(1994) 09 NCDRC CK 0025

In the National Consumer Disputes Redressal Commission

GILT PACK LIMITED APPELLANT

Vs

New India Assurance Co. Ltd RESPONDENT

Date of Decision : 01-09-1994

Acts Referred:

Citation : 1994 2 CPC 477 : 1994 3 CPR 335 : 1995 1 CPJ 271

Hon'ble Judges : G.G.Sohani , M.L.Tiwari J.

Advocate : M.L.Dhupar , Mahavir Bhatnagar

Judgement

1. -IT was not in dispute that the New India Assurance Company Ltd. the issued a Marine Open Cover (Cargo) Policy bearing No. 2145080100738 on 25.6.90 in favour of M/s. Gilt Pack Limited subject to the conditions as stipulated in the policy. The Insurance Company has been sending debit notes and statements in regard to bank guarantee. The loss of the consignment was suspected and survey was held between 19.10.90 to 23.10.90 and the Surveyor M/s. H. Kannan & Company, Bombay submitted their report on 8.11.90. The second survey was done by M/s A.K. Govil & Associates, Bhopal at Pithampur on 15.11.90 & 17.11.90. Copies of the Survey Reports are placed on record.

2. THE case of the complainant, in brief, is as per the Marine Open Cover Policy referred above, New India Assurance Company Ltd. (hereinafter referred to as the ''Opposite Party'') admites to cover the risk in respect of consignments to be imported by the complainant within the time span of one year commencing from 25.6.90 and the name of the ship or other particulars of the consignment were left to be defined by subsequent declaration to be made by the assured in the declaration form provided by the insured to the assured. THE declarations were required to be made in the order of despatch or shipments and they were to cover all the consignments of the goods mentioned in the policy. THE insurer agreed that risk in respect of all despatches or shipments shall commence as soon as the declaration was made in the prescribed proforma supplied by the Company. THE assured was under obligation to declare each and every shipment whether arrived or not. THEre was a stipulation that unintentional failure of the

assured to report any shipment to the company shall not void the open cover and such shipments shall be held covered by the policy subject to open cover conditions. The Opposite Party i.e. the Insurance Company is entitled to premium on all shipments covered by the policy whether reported or not. The risk commenced in respect of each declaration as soon as the declaration was made it was obligatory for the insurer to issue a certificate or policy covering the risk in respect of goods mentioned in the declaration. The payment of premium was not a condition precedent for the commencement of the risk. The payment of premium was guaranteed by the State Bank of India, G.P.O. Branch, Indore vide their Bank Guarantee No. 90-91/21 dated 21.6.90 for Rs. 50,000/-. Actual payment of premium was guaranteed and the insurer could recover the same by invoking the Bank Guarantee. The contract could not be avoided on the ground of non-payment of premium. The guidelines issued by the Head Office to the Regional Office show that the contract cannot be avoided if the loss has been assessed before the next succeeding month and the claim is payable after recovering the premium from the insured or the Bank against the Bank Guarantee. That on 13.9.90 the Complainant made a delcaration in respect of a consignment of 100 MT HIPLEX imported from Yogoslavia. The insurer accepted the risk and issued the certificate of insurance subsequently covering the risk w.e.f. 14.9.90 The insurer also agreed to issue an insurance cover on increased value of cargo by reason of payment of customs duty and the said customs duty insurance cover were subject to the same clauses and condition as contained in the Marine Insurance Policy (Cargo). The insurer never appraised the assured that the policy would be subject to the duty insurance clause nor was the assured informed that the policy could be avoided if the insurance was effected after the arrival of the vessel at the destination port. The assured submitted the customs duty proposal on 26.9.90 and as per the practice of the company the assured was informed orally that the proposal is accepted and the company is on risk. The policy was to be sent forthwith but the assured received the Marine Insurance Policy No. 2145080100795 issued and delivered on 5.10.90 by which the insurer accepted the risk w.e.f. 26.9.90. The premium for the aforesaid two certificates of insurance were debited to the Bank Guarantee Account of the assured but Debit Notes were not received. The insurer showed that an amount of Rs. 29,274/- to this account under the column balance brought forwarded in the monthly statement of Bank Guarantee for the month of October 1990 which was received on 12.11.90. The as-sured issued a cheque for Rs. 39,362/- on 17.11.90 against the premium debited to Bank Guarantee Account. The assured through his agent paid the custom duty on 17.10.90 and the delivery was effected to him thereafter. As per survey report there was shortage of 28136.00 Kgs. or HDPE (HIPLEX) granules. So a claim was lodged against the Insurance Company for a sum of Rs. 8,86,174/-. Despite attempts claim was not settled. The Insurance Company i.e. the Opposite Party repudiated the claim on 9.1.92 on two counts that there was a violation of the provisions of Section 64 VB of the Insurance Act, 1938 in as such as the premium for the cargo and duty policies which was debited to the bank guarantee account on 14.9.90 and 26.9.90

