(2015) 01 NCDRC CK 0059

In the National Consumer Disputes Redressal Commission

Sparkling Traders Pvt Ltd APPELLANT

Vs

Pooja Road Links RESPONDENT

Date of Decision : 23-01-2015

Acts Referred:

Citation : (2015) 01 NCDRC CK 0059

Hon'ble Judges : K.S.CHAUDHARI J.

Final Decision : Appeal allowed

Judgement

1. THIS appeal has been filed by the appellant against the order dated 05 -09 -2009 passed by the Learned State Commission in Complaint No. 477 of 1999 M/ s Sparkling Traders Pvt. Ltd. Vs. M/s New India Assurance Co. Ltd. and Anr., by which complaint was dismissed.

2. BRIEF facts of the case are that complainant/appellant sent consignment of 400 kgs. of PM Oil to its Branch Office at New Delhi through Opposite party no. 2/ Respondent no. 2. Goods were insured with opposite party no. 1/respondent no. 1 and there was pre -survey report pertaining to consignment. At the destination consignment was not delivered and containers were empty. Complainant lodged complaint with the opposite parties but opposite party no. 1 repudiated claim vide letter dated 12 -07 -1999 on the ground that there were holes at different places in the drums and that loss cannot be attributed to the transit hazards. Alleging deficiency on the party of opposite parties, complainant filed complaint before State Commission. Opposite party no. 1 resisted complaint and submitted that as loss was recorded due to holing and cuttings on drums and such loss cannot be attributed to transit hazards and claim was directly repudiated and prayed for dismissal of complaint. Opposite Party no. 2 did not appear before State Commission. Learned State Commission, after hearing both the parties, dismissed complaint by impugned order against which this appeal has been filed. 2. None appeared for R -2 even after service and he was proceeded ex -parte.

3. HEARD learned counsel for the parties and perused record. Learned counsel for the appellant submitted that inspite of proof that insured consignment was

not delivered at the destination, learned State Commission committed error in dismissing the complaint, hence appeal be allowed and impugned order be set aside and complaint be allowed. On the other hand, learned counsel for R -1 submitted that order passed by learned State Commission is in accordance with law, hence appeal be dismissed.

4. IT is admitted case of the parties that complainant got his 400 kg. P.M. oil consignment insured from opposite party no. 1 by policy dated 28 -09 -1998, which was subject to Inland Transit Clause (All risks). It is also not disputed that consignment was sent through Opposite Party No. 2 and as per report dated 13 -10 -1998 of opposite party no. 2, consignment was delivered totally empty with a shortfall of 400 kgs. of material.

5. NOW , the core question to be decided is whether opposite parties were responsible for loss of consignment. As per pre -dispatch survey done by M/s A.S. Pappu Technocrats on 28 -09 -1998, consignment of 400 kgs. PM oil in two sealed drums was found extremely in sound condition. As per surveyor M/s S.S. Kashyap and Co. report dated 13.10.1998, loss occurred due to leakage which occurred due to holing and cutting of drums. It was further mentioned in the report that drums were completely empty at the time of inspection by surveyor and after deducting salvage value of two drums, total loss was Rs.5,81,900/ -.

6. IT appears that after report of surveyor M/s S.S. Kashyap, opposite party no. 1 appointed 2nd surveyor M/s J. Basheer and associates, who furnished questionnaire to the complainant on 13 -01 -1999 which was replied by complainant by letter dated 18 -01 -1999. M/s J. Basheer and Associates mentioned in its questionnaire that pre -consignment survey was done by complainant''s surveyor M/s A.S. Pappu Technocrats but complainant in its reply to the questionnaire submitted that M/s A.S. Pappu Technocrats was nominated by opposite party and not by the complainant. Admittedly pre -dispatch surveyor was appointed by O.P. Opposite party no. 1 by letter dated 12 -07 -1999 repudiated claim on the basis of M/s J. Basheer and Associates report on the ground that pre -dispatch surveyor did not notice any specific marks namely, "L.K.PNET India" on the drums, hence it could not be established that drums surveyed by pre -dispatch surveyor were the same at the time of reported loss.

