(2016) 02 NCDRC CK 0051

In the National Consumer Disputes Redressal Commission

Case No : 1266 of 2014

M/S. MASTER COLD STORAGE & ICE FACTORY — APPELLANT

Vs

NEW INDIA ASSURANCE COMPANY LTD. & ANR. — RESPONDENT

Date of Decision : 08-02-2016

Acts Referred:

Citation : 2016 2 CPR 13

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

Advocate : M.S. Sethi, Salil Paul

Judgement

1. This order shall decide the two above-said cross appeals, which pertain to same impugned order dated 24.09.2014. FA 1266/2014 has been filed by the complainant, M/s. Master Cold Storage & Ice Factory, for enhancement of the award granted by the State Commission and FA 39/2015 has been filed by the OP, New India Assurance Co. Ltd., for quashing the order of the State Commission.

2. The appeal filed by the Insurance Company is delayed by 46 days. We have perused the application for condonation of delay. It is explained that local Advocate Sh. P.S. Saini, gave the opinion dated 31.10.2014 that it was not a fit case to file the First Appeal before the National Commission. Copy of the opinion has been placed on record as Annexure X1. The Appellant

took another opinion from Sh. Hemant Kalia, Advocate, who gave his opinion on 26.12.2014 that it was a fit case to file the First Appeal. Copy of the opinion dated 26.12.2014 has been placed on record as Annexure X2. Thereafter, The Deputy General Manager gave the approval to file this appeal (FA No. 39/2015), on 30.12.2014. Consequently, the said First Appeal was filed on 13.01.2015. The Appellant has referred to few authorities, reported in (1) 2012 (4) Scale 152, titled S. Ganesharaju (D) through LRs & Anr. Vs. Narasamma (D) through LRs & Ors. (2) 2012 (7) Scale 230, titled B. Madhuri Goud Vs. B. Domodar Reddy (3) AIR 1987 SC 1353, titled Collector, Land Acquisiton, Anantnag & Anr., Vs. Mst. Katiji & Ors. and (4) I (2012) CPJ 4 NC, titled National Travel Services Vs.

Gaurang Films.

3. The counsel for the complainant has contested this application and cited few authorities reported in (1) United India Insurance Co. Ltd. Vs. Mohan General Store, RP No. 4558 of 2014, decided on 24.03.2015, wherein reliance was placed on authorities of the Hon''ble Supreme Court (2) Executive Engineer, Electricity Distribution Division Vs. Mukut Bihari Srivastava, RP No.3470 of 2014, decided on 02.01.2015 (3) State of U.P., through Executive Engineer & Anr. Vs. Amar Nath Yadav, 2014 (1) Civil Court Cases 690 (SC) and (4) Anshul Aggarwal Vs. New Okhla Industrial Development Authority, IV (2011) CPJ 63 (SC).

4. We are of the considered view that in view of the above said authorities, the delay of 46 days'' is a small delay and the same can be condoned by payment of adequate costs to the complainant. We, therefore, condone the said delay subject to the payment of costs in the sum of Rs.15,000/- by the OP, in favour of the complainant, which be paid within 90 days from the receipt of copy of this order, otherwise, it will carry interest @ 9% p.a., till its realisation.

5. Now, we come to the merits of these cases. M/s. Master Cold Storage & Ice Factory, the complainant, is a Cold Storage, situated at Village Sadha Chak, District Jalandhar. The complainant procured a Fire and Special Peril Insurance Policy for the period 17.01.2011 to 16.01.2012 for a sum assured at Rs.1.50 crores, out of which, Rs.1.30 crores were towards the building super structure and Rs.20.00 lakhs towards the plant, machinery and accessories, from the New India Assurance Co. Ltd., OP1.

