

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.03.2018

ORDERS RESERVED ON 01.03.2018

ORDERS DELIVERED ON 09.03.2018

C O R A M

THE HON'BLE Mr.JUSTICE K. RAVICHANDRABAABU

W.P.No.43202 of 2016

and

W.M.P.Nos.37034 and 37035 of 2016

Dr.Shanthi Rengarajan ...Petitioner

vs

1.The Oriental Insurance Company Ltd.,
Divisional Manager,
Uil Building, 4th Floor,
No.4 Esplanade,
Chennai 600 108.

2.MD India Healthcare Services
(TPA) Pvt. Ltd.,
Guna Complex,
New No.443 & 445,
Old No.304 & 305,
Anna Salai, Teynampet,
Chennai 600 018.

...Respondents

Prayer:Writ petition filed under Article 226 of the Constitution of India for issuance of a writ of certiorarified mandamus to call for the records pertaining to the impugned proceedings dated 24.06.2016 in Policy No.411200/48/15/03676 for claim amount of Rs.70,764/- and Policy No.411200/48/16/03529 for claim amount of Rs.4,51,294/- issued by the second respondent, quash the same and direct the respondents to settle the claim on merits.

For petitioner : Mr.B.Ravi
for M/s.R.Subramanian

For Respondents: Mr.G.Guruswaminathan for R1
M/s.Nageswaran & Narichania
No Appearance for R2

O R D E R

The petitioner is aggrieved against the order of the second respondent in repudiating the medical insurance claim made by the petitioner under two Policy Nos.411200/48/15/03676 and 411200/48/16/03529.

2.The case of the petitioner is as follows:

She is a Doctor by profession and working as a Paediatrician at a private hospital in Chennai. She took medical claim insurance policy with the first respondent since 2004. This policy is a Happy Family Floater Policy with a total sum insured Rs.3,50,000/-. From the year 2004 till 2015, there was no claim made by the insurer. The policy is running continuously without any break. The petitioner is having two sons. She had lost her husband in 2001 due to colon cancer. As per the medical research and findings, the familial adenomatous polyposis, due to which her husband died, may begin to develop multiple non-cancerous growth in the colon as early as in the teenage years and unless the colon is removed, these polyps will become malignant (cancerous). Therefore, children born to these parents have to undergo genetic study and to detect and rule out polyposis colon. Accordingly, her first son by name Shashank was admitted to Med-India hospitals at Chennai for undergoing genetic study. Unfortunately, he was found to have multiple polyps and further study revealed APC gene is positive. This colonoscopy and genetic study incurred expense of a sum of Rs.70,764/- and it was immediately claimed from the respondent. Doctors in the field advised the petitioner's son to undergo immediate surgery for the removal of portion of the colon, which was affected by polyps. Therefore, it required great amount on counselling on her son. At that time, he was studying in USA. Thereafter, her son underwent a surgery i.e., total colectomy with ileostomy and ileo-anal anastomosis at Gem Hospital and Research Centre, Coimbatore. This resulted in another medical expenses of Rs.4,51,294/- towards hospitalization and surgery. A claim of the same was also made before the respondents. Her son had to undergo reversal of ileostomy during May 11th to 20th 2016 at Gem Hospital Research Centre. The expenses incurred in respect of the surgery was claimed on the respondent immediately. All the three claims were duly received and scrutinised by the second respondent. However to the shock and surprise of the petitioner, the claims were repudiated on the reason that the condition of her son is a genetic disorder. Hence the present writ petition is filed with the relief as stated supra.

3. The first respondent filed a counter affidavit, wherein it is stated as follows:

The writ petition is not maintainable, as the petitioner cannot invoke the writ jurisdiction to enforce a contractual right. The first respondent is a Public Sector Undertaking and however it cannot be interpreted as an instrumentality of a State to maintain the present writ petition. The first respondent had repudiated the claim of the petitioner only after due application of mind and proper appreciation of the documents as per the terms and conditions forming part of the policy of Insurance.

