2021 INSC 565

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.9050 OF 2018

Khatema Fibres Ltd. ... **Appellant (s)**

Versus

New India Assurance Company Ltd. & Anr. ... **Respondent(s)**

J U D G M E N T

V. Ramasubramanian, J.

1. Aggrieved by the Judgment of the National Consumer Disputes Redressal Commission *(for short "National Commission")* confining the compensation payable to them only to the extent of the assessment as made by the final Surveyor, the complainant before the National Commission has come up with the above appeal.

2. We have heard Ms. Meenakshi Arora, learned senior counsel for the appellant and Mr. Joy Basu, learned senior counsel for the respondent-Insurance Company.

3. The appellant took a *"Standard Fire and Social Perils"* policy for the period from 7.05.2007 to 6.05.2008, for a sum of Rs.42,40,00,000/-. When the policy was in force, a fire broke out in the factory premises of the appellant on 15.11.2007.

4. The appellant submitted a claim on 19.11.2007, estimating the quantity of waste paper destroyed by fire at 8500 MT and its value at Rs.13,00,00,000/-.

5. One M/S Adarsh Associates, appointed by the respondent-Insurance Company, conducted a survey, sought documents from the appellant, raised queries and received clarifications from the appellant and submitted a final report dated 9.01.2009, assessing the loss suffered by the appellant on account of the fire accident as Rs.2,86,17,942/-.

6. Though the appellant, vide their letter dated 2.5.2009, objected to the survey and assessment report and sought the appointment of

another surveyor, the respondent informed the appellant by their letter dated 21.08.2009 that the claim of the appellant has been approved only to the extent of Rs.2,85,76,561/-, in full and final settlement. The appellant, through letter dated 14.09.2009, again raised objections to the Survey Report, but the respondent informed the appellant by their letter dated 7.10.2009 that the claim could be finalized only for the amount indicated in the letter dated 21.08.2009.

7. Therefore, the appellant filed a consumer complaint before the National Commission under Section 21(a)(i) of the Consumer Protection Act, 1986, claiming: ***(i)*** compensation in a sum of Rs.1364.88 lakhs towards the loss suffered in the fire accident; ***(ii)*** compensation in a sum of Rs.2095.52 lakhs, for the financial stress caused by the respondent by delaying the processing of the claim; ***(iii)*** interest @ 18% p.a. on the compensation amount of Rs.1364.88 lakhs from November, 2007 till 31.12.2009; and ***(iv)*** the cost of litigation estimated at Rs.1,00,000/-.

8. The National Commission, by its Judgment dated 3.07.2018 rejected the claim of the appellant under both the heads, but directed the respondent to pay only the amount of Rs.2,85,76,561/- as admitted

by them. This amount was directed to be paid to the appellant with interest @ 9% p.a. from 15.11.2007, only till the date the Insurance Company had made the offer. It is against the said Judgment of the National Commission that the appellant has come up with the above appeal under Section 23 of the Consumer Protection Act, 1986.

9. Admittedly, the respondent-Insurance Company appointed one Shri Kapil Vaish, a Chartered Accountant, on 16.11.2007 itself *(the day following the date of fire accident)*, to conduct a spot inspection and file a status report. When he visited the factory premises, the fire fighting was still going on and it was found that the fire had taken place only in the waste paper yard of the factory. In the status report submitted by Shri Kapil Vaish on 16.11.2007, he indicated that the fire had affected waste paper bales lying in an area measuring 27 mtrs. X 55 mtrs. = 1485 sq.mtrs. in open compound. Presuming that waste paper would have been stacked in bunches of six bales, one on top of the other and that the quantity of affected waste paper could be around 5000 MT, whose cost may be around Rs.20-22 per kg., Shri Kapil Vaish roughly estimated the loss to be around Rs.10-11 crores. The appellant

themselves estimated the quantity of waste paper burnt in the fire to be 8500 MT valued at Rs.13,00,00,000/-.

10. M/s Adarsh Associates who conducted the actual survey with reference to the records and other evidence available with the appellant, had two options before them for arriving at the quantity of material destroyed by fire. The first option was to proceed on the basis of the stock registers and other records of the appellant company to fix the quantum of loss. The next option was to proceed on the basis of volumetric analysis, by taking the measurement of the open yard in which the fire broke out, finding out the optimum capacity of the yard with reference to the measurement of the bales of paper stored therein and then working out the quantum of material destroyed.

