(2005) 07 NCDRC CK 0044

In the National Consumer Disputes Redressal Commission

M.SITARAMA REDDY APPELLANT

Vs

UNITED INDIA INSURANCE COMPANY LTD. RESPONDENT

Date of Decision : 13-07-2005

Acts Referred:

Citation : 2005 0 NCDRC 76 : 2005 2 CPC 429 : 2005 3 CPJ 112 : 2005 3 CPR 51

Hon'ble Judges : M.B.SHAH , P.D.SHENOY J.

Advocate : P.S.NARASIMHA , SRIDHAR POTARAJU , P.K.SETH

Judgement

1. IT is the say of the complainant that he had undertaken high-class civil contracts from various Government departments worth crores of rupees by maintaining high standard in their execution. On 9th March, 1992 the Government of Andhra Pradesh issued a tender inviting bids for construction and completion of work under the "Cyclone Emergency Reconstruction Project". Complainant was awarded the work of construction and completion of "improvements to Eluru-Gundugolan-Kavvuru Road". Its approximate value was Rs.250 lakhs. Complainant was also instructed to take insurance for the construction as well as maintenance, as per the terms of agreement. Therefore, the Complainant approached the United India Insurance Company Ltd. (opposite party No.1) and took a "contractor''s All Risk Insurance Policy" dated 29th September, 1992 in the joint names of the Superintendent Engineer (R&B) as the principal insured and the Complainant as joint insured. As per the insurance policy the period of insurance commenced from 1.10.1992 to 31.3.1994 and extended to one year for maintenance from 1.4.1994 to 31.3.1995. The insured value was noted at Rs.3,95,50,000/- (Rupees three crores ninety-five lakhs fifty thousand). Further, there was coverage for an amount of Rs.39,55,000/- towards escalation; third party liability at Rs.5.00 lakhs and Rs.10.00 lakhs and further a total amount of Rs.9.00 lakhs towards storage maintenance and major peril claims were also mentioned. Contractor''s All Risk Insurance Policy has been issued covering a total amount of Rs. 4,45,00,000/- (Rupees four crores forty-five lakhs).

2. IT is the say of the Complainant that pursuant to the execution of the agreement Complainant commenced the road work from 3rd August, 1992. On 11.9.1993 complainant addressed a letter to the Branch Manager of the Insurance Company intimating that the road work covered by the policy had developed cracks due to sudden inundation and heavy rains resulting in seepage of soil beneath the road. The Insurance Company was also informed that the cracks have developed within weeks. Therefore, the Insurance Company was requested by letter dated 11th September, 1993 to register the claim and depute a surveyor to make assessment. Insurance Company, thereafter, appointed one Mr. Y. Ravindra Babu as Surveyor to submit survey report, and, thereafter the Insurance Company also appointed anther surveyor. Both the surveyors arrived at the conclusion that the claim was not payable. Hence, the Insurance Company issued letter dated 13.2.1995 repudiating the claim. The reasons given thereunder are: (a) excessive watering of the road surface; (b) heavy traffic was permitted during the execution of work, and (c) there was improper and defective workmanship, which would be outside the scope of policy. Further it was stated that the entire bitumen work had been completed by 31st May, 1993 and that traffic had resumed and since the crack on the road surface were seen only in July, 1993 the damage appeared to have occurred after completion of road work and thereafter full traffic was also allowed for some time. Therefore the liability of the Insurance Company had ceased as the contract contemplates, "However, the company''s liability expires also for parts of the insured contract works taken over or put into service by the Principal prior to the expiry date specified in the policy whichever shall be earlier". Para (f) of the said letter reads thus: "Under ''limited maintenance visits cover'', the coverage is for ''loss of or damage to the contract works caused by the insured contractor in the course of the operations carried out for the purpose of complying with the obligations under the maintenance provisions of the contract". It can be seen that the loss as above would not fall within the ambit of the above extension as well. (The maintenance coverage as taken is for 1-4-1994 to 31-3-1995, but has to be reckoned from the date of handing over the road stretches for traffic.)"

