SGS INDIA LTD. A

v.

DOLPHIN INTERNATIONAL LTD.

(Civil Appeal No. 5759 of 2009)

OCTOBER 06, 2021 B

[HEMANT GUPTA AND V. RAMASUBRAMANIAN, JJ]

Consumer Protection Act, 1986 – Deficiency in service – Onus of proof – Complainant engaged the appellant, a testing, inspection and certification company, for inspection of groundnut procured by the complainant for exporting to Greece and Netherlands – Dispute with regard to shipment in Greece and Netherlands was w.r.t the size/count of Java peanuts and content of Aflatoxin being more than what was specified, respectively – Commission found the appellant to be deficient in service – On appeal, held: Initial burden of proof of deficiency in service was on the complainant – Having failed to prove that the result of the sample retained by the appellant at the time of consignment was materially different than what was certified by it, the burden of proof would not shift on the appellant – Complainant has not produced best evidence in respect of the test results of the samples sent by the appellant to the port of destination – There is no proof of negligence on the part of appellant at the time of loading of the consignment – Thus, it cannot be held responsible if at the port of destination, the products specifications were not the same as certified by it at the time of loading of consignment – Order passed by the Commission set aside – Complaint dismissed. C D E F

Allowing the appeal, the Court

HELD: 1.1. The onus of proof of deficiency in service is on the complainant in the complaints under the Consumer Protection Act, 1986. It is the complainant who had approached the Commission, therefore, without any proof of deficiency, the opposite party cannot be held responsible for deficiency in service. The Commission has referred to the samples collected at the time of dispatch of consignments to Netherlands but the report G H

of such samples has not been produced by the appellant to hold that the appellant is deficient in providing services therefore, drawn adverse inference against the appellant. The onus of proof that there was deficiency in service is on the complainant. If the complainant is able to discharge its initial onus, the burden would then shift to the respondent in the complaint. The rule of evidence before the civil proceedings is that the onus would lie on the person who would fail if no evidence is led by the other side. Therefore, the initial burden of proof of deficiency in service was on the complainant, but having failed to prove that the result of the sample retained by the appellant at the time of consignment was materially different than what was certified by the appellant, the burden of proof would not shift on the appellant. Thus, the Commission has erred in law to draw adverse inference against the appellant. [Paras 19, 21 and 22][704-B-C; 705-B-E]

Ravneet Singh Bagga v. KLM Royal Dutch Airlines & Anr. **(2000) 1 SCC 66 : [1999] 4 Suppl. SCR 320 – relied on.**

1.2 The orders on the appellant to quality check the groundnuts do not indicate that there was any obligation on the part of the appellant to ensure that the requirements as specified at the port of loading should also be met at the port of destination. The appellant has certified the weight, packing, quality and quantity of the consignment at the port of loading. There is no allegation that there was any deficiency either in respect of weight, packing, quality or quantity against the appellant. There is even no allegation that the directions regarding containers or packing were not complied with. Once there was a direction that after fumigation the tapes should be removed, then it cannot be said that the appellant was duty bound to send in air-tight containers. The two things do not reconcile. The certificates issued by the appellant had a disclaimer that "no responsibility can be accepted for the possible consequences of further development of Aflatoxin producing moulds dependent upon condition of storage and/or transportation nor for differences arising from varying methods applied". Thus, the appellant cannot be held responsible for the

excess content of Aflatoxin for the reason that the result was a variance with the results in the certificates given by the appellant. Still further, there was no obligation upon the appellant to ensure that the consignment would have the same product specification at the port of destination which were at the port of loading. The complainant has not produced best evidence which they were expected to produce in respect of the test results of the samples sent by the appellant to the port of destination. There could be a deficiency of service only if the complainant was able to prove that the certificate issued by the appellant at the time of dispatch and the samples sent to the complainant or his agents is materially different. In the absence of any such proof, the appellant cannot be held deficient in service. Therefore, in the absence of any proof of negligence on the part of the appellant at the time of loading of the consignment, the appellant cannot be held responsible if at the port of destination, the products specifications were not the same as certified by the appellant at the time of loading of consignment. In the absence of any clause in the contract to ensure that the goods consigned has to meet the products specifications at the time of loading of consignment, the appellant cannot be held liable for change in specifications of the agricultural produce at the destination port after being in transit for two months on the high seas. The order of the Commission holding the appellant as deficient in service is not sustainable in the absence of any clause in the work order that the specifications should remain the same even at the port of destination. The order passed by the Commission is thus set aside and the complaint is dismissed. [Paras 23-26][705-E-H; 706-A-E]

Indigo Airlines v. Kalpana Rani Debbarma & Ors. **(2020) 9 SCC 424 : [2020] 3 SCR 389 – relied on.**

Case Law Reference

[1999] 4 Suppl. SCR 320	**relied on**	**Para 19**
[2020] 3 SCR 389	**relied on**	**Para 20**

A CIVIL APPELLATE JURISDICTION: Civil Appeal No.5759 of 2009.

