

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA Nos. 76/2004 and 78/2004**

% **21st February, 2012**

1. RFA 76/2004

UNION OF INDIA Appellants
Through: Mr. R.V. Sinha and Mr. A.S. Singh,
Advocates.

versus

M/S COX & KINGS (INDIA) LTD. & ANR. Respondent
Through: Mr. H.L. Raina, Advocate for R-1.

AND

2. RFA 78/2004

UNION OF INDIA AND ANR Appellants
Through: Mr. R.V. Sinha and Mr. A.S. Singh,
Advocates.

versus

M/S COX & KINGS (INDIA) LTD. Respondent
Through: Mr. H.L. Raina, Advocate for R-1.

**CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA**

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J. (ORAL)

RFA No. 76/2004

1. The challenge by means of this Regular First Appeal (RFA) filed

under Section 96 of Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 23.5.2003 dismissing the suit for recovery of ₹4,46,027.65/- filed by the appellant/plaintiff against respondent No.1/defendant No.1. Respondent No. 2/Oriental Insurance Company Limited/defendant No.2 was a proforma party.

2. The facts of the case are that the appellant/plaintiff had originally appointed one M/s Globe Commercial Agency in February, 1986 as a clearing agent. The respondent No.1 was, thereafter, substituted as a clearing agent in place of M/s Globe Commercial Agency in terms of letter dated 20.8.1986. One of the consignment belonging to the appellant/plaintiff consisted of 10 TWT mounts, i.e. 6 TWT mounts were type VYJ2609E9 and 4 TWT mounts were type VYG2630F8. These mounts were packed in one skid. The total weight of this consignment was 100 Kgs. as per the Airway Bill No. 098-4541-6696. The consignment was dispatched by the supplier from Canada to New Delhi by the aforesaid Airway Bill dated 30.4.1986. This consignment was got released by defendant No.1/respondent No.1 on 9.12.1986 from International Airport Authority of India, Palam Airport, New Delhi and was dispatched to Calcutta by Indian Airlines Consignment Note C/No: 09635970 dated 9.12.1986. It was the case of the appellant/plaintiff, as per the plaint, that

when the package was opened at Calcutta it was found that the same contained only 6 TWT mounts out of 10 TWT mounts and, therefore, the consignment of 100 Kgs. was short as the weight which was found was only of 47 Kgs. of 6 TWT mounts instead of 100 kgs of 10 TWT mounts. It was pleaded that the appellant/plaintiff was thus caused loss due to the negligence of defendant No.1/respondent No.1 and, therefore, the claim of ₹1,85,201.90/- arose on account of short supply. The suit plaint also included a claim of ₹92,041.80/- towards ground rent in addition to certain incidental charges of ₹28,832/- totaling to ₹3,06,075.70/-. Interest of ₹1,39,951.95/- was also claimed. Originally, the insurance company/respondent No.2 was not added as a party, however, on an objection being taken by defendant No.1/respondent No.1 the insurance company was added as a party, however, most surprisingly only as a proforma defendant, and which would be a grave error as will be shown hereinafter.

3. Defendant No.1/respondent No.1 contested the claim and denied its liability on the ground that the consignment in question had already landed and was damaged before defendant No.1/respondent No.1 was appointed as a clearing agent. It was pleaded that loss of 4 TWT mounts was to the knowledge of the appellant/plaintiff, and there is no liability of defendant

No.1/respondent No.1, inasmuch as, whatever consignment was delivered to defendant No.1/respondent No.1 at New Delhi, the same consignment was delivered to the appellant/plaintiff at Calcutta.

4. After the pleadings were completed, the trial Court framed the following issues:-

“1. Whether the plaint has been signed and verified and suit has been instituted by a duly authorised person? OPP

2. Whether the suit is barred by limitation as alleged by the defendant? OPD

3. Whether the defendant had taken the delivery late and was negligent and the defendants are liable to pay the damages amounting to Rs.3,03,075.70 p. as claimed by the plaintiff? OPP

4. Whether the defendant are liable to pay interest amounting to Rs.92041.80 and Rs.13101.85 as claimed by the plaintiff? OPP

