(2016) 04 NCDRC CK 0012

In the National Consumer Disputes Redressal Commission

Case No : 335 of 2010

VISHAL CHANDRA — APPELLANT

Vs

ROYAL SUNDARAM ALLIANCE GENERAL INSURANCE CO. LTD. — RESPONDENT

Date of Decision : 07-04-2016

Acts Referred:
Indian Penal Code, 1860, Section 380 - Theft in dwelling-house, etc.

Citation : 2016 2 CPR 592

Hon'ble Judges : Ajit Bharihoke, Rekha Gupta

Advocate : Rajesh Kumar, Jiwan Pal Singh

Judgement

1. This revision is directed against the order of the State Commission Delhi in Appeal No. FA/09/443 dated 01.12.2009 whereby the State Commission allowed the appeal of the respondent insurance company against the order of the District Forum (East), Delhi dated 01.05.2009 and dismissed the complaint.

2. Briefly stated, the facts relevant for the disposal of the revision petition are that petitioner filed a consumer complaint in the District Forum alleging that he had purchased a fire and burglary policy from the opposite party insurance company for a sum insured Rs.12,50,000. The insurance policy covered the loss pertaining to the building, furniture, equipment and other office assets. The policy was valid from 14.10.2003 to 13.10.2004. It is the case of the petitioner that somewhere between 10.01.2004 5 p.m. and 12.01.2004, some unknown person committed theft of two computers and one fax machine from the insured premises. The matter was reported to the police vide FIR no. 14 of 2004 u/s 380 IPC dated 13.01.2004 P.S. Pandav Nagar, Delhi. The theft was also notified to the respondent opposite party. A surveyor was appointed to assess the loss. However, the opposite party repudiated the insurance claim vide letter dated 07.06.2004 for following reasons:

"The Surveyors had listed out documents required to be submitted for assessment of the loss. Despite various reminders, you have not submitted the documents required. Some of the material documents not produced include,

1. Break up of items forming part of SI of Rs.12,50,000/-.

2. Full particulars of items claimed stolen and payment proof of them

3. Balance sheet and Fixed Asset Schedule for the last two years. In the absence of these documents, the Surveyors are not in a position to assess the loss. Though you have produced invoice of Infocon Computers, you have not furnished details of payment made in satisfaction of these invoice nor the receipts of the seller. The consideration of the claim is further hampered by the facts that :

a. the market enquiries reveal that computer with configuration of Pentium IV/2.0 GHz/512 MB RAM was not available in the market during Oct 2002, when they are claimed to have been purchased by you.

b. The Police authorities have registered the crime under Sec. 380 of IPC and the FIR does not mention about burglary, which is the peril insured covered under the Policy.

Under the circumstances, we regret our inability to consider settlement of the claim."

3. Being aggrieved of non settlement of his claim by the opposite party, the petitioner raised the consumer dispute by filing a complaint before the District Forum. The opposite party despite of service of notice of the complaint failed to put in appearance. As such, the opposite party was proceeded ex parte.

4. The District Forum concerned vide its order dated 03.01.2006 disposed of the complaint with following observations. " In view of the above discussion, the forum orders OP to consider the claim of the complainant afresh if the complainant furnishes the required information and convincing reply to the OP within 60 days of the date of this order."

5. Being aggrieved of the order of the District Forum, the petitioner complainant preferred an appeal in the State Commission being Appeal No. 171/06. The State Commission disposed of the appeal with following observations: "In the result, we allow the appeal at the outset, set aside the impugned order and remand the matter to the District Forum for deciding it afresh on merit after ensuring the presence of the respondent and obtaining its version and keeping in

view the principle of law that uncontroverted evidence in the form of affidavit cannot be brushed aside cavalierly.

The appellant shall appear before the District Forum on 11.08.2006 for the aforesaid purpose. "

6. The District Forum in compliance with the above noted remand order of the State Commission issued notice of the consumer complaint to the respondent opposite party. Pursuant to the notice, the respondent opposite party filed a

written statement admitting issue of insurance policy. The opposite party, however, took the plea in the written statement that the claim of the petitioner was rejected for two reasons (1) non submission of documents; (ii) that the loss was not covered within the insurance contract as it was a case of theft and not the burglary which was covered under the insurance policy.

