(2016) 04 NCDRC CK 0022

In the National Consumer Disputes Redressal Commission

Case No : 639 of 2015

M/S. AGGCON EQUIPMENTS INTERNATIONAL (P) LTD. — APPELLANT

Vs

IFFCO TOKIO INSURANCE COMPANY LTD. — RESPONDENT

Date of Decision : 04-04-2016

Acts Referred:

Insurance Act, 1938, Section 64 - Books to be kept by insurers established outside India

Citation : 2016 2 CPR 638

Hon'ble Judges : J.M. Malik

Advocate : Rajan Gupta, Heman Gupta, Siddhant Tyagi, Suman Bagga

Judgement

1. M/s Aggcon Equipments International Pvt. Ltd. is the owner of a maching (MAIT HR180) used for drilling deep boring of foundations and bores in the earth, which was purchased on 13.05.2011. The market value of the said machine is Rs.4,00,00,000/-. The complainant got the above mentioned machine insured from IFFCO TOKIO Insurance Company Ltd.- the Opposite Party, under a Commercial vehicle Tariff (CVT) package Motor policy of miscellaneous and special type of vehicles class D for a sum of Rs.3,04,48,687/- for a period from 09/06/2013 to 08/06/2014. The copy of the Insurance Policy is annexed with the complaint as Annexure-3.

2. On 16.09.2013, the above said machine while drilling on a project at 3C, Sector-100 of Capacite Infraprojects Pvt. Ltd. Under Pile Foundation Company met with an accident where damage was caused by soil collapsing whereby the machine drilling shaft got stuck into the earth. The complainant tried its best to retrieve the drilling shaft from 40 meters deep bore and spent lot of money for the same, but the same could not be retrieved. The copies of the photographs at the project site have been placed on the record as Annexure-4 (colly). After the receipt of the information, after the primary survey, appointed M/s Mach Surveyors Pvt. Ltd. to survey and give its report. Mr. H.M. Walia on behalf of the Surveyors Company surveyed the machine.

3. The inquiry was made from Mr. Deshraj, the operator of the said machine, who mentioned that he had done the piling up to 40 meters and when he pulled the lever for lifting, suddenly the soil around the rig caved in and there was a ditch around the machine because of which machine could not do further piling. The surveyor Mack Insurance Surveyors & Loss Assessors (P) Ltd., submitted his final report on 29.10.2013 and did not recommend the claim settlement under the Commercial vehicle package motor policy. It is pertinent that the damage to the machine was due to soil collapsing and not due to any mechanical or internal failure of the machinery. It is alleged that the surveyor has erred in stating the damages are not due to accidental external means. The report of the surveyor has been placed on the record as Annexure-5. There was correspondence and the OP vide its letter dated 06.11.2013 and 28.11.2013 to the complainant, denied any legal liability to pay towards the claim settlement. Copy of the above mentioned letters are annexed as Annexures -6 to 9.

4. The complainant had no other option but to request the Insurance Regulatory Development Authority (IRDA) to intervene and appoint another surveyor under Section 64 UM (3) of Insurance Act 1938 vide letter dated 12.12.2013. On 11.02.2014, IRDA asked the Opposite Party to provide documents/information for examination by the Insurance Development Regulatory Authority. The copy of the letter is annexed as Annexure-11. Thereafter, the complainant apprised IRDA of getting the opinion of an independent surveyor Mr. C.K. Bhatia. Mr. C.K. Bhatia inspected the machine and reported that the "sudden collapse of the soil into the drilled pile hole is clearly accidental and also external means". He concluded that the claim is very much payable. The copies of his opinion and report are annexed as Annexures-14 & 15. The complainant sent reminders to IRDA but it suggested that due to contradictory reports the matter should be taken to this Commission vide letters, copies of which have been annexed as Annexures 16 , 17 & 18. Ultimately, the present consumer complaint was filed with the following prayers:- "a) An order directing the opposite party to pay to the complainant a sum of Rs.1,02,34,313/- being the amount of loss assessed by the surveyor and to which the opposite party is liable under the contract of insurance.

b) An amount of Rs.1,25,00,000/- for non-usage of the machine since 2013. Furthermore Rs. 10,00,000/- has been spent on trying to retrieve the machine and minimize the losses.

c) Interest from the date of denial of the claim of the complainant till its realization at the rate of 18% p.a.

d) Rs.1,00,000/- being the cost of the present complaint.

e) Rs.2,00,000/- towards harassment, inconvenience and loss of reputation on account of unlawful and unethical activities of the opposite party.

f) Any other relief as this hon''ble commission may deem fit & proper in the light of the facts & circumstances of the case".

5. The Insurance Company could not contest this case as it failed to file the written statement within the prescribed time. Its right to file the written version was forfeited vide order dated 01.02.2016.

