(2015) 07 NCDRC CK 0057

In the National Consumer Disputes Redressal Commission

Case No : 208 of 2002

The Kolar District Co -Operative Milk Producers Societies Union Ltd. APPELLANT

Vs

Canara Bank and Ors. RESPONDENT

Date of Decision : 01-07-2015

Acts Referred:

Citation : (2015) 07 NCDRC CK 0057

Hon'ble Judges : Ajit Bharihoke

Final Decision : Consumer dismissed

Judgement

1. THE complainant is a co -operative society formed with a view to serve the interest of milk producers of Kolar District, Karnataka.

2. ON 13th July, 1998 the complainant placed a purchase order on opposite party No. 2 M/s. Lynjef International for supply of one reconditioned Pasilac Continuous Butter Making Machine inclusive of two numbers 15 MT. Deep Freeze Cabin Container (hereinafter referred to as Machine). The cost of machine was 1,05,000/ - Australian Dollars. The second opposite party accepted the purchase order and requested the complainant to open the letter of credit. It is the case of the complainant that as per the terms of the purchase order the machine was to be delivered within four weeks at Chennai Port by sea and from there to Kolar by road. The mode of payment was that the complainant would draw a letter of credit in favour of 2nd opposite party for a sum of 1,05,000/ - Australian Dollars for a period of 180 days and opposite party No. 2 was required to service the documents through its Banker ANZ Bank.

3. THE complainant, thus, approached opposite party No. 1 Bank for opening an irrevocable letter of credit in favour of opposite party No. 2. The complainant also gave an declaration -cum -undertaking and submitted a request for waiver of Lloyds/SGS Certificate as demanded by the first opposite party.

4. OPPOSITE party No. 2 thereafter without dispatching goods submitted the

relevant documents i.e. invoice, bill of lading, insurance certificate, certificate of origin, packing slip, inspection certificate, performance guarantee and beneficiary''s certificate to opposite party No. 1. Opposite party No. 1 thereafter wrote a letter dated 14th September, 1998 to the complainant stating that it was holding the bills drawn on complainant and informed that the documents would be delivered against acceptance of payment. The letter also stated that exchange control formalities were to be completed before taking delivery of documents. The opposite party No. 1 also called upon the complainant to ascertain the arrival date of the steamer from the clearing agency and inform the bank''s lien to the shipping company and arrange for clearance and warehousing and insurance and also submission of certain forms and import license. Under the purchase order the complainant was supposed to get delivery at Kolar and thereafter inform the bank about satisfactory performance of the machine before the release of payment under the bank guarantee. Thus, the complainant was under the impression that the machine which was stated to have been dispatched on 16th August, 1998 from Melbourne would arrive at Kolar in 2nd/3rd Week of September, 1998 and then after taking delivery and satisfying itself about performance of machine the complainant would inform the first opposite party to effect payment. However, the machine never arrived.

5. THE complainant was under the bona -fide belief that payment under letter of credit would not be made by opposite party No. 1 unless satisfactory performance was confirmed. However, in first week of February, 1999 the complainant received a letter from opposite party No. 1 stating that they were holding the bills pertaining to the purchase of machine and the complainant had not retired the bill by making payment and requested him to retire the bill by making full payment on or before 12.2.1999. Thereafter, on 18.2.1999 complainant received another letter dated 12.2.1999 stating that bill in respect of the machine has been delinked and opposite party No. 1 Bank was had remitted a sum of Rs. 28,91,832/ - including commission @ 0.15% to opposite party No. 2. Vide said letter the complainant was called upon to remit the aforesaid amount alongwith interest @ 17.34% from the date of delinking till the date of remittance. The said letter was followed by another letter dated 12.5.1999 calling upon the complainant to remit the amount of Rs. 28,87,500/ - together with interest @ 17.34% from 12.2.1999 failing which it was stated in the letter dated that the bank would close fixed deposit account No. 178 & 179 respectively dated 15.12.1998 for the sum of Rs. 50 Lakhs to cover the liability with interest. Being faced with the aforesaid threat the complainant remitted the sum of Rs. 28,87,500/ - towards payment of the second opposite party and requested the bank to release the documents. The bank on receipt of cheque furnished the documents which were stated to have been received from the banker of the second opposite party. According to the complainant he did not receive delivery of the machine and that the opposite party No. 1 bank by releasing the amount under letter of credit before the machine was delivered and satisfactory performance was intimated, have committed deficiency in service

and is, therefore, liable to compensate the complainant for the loss suffered by him due to non -delivery of machine. It is also the case of the complainant that opposite party No. 2 having received the consideration amount but failing to deliver the machine has caused immense loss to the complainant and his conduct also amounts to unfair/restricted trade practice.

