

A M/s BAWA PAULINS PVT. LTD.

v.

UPS FREIGHT SERVICES (INDIA) PVT. LTD. AND ANOTHER
(Civil Appeal No. 8298 of 2022)

B NOVEMBER 10, 2022

[B. R. GAVAI AND B. V. NAGARATHNA, JJ.]

- Consumer Protection – Sale of Goods through ‘Free on Board’ Basis – Quantum of compensation – Appellant during the course of its business entered into a contract with respondent no. 5 for export of goods for a total invoice value of US\$ 31,920 (Rs.13,79,901/- approx.) – Mode of payment was agreed to be through Letter of Credit (LC) against the Forwarder Cargo Receipt (FCR) – The sale of goods was through a ‘Free on Board’ (FOB) contract – Respondent Nos. 1-3 were appointed as forwarding agents to collect goods and forwarding the same – Respondent no.1 mentioned the port of loading to be Jawaharlal Nehru Post Trust, Bombay instead of FOB, New Delhi on the FCR, which was rectified later on – After shipping goods, the Letter of Credit presented by the appellant could not be honoured on account of discrepancies in the FCR – The appellant neither got the goods back nor did they get any payment in respect of the said goods and therefore the appellant approached the concerned State Consumer Commission – State Commission allowed the complaint and awarded a sum of 13,79,901/- towards loss suffered, 50,000/- for mental agony and 10,000 towards the cost of litigation – National Commission set aside the judgment passed by the State Commission – The National Commission, reduced the compensation to Rs.10,000/- only along with an interest at the rate of 9% p.a. – On appeal, held: It is only after the appellant approached respondent no.1 to issue a certificate/letter rectifying the error regarding the wrong point of loading, the respondent issued such a certificate/letter mentioning that the shipment was loaded from FOB New Delhi and effected from JNPT Bombay – The State Commission has based its decision that a mistake was committed by the respondent no.1 while issuing the FCR to the appellant – The National Commission has categorically held that there was deficiency in rendering services by the respondent no.1, therefore,*

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the it ought not have reduced the compensation payable to the appellant – National Commission was not right in setting aside the judgment and order passed by the State Commission – Respondents to make the payment as assessed by the State Commission. A

Words and Phrases – Free on Board – Bill of Lading – Letter of Credit – Explained. B

Allowing the appeal, the Court

HELD : 1. As per Section 2 (g) of the Act of 1986, ‘deficiency’ is defined as “fault, imperfection shortcoming or inadequacy in the quality, nature, and manner of performance which is required to be maintained by or under any law for time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service.” What is needed to be assessed here is whether the admitted error on the part of the respondent Nos. 1 to 3 would amount to deficiency in service or not. In the factual matrix of the present case, it is noted that the appellant herein vide its letter dated 11.02.1999 gave shipping instructions to respondent Nos. 1 to 3 wherein it was mentioned that the shipment is from FOB, New Delhi to Baltimore. However, despite clear instructions vide the said letter, respondent Nos. 1 to 3 negligently recorded the port of loading to be JNPT Bombay. It is due to this negligence as well as deficiency in service of the respondent Nos. 1 to 3 that the respondent No. 4 Bank refused to accept/honour the documents including the FCR and the same was returned to the bank of the appellant. Due to refusal of honouring the said documents, the sale consideration was not paid to the appellant herein who suffered loss as well as mental harassment and agony. [Paras 36 & 37][1176-F-H; 1177-A-B] C

2. The appellant herein received the telex/letter on 08.03.1999 wherein the documents including the FCR were refused. It is only after the appellant approached respondent No.1 to issue a certificate/letter rectifying the error regarding the wrong point of loading that the respondent No.1 issued such a certificate/letter dated 30.03.1999 mentioning that the shipment was loaded from FOB New Delhi and effected from JNPT Bombay. The D E F G H

