(2012) 02 NCDRC CK 0037

In the National Consumer Disputes Redressal Commission

National Insurance Company Ltd. — APPELLANT

Vs

ASHOK KUMAR GUPTA — RESPONDENT

Date of Decision : 28-02-2012

Acts Referred:

Citation : 2012 0 NCDRC 66 : 2012 1 CPJ 547

Hon'ble Judges : Anupam Dasgupta , Suresh Chandra J.

Advocate : Sushil Kumar Gupta

Judgement

1. THIS revision petition challenges the order dated 10.11.2006 of the Andhra Pradesh State Consumer Disputes Redressal Commission, Hyderabad (in short, ? the State Commission?). By this order, the State Commission allowed the appeal of the complainant and directed the opposite party (OP ? Insurance Company) to pay to the complainant, within six weeks, Rs.1,20,051/- with interest @ 9% per annum from the date of the complaint till the date of realisation towards reimbursement of expenditure incurred by him on his treatment in the Care Hospital and Rs.1,000/- towards cost. The State Commission also directed that failure to comply would attract further interest @ 9% per annum on the awarded amount.

2. THE respondent was the complainant before the District Consumer Disputes Redressal Forum I, Hyderabad (in short, ?the District Forum?). In his complaint he alleged that the OP (petitioner before us) was guilty of deficiency in service in repudiating his claim for reimbursement of the expenditure of Rs.1,20,051/- on his medical treatment at the Care Hospital, Hyderabad during 06.11.2000 to 20.11.2000 for Coronary Artery Disease (CAD). THE case set out by the complainant was that he had purchased the mediclaim policy for Rs.2 lakh each for himself and his wife for the period 28.09.2000 to 27.09.2001. Though he (45 years of age) was hale and hearty when he obtained the insurance, he suddenly developed chest pain on 06.11.2000 and was taken to the Care Hospital. After the requisite tests, including Coronary Angiogram, he was diagnosed with Coronary Artery Disease (CAD - 2-vessel disease). Accordingly, a Coronary

Artery By-pass Graft (CABG) surgery was performed on him on 13.11.2000. After his discharge from the hospital on 20.11.2000, the complainant submitted a claim to the OP. However, the OP repudiated the claim without sufficient ground. Hence, alleging deficiency in service on the part of the OP, the complainant prayed for a total award of Rs.1,68,901/- on various counts. The allegations in the complaint were strongly resisted by the OP. It was submitted that the complainant was suffering from CAD for long. As he was running a Chemist and Druggist Shop, he was fully aware of his medical condition. On 06.10.2000, the complainant went to the clinic of one Mr. Kedarnath, Cardiologist who advised him to get admitted to the Care Hospital with the observation, "Rest Angina Post Prandial with ECG changes". However, the complainant did not get himself admitted soon thereafter because he was aware that it would affect his claim for reimbursement of expenditure on the treatment under the mediclaim insurance policy taken by him if the treatment started within 30 days of taking the policy. Therefore, he delayed his admission to the Care Hospital till 06.11.2000 by when the policy had run for a little over a month. As per clause 4.1 of the insurance policy, all pre-existing diseases/injuries at the time of inception of the insurance cover were excluded from the purview of the policy. Further, under clause 4.2 of the policy, any disease for which treatment was taken during the first 30 days of the commencement of the policy was also excluded. The claim was validly repudiated because the complainant/insured was suffering from CAD even before he applied for the mediclaim policy. In his proposal for the insurance, he suppressed this information while filling in the "Details of The Insured" in the prescribed form.

After considering the pleadings, evidence and documents brought on record by the parties, the District Forum dismissed the complaint by its order dated 13.07.2004, holding that the complainant did not disclose the history of his pre-existing disease at the time of submitting the proposal for the mediclaim insurance policy and also deliberately delayed his admission to the Care Hospital to 06.01.2001, though he had consulted Dr. Kedarnath, Cardiologist on 06.10.2000 and was advised to get admitted to the said Hospital. According, to the District Forum the complainant did this in order to avoid the application of exclusion of clause 4.2.

