(2008) 06 NCDRC CK 0007

In the National Consumer Disputes Redressal Commission

ORIENTAL INSURANCE COMPANY LTD — APPELLANT

Vs

GHULAM NABI KANA — RESPONDENT

Date of Decision : 19-06-2008

Acts Referred:

Citation : 2008 4 CPJ 99

Hon'ble Judges : G.D.Sharma , Rifat Aijaz J.

Advocate : J.A.Kawusa , Sami Yakub

Judgement

1. -THROUGH the medium of this appeal, order dated 9. 4. 2007 passed by the learned District Consumer Protection Forum, Srinagar, (hereinafter referred as the Forum), has been challenged. The learned Forum in terms of this order had accepted the complaint of the complainant and allowed him claim of his gutted insured house for a sum of Rs. 4,27,821 along with interest @ 6% p. a. from the institution of the complaint till its realization. Litigation charges of Rs. 2,000 have also been awarded in his favour.

2. THE order has been challenged, inter alia, on the grounds that the Surveyor namely Sh. Javed Sofi, was not deputed by the appellant to make any assessment because no claim had been raised by the respondent regarding the alleged loss. That it is totally a false and fabricated case because the alleged gutted building is intact which fact was got verified by the appellant from the Investigators, namely AMS Consultants, who after conducting the investigation submitted their report before the appellant on 11. 10. 2005. On the basis of said investigation, the appellant had come to the conclusion that no fire had broken out in the shop during the intervening night of 24/25. 2. 1997. The appeal is accompanied by Annexure A1 which is a certificate issued by the Director, Fire and Emergency Services, Srinagar, which does not speak of any fire to have ever broken out in the house of the respondent but states that two shops in the ground floor belonging to the brother of the respondent, namely Ghulam Jeelani Kana were affected and those shops were occupied by his tenant namely, Farooq Ahmed Janwari. Those shops were totally empty and only ceiling of one of the

shop, along with shutter and sales counter were partly damaged. Heard the arguments.

Mr. J. A. Kawoosa, the learned Counsel of the appellant has contended that in para 4 of the written version that it was pleaded by the appellant that "the claim in question was not pending in the record of "outstanding liability" and no registered Surveyor had mentioned the claim in question as "outstanding claim". M/s. AMS Consultants who during the pendency of these proceedings were appointed to investigate the claim clearly stated in the finding that no loss to the insured building had been caused and the building was intact. On the basis of investigation case had been made out for the commission fraud and misrepresentation of facts, and the Forum wrongly rejected the prayer of the appellant to place on record the report of the Investigator as well as examine him as a witness. To buttress his contention the learned Counsel has cited the case of United India Insurance Co. Ltd. v. Rajendra Singh and Ors. , Etc. , III (2000) SLT 1=i (2000) ACC 484 (SC)=ii (2000) CLT 25 (SC)=air 2000 SC 1165, wherein it has been held that the remedy to move for recalling an order on the basis of newly discovered facts amounting to fraud cannot be fore-closed. No Court or Tribunal can be regarded as powerless to recall its own order if it is convinced that the order was wangled to fraud or misrepresentation of such dimension as would affect the very basis of the claim. He has also cited the case of National Insurance Co. Ltd. v. Harjeet Rice Mills, III (2005) CPJ 6 (SC)=v (2005) SLT 503=2005 (6) SCC 45. In that case, the report of a private investigator hired by the service providing (Insurance Co.) was made admissible to consider the allegations of the Insurance Company that the claim of the complainant therein was fraudulent. The case requires prima facie a proper inquiry. After deriving support from the principles enunciated above by the Apex Court the Counsel has concluded his arguments by submitting that the case is based on fraud and misrepresentation and the Forum should have gone into the fact of unearthing the fraud because the insured building stands intact and the report of M/s. AMS Investigators should have bene considered. It is also pleaded that the Forum has not addressed itself to decide the allegations with regard to the point of limitation because the complaint was filed after seven years from the date when the cause of action had arisen and the period of limitation provided is that of two years.

