(2009) 10 NCDRC CK 0009

In the National Consumer Disputes Redressal Commission

Dildar Nagar Cold Storage And Ice Plant (Pvt.) Ltd. APPELLANT

Vs

Oriental Insurance Co. Ltd. and Anr. RESPONDENT

Date of Decision : 01-10-2009

Acts Referred:

Citation : 2009 4 CPJ 195

Hon'ble Judges : K.S.GUPTA , RAJYALAKSHMI RAO J.

Final Decision : Complaint dismissed.

Judgement

1. MR . Justice K.S. Gupta, Presiding Member -It was alleged that the complainant company owns a cold storage which is located at Dildar Nagar, Gazipur (U.P.). Complainant purchased a policy to insure the stock of potatoes numbering 35,000 bags of one quintal each valid for the period from 11.4.1997 to 10.11.1997 from the opposite party -Insurance Company. During the currency of policy, 34,974 bags of potatoes were spoiled for unknown reasons. Damage was reported to the opposite party. Complainant thereafter lodged the claim. Insurance Company appointed two surveyors. Complainant provided all the information as required by the surveyors from time -to -time. By the letter dated 30.11.1998, the Insurance company repudiated the claim on the ground of breaches of warranties and conditions of the policy. Surveyors assesed the loss to the tune of Rs. 45,00,000. Attributing deficiency in service, direction was sought to be made to the Insurance Company to pay amount of Rs. 45,00,000 with interest at the rate of 24% per annum to the complainant.

2. OPPOSITE party -Insurance Company contested the complaint by filing written version. Issuance of policy was not denied. However, it was alleged that on receipt of intimation regarding loss from the complainant by the letter dated 13.10.1997, the replying opposite party appointed M/s. S.P. Singh and Associates as preliminary surveyor. This surveyor visited the cold storage on 21.10.1997 and submitted the preliminary survey report on 24.10.1997. M/s. V.K. Kharbanda and Associates, surveyor was appointed to assess the loss. By the letter dated 11.11.1997 which was followed by reminders dated 31.12.1997, 28.1.1998 and

12.2.1998, the surveyor asked the complainant to submit certain documents which the complainant supplied in piecemeal. Said final surveyor submitted the report on 17.6.1998. It was further alleged that replying opposite party had covered the risk after obtaining a written agreement from the complainant who consented to the additional requirements in view of acute power shortage. Relevant stipulations of this agreement are as under: "(i) During the time the power supply is made available to us all the refrigeration shall be put into use with a view to bringing down the cold storage temperature and from the quick cooling effects thus obtained, we shall maintain the temperature range inside the Cold Storage Chambers within the specified safe limits to 30 degree F to 40 degree F. We shall also ensure that the temperature does not rise beyond 40 degree F even if the plant is required to be stopped on account of non - availability of power for the remaining period.

(ii) No loading or unloading of potatoes shall be carried out during the period when the plant is shut down because of non availability of power.

(iii) The installation of the Cold Storage Chambers will be improved by providing additional insulation layers in order to minimize the chances of leakages and thereby facilities maintaining the requisite temperature range.

(iv) The Cold Storage Chambers will be designed for certain normal storage capacity. However, due to the cut in the power supply we shall load the Cold Storage Chamber at a lever lower than the designed capacity which will help in maintaining the temperature, inside the Cold Storage Chamber, by running the plant in the limited period when power is available as stated under (a) above. We will also ensure that the loading of the Cold Storage Chambers is not exceeded 75% of the normal capacity.

(v) We also note that as per excess clause conditions, we shall have to bear an excess of 25% of the claim amount or Rs. 10,000.00 whichever is more and this excess shall be applicable for claims over and above loss of weight due to shrinkage and driage."

