(2014) 12 NCDRC CK 0031

In the National Consumer Disputes Redressal Commission

BAJAJ ALLIANZ GENERAL INSURANCE CO. LTD. APPELLANT

Vs

Achala Rudraniwas Marde RESPONDENT

Date of Decision : 01-12-2014

Acts Referred:

Citation : 2015 1 CPJ 146

Hon'ble Judges : J.

Final Decision : Petition dismissed

Judgement

1. THE present Revision Petition has been filed before this Commission under Section 21(b) of the Consumer Protection Act, 1986 against the impugned order dated 26.07.2013 in Appeal No. A/11/939 passed by the State Consumer Disputes Redressal Commission, Maharashtra (in short, ''State Commission''). The State Commission partly allowed the Appeal filed against the order in Complaint No. 29 of 2011 dated 23.08.2011 passed by the District Consumer Disputes Redressal Forum, Mumbai (in short, ''District Forum'').

2. THE State Commission setting aside the order of the District Forum partly allowed the first appeal. The State Commission directed to pay a sum of Rs. 5,00,000/ - along with the interest @ 9% p.a. effective from the date of repudiation till it''s realization of the amount. However, the District Forum dismissed the complaint. Brief Facts of the case are: The complainant Smt. Achala''s husband Mr. Rudraniwas Marde (since deceased) was having General Contingency Policy with Comprehensive Health Cover. Her husband met with an accident on 24.12.2009 at 10.30 p.m. while driving his motorcycle and subsequently he died on 25.12.2009. The accident took place by another motorcycle rashly driven with a very high speed came from the wrong side, hit the motorcycle of the deceased, Mr. Rudraniwas. The Complainant being an assignee and the legal heir, submitted claim to the OP Bajaj Allianz Insurance Co. for release of sum of Rs. 10,00,000/ - as covered under clause PA(Death +PTD) of the policy. The OP who repudiated the claim stating the reason that "Insured was under the influence of alcohol at the time of accident which had been proved

Blood Analysis Report." The complainant submitted that the entire family including the husband was religious, her husband never consume alcohol. She alleged that, the policy was issued was incomplete, without any information about exclusion clause to the Complainant or the policyholder. Thus, the repudiation was arbitrary and unilateral; the Complainant filed a complaint before the District Forum.

3. THE District Forum dismissed the complaint, relying upon the Forensic Laboratory report, that 121 mg/100 ml of ethyl alcohol was found in blood sample of deceased insured at the time of accident; and it was against the terms and conditions of the policy. Therefore, aggrieved by the order of District Forum, the complaint approached State Commission, through the first appeal No. A/11/939.

4. THE state commission observed the deficiency of OP insurance company and directed the OP to make payment of 50% sum insured i.e. Rs. 5 lacs with interest @ 9% pa from the date of repudiation (19.7.2010) and the cost of Rs. 25,000/ - to the complainant. Aggrieved by the order of Sate Commission, the OP filed this revision petition. We have heard the learned counsel for both the parties. The counsel for petitioner/OP brought our attention towards the policy conditions and as per exclusion clause B1(b) that the repudiation of claim was correct as the deceased was under influence of liquor. The counsel for complainant vehemently argued that, the deceased was religious person, never consume alcohol, after duty in the night, he was returning to home, there was no fault of his driving and the death took place due to rash, speedy vehicle from opposite side hit the deceased.

5. WE have requisitioned the records from the District Forum. Perused the Post Mortem (PM) report, the Forensic Science Laboratory (FSL) report and the affidavit evidences of both the parties. As per the evidence of complainant, the OP provided only 1 1/2 page policy, the Clauses, terms and conditions were never attached. Thus the OP cannot claim their repudiation was correct. We are of considered view that the act of OP was arbitral. Further it was the case of the Complainant that the terms and conditions relied upon by the insurance company were never supplied and not brought to the notice of the insured. Therefore, non -disclosure of the terms and conditions is violation of utmost good -faith which is the base of insurance contract between the parties. The counsel for complainant upon the judgments of Hon''ble Supreme Court in case Modern Insulators Ltd. v. Oriental Insurance Co. Ltd., : (2000) 2 Supreme Court Cases 734, which was held in - "Para 5. The Appellant also urged before the National Commission that only the cover note and the schedule of the insurance policy were supplied and other terms and conditions including the exclusion clause were not communicated."

Para 8. "It is the fundamental principle of insurance law that utmost good faith must be observed by the contracting parties and good faith forbids either party from non -disclosure of the facts which the parties know. The insured has a duty to disclose and similarly it is the duty of the insurance company and its agents to disclose all material facts in their knowledge since the obligation of good faith applied to both equally."

