
(2012) 09 NCDRC CK 0067

In the National Consumer Disputes Redressal Commission

DLF INDUSTRIES LTD

APPELLANT

Vs

New India Assurance Co. Ltd , Binny Ltd , F.M. Gru

RESPONDENT

Date of Decision : 11-09-2012

Acts Referred:

Citation : 2012 0 NCDRC 541

Hon'ble Judges : J.M.Malik , Vinay Kumar J.

Advocate : Pallav Shishodia , Amit Agrawal , Nimita Kaul , P.K.Seth

Judgement

1. THE whole controversy centers around the question, "Who is liable for the damages, in respect of complainant 's tower crane, which collapsed and stood totally destructed beyond repairs? ". THE burning point of discussion is "Whether the Insurance Company, the main and only contestant or the manufacturer and supplier who did not contest the case and were given the clean chit trotted out by the complainant at the eleventh hour, i.e. at the time of final arguments is liable for the above said damages?.

2. THE genesis and sequence of the claim petition is this. THE complainant company purchased two Tower Cranes from M/s. Binny Ltd, OP 2, the authorized supplier/agent of M/s. F.M. Gru, OP3 (Italy), the manufacturer of the said two Tower Cranes. THE Tower Cranes were supplied to the complainant on 16.07.1995 and were commissioned on 01.08.1995. THE warranty came to an end on 21.07.1996. THE Complainant entered into a Contractor 's Plant and Machinery Insurance Policy with New India Assurance Co. Ltd., OP 1, in respect of the above two Tower Cranes. One of the clauses of the Insurance policy specifically mentions that the insurance company, OP1, would indemnify the complainant against " ... unforeseen and sudden physical damage by any cause not hereinafter executed to any insured property specified in the attached schedule ". THE said policy covered the period from 25.07.1995 to 24.07.1996. It was again renewed from 25.07.1996 to 24.07.1997. THE complainant paid premium in the sum of Rs.75,964/- in respect of the above said period. On 07.10.1996, at around 3.50PM, one of the said Tower cranes met with an

unforeseen and sudden accident, while the tower crane was being used for building wall No. DW/10 in Tower No. 17, above Fifth Floor slab level, thereby resulting in the death of one of the employees of the complainant and serious injury to another employee, who, too, subsequently passed away. Till then, the warranty period had expired. M/s. A.K. Govil and Associates, the Surveyor, visited the site of the accident on 15.10.1996. The complainant claimed a sum of Rs.53,00,000/- on 09.01.1997 with the OP1 for the loss or damage caused in respect of the damaged Tower Crane. OP1 was requested to complete their assessment for early settlement, vide letter dated 27.05.1997.

Op1, Insurance Company vide its letter dated 06.03.1998 repudiated the claim made by the complainant. The relevant portion of the repudiation letter, runs as follows:- " and it has been revealed that the tower crane had failed because of design defect or manufacturing defect or poor workmanship. Under the policy, the company undertook to indemnify against loss or damage to the tower crane, if the loss or damage is caused solely due to accidental external means, whereas in your case the cause of damage was purely internal to the crane. Under the terms and conditions of the policy, it has been provided under Clause (p) that the Company shall not be liable under the policy, in respect of the loss or damage for which the supplier or the manufacturer is responsible, either by law or under the contract. Since it has been found that the tower crane has failed due to manufacturing defect, the company is not liable under the terms and conditions of the policy, and we have decided to repudiate the same, which we hereby do, and are closing our file as no claim ".

