$~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 8th May, 2020
Pronounced on: 12th May, 2020

\+ **W.P.(C) 2968/2020 & C.M. APPL. 10302/2020**

SUDHAKAR TIWARI ..... Petitioner
Through: Mr. Rajiv Dutta, Senior Advocate with Mr. Piyush Sharma & Mr.Aditya N. Prasad, Advocates.

Versus

NEW INDIA ASSURANCE CO. LTD. ..... Respondent
Through: Mr. J. P. N. Shahi, Advocate.

%
CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

J U D G M E N T

1. The dispute between the parties arises out of a medical insurance policy known as the "New India Mediclaim Policy" (hereinafter, "the policy"), purchased by the petitioner from the respondent. The petitioner is aggrieved by a communication dated 05.04.2020 by which the respondent has declined to cover the petitioner's claims under the policy.

FACTS

2. The petitioner first purchased the policy (bearing no. 311600-341625-00000498) in the year 2002. It came into effect on 11.09.2002. The sum assured under the policy was then ₹5,00,000/-. The policy was renewed annually. In the year 2017, the respondent offered the petitioner an enhancement of the sum assured, which the petitioner accepted. The sum assured under the policy was thus

enhanced to ₹8,00,000/- with effect from 11.09.2017, and the policy document to this effect was issued on 04.09.2017.

3. The genesis of the present dispute is that the petitioner was diagnosed with metastatic squamous cell carcinoma in cervical lymph nodes in January 2020, and is undergoing treatment at Medanta Hospital, Gurugram, and Apollo Hospital, Delhi. In accordance with the procedure under the policy, the petitioner applied for the "cashless facility". However, the third-party administrator appointed by the respondent (hereinafter, "the TPA") rejected the petitioner's request. In a communication dated 30.03.2020 addressed by the TPA to Apollo Hospital, the reason cited for the rejection was that the maximum eligible sum insured of ₹5,00,000/- had been exhausted.

4. The petitioner protested to the respondent on the same date and drew the respondent's attention to the enhancement of the sum insured in the year 2017. The respondent, by its communications dated 30.03.2020 and 31.03.2020, requested the TPA to confirm the position. In the second of these communications, the representative of the respondent stated *inter alia* that, according to the information available with the respondent, the sum insured under the policy was ₹8,00,000/- (plus cumulative bonus of ₹90,000/-) and not ₹5,00,000/-. The respondent indicated that its record did not disclose exhaustion of the sum insured by the petitioner, and that there must have been "some misjudgement" at the TPA's end.

5. The TPA responded on 01.04.2020, relying upon the exclusion contained in the policy in respect of pre-existing conditions. It took the position that the petitioner was already suffering from the said ailment

when the enhanced coverage was taken, and the enhanced sum assured would therefore not be available until the petitioner completed four years of enhanced coverage.

6. The petitioner disputed this and asserted that he had been treated in 2017-18 for a different ailment. He cited the opinion of the treating physician that he was free of the earlier ailment (cancer of the oesophagus) in 2018.

7. Although the respondent on 03.04.2020 requested the petitioner for further details, the TPA contended, on the same date, that the claim had been correctly refused, and stated that no further documents were required.

8. The petitioner's further protest dated 05.04.2020 led to the impugned communication of the respondent. The relevant parts of the impugned communication are set out below: -

> *"Please refer to the mail of Raksha TPA in the trail. As per the statement you made in your reply, I am afraid, as per the policy conditions, the enhanced Sum Insured portion (Rs.3.00 lakhs) opted on the renewal on 11/09/2017 shall not be allowed to you,and will be blocked till 10/09/2021.*
> *As per doctor prescription date 22-09-2017. You were having complaints dysphagia to solid since 2 weeks hence the disease appeared since 07-09-2019. You also undergone USG endoscopy on 14-09-2017.*
> *As per policy exclusion* ***5.11.Enhancement clause****. {In respect of any enhancement of Sum Insured, exclusions 4.1, 4.2 and 4.3 would apply to the additional Sum Insured from such date.}*
> ***As per policy Pre-existing clause 4.1.- PRE-EXISTING CONDITION/DISEASE*** *means any condition, ailment or injury or related condition(s) for which You had signs*

or symptoms, and/or were diagnosed, and/or for which You received medical advice / treatment within forty eight months prior to the first policy issued by Us (as mentioned in the Schedule) and renewed continuously thereafter.
Further, presence of symptoms before the sum insured enhancement clearly state that the cost of treatment will be limited to the previous Sum Insured only.
The TPA is correct in their interpretations."

