(2006) 03 NCDRC CK 0030

In the National Consumer Disputes Redressal Commission

AGGARWAL GRANITE EXPORTS LTD. APPELLANT

Vs

NEW INDIA ASSURANCE CO. LTD. RESPONDENT

Date of Decision : 31-03-2006

Acts Referred:

Citation : 2006 0 NCDRC 43 : 2006 1 CPR 346 : 2006 2 CLT 306 : 2006 2 CPC 16 : 2006 2 CPJ 150

Hon'ble Judges : M.B.SHAH , S.N.KAPOOR J.

Advocate : S.L.AGARWAL , NEERAJ SINGH

Judgement

1. M /s. Aggarwal Granite Exports Ltd., Complainant herein, has filed this complaint against M/s. New India Assurance Co. Ltd. (hereinafter referred to as the Insurance Co.) for reimbursement of loss suffered by it as the ship through which it sent the granite and granite products to its purchaser, M/s. Ul Nahla General Trading, Ajman, UAE, through a vessel known as "Al Said", sunk. The vessel set sailing on 24.3.1994 from Mangalore Port to Dubai. After sailing about 40 to 60 Kms. from Mangalore Port to Dubai the vessel sunk. The Complainant states that he was not knowing about sinking of the vessel till the third week of April, 1994.

2. UNDISPUTEDLY , the Complainant had taken a marine insurance policy from the Insurance Company for a sum of Rs.18.5 lakhs by paying a premium of Rs.9,031/-, for which cover note dated 1.2.1994 was issued. Subsequently, as the Complainant got an enhanced order from the consignee for purchase of the granite, he requested the Insurance Company to enhance the marine insurance cover to Rs.28 lakhs. The Insurance Company accepted the same and issued additional Marine Policy (Cargo) for a sum of Rs.9.25 lakhs. It is the say of the Complainant that the vessel sailed on 24th March 1994 and on the next day, i.e. on 25th March, 1994 when it was about 40 miles off (i.e. 63 kms.) from Malpe Port, it developed leaks. The crew failed to repair the defects and were compelled to jettison the cargo. Even the jettisoning of the cargo did not save the vessel and the vessel was required to be abandoned. Thereafter, with the help of a

fishing boat the crew reached Malpe Port at about 11.30 am on 26.3.1994.

3. IT is the say of the Complainant that on reaching the Malpe Port on 26th March, 1994, Tindle, Shri Ayub Siddik informed the Deputy Port Conservator of Malpe Port, of the mishap, vide his statement dated 26th March, 1994. It was stated that the vessel sailed from the old Mangalore Port with cargo of granite of different sizes; the weather was favourable; and, he set sailing the vessel on 24th March at about 7.30 pm. On 25th March, when he was sailing about 40 miles off Malpe (approx. 64 Kms) suddenly he noticed some defects in stan tube and he tried to repair it, but water started entering inside and the vessel. As the sea water entered, they started bailing out the sea water by pump and buckets, but their efforts failed. To save the vessel and the crew members, they started jettisoning a portion of the cargo into the sea. But, the vessel could not be saved due to heavy water in the vessel. The incidence happened at about 3.00 pm. on 25.3.1994. Then, with the help of a fishing boat, they reached Malpe at 11.30 am on 26.3.1994 with all the crew. It is also mentioned that the statement was read over to him by translating him in Hindi by vessel"s broker.

4. SIMILAR is the statement of the Crew Mr. Abdul Jusab Sumbahmia. He further stated that the sinking of the vessel in the middle of the voyage was the first experience, during his 16 years of service. And, further added that from 25.3.1994 at 3.00 pm to 26.3.1994 at 7.00 am, they were sailing in the Sea on a barrel flat. Then they noticed a vessel (fishing boat), "Udupi Prasad" and with its help they reached the Malpe Port at about 11.30 am on 26.3.1994. The statements of the other crew members were also recorded. It is the say of the Complainant that immediately after they learnt about the mishap they had informed about it to its customer, (the consignee). As per the terms of the policy, the insurance claim was to be settled by M/s.Maritime and Mercantile International Pvt. Ltd., Dubai. The policy provides that the claim amount was payable at Dubai. Hence, they had contacted the customer at Dubai. The customer of the Complainant lodged the papers with the M/s. Maritime and Mercantile International Pvt. Ltd. at Dubai. However, after some correspondence M/s. Maritime and Mercantile International Pvt. Ltd. denied its liability to settle the claim and advised the Complainant to approach the Insurance Company for settlement of the claim. They further informed the customer that they were not the agents of the underwriters and, therefore, no civil action may be taken against them for the actions of the underwriters.

