
(2005) 01 NCDRC CK 0006

In the National Consumer Disputes Redressal Commission

KAJIMA DAEWOO JOINT VENTURE

APPELLANT

Vs

NEW INDIA ASSURANCE CO. LTD.

RESPONDENT

Date of Decision : 11-01-2005

Acts Referred:

Citation : 2005 0 UAD 455 : 2005 1 CPJ 534

Hon'ble Judges : K.D.Shahi , Surendra Kumar , Luxmi Singh J.

Advocate : K.K.Bhatia , V.K.Kohli

Judgement

1. THIS complaint has been filed by M/s. Kajima Daewoo Joint Venture on 15th December, 2003 for recovery of a sum of Rs. 26,00,000/- as the cost of engine and other expenses. The total claim is of Rs. 44,89,096/- against the New India Assurance Co. Ltd., with which the machine in dispute was insured.

2. THE brief facts of the case are that the complainant is a joint venture company engaged in constructing power project at Chirkila, Uttaranchal. THE various machines were deployed on the site. THE machines were insured for various amounts. THE disputed machine a TIL Excavator model 330 B bearing Chassis No. 8 SR 00596 and Engine No. 10Z 39069 was got insured with the opposite party, New India Assurance Co. Ltd. for a sum of Rs. 67,25,908/-. THE complainant has paid the premium of Rs. 77,937/- and the insurance was valid from 15.3.2002 to 14.3.2003. To be brief here the details of the machine and insurance, its validity date etc. has not been disputed. THE machine is said to have met with an accident on 3.5.2002, when the machine was operating on the hills of the site. THE cause of the accident was due to loose blasted stones below the chains of the machines slipped causing the machine nose diving and fell almost 90 degrees when the operator tried to hook and save the machine. But due to such a fall of the machine the operator also had some injuries and he jumped out of the machine with fear that the machine was likely to fall further down deep into the valley. In the process the machine suffered a heavy loss of engine bursting as the lubricating system failed due to oil starvation to the pump in the fallen position. The information of accident was given to the Insurance

Company. The Engineers and Technicians on the site realised that the machine was hanging in a dangerous position and was (sic.) to fall further down 300-400 metres deep, which will cause total loss to the machine. It was thought to save the machine immediately. The Engineers and Technicians on site after analysis realized that machine weighing 30 tons cannot be moved from the place as neither the crane of such a capacity was available nor it was practically possible to make a crane reach there in such a short time to save the machine. Another similar machine was replaced in the machine. Then with its own power and also with the help of other machines, the machine was lifted to a safety. The information was given to the Insurance Company on 3.5.2002 itself but a formal letter was delivered to the Insurance Company on 6.5.2002. In response to telephonic information Insurance Company's Surveyor Sh. Girish Joshi visited the site on 6.5.2002 by when the machine was retrieved from the dangerous position and damaged engine was available for the inspection. Sh. Girish Joshi was shown various photographs. He was informed how the machine was retrieved. The main damage in the machine in question was the engine, whereas other damages to the machine were minor dents and glass breakage. The Service Engineers of manufacturer from TIL, Sahibabad also visited the site and inspected the machine and after inspection declared that the engine is not fit to be repaired. The quotation of engine which was received on fax on 3.5.2002 from TIL was sent to insurers for their further needful. The copy of the report of the TIL Services Engineer is annexed as Annexure-4 of the complainant while the copy of the quotation of engine is Annexure-5. Again Sh. C.K. Bhatia Surveyor was appointed to inspect the accident machine and to decide the claim. Sh. C.K. Bhatia visited the site on 6th June, and 7th June, 2002. He made full survey. On the advice of Surveyor Sh. C.K. Bhatia, the complainant transported the engine to TIL, Sahibabad for detailed inspection by opposite party company officers. There Sh. C.K. Bhatia again inspected the engine in August 2002. The complainant made correspondence for the settlement of the claim but it was not done. Again he was informed verbally that another Surveyor Sh. Israni was now deputed from Mumbai. Sh. Israni did not visit for next two months. The complainant was asked to contact Sh. Israni. He visited the site in February, 2003. He first inspected the engine at TIL, Sahibabad and then in Chirkila. It is said that the accident took place on 3.5.2002 but till February 2003 the claim was not settled, which is in itself a deficiency in service. However, the complainant got the letter from the Insurance Company which reads, "as per observations of the independent Surveyors, licensed under Section 64 UM of the Insurance Act, 1939, the machine had not suffered any external impact and engine had suffered a mechanical failure which is out of the scope of the motor policy, hence the claim is repudiated". Therefore, the complainant filed this complaint.

