

A NEW INDIA ASSURANCE CO. LTD.

v

M/S HIRA LAL RAMESH CHAND & ORS.

(Civil Appeal No. 4306-4307 of 2003)

JUNE, 13, 2008

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**[B.N. AGRAWAL, P.P. NAOLEKAR AND R.V.
RAVEENDRAN, JJ]**

MARINE INSURANCE ACT, 1963:

- C ss.3 and 4 – *Marine insurance – Consignments “covered against: All risks (ICC), war and SRCC from consignor’s warehouse to consignee’s warehouse” – Consignors telephonically informing insurer about non-realization of bills, and claiming value of consignments – Insurer repudiating claims –*
- D *Complaints of consignors by National Consumer Disputes Redressal Commission – Partly allowed – HELD: Failure of buyer to make payment and take delivery is not a ‘loss’ of consignment covered by Insurance Policy – Absence of averment or proof that consignments did not reach the destination or*
- E *the goods were not taken delivery by the consignee – No averment as to whether holders of the documents applied for or attempted to take delivery of consignments to store the same in a bonded warehouse or whether they were refused delivery – Complainants have failed to plead and make out a*
- F *case of loss of consignments during transit or within 60 days of the consignment being discharged from the ship – Consequently, claims of complainants against insurer are liable to be rejected – Order of National Commission set aside – Consumer Protection Act, 1986 – Deficiency in service – Connotation of.*
- G *Marine Insurance – ‘Loss’ of consignment – Connotation of.*

The complainants-respondent no. 1 in both the ap-

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peals, who were engaged in the business of manufacture and export of rugs and *durries* at Mirzapur, U.P., filed two separate complaints against the appellant-Insurer before the National Consumer Disputes Redressal Commission under the Consumer Protection Act, 1986. Their case was that they, in pursuance of the orders placed by a buyer at Atlanta in USA, namely, Atlanta Rugs Inc., dispatched consignments of rugs and *durries* between 23.8.1994 and 4.7.1995. All the consignments were insured with the appellant insurer and were "covered under: All risks (1CC), war and SRCC from consignor's warehouse to consignee's warehouse", and were entrusted to the forwarding agent at Mumbai, namely, Overseas Container Line Inc. (OCL) which was a Non-Vessel Owning Common Carrier (NVOCC) registered in USA; that the Bill of Lading issued by 'OCL' in regard to each consignment showed the consignee as "unto order" and the buyer as the party to be notified; that the complainants had a foreign Out Bill Purchase Account with their Bankers and, therefore, endorsed the Bill of Lading in favour of the said Bankers and the latter in turn endorsed the negotiable copy of the Bill of Lading in favour of its foreign correspondent Bank (the collecting Bank). On 25.1.1996 the collecting Bank informed the Bankers of the complainants that the drawee did not make the payment nor did it obtain release of the documents of title; that thereafter the complainants made efforts to contact the buyer and the forwarding agent 'OCL', but they could not be located. Ultimately, the complainants telephonically informed the Insurer on 2.2.1996 about the non-realization of the Bills and claimed value of the consignments. As the Insurer did not settle the claims, the complainants filed petitions before the Commission on 25.2.1997, alleging that the conduct of the Insurer in not settling the claim amounted to deficiency in service. They claimed compensation from the Insurer in regard to the value of the consignments and other losses.

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- A The stand of Insurer was that the claims were not maintainable as none of the consignments were lost or damaged in transit; that it had got the matter investigated through the surveyors and the investigation report disclosed that the shipping agent OCL and the buyer were
- B headed by a common President, namely, 'KC' who had admitted to the surveyors that the consignments had all been received by the buyer. There was thus no loss of the consignments and, consequently, no deficiency in service.
- C The Commission held that the complainants had valid marine insurance cargo policies which gave insurance cover against all risks of loss; that even if the buyer had managed to receive the consignments by fraudulent means without legitimate endorsement or transfer of the
- D original documents of title which were in custody of the collecting Bank, that amounted to loss of goods; that as the consignee was shown as "unto order" in the bills of lading, the complainants had lien and control over the consignments and, consequently, property in goods did
- E not pass to the buyer and in such circumstances delivery to buyer would still amount to loss of goods, and insurer was liable to indemnify the complainants and failure to do so was a deficiency in service. The Commission, accordingly, allowed both the complaints in part. Aggrieved, the Insurer filed the appeals.

- G The questions for consideration before the Court were: "(i) What is the scope of the policies of insurance issued by the Insurer to the insured; (ii) Whether the complainants had proved that there has been loss of consignments falling within the risks covered by the Marine insurance policies; and (iii) Whether the Commission was justified in holding the insurer liable ?"

Allowing the appeals, the Court

- H HELD: 1.1 Section 4 of Marine Insurance Act, 1963

makes it clear that a contract of 'marine insurance', as defined in s.3, may, by its express terms or by usage of trade, be extended so as to protect the assured against losses on inland waters or on any land risk which may be incidental to any sea voyage. The provisions of the Act are, therefore, subject to the terms of the policy of insurance. [para 13.2] [1218-C & D]

1.2 In the instant case, in view of the insurance cover extending 'warehouse to warehouse'; the consignments are covered by insurance not only during the sea journey, but beyond, as stated in the policy. Therefore, it may not be correct to say that the insurance cover is available only in regard to maritime perils. Having regard to section 4 of the Act and the terms of the policy undertaking insurance cover against wider risks, the policy of insurance would cover the loss not only while goods are navigating the sea but also any loss or damage during transit from the time it leaves the consignor's warehouse till it reaches the consignee's warehouse. The cover against risks will however cease, as stipulated in clause (8) of Institute Cargo Clause (A), on the expiry of 60 days after discharge of the consignment from the vessel at the final port of discharge, if the goods do not reach the consignee's warehouse or place of storage for any reason within the said 60 days. [para 17] [1222-B,C & D]

Hulsbury's Law of England, 4th Edition, Vol.25 paras 216 and 218 – referred to.

1.3 There is a difference between marine insurance policies which extend cover only against marine losses or maritime perils and marine 'extra' insurance policies which extend cover against all risks from consignor's warehouse to consignee's warehouse which include not only the sea journey but also the land journey at either end. [para 19] [1223-A & B]

A **SCC 639; and Concord of India Insurance Co. vs. Ravi Thokassaria ILR 1974 Kerala 649** – held inapplicable.

Peacock Plywood (P) Ltd. v. Oriental Insurance Co. Ltd.
2006 (12) SCC 673 – referred to.

B 2.1 Failure of the buyer to make payment and take delivery is not a 'loss' of consignment which is covered by the Insurance Policy. The complainant should make out a case of actual 'loss' of the consignment covered by the contract of insurance or non-delivery of the consignment that is refusal to meet a demand for delivery. [para 33] [1234-A & B]

C 2.2 A claimant insured in a marine insurance claim has to plead and prove: (i) his position - whether he is the assured or an assignee; (ii) his insurable interest; (iii) the type or kind of the insurance policy and its relevant terms; (iv) the duration of the cover; (v) the nature of risk/loss; and (vi) the risk/loss is covered by the policy. In the absence of necessary averments and evidence to establish a marine insurance claim, a claim against the insurer is liable to be rejected. [para 37] [1236-D,E & F]

D 2.3 It is no doubt true that the complainants had booked the consignments showing the consignee as 'unto order' thereby indicating that the goods should be delivered only to the holder/endorsee of the Bills of Lading; that the original documents were not cleared/retired by the buyer and were ultimately returned by the foreign correspondent Bank to Punjab National Bank (Bankers of complainants); and that the consignments were insured against all risks of loss and damage. But, the basic averment and proof required in a case of this nature is that the consignments had been lost or damaged in transit or that when the holder of the documents applied for delivery, the goods were not delivered on account of the same being irretrievably lost, that is, having been pilfered, stolen, lost or mis-delivered. But

there is no such averment or evidence that the consignments were lost or damaged. Nor is there any averment that the holder of the documents of title applied for delivery of the consignments, and was denied or refused delivery on account of non- availability of the consignments due to pilferage, loss or mis-delivery. When there is no allegation or proof of foreign correspondent Bank having applied for delivery and refusal of delivery, the complainants cannot maintain a claim against the insurer. [para 32] [1233-F,G & H; 1234-A]

2.4 Admittedly, Overseas Containers was only a non-vessel owning common carrier (NVOCC) and not the actual shipping line. Necessarily, therefore, Overseas Containers had to entrust the consignment to an actual shipping line for transportation and the Master Bill of Lading given by the shipping line would show the Overseas Containers as the consignee entitled to receive the delivery. The very fact that the Master Bill of Lading is not given to the consignors/complainants and the fact that the complainants did not demand for the same shows that they did not intend to apply for delivery directly from the shipping line that carried the consignments but only intended that delivery should be from Overseas Containers which had issued the Bill of lading. [para 34] [1234-E,F & G]

