

THE ORIENTAL INSURANCE CO. LTD.

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v.

MALANA POWER COMPANY LTD.

(Civil Appeal No.5132 of 2019)

NOVEMBER 15, 2021

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[R. SUBHASH REDDY AND HRISHIKESH ROY, JJ.]

Insurance: Insurance claim – Repudiation of – Non-disclosure or fraud – On facts, claim raised by complainant as per the Special Contingency Policy – Insurance Company’s case that there was suppression or non-disclosure of hydrology data of previous year by the complainant company – National Commission allowed the complainant – Interference with – Held: Not called for – It is not a case of suppression or non-disclosure of data – Whatever data was available, the complainant has made known to the Insurance Company – Insurance Company was aware of the earlier insurance policy obtained from the previous insurance company by the complainant, there was no reason for not asking for such hydrology data of the previous year – Furthermore, cancellation of the subject policy was also not on account of suppression or fraud played by the complainant, but since the complainant has not acceded to the request of the Insurance Company to modify the sum insured; and insurance company were not able to re-insure the claim in the re-insurance market for protection of their interest – Thus, there was no non-disclosure or fraud, to repudiate the claim.

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Dismissing the appeal, the Court

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HELD: 1.1 There was no suppression or non-disclosure by the respondent in suppressing any hydrology data of the previous year, as pleaded by the appellant. The data of the years 1993 to 2002 could not be provided as the same was not available with the respondent and it was also made known to the appellant. [Para 10][943-D-E]

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1.2 The Special Contingency Policy for the year 2001-02 was obtained from IFFCO - TOKIO and sum insured was only Rs.5.00 Crores. When the respondent has requested to increase the coverage to Rs.10.00 Crores, the same was agreed by the

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- A appellant and entered into an MoU with the similar terms and conditions of the previous year policy which was with IFFCO-TOKIO. Except the amount of coverage was increased from Rs.5.00 Crores to Rs.10.00 Crores in the policy issued by the appellant, all other terms and conditions were the same. The
- B appellant was aware of the earlier insurance policy entered into by the respondent with the IFFCO-TOKIO prior to issuance of the subject policy in favour of the respondent for the period covering from 07.07.2002 to 06.07.2003. If they were to examine the hydrology data of the previous year, it was well within the knowledge of the appellant to ask for such data even before
- C entering into contract. It is not a case of suppression or non-disclosure of data as pleaded, and whatever data was available, the respondent has made known to the appellant. When the appellant was aware of the earlier insurance policy obtained from IFFCO-TOKIO by the respondent, there was no reason for not asking for such hydrology data of the previous year. As such, it
- D cannot be said that there was non-disclosure of hydrology data or any fraud from the side of the respondent, as is projected by the appellant so as to repudiate the claim. [Para 11][943-E-H; 944-A-B]

- E 1.3 It is to be noticed that the cancellation of the subject policy vide proceedings dated 25.11.2002 was also not on account of suppression or fraud played by the respondent, but it was only for the reason that the respondent has not acceded to the request of the appellant to modify the sum insured from Rs.10.00 Crores to Rs.5.00 Crores. Further, the cancellation of policy is on the
- F ground that they were not able to re-insure the claim in the re-insurance market for protection of their interest. If there was any suppression or non-disclosure, as pleaded, the appellant would have cancelled only on such ground. No such ground was raised at any point of time either at the stage of issuing notice dated 20.11.2002, or while issuing the proceedings dated 25.11.2002
- G cancelling the policy for the remaining period by refunding premium on pro-rata basis. [Para 12][944-B-D]

1.4 The submission that the respondent has encashed the cheque which was issued towards refund of pro-rata premium,

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will not make any difference as the claim was only for the period for which the insurance policy was in force. [Para 13][944-E-F] A

1.5 There was no non-disclosure or fraud, as pleaded by the appellant to repudiate the claim. Whether there was any material suppression or not, is a matter of fact, which is to be verified from the facts and circumstances of each case and material on record. [Para 14][944-F] B

1.6 The previous policy with IFFCO-TOKIO for the preceding year, for the period from 07.07.2001 to 06.07.2002 was made known to the appellant, as such, it cannot be said that there was any suppression or non-disclosure. [Para 15][945-A-B] C

Oriental Insurance Company v. Mahendra Construction
(2019) 18 SCC 209 – referred to.

