

(2016) 04 NCDRC CK 0068

In the National Consumer Disputes Redressal Commission

Case No : 52 of 2009

KISHAN COLD STOREGE

APPELLANT

Vs

BAJAJ ALLIANZ GENERAL INSURANCE CO. LTD. & ORS.

RESPONDENT

Date of Decision : 21-04-2016

Acts Referred:

Consumer Protection Act, 1986, Section 2(d),
Section 2(d)(i) - Definitions - Definitions

Citation : 2016 2 CPR 481

Hon'ble Judges : V.K. Jain, Dr. B.C. Gupta

Advocate : Ravi Sikri, Priya Ranjan Roi, Deepak Yadav, Atul Nanda, P.T. Vasandani, Rabi Narayan Rovi

Judgement

1. The complainant, Kishan Cold Storage is a registered partnership firm consisting of four family members as partners, and engaged in the business of running a cold storage to preserve food stuff belonging to the farmers, after taking requisite charges from them. The complainant firm raised finance from the United Bank of India (opposite party No. 04 & 05) as cash credit loan/working capital etc. for setting-up the said cold storage and for that purpose, they mortgaged/pledged the entire assets of the cold storage with the Bank. The said loan facility was granted by the Bank subject to taking up comprehensive insurance policy covering all possible risks in the business. As stated in the complaint, the Bank insisted that it shall approach the insurance company to get the insurance to its satisfaction. The complainant had no option but to issue a letter of authority in favour of the Bank. For the years 2005, 2006 and 2007, the Bank took the insurance policies from the New India Insurance Company and debited the premium to the account of the complainant and kept the policies with itself only. For the year 2008, the Bank asked the complainant to make payment of insurance policy premium to them which the complainant did on 31.03.2008, under legitimate expectation that the plant, machinery and stock of potatoes would be under full coverage against all risks. The Bank took the Insurance Policies from Opposite Party No. 1 to 3, (OP 1- 3), M/s. Bajaj Allianz General

Insurance Company Ltd. instead of the previous company, i.e., New India Insurance Company. As per the complainant, the Bank did not provide them copy of the Insurance Policy at any time. As per the version given, due to load-shedding of electric supply in the area and the break-down of the generator sets, the temperature in the cold storage started rising. The complainant tried to get the generator set repaired, but the potatoes kept in the cold storage could not be saved and got damaged, resulting in loss of approximately 1,40,00,000/- to the complainant. The complainant contacted the insurance agent on 29.05.2008 and also lodged claim on 30.05.2008. An authorized surveyor of OP 1 to 3 Insurance Company inspected the cold storage on 03.06.2008. Another surveyor appointed by the OP 1 to 3 examined the matter in greater detail on 12.06.2008. It is alleged that the surveyor did not perform their job as per relevant regulations on the subject. Based on the report of the surveyor, the Insurance Company repudiated the claim, saying that the loss was not attributable to the insured peril of the insurance policy. The complainant took up the matter with the insurance company and also with the Insurance Regulatory Development Authority (IRDA) but to no effect. The complainant also requested the Bank to do the needful, but to no effect. The consumer complaint, in question, was then filed with the following prayers:- "(A) Declare that the Opposite Party No. 1 is guilty of deficiency of service and unfair trade practices as against the complainant;

(B) Direct the Opposite Party to pay a sum of Rs.1,60,00000 towards compensation to the Complainant alongwith interest at the rate of 24% p.a. from the date of transfer of the amount from the account of the complainant till the date of payment;

(c) Award a compensation of Rs.50,00,000/- for arbitrarily and illegal action and for undue harassment, mental agony and suffering in favour of the complainant and against the Opposite Party;

(D) Award the costs of the litigation in favour of the Complainant and against the Opposite Party;"