3. IN rebuttal, Mr. Sami has contended that there is no question of any fraud but a genuine claim of the respondent was not entertained by the appellant and the matter was reported immediately in the police as well as the claim was raised and upon that move of the respondent, the appellant had appointed Sh. Javed Hussain Sofi as final Surveyor who could not get any support from the appellant to complete the assessment of the loss in time because of the consistent plea which was being taken by the appellant that the claim record of the respondent was not traceable in its records. In other words, the appellant had not rendered any help in assessing the loss. In these circumstances the respondent had to knock at the door of the Forum and after securing direction from the Forum the

Surveyor submitted his report, which shows the actual loss suffered by the respondent. The learned Counsel has also taken us through the pleadings. In the written version filed by the appellant we do not find any assertion being made therein which corroborates his present argument that respondent had not raised any claim with the appellant. Rather the pleas taken in the written version were that the claim was time barred as well as the record of the claim was not traceable in the official records of the Insurer. There was no specific denial on the part of the appellant with regard to the appointment of the loss assessor viz. , Sh. Javed Hussain Sofi, which averment has been specifically made by the respondent in Para 3 of the complaint. Rather the reply was evaded by stating that the complaint was not maintainable before the Forum as it involved complicated questions of law, which could be adjudicated upon in a Civil Court of competent jurisdiciton. In para 4 of the written version, it is pleaded that after the receipt of the notice form the Forum, the appellant contacted the Surveyor Mr. Javed Sofi who had informed that the assessment could not be made because the respondent had provided no document to eastablish his claim. It is not specifically pleaded in that para that the claim had not been raised by the respondent and that the appellant had not appointed the Surveyor Sh. Javed Hussain Sofi to assess the loss. Regarding the authenticity of M/s. AMS Consultant''s report it is pleaded by the Counsel of the respondent that the report is a figment of imagination because no investigation was ever conducted by them on the spot. That their finding to the effect that the "insured house never gutted in the fire and it was intact on spot" stands nullified by the final report made by SHO, Police Station Sopore dated 16. 3. 2006 wherein the factual position regarding the gutting of the insured house has been admitted. This finding has been given by a statutory investigating authority viz. , the concerned police. Not only that, it is latter in time than the report of the abovesaid private Investigators (M/s. AMS Consultants) which is dated 11. 2. 2005, similarly, Annexure A1 produced with the memorandum of appeal by the appellant too has no authenticity as it stands cancelled by Annexure ''c'' which already stood annexed with the complaint and which is dated 4. 7. 1997. Annexure C has been issued by the Assistant Director, Fire Services Command, Sopore and it bears his seal and signatures. It states that "on 25. 2. 1997 at 2. 30 hours a fire had broken out at Khushall Mutoo, Sopore in which one house having two shops in the ground floor belonging to Gh. Nabi s/o Ashiq Kana had been damaged due to fire, heat and water. " Annexure A1 attached with the memo of appeal, which is prior in time i. e. , dated 17. 6. 2005 does not bear the seal of Director, Fire Services, Srinagar, through it carries his alleged signatures. In the presence of two official documents, Annexures C and A 1, which mutually are of contradictory nature, it is not safe to place any reliance on any of them and the best course is to discard them. The benefits of it flows in favour of the respondent.

4. DURING the course of arguments learned Counsel has produced a certified copy of the letter written by the Oriental Insurance Co. (appellant) to the Assistant Director, Fire Services Sopore dated 17. 9. 1997 wherein it is clearly

admitted that "the above named party has lodged a claim on account of damage/ loss to his property in the night intervening 24/25. 2. 1997. The policy number is the same which covers the risk of gutted house and claim number stated therein is the same. In the presence of these admitted facts on the part of a responsible officer borne on the strength of the appellant how it could later on lie in the mouth of the appellant to file this meritless appeal by twisting the facts which course is not expected from a public Corporate. Rather it is expected from it to act fairly and honestly while dealing with the claims of the genuine consumers. From the above made discussion, we find no merit in this appeal, which is dismissed with costs of Rs. 4,000 to be paid by the appellant to the respondent. Accordingly the order of the Divisional Forum is upheld and its record be returned at once. The appeal record be consigned to the Record Room. Appeal dismissed.