2.5 As the contract for carriage was between complainants and Overseas Containers and the Bills of Lading issued by the Overseas Container showed that the consignments were deliverable to the order of the complainants, necessarily Overseas Containers were expected to take delivery of the consignment at Atlanta from the shipping line which actually transported the consignments and then deliver it to the holder of the documents of title who seeks delivery. Overseas Containers were, thus, entitled to take delivery from the shipping line which transported the consignment and there was nothing conclusive, clandestine or irregular about delivery of consign- H

A ments being taken by Overseas Containers from the shipping line, as it had entrusted the consignment to the shipping line for transportation. [para 34] [1234-G,H; 1235-A & B]

2.6 The insurance cover was in regard to all risks from consignor's warehouse to consignee's warehouse.

B There is no dispute as to what is the consignor's warehouse as the complainant is clearly shown as the consignor. As regards the consignee's warehouse, if the consignee is treated as Atlanta Rugs Inc., on delivery to Atlanta Rugs Inc., the insurer is discharged of any liability

C for risks. If the consignee is shown as 'unto order', it does not obviously refer to complainants' warehouse as admittedly the complainants were not having any warehouse in Atlanta (USA), nor were they the holders of the documents. The 'consignee' at the relevant time could

D only be the collecting Bank in whose favour the documents had been endorsed. But it is not the case of the complainant that the collecting Bank as the holder of the documents of title sought delivery of the consignments from the custom's warehouse or steam ship line or from

E Overseas Containers. [para 36] [1235-D,E,F & G]

2.7 Where there is no effort on the part of the 'consignee' to take delivery from the shipping line/customs warehouse, the duration of insurance cover cannot be infinite or indefinite. In such circumstances the risk cover

F would terminate on the expiry of 60 days after completion of discharge overside of the insured shipment from the overseas vessel at the final port of discharge at Atlanta having regard to clause 8 of Institute Cargo clause. [para 36] [1235-G & H; 1236-A & B]

G 2.8 It is not the case of the complainant that within that time (of 60 days), delivery was sought by the holder of the documents and that such delivery was refused. It is also not the case of the complainants that the consignments were unauthorizedly delivered to Atlanta Rugs or

that such delivery was within 60 days of landing of the consignments at Atlanta. In the absence of any averment or evidence as to when the consignments were discharged from the ship at Atlanta and an averment that within 60 days of landing of the consignments at Atlanta the holder sought delivery and delivery was refused, the question of the Insurer being made liable for non-delivery does not arise. After 60 days of the landing of a consignment even if the consignment is destroyed, lost or mis-delivered, it is no concern of the Insurer. [para 36] [1236-B,C & D]

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2.9 Besides, the consignments were being continuously sent from August, 1994 to July, 1995 by the complainants without making any effort to ascertain the fate of the earlier consignments. They merely gave the oral intimation to the insurer that too on 2.2.1996. No claim was lodged with the insurer in writing. The allegation that orally a claim for 'loss of goods' was made on 2.2.1996 cannot be true as, according to complainants themselves, till that date they had no knowledge that the consignments had been either lost or wrongfully delivered. In fact the complainants have not produced even a single document making a claim on the insurer on the ground that the goods had been lost or not delivered. [para 38] [1236-G & H; 1237-A & B]

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3.1 The complainants have failed to plead and make out a case of loss in respect of each and every consignment, either during transit or within 60 days of the consignments being discharged from the ship at Atlanta Port. They merely proceed on the assumption that the Insurer is liable when the documents are not retired by the buyer, which, to say the least, is untenable. As there is no averment or proof that the consignor or the foreign correspondent Bank holding the documents of title or any person authorized by the said Bank applied for delivery within 60 days of the goods being discharged, and as there is no averment or proof that the consignments were lost or wrongly delivered within the

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A said period of 60 days, the liability and responsibility of the insurer under the policy of insurance came to an end with reference to each of those consignments. Consequently, the claim of the complainants against the insurer is liable to be rejected. [para 40] [1239-E,F,G & H]

B 3.2 The National Consumer Disputes Redressal Commission has referred to the delay of nine months on the part of the Insurer in repudiating the claim after receiving the surveyor's Report and the failure to furnish a copy of the reports to the complainants, as deficiency in service.

C But, the fact that the complainants did not lodge any claim in writing has been overlooked. At all events, they did not produce any document to show the lodging of claim. It was on a mere oral intimation on 2.2.1996, the investigation by surveyor was set in motion. Further, the contents

D of the report had already been notified to the complainants by the surveyor in the telexes dated 4.3.1996 and 1.4.1996. Therefore, the finding of deficiency in service was not warranted. [para 41] [1240-A,B & C]

E 3.3 National Consumer Disputes Redressal Commission did not address itself to the relevant issues. It disposed of the matter without examining the terms of the policy and obligations undertaken by the insurer. In fact, having regard to the nature of issues involved, this was more appropriately a matter for civil court. The order of the National

F Consumer Disputes Redressal Commission is set aside and the claim petitions before the Commission stand dismissed. [para 31,37 and 43] [1233-C; 1236-F & G 1240-E]

G CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4306-4307 of 2003

From the final Judgment and order dated 31.1.2003 of the National Consumer Disputes Redressal Commission in Original Petition Nos. 45 & 49 of 1997

H Raju Ramachandran, M.K. Dua, Kishore Rawat, Debasis

Misra for the Appellant.

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Nagendra Rai, Harish Chander and Viivek Krishna Tankha, M.T. George, N. Ganpathy, Subramonium Prasad, Imtiaz Ahmed, Naghma Imtaiz, Farukh Rashid, V.N. Raghupathy, J.R. Midha, Pranab Kumar Mullick, S.K. Pattnaik and Anshul Raj (for M/s. Equity Lex Associates) for the Respondents.

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The Judgment of the Court was delivered by

R. V. RAVEENDRAN, J. These appeals under section 23 of the Consumer Protection Act, 1986, are filed against the common order dated 31.1.2003 passed by the National Consumer Disputes Redressal Commission, New Delhi ('Commission' for short) allowing in part OP No. 45 of 1997 and OP No. 49 of 1997. OP No.45 of 1997 was filed by M/s Hira Lal Ramesh Chand and its partner Rajender Kumar Jain (respondents 1 and 2 in CA No.4306/2003). OP No.49 of 1997 was filed by M/s Ratan Chand Deep Chand and its two partners (respondents 1 to 3 in CA No.4307/2003).

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2. As the ranks of parties differ in the two appeals and as some parties were given up before the Commission, for convenience, we will also refer to the parties as follows : New India Assurance Co. Ltd., as 'Appellant' or 'Insurer'; M/s Hira Lal Ramesh Chand and its partners (Respondents 1 & 2 in the first matter) and M/s Ratan Chand Deep Chand and its partners (Respondents 1 to 3 in the second matter) as the 'complainants'; M/s Niranjan Shipping Agency Pvt. Ltd., (third Respondent in the first matter and fourth Respondent in the second matter) as 'Niranjan Shipping'; Punjab National Bank (fourth Respondent in the first matter and fifth Respondent in the second matter), and Bank of Baroda (sixth Respondent in the second matter) by their names; Atlanta Rugs Inc. as the 'Buyer'; and Overseas Container Lines Inc. (the Non-Vessel Owning Common Carrier acting as shipping Agent) as 'NVOCC' or 'Overseas Container'.

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3. The case of the complainants, in brief, is as follows : Complainants are manufacturers of Rugs and Durries, carrying on business at Mirzapur, UP. In pursuance of orders placed by

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- A Atlanta Rugs Inc., Atlanta (for short the 'buyer'), M/s. Hira Lal Ramesh Chand dispatched 17 consignments of rugs and durries of the value of US \$ 4,06,096 between 15.3.1995 and 29.6.1995; and M/s. Ratan Chand Deep Chand dispatched 38 consignments of the value of US \$ 8,87,973 between 23.8.1994 and 4.7.1995.
- B The consignments were entrusted to M/s Overseas Container Line Inc., a non- vessel owning shipping Agent represented by its Agent Niranjan Shipping Agency (P) Ltd., for transhipment from Mumbai to Atlanda (USA). The Bill of Lading issued by Overseas Container in regard to each of the consignment showed the consignee as "Unto order" and party to be notified as "Atlanta Rugs Inc.". All the consignments were insured by the consignors, with the New India Assurance Co. Ltd. The original documents relating to the consignments were forwarded by Niranjan Shipping to the Bankers of complainant - Punjab National Bank. The complainants obtained credit facilities from Punjab National Bank by discounting the Bills and endorsed the Bill of Lading in favour of the said Bank. The said Bank, in turn, forwarded the original documents of title to its agent Sun Trust Bank (earlier known as Trust Company Bank) Atlanta, for collection, by endorsing the documents in their favour.
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- E The buyer (Atlanta Rugs Inc.) did not make payment and obtain release of the documents of title. They therefore made efforts to contact the buyer and the shipping Agent- Overseas Container. They were also not able to locate them. Nor were they able to find out the whereabouts of the consignments. Therefore they telephonically lodged an oral claim with the insurer on 2.2.1996 seeking
- F payment of the value of the consignments. The insurer directed them to get in touch with their Surveyor-cum-Claim Settlement Agent at Atlanda -- M/s. Toplis and Hoarding Inc. They accordingly requested the said Surveyor to inquire and investigate the matter and issue necessary certificates. The surveyor submitted their reports to the Insurer, but failed to furnish copies thereof to the complainants. Their claim was not settled by the Insurer for more than a year in spite of reminders. Such failure amounted to deficiency in service and consequently the insurer became liable to pay the value of the consignments and the other amounts claimed, as compensation.
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4. The complainants sought a direction to the New India Assurance Co. Ltd. (appellant) to pay the following amounts as compensation :