2. The complaint has been resisted by OP 1 to 3, Insurance Company by filing a written statement in which they stated that the alleged damage had been caused due to electric failure which was not a peril "insured", but was a specific "exclusion" under the Policy. The loss was on account of insufficient refrigeration and increase in the temperature in the storage chambers due to load-shedding and, hence, under the "Exception Clause (iii)," it was excluded from coverage. As per Express Warranty Clause 6 (i) of the Policy, the temperature of the chamber was required to be brought-down to 34 F (1.1 C) before loading of stocks. Under Express Warranty Clause O O 6(ii), a maximum temperature of 50 F (10 C) was required to be maintained during the O O process of loading and 40 F(4.4 C) during the subsequent period of storage. However, the O O final report of the surveyor dated 15.07.2009 stated after analysing the relevant log book that for the period 9/03/2008 to 12/03/2008, the temperature was ranging from 78 F to 50 F. The log O O book for April 2008 was not given to the surveyor by the

complainant. The log book for May 2008 showed an average temperature of 45 F, which was also more than the average. The O failure to maintain the temperature was a breach of "Express Warranties" on the part of the complainant. Moreover, the Insurance Policy, in question, was a restricted insurance policy, covering only deterioration of stocks, where such deterioration could occur following "accident" to refrigeration machinery. In the present case, there was no loss due to "accident", as the loss did not occur on account of break-down of plant and machinery. The OP 1 to 3, further took the plea that the complainant was not a "consumer" under section 2(d)(i) of the Consumer Protection Act, as it was a partnership firm, running a cold storage for commercial purpose. OP 1 to 3 also stated that there was no deficiency in service on the part of the Insurance Company and moreover, the proper adjudication of the matter required taking detailed evidence which was beyond the scope of the present proceedings. The OPs have also stated that the report of the surveyor has brought out that power supply in Bhagalpur Town of Bihar was quite erratic. Knowing this aspect fully well, the complainant should have opted for the coverage under FOES (Failure of Electric Supply) Policy. The OP 1 to 3 also stated in the reply that the copy of the Insurance Policy alongwith schedule had been supplied to OP-4 Bank which was acting as an agent of the insured. The Insurance Company stated that for the reasons stated above, the complaint should be dismissed.

3. The OP No. 4 & 5 Bank also filed a written statement, saying that the complainant was not a "Consumer" under the Act, being engaged in commercial activity and hence, the complaint was not maintainable. The Bank stated that they had insisted upon the complainant to get insurance to its satisfaction, as per the terms and conditions of the sanction of loan. However, the complainant had suggested to the bank to take the insurance cover at its own choice only and accordingly, the Bank had taken the Insurance Policy from OP 1 to 3, for covering risk against "deterioration of stocks of potatoes, following breakdown of insured plant and machinery", and the same was informed to the complainant and a copy of the cover note was also handed over to the complainant. The Bank also stated also that as soon as, they obtained policy from the Insurance Company, a copy of the same was handed over to the complainant. The Bank further stated that it was the responsibility of the complainant also to ensure that proper insurance policy should have been taken. If the policy obtained did not meet the requirements, the complainant could have raised objection with the Insurance Company and taken necessary steps to obtain the right policy. There was, therefore, no deficiency in service on the part of the Bank.

4. The parties were given opportunity to file their evidence affidavits and other documents, which they did during the course of hearing in the case. The parties also filed their written submissions which are on record. Detailed arguments were made by the learned counsels for the parties and given due consideration.

5. The main issue which requires our consideration in this case is whether the

Insurance Cover obtained by the OP Bank on behalf of the complainants from the OP Insurance Company was adequate to provide indemnification in the event of the loss in question. From the record, it is made out that three different insurance policies were issued by the OP Insurance Company in this case. There is a "Deterioration of Stocks" Policy No. OG-08-2416-0411-00000001, valid from 27.03.2008 to 26.03.2009 for a sum insured of 1,60,00,000/-. The risk covered under the Policy has been stated to be the " deterioration of stocks of Potatoes following break-down of insured plant & machinery. " It is mentioned under the heading "special perils" as "DOS coverage without FOES (Failure of (Public) Electricity Supply). Under the clause warranties it is stated as under : "PLANT AND MACHINERIES COVERED AS PER FIRE POLICY NO. OG-08-2416-4007-00000002. LOSS OR DAMAGE IS PAYABLE ONLY IF ARISING OUT OF INDEMNIFIED BREAKDOWN OF AN INSURED EQUIPMENT."

