

## Fena Ltd vs J.M. Baxi on 30 September, 2024

IN THE COURT OF MR. SATYABRATA PANDA, DJ-04,  
PATIALA HOUSE COURTS, NEW DELHI

CS No.59079/2016

Date of Institution: 06.01.1999

Date of Arguments: 29.07.2024

Date of Judgment: 30.09.2024

M/s Fena Limited  
A-237, Okhla Industrial Area,  
Phase-I, New Delhi-110020

...Plaintiff

Vs.

1. M/s J M Baxi & Co.,  
106-116, Kanishka Shopping Plaza,  
Ashoka Road, New Delhi-110001.

2. M/s Container Movement (Bombay) Transport Pvt. Limited,  
J P House  
118 Shahpur Jat,  
Opp. Asian Games Village,  
New Delhi-110049.

3. M/s Shipping Corporation of India Limited,  
J P House,  
118 Shahpur Jat,  
Opp. Asian Games Village,  
New Delhi-110049

...Defendants

### JUDGMENT

1. The plaintiff has filed the present suit against the defendants seeking decree for sum of Rs 22,48,877.46 along with pendente lite and future interest.

### PLAINT

2. The case of the plaintiff as pleaded in the plaint is summarised as follows:

2.1. The plaintiff company is one of the leading manufacturers of FENA brand of detergents and exporter of detergents from India to its clients in different parts of the world.

2.2. The defendant no. 1 is an approved shipping agent and stevedore. The defendant no. 2 is the agent of the defendant no. 3 which is a shipping line.

2.3. In the year 1997, the defendant no.1 approached and informed the plaintiff that it is an approved C&F Agent and has necessary infrastructure and experience to undertake the works relating to customs clearance and shipment of products meant for export.

2.4. The plaintiff was having one consignment of 27.504 MT FENA detergent powder, valued at Rs.

7,48,877.46 ('the consignment') to be shipped to Moscow, via Kotka, against Contract No. R-970610-2 dated 10.06.1997 and Letter of Credit dated 17.06 1997 issued by its buyer M/s. Jainyo Overseas, Moscow. It was an essential term of the contract that the material against this order was to be shipped to Moscow via Kotka and not through any other route.

2.5. As the defendant no.1 had been approaching the plaintiff for rendering its services to transport the goods, the officials of plaintiff met the officials of defendant no.1 and explained to them that the consignment that the plaintiff intended to export has to be sent to Moscow via Kotka and not through any other route. The officials of defendant no. 1 agreed and confirmed that they would arrange for shipment of goods through Kotka and accordingly the parties had agreed for freight charges for delivery at the Moscow warehouse of the consignee on Tricarnet basis.

2.6. On the faith of assurances and representations made by defendant no.1, the plaintiff handed over the said consignment to the defendant no.1, with clear instructions that the said consignment is to be sent to Moscow via Kotka and to be delivered to the party as mentioned in the documents, comprising inter alia, shipping bills, invoices, packing list, which were also furnished to the defendant no.1 by the plaintiff.

2.7. Thereafter, the plaintiff paid the agreed freight charges amounting to Rs. 2,52,940/- to the defendant no.3, through defendant no.1 and 2, vide Debit Note No. DE/97-98/620 dated 22.09.1997 issued by the said defendant.

2.8. After customs clearance for the said consignment at ICD, Tuglakabad, New Delhi, the defendant no.1 took the said consignment for eventual loading and shipment on a carrier belonging to the defendant no.3.

2.9. The defendant no.1 handed over to the plaintiff duly authenticated customs documents including the Bill of Lading in respect of the said consignment. On an examination of the Bill of Lading, the plaintiff was shocked and dismayed to note that the port of discharge had been changed to 'Hamburg' in place of 'Kotka' mentioned earlier. This was done by the defendants no.1 to 3 unilaterally and without any information, knowledge or approval from the plaintiff.

2.10. As the changes carried out by the defendants was at variance to the instructions given by the plaintiff, the plaintiff immediately contacted the officials of defendant no.1 and lodged a protest against unilateral change of port of discharge. The defendant no.1 and 2, however, assured the plaintiff that they would make necessary arrangements for onward shipment of the consignment to

Moscow from Hamburg via St. Petersburg, without any loss of time and cost and without asking for completion of any other formalities by plaintiff and/or consignee. They further assured the plaintiff that neither the plaintiff nor the consignee need to worry about the consignment and they would take all relevant steps for transportation of consignment from Hamburg to Moscow.

2.11. Based on the assurances and representations extended by the said defendants, the plaintiff forwarded the shipping advice to its buyer and also presented relevant documents to its bankers for negotiation.

2.12. On receiving the said information, the buyer M/s Jainyo Overseas protested against shipment of goods via Hamburg/St. Petersburg and refused to honour the documents presented against the Letter of Credit.

2.13. The plaintiff immediately brought the same to the notice of defendant nos.1 and 2 and the said defendants again assured the plaintiff that the consignment would be delivered in Moscow to the consignee and neither the consignee nor the plaintiff would have to take any further action in regard to transportation of consignment from Hamburg via St. Petersburg. On the basis of assurances and representations given by the defendants, the plaintiff got in touch with the buyer and informed him that the consignment would reach him without any problem.

2.14. The defendant no.2, however, contrary to the assurances extended by the defendants to the plaintiff, vide letter dated 29.10.1997, informed the plaintiff that the Hamburg office of defendant No.2 had asked the consignee to submit further documents to move the container from Hamburg to St. Petersburg. For the first time, vide the said letter dated 29.10.1997, the defendants brought to the notice of the plaintiff, that the defendant nos. 2 and 3 never had any services for Moscow via Kotka.

2.15. Since the information contained in the said letter dated 29.10.1997 was contrary to the instructions of plaintiff and to the assurances extended by defendants herein, the plaintiff wrote to the defendant nos. 1 and 2 on 03.11.1997 denying the contents of the letter dated 29.10.1997 and this was followed by another letter dated 04.11.1998.

2.16. The defendants, however, compelled the plaintiff as well as the consignee to meet all their requirements for onward transportation of consignment from Hamburg to St. Petersburg and yet because of mishandling of the entire transaction by the defendants herein, the customs confiscated the consignment en route St Petersburg from Hamburg. In spite of best efforts of plaintiff as well as of the buyer, they could not get the consignment released, though they complied with all instructions of defendants and/or their agents.

2.17. Because of failure of the defendants to deliver the goods to the consignee even after the plaintiff and the buyer complied with all the requirements of the defendants and/or their agents from time to time, the buyer returned all the documents forwarded to them by the plaintiff.

2.18. The plaintiff, being concerned about the goods and also about the future business prospects with its clients, was desperately contacting the defendants to take steps to get the goods released

without any extra cost imposed on them and to forward further to the consignee/buyer in Moscow. The defendants, however, failed to respond to the request and the plaintiff sent a demand letter dated 30.09.1998 on the defendants demanding payment of the amount lost by plaintiff because of failure of defendants to get the consignment released as well as the loss of business and expenses incurred in following up the matter with the defendants at various stages, amounting to Rs. 22,48,877.46 together with interest.

2.19. The defendant no.2, however, vide fax message dated 14.10.1998, alleged that the consignment was confiscated by the Russian customs authorities because of the failure of plaintiff and/or the buyer and denied any liability on that account. The said allegation was totally false and contrary to the assurances given by the defendants from time to time, inasmuch as after unilaterally changing the port of discharge to Hamburg, it was stated by the defendants that they shall take necessary steps to transport and deliver the consignment in Moscow to the buyer.

2.20. Thereafter, on 19.11.1998 the plaintiff received another fax message that subject to the plaintiff bearing the cost and all other charges, the agents of the defendant nos. 2 and 3 could undertake the work relating to release of the consignment. It is pertinent that the fax in reference talked about payment of costs for release of the consignments and did not refer to the submission of documentation requirements as was emphasised by the defendant in its fax message dated 14.10.1998. It was thus evident that the defendants failed to take appropriate steps at the relevant time for transportation and delivery of goods for the consignee in Moscow and were blaming the plaintiff and the buyer for confiscation of goods and were now demanding extra money for release of the goods from the customs.

2.21. The defendants had miserably failed in discharging their obligations under the contract and as a result the plaintiff as well as the buyer/consignee were put to considerable loss, hardship, loss of reputation and business, inasmuch as:

- a) the defendants had unilaterally changed the port of discharge from Kotka to Hamburg, contrary to the instructions of the plaintiff;
- b) the defendant nos. 2 and 3 were fully aware that they never had any service to Moscow via Kotka and yet accepted the consignment of plaintiff and in conspiracy with defendant no.1 changed the port of discharge without any intimation to plaintiff;
- c) when the plaintiff protested against the unilateral action of defendants, the defendant nos. 1 to 3 assured the plaintiff that they shall transport the consignment to Moscow from Hamburg via St. Petersburg and neither the plaintiff nor the consignee need to take any further action on the subject. However, the said defendants kept on seeking some document or other from the consignee and the parties involved had to spend lot of time, money and effort to completing the formalities;

d) the defendants failed to ensure safe transportation of the consignment from Hamburg to Moscow, as a result the consignment was confiscated;

e) the defendants failed to take adequate steps for release of the consignment from the Custom Authorities and were insisting for some documentation or the other from the plaintiff and/or the buyer, whereas their ultimate aim was to force the plaintiff to pay more money, as was evident from the fax message dated 18.11.1998 forwarded by defendants to the plaintiff.

2.22. Because of defendants' failure to transport the consignment handed over by the plaintiff, all the defendants have committed breach of trust and breach of obligations cast upon them under Indian Carriage of Goods by Sea Act inasmuch as the defendants failed to inform the plaintiff, prior to issuing the Bill of Lading that they never had direct service to Moscow via Kotka though they had prior knowledge of same and issued the Bill of Lading by changing the port of discharge to Hamburg unilaterally with intent to collect the freight charges from the plaintiff. Had the defendants informed the plaintiff that they have no direct service via Kotka, the plaintiff might have opted for some other shipping line or some other mode of transport to comply with the order conditions.

2.23. On account of the aforesaid illegal and unlawful acts of the defendants, the plaintiff suffered loss of business, reputation and goodwill, besides loss of consignment. The plaintiff has assessed the loss/damages suffered by it as follows:

a) Loss on account of confiscation of Consignment:

Rs. 7,48,877.46

b) Loss of business because of failure to meet Contractual obligations: Rs. 10,00,000.00

c) Expenses incurred on following up of the Consignment at various stages: Rs. 5,00,000.00 Total: Rs.22,48,877.46 2.24. All the defendants are jointly and severally liable to pay the said losses/ damages suffered by the plaintiff, amounting to Rs. 22,48,877.46.

