
(2011) 09 NCDRC CK 0091

In the National Consumer Disputes Redressal Commission

Hughes Escorts Communication Ltd.

APPELLANT

Vs

Ravi Cranes and Movers Ltd.

RESPONDENT

Date of Decision : 01-09-2011

Acts Referred:

Citation : 2011 0 NCDRC 569 : 2011 3 CPJ 17 : 2011 3 CPR 371

Hon'ble Judges : R.K.Batta , Anupam Dasgupta J.

Advocate : Jos Chiramel , Sarosh Bastawala

Judgement

1. THIS complaint has been filed by M/s. Hughes Escorts Communication Ltd., through its attorney, viz., New India Assurance Company Ltd., and the New India Assurance Company Ltd. against M/s. Ravi Cranes and Movers Ltd., the opposite party (OP). For the sake of convenience, the complainants are referred as HECL and the Insurance Company respectively.

2. (i) The case of the complainants is that HECL was awarded a contract by the Institute for Development and Research in Banking Technology, Hyderabad (in short, the IDRBT), an autonomous body set up and funded by the Reserve Bank of India with a view to Providing wide range of training and development facilities to the Banking sector, Particularly, the nationalised banks. The contract was for setting up a VSAT Network for satellite communication to facilitate Payment system in the Banking sector, for which the Central Master Terminal was to be installed in the Premises of the IDRBT at Hyderabad which could communicate, via satellite, with smaller sub-systems at 27 other locations in the country.

(ii) Under the contract, HECL was to Procure, supply, deliver, install and commission the necessary hardware and software and also Provide training of Personnel in respect of the above-mentioned VSAT Network equipment for Rs.5,67,48,488/- for C-Band equipment and Rs.5,82,72,372/- if the IDRBT Preferred extended C-Band equipment. The terms and conditions also required HECL to replace the defective or damaged equipment or Parts at its own cost. For this contract of installation, commissioning, etc., of the HUB (VSAT Antenna System for Satellite Communication), HECL obtained a storage and erection

insurance Policy from the Insurance ComPany for a sum of Rs.5.67 crore including the costs of equipMent, erection and civil engineering works for the Period 21.09.1998 to 20.01.1999.

(iii) HECL thereafter issued a work order dated 19.11.1998 to the OP to hire a 30 MT 85 feet crane along with manPower, wire roPes, extra crane and trailer in connection with erection of the 11 metre diameter Dish Antenna (Reflector assembly) of the HUB at the designated site in the IDRBT Premises. The oPerative Part of the work order is reProduced below: ScoPe of service: (a) 30 Mt. 85 feet crane is available in oPerational condition at our site (sic?) for starting work at 09.00 a.m. from 20.11.1998. (b) You will Provide manPower, wire roPes, extra crane and trailer. (c) Site address: Institute for DeveloPment and Research in Banking Technology H. No. 10-3-311 Castle Hills, Road No. 1 Masab Tank Hyderabad 500 057 Charges: Rs.2,00,000/- for five days or less and Rs.20,000/- Per day for extra usage beyond five days. Payment terms: 100% after satisfactory comPletion of services as Per the scoPe of service. Other terms: You will indemnify us for all liabilities related to any harm to your equipMent and your emPloyees/subcontracted labour. (EmPhasis suPPLIED)

(iv) The main antenna/reflector dish was fully assembled by HECL at the site on 08.12.1998 and then lifted for mounting on the King Post with the help of the crane suPPLIED by the OP. During the Process of lifting the fully assembled antenna, a Part of the crane boom buckled uPwards and the antenna dish, which had been barely lifted, got damaged.

