

(2011) 05 NCDRC CK 0020

In the National Consumer Disputes Redressal Commission

Crown Consultants (P) Ltd.

APPELLANT

Vs

Oriental Insurance Company Ltd

RESPONDENT

Date of Decision : 31-05-2011

Acts Referred:

Citation : 2011 0 NCDRC 276 : 2011 2 CPR 382 : 2011 3 CPJ 439

Hon'ble Judges : R.C.Jain , Anupam Dasgupta J.

Advocate : Sukumar Pattjoshi , P.K.Seth

Judgement

1. THE complainant in this case is a private limited company owned and managed by one Chandaliya family, with registered office in Mumbai and engaged in stock broking. In that capacity, the company became a member of the National Stock Exchange of India Ltd. (NSE) and started its trading operations at that Exchange in October 1995 from its online terminal at Pune. THE complaint pertains to the alleged deficiency in service on the part of opposite party no. 1, the Oriental Insurance Company Ltd. (hereafter, OP 1) in repudiating, without justification, the complainants claim for indemnification of the loss of Rs. 43.06 lakh approximately. THE complainant claims it suffered this loss because of deception by an unidentified person in the course of its stock broking business, which was a peril covered by an insurance policy availed of by the complainant from OP 1. THE prayer in the complaint, however, is for award of a sum of Rs. 66, 30,500/-. This sum includes the alleged loss of Rs. 43,05,032/-, interest on the said amount @ 18% per annum for the period 01.07.1996 to 30.04.1999 and cost of Rs. 30,000/- on travel, etc., in pursuing the repudiated insurance claim and compensation of Rs. 1 lakh towards harassment and mental agony. In addition, the complainant has prayed for subsequent interest on the above-mentioned sum @ 18% per annum from the date of filing the complaint upto realisation. Opposite party no. 2 (hereafter, OP 2) is the foreign re-insurer of OP 1 and has chosen not to be represented in these proceedings.

2. THE undisputed facts are few. In view of the various risks faced by its members in the business of trading in stocks as well as the directives of the

Securities and Exchanges Board of India (SEBI) in that context, the NSE was looking out for an obligatory insurance policy for all its members. When OP 1 offered a product that appeared suitable to cover such risks, the NSE negotiated the policy cover sometime during 1995 and required that all its member stockbrokers avail of the said policy and pay the requisite premia directly to OP 1. THE stock trading at the NSE was based almost ab initio on computer-assisted online trading, with the authorised computer terminals at the premises of the member stockbrokers being linked to the central computer (server) of the NSE for viewing, with due authorisation, the continuously quoted prices for buying and selling of listed stocks and executing the trades based thereon. THE clients of the individual member stockbrokers would contact them, including on telephone, and, give instructions for purchase/sale of stocks. Based on their instructions, the authorised trader of the member stockbroker would bid for purchase/sale of the specified stocks at those prices (or, thereabouts). THE authorised trader would execute the trades of purchase/sale of the stocks when the prices displayed by the central server of the NSE on the screen of the member brokers computer terminal(s) would match the bid prices. Given this nature and modality of operation, there were clearly several types of possible errors of omission and commission in such trading. Hence, the insurance policy negotiated by the NSE with OP 1 provided for covering the member brokers against such risks, subject to the conditions and exclusions specified in the terms and conditions of the policy. THE complainants cover was for indemnification of loss because of the specified perils to the extent of Rs. 25 lakh for any one event (or loss) during the period 19.10.1995 31.05.1995. As the amount of the premium payable by a member was dependent on the members turnover, the complainant paid a higher supplementary premium at a subsequent stage during the year. THE complainant, however, suffered a loss of Rs. 43,05,932/- in a set of share purchase (and sale) transactions on behalf of one of its clients during 01-03.05.1996 and lodged a claim for indemnification under the above-mentioned insurance policy on 30.06.1996, under intimation to the NSE on the same day. On 02.07.1996, OP 1 appointed M/s Padamsey P. Shah and Company, Surveyors and Loss Adjusters, Mumbai to assess the loss reported by the complainant. THE surveyor made enquiries and submitted his report dated 23.10.1996, to OP 1, recommending that the insurer, OP 1 had no liability in this case under the relevant Certificate of Insurance. Based on the surveyors report, OP 1 finally repudiated the complainants claim by its letter of 23.05.1997, citing three specific grounds. THEse grounds were: 1. Claim was lodged on 1.7.96 i.e. more than 30 days after the incident and crystallisation of the loss on 7.5.96 and not immediately. 2. THE Member constituent agreement with the client was not executed on stamp paper duly notarised, which is not as per NSE/SEBI rules and falls under Policy exclusion.

Client codes were not entered on several occasions by your office at the time of trading but entered subsequently and also not for all trades. This practice is also not as per NSE rules. The complainants case is that OP 1 committed deficiency in

service under the provisions of the Consumer Protection Act, 1986 (hereafter, the Act) because these grounds are not valid under terms of the insurance policy and the rules and regulations of the National Stock Exchange of India Limited and OP 1 also did not respond to the complainants request for reconsideration of its decision to repudiate the claim. Hence, the complainant filed this complaint on 21.05.1999 (i.e., almost exactly 2 years from the date of repudiation of the insurance claim). (i) We have heard Mr. Sukumar Pattjoshi, learned counsel for the complainant and Mr. P. K. Seth, learned counsel for OP 1 and considered the pleadings, evidence and records furnished by the parties.

(ii) We have also had the benefit of hearing and perusing the affidavit filed by Mr. T. Venkat Rao, Manager, NSE Branch Office at New Delhi in response to our notice to the NSE for clarification on certain technical and NSE/SEBI rule/regulation-related issues that we wanted to be clarified generally and also some issues with reference to the conduct of business by the complainant company in its capacity as a member of the NSE.

The case of the complainant, as argued at length by Mr. Pattjoshi, is as under: (i) A Mumbai-based person, known to the complainants Directors, introduced to the complainant a new client, named Babu Lal Sethia, proprietor of M/s Sethia Investments, Laxmi Bazar, Barmer, Rajasthan (hereafter, referred to as Sethia). The complainant started doing business with Sethia with effect from 27.03.1996 and executed the necessary member constituent agreement on 01.04.1996. The agreed operating arrangement was that Sethia would place orders for purchase/sale of stocks on telephone from his place of residence/business at Barmer and the complainants person in-charge of the trading terminal at Pune would execute them. The complainant carried out trades on behalf of Sethia in this manner, without any problem, for five successive settlements during April 1996. During this period, the complainant regularly sent the contract notes for the trades to Sethia by courier. At the end of each (NSE) settlement period, the outstandings, if any, were settled. Sethia had also informed the complainant that he would at times place orders on behalf of one Mangilal Nahata of Barmer (hereafter referred to as Nahata) and he (Sethia) would clarify on telephone if any particular trade had to be done in the name of Nahata. Nahata would also occasionally call up the complainants office to enquire about share prices, etc., to be able to do trades through Sethia.

(ii) On 01.05.1996, Manoj Chandaliya, a Director of the complainant company and the person in-charge of operating the complainants computerised trading terminal at Pune, received a call from a person who said he was Sethia, calling from Barmer and wanted to place orders for purchase of some shares. Manoj Chandaliya could not fully recognise the callers voice and enquired with the caller, to which the latter said that the volume was low because it was a long-distance call and he was using a call-conference facility. However, the caller gave the details of some previous deals of Sethia, a recent payment made by demand draft and the system of internal marking of deals between Sethia and Nahata (an

arrangement specific to this client). Therefore, Manoj Chandaliya believed the stated identity of the caller and executed the orders. Manoj Chandaliya also executed similar orders of purchase of shares on 02.05.1996 and 03.05.1996 on receipt of calls, which was in the same voice as that he heard on 01.05.1996. The corresponding contract notes were prepared accordingly and sent by courier to Sethia at the end of each day.

(iii) However, sometime after the market hours on 03.05.1996, on receiving the contract note for the purchases of 01.05.1996, Sethia called up the complainants trader (Manoj Chandaliya) to say that he had not placed any share purchase orders on 01.05.1996. When the trader informed Sethia about the further purchases of 02.05.1996 and 03.05.1996 made on his behalf, he expressed surprise and flatly denied them all. Sethia also telephoned Pramod Chandaliya, another Director of the complainant to say he was not even at Barmer during that period as he was busy studying the general elections being held around that time. This led the complainant to make urgent enquiries with all concerned in Mumbai, Barmer, etc., but to no avail.

(iv) On 04.05.1996, therefore, the Board of Directors of the complainant company met and decided to square up the deals done on behalf of Sethia. The share prices had fallen during the period 01-03.05.1996 (04.05 and 05.05.1996 were Saturday and Sunday). The complainant squared up only a small part of the trades purportedly done on behalf of Sethia on 06.05.1996 on best-judgment basis, with the expectation that the market might recover on 07.05. 1996. The complainant finally squared up the deals on 07.05.1996, the last day of the relevant settlement period. The net loss on account of the deals thus done on behalf of Sethia during the three-day period of 01 03.05.1996 came to Rs. 43,05,032/-. The complainant also intimated the fact to Sethia.

