(1999) 05 NCDRC CK 0012

In the National Consumer Disputes Redressal Commission

National Insurance Co. Ltd. APPELLANT

Vs

B.ARAVINDAKSHAN NAIR RESPONDENT

Date of Decision : 05-05-1999

Acts Referred:

Citation : 2000 1 CPR 183 : 2000 2 CPJ 412 : 2001 1 CLT 141

Hon'ble Judges : L.Manoharan , K.M.Latha , R.Vijayakrishnan J.

Final Decision : Appeal dismissed

Judgement

1. THE opposite party in O.P. 442/94 on the file of the Consumer Disputes Redressal Forum, Alappuzha is the appellant.

2. THE complainant alleged before the District Forum that he took a Marine Hull Policy dated 10.11.1993 for his Marine Fish Boat MFV Sree Murugan bearing registration No. Alp. 708. THE policy was issued by the opposite party-appellant. He was regularly paying the premium. THE same was time policy and it covered a period from 11.11.1993 to 10.2.1994. He alleged, subsequently the period of policy was extended for a further period from 11.2.1994 to 10.5.1994. THEreafter, also the policy was extended from 11.5.1994 to 10.11.1994. THE opposite party had accepted premium and issued the said policy with conditions of Marine Hull Insurance. During the night of 31.3.1994 another boat hit against his boat, consequent upon which the same suffered damage, water flushed into the boat but the crew alongwith others salvaged the boat and later the boat was taken to Quilon for repair. It was duly repaired, he launched a claim before the opposite party with necessary documents. But, according to him the opposite party did not respond inspite of the fact that he had to spend Rs. 27,341/- for repairing the boat. On 20.5.1994 while the boat with the crew was returning after fishing, at about 2.30 p.m. and reached about 10 kilometres west of Cochin Sea Shore at a depth of 11.5 fathoms, the water began to gush into the boat through a hole. Inspite of the effort of the crew to prevent the flow of water, the same could not be stopped. When they realised that the boat could not be saved, they clamoured for help, responding the same the crew of the boat by name St.

Antony rescued the crew. The boat of the complainant capsized. Immediately, thereafter, the complainant sent telegrams to the opposite party, the Port Officer and the Deputy Director of Fisheries. He made a report of the accident to the Fort Cochin Police Station also. He made a claim for the insured amount of Rs. 2,40,000/- on the basis of total loss. The opposite party who appointed Surveyor Sea Scan Service (Kerala Cochin). The complainant received communication from them on 31.5.1994, calling upon him to produce about 25 documents. Pursuant to the same the complainant produced the said documents but thereafter nothing was intimated inspite of reminders. Ultimately, the complainant received a communication dated 22.8.1994, asking the complainant to wait. Therefore, complainant filed this complaint for the insured amount with compensation.

The opposite party in their version though admitted the policy and the extension of the same, contended that with respect to the occurrence on 31.3.1995, Surveyor Mr. Shaji inspected the vessel and reported as to the condition of the vessel which would not support the claim of the complainant, he reported that the boat was not properly maintained. The opposite party filed an additional version also in which they contended that, on the claim made by the complainant, they had appointed Surveyor M/s. Sea Scan Service, Kerala which made investigation and had filed an elaborate report. The report would show that the vessel was not in a sea-worthy condition. That would constitute violation of the policy condition. They contended that the vessel had double plates provided by the insured in the process of attending repairs after the first accident. The said double plates according to them are not safe to hold the vessel in sea as they got rusted and damaged easily. The boat was not supervised or inspected by any qualified person. From the nature of the damage it could be seen that, one of the double plates below water level opened during the voyage and that occasioned the gushing in of water. The boat had no separate driver, there was only Serang-cum-driver. Had a driver been employed, he could have noticed the leakage earlier. In such circumstances, the opposite party is justified in repudiating the claim. Therefore, they wanted the dismissal of the complaint.

