Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.1299 OF 2019
(Arising out of Special Leave Petition (Civil)No.27695 of 2018)

SUMIT KUMAR SAHA ……Appellant

VERSUS

RELIANCE GENERAL INSURANCE COMPANY LTD. ..…. Respondent

JUDGMENT

Uday Umesh Lalit, J.

1. Leave granted.

2. This appeal arises out of final judgment and order dated 16.02.2018 passed by the National Consumers Disputes Redressal Commission (‘the National Commission’, for short) in First Appeal No.182 of 2014.

3. On 27.03.2007 the appellant purchased one Volvo Hydraulic Excavator for a sum of Rs.49,75,000/- with VAT amounting to Rs.1,99,000/-, the total purchase value thus being Rs.51,74,000/-. Immediately after the purchase said Hydraulic Excavator was insured with the respondent vide

"Contractor, Plants & Machinery Insurance Policy" bearing number 150719225001168. The insurance policy thereafter stood renewed. For the period 22.07.2009 to 21.07.2010, the sum insured was Rs.46,56,600/- on payment of premium of Rs.33,700/-. The column regarding 'coverage' mentioned the 'year of make' of said Excavator as '2007'. Under the caption – PROVISIONS, the policy contained following stipulations:-

> "**1. 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 of the same kind and same capacity, which shall mean its replacement cost including freight, dues and customs duties if any and erection costs.
>
> **2. 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 condition immediately prior to the accident/loss plus the cost of 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 the 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 hereinabove 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) In cases where an insured item is totally destroyed the Company will pay the actual value of the item immediately before the occurrence of the loss, including costs for ordinary freight, erection and customs duties if any, provided such expenses have been included in the sum insured, such actual value to be calculated by deducting proper depreciation form the replacement value of the item. The Company will also pay any normal charges for dismantling of the machinery destroyed but the salvage shall be taken into account.

Any extra charges incurred for overtime, night-work, work on public holiday, express freight, are covered by this insurance only if especially agreed to in writing.

In the event of the Makers' drawing, patterns and core boxes necessary for the execution of a repair, not being available, the Company shall not be liable for the cost of making any such drawings, patterns and core boxes.

The cost of any alteration, improvements or overhauls shall not be recoverable under this Policy.

The cost of any provisional repairs will be borne by the Company if such repairs constitute part of the final repairs, and do not increase the total repair expenses.

If the sum insured is less than the amount required to be insured as per Provision-I herein above, the Company will pay only in such proportion as the sum insured bears to the amount required to be insured. Every item, if more than one, shall be subject to this condition separately.

The Company will make payments only after being satisfied, with the necessary bills and documents, that the repairs have

> been effected or replacement have taken place, as the case may be. The Company may, however, not insist for bills and documents in case of total loss where the insured is unable to replace the damaged equipment for reasons beyond their control. In such a case claims can be settled on 'Indemnity Basis'."

4. Said Hydraulic Excavator was hired and was to be used at a different location. The appellant duly intimated the change of location. On 30.06.2010 the Hydraulic Excavator was badly damaged in a fire while it was at such changed location. An FIR was lodged on 01.07.2010 with the local police and the respondent was also immediately intimated about the damage and was requested to survey the damage and settle the claim.

5. On 07.07.2010 a surveyor came to be appointed by the respondent to survey and assess the loss and damage. Though the survey was undertaken, the claim of the appellant was not getting settled and as such reminders were sent by the appellant on 18.08.2010 and 10.02.2011. Thereafter, on 13.04.2011 the appellant was intimated that the loss was assessed by the surveyor at Rs.25,24,273/-. The relevant portion from the report of the surveyor Cunningham Lindsey was to the following effect :-

