(1995) 01 NCDRC CK 0072

In the National Consumer Disputes Redressal Commission

AIR INDIA , N. UDDAVAN , SADDLER SHOES PVT. LTD APPELLANT

Vs

AIR INDIA , N. UDDAVAN RESPONDENT

Date of Decision : 13-01-1995

Acts Referred:

Citation : 1995 1 CPJ 190 : 1995 1 CPR 647 : 1995 2 CLT 2

Hon'ble Judges : V.Balakrishna Eradi , Y.Krishan , B.S.Yadav J.

Advocate : T.R.Andhyarujina , H.D.Nanavati , T.A.Mavani , Sriram Panchu , N.L.Rajah , S.Muraidhar , B.L.Anand , Pradeep , A.K.Kher

Final Decision : Dismissed

Judgement

1. THOUGH the Complainants in these cases are different the main opposite party in all the three complaint petitions is the same, namely, Air India. The facts in the three cases are substantially similar and the points arising for determination are identical. Hence, these three cases are being disposed of together under this order.

2. FIRST Appeals Nos. 217of 1992 and 236 of 1992 arise out of a common order dated 23th April, 1992 passed by the State Commission, Tamil Nadu at Madras allowing substantially the claims for compensation put forward by the Complainant on the ground that there was deficiency in service on the part of Air India in the performance of a contract of carriage by Air of certain consignments of leather garments which were air-freighted by the two complainants from Madras to Gdansk in Poland under two separate transactions. The case put forward by the Complainants in these two cases has been summarised by the State Commission in paragraph 2 of its order in O.P. No. 283 of 1991(out of which Appeal No. 236 of 1992 has arisen) in the following terms : "The Complainant entrusted through M/s. Sheriff Travel and Cargo Service Pvt. Ltd. to the Opposite Party a cargo of leather garments for transport and delivery to ANFI Import and Export, Poland, under Air Bill No. 098581149980 dt. 30.5.1991. As the consignee in Poland did not take delivery the complainant instructed the Opposite Party through M/ s. Sheriff Travel and Cargo Services Pvt. Ltd., to

arrange for forwarding the cargo to Gothenburg, Sweden, for delivery to the another named consignee. But, no action was taken by the Opposite Party in spite of several reminders. Finally, on 3.10.1991 the Opposite Party informed the Complainant that his request has been forwarded to their office at Gdansk and would revert to the complainant hearing from their office at Gdansk. The goods were not transported to Sweden as instructed. Consequently, the consignee at Sweden cancelled the order. The complainant was put to heavy loss of the value of the cargo, loss of business and loss of reputation. He, therefore, claimed compensation in the sum of Rs. 9,28,972/-."

It will be seen from the above summary that the main thrust of the complainant was that the instruction given by him to Air India after the Complainant having come to know that the consignee in Poland did not take delivery of the goods that the cargo should be forwarded to Gothenburg, Sweden for delivery there to another consignee by name "M/s. FUR FASHION" was not carried out by Air India in spite of several reminders and that this default on the part of Air India constituted "deficiency'' in service. In the connected case which was numbered as Original Petition No. 283 of 1994 on the file of the State Commission the facts were almost identical as is seen from the following summary thereof given in paragraph 2 of the State Commission''s order in First Appeal No. 217 of 1992. In defence to the complaints, it was contended by Air India that their obligation was to carry the consignments booked by the two complainants to a destination specified by them, namely, Gdansk in Poland and this obligation had been duly carried out by it inasmuch as the consignments involved in both the cases had safely reached the Air Port, Gdansk in Poland on 6.6.1991. Since Air India did not operate any service to Gdansk in Poland, it had arranged with LOT Polish Airlines for the transportation of the consignments in question from Frankfurt to Gdansk and it was through the instrumentality of the said Polish Airlines that the consignments were safely carried to the destination airport, namely, Gdansk in Poland. After the arrival of the consignments in the said port of destination the Polish Airlines gave notice of arrival of the consignments to the consignees concerned and even though reminders were also sent to the consigness, there was no response from them. The consignments therefore, remained undelivered at the Gdansk Airport. When long subsequently the complainants conveyed a request that the consignment should be rerouted to Gothenburg, Sweden, Air India contacted the LOT Polish Airlines to ascertain the charges that had to be paid to the Polish authorities at Gdansk Airport since the goods had remained undelivered in the Airport for a long time and huge amounts would have accumulated as airport demurrage charges and customs charges. Simultaneously, the complainants were informed that the said information was being awaited from the Polish Airlines and that in the meantime they should make a deposit of a substantial amount in U.S. Dollars with Air India to enable it to arrange for transportation of the goods from Gdansk to Gothenburg. The complainants thereupon offered to make some payment only in Rupee-currency, but they were advised by Air India to get Reserve Bank''s approval for accepting the payment in Indian currency. The re-transportation from Gdansk to Gothenburg could not be arranged by the Opposite Party only because of the failure on the part of the complainants to obtain Reserve Bank''s approval and deposit the required amount in Rupee-currency or alternatively to pay the same in foreign exchange. In the circumstances it was contended by Air India that there was no deficiency in service on their part.

