

(2012) 03 NCDRC CK 0020

In the National Consumer Disputes Redressal Commission

M O H Leathers Represented By Its Managing Partner
Zeenath Iqbal

APPELLANT

Vs

United Commercial Bank Represented By Its Chief Manager

RESPONDENT

Date of Decision : 30-03-2012

Acts Referred:

Citation : 2012 0 NCDRC 188 : 2012 2 CPJ 694 : 2012 2 CPR 404 : 2012 2 CPR 424

Hon'ble Judges : R.C.JAIN , S.K.NAIK J.

Final Decision : Appeal accordingly dismissed

Judgement

1. ALLEGING deficiency in service on the part of the opposite party, the complainant has filed this complaint for recovery of a sum in Indian Rupees equivalent to 1,85,200 DM (German Currency) alongwith interest @ 21% p.a. on the said amount from August 1988 till payment of the amount besides a sum of Rs.1,00,000/- towards the expenses incurred by the complainant.

2. THIS case has a somewhat chequered history. From the record of the case, it is noticed that complaint was originally filed by the complainant in person sometime in March 1993 making the allegation of deficiency in service and claiming the above noted reliefs. The said complaint came up for preliminary consideration before the Commission first time on 07.09.1994 when it adjourned the consideration of the complaint to 21.10.94 when Commission directed the complainant to file proper complaint petition and adjourned the matter sine-die. It would appear that pursuant to the said order, the complainant filed a comprehensive complaint in the year 1995 which came up for consideration of the Commission on 30.05.1996. Since the complainant was not present or represented through his advocate when the complaint was taken up for hearing while the opposite party was duly represented, this Commission dismissed the complaint as barred by limitation by observing as under: "The Complainant is not present either in person or through his advocate when the case is called for hearing. The Opposite Party is represented by Mrs. Dipti Chaudhary. We have

gone through the records including the original and the revised complaint. Petitions and the counter statement filed by the opposite party in reply to the original complaint. We find that the alleged loss of complainant 's goods had taken place in 1987-88 and though the complainant had come to know about it in 1988, he has chosen to file the complaint before this Commission on 29th March, 1993. The cause of action if any for the complainant arising from the alleged loss of goods by theft had become clearly time-barred. This complaint has to fail on this ground. Accordingly, we dismiss the original petition as barred by limitation. No costs ".

Aggrieved by the said order passed by this Commission, complainant preferred an appeal (Civil Appeal No. 10990/96) which was decided by the Supreme Court vide order dated 9.9.1997 in the following manner: "Learned counsel for the appellant states that the impugned order was passed by the National Consumer Disputes Redressal Commission behind the back of the complainant. It is stated that the notice was sent to the learned counsel for the complainant on May 20,1996 for hearing which was fixed on May 30, 1996. The notice was returned unserved as the counsel had already left for summer vacation. Be that as it may, we give liberty to the complainant to move an application for setting aside the order on the alleged ground. The appeal is disposed of. We, however, give liberty to the appellant to approach this Court after the final order is passed by the Commission ".

3. PURSUANT to the said order passed by the Supreme Court, the complainant file Miscellaneous Petition No. 1 of 2001 seeking review of the order dated 30.05.1996 thereby dismissing the complaint as barred by limitation. The said petition was dismissed by observing as under: "On strength of this order, present application has been filed seeking review of the order of State Commission dated May 30, 1996. No doubt the order of the Commission was made ex-parte. The order of the Commission, was however, based on the provisions of Consumer Protection Act, 1986, under which the Commission has been constituted. In Jyotsana Arvind Kumar Shah and Ors. Vs. Bombay Hospital Trust- 1999 (4) SCC 325 (decided on 22.1.1999) while considering the powers of State Commission under the Act for setting aside an ex-parte order, Supreme Court held that no such jurisdiction vested with the State Commission. In the case before the Supreme Court an ex-parte order was made against the respondent and on merit compensation of Rs.7.00 lakhs with interest @ 12% was awarded in favour of the appellant. Respondent instead of preferring an appeal under the Act filed a writ petition in the Bombay High Court which was dismissed with an observation that the respondent could approach the appellate authority or to make an appropriate application before the State Commission for setting aside the ex-parte order, if permissible under the law. Armed with the order of the High Court respondent filed an application before the State Commission for setting aside ex parte order which was allowed. Revision was filed by the respondent before the National Commission which was allowed. Revision was filed by the respondent before the National Commission which was dismissed. Appellant then filed an appeal in the

Supreme Court against that order. Supreme Court said that the order of the State Commission setting aside its ex-parte order was one without justification. It said that State Commission fell into an error in not bearing in mind that the Act under which it was functioning had not provided it with a jurisdiction to set aside an ex-parte reasoned order. Supreme Court added: It is also seen from the order of the State Commission that it was influenced by the concluding portion of the judgment of the Bombay High Court to the effect that the respondent (writ petitioner) could approach the Appellate Authority or make an appropriate application before the State Commission for setting aside the ex parte order, if permissible under the law. Here again, the State Commission failed to appreciate that the observation of the High Court would help the respondent to move the application for setting aside the ex parte order, which appears to be the position, the order of the State Commission setting aside the ex parte order cannot be sustained. As stated earlier, there is no dispute that there is no provision in the Act enabling the State Commission to set aside an ex parte order. This judgment of the Supreme Court squarely covers the present case and was rendered considering the provisions of the very Act with which we are concerned. The learned counsel for the Complainant referred to other judgments of the Supreme Court, however, not rendered under the provisions of this Act, to contend that there is inherent jurisdiction with any Tribunal to set aside its ex-parte order. It is not necessary for us to go into those judgments as we have to follow the law laid down by the Supreme Court in the case of *Jyotsana Arvind Kumar Shah and Ors. Vs. Bombay Hospital Trust*. We have to consider the application for setting aside an ex parte reasoned order as per law. The application is dismissed".