Immediately after the occurrence of the accident, M/s. Binny Ltd, and manufacturer of tower cranes, M/s. F.M. Gru, furnished a declaration dated 07.10.1996 stating that the tower had been planned and designed according to the International Standards and had been verified and approved by the Italian Safety Bureau. They also explained that they sold 300 tower cranes, but no such complaint was ever received. Both the OPs 2 and 3, denied that there was any manufacturing defect. The complainant purchased the two cranes for a sum of Rs.45,80,000/-, which is inclusive of excise duty. There were two reports from M/s. Star Wire India Ltd., which also examined the tower cranes. The warranty given by the OP2 against the material and manufacturing defects was for a period of Twelve months " from the date of commissioning of tower cranes, or 80 months " from the date of supply of the tower cranes, whichever was earlier. OP 3 is the manufacturer of the two tower cranes and is liable to compensate the complainant. OP2 being the authorized supplier/agent of OP3, is also liable to compensate the complainant. The insurance company, OP1, has wrongly repudiated the claim of the complainant and, therefore, it is also liable to compensate the complainant. In the meantime, the complainant, vide letter dated 08.10.1996, sent to the Chief Manager, Oriental Bank of Commerce, requested for encashment of Bank Guarantee, to the amount of Rs.9.16 lakhs, furnished by M/s. Binny Ltd, the supplier of the cranes, as the cranes had not performed to the complainant 's satisfaction. The said Bank Guarantee was

released on 21.12.1996 to the satisfaction of the complainant. It is averred that the damaged crane was beyond repair and is no longer in use and, therefore, the complainant is entitled to the actual value of the crane, as per the terms and conditions of the policy. There has been deficiency of service by OP1. The OP1 is liable to indemnify the complainant for the loss suffered by the complainant in the sum of Rs.44,00,000/-. He is also entitled to interest @ 18% p.a., and compensation for mental torture and harassment in the sum of Rs.10,00,000/-. No relief was claimed against OPs 2 and 3.

3. THE OP1, in its written statement, has listed the following defences. After receiving the intimation, the OP1 immediately deputed its Surveyor and got the matter investigated to assess the loss by an independent agency. On the examination of the report of these independent agencies, it transpired that the loss to the tower crane was due to manufacturing defect and, therefore, the insurance claim of the complainant did not fall within the purview of the insurance policy, and was accordingly repudiated. THE case of the complainant itself is that loss of the tower crane was due to manufacturing defect. THE complainant also encashed the bank guarantee, given by OP2. Civil suit is pending, where the complainant himself pleaded that the tower crane was made of inferior quality, raw material and, therefore, it crashed and two of the workers also died. THE case is barred by time. All the allegations have been denied. The counsel for the complainant made the following submissions. The Tower crane in question, was insured for the period from 25.07.1995 to 24.07.1996, in first instance and thereafter, under insurance renewal, for the period from 25.07.1996 to 24.07.1997, and as such, the insurance cover was valid as on the date of the accident i.e. 07.10.1996 and worked for 2330 hrs, till 07.10.1996. The insurance cover was provided after satisfaction, as per pre-insurance survey report of 28.07.1995, given after inspection, prior to acceptance of risk. This is the only document which is not traceable in the Office of the New India Assurance Co. Ltd. The insurance company has invoked the inclusion clause (p) on an allegation that it has been found that "tower crane has failed due to manufacturing defect, as per the letter of repudiation, dated 06.03.1998 ". The Insurance Company, OP1 has failed to explain as to how the manufacturer is liable for damages under the Law of Contract. It is noteworthy that previously, the stand taken by the complainant was that the tower crane crashed due to manufacturing defect, but during the final arguments, it was clearly and specifically argued by the counsel for the complainant that they have got no grievance against the manufacturer. The learned counsel contended that they could not find out any manufacturing defect, and, therefore, they desire that they should be compensated by the insurance company. It was further argued that the insurance company heavily relies upon the surveyor 's report, which itself is vague and not at all definite as to the cause of accident. The above said indetrimental conclusion is based on self-surmises and inferences of the Surveyor, appointed by the insurance company and the said inferences are not warranted by material rendered therein. There is no evidence adduced by the insurance company to show as to the standards for

manufacture, design or workmanship and deviations, if any, from such standards.