respectively and was payable till 31.10.90 was not paid till then and that the duty cover was obtained on 26.9.90 after the arrival of the vessel. That the repudiation of the claim on the aforesaid ground is malafide, arbitrary and unjustified. The actual payment of the premium was not a condition precedent for the formation of the contract. Section 64 of the Act provides that although ordinarily it is the duty of the assured or his agent to pay the premium and the duty of the insurer to issue the policy are concurrent conditions yet the parties to the contract may agree to accept the premium subsequently. Actual payment of premium is therefore not necessary for the creation of a binding contract. Section 64 VB of the Insurance Act, 1936 does not provide'' that the premium must be paid in advance. The insurer can assume the risk in respect of any insurance business even if the premium is guaranteed to be paid by the assured in such manner and within such time as may be prescribed, In the instant case premium was guaranteed and in the event of any default on the part of the assured to pay the premium after the receipt of the debit note the insurer could invoke the Bank Guarantee and realise the premium forthwith in terms of the Bank Guarantee dated 21.6.90. That the debit notes were not received by the assured for the month of September. The Bank Guarantee Account statement for the month of September 1990 required to be sent every month by the insurer was also not received by the assured. The Bank Guarantee account statement was received in November and as per that statement Rs. 29,274/- were debited towards the premium of the month of September 1990. The total premium payable was Rs. 29,262/- and the same was paid by the complainant by cheque No. 653732 dated 17.11.90 drawn on State Bank of India, G.P.O. Branch, Indore. The insurer accepted the premium without demur and that too after having known that the loss has already occurred. The second ground on which the claim in respect of refund of duty insurance is sought to be avoided is that the insurance was effected after the arrival of the ship. The said ground is also not justified. The said condination were never made known to the assured in any manner. He never agreed to those conditions. The policy was not in the prescribed proforma. The duty insurance clause was not attached to the policy. The said clause was supplied to the insurer when he asked for it after the repudiation of the claim. The insurer never referred to that duty insurance clause in any of the correspondence. From the conduct of the insurer, it is clear that there was no intend that the contract of insurance would be void if effected after the arrival of the ship as they would have attached the said clause to the policy of insurance and also the fact that the claim was not repudiated on this ground immediately after having known about the date of arrival of the vessel and the Insurance Company did not refer to it till 9.1.92 proved that the Insurance Company never intended to rely upon the said clause. Thus, complainant prayed cost of shortages of material quantity 28.136 MT Rs. 4,44,849/-, amount of customs duty on shortage, of 28.136 MT Rs. 4,27,200/-, survey fees Rs. 14,125/- total claim Rs. 8,86,176/-. Compensation by way of interest @ 12% per annum from 4.8.91 to 26.6.92 on this amount, Rs. 96,144/-. Thus, the claim was for Rs. 9,82,318/-.

The New India Assurance Co. Ltd. the Opposite Party in its written statement raised preliminary objections that the complaint has been filed in the name of P.S. Kalani with whom no contract of insurance was made by the Opposite Party and as such the complaint is liable to be rejected. The Commission has no jurisdiction to entertain the complaint as it does not fall within the definition of ''complaint'' as defined in Section 2 of Consumer Protection Act, 1986. The contention of the Insurance Company was that the Insurer had never agreed to receive this immediately after the declarations were received. Assumption of risk on receipt of declarations was subject to the stipulation that the assured shall pay the premium before the end of next succeeding month from the month of declaration. This was an essential condition for assuming risk. The complainant was required to declare each and every shipment and was liable to pay premium on all shipments whether declared or not. The Insurance Company is not liable in respect of shipments declared after loss or arrival of the vessel. The condition precedent was payment of premium before the end of next following month. Failure on the part of the assured to pay the premium absolved the Insurance Company from asuming any risk from the date of declaration and any certificate of insurance obtained by the assured was rendered invalid for the purposes of risk. As a matter of fact concurrent payment of premium is obligatory as per Section 54 of the Marine Insurance Act, 1963 unless otherwise agreed, it is the duty of the assured to pay the premium simultaneously alongwith the proposal. This essential condition can be modified by agreement by the assured and the insurer. Bank Guarantee does not amount to payment of premium. It was merely a guarantee of the Bank to reimburse the Opposite Party to the extent of Rs. 50,000/- in the event of non-payment of premiums by the complainant. The Duty Insurance Clause was part of the policy. It was for the complainant to go through all the conditions attached to the policy. There was no such condition in the Insurance Cover that the Insurance would send such statements. Neither the Bank Guarantee nor these debit statements absolved the complainant from paying the premiums in terms of agreement. The repudiation of the claim was justified. The Insurance Company assumes risk only when premium is received in advance or within prescribed period. The prayer for refund was rightly repudiated. There was no valid contract of insurance. The Insurance Company is not at all liable to pay the compensation and the amount claimed. The repudiation was on merits. There is no reference to the deficiency of service in the complaint. The Insurance Company is a subsidiary of General Insurance Corporation of India of the General Insurance Business (Nationalization) Act, 1972, so the Insurance Company has no powers to deviate from the Rules and is to discharge its functions according to the provisions of Insurance Act, 1938.

