

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 18 OF 2011**

Yvonne Miranda, 5, Miquelina Apts.,
Agalli, Fatorda, Salcete, Goa-403 602. Petitioner

Versus

Life Insurance Corporation, Represented
by Manager (Claims), "Jeevan Vishwas",
Plot No. 2, Patto Plaza, Panjim, Goa. Respondent

Shri Jagannath Jayant Mulgaonkar, Advocate for the Petitioner.

CORAM:- C.V. BHADANG, J.

DATE:- 4th SEPTEMBER, 2017.

ORAL JUDGMENT:

Heard Shri Mulgaonkar, the learned Counsel for the petitioner. None for the respondent.

2. By this petition, the petitioner who is the beneficiary, under the insurance policy of her estranged husband, is challenging the dismissal of the complaint filed under the Consumer Protection Act. The Consumer Disputes Redressal Forum (District Forum), by order dated 15.12.2009 has dismissed the complaint, which was challenged by the petitioner before the State Consumer Disputes Redressal Commission (State Commission). The State Commission vide

order dated 19.03.2010, has concurred with the findings of the District Forum. Hence, this petition.

3. The brief facts are that the late husband of the petitioner, namely, Valerian Colaco had taken out three insurance policies bearing nos. 111654322, 111648920 and 930290496. The present dispute pertains to the third policy, namely, policy no. 930290496, which was taken out on 28.03.1999 (hereinafter referred to as the said policy). It appears that on account of failure to pay the premium, the said policy got lapsed. The petitioner paid the premium and sought renewal of the said policy on 22.01.2001, which was after six months from June, 2000, when the premium was defaulted. The insured i.e. the deceased husband of the petitioner had furnished a declaration of good health on 22.01.2001 and on the basis of the same, the policy was revived. Subsequently, Mr. Valerian Colaco passed away on 12.04.2001.

4. Undisputedly, the petitioner was the nominee under all the three policies and she has received payment in respect of the first two policies. As the respondent failed to pay the claim under the said policy, the petitioner approached the District Forum, claiming that there was deficiency in service by

the respondent. The respondent claimed that in the interregnum i.e. after the said policy lapsed, the deceased (insured) was diagnosed with diabetes as well as 'Adeno Carcinoma', which the deceased failed to disclose in the declaration of good health and therefore, the respondent repudiated the liability to pay the benefits under the said policy.

5. The District Forum and the State Commission have upheld the defence.

6. At the outset, it is necessary to note the decision of the Supreme Court in the case of **Cicily Kallarackal Vs. Vehicle Factory, (2012) 8 SCC 524**, in which the Supreme Court has *inter alia* held that in view of an alternate statutory remedy of appeal, the High Court would not entertain a petition under Article 226/227 of the Constitution of India. The said case arose under the provisions of the very Act viz. the Consumer Protection Act, in which the order of the National Consumer Disputes Redressal Commission (National Commission) was challenged before the High Court, when there was a remedy of statutory appeal before the Supreme Court. Here is a case where the petitioner has not even approached the National Commission and the challenge in the present

petition is to the order of the State Commission. For this reason alone, I find that the petition cannot be entertained. However, looking to the fact that Rule was issued in the year 2011, I have heard the learned Counsel for the petitioner on merits also.

7. The declaration of good health (to the extent relevant) given by the insured reads thus:

DECLARATION OF GOOD HEALTH

1) I hereby declare that I am in good health and that I have not undergone any operation or suffered from any illness nor I have been advised to go in for any treatment or take an X-Ray, ECG, Pathological and other tests since the date of the proposal or last revival to this date. I further declare that no proposal for assurance or any application for revival of a policy on my life is pending or has been withdrawn or dropped, or deferred or declined or accepted at an increased premium or subject to a lien or on terms other than as proposed.