11. The Surveyor adopted the second option namely that of volumetric analysis and assessed the quantity of raw material damaged at 2264.400 MT. He valued this raw material @ Rs.15137.35/- per MT, inclusive of CENVAT. Thus, he arrived at the value of the material damaged to be Rs.3,42,77,015.34/-. Then the Surveyor fixed the salvage value at Rs.18,92,200/- and deducted the same from the value of the

raw material, to arrive at the gross assessed loss at Rs.3,23,84,815.34/- From out of this amount the Surveyor deducted the CENVAT as well as 1% towards soiled goods. After so doing, the surveyors arrived at the value of loss at Rs.2,86,17,942/-.

12. For proceeding on volumetric analysis method, the Surveyor took the measurement of the open yard as 27 mtrs. X 55 mtrs. = 1485 sq. mtrs. This was on the basis of the Status Report of the Chartered Accountant who made the spot inspection on 16.11.2007 when the fire fighting was still in progress. There was a finding in the status report of the Chartered Accountant that the material affected by the fire was lying in the yard measuring 27 mtrs. X 55 mtrs. = 1485 sq. mtrs. Therefore, the Surveyor took this measurement as the starting point and proceeded as detailed above.

13. Keeping the above background in mind, let us now come to the grievance of the appellant, against the Judgment of the National Commission. Ms. Meenakshi Arora, learned senior counsel for the appellant contended that the National Commission committed a serious error first in taking the net weight of waste paper bales burnt/damaged

during the incident as 2264.400 MT, as against the claim of the appellant that the net weight of the material damaged was 8332 MT. According to the learned senior counsel, there were no discrepancies in the various records and stock registers maintained by the appellant with respect to the quantity and weight of material stored in the open yard, but the Surveyor chose to reject the same arbitrarily and proceeded on volumetric analysis basis. The learned senior counsel further contended that even while proceeding on volumetric analysis basis, the Surveyor did not do justice. Though, the total area of the open yard was 27 mtrs. X 100 mtrs. = 2700 sq. mtrs., the Surveyor took the measurement as 27 mtrs. X 55 mtrs = 1485 sq. mtrs., despite they themselves finding that the area was 22.5 mtrs. X 105 mtrs. = 2362 mtrs. This, according to the learned senior counsel for the appellant, resulted in gross injustice to the appellant in the matter of assessment of the quantum of loss.

14. Another gross error committed by the Surveyor, according to the learned senior counsel for the appellant, is that despite finding the net weight per bale as 988.889 kgs. as per Annexure A-3 to the Survey Report dated 9.01.2009, the Surveyor took the net weight as 900 kgs.

per bale, merely because the complainant had indicated the same to be 900 kg. per bale. The Surveyor had thus adopted double standards, in taking either what is found by them or what is claimed by the appellant, whichever was less. This according to the learned senior counsel for the appellant resulted in the Insurance Company eventually admitting the claim only to the extent of less than 25% of the total amount of loss suffered by the appellant.

15. Justifying the judgment of the National Commission, it is contended by Mr. Joy Basu, learned senior counsel for the respondent that M/S Adarsh Associates were appointed by the respondent as Surveyors to act as such in terms of Section 64UM(2) of the Insurance Act, 1938 and that they have assessed the loss in a scientific manner. As the Surveyors appointed by the respondent are experts in the field, who have gone into every minute detail by examining the records of the appellant scientifically, their report is unassailable. In the case on hand, it was admitted even by the appellant, to Shri Kapil Vaish who conducted spot inspection that there was no physical verification of the stock of raw material in the recent past and that the consumption of

raw material was recorded only on estimated yield basis. Therefore, the learned senior counsel for the respondent contended, by drawing our attention to the letter dated 5.12.2007 sent by the appellant that the appellant themselves were adopting volumetric analysis for the quantification of the stock. The learned senior counsel relied upon the decisions of this Court in ***(i) United India Insurance Company Ltd. And Others*** *vs.* ***Roshan Lal Oil Mills Ltd. And others***[1]; ***(ii) Sikka Papers Limited*** *vs.* ***National Insurance Company Limited And Others***[2]; and ***(iii) New India Assurance Company Limited*** *vs.* ***Luxra Enterprises Private Limited And Another.***[3], in support of his contention that the report of the surveyor is an important document and that Courts may have to show deference to the report of the surveyor appointed in terms of section 64UM(2) of the Act.