<u>Particulars</u>	<u>Claim in OA 45/</u>	<u>Claim in OA 49/</u>
	<u>1997</u>	<u>1997</u>
	<u>Amount (in US \$)</u>	<u>Amount (in US \$)</u>
a) Insurance amount (unrealized value of shipments)	406096	887973
b) Increase in cost of goods (10%)	40609	88797
c) Compensation for mental agony	100000	100000
d) Business loss for one year	58091	100000
e) Expenses for pursuing the claim	10000	10000
 TOTAL	 <u>614796</u>	 <u>1186770</u>
f) Interest at 24% p.a. with quarterly rests on the unrealized value of shipments from the date of claim to date of complaint	108253	233072
g) Pendente lite and future interest at 24% p.a. from the date of complaint to date of payment.		

5. The Appellant - Insurer, the opposite party - Respondent in the two complaints, resisted the said claims. It contended that the claim was not maintainable as none of the consignments were lost or damaged in transit. According to them, the investigation report of the surveyor disclosed that one Kumar Chaudhary was the common President of M/s. Overseas Container Lines Inc. (the shipping Agent) and M/s. Atlanta Rugs Inc. (the buyer) and that the said Kumar Chaudhary had admitted to the surveyors that the consignments had all been received by the buyer. If the buyer, having taken delivery of all the consignments, failed to pay the value of the consignments, such non-payment of price by the buyer or non-realisation of the price by the seller, will not be a maritime peril giving rise to a claim against the Insurer under a Marine Insurance Policy. When the insured consignments had been delivered to the buyer, it cannot be said that there is a loss of the consignments. The claims were repudiated on 4.3.1997. The reasons for repudiation were furnished to the complainants by the Insurer as also by the sur-

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A veyors. There was thus no deficiency in service. It was also pointed out that when the goods are entrusted to a sea going vessel, a master bill of lading is issued by the vessel/shipping line showing the particulars of consignments and the names of the consignees and the said Master Bill of Lading was not part of the documents of title. The failure on the part of the complainants to take any action against the buyer and the manner in which the transactions were conducted, gave room for doubt that there has been a collusion between the complainants and the buyer to foist false claims against the insurer. The Insurer also prayed that the detailed reasons for repudiation given in its letter dated 4.3.1997 be read as part of its written statement. The relevant portions of the letter of repudiation are extracted below :

D "The buyer had taken delivery of all the consignments but has not paid your Company for the same. Non-payment of the price by the buyer is not an insured peril under the captioned policies and hence your claim falls beyond the scope and ambit of the policies issued by our company. xxxx

E Instead of taking up the matter with your buyer for the payment of the price of the said consignments, you thought it fit to take no action whatsoever against your buyer. xxxxxx

D) You have failed and neglected to act with reasonable dispatch as required by Clause 18 of the Institute cargo clauses (A) to which the above polices were made subject to. Clause 18 reads as under :

F 'It is a condition of this Insurance that the Assured shall act with reasonable dispatch in all circumstances within their control'.

G The consignments were shipped from Bombay to Atlanta between the months of August 1994 to July 1995. However, your company has informed our company and our aforesaid Surveyors of the alleged loss allegedly suffered by you only in the first week of February, 1996. As you have failed to act with reasonable dispatch as required by the said policies, our company is not liable to pay any amount under the captioned policies.

H E) As you are aware, it is a conditions of the policy that a

certificate of loss/damage should be obtained from our Surveyors who are the company's agents at the Port of discharge. It is an admitted position that no such certificates has been obtained by your company. In view of breach of the aforesaid condition our company is not liable to pay any amount to your company under the captioned policies.

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G) We have to state that under the aforesaid policies, we had agreed to insure that consignment subject to Institute Cargo Clause (A). Clause 1 of the said Institute Cargo Clause (A) clearly stipulates as under:

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'This insurance covers all risks of loss or damage to the subject matter.....'

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As is pointed out by the surveyors, that the consignment under the captioned policies have been received by the buyers. In view thereof, there is no loss and/or damage to the subject matter i.e. the said consignments entitling your company to seek an indemnity from our company.

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H) Records in our possession show that you kept on sending consignments to your buyer without caring to ascertain if the buyer was financially solvent and would make payment in respect of the consignments shipped to you. In view thereof, we have to state that the alleged loss is also attributable to the aforesaid willful misconduct on the part of your company under provisions of Institute Cargo Clause (A) - clause 4.1 and section 55 of the Marine Insurance Act, 193.

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I) You will appreciate that our company has agreed to indemnify you for the loss and/or damage suffered to the consignments during its journey from your company's warehouse to the buyers warehouse due to the insured perils. Financial insolvency and/or refusal of the buyer to pay for the price of the said consignments is not one of the perils insured under the captioned policies and hence your company cannot seek any indemnity under the captioned policies.

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6. Initially, there were four common respondents in both the complaints. The Divisional Office, Regional Office and Head

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- A Office of New India Assurance company Ltd. were respondents 1 to 3. Overseas Container Lines Inc., was the fourth Respondent. By order dated 10.11.2000, the Commission directed the complainants to implead M/s Atlanta Rugs Inc. (Buyer), M/s Niranjan Shipping Agency Pvt. Ltd. (Forwarding Agent of the
- B Complainants, as also the agent of Overseas Container Lines Inc.), Punjab National Bank and Bank of Baroda (Bankers of complainant), Sun Trust Bank, earlier known as Trust Company Bank (the foreign correspondent Bank of Punjab National Bank) as they were proper and necessary parties. Accordinigly, M/s
- C Atlanta Rugs Inc., Niranjan Shipping Agency (P) Ltd., Punjab National Bank and Sun Trust Bank, were impleaded as respondents 5 to 8 in OP no.45 of 1997. However, subsequently respondents 4, 5, and 8 were given up by the complainants as service could not be effected and their names were deleted from the array of parties and consequently, when the matter was heard, the respondents in OP No.45/1997 were the insurer, M/ s Niranjan Shipping Agency (P) Ltd., and the Pubjab National Bank. Similarly, the said four persons as also Bank of Baroda were impleaded as respondents 5 to 9 in OP No.49 of 1997. But later, the three respondents who could not be served were given up and deleted and at the time of hearing the respondents were the insurer, M/s Niranjan Shipping Agency (P) Ltd., Punjab National Bank and Bank of Baroda.

- F 7. The parties did not lead any oral evidence nor mark any document as exhibits, but produced some documents. The complainants and the insurer filed affidavits supporting the complaint and the written statement. On the basis of the pleadings, affidavits, copies of documents produced and arguments, the Commission decided the complaints by its common order dated 31.1.2003. The Commission held that the complainants held valid marine insurance cargo policies which gave insurance cover against all risks of loss. The bills of lading showed the consignee as "Unto order" and they were endorsed in favour of Sun Trust Bank. The original documents were not retired by the buyer and were returned by Sun Trust Bank to Punjab National Bank. As
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delivery could be taken only after obtaining original bills of lading which were with the Sun Trust Bank and as the original documents had been returned, and as there was no evidence on record about the fate of the shipments, the shipments should be covered under the term "loss" and insurer will have to indemnify the complainants for such loss. Even if Atlanta Rugs Inc. had managed to receive the consignments by fraudulent means without

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legitimate endorsement or transfer of the original documents of title which were in the custody of the Sun Trust Bank, that amounted to loss of goods. As the consignee was shown as "Unto order" in the bills of lading, the complainants had lien and control over the consignments and consequently, property in the goods did not pass to the buyer and in such circumstances, delivery to Atlanta Rugs Inc. would still amount to loss of goods. As the goods were lost, the insurer was liable to indemnify the complainants for such loss and failure to do so was a deficiency in service. It therefore allowed both the complaints in part.

