

INDO KNIT & EMBROIDERY (P) LTD. V. NATIONAL INSURANCE COMPANY LTD.

1. INDO KNIT & EMBROIDERY (P) LTD.
VOHRA BUILDING, KHUH BHALLE WALA P.O. KHALSA
COLLEGE,
AMRITSAR

.....Complainant(s)

Versus

1. NATIONAL INSURANCE COMPANY LTD.
3, MIDDLETON STREET,
KOLKATA-700071

.....Opp.Party(s)

Case No: CONSUMER CASE NO. 1059 OF 2015

Date of Judgement: 24.08.2022

Judges:

HON'BLE MR. SUBHASH CHANDRA, PRESIDING MEMBER

For the Complainant : Mr Srijan Sinha, Advocate with
Mr Naveen Soni and Ms Parul Dhurvey Advocates

For the Opp.Party : Mr Abhishek Gola, Advocate

Facts

The complainant, Indo Knit & Embroidery Pvt Ltd, had taken insurance policies from the opposite party (National Insurance Co Ltd) covering stocks, building and machinery. On 19.04.2014, there was an accidental fire in the complainant's premises. Fire brigade controlled it. Complainant filed a

claim for Rs 1,00,09,610 on various losses. Opposite party appointed a surveyor who submitted a report disallowing many items. Opposite party settled the claim at Rs 14,71,813 based on surveyor's report dated 08.12.2014. Complainant alleges the survey report was biased, arbitrary, ignored audited accounts and physical verification of stocks. A joint survey by two independent surveyors assessed loss at Rs 66,74,280. Complainant has filed this consumer complaint alleging deficiency in limiting the claim relying on biased survey report.

Complainant's Arguments

Surveyor's report is arbitrary, ignores audited books, physical verification of stocks and dead stock. Loss to building, machinery not considered. Availability of 43000-45000 meters of salvaged fabric ignored. Recast trading account without considering audited statements. Electricity bills show production was constant. Woollen manufacturing process is seasonal. Seeking claim of Rs 1,00,09,610 along with compensation and costs.

Opposite Party's Arguments

Settlement was based on surveyor's assessment of Rs 15,52,025 less 5% deduction as per policy. Salvage value and dead stock considered. Burnt stock lying in open was of no value. Surveyor rightly assessed loss based on capacity, financial trends. Complainant did not cooperate in providing bills for machinery repairs. Not a 'consumer' under Act. No pecuniary jurisdiction. No deficiency in service. Claim liable to be dismissed.

Court's Reasoning and Decision

Repudiation of claim was based on surveyor's report. Complainant claimed loss based on audited accounts and statements. Surveyor's assessment method ignoring audited accounts raises doubts. His letter dated 14.11.2014 showed premeditated position. Option of appointing another surveyor should have been considered as per SC decision in

Venkateshwara Syndicate case. Surveyor's report mandated under Insurance Act is not final or binding. Settlement of claim based only on such report is arbitrary. Joint surveyor's report is more realistic assessment based on production trends, actual verification. Reasonably assessed loss at Rs 66,74,280. Hence OP failed to settle claim properly relying on biased report. Deficiency in service established. Claim allowed based on joint surveyor's assessment. OP directed to pay Rs 66,74,280 plus interest.

Sections Referred

Section 21(a)(i) of Consumer Protection Act 1986 – Jurisdiction of National Commission

Section 2(1)(d) and 2(1)(m) – Definition of 'consumer'

Section 64 UM of Insurance Act 1938 – Surveyor's report

Cases Referred/Cited

Amrish Kumar Shukla Vs. Ferrous Infrastructure Limited

Renu Singh Vs. Experion Developers

Ravneet Singh Bagga Vs KLM Royal Dutch Airlines

New India Assurance Co Ltd Vs Pradeep Kumar

Sri Venkateshwara Syndicate Vs Oriental Insurance Company Ltd

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Court

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Full Text of Judgment:

1. This is a complaint filed under section 21(a)(i) of the Consumer Protection Act, 1986 (in short, the 'Act') alleging deficiency in service in the repudiation of the claim filed by the complainant under a Standard Fire and Special Perils Policy issued by the opposite party.

