
(2016) 05 NCDRC CK 0053

In the National Consumer Disputes Redressal Commission

Case No : 418 of 2010

NEW INDIA ASSURANCE CO. LTD.

APPELLANT

Vs

M/S. KASSA FINVEST PVT. LTD.

RESPONDENT

Date of Decision : 20-05-2016

Acts Referred:

[Consumer Protection Act, 1986](#), [Section 19](#)
a> - Appeals

Citation : 2016 3 CPR 263

Hon'ble Judges : Dr. B.C. Gupta, Prem Narain

Advocate : Rajesh K. Gupta, Jos Chiramel, Abu John Mathew, ?Apoorva Srivastava

Judgement

1. This first appeal has been filed under section 19 of the Consumer Protection Act, 1986 against the impugned order dated 16.09.2010, passed by the Delhi State Consumer Disputes Redressal Commission (for short "the State Commission") in complaint, CC No. C-08/61, vide which, the said complaint filed by the present respondent was allowed and the Appellant Insurance Company was directed to pay a sum of 22,48,428/- to the complainant with simple interest @5% p.a. with effect from 26.03.2008 till realisation.

2. The facts of the case are that the complainant/respondent is a company registered under the Companies Act, 1956 and is carrying on the business of stock-broker, for which it is registered with the Securities & Exchange Board of India (SEBI) and is a member of the National Stock Exchange (NSE) since 1995. The company has its registered office at Connaught Circus, New Delhi and has its branch offices in different parts of the country, including one at Faridabad,

Haryana. The company obtained the Stock-Brokers Indemnity Insurance Policy from the petitioner Insurance Company in accordance with the guidelines of SEBI. One such policy No. 112700/46/07/51/00000300 was obtained by the complainant for the period 01.06.2007 to 31.05.2008 with sum insured at 50 lakhs. It has been stated that as per section II of the Policy, dealing with "Errors

and Omissions (Liability)", the Insurance Company agreed to indemnify the complainants in respect of the legal liability of the complainant for any third party for compensation for financial loss caused by:- "(a) ".....a negligent act, negligent error or negligent omission on the part of an officer or employee of the Insured.....", or

(b) ".....a dishonest or fraudulent act or omission on the part of an officer or Employee of the Insured....."

and ".....any pecuniary loss suffered by the Insured as a direct result of any negligent act, negligent error, negligent commission or omission by their employee(s) taking place in course of Insured's business activity.....".

3. It has been stated in the complaint that on 08.06.2007, a client of the complainant Sh. S.N. Mohta, (Client Code CFD7) visited the Faridabad Branch office of the complainant and placed an order to sell 100 shares of UFLEX at 149/- per share with Sh. Vijay Chandak, Branch Manager of the complainant on the trading terminal of NSE. It is stated that the figure of price of 149/- got fed into the quantity field after 100 which was already there, making the quantity read as 100149, and the order was put through by the System. The complainant stated that they had installed sophisticated instruments at their Head Office for surveillance at a cost of 25 lakh approximately to ensure that the transactions which exceed the parameters as provided therein, shall not be fed into the NSE trading terminal. There was a client exposure limit of 1 lakh and terminal quantity limit of 17000 shares in respect of the branch office at Faridabad. On account of punching of wrong figure by Sh. Vijay Chandak, the order failed at the surveillance in the Head Office of the complainant, as it exceeded the said client exposure limit and trading terminal quantity limit as stated above. The said incident happened at about 3:15PM and there was heavy trading at that time before the closure of the market at 3:30PM. When Sh. Vijay Chandak received message on his terminal that his order was stopped at the surveillance of Head Office, he under pressure from the client to complete the transaction for the sale of 100 shares, rang up Sh. Ashish Garg, Manager, surveillance in the Head Office and requested him to accept the order and to pass it to NSE. Sh. Vijay Chandak was not aware of the mistake committed by him at that time by feeding the figure of 100149. Sh. Ashish Garg, Surveillance Manager pressed the acceptance keys without actually going into the details of the cause of holding up of the order by the system because a telephone call had come from the Branch Manager. The order for the sale of 100149 shares went through to NSE for execution whereas the intended sale was for 100 shares only at a price of 149/- per share.

