
(2006) 09 NCDRC CK 0001

In the National Consumer Disputes Redressal Commission

Pearl Syntex Pvt Ltd

APPELLANT

Vs

Klm Cargo

RESPONDENT

Date of Decision : 29-09-2006

Acts Referred:

Citation : 2006 4 CPJ 276

Hon'ble Judges : M.B.SHAH , RAJYALAKSHMI RAO J.

Judgement

1. THESE three complaints are of similar nature, cause of action is the same, there is no material difference in facts as well as in evidence except the weight and value of the gold jewellery that was exported, the dates of invoices and their dispatch; in short, the complainants have sold gold jewellery to M/s. F.M. Mir Jewellers, a partnership firm of the United Kingdom, as one of the partners of the firm came to India and agreed to purchase the same. Consignor was the complainant, consignee was M/s. National Westminster Bank (hereinafter referred to the Bank), and notified party was M/s. FM Mir Jewellers. The said gold articles were dispatched through the Carrier, M/s. KLM Royal Dutch Airlines (hereinafter called the KLM). Thereafter, the goods were delivered, without verification of the required documents, within minutes of customs clearance, by the agent or employees of the KLM, on the basis of so -called fax message. That was a fraud committed by some persons against whom prosecution was launched in the Crown Court of Northampton, the United Kingdom, and some of them were convicted. The aforesaid complaints are filed for recovery of the amount of loss suffered by the complainants, from the carrier. In addition, in two cases, namely, (i) O.P. No. 47 of 1998, and (ii) O.P. No. 296 of 1998 complaints are filed against the Insurance Companies on the ground that the complainants have taken insurance policies for a loss in such cases.

2. FURTHER , it is established on record that for the alleged fraud committed in taking the delivery of the goods without producing original bank release notes, prosecution was launched before the Crown Court, Northampton. In that case it was alleged that there was an agreement of dishonest use of forged instrument,

namely, bank release notes, which were altered and then used for obtaining the release of jewellery from the cargo agents. It was the say of the prosecution that to secure the system for payment of the amount on the basis of the arrangement between banks in India and in the U.K., Fine Arts was able to obtain credit which they were not entitled to. After the goods were dispatched from India, the necessary documents were sent to English Bank. The procedure for obtaining delivery of consignment is, once the goods arrive at the port of destination the importer goes to the bank, signs the bill of exchange and collects the documents. According to the terms of the bill he may make payment immediately on sight or within 30 days or 60 days, as per the terms. In the criminal case, the Crown Court discussed two Counts, i.e. Count No. 1, whether there was any conspiracy to use forged bank release notes and whether the four defendants/accused were party to it; and, Count No. 2 is, whether there was a conspiracy to defraud the suppliers of jewellery and whether each of the defendant was a party to it?

3. ON these two counts the Jury awarded the following sentences to the four accused: 1. Sunil Dutt : 2 years imprisonment on Count 1. 4 years imprisonment on Count 2. 2. Abdul Rauf : 4 years imprisonment on Count 2, ordered to pay compensation of Pounds 50,000 out of which Pounds 12,272.34 were awarded to PP Jewellers (OP 296/98); Pounds 8,854.79 were Awarded to Bholasons Exports (OP No. 118/98); Pounds 14,967.10 were awarded to Yellow Metal Inc. (OP. 47/98). 3. Ashok Kumar : 18 months imprisonment on Count 1, Pounds 1,500 costs. 4. Harjeet : 7 months imprisonment. Dhariwal

4. IT is contended by the learned Counsel for the complainant that no amount is received by the complainants on the basis of the direction issued in the criminal case. We would take the facts in Original Petition No. 217 of 1997 for the purpose of deciding the contentions in these matters. Original Petition No. 217 of 1997

5. IT is the case of the complainant Company that it exported - * 4.282 kgs (net weight) of plain and meenakari jewellery of fineness .930 (kdm soldered) as per invoice No.PSOL/NEPZ/41/96 -97 dated 18.10.96, * of value US \$ 55,845 (CIF Value), * from Delhi to Birmingham, * shipped vide Airway Bill No. 074 -7423 -3261 dated 16.10.1996, * through carrier opposite party No.1 [KLM Cargo], * with the consignee being opposite party No. 3 [M/s. National Westminster Bank], * and the notified party being FM MIR Jewellers. Copy of the relevant invoice is dated 18.10.1996.

6. ON 19.10.1996, the consignment reached the U.K. As per the Annexures H, J and O attached to the complaint the original shipping documents reached opposite party No. 3 - National Westminster Bank (hereinafter referred to as the Bank) through carrier only on 23.10.1996. A day before that, i.e. on 22.10.1996, the goods/consignment in question were released, by OP -1 [KLM Cargo] on the basis of an alleged fax copy of the Release Note, which was prepared on the stationery of OP -3 (the Bank). Also, OP -3 (the Bank) HAD NOT COLLECTED THE PAYMENT from notified party, FM Mir Jewellers, before the release of the

consignment and the price of goods remains uncollected by OP -3 till date and remains unpaid to the complainant. On the basis of the aforesaid facts, it was contended that the KLM is liable to reimburse the Complainant. The Complainant prays that - (a) the complainant had exported the jewellery and is, therefore, entitled to be compensated the principal amount in US \$ i.e., the invoice amount of US Dollars 55,845 plus interest thereon in US Dollars; and, (b) the complainant is entitled to compensation as well as interest in US Dollars as the export remittance has to be earned in foreign exchange as per Reserve Bank of India (RBI) rules failing which the RBI Enforcement Directorate and the Economic Intelligence Bureau may initiate action. (a) Presumption

7. IN case of loss of goods or delivery to a wrong person or delay in the delivery, presumption would be of negligence on the part of the carrier, as per the settled law. For this, we would refer to the following observations made by the Apex Court in *Patel Roadways Ltd. v. Birla Yamaha Ltd.*, I (2000) CPJ 42 (SC)=III (2000) SLT 554=II (2000) CLT 83 (SC)=(2000) 4 SCC 91, at page 101: "31. Coming to the question of liability of a common carrier for loss of or damage to goods, the position of law has to be taken as fairly well settled that the liability of a carrier in India, as in England, is more extensive and the liability is that of an insurer. The absolute liability of the carrier is subject to two exceptions: an act of God and a special contract which the carrier may choose to enter with the customer.

32. In *Sarkar on Evidence* (15th Edn., 1999), at p. 1724 under the heading "Negligence" it is stated:

"As a rule negligence is not to be presumed; it is rather to be presumed that ordinary care has been used. The rule does not apply in the case of common carriers, who on ground of public policy, are presumed to have been negligent if goods entrusted to their care have been lost or damaged or delayed in delivery (*Ross v. Hill* 2 CB 890; *Jones* s15). The law will conclusively presume that the carrier has been guilty of a negligence unless he can show that the loss or damage was occasioned by what is technically called the Act of God, or by Kings enemies".