The facts are substantially the same in Original Petition No. 54 of 1992 filed before this Commission. The Complainant, Saddler Shoes Pvt. Ltd., Madras, acting through their cargo agent, M/s. Sheriff Travel Services Pvt. Ltd., Madras, booked two consignments of leather garments for transportation from Madras to Gdansk in Poland as per two air waybills dated 11.5.1991. According to the Complainants the goods reached the destination airport in Poland, but the Opposite Party did not inform the consignee about their arrival and did not also deliver the goods to the said consignee. It is averred in the complaint that sometime in July,1991 the Complainant came to know that the consignees were not interested in taking delivery of the goods consigned. Subsequently, the complainant is said to have thereafter managed to locate another purchaser by name "FUR FASHION" in Gothenburg, Sweden, who was willing to purchase the Goods and hence by letter dated 20th July, 1991 requested Air India to redirect the two shipments to Gothenburg, Sweden. In spite of repeated reminders sent by the Complainants, the Opposite Party failed to carry out the complainants'' instructions for re-routing the goods to Gothenburg for delivery to "Fur Fashion". As a result of such delay, M/s. FUR FASHION cancelled the orders placed by them with the Complainants thereby causing enormous financial loss to the Complainants, in addition to the inconvenience, mental anxiety, worry etc. According to the Complainants the Opposite Party stated in the reply sent by it in response to the said request for redirecting the goods that the demurrage charges would have to be paid to the authorities in Poland, but the Complainant contends the question of paying demurrage would not have arisen at all, had the first opposite party been prompt in discharging its duties. The Complainants have taken the plea that the Opposite Party was under obligation under Paragraph 2.7.1 of the Air Cargo Tariff Rules published by I.A.T.A. to promptly inform the complainants about the failure of the Consignee to take delivery of the goods and in not carrying out the said duty the Opposite Party had been guilty of negligence which constitutes v deficiency'' in service. Thus, on the ground that (a) Air India had not informed the consignees at Poland of the arrival of the goods and deliver the goods to the consignees in Gdansk, (b) that they had not acted on the instructions of the Complainants to reship the goods and deliver the same to the Sweden consignee, and (c) that Air India did not promptly inform the complainants about its difficulty in carrying out the Complainants'' instructions to reship the goods to Sweden, the Opposite Party No. 1 had been wilfully negligent and guilty of deficiency in service. On these averments the Complainant has sought to recover a total compensation of Rs. 31.52 lakhs as representing the loss and damage caused to him under the various heads set out in Clauses (a) to

(h) of paragraph 21 wherein the reliefs claimed by the Complainants has been enumerated.

3. IN the written statement of objections filed by Air INdia they have pleaded, inter alia, that since Air INdia does not operate any service to Poland, it entrusted the task of transportation of the goods upto Frankfurt which is the farthest point on the route upto which its flights operate and thereafter entrusted the goods to LOT Polish Airlines for onward carriage from Frankfurt to Gdansk. The two consignments arrived in Gdansk of May 26, 1991. Soon thereafter, the LOT Polish Airlines advised the consignee about the arrival of the goods by letter dated May 29, 1991 and followed it up with reminders sent on June 11, 1991 and July 19, 1991. But, the consignee, for reasons best known to him failed to take delivery of the consignments. It is submitted by Air INdia that the responsibility of the carrier was only to safely carry consignments to the port of destination and offer delivery of the same to the consignee. If, within a reasonable time thereafter, the consignee fails to take delivery of the goods, the responsibility of the carrier comes to an end in law. On the basis of this plea Air India contends that inasmuch as the goods had been safely carried to the port of destination and intimation of the arrival of the goods had been given to the consignee so that the goods could be taken delivery of by them, the services contracted for by Air India had been fully performed by it and no question can arise of any deficiency in service on the part of Air India in relation to the contract of carriage of goods entered into by it with the Complainant. It is admitted in the written statement that after the expiry of nearly two months from the date of arrival of the consignments in Gdansk a request was received from the Complainant on 22nd July, 1991 for arranging for the reshipment of the consignment from Gdansk to Gothenburg in Sweden. In the said letter the Complainant had offered to pay the requisite charges only in Indian currency. In reply, Air India pointed out to the Complainant that the said course could be adopted only if the Complainants obtained an order from the Reserve Bank of India specifically authorising Air India to accept the payment in rupee currency without which it will constitute clear violation of the Foreign Exchange Regulations and Rules. During this long interval of time the goods had suffered heavy demmurage charges plus penalties imposed by the Customs authorities in Poland which became leviable under Polish Law if the goods were not cleared within 15 days after arrival. Repeated telegraphic messages were sent by Air India to the Polish Airlines in Gdansk seeking information about the total demurrage and customs charges that had accrued which will have to be paid in order to clear the consignments so that the shipper and his agent could be furnished with the said information. Annexed to the counter affidavit of the 1st Opposite Party and marked as Exhibit ''B'' collectively are copies of the telex messages dated August 1,1991, August 3,1991, August 6, 1991, August 11, 1991, August 16, 1991, August 21, 1991, August 29, 1991, August 31, 1991. Ultimately, it was only on 3rd September, 1991, the LOT Polish Airlines could get information from the Polish authority and communicated the same to Air India as per the telex message evidenced by

