

**SUPREME COURT OF INDIA**

Sikka Papers Ltd.

Vs.

National Insurance Co. Ltd.

C.A.No.6527 of 2002

(D.K.Jain and

29.05.2009

**JUDGEMENT**

**R.M. LODHA, J.**

1. This appeal under Section 23 of the Consumer Protection Act, 1996 (for short 'the Act') is at the instance of the complainant as its claim to the tune of of Rs.35,06,000/- against the National Insurance Company Limited (for short 'insurer') has not been accepted in its entirety and the National Commission in its judgment and order dated July 18, 2002 directed the insurer to pay to the complainant an amount of Rs. 10,47,491 only along with interest at the rate of 12% from March 1, 2000, till the date of payment after adjusting the amount already paid.

2. The facts from which the controversy arises are these:

The complainant, Sikka Paper Limited, is a limited company engaged in the manufacture of paper having a paper mill unit in District Muzaffarnagar (U.P.). For want of regular and continuous supply of electricity from the Uttar State Electricity Board, the complainant purchased the Diesel Generating Set of 1000 KVA of Kirloskar Cumins Limited with alternator of 1250 KVA for the smooth running of its unit. The said diesel generating set along with alternator was got insured by the complainant for a period from April 8, 1999 to April 7, 2000 for Rs.35,00,000/- vide insurance policy No. 451902/46/99/415. The complainant paid a premium amount of Rs.55,860/- to the insurer.

3. On December 25, 1999, the said generating set broke down and it could not start again despite efforts. The concerned officers of the insurer were intimated in this regard by the complainant and they were requested for arranging immediate survey of the insured generating set. The first surveyor appointed by the insurer is said to have completed his inspection on December 26, 1999 and advised the complainant to send the engine to the authorized repairers viz., Cumins Diesel Sale and Service (India) Limited, Pune. On December 30, 1999, another surveyor is said to have inspected the diesel generating set and identified the damages and the complainant with the consent of the insurer, sent the diesel generating set for repairs to authorized repairers at Pune. The authorized repairers gave the estimate of expenses of repairs to the tune of Rs.27,00,395/- and repaired the diesel generating set. The complainant is said to have paid Rs. 25,00,000/- to the repairers.

4. The case of the complainant is that all bills acquired and directed by the insurer and their appointed surveyors and as required by the policy were handed over to the insurer and the complainant was told that the actual expenses incurred by them in the repairs of the diesel generating set as well as reinstatement charges would be paid but later on they agreed to reimburse Rs.8,07,110/- only. Constrained thereby, the complainant approached the National Commission and claimed a sum of Rs.25,00,000/- towards repairs of diesel generating set;

Rs.10,00,000/- for mental harassment and damages along with interest and costs. The complainant alleged that the insurer failed to discharge their obligations under the insurance policy and with mala fide intention to defeat and delay its legitimate claim, adopted all unwarranted and illegal devices.

5. The insurer resisted the complaint and set up the plea that claim of Rs.8,07,110/- was accepted as per the surveyor's report dated May 15, 2000; the surveyor considered the damage caused as a result of the accident to the various parts of the diesel generating set and wherever he found that replacement was required, he provided for the same. The insurer stated that the surveyor assessed the damages on the basis of only those items which were affected in accidental damage and the balance items not following the scope of the policy were disallowed. It was the case of the insurer that the parts which did not suffer any damage as a result of accident were not liable to be replaced at the expense of the insurer. The insurer also averred that the surveyor in its report dated May 15, 2000 after considering the damage caused to the diesel generating set has allowed amounts for

carrying out the necessary replacement of parts damaged in accident after deducting the depreciation. The deduction at the rate of 25.71% as under-insurance was also sought to be justified.

The insurer denied the claim towards mental harassment.

6. The National Commission, inter alia, considered the matter thus:

"...We are also unable to accept the figure given by the Complainant for purchase of the Engine as well as while it meets the 'capacity' requirement but not of 'kind' i.e. a cummin engine thus not meeting the requirement of the Terms of Policy as reproduced earlier under the head 'Sum Insured'. We find that the third Surveyor has taken pains to explain each and every part of the repairs, freight etc. and his assessment of loss is as per terms of the Policy which alone can form the basis of payment to the Complainant. We also see further material on record that estimates of Rs.25 lakhs for repairs relate to replacement of several parts not affected by the incident but to prolong the life of the Engine. Full reimbursement has been made for replacement of crankshaft, Main bearings, connecting Rod bearing, oil coolers and Gears but not for cylinder liners, Piston and Pistons rings as they are expendibles, to the extent that they are subject to wear and tear on account of constant use. The latter contingency is not covered by terms of the policy, hence cannot be allowed.