7. LEARNED counsel for the appellant submitted that if pre -dispatch surveyor has failed to note certain marks on the drums, opposite party is not absolved from liability and cannot take stand that surveyed drums were not consigned by the complainant. It was further submitted by learned counsel for the appellant that there was no occasion to appoint 2nd surveyor and report of the 2nd surveyor has also not been placed on record and in absence of such report, claim could not have been repudiated. Learned counsel for the opposite party also admitted that 2nd surveyor''s report is not on record.

8. MERELY because pre -dispatch surveyor has not recorded specific marks on drums, it cannot be presumed that pre -dispatch surveyed drums were not

consigned by the complainant through carrier. Opposite party failed to place report of 2nd surveyor M/s J. Basheer and Associates and in absence of report there was no occasion for opposite party no. 1 to repudiate claim of the complainant.

9. AFTER getting first surveyor''s report there was no occasion to appoint 2nd surveyor without any cogent reason. This Commission in Complaint No. 73 of 2002 M/s Jagannatha Poultries Vs. New India Assurance Co. Ltd. while placing reliance on judgment of Hon''ble Apex Court New India Assurance Co. Ltd. Vs. M/s Protection Manufacturers Pvt. Ltd., 2010 AIR(SC) 3035 observed as under: "The submissions of Mr. Piyush Gupta in regard to Section 64 -UM of the Insurance Act, 1938, are also of substance, as the Appellant -Insurance Company should have applied to the Regulatory Authority under the Act for a second opinion instead of appointing M/s J. Basheer and Associates for the said purpose unilaterally. The reports submitted by M/s J. Basheer and Associates are liable to be discarded on such ground as well"

and rightly held that though it is permissible to appoint 2nd surveyor to assess the loss but this must be for given reasons and only through the auspices of the Regulatory Authority i.e. IRDA. Admittedly, in the case in hand neither any cogent reason has been given by opposite party no. 1 for appointing 2nd surveyor nor 2nd surveyor has been appointed through IRDA nor report of 2nd surveyor has been placed on record and in such circumstances no reliance can be placed on the report of 2nd surveyor M/s J. Basheer & Associates. Report of the 2nd surveyor was not relied by Hon''ble Apex court in the judgment of M/s Protection Manufacturers Pvt. Ltd. . If report of 2nd surveyor M/s Protection Manufacturers Pvt. Ltd. is discarded than on the basis of report of surveyor M/s S.S. Kashyap, complainant was entitled to get compensation of Rs.5,81,900/ -.

10. LEARNED State Commission dismissed complaint mainly on the basis that marks were not found on drums consigned by pre -dispatch surveyor. As I have already observed, complainant cannot be held responsible on account of failure on the part of the surveyor to mention specific marks on the drums. Learned State Commission further observed that first surveyor report was based on assumption accepting declaration of the complainant that two sealed drums contained PM oil. Surveyor report dated 13 -10 -1998 also mentions that two PM drums containing 200 kgs. of PM oil were inspected by the surveyor M/s A.S. Pappu Technocrats and as per their report, sealed drums were found externally in sound condition. In such circumstances there was no occasion to draw any inference that drums were not containing PM oil. Merely because drops of oil evaporated did not leave smell of said oil, it cannot be inferred that PM oil was not consigned in the drums. Learned State Commission committed mistake in dismissing complaint on flimsy grounds and appeal is to be accepted.

11. CONSEQUENT LY , appeal filed by the appellant is allowed and order dated 05 -09 -2009 passed by learned State Commission in Complaint No. 477/1999 M/s Sparkling Traders Pvt. Ltd. Vs. M/s New India Assurance Co. Ltd. and Anr. is set

aside and complaint is allowed and respondents are jointly and severally held liable to pay compensation of Rs.5,81,900/ - to appellant with 12% p.a. interest from 22 -09 -1999 till date of receipt of payment with no order as to costs.

