

M/S. Gmr Industries Limited, Hyderabad Represented by Its Managing Director Vs. M/S. the New India Assurance Company Limited Represented by Its Divisional Manager and Others

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Court : Andhra Pradesh State Consumer Disputes Redressal Commission SCDRC Hyderabad

Decided On : Sep-30-2009

Judge : SRI SYED ABDULLAH, PRESIDNG MEMBER & SRI R. LAKSHMINARASIMHA RAO, MEMBER

Appeal No. : C.C. No. 28 of 2006

Appellant : M/S. Gmr Industries Limited, Hyderabad Represented by Its Managing Director

Respondent : M/S. the New India Assurance Company Limited Represented by Its Divisional Manager and Others

Advocate for Pet/Ap. : Counsel for the Complainants: M/s.K. S. Gopala Krishnan. Counsel for the Opposite parties: Mr. Kota Subba Rao for R-1, Mr. K. Rama Reddy for R-2, Mr. D. Srinivas for R-3

Judgement :

Oral order : (per Sri Syed Abdullah, Honble Member)

1) This complaint is filed to direct the opposite parties 1 to 3 for payment of the value of short delivery of imported Australian Coaking coal of 966.22 MTs, out of the total weightment of 24,418 MTs of cargo, worth Rs.84,99,410/- discharged at Haldia and Paradeep Sea ports covered by three Standard Fire and Special perils Policies which was undertaken to be transported by the third opposite party as per the contract. The repudiation of the insurance claim by opposite parties 1 and 2 and denial of liability by the third opposite party as to the short delivery of the consignment has been attributed as deficiency in service.

2) The factual matrix of the case in brief is as follows :

The complainant is a Public Limited Company had imported cargo of 40,483 MTs Australian Coaking Coal through shipment and consignment reached Indian territory through container. Out of the total weightment, 24,418 MTs of Cargo was discharged at Haldia and Paradeep ports on 3rd July, 2004. For discharge and transit of the said consignment on Indian soil, the clearing and forwarding agent, the third opposite party (C and F) has agreed and his offer was accepted on first July, 2004 by means of an agreement which was entered into for stevedoring discharge from vessel into dumpers allotted plot at the port area, un loading, high staking and reloading into trucks including processing, customers clearance, water sprinkling, security and supervision and transportation to the cookerries of the complainant situate at Dhanbad up to a handling loss of 0.50%. The contract enures for a period of 60 days from the date of arrival of the vessel at berth.

3) The complainant had taken Standard Fire and Special Perils Policy from the first opposite party on 21.7.2004 for a value of Rs.32 crores covering the total consignment of 49,483 MTs of Australian Coaking Coal for a short duration of two months which was extended for a further period of 2 months i.e., up to 21.11.2004. Another Marine Cargo Policy was also taken on 22.7.2004 for a value of Rs.32 crores for the imported cargo stocked at the above Sea ports from the first and second opposite parties on Co-insurance basis of 75:25

responsibility ratio. Apart from these two policies, another Standard Fire and Special Perils Policy was taken from the first opposite party on 21.7.2004 relating to stocks proposed to be stored at Dhanbad Cookeries and for LAM coke that was proposed to be converted at the Coakeries for the imported Australian Coaking Coal for a value of Rs. 5.60 crores and Rs.3.78 crores respectively.

4) Regarding the discharge and transit of cargo from vessel to the Dhanbad Cookeries of the complainant, as per contract, it was the entire responsibility of the third respondent (C and F) agent as per the work order. As per the Kolkata Port Trust Haldia Dock letter dated 18.1.2005 the entire cargo 24,418 MTs of coking coal voyaged through M. V. Star Victory to Haldia seaport was discharged during 4.7.2004 and 8.7.2004 under two line no.s 1 and 2 and the same was received by the third opposite party, who, stored the same at the licenced plot allotted inside the port area for purpose of safe custody and transportation. The formidable Marine Transit Policy issued by the first opposite party ensures the insurance coverage of transit of cargo from any where in India to any where in India, that means, from the point of discharge in the port area till the point the entire cargo reaches various cookeries of complainant at Dhanbad.

5) A survey was conducted by M/s. Geo-chem Laboratories Private Limited , Bhuvaneswar at Haldia Sea port both at the time of discharge of cargo from the vessel M. V. Star Victory and at the time of unloading of cargo and dumped into the allotted Plot Area in the Haldia Port and as well at the point of unloading of cargo at Dhanbard cookeries. After the stock verification by M/s. Geo-Chem laboratories (P) Ltd at various cookeries in Dhanbad a shortage of 966.22 MTs of cargo was reported to the complainant which is very disproportionate than the agreed rate of 0.50% of handling loss by C and F Agent (third opposite party) which resulted in pecuniary loss to a tune of Rs.84,99,410/- which is the approximate market value of the cargo that was lost in transit. Since the Marine Transit Policy continued with the opposite parties 1 and 2 on co-insurance basis both the opposite parties are liable to answer the claim for the aforesaid estimated loss. The third opposite party being the C and F Agent is equally liable to compensate the loss caused in shortage of cargo while delivering the same at the cookeries. The act or omission of the opposite parties amounts to deficiency in service. The complainant had lodged the claim with the opposite parties 1 and 2. The first opposite party had suggested through its letter dated 6.5.2005 to lodge a complaint with C and F Agent for the shortage of cargo in transit. The complainant had furnished all the details required by the first opposite party. Ultimately both the opposite parties 1 and 2 had turned down their liability on false and untenable pretext. The third opposite party also turned down its liability . Exchange of legal notices ensued against the third opposite party. The estimated pecuniary loss is worked out as per the details in para 9 of the complaint.

