

(2001) 12 NCDRC CK 0041

In the National Consumer Disputes Redressal Commission

Tata Chemicals Ltd.

APPELLANT

Vs

SKYPAK COURIERS PVT. LTD.

RESPONDENT

Date of Decision : 14-12-2001

Acts Referred:

Citation : 2002 0 CTJ 539 : 2002 2 CLT 428 : 2002 2 CPC 107 : 2002 2 CPJ 24

Hon'ble Judges : D.P.Wadhwa , J.K.Mehra , B.K.Taimni J.

Final Decision : Objections dismissed

Judgement

1. THIS complaint was filed on 6.4.1992 complaining deficiency in service on the part of the opposite party for loss/non-delivery of the consignment of the complainant containing computer hardware valuing at Rs. 36.00 lakhs which was entrusted to opposite party who is a common carrier as defined in the Carriers Act, 1865. Negligence was alleged on the part of the opposite party in not delivering the consignment entrusted to it for being transported from Mithapur (Gujarat) to Bombay. Complainant, therefore, claimed damages amounting to Rs. 36.00 lakhs with interest @ 18% per annum from 10.10.1990, the date of entrustment of the consignment, till payment. It is not necessary for us to set out the details of the consignment. Defence of the opposite party was two-fold that, (i) it did deliver the consignment though at a later stage; and (ii) that as per the terms of the consignment note opposite party was liable to pay the maximum of US \$ 100 where the consignment is international and Rs. 1,000/- where it is domestic.

2. AFTER the pleadings were complete with the consent of the parties this Commission by its order dated 17.7.1993 referred the dispute for consensual settlement by Justice V.D. Tulzapurkar, a retired Judge of the Supreme Court. This order reads as under : "AFTER hearing both sides we suggested to parties that since evidence will have to be taken and the questions of facts determined after scrutiny of various documents and the oral evidence, it is best that both sides agree to the matter being adjudicated upon consensually by a retired Judge of the Supreme Court. Both parties have submitted before us that they are

agreeable to the course suggested by us. Accordingly both sides consented before us. That the dispute forming the subject matter of this original petition may be referred to Mr. Justice V.D. Tulzapurkar, retired Judge of the Supreme Court of India, who is residing in Bombay. Both parties to this dispute have their offices in Bombay and so it would be convenient to have the adjudication conducted by a retired Judge who is in Bombay. The records of the case will be transmitted by the Registry to Mr. Justice V.D. Tulzapurkar at his address in Bombay in Samta Building, General Bhonsale Marg, near Sachivalaya, Bombay. Mr. Justice Tulzapurkar may stipulate the terms and conditions to be complied by the parties as to his remuneration and expenses of the adjudication proceedings. We make it clear that this is not an arbitration under the Arbitration Act, but only a consensual adjudication which will be binding on both parties. The award of Mr. Justice Tulzapurkar will be sent to this Commission after the arbitration proceedings are completed so that final orders in the matter may be passed by this Commission in accordance with the terms of the said award. We request Mr. Justice Tulzapurkar to enter on the reference at his earliest convenience and to complete the proceedings of adjudication preferably within a period of three months from the date of his entering on the reference. Both the parties will be at liberty to adduce all their oral and documentary evidence in the course of the adjudication proceedings. Post this case after receipt of the original award from Mr. Justice Tulzapurkar."

A reasoned award was given on 11.12.1993 holding that opposite party was liable to pay to the complainant Rs. 34,20,000/- being the value of the lost consignment, with interest @ 18% per annum from 10.10.1990 till realisation. Complainant was also awarded cost of Rs. 50,000/-. This Commission thereafter passed order dated 7.2.1994 in terms of the award as under : "The dispute between the parties forming the subject matter of this complaint petition was referred for consensual adjudication to Justice Sri V.D. Tulzapurkar, former Judge of the Supreme Court of India with the stipulation that the award passed by the Adjudicator will be final and binding as between the parties. The award has been passed by Justice Sri Tulzapurkar and it has been forwarded to this Commission in accordance with the terms of our order wherein it was stated that after the completion of the adjudication proceedings the award may be forwarded to this Commission for its being incorporated into the order of this Commission. We direct that there will be an order in the original petition in terms of the directions contained in the award."

