

HIGH COURT OF JAMMU AND KASHMIR AT
JAMMU

OWP No. 424/2007
CMP Nos. 854/2007 & 640/2007

Date of Decision: **30. 10.2007**

New India Assurance Co. Ltd. v. Ghulam Nabi Khan & Ors.

Coram:

Mr. JUSTICE J. P. SINGH, JUDGE.

Appearing Counsel:

For Petitioner : Mr. R.K.Gupta, Advocate.
For Respondents : Mr. Ajay Kumar Gandotra,
Advocate.

i)	Whether to be reported In Press/Journal/Media:	Yes
ii)	Whether to be reported In Digest/Journal :	Yes

New India Assurance Company Limited has filed this writ petition questioning order dated 08-07-2006 of the Divisional Consumer Forum, Jammu and Appellate order dated 09-03-2007 of the Jammu and Kashmir State Consumer Disputes Redressal Commission, Jammu, (State Commission for short), saying that both the authorities constituted under the Jammu and Kashmir

Consumer Protection Act, 1987 had erred in allowing respondent Ghulam Nabi Khan's Claim Petition No.856, claiming compensation for the loss alleged to have been caused to his building situated at Ghutha Bhagwah, Doda which was gutted in fire during the currency of Policy No. 1135250300892.

The insurer-writ petitioner had disputed its liability to pay compensation to the respondent on the ground that the building which had been stated to have been gutted in fire, had not infact been insured with it, and it was rather the cattle-shed of the respondent, that had suffered loss because of the fire, which however was not covered by the Insurance Policy.

The complaint/claim of the respondent was adjudicated upon by the Divisional Consumer Forum, which, on the basis of the evidence produced before it, came to the conclusion that the double storeyed building of the respondent had been used both for residential purposes as also for providing shelter to his cattle which had suffered loss because of the fire, and the Insurance Company could not

thus deny its liability to compensate the respondent. Holding the repudiation of respondent's claim by the insurer as arbitrary and illegal, the Divisional Consumer Forum, directed the writ petitioner to pay an amount of Rs.1,70,000/-, as compensation to the respondent, as assessed by Mr. Mahesh Badyal Surveyor and loss assessor along with interest @ 6% per annum w.e.f. September, 1995 i.e six months after the date of loss, and litigation expenses amounting to Rs.3000/-.

Dissatisfied with the decision of the Divisional Consumer Forum, Jammu, both the parties to the dispute, appealed to the State Commission.

The State Commission has, while dismissing petitioner-insurer's appeal, allowed respondent's appeal enhancing the compensation awarded by the Divisional Consumer Forum, Jammu to Rs. 3 lacs along with interest @ 6% per annum w.e.f. 08-01-1999, i.e. the date of filing of the complaint before the Forum, besides awarding an amount of Rs.5000/- as litigation charges and Rs.15,000/- as compensation for mental and physical agony.

Mr. R.K.Gupta, learned counsel appearing for the writ petitioner-Insurance Company, while questioning the findings of the two statutory authorities, on facts, additionally submitted that the findings of the State Commission, raising the amount of compensation to Rs. 3 lacs, was unwarranted, besides being unjustified, in that, there was no material on records on the basis whereof the compensation awarded by the Divisional Consumer Forum could have been enhanced.

Mr. Ajay Gandotra, Learned counsel for the respondent, on the other hand, while supporting the judgment of the Commission, urged that as the building of the insured had suffered total loss so the compensation claimed by the respondent had been rightly allowed by the State Commission.

I have considered the submissions of learned counsel for the parties and examined the records of the two statutory authorities.