5. Whether the plaintiff is entitled to recover Rs.28832/- regarding insurance charges as claimed by the plaintiff? OPP

6. Whether the plaintiff is entitled to recover interest at the rate of 18% p.a. as claimed? OPP

7. Relief.”

5. The main issue to be addressed was with respect to whether the defendant No.1/respondent No.1 was negligent and which was the subject

matter of issue No.3. The trial Court has held that the appellant/plaintiff failed to prove the negligence of defendant No.1/respondent No.1, inasmuch as, what was delivered to defendant No. 1/respondent No.1 was the consignment of 47 Kgs. and it is this consignment in the form which was received, was delivered by defendant No. 1/respondent No.1 to the appellant/plaintiff at Calcutta. Some of the relevant observations of the trial Court for holding defendant No.1/respondent No.1 not liable, because whatever package was received by defendant No.1/respondent No.1 was delivered to the appellant/plaintiff in the same condition at Calcutta, are contained in paras 15-17 of the impugned judgment which read as under:-

“15. Onus to prove this issue was upon the plaintiff and in discharge of that onus the plaintiff has examined the aforesaid 10 witnesses. PW-1 Shri K.D. Nindawat is the most material witness, who had deposed almost on all the material facts consistent to its claim and in addition to that he has exhibited the documents Ex.PW1/1 to Ex.PW1/21. The document Ex.PW1/1 is the tender notice, Ex.PW-1/2 is letter dated 10.8.1986 giving the contract to defendant No.1, Ex.PW1/3 is the letter written by Shri R B Tewari, which was objected to, Ex.PW-1/4 is the letter dated 12.6.86 which is also objected for proving the same on account of mode of proof, Ex.PW1/5 is the letter written by Oriental Insurance Co. to India Airlines, Ex.PW1/6 letter dated 2.3.1987 is reply, Ex.PW1/7 is letter for shipment under enquiry consisted of one packet only weighing 47 Kgs. Ex.PW1/8 is letter dated 18.12.86, written to Airport authority of India, Ex.PW1/9 is the letter dated 9.12.86 regarding consignment, Ex.PW1/10 is letter regarding request of waiver of the ground rent, Ex.PW1/11 is the letter dated 30.8.1986 by which the

defendant was instructed to dispatch the said consignment to Calcutta, Ex.PW1/12 is letter dated 18.12.1986 written to the defendant regarding seeking clarification about the delivery. Ex.PW1/13 is postal receipts, AD card is Ex. PW1/14, Ex.PW1/15 is the letter written by the plaintiff to the defendant regarding release of consignment, Ex.PW1/16 and Ex.PW1/17 are the postal receipts, Ex.PW1/18 is the letter dated 18.5.87, Ex.PW1/19 to Ex.PW1-21 are the postal receipts. At the same time certain documents are also marked which are marked A to Z, Z-1 to Z-15. On cross-examination, there appears no dispute regarding those documents and certain facts are admitted by this witness admitting to be correct that M/s Globe Commercial Agency was awarded a tender for the year 1986 which is not in dispute. He has further admitted the fact suggested by the defendant which are reproduced here as under:

“It is correct that the consignment receipts are kept by the Airport Authority in their warehouse and after their authorization the same is received from the warehouse by the agent.”

“It is correct that the short of consignment was not reported at the time of taking delivery. Delivery was taken in the manner in which it was booked. It is correct that the consignment was complete booked. It is correct that the consignment was complete at the time of booking, the same has been complete at the time of delivery and the same was confirmed by airport authority that the consignment was complete. It is correct that one of the claims in the present suit is in respect of the short delivery of the consignment which was sent to Calcutta.”

16. In view of these facts admitted by this witness, it appears that the consignment was delivered to the

defendant as complete as admitted by this witness and in the same condition the same was dispatched to the ultimate consignee and there also in the same condition the same has been received. PW-2 Shri J J Bhalla, who was the asst. Manager, Cargo Sales Department, Air India did not state anything in favour of the plaintiff in respect of the record of air way bill No.098-4541-6696 as there was no record. PW-3 Shri K.K. Mehta deposed that the record has been weeded out and therefore the letter dated 30.5.88 was not traceable. PW-4 Shri S L Arora also deposed nothing favourable and material in favour of the plaintiff and against the defendant. PW-5 Shri R M Dubey, who has proved the document Ex.PW5/1 by which it is proved that the summoned record has been weeded out. PW-6 Shri Azad Singh has also proved the document Ex.PW-6/1 a report regarding the weeding out the record, PW-7 Shri A K Seth has also proved the document Ex.PW7/1 regarding weeded out of the original record maintained by them. PW-8 has already been discussed while deciding issue No.1 PW-9 Subhash Thadani has proved the document Ex.PW-9/1 to Ex.PW-9/3 in all. The document Ex.PW-9/1 is the document that is already exhibited as Ex.PW-1/5 Ex. PW9-3 is of two pages document bearing the signatures of M. Simoos. PW-10 Shri Avdhesh Kumar, who was the Sr. Manager Cargo but he had not produced the summoned record and nothing material was proved by him.

