, the Defendant did not produce such evidence or even put such reports to the Plaintiff under cross-examination. Nor did the Defendant adduce any reason which prevented the Defendant from presenting such reports as evidence at the trial. In terms of section 114 of the Evidence Ordinance, a permissible inference the Court is entitled to arrive at under such circumstances is that, had the Defendant produced such documentary evidence, it would have accrued against his interests. In view of the foregoing, in the interests of justice, I must apply that inference against the Defendant – Respondent. Therefore, based on such inference, I conclude that those reports issued directly to the Defendant by *Medi-Calls* did not contain any reference to the Plaintiff having suffered from Diabetes or was passing sugar in his urine or that he was insulin dependent. This conclusion also supports the case of the Plaintiff, that he did not misrepresent or

suppress material facts or that he stated falsehoods in the insurance policy application form ("V1").

58) There is a need for me to refer to the 'documentary evidence' produced by the Defendant when the Plaintiff was under cross-examination. Indeed, other than for "V8 - vi", the Plaintiff did not challenge the production of the remaining "V" documents produced by the Defendant during the cross-examination of the Plaintiff. Thus, the Defendant was not required to prove their admissibility as being 'documentary evidence' that should be treated as 'evidence' in the case. However, "V8 -vi" was challenged by the Plaintiff, and thus the Defendant was required to prove such document, which requirement the Defendant did not fulfill, as the Defendant did not present evidence in proof of the admissibility of the documents or for any other reason.

59) I must now turn towards principles relating to 'documentary evidence' and applicable provisions of the Evidence Ordinance. 'Documentary evidence' forms an important category of evidence in judicial proceedings, and its production is governed by provisions of the Evidence Ordinance. Documentary evidence must be viewed as amounting to an alternative source of evidence to 'Oral evidence'. Unlike oral evidence which is founded upon facts that can be perceived by the human senses (definition of a 'fact' as contained in section 3 read with section 60 which provides for direct evidence to be presented, as opposed to hearsay evidence), 'documentary evidence' constitutes facts incorporated in documents (definition of a 'document' as contained in section 3) in the first instance itself. Thus, the most direct and reliable manner in which evidence relating to such facts found in documents can be produced judicial proceedings, is by producing the document itself. However, the underlying policy of the law contains an appreciation that there can be instances where it may not be possible or expedient for a party to judicial proceedings to be able to produce the document (original document) itself. Thus, the law provides for in certain instances certain forms of copies of the document to be produced, and not any other copy. That is to ensure the integrity of the documentary evidence being produced. Thus, when a document is sought to be produced as evidence, it must be established that the relevant document is an original document or an authorized form of copy of the original document. This is what is meant by 'proving' a document.

60) Thus, it must be noted that, a 'document' being initially proved and presented as documentary evidence is for the purpose of establishing that it is a document which comes within the meaning of a 'primary document' (section 61) or in the alternative a 'permissible copy' of a primary document, which is referred to as 'secondary evidence' (section 63). When secondary evidence of a primary document is produced in evidence (such as a certified copy of the original), such production must comply (to the extent applicable to the respective copy) with the requirements contained in sections 65 to 73 of the Evidence Ordinance. This is for the purpose of establishing the authenticity of the copy of the original document being produced.

61) Proving the admissibility of a document is the first stage of causing the admission of the contents of a document as 'evidence'. The second stage is to prove the admissibility of the contents thereof. That is because a document (may it be an original document or an authorized copy thereof) may contain both admissible content as well as inadmissible content. Thus, unless the contents of the document are admitted as well, by the opposing party, the contents of the document must also be proved independently of proving the authenticity of the document. I reiterate that, the need to do so arises because a single document, the existence and authenticity of which is admitted by the opposing party or is proved according to the afore-stated provisions of the Evidence Ordinance, may contain, in addition or alternate to direct facts pertaining to *facts in issue* and *relevant facts*, (a) indirect evidence (hearsay evidence), (b) evidence which does not come within the spectrum of *facts in issue* and *relevant facts*, (c) facts in respect of which the law prohibits presenting proof, and (d) facts in the nature of opinion which does not come within the ambit of sections 45 to 47. Thus, in addition to proving the document being presented (genuineness of the copy), the contents of the document must also be proven. That would of course not be necessary if the opposing party admits both the document and the contents therein.