(v) On the loss being intimated, the Insurance ComPany aPPointed a Preliminary surveyor. After visiting the site and insPecting the damaged equipMent, the Preliminary surveyor submitted his rePort dated 18.12.1998. The findings of the Preliminary surveyor included the following: (a) Due to the accident, the reflector assembly has suffered extensive damages. (b) The PrinciPal cause for mishap is the failure of the crane used for lifting the Reflector assembly. More sPecifically, the failure of the boom of the crane. As soon as the boom took the full load and the Reflector assembly had just cleared the ground surface by about one inch, according to eye witnesses, the boom of the crane buckled uPwards and within seconds the bent boom and lifting hook crashed onto the Reflector assembly. The Reflector assembly was in the Process of being lifted from ground level to a height of about 20 feet for mounting on the King Post. (c) The survey Process tends to get the imPression that the failure of the boom was due to fatigue conditions having set in and coincidentally, it gave way at the time of handling the Reflector assembly. It is also felt that the fatigue condition was higher in the uPPer section of the boom frame, and hence, the lifting load of the cable against the weight being filled uP buckled the boom uPwards. This uPward buckling of the boom introduced a lot of sudden slack in the cable and so the lifting hook and the boom came crashing down onto the Reflector damaging the Reflector. No earlier cracks or failure was visible on the boom where the buckling took Place, leading to the indication that the internal fatigue condition at the section of the

boom rendered the boom vulnerable and it gave way. (d) The above tends to indicate that there has not been any contribution because of any willful or deliberate negligence on any one's part. The same also indicated that all normal adequate expertise and supervision was provided and the failure cannot be attributed to any deliberate withdrawal of support skills. The failure therefore may be considered as a case of pure accident and the claim is tenable under the terms of the Policy. This will be reconfirmed in the final report based on additional data and information being available as the survey process goes along.

(vi) In addition to the foregoing, the Preliminary surveyor's report also contained the following observations: Copy of the order placed on M/s. Ravi Cranes by the erection contract HECL is enclosed (annex. 5). M/s HECL have been requested to clarify in respect of specific clauses in the work order raised on M/s Ravi Cranes and have also been advised to take up the matter with M/s Ravi Cranes. It was indicated to the insured and M/s HECL that a little more attention to the selection of crane facility specially in respect of such sophisticated high cost material, may have been in order.

(vii) It would appear that the report of the Preliminary surveyor (which, according to the normal practice prevalent at the relevant time, would have been submitted only to the Insurance Company) was at some stage made/became available to HECL. It would also appear that as a result of the specific observation of the Preliminary surveyor to take up the matter with M/s. Ravi Cranes, HECL lodged a monetary claim dated 01.01.1999 against the OP for a sum of Rs.1,09,10,075/-. The content of the claim letter is reproduced below: This has reference to the crane hired from your firm on 20.11.1998 for the purpose of installation of antenna at the site of our client IDRB at 10-3-311 Castle Hill Road No.1, Masab Tank, Hyderabad 57. During the course of installation your crane has collapsed and caused a loss to the equipment of our client. We formally now lodge a claim with you for making good the loss suffered by our client. The total replacement cost for the same would amount to Rs.1,09,10,075/. (Emphasis supplied)

(vii) The OP replied to this notice by its letter dated 13.01.1999 which is also reproduced below: With reference to your letter dated 01.01.1999, in normal course and also as per our quotation/discussion and your work order, we deny any claim for any loss suffered either by you or by your client.

(ix) A final surveyor was appointed, who visited the site on 12.01.1999 though the Insurance Company had asked to conduct the survey by its letter dated 07.01.1999. The final surveyor submitted his report dated 08.10.1999, i.e., after considerable delay.

(x) Some of the important observations in this report are as under: Insurers had appointed local surveyor Mr. Rao for the survey, whose report is already available on records. Mr. Rao has confirmed that boom of crane, which was utilized for lifting the crane and bucked in center (about 30 from anchoring base) and

caused the antenna to crash down. It is Pertinent to note that by the time we reached site the damaged boom was already shifted and hence was not available for inspection. Our comments thus on cause of failure are at best based on hearsay or the Photographs taken at site, immediately after the accident and attached to this report as enclosed Annexure II. Photographs show that the failed Portion of the boom was fabricated by the local Party (owners of the crane) Probably for specific Purpose of the boom length extension. Such extension was required for the Purpose of getting clean lift of Antenna base which was to be secured to the Pedestal. The fabricated boom might have had (a) Bad weld joints which failed on load. (b) Weak hardware which could have failed in tension. (c) Loose nuts without locking washer or split Pin, etc., causing shear failure on threads. (d) Structural steel failure due to laminated material. What was the exact cause cannot be now Pin-Pointed, as material was not available for inspection, at the time of our visit.

