(2010) 11 NCDRC CK 0008

In the National Consumer Disputes Redressal Commission

Ace Glass Containers Ltd APPELLANT

Vs

United India Insurance Co. Ltd RESPONDENT

Date of Decision : 10-11-2010

Acts Referred:

Citation : 2011 1 CPJ 6

Hon'ble Judges : K.S.Gupta , S.K.Naik J.

Advocate : Mayank Mishra , Vishnu Mehra , R.L.Kadamb

Judgement

1. MR. Justice K.S. Gupta, Presiding Member-Complaint was filed by M/s. Owens Brockway (India) Ltd. (formerly known as M/s. Owens Bilt Ltd.) whose name was allowed to be substituted to M/s. Ace Glass Containers Ltd. vide order dated 12.8.2005, alleging that it had been carrying on business of manufacturing and marketing of glass containers with works at Rishikesh, Pune and Pondicherry. Complainant purchased 2000 MTs of Dense Soda Ash of the value of US $ 3,22,000 from M/s. Goverest International S.R.L. Bucharest, Romania which amount has been paid. Marine Insurance Policy No. 40300/21/50/11/2355/97-98 dated 4.9.1997 of Rs. 1,13,76,000 was purchased by the complainant from Janpath, New Delhi branch of the opposite party-Insurance Co. Soda Ash Dense purchased was insured against all risks in terms of Cargo Clauses ''A'' and Inland Transit (Rail or Road) Clause-A from Romania to Rishikesh. Vide endorsement No. 21121/1181/97-98 dated 11.9.1997 made on the policy, the insured value was increased to Rs. 1,15,92,000. Vide another endorsement No. 21/21/1185/97-98 dated 15.9.1997, the voyage covered under the policy was altered from Romania to Pondicherry via Madras by the Insurance Co. It was further alleged that the cargo of 2000 MTs of Dense Soda Ash contained in bags of 50 kgs each was shipped per M.V. Golden Sunlight under a Clean on Board Ocean Bill of Lading No. 3 dated 30.9.1997 from Constanta Port of Romania to Madras Port. The freight was pre-paid. Since the cargo did not reach Madras Port within 4-5 weeks, inquiries were made by the complainant from the surveyor. Telefax message dated 2.12.1997 was received from M/s. Unistar Shipping andTrading Ltd., ship broker stating that after sailing from Colombo, due to

engine problem, the vessel anchored somewhere in south west coast of India for repairs and repairs were expected to be completed in four days. After waiting for some time when the vessel did not arrive, the complainant lodged claim with the opposite party on 26.12.1997 which was followed by the reminder dated 6.1.1998. By the letter dated 8.1.1998, the opposite party-Insurance Co. informed the complainant of its having engaged M/s. ICC International Maritime Bureau, U.K. to take urgent action to protect the interest of the complainant and the Insurance Co. The complainant engaged M/s. Holman Fenwick and Willian, Hongkong for taking suitable legal action to save the cargo. Considerable expenses were incurred by the complainant in trying to minimize the loss which expenses the complainant is entitled under law to recover from the opposite party-Insurance Company. It was also alleged that the said vessel reached Ningbo Port in China where it was arrested and the cargo belonging to the complainant was discharged. Complainant secured an order from Ningbo Maritime Court permitting it to take the cargo back to the port at Madras. Court, however, ordered that the port charges and customs cost as also the expenses of shipment of cargo shall be upon the complainant. Complainant enquired from the opposite party-Insurance Company whether the cargo could be disposed of at Ningbo Port if the expenses incidental to taking delivery and transhipment to India are found to be uneconomical. Vide fax dated 11.3.1998, the opposite party-Insurance Company confirmed that if Clause 4.6 ultimately is proved to be inapplicable, it shall admit the liability for the difference in price and incidental expenses. On 28.4.1998, the complainant submitted to the opposite party the details of heavy expenses already incurred and estimate of the expenses which would become due in case the cargo was brought to India. Those expenses amounted over to Rs. 1.00 crore. Complainant asked the opposite party-Insurance Co. to pay an advance of Rs. 1.00 crore on account so that the release of cargo could be obtained but the opposite party did not respond favourably. At the insistence of opposite party the complainant further paid a sum of Rs. 34,773 on 9.12.1998 towards additional premium to get the policy extended for storage at Ningbo Port for onward transit of cargo to Pondicherry via Madras. Complainant had been informed that the subject cargo has been disposed of by the Local Authorities at Ningbo Port. Attributing deficiency in service, direction was sought to be made to the opposite party-Insurance Company to pay amount of Rs. 1,15,92,000 and sum of Rs. 34,50,000, the details whereof have been given in the prayer clause of the complaint as also the cost.

