(2012) 11 NCDRC CK 0028

In the National Consumer Disputes Redressal Commission

Heaven Diamonds Pvt. Ltd. APPELLANT

Vs

ORIENTAL INSURANCE CO. LTD. RESPONDENT

Date of Decision : 20-11-2012

Acts Referred:

Citation : 2012 0 NCDRC 895 : 2013 1 CPJ 104

Hon'ble Judges : J.M.MALIK , VINAY KUMAR J.

Advocate : Arjita

Judgement

1. THE burning point of discussion is whether pieces of diamond impregnated scaives i.e. grinding wheel feat type 30 m.m. depth 2 m.m. can become rusty or stand broken during the consignment sent through the ship to Belgium or prior to that at the time of packing particularly when a silver nitrate test was carried on the grinding wheels, with negative results.

2. THE facts germane to this complaint case filed in this Commission on 15.9.1999 are these. Heaven Diamonds Private Limited, the complainant, is a private limited company which transacts the business of diamond cutting and polishing having their office at Gore Gaon, East Mumbai. One Nice Diamonds BVBA- Belgium purchased 200 pieces of diamond impregnated scaives i.e. grinding wheels flat type 30 m.m., Depth 2 m.m. for a sum of US $ 600 per piece. The delivery was to be made within 6 to 8 weeks and payment was to be made within 60 days. The purchaser had sent a letter dated 29.8.1998. It was also agreed that the price was US $ 1,15,000 with packing, insurance and sea freight in the sum of US $10 per piece amounting to US $ 575 per piece. The purchaser accepted all these terms and conditions vide their letter dated 4.9.1998. Invoice dated 15.9.1998 was issued by the complainant. On 14.11.1998, the purchaser rejected the shipment on the ground that the same were received in broken and damaged condition. The scaives were rusty and diamond layer was with full holes due to which the goods were rendered unmerchantable. The purchaser asked the complainant to send another shipment of 200 pieces of diamond unpregnated scaives (grinding wheel). The matter was

immediately brought to the notice of the Oriental Insurance Company Limited, the opposite party who had insured the goods on behalf of the complainant. A letter in this context was also sent to the opposite party on 14.11.1998. The opposite party sent a letter on 16.11.1998 to the complainant stating that the purchaser/consignee should approach the settling agents at Antwerp (Belgium), lodge a monetary claim with the carriers/bailees or other third parties and take an open assessment after a joint survey. The complainant accordingly sent a fax message to the purchaser which was proved as Ex. H dated 16.11.1998. A letter was also addressed to N.V. Beeckman De Vos-Suikerru, Belgium. Another letter was addressed to The Total Transport Systems Pvt. Ltd., Fort, Mumbai who were the carriers along with a copy to the complainant. A claim in the sum of Rs. 53,72,455 was lodged.

3. ON 16.12.1998, complainant was informed that the purchaser had rejected the consignment. The opposite party also requested N.V. Beeckman De Vos-Suikerru, Belgium to survey and settle the claim on their behalf. This is an admitted fact that the consignment was received back and it is in possession of the complainant. Vide their letter dated 24.12.1998 sent by the opposite party to the complainant wherein they refused to commit their liability at that stage. The opposite party sent a letter to the complainant that they had also appointed a Surveyor M/s. K.L. Assar and Company to look into the matter relating to the dispatch of the diamond cutting from the end of the complainant. Thereafter, correspondence went on between the complainant and all the above said connected parties.

4. NOW we advert to the report of N.V. Beeckman De Vos-Suikerru, Belgium dated 9.2.1999. This is the crucial evidence which clearly goes to show the real state of affairs. Its relevant paras are reproduced as follows: "Packing - The packing consisted of hardboard panels, nailed onto a wooden frame. The cases were closed on top and the sides, but open underneath. The cases had apparently been secured by steel straps, but these were no longer present at time of survey. Finding: Inspection revealed that one of the cases had one side broken and holed, especially near the bottom, obviously due to the use of forklift trucks. On lifting the case, it was noted that it was open underneath and that the base was partly broken. On opening the case, it was found that the grinding wheels had been stacked vertically, with a metal rod through the core of the wheels. These rods were placed vertically, from top to bottom. The base of the case consisted of two wooden beams, on which the rods were attached. One of these beams was broken, so that the rods had come loose, which resulted in a number of the grinding wheels lying somewhat loose and having shifted. The consignees feared that the grinding wheels would be scratched or even deformed. It was further noted that the grinding wheels were rust-stained and had rusty patches on them. The second case was in a better external condition and the grinding wheels had apparently not shifted, although the base of the case was partly loose. The grinding wheels in this case were also rusty. As mentioned above, the grinding wheels in both cases were rusty to varying

