(2010) 05 NCDRC CK 0025

In the National Consumer Disputes Redressal Commission

Debendranath Nayak — APPELLANT

Vs

Divisional Manager, New India Assurance Co. Ltd. , India Assurance Co. Ltd. , Deputy Manager, New India Assurance Co. Ltd. — RESPONDENT

Date of Decision : 26-05-2010

Acts Referred:

Citation : 2010 0 NCDRC 64 : 2010 3 CPJ 319

Hon'ble Judges : R.C.Jain , Anupam Dasgupta J.

Advocate : R.M.Patnaik , V.Subramaniam , Pankaj Bala Verma

Judgement

1. AGGRIEVED by the dismissal of his complaint, C.D. Case No. 44/2000, vide order dated 02.05.05 passed by the Orissa State Consumer Disputes Redressal Commission, Cuttack, the original complainant has filed this appeal.

2. THE case of the complainant is that his wife, Smt. Sabita Sahoo @ Nayak had taken a Janata Personal Accident Insurance Policy No. 47550700025 on 3.11.97 in the sum of Rs.5 lakh. It was alleged that during the validity of the said policy, in the intervening night of 12/13.12.98, the insured, Smt. Sabita Sahoo @ Nayak died due to drowning in a well when she had gone to answer the call of nature. Her body was recovered in the morning, inquest proceedings were conducted and body was subjected to post mortem examination. Post mortem examination report gave the cause of death of the deceased as asphyxia due to drowning. Based on the enquiry and the said report, the police submitted the final report. It would appear that originally Mr. Jyoti Parkash Sahoo, father of the deceased insured was declared as the nominee but later, pursuant to a request made by the complainant, he was declared nominee in place of Jyoti Parkash Sahoo. Accordingly, the complainant lodged a claim with the insurance company seeking payment of the payable amount under the policy. After protracted correspondence and despite supply of several documents, as asked for by the insurance company, the insurance company ultimately repudiated the insurance claim vide letter dated 30.09.99 primarily on the ground that Late Sabita Sahoo

suffered death due to intentional self injury caused by insanity and, therefore, the claim was not payable as per clause 4 (c) of the Janata Personal Accident Insurance policy. The insurance company resisted the complaint by filing written version in which it did not dispute the factum of the issue of Janata Personal Accident Policy in the sum of Rs.5 lakh as also death of the insured, late Savita Sahoo @ Nayak in the intervening night of 12/13.12.98. However, repudiation of the claim was sought to be justified on the ground that at the time of taking the policy the insured had not disclosed certain material facts in regard to her mental state. It was pleaded that the deceased was suffering from a certain disability, viz., insanity and non-disclosure of such a disability amounted to suppression of material facts which rendered the insurance policy void. The circumstances in which the complainant claimed that the insured, Smt. Sabita Sahoo died were also denied on the ground that version of the complainant was improbable. It was also alleged that the insured might have jumped into the well due to the said mental disability. It was denied that the complainant was entitled to any claim under the said policy, much less any compensation for mental agony and harassment.

The State Commission, going by the respective pleas, evidence and the material placed on record, however, dismissed the complaint primarily on the ground that the version of the complainant in regard to the circumstances in which late Sabita Sahoo @ Nayak was stated to have died by drowning in the well could not be established. In this regard, the State Commission observed as under:- In the post mortem report, the cause of the death was mentioned as asphyxia by drowning. The aforesaid version of the petitioner in the complaint that she might have slipped into the well while drawing water from it is not corroborated. As mentioned above, the petitioner himself has stated that the well has a protected wall around it whose height would be 1 feet. If the well had a wall of 1 feet height around it, it is beyond ones imagination as to how the insured could slip and fall into it. There is no material to indicate that she got up from her bed at 2 A.M. and went to the bari to attend the call of nature and while drawing water from the well she slipped and fell into it. The circumstances in which the dead body was found inside the well appears to be suspicious and do not confirm to the story made out in the complaint. Rather it gives credence to the plea taken by the opposite parties that she was insane and might have fallen into the well. It was submitted by the counsel for the petitioner that her dead body was found in the well. There is no evidence about the depth of the water in the well and therefore the story of the floating of the dead body in the well does not sound to be creditable.

