

(2001) 04 NCDRC CK 0045

In the National Consumer Disputes Redressal Commission

DESH BANDHU GUPTA

APPELLANT

Vs

Indian Airlines Ltd.

RESPONDENT

Date of Decision : 20-04-2001

Acts Referred:

Citation : 2001 2 CPJ 61 : 2001 3 CPR 1

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

Final Decision : Ordered accordingly

Judgement

1. THESE two complaints arise out of the same incident when an aircraft crashed on take-off from Aurangabad airport. Claim is for damages. Since with this judgment we are deciding a preliminary issue, it would be appropriate to refer, though briefly, to one of the two complaints. This would be Original Petition No. 35 of 1995 entitled Desh Bandhu Gupta & Ors. v. Indian Airlines & Anr.

2. PYARE Lai Gupta (since deceased) travelled by Indian Airlines flight from Aurangabad to Bombay on 26th April, 1993. The flight was operated by the Indian Airlines, the first opposite party, and the Aurangabad Airport is under the control and management of the second opposite party. Indian Airlines is a body corporate constituted under the Air Corporation (Transfer of Undertakings and Repeal), Act, 1994. National Airport Authority is also a body corporate constituted under the National Airport Authority Act, 1985. The aircraft was Boeing 737. Commander of the flight was Captain S.N. Singh. First Officer was Captain Manisha Mohan. Operating schedule of the flight was New Delhi-Jaipur-Udaypur-Aurangabad-Bombay. When the flight was to take off from Aurangabad Airport there were 112 passengers on board. Air Traffic Control gave clearance to use Run Way No. 09. The aircraft crashed soon after the take-off. It appears that the aircraft when lifted up at the end of runway collided with a stationary truck on the Aurangabad-Beed Road which runs just outside on the boundary wall of the airport. The aircraft continued the flight and went through the high tension electric wires at the height of about 35 ft. and mashed into the ground. 53

passengers and 2 cabin crew members died in the accident. 10 passengers and cabin crew member received serious injuries. 6 passengers and one cabin crew member received minor injuries. 43 passengers and 1 cabin crew member had a miraculous escape. They received no injury. The Commander, the First Officer and 2 cabin crew members who were in the first Section of the cabin and 59 passengers were the lucky survivors. Pyare Lal Gupta was not that lucky. He died in the crash. Complainants are the children of said Pyare Lal Gupta who died intestate. They as heirs and legal representatives of Pyare Lal Gupta have filed this complaint claiming damages to the extent of Rs. 5,79,37,534/- (Rupees five crores seventy-nine lakhs thirty-seven thousand five hundred and thirty-four only) on account of death of Pyare Lal Gupta, alleging negligence against both the opposite parties resulting in the accident. Out of this, an amount of Rs. 4 crores has been claimed due to mental agony, sufferings, shock, etc. and the amount of Rs. 1,79,37,534/- is towards interest @ 24% per annum from 25.5.1993 to 9.3.1995. Both the Indian Airlines and National Airport Authority have denied their liability arising out of the accident. They have also denied any negligence on their part as alleged by the complainants. Indian Airlines has also taken shelter behind the provisions of the Carriage by Air Act, 1972 which limits the liability even of a domestic air carrier.

After the Accident, the Central Government by notification issued under Section 7* of the Aircraft Act, 1984 read with Rule 75** of the Aircraft Rules constituted a Court of Inquiry to hold a formal investigation and report to the Central Government stating its findings as to the causes of the accident and the circumstances thereof and adding any observations and recommendations which the Court thinks fit to make with a view to the preservations of life and avoidance of similar accidents in future. The Court of Inquiry was headed by Justice V.A. Mohta, a Senior Judge of the Bombay High Court. He submitted his report on 25th December, 1993. His findings and causes were : "C.1 FINDINGS : (1) There was no defect either in the aircraft or in the engine performance. (2) There was no sabotage by explosives or otherwise. (3) The aircraft was overloaded, its extent was about 1 ton. However, this overloading as such did not contribute in degrading the performance of the aircraft. (4) There was Pi's error in initiating delayed rotation and in following wrong rotation techniques. (5) Weather condition did not affect the aircraft's performance. (6) angabad Airport and its surroundings were not properly maintained. The NAA failed to perform its duty of regulating mobile traffic on the Beed road during aircraft's operation. The NAA also failed in not showing the unregulated traffic in the Obstacle Charts and also not issuing NOTAM about stoppage of practice of regulating traffic. (7) Aurangabad Airport requires improvements. Those improvements include, (i) extending the runway length preferably by additional 3000"; (ii) making permanent arrangement about regulating the traffic on the Beed road; and (iii) providing modern facilities at the airport considering Aurangabad's importance as an international tourist center and developing industrial town. (8) By and large adequate post-accident actions were taken by the NAA and others

