(2024) 07 NCDRC CK 0087

National Consumer Disputes Redressal Commission

Case No: First Appeal No. 365 Of 2018

M/s Enchante Jewellery Ltd	APPELLANT
Vs	
Bajaj Allianz General Insurance Co. Ltd	RESPONDENT

Date of Decision: July 31, 2024

Acts Referred:

- Consumer Protection Act, 1986 - Section 19

Hon'ble Judges: Avm J. Rajendra, Avsm Vsm (Retd.), Presiding Member

Bench: Single Bench

Advocate: Aditya Sharma, Suman Bagga

Final Decision: Dismissed

Judgement

Avm J. Rajendra, Avsm Vsm (Retd.), Presiding Member

1. The present First Appeal has been filed under Section 19 of the Consumer Protection Act, 1986 (“the Act”) against Order dated 19.12.2017 of the State Consumer Disputes Redressal Commission, Delhi (“the State Commission”) in CC No. 332 of 2009 wherein the State Commission dismissed the Complaint.

2. For Convenience, the parties in the present matter as referred to as mentioned in the Complaint. “M/s. Enchante Jewellery Ltd.” is the Complainant (Appellant herein). "Bajaj Allianz General Insurance Co. Ltd " is referred to as the Opposite Party/Insurer (Respondent herein).

3. Brief facts of the case, as per the Complainant, are that the firm is engaged in manufacturing and selling gold ornaments in Delhi/NCR. In May 2008, the complainant booked a consignment of a rope chain making machine to be shipped to Italy for repairs. The

consignment was insured under Marine Insurance Policy No. OG-09-1103-1013-0000011, dated 28.05.2008, with a value of Rs. 1 Crore by the OPs. The policy issued by the OPs included the clauses with respect to Institute Radio-Active Contamination Exclusion; Important Notices; Institute Replacement Clause; Excess clause of 0.5% of the consignment value, subject to a minimum of Rs. 25,000 for each claim; Warranted packing to withstand the journey; Excluding Third Party Liability; Termination of Transit Clause; and Terrorism.

4. The machine was packed in 9 wooden boxes and was shipped through M/s DHL Worldwide Courier Services. The consignee, M/s Ciemmo SRL in Italy assured repairs within a week at an estimated cost of Euro 2,500. On delivery in Italy, the consignment was found to be damaged. The consignee accepted it with reservations and informed them providing photographs of damages. The firm immediately reported the damage to DHL and the respondent by email on 06.06.2008. Despite continuous follow-up, the OPs delayed appointing a surveyor to assess damage. On 11.06.2008, OPs claimed that the cover was on restricted terms (ICC B) and the loss was not covered under the policy.

5. The complainant contested this, asserting that the policy covered all perils, and no surveyor was appointed to assess the damage. Due to the damage, the repair cost increased significantly to Euro 29,900.05 plus additional packaging costs of Euro 1,950. The total cost for repairs was Rs.21,39,686, leading to an excess cost of Rs.19,71,736. Additional customs duty of Rs. 7,70,148 was paid on re-import, with an excess duty of Rs.5,70,383 due to the enhanced repair charges. Being aggrieved, they filed a complaint before the State Commission seeking Rs.25,42,119 as compensation for loss along with Rs.5,00,000 for mental agony and harassment and Rs.1,00,000 as cost of proceedings.

6. In reply before the State Commission, OPs denied the allegations and contended that the insurance policy was issued on restricted terms, specifically ICC(B) only. As such, they claimed the loss is not covered under the policy, and the repudiation of the claim is as per the terms and conditions of the policy. OPs denied any deficiency in service and contended that the complainants did not adhere to warranty clauses stipulated in the policy for packing, which requires the consignment to be "packed to withstand the intended journey." OPs disputed their claim that the consignment was adequately packed and labelled as fragile, with necessary signage. Under international trade practices governing marine insurance, it is the responsibility of the consignee or consignor to arrange a survey for any loss or damage. The complainant failed to arrange a survey, thereby making it difficult for OPs to assess the damage and process the claim. OPs alleged that the complainant had exaggerated the claim in connivance with the consignee and inflated the unsubstantiated claim. thus the claim was repudiated.