REPLACEMENT OF ANTENNA AND INSURED CLAIM As Per advises of suppliers, insured have replaced the antenna and Presented their claim bill for Rs.83,49,720/- copy of this is enclosed as Annexure III to this report. This was based on the replacement cost of \$1,02,070 and air freight of \$23,040. Insureds bill for erection of the antenna at Rs. 18,09,860/- was submitted later, and is also enclosed as Annexure IV. Thus insured total claim was for Rs.1,01,59,580/- (Rs.83,49,720/- + Rs. 18,09,860/-). On enquiring the reasons as to why all Parts are being changed, when a number of Parts were seen apparently sound condition, insured informed that though there is no visible damage some invisible damage can be Present, in absence of test Procedures/ test charts, knowledge about tolerance, levels, deviation allowed, detailed inspection and acceptability could not be established. Further even if such inspection was to be carried out the Parts had to be shifted back to suppliers works and costs for Packing, transport, inspection etc., were considered (based on suppliers advises) Prohibitive. Replacement was considered as economical option. We however have our reservations on the same. Basically, none of the individual components are Precision machined to have (achieved) any close tolerance. Components being fabricated can have only open tolerance and checking for deviation cannot be either time consuming or costly. If one further analyses all the components individually, a reflector Panel segment may have dents, kinks and still show all other dimensions (as regards are radius, length and breadth) to be OK. However, such kinks, dents will still render the Panel to be useless as it will not reflect the signal. Thus we agree with all concerned that, after such a major impact all Panels should be scrapped and new Panels be used. As regards radials and lacing however, we are of the opinion that these do not need replacement, if they do not appear to be damaged. We requested insured to submit break-up cost of these components. However, insured exposed their inability furnish such break-up as the equipment was not Purchased by them directly from manufacturer but from the system supplier. Having once declared the unit as a total loss, suppliers were not willing to quote Prices for components.

(x) After detailed reasoning and calculations, final surveyors rePort concluded as under: SUMMARY Summarised loss is given below: Particulars Insureds Claim Amount (Rs.) Assessed Amount (Rs.) Remarks RePlacement Cost \$ 1,02,070 \$ 91,863 Deducted 10% other RePair ExPenses of \$102070. Add. Air Freight \$ 23,040 \$ 23 040 Reasonable TOTAL \$ 1,23,110 \$ 1,14,903 RePlacement Assessed Cost \$ 1,14,903.00 Converted at 1 US \$ = Rs.42.75 Rs.49,12,103.00 Add: Customs duty at 20% + 2% (on 101%) Rs.10,91,469.00 Rs.60,03,572.00 Add: SPecial Additional Duty 18% Rs.10,89,485.00 (on 101% of CIF + Duty _____ Rs.70,93,057.00 Add: Erection Cost Rs.15,53,332.00 _____ Rs.86,46,389.00 Less: Salvage Rs. 30,389.00 _____ Rs.86,16,000.00 Less: Under insurance Rs. 2,39,524.80 (Rs. 86,16,000 on 2.78%) _____ Rs.83,76,475.20 Less: 5% Excess Rs. 4,18,823.76 Net Claim Amount Rs. 79,57,651.44 This rePort is based on the actual insPection carried out at site to the best of our knowledge and ability and is without Prejudice.

(xi) The Insurance ComPany settled the claim for Rs.79,29,934/- as assessed by the final surveyor. On receiPt of this amount in full and final discharge of the claim, the HECL also subrogated its right of claim in favour of the Insurance ComPany by its letter of subrogation dated 09.03.2000. HECL also executed a Power of attorney in favour of the Insurance ComPany. The letter of subrogation and Power of attorney were together aimed at enabling the Insurance ComPany to recover the compensation claimed by HECL from the OP.

