(2004) 05 NCDRC CK 0005

In the National Consumer Disputes Redressal Commission

AJANTA OFFSET AND PACKAGING LTD. APPELLANT

Vs

NATIONAL INSURANCE CO. LTD. RESPONDENT

Date of Decision : 27-05-2004

Acts Referred:

Citation : 2004 0 NCDRC 13 : 2004 0 NCDRC 8 : 2007 1 CPJ 208

Hon'ble Judges : M.B.SHAH , RAJYALAKSHMI RAO J.

Advocate : S.K.MAKKAR , RAJENDRA DHAWAN , SHEFALI DHAVAN

Judgement

1. IT is the say of the Complainant that pursuant to the Opposite Party No.3''s, M/s. Indo Polygraph Machines Pvt. Ltd., approaching the Complainant for placing an order for supply, erection and commissioning of the "High Speed two Colour sheet-fed offset Printing machine Planeta Super Variant Model P24-8SW1", the Complainant placed order with the Opposite Party No.3 by paying as advance Rs.5,91,714.14 by a demand draft dated 23.2.1991. The total cost of the machine is Rs.59,87,741.40. On 21.12.1990, the machine was imported by the Opposite Party No.3 who is the sole selling agent of the manufacturer in Germany. The same was insured with Opposite Party No.1, i.e. M/s. National Insurance Co. Ltd. on 14.1.1991. The machine arrived at the Calcutta Port on 26.2.1991 and was despatched from Calcutta on 19.4.1991. Installation of the machine in the factory premises of the Complainant started on 15.7.1991 and was completed on 17.8.1991. At the time of trial run on 19.8.1991 the machine got damaged because of a component called alien-key was found clinging with the paper.

2. IMMEDIATELY , Opposite Party No.3 had informed the Branch Manager of the Insurance Company by letter dated 20.8.1991. The Insurance Company appointed M/s. J.B. Boda Surveyors Pvt. Ltd. The surveyors had demanded certain information from the Opposite Party No.3 who in turn supplied the same. The Surveyors informed the Opposite Party No.3 vide their letter dated 23.10.91 that apparently the Allen-key that damaged the cylinder of the machine was left inadvertently at the manufacturer''s end in Germany and that the matter shall be

taken up with the manufacturers/suppliers in Germany. Vide letter dated 19.11.1991 the manufacturer in Germany refuted the same and further stated that no question of leaving any tool inside the machine arose. Since the Surveyors did not submit their survey report for over ten months, the Opposite Party No.2 appointed another Surveyors, M/s. Kaypsens, who surveyed the damaged machine on 3.7.1992. Vide their letters dated 7.7.1992 and 13.7.1992, the second Surveyors informed the Complainant that the Complainant had started using the machine with the damaged rollers without the permission of the underwriters. The Complainant submitted all the documents as desired by the Surveyors vide their letter dated 8.9.1992 and had answered all the queries of both the Surveyors and supplied the information as and when called for by them. The Complainant contends that the machine had been surveyed at least three times by the Surveyors and the alleged use of the machine by the Complainant would not be in contravention of any law as it was to minimise the losses. In spite of that, the Insurance Company, vide its letter dt. 23.11.1992 informed the Complainant that the claim could not be finalised unless some more documents asked for by the Surveyors are submitted. The Complainant again submitted all the details. The Surveyors, M/s. Kaypsens, desired the Opposite Party No. 3 to get the damaged cylinders repaired and further requested Opposite Party No.3 to let them know the reasons why the cylinders could not be repaired, instead of replacing them. In the meanwhile, on 3rd August 1994 the Opposite Party No.3 issued letter stating that it was certified that the Opposite Party No.3 shall have no objection in pursuance and realisation of the insurance claim by the Complainant who had purchased the machine and the Opposite Party No.3 had received the full payment for the machine in question.