7. The State Commission vide order dated 19.12.2017 dismissed the complaint with the following reasons:

"The point for adjudication in the complaint is whether the claim preferred by the complainant is payable. For this we may have to see whether the damage done to the machine while transporting it is covered within the policy obtained by the complainant. We may in the first instance advert to the terms of the policy.

The basic features of the policy, inter alia, are these.

"Excess 0.5% of the consignment value subject to a minimum of Rs.25,000/- for each and every claim.

BASIC COVER ONLY".

<u>RISK COVERED</u>

1. This insurance cover all risks of loss of or damage to the subject matter insured except as provided in Clause 4,5,6, and 7 below.

2. This insurance covers general average and salvage charges, adjusted or determined according to the contract of affreightment and/or the governing law and practice, incurred to avoid or in connection with the avoidance of loss from any cause except those excluded in Clause 4, 5, 6, and 7 or elsewhere in this insurance.

3. This insurance is extended to indemnify the assured against such proportion of liability under the contract of affreightment "Both to Blame conclusion clause as is in respect of a loss recoverable hereunder. In the event of any claim by shipowners under the said clause the insured agree to notify the underwriters who shall have the right, at their own cost and expense, to defend the assured against such claim.

<u>EXCLUSIONS</u>

4. In no case shall this insurance cover

4.1 loss damage or expense attributable to willful, misconduct of the assured.

4.2 ordinary leakage, ordinary loss in weight or volume, or ordinary wear and tear of the subject matter insured. 4.3. loss damage of expense cause by insufficiency or unsuitability of packing preparation of the subject matter insured (for the purpose of this Clause 4.3 "packing" shall be deemed to include stowage in a container or lift van but only when such storage is carried out prior to attachment of this insurance or by the assured or their servants).

4.4. loss damage or expense caused by inherent vice or nature of the subject matter insured.

4.5. loss damage or expense proximately caused by delay, even though the delay be caused by a risk insured against (except expenses payable under clause 2 above). 4.6.

loss damage or expense arising from insolvency or financial default of the owners managers charterers or operators of the vessel.

4.7. deliberate damage to or deliberate destruction of the subject matter insured or an / part thereof by the wrongful act of any person or persons.

4.8. loss damage or expense arising from the use of any weapon of war employing atomic or nuclear fission and/ or fusion or other like reaction or radioactive force or matter.

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5.1 In no case shall this insurance cover loss damage or expense arising from unseaworthiness of vessel or craft, unfitness of vessel craft conveyance container or lift van for the safe carriage for the subject matter insured, where the assured or their servants are privy to such unseaworthiness or unfitness, at the time the subject matter insured is loaded therein.

5.2 The underwriters waive any breach of the implied warranties of seaworthiness of the ship and fitness of the ship to carry the subject matter insured to destination, unless the assured or their servants are privy to such unseaworthiness or unfitness.

6. In no case shall this insurance cover loss damage or expense caused by

6.1 War Civil war revolution rebellion insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power.

6.2 capture seizure arrest restraint or detainmant (piracy excepted) and consequences thereof or any attempt thereat.

6.3 derelict mines torpedoes bombs or other derelict weapons of war;

7. In no case shall this insurance cover loss damage or expense

7.1 Caused by strikers, locked out or persons taking part in labour disturbances, riots or civil commotions.

7.2 resulting from strike, lock outs labour disturbances, riots or civil commotions.

7.3 caused by any terrorist or any person acting from a political motive.

Claims procedure

It is the duty of the assured and their agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimizing a loss and to ensure that all rights against carrier, bailees or other third parties are properly preserved and exercised in particular, the assured on their agents are required.

