

CASE NO.:
Appeal (civil) 9128 of 2003

PETITIONER:
United India Insurance Co. Ltd

RESPONDENT:
M/s Kiran Combers & Spinners

DATE OF JUDGMENT: 08/12/2006

BENCH:
G.P. MATHUR & A.K. MATHUR

JUDGMENT:
J U D G M E N T

A.K.MATHUR, J.

This appeal is directed against the order passed by the National Consumer Disputes Redressal Commission, New Delhi in Original Petition No. 74/1994 on 18.7.2003.

Brief facts giving rise to this appeal are:

The respondent/complainant M/s Kiran Combers & Spinners filed its complaint alleging deficiency in service on the part of United India Insurance Company. The case of the complainant/respondent was that they got their building and stock insured from the United India Insurance Company (hereinafter to be referred to as 'the Company'). The respondent-complainant held a valid Fire Policy for its stock (Building Rs. 25 lakhs, Machinery Rs. 40 lakhs, stocks Rs. 25 lacks and Furniture/Fixtures Rs. 1 lakh) effective from 11.1.1993 to 10.1.1994. This policy also endorsed to cover risk of flood. On account of heavy rains and floods in the city, insured property was affected by floods on 24th July, 1993 at about 7.45 P.M. which caused damage to building, machinery and stocks. This incident was reported to the Company on 25th July, 1993 and an FIR was lodged on 27th July, 1993. The respondent-claimant claimed Rs.20,03,842/- in July, 1993 from the Company. Surveyor, namely, M/s Vij Engineer's Enterprise appointed by the Company carried out its preliminary survey and submitted a report on 29th July, 1993. Second Surveyor; M/s Mita Marine and General Survey Agencies Pvt. Ltd. also visited the premises and submitted its detailed report on 14th September, 1993. M/s Mita Marine assessed the loss of Rs.10,13,571.90. However, at the same time M/s Mita Marine surveyor recommended that the insurer carries no responsibility in this case as building collapsed on account of structural defect caused by subsidence which was not covered by policy. A legal notice was issued by the claimant on 4.12.1993 and claim was repudiated on 7.1.1994 by the Company, basing on the report of the second surveyor i.e., M/s Mita Marine. Aggrieved against the repudiation of the claim of the respondent-claimant, an Original Petition No. 74/1994 was filed in the National Consumer Disputes Redressal Commission, New Delhi claiming the damages as aforesaid.

The claim was contested by the Company; appellant herein on the basis of the report given by the Surveyor and their plea was that the loss and damage caused to building due to structural defect in column No. 1 of building, the subsidence is a specific extension to the above policy which was not insured by the company. The relevant extract of Surveyor's report reads as under:

"As brought out in the body of the report, this loss and damage has happened due to failure of column No. 1 which may have happened due to its own

structural failure or due to its sinking/tilting causing it to become eccentrically loaded and hence falling in tension. The insured are covered under the Std. FP 'C' with flood endst. Subsidence is a specific extension to the above policy, which has not been taken by the insured. As such, we regret to say that either of the original cause of failure do not conform to the existing cover. In view of the above, we find that the insurers carry no liability in the above case. We understand that the insured had been asking the insurers permission for repairs. We, during our visits had informed the insured that they would be carrying out the repairs in their personal capacity and that the insurers were in no way involved in the same since the liability was not admitted."

The report was rebutted by the respondent-complainant by filing rejoinder. The National Commission after hearing the parties came to the conclusion that the repudiation of the claim by the Company is not warranted and they decreed the claim of the complainant to the extend of Rs. 10,13,571.90 as recommended by the second surveyor.

Aggrieved against the order passed by the NCDRC, New Delhi on 18th July, 2003, the present appeal has been filed by the Company.

