

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

FIRST APPEAL NO. 39 OF 2018

(Against the Order dated 10/11/2017 in Complaint No. 48/2014 of the State Commission
Karnataka)

1. NATIONAL INSURANCE CO. LTD.
2E/9, JHANDEWALAN EXTENSION.
NEW DELHI-110055

.....Appellant(s)

Versus

1. MEGHANA (BIO-TECH) TISSUE CULTURE NURSERY
REPRESENTED BY ITS PARTNERS. R/O. CULTURE
NURSERY, BELAVONUR TALUK.
DEVANGERE.
2. M. UMAPATHY.
R/O. NO.2000/4, 1ST A MAIN ROAD, BEHIND VANIVILAS
RICE MILL, TARALABALU BADVANE.
DAVANGERE.
3. M.D. JAYA KUMAR.
R/O. 2000/4, 1ST A MAIN ROAD, BEHIND VANIVILAS
RICE MILL, TARALABALU BADAVANE.
DAVANGERE.

.....Respondent(s)

BEFORE:

**HON'BLE MR. SUBHASH CHANDRA,PRESIDING MEMBER
HON'BLE DR. SADHNA SHANKER,MEMBER**

FOR THE APPELLANT :

Dated : 08 April 2024

ORDER

For the Appellant Mr Amit Kumar Singh, Advocate with

Ms Chubalemla Chang, Advocate

For the Respondents *Ex parte*

ORDER

PER SUBHASH CHANDRA

1. This appeal under Section 19 of the Consumer Protection Act, 1986 (in short, the 'Act') challenges the order dated 10.11.2017 of the State Disputes Redressal Commission, Karnataka, Bangalore (in short, the 'State Commission') in Complaint No. 48 of 2014 partly allowing the complaint and directing the appellant herein to pay the respondent Rs 18,12,600/- with interest @ 9% p.a. from the date of the complaint till realization along with costs of Rs 25,000/- in respect of the claim for loss and damage under a comprehensive insurance policy.
2. Briefly put, the relevant facts of the case are that the appellants had indemnified the respondents, who are a Tissue Culture Nursery (Biotech) located at M/s Eswari Farms & Nursery, Belvanu, Davangere, Karnataka against losses under a Standard Fire and Special Perils Policy through Bank of India for Rs 1.60 cr covering building (Rs 60 lakhs), Fencing, pumpset, overhead tank and pipeline (Rs 4 lakhs), Furniture and fixtures (Rs 20 lakhs), Machinery/equipment of laboratory including AC (Rs 25 lakhs), Material for banana tissue culture (Rs 8 lakhs) and Finished and semi-finished products/raw materials (Rs 43 lakhs). During the validity of the Policy, on 11.09.2013 the respondents reported an incident of loss to the appellant who deputed a surveyor who visited the site the same day. The surveyor reported on 30.10.2013 that the loss was not on account of a fire but due to failure of the split air conditioner in the growth room on account of voltage fluctuation the room temperature increased while lights continued to remain switched on as a consequence of which "*tissue cultures exposed to high temperature turned brown and died*". It was also stated that the proximate cause of the failure of the AC was not a fire but failure of AC panel connector due to variation in voltage as a result of widespread and heavy rain in the region between 09.10.2013 and 10.10.2013. The loss was of tissue culture in 25,000 bottles since 300 tube lights were switched on. The respondent's claim for loss under the Policy was repudiated on 29.11.2013 on the ground that the cause of loss was not covered under Clauses 1 to 12 of the Policy conditions and exclusions. The respondent challenged the repudiation before the State Commission through consumer complaint no. 48 of 2014 seeking compensation of Rs 70 lakhs with other reliefs which was decided on contest by way of the impugned order partly allowing the complaint. This order is impugned before us with the prayer to set it aside.
3. We have heard the learned counsel for the appellant. The respondent remained absent despite notice. Its written submissions are considered as the final submission.
4. As per the appellant's grounds of appeal and oral submissions, (i) the State Commission erred in not appreciating that the alleged loss was not caused due to a fire and therefore was not covered under the terms of the Policy as was held in ***New India Assurance Co. Ltd. Vs Novelty Palace***, 2008 SCC OnLine NCDRC 85 that "*...if the property in proximity to a source of heat in ordinary use is damaged by the excessive heat thrown out, but is not actually ignited, the damage is not within the policy...*"; (ii) the Surveyor's report was categorical in stating that there was no fire but only the fire panel was damaged due to voltage fluctuation and therefore under a conjoint reading of Exclusion Clauses 6 and 7 pertaining to "*Loss, destruction or damage to the stocks in cold storage premises caused by a change of temperature*" and "*Loss, destruction or damage to any electrical machine, apparatus, fixture fitting arising from or occasioned by overrunning, excessive pressure, short-circuiting, arcing, self heating, oil leakage of electricity from whatever cause*