(b) Admission of liability :

8. FURTHER , by letter dated 6th March, 1998, the KLM admitted its liability and wrote as under: "We acknowledge receipt your letter No. 242 dated March 2, 1998 in connection with subject shipment. We would like to inform you that this shipment was delivered against a clean receipt but so far we could not trace the copy of the bank release. This would lead to the conclusion that we failed in this respect. Therefore, we herewith decide to offer the amount as declared value for carriage on the airway bill i.e. Rs. 1,00,000.00 in full and final settlement. Please return the enclosed final release in triplicate signed and completed to our department, after which payment will be effected as soon as possible." (c) Contentions on the basis of facts: At the time of hearing, the learned Counsel for

the complainants submitted that the Carrier (KLM Cargo) cannot plead any limitation of its liability because of its reckless act of delivery of known valuable jewellery, inter alia, on the following grounds - (a) for acting upon a fax release note/photocopy of release note without verification of the source of fax message; (b) for non -verification by opposite party No. 1 of source of fax message/photocopy; (c) the release and delivery of valuable consignment to an unknown and unauthorized person without verification of identity of the collecting party either by insisting on identification or by insisting upon original bank release, invoice or any original shipping documents which would have established the bona fides of the person collecting the consignment; (d) for not informing the consignee (Bank) about the arrival of the consignment for releasing the consignment without cross -checking with Bank about the arrival of the original shipping documents; (e) the non -delivery of cargo to named consignee or named notified party upon authorization of named consignee; (f) acting in reckless manner knowing fully well that cargo was valuable and consisted of gold jewellery as described on the air waybill. It is submitted that gold and gold jewellery are a form of currency being highly valuable yet compact and with easy disposability and liquidity. Therefore, the physical safety of gold and gold jewellery is the highest obligation of the carrier and bank, and both opposite party No.1, the KLM, and opposite party No. 3, the bank, were in the know of this obligation and have breached this obligation by failing to ensure proper release of goods and collection of price; and (g) for cargo the carrier had charged freight at 200% of normal rates and also valuation charges to ensure better safety of such valuable cargo. Hence, it was their duty to take proper precautions to ensure proper safety and delivery of the consignment to proper person. Findings:

9. FROM the facts stated above, it is apparent that the release of goods/consignment by the Carrier or its agent was totally unjustified. It was done without there being any original document, including the bank release note and without the knowledge/consent of the consignee, namely, Natwest Bank (i.e. M/s. National Westminster Bank) and that too on the basis of the alleged fax letter without verification from the Bank and that too within a few minutes of the receipt of the goods after customs clearance. From the act of delivery of known valuable consignment and the omission in discharge of the duty on the part of the carrier it can be inferred that the carrier acted negligently in discharge of their functions. Carrier has also admitted their liability, as stated above, vide their letter dated 6th March, 1998.

10. THE question, therefore, would be: Whether the carrier would be liable to pay the loss/damages suffered by the complainant as per Rule 25 or whether its liability is limited as provided in Rule 22(2) of Schedule II of the Carriage By Air Act, 1975. In the present case, as we are required to deal with the question under the Carriage by Air Act, 1972, we reproduce the relevant part of the Rules, which is as under: "22(2)(a): In the carriage of registered baggage and of cargo, the liability of the carrier is limited to a sum of 250 francs per kilogramme,

unless the passenger or consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case, the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that the sum is greater than the passengers or consignors actual interest in delivery at destination".

"25. The limits of liability specified in Rule 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment."

Rule 22(2)(a) Now, the question that requires consideration, in terms of Rule 22(2)(a) is: Whether the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination, and had paid a supplementary sum if the case so required?

11. WITH regard to special declaration of interest in delivery it has been pointed out that the complainants have paid 200 per cent of the normal freight charges by specifically declaring that it was gold jewellery and its value was as per the invoices. For the customs clearance also the value was mentioned at Rs.19,66,218. In the column handling information it is specifically mentioned that it was valued cargo, ensure security.

12. AS per the invoice, the CIF value is mentioned as US Dollars 55,845: FOB Value (in INR) is mentioned as Rs. 19,78,008. Freight and Forw. Charges, i.e. Rs.10,701, and, Insurance at Rs. 19,91,991. It is, therefore, pointed out that the gold jewellery in package was handed over to the carrier with a special declaration of interest in delivery at destination and has paid 200 per cent of the normal freight charges. In such cases, as per rule, carrier will be liable to pay a sum not exceeding the declared sum, unless the carrier proves that the sum was greater than the consignors actual interest in delivery at destination. In this case, there cannot be any dispute with regard to consignors actual interest in the value of the goods. Hence, the carrier would be liable to pay a sum not exceeding the declared sum.

13. HOWEVER , it was contended that as per the bill, the declared value for carriage is mentioned as Rs. 99,000, and, therefore, there is non -compliance of the aforesaid Rule 22. In our view, the phrase used in the Rule is "special declaration of interest in delivery at destination" has not been explained in the Air Waybill. Declaration is already made with regard to the exact sum by mentioning that its declared value for customs Rs. 19,66,218, and, further, invoice is also delivered to the carrier wherein the contents of the package and its value is mentioned, as stated above. Learned Counsel for the parties were not in a position to point out what type or other special declaration of interest was

required.

14. IN this view of the matter, in our view, the carrier (KLM) cannot contend that its liability is limited, as provided under Schedule II of Rule 22 of the Carriage by Air Act, 1972. Rule 25: In the alternative, presuming that even if there is no special declaration of interest as contemplated under Rule 22(2)(a), then, we have to find out whether there is compliance of all the ingredients of Rule 25. For the said purpose, Rule 25 can be devided as under: (a) Whether it is proved that the damage resulted from an act or omission of the carrier? (i) For this, there is no doubt that the damage has resulted from the act of the carrier in delivering the goods without there being the original bank release note. (ii) Further, it was omission on the part of the carrier in not verifying from the consignee (Bank) that someone was claiming the release of goods without bank release note.

(b) Whether it was done recklessly or with the intent to cause damage? (i) It can be said without any reservation that it was a reckless act. (ii) With regard to intent to cause damage, it can be easily inferred that delivery of the valuable goods, namely, jewellery, without bank release note or original documents would cause damage to the consignee and/or to the consignor.

(c) Whether knowledge can be inferred that damage would probably result?

As stated above, with regard to valuable gold jewellery of which value is more than about Rs. 20 lakh knowledge can be inferred that wrong delivery would cause damage. The person who was taking the delivery was not identified and was not known to the carrier. Submissions of the learned Counsel for the K.L.M:

15. THE learned Counsel appearing on behalf of the KLM (the Carrier), referred to various decisions giving meaning to the words recklessness, wilful, etc.

16. IN our view, in the present case, the facts speak for themselves and the maxim *res ipsa loquitur* would be applicable. However, we would refer to some of the judgments relied upon by the learned Counsel for the KLM. At the outset, we make it clear that Schedule II of Rule 25 of the Act uses the words act or omission which is reckless and not the expression wilful default. Therefore, interpretation given to the expression wilful default would not have much bearing on the facts of the case. Therefore, we would consider how the word reckless is interpreted.

17. THE word reckless is considered by this Commission in *Manager, Air India Ltd. & Anr. v. India Everbright Shipping & Trading Co.*, First Appeal No. 451 of 1994 reported in II (2001) CPJ 32 (NC), wherein the Commission has referred to the dictionary meaning in the Blacks Law Dictionary as well as the interpretation of the said word by the Court. The relevant discussion is as under: "With regard to the word recklessly the Blacks Dictionary says, A person acts recklessly with respect to a material element of an offence when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. This risk must be of such a nature and degree that, considering

the nature and purpose of the actors conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actors situation. In *Shawinigan Ltd. v. Vokins and Co. Ltd.*, (1961) 3 All ER 396, this is how Megaw, J. described recklessly -

In my view, recklessly means grossly careless. Recklessness is gross carelessness - the doing of something which in fact involves a risk, whether the doer realises it or not; and the risk being such having regard to all the circumstances, that the taking of that risk would be described as reckless. The likelihood or otherwise that damage will follow is one element to be considered, not whether the doer of the act actually realised the likelihood. The extent of the damage which is likely to follow is another element, not the extent which the doer of the act, in his wisdom or folly, happens to foresee. If the risk is slight and the damage which will follow if things go wrong is small, it may not be reckless, however unjustified the doing of the act may be. If the risk is great, and the probable damage great, recklessness may readily be a fair description, however much the doer may regard the action as justified and reasonable. Each case has to be viewed on its own particular facts and not by reference to any formula. The only test, in my view, is an objective one. Would a reasonable man, knowing all the facts and circumstances which the doer of the act knew or ought to have known, describe the act as reckless in the ordinary meaning of that word in ordinary speech? As I have said, my understanding of the ordinary meaning of that word is a high degree of carelessness, I do not say negligence, because negligence connotes a legal duty."