As per the copy of the said policy and the terms and conditions placed on record by the OP Insurance Company, it has been stated in the "Exception Clause III" as follows:-

"The company shall not be liable for any damage to the stocks due to rise and fall in temperature caused by failure of electric supply for whatsoever reason ."

Under the heading "warranties", it has been stated in clause 6 as follows:-

"(i) The temperatures inside the Cold Chambers are brought down to 34 F O (1.1 C) in all the floors of all the chambers before the loading commences and O

(ii) Further ensure that the temperature in all the Chambers does not exceed 50 F (10 C) during the entire period of loading and 40 F (4.4 C) during the O O O O subsequent period of storage."

6. Another policy has been issued by the OP Insurance Company, called the Standard Fire and Special Perils policy No. OG-08-2416-4007-00000002 valid from 29.02.2008 to 28.02.2009. There is still another policy called the Standard Fire and Special Perils policy No. OG-08-2416-4001-00003038 valid from 27.03.2008 to 26.03.2008. In both these policies, it has been mentioned under the clause "risk covered," that standard fire and special perils and add-ons as detailed under Annexure-I are covered. In the said Annexure - I, the add-on cover has been given for earthquakes without plinth and foundation.

7. The learned counsel for the OP Insurance Company vehemently argued that damage to potato stocks had occurred due to electric failure, resulting from erratic electric supply and break-down of generators etc. Under the Exception Clause-III to the DOS Policy, any damage to the stocks due to rise or fall in temperature caused by failure of electricity supply for whatever reason was not liable to be paid by the Insurance Company.

8. In the instant case, it had been adequately brought out in the report of the surveyors that the complainant failed to maintain the required temperatures during loading of stocks as well as during storage, and hence, the complainant

acted in contravention of warranty clause 6(i) and (ii) of the Policy. The complainant failed to supply the log book for the refrigeration machinery for April 2008 to the surveyor, but the entries in the log book made during March 2008 and May 2008 explicitly showed that the temperatures during this period was more than that required for the operations of the plant. The Insurance Company was, therefore, not liable to make payment of the claim under the said "exception" clause.

9. The learned counsel for OP Insurance Company has also drawn our attention to the "Accident" clause in the insurance policy, saying that if there was an accident to the refrigeration machinery, resulting in rise of temperature in the refrigeration chambers, causing damage to the goods described, the Insurance Company was liable to pay for the same. The definition of the term "Accident" has been given in the said policy as follows:- "(a) Any sudden or unforeseen loss of or damage to the Refrigeration Machinery described in Schedule I of this policy due to any accidental cause covered by Machinery Insurance Policy specified in Schedule I and not hereinafter excluded."

10. It has been stipulated in the above clause that if there was any sudden or unforeseen loss or damage to the refrigeration machinery covered by the insurance policy, the Insurance Company was liable. In the present case, however, it has nowhere been stated by the complainant that there was any "sudden" or "unforeseen" event that led to damage to the stocks. On the other hand, it has been brought out in the surveyor's report as stated above, that the temperatures remained, above those required at the time of loading as well as storage for a considerable time, and the complainant failed to take requisite steps to maintain the temperatures at desired levels. We, therefore, find no reason to differ with the line of argument taken by the Insurance Company that the claim was not covered under the "Accident" clause as well. Further, it has been clearly stated in the DOS Policy that DOS coverage was being given without FOES (Failure of Electric Supply). The complainant had neither been given the FOES Policy, nor the machinery breakdown policy and hence, it is made out that the claim is not covered under the Insurance Policies issued.

