

(2010) 06 AP CK 0001

Andhra Pradesh High Court

Case No: Writ Petition No. 24137 of 2009

Apollo Hospital Vikram Puri and
Apollo Hospital Jubilee Hills

APPELLANT

Vs

T.S. Anand Kumar Murthy and
Others

RESPONDENT

Date of Decision: June 29, 2010

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 1 Rule 10
- Consumer Protection Act, 1986 - Section 12, 2, 21

Citation: (2010) 6 ALT 160

Hon'ble Judges: Ghulam Mohammed, J; G. Chandraiah, J

Bench: Division Bench

Advocate: Indus Law Firm, for the Appellant; Katta Laxmi Narayana, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Ghulam Mohammed, J.

This Writ Petition has been filed in the nature of writ of Certiorari calling for the records relating to the impugned order dated 29.8.2009 passed by the A.P. State consumer Redressal Commission, Hyderabad in R.P. No. 32 of 2009 in confirming the order dated 8.4.2009 in I.A. No. 529 of 2008 in CD. No. 67 of 2001 passed by the District Consumer Redressal Forum-I, Hyderabad and quash the same as illegal.

2. Brief facts of the case are that both the petitioners are Apollo Hospital, Vikram Puri, Secunderabad and Apollo Hospital, Jubilee Hills, Hyderabad respectively. Their case is that the first respondent T.S. Anand Kumar, S/o Late Mr. V.T.S. Murthy has filed C.D. No. 67 of 2001 before the District Forum-I, Hyderabad alleging medical negligence and deficiency in medical service against respondents 3 to 5 herein and the said CD. was dismissed on 7.1.2004. Aggrieved by the said order, the first

respondent herein filed F.A. No. 130 of 2004 before the A.P. State Consumer Redressal Commission, Hyderabad and the same was remanded to the District Forum-I Hyderabad for fresh consideration. Thereafter the first respondent has filed I.A. No. 4040 of 2008 before the District Forum-I seeking impleadment of petitioners herein and the said I.A was allowed on 10.7.2008. Again LA. No. 529 of 2008 was filed by the petitioners herein, seeking impleadment of the second respondent-Oriental Insurance Company as the petitioners herein are insured with it. It is further submitted that the District Forum-I, Hyderabad without proper appreciation of the facts dismissed the I.A. No. 529 of 2008 on 9.4.2009. Against that order, petitioners herein filed R.P. No. 32 of 2009 before the A.P. State Consumer Redressal Commission, Hyderabad and the same was dismissed by an order dated 20.8.2009 confirming the order of the District Forum, the relevant portion of the order reads as under:

This is virtually an endeavour to take advantage of a third party consumer dispute as the opposite parties filed to conveniently bypass the likely litigation between them and their insurer. But the fact remains that the complainant's grievance is not at all against the Insurance Company as such and the insurance policy appears to be one for reimbursement of the liability as the liability comes to be fixed but not by way of a contract of indemnity. This point itself cuts at the root of the claim of the opposite parties to bring in the insurance company in the array of parties. The purpose of impleading the insurers of the doctors facing the action for deficiency in service is to transfer their liability to the Insurance Company forestalling the adjudication of issues that might arise between them, which is beyond the scope of the present proceedings. The rights of the Insurance Company to exercise its options and take defences against the insured cannot be allowed to be preempted and the Insurance Company by this decree cannot be hustled into submitting to a joint and several decree along with the doctors when it comes to that. For the reasons stated above, we do not see any merits in the revision petition. Accordingly, the revision petition is dismissed.

3. Being aggrieved by the same, the present Writ Petition has been filed.

4. The learned Counsel appearing for the petitioners has brought to our notices of provisions of Consumer Protection Act, 1986 (for short "the Act") appreciate this contention necessary to refer the "Statement of Objects and Reasons". The relevant portion reads as under:

2. It seek, inter alia, to promote and protect the rights of consumers such as:

(a) the right to be protected against marketing of goods which are hazardous to life and property;

(b) the right to be informed about the quality, quantity, potency, purity, standard and price of goods to protect the consumer against unfair trade practices;

- (c) the right to be assured, wherever possible, access to an authority of goods at competitive prices;
- (d) the right to be heard and to be assured that consumers interests will receive due consideration at appropriate forums;
- (e) the right to seek redressal against unfair trade practices or unscrupulous exploitation of consumers; and
- (f) right to consumer education.

5. He also drawn our attention to provisions of Section 2(e) of the Act, which reads as under:

(e) "Consumer dispute" means a dispute where the person against whom a complaint has been made, denies or disputes the allegation contained in the complaint;

6. He further drawn our attention to provisions of Section 21 of the Act, which reads as under:

21. Jurisdiction of the National Commission:-Subject to the other provisions of this Act, the National Commission shall have jurisdiction:

(a) to entertain:

(i) complaints where the value of the goods or services and compensation, if any, claimed exceeds (rupees one crore); and

(ii) appeals against the orders of any State Commission; and

(b) to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any State Commission where it appears to the National Commission that such State Commission has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity.