4. AGAIN, the other reason advanced by the insurance company is that, in the claim form, it was mentioned as "could be designed/ manufacturing defect " mentioned by the complainant. It was submitted that it is not a statement of fact, but opinion about the fault, in the sense of reason, for breakdown. It was treated that this then expression of one of the likely cause, complainant thought probable at the relevant time. AGAIN, no material evidence has been given on record to treat this probability, as definite conclusion. It was argued that, as a matter of fact, the complainant always maintained that there is no concrete evidence led by the insurance company, against the manufacturer. It was also submitted that OP1 relies upon pleadings by complainant in the suit filed by Supplier, to restrain invocation of performance Bank Guarantee. The City Civil Court, Madras High Court has dismissed the suit. The relevant extracts, of the said order made, in paras 11 and 12 are as under :- "11. The learned Advocate appearing for the 2nd respondent and as pointed out by him as per the agreement between the 1st and 2nd respondents, the Bank Guarantee had been claimed with the Guarantor and in respect of damage, it could be decided only at the time of giving evidence in the suit. As far as this petition is concerned, in respect of the bank guarantee, as per petitioner 's Ex.No.3 and respondent 's Ex.No.5, it would be enough if the demand were to be made by the 2nd respondent. 12. The arguments put forth on behalf of the petitioner by his advocate, that special reasons are available, that the repairs in the cranes will be rectified and further since there was no connection between the parties, by way of agreement, he has special circumstances, is not at all accepted. As argued by the 2nd respondent, the 2nd respondent has got a prima facie case and the balance of convenience is in his favour and further there is irreparable loss. Further, the 2nd respondent had remitted 80% of the total costs of the cranes, 2 in number, and each crane costing Rs.45 lakhs. In these circumstances, the 2nd respondent has got the prima facie case. In view of the aforesaid reasons, this petition is hereby dismissed and the parties do bear their respective costs ".

Emphasis was laid upon the point that burden of proof to bring under the cover of exception clause, which solely and entirely lies on the insurance company, as the insurer is not discharged, nor the proximity between the accident resulting into total loss and allied costs as per survey report dated 18.03.1997, it was, therefore, prayed that the claim of the complainant should be allowed, along with interest, as prayed. It must be borne in mind that certain harsh realities cannot be glossed over. As a matter of fact, the case of the complainant bristles with flaws. The learned counsel for the complainant did not come to grips with the real problem but touched the unimportant one. It is unfathomable as to why did the complainant settle the scores with the manufacturer. The record reveals that the complainant wants to have the benefit of both the worlds. On the one hand, counsel for the complainant argued with vehemence that no case against the manufacturer is made out. He contended that at the initial stage their perception was that the tower crane had crashed due to manufacturing defect but since no

concrete evidence came out, therefore, they are praying against the insurance company only, and have got no grouse against the manufacturer.

We are not impressed by his arguments. This stands proved on the record that M/s. Binny Ltd, OP2, the supplier, had filed a Civil Suit before the City Civil Court, Madras, in the year 1996. As a matter of fact, the complainant had got the above said Bank Guarantee released from the Oriental Bank of Commerce. Aggrieved by that action, M/s. Binny Ltd filed a suit with the following prayers :- a) For a declaration that by virtue of the performance bank guarantee clause provided in the Purchase Order dated 15.12.94 the 2nd defendant is not entitled to enforce the bank guarantee furnished by the 1st defendant beyond 3.8.1996; b) For a permanent injunction restraining the 2nd defendant from invoking the bank guarantee dt. 4.8.95 and also the 1st defendant from disbursing any amount much less the sum of Rs.9.16 lakhs as demanded by the 2nd defendant in its communication dated 08.10.96; c) Binny Ltd., had also filed petition for injunction, along with the above said suit.

5. M/s. DLF Industries Ltd, OP1 filed the written statement. Its relevant extracts are reproduced as follows:- "5. Para 5 of the Plaint is admitted to the extent that Plaintiff is having some collaboration with M/s.Fuchi-Milanes, Italy. The quality of cranes manufactured and supplied is highly doubtful as the one supplied to the answering defendant collapsed within a short period resulting in tremendous loss of money and men ". 7. In the reply to Para 7 it is submitted that the cranes were assembled and commissioned in a very brief period of a few days and were put up in operation from 1.8.1995. As per the purchase order dt.15th Dec, 1994, the Plaintiff was to provide warranty on the equipment supplied/commissioned by it. It is pertinent to mention that the cranes were supplied on 27.7.95 (as against contractual date of supply as 15.1.95) which was hurriedly commissioned by plaintiff on 1.8.95 within a short span of a few days. The answering defendant wrote letters dt. 31.7.95 and 12.8.95 pointing out the problem and deficiencies in the cranes supplied by the plaintiff. The purpose of providing period of 18 months from the date of supply of crane was to ensure that the testing and commissioning would take considerable time from date of the supply. As there was practically no time lag between supply and commissioned of the cranes with various deficiencies and the supply was highly belated, the defendant offered to the plaintiff to provide the contract performance guarantee valid upto 31st Dec, 96 and the plaintiff accordingly furnished the same. The contract Guarantee at pages 57-59 of the paper book clearly and unambiguously shows the validity of Bank Guarantee. This Guarantee was provided by the Bank on instruction of the plaintiff. The plaintiff at no stage till invocation on 08.10.96 raised any such contention or alleged any mistake on the part of defendant No. 1 (Bank), as now alleged. It was done by mutual agreement of all the parties whereafter the balance payment due under the Contract was released to the plaintiff. The plaintiff cannot be allowed to resile and take shelter by pleading mistake on part of the defendant no.1, which did not allege so. The Bank Guarantee is an independent contract between the defendants inter se. The plaintiff who had

