A DR. VIJAYAKUMARAN C.P.V.

v.

CENTRAL UNIVERSITY OF KERALA & ORS.

(Civil Appeal No. 777 of 2020)

B JANUARY 28, 2020

[A. M. KHANWILKAR, HEMANT GUPTA AND DINESH MAHESHWARI, JJ.]

Service Law:

C *Termination of service – Of University Associate Professor on probation – Pursuant to report of Internal Complaints Committee which was constituted on complaints regarding sexual harassment of female students – Appellant assailed the termination order on the ground that it was stigmatic – Single Judge as well as Division* D *Bench of High Court construed the termination order as termination simplcitor – Appeal to Supreme Court: Held: From the tenor of the termination order it is evident that it is* ex- facie *stigmatic and punitive – Such an order could be issued only after subjecting the incumbent to a regular inquiry as per service Rules – Therefore, the termination order is illegal – Incumbent is directed to be reinstated – University* E *Grants Commission (Prevention, Prohibition and Redressal of Sexual Harassment of Women Employees and Students in Higher Educational Institutions) Regulations, 2005 – Regulations 5 and 8.*

Disposing of the appeal, the Court

F **HELD: 1. Going by the tenor of the order of termination, it is incomprehensible as to how the same can be construed as termination simplictor, when it has made the report of the inquiry conducted by the Internal Complaints Committee and the decision of the Executive Council dated 30.11.2017 as the foundation, in addition to the ground of academic performance. Had it been a** G **case of mere unsatisfactory academic performance, the situation would have been entirely different. The appellant has been subjected to a formal inquiry before the Committee constituted under statutory regulations to inquire into the allegations bordering on moral turpitude or misconduct committed by the appellant and that inquiry culminated in a finding of guilt against**

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the appellant with recommendation of the Executive Council to proceed against the appellant as per the service rules. In such a situation, it is unfathomable to construe the order as order of termination simplicitor. [Para 7][382-F-H; 383-A-B]

2. The material which amounts to stigma need not be contained in the order of termination of the probationer, but might be contained in "any document referred to in the termination order". Such reference may inevitably affect the future prospects of the incumbent and if so, the order must be construed as ex-facie stigmatic order of termination. [Para 8][383-C-D]

3.1 One of the judicially evolved tests to determine whether in substance an order of termination is punitive is to see whether prior to the termination there was (a) a full-scale formal enquiry (b) into allegations involving moral turpitude or misconduct which (c) culminated in a finding of guilt. In the present case, all the three elements are attracted, as a result of which it must follow that the stated order is ex-facie stigmatic and punitive. Such an order could be issued only after subjecting the incumbent to a regular inquiry as per the service rules. [Para 9][385-G-H; 386-A-B]

4. Upon receipt of complaints from aggrieved women (girl students of the University) about the sexual harassment at workplace (in this case, University campus), it was obligatory on the Administration to refer such complaints to the Internal Committee or the Local Committee, within the stipulated time period as predicated in Section 9 of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. Upon receipt of such complaint, an inquiry is required to be undertaken by the Internal Committee or the Local Committee in conformity with the stipulations in Section 11 of the 2013 Act. The procedure for conducting such inquiry has also been amplified in the University Grants Commission (Prevention, Prohibition and Rederessal of Sexual Harassment of Women Employees and Students in Higher Educational Institutions) Regulations 2015. Thus understood, it necessarily follows that the inquiry is a formal inquiry required to be undertaken in terms of the 2015 Regulations. The allegations to be inquired into by

such Committee being of "sexual harassment" defined in Section 2(n) read with Section 3 of the 2013 Act and being a serious matter bordering on criminality, it would certainly not be advisable to confer the benefit on such employee by merely passing a simple order of termination. Such complaints ought to be taken to its logical end by not only initiating departmental or regular inquiry as per the service rules, but also followed by other actions as per law. In such cases, a regular inquiry or departmental action as per service rules is also indispensable so as to enable the employee concerned to vindicate his position and establish his innocence. [Para 10][386-E-H; 387-A]

5. The impugned termination order dated 30.11.2017 is illegal being ex-facie stigmatic as it has been issued without subjecting the appellant to a regular inquiry as per the service rules. On this conclusion, the appellant would stand reinstated, but whether he should be granted backwages and other benefits including placing him under suspension and proceeding against him by way of departmental or regular inquiry as per the service rules, is, a matter to be taken forward by the authority concerned in accordance with law. [Para 11][387-B-C]

6. Even though the impugned order of termination dated 30.11.2017 is set aside in terms of this judgment, as a result of which the appellant would stand reinstated, but at the same time, due to flawed approach of the respondent No. 1 – University, the entitlement to grant backwages is a matter which will be subject to the outcome of further action to be taken by the University as per the service rules and in accordance with law. [Para 11] [388-B-C]

7. The impugned judgments and orders dated 30.1.2018 and 20.2.2018 passed by the High Court including the order of termination dated 30.11.2017 issued under the signatures of the Vice-Chancellor of the respondent No. 1 – University are set aside instead reinstatement of the appellant is directed and the question regarding backwages, placing him under suspension and initiating departmental or regular inquiry as per the service rules, to be taken forward by the authority concerned in accordance with law is left. [Para 12][388-D-E]

Indra Pal Gupta v. Managing Committee, Model Inter College, Thora **(1984) 3 SCC 384 : [1984] 3 SCR 752;** *Dipti Prakash Banerjee v. Satyendra Nath Bose National Centre for Basic Sciences, Calcutta & Ors.* **(1999) 3 SCC 60 : [1999] 1 SCR 532;** *Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences & Anr.* **(2002) 1 SCC 520 : [2001] 5 Suppl. SCR 41;** *Managing Director, ECIL, Hyderabad & Ors. v. R. Karunakar & Ors.* **(1993) 4 SCC 727 : [1993] 2 Suppl. SCR 576 – relied on.**

Case Law Reference

[1984] 3 SCR 752	**relied on.**	**Para 8**
[1999] 1 SCR 532	**relied on.**	**Para 8**
[2001] 5 Suppl. SCR 41	**relied on.**	**Para 9**
[1993] 2 Suppl. SCR 576	**relied on.**	**Para 11**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 777 of 2020.

From the Judgment and Order dated 20.02.2018 of the High Court of Kerala at Ernakulam in WA. No. 444 of 2018 in WPC No. 39013 of 2017.

R. Basant, Sr. Adv., Ms. Resmitha R. Chandran, Subhas Chandran, Biju Joseph, Pramod P., Advs. for the Appellant.

Vinary Navare, Sr. Adv., Nachiketa Joshi, Sajith Vishvanathan, Ms. Sucheta Joshi, Ms. Himadri Haksar, Vipul Tiwari, Advs. for the Respondents.

The Judgment of the Court was delivered by

A. M. KHANWILKAR, J.

1. Leave granted.

2. The moot question involved in this appeal is: whether the order issued under the signatures of Vice-Chancellor of the Central University of Kerala (respondent No. 1), dated 30.11.2017 is simplicitor termination or *ex-facie* stigmatic? The said order reads thus: -

"**Order**

On scrutiny of report by the Internal Complaints Committee, other documents and academic performance, the Executive Council held on 30/11/2017 felt that the performance of Dr. C.P.V. Vijayakumaran on probation is not suitable for continuation and confirmation in this University and had resolved to terminate the services forthwith. It is ordered accordingly."

3. Shorn of unnecessary details, on 5.6.2017, the respondent No. 1 – University sent an offer letter to the appellant for being appointed to the post of Associate Professor in the Department of Hindi. This letter stated that he would be on probation for a period of twelve months from the date of joining and governed by the rules and regulations of the Central University of Kerala for teachers and other academic staff, orders issued by the University/University Grants Commission (UGC)/ Government of India from time to time and the code of conduct applicable to all the employees of the respondent No. 1 – University etc. A formal written contract was entered into between the appellant and the respondent No. 1 – University on 12.6.2017, restating the terms and conditions referred to in the offer letter. The relevant clauses of the contract read thus: -

"2. (a) The teacher shall be on probation for a period of 12 months which may be extended by a further period of 12 months. The total period of probation shall in no case exceed twenty four months.

(b) The case of each teacher shall be placed before the Executive Council for confirmation soon after the expiry of the period of probation prescribed that is within 6-8 weeks. The decision of the Executive Council with regard to his/her confirmation or extension of his/her probation period, should be communicated to the teacher immediately.

(c) If the University is satisfied with the suitability of the teacher for confirmation he/she shall be confirmed on the post to which he/she was appointed at the end of the period of his/her probation.

(d) Where a teacher appointed on probation is found, during the period of probation, not suitable for holding that post or has not completed the period of probation whether extended or not, satisfactorily, the Executive Council may (i) if the appointment is

by direct recruitment, terminate the teacher's Service from the University without the notice (ii) if the appointment is by promotion, revert the incumbent to previous post held by him.

(e) That the said Teacher shall be a whole-time teacher of the University and unless the contract-is-terminated by the Executive Council or by the teacher as hereinafter provided shall continue in the service of the University until he/she complete the age of 65 years."

xxx xxx xxx

7. It is further agreed that this engagement shall not be liable to be terminated by the University except on the grounds specified and in accordance with the procedure laid down in clauses (i) to (vi). Reproduced below:

(i) Where there is an allegation of misconduct against a teacher or a member of the academic staff the Vice-Chancellor may if he thinks fit by order in writing, place the teacher under suspension and shall forthwith report to the Executive Council the circumstances in which the order was made:

(ii) Provided that the Executive Council may if it is of the opinion that the circumstances of the case do not warrant the suspension of the teacher or the member of the academic staff revoke that order.

(iii) Notwithstanding anything contained in the terms of her contract of service or of her appointment, the executive council shall be entitled to remove a teacher or a member of the academic staff on the ground of misconduct.

(iv) Save as aforesaid, the Executive Council shall not be entitled to remove a teacher or a member of the academic staff except for good cause and after giving three months notice in writing or on payment of three months salary in of notice.

