
(2018) 04 J&K CK 0059
In the Jammu And Kashmir High Court
Case No : MA No.361 OF 2009,

NEW INDIA ASSURANCE CO. LTD

APPELLANT

Vs

SARVESHWAR SHARMA

RESPONDENT

Date of Decision : 23-04-2018

Acts Referred:

Citation : (2018) 04 J&K CK 0059

Hon'ble Judges : BADAR DURREZ AHMED;CJ, SANJEEV KUMAR

Bench : Division Bench

Final Decision : Disposed Of

Judgement

1 This appeal is directed against the order dated 24.04.2009 passed by the J&K State Consumer Disputes Redressal Commission, Jammu (hereinafter

to be referred to as the "Commission") in File No. Complaint 2626/2004 titled "Sarveshwar Sharma vs New India Assurance Co. Ltd."

2 Briefly stated, the facts leading to the filing of this appeal, are as follows:

The respondent, a proprietor of Stone Crusher being run in the name of Baba Peer Stone Crusher, purchased a Larsen & Turbo Hydraulic

Excavator and Loader Machine for an amount of Rs. 14.00 lac. The aforesaid machine was insured by the respondent with the appellant company

under a policy which was effective from 29.01.2002 to 28.01.2003. It is claimed that the aforesaid machine had been purchased by the respondent by

taking a loan from the Punjab National Bank, Kathua and the said machine was hypothecated with the said Bank. On 05.04.2002, the said machine

claims to have caught fire and as a result whereof, the whole machine was allegedly damaged. The respondent has also claimed that he reported the

matter to the Police Station, Lakhanpur on 06.04.2002 and during the course of

investigation, the police found that the machine in question had been damaged due to the fire that took place all of a sudden. It is further averred in the complaint that the respondent informed the appellant-company about the incident and requested it to appoint surveyor to assess the loss. Responding to the request of the respondent, the appellant-company appointed Mr. K.L.Datta as surveyor, who visited the site, visually inspected the damaged machine and asked the respondent to get the loss of the damaged machine assessed by an authorized engineer/dealer. Accordingly, the respondent approached the Sawhney Sales Corporation, an authorized dealer of Larsen and Toubro for deputing an engineer to inspect the aforesaid machine. The said machine was inspected by an authorized engineer of Sawhney Sales Corporation, who, on visually seeing the machine, opined that it was a total loss and that the cost of the new machine would be Rs.14.00 lac. On the basis of the aforesaid inspection, Sawhney Sales Corporation submitted estimated price of some major parts of the machine on 20.04.2002. It is further claimed that the aforesaid report prepared by Sawhney Sales Corporation with regard to the assessment of the damaged machine was handed over to the surveyor somewhere in the month of April 2002, but the surveyor appointed by the appellant-company did not visit the site and had been impressing upon the respondent to dismantle the machine and get it repaired. It is the grievance of the respondent, that the surveyor on its own and without associating the respondent assessed the total loss to the tune of Rs.2,07,818/-. It is further averred that since the respondent was not satisfied with the report of the surveyor, so he requested the appellant-company to appoint some other competent surveyor to assess the loss. It is complained that the appellant-company did not appoint the new surveyor and instead relied upon the assessment made by Mr.

K.L.Datta.

3 Being aggrieved of inaction on the part of the appellant-company, the respondent filed a complaint before the Commission.

