2023 INSC 689

Non-Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2042/2012

S.S. Cold Storage India Pvt. Ltd. ... APPELLANT

VS.

National Insurance Company Limited ... RESPONDENT

J U D G M E N T

DIPANKAR DATTA, J.

1. The present appeal, under Section 23 of the Consumer Protection Act, 1986 (for brevity, "CPA" hereafter) registers a challenge to the judgment and order dated 13th September 2011 passed by the National Consumer Disputes Redressal Commission, New Delhi (for brevity, "NCDRC" hereafter), whereby Original Petition No. 80 of 1999 (for brevity, "Complaint" hereafter) filed by the Appellant was dismissed.

2. A decision herein, by virtue of being a first appeal, necessitates looking at the facts in some depth. The relevant facts triggering the Complaint are noticed hereunder:

   a. The Appellant is engaged in the business of operating a cold storage facility (for brevity, "Facility" hereafter), the plant,

machinery, and stock whereof were continually insured by the Respondent.

b. The Appellant had obtained the following insurance policies from the Respondent between 1997 and 1998:
    i. Machinery Insurance Policy,
    ii. Refrigeration Plant (Stock) Policy (for potatoes) (for brevity, "Refrigeration Policy" hereafter),
    iii. Fire Policy (Comprehensive Fire Policy for the building, furniture plant, machinery, and installation),
    iv. Fire Policy (On stock of potatoes in the Facility).
c. Sometime around 3rd and 4th October 1997, there was leakage of ammonia gas in Chamber Nos. 1 and 2 of the Facility (for brevity, "Chambers" hereafter), resulting in significantly elevated temperatures, and a foul smell, culminating in a closure of the Facility.
d. In the immediate aftermath of the incident of leakage of gas, on 4th October 1997 to be precise, the Appellant informed the Respondent and the District Horticulture Officer of the same, whilst requesting an inspection of the Facility.
e. The Appellant, on 10th October 1997, also wrote to the District Horticulture Officer to sell the potatoes that were stored in the affected Chambers in order to have the Chambers cleared.
f. The Appellant, on 14th October 1997, filed a claim with the Respondent claiming an amount of Rs.1,03,15,080/-. Therein,

the damage was claimed in respect of 85,956 bags of potatoes, each weighing around 80kg, where the amount claimed was calculated at Rs.150/- per quintal as per the stipulations of the Refrigeration Policy.

g. The District Horticulture Officer, on 18th October 1997, while responding to the Appellant's letter dated 10th October 1997 stated that the disposal of potatoes should be prioritised to prevent the spread of any disease or epidemic in the vicinity.

h. The Respondent meanwhile had instructed a surveyor named Mr. S.K. Agarwal to inspect the Facility. However, he expressed his inability to assess the Facility due to the magnitude of the damage.

i. Then the Respondent appointed another surveyor, M/s Mehta and Padamsey Surveyors Pvt. Ltd. (for brevity, "Surveyor" hereafter) to inspect the Facility. One Mr. A. Banerjee was sent by the Surveyor to visit the Facility from 23rd October 1997 to 25th October 1997. On 27th October 1997, the Surveyor addressed a letter to the Appellant asking it to preserve the existing state of affairs in the Facility as the Chambers were inaccessible due to high temperature and the stench of ammonia.

j. After the Chambers were cleared of the ammonia gas, the Surveyor visited the Facility on 17th January 1998, to conduct the requisite inspection.

k. The Surveyor, by letter dated 10th March 1998, informed the Appellant that the incident had occurred due to decay, wear and tear, leading to leakage of ammonia gas. The pipe had given way along the seam, and that was attributable to decay, wear, and tear; hence the same was excluded as per the Refrigeration Policy.

l. On 22nd January 1999, the Respondent informed the Appellant that its claim had been repudiated by its competent authority.

m. The Appellant then instituted the Complaint before the NCDRC on 17th April 1999 claiming an amount of Rs.1,03,15,680/- and certain further amounts, upon the repudiation of its claim under the Refrigeration Policy. On 7th January 2010, the Appellant's amended complaint was taken on record by the NCDRC, wherein the following relief was sought:

