(2008) 03 NCDRC CK 0074

In the National Consumer Disputes Redressal Commission

J K CORP LTD APPELLANT

Vs

National Insurance Co Ltd RESPONDENT

Date of Decision : 03-03-2008

Acts Referred:

Citation : 2008 4 CPJ 35

Hon'ble Judges : M.B.Shah , S.K.Naik , R.C.Jain J.

Advocate : Bharat Gupta , Kishore Rawat , T.K.Ganju

Judgement

1. THE only question involved in this complaint is: Whether the damage suffered by the complainant is due to malicious act or, is it due to mistake or negligence on the part of the concerned employees in feeding contaminated Purified Terephthalic Acid (PTA) bags in the hopper?

2. ADMITTEDLY, there is no direct evidence with regard to "malicious act" by any employee. But, it is contended that from circumstantial evidence it can be inferred that there was malicious act by disgruntled employees. In our view, in such type of cases, burden of proof to establish that contemplated peril occurred, is on the insured (Complainant). Simplicitor stating that damage has occurred is not sufficient, to establish that contemplated ''peril'' which is covered by the insurance policy, has happened.

Facts A. M/s. J. K. Corp. Ltd. , (Complainant), during the relevant time had taken three insurance policies-one for building, plant and machinery for a sum of Rs. 74. 28 crores; second for stocks including stock in process for Rs. 10. 00 crores and the third one with respect to loss of profits for Rs. 27. 00 crores, by paying the annual premium for all the three policies, approximately Rs. 33 lakh to Rs. 34 lakh. It is contended that manufacturing of polyester staple fibre involves a continuous process, operated in closed vessels, not visible from outside, until the end product is ready for spinning. The factory works round the clock in three shifts with its workers, staff and officers and also the contract labourers. The stores operate from 8 a. m. to 5 p. m. only. The Insured Complainant was using Purified Terephthalic Acid (PTA) in powder form supplied by Reliance Industries

Ltd. , (REL) in bags for manufacturing polyester staple fibre and yarn. The contents of the PTA bags were being physically checked for its purity before feeding the contents in the hopper and the actual operation of feeding used to be done by the employees and by the contract labourers. The entire process from the time of charging of PTA power through hopper till yielding of polymers through pack life used to take 28 hours. That the labourers in the factory were members of two Trade Unions, one of which was recognized. It is contended that in or about September 1988 the main water intake pipeline outside the said factory premises was detected to have been damaged by violent means. By another distinct but not isolated incident, some contrivance, suspected to be explosives, were found in October 1988 in the coal bunker of the said factory. After the said incidents, the President of the recognized Union had manhandled the Process Engineer of the Company. Hence, he was charge-sheeted for it. In consequence, the workers struck work on 27. 10. 1988. It is contended that to avoid disruption in continuous process of production, discussions were held with the Union leaders reluctantly. Despite this, tension continued to prevail in the factory even in December 1988. On 4. 12. 1988 Shri M. K. Singh, the Charging Operator, during the second shift, i. e. from 2 p. m. to 10 p. m. , detected on physical checking that two bags were contaminated and hence those bags were not charged in hopper and were kept separately. Senior officers were immediately informed of it and entry was made in log book as "bag numbers 16397 and 16402 checked. To be sent back to stores". The entire controversy centers round feeding of those two bags in the hopper on the said date. And, whether it is accidental or malicious act?

B. That on 5. 12. 1988 during the third shift from 10 p. m. to 6. 00 a. m. , the pack-pressure in the spinnerettes was found increasing. The inspection revealed no defect in the machineries or plant but the end-product contained dirty contents, which had to be drained out on 6. 12. 1988 and subsequently. It is contended that on subsequent inquiries it was found that the two contaminated bags had not been returned to stores and were also not found at hopper floor.

C. (i) Thereafter, the Insurance Company was informed on 9. 12. 1988; (ii) information was also sent to Police on 10. 12. 1988 about the generation of waste products. No FIR was lodged alleging criminal offence either of mischief or malicious act. (iii) Thereafter, the Complainant constituted a Departmental Inquiry Committee consisting of Senior Officials who concluded that some unidentified person/persons had charged the contents of the said two contaminated bags in the plant between 5 p. m. and 10. 30 p. m. on 4. 12. 1988 with intention to cause damage.

