Acme Fluro Polymers Ltd Vs Central Warehousing Corporation Ltd.

Court: NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION

Date of Decision: April 8, 2011

Citation: 2011 0 NCDRC 214 : 2011 2 CPJ 216

Hon'ble Judges: R.C.Jain , Vineeta Rai , Vinay Kumar J.

Final Decision: complaint is partly allowed.

Judgement

1. THIS complaint was earlier disposed of by this Commission (by a Bench presided over by the then President) vide an order dated 05.07.2004.

By the said order, this Commission partly allowed the complaint in the following manner:

Taking into consideration the aforesaid submissions, it is directed that the opposite party no.1 shall pay the above said amount of Rs.61,44,000/-

to the complainant with interest at the rate of 19% from 1st February, 1996 till its payment. For the demurrage charges, the damage to the

machinery had occurred in August, 1995 and for one reason or the other, the claim was not settled. Therefore, I will be just and proper to direct

the opposite party no.1 not to recover demurrage charges for the goods stored in the godown from 1st September, 1995 and permit the

complainant to remove the same within a period of eight weeks from today. The Registry of this Commission is directed to send the information to

the Canara Bank about this order, so that if any amount is due and payable by the complainant, the bank can file proper application. The complaint

stands disposed of accordingly. There shall be no order as to costs.

2. AGGRIEVED by the said order, opposite party no.1 "" Central Warehousing Corporation Limited (for short, ""CWC"") filed Civil Appeal

No.6290 of 2004 which has been decided by the Supreme Court vide an order dated 10th September, 2009 by observing as under:

Mr. Jayant Bhushan, learned senior counsel appearing for the appellant has relied on Section 151 of the Indian Contract Act, 1872. From the

impugned order it is clear that such an argument was not raised before the National Commission. Since the contention regarding applicability of

Section 151 of the Indian Contract Act, 1872 goes to the root of the matter, we are of the opinion that it should be considered by the National

Commission. Hence, we allow this appeal and set aside the impugned order and remand the matter to the National Commission to go into the

question of applicability of Section 151 of the India Contract Act, 1872. In addition to the said point, the parties may take such other or further

points, as they may be advised. Since the original petition before the National Commission pertained to the year 1995, we request the National

Commission to dispose of the same as far as possible within a period of four months from the date a copy of this order is produced before it.

Appeal allowed. No order as to the costs. In view of the order abovementioned, no order is required to be passed on the application for

impleadment.

It is in these circumstances, that the complaint is again before us for fresh decision.

The facts and circumstances leading to the complaint are in a narrow compass and can be stated thus:- The complainant had imported certain

machinery viz. Iso-static presses from Belgium. As per the invoice dated 24.11.1994, the value of the machinery was Rs.1,60,00,000/-. Awaiting

the clearance from the Custom authorities, the complainant was required to store the said machinery in the bonded warehouse of the opposite

party "" CWC at Mumbai Port. Having regard to the nature of the machinery, ideally it should have been stored under covered space but covered

space being not available, the complainant""s agent applied for allotment of 10 sq. meters open space for the storage of the said consignment of the

machinery. Initially, the storage was for a period of three months, i.e., uptil May 1995 with the assurance that it will be cleared by that time, i.e.

before onset of monsoon. However, that had not happened and the machinery continued to be stored in the open space beyond May 1995. On

04.08.1995, when the agent of the complainant went to the yard of the opposite party, he noticed that the machinery in question had been badly

damaged due to the fall of certain very heavy steel coils each weighing 15 metric tonnes which were stacked adjacent to the machinery in question.

Immediately information was given to the officers of the opposite party and the opposite party lodged a claim with the insurer in the sum of

Rs.1,72,30,180/- under their All India Floater Declaration Policy which covered the risk of fire, flood and theft etc.

