**(2023) 02 KL CK 0284**

**In the High Court Of Kerala**

**Case No :** Writ Appeal Nos.120, 121, 140, 141, 142, 143, 144, 145, 146, 147, 156, 157, 160, 163, 164, 180, 181, 182, 183, 184, 192, 195, 197, 198, 199, 207, 210, 211, 213, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 231, 233, 234, 235, 236, 237, 238, 239,

Asharaf APPELLANT

Vs

Union Of India RESPONDENT

**Date of Decision :** 28-02-2023

**Acts Referred:**

Constitution of India, 1950 — Article 226

**Citation :** (2023) 02 KL CK 0284

**Hon'ble Judges :** A.Muhamed Mustaque, J;Shoba Annamma Eapen, J

**Bench :** Division Bench

**Advocate :** Kodoth Sreedharan, K.P.Muhammad Arif, Abdul Jaleel.U.K, Chackochen Vithayathil, Manu S., Joseph Kodianthara, Abraham Joseph Markos, John Nellimala Sarai

**Final Decision :** Dismissed

# Judgement

A.Muhamed Mustaque

1. These intra-court appeals are filed by the writ petitioners. The matter is related to a claim for compensation under the Carriage by Air Act, 1972. Claims have been raised by passengers and relatives of the victims of the air crash at Karipur International Airport who were traveling in Air India Express Dubai-Kozhikode Flight IX-1344. Accident occurred on 7/8/2020.

2. Heard the learned counsel, Shri Kodoth Sreedharan appearing for the appellants and the learned Senior Counsel, Shri Joseph Kodianthara appearing for Air India and learned Amicus Curiae Smt.John Nellimala Sarai.

3. The learned Single Judge who heard the matter dismissed the writ petitions holding that Air India is a private entity and no public function is being discharged in payment of compensation that is payable by them under the

Carriage by Air Act. The learned Single Judge also found that all the petitioners having received compensation, the writ petitions are not maintainable.

4. In regard to the finding that the writ petitions are not maintainable as Air India being a private carrier, is according to us, unwarranted.Merely because Air India is a private entity, it cannot be said they are not discharging public function in matters related to Air Laws and regulations thereon. A learned Single Judge of this Court in Abdul Salam S. and Others v. Union of India and Another [2011 (3) KHC 199] after adverting to Rules 20, 21, 26 and Rule 28 of the third schedule to the Carriage by Air Act, was of the view that in the matter of accidents arising from air crash, air carrier is liable to pay minimum compensation of one lakh SDRs (then prevailing rate). The view of the learned Single Judge was overturned by a Division Bench in National Aviation Company of India Ltd. v. S.Abdul Salam and others [2011 (3) KHC 761]. The Division Bench was of the view that the air carrier was only liable to pay damages for proven loss. The appeal against Division Bench Judgment is pending before the Apex Court. If the view of the learned Single Judge is upheld, perhaps we may have to hold that minimum compensation prescribed under the Carriage by Air Act is based on public policy and even private carriers could be accountable under public law for non-payment of minimum compensation. It has to be noted that the obligation to pay compensation under the Carriage by Air Act is not based on mere regulatory regime but also based on sovereign functions as committed by our country in international forums. An air carrier may have to carry many passengers from different countries. Convention for unification of rules relating to international carriage was signed in Warsaw in the year 1929 and Montreal convention in the year 1999. The Montreal convention casts an obligation on air carriers to pay the compensation as referred to in the Carriage by Air Act. These are sovereign's obligations and private carriers in fact shoulder such obligations assured by the Sovereign in international forums. In such a scenario, it may not be safe to hold that the writ petitions are not maintainable even to direct the air carrier to pay minimum compensation. In such circumstances, we find that question can be left open for decision in appropriate cases in future.

5 In these cases, admittedly, all the writ petitioners have received compensation. The compensation has been received without any protest or any reservation. We also note that some of the writ petitioners who in the earlier round of litigation had claimed compensation, withdrew the writ petition as not pressed based on the settlement of payment of compensation.

5. The learned counsel for the appellants submitted that the compensation received is much less than the compensation payable under the Carriage by Air Act and, therefore, they have every right to approach this Court invoking Article 226 of the Constitution. The learned counsel further placing reliance on the judgments of this Court and other materials argued that Air India is discharging public function and therefore, they are amenable to Article 226 of the

 

Constitution. The learned counsel pointed out Rule 26 of the third schedule to the Carriage by Air Act. The above provision reads thus: 26. Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in these rules shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of these rules .

6. According to the learned counsel for the appellants, any action on the part of Air India limiting compensation by a contract is null and void and, therefore, even if they have accepted compensation, that will not preclude them from claiming higher compensation as per the statutory regulation.

7. The learned Senior Counsel Shri Joseph Kodianthra submitted that merely because the compensation regime is regulated by a statutory provision, that will not confer a right on passengers to move a public law remedy. He cited examples of claims under the Motor Accidents Claims Tribunal for compensation arising out of motor accidents. The learned Senior Counsel further submitted that compensation was worked out based on individual claims and entire compensation was paid based on mediation to each individual claimant.

8. We shall now have a look at Rule 26 of the third schedule to the Carriage by Air Act once again. Rule 26 only nullifies the provision if any made by the carrier by way of contract or stipulation in air ticket limiting the liability of the air carrier. Thus, any contract contrary to the compensation regime under the statutory provision, if it is not beneficial to the passenger, such contract is null and void. That means that the carrier cannot escape liability to pay compensation in accordance with the statutory provisioncitingcontractsentered with passengers. In this case, however, we note that all the parties to this litigation voluntarily accepted the compensation given to them without any protest. Rule 26 refers to entitlement and that cannot be whittled down by a contract. But that does not mean that the parties are not free to enter into a contract to accept the compensation at a lower fixed rate than prescribed in the statute. In every contract what is reflected is party autonomy. If parties voluntarily accept the compensation given to them, they cannot turn around and challenge the same, contending that it is lower than what is stipulated in the statutory provision. The offer and acceptance refers to a contract. That can be impeached only through a known manner as provided in the Indian Contract Act, 1872. In such circumstances, we are of the view that there is no merit in the writ petitions. The question whether Air India is amenable to writ jurisdiction being a private entity for payment of any compensation as per the schedule, is left open. These appeals stand dismissed. No costs.