6. We have heard the counsel for the parties. It is note-worthy that the complainant has not filed the complete policy. He has filed the cover note only. When the evidence of the OP was stuck off, it should have produced the entire complete policy during its evidence. However, the needful was not done. The repudiation letter dated 06.11.2013, runs as follows:- "In continuation to our earlier communication dated 30/10/13 for the claim on the above said policy wherein Mack Insurance Surveyors & Loss Assessors P Ltd. were deputed for final survey and assessment of loss. On careful perusal of the Survey report & documents on record submitted by you and considering the terms & conditions of the issued Motor policy, we have observed that:-

The loss to the subject machine occurred on 16/09/13 whereas the same was intimated to us on 26/09/13 thus not giving enough opportunity to inspect the subject vehicle and assess the loss in time which is a direct breach and violation of condition no. 1 of the motor policy which reads as " Notice shall be given in writing to the Company immediately upon the occurrence of any accidental loss or damage in the event of any claim and thereafter the insured shall give all such information and assistance as the Company shall require. Every letter claim writ summons and / or process or copy thereof shall be forwarded to the Company immediately on receipt by the insured. Notice shall also be given in writing to the Company immediately the insured shall have knowledge of any impending prosecution, inquest of fatal inquiry in respect of any occurrence which may give rise to a claim under this Policy. In case of theft or criminal act which may be the subject of a claim under this Policy the insured shall give immediate notice to the police and co-operate with the Company in securing the conviction of the offender ".

The damages caused to the above said vehicle / machine are not found to be due to accidental external means. We would like to Quote the Policy wordings in the same regard which reads as " SECTION 1: (LOSS OF OR DAMAGE TO THE VEHICLE INSURED) (subsection 1). The company will indemnify the insured against loss or damage to the vehicle insured hereunder and / or its accessories whilst thereon, (point no. vi) "by accidental external means";

Further, as per point no. 2 of SECTION 1 (LOSS OF OR DAMAGE TO THE VEHICLE INSURED), of the Motor Policy which reads as " The Company Shall not be liable to make any payment in respect of consequential loss, depreciation, wear & tear, mechanical or electrical breakdown, failures nor for damage caused by overloading or strain of the Insured vehicle nor for loss of or damage to accessories by burglary, housebreaking or theft unless such vehicle is stolen at the same time . The loss to the insured vehicle has occurred due to the cause which is an exclusion as per point no. 2 of Section 1 of the Motor policy as stated above.

[EMPHASIS SUPPLIED]

The aforesaid machine was being operated by Mr. Deshraj s/o Mr. Inderbhan Singh and the Operator''s certificate to operate the said machine was not produced for our consideration .

We would like to draw your kind attention towards the letter sent by M/s Mack Insurance Surveyors & Loss Assessors P Ltd. on 14.10.13 wherein the vital information (response to Serial no. 5, 8 & 18) with regard to the incident were not adequately explained by your good self-leading to non-cooperation in concluding the matter investigation. This is also in violation of condition no. 1 of Motor Policy as has been enumerated in point no. 1 above. Independent Surveyor (duly licensed by IRDA), in his detailed report has concluded as under: "For admission of Insurer''s liability, two factors external & accidental must exist simultaneously. As there is no impact from external source (i.e. no overturning) to the machine being used as the tool of the trade, only sudden factor is present. As damages are not due to accidental external means, it is a case of mechanical failure not covered under the policy issued to the insured. The occurrence due to ground condition & load condition is not covered under the policy. Thus the claim settlement is not recommended under COMMERCIAL

VEHICLE PACKAGE MOTOR POLICY"

In view of the above the claim is not tenable under the policy terms & conditions and we are therefore closing this file as "NO CLAIM".

We are sure that you would appreciate our stand that payment of any claim has to be in accordance with the conditions and provision of the policy issued. While expressing our inability to pay this claim due to the above-mentioned reasons, we reiterate our commitment to pay all admissible claims fairly and promptly".

7. The complainant has replied this repudiation letter vide his letter dated 15.11.2013. Counsel for the complainant has invited my attention towards the report of its own surveyor. The following paras are relevant: "IMPORTANT : This is important to understand the operation of the machine. This is long piling shaft which is mounted with front blades. The piling shaft is rotated with a hydraulic head which has high torque force. This cuts the soil deep in the earth. Water is also poured in the drilled hole for reasons 1. To cool the heat generated in operation and keep the blades safe, 2. To soften the soil for drilling, 3. To give binding to the soil in the wall of drilled hole.

The pile drilling is done in steps of about 1 meter each time. The deeper soil is drilled even less than a meter due to hard soil in deeper earth. Once one meter is drilled the soil collected in blade buck is lifted up and thrown out. The depth of the pile is approximated by the shaft that penetrates after drilling. There are occasions when the soil in the pile collapse, but the machine''s own force and sometime additional crane is employed and the rig shaft is pulled out".

He also gives opinion:-

"OPINION : I am of a firm opinion that the loss is due to soil collapsing which may also have stone struck in wall of the pile. The loss is accidental and due to external means. There are no cause observed which is excluded in the policy terms. There is no force applied by the tool of the machine which can cause collapsing of the soil.