2. The facts of the case, in brief, as stated by the complainant, are that the complainant who is a private limited company engaged in the manufacture of woollen textiles had obtained a comprehensive insurance policy for the period 29.05.2013 to 28.05.2014 covering stock of yarn of all kinds

and cloth including woollen cloth, blankets, blazers and goods of a similar nature including finished stocks, held on trust or on commission or in process at various locations in the mills or godowns. According to complainant, there were 4 policies totalling to Rs 3,05,00,000/- which covered building, machinery and stocks (although with complaint a 5th policy no. 40130965683 for Rs. 35,00,000 covering stock was also enclosed). On 19.04.2014 an accidental fire broke out on the premises of the complainant which was controlled by the Fire Brigade. Apart from the damage to the stock, the fire also destroyed two wrapping machines apart from the building, electric installations, etc. The opposite party was informed and one Sumant Sud, Chartered Engineer, Surveyor and Loss Assessor who submitted a report dated 06.06.2014 stating that the fire originated due to an electrical short circuit which was covered under the Policy. The complainant filed a claim for Rs 1,00,09,610/- on 08.12.2014. M/s N. Kumar, Surveyors Pvt. Ltd. was appointed as Final Surveyor by the opposite party whose representative visited the premises on 20.04.2014 and 13.05.2014. Clarifications were sought vide letter dated 14.11.2014 by the surveyor which conveyed that while the risk covered was for yarn/cloth, the claim related to 'stored goods' meaning store in godown and therefore, "this claim cannot be considered". In addition, it was stated that as "the fire was confined to godown only, hence no loss to goods lying at other locations". Lastly, it was concluded that as "50% of the stock was thrown/taken out, damage was 50% only". It is averred by the complainant that these conclusions were premature as the surveyor had not finalised his report and therefore was biased against him. Vide their letter dated 27.01.2015 the claim was admitted for Rs 14,71,813/-.

3. Upon enquiry it was learnt that the claim was admitted on the basis of the surveyor's report dated 08.12.2014 which, according to the complainant, is misconceived, distorted and an arbitrary exercise of discretion. It is stated that there was no basis for disregarding the audited books of account as

on 31.03.2014 and details of stock has been disregarded and the burnt and salvage stock, despite having been physically checked, had not been considered. The report mentions that no claim had been preferred for building and machinery whereas these details were submitted. The complainant avers that salvage of half the burnt stock was still physically available, approximating to 43000-45000 meters of fabric. This was on account of the fact that though the fire occurred inside the premises, the half burnt stock of yarn and fabrics was removed outside with the knowledge and permission of the representatives of the opposite party. According to the complainant, the surveyor recast the trading account without considering the audited statement prepared by Chartered Accountants. A representation dated 18.03.2015 was made to the opposite party who sought documents/bills pertaining to the building and machinery on 27.04.2015. Details were discussed with the surveyor who sought original bills pertaining to the purchase of machinery on 10.06.2015.

4. The claim has been repudiated by the opposite party according to the complainant on misconceived grounds. The reason for manufacturing process is questioned in the report in the light of declining sales. Complainant states that this was justified on the ground that the woollen manufacturing process was seasonal in nature and was justified on the ground that electricity bills were constant through the year which was indicative of there not having been any decline in the manufacturing process. The complainant is before this Commission with the following prayer:

(a) opposite party may kindly be directed to pay a sum of Rs 1,00,09,610/- incurred on the treatment of the complainant along with interest at 18% per annum from 19.04.2014 i.e. the day on which the fire broke out till its realization;

(b) the opposite party may kindly be directed to pay an amount of Rs 25,00,000/- towards mental agony, loss of business and harassment suffered by the complainant;

(c) the opposite party may kindly be directed to pay an amount

of Rs 5,00,000 to the complainant for expenses incurred under litigation costs; and

(d) any other relief to which the complainant is found entitled to in equity, law and justice, may kindly be awarded in its favour.

5. The complaint was resisted by the opposite party by way of a reply. Denying the complaint as unsubstantiated and baseless, the opposite party has contended that the full and final settlement of Rs 14,71,813/- offered was based upon the assessment report dated 08.12.2014 enclosed with the claim. It is contended that the surveyor had considered the inventory jointly taken as on 19.04.2014 and arrived at a net loss of Rs 15,52,025/- from which a deduction of excess 5% (Rs 77,601/-) as per policy was done. It has relied upon the survey report to justify the salvage value at Rs 10,000/- and the quantum of dead stock. The justification for the same is stated by the opposite party to be that while some of the burnt/burning material was thrown outside the godown in the process of fire-fighting, in the godown no salvage was visible except ash and the goods were lying in the open. It is stated that the loss of fabric lying in the open

“is the same stock which was destroyed in fire and taken out of fire to save the building. The position of these thans was as such that they are of no value, some corners as well as some centre part of them was burnt. So in totality no single meter can be extracted out of it as such.”

