(2011) 09 NCDRC CK 0063

In the National Consumer Disputes Redressal Commission

S.S. Cold Storage India Pvt. Ltd. , Subhash Nagar Mahmoodabad — APPELLANT

Vs

National Insurance Company Limited — RESPONDENT

Date of Decision : 13-09-2011

Acts Referred:

Citation : 2011 0 NCDRC 606 : 2011 4 CPJ 45 : 2011 4 CPR 319

Hon'ble Judges : R.C.Jain , S.K.Naik J.

Advocate : Niraj Gupta , Joy Basu , Maibam N.Singh

Judgement

1. M/s S.S. Cold Storage India Pvt. Ltd. had originally filed this complaint during April, 1999, seeking a number of reliefs, the prominent amongst them being :- (a) Indemnification of actual loss on account of damage to their stock Rs.1,03,15,680/- (b) Consequential damages for reinstalling the damaged chambers no. I and II Rs.8,88,018/- (c) Loss of business for closure of the plant Rs.30,00,000/- (d) Compensation on account of mental agony Rs.50,00,000/- (e) Legal cost and damages Rs.2,50,000/-

2. SUBSEQUENTLY, after more than a period of ten years, the complainant filed an application for amending the said complaint on 7th of January, 2010, submitting therein that the original complaint contained several errors in calculating the actual loss and also stating that the prayer clause in the erstwhile complaint was not properly set up. In the amended complaint, M/s S.S. Cold Storage India Pvt. Ltd. has alleged gross deficiency in rendering service by the National Insurance Company Limited and has sought a payment of Rs.98,03,640/- towards the actual loss for damage to potatoes and Rs.20,000/- towards the cost of Ammonia gas pipeline and in addition imposition of interest @ 18% per annum from the date of incident till the date of actual payment, besides a prayer to award adequate compensation on account of mental agony and cost of litigation. It is the say of the complainant that it was running a cold storage at Mahmoodabad, District Sitapur, U.P., which was well equipped with all the requisite facilities and was in good running condition. In order to safeguard

and secure his plant including machinery as also the stock of potatoes involving business interests as well as the interest of the farmers, they have been insuring their plant, machinery and stock comprehensively with the opposite party-Insurance Company ever since 1992. During the year 1997-1998 they had obtained the following policies :- (A) Machinery Insurance Policy Sum insured is Rs.40,13,000/- Period covered is 25th of March, 1997 to 24th of March, 1998 (12 months) (B) Refrigeration Plant (Stock) Policy (For Potatoes only) Sum insured is Rs.1,35,45,000/- Period covered is 25th of March, 1997 to 24th of October, 1997 (7 months) (C) Fire Policy (C) (Comprehensive Fire Policy for building, furniture plant, machinery and installation) Policy Sum insured is Rs.1,20,30,000/- Period covered is 31st of March, 1997 to 30th of March, 1998 (12 months) (D) Fire Policy (On stock of potatoes in Cold Storage) Sum insured is Rs.1,35,45,000/- Period covered is 24th of March, 1997 to 24th of March, 1998 (12 months)

According to the complainant, the machinery insurance policy had been issued after a thorough inspection of the machinery installed in the cold storage plant. Unfortunately, there was a sudden burst in the liquid Ammonia gas pipeline on the 3-4th of October, 1997 at both the chambers no. I and II causing instant spread of the gas resulting in abrupt closure of the total plant. Information with regard to this accident/incident was given to the opposite party-Insurance Company as well as to the District Horticulture Officer, Sitapur, requesting them to inspect the cold storage/accidental premises and provide guidance.