6) The first opposite party has resisted the claim denying the allegations of paras 1 to 9 of the complaint. It is stated that as per the complainants version the cargo was discharged on 03.07.2004 through the Vessel M. V. Star Victory. Fire and Burglary policy was issued for two months and Marine Policy was issued for one year. At the time of discharge of the cargo, they have not issued any policy to the consignment, so also, imports policy. The Marine policy was issued by the first opposite party covered marine consignment commencing from Haldia and Paradeep sea ports and not for the loss or damage that occurs at the storage area. They cannot be made liable. The policy does not cover the stock of coal short landed or whilst being stored in the Port Area. The standard Fire policy was issued for two months only commencing from 21.09.2004 to 20.11.2004. During this period it has not covered perils operated to cause any loss or damage to the stored goods at that area. The complainant himself admits that the policy covers the transits from the point of discharge i.e., Haldia Port area to the destination points of Dhanbad. M/s. Geo Chem Industries Ltd, Bhubaneswar have issued a certificate dated 11.04.2005 which clearly shows that they have taken final dispatches and quantity at Haldia Weight Bridge for all the imported cargo dispatches from M/s. M. V. Star Victory. It is stated that the material was sent to M/s. Sri Durga Coke over, Jai Ram Coke industries, Balaji Coke Industries, Ganesh Hard Coke, Om Sri Durga of total of 343 trips which amounts to quantity of 23451 entries. This clearly shows that the consignments were weighed at Haldia port received from the M.V. Star Victory at Haldia itself and that they have noticed the shortage of cargo at that time itself. The Third opposite partys agent stated that the weight and measurements were taken at Haldia weight bridge only and other letters

also shows that the loss noticed at Haldia Port only and when the complainant had approached the second opposite party with regard to the claim under Fire policy, the said insurer informed that the loss would have taken place at the time of importing the raw material as such it is a short landing. It is to be noted that the loss was not noticed at various cookerries at Dhanabad and it was noticed only at Haldia Port. The shortage of material was noticed by the insured at Haldia port Trust as per the report given by M/s. Geo Chem Laboratories, The Marine Transits were covered for the entire cargo on transit. Hence short landing and quantum of loss at storage area does not come under the purview of the transit policy. M/s. Geo Chem Laboratories, Bhubaneswar had conducted a survey at Haldia Sea Port where they noticed shortage, as such, the Marine Policy was not in operation at the time when shortage was noticed. The claim was denied as it was not admissible. After expiry of short period fire policy issued by first opposite party, the complainant said to have taken a Fire Policy with M/s. Oriental Insurance Company. However, the Marine Policy continued with the first opposite party for the Australian coaking Coal which was in transit from Haldia to anywhere in India. The first opposite party had not issued overseas policy to Marine consignment in favor of the complainant for covering the imports to these ports. On receipt of claim intimation on 12.4.2005 along with the report of M/s. Geo Chem Laboratories, the first opposite party had requested the complainant to provide correct policy number with all the details to depute the surveyor to assess the loss. The second opposite party had also informed in this regard and that the third opposite party in its letter dated 25.04.2005 informed that the loss reported was due to short landing which is to be covered under the Marine Policy. The shortage was noticed only at Haldia Airport. The marine perils were not operated at that time.

7) The second opposite partys version is that the second opposite party has no knowledge that the complainant had obtained Standard Fire and Specials Perils Policy from the first opposite party on 21.07.2004 for a value of Rs.32 crores covering the entire imported cargo of 49,483 MTs of Australian Coaking Coke for short duration of two months and extended for a further period of two months, i.e., up to 21.11.2004. It is further stated that the opposite party no. 2 denies that the complainant had taken the Marine Policy from the first opposite party on 21.11.2004 for a period of one year for Rs.32 crores in respect of the entire imported cargo lying at Paradeep and Haldia ports from the opposite parties 1 and 2 on co-insurance basis of 75: 25 responsibility ratio is concerned. The second opposite party has no knowledge about the Standard Fire and Perils Policy obtained from the first opposite party on 21.7.2004 relating to the stocks which are proposed to be stored at Dhanbad Cookerries and for LAM Coke that was proposed to be converted at the cookerries etc. for a value of Rs.5.6. crores and Rs.3.78 crores respectively is concerned. The second opposite party is not a party to the said transactions. The complainant had taken a Standard Fire and Special Perils Policy from the second opposite party on 21.11.2004 for a period of one year on the basis of better quotation etc is true but it is not aware of any suggestion of the first opposite party for payment of additional premium to convert the existing Standard Fire policy to a floated declaration policy in December, 2004 to enable the complainant to store these stocks at various places in and around Dhanbad. The second opposite party is not a party to the transactions mentioned in para 6 of the complaint. The opposite party has no knowledge of formidable Marine Transit Policy said to have been issued by the first opposite party to ensure the insurance coverage of transit of cargo from anywhere in India to anywhere in India. The second opposite party had issued only Fire Declaration Policy bearing No. 139 covering Australian Coke lying at paradeep and Haldia ports from 22.11.2004 to 21.11.2005 on sharing basis 70% with the opposite party and 30% share with OP. 1 and the third opposite party was never approached by the complainant for any Marine Insurance Policy as averred by the complainant in the complaint. The second opposite party repudiated the claim by sending a letter dated 25.04.2005 informing that Fire Policy issued by the second opposite party (policy no. 433201/F/2005/139) covers the loss due to any Fire and allied perils policy. The second opposite party has no liability under this policy for the loss due to shortage.

8) The third opposite partys version is that this Commission has no territorial jurisdiction to entertain the complaint. The claim against the opposite parties 1 and 2 is different and distinct from the claim against the third opposite party. The cause of action also is different, as such, there is no joint and several liability relating to the present claim. The present claim against the third opposite party is not maintainable. No part of cause