18. FROM the law as stated above, it can be held that recklessness ordinarily would mean high degree of carelessness. The other objective test can be, would a reasonable man, knowing all the facts and circumstances, consider the said act as reckless? From the facts as stated above, it can be held that the act of delivery of the gold jewellery without the bank release note was an act of gross carelessness and may indicate that it was intentional misconduct. Because, a prudent employee of the KLM knowing the fact that the small packet, containing gold jewellery, valued more than Rs. 20 lakh, as described in the invoice, in ordinary course of business, would not deliver such goods in the manner in which it is done, and, that too, in breach of all requirements. The extent of damage which was likely to follow was also known to the doer. In such cases, it can be said that carrier/employees are guilty of wilful default as it has disregarded the normal procedure of taking care in handling such a consignment.

19. THE learned Counsel for the KLM relied upon what is meant by the expression wilful default. He submitted that the agent of the KLM has released the goods on the basis of alleged fax message and, therefore, it cannot be said to be a wilful act so as to be covered by Rule 25. He referred to the decision in *S. Sundaram Pillai v. V.R. Pattabiraman*, AIR 1985 SC 582=(1985) 1 SCC 591. In that case the Court was concerned with the interpretation of the expression wilful

default used under Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. In our view, as such, the said judgment would have no bearing on the facts of the present case. But, still, we would refer to the ratio laid down therein which would establish that it was a wilful default on the part of the carrier. The relevant part is as under: "25. Thus, a consensus of the meaning of the words wilful default appears to indicate that default in order to be wilful must be intentional, deliberate, calculated and conscious, with full knowledge of legal consequences flowing therefrom. Taking for instance a case where a tenant commits default after default despite oral demands or reminders and fails to pay the rent without any just or lawful cause, it cannot be said that he is not guilty of wilful default because such a course of conduct manifestly amounts to wilful default as contemplated either by the Act or by other Acts referred to above."

20. APPLYING the aforesaid ratio it would be apparent that the agents or employees of the KLM committed wilful default in not verifying the veracity of the fax message or identity of the person from the bank which was the consignee and released the goods without Bank Release Note. Further, in the aforesaid case the Court has referred to the dictionary meaning of wilful default which is as under: 22. In other words, wilful default would mean a deliberate and intentional default knowing fully well the legal consequences thereof. In Words and Phrases, Vol. 11 -A (Permanent Edn.) at p. 268 the word default has been defined as the non -performance of a duty, a failure to perform a legal duty or an omission to do something required. In Vol. 45 of Words and Phrases, the word wilful has been very clearly defined thus -

" Wilful - intentional; not incidental or involuntary; -done intentionally, knowingly, and purposely, without justifiable excuse as distinguished from an act done carelessly; thoughtlessly, heedlessly or inadvertently; - in common parlance word wilful is used in sense of intentional, as distinguished from accidental or involuntary. p. 296 - Wilful refers to act consciously and deliberately done and signifies course of conduct marked by exercise of volition rather than which is accidental, negligent or involuntary. " 22A. In Vol. III of Websters Third New International Dictionary at p. 2617, the word "wilful" has been defined thus - "governed by will without yielding to reason or without regard to reason: obstinately or perversely self -willed."

23. The word "default" has been defined in Vol. I of Websters Third New International Dictionary at p. 590 thus - "to fail to fulfil a contract or agreement, to accept a responsibility; to fail to meet a financial obligation."

24. In Blacks Law Dictionary (4th Edn.), at p. 1773 the word wilful has been defined thus: " Wilfulness implies an act done intentionally and designedly; a conscious failure to observe care; conscious; knowing; done with stubborn purpose, but not with malice. The word reckless as applied to negligence, is the legal equivalent of "wilful" or wanton."

21. APPLYING the aforesaid dictionary meaning, it would be a wilful act because,

the act or omission of the employees of the KLM were without regard to reason or were perverse, and self-willed. It can also be said to be wilful failure to fulfil a contract or agreement or conscious failure to observe care.

22. THE learned Counsel Mr. Aggarwal referred to the decision in *Rakapalli Raja Rama Gopala Rao v. Naragani Govinda Sehara Rao*, (1989) 4 SCC 255, wherein the Court has observed that "an act is said to be wilful if it is intentional, conscious and deliberate". In that case also, the Court has followed earlier decision in *S. Sundaram Pillai* (supra) and no different ratio is laid down. Hence, it is of no use to refer to the other decisions in view of the established facts of the present case and the law as discussed above.

23. LEARNED Counsel for the KLM further referred to the decision rendered by the Delhi State Consumer Disputes Redressal Commission in *Ms. Gargi Parsai v. KLM Royal Dutch Airlines*, I (1996) CPJ 2. In our view, the aforesaid judgment is not required to be discussed, because the wordings in Rule 25 of Second Schedule and Rule 25 of the First Schedule are altogether different. Rule 25(1) of Schedule I, inter alia, provides that if the damage is caused by wilful misconduct or by such default on his part as is in the opinion of the Court equivalent to wilful misconduct. As against this, Rule 25(1) of Schedule II, as quoted above, does not talk of wilful misconduct, but covers reckless act or omission. Therefore, the rest of the judgments which are on the same point are not required to be dealt with.

24. FINALLY, we hold that when employees of a carrier are dealing with goods worth crores of rupees, they are expected to be cautious in delivering the goods to a layman and ought not to have delivered without ascertaining his identity, without verification of proper documents and without the knowledge of the consignee or the consignor. In such a case, a man of prudence would certainly arrive at the conclusion that the act or omission on the part of the employees was reckless and knowledge can easily be inferred that it would cause damage to the consignor/consignee. In view of the above discussion, we hold the K.L.M. responsible for the deficiency in service. Liability of opposite party No. 3 -Bank:

25. THE next question would be with regard to the liability of the National Westminster Bank.

26. IT is the contention of the complainant that without the connivance of the employees of the National Westminster Bank it would be difficult for the persons who have taken away the goods, to get the zerox copy of the alleged Bank release note and get the consignment released. In our view, there is nothing on record to establish that officers of the Bank have taken any part in the alleged fraud. For the fraud, some persons were prosecuted before the Crown Court at Northampton. There is an elaborate judgment and nowhere it points out that the bank employees were involved in the said fraud.

27. FURTHER, it is the contention of the Bank, in Original Petition No. 217/1997, that they received original documents on 23rd October, 1996, while the goods were released on 22nd October, 1996 and hence they are not responsible.

28. HENCE , even though there is nothing against the officers of the Bank, or the Bank that the officers of the Bank were party to the alleged fraud, it is surprising to note that a Bank like the National Westminster Bank a known and established bank with all their system, computerization and documentation are modernized especially being in a country like the U.K., submit that the original documents pertaining to air waybill, invoice, etc., received by it from its counterpart in India are lost from the custody of the Bank, that too, not in one or two cases, but in all the four consignments, within a span of two weeks. There is no whisper as to how, suddenly, such documents were misplaced so that they could not be found out by the bank officers. The bank has also not explained as to what are their internal instructions for maintaining such important documents and who are responsible for not maintaining them properly. Hence, an inference can be drawn that a reasonable care which is expected from a bank of high standard is not taken to protect the valuable documents which would be the basis of recovering a large amount for sale of jewellery. In our view, such a statement before the Court, is an admission of its deficiency in service. This deficiency on the part of the Bank cannot be condoned. Because, for want of original documents, the Insurance Company repudiated the claim and the Complainants are without reimbursement for years for the loss suffered by them. In such circumstances, deficiency on the part of the Bank is established by its own admission that the documents are lost, which, according to us, is an unusual thing. No doubt, the loss of original documents has not played any part in release of the goods, because, the goods were released prior to the receipt of the original documents.