(lightening included) provided that this exclusion shall apply only to the particular electrical machine, apparatus, fixture or fittings so affected and not to other machines, apparatus, fixture of fittings which may be destroyed or damaged by fire so set up”.; (iii) the State Commission erred in failing to appreciate that the loss was a consequential loss due to increase in temperature due to failure of the AC equipment which was not a covered risk; (iv) the Hon’ble Supreme Court had held in ***Suraj Mal Ram Niwas Oil Mills (P) Vs. United India Insurance Co. Ltd.***, 10 SCC 567 that the terms of a policy have to be strictly construed to determine the extent of liability of the insurer.

5. As per the written synopsis of the respondent, it was contended that the voltage fluctuation was on account of the heavy rainfall and hence the air conditioner panel failed resulting in damage to semi-finished and finished tissue culture banana plants. The surveyor’s report had stated that the tissue cultures had turned brown due to exposure to high temperatures and died and the cause of the loss was not any kind of fire. It was stated that the split air conditioner failed due to voltage fluctuation and the lights were switched resulting in rise in temperature and therefore the loss was covered under the Policy. It was argued that the word “fire” can have different dimensions such as a flame of different types/sizes, or intensity and can be of several kinds such as self heating/burning. It was submitted that “there was no proximity of fire or source of heat in ordinary use in damage by the excessive heat thrown out, in the present case there would be a direct cause of loss”. It was contended that the ratio of the judgment in ***Novelty Palace*** (supra) relied upon by the appellant was not applicable to the present case and that in cases of ambiguity, an interpretation favourable to the insured should be adopted since the Consumer Protection Act was a beneficial legislation. It was also submitted that since tissue culture required conditions of light and temperature, the banana tissue culture was lost due to the rise in temperature. Reliance was placed on the deposition of the Assistant Professor, University of Horticulture Sciences, Bagalkot that the banana tissues burnt due to variation in temperature. Reliance was placed on the Hon’ble Supreme Court’s judgment in ***New India Assurance Co. Ltd. Vs. Zuari Industries Ltd. & Ors.***, (2009) 9 SCC 70 wherein it was held that “proximate cause is not the cause which is nearest in time or place, it is the active and efficient cause that sets in motion a chain of events that that brings about the ultimate result without the intervention of any other force.” It was also contended that the ratio of the judgment in ***Suraj Mal Ram Niwas Oil Mills Pvt. Ltd. Vs United India Insurance Co. Ltd. & Anr.*** did not apply in the present case since the facts were different and that the issue in that case pertained to the declaration of each and every consignment to the insure by the apppellant before dispatch. Similarly, it was argued that the ration in ***Oriental Insurance Co. Ltd. Vs. Sony Cheriyan***, (1999) 6 SCC 451 was also not relevant to this case as it pertained to hazardous goods under the Motor Vehicles Act, 1988. Similarly, ***Vikram Greentech India Ltd. & Anr. vs. New India Assurance Co. Ltd.***, (2009) 5 SCC 599 also did not apply as in that case the issue was one oy *uberrima fides*. Lastly, it was contended that in ***United India Insurance Co. Ltd. Vs. Harchand Rai Chandan Lal***, (2004) 8 SCC 644 the issue pertained to the interpretation of ‘burglary’ as defined in the policy and hence the reference was therefore not applicable to the present case. Hence, it was argued that it was admitted by both the appellant insurance company and the Bank that the cause of rise in temperature which was the cause of loss was due to failure of electricity due to heavy rain, and as per the evidence of the Assistant Professor on record, ‘burning’ need not be due to a physical fire and that the loss of the tissue culture was also a

loss due to 'burning', although not due to a physical fire, a proximate cause. It was submitted that the appeal be dismissed with cost.