Exhibit ''C According to the written statement of the 1st Opposite Party, the complainant thereupon insisted on obtaining reaffirmation of the figures from LOT Polish Airlines since according to the Complainant the amount of charges mentioned in Exihibit ''C appeared to him to be heavy. Hence, Air India sent another telex message to LOT Polish Airlines on September 4, 1991 stating that the shipper considered the charges to be too heavy and requested LOT Polish Airlines to recheck the same. This message was followed up with reminders sent on 6.9.1991, 9.9.1991, 11.9.1991,17.9.1991 and 23.9.1991. It was only on 25th September, 1991 that Air India received a message from LOT Polish Airlines reaffirming the correctness of charges. Exhibit ''D'' collectively are copies of the aforementioned telex messages. On September 28, 1991, Air India wrote to the Complainant calling upon them to make payment so that the demurrage charges etc. could be paid and the goods could be got released for reshipment to Sweden, as desired by the Complainant. However, the Complainants failed and neglected to pay the requisite amount and it was as a result thereof that the consignments could not be reforwarded. Air India has stated in its written statement that through out the period between July, 1991 and 25th September, 1991 the shipper''s agent was continuously advised by Mr. Jeevan Mehra who was then functioning as Air India Cargo Sales Manager at Madras over the telephone concerning the telex messages that were sent to LOT Polish Airlines and the efforts made to get a response from them. It is only because of the fact of the shipper''s agent being in constant touch with Mr. Jeevan Mehra by meeting him personally or by conversing over telephone that written replies were not sent by Air India to all the letters of the Complainant. The Opposite Party No. 1 has also filed an affidavit of Shri Jeevan Mehra who is presently working as Cargo Sales Manager of Air India at Tripoli affirming the above facts.

4. IT is further averred in the counter affidavit that since the goods were due to be shipped from one foreign country to another outside country, payment for the same was required to be made in foreign exchange and clearance from the Reserve Bank of India was required for the same. As a matter of fact neither the shipper nor tine party in Gothenburg made any payment of the freight charges for such reshipment nor did they remit the charges and penalties payable to the authorities in Gdansk in order to get the goods released and hence there was nothing further that Air India could do in the matter. This was pointed out to the Complainant by Air India in its letter dated October 9, 1991 (Exhibit ''F'') wherein it was specifically mentioned that the demurrage charges for the two consignments amounted to US $ 48,230/-. The detailed break up of the charges to be paid to the authorities in Gdansk was furnished to the Complainant as part of Exhibit ''''. Air India contends that such being the true facts of the case there was no negligence or deficiency in service on its part in relation to the performance of the service that had been hired and promised to the Complainant and that the claim for recovery of compensation made by the Complainant is totally unsustainable in law. The prayer made by Air India for impleadment of LOT Polish Airlines was allowed and accordingly LOT Polish Airlines was

impleaded as Opposite Party No. 3 in this case. A reply statement dated 18th March, 1994 has been filed by the said LOT Polish Airlines. It is averred therein that soon after the arrival of the consignment in Gdansk the consignee namely, ANFI Import/Export, Gdansk, Poland was informed about the arrival of the shipment. But, for reasons unknown to the replying respondent, ANFI failed to take delivery of the shipments. After 14 days of the arrival of the shipment, the Polish Customs office began calculating interest for delay in clearing the shipment in accordance with the Polish Customs Rules and those interests were accruing daily. When even after many days M/s. ANFI who had been asked to clear the customs liabilities and take delivery, did not honour its obligation, the customs authorities in Sweden took over the consignment and sold the products which were contained in the shipment for realising the amounts due to them. According to the replying respondent the shipment had actually been carried by air only upto Warsaw in Poland since very small aircraft operated to Gdansk and the things could not be contained r carried in such small aircrafts and hence it was transported from Warsaw to Gdansk by truck and had been safely delivered at Gdansk airport in the office of the LOT Polish Airlines. The third respondent has totally denied any responsibility for the good after they had been safely carried upto Gdansk and delivery had been duly offered to the consignee, but had not been taken by him.

5. WE shall first proceed to consider the points arising for determination in Original Petition No. 54 of 1992. From the pleadings of the parties and the documentary evidence available on record, it is clearly established that a contract for carriage by Air of two consignments of leather garments from Madras to Gdansk in Poland had been entered into between the Complainant who was the consignor and Air India as the carrier. The subject matter of the contract consisted of two parcels covered by two air-way bills dated 11.5.1991. Since Air India was not operating any flights of its own to Poland, it carried the goods upto Frankfurt which is the farthest point on the route to which its flights operate and arranged for the further carriage of the consignments from Frankfurt to Gdansk in Poland through the LOT Polish Airlines. LOT Polish Airlines safely carried the consignments to Gdansk and the two parcels arrived in the said airport of destination at Gdansk on May 23, 1991 and May 26, 1991 respectively.

6. WE are of the view that the case put forward by the Complainant that the consignee had not been intimated about the arrival of the consignment in Gdansk cannot be accepted as correct. On the other hand the evidence adduced in the case fully substantiates the case put forward by Air India which is reiterated in the statement filed by LOT Polish Airlines (Third Respondent) that the Polish Airlines had advised the consignee about the arrival of the goods on 29th May, 1991 and had followed it up with reminders sent on June 11, 1991 and July 19,1991. There was, therefore, no failure on the part of either Air India or its agent LOT Polish Airlines to carry out their obligation to give due intimation to the consignee about the arrival of the goods at the port of destination. The consignee, however, for reasons known to it, failed to take delivery of the goods.