> "GROSS LOSS — Both types of claim settlement possibilities viz. in Partial Loss and Constructive Total Loss basis were explored. Finally, it was established that PL i.e. repairing of the whole

	excavator will involve much higher than its insured value. Hence, we have considered it as case of Constructive Total Loss. Considering the above, the Gross Loss comes around Rs.5,100,000.00, which is the present new replacement cost of same type and capacity of excavator. Refer attached quotation for new machine.
MARKET VALUE OF LOSS	Since procurement, i.e. 27th March 2007 and the date of loss i.e. 30th June 2010 the subject excavator was in operation for 3 years and 3 months. As such, considering the life of such excavator as 10 years, the depreciation for 3 years and 3 months works out to 32.5% . Hence, the depreciated value or Market Value of the excavator is Rs.3,442,500.00
SALVAGE REALISATION	The matter of salvage was first discussed with the insured, who refused to retain the same. Immediately, we informed all the details of the affected machine to the insurer for appropriate action on the salvage disposal through their concerned department. As a result of the same, the insurer vide their mail dated 21st February 2011, confirmed that they had recovered Rs.650,000 from the subject excavator, which we opine to be extremely fair and reasonable considering the extent of damage to the excavator and

	remoteness of the location of loss.
ASSESSED LOSS	Rs.2,792,500.00 (as net of salvage)
UNDER INSURANCE	The present new replacement cost of an excavator of same type and capacity is Rs.5,100,000.00, whereas the sum insured taken for the same is of Rs.4,656,000.00. On comparing those two, it is worked out that the property is under insured by 8.71%.
ADJUSTED LOSS	Rs.2,549,273.25 (as net of under insurance)
DEDUCTIBLE	For Individual Value over Rs.25 lakhs upto Rs.50 lakhs Rs.25,000.00 (Flat Excess) for claims arising out of perils other than AOG perils.
NET ADJUSTED LOSS	Rs.2,524,273.00 (as net of policy excess)
RECOMMENDATION	We recommend payment of the net adjusted amount of Rs.2,524,273 under Policy No.1507192215001168 in full discharge of the claim subject to Agreed Bank Clause.”

6. The appellant being aggrieved, filed case No.CC/18/11 before the State Consumer Disputes Redressal Commission, West Bengal (‘the State Commission’, for short). The appellant submitted that the Excavator was a total loss and that he was entitled to the insured amount of Rs.46,56,600/-

along with interest @ 12% p.a. and compensation as claimed in the complaint. During the pendency of the matter, the appellant placed on record the report of a surveyor appointed by him. Said surveyor had assessed the loss on two counts, namely "loss assessed on repairing basis" at Rs.94,64,357.70 and on "total loss basis" at Rs.41,90,940.00. The relevant portion from the report of said surveyor named Subbiah Jeyakarthigesan was as under :-

> **"LOSS ASSESSED ON REPAIRING BASIS Rs.9,464,357.70**
>
> (Rupees Ninety four lacs sixty four thousand three hundred fifty seven & seventy only).
>
> **ASSESSMENT ON TOTAL LOSS BASIS**
>
Present depreciated cost of the Excavator as declared to the Insurance Company and accepted by them	Nu. 4,656,600.00
Less: 10% Depreciation for usage from the date of insurance to the date of accident	Rs. 465,660.00
Assessed on Total Loss Basis	**Rs. 4,190,940.00**

> (Rupees Forty one lacs ninety thousand nine hundred forty only.)
>
> **UNDER INSURANCE**
>
> In my opinion the under insurance in this case will not be applicable as the total machine has been totally burnt. The machine has been insured for Rs.46,56,600.00 which is after application of depreciation from the period of purchase to the last renewal of the insurance policy, as such I have not applied any under insurance in this case."

7. The State Commission allowed the complaint. The relevant portions of its order dated 04.12.2013 are as under :-

> "Thirdly, the loss assessed by the Surveyor appointed by the insurance company has taken into consideration the depreciation value @ 32% of the original purchase value of Rs.51,74,000/- only, but the premium as on 7th July 2009 was made after fixing depreciation value. It is quite reasonable that the depreciation value, as pointed out by the surveyor appointed by the insured in reply to question No.8 of the OP, that the depreciation has been applied by the OP at the time of renewal of policy and depreciation can be applied only once, only from the period from the date of renewal of insurance to the date of accident. Again, in reply to question No.9 of the OP, it has been held that under insurance @ 8.71% is incorrect as the insurance company has put in their own value at the time of renewing the policy without obtaining the proposal form from the owner of the excavator machine. We also agree with the view taken by the surveyor appointed by the insured as stated in his reply to question No.10 of the OP that salvage wreck is the property of the insurance company and it cannot be forced upon the owner of the damaged machine…….
>
> Ordered
>
> That the complaint be and the same is allowed on contest against O.P.Nos. 1 & 2 who are hereby directed to pay a sum of Rs.41,90,940/- (Forty one lakh ninety thousand nine hundred and forty only) with interest @ Rs.8% p.a. from the date of filing of the claim. The said