From the Judgment and Order dated 01.07.2009 of the National Consumer Disputes Redressal Commission at New Delhi in Original Petition No.240 of 1998.

B Gopal Sankarnarayan, Sr. Adv., Simranjeet Singh, Rhea Dube, Jatin Khatri, Gautam Talukdar, Rajan Narain, Advs. for the Appellant.

Vijay Hansaria, P. I. Jose, Prashant K. Sharma, Jenis V. Francis, Advs. for the Respondents.

The Judgment of the Court was delivered by

C **HEMANT GUPTA, J.**

1. The challenge in the present appeal is to an order passed by the National Consumer Disputes Redressal Commission[1] on 1.7.2009 allowing the complaint filed by the respondent[2] and directing the appellant to pay a sum of Rs.65,74,000/- with interest @9% p.a. from the date of filing of complaint till realization. The appellant was also directed to pay D Rs.25,000/- as cost to the complainant.

2. The appellant herein is a testing, inspection and certification company that tests the quality and quantity of several products. The complainant engaged the appellant for providing services forinspection of groundnut procured by the complainant for the purpose of exporting E the same to Greece and Netherlands. The appellant was responsible for carrying out the inspection of samples and further certifyingin respect ofdifferent parameters of the groundnut. There were two sets of consignments, one to Piraeus, Greece and another to Rotterdam, Netherlands. The specification requirement in the communication dated 7.11.1997 was in respect of 122 containers of peanuts procured from F M/s Shree Ram Industries, Rajkot. 10 containers out of 122 containers were required to be stuffed at Kandla Port and the rest at the factory of Shree Ram Industries, Rajkot. The specifications required by the complainant in respect of consignment to Greece were as under:

"1) Product Specification	:	Moisture	:	Max 7.0% till 15/11/97 Max 6.5% thereafter
G		Aflatoxin	:	Max 5 PPB
		Broken/Split	:	Max 1%
		Admixture	:	Max 0.25%
		Damage	:	Max 0.5%
		Sprouty/yellow	:	Nil

[1] For short, the 'Commission'

H [2] For short, the 'complainant'

2) Packing Requirement : 50 Kg new jute bag of minimum 450 gms.Gross for net basis.
3) Marking : As per contract with supplier
4) Stuffing Instructions :
- Containers should be new, without holes and with doors which close hermatically.
- To protect bags from sweating and prevent them from touching the walls of the containers, every container's bottom, top and walls should be lined by bituminised paper (not simple craft paper) top-most layer of bags is to be covered with corrugated sheet.
- Container

- Container should be fumigated by 48 Grams/cb.m. Methyl Bromide and sealing tapes used to cover container vents so as to ensure proper fumigation.
- Sealing tapes must be removed as port prior to container being shipped.

5) SGS Certificate: SGS Certificate of quality, quantity and aflatoxin can be issued at your Kandla/Jamnagar office on receipt of copy of B/L from our C&F agent in Kandla.

xx xx xx

Hope you will find the above in order. Kindly carry out stringent continuous inspection of the cargo accordingly and do not hesitate to reject the cargo if the material/stuffing is not as per our requirements."

3. The appellant carried out the inspection and analysis of Hand Picked and Selected peanuts[3] which were to be exported to Greece. The peanuts were of two qualities – Bold and Java and the Inspection Certificate of quantity, quality, weight and packing certificates were issued from 2.12.1997 to 20.12.1997. One of the reports in respect of Bold and Java variety of peanuts is as under:

"Representative samples were drawn from 10% of the bags selected at random. Based on examination analysis of samples, we certify that the goods are:-

350 BAGS INDIAN GROUNDNUT KERNELS CROP 1997
COUNT 45/55 JAVA VARIETY (WINTER CROP)

-	Moisture	.....	5.65%
-	Admixture	.....	0.07%
-	Damage	.....	0.15%
-	Sprouty/Yellow	.....	0.07%
-	Broken/Split	.....	0.47%
-	Aflatoxin (B1 B2 G1 G2)	.....	Less than 5 PPB

[3] For short,'HPS peanuts'

A No responsibility can be accepted for the possible consequences of further development of aflatoxin producing moulds dependent up on condition of storage and/or transportation nor for differences arising from varying methods applied."

