

M/S Suresh Pharmaceuticals Pvt. Ltd., vs M/S Oriental Insurance Company ... on 1 August, 2022

NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION NEW DELHI CONSUMER C
BEFORE: HON'BLE MR. C. VISWANATH, PRESIDING MEMBER HON'BLE MR. JUSTICE
For the Complainant : Mr. S.S. Ray, Advocate
Mr. Manu Monge, Advocate
Mr. Vaibhav Gulia, Advocate For the Opp. Party : For Opp. Party No.1
For Opp. Party No. 2 : Mr. S.K. Jha, Advocate
Dated : 01 Aug 2022 ORDER

1.

The present Complaint is filed under Section 21(a)(1) of the Consumer Protection Act, 1986.

2. The Complainant is a Private Limited Company, with registered office at 37, Vaidyanatha Mudali Street, Chennai and Branch Office at C-175, Hosiery Complex, Phase-II, Noida, U.P. The Complainant is engaged in the business of manufacturing, import export and deals in all kinds of pharmaceuticals, cosmetics, drugs and chemical products etc.

3. The case of the Complainant is that it insured its godown at C-175, Hosiery Complex, Phase II, Noida from Opposite Party No.1 valid from 30.01.2009 to 29.01.2010 for an amount of Rs.4,00,00,000/- by purchasing a Standard Fire and Special Perils Policy No.272102/11/2009/287. The Policy was renewed from 26.02.2010 to 25.02.2011 at an insured amount of Rs.2,00,00,000/-, vide Policy No.272102/11/2010/296. An agreement was executed between the Complainant and Opposite Party No.2 whereby the Complainant was to sell the products to Opposite Party No.2. As per Agreement, the Complainant was liable to take proper and necessary care of goods including its storage, dispatch and provide insurance coverage of goods in stock. The Complainant also deposited Rs.2 crores as security for due performance and observance of terms and conditions of the Agreement.

4. On 03.06.2010, at about 17:45 hours there was a devastating fire in the godown of the Complainant, which destroyed all the goods/stocks kept in the godown, causing loss of approximately Rs.1,90,00,000/-. The Complainant immediately informed the Police, Fire Brigade and Opposite Party No.1. On 07.06.2010, the Insurance Company deputed M/s Sanjay Dwivedi & Associates as Surveyors and Loss Assessors. On 08.08.2010, the Incident Command Officer alongwith the Fire Officers submitted a report wherein it was mentioned that the fire was due to electric short-circuiting and there was loss to the stocks of medicines, furniture, electric fans, machines and building, including statutory documents, stationary etc. The Surveyor, vide letter dated 02.11.2010, asked the Complainant to furnish certain documents. The Complainant, alongwith a letter dated 27.12.2010, provided the documents sought by the Surveyor. The Complainant also provided the account of Suresh Pharmaceuticals Pvt. Ltd. Noida for the year 2008-2009, 2009-2010 and 2010-2011. The Complainant made available the MRP of the products, copies of STNs 2010-2011 and the stock register for the period 01.04.2009 to 31.03.2010 and

01.04.2010 to 03.06.2010, along with itemwise description for relevant period as required by the Surveyor. The Surveyor after physical verification of the premises and receiving all the documents submitted final Survey Report on 02.08.2011, assessing the loss to the tune of Rs.1,48,34,955/-. The Surveyor observed that no policy condition or warranty was breached by the Complainant.

5. After the assessment made by the Surveyor, the Insurance Company appointed a second Surveyor, M/s Aditi Insurance Surveyors & Loss Assessors Pvt. Ltd., without intimation to the Complainant, who sent a letter to the Complainant on 12.11.2012 i.e. after more than a year from the date of the final Survey Report. The Complainant, however, replied to the letter sent by the second Surveyor. The Complainant sought certain information from the Insurance Company under Right to Information Act, 2005. The Insurance Company, vide its letter dated 28.03.2013, repudiated the claim of the Complainant on the ground that there was violation of Condition Nos.1 and 8 and there was no insurable interest of the Complainant. Alleging deficiency in service on the part of the Opposite Parties, the Complainant filed the present Consumer Complaint with the following prayer:-

"(a) hold that the Opposite Party No.1 & 2 have committed deficiency of service under the relevant provisions of the Consumer Protection Act, 1986;