6. OPPOSITE party No. 2 despite of service of notice of the complaint failed to put in appearance. It was, therefore, proceeded ex -parte vide proceedings dated 11 December, 2002. Opposite party No. 1 bank has resisted the complaint. In the written statement opposite party No. 1 took the preliminary objection that the complaint is barred by limitation. Even on merits, the allegations of deficiency in service were denied and it was pleaded that opposite party Bank had acted in accordance with the terms and conditions of the letter of credit particularly the clause ''G''.

7. THE complainant has filed affidavit of Dr. S.P. Krishna, the then Managing Director in support of the complaint whereas the opposite party No. 1 has filed affidavit of Shri V. Ramesh Kumar, Senior Manager, Canara Bank.

8. WE have heard learned counsel for the parties and perused the record. Learned counsel for opposite party No. 1 has contended that the instant complaint is liable to be dismissed as it is barred by limitation. Expanding on the argument, learned counsel for the opposite party No. 1 has contended that the consumer complaint has been filed on the allegation of wrongful release of the amount in favour of opposite party No. 2 against the terms and conditions of the letter of credit. It is argued that perusal of the complaint would show that complainant was informed about the release of sum of 1,05,000/ - Australian Dollars under letter of credit to opposite party No. 2 vide letters dated 12.2.1999, 15.4.1999 and 12.5.1999. From this it is evident that the alleged act which is claimed as deficiency in service was done on 12.2.1999 and the complainant was informed about the same on 12.2.1999, 15.4.1999 and 12.5.1999 meaning thereby that the cause of action to challenge the alleged wrongful release of money under letter of credit arose on 12.2.1999 which admittedly came to the knowledge of the complainant through the letters dated 15.4.1999 and 12.5.1999. Thus, it is clear that cause of action for filing the complaint arose in the year 1999 but the consumer complaint has been filed after the expiry of two years from the date of arising of cause of action on 3.6.2002. Thus, it is contended that the consumer complaint is hopelessly barred in view of Section 24 -A of the Consumer Protection Act, 1986 and the complaint is liable to be dismissed on this count alone particularly when no application for condonation of delay has been moved by the complainant despite of the fact the plea of limitation was specifically taken in the written statement. Learned counsel for the complainant on the contrary has drawn our attention to letter dated 16.10.2001 addressed by the Manager, Canara Bank (opposite party No. 1) to the complainant wherein it is mentioned that the Bank is looking into the representation dated 6th September, 2001 against the Kolar Branch regarding

import of machine from Australia. It is contended that aforesaid letter of opposite party No. 1 amounts to acknowledgement and since the representation of the complainant was under consideration of the Bank the period of limitation obviously got extended from the date of acknowledgement dated 16th October, 2001. Thus, complaint being within two years from 16.10.2001 is well within limitation.

9. IN order to appreciate the contention of respective parties, it would be useful to have a look on Section 24 -A of the Consumer Protection Act, 1986 which deals with the period of limitation for filing the consumer complaint. Section 24 -A reads as under: - Limitation period. - (1) The District Forum, the State Commission or the National Commission shall not admit a complaint unless it is filed within two years from the date on which the cause of action has arisen.

(2) Notwithstanding anything contained in sub -section (1), a complaint may be entertained after the period specified in sub -section (1), if the complainant satisfies the District Forum, the State Commission or the National Commission, as the case may be, that he had sufficient cause for not filing the complaint within such period:

Provided that no such complaint shall be entertained unless the National Commission, the State Commission or the District Forum, as the case may be, records its reasons for condoning such delay.

10. ON reading of the above, it is clear that period of limitation for filing a consumer complaint is two years. Clause -2 of the Section, however, provides an exception to the effect that a consumer complaint may be entertained after the period of limitation provided the complainant satisfies the consumer fora that he had sufficient cause for not filing the complaint within such period. Admittedly, the instant complaint has been filed on the allegation that opposite party No. 1 has committed deficiency in service by remitting the amount of letter of credit to opposite party No. 2 against the terms and conditions of the letter of credit despite of the fact that neither the delivery of machine was received by the complainant nor he had given performance certificate to the opposite party No. 1 Bank. On perusal of the complaint we find that it is admitted case of the parties that the sum under letter of credit was remitted by opposite party No. 1 to opposite party No. 2 on 12.2.1999 and the fact of remittance of amount was brought to the knowledge of the complainant vide letters dated 12.5.1999 whereby the complainant was called upon the remit the amount of Rs. 28,87,500/ - (rupee equivalent of 1,05,500/ - Australian Dollars) together with 7.34 interest w.e.f. 12.2.1999. It was also intimated in the letter that in the event of the complainant failing to remit the said amount the Bank would close its two fixed deposit accounts for Rs. 50 Lakhs before maturity and recover the amount with interest and other charges. The complainant has placed on record his letter dated 10 September, 1999 vide which he remitted the amount of Rs. 28,87,500/ - in favour of opposite party No. 1 Bank towards payment for import of the machine and requested for release of documents. From the above it is

clear that the bank guarantee was honoured by opposite party No. 1 Bank on 12.2.1999 and this fact came into the knowledge of the complainant on the receipt of the letter dated 12.5.1999.

