

(1993) 04 NCDRC CK 0134

In the National Consumer Disputes Redressal Commission

ASSOCIATED GASES (ASSAM) PVT. LTD.

APPELLANT

Vs

GREAVES COTTON And CO. LTD.

RESPONDENT

Date of Decision : 03-04-1993

Acts Referred:

Citation : 1993 2 CPR 236 : 1993 3 CPJ 1536

Hon'ble Judges : S.N.Phukan , A.C.Bora J.

Final Decision : Petition partly allowed

Judgement

1. THIS petition under Section 17 of the Consumer Protection Act, 1986, for short the Act, has been filed by a company registered under the Companies Act, 1956 and is carrying on business of manufacture of electrodes at its factory at Rani within the District of Kamrup, Assam. The company has taken a loan from the Assam Financial Corporation under hypothecation of its machineries. The Opp. Party No. 1 is also a company dealing in manufacturing, marketing and systems engineering with registered office at Bombay and a branch office at Guwahati. It has been stated that the Opp. Party No. 2 is the North Eastern Region specialising in erection, commissioning and maintenance of Ruston M.W.M. Diesel/Gas engines and generating sets. Opp. Party No. 2 has its office at Guwahati. After obtaining quotation from Opp. Party No. 2 for purchase of a diesel generating set, the petitioner/company placed an order for purchase and installation of 63 KVA Ruston Diesel Generating Set for the industry of the petitioner/company. The price was fixed at Rs. 2,87,504,82 for the set and a sum of Rs. 25,000/- was agreed between the parties for installation of the generating set without materials. A sum of Rs. 80,293/- was paid as advance and the Opp. Parties agreed to despatch the generating set within 10 days. It has been alleged by the petitioner/ company that for the transaction Opp. Party No. 2 gave an undertaking on behalf of Opp. Party No. 1. As the Diesel Generating Set was not delivered and the petitioner/company had to enter into various correspondences with the Opp. Parties. According to the petitioner/company due to non-delivery of Diesel Generating Set within time, the Company had to incur loss due to interest payable by the company to the Assam Financial Corporation

and also Indian Bank, Guwahati Branch for purchase of machines, raw materials etc. necessary for manufacture of electrodes which according to the project taken by the petitioner/company was to be manufactured. Ultimately, the petitioner/company received the Consignment note on 1.7.91 confirming despatch of the Diesel Generating Set. It may be stated that the above terms and conditions and placing of orders, with the Opp. Party No. 2 by the petitioner/company was on 11.6.91 and Opp. Party No. 1 agreed to despatch the diesel generating set within 10 days from that date. After receipt of the consignment note, the amount of Rs. 2,87,504.82 was paid by the petitioner/company as full and final payment of the diesel generating set after obtaining financial assistance from the Assam Financial Corporation. Eventually after lapse of about 1 year from the date of placing the order the diesel generating set was commissioned by the technician employed by the Opp. Party No. 2 on 22.1.92. However, immediately after commissioning the diesel generating set the Alternator failed and got burnt down and as a result the Diesel Generating Set failed to work. THIS fact was brought immediately to the notice of the Opp. Parties by letter dated 23.1.92 of the petitioner/company demanding that the Alternator may be replaced within 7 days. The parties were also informed that production in the factory was paralysed due to non-functioning of the diesel generating set thereby the petitioner/company incurred heavy loss directly attributable to delay in delivery of the diesel generating set and non-functioning of the set after its installation. The petitioner/ company wanted extension of the warranty period for another six months. The copy of the letter is at Annexure-3 to the petition. The Diesel Generating Set was not put into order within 7 days after letter was issued on 1.2.92 with copies to Assam Financial Corporation, Indian Bank and the Association of Entrepreneurs of Rani Industrial Area. The Assam Financial Corporation also took up the matter with the Opp. Parties. The petitioner/company was informed by the Opp. Party No. 2 by letter dated 13.2.92 the decision of the Opp. Party No. 1 to instal an Alternator on a temporary basis to meet the emergency and the letter is annexed as Annexure-6 to the petition but it was not installed and thereby forced the petitioner/company to shut down its factory.

2. THE petitioner/company received a letter dated 18.2.92 vide Annexure-7 to the petition from M/s. Kirloskar Electric Company, Calcutta informing him that the A.C. Generator is not available anywhere and there was no plan to manufacture such generator. However, it was informed that the defective Alternator could be handed over to their authorised service centre at Guwahati for its rectification within two weeks. This fact was immediately brought to the notice of the Opp. Party No. 1 by the petitioner/ company by letter dated 18.2.91 expressing their surprise as to how could M/s. Kirloskar Electric Company send such a letter as there was no such agreement with the said company. THE Opp. Party No. 1 was also informed that order for Diesel Generating Set was placed with their authorised dealer Opp. Party No. 2 and payments were also made accordingly and that the diesel generating set was supplied by the Opp. Party No.