Case Law Reference

(2019) 18 SCC 209 referred to Para 8 D

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 5132 of 2019.

From the Judgment and Order dated 28.02.2019 of the National Consumer Disputes Redressal Commission, New Delhi in Original Petition No.53 of 2005. E

Mahavir Singh, Sr. Adv., Mohan Babu Aggarwal, Celeste Aggarwal, Akansha Aggarwal, Mukesh Kumar Sharma, Advs. for the Appellant.

Neeraj Malhotra, Sr. Adv., Sameer Nandwani, M/s Shakil Ahmad Syed, Advs. for the Respondent. F

The Judgment of the Court was delivered by

R. SUBHASH REDDY, J.

1. This Civil Appeal is filed by the appellant/the Oriental Insurance Company Limited, aggrieved by the order dated 28.02.2019 passed in O.P. No.53 of 2005, by the National Consumer Disputes Redressal Commission, New Delhi. By the aforesaid order, the National Commission has allowed the complaint filed by the respondent/complainant Company and directed the appellant to pay a sum of Rs.4,68,33,840/- towards the loss suffered by the respondent, in terms of insurance policy along with H

- A interest @ 6% per annum from the date of filing the complaint till the date of payment.

2. The respondent is a company which runs a Hydro Power Project around Malana Nalah. The respondent was interested in securing an indemnity in respect of any shortfall that may take place in aggregate

- B annual power generation at its Hydro Power Plant due to failure of hydrology which depends upon vagaries of nature.

3. For the year 2001-02, the respondent has obtained policies from M/s. IFFCO-TOKIO General Insurance Company. M/s. IFFCO-TOKIO General Insurance Company provided a package deal of the two insurance policies to the respondent. First one was Industrial All Risk Insurance Policy which covered material, damages due to fire and special perils, machinery breakdown, loss of profit etc., for a period of 12 months. The second insurance policy was Special Contingency Policy which covered loss of power generation due to loss of hydrology. The insurance coverage for the year 2001-02 was for a period of 12 months commencing from 07.07.2001 to 06.07.2002. The respondent has obtained policies from the appellant in similar lines for the period commencing from 07.07.2002 to 06.07.2003. In respect of Special Contingency Policy, which covered the loss of power generation due to loss of hydrology, the risk cover for the year 2001-02 was Rs.5.00 crores. Since the likely loss of power generation was estimated to be around Rs.8.00 Crores, the respondent wanted the risk coverage enhanced from Rs.5.00 Crores to Rs.10.00 Crores for the year 2002-03. The terms and conditions were accepted by the appellant. The Special Contingency Policy which is obtained from the appellant for the year 2002-03 covered Rs.10.00 Crores instead of Rs.5.00 Crores, as provided by the earlier insurer i.e. IFFCO-TOKIO for the previous year i.e. 2001-02. The Special Contingency Policy issued by the appellant was identical to the one issued by M/s. IFFCO-TOKIO except the sum insured was Rs.10.00 Crores in case of short-fall in the aggregate annual power generation due to loss of hydrology. A premium of Rs.16,95,750/- was paid by the respondent. As per the terms of the contract entered into, the Insurance Company was entitled to cancel the policy by issuing 7 (seven) days' prior notice.

4. When the appellant was not able to obtain reinsurance in the reinsurance market for getting it protected as per the requirements of business retention norms by the Insurance Industry, it has addressed a letter dated 11.11.2002 to the respondent for modifying the terms and
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conditions of the policy to reduce the insurance coverage to Rs.5.00 Crores from Rs.10.00 Crores. It is specifically mentioned in the letter dated 11.11.2002 issued by the appellant that the sum insured had to be kept at Rs.5.00 Crores as no reinsurer was willing to accept the sum insured beyond Rs.5.00 Crores. When the said proposal for revising the policy with a sum insured of Rs.5.00 Crores was not accepted by the respondent, the appellant vide proceedings dated 25.11.2002 cancelled the policy by refunding the premium on pro-rata basis for the remaining period i.e., from 27.11.2002 to 06.07.2003.

