

## HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

**CIMA No.249/2015****Date of Order:28.07.2016**


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New India Assurance Co. Ltd. Vs. Rajeshwar Sharma & ors.

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**Cross Appeal (C) No.07/2015**


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Rajeshwar Sharma. Vs. New India Assurance Co. Ltd., & ors.

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**Coram:*****Hon'ble Mr. Justice Dhiraj Singh Thakur, Judge.******Hon'ble Mr. Justice B. S. Walia, Judge.*****Appearing counsel :**

For appellant( s)	:Mr. Sandeep Singh, Advocate.
For Respondent(s)	:Mr. S. S. Nanda, Sr. AAG.
	:Mr. L. K. Sharma, Sr. Adv. with
	:Mr. G. P. Singh, Advocate.
	:Mr. D. R. Khajuria, Advocate.

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i)	Whether to be reported in : Press / Media	Yes/No.
ii)	Whether to be reported in : Digest / Journal/Net	Yes/No.

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**Judgment.*****Per : B. S. Walia - J.,***

1. Prayer in CIMA No.249/2015 filed by the New India Assurance Co. Ltd., is for setting aside order dated 31.03.2015 passed in Complaint No.2628 of 2004 by the Jammu and Kashmir Consumer Disputes Redressal Commission, Jammu (hereinafter referred to as the '**Commission**') and for dismissing the complaint which had been allowed and a sum of Rs.17.28 Lac awarded in favour of respondent Nos.1 & 2 while Cross Appeal (C) No.07/2015 has been filed by the complainants seeking enhancement of the awarded amount to Rs.

16,98,000/- plus interest @ 15% p.a. w.e.f. two months after the demolition till the amount was paid by the New India Assurance Co. Ltd.

2. Brief facts of the case leading to the filing of the appeal / cross appeal are that complaint No.2628/2004 was filed under Section 10 of the Consumer Protection Act before the Commission on 15.04.2014 by the complainants claiming to be owners of a building known as Patel House situated at Akhnoor Road Jammu on the allegations that the building was constructed in 1984 after obtaining due permission from the Municipality. Minor addition and alteration's as were done on the spot were compounded in the year 1985. Thereafter in the year 1993, additional construction was raised after obtaining permission from the Municipality. On notice under Section 229 of the Municipality Act being served, the complainant's / respondent's approached the Jammu & Kashmir Special Tribunal which compounded the offence in the year 1996.

3. That since respondent No.3 had initiated a demolition drive to remove encroachment's and illegal construction, respondent No.2, apprehending damage obtained an injunction from the Court of the 1<sup>st</sup> Civil Subordinate Judge, Municipal Magistrate, Jammu but still respondent No.3 i.e., Municipal Corporation, Jammu demolished the front portion of the building which stood compounded way back on 18.04.2003. Stand of the complainants was that they had been carrying on the business of Sanitary Wares in the portion of the building

which came to be demolished and the building was insured with the appellant for an amount of Rs.45.00 Lacs.

4. That on account of demolition, the complainant's claimed to have suffered damage to the tune of Rs.19,55,846/- as per estimate prepared by Shri K. R. Sharma, retired Executive Engineer and Evaluator. Complainant's claimed recovery of damage / loss suffered at the hands of the Municipal Corporation for their illegal action from the New India Assurance Company Ltd., under the Policy of Insurance. The complainants applied to the New India Assurance Company Ltd., to appoint a surveyor to assess the loss. Although the surveyor visited the site on the first day, but, for reasons best known to him, he never conducted the survey. In the circumstances, the complainants were constrained to appoint retired Engineer, Shri K. R. Sharma to assess the loss who assessed total loss on 19.04.2009 at Rs.34,75,351/-including the loss of Rs.19,55,846/- already suffered by the complainants besides loss of Rs.15,19,505/- on account of dismantling a portion of the building.

5. That the complainant's submitted claim along with report of the Surveyor to the New India Assurance Company Ltd., but to no avail. Thereupon, alleging New India Assurance Company Ltd., to be guilty of deficiency of service, complaint came to be filed for reimbursement of loss in terms of the Policy.