Hence, the first contention put forward by the Complainant that Air India was guilty of deficiency in service on the ground of failure on its part to give intimation to the consignee about the arrival of the goods in Gdansk is devoid of factual foundation. WE accordingly reject the said plea raised by the Complainant. We have next to consider the nature and scope of the duties and responsibilities of a carrier who has undertaken to transport by air a consignment of goods from one place in India to another destination either within the country or outside. The rights and liabilities of the parties are governed by the rules contained in ChapterIII of Schedule II in the Carriage by Air Act, 1972. Rule 13(2) states that unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the. goods arrived. Our attention has not been invited to any provision in the to the consignee as soon as the goods arrived. Our attention has not been invited to any provision in the said Schedule which casts an obligation on the carrier to give any intimation to the consignor about the failure on the part of consignee to take delivery of the goods. A reference to Rules 18 and 19 of Schedule II in Chapter III of the said Act would go to show that under the said rules, the carrier will be liable for damages in the event of (1) destruction (2) loss (3) damage to any cargo and (4) delay in the carriage of the goods. In the present case none of the goods had arrived safely in the port of destination (Gdansk in Poland) without any damage or delay in the carriage. It Would appear that when, even after the lapse of a reasonable time the consignee did not take steps to pay the demurrage and interest charges that had accrued due to the Polish authorities, the Polish Customs authorities took over the goods on the ground of nonpayment of such amounts due to them and sold away the goods.

The contract entered into between the Complainant and Air India was only for carriage by air of the goods in question from Madras to Gdansk in Poland. The obligation of the 1st Respondent in the contract must be regarded as having been fully discharged on the goods having been safely carried to Gdansk and on due intimation being given to the consignee about the arrival of the goods. In law the responsibility undertaken by the carrier came to an end on the expiry of reasonable period from the date on which intimation of arrival was given to the consignee so that he could take delivery within such reasonable period. The fact that the consignee failed to take even after expiry of a reasonable period would not operate to keep alive the responsibility of the carrier for the goods. In the present case, the goods shipped in two consignments had admittedly arrived safely in good condition at the port of destination on 23rd May and 26th May, 1991 respectively. The consignee was given intimation about the arrival of the consignments at Gdansk on 29th May, 1991 and on the expiry of a reasonable period of one week thereafter all obligations of Air India in its capacity as carrier of the goods under the contract of carriage entered between the parties came to an end.

7. IN Halsbury''s Laws of England (4th Edition, Reissue) Vol. 5(1), the law governing this topic is enunciated in paragraph 456 in the following terms: "Non-

acceptance by consignee.-The liability of a common carrier as an insurer of the safety of goods ceases if the consignee is not to be found at the address given by the consignor, or if the goods are tendered to the consignee and refused. Thereafter the carrier becomes an involuntary bailee, although he continues to owe a duty of reasonable care in effecting a delivery of the goods to a claimant and may owe a more general duty of reasonable care for the safekeeping of the goods. Where the goods are refused by the consignee the carrier need not give notice of the refusal to the consignor, but should do what is reasonable in the circumstances. Where the goods are refused because the consignee is not prepared to pay the carriage demanded, the goods should not be returned at once to the place of departure, but should be kept at the place of destination for a reasonable time."

From the above passage it becomes clear that the liability of the carrier ceases after the expiry of reasonable period from the date of giving intimation of arrival of the goods to the consignee. The legal position is also clear that there is no obligation in law for the carrier to intimate the consignor about the failure of the consignee to take delivery of the goods. Hence we hold that the omission on the part of Air India to inform the consignor about the failure of the consignee to take delivery of the goods does not constitute ''deficiency in service''.

8. EVEN assuming, for the purpose of arguments, that there was an obligation on the part of Air India to furnish such information to the consignor regarding the consignee''s failure to take delivery of the goods (an obligation that does not exist in law), we are unable to see, how, by reason of the said failure on the part of airline, the Complainant can be said to have been put to any loss or damage. The transaction of the sale of the goods to the consignee in Gdansk had been effected by the Complainant by the process of negotiating the documents of title to the goods through its Bank in Madras which in its turn had sent the documents to its counterpart in Gdansk with instructions to deliver them to the consignee only on the payment of the full amounts payable to the consignor as noted in the documents. The consignor as a prudent businessman to whom substantial amounts were due in respect of the goods despatched to Poland, would ordinarily have been in regular touch with his banker for ascertaining whether the bills had been honoured and the amount due thereon had been credited to his account. We are unable to believe and accept as true the case put forward by the Complainant that they made no inquiries of the said nature and were content to sit back and wait until some day in July, 1991 when they casually came to know from a party in Sweden that the consignees were not interested in taking delivery of the goods. The probability is that, soon after the consignments reached Gdansk in Poland and the consignee failed to take delivery thereof, the Complainants would have come to know from their banker in Madras that the bills had not been honoured and hence they would have contacted the party in Sweden in their efforts to find an alternative buyer. We hold that no loss of any kind had occurred to the Complainant by reason of the alleged deficiency in service on the part of Air India to inform the Complainant about the failure of the

