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(2015) 02 NCDRC CK 0108

In the National Consumer Disputes Redressal Commission

Super Lable Mfg Co APPELLANT

Vs

NEW INDIA ASSURANCE COMPANY LIMITED RESPONDENT

Date of Decision : 24-02-2015

Acts Referred:

Citation : (2015) 02 NCDRC CK 0108

Hon'ble Judges : V.K.JAIN , B.C.Gupta J.

Advocate : YUSUF IQBAL , AVNI MEHTA , Bhavya Sethi , S.M.TRIPATHI

Judgement

1. THE complainant, M/s. Super Label Manufacturing Company, a registered partnership firm, engaged in the business of printing high technology labels, used mostly by drug manufacturers and other companies for their packing material, obtained Standard Fire and Special Perils Insurance Policies from the opposite party (OP) Insurance Company vide Policy nos. 112500/11/03/00214; 112500/11/03/01160; and 112500/11/03/01161 and the total sum insured was ? 3,35,30,000/ -. The case of the complainant is that there was fire in their factory on 28.02.2004 at about 7:50 AM, resulting in damage to plant and machinery, building, raw material and finished products. The complainant filed a claim for a sum of ?3,02,75,000/ -. The Insurance Company appointed a surveyor M/s. Prabha Associates, Mumbai to assess the loss. It has been stated that the surveyor was bound to give his report within a maximum period of 6 weeks from the date of his appointment, but the said report was not submitted even after one year for the reasons best known to the surveyor. The complainant had been pressing for the grant of interim relief in the meantime, as the loss was clearly visible and tangible but there was no response from the OP. The surveyor conducted inspection many times, but at his instance, the complainant had to call an engineer from the manufacturer from Switzerland. The engineer gave his opinion in the presence of the surveyor that the machine could not be repaired and brought to the pre -accident condition. The complainant had to pay a sum of ?4,86,665/ - for the visit of foreign engineer. It is further stated by the complainant that the surveyor admitted that the loss was to the tune of ? 1,81,35,810/ -. Following meetings with the complainant, the surveyor revised

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his assessment of loss to ?2,32,02,000/ - and then to ?2,26,61,376/ -, as is evident from the letters dated 13.09.2004 and 07.10.2004 from the complainant to the surveyor. However, the Opposite Parties refused to settle the claim, despite making many requests to them. Later on, on 16.05.2005, the OPs sent a voucher for ?16,15,606/ - for full and final payment of the claim, but the complainant refused to accept that amount. The consumer complaint, in question, was then filed claiming a sum of ?5,20,91,724/ - including an amount of ?2,26,61,376/ - as per assessment of loss by the surveyor, interest payable to various banks, salary and wages bill etc., the cost of travel of foreign engineer and various other losses suffered by the complainant.

2. THE complaint was resisted by the OP by filing a written statement saying that there was no deficiency in service shown by the OP, because they had offered the amount as assessed by the surveyor to the complainant in full and final settlement of the claim, but the complainant had declined the offer. It is also stated that the complainants refused to cooperate with the surveyors at the time of assessment of loss. There was no provision for making any interim relief. It is further stated that the loss is mainly on account of damage to two imported machines, namely, Gallus Printing Machine and Acquaflex Printing Machine. M/s. Gallus are the manufacturers of Gallus Printing Machine and another company, M/s. Heidelberg are their representatives in India. The local representative, M/s. Heidelberg were not able to technically prove the damages done to the machine, saying that they had no technical expertise / knowledge to attend the machine. The engineer who visited from M/s. Gallus had declared the machine to be a total loss, based on the photographs and had not stated categorically that the machine could not be repaired. Such engineer also could not explain as to how damage had been done due to fire. He stated that the machine could not be opened at site and hence, his opinion was based on visual inspection only. It has further been stated in the reply that when the surveyor visited the site subsequently, it was found that the complainant had cleaned the machine and hardly few components were found rusted.