1 and as such, responsibilities and liabilities for the defective machine are cast on the Opp. Parties, as M/s. Kirloskar Electric Company was a stranger to any dispute between the parties. On the same day, the Opp. Party No. 1 informed the petitioner/company that the Kirloskar Electric Company had assured that the Alternator would be returned after due rectification within seven days vide letter at Annexure-A. Though the Alternator was taken it was not returned as promised due to which the petitioner/company suffered heavy loss break up of which has been given in para 17 of the petition. An interim prayer was also made to replace the defective Alternator or the Diesel Generating Set with a new one. In the written objection filed on behalf of the Opp. Party, the plea of absence of cause of action has been taken. According to Opp. Party No. 1, there is no privity of contract as the Diesel Generating Set was sold by Opp. Party No. 1 to Opp. Party No. 2 and in turn it was sold to the petitioner/company by the Opp. Party No. 1. A plea has also been taken for non-joinder of M/s. Kirloskar Electric Company being the supplier and manufacturer of Alternator. It has been denied that Opp. Party No. 2 is the authorised dealer of Opp. Party No. 1 for all goods and services as set out in the petition including Ruston Diesel Generating Set. According to the Opp. Party No. 1, Opp. Party No. 2 is the authorised dealer of only goods and services confined to the sale of spare parts of engine of Ruston and M.W.M and for providing after sales service and only for the Brahmaputra Valley including Guwahati. It has been averred that Opp. Party No. 2 did not submit any quotation to the petitioner/ company on behalf of Opp. Party No. 1 and there is no relationship of principal and agent between the Opp. Party No. 1 and Opp. Party No. 2. Regarding the price of the Diesel Generating Set in question, according to Opp. Party No. 2, the set was purchased by the Opp. Party No. 2 by paying less amount but it was sold to the complainant at a higher price of Rs. 2,87,504.82. In this connection the copy of the letter issued by the Opp. Party No. 2 has been annexed as Annexure-I to the written objection. It has been admitted that on receipt of the order for sale of the set from Opp. Party No. 2, the Opp. Party No. 1 agreed to deliver the generating set vide letter dated 3.7.91 (Annexure-II). According to the Opp. Party No. 1 though it was not a part of the contract between Opp. Party Nos. 1 and 2, at the request of Opp. Party No. 2 by letter dated 12.7.92 the Opp. Party No. 1 despatched the set to Rani Industrial Area through recognised transporter but due to flood prevailing at that time the transporter could not deliver the said set on 27.1.91 and for the delay a sum of Rs. 75,000/- was paid by Opp. Party No. 1 to Opp. Party No. 2 in view of the agreement dated 26.9.91. Regarding installation of Diesel Generating Set, it has been stated that the set was installed on 7.10.91 but as the workload was not sufficient the set could not be tested and therefore could not be commissioned and therefore the Opp. Party No. 1 is not liable for any loss. According to this Opp. Party, the Alternator of the set got burnt down not due to any manufacturing defect or deficiency but due to overload or due to some short circuit in the main plant machinery for which the Opp. Party No. 1 is not responsible. The Opp. Party No. 1 has put the blame on the petitioner/company by stating that due to negligence of petitioner/company, as it could not provide

any brake up fuse to protect against any overload and as the plant machineries were not tested earlier for any short circuit, the Alternator got burnt down. According to Opp. Party No. 1 though the Opp. Party No. 2 informed the petitioner/company the damage Alternator was not delivered to Opp. Party No. 1 for necessary rectification due to fault of the petitioner/company till 24.2.92. The defect was rectified and it was handed over to the petitioner/company on 4.3.92. A statement has been made that the Diesel Generating Set was only alternative source of power as the main pwr is supplied by the A.S.E.B. and in absence of the Generating Set, the petitioner/company could have manufactured their products even without any alternator. It has also been stated that though the main plant and machineries were installed by 22.1.92 the petitioner/ company could not start production which could have been done even without Generating Set. The vicarious relationship between the petitioner/company and M/s. Kirloskar Engineering Company has been pleaded. It has been denied that there was any intentional delay on the part of the Opp. Party No. 1.

