
(2005) 08 NCDRC CK 0023

In the National Consumer Disputes Redressal Commission

ATLAS EXPORTS INDIA

APPELLANT

Vs

NEW INDIA ASSURANCE CO. LTD.

RESPONDENT

Date of Decision : 03-08-2005

Acts Referred:

Citation : 2005 0 NCDRC 23 : 2005 4 CPJ 190 : 2006 1 CPC 3

Hon'ble Judges : K.S.GUPTA , B.K.TAIMNI , P.D.SHENOY J.

Advocate : DEEPA CHACKO , SANJEEV SHARMA

Judgement

1. THIS is a case where the Insurance Company wishes to impose non-existing conditions of the policy on the Insurer which were not part of the insurance policy "the contract document" thereby trying to settle the claim at less than half of the amount assessed by the Surveyor.

2. ATLAS Export India (complainant) is a partnership firm, primarily dealing with export of garments. The complainant, their associate and/or sister companies who are carrying on the business of exporting cotton textile goods of various descriptions have been insuring the same against various perils under Fire Insurance Policies provided by the New India Assurance Co. Ltd. (opposite party) for over a decade. In view of expansion of export business, the property/goods/stock-in-trade of the complainant had to be stored in different locations. The complainant had obtained a Fire Insurance "O Floater Policy as the stock-in-trade was lying in different locations and paid annual premium of Rs. 31,500/- including a floater extra of 50 paise per Rs. 1,000/- plus 5% service tax, totally amounting to Rs. 33,075/- for a period of 12 months from 4.10.1996 to 3.10.1997. At the request of complainant, the opposite party issued a revised Fire Insurance Endorsement on 28th February 1997, nothing therein that the three locations stated in Floater Policy stand amended to include 22 locations all of which were situated within the Municipal limits of Dombivli and Badlapur, District Thane, Maharashtra State. In the night of Saturday, the 5th April, 1997 a massive fire broke out at the complainant's godowns, full addresses of which are given below" (A) Item No. 13 of the Endorsement SHREE SAGAR TEXTILE MILLS

F-23A MIDC BADLAPUR, DIST. THANE (B) Item No. 14 of Endorsement SHREE SHUBLAXMI DYEING PVT. LTD. Plot No. F-23MIDC INDUSTRIAL AREA BADLAPUR, DIST THANE (MAHARASHTRA)

3. IMMEDIATELY on receipt of an information to this effect, the complainant, vide their letter dated 6.4.1997 informed the opposite party of the said unfortunate fire accident and requested the latter to conduct an early survey so as to minimize the consequential loss. Due to the accidental fire and, subsequently, the extent of loss to the stock lying on the site of fire, was extensive and the salvages virtually burnt into ashes were of no commercial value. OP appointed two Surveyors viz, Messrs B.P. Shah and Associates, and Mr. M.R. Jhalani. They assessed the loss to the tune of Rs 24,84,707/- to which the complainants gave their consent. One of the representatives of the OP informed the complainant that since the loss preferred by the complainant exceeds Rs. 50 lakhs on aggregate, they have to get the loss inspected by the Risk Engineer of the Loss Prevention Association of India (LPA). After five months Risk Engineer of LPA visited the site of fire. OP wrote a letter to the complainant in which suggestions and recommendations of LPA were reproduced as to how to improve the situation. O.P. offered Rs. 7,98,541/- as full and final settlement which was not acceptable to the complainant who insisted for payment of the said amount as the first instalment of claim, and decisions about the balance could be taken later on. This was not acceptable to the opposite party.

4. IN this complaint the relief claimed was" (i) Settle said claim of the complainant for Rs. 24,84,707/- for which the opposite party's Joint Surveyors had obtained a consent letter; from the complainant, with an interest at the rate of 21% w.e.f. 6.4.1997 till the date of disbursement of the said claim amount. (ii) Pay an amount of Rs. 24,84,707/-being the consequential loss suffered by the Complainant as the opposite party failed and to take appropriate steps to conduct timely inspection by the representatives of LPA/TAC although such conditions were not specified in the Policy and the same were outside the scope of contract of insurance, and also being compensation for mental agony suffered by the management of the complainant in this connection. (iii) Cost and other incidental expenses of this complaint. (iv) Any other appropriate relief/ compensation, etc., which this Hon'ble Commission may deem it fit and proper in interest of justice are fair-play.