(v) No teacher or a member of the academic staff shall be removed under clause (ii) or under clause (iii) until she has been given a reasonable opportunity of showing cause against the addition proposed to be taken against her.

A **(vi) The removal of a teacher or a member of the academic staff shall require a two-thirds majority of the numbers of the executive council present and voting.**

(vii) The removal of a teacher or a member of the academic staff shall take effect from the date on which
B **the order of the removal is made.**

Provided that where a teacher or a member of the academic staff is under suspension at the time of removal, the removal shall take effect from the date on which she was placed under suspension.

C 8. Any dispute arising, out of this contract shall be settled in accordance with the provisions of the Central University of Kerala."

(emphasis supplied)

D 4. After being appointed as Associate Professor in the Department of Hindi with effect from 12.6.2017, the appellant assumed office. But soon thereafter, a complaint was filed against him by a third-semester student on 13.7.2017 followed by two other complaints dated 14.7.2017 filed by 16 students and 29.8.2017 filed by 23 students. It is not necessary for us to highlight the grievance(s) set out in the said complaints. As a E consequence of the stated complaints, the respondent No. 1 – University had no option but to constitute an Internal Complaints Committee in terms of the statutory regulations being University Grants Commission (Prevention, Prohibition and Redressal of Sexual Harassment of Women Employees and Students in Higher Educational Institutions) Regulations, F 2015 (for short, 'the 2015 Regulations'). Regulation 5 thereof sets out responsibilities of the Internal Complaints Committee and the process of conducting inquiry by the Committee is predicated in Regulation 8, which includes submission of inquiry report with its findings and recommendations to the Executive Authority of the respondent No. 1 – University. The stated Committee accordingly submitted its inquiry report G with findings and recommendations. The operative part of that report reads thus:-

"…….

In view of all the facts above, it appears to the Committee that the complaint is genuine and consistent and it is improbable that
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all eighteen students of a batch (complainants) could be influenced to fabricate an allegation against the accused by the University authorities. The possibility of any such interventions was categorically denied by the complainants. The evidences against the accused, both verbal as well as written statements are strong and authentic, and the accused failed to establish his innocence during the investigation process. The Committee unanimously feels that the accused had committed sexual offences against girl students spoiling the entire academic atmosphere in the department and as well in the campus as a whole We feel that this can affect the reputation of the University.

The committee further would like to emphasis on ensuring fearless learning environment for the woman students. Irrespective of possible positive decision if any in favour of the accused, the committee recommends that the accused should not be allowed to engage the classes and evaluation duties of the current Sem 1 and Sem 3 batches of the Hindi department.

All the evidences and conclusion are hereby submitted by the Committee before the Hon, VC for further actions. (The minutes of the committee meetings and the voice records of the statements are already submitted with the interim report and hence not added this time."

This report was taken up for consideration by the Executive Council of the respondent No. 1 – University on 30.11.2017. The relevant portion of the decision taken by the Executive Council reads thus: -

"…….

The Hindi Department is only having these two batches of students. The accused is presently aged 62. He had committed sexual misconduct with the girl students of his daughter's age and the same has been convincingly established in the report of the Internal Complaints Committee. Dr. C.P.V. Vijayakumaran, a probationer committed serious misconduct and brought disrepute to the University apart from vitiating the academic atmosphere at the University.

He has been drawing salary, without any academic work w.e.f. 19 September 2017 due to the complaints and indefinite boycott of classes by the I Semester and III Semester students. The

A Executive Council has also examined the academic performance of Dr. C.P.V. Vijya Kumaran from the date of appointment.

Decision: On scrutiny of report by the Internal Complaints Committee, other documents and academic performance it is felt that performance of Dr. C.P.V. Vijaya Kumaran on probation is
B not suitable for continuation and confirmation in this University and therefore it is resolved to terminate the services forthwith. The Vice-Chancellor is authorized to issue orders accordingly……."

5. From the perusal of the termination order dated 30.11.2017
C issued by the Vice-Chancellor, it is evident that the same was issued in the backdrop of the Internal Complaints Committee report. The opening part of the order itself mentions that on scrutiny of report by the Internal Complaints Committee, other documents and academic performance, the Executive Council in its meeting held on 30.11.2017, decided to take the decision to terminate the services of the appellant forthwith.
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6. The appellant had assailed the impugned termination order dated 30.11.2017 being *ex-facie* stigmatic. The learned single Judge of the High Court of Kerala at Ernakulam (for short, 'the High Court') vide judgment and order dated 30.1.2018 in Writ Petition (Civil) No. 39013/ 2017, however, construed the same as one of termination simplicitor.
E The Division Bench of the High Court vide impugned judgment and order dated 20.2.2018 in Writ Appeal No. 444/2018 has affirmed that view taken by the learned single Judge and rejected the appeal preferred by the appellant.

7. Accordingly, the moot question before us is: whether the order
F dated 30.11.2017 can be regarded as order of termination simplictor or is *ex-facie* stigmatic? Going by the tenor of the stated order, it is incomprehensible as to how the same can be construed as termination simplictor when it has made the report of the inquiry conducted by the Internal Complaints Committee and the decision of the Executive Council
G dated 30.11.2017 as the foundation, in addition to the ground of academic performance. Had it been a case of mere unsatisfactory academic performance, the situation would have been entirely different. The stated order not only adverts to the report of the Internal Complaints Committee, but also the decision taken by the Executive Council, which in turn highlights the fact that the appellant had to face an inquiry before the
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Committee in reference to the allegations of serious misconduct committed by him. Notably, the appellant has been subjected to a formal inquiry before the Committee constituted under statutory regulations to inquire into the allegations bordering on moral turpitude or misconduct committed by the appellant and that inquiry culminated in a finding of guilt against the appellant with recommendation of the Executive Council to proceed against the appellant as per the service rules. In such a situation, it is unfathomable to construe the order as order of termination simplicitor.

8. It is well-established position that the material which amounts to stigma need not be contained in the order of termination of the probationer, but might be contained in "any document referred to in the termination order". Such reference may inevitably affect the future prospects of the incumbent and if so, the order must be construed as *ex-facie* stigmatic order of termination. A three-Judge Bench of this Court in ***Indra Pal Gupta vs. Managing Committee, Model Inter College, Thora***[1] had occasion to deal with somewhat similar situation. In that case, the order of termination referred to the decision of the Managing Committee and subsequent approval by the competent authority as the basis for termination. The resolution of the Managing Committee in turn referred to a report of the Manager which indicated serious issues and that was made the basis for the decision by the Committee to terminate probation of the employee concerned. Relying on the aforementioned decision, the Court in ***Dipti Prakash Banerjee vs. Satyendra Nath Bose National Centre for Basic Sciences, Calcutta & Ors.***[2], observed as follows: -

> "**32.The next question is whether the reference in the impugned order to the three earlier letters amounts to a stigma if those three letters contained anything in the nature of a stigma even though the order of termination itself did not contain anything offensive**.
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> **33.** Learned counsel for the appellant relies upon *Indra Pal Gupta* v. *Managing Committee, Model Inter College* (1984) 3 SCC 384 decided by a three-Judge Bench of this Court. In that case, the order of termination of probation, which is extracted in the judgment, reads as follows: (SCC p. 386, para 1)

[1] (1984) 3 SCC 384
[2] (1999) 3 SCC 60

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> "With reference to the above (viz. termination of service as Principal), I have to mention that in view of Resolution No. 2 of the Managing Committee dated April 27, 1969 (copy enclosed) and subsequent approval by the D.I.O.S., Bulandshahr, you are hereby informed that your service as Principal of this Institution is terminated…."

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Now the copy of the resolution of the Managing Committee appended to the order of termination stated that the report of the Manager was read at the meeting and that the facts contained in the report of the Manager being serious and not in the interests of the institution, that therefore the Committee unanimously resolved to terminate his probation. The report of the Manager was not extracted in the enclosure to the termination order but was extracted in the counter filed in the case and read as follows: (SCC p. 388, para 3)

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> "It will be evident from the above that the Principal's stay will not be in the interest of the Institution. It is also evident that the seriousness of the lapses is enough to justify dismissal but no educational institution should take all this botheration. As such my suggestion is that our purpose will be served by termination of his services. Why, then, we should enter into any botheration. For this, i.e., for termination of his period of probation, too, the approval of the D.I.O.S. will be necessary. Accordingly, any delay in this matter may also be harmful to our interests.
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> Accordingly, I suggest that instead of taking any serious action, the period of probation of Shri Inder Pal Gupta be terminated without waiting for the period to end."

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It was held by Venkataramiah, J. (as he then was) (p. 392) that the letter of termination referred to the resolution of the Managing Committee, that the said resolution was made part of the order as an enclosure and that the resolution in its turn referred to the report of the Manager. A copy of the Manager's report had been filed along with the counter and the said report was the "foundation". Venkataramiah, J. (as he then was) held that the Manager's report contained words amounting to a stigma. **The learned Judge said: "This is a clear case where the order of termination issued is merely a**

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camouflage for an order imposing a penalty of termination of service on the ground of misconduct …", that these findings in the Manager's report amounted to a "mark of disgrace or infamy" and that the appellant there was visited with evil consequences. The officer was reinstated with all the benefits of back wages and continuity of service.

34. It will be seen from the above case that the resolution of the Committee was part of the termination order being an enclosure to it. But the offensive part was not really contained in the order of termination nor in the resolution which was an enclosure to the order of termination but in the Manager's report which was referred to in the enclosure. The said report of the Manager was placed before the Court along with the counter. The allegations in the Manager's report were the basis for the termination and the said report contained words amounting to a stigma. The termination order was, as stated above, set aside.

35. The above decision is, in our view, a clear authority for the proposition that the material which amounts to stigma need not be contained in the order of termination of the probationer but might be contained in any document referred to in the termination order or in its annexures. Obviously, such a document could be asked for or called for by any future employer of the probationer. In such a case, the order of termination would stand vitiated on the ground that no regular enquiry was conducted. We shall presently consider whether, on the facts of the case before us, the documents referred to in the impugned order contain any stigma."

