

(2011) 01 NCDRC CK 0043

In the National Consumer Disputes Redressal Commission

East India Transport Agency

APPELLANT

Vs

Voltas Limited

RESPONDENT

Date of Decision : 18-01-2011

Acts Referred:

Citation : 2011 0 NCDRC 708 : 2011 1 CPJ 168 : 2011 1 CPR 156

Hon'ble Judges : R.C.Jain , Anupam Dasgupta J.

Final Decision : appeal partly allowed

Judgement

1. AGGRIEVED by the order dated 25.04.1996 passed by Maharashtra State Consumer Disputes Redressal Commission, Mumbai (in short, ?the State Commission?) in complaint case no. 82 of 1995, M/s East India Transport Agency, the original opposite party in the complaint has file the present appeal. By the impugned order, the State Commission has partly allowed the complaint filed by Voltas Limited and National Insurance Co. Ltd. for seeking compensation of Rs.9,72,166/- on which amount the second complainant M/s National Insurance Company had settled the claim of Voltas Limited in respect of the loss suffered by the latter due to non delivery of insured consignment containing one number Voltas Diesel Fork, Lift Truck, Model DV: 25 complete with standard accessories under their invoice No.398747 for its delivery to the Daily Amar Ujala, Bareilly, the consignee. The complaint was resisted by the opposite party-carrier on a variety of grounds and one plea being that consignment was destroyed when the truck carrying the said consignment alongwith certain other goods had caught fire on its way to the destination and, therefore, there was no negligence / deficiency in service on the part of the carrier which would entitle the complainants for any compensation for the loss occasioned to the Voltas Limited. The State Commission allowed the complaint and going by the surveyor's report who assessed the loss to the extent of Rs.9,57,022/- after deducting the salvage value of Rs.20,000/- with the stipulation that amount shall be paid to the complainant no.2 within a period of eight weeks from the date of the order failing which it shall carry interest @ 18% p.a. till its realization.

2. THE appeal was earlier answered by this Commission based on the decision of the Supreme Court in the case of Oberai Forwarding Agency Vs. New India Assurance Co. Ltd. & Anr. (2002) 2 SCC 407 by observing as under: "THE Supreme Court considered the entire conspectus of law and after referring to the provisions of Section 2(1) (o), 2 (d) (ii), Section 3 and various judgments in Consumer Protection Act. Referring to the "Insurance Law" by Mac Gillivray in para 16 made the following observation in para 17 and 18 about the distinction between subrogation and assignment. Para 17 and 18 reads as under: With the distinction between subrogation and assignment in view, let us examine the Letter of Subrogation executed by the second respondent in favour of the first respondent. Its operative portion may be broken up into two, namely, (i) we hereby assign, transfer and abandon to you all our rights against the Railway Administration Road transport carriers or other persons whatsoever, caused or arising by reason of the said damage or loss and grant you full power to take and use all lawful ways and means in your own name and otherwise at your risk and expense to recover the claim for the said damage as loss"; and (ii)" we hereby subrogate to you the same right as we have in consequence of or arising from the said loss or damage." 18. By the first clause the second respondent assigned and transferred to the first respondent all its rights arising by reason of the loss of the consignment. It granted the first respondent full power to take lawful means to recover the claim for the loss, and to do so in its own name. If it were a mere subrogation, first, the word "assigned" would not be used. Secondly, there would not be a transfer of all the second respondent's rights in respect of the loss but the transfer would be limited to the recovery of the amount paid by the first respondent to the second respondent. Thirdly, the first respondent would not be entitled to take steps to recover the loss in its own name; the steps for recovery would have to be taken in the name of the second respondent. Thus, by the first clause, there was an assignment in favour of the first respondent. By the first clause, the second respondent assigned and transferred to the first respondent all its rights arising by reason of the loss of the consignment. It granted the first respondent full powers to recover the claim for the loss by lawful means, and to do so in its own name. If it were a mere subrogation, first, the word "assigned" could not be used. Secondly, there would not be a transfer of all rights of the second respondent in respect of the actionable claim but the transfer would have been limited to the right to recover of the amount paid by the first respondent to the second respondent. Thirdly, the National Insurance Company would not be entitled to take steps to recover the loss in its own name; the insurance company had not hired the services from the appellant and as such it may be difficult to say after assignment of all rights M/s Voltas Limited continued to be consumer and National Insurance Company had become consumer. For the aforesaid reasons and transfer of all rights of M/s Voltas Limited in favour of National Insurance Company, we feel that the impugned order cannot be sustained and it is hereby set aside. However, the parties are left to bear their own cost. Respondent-National Insurance Company is given liberty to approach the civil court to seek appropriate relief and may also take

advantage of the observation made by the Supreme Court in *Laxmi Engineering Works Vs. P.S.G.Industrial Institute* 1995 (1) State Commission 369 (NS) With the above observation, the appeal is allowed accordingly".

Aggrieved by the said order, National Insurance Co. Ltd. filed Civil Appeal No.7340 of 2010 before the Hon'ble Supreme Court which was decided by the Supreme Court vide order dated 01.09.2010 by observing as under: "In *M/s Economic Transport Organisation vs M/s Charan Spinning Mills (P) Ltd.* (2010) 4 SCC 114, a Constitution Bench of this Court has overruled the decision in *Oberoi* in so far as the observations relating to rights of subrogee to maintain a complaint under the Consumer Protection Act. Applying the principles laid down in *M/s Economic Transport Organisation*, the complaint by the consumer (consigner) and the insurer was maintainable. This appeal has to be therefore allowed. However, as the National Commission has not examined the matter on merits, this appeal will have to be remitted back to the National Commission for consideration on merits. We, accordingly, allow this appeal, set aside the order of the National Commission and remit the matter to the National Commission for decision on merits in accordance with law. It is open to the respondent to approach the National Commission for appropriate interim order pending disposal of the matter".

