
(2015) 06 J&K CK 0001
In the Jammu And Kashmir High Court
Case No : CIMA No. 90 of 2014

New India Assurance Company

APPELLANT

Vs

Mohd. Akram Bhat

RESPONDENT

Date of Decision : 01-06-2015

Acts Referred:

Citation : (2016) 2 JKJ 12

Hon'ble Judges : Mr. N. Paul Vasanthakumar, CJ. and Mr. B.S. Walia, J.

Bench : Division Bench

Advocate : Mr. Manzoor Ahmad Dar, Advocate, for the Appellants/Petitioners;
None, for the Respondent

Final Decision : Dismissed

Judgement

Mr. B.S. Walia, J. - New India Assurance Company (hereinafter referred to as the company) (although the same ought to have been New India

Assurance Company Limited) is in appeal against order Annexure-A dated 23.12.2013 passed in consumer complaint No. 33/2011 in case titled

as Mohammad Akram Bhat v. Divisional Manager and others whereby complaint filed by the respondent was allowed and a sum of Rs.

2.85 Lacs along with Rs. 7000/- as litigation charges, total Rs. 2.92 Lacs was awarded, to be paid by the appellant to the respondent or to be

deposited in the State Commission within 6 weeks from the date of order. Although the appeal is liable to be dismissed on the ground of not having

been instituted by the correct party, however, ignoring technicality, we proceed to examine the case on merit.

2. Learned counsel contended that the award was passed behind the back of the appellant company and that although the presence of counsel was

marked in the order but a perusal of the order revealed that none was present on behalf of the appellant company when the matter was heard by

the State Commission. Secondly, the State Commission had misconstrued the survey report as there was absolutely no material available with the

State Commission on the basis of which the report submitted by the surveyor could be discarded. The State Commission also failed to take into

account the consent letter which formed part of the record. Thirdly, the nature of damage as evident from the photographs appended with the

appeal revealed that there was no question of award of compensation by treating the building liable to reconstruction. Lastly, the award by the

State Commission based on the assumption that the building in question had to be reconstructed was not supported by any material available on

record.

3. Respondent had insured his 2 storeyed residential house building (A Class Construction) under the "FIRE AND SPECIAL PERILS POLICY

under Insurance Policy No. 1135120393407 for a sum of Rs. 10 lakhs for a period of one year i.e. from 24th of August 2010 to 23rd of August

2011 and was issued insurance policy, Annexure-A attached with the complaint. On account of damage to the insured building in an earthquake,

the respondent submitted a claim to the appellant along with all relevant record including certificate Annexure-C attached with the complaint as

issued by the Assistant Executive Engineer, Srinagar Municipal Corporation to the effect that the residential house of the respondent was unfit for

residential purposes and required complete reconstruction while copy of loss to the building estimated at Rs. 14.97 lakhs was attached along with

the complaint as Annexure-B.

4. Eventually the appellants informed the respondent that the surveyor had submitted the assessment report estimating the loss at Rs 27,266/- only.

The same was protested to by the respondent on account of the loss assessed being far less than the actual loss suffered by the respondent i.e. Rs.

14.97 lakhs as per estimate of reconstruction prepared by a competent and qualified engineer as per the PWD Schedule of 2008 approved by the

State Government.

5. It needs noticing here that the alleged consent letter attached to the surveyors report at page No. 34 of the appeal was not submitted before the

State Consumer Disputes Redressal Commission. Besides in the appeal there is no application for additional evidence on record. For the aforementioned reasons the reliance on the consent letter cannot be gone into. Moreover, the alleged consent letter was for final settlement at a particular amount and when the matter was not settled at the said amount and the respondent approached the State Consumer Disputes Redressal Commission with his grievance for full indemnity after returning cheque Annexure-G dated 31.05.2011 for an amount of Rs. 27,266/- to the appellant on account of the same being on much lower side than the loss suffered, the said consent letter loses its significance. As has been noticed above, the complaint filed by the respondent was allowed and a sum of Rs. 2.85 Lacs along with Rs. 7000/- as litigation charges, total Rs. 2.92 Lacs was awarded to be paid by the appellant to the respondent or to be deposited in the State Commission within 6 weeks from the date of order.

6. We have heard Learned Counsel for the appellant and have perused the record. However, we are of the considered view that the order passed by the State Consumer Disputes Redressal Commission, Srinagar i.e. Annexure-A dated 23rd of December 2013 does not suffer from any infirmity so as to warrant interference, therefore the appeal merits dismissal for the reasons recorded hereunder.

7. Admittedly, respondent insured his 2 storeyed residential house building (A Class Construction) along with electric fittings, furniture and fixtures under the ""FIRE AND SPECIAL PERILS POLICY"". On account of the respondent's insured building suffering damage in an earthquake in 2010, claim was made before the appellant for indemnification of the loss which was not done to the satisfaction of the respondent which led to his filing a complaint before the State Commission seeking indemnity to the tune of Rs. 10 lakhs.

8. In the written statement filed by the appellant before the State Commission it was pleaded that the damaged house required repairs only and not reconstruction and that in view thereof the claim by the respondent was excessive.

