(1999) 12 NCDRC CK 0049

In the National Consumer Disputes Redressal Commission

ORIENTAL INSURANCE COMPANY — APPELLANT

Vs

GOSIA CLOTH HOUSE — RESPONDENT

Date of Decision : 15-12-1999

Acts Referred:

Citation : 2000 1 CPJ 586 : 2001 1 CLT 151

Hon'ble Judges : K.C.Bhargava , D.D.Bahuguna J.

Final Decision : Appeal allowed

Judgement

1. THIS is an appeal against the judgment and order dated 1.8.1997 passed by District Consumer Forum, Rae Bareilly in Complaint Case No. 280/1995.

2. THE facts of the case stated in brief are that the complainant has claimed a sum of Rs. 1,85,640.99 as compensation and for future damages. According to the complainant he is the owner of M/s. Gosia Cloth House, Furzatganj, Rae Bareilly and was doing cloth business. He got shop insured for one year which was in force from 5th of June, 1987 to 4th June, 1988. A policy was also issued to the complainant. At the time of insurance, furniture worth Rs. 15,000/-, cloths worth Rs. 1,05,000/- thus totalling Rs. 1,20,000/- was in stock in the shop. THE insurance was for a sum of Rs. 1,20,000/-. During the night of 14th/15th April, 1988 a fire broke out in the shop of which he got the information at his residence and when the complainant reached the shop he found it was damaged by fire. He informed the Police Station, Nazirabad District Rae Bareilly on 15.4.1988. An information was also sent to the Insurance Company as well as bank. The Insurance Company appointed a Surveyor Sri B.K. Kapoor for assessment of the loss. Sri Kapoor submitted his report but this fact was never told to the complainant. On 27.12.1988 the complainant has put forward a claim alongwith all the required papers. He had filed copy of policy, copy of NCR, balance sheet of 1986-87 from December, 1986 to March, 1987. He also provided the monthly statement from April, 1987 to March, 1988 including a list of unburnt cloth.

It is alleged that the complainant had taken loan of Rs. 25,000/- from the Bank of Baroda. The complainant has given a statement of accounts on 31st March,

1988 to the bank. At that time there was a stock worth Rs. 1,01,500/-. A day prior to this incident, the complainant had sold clothes worth Rs. 5,000/- on credit and cloth worth Rs. 4,500/- on cash basis. In this way at the time of the fire, clothes worth Rs. 91,940.99 was in stock. The clothes which have been damaged has not been including in this amount.

3. OPPOSITE parties have not, inspite of several reminders, settled claim of the complainant who is sitting idle. The complainant used to earn Rs. 1,550/- per day. He has suffered loss of Rs. 83,700/- on non-settlement of the claim. Cash credit facility was also provided to the complainant. The complainant was informed by the Insurance Company later on that the claim of Rs. 24,242/- has been approved and this much amount has been paid to Bank of Baroda on 30.11.1989. This amount was claimed to be the final claim amount.

4. THE opposite party filed a statement in which they admitted the happening of the fire and payment of Rs. 24,242/- to the bank in view of the final settlement of the claim. THE opposite parties have denied the incidence of stocks claimed by the complainant. THEre is no deficiency in service on behalf of the Insurance Company. THE payment was made by them vide cheque dated 20.11.1990 After the perusal of the evidence, the learned District Forum allowed the complaint for a sum of Rs. 67,698.99 as damages alongwith 18% per annum interest from 14.4.1988 till the date of payment. It also allowed Rs. 25,000/- as compensation and Rs. 1,000/- as cost. Aggrieved against the order, the Insurance Company has come in appeal and has challenged the correctness of the order passed by the learned District Forum.