(v) The enquiries at Pune/Mumbai by the Directors of the complainant on 03.05.1996 and thereafter into the possible deception suffered by the complainant in these transactions on behalf of Sethia did not lead to any concrete conclusion. Therefore, Prakash Chandaliya and his brother Kiran Chandaliya, both Directors of the company visited Barmer on 08.05.1996 to make detailed enquiries. In the several rounds of discussions that they had with Sethia at Barmer, the latter continued to deny that he had placed the share purchase orders in question. Prakash and Kiran Chandaliya also met and sought the assistance of Sethias relatives and friends, including Nahata, as well as persons known to the Chandaliya family. They made enquiries about the telephone calls from Barmer during the period of 01-03.1996 at the local Telephone Exchange and the public call booths near Sethias office/residence. They also went to the local Police Station to make enquiries about Sethias standing in the area and creditworthiness. However, none of these enquiries gave any clue to the identity of the possible caller who could have made those telephone calls placing orders for purchase of shares. After these attempts, the Chandaliya brothers returned to Mumbai on 11.05.1996.

(vi) The Board of Directors of the company met on 12.05.1996 and, in view of the Directors report, concluded that some unidentified person had deceived the complainant, by representing himself to be Sethia and placing the orders in question for purchase of shares. The Board accordingly decided to pay up the loss by arranging funds. However, even after paying up the loss to make good the deliveries, the Chairman of the company, Shantilal Chandaliya was still not satisfied that it was not possible to ascertain the identity of the person who had represented himself to be Sethia. Therefore, on 28.05.1996, he himself went to Barmer for further enquiries. Yet, after checking minute details with the persons concerned at Barmer over a couple of days, the Chairman also came to the same conclusion that they had been deceived by some unknown caller and returned from Barmer. The company did not correspond with Sethia thereafter because everything had been clarified between the company representatives and Sethia during this period of enquiry. Thus, according to the complainant, the loss in this set of transactions crystallised on 01.06.1996.

(vii) It took the complainant some more time thereafter to obtain a copy of the detailed terms and conditions of the insurance policy from the office of the NSE because all that the OP 1 had provided to the complainant was a Certificate of Insurance. The complainant lodged the first information report with the NSE by its letter dated 30.06.1996 and, on the same day, endorsed a copy to OP 1. This intimation was thus within the period of 30 days of crystallisation of the loss, which, according to the complainant, took place on 01.06.1996.

(viii) The repudiation of the claim by OP 1 was not in accord with the terms and conditions of the insurance policy. The first information report to the NSE and (consequently) the claim with OP 1 were filed within 30 days of crystallisation of the loss, which was on 01.06.1996 and not 07.05.1996, as stated in the letter of repudiation. This was so because the complainant needed reasonable time to make the necessary attempts, as it actually did, to verify if Sethia had made the calls leading to the share purchase transactions during 01-03.05.1996. Only when, at the end of their enquiries, the Chairman of the complainant company was satisfied that Sethia did not indeed make these calls could it be said that a loss from the purchase/sale of the shares in question had crystallised and the loss was attributable to deception by some unknown caller. These attempts of the complainant to establish the deception went on until the end of May 1996. The second ground for repudiation was that the member-constituent agreement between the complainant and Sethia was not on stamp paper nor was it duly notarised. This ground was also not valid because the NSE or SEBI regulations requiring such compliance did not exist in 1996 when the cause of action arose. The third ground of repudiation too was misconceived because the NSE introduced the requirement of entering specific client codes in each sale/purchase transaction by member stockbrokers in December 1996, i.e., much after the period of the sale/purchase transactions of the shares in question, viz., May 1996. Moreover, in this case, the names of Sethia or Nahata were entered, by hand, in the computer-printed transaction records when such transactions

took place (except on 01.05.1996), as and when the person in-charge of the terminal had enough time to do so, in the midst of the priority to actually execute the orders on behalf of various clients.

(ix) In terms of the procedure prescribed for filing claims under the insurance policy, it was necessary for the complainant to furnish only a narration of events to disclose the entire incident wherein the insured was deceived as to the identity of any person for the purpose of buying and selling of securities and steps taken pursuant to the deceit (sic). The claim proposal of the complainant met with both these requirements.

(x) The survey report was deficient and biased. The surveyors representative did not make enquiries with Sethia nor did he visit Barmer to question him. He did not inform the Police at Pune, did not think it necessary to make enquiries with any employee of the complainant at Pune about the incidents in question and did not even meet the representatives of the complainant after the first meeting of 12.07.1996. The report made some speculative observations about the complainants conduct after 07.05.1996 in recommending that the claim was not genuine and OP 1 merely accepted the survey report, without giving the complainant a copy thereof.

(xi) The complainant sent a review petition to the Chairman of OP 1 on 16.06.1997. Yet, it did not get a reply explaining the reasons for repudiation of the claim. This action was against the policy guidelines of OP 1 regarding grievance redressal.

(xii) The complainant also met the country representative of the insurance consultants M/s Jardin Insurance Consultants Ltd. and that of the re-insurer company (OP 2) sometime in July 1997 in a joint meeting with the representatives of OP 1 and explained the situation. According to the complainant, the latter expressed surprise that OP 1 had repudiated the claim and refused to consider even arbitration.

(xiii) Thus, OP 1 had committed acts of deficiency in service in wrongfully repudiating the complainants claim for indemnification of the loss in accordance with the terms and conditions of the insurance policy.

3. ON the other hand, Mr. Seth has argued the case of OP 1 as under: (i) Despite being a member stockbroker of the NSE, the complainant failed, willfully and deliberately, to exercise due diligence in ascertaining and determining the authenticity of the orders for purchase of shares made on telephone, particularly the identity of the caller. As admitted, the complainant had known and dealt with Sethia only for about four weeks. In such a situation, no prudent stockbroker could act upon such telephonic instructions, considering the number of orders placed in the course of a three-day period and the large sums of money involved. Further, it is also the usual practice of stockbrokers to ascertain/confirm and then enter the client codes to ensure that the orders placed by the clients, particularly on telephone from outside are genuine and then get the contract notes confirmed

by faxing them in case of large outstanding positions. The complainants person in-charge of the terminal should have done this, particularly when the voice of the caller was not clear and the former was not sure if the caller was indeed Sethia, as the caller claimed.

(ii) The alleged deception was clear by the afternoon of 03.05.1996 when Sethia completely denied having placed the orders for the transactions of the last 3 days. As such, the complainant should have taken steps to either square up the deals or cancel the trades in the morning of 04.05.1996 and should have informed the NSE Market Watch the same day. However, despite its Board of Directors deciding on 04.05.96 to square up the outstandings, the complainant actually squared up only on 07.05.96, i.e., the last day of the settlement and sold only a small number of the purchased scrips on 06.05.1996.

(iii) The complainant reported the loss on 30.06.1996. This was after the lapse of about 55 days from 07.05.96. This was the date on which, according to the complainant itself, both the amount of loss and the circumstances leading thereto were fully clear. Thus, the complainant filed the claim for indemnification of the alleged loss well after the period of 30 days stipulated in the terms of the insurance policy, without any valid and bona fide reason. The filing of a claim for loss within the period stipulated in the policy was one of the most crucial conditions, prominently highlighted on the Certificate of Insurance available with the complainant ab initio.

(iv) The complainant failed to lodge any FIR with the Police Station concerned in respect of the said loss, though it suspected deception. It was not the task of either the surveyor appointed by OP 1 or OP 1 itself to advise the complainant to lodge an FIR with the Police but the duty of the complainant to do so immediately in respect of the alleged deception resulting in loss. However, only after the surveyor advised the complainant that the complainant wrote a highly belated letter dated 20.07.1996 to the Police Station concerned about the said incident. Police FIR about the alleged deception and loss was not registered.

(v) It was wrong to state that the representative of M/s Jardin Insurance Consultants Ltd. had commented in a joint meeting of the Directors of the complainants company and representatives of OPs 1 and 2 that there was no practice in India at that time of stockbrokers seeking and obtaining faxed confirmation of telephonic orders placed by the clients. Similarly, it was also not true that there was no practice of using passwords and most of the business was done on such oral orders, in good faith. It was also wrong to contend that the re-insurer (OP 2) acknowledged in principle the validity of the complainants case or proposed a compromise settlement or arbitration. OP 1 could settle insurance claim of the complainant only according to the terms and conditions of the insurance policy and repudiated it because it was not payable. OP 1 was primarily responsible to take a final decision in the matter.

(vi) The insurance claim of the complainant had to be examined in accordance

with the terms and conditions of the insurance policy under which the insured was covered and not based on any change/addition/subtraction of any of the terms and conditions of the insurance policy issued for subsequent years. The contract of insurance between the parties during the period in question was a concluded contract. Both the complainant and OP 1 were bound by those terms and conditions of the insurance policy in question.

(vii) OP 1 repudiated the claim of the complainant after due examination of related documents and the attendant circumstances and taking into consideration the report of the surveyor appointed to assess the loss. Even on re-examination, as a sequel to the complainants review petition, OP 1 found that the repudiation of the claim was justified in the facts and circumstances of the case.