3. YET another reason given by the State Commission for non-suiting the complainant was that the complainant had failed to establish that the deceased insured had sustained any bodily injury resulting solely and directly from accident caused by external violent and visible means which was the condition precedent under the policy. We have heard Mr. R.M. Patnaik, learned counsel for the appellant and Mrs. Pankaj Bala Verma, learned counsel for the respondent

insurance company at length and have given our thoughtful consideration to their respective submissions. Mr. Patnaik would assail the finding of the State Commission as erroneous and not based on correct and proper appreciation either of the evidence and the material produced on record or of the correct and proper interpretation of the terms and conditions of the insurance policy in question. In this connection, he has submitted that the observations and finding (supra) recorded by the State Commission are based on surmises and conjectures and they ignore the cogent material produced on record. There appears to be force in this contention because while deciding a question of fact, a consumer forum constituted under the provisions of the Consumer Protection Act, 1986 would not insist on the kind of proof (proof beyond reasonable doubt) as would be required by a criminal court in order to establish a crime against an accused person. A consumer forum should decide the question of fact based on preponderance of the probabilities and should not raise unnecessary suspicion in its mind about the version put forth by the complainant. This is exactly what has happened in the present case. The State Commission doubted the version of the complainant in regard to the circumstances in which the deceased, late Sabita Sahoo @ Nayak died giving certain reasoning of its own though there was ample evidence and material on record in the shape of inquest report, post mortem report and final report of the case u/s 174 Cr. PC which unequivocally established that the death of the deceased was caused accidentally due to drowning and there was no suspicion of any foul play in her death.

4. LEARNED counsel for the respondent insurance company has supported the finding of the State Commission as also the repudiation of the claim mainly on the ground that the deceased did not die due to drowning. She has submitted that there was not enough water in the well from where her body was extricated the next morning hour and, in any case, the deceased must have either jumped into the well or fallen due to the insanity/depression from which she was suffering for sometime past. In this regard, she has invited our attention to the statement made by her father before the police where it was stated that the deceased was blessed with a son and two daughters but about 2 months preceding her death her minor son had expired on account of which the deceased was undergoing a state of depression. We have recorded this submission only to reject it because in the absence of any cogent material forthcoming, it is difficult to hold that the deceased had jumped into the well in a bid to commit suicide. We have, therefore, no hesitation in holding that the finding reached by the State Commission is not based on correct and proper appreciation of the evidence and the material brought on record. In our view, the material produced on record is sufficient to establish the factum of accidental death of the deceased insured by drowning in the well during the currency of the insurance policy. Despite having held as above, the important question which awaits consideration in the present case is as to whether the said death of the insured in the above circumstances would make the insurance company liable to pay the insured amount under the policy to her nominee. The relevant condition under which the nominee of the

deceased insured is entitled to such a benefit reads as under :- If at any time during the currency of the policy the insured person sustains any bodily injury resulting solely and directly from accident caused by external violent and visible means, then the company shall pay to the insured the sum hereafter set forth; If such injury shall within 12 calendar months of the occurrence be the sole and the direct cause of the death of the insured, the capital sum insured as stated in the schedule and the amount payable under this clause shall be paid to the nominee. Mrs. Verma, learned counsel for the respondent insurance company has strongly urged before us that even if the late Sabita Sahoo had died in the above circumstances, the complainant is not entitled to the insured sum because it has not been established on record that the insured had sustained any bodily injury resulting solely and directly from accident caused by external violent and visible means. According to her, the death of the deceased has not been caused by external violent and visible means. On the contrary, Mr. Patnaik, learned counsel for the appellant contends that the present case is well covered under the said clause. In support of his contention, he has placed reliance upon a decision rendered by the Supreme Court of New South Wales in the matter of MBF Life Limited Vs. Rowena Merchant (2006) NSWCA 363 (15 December 2006). In that case, the foreign Court had the occasion to dwell on the question as to what amounts to violent, visible and external means considering the facts and circumstances of the said case where the allegation was that the insured had suffered certain injury due to administration of chemotherapy. The Court, in paragraphs 27 to 35 of the judgment held as under :- Violent, visible and external means The appellant submitted that the policy condition that there be physical injury caused, relevantly, by violent, visible and external means was not satisfied. It was submitted that the physical injury was not caused by any external means. It was said the event, being the administration of the chemotherapy agent, did not cause injury by any external means. Rather the injury was caused wholly internally. It was submitted that it was necessary to look at the relevant event as commencing after the chemotherapy agents had been administered into the body. The appellant further submitted that the injuries were not caused by the administration of chemotherapy agents, as those agents did not themselves give rise to physical injuries, but, rather, that it was the later reaction of the body to those agents which gave rise to the physical injuries. The appellant submitted that the accident could only be considered to have been caused by violent, visible and external mean if the insertion of the cannula was said to be the means. However, the insertion of the cannula on the appellants argument was merely the means by which the relevant event, namely the administration of the chemotherapy was facilitated. It was submitted that as the chemotherapy acted internally within the body, it was not external, nor was it violent or visible. It was further submitted that the policy specification that the means be violent, visible and external had to occur simultaneously. The respondent submitted that the phrase violent, visible and external means was not a single phrase. Rather, the words violent, visible and external were each adjectival, describing the means by which the physical injuries were caused.