In the written objection filed by the Opp. Party No. 2, a plea has been taken that Opp. Party No. 2 is neither a manufacturer nor a trader within the meaning of Section 2 of the Act, and as such, the complaint petition is not maintainable. Regarding the Diesel Generating Set, it has been pleaded that it was sold through the Opp. Party No. 1 to the petitioner/company directly under valid warranty issued by Opp. Party No. 1 and therefore the Opp. Party No. 2 has no liability towards the petitioner/company. The Opp. Party No. 2 has also supported the statement of Opp. Party No. 1 regarding authorised dealership in respect of the present goods in question. The allegation of delay by the petitioner/ company has been denied and according to Opp. Party No. 2 despatch of the set was not done as per agreement as the petitioner/company requested not to do so for want of adequate finance and immediately on receipt of the clearance from the petitioner/ company, the set was despatch by Opp. Party No. 1 by road directly through transporter. The Diesel Generating Set reached its destination and the Opp. Party No. 2 deputed technical person for installation immediately and the diesel generating set was installed to the satisfaction of the complainant. According to Opp. Party No. 2, the petitioner/ company requested the Opp. Party No. 2 to delay commissioning of the set as sufficient load was not ready and also undertook to inform as soon as it is ready for commissioning which was done on 22.1.92 and on that date the Alternator got burnt. As the set was covered by valid warranty issued by Opp. Party No. 1, the Opp. Party No. 2 immediately informed the Opp. Party No. 1 by telex, telegram, letter etc. requesting to urgently attend the matter. According to Opp. Party No. 2 in view of the above warranty it was a matter between the petitioner/company and Opp. Party No. 1 to sort out the matter. But inspite of this fact Opp. Party No. 2 made all efforts for setting the set right. Opp. Party No. 2 also paid Rs. 75,000/- in two instalments due to delay in delivery of the Diesel Generating Set by the carrier. According to the Opp. Party No. 2 replacement and repair of the damaged Alternator is a matter between the petitioner/company and Opp. Party No. 1.

However, the defect of the alternator was rectified and installed successfully in presence of the petitioner/company at the factory and is still working successfully since 10.3.92. Regarding the Alternator to be supplied as a temporary measure, it has been stated that this offer was refused by the petitioner/company. Opp. Party No. 2 has stated that all the actions were bona fide and attended with due diligence, and as such, there is no liability.

3. IT may be stated that drawing our attention to the prayer portion of the petition, it was urged that the petition is not maintainable as the amount claimed by the petitioner/company was more than Rs. 10,00,000/-. In Clause "C of the prayer portion, the petitioner has claimed price of the Diesel Generating Set with interest and production losses calculated at Rs. 9,62,610.30. The petition was taken up for preliminary hearing on 2.5.92 and by order on the same day, the petitioner was allowed to amend the prayer as the contention of the petitioner was regarding replacement of the Alternator. In the said order it was also noted that after about two months of the defects in the Alternator it was rectified and now it is functioning. We may state here that after the petition was filed before this Commission the Opp. Parties took action and got the Alternator rectified. We have stated in detail the contentions of the parties only for the purpose of appreciating the disputes in the present case. From the facts stated above it is clear that though the Opp. Party No. 2 gave the quotation for supply of the generating set, it was done on behalf of the Opp. Party No. 1. That apart, the Opp. Party No. 1 despatched the generating set directly to the petitioner/company by road transport.

4. IN this case both the parties examined one witness each and documents were proved. Ext. "D" is the certificate issued by No. 1 certifying that Opp. Party No. 2 was their authorised dealer for sales of Diesel Generating Set engines and spare-parts for Ruston and MW Mproducts in North Eastern Region and further authorised to service the above products. Ext. "E" is the consignment note and Ext. "X" is the guarantee of the Opp. Party No. 1. Ext. "F" is the agreement entered into amongst the three parties, namely, the petitioner Opp. Party Nos. 1 and 2. This agreement was duly signed by all the parties and it was agreed that a sum of Rs. 75,000/- will be paid for delay in delivery of the D.G. Set. These documents would clearly show that at the relevant time the Opp. Party No. 2 was the authorised agent for supply of DG Set and its installation for Opp. Party No. 1 and the petitioner, Opp. Parties Nos. 1 and 2 were parties to the agreement for supply of the DG Set to the petitioner-company. Therefore, the plea taken that there was no privity of contract between the parties is not tenable. It has been urged that M/s. Kirloskar Engineering is also a necessary party. We find that M/s. Kirloskar Engineering came to the picture only after the Alternator got burnt. The entire DG Set was assembled by Opp. Party No. 1 and in doing so the Alternator manufactured by Kirloskar was also used. Merely because the Alternator manufactured by this company was also used for assembly of the generating set we are unable to accept the contention that there was any privity of contract between the petitioner-company and M/s. Kirloskar Engineering for the present

dispute. As the Alternator was manufactured by M/s. Kirloskar Engineering, definitely the Opp. Party No. 1 had to approach them to set the defective generator in order. We, therefore, reject the contention that M/s. Kirloskar Engineering is a necessary party in the present dispute.