DISCUSSION (i) We may first observe that it was the Chandaliya family alone which owned and managed the complainant company, with its registered office in Mumbai and stock trading computer terminal at Pune. This was not an old-style stock broking outfit consisting of one or few semi-literate stockbrokers. As pointed out in the surveyors report, an un-rebutted position, the family also had, at least at the relevant time, a Chartered Accountancy practice in the name of some other firm. In the course of hearing the complaint, it also came to our notice that Manoj Chandaliya, a Director of the complainants company and the person in-charge of the companys trading terminal at Pune was himself a qualified Chartered Accountant. In other words, some well-educated, comparatively younger persons managed the complainants company and, at least one of the Directors, namely, Manoj Chandaliya, was a Chartered Accountant. The management of the company was thus well familiar with the principles and practices of due diligence in various commercial operations, including trading in equity shares.

(ii) We may also note that at the behest of the Government of India, some leading financial institutions set up the National Stock Exchange (NSE) as a company in November 1992 and it received recognition as a stock exchange in April 1993. The NSEs mission objectives were: Establishing a nation-wide trading facility for equities, debt instruments and hybrids; Ensuring equal access to investors all over the country through an appropriate communication network; Providing a fair, efficient and transparent securities market to investors using electronic trading systems; Enabling shorter settlement cycles and book entry settlement systems; and Meeting the current international standards of securities markets. NSEs capital market (equities) segment of operations went live in November 1994. By October 1995, the NSE had already become the largest stock exchange in the country, overtaking the much older Bombay Stock Exchange. One of the principal distinguishing features of the trading operations at the NSE was that the member stockbrokers did screen-based trading using modern information technology (IT) facilities made available by the NSE. Apart from substantially speeding up each stage of operations in execution of trades in

stocks and debt instruments, the IT infrastructure and operating procedures of the NSE aimed at minimising the possibility of fraudulent trades, either by investors or by member brokers, by ensuring computerised protocol of recording each transaction. [Source: NSE Website] (iii) It is necessary, in our view, to keep in mind this background of the complainant company and the operating procedures permissible under the rules and regulations of the NSE.

4. (i) The complainant (member) and Sethia (M/s Sethia Investments - constituent) executed a member-constituent agreement on 01.04.1996, as mandated under the regulations of the NSE. A specific clause in the Preamble to this agreement, reproduced below, is of particular relevance to the case: Whereas the MEMBER has satisfied and shall continuously satisfy himself about the genuineness and financial soundness of the CONSTITUENT and the investment objectives relevant to the services to be Provided. [Emphasis supplied] The first point of interest in this context is the admission in the complaint that the transactions with Sethia started on 27.03.1996 (Wednesday) in NSE settlement no. 1996013 (in brief, 13), i.e., several days before entering into the mandatory agreement, which was of 01.04.1996 (Monday).

(ii) Secondly, it is the case of the complainant that someone, whom the complainants Directors knew well, introduced Sethia. However, there is no evidence, not even a claim, that Nahata was also similarly introduced to the complainant. In fact, admittedly, it was only Sethia who informed the complainant that someone called Nahata would also buy and sell shares through him (Sethia). It is a position volunteered by the complainant that this Nahata would off and on call up complainants office to make enquiries about share Prices and obviously his queries would be entertained by the complainant. Further, from the copies of the computer-generated records produced by the complainant in respect of the trades done during the settlement period in question (online trade confirmation slips, vide Annexure P 10 and trade details vide Annexure P 37) enclosed by the complainant with its complaint and rejoinder affidavit respectively, we find that several trades were entered in the name of Nahata, under the heading settlor or the column marked Client A/c. Nahata was surely not a client of the complainants only Sethia (or, more accurately, M/s Sethia Investments) was such a client. This raises the question: were such trades, clearly in the name of an altogether different person (not even claimed to be a Partner of the firm M/s Sethia Investments), at all permissible under the regulations of the NSE, without the complainant executing another member-constituent agreement with Nahata? If such trades were permissible, it is easy to see that the NSE regulation, which required a member stockbroker to enter into a member - constituent agreement with each intending investor, could be easily subverted. This is the next limb of the conduct of the complainants that needs to be noted in this case.

(iii) In the affidavit filed before us, it has been specifically averred on behalf of the NSE on this issue as follows: As already mentioned above, under Regulation

4.3.1 of Chapter 4 of Part A of the Capital Market Regulations of NSE, every Trading Member is required to enter into a member constituent agreement with each of its constituents before accepting or Placing orders on behalf of the constituents. Therefore, in view of the said Regulation, accepting or Placing orders on behalf of a friend or associate of a constituent would not be in accordance with the said Regulation.

(iv) It is clear from this averment of the NSE that both in starting trading on behalf of Sethia before entering into the member constituent agreement with him and in trading with Nahata on the mere say-so of Sethia without entering into separate member constituent agreement with the former, the complainant breached the relevant NSE regulation.

(v) In response to our query, the NSE has also brought to our notice that the operations of the complainant during the Period 04 18.03.1996 (i.e., a Period shortly before commencement of its transactions with Sethia and Nahata) were subjected to an inspection through a Chartered Accountancy firm appointed by the NSE. NSE has furnished a copy of the inspection report. It has also furnished a copy of its letter dated 21.04.1997 addressed to the complainant from which it is seen that the complainant was reprimanded and instructed to adhere to the Rules, Regulations and Bye-Laws of the Exchange with regard to its violations of (a) not collecting margins from constituents and (b) not maintaining register of transactions and also urged and advised to execute Proper Member - Constituent Agreements as Per the Exchange Requirements because such agreements entered into by the complainant with its constituents were not stamped.

(a) As regards the sequence of events constituting the very basis of the insurance claim, that is, how the deception by some unknown Person came about and led to the loss, it is useful to notice the narration of events by the complainant in its first information report of 30.06.1996 (31.05.1996?) sent to the NSE (and OP 1). (i) In the first information report, the following was stated: (8) The fact that a huge quantity was outstanding on the 3rd day of settlement was the main reason to arise (sic arouse) suspicion about the clients (sic clients) outstanding Position. The member then immediately contacted the client during the market hours of the 3rd day of the settlement to confirm his outstanding Position and to request him to send additional margin for keeping the Position outstanding. However, as the client was not available the member could not confirm the outstanding Position with him. Later in the day after the market hours when the daily confirmation note for trades done on 1st May, 1996, which was Posted on Wednesday (1st May 1996) by the member reached the client at Barmer, the client immediately called up the dealing office of the member and clarified that the transactions mentioned in the contract were not ordered by him. When the member informed the client about further transactions done in his name on the 2nd day of the settlement (2nd May 1996, Thursday), and 3rd day of settlement (3rd May 1996, Friday), the client was surprised and he flatly negated that he had not (sic) done any such transaction as he clarified that he

had hardly / not attended office or was not involved in his day to day business activities during the said Period due to the election activities going on in the country and he was busy in studying the election scenario of the country (between 1st May 1996 to 7th May 1996). (9) The client M/s Sethia Investments further claimed that he had not Phoned for Placing the orders from his office Premises or his residence. The member had no other choice but to conclude that the said Phone calls had been made by a cheater or any other mischievous Person who with the intention to deceive the member gave orders / instructions which were telePhonic to the authorised dealers of the said member in the decePtive identity of being Babulal Sethia the so called rePresentative of M/s Sethia Investments. Due to long distance calls it was not Possible to easily identify the voice of Mr. B. L. Sethia by the dealer staff of the member which further resulted in execution of the orders by dealers without any reason for susPicion on the caller. Assessing the gravity of the situation the Management came into action to Put the things right and to find out the identity of the Person who had deceived the member by calling in the name of the client of the member M/s Sethia Investments. (10) Meanwhile, at the end of the third day of the settlement which was the last working day of the week for markets i.e. Friday (3rd May 1996) and there being two consecutive holidays for the market i.e. on Saturday (4th May 1996) and on Sunday (5th May 1996) which were two very fatal days for the markets as the election were being conducted at many Places. The Political uncertainty of the Election Results took its toll on the markets which ultimately led to the markets falling 25% to 30% in Kerb Deals which resulted in the market oPening very low and falling further on the following day i.e. on Monday (6th May 1996). This resulted in the Member to call an emergency Board Meeting and to take joint decision of the Board of Directors of the comPany that all the transaction outstanding in the name of the client M/s Sethia Investments should be squared off by using the best judgment and by incurring minimum losses to the Member and that a team of Directors be sent to the said Place i.e., Barmer, Rajasthan for investigation of the true facts and to bring to the conclusion as to who was resPonsible for the said orders Placed with the Member during the market time. (11) On the last day of the settlement i.e., on 7th May 1996 the outstanding Position standing in the name of the client M/s Sethia Investments was squared off so as to avoid any defaulting, as the same, if not squared would have led to taking of delivery of the said outstanding Purchases quantity of shares having a value of more than 4 crores ruPees which would have been nearly 3 times the net worth of the comPany. Thus to avoid Pay in Problems and to avoid huge losses in auction of these shares on non-Payment, the Board of Directors of the Member ComPany decided that it has to suffer the loss for the moment as there was a very clear indication from the said client namely, M/s Sethia Investments that it was not concerned in any way with the transactions executed by the Member on this behalf as the same was never given by him or from his office or his residence. [EmPhasis suPPLIED] (ii) Notably, the singularly imPortant statement, Due to long distance calls it was not Possible to easily identify the voice of Mr. B. L. Sethia by the dealer staff of the member which

