(1997) 07 J&K CK 0009

In the Jammu And Kashmir High Court

Case No : Complaint No. 117/96

Khazir Mohammad Khirqa APPELLANT

Vs

New India Insurance Company Ltd. RESPONDENT

Date of Decision : 01-07-1997

Acts Referred:

Citation : (1997) SriLJ 387

Hon'ble Judges : M.Maryum, J and Malik Sharief-ud-Din, J

Bench : Division Bench

Advocate : Vishnu Mehra, Noor-ul-Amin, Noor-ud-Din Kapra, N.H.Khuroo, Mohammad Sultan, M.Ali, Jalal-ud-Din Asgar, J.A.Kawoosa, Advocates appearing for the Parties

Judgement

Justice, Malik ShariefudDin

l. This case together with a large number of cases pertain to monumental loss at CharariSharief. The property involved in this case together with

large number of properties some insured and others uninsured were destroyed in a devastating fire on 12th of May 1995 The matter was reported

not only in the local press but also in the international press and rival versions as to the cause of fire were floated.

2. One version was that the Township was set on fire by the militants in order to make good their escape while the other version was that the fire

was caused in a fight between the Security Forces and the militants. It may not be out of place to mention here that this incident of fire involved the

venerated Shrine of Sheikh NoorudDin Wali as well and this caused great deal of annoyance and anxiety to the entire people. We are not now

concerned with the cause of fire in view of the fact that the OP admits that the loss took place due to terrorist activity

3. Pursuant to this loss the claims were raised by the insured for indemnification of loss with their respective insurers. It goes to the credit of the

insurers that they immediately deputed surveyors to assess the loss. There is no dispute that all the requisite and the required cooperation was

provided by the insured in furnishing the necessary material for processing the claims.

4. The Loss Assessors assessed the loss in each case and made recommendations for indemnification subject to terms and conditions of the policy.

However, once the cases were complete, the insurers suddenly volte faced by taking a stand that they will deduct from the accepted liability the

amount of exgratia relief received by the insured from the State. The insured, however, refused to accept this stand and asked for full

indemnification.

5. The insured have taken the stand that exgratia relief was sanctioned by the State irrespective of the fact whether the property lost was insured or

not. The insured have pleaded that the liability of the insurer arise out of a contract and it has nothing to do with any relief they may have received

from any source. It is contended that exgratia relief is paid by the State in lieu of its failure to provide security to the citizen and that it is not in lieu

of or as a part payment of the contractual obligation, the insurers owe to the insured.

6. It is further pleaded that the insurers decided to deduct the amount pursuant to a decision taken on 26091995 in I.C.C.C, meeting which

decision was taken unilaterally by a party to the contract and is based on the fiction that policy holders cannot make profit out of insurance contract

which in essence in the present case is a contract of indemnity.

7. It is further stated that this stand of the insurers is not only illegal but tantamounts to fraud and sole objective is tp deprive the insured of their due

claim under the contract to which the State is not a party. The insured claim that no party to the contract can vary the conditions of the contract

and there is no such condition in the contract of Insurance.

8. On the aforesaid facts it is contended that by refusing to fully indemnify the insured there is deficiency of service. In this state of things most of

the insured have approached us to issue directions to the insurers to indemnify the insured fully with interest on the due amount from the date of

loss till the date of final payment. We may note that by and large none of the insured is aggrieved of the assessment made by the Surveyors and the

loss assessed in each case is acceptable to them.