consignee in Poland to take delivery of the two consignments Another contention which was very strongly urged on behalf of the Complainants is that in not carrying out the instructions given by the Complainant to reship the goods from Gdansk to Gothenburg in Sweden Air India had committed very serious deficiency in service and hence they should be held liable to compensate the Complainant in respect of the loss sustained by reason of cancellation of the order that had been placed by "FUR FASHION" undertaking to pay for and take delivery of both the consignments if redirected to Sweden. This contention omits to take note of the fact that the contract of hiring of service entered between the Complainants and Air India was only for the transportation of the goods by air from Madras to Gdansk in Poland for delivery to the consignee mentioned in the air waybill. This duty of safe carriage of the goods to Gdansk and delivery to the consignee have been duly discharged by the carrier. There was no further obligation on the part of Air India to reship the goods to another counter, namely, Sweden, unless a fresh contract in respect of such carriage of the goods from Gdansk to Gothenburg was entered into between the parties. Admittedly, there was no such contract and hence there can be no deficiency on the part of Air India in the matter when the original contract had been fully carried out and any fresh arrangement for reshipment of the goods from Gdansk to Gothenburg in Sweden had not been entered into between the parties. Our attention was drawn by the complainant to Rule 12 of the Rules contained in Part-Ill of Chapter II of the Second Schedule to the Carriage by Air Act, 1972. The said rule is in the following terms: 12.(1) Subject to his liability to carry out all his obligations under the contract of carriage, the consignor has the right to dispose of the cargo by withdrawing it at the aerodrome of departure or destination, or by stopping it in the course of the journey on any landing, or by calling for it to be delivered at the place of destination or in the course of the journey to a person other than the consignee named in the air waybill, or by requiring it to be returned to the aerodrome of departure. He must not exercise this right to disposition in such a way as to prejudice the carrier or other consignors and he must repay any expenses occasioned by the exercise of this right.

(2) If it is impossible to carry out the orders of the consignor the carrier must so inform him forthwith.

(3) If the carrier obeys the orders of the. consignor for the disposition of the cargo without requiring the production of the part of the air way bill delivered to the latter, he will be liable, without prejudice to his right of recovery from the consignor for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill.

(4) The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with Rule 13. Nevertheless, if the consignee declines to accept the waybill or the cargo, or if he cannot be communicated with, the consignor resumes his right of disposition."

In our opinion , this Rule does not confer any right on the consignor to call upon the carrier to undertake transportation of the goods from its original port of destination to another place situated in a different country particularly after the obligation of the carrier under the original contract of carriage to safely transport the goods to the destination originally specified had been fully performed and the goods had been unloaded at the port of destination and notice of the arrival of the consignment had been duly given to the consignee. In our view, this is made absolutely clear by Clause (4) of the said Rules which says that "The righ conferred on the consignor ceases at the moment when that of the consignee begins in accordance with Rule 13. Rule 13 reads as follows: 13.(1) Except in the circumstances set out in the preceding rule, the consignee is entitled to on arrival of the cargo at the place of destination to require the carrier to hand over to him the air waybill and to deliver the cargo to him, on payment of the charges due and on complying with the conditions of carriage set out in the waybill.

(2) Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the cargo arrives.

(3) If the carrier admits the loss of the cargo, or if the cargo has not arrived at the expiration of seven days after the date on which it ought to have arrived, the consignee is entitled to put into force against the carrier the rights which flow from the contract of carriage."

9. ON a combined reading of Rules 12 and 13 it appears to be manifest to us that whatever right is conferred on the consignor under Rule 12 is capable of being exercised only before the right of the consignee to take delivery of the goods from the port of destination, namely on its being given due intimation of the arrival of the goods. Such being the correct position relating to scope of Section 12, the Complainant cannot derive any assistance from the said provision for sustaining his plea that even without any fresh contract Air India was under an obligation to reship the goods from Gdansk to Gothenburg in Sweden on instructions being given to it in that regard.

10. IT may also be noticed that apart from merely instructing Air India to reship the goods, the Complainants had not taken any steps to deposit with Air India, despite being called upon by it in the letters and telex messages sent to the Complainants, the charges for such retransportation which had to be paid either in foreign currency or in Rupee-currency with the express approval and permission obtained from the Reserve Bank of India. Huge amounts had also to be depos-ited with the customs authorities in Gdansk by way of terminal charges, handling fee, storage fee etc. and the goods could be got released only if these amounts were paid at Gdansk in US dollars. In spite of being informed about the said requirement the Complainants had not put Air India in possession of the requested funds for the purpose of getting the goods released from the Polish Customs. It is in evidence that after waiting for some days the Customs authorities in Poland confiscated and sold away the goods because of such non-payment of dues to them. In these circumstances, the conclusion is inevitable that no deficiency of any kind could be attributed to Air India on the ground that

the goods were not reshipped by them from Gdansk to Gothenburg in Sweden.

In the result, we hold that all the contentions advanced by the complainant in support of its claim for recovery of compensation from the Opposite Party-Air India are devoid of merit and in consequence this Original Petition has only to be dismissed. Accordingly, we dismiss this petition with direction that the petitioner shall pay a sum of Rs. 10,000/- by way of costs to the Air India. No relief has been claimed by the Complainant against LOT Polish Airlines nor has any case been made for grant of any relief against them.