6. That objections were filed on behalf of the New India Assurance Company Ltd., contending therein that demolition having been ordered by the Municipality Jammu, the claim did

not fall under the contract of insurance. Besides, the portion in respect of which claim was made was not covered under the policy of insurance, complaint was liable to be dismissed for mis-joinder and non-joinder of necessary parties as it had been admitted by the complainants that the portion of the house was demolished by the Municipality Jammu for violation of Municipal Laws, complainant was not a consumer, complaint as filed was not verified in accordance with law, no documentary proof with regard to ownership, nor order of Special Tribunal etc. had been annexed with the complaint.

7. That, in response to paragraph No.5 of the complaint, it was admitted in the objections that the Municipal Corporation / Municipality Jammu had started demolition drive to remove encroachments and illegal constructions, it was only the old building which was insured, additional construction raised was not covered under the policy of insurance, complaint was liable to be dismissed as the allegations were against the Municipality for the unlawful act of demolition of the illegal construction, complaint was time barred etc. In the aforementioned background, prayer was made for dismissal of the complaint.

8. That in the aforementioned background, an application was moved on 28.02.2005, i.e. a month prior to the passing of the impugned order allowing the complaint, for arraying Jammu Municipal Corporation, Jammu as party respondent in the complaint. The application was allowed and Jammu Municipal Corporation was impleaded as opposite party.

9. That the Commission considered the defence of the New India Assurance Company Ltd., in denying liability under the exclusion clause in the policy. Relevant clause is reproduced hereunder :-

**“V. Riot, Strike, Malicious and Terrorism**

**Damage Loss of or visible physical damage or destruction by external violent means directly caused to the property insure but excluding those caused by :-**

**a)     xxxx**

**b)     Permanent or temporary dispossession resulting from confiscation, commandeering, requisition or destruction by order of the Government or any lawfully constituted Authority.”**

10. That stand of the New India Assurance Company Ltd., was that since the damage was due to demolition ordered by the Municipal Corporation i.e., a Statutory Authority, the New India Assurance Company Ltd., was not liable on account of the exclusion clause.

11. That the Commission in its order observed that construction having been raised by the predecessor in interest of the complainants in 1984 and certain violations of the building plan having been compounded by the Municipal Council/Municipality before the Minister in-charge in 1984-1985 where after, under extended permission, certain additions were made which too reportedly suffered certain

minor deviations but the same were also compounded by the Municipality in 1996 before the J&K Special Tribunal, in view thereof, as on date of demolition, the building as it was, existed lawfully, besides was protected under a status-quo order passed by the Civil Court. In the circumstances, the Commission was of the view that since the New India Assurance Company Ltd., sought to avoid its liability by taking shelter of the exclusion clause, order of demolition passed by the Government / Jammu Municipal Corporation was crucial for determining the controversy in issue, but the same had not been placed on the record by either of the respondents i.e. the New India Assurance Company Ltd., or for that matter the Municipal Corporation Jammu despite express directions, therefore, the very basis for avoidance of liability by the New India Assurance Company Ltd., stood knocked out rendering it liable to indemnify the complainants.

12. That in the aforementioned background, while considering the amount claimed by the complainants against the insurance company, the Commission observed that the loss / damage caused to the insured structure claimed to be the tune of Rs.16,98,066/- had not been contested, much less disproved by any of the respondents but that out of the estimated loss, approximate sum of Rs.5 Lac's was liable to be deducted on account of addition for certain items not expressly covered by the insurance policy. Accordingly, the entitlement to compensation was reduced from that claimed to Rs.11,98,066/- i.e., Rs. 12.00 lac's along with compensation for loss of profit

and business during the intervening years assessed @ 4% per annum, assessed at Rs. 5.28 lac's thereto. Accordingly, complaint was allowed and a sum of Rs.17.28 lac's i.e. Rs. 12.00 lac + Rs.5.28 Lac was awarded in favour of the complainants together with litigation costs of Rs.10,000/-, thus, bringing total liability of the New India Assurance Company Ltd., towards the complainant's to Rs.17.38 Lac to be paid to the complainants or deposited with the Commission within a period of six weeks from the date of order.