11. THE grievance of the complainant is against the release of bank guarantee amount in favour of opposite party No. 2. As the amount was released on 12.2.1999 and admittedly this fact came to the knowledge of the complainant vide letter dated 12.5.1999, in our view, the cause of action for challenging the aforesaid act of release of bank guarantee amount on the part of the opposite party No. 1 arose on 12.2.1999 and secondly on 12.5.1999 when this fact came to the knowledge of the complainant. Thus, in view of Section 24 -A of the consumer complaint to be within the limitation ought to have been latest by 12.5.2001. Admittedly, consumer complaint has been filed on 3.6.2002 i.e. more than three years after the cause of action arose. As such, the consumer complaint is hopelessly barred by limitation.

12. LEARNED counsel for the complainant has taken a plea of extension of period of limitation on the ground that he given a representation against wrongful release of amount to opposite party No. 1 which was acknowledged vide reply dated 16 October, 2001 stating that opposite party No. 1 was looking into the matter. It is contended that since opposite party No. 1 had assured the complainant that it was looking into the matter the complainant was justified in waiting for the outcome of the representation before taking recourse to the legal proceedings. We do not find merit in this contention. On perusal of the letter dated 16th October, 2001 we find that vide this letter Manager, Canara Bank has acknowledged the receipt of representation of the complainant dated 6 September, 2001 regarding the subject disputed. From this it is evident that representation against the alleged wrongful release of the amount of L.C. was made by the complainant on 16.9.2001 which is also after the expiry of period of limitation for filing of the consumer complaint as provided under Section 24 -A of the Act. In our considered view by making a representation after expiry of period of limitation and getting confirmation regarding the receipt of the same the complainant cannot get the extension of period for filing of the complaint which became time barred much earlier to filing of representation. There is no case against opposite party No. 1 even on merits. Learned counsel for the complainant has drawn our attention to the letter of credit (Ext. R/1/1) and submitted that as per the letter of credit the amount of letter of credit was payable to opposite party No. 2 within 180 days from the bill of lading for 100% of invoice value drawn on the bank and accompanied by various documents one of which was performance certificate in 02 folds. It is contended that the opposite party No. 1 Bank without having obtained satisfactory performance report from the complainant has released the amount of letter of credit, which obviously amounts to deficiency in service.

13. WE do not find merit in this contention. Ext. R -1/5 is the letter of the complainant dated 26.9.1998 addressed to the Manager of the opposite party

No. 1 Bank which reads as under: - "This letter bears reference to the documents received under import letter of credit established by you covering import of Machine as detailed above and in this regard WE HEREBY

i. tender our acceptance of documents drawn under subject LC without reservations.

ii. Confirm the due date of bill as 12.2.1999.

iii. Undertake submit all the necessary documents to ensure transfer of funds.

iv. Undertake to make payment on due date and authorize you to debit our account on the due date the counter value of the bill amount together with interest and such other charges incidental thereto."

14. ON reading of the above, it is clear that documents received from opposite party No. 2 under import letter of credit were accepted subject to letter of credit without reservation and the complainant undertook to submit all necessary documents to ensure transfer of funds and to make payment on due date and authorized the opposite party Bank to debit their account on the due date the counter value of the bill amount together with interest and incidental charges. Case of the complainant is that subject machine was never delivered to it. If that was the case it was obligatory on the complainant to intimate the Bank before the due date of payment that he has not received the subject machine and, therefore, the letter of credit should not be honoured. The complainant, however, has not sent any such communication to the Bank. Thus, in our considered view the Bank by releasing the amount of letter of credit on due date has not committed any deficiency in service and the complainant because of its own conduct is estopped from raising the plea that the Bank has committed deficiency in service by releasing the amount of letter of credit without verifying about performance certificate. Thus, on merits also the complaint against opposite party No. 1 is liable to be dismissed. In view of the discussion above, we do not find merit in the complaint. The complaint being hopelessly time barred is accordingly dismissed.

