OD 3

WPO/308/2024

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
ORIGINAL SIDE

PRALAY SHANKAR DHAR AND ANR.
VS
THE INSURANCE OMBUDSMAN AND ANR.

BEFORE:
The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA
Date: 1st May, 2024.

*Appearance:*
*Mr. Pratyush Patwari, Adv.*
*…for the petitioner*

*Mr. Rajesh Singh, Adv.*
*…for the respondent*

The Court: The petitioners challenge an order of the Insurance Ombudsman whereby the petitioners' insurance claim on the count of undergoing a cardiac operation was refused.

Learned counsel for the petitioner cites Section 45 of the Insurance Act, 1938 and argues that no insurance policy shall be called in question on any ground whatsoever after the expiry of three years from the date of the policy. In the present case, the policy was taken out in the year 2019 whereas the present refusal is of the year 2023.

Learned counsel further relies on Rule 8, Sub-Rule 2 of the Insurance Regulatory and Development Authority of India (Protection of Policyholders' Interests) Regulations, 2017 where it is provided inter alia that where the insurer claims that the prospect suppressed any material information or provided

misleading or false information on any matter material to the grant of a cover, then the onus of proof rests with the insurer only in respect of any information not so recorded.

Learned counsel also places reliance on Rules 15 and 17 of the Insurance Ombudsman Rules, 2017. Rule 15 provides that the Insurance Ombudsman is to act fairly and equitably.

Sub Rule (4) of Rule 15 stipulates that the Ombudsman shall dispose of a complaint after giving the parties to the dispute a reasonable opportunity of being heard.

Rule 17 speaks of the award.

Learned counsel contends that although the Ombudsman, while passing the impugned order, placed specific reliance on the transcript of a purported tele-conversation between the petitioner and the agent of the insurance company, the transcript itself suffers from inherent contradictions. Moreover, despite the petitioners' request, no copy of the transcript was handed over to the petitioner to enable the petitioner to have a proper audience before the Ombudsman, which violates the rules of reasonable hearing being given to the petitioners, which is embedded in Rules 15 and 17 of the Rules referred to above.

It is pointed out that as per the transcript, in answer to the query whether the petitioners ever suffered from/currently suffering from any diseases, ailments, medical conditions or illnesses, accidents or injury, the reply was "OK" which could not have been any valid reply, which itself shows that the premise of the said transcript is suspect.

Learned counsel next argues that the insurer had honoured the claims of the petitioners at least twice after taking out the policy.

At those junctures, the petitioners had produced relevant documents and had undergone diagnostic tests which clearly disclosed that the petitioner no.1 had had Double Hip Replacement Surgery in the year 2018. Despite the same, the insurer had honoured the claims of the petitioners, thereby giving a go-bye to the insurer's purported rights to repudiate the claim. It is argued that such act on the part of the insurer, acquiescing to the claim, itself vitiates the subsequent repudiation of the insurance policy as a whole.

Learned counsel appearing for the insurance company places thoroughly the provisions of Section 45 of the 1938 Act and points out that the same pertains only to a policy of life insurance whereas the policy in question in the present litigation pertains to medical insurance.

Learned counsel places reliance in support of such proposition on a judgment of the Supreme Court reported at *(2009) 8 SCC 316 (Satwant Kaur Sandhu vs. New India Assurance Company Ltd.)* where the Supreme Court clearly distinguished between the other insurance policies and a life insurance, only the latter of which is covered by Section 45.

In paragraph 16 of the said judgment, the Supreme Court went on two observe as to whether the factum of non-disclosure of the illness was a 'material' fact for the purpose of a mediclaim policy and its non-disclosure was tantamount to suppression of material facts enabling the Insurance Company to repudiate its liability under the policy.

The Supreme Court observed that the term 'material fact' is not defined in the Act and therefore it has been understood and explained by the Courts in general terms to mean as any fact which would influence the judgment of a prudent insurer in fixing the premium or determining whether he would like to

accept the risk. Any fact which goes to the root of the Contract of Insurance and has a bearing on the risk involved would be 'material'.

Learned counsel also argues that the insurance company is prepared to hand over a voice recording of the tele-communication on the basis of which the transcript was prepared.

It is submitted that ample opportunity of hearing was given to the petitioners.

Insofar as the previous occasions are concerned, when two claims of the petitioners were honoured by the insurer, it is submitted that those were honoured for the simple reason that the insurer was not aware of the Double Hip Replacement Surgery which took place in the year 2018. The moment the insurer became aware of the same on a scrutiny of the documents in connection with the current claim, the insurer repudiated the contract, which decision was challenged before the Ombudsman.

