(2012) 02 NCDRC CK 0022

In the National Consumer Disputes Redressal Commission

Motisons Securities Pvt. Ltd APPELLANT

Vs

ORIENTAL INSURANCE CO. LTD RESPONDENT

Date of Decision : 01-02-2012

Acts Referred:

Citation : 2012 0 NCDRC 755 : 2012 2 CPJ 244

Hon'ble Judges : R.C.JAIN , S.K.NAIK J.

Final Decision : Appeal Complaint dismissed

Judgement

1. PRESIDING Member: 1. The above named complainant, a Private Limited Company, broker of National Stock Exchange of India (NSE) engaged in the business of buying and selling shares through NSE according to the orders placed by its clients and sub-brokers has filed this complaint against the opposite party-Insurance Company seeking a total compensation of Rs. 35,93,632.50 alleging deficiency in service on the part of the Insurance Company in repudiating its insurance claim on unjustified grounds. The break-up of the amount claimed is as under: (i) Loss due to acts of infidelity of its employee-Miss Sonal Ganatra, reduced by the amount recovered and salary withheld Rs. 22,66,667.50 (ii) Interest @ 18% p. a. thereon from18.2.1998 till 2.2.2001 Rs. 12,06,965.00 (iii) Compensation for harassment and mental agony of directors of the complainant Rs. 1,00,000.00 (iv) Court expenses incurred in connection with police complaint and for Case No. 11/1 and R/99 on the file of A.C.M.M. Mazagaon Rs. 20,000.00 Total Rs. 35,93,632.50

2. IN nut shell the case set up in the complaint is that the complainant company had taken a stock brokers '' Indemnity Insurance Policy for the Trading Members of National Stock Exchange of India Ltd., bearing No. 330/98 valid uptil 31.5.1998 for an indemnity limit of Rs. 25,00,000 upon non-delivery securities, etc., from the opposite party by paying the requisite premium. The said policy inter alia covered the acts of infidelity, negligence and dishonesty of the employees of the insured. The complainant had installed four terminals, three in Mumbai and one at Jaipur with total staff of about 11 people. Ms. Sonal

Pravinchandra Ganatra was one of the employees of the complainant and was put incharge of purchase and sale through computer terminal. She used to make daily transactions through computer and at the end of the day online back-up was taken from the NSE. According to the complainant, on 17.2.1998, the last day of the Vallan, Rakesh Parasrampuria, one of the directors of the complainant, on checking the position from the computer back-up received from NSE, to his great shock and surprise found that huge volumes were made in Hindustan Lever and ITC as none of its clients authorized to take such huge positions. From the statement, it was revealed that 41,000 shares of Hindustan Lever and 15,000 shares of ITC were sold on the exchange. Having become suspicious and made inquiries from Ms. Sonal Ganatra and clients in whose account the transactions were done and after a few minutes it was confirmed that the said transactions was done by Ms. Sonal Ganatra without the instructions or authority of the concerned clients or the Directors of the complainant company. On sustained interrogation, she accepted that she had done those transactions for her personal gain. On account of the said unauthorized transactions done by her on 11.2.1998 and 17.2.1998, the complainant suffered a loss of Rs. 25,11,167 and as the complainant had to pay the said amount to the NSE. A complaint was lodged with the Police and FIR was registered on 19.2.1998 against Sonal Ganatra under Sections 420 and 408 of IPC and after investigation charge-sheet was filed in the Court of Additional Chief Metropolitan Magistrate at Mazagaon, Mumbai. Sonal Ganatra was arrested on 14.7.1999 and was granted bail after seven days after that she has deposited an amount of Rs. 2,40,000 to the complainant. The complainant lodged insurance claim with the Insurance Company and Insurance Company appointed a Surveyor. However, ultimately after consideration of the matter and on interpretation of terms and conditions of the Insurance policy, Opposite Party/Insurance Company repudiated the insurance claim of the complainant primarily on the following grounds that: "1. It is not established con-clusively that the loss resulted solely and directly from dishonest or fraudulent act of the employee. There is no documentary evidence or conclusive proof against the accused. 2. As per the NSE regulations, Trading Members have to register with the Exchange the names of the designated persons responsible for physically executing trades on the NSE Terminal. As per NSE records, no approval of the accused employee was sought or granted. This would attract Exclusion Clause 11 to part-I of the Policy whereby Under-writer shall not be liable "for the knowing failure of the Insured to comply with the provisions of any Statute including any regulations made thereunder, or with any laws, regulations or require-ments laid down by any regulatory or supervisory body or agency, whether govern-mental or otherwise. "

3. You have recovered Rs. 2,40,000 from the accused employee, which came on record during the hearing of the accused ''s bail application. This material fact relating to the claim was withheld from the Surveyor as well as the Police complaint. This has breached the principle of ''Utmost good faith '' a cardinal principle of all insurances. We have therefore closed the above file as "No Claim

". This is for your information. "

Aggrieved by the same, the complainant has filed the present complaint. On being noticed, the opposite party/Insurance Company resisted the complaint by filing a written version not disputing the factum of issue of the policy 330/98 to the complainant. Other factual position in regard to the transactions which were conducted by Sonal Ganatra on 11.2.1998 and 17.2.1998 are also not disputed. However, it was alleged that the controversies raised in the complaint cannot be decided by this Commission in exercise of its summary jurisdiction. The repudiation of claim is justified on the strength of the terms and conditions of the policy in particular the Exclusion Clause No. 11. It is denied that the O.P. has committed any deficiency in service in repudiating the claim of the complainant.

