
(2015) 08 NCDRC CK 0051

In the National Consumer Disputes Redressal Commission

Case No : 14 of 2008

KUNDAN RICE MILLS LIMITED

APPELLANT

Vs

UNITED INDIA INSURANCE CO LTD

RESPONDENT

Date of Decision : 03-08-2015

Acts Referred:

Citation : (2015) 08 NCDRC CK 0051

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

Advocate : Sukumar Pattjoshi, Somesh Kumar Dubey, Ajay Jain, Virender Kumar Singh, V S Chopra

Judgement

V.K. Jain, Presiding Member

[1] The complainant company obtained a floater policy from the opposite party insuring the stock of Canadian Yellow Peas lying in the customs bonded warehouse at Visakhapatnam and other godowns of the insured situated at various ports/or various towns as specified in the endorsement attached to the said policy, for the period of two months from 16.8.2005 to 15.10.2005. The case of the complainant is that the rainwater flooded its warehouse at Visakhapatnam on 14.9.2006, damaging the stock of the peas which had been insured with the opposite party. One Mr. D.S. Prasad Babu was appointed as the surveyor to visit the premises of the insured and carry out an inspection. In his letter dated 15.9.2005 written to the insured, Mr. Prasad Babu, inter-alia stated as under: "The insured have stated that heavy waters were entered inside the godown caused inundation, approximately 2 ft. of water was stagnated and prior to my inspection with a view to save the cargo from further damage, the insured's agents have completed dewatering exercises. However, they have provided me one set of photographs taken by them before commencement of dewatering operations.

My initial examination, the HDPE Bags mainly form bottom two layers were having water stains, mud deposits which were left by the water during receding time and I have also noticed that approximately 13" to 14" height of water stains

were formed inside the godown.

At my request, the agents labour have cut the bags mainly from bottom two layers, noticed that yellow peas were damaged, water was absorbed.

I have held thorough discussions with them about the loss minimization measures and they have stated that they are making arrangements for immediate lifting of approx.. 2400 Tons of cargo to Kolkata and I have clearly suggested them to gear up the delivery operations so that the condition of cargo from bottom two layers can be ascertained.

Even though, bottom layers were appears to be affected with water, keeping in view of packing provided to the cargo, chances of spread of moisture to the middle of the stacks may not be having that much effect as the front and sides bags of two layers since these were directly exposed to inundated waters. However, for ascertaining the total condition of two layers of the stacks of packed cargo, those needs detailed inspections, segregation, standardization or salvaging etc."

He also sent a letter dated 15.9.2005 to the complainant stating inter-alia as under:

"During the course of my survey on 14th and 15th September, 2005, your officials have stated that mostly the stacked cargo which was in two layers height was affected and at my request, the bags were cut mainly form bottom layers, noticed that yellow peas were damaged, water was absorbed by the peas.

It was further stated by your officials that you are making arrangements for immediate lifting of huge stocks from the godown so that the condition of bags mainly from the bottom two layers can be examined. Kindly treat the matter as MOST URGENT and arrange immediate shifting of majority of the cargo so that the actual condition of the bottom two layers of the cargo can be examined.

Even though, bottom layers were appears to be affected with water, keeping in view of packing provided to the cargo, chances of spread of moisture to the middle of the stacks may not be having that much affect as the front and sides bags of two layers since these were directly exposed to inundated waters. However, for ascertaining the total condition of two layers of the stacks of packed cargo, those needs detailed inspections, segregation, standardization or salvaging etc."

[2] According to the complainant, since there were heavy rains in and around Visakhapatnam, they were able to load 2461 MT of peas to Kolkata as per the instructions / discussion with Mr. Prasad Babu incurring expenses of Rs.24,18,903/- on account of loading, unloading, freight etc. On 18.09.2005, Mr. S.S. Anantha Padmanabhan was appointed as the surveyor to survey the damage and assess the loss to the complainant. The said surveyor submitted a report dated 07.02.2006, assessing the loss to the complainant at Rs.94,23,995/-, after making 5% deduction on account of applicable excess and

the value of the salvage. He also recommended payment of Rs.1,07,300/- to the complainant towards segregation, sorting out, repacking and labour of the salvage. He recorded that the insured had confirmed to him during his visit that water did not enter the godown due to rains from 18.9.2005. Thus, no further damage to the stock kept in the Visakhapatnam warehouse was caused after the visit of the first surveyor. Though the complainant had submitted claim bill for Rs.2,33,79,075/-, representing the quantity of the totally damaged stock to be 395.76 MT and the quantity of partly damaged stock to be 4304.51 MT, the surveyor considered only 1900.45 MT stock kept in HDPE Bags and 28.70 MT loose stock, to be the stock affected due to inundation and assessed the claim accordingly. He did not recommend any payment for the alleged damage to the stock, which the complainant had shifted from Visakhapatnam to Kolkata. Determining the affected quantity of the stock, he inter-alia observed as under: "A) Determination of Quantities affect: (Please refer Godown storage sketch enclosed)