- A National Commission in the impugned order has held that it is an admitted position that a mistake was committed by the respondent No.1 while issuing the FCR to the appellant. The State Commission has based its decision on the said reasoning. When it is admitted that a mistake was committed by the respondent No.1, it is not correct to say that the said mistake was not noticed by the appellant while forwarding the documents to its bank and that the appellant should have been more vigilant. It would be incorrect to now say that the appellant should have exercised due diligence in that regard. The National Commission has categorically held that there was deficiency in rendering services by the respondent No.1, therefore, the National Commission ought not have reduced the compensation payable to the appellant herein. In view of the aforesaid discussion, we find that the National Commission was not right in setting aside the judgment and order passed by the State Commission and therefore, the impugned judgment and order passed by the National Commission is liable to be set aside. [Paras 38-40][1177-C-G]

Hindustan Steel Workers Construction Ltd. V G.S. Atwal & Co. (Engineers) (P) Ltd. (1995) 6 SCC 76 – relied on.

- | E | <u>Case Law Reference</u> | |
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| | (1995) 6 SCC 76 | relied on |
| | CIVIL APPELLATE JURISDICTION : Civil Appeal No.8298 of 2022. | |
| F | From the Judgment and Order dated 30.04.2015 of the National Consumer Disputes Redressal Commission New Delhi in First Appeal No.6 of 2010. | |
| | Rajiv Garg, Ashish Garg, Lalit Nagar, T. L. Garg, Advs. for the Appellant. | |
| G | Sudhanshu S. Choudhari, Vikas Kumar, Devmani Bansal, Manish Paliwal, Advs. for the Respondents. | |
| | The Judgment of the Court was delivered by | |
| | NAGARATHNA, J. | |
| H | Leave granted. | |

2. This Civil Appeal has been filed assailing the impugned judgment and order dated 30.04.2015 passed by the National Consumer Disputes Redressal Commission (hereinafter referred to as 'National Commission' for the sake of convenience) at New Delhi by which the National Commission has allowed Appeal No. 6 of 2010 filed by respondent Nos.1 to 3 and set-aside the judgment and order dated 09.02.2009 passed by the State Commission, New Delhi. A

3. The National Commission *vide* impugned order has reduced the amount of compensation to Rs.10,000/- (Rupees Ten Thousand) as against the amount granted by the State Commission to be paid to the appellant herein i.e., a sum of Rs.13,79,901/- (Rupees Thirteen Lakhs Seventy-Nine Thousand Nine Hundred and One), together with compensation of Rs.50,000/- (Rupees Fifty Thousand) and cost of litigation amounting to Rs.10,000/- (Rupees Ten Thousand). C

4. The issue involved in the present appeal is in a very narrow compass and relates only to the quantum of compensation that the appellant is entitled to receive from the respondents. D

5. The appellant herein- original complainant, a private limited company, filed a consumer complaint before the State Commission against the present respondents-opposite parties. Respondent No.1- UPS Freight Service (India) Pvt. Ltd. (formerly known as M/s Fritz Freight Forwarding India Pvt. Ltd.) and respondent No.2- M/s Fritz International are the subsidiaries and agents of respondent No.3- M/s Fritz Companies Inc. to administer, look after and carry out the business of respondent No. 3, in India. Respondent No.4- Bank of Boston is the consignee's bank and respondent No.5- M/s County Seat Stores, New York is the consignee company. E F

6. IA No. 1 of 2015 seeking deletion of respondent No.5 was allowed and IA No. 40994 of 2017 for deletion of name of respondent Nos. 2 - M/s. Fritz International and respondent No. 3- M/s. Fritz Companies Inc. was allowed by this Court and were deleted from the array of parties *vide* order dated 17.07.2017. Respondent No.5- M/s County Seat Stores was deleted from the array of parties *vide* order of this Court dated 08.07.2015. G

7. Succinctly stated, the facts of the case are that the appellant herein during the course of its business entered into a contract with respondent No.5 for export of two hundred and thirty-four (234) packages H