3. BEFORE the District Forum, the complainant produced Exts. A1 to A26. The opposite party produced Exts. R1 and R2. On the side of the complainant P.W. 1 was examined and the opposite party examined R.W. 1. The District Forum on a consideration of the said material found that the opposite party is liable to pay the insured amount of Rs. 2,40,000/- with interest at the rate of 8% from 15.6.1994 the date of the claim. Rs. 1,000/- was awarded towards costs of the complaint. Aggrieved by the said order, as indicated, the opposite party has come up in appeal. It was urged by the learned Counsel for the appellant that the District Forum has gone wrong in finding that the complainant is entitled to the insurance amount as according to the learned Counsel there was breach of warranty. The learned Counsel maintained that the vessel was not in a sea-worthy condition and, therefore, by virtue of Section 41(5) of the Marine Insurance Act, 1963; the insurer cannot be made liable. As the vessel was sent to the sea in an un-sea-worthy condition to which the complainant-respondent

was privy, that itself would disqualify of him for the insured amount. It was contended that, the vessel was not in a sea-worthy condition as its physical condition was such that it was not worthy to be taken to the sea. Then there is violation of the policy condition inasmuch as the respondent did not comply with Rules 38 and 39 of the Kerala State Fishing Harbour Craft Rules, 1970. The point urged by the learned Counsel is, as is found in Ext. R1 the report by the Surveyor M/s. Sea Scan, the occurrence took place because the repair affected to the vessel when it met with an accident on 31.3.1994, was defective inasmuch as at that time double plates were used for mending the damage to the vessel. It was urged by the learned Counsel, use of the double plates would accelerate rusting particularly when the vessel is in the sea and the gushing in of the water on the date of the occurrence in question was due to the defective repair affected earlier. According to the learned Counsel, since the complainant did not take the care that is expected of him before the vessel was launched after the repair and the repairer was engaged at his option, he being a privy to the fixing of double plates, the condition in Ext. A21 Marine Hull Insurance Policy (Clauses 20 and 21) having been not complied with, the Insurance Company is entitled to repudiate the claim as per the aforesaid clauses as well as by virtue of Section 41(5) of Marine Insurance Act. The learned Counsel also maintained that, since as per the condition in the schedule to the policy, copy of which is obtained in Ext. R1, the complainant has to comply with the local laws, according to which necessary crew as per Rules 38 and 39 of the Kerala State Port Harbour Craft Rules, 1970; that requires the vessel has to be manned by a master or Serang and one Engineer or Engine Driver possessing licence. Admittedly no Engine Driver with licence was appointed, instead only a Serang who was attending both the duties of the Serang as well as the Engine Driver was there in the vessel. This by itself would constitute breach of warranty. In such situation, according to the learned Counsel, by the operation of Section 35(3) of the Marine Insurance Act, the insurer would be discharged from the liability. Therefore, according to him on that ground also repudiation is valid.

4. ON the other hand, the learned Counsel for the respondent/complainant maintained the case of the appellant that the respondent is guilty of committing breach of the warranty cannot be sustained in view of the evidence in the case. It is urged by the learned Counsel that repair was necessitated on account of the first accident and the boat was re-launched on 12.4.1994; the same was known to the appellant. Further, it is pointed out that the complainant had specifically alleged that the time policy was extended twice, first from 11.2.1994 to 10.5.1994 and thereafter from 11.5.1994 to 10.11.1994 after the accident, and necessary premium was also paid. The occurrence was after the said extension of the policy and receipt of the premium. The boat was relaunched on 12.4.1994 whereas the policy stood extended upto 10.11.1994. Therefore, the learned Counsel maintained that the said conduct of the appellant would constitute waiver consequently, the appellant cannot now contend that the vessel was not in sea-worthy condition when it was launched on 12.4.1994 after the repair