3. ON the basis of the contentions of the parties, the following issues were raised by the Commission in Hindi and they are for the convenience of discussion rendered in English:- 1. Whether the Commission has jurisdiction to hear the complaint? 2. Whether the Insurance Company has agreed to the liability about the Cargo? 3. Whether the payment of the premium was a condition precedent

for the claims? 4. Whether under the Marine Insurance Act, 1938 the payment of the premium and offering of proposal are the requirements? 5. Whether the Bank Guarantee can be treated as payment of premium? 6. Whether the Insurance Company enclosed the conditions of the duty along with the policy? 7. Whether complainant is entitled to Rs. 4,44,849/- as the loss of the goods and Rs. 4,27,200/- in view of customs duty, Rs. 14,125/- as fees of the Surveyor and Rs. 96,840/- as damages. In all Rs. 9,82,318?

Before we deal with the above points, the two legal objections raised or resolved hereby:- There were two legal objections raised by the Opposite Party. There was misdescription in the cause title of the complaint which was ordered to be corrected by us as per order dated 22.8.94 and the second objection was about a suit pending before Hon''ble Bombay High Court. The Opposite Party agreed that their names from the array of non-applicants or defendants in that suit before Hon''ble High Court has been deleted so this is not a case where the matter between the parties is subjudice before any other Court. So the objection about maintainability of this complaint in view of Civil Suit No. 94/93 is rejected. Reasons with finding on Point No. 1:

4. THE case of the complainant does fall under the definition of the term ''complaint''. As per Section 2(1)(c)(iii) the services hired or availed of or agreed to be hired or availed of by him suffer from deficiency in any respect. THE relief claimed is also covered by Section 14 of the Consumer Protection Act. Section 2(1)(d) defines ''Consumer'' means any person who hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person. THE Insurance Company renders service and under Section 2(o) of the Consumer Protection Act, 1986 ''service'' includes services means of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying a news or other information, but does not include the rendering of any service free of charge or under a contract of personal service. So in the light of the definition of the ''complaint'', ''consumer, and ''service'', the Consumer Redressal Commission has jurisdiction to resolve the dispute raised. Reasons with finding on Point No. 2:- Determination of this point is not necessary because it is an admitted position that there was an Insurance Policy Marine Open Cover (Cargo) the documentary evidence filed as Ex. C-1 the policy. Reasons with finding on Point Nos. 3, 4, 5 & 6. For convenience of discussion, these points are taken together:- After going through the case of both the parties, the documentary evidence, oral evidence placed on record, the affidavits, the legal points raised as interpretation of Section 64VB, and for convenience sake the

relevant portion of Section 64 VB reproduced hereunder:- "64VB. No risk to be assumed unless premium is received in advance. (1) No insurer shall assume any risk in India in respect of any insurance business on which premium is not ordinarily payable outside India unless and until the premium payable is received by him or is guaranteed to be paid by such person in such manner and within such time as may be prescribed or unless and until deposit of such amount as may be prescribed, is made in advance in the prescribed manner."