Upon issue of notice, opposite party/ Insurance Company has submitted their reply to the complaint in detail. Their first objection is that as all rights, title and interest under the policy issued to the complainant were assigned in favour of Bank of Baroda, only the Bank can file the complaint. There was no deficiency of service in the instant case, the Surveyors carried out the survey and initially assessed the loss to the extent of Rs. 24,84,707/- but when the report was submitted to the opposite party, it was noticed that the assessment was carried out by the said Surveyors without following the conditions of the Floater Policy including the condition of maximum liability of the insurer at any one

location. This fact was subsequently pointed out to the Surveyors, who submitted their revised loss assessment report and the loss assessed was Rs. 8,50,516/-. However, since the construction of the premises was II Class as per the surveyor's report, hence difference in rates for Class II construction was also taken into consideration and vide letter dated 5.2.1998, the opposite party offered to the complainant a sum of Rs. 7,98,541/-.

5. IT is submitted that the loss is payable subject to the terms and conditions of the policy. It is denied that the Development Officer of opposite party gave any assurance to the complainant, as alleged. Rather the Development Officer discussed all the terms and conditions of a Floater Policy including maximum liability at any one location at the time of issuing the policy. It is further submitted that in the instant case it was stipulated that the policy issued is on floater basis and as such the rates and terms and conditions as prescribed by the Tariff Advisory Committee automatically applied in the instant case also.

6. ON 8th April, 2005, learned Counsel for the complainant, Ms. Deepa Chacko and learned Counsel for the opposite party, Mr. Rajiv Sharma were heard in detail. Learned Counsel for the Complainant, Ms. Chacko quoted from the policy in which it is mentioned that Re. 0.50 is the floater extra. She submitted that the fire occurred at the address given at SI. Nos. 13 and 14 indicated earlier. The intimation was given to the insurance company on 6.4.1997. The survey report stated that Shree Sagar Textile Mills and Stock of Bales in the Godown of M/s. Shree Shubhalaxmi Dyeing Pvt. Ltd. constantly fuelled the Fire. First Fire Brigade arrived at 11.30 p.m. Fire brigades from Ambarnath Ulhasnagar Nagar, Kalyan and Dombivli attended the above fire. Flames were off at around 3.30 a.m. and smouldering continued till next day morning 6 a.m. Stock of Grey Cloth and Finished Bales was totally gutted. There was heavy damage to AC sheet roof which almost collapsed totally. Idle Mercerising Machine lying in the godown was also damaged. Front office portion and also all the records were saved. Stock-in-process was saved, so also the stock lying on the first floor in M/s. Sagar Textile Mills. No stock was saved in M/s. Shubhlaxmi Dyeing Pvt. Ltd. Fortunately fire did not spread to any of the Machineries lying in the Process Area of M/s. Sagar Textile Mills and to the Stenter machine lying in Shree Shubhlaxmi Dyeing Pvt. Ltd. There was damage to only Bailing Press and Weighing Scale belonging to M/s. Shubhlaxmi Dyeing Pvt. Ltd. There was no human casualties. Incident was reported to the Police Authorities and Panchnama was made. The loss and damage sustained to the stocks was thus severe.

7. THESE stocks sustained almost a total loss and half burnt remainder of Grey Cloth available had very little commercial value except in the form of Waste and Chindi. Stock-in-process in Bleaching Tank was saved. Small quantity of stock lying on the first floor was also saved.

8. TAKING into consideration, that Extent of Damage, Value of Salvage. Under insurance and excess applicable, the insured had agreed to the assessment of their net loss at Rs. 24,84,707/- by the Surveyors. However, the blank discharge

voucher was sent for Rs.7,98,541/- which was not acceptable. Ultimately this amount was paid as an ad-interim measure on 8.7.2004 only as per the directions of the National Commission. It was also argued by the learned Counsel of complainant that" the Surveyor has clearly stated: "All terms and conditions of the Policy have been observed by the Insured. Cause is covered under the Policy and loss falls within the Scope of the Policy There was no other breach of Warranty".

