(2015) 03 NCDRC CK 0139

In the National Consumer Disputes Redressal Commission

Belgique Fashions APPELLANT

Vs

INDIAN OVERSEAS BANK RESPONDENT

Date of Decision : 16-03-2015

Acts Referred:

Citation : 2015 3 CPJ 207

Hon'ble Judges : V.K.JAIN , B.C.Gupta J.

Advocate : V.PRAKASH , V.BALAJI , Khushboo , C.KANNAN , SNIGDHA SHARMA , KUNAL TANDON

Judgement

1. IN January 2001, the complainant exported garments to an Italian buyer in Milano. The documents pertaining to the aforesaid export were negotiated through the opposite party Indian Overseas Bank (hereinafter referred to as IOB), and were to be released to the overseas buyer against payment within 120 days from the date of the bill of lading. The documents were transmitted by the opposite party -IOB to Bank Credito Italiano, for collecting payment from the overseas buyer. According to the complainant he had given 10% discount to the buyer in case the bills were paid within 120 days from the date of delivery of documents but he did not make payment of three bills on due dates and, therefore, he cancelled the said discount. As regards one bill it is claimed that though no payment was made by the buyer, the goods were got cleared by him meaning thereby that the bank in Italy had handed over the documents to the buyer without receiving the payment. This is also the case of the complainant that though vide letter dated 07 -03 -2001 they had requested IOB to instruct the drawee bank to release the documents against their guarantee for payment by 120 days from the date of bill of lading and allow 10% discount, even the said guarantee was not collected by IOB. The case of the complainant thus is that there was negligence on the part of the IOB in carrying out the instructions given to it from time to time. The complainant claims that full amount of one bill is due to it from the foreign buyer whereas 10% of the balance amount is due against the remaining three bills. Alleging deficiency on the part of the IOB in rendering services to it, the complainant is before this Commission seeking payment of

Rs.3,74,64,930/ - along with interest, besides loss of profit amounting to Rs.2,62,00,000/ -, compensation amounting to Rs.50,00,000/ - and cost of litigation amounting to Rs.1,00,000/ -.

2. THE complaint was filed on 30 -10 -2006. Vide order dated 05 -12 -2006 this Commission summarily dismissed the complaint on the ground that it was barred by limitation. Being aggrieved from the order passed by this Commission the complainant approached the Hon''ble Supreme Court by way of an appeal. The Hon''ble Supreme Court, however, was of the view that this Commission was not justified in summarily dismissing the complaint without even taking note of the fact that the complainant had also filed a petition seeking condonation of delay. Accordingly, the order passed by this Commission was set aside and the matter was remanded back to this Commission. It was directed by the Hon''ble Supreme Court that this Commission shall first issue notice to the opposite party in the matter of limitation and pass appropriate order after giving opportunity of hearing to the parties on the question of limitation. If that question is decided in favour of the complainant then this Commission shall decide this matter on merit.

3. ALONG with the complaint an application under Section 24A of the Consumer Protection Act seeking condonation of delay in filing the complaint was filed by the complainant. The aforesaid application to the extent it seeks to explain the delay reads as under: "3. The complainant''s transactions with the opposite party were from the year 1992, In the year 2001, the opposite party because of their negligence and deficiency in service had caused loss to the complainant by not ensuring payment before delivery of four export documents, as the opposite party had also not carried out the instructions given by the complainant. After that the complainant had been regularly corresponding with the opposite party to make good the loss suffered by the complainant, but the opposite party were prolonging the matter and were assuring the complainant that the matter would be sorted out. The opposite party had with a malafide intention had been maintaining silence and were neither deciding the claim of the complainant nor were rejecting the claim as they knew that would create a cause of action for the complainant.

4. Unfortunately on 08.10.2004, the opposite party formally rejected the claim of the complainant. After that also the opposite party had been entertaining the request of the complainant to settle the issue amicably and were corresponding with the complainant by various letter more specifically letter dated 21.04.2005 and even 04.07.2006 stating that the issue will be resolved. The complainant had also issued notice on 27.08.2005 for which the opposite party had sent a reply dated 31.10.2005. Therefore according to the complainant as the bank had neither returned the documents nor made the payments, a continuing cause of action subsists. Therefore the complainant has filed the present Original Petition is well within time.

5. That by way of abundant cause the complainant is filing the application for Condonation of Delay for condone the delay, if any for the reasons more stated in

detail in the Original Petition itself. It is submitted that considering the continuous correspondence between the complainant and opposite party. There is no delay in filing the complaint, if at all there is any delay condoned as the complainant would be put irreparable loss and injury. The complainant submits that his because entire livelihood has been jeopardized because of the negligence and deficiency in service rendered by the opposite party. That because of the huge loss suffered by the complainant, the livelihood of an entire labour force, which was solely depended on the business of the complainant has been grossly affected."