(xii) HECLs notice dated 01.01.1999 for the claim of Rs.1,09,10,075 had been rePudiated by the OP by its letter dated 13.01.1999. HECL and the Insurance ComPany joined together to file this consumer comPlaint on 03.10.2000, restricting the claimed amount to what the HECL had received from the Insurance ComPany, viz., Rs.79,29,934/- along with interest @ 24% Per annum from the date 20.03.2000 i.e., the date of Payment of compensation by Insurance ComPany to HECL and costs, stating that the insurance Policy in question was issued by the Insurance ComPany jointly in favour of the Institute for DeveloPment and Research in Banking Technology and comPlainant no. 1. The HECL went on to assert that the final liability was entirely that of the HECL and not of the IDRBT and therefore, the IDRBT had informed the Insurance ComPany by its letter dated 08.03.2000 that the insurance claim be settled and Paid directly to the HECL. The full text of this letter is reProduced below: Ref. No. IDRBT/337/1999-2000 March 8, 2000 The New India Assurance Co. Ltd 19 Community Centre, New Delhi 110 065 Dear Sir, This has reference to our full and final settlement of claim no. 44/99/225 under Policy no. 4431190146006 taken jointly in our name and in the name of M/s. Hughes Escorts Communication Ltd. for damage of Reflector Assembly for the Satellite Earth Station 11 meter Antenna. Kindly release the settlement amount directly to M/s Hughes Escorts Communication Ltd., 2nd Floor, ITT, Nehru Place, New Delhi 110 019. We have no objection to release of the claim amount of Rs.79,29,934/- (Rupees seventy nine lakh twenty nine thousand nine hundred thirty four only)

directly in favour of M/s Hughes Escorts Communication Ltd. Yours faithfully,
Manager

This Commission admitted the complaint on 23.01.2001. The OP filed its counter affidavit to the complaint on 08.05.2001 without, however, filing any written version with Paragraph-wise reply to the complaint. Thereafter, the complaint remained dormant in this Commission for several years. On 03.08.2009, the complainants filed a rejoinder to the reply affidavit of the OP and furnished with this rejoinder copies of the insurance Policy along with its conditions and the final survey report of 08.10.1999. The complainants also filed the evidence affidavit of an officer of the Insurance Company who was the constituted attorney. The OP served a notice on the complainants requiring them to Produce certain documents, which was noticed in the Proceedings dated 12.08.2009 of this Commission. At that time, learned counsel for the complainants stated that the documents in question would be furnished to the OP within four weeks. OP was, therefore, directed to file its evidence affidavit within the next four weeks. Parties were also directed to submit brief written notes of their submissions. On 07.12.2009, however, the OP filed a miscellaneous application Praying for dismissal of the complaint on the ground that copies of the documents sought in the Previous notice had not been furnished by the complainants despite the assurance given on 12.08.2009. On 08.12.2009, learned counsel for the complainants stated that the only document in the Possession of the complainants, out of those mentioned in the OPs notice, was the insurance Policy, a copy of which has been furnished to the learned counsel for the OP on that date. In view of this statement by the learned counsel for the complainants, learned counsel for the OP did not Press for dismissal of the complaint as Prayed for in the miscellaneous application.

However, the OP subsequently filed another miscellaneous application (no. 87 of 2010) under the Provisions of Order XI Rule 15 of the Code of Civil Procedure, 1908 read with section 22(1) and 13(4)(ii) of the Consumer Protection Act, 1986 (in short, the Act), Praying, inter alia, that the incomplete and Partial documents filed by the complainants in this matter be expunged from the record and not taken as exhibits. Reply of the complainants to this miscellaneous application was filed on 23.07.2010. Consideration of this application was deferred to the stage of final hearing. After the OP filed its evidence affidavit in April 2010, the matter was finally heard in May 2011.

3. WE have heard Mr. Jose Chiramel, learned counsel for the complainant and Mr. Sarosh Bastawala, learned counsel for the OP and have considered the evidence affidavits filed by the parties. The documents, including those which are incomplete, have also been perused. The main arguments of Mr. Chiramel on behalf of the complainants are as under: (i) As per the work order, the OP agreed to indemnify HECL for equipment damaged during erection. (ii) Though the capacity of the crane provided by the OP was 30 MT, its boom failed due to fatigue even with the load of 5 MT of the Reflector assembly. The certificate in