9. The petitioner has challenged this decision by way of the present writ petition. Notice was issued on 15.04.2020, parties were directed to complete pleadings, and the petition was adjourned to 19.05.2020. However, no *ad interim* relief was granted, which led the petitioner to approach the Division Bench in LPA No.144/2020. The Division Bench expedited the filing of pleadings and advanced the date of hearing to 05.05.2020. The petition was heard on 05.05.2020 and 08.05.2020 by way of video conferencing. Learned counsel for the parties have also filed their written submissions.

CONDITIONS OF THE POLICY

10. The relevant clauses of the terms and conditions of the policy are extracted below:

"2.32 ***PRE-EXISTING CONDITION/DISEASE*** *means any condition, ailment or injury or related condition(s) for which You had signs or symptoms, and/or were diagnosed, and/or for which You received medical advice/ treatment within forty eight months prior to the first policy issued by Us (as mentioned in the Schedule) and renewed continuously thereafter.*

xxxx *xxxx* *xxxx*

4. <u>WHAT ARE EXCLUDED UNDER THIS POLICY</u>

<u>No claim will be payable under this Policy for the following:</u>

4.1 *Treatment of any Pre-Existing Condition/Disease, until forty eight months of Continuous Coverage of such Insured Person has elapsed from the Date of inception of his/her first Policy with Us as mentioned in the Schedule.*

xxxx xxxx xxxx

5.11 <u>ENHANCEMENT OF SUM INSURED:</u>

You may seek enhancement of Sum Insured in writing before payment of premium for renewal, which may be granted at Our discretion. Before granting such request for enhancement of Sum Insured, We have the right to have You examined by a Medical Practitioner authorized by Us or the TPA. Our consent for enhancement of Sum Insured is dependent on the recommendation of the Medical Practitioner and subject to limits as stated below: -

Age <=50 years	*Up to Sum Insured of 15 lakhs without Medical Examination*
Age 51-60 Years	*By two slabs without Medical Examination*
Age 61-65 Years	*By one slab with Medical Examination*

Enhancement of Sum Insured will not be considered for:

1) *Any Insured Person over 65 years of age.*

2) *Any Insured Person who had undergone more than one Hospitalisation in the preceding two years.*

3) *Any Insured Person suffering from one or more of the following Illnesses/Conditions:*

a) *Any chronic Illness*

b) *Any recurring Illness*
c) *Any Critical Illness*

In respect of any enhancement of Sum Insured, exclusions 4.1, 4.2 and 4.3 would apply to the additional Sum Insured from such date."

SUBMISSIONS

11. At the outset, Mr. J.P.N. Shahi, learned counsel for the respondent, raised a preliminary objection that the writ petition is not maintainable as it concerns a purely contractual dispute. He urged that the petitioner ought to be relegated to his civil remedies, either before the dispute redressal forums under Consumer Protection Act, 1986, or by way of a regular civil suit.

12. On the question of maintainability, Mr. Rajiv Dutta, learned Senior Counsel for the petitioner, argued that there is no absolute bar to the jurisdiction of the writ court even in contractual matters arising between a citizen and an instrumentality of the State, but the exercise of jurisdiction is a matter for the Court's discretion. He urged that the discretion ought to be exercised in favour of the petitioner in the present case, where the underlying facts are undisputed and the action of the respondent, entirely arbitrary. In this connection, Mr. Dutta cited the judgment of the Supreme Court in *United India Insurance Company Limited and Ors. vs. Manubhai Dharmasinhbhai Gajera and Ors.,* (2008) 10 SCC 404, and three judgments of this Court - *Talvinder Choudhary vs. Union of India & Anr.,* 2004 (76) DRJ 680; *Mukut Lal Duggal vs. United India Insurance Co. Ltd.,* 2005 (82) DRJ 70; and *Hari Om Agarwal vs. Oriental Insurance Co. Ltd*., 2007 (98) DRJ 246. He also referred me to the judgment of the Bombay High

Court in *Smt. Asha Goel vs. Life Insurance Corporation of India & Ors*., AIR 1986 Bom 412.