further resulted in execution of the orders by dealers without any reason for suspicion on the caller, does not mention the date and approximate time of the call when the difficulty in identifying the voice of the caller claiming to be Sethia first arose. More important, nothing is stated in this narration if the dealer in charge made any verifying enquiries when he was unable, because of the call being a long-distance one, to identify from the voice of the caller if he was indeed Sethia and, if so, what the said callers response was to satisfy the dealer about the genuineness of his identity as Sethia, as a result of which the dealer accepted and executed his (the callers) orders for very large purchases. Thirdly, according to this narration, the main reason the complainant had suspicion was because huge quantity was outstanding on the 3rd day of settlement. On a plain reading, this sentence would mean that there was hardly any suspicion about the caller not being Sethia till the 3rd day of the settlement period, i.e., 03.05.1996 when the outstanding position of the client became very high. We need to observe here that the mere fact that there was a huge outstanding position against this client at the end of the third day of the settlement period (settlement no. 18 from 01.05 to 07.05.1996) could not have been, by itself, the reason for arousing suspicion about the clients identity. That, in fact, the dealer concerned did not have any suspicion about the identity of the caller after it was understood that it was a long distance call is obvious from the next part of the same sentence, viz., which further resulted in execution of the orders by dealers without any reason for suspicion on the caller. (iii) Further, there is no statement in this narration that when the so-called Sethia called up on 03.05.1996 to place further orders, the dealer asked him for any additional margin or that Sethia said he would remit any additional sum. Secondly, though the narration states that during the market hours of 03.05.1996 the complainants representative called Sethia to seek confirmation of the orders placed and ask for higher margin money, once again there is no mention of the time of the call. Moreover, there is no claim that a second attempt was made to call Sethia on that day later during the market hours when he could not be contacted in the first call. (iv) Reading together the contents of paragraphs (8) and (9) of the narration (portions underlined, in particular) it is also clear that from the conversations with Sethia in the after-market hours of 03.05.1996 the complainants trader came to a clear conclusion that the latter had been deceived by some cheat or mischievous person in believing that the telephone calls of 01-03.05.1996 were from Sethia and accordingly executing orders of purchase and sale of shares on his (and Nahatas) behalf) during that period. The important point here is the unambiguous affirmation that this conclusion had been reached after the telephone conversations that Sethia had with Manoj Chandaliya and Pramod Chandaliya in the after-market hours of 03.05.1996 itself. (v) The last sentence in paragraph (9) and the underlined narration in paragraphs (10) and (11) also convey distinctly that the Board of Directors of the complainant met, for the first time, sometime on 06.05.1996 to consider the consequences of the deals of 01-03.05.1996. The Board decided to square up the deals on best judgment basis so as to cause minimum loss to the company; this was because the Board

recognised that to avoid being forced to take delivery of the outstanding (bought) shares worth nearly 3 times the net worth of the company it had no alternative but to suffer the loss for the moment in squaring up the deals. This was also because there was very clear indication from the client M/s Sethia Investments was in no way concerned with the transactions in question. The Board also decided that a team of Directors should be sent to Barmer to further investigate into the matter and find out who was responsible for the orders Placed during the said Period.

(b) The complainant furnished some additional documents and details to the surveyor in support of its claim of deception by some unknown Person in the months of July August 1996 but there was no addition to any of the statements made in the first information report so far as the sequence of events and the content of the narrations noticed/reproduced above are concerned. In other words, these statements in the first information report were the material that constituted the sole basis of the complainants claim for indemnification of its alleged loss under the insurance Policy.

(c) Keeping the background detailed in sub-Paragraphs (a) and (b) above in sharp focus, we may now turn to read what the complainant said in this context in its complaint filed full 3 years after the events of 01 07 May 1996: 12. On 01.05.1996 one Person using the name of Mr Sethia of Barmer rang up the complainant company and wanted to Place orders for Purchase of shares. Since it was a long distance call, the terminal user could not fully recognize the voice of the caller. However, the Person calling mentioned about Previous deals done by Mr. Sethia, details of demand draft sent to the complainant a week back and about internal marking being done for Mr. Nahata, which marking is Peculiar and applicable to this client only. After hearing all these details from the caller, the terminal user was satisfied that the caller was Mr. Sethia only, otherwise caller could not have given these details. Hence, the orders for Purchase of shares were entered into NSE terminal and same got executed. 13. On 02.05.1996 the terminal user again received calls from the Person who had the same voice as on 01.05.1996. The caller told the terminal user that he was Sethia speaking and wanted to Place further orders for Purchase of shares. Since the voice of the caller was the same as that on 01.05.1996, the terminal user received orders for Purchase of shares from him. Consequently, the terminal user entered these orders into the NSE terminal and same got executed. Similarly, on 03.05.1996 the terminal user received calls from the Person whose voice as that on 01.05.1996. Then the caller again Placed the orders for Purchase of shares. The same orders were entered into NSE terminal and got executed. As Per usual Practice the contract note for the said transaction executed on 01.05.1996, 02.05.1996 and 03.05.1996 were sent to Mr. Sethia on the respective dates by courier. These orders during the Period from 01.05.1996 to 03.05.1996 were Pertaining to three companies namely, SBI (N) TISCO and Reliance and were received and executed by the terminal user Mr. Manoj Chandaliya. The summary of the orders for Purchase of shares as Placed by the caller and copies of the on

line trade confirmation rePort of NSE are collectively annexed hereto and marked as Annexure P 9 to P 10 resPectively. 14. When the daily confirmation / contract notes for trades done on 01.05.1996, which were sent by courier on Wednesday i.e. 01.05.1996 reached Mr. Sethia at Barmer on 03.05.1996, he immediately called uP the dealing office of the comPlainant in Pune and said that the transactions mentioned in the contract were not ordered by him. When Sethia was informed about further transactions done in his name on 2nd and 3rd May 1996 also Sethia was surPrised and he flatly denied having done any such transactions. Mr. Sethia informed Mr. Pramod Chandaliya, Director that he had hardly attended his office and was not involved in his day to day business activities during the said Period of 01.05.1996 to 03.05.1996 due to the election activities going on in the country and he was busy in studying the election scenario of the country. Mr. Sethia further affirmed that he had not Phoned for Placing the orders on any day during May 1996.

(d) The differences between the two versions in the narration of each significant detail relating the events during 01 03.05.1996 are remarkable: it is as if by some magic, the individual and collective recall of each ParticiPant on the comPlainants side became graPhic after the laPse of 3 years. (1) Thus, the version in the first information rePort merely states, Due to long distance calls it was not Possible to easily identify the voice of Mr. B. L. Sethia by the dealer staff of the member which further resulted in execution of the orders by dealers without any reason for susPicion on the caller. It also states, The fact that a huge quantity was outstanding on the 3rd day of settlement was the main reason to arise (sic arouse) susPicion about the clients (sic clients) outstanding Position. The member then immediately contacted the client during the market hours of the 3rd day of the settlement to confirm his outstanding Position and to request him to send additional margin for keePing the Position outstanding. However, as the client was not available the member could not confirm the outstanding Position with him. (2) As against this, the comPlaint states, On 01.05.1996 one Person using the name of Mr Sethia of Barmer rang uP the comPlainant comPany and wanted to Place orders for Purchase of shares. Since it was a long distance call, the terminal user could not fully recognize the voice of the caller. However, the Person calling had mentioned about Previous deals done by Mr. Sethia details of demand draft sent to the comPlainant a week back and about internal marking being done for Mr. Nahata, which marking is Peculiar and aPPllicable to this client only. After hearing all these details from the caller, the terminal user was satisfied that the caller was Mr. Sethia only, otherwise caller could not have give these details. Hence, the orders for Purchase of shares were entered into NSE terminal and same got executed.

(e) The embellishments in the narration of the same sequence of events (leading to ascertaining the identity of the caller of 01.05.1996 claiming to be Sethia) in the affidavit filed by Manoj Chandaliya, comPlainants trader in question in 2008 (i.e., 12 years after the events) are even more remarkable.

(f) What, however, remains wholly unexplained and hence detracts seriously from the credibility of these successive improvements is the reason for non-disclosure of these crucial details on this issue, if indeed true, in the first information report itself.

(i) It is clear from an un rebutted Table in the surveyors report that the complainant purchased shares worth over Rs. 1.42 crore for Sethia (and Nahata) on 01.05.1996; over Rs. 2.19 crore on 02.05.1996 and nearly Rs. 1.98 crore on 03.05.1996, i.e., nearly Rs. 5.6 crore over just 3 days. The cumulative outstanding (bought) positions were over Rs. 1.36 crore on 01.05.1996, over Rs. 3.03 crore on 02.05.1996 and over Rs. 5.01 crore on 03.05.1996. The complainant's claim towards the loss finally booked on 07.05.96 after squaring up the outstanding position was over Rs.43 lakh because of these specific trades done over 3 days (01-03.05.96). By any standard, this is indicative of sudden and extremely large volumes of trade for an individual (or, a proprietary firm).

(ii) Though specifically required under the above-mentioned clause of the member-constituent agreement, the complainant has not averred anything to show how it satisfied itself, either initially or at any time later leave alone continuously - about the financial soundness of Sethia or his proprietary firm so as to engage in share purchases of such amounts. On the other hand, as pointed out in the surveyors report, a stock broking company like the complainant, managed by a group of well-informed and educated persons, did not require Sethia, as part of the NSE-mandated regulations, to deposit and maintain requisite margin money with the complainant, though admittedly Sethia was barely a month-old client.

