(2016) 09 NCDRC CK 0008

In the National Consumer Disputes Redressal Commission

Case No : 435 of 2011

ORIENTAL INSURANCE CO. LTD. APPELLANT

Vs

M/S. AJANTA INTERNATIONAL RESPONDENT

Date of Decision : 05-09-2016

Acts Referred:

Marine Insurance Act, 1963, Section 7, Section 17 - Insurable interest defined - Assignment of interest
Sale of Goods Act, 1930, Section 39, <a href=68

Citation : 2016 3 CPR 747 : 2016 4 CPR 346 : 2017 1 CPR 37

Hon'ble Judges : V.K. Jain, Anup K Thakur

Advocate : Kishore Rawat, Rakesh Malhotra

Judgement

1. The respondent / complainant obtained a Marine Cargo Policy from the appellant, in respect of a consignment which it had to export from Jetpur in Gujarat to Lusaka in Zambia. The sum assured under the said policy was Rs.28,10,000/- and the basis of valuation was CIF (cost, insurance and freight) plus 10%. The goods were sold by the complainant to the overseas buyers against an invoice dated 15.4.2003. From Mumbai, the goods were sent through Safmarine India Pvt. Ltd. in a container carried in a ship. The container, containing the goods was discharged at Dare-E Salaam Port on 08.5.2003. The delivery of the consignment at Dare-E Salaam was taken by the clearing and forwarding agent of the consignee / purchaser and from there, the goods were dispatched to Lusaka by road, after payment of the requisite custom duty etc. The goods however, got stolen before the container could reach Lusaka and the loss was reported to the police as well as to the local agent of the insurer. The claim lodged by the complainant / respondent however, was repudiated by the insurer on the ground that its contract with the consignee was on C&F basis, responsibility for transportation from Dar-E-Salaam to Lusaka would be of consignee, and since the loss had taken place during road transit from Dar-E-Salaam to Lusaka, it would not be covered within the scope of the insurance

policy taken by the complainant. Being aggrieved, the complainant approached the concerned State Commission by way of a consumer complaint.

2. The complaint was opposed by the insurer on the ground that the complainant had made a false representation while taking the insurance policy, since it was not disclosed to them that in fact, the goods were sold on C&F and not on CIF basis. According to the insurer, sale on C&F basis implied that the complainant was responsible for the goods only till they reached Nhavaseva Port at Mumbai. This was also the case of the insurer that it was for the overseas buyer to take insurance once the goods at reached Nhavaseva Port.

3. The State Commission vide its order dated 02.8.2011 directed the insurer to pay a sum of Rs.28,10,000/- along with interest @ 9% per annum from the date of the repudiation of the claim, compensation quantified at Rs.10,000/- and the cost of litigation quantified at Rs.5,000/-.

4. Being aggrieved the appellant is before this Commission by way of this appeal.

5. It is not in dispute that the sale by the complainant / respondent to the overseas buyer M/s. Aafrin Investment Ltd., was made on Cost & Freight (C&F) basis, whereas the basis of valuation as per the insurance policy was on CIF (Cost, Insurance & Freight) plus 10%. A perusal of the said policy would show that it contains a reference to Invoice No. A1/25/2003 dated 15.4.2003, whereby the goods were sold by the complainant / respondent to the overseas buyer. This obviously means that the copy of the invoice was provided to the insurer for obtaining the policy. A perusal of the above referred invoice shows that the rate agreed between the buyer and the seller was 1.10$ per piece on C&F basis. Therefore, it cannot be said that the insurer was not aware that the transaction between the complainant and the overseas buyer was on C&F basis, and not on CIF basis. In the sale on CIF basis, the cost of insurance is borne by the seller, whereas in the sale on C&F basis, the cost of insurance is borne by the purchaser. There is no evidence on record to show that the complainant had made a misrepresentation to the insurer as regards the basis of the transaction between it and the overseas seller. The insurer, despite knowing, through the invoice, that the transaction between the complainant and the overseas buyer was on C&F basis, having issued a policy on CIF basis, has only itself to blame if in such a transaction it was not to issue a policy on CIF basis. Therefore, the claim cannot be denied on the ground that the transaction between the parties was on C&F basis, and not on CIF basis.