3. FOR appreciating the facts of the case, we would first refer to the relevant terms of the policy which are as under: "Period of Insurance: From 01-10-1992 to 31.3.1994 Plus 1 Year - Maintenance period - from 01.04.1994 To 31.3.1995 Premium (Subject to adjustment: 1st instalment : Rs.34,359.00 On Completion of the project) 2nd " : Rs.19,905.00 3rd " : Rs.19,905.00 4th " : Rs.19,905.00 ___________ Total: Rs.94,074.00 ------------- Description of Contract works: Construction of Roads Eluru-Gundugolanu-Kovvur Road, LR No.117-D1-CA agreement No. 13/92-93 Items- Sum Insured: I. Material Damage 1. Contract works (Permanent and Temporary works and materials to be incorporated therein)) 1.1 Contract price (as per Schedule of Rs.3,95,50,000/- Qualities and Rates and or/Values Attached) 1.2 Materials and items supplied by the Principal 2. Any other works and Installation not included in 1.1 and 1.2 above (e.g. camp, colony, stores etc. as per list enclosed). 3. Contractors Plant and

Machinery (Memo 6) (as per list enclosed). Period of Cover:

4. CONSTRUCTION Period: The liability of the Company shall commence (notwithstanding any date to the contrary specified in the Schedule) only from the time of commencement of work after the unloading of the property specified in the Schedule from any conveyance at the site specified in the schedule whichever is earlier and shall expire on the date specified in the schedule. However, the Company''s liability expires also for parts of the insured contract works taken over or put into service by the Principal prior to the expiry date specified in the policy whichever shall be earlier. If the actual construction period is shorter than the period indicated in the Schedule, no refund of premium shall be allowed.At the latest, the Insurance shall expire on the date specified in the Schedule but if the work of construction included in the insurance is not completed within the time specified hereunder the company may extend the period of insurance but the insured shall pay to the Company additional premium at rates to be prescribed by the company. Section - I Material Damage

5. THE Company hereby agrees with the Insured (subject to the exclusions contained herein or endorsed hereon) that if, at any time during the period of insurance stated in the said Schedule, or during any further period of extension there of the property (except packing materials of any kind) or any part thereof described in the said schedule, be lost, damaged or destroyed by any cause, other than those specifically excluded hereunder, in manner necessitating replacement or repair the Company will pay or make good all such loss or damage upto an amount not exceeding in respect of each of the items specified in the Schedule the sum set opposite thereto and not exceeding in the whole the total sum insured hereby.

6. THE Company will also reimburse the Insured for the cost of clearance and removal of debris following upon any event giving rise to an admissible claim under this policy but not exceeding in all the sum (if any) set opposite thereto in the Schedule. As per the aforesaid section, the Insurance Company is bound to reimburse, in case the property is damaged or destroyed by any cause subject to exclusion clauses. The phrase ''any cause'' is very wide and would cover loss or damage to the property for any reason, unless the said cause is specifically excluded.

7. THEREFORE , we have to refer to the relevant part of the exclusion clause which is as under: "Exclusion to Section-I .The Company, shall not, however, be liable for: e) the cost of replacement, repair or rectification of defective material and/or workmanship, but this exclusion shall be limited to the items immediately affected and shall not be deemed to exclude loss of or damage to correctly executed items resulting from an accident due to which defective material and/or workmanship f) the cost necessary for rectification or correction of any error during construction unless resulting in physical loss or damage. Memo 4: Basis of loss settlement: In the event of any loss or damage the basis of any settlement under this Policy shall be: (a) in the case of damage which can be repaired the

cost of repairs necessary to restore the property to their condition immediately before the occurrence of the damage less salvage, or (b) in the case of a total loss the actual value of the property immediately before the occurrence of the loss less salvage". From the aforesaid terms and the repudiation letter, questions requiring consideration are: (i) Whether the use of the road for traffic purpose would be covered by exclusion clause? (ii) Whether the exclusion clause which provides that the Company shall not be liable for the cost of replacement, repair, or rectification of defective material and/or workmanship is established by the Insurance Company? (iii) Whether heavy watering of the road surface could be the cause for repudiation? (iv) Whether insurance coverage was in existence in the month of July, 1993?