5. The respondent vide letter dated 26.11.2002 informed the appellant that there has been a shortfall of 28302839 KWH of electricity generated from 07.02.2002 to 20.11.2002 and the loss suffered was Rs.5,20,37,800/- and after deduction of 10%, the respondent has claimed an amount of Rs.4,68,33,840/-. By the said letter, the respondent has made a formal claim with the appellant for reimbursement of the amount as per the terms of the policy. As the same was not acceded to, the respondent approached the National Consumer Disputes Redressal Commission, New Delhi, claiming an amount of Rs.8,56,77,608.81 as per the Special Contingency Policy.

6. The appellant has filed written statement opposing the claim. While contesting the claim on various grounds, mainly it was the case of the appellant that the respondent has fraudulently suppressed the hydrological data of that project of the previous year. The plea of the appellant was not accepted by the National Commission mainly on the ground that the appellant, with open eyes, had entered into a Memorandum of Understanding (MoU) with the respondent and issued the policy on the same lines as that of preceding year for the year 2001-02, by duly incorporating the available hydrology data. The National Commission has found that there is no non-disclosure of material information in terms of the insurance policy issued by the appellant when the available hydrology data was duly supplied by the respondent and incorporated in the policy itself. Further, with reference to cancellation of the insurance policy, the National Commission has found that at no point of time, there was any complaint of any material suppression with regard to hydrology data and further noticed that the notice dated 20.11.2002 for cancellation of the special contingency policy was also only for the reason that the respondent was not accepting for amendment of the policy for revision of the sum insured to Rs.5.00 Crores from

A Rs.10.00 Crores only on the ground that they were not able to reinsure their interest. The National Commission by clearly recording a finding that there was no suppression and fraud on the part of respondent, has allowed the claim of the respondent and directed to pay an amount of Rs.4,68,33,840/- which is the loss suffered by the respondent in terms of the policy along with interest @ 6% per annum.

B 7. We have heard Sri Mahavir Singh, learned senior counsel appearing for the appellant and Sri Neeraj Malhotra, learned Senior Counsel appearing for the respondent.

C 8. Even in this appeal, by referring to the impugned order and other material placed on record, the learned Senior Counsel appearing for the appellant has mainly contended that the respondent had obtained policy by playing fraud and suppression, as such, the respondent is not entitled to make any claim against the appellant. It is submitted that there is non-disclosure of previous hydrology data of the year 2001-02 before obtaining the policy despite the same was available with the respondent. It is further submitted that after obtaining the subject policy from the appellant, few days thereafter, the respondent made a claim against the earlier insurer M/s.IFFCO-TOKIO, which itself shows that by changing the insurance companies, the respondent was in the habit of making wrong claims. It is submitted that in view of the suppression / non-disclosure of hydrology data of the previous year though it was available with the respondent, the appellant has rightly repudiated the claim of the complainant company. It is contended that the National Commission without considering the matter as per the settled legal position, by recording erroneous findings, allowed the claim made by the respondent. In support of his argument, the learned Senior Counsel has placed reliance on the judgment of this Court in the case of **Oriental Insurance Company v. Mahendra Construction**¹.

F 9. On the other hand, Sri Neeraj Malhotra, learned Senior Counsel appearing for the respondent, by taking us to the findings recorded by the National Commission and other material placed on record, has submitted that there was no suppression or fraud played by the respondent, as pleaded and the claim of the respondent was rightly allowed by the National Commission. The learned Senior Counsel has also submitted that in the absence of any errors in the order impugned, there are no grounds to interfere with the same. It is contended that the appellant is aware of the conditions of the insurance policy which the

H ¹ (2019) 18 SCC 209

respondent has obtained for the previous year 2001-02 from M/s.IFFCO-TIKIO and as per the same terms and conditions, the subject policy was issued by the appellant. At no point of time, the appellant asked for the hydrology data. It is submitted that without informing the respondent, the appellant has appointed M/s. A.K. Gupta & Associates for carrying out a survey and called for report on the loss of power generation. The Surveyor appointed by the Insurance Company has submitted a report which was not even furnished to the respondent and based on such report, the claim made by the respondent was repudiated. It is submitted that having regard to the material produced before the National Commission, it has come to a definite finding that there was no suppression or non-disclosure from the side of the respondent, as such, there was no reason or justification for repudiating the claim made by the respondent and allowed the claim of Rs.4,68,33,840/-.

