(2008) 12 NCDRC CK 0003

In the National Consumer Disputes Redressal Commission

Case No : 5 of 2007

Orissa State Warehousing Corporation APPELLANT

Vs

Senior Divisional Manager RESPONDENT

Date of Decision : 10-12-2008

Acts Referred:

Citation : (2008) 12 NCDRC CK 0003

Hon'ble Judges : K. S. Gupta, Rajyalakshmi Rao

Judgement

1. This appeal by the complainant is directed against the order dated 27.11.2006 of Consumer Disputes Redressal Commission, Orissa, Cuttack dismissing the complaint.

2. Facts giving rise to this appeal lie in a narrow compass. Appellant a statutory corporation has warehouses at different places for the purpose of storing agricultural produce and fertilizers etc. At Cuttack warehouse there were two godowns-one at Jagatpur and another at Naya Bazar. Appellant had taken Fidelity Guarantee Insurance Policy from the respondent/opposite party insurance company of Rs. 20,00,000 for the period from 23.11.1997 to 22.11.1998. Bibhuti Bhusan Biswal took over as Superintendent of the Cuttack warehouse from Chunu Tudu on 16.2.1998. Shri Biswal found the shortage of fertilizers of Rs. 12,52,801. F.I.R. was lodged with the police. Respondent was informed of the shortage. Claim under the Fidelity Guarantee Policy was lodged by the appellant with the insurance company. Respondent appointed A. K. Tripathy, surveyor to assess the loss. Surveyor confirmed the shortage/ misappropriation of the fertilizers. However, by the letter dated 11.1.2001 the insurance company repudiated the claim. Thereafter, complaint filed by the appellant was contested by the respondent by filing written version. It was alleged that the claim made was beyond the coverage of the policy. Shortage had occurred sometime during 1995-1996 and it was discovered after 2-3 years.

3. Appellant had filed application dated 4.1.2007, seeking permission to take on record the insurance policy for the period 1995-1996 and two reports of

inspection and physical verification of the stocks conducted in the months of February, 1997 and June, 1997. It is stated that the two reports though were shown to the surveyor but were not filed before the State Commission. Non-filing of two reports before the State Commission was neither deliberate nor intentional and those are necessary for just and proper adjudication of the case. Copy of the report of inspection and physical verification of February, 1997 is at pages 45 to 47 while that of June, 1997 is at pages 54 to 56 alongwith enclosures. Copy of the policy of 1995-96 is at pages 33 to 44 whereas that from 23.11.96 to 22.11.97, issued by the appellant is at pages 27 to 32. As is manifested from the order under appeal the State Commission was of the view that shortage/ misappropriation of the fertilizers was detected on 16.2.1998 and the misappropriation of fertilizers of the huge amount of Rs. 12,51,776 could not have been done in a day or two and it might have started even prior to the commencement of the policy covering the period from 23.11.97 to 22.11.98 and, therefore, the liability could not be fastened against the insurance company. It was submitted by Shri T. K. Pardhan for the appellant that appellant had previously purchased Fidelity Guarantee Insurance Policies for the period from 23.11.96 to 22.11.1997 and 23.11.1995 to 22.11.1996 from the respondent. Inviting attention to para No. 23 of the two reports of inspection and physical verification of (copies at pages 45 to 47 and pages 54 to 56) it was further submitted that no shortage of stock was detected either in February, 1997 or June, 1997. Shortage/misappropriation had taken place between July, 1997 and February, 1998 before the charge as Superintendent, Cuttack warehouse was taken by Bibhuti Bhusan Biswal from Chunu Tudu and the misappropriation was, thus, covered by the two policies of 1996-97 and 1997-98 and the State Commission fell in error in dismissing the complaint. Reliance was placed on the decision in Food Corporation of India v. New India Insurance Co. Ltd. and others, 1994 (3) SCC 324 . On coverage the following recitals made in said two policies which are similar, is reproduced below : "Now this policy witnesseth that subject to the terms provisos exceptions conditions and definitions contained herein or endorsed or otherwise expressed herein the company agrees to indemnify the insured against a direct pecuniary loss sustained by reason of any act or fraud/ dishonesty committed on or after the date of commencement of this policy and during uninterrupted service with the insured and discovered during the continuance of this policy or within 12 calendar months of the expiration thereof and in the case of death, dismissal or retirement of the employee within 12 calendar months of such death, dismissal or retirement whichever of these events shall first happen."