> *1. Respondent be ordered to pay to the complainant the claim amount of Rs.98,03,640/- (Rupees Ninety Eight Lakh Three Thousand Six Hundred and Forty only) towards the actual loss on account of stock (potato) damage;*
>
> *2. Direct the Respondent no.1 to pay the complainant an amount of Rs.20,000/- towards the cost of the ammonia pipeline as per the insurance policy;*
>
> *3. Award adequate compensation to the Complainant towards the financial losses suffered by the complainant due to the reason the Respondent did not settle the claim and withhold the claim amount, which resulted closure of instant cold storage for full one season, especially in view*

of the fact that the complainant had to bear the penal interest on the loan taken from State Financial Corporation/bank;

4. Award interest @18% from the date of instant incident i.e. 04.10.1997 and till the date of actual payment on the entire losses suffered by the complainant;

5. Award adequate compensation to the complainant on account of mental agony and torture, the complainant suffered and also as exemplary damages against unfair trade practices adopted by the Respondent;

6. Award legal costs and damages to the complainant;

n. The Respondent filed its reply to the aforesaid Complaint on 7th August 2000, placing on record the report of the Surveyor dated 3rd August 1998 (for brevity, "Surveyor's Report" hereafter).

o. At the stage of evidence, on 19th April 2008, the Appellant placed on record before the NCDRC a report by one Mr. S.K. Ahuja, Chartered Engineer/Loss Assessor (for brevity, "Loss Assessor" hereafter), wherein *inter alia* it was stated that the crack in the pipes could not have been due to wear and tear.

p. Subsequently, the Appellant filed an application before the NCDRC to allow the inspection of the pipes, which had been removed from the Facility by the Surveyor, by two technical experts. The NCDRC, on 11th May 2009, allowed the Appellant's application. Subsequently, the pipes were inspected (then in the custody of the Surveyor) in the presence of two technical experts, *viz*. (i) Dr. Manohar Prasad (a retired professor of IIT,

Kanpur) and (ii) Mr. K.K. Gupta (Chartered Engineer) on 25th July 2009 (for brevity, "Experts" hereafter when referred to jointly).

q. On 4th November 2009, the said Dr. Prasad submitted his report stating *inter alia* that the leakage of ammonia could only be termed as an accidental happening, and that the theory of it being due to normal wear and tear was not correct. On his part, Mr. Gupta submitted a report dated 6th November 2009 where he concluded *inter alia* that the pipes could not have been termed as worn out as the material flowing through them was alkaline, and not corrosive like acid.

3. After considering the pleadings as well as the other materials on record, the NCDRC opined that the Appellant had failed to establish deficiency by the Respondent in providing services and declined to grant compensation, as a consequence whereof it dismissed the Complaint filed by the Appellant as noted above. Certain salient observations made by the NCDRC in the impugned judgment are summarised below for convenience:

a. The NCDRC noted that the cracks in the pipes were thin (hairline) and had occurred at the joints. The pipes were not seamless as claimed by the Appellant; hence, the leakage of gas could not be due to a bursting of pipes.

b. Relying on the dictionary definition of *burst,* it was held by the NCDRC that there was no *sudden burst* in the pipe resulting in the leakage of ammonia.

c. The NCDRC also went on to reproduce certain findings from the Surveyor's Report, indicating that the leakage of ammonia was attributable to the hairline opening along with welding joints in the pipe and that the same was due to wear and tear.

d. Further, the NCDRC reproduced certain portions of Mr. Gupta's report to substantiate its conclusions that the leakage occurred due to normal wear and tear as the same had appeared after 5 to 7 years of usage and were not due to any accident. Further, it noted that the report submitted by Mr. Gupta supported the view that there was no proper fusion of the welding joints along the welding line, and that this could have resulted in hairline cracks.

e. Also, the NCDRC observed that the "C Class" pipes claimed to be used by the Appellant, that purportedly had a lifespan of 20 to 25 years, were not actually used in the Facility as the pipes used were not seamless and had welded joints.