10. On hearing the learned counsel on both sides and perusal of the material placed on record, we too are of the opinion that there was no suppression or non-disclosure by the respondent in suppressing any hydrology data of the previous year, as pleaded by the appellant. The data of the years 1993 to 2002 could not be provided as the same was not available with the respondent and it was also made known to the appellant.

11. The Surveyor appointed by the Insurance Company instead of assessing the loss of hydrology as per the policy, went into several aspects which are irrelevant to the claim. The Special Contingency Policy for the year 2001-02 was obtained from IFFCO-TOKIO and sum insured was only Rs.5.00 Crores. When the respondent has requested to increase the coverage to Rs.10.00 Crores, the same was agreed by the appellant and entered into an MoU with the similar terms and conditions of the previous year policy which was with IFFCO-TOKIO. Except the amount of coverage was increased from Rs.5.00 Crores to Rs.10.00 Crores in the policy issued by the appellant, all other terms and conditions were the same. The appellant was aware of the earlier insurance policy entered into by the respondent with the IFFCO-TOKIO prior to issuance of the subject policy in favour of the respondent for the period covering from 07.07.2002 to 06.07.2003. If they were to examine the hydrology data of the previous year, it was well within the knowledge of the appellant to ask for such data even before entering into contract. It is not a case of suppression or non-disclosure of data as pleaded, and whatever data

A was available, the respondent has made known to the appellant. When the appellant was aware of the earlier insurance policy obtained from IFFCO-TOKIO by the respondent, there was no reason for not asking for such hydrology data of the previous year. As such, it cannot be said that there was non-disclosure of hydrology data or any fraud from the side of the respondent, as is projected by the appellant so as to repudiate the claim.

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D 12. Further, it is to be noticed that the cancellation of the subject policy vide proceedings dated 25.11.2002 was also not on account of suppression or fraud played by the respondent, but it was only for the reason that the respondent has not acceded to the request of the appellant to modify the sum insured from Rs.10.00 Crores to Rs.5.00 Crores. Further, the cancellation of policy is on the ground that they were not able to re-insure the claim in the re-insurance market for protection of their interest. If there was any suppression or non-disclosure, as pleaded, the appellant would have cancelled only on such ground. No such ground was raised at any point of time either at the stage of issuing notice dated 20.11.2002, or while issuing the proceedings dated 25.11.2002 cancelling the policy for the remaining period by refunding premium on pro-rata basis.

E 13. Though it is contended by Mr. Mahavir Singh, learned Senior Counsel that the respondent has encashed the cheque which was issued towards refund of pro-rata premium, we are of the view that the same will not make any difference as the claim was only for the period for which the insurance policy was in force.

F 14. In view of the above, we are of the view that there was no non-disclosure or fraud, as pleaded by the appellant to repudiate the claim. Whether there was any material suppression or not, is a matter of fact, which is to be verified from the facts and circumstances of each case and material on record.

G 15. Though the learned counsel for the appellant relied on the judgment of this Court in the case of **Oriental Insurance Company Limited v. Mahendra Construction**¹, but the same would not render any assistance to support his case. In the aforesaid judgment, there was non-disclosure of previous claim against the insured goods in the proposal for insurance itself. In view of the same, this Court has held that insured

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made a false representation and suppressed relevant material. Coming A
to the case on hand, the previous policy with IFFCO-TOKIO for the
preceding year, for the period from 07.07.2001 to 06.07.2002 was made
known to the appellant, as such, it cannot be said that there was any
suppression or non-disclosure.

16. For the aforesaid reasons, we are of the view that there is no B
merit in this Civil Appeal, and the same being devoid of merit, is dismissed.
The appellant has deposited an amount of Rs.1.25 crores before Registry
of this Court which is kept in fixed deposit. We permit the respondent to
withdraw the said amount of Rs.1.25 crores along with accrued interest,
if any, without furnishing any security. The appellant shall pay the balance C
amount due to the respondent within a period of three (03) months from
today.

Nidhi Jain

Appeal dismissed.