

(2007) 03 NCDRC CK 0039

In the National Consumer Disputes Redressal Commission

PROPER ENGINEERING WORKS

APPELLANT

Vs

Export Credit Guarantee Corporation of India Ltd.

RESPONDENT

Date of Decision : 13-03-2007

Acts Referred:

Citation : 2007 2 CPJ 202

Hon'ble Judges : S.N.Kapoor , B.K.Taimni J.

Final Decision : Appeal dismissed

Judgement

1. APPELLANT was the complainant before the State Commission, where they had filed a complaint alleging deficiency in service on the part of the respondent/opposite party.

2. VERY briefly facts leading to filing this complaint were that the appellant/Complainant having obtained a policy from the respondent covering risk of exports made during 15.12.1992 to 31.12.1994, sent consignments, beside other, two consignments in question in July 1994 and September 1994 to Jeddah, where the buyer refused to accept the goods, returning the documents to the complainants. The appellant took time to take consent from the concerned authorities and again sent the documents through his Bank, by making deduction of 50% in the invoice value; however the buyer did not agree with these terms. During all the period the demurrage was getting accumulated. The complainant also tried to find out other parties for sale of goods in Jeddah or nearby places as also for re-importing these goods but this was not found economical any prospective buyer on account of the accumulated demurrage charges. The goods were auctioned by Jeddah Port Authorities and amount appropriated towards demurrages, etc. The complainant lodged two separate claims with the respondent Corporation but they were repudiated by the respondent. As per material on record, later on an offer was made by letter dated 1.1.1997 for making payment of Rs. 2,55,534 by way of "full and final" settlement which was accepted by the appellant allegedly under difficult circumstances in which he was in. In the meantime, the appellant also approached the Hon'ble High Court of

Gujarat and certain directions were given. Finally after receipt of the offered amount on or about 20.2.1997, a complaint was filed in July, 1997 before the State Commission. The matter was contested by the respondent/opposite party and the State Commission dismissed the complaint on account of limited ground that it raises complicated and highly disputed question of facts and law and hence by inference directing the appellants to approach other Forum than the Consumer Forum. Aggrieved by this order, this appeal has been filed before us. We heard the learned Counsel for the parties and perused the material on record.

There is no disputing the fact that the first consignment was sent in the month of July, 1994 which was declared on 2.9.1994 and second consignment was sent in August, 1994, declaration in the prescribed form in support of this consignment was filed only on 25.1.1995. Admittedly, there was delay in filing the declarations. Condition 8 of the policy reads as follows: "8. Declarations-The Exporter shall (a) on or before the 15th day of each calendar month deliver to the Corporation a declaration on the form prescribed by the Corporation of, (i) all shipments made by him during the previous month, (ii) all amounts which at the end of the previous month remained wholly or partly unpaid for more than one month from the due date of payment in respect of shipments previously declared (such declarations shall continue to be delivered to the Corporation in respect of all transactions insured with it, so long as such transactions remain outstanding, even though the Policy might have expired."

3. IN view of the facts narrated above and the conditions referred to above, there is apparently a delay in filing the declaration which leads us to conclude that it was a clear case of violation of the Policy. Conditions 32 and 33 of the Policy reads as under: "32. Observance of Conditions-The due performance and observance of each term and condition contained herein or in the proposal or declaration shall be a condition precedent to any liability of the Corporation hereunder and to the enforcement thereof by the Exporter. 33. Failure to comply with conditions No failure by the Exporter to comply with the terms and conditions of the Policy shall be deemed to have been waived, excused or accepted by the Corporation unless the same is expressly so waived, excused or accepted by the Corporation in writing."

(Emphasis supplied) Condition 32 clearly stands violated, which is a condition precedent to affect a claim. In terms of condition 33, there is no express waiver granted by the respondent Corporation. In view of this condition, the complaint has no merit.

4. A point is made by the learned Counsel for the appellant that the letter issued by the respondent dated 1.1.1997 should be deemed to be a waiver in this condition. For purposes of facility we reproduce the letter in toto: "Dear Sirs, Sub: Claims for bills drawn on M/s. Omar Yasslam Binlaswas, S. Arabia. Kindly refer to the correspondence on the captioned claim resting with your fax message dated 10.12.1996.

2. We deny that the three claims preferred by you on us in respect of your three shipments to M/s. Omar Yassim Binlawad, Jeddah, Saudi Arabia are pending with us as alleged by you. We state that your claims with reference to the said three shipments was repudiated by us and was duly conveyed to you vide our letter REF:AHD : 90994 : 96 dated 6.3.1996 (copy enclosed for ready reference). Having already acknowledged receipt of our above said letter vide your letter dated 26.3.1996, your allegation that the claims are still pending with us seems to have made with ulterior motives.

3. As stated in our aforesaid letter dated 6.3.1996, your claims in respect of the subject three shipments are not admissible in terms of the Policy conditions. You had failed and neglected to comply with the requirements under condition 8 of the Policy which is one of the most vital conditions of the Policy. In terms of the said Policy condition, the shipments effected by you on 16.7.1994 and 18.8.1994 were to be declared to the Corporation by not later than 15.8.1994 and 15.9.1994 respectively together with the tender of premium due thereon. However, you failed and neglected to declare these shipments to the Corporation and payment of the amount that was due thereon as premium after the specified period cannot be construed as due compliance of this policy. Moreover, when premium is tendered after the occurrence of default (as it happened in your case), there could be no insurance since the hazard which was to be insured against had already materialised.

