(2015) 09 NCDRC CK 0045

In the National Consumer Disputes Redressal Commission

Case No : 293 of 2002

M/S. BEDROCK LIMITED APPELLANT

Vs

NEW INDIA ASSURANCE CO. LTD. RESPONDENT

Date of Decision : 17-09-2015

Acts Referred:

Insurance Act, 1938, Section 64, Section 64(2), Section 64(3), Section 64(4) - Books to be kept by insurers established outside India - Books to be kept b

Citation : 2016 1 CPJ 332

Hon'ble Judges : J.M. Malik, Dr. S.M. Kantikar

Advocate : M.N. Krishnamani, Soumyajit Pani, Rahul Bhandari, Niraj Singh, Jyoti Nagpal

Judgement

1. M/s. Bedrock Ltd., the complainant took a Fidelity Guarantee Insurance Policy dated 16.01.1998, covering a sum of Rs.20,00,000/- for the period from 19.01.1998 to 18.01.1999, from the New India Assurance Co. Ltd., the OP1. Even before 1998, the complainant took similar policies from the OP1. Mr. R.B. Deshpande, was appointed as Branch Manager at Pune Branch of the Complainant. Later on, he was promoted to the post of Area Manager. He was appointed on 08.07.1996. He also got executed Fidelity Guarantee by two Guarantors of Rs.1,00,000/- each, which was duly notarised. It is alleged that Sh.Deshpande started playing truants and finally absconded since 06.06.1998, without any intimation to the complainant''s Branch office at Pune or Head Office. Thereafter, some Dealers, who used to have business dealings with Mr. Deshpande, demanded supply of goods from Sh. Kasthure, the Accounts Officer of the

complainant, Pune Branch, for which they had already placed orders with Mr. Deshpande. Sh. Kasthure, the Accounts Officer, informed the Dealers that certain amounts were overdue, outstanding against them and unless or until the same were paid, further supply could not be effected to them. However, those Dealers replied that they had already given the payment to Mr. Deshpande and denied their liability to pay any further amount. This aroused suspicion about the bonafides of Mr. Deshpande. The records were scrutinised and it transpired that huge amounts of Rs.36.6 lakhs were found mis-appropriated by the said Sh. R.B. Deshpande. Later, Sh. Deshpande vanished into the thin air and could not be traced out.

2. On 30.06.1998, as per the Board Resolution passed by the Complainant, Mr. V.R. Oza, Manager Sales, lodged a report with the police against Sh.R.B. Deshpande. Copies of the police complaint and intimation to the insurance company are placed on record as Annexures - II and III, respectively. As per the requirement by the Maharashtra Government, Sh. Sharad P. Joshi, an independent Chartered Accountant at Pune to audit the accounts of the complainant Branch office at Pune was appointed. He submitted his Audit Report on 30.12.1998. He opined that it was a clear case of fraud. The Audit Report dated 30.12.1998 has been placed on record as Annexure - IV. The complainant received this report on 30.12.1998 and submitted the same to the police on 31.12.1998. FIR was registered on 06.02.1999, and was duly informed to the insurance company vide letter dated 15.02.1999. Copies of FIR and Media Notice have been placed on record as Annexures V and VI, respectively. The total loss came to over Rs.36.00 lakhs but the insurance cover is limited to Rs.20.00 lakhs. It is also averred that insurance limit of per employee in the sum of Rs.4,00,000/- was enhanced to Rs.20,00,000/- vide amendment dated 01.06.1998.

3. Mr. Deshpande was arrested on 18.07.2000. Subsequently, he was released on bail. The Guarantors could not be traced out. Information to this effect was sent to the police vide copy of report, marked as Annexure-VII.

4. M/s. M.B. Nagarkar & Co., was appointed as Surveyors by the insurance company in the months of March-April, 1999. The complainant fully extended the help to the Surveyors vide various letters which have been marked as Annexures - VIII & IX. The said Surveyors submitted their report on 03.02.2000 recommending the claim of the complainant. The complainant sent several letters requesting for early settlement of the claim. Copies of said letters have been placed on record as Annexure - XI (Colly).

5. Subsequently, it came to light that the OP-Insurance Company had ignored the report of the First Surveyor and the Insurance Company had appointed Second Surveyor, calling him as Investigator to reassess the claim, after the expiry of more than two years, after the claim was lodged with the insurance company. The complainant was apprised of this fact vide letter dated 28.07.2000. The complainant vide its letters dated 12.03.2001 and 04.05.2001 requested the OP to settle the claim early, on the basis of the First Surveyor. However, the request made by the complainant did not bring the desired result.

