IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated:28-03-2002

Coram

The Honble Mr. Jutice P. SATHASIVAM

Writ Petition No. 16822 of 2001 and WPMP No. 24938 of 2001

N. Subbanan.
.. Petitioner.
Vs.

1. United India Insurance Company Ltd.,
represented by its Chairman cum
Managing Director,
24, Whites Road, Chennai-600 014.

2. The Divisional Manager,
Divisional Office of United India
Insurance Company Ltd.,
CG Complex, 39, Kumaran Road,
Tirupur.

.. Respondents.

Petition under Article 226 of the Constitution of India
for issuance of a Writ of Mandamus as stated therein.

! Mr. R. Gandhi, Senior counsel for Mr.
R.G. Narendhiran:- For petitioner.
Mr. K.S. Narasimhan:- For respondents.

: ORDER

Petitioner has filed the above writ petition to issue a Writ of Mandamus, directing the respondents to settle all claims preferred against the Videsh Yatra Mitra Policy bearing policy No. 759562/2 000, Category B and H, Plan G, DO Code: 171300, Co. Code 1, purchased by the petitioner on 6-2-2001 from the office of the second respondent, with regard to the petitioners heart treatment undergone by him in the United States of America during the petitioners visit there during the months from February to August, 2001, by not giving effect to the miscellaneous endorsement No. 171300/46/43/21/03/0003/2001 dated 12-2-2001 and the said endorsement is invalid, null and void and not binding on the petitioner and also that it cannot be enforced or given effect to, and that the petitioner is entitled to all the benefits of the above said policy as regards his heart treatment in United States of America.

2. The case of the petitioner is briefly stated hereunder:-
The petitioner is a retired Superintending Engineer from the Tamil Nadu Electricity Board. His daughter and son are working in the United States of America. He and his wife decided to go to America to pay them a visit. In connection with his U.S. visit, he applied for an Overseas Medical Insurance Policy more specifically called as the Videsh Yathra Mitra Policy at Tirupur in the Divisional Office of the United India Insurance Company Ltd. As per the terms of the policy, it is not a general health policy. Further, it is intended for use by the person insured in the event of a sudden and unexpected sickness or accident which may arise when the person insured is outside the Republic of India. It specifically excludes general health insurance. The said policy deals with various other aspects including the expenses that are covered and specifically states that expenses for special care services, hospital and medical services and local emergency medical transportation are covered expenses. Though certain categories are excluded, the policy does not exclude heart diseases that might occur during the policy period (i.e. from 12-2-2001 to 6-7-2001 ). In view of this, the respondents cannot now deny their liability to the petitioner with regard to the petitioners heart treatment undergone at Edward Hospital, Chicago. Regarding his medical history, the petitioner has stated in his application that he had suffered an Anterior Wall Myo-Cardial Infarction for which treatment commenced during September, 1997 at G.K. Hospital, Coimbatore. His treatment was complete in February, 1998 at the Apollo Hospitals, Chennai. Along with his application he filed the relevant medical certificate from the Cardiologist and the ECG and blood glucose test. It was only thereafter that the 2nd respondent herein, had issued an insurance policy called Videsh Yatra Mitra Policy. Te policy is effective for the policy period from 12th February, 2001 to 6th July, 2001 and covers a sum of about 5,00,000/- US Dollars. Thereafter, the petitioner left India on 12-2-2001 and landed in Chicago on 14-2-2001. On 16-2-2001, the petitioner had some pain in his back and so he got admitted in the Emergency Ward at Edward Hospital, Chicago. There, a preliminary check up and the petitioner was diagnosed as suffering from severe multi vessel coronary disease for which the petitioner was advised by the doctors to undergo an angiogram test before commencing treatment relating to the heart. After going into all the relevant aspects, the Florida Office of Mercury International Assistance Inc. had confirmed to the petitioner that the above said Videsh Yatra Mitra Policy taken by the petitioner covers cent percent for heart treatment as heart treatment is not excluded by the policy during the policy period. Further, elaborating that since the previous instance of heart problem was 3 years prior to the taking of the policy, that in no way affected the claim of the petitioner and that the petitioner was not affected by the definition of pre-existing condition as defined in clause 10 (c)of the head, General conditions applicable to all sections. After satisfying themselves, the doctors at Edward Hospital proceeded with the treatment. He underwent bypass surgery and he was discharged on 26-2-2001. Home care service provided him treatment at home upto 31-3-2001. The hospital bill, lab charges and the bill of the agencies were also directly sent to Mercury International Assistance and Claims

