
(2009) 08 J&K CK 0033

In the Jammu And Kashmir High Court

Case No : CIMA No. 10 Of 2005 & CMP No. 50 Of 2005

New India Assurance Co.Ltd.& Ors.

APPELLANT

Vs

Virender Mohan Kapoor & Ors.

RESPONDENT

Date of Decision : 20-08-2009

Acts Referred:

Insurance Act, 1938 — Section 64VB

Citation : (2009) JKJ 625 Supp

Hon'ble Judges : Barin Ghosh, J and Mohd.Yaqoob Mir, J

Bench : Division Bench

Advocate : J.A.Kawoosa, N.A.Ronga, Manzoor Ahmad Dar, Advocates appearing for the Parties

Judgement

1. The present appeal is against an award made and published by the Jammu & Kashmir Consumer Protection Commission, Srinagar (hereinafter referred to as 'the Commission'). The award having been made and published against the appellants, appellants are before us in this statutory appeal.

2. We have heard learned counsel for the appellants, claimant before the Commission as well as the respondent Insurance Company.

3. The appellants had covered merchandise of the claimant before the Commission against, amongst others, the peril of fire by issuing a policy of

insurance. The fire took place on February 7, 1990 at 4:30 p. m. The incident of fire and destruction of his merchandise as a consequence of such

fire, was brought to the notice of the appellants by the claimant before the Commission. The appellants sent a surveyor for assessing whether the

claimant before the Commission suffered any loss by reason of any of the perils covered by the policy of insurance issued by the appellants and, if

so, the quantum thereof. Before the surveyor so deputed by the appellants the claimant before the Commission disclosed that he had taken out a

policy of insurance on the date of the incident, i.e., on February 7, 1990 at 12:30 a.m. covering the selfsame goods for, amongst others, peril of

fire from the respondent Insurance Company. The surveyor perused the Interim Protection Note issued by the respondent Insurance Company and,

having regard to the quantum of coverage granted by the appellants and the respondent Insurance Company, determined that of the assessed loss

of Rs. 10,24,222.00, the appellants are liable to pay a sum of Rs. 4,56,406 and the respondent Insurance Company a sum of Rs. 5,67,817. There

is no dispute that if the claimant before the Commission had not taken out the policy of insurance from the respondent Insurance Company, liability

of the appellants on account of loss suffered by the claimant before the Commission would have been the whole, i. e., Rs. 10,24,222.

4. The report of the surveyor was accepted by the appellants and, accordingly, the appellants paid, in full and final settlement of the claim, a sum of

Rs. 4,56,405 to the claimant before the Commission on August 23, 1993.

5. The claimant before the Commission approached respondent Insurance Company for recovery of the remaining compensation of Rs.

5,67,817.00, but in vain. The respondent Insurance Company refused to accede to the contention of the claimant before the Commission that it had

issued a policy of insurance covering the subject goods at or before the incident. This information was brought to the notice of the appellants by the

claimant before the Commission from time to time, including on September 6, 1997. The appellants also requested the respondent Insurance

Company to pay its share of compensation, as assessed by the surveyor, to the claimant before the Commission. Inasmuch as the

respondent Insurance Company did not pay any part of the assessed compensation, that forced the claimant before the Commission to approach

the Commission on July 18, 2001.

6. Before the Commission, evidence was led for establishing that the respondent Insurance Company had covered the peril of fire and the

merchandise belonging to the claimant before the Commission prior to the incident of fire taking place destroying the merchandise in question. In

order to do so, the Interim Protection Note issued by the respondent Insurance

Company was brought on record as a piece of evidence. The same suggested that Canara Bank, the Banker of the claimant before the Commission, has paid a sum of Rs. 3,895 on account of premium for taking out the said Interim Protection Note. At the same time, the Interim Protection Note suggested that the same will not be valid unless the actual premium adequate to cover the risk has been received by the Company, i.e., the respondent Insurance Company. Therefore, a question cropped up, whether actually premium was or was not received by the respondent Insurance Company at or before the incident. In order to substantiate that premium was paid, reliance was placed on a debit advice of Canara Bank, i. e., the Banker of the claimant before the Commission, dated February 8, 1990, which suggested that a sum of Rs. 6,744 was paid to the respondent Insurance Company on that date. There is no dispute that the sum of Rs. 6,744 covered the amount of Rs. 3,894, being the sum required to be paid for obtaining the said Interim Protection Note. That being the situation, the Commission held that at the time of the incident there was no valid policy of insurance issued by the respondent Insurance Company covering either the peril of fire or the merchandise of the claimant before the Commission which was gutted by fire. The Commission noticing that in the absence of an Insurance Policy issued by the respondent Insurance Company, the appellant had full liability to pay the assessed loss of Rs. 10,24,222 directed the appellant to pay the same less the amount already paid, together with interest at the rate of 9% per annum from September 6, 1997 upto the date of complaint, i. e., July 18, 2007.