7. The District Forum on consideration of the pleadings and the evidence disposed of the consumer complaint vide its order dated 04.12.2006 with following observations:

"The forum cannot record deficiency in service against any OP only on the ground that complainant suffered losses. Deficiency in service can be recorded only if the OP repudiates the claim arbitrarily.

The complainant is under obligation to provide all assistance to OP to adjudicate upon the matter.

In view of the above discussion, the forum orders OP to consider the claim of the complainant afresh if the complainant furnishes the required information and convincing reply to OP within 60 days of the date of this order."

8. The petitioner, thereafter, moved an application u/s 27 of the Consumer Protection Act, 1986 alleging that the insurance company has failed to comply with the directions given by the District Forum vide order dated 04.12.2006. The concerned District Forum disposed of the said application vide order dated 21.02.2008 with following observations: " The OP cannot enlarge the scope of reconsideration of the claim by making fishing inquiry. After issuing the insurance policy the OP cannot ask any break up of the sum assured. This could have been very well done before receiving the premium or issuing the insurance policy. Likewise we failed to understand the logic of asking details of item lost in theft and for balance sheet, as the complainant has duly given the affidavit of Mr. Neeraj dated 8.2.07 to the OP which has full address of deponent and description of computer and fax machine delivered to the complainant by him. Opposite Party had enough opportunity to oppose this affidavit by proving the same as false. Opposite Party has chosen not to rebut the above affidavit. Therefore, in our opinion we are bound to pass a substantive order in this execution petition.

It is hereby ordered that Opposite Party shall pay Rs.66,250/- as per invoice no.241 dated 14.07.03 and Rs.99,000/- as per invoice no. 189 dated 03.10.02 to the

complainant within 30 days of receiving of this order. The complainant shall be free to take appropriate action if the opposite party fails to comply this order."

9. Being aggrieved of the above noted order of the District Forum on application u/s 27, the respondent opposite party preferred an appeal before the State Commission and the State Commission Delhi vide its order dated 27.05.2008 set aside the order of the District Forum dated 2102.2008 and again remanded the matter for fresh decision on merits with following observations: In order to

obviate further legal objections as well delay in deciding the matter, we allow the appeal, set aside the impugned order with the observation that the application under section 27 shall be treated as fresh complaint by the respondent under section 12 of the C.P. Act and the appellant shall be given opportunity to file reply and thereafter respondent may file rejoinder and affidavit by way of evidence followed by an affidavit of evidence by the appellant and thereafter District Forum shall decide the matter on merits.

However, liberty is given to the respondent whether he wants to file fresh complaint or wants the application filed under section 27 be treated as fresh complaint. This option shall be obtained by the District Forum at the start of the proceedings.

10. The District Forum concerned vide its order dated 01.05.2009 on consideration of the pleadings and evidence, allowed the complaint and directed the opposite party to pay to the complainant a sum of Rs.1,65,250/- as insurance claim besides Rs.10,000/- as compensation for physical and mental harassment and Rs.5000/- as cost of litigation. Being aggrieved of the aforesaid order, the respondent insurance company preferred an appeal in the State Commission. The State Commission relying upon the judgment of Supreme Court in the matter of United India Insurance Company Limited Vs. Harchand Rai Chandan Lal IV (2004) CPJ 15 (SC) took the view that since there was no violation of forcible entry into the insured premises for committing the theft, it was not a case of burglary and as such the insurance claim was not covered under the insurance contract. The State Commission accordingly set aside the impugned order and dismissed the complaint. Being aggrieved of the said order, the petitioner has preferred this revision.

11. Learned Shri Rajesh Kumar, Advocate for the petitioner has contended that impugned order of the State Commission is based upon incorrect appreciation of facts. It is contended that observation of the State Commission in para 10 of the impugned order to the effect that the unknown thief obtained access to the insured premises by removing the nuts and bolts of the handle by screw driver is based upon assumption as there is no evidence to substantiate that finding and, therefore, impugned order is liable to be set aside.

12. Learned counsel for the opposite party has contended that the State Commission has rightly appreciated the ratio of judgment of Supreme Court in the matter of United India Insurance Co. Ltd. Vs. Harchand Rai Chandan Lal (supra) in allowing the appeal and dismissing the complaint on the premise that there was no evidence of violent or forcible entry into the premises for committing the theft. It is also argued that the repudiation of claim is justified because the petitioner/complainant did not cooperate with the Surveyor.

