(1999) 08 NCDRC CK 0045

In the National Consumer Disputes Redressal Commission

ISHWAR CHANDRA GANGRADE — APPELLANT

Vs

NEW INDIA ASSURANCE CO. LTD. — RESPONDENT

Date of Decision : 13-08-1999

Acts Referred:

Citation : 1999 3 CPR 283 : 2000 1 CLT 317 : 2000 1 CPC 215 : 2000 2 CPJ 254

Hon'ble Judges : S.K.Dubey , N.K.Vaidya J.

Final Decision : Complaint allowed with costs

Judgement

1. THE complainant No. 1 is the husband, the complainant Nos. 2 to 4 are the sons and the complainant No. 5 is the daughter of the deceased Smt. Vimaldevi Gangrade (for short ''insured'') who have filed this complaint under Section 17(a) (i) of the Consumer Protection Act, 1986 (for short the ''Act'') to claim the amount of Rs. 20 lacs on account of deficiency in service by the opposite parties (for short the ''insurer'') in not making the payment of 5,000/- dollars the expenses incurred in Houston Northwest Medical Center in terms of the Overseas Mediclaim Policy Annexure A-1 (for short the policy) as a consequence of that the insured could not continue her treatment and had to come back to India on 1.9.1991, who ultimately died on 10.10.1992.

2. THE insured filled up the proposal form for obtaining policy on 10.6.1991 for a period of 120 days, i.e. for four months and paid the full premium of Rs. 2,921/- by crossed account payee''s cheque No. 222252 dated 10.6.1991 drawn on UCO Bank, Branch Anoop Nagar, Indore. THE proposal form and the amount of premium was accepted by the opposite party (the ''insurer'') of which a receipt No. 359337 was issued. THE insured left India for USA on 15.6.1991 at 12.30 a.m. by the scheduled flight from Bombay Air Port on visitors visa. THE complainants alleged that for the reasons unknown the policy initially was issued for 60 days on 11.6.1991 plan B for illness, accident covering the amount to the extent of US dollar 1 lac. Of this an extension (Annexure A-2) vide endorsement No. 1991/02 dated 27.6.1991 was made for covering the further period of 60 days. This extension was issued unilaterally when the insured was already in

USA. THE insured fell ill, therefore, was admitted in the hospital of Houston Northwest Medical Center on 12.8.1991 of which the expenses treatment was to be borne by the insurer. For that Mercury Insurance Service Ltd. (for short ''Mercury'') who was acting as agent of the insurer was informed. THE insured was detected malignancy and advised for operation. A bill of 500 dollars of investigation and hospitalisation charges of the insured for the period of 12th August to 17th August, 1991 was sent to Mercury by the hospital Authorities. THE Mercury made the payment only of 434 dollars and the balance payment of 150 dollars and further expenses was not made by the Mercury on the ground that the insured''s illness occurred on 12th August before the expiry of the original insurance, therefore, the extension would not be valid for any expenses concerning the illnesses in future. As the insured was not in a position to bear the expenses, which mounted to 5,000 dollars after 13th August, 1991 the insured being helpless stayed outside hospital upto 1.9.1991 and lastly she left for India on 2.9.1991 struggling with life and death for want of proper treatment. THE insured made correspondence alleging that when she filled the proposal for taking of the policy for 120 days and paid the full premium by cheque, the policy was given to her on the day when she was leaving for USA. Without the consent of the insured and without the fresh proposal the insurer could not have reduced the period and thereafter issued an extension by endorsement for further period of 60 days which would not have any effect on the coverage for 120 days. THErefore, the insured is entitled to be reimbursed for the medical expenses incurred in USA. THE insurer did not pay the amount nor sent any reply till her death on 10.10.1992. After the death of the insured the complainants made correspondence and lastly sent a notice dated 5.8.1994 to claim the amount of 1 lac US dollar under the terms of the policy. THE insurer through their Counsel for the first time sent the reply dated 15.10.1994 denying the liability stating therein that after 13th August, 1991 that is for the subsequent period to the expiry of the first policy the insured was not entitled to any amount in terms of the policy. THErefore, the complainants who are the legal representatives of the deceased insured filed this complaint restricting the amount of claim for Rs. 20.00 lacs for the deficiency in service as a result of which the insured was deprived of the expert treatment in not meeting out the expenses of the treatment under the policy by the insurer which resulted in great sufference of mental and physical pain to insured. THE complainants also claimed compensation for their mental agony and for loss of company of the deceased insured. The insurer denied the allegations of the complaint and any deficiency on their part. It is submitted that the amount of Rs. 20.00 lacs alongwith costs exceeds the valuation of Rs. 20.00 lacs which is beyond the pecuniary jurisdiction of this Commission. The complaint is barred by time. The cause of action arose on 4.11.1991 when Mercury did not make the payment of the hospital bill beyond the period of 13th August, 1991, while, the complaint is filed on 10.10.1995 beyond the period of 2 years. The complainant suffers from non-joinder of Mercury as necessary party, it was submitted that the policy was only for 60 days and thereafter, supplementary policy was issued for further period of 60 days. The complainant did not object to