(emphasis supplied)

9. In the case of ***Pavanendra Narayan Verma vs. Sanjay Gandhi PGI of Medical Sciences & Anr.***[3], the Court observed thus: -

"**21.** One of the judicially evolved tests to determine whether in substance an order of termination is punitive is to see whether prior to the termination there was (*a*) a full-scale formal enquiry (*b*) into allegations involving moral turpitude or misconduct which (*c*) culminated in a finding of guilt. If all three factors are present

[3] (2002) 1 SCC 520

A the termination has been held to be punitive irrespective of the form of the termination order. Conversely if any one of the three factors is missing, the termination has been upheld."

In the present case, all the three elements are attracted, as a result of which it must follow that the stated order is *ex-facie* stigmatic
B and punitive. Such an order could be issued only after subjecting the incumbent to a regular inquiry as per the service rules. As a matter of fact, the Internal Complaints Committee had recommended to proceed against the appellant appropriately but the Executive Council proceeded under the mistaken belief that in terms of clause 7 of the contract, it was
C open to the Executive Council to terminate the services of the appellant without a formal regular inquiry as per the service rules. Indisputably, in the present case, the Internal Complaints Committee was constituted in reference to the complaints received from the girl students about the alleged misconduct committed by the appellant, which allegations were duly inquired into in a formal inquiry after giving opportunity to the appellant
D and culminated with the report recording finding against the appellant with recommendation to proceed against him.

10. Upon receipt of complaints from aggrieved women (girl students of the University) about the sexual harassment at workplace (in this case, University campus), it was obligatory on the Administration
E to refer such complaints to the Internal Committee or the Local Committee, within the stipulated time period as predicated in Section 9 of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (for short, 'the 2013 Act'). Upon receipt of such complaint, an inquiry is required to be undertaken by the Internal Committee or the Local Committee in conformity with the
F stipulations in Section 11 of the 2013 Act. The procedure for conducting such inquiry has also been amplified in the 2015 Regulations. Thus understood, it necessarily follows that the inquiry is a formal inquiry required to be undertaken in terms of the 2015 Regulations. The allegations to be inquired into by such Committee being of "sexual harassment"
G defined in Section 2(n) read with Section 3 of the 2013 Act and being a serious matter bordering on criminality, it would certainly not be advisable to confer the benefit on such employee by merely passing a simple order of termination. Such complaints ought to be taken to its logical end by not only initiating departmental or regular inquiry as per the service rules, but also followed by other actions as per law. In such cases, a regular
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inquiry or departmental action as per service rules is also indispensable so as to enable the employee concerned to vindicate his position and establish his innocence. We say no more.

11. A priori, we have no hesitation in concluding that the impugned termination order dated 30.11.2017 is illegal being *ex-facie* stigmatic as it has been issued without subjecting the appellant to a regular inquiry as per the service rules. On this conclusion, the appellant would stand reinstated, but whether he should be granted backwages and other benefits including placing him under suspension and proceeding against him by way of departmental or regular inquiry as per the service rules, is, in our opinion, a matter to be taken forward by the authority concerned in accordance with law. We do not intend to issue any direction in that regard keeping in mind the principle underlying the exposition of the Constitution Bench in ***Managing Director, ECIL, Hyderabad & Ors. vs. R. Karunakar & Ors.***[4]. In that case, the Court was called upon to decide as to what should be the incidental order to be passed by the Court in case after following necessary procedure, the Court/Tribunal was to set aside the order of punishment. The Court observed thus: -

> "**31.** .....
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> **Where after following the above procedure, the Court/ Tribunal sets aside the order of punishment, the proper relief that should be granted is to direct reinstatement of the employee with liberty to the authority/management to proceed with the inquiry, by placing the employee under suspension and continuing the inquiry from the stage of furnishing him with the report. The question whether the employee would be entitled to the back-wages and other benefits from the date of his dismissal to the date of his reinstatement if ultimately ordered, should invariably be left to be decided by the authority concerned according to law, after the culmination of the proceedings and depending on the final outcome. If the employee succeeds in the fresh inquiry and is directed to be reinstated, the authority should be at liberty to decide according to law how it will treat the period from the date of dismissal till the reinstatement and to what benefits, if any and the extent of the benefits, he will be entitled**. The reinstatement made as a result of the setting

[4] (1993) 4 SCC 727

A aside of the inquiry for failure to furnish the report, should be treated as a reinstatement for the purpose of holding the fresh inquiry from the stage of furnishing the report and no more, where such fresh inquiry is held. That will also be the correct position in law."

B (emphasis supplied)

Following the principle underlying the above quoted exposition, we proceed to hold that even though the impugned order of termination dated 30.11.2017 is set aside in terms of this judgment, as a result of which the appellant would stand reinstated, but at the same time, due to C flawed approach of the respondent No. 1 – University, the entitlement to grant backwages is a matter which will be subject to the outcome of further action to be taken by the University as per the service rules and in accordance with law.

12. Accordingly, this appeal partly succeeds. We set aside the D impugned judgments and orders dated 30.1.2018 and 20.2.2018 passed by the High Court including the order of termination dated 30.11.2017 issued under the signatures of the Vice-Chancellor of the respondent No. 1 – University; and instead direct reinstatement of the appellant and leave the question regarding backwages, placing him under suspension and initiating departmental or regular inquiry as per the service rules, to E be taken forward by the authority concerned in accordance with law.

13. The appeal is disposed of in the above terms. There shall be no order as to costs. Pending interlocutory applications, if any, shall stand disposed of.

Kalpana K. Tripathy Appeal disposed of.

THE BRANCH MANAGER, INDIGO AIRLINES, KOLKATA & ANR.

v.

KALPANA RANI DEBBARMA & ORS.

(Civil Appeal Nos. 778-779 of 2020)

JANUARY 28, 2020

[A. M. KHANWILKAR AND DINESH MAHESHWARI, JJ]

Consumer Protection Act, 1986:

s. 2(1)(g) – Complaint against airlines – Alleging that the complainants were left behind by the ground staff without informing them about the departure of airline and that they were also not accommodated in the next flight – District consumer court allowed the complaint awarding compensation with 9% interest – In cross - appeals before State Consumer Commission, compensation amount enhanced – National Consumer commission dismissed the Revision petition with cost on the Airlines – Appeal to Supreme Court – Held: The nature of enquiry to be undertaken by consumer fora is limited to the factum of deficiency in service and to award compensation only if that fact is substantiated by the party alleging the same – The initial burden to substantiate the factum of deficiency in service was on the complainants – The complainants failed to substantiate the allegation of deficiency in service – The consumer fora in complete disregard of the principles of pleadings and burden of proof, unjustly shifted the onus on the Airlines – The National Consumer Commission erroneously denied itself the Revisional jurisdiction despite the fact that decisions assailed therein were manifestly wrong and suffered from error of jurisdiction.

Allowing the appeals, the Court

HELD: 1. While dealing with a complaint filed before consumer fora, the jurisdiction or the nature of enquiry to be undertaken by the consumer fora is limited to the factum of deficiency in service and to award compensation only if that fact is substantiated by the party alleging the same. The expression 'deficiency in service' has been defined in Section 2(1)(g) of the Consumer Protection Act, 1986, to mean any fault, imperfection,

A **shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service. Thus, the enquiry in such proceedings is limited to grievance about deficiency in service, which is distinct from the tortuous acts of the other party. [Paras 11 and 12][403-G; 403-A-B; 404-B]**

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Ravneet Singh Bagga v. KLM Royal Dutch Airlines & Anr **(2000) 1 SCC 66 (paragraph 6) : [1999] 4 Suppl. SCR 320– relied on**

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2. On a fair reading of the complaint and the evidence given on the same lines, all that can be discerned is that the respondents had reported at the "check-in counter" well in time and were issued boarding passes for the flight, which was scheduled to depart at 08:45 a.m., and that the flight took off leaving them (respondents) at the airport without informing them about the departure. There is no assertion that no public announcement was made at the boarding gate or on the T.V. screens displayed across within the airport before closure of the boarding gate and as to how they (respondents) were prevented or misled from reporting at the boarding gate, 25 (twenty-five) minutes before the scheduled departure time (08:45 a.m.) of the flight in question, and moreso before the boarding gates were actually closed at 08:58 a.m. [Para 12][405-G-H; 406-A-B]

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3. The consumer fora committed manifest error in shifting the burden on the appellants and drawing adverse inference against them for having failed to produce evidence regarding announcements having been made to inform the passengers including the respondents to arrive at the boarding gate before its closure at 08:58 a.m. The appellants had clearly stated that as per the standard practice, such announcements are made at the boarding gate itself and the record in that behalf is not maintained by the Airlines (appellants), but by the airport authorities. The need to prove that fact would have arisen only if the respondents had clearly pleaded all relevant material facts and also discharged their initial burden of producing proof regarding deficiency in service by the ground-staff of the appellants at the airport after

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issuing boarding passes and before the closure of the boarding gate and departure of the flight. [Para 12][406-B-D]

4. The approach of the consumer fora is in complete disregard of the principles of pleadings and burden of proof. First, the material facts constituting deficiency in service are blissfully absent in the complaint as filed. Second, the initial onus to substantiate the factum of deficiency in service committed by the ground-staff of the Airlines at the airport after issuing boarding passes was primarily on the respondents. That has not been discharged by them. The consumer fora, however, went on to unjustly shift the onus on the appellants because of their failure to produce any evidence. In law, the burden of proof would shift on the appellants only after the respondents/complainants had discharged their initial burden in establishing the factum of deficiency in service. [Para 16][411-D-E]