respect of fitness of the crane was not produced before the surveyor/s. (iii) Though in reply to the claim notice of HECL the OP claimed that it had no liability as per its quotation and discussions, the OP did not place copy of any such quotation or other document on record. (iv) Though the OP filed a counter affidavit by way of reply to the complainant on 08.05.2009, it did not file any paragraph-wise reply to the complaint and thus did not dispute the basic facts stated in the complaint with regard to the cost of the equipment, work order placed by HECL on OP, damage to the equipment because of fall of the crane, assessed value of the damage by the surveyor and the amount paid by the Insurance Company to HECL which was sought to be recovered from the OP. (v) In their rejoinder, the complainants refuted the objections/allegations raised/made by the OP in its reply. Whatever documents out of those sought by the OP were available with the complainants were also produced/furnished by them. The complainants were unable to obtain copies of other documents referred to in the complaint because this point was not raised by the OP in the counter affidavit filed in 2001 but only in 2009 for the first time. The complainants were unable to obtain the relevant records because the original claim file of the Insurance Company containing various documents was not traceable. (vi) The Insurance Company was entitled to file the complaint on behalf of HECL in accordance with the law laid down by the Apex Court. (vii) The preliminary survey report ought to be considered independent of its annexures for its inherent worth. (viii) Neither the counter affidavit filed by OP nor the affidavit evidence disclosed any defence. Though it was claimed that the crane had been tested and certified to be fit, certificate of fitness of the crane was not produced. The crane, bought second-hand by the OP, was 10-15 years old, which led to fatigue conditions setting in while lifting the reflector assembly. Though the OP had full knowledge about the condition of the crane, it withheld this vital information. (ix) The liability of the OP was absolute because the crane was operated and had fallen down, as a result of which costly equipment of HECL being erected at the site were severely damaged and had to be replaced. The claim of the HECL towards this damage was settled by the Insurance Company for Rs.79,29,934/-. Hence, by virtue of its rights because of the deed of subrogation executed by the HECL, the Insurance Company was entitled to recover from the OP the said amount along with interest @ 24% per annum from 28.03.2000 and also cost of the proceedings. (x) In these circumstances, the complaint should be allowed on the basis of admissions made in the counter affidavit and the evidence by way of affidavit regarding the basic ingredients of deficiency of service and negligence alleged against R with regard to the crane falling down during the erection resulting in damages to the costly equipment, Rs undertaking to indemnify C1 for any liability due to harm to Rs equipment as stated in the work order, R not disputing the cost of the equipment, extent of damages etc., Technical objection raised by R are not maintainable. [NOTE: (R Stands for OP and C1 for HECL)].

4. ON behalf of the OP, Mr. Bastawala submitted as under: (i) The complaint had not been instituted validly because the IDRBT was not a party to the complaint

though it was the actual Insured in the insurance policy which described the HECL merely as the Contractor. Hence, only IDRBT could have subrogated its claim to the Insurance Company and not HECL and the complaint could have been filed only in the name of IDRBT or by the IDRBT represented by the Insurance Company as its subrogee-cum-attorney or by the IDRBT and the Insurance Company as co-complainants.

(ii) In terms of the work order 19.11.1998 placed by HECL on the OP, the indemnity provided by the OP to the HECL was only to the extent of damage, if any, to the equipment of the OP itself and did not at all cover any of the equipment or material of the HECL handled by the OP using its crane, manpower, etc.

(iii) The preliminary surveyor clearly observed in its report that the incident was an accident and there was no willful/deliberate negligence on the part of the OP. Therefore, the OP could not be held liable for any deficiency in service and hence any compensation/claim under section 14 of the Act.

(iv) Neither the IDRBT nor the HECL made any claim on the OP after the report dated 08.10.1999 of the final surveyor became available and the claim was settled by the Insurance Company for the loss assessed by the final surveyor. The OP had promptly replied to the only claim letter dated 01.01.1999 of the HECL by its letter dated 13.01.1999, pointing out that the OP had no liability in view of the terms and conditions of the work order, (referred to at paragraph 3 above).

(v) It was only a Regional Manager of the Insurance Company who filed the only evidence affidavit on behalf of the complainants. So far as this officer was concerned, all that he stated in the affidavit was based on hearsay. In particular, no evidence affidavit of any responsible officer of the IDRBT or the HECL who was actually present at the site of works during the lifting operation of the Reflector assembly was filed by the complainants though only such an officer could have led evidence about the actual events that occurred and thrown light on whether there was any negligence on the part of the manpower of the OP provided to operate the crane in question while lifting the Reflector assembly. The evidence affidavit of the Regional Manager of the Insurance Company could not, therefore, be at all relied upon.