The loss is indemnifiable under the policy terms and conditions". He came to the conclusion that the total loss assessed was at:-

"Cost of parts as per quotations Rs. 1,22,18,835.00 Less depreciation @ 15% Rs. 18,32,885.25 Net of parts Rs.1,03,86,009.75 P Add Labour Charges Rs. 8,42,700.00 TOTAL LOSS ASSESSED Rs.1,12,28,709.75 P"

8. Counsel for the complainant vehemently argued that soil is the part of the machine. The machine was purchased in the year 2011 and incident took place on 16.11.2013. Further, it is note-worthy that there was delay in reporting the matter to the Insurance Company, that delay has not been explained to my satisfaction. It is also difficult to understand why was the complete policy not filed. If only cover note was given to the complainant, it was its duty to get it from the Insurance Company. No notice was sent to the Insurance Company, in this regard. No effort was made to get it from R.T.I. Without exclusion clause, the policy is just like a ship without radar.

9. Last but not the least, there is report of the surveyor appointed by the Opposite Party. That carries infinite value. It mentions about the statement of Sh. Deshraj, the relevant extract is reproduced here as follows:- "Note: The operator, Mr. Deshraj statement about the occurrence vide his letter dated 0.10.13 (attached) is given below:-

"I Deshraj (DL No. RJ11/DLC/04/486) on 16.09.13 at 6:00 PM was operating Mait Piling Rig Sr. No. 18091J0912 at site. While I had done the piling upto 40 meters & when I pulled the lever for lifting, suddenly the soil around the rig caved in and there was a ditch around the machine. We wanted to do piling upto 42 meter but could not do so. After that I informed my boss. I have six years experience to operate this type of machine and I am working with my boss. I have six years experience to operate this type of machine and I am working for last two years in this company".

Note: As informed by the operator, he has the experience to operate this special type of vehicle but does not have any training certificate for the same. The operator informed us that they do not have any maintenance log book".

10. It is also note-worthy that the complainant could not produce the detailed report from the manufacturer. The reply of the insured is quoted as follows:- 18 We have advised you to call the Original Equipment Manufacturer''s representative for a detailed inspection. The repair of the machine can be undertaken, however replacement of major items can be done only after we get detailed report from the manufacturer. We have intimated to manufacturer as

soon as we will provide to you.

13. PARTICULARS OF LOSS/DAMAGE As per the instructions received from the insurers, the above accidental / damaged vehicle was carefully inspected/ examined and photographed by the undersigned. Damage caused to it were minutely checked and the cause and nature of accident was noted down. The damages considered are fresh and in accordance with the cause & nature of accident.

14. Provisions Calculation of Insured''s Loss : The assessment of loss is arrived as under:

14.a Considerations

1. The parts claimed appear to be damaged, however exact nature & extent of damage will be known only when the parts of the machine which are buried in the ground, is taken out & checked by experts, most probably by the representative of the supplier. It is only that we can know if the parts which appear damaged can be repaired or have to be replaced. Below detailed calculation are for working out the maximum probable loss to insured.

2. Insured has claimed cost of parts as per the quotation he has received from the manufacturer.

3. The exchange rate, customer duty & VAT are calculated based on prevailing applicable rates.

4. The exact cost will be worked out based on the actual purchase cost when the parts are purchased.

5. Depreciation @ 15% is applied on metal parts for 2 to 3 years of use.

6. Labour charges as claimed appear to be reasonable, however after the mode repair / replacement is finalized, then only exact quantum of labour involved will be known & can be assessed.

7. Salvage Value: To be decided later on.

8. Adequacy of Insurance: To be worked out later.

9. Policy has an Excess of 0.5% of IDV, same is to be applied which works out Rs. 1,52,243.43/- & imposed excess of 7.5% on partial loss / total loss.

11. The surveyor made the following recommendations:- "Thus the claim settlement is not recommended under the COMMERCIAL

VEHICLE PACKAGE MOTOR POLICY due to following reasons:- For admission of Insurers liability, two factors accidental & external means must exist simultaneously. As there is no impact from external source to the machine being used as the tool of the trade, only sudden factor is present. As the forces of destruction were originated by the machine at the time of soil lifting [when the driver pulled the lever] & damages are not due to accidental external means therefore not covered under the policy issued to the insured. The occurrence due to ground condition & load condition is not covered under the motor policy. The above assessment is subject to your final approval and admission of liability as per policy''s terms and conditions.

(H M Walia) MACK INSURANCE SURVEYORS & LOSS ASSESSORS (P) LTD".

12. The case of the complainant is not bolstered by any evidence, what to talk of solid and unflappable evidence. The delay in reporting the matter to the insurance company is also pernicious. The Complainant did not cooperate with the Surveyor fully. The report of manufacturer could have gone a long way to support their weak and stumbling case. We see reason to discard the report of the official surveyor. The but and ben view given by the Complainant''s surveyor carries exiguous value. There is not even an iota of evidence to show that there is any external or internal damage. No expert''s evidence is forthcoming. Soil collapsing is not covered under the policy. Due to lack of evidence the case against the opposite party does not stand proved. The complaint is, therefore, dismissed. No costs.