3. IT is the say of the Complainant that the machine was a bi-colour machine and on damage to cylinders and the Opposite Parties failed to replace the damaged cylinders, the same was being used by the Complainant for single colour printing jobs. This was on account of damage to the impression cylinders which rendered the machine unusable as a two colour machine. And, that the purpose for which the machine was purchased had been defeated by the callous and unresponsive attitude of the Insurance Company. It is further contended by him that the machine was covered under comprehensive Marine-cum-Erection Insurance Policy dt. 14.1.1991 and since the machine was damaged at the time of trial run, the Opposite Parties are liable to compensate the Complainant for the damage covered under the terms of the policy. The Complainant further attributes all the losses suffered by it, to the Insurance Company for its delay in settling the claim. As the claim was not settled, on 6.12.1996 the complaint was filed claiming a sum of Rs.79,33,993/- which includes the cost of replacement of cylinders, estimated increase in the price of cylinders, customs duty payable on the price of the cylinders at 44% and compensation with interest at the rate of 21% p.a. Submissions by the Insurance Company On behalf of the Insurance Company it is contended that: (a) the complaint is not maintainable as the Complainant has no locus standi. The contract is between the Opposite Parties 1

and 2 and the Opposite Party No.3 and that under the provisions of the policy, the Opposite Party Nos.1 and 2 were not required to render any service to the Complainant. The assignment of the insurance claim does not make the Complainant a consumer. (b) That the alleged assignment of the insurance policy is without consideration and hence not enforceable in law. Complainant cannot pursue the claim as the policy cannot be assigned. The person who has taken the policy and paid the premium is alone entitled to pursue it. The Marine Insurance policy provides that the policy is not assignable. (c) Since the Complainant had purchased the machine for commercial purpose, he could not take shelter under the provisions of the Consumer Protection Act, 1986. (d) At the time of taking the policy, the insured had not informed the Insurance Company that the machinery had already left the manufacturer''s place. The insurer assumed the risk on 14.1.1991, whereas the goods had already left on 21.12.1990, which fact was not disclosed to the insurers. In any case the insurer could not have assumed the risk retrospectively. (e) The Complainant cannot maintain any claim, as he had been using the machine in spite of the fact that it was found defective during the trial run. (f) Since the questions of fact involved in the complaint are disputed, evidence is required to be lead. And, hence, the other remedies are open to the Complainant to pursue his alleged claim. (g) The damage may be because of leaving the ''Allen key'' in the machine inadvertently by the manufacturers and hence they may be responsible. Or the Alley key might have loosened in transit from manufacturer''s place before the risk underwritten by the Respondent. (h) As per the Opposite Party No.3, the machine is under guarantee for one year. For ulterior motives the Opposite Party No.3 did not take up the matter with the manufacturer, as he is the sole-selling agent in India.'' I. Relevant terms of Insurance Policy:

4. FOR deciding the controversy we would refer to the terms of the insurance policy which are as under: It is marine-cum-erection insurance policy. "The insured: Name : M/s. Indo Polygraph Machinery Pvt. Ltd. 88, Okhla Industrial Estate, New Delhi - 110 020. One brand new German make two colour Offset Printing Machine Planeta Model P24-8SWI. Period of insurance : From__________to__________. The cover commences from the date of the first consignment or despatch from manufacturer''s/supplier''s warehouse either in India or abroad and remains in force for the period as mentioned above (the said period starting from the arrival of the first consignment or despatch at the site of origin) or completion of erection including test period not exceeding four weeks, whichever is earlier".

Insured Voyage : Hamburg to Calcutta Port & then anywhere in India." Site of erection : Anywhere in India. The insurance coverage is for Rs.55,60,000/-." [Ref: P.6, Vol. III] "Marine-cum-Erection Policy : Part-I - Terms and Conditions of the Marine Cover: Now this policy witnesseth that the Company promises and agrees with the insured their executors administrators and assignees to make good all such losses and damage hereinafter expressed as may happen to the subject matter of this policy and may attach to the

Company in respect of the sum stated in the schedule hereby insured which isurance is hereby declared to be upon the good described in the schedule in the ship or vessel called as hereinafter specified lost or not lost at and from as described in the schedule." [Ref: P.7, Vol. III]

