REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 8884-8900 OF 2010

M/s. Galada Power and Telecommunication Ltd. — **Appellant(s)**

Versus

United India Insurance Co. Ltd. and Another Etc. — **Respondent(s)**

J U D G M E N T

Dipak Misra, J.

The appellant-complainant filed a batch of 21 complaints i.e. C.D. Nos.539 to 559 of 2000, claiming compensation of Rs.43.59 lacs along with interest @ 18% p.a. from the respondents, namely, United India Insurance Company Limited and India Transport Organization, on the ground that there had been shortage/loss of 'All Aluminium Alloy Conductor' (for short, 'AAAC') wire, which was supplied by the complainant to the Power Grid

Corporation of India Limited (PGCIL). The case of the complainant before the Consumer Disputes Redressal Forum, Ranga Reddy District (for short, 'the District Forum') was that between 1.3.1998 to 13.4.1998, twenty-one trucks of AAAC wire packed in wooden drums were delivered at stores of PGCIL at Assam. In all the trucks shortage was noticed by PGCIL on 25th March, 1998. As there was shortage, which is called transit-loss for which the appellant had taken a policy from the insurer, it put forth a claim before the insurer for Rs.35 lacs. The said claim was lodged before the insurance company *vide* letter dated 3rd April, 1998.

2. On the basis of the communication made by the appellant, the insurer appointed a surveyor who gave a report on 1st September, 1998, assessing the loss approximately at Rs.2 lacs in each case, thereby the amount in toto assessed by the surveyor was approximately Rs.43 lacs. Though the surveyor had assessed the loss and sent it to the insurance company, the insurer *vide* letter dated 20th September, 1999, repudiated the claim by stating thus:-

"Dear Sirs,

Re: Marine claim No.050202/21/26/7/18/97/
Policy No.050202/21/26/16/2101/97

On perusal of the records pertaining to the above claim, and subsequent investigation into the matter, we find that the above claim lodged by you does not fall under the purview of "TRANSIT LOSS". As such, the claim is not tenable under the terms of the policy. In view of this, we are treating your above claim as "NO CLAIM"."

[Emphasis added]

3. As the claim was not accepted, the appellant knocked at the doors of the District Forum for grant of compensation, but the District Forum declined to accept the claim on three counts, namely, that there was non-joinder of necessary parties; that the allegation of theft was not proved; and that in a summary proceeding the factual dispute could not be decided.

4. Dissatisfied by the order passed by the District Forum, the appellant preferred twenty-one appeals before the Andhra Pradesh Consumer Disputes Redressal Commission (for short, 'the State Commission'). The State Commission after analysing the materials brought on record opined that the investigator could not be relied

upon as the investigation had been completed after six months from the date of occurrence; that the report of the investigator could not be said to have been based on any material worthy of verification; that since it was the carrier who had undertaken to deliver the goods at Assam, it was they who are responsible to give reasons as to how, when and where the goods were transshipped and in what condition the goods were delivered; that the length and net weight of AAAC wire was mentioned on each drum and also dispatch documents and the respondent No.2, that is, the carrier company had issued Exhibit A-3 (lorry receipts) wherein cross reference to the invoice and delivery challan numbers were given which clearly established the fact that the complainant had dispatched as per the said Exhibit; that since the persons present at the site at the relevant point of time i.e. unloading, were the drivers, there was no reason to disbelieve their endorsements, specifically when the documents, viz., Exhibits A-25 and 27 confirm the shortage on 25.04.1998 in 109 drums; that the finding of the District Forum that the complaint was not maintainable due to non-joinder of necessary party, that is,

PGCIL, was not correct and the complaint could not have been dismissed on that score; that the report of the surveyor, that is, Exhibit A-12 was based on physical verification of the consignment of AAAC wire and hence, the repudiation of claim by the insurer was unjustified; and that there was no inordinate delay in intimating the claim to the insurance company. Being of this view, the State Commission allowed the appeals preferred by the appellant and determined the compensation approximately at Rs.43 lacs in all the appeals. Be it noted, the State Commission while determining the quantum, made the insurer and the carrier jointly and severely liable.

5. The judgment and order passed by the State Commission compelled the insurer and the carrier to file independent revisions before the National Consumer Disputes Redressal Commission, New Delhi (for short, 'the National Commission). The revisions preferred by the carrier stood dismissed and the same have not been challenged and, therefore, the view expressed in the case of the carrier has attained finality.