of action between the complainant and this opposite party took place in Andhra Pradesh. The imported coal was brought from Australia in July, 2004 which was discharged at Haldia Port in West Bengal through a ship i.e.. M. V. Star Victory. The third opposite party is a reputed clearing and forwarding as well as handling Agent in the sea ports including Haldia Port. The complainant had appointed the third opposite party as its agent at Haldia port to take delivery of the imported coal and to handle operations. The third opposite party unloaded the coal at Haldia Port through Port authorities from 04.07.2004 to 08.07.2004 carried out the other operations as per the contract. The imported cargo was stored at the place hired inside the port premises. The contract period was for sixty days from arrival of vessel at Berth and the vessel arrived on 03.07.2004. The complainant was supposed to take the entire coal within two months i.e., before 03.09.2004 but he did not take delivery of it within time. The complainant himself does not know from whom it has to claim damages, if any. At first the complainant claimed damages from the Haldia Port Authority who had rejected it. Then claimed insurance from the opposite parties 1 and 2 who also rejected it, with regard to the alleged loss of cargo and there is no consistency in the claim. The complainant in his correspondence claimed a sum of Rs.50 lakhs as loss but it was enhanced to more than Rs.80 lakhs without any basis, such, claim is arbitrary and baseless. There is a discrepancy in the claim of the complainant made by himself . The transportation of coal from Haldia port to Cookeries situate at Dhanbad was not a part of the contract. It is the responsibility of the complainant itself to transport the coal from Haldia Port to Dhanbad. The moment the coal was reloaded into trucks at Haldia Port for transportation to Dhanbad, the responsibility of the third opposite party ceased after 60 days from the date of arrival of the ship, i.e.. on 3.7.2004. A letter dated 11.04.2005 of M/s. Geo Chem Laboratories Private Limited was sent after a lapse of 7 months from the expiry of the contract period of 60 days. Since the weight of the coal at the time of reloading into the trucks was not taken in presence of the representative of the third opposite party. The complainant is also put to strict proof of the contents of the letter and also to prove the so called shortage of 966.22 MTs of coal. The estimated pecuniary loss of Rs.84,99,410/- shown in the claim is arbitrary, excessive and imaginary . The complainant is trying to make unlawful gain for itself. The complaint was filed on 30.06.2006, i.e., at the fag end of the two years limitation period. The opposite party no. 3 has to receive Rs. Four lakhs from the complainant towards its fees and the cause of action mentioned in the complaint is not correct. The contract between the complainant and the third opposite party is concluded at Haldia port.

9) On the above contentions, the following points would arise for adjudication and determination.

(1) Whether the complainant is a consumer and the complaint is maintainable ?

(2) Whether this State Commission has territorial jurisdiction to entertain the complaint as contended by the opposite party no. 3 ?

(3) Whether the shortage of cargo was due to weather conditions in port area as contended by the third opposite party or it was shortlanded while imported through shipment or the alleged loss was at Haldia port but not during transportation as contended by the opposite parties 1 and 2 insurance companies?

(4) Whether the third opposite party has liability along with the opposite parties 1 ad 2 for the value of the deficit of Cargo ?

(5) Whether the opposite parties 1 and 2 are justified in repudiating the insurance claim?

(6) What is the quantum of damages, the complainant is entitled for fastening liability against the opposite parties 1 to 3 ?

Point No.1

Whether the complainant is a consumer and the complaint is maintainable ?

10) None of the opposite parties have raised the question of maintainability of the complaint. They have not disputed that the complainant is not a consumer. However, the question is to be answered at first before the

adjudication of other issues in view of the amendment of the definition of consumer U/s.2(1)(d) (i) by amendment Act 50/2003 which came into effect from 18.6.2003 by insertion of the word commercial purpose.

11) The learned counsel for the complainant answering the said question has explained that the complainant which is a Limited company had imported the Australian Coaking Coal, the Raw material which is used for its industry without there being any re-sale and the industry was set up for earning livelihood and also for self-employment and employment generation. It is also contended that separate insurance policies were taken from the opposite parties 1 to 2 in respect of the imported ore which was stacked at the sea ports and from there to be transported to cookerries situated at Dhanbad so as to protect from the perils, loss of damage either by natural calamities or by theft etc, as such, the insured ore will not come under the category of as commercial purpose or activity involved in it. The reasoned explanation given by the complainant to get over the term commercial purpose is meaningful and acceptable. It is made clear that raw material that was imported was not intended for re-sale or for commercial activities except for the use to its own industry. Thereby the complainant is not barred from the definition of consumer. The explanation is accepted to hold that the complainant is a consumer which is explained factually from the material on record. The learned counsel has placed a reliance upon a decision of the Honble National Commission in M/s.Harsolia Motors and others Vs. M/s. National Insurance Company Limited reported in 2004 INDLAW NCDRC 42, to support his contention that the insurance claims of a Company are maintainable under the provisions of Consumer Protection Act. The aforesaid decision has elaborated the definition of consumer U/s.2(1)(d), service U/s.2(1)(O), so also, the term commercial purpose in para 19 it is held that Contract of Indemnity

the very foundation in my opinion of every rule which has been applied to the insurance law is that the contract of insurance contained in a fire or marine policy is a contract of indemnity and of indemnity only and that this means that the assured in the case of loss against which the policy has been made, shall be fully indemnified but never more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it, that is to say which either will prevent the assured from obtaining a full indemnity, that proposition must certainly be wrong .

12) Referring to the English Case law, Mathey Vs. Curling 1922 (2) AC 180, it is concluded that a person who takes insurance policy to cover the envisaged risk does not take the policy for commercial purpose. Policy is only for indemnification and actual loss. It is not intended to generate profit.

13) Perhaps in all fairness and in view of the legal position, the learned counsel for the opposite parties have not raised any objection on this aspect. . Hence this point is answered in favour of the complainant.

2) whether this State Commission has territorial jurisdiction to entertain the complaint as contended by the opposite party no. 3 ?

14) Ex A18 is the original contract entered into between the complainant and the third opposite party for unloading imported coaking coal at Haldia for which terms they were agreed to. The third opposite party is having its head office at Mumbai and branch office at Kolkotta which are indicated in it. Similarly in Ex.A-39 letter dated 24th June,2004 it is mentioned that the branch office is situated at Visakhapatnam also. In fact, Ex. A-18 was addressed on 1st July, 2004 by the third opposite party to the complainant on to its office situate at Hyderabad informing that the offer cum acceptance was accepted with the terms and conditions noted there in. Similarly, Ex.A-40 was issued by the third opposite party which contains the details of the nature of the work in respect of C and F contract and transport. These three documents are vital documents to cut the roots of the contentions of the third opposite party that the transaction was not entered in to within the jurisdiction of the State Commission. Sub-clause (c) (2) of Section 11 of the C. P. Act is very clear that the place where the cause of action whole or in part arises, the said District Forum/State Commission has jurisdiction to entertain the complaints for the value of the goods or services and the compensation if any claimed. No doubt, the imported cargo had reached Haldia Sea port where the same had to be discharged from the ship and then it is to be stocked at the allotted place of port sites and from there to be transported to the

cookeries at Dhanbad as per the contract. But the contract was actually entered into and the terms were worked out and finalized within the jurisdiction of the State Commission, as such, the objection raised by the third opposite party is not sustainable. Hence this point is answered in favour of the complainant and against the third opposite party.