2.25. Since the defendants failed to pay the said amount inspite of repeated demands and reminders and have withheld the same, the plaintiff is entitled to claim and recover from the defendants interest @ 24% p.a. from the date the defendants were required to deliver the consignment and till the time the same is paid to the plaintiff.

2.26. On this basis, the plaintiff has filed the present suit seeking recovery of sum of Rs. 22,48,877.46 along with pendente lite and future interest.

WRITTEN STATEMENT

3. The defendants have filed their respective written statements taking similar defences and denying and disputing the claim of the plaintiff. The case of the defendants as pleaded in the written statements is summarised as follows:

3.1. The suit is without cause of action.

3.2. The suit is liable to be dismissed on the ground of suppression and concealment of material facts which would go to show that it was only due to the plaintiff's and the buyer/consignee's complete non-

cooperation in not complying with the customs requirements that had obstructed the carrier from delivering the cargo at Moscow. Since the containers landed in Hamburg and thereafter at St. Petersburg, the buyer was time and again requested to provide the necessary documents as per the existing Russian laws to enable the movement of the containers to Moscow. The buyer was not willing to comply with the customs formalities as per the Russian laws at St. Petersburg and this was the sole reason as to why the cargo could not be delivered at Moscow. The buyer M/s. Jainyo Overseas had also committed a major fraud by not disclosing the fact that it did not possess the requisite licence to import goods into Russia.

3.3. The following facts would show that the plaintiff was trying to mislead:

i. The containers which were loaded on MV Indira Gandhi VOY-27 and sailed on 26.09.1997 arrived at Hamburg on 25.10.1997.

At no point of time till the date of arrival at Hamburg, the plaintiff had ever objected to the goods being routed through Hamburg.

ii. The consignee was duly informed of the arrival of the container at Hamburg and was asked to provide the necessary documents required as per the existing Russian laws to enable the movement of containers to Moscow via St. Petersburg. Due to the delaying tactics of the plaintiff and the consignee, which would be evident from the letters dated 03.11.1997 and 04.11.1997 addressed by the plaintiff itself, the goods could finally leave Hamburg only on 13.11.1997 and arrived at St. Petersburg on 16.11.1997. If, thereafter the buyer would have complied with the customs formalities at St. Petersburg without any delay, the goods would have been loaded at St. Petersburg on 18.11.1997 and would have reached Moscow by the next day, i.e. 19.11.1997.

iii. On 19.11.1997, Karl Geuther, sub-agent of the defendants at St. Petersburg, intimated that the containers were not loaded for Moscow as the consignee i.e. M/s. Jainyo Overseas was not ready with the documents. On 24.11.1997, Karl Geuther again informed that the consignee had been contacted and was arranging to send the documents to St. Petersburg. On 01.12.1997, the consignee was again informed that one document was still awaited i.e. "License of Custom Warehouse". Finally, after a delay of 26 days from the date of arrival at St. Petersburg i.e. on 12.12.1997 all the documents were delivered and further process could be initiated for the release of the cargo.

iv. At this point of time, the defendant came to know that the buyer did not possess the requisite licence to import goods into Russia. Neither the plaintiff nor the buyer had ever informed the answering defendant that it did not possess the requisite import licence and therefore could not import the goods into Russia. On 17.12.1997, Karl Geuther informed the defendant no.2 that the consignee, i.e. M/s. Jainyo Overseas, is not allowed to import into Russia and change of consignee is therefore required from the original consignee. On 22.12.1997, Karl Geuther again informed the defendant no.2 that nothing could be done until Russian Customs agree that the containers can be handed over to the new consignee. At this point of time, the consignee was informed that due to the change of the original consignee, the Baltic Customs insisted on cargo being cleared at St. Petersburg which the original consignee, i.e. M/s. Jainyo Overseas refused to comply with as would be evident from its own letter dated 23.01.1998.

v. From this it would be abundantly clear that it was due to the fraud played by the buyer in collusion with the plaintiff due to which goods were ultimately confiscated at St. Petersburg. In the process, even the containers of the defendant no.3 got confiscated due to which the defendant no.3 had to incur heavy losses. Even thereafter, the defendant had continuously tried to help the plaintiff and the buyer but due to non-cooperation and fraudulent approach of the buyer in collusion with the plaintiff, the goods could not be released from St. Petersburg.

3.4. The entire basis of the case filed by the plaintiff is that the defendant has agreed and confirmed that the defendant would arrange for shipment of goods to Moscow via Kotka. To support this allegation, the plaintiff is relying upon the letter dated 06.09.1997 issued by the buyer, M/s. Jainyo Overseas, in which it is stated that the material to be shipped by the plaintiff to Moscow should be via Kotka and not through any other route. The contention put forward by the plaintiff that the defendant has assured the plaintiff that the shipment would be routed via Kotka does not hold good and is liable to be dismissed at the threshold itself for the simple reason that the Purchase Order dated 10.06.1997 between the plaintiff and the buyer does not indicate any such condition, and secondly, even assuming that there is some such agreement reached between the plaintiff and the buyer, it is a contract entered between the parties to which the defendants are not party. It would also be seen that even in the Bill of Lading dated 26.09.1997, the reference has been to the buyer's purchase order dated 10.06.1997 and no reference is made whatsoever to the alleged letter dated 06.09.1997. Also, the objection that the goods have to be shipped only via Kotka and not through any other route has never been taken up by the plaintiff at any point of time till the goods arrived at Hamburg on 25.10.1997. This only further substantiates the fact that this objection put forward by the plaintiff was only an afterthought which would be evident from the fact that even the buyer i.e. M/S Jainyo Overseas had also allegedly taken up this objection, if any, only on 20.10.1997 although the goods were despatched from M.V. Indira Gandhi VOY-27 on 25.09.1997 itself. In maritime law, the contract that the shipper i.e. the plaintiff entered with the buyer is totally irrelevant so far as the carrier or its agent are concerned and what is relevant is only the contract that the shipper entered through its agent with the carrier. In this regard, the Bill of Lading entered into by the shipper with the carrier is the sole document that governs the rights inter se the parties.

3.5. The suit is time barred and is liable to be dismissed on the ground of limitation. The Bill of Lading is dated 26.09.1997 and the cargo arrived at Hamburg being the port of discharge on

25.10.1997 and thereafter arrived at St. Petersburg on 16.11.1997. As per Article 10 of the Bill of Lading, any suit to be instituted should be brought within 9 months from the date of the cause of action. In the present case, even assuming that the shipment was held up at St. Petersburg and was not dispatched to its destination, i.e. Moscow, the suit should have been filed sometime in the month of July 1998, being nine months from the date of arrival of the goods at St. Petersburg i.e. on 16.11.1997 or the expected date of dispatch from St. Petersburg i.e. 18.11.1997. However, the present suit has been instituted by the plaintiff in January 1999, i.e. nearly after 14 months from the date of alleged cause of action, if any.

3.6. In any eventuality, under Article III, Rule 6 of the Schedule of the Carriage of Goods by Sea Act, 1925, the carrier and the ship shall be discharged from all liabilities in respect of loss or damage unless the suit is brought within 1 year after the delivery of the goods or the date when the goods should have been delivered. The rule further stipulates that notice of loss or damage and the general nature of such loss or damage should be given in writing to the carrier or its agent at the port of discharge or if the loss or damage be not apparent, within 3 days. In the present case, the notice itself was given by the plaintiff on 30.09.1998, i.e. nearly after 10 months of the date of alleged cause of action. It is, therefore, submitted that even under the statute as under the Carriage of Goods by Sea Act, the time limit stipulated for the filing of the suit under the defendant no. 3's Bill of Lading has well surpassed the stipulated time.

3.7. Under Article 6 (B) of the defendant No.3's Bill of Lading, it is clearly stipulated that no compensation for any loss or damage can be imposed upon the CTO (Combined Transport Operator) if the loss or damage was caused by an act or omission of the consignor or the consignee or of a person acting on behalf of the consignor or consignee or of a person from whom the CTO took the goods in charge. In the present case, since the buyer did not comply with the custom's requirements, the carrier was obstructed from delivering the cargo at Moscow. Since the container landed in Hamburg, the buyer was time and again requested to provide necessary documents as per the existing Russian laws to enable the movement of the container to Moscow via St. Petersburg which would be evident from the letter of defendant No.2 to the plaintiff dated 29.10.1997. In this letter, it was clarified that there are no services for Moscow via Kotka and therefore no orders are accepted or any containers delivered through this route and the only route is via St. Petersburg. Despite this communication, the plaintiff continued to delay the matter as would be evident from the letters to the defendant no.2 dated 03.11.1997 and 04.11.1997 wherein the plaintiff kept on insisting that the goods have to be shipped via Kotka. Finally, when the cargo could leave Hamburg and reach St. Petersburg, which is the usual port of call en route from Hamburg to Moscow, customs and the relevant government authorities seized the cargo in St. Petersburg for the reasons already mentioned. The plaintiff also had on 21.11.1997 written to its consignee M/s. Jainyo Overseas asking it to send the documents to St. Petersburg thereby enabling the shipping agent at St. Petersburg to get the containers cleared from the port but even this was done by the buyer only on 12.12.1997. The buyer, M/s. Jainyo Overseas thereafter refused to comply with the customs formalities after the change of the name of the consignee and this would be most evident from its own letter dated 23.01.1998 filed by the plaintiff. Under the circumstances, it was not possible for the defendant to despatch the goods from St. Petersburg to Moscow and the reason for the same was the failure of the consignee to obtain appropriate customs clearance in Russia and this omission of the buyer clearly



falls within the mischief as understood under Article 6(B) (a) of the defendant No.3's Bill of Lading.

3.8. Without prejudice to the contention of the defendant that no assurance was ever given for the shipment of the goods via Kotka, even assuming that the same was done, Article 19 of the defendant No.3's Bill of Lading provides sufficient liberty to the Master to proceed by any route at any time whatsoever whether before or after the shipment or before or after proceeding towards or calling at port of discharge and proceed by any route at any time whatsoever is the CTO or Master's absolute discretion whether or not such route is the nearest or most direct or customary or advertised route between the ports of shipment or discharge. It is therefore submitted that even assuming for the sake of argument that all the allegations put forward by the plaintiff are assumed to be true, even under such circumstances, it would be the complete discretion of the CTO to choose the route by which it desires to deliver the cargo at its destination. Article 20 of the defendant No. 3's Bill of Lading indemnifies CTO against payments, expenses, fines etc. sustained or incurred by or levied upon the CTO or the ship in connection with the goods from any cause whatsoever, and therefore the letter dated 18.11.1998 filed by the plaintiff is in perfect consonance with the rules and the plaintiff and its buyer cannot escape liability therefrom. Even otherwise, the customary route to Moscow is via Hamburg which entails the usual stoppage at St. Petersburg for necessary customs clearance.

