

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

CONSUMER CASE NO. 155 OF 2013

1. M/s SHITAL FIBRES LTD.,
A-17, Focal Point Extension,
JALANDHAR.

.....Complainant(s)

Versus

1. ICICI LOMBARD GENERAL INSURANCE COMPANY
LIMITED IN PLACE OF M/s BHARTI AXA GENERAL
INSURANCE CO. LTD.,

-,
JALANDHAR - 143001.

.....Opp.Party(s)

BEFORE:

HON'BLE MR. JUSTICE R.K. AGRAWAL, PRESIDENT

For the Complainant : For the Complainants : Mr. Sameer Nandwani, Advocate

For the Opp.Party : For the Opposite Party : Mr. Joy Basu, Senior Advocate with
Ms. Manvi Adlekha, Mr. Trinath Tadakamalla, Mr. Kanak Bose, and Mr. Naman
Khatwani, Advocates

Dated : 09 Jan 2023

ORDER

1. The present Consumer Complaint has been filed under Section 21(a)(1) of the Consumer Protection Act, 1986 (for short "the Act") by M/s Shital Fibres Ltd. (hereinafter referred to as the 'Complainant/Insured) against Opposite Party Bharti AXA General Insurance Co. Ltd. Upon Application being IA / 7418 / 2022 filed, vide Order dated 12.08.2022, the name of the Opposite Party, Bharti Axa General Insurance Co. Ltd. has been changed to ICICI Lombard General Insurance Co. Ltd. (hereinafter referred to as Opposite Party/Insurer), alleging that the later was wrong in denying the claim of losses incurred by the Complainant.

2. According to the Complaint, the brief facts of the case are that the Complainant Company got constructed a building at Plot No.C-81, Focal Point, Jalandhar, Punjab, in December, 2007 under the supervision of M/s. Gosai & Associates, an experienced government approved Architect. Initially the Building, Plant, Machinery & Stocks were insured with different insurance companies but in the year 2011, the Insurance Policies were shifted to Opposite Party, M/s. Bharati AXA General Insurance Co. Ltd, (now known as ICICI Lombard General Insurance Company Ltd.) The policies issued were termed as "Special Peril Policies" which included the loss of the building due to subsidence and landslides. The details of the said seven polices are as follow:-

PFC/10587504/P3/04/D5P311 (from 29.04.2011 to 28.04.2012)

PFC/10360046/P1/09/D5P116 (from 14.09.2011 to 13.09.2012)

PFC/10587435/P3 (from 29.04.2011 to 28.04.2012)

PFC/10279808/P1 (from 15.05.2011 to 14.05.2012)

PFC/10613562/P1 (from 28.06.2011 to 27.06.2012)

PFC/10652264/P1 (from 30.08.2011 to 29.08.2012)

PFC/10359761/P1 (from 08.09.2011 to 07.08.2012)

3. It was averred that premium as claimed by the Opposite Party Insurance Company was paid by the Complainant. The Opposite Party Insurance Company issued risk cover letters but till date neither the Policy cover note nor the terms and conditions of the Policies were provided to them. Unfortunately, on 15.04.2012,

the insured building, collapsed while the machines were running and work was going on, as the factory used to run for 24 hours. The loss was intimated to the Opposite Party Insurance Company, which appointed M/s. Puri Crawford Insurance Surveyors and Loss Assessors, who visited the site for the first time, on 17.04.2012 and assessed the loss to the tune of ₹4,19,04,368/-. The Surveyor called for documents in piece-meal, from time to time, w.e.f. 25.06.2012. All the documents and drawings were immediately furnished whenever the same were required. A Structural Engineer was appointed by the Surveyor but he did not have any interaction with the Complainant. No joint meeting was held with the Surveyor. Final survey report was issued by the Surveyor on 14.12.2012 according to which the main cause of collapse of the building was a structural design defect. On receipt of the Survey Report, the Complainant contacted M/s. Gossian & Associates who had supervised the construction of the building and issued the Completion Certificate. M/s. Gossian & Associates vide their report reiterated that the sudden collapse of the entire structure could not be a design/material defect and had to do more with the movement of the soil. The Opposite Party did not pay heed to any reports, therefore, a Legal Notice dated 16.02.2013 was served on it to make the payment.

