Advantage Consumer

Monthly News Letter of Consumer Protection Council, Rourkela

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VOLUME – XXXV **APRIL 2023** **ADVANTAGE - IV**

Queries & Answers through the Web

(*www.advantageconsumer.com* is the website of Consumer Protection Council, Rourkela. One of the major attractions of the website is that a visitor can ask queries on issues relating to consumer protection. Answers to these queries are made free of cost, by the Chief Mentor of the Council, Sri B. Vaidyanathan.)

Continued from March 2023 issue.....

An Insurance Company while settling a claim cannot find fault with the construction of a building or its structures, having insured it after due inspection and assessment.

NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI

FIRST APPEAL NO. 401 OF 2013
(Against the Order dated 01/04/2013 in Complaint No. 02/2012 of the State Commission, Sikkim)

BAJAJ ALLIANZ GENERAL INSURANCE CO.LTD.
HAVING ITS RGD. OFFICE AT, GE PLAZA, AIRPORT ROAD, YERWADA,
PUNE-411006. MAHARASHTRA .....Appellant(s)

Versus

DR. KUMAR BHANDARI
S/O. LATE TIKA RAM BHANDARI, R/O. BALUWAKHANI, P.O. & P.S. GANGTOK,
EAST SIKKIM-737101 .....Respondent(s)

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

Dated : 17 Oct 2022

ORDER

12. State Commission after analysing the Independent Expert Opinion of Mr. Ashok Chettri, a qualified Structural Engineer, examining the Paper written by Prof S.K. Thakkar of Structural Dynamics for 'Retrofitting of Buildings' and going through the Surveyor' Report, has rightly rejected the plea of the Opposite Party Insurance Company that the retrofitting in repairs would amount to betterment/improvement of the condition of the structure existing prior to the occurrence of the loss, by observing as under:-

"From the analysis of the opinion of the Assistant Engineer, Mr. Ashok Chhetri, and on-going through the relevant parts of the reports reproduced above, there can be no matter of doubt that the insured building suffered severe structural damage due to the high intensity Earthquake that shook the State of Sikkim on 18.09.2011.From the uncontroverted opinion of the Assistant Engineer it is clear that retrofitting is a technology used not only in new structures but also in buildings damaged by earthquakes and that repair of buildings damaged by earthquakes by this technology apart from repairing, also adds to its strength to withstand future shocks. It has been eminently opined in Ext. 'X' that the seismic retrofit is an evolving practice, which is continuously updated as results of research and new experience from the observations of performance during earthquakes. Therefore, it can indubitably be concluded that the primary object of the Complainant to retrofit the insured building was to get it repaired, this being a new technology available to him. Even the structural expert, Dr. D. Bandhyopadhyay whose expertise was sought by M/s. S.N. & Associates for when difficulty was felt by them to assess the actual loss, had recommended use of the technology in repairing the insured building as can be seen from the portion of his report reproduced above.

From paragraph 11.1 of the report of "M/s. S. N. & Associates" it is quite evident that reliance has been placed by them only on a selected portion of the Survey Report of "M/s B.K. Infrastructure" completely overlooking their own opinion contained in paragraphs 1.2.1, 1.2.2, 1.2.5, 1.3 and above all, the conclusion part contained in paragraph 1.5, in order to opine that retrofitting in repairs would amount to betterment/improvement of the condition of the structure existing prior to the occurrence of the loss. This being the principal reason for disallowing the claim on the retrofit by the Claimant as apparent from the letter dated 01.06.2012 filed as Annexure C4 to the claim petition, we are of the view that the same deserves to be rejected.

13. The Surveyor's Report is not the final word, and it is not binding upon the insured or insurer as has been held by the Hon'ble Supreme Court in "***New India Assurance Co. Ltd. v. Pradeep Kumar*, (2009) 7 SCC 787"** in which it has been observed as under:-
    1. Section 64 UM (2) of the Act, 1993 reads: -

64-UM. (2) No claim in respect of a loss which has occurred in India and requiring to be paid or settled in India equal to or exceeding twenty thousand rupees in value on any policy of insurance, arising or intimated to an insurer at any time after the expiry of a period of one year from the commencement of the Insurance (Amendment) Act, 1968, shall, unless otherwise directed by the Authority, be admitted for payment or settled by the insurer unless he has obtained a report, on the loss that has occurred, from a person who holds a licence issued under this section to act as a surveyor or loss assessor (hereafter referred to as 'approved surveyor or loss assessor'):

Provided that nothing in this sub-section shall be deemed to take away or abridge the right of the insurer to pay or settle any claim at any amount different from the amount assessed by the approved surveyor or loss assessor."