5. Further, there is no averment in the complaint or deposed to by the witness of the complainants/respondents as to how the ground-staff of the appellant-Airlines was responsible and that it was not their own acts of commission or omission. It is not the case of the respondents that they were prevented, misled or obstructed by the ground-staff of the appellants from reaching at the boarding gate well in time and until it was closed treating as 'Gate No Show'. It is also not the case of respondents that they had sought assistance of the ground-staff of the appellants and that was denied to them. In absence of such a case made out in the complaint or in the deposition and other evidence produced by the respondents, it is unfathomable as to how the respondents had substantiated the allegation of deficiency in service by the ground-staff of the appellants. Such a complaint ought not to proceed further for want of material facts constituting deficiency in service. [Para 13][408-H; 409-A-C]

6. The fact that the respondents were not accommodated in the next flight for Agartala without payment of airfare, *per se*, cannot be regarded as deficiency in service in relation to the contract which stood discharged and accomplished after 'Gate No Show' by the respondents and departure of the flight in terms of Articles 8.2 and 8.3 of the CoC. [Para 14][409-D]

7. The appellants at best were liable only to refund the Government and airport fees and/or taxes (if applicable) and not liable for any loss caused to the passenger(s). Had it been a case of 'denied boarding', the obligation of the appellants would have been somewhat different including to accommodate the passengers without insisting for air-ticket charges for the next flight available for reaching the desired destination. Therefore, in case of 'Gate No Show', not acceding to the request of the respondents until they paid air charges for the next flight, may or may not be a case of tortuous claim which, however, can be proceeded before any other forum but not consumer fora. For, the contract relating to travel plan of the respondents upon issue of the boarding passes at the airport check-in counters, was accomplished after 'Gate No Show' and resultantly closure of the boarding gate at 08:58 a.m. The deficiency in service must be ascribed only in respect of the stated contractual obligations of the parties. [Para 14][410-B-D]

8. The CoC is binding on both parties. The respondents, however, urge that in the present case, the air ticket did not contain the reference to the CoC. It is, however, not the case of the respondents (who are well educated, as respondent Nos. 1 and 2 claim to be Engineers working in Government establishment), that the website of the appellant-Airlines does not display the CoC or that the same was not made available at the airport check-in counter for inspection, which is the standard operating procedure followed by all the airlines. No such assertion has been made in the complaint as filed. [Para 15][410-E; 411-B-C]

Interglobe Aviation Limited v. N. Satchidanand **(2011) 7 SCC 463; [2011] 6 SCR 1116 – relied on.**

9. The allegation that the boarding passes were snatched away by the ground-staff of the appellants at the airport itself is blissfully vague and bereft of any material facts. It is not the case of the respondents that after the boarding passes were issued to them, they did not read the same to reassure themselves about the relevant information and the departure time of the flight indicated therein including the reporting time at the boarding gate. Nor is the case of the respondents that they had read the

boarding pass and it did not contain the relevant information including regarding the necessity of reporting 25 (twenty-five) minutes before the departure time at the boarding gate. Nothing of this sort is either pleaded or stated in the evidence by the respondents. [Para 17][412-A-C]

The Manager, Southern Region, Air India, Madras & Ors. v. V. Krishnaswamy **1994 (2) C.P.C. 171 – approved**

10. No doubt, the consumer is the king and the legislation is intended to safeguard and protect the rights and interests of the consumer, but that does not mean that he is extricated from the obligations under the contract in question much less to observe prudence and due care. The respondents have not offered any explanation for their inaction nor have mentioned about any act of commission or omission by the ground-staff of the appellant-Airlines at the airport during this period. [Para 18][412-E-F; 413-A-B]

11. There is no contractual obligation on the airlines to escort every passenger, after the boarding pass is issued to him at the check-in counter, up to the boarding gate. Further, the Airlines issuing boarding passes cannot be made liable for the misdeeds, inaction or so to say misunderstanding caused to the passengers, until assistance is sought from the ground-staff of the airlines at the airport well in time. It is not the case of the respondents that the boarding gate was changed at the last minute or there was any reason which created confusion attributable to airport/airlines officials, so as to invoke an expansive meaning of 'denied boarding'. The fact situation of the present case is clearly one of 'Gate No Show', the making of the respondents and not that of 'denied boarding' as such. [Para 19][413-B-D]

Finnair Oyj v. Timy Lassooy Decided **on 4.10.2012 in Case C-22/11;** *Denise McDonagh v. Ryanair Ltd.* **Decided on 31.1.2013 in Case C-12/11 – referred to.**

12. The question of due care by the ground-staff of the appellant-Airlines would arise when the passengers are physically under their complete control. That is possible after the

passengers have boarded the aircraft or may be in a given case at the operational stage whilst facilitating their entry to the boarding gate. In the present case, there is no assertion in the complaint or in the oral evidence produced by the respondents that they (respondents) had made some effort to take guidance or assistance of ground-staff of the appellant-Airlines at the airport after the boarding passes were issued to them for reaching at the boarding gates and that such assistance was not provided to them. [Para 22][414-C-E]

Interglobe Aviation Limited v. N. Satchidanand **(2011) 7 SCC 463; [2011] 6 SCR 1116 – distinguished.**

13. The CAR is only executive instructions, which has been issued for guidance of the duty holders/stakeholders and to implement the scheme of the act and do not have the force of law. Concededly, clause 3.2 if read as a whole, in no way would apply to a case of 'Gate No Show', which is markedly different than 'denied boarding'. [Para 24][416-A-B]

Joint Action Committee of Airlines Pilots' Association of India & Ors. v. the Director General of Civil Aviation & Ors. **(2011) 5 SCC 435 : [2011] 5 SCR 1019 – relied on.**

14. It would not be appropriate to cast an obligation on any airlines to delay the departure of an aircraft beyond the scheduled time of the departure and to await late arrival of any passenger, whosoever he may be, howsoever highly or lowly placed. The appellant-Airlines cannot be blamed for the non-reporting of the respondents at the boarding gate before 08:20 a.m. and in any case before 08:58 a.m., when the boarding gate was finally closed. [Para 25][416-C-D]

The Manager, Southern Region, Air India, Madras & Ors. v. V. Krishnaswamy **1994 (2) C.P.C. 171 – approved.**

15. The National Commission erroneously denied itself of the jurisdiction to entertain the revision petitions despite the fact that decisions assailed in the revision petitions were manifestly wrong and suffered from error of jurisdiction. In the

fact situation of the present case, the National Commission ought to have exercised its jurisdiction and corrected the palpable and manifest error committed by the two consumer fora below. [Para 20][413-E-F]

Ruby (Chandra) Dutta v. United India Insurance Co. Ltd. **(2011) 11 SCC 269 : [2011] 3 SCR 977;** *Dr. Bikas Roy & Anr. vs Interglobe Aviation Ltd. (IndiGo)* **Decided on 22.2.2018 in Appeal Case No. A/42/2017 – referred to**

16. So far as the suggestions given by the *Amicus Curiae* for issuing directions to all the airlines to abide by uniform practice is concerned, it is left to the competent authority (the DGCA) to consider the same and after interacting with all the stakeholders, take appropriate decision and issue instructions in that behalf, as may be advised. The competent authority (the DGCA) may do so within a reasonable time, preferably within six months from receipt of a copy of the present judgment or any representation in that behalf. [Para 26][416-E-F]

Case Law Reference

[1999] 4 Suppl. SCR 320	**relied on**	**Para 11**
[2011] 6 SCR 1116	**relied on**	**Para 15**
(1994) 2 C.P.C. 171	**approved**	**Para 17**
[2011] 3 SCR 977	**referred to**	**Para 20**
[2011] 6 SCR 1116	**distinguished**	**Para 22**
[2011] 5 SCR 1019	**relied on**	**Para 24**
(1994) 2 C.P.C. 171	**approved**	**Para 25**

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 778-779 of 2020.

From the Judgment and Order dated 12.09.2018 of the National Consumer Disputes Redressal Commission, New Delhi in Revision Petition Nos. 1520-1521 of 2018.

Rajiv Dutta, Sr. Adv., Sanjeev Kr. Singh, Aman Jha, Rahul Rajan, Raghvendra P. Singh, Advs. (A.Cs.)

A Shyam Divan, Sr. Adv., Ajit Warrier, Angad Kochhar, Ms. Tanvi Dubey, S. S. Shroff, Advs. for the Appellants.

Amlan Kumar Ghosh, Adv. for the Respondents.

The Judgment of the Court was delivered by

B **A. M. KHANWILKAR, J.**

1. Leave granted.

2. The appellants, who are representatives of two different branches of an aviation company operating low cost air carrier under the name and style of M/s. Indigo Airlines have filed these appeals, C taking exception to the judgment and order dated 12.9.2018 passed by the National Consumer Disputes Redressal Commission, New Delhi (for short, 'the National Commission') in Revision Petition Nos. 1520-1521/ 2018. Thereby, the revision petitions filed by the appellants came to be rejected and the judgment and order dated 22.8.2017 passed by the District D Consumer Disputes Redressal Forum, West Tripura, Agartala (for short, 'the District Forum') in Case No. CC-35/2017, as modified by the Tripura State Consumer Disputes Redressal Commission, Agartala (for short, 'the State Commission') vide judgment and order dated 22.2.2018 in Appeal Case Nos. A.53.2017 and A.61.2017, directing the appellants to pay to the respondents a compensation of Rs.51,432/- (Rupees fifty one E thousand four hundred thirty two only) within two months failing which to pay the same alongwith interest at the rate of 9% per annum, came to be confirmed. Additionally, a cost of Rs.20,000/- (Rupees twenty thousand only) for filing the revision petitions against such meagre compensation amount was also imposed.

F 3. At the outset, the appellants made it clear that they were not so much concerned about the amount of compensation/cost ordered to be paid to the respondents, but have serious grievance about the sweeping observations made by the three fora, which were untenable, both on facts and in law. The appellants agreed to deposit a sum of Rs.1,00,000/ - (Rupees one lakh only) in the District Forum, which was a condition G precedent for issuing notice to the respondents vide order dated 13.11.2018. That amount has been deposited and also withdrawn by the respondents. The matter, therefore, proceeded with the clear understanding that the appellants will not insist for refund of the amount, even if the appeals succeed on merits. The respondents, though entered

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appearance, the Court requested Mr. Rajiv Dutta, learned senior counsel to appear as A*micus Curiae* to assist the Court.