4. The Complainant obtained opinion from Guru Nanak Dev Engineering College Testing and Consulting Cell, Ludhiana, who vide their Report dated 15.03.2013, gave the opinion that structural design was 'OK' and there was no defect in it. Another opinion from an Expert, namely M/s. ARO Tech Structural Consultants, Jalandhar City, Punjab, was obtained, which also opined that the collapse was due to faulty construction of sewer line by Punjab Sewerage Board, due to which soil underneath had become bad. The Complainant also met Shri Kunwar Sunil Kumar, Chartered Engineer for his expert report and he opined that even if the total vibration of the machine is taken together, it cannot cause the collapse of the building.

5. The Opposite Party Insurance Company repudiated the claim made by the Complainant vide its letter dated 04.02.2013, wherein it was mentioned as below:-

“We reiterate that the claim lodged is not admissible under the captioned policy due to non-operation of any insured peril as observed and recommended by surveyors. We thus repudiate our liability under the claim & close the claim file as "No Claim".

6. It is the case of the Complainant that the Opposite Party / Insurance Company is wrong in denying its claim as the present case falls within the ambit of Clause VIII of the Policy in question which is reproduced as below:

“(viii) Subsidence And Landslide including Rockslide Loss, Destruction or damage caused by Subsidence of part of the site on which the property stands or Landslide / Rockslide excluding:

- (a) The normal cracking, settlement or bedding down of new structures
- (b) The settlement or movement of made up ground
- (c) Coastal or river erosion
- (d) Defective design or workmanship or use of defective materials
- (e) Demolition, construction, structural alterations or repair of any property or ground works or excavations.”

7. The stand of the Complainant was that the building had collapsed due to subsidence and on that basis a claim was made with the Opposite Party Insurance Company. However, the Insurance Company repudiated their legitimate claim on the ground that the claim is not admissible under the captioned policy due to non-operation of any insured peril. Alleging deficiency in service on the part of the Opposite Party Insurance Company, the Complainant has filed the present consumer complaint seeking following reliefs:-

“i) ₹4,19,04,368/- towards losses/damages as assessed by the surveyors of the opposite party.

ii) ₹25,00,000/- towards punitive losses

iii) ₹20,00,000/- towards compensation for loss of business and delay in setting the claim amount of ₹4,19,04,368/-

iv) Interest @ 2% or at the bank rate prevalent as on 15.04.2012 as per regulation 9 of the Insurance Regulatory and Development Authority (Protection of Policy holders Interest) Regulations, 2002 since the amount has not been paid within 30 days from the date of appointment of surveyors.

v) Cost of the complaint be also awarded.

vi) Such other or further relief which this Hon'ble Commission may deem fit and proper may also be passed in favour of the complainant and against the opposite party.

8. Vide Order dated 04.07.2013, the Complaint was dismissed by this Commission by observing as under:-
"The complainant has no bone to pluck with the opposite party. The case is meritless and, therefore, the same is dismissed at the admission stage."

9. Being aggrieved, the Complainant approached the Hon'ble Supreme Court through Civil Appeal No. 7760 of 2013 against the Order dated 04.07.2013 passed by this Commission. The Hon'ble Supreme Court, vide Order dated 23.02.2017, remanded the matter back to this Commission to be heard on merits. The relevant para of the said order is reproduced as below:-

"In our considered opinion the stand adverted to by the appellant and the denial thereof by way of communication by the insurer was required to be looked upon when a claim of the present nature was filed.