3. UNDER the Deterioration of stocks policy in question the claim is admissible only when the deterioration is as a result of rise in temperature due to some damage to the plant and machinery and the claim is payable under the machinery insurance policy as well. In the present case, admittedly, there was no breakdown of the machinery. Surveyors had reported that the loading was done at high temperature. Indiscriminate unloading was resorted to which increased the temperature of the cold storage. Reduced cooling capacity resulted into damage to the stocks. There were breaches of the conditions and warranties of the policy. It was stated that though the deterioration of stocks has started in July -August 1997 the complainant informed the insurance company about the same on 13.10.1997. No steps were taken to minimize the loss by the complainant. Though the final surveyor assessed the loss at Rs. 16,48,122 the insurance company came to the conclusion that the claim was not payable as no

peril had operated. Repudiation of claim was conveyed to the complainant vide letter dated 30.11.1998. It was denied that the loss was assessed at Rs. 45,00,000 as alleged. Denying deficiency in service, liability to pay the claimed amount was emphatically denied. In the rejoinder filed to the written version of opposite party -Insurance Company the complainant alleged that as the policy was not supplied the surveyors could not state that there was breach of any warranty or condition of the policy on part of the complainant.

4. AFFIDAVIT of Ajay Kumar Sharma dated 3.4.2003 was filed by way of evidence by the complainant company. Additional affidavit with annexures filed on 10.11.2004 by the complainant was ordered to be taken off the file vide order dated 16.11.2004. Opposite party -Insurance Company filed the affidavit of Dilbagh Singh, Manager dated Nil.12.2003 in evidence.

5. INDISPUTAB LY , the complainant had purchased a Deterioration of stock (potatoes in cold storage) policy for the period from 11.4.1997 to 10.11.1997 and a cover note (copy at page 8) was issued by the opposite party. In the rejoinder the complainant has denied the receipt of the policy. It was pointed out by Mr. Kishore Rawat for the opposite party that in the complaint it is not alleged that the policy was not supplied by the Insurance Company. To rebut the allegation of non -supply of policy Mr. Rawat drew attention to the last para of the cover note and the complainant''s letter dated 10.4.1997 (copy at page 67). In the last para of the cover note it is written that the risk is insured subject to the usual terms and conditions of the company''s standard policy. Letter dated 10.4.1997 notices that the complainant has received the specimen policy copies in respect of the Machinery breakdown and Deterioration of stock and it confirms having read carefully all the policy conditions which are to be complied with by the complainant. Both the cover note and the letter only indicate that the risk was covered subject to usual terms and conditions of the standard policy and copies of said two specimen policy were read by the company who undertook that the conditions thereof will be complied with by the complainant. This letter is signed by aforesaid Ajay Kumar Sharma, M.D. of the company. Reading of the complaint would show that it is silent in regard to non -supply of the policy by the insurance company. Copy of legal notice got served through D.P. Patial and Associates, Advocates by the complainant on the opposite party -insurance company is at page No. 12 of the paper book. Para No. 1 thereof which is material, reads thus: That my client is running the business of Cold Storage with the name and style as mentioned above and has insured 34,974 bags of potatoes containing 100 kg. potatoes in each bag at its above plant vide policy No. 44/97/0006, after paying the requisite amount on 11.4.1997 vide insurance cover No./L.R. No. 385005, after complete satisfaction of your officials."

Number of the insurance cover noted in this para tallies with the number of cover note at page 8. Above policy number 44/97/0006 corresponds with the policy number as given in preliminary survey report dated 24.10.1997 of M/s. S.P. Singh and Associates, surveyors. If the policy was not supplied there was no occasion of its number being mentioned in para No. 1 of the legal notice nor the complainant would have omitted to plead non -supply of the policy to the complainant. In para No. 10 of the affidavit, aforesaid Dilbagh Singh, Manager has asserted that policy was supplied. Objection in regard to non -supply of the policy taken to avoid the breaches of the conditions and warranties thereof is, therefore, repelled being without any substance.

