(2014) 11 NCDRC CK 0043

In the National Consumer Disputes Redressal Commission

Indraprastha Gas Ltd. APPELLANT

Vs

New India Assurance Co. Ltd. and Ors. RESPONDENT

Date of Decision : 07-11-2014

Acts Referred:

Citation : 2015 1 CPJ 279

Hon'ble Judges : V.K.JAIN J.

Judgement

1. THE complainant Indraprastha Gas Ltd. obtained a Fire and Special Peril Policy (material damage) from the opposite party, New India Assurance Co. Ltd. to the extent of Rs. 32,90,00,000 in order to cover its goods at 45 different CNG Stations in New Delhi for the period from 22.9.2000 to 21.9.2001. On 5.3.2001, a fire took place at the CNG filling station of the complainant at R.K. Puram involving the compressor and the generator installed at the said filling station. A survey of the aforesaid filling station was carried out by S.K. Agarwal & Co., Loss Assessor and Surveyor appointed by the Insurance Company on 7.3.2001 and 9.3.2001. After carrying out their inspection and going through the documents submitted to them by the complainant, the Surveyor vide their report dated 18.8.2003, inter alia, reported as under: "3. CIRCUMSTANCES OF DAMAGE:

(c) Mr. Deep Chand, Area In -Charge at the R.K. Puram CNG Mother Station stated the circumstances of occurrence as under:

Compressor stopped at 6.40 p.m. (5.3.2001). While we approaching the compressor we saw suddenly fire broke out in compressor. Immediately, suction valve closed, electricity switched off, cascade valve also closed. Removed bus from Gas Station. Meanwhile informed on Walkie Talkie to Shri Rajeev Chak and phoned at Sarai Kalan Khan and called up 100 and 101. In no time, fire brigade rushed to the site and put off the fire in 10 minutes. Hyatt valve was closed by the technician and by me. All the officers came to the site after within five minutes.

(d) The examination of R.K. Puram Mother Station logbook showed that the compressor BDV regulator was giving trouble on 4.3.2001. At about 11.00 a.m. on 4.3.2001, Galileo India people took shut down of the compressor for regulator work. It was restarted at 1.30 p.m. but again showed problem and did not start. Finally, Mr. Verma of Galileo India put it back on operation at 2.30 p.m. The compressor again stopped at 4.30 p.m. The Galileo technician restarted it at 4.45 p.m. after draining BDV pressure. Next day i.e. on 5.3.2001 at about 4 p.m., Mr. Vikas of Galileo inspected the compressor for checking its BDV diaphragm. He replaced the same.

At about 6.40 p.m., the compressor stopped on its own. While Mr. Deep Chand and two technicians - -Mr. Pradeep and Mr. Pramod were approaching towards the compressor, suddenly a fire broke out in the compressor. Quickly, the incident was informed to Mr. Rajeev Chak on walkie -talkie and through telephone, it was conveyed to Sarai Kale Khan Mother Station. The emergency phones to 100 and 101 were also called up.

In no time, fire brigade rushed to the site and put out the fire in 10 minutes. In the meanwhile suction valve was closed and electricity was switched off. The cascade valve and Hyatt valve were also closed. All the officers came to the site after few minutes. The photocopy of logbook sheets were collected and are placed in Enclosure II of the report.

8. Cause of fire:

(f) On the basis of these reports and our site observations, we are of the view that:

• The fire in the package unit occurred due to the leakage of gas into the micro box, which was due to the failure of the blow down regulator diaphragm. The leaked gas formed an explosive mixture inside the micro box, which got ignited. The source of ignition was static charge. The primary fire, so set, led to occurrence of a secondary fire due to burning of the polyurethane acoustic insulation.

• Eventually, the rubber hoses connected to the lubricant oil console got melted and caused leakage of lubricant oil. The leaking oil burnt till extinguished by the Fire Service and caused more concentrated and severe damages at the engine side of the package unit.

• The committee appointed by the Ministry has examined in detail the cause/ causes leading to the malfunctioning of the blow down regulator valve and failure of its diaphragm. They noted shortcomings in the installation and maintenance of the compressor package unit. The committee has also observed non -availability of adequately trained manpower at the local subsidiary of this Supplier and use of substandard spares in the maintenance of the machine. These observations are contained in the investigation report, issued by the committee.