6. On the other hand, the OP-insurance company sent letters dated 16.03.2001

and 11.05.2001 to provide the details to the Second Surveyor. The complainant sent some documents vide letters dated 05.06.2001 and 15.06.2001. The Second Surveyor - M/s. Insight Intelligence, recommended that the matter needs further investigation. Consequently, third Surveyor M/s.B.V. Surveyors Pvt. Ltd., as Loss Assessors, Chandigarh, was appointed. The complainant received letter dated 13.02.2002, from the Third Surveyor, which has been placed on record as Annexure XIII.

7. It also transpired that some of the Dealers with whom Sh.R.B.Deshpande had connived and colluded to defraud the complainant''s funds have been denying that there were outstanding dues from them on the pretext that Sh. Deshpande had offered them extra discounts. Thus, it is clear that Sh.Deshpande and the Dealers had colluded with each other to earn unlawful gains by unfair means. The complainant company, as a measure of abundant caution, filed a civil suit against some of the Dealers so that the due amounts recoverable from those Dealers do not become time barred. The complainant had already given subrogation letter to the insurance company to that effect. The insurance company would be entitled to be subrogated upto Rs.20.00 lakhs. Consequently, this complaint was filed on 08.08.2002, before this Commission with the prayer, while restricting the claim to Rs.20.00 lakhs only, for its reimbursement. It has also claimed interest at Rs. 21,05,000/- from June, 1998 to June, 2002, @ 18% per annum, Rs.5,00,000/- towards compensation for loss of profits and harassment and Rs.25,000/- towards costs of proceedings, total being Rs. 46,30,000/-.

8. The OP catalogued the following defences, in their written statement. The above said policy was issued for the period from 19.01.1998 to 18.01.1999, in respect of employees of the complainant, for a sum of Rs.20,00,000/- with a limit of Rs.4,00,000/- per employee. On 28.05.1998, the complainant requested the OP to enhance the sum assured per employee, from Rs.4.00 lakhs to Rs.20.00 lakhs, pursuant to which, the OP issued endorsement dated 01.06.1998 to that effect. On 21.09.1998, the complainant informed the OP that Sh.Deshpande had committed some misappropriation of funds.

9. The OP appointed M/s. M.B. Nagarkar & Co. as Surveyors, who submitted their report dated 03.02.2000 in which they assessed the loss at Rs.22,86,475/-. A scrutiny of the report reveals that the Surveyor had not dealt with the aspect as to whether, the complainant had the knowledge of misappropriation of funds by the employee, before applying for the enhancement of the limit of liability of the policy, from Rs.4.00 lakhs to Rs.20.00 lakhs, per employee, on 28.05.1998?. The FIR lodged by the complainant mentions that four Memos were issued by the complainant to Sh. Deshpande, one on 16.01.1998 and three on 07.05.1998, for irregularities and the said Memos were issued before the date of endorsement, i.e. the First Surveyor did not examine the internal audit reports, accounts and sales records, FIR, etc. On 19.05.2000, the OP sought clarification from the Surveyor, but it did not evoke any response, till 10.07.2000.

10. Consequently, the Second Surveyor, M/s. Insight Intelligence was appointed. It submitted the report on 10.11.2001. He confirmed that the complainant was well aware of the misappropriation of the funds by the employee, before-hand. The Second Surveyor advised the OP to obtain the opinion of Expert for examining the annual reports, audit reports and various other reports issued by the complainant.

11. M/s. B.V. Surveyors Pvt. Ltd., were appointed as Third Surveyor, who examined all the documents mentioned above and submitted their opinion dated 06.08.2002. It opined that the complainant had concealed from the OP, the above said fact, requesting enhancement of limit of liability made on 28.05.1998, which is a clear violation of condition Nos. 5, 8 and 11 of the policy. Consequently, the liability of the complainant is restricted to Rs.4.00 lakhs, per employee. It also transpired that Sh. Deshpande has committed a defalcation in cash collection to the tune of Rs.2,85,976/-. The OP accepted the said opinion and claim of the complainant to Rs.2,81,021/- which already stands paid to the complainant.

12. The police recorded the statements of various witnesses who clearly stated that the complainant was well aware of the misappropriation made by Sh. Deshpande, the employee of the complainant.