11. During the course of hearing before us, the learned counsel for the Insurance Company was asked to file an affidavit, stating specifically therein, as to whether any written proposal/ written request was received by the Insurance Company from the United Bank of India before the Insurance Policies were issued in favour of the complainant. The Insurance Company was also asked to file a copy of such request/proposal, if received by them alongwith affidavit. In response to the direction, the Insurance Company filed an affidavit stating that besides a letter dated 20.07.2008, no other written proposal/request was received from the OP Bank before the Insurance Policies, in question, were issued. The said letter dated 20.07.2008 is an internal document of the Bank, sent by the Senior Manager, Katihar Branch of the Bank to their Chief Regional Manager and it reads as follows:-

"To

The Chief Regional Manager

United Bank of India,

Bihar Region,

Patna

Dear Sir,

Reg. Insurance Premium of Bajaj Alliance for Rs.6,48,281/-

We are sending DD No. 948492 and 948293 for Rs.2,57,111/- and

Rs.3,45,170/- for Bajaj Allianz General Insurance Co. Ltd. against premium of Insurance of cast credit S/P. As per list attached."

12. In the normal course of business, the Insurance Company is expected to retain in their records, the proposal form sent by any of its client for obtaining an insurance policy. The OP Bank is also expected to retain in their record a copy of such proposal form sent to the Insurance Company on behalf of the complainant. Both the Bank as well as the Insurance Company are also expected to retain copies of the letters/communications exchanged between them for obtaining the said Insurance Policies. In the present case, however, neither the Bank nor the Insurance Company have been able to produce before us, any such proposal form, from which it could be deciphered whether efforts were made to obtain the appropriate insurance policy to indemnify the complainant in the event of loss. It may be observed, however, that neither the complainant nor the OP Bank have raised the contention anywhere that the Policies issued by the insurance company were not in accordance with the proposals submitted to them. In such a situation, therefore, the natural presumption is that the Insurance Company issued the policies in question as per the proposals received by them from the Bank on behalf of the complainant.

13. The OP Insurance Company have also taken the plea that the complainant should have taken the Machinery Break-down (MBD) Policy and only then, they could be paid for loss or damage in the event of break-down of equipment. It is evident from record that such a policy was not obtained from the insurance company and the reasons for not taking the same have not been spelt out by the Bank or the complainant.

14. Based on the discussion above, we do not find any justification for giving directions to the OP Insurance Company to compensate the complainant for damage to stocks and hence, the prayer in the complaint for declaring the OP Insurance Company guilty of any deficiency in service or unfair trade practice is liable to be dismissed. We now proceed to determine whether the OP Bank can be held liable to compensate the complainant in any manner, for the alleged deficiency in service towards it, in the matter of obtaining the insurance policies

in question.

15. The OP United Bank of India have taken the main plea that the complainant was not a consumer under section 2(d) of the Consumer Protection Act, 1986 and hence, the complaint against the OP Bank was not maintainable. Section 2(d) (ii) of the Act states as follows: "(d) "consumer" means any person who-

(i)

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly prom-ised, or under any system of deferred payment and includes any beneficiary of such services other than the person who "hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person but does not include a person who avails of such services for any commercial purposes;

Explanation.- For the purposes of this clause, "commercial purpose" does not include use by a person of goods bought and used by him and services availed by him exclusively for the purposes of earning his livelihood by means of self-employment;"

16. It is evident that the setting-up of a cold-storage for providing facility of storage to the farmers of the area, by raising loan from a Bank is a commercial activity. It is to be examined, however, whether the complainant fall under the "explanation" under section 2(d)(ii) of the Act. The complainants have stated that they are four partners and that they decided to set-up the unit in question for earning their livelihood. However, during the proceedings before us, the complainants have not been able to explain anywhere, whether the services availed by them from the Bank were exclusively for the purpose of earning their livelihood by means of self-employment. We, therefore, find weightage in the argument taken by the OP Bank that the complainants do not fall under the definition of "Consumer" qua the Bank and hence, the complaint against the Bank is not maintainable. From the facts on record including the version given by the Insurance Company as well as by the Officers of the Bank in their affidavits, it is made out that the Insurance policies in question were obtained on behalf of the complainants by the Bank. In case, any deficiency was shown by the Bank in obtaining such policies with a view to ensure proper coverage etc., the complainants can take-up the issue against the Bank in a Court or Forum of competent jurisdiction, but relief can be granted under the provisions of the Consumer Protection Act only, if it is established that the complainant is a Consumer, vis-a-vis, the Bank.