3. IN the rejoinder, the complainant has controverted the pleas and objections raised by the opposite party and have generally reiterated the averments made in the complaint.

4. PARTIES have filed affidavits and some documents in support of their respective pleas. On behalf of the complainant, affidavit of Mr. Rakesh Parasrampuria, Mr. Ram Singh M. Agarwal and Mr. Udai Shah have been filed. Besides reliance has been placed on several documents like some other Police proceedings dated 14.7.1999, statement of Jenish Shah and the Court record of the concerned Criminal Court. On the other hand O.P. has filed the Surveyor report, report of investigation and certain other documents. We have carefully perused the entire evidence and material placed on record and have heard Mr. K.K. Kishore, learned Counsel representing the complainant and Mr. P.K. Seth, learned Counsel for the opposite party/Insurance Company at great length and have considered their submissions.

5. THE fate of this complaint hinges mainly on the interpretation of the terms and conditions of the insurance policy. It is not disputed that the complainant had obtained the policy in question and due to the alleged unauthorized acts of the employee-Sonal Ganatra, they had to settle the claim with the NSE by paying a sum of about Rs. 25,00,000 out of which they have recouped a sum of Rs. 2,40,000 from the said employee. Learned Counsel for the O.P. has also not disputed that the policy under Part-1 ''Non-Delivery Based '', Section 1 of the said Part, the insurance covered Infidelity of the Employees ". The relevant Clause reads as under: "Section 1.Infidelity of Employees - Indemnity is afforded to the Assured under this section for loss resulting solely and directly from dishonest or fraudulent acts by Employees of the Assured wherever committed and whether committed alone or in collusion with other, including loss of Securities and/or Cash through any such acts by Employees. "

6. THE term "Employee " is defined in Clause 5 of the definitions to Part-1 as under: "Employees " shall mean: (a) All persons under contract of service with Assured; (b) All temporary employees employed by the Assured including apprentices on the salary rolls of the Assured; (c) All persons provided by an

employment contractor to perform employee duties for the Assured under the Assured ''s supervision; (d) All persons engaged as consultants by the Assured, including retired employees. Other than consultants involved in the Assured ''s data processing activities; but does not include any partner(s) or non-executive director(s) of the Assured: Provided further that for the Insured Peril of loss of securities, being marketable securities, employees of sister companies operating from the same premises or same offices (as declared in the Application Form or as supplemented in writing during the policy period to the Underwriter and notified to the Exchange) will also be deemed to be employees of the Assured. "

Before we come to the relevant Exclusion Clause on the strength of which the opposite party has repudiated the claim, it is pertinent to take note of Clause -6 of the special conditions existing in the policy, which reads as under: "It is hereby understood and agreed that the Assured will specifically comply with all the requirements under SEBI (Stockbrokers and Sub-brokers) Rules and Regulations, 1992 and the requirements of the Rules, Byelaws and Regulations as may be laid down by National Stock Exchange of India Ltd., from time-to-time specifically in regard to transactions/deals entered into by the Assured on the Exchange which have originated from an unregis-tered sub-brokers. "

7. CLAUSE 11 of the Exclusions to Part-I of the clauses is to the following effect: "11. The knowing failure of the Assured to comply with the provisions of any Statute, including any regulations made thereunder, or with any laws, regulations or requirements laid down by any regulatory or supervisory body or, agency, whether governmental or otherwise. "

8. IN the present case, it is not disputed that Ms. Sonal Ganatra, who had conducted transactions in equities on 11.2.1998 and 17.2.1998 in the account of sub-brokers was an employee of the complainant covered under the said definition and she was given a Charter of Duties including conducting the transactions on the computer terminal on behalf of the complainant. It is pertinent to note that the complainant company did not take care to get her name registered with the NSE which was a condition precedent for any person to operate on the computer terminal and conduct the transactions. The NSE under its Regulations and Bye-Laws had prescribed a format for registration of a person and for obtaining approval of NSE for use of the terminal. The said format has been filed on record and reads as under: "(On the Letterhead of the Trading Member) Annexure-2 Application For Approval As User From : Name of Trading Member/ Participant Member Code : User ld. Number : To: National Stock Exchange of India Limited Membership Department, Trade World, Senapati Bapat Marg, Lower Parel, Mumbai-400 013 Dear Sir, We .... (Name of the Trading Member/Participant) hereby, apply for authorized person ....(Name of User) .... of State who is to be approved as User. We hereby agree and bind ourselves to be responsible for all acts, quotations and transactions and transactions done, trades made, or effected by such user on the Trading System. We shall ensure that he/she will

not execute any order on his / her own account of anyone without such order having been prior approved by us in writing. For... (Name of Trading Member/Participant) "