• As far as the insured is concerned, the occurrence of fire is accidental in nature. In our opinion, the occurrence is covered under the terms and conditions of the Fire and Special Peril Policy."

The loss to the complainant company was assessed by the Surveyor as hereunder:

2. THE Surveyor, in para No. 12 of their report, expressly stated that during survey, no breach of policy conditions or warranties by the insured was observed. As noted earlier, the Surveyor was also of the view that as far as the insured was concerned the incident of fire was accidental in nature and the said incident was covered under the terms and conditions of the policy taken by the complainant company. However, despite the report of the Surveyor extracted hereinabove, the claim was repudiated by the Insurance Company vide letter dated 23.2.2004, which to the extent it is relevant reads as under: "It has been asserted that compressor was damaged due to eruption of fire within the canopy of the packaged unit while it was installed and in operation at the station. It has been revealed that fire in the unit and subsequent damage if any occurred due to poor maintenance by maintenance team, use of substandard quality of spares during maintenance and inherent design defect in the machine.

In case of diaphragm failure gas from regulator migrates to its spring side which is not a pressure part. The escaping gas therefore needed to be vented out under these conditions to a safe point rather than allowing it to pass into the sealed container i.e. micro box housing the engine and the compressor. This safe venting arrangement was not provided in the affected compressor. The compressor unit had problems even before the incident of 5.3.2001 but necessary and proper maintenance was not done. It transpires that failure of diaphragm could be owing to any one or combination of: (a) over pressurisation due to sluggish movement of connected lever and valve plug leading to sudden exposure of diaphragm to high pressure, (b) over or under tightening of the counter balancing spring in the absence of clear cut maintenance and post maintenance calibration practices, (c) use of nonstandard diaphragm possible due to procurement from vendors other than original manufacturer or supply of substandard material by original manufacturer, (d) absence of structured and documented maintenance practice and training of personnel operating and maintaining the equipment.

It appears that gas leaked into the micro box due to rupture of diaphragm in the blow down regulator valve and forming an explosive mixture inside the micro box and catching fire. The source of ignition could be due to static change caused by impingement of leaking gas into the acoustic insulation (polyurethane foam). It also transpires that micro box was not earthed/properly earthed and this could be another source of ignition due to static charge. Secondary fire could have taken, place owing to burning of the polyurethane acoustic insulation and eventually rubber hoses connected to the lub. oil console getting melted causing leaking and burning of lub. oil till extinguished by fire services.

You have failed to initiate appropriate legal action against the supplier of the machine as per terms agreed between you and supplier for the consequences of which you are responsible. Your remedy if any lies against supplier and not against our company. The nature of loss in question has not been insured by us and for this reason, as stated above, we are not liable. In view of the above we hereby repudiate the claim and make it known that we are not liable to pay any amount to you. This is without prejudice."

3. BEING aggrieved from the rejection of its claim, the complainant company is before us, seeking compensation amounting to Rs. 1,05,70,408 along with interest on that amount at the rate of 12% per annum from the date of fire and 18% per annum w.e.f. the date the claim was repudiated. The complainant is also seeking compensation of Rs. 25 lacs for the delay and the harassment caused to it by rejecting the claim.

4. THE complaint has been resisted by the Insurance Company primarily on the following ground: (a) The contract between the parties contains a limitation period of 12 calendar months from the date of disclaimer to file civil suit in a Court of Law and in the event of the jurisdiction of Civil Court is not invoked within the said period, the claim is deemed to have been abandoned.

(b) The complainant is not a consumer within the meaning of Consumer Protection Act.

(c) The complaint is bad for non -joinder of manufacturer company M/s. Galelio Argentina Ltd.

(d) The complaint is not maintainable without obtaining clearance from the High Power Committee set up by the Government of India for settling the disputes between Public Sector Undertakings.

(e) The claim does not fall within the scope of the insurance policy.

This is also the contention of the learned Counsel for the opposite party that the complaint has not been filed within the period of limitation prescribed in Section 24A of the Consumer Protection Act.