4 The appellant-company filed objections to the said complaint. In the objections, the appellant-company took the stand that the surveyor had visited the site and after inspecting the damaged machine, he had assessed the loss to the tune of Rs.2,07,818/- and the said amount alone was payable to the respondent as per the terms and conditions of the policy. The appellant-company

also refuted the contention of the respondent that the surveyor deputed by it was not expert in the field and therefore, was not capable of assessing the loss. It was claimed that the surveyor appointed by the appellant-complaint was an automobile engineer. The appellant-company also refuted the allegation of the respondent that the machine had suffered a total loss and was not reparable. Before the Commission, the respondent filed evidence in the shape of an affidavit, reiterating what he had pleaded in the complaint and also submitted an affidavit of one Sh. Amit Sawhney, son of Sh. S.C.Sawhney, proprietor of Sawhney Sales Corporation, Warehouse Pathankote as evidence to support the claim of the respondent. On the other hand, the appellant-company submitted affidavits of Sh. V.K.Anand, Divisional Manager of the Appellant-company and Kashmiri Lal Dutta, surveyor by way of an evidence to rebut the claim of the respondent.

5 The Commission, after going through the pleadings of the parties and the evidence led, passed an order dated 24.04.2009 directing the appellant-company to reimburse the respondent total price of the said machine in the sum of Rs.14.00 lacs along with interest at the rate of 8% per annum from the date of loss, till final payment is made. The respondent was also awarded cost of litigation quantified as Rs.5000/-. It is this order of the Commission which is called in question before us in this appeal.

6 Having heard learned counsel for the parties and after going through the record, we feel that the order impugned in this appeal does not deserve to be sustained. It is not in dispute that on the date of alleged fire incident, the insurance policy of the aforesaid machine was in operation and the appellant-company had charged the premium for insuring the machine for an amount of Rs.14.00 lacs. It is the case of the appellant-company that the machine in question caught fire on 05.04.2002 and on the next day, the appellant-company was informed about the incident with a request to appoint surveyor to assess the loss. It is also not in dispute that the appellant-company appointed Mr. K.L.Dutta as surveyor to visit the site and assess the loss caused to the insured machine. The averments made by the respondent in paragraph-7 of the complaint that the surveyor had asked him to get the loss assessed from the authorized dealer for repair of the machine and replacement of damaged parts of the machine has been specifically denied by

the appellant-company. The respondent, as is claimed by him, obeyed the instructions of the surveyor and approached Sawhney Sales Corporation for deputing some engineer to inspect the damaged machine and assess the loss. Till this stage, as is apparent from the pleadings of the respondent, the respondent did not object to the appointment of the surveyor. It is only after the surveyor submitted his report and assessed the loss to the tune of Rs.2,07,818/-, the respondent challenged the expertise of the surveyor to assess the loss of the damaged machine.

7 From the communications of the respondent appended with the complaint dated 01.10.2002 and 17.10.2002, it is apparent that the surveyor appointed by the appellant-company had visited the site and asked the respondent to dismantle the machine and get it repaired at the expense of the appellant-company, but the respondent insisted the surveyor to declare the machine a total loss. Relevant extract of the communication dated 17.10.2002 (supra) is reproduced hereunder:

“I may bring in your notice that the estimate loss assessed by the authorised dealer dated 20.04.2002 is much more than the cost of new machine and your surveyor was pressing hard to dismantle the machine and continue the repair work, which I have already told to you is not possible as the machine has suffered total loss and the cost of new machine is below the cost of repair of this burnt machine.”

8 With a view to come out of the report of the surveyor, the appellant company got one certificate issued by one Amit Sawhney son of proprietor of Sawhney Sales Corporation. The said certificate issued by the said Amit Sawhney makes an interesting reading which is reproduced as under:

“To whom so-ever it may concern Our Service Engineer has visited the burnt machine. On visually seeing the machine at their work site seems to be total loss. The cost of the new machine of the same model is Rs.14.00 lacs.”