(vi) The documents produced by the complainants, particularly, the contract between the IDRBT and the HECL was incomplete. Even the preliminary surveyors report was not accompanied by all the annexures that the report referred to. These documents could not, therefore, be read in evidence in accordance with the provisions of Order XI, Rule 21(1) of the Code of Civil Procedure read with section 22(1) of the Act. Accordingly, as prayed in MA no. 1396 of 2010 and MA no. 87 of 2010, the complaint ought to be dismissed on this ground alone.

(i) The first point that comes to notice is that the insurance policy clearly

designated the IDRBT as the Insured and the HECL as the Contractor. In accordance with the law laid down on this issue by a Constitution Bench of the Apex Court in the case of Economic Transport Organisation vs Charan Spinning Mills (P) Ltd. and Anr. [I (2010) CPJ 4 (SC)], it is the insured IDRBT, which alone could have executed the letter of subrogation in favour of the Insurance Company. This is clear from the Courts observations in paragraph 17 of the order, which is reproduced below: 17. The principles relating to subrogation can, therefore, be summarised thus: (i) Equitable right of subrogation arises when the insurer settles the claim of the assured, for the entire loss. When there is an equitable subrogation in favour of the insurer, the insurer is allowed to stand in the shoes of the assured and enforce the rights of the assured against the wrongdoer. (ii) Subrogation does not terminate nor put an end to the right of the assured to sue the wrong-doer and recover the damages for the loss. Subrogation only entitles the insurer to receive back the amount paid to the assured, in terms of the principles of subrogation. (iii) Where the assured executes a Letter of Subrogation, reducing the terms of subrogation, the rights of the insurer vis vis the assured will be governed by the terms of the Letter of Subrogation. (iv) A subrogation enables the insurer to exercise the rights of the assured against third parties in the name of the assured. Consequently, any plaint, complaint or petition for recovery of compensation can be filed in the name of the assured, or by the assured represented by the insurer as subrogee-cum-attorney, or by the assured and the insurer as co-plaintiffs or co-complainants. (v) Where the assured executed a subrogation-cum-assignment in favour of the insurer (as contrasted from a subrogation), the assured is left with no right or interest. Consequently, the assured will no longer be entitled to sue the wrongdoer on its own account and for its own benefit. But as the instrument is a subrogation-cum-assignment, and not a mere assignment, the insurer has the choice of suing in its own name, or in the name of the assured, if the instrument so provides. The insured become entitled to the entire amount recovered from the wrongdoer, that is, not only the amount that the insured had paid to the assured, but also any amount received in excess of what was paid by it to the assured, if the instrument so provides.

(ii) In this case, however, the Insured IDRBT has merely written a letter dated 08.03.2000 to the Insurance Company to the effect that the insurance claim may be settled for the amount of Rs.79,29,934/- and paid directly to the Contractor HECL. The deed of subrogation that was executed by the HECL in favour of the Insurance Company (and apparently notarised on 09.03.2000) does not even refer to the aforesaid letter written on behalf of the IDRBT to the Insurance Company. Likewise, the said letter of the IDRBT (reproduced under paragraph 2 (xii) above) does not mention that this letter could be read as the IDRBT authorising subrogation in favour of the Insurance Company. Therefore, prima facie, the deed of subrogation executed by the HECL in favour of the Insurance Company cannot be considered to be a subrogation authorised by the Insured of its claim, if any, against the OP on account of damage to the Reflector assembly.

The claim in the complaint and in the letter of 08.03.2000 of the IDRBT that the insurance policy was jointly in the name of the IDRBT and the HECL is not borne out by the policy document. Even the preliminary surveyors report records the IDRBT as the Insured and goes on to state, inter alia: Institute for Development and Research in Banking Technology (IDRBT) have reported damages to the Antenna System . Notably, this report does not mention the HECL as the Contractor in the description of the parties at the beginning of the report.