Learned counsel for the appellant submitted that it is true that this is a fire policy and the appellant also covered the perils of flood but the policy did not cover subsidence. Therefore, learned counsel for the appellant tried to justify that since the policy had not covered subsidence and as pointed out by the surveyor the respondent is not entitled to be compensated. Learned counsel for the appellant also submitted that as pointed out by the surveyor that the third column over which the building was constructed was not properly constructed and therefore, on account of tilting of that column the whole building collapsed and as such the company was not entitled to compensate the claimant- respondent because of the structural defect. As against this, learned counsel for the respondent submitted that the Company has certified the building to be of first class construction and no defect was pointed out by the company, and it is on account of the flood water entering from the side of Kohinoor Woollen Mills, the building collapsed. It was submitted that in fact the collapse of the building was on account of entering of flood water from the side of Kohinoor Woollen Mills and not on account of flood water coming from the road. It was also pointed out that there is no provision for covering subsidence in the policy and therefore, the National Commission has rightly decreed the claim of the claimant- respondent.

We have considered the rival submissions of the parties. It is an admitted position that the claimant was covered from 11.1.1993 to 10.1.1994 and the flood took place on 24.7.1993 and caused extensive damage to the building. It is submitted that as per the policy, fire policy is covered for flood, storm and tempest on payment of extra 20 per cent premium i.e. Rs.500/-. Therefore, there is no dispute that the incident has taken place during the coverage of the policy and the cause of the damage is flooding of water into the building. The basic submission which has been addressed by learned counsel for the appellant was that the company has not covered subsidence. Subsidence means " the gradual caving in or sinking of an area of land". But on account of the water flooding into the premises of the claimant-respondent's factory from Kohinoor Woollen Mills, the land caved in as a result of which one column of the building collapsed. The question is whether subsidence was covered in the policy or not. In this connection, a reference may be

made to the terms of the policy. Clause 8 of the policy deals with exclusions that if any loss is occasioned on account of these events then policy shall not cover. Clause 8 of the Exclusions in the Policy reads as under :

" 8. Any loss or damage occasioned by or through or in consequence directly or indirectly of any of the following occurrence namely,

(a) Earthquake, volcanic eruption, or other convulsion of nature.

(b) Typhoon, storm, cyclone, tempest, Hurricane, Tornado, Flood and Inundation.

(c) War, invasion, act of foreign enemy, hostilities or warlike operations (whether war be declared or not), Civil War.

(d) Mutiny, civil commotion assuming the proportions of or amounting to a popular rising, military rising insurrection, rebellion, military or usurped power.

(e) Burning, whether accidental or otherwise, forest bush and jungles and the clearing of lands by fire.

In any action, suit or other proceeding where the Company alleges that the reason of the provisions of the above Exclusions any loss or damage is not covered by this Insurance, the burden of proving that such loss or damage is covered shall be upon the insured."

A perusal of the aforesaid clause would clearly show that there is no exclusion clause for subsidence. Clause 8(b) only talks of typhoon, storm, cyclone, tempest, hurricane, tornado, flood and inundation. None of the events mentioned above includes subsidence. We fail to understand from where the surveyor has brought the expression "subsidence" although clause 8 which specifically talks about exclusions, does not mention anything like subsidence. The policy is covered for flood and inundation for which the claimant is covered by paying extra premium, therefore, now to say that the policy has not covered subsidence, which is not a clause in the present policy cannot be sustained. Therefore, on the basis of this ground, repudiation of the claim of the claimant by the appellant does not appear to be justified. Had this been the clause, that if damage is caused on account of sinking and caving of the building i.e. subsidence then perhaps this would have come to the rescue of the company but since in the exclusion clause there is no mention of subsidence, therefore, this ground taken by the appellant-company and by the surveyor to defeat the claim, is absolutely unwarranted.

Now, coming to the next question of collapse of the building on account of poor construction of column no.3 of the building, there also the submission appears to be not justified. In fact, the Company has certified that this building has a first class construction. 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. More so, in the present case, as pointed out that because of defective structure i.e. column No.3, the building has collapsed but the question is what aggravated or accentuated this, factory is in place for more than 12 years & it is on account of flood water entering in factory that has caused this damage. So called defect was aggravated on account of flooding of the water in the premises of the factory, if the flood water had not entered into the factory,

perhaps the construction which stood good for 12 years, would have lasted long. The cause of the damage to the column No.3 of the building was flood water. Therefore, the company cannot escape the liability to compensate the claimant for collapse of the building on account of floods. As a result of above discussion, we are of opinion that the view taken by the National Consumer Disputes Redressal Commission is correct and is fully justified and there is no ground to interfere with the order. As such, the appeal is dismissed. There would be no order as to costs.

JUDIS