(2014) 09 NCDRC CK 0077

In the National Consumer Disputes Redressal Commission

Shiva International Fashions APPELLANT

Vs

ORIENTAL INSURANCE CO. LTD. RESPONDENT

Date of Decision : 03-09-2014

Acts Referred:

Citation : 2014 0 NCDRC 641 : 2014 4 CPJ 231

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

Advocate : SANJAY HEGDE , MRINAL BHARTI

Judgement

1. THIS is theoldestcase pending before this Commission which was, perhaps, filed on 18.12.2000. It is well said that ""Weakness on both sides, is, as we know, the trait of all quarrels "".

2. M /s. ShivaInternationalFashions is a Proprietorship entity. Sh.MukeshLuthra,is its Sole Proprietor. Its principalplaceof business is at New Delhi and its factory is situated at 23, HSIDC, MarutiIndustrial Complex, Sector -18. The complainanttransactsthe business of export of ready -made fashion garments to various countries, though, primarily to South Africa. The complainant was holding a marine insurance policy under ""Open insurance policy cover "", dated 07.07.1995 for the period from 07.07.1995 to 06.07.1996 for an initial total value of Rs.2.00 croresonly. M/s. OrientalInsuranceCo. Ltd., OP1 had insured the same from its Branch, situated at Gurgaon, Haryana, OP2. The policy has been placed on record as Annexure -A.

3. THE said policy stipulated that the transit risk cover would be provided on all sea shipments made by the complainant anywhere in the world, except Russia and Nigeria, subject to each shipment to be of the maximum value of Rs.50.00 lakhs only. The insurance policy permitted all shipments to remain covered against transit risks subject to insurance premium having been paid in advance, implying that the value of total insurance cover at any given point of time equals or exceeds the value of the shipment before dispatch. The additional insurance coversfromtime to time to ensure that all the shipments made during the validity period of the policy remained covered against transit risks. In the marine

insurance Declaration Nos. 31, 32 and 34 it is categorically stated that under the Head ''''Special Instruction '''', that if any claim arises, settlement of the same is to be done in favourof the complainant, copies of said declaration Nos. have been annexed as Annexure B (colly). The factual matrix of this case is as follows. The complainant received orders from the Buyers, telephonically, from one M/s. TosenEnterprises, P.O. Box No.1614, Kelvin, Johannesburg, South Africa and another M/s. Twin Clothing Manufacturers Pvt. Ltd., Post Box 581, Durban 4000, Natal,SouthAfrica. The complainant dispatched ready -made garments consignment consisting of 29 bales of 100% yarn dyed cotton twill fabric (power -loom) 451 boxes containing power -loom ready madegarments and 46 boxes containing power loom ready -made garments, such as velvet and rayon skirts. Against the dispatch of the saidconsignment, the complainant has raised the Invoices on the buyer bearing No.73 dated 22.11.1995 and Invoice Nos. 77 and 77A, dated 27.01.1996. Similar Invoices were raised on one M/s. JonenFreight (Pty) Ltd., 401, Customs Agent Building, Jan Smuts Airport, Kempton Park - South Africa, which was appointed by the complainant as their ''Delivery Agent '', for the purpose of delivery of the consignment to the consignee under specific instructions/terms of delivery that the goods would be delivered to the buyer only upon receipt of ocean freight and insurance by the delivery agent from the buyer and recovery of cost of the goods by the complainant. Copies oftheInvoices have been annexed as Annexure C (colly). As per the said instructions/ terms, the payment was to be realized against delivery of documents negotiated through the Oriental Bank of Commerce and which in turn were to be negotiated through the nominated bankers of the consignees/ buyers. The consignee would not acquire the insurable interest until he hasmadethe payment and acquired the ownership of the goods.