The Insurance Company contested the complaint, however the insurance is admitted. It is alleged that it is incorrect to say that the machine slipped and fell almost 90 degrees and on that account the engine of the machine bursted. On

necessary investigations, it was established that the machine did not suffer any external impact and the damage to the engine was not on account of any but the damage was mechanical on account of the seizure of the engine due to starvation of lubricating oil, which was not within the purview of the policy. Hence the claim was rejected. It is further alleged that on inspection by Sh. Girish Joshi, it was found that the machine was working at a different site fitted with a spare engine. It is said that Sh. Girish Joshi was the first investigator while Sh. C.K. Bhatia was deputed for the satisfaction of the head office, who had also given similar report that there was mechanical failure and the engine was damaged due to starvation of lubricating oil in system. In para 9 of the written statement, it is alleged that the Surveyors are not the employees of the Insurance Company, they are experienced independent Surveyors.

3. THE parties filed their evidence in support of their case. THE complainant has filed Annexure-1 the paper of insurance, Annexure - 2 letter of information regarding the accident to the Insurance Company, Annexure-3A is the photograph of alleged accident, Annexure - 4 is the report of TIL Limited, which has given the report that engine failure is due to oil not reaching in circuit which is due to tilting of engine to almost 90 degrees and oil level getting lower than suction pipe of oil sump, Annexure-5 is the quotation of the engine, Annexure -6 are the various letters of the complainant for the settlement of the claim, Annexure-7 are the letters and Annexure-8A to 8C are the papers by which these letters were despatched, Annexures-8 D to 8L are the various letters of the complainant for the settlement of the claim, Annexure - 9 is the letter of repudiation. Sh. Sarvanand Pandey, Authorised Power of Attorney of the complainant has filed his affidavit dated 20.5.2004 to support his allegations along with photographs. The opposite party filed the affidavit of Sh. R.S. Jaswal, who has also signed the written statement. The Insurance Company filed preliminary survey report of Sh. Girish Joshi, survey report of Sh. C.K. Bhatia, survey report and addendum issued by Dynamic Industrial Enterprises.

4. WE have heard the learned Counsel for the parties and gone through the records. WE have already said above that the insurance of the machine is admitted. Its validity period is admitted. It is not said that the premium has not been received. The amount of insurance is also admitted. The date of accident is said to be 3.5.2002. According to the complainant while the machine was in operation at the site, it all of a sudden slipped causing the accident by which the engine failed. The entire price of the machine is said to be more than Rs. 67,00,000/-, while the price of the engine is said to be about Rs. 22,00,000/-. It is said that to avoid total loss to the machine, another engine was taken and it is specific in para 4 of the complaint that in best possible way the engine of another similar machine was removed and replaced in this machine and then the machine with its own power and also with the help of other machines, the machine was lifted to safety. The learned Counsel for the Insurance Company told that how it is possible to remove the machine of 30 tons as alleged but the reply is specifically that other machines were also deployed. How other machines can be