Ms. Chacko refuted the contention of the O.P. that floater condition is not a part of the Policy. If Rs. 30 lakhs is the limit indicated by them then they should have collected the premium only on Rs. 90 lakhs. When the policy was extended to the new premises, they have stated that "all other terms, conditions and warranties remain unaltered". Now they are telling, after seven years of the accident, that it is restricted to 1/3rd of the amount insured. In the affidavit-cum-rejoinder, it has been clearly mentioned that insofar as the complainant is concerned, they are neither aware nor were they made aware by the opposite party that the general insurance business is regulated by the Tariff Advisory Committee, about its formation and/or constitution and/or any provision of the Insurance Act, 1938 and that who prescribes the premium rates and stipulates terms and conditions that may be offered to the insurers.

9. MS . Chacko further submitted that it was the opposite party alone, who without involving any other party/authority, promised and provided full general insurance protection cover through their Fire "C Floater Insurance Policy, upon receipt of the annual premium in advance from the complainant and clearly showing all the terms and conditions applicable to the parties to the contract. It is, therefore, crystal clear that the complainant had entered into a contract only with the opposite party and all the applicable terms and conditions having been specifically shown on the face of the policy, only those terms and conditions are applicable and binding on the parties to the contract and definitely not any other extraneous terms and conditions which are not specifically mentioned on the face of the Policy/contract of insurance.

10. MS . Chacko quoted letter dated 19th December, 1997 addressed by Shri S.D. Manohar, Divisional Manager of the O.P. to Shri PA. Thakkar, Manager, Mumbai Regional Office-1: "This has further reference to our claim note dated 7.11.1997 recommending the above three claims for total sum of Rs. 82,00,000/-. In this connection kindly note that M/s. Atlas Exports and their sister concern M/s. Arihant Enterprises and M/s. Amber Eximpt are on our records since 1989. They are having export house, major exports are doing in African ports; average annual premium of Rs. 8 to 10 lac year-wise figures are given in the file. As the insured is having exports business but they are not manufacturers so they have to depend on process house to which they are giving material for processing on job work basis. They have taken the Floater Policy with highest loading of 50% and they do not know specific sum insured on specific location. While giving the Floater Policy the condition of the floater has

been applied since beginning i.e. all process house should be one municipal limit, there should not be transported godown, etc. But in the year 1996-97 policy as we had changed 50% loading as many godowns they can add so party could give fresh letter for additional location; same we have done for alteration in the policy only to add location. And all locations are in Thane district and other terms and conditions are as per the policy".

Learned Counsel for the Complainant submitted that all the places where fire accidents took place are located in one place within one municipal limit i.e. originally three locations were at M.I.D.C, Badlapur and the locations where fire accident took place are Shree Sagar Textile Mills, F-23A MIDC, Badlapur, Distt Thane and Shree Shubhlaxmi Dyeing Pvt. Ltd. F-23, MIDC, Distt. Thane. They are also located at M.I.D.C, Badlapur. Accordingly they are entitled for compensation as assessed by the surveyors and agreed to by the insurer.

11. THE exclusion clause which is not incorporated cannot be a part of the policy at a later date. She quoted the details of losses and amount payable to three companies pertaining to the three connected cases: On the other hand learned Counsel for the opposite party, Mr. Sanjeev Sharma argued that the Development Officer of the Insurance Company discussed all the terms and conditions of the Floater Policy including maximum liability at any one location, at the time of issuing the policy which meant that he discussed about the guidelines laid down by the Tariff Advisory Committee which lays down general rules and regulations including those relating to Floater Policies and declaration policies. According to these rules and guidelines as far as "floating" policies, for risks situated within the limits of one city/town/village, it is permissible to issue a policy covering stock in one amount in more than one specified building or in open within the limits of one city/town/village by charging 25% "loading" over and above the highest rate applicable to any one risk.

12. FURTHER it is permissible to issue a policy covering stock in one amount for risks in specified building or in open situated in more than one city/town/village by charging 50% loading over and above the highest rate applicable to any one risk inter alia, subject to the following conditions: The maximum sum insured at any one location should not be more than 10% of the total sum insured under the policy unless the number of locations is less than 10, in which case the sum insured per location should not exceed 30% of the total sum insured.