Point No. 3:

Whether the shortage of cargo was due to weather conditions in port area as contended by the third opposite party or it was shortlanded while imported through shipment or the alleged loss was at Haldia port but not during transportation as contended by the opposite parties 1 and 2 insurance companies?

15) The opposite parties 1 to 3 have raised the objection doubting that there is no certainty of the exact quantity of ore that was discharged at Haldia port. In Ex.A-8 letter dated 25.05.2005 and Ex.B17 opposite parties 1 and 2 have raised the points that the short landing is covered under the Marine Transit policy and not under a Fire policy , as such, they have no liability and thereby repudiated the claim .

16) It is surprising how the insurance companies would issue policies covering the risk in respect of the imported consignment ore either at Haldia port or during transit without receiving the invoices or documents as to exact quantity of the imported ore and the exact quantity that was stocked in the port areas. Except filing Ex. B12 , B-13 and B15 policies the opposite parties 1 and 2 have not filed any convincing evidence to substantiate their contention that there was shortage of the material while landing at the port itself. It is improbable to believe or accept that any insurance company would issue the policy covering the risk especially when the goods that were insured are of high value worth Crores. So it is to be resumed that after receiving invoice and verifying the actual quantity of material which was stocked at the licenced site of Haldia sea port, the policies were issued. Ex. A-3 is the invoice filed by the complainant. This invoice was received after clearance of the amount through Andhra Bank. A cursory look of Ex. A3 shows that a total quantity of 49,484 MTs coaking coal was imported from Australia and that out of which an extent of 24,418 MTs was discharged at Haldia. This was also acknowledged by the third opposite party in its invoice. Ex A1 to A14 as to the quantity for which necessary payments were made pertaining to the security deposit, supervision charges etc., So the contentions of the opposite parties 1 and 2 that the total quantity that was received as mentioned in Ex.A3 is doubtful is not correct and raised for the sake of litigation. Ex.A-28 was addressed by the first opposite party to the complainant raising a doubt on the following points.

(1) Is there any involvement of carriers for transporting the material from one place to another place ?

(2) Are there any chances of suspecting shortage during i.e. time of shipment and transportation of material through ship ?

(3) Please send the details, if you notice that the carriers vessel is involved for the shortage/loss, we advise you to lodge the monetary claim on the concerned for the said shortage.

So also in Ex.A-29 some sort of objection or doubt was raised on 26.07.2009, for which, Ex A-30 reply was given by the complainant clarifying as to the exact total quantity of consignment as well the actual shortage, i.e., 966.22. MTs worth Rs.85.00 lakhs. As per Ex.A18 r/w Ex.A40, the third opposite party had agreed to discharge total quantity of cargo from the vessel into dumpers to the Port allotted area by unloading, High stacking and reloading into truck including High seas Sales, Processing Customs clearance at Haldia @ Rs.93.00 PMT plus 8% of 15% as per Government of India Excise Rules. Complete operation inclusive of water sprinkling, security and supervision and also inclusive of payment of port and Customs Overtime charges, also agreed for handling loss of 0.50% from out of the total weighment. Ex.A20 is the Geo-Chem Laboratories (P) Ltd report which has certified that a total quantity of 24418.00 MTs was discharged from the ship at berth no.7 at Haldia port from 04.07.2004 to 08.07.2004. it has also given the test analysis report which is enclosed with three sheets of gross moisture, proximate analysis of the total consignment of 24,418 Mt. Ex.A-21 is the report dated 11.04.2005 given by the Geo Chem Neutral Surveyors certifying the quantity of the ore that was

discharged or transported from Haldia to the destination i.e., cookeries situate at Dhanbad which was weighed at Haldia Weigh Bridge before transportation. The weight of each load was taken and also mentioned the total extent of ore that was loaded and transported through trucks. Ex.A21 contains a list 12 in number showing different dates on which the number of trips that were sent to different cookeries. Neither the third opposite party nor the opposite parties 1 and 2 have disputed or questioned the correctness of the reports of Geo chem. Laboratories who is a Neutral Marine Surveyors and as well Analysts Weighment expert. As an abundant caution, when the opposite parties 1 and 2 have raised a doubt about the actual quantity of the stock that was imported which was stored at Haldia port sites, the complainant had addressed a letter dated 27.12.2005 to the port authority for which Ex. A19 letter dated January 18, 2006 was sent by Kolkata Port Trust, Haldia Dock Complex confirming that the vessel had discharged 24,418 MT of Ore during the period from 04.07.2004 to 08.07.2004 and that the third opposite party had received the same and stored at the licensed plot allotted and that the entire stock was loaded by C and F agent from the plot which was taken delivery by trucks in full which was landed as per the draft survey. It is made clear that no cargo was left over inside the Port premises after completion of delivery. By the time the Cargo was discharged by the C and F agent from the Haldia port to its destination i.e., to the cookeries at Dhanbad, the total weighment was 24,418. As per the certificate of Kolkata, Sea Port authority the third opposite party had transported the entire stock in the trucks. The opposite parties 1 and 2 have raised un-necessary doubts and objections that the shortage of the Ore or loss at the place of sites or at the time of discharge. In view of the insurance coverage, it is incumbent for the insurance companies to know the total quantity of stock position and the transportation of it. Ex. A29 dated 27.06.2005 was addressed by the the first opposite party informing the complainant that they would depute a competent Investigator/surveyor to find out the loss. The said investigator M/s. Pinnacle Marine Services submitted Ex B-1 report dated 07.02.2008 after a long lapse of time with its conclusion (1) that there is no mention of a peril that had operated to cause the said loss under which the insurer is liable to pay the pecuniary loss. (2) the loss itself is not substantiated with facts and figures, (3) coal being regarded as perfect black body which is liable to absorb radiation and dissipate moisture. Hence in bulk stocking where moisture losses are of inherent nature (4) The insured had not provided the weight of transported material at all the three stages of operations. It is not known when the said surveyor had asked the complainant to furnish the details and it is not supported by any evidence. The consignment was transported by April, 2005 itself. While so, the first opposite party had informed to the complainant in June, 2005 that they would appoint a surveyor. It is not known when the surveyor had taken up investigation of it. Even in Ex B1 the said surveyor had expressed regret for submitting the report with inordinate delay with a lame excuse that they could not get any information from C and F agent. The very report is of no value and it is to be rejected in total as baseless.

