(1994) 11 NCDRC CK 0049

In the National Consumer Disputes Redressal Commission

K.M. PONNAPPAN APPELLANT

Vs

New India Assurance Co. Ltd RESPONDENT

Date of Decision : 08-11-1994

Acts Referred:

Citation : 1995 1 CLT 363 : 1995 1 CLT 368 : 1995 1 CPC 1 : 1995 1 CPJ 7 : 1995 1 CPR 269

Hon'ble Judges : S.A.Kader , R.N.Manickam , Ramani Mathuranayagam J.

Advocate : F.B.Benjamin George , K.S.Narasimhan , R.Sivaprakasam , V.Aravamudan , R.G.Rajan

Final Decision : Dismissed

Judgement

1. -THIS is a complaint under Section 17 read with Section 12 of the Consumer Protection Act.

2. THE complainants are carrying on business in timber. THEy purchased 102 pieces of logs of timbers from the second opposite party M/s Andaman and Nicobar Islands Forests and Plantation Development Corporation Limited under Invoice No. T/91-92/10 dated 12.7.91 for a sum of Rs. 3,12,565.10. THE said consignment was entrusted to the third opposite party carrier at Port Mayabunder on 11.7.91 to be transported and delivered at Madras to the complainant under a clean bill of lading dated 19.7.91. THE consignment was insured with the opposite party under Marine Policy (Cargo) dated 11.7.91 for a sum of Rs. 15,12,500/-. THE consignment was carried in M.V. Diglipur and discharged at the Port of Madras on 30.7.91. THE complainant cleared the consignment through their agent but out of 102 pieces of timber, only 82 pieces were delivered resulting in a shortage of 20 logs of Timber. THE value of the short delivered timber logs of Rs. 1,38,865.30. THE 4th opposite party Port Trust of Madras confirmed the short delivery by its certificate dated 26.10.91. THE complainant lodged the claim with the third opposite party which rejected the claim by letter dated 26.11.91. THE complainant preferred a claim with the first opposite party insurer. But it was refuted by letter dated 6.1.92. THE first

opposite party again refuted the claim dated 13.5.92. THE complainant has therefore filed this complaint seeking compensation against O.P.I in the sum of Rs. 1,52,751.80 towards the value of the short delivered consignment, Rs. 13,886.50 towards the loss of profit with interest, Rs. 50,000/- towards mental pain and agony and costs of Rs. 5,000/-. THE opposite parties 2 to 4 have been impleaded as formal parties to establish the fact of short delivery and consequence the loss. But no relief is claimed against them. The first opposite party resisted the claim, Inter-alia it is contended that no relief has been claimed against the carrier who was responsible for the safe carriage and delivery and by this conduct the complainants have forfeited the right of indemnity against this opposite party

The second opposite party which has sold the consignment to the complainant filed a formal counter stating that as per specifications 102 logs were entrusted to the third opposite party carrier and obtained Mate''s receipts dated 11.7.91 acknowledging the receipt of 102 timber logs. It is also averred that only after making physical verification, the third opposite party carrier has issued the clean bill of lading. There was no default on the part of this opposite party.

3. THE third opposite party carrier in its counter contended mat the claim got extinguished against that party as no action filed against it within one year from the date of sailing of the vessel as per the provisions of the contract of carriage and as per Article IV Rule 5 of the Carriage of Goods by Sea Act. It was also contended by this opposite party that the consignment was landed at Port at Madras in full without any shortage. The fourth opposite party is the Port Trust of Madras. It contended that the complainant''s clearing agent cleared only 82 logs of timber on 23.8.91 as against the manifested quantity of 102 logs bearing the mark ''LT'' in blue-paint. The remaining 20 logs were not handed under mark ''LT'' in blue paint. How ever 23 logs of timber were found to be lying uncleared and they were landed with different marks other than LT in blue paint. These 23 logs were subsequently cleared by M/s. South India Corporation Limited after filing a supplementary manifest through customs. It is contended by this opposite party that the responsibility for short delivery is solely that of the carrier.

4. EXHS. A1 to A37 and B1 to B52 are marked by consent. Proof affidavits are filed. No oral evidence has been let in. The preliminary point which arises for consideration is whether the complainants have forfeited their rights of indemnity by virtue of condition No. 11.2 of the policy of insurance. Point: The complainants have purchased 102 logs of timber from the second opposite party Andaman and Nicobar Islands Forest and Plantation Development Corporation and the consignment has been delivered to the third opposite party carrier to be transported by sea and delivered to the complainants at Madras. The consignment was loaded and transhipped in the vessel M.V. Diglipur and landed at the Port of Madras on 30.7.91. A Marine cargo policy has been taken in respect of this consignment. These 102 logs have been marked ''LT'' in blue paint. Exh. B52 is the manifest issued by the third opposite party. This

consignment is item Nos. 9 & 10 in Exh.B52 manifest which contains other items of timber also. Exhs. B29 and B30 are the Mate''s receipts issued by the third opposite party for the receipt of 48 + 54 = 102 logs marked ''LT'' in blue paint. Exh.B31 is the bill of lading in which also it is clearly stated that the consignment consisted of 102 logs marked ''LT'' in blue paint. There is therefore no doubt that the third opposite party has been entrusted with the consignment of 102 logs marked ''LT'' in blue paint by the second opposite party to be transported by sea and delivered to the complainants. The consignment has been landed at the port at Madras on 30.7.92 and the complainants'' clearing agents have taken delivery of only 82 logs bearing the mark ''LT'' in blue paint. According to the Port Trust the remaining 20 logs were not landed under mark ''LT'' in blue paint. Exh.A11 is that certificate issued by the Port Trust, the 4th opposite party. This is therefore a clear case of short delivery by the carrier, the third opposite party.