- A of MN's 100% CTN Twill messenger bags for a total invoice value of US\$ 31,920 (equivalent to Rs.13,79,901/- approximately). The mode of payment was agreed to be through Letter of Credit ("LC", for short) against the Forwarder Cargo Receipt ("FCR", for short). For the said purpose, respondent No.5 consignee appointed respondent No.4 as the purchaser's bank through which the Letter of Credit was opened in favour of the appellant. Respondent Nos. 1-3 were appointed as forwarding agents to collect the goods from the appellant and forward the same.
- B 8. As per the terms of the agreement and the Letter of Credit, the shipment was Free on Board ("FOB", for short), from New Delhi to Baltimore M.D. Respondent No.5 consignee appointed Respondent Nos.1-3 as their forwarding agents/consolidators to execute the entire transaction for respondent No.5 with the appellant herein. A Purchase Order dated 30.10.1998 was issued in that respect.
- C 9. On 11.02.1999, the appellant issued shipping instructions to respondent Nos.1 to 3 about the consignment from New Delhi to Baltimore and respondent No.1 in turn issued a FCR to the appellant on 22.02.1999.
- D 10. Immediately after shipping the goods, the appellant presented the documents including the aforesaid FCR to its bank, namely, Canara Bank for negotiating with respondent No.4 – Bank to release the payment against the Letter of Credit which was opened in favour of the appellant herein.
- E 11. By letter dated 08.03.1999, respondent No.4 informed the bank of the appellant that in accordance with the Uniform Customs and Practice for Documentary Credits ("UCP 500", for sake of convenience), the documents had been refused and that the Letter of Credit could not be honoured on account of discrepancies in the FCR issued to the appellant. The first discrepancy was late shipment. The second discrepancy was that respondent No.1 mentioned the port of loading to be Jawaharlal Nehru Post Trust ("JNPT", for short), Bombay instead of FOB, New Delhi on the FCR.
- F 12. By letter dated 18.03.1999, respondent No.4 - Bank informed appellant's bank that they had approached respondent No.5 for approval to pay the sale consideration but Respondent No.5 was not willing to honour such request and thereafter the documents were returned to the H appellant's bank i.e., the Canara Bank for further disposal.

13. On being notified by the appellant's bank of Respondent No. 5's refusal to release the sale consideration, the appellant approached respondent No.1 herein in connection with the negligence on their part in mentioning the wrong point of loading in the FCR. Respondent No.1 then issued a letter/certificate dated 30.03.1999, rectifying the error and mentioning therein that the shipment was loaded from FOB, New Delhi and was effected from JNPT, Bombay.

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14. As per the appellant's version, the aforesaid letter/certificate was accepted by respondent No.4 Bank which thereafter released the documents to respondent No.5 but later respondent No.5 returned the documents to respondent No.4 Bank and in order to camouflage their misdeeds, they had put ink on the endorsement which respondent No.4 Bank had made on the reverse side of the FCR. In the meanwhile, respondent Nos.4 and 5 acted in connivance and got the goods cleared and refused to accept the documents. As per the appellant, after receiving the documents including the FCR, the appellant got done infrared scanning of the reverse side of the FCR and detected the misconduct of the respondents.

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15. The appellant herein neither got the goods back nor did they get any payment in respect of the said goods and therefore the aggrieved appellant approached the concerned State Commission by way of a complaint claiming Rs.13,79,901/- (Rupees Thirteen Lakhs Seventy-Nine Thousand Nine Hundred and One) as value of goods consigned; Rs.4,53,666/- (Rupees Four Lakhs Fifty-Three Thousand Six Hundred and Sixty Six) as interest at the rate of 24% p.a., and Rs.1,50,000/- (Rupees One Lakh Fifty Thousand) in lieu of loss of profit.

