
(2006) 08 NCDRC CK 0007

In the National Consumer Disputes Redressal Commission

UNICHEM LABORATORIES LTD.

APPELLANT

Vs

NEW INDIA ASSURANCE CO. LTD.

RESPONDENT

Date of Decision : 28-08-2006

Acts Referred:

Citation : 2006 0 NCDRC 16 : 2006 3 CPJ 359 : 2006 3 CPR 43

Hon'ble Judges : M.B.SHAH , RAJYALAKSHMI RAO J.

Advocate : S.Raghawan , R.Nikhlesh , KISHORE RAWAT , RANJEET KUMAR

Judgement

1. THE main question involved in this case is : in case of loss of insured goods or merchandise whether the Insurance Company is bound to reimburse on the basis of the cost of production or on the basis of sale price or by taking into account cost of production plus profit. In our view, in the case of unvalued policy, the Insurance Company is required to reimburse on the basis of cost of production of the goods or merchandise and not on the basis of sale price of the goods or cost of production plus loss of profit.

2. M /s.Unichem Laboratories Ltd., Complainant herein, has filed this Original Petition contending that due to fire goods worth Rs.23 lakhs were destroyed during transit in the godown (at Gaziabad) of carrier, M/s. Patel Roadways Ltd. (Opposite Party No.2), on 23.3.1993. It is contended that the Complainant has taken an "All India Marine Insurance (Cargo) Special Declaration Policy" for the period between 1.11.1992 and 31.10.1993. It was an open Marine Insurance policy for a sum of Rs.8 crores. It is their say that on 24.2.1993, Akin Laboratories, Hyderabad, at the instance of the Complainant (Ghaziabad Unit), despatched a consignment of 209 C.Boxes containing 49,820 jars of Unienzyme tablets worth Rs.23,23,064/- as per two transfer invoices (Rs.12,35,493/- and Rs.10,88,111/-) through M/s. Patel Roadways Ltd. The consignment was booked upto Ghaziabad as the destination/delivery point, since the Complainant's office and godown are in Ghaziabad city and that the Carrier's godown is also situated in Ghaziabad. It is stated that the goods reached at the Carrier's godown on 4.3.1993, as per the information received by the complainant. Thereafter, an

incident of fire took place at the godown of the Carrier on 23.3.1993 and the consignment was completely destroyed and the complainant was informed accordingly. The Complainant made enquiries with the Carrier. From the Carrier, they came to know that the Carrier had also taken an insurance policy from the National Insurance Co. Ltd. for the goods lying in its godown. For the loss suffered by the Carrier, survey was carried out and loss and damage was assessed. Yet, the claim made by the Complainant was not settled by the Carrier.

3. IN the meantime, the Complainant also informed the Opposite Party - M/s. New India Assurance Co. Ltd. (hereinafter referred to as the Insurance Company) from whom it has taken Insurance coverage. The Insurance Company appointed M./s. Agrawal and Sons , New Delhi as surveyors and information was also sent to the Carrier with a request to cooperate. The Complainant claimed Rs.23,23,604/-. The Surveyors after completing the survey, submitted their report on 27th July, 1993. Thereafter, the insurer sought information about the payment of freight of Rs.8,820/- . The information sought was submitted, but the claim was not settled by the Carrier.

4. IT is also stated that the Complainant requested the Carrier to make good the loss by letters dated 12th June, 1993, 27th August, 1994, 21st May, 1996, 25th May, 1996 and 27th March, 1997. Subsequently, the Insurance Company deputed Lt. Col. Khairat Lal Sharma, Surveyor, Loss Assessor & Investigator. Again, the Surveyor sought additional information. As the claim was not settled, hence this complaint against the Insurance Company as well as the Carrier claiming a sum of Rs.23,23,604/- with interest @ 18% and costs of Rs.50,000/- was filed on 31st March, 1997. However, the prayer is made that the Insurance Company be directed to pay the amount as stated and no specific prayer is made against the Carrier. It is not disputed that the Complainant had sent the raw material for manufacturing of Unienzyme & MPS tablets to Akin Laboratories (P) Ltd, Hyderabad. After the tablets were manufactured, they were sent though the Carrier, Opposite Party No.2 vide two Invoice Nos. R142 dt. 24.2.93 and R143 dt. 24.2.93 wherein there is a note to the following effect: Note - APPROX COST OF R.M + P.M. ETC. OF THIS INVOICE = Rs. 11,89,135.90. APPROX. COST OF TOTAL CONSIGNMENT INCL. LABOUR CHARGES RS.12,35,493.40" and "Note - APPROX COST OF R.M&P.M. ETC. OF THIS INVOICE IS Rs. 10,47, 283.60. APPROX. COST OF TOTAL CONSIGNMENT INCLUDING LABOUR CHARGES IS RS.10,88,111.10". In both the invoices labour charges are mentioned as Rs.46,357.50 and Rs.40,827.50.