6. From an analysis of the foregoing, it is manifest that the claim of respondent pertained to loss of banana tissue culture on account of rise in temperature in the growth room that was occasioned by the failure of the air conditioning and the tube lights remaining switched on. The letter of repudiation issued by the appellant dated 12.11.2013 reads as under:

“As per your claim form dated 16.09.2013, 26.11.2013 and Surveyor’s Report, the cause of loss is not covered under Operative clause 1 to 12 of Standard Fire & Special Perils Policy, conditions and exclusions.”

7. From the Policy on the record, Clauses 6 & 7 of “General Exclusions” read as under:

6. Loss, destruction or damage to the stocks in Cold Storage premises caused by change in temperature.

7. Loss, destruction or damage to any electrical machine, apparatus, fixture or fitting arising from or occasioned by over-running, excessive pressure, short circuiting, arcing, self heating or leakage of electricity from whatever cause (lightning included) provided that this exclusion shall apply only to the particular electrical machine, apparatus, fixture or fittings so affected and not to other machines, apparatus, fixtures or fittings which may be destroyed or damaged by fire so set up.

8. The Report of B.R. Manjunath, Chartered Engineer & Loss Assessor, Davangere dated 30.10.2013 recorded that:

“In the growth room Split ACs failed due to voltage fluctuation. Lights were on which led to increase in temperature inside growth chamber. Increased heat caused physical, physiological and biochemical damage to cultures such as desiccation browning and death of cultures especially banana tissue cultures are very sensitive and delicate in nature that turned brown and dead due to increasing temperature to subsistent high temperature problem. Hence it is very clear that tissue cultures exposed to high temperature turned brown and died and not due to any kind of fire.

PROXIMATE CAUSE OF PLANTS:

The same was occurred not due to any kind of fire and occurred due to failure of AC panel connector and the same was damaged due to variation in voltage.”

9. As per the impugned order of the State Commission, it has been held that:

19. On perusal of the affidavit evidence of both parties there is no dispute regarding the fact that banana tissue culture was damaged as a result the complainants have suffered a monetary loss. Now it has to be seen about the cause which led to the damage of banana tissue culture. In a decision reported in (2009) 9 SCC 70, it is held as under:

The question before the Supreme Court was whether sustained fire is a sine qua non to make insurance claim for damages caused by fire.

The duration of the fire is not relevant. As long as there is a fire which caused the damage the claim is maintainable even if the fire is for a fraction of a second. Admittedly, there was fire and flash over caused the damage. The term "fire" in Clause (1) of the Fire Policy C in the present case is not qualified by the word "sustained". It is well settled that the court cannot add words to a statute or to a document and must read it as it is. Hence repudiation of the policy on the ground that there was number sustained fire is not justified.

It is the main contention of the advocate for complainant that proximate cause of loss was not considered and cause for burning of banana tissue culture in the entirety of the claim was not properly and fairly considered while repudiating the claim. It appears that the OPs insurance company repudiated the claim placing reliance on the terms of the policy wherein undergoing any heating or drying process is excluded under the heading of fire. But it is explained by the complainant in the course of his affidavit by producing some of the documents to establish the fact that from 09.10.2013 to 10.10.2013 there was heavy rain throughout Davangere and due to heavy rain and lightning there was failure of air condition units and operation of the entire unit came to stand still. As a result the temperature inside the growth room was increased abnormally. Further, due to the increase in temperature, the tissue culture which was kept in 25,000 bottles was burnt. While rejecting the claim of the complainant the OP insurance company have not narrated in detail as to how the present incident does not amount to cause of fire. **The fact that there was a heavy rain and lightning on the date of incident is also admitted by the insurance company as well as OP No. 3/Bank. When that is so, the contention of the complainant that cause of heavy rain and lightning and as a failure of electricity there was a raise in the temperature which resulted in the burning of banana tissue culture. This is again supported by the say of Dr D.P. Prakash who is an assistant professor in University of Agriculture Sciences, Bagalkote. Dr D.P. Prakash, in the course of his evidence, has clarified that process of burning varies from things to things and presence of ash need not be present in all process of burning and causing damage and loss as a result of extinction of living things due to variation in temperature. It is also his opinion that the presence of fire in physical form to the sense of human being alone need not result in or cause burning of a living thing. Therefore, there was a proximate cause regarding burning of tissue culture. Just because there is an ambiguity in the terms of the policy the OP cannot take advantage of the same. In the aforesaid decision it is also held that when there are ambiguity in the terms which is beneficial to the consumer has to be upheld. If these facts and circumstances are taken into account it has to be held that the complainants have made out a bona fide claim and as such it is for the OP insurance company to make good the same.**