The first and the foremost question which arises for our consideration in this complaint is as to whether the loss sustained by the complainant company, on account of the fire which took place at the CNG filling station at R.K. Puram, is covered under the terms of the policy or not. The case of the Insurance Company in this regard is that the incident of fire took place due to poor maintenance by the maintenance team, use of sub -standard spares in repairs and inherent design defect in the machine which the complainant had purchased from M/s. Galelio Argentina Ltd. This is also the case of the Insurance Company in this regard that the complainant had failed to initiate appropriate legal action against the supplier of the machinery, which has resulted in relieving the Insurance Company of its obligation under the insurance policy.

5. THE learned Counsel for the parties have led us through the terms and

conditions on which the insurance policy was issued to the complainant company. A perusal of the said terms and conditions would show that the policy covered any damage to the property of the complainant by fire except that such damage or restriction to the property was caused by: 1. Its own fermentation, natural heating or spontaneous combustion.

2. Its undergoing any heating or drying process.

3. Burning of property insured by order of any public authority.

The general exclusions contained in the policy reads as under:

"General Exclusions

This Policy does not cover - -

1. 5% of each and every claim resulting from the operation of Lightning, STFI and Subsidence and Landslide including Rock slide covered under the Policy.

2. Loss, destruction or damage caused by war, invasion, act of foreign enemy hostilities or war like operations (whether war be declared or not), civil war, mutiny, civil commotion assuming the proportions of or amounting to a popular rising, military rising, rebellion, revolution, insurrection or military or usurped power.

3. Loss, destruction or damage directly or indirectly caused to the property insured by

(a) Ionizing radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel.

(b) The radio active toxic, explosives or other hazardous properties of any explosive nuclear assembly or nuclear component thereof.

4. Loss, destruction or damage caused to the insured property by pollution or contamination excluding

(a) Pollution or contamination which itself results from a peril hereby insured against.

(b) Any peril hereby insured against which itself results from pollution or contamination.

5. Loss, destruction or damage to bullion or unset previous stones, any curios or works of art for an amount exceeding Rs. 10,000, manuscripts, plans, drawings, securities, obligations or documents of any kind, stamps, coins or paper money, cheques, books of accounts or other business books, computer systems records, explosives unless otherwise expressly stated in the policy.

6. Loss, destruction or damage to the stocks in Cold Storage premises caused by change of temperature.

7. Loss, destruction or damage to any electrical and/or electronic machine, apparatus, fixture or fitting (excluding fans and electrical wiring in dwellings) arising from or occasioned by over -running, excessive pressure, short circuiting, arcing, self -heating, or leakage of electricity, from whatever cause (lightning included).

6. EXPENSES incurred on, (i) Architects, Surveyors and Consulting Engineer''s Fees, and (ii) Debris Removal by the insured following a loss, destruction or damage to the Property insured by an insured peril in excess of 3% and 1% of the claim amount respectively. Loss of earnings, loss by delay, loss of market or other consequential or indirect loss or damage of any kind or description whatsoever. 8. It would thus be seen that the insurance policy does not exclude the damage from fire due to poor maintenance, use of substandard quality spares or inherent design defect in the machine insured by the Insurance Company. Therefore, even if we proceed on the assumption that the fire which resulted in damage to the property of the complainant company took place on account of poor maintenance or use of substandard spares or on account of some inherent design defect in the machinery installed at the filling station, the liability of the Insurance Company is not excluded. It is settled legal proposition that while interpreting the policy of insurance, which is nothing but a contract between the insurer and the insured, the Courts have to give a natural meaning to the expressions used in the documents and it is not open to the Court to make any addition to or subtraction from the terms and conditions contained in the insurance policy. Reference in this regard may be made to Harris v. Poland, (1941) 69 LLR 35 (KB). In the above referred case, the plaintiff had taken a house holders comprehensive policy in respect of her flat, insuring it against the loss or damage which might arise from various causes including fire. On a particular day, the plaintiff wrapped up her jewellery, which formed part of the insured articles, and kept them under the coal and wood, which was ready for lighting in the grate. On her return at night, she forgot having kept the jewellery in the grate and lit the fire, as a result of which, the jewellery was partly destroyed and partly damaged by fire. The claim filed by her was resisted by the Insurance Company on the ground that the loss had taken place due to negligence on the part of the plaintiff. It was also pointed out that the fire had taken place in the place where it was expected to be lit and therefore the loss sustained by the plaintiff was not covered under the policy. The insurance policy issued in that case provided insurance against the loss or damage caused by fire and did not expressly exclude the loss caused on account of the negligence of the insured. It was contended on behalf of the Insurance Company that the words loss or damage caused by the fire used in the insurance policy means the loss or damage caused by a fortuitous catching fire of something not intended to be consumed by fire in a place where fire was not intended to be. The contention however, was rejected by the Court and during the course of the judgment, it was, inter alia, observed that the Court has no right to imply, in a written contract, any such stipulation unless, on considering the terms of the contract in