4. Briefly stated, the respondents had booked air ticket(s) vide PNR No. IHRNSE to travel from Kolkata to Agartala on 8.1.2017 i.e. Sunday in flight No. 6E-861, operated by the appellant-Airlines, departing at 08:45 a.m. According to the respondents, they had reported well in time at the check-in counter of the appellant-Airlines at Netaji Subhash Chandra Bose (Domestic) Airport, Kolkata and after completing necessary formalities, they were issued boarding passes for travelling by the stated flight. However, the respondents were left behind by the ground-staff of the appellant-Airlines and the concerned flight departed, without any information about its departure given to the respondents. The respondents then requested the ground-staff of the appellant-Airlines to accommodate them in the next available flight for Agartala from Kolkata. Even that request was turned down, as the respondents did not have requisite funds to procure the air-tickets for the same. Instead, the ground-staff of the appellant-Airlines snatched away the boarding passes of the respondents, as a result of which the respondents had no other option but to stay back at Kolkata in a hotel for two nights, and after arranging for funds, they left by a flight of the appellant-Airlines on 10.1.2017. Resultantly, the respondents had to incur expenditure for staying back in a hotel at Kolkata for two nights. They also had to incur loss of salary, loss of education of the two accompanying children (respondent Nos. 3 and 4) of respondent Nos. 1 and 2 and mental agony, harassment, suffering and frustration. Initially, the respondents sent a legal notice through their Advocate on 28.1.2017 demanding compensation of Rs.3,32,754/- (Rupees three lakhs thirty-two thousand seven hundred fifty-four only). As no response thereto was received, the respondents filed a complaint before the District Forum reiterating the grievance made in the legal notice and prayed for direction to the appellants to pay a total sum of Rs.3,77,770/- (Rupees three lakhs seventy seven thousand seven hundred seventy only) alongwith interest at the rate of 12% per annum. The said complaint was contested by the appellants by filing written statement raising preliminary objection and also asserting that the flight in question had to depart after the boarding gate was closed at 08:58 a.m. By that time, the respondents had not reported at the boarding gate despite the stipulation that the boarding gate would be closed 25 minutes prior to the departure time as per the Conditions of Carriage

A (for short, 'the CoC'), which were binding on all concerned, as expounded by this Court in ***Interglobe Aviation Limited vs. N. Satchidanand***[1]. The respondents having failed to report at the boarding gate before its closure for reasons best known to them, the ground-staff of the appellant-Airlines had no other option but to treat it as 'Gate No Show' in terms of article 8.2 of the CoC and to facilitate the flight to depart as per the B permission given by the Air Traffic Control (ATC) for departure. The respondents were responsible for the situation for which the appellants cannot be made liable, much less on the ground of deficiency in service. As a matter of fact, the scheduled time of departure was 08:45 a.m. In terms of article 8.2 of the CoC, the boarding gate was supposed to be C closed at 08:20 a.m., but as the flight was delayed for some time due to logistical reasons beyond the control of the appellant-Airlines, the boarding gate was actually closed at 08:58 a.m. Despite that, the respondents failed to report at the boarding gate in time, although boarding passes were issued much earlier at around 07:35 a.m. as asserted by the respondents. The appellants also asserted that in terms of the stipulations D in the CoC, in the present situation, the appellants were required to merely refund the Government and airport fees and/or taxes, as applicable and forfeit the ticket amount. Being a case of 'Gate No Show', the appellants were not obliged to accommodate the respondents in the next flight going to Agartala and in any case, without the respondents offering payment E for the fresh air tickets in that regard. In short, the appellants prayed for dismissal of the complaint.

5. The District Forum, after analysing the plea taken by both sides and going through the evidence produced by the parties, allowed the complaint on the finding that as per clause 8.2 of the CoC, the ground-F staff of the appellant-Airlines was expected to make subsequent announcements to secure the presence of the respondents and facilitate them to board the flight. However, no evidence was forthcoming that such announcements were made by the ground-staff of the appellant-Airlines. Further, in the e-tickets issued by the appellants, there is no indication about the fact that the passengers are required to report at the G boarding gate 25 (twenty-five) minutes prior to the departure of the flight. What is mentioned is only that the check-in begins 2 (two) hours prior to the flight time for seat assignment and closes 45 (forty-five) minutes prior to the scheduled departure. Although the boarding passes were not produced on record, the District Forum went on to observe

H [1] (2011) 7 SCC 463

that in the boarding pass(es) also, nothing was written to show that the passenger must report at the boarding gate 25 (twenty-five) minutes prior to the departure of the flight. In fact, in the same paragraph, the District Forum has adverted to the plea of the respondents that the boarding passes were snatched away from them by the ground-staff of the appellant-Airlines at the airport. It further held that there was no evidence to show that any assistance was provided by the ground-staff of the appellant-Airlines to the respondents for reaching upto the boarding gate in time. Moreover, the ground-staff refused to take the complaint of the respondents and instead snatched away the boarding passes from them, leaving them in helpless situation at the airport and forcing them to stay in a hotel for two days at Kolkata. On such findings, the District Forum proceeded to award compensation to the respondents in the sum of Rs.16,432/- (Rupees sixteen thousand four hundred thirty two only) towards airfare for travel to Agartala, Rs.10,000/- (Rupees ten thousand only) towards hotel expenditure, Rs.10,000/- (Rupees ten thousand only) towards mental agony, harassment and suffering and Rs.5,000/- (Rupees five thousand only) towards litigation costs, total amounting to Rs.41,432/- (Rupees forty-one thousand four hundred thirty two only) to be paid within two months, failing which to bear interest at the rate of 9% per annum.

6. The appellants carried the matter in appeal before the State Commission being Appeal Case No. A.61.2017, assailing the judgment and order passed by the District Forum. At the same time, the respondents filed cross-appeal being Appeal Case No. A.53.2017 for enhancement of compensation. Both the appeals came to be disposed of by the State Commission by the common judgment and order dated 22.2.2018. The State Commission, more or less affirmed the findings and conclusions recorded by the District Forum by observing that no evidence was forthcoming that proper assistance was given to the respondents to facilitate them to board the flight before the scheduled departure. It also observed that no oral evidence was produced by the appellants whatsoever including regarding the announcements made to invite the attention of the respondents for reporting at the boarding gate. The State Commission also went on to observe that after issuing boarding passes, it is the obligation of the airlines to provide assistance to the passengers to facilitate them to board the flight before the boarding gate closes. The State Commission, however, modified the order of the District Forum to the limited extent of enhancing the awarded amount towards mental agony,

A harassment and suffering from Rs.10,000/- (Rupees ten thousand only) to Rs.20,000/- (Rupees twenty thousand only) and resultantly, the total sum of Rs.41,432/- (Rupees forty-one thousand four hundred thirty-two only) was enhanced to Rs.51,432/- (Rupees fifty-one thousand four hundred thirty-two only).

B 7. Feeling aggrieved, the appellants carried the matter to the National Commission by way of Revision Petition Nos. 1520-1521/2018. The National Commission confirmed the findings and conclusions recorded by the two consumer fora and dismissed the revision petitions with observation that the appellants had chosen to challenge the order(s) providing for meagre compensation and showed no interest to settle the matter. The revision petitions were dismissed with costs of Rs.20,000/- (Rupees twenty thousand only).

8. Feeling aggrieved, the present appeals have been filed by the appellants, assailing the concurrent findings and conclusions of the three consumer fora. The principal grievance of the appellants is that the three consumer fora have failed to consider the principles of pleadings and burden of proof and have erroneously held that the appellants were liable for deficiency in service. This conclusion has been recorded in absence of any pleading or evidence laid before the consumer fora to show that the respondents had reported to the boarding gate well in time i.e. 25 (twenty-five) minutes prior to the scheduled departure of the flight in question, as required in terms of the CoC. They had not even pleaded or adverted to the circumstances which prevented them from reporting at the boarding gate before the stipulated time. In fact, it was a case of 'Gate No Show' by the respondents and not one of 'denied boarding' as such. Further, the deficiency in service must be in relation to the contractual obligation and not on the basis of sympathy and matters extraneous thereto. It is urged that the respondents had clearly failed to plead and prove some fault, imperfection, shortcoming or inadequacies in the quality, nature and manner of performance which was required to be performed by the appellants or their ground-staff at the airport in reference to the contract, which was *sine qua non* for invoking the remedy before the consumer fora as expounded in ***Ravneet Singh Bagga vs. KLM Royal Dutch Airlines & Anr.***[2]. The respondents have not pleaded or deposed about their whereabouts and efforts taken by them between the time when the boarding passes were issued to them

H [2] (2000) 1 SCC 66 (paragraph 6)

(at 07:35 a.m.) and until the boarding gate was closed (at 08:58 a.m.) or for that matter, the scheduled departure time (of 08:45 a.m.). The airlines is not expected to wait for the passengers until their arrival at the boarding gate and is obliged to close the boarding gate as soon as permission to 'Pushback' and 'Start-up' is received from the ATC as per the Civil Aviation Requirements (for short, 'the CAR') issued by the Director General of Civil Aviation (for short, 'the DGCA'). It is stated that 171 passengers were booked to travel on the flight in question, out of whom only 7 (seven) including the 4 (four) respondents were treated as 'Gate No Show' and 164 boarded the flight well in time. The thrust of the grievance of the appellants is that the consumer fora have committed jurisdictional error in not considering the fact that there was no pleading, much less tangible evidence produced, by the respondents to substantiate the fact that it was a case of deficiency in service in respect of the contractual obligation of the appellants. Thus, the burden of proof was wrongly shifted on the appellants. Further, the consumer fora have made sweeping observations which cannot be countenanced in law.