As per the observations of Mr. Prasad Babu, Surveyor, about 14" water was seen in the Godown on the date of survey on 15.9.2005. The water marks seen on the inner walls of the Godown, substantiate this point. Since, the thickness of each bag is about 7", the bottom two layers would have been submerged in the Flooding waters. In Bay 1, there were 28.70 MT of loose stock and 98.770 MT of Bagged stocks with Bags in torn condition. Hence, the stocks in this Bay are treated as Total Loss. In the other 3 Bays, the heights of stacking were 9 and 12 bags in Bay2, 14 bags in Bay 3 and 15 bags in Bay 4.

In addition, Bay 4 contained about 310.00 MT of Soya Bean Meal belonging to Toepfer, which has no relevance to this assessment. In case of Bay Nos.2, 3 and 4, immaterial of the height of each stack, water ingress was observed in the bottom 5 layers. This was also verified by the undersigned during my visit. Also it takes some time for the insured, to lift the upper layer of bags and come down, and hence, without prejudice to the rights of the insured, we have considered layers as affected. Based on the above method, the following is the number of bags that were affected:

Bagged Quantity	Bulk/Loose Qty.	Total Qty.	Bay-1 (Cut and torn bags)	98.700 MT
28.70 MT	127.40 MT	Bay-2	57x23x5=6555x50 kgs=327.75MT	
40x16x5=3200x50 kgs=160.00 MT	61x16x5=4880x50 kgs = 244.00 MT	60 torn bags at 50 kgs = 3.00 MT	734.75 MT	734.750 MT
NIL	734.750 MT	Bay-3	58x50x5=14500x 50 kgs= 725.000 MT	NIL 725.000 MT
Bay- 4	57x24x5=6840x 50 kgs= 342.000 MT	NIL	342.000 MT	Total Quantity
1900.450 MT	28.70 MT	1929.150 MT		

Computing the gross value of the affected stock at Rs.2,31,45,071/- he deducted the salvage value of Rs.1,33,37,434/- as per the information given by the complainant. After making 5% deductions on account of applicable excess, he arrived at Rs.9,31,669/- and adding salvage expenses of Rs.1,07,300/-, he assessed the net loss at Rs.94,23,995/-.

[3] The Insurance company paid a sum of Rs.93,90,000/- to the complainant after it had executed a discharge voucher, accepting the aforesaid amount in full and final settlement of its claim. Being aggrieved, the complainant is before this Commission, seeking a sum of Rs.2,64,76,986/-, along with interest @ 24% per annum.

[4] The complaint has been resisted by the insurance company, inter-alia on the ground that having accepted the amount of Rs.93,90,000/- in full and final settlement of its claim, the complainant cannot have any plausible grievance against the insurance company. On merits, it is alleged that the complainant had shifted 2461.185 MT of unaffected cargo to Kolkata and this was done without any consent or approval from the insurance company. It is further stated that the stock, which the complainant had shifted from Visakhapatnam to Kolkata was disposed of without any permission from the surveyor or the insurance company.

[5] Since the complainant has been reimbursed in respect of the stock, which had remained at Visakhapatnam till the visit of Mr. Padmanabhan surveyor on 18.9.2005, the only question involved in this complaint is as to whether the stock which the complainant had shifted from Visakhapatnam to Kolkata was damaged or not. The onus obviously was on the complainant to prove that the said stock was also damaged, either wholly or partly.

[6] Admittedly, the stock which was shifted from Visakhapatnam to Kolkata was not inspected by Shri Padmanabhan and no written request in this regard was made by the complainant either to him or to the insurance company. Though, it is claimed by the complainant that the said stock was shifted to Kolkata as per the instructions/discussion with Mr. Prasad Babu, Surveyor, the letter dated 15.9.2006 sent by Mr. Prasad Babu to the insurance company clearly shows that the complainant itself had decided to shift 2400 MT of the stock to Kolkata. This information was given to Mr. Prasad Babu when he discussed the loss minimization measures with the complainant. Even in his letter dated 15.9.2005 to the complainant, Mr. Prasad Babu had clearly stated that it were the officials of the complainant who had told him that they were making arrangements for immediate shifting of stock from the godown so that the condition of the bags, mainly from the bottom two layers, could be examined. The aforesaid letter from Mr. Prasad Babu clearly indicate that even the complainant had not claimed any damage to the stock which it was seeking to shift from Visakhapatnam to Kolkata. Even otherwise, a prudent businessman would shift only the unaffected stock and not the damaged stock to another destination, particularly if he is seeking to lodge a claim with the insurance company in respect of the entire stock, including the stock which he proposed to shift to another destination. The complainant knew that without inspection of the entire stock and assessment of the damage, if any, the insurance company would not reimburse it in respect of the entire stock including the stock which it was seeking to shift from Visakhapatnam to Kolkata. Therefore, had the stock shifted to Kolkata been affected due to accumulation of water in the shed, the complainant would have

