(2005) 12 NCDRC CK 0037

In the National Consumer Disputes Redressal Commission

BROWN AND BURK PHARMACEUTICALS PRIVATE LIMITED APPELLANT

Vs

National Insurance Co. Ltd. RESPONDENT

Date of Decision : 05-12-2005

Acts Referred:

Citation : 2006 1 CPC 281 : 2006 1 CPJ 213 : 2006 2 CLT 100

Hon'ble Judges : Chandrashekhar , J.N.Srinivasa Murthy , Rama Ananth J.

Final Decision : Complaint allowed with costs

Judgement

1. THE complainant is a manufacturer of pharmaceutical goods, i.e., drugs and medicines, for which they import raw-material such as "Sulphadoxine BP 80". Accordingly, the complainant imported the above said raw-material in 40 drums of 25 kgs each in the vessel "S.S. Pacific Arrow PER S.S. Ocean Strenth V. 30A" under the Bill of Lading vide No. 310777100 dated 31.12.1990 from M/s. APC Pharmaceuticals and Chemicals Limited, Hongkong vide their Invoice No. INV 1680/90. THE container of the cargo was destuffed fully at 20 ID(DPT) on 8th and 9th February, 1991. THE clearing agents inspected the goods under the custom''s supervision and found only 25 drums out of 40 drums. Immediately thereafter the complainant issued a notice to the opposite party (for short, "O.P.") No. 1 for untraced cargo on 18.2.1991. THE said fact was intimated to O.P. No. 2. O.P. No. 1 called upon the complainant to furnish the certificate of survey held in Hongkong while boarding the raw-materials on ship on 31.12.1990. Immediately after the receipt of the said notice, the complainant furnished the certificate. O.P. No. 2 had also issued a short landing certificate dated 15.4.1991.

2. AFTER the receipt of the short-landing certificate, the complainant made a claim for compensation of US $ 15,912.50 (which represents the value of 15 drums consisting of sulphadoxine BP 80 at the rate of US $ 41 per kg). On the said claim, O.P. No. 1 issued an endorsement stating they are not able to accept any liability on the ground that the container was delivered at the destination with the original seal intact and O.P. No. 1 directed the complainant to take up

the matter with the supplier of the complainant. This has made the complainant to file the complaint before this Commission. O.P. No. 1 has filed version justifying its action in repudiating the claim. According to O.P. No. 1, the policy is in the name of M/s. APC Pharmaceuticals and Chemicals Limited, Hongkong and, therefore, it is for the complainant to prove that it is a consignee and the consignor has endorsed the policy in its favour.

This Commission after hearing both the parties had dismissed the complaint by its order dated 15.3.1996. As against this order, the complainant preferred a First Appeal No. 151/1996 before the National Commission, New Delhi. The National Commission after considering the stand taken by the O.P. No. 1 with reference to Sections 7 and 17 of the Marine Insurance Act has held as follows: "In the course of business, it is nothing but an implied agreement with assignee to take benefits of the insurance cover. Otherwise the original policy to the complainant could not be handed over to the complainant. In case we consider the moment the documents were assigned to take delivery of the consignment insurable interest also stood transferred impliedly in favour of the appellant-complainant and naturally, the complainant-appellant is supposed to be the owner of the insured goods having insurable interest in them. In the aforesaid circumstances to say that the appellant did not have any insurable interest or that insurable interest had not been assigned, does not appear to be sustainable and, accordingly, we set aside the finding of the State Commission."

After holding so, the National Commission has remanded the matter to this Commission for reconsideration of the case in view of the statement made by the learned Counsel appearing for O.P. No. 1 (respondent in the appeal) that the respondent wanted to file certain documents. The said statement reads thus: "During the course of arguments, learned Counsel for the respondent wanted to file certain documents. We do not have the benefit of the opinion and the view which might have been taken by the State Commission on merits of the case."

3. WHILE remanding the matter, the National Commission has also directed the parties to appear before this Commission on 29.9.2005. Pursuant to the order of the National Commission, this Commission listed the case for hearing on 29.9.2005. On that day, Mr. R.D. Kolekar, Advocate, filed power for O.P. No. 1. As the appellant was absent, the matter was adjourned to 20.10.2005. On 20.10.2005, at the request of the learned Counsel for O.P. No. 1, the matter was adjourned to 28.10.2005, as a last chance. Accordingly, the matter was listed for arguments on 28.10.2005. On 28.10.2005, the arguments of both the parties were heard and the case was reserved for judgment.

