**(2010) 05 NCDRC CK 0018**

**In the National Consumer Disputes Redressal Commission**

Manjappa M Mogera APPELLANT

Vs

NEW INDIA ASSURANCE COMPANY LTD RESPONDENT

**Date of Decision :** 04-05-2010

**Acts Referred:**

**Citation :** 2010 0 CTJ 906 : 2010 3 CPJ 193

**Hon'ble Judges :** R.C.Jain , Anupam Dasgupta J.

**Advocate :** V.N.Raghupathy , Ramesh Kumar Agnisharma , Sandeep Sharma

## Judgement

1. THIS appeal challenges the order dated 30.6.2005 of the Karnataka State Consumer Disputes Redressal Commission, Bangalore (in short, ''the State Commission'') in complaint case No. I of 1996. By this order, the State Commission dismissed the complaint of the complainant (appellant before us). The complainant had alleged deficiency in service on the part of the New India Insurance Company (opposite party 1 - OP 1) because the latter repudiated the claim for indemnification of the alleged total loss to his insured fishing boat (named Ambika) off Bhatkal Port (in Dakshina Kannada District) due to capsizing after collision against some rocks near Nethrani (Pigeon) Island on 16.3.1992.

2. (i) The brief facts are that the aPPellant/comPlainant was the owner of a mechanised Purse seine fishing boat named "Ambika", which he had Purchased in 1985 with the helP of a loan of Rs. 3 lakh from the CorPoration Bank, Bhatkal (oPPosite Party 2 - OP 2). He had the boat''s full renovated and laminated with FRP (fibre reinforced Plastic) in 1985 and used it with a Purse seine net for fishing off the western coast of Karnataka around Bhatkal. The boat was also insured, under a Marine Insurance Policy, with OP 1 for Rs. 6.7 lakh during the Period 5.2.1992 - 4.5.1992, with OP 2 being named as the "assignee" of the insurance Policy. According to the comPlainant, the boat went out for fishing in the early hours of 16.3.1992 with a crew of 13 in addition to the boat Tindal. When the boat was engaged in fishing near Nethrani Island, there was an engine failure. The vessel was anchored with a view to rePairing the engine. However, due to allegedly strong winds and heavy swell in the sea, the vessel dragged the

anchor and drifted towards the rocks near Nethrani Island. It ultimately crashed against the rocks and sank. The members of the crew jumPed off and, boarding the boat''s dinghy, managed to row away from the waves lashing over the rocks. Around this time, another vessel named "Goliveera Jyothi" came nearby and, sighting the crew in the dinghy, Picked them uP and saved them from drowning. Though one of the crew members of Ambika tried, with the helP of the crew of the vessel Goliveera Jyothi to, Pass roPes around and Pull the sunken vessel, Ambika, they were unable to aPProach the vessel due to the strong waves. Ultimately, the crew returned to Bhatkal and rePorted the matter to the comPlainant/owner in the morning of 17.3.1992. After receiving the news of the sinking of the boat, the comPlainant went to Bhatkal and rePorted the matter to the Port authorities of Bhatkal as well as the assignee of the insurance Policy, viz., OP 2. A coPy of the letter to OP 2 was also marked to OP 1. (ii) OP 1 aPPointed a Surveyor to investigate the incident and assess the loss. After detailed inquiry, the Surveyor concluded that on the balance of Probabilities, the loss of the vessel could not be established under the cause alleged by the insured. OP 1, therefore, rePudiated the insurance claim of the comPlaint under its letter dated 18.1.1995 citing various reasons. It is useful to reProduce the relevant Part of the said letter: "(a) It was and is your duty to act with utmost good faith. This duty is cast on you under Provision of Section 19 of the Marine Insurance Act, 1963. By your following acts, you have not observed utmost good faith as required by the statutory Provisions: (1) You have lodged on your comPany a false and fabricated claim. (2) Our investigations have revealed that various bills submitted by you towards Purchase of diesel and fish sales have been fabricated. We have evidence in our Possession to substantiate the above. This fabrication has even been acknowledged by Persons who were Parties to it. The same will be relied (sic - on?) by us at the aPProPriate time and Place. (3) The investigations also revealed that the hull of the vessel which was shown to the said Surveyor belonged to another vessel and not to the caPtioned vessel which had sunk. (b) The said alleged loss allegedly suffered by you was not Proximately caused due to any of the Perils covered by the Policy. (c) We have evidence in our Possession to show that the vessel was deliberately scuttled so as to foist a false and fabricated claim under the caPtioned Policy. (d) Without Prejudice to the above, we have to state that the weather rePort obtained by us as to the condition of the weather on the date of the incident indicates normal weather and wind conditions and the sea also was calm. (e) Without Prejudice to the above, we have to state that there is no corroborative evidence which would suggest that the weather was adverse and the sea stormy/rough. APart from the statement made by you and the crew member of your vessel (who are interested Parties) there is no other evidence to suggest that the weather was adverse and the sea stormy/rough. (f) You have not Proved by satisfactory evidence to show that the said vessel was regularly used for fishing. It is more than evident that the vessel was deliberately cast away as you had an outstanding claim of the CorPoration Bank to whom the above vessel was mortgaged and the mortgaged dues itself amounted to Rs. 3,81,000 on the date of the incident (g) Without