6. Unfortunately, on 05.06.2011, a storm hit the second chamber of the complainant from northern side at about 9.30 PM due to which extensive damage was caused to the second chamber as ceiling of the building fell down which resulted into the fall of whole internal structure of the chamber. The first chamber is situated adjoining to the southern side of the second chamber, which remained intact. OP was intimated about the said destruction on the next day, i.e., 06.06.2011. OP1 deputed M/s. Vij Engineers Enterprises, Surveyors and Loss Assessors - OP6, to assess the loss. OP6 conducted the necessary investigation. However, as the OPs were not co-operating with the complainant, the complainant, after giving notice to the OPs, started dismantling the damaged chamber after 11/2 months of damage, as it was filled with the potatoes belonging to the other farmers / customers, in order to save the stock. On instructions from the OP6, the complainant procured estimated loss report from R.K. Khosla, Private Architect (unofficial), Valuer and Interior Designer, Jalandhar and then detailed estimate from M/s. Dhir

Associates, Government Approved Valuer, Jalandhar (unofficial), which was assessed to be Rs.58,15,330/-.

7. The OPs vide letter dated 04.10.2011 informed the complainant that they had visited the affected site on 31.08.2011 along with Surveyors, OP6 and further observed that the damaged building had been demolished but they did verify the

portion of the bent/mangled steel structures in open. Thereafter, the OPs appointed second Surveyor , i.e. Protocol Surveyors, OP5. OP1, vide letter dated 08.11.2011 asked the complainant to provide clarifications as well as documents to OP5. The complainant vide its letter dated 31.01.2012, informed the OP5 that it had sought information under the RTI Act from the OPs and the queries raised by OP5 would be replied. However, OP3 did not allow the complainant to inspect the claim file. A warning was given to the complainant that in case, necessary documents were not supplied to OP5, within time, then they would close the file as "no claim". After some time, it was replied that OP6 had supplied preliminary survey report dated 08.06.2011 without awaiting the documents. The claim of the complainant was repudiated for non-supplying of the documents. The relevant portion of the repudiation letter dated 23.04.2012, runs as follows :-

" .... The Surveyors also vide their letters dated 08.11.2011, 20.12.2011, 27.12.2011 and even a regd. Letter dated 08.01.2012, have requested to your goodselves to supply the requisite information documents as referred therein. The Surveyors waited till the end of March, 2012 and they have also reported us that the cause of loss does not appear to be any of peril as per the Fire Policy and further they have quoted condition No.6.1 of the policy insurance, which reads as under :-

" 6.1 The insured shall also, at all times, at his own expenses, produce, procure and give to the company all such further particulars, plans, specification books, vouchers, invoices, duplicates or copies thereof, documents, investigation reports (internal / external) proofs and information with respect to the claim and the origin and cause of loss and the circumstances under which the loss or damage occurred and any matter touching the liability or the amount of the liability as may be reasonably required by or on behalf of the company, together with a declaration on oath or in other legal form of the truth of the claim and of any matters connected therewith".

In view of the premises written above, your claim does not fall within the limits/ ambits of policy of insurance issued to you, thus, is hereby repudiated".

8. The instant complaint was filed with a direction to the OPs to pay a sum of Rs.58,15,330/- towards reinstatement of the insured building along with interest @ 15% p.a., from the date of loss, till realisation. It was also prayed that compensation in the sum of Rs.10,00,000/- for mental agony and Rs.55,000/- towards legal expenses, be also awarded to the complainant.

DEFENCE :

9. The OPs have listed the following defences. The complainant is carrying on its business on commercial activities of cold storage, therefore, it does not come within the purview of definition

of ''consumer'' and as such, the complaint is not maintainable. M/s. Vij Engineers Enterprises raised some queries regarding the cause of loss, through their letter dated 04.08.2011 wherein two glaring facts were brought to the notice of the complainant, viz., cause of loss in intimation letter has been mentioned as building damaged suddenly and information regarding alleged loss was given to the police on 16.07.2011, whereas, the loss had occurred on 05.06.2011 at about 9.30PM. The Surveyors also observed that the loss could not occur due to storm as roof structure made of ACC sheets found intact. M/s. Vij Engineers Enterprises vide report dated 08.06.2011 reported that RSJ Structure made of channel and pipe etc., suddenly tilted as welding joints broken due to overloading of potatoes bags or bad workmanship of the steel structure, thus RSJ structure struck with walls and damaged ''insulation'', brick-work etc., and there is no liability of the underwriter in this case. Further, M/s. Protocol Surveyors & Engineers (P) Ltd., took photographs of the building and raised questions from different angels. They raised a number of queries to the complainant, which were never answered. It also came to the conclusion that there was no storm and closed the file as "no claim".