17) It may be that at first the complainant had sent a letter dated 24.11.2005 to the second opposite party stating that there was an approximate loss of 825 tons ore. By the date of the said letter, it was only an approximate loss. Subsequently, the exact shortage of 966 MT was given as per the report given by the Neutral surveyor Geo Chem Laboratories There was an exchange of correspondence and legal notices between the complainant and the first opposite party covered by Ex.A-34,A35 and Ex.a37 with regard to the shortage of the consignment while transporting to the destination. In Ex.A-36 dated 29.12.2005 the complainant had correctly confirmed the exact shortage of the cargo as well estimated the loss at Rs. 85 lakhs by correcting that it is not Rs.50 lakhs as worked out earlier. Both the opposite parties 1 and 2 taking advantage of the initial discrepancy in the weightage mentioning it as 833 MT and then confirmed it as 966.20 MT. They tried to twist the facts and raised imaginary doubt about the actual quantity of the ore that was imported at Haldia port or loss that might have taken place at the place where it was stored at Haldia Port area,. This sort of distortion and inconsistency in the stand of the opposite parties 1 and 2 reflects unfair trade practice which was adopted by them to repudiate the claim.

18) Ex B.13 report filed by the first opposite party along with affidavit of the surveyor about the usual practice adopted at the sea ports with regard to the discharge of imported ore given as an example to support its stand is very much irrelevant and of no help at all.

19) The third opposite party as C and F agent having agreed with terms and conditions of Ex.A18 to ,Ex. A39 and A.40, has not filed any iota of evidence on record to show the total quantity of Ore that was discharged at the sea port was which was transported to the destination. The third opposite party being a reputed C and F agent is expected to maintain and should maintain its records to establish that it had discharged and transported the otal weight without any loss and he failed to discharge the burden which was shifted on him. The lengthy pleadings and the written arguments are not based on true facts and figures, much less, supported by any documentary evidence to get over the documentary evidence filed by the complainant to prove its case. Any prudent C and F agent would obtain an acknowledgement of the delivery of the total consignment on completion of the contract. Hence this point is answered against opposite parties 1 and 3.

Point No. 4 :

Whether the third opposite party has liability along with the opposite parties 1 ad 2 for the value of the deficit of Cargo ?

20) In Ex.A18 contract the terms and conditions entered between the complainant and the third opposite party are incorporated, so also, in Ex.A39 and A.40. In Ex. A40 under the column of transportation charges from discharged port to Dhanbad per MT with weighment tolerance, it is noted as to be discussed directly with transporters. Relying on this column the learned counsel for the third opposite party had argued that the third opposite party had not undertaken the contract to transport the ore from Haldia port to the destination ie. At Dhanbad. The said contention is untenable as per Ex. A39 commitment and the details in Ex.A40. In the columns of Ex. A40, it is mentioned that the transport charges are be worked out separately. It does not mean that the third opposite party had not undertaken to transport from Haldia port to the destination by rail or road.

21) The learned counsel for the complainant has relied on the reply Ex. A-19 dated 18.01.2006 sent by Haldia port authority which suffers the fact as to the total quantity of Ore that was transported from Haldia Sea Port. . It does not mean that the third opposite party had transported the entire quantity of Ore to its destination. The burden heavily rests on the third opposite party who being a C and F agent cum carrier to account for the total quantity of ore that was transported in fact with handling loss of 0.50% and that the laboratory reports and the weighment is not correct. No where, the third opposite party has pointed out any single lacune or defect in the Marine Neutral surveyor report. Before filing the complaint, there was an exchange of notices between the complainant and the opposite parties with regard to the loss/shortage of consignment. Ex. A34 notice was sent to the third opposite party within time. The law relating to rights and liabilities of common carriers is well settled. The responsibility of the third opposite party also as a carrier is like that of an insurer and it is his duty to see that the consignment reaches safely without any loss during transit.

22) In a decision of the Apex Court in Patel Roadways Limited Vs Birla Yamaha Limited 2000 INDLAW SC 2703, it is made is clear that in any suit brought against a common carrier for the loss, damage or non-delivery of goods (including containers pallets or similar articles of transport used to consolidated goods) entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage or non-delivery was due to the negligence or criminal act of the carrier, his servants or agents. Further, it is made clear that as per section 2(1)(d) r/w 2(1)(o) and 2(1)(g) the District Forums, State Commissions and National Commission are vested with powers of adjudication of all types of Consumer Disputes where there is a negligence on the part of a carrier and the claim could be entertained by Consumer Forums. The complainant had issued a notice as required U/s.9 and 10 of the Carriers Act before filing the complaint against the third opposite party.

The omissions and commissions on the part of the third opposite party amounts to deficiency in service. So under no stretch of any interpretation it can be said that the claim against the third opposite party cannot be linked with the claim against the opposite parties 1 and 2. Hence this point is answered against the third opposite party and answered in favour of the complainant.

Point No . 5

Whether the opposite parties 1 and 2 are justified in repudiating the insurance claim?

23) The undisputed facts are that both the opposite parties 1 and 2 have issued the following policies. Policy No.621200/11/04/00286 issued by the New India Assurance Company Limited and the validity period from 22.7.2004 to 21.7.2004 which is a standard fire and Special Peril Policy for an assured sum of Rs.16 crores. In the description of risk column it is noted that the stocks are of Australian coaking coal insured and stored at Open Paradeep and Haldia ports worth 25,000 MTs. The sum insured was later enhanced from Rs.16 crores to Rs.32 cores under receipt dated 23.7.2004 for which additional premium was paid at Rs.2,33,280/-.It is a co-insurance along with oriental insurance sharing the liability at 25% and the National Insurance at 75%. The period of risk was extended from 22.7.2004 to 21.11.2004 subject to warranty as per policy stored open at Paradeep and Haldia ports 45,000 MTs. In the caption of the policy it is noted as miscellaneous/Burglary . In the policy No.621200/46/04/00038 cookery stocks at Haldia ports , premium at Rs.12,000/-, assured sum Rs.16 crores period from 22.7.2004 to 21.09.2004. The assured value is enhanced from Rs.16 crores to Rs.32 crores for the of policy period from 22.09.2004 to 21.11.2004 issued by the National Insurance Company Limited. Policy bearing No. 621200/46/04/0000038 was issued covering all risks of the material while transporting from anywhere in India to anywhere in India by rail/road in bulk. Australian coal during the period from 22.7.2004 to 21.7.2005 from assured value Rs.16 crores. The first opposite party filed the Xerox copies of policy Ex.B1, B7,B9 and B10. Ex B6 is the letter dated 22.7.2004 addressed by the complainant to the first opposite party giving details of the polices claiming loss from the assured sum covered policy. Ex B15 policy bearing No. 139 was issued by the second opposite party under Standard Fire and Special Peril policy covering the risk for the period from 22.11.2004 to 21.11.2005 in respect of the stocks kept at Haldia port.