In the case in hand admittedly the Director of the company Mr. Rakesh Parasrampuria and four others had applied and taken approval of NSE for the use of the computer terminal. Ms. Sonal Ganatra, the employee who conducted the transaction on 11.2.1998 and 17.2.1998 was not admittedly amongst them. In other words despite the specific requirement of the NSE in that behalf the complainant did not register Ms. Sonal Ganatra with the NSE as a person who could to do the trading and conduct the transactions on the computer terminal on behalf of the complainant company. Clause-6 (supra) in no uncertain terms required that assured will specifically comply with all the requirements under SEBI and NSE from time-to-time specifically in regard to the transactions/details entered in it by the assured on the exchange, which has originated from unregistered sub-brokers. Therefore, it is evident that the complainant has not complied with the above legal requirements laid by the NSE i.e. in regard to the seeking approval of the NSE for Ms. Sonal Ganatra to conduct transaction on the computer terminal. Clause 11 of the Exclusion Clause makes it abundantly clear that the failure of the assured to comply with provisions of any Statute including any regulations made thereunder or with any laws, regulations or requirements laid down by any regulatory or supervisory body or agency, whether governmental or otherwise would absolve the Insurance Company from its liability to indemnify the assured. The said Exclusionary Clause is fully attracted in the case in hand because the complainant had assigned the important responsibility of operating the terminal and conducting trading on behalf of the complainant and other sub-brokers, though she was legally forbidden to do so under the NSE, Rules, Bye-Laws and guidelines.

9. MR . K.K. Kishore, learned Counsel for the complainant has vehemently argued that the terms of the policy should be given a harmonious construction so that the purpose of the insurance is not defeated. In this connection his first submission is that this is a fit case where this Commission should apply Doctrine of "Generalia Specialibus Non-Derogant ", meaning thereby that this "Specific Phrases/Words Would Prevail Over General Phrases/Words ". In support of his contention he has placed reliance upon a number of foreign decisions as also that of several High Courts. We do not wish to burden this opinion by referring to them because there is no quarrel with this legal proposition, which is well settled over a long period. Question is whether this Doctrine even if it is applied will be of any help and can be used to the advantage of the complainant in the present case. We do not think so. We say so because all the terms and conditions of the policy including the Exclusionary clause have to be interpreted strictly. In this view, we are supported by the will celebrated authority of the Hon ''ble Supreme Court in the case of United India Insurance Co. Ltd. v. Harchand Rai Chandan Lal, IV (2004) CPJ 15 (SC)=V (2004) SLT 876=(2004) 8 SCC 644. Exclusion Clause(s) are part and parcel of the insurance contract and no attempt should be

made to read down the same on the ground that the clause has general phrases and words.

10. THERE being no dispute that no approval was obtained from NSE in respect of Ms. Sonal Ganatra for operating the computer terminal and to conduct the transaction(s) it follows that she was not legally authorized to conduct such transactions. The act of the Directors of the company by delegating their power to conduct the transaction was a wholly unwarranted and unauthorized act and is in clear breach of the conditions of the Policy. By doing, they have taken a calculated risk and so are responsible for the acts of the said employee, even if the transactions were conducted unauthorizedly by her. The plea of the complainant that the said employee did the said transactions for personal gain without the knowledge or authority of the complainant or its Directors, does not cut much ice even going by the affidavit of Sonal Ganatra, which is confessional in nature and given by her at the time when she was in custody. This is not of much consequence. Despite our repeatedly asking, it is not explained as to what advantage Sonal Ganatra could have derived by those transaction. Even if it was so, it could not be without the direct or indirect connivance of the director of the company.

11. HAVING considered the matter from different angles and from the foregoing discussions, we are of the considered opinion that the present case clearly fell under the Exclusion Clause No. 11 of terms and conditions of the Policy and the Insurance Company had committed no deficiency in repudiating the claim of the complainant on the strength of the said clause. Therefore, we are of the clear view that the Insurance Company was not liable to indemnify the complainant for the loss occasioned to them on account of the said transactions conducted by Ms. Sonal Ganatra on 11.2.1998 and 17.2.1998.

12. THE complainant has also claimed an amount of Rs. 20,000 as expenses incurred by it in connection with the Court proceedings before the Criminal Court, which though is one of the perils covered under one of the clauses of the Policy, but no proof of incurring such expenses has been filed. Therefore, even this claim cannot be allowed. In the result, the complaint fails and is hereby dismissed, leaving the parties to bear their own costs. Complaint dismissed.