9. On notice being issued to the insurers they have filed their versions of the case and they offer resistance on the following grounds:

a) That the state has paid exgratia relief to all the fire sufferers by way of compensation for the loss suffered through revenue agency after

evaluating the loss in each and every case. Here we may note that admittedly the loss suffered by the insured is far more than the exgratia relief

paid and their is no justification to say that it was offered by way of compensation for the loss.

b) That the receipt of exgratia relief has the effect of diminishing the loss and consequently the liability of the insurer to indemnify for the loss.

c) That all such payments have to be taken into account while assessing the loss suffered as the liability of the insurer is based on the principle of

indemnity and by virtue of doctrine of subrogation the insurer is entitled to be placed in the position of the insured.

d) Support to this contention is being sought from the condition in the contract which reads as under:

The insured shall at the expense of the Company do and concur in doing and prepared to be done acts and things, as may be necessary or

reasonably required by the Company for the purpose of enforcing rights and remedies or of obtaining relief or indemnity from other parties to

which the Company shall be or would become entitled or subrogated, upon its paying for or asking good any loss or damage under this policy,

whether such acts and things shall be or become necessary or required before or after his indemnification by th6 Company.

e) It is also pleaded that after deducting the exgratia relief the insurer was always prepared and is prepared to pay the remaining liability but the

insured have refused to accept the same.

f) In para 13 of the objections there is an admission that the insured is entitled to receive the full amount of loss within the policy limits but has to be

content with an indemnity and any amount of diminishing the loss be taken into account.

Here we may note that this contention is based on a manipulated defence though there is no such condition in the contract of insurance.

g) It is also pleaded that even if a person not under lability, pays compensation voluntarily to the insured to assist him to bear the loss, the insurers

are entitled to take that into account and reduce the liability to that extent. This is so said despite the fact that there is not such condition in the

contract. Lastly, the insurer's stand is that they are not liable to pay interest.

10. Now in all these cases evidence has been recorded and two different companies have examined two different witnesses and the counsel

representing the insurerers have submitted that since the facts and points under consideration in all these cases are same this evidence may be read

in all the cases of CharariSharief.

11. Now it is high time that we make it clear that there is no dispute in respect of the liability of the insurers, the validity of the insurance cover, and

the fact that insured are entitled to be fully indemnified. There is no need for us to make use of the evidence tendered by the insured as they have

not disputed the recommendations of the surveyors and are contented with whatever recommendations have been made. The evidence tendered

by the OP is of Hafizullah Bhat for New India Insurance Company, and Abdul Rashid Bhat for United India Insurance Company. A bear reading

of the testimony in cross examination makes it clear that these affidavits do not represent their deposition but these have been dictated by their

counsel from Delhi pursuant to a policy decision and these two persons have been asked to sign the same. In any case even in these affidavits no

dispute has been raised in respect of the factual aspects of the cases and in essence what is deposed is that the insurer is entitled to reduce its

liability by the amount of exgratia relief received by the insured from the State. In this regard reliance is placed on the condition of the policy which

we have reproduced above.

12. The crux of the matter, therefore, is as to whether the insurers are entitled to deduct the amount of exgratia relief received by the insured from

the State and whether there is any justification for the same or not. We may note that the relationship of the parties is governed by a contract and

none of the parties is entitled to vary conditions in the contract or to add to it something which does not exist therein.

13. The condition in the contract referred to above and on which the reliance is placed by the OP does in no way provide any justification for the

insurer to reduce the amount of its liability by the amount of exgratia relief paid by the state or by the amount of assistance that the insured may

have received from any quarters. This condition in fact represents the doctrine of subrogation which evisages that there must be an existing right

against third party contract. The insured have no legal right against third party which can be subrogated in favour of a party to the contract. The

insured have no legal right to receive exgratia relief. If the State had not come to provide relief to them to mitigate their sufferings they could do

nothing in the matter. Exgratia relief paid to the insured in essence is a relief and not compensation or indemnification and it is paid by the Welfare

State as a measure of its responsibility to mitigate the sufferings of the citizens. It will not be out of context to hold that it is an admission by the

State of its failure to provide security. What is in fact lost in such calamities is not the properties alone but the loss is extensive and involves not only

the loss of properties but loss of mental peace and the source of sustenance. It leaves the sufferers shelterless and he is emotionally wrecked. In

fact in such calamities the sufferer is left bewildered. The State, therefore, finds itself morally bound to provide relief to mitigate the sufferings of its

citizens to the extent its resources permit. It is indeed a fact that the State of Jammu and

