I (2018) CPJ 546 (NC)

NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION, NEW DELHI

Mrs. M. Shreesha, Presiding Member

TAJ MAHAL HOTEL—Appellant

versus

UNITED INDIA INSURANCE CO. LTD. & ORS.—Respondents

First Appeal No. 440 of 2016 against Order dated 29.1.2016 in Complaint No. 198 of 1999 of Delhi State Consumer Disputes Redressal Commission—Decided on 5.2.2018

Consumer Protection Act, 1986 — Sections 2(1)(g), 14(1)(d), 21(a)(ii) — Hotel Services — Valet Parking — Loss of vehicle — Negligence — Breach of duty of reasonable care — Deficiency in service — State Commission partly allowed complaint — Hence appeal — Valet parking services are provided by Hotel for convenience of its guests looking for a parking space and it is a special privilege which is given to guests — A deposit is constituted from moment a person receives a thing pertaining to another with obligation to safely keep it and returning same in condition it was received— Contract of deposit was effected from Car Owner's delivery the moment he handed over keys of his vehicle to Hotel valet, who, in turn, received the car keys with obligation to keep car safely and return it in same condition as taken— Duty of care cannot stop with parking of car — Reasonable degree of care to be taken by a Hotel or any service provider while accepting keys of a vehicle continues till vehicle is returned to owner in same condition as it was taken — Valet facility, is one of services offered by the Hotel for comfort and convenience of its guests, a significant feature of an allurement to visit Hotel, in preference to other where such a facility may not be provided — Possession and control of car had been passed on by complainant to Hotel, which constituted bailment; duty of due care implicit in bailment, was violated by Hotel and the ensuing liability could not be diminished by disclaimer of liability on parking tag — Hotel has admitted that complainant had dinner at their Hotel and with such an effectual consideration question of whether car owner is a 'consumer' does not arise — Doctrine of *infra hospitium* applied — Hotel is held liable to pay damages — Impugned order modified.

[Paras 33, 34, 35]

Result : Appeal partly allowed.

Cases referred:

1. ***Oberoi Forwarding Agency*** v. ***New India Assurance Company Limited,*** I (2000) CPJ 7 (SC)=II (2000) SLT 86. *(Referred)* *[Para 9]*

2. ***B. Dutta, Senior Advocate*** v. ***Management of State Owned Ashoka Hotel & Ors.,*** IV (2009) CPJ 191 (NC). *(Referred)* *[Para 10]*

3. ***Bombay Brazzerie*** v. ***Mulchand Agarwal,*** I (2003) CPJ 4 (NC). *(Referred)* *[Para 10]*

4. ***Hotel Hyatt Regency*** v. ***Atul Virmani,*** III (2008) CPJ 281 (NC). *(Referred)* *[Para 12]*

5. ***Mahesh Enterprises*** v. ***Arun Kumar Gumber & Ors.,*** II (2001) CPJ 1 (NC). *(Referred)* *[Para 12]*

6. ***Nath Bros. Exim International Ltd.*** v. ***Best Roadways Ltd.,*** I (2000) CPJ 25 (SC). *(Referred)* *[Para 16]*

7. ***Talita Lofty-Eaton*** v. ***Gray Security Services Namibia (Pty) Ltd. & Ors.,*** (1495/01, 1495/01) [2005]. *(Referred)* *[Para 23]*

8. ***Park-O-Tell Co.*** v. ***Roskamp,*** 203 Okla. 493, 223=1950 P.2d 375. *(Relied)* *[Para 26]*

9. ***Abercrombie*** v. ***Edwards,*** 62 Okla. 54=161 P. 1084. *(Relied)* *[Para 26]*

10. ***Williams*** v. ***Linnitt,*** 1951 (1) KB 565 (CA 1950). *(Relied)* *[Para 27]*

11. ***Jai Laxmi Salt Works (P) Ltd.*** v. ***State of Gujarat,*** 1994 (SLT SOFT) 56. *(Relied)* *[Para 28]*

12. ***Hallman*** v. ***Federal Parking Services,*** (1957) 134 A.2d 382. *(Relied)* *[Para 30]*

Counsel for the Parties:

For the Appellant : ***Mr. Gopal Jain, Sr. Advocate with Ms. Meenakshi Midha, Mr. Akhil Roy and Ms. Prashanti Pasupuleti, Advocates.***

For the Respondent No. 1 : ***Mr. Kishore Rawat, Advocate.***

For the Respondent No. 2 : ***Nemo.***

For the Respondent No. 3 : ***Mr. R.B. Shami, Advocate.***

ORDER

Mrs. M. Shreesha, Presiding Member—Aggrieved by the order in Consumer Complaint No. 198 of 1999 passed by the State Consumer Disputes Redressal Commission, Delhi (in short “the State Commission”), Taj Mahal Hotel arrayed as the First Opposite Party in the Consumer Complaint, has preferred this Appeal under Section 19 of the Consumer Protection Act, 1986 (for short “the Act”). By the impugned order, the State Commission has allowed the Complaint in part directing the first Opposite Party to pay to the first Complainant the value of the car, *i.e.*, 2,80,000 along with interest @ 12% p.a. from 28.1.1999 till the date of realization together with costs of 50,000. An amount of 1,00,000 was directed to be paid to the second Complainant. The aforenoted amounts were directed to be paid to the Complainants within 30 days from the date of

order, failing which, the amount shall be paid with interest @ 24% p.a. after the expiry period of 30 days.