4. FROM the order of the National Commission it is seen that the matter was remanded only because the respondent in the first appeal, i.e., O.P. No. 1 in this case, wanted to file certain documents. But O.P. No. 1 has not filed any documents before this Commission. Hence, the complaint is disposed of after hearing both the parties with reference to the documents produced by both the parties. The fact that the complainant has imported 40 drums of sulphadoxine BP

80 from M/s. APC Pharmaceuticals and Chemicals Limited, Hongkong, in the vessel "S.S. Pacific Arrow Per S.S. Ocean Strenth V. 30A" is not disputed. It is also not disputed that the transient risk is covered under the policy. The complainant has produced the invoice, which is marked as Exhibit ''C-1''. This invoice shows that 1000 kgs of sulphadoxine BP 80 was shipped from Hongkong to be delivered to the complainant at Mumbai Sea Port. The complainant has produced Exhibit ''C-2'', which is a packing list/weight list. From the said document it is seen that the contents transported consisted of 40 drums and each drum consisted of 20 kgs. Bill of lading produced by the complainant is marked as Exhibit ''C-4''. From this it is seen that 40 drums of sulphadoxine BP 80 were loaded into the ship for transportation. Once the Bill of Lading is issued after verification, there is no reason to suspect that the container did not contain 40 drums of sulphadoxine BP 80. But, ultimately, at the Mumbai Sea Port, what was delivered to the complainant was only 25 drums out of 40 drums. The complainant has also produced the certificate of survey conducted at Hongkong before loading the consignment into the ship, which discloses that 40 drums of sulphadoxine BP 80 were loaded into the ship for delivery to the complainant at Mumbai Sea Port. The said certificate is marked as Exhibit ''C-9''. The Mumbai Port Trust Docks issued a short-landing certificate stating that there is a shortfall of 15 drums. Copy of the said certificate is produced as Exhibit ''C-10''. Thereafter, the complainant made a claim with O.P. No. 1 for payment of compensation by producing all the above said documents. As O.P. No. 1 has not taken any steps to consider the claim within reasonable time, the complainant has issued a legal notice to O.P. No. 1. Copy of the legal notice is marked as Exhibit ''C-13''. The complainant has also produced an acknowledgement to show that the said certificate was served on O.P. No. 1. From the documents referred to above, it is clear that the complainant placed orders with M/s. APC Pharmaceuticals and Chemicals Limited, Hongkong, for import of 40 drums of sulphadoxine BP 80 and, accordingly, M/s. APC Pharmaceuticals and Chemicals had sent 40 drums of sulphadoxine BP 80 in the vessel "S.S. Pacific Arrow PER S.S. Ocean Strenth V. 30A" to be delivered to the complainant at Mumbai Sea Port. But what was delivered to the complainant at Mumbai Sea Port was only 25 drums and there was a shortfall of 15 drums. To show that there was a shortfall of 15 drums, the complainant has produced a certificate issued by the Mumbai Port Trust Dock vide Exhibit ''C-10''. But the Insurance Company repudiated the claim only on the ground that if at all if there is any shortfall, it is only the shipper liable and, therefore, the Insurance Company directed the complainant to take up the matter with the shipper concerned as per Exhibit ''R-3''. The relevant portion of the letter dated 11.4.1991 written by the Orient Ship Agency Private Limited to the complainant, which is marked as Exhibit ''R-4'', reads thus: "As advised by our Principal''s Agents in Hongkong, the consignment was loaded in full in container. However, please note that the container was accepted on "shipper''s load and count" basis and the same was discharged and delivered to the port authorities with seal intact as per discharging tally receipt issued to the vessel by the Bombay Port Trust."

5. EVEN according to O.P. No. 1, there is a shortfall of 15 drums. The case of O.P. No. 1 is that the seal of the container wherein 40 drums were kept was intact and if there is any shortfall it is only the carrier liable. The contention of O.P. No. 1 that the seal put to the container was intact is based on the report of the officer who inspected the container at Mumbai Sea Port. In order to prove the stand that the seal put to the container was intact, O.P. No. 1 relied upon the investigation said to have been conducted. But no affidavit of the person who investigated the matter was filed in this case. In the absence of either affidavit or evidence to prove the fact of investigation it is not possible to accept the defence putforth by O.P. No. 1. EVEN assuming that the seal put to the container was intact, the fact remains that there is a shortfall of 15 drums. The Insurance Company covers the transhipment risk. If that is so, the Insurance Company is liable to indemnify the loss caused during transhipment. Therefore, we hold that the Insurance Company is liable to pay the value of the 15 drums containing sulphadoxine BP 80.

6. THE case of the complainant is that the value of the 15 drums of sulphadoxine BP 80 is US $ 16,912.50 which is equivalent to Rs. 4,56,637.50 ps., which is rounded off to Rs. 4,56,638. THE complainant is also deprived of the use of the said sulphadoxine BP 80 for his business. THErefore, in our view, the complainant is entitled for interest on the said sum of Rs. 4,56,638. Since we are awarding interest on the said amount, we do not propose to award any damages. In the result, we pass the following order: (1) The complaint is allowed. (2) O.P. No. 1 is directed to pay Rs. 4,56,638 to the complainant with interest at 12% per annum from the date of the complaint till realisation. (3) O.P. No. 1 is also directed to pay Rs. 5,000 as costs of these proceedings to the complainant.

Complaint allowed with costs.