

(2001) 05 NCDRC CK 0054

In the National Consumer Disputes Redressal Commission

ARUNA MISHRA

APPELLANT

Vs

MANAGING DIRECTOR, INDIAN AIRLINES

RESPONDENT

Date of Decision : 21-05-2001

Acts Referred:

Citation : 2001 2 CPJ 71

Hon'ble Judges : D.P.Wadhwa , C.L.Chaudhry , J.K.Mehra J.

Final Decision : Petitions disposed of

Judgement

1. THESE two petitions have been filed by the legal heirs of the deceased who died in the air crash of the Indian Airlines plane at Aurangabad Airport on April 26, 1993. In Original Petition No. 57 of 1995 complainants are the wife and 3 minor children of Rajindra Mishra (deceased). In Original Petition No. 67 of 1995 first complainant is the wife of Mahabir Prasad Poddar (deceased) and second complainant is the wife and complainant Nos. 3 to 6 minor children of Suresh Kumar Poddar (deceased). All the three namely Rajindra Kumar, Mahabir Prasad Poddar and Suresh Kumar Poddar unfortunately died in the air crash. Claims in both the complaints are for damages resulting from the death in the air crash.

2. WHOLE reliance for claims for damages is on the report of Court of Inquiry constituted under Section 7 of the Aircraft Act, 1934 read with Rule 75 of the Aircraft Rules. The Court of Inquiry was headed by Justice V.A. Mohta, a Senior Judge of the Bombay High Court, who submitted his report on 25th December, 1993. Apart from the report of Justice Mohta there is no other evidence to give the finding of negligence on the part of the two opposite parties or any one of them to sustain the claim for damages. In two Original Petition No. 35 of 1995 entitled Desh Bandhu Gupta & Ors. v. Indian Airlines & Anr., and Original Petitions No. 36 of 1995 entitled Sangeeta Gupta & Ors. v. Indian Airlines & Anr., arising out of the same accident of the Indian Airlines aircraft at the Aurangabad Airport, we held that the report of the Court of Inquiry headed by Justice Mohta was not admissible in evidence and that there was nothing on record to support the allegations levelled in the complaints against the opposite parties. We hair,

therefore, dismissed those complaints by our judgment dated April 20, 2001. Present two complaints are thus covered by the decision in the above mentioned original petitions. However, it was contended by Mr. Deshpande, learned Advocate for the complainants that certain points were not taken note of by this Commission when it gave its judgment dated April 20, 2001 in Original Petition Nos. 35/1995 and 36/1995. He referred to Rule 20 to the Second Schedule to the Carriage by Air Act, 1972 which he said is to be read with Rule 17. We quote them : "17. The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

20. The carrier is not liable if he proves that he and his servants or agents have taken all necessary measures to avoid the damages or that it was impossible for him or them to take such measures."

Argument is that carrier is per se liable in case of death of a passenger unless it proves that it had taken all necessary measures to avoid the damage or that it was impossible for it to take such measures.

This plea was controverted by Mr. Nanavati who said that Rule 20 aforementioned has since been amended so as to be applicable to carriage of baggage and cargo only and not in the case of a death of a passenger. We have been referred to Notification dated 30th March, 1973 making application of Carriage by Air Act, 1972 of carriage by air which is not international, by amending Rule 20 which now reads as under : "In the carriage of baggage and cargo the carrier is not liable if he proves that the damage was occasioned by negligence, pilferage or negligence in the handling of the aircraft or in navigation and that in all other respects, he and his agent have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

It is, therefore, obvious that in the case of death or injury to the passenger, the benefit of Rule 20 is not applicable in the case of domestic carrier. We have been informed that there are further notifications which have been issued from time to time increasing the amount of liability in the case of death in the air crash in the case of domestic carrier and today the amount of liability is Rs. 7.50 lakhs. Mr. Nanavati also submitted that under Section 5 of the Carriage by Air Act, 1972, liability in the case of death can be enforceable only for the benefit of such of the members of the passenger's family who have sustained damage by reason of his death and that damage cannot be awarded for loss to the estate of the deceased. He said that right to compensation under the Carriage by Air Act is a new right in substitution for any existing civil liability of the carrier under any other law. Opening words of Sub-section (1) of Section 5 are quite explicit. Relevant part of Section 5 is as under : "5. Liability in case of death-(1) Notwithstanding anything contained in the Fatal Accidents Act, 1855 (13 of 1855) or any other enactment or rule of law in force in any part of India, the rules contained in the First

Schedule and in the Second Schedule shall, in all cases to which those rules apply, determine the liability of a carrier in respect of the death of a passenger. (2) The liability shall be enforceable for the benefit of such of the members of the passengers' family as sustained damage by reason of his death. Explanation : In this sub-section, the expression "member of a family" means wife or husband, parent, step-parent, grand-parent, brother, sister, half-brother, half-sister, child, step-child and grand-child : Provided that in deducing any such relationship as aforesaid any illegitimate person and any adopted person shall be treated as being, or as having been, the legitimate child of his mother and reputed father or, as the case may be, of his adopters. (3) (4) ... (5) "