6. As far as the insurer is concerned, it preferred

twenty-one revisions, out of which four were dismissed by the National Commission *vide* judgment and order dated 6th March, 2009, on the foundation that as they dealt with the transactions pertaining to "open delivery". We are not concerned with those four revisions. As far as the seventeen revision are concerned, the National Commission allowed them on the ground that the intimation by the complainant to the insurer was not made within seven days of arrival of the vehicles at the destination mentioned in the policy. The reasoning of the National Commission is to the following effect:-

> "In this regard, the dates of delivery are important to us. As per material brought on record, the first intimation of the claim or loss was reported to the petitioner insurer only on 27.3.1998 and confirmed by letter dated 3.4.98. There is no dispute that the arrival dates of the different consignments in question start from 1.3.98 onwards till 11.4.98. In the above circumstances and keeping in view the terms of the Policy, condition 5 of Inland Transit Clause, we are of the view that there was no Policy Cover in existence and the risk stood not covered after delivery of goods to the consignee. We further note that, even on practical side, not reporting the loss in time deprived the Insurer to have a first a first hand appreciation/assessment of the extent of loss, more so when, as per statement on record, against number of consignments/delivery notes it is clearly

noted 'seal tempered'.

There can be no dispute that Insurance is a contract of utmost good faith. Failing to report the loss, noted at the time of receipt/delivery is a decisive and a determinate factor against the complainant. We also note with some dismay, and wonder as to why PGCIL was not made a party as it was at their warehouse in Assam that shortage/loss is alleged to have been notice. It is stated by the Ld. Counsel of the Petitioner that an effort was made before the State Commission praying for making PGCIL a party but it was declined. The whole episode leaves us with a single thought that complainant did not care for the terms of the contract and went on to compound the wrongs.

In retrospect one could only observe that at least in cases/consignment where material was found tempered, matter should have been reported to the underwriters immediately and delivery should not have been made by the complainant to the consignee till the loss had been assessed by the surveyor after perhaps asking for an open-delivery. This could have been the case of the consignee also – not making him a party should be held against the complainant.

In the aforementioned circumstances, we are of the view that there was no coverage of risk at the time of reporting the loss to the petitioner/insurer, hence the complainant is not entitled to any relief in terms of condition(s) of Policy as also law and other material on the subject discussed earlier and also the law laid down by this Commission in the cited judgment (supra)."

7. Being of this view, the National Commission allowed the revision petitions and set aside the orders passed by the State Commission.

8. We have heard Mr. Rana Mukherjee, learned senior counsel for the appellant and Mr. Rakesh Kumar, learned counsel for the respondent No.2. None has appeared on behalf of the respondent No.1, the insurer.

9. It is submitted by Mr. Rana Mukherjee, learned senior counsel that the National Commission has grossly erred by opining that the PGCIL is a necessary party. It is his further submission that the view expressed by the National Commission that the claim stands defeated because of delayed intimation as postulated in clause no. 5, of the policy is not sustainable, inasmuch as a survey was conducted and that apart the letter of repudiation does not refer or even remotely touch upon any of the aspects enumerated in clause 5. Additionally, it is urged by Mr. Mukherjee, learned senior counsel that the National Commission has erroneously held that the complainant went on compounding the wrongs, whereas the material brought on record clearly establish that it was

quite vigilant and diligent in putting forth his claim and, in fact, its conduct shows intrinsic faith in the insurer.

10. Mr. Rakesh Kumar, learned counsel appearing for the respondent No.2 made an endeavour to support the order passed by the National Commission, but, as has been stated earlier, when the revisions preferred by the carrier have already been dismissed and the said orders have attained finality having not been assailed, we do not think he can be permitted to argue to sustain the order passed by the National Commission. Be that as it may, it really does not make any difference.

11. Clause 5 of the Policy that relates to "Duration", reads as follows:-

> "5. Duration–. This insurance attaches from the goods leave the warehouse and/or the store at the placed name in the policy for the commencement of transit and continues during the ordinary course of transit including customary transhipment if any,
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> (i) until delivery to the final warehouse at the destination named in the
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> (ii) in respect of transit by Rail only or Rail and Road, until expiry of 7 days after arrival of the railway wagon at the final destination railway station or
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> (iii) in respect of transit by Road only until

> expirty of 7 days after arrival of the vehicle at the destination town named in the policy whichever shall first occur.
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> N.B.1. The period of 7 days referred to abvoe shall reckoned from the midnight of the day of arrival of railway wagon at the destination railway station or
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> 2. Transit by Rail only shall incidental transit by Road performed by Railway Authorities to or from Railway Out-Agency."

