
(2007) 10 NCDRC CK 0009

In the National Consumer Disputes Redressal Commission

Syndicate Bank

APPELLANT

Vs

RAMAKANT T KHANDKE

RESPONDENT

Date of Decision : 31-10-2007

Acts Referred:

Citation : 2008 1 CPJ 404 : 2008 1 CPR 53

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

Advocate : Adarsh Malik , Manish Sharma , P.K.Seth , Satender Sharma

Judgement

1. THESE three appeals have been filed against a common order of Himachal Pradesh Consumer Disputes Redressal Commission directing the appellants in these three appeals to pay Rs. 4,29,445 along with interest @ 18% and cost of Rs. 5,000 to the complainants/respondent Nos. 1 and 2 on the complaint of complainants, owners of M/s. Lucky Off-set Printers, Shri Kamlander Kashyap and Smt. Champa Devi.

2. APPEAL No. 66 of 2000 has been jointly filed by opposite party No. 1, M/s. Auto Print Machinery Manufacturer (P) Ltd. and its Marketing Manager, Sh. A. S. Bakshi, opposite party No. 2. Appeal No. 151 of 2000 has been filed by insurers Oriental Insurance Co. Ltd.

Appeal No. 473 of 1999 has been filed by the carriers, M/s. Associated Road Careers Ltd.

3. FEELING aggrieved by this order, the appellants in aforesaid appeals have filed these three appeals. The brief facts are as under: m/s. Lucky Offset Printers, Bilaspur booked an order for Mini Off-set Press to M/s. Auto Print Machinery through its Marketing Manager, Sh. A. S. Bakshi on 31. 12. 1997. A sum of Rs. 50,000 was paid by Bank Draft to Sh. A. S. Bakshi, Marketing Manager of opposite party No. 1, the manufacturer. The complainants gave three options in writing, namely, T. C. I. , Patel and Nitco for carriage of the machine from Coimbatore to Bilaspur. However, contrary to the options by the complainants for transportation of the machinery, the opposite party Nos. 1 and 2 dispatched the

machinery through Associated Road Carriers Ltd. , Chandigarh without the permission and consent of the complainant/respondent. The consignment was received on 5. 3. 1998 in damaged condition. The consignment was not opened since it was duty of the qualified Engineer to be deputed by the opposite party Nos. 1 and 2 for opening the box. The complainants took a note on goods receipt from the carriers/opposite party No. 4 that the box was in damaged condition. Mr. B. Subramaniam, authorized Engineer opened the box on the next day i. e. 6th March, 1998 and wrote a letter to the opposite party No. 2 about the damage caused to the machinery. The complainants wrote to the opposite party to replace this machine with another machine. The requisite papers as were required by the opposite party No. 1 were sent. Though M/s. Auto Print Machinery wrote that they were not liable for the loss caused in transit, however, they also informed that they were taking up the matter with the Insurance Company to indemnify the loss for it was alleged that the opposite party Nos. 1 and 2 had taken the transit insurance from the Oriental Insurance Co. Ltd. At the time of placing the orders, the complainants were given to understand that immediately after booking the machine, the complainants would get numerous orders for printing from various persons and that the machinery should be sent to them within 10 days. They suffered loss of Rs. 5,36,995 as well as payment of Rs. 4,05,410 for the purchase of machinery, carrier charges, Rs. 13,035, unloading charges Rs. 500, telephone call charges Rs. 2,000, other expenses 5,000 and rental/stacking charges Rs. 5,000. They had also claimed Rs. 9,67,940 with interest @ 18% from the date of delivery of the consignment.