5. WE have heard the learned Counsel for both the parties and have perused the records.

6. IN the present case the incident is admitted by both the parties. The only dispute which remains between the parties is about the amount which has to be awarded to the complainant for the loss caused to his belongings kept in the shop when the incident of fire took place. According to the complainant he has suffered a loss of Rs. 83,700/- and damages. According to the complainant at the time when the fire took place, cloth worth Rs. 91,940.99 were kept in the shop which fact, according to the complainant, is proved from the statement of stocks submitted to the bank. It may be mentioned here that the statement of stocks submitted to the bank on account of the fact that cash credit limit has been fixed by the bank. Naturally when the cash credit limit is fixed by the bank, the statement of stock held at the end of the month is to be sent to the bank so that the bank may know that the amount which it has advanced in the form of cash credit limit is secured by the stock kept by the complainant in the shop. The amount which has been fixed by the Insurance Company is based on the report of the Surveyor. Therefore, it will be necessary for us to see as to what is the report of the Surveyor and whether the amount approved by the Surveyor is correct on the basis of the material on record. The report of the Surveyor, is dated 30.11.1989. The survey was conducted on 16th April, 1989. A perusal of

this report goes to show that the Surveyor has dealt with the stock statement furnished by the complainant to the bank. In the column of assessment of loss on page 6, the Surveyor has mentioned that the Insured informed that they were not maintaining the detailed books of accounts. Only records of sales, purchases and expenditures were kept in a note book and a monthly statement was submitted to the bankers. Photocopy of these statements were supplied for the months of March, 1987, November, 1987 and December, 1987 only as reported by the Surveyors. The stock position of those dates have been noted by the Surveyor in his report. According to the Surveyor the complainant had informed him that the note book of records have been burnt in the fire. Therefore, all the copies are not being produced. It has further been argued that the bank has made an inspection of the shop on 21.3.1988 and the stock was found to be worth Rs. 21,700/-. Then he has given the stock position, opening stock, purchases and sales of the shop of the complainant. According to the Surveyor, on page 8 of the survey report, it is mentioned that as per loss details submitted by the insured, value of stock just before the loss was Rs. 86,995.08. According to the balance sheet the stock on 1.4.1989 was of Rs. 1,01,500/-. According to the Surveyor there was no purchase and sales between 1.4.1988 to 14.4.1988 so the stock position was of the order of Rs. 14,504.92 from 1.4.1988 to 14.4.1988.On para 8 the Surveyor has mentioned that it is quite unpractical and untraditional that a firm having average monthly sale of Rs. 7,956.25 and purchase of Rs. 7,340/- will be keeping an average stock of Rs. 1,16,414.68. On this basis the Surveyor has drawn an inference that the figures submitted by the insured are on the higher side.

With respect to the stock position of the inspection done by the bank on 21.3.1988 the Surveyor has mentioned on page 7 that during correspondence the bank has informed that the value of stock given in their records on the basis of inspection by their officer does not seem to be realistic. The Surveyor has written that no reason has been given for the same. Thus even the stock position shown by the officers of Bank of Baroda becomes doubtful in view of letter of the bank which was written by the bank to the Surveyor. Thus on the basis of stock position taken by the Surveyor on basis of inspection report dated 21.3.1988 conducted by the officers of the bank becomes doubtful and no reliance can be placed on that report and on that basis the stock position of the complainant''s shop on that date cannot be relied upon. Thus the report of the Surveyor on the basis of this statement cannot be accepted.

7. THE complainant has filed copies of the statement of accounts sent by him to the bank. We are not concerned with the statement of accounts which was submitted to the bank in the month of April, 1988 for the stock position for the month ending on 31st March, a copy of which is obtained from the Bank of Baroda is dated 4th April, 1988. THE statement is addressed to the Branch Manager of the Bank of Baroda, District Rae Bareilly. It has been stated that in the end of March, 1988, the stock of cloths worth Rs. 1,01,500/- was in stock, the details of which have been given in this statement. He has also given below