4. Learned counsel for the petitioner submitted that the writ petition is maintainable since the first respondent is discharging a public duty more particularly, when it is admitted that it is a public sector undertaking. He relied on the decision of the Supreme Court reported in 2008 (10) SCC 404, United India Insurance Company Limited vs Manubhai and the decision of the High Court of Delhi reported in 2007 (98) DRJ 246, Hari Om Agarwal vs Oriental Insurance Co. Ltd., in support of the maintainability of the writ petition. On merits, the learned counsel submitted that the reasons assigned in the impugned order to repudiate the claim cannot be sustained in view of the recent decision of the Delhi High Court dated 26.02.2018 in the case of M/s. United India Insurance Company Limited vs. Jai Parkash Tayal. The learned counsel submitted that in the above said decision, the very same issue was considered by the Delhi High Court and the very same objection raised by the Insurance Company on merits was rejected.

5. On the other hand, the learned counsel appearing for the respondent Insurance claim relied on the decision of the AIR 2001 SC 549, Life Insurance Corporation of India vs Asha Goel, to contend that the writ petition is not maintainable. He further submitted that since the genetic disorders are excluded in the terms of the agreement entered between the parties, the claim made by the petitioner was rightly repudiated as such genetic disorders are not covered under the Insurance policy.

6. Heard both sides.

7. The points for consideration in this writ petition are as follows:

- a) Whether the writ petition is maintainable against these respondents?
- b) If maintainable, whether the impugned orders are liable to be interfered with?

8. Let me consider the first issue regarding the maintainability of the writ petition, as follows:

It is not in dispute that the first respondent Company is a public sector undertaking. The business of the first

respondent Company in dealing with the insurance of various kinds is undoubtedly a duty aiming at the general public and thus, the functioning and responsibilities of the first respondent Company are to be treated as the one discharging public duty. Therefore, when an element of public duty and responsibility is traceable to the activities of the respondent Insurance Company, there is no point in saying they are not amenable to the writ jurisdiction. When a complaint is made that an instrumentality of the State, who is party to a contract, is acting unfairly, unjustly and unreasonably in violation of its constitutional obligation as enshrined under Article 14 of the Constitution of India, such instrumentality is certainly amenable to the writ jurisdiction and consequently answerable to the complaint made against it.

9. At this juncture, the decision of the Apex Court reported in 2008(10) SCC 404, *United India Insurance Company Limited vs. Manubhai Dharma Sinhbhai Gajera*, is relevant to be quoted, wherein at paragraph No.61, it is observed as follows:

"61. While determining a lis having public law domain, the courts would be entitled to take a broader view. It would not consider it to be a case involving contract-qua-contract question only. Even cases involving contracts may be determined by the High Court in exercise of its jurisdiction under Article 226 of the Constitution of India. (See *LIC v. Consumer Education & Research Centre* [(1995) 5 SCC 482], *Sanjana M. Wig v. Hindustan Petroleum Corpn. Ltd.* [(2005) 8 SCC 242], *ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd* [(2004) 3 SCC 553], *The D.F.O. v. Ram Sanehi Singh* [(1971) 3 SCC 864], *Noble Resources Ltd. v. State of Orissa* [(2006) 10 SCC 236]. We, however, do not think that facts involved in each case and the law laid down therein need not be discussed as there do not exist any basic principles therefor. These cases do not involve serious disputed question of fact. Basic facts are admitted. The High Court was concerned with the interpretation of statute and interpretation of the contract. Judicial Review of the impugned action on the part of the appellant was, therefore, permissible."