4. THAT the consignment was dispatched from the complainant ''s factory at Gurgaon, on 23.02.1996 and 28.02.1996 and was transported to Bombay Dock by road for its further shipment to the said destination, i.e., Durban in South Africa. Copies ofdeliverychallanshave been annexed as Annexure D (colly). The receipts exhibiting the freighttobe paid by the complainant for the said road transportation from Gurgaon to Bombay Dock, issued by M/s. Shiv Shakti Road Lines, have been annexed as Annexure E (colly). Thereafter, at Bombay Dock, one M/s. KaminoInternational Logistic Pvt. Ltd., the Forwarding Agent, appointed by the Complainant was responsible for handling and effecting the shipment of the consignment to its destination. Initially, the vessel ''M.V. VishwaNandini '' was nominated by the said Forwarding Agent, however, on account of delay due to congestion at the port and custom clearance of the goods, another Vessel, ''M.V. CMBT -TANA was arranged by the said Forwarding Agent.

5. ON 09.03.1996, the complainant obtained separate in -house Bills of Lading of M/s. KaminoOcean Line, to order basis, copies of which have been annexed as Annexure F (colly). As per the Bills of Lading, the goods were consigned to M/s. JonenFreight (Pty) Ltd., the delivery agent with specific instructions to part away with the delivery of the merchandise onlyafterthe connected ocean freight and

insurance costs were recovered by the delivery agent from the buyer. A combined Bill of Lading was obtained by M/s. KaminoOcean Line from Shipper, M/s. Unicorn -CMBT Services of the Vessel, ''M.V. CMBT -TANA and the goods were shipped on board on 23.03.1996, copy of said combined Bills of Lading have been annexed herewith as Annexure G. As per the combined Bill of Lading, it stated '' Freight Prepaid '', which meant that the complainant had incurred the insurance and freight charges.

6. THECONSIGN MENTREACHED the port of destination at Durban, South Africa on or around 11th April, 1996. As per the information forwarded to the complainant by its Forwarding and Clearing Agent, within three days of arrival of the consignment at the port of destination, the said consignment was shifted by the Durban Port Authorities to the yard, maintained by M/s. Container Link, MethrenRoad, MaydonWharf, Durban, South Africa. However, the complainant was informedvideletter dated 30.07.1996 that the said consignment awaiting clearance and undelivered at the yard of M/s. Container Link, was reported to having been stolen from the yard. Copy of the said letter has been annexed herewith Annexure H. Immediately, upon receipt of the same, the complainant vide its letter dated 01.08.1996, intimated the OP2 of the loss incurred on account of the entire consignment having been stolen in transit. Copy of the said letter has been annexed as Annexure I. The Unit Commander, Commercial Crime Unit, Durban, addressed to M/s. JonenFreight, the Delivery Agents, stating that as per the report of the Durban Shipping Company, M/s. Quadrant Ships Agency, the container No. CMBU 4049016 containing thecomplainant ''sconsignment was stolen on 08.06.1996, itself. Copy of said letter has beenannexedas Annexure J. In responsetothe said letter OP3 vide letter dated 29.08.1996 asked the complainant to submit certain documents mentioned therein. Copy ofthesaid letter has been placed on record as Annexure K.

7. THE complainant vide its letter dated 10.08.1996 while expressing that the theft of the consignment was committed while it was in custody of the agent of Shipping Company at Durban, M/s. Quadrant Ships Agencies (Pty) Ltd, requested the Forwarding Agent to lodge a claim with the Shipping Company and Port Trust Authorities of Durban, copy of which has been placed on record as Annexure L. Thereafter,correspondencecontinued between the parties, vide Annexures M to T (colly). On 25.03.1997, M/s. Garg& Jain Insurance Consultants (Pvt.) Ltd., informed the complainant that vide letter dated 21.03.1997, that they were appointed as Investigators to investigate the complainant ''s insurance claim, after seven months of lodging of the claim by the complainant. The complainant furnished all the documents. However,theclaim of the complainant was not settled despite various reminders. Thereafter,correspondencewent on between the parties vide Annexures V (colly) to X. The claim of the complainantwasclosed as ''''no claim '''', vide letter dated 24.02.1998. The complainantagainrequested the insurance company vide letter dated 17.03.1998 to settle its claim at the earliest. Thereafter, legal notice dated09.10.1998was served upon the OPs, which has been placed on record as Annexure AA.

