

IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(C) 3911/2010 & CMs 7844 and 11074/2010

Reserved on: 13th August 2010

Decision on: 21st September 2010

RADIANT OVERSEAS PVT LTD

..... Petitioner

Through: Mr. Sudhir Nandrajog, Sr. Adv
with Mr. Satinder Kapur and
Mr. Pramod Kumar, Advocates.

versus

**INSURANCE REGULATORY
AND DEVELOPMENT AUTHORITY
OF INDIA AND ANR**

..... Respondents

Through : Mr. Dipak K. Nag, Adv. with
Ms. Rashmi Rea Sinha, Adv. for R-1/IRDA.
Mr. S. Khatri, proxy Adv. for Reeta Kaul,
Advocate for R-2/UOI.

CORAM: JUSTICE S. MURALIDHAR

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| 1. Whether Reporters of local papers may be
allowed to see the judgment? | No |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in Digest? | Yes |

JUDGMENT

21.09.2010

1. The Petitioner is a company having its registered office at Unnaon in Uttar Pradesh and an administrative office in New Delhi. It carries on the business of tourist agents and facilitating travel arrangements for tourists. The Petitioner challenges an order dated 30th April 2010 passed by the Insurance Regulatory and Development Authority ('IRDA') Respondent No. 1 under Section 14(1) of the Insurance Regulatory and Development Authority Act, 1999 ('IRDA' Act) directing the Petitioner to forthwith stop issuing, marketing or selling insurance policies or collecting money towards insurance premium or carrying on any activity related to and connected with

the business of insurance, failing which the IRDA would initiate action both under the IRDA Act as well as the Insurance Act, 1938 ('IA').

2. The background to the present petition is that on 20th September 1997 the Petitioner entered into a broker agreement with a Ukrainian State Joint Stock Company named Ukrinmedstrakh, which in turn was acting on behalf of its general broker company Vitex Ltd. Austriya. This was pursuant to a Cabinet Resolution of the Government of Ukraine on 17th September 1997 requiring rendering of medical aid to foreign citizens who happened to be temporarily in the territory of Ukraine. In terms of the said Resolution, medical insurance of foreigners could be conducted only by a specially licensed insurance company incorporated in Ukraine. It is stated that Ukrinmedstrakh has a monopoly of medical insurance business in Ukraine. The Petitioner is stated to be an agent of Ukrinmedstrakh.

3. In terms of the agreement dated 20th September 1997 between the Petitioner and Ukrinmedstrakh, emergency medical aid was to be provided to foreign citizens. For this purpose, the Petitioner was authorised to sell certificates of emergency aid to such foreigners and non-citizens of Ukraine intending to visit Ukraine. At the time of entering into the agreement, an intimation was sent by Ukrinmedstrakh to the Embassy of Ukraine in India through the Ministry of External Affairs ('MEA'), Government of India. The notarised copy of the said agreement has been enclosed with the present petition. It is stated that the official website of the Ukraine Embassy also acknowledged the fact that it accepted the travel insurance policy of Ukrinmedstrakh and its Indian agent, the Petitioner herein.

4. The Petitioner states that it was asked by the Embassy of Ukraine at New Delhi to obtain requisite permission/registration from the Government of India to collect insurance premia before issuance of certificate of emergency medical aid to the persons intending to visit Ukraine. The Petitioner complied with the above directions and applied through its banker, Syndicate Bank, New Delhi.

5. The Petitioner refers to its letters dated 4th June 1998 and 11th June 1998 addressed to the Reserve Bank of India ('RBI') and the Special Secretary (Insurance Cell), Department of Economic Affairs ('DEA') respectively for obtaining such permission. On 15th October 1998, the DEA wrote to the Petitioner as under:

“Sir,

This is with reference to your letters dated 11th June, 1998 and 25th August, 1998 on the above subject.

We have examined the matter in consultation with General Insurance Corporation of India. In view of the resolutions passed by the Cabinet of Ministers of Ukraine, making it obligatory to take Mediclaim insurance by visitors to that country from the State Joint Stock Insurance Company “UKRINMEDSTRAKH”, we have no objection to the Mediclaim policy being purchased by the intending Indian visitors to Ukraine from “UKRINMEDSTRAKH”.

6. By a letter dated 2nd December 1998, the RBI granted permission for transfer of insurance premia collected by the Petitioner to the Ukrainian Company, i.e., Ukrinmedstrakh in US dollars “after ensuring that the amounts have been collected as premia towards mediclaim insurance by visitors to Ukraine from India.” Information in this regard was also given to

the Petitioner by its banker Syndicate Bank on 9th December 1998.