stated so in writing either to the surveyor or to the insurance company and would have requested them to inspect the said stock and assess the damage at Kolkata. As noted earlier, no request was made by the complainant either to the insurance company or to the surveyor to inspect the stock at Kolkata and assess the damage to the said stock. The inevitable inference in these circumstances would be that there was no damage to the stock which the complainant had shifted to Kolkata from Visakhapatnam.

[7] It is not in dispute and is also visible from the photographs filed by the insurance company that the stock of the peas had been kept in stacks. There were upto 24-25 bags in each row of HDPE bags containing peas. Dewatering exercise had been completed by the agents of the complainant even before the first surveyor Mr. Prasad Babu reached the spot. In his letter dated 15.9.2005 to the insurance company he stated that the complainant had informed him that about 2 ft. of water had stagnated in their premises and was later flushed out by them. In this letter dated 15.9.2005, Mr. Prasad Babu, inter-alia stated that it were the bottom layers which appeared to be affected with water and considering the nature of the packing of the cargo, chances of moisture spreading to the middle of the stacks might not be having that much effect as the front and side bags of two layers, which were directly exposed to inundated waters. He was of the view that for ascertaining the condition of the two layers of the stacks, detailed inspections, segregation, standardization or salvaging etc. was required. Even in his letter dated 15.9.2005 to the complainant he noted that the officials of the complainant had told him that mostly the cargo which was in two layers in height was affected and the bags were cut mainly from the bottom layers. Thus, in the opinion of the surveyor Mr. Prasad Babu, who had seen the entire stock in the shed at Visakhapatnam, only the two bottom layers of the stock were likely to be affected though he did not altogether rule out the possibility of the moisture spreading upto the middle of the stacks. It was not claimed before him that even the top layers of the stacks were affected due to spread of moisture from the bags which were exposed to inundated waters.

[8] In our opinion, considering the fact that peas had been stacked in HDPE bags and even the agents of the complainant had told the surveyor that only 2 ft. of water had stagnated before it was flushed out on the same day, the moisture in the bottom layers of the stacks could not possibility have affected the upper middle or top layers of the stacks. That also explains the reason why no request was made by the complainant either to the surveyor or to the insurance company to carry out inspection of the stock which they had shifted from Visakhapatnam to Kolkata. It may be pertinent to note here that in his report Prasad Babu observed that only 14" high water stains were seen by him in the godown at the time it was surveyed by him on 15.9.2005 and thickness of each HDPE bag was about 7". Thus, only bottom two layers would have been directly exposed to the flood water which had entered the godown of the complainant.

[9] In his report Mr. Padmanabhan inter-alia observed that "the insured has

realized reasonably good salvage on the entire stocks as is evident from the list enclosed". Relying upon the aforesaid observation of the surveyor, the learned senior counsel for the complainant contended that since the list enclosed to the report pertained not only to the stock which was retained at Visakhapatnam but also to the stock which had been shifted to Kolkata, the surveyor has by making the aforesaid observation admitted damage even to the stock at Kolkata. We however, are unable to accept the said contention. Admittedly, Mr. Padmanabhan did not even have an opportunity to look at the stock which the complainant had shifted from Visakhapatnam to Kolkata. Therefore, there could be no question of admitting the alleged damage to the said stock. The report of the surveyor has to be read as a whole and it is not permissible to interpret the said report by taking some observation out of the context in which they are used. We are in agreement with the learned counsel for the insurance company that the aforesaid observation was with respect to the price which the complainant had realized by sale of the stock which had been retained at Visakhapatnam since the said stock also formed part of the list enclosed to the report.

[10] For the reasons stated hereinabove, we hold that the complainant has failed to prove that the stock which it had shifted from Visakhapatnam to Kolkata was damaged on account of the inundation of water in the shed/godown at Visakhapatnam. Consequently, no amount, in our view, is payable to the complainant company.