The claim of the complainant having not been settled, the complaint was filed claiming various amounts under the following heads:-

21. RELIEF CLAIMED The value of the damage to the consignment entrusted to the CWC for storage for the purpose of the claim by the

complainant, and related items are as follows: In Rs. Belguim (Approx.) Francs a) cost of 3 cases Completely damaged as provided by Supplied

M/s National Forge, Belgium 6,570,000 72,27,000 b) Testing, Transportation, Insurance during transit etc. of the other three cases 5,00,000 c)

Two day visit of Technicians 180,000 1,98,000 from Belgium d) Subsequent visit by Technicians 450,000 4,95,000 for rectification and erection

(5 day visit) e) Interest payable to Canara Bank who have financed the import of the equipment Actuals f) Loss of Production / Profit. Two

Installments of DPG (Deferred Payment Guarantee) extended by Canara Bank 38,00,000 g) Legal and other actual expenses 50,000 h) Interest

@ 18% p.a on the total of claims from (a) to (g) above till actual payment.

3. THE complaint was resisted by the opposite party no.1 "" CWC and a written version has been filed not disputing the factum of the complainant

having stacked its machine in the Warehouse of the opposite party. However, the allegation of deficiency in service on its part and liability to pay

any compensation much less the compensation claimed by the complainant is specifically denied. THE main defence put forth by the opposite party

no.1 "" CWC is that the damage to the consignment of machinery had taken place due to Vis-Major, i.e. the act of God and, therefore, the

opposite party is not liable to compensate the complainant. It was, however, sought to be explained that when the Custom House Agent (CHA) of

the complainant approached the opposite party for allocation of 10 sq. meter of space, he was informed that such space was not available in the

covered area and, therefore, he could obtain a number on the waiting list, if he wanted the covered space for stacking the consignment. Despite

this, the CHA opted for open space and undertook to clear the consignment by May 1995, i.e., before the onset of monsoon in Mumbai. It is not

disputed that the machine was damaged due to the fall of heavy coils stacked adjacent to the consignment in question. THE said fall of steel coils is

sought to be explained on the premises that the same had occurred due to erosion of soil underneath the stack of steel coils due to heavy rainfall

from 16.07.95 to 25.07.95, which circumstances was beyond the control of the opposite party.

Opposite party no.2 - Insurance Company remained unrepresented on record.

4. IT would appear that since the extent of loss on account of damage to the machinery was not assessed before filing of the complaint, on the

request of the complainant, this Commission allowed the complaint to appoint a Surveyor for making the assessment of the loss. A Surveyor in the

name of M/s Rane Engineers & Surveyors, Chartered Engineers, Marine, Fire Engineering Surveyors and Valuers (Government registered) after

assessed the estimated loss at Rs.61,44,000/- by giving the cause of damage as under:-

Falling of very heavy material on the machine cases. The cases have been badly damaged due to sudden impact caused by the falling of heavy

steel coils stacked nearby. The cause of falling may be due to external accidental impact or may be tumbling due to marshy soil where coils have

been stacked in three to four tires one above the other. When we visited the site on 25.3.1996 all the coils had been removed by CWC

Authorities, as such our observation is based on the photographs shown by the Company and our detailed study of the location of the equipment.

Even now, lot of old heavy equipments have been stacked nearby and the equipment is thus prone to further damage.

It would also appear that on a prayer being made by the complainant, it was allowed to take away the damaged machinery on clearance of the

Custom duty and bond warehouse charges etc.

Parties have largely relied upon the documents produced on record in support of their respective pleas. After the matter was remanded back to

this Commission, we have carefully perused the same and have heard Mr. Abid Ali Beeran, learned counsel representing the complainant "" official

liquidator and Mr. K.K. Tyagi & Mr. Iftikar Ahmad for opposite party no.1 and Mr. R.C.S. Bhadoria for opposite party no.3. and have

considered their submissions. As noted above, in this case, the factum of the storage of machinery in question in the bond warehouse of opposite

party in an open space and its damage due to fall of heavy steel coil rolls is not disputed. The same would otherwise be manifest from the

communication dated 8th of August, 1995 addressed by opposite party no.1 to the opposite party no.2 Oriental Insurance Co., giving out the

circumstances in which the machinery of the complainant stored in their warehouse was damaged. It reads as under:-