5. HENCE , the Complainant lodged a claim with the Insurance Company on 2.9.1994.

6. THE Insurance Company vide its letter dated 27th September, 1994 informed the Complainant that: (i) before taking the insurance policy the Insurance Company was not informed that the consignment was to be despatched by a sailing vessel (country crafts); and (ii) from the invoice copies it is clear that the sale was on C&F terms. In such cases, insurance is to be arranged by the buyer and in any case the risk in goods passes on to the buyer once the goods are

placed on board the vessel. In this case, allegedly the vessel sank after the voyage started and, as such, the buyers will have to claim under the insurance obtained by them, and the claims would not be admissible under the policy obtained by the complainant. It was further mentioned: "We understand that our Branch had granted cover from Bangalore to Dubai as they were informed by you that the sale was on CIF terms. If it was disclosed that the sale was on C&F terms, cover would have been granted only from Bangalore to Mangalore, if necessary, till loading onto the vessel". ; (iii). The inordinate delay of more than five months in the intimation of the claim which violates "reasonable despatch clause" and "notice of loss" condition applicable to sailing vessel consignments. Thereafter, without prejudice to the aforesaid contentions, the Complainant was asked to supply copies of documents as mentioned in the said letter. In response to that, by letter dated 24th October, 1994, the Complainant supplied the documents sought for and stated that: At the time of payment it was made clear that the cargo was to be transported by a sailing vessel; The sale was on CIF basis which can be verified from the purchase order received by them and the letter dated 30.1.1994 received from the customer which was shown at the time of paying the premium. Therefore, the description in the invoice C&F is obviously erroneous.

7. AS regards the delay, the customer at Dubai made inquiries but no clear reply was received. Thereafter, he had contacted the shipping agents and came to know about the mishap. As per the terms of the policy the claim was to be lodged with M/s. Maritime and Mercantile International Pvt. Ltd., Dubai. The customer was asked to lodge the claim. However, the same was rejected in the second week of July, 1994.

8. THEREAFTER , they made arrangements for getting back the papers to lodge the claim with Insurance Co. and by letter dated 2nd September, 1994, they submitted the claim. Defence of the Insurance Company: At the time hearing on behalf of the Insurance Company it was contended that: (i) the Complainant was not having insurable interest as the Insurance Company was not informed that the sale was on CIF basis. As per the invoices it was C&F basis; (ii) that the vessel was not sea-worthy as the consignment was sent by sailing vessel (country craft) and not by ocean going motor vessel. And, therefore, the Insurance Company is not liable, as this was not disclosed; (iii) that no information was given to the Insurance Company with regard to the sinking of the ship within the reasonable time, as they were informed only on 2nd September, 1994, i.e. after about five months, of the date of the incident; and (iv) it is also contended that causality report was not produced by the complainant.

9. RELEVANT evidence: The insurance policy dated 1.2.1994 is for the sum of Rs.18,75,000/-: (i) wherein against the column "Vessel &/or Conveyance", it is mentioned "By Sea" and the vessel Name is "AL-SAID". (ii) In the column "Special Conditions and Warranties", it is mentioned : Subject to Institute Cargo

Clauses-A (Cargo) and other relevant clauses., (iii) Warranted that B/L No. will be furnished". (iv) In the Column: "Survey and Claims Settlement", it is mentioned, "In the event of loss or damage which may result in a claim under this insurance, immediate notice must be given to M/s. Maritime and Mercantile International (P) Ltd., P.O. Box 70, Dubai, U.A.E., who are the company"s agents at port of discharge, in order that they may examine the goods and issue a survey report. When the company has no agent, the notice must be given to Lloyd"s Agents. Payable at Dubai. By M/s. Maritime and Mercantile International Pvt. Ltd."