[11] The learned counsel for the complainant has referred to the decision of this Commission in *S.K. Exports (P) Ltd. Vs. New India Assurance Co. Ltd.*, 2004 3 CPJ 74 (NC). The aforesaid decision however, has no applicability to the facts of the present case.

[12] Admittedly, the complainant executed a settlement voucher, agreeing to accept the amount of Rs.93,90,000/- from the insurance company in full and final discharge of its claim. The photocopy of the said voucher filed by the complainant does not bear any date below the signature of the authorized signatory of the complainant company but since the cheque issued to the complainant was dated 07.9.2006, the said voucher must have been executed on or before 07.9.2006. Soonafter receiving the cheque, the complainant wrote a letter, which it delivered to the insurance company on 11.9.2006. It was stated in the said letter that the amount of Rs.93,90,000/- was received by them under protest and they were reserving their right to claim the balance amount with interest. However, there is no indication on the discharge voucher that it was being executed under protest. The case of the complainant in this regard is that since the insurance company made the execution of the discharge voucher a condition precedent for payment of Rs.93,90,000/-, they had no choice but to execute the said document.

[13] Section 14 of the Indian Contract Act, 1872 which defines free consent reads as under: "14. "Free consent" defined

Consent is said to be free when it is not caused by- (1) coercion, as defined in section 15, or (2) undue influence, as defined in section 16, or (3) fraud, as defined in section 17, or (4) misrepresentation, as defined in section 18, or (5) mistake, subject to the provisions of sections 20, 21, and 22. Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation, or mistake."

[14] Section 19 of the Indian Contract Act, 1872, to the extent it is relevant provides that, when the consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. Section 19 A of the Indian Contract Act provides that when the consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused. Section 20 of the said Act declares void, the contracts where both the parties are under mistake as to a matter of fact essential to the agreement.

[15] Thus the acceptance of the payment of Rs.93,90,000/- by the complainant in full and final settlement of its claim shall constitute a valid and binding contract between the parties unless it is shown that the agreement was caused by undue influence of the consent of the complainant was obtained by coercion, fraud or misrepresentation.

[16] Coercion, undue influence, fraud and misrepresentation are defined in Sections 15, 16, 17 and 18 respectively of the Indian Contract Act and reads as under: 15. "Coercion" is the committing, or threatening to commit, any act forbidden by the Indian Penal Code (45 of 1860) or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

Explanation: It is immaterial whether the Indian Penal Code (45 of 1860) is or is not in force in the place where the coercion is employed.

16. "Undue influence"

(1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another-

(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters

into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Nothing in this sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872 (1 of 1872).

17. "Fraud"

"Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agents, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:

- (1) the suggestion as a fact, of that which is not true, by one who does not believe it to be true;
- (2) the active concealment of a fact by one having knowledge or belief of the fact;
- (3) a promise made without any intention of performing it;
- (4) any other act fitted to deceive;
- (5) any such act or omission as the law specially declares to be fraudulent.

Explanation: Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

18. "Misrepresentation"

"Misrepresentation" means and includes-

- (1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
- (2) any breach of duty which, without an intent to deceive, gains and advantage to the person committing it, or any one claiming under him; by misleading another to his prejudice, or to the prejudice of any one claiming under him;
- (3) causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is the subject of the agreement."

[17] There is no allegation of fraud against the insurance company. There is no allegation of concealment of any material fact by the insurance company from the complainant with a view to obtain the consent of the complainant company to the acceptance of Rs.93,90,000/- in full and final settlement of its claim. Therefore, Section-17 of the Act is also not applicable. There is no allegation of any misrepresentation within the meaning of Section 18 of the Contract Act and, therefore, the aforesaid Section also does not apply. No case of coercion is made

out by the complainant company, since there is no allegation of committing, or threatening to commit, any act forbidden by the Indian Penal Code or unlawful detaining, or threatening to detain, any property, to the prejudice of the complainant, with intention of causing the complainant to enter into any settlement.

This is also not the case of the complainant that it was in such a severe financial hardship that it had no option but to accept the offer made by the insurance company. Neither there is any allegation to this effect nor has the complainant led any evidence to make out a case of financial hardship. Nothing prevented the complainant from approaching this Commission instead of executing a discharge voucher in favour of the insurance company and seeking an interim order for payment of the amount, which the insurance company had offered to the complainant. Such a course however, was not attempted by the complainant company.

