(1994) 07 NCDRC CK 0049

In the National Consumer Disputes Redressal Commission

GITANJALI ENTERPRISES APPELLANT

Vs

New India Assurance Co. Ltd RESPONDENT

Date of Decision : 07-07-1994

Acts Referred:

Citation : 1995 1 CLT 443

Hon'ble Judges : S.A.Kader , Ramani Mathuranayagam J.

Advocate : R.Yashod Vardhan , M.B.Gopalan , R.G.Rajan

Judgement

1. THIS is a complaint under Section 17 read with Section 12 of the Consumer Protection Act.

2. THE complainant is an enterprise manufacturing fire fighting equipments. It placed an order with M/s. Fritz Emde, West Germany for the supply of a Dry Powder Filling and Emptying Machine. THE machineries and accessories packed in 2 crates were transported by sea by Vessel ''Alum Bay'' from Bremen to Madras Port. THE complainant had taken up a policy of marine insurance with the first Opposite Party for a sum of Rs. 1,75,000/-. THE complainant cleared the consignment through the clearing agents Southern Shipping Services on 27.10.89. When the crates were examined at the premises of the complainant, certain accessories and machineries were missing from the crates. Since the shortage was noticed only when the consignment was opened it could not be notified to the Customs Authorities and no duty remission could be obtained for the shortage. THE complainant preferred a claim with the first Opposite Party. THE claim was rejected by the first Opposite Party on 10.1.92 on the ground that there was no documentary evidence for supporting this claim. Hence this complaint for payment of the insured amount of Rs. 1.75 lakhs with compensation in the sum of Rs. 2,00,000/- and interest. THE second Opposite Party Port Trust of Madras is impleaded only as a formal party and no relief is claimed against it. The claim is resisted by the first Opposite Party. It is denied that there was any deficiency in services. The claim was rejected on 10.1.92 after considering all records and documents on the ground that the loss was not

established. It is pointed out that the landing remark indicated at the time of the dicharge of the goods that the planks were broken. But the complainant has not given any notice to the Steamer or asked for steamer survey. The complainant''s clearing agent had opened the consignment in the presence of the Customs Authorities for the purpose of assessment to duty and even at that stage the loss, if any, would have been brought to the notice of the Opposite Party authorities, but nothing has been done. It is then pointed out that if there had been any loss in transit, such loss ought to have occurred while the consignment was in the custody of the carrier or Port Trust. The complainant ought to have immediately notified the carried and arranged for steamer survey. The complainant ought also to have issued a statutory notice to the Port Trust under Major Port Trust Act and taken legal proceedings against the Port Trust. The complainant has thus failed to protect the rights of recovery of the insurer against the carrier and the Port Trust and hence the first Opposite Party is entitled to reject this claim of the complainant.

The second Opposite Party has filed a counter that it is an unnecessary party. It is pointed out that while destuffing, the planks of one of the crates were found broken as is evident from the remarks recorded in the destuffing tally receipt issued to and acknowledged by the representative of tine Steamer Agent.

3. EXHS. Al to A18 and Bl to B19 are marked by consent. Proof affidavits are filed. No oral evidence has been let in. The preliminary point which arises for consideration is whether the claim is maintainable.

4. POINT:-The complainant has placed an order with M/s. Frite Emde, West Germany for the supply of a Dry Powder Filling and Emptying Machines. The machineries and accessories packed in two crates were transported by sea by vessel ''Alum Bay'' from Bremen to Madras Port. The complainant has also taken up a policy of Marine Insurance with the first Opposite Party insurer. The consignment was cleared by the complainant through its clearing agent Sourthern Shipping Services on 27.10.89. According to the complainant when the consignments opened at its end, they found some accessories missing and they were (1) Liquid Feeding Pump (2) Potentiometer for regulating Pump (3) External Proximity Switch (4) Suction Hose with Universal Filling Adaptor (5) Special Adaptor

The complainant has preferred a claim with the first Opposite Party insurer which has rejected the claim on the ground that the loss has not been satisfactorily established. Hence this complaint. Exh. A15 is the landing remark certificate issued by the Port Trust of Madras, the second Opposite Party. The remark therein is mat ''PBKN'' which means ''Planks broken''. As rightly contended by the first Opposite Party if there had been any theft or pilferage, it must have occurred while the consignment was in transit in the custody of the steamer or after landing while in the custody of the Port Trust. Under Clause 3 of Paragraph 6 of Article (iii) of the Schedule to the Indian Carriage of Goods by Sea Act of 1925. "The carrier and the ship shall be discharged from all liabilities in respect of loss or damage unless suit is brought within one year ater delivery of the goods or the date when the goods should have been delivered."

The goods in the instant case have been delivered to the complainant on 27.10.89 and no suit having been brought against the carrier on or before 27.10.90 the claim against the carrier is extinguished. Under Section 120 of the Major Port Trust Act of 1963 "No suit or other proceeding shall be commenced against a board or any member or employee thereof for anything done, or purporting to have been done, in pursuance of this act, until the expiration of one month after notice in writing has been given to the board or him stating the cause of action or after 6 months after the accrual of the cost of action."

The complainant has not given any such notice or taken any such legal action against the second Opposite Party Port Trust within the period of 6 months as stipulated under Section 120 of the Major Port Trust Act. The question is whether the complainant is now entitled to claim compensation from the insurer. Exh. B5 is the copy of the policy produced by the Opposite Party. Condition No. 16.2 of the policy says that it is the duty of the assured and their servants and agents in respect of loss recoverable hereunder to ensure that all rights against the carriers, bailees or other third parties are properly preserved and exercised. It is argued for the first Opposite Party insurer that as the complainant has failed to take appropriate action against the carrier and the Port Trust as pointed out above, it has failed to ensure that the rights of the insurer against the carrier and the Port Trust are properly preserved and hence the insurer is not liable for the compensation claimed by the complainant. The point is covered by a direct decision of the High Court of Madras in E.I.D. Parry (India) Ltd. v. Far Eastern Marine Transport Co. Ltd. (1988 (I) LW 320). The High Court observed as follows:- "Under the Law of Insurance, the right of the insurer on payment of the loss to the assured is to be subrogated to the rights of the assured so as to enable the insurer to proceed against the third party and indemnify itself. It is therefore incumbent upon the assured to keep alive his remedies against the carrier or other third party and any default committed by the assured either by allowing the remedy to get time barred or by abdicating or abandoning his rights against the carrier or the third party will deprive the insurer of its remedies against tine third party for indemnity. In such cases, it is open to the insurer to repudiate the liability under the policy, if the loss is not paid to the assured or to lay a counter claim against the assured for damages if it has paid the loss to the assured. The law is thus stated in Mac Gillvray & Parkington Insurance Law, Seventh Edition, paragraph 1172:- "The assured is under an obligation not to deal with any claim be possesses, or will possess, against a third party in such a manner as to prejudice the insurer''s rights of subrogation in relation to it. The insurer''s remedy will be to repudiate liability on the policy, or to counter claim for damages for the loss of, or diminution of their rights, depending on the circumstances. The position varies slightly, depending on whether the insurer has paid for the loss."

In the instant case, the complainant has failed to institute any action against the carrier or against the Port Trust of Madras within the stipulated time and consequently the first Opposite Party insurer is deprived of its right to indemnity itself against the carrier or the Port Trust. It is therefore, open to the first Opposite Party insurer to repudiate the claim under tine policy of insurance and this complaint against the first Opposite Party insurer must therefore fail.

5. IN the result, the complaint fails and is dismissed, but without costs. Complaint dismissed.

