**(1996) 10 NCDRC CK 0026**

**In the National Consumer Disputes Redressal Commission**

ARAKSHITA NATH APPELLANT

Vs

BRANCH MANAGER, NATIONAL INSURANCE CO.LTD RESPONDENT

**Date of Decision :** 01-10-1996

**Acts Referred:**

**Citation :** 1997 1 CPJ 263 : 1997 1 CPR 636

**Hon'ble Judges :** P.C.Misra , Biswanath Rath , Mrinalini Padhi J.

**Final Decision :** Ordered accordingly

## Judgement

1. THIS appeal is directed against the final order passed in C.D. Case No. 24 of 1994 by the Consumer Disputes Redressal Forum, Jagatsinghpur. The complainant in the said case is the appellant. His case before the District Forum is that he is the owner of a cloth store in the name and style of M/s. Arakshita Nath and Sons situated in Manijanga Bazar. The said shop was insured with respondent-Insurance Company from 2.11.90 to 20.11.91 under a Shop-keepers insurance bearing No. 153102/9800080/90. During the night of 12.10.91 it was alleged by the complainant, that some cloths worth more than Rs. 80,000/- were stolen from his shop. He registered one FIR under Sections 457/380, Indian Penal Code in respect of which the police made investigation and submitted a Final Report to the Sub-Divisional Judicial Magistrate, Jagatsinghpur. The police in the said report stated that the case is true but no clue could be found out. The complainant also preferred a claim before the Insurance Company on 23.10.91 claiming a compensation of Rs. 80,413/- representing the loss. It was alleged that a Surveyor was deputed by the Insurance Company but no compensation was paid to him. He made repeated representations to the Company, but there was no response. Ultimately by a communication dated 20.11.91 his claim was repudiated on the ground that the theft having been committed without actual forcible and violent breaking into or out of the premises, it would not be covered under the policy issued to the complainant. He claimed a compensation of Rs. 2,30,000/- before the District Forum besides the cost and damage suffered by him for non-payment of the compensation in due time.

2. THE Insurance Company (the respondent) filed a written version before the District Forum denying their liability. It was stated in the said show cause that the story of theft is suspicious from the nature of narrations made in the complaint petition. It was further stated that no force having been applied for the commission of the burglary it does not constitute an offence under Section 457 of the Indian Penal Code. THEy relied on the investigation made by one Sri B.C. Swain a retired O.P.S. who did not observe any mark of violence on the wooden door and consequently he opined that no force was applied to open the lock. Since no violence has been applied for the breaking of the house or committing theft therefrom, it would not come within the terms of the policy and therefore the complainant would not be entitled to any compensation whatsoever under the said policy. THEy filed the specimen copy of a Burglary Policy wherein it has been mentioned that the Insurance Company will indemnify the insured against loss of or damage to the property insured described in the schedule whilst contained in the premises by theft following upon burglary or house-breaking accompanied by the actual forcible and violent breaking into or out of the premises or any attempt thereat occuring during the period of Insurance. The District Forum after considering the case of both parties, concluded that since the Insurance Company has repudiated the claim of the complainant, the matter cannot be entertained for adjudication by the Forum. Therefore it dismissed the complaint case and directed the complainant to approach the Civil Court for appropriate redressal.

We have gone through the entire records of the District Forum including the documents filed by each of the parties and have heard the learned Counsel appearing for both the parties at length. The complainant in order to substantiate his claim has filed the original policy which was issued to him in which the clause of risk covered by the policy has been mentioned as Shopkeepers insurance policy. The Shopkeepers insurance policy which was issued to the complainant shows that it covers the risk that the Company will indemnify the insured in respect of loss of or damage to the whilst Contents contained in the insured premises by burglary and/or house breaking. It was not the case of the Insurance Company that the aforesaid policy was not issued to the complainant or the policy that was filed by the complainant before the District Forum was incomplete in any respect. They, however, filed a specimen copy of a Burglary Policy in which as already mentioned the liability of the Company would arise in respect of theft following upon burglary or house breaking accompanied by the actual forcible and violent breaking into or out of the premises what would be really meant by the "actual forcible and violent breaking into or out of the premises" is a different matter and we do not feel the necessity of complaining the same inasmuch as the aforesaid clause does not appear in the policy which was issued to the complainant in this case. But it is curious that the repudiation was made by the Insurance Company on the basis that there is no element of a forcible and violent breaking into or out of the premises for which reason it would not be covered by the policy issued to the complainant.