To claim immediately on the carriers, port authorities or other bailees for any missing packages

In no circumstances, except under written protest, to give clean receipt where goods are in doubtful condition.

When delivery is made by container, to ensure that the container and its seals are examined immediately by their responsible official, if the container is delivered damaged or with seals broken or missing or with seals other than as stated in the shipping documents, to clause the delivery receipt accordingly and retain ail defective or irregular seals for subsequent identification.

To apply immediately for survey by carrier or other bailee's representative if any loss or damage be apparent and claim on the carrier or other bailee for any actual loss or damage found at such survey.

To give notice in writing to the carriers or other bailees within 3 days of delivery if the loss or damage was not apparent at the time for taking delivery.

We have examined the terms of the policy and we are satisfied that claim Is not maintainable since not covered under the scheme, since procedure required to be followed was not done. If the insured is found wanting in the discharge of his duties as per the policy and the procedure contained therein, he cannot be allowed to agitate the issue with the Company having insured him.

The Hon'ble NCDRC in the matter of Rajesh Verma vs. United Insurance Co. IV(2011) CPJ 491(NC) held as under:-

Goods stores in Godown if not covered under the policy the Insurance Company is not liable to pay compensation. Repudiation justified.

Ind. Swift Ltd. Vs. New India Assurances Company Ltd. IV(2012) CPJ148 (NC) (FA 157/2006 - decided on 17.092012)

Construction of the policy is to be construed strictly conditions of the policy document which is binding contract between the parties and nothing can be added or subtracted by giving different meaning.

LIC vs. Banwari Lal Yadav - IV (2013) CPJ 38 (NC)

Forum has no jurisdiction to go beyond terms and conditions of the Policy.

Morien Chemicals Ltd. Vs. UCO Bank - Ill(2013) CPJ 261 (NC) Insurance company is not liable to pay damages which are not covered under the policy.

Having regard to the facts and circumstances of the case we are of the considered view that the action of the OP in repudiating the claim preferred by the complainant does not suffer from any infirmity. Accordingly we hold that the complaint is not maintainable and liable to be rejected. We order accordingly leaving the parties to bear the cost. Ordered accordingly."

8. Being aggrieved by the order of the State Commission, the Complainant/Appellant filed Appeal no. 365 of 2018 seeking:

i. set aside the impugned judgement and order dated 19.12.2017 passed in Complaint No. 332/2009 by Hon'ble State Consumer Disputes Redressal Commission, Delhi

ii. call for the records of the case, if necessary

iii. award costs of the appeal

iv. pass such other or further order(s) as this Hon'ble Commission may deem fit and proper in facts and circumstances of the present case..

9. In the Appeal, the Appellant mainly raised the following issues:

A. The impugned order and judgment are arbitrary, contrary to the facts and documents on record, and inconsistent with the evidence. Thus, it deserves to be set aside.

B. The judgment is based on assumptions not endorsed in the policy. The claimed 'Risk Covered' and 'Exclusions' clauses mentioned in the judgment are not part of the actual policy. It relied on Institute Cargo Clauses (A), which were not endorsed on the policy and neither of the parties claimed the same.

C. The judgment does not explain how the findings were arrived at. It merely states that the claim procedure was not followed, without specifying the violation. it misinterpreted the terms of the policy, ignoring the appellant's compliance with claim procedure.

D. The OPs falsely claimed that the complainant and consignee failed to arrange joint survey. It was the OPs responsibility to arrange the survey on receiving damage notification.

E. The Commission overlooked that the damage was covered under the Institute Replacement Clause endorsed on the policy. The complainant provided extensive evidence to support their claim, while the OPs failed to substantiate their contentions.

F. The judgment undermines the purpose of the Act for protecting consumer interests against unethical practices. The OPs denied a valid claim on false grounds, an unethical practice. And the order did not address the extensive evidence on record, making it a non-speaking order.