4. OPPOSITE party No. 1, M/s. Auto Print Machinery and opposite party No. 2, Shri A. S. Bakshi, Marketing Manager of opposite party No. 1 contested the matter, inter alia, on the ground that the machine had been purchased for commercial purpose. The complainant firm was not a consumer under the terms and conditions of sale for immediately after the consignment left the factory, all the risks connected with the delivery of the machinery passed on to the buyer and that they were not responsible for any act of the opposite party No. 3 who transported the machinery. The guarantee given by them related to the defect not to damage which might have occurred in transit. As such they were not liable. The primary liability for damages, if any, would lie on opposite party Nos. 3 and 4 - the carriers of the machinery and the Insurance Company. As per term and condition No. 10 of the agreement, the matter was required to be referred to arbitration. The Oriental Insurance Company has taken the pleas that there was no privity of contract between Insurance Company and the complainants; that the complaint was bad for mis-joinder; that the State Commission did not have territorial jurisdiction; and also that the complainants are not the consumers. The insurer have further pleaded that the opposite party-manufacturer had taken the Marine Cargo policy for a sum of Rs. 50,00,000 with the limit per transit Rs. 15,00,000. Marine declaration was required to be submitted by the insured. It was furnished on 3. 2. 1998 later by the insured in which the destination of the journey was declared from Coimbatore to Pondicherry and the risk for onward

transmission of machinery to Bilaspur was not covered under the said declaration and therefore they were not liable for any compensation. The Insurance Company had been wrongly impleaded as party by the consignee in the present case. Since the insured, M/s. Auto Print Machinery did not inform of endorsing declaration in favour of any one including the complainant, no liability of compensation had arisen against the opposite party No. 3 and the insurance Company had been wrongly impleaded as a party by the consignee. M/s. Associated Road Carriers Ltd. claimed that there was no privity of contract between the complainants and the carrier. Consequently, there was no cause of action. Notice under Section 10 of the Carriers of Goods Act, 1965 was not given. The goods transported by the appellant were delivered in same condition in which they were booked and delivered to the complainant with acknowledgement. There was neither deficiency nor negligence on the part of opposite party No. 4. Once the goods were received, the responsibility of the carrier would come to an end and the document Annexure P-3 which referred to the damaged condition of the goods was procured and forged document.

5. THE State Commission considered the preliminary objection about the complainant/respondent being a consumer, relied upon the averments made in the rejoinder to the effect that the complainant No. 1, namely; M/s. Kamlander Kashyap after doing his graduation in 1996, applied for job, but he could not get any job or even a private service and with the intention of self-employment, he applied for loan and obtained loan of Rs. 3,67,000 from the Punjab National Bank. The complainant purchased the said machinery for earning livelihood and settle his life by way of self-employment. Seeing the reasons given by the State Commission, we think that we cannot take any view other than the view taken by the State Commission. It may be mentioned that for the sake of pleadings neither genuine case nor substantial justice could be thrown out. For the aforesaid reasons, the complainants are covered under the definition given under Section 2 (1) (d) of the Consumer Protection Act, 1986.

6. INSOFAR as the plea of territorial jurisdiction is concerned, the machinery was to be installed admittedly at Bilaspur. Condition No. 4 of the order confirmation dated 31st December, 1997 stipulated that the erection of the machine would be done by the seller/dealer at the site to be provided by the complainant, which was admittedly at Bilaspur. Undisputedly, Mr. B. Subramaniam, Authorised Engineer of the opposite party No. 1 visited for the purpose of installation of the machinery. Since the cause of action arose at Bilaspur, the Himachal Pradesh State Consumer Disputes Redressal Commission had jurisdiction to entertain this complaint. The carriers were to deliver goods at Bilaspur and did deliver at Bilaspur, consequently, plea of lack of territorial jurisdiction have lost all its value and could not be entertained. However, M/s. Auto Print Machinery has taken the plea that Clause 11 of the terms and conditions of sale provided that the Courts situated at Coimbatore city alone shall have the jurisdiction to try all or any dispute exclusively to the exclusion of all other Courts and, therefore, the H. P. State Commission would not have any jurisdiction to entertain the complaint.

