
(2013) 11 NCDRC CK 0046

In the National Consumer Disputes Redressal Commission

Rajankumar And Bros

APPELLANT

Vs

ORIENTAL INSURANCE CO. LTD

RESPONDENT

Date of Decision : 12-11-2013

Acts Referred:

Citation : 2013 0 NCDRC 783 : 2013 4 CPJ 541

Hon'ble Judges : J.M.MALIK , S.M.Kantakar J.

Advocate : SYED NAQVI , PREM PRAKASH , DIPESH , ARVIND GUPTA

Judgement

1. THE emphatic view taken by the Hon "ble Apex Court is that in a contract of insurance, the rights and obligations are governed by the said terms of the contract. Therefore, the terms of a contract of insurance have to be strictly construed and no exception can be made on the ground of equity. In interpreting the documents relating to a contract of insurance, the duty of the Court is to interpret the "words ", in which the contract is expressed by the parties because, it is not for the court to make a new contract, however reasonable, if the parties have not made it themselves. It needs little emphasis that in construing the terms of the contract of insurance, the "words " used therein, must be given paramount importance and it is not open for the Court to add, delete or substitute any words. It is also well settled that since upon issuance of an insurance policy, the insurer undertakes to indemnify the loss suffered by the insured on account of risks covered by the policy, its terms have to be strictly construed to determine the extent of liability of the insurer. Therefore, the endeavor of the court should always be to interpret the words in which the contract is expressed by the parties. This view was taken in a catena of judgments by the Hon "ble Supreme Court in Suraj Mal Ram Niwas Oil Mills (P) Ltd. Vs. United India Insurance Co. Ltd. and Anr., (2010) 10 SCC 567, General Assurance Society Ltd. Vs. Chandmull Jain, 1966 ACJ 267 (SC) 23, Harchand Rai Chandan Lal "s case, 2005 ACJ 570 (SC), etc.

2. THE main question in this case swirls around the question whether the consumer complainant has stated the truth in this case. It must be borne in mind

that insurance policy is a contract of insurance falling under the category of contract of uberrimae fidei, meaning thereby, a contract of utmost good faith, by the assured. [Satwant Kaur Sandhu Vs. New India Assurance Co. Ltd., IV (2009) CPJ 8 (SC)]. The facts of this case are these. M/s. Rajankumar and Bros., (IMPEX) is a partnership firm which transacts the business as Importers and Exporters of various commodities, including steel coils. The Oriental Insurance Co. Ltd., issued a Marine Cargo Cover dated 14.05.2010 for an insured sum of Rs.6,25,62,500/- only covering the voyage from any port in China to Taloja, Navi Mumbai, via Mumbai Port, India, in respect of the said cargo covered under B/L No.K4, both dated 11.06.2010. The perils covered were as per the Institute Cargo Clauses "A" War and SRCC terms against the payment of premium amount of Rs.34,504/- vide premium receipt Ex.A. The complainant vide its letter dated 26.05.2010 forwarded to the OP the particulars of the ship, Vessel, namely, Khalijia-III, was built in March, 1985, Class of Vessel as IRS and other particulars vide Ex. "B" and "C". The complainant also informed Kirtanlal and Sons, intending agents of the Overseas Sellers vide Ex. "C1".

3. HANGZHOU Cogeneration (Hong Kong) Co. Ltd. through M/s. Kirtanlal and Sons, shipped 80 -prime hot rolled steel coils weighing 2000 MT on Board the Vessel Khalijia -III from the Caofeidian Port, China to the complainant for discharge at Mumbai Port cargo totally valued at USD 1263712.50 for the said consignment under Bill of Lading No.K -4, dated 11.06.2010 and issued their commercial Invoice dated 07.06.2010 to the complainant. The above said Sellers negotiated the shipping documents, including the certificate that the said Vessel was registered with approved classification Society as per the Institute Classification Clause and Class Maintained equivalent to Lloyds 100 AI and that the said Vessel was sea -worthy which was not more than 30 years " old. The shipping details were furnished to M/s. Sun Insurance Brokers Ltd., of the OP, with a request to issue the policy, who, in turn, vide its letter dated 02.07.2010, forwarded the same to the OP against the cover note Ex. "D". The OP accepted the above said particulars and specified that the above said particulars and specified that the cover issued was as per the Insurance Cargo Clause "A". No other terms and conditions, clauses and/or warranties were attached thereto. The premium was accepted.