6. THIS brings us to the main controversy in regard to alleged breaches mainly of warranty Nos. 3, 6 and 9 and condition Nos. 2 and 4 of the policy. Recitals made in the beginning of policy (copy at pages 61 to 66) and said warranties and conditions being material are reproduced below: "Now this policy of insurance witnesseth that in consideration of the insured having paid to the company the premium mentioned in the Schedule and subject to the terms, provisions, exceptions, warranties and conditions contained herein or endorsed hereon, the company hereby agrees with the insured that at any time during the period of insurance stated in the Schedule II or during any subsequent period for which the insured pays and the company may accept the premium for the renewal of this policy, the company will indemnify the insured in the manner and to the extent hereinafter provided for damage to the stocks described in Schedule II by contamination and/or deterioration, purefaction as a result of rise in temperature in the Refrigeration Chambers caused by any loss of or damage due to an accident as defined hereafter to the plant and machinery specified in Schedule I and indemnifiable under the Machinery Insurance Policy in force.

The total liability of the Company under this Policy shall be limited to the Sum Insured specified in Schedule II.

Provided always that -

(iii) The plant and machinery specified in Schedule I is insured under Machinery insurance policy in force and payment shall have been made or liability admitted under such insurance; if no payment shall have been made under such insurance solely as a result of the operation of any Excess'' thereunder liability of the company under this policy shall not be affected.

(iv) The insured maintains, on a daily basis, a stock book in the Proforma prescribed by the company, in which the type, quantity and value of the stocks stored and the beginning and the end of the storage period are entered for each Refrigeration Chamber separately.

(v) During the entire period of storage the insured records in a Log Book as per the Proforma supplied by the company the readings of the temperature and relative humidity of the Refrigeration Chambers as also the suction, discharge and oil pressure on four hourly basis throughout the day.

(vi) Stock book, Log book and all other records of the insured relating to the stocks stored shall at all reasonable times be open to inspections by duly authorized representatives of the Company.

Definition

The term Accident'' shall mean and be limited to -

(a) Any sudden or unforeseen loss or damage to the plant and machinery described in Schedule I of this policy due to an accidental cause covered by the Machinery insurance policy specified in Schedule I and not hereinafter excluded Exclusion.

(i) Failure of any part(s) requiring periodical renewal (such as failure of belts, gaskets, packing material, joints of any kind and insulation).

(ii) Operation of the fuses and kindired devices.

(b) Escape of Refrigerant in the Chamber as a direct result of damage to the Plant and Machinery described in Schedule I for which damage a claim is admissible under the Machinery insurance policy specified in the Schedule I.

WARRANTIES

3. The insured shall pre -cool the stocks meant for storage for 24 hours before loading into the chambers.

6. The insured shall take care to see that -

(i) the temperature inside the Cold Chambers are brought down to 340F(1.10C) in all the floors of all the chambers before loading commences; and

(ii) Further ensure that the temperature in all the chambers does not exceed 500F (100C) during the entire period of loading and 400F (4.40C) during the subsequent period of storage.

9. The insured shall forthwith notify the company in writing about any abnormal operating conditions of the Refrigeration Plant and Machinery or stoppage of the function of the Cold Storage causing rise or fall in temperatures or any circumstances which may give rise to a claim under this policy and shall at his own expenses diligently comply with all the directions that may be given by the Engineer of the company or any other technical personnel appointed or may be appointed by the Company for bringing back the operation of the Cold Storage to its normal working conditions.

CONDITIONS

2. Due observance and fulfillment of the terms, provisions, conditions, warranties and endorsements of this policy shall be a condition precedent to any liability of the Company to make payment under this Policy.

4. In the event of any accident (a) the insured shall give immediate notice thereof to the office of the company which has issued the policy by telephone or telegram and followed by a letter confirming such intimation. Similar intimations may also be given to the nearest branch office of the company and should

damage within the meaning of the policy occur to the stocks stored, then the insured shall, within fourteen days after the occurrence of such damage or such further time as the company may allow in writing, at his own expense deliver to the company a claim in writing containing as particular an account as may be reasonably practicable of the stocks damaged and of the amount of damage thereto having regard to their value at the time of damage together with details of any other insurance of any stocks hereby insured and; (b) shall take all reasonable precautions to minimize the loss and/or damage and to prevent any further loss and/or damage and the company shall not be liable for any further loss and/or damage arising out of the continued use of any damaged or defective refrigeration machinery until such machinery is repaired to the satisfaction of the Company.