2. The facts material to the case are, that the second Complainant (hereinafter referred to as "the car owner") insured his Maruti Zen 1997 model with the first Complainant (hereinafter referred as the "Insurance Company") for the period from 15.7.1998 to 14.7.1999. This Complaint had been filed by the Complainants as the said claim for the stolen car had been settled by the Insurance Company and the Car Owner had executed a Power of Attorney as well as a letter of subrogation in favour of the Insurance Company.

3. Succinctly put, the facts in brief are that the Car Owner reached the first Opposite Party (hereinafter referred to as "The Hotel") on 1.8.1998 at about 11 p.m.; parked his car at the porch; gave the car keys to the concerned parking man; received a parking slip from him; went inside the restaurant for having dinner and returned after the meal at about 1.00 a.m.; on asking for the keys of the vehicle, he was informed by the officer on duty at the parking lot that his vehicle was driven away by some unknown person; he immediately rushed to the security room of the Hotel and contacted Mr. Sanjiv Sharma, Security Officer, who reported to him about the theft of the vehicle. It was averred that on an inquiry he was informed about the sequence of events, that 3 young boys came to the Hotel in a blue Maruti Car No. DL-6C- D-9164, parked their car, went inside the Hotel, immediately came out, asked the porch driver to bring their car to the main porch and during this period, one of the boys, who disclosed his name as Deepak, picked up the key from the desk, went to the car parking area and stole the Maruti Zen belonging to the second Complainant. It was stated by the Hotel staff that despite efforts by the Hotel guard, the car sped away.

4. The Hotel lodged a Complaint at the police station but police had given a report stating that the car was untraceable. A Surveyor was appointed by the Insurance Company who settled the claim for 2,80,000 *vide* a cheque dated 28.1.1999. It was averred that the Hotel was duty bound to take care of the car when they offered their parking services along with the dinner for which the car owner made the payment. It was pleaded that at no point of time did the Hotel refuse the provision of parking facilities and that the car was kept in their custody for consideration as he had taken dinner in the restaurant and paid for it. The Hotel was requested to compensate for the loss, but they refused to do so. Hence the car owner served a legal notice on 13.11.1998 calling upon the Hotel to pay a compensation of 5,30,000 along with interest @ 24% p.a., for which the Hotel replied *vide* letter dated 28.1.1999 stating that there was no deficiency of service on their part and refused to pay any compensation.

5. It was averred that the car owner is a 'Consumer' *qua* the Hotel as he had taken dinner at the restaurant and availed the parking services of the Hotel. It was pleaded that parking services are part of the facilities offered by the Hotel and the car was in their custody and it was their responsibility to keep the car in safe custody and return the same to the car owner. Despite several requests, the Hotel did not come forward to settle the claim, hence, the car owner approached the State Commission and filed the

Complaint seeking directions to the Hotel to pay a sum of 5,30,000 as compensation together with other reliefs.

6. The Hotel filed their Written Version stating that the Complainants do not fall within the definition of 'consumer' as defined under Section 2(1)(d) of the Consumer Protection Act; that no consideration was paid by the car owner; that the purported subrogation was done by a person who is not a consumer and therefore, the car owner does not have *locus standi* to file the Complaint; that the Hotel provides valet parking facilities to the guests without taking any consideration; that the tag given to the car owner makes it abundantly clear that what was provided was only a facility to park the car and not to hold it in safe custody; that it would be unfair to expect the Hotel to take the risks and responsibilities for safety and security of the vehicle merely because it has offered to park the same to avoid inconvenience to the car owners; that it was not compulsory for the visitors to avail the valet parking services; that the Hotel shall not be responsible for any theft, damage or loss which condition is expressly and prominently mentioned on the parking tag; that having accepted the said condition it was now not open to the car ownerto claim to the contrary on the ground that the conditions were not binding or not enforceable or were defective; that what was provided was only a valet parking facility and not a service for safe custody of the motor vehicle; that the purported letter of subrogation and said Power of Attorney are meaningless and ineffective in as much as there was no claim which the Insurance Company was entitled to maintain against the Hotel; that there was no hiring of services as no consideration was paid by the car owner and therefore, the Complaint was not maintainable before the Consumer Forum.

7. In their Written Version the conditions printed on the parking tag were reproduced as hereunder:

> **"**IMPORTANT CONDITION: This vehicle is being parked at the request of the guest at his own risk and responsibility in or outside the Hotel premises. In the event of any loss, theft or damage, the management shall not be held responsible for the same and the guest shall have no claim whatsoever against the management."

8. The Opposite Party No. 2 (hereinafter referred to as "New India Assurance Company Ltd.") supported the case of the Hotel and submitted that the service of valet parking was purely complimentary; that they were not liable to indemnify the loss, if any, incurred on the premises of the Hotel as no notice of loss of vehicle was given to it by the Hotel and they did not have an opportunity to investigate the same.

9. The State Commission *vide* order dated 27.5.2008 dismissed the Complaint holding that the Complainant-Insurance Company was not a 'Consumer.' On an Appeal preferred by the Insurance Company, this Commission *vide* order dated 20.9.2010 held that the decision of ***Oberoi Forwarding Agency*** v. ***New India Assurance Company Limited,*** I (2000) CPJ 7 (SC)=II (2000) SLT 86, does not apply to the facts of the present case and observed that the Complainant- Insurance Company was within its

right to maintain the Complaint, as subrogee of the insured. It is relevant to note that this order was not challenged and has attained finality and therefore, the contention of the learned Counsel that the Complaint is not maintainable as the Insurance Company has no *locus standi*, is unsustainable.