11. FIRST Appeal No. 217 of 1992 is an appeal filed by Air India against the order dated 23rd April, 1992 passed by the State Commission, Tamil Nadu, in Original Petition No. 283/91 whereby the State Commission directed Air India to pay a total amount by way of compensation of Rs. 2,93,189/- to the complainant for deficiency in service in relation to the performance of a contract for carriage of a consignment of leather garments from Madras to Gdansk in Poland. The State Commission has also directed Air India to pay Rs. 25,000/- as compensation and Rs. 2,000/- as costs. The facts of this case are exactly similar to those in Original Petition No. 54 of 1992 dealt with by us above and the contentions advanced by Air India in this appeal are identical with those that have been put forward in defence in the above Original Petition

12. FIRST Appeal No. 236 of 1992 is an appeal filed by Mr. N. Uddavan who was the complainant before the State Commission in Madras praying for the enhancement of the quantum of compensation allowed to him by the State Commission. The only two grounds on which the State Commission has held that there was deficiency in service on the part of Air India are: (i) The Air India had defaulted in discharging its obligation to give intimation to the Complainant about the failure of the consignee to take delivery of the; goods; and (ii) There was deficiency in service on the part of Air India in not following the instructions given by the consignor to reship the goods to Gothenburg.

Since the facts of these cases and the contentions raised by the Opposite Parties are exactly identical with those dealt with by us in Original Petition No. 54 of 1992, it is not necessary for us to discuss them over again. Both the above mentioned points have been fully discussed in the earlier part of this Order while dealing with the Original Petition No. 54 of 1992, and for the reasons therein mentioned we have to reject both the above mentioned pleas holding that there was no obligation on the part of Air India to give intimation to the consignor about the failure of the consignee to take delivery of the goods and also that in the absence of any fresh contract having been entered into between the parties the Air India was not under any legal obligation to reship the goods from Gdansk to Gothenburg. In this case also the Complainant had not deposited with Air India the requisite charges for getting the goods released from the airport and customs authorities in Poland and had not also paid any amounts by way of transportation charges from, Gdansk to Gothenburg. Hence, no charge of deficiency in service can be levelled against Air India in view of our having held that no obligation to perfom any such service did exist in law in the absence of any fresh contract.

13. IN the light of the findings rendered by us in Original Petition No. 54 of 1992 which are fully applicable to the present case we have no hesitation to set aside the order passed by the State Commission. It must automatically follow that the plea put forward by the Complainant in the appeal filed by him (First Appeal No. 236 of 1992) for the grant of an enhancement of the compensation allowed to him by the State Commission is totally devoid of merit and it has only to be rejected. Accordingly, we allow First Appeal No. 217 of 1992, set aside the impugned order and dismiss the complaint petition. The Respondent in First Appeal No. 217 of 1992-N, Uddavan-shall pay a sum of Rs. 10,000/- to the Appellant-Air INdia by way of costs. First Appeal No. 236 of 1992 is dismissed without any order as to costs.

14. Y. Krishan, Member-(a) Appeals. There are two Cross Appeals of Air India and Uddavan against the Order dated 23.4.1992 by the State Commission of Tamil Nadu in O.P. No. 283 of 1991 before that Commission. The State Commission had recorded an elaborate order in this case. In paras 7 to 11 of its order, the State Commission had considered in detail whether there has been a deficiency in service and negligence on the part of the Air India, the O.P. in the Original Petition before the State Commission. It had come to the following finding on this issue: "As already pointed out under Rule 2.7.1 of the non-delivery consignments rules, the Opposite Party should have sought further instructions of the shipper when the consignment was not taken delivery of by the consignee and acted according to instructions and if the instructions could not be complied with, the consignments should have been returned to the airport of origin or if this is not possible the consignment must have been sold after 30 days. The Opposite Party in this case has not followed any of these instructions. It has simply kept the consignment at Gdansk Airport, Poland, failed to inform the complainant of its disposal and has miserably failed to follow the instructions given by the complainant. The Opposite Party would not even divulge the fate of the consignment. The conduct of the Opposite Party amounts to gross deficiency of service and wilful negligence. The point is answered against the Opposite Party."

It is an undisputed fact that the consignee did not take delivery of the goods. The question to be considered is: what are the obligations of the carrier when the consignee does not take delivery? There is no doubt that the carrier has to intimate the fact of failure of the consignee to take delivery to the consignor and seek the latter''s instructions because the consignor has the right to give instructions regarding the disposition of goods booked for carriage. Para 11 of Resolution 600b(II) of Cargo Service Conference Manual laying down the Conditions of Contract specifies: "If the consignee declines to accept the goods or cannot be communicated with, the disposition will be in accordance with the instructions of the shipper."

15. AGAIN under Rule 2.7.1 of Section 2 of Air Cargo Tariff, if the Carrier receives no instructions from the consignor regarding an undelivered consignment or the instructions of the consignor cannot be complied with, the carrier has the right either to return the Cargo to the airport of origin or sell the consignment after 30 days. But he must notify to the consignor the action he intends to take. It is implicit in the above Rules that the carrier has to intimate without delay to the consignor the fact that the consignee has declined to accept the goods or cannot be communicated with and seek his instructions for the disposition of the goods. The finding of the State Commission is that the factum of the consignee not taking delivery had not been intimated to the complainant consignor by the Opposite Party Carrier. The complainant came to know about the consignee''s failure to take delivery of the consignment from other sources and requested the Opposite Party Carrier to forward the Cargo to Sweden and to deliver the consignment to another paty viz. Nordbanken Head Office, Vastra, Hamgatan, Gothenburg. The State Commission has pointed out that there was no response regarding disposition of the consignment from the Opposite Party Carrier who was reminded by the complainant on the 26th of August, 1991, 11th September, 1991,16th September, 1991 and 24th September, 1991. The O.P. Carrier on the 3rd of October, 1991, regretted the delay in reply and added that it was getting in touch with its office at Gdansk and that it would revert to the complainant on hearing from its office at Gdansk. These facts are being mentioned only as evidence in support of the contention of the complainant that at no point of time was it informed that the consignee had not taken delivery of the consignment.