4. The complainant has stated that when the error came to their notice, they made efforts to reverse the damage by putting buy order in the system to cover the sales. However, they were able to purchase only 21702 shares from the market, out of the entire quantity of 100149 shares sold, leaving behind 78,447 shares as sold blank. In this way, they were able to make good some of the loss

suffered on account of the negligent act of its executives. Soon after the incident, the complainant informed the insurance company on 08.06.2007 who appointed M/s. R.G. Verma and Associates as surveyor to assess the loss. The complainant also informed the NSE of the error and requested them to appreciate the genuine mistake and cancel the trade. However, the NSE informed them that their client was not agreeing to the cancellation of the trade. Still, the company made sustained efforts to reduce the loss and collected further 606 shares including adjustment of 100 shares sold by Sh. Mohta. The complainant has further stated that since the deliveries of the shares could not be given to the NSE, they conducted auction of 77841 shares and a sum of 1,40,33,831.45 was debited to the complainant. In this way the complainant suffered a loss of 23,93,746/-. According to the complainant, since the loss had occurred on account of error/ omission on the part of its officials, such loss was covered under section II of the Insurance Policy, in question, and hence they were liable to be given their claim by the Insurance Company.

5. The surveyor submitted his final survey report dated 17.09.2007 to the Insurance Company, saying that the complainant had suffered a loss of 23,93,082/-, but after deducting compulsory excess @5% of the claim as per the terms and conditions of the policy, the net loss was assessed as 22,48,428/-. The surveyor, however, stated in his report that the loss had occurred on account of lack of reasonable care on the part of the complainant and hence, they were not liable to be compensated as per clause 11 of the general conditions of the policy which provides, inter alia as under:- " The Policy is subject to the duty of care on the part of the insured and the insured shall extend all due diligence care and concern having due regard to the market practice to protect and safeguard the legitimate interest of the Insurers. Duty of care as applicable to the insured shall be deemed to extend to their agencies and their employees also. "

6. The OP Insurance Company accepting the observation of the surveyor rejected the claim of the complainant vide repudiation letter dated 10.12.2007. The complainant sent a letter dated 06.02.2008 to the Head Office of the company but still, no relief was provided. The consumer complaint in question was then filed saying that compensation of 22,48,428/- as assessed by the own surveyor of the company should be provided to them alongwith interest @18% p.a. with effect from 08.06.2007, i.e., the date of the loss till realisation, besides a sum of 2 lakh as compensation and 1 lakh as cost of litigation.

7. The complaint was resisted by the Insurance Company by filing a reply before the State Commission in which they stated that the insured was required to take all reasonable precautions/steps to check and minimise the loss. It was denied in the reply that loss on account of errors and omissions of the officers and employees of the complainant were fully covered under the said policy. The Policy did not cover gross negligence, total lack of care and diligence of the employees/officers. It was also stated that the Surveillance Manager had acted in a grossly negligent manner in accepting the order in spite of the fact that the entry was

held up at the System.

8. The State Commission vide impugned order concluded that the complainants were entitled to be indemnified for the loss occurred because the general conditions appended to the policy come into play only, if the case of the complainant does not fall within section II of the Policy, i.e., Errors and Omissions. The State Commission ordered that a sum of 22,48,428/- should be paid to the complainant alongwith simple interest @5% with effect from 26.03.2008 till realisation.

9. Being aggrieved against this order, the insurance company is before us by way of the present appeal.

10. The learned counsel for the appellant stated during hearing before us and also in the written synopsis filed by them that the executives of the complainant company had shown gross negligence in disregard to prudent market practice and failure of duty and hence, they had failed to take reasonable care and exercise due diligence as mandated by the Stock Brokers Indemnity Insurance Policy. Admittedly, in the surveillance mechanism, a client exposure limit of 1 lakh and terminal quantity limit of 17000 shares was provided by the complainant for their Faridabad Branch, but still the order was exceeded at the instance of the employees of the complainant. The surveyor appointed by the Insurance Company had also brought out in his report that proximate cause of the loss was "not taking reasonable care" by the Surveillance Manager. Had the Surveillance Manager taken due care and shown due diligence, the loss could not have taken place. The learned counsel argued that the liability of the insurer as stated in section 2(A) and 2(B) of the Policy was subject to the general conditions applicable to the policy and hence the claim had been rightly repudiated under clause 11 of the general conditions of the policy.

11. The order passed by the State Commission was contrary to the rules and regulations, directives and guidelines, norms and procedures of SEBI and NSE on risk management of the capital markets endangering thereby integrity and stability of the financial markets. The learned counsel further argued that under section II (Errors and Omissions) (liability) clause A (II) under which compensation had been claimed was with regard to the third party claim only. The learned counsel further argued that even if the insurer was found liable to indemnify the loss under the policy, its liability was limited to 25% of the basic indemnity limit as provided in the policy itself. According to the learned counsel, the State Commission, while passing the impugned order had not given proper consideration to the legal points involved in the issue and such points could be raised at any time of the proceedings, even at the appellate stage.

