

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 11th May, 2012

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LPA No. 811/2010

% **M/S RADIANT OVERSEAS PVT. LTD** Appellant
Through: Mr. Alok K. Aggarwal, Adv.

Versus

**INSURANCE REGULATORY & DEVELOPMENT
AUTHORITY OF INDIA & ANR.** Respondents
Through: Mr. D.K. Nag & Ms. Debopama
Roy, Advs. for R-1.
Mr. Sachin Datta, Adv. for R-2/UOI

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

J U D G M E N T

RAJIV SAHAI ENDLAW, J.

1. This intra-court appeal impugns the judgment dated 21.09.2010 of dismissal of W.P.(C) No.3911/2010 preferred by the appellant. The said writ petition was filed impugning the order dated 30.04.2010 of the respondent No.1 Insurance Regulatory & Development Authority of India

(IRDA); the appellant in the alternative sought a direction to the respondent No.1 IRDA to register the appellant under the relevant provisions of the Insurance Act, 1938 as amended by the Insurance Regulatory and Development Authority Act, 1999.

2. The appellant pleads:

- (i) that the Cabinet of Ministers of Ukraine vide Resolution dated 17.09.1997 made it obligatory for foreigners visiting Ukraine to have medical insurance; the said Resolution was passed with the object of rendering medical aid to foreign citizens temporarily in the territory of Ukraine;
- (ii) Ukrinmedstrakh, a Ukrainian company was granted exclusive licence by the Government of Ukraine for providing such obligatory medical insurance for foreigners temporarily staying in the territory of Ukraine;
- (iii) The said Ukrinmedstrakh entered into an Agreement dated 20.09.1997 with the appellant whereunder it authorized the appellant to sell the obligatory medical insurance policy of Ukrinmedstrakh to Indians intending to visit and / or travelling to Ukraine;

- (iv) the appellant in or about the year 1998 obtained the requisite clearance from the Reserve Bank of India for collecting insurance premium from the intending visitors to Ukraine and to remit the same to Ukrinmedstrakh / Government of Ukraine;
- (v) similarly, the Government of Belarus also vide Resolution dated 26.06.2000 made it mandatory for all visitors to the Republic of Belarus to purchase the medi-claim insurance policy prior to applying for the VISA at the Embassy of Belarus at New Delhi. An Agreement dated 12.07.2001 was executed between the appellant and the Belarusian State Insurance Organization viz. Belgosstrakh whereunder the appellant was authorized to collect insurance premium from the intending visitors to Belarus. The appellant obtained permission from the Department of Economic Affairs, Insurance Division, Ministry of Finance, Government of India in this regard also;
- (vi) that the appellant since then was issuing certificates for emergency medical aid to the intending visitors to Ukraine and Belarus and the premium so collected was remitted to Government of Ukraine and Belarus respectively;

- (vii) that in the year 2003, a complaint was made to the respondent No.1 IRDA against the appellant, which was inquired into and after satisfying that the appellant had the requisite permission, the same was closed;
- (viii) that again in December, 2008, a complaint against the appellant was made to the respondent No.1 IRDA and ultimately W.P.(C) No.7305/2009 was filed in this Court, in which directions were issued to the authorities to conduct an inquiry into the aforesaid activity of the appellant;

(at this stage, it may be recorded that no notice of W.P.(C) No.7305/2009 was issued to the appellant and the same appears to have been disposed of on the very first date with direction for inquiry to be conducted.)

- (ix) that in pursuance thereto, the respondent No.1 IRDA issued notice to the appellant and after hearing the appellant passed the order dated 30.04.2010 which was impugned in the writ petition from which this appeal arises.

3. The respondent No.1 IRDA in the order dated 30.04.2010 has found, that since the appellant collects money and issues certificate on behalf of overseas State Government insurance companies and transfers the premium so collected to the overseas insurance companies, it is engaged in the business of insurance; that in terms of the provisions of the third proviso to Section 2C read with Section 3 of the Insurance Act no person can carry on any insurance business in Indian unless has obtained from the Authority a Certificate of Registration to that effect; no person can function as an agent or broker for an insurance company unless holds a valid licence issued by IRDA, authorizing him/her/it to function as such. Since the appellant had not obtained any permission or licence from the respondent No.1 IRDA authorizing it to carry on any insurance business or to function as an agent or a broker of an insurance company, the respondent No.1 IRDA in exercise of powers under Section 14(1) of the IRDA Act directed the appellant to stop issuing, marketing or selling insurance policies, collecting money towards insurance premium or carrying on any activity related to and connected with the business of insurance; for violation, the appellant was threatened with proceedings

under the Insurance Act and the IRDA Act and Regulations framed thereunder.