8. IN response to the said notice, the OPs, for the first time, vide letter dated 24.02.1998, indicated that the claim of the complainant has been repudiated, copy of which has been placed on record as Annexure BB. The stand of the OPs is contradictory. In its letter dated 24.02.1998, the only reason stated for closing the complainant ''s claim file is the non -receipt of response from the complainant to the OPs letters dated 11.07.1997, 27.08.1997 and 25.11.1997. While in its reply dated 21.12.1998 to the complainant ''s legal notice, the OP stated that the complainant ''s claim was turned down on account of its non -satisfactory response to the OPs letter dated 11.07.1997. Again, OP, through its reply dated 21.12.1998, also, for the first time, raised doubts on the genuineness of the documents furnished and submitted by the complainant to the OPs which is merely inconsistent with the stand taken by the OP vide their previous communication of 24.02.1998. Moreover,forthe first time, the OP stated that the loss of the complainant '', falls beyond the purview and scope of the policy on account of the complainant not having an insurable interest in the consignment at the time of loss. The complainantsentanother letter dated 19.11.1999, Annexure CC.

9. ULTIMATELY , the present complaint was filed with the following prayers : - ''''a) Awarddamagesin favourof the complainant and against the Opposite parties upon pronouncement of judgment/order for an amount of US Dollors1,24,741.75 and the same be converted into Indian Rupees, on the rate of exchange prevailing on the date of pronouncement of judgment, to be paid to the Petitioner on account of losses suffered by it due to deficiency in the services provided by the Opposite parties;

b) Award interest @ 18% per annum on the above amount with effect from the date of the filing of the present petition till the date of realization of the entire above mentioned claim amount; and

c) Award costs of the proceedings; and

d) Pass such further or other order/reliefs as this Hon ''bleForum may deem fit and proper in the facts and circumstances of the case ''''.

DEFENCE :

10. IN its written version,theOPs have listed the following defences. The complaint isbaselessand time barred. There is no deficiency of servicewhichcan be attributed to the part of the OPs. The goods were sold andexportedon ''FOB '' (Freight on Board) basis and not on ''CIF '' (Cost, Insurance and Freight) basis. The complainant would have had insurableinterestonly if the goods were sold on ''CIF '' basis. Under an ''FOB '' sale, the Consignor/Complainant would have an insurable interest on the goods only up to the point that they are loaded on board the shipping vessel and the insurable interest under the document of sale ceased the moment the goods were received by the Shipper, in good order under a Bill of Lading, which was issued on 09.03.1996. The Invoice and the bank remittance of the Invoice receipts are based on the ''FOB '' price only, indicating

thereby that the exporters have received only ''FOB '' proceeds against the Bill. The insured goodslandedat Durban Harbour(Destination port) on 11.04.1996 and were subsequently moved, on instructions from the Container Operators, to the premises of Container Link, Durban, for storage. The Container was removed from the premises of the Container Link on 08.06.1996 utilisingfalsified documentation, the relevant documents being Delivery Release Order. The goods reached the port of Destination in the first week of April, 1996, but the consignee failed to take delivery of the same for almost two months. Vide letter dated 26.08.1996, the South African police have stated that the goods were reportedtohave been stolen on 08.06.1996. However, it is not clear as to when the FIR was lodged with the police. The Consignor and Consignee have both failed to take any action against Container Link or the Port Authorities for the loss of goods. The causeofaction lies against them, hence, the complainant should have sued them for the loss.

11. OP had intimated the complainant that upon examination of Invoice Nos. 73, 77 & 77 -A, received by them through M/s. RennieMurray & Co. it transpired that the said documents indicated only the terms of payment, but the terms of sale had not been mentioned therein. As per the copies of the Invoices entrusted to M/s. Garg& Jain, Insurance Consultants, who had investigated the matter in India, the terms of sale are clearly mentioned as ''FOB '', New Delhi, implying therein that the title in the goods were intended to pass on to the Buyers, the moment the goods were entrusted to the Carriers in Delhi.

12. ON 08.07.1997, the complainant had conveyed to the Insurer that the amount of insurance premium and freight were paid by the complainant and subsequently claimed from the Overseas Buyers, in an approved manner. It was also conveyed to the complainant that according to the Duration Clause 8, sub - Clause 8.1.3, of Institute Cargo Clauses (A), though provides for cover of 60 days after discharge of the same, is not applicable as storage was not incidental to transit.