10. The State Commission, relying on the decision of this Commission in ***B. Dutta, Senior Advocate*** v. ***Management of State Owned Ashoka Hotel & Ors.,*** IV (2009) CPJ 191 (NC) and case of ***Bombay Brazzerie*** v. ***Mulchand Agarwal,*** I (2003) CPJ 4 (NC), observed as follows:

> "Now we are confronted with the question as to whether the complainant is a 'Consumer' within the ambit of Section 2(1)(d) of Consumer Protection Act, 1986. Law on this point stands settled by the Hon'ble National Commission in the case of *B. Dutta, Senior Advocate* v. *Management of State owned Ashoka Hotel & Ors.*, IV (2009) CPJ 191(NC). The case of*Bombay Brazzerie* v. *Mulchand Agarwal*, I (2003) CPJ 4 (NC), was noticed. National Commission in the case of *Bombay Brazzerie* (supra), had observed as under:
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> > Judgments in the case of *Rutter* v. *Palmer*, [1922] 2 KB 87; *Hood* v. *Anchor Lines Henderson Brothers Ltd.*, [1918] AC 837 and *Bharathi Knitting Company* v. *DHL Worlwide Express Courier Division of Airfreght Ltd.*, (1996) 4 SCC 704 appear to be quite relevant to the issue involved in the present case though in the later case the customer had put his signature on the document containing the terms of contract. Token issued to the complainant at the time when his car was taken for parking tells him in unmistakable and unambiguous language that Hotel management would not be responsible for any theft/ damage/loss. The fact that he took the token without any protest and availing of the facility of free parking would bind him to the terms of the token which would constitute a binding contract between him and the Hotel.
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> > The laws regarding bailment apply when a customer pays to park his car in a parking lot and it is stolen or damaged. A bailment occurs when the owner of the car (bailor) transfers the possession, care, and/or control of his car to another person (bailee) for limited time and for a special purpose.
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> > Chapter IX of the Contract Act, 1872 contains provisions regarding bailment. Section 148* defines bailment. It is the delivery of goods by one person to another for some purpose upon a contract that they shall, when the purpose is accomplished, be returned according to the directions of the person delivering them. The person delivering the goods is the bailor and the person whom these are delivered is the bailee. Under Section 151* bailee is bound to take such care of goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods. Under Section 152 the bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing

bailed, if he has taken the amount of care of it described in Section 151. Under Section 161* if by the fault of the bailee, the goods are not returned or delivered, he is responsible to the bailor for any loss of the goods. The bailment thus envisages the contract between the bailor and the bailee. A contract requires consideration emanating from the promisor to promisee *i.e.* from the bailor to the bailee.

In the present case we are proceeding on the assumption that price paid for the food consumed would include the consideration from the consumer, the bailor to the Hotel, the bailee. We are not considering the question when the car is given to the Hotel management for parking gratuitously. It cannot however be the case that the car has been lent by Mulchand to the Hotel management for its use gratuitously as per the requirement of Section 151 of the Contract Act. In any case the contract squarely provided that Hotel management would not be responsible for any theft/loss/damage to the car. We are thus of the view that Mulchand, complainant is not entitled to claim for loss of his car under the laws of bailment. But then that does not conclude the matter.

Deficiency in service has two aspects—(i) claim for the amount of actual loss and (ii) damages for inconvenience, harassment and mental tension. This second aspect is what we call consumer factor or consumer component or consumer surplus like the present one. Consumer component may not be present in every contract. It would depend upon the nature of the contract.

Mulchand had given his car to the Hotel management apparently for safe parking till he consumes his food and pays the price. One of the factors which brought him to the Hotel was the offer of the Hotel management for free but safe parking. After consuming his food and paying the price Mulchand comes out and to his horror he finds his car has been stolen. He and his friends suffer a great deal of inconvenience and mental tension. Mulchand has claimed compensation for inconvenience, harassment and mental tension which he had to undergo. In our view, though the Mulchand may not be entitled to the price of the car in view of the contract he is certainly entitled to damages for mental tension, harassment and inconvenience caused to him and his friends. Mulchand has claimed Rs. 25,000 as compensation on this account.

Keeping in view the aspect of consumer factor or consumer component or consumer surplus as aforementioned we are of the opinion that Mulchand is certainly entitled tocompensation for the mental tension, harassment and inconvenience caused to him. Mulchand has claimed Rs. 25,000 but in our view award of Rs. 10,000 will meet the ends of justice. There cannot be any standard for measuring damages in such a situation.

OP-1 Hotel simply averred that the complainant No. 2 did not dine in the Hotel on that night. Be that as it may, admittedly the complainant No. 2 remained in the said Hotel from 11 p.m. uptil 1.00 a.m. on that night. It does not stand to reason that the complainant Sh. Sapan Dhawan remained without any food or snacks throughout his stay for three hours there and did not pay any bill of any kind to OP-1 Hotel. Having made payment of any sort to the Hotel during the said period, complainant Sh. Sapan Dhawan comes within the ambit of 'Consumer' and is deemed to have paid the parking charges to OP-1 Hotel in terms of the law laid down by the Hon'ble National Commission in the case of *B. Dutta, Senior Advocate*(supra).