extent, on both sides. They showed rusty spots indicating that liquid had dripped on them, whilst they were also generally rusty. It was further observed that, as far as could be seen, all 200 pieces were rusty to some extent. The grinding wheels found in the centre of the cases were damaged in a similar manner as those located on top. A silver nitrate test was carried out on the grinding wheels, with negative results. It may therefore be concluded that these goods became wetted by contact with fresh water. Cause of damage: As mentioned above, the grinding wheels became damaged by contact with fresh water. Judging from the appearance of the goods, all those present shared the opinion that the damage must have been sustained at some time prior to and/or during the packing of the pieces into the cases. " (Emphasis supplied)

The complainant did not agree to these findings. It protested N.V. Beeckman De Vos-Suikerru; Belgium gave response vide letter dated 26.5.1999. Its relevant extract runs as follows: "We have stated in our report that it was clear that the pieces had suffered some kind of wetting. Judging from the condition of the pieces, it was concluded that this wetting was sustained at some time prior to shipment, most likely prior to and/or during packing. This is based on the fact that all pieces in both cases were in a similar condition, and that the traces of rust were present on both sides of the discs. All those who inspected the cases at Antwep agreed that this could not have been sustained whilst the pieces were inside the cases. We have indeed reported that there was some breakage to the cases themselves and we accept that this was sustained in the course of the various handling and/or shocks they underwent during transit. "

5. M /s. K. L. Assar and Company gave the following report: "based on our various inquiries, we are of the opinion that dispatch. However, considering the cost of the scaives and sensitive functioning of the width and the grade of the diamonds layer which reportedly cannot be rectified once it gets rusted and pitted, we recommend each of the scaives is to be covered with polythene or water proof paper and wooden cases are protected by polythene sheet. The insured had reported that 200 Nos. Diamond impregnated scaives were manufactured by them between 4.9.1998 and 15.9.1998. In spite of our request, the insured did not allow us to enter inside the cabin to inspect the machine. Therefore in the absence of the specifications, and the capacity of machines and due to non-availability of production records, log books of machines and Sr. Nos. of the scaives, batch No., or lot No. inspection reports of the scaives we are unable to confirm the 200 Nos. Diamond impregnated scaives were manufactured by the insured, the condition of the scaives inside the wooden cases and delay if any of the consignment dispatched from the wooden cases were in sound condition at the time of the consigner ''s warehouse. " From the report it is clear that the loss if any has taken place due to insufficiency of packing which is an exclusion under the ICC ''A '' Clause. " (Emphasis supplied)

6. IT is stated that the cover note was provided for Marine Cargo Policy for which the premium of Rs. 17,994 was paid for the total sum insured of Rs. 53,72,455

to the opposite party. Consequently, there is privity of contract between the complainants and the opposite party. Since there was a total loss of the claim which was not settled within the stipulated statutory period of time, consequently there is the deficiency in service. The opposite party is liable to pay Rs. 53,72,455 as well as pay a duty drawback that could have been reimbursed to the complainant amounting to sum of Rs. 53,72,455. It is explained that a duty drawback is a scheme which the complainant is entitled to claim for the purpose of incentive by the Government for export of goods. It was prayed that a decree be passed in the favour of complainant and against the opposite party to pay a sum of Rs. 53,72,455 together with interest at the rate of 18% from the date of admission of this case till payment. Costs for defending this complaint from Mumbai together with total legal expenses amounting to Rs. 1,50,000 has also been claimed. The present case was contested by the respondent. The opposite party has listed the following defences. The complainant has got no cause of action. The opposite party after appreciating and analysing the survey report came to the conclusion that the loss as claimed by the complainant is not payable under the policy conditions and the opposite party accordingly repudiated the claim of the complainant. The letter of repudiation dated 14.2.2001 has been placed on the record. It is averred that there is no deficiency on the part of the opposite party and the loss occurred during the packing conditions. All the other allegations have been denied.