2. OPPOSITE party-Insurance Company contested the complaint by filing written version. By way of preliminary objections, it was alleged that the claim made is not payable under Exclusion Clause 4.6 of the policy. Insurance Co. had repudiated the claim by the letter dated 17.11.2000. Claim bill was submitted late on 21.5.1999 and the complainant was not even aware of the status of the cargo or was even possessed of the original documents till June, 1999. On merits, issuance of the policy in question of Rs. 1,13,76,000 and enhancement of the insured value to Rs. 1,15,92,000 on 11.9.1997 as also alteration of place of

destination of cargo to Pondicherry on 15.9.1997 were not disputed. Receipt of additional premium amount as alleged too was not disputed. However, for want of knowledge it was denied that US $ 3,22,000 was paid towards the value of the cargo to the seller by the complainant. It was alleged that M/s. ICC International Maritime Bureau Essex, UK (for short "1MB") was engaged by the answering opposite party to take urgent action to protect the interest of the complainant. There was dispute between the Charteres-Radiant and the Owners as to the payment of freight and demurrage. Opposite party had tried to contact the vessel owners in China and Hongkong but there was no response from them. It was denied that the opposite party-Insurance Co. is liable to pay the insured value of the cargo and/or the expenses incurred by the complainant as alleged.

3. IT is, thus, the admitted case of the parties that to cover all transit risks to 2000 MTs of Soda Ash Dense imported from Romania, the complainant had purchased Marine Insurance Policy No. 40300/21/50/11/2355/97-98 dated 4.9.1997 of Rs. 1,13,76,000 from the opposite party vide endorsement No. 21121/1181/97-98 dated 11.9.1997 the insured value was increased to Rs. 1,15,92,000. Subject cargo was shipped per M.V. Golden Sunlight under a Bill of Lading No. 3 dated 30.9.1997 from Constanta Port of Romania to Madras Port; cargo was sold by the local authorities at Ningbo Port. Treating it to be a case of total loss, amount of Rs. 1,15,92,000 being the value of subject cargo and sum of Rs. 34,50,000 allegedly spent by the complainant towards legal expenses and loss minimization charges have been claimed in the complaint. During the course of arguments, Mr. Mayank Mishra for the complainant was not pressed the latter claim of Rs. 34,50,000. Thrust of argument advanced by Mr. Vishnu Mehra for the opposite party-Insurance Co. was that the burden to prove entitlement to the value of subject cargo and that the Exclusion Clause 4.6 of the policy is not attracted, is on the complainant. Complainant had failed to take necessary steps to minimize the loss and/or to protect the cargo and is not entitled to any of the reliefs. Copy of the policy is at pages 17 to 19 on the paper book. Institute Cargo Clause (A) forms part of this policy. Clause 1 under the heading ''RISKS COVERED'' reads as under: "1. This insurance covers all risks of loss of or damage to the subject matter insured except as provided in Clauses 4, 5, 6, and 7 below."

Exclusion Clause 4.6 reads thus: "4. In no case shall this insurance cover- .... 4.6 Loss damage or expense arising from insolvency or financial default of the owners managers charterers or operators of the vessel."

4. TO be only noted that the claim was repudiated by the opposite party-Insurance Co. by the letter dated 17.11.2000 much after the institution of the complaint and immediately before the filing of written version on 30.11.2000. Omitting immaterial portions, this letter runs as under: "Please refer your letter of dated. 4.5.1998 intimating claim. Please also refer to various correspondence exchanged in this matter. This matter has been examined and we find that the circumstances of loss attract provisions of Exclusion Clause No. 4.6 of Institute

Cargo Clause (A) of the Transit Policy issued to you, reproduced for your immediate reference- ''Loss damage or expense arising from the insolvency or financial default of the owners, managers, charterers or operators of the Vessel.'' Due to financial default of the charterer to pay the demurrage charges demanded by Vessel Owners the Owner has diverted the Vessel to a Chinese port and, attempted to sell the cargo. As this deviation and sale of cargo is due to financial default of the charterers of the Vessel, no liability devolves upon us in terms of above referred exclusion. In view of the above we regret our inability to accept any liability under the policy for the referred claim."