Thus, the means by which the physical injury was caused had to be external. It had to be visible and it had to be violent. However the violence did not have to be either external or visible. The violence could occur as a result of the bodys reaction to a chemical agent. The respondent further submitted that the word means in the phrase violent, visible and external means refers to the cause of the injury and that the word means had to be approached in a commonsense way by asking what was the cause: see National and General Insurance Co. Ltd. v Chick [1984] 2 NSWLR 86 at 97-99. In Chicks case, Samuels JA, in dealing with a cause in a policy in the following terms, bodily injury caused solely and directly by violent, accidental, external and visible means, said at 97 of the word means in that context: ..it seems to me that the cause of an injury does not differ from the means by which it was caused, since the word means may be defined as a way to an end or that which is concerned in bringing about a result; or, in other words, as a cause. Counsel for the respondent in his written submissions, as amplified in oral argument, explained the evolution of the phrase violent as well as violent, visible and external means as it has been used in insurance policies since approximately the eighteenth century. It is not necessary to refer to that history in detail. It is sufficient for present purposes to indicate that, as was pointed out (at 29) in Personal Accident, Life and Other Insurances, E.R Hardy Ivamy, 2nd ed, 1980, it has been established that the word violence in insurance policies means the contrary of without any violence at all and merely expresses that the injury is due to other than purely natural causes, such as bodily weakness or disease. It followed, on the respondents submission that the word violent when used in the phrase violent..means meant generating a violent reaction. In MacGillivray on Insurance Law, N. Legh-Jones et al (9th ed, 1997), the authors at p701 also give consideration to the meaning of violent means as used in insurance policies. After referring to Hamlyn they state: the phrase seems to include almost any external cause of injury such as drowning; or the inhalation of gas. (Footnotes omitted) The authors footnote two American decision, the first being Henley v Mutual Accident Association, 133 III 556 (1890) (Mutual Accident Association of the Northwest v Tuggle 39 II App 509 (1891) on appeal), noting that it was held there that death by poison acting on the intestines was death by violent means. In the second, Paul v Travelers Ins Co. 112 NY 472 (1889), it was held that arresting the action of the lungs so that suffocation resulted was also within the phrase violent means In Winspear v The Accident Insurance Co. Limited (1880) 6 QBD 42 the Court held, in relation to a policy which provided for insurance cover in the case of any personal injury caused by accidental, external and visible means, that injury by drowning was covered, relying upon the earlier decision in Trew.

5. COUNSEL for the appellant then referred to another decision of the Queens Bench in the case of Winspear Vs. the Accident Insurance Company Ltd. In that case the insured during the currency of the policy whilst crossing and fording a stream or brook called the river Rea, in Edgbaston, Birmingham, was seized with an epileptic fit, and whilst in such fit fell down in the stream, and was drowned.