8. LEARNED counsel for the Insurance Company submitted that heavy traffic was permitted to pass on the road and thus it has resulted in development of the cracks. As stated above, there is nothing on record to establish that heavy traffic could cause such cracks. In any case, exclusion clause would not apply to such case. Even if the cracks have developed because of heavy traffic there is no exclusion in such eventuality. That coverage is for reimbursement for loss, damage or destruction of the property ''by any cause'' except by the causes specifically excluded. In this case, the Complainant has proved by positive evidence that there was no defective workmanship nor heavy watering of the road could be the cause for development of cracks. The cracks have developed because of flow of sub-soil water. For this he has examined K.Lakshminarayana, M.E., who, at the relevant time, was Superintending Engineer, Rajahmundry. It is his say that there was no deviation by the Complainant from the specification for relaying of the road prescribed by W.B.M. (Water Bound Macadam) with Grade-I Metal and other requirements. Profuse watering was only to strengthen the W.B.M. and it does not have any adverse impact as contended by the insurance surveyor. It is his say that after profuse watering for 14 days, the surface was allowed to dry up. After drying up was completed, B.M. (Bituminous Macadam) layer was placed on the road as per the specification. Regarding traffic, it is pointed out that in case of existing road being strengthened to ensure free flow of traffic a portion of the road is kept open for traffic. He has overseen the construction undertaken by the Complainant which was executed under the direct control and supervision of the Department. Engineers from Quality Control Wing of the Department made surprise visits to assess the quality of the work. The quality control reports are fully taken into account and necessary rectifications are ensured through contractor before making any payment to the contractor. In the present case, after being fully satisfied with the work payments were made to the contractor and subsequently even deposits were also released.

9. IN the cross-examination he has denied the suggestion that the alligatory cracks on the road were due improper compaction, excess watering and allowing traffic before setting and drying of the road during the road laying work. He has denied the suggestion that the traffic was allowed even during the construction of the road.

10. SIMILARLY , the Complainant has examined S.Chandra Mohan, B.E., M.I.E., who was the Executive Engineer at the relevant time. He has stated that on the verification of the work it was found that the work was done as per the specification. It was noticed that all the W.B.M. (Water Bound Macadam) layers and M.S.S. (Mix Seal Surface) was found intact except some alligatory cracks in the M.S.S. layers. It is his say that due to heavy rains the water content in the sub-soil and side drains had increased leading to inundation in the W.B.M. layers. The excessive water in the W.B.M. layers was under constant pressure due to heavy traffic on the road, which resulted in capillary action forcing the water to find its way into the top BM layer. This resulted in appearance of the cracks on the road. He has also stated that cracks in the M.S.S. layer (i.e. upper most layer) was due to inundation of the B.M. layer immediately below the M.S.S. layer. Even in areas where alligatory cracks were not seen the B.M. layer underneath was found to be damaged severely. It is his say that there was no deficiency in quality of material used or in the workmanship of the contractor. He has specifically stated that he has gone through the surveyor''s report and the reasons given therein for rejecting the claims were technically wrong and made without any understanding on the subject. It is his say that the stretch of the road in question was also inspected by one U.K. Expert and by the Superintending Engineer (R&B) Quality Control, Hyderabad, to ascertain the reasons and both of them expressed their opinion that the likely cause of damage was unexpected presence of subsoil water and raising of subsoil water to the level of B.M. layer. In cross-examination nothing has been brought out to doubt the version of the officer. On the contrary, he has specifically stated further in the cross-examination that inspection was carried out to ascertain whether it was due to poor workmanship or design lacking or material defect.

11. IN our view there is nothing on record to doubt the evidence of the aforesaid two relevant witnesses.Further, admittedly the Complainant has taken contractors'' All Risk Insurance Policy. The insurance coverage as stated above is as per Section-I, for the property for damage by any cause and that in such eventuality the insurance company is required to pay or make good such loss upto the limits specified in the schedule for replacement or repair of the work. In this view of the matter, the Insurance Company is bound to reimburse the replacement or repair cost incurred by the complainant.

