

(2020) 08 J&K CK 0095

In the Jammu And Kashmir High Court

Case No : Miscellaneous Appeal No. 15 Of 2018

Divisional Manager Bajaj Allianz General Insurance

APPELLANT

Vs

Kohinoor Enterprises

RESPONDENT

Date of Decision : 04-08-2020

Acts Referred:

Citation : (2020) 08 J&K CK 0095

Hon'ble Judges : Gita Mittal, CJ; Sanjay Dhar, J

Bench : Division Bench

Advocate : N. A. Shalla, Q. R. Shamas

Final Decision : Dismissed

Judgement

Sanjay Dhar, J

1) The instant appeal is directed against order dated 28.02.2018, passed by J&K State Consumer Disputes Redressal Commission (hereinafter referred to as 'the Commission?'), whereby a sum of Rs.3.80lacs along with interest @ 10% has been awarded as compensation in favour of the complainant (respondent herein) and against the insurance company (appellant herein).

2) The facts giving rise to the instant appeal are detailed out here-under:

(I) The respondent herein happens to be a business concern dealing with sale and storage of bananas and other fresh fruits. The said business establishment was located at Industrial Estate Zainakote, Srinagar. A policy of insurance was purchased by the respondent from the appellant to cover risk to his business up to a sum of Rs.30,00,000/ under Policy No. OG-14-1205-4001-00056088. The policy covered building, plant, machinery, cold storage and stock of bananas and was in operation from 29.03.2014 to 28.03.2015. The respondent had availed financial assistance from the Jammu and Kashmir Bank Ltd. to run his business.

(II) In September, 2014, unprecedented devastating floods took place in the Kashmir Valley, particularly in Srinagar City, which caused enormous damage to

property. As a result of the unprecedented flood, electricity installations also suffered massive damage resulting in disruption in supply of electricity in whole of the Valley including the premises of the cold storage belonging to the respondent. As a consequence of this, the stock of bananas stored in the cold storage got damaged.

(III) Since the stock of the respondent lying in the cold storage was covered under the insurance policy, a claim was lodged by him with the appellant insurance company. A surveyor was deputed by the appellant insurance company to assess the loss and vide a report dt. 29.12.2014 the same was assessed at Rs.3.80lacs. However, vide a communication dated 17.04.2015, the appellant repudiated the claim of the respondent conveying the following reasons:

"Loss &/or damage caused to the stocks was due to change in temperature of cold storage following failure of electricity and not due to any insured peril under the subject policy."

(IV) The repudiation of the claim by the appellant insurance company compelled the respondent to file a complaint before the Commission. The complaint was resisted by the appellant insurance company on the ground that the loss to the stocks was caused by failure of electricity and not due to the flood which stands excluded under the terms of the policy of insurance.

(V) After hearing the parties, the Commission held that the instant case is not covered by the exclusion clause, inasmuch as the flood, which led to disruption of electric supply, was the cause of deterioration of the stocks in the cold storage of the respondent. The Commission further observed that connection between the floods and deterioration of the stocks in trade, in the instant case, was proximate. Accordingly, the Commission awarded compensation of Rs.3.80 lacs (the amount of loss assessed by the surveyor) in favour of the respondent herein and the said sum was to carry interest @10% p.a.

3) It has been contended in the appeal that the claim of the respondent was repudiated in terms of the ?exclusion clause? contained in the policy of insurance and the same has been ignored by the Commission while passing the impugned order. It is also contended that the Commission has, without recording any evidence, passed the impugned order which is contrary to law and, as such, deserves to be set aside.

4) On the other hand, learned counsel for the respondent has contended that the flood was the proximate cause of disruption of electricity supply leading to damage to the stock of bananas. On this basis, it is contended that because the risk on account of flood was covered under the policy of insurance, as such, the Commission was justified in passing the impugned order in favour of the respondent.

5) We have heard learned counsel for the parties and perused the grounds of appeal, the impugned order and the record of the Commission.

6) The obligations and the rights of the parties to a contract of insurance are governed by the terms and conditions of the policy of insurance. In the instant case, if we have a look at the policy of insurance, it becomes clear that the policy covers, inter-alia, risk of damage caused by flood etc. to certain items including building, plant and machinery, cold storage and stocks of bananas belonging to the respondent.