received payment due under the contract on the strength of the said Bank Guarantee cannot be allowed to question its validity period, as specifically and prominently written therein. In this regard, reference is invited to payment clause in Purchase Order dt. 15.12.94, whereby 80% payment was payable after submission of Bank Guarantee. It is the plaintiff who arranged the Bank Guarantee and it is patently wrong for the plaintiff to allege that the defendant No.1 had issued the Bank Guarantee at the instance of Defendant No.2 while in fact, it is the plaintiff which had arranged the contract Performance Bank Guarantee through their own Bank at Madras, which was unknown to the defendant No.2 who was at Gurgaon/Delhi. It is the plaintiff who arranged the Bank Guarantee and paid premium for issue of the Bank Guarantee. It cannot now betray any ignorance of the same, which is fully binding on all like concerned as a Letter of Credit. 8. In reply to para 8 it is submitted that the plaintiff defaulted in supplying the cranes within stipulated period and there was considerable delay of six months on its part despite notices. Though the cranes were commissioned on 1.8.95, but the same were not working properly as Electronic Printed Circuit was not installed and the same were giving problems from the day one as there was some internal/inherent defects in the cranes. The answering defendant wrote to the plaintiff as early as 31.7.95, 12.8.95 and subsequently on a number of occasions that the cranes were not giving proper service. Copies of some of the letters were enclosed as Annexure R-3 ".

[Emphasis supplied]. Succinctly stated the entire blame was put at the doors of the manufacturer. We have quoted few paras but the whole of the written statement tells the same story i.e. defect in manufacturing of the tower. The Civil Court vide its order dated 08.11.96, dismissed the suit filed by M/s. Binny Ltd. This is an indisputable fact that the complainant had got the Bank Guarantee released and a sum of Rs.9.16 lakhs has been taken by them. The Hon "ble High Court of Madras dismissed the Writ Petition on the ground that in view of Civil Court "s order, the same had become infructuous . The order of Civil Court has attained finality. Both the manufacturer and the complainant are satisfied with that order because the order passed by the Civil Court was never called into question. It is just, Heads I win, Tails, you lose.

6. THE another significant fact to be noticed is that there is Insurance Policy/ Form dated 09.01.1997, where the information given by the complainant was recorded by the New India Assurance Co. Ltd. Its relevant extract runs as follows :- 4. What was the cause of the damage? (e.g. Defective materials, faulty design, giving particulars of parts concerned) Collapse in Tower Crane, due to material failure (yield failure) in the basic mast element of Tower. Could be design/manf.fault. 5. Is any one responsible for the damage? Is there any possibility of recovery No. Scrap value of Tower Crane. 6. How will the damage be repaired? (Please state in details whether any parts must be replaced: (give weight and value of damaged parts). THE damaged items cannot be repaired, complete mast sections, Jib sections, counter Jib section have undergone impact damage and basic material could also have cracks/faults due to collapse.