10. In his arguments, the learned counsel for the Appellant reiterated the complaint and grounds of appeal, stating that the OPs falsely claimed that the policy was issued under restrictive clause ICC(B) and that the risks were not covered under this clause. However, only a "Basic Cover" endorsement was made on the policy, with no mention of any restrictive clause ICC(B). The State Commission was misled by the OPs incorrect definition of ICC(B) as found in clause definition booklet, which should only be relevant if endorsed on the policy. Their case was that there was no endorsement of ICC(B) on the policy, and thus the OPs wrongfully denied its claim. The State Commission relied on clause ICC(A), which was not part of the case of either party, indicating an error in the order based on assumed facts. The judgment's reasoning is inherently contradictory, as evidenced by the following statement: "We have examined the terms of the contract and we are satisfied that the claim is not maintainable since not covered under the scheme since procedure required to be followed was not done....." He further argued that OPs claimed that they failed to follow due procedure for claim as outlined in an accompanying booklet. The appellant refuted the claim by extensive correspondence as proof. The impugned order inconsistently states that the claim is not covered under the scheme and also that the procedure was not followed, showing a lack of coherent reasoning. It failed to clarify whether the claim was refused due to non-coverage under the policy or non-compliance of procedural mandate, indicating improper evaluation. The State Commission erred in allowing the OPs to claim the benefit of restrictive clauses ICC(B) and ICC(A) that were not endorsed on the policy. This led to denial of their bona fide claims, resulting in unjust enrichment of Rs.25,42,110/- by the OPs. The State Commission’s decision to uphold the OPs refusal based on these non-endorsed clauses was incorrect. The impugned judgment merely stated that the procedure for claim settlement was not followed, without stating which provision was violated. The claims procedure consists of five clauses, where clauses (a), (c) & (e) were not applicable, and clauses (b) and (d) were duly complied with. Clause (b) was fulfilled when they immediately informed the goods' condition to the OPs and obtained a damage certificate. Clause (d) was met through extensive mails seeking the OPs to assign a surveyor for damage assessment. The impugned judgment lacks the necessary reasoning for its findings, contravening the principles established by the apex court in *Kranti Associates Pvt. Ltd. & Anr. vs. Masood Ahmed Khan & Ors. (2010) 9 SCC 496 and Charan Singh vs. Healing Touch Hospital & Ors. (2000) 7 SCC 668.* The duty of adjudicating authorities to record reasons in their decisions ensures that justice is not only done but also appears to be done. The State Commission failed to provide a speaking order that explains how it reached its findings on policy issuance under ICC(B) and the applicability of ICC(A), or non-compliance with procedure, necessitates the setting aside of the judgment.

11. On the other hand, the counsel for the OPs/Respondents argued in favour of the impugned order passed by the State Commission and asserted that the appellant's claim that there was no endorsement of restrictive clause ICC(B) on the insurance policy is incorrect. The policy schedule and attached terms, conditions, exclusions and endorsements