16. THESE facts establish beyond doubt that there was deficiency in service on the part of O.P. Carrier Air India. The second question is whether the failure to inform the complainant of the nondelivery of the consignment to the consignee caused avoidable loss to the complainant and if so the quantum thereof? The complainant has pleaded that he had instructed the O.P. Carrier, on 5.8.1991 to transport this consignment to another party at Gothenburg but the O.P. failed to do. But, by the time, the O.P. was instructed to divert the consignment to Gothenburg viz., 5th of August, 1991 the consignment has attracted penalties under the Polish Customs Regulations and also accumulated storage charges for the storage of the consignments at the airport in Poland. These charges would exceed the value of the consignment. Further permission of Reserve Bank of India was required for making payment of these charges in foreign currency before the consignment could be cleared by the Customs and Airport Authorities in Poland for carriage to Gothenburg in Sweden.

17. UNDER the Polish Customs Regulations any consignment imported to Poland has to be presented forthwith but not later than 15 days to the Customs failing which they impose heavy penalties on the consignee. The consignment reached the Port of destination in Poland on the 6th of June, 1991. Consequently, when these instructions, for transporting the consignment to Sweden, were issued in August, 1991, the 15 days'' time allowed by the Customs Authority was already over. Likewise, the free-time for removal of consignments from the Port after

delivery in Poland was also over. It is also in evidence that the consignor only wanted to pay the customs penal and port storage charges in rupees whereas payment was required in foreign currency. The consignor also informed the O.P. Carrier that the goods should be rebooked and transported "free of all charges". Hence the clearance and transportation of the consignment from Poland to Sweden was not possible. So if the O.P. carrier Air India had informed the Complainant Consignor about the non-delivery of the consignment to the consignee without delay, it would have been possible for the complainant consignor to give timely instructions for the disposal of the consignment without attracting the mischief of Polish Customs Regulations and also without accumulating storage charges beyond the freetime admissible. In short, the inability of the complainant consignor to dispose of the undelivered goods is to be traced to the initial default of the O.P. Air India to inform promptly the consignor about the consignee not taking delivery and not obtaining instructions for the disposition of the goods. I have, therefore, no doubt that there has been deficiency in service on the part of the O.P. Air India. I, therefore, confirm the order of the State Commission on this point.

18. THE O.P. Air India has also pleaded that it was not the final carrier of the goods to the point of destination and that, therefore, it could not be aware of the consignee not taking delivery of the goods. It has argued that under the relevant rules of the Air Cargo Tariff and as per the Airlines practice, it is for the delivering carrier (i.e. the last carrier at the final destination, the Polish Airlines in this case) to advise the shipper through the first Carrier about the fact that the consignee has refused to take delivery and to seek alternative instructions from the shipper. In the instant case, the delivering carrier, LOT Polish Airlines, failed to advise the O.P. Air India of the consignee''s failure to take delivery. THE Carrier Air India came to know about this on the 6th August, 1991 when the shipper''s agent instructed the Opposite Party Air India to re-book the goods to Gothenburg in Sweden. There is no merit in the contention of the O.P. Air India. Firstly the contract of carriage was between the complainant and the O.P. Air India only and the Polish Airlines were not a party to the contract. Again under Rule 31(3) of the Second Schedule to the Carriage by Air Act, 1972, in case of carriage by multiple carriers, the consignor has a right of action against the first Carrier of the Cargo. Sub-rule 4 of Rule 1 of the First and Second Schedules also lays down that: "A Carriage to be performed by several successive air carriers is deemed...to be one undivided carriage if it has been regarded by the parties as a single operation..." Condition No. 3 of the Conditions of Contract, in the Airway Bill prescribed under Resolution 600b (II) lays down that: "Carriage to be performed hereunder by several successive carriers is regarded as a single operation." In short, the O.P. Air India had employed Polish Airlines as its agent for carrying the consignment. Hence Air India continued to be responsible under the Conditions of Contract for loss or damage arising from the default on the part of the successive agent carrier.

It also appears that the consignor did not initiate any legal steps either by way of suit or by way of arbitration to recover the loss or damage sustained by him as a result of the failure of the consignee to take delivery of the goods. There is no doubt whatsoever that it was this breach of contract on the part of the consignee which was primarily responsible for the loss or damage sustained by the consignee.