f. Pertinently, the NCDRC noted that the expert opinions had been obtained after a span of more than 10 years, and they could not be given credence as the Experts had refrained from giving any definite opinion as to the real cause of the cracks. Further, the reports could not be treated as fully independent as the

choice of Experts was that of the Appellant's. It also dismissed the allegations of collusion against the Respondent and the Surveyor as the same had not been substantiated by the Appellant.

g. The NCDRC went on to observe that the hairline cracks in the pipes, in all probability, had occurred due to wear and tear and gradual deterioration rather than a sudden burst. Since the damage was due to wear and tear, the other aspects of the claim did not require consideration as per Exception Clause 3 of the Refrigeration Policy which excluded such an occurrence from the scope of the Refrigeration Policy.

h. It was also noted by the NCDRC that the Appellant had made no payment to the potato growers and even the original and amended Complaint recorded no detail of any payment of such a nature; hence, the Appellant had suffered no loss in that respect.

4. We have heard Mr. Vijay Hansaria, learned senior counsel appearing on behalf of the Appellant and Mr. Yogesh Malhotra, learned counsel appearing for the Respondent.

Contentions of the Appellant

5. At the outset, Mr. Hansaria urged that the NCDRC had erred in holding that the hairline cracks along the welding joints of the pipes were attributable to wear and tear. He emphasised that the Refrigeration Policy had been issued to the Appellant after a thorough inspection

of the Facility, and that the same had been conducted only five months prior to the incident in question.

6. Mr. Hansaria then submitted that the reports of three experts, *viz.*, Mr. Ahuja, Dr. Prasad, and Mr. Gupta, indicated that the cracks in the pipes were not due to normal wear and tear, but due to an accident. Further, he iterated that the Surveyor had not sent the extracted portion of the pipes to any approved laboratory for testing after the incident, and it was thus clear that the Surveyor's views were not tenable.

7. Next, Mr. Hansaria contended that the NCDRC fell in error by adopting an approach which is impermissible in law. Our attention was invited to the impugned judgment to show how selectively the NCDRC had relied on observations in the reports of Mr. Ahuja, Dr. Prasad and Mr. Gupta which tended to support the conclusions reached by it while brushing aside the observations which did not support such conclusions. According to him, the contents of the reports being inseparable the same could not have been accepted in part and rejected in part; either it had to be accepted as a whole or rejected *in toto*.

8. Adverting to the findings of the NCDRC regarding the damage caused to the potatoes stored in the Facility, Mr. Hansaria submitted that the Respondent was contractually obliged to pay the amount claimed to the Appellant at the agreed rate of potatoes as per the Refrigeration Policy and that the Appellant had indeed suffered a loss. He indicated

that the potato growers, whose stocks were stored at the Facility, refused to take back the ammonia affected potatoes and also refused to clear their rental dues with the Appellant whilst litigation regarding the same was pending before the respective fora. In fact, a writ petition filed by the Appellant challenging recovery proceedings initiated by the potato growers is pending before the Allahabad High Court and that the Appellant still runs the risk of being burdened by orders of court to compensate the potato growers whose produce had been stored in the Facility.

9. Contending that the Appellant has been unfairly treated by the Respondent and the NCDRC having failed to redress its lawful grievance on untenable grounds, the appeal ought to succeed and the Appellant be held entitled to relief as claimed before the NCDRC.

Contentions of the Respondent

10. Mr. Malhotra urged this Court not to disturb the finding of the NCDRC in the impugned judgment that the leakage of ammonia was not due to any *sudden burst* or an accidental occurrence. He submitted that the Surveyor's Report was clear in its findings that the leakage of ammonia was due to hairline openings along the welding joint of the pipes caused by normal wear and tear and, hence, was excluded by Exception Clause No. 3 of the Refrigeration Policy.

11. Further, Mr. Malhotra pointed out that the Appellant had appointed the Experts after more than a decade of the incident, and that even their reports did not identify any specific cause of the hairline cracks.

