(2016) 10 NCDRC CK 0029

In the National Consumer Disputes Redressal Commission

Case No : 1357 of 2012

BAJAJ ALLIANZ INSURANCE CO. LTD. APPELLANT

Vs

KETAN VIRA & ANR. RESPONDENT

Date of Decision : 18-10-2016

Acts Referred:

Consumer Protection Act, 1986, Section 21(b) - Jurisdiction of the National Commission

Citation : 2016 4 CPR 500

Hon'ble Judges : S.M. Kantikar

Advocate : Sameer Nandwani, Ashutosh Marathe

Final Decision : Petition Dismissed

Judgement

1. The brief facts relevant to dispose of this revision petition are that, Mr. Ketan Vira and Mr. Madhukant Vira, complainants had taken Standard Fire and Special Perils Policy for a sum of Rs.3,43,50,000.00 from Bajaj Allianz Insurance Co. Ltd./ OP covering the risk of building, machinery, furniture fittings and fixture stocks and others in their M/s K. P. Packing Konark Udyog. The policy was valid for 1 year i.e. from 18.07.2005 to 17.07.2006. During the subsistence of policy, between 19.9.2005 to 21.9.2005, there was damage to stock lying in the insured premises due to sudden storm, gusty winds and heavy rains. The complainants informed the OP on 21.9.2005 because, 20.9.2005 was being a staggering holiday and claimed total Rs.12,67,481/- from the OP. The petitioner appointed Mr. P. D. Desai, as a Surveyor and also obtained report from metrological department of Surat. Survey was conducted on 23.9.2005, but the copy of survey report was not furnished to complainant. On the basis of Surveyor''s report, the complainant claim towards reimbursement of loss was repudiated by OP. Therefore, aggrieved by unlawful repudiation, on 28.09.2006, the complainants filed a complaint before District Forum at Central Mumbai.

2. The District Forum after considering the pleadings and evidence, allowed the complaint and directed the OP to pay Rs.12,67,481.93 towards loss sustained

due to storm with interest @ 10% from 21.9.2005, alongwith Rs. 20,000/- towards mental agony plus Rs.10,000/- as costs of litigation.

3. Aggrieved by the order of District Forum, the petitioner filed first appeal before the State Commission on 2.6.2009. The State Commission dismissed the appeal and confirmed the order of District Forum. Hence, against the impugned order of State Commission, this instant revision petition arose.

4. Learned counsel for both the parties present. Arguments heard at length. Learned counsel Mr. Nandwani, for the petitioner submitted that there is a difference between thunderstorm and storm. As such, there was no storm or heavy rains between 19.9.2005 to 21.9.2005. The OP had element of suspicion that, how the only part of roof of godown was affected and not the entire roof during the storm. Counsel brought my attention towards the condition of the policy under clause ''VI'' of the policy, which are reproduced as under:-

"Clause VI

STORM, CYCLONE, TYPHOON, TEMPEST, HURRICANE, TORNADO, FLOOD AND INUNDATION.

Loss destruction or damage directly caused by storm, cyclone, typhoon, tempest, hurricane, flood and inundation, excluding those resulting from earthquate, volcanic eruption or other convulsions of nature."

5. About metrological report, the counsel submitted that the observation made by District Forum and the findings recorded by the Surveyor are more relevant that the date and time of loss or damage was noticed on 21.9.2005 at 9.00 hrs. Further, there was growth of moss on inner surface of the roofsheet, therefore, the sheets became porous. The repair/sealing was carried out on the joint prior to the occurrence. Such sealing becomes necessary only when gap is wider and leakage through the said roof. He brought my attention towards photographs of roof sheets. Learned counsel squarely relied upon the survey report and the observation of District Forum which is reproduced hereunder:

"The contentions of surveyor appears to be absurd as at one end the surveyor says that on inspection of the roof no sign or symptoms or displacement of the roof sheets could be seen and on the other hand the surveyor says that photographs also do not reflect the same. It appears that what the surveyor saw he is not sure hence he wants to confirm the same in the photographs. It is astonishing that what cannot be seen by the person inspecting the spot of the incident as displacement of roof as rightly contended by the Surveyor & Opponent Company is not a small event which goes unnoticed."