4. THE said Vessel carried on Board some other consignments of Prime Hot Rolled Steel Coils of seven other importers who purchased and imported the same from the same Sellers. The total of such coils on Board of the said Vessel was 1484 coils weighing about 30924.02 MTs. The said Vessel completed the Voyage and reached Mumbai Port , on or about, 06.07.2010 and was allotted berth on 14.07.2010, for discharge of the cargo on Board. On account of the failure of Vessel 's crane during discharge, further discharge did not take place and the Vessel was removed by an order of the port authorities from her Berth. On 19.07.2010, the complainant came to know from a Newspaper report that the Vessel had run aground on the midnight of 18.07.2010. Apprehending damage to their consignment on Board, to aid the grounded Vessel, the complainant

immediately sent a letter dated 20.07.2010 to the OP informing about the said policy vide copy Ex.F. It also came to light that Owners of the Vessel had engaged services of Salvors, M/s. Smit Singapore Private Ltd., for salving the said Vessel and the cargo on Board. On/or about 22.07.2010, the complainant also learnt that M/s.Richards Hogg Lindley (Piraeus, Greece) were appointed as General Average Adjustor, in short, "GAA ". By an e -mail, dated 22.07.2010 sent to the complainant and the OP by the said GAA, it was stated, inter alia, that the situation had given rise to General Average and the ship owners had declared General Average Security and had appointed their Piraeus Office to collect the General Average Security prior to the delivery of the cargo at the destination.

5. THE complainant requested the OP to issue General Average Guarantee, Form "B " as required by the said General Average Adjusters because the cargo could not be released to the Cargo Receivers, until they furnished the security documents and the Salvors had received satisfactory salvage security. Cargo was to be released immediately in order to avoid heavy port demurrage charges and further damage to the consignment. The OP agreed and undertook to pay to the ship owners or to the said General Average Adjustors on behalf of the complainant in contribution towards general average and which salvage/ expenses charges and/or special charges which may be ascertained to be properly due in respect of complainant 's consignment. The complainant took all those documents to the concerned authority. OP also gave the requisite separate salvage security. In addition to the general average security to be furnished in the amount of 25% of C.I.F., value of the cargo on Board the Vessel or equivalent to USD 256880.

6. ON the other hand, the OP appointed M/s. W.K. Webster and Co., London as their claim settling agents/representatives in London for the cargo insured by them on the said Vessel. By e -mail dated 09.08.2010, Mr. J.P.Vajpai of the OP2, Regional Office, Mumbai, informed Stephen Fernandez of M/s. Richard Hogg Lindley India Ltd., Mumbai, Mr. Mark Meredith of M/s.W.K.Webster and Co., OP 's claim settling agent/representatives in London, the Salvors, M/s. Smith Pvt. Ltd., Singapore, Ms.Diana Bowles of Lloyds, London, Mr. Alex Pinto of M/s. Richard Hogg of Singapore and Mr.R.K. Joshi of OP 1 and 2 that the OP had received all the compliances as required under Section 64VBA of Insurance Act and confirmed that the same were in order. On 08.08.2010, it was reported that on 07.08.2010, there was collusion between the said Vessel MV Khalijia -III with a Navy Vessel MV Chitra, in waters on JNPT, Mumbai Port, resulting, inter alia, in oil spill from the Vessel, MSC Chitra. It is alleged that the OP did not comply with their obligation to issue a separate salvage security as required by the said GAA thereby resulting in withholding all the instructions from release of the complainant 's consignment at Mumbai Port, though the complainant 's said consignment had been discharged into Mumbai Port Trust premises. On 13.08.2010, M/s. Smith Pvt. Ltd., the Salvors, claimed a maritime lien on the said cargo. As the OP did not issue a separate salvage security as required, the

complainant 's said consignment remained uncleared in the Mumbai Port Trust premises incurring heavy demurrage and being exposed to likelihood of further damages.

7. IN the meantime, Salvors had commenced Arbitration proceedings against the Owners of the said Vessel and the cargo interests in London and obtained an ex - parte order dated 16.08.2010 restraining the cargo owners from removing the cargo from the Mumbai Port Trust until a salvage security to the tune of USD 70.00 lakhs was furnished to the said Salvors, M/s.Smith Pvt. Ltd., Singapore. The Salvors, M/s. Smith Pvt. Ltd., Singapore, filed arbitration petition against the owners of the Vessel, Mumbai Port Trust and the cargo owners, including the complainant herein, under Section 9 of the Arbitration and Conciliation Act, 1996 in the Hon 'ble High Court, Mumbai and obtained an ex -parte interim order dated 13.08.2010, restraining the complainant and other cargo owners from, in any manner, directly or indirectly, removing, taking away and/or releasing their respective consignments and also restraining the Mumbai Port Trust from giving delivery or releasing the cargo to the complainant and other cargo owners. However, the Hon 'ble High Court declined to continue with the order dated 13.08.2010 vide its order dated 18.08.2010. But the Hon 'ble High Court, Mumbai, by order dated 18.8.2010 continued the earlier interim reliefs, till 24.08.2010.