In support of his submission Mr. Nanavati referred to a Division Bench decision of the Jammu and Kashmir High Court in *Controller of Estate Duty v. Kasturi Lal Jain*, (1974) 93 ITR 435, and a decision of the Supreme Court of South Australia in *Timeny v. British Airways pic*, (1991) 102 ALR 565. We quote from the head note of the decision of the High Court of Jammu and Kashmir in the case of *Kasturi Lal Jain* as under : "Before a property can pass to the heirs of a deceased person under section of the Estate Duty Act, 1953, it must fulfil the following conditions"- (i) the property must be in the power, possession and control (actual, constructive or beneficial) of the deceased; (ii) the deceased must have an interest, whether in praesenti or contingent, in the said property; (iii) the property must be in existence during the life-time of the deceased or at the time of his death; and (iv) the deceased must have power of disposition over the property. Where compensation is paid under the Carriage by Air Act, 1934, to the heirs of a person dying in an air-crash by the Airlines Corporation, the deceased had neither any interest in the property nor was he in possession of the property either actually or constructively. The property in such a case did not and could not have come into existence during the life-time of the deceased but accrued for the first time after his death and that too because his death took place in a certain mode. Under the provisions of the Carriage by Air Act, 1934, the compensation ensures for the benefit of the members of the passenger's family and has nothing to do with the estate of deceased. As none of the above said conditions for the passing of property on death under Section 5 of the Estate Duty Act, 1953 is fulfilled, estate duty cannot be levied on such compensation."

In the case of *Timeny v. British Airways pic*, the question before the Supreme Court of South Australia was whether Domestic Court was entitled to extend time-limit for action in view of the Rule 29 of Warsaw Convention under the Civil Aviation (Carrier's Liability) Act, 1959 of the Commonwealth of Australia, Warsaw Convention. Rule 29 of the Warsaw Convention provides that right of damage shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped. Rule 17 provides for the liability of carrier for damage sustained in the event of death or wounding of a passenger, etc. and Rule 28 provides where the action for damages should be brought. Supreme Court of South Australia held

that combination of Rules 17, 28 and 29 of Warsaw Convention created for passengers injured on international carriage by air a new right of action in substitution for any existing civil liability of the carrier under any other law. In this context Mr. Nanavati said that Section 5 of the Carriage by Air Act, 1972 created new rights only in favour of members of the passenger's family as defined therein. It was also his submission that there could not be any consumer dispute when liability of air carrier in case of death of the passenger was automatic and limited. But the consumer dispute does arise when the air carrier does not pay off its liability. It will certainly be deficiency in service on the part of the air carrier.

3. MR. Deshpande also invoked the provisions of Sections 56, 57(4), 106 and 115 of the Evidence Act. With reference to Sections 56 and 57(4), MR. Deshpande submitted that the recommendations of the Court of Inquiry headed by Justice Mohta were accepted by the Central Government. Report itself was placed before the Parliament. He said the Report thus became statutory document and this Commission should take judicial notice of the same. He said that in view of the acceptance of the Report by the Central Government, opposite parties could not be heard saying that there was no negligence. He said that in view of Section 115 of the Evidence Act opposite parties were stopped from stating that there was no negligence on their part. We are unable to understand this line of reasoning by MR. Deshpande. His further submission was that under Section 106 of the Evidence Act cause of negligence was especially within the knowledge of the opposite parties. It was for them to prove to the contrary. We do not think MR. Deshpande is right in his submissions. Central Government or the pilots are not the opposite parties before us. Question that now arise for consideration is why the amount of Rs. 5.00 lakhs each in the case of death of Rajendera Mishra (O.P. 57/95), Mahabir Prasad Poddar and Suresh Kumar Poddar (O.P. No. 67/95) was not remitted to the complainants. Apparently the amount was not paid as Indian Airlines wanted full and final discharge which the complainants were not prepared to give. In any case, the amount of Rs. 5.00 lakhs each could have been deposited with this Commission at the very initial stage. In our view Indian Airlines could not withhold the amount on such a specious plea when a certain amount is admittedly due to the party. Its payment cannot be denied on the plea that the party is not giving full and final discharge. This will certainly raise a serious consumer dispute inviting punitive damages by way of higher rate of interest or otherwise. Considering all the aspects of the matter in the present case that compensation payable could not be more than Rs. 5.00 lakhs in the case of death of a passenger, we direct Indian Airlines to pay to the complainants the amount of Rs. 5.00 lakhs on account of death of every passenger with 12% interest from one month after the date of accident till payment. The amount shall be payable without prejudice to the contentions of the complainants to claim any other amount before any other appropriate Forum whose jurisdiction complainants might like to invoke. These petitions are disposed of as aforementioned. Complainants shall be entitled to costs which we

assess at Rs. 10,000/- in each of the two complaints. Petitions disposed of.