Before considering the submissions of learned counsel for the parties, the findings recorded by the State Commission, while allowing the respondent's

appeal, need to be noticed. These findings read thus:-

“The report as well as the evidence of Mr. Mahes Badyal surveyor do not corroborate the story of the appellant with regard to the burning of his double storeyed insured house in fire. They are not to be taken seriously for the determination of the controversy because he has visited the spot after a gap of more than 10 years. **There was no legal binding on the insured to keep all the burnt material in safe custody for such a long period.** Mr. Shakeel Ahmed Bhat surveyor of the insurer in his report has stated that insured on spot had narrated to him that after the alleged occurrence the salvage was removed from the site. He after spot inspection and local inquiries has in his report stated that a single storeyed cow-shed/godown had been damaged in the said fire incident. **Mr. Mahesh Badyal** surveyor does not support him on this aspect of the incident but totally contradicts him. Thus, both the surveyors cancel each other’s version. **The insurer was statutorily bound under the provisions of the Insurance Act and the terms of the insurance contract to immediately get the alleged loss verified from its surveyor/surveyors but to our utter surprise and horror, we find that there was culpable negligence on its part for more than three years for not deputing any surveyor on spot.** Mrs. Suman Gupta Divisional Manager of the insurer company in her deposition has spoken about the deputation of M/s Alak Consultant Pvt. Ltd. as surveyor for assessment of loss but this story does not find any place in the objections filed by the insurer on 10-09-1999 which were filed five year earlier to the period of deposition of Mrs. Suman Gupta. She deposed on 20-01-2006. In para 5 of the

objections, the insurer has stated that immediately after getting the information from the complainant regarding the alleged occurrence, action was taken by the insurance company, and request was made to the complainant vide letter dated:-17-04-1995, to assist the surveyor which request was not acceded by him. Here we find no place of M/s Alok Consultant Pvt. Ltd. Surveyor. It thus becomes crystal clear that Mrs. Suman Gupta is concocting a false story to stave off the indolent conduct of the concerned colleagues which practice is deplorable. The plea raised by Mr. Sandeep Singh Advocate regarding the waiver of delay on the part of the insured is devoid of any legal force because the commission had not scuttled the right of the insured in its order dated:-17-04-1998 but by virtue of that order three months time was given to the parties to effect the compromise. Rather, they were allowed to approach the commission again in case no settlement could be affected (Annexure P-9). The doctrine of “**waiver**” has been discussed by the Hon’ble Supreme Court in the case of Associated Hotel of India Ltd. Vs. S.B.Sardar Ranjeet Singh (AIR-1968-SC-933) wherein it is held that, “a waiver is intentional relinquishment of a known right. There can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights and of facts enabling him to take effectual action for the enforcement of such rights.” Similarly, the apex court in the case of Mademsetty Satyanarayan appeallant Vs. G.Yelloji Rao and others, (AIR-1965-SC-1405) has held that, “waiver means agreement to release or not to assert right.” In the case of Jaswant Singh Mathura Singh and another Vs. Ahmedabad Municipal Corp and others (1992-Supp (1)-SCC-5) the apex court has held, “issue of notice essentially to

ascertain waiver of the benefit conferred.” Adverting to the facts of the present case, we do not find any ingredient of the doctrine of waiver existing in the factual matrix of the case. The argument of the learned counsel is thus neither factual nor legally correct and is rejected.

In view of the above made discussion, we find that the appellant Mr. Ghulam Nabi Khan has succeeded in proving his case by adducing documentary and oral evidence which has preponderant evidentiary value. On the other hand, respondent insured has failed to establish its plea that it is totally a false case put up by the insured in order to grab the insured amount. In case this was the scheme then the insurer should have become more alert and cautious in acting with utmost alacrity by deputing a surveyor on the spot without allowing any grass to grow under its feet. Rather, insurer had become a mute spectator for more than three years. It neither deputed any surveyor nor settled the claim in any way. In the circumstances of the case it becomes obligatory on the part of the higher ups in the administrative hierarchy of the insurer to locate the delinquent/delinquents who for three years have slept over the claim by not taking any effective action. Such a lapse should not be allowed to re-occur which is the demand of its bonafide consumers whose hard earned money is always at the stake. In this view of the matter, we accept appeal No:- 2800/2006 of Mr. Ghulam Nabi Khan whose claim to the extent of Rs.3.00 lacs is accepted with interest @ 6% per annum from 08-01-99 (the date of filing the complaint before the forum) till its realization and the litigation charges of Rs.5000/-. For mental and physical agony compensation is awarded in the sum of Rs.15,000/-. The appeal filed by the insurer bearing No:-2803/2006 is accordingly

dismissed. The record of the Divisional Forum be sent back.”