D. The Complainant also caused inquiry with the Reliance Industries Ltd. , (RIL), the supplier of the said two contaminated bags, who informed that the reasons for abnormal pack-pressure was due to presence of high foreign impurities in the said bags thereafter, five other bags containing PTA powder were examined by an independent analytical chemist, R. V. Briggs and Co. Pvt. Ltd. of Calcutta, who found four of them with contaminated foreign materials with high ash content and of inferior brightness/whiteness value not suitable for use into production.

E. Thereafter, the Insurance Company appointed M/s. N. T. Kothari and Co. , for survey and assessment of loss. The Surveyors gave their report on 18. 12. 1989, assessing the total loss at Rs. 1,65,54,896 and arrived at the conclusion that it was the case of malicious damage.

F. That report was not accepted by the Insurance Company. The Insurance Company, by letter dated 13. 7. 1990, sought clarification, on various facts from the Surveyor, which, inter alia, are as under: (a) When the loss occurred due to negligent action of Shri B. R. Sakhare, Dy. Manager, why no disciplinary action was initiated against him, why no proper FIR was lodged; how a casual labourer could have caused such a big disruption in production alone by feeding contaminated material in the system, as it would have been easy for them to throw some dust or sand into the hopper which was available to them; and, lastly, that the two contaminated bags could have been fed in the hopper before 4. 00 p. m. in the normal course. (b) That by letter dated 11. 8. 1990, Surveyor, M/s. N. T. Kothari gave a reply and clarified queries raised by stating that. (i) Mr. B. R. Sakhare was somewhat negligent in his duty; (ii) it was usual and proper for the Complainant to lodge a FIR in the manner they did. The reason for not following up the matter with the police and lodging a detailed FIR, has already been stated in the report. In respect to an action of malicious damage no particular worker casual or regular could have been pinpointed and an inquiry by the police would have meant calling all the workers to the police station for investigation and that could have aggravated the already tense situation in the factory premises. (iii) feeding of raw material is not such a skilful job that cannot be done by the casual labourer and, as a matter of fact, when the Surveyor visited the factory the casual labourer was found feeding the material. They also clarified that sand/dust is not easily available within the plant complex and rather than take the risk of having been detected at the time of taking them from outside the plant area, the mischief was done by feeding the contaminated material lying close to the hopper; (iv) the contaminated mate-rial could have been fed normally into the hopper before 4. 00 p. m. The Surveyor after referring to the records which included the stock position of the bin on 4. 12. 1988 came to a finding that since the waste started emerging at 10. 30 hours on 5. 12. 1988 the contaminated mate-rial could not have been fed into the hopper on or before 4. 00 p. m. It was demonstrated by the Surveyor that it takes 28 hours for the material to reach the spinning stage after the same is fed into the hopper and if the material would have been fed on or about 4. 00 p. m. as alleged by the Respondent, then the waste material should have emerged at about 7. 59 p. m. on 5. 12. 1988 whereas the records show that it started emerging after 10. 30 hrs on 5. 12. 1988. The Surveyor, stuck to his report dated 18. 12. 1989. (c) Again by letter dated 20. 9. 1990 the Respondent sought a final query from the Surveyor and raised an issue as to whether the act of feeding the contaminated material, as stated by the surveyor, was accidental or malicious. (d) The Surveyor by his letter dated 21. 9. 1990 clarified the position after referring to the records and statistics given therein stated as follows: "that the contaminated bags were not fed accidentally since this was examined by us very meticulously by giving through the relevant records. "

