

(2008) 08 NCDRC CK 0019

In the National Consumer Disputes Redressal Commission

Esys Information Technologies Ltd.

APPELLANT

Vs

New India Assurance Co.Ltd.

RESPONDENT

Date of Decision : 19-08-2008

Acts Referred:

Citation : 2008 0 CTJ 1187 : 2008 0 NCDRC 49 : 2008 4 CPJ 30

Hon'ble Judges : M.B.Shah , Rajyalakshmi Rao , Anupam Dasgupta J.

Final Decision : Appeal disposed of

Judgement

1. UNDISPUTEDLY, the appellant took a Floater Insurance Policy from the respondent, namely, the New India Assurance Co. Ltd. (hereinafter referred to as the insurance company) for the period between 28.10.2004 and 27.10.2005. The insurance cover was for a sum of Rs.75 lakh. Thereafter, on 26.7.2005 there was flood. Information was given to the insurance company and the insurance company appointed a surveyor who assessed the loss at Rs.42,24,345/-. Despite that, the insurance company approved the final claim for a sum of Rs.14,10,932/-. By letter dated 5.12.2006, the insurance company sent a cheque for the aforesaid amount to the complainant and informed the complainant that Rs.28,06,160/- have been deducted towards the short-charged premium on the basis of CAG report and Rs.7,253/- have been deducted towards reinstatement premium charges. On 11.12.2006, the complainant objected to the said deduction and demanded payment of the balance amount.

2. SINCE nothing was done, the complainant issued Legal Notice dated 11.6.2007 to the insurance company. As no payment was made, Complaint No.07/114 was filed before the State Commission, Delhi. The State Commission observed that it would not be feasible to decide the matter expeditiously in summary proceedings as to the factual matrix as enshrined under the Consumer Protection Act and dismissed the complaint summarily. Hence, this Appeal. Learned counsel appearing on behalf of the appellant (complainant) submitted that the impugned order passed by the State Commission was without application of mind. It was his contention that the only question which was

required to be decided was whether the insurance company was entitled to deduct a sum of Rs.28,06,160/- for the short-charged premium for the past years. He relied upon the decision of this Commission in Original Petition No. 82 of 1997 decided on 3.10.2006 wherein, while dealing with a similar question, this Commission has observed as under : The deduction of Rs.1,73,044/- was done for no fault of the complainant. He paid the entire premium amount originally demanded by the Opposite Party. The Opposite Party says that its offices have made an inadvertent mistake in levying a wrong rate of premium and it appears that this mistake came to be noticed at the time of audit of the accounts of the Opposite Party. Irrespective of the merits of this matter, there is no justification of linking up the matter of short payment of premium with the insurance claim. The Opposite Party is ordered to pay this amount of Rs.1,73,044/- and it would carry an interest of 18% from 1.4.1995 till the date of payment.

As against this, learned counsel appearing on behalf of the insurance company pointed out that the matter involved disputed question of law with regard to the determination of short levy of premium for the previous years and, therefore, at the most, the matter could be remitted to the State Commission for decision. He further submitted that against the Floater Policies, including endorsements issued thereagainst by way of increase in the sum insured, premium @ Rs.2.75% @ Rs.2.5% as per Risk/ Rate Code 20/09 was charged on the bona fide assessment. However, during the regular audit by the CAG, it was observed that some of the locations covered under the aforesaid two policies were transporters godowns and a premium @ Rs.6.05% @ Rs.5.5% was chargeable. Therefore, the CAG directed the insurance company to recover short-charged premium amounting to Rs.34,81,069/- from the complainant under the two policies. He, therefore, submitted that as it was a bona fide mistake on the part of the officers of the insurance company, the insurance company was entitled to deduct the said amount.

3. AT the outset, we have to state that if any disputed question was required to be decided, we would have remitted the matter to the State Commission because the State Commission has dismissed the complaint solely on the ground that the complaint involved disputed questions of fact which would require detailed evidence. The report submitted by the surveyor is accepted by the insurance company and on the loss assessed therein, there is no dispute.