(iii) The complainant has sought to repel this point in its rejoinder by stating that Sethia had deposited a demand draft for Rs. 4.25 lakh on 22.04.1996, which adequately covered the net loss of the trades done on behalf of Sethia and Nahata (on marked to market basis) even after the decline in the share prices on 02.05.1996. A few facts need consideration in this context. First, the marked to market basis of calculation (i.e., working on the basis that the liability at the end of a days trading is represented by the differential amount of the purchase price and the closing price of the shares in question and not the absolute amount of the purchase price) is at best a partial criterion for determining margin requirements. If this were to be the only criterion, it can be easily seen that any investor could buy lakhs of expensive shares involving crores of rupees during a day without any margin deposit whatsoever if the share price remained stable: for example, a person who without any margin deposit with the complainant could place order for, say, SBI (N) shares worth Rs. 5000/- in a day could also place orders for purchase of the same shares worth Rs. 50 lakh, on the assumption of stable share price because the differential between the purchase price and the closing price would then be zero, requiring no additional margin deposit by the logic of marked to market, as interpreted in the affidavit of Manoj Chandaliya. It may be further noticed that the purchase of shares in the account

of Sethia (including Nahata) during 01-03.05.1996 was overwhelmingly of SBI-New (SBI-N) and TISCO. The average market Price of SBI-N declined from Rs. 307.38 on 01.05 to Rs. 295.95 on 02.05 and to Rs. 289.93 on 03.05.1996, i.e., by nearly Rs. 17 Per share. The market Price of TISCO also declined but not so sharply (from Rs. 245.80 to Rs. 239.98). In support of the large Purchase (60,000 shares) of SBI-N even on 03.05.1996 (on top of 40,000 and 60,000 shares bought on 01 and 02.05.1996 respectively) despite the account of Sethia being seriously in the negative, the complainants rejoinder merely states, On 3.5.96 when still larger orders were Placed, the dealer asked the caller to remit additional margin money. Due to the distance involved and the satisfactory financial conduct in the Past, the dealer had to allow some time to the client to make a remittance and therefore orders were executed in the meantime. The fact is that the dealer also did not anticipate that Prices could fall by Rs. 20 in SBI and by Rs. 20 in TISCO between 3.5.96 to next working day 6.5.96. [Emphasis supplied]

(iv) The Point that emerges clearly from the foregoing statement is that though by the end of trading on 02.05.1996 the dealer was acutely aware of the extremely tenuous Position of funds in Sethias credit balance, he still went ahead with the transactions on 03.05.1996, mainly in the hope that things would be better when the market improved on the next working day. There was surely no intention of taking delivery of such a large number of shares. If this is not speculation, we wonder what would be. The speculative aspect becomes even more obvious if we note that during this Period the complainant itself Purchased on its own account large number of shares of SBI-N and TISCO (in addition to RELIANCE). It is not before us if the complainant also suffered losses on account of its own trades in these two shares, in addition to what it claims to have suffered on account of the alleged deception, and if so, how much. However, the conclusion of almost wanton speculation during the 3-day Period is inevitable.

(v) On the Point of satisfactory financial conduct in the Past of Sethia, the copy of the Ledger of M/s Sethia Investments (for the Period 01.04.1996 27.07.1996) filed by the complainant shows some interesting facts. The ledger has no entry of any debit or credit or of any balance upto 07.04.1996. The first entry is of 08.04.1996 (a Monday) showing a credit of Rs. 18,169.27. There are two deposits by Sethia of Rs. 30,000/- each on 15.04.1996 (the next Monday). Between 15.04 and 22.04.1996, the credit balance of (+) Rs. 78,169.27, however, turns into a debit balance of (-) Rs. 37,771.43, on account of some non-delivery trades. It is at this stage that a deposit Rs. 4.25 lakh is made by Sethia, credited to his account on 24.04.1996. [Note: The complainant has enclosed with the rejoinder affidavit a copy of Sethias letter of 11.04.1996 sending the two deposits of Rs. 30,000/- each, to demonstrate that Sethia did not have a fax connection over which the former could seek confirmation of contract notes. However, for reasons best known to the complainant, it has not Produced on record a copy of Sethias letter, if any, sending the remittance of the comparatively much larger deposit of Rs. 4.25 lakh. Be that as it may]. On

24.04.1996 itself, the credit balance was reduced to Rs. 3,87,228.97 because of a Payment liability (bill) of Rs. 38,366.98 Pertaining to settlement no. 15. The credit of Rs. 21.55 lakh aPProx. because of trades during settlement no. 16 were more than offset by the debit of more than Rs. 24.47 lakh because of Payments due for the same Period though the two entries have been so arranged date-wise (hoPefully, truly) that the credit entry is of 29.04.1996 whereas the debit is of 03.05.1996 though the credit and debit Pertain to sale/Purchase transactions in the same settlement Period, i.e., no. 16. Very strangely, there are no entries of either credit or debit Pertaining to settlement no. 17, the Period immediately Preceding the settlement Period in question, i.e., no. 18. This, then, was the basis of the comPlainants affirmation of the satisfactory financial conduct in the Past of Sethia (and Nahata, taken together) so much so that the comPlainant went ahead with Purchases worth crores of ruPees on their behalf during a short, 3-day Period beginning 01.05.1996. This has to be read carefully with reference to the clause in the member-constituent agreement quoted earlier. Moreover, both in the comPlaint and in the rejoinder, the comPlainant has highlighted the availability of the margin cover of over Rs. 3 lakh because of the dePosit of Rs. 4.25 lakh by Sethia on 22.04.1996. However, it has kePt comPletely quiet on the reality of this margin, which is seen to be rather fictitious in view of the ledger entries discussed above.

5. (i) The comPlainant has tried to exPlain the time taken in filing the claim with OP 1 (rather, the first information rePort with the NSE with coPy to OP 1, because no seParate claim aPplication is on record) on two grounds. First, it took time uPto 01.06.1996 to crystallise the loss due to decePtion and secondly, the Certificate of Insurance (CoI) issued by OP 1 to the comPlainant (and available with it right from the start) did not give sufficient details of the Procedure for filing claims. Therefore, the comPlainant had to obtain those details from the NSE, which too took time after 01.06.1996. As a result, the comPlainant was able to file the claim with OP 1 on 30.06.1996, which was within 30 days of crystallisation of the loss.

(ii) What the comPlainant stated in this regard in its first information rePort needs to be read carefully. The following was stated: REASONS FOR DELAY AND REQUEST FOR CONDONATION OF DELAY IN REPORTING THE MATTER TO THE INSURANCE COMPANY AND NSE AND THE ACTION TAKEN PURSUANT TO THE DECEIPT The member comPany and its Directors where (sic were?) in a state of shock and disbelief when they realized that the transactions on which loss was incurred was not belonging to its client. Further they could not reconcile as to how they would be able to Pay of such huge losses from its own resources to the NSE. Also as exPlained before they had sent a team of its Directors to Barmer (1st visit), for investigating the identity of the Person who had Placed the orders with the member in the name of the client. The team took one comPlete week (7th May 1996 to 12th May 1996) to assess the situation at Barmer by ascertaining from the client whether he had really Placed the orders or not. However, the client reiterated that he had never Placed the orders. The team

took the following actions at Barmer: (a) Visited the office and residence of Mr. B L Sethia Proprietor M/s Sethia Investments to ascertain the facts of the case and to see co-operation to identify the Person who could have deceived the member company in his name. (b) Met the Pancha (respected Persons), Friends/ Relatives/ Employees of Mr Sethia of the Barmer town to explain them the matter and sought their help in identifying the Person who could have Placed the orders on behalf of Mr. Sethia. (c) Visited the Barmer Police Station and enquired about the credit worthiness of Mr. B. L. Sethia and asked for their co-operation in sorting out the matter. (d) Visit the Telephone Exchange/ Telephone Public Call Booths and enquired about the Probable calls made from those Places at the offices of Member company at Pune by the Deceiver. Assurances were given by all the above Parties that they would help in identifying the said deceiver in a fortnights time and most of them opined that Mr. B. L. Sethia was a man of integrity and he being an advocate and respected Person would not have been involved in any mischievous acts. After making all the enquiries and ascertaining the facts the team of Directors and the member company concluded that the Member company was deceived by an unidentified Person by representing in the name of the client i.e. M/s Sethia Investments. In such a situation the Board of Directors of the company immediately called up a meeting and taking stock of the situation a resolution was Passed that as the transaction has already been squared off and loss have been booked and Pay-in being due on 14th May 1996, and the team having arrived only on 12th May 1996 the Member did not had (sic have?) any time to think in terms of reporting to the exchange or the insurance company as the same are situated at Bombay and it would have taken time to Prepare all the documents required for Placing of the said claim. Thus now the Member had two alternatives namely: Option (a) To default on the Exchange or, Option (b) To make the Pay-in of the Deceived Person loss by borrowing funds from outside Parties. EVENTS DATES Settlement Period N/1996018 1st to 7th May 1996 First Board Meeting for Squaring of Transactions 4th May 1996 Visit by the team of Directors at Barmer 7th to 12th May 1996 Second Board meeting for taking following decisions: (i) to raise loan from outside Parties (ii) not to default with the exchange (iii) to claim loss from Insurance Company and notify to exchange after receiving confirmations from Barmer Persons 12th May 1996 Funds Pay-in date of N/1996018 14th May 1996 Visit by the Chairman to Barmer after fortnight 27th May to 31st May 1996 Date of Final Discovery and Crystallisation of Loss 31st May 1996 Claim date as Per guidelines within 30 days of date of discovery of loss 30th June 1996 Then it was unanimously decided by the Board of Directors to opt for the second option due to time shortage and not to default on the National Stock Exchange and thus they decided to raise loans from outside Private Parties to Pay up its liability to the exchange. It was further decided in the Board meeting that the Member would claim its loss from the Insurance Company and notify the Exchange after confirmations is received from the various People whom the team had met in its 1st visit at Barmer that identity of the deceiver/ caller cannot (sic could not?) be ascertained. For coming to the conclusion about identity of the deceiver, the Chairman of the company visit (sic

- visited?) Barmer (2nd visit) (27th May 1996 to 1st June 1996) to make the final assessment and his visit concluded that the identity of the deceiver cannot (sic could not?) be ascertained. [Emphasis supplied] Thus, the visit of the Chairman for his Personal fact-finding on 27.05.1996 was not contemplated even at the meeting of the Board of Directors of the complainant held on 12.05.1996.

