(2015) 03 NCDRC CK 0073

In the National Consumer Disputes Redressal Commission

Case No : NO 471 of 2002

M/S. JAI MATA SPINNERS LTD. — APPELLANT

Vs

NEW INDIA ASSURANCE CO. LTD. — RESPONDENT

Date of Decision : 10-03-2015

Acts Referred:

Constitution of India, Article 226 - Power of High Courts to Issue certain writs

Citation : 2015 3 CPJ 35

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

Advocate : Vipin Nandwani, S.M. Tripathi

Judgement

1. Jaimata Spinners Ltd., the complainant, filed this complaint against the insurance company, OP, on the ground that the factory was set at fire and they have claimed a sum of Rs.42,07,476/- as the amount of loss suffered by the complainant in the fire with interest @ 18% p.a., from the date of incident, i.e., 03.05.2001, and Rs.10,00,000/- as compensation. The complainant has also prayed that OP be directed to pay the interest already paid to Canara Bank, Karnal, as per the accounts maintained by the Bank.

2. The facts leading to the present case are these. The complainant, having its registered office at Jaimata Building, Opposite Sabzi Mandi, Karnal, Haryana and factory premises at 117/8, K.M. Stone, Delhi Side, G.T. Road, Karnal, Haryana, business of the complainant was closed due to paucity of funds as the OP has repudiated the claim. The complainant company had raised funds from Canara Bank, Kunjpara Road, Karnal, i.e., O.C.C. limit of Rs.35.00 lakhs and M.T.L. of Rs.15.00 lakhs.

3. Unfortunately, on 03.05.2001, when the factory was closed, there was a fire in the factory at about 6.30AM. The watchman sent the information to Sh. Satpal, through whom, the present case has been filed. Sh. Satpal informed the fire brigade and lodged the complaint with the Police Station, Madhuban District, Karnal and also sent information to the OP on the very same day.

The fire brigade came to the spot at about 7.25 AM and were able to extinguish the fire only after about 5 hours.

4. The OP appointed one, Sh. T.S. Bhayana, as first Surveyor, who visited the spot on the same day and requested the complainant to furnish certain documents. The complainant lodged claim in the sum of Rs.42,07,476/- as detailed below :- "a) Loss of stock (including raw material, good under process, finished goods etc.) Rs. 35,79,758/-

b) Building repair estimate Rs. 03,57,568/

c) Machinery repair estimate Rs. 00,76,500/-

d) Fire brigade charges Rs. 00,02,200/-

e) Fire equipment refilling Rs. 00,02,000/-

f) Store/Stock of accessories Rs. 01,79,450/-

g) White Wash Charges of the Building Rs. 00,10,000/-"

5. It is alleged that the complainant received a message from the Surveyor that in case, the complainant wants to get his claim settled according to his wishes, then he should grease his palm as the higher officer of the company were asking for the amount. A letter dated 22.12.2001 was received by the complainant from the Surveyor assessing the loss to the tune of Rs.5,13,452/- and that was subject to confirmation of fire. It is alleged that grounds of assessment given in the said letter were factually incorrect and the same was replied vide letter dated 29.01.2002.

6. In the meantime, Sh. N.P. Punj, who claimed himself to be an Investigator appointed by the OP asked the complainant to produce the record and the complainant did the needful. On 10.09.2002, the complainant received letter dated 29.09.2002, from the OP, repudiating the claim of the complainant on the basis of survey report of Sh. T.S. Bhayana, also informing the complainant that the claim was reassessed / reinvestigated by one Mr. R.K. Jain. However, there was no mention of Surveyor, Sh.N.P. Punj.

7. A Legal notice dated 19.10.2002 was served on the OP. It is alleged that the OP had not supplied the complainant with copies of the insurance policies. Despite full co-operation of the complainant extended to the Surveyors, yet the OP did not settle/deny the claim till one year three months. No explanation was forthcoming. The record of the complainant clearly goes to show that he suffered a loss in the sum of Rs.42,07,476/-. The complainant was left with no funds to restart its business and on the other hand, Canara Bank and other creditors were pressing hard for the repayment of the amounts due towards them. The interest was piling on and on. The complainant was compelled to dispose of its machineries for just a sum of Rs.5,00,000/-, which was paid to the Financiers.