16. We have carefully considered the rival contentions.

17. As could be deciphered from the grounds of appeal and the submissions made at the time of hearing, the grievance of the appellant

1 2000 (10) SCC 19
2 2009 (7) SCC 777
3 2019(6) SCC 36

is primarily with respect to the quantification of the net weight of the raw material destroyed in the fire accident. The price of the material, fixed by the Surveyor at Rs.15137.35/- per MT, is not seriously disputed. Though a dispute is raised with regard to the salvage value, the contention relating to the same is very weak and feeble and hence we would not get into the same.

18. Insofar as the quantification of the weight of raw material damaged in the fire is concerned, the Surveyor had, in fact, worked out the quantity, as seen from paragraph 9.7 of his Report, both on the basis of the appellants' stock records and also on the basis of volumetric analysis of the area involved.

19. After extensively analyzing what is reflected in the stock records of the appellant, the Surveyor came to the conclusion that there were discrepancies which could not be reconciled. It is recorded by the Surveyor in paragraph 9.8.2 of the Report that the appellant initially submitted one set of documents, which reflected a huge quantity of imported waste paper both for general use and for newsprint. Therefore, the Surveyors requested the appellant to submit documents in support

of reversal of CENVAT, on the damaged quantity of waste paper. Immediately the appellant submitted a revised claim bill along with a fresh set of documents. In fact imported waste paper for newsprint is exempt from payment of customs duty subject to submission of end use certificate. In the revised set of documents, the quantity of closing stocks of imported waste paper meant for newsprint was substantially increased. The Surveyor also found in paragraph 9.8.7.7 of their Report that there was a huge difference between the overall quantity of burnt/ damaged stock of waste paper arrived at on the basis of the initial set of records and the overall quantity of burnt/damaged stock of waste paper arrived at on the basis of the revised set of records. Therefore, the Surveyor decided to adopt volumetric analysis method rather than rely upon the stock records of the insured.

20. We fail to understand how the Surveyors could be found fault with, for rejecting the stock records of the insured, especially in the light of the circumstances narrated above. When the insured produced 2 sets of records and the quantum of material destroyed by fire arrived on the basis of these records showed huge discrepancies, the Surveyor had no

alternative except to reject these records and proceed on volumetric analysis. In any case, as rightly pointed out by the learned counsel for the respondent, the appellant themselves have admitted to Shri Kapil Vaish, who went for spot inspection when the fire was still raging, that the appellant had not conducted physical verification of its raw material stock in the recent past and that the consumption was recorded on estimated yield basis. In their own letter dated 5.12.2007, the appellant had conceded that stock taking was done on the basis of receipts and consumptions as well as physical verification on volumetric basis. The following extract from the appellant's letter dated 5.12.2007 would clinch the issue in this regard; *"the estimates for stocks and burnt quantities may not be appearing close to stock inventory maintained in the books, since the estimates prepared for burnt material was not on weighment basis but on volumetric basis".* Therefore, we find that the refusal of the Surveyor to go by the stock records of the appellant, but to adopt volumetric analysis, was fully justified and no exception can be taken to the same.

21. On the method of volumetric analysis adopted by the Surveyor, the

first grievance of the appellant is that the physical measurement of the stockyard was 27 mtrs. X 100 mtrs. = 2700 sq. mtrs. But the Surveyor took the measurement as given by Shri Kapil Vaish, *namely,* 27 mtrs. X 55 mtrs. = 1485 sq. mtrs., despite finding in para 4.7 of the Survey Report that the actual measurement was 22.5 mtrs. X 105 mtrs. = 2362 sq. mtrs. Such a drastic reduction in the total measurement of the area of the open stock yard, according to the appellant, led to the quantum of the material burnt/damaged getting substantially reduced.

22. But it is seen from paragraph 9.4 and 9.5 of the Surveyors' Report that there were actually three different measurements available with the Surveyor, with a huge variation between one another. The Status Report dated 16.11.2007 filed by Shri Kapil Vaish, about which the appellant did not have any serious grievance, recorded clearly as follows *"it was estimated that the fire had affected waste paper bales lying in the area of 27 mtrs. X 55 mtrs. = 1485 sq. mtrs. in the open compound."* The appellant claimed in their letter dated 13.12.2007 addressed to the Surveyor that the total affected area was 27 mtrs. X 100 mtrs. = 2700 sq. mtrs. These two documents, *namely,* the Status Report of Shri Kapil

Vaish and the measurement given by the appellant in their letter dated 13.12.2007 were in contrast to the measurement given by the *Tehsildar,* Khatima, relied upon by the appellant themselves, according to which the measurement was 90 mtrs. X 23 mtrs. = 2070 mtrs.