Supposing for the sake of argument it is submitted that there was a clause relating to confining jurisdiction to the Coimbatore city alone, the Clause 11 would not be applicable for consumer Fora is not a Court. Secondly, there is a difference in provisions of Section 11 of the Consumer Protection Act and provisions in Sections 15 to 20 of the CPC insofar as place of jurisdiction is concerned. The cause of action had undisputedly arisen at Bilaspur, Himachal Pradesh and this would suffice to say sale confirmation letter would not be a bar in filing a complaint at Bilaspur. It may be mentioned that the provisions of Sub-section (2) of Section 11 could not be abridged by any agreement. If such an interpretation is put than the purpose of beneficial provisions of the Consumer Protection Act might be set at naught to a great extent for it would be difficult and cumbersome for a consumers to go to the distant place to contest the matter and to suffer more expenditure than what he would get. For the aforesaid reasons, we feel that no exception should be taken to the view taken by the State Commission.

As regards the plea of arbitration, that was rightly rejected by the State Commission for it should suffice to say that provisions of Section 3 of the Consumer Protection Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. We need not repeat that Section 3 is an additional remedy to the complainants in addition to all the remedies, which are otherwise available under the existing laws. Now it is settled that the arbitration clause would not be a bar to the entertainment of the complaint by the redressal agency constituted under the Act, even if the arbitration clause had been provided in an agreement or and if any reliance is required, one may refer to *Ram Nath v. Improvement Trust, Bathinda*, 1994 (1) CPR 357.

7. HOWEVER, the main thrust of the argument of the learned Counsel for the appellant M/s. Associated Road Carriers Ltd. relates to the lack of notice under Section 10 of the Carriers Act. In this regard, it may be mentioned that Section 10 of the carriers Act reads as under: "10. Notice of loss or injury to be given within six months-No suit shall be instituted against a common carrier for the loss of, or injury to, [goods including container, pallets or similar article of transport used to consolidate goods entrusted] to him for carriage, unless notice in writing of the loss or injury has been given to him before the institution of the suit and within six months of the time when the loss or injury first came to the knowledge of the plaintiff. "

As regards notice under Section 10, in a recent judgment *Arvind Mills Ltd. v. M/s. Associated Roadways*, II (2007) CPJ 1 (SC)=i (2007) SLT 243=air 2004 SC 5147, relying upon *Patel Roadways Ltd. v. Birla Yamaha Ltd.* , I (2000) CPJ 42 (SC)=iii (2000) SLT 554=ii (2000) CLT 83 (SC)=air 2000 SC 91, clarified the position that despite Section 3 of the Consumer Protection Act, the provisions of Section 9 and 10 of the Carriers Act would remain intact and no liability could be fastened without giving notice under Section 10 of the Carriers Act. In this regard, paras 7

and 8 are notable of the judgement: "7. Since the word "suit" has been used both in Section 9 and Section 10 of the Carriers Act, there is no reason why we should not construe the said word as far as Section 10 is concerned in the same manner as it was done in Patel Roadways Limited (supra) qua Section 9. The distinction that has been sought to be drawn between Section 9 and Section 10, namely; that the former creates a substantive right whereas the latter only provides for procedure is unacceptable. Section 9 deals with the rule of evidence to be followed in dealing with the rule of evidence to be followed in dealing with cases under the Carriers Act and Rules of evidence are rules of procedure. Besides, the construction of the word "suit" in Patel Roadways Limited (supra) did not turn on whether Section 9 was either procedural or substantive.

8. The fact that the remedies under the Consumer Protection Act are in addition to and not in derogation of any other law does not mean that the rights under the Carriers Act can be exercised except in accordance with the manner provided under the Act, Sections 9 and 10 form an integral scheme by which a common carrier is fastened with liability irrespective of proof of negligence. Merely because the procedure under the Consumer Protection Act is summary in nature does not in any way warrant the abrogation of the requirement to serve notice under Section 10 of the Carriers Act before fastening any liability under that Act on the carriers. "

(Emphasis supplied)