The order of this Commission was challenged in the Supreme Court by the opposite party in Civil Appeal No. 4029/1994. Ground of challenge was that this Commission did not at all consider the objections to the award by the opposite party. Similar issue was raised in other appeals before the Supreme Court and all were decided by a common judgment. For the purpose of decision of the grounds of appeal before it Supreme Court proceeded on the basis that dispute was validly referred for arbitration, award given which could be challenged on such grounds are available under the Arbitration Act, 1940 or the Arbitration and

Conciliation Act, 1996. Supreme Court held that in its view it was not correct on the part of this Commission not to allow the parties to file their objections or not to consider the objections which had been filed. On this premise Supreme Court set aside the order dated 7.2.1994 and remitted the matter back to this Commission to consider the objections of the opposite party.

3. NOW we gave opportunity to the opposite party to file affidavit in support of its objections and to the complainant to file its reply and affidavit thereto. This having been done we proceeded to hear arguments. While considering the objection to the award which, as stated above, is reasoned one, this Commission will not reappraise the evidence and the material before the Arbitrator and come to a different finding. If ground of objection is that there is error of law in the reasoning of the Arbitrator that error must appear from the award itself. There is no charge if the Arbitrator has misconducted himself or the proceedings. After examining the rival contentions of the parties the learned Arbitrator held that principally two issues were raised : (1) Whether the consignment containing the computer hardware was entrusted by the Mithapur office of the complainant to the opposite party for its transportation to Bombay and whether there has been non-delivery of the said consignment on the part of the opposite party ? and (2) Assuming there is non-delivery, whether the opposite party can limit its liability to US \$ 100 per consignment as per the terms contained in the consignment note ?

After examining the evidence, both oral and documentary, learned Arbitrator answered the first issue in favour of the complainant and held that consequently opposite party was liable to make good the loss suffered by the complainant arising out of the non-delivery of the correct consignment amounting to deficiency in service on its part. On the other issue of maximum amount of compensation of US \$ 100, learned Arbitrator referred to "small print" on the face of consignment note. He considered that issue as under : "It cannot be disputed that the Consignment Note issued by the opposite party is in standard printed form and that the clause limiting the carrier's liability, though appearing on the face of it, is in a very small and fine print. Even witness Jagdish Chittara examined by the opposite party, whose evidence I am inclined to disbelieve, does not say that the said clause or term was brought to the notice of the complainant's representative, much less discussed with him when he issued the Note and collected the consignment for transportation nor is there any correspondence exchanged between the parties indicating that the said clause was the subject of negotiations or bargain between the parties. In the circumstances, it is difficult to hold that the said clause would bind the complainant and as such I conclude that the said clause cannot be availed of by the opposite party for limiting its liability and it will have to make good the full value of the consignment to the complainant."

4. THOUGH the Arbitrator referred to terms of servicing appearing on the back of the consignment note but it would appear that these were not on the back of the

consignment note and were separately mentioned on the reverse of the consignment receipt. On this aspect learned Arbitrator held as under : "Relying on this term Counsel for the opposite party urged that since the value of the consignment was far in excess of the maximum limited liability indicated, the complainant ought to have taken a transit insurance cover, but it did not; he further urged that had the value which was far in excess of the limited liability been disclosed, the opposite party may not have accepted the consignment for transportation without transit insurance cover. The contention is based on a little misreading of term No. 7. It is not obligatory upon the consignor to obtain a transit insurance cover and all that term No. 7 says is that if consignments have higher values than the indicated limited liabilities it would be advisable for the consignor/consignee to have a transit insurance cover. In this case the opposite party without any inquiry about the value accepted the consignment for transportation without such insurance cover and having accepted the same in this manner cannot make any grievance on that account. In any event, neither term No. 7 appearing on the back side of the consignment note nor the clause limiting the liability appearing on the face of the note was brought to the notice of the complainant at the time of entrustment of the consignment nor was the same subject of negotiations or bargain between the parties and as such the opposite party cannot avail of the same and will have to make good the full value of the consignment to the complainant."

