SUPREME COURT OF INDIA

New India Assurance Co.Ltd.

Vs.

Priya Blue Industries Pvt. Ltd.

C.A.No.3714 of 2005

(B.Sudershan Reddy and Surinder Singh Nijjar,JJ.,)

09.03.2011

JUDGMENT

B.Sudershan Reddy,J.,

1. This appeal under Section 23 of the Consumer Protection Act, 1986 is directed against the final judgment and order of the National Consumer Disputes Redressal Commission. The National Commission by the impugned judgment allowed the complaint preferred by the respondent complainant and accordingly directed the appellant Company to pay a sum of Rs. 13.69 crores with interest at 9% per annum from 9th June, 1997 till its realization.

2. In order to consider as to whether the impugned judgment of the National Commission (for short `the Commission') suffers from any infirmity requiring our interference, it may be just and necessary to notice relevant facts.

3. The respondent-complainant at the relevant time was carrying on ship breaking and scrap dealing business. It had under a Memorandum of Agreement dated 2.6.1997 purchased and imported to Alang, a very large bulk ore and oil carrier by the name of "Vloo Arun" for the purpose of scrapping (ship breaking/demolition) from one M/s. Ruby Enterprises Inc. Belgium. There is no controversy that the respondent has taken a marine insurance policy for hull and machinery on 4.6.1997 for the said vessel. The policy was obtained after taking possession of the vessel for covering only 9 kms. distance between Alang Anchorage to Alang Ship Breaking yard. Insurance cover was for a sum of Rs. 25.70 crores for which a premium of Rs. 1,14,280/- was paid. As per the special condition it was "Institute Voyage Clause (hulls) dated 1.10.1983 as attached with a specific condition, `but to cover and/or Constructive Total Loss only' including salvage and sue and labour and expenses."

4. The case of the complainant is that on 9.6.1997, when vessel started its `funeral voyage' on its way it was completely damaged and could not be beached at the specified place because of extremely rough weather resulting in total loss. The insurance Company was accordingly informed, followed by several letters by the complainant requesting it to state as to what

action was to be taken with regard to the stranded vessel. The insurance Company did not respond.

5. It is under those circumstances the respondent complainant has claimed an amount of Rs. 18,30,44,912/- with interest @ 19.5% p.a from 14.6.1997 till its payment and Rs. 2.5 lakhs as costs and expenses of the litigation and further a sum of Rs. 5 lakhs towards harassment meted out by the appellant insurance Company.

6. In response to the claim, the appellant insurance Company appointed two Surveyors, and the respondent complainant with the acceptance and approval of the appellant insurance Company appointed Tony Fernandez Average Adjusters Pvt. Ltd. as its Surveyor. Each one of the Surveyors appointed by the appellant insurance Company submitted their respective reports on 24.6.1997 and 14.7.1997.

7. In addition to the aforesaid two reports on record, there is a report on record of Tony Fernandez Average Adjusters Pvt. Ltd. which was appointed by the respondent complainant. The appellant insurance Company had accepted and approved its appointment. In the report submitted by Tony Fernandez Average Adjusters Pvt. Ltd., the cause of loss is as under:

> "The proximate and dominant cause of the vessel becoming a total loss was the stranding on a rocky shoal prior to arriving at the destination. The stranding itself was due to heavy weather encountered on the "funeral" voyage to the ship-breaking yard. The stranding was accidental and fortuitous in nature. Both heavy weather and stranding are perils of the sea. The proximate cause of the loss is an insured peril, falling under Clause 4.1.1 of Institute Voyage Clauses Hulls, 1/10/83 wordings (Clause 285), which covers loss of or damage to the subject-matter caused by, `perils of the seas rivers, lakes or other navigable waters.' We have satisfied ourselves that the loss was neither caused proximately nor concurrently, by any of the excluded perils listed in Section 55 of the Marine Insurance Act, 1963, (MIA 1963), read in conjunction with the terms and conditions of the Policy of Insurance. We have also satisfied ourselves that the loss was not caused proximately or concurrently by perils enumerated in the Paramount Exclusions of Clauses 20, 21, 22 and 23 of the Institute Voyage Clause Hulls 1.10.83 wordings."

It is further observed in the said report that there was "no evidence to indicate that there was either non- disclosure of material facts or of any misrepresentation to underwriters by PBIL as the Proponent." They finally assessed the claim under Total Loss Claim at Rs. 13.69 crores.

8. The National Commission, upon a meticulous assessment and analysis of all the aforesaid survey reports, found that:

> "A) Insurance coverage was taken for a short voyage of the vessel from Alang Anchorage to Alang Ship Breaking Yard;

B) The vessel came from Singapore to Alang Anchorage point and was on its funeral voyage; C) From Singapore to Alang Anchorage point voyage was carried out on one engine only.

D) Delivery of the vessel was given to the insured at the Alang Anchorage point by the seller; E) At the time of the delivery one engine was functioning and was in working condition. The other engine was out of order;

F) Beaching of the vessel was scheduled on 6.6.97 at the evening tide time;

G) As the engine failed to start, beaching was not carried out;

H) Thereafter, beaching was scheduled on 9.6.97; I) During the voyage, the sea condition was rough and strong sea currents were flowing due to strong monsoon winds.;

J) The vessel started drifting away from the yard, and drifted towards a different point; K) Near Plot No. V-5(resting place) and beyond there was a coral rock structure on see bed which was not visible during the high tide time. The vessel's bottom collided with rocks and the vessel was grounded and all efforts to move the vessel on available power failed. L) The vessel was thereafter, badly damaged and was found deeply imbedded to the depth of 5ft.