these stock positions of the cloth, the previous balance of the last month, the purchases made during this month, total stock remained after the sale done in the month of March, 1988. Not only this the complainant has also given a number of statements obtained from Bank of Baroda, copies of these account statements which were submitted to the Bank by the complainant before the incident of fire broke out cannot be said to be manipulated. THE bank has been given stock position of every month in order to keep a watch on the stock position to show that the cash credit limits available to the complainant is checked. THE bank will not permit more cash credit limit than what is in stock with the complainant. It has been tried to show that this stock position has been falsely given by the complainant to the bank in order to obtain higher cash credit limit. This argument does not appeal to reason as it cannot be said that the bank will advance money on the basis of cash credit limit of more amount than the stock which is kept in the shop of the complainant. If this is done by a bank then it will be loosing huge amounts in the case of failure of a party to pay the amount. Adequate security is always taken so that the amount due is reduced from the sale of the property in stock. Thus we find that the report of the Surveyor is not according to the facts on records, and no cogent reason has been given to accept the report of the Surveyor. Learned Counsel for the Insurance Company, appellant, has argued that the amount of Rs. 24,242/- which was assessed by the Surveyor towards the loss sustained by the complainant has been given to the bank and a receipt of full and final settlement of the claim has been obtained. According to learned Counsel for the complainant this receipt granted by the bank satisfying the entire amount payable under the policy is wrong as also granting a receipt. Our attention has been drawn to the ''Agreed Bank Clause'' No. 1 of the policy which reads as under : "that upon any monies becoming payable under this policy the same shall be paid by the Company to the Bank and such part of any monies so paid as may relate to the interests of other parties insured hereunder shall be received by the Bank as Agents for such other parties."

8. THE above argument is based on this clause. Learned Counsel for the opposite party, complainant, has argued that no intimation was ever sent to the complainant that the amount assessed by the Surveyor is Rs. 24,242/- and the same amount is to be payable to the bank in full and final settlement of the claim. According to the learned Counsel, the complainant was kept in dark about assessment of the Surveyor which took place between the Insurance Company and the bank. According to learned Counsel, the complainant should have been informed and his consent should have been obtained before making payment to the bank and taking full and final settlement of the claim. In this connection it may be stated that the Insurance Company has not filed any paper issued by the Bank to show as to how much amount was due. No document has been filed on record by the Insurance Company which might have been written by it to the bank and the bank would have replied to their query that so much amount is due to the bank against the complainant. Atleast before making the payment to the

bank, the Insurance Company should have obtained the outstanding amount which was to be given by the complainant to the bank. As no document of this nature has been filed, it can safely be presumed that the Insurance Company has not asked the bank to give details of the amount which is due from the complainant. As a matter of fact the complainant should have been given an opportunity to scrutinize the statement given by the bank, if any, so that the correctness of the figure could have been judged by the complainant. THE amount had to be paid by the complainant and after the verification by the complainant the same should have been paid by Insurance Company to the bank. THE veracity of the statement was not examined by the complainant and one sided transaction took place without involving the complainant. These questions came for consideration before the National Commission, New Delhi in the case of Branch Manager, New India Assurance Company Limited v. Vimal through its Proprietor Vikramaditya Pal, II (1999) CPJ 34 (NC)=1986-99 Consumer Cases 3426 (NS). In that case also the Insurance Company made payment directly to the bank without informing the complainant and obtained a receipt for full and final settlement of the claim. The National Commission held in para 8 as under : "The argument about ''full and final settlement'' is entirely without any substance. The complainant did not state anywhere that the money was being accepted by him in full and final satisfaction of its claim. What the Bank had done cannot bind the complainant. The complainant had no prior notice of this settlement."

Thus we find that receipt obtained by the Insurance Company in full and final settlement of the claim does not bind the complainant and does not preclude him from challenging the amount of compensation and damages arrived at by the Insurance Company on the basis of records.

9. LEARNED Counsel for the appellant has argued that the complaint is barred by limitation. According to learned Counsel, the terms and conditions of the policy provide that the claim is to be filed within 12 months from the date of repudiation. This condition is mentioned in Clause 10 of the General Conditions. This provides as under : "It is hereby expressly stipulated and ordered that it shall be a condition precedent to any right or action or suit upon the policy that the award by Arbitrators or Umpire of the amount or the loss of damage shall be first obtained. It is also hereby further expressly agreed and declared that if the Company shall declare liability to the insured for any claim hereunder and such claims shall not within 12 calendar months from the date of such disclaimer have been made the subject matter of a suit in a Court of Law, then the claim shall for all practical purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder."