Dear Sirs, This has in reference to our phonogram message on the captioned subject it is to state that during continuous rain from 16.7.1995 to

23.7.1995 there was fast flow of water into the premises of the warehouse. The flow of water caused soil erosion into open space where the cargo

of heavy weight are in storage under custom bond. The stoppers are to be used for stable stacking of consignment and the same were washed

away due to fast flow of water. The displacement of stoppers caused collapse of stock of heavy coils on wooden cases consignment of M/s

ACME fluoro Polymers Ltd. under bond no. CW-20-4997 dated 28.3.1995. The collapsed lot of coils damaged the cases of machinery

consignment. The consignment is worth Rs.1,72,30,180/-. Therefore, you are requested to register the claim for flood loss of Rs.1,72,30,180/-

and arrange the survey of damaged consignment to enable the importer to get the compensation at the earliest. Sd/- (R.V. Vishwanath) Warehouse

Manager

5. THE Hon""ble Supreme Court has remitted the matter to this Commission largely for the reason that the question of the extent of duties and

responsibilities enjoined upon a Bailee in terms of Section 151 has not been raised and consequently not considered by this Commission. In this

Connection, we may with all humility at our end would like to take note of certain observations made by this Commission in its earlier order dt.

05.07.2004:

From this admission, it cannot be held that the damage to the machinery is an act of God. It is sheer negligence in storing articles in a warehouse.

Further, it is evident from the letter dated 8.8.1995 that there were continuous rains between 16th to 23rd July, 1995, and there was fast flow of

water into the premises causing soil erosion into open space where the cargo of heavy weight was stored. THE stoppers used to stabilizing the

stackings were also being washed away. If that was the situation, it was the duty of the concerned officers or employees of the Respondent No.1

to take appropriate precautions and care so that such event does not occur. No such steps were taken. THErefore, this is pure and simple case of

negligence and deficiency in service on the part of the warehouse management. Even in heavy rains, prudent person would take appropriate steps

to prevent damage to his properties. Respondent No.1 being bailey was required to be a prudent person. It is contended by the learned counsel

for the Opposite Party No.1 that the Complainant was required to remove the goods before the onset of monsoon. In our view, there is no such

condition and no such written condition was produced before us. It is next contended that the complainant was required to store the goods in

covered warehouse. This submission is also without substance. If the complainant was required to store in a covered warehouse, then the

Opposite Party No.1 ought to have refused the space for storing the goods in open area. In this view of the matter, the Opposite Party No.1 is

liable for damages.

6. FROM a bare perusal of the above, it is manifest that it was only keeping in view the duties and responsibilities of the opposite party as a Bailee

that this Commission had held that the opposite party "" CWC failed to exercise due care in regard to the storage of the other consignment of heavy

steel coils, firstly by storing the same adjoining to the consignment of the complainant and then in not taking proper care to ensure that it should not

fall on the adjacent consignment. Still going by the directions of the Hon""ble Supreme Court, as expected, we have examined the question in some

greater details.

The main plea of the opposite party "" CWC is that they had taken all necessary care in the storage of the consignment which as a bailee is

expected to take in accordance with the provisions of section 151 of the Contract Act. What is the extent of the said duty and standard of care

which as a bailee is obliged to take in respect of the goods bailed, has been laid down in section 151 of the Contract Act, 1872 as under: Section

151. Care to be taken by bailee "" In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary

prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.