3.9. The suit is bad for non-joinder of necessary parties in the form of the buyer i.e. M/S. Jainyo Overseas.

3.10. On this basis, the defendants have sought the dismissal of the suit.

## ISSUES

4. The following issues were framed in the suit vide order dated 22.09.2003 read with order dated 21.05.2004:

1. Whether the suit is bad for non-joinder of necessary party? OPD
2. Whether there is a privity of contract between the parties?

2A. Whether the suit is barred by limitation? OPD

3. Whether it was an essential term of the contract between the plaintiff and the defendants, that the consignment was to be shipped to Moscow via Kotka and not through any other route. If so what effect? OPP

4. What was the obligation undertaken by the defendants for shipping the goods of the plaintiff as indicated from the Bill of Lading and whether there was an obligation on the part of the defendants to ship the goods to Moscow via Kotka? OPD

5. If Issue No.4 is answered in affirmative, whether defendant could unilaterally change the port of discharge and if so, to what effect?

6. Whether there was any failure on part of the plaintiff to fulfill its obligations in the shipment of goods to Moscow via Kotka? If so what effect? OPD

7. Whether the defendants inform the plaintiff vide FAX dated 18.11.1998 that the confiscated goods could be released on the payment of about RUB 28,000.00. If so, what effect? OPD 7A. Whether there was any delay on part of the plaintiff or its buyer to get the consignment released and whether the plaintiff was responsible for confiscation of the said consignment and whether there was any failure on their part to get the same released and if so, its effect? OPP 7B. Whether the plaintiff has suffered any loss on account of confiscation of the consignment? If so, to what effect? OPD

8. Relief

5. Both parties have led their respective evidence, both oral and documentary.

#### PLAINTIFF'S EVIDENCE

6. In support of its case, the plaintiff has examined its authorised representative and Manager (Legal) Mr. Sunil Sharma as PW-1 and he has tendered his affidavit in evidence as Ex.PW1/A in which he has deposed along the lines of the plaint. He was cross-examined by the defendants. The plaintiff has relied upon the following documents:

i. Authorization in favour of PW1 as Ex.PW1/1. ii. The Certificate of Incorporation Ex.PW1/2. iii. The authorization in favour of Mr. M.R Sridhar Ex.PW1/3.

iv. The purchase order/contract no.R-970610-2 dated 10.06.1997, letter of credit dated 17.06.1997 and letter dated 06.09.1997 marked as Ex.PW1/4, v. and Ex.PW1/6 respectively.

vi. The debit note no.DE/97-98/620 dated 22.09.1997 Ex.PW1/7.

vii. The invoice and other documents given by plaintiff to defendant no.1 as Ex.PW1/8. viii. Ex.P-1 shows the correction carried out by the defendants with respect to change of port of dishcharge from Kotka to Hamburg.

ix. The communication dated 20.10.1997 received to this effect from the buyer M/s Jainyo Overseas marked as EX.PW1/9.

x. Letter dated 29.10.1997 received by plaintiff from defendant no.2 as Ex.P-2.

xi. Letter/fax messages dated 03.11.1997 and 04.11.1998 are marked as PW1/10 and Ex.PW1/11 respectively.

- xii. Letter dated 21.11.1997 from plaintiff to Jainyo Overseas (buyer) Ex.PW1/12.
- xiii. Letter/Fax message dated 21.11.1997 from Karl Guether Humburg, agents of defendant no.3 to Jainyou Overseas (buyuer) EX.PW1/13. xiv. Letter/Fax dated 22.11.1997 received by plaintiff from defendant no.1 Ex.PW1/14. xv. Letter/Fax dated 24.11.1997 from Jainyo Overseas (buyer) to Incotek Services, agents of defendants EX.PW1/15.
- xvi. Letter/fax dated 02.12.1997 from plaintiff to defendant no.1 Ex.PW1/16.
- xvii. Letter/fax dated 11.01.1998 from plaintiff to defendant no.2 Ex.PW1/17.
- xviii. Letters/Fax messages dated 23.01.1998 from Jainyo Overseas (buyer) to Incotek services, agents of defendants are collectively marked as Ex.PW1/18.
- xix. Letter/fax dated 23.01.1998 from Incotek services (agents of defendants) to Jainyo Overseas (buyer) as Ex.PW1/19.
- xx. Letter/fax dated 24.01.1998 from plaintiff to defendant no.2 marked as Ex.PW1/20.
- xxi. Letter/fax dated 24.01.1998 from defendant no.1 to defendant no.2 Ex.PW1/21.
- xxii. Letter/fax dated 04.02.1998 from plaintiff to defendant no.2 Ex.PW1/22.
- xxiii. Letter/fax dated 11.04.1998 from plaintiff to Incotek Services Ex.PW1/23.
- xxiv. Letter/fax dated 23.04.1998 from defendant no.2 to Karl Guether, Hamburg Ex.PW1/24. xxv. Letter dated 11.08.1998 received by the plaintiff from buyer Ex.PW1/25.
- xxvi. Letter dated 30.09.1998 written by plaintiff to defendants alongwith postal receipts and acknowledgment due cards collectively marked as Ex.PW1/26.
- xxvii. Letter/fax message dated 14.10.1998 sent by defendant no.2 to plaintiff Ex.PW1/27. xxviii. The fax message dated 18.11.1998 received by plaintiff from the defendants Ex.PW1/28.

#### DEFENDANT'S EVIDENCE

7. In support of their case, the defendants have examined Mr. Dinesh Paliwal, who is the manager of the Defendant no.1, as DW-1 and he has tendered his affidavit in evidence as Ex.DW1/A in which he has deposed along the lines of the written statement of the defendant no.1. He was cross-

examined by the plaintiff. He has relied upon the following documents:

- i. The bill of lading dated 26.09.1997 Ex.DW1/1 (already admitted as Ex.P-1) ii. Communication dated 03.11.1997 marked as Mark A. iii. Communication dated

04.11.1997 addressed by defendant no.1 to plaintiff as Mark B. iv. Telefax dated 11.12.1997 marked as Mark C. v. Telefax dated 06.02.1998 marked as Mark D. vi. An inquiry about another telefax again sent by defendant no.1 to the plaintiff marked as Mark E.

8. The defendants also examined Mr. B.R Prabhu as DW2 and he has tendered his affidavit in evidence Ex.DW2/A. He was also cross-examined by the plaintiff. He has relied upon the following documents:

- i. Letter dated 29.10.1997 proved Ex.DW2/1.
- ii. Letter dated 19.11.197 marked as Mark A.
- iii. Communication dated 24.11.1997 marked as Mark B.
- iv. Communication dated 01.12.1997 marked as Mark C.
- v. Communication dated 17.12.1997 made by Karl Geuther marked as Mark D.
- vi. Letter dated 22.12.1997 marked as Mark E.
- vii. Communication dated 24.03.1998 addressed

by M/s Karl Geuther to defendant no.2 Mark F. viii. Communication dated 14.10.1998 marked as Mark G.

9. The defendants also examined Mr. S. Ramaswamy as DW3 and he has tendered his affidavit in evidence as Ex.DW3/A. He was also cross-examined by the plaintiff. He has relied upon the following documents:

i. Original bill of lading dated 26.09.1997 is already exhibited as Ex.P-1 by the plaintiff. ii. Mark A is telefax message/letter dated 19.11.1997.

iii. Mark B is telefax message/letter dated 24.11.1997.

iv. Mark C is the telefax message/letter dated 01.12.1997.

v. Mark D is telefax message/letter dated

10.12.1997 .

vi. Mark E is telefax message/letter dated 11.12.1997.

vii. Mark F is telefax message/letter dated 17.12.1997.

viii. Mark G is telefax message/letter dated 22.12.1997.

ix. Mark H is telefax message/letter dated 25.12.1997 .

- x. Mark I is telefax message/letter dated 05.02.1998.
  - xi. Mark J is telefax message/letter dated 24.02.1998.
  - xii. Mark K is telefax message/letter dated 24.03.1998.
  - xiii. Mark L is telefax message/letter dated 12.06.1998.
  - xiv. Mark M is telefax message/letter dated 24.08.1998.
  - xv. Mark N is telefax message/letter dated 18.11.1998.
10. The Id. Counsels for both the parties have made their respective submissions.

#### PLAINTIFF'S SUBMISSIONS

11. The Ld. Counsel for the plaintiff has made the following submissions:

##### On Issue No.1:

11.1. The suit is not bad for non-joinder of necessary party as the plaintiff has suffered losses on account of mishandling of whole transaction by defendants only and there is no fault on part of plaintiff's buyer i.e. M/s Jainyo Overseas as alleged by defendants in their written statement, and as there was specific requirement of contract between plaintiff and Jainyo Overseas that said consignment was only to be shipped to Moscow via Kotka and not through any other route as evident from Ex-PW-1/6.

11.2. The Defendant no.1 while acting for defendant no.

2 and 3 herein has agreed and confirmed that they would arrange for shipment of said consignment of goods through Kotka and in view of same plaintiff has also handed over various documents comprising inter alia, shipping bills, invoices and packing list exhibited as PW-1/7 and PW-1/8 (Colly) to defendant no.1 in which also port of discharge is mentioned as Kotka and on that basis only freight charges for said consignment was decided that said consignment is to be delivered to Moscow via Kotka only.

11.3. After that Defendant no.1 handed over the plaintiff duly authenticated customs documents including bill of landing in respect of said consignment and on examination of same the port of discharge has been changed to Hamburg in place of Kotka in bill of lading exhibited as Ex-P-1. The said change in port of discharge was done by defendants without any information and knowledge or approval from the plaintiff and was at variance to the instructions given by plaintiff, due to which plaintiff immediately contacted the officials of defendant no.1 and lodged a protest against unilateral

change of port of discharge against which defendants assured the plaintiff that they would take all relevant steps for transportation of consignment from Hamburg to Moscow.

11.4. On receiving of said information that said consignment would be shipped to Moscow through Hamburg instead of essential requirement of contract that same is to be shipped through Kotka, said buyer of plaintiff vide its letter dated 20.10.1997 Ex-PW-1/9 has refused to accept the said bill of landing and has directed the plaintiff to assure them that said consignment will be delivered to Moscow via Kotka.

11.5. The Plaintiff on receipt of Ex-PW-1/9, brought the same to the notice of defendant no. 1 and 2 and after that defendant no.1 and 2 assured the plaintiff that said consignment would be delivered in Moscow to the buyer and neither the buyer nor the plaintiff have to take any further action in regard to same.