(b) allow the present Complaint by setting aside the repudiation of the insurance claim;

(c) pass an award/decreed in favour of the Complainant and against the Opposite Parties for a sum of Rs.1,90,00,000/- (Rupees One Crore Ninety Lacs Only) being the loss suffered by the Complainant;

(d) pass an award/decreed in favour of complainant and against the Opposite Parties for a sum of Rs.10,00,000/- (Rupees Ten Lacs Only) on account of agony and harassment caused to the Complainant due to the act of repudiation of a legitimate claim;

(e) pass an order thereby directing the Opposite Parties to pay a sum of Rs.10,00,000/- (Rupees Ten Lacs Only) to the Complainant towards costs of the present proceedings and litigation expenses;

(f) pass an order directing the Opposite Parties to pay to the Complainant pre-suit, pendente lite and future interest @ 18% on the reliefs claimed in prayers (a) to (e) above from the date of Intimating the loss to the Opposite Parties till the date of actual payment; and

(g) pass any other or further order(s) as this Hon'ble Commission deems fit and proper under the facts and circumstances of the present case."

6. The Complaint was resisted by the Opposite Parties by filing separate written statements. Opposite Party No.1 took preliminary objection that the Complainant was a corporate entity and had taken the Insurance Policy in connection with business for profit-making and "Commercial purpose". The Complainant was, thus, not a Consumer qua Opposite Party No.1. It was also stated that the matter involved complicated questions of law and fact and required extensive evidence, examination of voluminous record/documents and depositions of numerous witnesses. The matter, therefore, could not be adjudicated in a summary manner and the Complaint was liable to be dismissed in limine.

7. On merits, it was stated that the Insurance Company was constrained to repudiate the claim as the cause of loss was not covered by the terms and conditions of the Insurance Policy. It was submitted that after receipt of the first Survey Report dated 02.08.2011, Opposite Party No.1 noticed that the Complainant was acting as Consignee Sales Agent for Opposite Party No.2/M/s. Ochoa Laboratories and the Complainant was not the real owner of the stocks in question. The Surveyor assessed the loss only on the basis of the documents provided by the Complainant and did not go into this aspect and also had not verified the same from the records of M/s. Ochoa Laboratories. Considering that substantial amount was involved and to ensure that there was no ambiguity, the Insurance Company deputed a second Surveyor/M/s. Aditi Insurance Surveyors & Loss Assessors Pvt. Ltd. to carry out investigation and verification of accounts etc. The Second Surveyor carried out detailed investigation and verification of accounts and submitted a comprehensive report dated 26.12.2012. On the basis of the observations of the second Surveyor, the Insurance Company repudiated the claim.

8. Opposite Party No.2 filed separate written statement stating that on 03.07.2008, it entered into an Agreement with the Complainant whereby the Complainant agreed to become Consignee Sales Agent of Opposite Party No.2. The Complainant also deposited Rs.2 crores as Security Deposit for due performance and observance of the terms and conditions to be performed as per the Agreement. The Complainant was also responsible for proper and necessary care of goods, its storage, further despatches and insurance coverage for the goods in stock. Opposite Party No.2 did not take any insurance for the goods stored at the godown of the Complainant. The claim was not necessarily based on the ownership of the stock. As per the Agreement, the Consignee Sales Agent was required to insure the goods. The Complainant, therefore, had an insurable interest in the goods.

9. Heard the Learned Counsel for the Parties and carefully perused the record. Learned Counsel for the Complainant submitted that according to Clause III (A)(3) of the Memorandum of Association of the Complainant Company, the main objects of the company was "to carry on the business of dealers, distributors, super stockists, commission agents in all kinds of pharmaceuticals, medical drugs...." Pursuant to the objectives of the Company, the Complainant entered into an Agreement dated 03.07.2008 with Opposite Party No.2 as 'Consignee Sales Agent' and paid a sum of Rs.2 crores to Opposite Party No.2 towards security against the goods of Opposite Party No.2. It was submitted that the said Agreement with the Opposite Party No.2 fell within the contract of bailment. The Complainant cited Clause 6, Clause 10, Clause 14 and Clause 15 of the Agreement to justify the nature of the contract between the parties. Clause 6 of the said agreement stipulated that the