5. THE effect of Exclusion/Exception is to save the insurer from liability for the loss which but for Exclusion/Exception would be covered. It is, thus, for the opposite party-Insurance Co. to prove that the claim made is not payable under Clause 4.6 and not for the complainant to show that this clause is not attracted. Opposite party alleges that M/s. ICC International Maritime Bureau (U.K.) (IMB) was engaged by it to protect its interest as well as that of the complainant. The report of IMB filed by the opposite parties placed on the file. Discussion made under the headings ''BACKGROUND'' and ''INVESTIGATION'' of this report being material is reproduced below: "3. Background 3.1 Three parcels of cargo were loaded on MV Golden Sunlight on August and September/October 1997. They were prilled urea in bulk for discharge in Iloilo in the Philippines, Ammonium Sulphate for discharge in Sri Lanka, Soda Ash and Calcium Carbide for discharge in Mumbai (for different parties) and Chennai. 3.2 On the 18th August, 1997, the vessel completed loading the cargo of prilled urea. However, the vessel waited in Odessa to try and fix a completion cargo before sailing to the Far East. The vessel eventually sailed to Constanta to load a cargo of Ammonium Sulphate and Soda Ash. 3.3 The vessel completed loading the Cargo of Ammonium Sulphate and Soda Ash on the 6th October, 1997 but did not sail for the discharge ports on or about 15th October. 3.4 The vessel thereafter sailed to Colombo to discharge the Ammonium Sulphate arriving on the 5th November and completing discharge on the 30th November, 1997. The vessel next call was Mumbai but on the 6th December, 1997, the vessel had to apparently anchor South West Coast of India due to engine problems. 3.5 The Master advised that repairs would take two days. On the 8th December, 1997 he advised again that repairs would take until 11th December, 1997. Since then, the Charterers have been unable to contact the vessel either by Immarsat Telex or through Guanghzou Radio. 3.6 On the 30th December, 1997, vessel was found to be in the port of Ningbo, China. 4. INVESTIGATION 4.1 On the 8th January, 1998, the IMB Regional Manager Mr. Noel Choong travelled to Ningbo, China and visited the local ship''s agent, port officials, stevedoring company, local lawyers, etc. to find out the status of the vessel and her cargo. 4.2 Inquiries were made and it was found that the vessel arrived at Ningbo, China and anchored on the 25th December, 1997 at 1830 hrs. and N.O.R. tendered the same day. On the 2nd January, 1998, all entry formalities were passed and N.O.R. accepted and vessel berthed on the 3rd January, 1998 at the Ningbo Container Terminal, Beilun Port District, Pier #3. The

vessel commenced discharge on the 4th January, 1998. Documents attached in Appendix No. 1. 4.3 According to the ship''s agent Mr. Lee Yu Wei from Penavico Ningbo, one Mr. Wang Da Long from Qing Long Shipping Co. Ltd. contacted them to appoint Penavico as the ship''s agent but no documents were submitted. However, part port dues were paid in advance. The only contact number given to the agent was the Hotel number where Mr. Wang was staying Tel: 6275666-401 and Mr. Wang mobile number 01397695609. Document attached in Appendix No. 1. 4.4 The agent claimed that they got the instructions from Mr. Wang to make arrangement for the vessel to berth and discharge her cargo. A note from Tak Hing Shipping Limited appointing Mr. Wang Da Long to make necessary arrangement for the discharge of the cargo and port formalities etc. Document attached in Appendix No. 3. 4.5 The vessel declared her cargo as 7050 MT of Soda Ash and 150 MT of Calcium Carbide. Document attached in Appendix 4. 4.6 The vessel and part cargo were arrested on the 6th January, 1998. Mr. Ni Zhi Qiang from SLOMA and Co. Shanghai law firm is acting on behalf of the owners of the cargo - Messrs Ashpura Minechem Ltd. Ace International and Owens Bilt Ltd. Total cargo of 4200MT Soda Ash. Documents of arrest attached in Appendix 2. The Local Lawyer for Sloma and Co. in Ningbo is Mr. Tong Deng Yong from Boning Law Office. 4.7 A set of false Cargo Manifest was submitted to the Ship''s agent covering 22 sets of Bills of Lading. Full set of Cargo Manifest attached in Appendix No. 6. The false cargo Manifest shows the port of loading as Constanta and port of discharge as Ningbo. Shipper as Govcrest International S.R.L. Romania to the order of Ningbo Free Trade Zone Zhen Xin Zhou Cereals and Oil Trade Co. Ltd. 4.8 According to the lawyers, there are another set of Constanta Ningbo Bills of Lading issued by the Master covering the same cargo on board the vessel in favour of a local Chinese Consignee supporting the above false cargo manifest. 4.9 The Master of the vessel Capt. GE GUO PING claimed that he was instructed by the owner who got instructions from the Charterer to issue the other set of bills of lading. However, all documents and instructions on this matter on board the vessel were taken away by the owner of the vessel. The lawyer Mr. Ni said that a Court order instructing the owners to surrender these documents have been issued and they are now waiting for the documents which could clarify who gave the instructions to the Master to issue the Constanta/ Ningbo bills of lading. 4.10 Mr. Lee from Penavico Ningbo said that the local consignee here is Zhen Hai Xing Zhou Trading Company Ltd. Tel: 6267299 and the Manager is Mr. Zhou. The Manager refused to meet with Mr. Choong. However, Mr. Choong managed to speak with one Ms. Yan from the above mentioned company and she said that they had actually paid for the cargo and her employer was at the custom office to settle the duty and to try to get clearance for the remaining cargo which was not arrested. An official receipt from Tak Hing Shipping Ltd. was taken from Mr. Tong of Boning Law Office and when questioned, he refused to comment at this stage. However, the receipt does not have a proper letter head and signature. Document attached in appendix No. 3. 4.11 Mr. Lee also said that Penavico received a fax from the port asking for their advice regarding the balance of the cargo which was not arrested as the local