10. CLAUSE 5.2 of the Cargo Clause (A) reads thus: "5.2. The Underwriters waive any breach of the implied warranties of seaworthiness of the ship and fitness of the ship to carry the subject-matter insured to destination, unless the Assured or their servants are privy to such unseaworthiness or unfitness".

Clause 8.1, Duration Clause reads thus: "8.1 The insurance attaches from the time the goods leave the warehouse or place of storage at the place named herein for the commencement of the transit, continues during the ordinary course of transit and terminates either: 8.1.1 on delivery to the consignee"s or other final warehouse or place of storage at the destination named herein; 8.1.2 on delivery to any other warehouse or place of storage whether prior to or at the destination named herein, which the Assured elect to use either 8.1.2.1. for storage other than in the ordinary course of transit or 8.1.2.1. for allocation or distribution or 8.1.3 on the expiry of 60 days after completion of discharge overside of the goods hereby insured form the oversea vessel at the final port of discharge, whichever shall first occur. 8.2. If, after discharge overside from the oversea vessel at the final port of discharge, but piror to termination of this insurance, the goods are to be forwarded to a destination other than that to which they are insured hereunder, this insurance, whilst remaining subject to termination as provided for above, shall not extend beyond the commencement of transit to such other destination. 8.3. This insurance shall remain in force (subject to termination as provided for above and to the provisions of Clause 9 below) during delay beyond the control of the Assured, any deviation, forced discharge, reshipment or transhipment and during any variation of the adventure arising from the exercise of a liberty granted to shipowners or characterers under the contract of affreightment.

11. CLAUSE 11.1, Claims, reads as under: "11.1 In order to recover under this insurance the Assured must have an insurable interest in the subject-matter insured at the time of the loss."

12. THE second policy is also to the same effect as was the first policy, but the amount of policy is Rs.9,25,000/-. Findings: (i) Re. Contention No.1 : Insurable interest: (a) It is the contention of the Insurance Company that the complainant was not having insurable interest in the goods as it is mentioned in the invoice that the goods were sold under the condition C&F. For this we would refer to invoice No.07 dated 21.2.1994 (Annexure A-1) on the basis of the order of the

buyer dated 30.1.1994, in the column for "Terms of Delivery and Payment" it is mentioned: "C and F Dubai, D.A. Basis 90 Days, State Bank of Indore, J.C.Road, Bangalore 560 002".

At the end of the invoice, there is a declaration : "We declare that this invoice shows the actual price of the goods described and that all particulars are true and correct". The other invoices are to the same effect.

13. FROM the aforesaid invoices, it cannot be held that complainant has lost insurable interest in the goods. In the present case C&F would mean that cost and freight were to be paid at Dubai.

14. IT cannot be disputed that CIF stands for cost, insurance and freight. As per the insurance policy, he has insured the freight, cost of transportation is included in the price. Dictionary meaning of CIF in Oxford Dictionary, 10th Edition, p.256, is: "C.I.F. means "cost, insurance, freight (as included in a price). Even if it is C&F, it would mean that cost and freight included in the price". With regard to the insurance, the Complainant has taken the insurance and paid for it. So it does not make any difference in this case. (b). This aspect is discussed in Halsbury"s Laws of England, 4th Edition, Book No.25) freight is discussed as under: "115. Freight must be specifically insured: Certain interests must be specifically insured, and are not included in the general denomination of goods or ship. Freight must be specifically insured by apt wording in the policy. This is generally done by inserting the words "on freight" at the foot or in the margin of the instrument. The term "freight", when used in a policy to denote the subject matter insured, includes not only money payable to the shipowner for the carriage of goods, but also any benefit derived by him from the employment of the ship such as money paid by the charterer for the hire of the ship, or the benefit derived by the shipowner from the carriage of his own goods"

. (c). A reference to para 5-012 at p.184 of Benjamin"s Sale of Goods, 4th Edn. has been made by the Apex Court in Escorts JCB Ltd. vs. CCE (2003) 1 SCC 281, which is to the following effect: "Insurance.The passing of property is rarely of relevance to insurance. A person can insure goods to their full value against any loss on behalf of anyone who may be entitled to an interest in the goods at the time the loss occurs, provided that it appears from the terms of the policy that it was intended to cover their interest. Also a buyer will have an insurable interest in goods if they are at his risk, whether or not the property has passed to him."