3. IT is contended that as the Insurance Company was not satisfied by the said report, after about three-and-half years appointed an investigator to find out the cause of loss, who gave his report on 28. 3. 1994. On the basis of the said report, the claim of the insured was not settled. Hence, this complaint is filed for recovery of the sum of Rs. 1,98,28,000 which is the alleged loss suffered by the Complainant, with interest at the rate of 18% and Rs. 1,00,000 towards compensation and costs. Submissions of the Insurance Company: as against this, the Insurance Company contended that: (a) the complaint is hopelessly barred by limitation; (b) Complainant has failed to establish that damage to the stock in trade took place because of malicious act; (c) presuming that after the Surveyor''s report Insurance Company could not appoint Investigator, yet, in the present case, the reasons recorded by the Investigator for arriving at the conclusion that the damage was not because of malicious act, could be taken into consideration; (d) negligence or mistake is of the officers of the insured, namely, Sri B. R. Sakhare or Shri A. Mundley. Further, during the third shift of 4th December, 1988 when Shri A. Mundley, Technical Officer, of the factory joined his duty. He went through the instructions and assumed that those contaminated bags must have been removed to the store room. Findings i. Onus of proof: learned Counsel for the Insurance Company rightly contended that it is for the insured to prove that loss or damage to the goods was caused by malicious act and that there is no evidence in support of the said contention.

Learned Counsel Mr. Rawat placed reliance on Halsbury''s Laws of England, Vol. 25, 4th Edn. , page 84, para 111, which reads as under: "111. Onus of proof-As a general principle, the onus is on the insurers to prove that a condition has been broken, not on the insured to prove compliance on his part with each and every stipulation. It may well be that, if there is a question as to whether a contract of insurance has ever come into existence or begun to be operative, the insured has to prove the happening of any events necessary to its existence or its operation, but where the question is as to the insurer''s liability under an admittedly effective policy, the rule as to the burden of proof is axiomatic in insurance law. It is open to the parties to alter this result of making an express stipulation that the onus of proof is to be on the insured but very clear words are necessary to achieve such a result. "

It is to be stated that apart from the aforesaid observations in the Halsbury''s Laws of England, the said principles are reiterated in "principles of Insurance Law" by Shri M. N. Srinivasan, Eighth Edition, which are as under: "burden of Proof: where the proximity rule is to be applied, the assured must discharge the burden of proof to show that the proximate cause of the loss was an insured peril". Austin v. Drewe, (1819) 6 Taunt, 436; Everett v. London Assurance,

(1865) 19 CB 126; Century Bank v. Young, (1914) 84 LJKB 385; Rhesa Shipping v. Edmunds, (1985) 2 All ER 712 : (1985) I WLR 948 : (1985) 2 Lloyd''s Rep 7]. . . . . where the assured alleges a burglary, which the insurers deny, the onus remains on him of proving that a burglary has in fact occurred. Regina Fur v. Bossom, (1958) 2 Llyod''s Rep. 425 (CA)]. In Shakur v. Pilot Insurance, 73 DLR (4th) 337 (1991), it was held that the assured had to discharge the burden of proving that a mugging had taken place resulting in the loss of her jewellery, and that it was not incumbent on the insurers to prove fraud on her part. The approach taken in Slattery v. Mance [(1962) I QB 676: (1962) 2 WLR 569 : (1962) I All ER 525 : (1962) I Lloyd''s Rep 60] decided that it was the assured who first had the loss was caused by fire, one of the insured perils, and that once this was discharged, the onus was on the insurers who asserted that such fire was caused by the assured. "

In our view, the aforesaid contention requires to be accepted because it is for the Complainant first to establish that the alleged damage was caused due to the peril contemplated under the policy cover. Merely because damage has taken place in the premises of the insured, it would not mean that the cause of the damage is contemplated peril covered by the policy. II Keeping the aforesaid principles in mind, for the reasons stated below, it is difficult for us to accept the say of the Complainant that loss was caused due to malicious act. (a) Because some disputes were pending with the employees it would not mean that employees/workers caused the damage by feeding the contaminated PTA bags, which were allegedly kept aside by Mr. M. K. Singh, Charging Operator into the Feeding Hopper.