13. We have considered the rival contentions. The first and foremost issue which needs consideration in this revision petition is whether or not the insured articles were stolen as a result of burglary?

14. The term "Burglary" in the insurance agreement is defined as under: - " Burglary - Theft following upon an actual forcible and violent entry to and/or exit from the premises."

15. Hon?ble Supreme Court in the matter of United India Insurance Co. Ltd. (supra) had an occasion to interpret the above definition of Burglary. In the said judgment, Hon?ble Supreme Court after discussing the difference between Theft and Burglary has held as under: "The question before us is whether in terms of the policy, the repudiation of the claim of the respondent by the appellant company is justified or not. We have already reproduced the terms of the policy as also the definition of burglary and/or housebreaking as defined in the policy. The definition given in the policy is binding on both the parties. The policy is a contract between the parties and both parties are bound by the terms of contract. As per the definition of the word burglary, followed with violence makes it clear that if any theft is committed it should necessarily precede with violence i.e. entry into the premises for committing theft should involve force or violence or threat to insurer or to his employees or to the members of his family. Therefore, the element of force and violence is a condition precedent for burglary and housebreaking. The term ''burglary'' as defined in the English Dictionary means an illegal entry into the building with an intent to commit crime such as theft. But in absence of violence or force the insurer cannot

claim indemnification against the insurance company. The terms of the policy have to be construed as it is and we cannot add or subtract something. Howsoever liberally we may construe the policy but we cannot take liberalism to the extent of substituting the words which are not intended. It is true that in common parlance the term ''burglary'' would mean theft but it has to be preceded with force or violence. If the element of force and violence is not present then the insurer cannot claim compensation against theft from the insurance company. This expression appearing in the insurance policy came up for interpretation before the English Court and the English Courts in no uncertain terms laid down that burglary or theft has to be preceded with force or violence in order to be indemnified by the insurance company. In this connection reference may be made the statement of law as summarized in Halsbury''s Laws of England Fourth Edition (203 Reissue) Para 646. It reads as under:

"646. Forcible and violent entry. The terms of a burglary insurance may exclude liability in certain circumstances unless there is forcible and violent entry into the premises. If so, the entry must be obtained by the use of both force and violence or the definition is not satisfied and the policy does not apply. An entry obtained by turning the handle of an outside door or by using a skeleton key, though sufficient to constitute a criminal offence, is not within the policy since the element of violence is absent. However, an entry obtained by picking the lock or forcing back the catch by means of an instrument involves the use of violence and is therefore covered. The policy may be so framed as to apply only to violent entry from the outside; or the violent entry into a room within the insured premises may be sufficient. In any case, the violence must be connected with the act of entry; if the entry is obtained without violence, the subsequent use of violence to effect the theft, as for instance where a show-case is broken open, does not bring the loss within the policy."

16. From the above observation of the Supreme Court as also the definition of Burglary reproduced above, it is clear that if the theft is committed by forcible and violent entry or the force or violence has been used while exiting from the insured premises, it would be a burglary covered under the insurance contract. In the instant case, on perusal of the report of surveyor Shri Sajan Kumar Agarwal and Co., we find that insured in his statement made to the surveyor stated that he alongwith his caretaker Ajay Sharma has closed his office on 10.01.2004 at 17.00 hours and left for home and Sh. Ajay Sharma, employee of the insured firm made a statement to the surveyor that when he came on duty on 12.01.2004 at about 10.15 a.m., he found the main door lock handle / knob uprooted and on entering the office, he found two computers with monitors, CPU, key boards etc. stolen. From the aforesaid statement of Ajay Sharma, it is clear that unknown thief gained access to the insured premises by using the force i.e. uprooting the main door lock handle / knob. Therefore, it is evident that it is the case of the burglary.

17. In view of the discussion above, order of the State Commission allowing the appeal and dismissing the complaint cannot be sustained. Revision Petition is, therefore, allowed, impugned order is set aside and order of District Forum is restored. Respondent Opposite Party to comply with the order of the District Forum within one month failing which complainant shall be at liberty to execute the order.