11. OP-2 *i.e.* New India Assurance Co. Ltd. which was impleaded as a party during the proceedings, submitted in its reply that OP-2 hotel did not give any notice regarding theft of the car in question for this reason OP-2 contends that it is not liable to make good the loss suffered by the OP-1 hotel. I have given a careful thought to the proposition put-forth by the OP-2. In the absence of any notice to OP-2, right of OP-2 to trace the vehicle is lost. I, therefore, do not hold OP-2 liable to indemnify the loss suffered by the OP-1.

12. There is no dispute with the proposition that the car Maruti Zen belonging to the Complainant No. 2 was stolen on the night of 1.8.1998. Harassment, inconvenience and mental agony had been suffered by the Complainant No. 2 and paid him an amount of Rs. 2,80,000 but it also faced a long drawn battle of litigation. In the circumstances, I direct the OP-1 Hotel to pay to the Complainants as under:"

11. Learned Senior Counsel for the Appellant submitted that there was no legal or jurial relationship between the Car Owner and the Hotel; that no consideration was paid, there was no evidence filed by the Car Owner before the State Commission to establish whether he has paid for dinner at the restaurant; in the absence of any evidence on record that an amount was paid for any service in the Hotel, the Car Owner does not fall within the ambit of the definition of 'Consumer' as defined under Section 2(1)(d) of the Act; that the parking tag has a disclaimer stating 'owner's risk' and, therefore, the Management cannot be held responsible especially when the parking was done 'free of charge'. He further contended that the tag clearly specifies that the car was being parked at owner's risk and that the parking facility which was 'free' was not for safe-keeping or safe custody of the car in question and that this case has to be decided in that specific manner. He argued that the Car Owner cannot be a beneficiary as he did not avail of any 'Services' in the Hotel as on that date.

12. Learned Senior Counsel further argued that in the case of ***Hotel Hyatt Regency*** v. ***Atul Virmani,*** III (2008) CPJ 281 (NC), though this Commission relying on *Bombay Brazeerie* v.*Mulchand Agarwal & Anr.* (supra) and ***Mahesh Enterprises*** v. ***Arun Kumar Gumber & Ors.,*** II (2001) CPJ 1 (NC), has laid down that the parking of vehicle entirely at *'owner's risk'* as per docket given to the consumer is not acceptable, in that case the Car Owner had visited *Hyatt Regency* and paid a fee of 900

whereas in the instant case no such evidence has been filed on record that the Car Owner had paid any sort of consideration to the Hotel and, therefore, the decision rendered in *Hyatt Regency* case (supra) cannot be relied upon in this case.

13. Learned Counsel for the Complainants submitted that though the Car Owner had eaten at the restaurant and paid for the meal he did not retain the bill hence could not file the same; that in the legal notice it has been specifically stated that the Car Owner had dinner at the restaurant in the Hotel, which was never denied by the Hotel in their reply. He further drew my attention tothe statement in Paragraph 11 in the Affidavit filed by the Hotel which is reproduced hereunder:

> *"It is not denied that Complainant No. 2 had dinner in the restaurant*—It is correct that three young boys came to the hotel in a Maruti car and parked their car and went inside the hotel. They came back after some time and asked the porch driver to bring the car at the main porch and during this process, one of the boys took up the keys from the desk and went to the car parking and stole the Maruti Zen car. The hotel guard tried to stop the boy but he sped away with the car. Respondent No. 1 promptly took steps for registration of the complaint with the police for investigation."

14. Learned Counsel for the Hotel submitted that the word 'not denied' was a typographical error. Counsel representing the Respondents submitted that there was no such error in the original and that paragraph 11 read with paragraph 12 clearly denotes admission on the part of the Hotel that the Car Owner had dinner at the restaurant.

15. Even in the Written Submission filed by the Hotel in paragraph 1, *it is clearly stated that it is not denied that the Complainant No. 2 had dinner in the restaurant*. Therefore, the contention of the learned Counsel for the Hotel that Car Owner has never availed of any 'Services' in the Hotel is unsustainable.

16. Learned Counsel for the Complainants further argued that the concept of 'owner's risk' does not completely exonerate the Hotel and relied on the observations made by the Hon'ble Supreme Court in ***Nath Bros. Exim International Ltd.*** v. ***Best Roadways Ltd.,*** I (2000) CPJ 25 (SC), explaining 'owner's risk' in a contract of bailment. The same is reproduced hereunder:

> "28. *Learned Counsel for the respondent contended that the goods were booked at* "OWNER`S RISK" and, therefore, if any loss was caused to the goods, may be on account of fire, which suddenly engulfed the neighbouring warehouse and spread to the godown where the goods in question were stored, the carrier would not be liable.
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> 29. "OWNER`S RISK" in the realm of commerce has a positive meaning. It is understood in the sense that the carrier would not be liable for damage or loss to the goods if it were not caused on account of carrier's own negligence or the negligence of its servants and agents. In *Burton* v. ***English,*** (1883) 12 Q.B.D. 218 and again in *Wade* v. *Cockerline*, (1905) 10 Com.Cas. 47, it was held that in spite of the goods having been booked at "OWNER`S RISK", it

would not absolve the carrier of its liability and it would be liable for the loss or damageto the goods during trans-shipment or carriage. These decisions granted absolute immunity to the carrier, but they have lost their efficacy on account of subsequent decisions in*Svenssons* v. *Cliffe S.S.Co.*, (1932) 1 K.B. 490, which was considered in *Exercise Shipping Co. Ltd.* v. *Bay Maritime Lines Ltd. (The Fantasy)* (1991) 2 Lloyd‘s Rep. 391 [Queen‘s Bench Division], in which it was observed as under:

> "The question whether words such as "at charterer`s risk" can operate as an exemption clause in favour of a party otherwise liable for negligence was decided by Mr. Justice Wright (as he then was) in *Svenssons Travaruaktiebolag* v. *Cliffe Steamship Co.*, (1931) 41 Ll.L. Rep. 262; (1932) 1 K.B. 490. He considered the authorities in detail and concluded:
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> It is quite clear, in my judgment, on the authorities as they now stand, that the words "at charterers' risk", standing alone and apart from any other exception in the charter-party, do not excuse the shipowner in the case of a loss due to the breach of warranty of seaworthiness... I think that the words standing by themselves have also to be read as limited tolosses and damages where there has been no negligence on the part of the shipowner or his servants.
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> He went on to consider the charter-party terms in that case which also included an exceptions clause, Clause 11. He held that that clause should have its full effect whereas if "at charterers' risk" had included an exception of negligence, it might not have done so.
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> That judgment has been followed since 1932, for example in *The Stranna* (1937) 57 Ll.L.Rep. 231; (1937) P.130 and *East & West Steamship Co.* v. *Hossain Brothers*, (1968) 2 Lloyd‘s Rep. 145 (Supreme Court of Pakistan) and it has not, so far as I am aware, been dissented from."
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> 30. In *Mitchell* v. *Lanc. & Y.R.*, 44 LJQB 107=LR 10 QB 256, it was held that "OWNER`S RISK" only exempts the carrier from the ordinary risks of the transit and does not cover the carrier‘s negligence or misconduct. So also, in *Lewis* v. *The Great Western Railway Company*, 3 Queen‘s Bench 195, the words "OWNER‘S RISK", were held to mean, "at the risk of the owner, minus the liability of the carrier for the misconduct of himself or servants."
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> 31. Thus the expression "at owner`s risk" does not exempt a carrier from his own negligence or the negligence of his servants or agents."

17. Learned Senior Counsel also contended that when no negligence can be established on behalf of the Hotel the Hotel cannot be made liable to pay for the loss of the car in question. Learned Counsel for the Complainants submitted that the facts of the instant case prove that there was negligence on the part of the Hotel based on the affirmations of the Hotel staff itself.

18. A perusal of the FIR lodged by the Hotel on 2.8.1998 at 1.45 a.m. shows that there was a statement made that around 8.05 p.m. three young boys came to the Hotel, parked their car bearing No. DL 6C D 9164 and went inside the Hotel. They immediately came out and asked the porch driver to bring their car to the porch. Porch driver Kuldeep Singh brought their car to the main porch. During this period one boy picked up the car keys of the car owner and stole the same. It was stated that the guard tried to stop him but he drove away immediately. It was pointed out by the learned Counsel for the Complainant that the FIR was lodged belatedly at 1.45 a.m. though the car was stolen at 8.05 p.m. and had the Hotel taken immediate action the car perhaps could have been traced.

19. As against this argument learned Senior Counsel contended that the FIR was lodged promptly at 1.30 a.m. and that as the time of occurrence was 0.05 a.m., no negligence on this aspect can be attributed to them. He further contended that during the year 1999 there was no provision of CCTV cameras and only the statements of Hotel staff could be relied upon.

20. It is pertinent to note that in the statement made before the police it was clearly stated that the guard tried to stop the thief but he drove away immediately. The same fact was also reiterated by the Hotel in their Affidavit filed before the State Commission. Hence the admitted fact goes to show that the Hotel staff was in the knowledge that the car was being stolen as there is a specific averment that the Hotel guard tried to stop the boy who sped away with the car. The exact time as to when the said incident happened though was not mentioned in the Affidavit. It is mentioned in the FIR that it was at 0.05 a.m. and the FIR was lodged only at 1.30 a.m. If there was no delay in the lodging of the FIR, there would perhaps have been better chances of tracing the vehicle.

21. On a pointed query as to whether the Hotel had entered into any Agreement with the Service Provider for valet parking, Learned Sr. Counsel submitted that there was no such Agreement at that point of time. On a question whether the *'duty of care'* of the Hotel *'stops' with the parking of the car* . Learned Counsel submitted that the 'duty of care' has to be seen in relation towhether reasonable care was taken by the Hotel or not and whether any negligence can be attributed to the Hotel on the facts relevant to the case. He submitted that 'parking' is a separate self-contained contract and that reasonable degree of care is expected from the Hotel which in the instant case was shown at the entrance, at the time when the car was parked and also at the gate when the Hotel guard tried to stop the boy who ran away with the car.

22. Learned Senior Counsel further submitted that for the consumer to maintain an action against the Service Provider in contract for the recovery of his vehicle or other property in it, damaged or lost within the Hotel premises, the consumer must establish the existence of a distinct and separate contract with the Service Provider for the safety of such vehicle or property therein before the service provider, in the instant case the Hotel, could be held liable.