It is in this circumstance that appeal is again before us.

3. WE have heard Mr.S.K.Pattjoshi, Advocate, learned counsel representing the appellant and Mr. Kishore Rawat, Advocate, learned counsel representing the respondents- National Insurance Company and Voltas Limited and have considered their respective submissions. Mr. Pattjoshi would assail the findings and order of the State Commission as erroneous mainly on the ground that it is not based on the correct and proper appreciation of the evidence and material brought on record and is also not in consonance with the settled legal position in regard to the interpretation of section 9 of the Carriers Act, 1872. On the other hand, Mr. Kishore Rawat submits that as per the own showing of the appellant, the consignment was destroyed in a fire which show lack of care on the part of the carrier and, therefore, the State Commission was fully justified in allowing the complaint in the above manner. In this case it is not disputed that consignment was handed over to the appellant East India Transport Agency for its carriage and delivery to the consignee at Bareilly and it was totally damaged on account of fire which had taken place in the truck carrying the consignment alongwith other consignment was loaded. On the loss having been assessed by the surveyor, the insurance company settled the claim by paying a sum of Rs.9,72,166/- to the consignor M/s Voltas Ltd. and obtained a letter of subrogation from them in order to lay a claim against the carrier. The carrier simply denied its liability on the ground that there was no negligence and deficiency in service on its part because the consignment was destroyed in a fire which was caused due to lit of beedis by someone at the vehicle which was also carrying sodium chlorate belonging to different consignee and that it was on

account of the combustible nature of the said chemical that it caught fire and besides the said chemical, the consignment in question was also destroyed. The State Commission has duly considered this aspect and answered the same in the following manner: "On the other hand, the learned counsel for the opposite party contended that there is no negligence and deficiency in service on the part of the opposite party. He also relied on the report of the surveyor who has also observed that because of lit of beedis by someone the fire has occurred in the vehicle. He contended that sodium chlorate chemical were carried in the truck of the opposite party. In the said fire the said chemical was fully lost. It is also contended that carrying of chemicals in the truck was not prohibited. But the report of the surveyor clearly speaks that opposite party was carrying 9 tons of sodium chlorate. The said chemical was to be carried to Nainital. While negotiating on the road this truck got fire and the consignment of the complainant no.1 was fully lost. It is contended by the learned counsel for the complainant No.1 that the opposite party has violated the provisions of Explosives Act. The opposite party stated that they have no knowledge about the said fact and, therefore, there was no negligence and carelessness on the part of the opposite party. The complainant no.1 stated that he has filed affidavit of the surveyor which mentions about the prescription of the opposite party for infringement of the provisions of the Explosives Act. The learned counsel for complainant no.1 also placed reliance of various judgments about the negligence on the part of the opposite party. He contended that he wanted to adduce the evidence in the subject matter. Considering the facts of the case that the complaint is supported by the affidavit alongwith survey report as well as certificate about the loss occurred to the complainant no.1 then it was obligatory on the part of the opposite party to compensate for the said loss. The contention of the opposite party is that there was no negligence on their part cannot be accepted. It is pertinent to note that the opposite party has accepted the said consignment to be delivery to bareilly. The opposite party was not prohibited to carry the additional load in the said truck. There was no proof left for the opposite party to establish his case. It can be seen from the survey report that the opposite party has allowed the over load of sodium chlorate chemicals which inflammable was got fire because of beedis lit resulted into total loss of the consignment of the complainant no.1."

4. MR.Pattjoshi has vehemently argued that unless the complainant had established any negligence and lack of care on the part of the carrier, they cannot claim compensation for the loss occasioned to the consignor. We have noted this contention only to be rejected because the law presumes negligence on the part of the carrier if there is loss or damage to the consignment but said presumption is rebuttable by the carrier. In the present case the carrier has simply come with a plea that the truck which was containing the consignment also contained combustible material which had caught fire on account of lit / beedis. It led no evidence to show what precautions were taken by the driver of the vehicle to preserve the consignment at the time of carriage of the

consignment. The carrier cannot be allowed to exonerate itself of its liability to indemnify the loss occasioned to the consignor or consignee on account of damage to the goods which were handed over to the carrier. In the case in hand, no material has been brought on record from the side of the appellant in order to rebut the said presumption. The State Commission was, therefore, fully justified in allowing the complaint holding the appellant guilty of deficiency in service in not settling the claim of the complainants once the insurance company had settled the claim of the complainant no.1 by paying the insurance amount under the insurance policy in terms of the surveyor's report. In our view the findings recorded by the State Commission does not suffer for any legal infirmity. The State Commission while allowing the complaint had directed the opposite party ? appellant to pay the awarded amount to the complainant within a period of eight weeks from the date of the passing of the order with the stipulation that after the amount was not paid, it shall carry interest @ 18% p.a. In the given facts and circumstances, we consider the stipulation of award of interest at the above rate excessive and harsh on the appellant. We are, therefore, inclined to modify the same so as to make it reasonable to both sides. In our view the stipulation of payment of future interest may be restricted to 12% p.a. In the result, the appeal is partly allowed and impugned order so far as it has allowed the complaint is hereby upheld but stipulation in regard to the payment of interest @ 18% p.a. is modified to 12% p.a. Parties to bear their own costs throughout.