8. ON 18 -19.08.2010, the Complainant received a letter from M/s.Richard Hogg Lindley (Hellas) Ltd., the General Average Adjustors revised their demand for Salvage from USD 256880 to USD 423864 based on the said order dated 16.08.2010, in the arbitration proceedings in London. On 23.08.2010, the complainant received a letter from OP informing them that OP 1 were purportedly withdrawing the General Average Guarantee Form "B " issued by their Divisional Office in respect of the said complainant 's consignment insured by them on the said Vessel MV Khalijia -III. The Hon 'ble High Court of Mumbai vide its order dated 24.08.2010, directed that complainant and other cargo owners would be permitted to remove their respective consignments from Mumbai Port Trust premises on furnishing security in the Form of Bank Guarantee in the aggregate sum of Rs.14.00 crores and each of the cargo owners were to furnish separate guarantees, proportionate to the quantity mentioned in respect of the respective Bill of Lading. The Complainant furnished Bank Guarantee and took delivery of the said consignment from Mumbai Port Trust on 03.09.2010. On 02.12.2011 the learned Arbitrator passed the Award. The complainant vide its letter dated 02.02.2012, called upon the OP to clear the loss of Rs.1,60,23,982/- . The documentary evidence was also annexed. The complainant also forwarded the copy of the arbitration award dated 02.02.2011 and called upon the OP to clear the losses. Legal notice was sent on 21.06.2012, reminder was also sent on 04.07.2012, but which went unresponded. Consequently, this complaint was filed with the following prayers : - "i. A sum of Rs.1,61,32,953/ - (Rupees one crore sixty one lakhs thirty two thousand nine hundred fifty three only) as compensation for the loss suffered by the complainant together with interest @

18% p.a. thereon from 20.08.2010 on the said claim. ii. A sum of Rs.1,00,00,000/- (Rupees one crore only) towards compensation for the loss caused and deficiency in services of the OP together with interest @ 18% p.a. thereon. iii. A sum of Rs.5,00,000/- (Rupees five lakhs only) being the legal and other incidental expenses incurred and to be incurred by the complainant. iv. to hold and declare the OP to be guilty of deficiency in service and unfair trade practice as per provisions of the C P Act, 1986. v. to direct the OP to rectify the defects in its service and pay the complainants a sum of Rs.1,61,32,953/- as compensation for the loss claimed by the complainant together with interest @ 18% p.a. thereon from 20.08.2010 on the said claim. vi. to direct the OP to additionally pay to the complainants a sum of Rs.1,00,00,000/- towards compensation for the inconvenience suffered by the complainant due to the deficiency in services of the OP. vii. to direct the OP to rectify the defects in its service and to further pay to the complainant a sum of Rs.5,00,000/- being the legal and other incidental expenses incurred by the complainant for the present complaint. viii. For such other and further relief that this Hon "ble Commission may deem fit and proper in the nature and circumstances of the case ".

9. THE OP could not file the written statement within 45 days from its service. Consequently, the right to file the written version was forfeited, vide order dated 14.05.2013. Thereafter, the counsel for OP argued that the written arguments filed by him should be considered. The request of the OP was again dismissed vide order dated 01.07.2013, while placing reliance on the three Judges " Bench of the Hon "ble Apex Court, reported in Dr.J.J.Merchant & Ors. Vs. Shrinath Chaturvedi, III (2002) CPJ 8 (SC).

10. AGGRIEVED by the order dated 01.07.2013, Special Leave to Appeal (Civil) No.24705/2013 was filed by the Oriental Insurance Co., the OP, before the Hon "ble Supreme Court . The Apex Court vide its order dated 13.08.2013, dismissed the said SLP. However, we have heard both the counsel because the OP was permitted to raise the arguments on the legal questions only. The OP tried to make submissions on various legal points. However, in our opinion, the key question is whether the ship in question was having a "class "? ". The main grounds mentioned in the repudiation letter dated 20.08.2010 which appear to be valid, run as follows: - "Re: Withdrawing the General Average Guarantees issued in respect of your cargo on Board M.V. Khalijia -3. Dear Sirs, This is to inform you that we are withdrawing the General Average (GA) Guarantees issued by our Divisional Offices in respect of your Cargo insured by them on M.V. Khalijia -3. After we had issued the GA Guarantees to the Average Adjusters appointed by the Ship owners, we have been advised by the Surveyors appointed by us, that the Vessel was NOT classed in accordance with the Classification Clause, attached to and forming part of the Policy of Insurance issued to you. Since there is a breach of the terms and conditions of the Policy, we have no liability and hence our decision to withdraw the GA and Salvage Guarantees issued/arranged for by us. This letter is issued without prejudice to our rights, privileges, liberties and immunities under law and contract, as applicable. Sd/ -

For The Oriental Insurance Co. Ltd ".