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8. In OP No.45/1997, the Commission directed the insurer to indemnify the complainant - M/s. Hira Lal Ramesh Chand by paying US \$ 367311 (equivalent to Rs.1,32,78,293 at an exchange rate of Rs.36.15 per US Dollar) with interest at 12% p.a. from the date of complaint till the date of payment, and pay the said amount to Punjab National Bank so that the said Bank could adjust the said amount against the amount due from the complainants. In OP No.49/1997 the Commission directed the insurer to indemnify the complainant - M/s. Ratan Chand Deep Chand to an extent of Rs.30,00,000/- with interest at 12% p.a. from the date of complaint to the date of payment, and pay the said amount equally to the complainants' Bankers, Punjab National Bank and Bank of Baroda, Mirzapur.

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9. Feeling aggrieved the insurer has filed these two appeals. On the contentions raised, the following questions arise for our consideration in these appeals :

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- (i) What is the scope of the policies of insurance issued by the Insurer to the insured?
- (ii) Whether the complainants had proved that there has

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A been loss of consignments falling within the risks covered by the Marine insurance policies ?

 (iii) Whether the Commission was justified in holding the insurer liable ?

B Re : Question (i)

10. M/s. Hira Lal Ratan Chand had taken two marine policies (cargo) which are in the nature of open covers, from the Insurer. They are open cover Policy Nos.2142 11000 8745 dated 29.4.1994 (which was in force from 29.4.1994 to 28.4.1995) and No.2142 11000 9032 dated 19.5.1995 (which was in force from 19.5.1995 to 18.5.1996) each with an assured limit of Rs.50 lakhs. The assured limit of Open Cover No.2142 11000 8745 was extended by another Rs.50 lacs with effect from 22.2.1995 and by another Rs.7 lacs with effect from 27.4.1995 the total assured amount being Rs.1.07 crore. The Open Cover constituted the contract under which the insurer agreed to issue separate Marine Insurance Certificates as and when the insured made declarations of each shipment. The terms of the open cover are extracted below (from Policy No.2142 11000 8745) :

E *Subject matter Insured :*

On consignment said to contain of Indian handmade knotted woolen carpets/Durries packed in alkathene paper and double new hessiar cloths dispatched vide Road/Rail/Approved Vessel from warehouse Mirzapur to anywhere in world, from time to time. Insured will declare each and every consignment within 15 days or one month (as per insured) & dispatch with its value packing marks etc. Total sum insured under this policy is Rs.50 lakhs.

G **Risk covered :** All risks 0.1525%; war and SRCC Rs.0.0275%. On receipt of declarations, certificate of insurance will be issued for each consignment. This policy will remain in force for one year i.e. 29.4.1994 to 28.4.1995 unless previously exhausted by way of declaration. If no declaration is received from the insured the minimum premium will be retained by the company.

H *Special conditions & warranties*

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Covered against : All risks (ICC), War & SRCC from consignor's warehouse to consignee's warehouse : Inland transit clause (A) Institute cargo clause (A), Institute War Clause (Cargo), Institute strike clause (Cargo) Lorry warranty as attached hereto. A

The attached clauses and endorsements form part of this policy.

Survey and claims settlement :

B

In the event of loss or damage which may result in a claim under this insurance immediate notice be given to carrier at destination.

Certificate of loss/damage be obtained from our surveyor, who are the company's agents at port of discharge in order that they may examine the goods and issue a survey report. Where the company has no agent, the notice must be given to Lloyd's agents.

C

Payable as per declaration.

D

Similar were the terms of Open Cover No.2142 11000 9032 as also the Open Cover Policies issued to M/s. Ratan Chand Deep Chand.

11. As and when the complainants entrusted the consignments to OCL, they made declarations and the Insurer issued Marine Insurance Certificates in respect of each consignment.

E

Each of these Marine Insurance Certificates specified the particulars of the consignment, and the value thereof and confirmed that the consignment was "covered against : All risks (ICC), war & SRCC from consignor's warehouse to consignee's warehouse." The certificates required that in the event of loss or damage which may involve a claim under the certificate, notice of loss or damage should be given to its surveyors M/s. Toplis & Harding Inc., Atlanta (USA).

F

12. Clause (1) of the Institute Cargo clause (A) forming part of the Insurance Policy stipulated that the insurance covered all risks of loss of or damage to the subject matter insured (except as provided in clauses 4, 5, and 7 therein). Clause (1) of the Inland Transit clause (A) stipulated that the insurance covered all risks or loss or damage to the subject matter insured

G

H

- A (except as provided in clauses 2, 3 and 4 therein). Clause (1) of the Institute War Clause (Cargo) stipulated that the insurance covered loss or damage to subject matter insured caused by war, civil war etc. (except as provided in clauses 3 and 4 therein). Clause (1) of the Institute Strikes clause (cargo) stipulated that
- B the insurance covered loss or damage to the subject matter insured caused by strikes, lock outs etc. (except as provided in clauses 3 and 4 therein). The duration of insurance cover is specified in clause (8) of the Institute Cargo Clause (A), and clause (5) of the Inland Transit Clause (A).

- C They are extracted below :

Clause (8) of Institute Cargo Clause (A)

Duration.

- D 8.1 This insurance attaches from the time the goods leave the warehouse or place of storage at the place named herein for the commencement of the transit, continues during the ordinary course of transit and terminates either

8.1.1 on delivery to the Consignee's or other final warehouse or place of storage at the destination named herein,

- E 8.1.2 on delivery to any other warehouse or place of storage, whether prior to or at the destination named herein, which the Assured elect to use either

8.1.2.1 for storage other than in the ordinary course of transit or

- F 8.1.2.2 for allocation or distribution,

or

- G 8.1.3 on the expiry of 60 days after completion of discharge overside of the goods hereby insured from the oversea vessel at the final port of discharge,

whichever shall first occur.

Clause (5) of Inland Transit (Rail or Road) Clause (A)

Duration

- H

"5. This insurance attaches from the time the goods leave the warehouse and/or the store at the place named in the policy for the commencement of transit and continues during the ordinary course of transit including customary transhipment, if any, A

- (i) until delivery to the final warehouse at the destination named in the policy or B
- (ii) in respect of transits by Rail only or Rail and Road until expiry of 7 days after arrival of the railway wagon at the final destination railway station or
- (iii) in respect of transits by Road only until expiry of 7 days after arrival of the vehicle at the destination town named in the policy whichever shall first occur." C

Similar duration clauses are found Institute War Clause (Cargo) and Institute Strike Clause (Cargo). D

13. The Marine Insurance Act, 1963 governs the law relating to marine insurance. Section 3 defines marine insurance as under :

"3. Marine insurance defined.--A contract of marine insurance is an agreement whereby the insurer undertakes to indemnify the assured, in the manner and to the extent thereby agreed, against marine losses, that is to say, the losses incidental to marine adventure." E

13.1) The term 'marine adventure' is defined in section 2(d). The term 'maritime peril' referred to in the definition of 'marine adventure' is defined in section 2(e). The said two definitions are extracted below : F

- (d) "marine adventure" includes any adventure where -
- (i) any insurable property is exposed to maritime perils; G
- (ii) the earnings or acquisition of any freight, passage money, commission, profit or other pecuniary benefit, or the security for any advances, loans, or disbursements is endangered by the exposure or insurable property to maritime perils; H

may, however, by its express terms or by trade usage, be extended A so as to protect the assured against losses on inland waters or against any land risk which may be incidental to a sea voyage. (Vide sections 3 & 4 of Marine Insurance Act, 1963 and Hulsbury's Law of England, 4th Edition, Vol.25 paras 216 and 218).

15. The insurers offer different types of insurance cover. B There are three standard types of Institute Cargo Clauses (and Inland Transit Clauses) denoted as A, B, and C, providing insurance cover of varying extents. Institute Cargo Clause (C) provides the basic minimum cover as enumerated. Institute Cargo Clause (B) offers a cover against wider range of enumerated risks. The Insurer will also cover certain 'extraneous risks' like theft, pilferage and/or non-delivery in addition to the risks covered by Institute Cargo Clause (B) on payment of extra premium. While Institute Cargo Clause (C) and (B) specify and enumerate the risks covered, Institute Cargo Clause (A) which offers the widest cover, does not specify or enumerate the risks covered. Institute Cargo Clause (A) provides insurance cover against all risks of loss and damage to the subject matter insured except those excluded by clauses (4) to (7) thereof which are extracted below : C

"4. In no case shall this insurance cover

4.1 loss damage or expenses attributable to wilful misconduct of the Assured

4.2 ordinary leakage, ordinary loss in weight or volume, or ordinary wear and tear of the subject matter insured F

4.3 loss damage or expense caused by insufficiency or unsuitability of packing or preparation of the subject-matter insured (for the purpose of this Clause 4.3 "packing" shall be deemed to include stowage in a container or lift-van but only when such stowage is carried out prior to attachment of this insurance or by the Assured or their servant) G

4.4 loss damage or expense caused by inherent vice or nature of the subject matter insured