3. WITH regard to the other machine Acquaflex, the surveyor found that only some plastic knobs had partly melted and some of electrical wirings burnt. However, the main control panel was void of water / fire marks. The rear side of the machine did show some fire marks but the damage was not so extensive that the machine could not be repaired. The iron parts of the machine were found rusted. The OPs have further stated that the complainant had been alleging heavy corrosion of rollers stated to have occurred within 4 to 5 hours of the fire due to water used in extinguishment. The OPs, therefore, engaged the services of M/s. Material Technology Development Centre (MTDC) to make a technical study on the feasibility of corrosion of rollers immediately after the fire. The complainants did not cooperate with the MTDC as well in providing certain information. The MTDC had requested the complainant for a sample of roller, fresh sample of ink and requisite data for evaluation of corrosion but the complainants did not cooperate. The MTDC have stated in their conclusion as

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follows: - "To the best of our knowledge in light of the information received, our visual observations, tests conducted data generated, theory of materials sciences as related to thermal degradation and corrosion sciences, without prejudice to the parties involved based on these studies conducted we express our opinion as under: - 1. The corrosion of metal substrate of the ceramic roller subsequent to its cracking is technically feasible due to fire and its extinguishing; 2. We cannot confirm the validity of intense heat resulting in heavy rusting of roller surfaces within 4 - 5 hours; 3. Technically, we cannot confirm significant amount of rusting within 4 - 5 hours because of fire and it''s extinguishing as valid."

4. THE surveyor indicated the amount of ?16,19,209/ - for which voucher was released by the respondents for discharge by the complainant so that the payment could be made but the complainant declined to sign the same. Regarding the assessment of loss to the tune of ?1,81,35,180/ -, the OP have stated in their statement that the said assessment was based on the complainants unsubstantiated claim of total loss of two machines. There was, however, no evidence for total loss and hence, the claim could not be established in the final survey report. Regarding the consequential loss stated to have been suffered by the complainant, the OP stated that such losses were excluded by the insurance contract. The expenses on the visit of the foreign engineer were also not covered because he had not done his job as he was expected to do. The OPs stated that the complaint was without any basis and should be dismissed.

5. AT the time of hearing before us, the learned counsel for the complainants stated in his oral as well as written submissions that intimation about the fire incident had admittedly been given to the Insurance Company on the same day when the fire took place. It was also requested that some amount on adhoc / interim basis should also be given to them to enable to them to restart their unit at the earliest. The Insurance Company appointed M/s. Relwani of M/s. Prabha Associates as surveyor and the complainant requested the said surveyor also, vide their letter dated 11.08.2004 to release adhoc payment of at least 75% of the claim value immediately. The surveyor sent a letter dated 19.08.2004 to the complainant saying that they could recommend an ''On Account'' payment of ? 30 lakh. On 26.08.2004, the complainant sent a letter to the surveyor referring to discussion with them one day earlier, confirming that the machinery could not be repaired by them and the insurer could take over the machinery on "As and Where" basis. As per letter dated 03.09.2004, the surveyor sent the tender documents for the disposal of the fire/water affected machinery for approval of the complainant. However, the words "without prejudice" have been written on the top of this letter. On 06.09.2004, the surveyor sent their final assessment report to the complainant mentioning a total loss of ? 1,81,35,810/ - including ? 1,60,24,246/ - for Gallus printing machine after 45% depreciation and ? 14,46,614/ - for Aquaflex Machine after applying 75% depreciation. A copy of another letter dated 13.09.2004 sent by the complainant to the surveyor is on record saying that after discussion between the complainant and the surveyor, the amount payable as agreed in principal was ?232.202 lakh including ?