13. Mr. Dutta further pointed out that the petitioner's ongoing medical treatment for a life-threatening disease necessitates immediate relief, which would be extremely difficult to access due to the prevailing Covid-19 pandemic, and consequent restricted functioning of all judicial institutions.

14. Turning to the merits of the case, Mr. Dutta accepted that the enhanced coverage would not be available for a pre-existing condition upon a combined reading of clauses 5.11 and 4.1 of the policy. However, he referred to the undisputed medical documents placed on record by the parties to demonstrate that perianal abcess (from which the petitioner suffered in June 2017) is unrelated to the petitioner's cancer diagnosis, and that he had been successfully treated for cancer of the oesophagus in 2017-18, as certified by his treating physicians. He argued that the respondent's characterisation of the petitioner's present ailment (metastatic squamous cell carcinoma in cervical lymph nodes) as a continuation of the earlier ailment is therefore wholly arbitrary and liable to be set aside.

15. Mr. Shahi's response on the merits was that the medical documentation of 2017 and 2018 revealed the existence of cancer, and the petitioner's present ailment is the same. He submitted that the petitioner's claim was therefore rightly rejected, applying the exclusion under clause 4.1. He also relied on clause 5.11(3)(c) to argue that the petitioner was not entitled to enhancement of the sum insured, on account of his "critical illness". According to Mr. Shahi,

the petitioner suppressed his medical history when he sought enhancement of the sum insured under the policy.

ANALYSIS

A. Maintainability of the petition

16. Turning first to the issue of maintainability, Mr.Shahi's submission that the writ court will *normally* not entertain contractual disputes is doubtless correct. However, the question is not one of jurisdiction of the Court, but of whether the discretionary power under Article 226 of the Constitution ought to be exercised in a particular case. The judgments of the Supreme Court and this Court dealing with this question in the context of insurance contracts are particularly relevant for the purposes of this case.

17. The question was considered in some detail in *Life Insurance Corporation of India & Ors. vs. Asha Goel & Anr.,* (2001) 2 SCC 160. The Bombay High Court had allowed a writ petition against the appellant. The insurance company contended that the writ court ought not to have entertained a contractual dispute, and the Supreme Court held as follows:

> *"10. Article 226 of the Constitution confers extraordinary jurisdiction on the High Court to issue high prerogative writs for enforcement of the fundamental rights or for any other purpose. It is wide and expansive. The Constitution does not place any fetter on exercise of the extraordinary jurisdiction. It is left to the discretion of the High Court. Therefore,* ***it cannot be laid down as a general proposition of law that in no case the High Court can entertain a writ petition under Article 226 of the Constitution to enforce a claim under a life insurance policy****. It is neither possible nor proper to enumerate*

exhaustively the circumstances in which such a claim can or cannot be enforced by filing a writ petition. ***The determination of the question depends on consideration of several factors like, whether a writ petitioner is merely attempting to enforce his/her contractual rights or the case raises important questions of law and constitutional issues, the nature of the dispute raised; the nature of inquiry necessary for determination of the dispute etc. The matter is to be considered in the facts and circumstances of each case****. ... 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. ...*

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.* ***Similarly, where a plea of fraud is pleaded by the insurer and on examination is found prima facie to have merit and oral and documentary evidence may become necessary for determination of the issue raised, then a writ petition is not an appropriate remedy****."*
>
> (Emphasis supplied)

[Although Mr. Dutta relied upon the judgment of the learned Single Judge of the High Court in the same case, it is unnecessary to consider the said judgment as the matter was ultimately carried to the Supreme Court.]