4. AGGRIEVED by the dismissal of the application, complainant once again approached the Supreme Court by filing an appeal (Civil Appeal No. 8155 of 2001) and the said appeal filed by the complainant was taken up for hearing by the Supreme Court alongwith Civil Appeal No. 4307 of 2007 titled as *Rajeev Hitendra Pathak & Ors. Vs. Achyut Kashinath Karekar & Anr.* The appeals were decided by the Supreme Court by an order dated 19.08.2011 directing the State Commission to dispose of complaint No. 473 of 1999 (which was subject matter in Civil Appeal No. 4307 of 2007) and also directed the National Commission to dispose of Original Petition No. 110 of 2003 de novo as expeditiously as possible and in any event within three months from the date of communication of the order. The Supreme Court order was communicated to this Commission by the Registry of the Supreme Court vide forwarding letter order dated 15.09.2011 and was received in the Commission on 27.09.2011. Still surprisingly, the Registry of this Commission sat over the matter for considerable period and it was only on 08.12.2011 that the complaint alongwith order of Supreme Court was listed before the Commission for the first time seeking directions. The Commission took a serious note of the said lapse on the part of the Registry and gave the following directions in the matter: From the endorsement, appearing on the order dated 19.08.2011 passed by the Supreme Court giving the above direction was received in this Commission on 06.9.2011 and thereafter the matter has been

listed for the first time before the Commission today i.e. 08.12.2011. That would mean that a period of three months stipulated in the order of the Supreme Court for the final disposal of the Original Petition has already expired on 06.12.2011, we consider it a serious lapse on the part of the Registry. Registrar shall hold an enquiry and fix the responsibility of the concerned officer / official (s) who were so insensitive to deal with the order passed by the Hon "ble Supreme Court and failed to put up the matter before this Commission for hearing immediately on receipt of it or within a few days of receipt of the order containing a mandate to this Commission for the disposal of the original petition within three months in any event from the date of communication of the order. The enquiry shall be conducted and report submitted to this Bench in Chambers within one week positively for taking necessary action.

Realizing that the period of three months for the disposal of the complaint as envisaged in the order of the Supreme Court had already expired even before the matter was listed before the Bench and with a view to expedite the trial and hearing of the complaint, the Commission gave the following directions: In view of the prayer made by the counsel for the parties and in the interest of justice and to avoid any further delay in the disposal of complaint, we permit opposite party-UCO Bank to file revised / further written version, if any, within a period of one week from today. Rejoinder to the said written version if any filed, may be filed within next one week. Evidence by way of affidavits on behalf of the complainant may also be led within the same period. The opposite party thereafter may lead its evidence through affidavits in the next ten days of the filing of the evidence by the complainant. We hope that all this exercise would be completed within the above stipulated time. As the valuable time has already been lost by the Registry for which responsibility is required to be fixed, a copy of this order may be forwarded to the Registrar General of Supreme Court for information and necessary action as may be deemed necessary because time fixed by the Supreme Court for disposal of the complaint has already elapsed on 06.12.2011. List the complaint for final hearing on 19.01.2012.

5. PURSUANT to the said directions, evidence was led and matter was set down for final hearing and the matter was finally heard at length in view of the complexity of the facts and question of law involved in the matter. Now we come to the facts of the case and the respective pleas put forth on behalf of the parties.

6. IN nutshell, case of the complainant as can be culled out from the later petition filed in the year 1995 is that complainant is a partnership firm engaged in the manufacture and export of leather goods. They had Bank account with Opposite party-Commercial Bank with certain facilities including the facility of normal banking business practice "Bill Purchase Facility ". The opposite party-bank on presentation used to purchase the export bills from the complainant duly endorsed in its favour, discount them and credit the full value of the goods covered by the bills to the account of the complainant without waiting for their collection from the drawee and to take upon itself the responsibility of collecting

the said amount from the party concerned through its collecting agent by further endorsing the bills in favour of its collecting agent (Foreign bank) and to reimburse itself the price of the said bills purchased from the complainant. In July 1987, the complainant exported 66 carton of leather garments to West Germany as per orders placed by a foreign buyer Ciel Leder, Dusseldorf of Germany under two Export Bills No.180175/87 and P.180205/87 with the total invoice of 1,50,000 DM. On presentation of the Export Bills by the complainant to the opposite party-bank, in terms of "Bill Purchaser Facility ", the complainant presented the export bills to the opposite party - bank and the later purchased the said bills on 01.04.1987 and 16.04.1987 duly endorsed in its favour, discounted them and credited the full value of the export bills in the account of the complainant. By doing so, the opposite party became holder for value with absolute title over the goods. The opposite party-bank in turn endorsed the above referred two bills in favour of its collecting agent, namely, M/s Dresdner Bank, Dusseldorf of Germany to secure the amount from the purchaser. However, the foreign buyer Ciel Leder declined to clear the goods. The complainant by means of telex dated 07.07.1987 requested the opposite party to instruct Dresdner Bank (to be referred as "Foreign Bank ") to store the goods in a Bonded Warehouse and the Foreign Bank agreed to do so vide their telex message on 22.07.1987. Foreign bank accordingly stored the goods in the bonded ware house of M/s Danzaz, West Germany (to be referred as Bonded WareHouse) and also got the goods insured with Insurance Company M/s Oskar Schunck KG of West Germany (to be referred as "Foreign Insurance Company "). The insurance premium paid, monthly charges for storage of goods and other expenses incurred from 22.10.1987 onwards by the Foreign Bank were debited by the Opposite Party in the account of the complainant.

7. AS the Foreign Bank had failed to pay two export bills, the opposite party on 26.08.87 collected full value thereof alongwith interest totalling to Rs.11,37,711.28 by debiting the same in the account of the complainant. However, opposite party did not return the unpaid bills to the complainant and continued to hold them.

