(2014) 02 NCDRC CK 0006

In the National Consumer Disputes Redressal Commission

EXPORT CREDIT GUARANTEE CORPORATION OF INDIA LTD. APPELLANT

Vs

B.K. Office Needs (P) Ltd. RESPONDENT

Date of Decision : 21-02-2014

Acts Referred:

Citation : 2014 0 NCDRC 349 : 2014 2 CPJ 332

Hon'ble Judges : VINAY KUMAR J.

Final Decision : Appeal dismissed

Judgement

1. COMPLAINANT , B.K. Office Needs Private Limited had entered into a contract for export of granite to Singapore. The supply was made in 11 shipments. Payments in respect of six were received without any problem. These were sent on DP (delivery on payment) basis. But allegedly, there was considerable delay in receipt of payments on the other four shipments which were made on DA (delivery on acceptance and payment within 90 days) basis. The importer/ consignee alleged supply of defective material as the reason for non -payment. The Complainant and his inspecting agent visited the project site of foreign buyer in Singapore. Their assessment was that the importer had ordered excess quantity and was, therefore, avoiding payment on the pretext of poor quality. Eventually, the foreign buyer paid only US $ 55,388.02 as against full, cost of US $ 75,309.02. For the balance amount of US $ 19,921, the complainant made a claim under the policy with the ECGC. The claim was repudiated by ECGC. The State Consumer Disputes Redressal Commission, Chennai allowed the complaint directing the OP/ECGC to pay Rs. 7,63,054 with 9% interest and costs. It has held that the claim is covered by the terms of the policy issued by the OPs. The order of the State Commission has been challenged by the OP/ECGC in the present appeal.

2. WE have carefully considered the pleadings, evidence and other record submitted by the two sides before the State Commission. We have also heard at length, Mr. K.K. Bhat, Advocate for the appellant/ECGC and Mr. P.V. Raghavan, Advocate for the respondent/complainant. The main question, as observed by

the State Commission, is whether it was a case of ''credit risk'' as contended on behalf of the Complainant or a case of ''trade risk'', as claimed by the opposite party. The claim was repudiated on the ground that - - It is concluded from the given documents that the short payment was on a mutually agreed basis due to the damage of goods sent to them.

As informed earlier, loss of this nature is considered as trade loss which is outside the purview of the Policy.

3. EVIDENTLY , therefore, the case of the OP/ECGC before the State Commission was that it was a case of ''trade loss'' which allegedly, was the result of acceptance of short payment, mutually agreed with the foreign buyer, due to damage to the goods and, therefore, not covered under the policy. On this issue, the State Commission has made a detailed assessment of the evidence before it. It has observed that - - Indeed, under Ex. B1 dated 2.12.1998, the complainant had written to the foreign buyer stating as follows:

"the shipments against this Project order was executed on the basis of 50% D/P and 50% D/A 90 days payment terms. As we have been having good relationship till this incident, the undersigned accepted to give a discount in respect of the following items so that not only the balance payment could be realized but also our bankers who were pressurizing us to realise the payments without any further delay". The total amount under various items is given as USD 19602. The letter further says that "after this discussion, we were forced to issue a credit note for the above items, which we did, on the spot. Now we need to get these items back from you, in order to submit it to our customs authorities and regularise the accounts. We, therefore, request you to ship the above mentioned items, immediately on receipt of this letter by fax to enable our bankers also to regularise the issue of the credit note". The letter also makes a claim for reimbursement of the cost of air tickets and boarding/lodging expenses, in a total sum of USD 2,902. This letter has been produced by the opposite parties. We have already noted that this letter had been sent by the complainant to the foreign buyer. From this letter, it would be clear that the foreign buyer had to return the goods worth US D 19602. Admittedly this had not been done. We have already referred to the communication (Ex. A4 dated 16.4.1999 from State Bank of India, mentioning about Reserve Bank of India accepting the credit note on the assurance given by the complainant that the foreign buyer would be returning certain materials rejected by them. There is confirmation of this aspect in Ex. A17, which is the Facsimile Transmission Sheet from the foreign bank to the State Bank of India, Nungambakkam Branch. The foreign bank had contacted the buyer regarding unreturned materials and the buyer advised them that they would liaise direct with the drawer regarding the unreturned goods. The goods had not been returned. According to the opposite parties, when once the complainant gave a credit note, he must be deemed to have closed the transaction and it was a trade risk or trade loss and the same is not covered by the terms of the policy. If the matter had stopped with the issuance of credit note by the complainant, we can very well understand the position. It had not stopped with that. There was a clear arrangement that the opposite parties would return certain materials. It is not disputed that the materials had not been returned by the foreign buyer. The terms of the policy in this regard are quite clear and we also accept the contentions on behalf of the complainant that the complainant agreed to pass a credit note for the amount claimed from the opposite parties to prevent/minimise the loss. The policy does not contemplate that for taking such an action by the complainant, he had to take any express permission from the opposite parties. It could not be said that it was an unilateral decision. The decision had been taken as per the terms of the policy. We had already referred the Clause 3(iii) of the policy, which provides for taking suitable action to prevent/minimise the loss including such action as might be suggested by the Corporation and that action to prevent/minimise a loss would depend on the facts and circumstances of each case. We have also referred to Clause 4 of the communication dated 25.5.1998 which provides that the maximum liability would be the limit up to which the Corporation will entertain the claims irrespective of the cause of loss. Inasmuch as the complainant had not received back the alleged rejected goods, it would clearly amount to credit loss and covered by the policy.