[18] In *United India Insurance Co. Ltd. Vs. Ajmer Singh Cotton & General Mills & Ors.*, 1999 6 SCC 400, The Hon"ble Supreme Court inter-alia held as under: "Despite execution of the discharge voucher, the consumer may be in a position to satisfy the Tribunal or the Commission under the Act that such discharge voucher or receipt had been obtained from him under the circumstances which can be termed as fraudulent or exercise of undue influence or by misrepresentation or the like. If in a given case the consumer satisfied the authority under the Act that the discharge voucher was obtained by fraud, misrepresentation, undue influence or the like, coercive bargaining compelled by circumstances, the authority before whom the complaint is made would be justified in granting appropriate relief. However, where such discharge voucher is proved to have been obtained under any of the suspicious circumstances noted hereinabove, the Tribunal or the Commission would be justified in granting the appropriate relief under the circumstances of each case".

[19] In a recent decision *New India Assurance Company Ltd. Vs. Genus Power Infrastructure Ltd.* Civil Appeal No. 10784 of 2014, decided on 4th December, 2014, the respondent had purchased a Standard Fire and Special Peril Policy from the appellant company. In a fire explosion, extensive damage was caused to the manufacturing unit of the respondent. The surveyor appointed by the appellant assessed the loss at Rs.6,09,77,406/-. The insurance company paid a sum of Rs.5,96,08,179/- to the respondent after making certain deductions. The respondent signed a detailed Letter of Subrogation, accepting the said amount in full and final settlement of its claim. After about three weeks, the respondent sent a letter to the insurer, alleging that the discharge voucher was signed under extreme duress, coercion and undue influence taking undue advantage of the extreme financial difficulties of the respondent. The appellant was requested to appoint its nominee Arbitrator in terms of the Arbitration Clause. The appellant however, declined to do so, pleading that there was no arbitrable dispute, the respondent having voluntarily accepted the payment in full and final settlement

of its claim. Thereupon, the respondent filed a petition under Section 11 of the Arbitration and Conciliation Act in which an Arbitrator was appointed to adjudicate the disputes between the parties. The said order came to be challenged before the Hon''ble Supreme Court. It was claimed on behalf of the appellant that respondent being under tremendous pressure due to complete destruction of its manufacturing unit and not being in a position to negotiate the insurer, using its dominant position had forced it to sign the discharge voucher. The appellant however, pointed out that the respondent was a large company having annual turnover of more than Rupees 500 crores and therefore, was unlikely to be financial constrain. Setting aside the order passed by the Hon''ble High Court of Delhi, the Hon''ble Supreme Court held that a bald plea of fraud, coercion, duress or undue influence is not enough and the party who sets up a plea, must prime facie establish the same by placing material before the Chief Justice/his designate". Similar view on the legal position was taken by the Hon''ble Supreme Court in its earlier decision Union of India Vs. Master Construction Company, 2011 12 SCC 349.

[20] The learned counsel for the complainant has referred to the decisions of this Commission in National Insurance Co. Ltd. Vs. Gobind Chandra Nayak, 2008 4 CPJ 67 (NC), Singireddy Ramana Murthy Vs. National Insurance Co. Ltd. & Ors., 2003 1 CPJ 37 (NC) and Niharika Maurya Vs. New India Assurance Co. Ltd. & Ors., 2011 2 CPJ 241 (NC). In Gobind Chandra Nayak , the complainant had taken a big loan and was incurring continuous liability towards payment of interest. He therefore, claimed to have been compelled to sign the discharge voucher on account of the compelling financial hardship. However, no financial hardship has been claimed either in the letter sent to the insurance company on 11.4.2006 or in the complaint.

In Singireddy Ramana Murthy , this Commission inter-alia observed that a party who is faced with the situation like a disaster and is cash starved on account of calamity that has be fallen it, is not in a position to resist the pressure of the insurer to sign the receipts on the dotted lines in order to receive whatever payment is becoming available to it. As noted earlier, such a situation has not even been claimed by the complainant, not to talk of the establishing it by producing material evidencing such a situation.

In Niharika Maurya , it was noted that immediately after accepting the amount offered by the insurance company the complainant had approached the concerned Consumer Forum. It was therefore, inferred that she had accepted the offer either on misrepresentation or misunderstanding or because she needed money. However, in the present case, no such urgency was shown by the complainant and this complaint was filed about one year and five months after accepting the amount of Rs.93,90,000/- from the insurer. Therefore, none of the judgments referred by the learned counsel for the complainant would apply to the factual situation obtaining in this regard.

[21] For the reasons stated hereinabove, we are of the considered view that the

complaint is liable to be dismissed since (i) the complainant accepted a sum of Rs.93,90,000/- from the insurer in full and final settlement of its claim; (ii) No damage to the peas which the complainant had shifted from Visakhapatnam to Kolkata has been proved. No order as to costs.