7. It appears that this arrangement was continued for some time and on 10th September 2001, the Embassy of Ukraine wrote to the RBI about renewal of the permission issued to the Petitioner. By a separate letter dated 10th September 2001, the Petitioner also wrote to the DEA for renewal of permission for issuance of mandatory mediclaim insurance certificate. It is stated that by a separate letter dated 10th October 2001, the RBI and by a letter dated 25th September 2001, the DEA renewed the permission. The Petitioner states that there were similar arrangements in relation to Indians visiting Belarus. The Petitioner has thus been issuing certificates of emergency medical aid to intending visitors to Ukraine and Belarus and the premia so collected are remitted to the Government of Ukraine and Government of Belarus respectively.

8. It is stated that a complaint was made in 2003 against the Petitioner which was investigated by the EOW, Delhi Police and closed. Again in 2008, another complaint was made. This time, by a letter dated 22nd December 2008, the IRDA issued a notice to the Petitioner to which the Petitioner replied on 7th January 2009. The Petitioner informed the IRDA that if any other sanction or permission was required, it should be informed so that compliance may be made. One Shri Nikhil Gandhi filed a Writ Petition (Civil) No. 7305 of 2009 in this Court in which direction was issued to Police to conduct an inquiry. On 4th March 2009, the writ petition was disposed of directing the IRDA to examine the representation made by the Petitioner therein. On 6th May 2009 the IRDA issued a notice to the

Petitioner seeking information and explanation in regard to selling and marketing of foreign mediclaim insurance policies in India. A further letter was issued by the IRDA on 7th September 2009 directing the Petitioner to produce further documents and appear before it on 17th September 2009.

9. The Petitioner states that on 29th May 2010, it noticed that IRDA had, on its official website, posted an order directing it to stop issuing, marketing or selling insurance policies. Thereafter, a copy of the impugned order dated 30th April 2010 was downloaded by the Petitioner from the IRDA's official website. The said order has been challenged by the Petitioner in this petition as being illegal, arbitrary and contrary to the facts.

10. It is submitted by the Petitioner that it was only the Ukrinmedstrakh, which was rendering emergency medical aid to foreign citizens in India. The Petitioner was not itself issuing insurance certificates or settling claims. It was merely collecting premia for the Ukrainian company. It is further submitted that under the Foreign Exchange Management Act, 1999 ('FEMA') and the Current Account Transactions Rules, 2000, the Insurance Division, Government of India is the Competent Authority to issue permission for remitting payment so collected by an agent for securing insurance for health from a company abroad. Since in any event the Petitioner had obtained permission from the Ministry of Finance and no objection had been raised till then, the action of the IRDA was illegal. It is further pointed out that the IRDA Act came into force only on 19th April 2000 much after the Petitioner had sought and received sanctions from the concerned departments of the Government of India and the RBI for

collecting premia on behalf of the Ukrainian company for rendering emergency medical aid in Ukraine. Reliance is also placed on the third proviso to Section 3 of the IA (as amended by the IRDA Act) which states that any certificate of registration, obtained immediately before the commencement of the IRDA Act, shall be deemed to have been obtained from the IRDA. It is further submitted that IRDA Act is not applicable to the Ukrinmedstrakh. It is claimed that the obligation of the Petitioner to collect the premium amount in USD and remit it to Ukrinmedstrakh from the normal banking channels is covered under the FEMA. The Petitioner had applied and obtained the relevant permission and sanction under the FEMA even prior to the IRDA Act coming into force.

11. It is mentioned that prior to the issuance of the impugned order, the IRDA had referred the matter to the General Insurance Corporation of India ('GIC'). In response, the GIC on 11th September 1998 advised the IRDA as under:

“We note from the resolutions dated 28.1.97 and 17.9.98 passed by the Cabinet of Ministers of Ukraine that it is obligatory to take mediclaim insurance by visitors to that country from the State Joint-Stock Insurance Company “UKRINMEDSTRAKH”. In view of this, we feel it would be in order for remittance of premium collected from passengers bound for Ukraine to the State Joint Stock Company “UKRINMEDSTRAKH”.

12. In the counter affidavit, the stand of the IRDA is that every entity operating in the insurance sector and carrying out the business of insurance/reinsurance as an insurer or dealing with any policy holder as an agent or intermediary, is required to obtain a certificate of registration to that effect or

licence as the case may be, issued by the then Controller of Insurance and presently the IRDA, after fulfilling the necessary conditions required under the relevant statute. A reference is made to the third proviso to Section 2C(1) of the IA, which mandates that no insurer other than an Indian insurance company shall begin to carry on any class of insurance business in India under the IA on or after the commencement of the IRDA Act. Reference is also made to Sections 3(1) and 3(2) of the IA. It is stated that even though the Petitioner had entered into the agreement with the Ukraine company at a time when the IRDA Act had not been enacted, it was obligatory for the Petitioner to obtain a licence after 19th April 2000, when the IRDA Act came into force.