Portions of the final survey report dated 17.6.1998 under the sub -headings loading and unloading details'', cause of damage and its aggravation'', and our verification'' being material deserve to be referred to in toto. Same read thus:

"Loading and unloading details -

The loading was started on 26.2.1997 and completed on 3.4.1997. A total stock of 34,974 bags of potatoes comprising 470 lots was stacked in all the 7 floors of racks in the cold storage. Unloading had been done from time -to -time in the cold storage and upto the time of loss a total of 10,413 bags had already been unloaded and delivered to the owner farmers. But as per preliminary report of Shri S.P. Singh, dated 24.10.1997 complete turning of the bags had not been done. In anticipation of the damage, however, turning was done in pockets as per requirement and no mid -term inspection has been carried out as reported by the insurers.

Cause of damage and its aggravation'':

The loss was aggravated because of inordinate temperature rise from 21.8.1997 onwards which has not been found to be caused by any peril covered under the policy. The possible sequence of damage can be traced out as follows:

The loading was done at inordinately high temperature as indicated above. The breakdown of 7" x 7" compressor in May was immaterial as it was never used after the loading period in mid -April 1997. From mid -April till the date of its reported damage, it was not used, nor after its repairs till the date of damage which was very close to end of season. The other 7.5" x 7.5" compressor was working and maintaining tempera -ture. Because of loading at high temperature the dormancy period of stock of potatoes was considerably reduced resulting in its sprouting in July 1997. The sprouting could be killed by chilling the cold storage which was not done as the second compressor was never operated. In order to reduce the chances of damage to stock it was also desirable to start unloading in a controlled manner immediately after observing sprouting stock. However, the unloading was not done because there was bumper crop and good potatoes were available cheaply in the market and thus there was apparently no market for sprouted stock. Sprouting further resulted in deterioration of stock and when the position was becoming hopeless, indiscriminate unloading was resorted to and the unloading obviously needed the door of the cold room remaining open for considerable time, resulting in inordinate increase of temperature. Because of reduced cooling capacity available, the situation could not be controlled and this resulted into total damage to the stock by deterioration. It may be considered as gross negligence of the insured thereby forfeiting their right to claim the damage suffered thereby. Thus, there is a breach of warranties 3 and 5 of the policy as well as condition 4 thereof.

Further, an additional measure to safeguard the interest of the insured was also breached due to non -observance of the condition No. 5 of keeping/operating stand by compressor. In a way this also is breach of condition No. 1 of the additional requirement. It appears that during unloading, additional requirement No. 2 was also not properly adhered to otherwise temperature would not have jumped so high and become uncontrollable.

OUR VERIFICATION''

The insured have emphatically explained that only the upper layer of stock was partially sound which would not be more than 3%.

We verified the damaged stock lying in the chamber as well as that thrown in the open during our visit. We had also gone through loading and unloading registers as well as log book maintained by the insured right from the time of loading till the date of loss and our observations are as under:

Although loading started on 26.2.1997, the temperature in the log book was maintained only from 6.3.1997. The temperature observed at 2.00 p.m. on 6.3.1997 was 72 degrees F DB and 70 degrees F WB. This would imply that the temperature before this period could also be in the vicinity of the same after loading had started. Temperature remained above 40 degrees F tills 6.5.1997 during the period in which loading was carried out. Thus dormancy period of potatoes was seriously shortened due to excessive temperature during the loading period, making it prone to damage in normal course of storage in the cold store, even when the temperature therein is maintained well within limit of 40 degree F. After 6.5.1997 the temperature remained less than 40 degree F till 15.6.1997 when the motor of the water circulating pump had been damaged, and consequently the plant was shut down. The plant was restarted on 18.6.1997 when temperature was 42.5 degree F DB and 40.5 degrees F WB and temperature was brought down to less than 40 degrees F by 20.6.1997. Temperature remained in the vicinity of 40 degrees F thereafter. There were occasional power break -downs during which period the temperature was maintained by running the gen -set.