12. In reply, the learned counsel for the complainant/respondent stated that the appellant Insurance Company cannot be permitted to raise new issues at the appellate stage and hence, such issues should not be taken into consideration while deciding the appeal. The learned counsel stated that the issues regarding

third party claim and payment of only 25% of the Insured Value had not been raised by the appellant in their reply before the State Commission, or in their repudiation letter and hence, they had no right to take up such matters at this stage. The learned counsel further argued that as made out from the facts of the case, the complainant had already set-up a proper surveillance mechanism by investing a sum of 25 lakh at their Head Office. It is clear that when there was error by the Faridabad Branch of the complainant, the same was duly detected by their surveillance mechanism and the order was stopped. However, since it was a peak rush hour, the order was accepted following interaction between the Branch Manager at Faridabad and the Surveillance Manager at the Head Office. Even after the order had been executed, the complainant tried their level best to minimise the loss by placing buy order for equivalent number of shares and they were able to cover the loss to some extent. Referring to section II of the policy relating to "Errors and Omissions (Liability)", the learned counsel stated that a plain reading of the said provisions made it clear that even if, there was a deliberate, dishonest act on the part of the employees of the company, they were liable to be indemnified by the Insurance Company according to the terms and conditions governing the policy. The learned counsel stated that the main purpose behind issuing the policy had to be seen and the basic idea was to protect the consumer. Such view had been taken in a catena of judgments made by the Hon"ble Supreme Court of India and this Commission as well. Any exclusion clause has to be read with the "main purpose rule" governing the policy and the effort must be to harmonise the two, instead of allowing the exclusion clause to snipe successfully at the main purpose. Such a view had been taken by the Hon"ble Apex court in their judgment in " Skandia Insurance Co. Ltd. vs. Kokilaben Chandravadan and Ors ." [(1987) 2 SCC 654] and " B.V. Nagaraju v. The Oriental Insurance Company Limited " [JT 1996 (6) SC 32]

13. The learned counsel has further drawn attention to the judgments in the following cases in support of his arguments:- " United India Insurance Co. Ltd. v. Great Eastern Shipping co. Ltd. [(2007) 7 SCC 101] Satyanarayanan Jivanram vs. National Insurance Co. Limited [II (2006) CPJ 58 (NC)] National Insurance Company Ltd. vs. National Cooperative Consumer Federation of India Ltd. "

14. Referring to the above three judgments, the learned counsel for the complainant/respondent argued that as per the Contra Proferentem Rule, when two equally tenable but contrary interpretations are possible, one favourable to the insured ought to be applied. The main thrust of the arguments of the learned counsel for respondent was that there was no reasonable care clause in Section II of the Policy and moreover, there was no such provision in general exclusion clause (a) of the policy and there is no exclusion specific to section 2 & 3 under clause D of the general exclusion of the policy. The claim had, therefore, been rightly allowed by the State Commission and their order should be upheld.

15. After the conclusion of the main arguments in the case, it was felt that further clarifications were required on the legal issue, whether fresh pleas could

be raised by either of the parties at the stage of appeal. The appellant had taken the main plea that under the Insurance Policy, only third party claims could be entertained, and even if, the insurer was found liable to indemnify the loss under the Policy, its liability was limited to 25% of the basic indemnity limit as provided in the Policy itself. The matter was, therefore, fixed for hearing again and detailed arguments of the learned counsel on the said plea were heard. Relying upon the order made by the Hon''ble Apex Court in "National Textile Corporation Limited vs. Nareshkumar Badrikumar Jagad & Ors." [(2011) 12 SCC 695] , the learned counsel for appellant stated that question of law could be raised at any stage of the proceedings. In the said judgment it has been stated as under:- "There is no quarrel to the settled legal proposition that a new plea cannot be taken in respect of any factual controversy whatsoever, however, a new ground raising a pure legal issue for which no inquiry/proof is required can be permitted to be raised by the court at any stage of the proceedings."

16. The learned counsel also referred to another order of the Hon''ble Apex Court in " Babu vs. State of Kerala" [(1999) 8 SCC 499] , and "Subhanrao V. Patankar & Anr. vs. Masu Daji Pote & Ors." [(1983) I SCC 400] in support of his arguments. Referring to Clause 2A of Section II Errors & Omissions (Liability) of the Insurance Policy, the learned counsel argued that such clause provided a safeguard to the insurance companies against fraudulent claims; otherwise, the Insurance Companies shall be put to heavy losses on account of payment of claims to the insured on the plea that their employees had done some negligent act. The complaint in question therefore, deserved to be dismissed, relying upon the "reasonable care" clause stated in the Insurance Policy.