62) The above requirements of the law of evidence are of particular significance pertaining to document "V8 - vi", which was contested by the Plaintiff and its contents (that the Plaintiff had been suffering from '*Insulin Dependent Diabetes Mellitus*') was vehemently challenged by the Plaintiff as being untrue. Furthermore, the Plaintiff also contested the entry in the Bed-Head Ticket that the '*patient was on diabetic drugs for last 5 years*'. Under such circumstances, the

Defendant was required by law to prove that the document in issue was an authorized copy, and call the authors of the entries contained therein, show them the original documents or certified copies thereof, and lead their evidence regarding the contents of such entries, having first got them to identify their handwriting / signatures on such documents. The need to do so would not arise, if the contents of the relevant document would become admissible under another provision of the Evidence Ordinance (such as section 32) by which calling the person who made the relevant entry has been excused by law. The Defendant – Respondent had not complied with such requirements. Therefore, it is not possible to take cognizance of the contents of the contested documents, as amounting to evidence.

63) The learned Judge of the High Court has failed to appreciate that the contents of the contested document ("V8 – vi") contained information which cannot be treated as 'evidence', since the Defendant had failed to prove both (a) the admissibility of that document (that is was either the original document itself, or a copy of the original of that document which is in conformity with the Evidence Ordinance, and is therefore recognized as an 'authorised copy'), and (b) the admissibility of the contents thereof.

64) In view of the foregoing analysis, I conclude that the Defendant – Respondent has failed to prove on a balance of probability that the Plaintiff – Appellant had at the time he perfected "V1" been suffering from Diabetes, had been passing sugar in urine and that he was insulin dependent, and thus had not exercised *uberrima fides* towards the Defendant – Respondent.

65) Accordingly, I conclude that the Defendant – Respondent did not have a basis recognized by law to render void the "*Dashaka*" insurance contract entered into between the two parties and to also dishonour its obligations under the "*Surath Prathilabha*" supplementary benefits scheme.

66) In these circumstances, I conclude that on a balance of probabilities, the Plaintiff had been successful in proving against the Defendant the cause of action contained in the Plaint.

67) Due to the foregoing reasons, I find myself in disagreement with the findings reached by the learned Judge of the High Court.

68) Therefore, I conclude that the Plaintiff – Appellant was entitled in law to claim and obtain a sum of four hundred and fifty eighth thousand (Rs. 458,000/=) from the Defendant – Appellant, which is the actual sum expended by the Plaintiff – Appellant with regard to the bypass surgery performed on him and the treatment obtained from the Durdans Heart Surgical Centre (Pvt.) Ltd. Furthermore, I hold that the Plaintiff – Appellant is entitled for a declaration annulling the 'declaration of void' made by the Defendant – Respondent in respect of the "*Dashaka*" life insurance policy.

69) I have noted that the Plaintiff – Appellant has failed to place before the High Court any evidence that provides justification for the claim for damages from the Defendant – Appellant. Therefore, that claim must fail.

70) The Plaintiff – Appellant is also entitled to recover from the Defendant – Respondent interests on the sum due to him, from the date of the letter of demand.

**Outcome of the Appeal**

71) In view of the foregoing, I set aside the Judgment of the High Court dated 22nd September 2008 and substitute thereof the following, which the High Court shall convert into a decree and issue forthwith.

a) That the "*Dashaka*" life insurance policy No. 803233 is a valid insurance policy.

b) That the Plaintiff is entitled to a sum of Rs. 458,000/= from the "*Surath Prathilabha*" supplementary benefits scheme of the "*Dashaka*" life insurance policy No. 803233.

c) That the Plaintiff is entitled to legal interest for the afore-stated sum of Rs. 458,000/= from the date of the letter of demand dated 28th November 2003.

d) That the Plaintiff shall be entitled to recover cost of litigation before the High Court from the Defendant.

72) Accordingly, this Appeal is allowed.

**Judge of the Supreme Court**

**Mahinda Samayawardhena, J.**

I agree.

**Judge of the Supreme Court**

**K. Priyantha Fernando, J.**

I agree.

**Judge of the Supreme Court**