Complainant was entitled to a Commission @ 2% on the net stock transfer. Clause 10 envisaged an interest @ 10% p.a. on the deposit of Rs.2 crores paid by the Complainant to Opposite Party No.2. Clause 14 of the Agreement envisaged that the Complainant shall be liable to reimburse and indemnify Opposite Party No.2 for any loss incurred by Opposite Party No.2 due to improper storage or due to non-providing of insurance coverage. Clause 15 of the Agreement provided that the Complainant shall take proper precautions while selling the goods. The above extracts from the Agreement manifested insurable interest of the Complainant. Also, the certificate of Opposite Party No.2, dated 25.04.2011, ratified that no insurance was purchased by Opposite Party No.2 for the stock at the godown of the Complainant. Learned Counsel further submitted that it is an established principle that even the trustee and bailee have insurable interest in the goods. The Complainant relied on the judgment of Hon'ble High Court of Bombay in R.S. Deboo (Since deceased) by LRs vs. Dr. M.V. Hindlekar & Anr. [AIR 1995 BOM 68] wherein it was held that:

"The customer can never directly recover the insurance amount from the insurance company. The bailee is expected to take out insurance policy covering risk for loss of 'customers' goods. The concerned customers are owners of the goods. The customer has insurable interest in the goods entrusted in the bailee. The bailee has also same interest in the goods/articles which are sought to be insured by reason of the transaction of bailment. [Para 21]"

10. The Complainant also relied on the judgement in Quazi Azimuddin Quazi AH vs Hercules Insurance Co. Ltd., AIR 1953 Bom 61, (1952), decided on 26.07.1951 wherein Hon'ble High Court of Bombay interpreted the words "held by him in trust or on commission" to cover the goods entrusted to him, and insure them both in respect of his own personal interest to be indemnified against any liability to the owner in the event of their loss or damage and also in respect of the owner's general proprietary interest. Learned Counsel also relied on the judgment in New India Assurance Co. Ltd. Vs. M/s.T.R. Finance Ltd. & Ors. [RFA No.211/2001 decided on 28.02.2011] wherein it was held that the interest need not be an interest of ownership, and that a person is interested in the preservation of a thing and such interest can be insured. Learned Counsel further submitted that the Complainant furnished a copy of the Memorandum of Association as well as Agreement dated 03.07.2008 to the first Surveyor Mr. Sanjay Dwivedi. The Surveyor in its Report dated 02.08.2011 clearly mentioned at Clause 6.7 that "M/s. Suresh Pharmaceuticals are 'Consignee Sales Agent' of M/s. Ochoa Laboratories Ltd." Thus, there was no suppression of any material information. As far as any dead stock is concerned, all the accounts-books were made available to the first Surveyor. The first Surveyor, vide letter dated 18.03.2011, recommended the claim of Rs.1,48,34,955/- after taking into account the inventory status, sales pattern, stock & sales analysis, item-wise stock register. These documents clearly spelt out the tentative value of the dead stock. It was averred that the appointment of second Surveyor by the Insurance Company was illegal to get a favourable report. In this regard, the Complainant relied on the judgement of the Hon'ble Supreme Court in Sri Venkateswara Syndicate vs Oriental Insurance Co. Ltd. & Am. [(2009) 8 SCC 507] wherein it was propounded that the Insurer cannot appoint a second Surveyor in a routine manner without assigning any reason. In the present case the Insurance Company appointed the Second Surveyor by

using the term "Investigator" instead of "Second Surveyor", which was clearly an abuse of process of law inasmuch as the Insurance Company had not assigned any reason for appointing the second Surveyor/Investigator. The Complainant stated that the second Surveyor, on the basis of the statements of the neighbours, recorded that all stocks of medicines had expired as on 31.03.2010 and valued nil. The second Surveyor relied on the statements of neighbours, who had no concern or knowledge about the business of the Complainant. The entire audited accounts of Complainant were eschewed and the statements of the neighbours were considered as gospel truth.