Kashmir has been generous enough and has and is providing exgratia relief, there is no right to be subrogated. The reference to other parties in the

aforesaid condition is in a different context. For instance, if a vehicle is stolen and the insurance amount paid the insurer can validly ask for

subrogation as in the event of the vehicle being traced at subsequent date the insurer will become its rightful owner. Similarly, if a carrier of goods

insured, dishonestly does not deliver the goods to the consignee, in that event the doctrine of subrogation comes into play as the insurer to whom

the right to claim indemnity from the carrier is subrogated with a view to authorize and entitle the insurer to recover the amount of indemnity from

the Carrier. The reference to ""other parties"" as such has nothing to do with any assistance received by the insured either from the State or from any

other voluntary agency. If the insured in the present case had received any assistance from International Red Cross or from their friends and relations, the insurer could not either legally or under the terms and conditions of the contract ask for subrogation or reduce its liability to that

extent. Strangely, the Insurance Corporation is a statutory Corporation and the State also borrows from it. We have specifically asked the witness

as to whether the insurance Corporation is a statutory Corporation and the State also borrows from it. We have specifically asked the witness as

to whether the insurers are prepared in the event of reduction of its liability by the exgratia relief to refund that amount to the State and the answer

given is No. This would naturally mean that the insurers will get an undue benefit. When State pays exgratia relief, it is never meant of the insurer. It

is known fact that in all cases, all militancy related lossess whether of properties or lives the State has paid exgratia relief, earlier to this event also.

Never before this event have the insurers raised this objection and in fact earlier in all other cases insurers have accepted the liability in full. It is

impossible for us to allow them to deal with different citizen differently. While making payment of exgratia relief, the State has not made admission

of having done any civil wrong. It can not therefore be said that it is a tort feasor. It is not paying the damage. It is only paying this relief to mitigate

the sufferings of its citizens. In any case the very expression ""EXGRATIA RELIEF' signifies that it is in the nature of relief and not in the nature of

indemnification on behalf of the insurer. ""EXGRATIA"" in law lexicon Venkataramiaya's means ""without liability"".

14. Mr. Vaishno Mehra, who argued the case for OP, contends that fire insurance policy in fact is a contract of indemnity and any assistance

received by the assured from any quarter, even voluntarily, will have the effect of reducing the liability of the insurer and by virtue of principles of

indemnity and doctrine of subrogation such payments received by the assured whether before or after the acceptance of liability can be rightly

taken into account by the insurer in determining its liability. He argues that assured cannot make profit out of contract of indemnity and he cannot

be allowed double benefit. To support his contention he read out before us some commentaries from photo copies which we are unable to refer to

in the absence of the case law which alone could have enabled us to find out what was the issue before the court and what was the ration

decidendi.

15. The argument, however, in our view, does essentially involve the examination of the doctrine of subrogation and the liability of the insurer under

the contract of indemnity. In Vankataramiay'as Law Lexicon 4th Edition, Subrogation and assignment has been thus defined as under

Subrogation and assignment out of the nature of contract of indemnity, the insurer when he has indemnified the assured is subrogated to his rights

and remedies, against third parties who have occasioned the loss. This right of insurer to subrogation or to get into the shoes of the assured, as it

were, need not necessarily flow from the terms of the contract of insurance, but is inherent and springs from the principle of indemnity. This is a

matter of law relating to indemnity and the basis of the right is justice, equality and good conscience namely the indemnifier should be in a position

to reduce the extent of his liability within limits.