The Apex Court considered the aforesaid paragraph and observed as under: "From the above passage it is clear that ownership in the property may not have any relevance insofar as insurance of goods sold during transit is concerned. It would therefore not be lawful to draw an inference of retention of ownership in the property sold by the seller merely by reason of the fact that the seller had insured such goods during transit to the buyer. It is not necessary that insurance of the goods and the ownership of the property insured must always go together. It may be depending upon various facts and circumstances of a particular transaction and terms and conditions of sale. A reference has also been made to Colinvauz"s Law of Insurance, 6th Edn. by Robert Merkin to indicate that there may be insurance to cover the interest of others, that is to say, not necessarily the person insuring the interest must be the owner of the property"

15. FURTHER , in the present case As per duration clause 8.1 the insurance attaches from the time the goods leave the warehouse or place of storage and continues till the transit and it terminates only on delivery of the goods to the consignee etc. From the aforesaid law and the terms of the insurance policy there is no substance in the contention that the Complainant was not having any insurable interest in the goods for which the insurance coverage is taken by them. (ii). Re. Contention No.2: Seaworthiness of Vessel: With regard to sea worthiness of the vessel, it is to be stated that the name of the vessel is specifically mentioned in the insurance policy, i.e. M.S.V. Al-Said. Therefore, the Insurance Company was aware of the nature of the vessel. Hence, this contention is totally unjustifiable

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16. FURTHER there is a certificate of Registry of sailing vessels to the following effect: "That the vessel "AL-SAID" is a "Mechanised Sailing Vessel". It also certifies that the vessel has been duly registered at the Port of Mangalore under the Merchant Shipping Act, 1958. This certificate is issued by the Registrar of Sailing Vessels, Mangalore, Government of India, under Rule 6(2) of the Sea Rules. There is another certificate i.e. "Certificate of Inspection of a Sailing Vessel" by the same authority to the effect that the vessel has been duly inspected in accordance with the provision of the Sailing Vessel (Inspection) Rules, 1962. It further states that this certificate unless previously cancelled, shall remain in force until the 15th day of February, 1995. Further on 24.3.1994 the Officers of the Customs had permitted to sail the vessel, MSV AL-SAID subject to weather conditions at 7.30 pm on 24.3.1994 and the cargo was inspected. In the Bill of lading which is produced on record also it is specifically mentioned that the vessel was M.S.V. Al-Said, master of vessel was Shri Ayub Siddiki, and the owners of the vessel were Mr. Ismail Ayub Subhamia of Jamnagar. In view of the aforesaid certificates and facts, the defence of the Insurance Company that the vessel was not sea-worthy is totally baseless. In any case, Clause 5.2 of Institute Cargo Clause-A provides that the underwriters waive any breach of the implied warranties of seaworthiness of the ship. This also establishes that the Insurance Company is unjustifiably contending that the ship was not sea-worthy. (iii) Re. Contention No.3: Delay: In support of the contention that as there was delay in lodging the claim the complaint is required to be dismissed, the learned Counsel for the Insurance Company relied upon Clause 19 of the Policy and note appended thereunder. Clause 19 is as under: "Law And Practice: This insurance is subject to English law and practice."

17. TO that, there is a note to the following effect: "Note: It is necessary for the assured when they become aware of an event which is "held covered" under this

insurance to give prompt notice to the Underwriters and the right to such cover is dependent upon compliance with this obligation".