In its reply to the complaint the opposite party has taken a preliminary objection that since the due dates of the bills in question were 29 -04 -2001 in respect of one bill and 13 -06 -2001 in respect of the remaining three bills, the complaint ought to have been filed within the prescribed period of limitation computed from the date on which the cause of action had arisen.

4. IT is an undisputed position that all the four bills in respect of which deficiency in service is attributed to IOB had become due by 13 -06 -2001. Vide letter dated 11 -07 -2001 the complainant wrote to IOB that the documents had been delivered without collecting payment which was against their clear instructions and they could not wait any further for the drawee to make payment and IOB should, therefore, it should take up the matter with the bank for collection of the payment along with interest form the maturity dates.

5. VIDE letter dated 18 -09 -2001, the complainant wrote as under to the IOB: ""Ref: 1. 095/OUBFC/432614/08.01.01 for USD 73257.64 due on 29.04.01 2. 095/ODBFC/432724/16.03.01 for USD 118364.80 due on 13.06.01 3. 095/ODBFC/432734/16.03.01 for USD 119793.60 due on 13.06.01 4. 095/ODBFC/432737/16.03.01 for USD 106132.80 due on 13.06.01

Part payment received USD 100331.52 Balance due USD 317217.32

We regret to inform you that inspite of our several reminders and requests in person we have not yet received the payment of USD 317217.32. Please inform the respective drawee banks and arrange to the get the payments without any more loss of time since we are in great difficulty to continue our business. Please note that in case the payment is still delayed, we will be forced to file a claim for the compensation of damages caused to the reputation of our company, among our clients due to the non -payment of the above amounts on the maturity dates."

6. VIDE reminder dated 28 -09 -2001 sent to IOB, the complaint requested the bank to collect US$78202.58 by 03 -10 -2011 against their bill due on 29 -04 -2001, to avoid the claim of damages. Another letter was sent on the same date regarding other bills seeking credit of US$103542.60. The aforesaid letters dated 28 -09 -2011 also included demands for interest for the period payment was not received by the complainant. Vide letter dated 13 -10 -2001 the complainant requested the bank to credit the amount in question to its account within seven

days. Several other reminders were thereafter sent to the bank seeking the payment claimed by the complainant, along with interest on the said amount.

7. ON 31.01.2003, the complainant wrote four identical letters to the I.O.B., referring to his previous letters and seeking payment of the amounts mentioned in the said letters. The aforesaid identical letters contained the following caution to the Bank: - "Kindly note that in case the amount is not credited to our account within 30 days from the date of this letter, we will be forced to take appropriate steps to recover the amount. In the event of such situation, we will claim damages caused to the reputation to our company among our clients and also the compensation for the business loss suffered due to the non receipt of this payment on time. For your information, we are writing this letter on the advice of our lawyers.

Please acknowledge this letter and confirm the remittance to our account to avoid the unpleasantness keeping in mind the longest business relationship we have with you from 1992."

8. ON 16.07.2004, the complainant sent a comprehensive letter to the Bank referring to his earlier letters and reminders and informing that tired of sending reminders and meeting the officers personally without any response they had been consulting the lawyers on legal solutions. It was further stated on their advice, they were approaching the Bank once again for necessary action.

9. SECTION 24A of the Consumer Protection Act, to the extent it is relevant provides that this Commission shall not admit a complaint unless it is filed within two years from the date on which the cause of action has arisen. The term ''cause of action'' has not been defined in the Consumer Protection Act but, it is understood to mean the bundle of facts which the petitioner/plaintiff will have to prove, in order to succeed in the action initiated by him. In the context of Consumer Protection Act, the term cause of action in a case of deficiency of service arises when the deficiency in the service rendered by the service provider occurs or comes to the knowledge of the Consumer, whichever be later.

10. AS noted earlier, all the four bills sent to I.O.B. had become due by 13.06.2001 computed from the said date, the period of limitation expired on 13.07.2003. Vide letter dated 18.09.2001, referring to all the four bills subject matter of this complaint, the complainant clearly warned the Bank that he will be forced to file a case for compensation of damages in case the payment was still delayed. If computed from 18.09.2001, the prescribed period of limitation of filing the complaint expired on 18.09.2003. The application filed with the complaint does not give any plausible explanation for the complainant not approaching this Commission on or before 13.06.2003 or even 18.09.2003. Even if the period of limitation is computed from 31.01.2003, when the complainant threatened legal action against the Bank in case the amount in question was not credited to his account within 30 days of receiving the letter, the complaint is barred by limitation and the application seeking condonation of delay does not

give any worthwhile explanation for the said delay.