4.5 loss damage or expense proximately caused by delay, H

- A even though the delay be caused by a insured against (except expenses payable under Clause 2 above)
- 4.6 loss damage or expense arising from insolvency or financial default of the owners, managers, charterers or operators of the vessel
- B 4.7 loss, damage or expense arising from use of any weapon of war employing atomic or nuclear fission and/or fusion or other like reaction of radioactive force or matter
- 5. 5.1 In no case shall this insurance cover loss, damage or expense arising from unseaworthiness of vessel or craft.
- C Unfitness of vessel craft conveyance container or liftvan for the safe carriage of the subject-matter insured.
Where the Assured or their servants are privy to such unseaworthiness or unfitness, at the time the subject-matter insured is loaded therein,
- D 5.2 The Underwriters waive any breach of the implied warranties of seaworthiness of the ship and fitness of the ship to carry the subject-matter insured to destination, unless the Assured or their servants are privy to such unseaworthiness or fitness.
- E 6. In no case shall this insurance cover loss, damage or expense caused by
- 6.1 war, civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power
- F 6.2 capture, seizure arrest, restraint or detainment (piracy excepted), and the consequences thereof or any attempt thereat
- G 6.3 derelict mines, torpedoes, bombs or other derelict weapons of war
- 7. In no case shall this insurance cover loss, damage or expense
- H 7.1 caused by strikers, locked-out workmen, or person taking part in labour disturbances, riots or civil commotions

7.2 resulting from strikes, lock-outs, labour disturbances, riots A
or civil commotions

7.3 caused by any terrorist or any person acting from a political motive."

The exclusions under clauses (6) and (7) get deleted when B
Institute War Clause (Cargo) and Institute Strikes Clause (cargo) C
are included. Exclusion under sub-clause (1) of clause (5) virtually D
gets deleted by sub-clause (2) of clause (5). As a result, an insurance E
policy with ICC(A), ITC(A) and SRCC, providing cover against F
"all risks" of loss or damage to the insured consignment from G
consignor's warehouse to consignee's warehouse, provides a very H
wide coverage. All risks except those mentioned in clause (4) of I
Institute Cargo Clause (A) are covered. Theft, pilferage or non- J
delivery of the consignment are therefore risks covered by an insurance K
policy with ICC(A) and ITC(A). If the insured goods are L
not delivered by the shipping company or shipping Agent, who M
issued the Bill of Lading to the assured, due to theft, pilferage, loss N
or non-availability, occurring within the duration of insurance cover, O
the insurer will be liable under the policy of insurance.

16. Having regard to clause (8) of Institute Cargo clause E
(A) relating to duration, the insurance cover attaches from the F
time the goods leave the warehouse of the assured and terminates G
either on delivery at the consignee's final warehouse or H
store at the destination named in the policy (or on delivery to any I
other warehouse or place of storage, which the assured elects to J
use) or on the expiry of 60 days after completion of discharge of K
the goods from the vessel at the final port of discharge. The L
insurance cover commences when the consignment leaves the M
warehouse or place of storage at the place named in the policy N
for commencement of transit and the cover continues during O
transit and continues until the consignment reaches the final destination P
specified in the policy as the consignee's warehouse. Where the Q
consignment is temporarily stored on arrival at an interim destination R
(as for example on the dock, or in the shipping lines' warehouse S
or in the custom warehouse, pending onward journey to T
the consignee's warehouse mentioned as final destination in the U
policy).

A policy), the cover would remain only for a period of 60 days from the discharge of the consignments from the ship irrespective of whether consignment is put on onward journey to the consignee's warehouse/storage place, or not.

B 17. In view of the insurance cover extending 'warehouse to warehouse' the consignments are covered by insurance not only during the sea journey, but beyond as stated in the policy. Therefore the contention of the insurer that the insurance cover is available only in regard to maritime perils that is perils relating to or incidental to the navigation of the sea may not be correct.

C Having regard to section 4 of the Marine Insurance Act and the terms of the policy undertaking insurance cover against wider risks, the policy of insurance would cover the loss not only while goods or navigating the sea but also any loss or damage during transit from the time it leaves the consignor's warehouse till it reaches the consignee's warehouse. The cover against risks will however cease on the expiry of 60 days after discharge of the consignment from the vessel at the final port of discharge, if the goods do not reach the consignee's warehouse or place of storage for any reason within the said 60 days.

E 18. The learned counsel for the Appellant relied on two decisions, the first being a decision of this Court in *Bihar Supply Syndicate v. Asiatic Navigation* [1993 (2) SCC 639] and the second being a decision of the Kerala High Court in *Concord of India Insurance Co. vs. Ravi Thokassaria* [ILR 1974 Kerala 649].

F In *Bihar Supply Syndicate*, this Court was concerned with a marine voyage policy with Institute Cargo clause (FPA) covering "warehouse to warehouse". This Court held that the expression 'warehouse to warehouse' in the policy merely denotes the time during which the policy would remain in force and cannot be interpreted as covering each and every risk. This Court held that under a typical marine voyage policy with Institute Cargo Clauses (FPA), in the absence of loss due to perils of the sea, the insurance company was not liable, and the onus was on the plaintiff to prove as a fact that the cargo was lost due to the perils of the sea. In *Concord of India Insurance Co.*, the Kerala High Court

considering marine risk policy, held that non-delivery may be a A
good ground against the shipping company, but not against the
insurance company as non-delivery was not a maritime peril.

19. There is a difference between marine insurance policies B
which extend cover only against marine losses or maritime perils (as enumerated) and marine 'extra' insurance policies which extend cover against all risks from consignor's warehouse to consignee's warehouse which include not only the sea journey but also the land journey at either end. The decision in *Concord of India Insurance Co.* (supra) of the Kerala High Court and the decision of this Court in *Bihar Supply Syndicate* (supra) relate to marine insurance policies and not to mixed sea/land risks policies or to marine 'extra' insurance policies. They are not of assistance C
while considering the scope of a policy covering all risks including ICC(A), ITC(A), IWC(Cargo), ISC (Cargo). In fact in *Peacock Plywood (P) Ltd. v. Oriental Insurance Co. Ltd.* [2006 (12) SCC 673], D
this Court held that where the policy contained a wider term of risk coverage, the decision in *Bihar Supply Syndicate* (supra) will not apply. In *Peacock Plywood*, the extended warranty clause in the insurance policy specifically extended the coverage to include the risks of theft, pilferage and non-delivery. In view of it, this Court held E
that a claim by way of constructive total loss on account of a ship being stranded on sea on account of its unseaworthiness was maintainable, although the goods themselves were not damaged. In that case when the ship carrying the goods got stranded at a port due to its unseaworthiness, the assured took steps to recover the value of F
the cargo with a view to minimize its total loss due to non delivery, but found that the cost of recovering and getting the cargo back to the destination port would be more than the value of the goods. Therefore the assured effected sale of the insured goods at the port where ship was stranded. Insurer was found liable to pay the insured value G
of the goods (less the amount actually recovered by such sale).

Re : Questions (ii) and (iii) :

20. The complainants were manufacturers and exporters H
of carpets and durries, having their principal place of business

- A and manufacturing unit at Mirzapur. They allege that M/s Atlanta Rugs Inc. based at Atlanta (USA) placed orders on them for supply of rugs/durries. The orders are not placed on record. The complainants allege that they sent several shipments of Rugs/durries to Atlanta (USA) for the buyer. The two complaints
- B relate to 17 consignments sent by M/s. Hira Lal Ramesh Chand and 38 consignments sent by M/s. Ratan Chand Deep Chand, for which they did not receive payment. The common procedure adopted for supply is set out below.

- 20.1) The complainants handed over the consignment with
 - C an invoice made out in the name of Atlanta Rugs Inc., to their Forwarding Agent at Mumbai, namely, M/s Niranjan Shipping Agency Pvt. Ltd. The said Niranjan Shipping was also the shipping agent of Overseas Container Lines Inc., which was a Non Vessel Owning Common Carrier registered in USA. Niranjan
 - D Shipping as Forwarding Agent of the complainant entrusted the goods to Overseas Container Line Inc. (also represented by Niranjan Shipping as Shipping Agent) for transhipment from Mumbai to Atlanta. Overseas Container Line Inc., represented by Niranjan Shipping issued a Bill of lading in regard to each
 - E consignment. The Bill of lading showed the complainant as the consignor and mentioned "unto order" in the consignee column. Atlanta Rugs Inc. was shown as the buyer who should be notified by the collecting Bank. Overseas Container Line Inc. (represented by Niranjan Shipping) in turn entrusted the consignment to a shipping line which actually carried the consignment and the Shipping Line would issue a Master Bill of Manifest also known as Master Bill of Lading, showing the details of all consignments loaded in the container for being carried from the load port to the foreign destination port.

- 20.2) In regard to each consignment, M/s Niranjan Shipping as Custom House Agent issued a 'Shipping Bill for Export of Goods under Claim for Duty Drawback' showing the complainant as the Exporter and Atlanta Rugs Inc. as the Consignee, giving the particulars of the consignment and its value as also
 - H the name of carrier (vessel). The said Shipping Bill contained

an endorsement certified by the Customs Officer giving the A
particulars of the vessel and date of sailing.