On the instruction of the opposite party/Insurance Company, one S.K. Agarwal, an engineer from Lucknow, came to inspect the site but after viewing the enormous extent of damage expressed his inability to assess the loss. While the complainant was desperately trying to get in touch with the opposite party/ Insurance Company both orally and in writing to get the loss assessed as he was under pressure for payment from the farmers, the opposite party/Insurance Company was not serious to attend to the matter and had been advising the complainant to sell/dispose of the stock of potatoes to minimize the loss. It was only after his repeated requests that the opposite party/Insurance Company appointed Mehta & Padamsey Surveyors Pvt. Ltd., whose representative one Mr. Banerjee from Kolkata visited the site only on the 23rd of October, 1997 after 20 days of the incident and the said Mr. Banerjee after visiting the premises between 23-25th of October, 1997 returned to Kolkata as he could not enter into the two affected chambers to examine the source of leakage of Ammonia gas and the cause thereof as there was unbearable stench. Subsequently, when the complainant on 30th of December, 1997 informed the surveyors that the chambers no. I and II had been cleared of Ammonia gas, they visited the cold storage on 17th of January, 1998. In order to find out the cause/source of leakage of the gas, they started the compressor and discovered that the leakage was in the liquid Ammonia gas pipeline laid out in the topmost tier. The pipes had developed hairline (thin) cracks along the seams through which the gas leaked. The affected portion of the pipe was thereafter cut out from the pipeline and sealed in the presence of the complainant and taken by the surveyors to their head office at Kolkata. The surveyors did not inform the complainant that the hairline cracks had occurred under the natural process of wear and tear but after reaching their head office they sent a communication erroneously stating that they had said so on their visit to the site. According to the complainant, their letter dated 11th of March, 1998, informing them that the leakage of Ammonia gas was due to normal wear and tear of the machinery/pipes and, therefore, their damage fell within the exclusion clause, was only an afterthought as surveyors during their inspection of the pipeline at the cold storage had not expressed any such opinion. According to the complainant, the leakage of Ammonia gas occurred due to the sudden burst of the pipes, which was pure accident, but the surveyors completely erroneously and in order to benefit the opposite party/Insurance Company stated that the hairline opening along the welding joint was attributable to wear and tear. The complainant raised serious objection to this finding of the surveyors. Their action, therefore, was not only arbitrary but mala fide and designed to oblige the opposite party/Insurance Company. A series of correspondence that followed thereafter depicting the plea of the poor farmers and the pressure mounting on him fell into deaf ears. It was duly explained to the opposite party/Insurance Company that there was no possibility of disposal of the damaged stock of potatoes as the complainant had no legal authority to do so and the competent authority i.e. the Director, Horticulture had prevented them from doing so, thus, resulting in complete damage to the entire stock of potatoes. When the opposite party/Insurance Company failed to consider his claim, the complainant has filed this complaint, seeking the amended reliefs as already stated above.

3. ON notice being issued, the opposite party/Insurance Company has filed its reply denying any liability to indemnify the loss for the machinery as well as for the damaged stocks. In their written version, they have denied that there has been any deficiency on their part. ON receipt of the intimation with regard to the so called bursting of the Ammonia gas pipeline, they submit that they had immediately appointed one surveyor from Lucknow, who, on a visit to the site found, that the damage was in excess of his competence and thereafter M/s Mehta & Padamsey Surveyors Pvt. Ltd. were appointed. Their representative visited the cold storage on 23rd of October, 1997 but could not enter into the two affected chambers to examine the source of leakage of Ammonia gas and the cause thereof as there was unbearable stench emanating due to the presence of Ammonia gas, which had completely vitiated the environment. When the complainant later informed that the chambers had been cleared of the gas, they visited the cold storage and inspected the machinery/equipment and found that the hairline cracks through which the Ammonia gas leaked developed due to the normal wear and tear and there was no sudden burst or accident. They, therefore, cut out the affected pipes and got it sealed in the presence of the representative of the complainant as well as the opposite party/Insurance Company in order to avoid any ambiguity. The opposite party/Insurance Company also has relied upon the exclusion clause in the policy, which stated