10. Similar objection raised before the Delhi High Court by the very same Insurance Company was rejected in a case reported in 2007(98) DRJ 246, *Hari Om Agarwal vs. Oriental Insurance Co. Ltd.* In the said decision, the Delhi High Court, after following the decision of the Supreme Court reported in 2004(3) SCC 553, *ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd* and 1995(4) SCC 482, *LIC v. Consumer Education & Research Centre*, has found that the writ is

maintainable. Paragraph Nos.18 and 19 of the said decision read as follows:

"18. High Courts, while exercising jurisdiction under Article 226 of the Constitution usually refrain adjudicating disputes of contracting parties, after the finalization of terms. The courts desist from deciding essentially disputed questions of fact. Yet, this rule is subject to an important exception, i.e if the facts are not in dispute, and the executive policies or action, even post contract display elements of public law dispute, scrutiny under Article 226 or Article 32 cannot be barred. Therefore once the State or its instrumentality is party to a contract, it has an obligation in law to act fairly, justly and reasonably, as enjoined by Article 14 of the Constitution of India. A deviation from this obligation can entitle the court, even under Article 226 to entertain the dispute, in exercise of its discretion. Thus, in *ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd.*, (2004) 3 SCC 553, the Supreme Court summarized the appropriate approach to be followed in such cases, in the following terms:

"From the above discussion of ours, the following legal principles emerge as to the maintainability of a writ petition:

(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable.

19. In *Life Insurance Corporation of India v. Consumer Education and Research Centre* 1995 (4) SCC 482, the Supreme Court, after reviewing in detail several previous decisions on the obligations of state instrumentalities, to act fairly in a non-arbitrary manner, held that actions of the State, its instrumentalities and public authorities or of persons whose actions bear insignia of public law element or public character are amenable to judicial review and that legality of such actions would be tested upon the anvil Article 14. Public law remedy, through judicial

review under Article 226 was defined as intervention where the actions of State or its agencies, bearing the imprint of public interest, can be examined. Fairness and non-arbitrariness are considered as two immutable pillars supporting the equality principle, an unshakeable threshold of state and public behaviour. Every action, policy or even change of policy in the realm of State activity should be informed, fair and non-arbitrary."

11. No doubt, the learned counsel for the Insurance Company sought to rely upon the another decision of the Supreme Court reported in AIR 2001 Supreme Court 549, Life Insurance Corporation of India vs. Asha Goel. Perusal of the above decision would show that this decision is not in any way supporting the contention of the respondents. The Apex Court in the said decision, has in fact, observed that it cannot be laid down as a general proposition of law that in no case the High Court can entertain the writ petition under Article 226 of the Constitution of India to enforce a claim under a life insurance policy. It is further observed therein that while the jurisdiction of the High Court to entertain a writ petition under Article 226 of the Constitution cannot be denied altogether, Court must bear in mind the self-imposed restriction in not entertaining writ petitions for enforcement of purely contractual rights and obligations which involve disputed questions of facts. At paragraph No.11, the Apex Court observed as follows:

"11.The position that emerges from the discussions in the decided cases is that ordinarily the High Court should not entertain a writ petition filed under Article 226 of the Constitution for mere enforcement of a claim under a contract of insurance. Where an insurer has repudiated the claim, in case such a writ petition is filed the High Court has to consider the facts and circumstances of the case, the nature of the dispute raised and the nature of the inquiry necessary to be made for determination of the questions raised and other relevant factors before taking a decision whether it should entertain the writ petition or reject it as not maintainable. It has also to be kept in mind that in case an insured or nominee of the deceased insured is refused relief merely on the ground that the claim relates to contractual rights and obligations and he/she is driven to a long drawn litigation in the civil court it will cause serious prejudice to the claimant/other beneficiaries of the policy. The pros and cons of the matter in the context of the fact situation of the case should be carefully

weighed and appropriate decision should be taken. In a case where claim by an insured or a nominee is repudiated raising a serious dispute and the Court finds the dispute to be a bona fide one which requires oral and documentary evidence for its determination then the appropriate remedy is a civil suit and not a writ petition under Article 226 of the Constitution."

12. In this case, facts are not in dispute. It is an admitted fact that the Insurance claim was repudiated only on the reason that the treatment given to the petitioner's son for familial adenomatous polyposis syndrome disease is a genetic disorder and thus the expenses incurred towards such genetic disorders are not payable. The petitioner is not disputing that the claim was made in pursuant to a treatment given to her son involving genetic disorder, as referred to in the impugned order.