13. THERE were two Bills of Exchange for the amount, one drawn on 03.04.1996throughHabibBank and the other was on 22.10.1996 through First National Bank, South Africa. No proper justification had been given by the complainant for drawing the second Bill of Exchange in October, 1996 when the goods had allegedly, already been stolen and were not available for delivery. According to the OPs, underthesecircumstances, one could therefore safely conclude that the goods were not really stolen. Again,freightand insurance premium bills were raised on 18.09.2000, i.e., after the date of delivery of goods at Port of Destination and after knowledge of loss of goods due to theft. The complainantmadea vain attempt by seeking extension of insurance claim up to the stage of loss of goods by claiming that the sale was under a ''CIF '' sale.

14. AGAIN , the OPs sent letters dated 11.07.1997, 27.08.1997 and 25.11.1997, wherein the complainant was asked to send certain documents but the complainant sent a reply dated 10.09.1997 sans enclosures. Full co -

operationwasnot given. The consignee ''s name was mentioned as TosenEnterprises in the Bill of Lading, Shipping Bill and Invoices,therefore, it is incorrect to suggest that there was no fixed consignee. All other allegations have been denied.

15. THE claim was repudiated by the OPs, on the following grounds : - ''''1. The copies of Invoices Nos. 73, 77 and 77 -A, received by us through M/s. RennieMurray and Co., indicate the terms of payment but the terms of sale has not been mentioned. Against this, according to the copies of these invoices, entrusted to M/s. Garg& Jain Insurance Consultants, who had investigated the matter here, the terms of sale are clearly mentioned as FOB, New Delhi, implying thereby that title in the goods was intended to pass on to the Buyers, the moment the goods were entrusted to the carriers, in Delhi. As per ''Insurable Interest '' clause, which forms part of the policy conditions, any loss occurring after this stage of transit is clearly outside the purview of the policy irrespective of description of voyage mentioned on the face of the policy which in this case was New Delhi to Johanesburg. We have also checked up that the amount of your Bill of Exchangedrawn on the buyer/their bankers tallies with the FOB value mentioned in the Invoices. As per GR -1 Forms also, the terms of sale have been clearly indicated as ''FOB ''.

During discussions your representatives had with us on 8th July, 1997, we were given to understand that the amount of the insurance premium and freight were also paid by you and subsequently claimed from the overseas buyers in an approved manner. If it is so, we shall be thankful if documentary evidence in this respect is sent to us.

2. AsperDuration Clause 8 -1.2 of ICC (A), the coverunder the policy came to an end on arrival of consignment at place of storage at port of discharge. Though Clause 8.1.3 provides for cover for 60 days after date of discharge, the same is not applicable to the subject case as storage was not incidental to transit.

3. There are some discrepancies in the documents namely, Bill of Lading, GR Form and Shipping Bills, which are not clear to us. In the Bills of Lading, the consignment was dispatched per SS ''CNBT TANA '', whereas, as per customs documents, shipping bill and GR1 indicate the name of the vessel as ''''Vishwanandini ''''. Please let us have clarification in this respect.

4. It is observed that there were two Bills of Exchange for the same amount. One drawnon 3rd April, 1996, through HabibBank and the other one on 22nd October, 1996, through First National Bank, South Africa. We could not understand the justification for drawing the second bill of Exchange in October, 1996, when the goods had already been stolenand were not available for delivery ''''.

16. THE Surveyorcameto the following conclusion : - ''''CONCLUSION CAUSE OF LOSS The evidence before us suggests that the container was unlawfully removed from the premises of Containerlinkby means of a falsified Delivery Release Order. Our correspondence with both the S.A. Police Services

investigating officers and ContainerlinkSecurity Staff,has revealed that the persons alleged to have stolen the container were apprehended at the time of returning to Containerlinkin order to remove further FCL containers. The S.A. Police services and ContainerlinkSecurity personnel then raided a warehouse in FennesStreet, Umbilo, where goods from related container thefts were recovered,however, no positive identification has been possible in respect of goods that may have constituted part of this theft. We have queried with Customs and Excise as to whether any goods ex -this shipment were recovered, based on the Marks and Numbers on the Invoices and Bills of Lading. They have not been able to positively identifyany items ex -this shipment. The persons apprehended have been released on bail, pending prosecution ''''.