5. FOR the claim made by the Complainant, the Insurance Company has produced on record survey report dated 27.7.1993 of Agarwal and Sons. While assessing the loss, Surveyors have discussed the same in detail and have observed as under: "The tablets were manufactured by M/s. Akin Laboratories (P) Ltd. on job work basis. The raw material and packing material was supplied by the insured. The invoices indicate the labour charges and also the total value of the invoice. The excise duty is included in the invoice. The declaration to the

sales tax authorities as is evident from the Form 31 is the total Invoice value. The carrier has also given a Non Delivery Certificate for the total consignment. Based on these facts the Insured claimed as under: Note: (i) We have observed that the limit per sending as per the insurance policy is Rs.20,00,000/-. (ii) We observed from the Invoices that Invoices consist of two parts namely (a) manufacturing and labour charges (b) approximate cost of raw material and packing material and total of the two has been described as cost of total consignment. Similarly in G.P.I. issued by AKIN laboratories Private Limited, the assessable value of the consignments has been taken as Rs.19,81,840/- on which excise duty amounting to Rs.3,41,867.40 is stated to have been paid. Total comes to Rs.23,23,707/-. During our discussions we requested the insured to clarify the words "Approximate cost of Raw Material". As the same is supplied by the Insured, we wanted to have correct position as this invoice was not a Sale Invoice but a stock transfer invoice only. Moreover, on checking the declarations for Raw Material despatch we found only one entry for Rs.5,14,467/- (Despatch date 28.11.92). The policy does not mention basis of valuation and as per Marine Insurance Act, the Insured can claim on the basis of actual cost whereas the Transfer Invoice has been made on the basis of Insureds own sale price as clarified by the Insured during discussions. After our clarifications that the actual cost of Raw Material + manufacturing and labour charges + Both way freight and all other expenses including excise duty paid can be the only maximum liability, the insured has now given the total basis of cost (copy enclosed). Insured has included interest of Rs.41,694/- and Administrative overheads of Rs.35,557/-. Since the Interest as well as Administrative overheads are included based on actual working it can be taken as part of cost. Therefore, the Assessment of loss works out as follows: Note: In case of total loss freight paid is not payable but insured has paid it as transporters insisted at the time of taking of non-delivery certificate. In our opinion although the insured has a right to make the agreed value basis which may be the Transfer Invoice (Sale Price), but in the absence of any basis of valuation, in our opinion, only cost including all expenses should be the basis for claim settlement as per Marine Insurance Act. Hence, our assessment is for Rs.10,74,149/- and the same has been calculated as per insured"s own records".

6. DESPITE Survey Report, the loss assessed by the Insurance Company was not paid. Hence, during the pendency of the complaint, by an interim order dated 1.12.2005, we have directed the Insurance Company to pay the admitted amount of Rs.8,05,611/- as per the assessment made by the surveyor with interest at the rate of 9% per annum from 1.12.1997 till 31.12.2005. Admittedly, the said amount is paid by the insurance Company to the Complainant. Learned Counsel Mr.Raghavan, appearing on behalf of the Complainant submitted that the Complainant is required to be reimbursed by a sum of Rs.23,23,604/- on the basis of the transfer invoices. It is his submission that in preparing the medicine research and development costs as well as the goodwill is required to be added or taken into account. On that basis, transfer invoices are prepared which would

be the approximate value of the consignment. He has also referred to Section 29 of the Marine Insurance Act, 1963 (hereinafter referred to as the M.I. Act) which provides for valued policy.

7. AS against this, learned Counsel for the Insurance Company submitted that the Insurance Company is required to reimburse loss suffered by the insured. He referred to Section 18(3) of the M.I. Act, which provides that in case of insurance on goods or merchandise, the insurable value is the prime cost of the property insured, plus the expenses of and incidental to shipping and the charges of insurance upon the whole. He pointed out that in the present case the insurance policy is not a valued policy.