11.6. While acting to the assurances, defendant no.2 vide letter dated 29.10.2017 Ex-P-2 for the first time has brought to the notice of plaintiff that defendant no.2 and 3 never had any services for Moscow via Kotka even though it has duly been admitted by DW-1 in his cross-examination dated 07.11.2013 that it was within the knowledge of defendants that the buyer of the plaintiff wanted the goods to be routed through Kotka and DW-1 has further admitted that Plaintiff had been communicating to the defendants throughout, that goods have to be routed through Kotka only, but still despite having no route to Moscow via Kotka as stated in Ex- P-2, the defendants has accepted to ship the said consignment to Moscow via Kotka by giving false assurances to Plaintiff which was unilaterally changed by Defendants to Moscow via Hamburg without the consent of plaintiff and its buyer.

11.7. Despite of the same, the buyer of plaintiff and plaintiff herein have submitted all the relevant documents so that said consignment can get cleared from Hamburg and can be sent to St. Petersburg and yet because of mishandling of the entire transaction by defendants herein, the customs confiscated the consignment at St. Petersburg and because of failure of the defendants to deliver the goods to the plaintiff's buyer even after the plaintiff and the buyer complied with all the requirements of the defendants and/or their agent from time to time, the plaintiff's buyer returned all the documents forwarded to them by plaintiff, due to which plaintiff has suffered loss of business, reputation and goodwill besides loss of consignment only due to the illegal and unlawful acts of defendants, hence in view of same plaintiff has rightly filed the present suit against defendants and same is not bad for non-joinder of necessary party as buyer of plaintiff has complied with all the requirements of defendants and their agents so that said consignment can be delivered to them to Moscow via Hamburg despite of fact that it was very well in knowledge of defendants that said consignment has to be delivered to Moscow via Kotka but still defendants unilaterally changed the port of discharge without taking prior consent of plaintiff, hence plaintiff is entitled for all the reliefs as prayed by it.

On Issue No.2:

11.8. According to Section 2(h) of the Indian contract act 1872, a contract is an agreement between two parties enforceable by law backed by some consideration. The essence of the law of contract lies in the promise which both parties have made towards each other for fulfilling their part of the contract.

11.9. In present case too, Plaintiff has hired services of defendants on the assurances given by them that they will ship the said consignment to Moscow via Kotka as desired by plaintiff's buyer and in view of same plaintiff has also handed over various documents comprising inter alia, shipping bills, invoices and packing list exhibited as PW-1/7 and PW-1/8(Colly) to defendant no.1 in which also port of discharge is mentioned as Kotka and on that basis only freight charges of Rs. 2,52,940/- for said consignment was decided against which defendant no.3 raised a debit note bearing no. DE/97-28-620 exhibited as Ex-PW-1/7, and hence there was constituted a contract between the parties.

On Issue No.2A:

11.10. As per the Article 3 Rule 6 of the Schedule of the Indian Carriage of Goods by Sea Act 1925, it is stated that the proceedings ought to be initiated within a period of one year after the delivery of the goods or the date when the goods should have been delivered. This period is extendable by 3 months by the Court. In the facts of the present case, the present suit is filed by the Plaintiff in January 1999.

The Plaintiff has been informed about the confiscation by the Defendants vide their fax dated 06.02.1998. Hence, the suit has been filed by the Plaintiff within the period of one year from the date when the cause of action has lastly arisen i.e. when the Defendants have informed that the goods cannot be delivered as the goods were confiscated.

On Issues No.3 and 4:

11.11. It was an essential term of the contract between the plaintiff and the defendants, that the consignment was to be shipped to Moscow via Kotka and not through any other route and same was an obligation on part of defendants to ship the goods to Moscow via Kotka only, as there was specific requirement of contract between plaintiff and Jainyo Overseas that said consignment is only be shipped to Moscow via Kotka and not through any other route as evident from Ex-PW-1/6 which was also very well in the knowledge of defendants as same was duly been admitted by DW-1 in his cross-examination dated

07.11.2013.

11.12. Despite of specific requirement of contract which was very well in the knowledge of defendants and which had duly been communicated by plaintiff to defendants that said goods have to be routed through Kotka only as admitted by DW-1 in his cross-examination dated 07.11.2013 but

still defendants has very cleverly without the consent of plaintiff has changed the port of discharge to Hamburg in Ex-P-1 which was earlier mentioned as Kotka despite when plaintiff has also handed over various documents comprising inter alia, shipping bills, invoices and packing list Ex.PW-1/7 and PW- 1/8 (Colly) to defendant no.1 in which also port of discharge is mentioned as Kotka.

11.13. It is an admitted position by Defendant no.3 that plaintiff had not given any prior consent while changing the port from Kotka to Hamburg and plaintiff would never consent for same as the essential requirement of contract between plaintiff and its buyer for shipment of said consignment was only that same has to be shipped to Moscow via Kotka only and for the very first time defendant no.2 vide Ex-P-2 has informed the plaintiff that defendants do not have any route to Moscow via Kotka and they do not accept/deliver any containers through this route even when Ex.PW-1/7 and PW- 1/8(Colly) has been handed over by plaintiff to defendants and all the dealings between the parties and freight charges has been fixed on the basis of said route only as there was specific requirement of contract between plaintiff and its buyer that said consignment has to be shipped to Moscow via Kotka only which was also very well in the knowledge of Defendants. Hence in view of same essential term of contract between the plaintiff and defendants and same was also obligatory on part of defendants that the consignment was to be shipped to Moscow via Kotka and not through any other route, as there was specific requirement of contract between plaintiff and Jainyo Overseas that said consignment is only be shipped to Moscow via Kotka and not through any other route as evident from Ex-PW-1/6 which was also very well in the knowledge of defendants as same was duly been admitted by DW-1 in his evidence dated 07.11.2013.

11.14. In view of above, defendants have not undertook the obligations for shipping of goods as indicated from Ex-P-1 as defendants herein malafidely and dishonestly without prior permission of plaintiff have changed the port of discharge from Kotka to Hamburg which is also duly admitted fact by Defendant no.3 and despite of same said goods has not been delivered to its final destination despite of fact that defendant no.1 and 2 assured the plaintiff that said consignment would be delivered in Moscow to the buyer and neither the buyer nor the plaintiff have to take any further action in regard to same and in view of same buyer of plaintiff and plaintiff herein have submitted all the relevant documents so that said consignment can get cleared from Hamburg and can be sent to St. Petersburg and yet because of mishandling of the entire transaction by defendants, the customs confiscated the consignment at St. Petersburg and because of failure of the defendants to deliver the goods to the plaintiff's buyer even after the plaintiff and the buyer complied with all the requirements of the defendants and/or their agent from time to time, the plaintiff's buyer returned all the documents forwarded to them by plaintiff, due to which plaintiff has suffered loss of business, reputation and goodwill besides loss of consignment only due to the illegal and unlawful acts of defendants hence plaintiff is entitled for all the reliefs as prayed.

11.15. The Defendants have not been able to explain as to why the place Kotka was written at the first instance when they had no service. Further, there was no change in the Invoice and in the Bill of Lading the change was made to Hamburg unilaterally. There is no date mentioned by the Defendant to say that they had informed that Plaintiff about the change. The Plaintiff came to know about the change vide the letter dated 20.10.1997. Further, when the Plaintiff has been writing to the Defendants there is no rebuttal by the Defendants that the change was made with consent or that



there was a waiver.

11.16. Further, without the documents the Defendants could not have accepted the consignment. There is no letter on record that the custom authorities have demanded any documents, and there is no evidence on record to show as to which of the documents could not be provided by the Plaintiff/Buyer as were allegedly sought by the custom authorities.

11.17. In the cross examination of the DW-1 on 27.11.2012 of the Defendant witness, it is recorded that there is no signature or endorsement on behalf of the Plaintiff for the change of port of discharge from Kotka to Hamburg in the Bill of Landing dated 26.09.1997. Again, the said DW-1 was cross examined on 07.11.2013. He has stated that at the time of booking of consignment all relevant documents for export were taken from the Plaintiff. Further, it is stated by him that it was within the knowledge of the Defendants that the buyer of the Plaintiff wanted the goods to be routed through Kotka. He has further confirmed that the Plaintiff had been communicating to the Defendants throughout that the goods have to be routed through Kotka only. In the statement of the DW-3 in his cross examination on 02.07.2019, he has stated that it is correct that the Plaintiff had not given any prior consent while changing the port from Kotka to Hamburg.

On Issue No.5:

11.18. The defendants could not unilaterally change the port of discharge more specifically when defendants have taken the booking of said consignment by making assurances to plaintiff that they would deliver the said consignment to Moscow via Kotka only and plaintiff has also availed the services of defendant on account of same as there was specific requirement of contract between buyer and plaintiff that said consignment has to be delivered to Moscow via Kotka only.

11.19. If in case defendants can unilaterally change the port of discharge then same can only be done in unavoidable and unforeseen circumstances by which it became impossible to act on the pre-

decided port of discharge. However in present case no unavoidable and unforeseen circumstances have arisen and defendants cannot unilaterally change the port of discharge without the consent of plaintiff more specifically when defendants have assured the plaintiff that said consignment will only be delivered by Kotka.

On Issue No.6:

11.20. The defendants have never ever informed the plaintiff vide FAX dated 18.11.1998 that the confiscated goods could be released on the payment of about RUB 28,000.00, as it is admitted case of defendants in their written statement that said fax was for the release of empty containers of defendant no.3 and not to the release of the consignment as consignment includes the goods i.e. 27.504 MT of FENA detergent powder as manufactured by plaintiff which is to be delivered to buyer of

plaintiff in Moscow.

11.21. A bare perusal of Ex-PW-1/28(Colly) i.e. fax dated 18.11.1998, itself shows that agent of defendants herein is telling the estimate of cost which will be incurred for the release of empty containers of defendant no.3 and not to the release of the consignment, hence in view of same defendants have never ever informed the plaintiff vide FAX dated 18.11.1998 that the confiscated goods could be released on the payment of about RUB 28,000.00 as they have informed only for the release of empty containers.

On Issue No.7A:

11.22. There was no delay on part of plaintiff or its buyer to get the consignment released and plaintiff was not responsible for confiscation of said consignment as defendants have not undertaken the obligations for shipping of goods as indicated from Ex-P-1 as defendants herein malafidely and dishonestly without prior permission of plaintiff have changed the port of discharge from Kotka to Hamburg which is also duly admitted fact by Defendant no.3 and despite of same said goods have not been delivered to its final destination despite of fact that defendant no.1 and 2 assured the plaintiff that said consignment would be delivered in Moscow to the buyer and neither the buyer nor the plaintiff have to take any further action in regard to same and in view of same buyer of plaintiff and plaintiff herein have submitted all the relevant documents so that said consignment can get cleared from Hamburg and can be sent to St. Petersburg and yet because of mishandling of the entire transaction by defendants herein, the customs confiscated the consignment at St. Petersburg and because of failure of the defendants to deliver the goods to the plaintiff's buyer even after the plaintiff and the buyer complied with all the requirements of the defendants and/or their agent from time to time.