8. On the other hand, the OP enumerated the following defences. The

complainant is not a consumer. The services rendered were for commercial purposes. Matter involves complicated questions of fact and law which requires elaborate evidence. The complainant submitted papers before Sh.T.S.Bhayana, in piece-meal. The doubts raised by the Surveyor were not cleared. He also found many other discrepancies. The Surveyor had commented on the cause of fire that it was perhaps not accidental. Consequentially, the OP found it appropriate to appoint an Investigator. Mr. Punj was appointed initially, as Investigator, but due to some health problems, Mr. Punj could not carry on with the assignment and in his place, Mr. R.K.Jain, was appointed for investigation. Mr. R.K. Jain contacted the complainant at Karnal and discussed about the loss. Sh. R.K. Jain, observed that all burnt and / or damaged and / or safe stocks along with all the machinery had been removed and / or disposed of and only the fire affected building was left, as it is after the fire, the incident was inspected. The insured did not extend co-operation. Thereafter, the Investigator took the opportunity for verifying from the Haryana Sales Tax Department, Police Authorities, Central Excise Department at Sonepat for verifying TR12 quarterly returns. However, in the Central Excise Department, records of the insured could not be traced by the authorities. Sh. R.K. Jain, requisitioned the services of M/s. Arvind Krishan Associates, Chartered Accountants for verification of the accounts of the complainant company who checked the accounts for the relevant period. It was observed that a large number of discrepancies were found in the cash book, ledger book, purchase book, etc. M/s. Arvind Krishan Associates came to the conclusion that the accounts books were incomplete and incorrect leading to the conclusion that there was concealment of facts by the insured.

9. It was further contended that the insurance company applied its mind and gave a reasonable ground while repudiating the claim of the complainant. All the other allegations have been denied.

10. We have heard the counsel for the parties. Learned counsel for the complainant vehemently argued that the report of Mr.R.K.Jain is absolutely incorrect. They have extended full co-operation to Mr.R.K. Jain but it was not incumbent upon them to do the same after the survey report was filed by Sh. T.S.Bhayana. The counsel for the complainant invited our attention towards the letter dated 22.12.2001 sent by Sh. T.S. Bhayana, wherein he suggested that the loss was extended to Rs.5,13,452/- and that, too, was subject to confirmation of fire. The counsel for the complainant further argued that they have protested this letter vide reply dated 29.01.2002, where an attempt was made to remove all the doubts raised by Sh. T.S.Bhayana. It was argued that after more than six months from the date of mishap, the complainant received letter dated 22.12.2006 which has been detailed above. It is alleged that the Surveyor did not send any copy of his report to the complainant. No justification was forthcoming for disbelieving the records and account books, maintained regularly and produced before the Taxation and other authorities by the complainant.

11. It was further argued that out of blue, the complainant received another

letter dated 04.04.2002 from Sh. N.P. Kunj, who claimed to be an Investigator, appointed by OP, vide letter dated 29.08.2002, received on 10.09.2002/ Again, the complainant was shocked to learn that the claim of the complainant was repudiated on the basis of survey report of Sh. Sh. T.S.Bhayana, which was stated to have been reassessed / reinvestigated by one Mr.R.K.Jain, who had never come into picture, nor did he contact the complainant. The repudiation was made on the ground that the cause of fire / accident does not seem to be accidental in nature, the complainant did not extend full cooperation, withheld the records for a long time, discrepancies were found in the account books.

12. It was submitted that Sh. Bhayana did not give any confirmed information with regard to fire. He merely reported that the cause of fire many not be accidental. The Surveyor also opined that even after inspection, the cause of fire seemed to be unknown. On the other hand, the surveyor states that there was no power to control panel system of main supply and on the other occasion, he has further observed that the factory was being run in a day shift which was not possible if there was no power supply in the factory. Police have ruled out any malicious act or have registered the fire as accidental, which fact was totally ignored by the OP.