13. Therefore, based on the above stated position of facts, the only question that is to be considered and decided in this case is as to whether the reason set out in the impugned order is sustainable in the eye of law, which does not require leading of any oral or documentary evidence. Therefore, when such issue, not involving a disputed question of fact, can be decided by this Court itself under Article 226 of the Constitution of India, the respondents are not entitled to question the maintainability of the writ petition. Accordingly, I reject the above contention of the respondents on the maintainability issue.

14. The next question that arises for consideration is as to whether the repudiation of the claim based on the reason that the treatment given to the petitioner's son for familial adenomatous polyposis syndrome disease is a genetic disorder and the expenses incurred towards genetic disorders are not payable, is justifiable. In other words, whether the reasons stated for rejection is unfair, unjust and unreasonable which cannot withstand the judicial scrutiny if such reason violates Article 14 of the Constitution of India.

15. The answer to the above question is readily available by a very recent pronouncement made by the Delhi High Court dated 26.02.2018 in the case of M/s. United India Insurance Company Limited vs. Jai Parkash Tayal. No doubt the said matter before the High Court was arising out of a suit. But that does not matter when the issue is one and the same. The question raised in the said case was as to whether persons having genetic disorders can be discriminated against in the context of health insurance. The plaintiff therein suffered from Hypertrophic Obstructive Cardiomyopathy and was hospitalised for some time.

The expenses met out was sought by way of insurance claim, which was rejected by the Insurance Company therein on the reason that expenses met out for genetic diseases are not payable as per the policy which contains genetic exclusion clauses.

16. The Delhi High Court extensively considered the said issue by doing a wonderful research work with comparative study of the said issue in various countries and thereafter, found that the objection raised by the Insurance Company cannot be sustained. In paragraph Nos.D4, D5, D6, D12, E15, E16, E17 and F1, it is observed as follows:

"D.4. Thus, Right to Healthcare is a part of Right to Life. Medical care and health facilities are part of Right to Healthcare. With spiralling medical costs, health insurance has to be an integral part of medical care and health facilities. Thus, healthcare without health insurance is a challenge. The individual's Right to avail health insurance is an inalienable part of the Right to Healthcare. Health insurance with the exclusion of "genetic disorders" hits at the basic right of an individual to avail of insurance for prevention, diagnosis, management and cure of diseases. Excluding any particular category of individuals i.e., those with genetic disorders, from obtaining health insurance or having their claims honoured, based on genetic disposition would be per se discriminatory and violative of the citizen's Right to Health.

D.5. As held in LIC of India (supra) the clause in an insurance policy has to stand the test of 'reasonableness'. It is a means of social security. The principles laid down above in respect of life insurance equally apply with greater vigor to health insurance. Thus, the fact that a particular consumer's genetic heritage could lead to higher risk ought not to be used against the said person for exclusion of the person from availing medical insurance. What makes it worse is the fact that insurance companies, like in the present case, have not asked for higher premium based on a genetic disposition but have completely refused to honour a claim based on a broad understanding (or misunderstanding) of the term 'genetic disorders'.

D.6. The Insurance sector in India is regulated by The Insurance Act, 1938 which envisages the establishment of the Insurance Regulatory Development Authority (hereafter 'IRDA'). The IRDA had issued guidelines on standardization in health insurance dated

20th February, 2013, which had a specific exclusion in respect of 'pregnancy, infertility, congenital and genetic conditions'. Unfortunately, however, the term 'genetic conditions' is not defined in the guidelines. Thus, at the relevant point the IRDA itself permitted Insurance companies to provide for exclusions based on genetic conditions. These guidelines have now been superseded by guidelines dated 29th July, 2016, wherein only 'congenital anomalies' have been defined and genetic conditions do not find a mention. Thus, 'genetic conditions' can no longer be excluded.

