(2006) 10 NCDRC CK 0033

In the National Consumer Disputes Redressal Commission

JAGANNATH BHAGAT — APPELLANT

Vs

Bank of India — RESPONDENT

Date of Decision : 11-10-2006

Acts Referred:

Citation : 2006 3 CPR 353 : 2007 1 CPJ 38

Hon'ble Judges : Sunil Kumar Garg , T.P.Gupta J.

Advocate : Tej Prakash Sharma

Judgement

1. THIS appeal under Section 15 of the Consumer Protection Act, 1986 (hereinafter referred to as "the Act of 1986")) has been filed by the appellants against order dated 11. 9. 1997 passed by the District Forum, Bikaner by which the complaint of the respondent was allowed in the manner that the appellants were directed to pay the sum assured under the policy of the complainant''s wife with all benefits within a period of one month.

2. THE necessary facts giving rise to this appeal are as follows : the complainant respondent had filed a complaint under Section 12 of the Act of 1986 before the District Forum, Bikaner inter alia stating that Mrs. Krishna devi (hereinafter referred to as "the deceased") was his wife and she had taken a policy of Rs. 1 lakh from the appellants which had commenced from 28. 5. 1995 and in that policy the complainant respondent was the nominee. The further case of the complainant respondent was that the deceased had expired on 27. 8. 1996 and thereafter the respondent complainant has lodged a claim with the appellants which was repudiated by the appellants through letter dated 10. 3. 1997 inter alia stating that since the deceased was suffering from asthama and hip joint for which she had consulted a medical man and had taken treatment and since that facts were not disclosed in the proposal form, therefore, it was a case of suppression of material facts. After that complainant respondent had filed the present complaint before the District Forum, Bikaner. A reply was filed by the appellants and their case was that the claim of the complainant respondent was rightly repudiated by them through letter dated 10. 3. 1997 and the grounds of

that letter have already been mentioned above. It was further stated by the appellants in the reply that on investigation it was revealed that the deceased had taken the treatment from Bombay Hospital, Bombay where she had admitted on 16. 8. 1996 and had died on 27. 8. 1996 and the cause of death was Cardio Respiratory Failure Due to Pulmonary embolism in a operated case of right side total hip replacement. Hence, no case. Complaint be dismissed. After hearing both the parties, the learned District Forum, Bikaner allowed the complaint of the complainant respondent inter alia holding that the claim of the present policy should have been allowed and thus the claim of the complainant respondent was wrongly repudiated by the appellants. Aggrieved from the said order dated 11. 9. 1997 passed by the District Forum, Bikaner, this appeal has been filed by the appellants. In this appeal, the main contention of the learned Counsel for the appellants is that since the deceased was suffering from serious sickness and for which she had taken treatment from Bombay Hospital and since she had not mentioned that fact in the declaration form which was filled in up by the deceased on 28. 3. 1996, therefore, appellants had legal right to repudiate the claim and thus findings given by the District Forum by accepting the claim are erroneous one and should be set aside.

On the other hand, the learned Counsel appearing for the respondent has supported the impugned order of the learned District Forum.

3. WE have heard the learned Counsel appearing for the appellants as none has appeared on behalf of the respondent and gone through the entire materials available on record. There is no dispute on the point that on 28. 3. 1996 the deceased had taken the insurance policy from the appellants and there is also no dispute on the point that on the date the deceased had filled in up the declaration form in which she had not mentioned any disease for which she was suffering.

4. THERE is also no dispute on the point that the claim of the respondent complainant was repudiated by the appellants through letter dated 10. 3. 1997 on the ground that the deceased was suffering from the disease of asthama and hip joint and that was suppressed by her at the time of filling of the declaration form. There is also no dispute on the point that the deceased was admitted in Bombay Hospital on 16. 8. 1996 for the treatment of hip joint and at that time she was also a patient of asthama as is evident from the Bombay Hospital Admission Form. There is also no dispute on the point that while the deceased was admitted in the Bombay Hospital she has died there on 27. 8. 1996.

5. THERE is also no dispute on the point that the cause of death of the deceased was cardio respiratory failure due to pulmonary embolism in a operated case of right side total hip replacement.