4. LEARNED Counsel for the appellant argued that if the goods were defective, the foreign buyer would have returned them, as allegedly agreed with the exporter/complainant. He argued that the fact that the goods were eventually not returned, would mean that it was a case of mere trade discount. The Appeal Memorandum also repeatedly calls it as a case of ''unconditional and full discharge'' on reduced price, in violation of the policy. But, it does not refer to any evidence in support. Learned Counsel also conceded that there was no evidence to show that it was a case of discount simplicitor. In the letter of 2.12.1998 itself, admittedly received in the ECGC, the complainant had informed that the credit note was given against return of stocks. In our view, it would not become a ''trade discount'' in retrospect merely due to non return of goods by the foreign buyer. We, therefore, find ourselves in agreement with the State Commission that the credit note was against return of stocks and not as a price discount. Further, the ECGC has pleaded before the State Commission that the Complainant had no business to enter into unilateral negotiation with the foreign buyer resulting in agreement to accept return of goods and to issue credit note for the same. In the Written Submission before the State Commission, ECGC has categorically denied having advised the Complainant in this behalf. It was alleged that the Complainant had of its own volition given full discharge to the buyer in respect of outstanding liabilities covered under the insured shipments. On this point, the State Commission has considered at length the correspondence in Exhibits A -9, 19 and 27, between the two. It has concluded that the OPs had been duly consulted by the complainant and the latter had made attempts to salvage the situation only on the advice of the OPs.

5. WE may mention here that the complainant had informed full details to the

ECGC in the copy of its letter of 2.12.1998. The seal on the first page of this letter shows that it was received in the ECGC only on 19.2.1999. But, well before 19.2.1999, ECGC had sent two communications to the complainant, with clear advice on these four shipments. They are dated 7.12.1998 and 9.12.1998. Clearly, the complainant had taken up the matter with the O.P. sufficiently in time for such response to be generated. In these letters ECGC had even advised the complainant to make maximum effort, in view of the reported non -payment for the four consignments. These would show that the complainant was right in his claim that it was in touch with the OPs on this issue. We, therefore, reject the contention of the appellant that it was a case of unilateral decision on the part of the complainant.

6. LEARNED Counsel for the OP/ECGC has sought to rely upon the decision of Hon''ble Supreme Court of India in Suraj Mal Ram Niwas Oil Mills v. United India Insurance Co. Ltd., : IV (2010) CPJ 38 (SC) : VIII (2010) SLT 375 : (2010) 10 SCC 567. In that case the appellant had despatched a consignment of oil on 14.8.1992, from Jaipur to Agartala. The railway wagon met with an accident on 28.9.1992, resulting in extensive damage to the consignment. Surveyor appointed by the Insurance Company reported that between 1.4.1992 and 14.8.1992, the appellant/complainant had despatched oil worth Rs. 143.59 lakh while it had declared despatches worth Rs. 91.22 lakh only: The Insurance Company repudiated the claim under the policy on the ground that all despatches were not declared, which was violation of an express term of the policy. The Apex Court upheld the repudiation, observing that - - 24. Thus, it needs little emphasis that in construing the terms of a contract of insurance, the words used therein must be given paramount importance, and it is not open for the Court to add, delete or substitute any words. It is also well settled that since upon issuance of an insurance policy, the insurer undertakes to indemnify the loss suffered by the insured on account of risks covered by the policy, its terms have to be strictly construed to determine the extent of liability of the insurer. Therefore, the endeavour of the Court should always be to interpret the words in which the contract is expressed by the parties.

In our view, the claim of the respondent/complainant does not involve violation of any specific term of the policy. Therefore, the appellant/OP can derive no support from the above decision of Hon''ble Apex Court.

We therefore hold that the decision of the State Commission to allow the complaint is based on proper appreciation of the evidence before it. The appeal is held to be devoid of merit and is dismissed as such. Consequently, the order of Tamil Nadu State Consumer Disputes Redressal Commission in O.P. No. 54 of 2002 is confirmed.