4. The merchant vehicle "Shun Cheng-12" reached Piraeus, B Greece on 7.2.1998. The complainant thus sent a communication on 7.2.1998 to the appellant in respect of 20 full container loads. It was stated that peanut count size in 11 full container load was disputed and further asked to send all the sealed samples to SGS, Greece which was another unit of the Appellant. It was communicated as under:

C "This buyer is now disputing the peanut count size in 11 FCLs and is demanding the following: (a) a discount of US$ 30 = PMT on these 11 FCLs (b) Our bearing detention/demurrage charges for these 11 FCLs till settlement of this matter (c) Our bearing cost of SGS inspection for these 11 FCLs at discharge port."

D 5. The appellant thereafter responded to such communication on 9.2.1998 stating that the sealed samples for shipment retained by the appellant were couriered to the counterpart of the appellant in Greece. The samples were tested by the counterpart of the appellant. The result of type Bold of kernels per ounce was 52-54 whereas for Java type, the count was 57-61. The dispute with regard to shipment in Greece is only E in respect of the size/count ofJava peanuts as against the limit of 45/55.

6. In respect of shipment to Rotterdam, Netherlands, the product specifications as per the communication dated 7.11.1997were as under:

"All cargo is originating from Shree Ram Industries, Rajkot and will be factory stuffed. Contracted specs. are as under:

F

Moisture	:	Max 7.5%
Broken kernels	:	Max 1.0%
Admixture	:	Max 0.5%
Aflatoxin (as per "Code of Practice"	:	B1B2G1G2 : 4 PPB Max

G

Goods will undergo for final inspection by Dr. A. Verwey lab. at discharge port as per code of practice for peanuts of Product Board for Fruit of Vegetables, The Hague, "January, 1996" (Copy given by the undersigned to Mr. Prafful)."

H

7. The Inspection Certificate dated 23.12.1997 of quantity, quality, weight and packing for the consignment to Netherlands is reproduced as under:

"INDIAN GROUNDNUT KERNELS CROP 1997 COUNT 50/60 JAVA VARIETY (WINTER CROP)

-	Moisture	.....	6.30%
-	Admixture	.....	0.14%
-	Broken Kernels	.....	0.32%
-	Aflatoxin (B1 B2 G1 G2)	.....	Less than 4 PPB

Goods are free from Mould and infestation Crop 97

No responsibility can be accepted for the possible consequences of further development of Aflatoxin producing moulds dependent upon condition of storage and/or transportation nor for differences arising from varying methods applied."

8. Similar inspection certificate was given in respect of other containers for shipment by merchant vehicle "Orient Patriot".

9. Dr. Verwey's Lab at Rotterdam, Netherlands conducted an inspection of the consignmentand in its report dated 3.2.1998 reflected a higher level of Aflatoxin, including its variants B1, B2, G1 and G2. The test carried by SGS, Netherlands also confirmed high Aflatoxin level.

10. In this background, the argument of Mr. Gopal Sankaranarayanan, learned senior counsel for the appellant was that there was no responsibility or assurance of the appellant beyond the borders of India and that they were to only satisfy the quantity, quality, weight and packaging of the consignment at the time of shipment. The appellant was only incharge of supervising the weighing and packing and to certify the quality and quantity of peanuts. It had no control or responsibility of the subject shipment once the shipment left the Indian port. There was thus no corresponding obligation on the appellant to ensure that the packed consignment would have the same specifications at the port of destination as well. It was also pointed out that there were instructions that the appellant had to seal the containers for fumigation but after fumigation, tapes were to be removed. Therefore, the air could enter the container which may result in deviation in the reports at the

A port of destination. Each of the certificates furnished by the appellant also had a disclaimer that no responsibility can be accepted for the possible consequences of further development of Aflatoxin producing moulds depending upon the condition of storage and/or transportation nor for the differences arising from varying methods applied. Therefore, in view of such disclaimer being part of the certificates furnished by the appellant B at the time of shipment, the responsibility of the appellant in respect of the consignment does not extend till the port of destination.