13. We have heard the counsel for the parties. Learned counsel for the complainant vehemently argued that the appointment of third Surveyor casts a film of doubt over the bonafides of the OP. Our attention was drawn towards the authority of the Hon''ble Supreme Court reported in Sri Venkateswara Syndicate Vs. Oriental Insurance Co. Ltd. & Anr., Civil Appeal No.4487 of 2004, decided on 24.08.2009, wherein it was held:- "22. .... There is no disputing the fact that the Surveyor/Surveyors are appointed by the insurance company under the provisions of Insurance Act and their reports are to be given due importance and one should have sufficient grounds not to agree with the assessment made by them. We also add, that, under this Section the insurance company cannot go on appointing Surveyors one after another so as to get a tailor made report to the satisfaction of the concerned officer of the insurance company, if

for any reason, the report of the Surveyors is not acceptable, the insurer has to give valid reason for not accepting the report. Scheme of Section 64-UM particularly, of sub-sections (2), (3) and (4) would show that the insurer cannot appoint a second surveyor just as a matter of course. If for any valid reason the report of the Surveyor is not acceptable to the insurer may be for the reason if there are inherent defects, if it is found to be arbitrary, excessive, exaggerated etc., it must specify cogent reasons, without which it is not free to appoint second Surveyor or Surveyors till it gets a report which would satisfy its interest. Alternatively, it can be stated that there must be sufficient ground to disagree with the findings of Surveyor/Surveyors. There is no prohibition in the Insurance Act for 18 appointment of second Surveyor by the Insurance Company, but while doing so, the insurance company has to give satisfactory reasons for not accepting the report of the first Surveyor and the need to appoint second Surveyor".

14. It must be mentioned that the First Surveyor''s report is dated 03.02.2000, Second Surveyor''s report is dated 10.11.2001 and Third Surveyor''s report is dated 06.08.2002. It was also submitted by the counsel for the Complainant that there is an inordinate delay in repudiating the claim of the complainant. More than four years'' have elapsed when the claim of the complainant was repudiated.

15. The complainant had the knowledge of misappropriation of funds, before enhancing the limit of liability from Rs.4.00 lakhs to Rs.20.00 lakhs, per employee. The letter dated 19.05.2000 written by the OP to M/s. M.B. Nagarkar& Co., the First Surveyor, is crucial and goes a long way to answer this knotty question. The first portion of 1 para of the said letter is relevant, which is st reproduced here, as under :- " 1. Since the insured has enhanced the per employee limit in between the policy period, as such, possibility of defalcation having come to his notice before the effective date of endorsement, i.e., 01.06.1998 cannot be ruled out. In the FIR lodged by the insured it is clear that four Memos were issued to Sh. Deshpande on 16.01.1998, 07.05.1998, 07.05.1998 and 07.05.1998 for irregularities in sale. This is before the date of endorsement. Do you think that further investigation by professional Investigator could help us ascertain the facts. Also, if giving of undue discounts or committing irregularities in sale is taken as fraud/dishonesty then as per the policy conditions "the company shall not be liable if the insured shall continue to entrust the employee with money or ....".

16. It is noteable that M/s. M.B. Nagarkar & Co., did not care a fig to reply to this letter. The silence on the part of first Surveyor is pernicious and smacks of malafide intention on the part of first Surveyor. This letter clearly goes to show that, why the Second and Third Surveyors were appointed. The explanation given by the OP appears to be quite lucid.

17. The facts are stubborn things. Certain dates are very crucial in this case. The Memos given to Sh. Deshpande pertain to the year 1998, i.e., 16.01.1998, 07.05.1998, 07.05.1998 and 07.05.1998. The complainant has requested for deletion of the Second Clause, limiting the claim as to individual employee to Rs.4.00 lakhs. The said Clause was deleted on 01.06.1998. It is thus clear that the complainant was already in the knowledge that its employee had committed misappropriation of funds. This is a material fact and had the complainant apprised of the above said Memos to the notice of the OP, it would not have made the above said amendment. Nothing can obscure the fundamental facts.