Learned Arbitrator who considered the quantum of compensation to be allowed to the complainant since the two principal issues were held in its favour. After considering the relevant material he came to the conclusion that the opposite party was liable to pay the complainant for the loss of the consignment a sum of Rs. 34,20,000/- and then as noted earlier interest @ 18% was awarded from 10.10.1990 till realisation and cost of Rs. 50,000/-. The fact that consignment was entrusted by the complainant to the opposite party, its value and its non-delivery are all questions of fact arrived at by the Arbitrator after appreciating the evidence, both oral and documentary. There is nothing for the opposite party to contend that these findings are in any way perverse and have been arrived at without there being any evidence on record. The question of law which now only appears would be the value and effect of small print on the consignment note and the terms of servicing. On the consignment note following conditions are printed (in small and fine print). (1) We declare that this parcel contains only commercial documents, samples which are not of personal nature. (2) Non-negotiable consignment note subject to standard conditions of carriage available on the request. The carrier specifically limits its liability to a maximum of US \$ 100 per consignment for any cause. It is not that terms of servicing are given on the back of the consignment note but are separately provided. These are also in small and fine prints. There are 24 conditions and Condition No. 7 reads as under :

"Maximum liability per consignment is 100 US \$ per consignment or equivalent Indian rupees for any cause for international, Rs. 100/- maximum for intra-City

and Rs. 1,000/- maximum for domestic. In cases where consignments have higher values than the indicated limited liabilities it would be advisable for the consignor/consignee to have a transit insurance coverage."

We required the opposite party to show us the original consignment note or the consignment note used at that time. There were no conditions on the reverse of the consignment note and it would appear that all the parties proceeded on wrong premises that conditions are printed on the reverse of the consignment note. In fact terms on servicing are printed on the reverse of the consignment receipt and from there Clause 7 has been quoted.

5. THE consignment note when refers to US \$ 100 it is meaningless as far as service of carriage is engaged for delivery of goods in India itself. For that purpose it would appear this Clause 7 even in terms on servicing does not form part of the contract, if it is held that consignment note is a contract entered into between the parties.

6. AS the Preamble to the Carriers Act, 1865 states that the Act was enacted because it was thought expedient not only to enable common carriers to limit their liability for loss of or damage to property delivered to them to be carried but also to declare their liability for loss of or damage to such property occasioned by the negligence or criminal acts of themselves, their servants or agents. In *M/s. M.G. Bros. Lorry Service v. M/s. Prasad Textiles*, (1983) 3 SCC 61, Supreme Court said that it was important to keep in mind the background that the Act was passed for both the purposes; to limit the liability by carriers, as well as to declare the liability of the carriers. Under Section 6, however, a common carrier can limit his liability in respect of loss of or damage to any property so delivered to it to be carried by it. It would be limitation of liability of the common carrier which can be limited by agreement. Supreme Court in the case of *M.G. Bros. Lorry Service* was considering clause in the agreement which provided that no suit shall lie against the common carrier in respect of any consignment without a claim made in writing in that behalf and preferred within 30 days from the date of booking or from the date of arrival or at the destination by the concerned party. Supreme Court held that this clause was void being contrary to Section 10 of the Carriers Act which provided period of six months for notice in writing of the loss or injury being given before institution of the suit, six months period commencing from the loss or injury that first came to the knowledge of the plaintiff. In the present case we are not concerned with the applicability of Section 10. Under Section 8 of the Carriage Act a common carrier would be liable where loss or damage has arisen from the negligence of the carrier or any of his agents or servants. Under Section 9 it would be for the common carrier to prove that there is no negligence that could be attributed to it or to its servants or agents. Common carrier is defined in Section 2 of the Act and it denotes a person, other than the Government, engaged in the business of [transporting property under multinodal transport document or of] transporting for hire property from place to place, by land or inland navigation, for all persons

indiscriminately. It would be seen that carrier by air and sea are not included in this definition of common carrier. When the business of transporting property is from one place to another by land or navigation in India the value for loss or damage of goods to be transported has to be in terms of Indian rupees. The special condition appearing on the face of the consignment note of the opposite party limiting the liability to a maximum of US \$ 100 per consignment for any goods is, therefore, meaningless. There are no terms appearing on the back of the consignment note containing conditions of transportation. Terms of servicing are mentioned on the back of the credit agreement form which are separately prepared by the opposite party itself and does not bear the signatures of either of the parties.