He then submitted that the said reports did not add any credibility to the Appellant's submissions and were rightly rejected.

12. Mr. Malhotra also brought to our attention that the Appellant had not made any payments to the potato growers as of 24th July 1998, and that there was no loss caused to the Appellant as the stock was not owned by it.

13. Resting on the aforesaid contentions, Mr. Malhotra submitted that the appeal being devoid of merits deserves outright dismissal.

Consideration of the cited decisions

14. Both Mr. Hansaria and Mr. Malhotra invited our attention to several decisions of this Court, which we propose to consider hereafter before embarking on an appreciation and analysis of the evidence that was led by the parties before the NCDRC.

15. The proper approach in a case of the present nature where there are multiple reports of surveyors and experts has been outlined in a catena of decisions of this Court. Presently, we wish to advert to the decisions cited by the parties.

    a. **United India Insurance Company Limited vs. Kantika Colour Lab and Others[1],** where this Court held that simply the happening of a covered event did not entitle the insured to claim reimbursement of the amount stated in the policy, and

[1] (2010) 6 SCC 449

that only upon proof of actual loss could the insured claim reimbursement to the extent the same were established.

b. **United India Insurance Co. Ltd. and Others vs. Roshan Lal Oil Mills Ltd and Others**[2]**,** where this Court remanded the matter back to the NCDRC as due consideration was not placed on the joint survey report of the relevant incident on the basis of which the insurer had repudiated the claim of the insured; and that non-consideration of this important document resulted in a serious miscarriage of justice and vitiated the judgment of the NCDRC.

c. **Sikka Papers Limited vs. National Insurance Company Limited and Others**[3], where this Court observed that a surveyor's report was not the final word, and that there must be legitimate reasons for departing from such a report.

d. **Sri Venkateswara Syndicate vs. Oriental Insurance Company Limited and Another**[4] where this Court expounded on the duties of a surveyor, and the due importance to be given to his assessment. It was also observed that an insurance company was not bound by a surveyor's report, but also could not go on appointing surveyors one after the other so as to get a tailormade report to its satisfaction. Further, in the case that it did appoint a second surveyor, satisfactory reasons for the

[2] (2000) 10 SCC 19
[3] (2009) 7 SCC 777
[4] (2009) 8 SCC 507

same needed to be provided. It was also laid down that if the surveyor's reports were prepared in good faith and with due application of mind – in the absence of any error or ill motive – the insurer was not expected to reject the same, and in the event of an arbitrary rejection of a surveyor's report, the courts could intervene and correct the error committed by the insurer while repudiating the claim of the insured.

e. **New India Assurance Company Limited vs. Pradeep Kumar**[5] where it was observed that a surveyor's report was not the last and final word. Further, it was not that sacrosanct that it could not be departed from, and that though it could be the foundation/basis of the settlement of a claim, it was not binding upon the insurer or the insured.

f. **New India Assurance Co. Ltd. vs. Luxra Enterprises (P) Ltd**[6] and **New India Assurance Co. Ltd. vs. Sri Buchiyyamma Rice Mill**[7]**,** where this Court relied on **Sri Venkateswara Syndicate** *(supra)* to observe that a surveyor's report may be rejected only due to the report containing inherent defects, it being arbitrary, excessive, and exaggerated, or any such cogent reasons before the appointment of another surveyor.

[5] (2009) 7 SCC 787
[6] (2019) 6 SCC 36
[7] (2020) 12 SCC 105

g. **National Insurance Company Ltd. vs. Hareshwar Enterprises (P) Ltd and Others**[8] where this Court, relying on **Pradeep Kumar** *(supra)*, observed that while the assessment of loss by an approved surveyor was a prerequisite for settlement of the claim, it was not the last and final word. Further, it was not that sacrosanct so as not to warrant a departure if necessary. Further, the report was not binding on either party, and could be taken on as evidence until more reliable evidence was brought on record to rebut the contents of the surveyor's report.