4. It was the case of the appellant in the writ petition that the Certificate of medi-claim being issued by the appellant had no effect on the territory of India and was active only in the territory of Ukraine or Belarus; that the provisions of IRDA Act were not applicable to the foreign insurance companies and that the activity undertaken by the appellant was not governed by the IRDA Act.

5. The learned Single Judge dismissed the writ petition finding/ observing / holding:

- (i) that the collection of premium and the delivery of Certificate in India by the appellant amounted to carrying on the business of insurance in India;
- (ii) that the appellant was thus carrying on insurance business in India on behalf of foreign insurance companies;

- (iii) the appellant could not claim that its business fell outside the purview of the Insurance Act and that it did not require licence from IRDA.

6. It is not in dispute that no person can visit Ukraine / Belarus without purchasing the insurance policies (supra) from the State Insurance Companies of the two countries and who had authorized the appellant to sell the same in India. It is also not in dispute that none other in India was authorized to sell the said insurance policies. The counsel for the respondent No.1 IRDA has however argued that the prohibition is against being permitted to enter the said countries and a person from India visiting the said countries can, after reaching the airports of the said countries, buy the said insurance policy at the airports and whereafter he / she will be permitted to enter the aforesaid countries. The counsel for the appellant though not controverting the said position informs that the premium payable on purchasing the policy at the airport of the respective countries is nearly three times the premium payable if the policy is bought in India; he also highlights the inconvenience and delays in purchasing the policy after alighting in the said countries and the inherent uncertainties entailed

therein. From the documents annexed to the affidavit dated 02.11.2011 filed by the respondent No.1 IRDA in pursuance to order dated 28.09.2011 in this appeal also, it is clearly borne out that the insurance policy is a must for VISA to the said countries and though VISA can be obtained on arrival at the airport but at three times the cost than if bought from the Embassy of the said countries in India.

7. We had during the hearing enquired whether the policy could be purchased by the intending visitors via internet, sitting in India. The counsel for the respondent No.2 UOI states that the said aspect has also invited attention and is being enquired into. Be that as it may, what we have wondered is, if a person sitting in India can buy the policy on the internet, why the bar on the convenience of buying the same from the appellant in India. No answer has been forthcoming.

8. The counsel for the appellant has in an impassioned plea also stated that the business / activity of the appellant has already come to an end; that the appellant in any case was not earning much from it and the commissions were meagre; that the appellant is now pursuing these

proceedings more by way of public interest, for the facility of the intending visitors to the said countries. He has also argued that the appellant is not desirous of violating any law and would be happy to register with the respondent No.1 IRDA also, as it has obtained permission under the Foreign Exchange Regulation Act, 1973 and Foreign Exchange Management Act, 1999 but even that course of action is not possible. He argues that without the said foreign insurance companies being registered in India with the respondent No.1 IRDA and which they have not chosen to do and are not interested in doing, the appellant cannot be registered with the respondent No.1 IRDA as the agent of the said foreign insurance companies. He thus argues that a piquant situation has arisen where neither is there any provision in the existing laws for registration of the appellant as the agent of the foreign insurance companies nor is the appellant being permitted to carry on the said business / activity.

9. The counsels for the respondents also do not controvert that without the foreign insurance companies being registered, the appellant cannot be registered as their agent.

10. The counsel for the respondent No.1 IRDA has with reference to the various clauses of the Agreements entered into by the appellant with the foreign insurance companies contended that the same are in fact of appointment of the appellant as the agent in India of the foreign insurance companies. It is argued that it is in the capacity as agent only that the appellant was earning commission from the foreign insurance companies. He has with reference to the provisions of Insurance Act and the Insurance Regulatory and Development Authority (Licensing of Insurance Agents) Regulations, 2000 contended that the insurance agent also has to be licenced. It is further argued that the requirement for licencing is essential to enable the IRDA to, in the event of a complaint, take necessary action.