13. The IRDA summarises the position as regards the permissions granted by the RBI and the DEA to the Petitioner as under:

- “(i) The Ukraine and Belarus Governments had passed resolutions making it obligatory for intending visitors from India to Ukraine and Belarus to purchase the mediclaim policies from the State insurers; Ukrinmedstrakh and Belgosstrakh.
- (ii) Permission was sought by the petitioner from the RBI to collect the premia in Indian rupees and remit the same into the account of the broker ‘Vitex Ltd.’ to Austria in US dollars;
- (iii) Permission was granted by the RBI to transfer the insurance premia collected by the petitioner to Ukrinmedstrakh and Belgosstrakh;
- (iv) No objection was provided by the Director (Insurance) to the mediclaim policies being purchased from Ukrinmedstrakh and Belgosstrakh, by the intending Indian visitors to Ukraine and Belarus.”

It is submitted that the above permissions did not obviate the necessity of the Petitioner having to obtain a licence from the IRDA since it was selling mediclaim insurance policies of the Ukraine company in India and was, therefore, carrying on an insurance business in India.

14. Mr. Sudhir Nandrajog, learned Senior Counsel appearing for the Petitioner submitted that the Petitioner was doing nothing other than collecting insurance premia on behalf of the Ukraine company. It was only upon arriving at Ukraine that the visitors could avail of cashless facilities for emergency medical aid. The Petitioner was not carrying on any insurance business in India as the certificate issued by it was a certificate of the Ukraine company and was really not a travel insurance policy. In other words, the Petitioner was merely a post office for collecting and remitting the premia and this it was doing with the permission of the IRDA as well as DEA. Referring to Section 3(1) of the IA, it is submitted that since no contract was concluded in India and the policy was merely delivered in India whereas it was issued in Ukraine, there was no need for the Petitioner to seek registration under the IA. Reference was also made to Section 2(15) of the IA which defines 'principal agent' as under:

“2(15) “principal agent” means a person who, not being a salaried employee of an insurer, in consideration of any commission,--

- (i) performs any administrative and organising functions for the insurer, and
- (ii) procures general insurance business whether wholly or in part by employing or causing to be employed insurance agents on behalf of the insurer;”

15. Reference was also made to the third proviso to Section 3(1) of the IA to contend that the permission granted by the GIC and the RBI to the Petitioner to collect premia should be considered to be a certificate already granted, which would continue after coming into force of the IRDA Act.

16. In reply, it is pointed out by Mr. Dipak Kumar Nag, learned counsel appearing for the IRDA that one of the objects of the Petitioner company was to carry on business as “travel agents and insurance agents”. It is submitted that emergency medical aid could be availed of by the visitor of Ukraine even upon landing from Ukraine. Reference was also made to Section 2(7A)(b) of the IA which defines an “Indian insurance company” to be a company in which “the aggregate holdings of equity shares by a foreign company, either by itself or through its subsidiary companies or its nominees, do not exceed twenty-six per cent paid-up equity capital of such Indian insurance company.” Reference is also made to Section 2(9)(a) of the IA which defines “insurer”:

“2(9) “insurer” means—

- (a) any individual or unincorporated body of individuals or body corporate incorporated under the law of any country other than India, carrying on insurance business [not being a person specified in sub-clause (c) of this clause] which—
 - (i) carries on that business in India, or
 - (ii) has his or its principal place of business or is domiciled in India, or
 - (iii) **with the object of obtaining insurance business, employs a representative, or maintains a place of business, in India;**”

(emphasis supplied)

17. Reference was again made to Section 42 of the IA which talks of licensing of an insurance agent by the IRDA. This, according to Mr. Nag, has to be read with Section 30 of the IRDA Act as well as the Regulations of the IRDA concerning licensing of insurance agents.

18. It may be mentioned that as far as the Union of India is concerned, its stand is that merely because a no objection certificate was issued by the GIC or the DEA, it did not permit the Petitioner to carry on insurance business or act as an insurance agent without getting itself registered with the IRDA. On 28th January 2010, the IRDA wrote to the RBI seeking its advice whether the permission granted by the RBI to the Petitioner still stands or is modified or withdrawn/cancelled. Likewise, a letter was also written by the IRDA to the Department of Financial Services (Insurance Division), Ministry of Finance, Government of India on 28th January 2010. In response thereto, on 8th March 2010, the Government of India stated that “the relevant records, which could throw light in the genesis on which such a decision was taken, are not traceable in the Department. IRDA may take appropriate action as per extant rules and regulations in the matter under intimation to this Department.”