issue of the policy and accepted all the contents of the policy. In view of the terms of the policy the expenses incurred in the treatment subsequent to 13.8.1991 were not payable.

We have heard Mr. A.M. Mathur, Senior Advocate with Mr. Ashutosh Upadhyay, learned Counsel for the complainants and Mr. Mahavir Bhatnagar and Mr. S.K. Menon, learned Counsel for the opposite parties and perused the documents on record. We will deal with the contentions one by one.

3. RE : Pecuniary Jurisdiction : Section 17(a)(i) of the Act provides that the State Commission shall have jurisdiction to entertain a complaint where the aggregate value of the claim exceeds Rs. 5 lacs but does not exceed Rs. 20 lacs. In the present case, the complainants have restricted their claim to the extent of Rs. 20 lacs under various heads upon aggregate value of goods or services as well as for compensation. In this amount the costs of the proceedings claimed cannot be included which neither falls in the value of the goods nor under the claim of compensation. The award of costs depends on the discretion of the Consumer Disputes REdressal Agencies. Therefore, as the value of the aggregate claim is well within Rs. 20 lacs this Commission had pecuniary jurisdiction to entertain the complaint. See the decision of the National Commission in case of Quality Foils India Pvt. Ltd., v. Bank of Madura Ltd. & Ors., II (1996) CPJ 103 (NC). Re : Non-joinder of Mercury as a party : The privity of contract was between the insured and the insurer and not with Mercury, as the proposal was filled by the insured which on deposit of full premium for 120 days was accepted and the contract document that is the policy was issued. The policy prescribes a procedure for obtaining assistance and claims which lays down a condition precedent that when medical attention is required, Mercury must be contacted by the insured person, his representative or the attending physician/Hospital immediately on the address given. Admittedly, Mercury was contacted which paid the amount of expenses for two days. This was an arrangement of making the payment of the mediclaim by the insurer though Mercury in foreign countries. Mercury may be the representative or agent of the insurer but there was no privity of contract between the insured and the Mercury, therefore, Mercury would not be necessary party nor in the absence of the Mercury the complaint will fail.

4. RE : Right of the complainants to file complaint to claim compensation : The complainants are the legal representatives of the deceased is not in dispute. The expression legal representatives is not been defined in the Act. Section 2(11) of the Code of Civil Procedure, 1908 defines "legal representative" means a person who in law represents the estate of a deceased person and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued. The question came up for consideration before the Supreme Court in case of Gujarat State Road Transport Corporation v. Ramanbhai Prabhatbhai & Anr., AIR 1987 SC 1690, where the application under