20.3) The original documents of title comprising (i) the Bill of Lading issued by Overseas Container, represented by Niranjan Shipping as Agent, (ii) the invoice issued by complainants, (iii) the packing list and (iv) the shipping bill issued by Niranjan Shipping for claiming duty drawback, were sent by Niranjan Shipping to the Complainant's Bankers - Punjab National Bank. The copy of the Master Bill of Lading issued by the shipping line/ship was not included by Niranjan Shipping as part of the documents of title.

20.4) The complainant had a foreign Out Bill Purchase Account with Punjab National Bank. The Bank used to purchase/ discount the bills, and the Bill of Lading (Negotiable copy) was endorsed by the complainant in favour of Punjab National Bank or its order. The Punjab National Bank in turn endorsed the Negotiable copy of Bill of Lading in favour of its foreign correspondent Bank namely Trust Company Bank, Atlanta (subsequently known as Sun Trust Bank) and forwarded the documents of title to the said Trust Company Bank for collection. The foreign correspondent Bank would intimate the buyer about the receipt of the documents. On the buyer making payment of the Invoice amount, the foreign Bank would endorse the documents in favour of the buyer to enable the buyer to take delivery of the consignment. If the buyer did not make payment and retire documents within 90 days, the foreign correspondent Bank would return the documents to the Punjab National Bank.

20.5) The complainant would make a declaration under the marine insurance open cover issued by the appellant Insurance Company, in respect of each consignment as and when entrusted for shipment, for which the appellant would issue a Marine Insurance Certificate.

21. OP No.45/1997 filed by M/s. Hira Lal Ramesh Chand related to 17 consignments of the total value of US\$ 406,096. According to complainant, 12 consignments were covered by Marine Insurance Certificates issued under marine open policy

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A cover No.2142 11000 8745 and 5 consignments were covered by certificates issued under Marine open Policy Cover No.2142 11000 9032. The seventeen invoices were made between 9.3.1995 and 13.6.1995 and corresponding Bills of Lading were dated between 15.3.1995 to 29.6.1995.

B 22. OP No.49/1997 filed by M/s. Ratan Chand Deep Chand related to 38 consignments of the total value of US\$ 8,87,973. According to complainants, 33 consignments were covered by Marine Insurance Certificates issued under Marine Open Cover Policy No.2142 11000 8749 (validity period 4.5.1994 to 3.5.1995), two consignments were covered by certificates issued under Marine Open Policy Cover No.2142 11000 9038 (validity period 23.5.1995 to 22.5.1996) and three consignments were covered by specific policies No.2142 11000 8868, 2142 11000 8869 and 2142 11000 8870. The invoices in regard to these 38 consignments were made between 28.7.1994 to 25.6.1995 and corresponding Bills of Lading were dated between 23.8.1994 to 4.7.1995. According to the complainants, the original insured value of the two marine open cover policies was Rs.20 lakhs and Rs.10 lakhs, but on account of extra endorsements in respect of the open covers the extent of cover in respect of the two open covers stood increased to Rs.3,70,00,000 and Rs.90,00,000, and the three specific policies were for Rs.4,06,300, Rs.2,91,000 and Rs.2,81,700 in all Rs.4,69,79,000/-. It is contended that the value of 38 consignments which was US\$ 887973 (equivalent to Indian Rs.3,21,00,224/-) was well within the insurance cover amount and the commission erred in taking the total extent of cover as only Rs.30 lakhs. The complainants (respondents 1 to 3 in CA 4307/2003) have therefore filed cross-objections seeking increase in the amount awarded for Rs.30 lakhs to Rs.3,21,00,224/-. Be that as it may.

23. When the consignments were entrusted to Overseas Container, the complainants were not aware of its address, as the Bill of Lading did not indicate any address. On their request, Niranjan Shipping provided the address of Overseas Container

on 8.8.1995. The complainants claim to have written the following letter on 8.8.1995 to the Overseas Container Lines Inc. A

(NVOCC) :

"We have to transfer our goods to other buyers in USA. We have to convey the position of our cargoes to them and ask our bankers to transfer the documents in their name. For this reason we need the current position of our all the cargoes. B

Please let us know the position of our cargoes carried by you which had been booked with you for onward sea journey through forwarding agent M/s Niranjan Shipping Agency Pvt. Ltd., Bombay. C

Please treat the matter most urgent."

There was no reply in spite of a reminder dated 9.11.1995.

24. The complainants claim to have instructed their Bankers (Punjab National Bank) on 15.8.1995 to store the consignments sent to Atlanta in a Bonded Warehouse duly insured. But apparently neither Punjab National Bank nor its Foreign Correspondent Bank took any steps in the matter nor complied with the instructions. D

25. On 25.1.1996, the foreign collecting Bank informed the Punjab National Bank and complainants by telex message as follows : E

"We have contacted the drawee on several occasions and on each occasion they promised to make payment but as of date they have not make good on their promises. We have exhausted all efforts to obtain payment and do not wish to continue our fruitless efforts in pursuing these transaction. Please instruct us to turn the documents over to your agent for them to pursue as we do not offer the services you are requesting us to do and our policy is to return document after we exhausted efforts to collect payment and also not to hold documents over 90 days. F

If we do not receive your instructions to forward documents to your agent are returned them yourself by latest February 10, 1996. G

All documents will be returned to you and we will close our files on these transactions. It not our practice to investigate H

A **how the goods was released** nor to obtain any warehouse merchandise. We can assure you that we did not issue any form of guarantee to the drawee nor release any of documents to them. Please remit our charges of US \$ 3930, presenting our collection charges of US \$ 85 each, US \$ 5 each postage, cable charges US \$ 50 and courier US \$ 195."

B (emphasis supplied)

26. Thereafter, the complainants telephonically informed the insurer on 2.2.1996 about the non-realization of the Bills and claimed the value of the consignments. The insurer instructed the complainants to get in touch with their Surveyor and Claim settlement Agent -- M/s Toplis & Harding Inc., Atlanta, to investigate into the matter and give their report/certificate. Accordingly, the complainant sent a letter on 6.2.1996 to the said Surveyor requesting for an inquiry and investigation in regard to the consignments. In that letter the complainant stated:

E "In the above reference, we have to bring your kind attention that we failed to trace out the consignment as per details enclosed. We made the correspondence through our Bankers in India, that foreign Bank (Trust Company Bank now known as Sun Trust Bank) to whom the documents were endorsed and sent for collection of payments. Now foreign Bank has confirmed that the original documents are with them. We presumed that the following consignments are either lost or shipping company has done some fraud with our consignments with them."

F (Emphasis supplied)

G The complainant also sent reminder dated 19.2.1996 to the Surveyor. The Surveyor sent a Fax reply dated 4.3.1996 to the complainant stating that the various shipments had been delivered to and/or picked up by its customer - Atlanta Rugs Inc., with probable collusion from Overseas Container Line Inc., as Mr. Kumar Chaudhry was the President of both companies. In its letter dated 20.3.1996 to the Surveyor, the complainant acknowledged the information that the goods had been delivered by Overseas Container Line Inc., to someone other than Sun Trust Bank (who was holding the documents) and stated

that such act on the part of Overseas Container Line Inc. in releasing the goods has resulted in loss to them. The complainants therefore sought the following information from the surveyor: A

- (a) The basis for the surveyor's finding that the Trust Company Bank was not the consignee. B
- (b) Name and description of the person who actually took the delivery of the consignments. C
- (c) The particulars of documents on the basis of which releases were made by the custom services. D
- (d) Name and description of the authority giving delivery/release. E

The surveyor sent a telex dated 1.4.1996 to the complainant reiterating that its inquiry revealed that the President of Overseas Container Lines Inc. and President of M/s Atlanta Rugs Inc. was one and the same person namely Kumar Chaudhary and answered the four queries as follows: F

- (a) In the steamship line bill of lading (Master Bill of lading) Overseas Container Lines Inc. was probably named/shown as the Consignee. G
- (b) M/s Atlanta Rugs Inc. was apparently the person who actually took the delivery with the help of Overseas Container Lines Inc. which was named as the Consignee on the steamship line bill of lading. H
- (c) As the complainant had not furnished the details of the customhouse broker who cleared the goods through US Customs, the answer could be provided by Kumar Chaudhary. I
- (d) The release was probably by steamship line/custom warehouse. J

The surveyor also suggested that the complainant should contact S.K. Verma of M/s Niranjan Shipping as he was the signatory of the bills of lading issued by Overseas Container H

A Lines Inc. and as his role in the matter was not clear. The surveyor also informed the complainant as the Marine Insurance cover applied to shipments and as the shipments had reached the destination and were delivered without loss or damage, as per the insurance contract, the claim was not maintainable.