h. **Khatema Fibres Ltd. vs. New India Assurance Company Ltd.**[9] where this Court, while discussing the scope of the expression *deficiency*, stated that the appellant should be able to establish either that the surveyor did not comply with the code of conduct in respect of its duties, responsibilities, and other professional requirements or that the insurer acted arbitrarily in rejecting the whole or a part of the surveyor's report. It also reiterated the dicta of **Pradeep Kumar** *(supra)* as discussed hereinabove. Further, this Court held that a consumer forum, which was primarily concerned with an allegation of deficiency in service, cannot subject the surveyor's report to forensic examination. Once it was found that there

[8] (2021) SCC OnLine SC 628
[9] (2021) SCC OnLine SC 818

was no inadequacy in the quality, nature, and manner of performance of the duties and responsibilities of the surveyor, and that the report is not based on *adhocism* or vitiated by arbitrariness, then the jurisdiction of the forum to go further would stop.

Analysis

16. The issue which arises for determination, in the present appeal, lies within a narrow compass, i.e., whether the NCDRC was justified in rejecting the Complaint of the Appellant holding that there is no deficiency of service on the part of the Respondent. While deciding this issue, we would necessarily be required to assess the relative weightage to be placed on the report of the Surveyor appointed by the Respondent as well as the reports of the Loss Assessor and the Experts appointed by the Appellants regarding the possible cause for leakage of ammonia gas. That there were four reports on record before the NCDRC, one from the side of the Respondent and three from the Appellant's side, is not in dispute.

17. As our discussion hereafter would reveal, much depends on the answer to the question as to what was the 'make' of the pipes that were installed in the Chambers and through which ammonia gas leaked. It would have been fair, just, and expedient if direct and not opinion evidence was placed before the NCDRC by the parties or if the NCDRC itself had called upon an expert to give his opinion on the make of the pipes in view of the NCDRC not accepting the Appellant's

claim that it was of make *Tata Steel C Grade Heavy Duty*. The answer to such question would have been clinching. It would have been proper for us, in the light of the aforesaid circumstance, to remand the Complaint to the NCDRC for a fresh decision. However, having regard to the fact that the incident is more than 25 years old, and the parties also urged us to render a decision on the merits of this appeal, we proceed to decide the contentious issue by this judgment.

18. At the outset, a reference to the Surveyor's Report dated 3rd August 1998 is merited in some detail since it formed the foundation on which the impugned judgment and order of the NCDRC rests. Salient observations from the Surveyor's report are quoted below:

> *18. Following the Insured's advice, we were at Mehmoodabad on 17th Jan. 1998. We found the area around the cold storage was dumped with rotten potatoes. Though the Chamber No. I & II, were cleared of the rotten stocks even then the stench was unbearable. In order to identify the source of leakage, the Compressors were started and the source of leakage identified. The leakage in both the Chambers were in the liquid ammonia pipeline laid out in the top most tier and a thin (hair breadth) opening found along the seam (welding joint) through which the Gas had leaked. The location of the leakage was identified in each Chamber as under:*
>
> *Chamber No. I: Between Rack No. 199 and 200 as marked on the column.*
>
> *Chamber No. II: Between Rack No. 4/15 & 4/16 as marked on the columns.*

19. It did not require much of an explanation that the hairline opening along the welding joint was attributable to wear & tear (a contingency clearly excluded under the policy) […].

20. We would once refer to the fact that the hairline crack along the welding seam in the liquid Ammonia Pipeline in both Chamber Nos. I & II was attributable to the wear and tear of the Pipeline – expressly excluded from the scope of insurance as per the Policy Conditions. […]

23. We would submit once again that the damage/decomposition of the stocks held in Chamber Nos. 1 & II of the Insured's Cold Storage was not attributable to any of the insured peril under the Policy. It is entirely left to National Insurance Co. Ltd. to examine and decided as they deem fit and proper.