The above section provides that bailee is bound to take as much care of goods bailed to him as a man of ordinary prudence would under similar

circumstances. The degree of care is the same for all types of bailment. It is well established that bailee is bound to take reasonable care of the

goods depending on the circumstances of the particular case, irrespective of whether the bailment is gratuitous or for reward. Mere indication by

the bailee about a difficult situation arising out of labour disorder or otherwise is not sufficient to repudiate bailee""s liability. The standard of care or

diligence required of a bailee under this section is that of an average prudent man in respect of his own goods of the same bulk and value in similar

circumstances but the measure of care from a bailee would depend upon the facts of each case viz., upon the type and quality of goods. It is

equally settled that bailee can insure upto the value of the goods bailed to him and he can recover the full value, but in that case he will have to

account to the owner of the goods and will be a trustee for the owner, retaining so much as covers his own interest and trustee for the balance.

7. BEARING in mind the above legal position, we must examine the question whether in the case in hand, opposite party ""CWC can be said to

have taken care of the consignment in question which a man of ordinary prudence would take care of his own goods.

In this connection, learned counsel for the OP No. 1 "" CWC submitted that there was no negligence on the part of the CWC in storing the

consignment in question in a safe and secure manner. That as the damage to the consignment in question had taken place due to accident which

occurred on account of erosion of soil caused by heavy rain which destabilized the adjacent stock of coils which fell on the consignment in

question. The above circumstances were beyond the control of the opposite party no.1-CWC and therefore, they cannot be said negligent and are

not liable to indemnify the complainant for any loss occasioned to them due to damage to their consignment of machinery. In this regard, learned

counsel for the opposite party- CWC contended that complainant itself is responsible for the damage caused to its consignment due to its own

negligence in storing the consignment in open space against the advice of opposite party no.1. In this regard, our attention has been invited to a

request letter of the Custom House Agent (CHA) of the complainant dated 25.02.95 and the endorsement of the even date made by the official of

the opposite party no.1. The same read as under:

SHREE SHIPPING SERVICES LICENCED CUSTOM HOUSE AGENTS (11/0811) SHIPPING CLEARING FORWARDING &

CONSOLIDATORS Cable : SHREESHIP D-5, Mohan Mansion, IInd Floor Phone : 262 0657/261 21 94 274, Shahid Bhagat Singh Road Fax

: 091-22-2620657 Fort Bomaby - 400001 Date : 25 Feb 95 The Manager Central Warehousing Corporation Vashi Dear Sir Sub : Warehousing

of 213 Bundles of Aluminum ingols of Wt. 200 Mt of M/s Glada Power & Telecommunications Ltd. arriving per SS. Indira Gandhi With reference

to the above our clients wish to keep the goods in Bonded W/H for the time being. Hence you are requested to book reserve about 0.60 sq. mtr.

Co. store the goods on or about 5th March 1995 onwards for about 3 months and oblige. Thanking you, Yours faithfully, Sd/- PROPRIETOR

An endorsement of the even date appearing on the reverse of said letter reads as under : ""N O T E This is in reference to the NOC application on

the part of their letter. I advised the CHA representative to store the cargo into covered space and to put application for waiting list but he was in

hurry and insisted for open space as committed in letter. Accordingly, he was advised to lift the cargo before monsoon and the same he has

assured in the letter. Sd/- (T.P.Singh) T.A"". Despite the above noting. the Custom House Agent opted for open space for the time being with the

stipulation that goods in the bonded warehouse will be cleared on or before May 1995. The same reads as under: ""SHIPPING CLEARING

FORWARDING & CONSOLIDATORS Cable: ""SHREESHIP"" D-5 Mohan Mansion, PHONE 262 06 57/261 21 94 2nd Floor, 274 Shahid

Bhagat Singh Road Fort BOMBAY -400001. Our Ref. No. Dated 25.02.1995 Your Ref. No. The Manager, Central Warehousing Corporation,