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16. The State Commission *vide* order dated 09.02.1999 allowed the complaint filed by the appellant herein and directed the respondents to pay a sum of Rs.79,901/- (Rupees Seventy-Nine Thousand Nine Hundred and One). As there was a typographical error in the figure, it was later corrected to Rs.13,79,901/- (Thirteen Lakhs Seventy Nine Thousand Nine Hundred and One) towards loss suffered by the appellant, Rs.50,000/- (Rupees Fifty Thousand) towards compensation for mental agony and harassment and Rs.10,000/- (Rupees Ten Thousand) towards cost of litigation. The pertinent findings of the State Commission can be encapsulated as under:

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- i. That the appellant herein had acted as a beneficiary of the services rendered by respondent Nos.1 and 2 and as such

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- A is a consumer within the meaning of Section 2(1)(d)(ii) of the Consumer Protection Act, 1986 (hereinafter, referred to as the Act of 1986).
- B ii. That respondent Nos.1 and 2 admitted that the port of loading was mentioned as JNPT, Bombay instead of FOB, New Delhi. The said error was rectified only on 30.03.1999 when respondent No.1 wrote a letter seeking rectification/correction of the FCR.
- C iii. That the whole transaction was covered by Letter of Credit opened by respondent No.4 Bank and thus filing of bankruptcy application by the respondent No.5 had no effect on the payment that the appellant was entitled to receive.
- D iv. that due to the negligence of the respondent Nos.1 and 2, the Letter of Credit was not honoured by respondent No.4 and therefore the appellant had to suffer loss due to negligence of the respondent Nos. 1 and 2. That more than ten years had passed and respondent Nos.1 and 2 have to make up for the loss suffered by the appellant herein.
- E 17. The appellant herein filed an application seeking rectification of the typographical error in the judgment and order of the State Commission dated 09.02.2009 wherein the loss of amount towards loss was mentioned wrongly mentioned as Rs.79,901/- instead of Rs.13,79,901/-. The State Commission *vide* its judgment and order dated 17.03.2009 rectified the error and granted Rs.13,79,901/- (Rupees Thirteen Lakhs Seventy-Nine Thousand Nine Hundred and One) towards loss suffered by the appellant, Rs.50,000/- (Rupees Fifty Thousand) towards compensation for mental agony and harassment and Rs.10,000/- (Rupees Ten Thousand) towards cost of litigation.
- F G 18. Aggrieved by the judgment and order passed by the State Commission, respondent Nos. 1 to 3 approached the National Commission by way of an appeal. The National Commission *vide* order dated 18.08.2010 admitted the appeal and condoned the delay of 216 days subject to depositing a sum of Rs. 10,00,000/- (Rupees Ten Lakhs) with the National Commission within a period of four weeks from the date of order. The National Commission by the impugned judgment and order disposed of the appeal filed by respondent Nos. 1 to 3 herein by allowing the same and setting-aside the judgment and order passed by the State
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Commission. The National Commission held that the order of the State Commission holding respondent Nos.1 to 3 liable to the extent of the price of the goods, Rs.50,000/- as compensation and Rs.10,000/- as cost of litigation could not be sustained and respondent No.1 was thus directed to pay a sum of Rs.10,000/- as compensation to the appellant herein along with interest at the rate of 9% per annum from the date of filing of the complaint till the date of the payment. The pertinent observations of the National Commission are encapsulated as under:

- i. That although it was an admitted position that a mistake was committed by respondent No.1 herein while issuing the FCR to the appellant herein by showing that the shipment would be loaded from JNPT, Bombay instead of FOB, New Delhi, nevertheless, the aforesaid mistake was not noticed by the appellant while forwarding the documents to its banker. Thus, the deficiency on the part of respondent No.1 in rendering services could have been redressed had the appellant been vigilant. A
- ii. That it could not be gathered from the letter dated 18.03.1999 as to why the respondent No.5 was not willing to accept the document for payment. That it was not clear whether the unwillingness on the part of respondent No.5 was due to late shipment of the goods or due to the wrong port being indicated. B
- iii. That the mistake in the document could not have been the reason for respondent No.5 declining to accept the documents for payment unless the consignment itself had not reached its destination on account of the aforesaid mistake. That it was not the case of the appellant herein that the consignment had not reached Baltimore at all. Therefore, the description of the port is inconsequential. Further, no evidence was produced by the appellant to prove that the return of documents was solely on account of mistake committed by respondent No.1 herein. C
- iv. That the appellant herein did not lose the price of goods exported by it to the US on account of the mistake committed by respondent No.1 while issuing FCR. That it could be possible that the appellant lost its price of goods D