(emphasis ours)

19. We have noticed that the averments made in paragraph 3(xxxvi) of the appeal have not been dealt with by the Respondent in its counter affidavit; only the first sentence being relevant, is quoted hereunder:

xxxvi) That on the perusal of the Reply filed to the Complaint and the report of M/s Mehta and Padamsey Surveyors Pvt. Ltd., the Appellant came to know that neither a technical expert's opinion was obtained nor the pieces of pipes were sent to any laboratory by the said Surveyors before recommending the repudiation of the Appellant's claim by the said surveyors. […]

There being no rebuttal from the side of the Respondent, it stands to reason that the Surveyor's Report was not based on any scientific investigation.

20. As recorded in the Surveyor's Report, construction works of Chamber Nos. 1 and 2 were completed in March 1990 and February 1992 respectively, whereas the incident of leak of ammonia gas occurred in October 1997. It is trite to note that while the Surveyor's Report does advert to certain construction specifications of the Facility but the said report makes little mention of the nature of the compound (acidic or alkaline) passing through the pipes, its effect on the pipes, and does not dwell at all on the potential causes of such a wear and tear despite only a few years having lapsed post installation. Further, there is no discussion as to the details of the manufacturer, the likely lifespan of such installed pipes, and whether such pipelines could have developed a hairline crack akin to that of a hair's breadth within 5/7 years of their installation. It is undisputed that the Surveyor did not send the pieces of damaged pipes to an expert or a laboratory to identify the cause of leak. There was neither any oral or documentary evidence to support the theory of wear and tear. Also, no reason, far less cogent reason, was furnished by the Respondent to arrive at the conclusion that the leakage of ammonia occurred due to simple wear and tear. Such omission assumes greater importance as the Respondent had inspected the Facility prior to renewal of the policies

(including the Refrigeration Policy) by the Appellant just a few months prior to the incident of gas leak, after which the policies were renewed. Significantly, the Appellant after initial purchase of the policy went on seeking renewal of the same year after year and the Respondent too, on its part, permitted such renewal at regular intervals prior to expiry accepting substantial sums as premia, lending credence to the argument on behalf of the Appellant that all such renewals were preceded by a satisfaction reached by the Respondent that providing insurance cover for the Facility would not expose it to any risk. More importantly, what is apparent on a perusal of the Surveyor's Report is an *ipse dixit* that ammonia gas leaked because of wear and tear of the pipelines in the Chambers, rather than a conclusion drawn on the basis of a process of reasoning having regard to all relevant factors.

21. Whilst considering the rival submissions, useful guidance can be drawn from the decisions of this Court in **Hareshwar Enterprises** *(supra)* and **Pradeep Kumar** *(supra)* where it was held that though the report of a surveyor appointed by the insurance company may be considered as evidence while settling a claim, more evidence on record could be used to rebut the contents of the same.

22. In the instant case, the Appellant has placed on record reports of the Loss Assessor, and those of the Experts. No doubt, the said reports were not obtained in close proximity to the date of the incident of gas leak but at this juncture, we may remind ourselves that it was the

NCDRC which, *vide* its order dated 11th May, 2009, had allowed an application of the Appellant seeking permission to inspect the pipes, which were cut and kept in the custody of the Surveyor, for obtaining experts' reports thereon. It is in pursuance thereof that the Experts submitted their reports. If inspection and subsequent reports at such distance of time were not to be of any worth, it defies logic as to why, in the first place, the application was allowed. Next, if the reports of the Experts did not qualify to be considered only because they had a belated look at the pipes, on the same analogy the observations made by the NCDRC on visual impression thereof a few days before delivery of judgment is liable to be discredited and invalidated on the self-same ground of delay. We thus find the approach of the NCDRC to be flawed.

23. As Judges, we are not experts in the field of refrigeration of cold storages to opine on our own which of the two versions is correct and acceptable. This also applies to the members of the NCDRC. We are aghast to find that the members, who heard the Complaint, have made observations as if they were experts sitting in appeal on the reports of the Loss Assessor and the Experts. Within our limited jurisdiction, we are only entitled to draw inferences from the materials on record including the aforementioned reports, which the Respondent could not discredit, and say upon applying the test of preponderance of probabilities as to which of the two versions is more probable. Be that as it may, we intend to rely on certain general

observations made in the reports which the NCDRC did not discard with cogent reasons. Since the contents of the Surveyor's Report and those reports placed on record by the Appellant conflict with each other, we have thought it prudent to separate the grain and the chaff.