In the light of above discussions, we direct the Opposite Party to pay to the Complainant an amount of Rs.10,47,491/- as assessed by the third Surveyor along with interest @ 12% from 1.3.2000 i.e. after two months of the receipt of the report of the second Surveyor, till the date of payment after adjusting for the payment already made. The Opposite Party shall also pay cost of Rs. 5000/- to the complainant."

7. We heard the learned counsel for the parties. In the light of the contentions advanced before us, the following two questions arise for our consideration:

(one) Whether the insurer was justified in accepting report dated May 15, 2000 submitted by the surveyor who had assessed the loss of Rs.14,45,000/- after deducting about Rs.10,55,000/- from Rs.25,00,000/- i.e. actual amount paid by the complainant for repairing the diesel generating set ?  
(two) Whether the insurer was justified in deducting an amount of Rs.3,71,509.50 (25.71%) as under insurance from the loss assessed at Rs.14,45,000/- by the surveyor in its report dated May 15, 2000 ? re : question (one)

8. That the complainant took machinery insurance policy to cover diesel generating set of 1000

KVA with alternator of 1250 KVA from the insurer is not in dispute. The said diesel generating set with alternator was got insured for the period from April 8, 1999 to April 7, 2000. Although the said diesel generating set with alternator was purchased by the complainant as per the invoice in 1997 for Rs. 45,00,000/-, it is not in dispute that sum insured for alternator was Rs. 9,00,000/- and diesel generating set Rs.26,00,000/- i.e., insurance cover was for Rs. 35,00,000/- in all. It is also an admitted position that on December 25, 1999, the diesel generating set that was insured with insurer broke down and could not be started. The spot survey was got conducted by the insurer and on the advice of the surveyor, the diesel generating set was sent to authorized repairers at Pune for repairs. The last surveyor's report is May 15, 2000. According to the complainant, they paid a sum of Rs.25,00,000/- to the repairers for the repairs of diesel generating set but the insurer relying upon the report of the last surveyor agreed to reimburse the sum of Rs.8,07,110/- only which was not acceptable to the complainant.

9. In *Vikram Greentech (I) Ltd. & Anr. v. New India Assurance Co. Ltd.*,<sup>1</sup> we considered the essentials of insurance of contract thus:

"15. An insurance contract, is a species of commercial transactions and must be construed like any other contract to its own terms and by itself. In a contract of insurance, there is requirement of *uberimma fides* i.e. good faith on the part of the insured. Except that, in other respects, there is no difference between a contract of insurance and any other contract. The four essentials of a contract of insurance are, (i) the definition of the risk, (ii) the duration of the risk, (iii) the premium and (iv) the amount of insurance. Since upon issuance of insurance policy, the insurer undertakes to indemnify the loss suffered by the insured on account of risks covered by the insurance policy, its terms have to be strictly construed to determine the extent of liability of the insurer. The endeavour of the court must always be to interpret the words in which the contract is expressed by the parties. The court while construing the terms of policy is not expected to venture into extra liberalism that may result in re- writing the contract or substituting the terms which were not intended by the parties. The insured cannot claim anything more than what is covered by the insurance policy. [General Assurance Society Cheriyan (1999) 6 SCC 451 and United India (2004) 8 SCC 644.]"

10. The relevant portion of Machinery Insurance Policy taken by the complainant from the insurer are :

"NOW THIS POLICY OF INSURANCE WITNESSETH THAT subject to the terms and exemptions exclusions provisions and conditions contained herein or endorsed hereon the Company will at its own option by payment or reinstatement or repair indemnify the Insured against unforeseen and sudden physical damage by any cause not 1 JT 2009 (5) SC 579 hereinafter excluded to any Insured property specified in the attached Schedule whilst in the premises therein mentioned necessitating its immediate repair or replacement.

GENERAL EXCEPTIONS .

THE COMPANY SHALL NOT BE LIABLE UNDER THIS POLICY IN RESPECT OF:-

1.....

2.....

3.....

4.....

5.Deterioration of or wearing away or wearing out of any machine caused by or naturally resulting from normal use or exposure.

Special Exclusions:

1.....

2.....

3.....