In *Patel Roadways Ltd. v. Birla Yamaha Ltd.*, I (2000) CPJ 42 (SC)=III (2000) SLT 554=(2000) 4 SCC 91, Supreme Court was considering the applicability of Section 9 of the Carriers Act. It was contended before the Supreme Court that Section 9 would apply only when a suit is brought against a common carrier and that complaint before the National Commission is not a suit. Reliance was also placed by the opposite party on earlier decision of the Supreme Court in the case of *Bharathi Knitting Company v. DHL Worldwide Express Courier Division of Airfreight Ltd.*, II (1996) CPJ 25 (SC)=(1996) 4 SCC 704. Supreme Court held that it was clear from the perusal of Sections 8 and 9 of the Carriers Act that the burden of proof that there was no negligence on the part of the carriers or its servant or agent is upon the plaintiff. Supreme Court held that proceedings before the National Commission would fall within the expression "suit". Paras 45, 46 and 47 of the judgment in the case of *Patel Roadways Ltd. v. Birla Yamaha Ltd.*, are relevant and we quote : "45. Our attention was also drawn to a decision of this Court in *Bharathi Knitting Co. v. DHL Worldwide Express Courier Division of Airfreight Ltd.*, wherein this Court considered the question that when parties have contracted and limited their liabilities, whether the State/National Commission could go behind the terms of the contract and give relief for damages in excess of the limit prescribed under the contract. This Court interpreting the provisions of Sections 2(1)(g), 19 and 23 of the Consumer Protection Act, 1986 held : (SCC pp. 706 and 707, paras 5 and 6) "It is true that the Act is a protective legislation to make available inexpensive and expeditious summary remedy. There must be a finding that the respondent was responsible for the deficiency in service, the consequence of which would be that the appellant had incurred the liability for loss or damages suffered by the consumer due to deficiency in service thereof. When the parties have contracted and limited their liabilities, the question arises : Whether the State Commission or the National Commission under the Act could give relief for damages in excess of the limits prescribed under the contract ? It is true, as contended by Mr. M.N. Krishnamani, that in an appropriate case, the Tribunal without trenching upon acute disputed question of facts may decide the validity of the terms of the contract based upon the fact situation and may grant remedy. But each case depends upon its own facts. In an appropriate case where there is an acute

dispute of facts necessarily the Tribunal has to refer the parties to original Civil Court established under C.P.C. or appropriate State law to have the claims decided between the parties. But when there is a specific terms in the contract, the parties are bound by the terms in the contract."

46. This decision is of little assistance to the appellant since the contentions raised by them before us herein were not considered by this Court therein. 47. From the conspectus of views taken in the decisions of different High Courts noted above it is clear that the liability of a common carrier under the Carriers Act is that of an insurer. This position is made further clear by the provision of Section 9, in which it is specifically laid down that in a case of claim of damage for loss to or deterioration of goods entrusted to a carrier it is not necessary for the plaintiff to establish negligence. Even assuming that the general principle in cases of tortious liability is that the party who alleges negligence against the other must prove the same, the said principle has no application to a case covered under the Carriers Act. This is also the position notwithstanding a special contract between the parties. These principles have held the field over a considerable length of time and have been crystallised into an accepted position of law. No good reason has been brought to our notice to persuade us to make a departure from the accepted position. Therefore, we reiterate the position of law noticed above. The consequential position that follows is that the contention of Mr. Ashok Desai, learned Senior Counsel that the respondents herein having failed to establish negligence on the part of the appellant, their claim for damages should be rejected, cannot be accepted."