18. In *Biman Krishna Bose vs. United India Insurance Co. Ltd.*, (2001) 6 SCC 477, the Supreme Court held that insurance companies, acquiring the trappings of the "State" as other authorities under Article 12 of the Constitution, ought to act reasonably and fairly while dealing with customers. This judgment makes it clear that the actions of insurance companies can be tested in writ proceedings, and set aside if found to be arbitrary.

19. In *ABL International Ltd. & Anr. vs. Export Credit Guarantee Corporation of India Ltd. & Ors.,* (2004) 3 SCC 553, the Supreme Court considered several of its earlier judgments on the question of maintainability of writ petitions in contractual matters. The Court summarised its conclusions in the following manner: -

> *"27. 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.

28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (See Whirlpool Corpn. v. Registrar of Trade Marks [(1998) 8 SCC 1] .) And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction."

20. Mr. Dutta also cited the judgment in *Manubhai* (supra), which arises out of a mediclaim policy. In *Manubhai*, the Supreme Court noticed that the insurance company in that case, as in the present case, is a public sector undertaking, amenable to judicial review and held that in the absence of serious disputed questions of fact, judicial review of the impugned decision was permissible.

21. The judgments of this Court are on similar lines. In *Talvinder Choudhary*, the Court was concerned with non-renewal of the petitioner's mediclaim policies. Relying upon *Biman Krishna Bose* (supra), and the judgment of this Court in *Ashok Kumar Dhingra & Ors. vs. The Oriental Insurance Co. Ltd. & Ors*., 2003 (70) DRJ 470, it was held that the petition could not be thrown out on the ground of maintainability. [Although Mr. Dutta also cited the judgment of the learned Single Judge in *Mukut Lal Duggal* (supra), which is to the same effect, it is not necessary to consider the said judgment separately, as I find that it was carried in appeal to the Division Bench, and thereafter to the Supreme Court. The Supreme Court heard the matter alongwith the *Manubhai* case (supra). The judgments of the learned Single Judge and the Division Bench in *Mukut Lal Duggal* were also affirmed in *Manubhai*, which has been dealt with above.]

22. The judgment in *Hari Om Agarwal* (supra) is even closer to the facts of this case. In that case also, the insurance company had declined a claim under a mediclaim policy on the ground that it arose out of a pre-existing medical condition. Following the principles laid down in *Biman Krishna Bose* and *ABL International*, the Court entertained the writ petition, and granted relief. (During the course of hearing, I asked learned counsel for the parties to confirm whether this judgment was carried in appeal. Learned counsel for the petitioner has indicated that, to the best of his knowledge, the judgment was not challenged. Mr. Shahi has also not made any submission to the contrary.)

23. Applying the principles laid down in the above judgments to the present case, I am of the view that the writ petition cannot be dismissed on the grounds of maintainability. In the present case also, the facts of the matter are not in serious dispute. Parties are *ad idem* as to the details of the policy as well as its terms and conditions. The medical record of the petitioner is also undisputed. There is no allegation in the correspondence between the parties of any fraud or deceit by the petitioner. Although a case of suppression of material facts regarding the petitioner's medical history has been taken in the counter affidavit, it is clear from paragraph 11 of *Asha Goel* (supra) that, in order to succeed on this preliminary issue, the respondent would have to demonstrate the *prima facie* merit of its contention. In the absence of such *prima facie* finding, the case would turn not on the determination of any factual point requiring evidence to be led, but on an interpretation of clauses 4.1 and 5.11 of the policy. The petition has been filed to challenge the decision of a State instrumentality as arbitrary, and its fate can be determined in accordance with the principles which govern exercise of jurisdiction under Article 226 of the Constitution.