that damage to goods stored resulting from wear and tear and gradual deterioration of plant and equipment fell under the clause of exclusion, which was duly conveyed to the complainant. The opposite party/Insurance Company has also refuted the claim of the complainant that he was legally not entitled to dispose of the damaged stock of potatoes to minimize the loss. They have, therefore, contended that the complaint being without any merit deserves to be dismissed. The complainant has filed its rejoinder and has reiterated the stand taken in his complaint. From the side of the complainant evidence in the form of affidavits has been filed by Shri S.S. Lal & Shri Shiv Kumar Gupta, Managing Directors of the complainant firm at the relevant time. On behalf of opposite party/Insurance Company, evidence in the form of affidavits has been filed by Shri D.P. Ghosh, Manager, National Insurance Co. Ltd., Shri S.R. Arya, Branch Manager of National Insurance Co. Ltd. and Shri Swaminath Arunachalam of Mehta & Padamsey Surveyors Pvt. Ltd. We have heard the learned counsel for the parties and have perused the records of the case. Learned counsel for the complainant has concentrated his arguments primarily to convince us that the leakage to the pipeline, through which the Ammonia gas passed to the chambers of the cold storage, was a result of pure accident and not due to the normal wear and tear by usage. In this regard, he has referred to his application for permission to inspect the damaged gas pipeline portion cut out and kept with the M/s Mehta & Padamsey Surveyors Pvt. Ltd. and has contended that Dr. Manohar Prasad, an eminent former Professor of IIT, Kanpur and another Shri K.K. Gupta, a Chartered Consulting Engineer, Government Registered Valuer, were appointed to render their expert opinion as to whether the cracks on the pipelines were due to normal wear and tear or as a result of an accident. Both the experts have completely discarded the theory of normal wear and tear; thereby supporting the contention of the complainant that it was an accidental happening and, therefore, was fully covered within the ambit of the Machinery Insurance Policy.

4. ON the question of minimizing the loss to the stock of potatoes, learned counsel has argued that immediately after the occurrence of the incident when the two chambers were engulfed by the Ammonia gas, he not only informed the opposite party/Insurance Company but also the District Horticulture Officer vide his letter dated 4th of October, 1997 about the incident, requesting them to get the stock inspected and provide necessary guidance. Consequently, the Sr. Horticulture Inspector, Mahmoodabad visited the cold storage on the 6th of October, 1997 and expressed the view that the stock of potato had already been affected by the leaking gas to an extent that the stock has already become unsuitable for being sown in the next crop. Since the opposite party/Insurance Company had been insisting on the disposal of the stock, the complainant approached the District Horticulture Officer for disposal of the Ammonia affected potatoes by his letter dated 10th of October, 1997. In order to share their concern over the incident with the potato growers, the complainant waived the rent of cold storage to the farmers and advised them to remove their potatoes but the farmers did not lift the affected potatoes. Learned counsel contends that

the complainant did whatever was possible to minimize the loss but ultimately the entire stock had got rotten because of the increase in the temperature in the chambers, resulting in total loss. Learned counsel, therefore, submits that the repudiation of their claim by the opposite party/Insurance Company is totally unjustified and they be directed to indemnify the loss both under the Machinery Insurance Policy as also under the Refrigeration Plant (Stock) Policy with compensation on other counts as prayed for. Learned counsel for the opposite party/Insurance Company, on the other hand, has contended that M/s Mehta & Padamsey Surveyors Pvt. Ltd. is a highly repudiated surveyor whose representative at the time of inspection of the damaged pipes on 17th of January, 1998 has categorically opined that It did not require much of an explanation that the hairline opening along the welding joint was attributable to wear & tear. The complainant had been duly informed about the opinion of the surveyor at the time of inspection itself and he had raised no objection thereto. This was followed in writing. The complainant in order to make out a case resorted to the appointment of experts more than a decade after the occurrence. These reports did not have the presence of any expert on behalf of the opposite party/Insurance Company and, therefore, cannot be said to be the opinion of an independent/impartial expert. No doubt, they have not supported the theory of normal wear and tear but at the same time, they have not categorically held that it was a case of sudden burst of the pipes. If the damage was not due to normal wear and tear, they ought to have mentioned specific cause of such hairline cracks. He, therefore, contends that these reports being self-serving in nature will not lend any support to the claim of the complainant. With regard to appropriate steps not having been taken to minimize the loss of potatoes, the learned counsel submits that the hairline cracks on the pipes, as the terms suggests, were so miniscule that if gas started leaking from them, they could not have engulfed the entire chamber in a matter of few hours. If the so called accidental burst occurred during the night of 3-4th of October, 1997, it should have been detected early in the morning of 4th of October, 1997 if not earlier and immediate necessary action should have been taken to open the doors, windows and vents to expel the gas and remove the stock of potatoes. That would have prevented the damage to the potatoes. Learned counsel also submits that the plea of not having any authority to dispose of the stock in a contingency like this is not true, inasmuch as the complainant himself in his proposal form against the question as to whether he was authorized to dispose of the goods stored to avoid or minimize the loss due to deterioration, has clearly answered in the affirmative by stating Yes against that column (page 356 of the paper-book). Learned counsel has further contended that the mala fide intention of the complainant to unduly enrich himself is evident from the fact that in his earlier complaint he had made a highly inflated claim, which by an amendment sought after a gap of more than ten years has reduced it drastically. Even in the amended complaint, there is not a word with regard to any payment that he may have made to the farmers whose stock was held by him only for the purpose of storage. In the absence of any averment with regard to the loss having being made good to potato growers, learned counsel contends that any compensation on account of the loss of stock would amount to undeserved benefit and enrichment to the complainant. He, therefore, submits on both the counts i.e. the damage to the pipes having occurred in the course of normal wear and tear falling under the exclusionary clause and the complainant having suffered no loss on account of damage to the stock, the complaint has no merit and deserves to be dismissed.