11. IT must be borne in mind that it is the complainant and nobody else who is to carry the ball, in proving its case. We have gone through a number of documents filed by it. Counsel for the complainant has invited our attention towards letter written by the complainant dated 26.05.2010, wherein it was mentioned as under : - "With reference to the above, we would like to request you that our goods shipped from China to Mumbai by Vessel Khalijia -3, Qty: 2000 M/Tons. We are sending herewith shipped particulars with full details. Please kindly inform us whether this steamer is accepted by insurance company".

12. THERE is no inkling that the said letter was actually sent or was responded by the OP. We will assume that, that the said letter was not responded by the OP. There is no evidence worth the name, which may go to show that the second letter, in this regard or reminder was also sent. The complainant has produced on record, the ship particulars which mention "Class - IRS ", which stands for "Indian Registrar of Shipping ". Our only finding is that this representation was falsely made. There was no such "Class ". Consequently, the value of the claim made by the complainant stands evanesces. Mere ipse dixit on the part of the complainant, will not do. There must be some solid and unflappable evidence. This is one of the conditions of the policy dated 14.05.2010, wherein it was specifically mentioned : "Term of Insurance : The risks under this policy are covered as per the following Clauses, current on date of sailing or dispatch and/ or other conditions/warranties otherwise stated herein and attached hereto: Important Notice Procedure in The Event of Loss/Damage Institute War Atomic and Nuclear Exclusion Institute Radioactive Contamination Exclusion Clause Freight Brokers Warranty Cargoism Clause Termination Clause Computer Millennium Cargo Clause Institute Classification Clause Institute Cargo Clauses (A) Institute Tpncl Clause Institute War Clauses (Cargo) Institute Strike Clauses (Cargo)".

We have also gone through the Oriental Insurance Company 's letter which is part of Ex. P -1, at page 59 -A. The Insurance Co. came to the following conclusion : - "Classification and Age Our investigation reveals that the Khalijia -3 was classed with Lloyd 's until 10 Oct 2007, after which class was withdrawn by Lloyd 's. We do not have a copy of your insurance certificate/policy. However, we believe that it may incorporate the Institute Classification Clause. If it does, the relevant shipment would seem to fall outside the scope under the Main Identity ".

13. THE moment this conclusion has been drawn by the Oriental Insurance Co. Ltd., it was the duty of utmost importance on the part of the complainant to produce the certificate from IRS. Why did the Lloyd not extend the "Class "?.

14. BOTH the counsel could not throw more light on this issue. Consequently, we took the help of the internet and found out the text of the Institute Classification Clause, dated 01.07.1978, the relevant portion of which, runs as follows: -

"Cargoes and/or interests carried by mechanically self-propelled vessels not falling within the classification of the above are held covered subject to a premium and on conditions to be agreed. Vessels over 15 years " old, under 1000 G.R.T. and not classed by any one of the above classification societies attract additional rates provided in the tariff. It is possible to waive additional premium for vessels over 15 years old but not over 25 years of age and engaged in overseas (import/export) voyages, if they are declared as "Liners ". For this, it is necessary for the ship owner or the steamer agent in India to submit an application to the Advisory Committee, requesting them to declare the vessel as a "Liner ". The present rule should have completed at least one voyage to Indian Ports during the last 12 months. Age Limitation: 2. Cargoes and/or interests carried by Qualified Vessels (as defined above) which exceed the following age limits will be insured on the policy or open cover conditions subject to an additional premium to be agreed. Bulk or combination carriers over 10 years of age or other vessels over 15 years of age, unless they :- 2.1 have been used for the carriage of general cargo on establish and regular pattern of trading between a range of specified ports, and do not exceed 25 years of age, or 2.2 were constructed as container ship, vehicle carriers or double-skin open-hatch gantry crane vessels (OHGCS) and have been continuously used as such on an established and regular pattern of trading between a range of specified ports, and do not exceed 30 years of age ".

The case of complainant does not show that his case is covered under Clause 2.2. It must be borne in mind that date of loss is 18.07.2010, the date of built of ship in question is March, 1985. The loss occurred after a period of more than 25 years. The complainant submitted that its Class is IRS. This is a stoke and shaky explanation. It was the bounden duty of the complainant to produce the Certificate from IRS, even though its case is covered under Clause 2.2. Its absence rocks the boats to a dangerous extent. Attempts were made in vain to sweep the truth under the mat. The court is not to be deceived by this lie. The court has to be empherical and practical in confronting the reality. The complainant has tried to kick against the pricks. The complaint is sans merit and deserves dismissal which we hereby direct. No order as to costs.