There are four reports on the record in respect of the damage of the tower cranes. The first report is by a Committee, consisting of four persons, dated 08.10.1996. The Committee was appointed by the complainant itself. The following extracts/observations from the report are reproduced as follows:- "Immediate inspection showed that the three main angles out of four mast supports of the crane totally failed (broken off) due to bending and torque, resulting in twisting of the fourth leg. This apparently was the basic mode of failure (Photographs Nos. 10-21) ". "II. Reasons. The preliminary observations at the section of failure reveal yielding of material due to stress reversal leading to fatigue failure. A careful scrutiny exhibits that the cracks occurred near heavily welded area at the end of the gusset on the main leg. The high temperature involved in welding process generally results in granular/metallurgical changes due to reorientation of grain lattice structure of this high tensile steel and material reducing the ductile property. The resultant concentration of stress was not probably adequately relieved by standard practice of annealing ".

Secondly, there is report from M/s. A.K. Govil and Associates, dated 28.03.1997. The said Expert was appointed by the insurance company. The relevant extracts of its report, are as follows:- "At about 4PM on 07.10.1996, while carrying concrete bucket having 0.5 cum of concrete in the bucket above the pouring location on 5th floor slab, an abnormal noise was heard at the site and the Mast of Tower Crane was found to have collapsed, due to bending of the Mast at about 15 feet height from the base. The Mast at the upper end had fallen on the slab of 5th floor of block 17 with the Jib leaning towards the ground. The concrete trolley was found lying on the ground. The Crane operator sitting in the Cabin and a Welder working on the fifth floor slab were critically injured and succumbed to their injuries later on in the hospital " "Failure Analysis Physical Observations Immediately after the accident, investigations were carried out by the insured and it was observed that the bucket was being operated at 40.41 M away from the Mast which is less than maximum Lever Arm for Lifting of material (45m). At this boom length, the allowed capacity is 1.6 M.T. as against which the weight being lifted was estimated at 1.2 MT The Preliminary observations of the Insured at the section of failure revealed, yielding of material due to stress reversal, leading to fatigue failure. A careful scrutiny made it evident that the cracks occurred near heavily welded area at the end of the Gunset on the leg. A careful scrutiny of this report reveals that the suppliers have confirmed that the Crane operation at the time of accident is not necessarily the reasons of the accident and the cause of accident is due to reason before the accident. They have further confirmed, the signs of Fatigue closer lines towards the centre and more spread away from centre point of failed section of mast, which they have opined is the usual fatigue breaking in steels. A copy of their report is enclosed at Enclosure II. Chemical/Radiography Analysis A careful scrutiny of these reports indicate the Chemical composition of the parent metal to be of required standards, however, micro examination under Radiography indicate insufficient penetration of weld metal into the parent metal. Number of

Blow Holes, Gas Holes and Shrinkages were also observed in the weld metal. Hardness of the weld zone, heat affected zone and parent metal were also found to be different, indicating improper stress relieving resulting in internal stresses. The results of tests conducted on this Crane also reflected the findings as drawn in the subject Crane, which further confirms the cause of failure of subject Crane because of Material failure/Fatigue failure. Conclusion: Based on the physical findings, reports submitted by M/s. Binny Ltd., and the Chemical/Radiography Analysis discussed earlier, it can be safely concluded that the subject Crane failed because of Material failure/Fatigue failure because of deficient manufacturing process and/or workmanship which was not noticed/treated during stringent quality controls normally undertaken for such equipments. During the course of discussions, it was further revealed by the Insured that M/s. Binny Ltd., vide their letter MHD/KU/96 of 17th October, 1996 had suggested additional strengthening of Crane structure of the other Cranes at the same point where the subject Crane had failed. These Cranes were also supplied by them to the Insured, one of which was working at the affected site as on date of loss. It was further confirmed by the Insured that drawing for this additional strengthening suggested by M/s. Binny Ltd was also prepared and supplied by them and they only undertook this job at Insured "s site. Insured on their part made their own calculations and provided additional members in addition to those suggested by M/s. Binny Ltd. The above further confirms that the subject Tower Crane failed because of any or all of the following reasons: 1. Design defect 2. Manufacturing defect 3. Poor workmanship To our understanding of CPM Policy none of the above is covered under the policy. The Insured have further invoked the Bank Guarantee submitted by the Suppliers at the time of supply as the performance warranty period had not expired till the date of loss and was to continue till 31.12.1996 ".