17. A primary issue for consideration in the present case is whether the complainant itself was required to take appropriate steps to ensure that proper temperatures were maintained in the storage chambers at the time of loading as well as during storage. From the facts and circumstances on record, it is made out that power supply to Bhagalpur where the cold storage was situated was

erratic. It is a matter of general prudence that an entrepreneur engaged in a business such as running a cold storage, is expected to be in the knowledge of technical requirements of the operations, such as maintenance of temperatures at appropriate levels during the course of its business. It shall be wrong to presume that these issues are to be taken care of, by the financing institution or the company providing insurance cover. Even before envisaging the setting up of such a business, an entrepreneur generally gets an appropriate project report prepared, which is expected to spell out the requirements of plant and machinery, finance and various other administrative and technical matters. The complainants have not been able to explain anywhere whether they had made required and sufficient efforts to ensure that the temperatures were maintained at appropriate levels. The surveyors have brought out in their reports that right from the very beginning, the temperatures in the refrigeration chambers were not proper and the loading was started at maximum temperatures. In the report of the surveyor Santosh Kumar Sharma, it has been stated that from 09.03.2008 to 12.03.2008, the temperatures were varying between 78 F to 50 F. The loading started at 8 PM on 12.03.2008 as per the log O O book and the temperature at that time was from 48 F to 40 F. On 13.03.2008, the temperature O O was 38 F and that also at the 6 Floor. After that, the temperature again started rising and it O th was never found to be less than that required. The surveyor has also stated that two DG sets - one for 40KVA and other for 110 KVA were insufficient to run a cold storage of that capacity. The surveyor has, therefore, concluded that the claim was not payable as the insured did not opt for FOES Policy and also did not take separate policy for machinery break-down which was mandatory.

18. From the above facts, it becomes clear that the complainants did not take adequate steps to ensure that requisite power supply was made available to the refrigeration chambers at the time of loading as well as storage, as per the technical requirements. The complainants could have arranged sufficient number of generators to ensure that power supply was available to the plant in accordance with such requirements. The complainants are, therefore, guilty of not exercising reasonable and appropriate care for the upkeep and maintenance of the stocks, in question.

19. It has been stated by the complainants in their rejoinder statement to the counter affidavit filed by the OP Insurance Company as well as in their written submissions that the business of the complainant was to receive food stuffs of the farmers and to preserve it with due care at their premises. The preserved food stuffs were released at demand of the farmers as and when the same arose, after receiving charges for preservation of such food stuffs from them. It is evident, therefore, that the stocks at the cold storage belonged to the farmers and hence, in the event of any loss or damage to the stocks, the complainants are expected to provide compensation to the concerned farmers. The complainants have not stated anywhere whether and to what extent, they have compensated the farmers" whose food stocks were got damaged at their cold storage. Although the surveyor has made assessment of the loss based on the

quantity of potatoes found decomposed or sprouted, but any compensation payable to the complainant has to be correlated with their liability towards the farmers, who were the owners of such stocks. In the event of absence of any such evidence which could determine the liability of the complainant towards the farmers, it is not possible to compute the compensation payable to the complainant, even if it is concluded that such compensation is payable under the terms and conditions of the policies in question.

20. It may be observed, further, that it was the duty of the complainant also to ensure that appropriate insurance coverage was taken for their operations in the complaint. Even if they had given authority to the Bank to obtain the Insurance Policies and debit premium to their account, the complainants should have exercised more vigilance to find out and ensure whether adequate insurance coverage had been taken.

21. Based on the overall facts and circumstances of the case, it is held that the OP Insurance Company is not liable to compensate the complainants in any manner for the alleged loss due to damage of stocks and hence, the consumer complaint against the OP Insurance Company is ordered to be dismissed. Further, in so far as the alleged deficiency against the Bank is concerned, the complainants are not entitled to any relief against the Bank in the current proceedings as they are not proved to be consumers, vis-a-vis, the Bank. However, the complainants are at liberty to proceed against the Bank at an appropriate Forum in accordance with law. The consumer complaint, in question, is, therefore, ordered to be dismissed with no order as to costs.