7. THUS we opine that condition limiting the liability of the opposite party to US \$ 100 is inapplicable in the present case as the carriage of goods was only in India and secondly it is nobody's case that any attention of the consumer-complainant was drawn to Condition No. 7 on the reverse of credit agreement form which was not signed by the complainant and which was also in small and fine print. It could not be said that complainant was aware of any such condition. That condition would not, therefore, limit the liability of the opposite party. No argument has been addressed if computer hardware would come within the terminology scientific instrument as contained in the Schedule to the Carriers Act, 1865 so as to bring the case within the provision of Section 3 of that Act. The Arbitrator held that it could not be disputed that the consignment note was in the standard printed form and the clause limiting the liability, though appearing on the face of it, was in a very small and fine print and further there was no evidence to show that the said clause or term was brought to the notice of the complainant, much less discussed with complainant's representative when the consignment note was issued and consignment collected for transportation. Arbitrator was, therefore, of the view that the clause limiting the liability could not be availed of by the opposite party and that it would have to make good the full value of the consignment to the complainant. Numerous judgments have been cited before us for and against the value to be attached to such a clause. Then the condition in a contract is in a very fine and small print and the contract

in a standard form. It may perhaps be better to refer to the following paragraphs (paras 12-007 to 12-016) in the treatise Chitty on Contracts (Volume-I) - (27th Edition) dealing with the Standard Form Contracts : "12-007. Contracts in standard form-A different problem may arise in proving the terms of the agreement where it is sought to show that they are contained in a contract in standard form i.e. in some ticket, receipt, or standard form document. The other party may have signed the document, in which case he is bound by its terms. More often, however, it is simply handed to him at the time of making the contract, and the question will then arise whether the printed conditions which it contains have become terms of the contract. The party receiving the documents will probably not trouble to read it, and may even be ignorant that it contains any conditions at all. Yet standard form contracts very frequently embody clauses which purport to impose obligations on him or to exclude or restrict the liability of the person supplying the document. Thus, it becomes important to determine whether these clauses should be given contractual effect.

12-008 Contractual document-The document must be of a class which either the party receiving it knows, or which a reasonable man would expect to contain contractual conditions. Thus a cheque book, a ticket for a deck chair, a ticket handed to a person at a public bath house and a parking ticket issued by an automatic machine have been held to be cases "where it would be quite reasonable that the party receiving it should assume that the writing contained no condition and should put it in his pocket unread". On the other hand, a railway or ship ticket or a receipt for goods deposited has been held to be a contractual document. 12-009. Time of notice-The conditions must be brought to the notice of the party to be bound before or at the time when the contract is made. If they are not communicated to him until after the contract is concluded, they will be of no effect. In *Olley v. Marlborough Court Ltd.*, certain property of the plaintiff was stolen from his hotel bedroom owing to the negligence of the hotel management. On arrival at the hotel he had signed the hotel register which contained no mention of any exemption clauses, but in the bedroom there was a notice disclaiming liability for articles lost or stolen. It was held that the notice was ineffective as he had not been made aware of it until after the contract was made.

12-010. Course of dealing-Conditions will not necessarily be incorporated into a contract by reason of the fact that the parties have, on previous occasions, dealt with each other subject to those conditions. But they may be incorporated by a "course of dealing" between the parties where each party has led the other reasonably to believe that he intended that their rights and liabilities should be ascertained by reference to the terms of a document which had been consistently used by them in previous transactions. Conditions usual in a particular trade may likewise be incorporated where both parties are in the trade and are aware that conditions are habitually imposed and of the substance of those conditions, even if they are not referred to at the time of contracting. 12-011. Meaning of notice-It is not necessary that the conditions contained in the standard form document

should have been read by the person receiving it, or that he should have been made subjectively aware of their import or effect. The rules which have been laid down by the Courts regarding notice in such circumstances are three in number :

(1) If the person receiving the document did not know that there was writing or printing on it, he is not bound. (2) If he knew that the writing or printing contained or referred to conditions, he is bound. (3) If the party tendering the document did what was reasonably sufficient to give the other party notice of the conditions, and if the other party knew that there was writing or printing on the document, but did not know it contained conditions, then the conditions will become the terms of the contract between them.