(iii) We may also notice that the CoI issued by OP 1 (as Produced by the complainant) states, inter alia, the following: IMPORTANT CONDITIONS 1. In the event that the Insured becomes aware of any loss sustained, or any circumstances which may give rise to a claim, or any reasonable cause for suspicion of fraud, dishonesty or forgery on the Part of any Employee, the Insured must notify the Oriental Insurance Co. Ltd. at the address given below in writing as soon as Possible and in any event, not later than 30 days after discovery. FAILURE TO DO SO WOULD AFFECT THE INSURED'S RIGHTS UNDER THE POLICY. 2. The Insured must not make any admission of any liability, in respect of, nor offer to settle, any claim for which Indemnity may be sought under this Policy, without the Prior written consent of the Oriental Insurance Co. Ltd. [Emphasis supplied]

6. (i) On the tenability of the grounds advanced by the complainant to explain the delay, some observations are in order. The word crystallisation of the loss, repeatedly used in the complaint and the rejoinder, is a semantic invention of the complainant. The CoI or the master Policy document does not even once mention this word. The CoI is absolutely clear that when the insured becomes aware of any loss having been sustained; it must notify the insurer as soon as Possible and in any event, not later than 30 days after discovery (of the loss).

(ii) Undoubtedly, the event of deception was clear to the complainant latest by 04.05.1996 and the amount of loss from the transactions during 01-03.05.1996 was established by the end of trading on 07.05.1996. Thus, even from the limited details in the CoI, available with the complainant from the start, it was very much in the complainant's knowledge that it would have to notify the loss to OP 1 as soon as Possible and, in any event not later than 30 days from 07.05.1996 that is, if it believed that this was indeed a genuine case of deception, covered by Section 1 (c) of the insurance Policy. It is no doubt a stretched argument for the complainant to contend that with a view to ascertaining the facts in the alleged circumstances it was necessary for it to enquire further with Sethia and the time spent on the enquiries at Barmer between 08.05 and 11.05.1996 was thus necessary. Still, this argument is not entirely implausible. However, the claim that even after the company had actually paid up the loss in squaring up the deals the Chairman of the company was not satisfied with the findings of his younger brothers (and Directors of the company) and, therefore, decided to make a further fact-finding trip of his own to Barmer, full 16 days after that of his brothers, defies all logic and credibility as an explanation for further loss of time. This, in our view, could not have been the conduct of a Prudent Person in the responsible Position of the Chairman of the

Board of Directors of a diligent and Professionally managed comPany, which had suffered a large loss because of decePtion by either a new client or some unknown Person. That is, if the loss was indeed through decePtion.

If we ask the question as to what would have been the normal conduct of the management of a stock broking comPany, which genuinely concluded, after careful consideration by its Board of Directors, that it had been deceived in the course of a set of transactions that it had just carried out in good faith, some answers emerge. In our view, the first steP that such a comPany (or Person) would take after coming to such a conclusion is to see if the insurance Policy that it had availed of covered the Peril that it had faced (assuming that the insured did not know the full details of the master Policy till then as the CoI was only a summary document). It would, therefore, make urgent enquiries with the NSE or OP 1 or both regarding the detailed terms and conditions of the Policy, the Perils covered, the stiPulated Procedure, required documentation, etc., for filing a sustainable claim. It would, simultaneously and quite irresPective of the requirement or otherwise of the insurance Policy, also lodge a comPlaint with the Police, because such a decePtion (cheating by Personation) is not an event that a set of ordinary individuals, howsoever well qualified and adePt at dealing in stocks, would be comPetent or required to enquire into and hoPe to unravel it is a criminal offence under section 416 of the Indian Penal Code (IPC). If the alleged sequence of events were true, it might also involve abetment and/or criminal consPiracy, Punishable under aPProPriate section(s) in ChaPters V and VA of the IPC. The management of the comPlainant comPany was surely aware of this. If it had any doubt as to who should lodge such a comPlaint with the Police, the stockbroker itself or the NSE or the insurance comPany, or whether the first information rePort contemPlated in the insurance Policy was in lieu of a Police FIR, once again the management of such a comPany would at least immediately enquire with the NSE management, obtain clarification/advice if necessary, in writing - and act accordingly. Such a comPany would also take these stePs in quick succession, Particularly if it had Paid uP the loss by raising loans. In this case, the comPlainant did nothing of the kind. It kePt thunderingly quiet for over a fortnight since 12.05.1996 for there is no averment of any action between 12.05.1996 and 27.05.1996. It was only on 28.05.1996, out of the blue as it were, that the Chairman of the comPlainant comPany decided to go to Barmer for the second, his Personal, enquiry.

Even after the Chairmans return to Mumbai, the comPany took over 30 days to file its first information rePort, on the Plea that it had to obtain the details of the insurance Policy and claims Procedure from the NSE. In this context, we note some additional facts brought on record. Of course, the Period allowed for filing an insurance claim in case of loss due to decePtion was 30 days from the date of awareness of the loss. However, the question that needs to be asked is: was it normal conduct of a comPany in this Position to wait for the full Period of 30 days to file the first information rePort, even if the loss crystallised only on 01.06.1996 according to its reckoning? We are unable to find a reasonably accePtable answer

for the delay in filing the first information rePort with the NSE, Particularly in view of the clear stiPulation in the CoI that not intimating the insurance comPany within 30 days of becoming aware of the loss would affect the rights of the insured under the Policy. Incidentally, the comPlainant has Produced a letter PurPortedly written on 02.06.1996 to the NSE asking for a coPy of the master Policy issued by OP 1 this is obviously with a view to demonstrating that it did not have a coPy of the master Policy till then. There is no mark of NSEs office acknowledgement on this letter nor is on record any subsequent letter of NSE forwarding a coPy of the master Policy. We may also observe that 02.06.1996 was a Sunday.

7. APART from mentioning, inter alia, the sections insured, which were covered by the policy, the CoI does not indeed spell out the details of the insured perils nor does it give a summary of the claims procedure. It merely records, for example, Section 1 Legal Liability for inability to complete transactions for specified perils COVERED. Clearly, therefore, the complainant, having availed of the insurance policy at the directive of the NSE and received only the CoI was expected to obtain, as soon as possible, a copy of the detailed policy document that also included the claims procedure. In fact, that would be the immediate response of an average stockbroker of ordinary prudence because, as it stood, the CoI did not ex facie disclose these crucial details. The NSE circular, which detailed the rationale for obtaining a single master policy compulsorily covering all members of the NSE, also advised its Members, The insurance indemnity cover will be provided on a Master Policy basis issued to the National Stock Exchange of India Ltd. but the cover would be in respect of each Trading Member who will be issued individual certificate of insurance by the OIC. The copy of Master Policy will be available for inspection with the National Stock Exchange of India Ltd. once the same has been issued by the OIC. (i) The CoI issued to the complainant was for the period 19.10.1995 31.05.1996. It is not the case of the complainant that though it enquired soon thereafter with the NSE, it could not ascertain the details of the insurance policy, as OP 1 had not furnished the Master Policy to the NSE. On the other hand, it is an admitted position that by 04.05.1996 the complainant had concluded with reasonable certainty that the transactions during 01-03.05.1996 purportedly on behalf of Sethia were the result of a deception. The complainant was able to precisely quantify the loss after squaring up the transactions by 07.05.1996. In the teeth of these facts, however, the complainant would have us believe that though aware of a large loss by deception by 07.05.1996, it was unaware upto 02.06.1996 that the insurance policy could cover such a loss. Alternatively, that though conscious after 07.05.1996 about coverage of the loss under the policy, it could not file the requisite details/papers with the NSE and OP 1 as it had to necessarily spend over three weeks thereafter on enquiries to verify (and re-verify) the truth of the deception, the identity of the deceiver and to crystallise the said loss. It was so busy in that extremely diligent exercise of deceiver-identification-cum-loss-crystallisation (coupled with concerns as to how to pay up for the loss) that it

was altogether unable to even commence the process of ascertaining the detailed terms of the insurance policy and the claims procedure until 01.06.1996. Even thereafter, it took the complainant considerable time to ascertain the details of the policy and claims procedures. We are not at all persuaded that this could be even remotely, leave alone was, the factual position.