In view of the aforesaid, we're inclined to allow this appeal and set aside the order passed by the National Commission and remand the matter for reconsideration in accordance with law. As the respondent has entered appearance before this Court he shall appear before the National Commission on 10.04.2017 and file his reply by 24.04.2017. The written statement filed by the insurer shall be taken on record and thereafter the National Commission shall proceed in accordance with law....."

10. Consequently, the Opposite Party Insurance Company filed its Written Statement, inter alia, denying the contents of the Complaint and raising the Preliminary Objection that the Complainant do not fall within the definition of 'Consumer'; present proceedings are in respect of matters that are more appropriately dealt by a Civil Court owing to the technical and complex nature of the issue which would require examination and cross examination of both fact and expert witnesses, and also detailed consideration of the voluminous documents, therefore, it would be inappropriate for the summary jurisdiction of this Commission. Further, the reliability of a Survey Report was also stressed upon as being an important document to be considered in evidence. For the same, Hon'ble Supreme Court's Judgements in Sikka Papers v. National Insurance Co., (2009) 7 SCC 777 and United India Insurance v. Roshan Lal Oil Mills (2000) 10 SCC 19, were referred to. It is further submitted that in terms of General Condition 6 of the Insurance policy, the claim under the policy in question is payable only when the Complainant provides proof as to the origin and causation of the loss, however, no such evidence was provided by the Complainant to support its loss. It was stated that the proximate cause of loss was structural design defect/structural deficiency and the same was not a covered peril under the Insurance Policy in question.

11. Mr. Sameer Nandwani, learned Counsel appearing on behalf of the Complainant Company vehemently argued that the Opposite Party Insurance Company wrongfully and in a pre-determined manner repudiated the claim considering the quantum of loss. He argued that the Surveyor report was incorrect as no measures for soil testing were taken to determine whether the soil was wet or not. The Complainant obtained opinions from various Experts regarding determination of cause of Loss. Guru Nanak Dev Engineering College Testing and Consulting Cell, Ludhiana, vide their report dated 15.03.2013, opined that structural design was 'OK' and there was no defect in it. Another expert, M/s. ARO Tech Structural Consultants, Jalandhar City, Punjab, also opined that the collapse was due to faulty construction of sewer line by Punjab Sewerage Board, due to which soil underneath had become bad. Shri Kunwar Sunil Kumar, Chartered Engineer vide his expert report also opined that even if the total vibration of the machine is taken together, it cannot cause the collapse of the building. Relying on these expert reports, it was submitted that the collapse of the building was due to subsidence due to leakage from sewer pipelines which saturate soil making it more vulnerable to subsidence or to landslide and it was argued that the Surveyor Report was incorrect as no measures for soil testing were taken to determine whether the soil was wet or not.

12. It was further submitted that the Complainant has also obtained stock insurance cover from New India Assurance Company, who appointed Consolidated Surveyors Pvt. Ltd. to assess the loss in the same accident

and has opined that the claim is payable as the building has fallen due to subsidence and not due to structural design defect. Mr. Shital Vij, owner of the Complainant Company has been acquitted in a criminal case in which it has been held that the Building fell due to subsidence of soil.

13. Relying upon letter dated 08.08.2011 issued to Punjab Water Supply and Sewage Division regarding a sewer line construction which would possibly cause a flood situation, it was submitted that due to improper installation of sewer line and leakage of sewer, the building has collapsed.

14. Relying on the Judgment passed by this Commission in *New India Assurance Co. Ltd. V. Avadh Wood Products, II* (2013) CPJ 10 (NC), it was argued that neither copy of terms and conditions nor the cover note were supplied to the Complainant and hence, it was not bound by the same. The terms & conditions filed with the Reply are different with those displayed on the website of the Opposite Party Insurance Company. It was submitted that the Opposite Party has deliberately repudiated the legitimate claim of the Complainant and it was prayed that the Consumer Complaint be allowed.