29. IN these set of circumstances, for the deficiency in service by the Bank in not protecting the valuable documents, we think that it would be just and reasonable to direct the bank to pay compensation/punitive damages as provided under Section 14 of the Consumer Protection Act, 1986. Hence, the Bank is directed to deposit the sum in Rupees equivalent to 5,000 Pounds, with the National Consumer Disputes Redressal Commission. The said amount shall be deposited by the Registrar of the National Commission in the Consumer Legal Aid Account to be administered by this Commission. Reimbursement in Pounds/Dollars/ Rupees:

30. LEARNED Counsel for the complainants submitted that the complainants are entitled to receive the amount in Pound or Dollars as per the invoices. In our view, this submission cannot be accepted because in 1996 when the goods were sold the complainants were not entitled to keep currency in Pounds/Dollars in their possession. They are required to convert the same into Rupees at the earliest. Hence, we find no substance in the contention and hold that for reimbursement value in Rupees is required to be taken as on the date of dispatch of the consignments in all the three cases. A chart showing Conversion in Rupees is submitted by the complainant in each of the three cases. In complaint No. 217 of 1997, it has been stated as under: "Air Waybill No. 074 7423 3261 Invoice Dated : 18.10.1996 Value of Goods US \$ 55,453 Insurance US \$ 92 Freight US \$ 300 Total US \$ 55, 845 Rate of conversion mentioned on the invoice Rs. 35.67

per US Dollar. Calculated at the above rate US \$ 55,845 = Rs. 19,91,991.15" [Note: Calculations are supplied by the learned Counsel for the parties] Compensation:

31. WITH regard to the compensation claimed by the complainants, we think that in such cases proper measure or yardstick for granting compensation would be award of appropriate rate of interest on the amount which the complainant would have received, had the consignment been delivered to the consignee (Bank). That means, the complainant would have received the amount on the basis of the invoices and in terms of US Dollars and was required to get them converted in terms of the rupees on receipt of the amount, if receipt was in Dollars or Pounds.

32. THEREFORE , award of reasonable rate of interest would cover the compensation payable to the complainant, as it was a commercial transaction and the prices of gold has escalated. Hence, we direct that the amount shall be paid with interest at the rate of 12% p.a. Conclusion: In the result, it is directed that: (a) the opposite party No. 1, KLM Cargo shall pay a sum of Rs. 19,92,000 (rounded figure) with interest at the rate of 12% p.a. from 1st November, 1996 till its payment, within a period of four weeks from the date of this order; (b) the opposite party No. 3, National Westminster Bank shall also deposit a sum equivalent to Pounds 5,000 with the Registrar of this Commission, within a period of four weeks from the date of this order; and (c) KLM shall also pay costs of litigation quantified at Rs. 1,00,000. The said amount shall be deposited with the Registrar of this Commission within a period the four weeks from the date of this Order.

33. THE amount which may be deposited by the National Westminster Bank and the cost of litigation which shall be deposited by the KLM, with the Registrar of this Commission, shall be deposited by the Registrar in the Consumer Legal Aid Account which is to be administered by this Commission.

34. THE Original Petition is allowed accordingly. Original Petition No. 296 of 1998
1. In this complaint, the say of the complainant is that two consignments of gold jewellery which were exported by the complainant from New Delhi to Birmingham on 9th October, 1996. The complainant booked the said two consignments with M/s. KLM Cargo vide two Airway bills dated 9th October, 1996. Both the above consignments were on COD basis (Cash on Delivery Basis) with the price to be collected in the United Kingdom through Nat west Bank (National Westminster Bank, UK, hereinafter referred to as the Bank) and to be remitted to Vysya Bank Ltd. in India. The consignee in the Invoices as well as the Airway bills was the Bank and the notified party was the purchaser, M/s. FM MIR Jewellers.

2. Both the above consignments were insured with M/s. Oriental Insurance Company Ltd. (hereinafter referred to as the Insurance Company) vide two marine insurance certificates. The insurance policy covered "all risks".

3. On 10th October, 1996, the complainant sent the original documents of title, namely, two invoices two packing lists, two Airway bills, two shipping bills, two purchase certificates and Insurance Certificates to its bankers, M/s.Vysya Bank, for being forwarded to the collecting bank, Natwest Bank for delivery/release to the notified party after collecting the payment. The Bank confirmed the receipt of the above documents, vide receipt dated 4th November, 1996.

4. The KLM delivered the shipments in question on 16.10.1996 without obtaining the documents of title and bank release from the Bank. The Bank confirmed vide letter dated 11th November, 1996 that the collections remain unpaid and they had not issued the bank release. The Bank further confirmed that they were holding the original documents of title in their office.

5. On 19th November, 1996, Natwest Bank informed Vysya Bank that fraud appears to have been perpetuated for which police investigation was underway. The complainant was subsequently informed by Cambridgeshire Constabulary that the police had arrested the persons who had committed fraud. The complainants were called for investigation at the UK where their statements were recorded. The Cambridgeshire Constabulary prosecuted the accused persons. The relevant documents with respect to the police investigation and trial are on record. The accused persons have been convicted and sentenced by Crown Court at Northampton. The original certificate dated 22nd August, 2003 issued by the Crown Court at Northampton is Ex. P117, which reads as under:

"This is to certify that in the Crown Court at Northampton on 31st March, 1999 Abdul Rauf was convicted upon indictment of - 1. Conspiracy to defraud. And on 14th May, 1999 was sentenced to : - 4 years imprisonment. To pay compensation of -7710.86 to Arun Chopra ANK jewellers, 118 High Street, Edgware, Ha8 7EL. To pay compensation of -1796.14 to Satpreet Singh Khandpur Lilium International, 2a West End Road, Southall, Middx. To pay compensation of -4398.77 to Dhiraj Kotecha Rajesh Imports, 33 West Town Drive, Stanmore, London. To pay compensation of -12272.34 to Amit Gupta PP Jewellers, A13 CC Colony, Pratap Bagh, Delhi, India. To pay compensation of -8854.79 to Rajendra Bhola Bholasons Exports, 21/51 Punjabi Bagh, West, New Delhi 110027, India. To pay compensation of -14967.10 to Ashok Kumar Chandani Yellow Metal Inc, 159 Noida -201, 305 District Ghaziabad, Uttar Pradesh, India. Total sentence: To pay total compensation of -50,000.00. To be paid within one month. Decision of the Court of Appeal: SENTENCE QUASHED. TOTAL SENTENCE NOW 3 YEARS, 6 MONTHS IMPRISONMENT AND -50000.00 COMPENSATION An Officer of the Crown Court Date 22nd August 2003."

6. It is to be stated that no amount of compensation is received by the complainant.

7. The complainant lodged a claim for wrongful delivery with the KLM on 15th November, 1996. KLM wrote letters dated 6th March, 1998 to the complainant in which they admitted their liability and offered a sum of Rs. 1,00,000 each to the

complainant in respect of the two consignments, in full and final settlement. However, the complainant declined to accept the said amount as the liability of KLM is absolute and comprehensive. KLM has raised the plea of limited liability, which is not maintainable in view of the submissions made in the rejoinder dated 6th March, 1999, which is reproduced in Original Petition No. 217 of 1996.

8. Vide letter dated 11th November, 1996, NatWest Bank confirmed that the collections remained unpaid and that they did not issue the bank release. Mr. Warner Rootliep, General Manager of KLM in his affidavit has, inter alia, stated that the KLM delivered the consignment in question to the consignee on 16th October, 1996 on the basis of release/delivery order issued by opposite party No. 4 - Natwest Bank against a clean receipt. This is falsified by Natwest Banks letter dated 11th November, 1996, whereby Natwest Bank confirmed that they had not issued any bank release. Therefore, the stand taken by opposite party No. 2 [KLM] is clearly false. Even otherwise, opposite party party No. 2, KLM has not filed any document such as release/delivery order and clean receipt to prove its contentions.

9. The complainant also intimated about the loss to Oriental Insurance Company on 28th November, 1996. Thereafter, on 9th January, 1997, the complainant also lodged a claim with Insurance Company. The complainant submitted all the relevant documents demanded by Insurance Company from time -to -time, i.e. on 9th January, 1997, 28th January, 1997, 5th February, 1997, 12th February, 1997, 21st February, 1997, 6th May, 1997, 24th May, 1997, 1st June, 1997, 5th June, 1997, 9th March, 1998, 27th April, 1998, 18th June, 1998 and 27th August, 1998.