4. On the nature of Fidelity Guarantee Insurance Policy paras 4 and 5 of the Food Corporation of India''s case (supra) are material and those are reproduced below : "4. Truly speaking the entire discussion on Section 28 of the Contract Act, its broad sweep yet narrow reach and could have been avoided by examining the nature of Fidelity Guarantee and the clause of the agreement. ''Fidelity'' according to dictionary means faithfulness, loyalty. In insurance

terminology it is understood as assurance to indemnify against loss consequent upon the dishonesty or default. Usually the assured and the person whose fidelity is assured stand to each other in relation of employer and employee. As the use of the word ''Fidelity'' indicates, "it is a policy intended to protect the assured against the contingency of breach of fidelity on part of a person in whom confidence has been placed." It is a contract whereby, for a consideration, one agrees to indemnify another against loss arising from the want of honesty, integrity or fidelity of an employee or other person holding a position of trust. In Black''s Law Dictionary ''Fidelity Insurance'' is explained as under :

"Fidelity Insurance.-Form of insurance in which the insurer undertakes to guarantee the fidelity of an officer, agent, or employee of the assured, or rather to indemnify the latter for losses caused by dishonesty or a want of fidelity on the part of such a person." In Halsbury''s Law of England, Vol. 25, 4th Edn., a Fidelity Guarantee Insurance is described as pecuniary loss insurance, not falling within normal class related to contingency but-

"for making payment in the event of a specified event occurring, the payment representing either the loss or the possibility of loss which that event entails. A Fidelity Policy which insures the assured against losses which he may sustain by the default of his employee is a policy of pecuniary loss insurance." It is a policy, "intended to protect the assured against the contingency of a breach of fidelity on the part of a person in whom confidence has been placed...." In paragraph 798 dealing with time and notice it is stated :

"The duty of giving notice of the loss to the insurers does not arise until the employer has satisfied himself of his employee''s dishonesty ; the employer is under no duty to notify mere suspicion. However, if the policy fixes a time from the date of loss for giving notice to the insurers, the assured will be unable to recover if the time has expired before he becomes aware of the loss."

"5. Fidelity Guarantee is thus different from contingency guarantee. The insurance under it is for honesty, against negligence or for being faithful and loyal. The protection afforded is different than normal insurance policies. Its consequences and enforcement are also not the same. The employer or the principal has first to be satisfied about the breach. No action can be taken on suspicion. In contingency insurance the cause of action arises immediately whereas in Fidelity Guarantee it has to be ascertained and verified. And on being satisfied the company must necessarily be informed of it to enable the principal to seek its remedy in the Court of law."

5. Opposing the abovesaid application for permission to file additional documents it was urged by Shri Atul Nanda for the insurance company that the two inspection and physical verification reports of February, 1997 and June, 1997 were in power and possession of the appellant, still those were not filed before the State Commission and the appellant cannot be permitted to produce them by way of additional documents/evidence at this stage. In the reply to the

application, the respondent has not rebutted the averments made in the application that the two inspection and physical verification reports were shown by the appellant to the surveyor appointed by the insurance company. There cannot be any dispute that two reports are relevant for the just and proper adjudication of the claim of the appellant under the policies. In this backdrop, we allow the application and permit the two reports and the policy for the period 1995 to 1996 to be taken on record but subject to payment of Rs. 5,000 as costs by the appellant to the respondent insurance company. Respondent cannot oppose taking into consideration of the policy issued by it for the period 23.11.1996 to 22.11.1997. Since the insurance company did not have the opportunity to verify the authenticity of the said two reports the case deserves to be remanded to the State Commission for complaint being decided on merit.

6. Accordingly, while accepting the appeal, aforesaid order dated 27.11.2006 is set aside and case is remanded to the State Commission for complaint being decided afresh on merit. Insurance company will be entitled to lead evidence to assail the correctness of the two inspection and physical verification reports. Of course, appellant will also be entitled to adduce evidence in support of the two reports and/or to rebut the evidence of the insurance company.

7. Parties will appear before the State Commission, concerned for directions on 23.1.2009.