(ii) We may also notice a small fact, completely unexplained. The first information report to the NSE, narrating the event of deception and raising a claim for indemnification of the loss, was signed by a Director of the company and is dated 31.05.1996. Yet, the forwarding letter to the NSE (and OP 1) enclosing the same first information report and signed by the same Director is dated 30.06.1996. What was the complainant doing with the fully-completed first information report dated 31.05.1996 already signed by a Director that it actually took the complainants same Director to sign the forwarding letter a full one month later? Commonsense would suggest that the complainant, having already finalised its first information report on 31.05.1996, did not find it expedient and/or convenient to lodge this report soon thereafter as it was engaged during the whole of June 1996 in such activities relating to the claim as it could not afford to disclose in its complaint against OP 1. It also follows that these activities could not be such as to advance and establish a bona fide claim.

(iii) Therefore, in our view, the complainants conduct over the period from 08.05 to 30.06.1996 can have only one rational explanation. Sethia and/or the complainant engaged in highly speculative trades during 01-03.05.1996 that resulted in a large loss. The complainant knew that it was not a case of deception by someone impersonating Sethia. However, because the complainant did not quite follow the procedure laid down by the NSE to accept and execute orders for transaction with Sethia, it found it impossible to bring Sethia to own up these deals and face the consequences. The complainant then tried its level best to persuade Sethia to share at least, a part of the loss but failed. It was only then that the complainant realised, most likely after enquiries with persons concerned, that it could make out a possible case for an insurance claim on the ground of deception by an unknown person.

8. WE may notice a few more facts/circumstances that arose after the complaint was filed: (i) In 2008, during the proceedings before us, the complainant brought on record an (evidence) affidavit of Babu Lal Sethia as well as affidavits of its Directors concerned. Unfortunately, this long lapse of time in bringing necessary evidence on record is due to the processes in this Commission. Be that as it may.

(ii) Sethias affidavit averred that Nahata was a client of his. Thus, the said Nahata was not a client of the complainant. WE have already seen from the NSE trade records produced by the complainant that this position notwithstanding and despite the absence of a member-constituent agreement between the complainant and Nahata, the former actually executed substantial deals in the name of Nahata: the computer-generated records reflect that there was no difference in recording the trades in the name of Sethia and in the name of

Nahata. If at all there was a confidential system of distinguishing between the deals for Sethia and those for Nahata, as averred in the complaint and the subsequent affidavits, why should the trade records produced by the complainant show the names of Sethia and Nahata separately against specific trades? And, if Nahata was indeed a client of Sethia, why should the NSE record of trades produced by the complainant show the name of Nahata under the column of Client A/c?

(iii) Even after over 12 years of the transactions in question, Sethia states in his affidavit of June 2008 that he received the contract note of the transactions of 01.05.1996, by courier, from the complainant at about 3.30 pm on 03.05.1996 (vide paragraph 8 of the affidavit). His recollection is thus phenomenal. Even more phenomenal is Sethias recollection of the precise, abbreviated numbers (namely, 14, 15, 16 and 17) of the NSE settlements when he did good volume of business with the complainant (vide paragraph 5 of the affidavit). Also notable in this context is the fact that the complaint filed in 1999 (vide paragraph 10) also refers to these NSE settlements by the same numbers.

(iv) According to Sethias affidavit, on 10.05.1996, during the visit of Pramod and Kiran Chandaliya to Barmer, there were some heated exchanges and they as well as Sethia went to the Police Station, Barmer. However, at the intervention of one Sohan Lal, they did not file a Police complaint. They all decided so because Sohan Lal said, the Police could do hardly anything in this matter as there was nothing to prove that Sethia had placed the orders and thereafter they all returned to have a joint meeting. Pramod Chandaliya, in his affidavit of July 2008, says the same thing with the added revelation, WE tried to provoke Mr. Sethia through some heated exchanges on 10.05.1996 so that he could say something in our favour if he had done the transactions and during the process had asked him to come to the Police Station, Barmer also. WE all went up to the Police Station Thus, the two Chandaliya brothers were rather easily dissuaded from filing the Police complaint, despite their bona fide belief that there was a deception, if not by Sethia then some unidentified person and, according to Sethia, thereafter they all came back to have a joint meeting. However, we find from the complainants first information report (vide paragraph D (c)) to the NSE that at Barmer, the team of Directors of the company visited the Barmer Police Station and enquired about the creditworthiness of Mr. B. L. Sethia and asked for their cooperation in sorting out the matter. Thus, in the affidavit, there is no mention whatsoever if Pramod Chandaliya had already been to the Barmer Police Station for the specific purposes mentioned in the first information report, for he and his brother Kiran could possibly not have made enquiries with the Police about the creditworthiness of Sethia in the latters presence when they jointly went to the Police Station on 10.05.1996 after a heated exchange.

(v) A specific statement has been made in the complaint: As far as Mr. Sethia is concerned with this deception, all the issues had been clarified over telephone and during two visits by Director and Chairman of the Complainant Co. and

therefore no further correspondence with Mr. Sethia was required to be exchanged. In this context, we once again refer to the ledger account (for the period 01.04 27.07.1996) of Sethia produced on record. The loss because of the transactions during 01-03.05.1996 allegedly in the name of Sethia alias deceiver was quantified at over Rs. 43 lakh and apparently recorded in a separate account. Sethias ledger account, however, shows a debit entry of Rs. 24,47,721.99 on 03.05.1996. Further, on 06.05.1996, there is a credit of Rs. 1,12,761.53 in the account, leaving a credit balance of Rs. 2,07,715.65 as on that date. Finally, there is a debit entry of Rs. 21,996 dated 08.07.1996, with a longish explanation reading, To Dena Bank (Kalbadevi Road) (Being amount paid of Tisco (10000) towards Short Delivery Sett. No. A/16 of Sethia Inv towards Penalty charges). Thus, after this debit, Sethia had a credit balance of Rs. 1,85,719.65, according to this ledger account. WE wonder how the complainant treated this credit balance eventually, if there was no communication with Sethia after May 1996. The statement quoted above is of course carefully worded: it is about closure of further exchange of correspondence with Sethia as far as the loss because of this deception was concerned. In other words, correspondence/dealings with Sethia continued even after the incident of deception, albeit in respect of other matters. Now, the question arises: would a stockbroker continue any commercial contact at all with some person because of whom, in one way or the other, the stockbroker had recently suffered a large loss? The ordinary view would be not to continue any contact unless of course some superior, long-term advantage was perceived in doing so. That such an advantage was availed of in 2008 is obvious from the clearly procured affidavit of Babu Lal Sethia produced on record by the complainant.

(vi) It is in the backdrop these acts and circumstances that the surveyors observation in its report of October 1996 acquires added relevance: 2. An alleged deceiver cannot expect to gain monetarily as any profit from false orders will accrue to the client in whose name he has placed the orders and not to him. 4. In our considered opinion, the obvious and most likely scenario therefore appeared to be a client or possibly the insured, engaged in speculative trading and having incurred losses as the market moved adversely, thereby (sic) denied having placed the orders at all.

The claim for indemnification of the loss was clearly under PART I IN & OUT INDEMNITY Section 1 (c). The relevant provisions of the policy read as under: Whereas the Assured, as defined herein, have paid, or agree to pay, the premium as consideration for this Part of the Policy, The Oriental Insurance Co. Ltd. (hereafter called the Underwriters) agree to indemnify the Assured in the manner stated, as set out in the Schedule to have been incurred or sustained by reason of any of the following insured events: - SECTION 1 Legal Liability for which the Assured shall become liable pursuant to the following Indian Regulatory Authorities (including any rules, regulations or bye-laws, legislations made by the Government of India or such bodies constituted by it in the exercise of their statutory powers):- The Securities and Exchange Board of India and/or

appears to us that the Courts reference in this case to the uberrima fides doctrine was only to the extent mentioned in the judgment of a Constitution Bench of the Apex Court in the case of General Assurance Society Ltd. v Chandmull Jain [(1966) 3 SCR 500].

(iii) In United India Insurance Co. Ltd. v Pushpalaya Printers [(2004) 3 SCC 694], the Court, while discussing the interpretation of the term impact, referred to the said doctrine in the following words, A Constitution Bench of this Court in General Assurance Society v Chandmull Jain has expressed that (AIR p. 1649, para. 11) In a contract of insurance there is requirement of uberrima fides, i.e., good faith on the part of the assured and the contract is likely to be construed contra proferentem, that is, against the company in case of ambiguity or doubt.

(iv) THE case of LIC of India v Smt. G.M. Channabasamma [(1991) 1 SCC 357] was also one of application of section 45 of the Insurance Act, 1938 to a life insurance policy. THE Apex Court inter alia observed: It is well settled that a contract of insurance is a contract uberrima fides and there must be complete good faith on the part of the assured. THE assured is thus under a solemn obligation to make full disclosure of material facts which may be relevant for the insurer to take into account while deciding whether the proposal should be accepted or not. While making a disclosure of the relevant facts, the duty of the insured to state them correctly cannot be diluted. Section 45 of the Act has made special provisions for a life insurance policy if it is called in question by the insurer after the expiry of two years from the date on which it was effected. Having regard to the facts of the present case, learned counsel for the parties have rightly stated that this distinction is not material in the present appeal. If the allegations of fact made on behalf of the appellant Company are found to be correct, all the three conditions mentioned in the section and discussed in Mithoolal Nayak v Life Insurance Corporation of India must be held to have been satisfied. We must, therefore, proceed to examine the evidence led by the parties in the case.