PROVISIONS Sum Insured:

It is a requirement of this Insurance that the Sum Insured shall be equal to the cost of replacement of the insured property by new property or the same kind and same capacity which shall mean its replacement cost including freight dues and customs duties if any and erection costs.

Basis of Indemnity:

a) In cases where damage to an insured item can be repaired the Company will pay expenses necessarily incurred to restore the damaged machine to its former state of serviceability plus the cost dismantling and re-erection incurred for the purpose of effecting the repairs as well as ordinary freight to and from a repair-shop customs duties and dues if any to the extent such expenses have been included in the Sum Insured if the repairs are executed at a workshop owned by Insured, the Company will pay the cost of materials and wages incurred for the purpose of the repairs plus a reasonable percentage to cover overhead charges.

No deduction shall be made for depreciation in respect of parts replaced except those with limited life but the value of any salvage will be taken into account if the cost of repairs as detailed herein above equals or exceeds the actual value of the machinery insured immediately before the occurrence of the damage the settlement shall be made on the basis provided for in (b) below.

b).....

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If the sum insured is less than the amount required to be insured as per Provision 1 hereinabove the Company will pay only in such proportion as the sum insured bears to the amount required to be insured.

Every item is more than one shall be subject to this condition separately.

....."

11. It has been argued on behalf of the complainant that the insured must be reimbursed for the entire repairs costs incurred by it in repair of diesel generating set since as per insurance policy, the insurer was responsible for the payment of any sort of loss or reinstatement or repair and indemnify the insured in all respects. Relying upon the policy, it was submitted that it was the duty of the insurer to pay the necessary expenses incurred to restore the damaged generating set to its former state and the cost of dismantling and erection etc. We find it difficult to accept the aforesaid contention since it overlooks the General Exceptions incorporated in the policy that provide that the insurer shall not be liable under the policy in respect of deterioration of or wearing away or wearing out of machine caused by or naturally resulting from normal use or exposure. In other words, the policy does not provide for protection against wear and tear that the machinery had undergone and that the insured may have chosen to replace. The provision of 'sum insured' viz., the cost of replacement of insured property by new property of the same kind and same capacity is subject to the exception that repair or replacement shall not extend to the machinery or parts which have undergone normal wear and tear due to its use and exposure. In terms of the Machinery Insurance Policy taken by the insured, the insurer is required to reimburse the insured to the extent of moneys spent on repairs or replacement of the machinery to the kind of position that it was before the incident of damage.

12. In this backdrop, before we turn to the surveyor's report dated May 15, 2000, we deem it proper to notice Section 64 UM(2) of the [Insurance Act, 1938](#) that reads thus :

"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."

13. Recently, in *New India Assurance Company Limited v. Pradeep Kumar 2*, we had occasion to consider the aforesaid provision and we held thus :

"The object of the aforesaid provision is that where the claim in respect of loss required to be paid by the insurer is Rs.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. 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). In other words although the assessment of loss by the approved surveyor is a pre-requisite 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 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 last surveyor in his report dated May 15, 2000 assessed the loss thus :

2 2009 (6) SCALE 253 I) Working of Claim under Invoice No.60/184989 dated 13.01.2000 of M/s.CDSS :

We have allowed Labour Charges at Rs.80,000. Rs.80,000 Octroi Charge Rs.16,200 Freight Charges Rs.16,000 Transit Insurance Rs. 3,500 ----- Rs.1,15,700 Works Contract Tax 4% 4,628 --  
----- Rs.1,20,328 II) Working of Claim under Invoice No.60/184990 dated 31/1/2000 of M/s. CDSS:

1) "Kit -Crank Shaft" - Part No.AR 388113400K9 - 1 No. Rs.13,80,895. 52 (vide Page 1, Sr.No.1 of Subject invoice) Add 4% Work contract Tax Rs. 55,235.83 ----- Rs.14,36,131.35 The subjects Kit -Crank Shaft is comprising of set Main Bearings & connecting Rod Bearings, the reasonable total value for them is taken at Rs.1,35,131.35. Less Reasonable cost for set of main bearings & Connecting rod bearings Rs. 1,35,131.35 ----- - Rs.13,01,000/- Thus , bifurcation of costs are as under:- Cost of Crank Shaft Rs.13,01,000 Cost of set of main bearings & Connecting rod bearings Rs. 1,35,131 ----- Rs.14,36,131.35 A) Assessment for Crank Shaft:

Cost for Crank Shaft Rs.13,01,000 Less additional policy excess for the Crank shaft as per endorsement ..20% Rs. 2,60,200 ----- Net Loss Rs.10,40,800 B) Assessment for set of main bearings & connecting rod bearings:- Cost for the set Rs. 1,35,131.35 Less reasonable depreciation ..50% Rs. 67,565.67 ----- Net Loss after depreciation Rs. 67,565.67 2) Gears - 2 Nos. @ Rs.2587.69 - Part No.3177095 (Vide Page 6,Sr.