5. HAVING carefully perused the records and having heard the learned counsel for the parties, we wanted to examine the piece of damaged pipe so as to arrive at an objective assessment. After opening the seals of the containers in which the pipes were contained, we have taken a close look at them. The cracks are very thin (hairline) and occur at the joints. The pipes are not seamless. In our view, it certainly cannot be due to a bursting of the pipes. A burst would inevitably mean break or cause to break suddenly and violently apart or move or be opened suddenly and forcibly, as per the Concise Oxford English Dictionary, Indian Edition. Our visual examination does not confirm to this definition. It has been the consistent line of argument on behalf of the complainant that there was a sudden burst of the pipeline resulting in the leakage of Ammonia gas but this claim of burst is not convincing. The Surveyor, who inspected the pipes prior to their being taken out from the main pipeline, has observed as under:- (18) Following the Insureds advice, we were at Mehmoodabad on 17th Jan98. We found the area around the Cold Storage was dumped with rotten potatoes. Though the Chamber Nos. I & II, were cleared of the rotten stocks even then the stench was unbearable. In order to identify the source of leakage, the Compressors were started and the source of leakage identified. The leakage in both the Chambers were in the liquid Ammonia Pipeline laid out in the top most tier and a thin (hair breadth) opening found along the seam (welding joint) through which the Gas had leaked. The location of the leakage was identified in each Chamber as under : Chamber No. I : Between Rack No. 199 and 200 as marked on the columns. Chamber No. II : Between Rack No. 4/15 & 4/16 as marked on the columns. (19) It did not require much of an explanation that the hairline opening along the welding joint was attributable to wear & tear (a contingency clearly excluded under the Policy). To avoid any future controversy and the Insured coming forward with any contradictory statement, the section of the pipeline where the leakage was identified after testing in each of the Chamber Nos. I & II, were cut out of its position. These two pieces were duly certified by the Insured as having been taken out of their Cold Chamber Nos. I & II. The certificate (written in Hindi) together with the piece of pipeline taken out of each Chamber were tied and rolled up with the cut pieces and sealed with the shellac by Sri Shyam Sundar Lal, the Managing Director of the Insured in the presence of their employees and also in the presence of Sri N.P.S. Jadaon an executive of the Regional Office of National Insurance Co. Ltd., Lucknow as well as in our presence. The sealed pipelines were handed over to us towards the late afternoon of 17th January, 1998 and we have given our acknowledgment in the

carbon copy of the certificate. These facts were, for good order sake, recorded and communicated to the Insured by our letter No. C/1095/333 dated 19th January, 1998. This letter of ours were acknowledged by the Insured as evident from the Postal A.D. Card we have in our possession.

(emphasis added)