8. HERE, it would be useful to refer to the definition of "notice" and "adequate notice", as per Black's Law Dictionary (Seventh Edition), the meaning of "notice" and "adequate notice" are as under: "notice" in its legal sense is information concerning a fact, actually communicated to a person by an authorized person, or actually derived by him from a proper source, and is regarded in law as "actual" when the person sought to be affected by it knows thereby of the existence of the particular fact in question. United States v. Tuteur, C. A. III 215 F. 2d 415. It is knowledge of facts which would naturally lead an honest and prudent person to make inquiry, and does not necessarily mean knowledge of all the facts. Wayne Bldg. and Loan Co. of Wooster v. Yarborough, 11 Ohio St. 2d 195 228 N. E. 2d 841, 847, 40 O. O. 2d 182. In another sense, "notice" means information, an advice, or written warning, in more or less formal shape, intended to apprise a person of some proceeding in which his interests are involved, or informing him of some fact which it is his right to know and the duty of the notifying party to communicate. Fed. R. Civil P. 5 (a) requires that every written notice be served upon each of the parties. A person has notice of a fact if he knows the fact, has reason to know it, should know it, or has been given notification of it. Restatement, Second, Agency 9. Notice may be either (1) statutory, i. e. made so by legislative enactment; (2) actual, which brings the knowledge of a fact directly home to the party; or (3) constructive. Constructive notice may be sub-divided into: (a) Where there exists actual notice of matter, to which equity has added constructive notice of facts, which an inquiry after such

matter would have elicited; and (b) where there has been a designed abstinence from inquiry for the very purpose of escaping notice. "adequate Notice"-Notice reasonably calculated to apprise a person of an action, proceeding, or motion. Notice sufficient to permit an objection or defense. U. S. v. San Juan Lumber Co. , D. C. Colo, 313 F. Supp. 703, 709. Notice reasonably calculated, in all circumstances of given proceeding, to apprise all interested parties of action and opportunity to present their objections. U. S. v. San Juan Lumber Co. , D. C. Colo. , 313 F. Supp. 703, 709.

It is notable in this regard that the driver of the carrier Shri Rattan Chand had made an endorsement on the reverse page of 5th March, 1998 to the effect that the goods booked in the box and box was found broken and goods were in damaged condition. Damage was thus noticed on 5. 3. 1998 by the agent of the transporter. Complaint was filed on 1. 4. 1998. Reply to the complaint was also filed by the opposite party No. 4, the carriers on 15. 5. 1998, i. e. within six months from the damage caused to the goods. Putting liberal construction on the requirement to serve notice under Section 10 of the Carriers Act and seeing that notice in writing need not be given through an advocate and the acknowledgement of a representative would indicate that the injury to goods including container was caused was brought to the knowledge of the transporter. Besides, in this case, the complaint itself was filed on 1. 4. 1998. Reply thereto was also filed by the dealer/transporter on 15. 5. 1998. We may consider this aspect in two phases: Supposing the complaint was filed before giving the notice, the complaint at the most could be rejected to file afresh after giving notice. In this case, notice was issued. Complaint itself would amount to notice, which has just been given within a period of around 1 month from the date of delivery. Reply itself was filed within a period of 2 months from the said date. At the most, the complaint might not have been entertained if the period of six months had expired. But, in the present case, injury to the container and the goods consigned was already in the knowledge of the representative of the carrier and he made an endorsement on the back of the goods receipt to the above effect. Consequently, the Carrier had been served with adequate notice under Section 10 of the Carriers Act, in writing within stipulated period of six months and reply had also been filed within 2 months.

9. MORE we consider, it appears the notice to agent is sufficient, adequate and constructive notice to carriers for the purpose of Section 10 of the Act. Even otherwise, the filing of the complaint in the aforesaid circumstances was "adequate notice" for fulfilling requirement of Section 10 of the Carriers Act.

10. THE complaint, therefore, could not be thrown on hyper-technical submission to the effect that there was no notice under Section 10 of the Consumer Protection Act. Insofar as the liability of opposite party Nos. 3 and 4 is concerned, the plea of the respondent No. 3 in terms of condition No. 3 was to the effect that the respondent would seize to be liable the moment the goods left the factory premises. There could not be any dispute about the fact that one of

the terms and conditions provided in Condition No. 3 is that "all the risk connected with the delivery, passes to the buyer, the moment the consignments leaves the manufacturer's factory".