13. We have heard learned counsel for the parties and have gone over the exclusion clause relied upon by the learned counsel for the appellant which, in fact, was the only plea put forth, no other point was argued.

14. Learned counsel for the appellant contended that the liability for physical damage or destruction by external violent means directly caused to the property insured was not liable for indemnification in view of the exclusion clause which did not include liability for loss caused by permanent or temporary dispossession resulting from confiscation, commandeering, requisition or destruction by order of the Government or any lawfully constituted Authority. Emphasis was laid on the words "**or destruction by order of the Government or any lawfully constituted Authority**" in support of the plea that loss or damage to the property was covered under the exclusion clause on account of the demolition having been caused on account of the order of the Government / lawfully constituted Authority.

15. That existence of clause specifically excluding the liability of the insurance company in given circumstances is a matter of record. Risks covered are specifically excluded under Clause-V(b) of the insurance policy where damage / destruction / loss is caused by order of the Government or any lawfully constituted authority. Thus, in order to defeat the claim of the insured, it was obligatory for the Insurance Company i.e. appellant herein to establish that the damage / loss to the property/ destruction of the same was on account of order of the Government or any lawfully constituted authority. Reference in this context can be made to a decision of the Hon'ble Supreme Court in case titled **National Insurance Company Vs. Ishar Dass Madan Lal** reported as **(2007) 4 SCC 105**. Relevant extract of the same is reproduced hereunder:-

***“8. However, there may be an express clause excluding the applicability of insurance cover. Wherever such exclusionary clause is contained in a policy, it would be for the insurer to show that the case falls within the purview thereof. In a case of ambiguity, it is trite, the contract of insurance shall be construed in favour of the insured. [See United India Insurance Co. Ltd. v. Pushpalaya Printers<sup>1</sup>, Peacock Plywood (P) Ltd. v. Oriental Insurance Co. Ltd.<sup>2</sup> and United India Insurance Co. Ltd. v. Kiran Combers & Spinners<sup>3</sup>.]***



*Thus, in order to avoid liability, it was mandatory for the appellant / Insurance Company to establish that the conditions stipulated in the exclusion clause as agreed to between the parties were satisfied. However, the appellant / Insurance Company seeks avoidance of liability dehors the exclusion clause. The stand of the appellant / Insurance Company is that the insured property was damaged and suffered loss / damage / destruction on account of orders of a lawfully constituted authority. In the circumstances, it was, incumbent upon the insurer to establish the attraction of the exclusion clause by placing on record the orders of the lawfully constituted authority which resulted in the loss / damage / destruction of the property in question. The complainant was only required to establish damage to the insured property where after onus was on the New India Assurance Company Ltd., to establish that it was not liable on account of the destruction or loss to the property having been caused under the orders of the Government or any lawfully constituted Authority. The Commission has categorically recorded that despite number of opportunities having been given, no order passed by the Government or any lawfully constituted Authority authorizing demolition had been placed on record. Thus, in the absence of demolition order being on record, the exclusion clause would not operate. Once that be so, the New India Assurance Company Ltd., would be liable to indemnify the insured.*

16. For the reasons recorded above, CIMA No.249/2015 filed by the Insurance Company is bereft of merit and is accordingly,

**dismissed.** Resultantly, order dated 31.03.2015 passed in Complaint No.2628/2004 by the Commission is upheld. As regards, cross appeal for enhancement of awarded amount, it needs mention that the impugned order recorded that out of the estimated loss, approximate sum of Rs.5 Lac's was liable to be deducted on account of addition for certain items not expressly covered by the insurance policy. Neither have any submission's been made nor arguments advanced. Accordingly, Cross Appeal No.07/2015, is **dismissed** as such.

**(B. S. Walia)**  
**Judge**

**(Dhiraj Singh Thakur)**  
**Judge**

**Jammu**  
**28.07.2016**  
*Ram Murti*