> OPs. are also directed to pay a sum of Rs.1,00,000/- (One lakh only) as compensation for harassment, mental agony and financial loss, apart from another sum of Rs.5,000/- (Five thousand only) as costs. The entire amount shall be paid by OP Nos.1 & 2 within 45 days from the date of this order in default whereof, interest @9% p.a. shall be payable till full realisation."

8. The respondent, being aggrieved filed First Appeal No.182 of 2014 which was partly allowed by the National Commission vide its judgment and order dated 16.02.2018. The National Commission held as under:

> "… … …The Insurance Company is responsible to indemnify the loss on the basis of the replacement of the damaged machine in the same condition at which it was at the day of the accident. In the present case, though IDV of Rs.46,56,000/- was mentioned in the policy and was agreed between the parties, however, if the new machine is available for Rs.51,00,000/- then on that basis the same machine of 3.25 years age could be available on the approximate price being arrived at by deducting the depreciation for 3.25 years from the current price of the new machine. Obviously, the insurance Company shall go for this price for replacement as this is less than the IDV. On this basis, the surveyor has calculated depreciated price of the new machine fit for replacement as Rs.34,42,500/- after applying depreciation of 10% p.a. since the purchase of the machine on the current price of new machine till the date of accident."

The National Commission further observed that the salvage value to the tune of Rs.6,50,000/-, which was realized by the respondent could not have been deducted from the aforesaid sum of Rs.34,42,500/. The National Commission, thus directed the respondent to pay a sum of Rs.34,17,500/- for settlement of the insurance claim of the appellant. It was found that since the respondent was willing to settle the matter for Rs.25,42,273/-, the respondent would be liable to pay interest on the differential amount of Rs.8,93,227/- @ 8% p.a.

9. The decision of the National Commission is presently under appeal. We heard Mr. Soumya Roop Sanyal, learned Advocate for the appellant and Mr. Joy Basu, learned Senior Advocate for the respondent. The appellant contended that it was a case of a total loss as accepted by both the surveyors and going by the “sum insured” as agreed by the parties, the appellant was entitled to Rs.46,56,000/-. It was submitted that the Insurance Company was well aware that the Excavator was of 2007 make and after deducting appropriate depreciation the value that was arrived at for the purposes of cover of insurance was Rs.46,56,600/-. Countering said submission, the respondent submitted that despite stipulation of such amount as sum insured, the Insurance Company would not be disentitled in the present case from

contending that the actual value after suffering appropriate depreciation ought to be one that was indicated by its surveyor. Reliance was placed upon the decision of this Court in ***Sikka Papers Limited*** v. ***National Insurance Company Limited and others***[1].

10. It is common ground that as a result of fire, the Excavator was a "total loss" and the insured would be entitled to the replacement cost of the Excavator. The point, however, is what is the amount or value that the insured is entitled to.

11. The policy in question indicates that the "year of make" of the Excavator was "2007" while the policy was for the period 22.07.2009 to 21.07.2010. The parties were aware that the Excavator was purchased in the year 2007 for Rs.51.74 lakhs. If the contract mentioned the sum insured to be Rs.46,56,600/- the parties must be deemed to be aware about the significance of that sum and the fact that it represented the value of the Excavator as on the date when the coverage was obtained. In this regard the conclusion arrived at and the observations made in ***Dharmendra Goel*** v. ***Oriental Insurance Company Limited***[2] are noteworthy. In that case a vehicle was bought in the year 2000 and the relevant period of coverage was 2002-2003. The vehicle