3. IN appeal by the complainant, the State Commission, set aside the order of the District Forum and allowed the complaint with the following observations: "The learned counsel Mr. Eswara Prasad appearing for the appellant/complainant submitted that the opposite party has not examined any witness nor filed any affidavits for the purpose of establishing that the complainant has suppressed that he was suffering from hypertension. The learned counsel also submitted that the complainant has not suppressed any pre-existing disease with fraudulent intention to make monetary gain out of mediclaim policy. He further submitted that Exs. B 9 and B 10 cannot be relied upon without actually examining the Doctors and without filing the affidavits of the doctors and cross examining them before the District Forum. We have gone through the entire record and heard the

arguments of learned counsel for the appellants and respondent. The investigator has examined the prescription chit issued by Dr. Kedarnath who advised the complainant to admit in Care Hospital and also visited the Care Hospital. For the purpose of establishing that the complainant has wilfully suppressed the pre-existing disease the opposite party ought to have filed the affidavit of Dr. Kedarnath and he should have been examined before the District Forum. IN the absence of such procedure Ex. B 9 and B 10 do not have any evidential value. To establish the fact that the complainant did not reveal the history of hypertension and he wilfully and intentionally suppressed that he was suffering from hypertension is on the opposite party. Taking into consideration all these factors, we are of the considered opinion that the order of the District Forum suffers from infirmity apparent on the face of the record. Taking into consideration the totality of the facts and circumstances of the case we are of the considered opinion that the complainant is entitled to claim the expenditure incurred towards treatment in the Care Hospital i.e., Rs.1,20,051/- with interest @ 9% per annum from the date of complaint till the date of realisation. Complainant is allowed accordingly together with costs of Rs.1000/-. Time for compliance six weeks, failing which the said sum shall carry further interest @ 9% per annum."

[Emphasis supplied] We have heard Dr. Sushil Kumar Gupta, learned counsel for the petitioner/OP ? Insurance Company. Though an advocate represented the respondent/complainant, no one remained present on the last date of hearing.

4. IT is clear that the State Commission set aside the order of the District Forum only on the ground that neither Dr. Kedarnath who had (purportedly) seen the complainant on 06.10.2000 and issued the prescription slip diagnosing some cardiac ailment and advising admission to the Care Hospital was examined by the petitioner/OP before the District Forum nor was Mr. V. Sudhakar, Chairman, Health Care Management Services (who investigated the claim and submitted the report) was produced for evidence/cross-examination before the District Forum. Learned Counsel for the petitioner has emphasised that the State Commission erred in completely discounting the prescription slip dated 06.10.2000 issued by Dr. Kedarnath only on the ground that the petitioner failed to produce him for examination and cross-examination before the District Forum. Likewise, the petitioner failed to produce Mr. Sudhakar, Chairman Health Care Management Service to give evidence regarding the report submitted by him so that he could be cross-examined on the contents of his report. In this context, Dr. Gupta has brought to our notice that before the District Forum, the petitioner/OP had filed an interim application (no.203 of 2003) requesting the District Forum to summon both Dr. Kedarnath and Mr. Sudhakar because the complainant had objected to the production of documentary evidence marked "B 9" and "B 10" by the OP. By its order dated 28.07.2003 on this application, the District Forum directed as under: " ... ? ? ? ? We have gone through the respective pleas taken by the petitioners/respondent in the complaint and counters filed. As per the plea taken by the petitioner goes to show that the said witness to examine for the purpose of this case, they are the material witnesses, summons may be issued. The

respondent also did not object for summoning of the witness; only grievance is that he may be permitted to cross-examine the said witness. The petitioner affidavit discloses that an investigator was already appointed and submitted the relevant documents. After investigation Dr. Kedarnath has issued prescription, they are the material witnesses for the purpose of this case. On the other hand, instead of summoning the witnesses the petitioner is directed to file evidence affidavit of Dr. Kedarnath and V. Sudhakar before this Forum. After filing the said evidence affidavit if the respondent chooses to cross-examine the said witnesses will be considered. With these observations, the petition is partly allowed directing to file evidence affidavit instead of summoning the said witnesses, in the circumstances of the case without costs."

5. LATER, the OP filed another application dated 08.09.2003 pointing out that Mr. Sudhakar had refused to sign any affidavit and demanded Rs.10,000/- for remaining present before the District Forum. Dr. Kedarnath had also not agreed to file any affidavit. The OP, therefore, prayed for issuing summons to them. Instead of summoning these two witnesses, viz., Dr. Kedarnath and Mr. Sudhakar, the District Forum passed the following order on this application/ memorandum: "The submission made by the respondent is concerned there is no doubt we have gone through the orders passed in I.A. No. 207 of 2003 wherein a specific order was passed to file evidence affidavit instead of summoning the witness. Moreover, the memo filed by the opposite party itself goes to show that one Sudhakar, witness refused to sign on the evidence affidavit; the Forum cannot direct the witness to present before this Forum in order to direct him to sign on the affidavit prepared by the petitioner or to summon witness. The relief sought in the memo is quite contra to that of the orders passed by this Forum. Hence, the petitioner/opposite party is not entitled to any relief in pursuance of the memo filed by him. The relief sought in the memo is quite contra to that of the order passed by this forum in a proceeding. Hence this memo filed by the petitioner is rejected. In the result this memo is rejected".