8. It can thus be seen that the declaration is exhaustive and the declarant is expected to disclose not only the details of ailment already diagnosed, but, also whether the declarant was/is advised to take any treatment or take a X-Ray, ECG, pathological and other tests, since the date of the proposal or

last revival. It has been held by the District Forum and the State Commission and to my mind rightly so, that the renewal of the policy, would amount to a fresh contract. In any event, any suppression of material facts in respect of the ailments, (which were diagnosed during the period after which the policy had lapsed), would certainly be material and would be sufficient for the respondent to repudiate the liability.

9. The District Forum has noticed the following documents, which were supplied by the petitioner to the respondent (i) clinical laboratory reports of the Tata Memorial Hospital dated 08.01.2001, (ii) certificate of hospital treatment of Shanty Avedan Hospital and (iii) medical attendants certificate. It was contended by the learned Counsel for the petitioner that there is nothing on record to show that the deceased (insured) was aware of the fact that he was diagnosed with diabetes and for the matter of that 'Adeno Carcinoma'. Even assuming that the deceased was not aware of the same, the declaration as set out above is exhaustive and covers even the aspect whether the deceased was advised to undergo any tests. The clinical laboratory reports of Tata Memorial Hospital are dated 08.01.2001 and it is obvious that the insured must have undergone the tests prior to that. Thus, the declaration

given on 22.01.2001, cannot be accepted to be truthful. This was clear suppression of material facts.

10. It is next contented that the burden of establishing that there is suppression of material facts, would lie on the Insurance Company under Section 45 of the Insurance Act, 1938, which has not been discharged. The contention, in my considered view cannot be accepted. Section 45 of the Insurance Act (as it stood prior to the amendment by Act 5 of 2015) reads thus:

“Section 45 — No policy of life insurance effected before the commencement of this Act shall after the expiry of two years from the date of commencement of this Act and no policy of life insurance effected after the coming into force of this Act shall after the expiry of two years from the date on which it was effected, be called in question by 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, was inaccurate or false, unless the insurer shows that such statement was on a material matter or suppressed facts which it was material to disclose and that it was fraudulently made by the policyholder and that the policy holder knew at the time of making it that the statement was false or that it suppressed facts which it was material to disclose. Provided that nothing in this section shall prevent

the insurer from calling for proof of age at any time if he is entitled to do so, and no policy shall be deemed to be called in question merely because the terms of the policy are adjusted on subsequent proof that the age of the life insured was incorrectly stated in the proposal."

11. It can thus clearly be seen that under Section 45 of the Insurance Act, the insurer is entitled to 'call in question', the policy on the ground 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, was inaccurate or false, within two years from the date on which the policy was effected. However, the said period may not apply if, the insurer is able to show that such statement was on a material matter or there was a suppression of facts, which was material to be disclosed and it was fraudulently made by the policy holder and that the policy holder knew at the time of making it that the statement was false or that the facts were suppressed, which were material to be disclosed. In the first place, the policy was called in question by the insurer within two years of its renewal. The cause of action in the complaint filed by the petitioner before the District Forum is shown to have accrued on 12.11.2002, when the respondent finally informed the petitioner of its

decision not to make the payment under the said policy. This is within two years of the renewal of the policy on or about 22.01.2001. Be that as it may, there is clear evidence and the conclusion is inescapable on the basis of the documents supplied by the petitioner itself, that the deceased (insured) was aware of the diagnosis. As noticed earlier, the declaration is exhaustive enough to cover the aspect whether the insured was advised and/or has undergone any tests. At the cost of repetition, it needs to be mentioned that the clinical report from the Tata Memorial Hospital is dated 08.01.2001 and the insured must have undergone the tests prior thereto. Thus, the declaration furnished on 22.01.2001 would clearly tantamount to suppression of material facts. Thus, the burden, if any, on the respondent clearly stands discharged on the basis of the documents furnished by the petitioner.

12. I have carefully gone through the order passed by the District Forum and the State Commission and I do not find that they suffer from any infirmity so as to require interference.

In such circumstances, the petition is dismissed. Rule is discharged, with no order as to costs.

C. V. BHADANG, J.

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