16. The reliance by the counsel for the complainant's on 1978 A.C.J. Bombay 269 decided on 12021968 and reliance by Mr.Mehra on AIR

1973 S.C. 281 Union oi India V/s Sardah Mills Ltd, in our view, is misplaced. In the former case supra, the point for consideration before the

court. ""Whether a subrogatee could maintain a claim against third party in its own name?"" was answered in the negative. This view was reiterated in

1973 S.C. Supra with a further observation that the right of subrogator on assigning the right and remedy to subrogatee does not perish on giving

of subrogation to the subrogatee and the subrogator was still competent to maintain action in his own name.

17. However, on going through these and other cases, we have gathered some useful knowledge on the doctrine of subrogation and in respect of

the contracts of indemnity subrogation is a act of being substituted in the place of another only to a limited extent. ""Third Party"" referred to in the

condition of the contract has a limited connotation and it has no reference to a person who is not directly or by implication of law connected with

the contract of indemnity. Reference to Third Party in essence is a reference to a party who, though not a party to contract, is still liable in law by

implication. ""Third Party"" is one against whom subrogator has a right of action. It is the party which in fact or in law is liable to compensate for the

loss.

18. If the assured had been compensated by a Third Party who was liable to

compensate the loss he cannot claim indemnification once again from

the insurer. If the assured had got the loss indemnified, by the insurer, the third party liable to compensate for the loss cannot claim that his liability

is extinguished or reduced by payment made by the insurer. The third party remains liable to the assured just as if there had been no contract of

indemnity. But the person indemnified can take the same received from the third party as a trustee for the indemnifier and if he has not received any

sum to which he is entitled he is bound to afford to the latter i.e., the indemnifier all facilities for doing so. If the insurer recovers more than he has

paid to the assured it is only just that surplus should be paid by him to the assured.

19. Thus if a person has already recovered the loss from a third party meaning thereby one liable to compensate for the loss, there can be no

liability under the contract of indemnity. If he has not recovered the loss from a third party, but has a right to do so, there is no reason why such

third party should be allowed to allege that his liability is satisfied or reduced by a payment made by a stranger to him, under a contract with which

he has nothing to do. The third party remains liable to the person indemnified just as there had been no contract of indemnity. By no amount of

legal craftsmanship reference to third party can bring within its ambit the assistance that may be provided by other agencies not liable for

compensating the loss. Doctrine of subrogation in essence envisages, the existence of a right having a remedy in law for its enforcement and, the

principle of indemnity has only a reference to any indemnity received from a person liable for compensating the loss. It is thus, the right of the

insurer against the person responsible for the loss does not rest upon any relations of contract or of privity between them. It arises out of the nature

of the contract of indemnity and is derived from the assured alone. In other words, what is subrogated is a right on the basis of which a claim

against third party is maintainable, carrying with it a remedy in law to enforce that right. The expression ""diminishing the loss"" is also on account of

payments made by a third person who is liable to pay for the loss.

20. Mr. Menra s contention that exgratia was paid after evaluating the loss with a specific intention to reduce the liability of the insurer is utterly far

fetched and misconceived. The Government order clearly states that exgratia is not payable to those who have earlier been paid under model

Town Scheme. Exgratia has been paid by the State irrespective of the fact whether the property was insured or not. State had no material before it

is this regard. The fact that those who had been earlier paid on the ground of Model Town Scheme were deprived of exgratia clearly indicates that

it was paid as compensation for dislocation. Besides, there were political reasons and the awareness of the State of its responsibility towards and

citizen behind this grant. It is as such highly inappropriate to contend that exgratia was paid to reduce the liability of the insurer. The State had no

legal liability to compensate, and payment of exgratia is in no way on admission of its being a tortfeasor.

21. It would be noticed that after the stand of the insurer was brought to its notice, the State through its functionaries, District Development

Commissioner Budgam informed the insurers, that the exgratia relief was never intended to diminish the liability of the insurer. This amply proves

that the payment was never intended to meet partly or wholly the liability of the insurers who under the contract of indemnity are liable for full

indemnification of the assured. Mr. Mehra fairly admits that if it could be gathered from the Government action that it was not meant to diminish the

liability then he has no case. The wonderful part of the stand taken by the insurer in these cases is that liability is sought to be reduced on the basis

of payment made by the State who is neither a party to the contract nor is in any way responsible for paying for the loss by implication. It is not a

third party in the sense in which it is used in the insurance contract. That being the case, the OP seems to have entirely taken an oppressive and

dishonest stand.