7) Clause-6 of the insurance policy is relevant to the context and the same is reproduced as under:

"6. 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 earthquake, volcanic eruption or other convulsions of nature."

8) From a perusal of afore quoted clause, it is clear that the loss, destruction or damage to the stocks directly caused by flood is also covered under the terms of the policy. However, Clause-6 of the General Exclusions, as contained in the terms of the policy of insurance, provides that the loss, destruction or damage to the stocks in cold storage premises caused by change of temperature is excluded. It is this exclusion clause which has been pressed into service by the appellant insurance company in repudiating the claim of the respondent.

9) The question which falls for determination before us is as to what was the cause which led to the damage to the stock of bananas that were lying stored in the cold storage belonging to the respondent.

10) It has been vehemently contended by the counsel for the appellant that the damage to the stocks was caused not because of the floods but due to failure of the electricity which led to change in temperature. On this ground, it is urged that Clause (6) of General Exclusions of the policy of insurance gets attracted to the instant case. The learned counsel has relied upon the judgment of the Supreme Court of India in the case of United India Insurance Co. Ltd. Vs. M/s Orient Treasures Pvt. Ltd. (Civil Appeal No.5141 of 2007 decided on 13.01.2016).

11) It is undisputed that in September, 2014, unprecedented and devastating floods occurred in the Kashmir Valley, which resulted in extensive damage to the properties in whole of the valley in general and Srinagar city in particular. It is also a fact of common knowledge that due to the floods, the electricity supply to whole of the Valley including Srinagar City, where the cold storage of the respondent is located, remained snapped for several days. In fact, it took several weeks for the authorities to restore the electricity supply to Srinagar city and the same could be undertaken only when the flood water receded from the city. Thus it was the devastating flood of September, 2014 and not any other element, which was the cause of electricity failure in the area where the cold storage of the respondent was located. This directly resulted in rise in temperature of the

cold storage and consequent deterioration of the stocks lying therein.

12) The question which arises is whether in the backdrop of these established facts and circumstances; the insurance company was justified in repudiating the claim of the respondent herein by pressing into service the ?exclusion clause?.

13) National Consumer Disputes Redressal Commission, New Delhi, in the case of M/S S. K. Experts Pvt. Ltd. Vs. New India Assurance Co, Ltd &Ors, reported in 2004 (2) CPR 4 (NC), while determining the question whether the insurance policy covering damage caused by cyclone, held that it would include the ? deterioration of the stock of the prawn and other fishes? due to electricity failure because of cyclone and allowed the claim of the insured holding that cyclone was direct or proximate cause of power failure resulting in deterioration of the stock in cold storage. The National Commission went on to explain as under:-

"In the present case, the cover note specifically provides that insurance cover is for stock of prawn and other fishes kept at complainant's cold storage. If the complainant's cold storage becomes non-functional because of non-supply of electricity it cannot be said that there is no insurance coverage. However, it was contended that policy covers deterioration of stock in case there is break down of machinery or plant of the cold storage. In our view, non-supply of electricity by the 'Gridco', would result in breakdown in functioning of the cold storage, and, therefore, also there would be insurance coverage to such peril in the column with regard to particulars of property, it is specifically mentioned that it covers godown, freezing plant used for stock of prawn fishes, etc. and the building was electrified. If there is failure of electricity, the cold storage becomes non-functional resulting in deterioration of fish."

We are informed that this judgement has attained finality.

14) In (2009) 9 SCC 70, New India Assurance Company Limited v. Zuari Industries Limited and others, the Supreme Court of India dealt with a case similar to the present one. The case before the Supreme Court pertained to loss to a boiler and other equipment by stoppage of electricity supply due to short-circuiting in the switch board and not due to any fire. As before us, the policy of insurance in the said case contained exclusion clause in the following terms:

"(g) Loss of or damage to any electrical machine, apparatus, fixture or fitting (including electric fans, electric household or domestic appliances, wireless sets, television sets and radios) or to any portion of the electrical installation, arising from or occasioned by over running, excessive pressure short circuiting, arcing self-heating or leakage of electricity from whatever cause (lightning included), provided that this exemption shall apply only to the particular electrical machine apparatus, fixtures, fittings or portion of the electrical installation so affected and not to other machines, apparatus, fixture, fittings or portion of the electrical installation which may be destroyed or damaged by fire so set up."