Chinese consignee wants the balance of the cargo to be released. The port informed that the Chinese bills of lading had come irregularities (no shipper endorsement) and they understand that there is now two original set of bills of lading. Therefore, they asked Penavico to confirm which is the correct set. Mr. Lee said they have replied to the port advising them to hold back the cargo as they were unable to contact the owner of the vessel to get instructions etc. He told the port that to protect the owner of the cargo and to avoid unnecessary legal action, Penavico''s advice is to slow down the releasing of the cargo. Documents attached in Appendix No. 3. 4.12 Numerous efforts to contact Tak Hing Shipping Guangzhou, China and the owner representative, Mr. Wand Da Long failed. It was found that Mr. Wand Da Long is working for Qing Long Shipping Corp. Tel: 86 989 8532266 4.13 Mr. Lee also told Mr. Choong that he heard from Mr. Wang Da Long that the Charterer had not paid full freight to the Hong Kong Shipowner and they had waited for few months before deciding to sell the cargo. They also could not proceed to India thereafter as the vessel could be detained, etc. for late arrival, etc. He claimed they were cheated by the Charterer. However, there is no supporting documents to prove this is true. 4.14 Mr. Ni, the Indian cargo owners lawyer from Shanghai said that someone had reported this incident to the local police though this could not be confirmed yet. 4.15 There is another set of Singapore/Ningbo Bills of Lading with Mr. Ni but he refused to comment at this stage. He said that he needs to keep this confidential until the Court hearing is over. 4.16 The vessel completed discharge on the 16th January, 1998 at 0530 hrs and has been moved to anchor at the Jinntan anchorage under the control of the Court until the security as required have been put forward by the shipowners in favour of the Court. 4.17 A Survey Report on the Cargo is attached. 4.18 Attached in appendix No. 5 are copies of fax messages from Radiant Shipping and their lawyers to Penavico Ningbo advising them not to discharge the cargo onboard the vessel Golden Sunlight."

6. FROM said para No. 4.13, it is manifest that whatever was informed by Mr. Lee to Mr. Choong about non-payment of full freight by the Charterer to the owner of aforementioned vessel was based on hearsay and was not supported by any documentary proof. Insurance Co. has not led any cogent evidence about the alleged financial default on the part of Charterer towards the owner of the vessel. In absence of such evidence, the opposite party-Insurance Co. must be held to have failed to make out a case that the claim was not payable under aforesaid Exclusion Clause 4.6.