10. IN the present case, the repudiation of the claim was made by the INsurance Company on 15.1.1992. It has been issued on behalf of the INsurance Company to the complainant in which it is stated that with reference to your letter dated 21.10.1992 the amount of Rs. 24,242/- as assessed by the Surveyor has been

paid to the Bank of Baroda, Rae Bareilly by means of cheque after taking a discharge form. It has further been provided in this letter that as the Surveyor is an independent person, therefore, his assessment is fair. It has further been mentioned that besides the amount assessed by the Surveyor, no other amount is due and the payment made in final. According to the learned Counsel, by letter dated 1st January, 1990 the complainant was informed that the claim has been approved for a sum of Rs. 24,242/-. He was also requested to return the enclosed discharge voucher duly signed and stamped so as to enable the bankers to issue the receipt after release of the cheque. It was followed by another letter dated 23.1.1990 by which the Insurance Company enclosed a cheque for Rs,. 24,242/-, towards the payment of the said claim of the complainant. A copy of this letter was sent to the complainant for information.

Thus from the perusal of the Clause No. 10 of the General Condition of the insurance policy we find that if claim has been repudiated or settled, then the complaint has to be filed within a period of one year from the date of repudiation. In the present case the complaint was filed on 16.11.1992. The information of settlement of claim was sent to the complainant vide letter dated 1.1.1990 written by the Insurance Company, a mention of which has already been made in the earlier part of the judgment. Thus according to the Insurance Company the complaint should have been filed by 15th January, 1991. However, according to learned Counsel for the opposite party the complaint is to be filed within a period of three years which was the period of limitation prescribed under the unamended Consumer Protection Act. Thus if we take the limitation of three years then naturally the complaint is within time. A reference has been made by learned Counsel for the appellant to the case of National Insurance Company Limited v. Sujir Ganesh Nayak and Co. & Ors., II (1997) CPJ 1 (SC). In this case the Hon''ble Supreme Court had an occasion to deal with such clauses which provides curtailment of period of limitation under the insurance policy. The Hon''ble Supreme Court held as under in page No. 15 : "From the case law referred to above, the legal position that emerges is that an agreement which in effect seeks to curtain the period of limitation and prescribes shorter period than that prescribed by law would be void as offending Section 28 of the Contract Act. That is because such an agreement would seek to restrict the party from enforcing his right in Court after the period prescribed under the agreement expires even though the period prescribed by law for the enforcement of his right has yet not expired. But there could be agreements which do not seek to curtain the time for enforcement of the right but which provides for the forfeiture or waiver of the right itself if no action is commenced within the period stipulated by the agreement. Such a clause in the agreement would not fall within the mischief of Section 28 of the Contract Act. To put it differently, curtailment of the period of limitation is not permissible in view of Section 28 but extinction of the right itself unless exercised within a specified time is permissible and can be enforced. If the policy of insurance provides that if a claim is made and rejected and no action is commenced within the time stated in the policy, the benefits

flowing from the policy shall stand extinguished and any subsequent action would be time barred. Such a clause would fall outside the scope of Section 28 of the Contract Act."

11. THUS on the basis of interpretation of law, we have to scrutinise the conditions of the insurance policy. This condition clearly goes to show that if an action is not taken within 12 calendar months in a Court of Law, then the claim shall, for all practical purposes, be deemed to have been abandoned and shall not thereafter be recoverable thereunder. THUS if we apply principles of law laid down by Apex Court in this case we find that the period of limitation has not been curtailed but the right to bring the action has been extinguished by providing that the claim will be treated to have been abandoned and not recoverable. THUS the right to claim the amount is extinguished. Hence such a clause will be enforceable and will not be void under Section 20 of the Contract Act. In the present case the claim was filed beyond 12 calendar months from the date of intimation of settlement of claim, therefore, this claim has become barred by limitation. Thus we find that even though the settlement of the claim by the Insurance Company was not justified but even then the claimant cannot maintain his claim against the Insurance Company as being barred by time. The result is that the appeal is liable to be allowed and the claim petition is liable to be dismissed. Order

12. THE appeal is allowed. THE judgment and order of the learned District Forum is set aside and the complaint is dismissed. However, in view of the facts of the case there will be no order as to the cost. Let copy of this order be made available to the parties as per rules. Appeal allowed.