deployed. The photography has not been done but naturally it must be tied with the iron rope bars from two sides. There may be pulling by machines. After all it was excavator. Another engine has been fitted and then out of its own power and with the help of other machines, it was lifted to safety. WE will discuss it later on but this only the point of argument created by the learned Counsel for the Insurance Company how it can be done but it is not said either in the written statement, nor in the report of any of the Surveyors that it was not done and that the engine was not replaced and it was not pulled out. The Surveyors have also reported as is also in the written statement that the damaged engine was lying on the spot and the machine has been deployed to another spot and was in working condition. The claim is only of the engine as has been said in para 6 of the complaint that the main damage to the machine in question was the engine whereas other damages to the machine were minor dents and glass breakage. If the engine was not disturbed, it was only removed and the machine was sent to another place for working, no mala fide intention can be attached to the complainant. The main attack of the Insurance Company in the course of arguments and also in the letter of repudiation is that there was no accident at all. There was only starvation to the engine, by which it damaged. It is said that only accident is covered in the policy and as there was no accident the claim was rightly repudiated. The main question is not of the external or internal impact, the main question is how and why this starvation to the engine came out? It is not said that while running on plain earth, it starved but it is specifically said that the loose blasted stones below the chains of the machine slipped causing the machine nose diving and fell almost 90 degrees. Thus as the allegations are the cause of slipping of the machine was due to loose blasted stones below the chains that this position created that the engine did not get proper oil and it stopped and bursted. It was argued by the learned Counsel for the Insurance Company that in the letter dated 3.5.2002, it is not written that the engine has bursted. It is only written that it has damaged. This letter dated 3.5.2002 is before any inspection and with no technical meaning of damage or bursting. If the engine has bursted, it can be said to have damaged. If it has damaged, it can be said to have bursted. The term "damage" is a wider term, which includes even bursting. The written statement of the Insurance Company and the entire case of the Insurance Company is based on Surveyor's report. The Insurance Company has got no other evidence. It cannot even create any evidence except the report of the Surveyors. We fully agree that the Surveyors are not the party or the agent with the Insurance Company, they are Surveyors in their own rights and they are independent Investigators and Surveyors. The Surveyor is fully believable and reliable as independent witness less specific reasons are shown to disbelieve him. Even in the written statement, the opposite party has pleaded in para 9 that the Surveyors are not the employees of the company. They are experienced and independent Surveyors having licence under Section 64 UM of the Insurance Act. Thus it cannot be said by the Insurance Company that the report of the Surveyors is incorrect. However, the complainant has tried to challenge the report of Sh. Israni but in our view none of the reports are against

the complainant and all the reports perfectly show and justify that the case of the complainant regarding the accident due to tilting of the machine 90 degrees, that there was starvation of oil. We will take first the report of Sh. Girish Joshi dated 8.5.2002. In his report Sh. Girish Joshi has specifically alleged that the cause of breaking in his opinion to the engine assy was not an external impact but he however did not give any final opinion. He lastly said in my opinion the damages took place due to internal breaking of anything during running of the engine assy that only may be confirmed after its proper dismantling. He only gave the cause of accident as per the statement of the insured representative while the machine was working in dam side project all of a sudden the soil and stones under the chain of the machine roll down leading to the machine falling down and tilting causing damages to the machine. He did not give any opinion of his own on this allegation. However he was shown photographs, which shows the alleged tilting of the machine. Then there is report of C.K. Bhatia, which is a detailed report and actually as said by the Insurance Company Sh. Girish Joshi was an Investigator while Sh. C.K. Bhatia was the Surveyor. We shall now proceed to examine the report of Sh. C.K. Bhatia. Sh. C.K. Bhatia is a Chartered Engineer, Surveyor and Loss Assessor and as alleged by the Insurance Company, he has got a licence under Section 64 UM of the Insurance Act. Sh. C.K. Bhatia has given his preliminary report dated 7.6.2002, in which he has written, "I inspected the engine which was lying in the workshop. Inspection was done with Service Engineer Mr. Bharjana from TIL. The inspection revealed that engine block had burst from either side at cylinder No. 6. One side was widely blasted and the other side had smaller hole. To reveal the exact reason of the block bursting, the oil level was first checked". Then again he reported. "It was evident that the engine had seized because the lubricating oil not reaching up to the 6th cylinder and at high speed of the engine this caused its seizure. Insured, TIL Engineer, and I discussed the possible reason of lubrication system failure. Following is arrived at most probable reason of the failure: "It can be seen from the photos of the spot that machine dived almost 90 degrees due to soil slipping from bottom of the chain. In such a condition of the machine the engine would have tilted almost 90 degrees side wise, as the engine is mounted across the bodyline of the machine. It can be further seen from the spot photo that the machine had not only dived but tilted side wise also. This position of the machine and the engine brings the oil level in the sump in such a position that oil pump sunction level gets out of the oil. In such a position the oil supply to the pump shall substantially reduce. Since the 6th cylinder at far most place, it did not receive the oil supply and seized. As such a situation arose only due to falling of the machine accidentally and not due to any mechanical failure."