19. THE failure of the consignee to take delivery is the primary cause of the loss. THE delay on the part of the Carrier Air India in seeking instructions of the consignor is the secondary factor which prevented loss and damage being minimised. It would be unfair and unjust to make the O.P. Air India i.e. Carrier as liable for the entire loss or damage merely because it did not seek timely instructions from the consignor for the further disposal of the undelivered goods and which could have possibly minimised the loss or damage. THEre is no explanation as to why the consignor did not take steps to recover his loss or damage from the consignee and instead seeks to do so from the Carrier only. THEre is also merit in the contention of the O.P. Air India that it was merely a Carrier and not an Insurer and as Carrier its liability cannot exceed that fixed under the Warsaw Convention in case of destruction, total loss, or damage to a consignment during carriage. It is not possible to estimate precisely the quantum of loss caused to the consignor. In the circumstances, the O.P. Air India will be liable to pay a compensation of Rs. 10,000/- to the consignor for its deficiency in service. The appeal of the Air India is dismissed, the appeal of N. Uddavan is allowed to the limited extent as above and the order of the State Commission would stand modified as above. (b) Original Petition No. 54 of 1992. Saddler Shoes Private Limited v. Air India & Ors.

20. THE facts in this case are also more or less similar to those in the Cross Appeals Nos 217 of 1992 and 236 of 1992 dealt with above. In this case, two consignments of leather goods were booked on 11th May, 1991 for transporation from Madras to Gdansk in Poland. They were scheduled to reach the destination by the last week of May, 1991. The consignee did not take delivery. It is claimed by the Opposite Party Carrier Air India that the LOT Polish Airlines who carried the consignments from Frankfurt to Gdansk informed the consignee about the arrival of the consignment on 29th May, 1991 and reminded him on 11th June, 1991 and 9th July, 1991 but the consignee did not take delivery of the consignments. However, the O.P. Air India did not inform the Complainant Consignor about the failure of the consignee to take delivery and to seek instructions for further disposition of the consignments. It was only on 20th of July, 1991 that the Complainant Consignor came to know that the consignee was not interested in taking delivery of the consignments. At this point of the time, i.e. on 20.7.1991, the complainant asked the O.P. Air India to divert the two shipments to Nordbanken Head Office, Vastra Hammangtan Gothenburg A/c M/s. Fur Fashion Stav Hopparegaten Gothenburg-Sweden. The consignor and the. new consignee were willing to bear the cost of reshipment. But the consignments could not be re-shipped because the Opposite Party''s office at Stockholm desired that the instructions for changing the Airway Bills should come from the Opposite

Party''s office at Madras and that the same had not been received by the office at Stockholm. It was only on 23.7.1991, on receiving the communication for re-shipment of the consignment to the new consignee from the Complainant that the Opposite Party made enquiries from the LOT Polish Airlines Gdansk about the total charges accrued (customs and storage) for clearing the consignments. For this purpose, the Opposite Party sent a number of reminders to the LOT Polish Airlines. It was only on 2.9.1991 that the LOT Polish Airlines intimated the storage, customs etc. charges. The charges in terms of U.S. Dollars, were quite heavy.

21. AFTER expiry of 15 days after the consignments reached destination station in Poland, it would have been possible to re-ship these consignments to Sweden only after payment of customs and port storage charges and these charges were to be paid in U.S. Dollars. Payment of these charges by the complainant Consignor in India required the prior permission of the Reserve Bank of India. Because of the non-payment of these charges and the freight from the Gdansk to Gothenburg, the consignments remained at the place of destination in Poland.

22. IT may be readily accepted that after the elapse of 15 days after arrival of the consignments in Poland, it was not possible to re-ship the consignments but this situation arose because of the initial failure of the O.P. Carrier Air India to give prompt intimation to the Complainant Consignor about the consignee''s failure to take delivery and seek instructions for disposition of the un-delivered consignments. For the reasons recorded in the appeal cases above, I hold that Air India was guilty of deficiency in service towards the Complainant Consignor which prevented the consignor from minimising the loss through diversion of the consignments to Sweden. For the reasons also recorded in the same Appeal cases, the liability is of the first Carrier viz. O.P. Air India and it cannot be shifted to its agent LOT Polish Airlines which carried the consignments from Frankfurt to Gdansk.

The O.P. Carrier Air India has rightly pleaded that the loss to the consignor occurred primarily because the consignee did not take delivery of the two consignments. It was open to the consignor to take legal steps for recovery of the loss caused to him by breach of contract by the consignee who did not take delivery of the goods. But surprisingly, the consignor did not take any action to recover the cost of goods lost and another expenses incurred and damage sustained by the consignor due to the consignee''s failure to take delivery. On the other hand, he has sought to make the Carrier Air India as wholly responsible for the entire loss and damage.

23. THERE is merit in the contention of the O.P. Air India. The loss or damage occurred primarily due to breach of contract by the consignee to take delivery. It may be that the loss or damage might have been minimised if the consignments had been transported to Gothenburg in time if the O.P. Air India had sought timely instructions from the complainant consignor. However, the Counsel for the Complainant consignor could not explain at the hearings as to why the consignor

did not initiate legal action against the consignee which would have minimised the consequent loss or damage caused to him. In this context I am of the view mat it will be unfair and unjust to make the O.P. Carrier as liable for the entire loss and damage as such. It is also not possible to quantify the damage precisely. In my opinion, considering the value of consignments viz. Rs. 14,72,000/-, a compensation of Rs. 25,000/- payable by the O.P. Carrier Air India to the Complainant would meet the end of justice. THERE is no order as to costs. Ordered accordingly.