11. Learned Counsel for Opposite Party No.1 submitted that the Insurance Policy was obtained by the Complainant to cover its own stock with no intention of covering the stock held in trust, as is evident from the Complainant's averments, proposal form, Insurance cover note, Insurance Policy and claim form. The Complainant stated that it is "engaged in the business of manufacturing, import, export and deals in all kinds of pharmaceuticals, cosmetics, drugs and chemical products". The Previous Standard Fire & Special Perils Policy No.272102/11/2009/287 valid from 30.01.2009 to 29.01.2010 for the sum insured of Rs.4 crores, did not mention or cover the 'goods held in trust'. Proposal Form dated 25.2.2010 filled up and signed by the Complainant proposing to insure the stock for Rs.2 crores, pursuant to which the Policy No.272102/11/2010/296 was issued also did not mention 'goods held in trust' anywhere. The Standard Fire & Special Perils Policy No.272102/11/2010/296 from 30.01.2009 to 29.01.2010 for sum insured of 2 crores, issued pursuant to the Proposal Form of 25.2.2010, does not mention or cover the 'goods held in trust'. The Claim Form filled up and signed by Complainant specifically mentions as under:

"Q. 7: If insured is not sole owner, the nature of his/their [interest] in the property and details of other interests Ans.: Private Limited Company being the owner of the stock in fire."

12. Learned Counsel for Opposite Party No.1 further stated that the Policy obtained by the Complainant and issued by the Insurance Company did not intend to cover the stock held in trust/as a Consignee. Since the stock affected by the fire admittedly belonged to Opposite Party No.2 M/s/ Ochoa Laboratories Ltd. and not the Complainant, the claim was rightly repudiated by the Insurance Company. It was further stated in the second Survey Report, dated 2.8.2011, mentioned that the stock affected by fire was not owned by the Complainant but was held in trust and was, therefore, not covered under the Policy. It was further submitted that as per evidences, the godown was used to store expired medicines. As per Audited Balance Sheet of M/s. Ochoa Laboratories Ltd. dated 31.3.2010, finished goods lying with the Complainant had expired on 31.3.2010 and inventory value thereof was Nil.

13. Learned Counsel for Opposite Party No.2 submitted that an Agreement was executed between the Complainant and Opposite Party No. 2, by virtue of which, the Complainant agreed to become Consignee Sales Agent of the Opposite Party No. 2. As per the Agreement dated 03.07.2008, the Complainant was responsible for proper and necessary care of the goods, its storage, despatches and to provide Insurance coverage for goods in stocks. As per clause 6 of the Agreement, the

Complainant being a Consignee Sales Agent was entitled to commission @ 2% on the Net Stock Transfer. Opposite Party No.2, vide letter dated 25.04.2011, also confirmed that it had not taken any insurance for the stock/goods stored in the godown of the Complainant. It is a practice in the Pharma Trade that every Consignee Sales Agent has to furnish the security, equivalent to the value of stock. Opposite Party No.2 had secured itself by taking security amount of Rs.2 crore. If there was any loss due to theft, fire or otherwise, the same would be adjusted against the Security amount deposit by the Complainant. In order to protect itself from that eventuality, it became incumbent upon all the Consignee Sales Agent to get Insurance cover for the stock, and ownership is not one of the criteria to purchase Insurance Policy. Learned Counsel further submitted that the first Surveyor Mr. Sanjay Dwivedi had considered each and every aspect of the claim and deducted the amounts of Dead stock, losses etc. and then submitted his report. 14. Brief facts of the case are that on 03.07.2008, an Agreement was executed between the Complainant and Opposite Party No.2 whereby the Complainant was to sell the products of Opposite Party No.2 and was also responsible to take proper and necessary care of the goods, their storage, further despatches and provide Insurance coverage for goods in stocks. The Complainant, in continuation of earlier Policy, got renewed Standard Fire and Special Perils Policy No.272102/11/2010/290 from the Insurance Company for an insured amount of Rs.2,00,00,000/- covering stocks stored in the godown at C-175, Hosiery Complex, Phase II, Noida for the period 26.02.2010 to 25.02.2011. On 03.06.2010, at about 17:50 hours, a fire broke out in the godown of the Complainant due to electric short circuiting. On 07.06.2010, Opposite Party No. 1 appointed Surveyors and Loss Assessors, Sanjay Dwivedi & Associates. The Surveyor after receiving all the documents gave his final Survey Report on 02.08.2011 assessing loss to the tune of Rs.1,48,34,955/-. After the Assessment made by the Surveyor, Opposite Party No.1 appointed second Surveyor, Aditi Insurance Surveyors & Loss Assessors Pvt. Ltd. On the basis of the report submitted by the second Surveyor, the Insurance Company repudiated the claim of the Complainant on the ground that there was violation of Condition Nos.1 and 8 and there was no insurable interest of the Complainant.