[Emphasis supplied]

6. DR. Gupta has, therefore, contended that it was not for want of effort on the part of the petitioner/OP that DR. Kedarnath or Mr. Sudhakar could not be summoned before the District Forum to prove the authenticity of the prescription dated 06.10.2000 and the report submitted by the latter after investigating the insurance claim. DR. Gupta has further submitted that the medical record of the Care Hospital included entries under the heading ?Admission Data?. In that part of the report, at the time of the complainant?s admission to the said hospital on 06.11.2000, there was a clear mention of the admission being on the advice of "Consultant DR. Kedarnath". On the other hand, the complainant flatly denied consulting DR. Kedarnath at any time. However, considering the preponderance of probability it would be in order to conclude that the complainant had indeed consulted DR. Kedarnath who issued on 06.10.2000 the prescription produced on record as part of the investigation report by the petitioner/OP. Secondly, while

noting down the history on 06.11.2000, the record of the Care Hospital mentioned, "H/O Hyperthyroidism; taken Rx ? ? ? ? for six months; presently off drugs." This is the record of the Care Hospital and there is no reason to doubt its authenticity. This would clearly show that the complainant was suffering from hyperthyroidism for about six months prior to the date of his admission to Care Hospital, and yet this fact was no disclosed under any of the items at sr. no. 13 or 15 of the "Insured Personal Details" that the complainant filled in for the mediclaim insurance policy on 27.09.2000. This non-disclosure of his pre-existing condition of hyperthyroidism would clearly establish the breach of the requirement of "utmost good faith" by the complainant while seeking the mediclaim insurance policy. On careful consideration of the material brought on record by the parties, we are inclined to agree with Dr. Gupta that the State Commission erred in summarily dismissing the evidentiary value of the prescription dated 06.10.2000 issued by Dr. Kedarnath on the ground that the OP had failed to produce his affidavit before the District Forum, without taking cognisance of the fact that the petitioner/OP had requested the District Forum to summon and that it was the District Forum which, in its own wisdom, refused to do so because it wrongly felt that it could not direct the witness to remain present ? this was clearly in complete oblivion of the fact that the question was not of directing any witness to sign any affidavit but to depose if a certain document produced before the District Forum had been issued by him. Similar was the case with summoning and examination of Mr. Sudhakar, the author of the investigation report on which the petitioner had relied in repudiating the claim. The District Forum had the full power to summon and examine any witness under oath in accordance with the provisions of section 13(4) of the Consumer Protection Act, 1986.

Moreover, that the complainant did not disclose his pre-existing disease of "hyperthyroidism" (wrongly written as "hypertension" in the orders of the Fora below) is also clearly established by the admission record of the Care Hospital. Thus, the complainant was guilty of non-disclosure of material fact relating to his health in filling the forum under the heading "Insured Personal Details" just before obtaining the mediclaim insurance policy.

7. IT is a well-settled legal position that the duty of "utmost good faith" in disclosing the material facts lies with the insured when he seeks insurance cover for, the insurer?s assessment of the risk involved in accepting the insurance coverage would depend on such disclosure. The only case of exception is when the insured is and could not have been personally aware of the said material fact, including any incipient disease. In this case, such a defence cannot lie with the respondent/complainant because the history of his hyperthyroidism could not have been recorded in his admission record by the clinical/para-medical staff of the Care Hospital on 06.11.2000 without the respondent/complainant himself stating so. Yet, it is obvious that he did not disclose this fact while filling the details of the status of his health under item no. 13 or 15 of the prescribed Form (Insured Personal Details) mentioned above. Another aspect of the case that may

be noticed is that a Bench of the District Forum comprising Smt. M. Shreesha, Member passed the orders dated 28.07.2003 and 19.09.2003 on the interim applications of the OP. As mentioned above, the net effect of these two orders was that neither Dr. Kedarnath nor Mr. Sudhakar was summoned by the District Forum to tender evidence on the crucial Exhibits B 9 and B 10 and being subjected to cross-examination. On the other hand, the said Member, Smt. M. Shreesha was also a member of the Bench of the State Commission that passed the impugned order. In keeping with the well-settled norms of judicial propriety, the said Member ought to have recused herself instead of participating in the appeal proceedings, particularly because by its impugned order the State Commission upturned the order of the District Forum on the only ground that the aforesaid Exhibits had not been duly proved before the District Forum.

8. IN conclusion, we are inclined to hold that the order of the State Commission is erroneous because it failed to properly appreciate the evidence on record and cannot be sustained. As a result, the impugned order of the State Commission is set aside and the order of the District Forum is affirmed, leading to dismissal of the complaint, as the complainant could not establish any deficiency in service on the part of the OP/petitioner.