6. AFTER the visual examination of the pipes, we are of the opinion that the view expressed by the Surveyor at the first go that the hairline opening along the welding joint was attributable to wear and tear is closest to the truth. That even the expert Shri K.K. Gupta did not fully support the theory of burst of the pipe could be discerned from his report, the concluding para of which reads as under :- A thin hair line straight slit has been observed on both the pipes through which the Ammonia leaked which in my opinion occurred as unexpected rupture of the welding joint probably due to lack of Fusion in the welding line, which is absolutely unexpected and beyond ones control, but certainly not because of general wear and tear and this could also have been ascertained more firmly had the torn/ruptured pipes been sent to some recognized and approved metallurgical labs immediately after the date of mishap. Going by this observation, if there had been lack of fusion in the welding line, Ammonia gas should have started leaking from the very beginning and it would have been discovered at the time of commissioning itself. The fact that the hairline cracks have appeared after more than 5 to 7 years lends support to the theory of normal wear and tear and certainly not due to any accident. The opinion of the experts that a C class pipe which the complainant claims to have used in the plant should normally have a life span of 20 to 25 years, will not lend any support as the pipes were not seamless and had welding joints. Such a view could be taken only if the joints of the pipes had been subjected to rigorous tests through laser beams with regard to the uniformity of their amalgamation with the main pipe. The opinion of Shri K.K. Gupta in fact supports the view that there was no proper fusion of the welding joints along the welding line, which with the passage of time may have resulted in the hairline cracks. Further, the expert opinions obtained so belatedly after a lapse of more than 10 years cannot be given full credence as the experts have refrained from giving any definite opinion as to what was the real cause of the cracks. Their reports cannot be treated as totally independent as it was the complainant who made a choice of his experts. The contention of the learned counsel for the complainant that there has been collusion between the surveyor and the opposite party/Insurance Company in this background does not stand substantiated. Having regard to all the relevant facts and the attenuating circumstances, we have no hesitation to hold that in all probabilities the hairline cracks in the Ammonia gas pipeline had developed due to wear and tear and gradual deterioration, rather than on account of sudden burst of the said pipes.

Having held that the damage to the gas pipeline was due to normal wear and tear by usage, the other aspect of damage and compensation does not require consideration in terms of Exclusionary Clause 3, which reads as under :- The company shall not be liable for 3. damage to goods stored resulting from wear and tear gradual deterioration of the plant and equipment. Be that as it may, even on the question of compensation for the damaged stock of potatoes, we find that the complainant had not made any payment to the potato growers upto the 24th of July, 1998, i.e. even ten months after the date of the incident, when another cropping season for potato was already over. In the original complaint initially filed during 1999, we do not find any mention with regard to any payment having been made to the farmers. If any such payment had been made, the complainant ought to have so stated at least in his amended complaint filed 10 years thereafter during 2010. Thus, it stands established that for the claimed damage of potatoes of the farmers/potato growers, the complainant has suffered no loss. In this regard, it would be relevant to extract the relevant portion of the complainants letter dated 27th of July, 1998 addressed to the Regional Manager, National Insurance Co. Ltd, which reads as under:- Dated : 24.07.98 To The Regional Manager National Insurance Co. Ltd. Halvasia Market, Hazrat Ganj, Lucknow. Sub: Claim of potatoes damaged due to gas got filled in Chambers on 4.10.97 as a result of burst of Liquid Ammonia Pipe. Sir, Kindly refer to our letters dated 26.3.98 and 10.4.98 sent through Branch Manager, Barabanki and our registered letter dated 13.5.98. It may be noted that the farmers who had stored potatoes are suffering financial problems as a result of not getting claim for damaged potatoes and resentment is growing up among them and reputation of Insurance Company is also suffering due to this. You are, therefore, once again requested that the action taken may be informed within a week of receipt of this letter and after appointing two other Surveyors enquiry/inspection may be got conducted based on facts and claim may be paid within a month failing which we shall be constrained to approach the court at your risks costs and interest, etc. With regards, Yours faithfully, for S.S. Cold Storage India Pvt. Ltd. Sd/- (Shyam Sunder Lal) M.D.

(emphasis added)

7. OVERALL, therefore, we are of the view that the complaint fails, both on the point of damage to the Ammonia gas pipe having developed hairline cracks due to normal wear and tear falling within the exclusionary clause of the policy and also on the point of indemnification of the damaged stock of potatoes ownership of which belonged to the potato growers who have not been paid/reimbursed the value thereof. Thus, it is amply clear that the complainant has not suffered any loss arising out of damage to the stock of potatoes. It would be unjust enrichment of the complainant if any award is passed in his favour for the damage caused to the stock of potatoes not belonging to or owned by the complainant. For the above stated reasons, we hold that the repudiation of the insurance claim by the Insurance Company was justified. Complainant has failed to establish any deficiency in service on the part of the Insurance Company, entitling it to any compensation, much less the compensation claimed in the present complaint. The complaint is, accordingly, dismissed, leaving the parties

to bear their own costs.