17. In reply, the learned counsel for the respondent stated that as per clause 2B of Section II Errors & Omissions (Liability) of the Insurance Policy, the complainant stood indemnified against any pecuniary loss suffered by the insured as a result of any negligent act on the part of their employees during the course of the business activity of the insured. The present claim was not a third party claim, because the complainant had suffered the loss itself. Referring to maximum indemnity limit being 25%, the learned counsel stated that the same was applicable in the case of "add on cover" only. The endorsement schedule enclosed with the policy does not mention about add on cover and hence there was no question of any limit of 25% on the claim. The learned

counsel has drawn attention to the judgment passed by the Hon''ble Supreme Court in "Chitturi Subbanna vs. Kudapa Subbanna & Ors." [AIR 1965 SC 1325] and order passed by Hon''ble High Court of Delhi in "M/s. Gamma Investments vs. National Insurance Co. Ltd." [CS (OS) No. 1445 of 2002 decided on 23.01.2009] , saying that the pleas raised by the other party at appellate stage were not mere questions of law, but mixed questions of law and fact, and could not be raised at this stage.

18. We have examined the entire material on record and given a thoughtful consideration to the arguments advanced before us.

19. The facts of the case as admitted by both the parties are that the Branch Manager of the complainant/respondent at Faridabad placed an order for the sale of 100149 shares, but the same was stopped by the Surveillance mechanism installed by the complainant at their Head Office, where an exposure limit of 17000 shares had been provided by the complainant/respondent for the said branch. However, due to personal interaction between the Branch Manager at Faridabad and the Surveillance Manager at the Head Office, the order went through to the National Stock Exchange (NSE) for execution, whereas only 100 shares were intended to be sold resulting in loss to the complainant. It is the case of the complainant that due to peak hour of rush at that time, the Branch Manager as well as the Surveillance Manager could not detect the mistake that had happened on their part. Evidently, there was negligence shown by the employees of the complainant and it was not a case of simple error or mistake only. The New Oxford Advanced Learner's Dictionary, Oxford University Press, VII Edition defines the word "error" and th "negligence" as follows:- "Error : A mistake, especially one that causes problems or affects the result. Negligence : The failure to give enough care or attention."

At the initial stage, when the figure of 100149 was punched into the system by the Branch Manager of the complainant, it may be stated that this was a case of simple error or mistake. However, when the said order was stopped by the surveillance mechanism, duly installed by the complainant, there was discussion on telephone (as stated in the complaint itself) between Branch Manager and the Surveillance Manager, following which the order was allowed to go through the system. It has been stated by the complainant that due to rush of work neither Branch Manager nor the Surveillance Manager were able to detect the mistake at that time. Even if the version of the complainant is believed, it does reflect a high degree of negligence on the part of the officials of the complainant.

20. We now come to the basic question whether the complainant is still liable to be compensated under the terms and conditions of the policy, when there was negligence writ large on the part of the officials of the complainant. As already stated, a perusal of the Section II "Errors and Omissions (Liability)" of the policy specifies that if a financial loss is caused by negligent act, error or omission on the part of the officer or the employees of the insured or even if the said loss is caused by a dishonest or fraudulent act or omission on the part of the such official, the insured stands indemnified. In the exclusion clause of Section II, it has been stated that the error and omission committed or omitted by an intermediary or its employees is excluded. This exclusion clause is obviously not applicable to the present case as the error and omission has been caused by the employees of the complainant only. As pointed out by the learned counsel for the complainant, in the general "exclusion" section of the Policy, it has not been stated anywhere that claim for such financial loss is not payable. However, on the other hand, the appellant insurance company repudiated the claim on the ground that as per general condition No. 11 stated in the Policy with the title "Reasonable Care", the Policy was subject to duty of care on the part of the