Ltd., England (in short MIA and Claims Ltd., England) as per billing instructions from Mercury International Assistance Inc., Florida.

3. The petitioner then received a letter dated 17-4-2001 from MIA and Claims Ltd., England stating that they have requested final confirmation from the 2nd respondent before clearing off the bills above said. While so, he received a letter dated 14-6-2001 from MIA and Claims Ltd., England, stating that the policy aforesaid has been endorsed to exclude all claims relating to heart conditions by the 2 nd respondent and that the said miscellaneous endorsement had been made on the date of purchase of the policy itself i.e., on 6-2-2001 and so, they have no option but to decline the claim of the petitioner based on the above policy. It was only now for the first time that the petitioner came to know about the existence of the said miscellaneous endorsement to the above effect received by the MIA and Claims Ltd., England from the 2nd respondent. Only after going through the said miscellaneous endorsement the petitioner finds that it is headed as Miscellaneous Endorsement No. 171300/46/43/21/03/0003/2001, and is dated 12-2-2001, stating that it is attached to policy No. 171300/0/0/46 /43/759562/20000. It is clear that the miscellaneous endorsement was not made on 6-2-2001 (date of purchase of the above said policy) as stated by MIA and Claims Ltd., England, in their letter to the petitioner dated 14-6-2001 but much later on 12-2-2001 or subsequently to suit the convenience of the respondents, after the policy came into effect. Any alteration, omission or addition or variation of the terms and conditions thereafter, i.e., after the date of purchase cannot be made that too to the disadvantage of the insured person without the express concurrence and agreement of the insured person to this effect. If the second respondent had the intention to exclude heart diseases from the purview of the above said policy, then it would have been stamped on the cover page of the policy itself or an endorsement to this effect would have been incorporated to the policy on 6-2-2001 itself i.e., the same day when the policy was issued to and purchased by the petitioner. Having left with no other effective alternative remedy, the petitioner has approached this Court by way of the present writ petition.

4. The respondents have filed a counter affidavit disputing various averments made by the petitioner. It is stated that the petitioner has submitted a proposal seeking overseas medical insurance for his trip to United States. Along with the proposal dated 6-2-2001 , he submitted medical certificate issued by Dr. J.K. Periaswmi. On the basis of the certificate, a policy was issued called Videsh Yathra Mitra Policy by the 2nd respondent on 6-2-2001 for the period of cover for 145 days commencing from 12th February to 6th July, 2001. Two clauses in the policy are relevant for the purpose of this case., i.e., pre-existing condition of any sickness for which the insured person has sought medical advice or has taken medical treatment in preceding 12 months prior to the commencement of any travel and (2) general clause of exclusion applicable to all sections. A perusal of the proposal shows that the insured was continuing the medicines. The certificate of Dr. J.K. Periaswami clearly shows that the petitioner was continuing the treatment taking