24. As far as maintainability is concerned, the only question to be decided is therefore whether the respondent has made out a *prima facie* case of suppression by the petitioner. The basis of this argument is clause 5.11(3)(c), which contemplates denial of enhancement in the event of any critical illness. Mr. Shahi relied upon a prescription dated 22.09.2017 of Dr. Durgatosh Pandey of the Department of Surgical Oncology, Artemis Hospital, Gurugram. He pointed out that in the

said prescription, the doctor has noted the petitioner's history of drainage of perianal abscess three-four times, lastly in June 2017, and complaint of "dysphagia to solids" for the previous two weeks.

25. In my view, the respondent's reliance on this prescription is misconceived. The undisputed medical opinion placed on record is that the petitioner's complaint of perianal abscess in June 2017 (which is the date mentioned in the counter affidavit) has no relationship with cancer. The complaint of dysphagia, even according to the prescription relied upon by the respondent, was for a period of two weeks prior to 22.09.2017, i.e. from 08.09.2017. The documents placed on record by the respondent itself reveal that the enhancement of the petitioner's policy occurred prior to that date. The petitioner paid the enhanced premium amount of ₹30,284/- by a cheque dated 01.09.2017, for which the respondent issued a receipt on 04.09.2017. The policy document is dated 04.09.2017 and came into effect on 11.09.2017. In these circumstances, it is not possible to accept that the petitioner already knew, when he entered into the enhanced policy, that he suffered from a critical illness. The respondent has therefore failed to make out a *prima facie* case in support of its allegation of suppression, and no trial on evidence is necessary. In any event, neither the protracted correspondence between the parties nor the impugned rejection letter make out this case, which appears to be an afterthought, taken in the counter affidavit for the first time.

26. I am also conscious of the circumstances at present prevailing in the country (and indeed, in the rest of the world) on account of the Covid-19 pandemic. The entire country has been under a national

lockdown since 23.03.2020, and all judicial forums (including this Court) have been functioning restrictively. Although the insurance policy in the present case speaks of grievance redressal through an ombudsman (clause 5.19 of the terms and conditions), Mr. Shahi was unable to confirm whether the office of the ombudsman is functional at this time. The petitioner's illness is such that his treatment cannot be delayed; his right to life is very directly implicated. The existence of an efficacious alternative remedy, particularly at this juncture, is extremely doubtful. It appears to me that the petitioner would be seriously prejudiced if I were to relegate him to other remedies.

27. A consideration of the aforementioned facts and circumstances of the case, as mandated *inter alia* by paragraphs 10 and 11 of *Asha Goel* (*supra*), therefore leads to the conclusion that Mr. Shahi's preliminary objection on maintainability must be rejected.

28. During the course of hearing, Mr. Dutta also suggested that the petitioner may be relegated to other remedies if the respondent is willing, in the interregnum, to honour the petitioner's claims in accordance with the enhanced sum assured. He submitted that the petitioner would undertake to restitute the respondent in the event the claim was ultimately found to be invalid. However, Mr. Shahi was not in a position to accept this suggestion, which would have enabled the respondent to contest the matter on evidence.

B. Merits of the petitioner's claim

29. Turning now to the merits of the case, Clause 5.11 deals with enhancement of the sum insured under the policy. It is first to be noted that the enhancement is granted at the discretion of the insurer. The

insurer has the right to insist upon a medical examination of the insured prior to enhancement. In the present case, I was informed that no medical examination was required at the time of enhancement, as the clause does not mandate it when the insured is less than 50 years of age, and the sum insured is less than ₹15 lakhs. The enhancement was accepted by the respondent in its discretion – indeed, the pleading in paragraph 3(ii) of the petition to the effect that the enhancement was taken at the suggestion of the respondent, remains untraversed in the counter-affidavit. Since the enhancement, the respondent has also accepted higher annual premia computed on that basis.

30. Mr. Shahi also relied upon Clause 5.11(3)(c) to submit that the petitioner's "critical illness" disentitled him to claim in terms of the enhanced sum insured. In the absence of a finding in the respondent's favour with regard to the question of suppression, this contention is meritless. The three subclauses of clause 5.11 provide for situations in which enhancement of the sum insured would not be considered - clause 5.11(3)(c) thus does not afford a ground for withholding the enhancement when faced with a claim, but for declining the enhancement at the outset.