(b) In the report submitted to the Police by the Complainant it is stated that the plant was not functioning properly and the same had to be stopped. Therefore, the Police has not taken any steps for finding out whether any workers have committed any mischief/malicious act. In the said report it is nowhere mentioned that damage was caused by the disgruntled workers or that mischief was done, and, therefore, it was a malicious act. The contention of the Complainant that since the negotiations were going on with the workers Union, it was thought by the Management not to lodge any case with the Police against the workers, as that would have jeopardized the negotiation process, is a fallacious argument because in case of loss of crores of rupees it would have been natural for the insured to have made such allegations against the disgruntled workers in the police report. This conduct is not normal on the part of a big industry-like the Complainant, particularly, when, in recent past, complaints were filed against some workers and employees and they were prosecuted.

(c) Further, in the letter dated 14. 12. 1988 written to the Divisional Manager, Insurance Company, it is nowhere stated that internal inquiry report indicated the involvement of other workers with the intention to damage the plant. The letter reads as under: "this is to inform you that C. P. Department of our Plant had some problem from 5th December, 1988 which was noticed on 6th

December, 1988 that C. P. started generating waste instead of finished goods. The phenomenon was noticed by us was that exorbitantly high pack pressure persisted throughout the day on 6th December, 1988 resulted in production of waste. Because of the same we had to stop the production and shut down our plant from 7th December onward. The reasons of high pack pressure are being investigated and will be informed to you shortly. In the mean time, you are requested to please depute a Surveyor to survey the loss of stock and stock-in-process at the earliest. "

4. THIS would mean that till 14th December, 1988 Complainant never thought that some disgruntled employees caused the damage. Thereafter, in response to the said letter the Senior Divisional Manager, on 16th December, 1988 specifically informed the complainant that the letter nowhere indicates that the loss/damage was caused by any of the perils covered by the policy. The relevant part of the letter is as under: "we have for acknowledgement your letter No. OSL:ins:88:55643 dated 9th December, 1988 and request to note that the C. P. Department of your plant started generating waste instead of finished goods on the 6th December, 1988 due to persistence of exorbitantly high pack pressure throughout the same day and that due to the same reason you had to stop the production and shut down your plant from 7th December, onward. Kindly note that the nature of the loss/damage indicated by you has not been caused by any of the perils covered by our policy and hence we regret being unable to be of any assistance to you in this regard. "

In response to the said letter of 16. 12. 1988 on behalf of the Complainant it was stated that "the loss suffered by Company most probably on account of malicious damage to the process material. This would indicate that upto 16th December, 1988, the Company''s management was not sure whether the accident took place by mistake/negligence of the concerned clerk or feeding operator. (d) Further, even on 7th March, 1989, Complainant was of the view that as the contaminated PTA bags were supplied by the RIL, the supplier was required to settle the claim for the loss suffered by it by use of contaminated PTA bags. The relevant portion of the letter written by the Managing Director of the Complainant to the RIL is as under: "we had, however, drawn your attention towards the loss and damage suffered by us due to contaminated PTA supplied to us in early December, 1988. While we are thankful to you for sending your technical representatives to our site immediately after this episode, we informed you that thorough investigations had been conducted at our end as well as enroute from your plant to our site and it had revealed no possibility of contamination taking place either at our site or during transit. You had appreciated the facts of the matter and had indicated that you are fully concerned about the mishap and continuing to find how contamination has occurred we informed you of direct losses of about Rs. 2. 0 crores which our Company had suffered because of receipt of contaminated PTA bags from your plant. We are thankful for your appreciation of the magnitude of our above losses and shall request you to please settle this matter commercially at your earliest convenience. "