10. Opposite party No. 1, M/s. Oriental Insurance Company Ltd. in reply to the complaint, has substantially admitted the facts stated in the complaint. The Insurance Company has admitted Paras 3, 7, 8, 9 and 12 of the complaint to be matter of record. Para 12 thereof contains the complete facts and documents including the correspondence with the Insurance Company, documents submitted to Insurance Company and correspondence with the Vysya Bank, the Natwest Bank and the KLM. It is on record that the original documents of title were in possession of Natwest Bank who confirmed the same vide letters Ex. P19, P29, P30 and P44. The Cambridgeshire Constabulary police called upon Natwest Bank to hand over the original documents to them pursuant to which Natwest Bank enquired about the same from Vysya Bank who forwarded the same to the complainant who in turn wrote to the Insurance Company vide letter Ex. P45 and Ex. P46. The Insurance Company vide its reply Ex. P47 instructed the complainant to convey their approval to the complainant who instructed Vysya Bank to convey Natwest Bank to hand over the original documents of title to the police for investigation purpose only. In the meantime, the original documents of title were misplaced from the office of Natwest Bank during the period 17th January, 1997 to 20th January, 1997. Natwest Bank, therefore, sent the attested copies of the original documents to Vysya Bank who in turn forwarded the same

to the complainant (Ex. P102). The copies of the said original documents were submitted to the Insurance Company time and again.

11. The sole ground raised by the Insurance Company in their repudiation letter is that the original documents of title have not been submitted, which, as stated, above is not correct. The complainant has submitted, time and again, the copies of the title documents and complete correspondence with the Vysya Bank, the Nat West Bank and the KLM. The original documents of title were with the Natwest Bank who confirmed the same vide letters Exhs. P19, P29, P30 and P44. Nat West Bank vide letter Ex. P67 informed that the original documents have been misplaced from their office during the period 17th January, 1997 to 20th January, 1997. Natwest Bank sent the duly attested copies, which were submitted to the Insurance Company (Ex. P102). Repudiation of the claim on the ground that the complainant has not furnished the original documents of title and the correspondence with Vysya Bank, Natwest Bank and KLM, is contrary to the material on record.

12. Further, as the KLM has accepted the liability, the Insurance Company cannot avoid the liability. However, the Insurance Company delayed and repudiated the claim on unfeasible grounds, which clearly amounts to deficiency in service. The Insurance Company has also failed to give any justifiable ground as to why it took more than two years in investigating the claim made by the complainant. This delay itself constitutes deficiency in service by the Insurance Company.

13. Finally, it is submitted by the Complainant that - (a) the complaint may be allowed. (b) the Insurance Company and the KLM Cargo be held jointly and severally liable to pay US \$ 62,934 and US \$ 62,957 totalling US \$ 1,25,891 to the complainant along with 18% interest in foreign exchange from 16th October, 1996 till the date of payment. (c) the opposite parties be also held jointly and severally liable to pay an amount of US \$ 50,000 per year and proportionately part there of (US \$ 25,000 per consignment) from 16th October, 1996 till the date of payment of US \$ 62,934 and US \$ 62,957 totalling US \$ 1,25,891 and to the complainant to compensate for business losses incurred due to non - availability of the funds involved in the case for a long time from 16th October, 1996. (d) The complainant is also entitled for compensation for harassment and mental agony. (e) The complainant incurred an expenses of Rs. 2,70,764 for visit of its partner, Shri Kamal Gupta to England from 2nd April, 1997 to 8th April, 1997 and the visit of Mr. Amit Gupta, Export Executive of the complainant from 30th March, 1997 to 8th April, 1997 relating to the claim in question, which the opposite parties are liable to pay to the complainant. Findings:

14. For the reasons recorded in Original Petition No. 217 of 1997, we hold that the act and omission on the part of the employees of the KLM was reckless as the precious gold jewellery was delivered to a layman without verifying the source of the fax message, without ascertaining his identity, without verifying proper documents and without knowledge of the consignee or consignor. And, it is to be held that it was done with the knowledge that such release of the goods

would cause damage to the consignor/consignee.

Re: Liability of the KLM - Admission: 15. In this case also the KLM has admitted its liability by letter dated 6th March, 1998. The relevant part of the letter is as under: "We acknowledge receipt your letter No. 242 dated March 2, 1998 in connection with subject ship -ment. We would like to inform you that this shipment was delivered against a clean receipt but so far we could not trace the copy of the bank release. This would lead to the conclusion that we failed in this respect. Therefore, we herewith decide to offer the amount as declared value for carriage on the airway bill i.e. Rs. 1,00,000.00 in full and final settlement. Please return the enclosed final release in triplicate signed and completed to our department, after which payment will be effected as soon as possible."

16. The aforesaid admission is restricted to limited liability. The question which would require consideration is whether the liability is limited or would be to the extent of loss suffered by the complainants.

Special Declaration as required under Rule 22(2)(a): 17. For application of Rule 22(2)(a) it has been pointed out that there was a special declaration of interest in delivery and that the complainants have paid 200 per cent of the normal freight charges by specifically declaring that it was gold jewellery and its value was as per the invoices. For the customs clearance also the value was mentioned at Rs. 20,20,478 + Rs. 20,21,222 = 40,41,700.

I. Air Waybill No. : 074 7638 6144 Invoice Dated : 9.10.1996 Value of Goods : US \$ 56,963 Insurance : US \$ 81 Freight : US \$ 169 Total : US \$ 57,213 Rate of conversion mentioned on the Invoice Rs. 35.79 per US Dollar. Calculated at the above rate US \$ 57,213 = Rs. 20,47,653.27 II. Air Waybill No. : 074 7638 6155 Invoice Dated : 9.10.1996 Value of Goods : US \$ 56,984 Insurance : US \$ 81 Freight : US \$ 669 Total : US \$ 57,234 Rate of conversion mentioned on the Invoice Rs. 35.80 per US Dollar. Calculated at the above rate US \$ 57,234 = Rs. 20,48,977.20 Total of I and II : 20,43,653.27 + Rs. 20,48,977.20 =Rs. 40,96,630.20 [Note: Calculations supplied by the learned Counsel for the parties]. Banks Liability:

18. With regard to the liability of National Westminster Bank, for the reasons recorded in Original Petition No. 217 of 1997, it cannot be held that the officers of the bank have committed any fraud. For unjustifiable loss of the original documents by a bank, which amounts to deficiency in service they are held liable to pay damages, as stated above, i.e. to say, the bank shall deposit a sum in Rupees equivalent to 5,000 Pounds, with the National Consumer Disputes Redressal Commission. The said amount shall be deposited by the Registrar of the National Commission in the Consumer Legal Aid Account to be administered by this Commission.

Liability of the Insurance Company: 19. The next question would be with regard to the liability of the Insurance Company. 20. Mr. Vishnu Mehra, learned Counsel submitted that as the original documents were not handed over to the Insurance

Company, it has rightly repudiated the claim. He submitted that it is quite possible that original documents (Consignment Note) might have been assigned to someone else. 21. In our view, this submission is imaginary, baseless, without any substance and is only made to avoid the liability of the Insurance Company.

22. In the present case, there is no dispute with regard to the existence of the policy; there is no dispute that in case of loss or damage the Insurance Company is liable to reimburse; there is no dispute with regard to the fact that the jewellery was not delivered to the consignee; and, there is also no dispute that the complainant has not received any amount from the notified party. It is also established on record that prosecution was launched against the culprits and they were convicted by the Crown Court, Northampton. Therefore, to contend that original consignment note might have been assigned to someone else, cannot be said to be a bona fide defence. In any case, the Insurance Company cannot advance its case by inventing fanciful theories unsupported by evidence, as to how the event might have occurred. Such a conjecture unsupported by facts does not deserve any consideration.