a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exit. It was further observed that it was not enough to say that it would be a reasonable thing to make such implication. Noticing that the policy documents is prepared by the underwriters, it was held that any ambiguity in the documents must be taken more strongly against the underwriters and if a policy is reasonably susceptible of two constructions, that one will be adopted which is more favourable to the insured. It was also observed relying on Austin v. Drew,, 4 Camp. 360, during the course of the judgment, that now -a -days, it is well established that negligence is immaterial in such a case and if there is a fire, there is no answer that it was occasioned by the negligence or misconduct of the servants.

In New India Assurance Co. Ltd. v. Zuari Industries Ltd. & Ors., TV : (2009) CPJ 19 (SC) : VU (2009) SLT 122 : : IV (2009) ACC 390 (SC): : (2009) 9 SCC 17, the Hon''ble Apex Court referred to the Constitution Bench decision in General Assurance Society Ltd. v. Chandmull Jain, : AIR 1966 SC 1644, holding therein that in case of ambiguity in a contract of insurance the ambiguity should be resolved in favour of the claimant and against the Insurance Company.

9. In the case before us, since the insurance policy obtained by the complainant company did not exclude the liability of the company in case the fire took place due to poor maintenance, sub -standard quality of spares or manufacturing or inherent design defect in the machine, the Insurance Company was not justified in repudiating the claim on the aforesaid grounds.

7. CLAUSE 6(ii) of the insurance policy on which reliance was placed by the learned Counsel for the Insurance Company, to the extent it is relevant reads as under: "(ii) In no case whatsoever shall the Company, be liable for any loss or damage after the expiry of 12 months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration; it being expressly agreed and declared that if the Company shall disclaim liability for any claim hereunder and such claim shall not within 12 calendar months from the date of the disclaimer have been made the subject matter of a suit in a Court of Law then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder."

8. AS far as the first part of the aforesaid clause is concerned, this in our opinion applies to a case where the insured does not lodge a claim with the Insurance Company within a period of 12 months from the happening of the loss or damage. Since admittedly, claim in the case before us was lodged within 12 months of the fire taking place, first part of the above referred clause would not apply. As far as the second part of the above referred clause is concerned, though it does stipulates a period of 12 calendar months from the repudiation of the claim, to approach a Civil Court by way of a civil suit, the said clause in our view is void being contrary to the period of limitation prescribed in Section 24A of the Consumer Protection Act, which prescribes a limitation of 2 years from the

date of accrual of the cause of action. Section 28 of Indian Contract Act to the extent it is relevant for our purpose, reads as under:

"[Every agreement - -

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary Tribunals, or which limits the time within which he may thus enforce his rights; or

(b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent.]"

Since the above referred term contained in the insurance policy which is a contract between the insurer and the insured, restricts the right of the claim to enforce its statutory right within the time stipulated in Section 24A of the Consumer Protection Act by reducing the limitation period within which the consumer aggrieved from a defect or shortcoming in the services rendered by a service provider can approach a Consumer Forum, it is void to the aforesaid extent. Reference in this regard may be drawn to the decision of this Commission in Sujata Chemicals v. United India Insurance Co. Ltd.,, I (2007) CPJ 158 (NC). In the aforesaid case, Clause 12 of the aforesaid policy issued by United India Insurance Company Ltd. contained an identical clause except that the period of limitation prescribed in the said policy was 3 calendar months as against the period of 12 calendar months prescribed in the policy issued by the complainant before us. The complaint having not been filed within three calendar months from the date of repudiation the question which arose before this Commission was as to whether it was maintainable or not. Referring to Section 28 of the Indian Contract Act and relying upon the earlier decision of this Commission in New India Assurance Co. Ltd. v. K.A. Abdul Hameed & Anr., II (2005) CPJ 54 (NC), the plea taken by the Insurance Company was rejected by this Commission. During the course of the judgment, this Commission also referred to the decision of the Hon''ble Supreme Court in National Insurance Co. Ltd. v. Sujir Ganesh Nayak & Co. & Anr., : II (1997) CPJ 1 (SC) : (1997) 4 SCC 366, where the Supreme Court had declared the law as under:

"Curtailment of the period of limitation is not permissible in view of Section 28 but, extinction of right itself unless exercised within a specified time is permissible and can be enforced."

This Commission then noticed the legislative clause made in Section 28 of the Indian Contract Act and inter alia held as under: "9. There could not be any dispute about the fact that when the incident has taken place before amendment, several judgments referred to did not consider the declaratory nature of the amendment. No doubt, there is a distinction between extinction of right by agreement and curtailment of limitation. The agreement is not a voluntary agreement in the instant case. It is an agreement, which is deemed in a peculiar circumstance rather it was incumbent on the insured to accept it whether it liked it or not. One could not be oblivious to the monopolistic approach in framing such callused during British rule, much before globalization for it is not a voluntary act but a forced act. Such clauses would militate against conscience. One could not also be oblivious about the fact that Section 28 even without amendment would be against such provisions which'' curtailed the right to approach the Court. It should also be noted that this clause is contained in arbitration clause. Therefore, it would relate to arbitration alone. Such provision is just a device to curtail the right.

10. The Law Commission of India recommended that Section 28 of the Indian Contract Act, 1872 might be amended so that the anomalous situation created by the existing Section may be rectified.

11. In view of the above, it is felt that the amendment in Section 28 is of declaratory nature would have retrospective effect and consequently the claim of the complainant could not be dismissed on the ground of assumption that he had abandoned the claim against known fact."

This Commission also placed reliance upon the decision of a Division Bench of the Delhi High Court in M/s. Ramsons Southend v. Divisional Manager, New India Assurance Co. Ltd. & Ors., in : 71 (1998) DLT 842 (DB), taking a similar view of interpretation of Section 28 of the Indian Contract Act and concluded that the complaint was not time barred on account of the restriction contained in the insurance policy.

9. IN the case before us, the claim came to be rejected by the Insurance Company on 23.2.2004 and the complaint has been filed on 24.1.2006. If the period of limitation is computed from the date of repudiation of the claim, the complaint is within limitation, prescribed in Section 24A of Consumer Protection Act.

10. THE learned Counsel for the Insurance Company however, contends that the period of limitation is to commence from the date on which the incident of fire took place and not from the date on which the claim was repudiated by the Insurance Company. Reliance in this regard was placed upon decision of Hon''ble Supreme Court in case of Kandimalla Raghavaiah & Co. v. National Insurance Co. Ltd. & Anr., III (2009) CPJ 75 (SC). A perusal of the above referred decision would show that in the case before the Hon''ble Supreme Court, a fire had broken out in the night intervening 22/23.3.1988 and a Surveyor was appointed on 24.3.1988, who submitted his report on 2.4.1988. It was for the first time on 6.11.1992 that the appellants before the Hon''ble Supreme Court asked for claim form from the Insurance Company. Having failed to get any response, he sent legal notice to the Insurance Company on 26.10.1995. On 4.1.1996, he again asked for the claim form, but there was no response. Ultimately, the Insurance Company replied to his legal notice on 21.3.1996 denying the factum of fire and