12-012. Reasonable sufficiency of notice-It is the third of these rules which has most often to be considered by the Courts. The question whether the party tendering the document has done all that was reasonably sufficient to give the other notice of the conditions is a question of fact in each case, in answering which the Tribunal must look at all the circumstances and the situation of the parties. But it is for the Court, as a matter of law, to decide whether there is evidence for holding that the notice is reasonably sufficient. Cases in which the notice has been held to be insufficient have been those where the conditions were printed on the back of the document, without any reference, or any adequate reference, on its face, such as, "For conditions, see back", or where the conditions were obliterated by a printed stamp. In many situations, however, the tender of printed conditions will in itself be sufficient. It is not necessary that the conditions themselves should be set out in the document tendered they may be incorporated by reference, provided that reasonable notice of them has been given. 12-013. Onerous or unusual terms-Although the party receiving the document knows it contains conditions, if the particular condition relied on is one which is particularly onerous or unusual term, or is one which involves the abrogation of a right given by statute, the party tendering the document must show that it has been brought fairly and reasonably to the other's attention. "Some clauses, which I have seen", said Denning, L.J., "would need to be printed in the red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient".

12-014. Personal disability-It is immaterial that the party receiving the document is under some personal, but non-legal, disability, such as blindness, illiteracy, or an inability to read out language. Provided the notice is reasonably sufficient for the class of persons to which the party belongs e.g. passengers (on a ship or railway) he will be bound by the conditions. 12-015. Printed notices-Where printed notices are exhibited, it may be sufficient if the party to be bound has, before or at the time of making the contract, had his attention drawn to the notices, or received a printed document which refers him to the notices, in circumstances which make it clear to him that the contract is subject to the conditions contained in the notices. The reference may be circuitous provided it is clear. It has, however, been stated by Denning, L.J. that : "The party who is

liable at law cannot escape liability by simply putting up a printed notice, or issuing a printed catalogue, containing exempting conditions. He must go further and show affirmatively that it is a contractual document and accepted as such by the party affected". In many situations it will be sufficient to display a prominent public notice which can be plainly seen at the time of making the contract. But the issue of a catalogue or brochure which states that the contract to be concluded will be subject to exempting conditions may not be sufficient to make the conditions terms of the contract if further steps to incorporate the conditions are not taken at the time the contract is concluded. 12-016. Statute—Certain additional requirements of form have been imposed by statute on some classes of contract, for example, by the Carriers Act, 1830, Section 4 common carriers cannot limit their liability by publication of notices alone, but only by special contract."

8. STATEMENT of law as contained in the Chitty's Law of Contract and reproduced above is based on various judgments of English Courts. When there is a condition in a contract signed by both the parties that condition printed in small and fine prints is meant to limit the liability of one of the parties. It should be construed strictly. Small and fine print should be clearly discernible and should draw the pointed attention of the consumer. Directives of the European Commission provide that a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirements of good faith, it causes a significant imbalance in the parties rights and obligations arising under the contract, to the detriment of the consumer. An English Court has been empowered to override a contract term if it appears it to be unreasonable. United Kingdom has enacted the law called the Unfair Contract Terms Act, 1977 which provides certain conditions which must be satisfied to judge the requirement of reasonableness in a contract term. If, however, there is no such contract entered into by both the parties, there must be proof that the terms which are printed on the reverse are otherwise notified elsewhere have been brought to the notice of the consumer or at least that all could be reasonably done in that regard has been done by the opposite party to bring the same to the notice of the consumer. Such a term could be in bold print and it should be easily readable so that a consumer cannot miss reading it and understand it. A condition in small print would amount to a communication only when attention of consumer could be specifically drawn to it. We may note some of the judgments cited at the Bar. In *Hood v. Anchor Line (Henderson Bros.) Ltd.*, (1918-19) All ER Rep. 98, it was held that the onus was on the respondents to prove that they had done what was reasonably sufficient to bring the condition to the attention of the appellant; in view of the conspicuous notice on the envelope, the notice in conspicuous type on the ticket stating that it was subject to the conditions, and the notice in capital letters at the foot requesting passengers carefully to read the contract, they had discharged that onus; and therefore, the liability of the respondents was limited to the Clause 10 mentioned in the condition. In *L'estrage v. Graucob Ltd.*, (1934) All ER (Rep) 16, it was held that the contract having been