It is further argued that the contractual remedy sought by the petitioners ought not to be granted by the Writ Court.

A careful perusal of Section 45 of the 1938 Act clearly shows that learned counsel for the insurer is justified in arguing that the same pertains only to life insurance policies, which is not the case in the present litigation. Such contention is further strengthened by the ratio laid down in *Satwant Kaur Sandhu case (supra)*.

Insofar as the applicability of Clause 8(2) of the Regulations of 2017 is concerned, the same merely stipulates that where the insurer claims that the prospect suppressed any material information or provided misleading or false

information on any matter material to the grant of a cover, then the onus of proof rests with the insurer only in respect of any information not so recorded.

Such proposition cannot have any direct bearing here since it is an admitted position that the petitioner no.1 did have a Double Hip Replacement in the year 2018. The question which arises here is whether the petitioners were guilty of suppression at the relevant point of time when the insurance policy was opened.

Learned counsel for the petitioners, in his usual eloquence, has sought to satisfy the Court that there was no *mens rea* on the part of the petitioners regarding suppression of any material fact. It is submitted that the petitioners had opened themselves up to any scrutiny which may be required by the insurance company at the time of opening the policy. Moreover, it has been argued that the insurer ought to have become aware of the Hip Replacement Surgery at the time of the previous claims.

However, much reliance cannot be placed on such arguments.

It was for the petitioners to disclose clearly that the petitioner no. 1 had Hip Replacement Surgery at the relevant juncture when the policy was opened.

Paragraph 16 of *Satwant Kaur Sandhu (supra)* acquires much relevance in the context. The 'materiality' of the fact which is alleged to be suppressed depends not on the present claim or the nature of the same but on whether the suppression had a bearing on the insurer being agreeable to accept the risk at all or in fixing the premium for the insurance policy.

Thus, even if it were to be argued that the Hip Replacement Surgery which took place in 2018 might or might not have any bearing on the cardiac surgery undergone by the petitioner no. 1 in the year 2023, the same is not a relevant

consideration here. What is relevant is whether the Double Hip Replacement Surgery in the year 2018, only the year previous to opening of the policy in the 2019, was germane for opening the policy.

This Court is of the opinion that the said fact was undoubtedly of serious importance since the fixation of premium and/or the decision of the insurer to accept the policy in the first place would directly be linked with such disclosure. The petitioners having not disclosed the same specifically at the time of opening of the policy, the burden cannot now be shifted to the insurer by taking resort to Rule 8(2). Rule 8(2) can only affect the insurer at the initial juncture when the insurer had every reason to have knowledge of the suppressed fact. The present case is one where the bona fides of the policyholder is an extremely relevant consideration, since an insurance policy is opened in good faith. The petitioners having violated such faith of the insurer, it cannot be said that the petitioners are entitled to any equitable relief before the Writ Court.

Insofar as the transcript of the voice conversation between the parties is concerned, even if the same is entirely brushed aside, the fact remains that the petitioners have not come up with any material to indicate that categorical disclosure was made by the petitioners while obtaining the policy regarding the immediately preceding Hip Replacement Surgery of the year 2018.

The fact that the insurer had honoured two policies previously cannot be elevated to the high status of acquiescence or waiver on the part of the insurer, since an act of waiver constitutes an act which is done with full knowledge of the fact which is sought to be waived. The waiver on the part of the insurance, in the present case, had to be supplemented by a conscious relinquishment of rights by the insurance company to repudiate the claim of the petitioners. In the present

case, the mere fact that the factum of Hip Replacement disclosed in the previous surgeries were overlooked by the insurance company cannot by itself tantamount to waiver by the insurance company. As such, the moment the insurance company learnt about the suppression, the impugned measure of repudiation of the insurance contract was taken.

In view of the above discussions, I do not find any fault with the order of the Ombudsman in sustaining the refusal of the claim of the petitioners by the insurance company as well as the repudiation of the insurance contract itself by the insurance company.

However, it is made clear that nothing in this order shall entitle the insurance company to have any claim against the petitioners with regard to the previous claims made by the petitioners which were already honoured by the insurance company.

In the light of the above observations, WPO/308/2024 is dismissed on contest without, however, any order as to cots.

(SABYASACHI BHATTACHARYYA, J.)

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