11.23. The DW-1 has stated that said consignment was confiscated for want of certain necessary documents out of which one of the documents which was not produced before customs officers was the export licence in favour of plaintiff, whereas there was no such demand from the side of defendants of same and defendant has not put anything on record for same by which it can be shown that defendants has demanded the export license of plaintiff, as plaintiff being a company whose main business is of export is having all the necessary requisite licence of export, hence in view of same there was no delay on part of plaintiff or its buyer to get the consignment released as both have duly complied with the requirements as raised by defendants.

11.24. A bare perusal of EX-PW- 1/28(Colly) i.e. fax dated 18.11.1998, itself shows that agent of defendants herein is telling the estimate of cost which will be incurred for the release of empty containers of defendant no.3 and not to the release of the consignment, hence in view of same defendants have never ever informed the plaintiff vide FAX dated 18.11.1998 that the confiscated goods could be released on

the payment of about RUB 28,000.00 as they have informed only for the release of empty containers, hence in view of same plaintiff is entitled for all reliefs as prayed by them.

Hence, there was no failure on part of plaintiff for release of said consignment as it is the duty of defendants to release the same as same was confiscated due to the mishandling of said consignment by defendants.

On Issue No.7B:

11.25. It was an essential term of the contract between the plaintiff and the defendants, that the consignment was to be shipped to Moscow via Kotka and not through any other route and same was an obligation on part of defendants to ship the goods to Moscow via Kotka only, as there was specific requirement of contract between plaintiff and Jainyo Overseas that said consignment is only be shipped to Moscow via Kotka and not through any other route as evident from EX-PW-1/6 which was also very well in the knowledge of defendants as same was duly been admitted by DW-1 in its evidence dated 07.11.2013.

11.26. Despite of specific requirement of contract which was very well in the knowledge of defendants and which was duly been communicated by plaintiff to defendants that said goods have to be routed through Kotka only as admitted by DW-1 in its evidence dated 07.11.2013 but still defendants has very cleverly without the consent of plaintiff has changed the port of discharge to Hamburg in EX-P- 1 which was earlier mentioned as Kotka despite when plaintiff has also handed over various documents comprising interalia, shipping bills, invoices and packing list exhibited as PW-1/7 and PW-1/8(Colly) to defendant no.1 in which also port of discharge is mentioned as Kotka.

11.27. It is an admitted position by Defendant no.3 that plaintiff had not given any prior consent while changing the port from Kotka to Hamburg and plaintiff would never consent for same as the essential requirement of contract between plaintiff and its buyer for shipment of said consignment was only that same has to be shipped to Moscow via Kotka only and for the very first time defendant no.2 vide EX-P-2 has informed the plaintiff that defendants don't have any route to Moscow via Kotka and they don't accept/deliver any containers through this route even when PW-1/7 and PW-

1/8(Colly) has been handed over by plaintiff to defendants and all the dealings between the parties and freight charges has been fixed on the basis of said route only as there was specific requirement of contract between plaintiff and its buyer that said consignment has to be shipped to Moscow via Kotka only which was also very well in the knowledge of Defendants. Hence in view of same essential term of contract between the plaintiff and defendants and same was also obligatory on part of defendants that the consignment was to be shipped to Moscow via Kotka and not through any

other route, as there was specific requirement of contract between plaintiff and Jainyo Overseas that said consignment is only be shipped to Moscow via Kotka and not through any other route as evident from EX- PW-1/6 which was also very well in the knowledge of defendants as same was duly been admitted by DW-1 in its evidence dated 07.11.2013.

11.28. In view of above defendants have not undertook the obligations for shipping of goods as indicated from EX- P-1 as defendants herein malafidely and dishonestly without prior permission of plaintiff have changed the port of of discharge from Kotka to Hamburg which is also duly admitted fact by Defendant no.3 and despite of same said goods has not been delivered to its final destination despite of fact that defendant no.1 and 2 assured the plaintiff that said consignment would be delivered in Moscow to the buyer and neither the buyer nor the plaintiff have to take any further action in regard to same and in view of same buyer of plaintiff and plaintiff herein have submitted all the relevant documents so that said consignment can get clear from Hamburg and can be sent to St. Petersburg and yet because of mishandling of the entire transaction by defendants herein, the customs confiscated the consignment at St. Petersburg and because of failure of the defendants to deliver the goods to the plaintiff's buyer even after the plaintiff and the buyer complied with all the requirements of the defendants and/or their agent from time to time, the plaintiff's buyer returned all the documents forwarded to them by plaintiff, due to which plaintiff has suffered loss of business, reputation and goodwill for amounting to Rs. 10,00,000/- besides loss of consignment to the amount of Rs. 7,48,877.46/- only due to the illegal and unlawful acts of defendants and due to such acts of defendants, plaintiff has also incurred expenses to the tune of Rs. 5,00,000/- for following up of consignment at various stages, hence plaintiff is entitled for all the reliefs as prayed by it.

#### DEFENDANT'S SUBMISSIONS

12. On the other hand, ld. Counsel for the defendants has made the following submissions:

On Issue No.1:

12.1. M/s Jainyo Overseas, the buyer/consignee was a necessary party whose non-impleadment is fatal to maintainability of the suit.

12.2. Vide communication dated 13.01.1998 addressed by Defendant no.1 Ex.PX2, Plaintiff was put to notice that the consignee did not possess the requisite license to import goods into Russia. Again vide communication dated 06.02.1998 addressed by Defendant no.1 Ex.PX1 Plaintiff was put to notice that failure on part of the original consignee to organize clearance, change of consignee was carried out, namely in the name of Sint-K. The customs authority refused to accept since the container has already physically arrived at St. Petersburg in the name of M/s Jainyo Overseas ie.

original consignee. Vide the said communication; plaintiff was put to notice that the original consignee again submitted new set of documents which indicated that the third party stands recommended by Jainyo. The laches on part of the original consignee led to container being confiscated.

12.3. The facts of the case show that due to non-

clearance of custom formalities, goods stood confiscated at St. Petersburg. Communications exchanged between the plaintiff, buyer M/s. Jainyo Overseas and the defendants show the necessity of the buyer to be a necessary party, without whose presence there can be no effective adjudication of the issues arising out of the suit. Non-impleadment of the buyer M/s. Jainyo Overseas and/or lack of evidence being led on part of the plaintiff, proviso to Order 1 Rule 9 of CPC gets squarely attracted, sequitur being, dismissal of the suit.

12.4. Article 6 [B(a)] of the Bill of Lading clearly stipulates that no compensation for any loss or damage can be imposed on the CTO, if the loss or damage was caused by an act or omission of the consignor or the consignee or of a person acting on behalf of consignor or consignee or of a person from whom CTO took the goods in-charge.

12.5. The necessity for impleadment of the buyer is best evidenced by Admission/denial of documents conducted on 24.03.2003. Except for one document i.e. Letter dated 29.10.1997 which stands admitted, plaintiff refused to carry out the said exercise on the premise that they do not concern the plaintiff. Plaintiff's refusal to carry out Admission/Denial of documents on the premise that they do not concern the plaintiff was ex-facie an admission that said documents have to be dealt by the buyer either by making him party in the suit and/or evidence being led by the plaintiff in this regard.

12.6. Since the container landed in Hamburg on 25.10.1997, both plaintiff and the buyer were time and again requested to provide the said documents as per existing Russian Law to enable movement of the container to Moscow via St. Petersburg. Reference is made to Letter dated 29.10.1997- Ex. P-2/Ex.D-1.

12.7. Without prejudice, Plaintiff itself seeks to rely on documents exchanged between the buyer, plaintiff, defendants and the agent of defendant no.3. Plaintiff on 21.11.1997 asked its consignee M/s Jainyo Overseas to send the documents to St. Petersburg which was done as late as on 12.12.1997. The buyer thereafter refused to comply with the custom formalities after change of the name of the consignee as evident from its own letter dated 23.01.1998 annexed by the plaintiff in the list of documents.

12.8. Buyers' failure to obtain appropriate custom clearance in Russia made it impossible for the defendants to dispatch the goods from St. Petersburg to Moscow. Be it the Plaintiff and/or the Defendants, the buyer's culpability could be established if the buyer was made a party to the suit, without whose presence, core issue pertaining to confiscation of the consignment cannot be adjudicated.

12.9. Be it delay in documentation at Hamburg and/or confiscation of the consignment at St. Petersburg, the facts of the case unambiguously demonstrate laches on part of the Plaintiff and its buyer i.e. M/s Jainyo Overseas. It is undisputed that clearance of custom formalities has to be done by the buyer. Equally undisputed, is the fact that buyer did not clear the custom formalities leading

to confiscation of consignment at St. Petersburg 12.10. The containers arrived at Hamburg on 25.10.1997, while however due to delaying tactics at Hamburg led to the containers leaving Hamburg only on 13.11.1997 and arrival at St. Petersburg on 16.11.1997.

12.11. Thereafter, if the buyer would have complied with the custom formalities at St. Petersburg without any delay, the goods would have been loaded at St. Petersburg on 18.11.1997 and would have reached Moscow by the next date i.e. 19.11.1997.

12.12. The confiscation of consignment is for non-

compliance of custom formalities, which is admitted by the Plaintiff's witness in cross- examination. The Plaintiff not impleading the buyer is fatal to the suit.

On Issue No.2:

12.13. The Contract being Purchase Order dated 10.06.1997 without annexures is in the name of M/s. Syndet and Chemicals Limited, while the Bill of Lading (B/L) dated 26.09.1997 (Ex.P-1) shows the Shipper to be M/s Fena Limited and not M/s Syndet and Chemical Industries Limited. Even the Irrevocable Transferable Documentary Credit no.0945-3030151B dated 20.06.1997 (PW-1/5) issued by Bank of India is in the name of M/s.

Syndet and Chemicals Limited and not M/s Fena Limited.

12.14. The name of the Shipper, who is purportedly shipping the consignment, Purchase Order as also Irrevocable Transferable Documentary Credit no.0945-3030151B dated 20.06.1997, being in the name of M/s. Syndet and Chemicals Limited, there is no document on record evidencing a contract between M/s Fena Limited and M/s Jainyo Overseas, on which short ground alone, the suit is liable to be dismissed.

12.15. The locus standi of the plaintiff itself being subject matter of challenge, name of the consignee was changed on three occasions, evident from communications addressed by defendant no.1 to plaintiff dated 13.01.1998 and 06.02.1998 (Ex. DW-1/PX-2 and Ex. DW- 1/PX-1).

On Issue No.2A:

12.16. The Bill of Lading is dated 26.09.1997 and Cargo arrived at Hamburg being the port of discharge on 25.10.1997 and thereafter at St. Petersburg on 16.11.1997. As per Article 10 of the defendant no.3's B/L, any suit to be instituted should be brought within 9 months from the date of the cause of action. In the present case, even assuming that the shipment was held up at St. Petersburg and was not dispatched to its destination i.e. Moscow, the suit should have been filed sometime in the month of July 1998, being nine months from the date of arrival of the goods at St. Petersburg on 16.11.1997 or the expected date of dispatch from St. Petersburg i.e. 18.11.1997.