22. Adverting to the main issue again, we may point out that these are unique cases based on facts which in fact has been subject matter of

litigation before any court. The cases referred to in essence dealt with altogether different situation though involving the doctrine of subrogation and

principle of indemnity. This point as to whether the insurer has a right to reduce its liability by the amount of exgratia relief paid by the State was

directly in issue in the Division Bench judgment of J&K High Court.

23. In fact the stand of the insurers in these cases is based on wrong proposition of law and is in the nature of unsetting the settled law on the

subject. In National Insurance Company V/s Ghulam Mohammad, cited in 1979 Kashmir Law Journal at page 430, a Division Bench of High

Court of Jammu and Kashmir had occasion to deal with a similar point of law. The Division Bench has declined to accept this contention. The

observations on the point are reproduced at para 10 of the judgment as under :

Learned counsel for the appellant then submitted that the compensation which the plaintiff received from the Government may be deducted from

the amount that may be ultimately found due to him from the company. The basis for this contention was that the plaintiff in his statement admitted

that he got some amount from the Government as a fire sufferer for the development of a plot. The company claims that in case the plaintiff's suit

was decreed it may be given benefit of the amount already received by the plaintiff and the sum be deducted from the amount of the decree. We

are, however, unable to accept this claim. The house in question was not insured with the State Government and it cannot be said that it was

because of that the said amount was given to the plaintiff by the State. The amount, if any, given to the plaintiff was given to him by way of help on

the basis that he had suffered because of fire and for other reasons. Some of them may be event political. May be the plaintiff received help from

other quarters, say, from his relatives and from others. Will such amounts also be claimed to be deducted from the amount of decree? The answer

could be only in the negative. The fire insurance company was required to pay the amount to the insured under the Terms and Conditions of the

agreement entered into between the parties. No term or condition in the insurance policy has been referred to in support of such a claim. When it

was concluded that the fire in question was accidental, the amount of insurance, after proper survey and subject to reasonable deductions, was

payable under the terms of the agreement. The Insurance Company could not morally or legally in the absence of a specific condition in the

agreement be permitted to lay its hands on the monetary help received by the respondent from other source.

24. In that case also the insurer had made an attempt to derive support from certain judgments of England but the learned judges declined to

accept the proposition on the ground that the Insurance Company can claim benefit on this account only if the insured has received such an amount over and above the actual loss from person who were bound to pay such an amount to the insured or the insured had a right to claim such

compensation from third party. In this case also it is not the case of the insurers that the Government was either bound to pay relief or that the

insured had any right in law to claim such compensation from the State. In any case, the insurer cannot avoid their liability on any imaginary or

manipulated ground: If the insurers want to reduce their liability they can only do so under the terms and conditions of the contract. We have not

been shown any such terms and conditions in the contract and the one on which the reliance is placed does not entitle them to the reduction of its

liability to the extent of exgratia relief paid by the State. We have already quoted two instances to explain the extent and purpose of the condition

which is being pressed in service in support of the stand taken by the insurers. This condition is not at all applicable to the facts of the present cases

and reliance thereon is misplaced.