(iii) Certain interesting features of the documents produced on record in connection with the settlement of the claim of the Insurance Company and executing the deed of subrogation may also be noticed. (a) As already observed, the first letter/document in this context is that written by IDRBT to the Insurance Company, which is dated 08.03.2000. No letter prior to this date was produced on record to show any correspondence between the Insurance Company and the Insured suggesting full and final settlement of the claim for the amount assessed as loss by the final surveyor. It is, therefore, not understood how the letter written by IDRBT has reference to our full and final settlement of claim no. 44/99/225 under policy no. 4431190146006 taken jointly in our name and in the name of M/s. Hughes Escorts Communication Ltd. for damage of Reflector Assembly for the Satellite Earth Station 11 meter Antenna. The letter does not even refer to any prior discussion on the subject between the Insurance Company and the IDRBT/HECL. (b) Apparently, on the strength of this letter, the deed of subrogation was executed by the HECL, as noted above, on 09.03.2000, i.e., the very next day of the letter written by IDRBT. The deed of subrogation reads as under: In consideration of the New India Assurance Company Limited having its registered office at 87 Mahatma Gandhi Road, Fort, Mumbai 400 001 and a divisional office, inter alia, at 19 Community Centre, New Friends Colony, New Delhi 110 065 paying to us the sum of Rs.79,29,934/- (Rupees seventy nine lakh twenty nine thousand nine hundred thirty four only) in full and final settlement of our claim no. 44/99/225 under policy no. 44 311901 46006 for damage to Reflector Assembly of the Satellite Earth Station Antenna (vide supply cum installation contract no. IDRBT/ 911/ 97-98 dated 23.02.1998 placed on us by the Institute for Development and Research in Banking Technology) while being erected at Hyderabad site of the Institute, as a result of failure of the boom of the crane hired by us from M/s Ravi Cranes and Movers Limited, Kukatpally X Road, Hyderabad 500 072. (c) In other words, the deed of subrogation acknowledged that full payment of the claim had been received (by 09.03.2000). However, the copy of the receipt actually produced on record is dated 28.03.2000, witnessing the payment by two cheques, the first being dated 15.03.2000 and the second being dated 28.03.2000. Therefore, on the date on which the deed of subrogation was executed/notarised, the payment of the claim for Rs.79,29,734/- had not actually been received by the HECL and thus the right of the Insurance Company to subrogation had not even commenced. (d) This would only point to the preponderant probability of the entire process having been cleverly managed in conjunction with the Insurance Company, to the

intended detriment of the OP.

(iv) As rightly pointed out by Mr. Bastawala, learned counsel for the OP that the HECLs claim letter dated 01.01.1999 was completely misplaced in interpreting the OPs liability under the work order. The relevant clause of the work order, viz., Other terms: You will indemnify us for all liabilities related to any harm to your equipment and your employees/subcontracted labour clearly states what the HECL had required the OP to indemnify it in other words, it was not even remotely intended that the OP would indemnify the HECL for the liabilities related to any damage to the HECLs equipment. In fact, as the Scope of Service mentioned in the work order would show, there was no reference at all in the work order to the specific nature of the jobs for which the crane in question was being hired. In particular, there was no mention that the crane would be used for lifting the Dish Antenna/Reflector Assembly. In fact, the description of the Scope of Service in the work order would only show the complete carelessness on the part of the person issuing the work order on behalf of the HECL, because apparently the sentence, 30 MT 85 feet crane is available in operational condition at our site for starting work at 09.00 a.m. from 20.11.1998 was straightaway lifted from the quotation of the OP to the HECL, which, however, was not referred to at all in the work order. The other interesting aspect is that in the claim letter dated 01.01.1999 the claim was raised on behalf of the HECLs client, i.e., the IDRBT and not in the HECLs own name.

(v) Mr. Bastawala is also justified in pointing out that apart from the letter dated 01.01.1999 no letter of claim was ever issued either by the IDRBT or the HECL for the amount of Rs.79,29,934/-. It is quite clear that after the undisclosed process by which the insurance claim was settled for the above-mentioned amount, it was only the complaint in which the claim of the aforesaid amount was mentioned as being payable by the OP.