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- A due to the connivance between the respondent No.4 and respondent No.5 as was contended by the appellant, as a result of the alleged endorsement made on the FCR which was later concealed by putting ink on it. However, such conduct of Respondent No. 4 and 5, which may have resulted in loss in the price of the appellant's goods, could not be attributed to the mistake in the FCR.
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19. Aggrieved by the reduction in the amount of compensation, the appellant-original complainant has approached this Court by way of the present appeal.
- C 20. We have heard Sri Rajiv Garg, learned counsel for the appellant, Sri Sudhanshu S. Choudhari, learned counsel for respondent No.1 and Sri Vikas Kumar, learned counsel for respondent No.4 and perused the material on record.
- D 21. Learned counsel for the appellant at the outset submitted that the State Commission was right in assessing the claim of the appellant and had rightly granted the same, whereas, the National Commission has erred in reducing the said amount towards the loss of goods, compensation for mental agony and harassment and the cost of litigation. The submissions of the learned counsel for the appellant are summarised as under:
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- 21.1 That the appellant was, as a seller, only obliged to hand-over the consignment at New Delhi to respondent No.2, which the appellant had duly carried out and therefore the appellant became entitled to sale consideration. However, the appellant was deprived of the same for no fault of his and solely owing to deficiency and negligence of the respondents herein.
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- 21.2 That respondent Nos. 1 to 3 admitted before the State Commission their mistake in wrongly mentioning the port of loading as JNPT, Bombay instead of FOB, New Delhi on account of inadvertence and accordingly, a correction was carried out later. It is due to the mistake of these respondents that respondent No.4 - Bank failed to honour the FCR and declined the payment in favour of the appellant herein.
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- 21.3** That respondent Nos. 1 to 3 also admitted before the National Commission their mistake of writing the wrong port of loading in the appeal and accepted that it was due to an oversight on their part. The said appeal was also time-barred, being filed after a delay of 216 days. This was not appreciated by the National Commission A
- 21.4** That the National Commission failed to notice that respondent Nos. 1 to 3 had acted in collusion with respondent Nos. 4 and 5 and they got the consignment released from Customs in USA with the same FCR which could have been done only at the behest of respondent Nos. 1 to 3 who were the shippers of respondent No. 5. The appellant was thus deprived of both the goods as well as the sale consideration. B
- 21.5** That the Letter of Credit (LC) was irrevocable, the FCR was prepared by the respondent Nos. 1 to 3 on the instructions given by the appellant herein. Therefore, respondent No. 4 had no option but to release the payment without any objection. C
- 21.6** That the National Commission erred in noting that respondent Nos. 1 to 3 were appointed jointly by the appellant and respondent No. 5 and therefore held that they could not be held liable to pay for the complete loss and therefore reduced the amount of compensation. However, the fact of the matter is that the respondent Nos. 1 to 3 were appointed as the shippers, solely by the respondent No. 5 – the buyer/consignee of the goods as per an FOB contract. D
- 21.7** That the delay in payment could not be attributed to the appellant herein since the Letter of Credit specified that the consignment had to be shipped in the month of March and the appellant herein on 11.02.1999 had informed the shippers to take the delivery. Any delay occasioned was only on account of the conduct of the shippers in taking delivery of the goods and not on the part of the appellant. E
- 21.8** That the facts narrated above would demonstrate that the respondents acted in collusion with each other to deceive G
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- A the appellant herein. The *modus operandi* was to issue a defective FCR and withhold the documents till the expiry of the Letter of Credit and thereafter, rectify the FCR and in the meanwhile, get the goods delivered without payment of consideration to the appellant.
- B 22. *Per contra*, the learned counsel for the respondent No.1 supported the judgment and order passed by the National Commission and contended that the National Commission has rightly set-aside the order passed by the State Commission, thereby reducing the compensation and amount payable to the appellant. The submissions of the learned counsel for the respondent No.1 are epitomized as under:
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- 22.1 That had the appellant herein been vigilant, the FCR could have been corrected before presenting the same to the banker.
- 22.2 That the endorsement on the reverse side of FCR had been made prior to Respondent No. 4 issuing the letter dated 18.03.1999 to the bank of the appellant i.e., the Canara Bank. That the National Commission was right in holding that the return of the documents could be on account of the connivance between respondent Nos.4 and 5 and not on account of the error in names of port of loading i.e., JNPT, Bombay instead of FOB New Delhi by respondent No.1 while issuing the FCR. Therefore, respondent Nos. 1 to 3 are not responsible for the payment.
- 22.3 That the endorsement made on the reverse side of the FCR and later on concealed by putting ink on it and the return of documents by respondent No.4 cannot be attributed to the mistake in the FCR but solely to the acts of connivance on the part of respondent Nos.4 and 5.
- 22.4 That the goods exported by the appellant were seized by the U.S. Customs and thereafter auctioned by the Customs to recover the dues. The whole transaction failed since respondent No.5 had filed for bankruptcy under the US laws and the goods went to General Order due to non-payment of freight, ocean duty etc. by respondent No.5.
- 22.5 That respondent No.4 had clearly stated in their letter dated 18.03.1999 that respondent No.5 was not willing to make