Therefore, the counsel submitted that both the fora below without appreciating the law and facts of the case, wrongly allowed the complaint by mis-interpretating the report of metrological department of Surat.

6. Mr. Ashutosh Marathe, learned counsel for the complainant narrated briefly the

facts. He vehemently challenged the maintainability of the revision petition, as there are concurrent findings of facts given by both the fora below. Thus, the petitioner/OP cannot argue or bring new facts at the revisional stage. Hence, this revision petition is not maintainable. On merits, he submitted that the insurance company repudiated the claim prior to the conclusion of surveyor''s report dated 27.3.2006. He brought my attention to the repudiation letter, which was dated "16-3-2006". The second part of said letter is more relevant and it is reproduced as under:-

"Also we refer to our discussion in our office where in you have requested us to obtain the metrological report for the subject loss date. Accordingly, we have applied and obtained the same. Please find enclosed herewith a copy of the same for your reference.

xxxxx

Under the circumstances, we regret our inability to consider your claim"

7. The counsel further submitted that as the date, 20 th , was holiday, therefore, on the next date of morning at 9.00 a.m., the complainant came to know that the stocks got damaged. Regarding metrological report, counsel submitted that, it was issued from Surat office considering the rainfall recorded during past 24 hours ending at 8.30 hrs. On perusal of this report, it is clear that there was heavy rainfall on 19.9.2005 and 22.9.2005. Thus, it was a case of inundation. To understand more about the meaning of "flood" "thunderstorm" "inundate", the counsel produced reference from the Oxford dictionary. According to it, the ''flood'' is ''overflow of a large amount of water beyond its normal limits''. ''Thunderstorm'' means ''a storm with thunder and lightning and typically also heavy rain or hail''. ''Inundate'' means to ''cover (something) with a flood of water.''

8. Learned counsel relied upon various authorities of this Commission and Hon''ble Supreme Court. The counsel further submitted that even if we consider that there was no storm, under such circumstances also, it was the case of " Res Ipsa Loquitor," as there was damage due to inundation of water due to rainfall. Also, as per contention of OP, if we assume that there were pre-existing gaps in the roof of the godown, in that case, the complaint would have preferred claim much more earlier in the month of July or August rather than in the month of September because the Bombay and surrounding costal area suffer heavy rain fall during July and August. The counsel further stated that the OP issued the insurance cover after inspection of entire premises, thus, Pre-existing gaps should have been noted, if any, prior to issuing the policy.

9. I have perused the surveyor''s report, metrological report and the evidence on record. After thoughtful consideration, in my view, the instant case is of inundation of water due to thunderstorm or heavy rain. I have perused the definition of ''flood'', ''thunderstorm'' and ''inundation'' produced by the counsel for complainant from Oxford Dictionary and web i.e.

http:www.oxforddictionaries.com/definition/english/flood.

10. Counsel further relied upon several judgments of Hon''ble Supreme Court as well as this Commission as discussed below:-

I. Regarding revisional powers of National Commission, recently, Hon''ble Supreme Court in Mrs. Rubi (Chandra) Dutta Vs. M/s United India Insurance Co. Ltd . 2011 STPL (Web) 295 SC has observed as under:

"Also, it is to be noted that the revisional powers of the National Commission are derived from Section 21 (b) of the Act, under which the said power can be exercised only if there is some prima facie jurisdictional error appearing in the impugned order, and only then, may the same be set aside. In our considered opinion there was no jurisdictional error or miscarriage of justice, which could have warranted the National Commission to have taken a different view than what was taken by the two Forums. The decision of the National Commission rests not on the basis of some legal principle that was ignored by the Courts below, but on a different (and in our opinion, an erroneous) interpretation of the same set of facts. This is not the manner in which revisional powers should be invoked. In this view of the matter, we are of the considered opinion that the jurisdiction conferred on the National Commission under Section 21 (b) of the Act has been transgressed. It was not a case where such a view could have been taken by setting aside the concurrent findings of two fora."