signed by the buyer, the implied warranty was excluded by the express condition in the contract, notwithstanding that the buyer did not know that the contract contained such a condition. In this case it was also held that where a term or condition is contained in a railway ticket or other unsigned document it is necessary, to bind the recipient of the document, to prove that he was aware or ought to have been aware, of the term or condition, but when a document containing contractual terms is signed, in the absence of fraud or misrepresentation, the party signing it is bound, and it is wholly immaterial which or not he has read the document.

9. IN *Thompson v. London, Midland and Scottish Rail Co.*, (1929) All ER Rep. 474, it was held that the fact that the plaintiff was unable to read could not avail her; the condition exempting the company from liability for injury suffered by the holder of a ticket issued at a greatly reduced fare was not unreasonable; the company was to be taken as having made an offer to intending travellers that, if they would accept conditions on which the offer was made, they could be taken on special occasions and by special train for the specified journey at a reduced fare; the fact that the conditions could not be immediately ascertained by the plaintiff, but were to be sought in a document or documents other than the ticket to find which document or documents there might be some difficulty or delay, did not prevent the conclusion that the company had taken reasonable steps to bring the condition to the notice of the plaintiff, and therefore, the company were entitled to rely on the condition which relieved them from liability. It was also observed if the condition had been so unreasonable that nobody could contemplate that it existed, it would not have been binding.

10. IN *Sm. Mukul Dutta Gupta & Ors. v. INdian Airlines Corporation*, AIR 1962 Calcutta 311, in the office of the INdian Airlines Corporation a board was affixed at the door in which the conditions of carriage were written in bold letters. IN the ticket issued to the passenger itself it was stated that the ticket was issued subject to the conditions of carriage. The conditions of carriage were printed inside the cover page of the ticket though in very small letters. It was held that the Corporation did take steps to bring it to the notice of the passengers that the tickets were being issued subject to certain conditions of carriage. A passenger who was so minded could have been appraised of these conditions, if not from the ticket itself, at least from the board displayed at the door in which the conditions of carriage had been stated in sufficiently bold letters legible to all. The passenger must be deemed to have purchased the ticket with notice of the conditions and must also be deemed to have accepted them impliedly though not expressly. In *Indian Airlines Corporation v. Jothaji Maniram*, AIR 1959 Madras 285, it was held that under general law a common carrier is liable practically as an insurer of the goods. That liability can be regulated by a contract entered into between the parties. It is invariably the practice for common carriers to enter into a contract, defining and limiting their liability. That practice is so universal that in the normal course of things one would expect any consignor of goods to look into conditions which are found in consignment notes. To say that in every

case the carrier should prove that he drew the attention of the consignor to the clause in the consignment note regarding limitation of its liability in extending the rule beyond its limits.

In *Sudhir Deshpande v. Elbee Services Ltd.*, Bombay, I (1994) CPJ 140 (NC)=1986-96 National Commission & SC on Consumer Cases 1968 (NS), this Commission said : "We may make an observation here that the mention of the limited liability is in very small print at the back of consignment note which is not necessarily read by the consignor before he/she entered into the transaction of despatch of the consignment and hence it cannot be said to be a part of negotiation between the two parties. Further, whatever may be the binding nature of the said clause in an action based on breach of contract we are of the view that it cannot restrict the liability of the courier for the consequences flowing out of its negligence and deficiency in the performance of the service undertaken by it."