Vashi, Dear Sir, Sub: Warehousing of 6 C/o Machine arrived per S.S Eagle Prestige E/E NOs. 33/19 dated 9.1.1995. With reference to the

above we would like to bring to your kind notice that our client M/s. Acme Fluoro Polymers Ltd. Wish to keep the goods in Bonded W/H for the

time being. Same should be cleared on or before May, 1995. Hence you are requested to allow the above 10 Sq. Mts of Open Space to store the

goods and oblige. Thanking you, Yours faithfully, Sd/- PROPRIETOR

8. ON the strength of the above documents, learned counsel for the Central Warehousing Corporation strongly contended that having regard to

the delicate nature of the consignment, it being sophisticated machinery, the complainant ought to have stored the consignment in covered space

rather than in open space. He submitted that even if it is assumed that no covered space was available then, Custom House Agent of the

complainant was aware that covered space had become available afterwards towards the end of March and May 1995 as is apparent from

statement furnished on record. Despite the undertaking given by Custom House Agent and that the goods were stored in the open space for the

time being, no attempt was made to obtain covered space at least in May 1995 i.e. before the onset of monsoon.

The factual position about the CHA of the complainant having applied for open space and the consignment in question having been stored is not

disputed from the side of the complainant. Learned counsel for the complainant has, however, countered the above submissions of the opposite

party on the ground that open space for storage of the consignment was applied for because the space in the covered sheds was not available on

25.02.1995. In any case the submission is that at the time of deposition of the consignment, no other cargo was stacked adjacent to the

complainant""s consignment. The heavy steel coils each weighing 15 metric tones were deposited adjacent to the consignment in question only on

28.05.1995. This is so apparent from the counter affidavit filed on behalf of the opposite party. It is also contended that at no time after February

1995, the opposite party informed the complainant or its CHA about the availability of vacant space asking the complainant to avail the same and

shift the consignment to covered space. As regards the failure of the complainant to clear the consignment in question from the bonded warehouse

of the opposite party by May end, it is sought to be explained that complainant was indeed expected to clear the consignment by the said time but

that has not been possible due to certain circumstances. It is pointed out that as per section 61 (1) (b) of the Customs Act, 1962, the consignment

can remain in deposition in a bonded warehouse for a period of one year from the date of deposit and, therefore, there was nothing wrong on the

part of the complainant in not having de-bonded the consignment from the bonded warehouse of the opposite party by May end 1995.

Having considered the respective submissions, we are of the opinion that defence put forth by the opposite party has no legs to stand. Assuming

for the sake of arguments that complainant or its CHA failed to seek covered space or that the consignment in question ought to have been stored

under covered space, still it will not exonerate the opposite party from its duties and responsibilities as a bailee would exercise for ensuring safety

and security of the goods. It is pertinent to note here that in the case in hand, damage to the consignment of the machinery was not caused due to

the storage of the consignment in open space i.e. on account of vagaries of weather i.e. heavy rainfall but it was due to the fall of heavy rolls of steel

coils which had been stacked adjacent to the consignment in question. The fall of heavy coils sought to be explained on the ground that soil under

the consignment gave way due to gushing of water after heavy rainfall / flooding. Assuming that it had so happened in the above situation, still the

question would be as to whether opposite party can be said to have taken due care which will include all precautionary measure for safeguarding

the consignment in question. In our view, the answer is a plain ""NO"" because the opposite party ought to have envisaged that stacking of heavy

coils adjacent to the consignment in question was a high risk to the consignment because the possibility of the coils falling on the consignment in

question could not have been ruled out. In our view in the first place the opposite party should not have stored such heavy consignment adjacent to

the consignment in question. If at all it was imperative to do, all precautionary measures should have been taken to ensure that the coils do not fall

on the consignment in question either due to erosion of soil underneath it or for any other reason. The surveyor even after several years of the

damage has observed that that lot of old heavy equipments had been stacked near consignment in question making it prone to further damage. In

our view stacking of such heavy goods adjacent to the consignment in question by itself was an act of negligence or which can be termed as failure

to exercise due care in regard to the storage of the consignment in question.