the payment. The appellant did not take any action against respondent No.5 for recovery of money even after knowing that it refused to pay inspite of release of the goods. Thus, the respondent Nos.1 to 3 are nowhere concerned with the transaction between the appellant and respondent No.5 and thus are not responsible for the said payment.

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23. Having heard the learned counsel appearing for the respective parties, the following points would arise for our consideration:

- (a) Whether the National Commission was justified in reversing the judgment and order passed by the State Commission thereby reducing the amount of compensation that the appellant herein was entitled to?
- (b) Whether the judgment and order of the National Commission calls for any interference or modification by this Court?
- (c) What order?

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24. It is an admitted position that the goods in the consignment have been delivered to the respondent No.5 on 17.02.1999 and this fact has not been disputed any of the parties herein. The only issue before this Court is whether the compensation ought to have been paid to the appellant and as to what should be the quantum of the said compensation, if at all the same is to be allowed.

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25. The State Commission had awarded compensation of Rs.13,79,901/- towards loss suffered by the appellant plus Rs.50,000/- towards compensation for mental agony and harassment plus Rs.10,000/- towards cost of litigation. The National Commission, on the other hand, reduced the compensation to Rs.10,000/- only along with an interest at the rate of 9% per annum from the date of filing the complaint till the date of payment. It is also noted that the National Commission directed the payment of such amount from the amount deposited by the respondent No.1 before the National Commission while filing the appeal and the remaining amount was directed to be refunded to respondent No.1 after deducting the amount payable to the appellant herein.

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26. On a perusal of the purchase order issued by respondent No.5 dated 30.10.1998 to the appellant, it is clear that respondent No.5 herein placed an order for Two Hundred and Thirty Four (234) packages of