.....D.12. Thus exclusions such as the ones relating to genetic disorders do not remain merely in the realm of contracts but overflow into the realm of public law. The reasonableness of such clauses is subject to judicial review. The broad exclusion of 'genetic disorders' is thus not merely a contractual issue between the insurance company and the insured but spills into the broader canvas of Right to Health. There appears to be an urgent need to frame a proper framework to prevent against genetic discrimination as also to protect collection, preservation and confidentiality of genetic data. Insurance companies are free to structure their contracts based on reasonable and intelligible factors which should not be arbitrary and in any case cannot be 'exclusionary'. Such contracts have to be based on empirical testing and data and cannot be simply on the basis of subjective or vague factors. It is for lawmakers to take the necessary steps in this regard. However, the broad exclusion of genetic disorders from insurance contracts/claims is illegal and unconstitutional. Question (i) is answered accordingly.

...E.15. Insurance documents are standard form contracts and usually the insured person signs on the dotted line. It would be extremely tenuous to expect a layman to read each and every clause of an insurance document before signing it. On most occasions, a person who intends to obtain insurance has no choice to say NO to a clause in an insurance policy. Medical insurance is primarily obtained for the purpose of unforeseen medical conditions which may affect a person and so long as there has been no fraud, concealment or suppression, at the time of obtaining insurance, policies ought to be honoured. It is usual to see claimants running from pillar to post in order to get medical reimbursement from insurance companies. This

case is no different. In the insurance policy issued to the Plaintiff, no genetic testing was undertaken before hand. This obviously means that the exclusion of genetic disorder is being applied on the basis of family history and not on the basis of a specific test. Such application of exclusion lacks the foundation itself and is untenable.

E.16. In every disease, there are four stages- i) prevention, ii) diagnosis & management, iii) cure iv) palliative care in non-curable diseases. Insurance would be required at every stage; diagnostic tests can begin with a simple lab report to complex diagnostic costing thousands of rupees. Management of a disease would include continuous administration of medicines for example in the case of diabetes and blood pressure or use of devices like a pacemaker and ICD in the case of a cardiac condition. Cure of a disease would include medicinal cures & surgical cures. In the case of diseases like cancer, the fourth stage of chemotherapy, medicinal administration and palliative care go hand in hand. To exclude any particular medical condition from availing insurance for any of the above steps in the journey of well- being could lead to loss of life. There could be different terms specified by the insurance company in the case of serious ailments, provided they stand the test of reasonableness and the differentiation is intelligible.

E.17. A broad categorization and exclusion of genetic disorders of every and all kind would lead to enormous discretion in the hands of the insurance company to reject genuine claims. The ambiguity and the uncertainty of the precise definition of genetic disorders makes the exclusion too broad. Firstly, exclusion of genetic disorders by itself would be unconstitutional and the broad unqualified exclusion would not stand the test of non- arbitrariness and unreasonableness.

...F.1 To conclude:

- (i) Right to avail health insurance is an integral part of the Right to Healthcare and the Right to Health, as recognised in Art. 21 of the Constitution;
- (ii) Discrimination in health insurance against individuals based on their genetic disposition or

genetic heritage, in the absence of appropriate genetic testing and laying down of intelligible differentia, is Unconstitutional;

(iii) The broad exclusion of 'genetic disorders' is thus not merely a contractual issue between the insurance company and the insured but spills into the broader canvas of Right to Health. There appears to be an urgent need to frame a proper framework to prevent against genetic discrimination as also to protect collection, preservation and confidentiality of genetic data. Insurance companies are free to structure their contracts based on reasonable and intelligible factors which should not be arbitrary and in any case cannot be 'exclusionary'. Such contracts have to be based on empirical testing and data and cannot be simply on the basis of subjective or vague factors. It is for lawmakers to take the necessary steps in this regard.

(iv) The Exclusionary clause of 'genetic disorders', in the insurance policy, is too broad, ambiguous and discriminatory - hence violative of Art. 14 of the Constitution of India;

(v) Insurance Regulatory Development Authority of India (IRDA) is directed to re-look at the Exclusionary clauses in insurance contracts and ensure that insurance companies do not reject claims on the basis of exclusions relating to genetic disorders."