M) It has developed holes and cracks;

N) With all normal efforts floating of the vessel was not possible because it was partially lying on the rock structure and partially submerged in sand; and O) The grounded vessel could not be re-floated with the normal salvaging procedure and could not be beached.

In addition, in the report of J.B. Boda Offshore Surveyors & Adjusters Pvt. Ltd, it is inter alia observed:

"It is a `total loss' because it was irretrievably stranded - it was concluded that the vessel was irretrievably stranded due to marine casualty which has resulted for the vessel being deemed a total loss."

9. Tony Fernandez Average Adjusters Pvt. Ltd. further inter alia stated that "there is no evidence with regard to non-disclosure of material fact, nor misrepresentation; and the proximate and dominant cause of vessel becoming a total loss was stranding on the rocky shoal prior to arriving at the destination. This was due to heavy weather encountered on the `funeral' voyage to the ship-breaking yard. The stranding was accidental and a fortuitous one in nature and was proximately caused by an insured peril".

10. In the proceedings before the National Commission, the respondent complainant mainly contended that the vessel was badly damaged due to rough weather and strong winds and has collided with coral rock structure which was not visible during the high tide and efforts to move the vessel failed. It had relied upon the surveyors' reports that there was a total loss and grounded vessel cannot be refloated with normal salvaging procedure and cannot be beached. It relied upon the version of the Port Officer that the damage by stranding was attributable to the prevailing adverse weather conditions at the time of attempting to beach the vessel at the designated plot. It is under those circumstances the complainant contended that there was no justifiable reason or ground for repudiating the claim.

11. On behalf of the appellant insurance Company, it was merely contended that there was no deficiency of service on the part of the appellant insurance Company which was repelled by the National Commission. It was also contended on behalf of the appellant Insurance Company that there was no `total and/or constructive loss' as defined under Sections 57 and 60 of the Marine Insurance Act, 1963 inasmuch as the insured has recovered more than Rs. 13.00 crores by sale of the vessel. The Commission having meticulously examined the rival contentions with regard to this particular point, found that there was actual total loss of the vessel to the complaint because the complainant could not bring the vessel to the destined point for its breaking. The Commission found that the vessel was brought for the sole purpose of `breaking' and the complainant has lost its purpose as it could not bring it to the destined point because of the sea peril. It was impossible for the complainant to refloat the vessel for bringing it to the destined point for the purpose for which it was purchased. The National Commission also rejected the contention of the appellant insurance Company that the respondent complainant has committed utmost breach of the principles of good faith. It was the contention of the appellant insurance Company that the respondent complainant did not disclose at or before taking the insurance policy that:

> "(a) one engine of the vessel (viz. starboard engine) was not working.
>
> (b) the Addendum no. 2 dated 3.6.97, which records that the starboard engine of the vessel was not working. This plea of the appellant insurance Company was resisted by the respondent mainly contending that the issue has been raised for the first time at the time of filing the written statement alleging non-disclosure of material facts. The National Commission, after a critical analysis of the material available on record, found that the contract is liable to be repudiated for non- observance of good faith or non-disclosure of the material facts. At all points of time, the contract was sought to be repudiated on the one and only ground that there was no total loss. In this connection, the National Commission examined the complete correspondence that has taken place between the parties prior to filing of the complaint and written statement before the National Commission and found that at no point of time the insurance company took any plea or stand that there was any suppression on the part of the complainant in not disclosing that one engine of the vessel was not functioning. The Commission referred to the evidence led by the appellant insurance Company in

which it was specifically admitted that repudiation was only on the ground that the vessel had encountered neither total loss nor a constructive total loss. It is under those circumstances the Commission found that the issue has been raised by the insurance Company for the first time in the proceedings before it only as an afterthought.

12. The Commission also found that at the time of making insurance proposals, the respondent had given Memorandum of Agreement (MOA) along with two addendums and one addendum clearly stated that the vessel was with one engine, and it has come from Singapore to Alang Anchorage for its funeral voyage. The Commission found that there is no reason to disbelieve this version of the respondent. Neither the agent of the insurance Company nor the Development Officer stated that addendum No. 2 was not given to the insurance Company at the time of issuing the policy. The Commission also noticed that the vessel sailed from Singapore with one engine without any difficulty and in such view of the matter, the Commission found that it would be of no significance in the present case even if there is non-disclosure of fact that only one engine was working.

13. We do not wish to refer to other issues raised by the insurance Company before the Commission which were dealt with since the only question that was argued before us in this appeal relates to non- disclosure of the material facts. The learned counsel for the appellant submitted that the respondent complainant suppressed the material fact that one engine of the vessel was not working and therefore, not entitled to any relief. We do not find any merit whatsoever in the submission made by the learned counsel for the appellant. The material available on record which has been taken into consideration by the National Commission clearly demonstrates that the respondent complainant never made any representation that the vessel had two functional engines. On the other hand, addendum No. 2 to MOA expressly speaks about the fact that starboard engine was not working. The MOA that was forwarded included both the addendums and in fact it was one of the reasons for demolishing the vessel. At any rate, as observed by the National Commission, at no point of time the insurance Company took this plea to repudiate the contract. This plea was raised for the first time in the written statement filed in the National Commission as an afterthought.

14. The learned counsel for the appellant did not show any material available on record in support of her submission. Nor the counsel could point out any material or evidence which has a bearing on the issue that had escaped the attention of the Commission. Thus it is not a case of non-consideration of any evidence available on record by the Commission. The findings and conclusions drawn by the National Commission are based on proper appreciation and elaborate consideration of the entire material available on record. The Commission did not commit any error in appreciating the evidence available on record. The contention urged before us in this appeal is accordingly rejected. No other contention was raised.

15. For the same reasons, we find no merit in the cross appeal preferred by the respondent complainant.

16. The appeals are accordingly dismissed.