Smt. Madhumita Sarkar Vs Oriental Insurance Company Ltd. and Others

Court: Calcutta High Court

Date of Decision: Nov. 22, 2006

Acts Referred: Constitution of India, 1950 â€" Article 14
Contract Act, 1872 â€" Section 4, 65

Citation: AIR 2007 Cal 234

Hon'ble Judges: Girish Chandra Gupta, J

Bench: Single Bench

Advocate: Debjani Sengupta and S. Banerjee, for the Appellant;A. Gangopadhyay, F. Hossain and B. Roy, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Girish Chandra Gupta, J.
The admitted facts of the case briefly stated are as follows. Chinmoy Sarkar, aged about 43 years, took out a

Janata Personal Accident Insurance Policy, for a sum of Rs. 10 lakhs, for the period between 31st March, 1998 and 30th March, 2010. His wife

Srimati Madhumita Sarkar was appointed nominee. Chinmoy Sarkar died in a car accident on 25th June, 2003 leaving him surviving his widow

Shrimati Madhumita Sarkar and two minor daughters : Antarlina Sarkar born on 4th October, 1996 and Somrupa Sarkar born on 6th August,

2001. On 30th June, 2003 the respondent/insurance company was duly intimated about the aforesaid death. On 29th July, 2003 by a letter she

requested the insurance company to arrange for payment of the sum assured.

2. On 1st August, 2003 the insurer purported to write a letter addressed to the de-ceased-Chinmoy Sarkar that as per the direction of the Head

Office vide their letter dated 29th August, 2002 all the Janata Personal Accident policies for a sum of above Rs. 1,00,000/-issued prior to 1st

May, 1999 had been cancelled with effect from 19th September, 2002. It was alleged that the deceased had already been informed about the

same. Should the deceased however have not received such information he was once again being told that he should claim refund of the

proportionate premium. It would only be proper to notice the contents of the letter dated 1st August, 2003 in extenso.

This is to inform you that as per direction of our H.O., New Delhi vide their letter dated 29-8-2002, we have cancelled all Long Term JPA

Policies with sum insured higher than 1 lacs and issued prior to 1st May, 1999 with effect from 19-9-2002.

This was already informed to you by our office. However, if you have not received cancellation of the explained policy so far, we once again

sending a policy cancellation endorsement and a set of refund voucher for Rs. 1875.00 (Rupees One thousand eight hundred seventy five only) in

duplicate.

By a letter dated 1st September, 2003 also addressed to the deceased the insurer purported to forward a cheque for a sum of Rs. 1875/-

presumably on account of refund of the premium which naturally could not have been accepted because the recipient was already dead. The

payment of the sum assured was in the circumstances refused by a letter dated 18th November, 2003 on the ground that the policy had already

been cancelled on 19th September, 2002.

3. Alleging arbitrariness amongst others, the widow has come up before this Court, invoking the writ jurisdiction, praying for quashing of the refusal

to pay and for a direction upon the insurer to pay the sum assured Rs. 10 lakh together with interest at the rate of 18% p.a.

4. The insurer in its affidavit-in-opposition had admitted that the policy was issued to the deceased which according to them contained Clause 5

which provides as follows:

The company may at any time by notice in writing cancel this policy, provided that the company shall in that case return to the insured the then last

paid premium less a pro rata part thereof for the portion of the current insurance period which shall have expired. Such notice shall be deemed

sufficiently given if posted addressed to the insured at the address last registered in the company''s books and shall be deemed to have been

received by the insured at the time when the same would be delivered in the ordinary course of post.

5. The case in the affidavit-in-opposition is that since the policy was cancelled, during the existence of the life assured, the question of making any

payment does not arise. In paragraph 16-B of their affidavit they have also alleged that the petitioner cannot have any personal knowledge as

regards the cancellation of the policy during the lifetime of her husband. It would be appropriate to notice paragraph 16-B of the affidavit-in-

opposition which reads as follows:

I submit that the petitioner in his petition has stated that the husband of the petitioner duly deposited the premium in respect of the said insurance

policy regularly. But the fact is that in such a policy the premium was to be paid only once when the proposed form was submitted. Such

statements of the petitioner shows that the petitioner was not aware about the conditions of JPA policy in the name of the insured including the

condition of cancellation of the said policy and its actual cancellation by sending notice to the holder of the cancelled policy being the husband of

the petitioner. I further submit that the petitioner cannot have any personal knowledge whether the notice of cancellation of the policy was received

by the husband of the petitioner.