31. The petitioner's claim must therefore turn on an interpretation of the exclusion contained in clause 4.1, which is made applicable to a situation of enhancement of the sum insured by the very last stipulation contained in clause 5.11. In the case of a new policy, clause 4.1 makes it clear that pre-existing conditions would not be covered for the first four years of the policy. Applying this to a case of enhancement, the clause indicates that in respect of a condition which

exists on the date of enhancement, the enhancement would not be applicable for a period of four years thereafter. Thus, if the petitioner's claim is in respect of a condition which existed at the time of enhancement, the coverage would be only for a sum of ₹5,00,000/- until September 2021, and for ₹8,00,000/- thereafter. Alternatively, if the claim is in respect of an ailment which was not a pre-existing condition, the petitioner's claim would be immediately admissible for the enhanced amount of ₹8,00,000/-.

32. In interpreting an exclusion clause such as clause 4.1, the Court's approach is generally restrictive. An exclusion clause must be read in a manner consistent with the object of the insurance which, in the case of a medical insurance, is reimbursement of the healthcare costs of the insured. The approach to be adopted by the Court is clear from the following observations in *Hari Om Agarwal* (supra):

> *"21. The bone of contention, or the point of dispute is the precise meaning of "complications arising from pre-existing disease will be considered part of that pre-existing condition.". This stipulation itself occurs in an exclusion clause. There is some authority that an exclusion clause, in the context of a contract of insurance, which is an assurance whose main purpose has to be given prominance, should be construed strictly (Ref. Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan & Ors., 1987 (2) SCC 654; B.V. Nagaraju v. Oriental Insurance Co. Ltd., 1996 (4) SCC 647). The primacy given to the main purpose, notwithstanding that contracting parties agreed to certain exclusions, is founded on the principle of interpretation that if contracting parties seek to achieve a certain purpose by entering into an agreement, the existence of exclusion clauses should be strictly*

interpreted and if it tends to defeat the main purpose, should be read down by the Court; if that is not possible, the court should altogether ignore it (Ref Halsbury, LC in Glynn v. Margeston & Co 1893 AC 351).

22. If the rule indicated in the preceding paragraph were kept in mind, it would be apparent that the object of the insurance policy is to cater to medical expenses incurred by the insured. That is the "main purpose" of the contract of insurance. The object of the exclusion clause is to except the liability of the insurer. In a sense this is at variance with the object of the policy. Nevertheless, it is a part of the contract; the court should firstly seek to harmonise the all the clauses, and attempt to give effect to it. If one proceeds on this premise, the concept of "pre-existing condition" has to be understood. Clause 4.1 defines it as any injury which existed prior to the effective date of the insurance; and any sickness or its symptoms which existed prior to the effective date of the insurance, whether or not the insured had knowledge that the symptoms were relating to the sickness. It is apparent that even if there were known diseases or conditions, which were disclosed and for which there was a likelihood of complications arising in the future, the insurer sought to distance itself from the liability. There is no dispute here that diabetes was a condition at the time of submission of proposal; so was hyper tension. In a sense these were "old ailments" the petitioner was advised to undergo ECG, which he did. The insurer accepted the proposal and issued the cover. One may ask, what then was the cover for. It is not an accident cover policy, or a life policy. Now, it is universally known that hypertension and diabetes can lead to a host of ailments, such as stroke, cardiac disease, renal failure, liver complications, etc, depending upon varied factors. That implies that there is probability of such ailments; equally they can arise in non-dibetics or those without hypertension. Unless the insurer spelt out with sufficient clairity, the purport of its clauses, or charged a higher

> *premia, at the time of accepting the proposal, the insured would assume and perhaps, reasonably that later, unforseen ailments would be covered. Thus, it would be apparent that giving a textual effect to clause 4.1 would in most such cases render the mediclaim cover meaningless; the policy would be reduced to a contract with no content, in the event of the happening of the contingency. Therefore, I am of the opinion that clause 4.1 cannot be allowed to override the insurer's primary liability; the "main purpose" rule would have to be pressed into service. This finding is reinforced in this case, as the insurer renewed the policy, in 2006, after the petitioner underwent the CABG procedure."*