(vi) In reply to the miscellaneous application filed on behalf of the OP it was replied on behalf of the HECL that copies of all the documents which were available with the HECL had been filed along with the complaint and that other documents/missing pages were not in the possession of the HECL or of the Insurance Company as the entire claim file had been misplaced. This is an unacceptable argument. There is no reason to believe that the contract between the IDRBT and the HECL had only one copy, which was placed in the Insurance Companys claim file. Even if it is assumed that the HECL did not have another copy of the contract document (a most unlikely event), no attempt was obviously made by either complainant to at least explore/ascertain if the IDRBT had kept a copy of the contract document. Therefore, the fact that the full contract document was not produced can only be held adversely against the complainants.

(vii) We may now notice the preliminary surveyors observations about the incident: The above tends to indicate that there has not been any contribution because of any willful or deliberate negligence on any ones part. The same also indicated that all normal adequate expertise and supervision was

provided and the failure cannot be attributed to any deliberate withdrawal of support skills. The failure therefore may be considered as a case of pure accident. This observation was based on a contemporaneous appreciation of the facts and events leading to the accident and its validity has to be accepted as such.

(vii) In this context, it is salutary to bear in mind the general principles relating to deficiency in service laid down by the Apex Court in the case of *Ravneet Singh Bagga vs KLM Royal Dutch Airlines* [(2001) 1 SCC 66]. In this case, while agreeing with the view of this Commission in a complaint involving the alleged negligence on the part of the above-mentioned Airline, the Apex Court ruled as under: 6. The deficiency in service cannot be alleged without attributing fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be performed by a person in pursuance of a contract or otherwise in relation to any service. The burden of proving the deficiency in service is upon the person who alleges it. The complainant has, on facts, been found to have not established any willful fault, imperfection, shortcoming or inadequacy in the service of the respondent. The deficiency in service has to be distinguished from the tortious acts of the respondent. In the absence of deficiency in service the aggrieved person may have a remedy under the common law to file a suit for damages but cannot insist on grant of relief under the Act for the alleged acts of commission and omission attributable to the respondent which otherwise do not amount to deficiency in service. In case of bona fide disputes no willful fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance in the service can be inferred (sic - inferred?). If on facts it is found that the person or authority rendering service had taken all precautions and considered all relevant facts and circumstances in the course of the transaction and that their action or the final decision was in good faith, it cannot be said that there had been any deficiency in service. If the action of the respondent is found to be in good faith, there is no deficiency of service entitling the aggrieved person to claim relief under the Act. The rendering of deficient service has to be considered and decided in each case according to the facts of that case for which no hard and fast rule can be laid down. Inefficiency, lack of due care, absence of bona fides, rashness, haste or omission and the like may be the factors to ascertain the deficiency in rendering the service. [Emphasis supplied].

(viii) From the pleadings as well as the documents brought on record, the complainants have not been able to establish that there was any willful or deliberate negligence on the part of the OP in carrying out the operations, which ultimately led to the buckling of the crane boom and consequent damage to the reflector dish. Even the limited material on record shows that the HECL selected the OP after due verification of its credentials to the extent that HECL thought it necessary. In no way it is the case of the HECL that the OP was incapable of performing the contracted task or that it had carried out certain tests to check the mechanical/dynamic capabilities of the crane and found it unequal to the

task. On the other hand, there is clear evidence that the same crane hoisted the King Post weighing more than the 11 metre Reflector assembly and held the former assembly long enough for successful erection. Therefore, immediately prior to the incident the crane and its boom were found to be technically adequate for the tasks on hand. The conclusion of the final surveyor that the OP had carried out some modifications locally to the crane boom was based on photographs. This conclusion has to be rejected because the preliminary surveyor could not have failed to notice the fact had it actually been so as he had seen the crane immediately after the accident. As regards the assumed cause of metal fatigue affecting the crane boom, it is well known that metal fatigue cannot be conclusively determined in the absence of tests based on metallography. This was not even attempted and for undisclosed reasons the crane was allowed to be moved from the site of the accident.

(ix) In such a situation, the inevitable conclusion is that the HECL has not been able to demonstrate that the OP did not carry out the contracted task with necessary precautions and in good faith. The complainants have not been able in this case to establish the essential elements of deficiency in service as ruled by the Apex Court (*supra*).

In view of the foregoing discussion, the complaint is dismissed, with no order as to cost.