6. THERE is also no dispute on the point that the death of the deceased had taken place within two years of the commencement of the policy in question. Thus, in the facts and circumstances just narrated above, the question for

consideration is whether the findings recorded by the learned District Forum could be sustained or nor or whether the stand taken by the appellants should be accepted or not.

Before proceeding further, it may be stated here that 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 known. 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 obligation of good faith applies to both equally and in this respect, the decision of the Hon''ble Supreme Court in M/s. Modern Insulators Ltd. v. Oriental Insurance Company, I (2000) CPJ 1 (SC)=ii (2000) SLT 323=air 2000 SC 1014, may be referred to.

7. THE onus probandi, in cases of fraudulent suppression of material facts rests heavily on party alleging fraud namely the insurer. Furthermore, mere concealment of some facts will not amount to concealment of material facts. Suppression of facts must be a conscious operation of the giver of the answer which he knowingly did not disclose.

8. THE Hon''ble National Commission in National Insurance Co. Ltd. v. Bipul Kunda, II (2005) CPJ 12 (NC)=2005 CTJ 377 (CP) (NCDRC), has held that for repudiating a claim of an insured, it is for the insurer to show that a statement on a fact, which was material for the policy, had been suppressed by the insured and that statement was fraudulently made by him/her with the knowledge of the falsity of that statement. As already stated above, the death of the deceased had taken place within two years of the issuance of the policy. It may be stated here that where the insurer wishes to call in question a policy within two years of its being effected, it is enough if the insurer is in a position to show that a statement made in the proposal for insurance or in any report of a medical officer or referee or friend of the insured or in any other document leading to the issue of the policy is inaccurate or false.

9. IT may further be stated here that even if the death takes place within two years, mis-representation, if any, that should be material in the sense of having some effect upon life expectation whether direct or indirect and if it is found material, that defence could be taken by the Insurance Company not otherwise.

10. IF the above legal position is taken into consideration with the facts of the present case it is very much clear that on the date of declaration form i. e. , on 28. 3. 1996 there is no evidence to show that she was suffering from any disease. From the Bombay Hospital record it appears that the deceased was first admitted in the hospital on 16. 8. 1996 as she was having pain in hips. When this being the position it can easily be concluded that the present case was not a case of suppression of material facts in any manner.

The test of determine materiality is whether the fact has any bearing on the risk undertaken by the insurer. If the fact has any bearing on the risk, it is a material

fact; if not, it is immaterial.

11. IN our considered opinion, there are certain diseases such as kidney, heart and brain and they are connected with the life span of a person and if any mis-statement is made in respect of such type of diseases by the person seeking insurance, in such case it can be believed that knowingly the person taking out the insurance has made mis-statement. But if any one suffers from temporary illness such as fever, cough, cold, etc. and the same was not mentioned at the time of taking insurance, it cannot be stated in true sense that a mis-statement in respect of the state of health has been made by the person seeking insurance. For the sake of argumets if it is held that the deceased was a patient of asthama and hip joint, in our considered opinion such type of diseases cannot be treated as a disease in the same manner as the diseases such as kidney, heart and brain which directly affect the life span of a person.

12. APART from this, disease Asthama is caused by increased responsiveness of the tracheobronchial tree to various stimuli. Asthama is the leading cause of chronic illness in childhood. There may be allergic Asthma also. Sometimes it may be precipitated by infection of the upper or lower respiratory tracts. Therefore, in our considered opinion, the disease Asthama cannot be treated as a disease in the same manner as the diseases such as kidney, heart and brain, which directly affect the life span of a person. Asthma is not a permanent disease, but it is a recurring disease and thus, it is not a serious disease and Bronchial Asthma can never be the cause of death itself. Thus, Bronchial Asthma could not be said to be fatal one and, therefore, non-mentioning of such type of disease in the declaration form would not amount to mis-statement.

13. FOR the reasons stated above, it is held that repudiation of claim of the respondent complainant by the appellants through letter dated 10. 3. 1997 on the ground of suppression of material facts in the declaration from by deceased was not justified because non-mentioning of such of disease hip joint. does not amount to mis-statement in real sense.

14. THEREFORE, we uphold the impugned order of the learned District Forum, Bikaner. Accordingly, this appeal filed by the appellants is dismissed. Appeal dismissed.