FINDINGS OF STATE COMMISSION:

10. The State Commission accepted the complaint and directed the OPs to pay a sum of Rs.33,72,240/- in case the salvage is kept by the complainant, otherwise, if the salvage is not kept with the complainant, the OP will pay Rs.15 lakhs on account of salvage, in addition to the amount of Rs.33,72,240/- to the complainant. Further, the OPs will pay interest on this amount @ 9% p.a., from the date of filing of the complaint till the payment. The State Commission also granted compensation to the tune of Rs.100,000/- and Rs.11,000/- as litigation expenses.

SUBMISSIONS AND FINDINGS:

11. The principal question swirls around the controversy "whether, "insulation", is covered by the insurance policy and whether, it was damaged by the "storm"?".

12. We have heard the counsel for the parties and perused the documents on record. The Policy, Ex.C-3 describes the property in question as under :-

"Rs.1,30,00,000/- on building used for cold storage purpose includes boundary wall sheds, etc. Rs.20,00,000/- on plant, machinery whilst lying or fitted at above said cold storage and similar other items related to insured''s trade".

13. The learned counsel for the complainant has invited our attention towards the policy. There is a column of description of property, as mentioned in Ex. C-3, already quoted above. There is a detailed fire policy which mentions as under :-

" Scope

Properties that are covered :

All moveable / immoveable properties of the proposer on land (excluding those in transit) broadly categorized as follows :-

1. Building (including plinth and foundations, if required):

- Whether completed or in course of construction (excluding the value of land)

- Interiors, partitions and electricals.

2. Plant & Machinery, Equipments & Accessories

(including foundations, if required)

- Bought second-hand

- Bought new".

14. The internet meaning of ''insulation'' runs as follows :-

(i) insulation - the state of being isolated or detached.

(ii) insulation - a material that reduces or prevents the transmission of heat or sound or electricity.

(iii) insulation - the act of protecting something by surrounding it with material that reduces or prevents the transmission of sound or heat or electricity.

15. The complainant itself appointed Sh. R.K. Khosla, Private Architect Valuer &Interior Designer (unofficial), who, observed, as under, (Ex. C-13) :

Sl.No. Description Qnty Rate Amount (in Rs.)

1. RSJ Structure 50,000kgs 42 21,00,000/-

2. Insulation 18,600sft. 100 18,60,000/-

3. 13.5" Th Brick walls 9,000 sft 110 9,90,000/-

4. Angle Iron Trusses 6,000 kg 50 3,00,000/-

5. Wooden Flooring 16,500 sft 60 9,90,000/-

6. RCC Structure (Floor Beams, Columns & Beams) 2,250 Cft. 250 5,62,500/-

7. ACC Sheets (@ floors) 6,600 sft. 40 2,64,000/-

8. Electrification L.S. L.S. 1,50,000/-

TOTAL

72,16,500/-

SAY

72,16,000/-

16. It is interesting to note that on the other side, the complainant also got its loss assessed by Dhir Associates, Govt. Approved Valuer, who gave a detailed Assessment of Net Loss, Ex. C-14, dated 23.08.2012, to the tune of Rs.58,15,330/- and according to Ex.C-15 - Detailed Estimate, dated 25.05.2012,

he has certified the estimated replacement cost of construction of Cold Storage Chamber at Rs.72,00,000/-.

17. The Second Surveyors, i.e., Protocol Surveyors & Engineers Pvt. Ltd., assessed the loss at Rs.50,75,250/- and Rs.2,03,010/- was deducted as depreciation. After taking out the salvage and under-insurance, the Protocol Surveyors assessed the loss to the tune of Rs.18,78,675/-.