18. Mr. Vinod Inamdar, Investigator, M/s.Insight Intelligence, in his letter (Confidential) dated 10.11.2001, mentions, at Para No.11, as under :- " In view of the above and considering all the points raised by you in your letter addressed to M/s. Nagarkar Surveyors and various points raised by us, we would like to conclude the case as under :

1. At the outset, we have to state that the company had sustained huge financial loss due to the fraud committed by their Pune Branch Manager. The fraud was committed by Mr. Deshpande by way of giving more and more discount to parties directly controlled by him only. It appears from all records that he has always overlooked the limits of discount given by the company. The company have given the memos in writing to that effect, i.e., on 16.01.1998, 07.05.1998, 07.05.1998, for irregularities in sale".

19. It was also mentioned in the report, as under : " Mr.Satish Doshi of Satish Sales recorded by Police, that the company officials were fully aware that Mr. Deshpande was crossing his limits and overlooking the discount policy of company".

20. The FIR was lodged on 06.02.1999. It mentions time period, i.e. 06.06.1998. This is a case of material suppression of facts. So far as insurance policy is concerned, it is a contract of insurance following in the category of Contract - Uberimae fidei , meaning, a contract of utmost good faith on the part of the assured. In United India Insurance Co. Ltd. Vs. M.K.J. Corporation, III (1996) CPJ 8 (SC)1996) 6 SCC 428 , the Hon''ble Supreme Court has observed that it is a fundamental principle of insurance law that utmost faith must be observed by the contracting parties. Good faith forbids either party from non-disclosure of the facts which the party privately knows, to draw the other into a bargain, from his ignorance of that fact and his believing the contrary. (Also see: Modern Insulators Ltd. Vs. Oriental Insurance Co. Ltd., II (2000) SLT 323 = I (2000) CPJ 1 (SC) = (2000) 2 SCC 734).

21. It is also noteworthy that the complainant did not take due care. They were aware for a long time, i.e., about a year or so, that irregularities were being committed by Mr. Deshpande, time and again, but they did not take quick action. No FIR was lodged, immediately. The Departmental Enquiry was being conducted in a lackadaisical manner. The over-all audit report for the period April, 1997 to August, 1997, which was prepared during the period from 25.09.1997 to 01.10.1997, which is a lengthy one, but contains the following extracts:- "Sales / Sales Policy :

.... While scrutinising the ledger, it has found bill to bill amount has not collected from some partners, has collected on Account Payment basis. Because of this, what it has found, one bill amount was to recover from party, i.e., after adjusting discount rebates, balance amount. Next bills recovered and previous bills still pending.

Secondly, it has found while scrutinising discount entries have not reversed against dishonoured cheques, from April ''97 to August ''97. We also found cheque repeatedly dishonoured, but goods supplied to following parties ..... "

In case of discount/rebates & special rebates are allowed as per company policy, somewhere in case of some parties it was exceeded by Branch .... (illegible) query sheets from April to August, 1997, but Branch Manager has assured that in future, such mistakes will not take place, they will strictly follow company sales policy".

B. Discount calculated by company from the date of issue of bill but outstation dealers receive goods after a week''s period or more. System of discount calculation needs to change".

D. Some of the Dealers are not receiving goods against order placed, they receive shorty quantity & other brand goods against brand required.

E. Some dealers require authorised dealership certificate from Bed Rock Ltd.".

22. Now, we turn to the policy. Clause 5 of the policy, is reproduced, as follows : " Unless the company be advised and its written approval be obtained, the company shall not be liable hereunder in the event of any change in the nature of the business of the insured or in the duties and conditions of service of the employee or if remuneration of the employee be reduced or its basis altered or if the precautions stated by the Insured with regard to accounting be not duly followed or if the Insured shall continue to entrust the employee with money or goods after having knowledge of any material fact bearing on the honesty of the employee".

23. It is noteable that First Memo was given on 16.01.1998. No reply was given to it by Sh. Deshpande. Thereafter, Three other Memos were issued on 07.05.1998, but no reply was given. A doubt crops up, whether, Sh. Deshpande is working in cahoots with other employees and dealers, as well. Everybody was well aware that Sh.Deshpande left no stone unturned in misappropriating the funds of the complainant, but there was huge delay, which was never explained. The complainant tried to wrench the facts from their real significance. The skimble scamble explanation given by it further weakens its case. It has made an attempt to pull the wool over the eyes of Law.

24. Although, Mr. Deshpande was stationed at Pune and the Head Office was situated at Ludhiana, yet, it does not take so much time to make investigation about this serious case.

25. Thus the value of complainant''s case evanesces. Its attempt to tilt at windmills does not succeed. The complaint is therefore dismissed. No costs.