Though this point does not appear to have been specifically amplified in any case before the Apex Court, it is our considered view that to be consistent with the law laid down by the Apex Court as well as the international legal framework relating to insurance, the doctrine of utmost good faith must pervade the entire range of conduct of both the assured/insured and the insurer all through the life of an insurance contract. For, it can be no bodys case that while the parties to an insurance contract must be held answerable to this doctrine in making the contract, i.e., the insured putting up its proposal for the insurance and the insurer in issuing the policy, they would be exempt from conduct adhering to this doctrine at some later stage of the contract, say, in filing a claim for indemnification of a loss or in examining it.

(i) We need to also bear in mind another dimension of adjudicating complaints relating to claims for indemnification of loss under an insurance policy. The Consumer Fora established under the Act derive jurisdiction to adjudicate such

matters only on the ground of deficiency in service on the part of the insurer. [Note: There is of course a further dimension of involvement of commercial purpose, as dealt with in this Commissions judgment and order of 03.12.2004 in the case of Harsolia Motors v National Insurance Company Limited [(2005) 1 CPJ 27 NC]. This judgment is, however, under challenge before the Apex Court]. In dealing with deficiency in service, it is thus salutary to bear in mind the general principles laid down by the Apex Court in the case of Ravneet Singh Bagga v KLM Royal Dutch Airlines [(2001) 1 SCC 66]. In this case, the Apex Court, while considering an appeal against the order of this Commission in a complaint involving alleged negligence on the part of the above-mentioned Airline, agreed with the view taken by this Commission and ruled as under: 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 willful fault, imperfection, shortcoming or inadequacy in the service of the respondent. The deficiency in service has to be distinguished from the tortious acts of the respondent. In the absence of deficiency in service the aggrieved person may have a remedy under the common law to file a suit for damages but cannot insist on grant of relief under the Act for the alleged acts of commission and omission attributable to the respondent which otherwise do not amount to deficiency in service. In case of bona fide disputes no willful fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance in the service can be inferred (sic - inferred?). If on facts it is found that the person or authority rendering service had taken all precautions and considered all relevant facts and circumstances in the course of the transaction and that their action or the final decision was in good faith, it cannot be said that there had been any deficiency in service. If the action of the respondent is found to be in good faith, there is no deficiency of service entitling the aggrieved person to claim relief under the Act. The rendering of deficient service has to be considered and decided in each case according to the facts of that case for which no hard and fast rule can be laid down. Inefficiency, lack of due care, absence of bona fides, rashness, haste or omission and the like may be the factors to ascertain the deficiency in rendering the service. [Emphasis supplied]. (ii) Thus, to succeed in this complaint, the complainant would have to establish deficiency in service on the part of OP 1 in repudiating the claim of the complainant.

11. (i) OP 1 rePudiated the claim of the comPlainant on the following three grounds: 1. Claim was lodged on 1.7.96 i.e. more than 30 days after the incident and crystallisation of the loss on 7.5.96 and not immediately. 2. The Member constituent agreement with the client was not executed on stamp PaPer duly notarised, which is not as Per NSE/SEBI rules and falls under Policy exclusion. 3. Client codes were not entered on several occasions by your office at the time of

trading but entered subsequently and also not for all trades. This Practice is also not as Per NSE rules.

(ii) The detailed discussion of the facts and circumstances above show beyond any trace of doubt that the claim was filed well beyond the sPecified Period of 30 days from the date of discovery/awareness of the loss due to the share trades carried out by the comPlainant during 01-03.05.1996 and that there was no reason for this inordinate delay which could be held to be reasonable, bona fide and sufficient. The comPlainant, from its unambiguous admissions in the first information rePort, became fully aware of the loss and its exact amount latest by 07.05.1996. The most charitable interPretation of the entire exercise thereafter of trying to ascertain the identity of the so-called deceiver (who allegedly ordered, in the name of Babu Lal Sethia, the Purchases of shares on telePhone from Barmer during 01-03.05.1996) by sending a team of two Directors to Barmer and later on the Chairman of the comPlainant comPany undertaking another sudden triP, allegedly to Barmer is that the comPlainant was trying to minimise the loss by exPloring if Sethia could somehow be Persuaded to own uP a Part of the deal. There was no case whatsoever of all this time being unavoidable to crystallise the loss. In any event, the complete inaction in the last 15 days of May 1996 is altogether unexPlained and, as we have seen, even the Board of Directors meeting on 14.05.1996 did not contemPlate or authorise a second fact-finding visit by the Chairman to Barmer (vide Para 10 (ii) P. 35 suPra). The time taken in June 1996 is also not exPlained as we have seen, the signed coPy of the first information rePort is actually dated 31.05.1996 and we are not Persuaded that the date is a mere tyPograPhical error. The insurance comPany, OP 1 had to base its decision regarding the delay on the facts narrated in the comPlainants first information rePort. On that basis, OP 1 committed no deficiency in service in concluding that the delay was uncondonable.

(iii) The comPlainant has sought to make much of its contention that the member constituent agreement (with M/s Sethia Investments) need not have been executed on stamp PaPer and even if use of stamp PaPer was necessary, there was no requirement of either SEBI or the NSE to get the agreement notarised. In contesting the comPlaint OP 1 has not been able to demonstrate if the execution of a member constituent agreement on stamp PaPer and its notarization were indeed mandated by the NSE regulations. However, we find from the PaPers filed by the NSE before us in resPonse to our direction in this regard that the comPlainant itself was urged and advised (albeit by a letter of 21.04.1997, i.e., well after the dates relevant to this comPlaint (APril May 1996) to execute ProPer Member-Constituent Agreements as Per the Exchange requirements when it was brought out in an insPection of the comPlainants oPerations since October 1995 that Agreements entered into with constituents were not stamped. This shows that it was very much a requirement of the NSE to execute the agreements with constituents on stamp PaPer though the requirement of getting them notarised might not have been there.

(iv) In respect of the last ground of repudiation, the complainant has again tried to make most of a loosely worded sentence. It is true the NSE had not made it mandatory to enter specific client codes in execution of client orders during May 1996, i.e., the relevant Period. However, the essence of the ground is not so much the phrase client code, as is obvious from a reading of the sentence as a whole. The true import is that the complainant failed to enter the details of the client(s) on whose behalf the individual trades were executed at the time of executing the trades and that the details were recorded in hand subsequently and were thus amenable to either inadvertent error or manipulations, which was clearly against the regulations of the NSE. In the case of entries in question, we are unable to see why the complainant's trader failed to record either Sethia or Nahata in any of the trades executed on 01.05.1996 though these words were recorded against all entries of trades of 02.05 and 03.05.1996. The so-called Priority of actually executing the trades and hence not finding time to make the entry of the clients detail does not convince us because this Priority of executing trade could not be only for 01.05.1996.

(v) Thus, we are unable to find any element of Inefficiency, lack of due care, absence of bona fides, rashness, haste or omission (vide Apex Court order in the Ravneet Bagga case excerpted above) on the Part of OP 1 in citing the foregoing grounds of repudiation of the complainant's claim.

(vi) On the other hand, as discussed above in detail there is ample evidence of lack of even ordinary good faith, leave alone utmost good faith in the conduct of the complainant. It did not comply with the regulatory requirements of the NSE in doing trades on behalf of Nahata under the garb of his being a client of Sethia. Though in its first information report the complainant merely stated that it did not have any suspicion about the caller not being Sethia once it was pointed out to and realised by the trader that it was long distance call, (vide P. 20-21 Portions of extracts underlined) it went to great lengths in the complaint and later the affidavits to import additional unverifiable details to improve its version that the trader was deceived on this account. It failed to register a complaint with the Police after finally concluding about the alleged deception and even after doing so at the instance of the surveyor, continued to persist with the absurd position that it was for the NSE and/or the insurance company and not the complainant to file such a complaint with the Police. It failed to exercise due diligence and care in executing very large trades on behalf of a very new client without any margin money worth the name and, in fact, went to great lengths to justify how according to its own interpretation of the marked to market basis of calculation, there was sufficient margin in favour of Sethia till the end of trades on 02.05.1996. It spun a long, most unacceptable yarn about its being able to crystallise the loss only on 01.06.1996 as against 07.05.1996 and then waited for full one month to file its first information report with the NSE on 30.06.1996. Insofar as Nahata was not a duly recognised client of the complainant, the complainant could not, if it were acting in utmost good faith, have included the losses incurred in the trades attributed to Nahata in its insurance claim. Thus, in

our view the comPlainant not only did not disPlay utmost good faith in its conduct but also failed to discharge the burden of Proof in resPect of its claim.

In conclusion, we find no deficiency in service on the Part of the OPPOSITE Party no. 1, Insurance ComPany in rePudiating the comPlainants insurance claim and dismiss the comPlaint as being totally devoid of merit or good faith.