"Part-IL Terms and Conditions of the Erection All Risks Cover -Section 1 - Material Damage: "The Company hereby agrees with the insured that if at any time during the period of insurance stated in the schedule or during any further period of extension thereof the property (except packing materials of any kind) or any part thereof described in the said Schedule be lost damaged or destroyed by any cause other than those specifically excluded in a manner necessitating replacement or repair the Company will pay or make good all such loss or damage upto amount not exceeding in respect of each of the items specified in the Schedule the sum set opposite thereto and not exceeding in the whole the total sum insured hereby. The Company will also reimburse the insured for the cost of clearance and removal of debris following upon any event giving rise to an admissible claim under the policy but not exceeding in all the sum (if any) set opposite thereto in the schedule". [Ref: P. 10, Vol. III]

Surveyors'' Reports; (a) Report of M/s, J.B.Boda Surveyors Pvt. Ltd. M/s. J.B.Boda Surveyors Pvt. Ltd. visited the premises of the Complainant on 21.8.1991 to survey and report the damage caused to the two-colour offset printing machine, said to have been damaged during testing on 19.8.1991. In the report it is mentioned that indo Polygraph Machinery Pvt. Ltd. (1PMP) are the sole selling agents for Planeta Offset Printing Machine in India. They are reportedly importing these machines on behalf of PEC (Projects and Equipment Corporation of India) and supplying to actual users against their release orders. For the occurrence of the damage it is mentioned that during the first trial itself the paper sheets got stuck and squeezed, the machine was immediately stopped and the squeezed papers were manually pulled out. On inspection one alien key was found clinched/stuck with the paper. For the cause of damage it is stated that from the nature of damages that during the course of erection one alien key was inadvertently left inside. After making observations and recommendations, they estimated the loss to be in the range of Rs.10 to Rs.12 lakhs. [Ref: P. 15, Vol. III]

(b) Report of M/s. Kaypsens, Surveyor, Loss Assessor and Risk Engineer: The Surveyor, M/s. Kaypsens, has assessed the loss suffered by the Complainant on ''estimated cost of replacement'' at Rs.23,70,677/-. But after deducting salvage at 50%, excess during the trial run, he has assessed the net loss at Rs. 10,90,836/-. The relevant portion of his report is as under:

I. "Although the insured did not replace the damaged rolls by new rolls, the insured''s buyer M/s. Ajanta Offset Packaging Ltd. have started printing half size of the printed material by utilising the non-damaged zone of the cylinders which is the left half of the sheet as attached. In fact, by utilising the 50% of the roll capacity and 50% of printing capacity the loss has been minimised by the insured/insured''s buyer as in lieu of leaving it as totally damaged. The damaged rolls have been utilised to the 50% efficiency level which would fetch substantial amount of salvage depending on its reutility value. The logbook of production has been checked and photocopies of the same are enclosed herewith. The maximum printing capacity : 700 mm x 1010 mm. The present utilisation capacity : 700 mm x 505 mm As such, the utilisation of the damaged cylinders have been made to the extent of 50%, i.e. inter alia the salvage value of the damaged rolls would be to the extent of 50%. II. Originally the machine have been imported from Hamburg, under Project Imports at Rupee Currency rate and the invoice cost was coming to INR 2375000=00/-. After the machine was supplied, both the Germany were amalgamated and as such the understanding with the East Germany to supply the machine on rupee currency has ceased. Under the circumstances, to arrive at the assessed loss, on proforma invoice, we have applied Dotch Mark Conversion as on the date of loss and accordingly the loss is assessed. III. The air freight charged by the insured are not payable. As the original machine was ocean freighted the proportionate ocean freight have been allowed.

With these taken into consideration, the loss is assessed as under: Net adjusted loss comes to Rs. 10,90,836-00 which has been apprised of to the insured. Validity of the claim: The policy is a marine-cum-erection policy and as the suppliers/ manufacturer''s responsibility has been over ruled, entry of foreign material due to reason not known and damaging the cylinders are accidental and unforseen according to our subjective understanding of the policy". [P.P. 24-25, Vol. III]

The Complainant has invoked his right within the time limit mentioned in the Marine-cum-erection policy dt. 14.1.1991 wherein it has been clearly stated that the cover commences from the date of the first consignment or despatch from the manufacturers/supplier''s warehouse either in India or abroad and remains in force for the period as mentioned above. The said period starting from the arrival of the first consignment or despatch at the site of erection or completion of erection including test period not exceeding four weeks whichever is earlier. In the present case marine-cum-insurance policy was obtained on 1.4.1991. On 19.4.1991, the machine was despatched from Calcutta to New Delhi. On 28.4.1991, the machine reached the destination. On 15.7.1991 the installation work was started by the Engineers of Respondent No.3. On 17.8.1991, installation work was completed.