24. While it is true that the Experts' reports were based on their visual impression of the pipes, it is equally true that it is the Appellant who had appointed them. The NCDRC rightly observed that the reports "*cannot be treated as totally independent as it was the complainant who made a choice of his experts*"; nevertheless, there are certain general observations in such reports to be noticed hereafter which do help us in our search for the truth.

25. The Loss Assessor's report states that for wear and tear to occur, there should have been a chemical active reaction of mechanical frictional force; hence, in the present case, due to the lack of such factors, the leakage of ammonia was not attributable to decay or wear and tear along the welding seam of the said pipes. It also discussed the kinds of materials ammonia would be corrosive to, where the steel of the present pipes does not find a mention. There is also a discussion on the make of the concerned pipes being of *Tata Steel C Grade Heavy Duty*, and those of its specifications as per the product catalogue. It then stated that as per the said specifications, the life of such pipes would be beyond 25 years, and to say that their failure was due to wear and tear within 10 years of installation does not hold good. It also remarked that any failure caused by wear and

tear would be preceded by marks of corrosion; further, the pipes were also said to be painted with anticorrosive paint for protection against deterioration. Hence, it was concluded, that leak of ammonia gas was a natural outcome not related to ageing or normal wear and tear.

26. Dr. Prasad, in his report, while considering the thickness and class of pipes and the nature of ammonia, noted that there was no possibility of wear and tear. He went on to state that such C Class pipes operate without any issues for 20 to 25 years, and that the present sudden leakage of ammonia can only be explained as an accidental happening.

27. Mr. Gupta's report observed that the Facility was in conformity with all relevant safety norms prescribed for running such a cold storage facility. It further noted that the pipelines and equipment in the Facility (Chambers) were 5 to 7 years old as Chamber No. 1 was constructed in 1990 and Chamber No. 2 in 1992. Pertinently, Mr. Gupta observed that wear and tear would take place only when there was movement and friction between two objects. In the present case, his report stated that there was no sort of movement, vibration, or air resistance. He further pointed out that anhydrous ammonia flowing through the pipes, being alkaline, could not damage them, unlike an acidic compound which could attack the pipes. The report also proceeded to indicate that the lifespan of such *mild steel* pipes (C Class pipes) would be around 20 years and ruled against 5 to 7 years old pipes being worn out.

28. While the reports were such, on the one hand the NCDRC refused to give credence to the reports of the Loss Assessor and the Experts appointed by the Appellant on the ground that such reports, obtained belatedly, did not also contain any definite opinion as to what was the real cause of the cracks; yet, on the other hand, the NCDRC picked up stray observations contained in the reports to reject the claim of the Appellant. We are in agreement with Mr. Hansaria that it was not open to the NCDRC to rely on portions of the reports which supported its conclusions drawn from its visual impression of the pipes and discard the rest because the observations came in conflict with such conclusions. The NCDRC ought to have either accepted or rejected the reports in full and not accept/reject the same in part, since the contents were to be read as a whole, not being severable.

29. In the light of Exception Clause 3 and in the context of the Complaint of the Appellant read together with the Expert's reports, we are inclined to the view that wear and tear would generally refer to the expected deterioration of the plant and equipment caused by frictional force. The Surveyor's Report is conspicuously silent on this aspect. The Surveyor identified the cause for the leak as wear and tear, without delving deep into the matter as to whether the pipes that were used were likely to develop such wear and tear within 7 and 5 years of their installation in the two Chambers. There was nothing in the report to suggest that the Appellant had failed to maintain the Facility satisfactorily for inferring wear and tear. Thus,

there was absence of material resting whereon it could be pointed out by the Surveyor that even a normal and gradual wear and tear by passage of time resulted in the cracks developing on the surface of the pipes.