17. In view of the evidence led by the plaintiff by examining the aforesaid witnesses the substance of which has already been discussed, I find that the plaintiff bitterly failed to prove that the said consignment was damaged after the delivery of the same was taken by the defendant. It is the case of the plaintiff that the consignment was 100 kgs when it had started from Canada and that when it was delivered at the final stage at Calutta it was 47 kgs. It is the case of the plaintiff that at the time of booking from Delhi to Calcutta it was 47 kgs. The document-Mark -C has been filed by the plaintiff and this document is dated 9.12.96 regarding the

delivery and booking which is airway bill and by this document it is established that at the time of bookig from Delhi the weight was 47 kgs. Admittedly the consignment has been received on 4.6.86 in India and the delivery have been given to the defendant on 9.12.86. Admittedly, the contract has been assigned to the defendant on 20.8.86. Therefore it is admitted fact of the plaintiff that the consignment has reached in India and was lying in India during the course of subsistence of the contract between the plaintiff and the M/s Globe Commercial Agency. No document has been proved by the plaintiff to establish that when the contract was assigned to the defendant and delivery was taken by the defendant, the weight was 100 kgs. It has been pointed out during the course of argument that at the joint inspection it was found that there were only 6 items and consignment had already been broken and joint inspection conducted by the plaintiff and the defendant while the goods were lying at the cargo and it was found that there were only six TWT mounts and the consignment was not intact as it was sent by original consignee, I find that plaintiff bitterly failed to prove any negligence on the part of the defendant on any ground, and therefore, in those circumstances, I find that the plaintiff cannot be held entitled to claim any amount as pleaded in the plaint. Therefore, the plaintiff cannot be held entitled to recover suit amount from the defendant as claimed in the suit. So this issue stands decided in favour of the defendant and against the plaintiff.”

(underlining added)

6. A reading of the aforesaid paras shows that the admitted document, being the Indian Airlines Consignment Note C/No: 09635970 dated 9.12.1986 showed that the package in question which was booked from Delhi for Calcutta, was only of 47 Kgs. It was this package which was

delivered to the appellant/plaintiff at Calcutta. The trial Court has also correctly found that it is an admitted fact that the consignment had reached India and was lying in India during the subsistence of contract between the appellant/plaintiff and M/s Globe Commercial Agency and no document has been proved to establish that when the contract was assigned to defendant No.1/respondent No.1 the delivery taken by defendant No.1/respondent No.1 was of the weight of 100 kgs.

7. In addition to the aforesaid reasoning of the trial Court, I have examined the documents filed by the appellant/plaintiff itself in the trial Court. A reference to the original documents which are filed by the appellant/plaintiff in the trial Court along with its list of documents dated 29.7.1991 show that this consignment under the Airway Bill No. 098-4541-6696 remained untraceable for a long period of time i.e. from August, 1986 till almost the end of November, 1986. The appellant/plaintiff had written various letters to the International Airport Authority of India at Delhi with respect to several missing packages/consignments and one such missing consignment was the subject consignment. Some of the letters written in this regard to the relevant officials at the cargo terminal at Palam Airport, New Delhi are letters dated 6.10.1986, 8.10.1986 and 13.10.1986. In addition to the aforesaid letters, letters were written to defendant

No.1/respondent No.1 itself with respect to these missing packages and which are letters dated 20.10.1986 and 28.10.1986.