11. The counsel for the respondent No.2 UOI has stated that grant of no objection by the Reserve Bank of India to the appellant did not permit the appellant to carry on insurance business without getting itself registered with the respondent No.1 IRDA. It is also stated that the appellant under the Agreements aforesaid was in fact functioning as agent of the foreign insurance companies and cannot describe its activity as anything other

than that of an agent.

12. The counsel for the appellant in rejoinder has clarified that the insurance policies aforesaid are valid and operative only during stay in Ukraine / Belarus and are only to enable the visitors to obtain urgent medical aid if becomes necessary during the said visit and the said insurance policies are no longer valid once the insured leaves the territory of the said countries.

13. The question which arises is, whether the Laws and Regulations aforesaid of India can govern the business of insurance outside India and if not, the business of buying in India of such foreign insurance. The Supreme Court recently in *Vodafone International Holdings B.V. v. Union of India* 2012 (1) SCALE 530 has reiterated that though laws made by a country are intended to be applicable to its own territory but that presumption is not universal; Article 246 of the Constitution of India gives Parliament the authority to make laws which are extra territorial in application. It is to be thus seen on an analysis of the provisions of the Insurance Act and the IRDA Act, whether any intention of the legislature

to apply insurance laws extra territorially can be found.

14. The preamble to the Insurance Act describes the same as “An Act to consolidate and amend the law relating to the business of insurance” as distinct from ‘the business of insurance in India’, though the applicability of the Act under Section 1 (2) is pan India. Section 2C and Section 3 of the Insurance Act, referred to by the IRDA in the impugned order prohibit any “person” from beginning to carry on any class of insurance business ‘in India’ save in the manner prescribed therein and without obtaining registration thereunder. The question which next arises is as to what is ‘insurance business’.

15. Section 2(6A), Section 2(11) and Section 2 (13A) define fire insurance business, life insurance business and marine insurance business respectively (but with which we are not concerned). Section 2 (13B) defines miscellaneous insurance business as meaning the business of effecting contracts of insurance which are not of fire insurance, life insurance or marine insurance. A contract of insurance is a contract to compensate the loss suffered by the insured on account of risks covered by

the insurance policy, in consideration of premium received.

16. Though Section 2(8) of Insurance Act while defining an ‘insurance company’, defines the same as a company, association or partnership which may be wound up under the Companies Act, 1956 or to which the Indian Partnership Act, 1932 applies, implying thereby reference to Indian Companies / firms only and Section 2(7A) while defining ‘Indian Insurance Company’ includes within its ambit insurance companies in which foreign holding does not exceed 26% but it is not as if the Act is dealing with Indian Insurance Companies only. Section 2C and Section 3 as aforesaid prohibit any ‘person’ and which would include a foreigner, be it individual or juristic entity, as well. In fact Section 2(9) defining ‘insurer’ includes within its ambit a foreigner, again whether individual or juristic entity incorporated under the laws of any country other than India, carrying on insurance business in India or having principal place of business or domicile in India or employing a representative or maintaining a place of business in India with the object of obtaining insurance business. Thus the Act does envisage foreigners carrying on insurance business or

maintaining a representative or a place of business in India. The same intent is evident in Section 2C(1)(c) also. However the third proviso (added with effect from 19th April, 2000) to Section 2C(1) prohibits insurers other than an Indian Insurance Company from beginning to carry on any class of insurance business in India after the commencement of the IRDA Act. Similarly Section 3(3) prohibits grant of registration to an insurer having principal place of business or domicile outside India, if the country in which such insurer has principal place of business or domicile prohibits Indians from carrying on the business of insurance in their territories. Ukraine and Belarus, as aforesaid, while making it mandatory for visitors to obtain insurance, further insist upon such insurance from their respective insurance companies, thereby prohibiting Indian Insurance Companies from providing such insurance; their insurance companies viz Ukrinmedstrakh and Belgosstrakh are thus not entitled to registration under Section 3.