8. WHILE the goods were stored in the bonded ware house, complainant found another buyer M/s Scarlett Leder (to be referred as "Second Foreign Bank "). In order to effect the delivery of the goods lying in the bonded ware house of Danzaz, West Germany, complainant 's representative Mr.M.O.H.Iqbal went to Dusseldorf, Germany in August 1988 with authorization from the opposite party-bank to the Foreign Bank to inspect and seal the goods. However when the above named representative visited the ware house of M/s Danzaz, to his shock, he found that the goods covered under the two export bills valuing at 1.50 lakh DM were missing from the ware house and were reported to have been stolen. The matter was reported to the Foreign Bank. On 25.08.1988, the Foreign Bank informed the opposite party - Bank that the goods were stolen from the bonded ware house and Criminal Investigation Department and Customs Search Office had been activated for taking necessary action. Foreign bank also took up the

matter M/s Danzaz, the bonded ware house owner to raise the insurance claim. On 12.10.88, the Foreign Bank filed claim with the Bonded Warehouse owner for recovery DM 1,85,200 with interest. Thereafter, the Foreign Bank informed the opposite party that M/s Danzaz was requested by the insurance company to wait sometime for settlement of claim. Insurance company proposed to settle the claim at DM 50,000 only which was rejected by the Foreign Bank. Thereafter, the Foreign Bank wrote to the opposite party to request the complainant to settle the insurance claim directly with M/s Danzaz and to engage a Law Officer for filing an action but according to the complainant it could not be done as it had no privity of contract either with the warehouse owner or the foreign insurance company. Complainant, therefore, wrote to the opposite party seeking its cooperation in finding a legal practitioner with the help of Foreign Bank in order to file a case against M/s Danzaz & Insurance Company. The opposite party took up the matter with their counter part foreign bank and certain papers were received which were passed on to the complainant. After that, complainant in consultation with the opposite party decided to file a suit and deputed its own Legal Attorney to initiate legal proceedings. An Attorney-at-law Shri Erhard Pohl was engaged for doing the needful. It appears that the said Attorney took up the matter with the insurance company but the Attorney of the insurance company rejected the complainant 's claim as there was no contractual relation between the complainant and the policy holder as also on the ground that complaint had become time barred from August 1988 to September 1989. Complainant wrote to the opposite party about the challenge to his locus and requested them to ask foreign bank to give written authorization to complainant 's lawyer in Germany to negotiate and initiate recovery proceedings against M/s Danzaz and Insurance Company on behalf of the foreign bank. Complainant again wrote to the opposite party by making immediate request to the foreign bank to give authority to the complainant 's lawyer to file a suit in the name of the foreign bank for recovery of the claimed amount. Although the opposite party took up the matter with the foreign bank for issuing such an authority to the complainant 's lawyer in order to enable him to take action but foreign bank failed to give such an authority. Thereafter, complainant requested the opposite party - bank to get sanction of the Reserve Bank of India for remitting legal fees and expenses of DM 20000 which they agreed to do for debiting in the account of the complainant. According to the complainant as the foreign bank did not authorize the complainant 's lawyer for recovery of the claim, the complainant right to file the claim was frustrated. Complainant, alleging negligence and deficiency in service on the part of the opposite party - bank in not taking proper steps in cooperation with the foreign bank to claim the damages for loss of goods got issued a legal notice. Notice was replied by explaining that role of the opposite party as collecting agent was very limited and it was not obliged to pursue the claim of the complainant. According to the complainant, the opposite party failed to discharge its duty as bailee and hence was liable to make good the loss suffered by the complainant and accordingly filed the complaint claiming the aforesaid amount under the following heads: "i to recover from the opposite party 1,85,200 DM

(German Currency) or its rupees value; (ii) to award interest at 21% per annum on 1,85,200 DM from August 1988 till the amount is received; (iii) to recover Rs.1,00,000/- in Indian Currency towards the expenses incurred; (iv) to award costs, and (v) grant such other relief as this Hon "ble Commission may deem fit and proper in the circumstances of the case ".

9. THE complaint was resisted by the opposite party-bank by filing a written version which was infact filed in response to the complaint which was originally filed in March 1993 and the same written version has been adopted and holds good even in respect of the complaint filed in the year 1995. In the written version filed on behalf of the opposite party, several preliminary objections have been raised about the maintainability of the complaint interalia on the ground that entire case of the complainant is totally false and frivolous and is otherwise barred by limitation and has been cooked up by the complainant with the sole intention to harass the opposite party - bank. Opposite party - Bank having acted throughout as complainant "s collecting bankers only and the two export bills were negotiated through the opposite party. On merits sequence of events starting from the presentation of the two export bills and up till the receipt of the legal notice are not denied but it is denied that there was any negligence or deficiency in service in the whole series of transaction. Liability to pay any compensation for any such deficiency in service much less the compensation as claimed in the complaint is specifically denied.

10. IN the rejoinder, the complainant has controverted the objections and pleas raised in the written version of the opposite party and has generally reiterated the averments and allegations made in the complaint. In support of their respective pleas, parties have largely relied upon the documentary evidence produced on record which mostly consists of correspondence exchanged between the complainant and the opposite party, opposite party and the foreign bank as also between the foreign bank and bonded ware house and between the attorney of the insurance company and attorney of the complainant.

11. BESIDES , parties have also filed supporting affidavits on behalf of the complainant. Affidavit of Smt. Zeenath Iqbal, Managing Director of the complainant-firm has been filed while affidavit of Shri Sarat Kumar Pati, Chief Manager, UCO Bank, Chennai Main Branch has been filed on behalf of the opposite party - bank.

12. WE have heard Mr.R.Venkatramani, Senior Advocate alongwith Mr. V.G.Pragasam, Mr. S.Prabu Ramasubramanian, and Mr.K.Joseph Advocates on behalf of the complainant and Mr.Rajeev Mehra, Sr. Advocate and Mr.R.N.Rout, Advocate, learned counsel on behalf of the opposite party and have considered their respective submissions. Before advertng to the merits of the matter, we would like to deal with the preliminary objections raised by the opposite party in regard to the maintainability of the present complaint. First and foremost objection raised was about the complaint being barred by limitation. Mr. Rajeev Mehra emphatically argued that in the present case the cause of action for filing