This report clearly depicts that there was manufacturing defect and complainant "s not running the tower crane properly. The trouble was invited by complainant "s own omission and commission besides the manufacturing defect.

7. THE third report is by M/s. Star Wire (I) Ltd., dated 04.12.1996. THE material part runs as follows:- "Sub : Failure Analysis 1. THE material failed due to cracks developed in weld metal zone, extending into parent metal through heat affected zone because of heavy isolated slag and MnO SiO₂ inclusions in the weld materials zone and poor side welding of the bracket i.e. lack of penetration shrinkage and blow holes etc. 2. THE hardness variation between parent metal and heat affected zone is more than 100 Bhn which resulted in internal stresses. 3. THE internal stresses and cyclic stresses on the tower crane during operation resulted in stress raiser points at the inclusions, thereby initiating the cracks. THE parent material of the cranes is chemically and physically within specifications ".

The complainant got a preliminary inspection report which was attended by Mr. J.K. Chandra, Sr.Vice President and Mr.K.K. Bhattacharya, Vice President on

17.10.1997. Relevant portions of the report are as follows:- "Point 1. Signs of compression (bright surface/smooth) Point 2. There are signs of positive closer lines at towards the centre and more spread away from centre. Point 3. The breaking area. Note : This is the usual Fatigue breaking in steels with Elasticity of 25%. Progression of the breaking : Please refer enclosed calculation sheet No. 160/187. From the calculation you can see that the load of 1.92 t/cm is about 1/3 of the breaking load of the material i.e. SI 52 is 624 N1/MM2 (N/MM2). Please refer enclosed test certificate No. 27789 dt. 16.01.95. The compression at point (1) is before the accident about i.e. the breaking started one month before the accident. The compression at point (1) is due to slewing motion of the crane and plasticity of the material. All the three main mast elements damaged have similar cross section. 3.0 General Inspection of the crane. 3.1 Crane serial No. (10972) subject of accident. It was observed wire for by passing the switches was available inside the Electrical panel. On the top of the crane (the cusp) moment limit switch was not in position. Also the over load limit switch was not in position. 3.2 Crane serial No. (10973) From the inspection we have found no cracks at the same are in the mast element. Mr. Croceiferi and Mr. K. venkat ratanam claimed on the crane and in the cusp area found the moment limit switch was not in a position. 3.3 Crane serial No. (109735) During inspection it was found welding carried out at the same area in the mast element. We found the limit switch was in position. It is was informed the welding was carried out about one week before 7.10.96 without the knowledge of senior officers ".

All these reports clearly, specifically and unequivocally reveal that there was manufacturing defect. It is surprising to note that out of 300 tower cranes, only the tower cranes in question, crashed and stood completely smashed. It did not work properly from the very start. Several complaints, vide the above said letters dated 31.07.1995 and 12.08.1995, were lodged. Why did the supplier give the additional security after the expiry of warranty period?. What was the need of welding, on the new crane? It is apparent that the complainant is working in cahoots with the manufacturer and absolved him of the liability without waiting for the verdict of this Commission. There is strong evidence against the manufacturer of the tower cranes but the complainant claims no relief against him. The Insurance Company has discharged its duty. As per Col.4, mentioned above, the Insurance Company should not have taken any step after the complainant itself mentioned that it was a manufacturing defect. Yet, it appointed Surveyor, pondered over the matter and then rejected the claim. The "but and ben " stand taken by the complainant does not help him much. On the one hand, it accepted the amount of Rs.9.16 lakhs from the manufacturer, and on the other hand, it wants that the liability of the abovesaid damage should be fastened upon the Insurance Company. It is thus clear that the complainant has been crying from the roof top that it was due to manufacturing defect that the tower crane collapsed. Moreover, the facts of this case, speak for themselves. The life span of such like tower cranes should not be less than 50 years. This tower crane was having defects from the very start, as is apparent from the

written statement filed by the complainant. This is an unsavoury volte face, on the complainant 's part.

8. THE whole gamut of facts and circumstances leans on the side of the Insurance Company. THE complainant has made a tenuous claim against the Insurance Company, OP1. THE complaint is, therefore, dismissed. THERE shall be no order as to costs.