C.2 CAUSE OF ACCIDENT : (i) Pilots' error in initiating late rotation and following wrong rotation technique. (ii) Failure of the NAA to regulate the mobile traffic on the Beed road during the flight hours."

The Report also records recommendations which are not relevant for the decisions of issues now raised before us which is as to be admissibility of Justice Mohta's report.

3. THE second opposite party-National Airport Authority also raised an issue if this Commission has at all jurisdiction in the matter as the complainants are not consumers within the meaning of Section 2(1)(d) of the Consumer Protection Act, 1986. Second opposite party, therefore, also wanted that issue be decided as a preliminary issue. However, we are not going into that question as well at present. In support of their claim for quantifying the damages claimed in the complaint, complainants filed affidavits, one joint affidavit of four of the complainants being the sons of Pyare Lal Gupta deceased and second of the 5th complainant being the daughter of the deceased. In both these affidavits it has been stated that Pyare Lal Gupta died on 26.4.1993 in the crash. After the accident his body was not traceable in spite of their visits to morgue several times. Complainants were thus deprived of even performing the traditional last rites and cremate the body of their deceased father. They said that they formed part of a very close-knit family of which the deceased was the head and being close to the deceased his death has been a great personal loss to the complainants and they estimate the loss and/or damage caused to them for the sufferings at Rs. 18 lakhs each. They said that the opposite parties are jointly and severally liable to pay this amount with interest. That is all about these two affidavits. There is no affidavit and there is no evidence if there is any negligence on the part of any of the opposite parties resulting in the accident or even how the accident happened.

4. BEFORE we consider rival contentions of the parties, it must be noted that during the pendency of these proceedings, the complainants filed a civil suit in the Court of Civil Judge, Senior Division, Aurangabad basing their claim also on the same cause of action i.e., the accident which occurred on 26.4.1993 and claiming the same relief as in the present case. It has been submitted by the complainants that civil suit was necessitated as they were advised that the complaint before this Commission may take considerable time for adjudication and the opposite parties might also not take up the plea that claim be not adjudicated upon on merit on the ground that this Commission had no jurisdiction and on the happening of such a decision the complainants might be left without any remedy as a civil suit would become time barred in April, 1996. All this, they said, necessitated filing of the suit which was done by way of abundant caution and is now pending in the Court of Civil Judge, Senior Division, Aurangabad. On this basis first opposite party had prayed that the present complaint be dismissed and that civil suit was a proper remedy where all necessary evidence will have to be led by the complainants as plaintiffs. It is the

submission of Mr. Atul Setalvad, learned Senior Counsel for the complainants, that Justice Mohta Report giving a clear finding of negligence by the pilots of the Indian Airlines and poor maintenance of the Aurangabad Airport by the National Airport Authority, was admissible in evidence and nothing more was required by way of evidence to prove negligence of either of the opposite parties in the proceedings. He referred to Section 35 of the Evidence Act in this context. It may be noted that pilots are not party to the proceedings and Indian Airlines the first opposite party, it appears, is sought to be held liable vicariously. Mr. Setalvad was quite candid in his approach that if the report of Justice Mohta was held not to be admissible he will have no case to proceed further for award of damages as claimed by the complainants. The question that arises for consideration is if the report is admissible and if so, what is its probative value. It is the first hurdle which the complainants have to cross. Since the admissibility of the report turns on the applicability of Section 35 of the Evidence Act, 1972, we may quote the same : "35. Relevancy of entry in public record made in performance of duty-An entry in any public or other official book, register, or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact."