4. We acknowledge that you had made representations against our above said action of repudiating your claims and had explained the circumstances under which you happened to contravene the policy conditions. If at all we were to accept that the said lapses and failures on your part were unintentional, the fact remains that the policy conditions had not been complied with and hence, the claims had become inadmissible under the Policy.

5. Since you had represented in person and through correspondence that the non-declaration/delay in declaration of shipments were unintentional and that you are a small exporter who had suffered genuine loss, we are agreeable to pay you an amount of claim that would have been due in respect of your shipment made on 18.8.1994 and which was declared to us with a delay of 4 months on 31.1.1995. The other two shipments made on 16.7.1994 was never declared to us and the premium that was due thereon was collected by us only on 21.5.1996.

6. Our offer to pay you Rs. 2,55,534 as aforesaid as ex gratia and without prejudice to our rights to repudiate entirely any liability to pay any claim whatsoever in respect of all the three shipments. Please note that the offer is made as a gesture of goodwill and does not confer any right whatsoever on you. Besides, before we made payment, it is necessary that your action in having abandoned the goods that were exported from India had been with the due concurrence/approval of the Reserve Bank of India. So, in case you are agreeable to accept this ex gratia payment in full and final settlement of all your claims on the Corporation, you may convey your concurrence and please submit

to our Ahmedabad Branch Office a certified copy of RBI's approval for abandonment of goods and waiver of GR Form requirements to enable us to release the payment to you.

7. In case you are not agreeable to accept this amount of Rs. 2,55,534 as aforesaid in full and final settlement of your all the three claims, you may decline to accept this amount and may treat all your three claims as repudiated by the Corporation."

We are afraid that under no circumstances we can treat this as a waiver for two reasons -one that admittedly the goods in Jeddah had been auctioned some time in the month of Jan. 1996. The so-called waiver dated 1.1.1997 would have lost any value even if the argument of the appellant is accepted. There were no sign of the insured goods on this date as they had already been auctioned by the Port Authorities at Jeddah. There is nothing on record to show that at any stage appellant brought it to the notice of the respondent about this auction in time. Condition 33 clearly states waiver has to be in clear and express. No implied waiver is envisaged under the "Terms and Conditions" of the Policy, unless express so waived and that too in writing. No such contingency has been shown to us from the record, to persuade us that any of the conditions had been waived. Hence we do not see any merit in the plea of the appellant. From the above quoted letter we also see that the appellant had accepted the ex gratia payment of Rs. 2,55,534. The word "ex gratia" itself show that it does not amount to any liability and as mentioned in para 6 of the above quoted letter, this amount was offered in view of the goods relations and the difficult situation in which the appellant was.

5. ANOTHER dimension to this is that having accepted this amount in full and final settlement in February 1997, the complaint was filed only in July, 1997. There is no letter of protest for period of almost over 3 months, registering anything different than the acceptance of the amount in full and final settlement. We have carefully gone through the judgment of the Hon"ble Supreme Court in the case of United India Insurance Co. Ltd. v. Ajmer Singh Cotton & General Mills & Ors., VI (1999) SLT 590=II (1999) CPJ 10 (SC), and found that this judgment does not support the case of the appellant. Admittedly this is not a case of misrepresentation or of suspicion circumstances.

6. WE are also unable to appreciate the plea of the learned Counsel for the Appellant that the said amount was accepted under coercion, as according to him, as per Para 7 of the letter referred to above, clearly stated that offer is in full and final settlement and in case, the acceptance is declined then all the claims in that case all the three claims stand repudiated. Since the Appellant was in need of money, he accepted this. WE have no difficulty in agreeing with this proposition except that the Appellant has not been able to satisfy us that even if we accept this, under adverse condition than what was he doing between the period from middle of February, 1997 to July, 1997? If he was not satisfied with the relief given by the respondent. Admittedly there was no protest letter after

receipt of the money, a protest in the form of filing the complaint after over three months, in our view, would be an afterthought. In view of this we find no merit in this plea of the appellant. Learned Counsel for the Appellant also states that since the premium was accepted as late as 21.5.1996 (as per para 5 of the letter above) it does not become of the respondent to show that implied waiver was not given. We have seen this para carefully and find that admittedly the word used is "collected". The appellant has not been able to show us as to in what form the payment was made and under what circumstances it was "accepted" by them? The word "accepted" is not used in this letter; word used is "collected". No receipt of this "collection" has been brought on record as also how it was collected? Hence we do not find any merit in this plea as well.

The appellant has also not been able to show us any steps taken by him to minimise the loss. In our view had the appellant been vigilant, the loss would have been kept to the minimum. Admittedly, the consignment was sent in July/ September, 1994 and it would not take more than three weeks for the two consignments to reach the destination, i.e., by late August/ September 1994/ October 1994 respectively. We are not aware as to what steps were taken to minimise the loss by way of early disposal or minimising the demurrage charges being accumulated? The respondent cannot be faulted for any deficiency in service for the simple reason that the declarations were made much after the consignments had been sent and date of its arrival at the port of destination. It was in violation of the condition of the Policy.

7. IN the aforementioned circumstances, we see no merit in this Appeal, hence dismissed. In the peculiar facts and circumstances of the case, we refrain from imposing any cost on the appellant/complainant. Appeal dismissed.