17. WE haveheardthe counsel for the complainant. None appeared for the OPs. We have gone through the written synopses filed by both the parties. This appears to be a case of contributory negligence. The fault lies at the doors of both the parties. Both the parties are responsible for the national loss. One was under the impression that the insurance company would reimburse the loss and the other was under the impression that it will repudiate the claim by hook or crook. The Duration Clause in the policy is crucial. The said Duration Clause is mentioned in Clause 8 of the Institute Cargo Clauses (A), which runs as follows : - ''''DURATION

8 8.1 Thisinsurance attaches from the time the goods leave the warehouse or place of storage at the place named herein for the commencement of the transit, continues during the ordinary course of transit and terminals either.

8.1.1.ondelivery to the Consignee ''s or other finalwarehouse or place of storage at the destination named herein.

8.1.2 ondelivery to any other warehouse or place of storage, whether prior to or at the destination named herein, which the Assured elect to use either

8.1.2.1 for storage other than in the ordinary courseof transit or

8.1.2.2 for allocation ordistribution Or

8.1.3 ontheexpiry of 60 days after completion of discharge over side of the goods hereby insured from the oversea vessel at the final port of discharge Whichevershallfirst occur

8.2 If, after discharge over side from the oversea vessel at the final port of discharge, but prior to termination of this insurance, the goods are to be forwarded to a destination other than that to which they are insured hereunder, this insurance, whilst remaining subject to termination as provided for above, shall not extendbeyondthe commencement of transit to such other destination.

8.3 This insurance shall remain in force (subject totermination as provided for above and to the provisionsof Clause 9 below) during delay beyond the control of the Assured, any deviation, forced discharge, reshipment or transshipment and during any variation of the adventure arising from the exercise of a liberty granted to ship -owners or charterers under the contract of afreightment ''''.

18. ACCORDING to the counsel for the complainant, sub -clause 8.1.3 is applicable to their case and the complainant is entitled to have the compensation. The goodsarrivedat the destination on 11.04.1996. The thefttookplace on 08.06.1996. However, it must be borne in mind that Clause8is subject to the provisions mentioned in Clause 9 of ICC (A), which is reproduced here, as under : ''''9. If owing to circumstances beyond the control of the Assured either the contract of carriage is terminated at a port or place other than the destination named therein or the transit is otherwise terminatedbeforedelivery of the goods as provided for in Clause 8, above, then this insurance shall also terminate unless prompt notice is given to the Underwriters and continuation of cover is requested when the insurance shall remain in force, subject to an additional premium if requiredby the Underwriters, either

9.1 until the goods are sold and delivered at such port or place, or, unless otherwise specially agreed, until the expiry of 60 days after arrival of the goods hereby insured at such port or place, whichever shall first occur. Or

9.2 if the goods are forwarded within the said period of 60 days (or any agreed extension thereof) to the destination named herein or to any other destination, until terminated in accordance with the provisions of Clause 8 above ''''.

19. THEGOODSWE RE shipped on 23.03.1996. These arrived at the destination on 11.04.1996. These goods were stolen on 08.06.1996. The information of theft of goods wasgivento the complainant on 29.07.1996. The complainantinformedthe insurance about the theft of the said goods, vide its letter dated 01.08.1996. DE -MERITS OF COMPLAINANT ''S CASE :

20. CERTIFIED copy of the FIR was never furnished to the OP. The exact date oftheftwas never disclosed/known. Thecertifiedcopy of the final investigation report of the police was never furnished to the OP. The original non -deliverycertificatesgranted by the Port/Ship ''s agents was not furnished to OP. The originals sets of threeBillsof Lading in respect of these three consignments were not produced. Ifproduced, they would have gone a long way to show that several endorsements on them containing orders for delivery if at all. The complainantdidnot send the certified copies of the purchase orders placed by the consignees, Original insurance policy or certificates/Declarations. The terms of sale were kept under the hat. This is a very importantfactor. Thetermsof sale would have gone a long way to clear the picture. Secondly, the complainantdidnot co -operate fully with the OPs despite their letters dated 14.11.1996, 30.11.1996, 19.12.1996, 05.07.1997, 22.12.1997 and 20.01.1998.