The object of the aforesaid provision is that where the claim in respect of loss required to be paid by the insurer is □20,000 or more, the loss must first be assessed by an approved surveyor (or loss assessor) before it is admitted for payment or settlement by the insurer. The proviso appended thereto, however, makes it clear that insurer may settle the claim for the loss suffered by insured at any amount or pay to the insured any amount different from the amount assessed by the approved surveyor (or loss assessor).

22. In other words although 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 in respect of the loss suffered by the insured but surely such report is neither binding upon the insurer nor insured."

14. The contention of the Appellant Insurance Company that there was pre-existing defect in the structure of the insured building, was rightly rejected by the State Commission having relied upon the Judgment passed by the Hon'ble Supreme Court in "***United India Insurance Co. Ltd. Vs. M/s. Kiran Combers and Spinners" (supra)***, wherein it has been held as under:

> ***"9. ……Normally when the company insures any factory, then their Officers and the Engineers used to inspect the building to find out whether there is any defect in the construction or the construction is of poor quality. In the present case, the Company certified that it is a first-class construction, then for some defect which has not been noticed by the Company, no benefit could be given to the Company for such defect……"***

15. For the reasons stated hereinabove, the Impugned Order dated 01.04.2013 passed by the State Commission cannot be said to be erroneous. The State Commission has dealt with all the issues in detail and passed a well-reasoned Order after appreciation of independent expert opinion, evidence and material available on record. I do not find any illegality or perversity in it. The Order passed by the State Commission is upheld and the Appeal is dismissed. ■

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Even if the insured accepts the compensation offered by the Insurance Company, such receipts will have no meaning if the insured immediately thereafter repudiated the discharge voucher, and evidence show that the party protested soon after signing.

NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI

REVISION PETITION NO. 1607 OF 2017

(Against the Order dated 25/10/2016 in Appeal No. 562/2007 of the State Commission Uttar Pradesh)

KAMALRAJ PALIWAL
S/O. SHRI PYARE LAL SHARMA, R/O. DHAKPURA
HATHRAS,
DISTRICT-MAHMAYA NAGAR
UTTAR PRADESH .....Petitioner(s)

Versus

NATIONAL INSURANCE CO. LTD.
D.P. SINGH DIVISIONAL MANAGER, MARSIS ROAD,
SWAROOP MARKET,
ALIGARH
UTTAR PRADESH .....Respondent(s)

BEFORE:

HON'BLE MR. SUBHASH CHANDRA,PRESIDING MEMBER

Dated : 12 Oct 2022

PER MR SUBHASH CHANDRA, PRESIDING MEMBER

This revision petition has been filed under section 21 of the Consumer Protection Act, 1986 (in short, 'the Act') assailing the order of the Uttar Pradesh State Consumer Disputes Redressal Commission, Lucknow (in short, 'the State Commission') in appeal no. 562 of 2007 allowing the appeal filed by the respondent and setting aside the order of the District Consumer Disputes Redressal Forum, Mahamaya Nagar (in short, 'the District Forum') in OS no. 172 of 2003 dated 05.02.2007.