We lay emphasis on the words "As such a situation arose only due to failling of the machine accidentally and not due to any mechanical failure". The entire case of the Insurance Company is that this was not a case of accident but it was a case of only mechanical failure but the Surveyor has very specifically given the opinion after discussing with the TIL Engineer that it was due to falling of the

machine accidentally. In our view also non-supply of the oil was due to reason that oil did not reach to the engine. It did not reach to the engine because it was placed at 90 degrees, oil could not pass upward. This situation of the machine was only due to its slipping and its slipping was due to loose blasted stones below the chains of the machine. Thus the direct cause of non-supply of oil was due to slipping of the machine and that is nothing else but accident and this non-supply or mechanical failure resulted due to this slipping of the machine. Therefore, even if there is mechanical failure, then also it is due to accident, there is no other cause of non-supply of oil or mechanical failure.

5. TO go further Sh. C.K. Bhatia also gone in deeper and at page 4 of his report dated 7.6.2002, he wrote, "In regard to spot Surveyor's observation and remarks in the report, he is right that engine block bursting was due to internal failures, but he did not try to see it deeper that can the reported accident cause any internal engine failure". The learned Counsel for the Insurance Company has further argued that the accident took place at Chirkila, Engineers came from Sahibabad same day, quotations came from different places same day. Regarding this the Surveyors has reported: "Now about quick actions taken by insured, viz., quotation of same date, replacing the engine even before spot Surveyor and even placing the order for the new engine. It may be noted that the machine was in vulnerable situation to fall from the uphill and there was no way to bring down except to make it operative and bring down on its own proper only. Chirkila Dam site and KD's Delhi office have Satellite telephone connection by which they can talk like a hot line. When the facts were found by noon on 3.5.2003 (date of accident) that engine has failed and shall have to be replaced they talked to TIL through Delhi office and desired the quotation for placing order of new engine whose lead time of delivery was 5-6 weeks. This promptness of insured should not be seen in Indian background, but with fact that Japanese and Koreans are the actual management and their decision making is prompt. In prevailing circumstances, insured has removed the engine with intentions of saving the machine from total loss rather than any other intention. I am of the opinion that these facts are realistic and in given situation even insurers would have advised the same."

Lastly Sh. C.K. Bhatia concluded that, "with above detail inspection of documents and machine and analyzing the prevailing circumstances, I am of the opinion that claim is admissible under the policy". Thus Sh. C.K. Bhatia has approved the case of accident and loss to the engine due to accident and has also approved the claim and was of the opinion that it was admissible and should be paid. Regarding quantum he reported that, "the complete engine is quoted for Rs. 22,69,467/- and he has opined that the net liability should be approximately Rs. 20-22 lacs. Sh. C.K. Bhatia has fully supported the case of the complainant.

6. THE complainant has raised objections against the appointment of third Surveyor Sh. Israni. In fact Sh. Israni is not the third Surveyor. He may be told to be second Surveyor. Even otherwise the appointment of second Surveyor is