13. The counsel for the complainant has placed reliance on a case decided by this Commission titled as Sudhakar Traders Vs. National Insurance Co. Ltd., IV (2005) CPJ 25 (NC) and Manmandir Synthetics Ltd. Vs. New India Assurance Co. Ltd., IV (2005) CPJ 6 (NC), where, this Commission has held that in such circumstances, as these, the reports submitted by the police authorities after investigation stating the cause of fire as accidental should not be over looked and merely because the Surveyors have not come across any specific evidence to conclude that the cause of fire was of electrical origin, would hardly be a ground for holding that cause of fire was not short-circuit or accidental. Lastly, it was submitted that the report of the OP is baseless as it is evident that Arvind Krishan Associates, the alleged Chartered Accountants, have prepared the report without the inspection of the records such as cash book, ledger, purchase books, etc., It was urged that complainant was entitled to entire amount in the sum of Rs.42,07,476/-.

14. We find force in the argument of the counsel for the complainant in a measure. First of all, it is difficult to fathom, why the second Surveyor was appointed in this case. No satisfactory explanation is forthcoming. The counsel for the OP took a specious plea that since Sh.T.S.Bhayana could not give opinion, whether, the accident was accidental or self-managed, therefore, they appointed the second Surveyor. We are able to locate few authorities, first being reported in Sri Venkateswara Syndicate Vs. Oriental Insurance Co. Ltd. & Anr., (2009) 8 SCC 507. Paras 21 & 22 of the said judgment, which are relevant, are reproduced here, as under :- 21)The Insurance Regulatory Authority (`IRDA'' for short) has formulated Insurance Surveyors and Loss Assessors (Licensing, Professional Requirements and Code of Conduct) Regulations, 2000, which regulate the

licensing and the work of surveyors. These regulations stipulate that the surveyor shall investigate, manage, quantify, validate and deal with losses arising from any contingency and carry out the work with competence, objectivity and professional integrity by strictly adhering to the Regulations. 22)The assessment of loss, claim settlement and relevance of survey report depends on various factors. Whenever a loss is reported by the insured, a loss adjuster, popularly known as loss surveyor, is deputed who assess the loss and issues report known as surveyor report which forms the basis for consideration or otherwise of the claim. Surveyors are appointed under the statutory provisions and they are the link between the insurer and the insured when the question of settlement of loss or 17damage arises. The report of the surveyor could become the basis for settlement of a claim by the insurer in respect of the loss suffered by the insured. 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 18appointment 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.

15. In New India Assurance Co. Ltd. Vs. Protection Manufacturers Pvt. Ltd., AIR 2010 SC 3035 , it was held that in view of Section 64 UM (3) which provides power only with authority, i.e. IRDA and not the insurer, the appointment and report of second Surveyor are nonest. OP could not have appointed the second Surveyor, hence the appointment and report of the second Surveyor are non-est.

16. Similar view was taken in a judgment of this Commission titled M/s . Jagnnath Poultries Vs. New India Assurance Co. Ltd., Original Petition No.73 of 2002, decided on 19.01.2012.

17. The next submission made by the counsel for the OP was that vide FIR, the police raised a doubt about the incident. The complainant has filed its English version. It is note-worthy that in the English version, where the doubt was raised

by the police, has been omitted. The Commission should not be misled like this. Its responsibility lies at the foot of the Advocate. The Advocate must get correctly translated the papers and secondly the paper must be legible. Full assistance to the Commission should be extended. There is much difference of assistance extended to the Surveyor and the assistance extended to the Commission/Tribunal or Court. This is a very serious matter. We have gone through the Hindi version which clearly goes to show that after inspecting the spot a doubt crept up in the mind of the investigating officer because the goods were picked up from three places and two packets were prepared on the spot.

18. Counsel for the OP vehemently argued that, under these circumstances, and since the complainant has not come to the Commission with clean hands, therefore, he is entitled to no compensation at all.