Section 33 of the Sale of Goods Act, 1930 would appropriately supports this contention for it reads as under: "delivery-Delivery of goods sold may be made by doing anything which the parties agree shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer or of any person authorized to hold them on his behalf. "

11. HOWEVER, the question of discharging the respondent Nos. 3 and 4 on the plea of the condition that "the moment and the consignment left manufacturers factory should deemed to be delivery for the purpose of risk" has to be seen in the light of intention of the parties to be decided on the basis of facts and circumstances of the case and in terms of various provisions along with the provisions under Section 19 of the Sales of Goods Act. The option of selected carriers was mentioned in the confirmation order regarding preferred roadways for the transportation and it provided that the goods would be transported through TCI, Patel Roadways or Nitco and thus like Sections 39 and 40 of the Sale of Goods Act, 1930 also provided exception to the general rule about the passing of the risk. These sections read as under: "39. Delivery to carrier of wharfinger- (1) Where, in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, or delivery of the goods to a wharfinger for safe custody, is prima facie deemed to be a delivery of the goods to the buyer.

(2) Unless otherwise authorized by the buyer, the seller shall make such contract with the carrier or wharfinger on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omits so to do, and the goods are lost or damaged in course of transit or whilst in the custody of the wharfinger, the buyer may decline to treat the delivery to the carrier the custody of the wharfinger, the buyer may decline to treat the delivery to the carrier or wharfinger, as a delivery to himself, the buyer may decline to treat the delivery to the carrier or wharfinger, as a delivery to himself, or may hold the seller responsible in damages.

(3) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, in circumstances in which it is usual to insure, the seller shall give such notice to the buyer as may enable him to insure them during their sea transit and if the seller fails so to do, the goods shall be deemed to be at his risk during such sea transit".

(Emphasis supplied)

12. IN the present case, it is an admitted case that firstly the goods were not sent in through TCI, Patel Roadways or Nitco. It is further notable that Sub-section (1) of Section 41 provides further that- "41 (1) Buyer's right of

examining the goods- (1) Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract".

(Emphasis supplied) In the present case, in addition to the above factors, the goods sold were required to be installed and the machine was to be erected by the representative of the dealer and the wooden box containing the printing machine, etc. was not required to be opened except in the presence of an authorized representative. As such, the risk could not be passed on to the purchaser, the complainants. The opposite party Nos. 1 and 2 also failed to send the consignment through specifically mentioned three transporters. As such, the alleged deemed delivery would not be effective delivery despite the aforesaid Condition No. 3 of the confirmation order.

13. IN the aforesaid light, it could not be said that the risk had been passed on respondent Nos. 1 and 2, the complainants, without the acceptance of the goods. Consequently, the damage has occurred during transit at the risk of the sellers i. e. respondent Nos. 3 and 4 and they are liable to refund the amount of the sale price to the complainants/ respondent Nos. 1 and 2.

14. AS regards Oriental Insurance Company, we feel that the Insurance Company could not be held liable in view of the fact that the information furnished to the Insurance Company under the marine declaration on 3. 2. 1998 indicated that the destination of the journey/consignment was from Coimbatore to Pondicherry. As such, the risk for onward transmission of machinery to Bilaspur was not covered under the said declaration. Consequently, the Insurance Company cannot be held liable for any compensation for the loss caused to the goods consigned during in transit. Besides in absence of giving any information of endorsing declaration in favour of the complainant, there was no privity of contract between the Insurance Company and the complainant. As such, the Insurance Company is not liable to pay any compensation under the insurance policy. For the aforesaid reasons, while allowing the Appeal No. 151 of 2000 of Oriental Insurance Co. Ltd. , we dismiss the appeals of M/s. Associated Road Carriers Ltd. as well as Auto Print Machinery Manufacturer (P) Ltd. and A. S. Bakshi, Marketing Manager and confirm the order passed by the State Commission. However, parties are left to bear their own costs in the peculiar facts and circumstances of the matter. Ordered accordingly.