not appreciated and the Hon"ble National Commission has definitely held in the ruling reported in I (2003) CPJ 33 (NC), National Insurance Co. Ltd. v. New Patiala Trading Company, that if a Surveyor is appointed, his report should be accepted. Second Surveyor should not be appointed. If the report of the first Surveyor is not to be accepted, the reasons thereof should be specified. THE insurer was not free to appoint second Surveyor to counter or contradict the report of the first Surveyor. If the report of the first Surveyor is not proved faulty, that is to be upheld. In view of this ruling and fact, the appointment of second Surveyor cannot be appreciated. THE reason of the non-acceptance of the report of Sh. C.K. Bhatia has not been given. Even in the written statement, it is only alleged in para 8 that Sh. Girish Joshi was the first investigator while Sh. C.K. Bhatia was appointed as a Surveyor and the Head Office has appointed another Surveyor for their satisfaction. What is the question of this satisfaction has not been explained? Why they were not satisfied with the first report has not been explained? At any rate in our view the report of Sh. Israni is also not against the complainant. He has reported in the important data regarding date and time of accident- 3.5.2002 at 8 a.m. He did not write that there was no such accident. Place of accident is written as Dhaulinganga Dam Site at Chirkula. He did not write that no accident took place at this site. In his report dated 6.4.2003, in the last line at page 2 he has written, "hence at the time of accident the subject machine was provided with the Engine No. 10Z39069". He has admitted the accident in occurrence. He has written at page 3 of his report in (B)(i) that the machine was in normal one excavating the hill side where the soil and the boulders were not soft and in loose state and, therefore, on the fateful day on 3.5.2002, the large quantity of the loose and soft soil along with boulders came crashing down disturbing and displacing the soil of the place where the subject machine was stationed in (B)(ii) he wrote, this caused the machine to sink in its front in loose soil it was almosst at 60 degrees in inclined position. He has also given the details of how the operator injured himself at the right side of his stomach and was seen bleeding in semi-conscious state before he was pulled out of the claim from inclined machine in about 20-25 minutes after the accident and in occurrence (B)(iii) he has given the details of accident and in (B)(iv) he reported, this resulted in oil pump not displacing/sucking enough oil to lubricate the running mechanism and this caused over heating of crank pins etc. and damaged. THE details are given therein. Thus in the opinion of Sh. Israni as well the accident resulted in non-supply of oil to the engine. He has taken the engine as total loss at page 6 of his report and at page 7 he reported, "Keeping in view the above details it gives a clear indication that the damages to the engine of the said machine created due to mechanical failure after the accident". Thus it is specific that mechanical failure was only due to the accident. He has given that the proximate cause of the mechanical failure is accident and nothing else. However, after the first report in order to defeat the claim of the complainant, the Insurance Company wanted an additional report and Sh. Israni issued Addendum dated 12.4.2003 and by this time he had beome conscious of the fact that the Insurance Company wants to repudiate the claim and reported that, "In

both versions indicate that the engine of the subject machine got damaged due to mechanical failure, which was due to starvation of lubricating oil in the system". Herein he did not think it proper to write that this starvation and mechanical failure is due to accident and nothing else. It is proved without any shadow of doubt that the mechanical failure in the engine was due to the accident and that is fully covered in the policy. This mechanical failure is not for any other reason than for accident. Mechanical failure cannot be separated from accident to say that it is not covered under the policy. The claim of the complainant is fully covered under the policy as reported by Sh. C.K. Bhatia, Surveyor.

Coming to the actual claim, the price of the engine is said to be Rs. 21,28,956/- as per quotation. This was on 3.5.2002 as is clear from Annexure-5. The machine was purchased in 2001. In para 17 of the written statement, the Insurance Company has pleaded: "That it is incorrect to say that the cost of the engine is Rs. 26.00 lacs. The machine which was insured by the opposite party was of 2001 Model. The TIL has quoted its price vide invoice dated 17.6.2002 as Rs. 21,28,956/-. In addition to it, they had added a sum of Rs. 3,74,000/- on account of air freight charges and emergency charges and Rs. 62,574/- as forwarding and handling charges. The invoice is overvalued as the engine was not to be imported by Kajima Daewoo, since the import is done by TIL and hence all such expenses are in their account and cannot be separately claimed. The complainant has also not taken into consideration the depreciation, as the machine was old, the cost of the salvage as well as the excess clause too was not taken into consideration. The total alleged loss was worked out to Rs. 17,42,702.80 by the Surveyor vide his report dated 25.1.2003. Thus to contend that the complainant has sustained a loss of Rs. 26.00 lacs and hence the claim in this respect is fictitious." There is no specific reply to this para by the claimant that depreciation was considered, the cost of the salvage was considered and that the total alleged loss as worked out by the Surveyor as Rs. 17,42,702.80 is not correct. The engine has been used for more than a year. Depreciation is to be given, price of salvage is to be adjusted and in view of these facts we are also of the view that the complainant is entitled to a sum of Rs. 17,42,702.80 as compensation for the loss of engine out of the insured amount from the Insurance Company.