11. IN *Skypak Couriers Pvt. Ltd. v. Consumer Education and Research Society*, 1986-96 National Commission & SC on Consumer Cases 1788 (NS), this Commission upheld the observation of the State Commission as under : "(v) The objection of the Couriers that liability of the opposite party was limited to Rs. 100/- did not carry any weight as the printed memo containing the above condition was neither signed by any body nor there was any evidence to show that the terms printed therein were shown to the consignor or the consignee or that the same were agreed upon by the consignor."

In *Olley v. Marlborough Court Ltd.*, reported in 1949 All ER 1276, one of the point was whether the owners of the hotel are protected by the notice which they put in the guest bed room providing, "The proprietors will not hold themselves responsible for articles lost or stolen unless handed to the manageress for safe custody". Lord Denning who was one of the Judges said : "The first question is whether that notice formed part of the contract. People who rely on a contract to exempt themselves from their common law liability must prove that contract strictly. Not only must the terms of the contract be clearly proved, but also the intention to create legal relations - the intention to be legally bound - must also be clearly proved. The best way of proving it is by a written document signed by the party to be bound. Another way is by handing him, before or at the time of the contract, a written notice specifying certain terms and making it clear to him that the contract is in those terms. A prominent public notice which is plain for him to see when he makes the contract would, no doubt, have the same effect, but nothing short of one of these three ways will suffice. It has been held that mere notices put on receipts for money do not make a contract. [See *Chapelton v. Barry Urban District Council*, (1940) 1 All ER 356]. So also, in my opinion, notices put up in bedrooms do not of themselves making a contract. As a rule, the guest does not see them until after he has been accepted as a guest. The hotel company, no doubt, hope that the guest will be held bound by them, but the hope is vain unless they clearly show that he agreed to be bound by them,

which is rarely the case."

He further observed that to exempt a person from liability for negligence, the exemption should be clear on the face of the contract and that it should not depend on what view the Courts may ultimately take on the question of common inn or private hotel.

12. IN *Thornton v. Shoe Lane Parking Ltd.*, (1971) 1 All ER 686, it was held that the defendants were not able to avoid liability by relying on the exempting condition because, in order to show that the plaintiff was bound by the condition, it was necessary to show either that he knew of it or that the defendants had done what was reasonably necessary to draw it to his attention, for this purpose, where the condition was exceptionally wide and destructive of the plaintiff's rights or was one which was not shown to be usual in that class of contract, it was not sufficient to show that the plaintiff had been given notice that the ticket was issued subject to conditions, it must be shown that adequate steps had been taken to draw his attention in the most explicit way to the particular exempting condition relied on, in the present case the defendants had failed to show that the plaintiff knew of the condition or that they had taken sufficient steps to draw his attention to it. In *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.*, (1988) 1 All ER 348, it was held that "where a condition in a contract was particularly onerous or unusual and would not be generally known to the other party, the party seeking to enforce that condition had to show that it had been fairly and reasonably brought to the other party's attention. Condition 2 was an unreasonable and extortionate clause which the plaintiffs had not brought to the attention of the defendants and, therefore, it did not become part of the contract and the defendants were not bound by it". In *Chapelton v. Barry Urban District Council*, (1940) 1 All ER 356, there is an interesting editorial note. Under the head note of this judgment which reads as under : "EDITORIAL NOTE. The basis of the decision here is that the ticket is a mere voucher or receipt and given to the hirer merely for the purpose of being shown at a later time to prove payment or the time of the commencement of the hiring. It is said to be entirely distinguishable from a railway ticket which contains upon it the terms upon which the railway company agree to carry the passenger."

The case of *Bharathi Knitting Co. v. DHL Worldwide Express Courier* (supra), which was also cited, does not deal with the question of small and fine print. Ultimately it will be seen that each case will have to depend upon the facts of that case. These judgments are merely guidelines and are useful to the extent of interpreting the law.

13. CONSIDERING the whole conspectus of the matter, the Arbitrator in the present case was right in his view that opposite party could not limit its liability to US \$ 100 per consignment as per the term contained in the consignment note. The objections to the award are, therefore, dismissed with costs of Rs. 10,000/-. The award will form part of the order of this Commission. Objections dismissed.