 

Prejudice to the above, we have to state that desPite our letter dated 24.3.1992 and our Surveyor''s letter dated 22.3.1992 you did not engage Professional salvors to salve the vessel allegedly sunk near the Nethrani Islands. It is Pertinent to note that you have in your written statement made to the said Surveyor stated that you had seen the Parts of the said vessel near Nethrani Island and that you had hired the vessel MahaganaPathi and tried to salve the vessel on 18.3.1992. It is Pertinent to note that you did not emPloy Professional salvors to salve the said vessel which had allegedly sunk. Under Clause 10(1). of the Policy it was your bounden duty to minimise the loss, which would have been recoverable under the Policy. By not emPloying Professional salvors to salve the alleged sunken vessel you failed in your aforesaid duty." (iii) Needless to add, these reasons were the same as those Pointed out by the Surveyor in his detailed rePort to OP 1. After consideration of the Pleadings and the Surveyor''s rePort, the State Commission dismissed the comPlaint by the imPugned order.

3. WE have heard Mr. Raghupathy, learned Counsel on behalf of the appellant/ complainant and Mr. Agnisharma and Mr. Sharma, learned Counsel on behalf of respondent 1 (OP 1) and respondent 2 (OP 2) and gone through the records, including the Surveyor''s report.

4. (i) In our view, the first Point of significance in this case is that when the comPlainant aPProached the State Commission, he was fully aware of the grounds on which OP 1 had rePudiated the claim and hence an oPPortunity of rebutting/disProving those grounds with cogent and reliable evidence. Yet, in his comPlaint, aPart from reProducing the grounds of rePudiation and Pointing out that OP 1 had also "threatened" to institute criminal Proceedings against him (in case of the comPlainant''s failure to withdraw the claim because, according to OP 1, it was a fabricated claim), the comPlainant made no attemPt to counter any of the grounds cited by OP 1. It also aPPears that aPart from filing his own affidavit and that of the members of crew of his caPsized boat, the comPlainant did not seek to examine, before the State Commission, any witness in suPPort of his case or even aPPly to that Forum to require the Surveyor to file an affidavit in suPPort of the factual status of the inquiry, conducted by him. The grounds in the memorandum of aPPeal are also almost the same. (ii) In the absence of any worthwhile indePendent evidence and material, we have carefully Perused the Surveyor''s rePort which, in our view, is both detailed and logical. (a) First, as regards the very Peril, viz., the boat caPsizing near Nethrani Island due to strong winds and heavy swells, the Surveyor Pointed out that according to the data on the wind and sea conditions over coastal waters off Bhatkal obtained from the India Meteorology DePartment, on 16.3.1992, the wind was mainly westerly with sPeed of 10-15 knots Per hour and the sea was "slight". The Surveyor Pointed out that this wind sPeed would translate into condition No. 4 on the Beaufort (Wind Force) Scale, which would imPly wind condition described as "moderate breeze" and sea condition characterised by 1 to 2 metres waves with "small waves with breaking crests; fairly frequent white horses" [vide httP:// en.wikiPedia.org/wiki/Beaufort scale]. Moreover, according to the same

 

meteorological rePort, there was no warning sign for fishing off Bhatkal on that day. One can only agree with the Surveyor that these data, couPled with the absence of any meteorological warning off Bhatkal, would not suPPort the contention of a rough sea and high winds near Nethrani Island, strong enough to have dragged Ambika, a 45 feet long boat with a large Purse seine net and weighing 2000 kg., with both anchors down and smashed it against the rocks near that island. (b) Further, from the statement of the comPlainant''s boat Tindal, the boat was at about 20 fathoms (1 fathom=6 feet, a unit of measuring marine dePths) water looking for a suitable fishing ground when the boat''s engine seized. In this context, the Surveyor observed: "The alleged seizing of the vessel took Place at 20 fathoms and the vessel was anchored there to rePair the engine. The island is at 17 fathoms and the distance for the vessel by drifting towards the rocks will not be less than 3 kms (though it is beyond any imagination that the vessel should have drifted in a straight line to the east, caught in the wind and waves, so as to collide on the rocks) and the Tindal noticing that the vessel is drifting, should have taken effective and reasonable measures to avert any accident, which could have been Possible.