15. So far as maintainability is concerned, the contention of Opposite Party No.1 is that the Complaint contains complicated facts which cannot be adjudicated in a summary proceeding under Consumer Protection Act, 1986. This contention of Opposite Party No.1 cannot be accepted because from the facts and circumstances of the case and the evidence produced on record, we do not find any complicated question of fact or law involved in this case. Opposite Party No.1 has made bald allegation and has not produced any evidence to this effect. In this regard, Hon'ble Supreme Court in CCI Chambers Coop. HSG. Society Ltd. v. Development Credit Bank Ltd., Appeal (Civil) 7228 of 2001 held as follows:

"It cannot be denied that Fora at the national level, the State level and at the district level have been constituted under the Act with the avowed object of providing summary and speedy remedy in conformity with the principles of natural justice, taking care of such grievances as are amenable to the jurisdiction of the Fora established under the Act. These Fora have been established and conferred with the jurisdiction in addition to the conventional Courts. The principal object sought to be achieved by establishing such Fora is to relieve the conventional Courts of their burden which is ever-increasing with the mounting arrears and whereat the disposal

is delayed because of the technicalities. Merely because recording of evidence is required, or some questions of fact and law arise which would need to be investigated and determined, cannot be a ground for shutting the doors of any Forum under the Act to the person aggrieved."

From the above settled principle, we find that this Commission is fully competent to adjudicate this Complaint filed for deficiency in service.

16. This Commission in *Harsolia Motors v. National Insurance Co. Ltd. I*, (2005) CPJ 27 (NC) decided on 03.12.2004 held since an Insurance Policy is taken for reimbursement or for indemnity of the loss which may be suffered on account of insured perils, the services of the Insurer cannot be said to have been hired or availed for a commercial purpose. This Commission does possess the requisite jurisdiction to entertain a Consumer Complaint wherever a defect or deficiency in the services rendered by an insurer is made out. In view of the above, the Complaint is held maintainable.

17. On merits, the main question for consideration is whether the Consignee Sales Agent has insurable interest under the Policy. In the Surveyor Report of M/s Sanjay Dwivedi and Associates also, the fact that the Complainant is a Consignee Sales Agent of Opposite Party No.2 was duly noted under Clause 6.7 and Clause 6.8. and it was observed that "No policy condition or warranty appears to have been breached". Further, Clause 14 of the Agreement dated 03.07.2008 reads as follows:

"14. It shall be duty of the Consignee Sales Agent to take proper and necessary care of the goods, their storage, further dispatches and provided insurance coverage for the goods in stock. The Consignee Sales Agent shall be liable to reimburse and indemnify to the Principal any loss incurred due to improper storage or due to non-providing of insurance coverage."

18. As per clause 14 of the Agreement, Opposite Party No.2 also deducted the amount of loss incurred due to fire from the Security amount of Rs.2 crores deposited by the Complainant. Hence, the loss of Stocks and Building due to fire was suffered ultimately by the Complainant. Further, the Proposal form only mentions stock in the insured premise. The Insurance Policy intended to cover all the stocks lying in the premise, and there was no special exclusion carved for the Stocks based on ownership or under Trust. It is therefore clear that the Complainant is eligible for the Insurance Claim for Stocks under the Policy having insurable interest in the stock.