19. It was in the above context that when the Petitioner made a representation on 14th June 2010, the IRDA wrote back on 16th August 2010 stating that its earlier order dated 29th April 2010 was reconfirmed.

20. The above submissions have been considered by this Court. The only issue that arises in the present case is whether in the above facts and circumstances, the Petitioner could be said to be carrying on insurance business in India. Under the meaning of Section 2(10) of the IA, an

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“insurance agent” is one who “receives or agrees to receive payment by way of commission or other remuneration in consideration of his soliciting or procuring insurance business including business relating to the continuance, renewal or revival of policies of insurance.” An insurer in terms of Section 2(9) (a)(iii) of the IA could be any body corporate incorporated under the law of any country other than India, which carries on insurance business and which “with the object of obtaining insurance business, employs a representative, or maintains a place of business, in India.” The facts of the present case show that the Petitioner company was collecting premia on behalf of the Ukrainian company. It was also delivering to the person, from whom it collected the premium, the certificate of mediclaim insurance, which when produced in Ukraine, would ensure cashless medical aid facility to such person. Therefore, the collection of the premium and the delivery of the certificate, both by the Petitioner, take place in India. In the considered view of this Court, there is considerable merit in the case of the IRDA that the Petitioner is carrying on the business of insurance in India.

21. Mr. Nandrajog placed extensive reliance upon certain observations of the Supreme Court in *Dhodha House v. S.K. Maingi (2006) 9 SCC 41* to state that in the above circumstances, the Petitioner could not be said to be carrying on insurance business in India. In particular, he referred to the following passage in the said judgment which extracts from pages 246 to 247 of 15th Edition of Vol. I of *Mulla on the Code of Civil Procedure*:

“(3) To constitute "carrying on business" at a certain place, the essential part of the business must take place in that place. Therefore, a retail dealer who sells goods in the mufassil cannot be said to "carry on business" in Bombay merely because he has

an agent in Bombay to import and purchase his stock for him. He cannot be said to carry on business in Bombay unless his agent made sales there on his behalf. A Calcutta firm that employs an agent at Amritsar who has no power to receive money or to enter into contracts, but only collects orders which are forwarded to and dealt with in Calcutta, cannot be said to do business in Amritsar. But a Bombay firm that has a branch office at Amritsar, where orders are received subject to confirmation by the head office at Bombay, and where money is paid and disbursed, is carrying on business at Amritsar and is liable to be sued at Amritsar. Similarly a Life Assurance Company which carries on business in Bombay and employs an agent at Madras who acts merely as a Post Office forwarding proposals and sending moneys cannot be said to do business in Madras. Where a contract of insurance was made at place A and the insurance amount was also payable there, a suit filed at place B where the insurance company had a branch office was held not maintainable. Where the plaintiff instituted a suit at Kozhikode alleging that its account with the defendant Bank at its Calcutta branch had been wrongly debited and it was claimed that that court had jurisdiction as the defendant had a branch there, it was held that the existence of a branch was not part of the cause of action and that the Kozhikode Court therefore had no jurisdiction. But when a company though incorporated outside India gets itself registered in India and does business in a place in India through its agent authorized to accept insurance proposals, and to pay claims, and to do other business incidental to the work of agency, the company carries on business at the place of business in India."

22. The above passage significantly notes that "when a company though incorporated outside India gets itself registered in India and does business in a place in India through its agent authorised to accept insurance proposal, and to pay claims, and to do other business incidental to the work of the

agency, the company carries on business at the place of business in India.”

The above example in fact supports the stand of the IRDA. The Petitioner does not deny that it is acting as an agent of a Ukrainian insurance company. In collecting premia and delivering insurance certificates in India, the Petitioner cannot but be said to be carrying on insurance business in India on behalf of the Ukrainian company. Consequently, this Court is unable to agree with the contention of the Petitioner that its business falls outside from the purview of the IA and that it does not require to obtain a licence from the IRDA.

23. For the aforementioned reasons, this Court finds no error having been committed by the IRDA in passing the impugned order dated 30th July 2010. The writ petition is dismissed but, in the circumstances, with no order as to costs. The pending applications are also dismissed.

S. MURALIDHAR, J.

SEPTEMBER 21, 2010
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