9. THAT takes us to the next submission of the opposite party that damage to the consignment in question was purely an accident, attributable to

vis-major i.e. an act of God, for which the opposite party cannot be held liable. We have noted this contention simply to be rejected because

concept of vis-major can be invoked only in extraordinary circumstances when certain happening takes place due to natural causes which could

not have been prevented due to any human intervention and it could not have been averted even by exercising any amount of foresight and care. In

this view, we are supported by the decision of Patel Roadways Ltd. Vs. Birla Yamaha Ltd., (2000) 4 SCC 91. In the case of Municipal

Corporation of the City of Bombay Vs Vas Udeo Ramchandra reported in Bombay Law Reporter Volume VI Page 899. In those cases it was

explained that vis major, to afford a defence, must be the proximate cause, the causa causans, and not merely a causa sine quo non of the damage

complained of. It was further held that where the damage caused was due to insufficiency of precautions by the defendant, in constructing bridges

and embarkment in a creek for carrying a duct line, to cope with conditions which might reasonably have been anticipated, the defendant is liable.

The mere fact that vis major co-existed or rather followed to the negligence is no adequate defence. Before an act of God may be admitted as an

excuse, the defendant must himself have done all that he was bound to do.

10. ALMOST similar circumstances exist in this case as has been noted above. We have therefore no manner of doubt that defence of vis major is

not available to the opposite party. In any case this defence appears to be after thought because CWC had already lodged a claim with the

insurance company for replenishment of the loss occasioned to it due to damage to the consignment. We have not been informed as to whether

insurance company has settled the said claim of the opposite party or not. In any case even if it is not settled, it was for the opposite party to have

pursued their remedy and it does not affect the claim of the complainant for indemnification of the loss suffered by it. We must, therefore, hold that

it is the responsibility of the opposite party to indemnify the complainant for the loss suffered by it due to the damage to the consignment in the

above circumstances.

Although an objection was also taken about the maintainability of the present complaint before a consumer fora but at the time of arguments, no

submissions were advanced in that behalf. Even otherwise going by the settled legal position that the opposite party "" CWC is the creature of

Statute and had established a bonded warehouse for stacking consignment till its clearance by the Custom authorities and it was receiving charges

for the storage of such consignment, the opposite party squarely falls within the definition of ""service provider"" appearing in section 2 (1) (g) of the

Consumer Protection Act, 1985 and the complainant a ""consumer"" having availed the said services. We, therefore, hold that complaint is

maintainable before this commission.

Having considered the matter from all possible angles, the irresistible conclusion is that OP-CWC failed to take the requisite care / precaution,

which a man of ordinary prudence would take for the safety of his own goods, having regard to the bulk, quality and value of the goods.

Consequently, we must hold that opposite party is guilty of negligence in the storage of the consignment in question and, therefore, cannot escape

their liability to indemnify the complainant for the loss occasioned to it due to the damage to their consignment. As the opposite party failed to settle

the claim of the complainant, they are guilty of deficiency in service also. Loss on account of the damage to the consignment of machinery of the

complainant has been quantified at Rs.61,44,000/- by the surveyor appointed by the complainant. This quantification has not been challenged.

Therefore, the complainant is entitled at least to the said amount from the opposite party. Since the claim of the complainant was not settled

promptly and within reasonable period after the peril, we are of the view that complainant is also entitled to be compensated for the unusual delay

in settlement. We would like to compensate the complainant by awarding some reasonable interest on the said amount of Rs.61,44,000/-. This

Commission had earlier awarded interest @ 19% from 1.02.1996 till its payment taking into account the circumstances that damage to the

machinery had occurred in August 1995 and giving some margin to OP- CWC during which the claim should have been settled. In our view, the

award of interest @ 19% appears to be on higher side and, therefore, we consider it just and reasonable to award interest @ 12% p.a. w.e.f.

01.02.1996 till its payment.

11. IN the result, the complaint is partly allowed. The opposite party No.1-Central Warehousing Corporation Limited is hereby directed to pay a

sum of Rs.61,44,000/- alongwith interest @ 12% p.a. w.e.f. 01.02.1996 to the complainant within a period of six weeks from the date of this

order failing which interest shall stand enhanced to 15% p.a. from the date of default.