7. He further contended that both the forums have committed serious error in not impleading the Insurance Company as party, which is proper and necessary party. He has drawn our attention to the judgment of the Supreme Court in Jave Alam v. Inderjit Kaur And Anr. (2005) 1 SCC 550, the relevant portion at paragraphs 2 and 3 reads a under:

A complaint was file before the Consumer Forum by Respondent 1 claiming damages on the ground of medical negligence. The complaint was allowed by the District Forum. The State Commission and the National Commission both dismissed the further appeals preferred by the appellant. The only question which the appellant seeks now to raise is whether the New India Assurance Company from which the appellant has taken an insurance policy could be directed to meet the

claim which has now been found against the appellant.

3. We have been taken through the stand of the Insurance Company before the District Forum. There is no denial of liability under the insurance policy. All that has been decided is the liability of appellant himself. The learned Counsel appearing on behalf of the Insurance Company readily concedes that the matter is in fact covered by the insurance policy taken out by the appellant in respect of the claim of medical negligence. In that view of the matter, the appeal is disposed of by directing the respondent Insurance Company to indemnify the appellant to the extent of its liability under the insurance policy.

8. He contended that in case of medical negligence committed by the doctor ultimately the insurance company is liable and the liability will be fastened on the Insurance Company. He also has drawn our attention to the judgment of the Supreme Court in Spring Meadows Hospital and Another Vs. Harjol Ahluwalia through K.S. Ahluwalia and Another, wherein the Supreme Court at paragraph 5 held as under:

5. The insurer-opposite party 3 which the appellant in Civil Appeal No. 7858 of 1997 contested the claim and took the defence that there has been no deficiency in service on the part of the insurance company and the provisions of the Consumer Protection Act could not be invoked against the insurer. According to the insurer the insurance company issued medical establishment professional negligence errors and omissions insurance policy and the terms and conditions of the policy would indicate that the liability of the insurer, if any, is to the extent of Rs. 12,50,000 and not beyond the same and further the insurer cannot be made liable when the liability in question has arisen on account of negligence or deliberate non-compliance of any statutory provisions or intentional disregard of the insured's administrative management of the need to take all reasonable steps to prevent the claim. According to the insurer the nurse Miss Bina Mathew was not a qualified nurse at all and she was not authorized to take up the employment as a nurse not having been registered with any Nursing Council of any State. It was also stated that the present state of affairs of the minor child is on account of negligence of an unqualified nurse and therefore the insurer cannot be made liable to pay for any loss or damage sustained. In course of the proceedings before the Commission to assess the minor's condition and rehabilitation requirement the Commission referred the matter to the Medical Superintendent, Safdarjung Hospital by order dated 28.1.1997, and in pursuance of such order the said minor was examined and a report was received by the Commission from the Medical Superintendent, Safdarjung Hospital, New Delhi. The Commission also examined witnesses including Dr. J.S. Nanra and Dr. A.S. Ahluwalia who testified that on account of a medicine having been injected the minor suffered from cardiac arrest on account of which the brain has been damaged. On the basis of the oral and documentary evidences on record the Commission came to the conclusion that the child had suffered from cardiac

arrest and cause of such cardiac arrest was intravenous injection of Lariago of high dose. The Commission also came to the conclusion that there has been considerable delay in reviving the heart of the minor child and on account of such delay the brain of the minor child got damaged. On the question of the negligence of services the Commission came to the conclusion that there was a clear dereliction of duty on the part of the nurse who was not even a qualified nurse and the hospital is negligent having employed such unqualified person as nurse and having entrusted a minor child to her care. The Commission also came to the conclusion that Dr. Dhananjay was negligent in the performance of his duties inasmuch as while Dr. Bhutani had advised that the injection should be given by the doctor but he permitted the nurse to give the injection. The Commission, ultimately came to the finding that the minor patient had suffered on account of negligence, error and omission on the part of nurse as well as Dr. Dhananjay in rendering their professional services and both of them were negligent in performing their duties in consequence of which the minor child suffered and since the doctor and the nurse were employees of the hospital the hospital is responsible for the negligence of the employees and the hospital is liable for the consequences. The Commission then determined the quantum of compensation and awarded Rs. 12.5 lakhs as compensation to the minor patient. In addition to the aforesaid sum of Rs. 12.5 lakhs, the Commission also awarded Rs. 5 lakhs as compensation to be paid to the parents of the minor child for the acute mental agony that has been caused to the parents by reason of their only son having been reduced to a vegetative state requiring life long care and attention. On the question of the liability of the insurance company the Commission came to hold that the said insurance company is liable to indemnify the amount of Rs. 12,37,500 in terms of the policy on account of the liability of the hospital as the case is fully covered under the indemnity clause. The Commission then considered the question as to how the amount of compensation should be disbursed for being spent for the welfare of the child and then issued certain directions with which we are not concerned in this appeal.