5. THE machine was put on trial run on 19.8.1991. At the time of trial run of the machine the very first sheet got stuck in the machine giving rise to the cause of action in the present case. The Surveyor was appointed on 21.8.1991. As per the insurance policy, the coverage commences from the arrival of the first consignment or despatch at the site of origin or completion of erection including test period not exceeding four weeks whichever is earlier.

6. AS stated above, installation work was completed on 17.8.1991 and damage

was found on 19.8.1991 and the information was sent to the Insurance Company on 20th August, 1991. Therefore, the information sent to the Insurance Company was within the period contemplated by the policy. Rights of the Complainant: The Complainant has produced on record bill dated 1.4.1992 issued by Opposite Party No.3, M/s.Indo Polygraph Machinery Pvt. Ltd. He has also produced a certificate dated 24.6.1994 issued by the Central Bank to the following effect: "No.ADV/94-95/ Date 24.6.94 To Whomsoever It May Concern This is to certify that the sum of Rs.53,90,G00=00 (Rupees Fifty three lacs ninety thousand only) were released to the credit of M/s. Indo Polygraph Machinery Pvt. Ltd. (CD. Account No. 8362) on behalf of M/s. Ajanta Offset and Packagings Ltd. towards purchase of offset printing machine, namely, Brand New German Make High Speed Sheet Fed Two Colour Offset Printing Machine Planeta Super Variant Model P-24-8SWIon 11.5.1992. For Central Bank of India Sd/xxx Chief Officer, 70, Janpath. New Delhi".

It is to be stated that as per letter dated 13.4.1992 M/s. Indo Polygraph Ltd. had confirmed that against the supply of machine, they have received Rs.5,91,714.14 as advance vide Demand Draft dated 23.2.1991. The bill of lading is dated 28th December, 1990. Undisputedly, bill of entry regarding arrival of imported machinery at Calcutta Port is dated 26.2.1991. The machine was despatched from Calcutta on 19.4.1991 and installation commenced in the premises of the Complainant on 15.7.1991 and completed on 17.8.1991.

7. FROM the aforesaid facts, it is apparent that the machinery was imported by M/s. Indo Polygraph Machines Pvt. Ltd., New Delhi, and the same was sold to the Complainant as per the invoice dated 1.4.1992 before despatch from Calcutta. For payment of full consideration, there is a bank certificate to the effect that Rs.53,91,000/- was released to the credit of M/s. Indo Polygraph Machines Pvt. Ltd., on behalf of M/s. Ajanta Offset and Packaging Ltd. towards purchase of offset printing machine.

8. THERE is no reason to doubt the certificate issued by the Central Bank and the payment made by the Complainant by Demand Draft. There is no reason to doubt the confirmation letter dated 13.4.1992 issued by M/s. Indo Polygraph Pvt. Ltd. stating that they have received an advance of Rs.5,91,714/- for the sale consideration. From this, it is apparent that the Opposite Party No.3 had received the entire purchase price in May, 1991. It got the machine installed in its premises on 15.7.1991. As per the insurance policy, the coverage begins from "despatch from the manufacturer to the supplier''s warehouse" and continues "till completion of the erection including test period not exceeding four weeks whichever is earlier". As per the bill of entry, the machinery was brought to Calcutta Port on 26.2.1991 and was despatched from Calcutta on 19.4.1991 and installation commenced on 15.7.1991 at the premises of the Complainant which was completed on 17.8.1991 and the trial run was on 19.8.1991.