9. The State Commission came to a categorical finding that a perusal of the survey report revealed that the same had been prepared with a pre-

determined mind with repairs in focus. The State Commission further came to the conclusion that excluding the cost of reasonable construction material, the quantum of indemnity had to be worked out on the basis of construction cost of a 2 storeyed building as it might have been before the incident which roughly worked out to Rs. 2.6 lakhs which obviously would have been payable to the respondent way back in August 2011 entitling him to compensation for loss of profit/earning thereupon for 2 intervening years which even if assessed at a meagre 5% per annum would entitle him to another Rs. 25,000/-. On the aforementioned basis, the State Commission allowed the complaint and awarded a sum of Rs. 2.85 Lacs along with litigation charges of Rs. 7000/- total Rs. 2.92 lakhs to be paid to the respondent or to be deposited by the appellant in the State Commission within 6 weeks from the date of the order. The State Commission also arrived at the categorical finding that the affidavits filed by the respective witnesses of the parties did not inspire sufficient confidence in order to enable the same to be relied upon and that the survey report was the only material indicative of the probable damage of the house.

10. The respondents witness i.e. Maroof Ahmad Bandy, Assistant Executive Engineer, Srinagar Municipal Corporation deposed on affidavit that

he had visited the site and after inspection had come to the conclusion that the residential house of the respondent was unfit for residential purposes

and needed complete reconstruction, therefore he issued communication bearing No. SMC/AEE/312, dated 04.03.2011 addressed to the Branch

Manager of the appellant regarding the damage and position of the residential house of the respondent and further that the contents of the

aforementioned communication were true and correct, bore his signature and were based on his personal inspection and spot verification. In cross-

examination, the said witness stated that he was a civil engineer in government service since the past 25 years and was dealing with construction

and further that at the moment he was dealing with construction of the Townhall at Nowshera, Srinagar which was at the completion stage.

11. Cross examination of the aforesaid witness, apart from eliciting that there was no rule as such authorising the witness to issue a certificate and

the right to issue such certificate being based on practise, is of no significance and no further questions were asked from the said witness especially

with regard to the veracity of the certificate or for that matter with regard to the damage and position of the residential house nor was any

suggestion put to the witness that the certificate was incorrect or false. In view of the aforementioned position, the cross examination of the said

witness is of no help to the appellant.

12. Another witness of the respondent i.e. Abdul Hamid Shoda, qualified engineer associated with Bhat Associates (Engineers, Valuers and

Estimators) stated that he visited the damaged house of the respondent and after thorough survey came to the conclusion that the damaged house

needed reconstruction and after taking into account all relevant schedules prepared the estimate for reconstruction of the house to the tune of Rs.

14.97 Lakhs. Said witness further stated that the estimate prepared by him for reconstruction of the residential house of the respondent had been

prepared on the basis of spot verification through analysis and as per the "PWD SCHEDULE OF 2008, APPROVED BY THE STATE

GOVERNMENT" and that the same bore his seal and signatures and that the contents thereof were true and correct and that the estimate/cost of

reconstruction was annexed with the affidavit.

13. In cross-examination, the aforesaid witness stated that he was a diploma holder in civil engineering and got degree in 1982 and was in

government service as junior engineer and was presently posted in the irrigation and flood control department and that the said department was

doing estimation of buildings, bridges, culverts, etc. The witness also gave the rates of construction, the type of material used, the covered area, the

basis on which the estimation was done i.e. PWD rates, material which could be reused, extent of damage in support of the estimation given by

him.

14. On the other hand, Hilal Ahmad Raja (Surveyor and Loss Assessor) of the appellant company gave affidavit that the final survey report had

been issued by him based on the assessment of loss and on the strength of the document's submitted by the respondent. In his cross-examination

he stated that the estimate of loss was based on reconstruction basis whereas he had prepared and assessed the loss on repair basis. He further

admitted that it was true that once wide cracks had developed in the building, the same would need reconstruction He further stated that as per

practise he had allowed the lowest market rate but not as per the schedule of PWD. A very important aspect of the matter which has a bearing on

the assessment qua claim made is that as per statement of the Surveyor, he was an electrical engineer. At this stage it would be fruitful to refer to

the extract of the surveyor's report.

EXTRACT OF SURVEYOR'S REPORT:

POSITION AT SURVEY:

In pursuance to the instructions received from the insurers concerned to conduct the final survey of the above captioned loss. The undersigned on

09-10-2010 visited the risk premises situated at Tailbal Srinagar Kashmir to carry out the detailed survey of the subject loss. Mr. Mohammad

Akram Bhat was present at the time of our visit and he along with his representative assisted us in conducting the survey. During the course of our

visit to the risk premises, it was revealed that due to the earthquake vibrations, the superstructure walls and partition walls provided in the

residential building had developed wide cracks and the said cracks were observed new and no dust were seen inside the cracks as such it is

confirmed that the said cracks had developed as a result of earthquake vibrations which occurred on 18.09.2010. The said cracks were observed

visible from inner as well as from outer sides of superstructure and partition walls as can be easily ascertained from the photographs arranged by

the undersigned.