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- A MN's 100% CTN Twill Messenger Bags. The mode of payment was agreed to be through an irrevocable Letter of Credit. The Letter of Credit was opened in favour of the appellant herein by respondent No. 5 through respondent No.4 Bank. Accordingly, the appellant herein issued shipping instructions to respondent No.1 along with the copy of the invoice, packing list and a copy of the Letter of Credit, on 11.02.1999. It is noted
- B that the said document shows 'invoice basis' as FOB, New Delhi and records that the shipment mode would be by sea from New Delhi to Baltimore. It is further noted that respondent No.5 appointed respondent Nos.1 to 3 as its shippers/forwarding agents and the said shippers/forwarding agents issued FCR dated 22.02.1999.
- C 27. It is also undisputed that the Letter of Credit was for a specific period of time i.e., till 28.02.1999 and was extended till 06.03.1999. The appellant has brought the extension letter to our attention. In the meantime, the documents including the FCR were submitted by the appellant to its bank, namely, Canara Bank for collection of the proceeds from respondent
- D No.4 Bank. It is noted that the documents submitted by the appellant along with the FCR were refused to be honoured by respondent No.4 by way of a telex dated 08.03.1999, citing two discrepancies, one, being late shipment and the other, being that the port of loading was shown as JNPT, Bombay instead of FOB, New Delhi. By letter dated 18.03.1999 addressed by respondent No.4 Bank to the appellant's bank, respondent No.4 returned the FCR and other documents to the appellant citing the reason that respondent No.5 is unwilling to make the payment.
- E 28. It is further noted that in the meantime, a letter/certificate was issued by respondent No.1 rectifying the error and stating that the shipment is 'FOB Delhi' and is being effected from JNPT Port at Mumbai.
- F Learned counsel for the appellant has also brought to our attention, a legal notice dated 13.10.1999 sent by the appellant to respondent Nos.1 to 3 herein wherein the appellant alleged that it was because of the discrepancy in the FCR, wherein the wrong port of loading had been entered, that the Letter of Credit in favour of the appellant could not be honoured.
- G Further it was also alleged that there also has been negligence on the part of the respondent Nos. 1 to 3 in not filing the Bill of Entry with the Customs due to which their shipment was seized by the Customs.
- H 29. It is also the case of the appellant herein that the respondents herein have acted in collusion with each other and have got the goods cleared based on the said FCR itself without paying the sale consideration

to the appellant. It is alleged that the respondents put an ink blot on the endorsement to camouflage their misdeeds. Aggrieved by the non-payment of dues as well as the action of the respondents in getting the goods released, the consumer complaint was filed.

30. In the instant case, the sale of goods was through a 'FOB' contract. 'FOB' contract means a contract "Free on Board". By such a contract the seller is to put on board at his own expenses which means this is a contract for sale of goods to be delivered free on board a ship. The buyer must name the ship upon which they are to be delivered and the seller must put them safely on board, meet the cost of doing so and for the buyer's protection, give possession of them to the ship only upon the terms of a reasonable and ordinary bill of lading or other contract of carriage; there the contractual liability of the seller as seller ceases and delivery to the buyer is complete as far as he is concerned. The goods are then at the risk of the buyer, he is responsible for the freight, and subject to the seller reserving the right of disposal, the property passes to the buyer. The price being payable against the bill of lading, they are at the risk of the buyer and he must pay the price on presentation of the bill of lading even if the goods have been lost.

31. Under the 'FOB' contract the seller is under no duty to make advance arrangements for shipping the goods or to bear any expense beyond that of putting the goods on board. That while putting the goods on board the seller is directly a party to the contract of carriage and he may be bound to get the bill of lading issued in buyer's name on the terms usual in the trade.

32. The bill of lading is an instrument signed by the master of shipping in his capacity of the carrier acknowledging the receipt of the merchant goods. There are usually three parts – one, is to be retained by the consigner of the goods; another, is sent to the consignee and the other one, is preserved by the master of the ship.

33. Undoubtedly, the appellant herein availed services provided by the respondent Nos. 1 to 3 and respondent No. 4 is a beneficiary of such services, therefore the appellant would fall under the definition of a 'consumer' as is under Section 2(1)(d)(ii) of the Act of 1986.

34. It is common knowledge that in international transactions, letter of credit is used as a mode of ensuring payment and performance of the contractual terms. A letter of credit is a document issued by a bank

- A (issuing bank) on behalf of a party (applicant) in favour of another party (beneficiary) under which, the issuing bank undertakes to pay to the beneficiary, certain sums of money subject to compliance of the terms and conditions of the letter of credit. In an international transaction, the beneficiary is the seller who requests the applicant (buyer) to furnish a letter of credit from any bank which is recognized worldwide (issuing bank). The letter of credit is issued in favour of a beneficiary on the request of an applicant after furnishing securities as may be demanded by the issuing bank. A seller can ask the issuing bank to honour the letter of credit to his own bank (confirming bank) within a certain maturity date. The seller is required to produce certain documents regarding proof
- B of delivery of goods, commercial invoice, bill of lading, insurance documents etc. before the confirming bank. On scrutiny the confirming bank would ask for advice of the issuing bank to confirm whether the documents produced by the beneficiary is compliant to the terms and conditions of the letter of credit. Once the issuing bank confirms the document, the confirming bank is obligated to pay to the beneficiary on demand, the credit amount and in turn recover the same from the issuing bank.