18. WITH regard to delay in informing the Insurance Company about the mishap, it is pointed out by the Complainant that they came to know about the sinking of the vessel only in the third week of April, 1994. In support of this, it is stated that the vessel set for sailing on 24th March, 1994. Therefore, in the normal course, the vessel would have reached Dubai by the first week of April, 1994, but when it did not reach by 10th April, 1994, the consignee made inquiries at Dubai Port. He did not receive any clear reply. However, they had assured the consignee that the cargo would reach in a few days. Till 15th April, 1994 the cargo could not reach there. Hence, the consignee contacted the Complainant. Thereafter, the Complainant contacted the ship agent telephonically and got the information about the mishap. Immediately, the consignee was contacted to lodge the claim at Dubai with M/s. Maritime and Mercantile International Pvt. Ltd., on behalf of the Complainant, as that was the condition of the policy. Necessary papers were supplied. But, the claim was rejected in the second week of July, 1994 and the Complainants were informed by M/s. Maritime and Mercantile International Pvt. Ltd. to lodge claim at Bangalore. Sometime was taken to get back the papers from Dubai. After receiving papers back from Dubai, they lodged the claim with the Insurance Company on 2nd September, 1994. Hence, there is no question of any delay in lodging the claim.

19. FURTHER , it has been pointed out that M/s. Maritime and Mercantile International Pvt. Ltd. wrote a letter dated 30th June, 1994 to the consignee. The said letter makes it clear that M/s. Maritime and Mercantile International Pvt. Ltd. had already forwarded the claim file to the Insurance Company on 30th June, 1994. Therefore, it is highly improper on the part of the Insurance Company, now, to contend that the claim of the Complainant was not known to the Insurance Company till 2nd September, 1994. The said letter reads thus: "We acknowledge the receipt of your letter dated 15.6.1994 together with its enclosures in respect of a claim under the above Certificate of Insurance. Please be advised that the claim file has been forwarded to the Underwriters and shall revert upon hearing from them. Please note that we are not the agents of the Cargo Underwriters and act only as Correspondent and therefore no civil action can be taken against us for the actions of the Cargo Underwriters. This is without prejudice".

20. FROM the above it is clear that the Maritime and Mercantile International had already forwarded the claim file to the Underwriters, i.e. the Opposite Party by 30th June,1994, and the Insurance Company was well aware of the incident before the Complainant made his claim with it in September, 1994. From the record, it is apparent that the Complainant has taken necessary steps within the reasonable time in informing the Insurance Company with regard to the mishap. Because : (i) they came to know or became aware about the sinking of the vessel only in the third week of April, 1994, when they made inquiries with the

shipping agents at Mangalore; (ii) immediately after that, as per the condition laid down in the Policy, against the Column "Survey and Claims Settlement", the Complainant lodged a claim with the agents of the Insurance Company, i.e. M/s. Maritime and Mercantile International Pvt. Ltd. to enable them to examine the goods and issue a survey report. (iii) Further, the note upon which reliance is placed makes it very clear that the Complainant is required to take prompt action when they became aware of an event of the mishap. This is done by the Complainant, as stated above. Hence, we find no substance in the contention of the Insurance Company that the Complainant has not acted with reasonable despatch. (iv). Re. Contention No. 4: Casualty Report: With regard to non-production of the Casualty Certificate, it would have no bearing because the statements of the Tindles and the crew members were recorded on 26th April, 1994 by the Port Officers and thereafter Customs Officers and the report about the sinking of the vessel, was sent on the same day. The Insurance Company has not placed any evidence to the contrary. Hence, there is no substance in the contention. It was the duty of the Insurance Company to examine the owner of the fishing ship or its tindle which has saved the crew members of the Al-Said, which sank.

21. FURTHER , on record there is a certificate produced by the Complainant of sailing of the vessel permitted by Custom Officers. After sailing of the vessel, it has not reached the destination. In this view of the matter, it cannot be said that because the Complainant has not produced the causality report, they are not entitled to reimbursement of the loss suffered by them.

22. IN the result, the complaint is allowed. The Insurance Company is directed to reimburse the Complainant on the basis of the invoices by which the goods were exported. The conversion rate of the US Dollar is mentioned in Para.1 of the amended complaint, details whereof are as under: Hence, it is directed that Opposite Party shall pay an amount of Rs.28,62,200/- to the Complainant with interest at the rate of 9% from 1.3.1995, i.e. six months after the date of the lodging of the claim i.e. 2.9.1994, till the date of payment. There shall be no order as to costs.