5. THE non-applicant/Insurance Company had paid attention to the heading of the Section only i.e. no risk to be assumed unless premium is received in advance. Now this advance receipt of premium is further incorporated under the main body of the Section and under the provision if the premium is guaranteed to be paid by such persons in such manners and within such time as may be prescribed or unless and until such deposit is made in advance in the prescribed manner. In this case for payment of premium to the extent of Rs. 50,000/- an agreement has been entered into between the New India Assurance Co. Ltd. and the State Bank of India. THEre it has been agreed that this deed of guarantee executed by the State Bank of India constituted under the State Banks of India Act, 1955 having its Central Office at Marine Point Bombay and amongst other places Branch at A.B. Road Indore near G.P.O. (hereinafter referred to as Bank) in favour of the New India Assurance Co. Ltd. (hereinafter referred to as the beneficiary) for an amount not exceeding Rs. 50,000/- only at the request of M/s. Gilt Pack Ltd. This guarantee is issued subject to the condition that the liability of the Bank under this guarantee is limited to a maximum of Rs. 50,000/- and the guarantee shall remain in full force which cannot be invoked otherwise than by a written demand or claim under the guarantee served on the Bank on or before 19.9.91.

6. SO the contention that premium was not paid within the stipulated period does not help the complainant. In such a case while issuing the policy in question, if Bank Guarantee furnished by the assured than the payment of premium in cash or by cheque if not paid, then in such case the risk in respect of the policy could be assumed by the Insurance Company. It was raised by the way of defence by the Insurance Company that the premium was not paid before the loss incurred so the policy is ineffective. That argument cannot be upheld as the complainant by offering Bank Guarantee has the shield of bank guarantee, and that saves the complainant from the lapse of payment of premium. The bank guarantee means that the Insurance Company in case premium is not paid within time can bank-upon the bank guarantee for which the company was agreeable and has entered into an agreement with the State Bank of India, Indore.

On this point we find support from a Division Bench Judgment of Hon''ble Karnataka High Court reported in Accident & Compensation Cases Vol. I (1994) ACC 430 in United India Insurance Co. Ltd. v. Murugan @ Krishnan & Another. In paras 10 and 11 of the aforesaid judgment their Lordships of the Karnataka High Court had interpreted Section 64VB and observed that in the instant case the fact that the Insurance Policy was issued in consideration of the guarantee furnished by the insured is not in dispute. As a matter of fact, the provisions contained in Section 64VB provides for issue of policy, against guarantee furnished by insured regarding the premium to be paid.

7. SINCE the Insurance Company on the basis of the guarantee furnished by the insured has assumed the risk, the contention of the learned Counsel for the Insurance Company, that the provisions of Section 64VB forbid the insurer from assuming risk has no merit. It is further observed in the same judgment that the aforesaid provisions clearly enable the insurer to assume any risk in India in respect of any insurance business on which premium is not ordinarily payable outside India, if the premium payable is guaranteed to be paid by such person in such manner and within such time as may be prescribed. However, the learned Counsel for the Opposite Party contended that in terms of the guarantee in the instant case the premium was required to be paid on or before 30.11.1988 and the same was not paid but was paid on 19.5.1989. If premium was not paid within the due date, the Insurer ought to have enforced the guarantee and recovered the premium. That is the very object of obtaining guarantee. If there is any lapse on the part of the insurer in enforcing the guarantee for recovery of the premium amount, that would not ensure the benefit of the insurer to repudiate the policy. We on our part are in complete agreement with the principle laid down in the said judgment.

8. A further argument was raised that the amount which was due was not paid back as per terms of the agreement. That is a different matter. Even after payment of the premium of both the policies sufficient amount remains with the Bank. The statement of account which as per complainant was not received for a couple of months. The legal position enunciated by us that furnishing of the Bank Guarantee itself fulfills the spirit of Section 64VB of the Insurance Act, 1938. In this respect, Rule 58 of the Insurance Rules, 1939 makes the position further clear. There is advance payment of premiums is further explained for the purposes of Sub-section (1)of Section 64 VB a risk in respect of a policy may be assumed before the premium payable in respect thereof is received: (i) if the entire amount of the premium is guaranteed to be paid by a Banking Company before the end of the calendar month next succeeding to the month in which the risk is assumed, if the premium due is not paid by the insured before that date. There was bank guarantee in this case and furnishing of bank guarantee is sufficient for assuming the risk against such deposit. After all Bank Guarantees given is to meet such exigencies, otherwise there is no purpose for spending amount and loosing some income which could have been accrued to the insurer in case he does not follow that course. The Insurance Company was pleaded to repudiate the claim in respect of refund of duty insurance on the ground that the insurance was effected after the arrival of the ship. There is doubt about the duty insurance clause attached to Ex. D/1, Marine Insurance Certificate Cargo. In this Case, P.S. Kalani, the Managing Director of the Complainant stated on oath in para 10 of his statement that C/8 is not the proper description of the Marine

Policy Cargo and no enclosure was received by him alongwith C/8. Much stress was led by the Opposite Party i.e. Insurance Company on the enclosure of C/8, which is marked as D/3 as Opposite Party''s document. This enclosure of duty insurance clause was enclosed with D/1 appears to be doubtful because D/1 duty insurance clause is part of D/1 which is C/8 as complainant''s document. The Insurance Company had accepted the premium and the complainant was never informed that the duty is not payable by the Insurance Company because the ship has entered the port and after that no policy was issued.