the present complaint which can be said to have arisen is as early as in April 1984 when the two export bills dated 01.04.1987 and 16.04.1987 were discounted by the opposite party-bank or when the bills were returned unpaid by the foreign bank and computing the period of two years for filing the present complaint, complaint is barred by limitation. In support of his contention, reliance has been placed to the Supreme Court decisions in the case of State Bank of India Vs. B.S.Agricultural Industries (I) AIR 2009 Supreme Court 2010 and Dr. V.N.Shrikhands Vs. Mrs Anita Fernandes JT 2010 (11) SC 524. In the former case, the Supreme Court has held that the provisions of section 24A are peremptory in nature and consumer fora must consider the question of limitation before admitting the complaint by observing as under: "Provision as to limitation is peremptory in nature and requires consumer forum to see before it admits the complaint that it has been filed within two years from the date of accrual of cause of action. The consumer forum, however, for the reasons to be recorded in writing may condone the delay in filing the complaint if sufficient cause is shown. The expression, "shall not admit a complaint " occurring in Section 24A is sort of a legislative command to the consumer forum to examine on its own whether the complaint has been filed within limitation period prescribed thereunder. As a matter of law, the consumer forum must deal with the complaint on merits only if the complaint has been filed within two years from the date of accrual of cause of action and if beyond the said period, sufficient cause has been shown and delay condoned for the reasons recorded in writing ".

13. THERE cannot be denial of the above legal position but it is pertinent to note that section 24A has been brought on the statute book by Act 50 of 1993 enforced w.e.f. 18.06.93. The complaint in its original form was filed in this Commission in March 1993 i.e. prior to the incorporation of Section 24A in the Consumer Protection Act, 1986. Therefore, strictly speaking it can be said that no limitation was prescribed for filing the complaint before a consumer fora prior to June 1993.

14. THAT apart, we may notice that in the present complaint, allegations of deficiency in service are not confined upto the debiting of the amount in the account of the complainant but several allegations have been made about inaction on the part of the opposite party in prosecuting their case between 1988 to 1990 despite several requests made by the complainant. It is also alleged that even the attempts of the complainant made to file an action against the bonded warehouse and the foreign insurer were frustrated due to the inaction on the part of the opposite party. Lastly, complainant got issued a legal notice in April 1992 which was replied by the opposite party in August 1992. On the basis of this position, we are of the view that complaint though filed after several years of the first transaction, is not barred by limitation. We would not like to non suit the complainant at least on this count. The next objection raised by the opposite party is about the complaint being barred for non joinder of the necessary parties i.e. foreign buyer Ciel Leder, bonded ware house and the insurance company. There cannot be denial of the position that the above named parties were

necessary parties to answer the claim of the complainant in an effective manner and in order to avoid multiplicity of the proceedings and the complainant ought to have joined them. The foreign buyer having refused to honour the supply order, the foreign bank having failed to issue the requisite authorisation in favour of the complainant to pursue their action against the bonded ware house for losing the goods on account of pilferage and the insurance company for not settling the claim of the complainant. However, we will not throw out the complaint as one bad for non joinder of necessary parties because by not impleading the necessary parties, the complainant has done so at his peril and will be deemed to have given up his claim against them and has restricted his claim qua the deficiency / negligence alleged on the part of the opposite party-bank.

15. IN the present case, the factual position being not in dispute, the fate of this complaint will largely depend upon the question as to whether the opposite party - bank has committed any acts of commission or omission which would amount to negligence and in turn deficiency in service on its part. According to Mr. R.Venkatramani, Senior Advocate, the sequence of events which took place between April 1987 when the opposite party - bank had purchased two export bills and credited the full value of the bills to the account of the complainant and lastly in April 1992 when the complainant issued a legal notice finding fault with the inaction on the part of the opposite party involve three stages.

16. IT is pointed out that first stage is between 01.04.1987 and 26.08.1987. In this connection, it is submitted that in April 1987, the opposite party - bank purchased two export bills relating to the export of leather garments and credited the full value of the bills to the account of the complainant and endorsed them in favour of the collecting agent M/s Dresdner Bank of Germany. As the purchaser declined to secure the goods , the opposite party instructed the above named bank to store the goods in a bonded ware house with instructions to get the goods insured. The foreign bank stored the goods in the bonded ware house and also effected insurance as per the instructions and the expenses incurred by the foreign bank in that connection were debited by the opposite party to the account of the complainant. On 26.08.1987, the opposite party collected the full value of the export bills with interest by debiting the same to the account of the complainant without returning the original bills to the complainant. Non return of the original bills by the opposite party to the complainant while debiting the amount in their account is stated to be inaction on the part of the opposite party. Mr. Rajeev Mehra, learned counsel for the opposite party-bank does not dispute that foreign bank had returned the unpaid bills to the opposite party and the same were not returned to the complainant soon after the receipt from the foreign bank or till date but it is strongly refuted that non return of the bills is an act of omission amounting to deficiency in service on the part of the opposite party - bank. It is sought to be explained that it was for the complainant to have asked for the return of the documents which he never did and, therefore, opposite party is not liable for any such inaction. On the other hand, complainant

"s counsel strongly argued that lack of express request from the complainant could not relieve the opposite party from its obligation because by retaining the bills, the opposite party continued to assume responsibility for its holding the export bills and continued to provide assistance to the complainant in handling the matter and prosecuting its case till May 1990. It is contended that non return of documents at the first available opportunity was an act of deficiency. In this connection, reliance is based on Supreme Court decisions in the cases titled as CitiBank Vs. Geekay Agropack Private Limited and Anr. (2008) 15 SCC 102 and Corporation Bank and Another Vs. Navin J Shah (2000) 2 SCC 628. In the former case, the Supreme Court had upheld the decision of this Commission holding that there was deficiency in service by Citi Bank N.A., New York and consequently by State Bank of Mysore because it was established that in that case, from the beginning, there was no response from Citibank despite several letters and reminders having been issued by the complainant seeking the documents which were handed over to it. This Commission had, therefore, held that Citi Bank was bound to respond to the communications and inform State Bank of Mysore as well as the complainant whether the amount was realised by it or not and if not realised, the bill of exchange with list of documents was required to be returned with due diligence and with necessary note. In the Corporation Bank "s case, the Supreme Court has generally laid down the obligation of a bank after purchasing or discounting an instrument from a customer by observing as under: "When a bank, after purchasing or discounting an instrument from a customer, credits the customer with the amount of the instrument and allows the customer to draw against the amount as credited before the bill or instrument is cleared, then the bank would be collecting the money not for the customer but chiefly for itself. If the bills and the relevant documents presented by its drawer are accepted by a banker with endorsement in its favour and the same are immediately discounted by the banker without waiting for its collection, by giving full credit for the entire amount of the document, so presented, the banker itself becomes a purchaser and the holder thereof for full value. A banker discounts a bill as opposed to taking it for collection or as security for advances, when he takes it definitely and at once as transferee for value and that it does not matter that the amount of the bill, less discount, is carried to current account as in the case of a customer that is the usual course and where the transaction is really one of discounting, the banker is of course at liberty to deal with the bill as he pleases rediscounting or transferring it ".