Mr. Setalvad said that report was a public document. It was prepared under authority of law in the discharge of duties imposed on the Court of Inquiry. It was, therefore, relevant under Section 35 of the Evidence Act. In support of his submissions Mr. Setalvad referred two decisions of the Supreme Court in the cases of : (i) P.C. Purushothama Reddiar v. S. Perumal, (1972) 2 SCR 646, and (ii) State of Bihar v. Radha Krishan Singh, AIR 1983 SC 684.

5. WE do not think these two decisions are of any relevance. Case of Purushothama Reddiar v. S. Perumal, related to election dispute where corrupt practice was alleged under the provisions of the Representative of People Act, 1951 on the ground that a candidate (respondent in the case) had incurred more expenses on his election than that was permissible under the law. The question was as to the number of election meetings held by the respondent. The allegation made by the appellant of the number of election meetings held by the respondent found corroboration by number of applications made by the respondent to the Inspector of Police seeking permission to hold meetings and by the Police reports which Head Constable of police made to their superior after attending those meetings. The Court observed that the police reports had been brought on record without any objection and it was not open to the respondent to object to their admissibility at a latter stage. Further the Court held that as regards the contents of the document, once a document is properly admitted the contents of that document are also admitted in evidence although the contents may not be conclusive evidence. The Court observed that the First Part of Section 35 of the Evidence Act says that an entry in any public record stating a fact in issue or relevant fact and made by public servant in the discharge of his official

duty is relevant evidence. Quite clearly, therefore, the Court held that the reports in question by the police Head Constable were made by a public servant in discharge of his official duty. Thus the issue before the Court was whether the respondent had arranged certain election meetings on certain dates, the police reports in question were extremely relevant to establish that fact, hence, these came within the ambit of the First Part of Section 35 of the Evidence Act. Police reports have been held to be relevant only as regards number of meetings held. It must, however, be noticed that the police reports had been brought on record without any objection from the respondent as to their admissibility.

6. THE dispute in the case of State of Bihar v. Radha Krishan Singh, which the Court was to resolve, was whether the plaintiffs had been able to prove any link between two families in order to succeed to the properties of late Maharaja of his estate, who died issueless. THE plaintiff would succeed only if he proved both these links. This the plaintiff sought to prove by proving a document (marked Exhibit-J) which was an ancient document of the year 1810 which was the main plank and cornerstone of the document so produced by the plaintiff. Admissibility of this document Exhibit-J was seriously disputed by the defendants but the Courts found the document to be admissible. For document Exhibit-J to fall under Section 35 of the Evidence Act, the following conditions, the Court said, are to be fulfilled before it could be admissible under that section : "In our opinion, Ex. J squarely falls within the four corners of Section 35 of the Evidence Act which requires the following conditions to be fulfilled before a document can be admissible under this section : (1) the document must be in the nature of an entry in any public or other official book, register or record : (2) it must state a fact in issue or a relevant fact; (3) the entry must be made by a public servant in the discharge of his official duties or in performance of his duties especially enjoined by the law of the country in which the relevant entry is kept."

THEn the Court proceeded to observe as under : "THE admissibility of Ex. J, or its genuineness is only one side of the picture and, in our opinion, it does not throw much light on the controversial issues involved in the appeal. We may not be understood, while holding that Ex. J, is admissible, to mean that all its recitals are correct or that it has very great probative value merely because it happens to be an ancient document. Admissibility of a document is one thing and its probative value quite another - these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and the weight of its probative value may be nil. Before going to the contents of Exh. J, which have been fully discussed by the High Court, we would first like to comment on the probative value of this document."

In the present case Mr. Setalvad said that the report has a great probative value. But then first thing first. It has to be shown if it is admissible in evidence. That to our mind he has been unable to show. In any case contents of the enquiry report cannot be made use of unless the facts are proved by evidence aliunde. In *Kehar Singh & Ors. v. State (Delhi Administration)*, (1988) 3 SCC 609 the question was

about the admissibility of the report under the Commission of Inquiry Act, 1952. The Court said : "The report is a recommendation of the Commission for consideration of the Government. It is the opinion of the Commission based on the statements of witnesses and other material, it has no evidentiary value in the trial of the criminal case".