9. FROM the facts stated above, it is apparent that the Complainant has purchased the machinery by making an advance payment in February, 1991,

and, thereafter, the remaining amount of Rs.53 lakhs and odd in May, 1991. Under Section 8 of the Marine Insurance Act the Complainant was interested in the subject matter insured at the time less, though he was not interested when the policy was effected, i.e. on 14.1.1991. For this purpose, it would be necessary to refer Sections 7 and 8 of the Marine Insurance Act, which read as under: "7. Insurable interest defined - (1) Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure. (2) In particular a person is interested in ''a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof. 8.When interest must attach. (1) The assured must be interested in the subject matter insured at the time of the loss though he need not be interested when the insurance is effected; Provided that, where the subject matter is insured "lost or not lost". The assured may recover although he may not have acquired his interest until after the loss, unless at the time of effecting the contract of insurance the assured was aware of the loss, and the insurer was not. (2) Where the assured has no interest at the time of the loss, he cannot acquire interest by any act or election after he is aware of the loss".

10. ONCE we accept that the Complainant has paid the ful price in May, 1991, then it would be apparent from the aforesaid sections that the Complainant was having insurable interest in the machinery. It is nobody''s case that the Complainant had acquired interest by any act or erection after he became aware of the loss. As per the phraseology of sub-section (2) of Section 7, the Complainant stands in legal and equitable relation to insured property and risk therein. He was to benefit by the safety of the insurable property and is prejudiced by damage thereto. It is to be further stated that the insurance policy itself provides that "the Company promises and agrees with the insured their Executors, Administrators and Assignees to make good all such losses and damage hereinafter expressed as may happen to the subject matter of this Policy and may attach to the Company in respect of the sum stated in the Schedule hereby insured which insurance is hereby declared to be upon the good described in the Schedule in the ship or vessel called as hereinafter specified lost or not lost at and from as described in the schedule". Therefore, the assignee is entitled to make good loss or damage, if covered by the insurance policy. This is also in conformity with Sections 52 and 53 of the Marine Insurance Act which provide ''when and how policy is assignable'' and ''which interest is not assignable''. Sections 52 and 53 read as under: 1986-05 Ajanta Offset and Packaging vs. National Insurance Co. 9327(NS) "52. When and how policy is assignable - (1) A marine policy may be transferred by assignment unless it contains terms expressly prohibiting assignment. It may be assigned either before or after loss. (2) Where a marine policy has been assigned so as to pass the beneficial interest in such policy, the assignee of the policy is entitled to sue thereon in his own

name; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the suit had been brought in the name of the person by or on behalf of whom the policy was effected. (3) A marine policy may be assigned by endorsement thereon in other customary manner. 53. Assured who has no interest cannot assign. - Whether the assured has parted with or lost his interest in the subject-matter insured, and has not, before or at the time of so doing expressly or impliedly agreed to assign the policy, and subsequent assignment of the policy is inoperative : Provided that nothing in this section affects the assignment of a policy after loss."

11. AS stated above, the Complainant was having beneficial interest in the policy because after import of the goods and before its installation he had purchased the said machinery by paying the entire amount. Therefore, under sub-section (2) of Section 52, Complainant being assignee, was entitled to sue in its name. Further, under Section 52(3) Marine Insurance Policy can be assigned by mere endorsement. Proviso to Section 53 also stated that the policy could be assigned even after loss. The right, title and interest of the insured in the imported machinery was transferred to the Complainant in May, 1991. Therefore, what was assigned was not only right to sue but ownership in the machinery and beneficial interest in the policy. This aspect and similar question was discussed by the Apex Court in New India Assurance Co. Ltd. vs. G.N.Sainani, (1997) 6 SCC 383, wherein it is observed as under: "The interest of the insured must exist in the case of marine insurance at the time of loss and the assured must have some relation to or concern in, the subject of the insurance. The service which the insurer offers is with reference to the goods and the insurable interest has to be in respect of the goods. To put it in other words, insurable interest in property would be such interest as shall make the loss of the property to cause pecuniary damage to the assured. To come under the scope of the word "consumer" as defined in the Act it should be possible for the assured to assign his insurable interest in the goods subject-matter of the policy for the assignee as a consumer to enjoy the benefit of the policy with reference to the goods which are insured. What has been assigned in the present case is the amount of loss suffered by the assured on account of shortlanding of the goods, meaning thereby that right to recover the loss is assigned to the assignee and not that any service is to be rendered under the policy by the insurer with reference to the goods. We ate looking at the whole thing from the point of the consumer under the Act with reference to certain relevant provisions of the Marine Insurance Act. Unless the assignee has some insurable interest in the property subject-matter of the insurance uptil the time the policy terminates he cannot be beneficiary of any service required to be rendered by the insurer under the policy. .... If the policy had been assigned during the course of its validity and before the goods were appropriated after their arrival at the port of destination, it could perhaps be said that the assignee had beneficial interest therein but not otherwise."