8. IN our view, there is no substance in the contention of the learned Counsel for the Complainant that the policy taken by the Complainant was a "valued policy". Section 29 of the M.I. Act provides that a policy may be either valued or unvalued; a valued policy is a policy which specifies the agreed value of the subject matter insured; and, in case of valued policy, in the absence of fraud, the value fixed by the policy is, the sum as is agreed between the insurer and the assured. In the present case, there is nothing on record to establish that the policy taken by the Complainant is valued policy. There is no agreed valuation by the insured and the insurer. It is an Open Marine Insurance Policy with a specific condition that in case of "one trip" limit for sending goods would be Rs.20 lakhs and the sum insured for the entire period of one year was Rs.8 Crores. Further, Section 30 defines "Unvalued policy", to mean, a policy which does not specify the value of the subject matter insured, but is subject to the limit of the sum insured, and leaves the insurable value to be subsequently ascertained, in the manner provided under the Act. For ascertaining the insurable value Sub-section (3) of Section 18, inter alia, provides that in insurance of goods or merchandise, the insurable value is the prime cost of the property insured, plus the expenses of and incidental to shipping and the charges of insurance upon the whole. That has been worked out by the surveyors.

9. THE Surveyors have rightly discussed this aspect and have arrived at the conclusion that only prime cost including all expenses could be the basis for claim settlement as per the M.I. Act. For assessing the loss, they have relied upon undisputed document, Annexure R-3, dated 28th July, 1993, given by the Complainant wherein the cost is worked out as under:

10. WORKING of Cost of 49,820 Jars of Loot Unienzyme Relying upon the loss assessed by the Surveyors, as the Complainant has not protected the recovery rights against the Carrier by initiating legal action, the Insurance Company treated the case as non-standard claim and reduced the loss by 25% and offered to pay Rs.8,05,611/- vide its letter dated 28.11.1997 which was not accepted by the Complainant. From the aforesaid discussion, it can be held that the total loss suffered by the complainant is for a sum of Rs.10.74,149/-, which in case of default by the carrier, Insurance Company is required to reimburse to the Complainant. The next question is with regard to carrier's liability. As per the

settled law, primary liability to reimburse the Complainant is that of the carrier. In the present case, carrier has not disputed the fact of fire at the godown and the loss suffered by the Complainant. Evidence by way of affidavit is filed by one Arun K. Singh, Assistant Manager (Legal) of the Carrier Company. In the said affidavit, it has been pointed out that the carrier was not negligent in discharge of its duties and the damage caused to the consignments was beyond their control. It is also pointed out that on 3.4.1993, the Complainant was asked, requested and advised to lodge the claim with their underwriters immediately to avail the maximum and speedy compensation. The Complainant was also requested to submit an affidavit stating that the consignment was insured for transit risk with their respective underwriters and that the insurance cover was valid and in existence with the underwriters, along with the copy of the original invoices, insurance policy cover note and consignee's copy. It is also contended that consignment of the Complainant was at owner's risk and carrier was not responsible for the loss caused to the consignment. Hence, within 3 months of the loss of consignment by fire, the certificate with the remark "consignment not delivered" was issued to enable the Complainant to lodge the claim with their underwriters.

11. IT is also pointed out that the Insurance Company of the Carrier has appointed M/s.Mehta and Padamsey Surveyors Pvt. Ltd. and the claims were divided into three heads, namely, (i) consignments which were declared to have not been covered by separate marine insurance covers by the concerned consignors-consignees; (ii) consignment initially as "covered" under separate marine insurance covers by consignors-consignees but later found to have expired and/or not valid at the time of fire; and, (iii) consignments which were declared to have been covered by separate marine insurance covers by the concerned consignors-consignees. On that basis, the loss was assessed by the Surveyors. As per the Surveyors' report, they have not assessed the loss with regard to consignments for which marine insurance cover were taken by the consignors/consignees separately and to that effect survey report dated 4th April, 1997 given by M/s. Mehta and Padamsey Surveyors Pvt. Ltd. is produced on record.

12. IN conclusion, they have stated as under: "The insurers' liability arises only when the insured makes payment to their customers, in their capacity as bailees. Documentary evidence of the insured having paid out an aggregate amount of Rs.29,03,145/- has been produced before us and verified. Based on the above On Account Payment not exceeding Rs.21,94,423/- as worked out above, can be made to the insured. Additional reimbursements can be made to the insured as and when they make further payments to the various consignors/consignees; subject to their producing documentary evidence thereof, for which we will issue supplementary reports from time to time".

Along with the survey report there are various annexures including Annexure D-1, which is a statement giving details of affected consignments in booking-

cum-delivery-cum-transshipment godown declared to have been covered under the separate marine insurance cover is produced wherein the goods transported by the Complainant is also mentioned. The said survey report dated 4th April, 1997 leaves no doubt that the Insurance Company of the carrier has kept the question open with regard to payment of damages to be reimbursed by the carrier to those other consignors/consignees to whom their Insurance Company has not reimbursed the damages.