9. Respondent Nos. 1 and 2 who are also espousing the cause of respondent nos. 3 and 4 are duly represented by the learned counsel engaged by them. They have supported the findings and conclusions recorded by the consumer fora and would contend that no interference is warranted in the present appeals. As this Court had additionally appointed an A*micus Curiae* to assist the Court, he, besides making oral submissions has submitted written note and a report suggesting formulation of some guidelines or directions in view of the increasing demand for air travel because of improved purchasing capacity of the passengers and their growing need to achieve timelines including promotional schemes like UDAN (Ude Desh Ka Naagrik), a flagship scheme of the Government of India introduced to enable air operations on unreserved routes, connecting regional and rural areas, thereby making air travel affordable for masses. The learned A*micus Curiae* submits that the DGCA guidelines should be more humane and passenger-friendly, considering the fact that the passenger-profile of air passengers has become more inclusive, covering passengers from hinterlands and country-side cutting across diverse social and income groups. He has commended to us to expand the meaning of 'denied boarding' to include the case such as the present one, inasmuch as, the fact that the passenger is under obligation to report before the scheduled time at the check-in counter and/or boarding gate, that should not extricate the airlines' staff

A from facilitating passage of the passenger after issuance of boarding pass and secure his/her presence at the boarding gate before the closure of the boarding gate. He has invited our attention to stipulation in the CAR, particularly in clause 3.2.1 thereof, which pertains to cases of 'denied boarding' due to overbooking by the airlines or such other operational reasons including cancellation of flight due to strike at the airport of departure or extraordinary circumstances such as volcanic eruption leading to the closure of the airspace, as expounded by the Third Chamber of Court of Justice of the European Union in ***Finnair Oyj vs. Timy Lassooy***[3] and ***Denise McDonagh vs. Ryanair Ltd.***[4]. He has suggested that direction be issued to all air carriers: (a) to bring in uniformity in closure of check-in counters and boarding gates across all the air carriers operating in and out of India as per their domestic/ international specifications; (b) to display/highlight on the boarding pass itself, the necessary details relating to check-in, boarding, closure of boarding gates, mode of contract etc. in vernacular and English language if already not done; (c) to widely display the Charter of Rights to their passengers, as well as, duties/obligations of the air carriers towards their passengers at the respective check-in counters and their websites in addition to duly inform the passengers about the same at the time of issuing air-tickets; (d) to maintain and keep all the records relating to arrival and departure of passengers including time of check-in, reportage at boarding gates, record of communications with the passengers in case of delay in check-ins, reporting at boarding gate and final warning for the passengers in cases of non-reporting at check-in counters/boarding gates and post-factum upto three months i.e., from the date and time of departure/arrival of the concerned flight; and (e) to mandatorily contact those passengers, who are otherwise late in reporting at the check-in counters/boarding gates through telephone/mobiles being a secured channel of communication/interface between the air carrier and its passengers.

10. We have heard Mr. Shyam Divan, learned senior counsel appearing for the appellants, Mr. Amlan Kumar Ghosh, learned counsel for the respondents and Mr. Rajiv Dutta, learned *Amicus Curiae*.

11. The present appeals emanate from the complaint filed before the consumer fora. While dealing with such a complaint, the jurisdiction

[3] Decided on 4.10.2012 in Case C-22/11

[4] Decided on 31.1.2013 in Case C-12/11

or the nature of enquiry to be undertaken by the consumer fora is limited to the factum of deficiency in service and to award compensation only if that fact is substantiated by the party alleging the same. The expression 'deficiency in service' has been defined in Section 2(1)(g) of the Consumer Protection Act, 1986, to mean any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service. This Court in ***Ravneet Singh Bagga*** (supra), therefore, opined as follows:-

> "6. **The deficiency in service cannot be alleged without attributing fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be performed by a person in pursuance of a contract or otherwise in relation to any service. The burden of proving the deficiency in service is upon the person who alleges it**. The complainant has on facts, been found to have not established any wilful fault, imperfection, shortcoming or inadequacy in the service of the respondent. **The deficiency in service has to be distinguished from the tortious acts of the respondent. In the absence of deficiency in service the aggrieved person may have a remedy under the common law to file a suit for damages but cannot insist for grant of relief under the Act for the alleged acts of commission and omission attributable to the respondent which otherwise do not amount to deficiency in service.** In case of bona fide disputes no wilful fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance in the service can be informed (sic). If on facts it is found that the person or authority rendering service had taken all precautions and considered all relevant facts and circumstances in the course of the transaction and that their action or the final decision was in good faith, it cannot be said that there had been any deficiency in service. **If the action of the respondent is found to be in good faith, there is no deficiency of service entitling the aggrieved person to claim relief under the Act. The rendering of deficient service has to be considered and decided in each case according to the facts of that case for**

which no hard and fast rule can be laid down. Inefficiency, lack of due care, absence of bona fides, rashness, haste or omission and the like may be the factors to ascertain the deficiency in rendering the service."

(emphasis supplied)

12. Thus, the enquiry in such proceedings is limited to grievance about deficiency in service, which is distinct from the tortuous acts of the other party. In this regard, we must immediately notice the assertion of the respondents in the complaint filed before the District Forum to ascertain whether the claim of deficiency in service in relation to the stated contract has been pleaded or otherwise. It will be useful to advert to paragraph 1 of the complaint, which reads thus: -

"1. That the Complainant Nos. 1, 2, 3 and 4 are the same family members of above noted address and the Complainant No.1 alongwith her husband Sri Swadesh Debbarma, Complainant No.2 and her two sons namely Master Albish Debbarma, Complainant No.3 and Master Alex Debbarma, Complainant No.4 was coming from Kolkata to Agartala through Airlines of the opposite parties and accordingly the Complainant No.1 along with her family members i.e. Complainant Nos. 2, 3 and 4 took air tickets vide PNR No. IHRNSE under airlines of the opposite parties for Agartala Airport from Kolkata Subhash Chandra Bose (Domestic Airport) on 08.01.2017 vide Flight No. 6E 861, departure time 08.45 a.m., Sunday and accordingly norms of the airlines of the opposite parties, all are the Complainants reported before the Airlines Counter of opposite party at Kolkata Airport on 08.01.2017 and after observing all formalities the opposite party No.1 i.e. authority of Indigo Airlines of Kolkata Airport issued Boarding Pass in favour of all the Complainants for coming at Agartala Airport from Kolkata Airport, **but the opposite parties Airlines authority of Kolkata Airport left all the Complainants at Kolkata Airport and flight of opposite parties and opposite party No.1 did not boarded the Complainants in the said flight for coming at Agartala from Kolkata airport as the Complainants were inside the Airport building of Kolkata Airport. But without boarded the Complainants in the said flight, the flight of the opposite parties left the Complainants to Kolkata Airport without giving any information to them**.

As a result all the Complainants have fallen with critical situation. At that time due to left them by the airlines of the opposite party at Kolkata airport and at that time the Complainant No.1 and 2 filed a complaint by written to the office of the opposite party No.1, Kolkata airport. But the office staff as well as Airport staff of the Indigo i.e. opposite party No.1 did not accept the complaint application of the Complainants and at that time office staff of opposite party No.1 at Kolkata Airport forcibly snatched away their boarding Pass which were issued by the Indigo Airlines authority of Kolkata Airport from their hand of the Complainant No.1 and 2 and requested the opposite party No.1 to consider their matter of left them at Kolkata Airport by the Airlines of opposite party No.1 and the Complainant No.1 and 2 also requested the opposite party No.1 to arrange to carry them by next flight of your Airlines to Agartala Airport from Kolkata Airport, as at that time no money was in hand of the Complainants to further purchase air tickets for them to come to Agartala airport to Kolkata airport. But the opposite party No.1 did not heed the request of the Complainants, nor any arrangement to carry the Complainants from Kolkata Airport to Agartala Airport in their home town and lastly after failure to come back to Agartala from Kolkata airport, the Complainants hopelessly return from Kolkata Airport with very financial hardship and took a hotel room nearby the Kolkata Airport for staying purpose along with their minor two sons and they also stayed in the hotel room for arranging money for purchasing further air tickets for coming at Agartala airport from Kolkata Airport."

(emphasis supplied)

On the same lines, the witness examined on behalf of the respondents has deposed. The question is: whether the averments in the complaint contain material facts with regard to deficiency in service complained about? Even on a fair reading of the complaint and the evidence given on the same lines, all that can be discerned is that the respondents had reported at the "check-in counter" well in time and were issued boarding passes for flight No. 6E-861, which was scheduled to depart at 08:45 a.m., and that the flight took off leaving them (respondents) at the airport without informing them about the departure. There is no assertion that no public announcement was made at the boarding gate or on the T.V. screens displayed across within the airport

A before closure of the boarding gate and as to how they (respondents) were prevented or misled from reporting at the boarding gate 25 (twenty-five) minutes before the scheduled departure time (08:45 a.m.) of the flight in question, and moreso before the boarding gates were actually closed at 08:58 a.m. Be that as it may, the consumer fora committed
B manifest error in shifting the burden on the appellants and drawing adverse inference against them for having failed to produce evidence regarding announcements having been made to inform the passengers including the respondents to arrive at the boarding gate before its closure at 08:58 a.m. The appellants had clearly stated that as per the standard practice, such announcements are made at the boarding gate itself and
C the record in that behalf is not maintained by the Airlines (appellants), but by the airport authorities. The need to prove that fact would have arisen only if the respondents had clearly pleaded all relevant material facts and also discharged their initial burden of producing proof regarding deficiency in service by the ground-staff of the appellants at the airport
D after issuing boarding passes and before the closure of the boarding gate and departure of the flight.