12. HOWEVER , learned counsel for the Insurance Company relied upon the warranty clause, which, inter alia, provides that ''warranted that this policy is not

assignable''. In our view this part is inconsistent with the provisions of Sections 52 and 53 as well as the main part of contract of insurance coverage as stated in the earlier paragraph, which specifically provides that the Insurance Company promises and agrees with the insured and its assignee to make good all such loss and damage. Whether complaint is maintainable: (a) The contention of the Insurance Company that the complaint is not maintainable as the Complainant is not a consumer, is without any substance. The word ''consumer'' as defined in Section 2(l)(d)(ii) of the Consumer Protection Act, 1986, means, any person who hires any services for consideration and includes beneficiary of such services other than the person who hires the service for consideration paid or promised. As stated above, the machine was purchased by paying full consideration in May, 1991, before its installation started in the premises of the Complainant. (b) The second part of the contention of the Insurance Company that as the Complainant has purchased the machine for commercial purpose the complaint is not maintainable, is without any substance. Neither the Opposite Party No.3 nor the Complainant, beneficiary/assignee, has taken the policy for any commercial purpose. (c) The Insurance Company contended that the damage might have occurred between 21/28-12-1990 and 14.1.1990, and, therefore, the Insurance Company is not liable. This contention is also baseless because on 14.1.1991 at the time of issuance of the policy it was known to the Insurance Company that the machinery was shipped as per Bill of Lading No.0011 dated 28.12.1990. This is as mentioned in the policy itself. Further for the period for insurance coverage, it is provided that it is from the date of 1st consignment or dispatch from the manufacturers/suppliers wherehouse and till its installation and trial period not exceeding four weeks. Therefore, it hardly lies in the mouth of the Insurance Company to contend that the Insurance Company is not liable on the assumption that damage might have occurred between 21.12.1990 and 14.1.1991. (d) It is also contended by the Insurance Company that the claim is not maintainable, because despite the defect, the Complainant is using the machine. Admittedly, the machine is a bicolour machine and because of the damage to the cylinders the same could be used as a single colour machine. The claim filed is for the damage caused to the machine. If the entire machine was not used, by this time, the Complainant would have suffered loss to a large extent, as he had purchased the machine by paying more than Rs.59 lakhs. Therefore, to minimise the loss, if the Complainant is using the machine it cannot be said that for the damage caused to the machine the Complainant is not entitled to file the claim. In the survey reports the use of the machine by the Complainant is stated. (e) It is also contended that as the machine is under guarantee for a period of one year and as no claim is filed against the manufacturer by the Opposite Party No.3, who is the sole-selling agent in India of the manufacturer, the claim requires to be rejected. In our view, this submission is also without any substance because for the insurance coverage the Insurance Company is liable to pay for the damage caused to the machine. The manufacturer may or may not be liable. The liability of the Insurance Company is as per the contract. (f) For the quantum of compensation, at present there is no evidence except survey report dated

5.3.1994 by M/s. Kaypsens. Relevant part of the said report is quoted above. The Surveyor has quantified the loss at Rs. 10,90,836/-. Further, the Surveyors, M/s.J.B. Boda Surveyors Pvt. Ltd., in their report, anticipated the loss to be in the range of Rs.10 to 12 lakhs. Hence, in our view, on the basis of these survey reports, the Complainant is entitled to recover the said sum of Rs. 10,90,836/- as assessed by the Surveyors, M/s. Kaypsens.

In the result, the Insurance Company is directed to pay the sum of Rs 10,90,836/- with interest at the rate of 9% p.a. from 1st March, 1992, i.e. after lapse of six months from the date of the information received by the Insurance Company. The complaint stands disposed of accordingly. There shall be no order as to costs.