15. Per contra, Mr. Joy Basu, learned Senior Counsel appearing for the Opposite Party Insurance Company vehemently argued that despite giving ample opportunities to the Complainant, it did not provide the reports of the experts for determining the cause of loss. However, during the assessment of loss by the Surveyor, the Complainant vide e-mail dated 06.08.2012 informed that the cause of collapse of the building was due to construction of the neighbouring building, which also belonged to the Complainant. After realising that the cause attributed by it to the collapse of building would exclude a claim under the terms of the Policy, the Complainant changed its stand regarding cause of the loss. The Insurance Company appointed Mr. Surjan Singh Sidhu, an Independent Structural Engineer, who opined that the cause of the loss was due to structural design defects in the Building alongwith vibration of the 24 hrs. running Machine, which led to collapse of the building.

16. The Surveyor vide its Final Survey Report dated 14.12.2012 found that the main cause of the collapse of the Building was a structural design defect and is not covered peril under the Insurance Policy. In view of the findings of the Surveyor and the Structural Engineer the Insurance Company repudiated the claim of the Complainant vide letter dated 14.12.2012, therefore, there is no deficiency in service on its part.

17. In the present case, the OP's case is that the loss is not covered under the Policy as opposed to the loss being excluded under the Policy. Onus was on the Complainant to prove that the loss was covered under the Policy, which could not be proved.

18. The claim does not fall under clause VIII of the Policy. The Expert reports produced by the Complainant cannot be relied as the same have not been proved through an affidavit of evidence by the respective Expert. The Reports have been reviewed by the Surveyor and detailed objections have been set out in the Surveyor's Affidavit of Evidence filed on behalf of the OP and none of the objections of the Surveyor have been rebutted by the Complainant.

19. It was submitted that no reliance can be placed on the Report issued by Consolidated Surveyor Pvt. Ltd. appointed by the New India Assurance Company or the decision of the Ld. State Commissions because the Assessment of loss of stock would have separate considerations than that under the Policy issued by the Opposite Party. The Opposite Party was not a party before the State Commission. The report issued by Consolidated Surveyors is flawed as much as it did not appoint its own Structural Engineer to determine the cause of loss. The said Surveyor relied upon two reports issued by Experts appointed by the Complainant even though their reports were issued much after the said Surveyor's report.

20. The Reliance cannot be placed on letter dated 08.08.2011 issued to Punjab Water Supply and Sewage Division regarding a sewer line construction which would possibly cause a flood situation, because the letter is pre-dated the loss by 8 months. The Complainant has neither filed RTI application nor the covering letter to prove that it has been received through RTI.

21. It was further submitted that for the sake of argument if it is assumed that the alleged repair or excavation of a sewer line could have resulted in subsidence on the plot on which the Building in question was located, the same would fall squarely within exclusion sub-clause(e) of Clause VIII of the Policy. Therefore, the claim was not payable. It was prayed that the Consumer Complaint be dismissed.

22. I have heard Mr. Sameer Nandwani, learned Counsel appearing on behalf of the Complainant, Mr. Joy Basu, learned Senior Counsel appearing on behalf of the Opposite Party Insurance Company, perused the material available on record and have given a thoughtful consideration to the various pleas raised by the Parties.

23. As far as the preliminary objection raised by the Opposite Party Insurance Company regarding jurisdiction of this Commission to decide the complicated question of law and facts, is rejected in view of the Judgments passed by the Hon'ble Supreme Court in the case of 'Dr. J.J. Merchant & Ors. Vs. Shrinath Chaturvedi' [2002 (6) SCC 635] and Judgment passed by this Commission in 'The Tax Publisher vs. UCO Bank & Anr. (2018) CPJ 886 (NC), wherein it has been held that the procedure prescribed under the Act for disposal of the Complaint is adequate to decide cases involving complicated questions of laws & facts.