11. IT was contended by the learned counsel for the complainant that the period of limitation did not commence to run before the Bank sent the letter dated 08.10.2004 denying its liability. We, however, are unable to accept the contention. In our view, the commencing of limitation can not be dependent on the admission or denial of the liability. If we accept the contention, the period of limitation for filing a complaint will become indefinite, if the liability is not denied by the opposite party. The prescribed period commences on the date when the cause of action to institute the complaint arises and that in our view happens when the deficiency rendered to the complainant comes to the notice of the complainant.

12. IT was pointed out by the learned counsel for the complainant that even vide letter dated 21.04.2005, the Bank had informed the complainant that the matter was under scrutiny of their legal department and they would advise him shortly on the matter. He submitted that if computed from the date of the aforesaid letter the complaint is within limitation. In our opinion, the aforesaid letter cannot extend the period of limitation since it does not amount to any acknowledgment of liability on the part of the Bank. Since the complainant had sent a letter dated 11.04.2005 to the bank, it was only expected of the Bank to acknowledge the said letter and examine it on its merit. But in the absence of an acknowledgment of liability that letter does not extend the period of limitation.

13. THE issue involved in this complaint came up for consideration of the Hon''ble Supreme Court in State Bank of India vs. B. S. Agriculture Industries Ltd., 2009 5 SCC 121. In the aforesaid case, the complainant averred that it had sent seven bills to State Bank of India for collection of payment instructing it to return the bills and the goods receipt if the drawee did not pay the bill by 07.06.1994, but despite repeated letters and the legal notice, the Bank had neither sent the money nor returned the bills or the goods receipts. The District Forum, the State Commission as well as this Commission having ruled in favour of the complainant, the Bank approached the Hon''ble Supreme Court by way of an appeal. The Hon''ble Supreme Court held that the cause of action occurred to the complainant on 07.06.1994 when it did not receive the demand draft nor received the documents and the limitation therefore began to run from that date. It was held that the complaint ought to have been filed within 2 years from 07.06.1994 and that having not been done, it was apparently time barred. The complainant sought reliance upon several letters written by it to the Bank and the reply to those letters received from the Bank and contended on the basis of the aforesaid correspondence that the complaint was within time. Rejecting the contention, it was held that the aforesaid letters and the reply written to the Bank were of no help to the complainant. The Hon''ble Apex Court was of the view that limitation could not be extended by the reply of the Bank.

14. AS held by the Hon''ble Supreme Court in B. S. Agriculture Industries Ltd. the provisions of Section 24A of the Consumer Protection Act are pre -emptry in

in nature and a Consumer Forum is required to dismiss the complaint unless sufficient cause is shown for condoning the delay in filing the complaint. The Hon''ble Apex Court was of the view that the Consumer Forum must deal with the complaint on merits only if it has been filed within two years from the date of accrual of the cause of action and if beyond the said period, sufficient cause must be shown and delay condoned for the reasons recorded in writing. The above referred decision of the Hon''ble Supreme Court squarely applies to the case before us. We, therefore, have no hesitation in holding that the period of limitation commenced on 13.06.2001 and consequently expired on 13.06.2003. Having been filed more than 2 years thereafter, the complaint is grossly barred by limitation.

15. COMING to the application for condonation of delay, we find that it contains no worthwhile explanation for the abnormal delay of more than three years in filing the complaint. In fact, the stand taken by the complainant in the aforesaid application is that there is no delay at all in filing the complaint and it is only by way of abundant caution that the said application is being filed. We fail to appreciate what prevented the complainant from approaching this Commission well within the prescribed period of limitation when it had also served the notice upon the Bank warning it of suing for damages and had also taken legal opinion in the matter. The complainant was not justified in simply keeping on writing to the Bank and waiting for the rejection of his claim. In fact, he took more than two years to approach this Commission even after the Bank had formally rejected his claim vide letter dated 08.10.2004. The complainant, in our opinion was grossly negligent in pursuing his interest since, he did not bother to approach this Commission, though the Bank never admitted its liability despite repeated letters and reminders sent to it by the complainant. We, therefore hold that the delay in filing this complaint does not stand explained. The application seeking condonation of delay is, therefore, liable to be dismissed.

16. FOR the reasons stated hereinabove, the application seeking condonation of delay is rejected and consequently, the complaint is dismissed as barred by limitation.