Smaller Frick ammonia compressor 7"x7" was broken down in the first week of May 1997 but that did not affect the temperature, which was maintained by the continuous operation of the other compressor.

Due to bumper crop of potatoes coming into the market which drastically reduced the price, unloading was not done expeditiously on seeing the abnormal condition in that cold store, which occurred around 29.8.1997. No intimation to Insurance Company or to the farmers was given.

The temperature of the chamber could not be maintained within 40 degrees F and it continued rising as evident from the log book. During August/October it continued rising from 40 degrees F to 70 degrees F without any machinery breakdown or undue power failure. Such a high temperature resulted in damage to the stock kept in the cold store.

From the above it is obvious that the machinery breakdown and power failures did not affect the temperature, but the main reason of rise in temperature was insufficient/mal -operation of machinery and excess temperature during loading period. Keeping all these factors in view in our opinion, the damage caused to the stock is, thus, outside the scope of the policy. Value of the stock existing at the time of damage was found to be varying from Rs. 100 to Rs. 150 per bag and, thus, the insured value of Rs. 100 can be taken as its market value. The assessment is being done only to limit the amount of claim."

7. FINAL surveyor assessed the net loss at Rs. 16,48,122 subject to the terms, conditions, exceptions and limitations of the policy issued by the opposite party - Insurance Company.

8. ON ground of insured stocks of potatoes having been damaged Shri Ajay Rai for the complainant pressed for award of compensation of Rs. 45,00,000. The sum assured was Rs. 35,00,000. Copy of the cover note at page 9 would show that the complainant had also purchased a Machinery breakdown policy for the period from 12.4.1997 to 11.4.1998 of a sum of Rs. 11,72,000. Mr. Rawat, Adv. pointed out that the complainant had not taken any action claiming any amount under the said Machinery insurance policy against the Insurance Company. Reading of the above recitals of the policy would show that the loss to the insured stocks has to be due to rise in temperature in refrigeration chambers as a result of accidental damage to the plant and machinery and claim is payable under Machinery insurance policy as well to fasten liability on the Insurance Company. Discussion made under the sub -headings cause of damage and its aggravation'', and our observations'' in final report would show that breakdown of 7" X 7" compressor was not responsible for rise in temperature as it was not used after the loading period, in April, 1997 till the date of reported damage on 13.10.1997 which was close to the end of season. Complainant is, thus, not entitled to be compensated under the said term of the Deterioration of stock policy. That apart, there had been breaches of aforesaid warranty Nos. 3, 6 and 9 and condition Nos. 2 and 4 of the policy and stipulation No. (1) of the aforementioned agreement. As noticed in final survey report dated 17.6.1998, loading of potatoes was started on 26.2.1997 and completed on 3,4.1997. Temperature in the log book was entered only from 6.3.1997 on which date it was 720 F DB and 700 F WB. Temperature before 6.3.1997 could also be in the

same vicinity after the loading was started. This was not breach of warranty Nos.3, 6.1 and former part of 6.2 as also stipulation (1). Opposite party - Insurance Company was intimated of the damage to the insured stocks only on 13.10.1997 whereas the sprouting had started in July 1997. During August to October, the temperature continued to rise from 400F to 700F thereby damaging the stocks. Unloading was too not done promptly. Therefore, again there was breach of latter part of warranty No. 6, warranty No. 9 and condition Nos. 2 and 4 on part of complainant company. Breaches of these warranties and conditions disentitle the complainant company from claiming any amount under the policy. Repudiation of claim made by the opposite party -Insurance Company was, thus, justified. Complaint, therefore, deserves to be dismissed being without any merit. Dismissed as such. No order as to cost. Complaint dismissed.