24. The next contention of the Opposite Party that the present Complaint is not maintainable since the Complainant does not fall within the definition of 'Consumer' is rejected in view of the Judgment passed by this Commission in Harsolia Motors v. National Insurance Co. Ltd. I, (2005) CPJ 27 (NC) wherein it has been held that since an insurance policy is taken for reimbursement or for indemnity of the loss which may be suffered on account of insured perils, the services of the insurer cannot be said to have been hired or availed for a commercial purpose. This Commission does possess the requisite jurisdiction to entertain a Consumer Complaint wherever a defect or deficiency in the services rendered by an insurer is made out.

25. The Surveyor appointed Structural Engineer, Er. Surjan Singh Sidhu BE (Civil) to investigate the cause of loss. The conclusion drawn by structural engineer, is reproduced, as follows:

"4. CONCLUSION

Keeping in view the above facts and figures, it is reported that the main cause seems to be the failure at and near joints of R.C.C. Columns and R.C.C. beams due to shear stresses, as the work was done without following structural design and may have led to the collapse. Therefore, structural design defect is the main cause of collapse of building. Addition to it, there is no reliable information regarding construction procedure adopted; required quality control system applied, and qualified Civil Engineers deputed for supervision, etc.

So, non-compliance of building construction Codal Rules and Regulations, Byelaws, Technical Specifications, may have contributed to produce a weak structure, which could not resist the applied loads, continuous vibrations due to operating machinery and other forces causing ultimate failure of the building.

26. The Report of Er. Surjan Singh Sidhu is only presumptive. As per report of Er. Surjan Singh Sidhu, the material used in construction of the building meets the standard specifications, but even then the building collapsed. It has been presumed that the beams failed near the joints due to sheer stress and vibrations. It is pertinent to mention here that no machines were installed on first and second floor of the building. Moreover, the insured has submitted a certificate from the competent authority that textile machines installed by the insured has minimum vibrations and such vibrations don't damage the building. Thus the Reports of Er. Surjan Singh Sidhu does not have much substance to prove that the building collapsed due to material failure. The Surveyor without taking any measures for soil testing to determine whether the soil was wet or not, concluded that the building collapsed due to defective design.

27. It is not in dispute that upon instruction from the Surveyor appointed by the Opposite Party Insurance Company, the Complainant obtained Expert Opinion to determine the cause of loss. Guru Nanak Dev Engineering College Testing and Consulting Cell, Ludhiana, vide their Report dated 15.03.2013, opined as under:-

"The drawings of Building as mentioned in subject (Refer Structural drawings Sheet No. 1 to 7) submitted by M/s. Sheetal Fabres Ltd. C-81, Focal Point, Jalandhar is checked and found OK, with amendments shown in red ink."

28. Shri Kunwar Sunil Kumar, Chartered Engineer vide his Expert Report also opined that even if the total vibration of the machine is taken together, it cannot cause the collapse of the building.

29. M/s. ARO Tech Structural Consultants, Jalandhar City, Punjab, opined as under:-

"Generally Reasons for building Failure are:

Structural Instability:

It was requested to client to check its, Str. Drgs, and he approached G.N.E. Ludhiana College for this Part. Their checking shows there was no any Structural defect in drags.
(Structural safety certificate is attached at end. Annexure-A)

Material Quality:

Existing steel, concrete and Brick samples at Failure site were sent to Bhaskar material testing lab, Jalandhar. Reports were found to be of good material used.
(Report is attached at end. Annexure-B)

Soil settlement due to excessive load or seepage of water or side deep excavation:

Shree Con consultants and Ghuman soil testing were called to give their reports; Report for bore at back side of building clearly indicates very loose-cohesive backfill upto 3.0m depth.

Road joining building and canal is around 17 feet. It reply of our queries Mr.Joginder told that one year back the road b/w building and canal was excavated by Punjab sewerage board to lay a 800mm sewer pipe.

Then we asked to check depth of foundation of collapsed building which was around 6 feet below road level.