17. THERE cannot possibly be any quarrel with the above proposition of law. No doubt the opposite party-bank discounted the export bills and credited the amount of the bills in the account of the complainant and, therefore, at that point of time, the bank had become purchaser and holder of the bills in full value but the matter did not end up there because the export bills received by the opposite party-bank were sent by them to the foreign bank for collection of payment which was never collected due to the refusal of the foreign buyer to honour the bills by paying its value to the foreign bank and, therefore, the bills

were returned to the opposite party - bank. Thereafter the opposite party-bank debited the amount of the bills and interest to the account of the complainant. In the case in hand, the foreign buyer had not guaranteed payment of the bills by establishing any Letter of Credit (LOC) on the foreign bank. Therefore, for all intent and purposes, the opposite party would be deemed to have received the bills for forwarding the same to the foreign bank and receiving its value on collection basis rather than purchaser and holder of the bills for value. It is the complainant 's own case that the first foreign buyer backed out from the supply order and did not pay value of the goods and, therefore, the bills were returned to the opposite party-bank. The bank cannot be held liable for any omission or deficiency in service in debiting the amount of the Bills in the account of the complainant.

18. IT is pertinent to note that on receiving the bills back from the foreign bank, the opposite party continued to hold them and did not make over the same to the complainant even after debit entry was made in their account. It is contended that once the bank had received the value of the bills by debiting the same in the account of the complainant, it should have returned bills to the complainant for any such action which the complainant thought to initiate. According to Mr. Mehra, the bills received by the opposite party-bank from the foreign bank being bills relating to the export of goods involving foreign exchange could not be returned to the complainant in view of the Exchange Control Manual under FERA Rule 1974, Chapter-6 Para 6.C.19 which is to the following effect: "The duplicate copies of / forms and shipping documents, once submitted to authorised dealers for negotiation, collection etc. should not ordinarily be returned to exports, except for rectification of errors and resubmission ".

It is further contended that opposite party-bank could not return the documents to the bailor unless and until foreign currency against the bills was received except for rectification of errors and that too could be done with the permission of RBI as foreign exchange was not remitted to the opposite party-bank. In any case the submission is that at no occasion prior to the filing of amended complaint in 1995, the complainant asked for the return of the documents nor alleged any deficiency in service on the part of the bank for non return of the documents. Attention in this regard is invited to the legal notice dated May 1992 got issued by the complainant to the opposite party-bank.

19. HAVING considered the respective submissions put forth on behalf of the parties, we are of the clear view that opposite party-bank cannot be held for deficiency in service for non return of the bills even if we assume that this was an omission. We say so because no loss or injury can be said to have been occasioned to the complainant due to non return of the bills. As per the complainant 's own showing, the original buyer had failed to honour the purchase order and, thereafter, the complainant found a second foreign buyer who agreed to purchase the goods. However, when the complainant 's

representative went to effect the delivery, the goods were reported to have been stolen from the bonded ware house of M/s Danzaz. In any case, complainant did not rake up this issue any time before filing the complaint. In our view, the complainant has failed to establish any deficiency in service on the part of the opposite party-bank at least on this count. Therefore, there is no question of fixing the liability of the opposite party to pay any compensation to the complainant on this count.

20. ACCORDING to the learned counsel for the complainant, the next instance of deficiency in service on the part of the opposite party-bank is relatable to the stage between 25.08.1988 and 30.05.1990. In this regard, it is pointed out that attempts made by the Dresdnar Bank to settle the claim for the lost goods with the insurance company failed and, therefore, on receipt of certain documents from the Dresdnar Bank on 17.10.1989, a decision was taken in consultation with the opposite party to pursue legal remedy in Germany. As there was no privity of contract between the complainant and the insurance company, the complainant requested opposite party-bank to secure authorisation from Dresdnar Bank for prosecuting the matter and request was also made for obtaining sanction from RBI for remittance of legal fees in foreign currency to the legal Attorney appointed by the complainant. However, Dresdnar Bank did not respond to the opposite party 's request for authorisation but this fact was not communicated in time to the complainant and the complainant was kept in dark about the action undertaken by the opposite party. It is contended that pursuant to an assumption of responsibility to take necessary action, the opposite party-bank did not take the matter to its logical end as a consequence the proposed action lapsed. Mr. Venkatramani emphatically argued that when a party assumes responsibility either through a contract or otherwise for doing a certain thing or respond to a request and provides advice or any other assistance, it has duty of care not to be negligent. To buttress his contention, learned counsel placed heavy reliance on a foreign decision in case of *Hedley Byrne Co Vs. Heller & Partner* 1963 (2) All. E.R.575 PP 611 and 594. We would like to extract the relevant paragraphs which are to the following effect: "In consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies on such skill, a duty of care will arise. The fact that the service is to be given by means of, or by the instrumentality of, words can make no difference. Furthermore if, in a sphere in which a person is so placed that others could reasonably rely on his judgment or his skill or on his ability to make careful inquiry, a person takes it on himself to give information or advice to, or allows his information or advice to be passed on to, another person, who, as he knows or should know, will place reliance on it, then a duty of care will arise. It is a responsibility that is voluntarily accepted or undertaken either generally where a general relationship, such as that of solicitor and client or banker and customer, is created, or specifically in relation to a particular transaction. In the present case the appellants were not, as in *Woods Vs. Martins*

Bank Ltd. (200 the customers or potential customers of the bank. Responsibility can attach only to the single act, i.e. the giving of the reference, and only if the doing of that act implied a voluntary undertaking to assume responsibility. This is a point of great importance because it is, as I understand it, the foundation for the ground on which in the end the House dismisses the appeal. I do not think it possible to formulate with exactitude all the conditions under which the law will in a specific case imply a voluntary undertaking, any more than it is possible to formulate those in which the laws will imply a contract ".