7. THE complainant has claimed Rs. 50,000/- as cost of retrieving the machine from accidental condition. THE machine is not that of the Insurance Company, it was of the complainant and it was also his duty to save the machine. It was not his duty to pull down the machine 300-400 metres to cause the total loss to the machine. If they tried to save the machine, that was their duty and it is specifically written in the paper book and was also admitted during the arguments that the retrieving was done by self-employees of the machine and by other efforts. THE manpower, etc. of the company has done a good job by saving its machine but the claimant is not entitled to any claim on this ground. He also did not submit any chart of actual expenses or actual hire money etc. of the

engine, if the engine would have been hired. A flat sum of Rs. 50,000/- is an exaggerated claim, without any maintenance. The complainant has further claimed Rs. 50,000/- for transporting the engine from Chirkila to Sahibabad as per instructions of the Surveyor and Insurance Company. The complainant has admitted this fact that it was done by their own transport. They had not hired any carrier for that. The complainant has claimed Rs. 50,000/- on this ground, which is also highly exaggerated. The complainant did not prove its actual expenses. However there is also nothing in writing that the Surveyors of the Insurance Company has directed them to bring the engine to Sahibabad and even if the complainant has done it to co-operate with the Insurance Company in settling the claim, the complainant should bear its expenses.

8. THE complainant has further claimed a sum of Rs. 50,000/- as storing charges of the engine. What is the rate of rent? Why the rate of rent is so high? Why the TIL will claim rent from its customer? It is the regular supplier of the complainant. It has got regular business dealing with it. Neither the company charges such a rent, nor anybody pays for that. That is a part of regular service. THE complainant is not entitled to any amount of this ground. The complainant has claimed a sum of Rs. 1,00,000/- for innumerable number of visits, telephone calls and letters of their company officers to Haldwani, Kanpur and Mumbai to follow up the claim. It is enough that the complainant has not claimed any amount on the dinner and drinks of the officers. If the complainant has to get a claim, it has to make expenses for the same. The complainant is entitled to interest and this interest is given only to compensate his costs and expenses. The complainant is not entitled to any amount on this ground. The complainant has further claimed a sum of Rs. 2,00,000/- for mental torture to the foreign company officers. This is a company. There is no mental torture to any company. Officers never bear any mental torture for the loss of company. However the complainant is not entitled to any compensation, he will get interest. It is settled principle as held in the rulings reported in II (2000) CPJ 1 (SC), Ghaziabad Development Authority v. Union of India; II (2003) CPJ 1 (NC), Enclave Power Electronics v. HRDC; and IV (2003) CPJ 90=2003 (6) CLD (SCDRC-Delhi) p 201, Rajpal Mahana v. National Insurance Co. Ltd., that the complainant cannot get interest as well compensation for mental torture and agony.

9. THE complainant has claimed a sum of Rs. 3,00,000/- for consultation and legal expenses. In our view the parties should bear their own costs of this litigation because the complainant has also not come before this Commission with genuine claims. He has claimed a sum of about Rs. 45.00 lacs, where his claim is being allowed only for a sum of Rs. 17,42,702.80. THEREfore, if we order for payment of legal expenses and cost etc., the opposite party should also get cost on the exaggerated claims, which the complainant has unnecessarily made. THE complainant has claimed interest @ 18%. In the present days the rate of interest has been enormously cut by the Banks. Interest @ 9% shall be sufficient interest. Ordinarily the rate of interest is allowed more than @ 6% by the Banks but to cover up compensation also, we are inclined to award interest @ 9% to

the complainant from the date of repudiation till the date of actual payment. ORDER THE complaint is hereby allowed for a sum of Rs. 17,42,702.80 (Rupees seventeen lacs forty two thousand seven hundred two and eighty paise only) against the opposite party along with interest @ 9% payable from the date of repudiation of the claim i.e., 12th August, 2003 till the actual date of payment. THERE is no order as to costs. Complaint allowed.