5. THE complainant has lodged a claim with the third opposite party carrier under Exh.A8 letter dated 23.9.91, Exh.A10 letter dated 5.10.91 and Exh.A12 letter dated 1.11.91. THE third opposite party refuted its liability under Exh. A14 dated 26.11.92. Unfortunately the complainants have not taken any legal steps against the carrier who is primarily responsible for this short landing. Under Article III Rule 6 paragraph 3 of the Indian Carriage of Goods by Sea Act of 1925 the carrier and the ship shall be discharged from all the liabilities in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered. THE goods have been delivered in this case on 30.7.91 and no action has been brought by the complainants against the third Opposite party carrier on or before 30.7.92. THE third opposite party stands discharged from all liabilities in respect of this short delivery. As pointed out by the Supreme Court in East and West Steamship Company v. S.K. Ramalingam Chettiar (AIR 1960 SC 1058). Clause 3 of paragraph 6 of Art. 111 in the schedule to the Carriage of Goods by Sea Act of 1925 provides for the extinction of the right to compensation and is not merely a rule of limitation. THE complainants have thus lost the right to claim any compensation against the Shipping Company.

6. EXH.A1 is the policy of insurance produced by the complainants and EXH.B26 is the policy of insurance produced by the first opposite party. EXH.A1 produced by the complainants contains the usual first sheet and two typed sheets mentioning the risks covered, exclusions and duration of the cover. The usual printed forms attached to the Marine Policy are not found in EXH.A1. But they have been produced by the opposite party under EXH. B26. It is contended by the Learned Counsel for the complainant that these printed conditions were not issued to the complainants and they are not therefore bound by the terms and conditions set out in the printed forms. We are unable to accept this contention. The first page of EXH.A1/EXH.B26 clearly reads thus: "Subject to important Notice attached hereto. The attached clauses and endorsements form part of this policy." Evidently, the complainants have not produced those printed forms for reasons best known to themselves. Condition No. 11 in the printed form under

EXH.B26 runs thus: MINIMISING LOSSES 11. It is the duty of the Assured and their servants and agents in respect of loss recoverable hereunder. 11.1 to take such measures as may be reasonable for the purpose of averting or minimising such loss, and 11.2 to ensure that all rights against carriers, bailees or other third parties are properly preserved and exercised and the Underwriters will, in addition to any loss recoverable hereunder, reimburse the Assured for any charges properly and reasonably incurred in pursuance of these duties.

It is therefore the contention of the first opposite party that since the complainants have not taken any action against the carrier, they have failed to ensure that the rights against the carriers were properly preserved and exercised and the insurer is not therefore liable to indemnify the complainants. The point is covered by a direct decision of the High Court of Madras in E.I.D. Parry India Limited v. Far Eastern Marine Transport Co. Ltd. (19881 LW 321). The Court observed as follows: "As is laid down in the policy of insurance, the insurer''s liability is only to succeed to and not in any way supersede any claim which the insurer may be entitled to make on any carriers or their agents. It is also laid down therein that it is the duty of the assured and the agents in all cases to take such measures as may be reasonable for the purpose of averting or minimising a loss and to ensure that all the rights against the carriers, bailees or other third parties and properly observed and exercised. In particular, the assured or their agents are required to take these steps and failure to comply with this requirement may prejudice any claim under this policy. Under the law of Insurance, the right of the Insurer on payment of the loss to the assured is to be subrogated to the rights of the assured so as to enable the insurer to proceeed against the third party and any default committed by the assured either by allowing the remedy to get time barred or by abdicating or abandoning, his rights against the carrier or the third party will deprive the insurer of its remedies against the third party for indemnity. In such cases, it is open to the insurer to repudiate the liability under the policy, if the loss is not paid to the assured or to lay a counter-claim against the assured for damages if it has paid the loss to the assured. The law is thus stated in MacGillvray & Parkington Insurance Law, Seventh Edition, paragraph 1172:- "The Assured is under an obligation not to deal with any claim he possesses, or will possess, against a third party in such a manner as to prejudice the insurer''s rights of subrogation in relation to it. The insurer''s remedy will be to repudiate liability on the policy, or to counterclaim for damages for the loss of, or diminution of their rights, depending on the circumstances. The position varies slightly, depending on whether the insurer has paid for the loss."

In the instant case, the plaintiff by its failure to institute this action in time against the first defendant-carrier has lost its remedy against the carrier and consequently the third defendant-insurer is deprived of its right of indemnity against the carrier. It is therefore open to the third defendant insurer to repudiate the claim under the policy of insurance, and the suit against the third defendant must therefore fail. We therefore hold that the complainants are not entitled to make any claim for compensation against the first opposite party. The complaint must fail. In the result, the complaint fails and is dismissed, but without costs. Complaint dismissed.