9. On the other hand, the learned Counsel appearing for the first respondent has drawn our attention to the complaint filed u/s 12 of Consumer Protection Act 1986 and he stated in that complaint that they were given false assurance that his mother will be improved by administering drugs and finally as per the death report issued on 20.9.2000, his mother expired on 24.9.2000 at 9.30 AM and the hospital authorities informed that after hectic effort they could not revive his mother and as a matter of fact his mother actually expired on 23.9.2000 at 8.00 pm. He also stated that the death certificate issued by Dr. Biswajeet who is a Medical Officer of the Hospital the date and time was mentioned as 23.9.2000 at 9.30 pm but later this certificate was cancelled on the instructions of respondents 1 to 3 in the complaint and later on fresh death certificate was written and given by the above said doctor as on 24.9.2000 at 9.30 am. He further stated that his mother's death was an act of omission of respondents 1 to 5 and it is a very clear act of criminal negligence and

direct consequence of respondents 1 to 5, therefore, the indemnity applies. According to "Medical Establishment-Professional Negligence Errors & Omissions Insurance Policy", description of indemnity given as under:

INDEMNITY: The indemnity applies only to claims arising out of bodily injury and /or death of any patient caused by or alleged to have been caused by error, omission or negligence in professional service rendered or which should have been rendered by the Insured or qualified assistants named in the Schedule or any nurse or technician employed by the Insured.

10. The learned Counsel has drawn our attention to the judgment of the Supreme reported in Vikram Greentech (I) Ltd. and Another Vs. New India Assurance Co. Ltd., wherein the Supreme Court held as under:

An insurance contract is a species of commercial transactions and must be construed like any other contract to its own terms and by itself. In a contract of insurance, there is requirement of uberrima fides i.e., good faith on the part of the insured. Except that, in other respects, there is no difference between a contract of insurance and any other contract.

The four essentials of a contract of insurance are: (i) the definition of the risk, (ii) the duration of the risk, (iii) the premium, and (iv) the amount of insurance. Since upon issuance of the insurance policy, the insurer undertakes to indemnify the loss suffered by the insured on account of the risks covered by the insurance policy, its terms have to be strictly construed to determine the extent of liability of the insurer.

11. We have heard the learned Counsel appearing for both sides and perused the material made available on record.

12. The point that arises for consideration is whether the impugned order dated 29.8.2009 passed by the A.P. State Consumer Redressal Commission, Hyderabad is just and proper.

13. The jurisdiction of this Court to issue Writ of Certiorari" is very narrow and limited. Unless the order passed by the lower Court suffers from jurisdictional error or it has committed any error or exceeded its limit, this Court cannot interfere. The A.P. State Commission made it clear that the complainants" grievance is not at all against the Insurance Company and the Insurance Policy is for reimbursement of the liability as the liability came to be fixed but not by way of a contract of indemnity. Therefore, we do not find any such jurisdictional error committed in this Case by the Court below.

14. Coming to the merits of the matter, a plain reading of the complaint does not disclose that there is a cause of action or any pleadings against the Insurance Company. Order I Rule 10 of CPC clearly postulates that "the Court may, in its discretion, request any pleader to address it as to any interest which is likely to be affected by its decision on any matter in issue in any suit or proceeding, if the party

having the interest which is likely to be so affected is not represented by any pleader". In this particular case, the Oriental Insurance Company Limited gave terms for Medical Establishment, Professional Negligence Errors and Omissions Insurance Policy, wherein under the heading "indemnity" it is clearly mentioned that the indemnity applies only to claims arising out of bodily injury and/or death of any patient caused by or alleged to have been caused by error, omission or negligence in professional service rendered or which should have been rendered by the insured or qualified assistants named in the Schedule or any nurse or technician employed by the insured. The main case viz., CD No. 87 of 2001 is still pending before the Forum. As seen from the record, the CD was filed in the year 2001 and an application seeking to implead the Oriental Insurance Company Limited as the 6th Opposite Party in the main case was filed in the year 2008. Therefore, both the Courts below viz., District consumer Disputes Redressal Forum-I at Hyderabad and the A.P. State Consumer Disputes Redressal Commission rightly dismissed the applications filed by the Apollo Hospital. Therefore, we see no reasons to interfere with the matter and both the courts below rightly declined to exercise its jurisdiction.

15. Accordingly, the Writ Petition is dismissed. There shall be no order as to costs.