23. Learned Senior Counsel also relied on a decision of the Namibia High Court in ***Talita Lofty-Eaton*** v. ***Gray Security Services Namibia (Pty) Ltd. & Ors.,*** (1495/01, 1495/01) [2005], NAHC 24 (15 th July, 2005), wherein the 'duty of care' and 'parking at owner's risk' has been discussed as follows:

> "In further particulars provided to first defendant plaintiff contended that first and second defendants had a duty of care towards plaintiff. In its plea first defendant denied that it owed plaintiff a duty of care or that it was under a legal duty to render security services in respect of the motor vehicle of plaintiff.
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> It was in addition submitted that the words on the card "parking is at own risk" are general words applicable to anybody however these general words are restricted by the next sentence that the hotel accepts no responsibility thus the liability of first defendant to third parties is not specifically excluded.
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> It was finally submitted by Mr. Grobler that first defendant had a duty of care towards all people that use the parking area in the sense that their vehicles would not removed without following prescribed procedures. Thus a card was issued on entering the parking area which must be returned to the security guard who controlled the boom at the entry of the parking area. If the security guard allowed a vehicle to leave the parking area without having returned the card then such security guard would be negligent, that it must be inferred that first defendant rendered security services at the parking area of third defendant, and that the reasonable man would at least ensure that plaintiff's vehicle is not removed from the parking area.
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> *The question which firstly must be decided in this action is whether there was a legal duty on first defendant to prevent economic loss to all third parties, including plaintiff, who parked their vehicles on the parking area of third defendant. Would the legal convictions of the community regard it as reasonable to impose such a duty of care on first defendant or to put it in another way would it be fair and just to do so? If it is found that there is no such legal duty then first defendant's conduct or omission cannot be said to be unlawful and that would be the end of the enquiry.*
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> *In considering the circumstances of this case I am of the view that the questions posed supra must be answered in the negative."*

24. Learned Counsel for the Complainants argued that the loss regarding bailment applies when a customer transfers the possession, care and/or control of his car to another person (bailee) for a limited time and for a special purpose. Merely writing 'owner's risk' at the back of a token does not completely exonerate the Hotel from any act of deficiency of service as neither was the Car Owner put to specific notice that any damage/loss occurred to his car would be at his risk, nor was there any kind of a Board at the entrance proclaiming that the management was not responsible for the theft of the car which was prominently displayed.

25. Keeping in view both the submissions, I find it relevant to discuss the liability under a bailment relationship. When the guest presents the car keys to the valet, possession of the car is transferred from the guest to the Hotel and a bailment is established. The Hotel may not be liable for the loss of any expensive goods that was left in the vehicle but historically the common law held a hotel liable for the loss of the guest's property if the property and the guest were within the premises of the Hotel. The concept of *infra hospitium*, a Latin term meaning "*within the Hotel*" has been discussed in various judgments wherein the liability of a Hotel/Innkeepers/restaurant owners was laid down. The guest turns over his key to the valet, creating a bailment relationship, thereby placing liability for the vehicle with the restaurant or the Hotel. In situations where a Hotel has an agreement with an independent parking garage, the Hotel may still be liable for a guest's automobile, since the garage could be considered to be an agent of the Hotel. Though in the instant case there was no such agreement with an independent service provider only the liability of the Hotel has to be ascertained.

26. The Hon'ble Supreme Court of Oklahoma extended the common law rule of strict liability to cover the automobile in ***Park-O-Tell Co.*** v. ***Roskamp,*** 203 Okla. 493, 223=1950 P.2d 375. The rule required that the claimant be a guest of the innkeeper, that the automobile to be within the confines of inn, *infra hospitium*. The Court, in ***Abercrombie*** v. ***Edwards,*** 62 Okla. 54=161 P. 1084, with reference to the innkeepers statute of Oklahoma held:

> "The provisions of this statute that the innkeeper is liable for goods of his guests, 'placed under his care,' is declaratory of the common law, not restrictive thereof. Under such provision it is not necessary, in order to render the innkeeper liable for their loss, that the goods be placed under his special care, or that notice be given of their arrival. It is sufficient if they are brought into the inn in the usual and ordinary way and are not retained under the exclusive control of the guest, but are under the general and implied control of the innkeeper."

The term "property" as used in this statute, it being declaratory of the common law, is broad enough to cover an automobile and its contents.

27. The high point of English case law holding an innkeeper strictly liable as insurer for the loss of a guest's car was reached in the case of ***Williams*** v. ***Linnitt,*** 1951 (1) KB 565 (CA 1950). In that case the Complainant, had liquid refreshments at the opposite party's inn and parked his car in an open lot provided *free of charge* for the purpose. The car was stolen and the Court held that the Complainant was a guest and that the parking lot was *infra hospitium* and hence the innkeeper was held strictly liable for the theft of the car. *By providing free parking space, the innkeeper extended an invitation to the guest to park there, which invitation was sufficient to constitute the lot as within the hospitium of the inn* . The Court also held that the Opposite Party innkeeper could not limit his liability by merely posting a notice to that effect. Where property is damaged or lost outside the inn, the landlord's liability is measured by a different rule *but if it is lost infra hospitium, the loss or damage to the property creates a prima facie case against the innkeeper* **.** In *Aria* v. *Bridge House Hotel (Staines) Ltd.*, 137, L.T.R. (n.s.) 299 (K.B.

1927) the Complainant, who parked his car in the parking lot of the Opposite Party Hotel, found that it was stolen and the Court held that the Hotel was liable for the loss of the stolen car when the guest was at dinner. The Court observed that the law has been framed for hundreds of years that the innkeeper is liable for the safe custody of goods which come into his hands on his premises which are goods belonging to the guest. The old common law rule applies that an innkeeper ensures the safety of his guest's carriage when it is brought to his inn.