7. THE repudiation letter runs as follows: "We refer to your letter dated 16.12.1998 addressed to our Diamond Branch enclosing therewith the fax message received by you from your consignees, M/s. Nice Diamonds, BVBA, Belgium informing that the scaives are very rusty and they cannot use these scaives and should be treated as total loss. Reference is also taken to the survey of the cargo undertaken by M/s. N.V. Beeckman De Vos at destination and their report thereon. It was reported by them that loss has occurred due to inadequate packing of the cargo for the shipment. We have also tried to collect more details about the cargo, mode of packing and precautions necessary for ensuring safe transportation of the cargo etc. and for this purpose, through Surveyor, M/s. K. L Assar and Co. and then also through M/s. Transocean Marine and General Survey Agencies. They have reported that you have failed to provide any further information/documents to prove that the cargo was adequately packed so as to withstand the normal hazards of transport and in their opinion also the packing/ preparation of the cargo for transportation was inadequate. As such, we have come to the conclusion that loss is due to inadequacy of packing of the cargo for shipment. Your attention in this respect is drawn to the condition as per Clause 4.3 of the Institute Cargo Clause (A) attached to the policy issued to you which reads as below - Improper Packing (4.3) - ''A claim would not be recoverable under the policy if it can be shown that any loss damage or expenses was actually caused by insufficiency or inadequacy of packing. This exclusion is also applicable to improper preparation of the goods and to stowage of the goods in containers or liftvans. The exclusion however, does not apply to losses caused by

poor stowage of the goods by container operator other than the assured, after commencement of the risk. '' "

8. WE have heard the Counsel for the parties and gone through the written synopses filed by them. Learned Counsel for the complainant vehemently argued that there was delay of three years in repudiating their claim. She contended that the delay itself goes to establish mala fides on the part of the respondent. She contended that the goods were produced in broken condition. The complainant had done the packing itself on 19.8.1998. The same consignment was properly packed and even the custom authorities did not raise any objection. She explained that due to sea water the goods had become rusty. She invited our attention towards letter dated 14.11.1998 wherein the complainant was informed that the complainant had received a fax from their clients M/s. Nice Diamond Belgium stating that they had inspected the consignment and found one box totally broken and all the scaives damaged and in the other box they have found the scaives rusty. It was argued that no question of rusting at the time of packing arise. It was the loss caused in transit. It was also argued that the packing box was made with medium density fibre board. The box was of dimensions approx. W24 " XL 52 " H29 ". Furthermore in each box, the complainant had put 10 pipes and in each pipe, the complainant had put 10 scaives. These goods were sent by complainant on tempo No. MH-02-3898 to B.P.T. ''E '' Shed Docks, Mumbai. The shipment was handed over to clearing agent M/s. M.D. Sadrani on 19.9.1998 at B.P.T. ''E '' Shed Docks, Mumbai. It is contended that under these circumstances the question of defective packing does not arise. It was argued that on the contrary the cause of action is that there has been deviation of the terms and conditions of the contract, pursuant to which the complainant had sustained a total loss of goods.

9. INSTEAD of touching the heart of problem, the Counsel for the complainant just skirted it. The complainant did not bolster his case with evidence. It must be borne in mind that it is the complainant and nobody else who has to carry the ball in proving its case. The evidence regarding packing and dispatch of consignment did not see the light of day. On the contrary the complainant chose to bury its head when it did not allow M/s. K.L. Assar and Co. to enter inside the cabin to inspect the machine. It ''s report clearly goes to show that the complainant did not co-operate with the said Surveyor. The co-operation on the part of the complainant would have gone a long way to pave the way to reality.

10. EVEN on quantum of loss, no evidence was led by the complainant. This is an indisputable fact that after rejection of above said goods, the complainant has received back those goods. The said goods are in possession of the complainant itself. The complainant did not produce any expert evidence on the manufacture and working of these machines and value of the salvage if any. The complainant did not produce any evidence in order to show as to what has happened to those goods. Dallops of mystery surround this case. This is not known whether those goods have been resold, if so at what price? It is also not known whether those

goods were repaired or lying with the same condition. The complainant is trying to make bricks without straw. It ''s Counsel did not try to throw light on these significant aspects. The case of the OP is emboldened by reports of two Surveyors. The evidence of these Surveyors does not give the flavour of suspicion or doubt. This is the crucial evidence, main pillar, foundation on which the case of opposite party rests. It is a fact that a silver nitrate test was carried out on the grinding wheels, with negative results. No evidence in rebuttal was adduced. The complainant was to prove that each of the scaives was covered with polythene or water proof paper and wooden cases were protected by polythene sheet. The case of OP is supported by eloquent evidence. Undoubtedly, there is a moisture in the fresh water but in case the goods are properly packed, it will have no effect upon the such like goods. Expert opinion would have gone along to tell the age of rust. It cannot be believed that the rust would crop up within a month or two, if the same is properly packed.

11. THE version of the complainant does not just stack up. The skimble scamble explanation given by it does not help the legal proceeding at all. The complaint is lame of strength and therefore the same is dismissed. There shall be no orders as to costs. Complaint dismissed.