clearly indicate that the policy included Institute Cargo Clause (B) risk coverage. The policy schedule explicitly states "Basic Cover Only." Therefore, the appellant's contention is seen as an afterthought and unacceptable. She further averred that the appellant, a well-established jewellery manufacturing unit, is familiar with international trade practices for consignment movement. Since the insured machines were second-hand, the appellant was informed that full coverage is not provided for second-hand machines due to underwriting prudence. The appellant consented to a Basic Cover with an excess of 0.5% of the consignment value, subject to a maximum of Rs. 25,000 per claim. The policy was issued accordingly with the necessary clause amendments incorporated in the policy schedule. She further argued that the respondent notified the appellant via email on 11.6.2008 that the insurance cover was granted on restricted terms, specifically ICC (B). As per policy terms, the loss was not attributable to any named perils in the clause and was not indemnifiable. The claim was repudiated as per the policy's terms, conditions, and exclusions. The appellant violated the policy warranty for packing, which required the goods to be packed to withstand the intended journey. Additionally, neither the appellant nor the consignee arranged for a joint survey with Lloyd's agent and the carrier's surveyor to assess the loss or damage. The lack of a proper survey report, which should have been arranged upon receipt of the damaged consignment, is a significant failure. She further argued that the consignee accepted the consignment in damaged condition with reservations and that the damage was communicated to the carrier. It also disputes the correspondence and photographs submitted by the appellant, arguing they do not correspond to the insured items and boxes. She further contended that the appellant did not submit any correspondence with the carrier or arrange for a carrier and insurance survey upon receiving the damaged consignment. As per international trade practices, the consignee or consignor should arrange the survey and bear the survey fee if the claim is admitted. The appellant's failure to do so weakens their claim. She further averred that the damage may be attributed to inadequate packing at the appellant's location and improper stuffing, which could have been verified by an independent surveyor. Even if the damage occurred during transit, it is not payable under the restricted cover purchased by the appellant. She further argued that the policy did not cover the return voyage of the Rope Chain Machinery or the custom duty payable. The insurance was specific to the voyage from Gurgaon to Italy, and the appellant did not insure the out-of-pocket expenses allegedly incurred due to the damage. The appellant is not entitled to claim compensation under the restricted basic cover explicitly stated in the policy schedule. The OPs correctly declined liability, with no deficiency in service or unfair trade practice involved. The respondent upholds public interest by adhering to the terms and conditions of the insurance contract. The impugned order was well-reasoned, based on the terms and conditions of the insurance contract, and the facts of the case. The appeal should be dismissed with costs.

12. I have examined the pleadings and associated documents placed on record and rendered thoughtful consideration to the arguments advanced by learned Counsels for both

parties.

13. Essentially the matter pertains to insurance cover for a ‘Rope Chain Making Machine’ which was shipped by the complainant/ appellant from Gurgoan to Italy for repairs. The complainant is a firm engaged in manufacturing and selling gold ornaments. In May 2008, the firm booked a Rope Chain Making Machine to be shipped to Italy for repairs. It is undisputed that the consignment was insured under Marine Insurance Policy dated 28.05.2008 for total value of Rs. 1 Crore by the OPs, which included the terms and conditions, claim procedure, excess clause, exclusions, warranted packing to withstand the journey, excluding third party liability etc.

14. It is uncontested position that towards transportation of the machine in question, the complainant packed the machine in nine wooden boxes and it was shipped through M/s DHL Worldwide Courier Services. The consignee was M/s Ciemmo SRL in Italy and the repair cost was estimated to be Euro 2,500. It is the complainant’s contention that on delivery to the consignee in Italy, it was found to be damaged. The consignee accepted it with reservations and informed them along with photographs of damages. The complainant immediately reported the damage to M/s DHL and OPs by email on 06.06.2008. Despite continuous follow-up, the OPs delayed appointing a surveyor and on 11.06.2008, the OPs repudiated the claim stating that the loss was not covered under the policy. It is the assertion of the complainant that the policy covered all perils, including the claim in question. Due to damages sustained, the repair cost increased to Euro 29,900.05 plus packaging costs of Euro 1,950. The total cost was Rs.21,39,686, leading to an excess cost of Rs.19,71,736. Additional customs duty of Rs. 7,70,148 was paid on re-import, with an excess duty of Rs.5,70,383 due to the enhanced repair charges.