8. In fact, ultimately, the appellant/plaintiff vide its letter dated 15.11.1986 lodged a claim with the International Airport Authority of India for two missing packages under two airway bills and one of this package was the subject consignment. In the aforesaid letters which have been referred to, there are two letters which are very relevant. First is the letter dated 6.10.1986 written on behalf of the appellant/plaintiff to Sh. Mago, Assistant Director Cargo at Palam Airport, and the second is the claim dated 15.11.1986 lodged with respect to the subject consignment. Since these two letters are important, they are in totality reproduced below:-

(a)

“Department of Telecommunication

From:

Divisional Engineer Telegraphs
Regional Spares Organisation
Eastern Court New Delhi.

No.DE/RSO/MW8-749/TM/60

Dt.6.10.86

Sh. Mago
Asstt. Director Cargo
New International Cargo Terminal
Palam, New Delhi.

Subject:- Regarding non traceable of package received
against two Air Way Bill.

The following two consignments have been marked for location but are not traceable except four packages. The details of consignments are as under.

<u>Sl. No.</u>	<u>Consignment No:1</u>	<u>Consignment No:2</u>
1.	Locator pass No.5122 Dt.24.9.86	64390 dt. 24.9.86
2.	AWB No: 098-4541-6674	098-4541-6696
3.	IWR Serial No. 11211	11222
4.	Location	1210
5.	Flight No. AI104 dt.5.6.86	AI104 dt.5.6.86
6.	No. of packages 01	01
7.	Weight 110 Kgs	100Kgs
8.	Consignee Agent/GCA	GCA

For your ready reference the following information for location is given.

It is presumed that are big card board in which ten TWT Mounts were packed in ten small cardboard packages received fide AWB 098-4541-6696 has broken and small packages must have been separated.

Similarly one big packages received against AWB098-4541-6674 must have broken and fifteen small packages must have been separated.

The small packages can be located as per the following details given on them

(i) Letter of credit No. 16056 dt. 20.2.86

(ii) Name of consignee : Accounts Officer (Cash)
O/O General Manger Maintenance
Northern Telecom Regens
A-1/2 NIA Phase-II
Bentex Tower Naraina
New Delhi-28

(iii) Name and Address of ultimate consignee:

(i) Divisional Engineer (RSO) WTR
345 Mount Road Bombay.

(ii) Divisional Engineer (RSO)
Eastern Telecom Regen 69,
Ganesh Chander Avenue
Calcutta.

(iv) Name of Supplier:- M/S Varian AG. Switzerland

Since the above two consignments are urgently needed and ground is abundantly increasing hence you are requested to kindly depute your staff at your earliest for tracing al the packages meant for each Air Way Bill.

The above information has been also given to Sh.P.K.Ratti after discussing the case.

Copy to

Sh. Mainker

Direcotr Cargo

II M/S Cox & Kings India Ltd.
For information and for n/a
As per above”

(b)

“Department of Telecommunication

From:

Divisional Engineer Telegraphs
Regional Spares Organisation
Eastern Court New Delhi.

No.DE/RSO/MW8-749/TM/75

Dt.15.11.86

The Director Cargo
IAAI New International Cargo
Terminal Indira Gandhi,
International Air Port
Palam, New Delhi.

Subject:- Claim in respect of two untraceable consignment received against AWB 098-4541-6674 flight No.AI 104 dt. 5.6.86 and AWB 098-4541-6696 Flight No: AI 104 dt. 5.6.86

The above two consignments were marked for location on 24.9.86 but to date the position of actual number of packages found against the each Air Way Bill has not been given to us despite our constant pursuance. Copy of our letter Ref. No.DE/RSO/MWB-749/TM/66 dt. 21.10.86 a reminder in respect of above two untraceable consignments with details of location of each consignment delivered to Sh. S.S. Ray Air port Officer IAAI Monkey farm New Delhi on 30.10.86 after discussing the intricacies by Asstt. Engineer (RSO) and copy has been duly received a copy of the same letter was also delivered in office of Director Cargo IAAI New International Cargo Terminal New-Delhi and has also been got received. Copy enclosed for your kind reference the case has again discussed on 7.11.86 with Sh. S.S.Ray.

Since much time has passed and there has been no progress to date hence a claim is being lodged.

The details of claim in respect of above referred consignments are as under.