17. I respectfully agree with the above findings in toto and apply the same to the present case.

18. In fact, this matter was originally taken up for hearing on 23.02.2018, on which day, after hearing the learned counsels for the parties for a while, I adjourned the matter and sought the learned counsel for the petitioner to work out on the subject in detail in view of exclusion clauses. Accordingly, the matter was adjourned to 01.03.2018. In between, the decision of the Delhi High Court was rendered on 26.02.2018, deciding upon the same issue extensively fortunately favouring the petitioner herein. Thus, when the matter was taken up on 01.03.2018, this Court felt that since the claim of the petitioner is genuine, the decision of the Delhi High Court has come to her rescue at right time, without giving room for any further doubt on the issue. Thus, based on the above findings rendered by the Delhi High Court, I am of the firm view that the

impugned orders cannot be sustained. Accordingly, the writ petition is allowed and the impugned orders are set aside. Consequently, the respondent Insurance Company is directed to disburse the insurance claim to the petitioner within a period of two weeks from the date of receipt of a copy of this order. No costs. The connected miscellaneous petitions are closed.

Sd/-
Deputy Registrar(CS)

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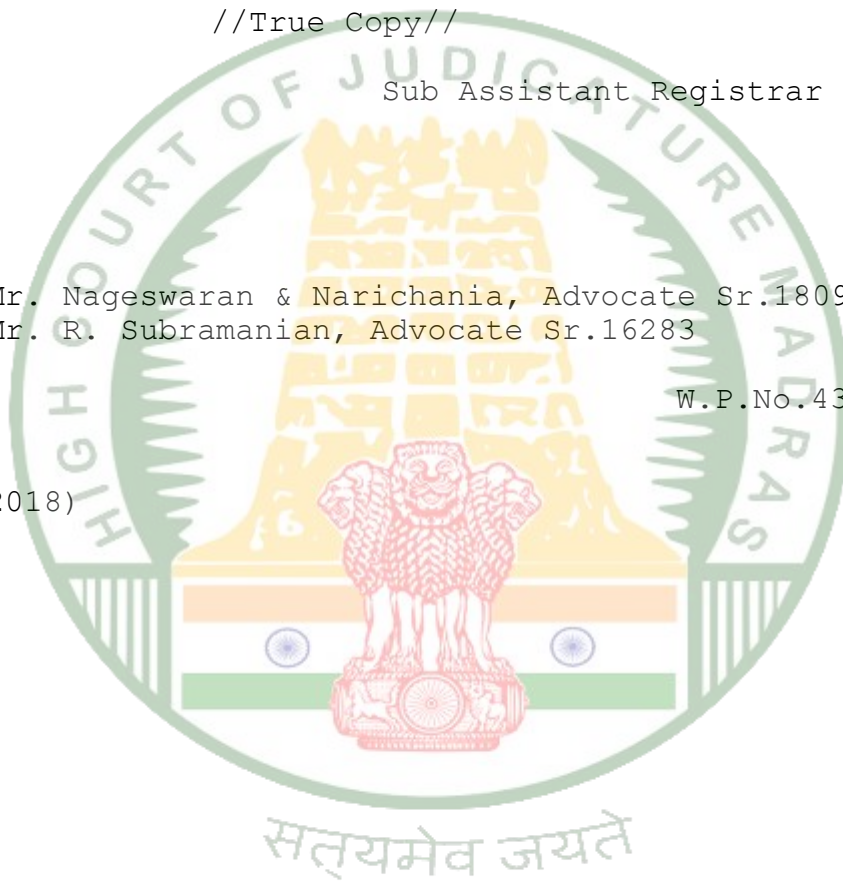
Sub Assistant Registrar

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+1 cc to Mr. Nageswaran & Narichania, Advocate Sr.18093
+1 cc to Mr. R. Subramanian, Advocate Sr.16283

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