23. Faced with three different measurements as aforesaid, the Surveyor reconciled the same by holding that despite the measurement of the open stockyard being 22.5 mtrs. X 105 mtrs. = 2362 mtrs., the area affected by fire could only be 1485 sq. mtrs. This is for the reason that during their visit to the site, the damaged/burnt bales as well as loose waste papers were found spread over an area of 22.5 mtrs. X 105 mtrs. and the insured was carrying out salvaging/segregation in the said area after the extinction of the fire. In other words, what was witnessed by Shri Kapil Vaish personally on 16.11.2007 was that the fire was confined to an area of 1485 sq.mtrs, but what was seen by the *Tehsildar* and the Surveyor was of a larger area where the salvage operation was going on. Therefore, the Surveyor chose to go by the measurement of the area mentioned in the Status Report of Shri Kapil Vaish, who had the benefit of witnessing what was happening when fire

fighting was still in progress. In such circumstances, we find nothing wrong in the Surveyor taking the measurement of the area of the stockyard affected by fire, as 27 mtrs. X 55 mtrs. = 1485 sq. mtrs. for the purpose of volumetric analysis.

24. At this stage it will be useful to extract the table given by the Surveyor in paragraph 9.9.2 of his Report, where detailed calculations are provided as to how the net weight of waste paper burnt/damaged during the incident was arrived at:

1.	Total area considered for storage bales in open	Sq Mtr	1485
2.	Less: 20% are considered for gaps/open spaces while storing bales and other open space for movement etc.	Sq Mtrs	297
3.	Total affected area, considered for storage (1-2)	Sq Mtr	1188
4.	Average area per bale, as considered by us	Sq Mtr	2.007
5.	Therefore no. of bales stored in one layer of local area (1188 divided by 2.007)	Nos.	592
6.	Total nos of bales in the affected stacks, considering 5 bales in height (592 x 5)	Nos	2960
7.	Av weight per bale as considered by us.	Kgs	900
8.	Therefore, total weight of bales stored in affected area/volume (2960 x 900)	Kgs	2664000
9.	Less: 15% of above bales / weight considered as shifted / save during fire fighting	Kgs	399600
10.	New weight of waste paper bales burnt/ damaged during the incident (8-9)	Kgs	2264400

25. An objection was raised by Ms. Meenakshi Arora, learned senior counsel for the appellant about 20% reduction made by the Surveyor in the measurement of the area. Such a reduction was made by the Surveyor, on the ground that gaps/space was required for the movement of men and material. It is her contention that when admittedly the appellant was using forklifts to move and store material, there was no question of leaving any vacant space.

26. But we do not agree. The allowance of some space within the open stockyard, for the purpose of movement of men and material is logical. It is not possible for us to accept that the whole space in the stockyard was completely stacked by material without any space for movement. Without providing adequate gaps and spaces within the open courtyard, it would not have been possible for the appellant to remove the material for the purpose of processing, even if forklifts were used. Therefore, the objection to the provision for open space/gaps is unfounded.

27. The next crucial objection of the appellant is to the adoption of the overall weight per bale at 900 kgs. According to the appellant, the Surveyors themselves calculated the average weight per bale in

Annexure A-3 to their report as 988.889 kgs. and that, therefore, this could not have been reduced to 900 kgs. per bale.

28. But the appellant has to blame themselves for this. In the calculation sheet annexed to the letter dated 13.12.2007 addressed to the Surveyor, the appellant themselves estimated the average weight per bale to be 900 kgs. What is arrived at by the Surveyor, in Annexure A-3 to their Report is based only upon the sizes of different types of bales and the areas occupied by different types of bales. Annexure A-3 to the Surveyors' Report arrives at the average weight per bale by multiplying the size of the bales by the area occupied. There was no reason for the Surveyor to be more royal than the king by adopting the average weight per bale on the basis of paper calculations, when the party himself has provided the average weight to be 900 kgs. per bale.