19. The next issue for consideration is whether the appointment of second Surveyor was legal. In this backdrop, Hon'ble Supreme Court in *Sri Venkateswara Syndicate v Oriental Insurance Company Limited and Another*, (2009) 8 SCC 507, held that the Report of a Surveyor must be given due importance and that there should be sufficient grounds for explaining disagreement with an assessment made by a Report of the Surveyor. Para 33 of the judgment reads as follows:

"33. Scheme of Section 64-UM, particularly of sub-sections (2), (3) and (4) would show that the insurer cannot appoint a second surveyor just as a matter of course. If for any valid reason the report of the surveyor is not acceptable to the insurer may be for the reason if there are inherent defects, if it is found to be arbitrary, excessive, exaggerated, etc., it must specify cogent reasons, without which it is not free to appoint the second surveyor or surveyors till it gets a report which would satisfy its interest. Alternatively, it can be stated that there must be sufficient ground to disagree with the findings of surveyor/surveyors. There is no prohibition in the Insurance Act for appointment of second surveyor by the insurance company, but while doing so, the insurance company has to give satisfactory reasons for not accepting the report of the first surveyor and the need to appoint second surveyor"

20. It is therefore clear that one must take into consideration the necessity of appointment of a second or successive Surveyors and it must be weighed in the context of relevant facts and circumstances, including deficiencies or omissions in the report of the first Surveyor. It is not open to the Insurer under Section 64-UM (2) of the Insurance Act 1938, to appoint successive Surveyors, with a view to obtain a tailor-made report. Appointment of another surveyor must be based on valid reasons bearing on the deficiencies found in the Survey Report and the reasons must be indicated by the insurer. The first Surveyor, vide report dated 02.08.2011, took note of all the documents, records and physically verified the premises before submitting the report. There must be valid grounds for appointment of second Surveyor. Merely on the ground that substantial amount is involved, Opposite Party No.1 cannot depute a second Surveyor. Opposite Party No.1 also failed to adduce any evidence to support its contention that there was defect in the report submitted by the First Surveyor. The first Surveyor, vide report 02.08.2011, took into account following factors for assessing the loss at Rs.1,48,34,955/- :

"18.1 The loss of stock is covered under the said policy, hence we have calculated loss of stock only in our assessment.

18.2 The burnt quantity of stock is of complete stock of medicines, cosmetics and allied products stored, which was verified by us during survey and the same quantity is taken in assessing the loss.

18.3 For the value of stock the insured has maintained the computerized stock statement and the cost is taken from their respective stock transfer notes & the same is considered for assessment of loss. In STN, the cost price & sales price of the product is mentioned. We have considered the loss on cost price. We are enclosing the copy of stock statement as on date of loss with stock transfer notes for relevant period (annexure 16).

18.4 In the stock of medicine, cosmetics etc. there is possibility of some slow moving stock called dead stock, hence we have considered 7% as the value of slow moving or

dead stock & the same is deducted from the assessed loss.

18.5 The insured is Consignee Sales Agent for medicine & cosmetics & major portion is of M/s Ochoa Laboratories Ltd & insured gets commission 2% - 3% on the total sales turn over from the manufacturers/companies, whose material is stored there. But in order to have a reasonable value, we have considered 5% as the turnover profit margin & the same is deducted from the assessed loss.

18.6 We have checked the expiry of each & every burnt stock from the stock register & details of the same is enclosed (annexure 16). From this we segregated the total stock, which was to expire within next 06 months from the date of loss & whole of this stock was not considered for loss. The total value of said stock was Rs.934510/-.

18.7 Similarly for stock whose expiry was 06 months - 1 year from the date of loss, we have deducted 10% as companies give discounts to buyers, when expiry date was approaching. The total value of stock whose expiry was between six months to 01 year from date of loss was Rs.14130917/-, thus 10% of this comes to Rs.1413092/-, which is deducted from the assessed loss.

18.8 Excess Rs.10000/-, as per terms & conditions of the policy is deducted from the assessed loss."

21. From the above, we find that the first Surveyor had given detailed reasons for assessing the loss at Rs.1,48,34,955/-. Opposite Party No.1/Insurance Company failed to point out any illegality in the Survey Report dated 02.08.2011 submitted by the first Surveyor. The appointment of second Surveyor by the Insurance Company was, therefore, not valid.

22. In view of the above, the Complaint is partly allowed. Opposite Party No.1 is directed to pay the Complainant a sum of Rs.1,48,44,955/- as assessed by the first Surveyor, with interest @ 9% per annum from the date of repudiation of claim of the Complainant till the date of realization. Order be complied within a period of three months, failing which, the Opposite Party No1 shall pay the principal amount with an interest @ 12% p.a. There shall be no order as to costs.

..... C. VISWANATH PRESIDING MEMBERJ RAM SURAT RAM
MAURYA MEMBER