consequent upon the accident on 31.3.1994. As regards the competency of the crew it was contended that Rules 38 and 39 since appears in para B of the Rules, the same cannot have application as the fishing boats are dealt within Part A. Apart from the same, according to the learned Counsel, even as per Ext. R1 since the crew was competent, the aforesaid technical objection cannot stand scrutiny. The main argument against the aforesaid point raised by the appellant is that there is waiver by the appellant with respect to the said breach of warranty also. In this regard the learned Counsel made reliance on Ext. A13 the claim form issued by the appellant wherein the only query with respect to the crew is under Clauses 10 and 11 which concern only the name of the person (Tindal) who was in charge of the vessel, and query, in the 11th Clause is only whether to the claimant''s knowledge, he is sober and fully competent. The point urged is that, there is not a query in Ext. A13 as to whether, there is an Engine Driver and whether he is a licensed Engine Driver. Therefore, the point urged is, even according to the appellant, all that is required is a Serang for the boat; and to the knowledge of claimant he should be competent. In this regard reliance was also placed on Ext. R1. Lastly, it was maintained that, even according to the appellant since sea-worthiness will include the competency of the crew also, waiver with respect to sea worthiness should constitute waiver of the requirement as to licensed Engineer Driver among the crew. In appreciating the rival contentions it will be incidentally necessary to note that the appellant intimated the occurrence to all the concerned Authorities by Exts. A22 to A25. With respect of the case of the opposite party that the physical condition of the boat was such that it was not sea-worthy, reliance is made on Ext. R1. In this regard the evidence of P.W. 1, the Serang is of importance. He says in his examination that, he himself was the Serang of the boat for the last two years and he has experience of four years; at the time when occurrence took place, he was in the boat attending his duties. He says that the boat was repaired before it was launched, it was done carefully and that at the time when repair was being made, he was also present. He would assert that, after the incident at Thottapally when the boat was repaired double plates were not used. He would assert that, the personnel of the Insurance Company also had seen it. He said, the boat after repair was launched only after carefully attending the repair. He added, if it was not so, the same could affect his own life. He concluded his chief-examination by asserting that the contention in the version of the opposite party that without removing the rusted portion double plates were used is not correct, what is important is, this witness was not cross-examined. So, as regards the physical condition of the vessel when it was launched, the evidence of P.W. 1 who was the Serang and who was present in the boat at the time of the occurrence assumes importance. It gains more probative value particularly in the context of the fact his evidence stands unchallenged. The statement by sea scan in Ext. R1 report to the contrary has to be weighed against the fact that admittedly the said Surveyor had no occasion to see the boat as the boat capsized before it conducted the survey. The person who had occasion to see the boat after the first occurrence was Mr. Shaji; he was not examined. The report of Shaji as to this aspect also, cannot be given much weight in the face of the unchallenged evidence of P.W. 1.

5. IN this context, it is relevant to note, as per the condition in Ext. A21 even negligence of the repairer need not by itself be a ground to repudiate the claim. IN this connection, it is necessary to note the argument of the appellant that sea-worthiness would include the competency of the crew also. With respect to the crew and their competency, the contention is on the basis of Rules 38 and 39 of the Kerala State Port Craft Rules as per which the crew should include a Serang and one Engineer or Engine Driver possessing certificate mentioned therein. Admittedly no driver having the certificate as enjoined therein was among the crew. The case is that the Serang was attending the duty of both the driver and the Serang. As to this aspect, the observation in Ext. R1 report submitted by the Surveyor is relevant. It is observed therein, the traditional fishermen engaged in fishing having substantial period of sea experience is the Serang. It states, the crew who operated the vessel do not hold any certificate of competency. Yet, they were traditional fishermen engaged in fishing having substantial sea experience as Serang. The opinion of the Surveyor is, though they were not holding any certificate of competency, can be considered competent based on their experience. Therefore, even according to the Surveyor they were competent. It has to be noted in this connection that, unless the non-possession of licence by the Serang who was also operating as driver had nexus with the occurrence, the mere absence of the licence need not be held against the insured. IN the decision of this Commission in Appeal 749/97 my learned predecessor relying on the decision of the National Commission in National INsurance Company v. Premjibhai Ranchodhabai Hodar Mangrol, Matsyagandha, Mangrol, I (1998) CPJ 100 (NC)=1997 NCJ 547 (NC), states that, if breach of warranty had no impact on the peril the INsurance Company is liable to indemnify the insurer. IN other words, unless the occurrence had the nexus with the breach of warranty the insurer is entitled to be indemnified.

6. AS to the physical condition of the vessel when it was re-launched, the evidence of P.W. 1 is relevant and important. Apart from the same, there is no dispute that the policy was extended from 11.5.1994 to 10.11.1994, the boat after repair was re-launched on 12.4.1994. The occurrence in which the boat capsized was on 20.4.1994, that is after the extension of the insurance. The premium for the extension was also received. R.W. 1 the Surveyor in his evidence said that only on satisfaction that the vessel is sea-worthy the Company would insure the vessel. It cannot be said in the said circumstance, the extension was made without receiving the necessary premium and charges for the same. The question for consideration is, whether the said conduct of the appellant would constitute the waiver under law. Whereas the learned Counsel for the appellant would urge that, as per Section 35(3) of the Marine Insurance Act, 1963, the warranty conditions have to be complied with, whether it be material to the risk or not, and if it is not complied with, the insurer could be discharged from liability from the date of breach of warranty. Thus by the