35. In *Hindustan Steel Workers Construction Ltd. V G.S. Atwal & Co. (Engineers) (P) Ltd. [1995] 6 SCC 76*] this Court held that a letter of credit is independent of and unqualified by the contract of sale or underlying transactions. The autonomy of an irrevocable LOC is entitled to protection and as a rule, courts refrain from interfering with that autonomy. If courts interfere in such transactions, it would be prone to misuse by the applicant party to gain undue advantage leaving the issuing bank at peril in the international financial market.

F 36. As per Section 2 (g) of the Act of 1986, 'deficiency' is defined as "fault, imperfection shortcoming or inadequacy in the quality, nature, and manner of performance which is required to be maintained by or under any law for time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation G to any service."

H 37. What is needed to be assessed here is whether the admitted error on the part of the respondent Nos. 1 to 3 would amount to deficiency in service or not. In the factual matrix of the present case, it is noted that the appellant herein *vide* its letter dated 11.02.1999 gave shipping instructions to respondent Nos. 1 to 3 wherein it was mentioned that the

shipment is from FOB, New Delhi to Baltimore. However, despite clear instructions *vide* the said letter, respondent Nos. 1 to 3 negligently recorded the port of loading to be JNPT Bombay. It is due to this negligence as well as deficiency in service of the respondent Nos. 1 to 3 that the respondent No. 4 Bank refused to accept/honour the documents including the FCR and the same was returned to the bank of the appellant. Due to refusal of honouring the said documents, the sale consideration was not paid to the appellant herein who suffered loss as well as mental harassment and agony.

38. It is further observed that the appellant herein received the telex/letter on 08.03.1999 wherein the documents including the FCR were refused. It is only after the appellant approached respondent No.1 to issue a certificate/letter rectifying the error regarding the wrong point of loading that the respondent No.1 issued such a certificate/letter dated 30.03.1999 mentioning that the shipment was loaded from FOB New Delhi and effected from JNPT Bombay.

39. The National Commission in the impugned order has held that it is an admitted position that a mistake was committed by the respondent No.1 while issuing the FCR to the appellant. The State Commission has based its decision on the said reasoning. When it is admitted that a mistake was committed by the respondent No.1, it is not correct to say that the said mistake was not noticed by the appellant while forwarding the documents to its bank and that the appellant should have been more vigilant. It would be incorrect to nowsay that the appellant should have exercised due diligence in that regard. The National Commission has categorically held that there was deficiency in rendering services by the respondent No.1, therefore, the National Commission ought not have reduced the compensation payable to the appellant herein.

40. In view of the aforesaid discussion, we find that the National Commission was not right in setting aside the judgment and order passed by the State Commission and therefore, the impugned judgment and order passed by the National Commission is liable to be set aside.

41. In the result, the appeal filed by the appellant-complainant is allowed and the impugned judgment and order passed by the National Commission is hereby quashed and set aside and the judgment and order passed by the State Commission is restored. The respondents, being severally and jointly liable, shall make the payment of the amount as

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A assessed by the State Commission within a period of two months from today. In the event the respondents fail to pay the said compensation within the stipulated time, the appellant shall be at liberty to seek remedy in accordance with the law.

42. If pursuant to the order of the State Commission, any amount has been deposited by the respondents, the same shall be withdrawn by the appellant in accordance with the order of the State Commission. If any amount has already been paid to the appellant by the respondents herein, then the balance amount, if any, as awarded by the State Commission shall be paid to the appellant within a period of two months from today.

C 43. Pending application (s), if any, shall stand disposed of.

Ankit Gyan
(Assisted by : Rahul Rathi, LCRA)

Appeal allowed.