25. The next limb of the case relates to the nonacceptance of the insurers to pay interest. The specific language of the insurance contract provides

for full indemnification of insured for loss. If an insured is indemnified years after the loss, it cannot be said that he is fully indemnified. Full

indemnification means that the insured is to be reimbursed as and on the very date of loss and certainly not when the insurer may choose to accept

the liability. In the present case the mischief of delaying the acceptance of liability on invalid legal proposition has to be remedied and this can only

be done by allowing interest on the liability from the date of loss. If paid in time assured could invest it in some gainful purpose. During the period

the payment was delayed, the money has considerably devalued while the insurer by investing the same has been deriving wrongful gains from the

same resulting in wrongful loss to the insured. The principle of equitable justice and fair play go in favour of insured. Besides, these very insurers in

the monumental claim of Sopore Town have on a compromise before High Court paid 18% .interest. These cannot now be permitted to

discriminate between a citizen and a citizen They owe it to law and morality not to take different stand in different cases. All these facts leave no

scope for the stand that insurer is not liable to pay interest. Insurers cannot even dispute the rate of interest in view of their negotiated settlement referred to above before the J&K High Court.

26. With a view not to prolong the agony of the insured by further litigation, we are not inclined to go into the questions of compensation for loss

and injury due to neglect, though we maintain that in these cases by taking a stand against settled law the insurers have displayed certain amount of

dishonesty and oppression. It is a clear case of illegal exercise of power resulting in harassment of the insured. The behavior of the insurers in

essence has been highly capricious and arbitrary, and no law protects the same. Arbitrariness can never be a part of good administration and all

administrative actions are also expected to be informed by certain amount of reason. In Lucknow Development Authority case Supreme Court has

come down heavily on the insurers for such callous conduct and we believe that the insurers are duty bound to conduct themselves in a more

responsible manner by virtue of being a dominant party to the contract, having jurisdiction to decide their own liability they can render the insured

helpless and bewildered. There is a powerful suggestion from the insured that the tendency of the insurer to defer and delay the acceptance of

liability on irrelevant and invalid grounds will breed crime and corruption. Besides, it results in the wastage of Public money and time in avoidable

litigation. This suggestion, surely, cannot be brushed aside as irrelevant. We would as such like to remind the insurer that public power, if exercised

dishonestly and maliciously, will render it liable for the abuse thereof and there is no protection for that in law.

27. Thus the doctrine of subrogation and the general principles of indemnity essentially presuppose the existence of a third party liable in law to

compensate for the loss, even though it is not a party to the contract of indemnity. It is only the compensation received from such third party that

will result in diminishing or reducing liability of the insurer. The fact that the assured can not claim double indemnity amply makes it clear that the

benefit, if any, received by the assured must be way of compensation for the loss and the payment should be made by a party liable to make that

loss good. Here in these cases it is nobody's case that the State has paid exgratia relief on the ground that it was liable to compensate for the loss.

Not only that it cannot hp treated even to be a third party by any legal fiction as envisaged by the contract of indemnity.

28. We are aware that all the insured have not filed their cases before us possibly in the hope that in case the Commission declines to accept the

stand taken by the insurers they need not resort to litigation. Since we have declined to accept the contention of the insurers it is advisable for the

insurers to accept liability in terms of this order even in respect of all other fire sufferers of ChkatariSharief in this very incident who have not filed

cases before, us. This order shall, therefore, be applicable to all such cases as otherwise, it would lead to avoidable litigation and will have effect of

rendering insurers liable for oppressive and malicious conduct.

29. Having come to the conclusion that the stand taken by the O.P. in these cases is yet another device not to accept the liability for full

indemnification and, having found that the exgratia relief paid by the State in no way either in law or under the terms of the contract reduces or

diminishes the liability of the insurers, we make the following orders:

1. In case No. 117/96 Khazir Mohammad Khirka V/s New India Assurance Co. Ltd. (the case in which the main order is passed O.P. is directed

to pay to the assured a sum of Rs.2,25,000.00. 2 to 212 [Award passed by the Commission in 211 other connected cases]

All the complainants apart from the amounts awarded to them under the contract of insurance will also be entitled to 18% interest PA. on the

awarded amounts from the date of loss till the date of final payment. The entire award shall be satisfied within six weeks from the date of this order.

All the aforementioned cases are disposed off.

30. A certified copy of the order be furnished to the counsel for the parties to be collected by than on their own within a period of one week.