refusing to provide the claim form on the ground that the claim had become time barred. The complaint was then filed by the appellant on 21.10.1997. The complaint having been rejected on the ground that it was barred by limitation, the complainant approached the Hon''ble Supreme Court by way of an appeal and contended that the complaint was not barred by limitation since it was a joint policy obtained by the complainant and the bank had lodged a claim with the Insurance Company way back on 14.7.1988, though it had failed to pursue the same. The Insurance Company, however, contended that the complaint was barred by limitation since the incident of fire had taken place on 23.3.1988 and the complaint was filed more than nine years thereafter. It was also pointed out by the Insurance Company that the appellant did not lodge any formal complaint with the Insurance Company as was required under the terms of the policy. It was on these facts and these circumstances that the Hon''ble Supreme Court observed that the appellant had not made any claim with the Insurance Company with respect to the loss suffered on 23.3.1988 and it was only on 6.11.1992 that the appellant had for the first time asked for supply of claim form in order to prefer a claim. It was noted by the Hon''ble Apex Court that by the time the appellant asked for the claim form, the time period of limitation for the purpose of Section 24A of the Act had expired. The appeal preferred by the complainant was therefore rejected holding that the complaint was barred by limitation prescribed in Section 24A of the Consumer Protection Act and no application seeking condonation of delay had been filed. However, the facts of the case before us are altogether different. In the case before us, the claim was promptly lodged with the Insurance Company and a Surveyor was also duly appointed by the Insurance Company. Admittedly the period prescribed in Section 24A of the Consumer Protection Act had not expired by the time the claim was lodged with the Insurance Company. It is settled legal proposition that the words used in a judgment cannot be interpreted like the words of a statute and cannot be read divorced from the facts and context in which the said words were used. Therefore, the view taken by the Hon''ble Supreme Court in Kandimalla Raghavaiah & Co. (supra), in our view does not apply to the factual situation prevailing in the case before us where the claim was promptly lodged with the Insurance Company and the complaint has been filed within two years of the claim being repudiated by the insurer. It was expressly noted by the Hon''ble Apex Court in Kandimalla Raghavaiah & Co. (supra), period of limitation prescribed in Section 24A had already expired by the time even the claim documents were sought from the Insurance Company. That is not the position in the present case. Therefore, the aforesaid case is clearly distinguishable on facts from a case where the case is promptly lodged with the Insurance Company and the complaint is filed within the prescribed period of limitation, computed from the date on which the claim is rejected by the Insurance Company. As regards the contention that the complainant is not a consumer within the meaning of Section 2(1)(d) of the Consumer Protection Act, we may take note of the decision of this Commission in Harsolia Motors v. National Insurance Co. Ltd., I (2005) CPJ 27 (NC), which this Commission has been consistently following, though, the aforesaid decision has been challenged before the Hon''ble Supreme Court. Following the said decision, we have no hesitation in holding that taking an insurance policy cannot be said to be a service availed for a commercial purpose within the meaning of Section 2(1)(d) of the Consumer Protection Act.

11. AS regards the contention that the complaint is not maintainable without obtaining clearance from the High Powered Committee set up by the Government of India, pursuant to the decision of Hon''ble Supreme Court in ONGC cases : (2007) 7 SCC 39, (2004) 6 SCC 437, 1995 Supp (4) SCC 541 and 1992 Supp (2) SCC, we are of the view that since the aforesaid directions were later recalled by the Hon''ble Supreme Court in Electronic Corporation of India Ltd. v. Union of India & Ors., : IV (2011) SLT 532 : (2011) 3 SCC 404, such a clearance is no more required. Consequently the complaint is not barred for want of such a clearance.

12. AS regards non -joinder of the manufacturer and its supplier, in our view, they are neither necessary nor proper party to the complaint, as they are not party to the contract. Reference in this regard may be made to the decision of this Commission in Ajanta Offset & Packaging Ltd. v. National Insurance Co. Ltd. & Ors., I (2007) CPJ 208 (NC). Even if the complainant company was entitled to proceed against the manufacturer and/or supplier of the machinery on account of the alleged inherent manufacturing defect in the machinery supplied by them, that does not preclude them from proceeding against the Insurance Company in terms of the policy obtained by them. It is also submitted by the learned Counsel for the Insurance Company that through its letter dated 1.9.2003, the Insurance Company had requested the complainant to provide them the details of the claim lodged with the manufacturer of the machinery and the findings thereof, considering that the machinery had got damage within six months of its being installed, so that the Insurance Company could know what steps they had taken to ensure the recovery under the warranty clause, which the equipment purchased by the complainant company carried, no steps were taken by the complainant company to proceed against the manufacturer under the warranty clause despite such a relief being available to it in law. A perusal of the reply sent by the complainant to the aforesaid letter on 8.10.2003 would show that the complainant company was advised that their claim had been approved for payment and the Insurance Company would like them to initiate legal proceedings against the supplier. The Insurance Company was requested to agree to confirm the same in writing so that a suitable note could be put up to the management for follow -up action. Vide letter dated 22.10.2003, the complainant informed the Insurance Company that they had already approached the manufacturer vide letters dated 19.12.2001 and 28.12.2001 and were informed that the loss/damage in question did not fall in terms of their warranties and therefore the manufacturer was not liable for the said loss. It was further stated in the letter that if the Insurance Company strongly felt that there was a possibility to hold the manufacturer legally liable, the complainant was prepared to subrogate all their recovery rights and willing to do all