The insured did not sustain any personal injury to occasion death other than drowning. Again the question as to whether the death of the deceased was accidental and whether it was the result of violent and visible external means was considered and the Exchequer Bench held that the nominee was entitled to the benefits under the insurance policy by observing as under:- It must be admitted that it has been decided that drowning would be an injury within the meaning of the policy; (1) but here there would have been no drowning had the insured not had an epileptic fit. It was the fit which caused the drowning, for even after the insured had fallen into the stream he could have got his head out of the water but for the fit, as the stream was shallow and could be forded. The death, therefore, was from an injury caused by the fit, or from weakness or exhaustion consequent upon disease, and came, therefore, within the terms of the proviso in the policy. The case of Sinclair Vs. Maritime Passengers Assurance Co. (2) shows that death from a sunstroke is from a natural cause, and not from an accident within the meaning of a policy like the present.

6. REFERENCE has also been made to a decision of this Commission in the case of New India Assurance Co. Ltd. Vs. Kaushalya Devi & Ors. II (2007) CPJ 293 (NC). In that case also the claim was repudiated on the ground that the insured had died due to fall in water after suffering from epileptic fit and, therefore, the death was not accidental. This Commission held that the insurance company failed to establish that the insured had fallen in water due to epileptic fit and, therefore, allowed the complainant and upheld the entitlement of the nominee of the insurance claim. Having considered the facts and circumstances of the present case in their entirety and the legal position as noted above, there is no escape from the conclusion that the deceased late. Sabita Sahoo had sustained bodily injury resulting solely and directly from an accident caused by external violent and visible means. Any other interpretation of this clause would defeat the very purpose of the insurance of the kind taken by the deceased. We have, therefore, no manner of doubt that the complainant, being the nominee under the policy, is entitled to the insured amount payable under the policy, of course, subject to the terms and conditions of the policy.

Lastly, Mrs. Verma, learned counsel for the respondent insurance company contended that even if the appellant is held entitled to the claim under the Janata Personal Accident Insurance Policy in question, by virtue of clause 6 of the terms and conditions of the policy, the maximum liability of the insurance company will be limited to a sum of Rs.15,000/- only because the insured had obtained another similar Janata Personal Accident Insurance Policy in the sum of Rs. 5 lakh. The contention appears to be catchy in the first instance but is found without any merit, once we examine the same with reference to the provisions of clause 6 of the policy in question. The said clause is as under :- 6. If the insured shall at any time during the continuance of the policy be insured against similar Janata Personal Accident Insurance Policy with one or more insurers, then the maximum liability of the insurers irrespective of the numbers of such policies in force with one or more insurer shall be limited to Rs.15,000/-.

7. LEARNED counsel for the appellant has not disputed that the late Sabita Sahoo had also taken another similar Janata Personal Accident Insurance Policy in the sum of Rs.5 lakh from Oriental Insurance Company Ltd. but his submission is that the said policy was taken prior to the policy in question, viz., on 8.11.97, while the policy in question was taken on 3.11.97 and, therefore, the said clause would have no application and the liability of the insurance company cannot be restricted to a sum of Rs.15,000/- only. On careful interpretation of the above referred clause, we find force in this contention because the liability of the insurance company could be restricted to a maximum sum of Rs.15,000/- only if the insured had taken any similar policy as the policy in question during the continuance of the policy in question. Here, it has not been established that the insured had taken that similar Janata Personal Accident Insurance Policy from any other insurer during the currency of the policy in question. Learned counsel for the respondent has also argued that the complainant has not come clean on record to state as to whether he has also received any claim under the policy issued by the Oriental Insurance Company Ltd. and, therefore, he is not entitled to insurance claim under the policy in question. In our view, it is none of the concern of the respondent insurance company to know about the fate of the claim under the other policy because either way it does not affect the liability of the respondent insurance company under the policy in question.

8. HAVING considered the matter in its entirety, we are of the opinion that the finding and order recorded by the State Commission is legally unsustainable and must be set aside. The complainant being the nominee under the policy, has successfully established his claim under the insurance policy. In the result, we allow the appeal and set aside the order of the State Commission. Resultantly, we partly allow the complaint and direct the respondent insurance company to pay the payable insurance claim under the policy No.47550700025 to the complainant with interest @ 6% p.a. w.e.f date of complaint till payment. We grant six weeks time to the insurance company to pay the amount failing which the rate of interest shall stand enhanced to 9% p.a. from the date of default. The First Appeal stands disposed of in these terms. Costs are made easy throughout.