23. Further, in the context of such contention it is worthwhile to refer to principles behind maxim *res ipsa loquitur* in the case of *Shyam Sunder and Ors. v. The State of Rajasthan* (1974) 1 SCC 690 (at 693 -4) the Apex Court discussed the maxim, *res ipsa loquitur* and observed that:

"The maxim is based as commonsense and its purpose is to do justice when the facts bearing on causation and on the care exercised by defendant are at the outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant (see *Barkway v. S. Wales Transo*, (1950) 1 All ER 392, 399)".

It also observed: "13. It should be noticed that the defendant does not advance his case by inventing fanciful theories, unsupported by evidence, of how the event might have occurred. The whole inquiry is concerned with probabilities, and facts are required, not mere conjecture unsupported by facts."

As Lord Macmillan said in his dissenting judgment in *Jones v. Great Western*, (1930) 47 PLR 39: "The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible, but it is of no legal value, for its essence is that it is a mere guess. An inference, in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof. The attribution, of an occurrence to a cause is, I take it, always a matter of inference. The cogency of a legal inference of causation may vary in degree between practical certainty and reasonable probability. Where the coincidence of cause and effect is not a matter of actual observation there is necessarily a hiatus in the direct evidence, but this may be legitimately bridged by an inference from the facts actually observed and proved. In other words, an inference is a deduction from established facts and an assumption or a guess is something quite different but not necessarily related to established facts."

24. In our view, the Insurance Company has not pointed out any reasonable ground for contending that the insured might have assigned the assignees interest in favour of third party. Hence, the contention is rejected and we hold that the Insurance Company would be liable to reimburse the complainant on the basis of the amount mentioned in the invoices.

25. Learned Counsel for the Complainant, contended that the Insurance Company should be directed to make payment first and, thereafter, recover it from the KLM.

26. In our view, the primary liability to reimburse the complainant is that of the KLM. Even if the Insurance Company reimburse the complainant, the Insurance Company is entitled to recover the same from the KLM. Hence, in this case, it is not necessary to direct the Insurance Company to reimburse in the first instance, because it is open to the complainant to recover the amount from the KLM at the earliest. Hence, it is directed that in case the KLM fails to pay the said amount, as directed, within a period of four weeks from the date of this order, it would be open to the complainant to recover the same from the Insurance Company.

Conclusions: 27. In the result, it is directed that: (a) The opposite party No. 2, KLM Cargo, shall pay a sum of Rs. 46,96,630 with interest at the rate of 12% p.a. from 1st November, 1996 till its payment, within a period of four weeks from the date of this order; (b) The opposite party No. 4, National Westminster Bank, shall also deposit a sum equivalent to Pounds 5,000 with the Registrar of this Commission, within a period of four weeks from the date of this order; (c) The KLM Cargo shall also pay costs of litigation quantified at Rs. 1,00,000 The said amount shall be deposited with the Registrar of this Commission within a period of four weeks from the date of this order. (d) In case the KLM fails to pay the amount as directed above, it would be open to the complainant to recover the amount of Rs. 46,96,630 with interest @ 12% per annum from 1st November, 1996 till its payment, from the Insurance Company.

28. The amount which may be deposited by the National Westminster Bank and the cost of litigation which shall be deposited by the KLM, with the Registrar of this Commission, shall be deposited by the Registrar in the "Consumer Legal Aid Account" which is to be administered by this Commission.

Original Petition No. 47/98 29. In this complaint also, the say of the complainants is similar to that what is contended in Original Petition No. 217/1997 and Original Petition No. 296/1998.

30. It is the case of the complainant that it agreed to send gold jewellery to Nat West Bank, U.K. The jewellery was on Cash on Delivery [COD] basis. The FoB value of goods exported was US \$ 139233 whereas the invoice value was US \$ 139769 which included freight, insurance, packing and forwarding charges of US \$ 536.

31. The said goods were insured with the United India Insurance Co. Ltd. by a

Comprehensive Insurance Cover Note No.83552 dated 16.10.1996 for an amount of CIF + 10% i.e. US \$ 153746 (equal to INR 5451053).

32. On 16.10.1996, the packets, in which gold ornaments of the complainant were booked, were handed over by Clearing Agent to KLM CARGO Delhi under Airway Bill No. 074 -7423.3224 dated 16.10.1996. The Airway Bill clearly and specifically mentioned as under:

No. of Pieces RCP Gross Weight Rate Class Commodity Item No. Chargeable Weight Rate/ Charge Total Nature and Quantity of goods including Dimensions of volume 02 17.150 K NS 200% 17.5 K 313 5477.50 SAID TO CONTAIN HANDICRAFTED PLAIN and MEENAKARI GOLD JEWELLERY VALUABLE CARGO IEC NO. 4192000241 RBI NO. DY -000300 GRI NO. AJ 144357 S.B. NO. NEPZ/3980/96 DIMNS : 12 x 12 x 12 x IN It is also mentioned that: Handling Information: NOTIFY : M/s. FM MIR JEWELLERS PEI -2LR U.K. TEL NO. 01733 -346569 TWO PKGS NOS. MKD and ADD PLAS INFM CNEE IMMEDIATELY ON ARRIVAL OF GOODS ONE ENVELOPE ATTACHED.

33. It is clear from the Airway Bill that the goods were gold jewellery and valuable in nature. The Airway bill required that M/s. Nat west Bank i.e. the consignee, was to be immediately informed on arrival of goods, which has not been done. The value of goods also mentioned on the Airway Bill. A copy of the invoice was given to the Airline [OP No. 3]. It is admitted by OP 3 in their affidavit by way of evidence that they knew the value of goods. It is submitted that as per the value of the goods, this case is covered under Clause 22(2)(a) of Schedule -II of the Carriage by Air Act. It is clear from the Airway Bill that the complainant had paid freight at the rate of 200% of the normal freight.

34. As the goods had been sent on COD basis, on 17.10.1996 the complainant handed over the documents to the Vysya Bank Ltd. for forwarding the same to Natwest Bank. The delivery was on COD basis, hence, the goods could be cleared only on receipt of payment by Natwest Bank. Accordingly, when the documents were forwarded to M/s. Natwest Bank, by letter dated 17.10.1996 the Vysya Bank Ltd. issued the following instructions:

1. Please deliver the documents strictly against payment only. In case of non - payment, please inform us promptly. 2. Please collect all your charges from Drawee only and do not waive. 3. Please remit the proceeds to the credit of our International Banking Dept. Bombay Office A/c No. 000 -390 -8 -0 with Marine Midland Bank, 140, Broadway, New York by duly quoting our reference No. C/084796/96 under Telex Intimation to us.

35. On 19.10.1996, the gold jewellery sent by the complainant reached Birmingham Airport.

36. On 20.10.1996, as per the Release Note sent by KLM Agent, the goods were released at 17.33 p.m. to M/s. Expeditors. The basis of the Release of the goods was a purported photocopy of the Bank Release Note dated 18.10.1996 (Ann.

A5). Although as per records of the KLM, the goods were released on 20.10.1996, the KLM wrongly informed the complainant that the goods had been released on 22.10.1996.

37. On 21.10.1996 the documents sent by Vysya Bank were delivered to Nat West Bank. As per KLM, on 22.10.1996, the goods were released and delivered to M/s. Expeditors whereas the Release Note is dated 20.10.1996. On 24.10.1996, the complainant wrote to KLM to find out the status of goods and payment. On the same day, KLM informed the complainant that the goods had been delivered on 22.10.1996 whereas the goods had been delivered and released to some unauthorized person on 20.10.1996.

38. On 25.10.1996 the complainant received fax copy of the Release Order and the purported Bank Release Note on the basis of which the Cargo was released.

39. The purported Bank Release Note was in favour of "FM Mir Jewellery" whereas the notified party was "FM Mir Jewellers". Further the said Bank Release Note was a FAX/photocopy and had overwriting and interpolation on the date. Thereafter, Vysya Bank also wrote several letters to Natwest Bank asking for payment.