[1] (2009)7 SCC 777
[2] (2008) 8 SCC 279

met with an accident. The surveyor found it to be a total loss which was assessed at Rs.1,80,000/-. In an action instituted in the Consumer Forum, the National Commission had granted compensation at said level of Rs.1,80,000/- with interest. Questioning such assessment, the insured was in an appeal and submitted, inter alia, that he was entitled to the sum insured, namely, Rs.3,54,000/-. Paragraphs 5 and 7 of the decision bring out the principle that the Insurance Company having accepted the value of the vehicle to be Rs.3,54,000/-, was bound by that value. Said paragraphs 5 and 7 were as under:

> **"5.** We have heard the learned counsel for the parties and have gone through the record very carefully. The facts as narrated above remain uncontroverted. Admittedly, the accident had happened on 10-9-2002 during the validity of the insurance policy taken on 13-2-2002 insuring the vehicle for Rs 3,54,000 on a premium of Rs 8498. It is also the admitted position that the vehicle had been declared to be a total loss by the surveyor appointed by the Company though the value of the vehicle on total loss basis had been assessed at Rs 1,80,000. We are, in the circumstances, of the opinion that as the Company itself had accepted the value of the vehicle at Rs 3,54,000 on 13-2-2002, it could not claim that the value of the vehicle on total loss basis on 10-9-2002 i.e. on the date of the accident was only Rs 1,80,000.
>
> … … …

> **7.** It must be borne in mind that Section 146 of the Motor Vehicles Act, 1988 casts an obligation on the owner of a vehicle to take out an insurance policy as provided under Chapter XI of the Act and any vehicle driven without taking such a policy invites a punishment under Section 196 thereof. It is, therefore, obvious that in the light of this stringent provision and being in a dominant position the insurance companies often act in an unreasonable manner and after having accepted the value of a particular insured good disown that very figure on one pretext or the other when they are called upon to pay compensation. This "take it or leave it" attitude is clearly unwarranted not only as being bad in law but ethically indefensible. We are also unable to accept the submission that it was for the appellant to produce evidence to prove that the surveyor's report was on the lower side in the light of the fact that a price had already been put on the vehicle by the Company itself at the time of renewal of the policy. We accordingly hold that in these circumstances, the Company was bound by the value put on the vehicle while renewing the policy on 13-2-2002."

12. Mr. Basu, learned Senior Advocate, however relied upon the decision of this Court in ***Sikka Papers*** (supra). In that matter a diesel generating set purchased in the year 1997 for Rs.45 lakhs was insured for Rs.35 lakhs for the period from 08.04.1999 to 07.04.2000. Said diesel generating set broke down. The complainant demanded what it had paid i.e. Rs.25 lakhs for the repairs but the insurer, relying upon the report of the Surveyor, did not agree. According to the Surveyor the net loss was Rs.14,45,000/-. But the Surveyor found that the generating set was under insured and as such the figure of net

loss that was assessed ought to suffer deduction of 25.71%. The net assessed loss was, therefore, at the level of Rs.10,47,491/-. This Court raised two questions:

> "(1) Whether the insurer was justified in accepting report dated 15-5-2000 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?
>
> (2) 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 15-5-2000?"

As regards first question, this Court found that insurer would not be liable in respect of wearing out of machinery from normal use or exposure and the cost of replacement of insured property by new property of the same kind and same capacity would be subject to the exception that repair or replacement would not extend to the machinery or parts which had undergone normal wear and tear. With regard to the second question, on facts it was found that there was an element of under insurance and the surveyor was justified in deducting 25.71%.

13. We do not see how the decision in ***Sikka Papers*** (supra) could be of any relevance in the present matter. The cases of "under insurance"

stand on a completely different footing. In such cases the Insurance Company stands denied of appropriate premium. If the sum insured is, in any way, lesser than the real value of the subject matter of insurance, and if there be cases of partial replacement or partial loss, it is well accepted that the Insurance Company is entitled to proportionate deduction representing the proportion of undervaluation. It is this facet of the matter which weighed with the Court in ***Sikka Papers*** (supra) in affirming the surveyor's report in so far as 25.71% deduction was concerned. Even in the present matter under the caption "Provisions", the stipulation in para 2 is to the effect that if the sum insured "is less than the amount required to be insured ……. the company will pay only in such proportion as the sum insured bears to the amount required to be insured."