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1,87.800 lakh for Arsoma -6 colour printing machine. There is yet another letter dated 07.10.2004 sent by the complainant to the surveyor, saying that the amount payable as agreed in principal was ?2,26,61,376/ -. However, despite all these discussions and assessments, the surveyor had submitted his final report recommending an amount of ?16,15,606/ - only and fully excluded the claim for two main machines. The Insurance Company had sent a settlement intimation voucher for the said amount to them which was accepted without prejudice and under protest. The surveyor had wrongly concluded that there was no damage due to fire/heat/smoke as reported by the manufacturer''s Engineers. The learned counsel argued that payment should be made to them as per the agreed assessment of ?2.26 crore in discussion between the complainant and the surveyor. The learned counsel mentioned that there was no breach of warranty or policy conditions as brought out in the report of the surveyor. The report of the metallurgist had also confirmed the corrosion on metal substrates of ceramic roller, subsequent to its cracking which was technically feasible due to fire and extinguishment. The complainants had also obtained report from the Indian Institute of Technology (IIT) Powai, Mumbai in which they had stated that all seven conditions for corrosion existed. The learned counsel further argued that the foreign manufacturer of the Gallus printing machine had categorically stated that the said machine could not be repaired at site and would have to be shipped to Germany for purpose of repairs for which an amount of Euro 4,22,450/ - equivalent to ?3,26,29,386/ - will have to be spent. This was exclusive of the cost of shipping the machine from Mumbai to Germany. It was highly illogical to carry out the repairs at such a huge cost and hence, the said machine should be treated as scrapped. The learned counsel further stated that it was a genuine incident which had affected the highly profitable and thriving business of the complainant for which they should be compensated and their claim should be allowed with interest.

6. THE learned counsel for the OP Insurance Company stated that the complainant had failed to cooperate with the surveyor as well as the metallurgical expert during the process of assessment of loss. The surveyor had concluded his findings based on the report of expert metallurgist in which it had been brought out that rusting could not occur within 4 to 5 hours as reported by the insured and hence, damage to these machines did not fall within the purview of the policy in question. The learned counsel concluded from the report submitted by the MTDC that the insurance company had the right to satisfy itself that the loss claimed had in fact occurred, arising out of the insured perils. The representatives of the foreign company in India M/s. Heidelberg were not able to technically prove the damages. The report from M/s. Gallus was based on photographs only and they had not identified the damaged parts of the machine. They had declared ''total loss'' without detailed inspection of the machine. Further, the MTDC had requested the complainant for a sample of roller and ink and requisite data for evaluation of corrosion and for conducting corrosion test. However, the complainant failed to provide them with the requisite samples. The

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report of the MTDC was, therefore, based on the concept of design and engineering of material sciences. The MTDC had given their opinion, saying that they could not confirm technically, significant amount of rusting within 4 to 5 hours because of fire and its extinguishing. The surveyor had made the following observations in their report, in nutshell: - "1. There was water on mechanical and electrical parts located on operators side of machine; 2. Rear side of machine was void of any water marks; 3. Various cables were found intact with no signs of fire marks; 4. Machine itself no visible fire damage noticed; 5. Glass bottle on machine was found intact. No visible deformation in any part of machine observed." The surveyor arrived at the following conclusion: - "1. There was water/rusting on the machine; 2. No fire/smoke/soot visible on the machine; 3. There was no damage due to fire/heat/smoke as reported by the manufacturers engineers. "

7. FURTHER , the surveyor had detailed discussions with the Gallus Engineer who also requested them to open up some parts and show the deviation from the standard parameters. However, the surveyor was informed that the machine parts could not be opened at site and hence, the report was prepared, based on visual inspection. The learned counsel stated that although there were no fire marks and no feasible deformation, yet in his report, the Gallus Engineer mentioned that damages are due to fire / water / heat / smoke. Based on visual inspection only, it could not be assumed that all parts needed replacement. The learned counsel further stated that in Acquaflex machine, some of plastic knobs had partly melted and some of electric wires burnt. However, the main control panel was void of water/fire marks. The damage due to fire was not so extensive that machine could not be repaired. The Insurance Company was, therefore, liable to make payment as per the report given by the surveyor only.

8. WE have examined the entire material on record and given a thoughtful consideration to the arguments advanced before us.

9. IT has been stated in the complaint that there was fire in their factory premises on 28.02.2004, resulting in damage to plant and machinery, building, raw material and finished products. The fire took place in Gala No. 25 and the said premises was covered under standard fire and special perils policy for a total sum of ?3,35,30,000/ - valid from 15.05.2003 to 30.08.2004 as per the following details: - JUDGEMENT_73_LAWS(NCD)2_20151.htm

10. THE following plant and machinery is installed in the premises of the insured : - JUDGEMENT_73_LAWS(NCD)2_20152.htm

11. THE summary of market value of plant and machinery under different items as mentioned in the surveyors'' report is as follows: - JUDGEMENT_73_LAWS(NCD)2_20153.htm