3. WHETHER there is any essential difference between "burglary or house breaking and the expression burglary or house breaking accompanied by the" actual forcible and violent breaking into or out of the premises" is a question which may be considered in an appropriate case. This case does not present such a dispute to be resolved inasmuch as the policy issued to the complainant does not contain the aforesaid clause. The learned Counsel appearing for the respondent strenuously argued that the Burglary Policy is a part of the Shopkeepers'' insurance policy and it has to be read together. We find no material in support of the aforesaid argument. The complainant filed the original policy consisting of five sheets bearing the seal and signature of the Insurance Company. In the show cause filed or during the course of hearing of the matter before the District Forum or in this appeal, the genuineness of the policy has not been disputed. The submission that the Burglary Policy is a part of the Shopkeepers'' insurance policy is prima facie not acceptable for the reason that the recitals of each of those policies make it clear that there are two different kinds of policies covering different points of risks and each of the said policies against any claim is to be accompanied with the proposal submitted by the insured. We are, therefore, of the view that the Burglary Policy cannot be a part of Shopkeeprs'' insurance policy. In the letter of repudiation dated 20.11.92, the Insurance Company after considering the report of the Surveyor deputed by them. Police Final Investigation Report and the Final Report of the Investigator appointed by the Insurance Company came to a conclusion that the contents of the shop of the complainant were stolen, by the miscreants opening the lock with false key without any physical and forcible entry/exit. They repudiated the claim on the ground that this type of theft is not covered under the policy since the theft did not occur following upon burglary/House-breaking accompanied by the actual forcible and violent breaking into or out of the premises or any attempt thereat. The repudiation has been made on the assumption that it was a burglary policy which was issued to the complainant which in our opinion is different from the shopkeepers'' policy. In other words the repudiation has been made on irrelevant grounds.

4. IT has also been contended by the learned Counsel for the appellant with reference to some decisions of different State Commissions and National Commission that once the repudiation is made by on Insurance Company the dispute is not entertainable by a Forum constituted under the Consumer Protection Act. Though the decisions are based on facts and materials peculiar to these cases, in several cases, this Commission has taken the view that where repudiation has been made without application of mind, it amounts to deficiency in service and in such cases the Forum would be competent to entertain the dispute for adjudication. In cases where there are materials on record itself for a fair assessment of the compensation, the Commission has gone to the extent of quantifying the compensation on the basis of materials which are beyond controversy. This is, however, a case where the Surveyor''s report has not been filed by the Insurance Company, except the claim made by the complainant,

 

there are no materials for the Commission to assess the loss or quantify the compensation payable to him under the terms of the policy. In such circumstances, we think it appropriate to direct the Insurance Company to assess the loss and to pay the compensation which in its discretion becomes payable. It is further clarified that since the Insurance Company in its letter of repudiation dated 20.11.92 has admitted that the contents of the shop of the complainant were stolen by miscreants opening the lock with false key, it amounts to burglary/ house-breaking as defined by law. It, therefore, comes under the heading "BURGLARY AND HOUSE-BREAKING CONTENTS UNDER SECTION-11 OF THE POLICY issued to the complainant. No further dispute is entertainable as to whether or not the alleged incident amounts to burglary/house-breaking. The Insurance Company is directed to assess the loss only on the basis that the theft was on account of burglary and house-breaking. The same be done within one month from the date of receipt of this order, failing which the remedies available under law will be available to the complainant for enforcement of the order. Ordered accordingly.

 