On 1.11.1996, Natwest Bank wrote to Vysya Bank informing as under: "we have however endeavoured to contact Drawee to send his authority to pay, upto date our communication remains unanswered. No Bank Release has been given."

Thereafter on 2.11.1996, there was exchange of correspondence between the complainant and the opposite parties. 40. The complainant filed a claim with the United India Insurance Co. Ltd. as it had taken an "All Risk Insurance Policy" from the said Insurance Company. As the claim of the complainant remained unattended, it wrote several letters and reminders dated 24.2.1997, 5.4.1997, 5.11.1997, 25.11.1997 and 10.12.1997 to the Insurance Company besides making representations to the Jt. Secretary, Ministry of Finance, in view of the casual and callous approach of the Insurance Company in delaying and in not attending to the claim filed by the complainant. The complainant repeatedly met the officials of the Insurance Company requesting for a decision on the claim. However, ultimately the Insurance Company vide its letter dated 27.3.1998, wrongly and erroneously rejected the claim of the complainant on the ground that the consignment in question had been delivered to the rightful consignee and, therefore, the loss does not fall within the purview of the insurance cover.

41. On 4.11.1996, the complainant wrote to KLM to settle the claim of US \$ 139769 since the consignee, namely, Natwest Bank, has confirmed that they have not issued any Bank Release Order in favour of anybody.

42. On 21.11.1996, in reply to the complainants letter dated 4.11.1996, KLM rejected the claim on the ground that they delivered the consignment to the ultimate consignee as per the Airway Bill, after receiving the Bank Release Note. It is pertinent to note that No Bank Release Order has been issued as confirmed

by the consignee, i.e., Natwest Bank. Liability of Opp. Party No. 1

43. It was submitted by the complainant that Opposite Party No. 1, Insurance Company, is liable inasmuch as the complainant had obtained an "All Risk Insurance Cover". As per the repudiation letter, the Insurance Company has denied its liability on the ground that the consignment was delivered to the right consignee (FM Mir Jewellers). It was further submitted that this contention of the Insurance Company is absolutely incorrect as the consignee was not FM Mir Jewellers but was the Bank and even the photocopy of the purported Bank Release Note on the basis of which fraudulent delivery was given refers to FM Mir Jewellery and not FM Mir Jewellers. Therefore, it cannot be stated that the consignment was delivered to the right consignee, rather the consignment never reached the right consignee. Further, the Insurance Company is liable for its negligence as it has delayed in taking any decision in the matter and kept the claim pending up to 27.3.1998, on which date the claim was wrongly and illegally rejected (Ann. A.12)

Liability of Opp. Party No. 2 - M/s. Nat West Bank - 44. It was submitted by the complainant that it was the duty of opposite party No. 2 to ensure that no release of consignment takes place without the collection of the price from the notified party, namely, FM Mir Jewellers. As a consignee Bank, it was its duty to ensure the safety of the consignments by issuing Release Notes only after receipt of full price/payment; and, by preventing and ruling out unauthorized access to its stationery and documentation to diminish the possibility of frauds. It is sheer negligence, recklessness and gross deficiency in service on the part of opposite party No. 2, Bank, in all the possible cases, outlined below, for the following reasons : (a) if an original Bank Release Note was issued, then the Bank is liable for authorizing release of consignment before shipping documents were received by the Bank; (b) if an original Bank Release Note was prepared and was only faxed by the consignee Bank to carrier, opposite party Nos. 3 and 4 without delivery of original thereof, then also the Bank is liable for authorizing release of consignment without realizing the price and for releasing consignment before shipping documents were received by the Bank; (c) if no original Bank Release Note was prepared or faxed by the consignee Bank to carrier, opposite party Nos. 3 and 4, then it is liable for gross negligence in allowing misuse of its stationery and signatures of its personnel. Such misuse was made possible by the failure of the consignee Bank to put in place procedures to prevent banking documents being deliberately or accidentally released in the wild i.e. being available for misuse by unauthorized parties. Since the Bank was consignee, its primary duty was realization of price and commercial safety of the consignment in which it grossly failed.

46. IT IS SIGNIFICANT TO NOTE THAT THE CONSIGNEE BANK HAS NOT BEEN ABLE TO PRODUCE EITHER WITH ITS PLEADINGS OR EVIDENCE, THE ORIGINAL BANK RELEASE DOCUMENTS AND ADVERSE INFERENCE SHOULD BE DRAWN AGAINST THE BANK. Failure to produce original release note adds further

credence to the allegations or gross negligence and deficiency in service against the opposite party No. 2 Bank for which it is liable.

47. Complainants Entitlement: It is contended by the complainant that he is entitled to the following: 1. The complainant is entitled to receive an amount of USD 1,39,769 as per the invoice. That the complainant is further entitled to receive another additional 10 per cent from the Insurance Company as in accordance with the Marine insurance Policy issued, the insurance cover note was issued for an amount of CIF USD 1,39,769 along with additional amount of 10 per cent of CIF value, the total amount comes to USD 1,53,746. The complainant is also entitled to receive interest and expenses incurred. 2. The premium was paid to the Insurance Company on the said amount which premium was unconditionally accepted by the Insurance Company. 3. The complainant is entitled to receive the amount in US dollar along with interest thereon inasmuch as the complainant company is a 100% export oriented unit. 4. For the purpose of making jewellery and exporting the same, the complainant imports gold bars from outside India and pays the amount towards the goods in US dollars. The complainant is not entitled, permitted and/or allowed and does not sell any jewellery in India and that whatever gold bars are bought are for the purpose of manufacturing gold jewellery for the purpose of export only. 5. In 1996, the complainant had imported gold bars by paying US dollar and had after making the gold jewellery, exported them as per the invoices. The invoices were in US dollars and the complainant has suffered in US dollars. Therefore, the complainant is entitled to receive the amount in US dollars only. 6. If the claim of the complainant had been dealt expeditiously, the complainant would have received US dollars. The complainant pays its buyers from whom it purchases gold bars in US dollars only. 7. A great loss and injury will be caused to the complainant if the complainant is now required to pay amount in rupees. The complainant will suffer heavily as the complainant for buying the same amount of gold, which it had exported, will have to pay much higher price. The amount will have to be paid in US dollars. Therefore, it is most humbly and respectfully prayed that the complainant is entitled to receive US dollar along with interest thereon.

47. PETITIONER ENTITLED TO ADDITIONAL AMOUNT ON ACCOUNT OF INCREASE OF COST OF RAW MATERIAL : 1. The complainant is in the business of gold jewellery. The complainant imports gold bars, makes jewellery and exports the same after manufacturing gold ornaments. 2. At the time when the loss occurred, the gold was at USD 384.76 per ounce whereas the present value of gold is 651.50 per ounce as on 6.8.2006. The complainant will have to buy the same quantity of gold at a much higher price. 3. On account of this fluctuation in the gold price, the complainant has suffered a further loss of USD 85,800.64. The complainant is also entitled to receive the said amount. 48. COST OF EXPENSES AND RECOVERY: The complainant has suffered expenses and an amount of INR 5,25,000 towards expenses incurred for travel to UK and for cost of Advocate etc. appointed in UK and in India. The complainant is also entitled to

receive the said amount.

49. Interest It was submitted that presently the complainant is entitled to interest at the rate at which the bank are lending the money rather than the rate at which the banks are accepting the money. The complainant should be granted interest on the basis and at the rate at which the complainant would have borrowed money and not the rate at which the complainant have lend the money. The lending rate by the banks even today is around 13%. Therefore, the complainant is entitled to 13% interest on the awarded amount.

