(2011) 09 NCDRC CK 0019

In the National Consumer Disputes Redressal Commission

Are Bee Star Maritime Agencies Pvt Ltd APPELLANT

Vs

Ramco International RESPONDENT

Date of Decision : 06-09-2011

Acts Referred:

Citation : 2011 4 CPJ 320 : 2011 4 CPR 227

Hon'ble Judges : V.R.Kingaonkar , Vinay Kumar J.

Final Decision : Appeals dismissed.

Judgement

1. THESE three appeals emanate from the same order of the Consumer Disputes Redressal Commission, UT Chandigarh in CC No. 1 of 2002. FA 714 of 2006 was filed jointly by ARE BEE Star Maritime Agencies Pvt. Ltd. and by M/s. Zim Israel Navigation Co. Ltd. who were OPs -2 and 1, before the State Commission. Subsequently, both filed individual appeals, FA Nos. 29 and 30 of 2007. In the two individual appeals, OPs 1 and 2 have not only impleaded the Complainant, Ramco International and OP-3, J B Boda, Surveyors Pvt. Ltd. but even each other, as respondents. The three appeals are taken together for disposal. For the purpose of discussion, facts as emerging from FA No. 714 of 2006 are taken.

2. AS seen from the record, the Complainant had engaged the service of OP-1/ Zim Israel Navigation Co. Ltd. for export delivery of 2337 of packages of garden tools to a consignee in Sheffield, U.K. The bills of lading was issued by OP-2/Are Bee Star Maritime Agencies Pvt. Ltd. and services of OP-3/JB Boda Surveyors Pvt. Ltd. were utilized by OP-1 and OP-2 to inspect the container before the goods were loaded. In his report of 12.1.2001, OP-3 reported the condition of the container as sound. Thereafter, the goods were loaded and the bill of lading was issued on 27.1.2001.

3. WHEN the goods reached the destination, the packages were found in mutilated condition and the contents dirtied by carbon ash in the container. Resultantly, the consignee refused to accept the consignment. It is alleged by the Complainant that fresh packages had to be air lifted from India to U.K., the goods were re-packed and only, thereafter, the consignee accepted the goods.

This involved an additional expenditure Rs. 6,03,076 for which total compensation of Rs. 8,13,076 was claimed including compensation on account of mental agony.

4. PER contra, the case of the respondent was that the goods were loaded only after inspection of the container by OP-3. The goods were loaded under the supervision of M/s. Jay Ess Co, the forwarding agent of the Complainant and even the bill of lading was certified in his presence. Before loading, the container was inspected by OP-3, the Surveyor on behalf of OP-1 and OP-2. The OPs also took the plea that the goods were for export sale and therefore, it was a commercial transaction.

5. THE State Commission took note of the fact that according to the record, the container had come from Hamburg to Mumbai on 15.9.2000, loaded with Cargo of black carbon and left for U.K. with garden tools on 20.2.2001. Therefore, the Commission came to the conclusion that the certificate given by the Surveyor was not proper. However, the Commission accepted the plea of the Surveyor/ OP-3 that his services were engaged by OP-1 and OP-2 and, therefore, there was no privity of contract between him and the Complainant. Therefore, OP-3 was not held liable and compensation of Rs. 4,89,176 was awarded jointly and severely against OPs 1, 2.

6. IN arriving at the above decision, the most significant evidence before the State Commission was the telex message of 5.3.2001 (Exhibit C-16) between the head office of OP-1 at Hong Kong and its branch office at Dubai, which shows that the container in question had come from Hamburg to Mumbai on 15.9.2000 loaded with full cargo of black carbon. The same container had carried the consignment in question (garden tools) to U.K. OP-3/ JB Boda Surveyors Pvt. Ltd. have issued a certificate to the effect that the container [No. ZCSU-243342-1 (40) Dv] was loaded at Ludhiana on 12.1.2001, in the presence of their representative. This is clear evidence to show that the same container had been used to transport black carbon shortly before the consignment of garden tools was transported in it.

7. WE have heard the Counsel of the rival parties and perused the records of the three appeals. The first appeal, jointly by OPs 1 and 2, was filed with delay of 37 days. The explanation for the same has been accepted and delay condoned. In this appeal, this Commission had observed on 5.12.2006, that there was an apparent conflict of interest between the two appellants. One claimed to be an agent and the other the transporter. They were, therefore, advised to seek appropriate instructions. In this background, it is considered just and proper to condone the delay in the two individual appeals that were subsequently filed.