The legal proposition propounded by the foreign court may be apt to the banking practice in England but is not much help to us in deciding the question of responsibility of the opposite party for any alleged inaction on its part. Even on facts of the present case, it is almost impossible to hold the bank guilty of any inaction amounting to deficiency in service on the part of the opposite party-bank. We say so because the protracted correspondence exchanged between the parties over a period leaves no doubt that the opposite party-bank had throughout sincerely and seriously followed each and every instruction given by the complainant in regard to securing the goods of the complainant in the bonded warehouse and by getting it insured through the foreign bank and thereafter for pursuing action with the foreign bank as desired of them by the complainant. We do not wish to burden this opinion by referring to each and every letter issued by the complainant to the opposite party and the opposite party in turn writing to their counter part foreign bank in Germany. However, since the complainant has alleged inaction on the part of the opposite party which according to them had the effect of lapsing / frustrating their action for claim against the bonded ware house and the insurance company, we would like to notice the relevant correspondence. It would appear that after that complainant decided to use the good office of the opposite party for laying the claim on the insurance company, the opposite party-bank had given instructions to their counter part in Germany, who in turn sent a fax message dated 02.06.1989 addressed to the opposite party-bank. The fax message reads as under: "UCO Bank, Madras / INDIEN RE LOST OF GOODS PLEASE NOTE THAT DANZAS INFORMED US THAT THE INSURANCE COMPANY ASKED THEM FOR SOME PATIENCE FOR A SHORT TIME CONCERNING PAYMENT OF THE COLLECTION OF AMOUNTS REGARDS DRESDBANK DUSSELDORF DO.DEPT " This message was forwarded by the opposite party-bank to the complainant by means of letter dated 07.06.1989 by stating as under: "MOH Leathers 576 Anna Salai Madras- 6 Sirs Export bills P180205 and 175/87 for DM 75000-each - CIEL Leder Further to our Lr FEX:EXP:1482/88 dt. 28.12.88, we forward herewith a Xerox copy of the telex message received by us from Dresdner Bank, Dusseldorf with regard to the claim lodged by us with insurance company for the loss of goods that has taken place in the godown. The text of the message is self-explanatory and further developments in this regard will be intimated to you in due course. Yours faithfully Sd/- Manager " Thereafter on October 6, 1989, the Dresdner Bank sent another fax to the opposite party - Bank which is to the following

effect: "Dear Sirs, We have been in contact with DANZAS GmbH Dusseldorf / Frankfurt and Oskar Schunck KG. Dusseldorf, since October 12, 1988 regarding the payment of the countervalue of the loss goods (DM 150.000 as per collection documents); photocopies of the correspondence enclosed. As Dresdner Bank Dusseldorf is not the owner of the goods and insofar is not in a position to negotiate the amount of the damages. We may ask you to request your customer M.O.H. Leathers, Madras, to settle the matter directly with DANZAS GmbH, Frankfurt. We cannot take any further action and suggest that your clients revert to a law office in this matter. Yours faithfully Dresdner Bank AG in Dusseldorf "

Complainant wrote back to the opposite party - Chief Manager of the opposite party-bank requesting them to send an urgent telex to Dresdner Bank to send all the papers in respect of the insurance claim so as to enable the complainant to take up necessary decision in regard to laying claim. The said letter reads as under: "To The Chief Manager UCO Bank 169, Thambu Chetty Street Madras-600 006

Dear Sir, 1. We refer to the above export bills totalling to Rs.1,50,000/- sent to Ciel Leder earlier which have not been cleared by the party when the bills were presented on C.A.D. terms through Dresdner Bank, Dusseldorf. 2. On refusal by party, at our request you have instructed the Dresdner Bank to put the goods in safe custody in bonded warehouse. Accordingly Dresdner Bank promptly put the same in Denzaz warehouse until we could make alternative arrangements. 3. In respect of these bills for DM 1,50,000/- you have discounted the above bills. When the party had not cleared the same, we repaid the money to you totally. 4. However, until we make arrangement for selling it, you have helped us through Dresdner Bank by giving necessary instructions to put the goods in bonded warehouse for which the storage charges and insurance amount were paid and debited to our account. 5. But unfortunately during the month of August last year when I took authorisation from you to Dresdner 's Bank to inspect the goods, but to our dismay we found that the goods totally stolen. The matter was reported to Dresdner Bank. Dresdner Bank took immediate action with Denzaz to raise the claim and close the insurance amount till then. 6. Since the goods have been stolen away, it is the responsibility of Denzaz and the insurance company to pay the cost of the goods. The matter was delayed for nearly one year. 7. Inspite of following up the matter by the Dresdner Bank and the undersigned 's visit to Germany, the money was still unpaid which is causing concern to everyone of us. 8. My representative Mr.Max Eckdart from Holland also called on Mrs.Ralph Elsson of Dresdner Bank repeatedly regarding claim on insurance company and Denzaz. 9. Of late you have been given cursory information from the Dresdner Bank that the insurance company is willing to pay DM.50,000/- instead of DM.1,50,000/- and all the related papers have been forwarded to you for decision, as according to Dresdner Bank the client is only UCO Bank technically. 10. We presume that you will be receiving all the papers shortly from Dresdner Bank. In this regard we would like you to study the papers and inform us as we do not want to accept the claim of DM.50,000/- against our original claim of

DM.1,50,000/-. We would like to discuss on receipt of the papers and after evaluation of the papers and information received from Dresdner Bank to you. If it may be necessary for us to go ahead with the help of Dresdner Bank to find a suitable legal practitioner who are well versed with the insurance matters to file a case against Denzaz and the insurance company for the recovery of the amount involving the cost of the goods as well as interest for the delay in payment until the amount is repaid to us in full. 11. We, therefore request you to send an urgent telex to Dresdner Bank to send all the papers in respect of insurance claim so that we can take up necessary decision in this regard. We solicit your kind co-operation to recover this amount as there is no fault on our part having fully paid all financial charges, insurance charges and storage charges etc. Thanking you, Yours faithfully For M.O.H. Leathers M.O.H.Iqbal "