4. HENCE, we are required to decide these Appeals only on the question of law. The question is whether the insurance company can deduct any amount validly assessed and undisputedly payable to the complainant for the loss suffered by it solely on the ground that in the previous years when the complainant took floater insurance policies, there was short levy of premium because of mistake on the part of the officers concerned of the insurance company ? In our view, the alleged short-levied premium amount for the past years cannot be deducted. In this case, the appellant took Fire Floater Policy for the period between 28.10.2005 and 27.10.2006. There was heavy damage due to flood at the

godown at Taratala, Kolkata. The appellant gave information to the insurance company and lodged its claim. The insurance company appointed M/s. Sunil J. Vora & Associates as surveyors who submitted their Interim Survey Report on 23.11.2005. In the survey report it has been stated that on 26.6.2005, the city of Mumbai, primarily the suburbs, was lashed with the highest ever rainfall recorded in the century. Heavy and incessant rains caused widespread water logging all over the suburbs of Mumbai and adjoining areas in Thane District, Panvel and Taloja. The rain and flood waters remained logged and stagnant for a period of almost between 36 to 48 hours. Due to the water logging, road and railways remained inaccessible. The water level at Sagar Plaza Industrial Estate Complex, which was higher up at an inkling gradient, had been reported as between 24 and 36. This water inundated all the compartments at the ground level at the various building blocks, including the insureds premises at gala nos. 6 & 7 at the Samrudhi building premises under about 4" to 12" of water. The water remained trapped at the insureds premises and had to be pumped out with diesel pumps on June 28, 2005. The film of silt, slime and mud was cleaned out thereafter. The entire row of cartons at the bottom of the stacks at the insureds warehouse compartments had been soaked in water and damaged. Cartons at the upper level remained unaffected and had been saved.

5. FOR the Nature and Extent of Damage, it has been stated that the water had penetrated the kraft paper cartons and the inner pvc product wrappings and the contents had been soaked partially/completely under the inundating water. The insureds products were primarily electronic merchandise and the penetration of water and its ingress within the populated circuit cards had caused irreversible damage to the products.

6. THEREAFTER, there was detailed inspection and verification. Finally, the surveyors did not accept the claim of Rs.74 lakh and assessed the loss at Rs.45,13,532.41. For the liability of the insurance company, it was mentioned that there was no apparent breach of warranty. The surveyors also stated that the insureds loss was due to floods and was specifically covered under the policy and did not fall under any excluded peril. For the interim relief, they stated that the insureds loss was not expected to exceed Rs.50 lakh and would not fall below Rs.45,13,000/-. They recommended that by way of interim measure, a sum of Rs.25 lakh be given to the insured.

The surveyors report was accepted by the insurance company. However, a sum of Rs.28,06,160/- was deducted from the said amount on the alleged ground that the premium was short-charged for past years. This was on the basis of the Audit Report of the CAG.

7. IN para 7 of the written version, the insurance company stated as under : The Respondent explained to CAG that the above C&F Agents of the Appellant were using designated area within their premises for storage of the Appellants goods, and that these were not communicating with any other areas. The Respondent also informed the CAG auditors that the segregated areas as above within the

premises of the Appellants C&F Agents in different parts of the country were clearly distinguishable by proper brick wall upto roof level, i.e., perfect party wall. The CAG in its report, copy of which was also furnished by the Respondent to the Appellant, however did not agree to the Respondents contentions, and insisted that premium was chargeable @ Rs.5.5% as according to them there was no mechanism available with the Appellant for segregating storage by C&F Agents. Similar was the admission by the insurance companys Solicitor Advocate in his reply dated 19.6.2007 to the Legal Notice given by the complainant. The same was also reflected in the letter dated 31.3.2006 written by the Audit Department to the insurance company. The relevant part thereof is as under :

8. MANAGEMENT replied that insured is engaging agencies such as Gati Ltd., Safeexpress Pvt. Ltd. etc. at some of their locations but these are insureds C & F agents and are using the designated area for storage of their goods in a segregated area not communicating with any other areas and these storage areas are clearly segregated by proper brick wall upto roof level i.e. perfect party wall. Management reply is not tenable because storage at transporters godowns & clearing and forwarding agents is chargeable @ Rs.5.50%0 as there is no mechanism available to the company to ensure the segregated storage by the C & F agents. Moreover AIFT does not contain any provision for segregated storage by the C&F agents. It is apparent that the CAG did not accept the explanation given by the insurance company and, therefore, the insurance company, by its letter dated 5.12.2006, sent a cheque of Rs.14,10,932/- after deducting a sum of Rs.28,06,160/- and Rs.7,253/-.