medicine even on the date of proposal. By way of precaution and clarification, the second respondent passed an Endorsement on 6-2-2001 specifically excluding the ailments with which the petitioner was suffering from the purview of the policy cover. Any treatment overseas for the said ailment claim was not payable. The endorsement was valid and binding as the same was passed before the petitioner entered the hospital for treatment. The insured has agreed to abide by the pre-existing exclusion in the policy, and hence the exclusion clause for pre-existing ailment is attracted. The pre-existing exclusion was not deleted from the policy. No extra premium was collected to give special benefits to the petitioner and even otherwise any loading of premium cannot take care of such preexisting condition. The agents has not properly understood the scope of exclusion of pre-existing illness or ailment covered under the policy and in any event the respondents are not bound by such impressions. Invoking Article 12 of the Constitution of India, is not appropriate as the contract is a private contract between the petitioner and the respondent in the normal course of business and merely because the respondents are STATE within the meaning of Article 12 of the Constitution, the contract in question cannot become a statutory contract. Notwithstanding the endorsement which is a clarificatory document, the exclusion clause stands by itself being part and parcel of the policy conditions, relying on the same the respondents repudiated liability. Insurance contract being a contract based on good faith it is the legal obligation of the petitioner to disclose all material information regarding health conditions including treatment had prior to the Policy in question. Article 226 of the Constitution cannot be invoked against the respondents to enforce the repudiation being a private contract between the petitioner and respondents, when alternative forum i.e Civil Court to resolve the disputes arising from the contract is available. Since the matter requires oral and documentary evidence for its determination, the proper and appropriate remedy is to approach a Civil Court.

5. The petitioner has also filed a reply affidavit reiterating his claim made in the affidavit.

6. In the light of the above pleadings, I have heard the learned counsel for the petitioner as well as respondents.

7. In the light of the narration of the case of both parties, it is unnecessary to refer the same once again.

8. The only point for consideration in this writ petition is whether the petitioner is entitled for a direction as claimed in the writ petition regarding his claim in Videsh Yatra Mitra Policy dated 6-2-2001? If so, whether the same can be granted in this writ petition?

9. Even at the outset Mr. K.S. Narasimhan, learned counsel for the

respondents, by drawing my attention to the stand taken by the Insurance Company, contended that though the respondents are State within the meaning of Article 12 of the Constitution of India and amenable to the jurisdiction of this Court, inasmuch as the contract in question being non-statutory one and also of the fact that they repudiated their liability, the same cannot be considered by this Court exercising jurisdiction under Article 226 of the Constitution of India. If his contention is accepted, then there is no need to go into the merits of the claim made by the petitioner.

10. It is the case of the petitioner that the policy, namely, Videsh Yatra Mitra Policy taken by him at Tirupur in the Divisional Office of the United India Insurance Company Ltd., which is a subsidiary of General Insurance Corporation of India on 6-2-2001 is not a general health policy and the same is intended for use by the person insured in the event of a sudden and unexpected sickness or accident which may arise when the person insured is outside the Republic of India. By drawing my attention to various clauses in the agreement, learned senior counsel for the petitioner, contended that in the said Insurance Policy there is no specific clause excluding all heart diseases that might occur during the policy period (i.e. from 12-2-2001 to 6-7-2001). Immediately on arrival at Chicago on 14-2-2001 within a period of two days that is on 16-2-2001 the petitioner had some pain in his back and he underwent angiogram and a bypass surgery was performed. At that time, the staff of Edward Hospital, Chicago, United States of America contacted the Florida Office of Mercury International Assistance Inc. about the coverage of the policy towards the case of the petitioner and the said Mercury International Assistance Inc. had confirmed that the said policy covers cent percent for heart and heart related treatment. It is also the case of the petitioner that it was only the doctor at the Edward Hospital proceeded with the treatment. After completion of the surgery, when the petitioner verified from Mercury International Assistance and Claims Ltd., England (in short MIA and Claims Ltd., England), he received a letter dated 14-6 -2001 stating that the policy aforesaid has been endorsed to exclude all claims relating to heart conditions by the second respondent and that the said miscellaneous endorsement had been made on the date of purchase of the policy itself i.e. on 6-2-2001. It is the definite case of the petitioner that only at that stage, the petitioner came to know about the existence of the said miscellaneous endorsement to the agreement. The said miscellaneous endorsement was not made on 6-2-20 01 i.e., on the date of purchase of the said policy as stated by MIA and Claims Ltd., England, in their letter to the petitioner dated 14-6-2001 but much later on 12-2-2001 or subsequently to suit the convenience of the respondent, after the policy came into effect. However, in the counter affidavit of the respondent, particularly in para 14, it is stated that the endorsement was made much earlier before the starting of the operation of the risk/con tingency i.e. his entering into the Edward hospital, Chicago and therefore the endorsement is valid and binding on the parties. It is also their case that by disclosing the pre-existing ailments, controversies regarding pre-existing disease are avoided and the insured enjoyed coverage in respect of other ailments or accident.