33. The contention of the respondent in the counter affidavit is that the petitioner had been symptomatic since June 2017. As mentioned hereinabove, the prescription dated 22.09.2017, relied upon by the respondent, noted a complaint of perianal abscess in June 2017, which is not related to his present condition at all. Further, the petitioner has disclosed in the petition that he suffered from cancer of the oesophagus in 2017-18 but, as discussed in paragraphs 24 and 25 hereinabove, considering the documents relied upon by the respondent itself, I am of the view that the policy for the enhanced sum assured was issued even before the petitioner developed any symptoms relatable to oesophagal cancer. The contention of the respondent that cancer was a pre-existing disease at the time of the enhancement of the sum assured is therefore unsustainable.

34. In any event, the petitioner has contended that he was successfully treated by Dr. Pandey for oesophagal cancer in 2017-18. The doctor's prescriptions from July 2018 to December 2018 show

that the petitioner was treated with chemotherapy, and underwent oesophagectomy in December 2017. However, the prescription of 24.07.2018 contains the following notation: "*Clinically – NED. Asymptomatic"*. [Mr. Dutta states that the term "NED" indicates that as on that date, there was no evidence of the disease. This is not disputed by Mr. Shahi.] Dr. Pandey's prescriptions of 18.12.2018 and 11.07.2019 carry the same notation.

35. The fact that the petitioner was found to be free of the disease in the interregnum, in my view, also shows that the petitioner's present condition cannot be treated as a pre-existing one. The respondent's representative, in his communication to the petitioner dated 03.04.2020, specifically enquired as to the date on which the petitioner had first been reported as being free of disease/NED by his treating doctor. However, later the same day, before receipt of the petitioner's response, the TPA referred to the aforesaid prescription dated 22.09.2017, and came to the conclusion that the petitioner had displayed symptoms before the enhancement of the sum insured. The TPA therefore informed the petitioner that no further documents or clarification was required, and asserted that the claim had correctly been rejected.

36. The petitioner nevertheless responded to the respondent's query on 04.04.2020 and also attached Dr. Pandey's prescription indicating that there was no evidence of the disease after July 2018. Surprisingly, none of this is dealt with or explained in the impugned communication of the respondent dated 05.04.2020. The respondent has instead relied

upon the interpretation of the TPA regarding the petitioner's disease in 2017, and declined the claim on that basis.

37. In my view, the respondent's analysis falls short of the minimum required standard. The original position taken by the TPA has simply been reasserted by the respondent without even considering the information it had sought from the petitioner. In the counter affidavit filed by the respondent, the petitioner's averments regarding the nature of the diseases, and the medical records have not been disputed. It is clear from the record that the petitioner was afflicted with one form of cancer (oesophagal cancer) in 2017, he was successfully treated, found to be free of the disease in July 2018, but the cancer unfortunately recurred in another form (this time in the lymph nodes) in 2020. Further, the fact that cancer, even if successfully treated, can recur in another part of the body at a later date is well known. However, it is not a matter of such certainty or correlation as to justify treating the present ailment as one for which the petitioner had symptoms prior to enhancement, particularly when there was no evidence of the disease in the interregnum. Such an interpretation is inconsistent with the restrictive construction of exclusion clauses, and contrary to the very purpose for which medical insurance is taken or enhanced.

38. For the reasons aforesaid, I am of the view that the impugned communication of the respondent is contrary to law, unreasonable and arbitrary, and liable to be set aside.

CONCLUSION

39. The writ petition is therefore allowed, and the impugned communication dated 05.04.2020 is set aside. The respondent is directed to honour the petitioner's claims arising out of his ailment of metastatic squamous cell carcinoma of the cervical lymph nodes for the enhanced sum of ₹8,00,000/- (and cumulative bonus) as indicated in the policy document. There will be no order as to costs.

40. Pending application also stands disposed of.

PRATEEK JALAN, J.

MAY 12, 2020/ *'pv'*