13. TO the same effect, on behalf of the Carrier (Opposite Party No.2), written submissions are filed on 17.8.2006 wherein it is, inter alia, contended that: (i) that the fire was serious in nature, and there was no fault on their part as they have taken necessary precautions to prevent the fire in the godown; (ii) non-delivery certificate was also issued to the Complainant to enable them to lodge their claim with their underwriters (Respondent No.1); (iii) no relief is sought in the prayer clause against the carrier; (iv) the claim of the Carrier Company against its Insurance Company was assessed by the Surveyor by dividing into three parts: (a). 539 consignments declared to have not been covered by separate marine insurance; (b). 239 consignments covered under separate marine insurance by the consignors/consignees but later found to have been expired and/or not valid at the time of fire; (c). 202 consignments covered by separate marine insurance cover taken by the consignors/consignees and on that basis the Complainant was asked to lodge claim against their underwriters; (v). Insurance Company (Respondent No.1) is not a consumer; (vi). The claim is barred under Section 24-A. In our view, the aforesaid submissions are without any substance. Firstly, law is settled on the subject. It is the primary liability of the carrier to reimburse the plaintiff/Complainant in case of loss/damage for non-delivery of the goods entrusted to them for carriage. For this Sections 8 and 9 of the Carriers Act, 1865, are very clear and the same are interpreted by the Apex Court in *Nath Bros. Exim International Ltd. Vs. Best Roadways Ltd.* (2000) 4 SCC 553, wherein the Court has held that the liability of the carrier to whom the goods are entrusted for carriage is that of the insurer and is absolute in terms, in the sense that the carrier has to deliver the goods safely, undamaged and without loss at the destination, indicated by the consignor. So long as the goods are in custody of the carrier, it is the duty of the carrier to take due care as he would have taken of his own goods and he would be liable if any loss or damage was caused to the goods on account of his own negligence or criminal act or that of his agent and servants. The Court has also observed that the carrier can escape his liability only if it is established that the loss or damage was due to an act of God or enemies of the State. The Court has also observed that the expression "at owner's risk" does not exempt the carrier from his own negligence or negligence of his servants or agents.

14. SECONDLY, the contention that the claim is barred under Sec.24-A of the Consumer Protection Act, 1986, is without any substance. The Carrier has not settled the claim made by the parties till the Surveyors of the Insurance Company of the Carrier submitted their report. The report, as stated above, was

submitted only on 4th April, 1997. Further, the Complainant has also written letters to the Carrier to settle their claims. Their letters are dated 12.6.1993; 27.8.1994; 21.5.1996; 25.5.1996; and, 27.3.1997. At no point of time the carrier has denied its liability. However, the Carrier had asked the Complainant to lodge its claim with the underwriters. On that basis, claim was lodged with Opposite Party No.1. But, as the claim was not settled, complaint was filed before this Commission on 31st March, 1997. Therefore, the contention that the claim is time barred is without any basis. The next contention is with regard to prayer clause. In the complaint which is filed before this Commission, the Carrier is a party Respondent. All the necessary facts are stated with regard to the Carrier's liability. It is stated that documents pertaining to the loss and resultant claim was furnished to the Carrier. Thereafter, the Complainant wrote a letter to the Carrier to make good the loss to the tune of Rs.23,23,604/-. Another communication was sent. Repeated letters were sent. But, there was no response. Thereafter, an inquiry was made as to whether the Insurance Company of the Carrier has settled the claim of the Complainant or not. However, the Complainant had not received any information. Therefore, at the initial stage, National Insurance Company Ltd. which had insured the Carrier was also made as party Respondent. However, as the Insurance Company of the Carrier was not necessary party it was required to be deleted. Further, before the Consumer Forum, inquiry is inquisitorial one and not adversary. Therefore, not claiming specifically against the Carrier in the prayer clause would not defeat the right of the Complainant to receive the reimbursement from the Carrier which is primarily liable to reimburse the Complainant for the loss suffered by it. In view of the foregoing discussion, the complaint is partly allowed. It is held that the Respondent No.2 - Carrier shall pay a sum of Rs.10,74,149/- with interest at the rate of 9% p.a. from 23.9.1993 (i.e. after six months from the date of the incident of fire). The Carrier is directed to pay the said sum within a period of three months from today. If the amount is not paid by the carrier within the stipulated time, it would be open to the Complainant to recover the remaining amount from the Insurance Company. In case the Carrier pays the amount as stated above, Complainant shall refund the amount paid by the Insurance Company as per our interim order dated 1.12.2005. In any case, if there is failure on the part of the Carrier to pay the amount, it would be open to the complainant to recover the same by filing execution petition and refund the amount paid by the Insurance Company.