2. The facts in brief are that the revisionist is the Secretary of the Paliwal Politex Sansthan a registered unit under Khadi Gram Udyog Board. He had taken a fire insurance policy from the respondent for the period 19.11.2001 to 18.12.2002 for Rs.6 lakh covering raw material, machines, goods ready for sale and building. Due to a fire on 04.04.2002 midnight all the stock material including raw and ready material and machines were burnt. The respondent was intimated on 05.04.2002 and on the same evening a surveyor Mr Prem Prakash Mandal was deputed by the respondent for inspection. It is the petitioner's case that the surveyor's report that the entire stocks had been burnt except goods valued at Rs.5900/- was not provided to the revisionist The respondent thereafter appointed another surveyor Mr A K Gumber who surveyed the premises on 30.06.2002 and prepared a loss report of Rs.2,80,000/-. The respondent pressurised the revisionists to accept a full and final settlement of Rs.2,74,701/- on 21.07.2003 which was accepted by him as he was in urgent need of money due to the losses incurred. However, on 25.07.2003, the petitioner contested the settlement and sought the settlement of his claim of the balance amount. As there was no response from the respondent, the revisionists filed a complaint before the District Forum, Hathras (UP) being complaint no.172 of 2003. Vide its order dated 05.02.2007, the District Forum allowed the complaint and directed the respondent to pay Rs.2,82,562/- to the revisionists with 9% interest. The respondent had challenged this order by way of appeal no. 562 of 2007 before the State Commission which decided on 05.02.2007 to set aside the order of the District Forum.

3. Revisionist has impugned this order on the grounds that value of the inventory and stock of the revisionists as on 04.04.2002 was Rs.5,64,255/- as approved by the Punjab National Bank, the financing bank. The Fire Brigade which responded to the fire incident had also estimated the damage at Rs.5,85,000/- in its report. It is also contended that respondent has filed a report of a Chartered Accountant, Mr Praveen Kumar Jain, before the District Forum showing that the stocks on 04.04.2002 was valued at Rs.5,65,163/-. The surveyor who inspected the loss on the day after the fire, Mr Prem Prakash Mandal, had also stated in his report that only goods worth Rs.5900/- could be salvaged and that huge quantity of cotton and synthetic yarn had been completely burnt. The revisionist has averred that he accepted the full and final settlement of the respondent in view of his financial condition on 21.07.2003 but had protested against this immediately thereafter on 25.07.2003. He has prayed that the impugned order be set aside, and the order of the District Forum be restored along with any other relief in the interest of justice.

4. The respondent had been placed at *ex parte* on 17.05.2019. He has not filed any written submissions. However, before the State Commission he had argued that the appellant herein had accepted the full and final settlement of his claim on the basis of the report of the surveyor Mr A K Gumbar which was based on the spot inspection and as per the terms and conditions of the policy, as per which the claim of finished and raw material had been quantified at Rs.2,80,000/-. It had been contended that there has been no deficiency in service and that the respondent had acted as per the terms and conditions of the policy. Reliance has been placed on this Commission's order in ***Kanta Mathur Vs. National Insurance Co. Ltd. &Ors.*** dated 17.12.2014 in RP 394 of 2010 which held that acceptance of a full and final settlement was considered as settlement of liability.

5. On behalf of the petitioner it has been contended that full and final settlement had been accepted by him under compulsion as a result of the dire financial position the loss caused by the fire had placed him in. It was immediately protested four days later. The receipt for the settlement had been obtained from him on a printed form. He is not fluent in English and so he did not realise the full import of the settlement. He submits that the settlement has not been fair as it has not been based on the loss estimation by the respondent's own surveyor

deputed on 05.04.2002. It is also contrary to the loss estimate by the Fire Brigade and the assessment by the Punjab National Bank, the financing bank.

6. The respondent had been placed *ex parte* on 07.05.2019. He chose not to file any written submissions or arguments. Heard the learned counsel for the petitioner and perused the records carefully.

7. The petitioner has relied upon the judgments of the Hon'ble Supreme Court in ***Sangireddy Raman Murthy Vs. National Insurance Co. Ltd., -*** I (2003) CPJ 37 NC dated 08.03.2002 which held that

> *It cannot be disputed that the Insurance Company is the dominant party when it goes to the settlement of the claims and it is very often in a position to dominate the will of insured. A party is faced with the situation like a disaster and who is cash starved on account of calamity that has befallen it, is not in a position to resist the pressure of the Insurance Company to sign the receipts on the dotted lines in order to receive whatever payment is becoming available to it. Such receipt will have no meaning if the party has immediately refuted it and repudiated its receipt or discharge voucher if the circumstances show that the party protested soon after signing.*

He also relies upon ***United India Insurance Co. Ltd. Vs. Ajmer Singh Cotton & General Mills &Ors.*** (1999) 6 SCC 400 which held that:

> *The mere execution of the discharge voucher would not always deprive the consumer from preferring claim with respect to the deficiency in service or consequential benefits arising out of the amount paid in default of the service rendered. Despite execution of the discharge voucher, the consumer may be in a position to satisfy the Tribunal or the Commission under the Act that such discharge voucher or receipt had been obtained from him under the circumstances which can be termed as fraudulent or exercise of undue influence or by misrepresentation or the like. If in a given case the consumer satisfies the authority under the Act that the discharge voucher was obtained by fraud, misrepresentation, undue influence or the like, coercive bargaining compelled by circumstances, the authority before whom the complaint is made would be justified in granting appropriate relief. However, where such discharge voucher is proved to have been obtained under any of the suspicious circumstances noted hereinabove, the Tribunal or the Commission would be justified in granting appropriate relief under the circumstances of each case.*

8. This Commission in exercise of its revisional jurisdiction is not required to re-assess and re-appreciate the evidence on record and substitute its own conclusion on facts. It can interfere with the findings of the *fora* below only on the grounds that the findings are either perverse or that the *fora* below have acted without jurisdiction. Findings can be concluded to be perverse only when they are based on either evidence that have not been produced or based on conjecture or surmises i.e., evidence which are either not part of the record or when material evidence on record is not considered. The power of this Commission to review under section 26 (b) of the Consumer Protection Act, 1986 is therefore, limited to cases where some *prima facie* error appears in the impugned order and different interpretation of same sets of facts has been held to be not permissible by the Hon'ble Supreme Court in ***Rubi (Chandra) Dutta vs United India Insurance Co. Ltd.,*** (2011) 11 SCC 269 and or when the lower *fora "...has either failed to exercise their jurisdiction or exercised when the same was not vested in them or exceeded their jurisdiction by acting illegally or with material irregularity" as held in* ***Lourdes Society Snehanjali Girls Hostel and Ors vs H & R Johnson (India) Ltd., and Ors*** – (2016) 8 SCC 286.

9. In the present case, the complainant while accepting the discharge voucher for a lesser amount compared to the claim amount presented by the Insurance Company after nearly 16 months of the fire accident on 21.07.2003, filed a claim for the balance amount on 25.07.2003. The discharge voucher for the amount settled by the respondent can, therefore, be considered to have been accepted under protest. The State Commission while deciding appeal no. 562 of 2007 against the order of the District Forum has clearly

erred in not considering the fact that its own surveyor had ascertained a salvage value of only Rs 5,900/- on 05.04.2002. It is seen that the full and final settlement by the respondent has been worked out on the basis of loss assessed by the second surveyor Mr A K Gumbar at Rs 2,80,000/- and the salvage value of Rs 5900/-determined by the first Assessor, Mr Prem Prakash Mandal, has been deducted from this assessed amount.

10. In this connection, the law laid down by the Hon'ble Supreme Court in ***Sri Venkateswara Syndicate Vs. Oriental Insurance Company Ltd. &Anr.*** (2009) 8 SCC 507 in C.A. No. 4487 of 2004 decided on 24.08.2009 is instructive. The Hon'ble Apex Court held that while the insurer is not prohibited from appointing a second or another surveyor for fresh estimation of loss, appointment of surveyors one after another so as to get a tailor-made report to the satisfaction of the insurer is impermissible unless cogent and satisfactory reasons for not accepting the report of the first surveyor are provided under section 64-UM of the Insurance Act, 1938. In the instant case, no reasons for the change in the surveyor have been provided. Further, while the salvage value of the loss is taken from the report of one surveyor, the estimated loss is based on the report of the other surveyor.

11. For the aforementioned reasons, it is apparent that the State Commission has been persuaded by the respondent on the basis of this Commission's orders in ***Kanta Mathur*** (supra) which is distinguishable from the present matter pertaining to fire loss. It has failed to appreciate that the principle of insurance is to indemnify loss and not to bargain on the quantum of loss assessed or to settle claims through coercive bargaining. In the result, there is merit in the appeal and is liable to succeed.

12. The revision petition is accordingly allowed. Impugned order of the State Commission is set aside and orders of the District Forum in OS no. 172 of 2003 dated 05.02.2007 affirmed. ■

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