12. THE summary of assessment of loss at ?16,19,209/ - done by the surveyor on various items is as follows: - JUDGEMENT_73_LAWS(NCD)2_20154.htm

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13. FROM the above, it is made out that the surveyor has assessed the loss for damage to the split A.C. unit, electrical cabling, chiller, air dryers, printing plates and cutting dies under the head ''plant and machinery'' and assessed loss to building at ?10,000/ - only and ''Nil'' loss for stocks, making a total of ? 16,19,209/ -. The surveyor stated that based on the report of expert metallurgist, rusting of machinery could not occur within 4 to 5 hours as reported by the insured and hence, damage to the machinery did not fall within the purview of the insurance policy.

14. THE main plea taken by the complainant says that damage had occurred on account of fire and water used in extinguishing the fire. The fire/water/heat/ smoke had led to heavy corrosion and rusting of the machinery. In this regard, the technical expert opinion obtained from M/s. Material Technology Development Centre (MTDC) brings out very clearly that heavy rusting is not technically feasible within the time span of 4 to 5 hours under conditions of fire and its extinguishing. The detailed report prepared by the MTDC is supported by many references/literature on the subject. The complainant have referred to a report dated 12.07.2006 made by the Indian Institute of Technology (I.I.T.) Mumbai, in which reference has been given to an earlier report dated 22.02.2005 stating that the conditions necessary for rusting and corrosion did exist and the metals would have corroded very quickly. This view is, however, not supported by the expert opinion from the MTDC. Moreover an opinion taken from Wikipedia, the free encyclopaedia from the website en.m.wikipedia.org ''corrosion'' has been defined as follows: - "Corrosion is the gradual destruction of materials (usually metals) by chemical reaction with their environment. In the most common use of the word, this means electrochemical oxidation of metals in reaction with an oxidant such as oxygen. Rusting, the formation of iron oxides, is a well -known example of electrochemical corrosion ."

15. IT is made out from above that corrosion / rusting involves oxidation of metals and it is evidently a very slow process and hence, it has been rightly brought out in the report of the MTDC that heavy rusting of machinery within 4 to 5 hours of the fire incident was not technically feasible. All these facts and circumstances of the case lead us to the irresistible conclusion that heavy rusting to the machinery had taken place over a number of years and not due to one incident of fire and its extinguishment.

16. THE contention raised by the complainant that the surveyor had earlier made assessment of loss at ?1,81,35,810/ -, which was further revised to ? 2,26,61,376/ - based on discussion with them does not help the complainant in any manner because the final report of the surveyor has taken into account the expert report from the MTDC and based on that, the surveyor concluded that rusting could not occur within 4 to 5 hours and hence, damage to the machines does not fall within the purview of the policy. The figures given earlier do find mention in the E -mail messages exchanged between the surveyor and the complainant, but they do not find mention in the final report prepared by the

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surveyor and hence, no reliance can be placed upon them.

17. THE surveyor has made an assessment of ?16,19,209/ - as liability of the insurer towards damage to plant and machinery and building and the said amount was also offered by the Insurance Company to the insured. It is held, therefore, that the insured is entitled to receive this amount from the insurer for the loss suffered by him.

18. IN so far as the contention of the OP Insurance Company that the complainant is not covered under the definition of ''Consumer'' as per section 2(1)(d)(ii) of the Consumer Protection Act, 1986, it may be stated that this Commission has decided in the case M/s Harsolia Motors versus M/s National Insurance Co. Ltd. and Ors., 2005 1 CPR 1 (NC)" that matters regarding such claims against Insurance Companies can be entertained by the consumer fora, as a person who takes insurance policy to cover the envisaged risk, does not take the policy for commercial purpose. In view of this order, the plea taken by the OP Insurance Company that the complainant is not a ''consumer'' is without any force.

19. BASED on the discussion above, the complainants are held entitled to be paid a sum of ?16,19,209/ - by the insurance company for the loss / damage to plant and machinery and other items as per the assessment made by the surveyor. The Insurance Company is directed to pay this amount within a period of two months from today alongwith interest @9% p.a. from the date of filing the complaint, failing which they shall be liable to pay interest @12% p.a. till realisation. There shall be no order as to costs.

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