Perusal of these findings indicates that whereas the State Commission had disbelieved the petitioner’s evidence, on its critical examination, it had, however, omitted to deal with the respondent’s evidence. It had not assigned any reason for disbelieving the respondent’s evidence either.

Mr. Gupta, therefore, appears to be right in saying that the Commission had awarded an amount of Rs. 3 lacs to the respondent without either disclosing reasons therefor or pointing out the infirmities in the report of Mr. Mahesh Badyal surveyor wherein he had assessed the value of the property, identified by the respondent to be the property, which had been gutted in fire, at Rs. 1,70,000/-.

While seeking appointment of a fresh surveyor, the respondent had indicated in his application that evidence of loss suffered by him to his building was still available on spot and appointment of a fresh surveyor would thus be warranted.

It needs to be noticed that the *report* of the surveyor appointed during the pendency of the proceedings had not been disputed by the parties to the litigation. Another thing which needs notice is that this report was in two parts. In its first part, the surveyor had opined that the building which had been shown by the respondent to him as the one which had been gutted, was not the same which had been insured by the respondent with the Insurance Company and the respondent was not, therefore, entitled to any insurance claim. In its second part, the report, had assessed the loss caused to the building which the respondent had stated to be the same which had been insured and got gutted. The surveyor had assessed the loss of this building as follows:-

“ANNEXURE A

Assessment of loss

In our opinion under this policy the underwriter is not liable to indemnify the loss. However as we visited the site along with the insured and took the measurements of the remains of the damaged building and accordingly assess the loss as under:-

The specification and type of construction is given as under:

- a) Foundation is made up stone masonry with mud mortar.
- b) Super structure is raised in dry rubble stone masonry.

- c) Floors are finished with mud flooring.
- d) Ground floor is provided with mud roofing resting on wooden logs.
- e) CGI sheet roofing resting on wooden battens had been provided on the first floor.

Keeping in view the specification, type of construction, and the date of loss i.e. 25-03-1995 the average rate on plinth area basis of Rs 100/cft is quite reasonable and can be considered

Area of the building	
Ground floor	35ft x 40ft = 1400cft
Ist floor	35ft x 40ft = <u>1400cft</u>
	2800cft

Value of the building @ Rs.100/cft\
i.e. 2800 x 100 = Rs.280000.00
Less Dep @ 1.5% per year for 11 years
as the building was constructed in
the year 1984 and damaged in the
year 1995 i.e.16.5% (-) = Rs.046200.00
Rs.233800.00

Less salvage value of materials
which can either be reused after
re-conditioning or having some
salvage value i.e stones, CGI sheets
& wood etc. (-) = Rs.053800.00
(-) = Rs.180000.00
Less Excess Clause (-) = Rs.010000.00
170000.00

This report is issued without prejudice subject to the underwriters admitting the liability under the terms and the conditions of the insurance policy.

Thanking you and assuring of my best and prompt services always.”

As against the report of this surveyor, there is nothing on records, on the basis whereof it may be said that the loss caused to the respondent's building was to the tune of Rs. 3 lacs. This is so because the only document which the respondent had relied upon in support of his claim was the

Report of Assessment of loss prepared by Mr. S.S.Pati Garoo, Engineer of Road and Building Department, who had valued the loss of building at Rs. 4 lacs, which report had been disbelieved by the State Commission in absence of the affidavit evidence of Mr. S.S.Pati Garoo in the case.

It appears that the second part of the report of Mr. Mahesh Badyal Surveyor, who, on the request of the respondent, had been appointed by the Divisional Consumer Forum to assess the loss of the gutted building, had escaped the notice of the State Commission.

I, therefore, do not find any justification in State Commission's finding and conclusion that the respondent was entitled to an amount of Rs. 3 lacs as loss to his building.

This is so because the conclusion reached at by the Commission is based on "No evidence".