This could indicate that the meeting was arranged with the suppliers, namely, RIL, on various dates. The said minutes only record the impurities in the PTA bags which have been fed and talks about the commercial settlement with the suppliers. But, it nowhere states that contaminated bags were noticed by Mr. Sakhare and were kept separately. This would establish that till 7th March, 1989 the Managing Director of the Complainant was of the view that the contaminated bags supplied by the RIL were fed in the hopper and that caused damage. But, it was not contended that after noticing the contaminated bags they were kept separate and the disgruntled workers fed the said bags in the hopper. (e) Not only this, it is difficult to believe as to how the disgruntled workers came to know immediately that the two contaminated bags were lying near the hopper and were not shifted to the store room, and, therefore, they fed the contaminated bags in the hopper within a few minutes after the incharge, Mr. Sakare left the place. (f) Further, it has been rightly pointed out that one PTA bag is of 1000 kgs and it cannot be manually lifted; it requires fork lift to lift the bag as the Hopper is about 3 to 4 metres high. And, lifting of 2 bags would, normally take about 30 minutes for feeding. The feeding operation has to be done by an experienced person since the operation had interlocking system and the inert gas of nitrogen supply required to be blown into storage bin for regular feeding of the plant. Hence, it cannot be reasonably believed that the disgruntled workers remain inside the hopper area for 30 minutes without being noticed by anyone and, that too, they entered such area as soon as Mr. Sakhare left. However, learned Counsel appearing on behalf of the Complainant submitted that once the Surveyor accepted the version of the Complainant, the Insurance Company was not justified in appointing Investigator. As against this, learned Counsel Mr. Rawat rightly submitted that opinion expressed by the Surveyor on the basis of the facts as found, is not final. That opinion may or may not be accepted by the Insurance Company, if there are justifiable grounds. He, therefore, submitted that presuming Investigator''s report is not be taken into consideration as it is, but it may be taken into consideration as the arguments by the Insurance Company.

5. IN our view, the submission made by learned Counsel Mr. Rawat is justified. This is not a simplicitor case of assessment of loss, but expression of opinion by a Surveyor with regard to cause of loss only from circumstantial evidence, and, if the circumstantial evidence are not sufficient to arrive at a reasonable conclusion that damage was caused to the stock in process by malicious act of disgruntled workers, then, the Insurance Company is justified in not accepting the Surveyor''s opinion for the cause of loss. In case of direct evidence, the position would be different depending upon facts of each case.

6. IN this view of the matter, from the evidence which is brought on record, it cannot be said that the complainant has proved with reasonable certainty that loss was caused by malicious act of disgruntled workers. III Limitation: (a) As

per the complaint, the incident took place on 4 to 5th December, 1988. But, the complaint is filed in 1998. It is pointed out that all throughout the Insurance Company had not agreed to settle the claim because it was not a malicious act. Firstly, in any set of circumstances, by letter dated 17th Octobter, 1994, the Complainant was informed that damage was not attributable to the malicious act, and, therefore, no question of reimbursement would arise. Various reasons are also recorded therein. Therefore, the complaint filed in the year 1998 is apparently time barred. In support of his contention, learned Counsel Mr. Rawat, referred to the decision of the Apex Court in the case of M/s. Kerala Agro Machinery Corporation v. Bijoy Kumar Roy and Ors. , wherein the Court observed as under: "we find that the question of limitation has not been considered seriously at any stage. There is no dispute that the claim petition was barred by limitation. National Commission has only observed that the delay was due to the assurances given by the dealer to get the defects rectified, but surprisingly no letter has been particularly indicated in the order much less within limitation, by which liability may have been acknowledged by the appellant. (Emphasis supplied)