13. THE policy indicates that a "floater extra" of additional 50 paise per Rs. 1,000/- but Tariff Committee guidelines are not mentioned in the policy because it is the general knowledge which every insurer is supposed to have e.g. "third party risk" is only mentioned in a Motor Insurance Policy whereas what is "third party risk" is not required to be explained. However, liability of a Floater Policy and the restriction relating to the liability of the insurance company on Floater Policy has been discussed in detail by the Development Officer with the insured.

14. THE Floater Policy Warranty has been explained as under 1. All process

houses which have been mentioned in the policy it should be within one municipal limit i.e. risk situated within the limits of one city/town/village. 2. Warranted that goods have not been stored in any Transport Company's contractors or clearing and forwarding Agents premises. 3. All process houses should be first class construction.

Subsequently, this policy was extended to 23 additional premises but the terms and conditions remained the same which means all process houses which have been mentioned in the policy should be within one municipal limit i.e. risk situated within the limits of one city/ town/village. Accordingly, it cannot be argued that the complainant was not aware of this stipulation.

15. THE issues for considerations are: 1. Whether the Development Officer had brought to the notice the additional conditions of the policy to the insured governing Tariff Advisory Committee's guidelines, if so, this amounts to incorporating of additional exclusion clause in the policy? 2. Whether the insured had a Floater Policy and if so, whether they had paid the maximum amount required by them under the Floater Policy? 3. Whether they are entitled to the compensation as assessed by the Surveyor or whether the compensation to be restricted to 10% of the total extent of loss in each location? Let us see the first issue: (1) An affidavit has been filed by Shri T. Sen Gupta, Administrative Officer of New India Assurance Co. Ltd. In the affidavit he states that the general insurance business is regulated by the Tariff Advisory Committee constituted under Section 64(U) of the Insurance Act, 1938 which also prescribes the rates and stipulates terms and conditions that may be offered by Insurers. In case of Floater Policies covering upto 50 locations in more than one city/town/village, the maximum sum insured at any one location should not be more than 10% of the total sum insured under the policy unless the number of locations is less than 10 in which case the sum insured per location should not exceed 30% of the total sum insured. The Surveyor has initially assessed loss to the extent of Rs. 24,84,707/- without taking into account the conditions of the Floater Policy but when this was pointed out to him, he reassessed the loss at Rs. 8,50,516/-. As the construction was stated to be of II Class, the O.P. reduced the settlement amount to Rs. 7,98,541/-. The Development Officer discussed all the terms and conditions of the Floater Policy including maximum liability in any one location at the time of issuing the policy. As against this affidavit, additional affidavit filed by the partner of the Atlas Exports (India) submits that opposite party for the first time stated in the affidavit evidence, para-8 that the Development Officer discussed all the terms and conditions of the Floater Policy including maximum liability at any one location at the time of issuing the policy. It is further submitted that the allegations of the opposite party are denied and the Complainant seeks permission of this Hon'ble Commission to counter this allegation of the O.P. Accordingly we do not understand as to when the insurer had insured the goods for Rs. one crore, what was the difficulty on the part of the Development Officer in giving a copy of the extract of the general rules and regulations of the Tariff Advisory Committee pertaining to Floater Policies to the