Section 110-A of the Motor Vehicles Act, 1939 for compensation was filed by the legal representatives of the deceased who died in motor accident. The Supreme Court observed that though the expression legal representatives has not been defined in the Act. However, legal representative ordinarily means a person who in law represents the estate of a deceased person or a person on whom the estate devolves on the death of the individual. The contention of the insurer is that the complainants to establish themselves as legal representatives of the deceased ought to have produced an authentic document, not said in so many words for succession certificate. The relationship of the complainants is not denied with the deceased insured. The deceased was a Hindu, her estate has devolved on the complainants, therefore, production of succession certificate would not be necessary as the legal representatives of the deceased may sue in respect of all causes of action that survived the deceased and may exercise the same power for the recovery of debts as the deceased had when living. Re : Limitation : The insurer avers that the cause of action arose on 4.11.1991 when Mercury vide letter dated 4.11.1991 repudiated the mediclaim intimating to Moonat Medical Associates that the policy cover of Mrs. Gangrade expired on 13.8.1991, therefore, the said Company is only able to deal with those invoices on or prior to that date which covers the expenditure amount of 434 dollars for which the draft was enclosed and for the balance dollar 150, the hospital Authorities were advised to collect the balance from Mrs. Gangrade. While the period prescribed for entertaining the complaint under Section 24-A for two years from the date on which cause of action has arisen. The complainant avers that when the insured was not reimbursed for the expenses after 13.8.1991 she came back to India and made correspondence and then served a notice dated 8.10.1992 Annexure A-3 through her Counsel Mr. Manohar Dalal, of which no reply was received. After the death of insured as the claim was not settled, the complainants served a notice dated 5.8.1994 through their Counsel Annexure A-4 of which reply Annexure A-5 dated 15.10.1994 denying the contents and the liability under the terms of the policy was sent by the insurer. Therefore, the complainants say that the cause of action arose first when the payments were not made to the insured in the hospital in USA and then after her return to India whose claims were not settled and finally the claims were not settled and liability was denied. In fact for the first time the insurer denied the liability, till this there was no repudiation of the claim. True, Mercury refused to make the payment to hospital Authorities vide letter dated 4.11.1991 but this will have no effect as insured was neither intimated by Mercury nor by insurer by any letter of not making the payment or repudiating the liability. The main office of Mercury is situated at Bright Town, Sussex in United Kingdom, therefore, it was not possible to the insured who was taking treatment in the hospital to contact Mercury. It is not the case of the insurer that Mercury ever communicated its decision of not making the payment to the deceased insured. Even if, Mercury would have intimated, the privity of contract was between the deceased and the insurer and not with the Mercury. In the present case the deceased insured or the complainants after the death of insured never received any communication of

repudiation of the claim by the insurer. Therefore, the cause was continuing. It is for the first time the insurer vide reply dated 15.10.1994 the insurer disclaimed the liability . Thereafter the complaint was filed on 10.10.1995 which is within two years from the date of arising of cause of action that is 15.10.1994. To say so we rely the decision of Maharashtra State Commission in Dawood Kumar Taj & Ors. v. Oriental Insurance Co. Ltd. & Anr., II (1994) CPJ 14. On merits deficiency in service the policy issued covers the period of 60 days only from the first day of insurance, from the date and time of boarding of the Air Craft, i.e. from 15.6.1991. The insured was denied payment of expenses as the last date of coverage was 13 August, 1991. The period of insurance in the policy reads thus : "This insurance is valid from the first day of insurance for the number of days specified in the Overseas Mediclaim Identification and Schedule, but ceases on his return to India. This insurance is automatically extended for a period of 45 days for treatment of covered illness or accident if during such treatment the policy cover expires."

5. HOWEVER, the complainants asserts that the insured paid full amount to cover the insurance for 120 days and that the insured never applied for extension. The insurer having realised their mistake issued endorsement of extension for another 60 days vide Annexure A-2. For the additional endorsement, the note of endorsement is important which reads thus : Note : 1. Extension of cancellation will be indicated for one policy only. 2. For each endorsement separate form is required to be completed. 3. Additional premium applicable only for extension. 4. Refund Premium Applicable only for cancellation.