It is contended that the surveyor had correctly assessed the loss not on the basis of debris/ash but the capacity, financial trends of the previous year and inventory of left over saved stock as the basis. Reliance has also been placed upon the joint survey commissioned by the complainant by M/s V.K. Mehta, Insurance Surveyors & Loss Assessors Pvt. Ltd. and M/s A.K Enterprises, both empanelled by the Opposite Party, who, after considering the report of M/s N. Kumar, surveyor appointed by the opposite party, arrived at the conclusion

that the loss could be quantified as Rs 70 lakhs. It is also submitted that the complainant did not cooperate in providing timely details of repairs to machinery of Rs.1,11,297/-.

6. It is contended that the complainant is not a 'consumer' under section 2(1)(d) as he is not covered as per the definition of 'person' in the Act. It is also stated that the complaint does not meet the pecuniary jurisdiction of this Commission under the Act and requires to be remanded to the State Commission. It is denied that there was any deficiency in service under section 2(g) as held by the Hon'ble Supreme Court in Ravneet Singh Bagga Vs. KLM Royal Dutch Airlines (2000) 1 SCC 66 where it was held that onus of proving wilful default lay on the complainant. It is prayed that the complaint be dismissed with costs.

7. Parties led their evidence and filed rejoinders and written synopsis of arguments. I have heard the learned counsel for the parties and carefully perused the material on record.

8. The learned counsel for the complainant has argued that the final report of the surveyor is arbitrary and based on ipse dixit without considering the figures based on audited books of accounts as on 31.03.2014 and details of stock held. It has also been urged that the burnt stock and salvage stock, despite being physically checked, have not been considered. Non-inclusion of the loss to machinery and building indicates that the report was misconceived since this had been included in the claim. The physical availability of salvage stock of 43000- 45000 meters of fabric has been ignored. The Trading Account as per an audited statement has also been arbitrarily recast by the surveyor. Evidence such as electricity bills to indicate manufacturing at a reasonably constant level has been ignored as well as the fact that woollen manufacturing was seasonal in nature. It is stated that the clarification sought by the surveyor vide letter dated 14.11.2014 was indicative of a premeditated approach. Lack of cooperation has been denied and it has been argued that the complainant is a 'consumer' under the Act being a private limited company. With regard to the joint inspection report of the independent surveyors

engaged, it is argued that the report dated 02.02.2019 notes that

" we have noted some major difference regarding the value at risk and assessment made by the said surveyors highlighted as under:

The said surveyors have considered sales for the period 01.04.2013 to 31.03.2014 as genuine but purchases for the same period are stated as manipulated whilst the said purchases are duly certified in the VAT return and the order of the VAT assessing authority which are substantial evidence enclosed as Annexure VKAC-XIV.

The said surveyors have evaluated the stocks on the basis of sales to closing stock ratio and purchase to closing stock ratio for the last one year and till date of loss which is not a normal practise. The insured is maintaining books of accounts and is having accounting records for the previous years. The insured is also maintaining stock register's which are signed by the representative of the said surveyors (as shown to us by the insured). (Annexure VKAC-XV) The insured is having records of purchase bills and Interstate barriers tax receipts which are substantial evidence to prove the genuinity of purchases found manipulated by earlier surveyors without any proof. However we are enclosing copies of few bills along with barrier receipts for last few months which are enclosed as Annexure VKAC-HVI.

The physical verification of damaged stocks has been grossly ignored by the previous surveyor.

They have not given any details of segregation and stocks found and signed in the stock register as well as physical inspection of damaged stocks.

... in our opinion the fair assessment of loss on physical basis comes to Rs 71,46,631/- and the fair assessment of loss on accounting basis comes to Rs 66,74,280/-. This report is issued without prejudice and is as opinion formed on the basis of documents and information made available and our own observations made during the proceedings of survey..."