In the counter affidavit they also very much relied on the medical certificate given by Dr. J.K. Periaswami, according to which, the petitioner was continuing treatment by taking medicine even on the date of proposal and the abnormality noticed by Dr. Periaswami and as such the possibilities of medical treatment during the petitioners visit to United States was also foreseen, by Dr. Periaswami. Though the petitioner asserted that he has not suppressed anything and even before commencement of his treatment at Edward Hospital, Florida, the doubt was clarified and he is entitled coverage even for heart treatment as per the said policy, as stated earlier, all those factual details were stoutly denied by the respondents in their counter affidavit. They very much rely on the medical certificate issued by Dr. J.K. Periaswami, and stated that miscellaneous endorsement was obtained well prior to starting of the operation that is before 16-2-2001, when the petitioner entered into the Edward Hospital, Chicago. In such circumstances, the contract in question being a non-statutory one and governed by terms and conditions of policy of Insurance and of the fact that the respondents repudiated their liability, I am of the view that the claim of the petitioner cannot be adjudicated and considered by this Court exercising jurisdiction under Article 226 of the Constitution of India.

11. Mr. R. Gandhi, learned senior counsel for the petitioner, by relying on (i) BIMAN KRISHNA BOSE v. UNITED INDIA INSURANCE CO., LTD., AND ANOTHER (2002-I-L.W. 325); (ii) LIFE INSURANCE CORPORATION OF INDIA v. MANUBHAI D. SHAH (AIR 1993 S.C. 171); and (iii) ANDI MUKTA S.M.V.S.S.J.M.S. TRUST v. V.R. RUDANI (1989) 2 Supreme Court Cases 691), contended that the respondents being a State within the meaning of Article 12 of the Constitution, this Court has ample power to go into the matter and grant the relief as claimed. In the light of the said contention, I have carefully considered all the above decisions. There is no dispute that the respondents are State within the meaning of Article 12 of the Constitution. However, the contract in question cannot become a statutory contract. Having given the proposal by the petitioner and the 2nd respondent having accepted the proposal, they are governed by the terms and conditions of the Policy. I have already referred to the reimbursement claimed by the petitioner for a pre-existing ailment was denied strictly in accordance with the exclusion clause of pre-existing illness by the respondents. It is also their case that notwithstanding the endorsement which is a clarificatory document, the exclusion clause stands by itself being part and parcel of the Policy conditions, relying on the same the respondents repudiated liability. In the light of the assertion by the petitioner and denial by the respondents and also of the fact that the dispute arose from a non-statutory contract, as rightly contended by the respondents, it requires oral and documentary evidence for its determination and for this purpose the proper remedy for the petitioner is to approach a competent Civil Court. In this regard, Mr. K.S. Narasimhan, learned counsel for the respondents, very much relied on a judgment of the Supreme Court in L.I.C. OF INDIA v. ASHA GOEL, reported in 2001 ACJ 806. The case before the Supreme Court by the Life Insurance Corporation was directed against the judgment of a Division Bench of the Bombay High Court, allowing the appeal on the ground that

the appellants should have had an opportunity of leading evidence relevant to their contention that the insurance policy was obtained by misrepresentation and, therefore, avoidable at the instance of the Corporation and remitting the writ petition to the writ court for fresh decision. The contention on behalf of the Corporation was that the writ petition should be dismissed as not maintainable leaving the writ petitioner-respondent No.1 before the Supreme Court to file a Civil Suit for enforcement of her claim. Considering the power of the High Court