8. THE foremost plea on behalf of the appellants is that the complainant is not a consumer as it was a commercial transaction. The Complainant has termed it a frivolous plea. The State Commission has held that it is not a case of sale or purchase of goods or providing service for commercial transaction but simple

case of shipping of goods on charging fare.

9. IN this context, the provision, which would govern the relationship between the complainant and the OPs in this case, is contained in Section 2(1)(d)(ii) of the Consumer Protection Act 1986. This provision was introduced through an amendment of 1993 to the Consumer Protection Act. By another amendment of 2002 to the Act, which came into effect on 15.3.2003, the following was added to Section 2(1)(d)(ii)- "but does not include a person who avails of such services for any commercial purpose."

10. THEREFORE, the question whether a service was hired for a commercial purpose or not, is relevant only to the cases arising after 15.3.2003. The present consumer dispute arose in 2001 and, therefore the question whether the transaction was a commercial one or not, has no relevance to this case. The plea is, therefore, rejected.

11. ANOTHER plea of the complainant is that agents/representatives of the complainant/respondent were present when the container was loaded. This is apparently, raised with reference to the conclusion of the State Commission that the certificate of 12.1.2001 about preloading inspection of the container was not proper and was contrary to the facts. The argument of the appellants is apparently, based on the communication of 8.6.2001, sent to OP-2, which mentions the presence of "our representatives, CHA''s representative and PSWC''s representative in clean and sound". The Complainant has raised this point in his affidavit evidence and pointed out that there is no reference to presence of any representative of the complainant in this. We may note that the certificate of 12.1.2001 issued by OP-3, on the day of loading, as Stuffing Container Survey Report, makes no mention of presence of others. Therefore, this communication, coming almost five months after the date of actual loading of the container, cannot be relied upon and needs to be rejected as an appeals afterthought.

12. BOTH appellants themselves say in their individual appeals that- "After the container has been loaded, it is no body''s case that it was ever opened by any one on the way. It cannot be opened because the container is custom sealed."

13. TRUE, that the container could not have been opened on the way. It therefore follows that whatever has damaged the cargo, was already there in the container. The plea of the appellants that, as the goods were loaded in perfect condition, there is no chance of carbon ash in the container or damage to the goods, has no logic to it. The case of the complainant is not about damage in the process of loading but damage by black carbon present in the container. Therefore, this plea also deserves to be rejected.

14. THE appellant/Are Bee Star Maritime Agencies has also pleaded that under Section 230 of the Indian Contract Act, he is in the position of the agent who had entered into the agreement on behalf of the principal viz. M/s. Zim Israel Navigation Co. Ltd./OP-1. As OP-1 has directly been impleaded, the appellant, as

the agent of a foreign principal who is named and disclosed, cannot be sued or personally held to be liable. On the contrary, a plain reading of Section 230 will show that in a case where the contract is made by an agent for the sale or purchase of goods for a merchant residing abroad, there is a presumption of existence of a contract to the effect that the agent can personally enforce the contract or be personally bound to it. This provision is meant to deal with contracts for sale or purchase of goods. The present case is one of hiring of services. However, applying the provision in Section 230 to the present case, it is clear that OP-2 has rightly been impleaded as OP-1, as per the averment of appellant/OP-2 himself, is a foreign principal.

15. FOR the reasons discussed above, we find no substance in these appeals. They are therefore, dismissed for want of merit. The order of the State Commission in CC No. 1 of 2002 is confirmed. While admitting the first of the three appeal (First Appeal No. 714 of 2006), this commission has directed deposit of the 50% of the awarded amount by OPs 1 and 2. Subsequently on 7.3.2007, Registrar of the Commission was directed to release the same to the Respondent/Complainant subject to furnishing of appropriate security. The security so obtained from the Complainant is, therefore, ordered to be released to him. The balance of the amount awarded by the Consumer Disputes Redressal Commission, UTChandigarh, shall be paid to the Complainant by OPs 1 and 2 jointly, within a period of two months. Failing this, the amount shall carry interest at 10% for the period of delay. There are no orders as to costs. Appeals dismissed.