15) While allowing the claim of the insured, the Supreme Court observed as

under:

"22. In the present case, it is evident from the chain of events that the fire was the efficient and active cause of the damage. Had the fire not occurred, the damage was also would not have occurred and there was no intervening agency which was an independent source of the damage. Hence we cannot agree with the conclusion of the surveyors that the fire was not the cause of the damage to the machinery of the claimant." (Emphasis supplied)

16) The afore-stated reasoning of the Supreme Court squarely applies to the facts of the case at hand. In the instant case, though the 'exclusion clause' does provide that in case of change of temperature in cold storage resulting in damage to the stocks, the liability of the insurance company is excluded, yet we have to bear in mind that the change in temperature in the cold storage was a direct result of the electricity failure on account of devastating floods and not because of any other reason. The flood was the event that set in motion a chain of events directly leading to failure of electricity resulting in change of temperature in the cold storage and consequent damage to the stocks lying therein without there being intervention of any other independent source. It was a continuous operation and hence a proximate cause of damage of the stock. The 'exclusion clause', as contained in the insurance policy, in these circumstances, could not have been pressed into service by the insurance company to repudiate the claim of the complainant.

17) Even otherwise, the 'exclusion clause' itself is ambiguous being bereft of any details pertaining to the circumstances in which the said clause would come into play. Such an ambiguous clause in the cases of contract of insurance is required to be read down in favour of the insured so as to serve the main purpose of the policy which is indemnifying the damage. We are supported in our aforesaid view by the judgment of the Supreme Court in *Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan*, case reported at (1987) 2 SCC 654, wherein the Court has observed as under:

"...When the option is between opting for a view which will relieve the distress and misery of the victims of accidents or their dependants on the one hand and the equally plausible view which will reduce the profitability of the insurer in regard to the occupational hazard undertaken by him by way of business activity, there is hardly any choice. The Court cannot but opt for the former view. Even if one were to make a strictly doctrinaire approach, the very same conclusion emerge in obeisance to the doctrine of 'reading down' the exclusion clause in the light of the 'main purpose' of the provision so that the 'exclusion clause' does not cross swords with the 'main purpose' highlighted earlier. The effort must be to harmonize the two instead of allowing the exclusion clause to snipe successfully at the main purpose."

18) Though the above observations were made by the Court with reference to an insurance policy under the Motor Vehicles Act, yet the principles stated therein

equally apply to other contracts of insurance.

19) In, AIR 1966 SC 1644, General Assurance Society Ltd. vs. Chandmull Jain, it was observed by a Constitution Bench of the Supreme Court that in case of ambiguity in a contract of insurance, the ambiguity should be resolved in favour of the claimant and against the insurance company.

20) The reliance placed by the appellant on the ratio laid down by the Supreme Court in Orient Treasures is misplaced because in that case there was no ambiguity in the 'exclusion clause' and it did not come in conflict with the main purpose of the policy. In fact it was a case where the insured had failed to keep the displayed ornaments back in the safe after the business hours, which was a mandatory condition of the policy to cover the peril of burglary in that case.

21) From the aforesaid enunciation of law on the subject, it becomes clear that the 'exclusion clause' contained in the contract of insurance in the instant case is required to be construed in a manner so as to harmonize it with the main purpose of the policy. In order to achieve the said objective the 'exclusion clause' under reference has to come into play only in a case where change of temperature in the cold storage resulting in damage to the stocks, is not caused directly by any peril covered under the policy. Any other interpretation to the 'exclusion clause' under reference would defeat the purpose of the policy because damage to stocks in a cold storage would, in most cases, involve change of temperature.

22) As already noted, the proximate cause of damage to the stocks in the instant case is the devastating floods which resulted in snapping of electricity supply leading to rise in temperature in the cold storage and consequent deterioration of the stock of bananas lying therein. Therefore, the 'exclusion clause' under reference would not come into play.

23) For what has been discussed hereinabove, we do not find any infirmity or illegality in the impugned order passed by the Commission. The same is, therefore, upheld and the appeal is dismissed.

24) Record of the Commission along with copy of this judgment be sent back.