petition under Article 226 of the Constitution cannot be denied altogether, courts must bear in mind the self-imposed restriction consistently followed by High Courts all these years after the constitutional power came into existence in not entertaining writ petitions filed for enforcement of purely contractual rights and obligations which involve disputed questions of facts. The courts have consistently taken the view that in a case where for determination of the dispute raised, it is necessary to inquire into facts for determination of which it may become necessary to record oral evidence a proceeding under Article 226 of the Constitution is not the appropriate forum. The position is also well settled that if the contract entered between the parties provide an alternate form for resolution of disputes arising from the contract, then the parties should approach the forum agreed by them and the High Court in writ jurisdiction should not permit them to by-pass the agreed forum of dispute resolution. At the cost of repletion it may be stated that in the above discussions we have only indicated some of the circumstances in which the High Courts have declined to entertain petitions filed under Article 226 of the Constitution for enforcement of contractual rights and obligations; the discussions are not intended to be exhaustive. This court from time to time disapproved of a High Court entertaining a petition under Article 226 of the Constitution in matters of enforcement of contractual rights and obligations particularly where the claim by one party is contested by the other and adjudication of the dispute requires inquiry into facts.

Their Lordships have further held: (para 10)

10In 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.

Though the Honble Supreme Court has granted the relief as ordered by the learned Single Judge in favour of the claimant, it is clear from the law laid down by them that in the light of the stand taken by the Insurance Company repudiating their liability, as observed by the Supreme Court, the proper remedy is a Civil Court and not a writ petition under Article 226 of the Constitution.

12. In STATE OF BIHAR v. JAIN PLASTICS AND CHEMICALS LTD., reported in 2002 (1) CTC 254, the Supreme Court has also held that it is settled law

that writ is not the remedy for enforcing contractual obligations. It is to be reiterated that writ petition under Article 226 is not the proper proceeding for adjudicating such dispute. It is also brought to my notice a decision of P. Shanmugam, J., in J. KUBERAN v. THE MANAGER, UNITED INDIA INSURANCE CO., LTD., AND ANOTHER (Writ Petition No. 12287 of 2001 dated 6-7-2001) wherein the learned Judge almost in similar circumstance in the light of the stand taken by the Insurance Company in the writ petition filed by the claimant has held:

3.Therefore, the question whether there was a contract of liability is a mater that has to be work out by the petitioner either before the civil court or before the Arbitrator and not under Article 226. The respondents are not statutory authorities under any Act, so as to seek for a relief under writ jurisdiction. Assuming for the sake of argument that the Insurance Companies are authorities under Article 12 of Constitution of India their business of Insurance and its conducts is commercial in nature and the jurisdiction of High Court under Article 226 cannot be resorted to for settling their disputes. Hence, without prejudice to the right of the petitioner either to move the civil Court or the Arbitrator for settling their claim the writ petition is disposed of..

All the above referred decisions lead to an irresistible conclusion that in a matter like this, the question raised by the petitioner cannot be adjudicated in a writ petition and the proper remedy is to file a suit in a Civil Court or appropriate Forum to resolve the dispute.

13. Under these circumstances, the petitioner is permitted to file a Civil Suit in a Civil Court or appropriate Forum to vindicate his grievance. It is made clear that the time taken by him in prosecuting this writ petition before this Court shall be excluded for the purpose of limitation. It is further made clear that the observation and conclusion made above is only for the disposal of the present writ petition and the same would not be an obstruction in proving his case before the competent Civil Court or appropriate Forum. With the above observation, the Writ Petition is dismissed. No costs. WPMP No. 24938 of 2001 is also dismissed.

28-03-2002
Index:- Yes/Internet
R.B.
P. SATHASIVAM, J.

Order in W.P.16822
of 2001 and WPMP No.
24938/2001

Dt:- 28-03-2002