9. The learned counsel for the complainant has therefore argued that the conclusion of M/s N. Kumar, Surveyors & Loss Assessors that "major manipulations/adjustments were seen made in the account of the insured for the year 2013-14, particularly in the month of March 2014" are clearly contradicted by the joint assessment report. It is argued that the conclusion of the surveyor regarding 'debris/ash' is incorrect and should be seen as 'semi affected stock'. The opposite party has only obtained the comments of the final surveyor on the joint inspection report and no independent assessment has been done. The report of the final surveyor has therefore been stated to be arbitrary and biased which should be disregarded. It is also argued that based on the law laid down by the Hon'ble Supreme Court in Sri Venkateswara Syndicate Vs. Oriental Insurance Company Ltd. & Anr. in CA No. 4487 of 2004 dated 24.08.2009 (2009) 8 SCC 507, the insurer was not prohibited from appointing another surveyor for fresh estimation of loss since non consideration of material facts that ought to have been taken into consideration can be a ground for the conduct of a fresh survey and that this Commission can intervene since rejection is arbitrary and not based on acceptable reasons.

10. On behalf of the opposite party preliminary objection has been taken with regard to the pecuniary jurisdiction of this Commission and maintainability in view of being a 'consumer'. On merits, it is argued by the learned counsel that the claim preferred comprised stock of Rs 96,59,610/-, machinery of Rs 2,00,000/- and building of Rs 1,50,000/- amounting to Rs 1,00,09,610/-. The stock at the time of loss was Rs 83,21,370/- as per Trading Account and the estimated loss for building was Rs 80,886/- and for machinery was Rs 39,060/-, the latter two not being supported by bills/vouchers. The stock figure/financials prepared by the joint survey have been accepted in totality by the complainant without considering business trends, closing stock from January 2013 to February 2014, average stock declared to Bank upto February 2014, decline in purchase/sales in the

previous years and sudden increase in closing stock in March 2014. The increase in damaged stock by 20% on which deduction of 7.50% has been applied by the joint surveyors has been questioned as being without basis. It is argued that it is not possible to determine loss on the basis of ash/debris. Also, that there were several godowns which were not affected by fire and the saved stock of 6858 meters approximates to 1/7th of the stock stated to be in the damaged godown implying storage of 7 times the stock in the damaged premises. It is argued that the loss of fabric lying in the open is that same stock that was destroyed in fire and hence the estimate of salvage stock of Rs 10,000/- was a fair assessment. Dead stock estimated at 2% or Rs 31,878/- is also justified by the surveyor. It is argued that the net loss of stock assessed at Rs 15,52,025/- less deduction of 5% amounting to Rs 14,74,424/- lakhs has been correctly arrived at by the surveyor. Loss towards building and machinery has not been considered as details of bills/vouchers were not provided by the complainant. The loss assessment of Rs 14,74,424/- is therefore justified.

11. With regard to the preliminary objections, the contention of the opposite party that the complainant is not a 'consumer' cannot be sustained as section 2(1)(d) read with 2(1)(m) of the Consumer Protection Act, 1986 clearly provides for a 'firm', whether registered or not, to be recognised as a 'consumer' under the Act. As regards the contention that the complaint does not meet the pecuniary jurisdiction of this Commission and should be remanded to the State Commission also does not merit consideration in view of this Commission having held in *Ambrish Kumar Shukla Vs. Ferrous Infrastructure limited and Ors.* – I (2017) CPJ 1 (NC) that pecuniary jurisdiction should be determined by the aggregate of all claims. This position was reiterated in *Renu Singh Vs. Experion Developers* – Consumer Complaint No. 1703 of 2018 decided on 26.10.2021. The total amount claimed by the complainant inclusive of the loss and compensation and litigation cost is Rs 1,00,09,610/- which is within the

pecuniary jurisdiction of this Commission. Hence, this contention cannot be sustained.

12. On merits, it is apparent from the material on record and the arguments of the parties, that the claim of the complainant was repudiated/limited to Rs. 14,74,424/- against the claim of Rs. 1,00,09,610/- preferred in respect of a fire on his premises. There is no dispute about the cause of the fire being a covered peril under the policy. The complainant has based his claim on the basis of audited statements of stock and other procurement details. The estimation of loss has been computed by the complainant on the basis of the stock in the godown which was reduced to ash and the salvaged stocks which were thrown out of the building during fire fighting operations. Some loss to building and machinery has been claimed although no details or documentation about these have been brought on record by the complainant by way of evidence or provided to the opposite party. The opposite party has relied upon the report of M/s N. Kumar, the surveyor appointed by it, who has assessed the loss based upon his own estimation which has discounted the audited statements of stock and accounts. The computation of loss as per joint assessment commissioned by the complainant by two Surveyors and Loss Assessors empanelled by the opposite party who assessed the loss on accounting basis at Rs. 71,46,631/- with a fair assessment of Rs 66,74,280/- is based on the basis of various considerations including audited statements, electricity consumption trends, stock statements and assessment of the complainant's production. It has adopted reasonable deductions and arrived at a loss value which has been further reduced allowing for 5% deduction as mandated by the policy itself. The figures of the joint assessment report have also been considered by M/s N. Kumar who have stated that they have adopted certain figures from it.