II. Regarding ''inspection of premises before issuing the policy'', in United India Insurance Co. Ltd. vs. M/s Kiran Combers & Spinners, Appeal (civil) No. 9128 of 2003 decided on 8.12.2006, Hon''ble Supreme Court held that:

"Normally when the company insurers any factory, then their Officers and the Engineers used to inspect the building to find out whether there is any defect in the construction or the construction is of poor quality. In the present case, the company certified that it is a first class construction, then for some defect which has not been noticed by the company, no benefit could be given to the company for such defect. More so, in the present case, as pointed out that because of defective structure i.e. column No. 3, the building has collapsed but the question is what aggravated or accentuated this, factory is in place for more than 12 years & it is on account of flood water entering in factory that has caused this damage. So called defect was aggravated on account of flooding of the water in the premises of the factory, if the flood water had not entered into the factory, perhaps the construction which stood good for 12 years, would have lasted long. The cause of the damage to the column No. 3 of the building was flood water. Therefore, the company cannot escape the liability to compensate the claimant for collapse of the building on account of floods."

The facts are similar in the instant case.

III. In Bajaj Allianz General Insurance Company Ltd. vs. Gondamal Hardyal Mal IV (2009) CPJ 165 (NC), this Commission discussed about rain water entered from the roof due to flood and inundation, which was covered. The facts are similar to the instant revision petition. In this case, as per surveyor''s report, the loss was not caused due to flow of water from the floor of godown but it had entered from the holes in the roof of iron sheets.

IV. In the case, Bajaj Allianz General Insurance Co. Ltd. & Anr. vs. Atibir Industries Co. Ltd. & Ors. IV (2011) CPJ 503 (NC) , this Commission discussed about meteorological report and the premises could have been inspected by the Surveyor.

V. Another case, Oriental Insurance Co. Ltd. vs. Blan Coffee Curers Pvt. Ltd. I(2011) CPJ 247 (NC) , only roof was collapsed due to lightening, which was covered. The National Commission held that the damage was due to lightening and held the insurance company liable.

VI. Also, the Hon''ble Apex Court in New India Assurance Co. Limited vs. Pradeep Kumar, civil appeal No. 3253 of 2002, decided on 9.4.2009 , held that surveyor''s report is not sacrosanct.

VII. In The New India Assurance Co. Ltd. vs. M/s Protection Manufacturers Pvt. Ltd., civil appeal No. 312 of 2006 decided on 8.7.2010, Hon''ble Supreme Court discussed about theory without evidence cannot be accepted (para 30, 31 and 33).

VIII. Similarly, National Commission in National Insurance Co. Ltd. & Ors. Vs. Ganesh Trading Co., Appeal No. 134 of 2007 decided on 12.9.2011 , also discussed that assumption without support of evidence is not correct. Relevant portion of paras 8 and 10 are as under:

"8. It is evident from the above, that the appellant/OP Insurance Company has based its decision of repudiation entirely on the report of the investigator. From a perusal of the investigator''s report, we find that it has made strong adverse assumption without being able to support them with evidence. For instance......"

10. From the examination above, it is evident that the Insurance Company has completely ignored the assessment of the two Surveyors appointed by it and has chosen to rely on the report of the investigator, which is full of unsubstantiated assumptions. Receipt of an anonymous petition may, to an extent explain appointment of investigator, but cannot be the justification for rejection of reports of the Surveyors......"

IX. Hon''ble Apex Court in M/s Modern Insulators Ltd. vs. Oriental Insurance Co. Ltd. I (2000) CPJ 1 (SC), and this Commission in Ponnamma K. K. vs. Lucknow Development Authority III (2013) CPJ 416 (NC) observed that parties cannot agitate new facts.

In my view, both the said judgments are not applicable in the instant case, because the counsel for OP has not agitated new facts.

11. After thoughtful consideration, I am of the view that this is a perfect case of

inundation of water. The meterological report submitted by the OP itself, proves that there was heavy rains and thunderstorm during 19.9.2005 to 21.09.2005. Further, it is pertinent to note that, OP repudiated the claim before final survey report, there is no explanation is forthcoming about issuance of policy after inspection of roof having moss and porous sheets. My view squarely dovetails from the judgments discussed (supra I to viii).

12. On the basis of foregoing discussion, I do not find any material irregularity or jurisdictional error in the impugned order of the State Commission which may call for interference in exercise of revisional jurisdiction. Therefore, the revision petition is hereby dismissed. There shall be no order as to costs.