12. The National Commission has relied upon Clause 5 and on that basis has rejected the claim by putting the blame on the complainant. The letter of repudiation dated 20th September, 1999, which we have reproduced hereinbefore, interestingly, does not whisper a single word with regard to delay or, in fact, does not refer at all to the duration clause. What has been stated in the letter of repudiation is that the claim lodged by the complainant does not fall under the purview of transit-loss because of the subsequent investigation report. It is evincible, the insurer had taken cognizance of the communication made by the appellant and nominated a surveyor to verify the loss. Once the said exercise has been undertaken, we are disposed to think that the insurer could not have been

allowed to take a stand that the claim is hit by the clause pertaining to duration. In the absence of any mention in the letter of repudiation and also from the conduct of the insurer in appointing a surveyor, it can safely be concluded that the insurer had waived the right which was in its favour under the duration clause. In this regard, Mr. Mukherjee, learned senior counsel appearing for the appellant has commended us to a decision of High Court of Delhi in ***Krishna Wanti v. Life Insurance Corporation of India***[1], wherein the High Court has taken note of the fact that if the letter of repudiation did not mention an aspect, the same could not be taken as a stand when the matter is decided. We approve the said view.

13. In this context, we may with profit, reproduce a passage from Halsbury Law of England, which reads as follows:-

> "In *Halsbury's Laws of England*, Vol. 16(2), 4th Edn., Para 907, it is stated:
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> "The expression 'waiver' may, in law, bear different meanings. The primary meaning has been said to be the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter as-

1 2000 (52) DRJ (DB)

> serted, and is either express or implied from conduct. It may arise from a party making an election, for example whether or not to exercise a contractual right... Waiver may also be by virtue of equitable or promissory estoppel; unlike waiver arising from an election, no question arises of any particular knowledge on the part of the person making the representation, and the estoppel may be suspensory only... Where the waiver is not express, it may be implied from conduct which is inconsistent with the continuance of the right, without the need for writing or for consideration moving from, or detriment to, the party who benefits by the waiver, but mere acts of indulgence will not amount to waiver; nor may a party benefit from the waiver unless he has altered his position in reliance on it.""

14. In ***Manak Lal v. Dr. Prem Chand Singhvi***[2], it has been held:-

> "*8.* ... It is true that waiver cannot always and in every case be inferred merely from the failure of the party to take the objection. Waiver can be inferred only if and after it is shown that the party knew about the relevant facts and was aware of his right to take the objection in question. As Sir John Romilly, M.R. has observed in *Vyvyan* v. *Vyvyan*[3]: (Beav p. 75 : ER p. 817)
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> 'Waiver or acquiescence, like election, *presupposes that the person to be bound is fully cognizant of his rights, and that being so, he neglects to enforce them*, or chooses one benefit instead of another, either, but not both, of which he might claim'."

2 AIR 1957 SC 425
3 (1861) 30 Beav 65 : 54 ER 813

15. Yet again, in ***Krishna Bahadur v. Purna Theatre***[4], it has been ruled that:-

> *"A right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute subject to the condition that no public interest is involved therein.* Whenever waiver is pleaded it is for the party pleading the same to show that an agreement waiving the right in consideration of some compromise came into being. *Statutory right, however, may also be waived by his conduct.*"

16. In ***State of Punjab v. Davinder Pal Singh Bhullar***[5], a two-Judge Bench speaking about the waiver has opined:-

> "41. Waiver is an intentional relinquishment of a right. It involves conscious abandonment of an existing legal right, advantage, benefit, claim or privilege, which except for such a waiver, a party could have enjoyed. In fact, it is an agreement not to assert a right. There can be no waiver unless the person who is said to have waived, is fully informed as to his rights and with full knowledge about the same, he intentionally abandons them. (Vide *Dawsons Bank Ltd.* v. *Nippon Menkwa Kabushiki Kaisha*[6], *Basheshar Nath* v. *CIT*[7], *Mademsetty Satyanarayana* v. *G. Yelloji Rao*[8], *Associated Hotels of India Ltd.* v. *S.B. Sardar Ranjit Singh*[9], *Jaswantsingh Mathurasingh* v. *Ahmedabad Municipal Corpn.*[10], *Sikkim Subba*