<u>Sl. No.</u>	<u>B/E No:</u>	<u>Air Way Bill No:</u>	<u>C.I.F. Value in</u> <u>Rs. per B/E</u>	<u>Custom duty</u> <u>Paid</u>	<u>Total Amount</u> <u>of claim in</u> <u>Rs. i.e. Total</u> <u>@ 4 & 5</u>
1.	34114	098-4541-6696	Rs.298712.72	i. Rs.134420.95-45%	Rs.4,63,004
	4.7.86			ii. <u>Rs.29871.05-10%</u>	
			Total =	<u>Rs.1,64,292.00</u>	

2. <u>33142</u>	098-4541-6674	Rs. 4,38,150.00	i. Rs.197166.60-45%	Rs.6,79,132.00
30.6.80			ii. Rs. <u>43815.40-10%</u>	
			Rs. <u>240982.00-55%</u>	
			Total	Rs. <u>11,42,136.00</u>

You are requested to kindly settle the above claim at your earliest please.

Encloser:- (R.B.Tewari)
 1. Copy of our letter No. Divisional Engineer
 DE/RSO/MW8-749/TM66 dt. 21.10.86 Regional Spares Organisation
 With details of location vide which Eastern Court New-Delhi
 the case was discussed and copy delivered in O/O Director Cargo IAAI
 New Delhi and to Sh. S.S.Ray Air Port
 Officer Monkey farm IAAI

2. Transfer TR-6 Challan in r/o B/E 34114 dt. 4.7.86
 - i. For ` 134420.95 in r/o 45% duty
 - ii. For `29871.05 in r/o 10% duty balance duty
3. TR-6 challan in r/o B/E No: 33142 dt. 30.6.86
 - i. For `197166.60 in r/o 45%
 - ii. For ` 43815.40 in r/o 10% balance duty
4. Invoice, Air Way Bill, packing list

Copy to:

1. Chairman IAAI New Delhi for information
2. Asstt. Collector of Custom, New Delhi for information.
3. Sh. S.S.Ray Air Port Officer Monkey Farm IAAI for information.”

9. Before proceeding further, I may also state that though these letters are not exhibited before the trial Court, since they are documents in original filed by the appellant/plaintiff itself, they can be referred to and relied upon against the appellant/plaintiff. These documents, including the two letters, as reproduced above, show that the subject consignment was untraceable from August to November, 1986. Immediately, after the same was traced in December, 1986, the consignment in the form and condition it was received from the International Airport Authority of India by defendant

No.1/respondent No.1, was dispatched to the appellant's/plaintiff's consignee at Calcutta. The letter dated 6.10.1986 reproduced above shows that the appellant/plaintiff was aware that the subject consignment had in fact been broken and the small packages were separated. Obviously, it is on account of this breakage, loss would have occurred with respect to 4 TWT mounts causing the difference in weight from 100 kgs. to 47 kgs. The correspondence between the appellant/plaintiff with the Airport Authority, as also the respondent No.1 shows that the subject consignment was not traced out till November, 1986 and the appellant/plaintiff was consequently forced to lodge a claim against International Airport Authority of India.

10. In view of the aforesaid facts, the trial Court was fully justified in holding that there was no negligence of defendant No.1/respondent No.1 in having lost any of the packages which were given to the defendant No.1/respondent No.1. The package which was given to it was of 47 kgs. as per Indian Airlines Consignment Note C/No: 09635970 dated 9.12.1986 and it is this consignment of 47 kgs. as stated in Airlines Consignment Note C/No: 09635970 which was delivered to the appellant/plaintiff at Calcutta. Surely, if only 47 kgs were delivered to defendant No.1/respondent No.1 there does not arise any question of any loss being

caused by it of the difference of 100 kgs. and 47 kgs. At best, the liability of defendant No.1/respondent No.1 would be for taking short delivery, however, even that liability would not be there because to the knowledge of the appellant/plaintiff the main package had been broken open as is clear from the letter dated 6.10.1986 written to Sh. Mago at the Airport Cargo Terminal and at best the negligence of defendant No.1/respondent No.1 would be of taking short delivery, however, that negligence in itself cannot fasten the defendant No. 1/respondent No. 1 with liability because it is not as if the appellant/plaintiff was not aware within the limitation period that it was the International Airport Authority of India which had given short delivery and therefore the suit could well have been filed against the International Airport Authority of India within the limitation period for the loss caused during the period the consignment was in the custody of the International Airport Authority of India. The liability, therefore, for having lost the goods, was of the International Airport Authority of India and not of defendant No.1/respondent No. 1.

