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In the National Consumer Disputes Redressal Commission

COMMERCIAL CO-OPERATIVE BANK LTD. APPELLANT

Vs

KALYAN AYURVEDI PHARMACY RESPONDENT

Date of Decision : 22-12-2003

Acts Referred:

Citation : 2005 1 CPJ 214

Hon'ble Judges : M.S.Parikh , M.K.Joshi , Leenaben P.Desai J.

Final Decision : Appeal allowed

Judgement

1. THIS appeal arises from order dated 21st April, 2003 rendered by the learned Jamnagar District Consumer Disputes Redressal Forum in Complaint Application No. 31/95 directing the opponent Bank to pay to the complainant Rs. 2,06,554.50 with interest at the rate of 9 per cent per annum from the date of complaint till payment and Rs. 7,000/- by way of compensation on the head of deficiency in service and cost of the complaint.

2. THE complainant''s case before the learned Forum was that the opponent Bank advanced loan to the complainant against hypothecation of stock of Ayurvedic medicines and used to take insurance by way of policy of insurance-A and policy of insurance-C. THE opponent Bank used to pay premium from the account of the complainant. Accordingly opponent Bank paid premium for both types of the policies for the years 1987-88 and 1988-89. However, in the year 1994-95 the opponent Bank, without intimating the complainant, did take the insurance, but without covering risk of flood/cyclone. Co-incidentally there was heavy rain in Jamnagar in the year 1994-95 resulting into collection of water in the godown of the complainant. THE complainant presented claim of insurance before the Insurance Company but as the risk of flood was left out, the complainant did not get the insurance amount. Complainant came to know about want of insurance so as to cover the risk of flood/cyclone. It was, therefore, alleged by the complainant that although it was the duty of the opponent Bank to take insurance it displayed deficiency in service in not taking cover of insurance for flood/cyclone resulting into loss of Rs. 2,15,554.50 as also compensation on the

head of mental hardship. The opponent Bank resisted the claim inter alia on the ground that it was not the duty of the opponent Bank to take insurance in respect of the property/including stock of the complainant. According to the opponent Bank it was the duty of the complainant to take insurance. Hence, there having been no deficiency on the part of the opponent Bank as no service in fact was required to be rendered the opponent Bank claimed dismissal of the complaint with cost.

Learned Forum came to the conclusion that there were some banking rules which required taking of insurance and, therefore, opponent Bank displayed deficiency in service in not availing of insurance so as to cover the risk of flood/cyclone to the hypothecated goods of the complainant. What the opponent Bank did was to take insurance under the policy of Insurance Company without cover of flood/cyclone risk. Learned Forum, therefore, passed the order which has been impugned in this appeal by the opponent Bank.

3. WE have heard the learned Advocates for the parties. WE have gone through the material placed on record before the learned Forum as well as shown to us. The bone of contention with regard to dispute involved in the complaint is whether it was obligatory upon the opponent Bank to take insurance and for that matter to have also the risk of flood/cyclone cover under the insurance. It is a primary proposition of law that such an obligation (obligation to take insurance) arises either under the contract between the parties or by virtue of any law for the time being in force. In the present case the contract between the parties was as per the agreement of hypothecation Clause-5 thereof, which would read as under: "5. The Borrowers shall at their own expense keep the hypothecated goods in good condition and keep the same insured in the names of the Bank and Borrowers against fire and also, if required by the bank, against riots and civil commotion with some Insurance Company approved by the Bank for the full market value of such goods and shall deliver to the bank the policy or policies for such insurance and the receipts for the premium paid therefor. If the Borrowers shall fail so to keep the hypothecated goods insured as aforesaid or deliver the policy or policies or the receipts for premium to the Bank, the bank shall be at liberty, but not be bound, to effect the said insurance in the Bank''s own name and to debit to the said Cash Credit Account all expenses incurred by the Bank for so doing. All moneys received under any such insurance shall be employed in or towards satisfaction of the moneys secured by the hypothecated goods."

[Emphasis supplied]. It would thus clearly appear that there was in fact no contract between the complainant and the opponent Bank throwing any obligation upon the opponent Bank to take insurance but there was a positive contract requiring the complainant to get the property insured and upon failure on the part of the complainant to do so giving option of the opponent Bank for taking appropriate insurance with a rider that even with regard to the option there was no obligation on the part of the opponent Bank to take insurance. It would, therefore, clearly appear that there was no contract of rendition of service

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of taking insurance for the hypothecated goods in respect of which the claim was preferred by the complainant against the opponent bank before the learned Forum. If that is so the complainant can neither be said to be a consumer vis-a-vis opponent Bank in respect of the service regarding taking of insurance nor can the service alleged be said to be consumer service such as has been alleged by the complainant against the opponent Bank.