13. The complainant has based his claim on audited statements of stock and accounts. The reasons for discounting the same have been commented adversely in the joint assessment report which has made specific observations on the methodology of

computation of loss by M/s N. Kumar, Surveyor and Loss Assessor. The assessment by surveyors who are empanelled surveyors of the opposite party needs consideration both in view of the fact that there is objectivity in their assessment which corroborates the loss as per the estimate of the initial surveyor who visited the site at the instance of the opposite party. The letter dated 14.11.2014 of the surveyor, M/s N. Kumar seeking clarifications and stating

“From the documents submitted, it is observed the risk is covered in respect of yarn/cloth whilst stored whereas your claim is in respect of fabric Since the risk in respect of stored goods mean store in godown, hence this claim cannot be considered.”

(Emphasis added)

is clearly reflective of a premeditated position adopted by the surveyor who was still in the process of assessing the loss. Therefore, this report needs to be considered in that light. The contention of the complainant, on the basis of Sri Venkateswara Syndicate (supra), that in view of there being allegations of arbitrariness in the surveyor's report, the appointment of another surveyor for a fresh estimation of loss should have been considered, is also a valid contention. The surveyor's report without reference to the estimated claim due to loss for building and machinery when there was, in fact a claim made for these items makes the report untenable. The rejection of these items by the surveyor for want of bills/vouchers could have been noted. However, the final report fails to record the same. The opposite party has erred on both these counts and the final assessment of loss/repudiation which is based on the report of the surveyor is liable to be set aside on this ground.

14. In view of the foregoing, I find merit in the complaint. The opposite party has acted arbitrarily in limiting the claim of the complainant by arriving at an assessment based upon a premeditated and biased report of its surveyor. There is a

clear deficiency in service on this account. The opposite party has not provided any reasons for not considering another surveyor. As per Sri Venkateswara Syndicate (supra) this option was available to the opposite party. The report of a surveyor, though mandated under section 64 UM of the Insurance Act, 1938 has been held by the Hon'ble Supreme Court in New India Assurance Co. Ltd. Vs. Pradeep Kumar (2009) 7 SCC 787 wherein it was held that:

"...the assessment of loss by the approved surveyor is a prerequisite for payment or settlement of claim of twenty thousand rupees or more by insurer, but surveyor's report is not the last and final word. It is not that sacrosanct that it cannot be departed from; it is not conclusive. The approved surveyor's report may be the basis or foundation for settlement of a claim by the insurer of the loss suffered by the insured but surely such report is neither binding upon the insurer nor insured."

The settlement of the claim by the opposite party is therefore set aside. The assessment of claim as per the joint assessment by M/s V.K. Mehta, Insurance Surveyors & Loss Assessors Pvt. Ltd. and M/s A.K Enterprises is found to be a more realistic assessment of loss. Its figures have also been considered by the surveyor appointed by the opposite party. It would be appropriate to consider the assessment of loss as jointly assessed as the basis of settlement of the claim. The loss calculated by the surveyors who undertook the joint assessment, i.e., Rs.66,74,280/- appears a more reasonable estimation of the loss since it is based upon a more detailed appreciation of the stocks held and audited and estimation of salvage value based upon stock lying on the premises. It has considered the production trend and other relevant details of bills, electrical charges, etc. The complaint is liable to succeed on this ground.

15. The complaint is, therefore allowed in view of the joint assessment. The opposite party is directed to settle the claim of the complainant assessed at Rs.66,74,280/- along with 6%

interest per annum from the date of submission of the claim within a period of two months failing which the interest shall be at the rate of 9% p.a. till realisation. Litigation cost of Rs 50,000/- shall also be paid by the opposite party to the complainant.

16. The complaint is disposed of with these directions.