11. In my opinion, there has been quite clearly a grave and glaring error on behalf of the appellant in not claiming relief from the insurance company/defendant No.2/respondent No.2, although, admittedly the consignment was insured. The insurance company, no doubt, had denied

its liability but the facts of the case clearly show that the denial of liability was without reason and really the appellant/plaintiff would have succeeded in its claim against the insurance company if the same had been filed. However, for the reasons which are difficult to fathom the defendant No.2/respondent No. 2/insurance company was made only a proforma party and no relief was claimed against the insurance company. Once the goods are lost and they are covered by the insurance policy, the present was a clear-cut case to claim the loss from the insurance company and which unfortunately has not been done. The denial of liability by the insurance company was meaningless and it becomes clear from the letter dated 3.6.1988 written by the said insurance company to the appellant/plaintiff, Ex.PW1/5, in which loss of goods/consignment and it being otherwise covered under the policy was not denied. This letter reads as under:-

“THE ORIENTAL INSURANCE COMPANY LIMITED
(Subsidiary of General Insurance Corporation of India)

Divisional Office No. 8 (Code No. 21180)
Jeevan Vihar Building,
3rd Floor, Sansad Marg,
New Delhi -110001
Grams: ORIEIGHT
Telex : 66357 OFGI IN
Phones : 311924, 310871, 343987, 353628, 324043

21180/20/MCL/86/05396

3rd June, 88

The Divisional Engineer,
Department of Telecommunication,

Regional Spares Organisation,
Eastern Court,
New Delhi.

Dear Sir,

Re: Additional documents in respect of missing/short delivered
consignment against AWB 098-4541-6674, 098-4541-6685,
098-4541-6696 and 098-4652-7423

We are in receipt of your letter No. DE/RSO/MW8-749/TM/Vol.2 dated 31.5.88 alongwith a copy of International Airport Authority of India's letter dated 30.5.88 and also your letter dated 2.5.88

We have examined the documents submitted to us in support of the claim on account of alleged shortage at Calcutta. We observe that according to International Airport Authority of India consignment per AWB No.0984541-6696 was delivered to you/your Clearing Agents at New Delhi against clean receipt in sound condition, meaning thereby that there was no shortage whatsoever at New Delhi. Subsequently part consignment weighing about 47 kgs, according to Indian Airlines letter there against clean receipt. It is claimed that at Calcutta only 6 TWTS were received and the other 4 were found short. It is obvious that no shortage had taken place during transit from New Delhi to Calcutta as only part consignment had been dispatched by your Clearing Agents. The whereabouts of remaining part consignment i.e. 4 TWTS should be known to you/your Clearing Agents. No explanation has been given to us as to how the same were handled and under what circumstances the same were lost. You are aware that as per insurance policy's terms & conditions liability arises thereunder only when it is shown beyond doubt that the loss occurred during currency of the policy owing to perils insured against. As revealed by the circumstances 4 TWTS which are being claimed as non-delivered in fact must be in the custody of your Clearing Agents/they are bound to account for. This is a matter which has to be sorted out by you with your Clearing Agents. We will come into the picture only if the said TWTS are shown to have been lost owing to perils insured against.

We hope the position is clear to you.

Yours faithfully,

SR. DIVISIONAL MANAGER"

12. A resume of the aforesaid facts shows the following:-

(i) The defendant No. 1/respondent No.1 was only a substituted

clearing agent.

- (ii) The consignment had reached the shores of India before defendant No. 1/respondent No. 1 took up the clearing agency contract.
- (iii) The consignment was in fact damaged and the packages had dispersed while the consignment was in the possession of International Airport Authority of India.
- (iv) This aspect of the main consignment being broken open and the small packages having been dispersed, was known to the appellant/plaintiff from August, 1986 itself.
- (v) The period from August, 1986 to November, 1986 was the period when the subject consignment was not traceable and after it was traced the same was immediately airlifted to Calcutta by defendant No.1/respondent No. 1 as per Indian Airlines Consignment Note C/No: 09635970 dated 9.12.1986.
- (vi) Defendant No.1/respondent No.1 received a package of 47 kgs. and delivered the package of 47 kgs. and therefore no case is made out of the defendant No.1/respondent No. 1 receiving a package of 100 kgs but delivering only 47 kgs.
- (vii) The liability in this case would be of the International Airport

Authority of India and not of defendant No.1/respondent No.1 because short delivery was given by International Airport Authority of India and which fact was to the knowledge of the appellant/plaintiff.