6. It was also contended on behalf of the respondent-insurer, at the hearing of the writ petition, that for recovery of a claim arising out of an

insurance policy a writ petition is not maintainable.

7. The following questions according to me arise for determination:

a) Did the respondent in exercise of power under Clause 5 terminate the contract?

b) Whether the writ petition is maintainable?

c) To what relief if any is the petitioner entitled?

We shall try to answer the issues formulated above serially.

a) Did the respondent in exercise of power under Clause 5 terminate the contract?

8. We already have noticed the relevant clause entitling the insurer to terminate the contract which is reproduced hereinbelow for convenience.

The company may at any time by notice in writing cancel this policy, provided that the company shall in that case return to the insured the then last

paid premium less a prorata part thereof for the portion of the current insurance period which shall have expired. Such notice shall be deemed

sufficiently given if posted addressed to the insured at the address last registered in the company''s books and shall be deemed to have been

received by the insured at the time when the same would be delivered in the ordinary course of post.

9. In order to exercise the power reserved under CL 5 of the policy; the steps required to be taken and the presumption enuring to the benefit of

the insurer are as follows:

i) Proportionate amount of the premium has to be refunded.

ii) The policy has to be cancelled in writing.

iii) The notice cancelling the policy shall be deemed to have been given if the same is duly addressed to the insured and is posted.

iv) Receipt of the notice in the usual course shall be presumed provided notice cancelling the policy duly addressed to the insured has been posted.

10. Admittedly proportionate amount of the premium was not refunded to the deceased during his lifetime.

11. After the death of the insured the insurer purported to send refund voucher by its letter dated 1st August, 2003 which we already have noticed

above.

12. The respondent-insurer has disclosed a letter dated 26th September, 2002 and a voucher dated 26th September, 2002 whereas the case of

the respondent-insurer in its letter dated 1st August, 2003 is that the policy was terminated with effect from 19th September, 2002. The letter

dated 19th September, 2002 disclosed by the insurer is not even alleged far less proved to have been posted. In order to establish that the letter

dated 26th September, 2002 and the voucher dated 26th September, 2002 were posted to Chinmoy Sarkar the insurer has relied upon a letter

dated 26th September, 2002 purporting to have been written to the postmaster Khanjanchak, Haldia which reads as follows:

To September 26, 2002

The Post Master,

Khanjanchak,

Haldia-721602,

Purba-Medinipur.

Dear Sir,

Re : Delivery of 151 number of envelopes to various addresses.

We are sending 151 number of sealed envelopes through the bearer of this letter along with a list showing total number of envelopes with name and

address details.

You are requested to deliver these envelopes at the earliest.

Please acknowledge receipt.

Thanking you.

13. It is not the case of the respondent that the letters cancelling the policies were sent under certificate of posting. The letter dated 26th

September, 2002 and the voucher dated 26th September, 2002 along with 150 other identical letters appear to have been handed over to the

Postmaster, Khanjanchak under the cover of letter dated 26th September, 2002. Unless a letter is sent under certificate of posting there is no

question of tendering letter or letters to the Postmaster. The ordinary letters are as a matter of practice simply dropped into the postal box regard

being had to common course of public business. Instead of following the common course of dropping the letters into the postal box, the insurer

alleges to have made over these letters to the Postmaster which is not an ordinary way of posting letters. The matter becomes all the more

suspicious when we find that the endorsement purporting to have been made by the postmaster or on his behalf contains interpolation both as

regards the number of letters received as also the year of 26th day of September. There is clear indication that at first the endorser wanted to write

2003 and then he corrected it to 2002. There is thus no creditworthy evidence to show that even the letter dated 26th September, 2002

addressed to Chinmoy Sarkar was given to the postmaster on 26th September, 2002.1 am, therefore, inclined to hold that the letter in question

was not posted in the ordinary course of business. On the top of that the evidence brought on the record to show that the letter in question was

made over the Post Master is also suspicious. We also have found that the letter dated 19th September, 2002 by which the policy is claimed to

have been terminated, according to the letter dated 1st August, 2003, is not even alleged far less proved to have been posted.