7. THIS brings us to the alleged failure of the complainant in minimizing the losses and/or protecting the subject cargo. Letter dated 28.4.1998 sent by the complainant to the opposite party-Insurance Co. is significant. Omitting immaterial portion, the same reads thus: "Sub.: Our Claim-M. V. Golden Sunlight. Please refer to our various discussions and correspondence on the above subject. (a) As apprised from time-to-time and as per your instructions we have already incurred the following expenses towards our efforts for loss minimization and release of the cargo. "on account" Counter Security-held in

favour of Ningbo Maritime Court US $ 20,000 2. Remittances made towards legal fees and related expenses US $ 45,000 3. Expenses incurred on travel and communications, etc. US $ 10,000 US $ 75,000 (b) We have been advised by our Advocates Holman Fenwick & Willan, Hong Kong/Sloma & Co. Shanghai that judgment by the Maritime Court releasing the cargo in our favour has been passed (copy enclosed). However, they have asked us to remit the following payments urgently before the cargo can be physically released and allowed to be shipped back to Madras. These costs amount to equivalent of Rs. 32,28,552.00 (Copy of Sloma & Co.''s faxes enclosed). 1. Port/Storage and other expenses US$ 45713,80 2. Advance towards expenses for organizing auction sale of the vessel US$ 12500.00 3. Customs charges US$ 22500.00 Total : US$ 80713.80 Equivalent to.... Rs. 32,28,552.00(@ 1US$=Rs. 40.00). (c) In addition to above we shall also have to pay Ocean freight for shipping cargo back to Madras. The lowest quotation so far received is US$ 55.0 per MT which amounts to US$ 110,000.00 for 2000 MT i.e. Rs. 44,00,000.00 (copy of quotations enclosed). (d) We shall also have to pay import duty on above freight. The duty would amount to Rs. 26,35,200.00 (including counter veiling duty) as per following details: 1. Import Duty (@ 35% of 1.01 x 55) US$ 19.44 per MT 2. Countervailing duty@ 18% of (1.01 x 55+ 19.44) US$ 13.50 per MT US$ 32.94 per MT 3. Total for 2000 MT =US$ 65880.00 Equivalent to =Rs. 26,35,200.00 Thus we shall have to pay additional sum of Rs. 1,02,63,752.00 (over and above the amount already incurred as per point ''A'' above). The above outgo is very huge and we cannot afford to pay this amount upfront particularly considering that our funds are already blocked in the principal amount already paid to Romanian suppliers and amounts remitted towards legal fees and expenses, etc. However, in order to get the delivery of the cargo there is no choice but to pay the above amount. We would therefore request you to help us out by way of paying an advance of Rs. 1.0 crore to us ''on account'' basis (pending final settlement of our claim) urgently so that release of cargo can be obtained and it can be shipped back at the earliest possible. You will appreciate that any delay in getting the cargo back would only result into additional costs of storage and other expenses at Ningbo and deterioration in the quality of the material. It will also defeat the purpose of our efforts for loss minimization..."

8. ADMITTEDLY, no amount on account was paid by the opposite party to the complainant after receipt of the said letter. We are satisfied that effective and reasonable measures to minimize the losses and/or to protect the subject cargo had been taken by the complainant but those did not yield any result as the necessary financial help was not made available by the opposite party-Insurance Co. Submission referred to above advanced on behalf of Insurance Co. in that regard is, therefore, repelled being without any substance.

9. IT is true that it is for the complainant to prove entitlement to the amount claimed of Rs. 1,15,92,000. It was pointed out by Mr. Mishra, Advocate, that the part of the cargo loaded on board the said M.V. Golden Sunlight was of Modi Alkalies and Chemicals Ltd. which too was lost and for recovery of the value of

lost cargo etc, it had filed OP No. 246 of 1998 which, on contest, was allowed by this Commission by the order dated 3.8.2009 and the appeal preferred by the opposite party against that order has been dismissed by the Supreme Court. Averment made in the complaint of the complainant having paid the entire invoice of the subject cargo of US $ 3,22,000 to the seller is supported by para No. 19 of the evidence affidavit of Rajiv Prasad, Vice-President (Sales and Marketing) of the complainant Company. When converted into Indian currency at the rate prevalent at the material time, the said amount would work out to more than Rs. 1,15,92,000 being the amount of the policy in question. Since the policy in question was all risks policy, it being a total loss case, the complainant is entitled to the entire amount of the policy with interest which we, in the facts and circumstances of the case, quantify @ 12% p.a. with effect from 26.12.1997, the date of lodging the claim with the opposite party. Complainant is not entitled to any separate amount towards compensation.

10. RESULTANTLY, the complaint is allowed with direction to the opposite party-Insurance Co. to pay amount of Rs. 1,15,92,000 with interest @ 12% p.a. with effect from 26.12.1997 till realization. Opposite party will also pay Rs. 25,000 as costs to the complainant. Awarded amount will be paid within six weeks.