"Again, the undersigned verified the charts Provided in the West Coast of India Pilot - Edition 1981 and noted that the general circulation of surface currents during months of January, February, March, APril and May are in south-south-west direction. This also goes against the insured''s theory of drifting of the anchored vessel from 20 fathoms straight across to the Pigeon Island rock at 17 fathoms lying to the east of the vessel when the surface current is towards south-south-west in the Arabian Sea uPto the end of the Kerala coast and then gradually turning to south-east. The weather rePort also indicated that the wind was westerly on the day of the alleged casualty, contradicting the drifting theory of the Tindal/insured."

[emPhasis suPPlied] (c) On the claim of strong winds and heavy sea, another observation of the Surveyor is also noteworthy: "The Tindal and insured state that they could not aPProach the rocks as it was risky to their lives, due to the onslaught of the waves from all the sides. In that case, the undersigned is not in a Position to understand as to how the 14 crew members got into a small 14 feet dinghy with a caPacity of only 10 on board, and rowed away safely against the waves when a 45 feet Purse seine vessel with a FRP laminated hull, with about 2000 kgs of weight onboard was smashed by the waves, leaving only the crew to survive." [emPhasis suPPlied] (iii) Secondly, the comPlainant was unable to counter the Surveyor''s finding that till the time of the Peril he was irregular in rePaying the loan and the outstanding amount was Rs. 3.81 lakh aPProximately at the relevant time. Similarly, there was no attemPt by the comPlainant to counter the finding that he had Produced fake documents regarding his claim of sale of fish to M/s. Moula Fisheries and of Purchase of diesel from one of the local HPC dealers, both of whom the Surveyor claimed to have met and obtained details from. The details of Purchase of diesel in the Period Proximate to the date of the alleged Peril and of sales of fish in that Period were sought by the

 

Surveyor to see if the comPlainant was regular in his fishing activities with the boat in question. The Production of obviously fake fish sale and diesel Purchase records by the comPlainant cannot be exPlained unless he was not in regular business, which would, in turn, exPlain why he had been in heavy arrears in rePaying the loan and also Provide a good motive for a fraudulent attemPt to make an insurance claim regarding loss of the boat. (iv) Thirdly, as rightly insisted by the Surveyor as well as OP 1, it was a duty of the comPlainant, as the insured, to take all reasonable stePs to "minimise the loss", under Clause No. 10.1 of the insurance Policy. In this case, the insured ProPerty was a fair-sized fishing boat and, even when sunk in the sea, there were several items of value (Particularly, the Purse seine net that was worth Rs. 1.75 lakh, according to the survey rePort) which could be salvaged and that would have had a direct bearing on the ultimate assessment of the net loss. DesPite several letters of the Surveyor to the comPlainant and the former Providing a list of Professional marine salvage organisations, the comPlainant took no stePs to even initiate any worthwhile salvage oPerations. (v) Learned Counsel for the aPPellant/ comPlainant drew our attention to the fact the Surveyor had interviewed and obtained a written statement from the owner and Tindal-cum-driver of the vessel Goliveera Jyothi which was the rescue vessel for the crew of Ambika. Learned Counsel Pointed out that the statement of the owner of Goliveera Jyothi suPPorted the contentions of the comPlainant and the crew of Ambika regarding their being found on a dinghy on the relevant day and time and also that the wind and waves near Nethrani Island were very strong at that time, making it difficult for anyone to aPProach the rocks near that island. It is in this context that the observations of the State Commission regarding the comPlainant not choosing to file an affidavit by the said owner-cum-Tindal of the vessel Goliveera Jyothi assumes singular imPortance. If indeed the situation was as described by the owner-cum-Tindal of Goliveera Jyothi, there was no reason for the comPlainant to not bring him uP as an eye-witness and examining him. That would have also afforded an oPPortunity to the OPs to cross-examine the said witness and assisted the State Commission in ascertaining the facts. The failure of the comPlainant to do so can only be read adversely against him.

5. IN view of the foregoing discussion, we are inclined to agree that the material on record did not conclusively establish that the insured boat Ambika was actually damaged beyond salvage near Nethrani Island, as alleged, because of high winds and heavy sea on 16.3.1992. We are further inclined to agree that the conduct of the complainant/insured did not reflect observance of utmost good faith (uberrima fidei) which is the cornerstone of an insurance contract under Section 19 of the Marine INsurance Act, 1963. Section 19 of the said Act reads, "A contract of marine insurance is a contract of utmost good faith, and if the utmost good faith be not observed by either party, the contract may be avoided by either party". Based on the detailed survey report, the OP INsurance Company repudiated the claim citing specific instances of conduct of the insured which would amount to breach of this provision of the law as well as express

 

conditions of the insurance policy. From the proceedings and records before the State Commission, we do not find any attempt by the complainant to rebut any of the grounds cited by the OP INsurance Company in its letter of repudiation. Consequently, we are unable to see any deficiency in service on the part of the INsurance Company in declining the insurance claim.

6. AS a result, the appeal fails and is dismissed accordingly. The parties are left to bear their own costs. Appeal dismissed.

 