6. FROM the Clause 2 of note it is evident that for each endorsement separate form is required to be completed. Clause No. 3 of note lays down additional premium applicable only for extension. In the present case neither the insured gave separate form nor paid any additional premium for extension. It was an unilateral act of the insurer of issuing the policy for 60 days against the premium of 120 days without refunding the balance amount of premium. The endorsement was issued at the back in violation of the conditions contained in the note. It is not the case of the insurer that insured agreed for issuance of cover of 60 days only and made a request to issue extension endorsement after her departure. In fact, having realised the mistake that the policy ought to have been issued for 120 days covering the risk of their own accord issued endorsement of extension. Thus issuance of the policy for 60 days was an unauthorised illegal or arbitrary act to save the insurer from the liability under the cover in case the occasion arises. This was not expected from the corporate body like insurer carrying monopolistic business of insurance. In the circumstances, the extension endorsement would have no effect as the endorsement was issued for treating the policy of 120 days instead of 60 days which was infact the intention of the parties as the insured gave proposal form with premium amount for coverage of 120 days. The insurer has also not established the fact by producing the proposal form to demonstrate that the insurer at the first instance agreed for issue of policy covering the period of 60 days and then to adjust the balance amount of

premium in additional premium as applicable only for extension. Therefore, adverse inference has to be drawn against the insurer for not producing the proposal form which is in their possession. See, the decision of the Supreme Court in case of A. Raghavamma & Anr. v. A. Chenchamma & Anr., AIR 1964 SC 136. Even assuming for arguments sake the cover was for 60 days, from a look to the period of insurance in the policy quoted in para 9, the insurance stood automatically extended for a period of 45 days for treatment of covered illness as the insured was taking treatment in the hospital during which the period of sixty days expired. Therefore, for this reason too the repudiation of the claim and denial of liability was unjustified.

Re : Amount of claim of expenses : The complainants have claimed 5000 dollars, the amount of expenses incurred in treatment while according to the insurer out of invoices totalling 584 dollars, Mercury has paid to the hospital Authorities 434 dollars and balance of 150 dollars was not paid. There is another bill Annexure A-8 of the hospital for the period 15th August to 17th August of 2823.40 dollars. Though its correctness and genuineness is challenged, but, the fact remains that there had been correspondence between the Mercury and the hospital Authorities for making the payment. Therefore, the amount of 2823.40 dollars is also due. Thus the total amount of 2973.40 dollars was due, and not 5000 dollars as has not been established by any evidence except the statement on affidavit which we are not inclined to accept. Thus the complainants would be entitled to be reimbursed of 2973.40 dollars in equivalent Indian Rs. 76,981/- of the relevant date the amount of expenses which the deceased insured had incurred in USA.

7. RE : Compensation : The act of denial of the amount of expenses amounted to deficiency in service to the deceased insured while she was undergoing treatment in hospital in Houston. Because of this illegal act she could not continue with the expert treatment for want of funds and had to come back to India. If the treatment would have been provided to her either she would have been cured or lived longer. For want of proper treatment due to not meeting out the expenses incurred in treatment by the insurer, the insured certainly suffered great mental agony and physical pain. Therefore, applying the principles for determining the non-pecuniary damages as laid down by the Supreme Court in R.D. Hattangadi v. Pest Control (India) Pvt. Ltd. & Ors., 1995 (1) SCC 551=I (1995) ACC 281 (SC), for mental and physical shock and for damages for the loss of expectation of life and for inconvenience, hardship, discomfort, dis-appointment, frustration and mental stress in life, on some sympathetically consideration link with the nature of the disease, it would be just and proper to fix the amount at Rs. 50,000/- as compensation to which the deceased insured was entitled, which on her death has become the estate of the deceased alongwith the pecuniary damage that is the amount of expenses not paid by the insurer in USA, as determined by us. Thus the complainants would be entitled in all 2973.40 dollars (Rs. 76,981/-, for deficiency in service in not meeting out the expenses under the cover and in addition to that Rs. 50,000/- as compensation. The complainants would also be entitled to interest on the amount of Rs.

76,981/- from the date of filing of the complaint, i.e. 10.10.1995 at the rate of 12% p.a. The insurer shall make the payment within a period of two months from the date of receipt of certified copy of this order failing which interest shall be payable at the rate of 15% per annum.

8. IN the result, the complaint is allowed as indicated hereinabove with costs which are quantified at Rs. 3,000/-. A copy of this order be conveyed to the parties. Complaint allowed with costs.