I do not find any merit in the submission of Mr. Gandotra that the respondent was entitled to an amount of Rs. 3 lacs as compensation, for which the building had been insured, even in the absence of

any proof by the respondent regarding the actual loss which had been suffered by the insured. This is so because the respondent was entitled to claim only that loss which his building had actually suffered. It was because of this reason that he had put up a specific case indicating the amount which he had suffered because of the loss to his insured building by relying upon the report of Mr. S.S.Pati Garoo who had given the details of the loss caused to the respondent's insured property. The respondent was therefore required to prove the actual loss which the insured building had suffered. Without proving the actual loss caused to his building and deducting the value of the property which had survived the effect of the fire, the respondent would not be entitled to claim the amount for which the building stood insured.

I have seen the Assessment of loss report prepared by Mr. S.S.Pati Garoo. It suffers from some inherent weaknesses. The depreciation value of the damaged property has been assessed while considering the age of building as five years

whereas going by the evidence of the respondent, the building is stated to have been constructed in the year 1985 and gutted in fire in 1995. This report does not take note of the salvage value of the material too i.e. stones, CGI sheets and wood etc., which according to the surveyor appointed by the Court could either be reused after reconditioning it or had some salvage value.

Keeping all these things in view, even if one were to take into consideration the report of Mr. S.S.Pati Garoo, minus its inherent weaknesses, the compensation could not have been awarded more than the one awarded by the Divisional Consumer Forum.

The Divisional Consumer Forum has given cogent reasons in arriving at its findings. These findings, for facility of reference are reproduced hereunder:-

“Considering the rival contention of L/C for the parties, the fact that two storeyed building of complainant which was duly insured with the OP for Rs,.3 lacs suffered damage on 15-2-1995 because of fire incident and was a total loss is not disputed and cannot be disputed. The loss having been caused to the building during the

currency of policy also is not disputed. For the above purpose reference can be made to the complaint, written version, documents produced by the complainant in support of his claim viz report of Numberdar, Chowkidar, Naib Tehsildar, Tehsildar, estimate of building and the report submitted by Mr. Mahesh Badyal Surveyor. The dispute is raised by the OP insurer that the residential building of complainant as per report of first surveyor Mr.Shakeel Ahmed Bhat and Mahesh Badyal is in tact and has not suffered damage while as the cow shed has been damaged for which the assessment has been made by Mahesh Badyal surveyor raises question as to whether the present claim preferred by the complainant is based on flimsy grounds or is not genuine claim. Regarding this aspect of the case if we go through the first communication addressed by the complainant to insurer OP and the reply of the OP one finds that the complainant has made a request to the OP by telegram dt.18-2-1995 intimating loss of the building covered under the policy in question with a request to depute surveyor for assessment of loss. This telegram has been acknowledged by the OP vide letter dt.17-4-1995 and complainant in turn has been asked to visit office of the OP for discussion and to accompany the surveyor for exact location and the complainant has been further asked to produce documents viz claim form duly completed and signed, estimate of loss, copy of FIR duly translated, Fire Brigade Report, Site Plan, Ownership Proof and age proof of building, report of Tehsildar and Brief description of loss. All these documents sought from the complainant have been made available by the complainant to the OP insurer and i.e. why the report from S.S.Pattigaroo SE regarding estimate of building and site plan and copy of FIR from police concerned, Fire