9 It is this certificate which appears to have weighed with the Commission to award a sum of Rs.14.00 lacs in favour of the respondent. The aforesaid Amit Sawhney has also issued another certificate on 20.04.2002 indicating therein the estimated price of some major parts of the aforesaid machine. Two certificates issued by Amit Sawhney, who has also filed an affidavit by way of an evidence in support of the respondent are contradictory to

each other. In the first certificate issued on 10.04.2002, Amit Sawhney states that their Service Engineer, who had visited the burnt machine, had

opined on visual inspection of the machine that the same was total loss, but in the second certificate issued on 20.04.2002, he indicates the estimated

price of major part of the machine. In any case, both the certificates indicate that the so-called engineer of Sawhney Sales Corporation had not

inspected the machine, but had rendered his opinion merely on visual inspection of the machine. The respondent did not produce evidence of the said

Service Engineer nor the certificate, if any, issued by such Service Engineer was placed on record. Amit Sawhney, who claims to be a son of a

proprietor of Sawhney Sales Corporation, an authorized agent of Larsen and Toubro Pvt. Ltd issued two certificates aforementioned on the basis that

he had accompanied the Service Engineer. As against this evidence, there are two reports, one preliminary and other final, indicating the manner in

which the surveyor had assessed the loss. The relevant extract of the report which has bearing on the controversy may be reproduced hereunder:

“But today on 09.09.2002 instead of cooperating us into the matter, we are astonished to find that he has deviated from his earlier stand and has

sent a legal notice to you for delay in settlement of his claim which is purely because of his non cooperative attitude and he being unable to decide fate

of his claim in the past 5 months. If at all he was rigid for total loss of his machine at the first instance, he could tell us plainly in writing that he was

not interested in the repairs of his machine and we would have issued an independent report much earlier and would have voluntarily requested

company to seek a second opinion on the claim or what so ever action they may like to take further on the same.”

10 To substantiate his report, Mr.K.L.Dutta, surveyor has filed his affidavit and reiterated that the loss caused to the respondent on account of

damage to the machine by fire was Rs.2,07,818/-. Interestingly and for the reasons best known to the respondent, Mr. K.L.Dutta has not been

cross-examine by the respondent. Similarly, Mr. V.K.Anand Divisional Manager filed evidence in the shape of an affidavit, but the respondent chose

not to cross-examine him also. In the face of the aforesaid evidence, there was nothing brought on record by the respondent to believe that he had

suffered total loss and that he was entitled to Rs.14.00 lacs. He has not been able to substantiate the claim projected by him in the complaint. The

service engineer, who allegedly inspected the damaged machine, has not issued any certificate nor has he been produced by the respondent as his

witness. In the affidavit, Amit Sawhney, who claims to have accompanied the service engineer of Sawhney Sales Corporation, has admitted that

the loss was assessed on visual inspection of the machine.

11 As rightly argued by the learned Senior Counsel, appearing for the appellant-company, it was a case of no evidence and the respondent had

miserably failed to substantiate his claim projected by him in the complaint by placing on record any cogent material. On the contrary, we do not find

any reason to discard the report of the surveyor, who, after inspecting the machine, had found the same repairable by incurring a sum of Rs.2,07,818/-

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12 Accordingly, we allow this appeal partly and modify the order of the Commission dated 24.04.2009 and hold the respondent entitled to a sum of

Rs.2,07,818/- along with interest @ 8% per annum from the date of loss till the final payment is made. We, however, are not inclined to interfere

with the cost of litigation awarded to the respondent.

13 At this stage, it has been brought to our notice that pursuant to order passed by this Court on 30.12.2011, whereby the respondent was permitted to

withdraw 50% of the amount deposited subject to executing an undertaking that in the event that appellant succeeds in the appeal, the respondent

would repay the amount withdrawn along with interest @6% per annum, the respondent was released a sum of Rs.10,10,935/- by the Registrar

Judicial of this Court vide Cheque No.019812 dated 04.01.2012. Since the appellant-company has succeeded in this appeal to the aforesaid extent, as

such, the respondent is bound and directed to deposit the amount received by him vide cheque dated 04.01.2012 before the Registrar Judicial of this

Court, less the amount awarded by us, along with interest @ 6% per annum in terms of order passed by this Court on 30.12.2011.

In the aforesaid terms, the appeal of the appellant-company is disposed of.