28. Hon'ble Supreme Court in ***Jai Laxmi Salt Works (P) Ltd.*** v. ***State of Gujarat,*** 1994 (SLT SOFT) 56=(1994) 4 SCC 1, in paragraph 10 discussed 'Negligence' and the 'duty to take reasonable care' together with the 'rule of strict liability' which is reproduced as under:

> "10. "Negligence" ordinarily means failure to do statutory duty or otherwise giving rise to damage. Winfield has defined 'negligence' as under:
>
> "Negligence" as a tort is the breach of a legal duty to take care which results in damage, undesired by the defendant, to the plaintiff. Thus its ingredients are—
>
> (a) a legal duty on the part of A towards B to exercise care in such conduct of A as falls within the scope of the duty;
>
> (b) breach of that duty;
>
> (c) consequential damage to B."
>
> 12. According to Dias,
>
> Liability in negligence is technically described as arising out of damage caused by the breach of a duty to take care.
>
> These text books thus make it amply clear that the axis around which the law of negligence revolves is duty, duty to take care, duty to take reasonable care. *But concept of duty, its reasonableness, the standard of care required cannot be put in strait-jacket. It cannot be rigidly fixed. The right of yesterday is duty of today. The more advanced the society becomes the more sensitive it grows to violation of duties by private or even public functionaries. Law of Torts and particularly the branch of negligence is consistently influenced and transformed by social, economic and political development*. The rule of strict liability developed by English Courts in *Rylands* v. *Fletcher* (supra), was judicial development of the liability in keeping with growth of society and necessity to safeguard the interest of a common man against hazardous activities carried on by others on their own premises even though innocently. By conservative standard it could not be termed as negligence as damage arose not by violation of duty. Yet the law was expanded to achieve the objective of protecting the common man not by narrowing the horizon of legal injury but by widening it. In *Donoghue* v. *Stevenson* (supra), the House of Lords held a duty to take care as a specific tort in itself. Even improper exercise of power by the authorities

giving rise to damage has been judicially developed and distinction has been drawn between power coupled with duty. Where there is duty the exercise may not be proper if what is done was not authorised or not done in the *bona fide* interest of the public.

In *Read* v. *J. Lyons & Co. Ltd.,* (1947) AC 156, it was observed that damage caused by escape of cattle to another land was a case of pure trespass constituting a wrong without negligence. Thus negligence is only descriptive of those sum total of activities which may result in injury or damage to the other side for failure of duty both legal or due to lack of foresight and may comprise of more than one concepts known or recognised in law, intended or unintended."

29. Now I address myself to the question whether the loss of a car given to a valet, parked in the Hotel premises, can be construed as 'Negligence' in the light of the breach of 'duty of care'?

30. The Municipal Court of Appeals for the District of Columbia in a case of similar facts titled ***Hallman*** v. ***Federal Parking Services,*** (1957) 134 A.2d 382, where the Complainant, his wife and daughter stopped for a night's lodging in a Hotel in course of their journey to Florida, was told by the desk clerk that it was a normal procedure in the Hotel by the bellboy to park the car and the bellboy would then get a claim check from the Hotel if the guest so desires the service. The claim check contained a printed notice limiting liability which provided that the parking lot was not responsible for loss due to theft and articles in vehicles were left at the owner's risk. The following morning when the Complainant observed that the side window of his car was broken and some personal property placed under the seat was stolen, he approached the Court and the argument of the Hotel was that: (a) *there was no contract of bailment between the Hotel and the* car owner; (2) That the doctrine of *infra hospitium* was inapplicable and (c) that while a contract of bailment existed between the parking lot and the car owner there was nothing to show that it *failed to exercise the degree of care required.* The Court did not agree with the submissions and laid down as follows:

"We need not resolve the arrangement between the hotel and the parking lot as to whether the hotel was the agent of the parking lot or vice versa as the paucity of evidence on this point would permit a purely conjectural solution at most. We pass then to a consideration of the relationship existing between appellant and both the hotel and the parking lot and the degrees of liability, if any, to be imposed.

This is undoubtedly the rule of common law having its source in the ancient case of Calye [1] which dealt with the innkeeper's liability for the loss of a guest's horse put to pasture. The common-law rule is of force in this jurisdiction. [2] The doctrine of infra hospitium has been applied in cases where a car or its contents are lost while in the exclusive care and custody of a hotel. [3] However, where the hotel takes custody of the vehicle, as here, and delivers it to a lot or garage not an integral part of the hotel and thereafter a loss of the

property occurs, the better rule imposes the liability of a bailee for hire on the hotel. [4] As such it is required to exercise *385 an ordinary degree of care to protect and return the property of which it assumes custody.

We conclude that when the bellboy, with actual authority of the hotel to deliver automobiles to the lot, took possession of the keys and the vehicle, both the vehicle and the contents of the automobile were accepted by the hotel into its custody. *It had physical control and the intent to control the property; a bailment relationship was therefore created. Accordingly, the Trial Court's conclusion that there was no contract of bailment between the hotel and appellant was erroneous*. That payment for parking was made to the lot and not the hotel is immaterial for the service was incident to this type of a business and a *hotel, particularly in a metropolitan area, derives indirect benefits and profits by providing such facilities.*

In substance the evidence in this case simply disclosed that the hotel held itself out to appellant as providing parking facilities for his car. In reliance on the information of the desk clerk the car with most *386 of its contents in plain view was entrusted to the hotel for safekeeping. The vehicle with its property was accepted by the hotel through its bellboy, who by actual authority and hotel practice was empowered to accept it. *While the claim check given appellant contained both the names of the hotel and lot, appellant could have reasonably inferred that his car with its contents was still in the care and custody of the hotel.*"

31. In the instant case, the vehicle was accepted by the Hotel through its valet parking by actual authority and hotel practice was empowered to accept it. While the tag had the name of the Hotel on it the Car Owner could have reasonably inferred that his car was in the 'duty of care' and 'custody' of the Hotel.