13. Concededly, boarding passes were issued to the respondents at 07:35 a.m. at the check-in counters, whereafter they entered the security channel area and like any other prudent passenger, were expected
E to proceed towards the concerned boarding gate in right earnest. The appellants in the additional affidavit dated 30.1.2019 filed before this Court have given graphic description of the layout of the airport and the area in which the respondents were expected to move forward towards the boarding gate. The relevant portion of the said affidavit reads thus:-

F "2. I say that for passengers to enter into the departure terminal of the domestic airport at Kolkata, there are six (6) terminal departure gates on the first floor of the airport terminal through which the passengers can enter the terminal building. The said gates are numbered as Gate Nos. 1A, 1B, 2A, 2B, 3A and 3B and all passengers booked on various airlines operating from this
G terminal can enter the airport through any of the six gates, subject to verification of their photo identity by the officials of the Central Industrial Security Forces ("CISF").

3. I further say that there are four (4) portals at the Kolkata Airport wherein the check in counters of different airlines are stationed,
H namely Portals A to D. The aforesaid four portals are situated at

the first floor of the departure terminal of the Kolkata Airport. Immediately after the said four portals, there are four (4) security gates situated inside the Kolkata Airport, namely security Gate Nos. 1 to 4. I say that these four security gates are manned by the officials of the CISF and clearance of all the passengers is subject to the security frisking undertaken by them. I say that the time taken by the officials of CISF for security, frisking and clearance of the passengers and their hand baggage (including the waiting time) is not within the control of InterGlobe Aviation Ltd.

4. I say that the check-in counters of InterGlobe at the Kolkata Airport are stationed at "Portal B" and on one side of "Portal C" in the first floor of the Airport. I further say that the said Portals are adjacent to security entry Gate Nos. 1A, 1B, 2A and 2B situated at the first floor of the Airport.

5. I say that as per the official records of the Petitioners, Respondents were booked to fly aboard IndiGo Flight No. 6E-861 from Kolkata to Agartala on 08.01.2017 under PNR No. IHRNSR.

6. I say that to my knowledge, on 08.01.2017 i.e. the scheduled date of travel in the present case, IndiGo flights departing from Kolkata to Agartala were allocated boarding gates located at the ground floor of the Kolkata Airport comprising a total of six (6) boarding gates i.e. from 23A to 23F.

7. I say that I have prepared a layout plan (not to scale) of the relevant sections of the Kolkata Airport and the same is annexed herewith and marked as "Annexure A". **From the said layout plan, it would be evident that:**

a. the distance from either of the check in Portals of InterGlobe to the nearest security gate is only around 10 metres.

b. the distance from any of the security gates to the escalator/lift leading towards the boarding gates (which are on the lower level i.e. on the ground floor) is only around 5 metres.

A **c. after traveling aboard the lift/escalator (which may take maximum upto a minute), the walking distance from the touch down point to the last boarding gate on the ground floor i.e. Gate No.23-F is only around 125 meters. Obviously, the walking distance to the other gates 23-E to 23-A is progressively lesser.**

B 8. I further say that I am also filing certain photographs taken at the Kolkata Airport on 03.12.2018 reflecting the location and layout of Portals B and C, the security gates and the lift/escalator on the first floor and the boarding gates at the ground floor. The said photographs are annexed herewith and marked as Annexure-B (colly).

C 9. I further say that to my knowledge, the total capacity of IndiGo Flight No.6E-861 was 180 passengers. I further say that as per passenger manifesto maintained by the Airline, the total number of passengers who were booked for travel on 08.01.2017 numbered 171. I also say that out of these 171 passengers, a total of 164 passengers (i.e. around 95% of the passengers) boarded and travelled on IndiGo Flight No. 6E-861 and only 7 passengers (including the Respondents herein) did not show up at the concerned boarding gate within the stipulated time and were consequently declared as 'Gate no show'.

D 10. I further say that to my knowledge, the layout of the entry gates, check in-portals, security gates, lift/escalator to all the boarding gates at the ground floor and the passage from the lift/escalator to the said boarding gates at the Kolkata Airport, as depicted in the layout plan (Annexure A), has not undergone any substantial changes between the date on which the Respondents were scheduled to travel on Indigo Flight No. 6E-861. i.e. 08.01.2017, and the date of the present affidavit."

E (emphasis supplied)

F As aforementioned, there is no averment in the complaint or the evidence of the witness examined by the respondents to even remotely suggest as to what prevented the respondents, after entering the security channel area upon issue of boarding passes at 07:35 a.m., from reaching at the boarding gate before 08:20 a.m. and in any case when the boarding gate was actually closed at 08:58 a.m. Further, there is no averment in

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the complaint or deposed to by the witness of the complainants/ respondents as to how the ground-staff of the appellant-Airlines was responsible and that it was not their own acts of commission or omission. It is not the case of the respondents that they were prevented, misled or obstructed by the ground-staff of the appellants from reaching at the boarding gate well in time and until it was closed treating as 'Gate No Show'. It is also not the case of respondents that they had sought assistance of the ground-staff of the appellants and that was denied to them. In absence of such a case made out in the complaint or in the deposition and other evidence produced by the respondents, it is unfathomable as to how the respondents had substantiated the allegation of deficiency in service by the ground-staff of the appellants. Such a complaint ought not to proceed further for want of material facts constituting deficiency in service.

14. The fact that the respondents were not accommodated in the next flight for Agartala without payment of airfare, *per se*, cannot be regarded as deficiency in service in relation to the contract which stood discharged and accomplished after 'Gate No Show' by the respondents and departure of the flight in terms of Articles 8.2 and 8.3 of the CoC. The same read thus: -

"**8.2 <u>Boarding</u>**

In order to maintain schedules, the boarding gate will be closed 25 minutes prior to the departure time. The Customers must be present at the boarding gate not later than the time specified by IndiGo when they check in or any subsequent announcements made at the airport. **Any Customer failing to report at the boarding within the aforesaid timelines shall be treated as a "Gate No Show" and the ticket amount for such Booking shall be forfeited by the Company. The Customers are, however, entitled to a refund of the Government and Airport Fees and/or Taxes (if applicable)**.

8.3 <u>Failure to Comply</u>

IndiGo will not be liable to the Customer for any loss or expense incurred due to their failure to comply with the provisions of this Article."

(emphasis supplied)

A It is not the case of the respondents that the appellants had refused to refund the Government and Airport fees and/or taxes, as may be applicable. As aforesaid, the follow-up event of not accommodating the respondents in the next available flight for Agartala until payment of air-tickets would be of no avail, in the context of the contractual obligations of both the parties in terms of the CoC. The appellants at best were B liable only to refund the Government and airport fees and/or taxes (if applicable) and not liable for any loss caused to the passenger(s). Had it been a case of 'denied boarding', the obligation of the appellants would have been somewhat different including to accommodate the passengers without insisting for air-ticket charges for the next flight available for C reaching the desired destination. Therefore, in case of 'Gate No Show', not acceding to the request of the respondents until they paid air charges for the next flight, may or may not be a case of tortuous claim which, however, can be proceeded before any other forum but not consumer fora. For, the contract relating to travel plan of the respondents upon issue of the boarding passes at the airport check-in counters, was D accomplished after 'Gate No Show' and resultantly closure of the boarding gate at 08:58 a.m. At the cost of repetition, we hold that the deficiency in service must be ascribed only in respect of the stated contractual obligations of the parties.

E 15. Indubitably, the CoC is binding on both parties as predicated by this Court in ***N. Satchidanand*** (supra). We may usefully refer to paragraph 31 of the said decision, where the Court observed thus: -

> "31. The fact that the conditions of carriage contain the exclusive jurisdiction clause is not disputed. The e-tickets do not contain the complete conditions of carriage but incorporate the conditions of F carriage by reference. **The interested passengers can ask the airline for a copy of the contract of carriage or visit the website and ascertain the same. Placing the conditions of carriage on the website and referring to the same in the e-ticket and making copies of conditions of carriage available** G **at the airport counters for inspection is sufficient notice in regard to the terms of conditions of the carriage and will bind the parties. The mere fact that a passenger may not read or may not demand a copy does not mean that he will not be bound by the terms of contract of carriage**. We cannot therefore, accept the finding of the High Court that the term H

relating to exclusive jurisdiction should be ignored on the ground that the passengers would not have read it."

(emphasis supplied)

These observations apply on all fours to the case in hand. However, the State Commission distinguished this decision on the basis of facts of the case disregarding the underlying principle expounded in the aforesaid extracted portion of the judgment of this Court. The respondents, however, urge that in the present case, the air ticket did not contain the reference to the CoC. It is, however, not the case of the respondents (who are well educated, as respondent Nos. 1 and 2 claim to be Engineers working in Government establishment), that the website of the appellant-Airlines does not display the CoC or that the same was not made available at the airport check-in counter for inspection, which is the standard operating procedure followed by all the airlines. No such assertion has been made in the complaint as filed.

16. In our opinion, the approach of the consumer fora is in complete disregard of the principles of pleadings and burden of proof. First, the material facts constituting deficiency in service are blissfully absent in the complaint as filed. Second, the initial onus to substantiate the factum of deficiency in service committed by the ground-staff of the Airlines at the airport after issuing boarding passes was primarily on the respondents. That has not been discharged by them. The consumer fora, however, went on to unjustly shift the onus on the appellants because of their failure to produce any evidence. In law, the burden of proof would shift on the appellants only after the respondents/complainants had discharged their initial burden in establishing the factum of deficiency in service.