24) In the written arguments, the first opposite party has raised the points that there is no deficiency in service and the State Commission cannot be converted as a recovery Court like Civil Court. for recovery in spite of its admission that it issued storage policy for two months and later on fire policy was issued. Also raised the point that on expiry of fire policy issued by the first opposite party, the complainant had taken a fresh policy from the second opposite party for the imported Ore. The first opposite party also admitted that Marine Cargo policy (Ex B12) was issued and the Private surveyor, M/s.J. B. Boda Surveyors who was appointed has certified in Ex B1 the complainant has not furnished weight of transported material at three stages. The Marine cargo policy which was issued by first opposite party covers for loss during transit. The Burglary policy will cover the risk of theft while loading only. But it is not a case of complainant that there was a theft or fire. The complainant has not filed any documents/bill of lading or any other documents to show the exact weight of the consignment at every stage. So also not filed any stock verification report of M/s. Geo Chem Laboratories Pvt. Ltd. Thus it is not established where the shortage occurred which was noticed on 15.7.2004 while so the claim was made on 12.04.2005. As per the terms of the policy it should be informed within 24 hours but not done. The third opposite party do not have any responsibility of the safety of stock for more than 60 days, Initially loss was claimed at Rs. 50 lakhs and later it was enhanced to Rs/84,99,410/-. There is an exclusion in clause 2.4 in Ex B12 which is to the effect that the damages or expenses caused by delay is excluded.

25) The second opposite party in its written arguments has raised the point that the second opposite party had issued only fire policy and not Marine cargo policy. The second opposite party is a co-insurance company with the first opposite party.

26) The contentions of the opposite parties 1 and 2 are not tenable and sustainable for the following reasons. It is a clear case of the complainant that the shortage of ore was done on the way from to Haldia port to Dhanbad by road and as such it is covered by Marine cargo policy Ex B.12 which was issued jointly as co insurance by the opposite parties 1 and 2. Discrepancy about shortage of the quantity or its value may be due to oversight or anxiety. However on the basis of correct details of Ex. A-20 dated 15.07.2004 issued by Neutral surveyor, i.e. M/s. Geo Chem Laboratories Ltd certifying the actual shortage of the quantity that was delivered at the destinations, a claim was made. There is no shadow of doubt as to actual quantity of Ore that was dispatched from Haldia i.e., 24418.00 MTs. It is very much clear from Ex. A19 that entire cargo was loaded in

dumpers at haldia port site and transported to the cookeries at Dhanabad. . It is clearly established that the shortage had not taken place at Haldia port but it was only during transit from Haldia port to Dhanbad cookeries for which Ex. B12 Marine cargo policy was issued by both the opposite parties 1 and 2 on co-insurance basis to the extent of its liability at 25: 75 ratio. The private surveyors report Ex.B1 is of no help and cannot be accepted for the reasons stated supra and the first opposite party himself had employed the investigator belatedly and that he is not a neutral surveyor. It is proved with satisfactory evidence that the third opposite party had accepted that he had loaded the cargo at Haldia port in to trucks for transportation by road to deliver at the destination, i.e., at the cookeries of Dhanbad. In Ex A-40 r/w A18 dated 24.6.2004 column no. 3 it is made clear on this aspect. It is pertinent to note that the third opposite party had never raised objection or disputed that the cargo was not lifted and transported within 60 days so he ceased to have any responsibility for the loss or shortage. It is only at the stage of notice that the third opposite party came forward disowning liability with a ruse pretext. It may be that a period of 60 days was contemplated in the contract but the period can be extended either by mutual consent. When the third opposite party had transported after 60 days it is to be ;inferred that it was mutually agreed. If time was not extended by mutual consent, the third opposite party should be informed on the 61st day that he ceased to have responsibility at all. No such steps were taken by him.

Ex. A20 and Ex. A21 which are the stock verification reports from which it is clear that there was a shortage of 966.28 Mts of cargo from the total stock covered by Ex. B12 Marine Cargo Policy and the third opposite party had undertaken the responsibility to transport the total stock of 24.418 MTs. Under no stretch of any interpretation the first opposite parties 1 and 2 to disagree the fact that the Marine policy is not covered by the loss that had arisen during transit. Ex. A38 policy terms and conditions are very clear. Clause 6.2 reads as follows :

Subject to 6.1 above, the insured shall be entitled to recover for insured loss occurring during the period covered by this insurance, notwithstanding that the loss occurred before the contract of insurance was concluded, unless the assured were aware of the loss and the under writers were not

Thus even though the policy was taken later it covers for cargo for which insurance was taken. Had it been the loss occurred prior to the taking of the insurance policy then alone the opposite party is not responsible. But loss occurred after the date of taking of the policy. Hence the insurance is covered in view of the clause 6.2. The third opposite party was very much in custody of the entire cargo till it reached Dhanbad, wherein, the neutral surveyors had taken stock verification and found deficient quantity of cargo, as such, the question of proof by the complainant regarding when and where the quantum of stock verification was done by the complainant does not arise. As observed earlier to the points it is a common knowledge that the insurer verifies and then only after due satisfaction a policy would be issued. Therefore, the presumption goes against the first opposite party . clause 2.1 of Ex.B12 has no application as the claim is for shortage and not due to delay. It is a case of loss of cargo, so also, 60 days period of contract as per Ex. A18 does not cover the case of transportation from Haldia port to Dhanbad. So this period has no application for transportation clause. The period of 60 days is fixed in the contract is in between the complainant and the third opposite party but not with the opposite parties 1 and 2. it is pertinent to note that the third opposite party did not raise any objection that since 60 days period was over, and he has no responsibility to transport the ore to the destination.