15. On other hand, it is the assertion of the OPs that the insurance policy was issued on restricted terms, specifically ICC(B) only. There is no deficiency in service as the loss reported is not covered under the policy and the repudiation of the claim is as per the policy terms. The main contention of the OPs is that the complainants failed to adhere to warranty clauses stipulated in the policy for packing, which requires the consignment to be "packed to withstand the intended journey". Further the inadequately packed consignment was not labelled as fragile, with necessary signage. The OPs stand is that under established international trade practices governing marine insurance, the liability to arrange for an independent survey is of the Appellant or M/s DHL. They failed to arrange a surveyor. In the absence of joint survey to be arranged by them or consignee with Lloyd's agent and the carrier's surveyor to assess the loss or damage, no claim is payable. As per international trade practices, the consignee or consignor should arrange the survey and bear the survey fee for the claim to be admitted. This was not complied with and it was a significant failure, while admittedly the consignee alleged to have received the consignment in damaged condition and notified the same to the Appellant. While OPs disputed the mails and photographs submitted as they do not correspond to the insured items and boxes, it was

uncontested. OPs contended that the damage is attributable to improper stuffing and inadequate packing at the Appellant's location, this ought to have been verified by an independent surveyor. Even if the damage occurred during transit, it is not payable under the restricted cover purchased by the Appellant. In any case the insurance was for specific voyage from Gurgaon to Italy. It did not cover return voyage or custom duty liability.

16. It is undisputed that the said policy was entered into between the parties for transporting the said rope chain making machine from Gurgoan to Italy and it was packed in 9 wooden boxes and shipped through M/s DHL Worldwide Courier Services. On delivery in Italy to the consignee, the consignment was found to be damaged. The consignee informed the complainants and provided certain damage photographs. They immediately reported the damage to M/s DHL Worldwide Courier Services and OPs by email on 06.06.2008. While the complainants considered it to be the mandate of the OPs to appoint a surveyor to assess damage, it was the contention of the OPs that as per established practices for such international transportations, it is the complainant and the carrier who are to arrange for independent surveyor. The main contention of OPs is that the complainant failed to adhere the warranty clauses stipulated in the policy especially in the form of proper packing of the machine which requires the consignment in question to be packed in a manner necessary to withstand the intended journey, which is the essential care which the Appellant is bound to do. The insurer/OPs contention is that the damage occurred to the machine either during loading or transit was due to inadequate packing of machine which is essential mandate under the policy. As the consignment was not adequately packed and labelled as fragile, with necessary signage, the machine suffered the damage. Further, while the insurer asserted that under international trade practices governing marine insurance, it is the responsibility of the consignee or transporter to arrange for independent survey to assess any loss or damage, the complainant contended that the surveyor was to be arranged at Italy by the OPs.

17. In addition to the above, perusal of the Insurance Policy in question reveals that, under Para 4.3 of the exclusion clause, the loss, damage or expenses caused by insufficiency or unsuitability of packing or preparation of subject matter insured is liable to be excluded from the liability of the insurer. It is admitted position that the insured machine had reached the consignees in a damage condition. There was no report as to how the damage was occasioned. Admittedly, this damage was such that it was revealed only after the consignment reached the consignee when it was opened. Therefore, it is not a case that there was any damage to the vessel or occasioning of any insured peril. No such incident is contested or otherwise established, as a consequence of which such damage occasioned. It is uncontested position that the insured machine belonging to and packaged by the complainant had reached the consignee and when opened, found to be in damaged condition. It is the mandate of the complainant to ensure reasonable and adequate safe packaging of the consignment as is required under the policy in a manner to withstand the

transit from their premises to the consignee at Italy. Undisputedly, it was packed and loaded in the vessel and the vessel reached the destination and the consignment was delivered to the consignee. When the consignee opened the package, the same was found in damaged condition. Other than asserting the damage as pointed by the consignee in Italy, there is no other corroborative evidence for the alleged damages sustained by the said machine. Further, reasons and circumstances under which the said damage occasioned have not even been stated or supported by evidence.

18. In view of the foregoing discussions, I find no reason to interfere with the detailed and well reasoned order passed by the learned State Commission in C.C No. 332 of 2009 dated 19.12.2017. The First Appeal No. 365 of 2018 is, therefore, dismissed.

19. All pending Applications, if any, are also disposed of accordingly.

20. There shall be no order as to costs.