7. In the present appeal, it is the contention of the appellants that it was the claimant before the Commission which represented to have taken out a policy of insurance from the respondent Insurance Company. It was submitted that by reason of such representation, the loss was apportioned. It was also submitted that such apportioned loss was accepted by the appellants as well as by the claimant before the Commission. It was contended that upon such acceptance, claimant before the Commission recorded full and final satisfaction on August 23, 1993 as regards its claim to receive compensation under the policy of insurance issued by the appellants. It was submitted that, in the circumstances, there could not be any deficiency in service and, at the same time, the claimant having approached the

Commission on July 17, 2001, the claim of the claimant, if any, against the appellants was wholly belated and could not be entertained. It was next submitted that the respondent Insurance Company in the Interim Protection Note has recorded, without any uncertainty, that it has received from Canara Bank the premium of Rs. 3,894 and, accordingly, no other piece of evidence could be looked at on the face of what had been stated in the Interim Protection Note. It was contended that in view of Section 64VB of the Insurance Act, 1938, the moment premium was received, as depicted in the Interim Protection Note, respondent Insurance Company assumed the risk covered by the Interim Protection Note. It was, therefore, contended that the finding of the Commission that there was no policy issued by the respondent Insurance Company to cover the risk of the merchandise at about the time the incident of fire incurred which gutted the merchandise of the claimant before the Commission, is not sustainable in law.

8. It is true that no evidence can be tendered or looked at to alter statements made in a written document. Either the statements so made are to be believed or to be disbelieved altogether. Such statements altered by some other evidence cannot be accepted. As a result, neither oral evidence nor documentary evidence can be relied to alter a statement already made in a written document. However, at the same time, it is permissible in law to explain, either by oral evidence or by documentary evidence, any matter stated in a written document. In the Interim Protection Note, while it was stated in one breath that the sum of Rs. 3,894.00, on account of premium, has been received, at the same time, it was denoted that the note will not be valid unless the actual premium has been received by the Company, i. e., the respondent Insurance Company. There being two such statements which are opposite to each other, no doubt could be explained either by giving oral evidence or by producing further documentary evidence. In the instant case, the further documentary evidence which could be produced denoted that the payment was made by the Canara Bank not on February 7, 1990 but on February 8, 1990.

9. A look at Section 64VB of the Insurance Act, 1938 makes it abundantly clear that the insurer assumes risk only on receipt of premium in advance and not when it issues a cover note or the policy itself. It is payment of premium which is sine quo non in commencing the liability of the

insurer as undertaken by it. Having regard to the fact that the premium was not received by the respondent Insurance Company at or before the

occurrence of fire incident, we are afraid, we are not in a position to interfere with the views taken by the Commission to the effect that in relation

to the incident which resulted in loss the respondent Insurance Company had no liability.

10. It is true that it was the claimant before the Commission who brought it to the notice of the appellants that it had taken out a policy of insurance

prior to occurring of the incident and such insurance covered the risk of fire as well as the merchandise which were destroyed by fire. There is also

no dispute that undertaking of liability by the respondent Insurance Company was assumed not only by the claimant before the Commission but also

by the appellants as would be reflected by their conduct as indicated above. Thus, the claimant before the Commission as well as the appellants

were in bona fide belief that the risk of fire as well as the merchandise of the claimant before the Commission were covered by a policy of

insurance issued by the respondent Insurance Company. This belief was pursued by both until the matter was determined by the Commission. The

mistake, thus, committed by the claimant before the Commission as well as by the appellants, was a mutual mistake, which became known to not

only to the claimant before the Commission but also to the appellants no sooner a pronouncement was made by the Commission that the

respondent Insurance Company did not issue a policy of Insurance in favour of the claimant before the Commission either covering the risk of fire

or his merchandise which were destroyed by fire. This knowledge made the appellants liable to compensate the claimant before the Commission

for the whole sum which became payable by reason of loss of the merchandise of the claimant before the Commission by the incident of fire as was

determined by the surveyor appointed by the appellants. The appellants having not paid the same, it cannot be said that there had been no

deficiency in service. Recording of full and final satisfaction by the claimant, in the circumstances as above, should and can only be said to be on

mutual mistake committed by the claimant and the appellants which stood resolved only on the Commission holding in the manner it held pertaining

to the policy said to have been issued by the respondent Insurance Company.

11. However, inasmuch as the mistake became known only when the Commission pronounced its decision and, accordingly, passed an award, it was not proper on the part of the Commission to award interest from any date prior to the date of pronouncement.

12. Accordingly, we modify the award of the Commission by making the appellants liable to pay interest on the sum adjudged on and from September 21, 2004 until payment. It is made clear that if any part of the principal amount has been deposited by the appellants, interest on such part of the amount will stop accruing from the date of deposit.

13. The appeal is, thus, disposed of with the modification as above.