5. FROM the facts stated in detail by the parties, which we have quoted, we find that the limited dispute in the present case is that the Alternator got burnt on 22.1.92. Both the Opp. Parties were informed, it was taken back for repairs on 24.2.92 and re-delivered and fixed in the generating set on 4.3.92 after which it started functioning from 10.3.92. This fact has also come out from the evidence of witness No. 1 for the petitioner-company. This witness Shri Rathin Borkotaky is one of the Directors of the petitioner-company. Thus there was a delay in repairing of the alternator for about one month ten days.

6. FROM the letter dated 13.2.92 issued by the Opp. Party No. 2 to the petitioner-company, we find that the petitioner was informed that Opp. Party No. 1 agreed to give a floating Alternator on temporary basis to meet the emergency. FROM the letter dated 18.2.92 from Kirloskar Engineering to the petitioner-company, it appears to us that the said company had detail discussion with Opp. Party No. 1 regarding the replacement of the generator and by this letter it was informed that this particular rating was not available anywhere. Therefore, M/s. Kirloskar Engineering Company asked the petitioner-company to handover the generator to their authorised service centre, namely, M/s. Rewinder Techno Electric, Dispur, Guwahati so that it could be rectified. It was also agreed to extend the warranty clause for the breakdown period. There is no dispute that after the set was handed over as per request of Kirloskar Engineering it was repaired, installed and from 10.3.92 it has been functioning properly. FROM this fact we find that though the Opp. Parties rectified the defect but it could have been done promptly and therefore we have no hesitation to hold that there was negligence on the part of the Opp. Parties there by deficiency in service. We may state here that the Opp. Parties have taken the plea that the Alternator got burnt due to overloading and/or short circuit in the machinery. This is purely a technical matter and it was within the knowledge of the Opp. Parties and they should have produced the relevant data on this point. As they have produced nothing, we are unable to accept the contention.

It has also been urged that the petitioner-company could not arrange load, and as such, there was delay due to fault of the petitioner-company. This point need not detain us as we are not concerned regarding the period prior to trial run conducted for the generating set after installation by Opp. Party No. 1 on 22.9.91. It may be stated that due to delay in delivery Opp. Parties have already paid a sum of Rs. 75,000/- as compensation.

7. AS there was deficiency in service for the short period, in our opinion, the petitioner company is entitled to get some compensation. The petitioner-company has claimed compensation for production loss per day as well as interest charged. The generating set was installed as a captive unit for supply of

power but the main source of power being A.S.E.B. In other words, if there is non-supply of electricity for a particular period, the petitioner-company has to use the generating set. No evidence has been produced regarding non-supply of electricity for the period in question for which the production was said to have stopped. Therefore, the petitioner-company is not entitled to get compensation for daily production loss. The petitioner/company also claimed other compensation such as payment of interest to Financial Corporation, Banks etc. In our opinion, the petitioner company is not entitled to such claims as there are remote claims.

8. FOR the reasons stated above, we hold that for mental sufferings and negligence in service the petitioner-company is entitled to get a nominal damage, which we assess at Rs. 20,000/- (Rupees twenty thousand) only and we make both the Opp. Parties jointly and severally liable for this amount. A plea has been taken that as this is a commercial transaction, the petitioner-company is not entitled to any damage. In reply, it has been urged that though finished products of the petitioner-company is meant for commercial purpose but the generating set was not purchased to be used for commercial purpose. In our opinion, even if the Diesel Generating Set was used for producing goods for commercial purpose, the transaction between the petitioner-company and the Opp. Parties cannot be deemed to be commercial. We have already stated that there was a deficiency in service of the Opp. Parties. Therefore, the above amount awarded by us has to be paid by the Opp. Parties. Our attention has been drawn to a decision of the Maharashtra State Consumers' Redressal Commission, II (1991) CPJ 619. In that case the Fuel pump attached to a tempo had manufacturing defects and the Commission found deficiency in service in relation to said Fuel pump. According to the Commission, as the complainant in that case did not purchase the Fuel pump either for re-sale or for any commercial purpose, it was immaterial whether the tempo was used for commercial purpose. As there was deficiency in service, the Commission held that the District Forum wrongly rejected the claim of the complainant in that case. We are in respectful agreement with the above ratio; it is also applicable to the case in hand.

9. OUR attention has also been drawn to a decision of Karnataka Consumer Disputes Redressal Commission, Bangalore reported in I (1991) CPJ 450 regarding electricity. That decision is not applicable to the present dispute as the fact of that case is slightly different.

10. FOR the reasons stated above we partly allow the petition by directing the Opp. Parties to pay Rs. 20,000/- (Rupees twenty thousand) to the petitioner-company within a period of four months failing which the amount shall bear interest @ 12% per annum. Parties to bear their own costs. Petition partly allowed.