30. Absence of consideration of relevant factors is, therefore, writ large on the Surveyor's Report. The reports of the Loss Assessor and the Experts dwelled on general aspects of scientific observations relating to the absence of friction or movement when ammonia passes through the pipes and its alkalinity (non-acidic nature) not being corrosive to the pipes as well as the manufacturing details, and specifications of the pipes, which are conspicuous by their absence in the Surveyor's report. It seems, all relevant factors were not considered in the proper perspective by the Surveyor, yet, such Surveyor's Report was relied on by the Respondent to defeat the claim of the Appellant. The report having recorded the *ipse dixit* of the Surveyor, without any reference to the aforesaid aspects touched upon by the Loss Assessor and the Experts, the same is, in our opinion, not worthy of acceptance.

31. The observation of the NCDRC that the pipes used in the Chambers were not seamless and had welding joints was apparently made to discard the reports of the Loss Assessor and the Experts. The Loss Assessor and the Experts had opined that the pipes were seamless. If at all the NCDRC had reason not to rely on the reports of the Loss Assessor and the Experts with regard to the make, quality, thickness,

and other features of the C Class Pipes, instead of relying on its opinion based on a visual impression of the pipes, it ought to have ordered an examination of the same by an independent expert in exercise of power conferred on it by Section 22(1) read with Section 13(4)(iv) of the CPA. Although the said power is to be sparingly used, this was, in our opinion, a fit and proper case calling for exercise of the power. It seems to us that the NCDRC made observations in the impugned judgment as if its members were experts in the relevant field and clothed with authority to sit in appeal over the same.

32. Considering all these factors and the attending circumstances and by applying the standard of proof of preponderance of probabilities, we feel inclined to lean in favour of the inference that the version of the Appellant, was more probable, i.e., that the leak of ammonia gas was not occasioned due to wear and tear (as claimed by the Respondent) but was the outcome of an accident[10] which was not foreseen and beyond its control and not covered by any of the exceptions in the Refrigeration Policy (Exception Clause 3) so as to entitle the Respondent to claim immunity for the ultimate purpose of repudiating the insurance claim lodged by the Appellant.

33. We hold that the NCDRC committed serious error by not giving the reports placed on record by the Appellant the extent of credence the same deserved. The manner in which the NCDRC dealt with such

[10] *Accident*, according to the Cambridge Dictionary, is something bad that happens that is not expected or intended and that often damages something or injures someone.

reports was not proper and legal; major part of the reports could not have been rejected and only stray observations relied upon to support the conclusions. This is one of the foremost reasons which compels us to interfere with the impugned judgment and order. The other reason assigned by the NCDRC that the Appellant did not have to pay compensation to the potato growers is equally untenable. The Appellant has brought on record particulars of certain proceedings at the instance of the potato growers which, having reached the Allahabad High Court, is being pursued by it. In any event, the fact that the Appellant has not paid compensation to the potato growers as yet is hardly a factor for determining whether the Respondent was justified in repudiating the insurance claim on the basis of the Surveyor's Report for damage caused to the stock of potatoes, which was duly insured, because of the accident.

34. Repudiation of the insurance claim by the Respondent, on facts and in the circumstances, is held to amount to deficiency in service on its part. We, therefore, see no reason to accept any of the grounds assigned by the NCDRC for rejection of the Complaint.

Conclusion

35. Since we have noticed, for the foregoing reasons, that the impugned judgment and order of the NCDRC, on merits, is indefensible and that there has indeed been a deficiency of service at the end of the Respondent, we are of the considered view that ends of justice would

be sufficiently served by granting to the Appellant a lumpsum amount of Rs. 2,25,00,000/- towards full and final settlement of the insurance claim. It is ordered accordingly. Let such amount be released by the Respondent to the Appellant within two months from date. Should there be a failure in this regard, the said amount shall carry interest @ 10% p.a. till the amount is paid.

36. The present appeal is accordingly allowed to the extent as aforesaid and pending applications, if any, stand disposed of.

37. No costs.

....., J.
[A.S. BOPANNA]

....., J.
[DIPANKAR DATTA]

NEW DELHI;
8TH AUGUST, 2023.