11. It was contended that there is not any whisper that the method of testing, packing, weighment was not as per the specifications provided by the appellant. Therefore, the agricultural produce transported via ship C has to face vagaries of nature starting from the tropical weather of India over the high sea, which could have altered the level of Aflatoxin and the size of peanuts.

12. In the absence of any requirement that the consignment should have the same level of Aflatoxin or the size of the peanut at the destination D port, the appellant cannot be made liable for any variation in the content of Aflatoxin or sizes of peanuts.

13. It was further contended that the samples retained by the appellant were couriered on the same day i.e., 9.2.1998, when the sample was tested at the destination but the report of the couriered sample has E not been shared by the complainant, nor the appellant was privy to the report of Dr. Verwey's Lab in respect of consignment to Netherlands.

14. It was also argued that the size of groundnut is subject to a marginal difference after 2½ months of transportation between Indian and Greece port. Such variation could be as a result of natural causes F such as weather, moisture, humidity, temperature and even storage condition, being an agricultural commodity. It was argued that the Commission has not given any finding in respect of any deficiency of service in respect of the inspection carried out by the appellant in the territory of India.

G 15. On the other hand, the argument of Mr. Vijay Hansaria, learned senior counsel for the complainantwas that it had got orders for export of 20 full container loads of HPS peanuts from Athens, Greece and 28 full container loads from Rotterdam, Netherlands. As per the terms and conditions of the inspection, Aflatoxin could be maximum 4 Particles Per Billion (PPB) in respect of consignment meant for Netherlands. H

The stuffing instructions were that the containers should be new, without holes and with doors which closed hermetically. It was pointed out that hermetic means to exclude external air, airtight as per the dictionary meaning. The appellant was thus liable to ensure not only the quality but also the stuffing and packaging of the containers and it was even authorized to reject the cargo if the material and/or stuffing were not as per requirement. The cargo was to be tested by High Performance Liquid Chromatography (HPLC) method for which higher charges wereclaimed by the appellant. It was pointed out that Aflatoxin content for the consignment to Rotterdam, Netherlands in respect of B1, B2, G1 and G2 was required to be maximum of 4 PPB. The certificate given by the appellant was to the effect that Aflatoxin content was less than 4 PPB but on arrival at the port of destination, the Aflatoxin B1, B2, G1, G2 was found to be beyond 4 microgram/Kg i.e. PPB. Mr. Hansaria referred to the communication dated 17.2.1998 on behalf of Dr. Verwey's Lab that on arrival of cargo, no water damage to the contents of the containernor any visible mould growth was reported. Any mould growth on groundnut kernel will not take place unless the water activity of groundnut is 0.68 which is equal to the moisture content of 7%. When Aflatoxin producing moulds are present in groundnuts, they will not metabolize Aflatoxins unless the water content of the nuts is above 10%. Dr. Verwey's Lab was an independent expert nominated by the buyer. The appellant was informed that the goods would undergo final inspection at the discharge port by the said Lab.

16. In respect of the cargo to Greece, the size of peanuts Java type were found to be 57 to 61 counts per ounce, which was higher than what was certified by the appellant to be 45 to 55 counts per ounce. It was alleged that the appellant had deliberately withheld the report of its counterpart in Greece with regard to samples sent by it on 9.2.1998. It was even contended that the appellant did not send its sealed sample at the port of loading to its counterpart in Netherlands though the same was requested on 12.2.1998 and 19.2.1998. Since report has not been produced by the appellant, adverse inference should be drawn against the appellant.

17. The Commission found that the appellant has not led any evidence in respect of the contention that quantity of Aflatoxin in peanuts is affected by various extraneous factors i.e., weather, moisture, humidity, temperature and storage conditions. On the basis of the said fact, the Commission returned a finding that the appellant was grossly negligent

A and deficient in service as the count of Java type peanuts and content of Aflatoxin was more than what was specified.

18. We have heard learned counsel for the parties and find that the order of the Commission is not sustainable and it proceeds on the wrong understandingof law and facts.

B

19. The onus of proof of deficiency in service is on the complainant in the complaints under the Consumer Protection Act, 1986. It is the complainant who had approached the Commission, therefore, without any proof of deficiency, the opposite party cannot be held responsible for deficiency in service. In a judgment of this Court reported as ***Ravneet Singh Bagga***v. ***KLM Royal Dutch Airlines &Anr.***[4], this court held that the burden of proving the deficiency in service is upon the person who alleges it.