In *Ram Bihari Yadav v. State of Bihar & Ors.*, IV (1998) SLT 631 =(1998) 4 SCC 517, the Court was considering the question as to the relevancy, admissibility and probative value of a dying declaration. The Court said : "More often the expressions "relevancy and admissibility" are used as synonyms but their legal implications are distinct and different for more often than not facts which are relevant may not be admissible, for example, communications made by spouses during marriage or between an advocate and his client though relevant are not admissible; so also facts which are admissible may not be relevant, for example, questions permitted to be put in cross-examination to test the veracity or impeach the credit of witnesses, though not relevant are admissible. The probative value of the evidence is the weight to be given to it which has to be judged having regard to the facts and circumstances of each case".

Mr. Setalvad then invoked the principle of *res ipsa loquitur*. For this principle to apply there has to be evidence on record. We have not been referred to the circumstances from the record which led to the accident as to whether it was on account of negligence of the pilots or poor maintenance of the second respondent or both or if there was any other cause. The principle of *res ipsa loquitur* means that the facts have to speak for themselves. But the facts have to be on record of the case. In *Gobald Motor Service Ltd. v. R.M.K. Veluswamy*, AIR 1962 SC 1, the Court was considering question of negligence and its principle and relying on the principle of *res ipsa loquitur* the Court said that in the case of events that happened told their story and that there was presumption that the accident was caused by the negligence of the driver. In *Municipal Corporation of Delhi v. Subhagwanti*, AIR 1966 SC 1750. The Court held as under : "In our opinion, the doctrine of *res ipsa loquitur* applies in the circumstances of the present case. It has been found that the Clock Tower was exclusively under the ownership and control of the appellant or its servants. It has also been found by the High Court that the Clock Tower was 80 years old and the normal life of the structure of the top storey of the building, having regard to the kind of mortar used could be only 40 or 45 years. There is also evidence of the Chief Engineer that the collapse was due to thrust of the arches on the top portion and the mortar was deteriorated to such an extent that it was reduced to powder without any cementing properties. It is also not the case of the appellant that there was any earthquake or storm or any other natural event which was unforeseen and which could have been the cause of the fall of the Clock Tower. In these circumstances, the mere fact that there was fall of the Clock Tower tells its own story in raising an inference of negligence so as to establish a *prima facie* case against the appellant".

7. In *Shyam Sunder v. State of Rajasthan*, AIR 1974 SC 890, the Court said that

since the driver could not explain the cause of the accident which was within his exclusive knowledge and it was not possible for the plaintiff to give any evidence as to the cause of the accident the maxim *res ipsa loquitur* was attracted to the case. All these above last three judgments rendered by the Supreme Court on the principle of *res ipsa loquitur* are not applicable in the present case as we said above, there is no evidence in our record as to how the accident happened or how it could have happened. It is difficult for us to hold that the statements made by the witnesses before the Court of Inquiry become relevant before us or the opinion of the Court of Inquiry binding on us to return the finding of negligence without the witnesses examined before us. The very argument is difficult for us to appreciate. The fact that there was negligence requires judicial determination independently by us after we record the evidence, both oral and documentary. We just cannot take off from Justice Mohta Report and start quantifying damages. The principle of *res ipsa loquitur* is not applicable in the present case.

8. MR. Setalvad tried to distinguish a Division Bench judgment of the Calcutta High Court in *Indian Airlines Corporation v. Madhuri Chowdhury*, AIR 1965 Cal. 252. This judgment has been strongly relied by MR. H.D. Nanavati, learned Counsel for the Indian Airlines. In this case there was claim for damages arising out of air crash at Nagpur when a Dakota Air Plane operated by the Indian Airlines crashed soon after it started flying from Nagpur to Madras. All the passengers and the crew were killed and the only person who escaped with severe injuries and burns was the pilot of the ill-fated aircraft. One of the questions before the Court was about the admissibility of the report of the Court of Inquiry appointed under Rule 75 of the Aircraft Rules. The Court held that the report of the Court of Enquiry cannot be regarded as an entry in a public or official book, register or record within the meaning of Section 35 of the Evidence Act. The Court added : "We, however, accept MR. Mitter's submission that although the report is admissible and has been duly proved as a fact of this case, yet the evidence tendered before the Court of Enquiry is not necessarily evidence here unless these questions and answers put to the witnesses were put to these witnesses who deposed at the trial here and only those portions of that evidence before the Court of Enquiry which was tendered before the witness concerned will alone be evidence here and not otherwise".