6. The main contention of the learned counsel for the appellant was that since the transaction between the complainant and the overseas buyer was on C&F basis, the property / ownership in the goods got transferred from the complainant to the consignee, the moment the goods were loaded on the ship for transportation to the Dar-E-Salaam, and therefore, the complainant which thereafter was left with no insurable interest in the goods, could not have got them insured and therefore, is not entitled to any reimbursement from the

insurer on account of loss of those goods. We however, find no merit in the contention. Firstly, as noted earlier, the insurer knew it, from the invoice, that the transaction between the complainant and the consignee was on C&F basis. Despite that they chose to insure the goods on CIF basis, upto Lusaka. Had the insurer refused to insure the goods upto Lusaka, on the ground that the transaction between the complainant and the overseas buyer / consignee was on C&F basis, it would have been possible for the complainant to ask the consignee / overseas buyer to obtain insurance cover in respect of the said goods, from the time they were loaded on the ship till they reached the warehouse of the consignee at Lusaka. Having insured the goods upto Lusaka, without any concealment on the part of the complainant, the insurer, in our view, is estopped from repudiating the claim solely on the ground that the transaction between the parties was on C&F basis.

7. A perusal of the invoice would show that in fact, the transaction between the complainant and the consignee was on "D/A 120 days" basis, which would mean that the complainant was to draw a Bill of Exchange on the consignee and on the consignee accepting the said Bill of Exchange and promising to make payment to the complainant within 120 days, the delivery of the consignment could be given to him. So long as the bill of exchange was not accepted and paid, the property / ownership in the goods would continue to vest in the seller. Therefore, it would not be correct to say that the property / ownership in the goods came to be transferred from the complainant to the consignee, the moment the goods were loaded in the ship. It is not known from the record as to when the bill of exchange was accepted but since admittedly, the delivery of the goods was taken by the agent of the consignee at Dar-E-Salaam, it can be presumed that by that time the consignee had accepted the bill of exchange drawn upon it and had thereby promised to make payment to the complainant within 120 days of the acceptance. It will only be apposite at this stage to take note of Section 25 (3) of the Sale of Goods Act, 1930, which to the extent it is relevant provides that where the seller of the goods draws on the buyer for the price and transmits to the buyer the bill of exchange to come with the bill of lading to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange and if he wrongfully retains the bill of lading, the property in the goods does not pass to him. There is no evidence of the consignee having paid the price of the goods to the complainant. If this is so, the property in the aforesaid goods did not pass to him and continued to vests in the complainant. Therefore, it would not be correct to say that in such a case, the property in the goods does not vest in the seller and he is not entitled to, in law, to obtain an insurance cover in respect of such goods. The complainant therefore, was not disqualified from obtaining an insurance cover in respect of the goods in question, till the time they had reached Lusaka.

8. Section-17 of the Marine Insurance Act, 1963 reads as under: " Where the assured assigns or otherwise parts with his interest in the subject matter

insured, he does not thereby transfer to the assignee his rights under the contract of insurance, unless there be an express or implied agreement with the assignee to that effect. But the provisions of this section do not affect transmission of interest by operation of law".

It would thus be seen that where a person who has obtained an insurance policy assigns, or sells the goods in respect of which the insurance cover has been obtained, the right available to him under the contract of Insurance does not get transferred to the assignee of the goods, unless there is an express or implied agreement between him and the assignee transferring such a right to the assignee. ''The subject matter insured'' in this case, was the goods sent by the complainant to the overseas buyer. The right of the assured under the contract of insurance is nothing but the right to obtain reimbursement from the insurer in case the insured goods are lost or damaged. Therefore, even if the property / ownership in the goods came to be transferred to the consignee either when the goods were loaded on the ship as is contended by the learned counsel for the insurer or at Lusaka when the delivery of the goods appears to have been taken by the agent of the consignee, such transfer of the property / ownership of the goods did not take away the right of the complainant to seek reimbursement from the insurer in terms of the insurance cover taken by it, since there is no evidence of the right to seek reimbursement in case of loss or damage to the insured goods having been transferred to the consignee of the goods. Section 17 of the Marine Insurance Act, expressly saves the right of the insured to claim reimbursement from the insurer in such a case.