No.91 of subject Invoice) Rs. 7,763.07 Add 4% work contract Tax Rs. 310.52 Rs. 8,073.59 Less reasonable depreciation 50% Rs. 4,036.79 Net Loss after depreciation Rs. 4,036.80 Thus, net loss after depreciation for (1) & (2)= A + B + Gears above for items under Invoice No.60/184990 Rs.11,12,402.47 III) Working of claim under Invoice No. 60/184991 Dt. 31/01/2000 of M/s.CDSS Core Coolers (Oil collers) - 4 Nos. @ 54,205.42 - Part No.3627295 Rs. 2,16,821.68 Add 4% Work contract Tax Rs. 8,672.87 This is not a Limited life item and hence there is no any depreciation applicable for it under the policy Net Loss Rs. 2,25,494.55 Thus net loss under all the three Invoice as per claim bill works out to I) + II) + III) Rs.14,58,225.02 Less reasonable Salvage at scrap value Rs. 13,225.02 Rs.14,45,000.00 Less under-insurance -25.71% vide page No.13 Rs. 3,71,509 .50 Rs.10,73,490.50 Say Rs.10,73,491 Less Policy Excess Rs. 26,000 Net assessed Loss Rs.10,47,491/-"

15. The parts which had suffered due to wear and tear on account of constant use, although replaced could not form part of claim for reimbursement under the terms of policy and, therefore, surveyor in its report dated May 15, 2000 cannot be said to have wrongly rejected such claim. It is true that surveyor's report is not the last word but then there must be legitimate reasons for departing from such report. In our view, the complainant has failed to show any reason justifying rejection of surveyor's report dated May 15, 2000.

re : question (two) 16. In the Dictionary of Insurance (Second Edn.) by C. Bennett, "under-insurance" is explained thus:

"under-insurance occurs when the amount of insurance is less than the full value of property insured and means that the insured pays a smaller premium than that required as the rate is fixed on the basis of full values being insured. It leads to partial loss claims being scaled down by average (qv.)."

The expression "average" is explained thus:

"In non-marine property insurance if a sum insured is 'subject to average', and the sum insured is less than the value at risk at the time of loss, the claim will be reduced in the same proportion. The measure combats under-insurance."

17. As per the invoice, the diesel generating set and the alternator was purchased by the complainant in the year 1997 for Rs.45,25,000/-. The complainant, however, got the insurance cover valuing diesel generating set (Rs.26,00,000/-) and alternator (Rs.9,00,000/-), in all for Rs.35,00,000/-. Apparently, therefore, there is an element of under-insurance. There is merit in the contention of learned counsel for the insurer that the value of the item is always declared by the insured at the time of issuance of the insurance policy while the element of under-insurance is calculated by the insurer at the time of assessment of loss.

Although on behalf of the complainant, it was contended that under-insurance, if any, must be calculated at the time of issuance of policy and could not be deducted at the time of assessment of the loss but we find it difficult to accept the same. The policy provides that if the sum insured is less than the amount required to be insured, the insurer will pay only in such proportion as the sum insured bears to the amount insured. In accordance with the said provision in the policy if the surveyor applied the pro-rata formula and deducted 25.71% from the loss so assessed i.e. Rs.3,71,509.50 from the sum payable as under-insurance, such deduction cannot be faulted.

18. We are, thus, of the view that the National Commission did not commit any error in accepting the Surveyor's report dated May 15, 2000 as the assessment made there-under is proper and in accordance with the provisions of the policy.

19. By way of footnote, we may observe that claim of Rs.10,00,000/- made by the complainant for mental harassment is wholly misconceived and untenable. The complainant is a company and, therefore, claim for mental harassment is not legally permissible. It is only the natural person who can claim damages for mental harassment and not the corporate entity.

20. In all, we find that the consideration of the matter by the National Commission does not suffer from any legal flaw justifying interference by us.

21. Appeal is, accordingly, dismissed with no order as to costs.