Findings: 51. For the reasons recorded in Original Petition No. 217 of 1997, we hold that the act and omission on the part of the employees of the KLM was reckless as the precious gold jewellery was delivered to a layman without verifying the source of the fax message, without ascertaining his identity, without verifying proper documents and without knowledge of the consignee or consignor. And, it is to be held that it was done with the knowledge that such release of the goods would cause damage to the consignor/consignee

For application of Rule 22(2)(a) it has been pointed out that there was a special declaration of interest in delivery and that the Complainants have paid 200 per cent of the normal freight charges by specifically declaring that it was gold jewellery and its value was as per the invoices. In the Air Waybill, Declared Value for Customs was mentioned at Rs. 49,38,595. I. Air Waybill No. : 074 7423 3261 Invoice Dated : 16.10.1996 Value of Goods : US \$ 139233 Insurance and Freight : US \$ 536 Total : US \$139769 Rate of conversion not mentioned on the Invoice. However, in case of Pearl Syntex, on the invoice dated 18.10.1996, the rate of conversion from US \$ to INR has been mentioned as Rs. 35.47 per US Dollar. Calculated at the above rate US \$ 139769 = Rs. 49,57,606 [Note: Calculations supplied by the learned counsel for the parties].

35. IT is to be further stated that in the Invoice there is a specific mention "Amount chargeable (in words): US Dollars: ONE LAKH THIRTY NINE THOUSAND SEVEN HUNDED SIXTY NINE ONLY" Banks Liability:

36. WITH regard to the liability of National Westminster Bank, for the reasons recorded in Original Petition No. 217 of 1996 and Original Petition No. 296 of 1998, it cannot be held that the officers of the bank have committed any fraud. However, in the facts of the present case unjustifiable loss of the original documents by the Bank is on the face of it deficiency in service bordering negligence and for the same they are held liable to pay damages as stated above, i.e. to say, the bank shall deposit a sum in Rupees equivalent to 5,000 Pounds, with the National Consumer Disputes Redressal Commission. The said amount shall be deposited by the Registrar of the National Commission in the Consumer Welfare Fund to be utilized by the National Commission. Liability of the Insurance Company: Learned Counsel, for the Insurance Company submitted that the Insurance Company is not liable to reimburse because the loss is not a marine loss.

37. IN any case, as contended by Respondent No. 3 (KLM) that consignment in question was delivered to the consignees agent, M/s. Expeditors on 22nd October, 1996, on the basis of the release order dated 20th October 1996 issued by the Natwest Bank (respondent No. 2 herein). Therefore, the Insurance Company is not liable. It is also contended that delivery to a wrong person is not covered by the marine insurance policy.

38. THIS submission, in our view, is without any substance for the reasons stated below: Undisputedly, the complainant has taken the comprehensive insurance policy for a sum of Rs. 54,51,053.

The policy begins with a specific agreement as under: "The Company hereby promises and agrees with the assured, their executors, administrators, and assignors that Company insures against loss, damage, liability or expense subject to the clauses, endorsements, conditions and warranties contained in the schedule".

The clauses annexed with the policy are -5 (i) Institute Cargo Clause (Air) (ii) Institute War Clauses (Air Cargo) (iii) Institute Strikes Clauses (Air Cargo) (iv) Important Red Clauses.

As per the schedule it was conveyance by air to anywhere in the world and the conveyance was not through shipment.

39. THE amount covered was Rs. 50 lakh.

40. THEREAFTER , Institute Cargo Clause (Air) specifically gives insurance coverage as under: "This insurance covers all risks of loss or damage to the subject matter insured except as provided in Clauses 2, 3, 4 below". Exclusions: 2. In no case shall this insurance cover 2.1. loss damage or expense attributable to wilful misconduct of the assured; 2.2. ordinary leakage, ordinary loss in weight or volume, or ordinary wear and tear of the subject matter insured; 2.3. loss, damage or expense caused by insufficiency or unsuitability of packing or preparation of the subject matter insured (for the purpose of this Clause 2.3 "packing" shall be deemed to include stowage in a container or liftvan but only when such stowage is carried out prior to attachment of this insurance or by the assured or their servants); 2.4. loss, damage or expense caused by inherent vice or nature of the subject matter insured; 2.5. loss, damage or expense arising from unfitness of aircraft, conveyance, container or liftvan for the safe carriage of the subject matter insured, where the assured or their servants are privy to such unfitness at the time the subject matter insured is loaded therein; 2.6. loss, damage or expense proximately caused by delay, even though the delay be caused by a risk insured against; 2.7. loss, damage or expense arising from insolvency or financial default of the owners managers, charters or operators of the aircraft; 2.8. loss, damage or expense arising from the use of any weapon of war employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter;

3. In no case shall this insurance cover loss damage or expense caused by: 3.1 war, civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power; 3.2 capture, seizure, arrest, restrain or detainment (piracy excepted), and the consequences thereof or any attempt thereat; 3.3 derelict mines, torpedoes, bombs or other derelict weapons of war;

4. In no case shall this insurance cover loss, damage or expense: 4.1 caused by strikers, locked-out workmen, or persons taking part in labour disturbances, riots or civil commotions; 4.2 resulting from strikes, lock-outs, labour disturbances, riots or civil commotions; 4.3 caused by any terrorist or any person acting from a political motive.

Duration, inter alia, specifically provides that it terminates only on delivery to the consignee.

41. FURTHER, it is to be stated that even under the Marine Insurance Act, 1963, the insurance policy can cover the risk as may be specified by the policy. This would be in conformity with the definition of maritime perils, which provides for inclusion of such perils designated by the policy. The policy can be mixed policy to cover sea and land risks. The policy can be covering the risk for the airlifting of the cargo. And, in this case, Institute Cargo Clause (Air) specifically covers all risks of loss or damage to the subject matter, except which are excluded and exclusion clauses do not provide exclusion of non-delivery of the goods to the consignee.

42. IN the additional reply filed by the complainant, it has been pointed out that the Insurance Company has appointed Surveyors and Investigators who have specifically stated that in such case, it would be a case of theft and the Surveyors have recommended settlement of the claim on the basis of the invoices, as the loss suffered by the complainant was beyond its control. Copies of the two survey reports are produced on record. Further, Consignments were required to be delivered to the consignee, and that too on COD basis (Cash on Delivery basis). Therefore, it cannot be contended that there was no loss or damage to the subject matter if the consignment is delivered to a third person on the basis of alleged fax message. In such cases, the whole consignment is lost and for the loss, the Insurance Company is bound to reimburse as per the terms of the policy.

43. IN this view of the matter, in our view, the Insurance Company would be liable to reimburse the complainant on the basis of the amount mentioned in the invoices.

44. LEARNED Counsel for the complainant contended that the Insurance Company should be directed to make payment first and, thereafter, recover it from the KLM. In our view, the primary liability to reimburse the complainant is that of the KLM. Even if the Insurance Company reimburse the complainant, the Insurance Company is entitled to recover the same from the KLM. Hence, in this case, it is not necessary to direct the Insurance Company to reimburse first,

because it is open to the complainant to recover the amount from the KLM at the earliest. Hence, it is directed that in case the KLM fails to pay the said amount, as directed, within a period of four weeks from the date of this order, it would be open to the complainant to recover the same from the Insurance Company. Conclusions: In the result, it is directed that: (a) the opposite party No.3, KLM Cargo, shall pay a sum of Rs. 49,57,600 (rounded figure) with interest at the rate of 12% p.a. from 1st November, 1996 till its payment, within a period of four weeks from the date of this order; (b) the opposite party No. 2, National Westminster Bank, shall also deposit a sum equivalent to Pounds 5,000 with the Registrar of this Commission, within a period of four weeks from the date of this order; (c) the KLM Cargo shall also pay costs of litigation quantified at Rs. 1,00,000 The said amount shall be deposited with the Registrar of this Commission within a period of four weeks from the date of this order. (d) In case the KLM fails to pay the amount as directed above, it would be open to the Complainant to recover an amount of Rs.49,57,600 (rounded figure) with interest @ 12% per annum from 1st November, 1996 till its payment, from the Insurance Company.

45. THE amount which may be deposited by the National Westminster Bank and the cost of litigation which shall be deposited by the KLM, with the Registrar of this Commission, shall be deposited by the Registrar in the "Consumer Legal Aid Account" which is to be administered by this Commission.