14. The insurer has further betrayed its guilt by purporting to address letters dated 1st August, 2003 and 1st September, 2003 to the deceased

being fully aware that he had already died on 25th June, 2003. There is yet another piece of evidence which goes to suggest that the insurer knew

that the alleged cancellation was never communicated to the deceased and that is why in the letter dated 1st August, 2003 the following significant

expression appears ""However, if you have not received cancellation of the explained policy so far, we are once again sending a polity cancellation

endorsement and a set of refund voucher for Rs. 1875.00 (Rupees One thousand eight hundred seventy five only) in duplicate."" Therefore the

presumption, in any event, is rebutted by the evidence of the insurer itself. According to the insurer the widow does not have personal knowledge

about cancellation of the policy. It is therefore for the insurer to prove service of the letter cancelling the policy. The insurer"s evidence is that it

may not have been received by the insured.

15. u/s 4 of the Indian Contract Act a revocation is complete as against the person to whom it is made only when it comes to his knowledge. There

is nothing to show that the deceased ever came to know that the policy had been terminated in exercise of power under Clause 5. The

presumption contained in Clause 5 in the facts of the case, stated above, does not enure to the benefit of the insurer. There is no the top of that no

satisfactory proof that the letter dated 26th September, 2002 was posted. It is also significant that in the letter dated 1st August. 2003 the insurer

did not even refer to the letter dated 26th September, 2002 and contended itself by alleging that the alleged cancellation ""was already informed to

you by our office."" I am, therefore, unable to hold that the policy was cancelled during the existence of the life assured. The requirement of Section

65 of the Contract Act was also not complied with in this case. The said section provides as follows:

When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such

agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

16. I am inclined to hold that a contract voidable, at the option of one of the parties, can be avoided by taking recourse to the procedure indicated

in Section 65. The fact that the premium was retained by the insurer goes to establish that the insurer did not exercise its right to avoid the contract.

I accordingly answer the issue in the negative.

b) Whether the writ petition is maintainable?

17. Relying on the judgment of the Apex Court in the case of National Highway Authorities of India Ltd. v. Ganga Enterprise, reported in 2003 70

SCC 410 : AIR 2003 SCW 4381 it was contended by the learned Counsel appearing on behalf of the respondent that in the case of a contractual

dispute writ Court is not the appropriate forum.

18. Ms. Sengupta, learned Counsel appearing for the writ petitioner relying on the judgment in the case of ABL International Ltd. and Another Vs.

Export Credit Guarantee Corporation of India Ltd. and Others, submitted that where the refusal to pay the claim is arbitrary a writ petition is

maintainable. She relied on paragraph 52 of the judgment which reads as follows:

On the basis of the above conclusion of ours, the question still remains why should we grant the reliefs sought for by the appellant in a writ petition

when a suitable efficacious alternate remedy Is available by way of a suit. The answer to this question in our opinion, lies squarely in the decision of

this Court in the case of Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, wherein this Court held:

The requirement of Article 14 should extend even in the sphere of contractual matters for regulating the conduct of the State activity. Applicability

of Article 14 to all executive actions of the State being settled and for the same reason its applicability at the threshold to the making of a contract

in exercise of the executive power being beyond dispute, the State cannot thereafter cast off its personality and exercise unbridled power

unfettered by the requirements of Article 14 in the sphere of contractual matters and claim to be governed therein only by private law principles

applicable to private individuals whose rights flow only from the terms of the contract without anything more. The personality of the State, requiring

regulation of its conduct in all spheres by requirement of Article 14, does not undergo such a radical change after the making of a contract merely

because some contractual rights accrue to the other party in addition. It is not as if the requirement of Article 14 and contractual obligations are

alien concepts, which cannot co-exist. The Constitution does not envisage or permit unfairness or unreasonableness in State actions in any sphere

of its activity contrary to the professed ideals in the Preamble. Therefore, total exclusion of Article 14 non-arbitrariness which is basic to rule of law

from State actions in contractual field is not justified. This is more so when the modern trend is also to examine the unreasonableness of a term in

such contracts where the bargaining power is unequal so that these are not negotiated contracts but standard form contracts between unequals.