In United India Insurance Co. Ltd. Vs. Leisure Wear Exports Ltd., Civil Appeal No. 1004 of 2006 decided on 29.06.2016, the respondent obtained an Open Marine Policy from the appellant United India Insurance Company Ltd., to the extent of Rs.2,00,00,000/-. The respondent shipped a consignment of hosiery goods and readymade garments to a buyer in Moscow. The consignment on reaching Moscow Port was loaded in the ship for its final destination - Moscow. The consignment landed at a port in Ukraine and from there it was taken by road to Moscow. When delivery was taken at Moscow, it was found short of 142 cartons of hosiery goods and 139 cartons of readymade garments. Thus, the facts in that case were identical to the facts in this case. Thus, the facts in that case were identical to the facts in this case. Initially the claim for the aforesaid loss was lodged by the consignee with another insurance company. They having not settled it, the consignee authorized the respondent to file claim against the appellant company for recovery of the loss ''of their goods''. The respondent then filed two consumer complaints on the strength of the policy which it had taken from the appellant. The complaints were resisted by the insurer firstly on the ground that the complainant had no right to file the complaint. It was also alleged that since the respondent had already assigned the policy in favour of the consignee to whom the goods were sent, it was for the consignee to file the complaint and the complainant had no locus-standi to file the said complaint. The question which arose before the Hon''ble Supreme Court , as spelt out in para 19 of the judgment was as to whether the respondent had a locus-standi to file the complaint on the strength of the contract of the insurance policy in question, claiming compensation for the loss sustained in the transaction. Referring to Section 17 of the Marine Insurance Act, the Hon''ble Supreme Court inter-alia observed and held as under:

"26. Section 17, in terms, recognizes and permits the insured to make assignment of their contract of insurance policy in favour of an assignee and at the same time allows the insured even after making an assignment to retain all those rights which are available to them under the contract of insurance with the insurer (appellant). In other words, in terms of Section 17, even after making an assignment by the insured of their contract of insurance policy, the rights of insured under the contract of insurance policy are not assigned in favour of assignee by the deed of assignment but they are continued to remain with the insured.

27. We are, therefore, of the considered view that firstly, we do not find that the respondent (insured) assigned the contract of insurance policy in favour of their consignee as contended by the appellant. Secondly, even assuming that the respondent (insured) assigned the contract of insurance policy in favour of their consignee, yet the assignment so made did not have any adverse effect on the rights of the insured under the contract of insurance policy as the rights continued to remain with them by virtue of Section 17 of the Act.

28. The respondent was, therefore, legally entitled and had the locus to file a complaint against the appellant on the strength of contract of insurance policy for enforcement of their all contractual rights available to them under the insurance policy for claiming compensation for the loss caused from the appellant and the complaint so filed by the respondent could not be dismissed as not maintainable on the ground of locus. It was thus rightly held as maintainable".

9. The learned counsel for the appellant relied upon the decision of the Hon''ble Supreme Court in Contship Container Lines Ltd. Vs. D.K. Lall & Ors. II (2010) CPJ 12 (SC), in support of his contention that since the complainant did not have ownership / property in the goods at the time they were stolen during transit from Dar-E-Salaam to Lusaka, it had no locus-standi to maintain the complaint. In D.K. Lall (supra), the respondent D.K. Lall Enterprises had obtained a Marine Cargo /Inland transit insurance policy in order to ensure certain goods it had exported to Spain. One carton however, was not delivered to consignee. The claim for the compensation having been denied by the shipping company as well as the insurer, the exporter filed a complaint before this Commission. The complaint was resisted by the insurer on several grounds, including that the liability of the seller had come to an end as soon as the consignment was loaded on the ship leaving the exporter with no insurable interest in the consignment. This Commission held that the policy was obtained on the representation that the transaction between the exporter and the purchaser was on CIF basis, whereas in fact, it was on FOB basis, which absolved the insurer of any liability for the