32. The Nigerian Law relating to Contract-Based Liability Posture of the Nigerian Law toward Consumers, discussed the obligation of an innkeeper to reasonably protect its guests and 'duty of reasonable care' was defined as follows:

"Common Law Confirmed

The earliest recorded Tennessee Court opinion came in 1843, (Dickerson v. *Rogers). Automobile liability today continues to be influenced by this case from the horse and buggy days.*Placing his horse in the stable of the inn, the guest obtained lodging for the night. When a loose board above a trough fell on the horse's neck, fatal injuries resulted.

The Supreme Court of Tennessee, upholding an award to the guest, imposed on hotels the highest level of care of guests' property. Citing English Common Law, the Court stated: "An innkeeper is bound to keep safe the goods of his guest deposited within the inn, except where the loss is occasioned by inevitable casualty, or by superior force, as robbery. The level of care is emphasized in the words of Justice Story that an innkeeper is bound to take, not ordinary care

only, but uncommon care of the goods and baggage of his guests. If, therefore, the goods or baggage of his guest are damaged in his inn, or stolen from it by his servants or domestics, or by another guest, he is bound to make restitution" (Dickerson v. *Rogers, 1843)."*

33. Hence keeping in view all the aforenoted facts and judgments, I hold that valet parking services are provided by the Hotel for the convenience of its guests looking for a parking space and it is a special privilege which is given to the guests. A deposit is constituted from the moment a person receives a thing pertaining to another with the obligation to safely keep it and returning the same in the condition it was received. The contract of deposit was effected from the Car Owner's delivery the moment he handed over the keys of his vehicle to the Hotel valet, who, in turn, received the car keys with the obligation to keep the car safely and return it in the same condition as taken. The duty of care cannot stop with the parking of the car. The reasonable degree of careto be taken by a Hotel or any service provider while accepting the keys of a vehicle continues till the vehicle is returned to the owner in the same condition as it was taken. The plea that no separate fee is charged for the parking and hence one of the ingredients of being a "Consumer" within the meaning of Section 2(1)(d) *viz.* the Consideration, is missing, in my view, is also misconceived, inasmuch as the Valet facility, is one of the services offered by the Hotel for the comfort and convenience of its guests, a significant feature of an allurement to visit the Hotel, in preference to the other where such a facility may not be provided.

34. In my opinion, therefore, possession and control of the car had been passed on by the Complainant to the Hotel, which constituted bailment; the duty of due care implicit in the bailment, was violated by the Hotel and the ensuing liability could not be diminished by the disclaimer of liability on the parking tag. Even otherwise, the determination of deficiency in this case also rests on the entire evidential picture. The Hotel has admitted that the Complainant had dinner at their Hotel and with such an effectual consideration the question of whether the car owner is a 'consumer' does not arise. The question of whether the bailee may contractually lessen or completely avoid the ensuing ' duty of due care ' imposed upon him should be considered in the light whether the bailer can be bound by any contractual provision without any notice of such provision. A mere retention of a parking receipt does not constitute notice on the terms written on the receipt. The Hon'ble Supreme Court of Utah observed that, the bailer considers the receipt to be only for purpose of identification and cannot therefore be presumed to have agreed to anything further. Any disclaimer printed on a parking tag will not be considered against the bailee and the Courts have held that such a sign cannot relieve the Service Provider of his normal duties.

35. Having regard to the fact that the Hotel admitted to the car owner having dinner at their restaurant; the doctrine of *'infra hospitium'* which provides that the Hotel's 'duty of care' towards guests' vehicle does not stop with mere parking of the vehicles; by providing free car parking and valet service for the convenience of its guests, the Hotel extended an invitation to park the car which is sufficient to constitute the valet parking as

within the hospitium; mere printing of ‘owner’s risk’ on the parking tag does not absolve the Hotel of its liability when the loss of vehicle from its parking space is construed as ‘negligence’; it is held that the hotel indirectly benefits from providing such facilities and when the Parking Tag is issued in the name of the Hotel, it can be reasonably inferred by the ‘car owner’ that the car would be in the ‘duty of care’ and custody of the Hotel, which in the instant case, it failed to exercise and is held liable to pay damages. I do not find any illegality or infirmity in the findings of the State Commission that there was deficiency in service on the part of the Hotel. However, keeping in view the submissions that the insured amount was already paid by the Insurance Company to the Car Owner and that the Hotel has paid to the Car Owner an amount of 1,00,000 in pursuance of the order dated 12.1.2017 by this Commission, the default interest @ 24% awarded by the State Commission is set aside. The interest awarded @ 12% p.a. to be paid from 28.1.1999 is also modified to 9%. The rest of the order of the State Commission is maintained.

36. This Appeal is partly allowed and the order of the State Commission is modified to the extent indicated above. No order as to costs.

37. The statutory amount deposited by the Appellant at the time of filing of the Appeal shall stand transferred to the Consumer Legal Aid Account.

Appeal partly allowed.

Citation	Decided On	Party Name