It may be noted that in para 6, the complainant itself held the bonded warehouse and the insurance company liable to pay the cost of the goods rather than the opposite party-bank. The said letter was replied by the bank by stating as under: "M/s MOH Leathers 576 Anna Salai Madras 600 006 Export bills P180205 and 180275/87 for DM 75000 each We are in receipt of your Lr MOHL:UCOB:1427/89 dt. 11.10.89. On going through the various points raised in your letter in respect of the above 2 bills, we find that against SI Nos. 10 and 11, you have indicated to us that we will be receiving some papers from Dresdner Bank, Dusseldorf, requesting us to claim an amount of DM50000 against your original claim of DM 150000. You have also indicated in your letter that you are not agreeable for any such reduction in the insurance claim for the goods lost in the godown of M/s DANZAS GmbH, Dusseldorf. You have further requested us to send a detailed telex to Dresdner Bank to call for the complete set of papers so that you can study the same and take necessary decision with regard to the offer made by them. Even before sending the telex message as desired by you, we have today received by courier, a set of papers from Dresdner Bank, Dusseldorf and the said papers are enclosed for your perusal and appropriate decision in the matter. Since our correspondent Bank has forwarded only one set of papers, we have taken out extra Xerox copies, which are forwarded herewith and the original papers received by us are retained in our file for our records. Please let us have your decision in the matter. Yours faithfully Sr. Manager "

21. . THIS letter would clearly show that the opposite party-bank had fully complied with the instructions of the complainant and had forwarded the Xerox copies of all the documents received by them from Dresdner Bank to the complainant. It appears that thereafter there was silence on the part of the complainant and the claim settler of the insurance company vide his communication dated 10.05.1990 addressed to Attorney-at-Law Erhard Pohl wrote as under: "Dear Mr. Pohl, We wish to refer once again to our letter dated 2nd May 1990 and inform you in this regard that we are unable to establish any insurance obligation on the part of the insurers we represent. First of all, we fail to see how your client has any rightful claim. There are no contractual relations between your client and our policyholder. Even if such were to exist, claims

against the SVS/RVS insurers of our policyholder would meanwhile be precluded in line with Section 10, item 6 of the SVS /RVS. The loss was reported to us through our policyholder in August 1988. Claims have been statute-barred since September 1989 at the latest. We reject the claims you assert on behalf of M.O.H.Leathers, Madras. Should you nevertheless still be considering filing action, we do not need to point out to you as someone conversant with these matters that the action should be directed against the VICTORIA as principal forwarder 's risk insurers. Please quote us party authorised to accept service specifying the above loss reference number. Yours sincerely OSKAR SCHUNCK KOMMANDITGESELLSCHAFT DusseldorfBranch "

22. IT would appear that after his return from Germany, Mr. Iqbal on behalf of the complainant wrote a letter to the opposite party on 18.05.1990 intimating the opposite party-bank that the efforts to settle the insurance claim had failed and therefore, the Attorney of the complainant wanted full authority to discuss and negotiate with the insurance company and sought following kind of help of the opposite party-bank: "Our lawyer in Germany has raised a very pertinent point informing that as far as Danzas and insurance company is concerned the goods have been stored by Dresdner Bank under your instructions on our behalf. To file in the German Court or any discussion and negotiation in the table with insurance company or Danzas, our lawyer should have authority from Dresdner Bank also. I, therefore, request you to inform in writing to Dresdner Bank to give full authorisation or power of attorney to our above mentioned lawyer to take up the matter for claim and give him full authority to respect of our claim and to settle the matter outside the Court or failing which he should be authorised to proceed to represent Dresdner Bank in the Court of Law. Please, therefore, send the message to Dresdner to give full authorisation to our lawyer Mr. Erhard Pohl in this matter. The format to send the authorisation is not specific. However our firm 's lawyer in Madras has drafted the full authorisation in the following form which may be sent to Dresdner Bank for signing and send it to our legal consultant Mr.Erhard Pohl for taking up necessary action in this regard. Best regards, Yours sincerely, M.O.H.Iqbal M.O.H.Leathers "

After communication dated 24.05.1990, the complainant sought help of the opposite party to make immediate arrangement requesting Dresdner Bank to give authority to Mr. Erhard and also for remitting the payment to the Attorney to file case in the name of Dresdner Bank for and on behalf of UCO Bank as well as M.O.H.Leathers. The opposite party - bank without least delay wrote to the Dresdner Bank on 28.05.1990 as under: "Dresdner Bank Dusseldorf West Germany Dear Sirs, We forward herewith a copy of letter dated 18.05.90 addressed to us by M/s MOH Leathers, our client, represented by Mr. MOH Iqbal, which is self-explanatory. We have gone through the contents of the letter and we request you to give your authority to their legal consultant Mr.Racht Sanwalt Erhard Pohl, authorising him to take action on our behalf and on behalf of your bank against the insurance company M/s Oskar Schunck KG and ware house people M/s Danzas, to recover the amount due in respect of the goods insured.

Our client M/s. MOH Leathers have agreed to bear all the expenses payable in connection with the legal proceedings direct to the legal consultant and hence apart from giving your authority you need not make any payment towards legal expenses. Yours faithfully Chief Manager "

23. ON 30.05.1990, the complainant wrote to the opposite party-Bank requesting them for obtaining sanction of the RBI for remittance of foreign exchange to the tune of DM 20,000 being paid to the Attorneys of the complainant towards legal expenses involved for filing an action in respect of the insurance claim. The complainant undertook to bear the said expenses. It appears that thereafter there was silence between the parties until 02.04.1992 when the complainant got issued a legal notice alleging default and deficiency on the part of the opposite party-bank in not taking proper and effective steps to claim the damages for the loss of the goods in co-operation with the Dresdner Bank, Germany and called upon the opposite party-bank to pay DM.1,85,200 besides a sum of Rs.1,00,000/- towards travelling expenses. The said notice was replied by the opposite party-bank thereby clarifying their stand that they acted as collecting bankers only for the complainant and since the foreign purchaser did not pay the bills for their own reasons as per the instructions given by the complainant, the goods were stored in a bonded ware house and got insured. From the above it is manifest that the opposite party-bank complied with all the instructions given by the complainant from time to time in the best possible manner although they were not obliged to pursue the claim for damages for the loss of goods. It was clarified that the role of the collecting bank was very limited, which it duly performed and the opposite party is not guilty of non-feasons or misfeasons resulting into the loss to the complainant.