20. An independent surveyor was appointed by the insurance company and he has assessed the loss damage caused to banana tissue culture independently. **The surveyor has given a report that the loss caused to the complainants was to the extent of Rs 18,12,600/- only. So from the surveyor report the complainants have been able to establish the fact that they have suffered the damages to the extent of Rs 18,12,600/-.** On the other hand, the claim of the complainant to the extent of Rs. 60,00,000/- is also not demonstrated amply by placing acceptable materials. **Hence, we are of the opinion that the complainants are entitled to a sum of Rs 18,12,600/- from OP Nos. 1 and 2 since the repudiation of the same is not just and proper for the reasons stated supra.** The complaint against OP No. 3 is dismissed since there is no deficiency as against OP No. 3.

[Emphasis added]

10. An insurance Policy is a contract of insurance, and the parties are bound by the terms of the Policy/contract. It has been laid down by the Hon'ble Supreme Court in *Bharathi Knitting Company vs DHL Worldwide Express Courier Division*, AIR 1996 SUPREME COURT 2508. In the instant case, the damage to the banana tissue culture is admittedly due to an event that does not involve a physical fire. Rather, it is admittedly due to variation of temperature due to failure of the air conditioner. Such damage or loss is not covered under the Policy. The contention of the respondent is that the loss be considered as 'burning' due to this fact, i.e., that there was an increase in temperature due to which the tissue culture turned brown. The State Commission has held this contention as valid on the ground of the evidence of Dr. D.P. Prakash and the fact that the contract has to be read in favour of the insured in case of ambiguity. However, no provisions in the Policy that constitute ambiguity are brought out in the order. The issue is whether there was a loss on account of a fire. It is not contended that there was no physical fire. It is also not the respondent's case that the deterioration of the tissue culture was due to a physical fire. Hence, it is moot whether the State Commission could have gone beyond the contractual terms of the Policy. As contended by the appellant, the law laid down by the Hon'ble Supreme Court in *Novelty Palace* (supra) would squarely apply to the instant case. The Hon'ble Supreme Court has also laid down in *Sri Venkateswara Syndicate Vs. Oriental Insurance Company Ltd. & Anr.* in CA No. 4487 of 2004 dated 24.08.2009 (2009) 8 SCC 507, that the Surveyor's Report under Section 64 UM of the Insurance Act, 1938 is an important document that should be departed from only if it is proved to be perverse through cogent arguments. In its absence, the conclusion of the State Commission and its finding of deficiency in service cannot be sustained. The State Commission's reliance on the ratio of the judgment in *Zuari Industries Ltd.* (supra) cannot be appreciated to apply to this case of loss of stock in the light of the facts of the case on hand since the loss in that case occasioned by the failure of one machine was held to apply to all such losses because of fire or losses in other machinery or apparatus. However, it was held that "*the court cannot add words to a statute or a document and must read it as it is*". The State Commission's finding that since the Surveyor has quantified the loss at Rs 18,12,600/- it constitutes deficiency in service cannot also be sustained as the quantification of loss is a mandatory requirement even in cases where claims are not considered admissible.

11. In view of the discussion above, and the facts and circumstances of this case, the appeal is liable to succeed. The appeal is accordingly allowed and the impugned order of the State Commission is set aside. Parties shall bear their own costs.

12. Pending IAs stand disposed of with this order.

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**SUBHASH CHANDRA
PRESIDING MEMBER**

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**DR. SADHNA SHANKER
MEMBER**