B 27. The complainants also contacted the Federal Maritime Commission, Washington, seeking their help to ascertain whether their consignments were lying at port or had been released and if lying at the port under whose custody they were lying or if they were released, when and to whom they had been

C released and under what conditions. The Federal Maritime Commission sent a reply dated 1.3.1996 to the complainant stating that it had been unable to locate either Overseas Container Lines Inc. or Atlanta Rugs Inc and advising the complainant to seek legal advice. The Commission also informed the complainant

D that Overseas Container Lines Inc. as a Non-vessel operating common carrier (NVOCC) had maintained a bond for US \$ 50000 and if any judgment is rendered, against it, the complainant could present a copy to Inter-Cargo Insurance Co., Illinois who were the insurer of Overseas Container Lines Inc. for payment.

E 28. Thereafter the complainant wrote a letter dated 6.5.1996 to Overseas Container Line Inc., stating as follows :

F "It is really strange that all our communications that is letters dated 8.8.1995 and 9.11.1995 have been un-replied. We are not able to contact you on phone and fax. **We have to come that all the goods have been released to you.** How and why you have done causing this huge lose to us. We will file a claim against you in proper forum at your entire risks."

(emphasis supplied)

G 29. The insurer informed the complainant that they were awaiting the report from the Surveyor M/s. Toplis & Harding Inc. and as soon as they receive the report, they will attend to the claims. The surveyor sent two reports dated 27.6.1996 in respect of the consignments of the two complaints. The relevant portions

H of the said report which are identical are extracted below :

NEW INDIA ASSURANCE CO. LTD. v M/S HIRA 1231
LAL RAMESH CHAND [R. V. RAVEENDRAN, J.]

".... We noted that the original bills of lading on hand at Sun Trust Bank were issued by Overseas Container Line Inc. which were the NVOCC involved in arranging of the various shipments at origin. The authorized signatory of the Overseas Container Line Inc. ocean bill of lading was a Mr. S. K. Verma of Nirajan Shipping Agency Pvt. Ltd. We advised all concerned parties to contact Mr. Verma for further information but we did not receive confirmation if this was carried out."

Master Bills of lading should have been issued by the steamship line but none were in Sun Trust Bank's possession. We noted that the Overseas Container Line Inc. bills of lading were consigned to the order of Trust Company Bank with the notified party as Atlanta Rugs Inc. At no time, have we been shown the master bills of lading issued by the steamship line.

Mr. Chang at Sun Trust Bank stated that he met Mr. Kumar Chaudhary, President of Atlanta Rugs Inc., on a number of occasions and he stated that to his knowledge Mr. Chaudhary was going through financial difficulties in both his personal and business life.

On February 23, 1996, we attended at the premises of Atlanta Rugs, Inc., and initially met with a person by the name of Rajesh Shorie, who said he was a new employee and could not assist our investigations. However, during our visit, Mr. Chaudhary arrived and was willing to speak with us but not to issue a signed statement.

Mr. Chaudhary understood the reason for the shipper's concern and stated unequivocally that he had received all the shipments and that very few pieces remained although he would not allow us to inspect his storage facility. He also did not give specifics as to how the cargo was cleared into his possession. He referred us to an attorney in Atlanta, Georgia, a Marshall Siegel. However, later Mr. Siegel informed us that he had only recently been contacted by Mr. Chaudhary and had not been retained by him as counsel.

During this time, we were contacted by another shipper, insured through a different underwriter, who also informed us that their shipments had not been paid for. We had been given a customs house clearing agents name in Atlanta - C.H. Powell and Company and we contacted their import manager, Mr. Wick. Mr. Wick informed us that he had acted as Atlanta Rugs, Inc. agent

A in 1994 and still had \$40000 of fees outstanding. We requested particulars details of the steamship lines involved and he volunteered that Neptune Orient Line was one of the carriers. Mr. Wick stated that on the NOL bill of lading the consignee and notify party were listed as Overseas Container Lines.

B This confirmed our earlier suspicion that probably Overseas Container Lines were using the steamship line master bill of lading to obtain and clear the shipments.

C We later became aware that Mr. Kumar Chaudhary is the registered President of Overseas Container Lines, Inc. We contacted Bureau of Enforcement at the Federal Maritime Commission (FMC) and we discussed that Overseas Container Lines address is registered at the same location as Atlanta Rugs, Inc. They also have a \$50000 bond with intercargo at Schaumberg, Illinois since 1993. They could not act as a Custom House Broker to clear the goods through US Customs

D as they would need to post a much larger bond with FMC. Ratan Chand Deep Chand did not furnish us with details of their customs house broker, although we did request this information on a number of occasions.

E In May 1996 we received a request from Punjab National Bank stating that they had purchased the 'Bills' pertaining to the shipments and that the claim amount should be remitted directly to themselves (see enclosed correspondence).

F At this time, we believe that Atlanta Rugs, Inc, has been dissolved and that Mr. Chaudhary is operating a different company. Based upon all the available information, at this present time, it would appear that all shipments were picked up by Atlanta Rugs, Inc. who used fraudulent methods to obtain the shipments without payment through the bank. We believe that the involvement of the steamship lines will be necessary to prevent further acts and to obtain more information on the stolen shipments. We are issuing our report to document all the facts as known at his present time and it is our intention to issue an addendum should our further involvement be necessary. Please note that we do not comprehend, and have received no explanation as to why the shipments were continually being sent even when the shipper was not receiving any proceeds."

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30. The copies of the reports were not furnished to complainants. As the Insurer did not settle their claim, the complainants filed complaints (OP Nos.45 and 49/1997) before the Commission on 25.2.1997 alleging that the conduct of the Insurer in not settling the claim amounted to a deficiency in service and consequently, claiming compensation from the Insurer in regard to the value of the consignments and other losses (as detailed in para 3 above). The Insurer sent letters of repudiation dated 4.3.1997 to complainants giving reasons for repudiation, relevant portions of which have been extracted above. A

31. We have considered the detailed submissions made by learned counsel. We have also considered the material that was placed before the Commission. We find on a careful consideration that the Commission has not addressed itself to the relevant issues. It is no doubt true that the complainants had booked the consignments showing the consignee as 'unto order' thereby indicating that the goods covered by the Bills of Lading should be delivered only to the holder/endorsee of the Bills of Lading. There is also no doubt that the original documents were not cleared/retired by the buyer 'Atlanta Rugs Inc.' and that the original documents were ultimately returned by the foreign correspondent Bank to Punjab National Bank and they are lying with Punjab National Bank. There is also no doubt that the consignments were insured against all risks of loss and damage. C D E

32. The basic and fundamental averment and proof required in a case of this nature is that the consignments had been lost or damaged in transit or that when the holder of the documents applied for delivery, the goods were not delivered on account of the same being irretrievably lost that is having been pilfered, stolen, lost or misdelivered. But there is no such averment or evidence that the consignments were lost or damaged. Nor is there any averment that the holder of the documents of title applied for delivery of the consignments, and was denied or refused delivery on account of non- availability of the consignments either due to pilferage, loss or misdelivery. When there is no allegation or proof of Sun Trust Bank having applied G H

A for delivery and refusal of delivery, it is inconceivable how the complainants can maintain a claim against the insurer.

33. Failure of the buyer to make payment and take delivery is not a 'loss' of consignment which is covered by the Insurance Policy. The complainant should make out a case of actual

B 'loss' of the consignment covered by the contract of insurance or non-delivery of the consignment, that is refusal to meet a demand for delivery. The question is whether the complainants have proved such loss or non-delivery. The case of the complainant as put forth in the complaint and reiterated in the affi-

C davit is that they have dispatched the consignment to Atlanta, that the consignments were insured against all risks; that the buyer did not retire the documents by making payment; that they do not know what happens to the consignments and that therefore the Insurer ought to have paid them the value of the con-

D signment and failure to do so amounted to deficiency in service as contemplated under the Consumer Protection Act, 1986. We are afraid that these are not allegations or proof of loss or non-delivery sufficient to foist any liability on the insurer.

E 34. Another question that arises for consideration is who was responsible for transshipment and delivery. Admittedly Overseas Containers was only a non-vessel owning common carrier (NVOCC) and not the actual shipping line. Necessarily therefore Overseas Container had to entrust the consignment to an actual shipping line for transportation and the Master Bill

F of Lading given by the shipping line would show the Overseas Containers as the consignee entitled to receive the delivery. The very fact that the Master Bill of Lading is not given to the consignors/complainants and the fact that the complainants did not demand for the same shows that they did not intend to apply for delivery directly from the shipping line that carried the consignments but only intended that delivery should be from Overseas Containers which had issued the Bill of lading. As the contract for carriage was between complainants and Overseas Containers and as the Bills of Lading issued by the Over-

G seas Container showed that the consignments were deliver-

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able to the order of the complainants, necessarily Overseas A
Containers were expected to take delivery of the consignment
at Atlanta from the shipping line which actually transported the
consignments and then deliver it to the holder of the documents
of title who seeks delivery. If that is so, the Overseas Containers
were entitled to take delivery from the shipping line which trans- B
ported the consignment and there was nothing collusive, clan-
destine or irregular about delivery of consignments being taken
by Overseas Containers from the shipping line, as it had en-
trusted the consignment to the shipping line for transportation.