9. IN our view, the deduction of such a large amount by the insurance company from the loss assessed by the surveyor (and accepted by the insurance company) is, on the face of it, contrary to the statutory provisions Section 64VB of the INSurance Act, 1938 which reads as under : Section 64VB : No risk to be assumed unless premium is received in advance (1) No insurer shall assume any risk in INDia in respect of any insurance business on which premium is not ordinarily payable outside INDia unless and until the premium payable is received by him or is guaranteed to be paid by such person in such manner and within such time as may be prescribed or unless and until deposit of such amount as may be prescribed, is made in advance in the prescribed manner. (2) For the purposes of this section, in the case of risks for which premium can be ascertained in advance, the risk may be assumed not earlier than the date on which the premium has been paid in cash or by cheque to the insurer. Explanation : Where the premium is tendered by postal money order or cheque sent by post, the risk may be assumed on the date on which the money order is booked or the cheque is posted, as the case may be. (3) Any refund of premium which may become due to an insured on account of the cancellation of a policy or alteration in its terms and conditions or otherwise shall be paid by the insurer directly to the insured by a crossed or order cheque or by postal money order and a proper receipt shall be obtained by the insurer from the insured, and such refund shall in no case be credited to the account of the agent. (4) . (5) ..

10. THIS would mean that under Sub-section (2) of Section 64VB of the Insurance Act, if there is short payment of premium, the insurance company cannot assume the risk. Similarly, under Sub-section (1), no insurance company can assume the risk until the premium payable is received. Therefore, it would be difficult to accept the contention of the insurance company that if there is alleged short payment of premium, it can recover the said amount at any time after the period of insurance cover is over. Dealing with a similar question, the Apex Court, in the case of Oriental Insurance Co. Ltd. Vs. Mantora Oil Products Pvt. Ltd. (2000) 10 SCC 26, held as under : If it was a mistake, the same should have been pointed out to the respondent during the period of the policy but the appellant did not raise this objection at any time during the continuance of the policy cover. The respondent also fulfilled its obligations under the policy and paid the premium as was agreed to between the parties. If there was a mistake on the part of the appellant in collecting the premium, the same should have been pointed out at the time of entering into the contract or immediately thereafter. After having received the benefit under the policy of insurance from the respondent by way of premium, it is not open to the appellant to contend that there was a mistake on their part in charging the premium at a rate lower than the rate at which it should have been charged by them. If the parties were not ad idem on this vital part of the contract of insurance, it would have an adverse effect on the contract itself. Since the period of policy is over, the appellant is under an obligation to refund the extra premium in terms of the policy. It cannot itself unilaterally make any adjustment from the amount of unutilized premium and retain a part of it on the ground that the premium charged was less than what it should have been charged.

Exactly the same is the position in the present case. Not only this, the Chief Manager of the insurance company justified the recovery of the premium (as realized by its officers/staff) by his letter to Auditors. In that set of circumstances, the insurance company cannot recover the alleged short payment of premium for the period 28.10.2003 to 27.10.2004 for the policies dated 9.9.2003, 24.6.2004 and 14.9.2004 and also the policies as stated in the said letter, on the alleged ground that some of the locations covered under the policy were transporters godowns.

11. FURTHER, this aspect is also discussed in the case of Hanil Era Textiles Ltd. Vs. Oriental Insurance Co. Ltd. & Ors. (2001) 1 SCC 269 wherein the insurance company contended that it had every right to claim any shortage of premium at a later date even after the issue of the policies, if it was found due and recoverable subsequently under the TAC Regulations. The said argument was negated on merits. For this purpose, the Apex Court relied upon the Halsburys Laws of England, Vol. 25, para 458, wherein the following observations are made: The rate of premium in fact charged may give rise to important inferences. The materiality of a representation which has been made may be inferred from a reduced rate of premium being charged. Similarly, ignorance on the part of the insurers of some matter supposed to be well known may be

inferred if they charge no more than the ordinary rate of premium, while an exceptionally high rate of premium may be indicative of their acceptance of the risk as hazardous without requiring disclosure of the precise facts making it so.

12. THIS Commission, in Original Petition No. 82 of 1997 (decided on 3.10.2006) has also held to the same effect. In the present cases, the insurance company repeatedly stated that the premium charged was proper. But, on the objection raised by the CAG, the burden was thrown upon the insured. In this view of the matter, there is no alternative but to allow these Appeals, as there is no dispute with regard to the survey report and the amount of the loss assessed therein. Even in the written arguments filed before this Commission, it is admitted that the surveyor submitted the final survey report assessing the loss at Rs.42,24,345/- (Gross assessment Rs.59,44,308/- less Rs.14,97,628/- being the salvage value and Rs.2,22,335/- as policy excess). In the result, the Appeals are allowed. The insurance company is directed to pay the remaining amount of Rs.28,06,000/- (rounded figure) to the appellant with interest at the rate of 10% per annum from 1.3.2006 (i.e., after 6 months from the date of incident and 3 months from the date of survey report) till its realization.

13. FIRST Appeals stand disposed of accordingly. There shall be no order as to costs.