6. THE deceased was hit by the rash and negligent driving of the coming motorcycle coming from the wrong side. The criminal proceedings are going on against that alleged motorcyclists. However, the facts of the case on hand are identical to the facts involved in the decision of the Hon''ble Supreme Court Royal Sundaram Alliance Insurance Co. Ltd. v. Sangeeta Deepak Tolani - it was held that, "The National Commission referred to the exclusion clause relied upon by the Petitioner and held that the same cannot be invoked for denying relief to the Respondent because the document containing the exclusion clause was not supplied to the deceased and he was not responsible for the accident. The National Commission also referred to Regulation 3 of the Insurance Regulatory and Development Authority (Protection of Policy Holders'' Interest) Regulations, 2002 (for short, ''the 2002 Regulations'') framed by the Insurance Regulatory and Development Authority under Section 114(A) of the Insurance Act, 1938 read with Sections 14 and 26 of the Insurance Regulatory and Development Authority Act, 1999, judgment of this Court in Modern Insulators Ltd. Insurance Company : (2000) 2 SCC 734 and held that if the exclusion clause is not explained to the insured, the same is not binding on him. We have relied upon the judgment, Jitendra Kumar v. Oriental Co. Ltd. : 2003 ACJ 1441 SC which observed as, "Section 149(2)(a)(ii) of the Motor Vehicles Act empowers the insurance company to repudiate a claim wherein the vehicle in question is damaged due to an accident to which driver of the vehicle who does not empower the insurance company to repudiate a claim for damages which has occurred due to acts to which the driver has not, in any manner, contributed, i.e., damages incurred due to reasons other than the act of the driver." At this juncture, we feel necessary to discuss whether Postmortem Blood Alcohol Concentrations (BAC) - Are they Reliable? and also "Some factors that need to be considered when interpreting results of alcohol analysis in postmortem specimens" It is known that micro -organisms involved in the process of putrefaction after death can produce alcohol, usually a mixture of ethanol and other volatile substances. This process occurs when a body is not refrigerated soon after death and is hastened by environmental conditions such as high temperatures and when the body has been traumatised.

7. IN this context we have perused Text book of forensic medicine and toxicology by PC Dikshit and Synopsis of Forensic medicine and toxicology by Dr. K.S. Narayana Reddy. The research study and medical literature revealed us, that the Postmortem blood alcohol concentrations (BACs) tend to be less reliable and stable than BACs obtained from drinking drivers for the following reasons: "Postmortem blood is not sterile, over half of postmortem blood samples were found to contain bacteria and fungi.

Postmortem blood can have a much higher glucose concentration of 7 to 10X that of ante -mortem blood

Postmortem diffusion of alcohol from the gut can falsely elevate the BAC."

It is because of Putrefaction - A high glucose concentration and bacteria/fungi/ yeast found in postmortem blood makes an ideal environment for the production of alcohol as the sugar is converted eventually into alcohol causing a falsely high BAC.

Australian Pathologist V.D. Pleuckhahn, who published several important studies nearly 50 years ago on postmortem blood alcohol levels. His conclusions, however, are as valid today:

"1. Blood alcohol levels at autopsy are valid up to 48 hours after death when simple principles are observed in the collection and storage of samples

2. Alcohol levels in samples of blood taken from the intact heart are as significant as levels of blood from the femoral veins

3. False blood alcohol levels greater than 0.200% can be generated in autopsy blood samples which are not correctly stored.

4. High blood alcohol levels may develop during putrefaction and levels up to 0.200% do not necessarily indicate that alcohol was imbibed before death.

5. Significant false blood alcohol levels do not develop during incineration in absence of putrefaction."

8. IN this instant case, the PM findings did not mention about alcohol consumption in contents of stomach. The PM/autopsy was performed on the next day, and the probable cause of death was "Head Injury (unilateral), however Blood for alcohol preserved." There are no details pertaining to the blood sample from which site it was collected and which preservative was used. The sampling tubes and containers used to collect and store postmortem specimens for alcohol analysis must contain sufficient sodium or potassium fluoride Urine sample was not sent for FSL.

Even the FSL report lacks, certain detail about alcohol concentration in liver or other organs. The gross PM findings are not supported by any histopathological evidence of Acute Alcohol Injury to the liver. Thus, in this instant case the PM and FSL reports appear to be inconclusive.

The police investigation report, Panchnama clearly said that, the insured was hit in the motor bike accident by the rash and negligent driving of oncoming motorcyclist from opposite side. Also, the criminal proceedings have been lodged.

Therefore, based on the scientific text and literature, the evidence on record of the complainant and relying upon several judgments of Hon''ble Supreme Court as supra, we are of considered views that, the OP want to take benefit of such Post Mortem report and the exclusion clause in the policy, which is unjustified. Hence, the repudiation was just an arbitrary and just technical one. Accordingly, we dismiss this revision petition.