XXX.

Unlike the private parties the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good

and in public interest. The impact of every State action is also on public interest. It is really the nature of its personality as State which is significant

and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of

scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is

nothing which militates against the concept of requiring the State always to so act, even in contractual matters. This factor alone is sufficient to

import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its

instrumentality. It is a different matter that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may

be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of

purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is

arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its

obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case

irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the

guarantee under Article 14 of non-arbitrariness at the hands of the State in any of its actions XXX.

19. Considering the rival submissions of the learned Counsel appearing for the parties I am inclined to hold that the writ petition is maintainable for

the insurer has in the facts of the case arbitrarily refused to make the payment. I take this view for the following reasons and conclusions arrived at

by me.

(a) In order to terminate the policy refund of the proportionate premium is a primary requisite which is admittedly not done in this case.

(b) The alleged cancellation of the policy was never intimated to the insured during his lifetime.

(c) The alleged cancellation subsequent to death of the insured is legally of no consequence because by that time the risk insured had already

occurred.

(d) If the alleged decision of the higher authority was to cancel the policies above Rs. 1 lakh the policy should not have been cancelled altogether

but the sum assured should have been reduced to Rs. 1 lakh. The alleged cancellation of the policy is an arbitrary act.

(e) The alleged decision dated 29-8-02 to cancel the policies has not even been disclosed.

(f) The insurer in this case is the Oriental Insurance Company Ltd. It is a subsidiary of General Insurance Company of India. Similarly National

Insurance Company Ltd. is also a subsidiary of the General Insurance Company of India. These are all Government companies. They cannot have

different policies. If any such policy decision was taken then the policy should have been pursued by the other subsidiaries alike. The National

Insurance Company Ltd. appears to have paid a sum of Rs. 5 lakh to the heirs of one Jaganath Prasad Singh whose policy was dated 27th March,

1998. This goes to show that no such policy decision was in fact taken. No convincing answer to this point was advanced by the learned Counsel

appearing for the insurer.

20. The issue is accordingly answered in the affirmative.

21. The third issue in the circumstances is answered in favour of the petitioner.

22. For the aforesaid reasons the writ petition succeeds. Refusal to pay, communicated to the writ petitioner by the letter dated 18th November,

2003 is quashed. The respondent No. 1 is directed to pay within 4 weeks the sum of Rs. 10 lakh together with interest at the rate 0% p.a. from

the date of death of Chinmoy Sarkar until payment on account of the claim arising out the death of the latter. Such payment should not however be

directly made to the petitioner. The amount should be deposited in the joint names of the petitioner and her two minor daughters in a fixed deposit

of 366 days renewable from time to time with any of the branches of the State Bank of India in the vicinity of the residence of the petitioner. The

petitioner shall be entitled to withdraw the monthly interest for her maintenance and for the maintenance of two minor children. The fixed deposit

shall automatically be renewed upon expiry for a like period until the younger daughter namely Somrupa Surkar attains majority. The fund shall

ultimately ho equally distributed among I he joint holders of the fixed deposit or their "heirs, it is recorded that mother of the deceased is already

dead. Therefore there is no other heir of the deceased except the petitioner and her two minor daughters in accordance with the law. The

respondent shall also pay casts assessed at Rs. 10,000/-.

23. Urgent certified copy of this judgment be delivered to the parties, if applied for.

24. Later on Mr. Gangopadhayay, learned Advocate appearing for the respondent has prayed for stay of operation of this order. Such prayer of

stay is considered and rejected.