29. Thus, we find that all the objections of the appellant to the Surveyors' Report are wholly unsustainable and the National Commission rightly rejected those objections. As a matter of fact we have taken pains to go into elaborate factual details, as this is a first appeal under Section 23 of the Consumer Protection Act, 1986.

30. As correctly pointed out by the National Commission, the appellant was not entitled to succeed unless they were able to establish any deficiency in service on the part of the Insurance Company. The expression deficiency is defined in Section 2(1)(g) of the Consumer Protection Act, 1986, as follows:

> *"2(1)(g) deficiency" means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service"*

31. This is not a case where the Insurance Company has repudiated the claim of the appellant arbitrarily or on unjustifiable grounds. This is a case where the claim of the appellant has been admitted, to the extent of the loss as assessed by the Surveyor. In cases of this nature the jurisdiction of the special forum constituted under the Consumer Protection Act, 1986 is limited. Perhaps if the appellant had gone to the civil court, they could have even summoned the Surveyor and cross examined him on every minute detail. But in a complaint before the Consumer Forum, a consumer cannot succeed unless he establishes deficiency in service on the part of the service provider.

32. It is true that even ***any inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law or which has been undertaken to be performed pursuant to a contract***, will fall within the definition of the expression *'deficiency'*. But to come within the said parameter, the appellant should be able to establish ***(i)*** either that the Surveyor did not comply with the code of conduct in respect of his duties, responsibilities and other professional requirements as specified by the regulations made under the Act, in terms of Section 64UM(1A) of the Insurance Act, 1938, as it stood then; or ***(ii)*** that the insurer acted arbitrarily in rejecting the whole or a part of the Surveyor's Report in exercise of the discretion available under the Proviso to section 64UM(2) of the Insurance Act, 1938.

33. Section 64UM (2) of the Insurance Act, 1938, before its amendment by Act 5 of 2015, mandated that no claim equal to or exceeding a sum of rupees twenty thousand only shall be admitted for payment unless the insurer had obtained a report from an approved surveyor or loss

assessor.[4] This provision read as follows:

> "(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"):*

34. But the Proviso to sub-section (2) of section 64UM also recognized the right of the insurer to pay any amount different from the amount as assessed by the approved surveyor or loss assessor. The *proviso* reads as follows:

> "*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.*"

35. This is why the law is settled that the surveyor's report is not the last and final word. It has been held by this Court in several decisions, that the surveyor's report is not so sacrosanct as to be incapable of

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4 After amendment through Act 5 of 2015, what was sub-section (2) earlier, has become sub-section (4) with the modification
that the words "twenty thousand rupees" have been substituted by the words "amount specified in the Regulations by the Authority".

being departed from. A useful reference can be made in this regard to the decision of this court in ***New India Assurance Company Limited*** *vs.* ***Pradeep Kumar***[5]***.***

36. The Insurance Act, 1938 even while assigning an important role for the surveyor, casts an obligation on him under sub-section (1A) of section 64UM[6] to comply with the code of conduct in respect of his duties, responsibilities and other professional requirements as specified by the regulations made under the Act. This provision reads as follows:

> *"(1A) Every surveyor and loss assessor shall comply with the code of conduct in respect of their duties, responsibilities and other professional requirements as may be specified by the regulations made by the Authority."*

37. Two things flow out of the above discussion, They are ***(i)*** that the surveyor is governed by a code of conduct, the breach of which may give raise to an allegation of deficiency in service; and ***(ii)*** that the discretion vested in the insurer to reject the report of the surveyor in whole or in part, cannot be exercised arbitrarily or whimsically and that if so done, there could be an allegation of deficiency in service.

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5 (2009) 7 SCC 787

6 Now sub-section (2) of section 64 UM after amendment under Act 5 of 2015

38. A Consumer Forum which is primarily concerned with an allegation of deficiency in service cannot subject the surveyor's report to forensic examination of its anatomy, just as a civil court could do. ***Once it is found that there was no inadequacy in the quality, nature and manner of performance of the duties and responsibilities of the surveyor, in a manner prescribed by the Regulations as to their code of conduct and once it is found that the report is not based on adhocism or vitiated by arbitrariness, then the jurisdiction of the Consumer Forum to go further would stop.***

39. In the light of the above we are of the considered view that the Judgment of the National Commission does not call for any interference. Hence the appeal is dismissed. No costs.

.....J.
(Hemant Gupta)

.....J.
(V. Ramasubramanian)

NEW DELHI
SEPTEMBER 28, 2021