insurer and taking an acknowledgement? 2. Secondly, it is clear from the documents that the Complainant had obtained a floater maximum extra policy for which payment of 0.50%, over and above, the normal premium has been paid, as is evident from the following, clause of the policy: (3) The above details leave no doubt in our mind that Policy covered the risk enshrined under "Floater" clause i.e., stocks kept/moved within the listed godowns/warehouses. We are also supported in our above view in the light of the ratio laid down by the Hon"ble Supreme Court in the case of M/s. Modern Insulators Ltd. v. Oriental Insurance Co Ltd., II (2000) SLT 323=1 (2000) CPJ 1 (SC), and United India Insurance Co Ltd. v. M.K.J. Corporation, III (2000) CPJ 8 (State Commission), would be applicable. The Apex Court observed that "As the above terms and conditions of the standard policy wherein the exclusion clause was included, were neither a part of the contract of insurance nor disclosed to the appellant, respondent cannot claim the benefit of the said exclusion clause. Therefore, the finding of the National Commission is untenable in law. The duty of good faith is of a continuing nature. After the completion of the contract no material alteration can be made in its terms except by mutual consent. The materiality of a fact is judged by the circumstances existing at the time when the contract is concluded. In the present case, the introduction of the Tariff Advisory Committee document materially affects the terms of the policy, resulting in the denial of the very indemnity of claim. And this was what the appellant sought to do, at the stage of clearing of the complaint. The Commission rightly rejected the appellant's plea. Notwithstanding this, on behalf of the appellant, it was insisted that the instructions of the Tariff Advisory Committee form part of the contract. Admittedly, the appellant-insurer had not incorporated the above quoted clause as part of the policy undertaken with the insured. Consequently, the insured is not bound by this exclusionary clause of liability".

This case also illustrates the same thing mainly because the insurance company claims that the Tariff Advisory Committee has been set up as per the statute. OP had not incorporated the relevant clause as part of the Policy issued to the insured and, therefore, in our view the insured is not bound by this exclusionary clause of limiting the liability of the opposite party. It is severally held that Insurance Policy is a contract between the parties, hence the clauses given in, the contracts are binding on the parties. Anything purported to convey what is not part of the contract (Policy) shall be alien to it and O.P. cannot take advantage of such a situation. Therefore, in our view the insurance company is bound to pay the amount initially assessed by the surveyor in the aforementioned three cases with interest from the date of the report of the Surveyor. This Commission has ordered on 8.7.2004 as follows: "P.P. No. 156/1998 Heard the learned Counsel for the parties. Application is filed for early hearing of the matter, which is pending since 1998. Learned Counsel for the complainant submitted that complainant is a reputed firm having large-scale business and was taking insurance policy for more than 12 years. On 5.4.1997 there was a massive fire in complainant's godown and the complainant has

suffered a huge loss. She pointed out that the joint surveyors, appointed by the insurance company, submitted survey report dated 22.7.1997 and assessed the loss at Rs. 22,84,707/-. As against this, learned Counsel for the insurance company pointed out that the said survey report has been given without taking into consideration various conditions of the insurance policy. Hence on the basis of the revised survey report dated 15.1.1998, insurance company offered to pay Rs. 7,98,541/- to the complainant for the loss suffered by it. It is the contention of the complainant that offer was conditional and that complainant was required to give voucher as if it was the full and final settlement of the claim. The same was not acceptable to the complainant, hence this complaint was filed. Considering the fact that dispute is pending since 1998 and that complainant was entitled to recover undisputed amount approximately of Rs 8 lacs for the loss suffered by it, we direct the opposite party-New India Assurance Co. Ltd. to pay the amount of Rs. 7,89,541/- within a period of four weeks from today with 12% interest from 1.1.1998 till its payment. The payment be made in the name of Bank of Baroda A/c M/s. Atlas Exports (India). O.P. No. 158/98 and O.P. No, 180/98 Facts in all the three petitions are similar. In O.P. No. 158/98 the Insurance Company had offered to pay Rs. 8,38,189/-. Similarly, in O.P. No. 180/98 the Insurance Company had offered Rs. 6,91,305/-. Hence in both these petitions, we direct the Insurance Company to pay the aforesaid amounts to respective parties within four weeks from today with 12% interest from 1.1.1998 till its payment. The payment be made in the name of Bank of Baroda A/c. M/s. Amber Eximpt and Bank of Baroda "A/c M/s. Arihant Enterprises respectively".

The facts in Original Petition Nos. 156,158 and 180/1998 are similar. The interpretation of the insurance policy as well as the points of law are also similar. Therefore, in these three petitions, we direct the insurance company to pay the balance amount payable to respective parties within four weeks from today with 12% interest from 1.1.1998 till its payment as detailed below: 1. O.P. No 156/98 : 15,86,166/- 2. O.P. No. 158/98 : Rs. 19,21.074/- 3. O.P. No. 180/98: Rs. 24,22,658/- There shall be no order as to costs.