insured and the insured was required to exercise due diligence, care and concern etc. To our mind, there is an obvious contradiction in the provisions contained in Section II Errors and Omissions (Liability) of the Policy and the general conditions of the policy. The learned counsel for the complainant has gone to the extent of saying that even if, there was a deliberate act done by the employees of the complainant, he shall still be liable to recover the amount from the Insurance Company as per the terms and conditions of the Policy. We do find weight in the arguments advanced on behalf of the complainant that once the Errors and Omissions clause makes mention of a dishonest or fraudulent act, there cannot be any question of "reasonable care" on the part of the person performing such dishonest or fraudulent act. The very definition of "fraudulent" as stated in the New Oxford Advanced Learner's Dictionary (supra) says an act intended to "cheat usually in order to make money illegally". It is made out, therefore, that whenever a dishonest or fraudulent act is performed, the wrong intention of the persons doing such act is clear and there is no question of any care or caution in that eventuality. In the present case, however, the complainant as a company has admittedly installed the surveillance mechanism at their Head Office by spending a sum of 25 lakh. The error committed by the Branch Manager at Faridabad was detected by such mechanism and order got stopped. However, on the personal intervention of the Branch Manager, the order went through resulting into loss. It is clear, therefore, that the complainant company did provide a mechanism to exercise due care and caution to take care of such errors or omissions done on the part of its employees, whether done intentionally or otherwise.

21. A contention has been raised on the part of the complainant/respondent that exclusions cannot be read in isolation but must be read to carry out the main purpose of the policy. We do not find any justification to disagree with the said line of argument because if the Appellant Insurance Company wanted reasonable care to be exercised by the employees of the insured, it would not have inserted clause of indemnification, even in the wake of a fraudulent or dishonest act on the part of the employees of the insured. If the claim is denied to the complainant based on the general conditions of the policy, it shall definitely negate the main purpose for which the policy has been taken by the complainant. We also do not find any reason to disagree with the contention of the complainant that when two contrary interpretations are possible ? one favourable to the insured should be applied as stated in various judgments made by the Hon'ble Apex Court and this Commission in support of the contention of the complainant.

22. The learned counsel for the appellant raised issues regarding applicability of the provisions of the policy for third party claims and also stated that only 25% of the basic indemnity limit could be allowed to the insured if their claim is accepted. These two issues were not taken by the Insurance Company at the time of filing their reply to the complaint before the State Commission. The learned counsel for the appellant, however, stated that these were legal issues

and could be raised by them at any stage of the proceedings. However, the learned counsel for respondents replied that these were entirely new pleas and hence, could not be allowed to be raised at this stage.

23. In this regard, it may be stated that the pleas raised by the appellant relate to interpretation of different clauses of the Insurance Policy in question, and it was no doubt, the duty of the insurance company to have raised these issues before the State Commission. In our opinion, however, the Insurance Company cannot be debarred from raising such issues at the stage of appeal, as these are legal questions relating to the interpretation of the various clauses of the policy. Relying upon the view taken by the Hon"ble Supreme Court in " Babu vs. State of Kerala" [supra] and "National Textile Corporation Limited vs. Naresh Kumar Badrikumar Jagad & Ors." [supra] , we feel that it shall be in the interest of justice if the pleas raised by the Insurance Company are taken into consideration at the appellate stage.

24. A perusal of Section II Errors & Omissions (Liability) of the Policy indicates that clause 2 A relates to insured's legal liability to third parties for any third party claim. However, clause 2B says in clear terms that the indemnity was provided against any pecuniary loss suffered by the insured as a direct result of any negligent act on the part of its employees in the course of business activity. We, therefore, tend to agree with the contention of the learned counsel for the respondent that the complainant could not be debarred from payment of the claim on the plea that the only third party claim were payable under the policy.

25. The learned counsel for the respondent stated that clause regarding maximum indemnity limit per branch being limited to 25% of the basic indemnity limit is applicable to "add on" cover only and not to substantive cover. A perusal of section II of the policy issued by the appellant says that no such clause is mentioned in the said section, meaning thereby that the clause to limit indemnity cover to 25% is applicable to add on cover only. The plea taken by the appellant, therefore, that only 25% of the assessed amount should be paid to the complainant, is not tenable. Further, as stated above, under clause "B" of section II of the Policy, any pecuniary loss suffered by the insured as a direct result of a negligent act on the part of its employees during the course of business activity of the insured is covered for indemnification under the policy.

26. Looking at the entire facts and circumstances of the case, it is evident that the complainant has taken adequate steps to ensure reasonable care by installing a surveillance mechanism and the

said mechanism was in operation when the said transaction took place. Moreover, they also made efforts to minimise the loss by purchase of 21702 shares from the market. We are, therefore, in agreement with the conclusion arrived at by the State Commission that the insured needs to be indemnified for the loss suffered and the amount assessed by the surveyor is liable to be paid to them. We, therefore, do not find any illegality, irregularity or jurisdictional error in the

order passed by the State Commission and the same is ordered to be upheld. The appeal is ordered to be dismissed. There shall be no order as to costs.