24. MR . Rajeev Mehra, learned counsel for the opposite party strongly contended that the present complaint against the opposite party is wholly misconceived inasmuch as the opposite party-bank had no obligation to take any action in respect of the goods including storage and insurance of goods either suo-moto or even when any specific instructions were given to do so. In this regard, reference has been invited to Uniform Rules for Collections, 1978 (URC) which lays down the procedure to be followed by a remitting bank in regard to the documents received by it from a collecting bank and the liabilities and responsibilities of such remitting bank. Article 10 & 11 of the said URC are relevant for our purpose and read as under: "Article 10 Documents Vs. Goods / Services / Performances Goods should be despatched directly to the address of a bank or consigned to or to the order of a bank without prior agreement on the part of that bank. Nevertheless, in the event that goods are despatched directly to the address of a bank or consigned to or to the order of a bank for release to a drawee against payment or acceptance or upon other terms and conditions without prior agreement on the part of that bank, such bank shall have no obligation to take delivery of the goods, which remain at the risk and responsibility of the party despatching the goods. Banks have no obligation to take any action in respect of the goods to which a documentary collection

relates, including storage and insurance of the goods, even when specific instructions are given to do so. Banks will only take such action, if when, and to the extent that they agree to do so in each case. Notwithstanding the provisions of Sub-Article 1c this rule applies even in the absence of any specific advice to this effect by the collecting bank. Nevertheless, in the case that banks take action for the protection of the goods, whether instructed or not, they assume no liability or responsibility with regard to the fate and/or conditions of the goods and/or for any acts and/or omissions on the part of any third parties entrusted with the custody and/or protection of the goods. However, the collecting bank must advise without delay the bank from which the collection instruction was received of any such action. Any charges and/ or expenses incurred by banks in connection with any action taken to protect the goods will be for the account of the party from whom they received the collection. Notwithstanding the provision of Sub-Article 10a, where the goods are consigned to or to the order of the collecting bank and the drawee has honoured the collection by payment, acceptance or other terms and conditions and the collecting bank arranges for the release of the goods, remitting bank shall be deemed to have authorised the collecting bank to do so. Where a collecting bank on the instructions of the remitting bank or in terms of Sub-Article 10e (1) above arranges for the release of the goods, the remitting bank shall indemnify such collecting bank for all damages and expenses incurred. Article 11 Disclaimer for Acts of an Instructed Party Banks utilising the services of another bank or other banks for the purpose of giving effect to the instructions of the principal, do so for the account and at the risk of such principal. Banks assume no liability or responsibility should the instructions they transmit not be carried out, even if they have themselves taken the initiative in the choice of such other bank(s). A party instructing another party to perform such services shall be bound by and liable to indemnify the instructed party against all obligations and responsibilities imposed by foreign laws and usages ".

A plain reading of the above URC makes it clear that the opposite party-Bank had no obligation to take any action in respect of the storage and insurance of the goods relating to the documentary collection but could only take such action and to the extent that they agreed to do so on the request of the principal i.e. complainant in the present case. We have already noted that the opposite party although under no obligation to do so, did all possible acts which were within their means to pursue the case of the complainant with the foreign bank. In absence of any legal obligation, they will be deemed to have done this service as a matter of courtesy and simply to help the complainant to settle its claim for the loss of goods which had been occasioned due to pilferage of goods in the bonded warehouse where the goods had been stored. Courtesy extended by a party is one thing than legal obligation to do the same thing. A person who seeks the help of the other as a matter of courtesy cannot be allowed to make complaint about inaction, improper action on the part of the person who had provided such help without any legal obligation. That is what the complainant seeks to do in the

present case.

25. MR .Venkatramani on behalf of the complainant urged that a duty was cast upon the opposite party to pursue the legal remedies for the purpose of realisation of the loss suffered by the complainant owing to the theft of the case from the bonded warehouse. It is argued that such an obligation emerged out of the fact that the claimant could not pursue the legal remedies in the foreign court since it was not a party to the contract of insurance and could not have directly dealt with the foreign bank either seeking its assistance or suing against it. The opposite party-bank was under an obligation to assist and facilitate the complainant in pursuing the legal remedies in foreign courts having assumed the responsibility to continue to act as the collecting agent and by retaining the export bills. We must reject this contention because we have already found that the opposite party-bank was under no such obligation and they pursued the matter with their counter part foreign bank only with a view to help the complainant to pursue his remedy in the foreign court. We do not agree with the contention of the learned counsel that the obligation of the bank did not end as a collecting agent and that the opposite party had assumed any responsibility to pursue the claim of the complainant. Likewise we cannot agree with the contention that the responsibility of the opposite party became greater following the non cooperation of the foreign bank.

26. HAVING considered the matter in its entirety and viewed from any angle, we have no hesitation to hold that the complainant has failed to establish any act of negligence amounting to deficiency on the part of the opposite party-bank in the entire transaction. Infact what appears to us is that the complainant having failed to pursue its remedy against the foreign bank, bonded ware house and the insurance company, has found in the opposite party-bank, a soft target to vindicate its grievance which he actually had against the foreign bank owner of the bonded warehouse and the insurance company. For the above stated reasons, the complaint is liable to be dismissed and is accordingly dismissed leaving the parties to bear their own costs. By deciding this complaint, we have heaved a sigh of relief because this was the oldest case on the Board of this Commission going by the chronology of cases pending in this Commission.