Brigade Report from concerned Fire Station, Ownership Proof from Patwari and the age proof of building, report of Tehsildar have been obtained by the complainant and submitted to OP. It appears that the area where the building was situated being not connected by a motorable road as certified by Fire Brigade Officer vide certificate referred to hereinabove coupled with the fact that the area being militancy prone area, the surveyor has not been appointed in the first instance upto May, 1998 by the OP insurer though loss to the building had been caused on 15-2-1995. It is common practice that the area falling in the winter zone of J&K State that the building used as residential building also invariably has within some space reserved for providing shelter to the cattle as well. i.e. why the Tehsildar Doda, Naib Tehsildar Bhagwa, Chowkidar and Numberdar of the village have used the words residential building cum cow shed in their reports and certificates. The first surveyor Shakeel Ahmed Bhat in his observations and findings has reported that the complainant and his three brothers Ghulam Mohidin, Shams Ud-Din and Manzoor Ahmad are jointly living in the double storeyed building situated at Dugga Gutha Doda and fifth brother is living separately in a different house situated adjacent to the main residential house of the insured so four brothers jointly owning the building living in the said building, the insurance cover for any kind of property should have description of all the owners and the said building was found safe and intact and no fire damage has caused to it since construction this has been made basis by the insurer to repudiate the claim. In para 2 of the said report he has reported that the insured had narrated regarding separate double storeyed building on the upper back side of the existing building which

building was damaged by fire on 15-2-1995 but as per his enquiries a single storeyed cow shed cum go down was damaged in the said fire incident. The said surveyor Shakeel Ahmed Bhat has nowhere specifically stated that the complainant was not owning residential double storeyed building. Does not it raise a question as to what building had been insured by the OP. The OP had insured double storeyed building of complainant which building as per report of Chowkidar, Numberdar, Naib Tehsildar and Block Development Officer BDO had suffered damage because of fire on 15-2-1995 which fact is also stated on oath by the three Advocates of Doda and declaration made by the residents of Dugga before the Notary Public Doda leaves no doubt that the double storeyed building of the complainant had got gutted in fire on 15-2-1995 and no relief has been provided to the complainant by Govt. for the reason that the said building was covered by the Insurance Policy. This is what has been certified by the Tehsildar Doda vide certificate referred to hereinabove.

The complainant used the double storeyed building for residential purpose and for providing shelter to his cattle, cannot be taken advantage by the insurer OP that it was cow shed only which had suffered damage because of the fire accident on 15-2-1995 and the cow shed being not insured and so the claim of the complainant has been repudiated, is such, the plea which cannot be accepted in the given facts and circumstances of the case. The repudiation of claim effected by the OP thus is arbitrary and illegal. The manner the OP has behaved with the complainant speaks volumes about the attitude of the OP either to delay the settlement or to prolong the same and repudiate the claim on flimsy grounds

is a glaring example of deficiency in service resorted to by the OP.

For what has been stated hereinabove the complaint is allowed and Op is directed to make payment of Rs.1,70,000/- assessed by Mr. Mahesh Badyal surveyor and loss assessor vide report dt.30-7-2005. The above amount shall be paid alongwith interest @ 6% p.a.w.e.f. six months after date of loss viz September, 1995 till realization. The complainant is also held entitled to an amount of Rs.3000/- as litigation expenses as the litigation has been thrust upon him by the OP. File after due completion be consigned to record."

I have not been able to find any material on records to take a view other than the one taken by the Divisional Consumer Forum in view of the nature of the evidence led by the parties in the case.

For all what has been said above, Order dated 09-03-2007 of the Jammu and Kashmir State Consumer Disputes Redressal Commission, Jammu insofar as it allows respondent's appeal against the Order of Divisional Consumer Forum, Jammu dated 08-07-2006, is, accordingly, set aside and Order passed by Divisional Consumer Forum, Jammu allowing respondent's claim to the extent of Rs.1,70,000/-, is upheld. The order of the Divisional Forum granting interest @ 6% per annum w.e.f.

September, 1995 and costs of Rs. 3000/- is, however, modified by directing that interest shall be payable w.e.f. 08-01-1999, i.e. the date of filing of the complaint/claim by the respondent before the Divisional Consumer Forum, and that respondent shall be entitled to costs/litigation charges amounting to Rs. 5000/-.

Registrar Judicial shall accordingly release the amount payable to the respondent in terms of this judgment, in his favour and the excess amount shall be released in favour of the petitioner-Insurance Company by a payee's account cheque.

This writ petition, accordingly, succeeds to the extent indicated hereinabove and is disposed of accordingly. No order as to costs.

(J. P. Singh)
Judge

JAMMU:
30.10.2007
Anil Raina, PS