27) The contention of the second opposite party that there is no proof to show that he is not the co-insurer with the first opposite party is not sustainable. In the entire pleadings, he has pleaded that the second opposite party has not agreed as co-insurer noted in Ex. B12 policy columns. It is clearly mentioned that the liability is in the ratio of 75%: 25% between the opposite parties 1 and 2 respectively. So both the opposite parties 1 and 2 are bound by this clause. Thereby the second opposite party is also equally responsible in the proportion furnished in the policy. Ex B15 policy issued by the second opposite party has no relevance with the claim made.

Point No. 6 :

What is the quantum of damages, the complainant is entitled for fastening liability against the opposite parties 1 to 3 ?

28) The complainant has given details of loss suffered for recovery of it from out of the insurance claim. In para 9-A of the complaint, the details are given with all calculation showing under different head with estimated total loss of 966.22 MTs cargo worth Rs.84,99,410/- . None of the opposite parties have disputed or pointed out any objection as to the correctness of the calculation noted in work sheet as well expenditure that was incurred in respect of shortage of 966.22 MTs cargo. A party is required to specifically deny the factual aspects in its pleadings. The opposite parties 1 and 3 failed to specifically deny the quantum of damages in the pleadings. Non-denial of the plaint averments amounts to judicial admission. This aspect has been made clear in a decision of M. Venkataramana Hebbar (dead) by Lrs and M. Rajagopal Hebbar and others, (2007) 6 SCC 401, in para 12(3) that it shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages. If not denied specifically or by necessary implications, or stated to be not admitted in the pleading of the defendant, it shall be taken to be admitted except as against a person under disability. In terms of section 58 of Evidence Act, the facts admitted only need not be proved and thereby the court is entitled to draw an inference that the same had been admitted. Thus, on an overall consideration of factual and legal aspects, we hold that the complainant has proved the claim by producing cogent and satisfactory evidence inasmuch as by establishing that there was a deficit of cargo of 966.22 Mts while the same was transported by the third opposite party from Haldia port to the Complainants cookeries situate at Dhanbad through trucks and the shortage is evident from the Neutral surveyors report Ex A.20 r/w Ex. A19. The opposite parties 1 and 2 knowing fully well and in spite of having knowledge of the loss of cargo during transit which was caused by the third opposite party they have twisted and mislead the facts to its advantage contending that there may be shortage at the place of export or landing or at the place where the same was stored. It can be said without hesitation that the third opposite party had taken inconsistent stand and he failed to discharge his burden to account for as to how and in what manner he transported the entire consignment of ore after it was discharged at Haldia port and from there to its destination, i.e., cookeries at Dhanbad. Thereby for the loss caused by the third opposite party, the opposite parties 1 and 2 are jointly and severally liable to pay the damages from out of the Insurance coverage Ex-B.12. The second opposite party should be fastened with liability to the extent of 25% share of co-insurance coverage as per Ex. B-12 policy. The third opposite party is also jointly and severally liable along with opposite parties 1 and 2 to indemnify the loss to the complainant.

29) In the result, the complainant is allowed ordering recovery from the opposite parties 1 and 3 with joint and several liability for a sum of Rs.84,99,410/- with interest at 9% there on from the date of repudiation, i.e., 21.07.2005 till the date of realization. However, the second opposite party is confined with liability to an extent of 25% of the insurance coverage under Ex. B12 policy. The opposite parties 1 to 3 are liable to pay litigation expenses of Rs.5000/- to the complainant. The aforesaid amount shall be paid within 30 days from the date of receipt of this order.

PRESIDING MEMBER

Dt. 30.9.2009.

Dissent Order : (per R.Lakshminarsimha Rao, Member)

I have gone through the draft order prepared by my learned brother and with due respect I do not agree with the findings recorded and conclusion arrived at by him. I express my opinion as follows:

2. The complainant is a company registered under the companies Act and engaged in the business. The opposite parties no.1 and 2 are insurance companies and the opposite party no.3 is a common carrier. The

complainant company for its business activity had imported Australian coking coal through vessel MV Star Victory in the year 2004. The ore was to be used for the business activity of the complainant company which is primarily a commercial purpose. In order to fit in the definition of the consumer u/s 2(1)(d)(i) of the C.P. Act, the goods purchased by the complainant company which is the subject matter of the complaint should not be meant for resale or for any commercial purpose. The complainant company is not a small scale industry nor an individual who buys goods or avails service exclusively for the purpose of earning his livelihood by means of self employment.

3. It is not a case of a simple claim for indemnification of the loss said to have been sustained. The complainant company as stated in the complaint seeks an amount of Rs.19,51,717/- loss in profit margin in 966.22 Mts. The complainant thus seeks loss in profit which in my view disentitles the company from invoking the jurisdiction of Consumer Forum under the C.P. Act.

4. Supreme Court in Laxmi Engineering Works Vs. P.S.G. Industrial Institute reported in (1995) 3 SCC 583 held :

Under definition of the expression 'consumer' in Section 2(d), a consumer means in so far as is relevant for the purpose of this appeal, (i) a person who buys any goods for consideration; it is immaterial whether the consideration is paid or promised, or partly paid and partly promised, or whether the payment of consideration is deferred; (ii) a person who uses such goods with the approval of the person who buys such goods for consideration (iii) but does not include a person who buys such goods for resale or for any commercial purpose. The expression "resale" is clear enough. Controversy has, however, arisen with respect to meaning of the expression "commercial purpose". It is also not defined in the Act. In the absence of a definition, we have to go by its ordinary meaning. "Commercial" denotes "pertaining to commerce" (Chamber's Twentieth Century Dictionary); it means "connected with, or engaged in commerce; mercantile; having profit as the main aim" (Collins English Dictionary) whereas the word "commerce" means "financial transactions especially buying and selling of merchandise, on a large scale" (Concise Oxford Dictionary). The National Commission appears to have been taking a consistent view that where a person purchases goods "with a view to using such goods for carrying on any activity on a large scale for the purpose of earning profit" he will not be a "consumer" within the meaning of Section 2(d)(i) of the Act. Broadly affirming the said view and more particularly with a view to obviate any confusion the expression "large-scale" is not a very precise expression the Parliament stepped in and added the explanation to Section 2(d)(i) by Ordinance/Amendment Act, 1993. The explanation excludes certain purposes from the purview of the expression "commercial purpose" - a case of exception to an exception.