However, the present suit has been instituted by the plaintiff in January 1999 i.e. nearly after 14 months from the date of alleged cause of action, if any.

12.17. Article III, Rule 6 the schedule of Carriage of Goods Act, 1925 stipulates the carrier and the ship shall be discharged from all liabilities in respect of loss or damage unless the suit is brought within one year after the delivery of the goods or the date when the goods should have been delivered.

Proviso to the said Article mandates that the suit may be brought after the expiry of period of one (1) year, referred to in sub-paragraph, within a further period of not more than three months as allowed by the Courts.

12.18. The pleadings in the matter coupled with other proceedings before the Court demonstrate that the Plaintiff on all occasions was well aware of the fact that the suit was time barred, despite which fact, Plaintiff chose not to seek condonation for nearly 5 years from the date of the filing of the suit.

Reliance on the proviso to Article 3 Rule 6 of the Indian Carriage of Goods by Sea Act, 1925 is again misconceived and malafide, and does not come in the aid of the Plaintiff when the application is filed along with the filing of the suit. As per Article 3 Rule 6 of the Indian Carriage of Goods by Sea Act, 1925, breach of the time limit leads to the carrier and the ship to be discharged from all liabilities. The provision is not for condonation of delay but a complete discharge from all liabilities which cannot be overcome by the said Application moved after a lapse of 5 years of the suit. In effect, Plaintiff seeks condonation of delay with retrospective effect, impermissible on a plain reading of the Section.

12.19. The rules further stipulate that the notice for loss or damage and the general nature of such loss or damage should be given in writing to the carrier or its agents at the port of discharge or if the loss or damage be not apparent, within 3 days. In the present case, notice itself was given by the plaintiff on 30.09.1998, nearly 10 months from the date of the alleged cause of action, while the suit instituted by the plaintiff in January 1995 i.e. nearly 14 months from the date of alleged cause of action.

On Issues No. 3 to 6:

12.20. Plaintiff never objected to the goods being routed through Hamburg from the time of its sailing on 26.09.1997 and arrival at Hamburg on 25.10.1997.

12.21. Plaintiff and the Consignee all along were aware of the routing of the consignment, through Hamburg, since Bill of Lading is available with Plaintiff and Consignee.

12.22. Without Prejudice, the alleged Purchase Order dated 10.06.1997 and the alleged Letter of Credit dated 20.06.1997 in the name of M/s Syndet and Chemical

Industries Limited, relied upon by the Plaintiff does not suggest the route to be adopted for delivering the Consignment to Moscow.

12.23. Bill of Lading dated 26.09.1997 Ex.P-1 does not suggest that the goods have to be shipped only via Kotka and not through any other route.

12.24. Only on the Consignee being informed about the arrival of the container at Hamburg on 29.10.1997 Ex. P-2/Ex.D-1 and calling for necessary documentation as per existing Russian Laws to enable movement from Hamburg to St. Petersburg, the Consignee as also the Plaintiff started raising the issue of routing through Kotka and not Hamburg. Plaintiff's letters dated 03.11.1997 and 04.11.1997 are ample evidence to this effect.

12.25. Plaintiff admits in its cross-examination dated 20.05.2010 that Bill of Lading was available with the plaintiff as also the consignee. Reference is made to PW-1's cross examination dated 20.05.2010. Plaintiff used the Bill of Lading to negotiate with the bankers for collection of payment. All in all demonstrating that it is an afterthought that the shipment has to be routed through Kotka and not Hamburg.

12.26. The Original copy of Bill of Lading (B/L) Ex.P-1 dated 26.09.1997 available with the Plaintiff and the Consignee, clearly stipulates that the shipment will reach Moscow through Hamburg.

12.27. The route to be taken for delivering the Cargo at its destination is in the complete discretion of the CTO (Combined Transport Operator). Article 19 of the Bill of Lading (Ex.P-1) provides sufficient liberty to Master to proceed by any route at any time whatsoever whether before or after the shipment or before or after proceeding towards or calling at port of discharge and proceed by any route at any time whatsoever, whether or not such route is nearest or most direct or customary or advertised route between the ports of shipment or discharge.

12.28. The Bill of Lading showing the port of discharge to be Hamburg was well within the knowledge of Plaintiff as also the Consignee, and they never objected, which amounts to acquiescence.

12.29. The Bill of Lading shows the place of discharge at Hamburg, a fact well within the knowledge of plaintiff and its consignee. Till the date of arrival at Hamburg, Plaintiff never objects the goods to be routed to Hamburg, demonstrating free consent to the route adopted by defendants. The Bill of Lading dated 26.06.1997 showing place of discharge at Hamburg and place of delivery at Moscow. Equally undisputed is the fact that the containers are arrived at Hamburg on 25.10.1997.

12.30. Admittedly, the goods were confiscated at St. Petersburg due to consignee not taking any steps for clearance of shipment. Plaintiff in its cross-



examination dated 22.04.2010 admits that it is the duty of the consignee to get release of the shipment after fulfilling all legal formalities.

12.31. Despite repeated communications being made to the consignee, no steps were taken for clearance of custom formalities leading to confiscation of the consignment along with the containers of Defendant no.3.

12.32. The non-clearance of formalities relating to custom department lead to the goods being confiscated at St. Petersburg. Plaintiff's reliance on two Letters, both dated 23.01.1998 shows that the original consignee i.e. M/s. Jainyo Overseas while not disputing its obligation to clear custom formalities, erroneously insisted that the same will be performed by it at Moscow and not at St. Petersburg. It is undisputed that the Defendants have no role to play so far as custom formalities are concerned, as admitted by PW-I's witness in cross-examination dated 22.04.2010 when he states that the consignee agreed to fulfilment of requirements at St. Petersburg.

12.33. Plaintiff admits in its cross-examination dated 20.05.2010 that Bill of Lading was available with the plaintiff as also the consignee.

On Issue No.7:

12.34. Reliance on fax dated 18.11.1998 by the plaintiff is misconceived, since what stands stated in the said letter pertains to expenses for release of empty containers belonging to Defendant no.3 which includes demurrage and storage charges till the date of confiscation (PW-1/28).

12.35. The empty containers of defendant no.3 stood confiscated by Russian authorities solely due to the negligence and fraudulent conduct of the buyer in collusion with the plaintiff. The claim on part of the defendants is strictly in consonance with Article 20 of the defendant no.3's B/L, which envisages plaintiff bearing the cost of the release of seized empty containers of Defendant no.3.

On Issue No.7B:

12.36. It is submitted that defendants are not liable to pay any amount to the plaintiff, least of all, the exaggerated and unsubstantiated claim of Rs,22,48,877.46/-.

12.37. The documents on record and evidence led by the parties unambiguously demonstrate laches on part of the plaintiff and the consignee, leading to confiscation of consignment at St. Petersburg.

12.38. The alleged claim for damages itself being not maintainable and liable to be rejected, claim for interest was also liable to be rejected.

12.39. Without prejudice, except for a bald statement in paragraphs 24-25 of the plaint claiming loss of business and expenses allegedly incurred, no evidence, documentary or otherwise was led by the plaintiff to prove its baseless claim, on short ground whereof the alleged claim is liable to be rejected.

12.40. The alleged claim of loss on account of confiscation of the consignment, is ex-facie not maintainable and liable to be dismissed since it is laches on part of the plaintiff and its consignee which led to confiscation of consignment at St. Petersburg.

12.41. Due to laches and breach of contract on part of the plaintiff and its consignee, the containers of defendant no.3 were held up. As pointed out in communication dated 18.11.1998, the said containers could be released only on plaintiff bearing the cost and other charges. Due to non-

cooperation on part of the plaintiff and its buyer, defendants were put to immense losses.

12.42. Article 6 [B(a)] of the Bill of Lading clearly stipulates that no compensation for any loss or damage can be imposed on the CTO, if the loss or damage was caused by an act or omission of the consignor or the consignee or of a person acting on behalf of consignor or consignee or of a person from whom CTO took the goods in-charge.

13. Both parties have also filed their respective written submissions.

14. I have considered the submissions of the Id. Counsels for the parties and I have perused the record including the pleadings, evidence (both oral and documentary) and the written submissions.

#### ISSUE-WISE FINDINGS

15. My Issue-wise findings are as follows.

Issue No.1. Whether the suit is bad for non-joinder of necessary party? OPD

16. The plaintiff has filed the present suit against the defendants for compensation for loss caused to the plaintiff on account of the actions and omissions of the defendants as alleged in the plaint. The defendants have taken the defence in the suit that the goods were ultimately confiscated due to non-clearance of customs formalities by M/s. Jainyo Overseas and since M/s. Jainyo Overseas did not have the requisite licence to import goods into Russia.

17. A necessary party is a party without whom an effective decree cannot be passed. In this sense, I do not find M/s. Jainyo Overseas to be a necessary party. M/s. Jainyo Overseas was the client of the plaintiff to whom the plaintiff had shipped the goods through the defendants. The plaintiff has not sought any relief against M/s. Jainyo Overseas and as such it cannot be said that no effective decree could be passed in the absence of M/s. Jainyo Overseas. From the pleadings of the parties and particularly the defence taken by the defendants, at best it could be said that M/s. Jainyo Overseas

would have been a proper party and could have been called as a witness by the plaintiff in the suit to throw light on the subject matter of the controversy, however, that by itself would not make it a necessary party. Ultimately, M/s. Jainyo Overseas has not been called as a witness by the plaintiff in the suit, however, what would be the effect of this would be altogether a different matter. There is no non-joinder of a necessary party.

18. Accordingly, the Issue No.1 is decided in favour of the plaintiff and against the defendants.

Issue No.2. Whether there is a privity of contract between the parties?

19. Clearly, there was privity of contract between the plaintiff on the one hand and the defendants nos. 1 to 3 on the other by virtue of the Bill of Lading which constituted the contract between the parties.

20. Accordingly, the Issue No.2 is decided in favour of the plaintiff and against the defendants.

Issue No.2A. Whether the suit is barred by limitation? OPD

21. Under Article III Rule 6 of the Schedule to the Carriage of Goods Act, 1925, the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered. Article III Rule 6 shows that there are two situations contemplated. In the first situation, the goods are delivered in which case the suit ought to be brought within one year of the delivery. The second case would be when the goods are not delivered in which case the suit ought to be brought within one year from the date when the goods should have been delivered.

22. In the present case, the goods ought to have been delivered at Moscow. The admitted position is that the goods were never delivered at Moscow and were confiscated at St. Petersburg. Hence, the first condition under Article III Rule 6 CPC calling for the suit to be filed within one year from date of delivery would not apply. It would be the second condition which would apply i.e. the suit ought to be brought within one year from the date when the goods should have been delivered.