4 (2004) 8 SCC 229
5 (2011) 14 SCC 770
6 AIR 1935 PC 79
7 AIR 1959 SC 149
8 AIR 1965 SC 1405
9 AIR 1968 SC 933
10 1992 Supp (1) SCC 5

> *Associates* v. *State of Sikkim*[11] and *Krishna Bahadur* v. *Purna Theatre*.)
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> 42. This Court in *Municipal Corpn. of Greater Bombay* v. *Dr Hakimwadi Tenants' Assn.*[12] considered the issue of waiver/acquiescence by the non-parties to the proceedings and held: (SCC p. 65, paras 14-15)
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> "*14.* In order to constitute waiver, there must be voluntary and intentional relinquishment of a right. The essence of a waiver is an estoppel and where there is no estoppel, there is no waiver. Estoppel and waiver are questions of conduct and must necessarily be determined on the facts of each case. …
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> *15.* There is no question of estoppel, waiver or abandonment. There is no specific plea of waiver, acquiescence or estoppel, much less a plea of abandonment of right. That apart, the question of waiver really does not arise in the case. Admittedly, the tenants were not parties to the earlier proceedings. There is, therefore, no question of waiver of rights by Respondents 4-7 nor would this disentitle the tenants from maintaining the writ petition.""

17. In the instant case, the insurer was in custody of the policy. It had prescribed the clause relating to duration. It was very much aware about the stipulation made in clause 5(3) to 5(5), but despite the stipulations therein, it appointed a surveyor. Additionally, as has been stated earlier, in the letter of repudiation, it only stated that the claim lodged by the insured was not falling under

11 (2001) 5 SCC 629
12 1988 Supp SCC 55

the purview of transit loss. Thus, by positive action, the insurer has waived its right to advance the plea that the claim was not entertainable because conditions enumerated in duration clause were not satisfied. In our considered opinion, the National Commission could not have placed reliance on the said terms to come to the conclusion that there was no policy cover in existence and that the risks stood not covered after delivery of goods to the consignee.

18. Coming to the merits of the claim, we find that the surveyor had given a report that there was a loss. He had also quantified it. The State Commission after elaborate discussion has held as follows:-

> "The surveyor also confirmed in their reports, the shortage/loss of AAAC due to pilferage during transit and estimated the loss as per Ex.A12. This shortage was also confirmed by Katigorah police as per Ex.A13 and as reiterated earlier by the Tage Over Certificate, Ex.A19. Taking into consideration that the surveyros appointed by the insurance company have completed their investigation and submitted their reports and thereafter an investigator was appointed on 16-4-1998 without any valid reasons. It is held by the National Commission in 1 (2004) CPJ 10 (NC) in Gammon India Ltd., v. New India Assurance Co. Ltd. that 'Report of first surveyor not accepted, second surveyor

> appointed-Appointment of second surveyor not explained – Deficiency in service proved – Report of first surveyor upheld' and the investigator in the instant case submitted his report on 28-12-1998 i.e. almost 8 months after his appointment. Taking into consideration all the above submissions, we are of the considered opinion that the appellant/complainant was able to establish that there was shortage/damage to the consignment which was given to second respondent for transportation."

19. Though the said aspect has not been gone into by the National Commission, yet we find, the findings recorded by the State Commission are absolutely justified and tenable in law being based on materials brought on record in such a situation we do not think it appropriate that an exercise of remit should be carried out asking the National Commission to have a further look at it. In any case, the exercise of revisional jurisdiction by the National Commission is a limited one. We may hasten to add that to satisfy ourselves, we have perused the surveyor's report and scrutinized the judgment and order passed by the State Commission in this regard and we are completely satisfied that the determination made by it is absolutely impeccable.

20. In view of the aforesaid analysis, the appeals are

allowed. The judgment and order passed by the National Commission in the batch of appeals is set aside. We have been apprised that 50% of the amount was deposited and the appellant has withdrawn the said amount. The balance amount along with interest, as directed by the State Commission, shall be paid by the insurance company within four months from today. There shall be no order as to costs.

.....J.
(Dipak Misra)

.....J.
(Rohinton Fali Nariman)

New Delhi;
July 28, 2016.