35. There is no averment or proof that the consignments C
did not reach the destination namely the Port at Atlanta or that
the goods were not taken delivery by the Overseas Containers.
There is no averment as to whether the holders of the docu- D
ments namely the Sun Trust Bank applied for delivery or at-
tempted to take delivery of the consignment and store them in
a bonded warehouse and whether they were refused delivery
within the insurance cover period.

36. The insurance cover was in regard to all risks from E
consignor's warehouse to consignee's warehouse. There is no
dispute as to what is the consignor's warehouse as the com-
plainant is clearly shown as the consignor. The difficulty arises F
about the consignee's warehouse. If the consignee is treated
as Atlanta Rugs Inc., on delivery to Atlanta Rugs Inc., the insurer
is discharged of any liability for risks. If the consignee is shown
as 'unto order' whose warehouse is to be treated as consignee's G
warehouse? It does not obviously refer to complainants' ware-
house as admittedly the complainants were not having any ware-
house in Atlanta (USA), nor were they the holders of the docu-
ments. The 'consignee' at the relevant time could only be the H
Sun Trust Bank in whose favour the documents had been en-
dorsed. But it is not the case of the complainant that Sun Trust
Bank as the holder of the documents of title sought delivery of
the consignments from the custom's warehouse or steam ship
line or from Overseas Containers. Where there is no effort on
the part of the 'consignee' to take delivery from the shipping

- A line/customs warehouse, the duration of insurance cover cannot be infinite or indefinite. In such circumstances the risk cover would terminate on the expiry of 60 days after completion of discharge overside of the insured shipment from the Overseas vessel at the final port of discharge at Atlanta having regard to
- B clause 8 of Institute Cargo clause. It is not the case of the complainant that within that time (of 60 days), delivery was sought by the holder of the documents and that such delivery was refused. It is also not the case of the complainants that the consignments were unauthorisedly delivered to Atlanta Rugs or that
- C such delivery was within 60 days of the landing of the consignments at Atlanta. In the absence of any averment or evidence as to when the consignments were discharged from the ship at Atlanta and an averment that within 60 days of the landing of the consignments at Atlanta the holder sought delivery and delivery was refused, the question of the Insurer being made liable for non delivery does not arise. After 60 days of the landing of a consignment even if the consignment is destroyed, lost or misdelivered, it is no concern of the Insurer.

- E 37. It should be noted that a claimant insured in a marine insurance claim has to plead and prove the following (i) his position - whether he is the assured or an assignee; (ii) his insurable interest; (iii) the type or kind of the insurance policy and its relevant terms; (iv) the duration of the cover; (v) the nature of risk/loss; and (vi) the risk/loss is covered by the policy. In the absence of necessary averments and evidence to establish a marine insurance claim, a claim against the insurer is liable to be rejected. It is unfortunate that the Commission disposed of the matter without examining the terms of the policy and obligations undertaken by the insurer. In fact, having regard to the nature of issues involved, this was more appropriately a matter for civil court. Be that as it may.
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- H 38. Another significant aspect is that the consignments were being continuously sent from August, 1994 to July, 1995 by M/s. Ratan Chand Deep Chand and from March to June, 1995 by M/s. Hira Lal Ramesh Chand without making any effort to ascertain the fate of the earlier consignments. Even when they learnt none

of the documents relating to the consignments had been retired A by the buyer, they merely gave the oral intimation to the insurer that too on 2.2.1996 about the non-retirement of the documents. No claim was lodged with the insurer in writing. The allegation that orally a claim for 'loss of goods' was made on 2.2.1996 cannot be true as according to complainants themselves till that date B they had no knowledge that the consignments had been either lost or wrongfully delivered. In fact the complainant have not produced even a single document making a claim on the insurer on the ground that the goods had been lost or not delivered.

39. The complaints, affidavits and the documents are also C significantly silent about the following aspects :

- (i) The particulars of the ships by which the consignments were transported and the dates on which the ships sailed, and whether any loss or damage was caused to any of the consignments while in transit. [Though the Xerox copies of the 'Shipping Bills for export of goods under claim for duty drawback' give the name of ship and date of sailing, they are not authenticated or supported by the evidence of the persons who prepared those shipping Bills or the Customs officers who certified them]. D E
- (ii) If the consignments were not damaged or lost in transit, when did the ships discharge the consignments in Atlanta Port; on such discharge whether the consignments were with the shipping line or were shifted to a customs warehouse; or whether they were immediately delivered to Overseas Containers and if so when. F
- (iii) In their rejoinder, the complainants stated that by letter dated 15.8.1995 they asked their Bankers to take delivery of the consignments and store them in a bonded warehouse duly insured. This assumes that the consignments had arrived safely and soundly at Atlanta Port. The Sun Trust Bank was holding the G H

A original documents at that time. There is no averment as to whether they complied with the said instructions and took delivery of the consignment and place them in a warehouse in its control. If they did not do so, the reasons ought to have been given.

B (iv) Nothing is said as to whether the Bank holding the documents of title apply for delivery by producing them. The complainants did not obviously apply. If no one ever applied or sought delivery and if there was no refusal, there is no question of loss or the question of liability on the part of the Insurer.

C (v) There is no averment as to whether the complainants or the holders of documents of title ever complained or reported loss of the consignment, or about any wrong delivery or misdelivery to any one, in writing.

D (vi) The consignments were entrusted to Niranjan Shipping, who was acting as the forwarding agent of complainants as also the agent of a non- vessel owning shipping agent (NVOCC) namely Overseas container. The Bills of Lading were issued by a NVOCC. In those circumstances the reason as to why the complainants did not demand for the supply of the copies of the Master Bills of Lading issued by the shipping line/vessel which actually transported the consignments, is not disclosed. The failure of complainants to pursue the matter with Niranjan Shipping to whom they had delivered the consignments, is also strange.

E (vii) None of the Bills of lading issued by the Overseas Container Lines Inc., contains their address. The complainants did not care to seek their address, even though it would not have been possible to take delivery without knowing the address. The complainants did not also care to enquire with Niranjan Shipping, about the absence of address in

the Bills of Lading. It was only long after all the A consignments were dispatched, when the documents were not retired by the buyer, the complainants woke up and requested Niranjan Shipping to furnish the address of the Overseas Container and Niranjan Shipping provided the address by communication dated 8.8.1995. This strange behaviour is not explained. This indicates either willful negligence or willful misconduct by way of collusion. B

(viii) In regard to all the consignments, Niranjan Shipping had issued shipping bills for export of goods under claim for duty drawback' showing the complainant as the exporter and the Atlanta Rugs Inc. as the consignee. If the Bills of lading showed the consignee as "unto order" (that is the endorsee of the documents of title) and if the property in the goods had not passed by the buyer (Atlanta Rugs Inc.), then the reason why the complainant did not protest against the issue of such shipping bill showing Atlanta Rugs Inc. as the consignee, is not stated. C D

40. The complainants have failed to plead and make out a case of loss, in respect of each and every consignment, either during transit or within 60 days of the consignments being discharged from the ship at Atlanta Port. They merely proceed the assumption that the Insurer is liable when the documents are not retired by the buyer, which, to say the least, is untenable. As there is no averment or proof that the consignor or the foreign correspondent Bank holding the documents of title or any person authorized by the said Bank applied for delivery within 60 days of the goods being discharged, and as there is no averment or proof that the consignments were lost or wrongly delivered within the said period of 60 days, the liability and responsibility of the insurer under the policy of insurance came to an end with reference to each of those consignments. Consequently the claim of the complainants against the insurer is liable to be rejected. E F G H

A 41. The Commission has referred to the delay of nine months on the part of the Insurer in repudiating the claim, after receiving the surveyor's Report, and the failure to furnish a copy of the reports to the complainants as deficiency in service. But what is overlooked is that the complainants did not lodge any

B claim in writing. At all events, they did not produce any document showing the lodging of claim. It was on a mere oral intimation on 2.2.1996, the investigation by surveyor was set in motion. Further the contents of the report had already been notified to the complainants by the surveyor in the telexes dated

C 4.3.1996 and 1.4.1996. Therefore, the finding of deficiency in service was not warranted.

42. In this view of the matter, it is unnecessary to consider the counter claim of the respondents 1 to 3 in CA No.4307 of 2003. Nor is it necessary to consider whether such counter claim

D is maintainable in an appeal under section 23 of the Consumer Protection Act, 1996.

43. In view of the foregoing, the appeals are allowed and the order of the National Consumer Redressal Commission is set aside and OP No.45/1997 and 49/1997 before the Commission stand dismissed. Parties to bear their respective costs.

R.P.

Appeals allowed.

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