4. LEARNED Advocate for the original complainant (respondent herein, however, would submit before us that there were some rules or guidelines either of the Reserve Bank of India or of the opponent Bank itself (we are not clear because brochure has not been produced) which would indicate that the opponent Bank would be obliged to take cover of insurance for the goods placed/hypothecated in its favour. The relevant clause which has been shown to us is in Gujarati and has been reproduced by the learned Forum at page 6 of the impugned order. At the outset this is not a clause or condition which operates against the opponent Bank as it is sought to be canvassed and construed. We would reproduce the same in its Gujarati form as under: "Regional language omitted" Translating the clause into English it would indicate that "in the documents of advances where hypothecation/guarantee is against the raw material or finished goods,complete insurance of the market value thereof is to be taken in the joint name of the borrower and the Bank and the policy of the insurance should be so obtained and kept along with other documents and all sorts of risks should be covered in the policy of insurance. Policy of insurance should be noted in the insurance register."

At this stage learned Advocate for the complainant would submit that this clause is mentioned in the Co-operative Bank Manual, Para 3. In the fist place this clause or the document in which this clause is contained is not shown to have statutory force. In the second place it is not a party to this clause. In the third place it does not indicate that it is entirely the liability or obligation on the part of the opponent Bank to see that the borrower takes complete insurance so as to secure the advances in order that the Bank would not run into loss on account of bad debts.

5. IN the present case if the aforesaid agreement is read along with the aforesaid clause it would clearly appear that the opponent had attended to its obligation of seeing that appropriate cover of insurance was taken. It is possible that the parties might have contemplated that the risk of flood/cyclone was quite remote requiring no insurance being taken. Be that it may, it is an admitted fact that the risk of flood/cyclone was not covered under the policy of insurance that was taken. The question, however, is whether the opponent Bank could be held responsible for absence of cover of risk of flood/cyclone. Our answer to this question obviously would be in the negative as stated above. It has, however, been submited before us that there was practice of taking such insurance by debiting premium of insurance from the loan account of the account holder/ complainant. Learned Advocate for the complainant has not been able to show any material of payment of premium so as to cover risk of flood/cyclone, having

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been required to be debited or having been debited from the loan account of the complainant for the years 1991-92, 1992-93 and 1994-95 (particular period).

6. LEARNED Advocate for the complainant would, however, refer to a decision of the Uttar Pradesh State Consumer Disputes Redressal Commission in the case of Senior Branch Manager, Punjab National Bank v. Sudhir Pal Singh, II (2001) CPJ 477. Para 6 thereof has been read before us. That would indicate deduction of premium from the account of the borrower/loan holder every year in the face of the clause in the contract showing that the obligation for taking of insurance was that of the borrower. Such facts would prima facie indicate variation in the original contract by debiting the premium from the account of borrower. Default in remitting the premium so debited to the Insurance Company would amount to deficiency in Banking service under such circumstances. Thus, on the basic with regard to contract providing for taking of insurance this decision will not be applicable. Learned Advocate for the complainant would refer to a decision of the National Commission in the case of Oriental Insurance Co. Ltd. v. Babul Dev, II (2003) CPJ 109 (NC). That was a case with regard to risk of flood having been excluded from the policy of insurance on the basis of handwritten endorsement on the proposal form. This decision will clearly have any application to the present case.

Reference has finally been made to a decision of Tamil Nadu State Consumer Disputes Redressal Commission in the case of Manager, Tamilnadu Mercantile Bank Ltd. v. A.X. Beski, III (2003) CPJ 145. In this case the Bank defaulted in not intimating the Insurance Company change of place of business although insurance was already taken. On facts it was found there was duty cast upon the Bank in furnishing the new address to the Insurance Company. In that view of the matter the opponent Bank was held to be liable to pay the amount of loss. The learned Forum has observed that the Bank was careless or negligent in renewing the policy by not furnishing the new address of business premises of the complainant although the Bank was intimated about the change in the address of the business premises by the complainant. The Bank was accordingly held liable to pay compensation in the sum of Rs. 19,447/- in that case. The decision will, therefore, not apply to the facts of the present case.

7. AS stated above the basic dispute centres around whether the opponent Bank was obliged to take insurance and if yes, to have also the cover of flood/cyclone. In the present case facts as referable to the aforesaid agreement between the parties will lead to only conclusion that there was no service of taking of insurance to be rendered by the bank in favour of the complainant. In T.V. Sundaram Iyanger and Sons Ltd. v. Muthu Swamy Durai Swamy, II (2003) CPJ 176 (NC)=2003 CTJ 786, the National Commission held that a Consumer Forum has no jurisdiction to strike down a condition in a contract howsoever onerous it may appear, so long as it is not shown with the aid of any law that the condition in the contract is illegal in any manner. In that view of the matter the complainant would not be entitled to claim award of compensation on the

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allegations of deficiency in service on the part of the opponent Bank in not having cover of risk of flood/cyclone in respect of the goods in question.

8. IN above view of the matter and bearing in mind all the facts and circumstances of the case following order is passed: Impugned order dated 21st April, 2003 rendered by the learned Jamnagar District Consumer Disputes Redressal Forum in Complaint Application No. 31/1995 is hereby set aside, Complaint bearing No. 31/95 shall stand dismissed. This appeal is accordingly allowed with no order as to cost throughout. Appeal allowed.

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