17. The appellants have produced a boarding pass issued in the name of the Advocate for the appellant, to illustrate that the same contains the relevant information regarding the flight number, date, boarding time, departure time and more importantly, the notification that boarding gate closes 25 (twenty-five) minutes prior to the departure time and that boarding gate numbers are subject to change, which may be seen from the screen(s) displayed at the airport for latest updates. Admittedly, the boarding passes were issued to the respondents. Presumably, the same must have set out similar information being the standard practice followed by all the airlines. Indeed, the respondents have asserted in the complaint that the boarding passes were snatched away by the ground-staff of the

A appellants at the airport itself. As a matter of fact, this allegation is blissfully vague and bereft of any material facts. Further, it is crucial to note that it is not the case of the respondents that after the boarding passes were issued to them, they did not read the same to reassure themselves about the relevant information and the departure time of the flight indicated therein including the reporting time at the boarding gate. Nor is the case B of the respondents that they had read the boarding pass and it did not contain the relevant information including regarding the necessity of reporting 25 (twenty-five) minutes before the departure time at the boarding gate. Nothing of this sort is either pleaded or stated in the evidence by the respondents. A similar plea that the boarding passes C were snatched away by the ground-staff was taken in the case of ***The Manager, Southern Region, Air India, Madras & Ors. vs. V. Krishnaswamy***[5] decided by the National Commission on 19.7.1994 in First Appeal No. 445/1992, which came to be rejected. Even in the present case, the appellant-Airlines has denied the allegation and also suggested to the witness examined by the respondents that the complaint D was false.

18. Concededly, it is the primary obligation of the passenger, who has been issued boarding pass to undergo the security-check procedure and reach at the boarding gate well before (at least 25 minutes before) the scheduled departure time. No doubt, it is said that the consumer is E the king and the legislation is intended to safeguard and protect the rights and interests of the consumer, but that does not mean that he is extricated from the obligations under the contract in question much less to observe prudence and due care. It is not the case of the respondents that they were delayed during the security check much less due to the acts of F commission or omission of the ground-staff of the appellants. In fact, nothing has been stated in the complaint or the evidence as to what activities were undertaken by the respondents after issue of boarding passes at the check-in counter at 07:35 a.m. until the departure of the flight and in particular, closure of the boarding gate at 08:58 a.m. The respondents having failed to take any initiative to ensure that they present G themselves at the boarding gate before the scheduled time and considering the layout of the check-in counter upto the boarding gate, the respondents cannot be heard to complain about the deficiency in service by the ground-staff. Notably, the distance between the check-in

H [5] 1994 (2) C.P.C. 171

counter, where boarding passes were issued, upto the boarding gate is so insignificant that there could be no just reason for the respondents not to report at the boarding gate between 07:35 a.m. till 08:58 a.m. The respondents have not offered any explanation for their inaction nor have mentioned about any act of commission or omission by the ground-staff of the appellant-Airlines at the airport during this period.

19. As aforesaid, after boarding pass is issued, the passenger is expected to proceed towards security channel area and head towards specified boarding gate on his own. There is no contractual obligation on the airlines to escort every passenger, after the boarding pass is issued to him at the check-in counter, up to the boarding gate. Further, the Airlines issuing boarding passes cannot be made liable for the misdeeds, inaction or so to say misunderstanding caused to the passengers, until assistance is sought from the ground-staff of the airlines at the airport well in time. It is not the case of the respondents that the boarding gate was changed at the last minute or there was any reason which created confusion attributable to airport/airlines officials, so as to invoke an expansive meaning of 'denied boarding'. The fact situation of the present case is clearly one of 'Gate No Show', the making of the respondents and not that of 'denied boarding' as such.

20. The National Commission erroneously relied on the dictum in ***Ruby (Chandra) Dutta vs. United India Insurance Co. Ltd.***[6] to deny itself of the jurisdiction to entertain the revision petitions despite the fact that decisions assailed in the revision petitions were manifestly wrong and suffered from error of jurisdiction. In the fact situation of the present case, the National Commission ought to have exercised its jurisdiction and corrected the palpable and manifest error committed by the two consumer fora below.

21. The State Commission has referred to the observations in ***Dr. Bikas Roy & Anr. vs Interglobe Aviation Ltd. (IndiGo)***[7] decided by the Commission taking the view that after issuing boarding pass, it is the duty of the airlines' authority to help the passengers, so that they can board the flight well in time on completion of the security check-up. This is a sweeping observation. We do not agree with the same. We have already taken the view that there is no obligation on the airlines to escort every passenger after issuing him/her a boarding pass at the check-

[6] (2011) 11 SCC 269
[7] Decided on 22.2.2018 in Appeal Case No. A/42/2017

A in counter until he/she reaches the boarding gate. That would be a very tall claim to make. Indeed, in a given case, if the passenger encounters difficulty or impediment to report at the boarding gate, he/she is expected to seek assistance of the ground-staff of the concerned airlines well in time. If such request is made, there is no reason to presume that the ground-staff of the concerned airlines will not extend logistical assistance B to facilitate the passenger for reporting at the boarding gate in time. That, however, would be a matter to be enquired into on case to case basis. That question does not arise in the present case, as no such plea has been taken in the complaint or the evidence given on behalf of the respondents.

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22. Additionally, the National Commission has invoked the principle of right to care of the passengers. The question of due care by the ground-staff of the appellant-Airlines would arise when the passengers are physically under their complete control as it had happened in the case of ***N. Satchidanand*** (supra). That is possible after the passengers D have boarded the aircraft or may be in a given case at the operational stage whilst facilitating their entry to the boarding gate. In the present case, there is no assertion in the complaint or in the oral evidence produced by the respondents that they (respondents) had made some effort to take guidance or assistance of ground-staff of the appellant-Airlines at the airport after the boarding passes were issued to them for reaching at E the boarding gates and that such assistance was not provided to them.

23. A priori, the decisions of the European Courts referred to by the National Commission in respect of the principle of right to care of passengers will be of no avail in the fact situation of this case. For, in those cases, the flight was cancelled due to strike at the airport of F departure [as held in ***FinnairOyj.*** (supra)] and/or extraordinary circumstances such as a volcanic eruption leading to the closure of the airspace [as held in ***Ryanair Ltd.*** (supra)]. That principle cannot be invoked in the fact situation of the present case not being a case of 'denied boarding' as referred to in the CAR. Clause 3.2 of the CAR G reads thus: -

"**3.2 Denied Boarding**

3.2.1 When the number of passengers, who have been given confirmed bookings for travel on the flight and who have reported for the flight well within the specified time ahead of the departure H of the flight, are more than the number of seats available, an airline

must first ask for volunteers to give up their seats so as to make seats available for other booked passengers to travel on the flight, in exchange of such benefits/facilities as the airline, at its own discretion, may wish to offer, provided airports concerned have dedicated check-in facilities/gate areas which make it practical for the airline to do so.

3.2.2 If the boarding is denied due to condition stated at Para 3.2.1 to passengers against their will, the airline shall not be liable for any compensation in case alternate flight is arranged that is scheduled to depart within one hour of the original schedule departure time of the initial reservation. Failing to do so, the airline shall compensate the passengers as per the following provisions:

a) An amount equal to 200% of booked one-way basic fare plus airline fuel charge, subject to maximum of INR 10,000, in case airline arranges alternate flight that is scheduled to depart within the 24 hours of the booked scheduled departure.

b) An amount equal to 400% of booked one-way basic fare plus airline fuel charge, subject to maximum of INR 20,000, in case airline arranges alternate flight that is scheduled to depart more than 24 hours of the booked scheduled departure.

c) In case passenger does not opt for alternate flight, refund of full value of ticket and compensation equal to 400% of booked one-way basic fare plus airline fuel charge, subject to maximum of INR 20,000.

3.2.3 A passenger booked on connecting flights of the same airline or of the other airline, shall be compensated by the airline of the first flight for the first leg in accordance with the provisions of Para 3.2.2 of this CAR, when he has been delayed at the departure station on account of denied boarding, but has arrived at the final destination at least three hours later than the scheduled arrival time."

24. Indubitably, the CAR is only executive instructions, which do not have the force of law. This Court in the case of ***Joint Action Committee of Airlines Pilots' Association of India & Ors. vs. the Director General of Civil Aviation & Ors.***[8], had occasion to consider

[8] (2011) 5 SCC 435

A the question as to whether the CAR is a statute or a subordinate legislation. The Court concluded that the CAR was only executive instructions, which has been issued for guidance of the duty holders/ stakeholders and to implement the scheme of the act and do not have the force of law. Concededly, clause 3.2 if read as a whole, in no way would apply to a case of 'Gate No Show', which is markedly different than 'denied boarding'. In the facts of this case, it is unnecessary to dilate on the argument of the learned *Amicus Curiae* that expansive meaning be given to the expression 'denied boarding'.

25. As a matter of fact, the coordinate Bench of the National Commission in the case of ***The Manager, Southern Region*** (supra) has had occasion to observe that it would not be appropriate to cast an obligation on any airlines to delay the departure of an aircraft beyond the scheduled time of the departure and to await late arrival of any passenger, whosoever he may be, howsoever highly or lowly placed. Even in that case, the complainant had failed to present himself at the departure lounge in time and there was no kind of negligence or deficiency in service on the part of the airlines. Similar situation obtains in the present case. The appellant-Airlines cannot be blamed for the non-reporting of the respondents at the boarding gate before 08:20 a.m. and in any case before 08:58 a.m., when the boarding gate was finally closed.

26. That takes us to the suggestions given by the learned *Amicus Curiae* for issuing directions to all the airlines to abide by uniform practice. We refrain from doing so and leave that to the competent authority (the DGCA) to consider the same and after interacting with all the stakeholders, take appropriate decision and issue instructions in that behalf, as may be advised. The competent authority (the DGCA) may do so within a reasonable time, preferably within six months from receipt of a copy of this judgment or any representation in that behalf.

27. In view of the above, the impugned judgments and orders passed by the District Forum, the State Commission and the National Commission cannot be sustained and the same are, therefore, set aside and resultantly, the complaint filed by the respondents stands dismissed. However, as assured by the appellants, no recovery of the amount deposited by them as a condition precedent for issuance of notice, which has already been withdrawn by the respondents, need be made from the respondents.

28. We place on record our word of appreciation for the able assistance given by the learned *Amicus Curiae* – Mr. Rajiv Dutta, learned senior counsel assisted by Mr. Sanjeev Kumar Singh, learned counsel. A

29. The appeals are accordingly allowed in the above terms. There shall be no order as to costs. Pending interlocutory applications, if any, shall stand disposed of. B

Kalpana K. Tripathy Appeals allowed.