failure of the insured to maintain utmost good faith, essential for a marine insurance policy. It was noted that in the declaration sent to the insurer no details of the conditions of the shipment were mentioned. It was also held by this Commission that the term of the policy did not cover the risk till delivery was made to the consignee. This Commission, however, held that the carrier was deficient in rendering services to the complainant. It was contended on behalf of the insurer that the transaction between the exporter and the purchaser being on FOB basis, the exporter had no insurable interest in the goods once they were delivered to the carrier. It was argued that in FOB transaction, the property in the goods stands transferred to the purchaser as soon as the goods are entrusted to the carrier and thereafter, it is only the purchaser who can sue the carrier or insurer if there be an insurance cover obtained by him for such goods. It was also contended on behalf of the insurer that the shipper had not maintained utmost good faith since the insurance policy was taken on the representation that the goods were being discharged on CIF basis while in reality they were sent on FOB basis, which amounted to a material non-disclosure. The difference between the FOB contracts and CIF contracts was explained by the Hon''ble Supreme Court in Para 21 of the Judgment which reads as under:

"21. Coming to the case at hand, the contract of sale was on FOB basis even when the contract of insurance proceeded on the basis that the transactions between the seller and the purchaser and meant to be covered by the policy would be on CIF basis. The distinction between CIF (Cost Insurance and Freight) and FOB (Free on Board) contracts is well recognized in the commercial world. While in the case of CIF contract the seller in the absence of any special contact is bound to do certain things like making an invoice of the goods sold, shipping the goods at the port of shipment, procuring a contract of insurance under which the goods will be delivered at the destination, etc., in the case of FOB contracts the goods are delivered free on board the ship. Once the seller has placed the goods safely on the board at his cost and thereby handed over the possession of the goods to the ship in terms of the Bill of Lading or other documents, the responsibility of the seller ceases and the delivery of the goods to the buyer is complete. The goods are from that stage onwards at the risk of the buyer".

The Hon''ble Apex Court, noticing the provisions contained in Section 7 of the Marine Insurance Act and Sections 23, 25, 26, 39, 46, 47 and 49 of Sale of Goods Act, observed that the delivery of the goods to a carrier is prima-facie deemed to be the delivery to the buyer and the lien available to an unpaid seller in terms of Section 46 and 47 of the Sale of Goods Act stands terminated in terms of Section 49 of the said Act, when the goods are delivered to a carrier for transmitting to the buyer without reserving the right of the disposal of the goods. Noticing that the seller had in that case not reserved any right or lien qua the goods it was held that in the absence of any contractual stipulation between the parties, the lien of the unpaid sellers stood terminated upon the delivery to the carrier and from that stage the goods were held by the carrier at the risk of the buyer and the property in the goods stood vested in him. It was held by the

Hon''ble Supreme Court that this Commission was right in holding that the seller had no insurable interest in the goods, which absolved the insurance company of the liability to reimburse the loss, if any, arising from the mis-delivery of the goods. However, as noted earlier in the present case, no misrepresentation was made by the complainant to the insurer as regards the basis of the transaction between it and the consignee, since the copy of the invoice was duly forwarded to it and as per the invoice the sale of the goods was on C&F basis. More importantly, this is not a case where the goods were delivered to the carrier, without reserving any right in them to the seller. The transaction being of delivery against acceptance, with promise to pay within 120 days, the property in the goods did not get transferred from the complainant to the consignee even at Dar-E-Salaam though the delivery of the goods at Dar-E-Salaam was taken by the agent of the consignee. Despite delivery to the agent of the consignee at Dar-E-Salaam, the property in the goods would have been transferred from the complainant to the consignee, only on payment of the price of the goods in terms of the bill of exchange accepted by the consignee.

10. For the reasons stated hereinabove, the order passed by the State Commission does not call for interference by this Commission in exercise of its appellate jurisdiction. It is however, directed that payment, in terms of the order of the State Commission shall be made to the complainant only after verifying that the price of the goods which were allegedly stolen while being transported from Dare-E-Salaam to Lusaka has not been paid to the complainant. If it is found that the complainant has been paid the price of the goods, there would be no question of any reimbursement to it and consequently no amount would be payable to it by the appellant. The appeal stands disposed of accordingly, with no order as to costs.