17. We are unable to find in the Insurance Act any specific provision qua medical or accident insurance for Indians while travelling abroad, while abroad. There is also nothing to show that India has made it mandatory for its citizens travelling abroad, to obtain such insurance. We are also unable to find any prohibition in the Insurance Act or the IRDA Act prohibiting Indians from dealing with foreign insurance companies. However, the Foreign Exchange Management (Insurance) Regulations, 2000 prohibit residents of India from taking general or life insurance policy issued by an insurer outside India. The said prohibition also does not extend to medical / accident insurance during the period of travel / stay abroad. The said Regulations also have been amended w.e.f. 5th June, 2003; now residents in India are permitted to hold general as also life insurance policies issued by an insurer outside India, provided the policy is held under a general or specific permission of RBI; no such permission even is required for continuing to hold such policy, if such policy was acquired while such person was resident outside India. The only restriction on such policy holder when premium due is paid by remittance from India, is to repatriate the maturity proceeds or claim amount under the

policy, to India. The said Regulations clearly establish that there is no prohibition on the Indians, when abroad, dealing with foreign insurers.

18. We are therefore unable to find any indication of the intention of the legislature to give extra territorial operation to the Insurance laws of India. The Indian laws cannot thus be held to apply to insurance business outside India. The Supreme Court in *British India Steam Navigation Co. Ltd. v. Shanmughavilas Cashew Industries* (1990) 3 SCC 481 has also observed that without anything more, Indian Statutes are ineffective outside the Indian jurisdiction.

19. The business of Foreign Insurance Companies of covering risks incurred outside India, cannot be said to be insurance business in India (within the meaning of Insurance Act), even if the premium for such insurance is paid in / from India and Insurance Policy is issued in India. The essence of the business / contract of insurance is the coverage of risk and if the policies issued by the foreign insurer do not cover the risk as long as the insured remains in India, mere issuance thereof cannot be said to be carrying on insurance business in India. We are of the view that

there cannot be said to be an insurance business only in effecting a contract which is contingent and is to be operative and enforceable not in India and only outside India. Without the contract being operative and enforceable in India, mere ministerial act of issuance of the contract in India cannot be said to be amounting to carrying on insurance business in India.

20. At this stage, notice may also be taken of Section 46 of the Insurance Act which is as under:

“46. Application of the law in force in India to policies issued in India - The holder of a policy of insurance issued by an insurer in respect of insurance business transacted in India after the commencement of this Act shall have the right, notwithstanding anything to the contrary contained in the policy or in any agreement relating thereto, to receive payment in India of any sum secured thereby and to sue for any relief in respect of the policy in any court of competent jurisdiction in India; and if the suit is brought in India any question of law arising in connection with any such policy shall be determined according to the law in force in India.

Provided that nothing in this section shall apply to a policy of marine insurance.”

We have wondered whether the said provision is indicative of extra-territorial operation of Insurance Act. Whether owing to said provision, the foreign insurer can be sued in India. The key words again are ‘insurance business transacted in India’. Moreover, the objects and reasons of the Amending Act of the Year 1944 by which proviso aforesaid was added to Section 46 show that the proviso was added to remove the defect in the said provision which was seriously interfering with the normal business of marine insurers in as much as marine insurance contracts were international in scope and affected mostly for the benefit of consignees abroad who have option of stipulating place where contracts are intended to be carried out. What applies to marine insurance equally applies to insurance policy which we are concerned with.

21. Even otherwise in exercise of our powers under Article 226 of the Constitution of India, we deem it our duty to address the inconvenience caused to the citizens of India or to other persons who travel to Ukraine

and Belarus from India, by depriving them of the facility of obtaining VISA and buying the mandatory insurance policy, from India and in compelling them to travel to the said countries without VISA and which is riddled with inherent uncertainties, and to acquire VISA and Insurance on landing, at three times the cost. The same amounts to an arbitrary, unreasonable restriction, interference with the travel to the said countries. The argument given by the counsel for the respondent No.1 IRDA of the necessity of licencing for securing the interest of the insured, also does not apply. The grievance or the claims if any against the said foreign insurance companies cannot be addressed by the respondent No.1 IRDA and have to be necessarily made to the said foreign insurance companies only.

22. We therefore allow the appeal and set aside the order of the learned Single Judge as well as the order of the respondent No.1 IRDA and hold that the provisions on the basis whereof the powers have been exercised are not applicable to the business / activity aforesaid of the appellant. We however clarify that if the Government feels the necessity for regulating

the said activity / business also, then it is for the Government to frame laws / regulations with specific reference and applicability thereto. Without doing the same, the appellant cannot be barred from carrying on the said activity.

No order as to costs.

RAJIV SAHAI ENDLAW, J

ACTING CHIEF JUSTICE

MAY 11, 2012
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