documentation as per the requirement. The Insurance Company was requested to convey the information in this regard to the complainant company. Admittedly, despite the aforesaid offer made by the complainant company, the Insurance Company did not pay the claim which would have enabled it to obtain the requisite letter of subrogation from the complainant company. Clause 12 of the Insurance policy on which reliance is placed by the learned Counsel for the Insurance Company reads as under:

"12. The Insured shall at the expense of the Company do and concur in doing, and permit to be done, all such acts and things as may be necessary or reasonably required by the Company for the purpose of enforcing any rights and remedies or of obtaining relief or indemnity from other parties to which the Company shall be or would become entitled or subrogated, upon its paying for or making good any loss or damage under this policy, whether such acts and things shall be or become necessary or required before or after his indemnification by the Company."

In our view, the aforesaid clause did not obligate the complainant company to initiate a legal action against the manufacturer and/or supplier of the machinery without the Insurance Company first paying the claim alleged by the complainant company. In our view, though the aforesaid clause entitles the Insurance Company to step into the shoes of the complainant company and take appropriate legal action against a third party, and on such a course been adopted by the Insurance Company, the complainant company would be under a legal obligation to take all such steps as are required by the Insurance Company including joining the Insurance Company in the legal proceedings, if any, initiated against the manufacturer and/or supplier of the machinery, it could not have compelled the complainant company to initiate a legal action against the manufacturer and/or the supplier of the company without first paying the claim due to the complainant under the insurance policy obtained by it. The learned Counsel for the Insurance Company submits that even a legal notice was not sent by the Insurance Company to the manufacturer and/or supplier asking them to pay to them under the warranty clause which the equipment/machinery purchased by the complainant company carried. We, however, find that there is no specific request to issue such a legal notice. In any case, the Insurance Company could not have insisted upon such a notice being issued by the complainant company without first paying the claim which the Surveyor appointed by the Insurance Company had recommended. This was more so when the complainant company was of the view that the damage which took place on account of the fire in the night on 5.3.2001 was not covered under the warranty clause which the machinery/equipment purchased by it had carried. Therefore, in our view reliance upon Clause 12 of the insurance policy is wholly misplaced.

13. MR . Tripathi, the learned Counsel for the Insurance Company submits that the request to issue a legal notice to the manufacturer and/or supplier was a reasonable request in terms of the policy. The learned Counsel for the Insurance

Company has drawn our attention to a draft letter which the Insurance Company had provided to the complainant for being sent to the manufacturer of the machinery in Argentina. Since, the terms of the policy did not mandate the complainant company to issue such a legal notice without first being paid by the Insurance Company and the complainant company itself did not feel that the damage suffered by it was covered under the warranty clause, it was not obliged to send a legal notice to the manufacturer in terms of the above referred draft letter sent by the Insurance Company. For the reasons stated hereinabove, we are of the considered view that the Insurance Company has rejected the claim of the complainant company without any justification whatsoever. We find that the Surveyor appointed by the Insurance Company had recommended the claim of the complainant to the extent of Rs. 78,25,005. We, therefore, direct the opposite party, Insurance Company to pay the aforesaid amount Rs. 78,25,005 to the complainant within six weeks from today along with interest at the rate of 9% per annum from the date of filing of the complaint till the date of the complaint. We also direct the Insurance Company to pay Rs. 25,000 to the complainant towards the cost of litigation. On such payment to it, the complainant company shall execute the requisite Letter of Subrogation and other necessary documents, in favour of the Insurance Company, and shall also join the Insurance Company, if so requested, in the legal proceedings, which the Insurance Company may decide to initiate against the manufacturer and/or supplier of the machinery to the complainant.