21. AGAIN , the complainant did not produce the two Bills of Exchange dated 03.04.1996 and 20.10.1996whichwere allegedly concealed by the complainant. The complainant has also not produced GR -I Forms, Shipping Bills, etc., and the

same were also not submitted to the Indian Customs by the complainant. The documents were negotiatedthroughBanks and the delivery of documents was to be made against payment. We find some force in the submission advanced by the OPs that Jonenmust have collected claims from their insurersbysurrendering of original Bills of Lading. Any fault of the complainant is that it did not give prompt notice to the OP, as per clause 9 of ICC (A), quoted above. It had come to the notice of the complainanton29.07.1996, that the theft was committed, after the expiry of 60 days. They should have informedtheInsurance Company, immediately, which was not done even after expiry of two days. No effort was made by the complainant to identify the recovered goods. The Buyertookunreasonable time to collect the goods from the Port.

22. IT must be mentioned here thatthequestion whether, the shipment was on ''FOB '' or ''CIF '', pales into insignificance. The case is governed by Clauses 8 & 9 of the ICC (A), quoted above. DEMERITS OF THE OPS '' CASE:

23. THE factsandcircumstances of this care clearly go to depict the negligence, inaction and passivity on the part of the OPs as well. Whenthishuge loss came to the knowledge of the OPs, they should have lost no time in sending their Surveyor to Durban, which was not done. Thecaseof the OPs hinges upon the Surveyor ''s report which was prepared in India. No efforts were made to solve the case at Durban. No assistance from the complainant in this regard was ever sought. This is unfortunate that the Surveyor came to know that the stolen goods were recovered. The OPstookno steps to get the same identified by the insured. The goods were not handed over to the complainantorhis representative, because there was no positive identification. As a matteroffact, the insured and the insurer should have gone to Durban and identified the goods, which was not done. FINDINGS :

24. THE complainant as well as the OPs areresponsible for not collecting the FIR. It was the duty of the insurance company to send a representative to Durban to collect the copy of FIR and final investigation report of the police.

25. THE OPs did not make any effort to get the non -delivery certificate from the Port authorities/Ships '' agents. The goods were stolen and the OPs did not make any investigation in this regard. One cannot make Omelettewithoutbreaking the eggs. The OPs should have made enquirywhetherthe Zonal Office had recovered the amount, whether, the Bank had paid the amount to the insured? Whether the insurance company at Durban had paid the compensation, if so, to whom and when? Efforts made by the insurance company were not put in writing.

26. BEFORE coming to the conclusion of this case, the bizarre conductofthe OPs, is difficult to fathom. Counsel for the OPs did not appear on 10.10.2013., 15.01.2014, 30.04.2014, when the arguments from the side of the complainant were heard. It was stated that the counsel for the opposite party was sick. On the request of the proxy counsel for the opposite party, Mr. FarooqAhmad, who was present, on 14.08.2014, it was ordered to inform the main counsel that the

matter can be argued on 20.08.2014 at 11.45AM. On 20.08.2014, at the request of the proxy counsel for the opposite party, the matter was again adjourned to 25.08.2014 at 12.00 noon, for final arguments. On 25.08.2014, none appeared for the Opposite party and as such the case was reservedfororders on 25.08.2014. Tillthedate of pronouncement of this order, nobody appeared on behalf of the Opposite parties. However, thewrittensubmissions have assisted us, sufficiently. In case the Advocates appear regularly in old cases, there could be an end to the cases pending for the years 2000, 2001 and 2002.

27. TAKING into consideration of all the facts and circumstances of the case, we hold that the OPs are partially liable for the said loss. Consequently, we hereby direct the OPs to pay 50% of the amount assessedbythe Surveyor, which comes to USD 54383.00. The said amount which is mentioned in USD, shall be paid to the complainant, equivalent in Indian Rupees, as per the rate prevalent on the date of payment. Thecomplainantis also granted interest @ 6% p.a., from the date of filing of this complaint, i.e., 18.12.2000. The said amount, along with interest, shall be payable by the OPs, within 90 days from the date of receipt of the order, otherwise, the rate of interest shall stand enhanced to 9% p.a., after the expiry of above said 90 days, till its realisation.