The severity of the damages is evident from the photographs taken at the time of survey and as well as the identification of the insured residential

building and are enclosed herewith.

15. As far as the grounds urged are concerned, apparently, counsel for the appellant was not present before the State Commission at the time

when the case was taken up for hearing. However responsibility to ensure presence at the time the case was taken up for hearing is of the counsel.

Despite its counsel not being present at the time of hearing nor any circumstances having been shown as beyond the control of the appellants

counsel on account of which the counsel could not be present at the time when the case was taken up for hearing, it is not open to the appellant to

raise the plea that the case was heard behind the back of the appellant. Secondly, the plea that the State Commission had misconstrued the survey

report and that there was absolutely no material on the basis of which the report submitted by the surveyor could be discarded is incorrect for the simple reason that the report of the surveyor itself reveals that the superstructure walls as well as partition walls of the residential building had developed wide cracks as a result of the earthquake and the same were visible from the inner as well as outer side of the superstructure and partition walls.

16. The aforementioned plea of the appellant also does not take into account certificate Annexure-C issued by the Assistant Executive Engineer,

Srinagar Municipal Corporation that the residential house of the respondent was unfit for residential purpose.¹ and required complete

reconstruction. The aforementioned certificate was issued by a civil engineer. Even the certificate of estimation of loss is by a civil engineer. On the

other hand, the survey report is by an electrical engineer and can therefore cannot be said to be of much weight on account of the nature of

expertise of civil engineering required for assessment of loss. Besides the photographs appended to the appeal as well as the findings of the

surveyor of the severity of the damage to the superstructure as well as partition walls on account of their having developed wide cracks as

apparent from the photographs speaks for itself. Therefore the plea that there was no material on the basis of which the report submitted by the

surveyor could be discarded is without any basis. The surveyor admitted the severity of the damage but chose to estimate loss based on repair

basis instead of as claimed i.e. reconstruction basis despite admitting in his cross-examination that it was true that once wide cracks developed in

the building the same would need reconstruction and further admitting in the survey report that the severity of the damage to the building on account

of the earthquake was apparent from the wide cracks which had come in the superstructure walls as well as the partition walls of the building.

Certificate i.e. Annexure-C has not been proved to be incorrect or false. In the circumstances there is no reason whatsoever to interfere with the

order of the State Consumer Disputes Redressal Commission.

17. The appellant has also raised the plea that the State Commission failed to consider the consent letter which formed part of the record. We have

gone over the record produced by the appellant before the State Commission.

Although there is a mention of the consent letter being attached to the survey report but the consent letter was not produced before the State Commission. Although a copy of the consent letter has been placed on record along with the appeal yet there is no application for permission to place on record additional evidence. In the circumstances it is not open to the appellant to rely upon the said document. Ignoring the aforementioned technicality, the fact remains that the consent letter was allegedly for Rs. 42,637/- whereas the amount offered to the respondent was only Rs. 27,266/-. The cheque issued for amount of Rs. 27,266/- was returned by the respondent to the appellant on account of the amount offered being much lower than the amount claimed. Thereafter the respondent filed a complaint and proved his case before the State Commission. In the circumstances, the plea with regard to the consent letter not having been taken into account by the State Commission is bereft of merit.

18. The further plea that the nature of damage was not severe so as to warrant award by treating the building liable to reconstruction and further that there was no material on the basis of which it could be said that the building in question had to be reconstructed is without any basis. None else than the surveyor appointed by the appellant has given a finding in the report with regard to the severity of the damage to the superstructure and the partition walls of the building in question on account of wide cracks. The surveyor in his cross examination has also admitted that it was correct that once wide cracks develop in the building, the building has to be reconstructed. Coupled with the aforementioned stand is the certificate Annexure-C issued by a civil engineer mentioning therein that the building was unfit for habitation and required to be reconstructed.

19. The finding of the State Commission that the survey report had been prepared with a predetermined mind with repairs in focus appears to be correct for the surveyor in his cross examination admitted that he had made the estimation of loss on the basis of repair whereas the claim was on the basis of reconstruction. Once the surveyor admitted in the report severity of the damage to the superstructure as well as to the partition walls on account of the superstructure as well as partition walls having developed wide cracks and further admitted in cross examination that in case wide cracks developed in a building the same would have to be reconstructed,

then obviously the report of the surveyor in as much as it recommends payment for repairs instead of for reconstruction is legally unsustainable. The civil engineers produced as witnesses by the respondent deposed with regard to the damage to the building, requirement of its reconstruction as well as the estimate in respect thereof. The credibility of the said witnesses could not be shattered. No suggestion was put to the said witnesses that their depositions was false or incorrect.

In view of what has been noted above, the appellant has failed to make out a case so as to warrant intervention by this court in exercise of its appellate jurisdiction. In the circumstances we are of the considered view that there is no merit in this appeal and therefore the same is dismissed but with no order as to costs. Amount deposited by the appellant in satisfaction of the orders of the State Commission be released to the respondent. Record of the case be returned to the State Commission.