12. THE next question is whether there is any evidence on record to indicate or establish that it is covered by the exclusion clause, namely, that the Insurance Company shall not be liable for the cost of replacement, repair or rectification of defective material and/or workmanship. Again, it is established law that if the Insurance Company intends to take benefit of exclusion clause it has to prove by leading necessary evidence. That has not been done in the present case. It is nobody''s case that defective material was used by the complainant or there was defective workmanship. The only allegation is that there was heavy watering of the road which resulted in cracks on the road after some time. There is nothing on record to establish that heavy watering of the road could cause such cracks

on the road. On the contrary, it is established by the Complainant by leading evidence that cracks had developed because of unexpected presence of sub-soil water and rising of sub-soil water to the level of B.M. layer. As stated above, in this case, the Complainant has examined two witnesses, namely, K. Lakshminarayana (Superintending Engineer at the relevant time) and S. Chandra Mohan, (Executive Engineer at the relevant time) who have categorically stated that because of the rise of the ground level water alligatory type cracks developed. The next question is whether the insurance coverage was in existence in the month of July, 1993. Cracks in the present case were noticed in the month of July, 1993. In the present case, insurance coverage is two fold: one - during the construction period/relaying of the road, and the other, after construction/ relaying of the road. It is the contention of the Complainant that the work was completed on 23rd August, 1993, and for this reliance is placed upon the letter written by the Executive Engineer to the Surveyor wherein it is stated that the work of relaying commenced on 3.8.1992 and was completed on 23.8.1993, and, thereafter, traffic has been allowed. Same is his say in the subsequent letter dated 9.5.1995, and, this does not require much discussion, in view of the specific statement in the repudiation letter dated 13th February 1995. In the last line, in bracketed portion of the said letter, the Divisional Manager of the Company has stated that maintenance coverage as taken is for 1.4.1994 to 31.3.1995, but has to be reckoned from the date of handing over the road stretches for traffic. Therefore, if the road stretches were handed over in the month of June, 1993 insurance coverage for maintenance would be applicable. This is in conformity with the insurance policy as insurance coverage for maintenance period is for one year and that, normally, would commence as soon as relaying of the road is completed and handed over for traffic. This is also clear from the first part which provides for period of insurance mentioned in the policy. It specifically provides that period is upto completion period and plus one year maintenance period. The word used is "plus year". It is settled law that if there is any ambiguity or a term is capable of two possible interpretations, the one beneficial to the insured should be accepted which is consistent with the purpose for which the policy is taken, namely, to cover the risk on the happening of certain event. (Re. United India Insurance Co. Ltd. Vs. Pushpalaya Printers, (2004) 3 SCC 694).

13. IN this view of the matter, the repudiation of its liability by the Insurance Company cannot be justified.The next question is quantum of reimbursement. The claim of the complainant for carrying out repair works is Rs.1,68,98,230.30. He has also claimed Rs.3.00 lakhs towards damages. In support of this claim he has examined the Executive Engineer, Mr. S. Chandra Mohan, who has stated that initially before commencing the relaying the damaged road, the cost was assessed to be approximately Rs1.38 Crores; however, after completing the relaying work, the total cost thereof was assessed by his subordinates and was assessed to be Rs.1,69,98,230.30.

14. AS against this the Surveyors have assessed the loss at Rs.68,28,838/-. The

surveyor has given in detail the amount required to be spent for repair of the road. The learned Counsel for the Complainant has not pointed out any error apparent in assessment made by the surveyor which would call for our interference. Hence, there is no substance in this contention.In the result, the complaint is allowed. The Insurance Company is directed to pay Rs.68,28,838/- as assessed by the surveyor with interest at the rate of 9% p.a. from 14.1.1995, i.e. the date after three months of survey report (14.10.1994). There shall be no order as to costs.S