9. IT is on record that the Insurance Company repudiated the claim on 9.1.1992 and it took about 15 months to repudiate the claim. Delay itself amounts to deficiency in service and creates doubt. Not only that as per statement of Shri Kalani and the documentary evidence placed on record the duty cover was obtained by them on 26.9.90 and the ship entered the port on 25.9.90. The fate of this part of the claim depends on whether when D/1 was issued and whether D-3 the Duty clause formed part of it. In cross-examination when this question was raised and the complainant has given reply to it that the document Ex. C/12 AB was ready on 19.9.90 and this document was prepared by the Agent of the complainant and it was presented on 26.9.90. Shri Kalani in para 5 of his cross-examination admits that duty clause in enclosed is referred in the policy but he did not receive it. He explained that for absence of that enclosure, no complaint was made because this does not come to his notice. The burden of proving the fact that this D/l and D/3 the duty insurance clause was part of D/l and C/8 was on the Opposite Party.

10. SHRI Praveen Godbole the witness for the Opposite Party who was cross-examined on his affidavit stated that there is a standard proforma for duty Insurance Policy clause. Then he says that there is no schedule proforma and he admits the position that there is no record with the Regional Office of attaching of this clause with the policy and he denies the fact that he has any knowledge about this attachment of duty clause. Similarly, Shri Ajay Khandelwal (DW/ 1) without asking any question on the duty clause stated that duty clause is attached to the policy. He further stated that the policy was prepared by the three agencies and 67 documents are executed per day. He further stated that the policy was prepared by one Hardeep Singh and he does not know when this policy was delivered to the insurer. That shows that in the light of the correspondence which the parties had before coming to the Commission, there was no reference that duty clause was added to D/l or C/8 and the material witness Hardeep Singh is not examined.

So on the preponderance of evidence, We can safely say that D/3 was annexed to D/l has not been proved, and the possibility that that is an after thought cannot be brushed aside.

11. THERE is no dispute about the Surveyors report and thus, the complainant has proved the loss on both counts. For both the counts i.e. for cost of shortage of material Rs. 4,44,849/- and the amount of custom duty paid on shortage of

this quantity i.e. 28.13 MT he is entitled for Rs. 4,27,200/-. Surveyors had not certified the fees charged. Shri Kalani in his statement does not say that what amount has been paid to the Surveyors. The complainant has claimed at the rate of 12% interest. This interest they have charged even on the Surveyors fee. We are of the view that the complainant is entitled for Rs. 8,72,049/-, and the interest shall be payable at the rate of 12% on this sum from the date of the complaint i.e. 30.6.1992. Counsel fee shall be Rs. 5,000/- if certified. The amount ordered be paid within two months after receipt of this order. Mr. Justice G.G. Sohani, President-I agree with the conclusion delivered at by the learned Member Shri Murarilal Tiwari. I would like to state that when this case came up before us for hearing on 22.8.1994, we found that on earlier occasions proceedings in the case were held before Hon''ble Justice V.S. Kokje, the then President of the Commission and the learned Members Shri Murarilal Tiwari and Mrs. Meena Sapre. Before the completion of these proceedings, Justice V.S. Kokje was transferred to the Rajasthan High Court and he resigned from the Office of the President of the Commission. One of the learned Members of the Commission Mrs. Meena Sapre also resigned. The other learned Member of the Commission Shri Murarilal Tiwari is however continuing as Member of the Commission. After the resignation of Hon''ble Justice V.S. Kokje was accepted, I was appointed as President of the Commission. Hence the case came up before us for hearing. Before the commencement of hearing we pointed out to the learned Counsel for the parties that in the circumstances, the proceedings would have to be conducted de novo. Learned Counsel for the parties however, moved a joint application that the parties did not want a de novo trial and prayed that all the evidence adduced by the parties so far be taken on record and be read as evidence adduced before us and that the matter be finally heard by us. In the view of this joint prayer by the parties, we allow their application and directed that the entire evidence adduced so far in the case be taken on at the request of the parties. Learned Counsel for the parties declared that they did not want to adduce any further evidence in the case and that the matter be finally heard by us Thereafter we proceeded to hear the learned Counsel for the parties and have decided the matter as aforesaid. Complaint allowed.