(b) At this stage, we would refer to the letter dated 17. 10. 1994 which is as under: "as desired by you, we arranged for a joint discussions on 14th September, 1994 at our Head Office, in connection with the above. At this meeting Sri T. C. Agarwal. General Manager (Commercial), Sri S. N. Anand and Sri S. K. Banerjee from your organization were present. For the sake of good order, we place on record the following: you advised us vide your letter of 9th December, 1988 delivered in person on 14th December, 1998 about the increase in pack pressure and generation of waste and the reasons were being investigated. In reply you were advised by our letter No. 1090/sm/psv/88 dated 16th December, 1988 that the damage as reported by you was not caused by any of the perils covered under our policy. In answer to our aforesaid letter of 16. 12. 1988, you stated vide your letter No. OSL. INS. 88:56106 dated 22nd December, 1988, "that C. P. started generating waste from 6th December, 1988 due to contamination in raw material caused due to workers fed contaminated material about 1 to 5 MT and as a result you suffered loss by way of generation of contaminated waste which cannot be used. You have, Inter alia, also stated that "the loss suffered by the Company most probably on account of malicious damage to the process material. " according to the inquiries of the Surveyors, it was reported. (a) That a departmental inquiry was caused by you and the inquiry committee was reported to have submitted their findings on 10th December, 1988. (b) That the inquiry committee concluded in their report that the cause of damage was due to malicious act (This was as on 10th December, 1988 itself). (c) That you wrote a complaint dated 10. 12. 1988 addressed to Jhargadia Police Outpost but delivered to the police on 12th December, 1988. (d) That there was no reference to any malicious act in the above complaint to the police. (e) That it was confirmed by you in answer to specific query that no further complaint was lodged with the police. You were also informed that according to the evidence on record available with us, the experts from your suppliers viz. Reliance Industries limited, visited your plant at Baulpur and held extensive enquiries and investigations. In this connection you were referred to the evidences in the following documents duly attested and given to the Surveyors. (1) Minutes of the discussions between Sri S. Sambasivan of R. I. L. and your representatives Sri Sudhir Singh and Sri B. R. Sakhare on 9. 12. 1988. (2) Minutes of the discussions between Sri S. Sambasivan of R. I. L. and Sri Sudhir Singh of your Plant on 14. 12. 1988 and 15. 12. 1988. (3) Minutes of the discussions between the experts from R. I. L. and your executives dated 16. 12. 1988 and 13 1 1989. The above documents established that the stock of PTA supplied by Reliance Industries Ltd. contained black particles, dust and others. It stood confirmed in your record that the two bags of P. T. A. BEARING Ref. Nos. 16397 and 16402 were received at your Plant around the noon time on 4th December, 1988 and the Surveyors questioned how these two bags were immediately taken to the hopper area and what type of quality control was exercised on such a costly and vital raw material. There was no satisfactory answer. Again when the pack pressure rose up according to your version on 6. 12. 1988, no reference was made about these so-called contaminated bags at all until on 8th December, 1988, Sri B. R. Sakhare was reported to have raised this issue i. e. more than two full days after the rise in pack pressure was noticed. When questioned how the quality of the materials in each stage of the process was being checked/ monitored for the quality parameters no record of the test reports was produced. Above all, you were referred to the letter dated 7th March, 1988 of your Managing Director to the Managing Director of Reliance Industries Ltd. This letter issued after a lapse of three months subsequent to lengthy investigations at different levels, speaks for itself. We have placed before you that in the light of the evidences cited, inter alia, that the damage was not attributable to malicious act. "

From the aforesaid letter it is apparent that the Insurance Company has not accepted the contention of the Complainant that the damage was due to malicious act and, therefore, the claim was not settled.

From the aforesaid letter it is also clear that the Complainants were trying to impress the Insurance Company that the damage was caused due to malicious act. That contention was not being accepted by the Insurance Company for 6 years, i. e. from 1988 to 1994. In that set of circumstances, it was for the Complainant to take appropriate proceedings at the relevant time. They ought not to have waited for years together for filing the complaint. Further, the learned Counsel for the Complainant contended that after receipt of the letter from the Insurance Company, the Complainant had correspondence with the Insurance Company. In our view, when the cause of action had arisen in 1988 because on 16th December, 1998, the Senior Divisional Manager of the Insurance Company specifically informed the Complainant that the loss/damage indicated by the Complainant was not caused by any of the perils covered by the policy and "we regret being unable to be of any assistance to you in this regard".

Hence, if the claim is not settled for a period of 6 years, a big commercial establishment ought not to have waited for further period of 4 years by entering into correspondence with the Insurance Company. Merely because the Insurance Company replies to some correspondence it would not mean that the Insurance Company acknowledges its liability. In case of illiterate, poor or a small consumer who may be beseeching repeatedly to the Insurance Company to consider his case again and again, may, in some case, be a ground for condoning the delay. But, a Company having a well established legal cell and doing business in crores cannot contend that for years together they were trying to settle the claim by negotiations, and, therefore, delay should be condoned.

7. IN the result, as the Complainant has failed to establish with reasonable certainty that damage was caused due to ''malicious act'' of disgruntled labourers and that the complaint filed by a big commercial establishment after a lapse of ten years of the date of the incident, requires to be dismissed. Hence, the complaint is dismissed. There shall be no order as to costs. Complaint dismissed.