After further investigation we found sewer man hole was at 8 feet distance from building due to which a side soil pressure under columns was developed as 1V:2H criteria for foundation at different levels was not maintained by Punjab sewerage board as per Indian Standard code IS 1904-1986 clause 8.0 (IS code clause attached with) “which satiates that in case of granular or clayey soils, a line drawn between the lower adjacent edges of adjacent footing shall not have a steeper slope than one vertical to two horizontal. At site Vertical distanced B/W foundation of two was 9.0 but horizontal different on h/w two was 8.0 which should be $9 \times 2 = 18'0''$. So a side pressure was developed in soil which was continued even after refilling, because that refilled soil was not compacted properly by Punjab sewerage board.

Other alternative for the deep excavation around an existing building is insertion of sheet piles around it and then excavate the land. This concept was also not followed by Punjab sewerage board.

So collapse of the building may be based on account of the phenomenon of the subsidence of the soil. The phenomenon as described include that a leak from a sewer pipe may saturate soil, making it more vulnerable to subsidence or to landslide. Additionally deeply wet soil is more vulnerable to compaction –by hoover, vehicles or other above ground forces.”

30. From the perusal of the above Expert Reports, it is crystal clear that the cause of collapse of the Building was subsidence of the soil which was due to the leakage from sewer pipe line installed by the Punjab Sewerage Board. Therefore, the claim of the Complainant does fall within Clause VIII of the Policy and it does not fall within the exclusion sub-clause(e) of Clause VIII of the Policy, as alleged by the Opposite Party Insurance Company. Even otherwise, the Opposite Party Insurance Company failed to establish that they have provided the copy of the terms and conditions and the cover note to the Complainant till the date of filing the Complaint, thus, they could not take benefit of the exclusion clause in view of the principle laid down by the Hon'ble Supreme Court in the case of “M/s. Texco Marketing Pvt. Ltd. vs. Tata AIG General Insurance Co. Ltd. & Ors. reported in 2022 SCC OnLine SC 1546]” wherein it has been held as under:-

“On a discussion of the aforesaid principle, we would conclude that there is an onerous responsibility on the part of the insurer while dealing with an exclusion clause. We may only add that the insurer is statutorily mandated as per Clause 3(ii) of the Insurance Regulatory and Development Authority (Protection of Policy Holder's Interests, Regulation 2002) Act dated 16.10.2002 (hereinafter referred to as IRDA Regulation, 2002) to the effect that the insurer and his agent are duty bound to provide all material information in respect of a policy to the insured to enable him to decide on the best cover that would be in his interest. Further, sub-clause (iv) of Clause 3 mandates that if proposal form is not filled by the insured, a certificate has to be incorporated at the end of the said form that all the contents of the form and documents have been fully explained to the insured and made him to understand. Similarly, Clause 4 enjoins a duty upon the insurer to furnish a copy of the

proposal form within thirty days of the acceptance, free of charge. Any non-compliance, obviously would lead to the irresistible conclusion that the offending clause, be it an exclusion clause, cannot be pressed into service by the insurer against the insured as he may not be in knowhow of the same.”

31. For the reasons stated hereinabove, the Consumer Complaint is partly allowed and the Opposite Party Insurance Company is directed to pay a sum of ₹4,19,04,368/- (Rupees Four Crore Nineteen Lakh Four Thousand Three Hundred Sixty Eight only) towards loss as assessed by the Surveyor, alongwith interest @9% p.a. w.e.f. 15.04.2012, i.e., the date of filing of the claim, till the date of payment, within six weeks from today, failing which the rate of interest shall increase to 12% p.a. Keeping in view the peculiar facts and circumstances of the case, the Opposite Party Insurance Company shall also be liable to pay a sum of ₹50,000/- towards cost of litigation to the Complainant. Pending application, if any, also stands disposed off.

.....J
R.K. AGRAWAL
PRESIDENT