14. It is not the case of the Insurance Company that there was any "under insurance" in the present matter. On the other hand, the contention is that as against the sum insured which was Rs.46,56,600/- the depreciated value was Rs.34,42,500/-. So according to the Insurance Company, if at all it was a case of over insurance. If we go by the idea of receipt of premium, then the Insurance Company had received more than what according to it the real value would have justified.

15. It is precisely in this set of facts that the question in the present matter arises. If both the sides, with their eyes open, had arrived at a particular figure to be the real value of the subject matter of insurance, is it open to any party to dispute said sum and contend that the real value was something different from what was declared by the parties to be the sum insured. One may understand cases where there is non-disclosure of material facts which may go to the root of the matter and as such the sanctity of the agreement itself may get affected. But if both the parties had agreed and arrived at an understanding, which understanding was otherwise not vitiated by any misrepresentation, fraud or coercion, the parties must be held bound by stipulation of such figure. This was the idea and the underlying principle in ***Dharmendra Goel*** (supra)

16. The relevant stipulation in the present case, namely clause (b) of Provision -Basis of Indemnity speaks of calculation of actual value by deducting "proper depreciation". The Surveyor of the Insurance Company has worked the figure of depreciation by starting with the figure of Rs.51 lakhs as the cost of a new Excavator and then deducting 32.5% by way of depreciation assuming the life of Excavator to be 10 years. In his assessment,

therefore, the stipulation of the figure of Rs.46,56,600/- on the day the contract was entered into, had no significance. Was he right and justified and how could he assume the life of the Excavator to be 10 years? If that was the understanding between the parties, the figure of sum insured could have been different. If the surveyor was calculating the depreciation from the day when the policy was entered into till the date when the accident occurred, such exercise could certainly be justified. But the exercise undertaken was in the nature of not only considering the depreciation post the policy but even including the period prior thereto. That exercise was already undertaken by the parties and in their assessment the real value of the Excavator as on the day when the policy was taken out was Rs.46,56,600/-. In the face of such agreement and understanding, the surveyor could not have calculated depreciation for a period prior to the date of policy or contract. The purport of aforesaid clause was to arrive at proper valuation as on the day when there was total destruction. He could have undertaken the exercise post the date of policy to assess the real value of the insured property as on the date when the fire actually took place. And for such purposes, the assessment must start with the amount described as “sum insured” on the day when the contract was entered into. It was not open to the Surveyor or to the Insurance Company to

disregard the figure stipulated as ‘sum insured’. The loss had to be assessed in the present case, keeping said figure in mind.

17. Having considered the entire matter, in our view, except in cases where the agreement on part of the Insurance Company is brought about by fraud, coercion or misrepresentation or cases where principle of *uberrima fide* is attracted, the parties are bound by stipulation of a particular figure as sum insured. Therefore, the surveyor and the Insurance Company were not justified in any way in questioning and disregarding the amount of “sum insured”. Further depreciation, if any, can always be computed keeping the figure of “sum insured” in mind. The starting figure, therefore, in this case had to be the figure which was stipulated as “sum insured”. Since Excavator, after the policy was taken out was used for eleven months, there must be some reasonable depreciation which ought to be deducted from the “sum insured”. The surveyor appointed by the insured was right in deducting 10% and in arriving at the figure of Rs.41,90,940/-. The other issue which weighed with the surveyor appointed by the Insurance Company regarding deduction of salvage value was rightly answered by the National Commission and as such does not require any elaboration. We, thus, find that the

assessment made by the State Commission was quite correct and that made by the National Commission was completely incorrect.

18. We, therefore, allow this appeal, set aside the decision of the National Commission and restore the judgment and order passed by the State Commission. No costs.

……..…..……..……J.
(Uday Umesh Lalit)

..…….……J.
(R. Subhash Reddy)

New Delhi,
January 30, 2019