operation of Section 35(3) of the Act, the appellant would maintain that, if the warranty condition is not complied with the insurer would be discharged from the liability from the date of breach. The learned Counsel maintained that strict compliance of the said provision is necessary with due regard to the scheme of the Act. But the learned Counsel for the respondent relied on Sub-section (3) of Section 36 of the same Act to contend that, breach of warranty is capable of being waived. The learned Counsel of the appellant sought to maintain that Section 36(3) cannot have relevance in judging the consequence, emanating from Section 35(3) of the Act; strict compliance of the provision is necessary, is sought to be supported by the decision of the Kerala High Court in J.M.F. Sea Foods Alleppey & Ors. v. National Insurance Co., AIR 1992 Kerala 202. There one of us (L. Manoharan, J.) was party to the judgment. A reading of the said decision would show that the same is distinguishable. The facts are clearly different. There the vessel was anchored at the port. The complainant alleged, the boat was seen to have sunk about 5 kilometres away from the sea-shore. It was explained that, considering the sea condition the boat could not have drifted outward to the sea, the tendency of the sea is only to wash the boat ashore. The evidence was such that it could not support the case of the complainant and it was held that, perils contemplated do not include the ordinary action of winds and waves. The above principles of winds laid down therein has no application to the facts of this case. In the context of the said rival arguments the important question to be considered is whether the consequence flowing from breach of warranty enjoined in Section 35(3) is capable of being waived, and whether in fact the appellant waived it. As has noticed the respondent would rely on Section 36(3) of the Act. The appellant would maintain that the said section has no relevance in considering the consequence of breach in Section 35(3). Whereas Section 35(3) concerns the consequence of breach of warranty, the very caption of Section 35(3) "when breach of warranty excused" and Sub-section (3) thereof states that "breach of warranty may be waived by the insurer". A conjoint reading of Section 35(3) and Section 36 particularly Sub-section (3) thereof would show that the said sub-section functions as a proviso to Section 35(3). If as is urged by the appellant it is to be held that Section 36 has no relevance in judging the applicability of Section 35(3), that could render Section 36(3) Otiose. And an interpretation which would render any provision ineffective cannot be adopted; on the other hand harmonious interpretation has to be made so that as far as possible all, provisions can be given effect.

In the decision in Sultana Begum v. Prem Chand Jain, AIR 1997 SC 1006, the Supreme Court pointed out, when there are two conflicting provisions in an Act which cannot be reconciled with each other, they should be interpreted so that, if possible, effect should be given to both. Even ''where'' there is conflict between the provisions harmonious interpretation is the rule.

7. THE Supreme Court in the decision in Shashi Gupta v. Life Insurance Corporation of India & Anr., II (1995) CPJ 15 (SC)=1995 (2) CPR 74, held that in insurance matter if two interpretations are reasonably possible, the Court will

accept one which favours the policy holder, the other things being equal. Thus the argument of the learned Counsel for the appellant in this regard cannot be accepted. As has already noted, the appellant received premium for extension of the policy and extended the same. That was after the repair of the vessel. This in itself would constitute waiver, it could as well be estoppel by conduct.

8. IN this connection as has noticed, it is the case of the appellant that sea-worthiness would include competency of the crew also. From the above discussion, it is clear that, even assuming that there is breach of warranty, appellant has waived the breach of warranty. There is a case for the respondent that there was unnecessary delay even in appointing the Surveyor and also in taking decision on report pointed out by the learned Counsel that the repudiation was disclosed, only in the version filed by the opposite party. There was no intimation as to repudiation before. This delay is also relied on to show that the repudiation by the appellant cannot be sustained. We have already found that the plea of breach of warranty cannot stand. The learned Counsel for the appellant also referred to the decision of Tamil Nadu Commission in S. Kamala v. New India Insurance Company, 1996 (3) CPR 93. That was a case where the vessel had no licence, hence the Commission held that the repudiation was valid, as per Section 35(3) of the Marine Insurance Act. There also plea under Section 36(3) of the Act was not accepted as the insured did not waive the warranty. Here the case is not so. There is evidence of waiver. With due regard to the abovesaid discussion, we see no merit in the appeal. The appeal is liable to be dismissed.

9. IN the result, the appeal fails and the same is dismissed, but in the circumstances, there will be no order as to costs. Appeal dismissed.