19. The Counsel for the OP has also invited our attention towards the report submitted by Trilok Singh Bhayana, and its relevant extracts are reproduced here, as under :- " The office where the accounting work is done is also situated within the factory and is controlled by an accountant. The insured submitted the papers in piece meal and was asked to substantiate the loss to stocks by confirming the purchases which has not reached the factory or sold at place of despatch itself. The insured was asked to submit the books of account during my subsequent visits by me and my consultant chartered accountants. As the insured''s accountant had recently got married, had gone on leave and completion of documents was delayed. Also the insured promises to substantiate the purchases for which doubts were raised by us but till date the same has not been confirmed by the insured. As these were not confirmed by the insured are not being considered in our assessment. Also the sales shows downward trends but the purchases shows upward trend which is not in line with the business system where the firm is going in losses or marginal profits". "The factory worked for merely about 115 hrs in April, as calculated from Power & fuel consumption".

"The insured was asked to submit the estimates / bills of repair for the parts required replacements and or repair. The insured submitted the estimates for repair of machinery and then repaired the machine as said above but did not submit any bill. After scrutiny of estimates, physical verification of affected stocks volumetrically, the assessment of the loss discussed at length and the insured has though verbally agreed to my assessment but was insisting for the claim bills raised by him and the reasons for the best known to insured. The assessment is further subject to your approval and policy conditions".

"The insured arranged machinery loan from Canara Bank to the tune of 2 lacs and working capital finance is availed in the form of C/C limit amounting 35 lacs also from Canara Bank, Karnal. The factory now works "off and on" as the season being sluggish and as on date of loss the factory was completely closed and without any power supply on to the factory and was up to control panel system of main supply".

"The books of account are audited by Chartered Accountant and the Balance Sheets for the last three years duly audited were verified by me along with my Consultant Auditors. The balance sheet shows the downwards trend of manufacturing and sales / turnover and some due recession in the trade in the market and some due to quality standards. As such, one care was disposed off by the insured and added the cards for carding of cotton waste, etc. The insured''s firm also incurred net losses till date from the date of incorporation after adjusting depreciation but otherwise the G.P. is negligible".

20. Counsel for the OP succinctly argued that it is clear that the complainant did not extend full co-operation to the Surveyors and its account books are not above board.

21. Counsel for the OP also laid emphasis on the report of Mr.R.K.Jain, dated 27.07.2002 which was filed after a lapse of 1 year 2 months, from the date of incident. In his report, Sh.R.K. Jain also submitted that the complainant did not extend full co-operation. However, that report has to be eschewed out of consideration for the reasons stated above.

22. Despite all these flaws pointed by the counsel for the OP, we see no reason to discard the statement of the first Surveyor. If the OP has proved what was the cause of incident, the complainant must get its benefit. It is the OP and nobody else who is to carry the ball to prove as to what is the cause of the accident. They could not deny the cause as stated in the police report, Fire brigade report, etc. If the cause of action is unknown, it is for the OP to find out what is the real cause.

23. It is well settled that the report of the surveyor is to be given due weight. See the law laid down in United India Insurance Co. Ltd., & Ors. Vs. Roshan Lal Oil Mills Ltd. & Ors., (2000) 10 SCC 19 and). D.N.Badoni Vs. Oriental Insurance Co.Ltd, 1 (2012) CPJ 272 (NC).

24. Record reveals that the complainant was facing financial constraints. The account books, ledger, etc., were showing downward trend of manufacturing and sales turnover due to recession in the trade in the market, the same was due to quality standards. The complainant has failed to show by solid and concrete evidence that any of the Surveyors had asked him to pay bribe. This is mere allegation which is not bolstered with any evidence. It does not behove on the part of the complainant to level such like allegations, without any evidence.

25. In the result, while allowing the complaint, we place reliance on the report of the first Surveyor and direct the OP to pay a sum of Rs.5,13,452/-, within 90 days'' from the receipt of copy of this order. Due to the bizarre conduct of the complainant and his non-cooperative attitude towards the Surveyor, we grant him no interest, at all. There shall be no order as to costs. However, if the said amount is not paid within the said 90 days'', the OP will pay interest @ 9% p.a., from the date of expiry of 90 days'', till its realization.