- (viii) The appellant/plaintiff ought to have in fact filed a suit and pursued its claim against the insurance company, and such claim if filed would have succeeded and decreed against the insurance company as the loss of the consignment was admitted and which was during the currency of insurance policy, however, for the reasons best known to it, the appellant/plaintiff did not claim any relief against the insurance company/defendant No. 2/respondent No.2.

13. In view of the above, I do not find any fault or error in the impugned judgment for the same to be set aside in this appeal. The trial Court has rightly dismissed the suit of the appellant/plaintiff. There could not be a claim for loss of goods, more so there was no loss caused by defendant No.1/respondent No.1. There also cannot be any claim for demurrage charges because the packages were not traced out by the International Airport Authority of India itself. There is also, in view of the aforesaid facts, no entitlement of the appellant/plaintiff with respect to the claim for

the insurance charges incurred.

14. In view of the above, the present appeal is dismissed, leaving the parties to bear their own costs. Trial Court record be sent back.

RFA No. 78/2004

15. This appeal impugnes the judgment of the trial Court passed on the same date, i.e. 23.5.2003, and on which date the impugned judgment was passed which is the subject matter of RFA No. 76/2004. By the impugned judgment which is the subject matter of RFA No. 78/2004, the claim of M/s Cox & Kings (India) Limited (which is defendant No.1/respondent No.1 in RFA No. 76/2004) was decreed on account of it having discharged the duties as clearing agent from September, 1984 to June, 1987. The clearing agent-M/s Cox & Kings (India) Limited proved the bills of charges, and which claim was decreed, inasmuch as the only defence by the defendant in the suit, i.e the appellant, herein, was the claim against the clearing agent for having lost the goods received under the Airway Bill No. 098-4541-6696. Since, in the connected suit, the trial Court held that the clearing agent was not guilty of causing loss, it was held that the clearing agent was entitled to recovery of charges. Some of the relevant observations of the trial Court in this regard are contained in paras 11 to 13 of the impugned judgment and which read as under:-

“11. I have given thoughtful consideration to the submissions made by the ld. counsel for the plaintiff and contentions raised by the ld. counsel for the defendants, gone through the evidence led by both the parties and the documents respectively proved by the witness and my findings on the aforesaid issues are recorded as under:

ISSUE NO.1

12. Onus to prove this issue was upon the plaintiff and in discharge of that onus the plaintiff had examined PW-8 Shri S.Bahumick, who has deposed that suit has been signed and verified by Shri R.D.Arya the then Chief General Manager and he has verified his signatures on the plaint. In view of cross-examination there appears no dispute regarding authority of Shri R.D. Arya of signing and verifying the plaint and institute the suit. In view of testimony of PW-8 in his examination-in-chief i.e. affidavit and there being no challenge, I find that Shri R.D. Arya was duly authorised to sign, verify and institute the suit for an on behalf of the plaintiff. So this issue stands decided in favour of this plaintiff and against the defendants.

ISSUE NO. 2

13. This issue has been framed in such term as the onus to prove this issue was upon the defendant, whereas, by reason of Section 3 of the Limitation Act it is always the burden and obligation of the plaintiff to establish institution of the suit within prescribed period of limitation, and in cases in the suit, the plaintiff fails to establish the institution of the suit before the expiry of the period of limitation the Court has no option but to dismiss the suit even though no defence is set up in that regard. Therefore, in view of the provision of Section 3 of Limitation Act it is the plaintiff who has to establish the institution of the suit within the prescribed period of limitation.”

16. Since, I have dismissed RFA No. 76/2004 giving detailed reasoning, accordingly, the impugned judgment which has been passed, which is the subject matter of the present RFA, has to be sustained and it is held that the appellant/plaintiff was bound to pay the charges of the clearing agent for the relevant period.

17. This appeal is therefore dismissed, leaving the parties to bear their own costs. Trial Court record be sent back.

VALMIKI J. MEHTA, J.

FEBRUARY 21, 2012

AK