C

> "6. The deficiency in service cannot be alleged without attributing fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be performed by a person in pursuance of a contract or otherwise in relation to any service. The burden of proving the deficiency in service is upon the person who alleges it. The complainant has, on facts, been found to have not established any wilful fault, imperfection, shortcoming or inadequacy in the service of the respondent. ....."

D

E

20. This Court in a Judgment reported as ***Indigo Airlines*** v. ***Kalpana Rani Debbarma & Ors.***[5], held the the initial onus to substantiate the factum of deficiency in service committed by the opposite party was primarily on the complaint. This Court held as under:-

F

> "28. In our opinion, the approach of the Consumer Fora is in complete disregard of the principles of pleadings and burden of proof. First, the material facts constituting deficiency in service are blissfully absent in the complaint as filed. Second, the initial onus to substantiate the factum of deficiency in service committed by the ground staff of the Airlines at the airport after issuing boarding passes was primarily on the respondents. That has not been discharged by them. The Consumer Fora, however, went on to unjustly shift the onus on the appellants because of their failure

G

---

[4] (2000) 1 SCC 66

H [5] (2020) 9 SCC 424

to produce any evidence. In law, the burden of proof would shift on the appellants only after the respondents/complainants had discharged their initial burden in establishing the factum of deficiency in service."

21. The Commission has referred to the samples collected at the time of dispatch of consignments to Netherlands but the report of such samples has not been produced by the appellant to hold that the appellant is deficient in providing services therefore, drawn adverse inference against the appellant.

22. The onus of proof that there was deficiency in service is on the complainant. If the complainant is able to discharge its initial onus, the burden would then shift to the respondent in the complaint. The rule of evidence before the civil proceedings is that the onus would lie on the person who would fail if no evidence is led by the other side. Therefore, the initial burden of proof of deficiency in service was on the complainant, but having failed to prove that the result of the sample retained by the appellant at the time of consignment was materially different than what was certified by the appellant, the burden of proof would not shift on the appellant. Thus, the Commission has erred in law to draw adverse inference against the appellant.

23. The orders on the appellant to quality check the groundnuts do not indicatethat there was any obligation on the part of the appellant to ensure that the requirements as specified at the port of loading should also be met at the port of destination. The appellant has certified the weight, packing, quality and quantity of the consignment at the port of loading. There is no allegation that there was any deficiency either in respect of weight, packing, quality orquantity against the appellant. There is even no allegation that the directions regarding containers or packing were not complied with. Once there was a direction that after fumigation the tapes should be removed, then it cannot be said that the appellant was duty bound to send in air-tight containers.The two things do not reconcile. The certificates issued by the appellant had a disclaimer that "*no responsibility can be accepted for the possible consequences of further development of Aflatoxin producing moulds dependent upon condition of storage and/or transportation nor for differences arising from varying methods applied".* Thus, the appellant cannot be held responsible for the excess content of Aflatoxin for the reason that the result was a variance with the results in the certificates given by the

A appellant. Still further, there was no obligation upon the appellant to ensure that the consignment would have the same product specification at the port of destination which were at the port of loading.

24. The complainant has not produced best evidence which they were expected to produce in respect of the test results of the samples
B sent by the appellant to the port of destination. There could be a deficiency of service only if the complainant was able to prove that the certificate issued by the appellant at the time of dispatch and the samples sent to the complainant or his agents is materially different. In the absence of any such proof, the appellant cannot be held deficient in service.

C 25. Therefore, in the absence of any proof of negligence on the part of the appellant at the time of loading of the consignment, the appellant cannot be held responsible if at the port of destination, the products specifications were not the same as certified by the appellant at the time of loading of consignment. In the absence of any clause in the contract to ensure that the goods consigned has to meet the products specifications
D at the time of loading of consignment, the appellant cannot be held liable for change in specifications of the agricultural produce at the destination port after being in transit for two months on the high seas.

26. In view thereof, we find that the order of the Commission holding the appellant as deficient in service is not sustainable in the
E absence of any clause in the work order that the specifications should remain the same even at the port of destination. Consequently, the present appeal is allowed. The order passed by the Commission is thus set aside and the complaint is dismissed.

Divya Pandey Appeal allowed.