23. The onus to prove the Issue No. 2A on limitation was on the defendant and it was for the defendant to prove that the plaintiff had not filed the suit within one year from the date when the goods should have been delivered. The defendant has not shown that there was any date on which the goods should have been delivered.

24. The plaintiff was informed of the confiscation of the goods by the defendants vide Fax message dated 06.02.1998. Hence, till the confiscation on 06.02.1998, the process for delivery was still on and the delivery would have been made only after 06.02.1998, and not prior to 06.02.1998, in case the goods had not been confiscated. In such circumstances, even if date of 06.02.1998 is taken as the date when the goods should have been delivered, the suit having been filed in January 1999 i.e. within one year, the suit is well within the limitation of one year under Article III Rule 6 of the Schedule to the Carriage of Goods Act.

25. Accordingly, the Issue No.2A is decided in favour of the plaintiff and against the defendants.

Issue No.3. Whether it was an essential term of the contract between the plaintiff and the defendants, that the consignment was to be shipped to Moscow via Kotka and not through any other route. If so what effect? OPP Issue No.4. What was the obligation undertaken by the defendants for shipping the goods of the plaintiff as indicated from the B/L and whether there was an obligation on the part of the defendants to ship the goods to Moscow via Kotka? OPD Issue No.5. If Issue No.4 is answered in affirmative, whether defendant could unilaterally change the port of discharge and if so, to what effect?

Issue No.6. Whether there was any failure on part of the plaintiff to fulfill its obligations in the shipment of goods to Moscow via Kotka? If so what effect? OPD Issue No.7A. Whether there was any delay on part of the plaintiff or its buyer to get the consignment released and whether the plaintiff was responsible for confiscation of the said consignment and whether there was any failure on their part to get the same released and if so, its effect? OPP

26. These issues are interlinked in nature and are, hence, taken up together.

27. In the Bill of Lading in original Ex.P-1 three places are mentioned which are the Port of Loading, Port of Discharge and Place of Delivery. In Ex.P-1, the Port of Loading is stated as JNPT which is the Jawarharlal Nehru Port at Mumbai. The Place of Delivery is stated as Moscow. The Port of Discharge is stated as Hamburg after having crossed-out Kotka. Hence, whereas it was Kotka mentioned as the Port of Discharge, this was crossed out and Hamburg came to be written instead.

28. The defendant's witness DW-1 has in his cross-

examination on 07.11.2013 admitted that it was within the knowledge of the defendants that the buyer of the plaintiff wanted the goods to be routed through Kotka. There is also no dispute that the Bill of Lading initially mentioned the port of discharge as Kotka although this was later crossed out. Thus, it is clear that initially as per the contract, the defendants were to deliver the goods to Moscow via Kotka.

29. However, although initially the defendants were supposed to send the goods to Moscow via Kotka and as such this was a term of the contract, the question arises whether this was an 'essential term' of the contract. The conduct of the plaintiff as evident from the record leads otherwise to the conclusion that it was not an essential term of the contract that the consignment be supplied via Kotka only and not through any other route. The essential term was only that the place of destination was Moscow, however, there was no essential term that the consignment should reach Moscow only via Kotka. I arrive at this finding for the reasons as discussed in the following paragraphs.

30. The Bill of Lading Ex.P-1 was issued by the defendants on 26.09.1997. As stated in the Bill of Lading (B/L), there were 3 sets of the B/L in original. One original B/L was given to the plaintiff. This was the 'Third Original' and has been filed in original by the plaintiff and has been admitted in

evidence as Ex.P-1. Ex.P-1 clearly mentions the Port of Discharge as Hamburg after having crossed out Kotka. Thus, as on 26.09.1997, the plaintiff clearly had knowledge that the defendants had struck out Kotka as the Port of Discharge and had mentioned Hamburg as the Port of Discharge. The undisputed position is that the consignment arrived at Hamburg on 25.10.1997. Till this date, there was no communication by the plaintiff with the defendants protesting that the Port of Discharge had been changed from Kotka to Hamburg. The plaintiff had knowledge since 26.09.1997 when the consignment was loaded on the ship at Mumbai port and the Bill of Lading was generated that the port of discharge had been changed to Hamburg from Kotka. No communication has been placed on record by the plaintiff showing that the plaintiff had protested to this at any point of time.

31. In case it was an essential term of the contract that the consignment was to be shipped only via Kotka and not through any other route, the plaintiff would have immediately upon receiving the Bill of Lading on 26.09.1997 raised this issue with the defendants. However, the plaintiff remained silent and did not raise any issue regarding the port of discharge having been changed from Kotka to Hamburg. By the conduct of the plaintiff in remaining silent and not raising any issue upon receiving the Bill of Lading on 26.09.1997 regarding the port of discharge having been changed from Kotka to Hamburg, the clear inference is that the plaintiff had accepted and acquiesced in the change of the port of discharge from Kotka to Hamburg by the defendants.

32. It is apparent from the record that it was only when the consignment had already arrived at Hamburg that the plaintiff had raised this issue telephonically. This is clear from the Fax communication dated 29.10.1997 Ex.P-2 from the defendants to the plaintiff. This Fax communication refers to a teleconference and goes on to state that the containers had arrived at Hamburg on 25.10.1997 and that the defendant's Hamburg office was in touch with the consignee i.e. Jainyo Overseas and had asked for the requisite documents to be furnished to move the container from Hamburg to St. Petersburg. The Fax communication goes on to state that the defendants never had any services for Moscow via Kotka, and that their routing is via St. Petersburg.

33. As already mentioned, despite being aware since the date of the Bill of Lading i.e. 26.09.1997 that the port of discharge had been changed to Hamburg from Kotka, the plaintiff never raised any issue with regard to the same and remained silent, and by the plaintiff's conduct it is deemed that the plaintiff had accepted and acquiesced with the same.

34. It appears that it was only after the plaintiff received the letter dated 20.10.1997 Ex.PW-1/9 from the consignee Jainyo Overseas stating that it was not willing to accept the Bill of lading unless there was assurance that goods would be delivered to Moscow via Kotka, that it appears that the plaintiff had subsequently raised the issue with the defendants through teleconference, in response to which the defendants had sent the fax message of 29.10.1997 Ex.P2. However, by this time the consignment had already arrived at Hamburg on 25.10.1997.

35. The defendants had vide their fax message dated 29.10.1997 Ex.P-2 informed the plaintiff that their routing was via St. Petersburg. Thereafter, in view of the objection raised by the consignee Jainyo Overseas, the plaintiff initially asked the defendants to send the goods to Moscow via Kotka, however, subsequently, the plaintiff had accepted for the supply of the goods to Moscow via St.

Petersburg from Hamburg. This is clear from the letter dated 21.11.1997 Ex.PW-1/12 from the plaintiff to the consignee Jainyo Overseas. Through this letter dated 21.11.1997 Ex.PW-1/12, the plaintiff informed Jainyo Overseas that it was advised by the shipping company that the consignee would have to send the documents to St. Petersburg to enable the shipping agent at St. Petersburg to get the containers cleared from the port and send it by TIR Carnet trucks to Moscow. The plaintiff asked the consignee to send the declaration along with original invoice, packing list and one original B/L to the agent at St. Petersburg by courier enabling them to do the needful. The plaintiff asked the consignee to cooperate with the shipping agent for quick clearance of the containers. Hence, it is seen that the plaintiff had accepted that the goods would be sent to Moscow via St. Petersburg from Hamburg.

36. In view of the chain of circumstances which is brought out from the record, the original term of contract of the port of discharge as Kotka had become a thing of the past and the parties by their conduct had agreed and acquiesced that the goods would be sent to Moscow via St. Petersburg from Hamburg.

37. It is the undisputed position that from the port of discharge i.e. Hamburg, the goods were transported to St. Petersburg. The correspondence between the parties on the record shows that the defendants' agent Karl Geuther & Co. was repeatedly informing that the consignee Jainyo Overseas was not providing the requisite documentation for movement of the containers from St. Petersburg to Moscow. This is clear from the communications by the defendants' agent Karl Geuther & Co. dated 19.11.1997 Mark-A, dated 24.11.1997 Mark-B, dated 01.12.1997 Mark-C, dated 10.12.1997 Mark-D. In its communication dated 11.12.1997, the defendants' agent Karl Geuther & Co. informed the defendants that the consignee was not responding to the messages and the consignment was in St. Petersburg for four weeks and that the consignee was giving the documents step by step only and was not cooperative with the St. Petersburg agent. It was also informed that the consignee was holding back documents. This information by Karl Geuther & Co. was shared by the defendants with the plaintiff. Vide communication dated 11.12.1997, the defendants informed that the consignee had not handed over the requisite documents to the agents at St. Petersburg and that in the absence of necessary documentation, the containers were still lying at St. Petersburg.

38. Vide communication dated 17.12.1997 Mark-F, Karl Geuther & Co. informed the defendants that they were informed that a change in consignee was required as the present consignee i.e. Jain Overseas was not allowed to import into Russia and that a new consignee i.e. CINT-K was being substituted. It was also informed that they would advise the decision of the customs if delivery to the new consignee CINT-K would be accepted. Vide communication dated 22.12.1997 Mark-G, Karl Geuther & Co. informed the defendants that no confirmation was received from customs agreeing to move the container to Moscow and that nothing could be done till Russian customs accepted that the containers be handed over to M/s. CINT-K. This message was forwarded to the plaintiff on 23.12.1997.

39. Vide communication dated 25.12.1997 Mark-H, another shipping agent of the defendants i.e. Michael Lebedev of Incotec Service informed the buyer M/s. Jain Overseas marking a copy to the defendants that permission was required from Baltic Customs to transport cargo to the address of

the new consignee. It was further informed that as per the customs rules, the change in the consignee after arrival of the vessel at the St. Petersburg port was prohibited and that the permission would take time. Vide communication dated 13.01.1998 Ex.DW-1/PX2, the defendants communicated this information to the plaintiff also. It was further informed that the situation was inevitable regardless of the route which was to be followed since the consignee Jain Overseas did not possess the requisite licence to import the goods into Russia.

40. Ultimately, the customs authorities refused the request for change of consignee since the container had already physically arrived at St. Petersburg in the name of Jainyo Overseas. The defendants vide communication dated 06.02.1998 Ex.DW-1/PX1 informed the plaintiff of this position. It was informed that initially the original consignee Jainyo Overseas did not present the required set of documents, and that when the original consignee could not organise clearance, then he asked Mr. Lebedev (defendants' agent) to organise the clearance in the name of Cint-K, i.e. a change in consignee, however, the local customs authority refused this request since the container had already physically arrived at St. Petersburg in the name of Jainyo Overseas. The defendants informed that when the original consignee did eventually show Mr. Lebedev a new set of documents, it turned out that these documents were in the name of yet another party. It was informed that as per information, the container stood confiscated. The defendants asked the plaintiff to explain the picture to the buyer and to request to use all his resources to release the consignment or to release the container.