18. The State Commission did not place reliance on the report of Vij Engineer''s Enterprise regarding the cause of action. It contended that there was no sound proof that the building had collapsed due to over-loading of potatoe-bags or bad workmanship of steel structure. The State Commission pointed out that the Surveyor was silent, how, it is a case of bad workmanship of steel structure. The State Commission further placed reliance on the view of the Hon''ble Supreme Court''s authority reported in New India Assurance Co. Ltd. Vs. Pradeep Kumar, 2009 (8) JT 141 , wherein it was held that Surveyor''s report is not the last and final word. It is not that sacrosanct that it cannot be departed from, it is not conclusive. The State Commission also cited the authority of the Allahabad High Court reported in National Insurance Co. Ltd. Vs. Venkateshappa & Anr., 2004 All. LJ 3056, regarding the poor quality of material and poor standard of construction which was not taken into account. The State Commission admitted that the loss was caused due to storm.

19. On the other hand, the counsel for the OPs vehemently argued ''insulation'' does not come within the terms of the policy and the order passed by the State Commission is sound.

20. We clap no importance to the argument urged by the counsel for the OP. The above said word ''insulation'' comes within the items highlighted, above, i.e., it has "similar other items". Secondly, all moveable and immoveable properties of the insured including interiors, partitions and electricals, are mentioned in the policy. Therefore, the damage comes to Rs.18.60 lakhs, as assessed by the unofficial Surveyors. The OP- Insurance Company is saddled to pay this amount to the complainant.

21. The Meteorological report, Ex. C-5, mentions that on 05.06.2011, from 2131 hrs to 2145 hrs, strong winds, speed of Gale force affected Adampur airfield and surrounding area from North direction with 60 KMPH wind speed. The letter sent by SSE 132 KV Sub-Station, Bhogpur, dated 28.05.2012, also reveals that on 05.06.2011, at 9.00PM, there was thunder storm as a result of which 11 KV Bhogpur field was closed at 9.30PM and it stopped at 9.45PM.

22. It, therefore, stands established that the cause of damage was ''"storm". The OPs have failed to buttress their case with solid and unflappable evidence. The State Commission has given good reasons for relying upon this aspect of the complainant''s case.

23. Now, we turn to the last point, i.e., "Whether, the OP is entitled to have the

benefit on the ground of ''under-valued'' insurance?". The State Commission observed, as under :-

" Since the building was constructed about two years'' back, therefore, depreciation charges @ 2% deducted, which comes to Rs.2,03,010/-. So far as the salvage is concerned, in case the complainant claims the salvage,

then certainly, a sum of Rs.15 lacs will be deducted, otherwise, the complainant will be entitled to this amount. Then, he has deducted a sum of Rs.14,93,565/- on account of ''under-insurance'' to the extent of 44.29%. However, the counsel for the OPs have not been able to explain, how the building was ''under-insurance''. The value of the building was determined at the time of taking the policy and the claim is within the insured cover. There is no technical report that the valuation of the building is more than that because they are applying the depreciation clause also. In case the building was under insurance, then, how they can apply the depreciation clause, therefore, the OPs were unable to explain how the building was under insured. However, they are not allowed to deduct a sum of Rs.14,93,565/- on account of under-insurance".

24. The learned counsel for the OP half-heartedly argued that the OPs are entitled to deduct the amount in the sum of Rs.14,93,565/- i.e., 44.29%. He contended that there are a number of Supreme Court''s authorities which allow to deduct the amount ''under-insurance''.

25. The counsel for the OP is trying to make bricks without straw. In absence of any evidence on the record, no amount can be under-valued. The OP itself, with its open eyes, insured the premises in dispute. There is no inkling in the policy that it was, ''under-insurance''.

26. In the result, we dismiss FA No. 39/2015, filed by the OPs and accept FA No.1266/2014, filed by the complainant. In addition to the State Commission''s order, damages in the sum of Rs.18.60 lakhs, is further payable by the OP - Insurance Company, along with interest @ 9% p.a., from the date of filing of this complaint, till realization, to the complainant. The OP-Insurance Company will pay costs of delayed filing of First Appeal, as ordered in para No.4 of this judgment. However, there shall be no order as to costs.