The explanation however clarifies that in certain situations, purchase of goods for "commercial purpose" would not yet take the purchaser out of the definition of expression "consumer". If the commercial use is by the purchaser himself for the purpose of earning his livelihood by means of self-employment, such purchaser of goods is yet a "consumer". The explanation reduces the question, what is a "commercial purpose", to a question of fact to be decided in the facts of each case. It is not the value of the goods that matters but the purpose to which the goods bought are put to. The several words employed in the explanation, viz., "uses them by himself", "exclusively for the purpose of earning his livelihood" and "by means of self-employment" make the intention of Parliament abundantly clear, that the goods bought must be used by the buyer himself, by employing himself for earning his livelihood.

5. The complainant entered into agreement with the third opposite party for discharge and transit of the cargo at Haldia port. The complainant had obtained the following insurance policies from the opposite parties no1 and 2.

1. Standard Fire and Special peril policy from the opposite parties on 21.7.2004 for a period of two months covering the risk on the cargo (it was said to be extended till 21.11.2004)

2. Marine Cargo Policy from the opposite parties for a sum of Rs.32 crores in respect of imported cargo lying at Paradeep and Haldia Ports from the opposite parties no.1 and 2 on the basis of 75 : 25 responsibility ratio.

3. Standard Fire and Special Peril Policy from the opposite party no.1 on 21.7.2004.

6. The marine cargo policy said to have been obtained by the complainant on 21.7.2004 for a period of one year for Rs.32 crores in respect of the entire imported cargo at Haldia and Paradeep Ports from the opposite parties no1 and 2 on co-insurance basis of 75 : 25 responsibility is denied by the opposite party no.2. It is stated that opposite party no.2 has not issued any Marine Cargo Policy on 21.7.2004 or at any time in favour of the complainant company. The opposite party no.2 has stated that it has issued the Fire and Special Peril Policy Bearing No.139 covering Australian coal lying at Paradeep Port and Haldia Ports from 22.11.2004 to 21.11.2005 on a share basis of 70:30.

7. The opposite party no.2 has denied payment of additional premium by the complainant in the month of December 2004 to convert existing standard fire policy into a floater declaration policy to enable the complainant to store the stocks at various places in and around Dhanbad.

8. Marine Transit Policy dated 22.7.2004 does not cover the risk during the storage period. Ex.B4 shows that New India Assurance Co., Limited that the opposite party no.1 requested the complainant through letter dated 25.5.2005 to inform them about involvement of any marine risks in the alleged shortage of coal. The complainant had not brought to the notice of the opposite party no.1 any marine risks. Ex.B1 is the report of Pinnacle Marine Services submitted to the opposite party no.1 expressing its opinion in regard to the claim of the complainant company. In the report it was stated that the loss said to have been suffered by the complainant company is not substantiated and there was possibility of depreciation in the quantity of coal as the coal could absorb radiation and dissipate moisture. The conclusions of the insurance surveyor as mentioned in Ex.B1 reads as follows:

2. the loss itself is not substantiated with facts and figures:

1. Coal being regarded as perfect black body it is liable to absorb radiation and dissipate moisture. Hence, in bulk stocking where moisture losses are of inherent nature (a characteristic of the commodity) calculations on bone dry basis are to be compared for ascertaining the exact storage.

2. The insured did not provide the weight transported material at all the three stages of operations. That is to say the weight on bone dry basis on arrival (by ascertaining the moisture levels at various stages), the weight prior dispatches and the weight at the collories. The cargo arrived in the month of July, 2004 and the dispatches were completed in the month of April, 2005, or in short the insured had not provided any records to substantiate the monitoring of moisture levels by way of drawing samples at various stages of the operation.

9. As seen from the report of the surveyor, the complainant had not got weighed the ore at all three stages of the operation. The opposite parties no.1 and 2 have put on the complainant company to establish the shortage of the coal and the exact place originating from Australia and culminating at different cookeries from Haldia Port to Paradeep port in India. The complainant has also not stated as to how and what quantity of the ore is lost while converting the Australian coal into coking coal at various cookeries. Geochem Lab on whose report the complainant lays reliance upon is a private surveyor appointed by the complainant company. The complainant has not informed either of the opposite parties before or at the time of appointing Geochem Lab as their surveyor. The opposite party no.3 has questioned the competence of Geochem Lab and sanctity of the report said to have been submitted by it to the complainant company. The Geochem Lab has not intimated the opposite parties at the time of inspection of the stocks said to have been conducted by it on instructions from the complainant company.

10) The complainant claims that they had imported 49,484 Mts of Australian Coking Coal in the year 2004. On 3.7.2004, 2418 Mts of cargo was said to have been discharged at Haldia port and 25,660 Mts of cargo at Paradeep Sea Port. The Marine Cargo Policy was issued by the opposite party no.1 on 22.7.2004. The cargo was received on 3.7.2004 at Haldia Port. The marine Cargo Policy, according to the complainant company was

issued on 22.7.2004 i.e., 18 days after the cargo was discharged at Haldia port. Hence, the policy is not in force as on the date of arrival of the cargo at Haldia port. The opposite party no.1 has informed the complainant through letter dated 21.7.2005 that the risk was not covered. The marine Cargo Policy was issued for the period commencing from 22.7.2004 to 21.9.2004, the Standard Fire Special Peril Policy only was in force and as per the terms of the policy, the property situated at GMR Industries Limited, LAT Tekkali only was covered. The Burglary policy issued by the opposite party no.1 does cover the risk of theft while loading only. It is not the case of the complainant that there was any theft committed while loading the consignment.

11. The complainant has not furnished the exact weight of the consignment loaded in the ship in Australia, the weight of the consignment after being unloaded at Haldia and Paradeep port and thereafter the weight of the coal discharged at various cookerries. The coal was not weighed at the time of unloading and reloading into the truck. Admittedly, loss was not occurred during transit by rail or road. Therefore, the risk is not covered by the Marine Transit Policy. The complainant has not established the shortfall either while the carrying the consignment by the rail/road from the port of discharge to cookerries or at cookerries.

12) The complainant has not filed the report of M/s Geochem Lab Private Limited. The complainant has not proved any operation of marine perils after the coal was unloaded at Haldia and Paradeep ports. The period of contract between the complainant company and the opposite party no.3 is only for 60 days from the date of arrival of the vessel at berth. The vessel arrived on 3.7.2004. The complainant had not taken the possession of the coal till the mont

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