41. Vide communication dated 24.03.1998 Mark-K from Karl Geuther & Co. to the defendants, the situation of non- delivery of the goods was explained in the following manner:

"Ref your fax dated 23.03.98 Before Messrs FENA are claiming nondelivery of above containers to consignee M/s Jainyo Overseas we again have to point out the situation:

23.10.97- Consignee JAIYO OVERSEAS received notice for arrival of containers to Hamburg and common instruction for delivery to Moscow from Shipping agent in St. Petersburg M/s INCOTEC Consignee insisted on storage in Hamburg until further advise 06.11.97-We are informed that consignee is not interested to accept containers via St. Petersburg due to unsafe route and no time bound delivery schedule. Shippers are not willing to pay more than agreed rate and are requesting schedule of delivery of containers via St. Petersburg if consignee furnishes all required documents. We gave requested schedule with procedures and required documents.

and also advised possibility of delivery via Helsinki or Kotka 12.11.97 after receipt of confirmation that containers have to be delivered from St. Petersburg to Moscow with bonded custom truck same were transhipped to St. Petersburg.

14.11.97- further to notice of 23.10.97 M/s INCOTEC informed consignee about procedures and demanded documents.

19.11.97- we are informed that consignee is for unknown reason not willing to hand over papers to St. Petersburg.

Consignee is not reachable on phone and is not replying by fax.

21.11.97- We advised contact address in Moscow to give consignee assistance for producing required documents.

24.11.97- Consignee instructs M/s Sint-K to arrange passing formalities on their behalve.

10.12.97 after several reminders documents are still not complete 11.12.97 Mr Jain from JAINYO OVERSEAS showed up in the office of INCOTEC with request to change consignee as they have no license for import to Moscow. Power of attorney from new Consignee is required.

22.12.97 power of attorney from new consignee Sint-K not received 05.01.98 power of attorney received and presented to Baltic customs after holidays on 08.01.98.

13.01.98 permission from customs to change consignee is still not received 22.01 98 INCOTEC informed JAINYO OVERSEAS that they did not receive permission from Baltic Customs to change consignee and as JANYO OVERSEAS is not allowed to do custom clearance in Moscow the only possibility would be to do clearance in St. Petersburg. Consignee was informed that Baltic Customs has prolonged time of storage up to 30.01.98 only, thereafter cargo would be confiscated.

23.01.98 JAINYO OVERSEAS insist on clearance in Moscow.

30.01.98 prolongation of storage in the port is running out.

02.02.98 after prolonged time of storage was run out Mr Jain came to St. Petersburg to start action at Baltic customs with request of prolongation for storage and with uncomplete set of documents for clearance on behalf of third partie.

03.02.98 new prolongation of storage was not granted and cargo was confiscated by Baltic customs.

02.03.98 JAINYO OVERSEAS requested Baltic Customs to release cargo on their behalf for customs clearance at Baltic Customs.

Baltic Customs advised that investigations are still in progress.

24.03.98 Decision of Baltic customs is not received until now.

It is still uncleared who will pay for charges like storage which only occur due to false and incomplete information/documents from Consignee.



We do not understand position of Messrs FENA that nondelivery of these containers are fault of JM Baxi / CMT/Karl Geuther / or Incotec, the only parties in this story who had the chance to clear up this matter were M/s JAINYO OVERSEAS who held back with information / required documents, who only started action when it was already too late.

Anyhow we instructed INCOTEC to keep contact to Baltic Customs and to advise as soon they receive any news.

Kind regards Karl Geuther GmbH & Co.

as agents of SCI Luiko Peters"

(Emphasis supplied by me)

42. Vide communication dated 14.10.1998 Mark-G, the defendants wrote to the plaintiff as follows:

"We refer to your letter dtd. 30th September'98 and will clarify matters, once again.

1. Our B/L was for "Hamburg" and not "Kotka". The B/L was dtd. 26.9.97 and the cargo arrived Hamburg

25.10.97. (Hamburg is the port of relay to St. Petersburg, which is the Russian port of entry, used by us for boxes destined Moscow, and which you are aware, is an Inland Russian destination.

We are therefore unable to understand or appreciate your statement that we have "mismanaged" the transportation of cargo.

2. The intention to deliver Moscow, is obviously not independent or in respect of Russian Government Customs Authority's documentation requirements at the first point of entry i.e. St. Petersburg. That your Consignee was unable to provide the same expeditiously, sufficiently or appropriately is a fact that was being frequently discussed and informed to yourself, your Consignee as well as your booking/Customs Agents.

It may please be appreciated that the Carrier under no circumstances can by-pass local Government requirements and imperative pre-requisite documentation, all of which can only be provided by Consignee / Shipper/Merchant/Cargo interest.

3. We have pointed out in the past, and now do so again, that you / your Consignees inability to meet local Government documentation requirements has caused tremendous financial loss to our Principals, The Shipping Corporation of India Ltd., whose containers are lying stuck for a very extended period of time. As containers are the revenue earning units, you will also appreciate that there has been a phenomenal loss of revenue to the Ship owner due to non-clearance of those containers.

This episode has already taken up a tremendous amount of expenses in the prolonged follow-up and communications, and to a large extent by long distance telephone calls between ourselves, Hamburg and St. Petersburg, substantially beyond what one would normally experience.

Regards, (CAPTA.K. JAIN) N.O.O.: J.M. Baxi & Co., New Delhi - Maj. Gen. Khanna (Retd) - Fax: 5784825 On 6.11.97 itself, (3) different possibilities for delivery ex Hamburg to Moscow, were provided. The chosen option was to deliver via St. Petersburg to Moscow via Bonded Customs truck, subject to submission of required local Customs documentation. Even this option ran into "bottle-necks" due to Consignee's own problems. Moreover, even after a large amount of Storage and Demurrage charges payable to local authorities at St. Petersburg had accumulated, partial payment were not made by the Consignees, which made even more difficult to deal with the respective Government authorities."

43. From the afore-discussed correspondence, it emerges that as per the defendants' agents at St. Petersburg the original consignee M/s. Jainyo Overseas did not even have the requisite licence to import goods into Russia and that the original consignee had sought for a change in the consignee to one Cint-K, which was however not permitted by the customs authorities since the consignment had already reached St. Petersburg and as per the customs rules it was not permissible for change in the consignee name after the goods had already reached the port of discharge i.e. St. Petersburg, and, ultimately, the consignment was confiscated.

44. In the face of the aforesaid communications and correspondence which are contemporaneous with the period of the transaction, the defendants have been able to discharge the onus to show that the consignment was confiscated due to the fault of the consignee M/s. Jainyo Overseas since it did not have the licence to import goods into Russia and that M/s. Jainyo Overseas did not provide the requisite documentation for release of the goods at St. Petersburg. It has clearly come on the record that the consignee was changed to Cint-K on the instructions or with the consent of the original consignee M/s. Jainyo Overseas. This gives credence to the version of the defendants that the original consignee M/s. Jainyo Overseas did not have the licence to import into Russia which is why the consignee had to be changed. However, the consignment was confiscated since the change in consignee was not permitted by the customs authorities as the consignment had already reached St. Petersburg and it was not permissible to change the name of consignee after the consignment had already reached the port. The onus then shifted to the plaintiff to show that M/s. Jainyo Overseas did actually have the licence to import goods into Russia and that it had provided the necessary documentation for release of consignment. However, no evidence has been led to this effect by the plaintiff and the plaintiff has been unable to discharge the onus in this regard. The plaintiff did not even call M/s. Jainyo Overseas as a witness in the suit, and as such an adverse inference would be drawn that the plaintiff was aware that the consignee would not be able to substantiate that it had the requisite import licence for import into Russia and documentation for release of the goods by the customs authorities. The plaintiff has also been unable to explain as to why the consignee was sought to be changed if the original consignee M/s. Jainyo Overseas had the requisite import licence and documentation for release of the consignment. Hence, on a balance of probabilities, the conclusion which is drawn from the evidence on record is that the consignment got confiscated by the St. Petersburg customs due to the default on the part of the consignee M/s. Jainyo Overseas and

not on the part of the defendants.

45. The Issues Nos. 3, 4, 5, 6 and 7A are answered accordingly.

Issue No.7. Whether the defendants inform the plaintiff vide FAX dated 18.11.1998 that the confiscated goods could be released on the payment of about RUB 28,000.00? If so, what effect? OPD

46. Vide Fax dated 18.11.1998 Mark N, Karl Geuther & Co.

wrote to the defendants as follows:

"Sub: 2x20 Fena Today we received reply from P & I Services St. Petersburg in abobe matter.

1) They would undertake the search and subsequent release of the SCI containers if parties concerned find it reasonable to authorize their office. They would be ready to give an estimate ohe expected costs for the services of their office. Kindly obtain confirmation from M/s Fena that they will bear these cost for releasing empty containers.

2) After receipt of Fena's confirmation that they will bear charges for release of empty containers. which will include all storage charges up to date of confiscation (this should be the amount of US\$ 1656, as mentioned in Incoteks Fax dated 24.02.98) and storage of the empties since they are destuffed by the customs (this amount is unknown to us sofar), please inform them that cargo might be released against payment of about RUB 28,000.00 as pecuniary sanctions and for storage of the cargo.

Please urgently obtain confirmation from M/s Fena to catch the possibility to bring this story to an end. Kind regards Karl Geuther GmbH & Co Luiko Peters"

47. However, nothing really turns on this Fax dated 18.11.1998 Mark N, in view of the finding that the confiscation of the consignment was due to the default of the consignee M/s. Jainyo Overseas. The charges for the release of the cargo, thus, could not be recovered from the defendants herein.

48. The Issue No.7 is answered accordingly.

Issue No.7B. Whether the plaintiff has suffered any loss on account of confiscation of the consignment? If so, to what effect? OPD

49. In view of the finding that the consignment got confiscated by the St. Petersburg customs due to the default on the part of consignee M/s. Jainyo Overseas and not on the part of the defendants, the plaintiff would not be entitled to seek any damages or compensation from the defendants for any

loss suffered by it. The suit is liable to be dismissed.

50. The Issue No.7B is answered accordingly.

#### DECISION

51. In view of the aforesaid discussion, the suit is dismissed.

52. Parties to bear own costs.

53. Let the decree-sheet be drawn up accordingly.

54. File be consigned to record room.

Satyabrata Panda

Panda Date:

2024.09.30  
17:56:32 +05

(SATYABRATA PANDA)

District Judge-04

Judge Code- DL01057

PHC/NewDelhi/30.09.2024