MR. Nanavati submitted under the Carriage by Air Act, 1972, a limit on the liability of the Air Carrier has been prescribed. He referred two Notifications of the Central Government dated 5.7.1980 and 26.3.1992 both issued under Sub-section (2) of Section 8 of the Carriage by Air Act, 1972. The provisions of the Carriage by Air Act, 1972 have been made applicable to domestic air travel. Both these notifications are with reference to Rule 22 of the Second Schedule to the Carriage by Air Act, 1972 and limits the liability of air carrier to Rs. 5 lakhs. Carriage by Air Act gives statutory recognition to the Warsaw Convention, 1929, as amended by the Hague Protocol, 1955 which contains provisions for international carriage of persons, luggage or goods by aircraft. Convention

balances the imposition of a presumption of liability on the carrier of limiting his liability. There is, however, no limitation of liability if the damage is caused by the wilful misconduct of the carrier or by such default on his part as in accordance with the law of the Court seized of the case, is equivalent to wilful misconduct. First Schedule of the Carriage by Air Act contains Rules of Warsaw Convention and Second Schedule of the Hague Protocol. The question is if Rule 22 applies or if it is Rule 25 of the Second Schedule. Relevant portions of Rules 22 and 25 are as under : "22(1) (2)(a) In the carriage of registered baggage and of cargo, the liability of the carrier is limited to a sum of 250 francs per kilogramme, unless the passenger or consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that sum is greater than the passenger's or consignor's actual interest in delivery at the destination.

(b) In the case of loss, damage or delay of part of registered baggage or cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the loss, damage or delay of a part of the registered baggage or cargo, or of an object contained therein, affects the value of other packages covered by the same baggage check or the same air waybill, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.

(3) . (4) The limits prescribed in this Rule shall not prevent the Court from awarding, in accordance with its own law, in addition, the whole or part of the Court costs and of the other expenses of the litigation incurred by the plaintiff. The foregoing provisions shall not apply if the amount of the damages awarded excluding Court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later.

(5) The sums mentioned in francs in this Rule shall be deemed to refer to a currency unit consisting of sixty-five and a half milligram's of gold of millesimal fineness nine hundred. These sums may be converted into national currencies in round figures. Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment." Rule 25:

25. The limits of liability specified in Rule 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment."

Mr. Nanavati said that if the complainants want damages for a higher amount than Rs. 5.00 lakhs they will have to bring their case under Rule 25 of the Second Schedule for which they will have to lead evidence. He said the provisions of Carriage by Air Act, 1972 were not before the Court of Inquiry headed by Justice Mohta. He said reference to Rule 25 is most important circumstance for this Commission to consider to find out if the death of Pyare Lal Gupta resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result. Mr. Nanavati referred to the terms of reference of Court of Inquiry and also provisions of Rule 75 particularly Sub-rule (6) thereof to contend that report has no relevance and is inadmissible in evidence. He said that before the Court of inquiry Rule 25 of the Second Schedule of the Carriage by Air Act, 1972 was not in issue and first opposite party did not have any opportunity to examine and cross-examine witnesses on that issue. He said that even assuming without admitting that statements in Report are taken as proved, or otherwise regarded as having probative value they would have no relevance to the question whether the circumstances mentioned in Rule 25 were present and as such, parameters for determining that question are wholly different from the issues with which the Court of Inquiry was concerned. Mr. Setalvad countered this argument by stating that assuming Rule 25 applies in the case of the first opposite party that cannot be applicable to the second opposite party.

9. ARGUMENT of Mr. Setalvad that Rule 25 of Second Schedule of the Carriage by Air Act, 1972 in any case would apply only in the case of first opposite party and that it does not cover the case of second opposite party, also does not hold good inasmuch as it is alleged that liability of both the opposite parties is jointly and severally.

10. THIS Commission constituted under the Consumer Protection Act, 1986 is not bound by the provisions of Evidence Act but when issues of fact and law are complex, it will be appropriate to apply those provisions of the Evidence Act which are based on the principles of natural justice. In the present case, the first opposite party is sought to be held vicariously liable without the pilots being party in the complaint and the report of Court of Inquiry is sought to be used against it when it had no opportunity to cross-examine the witnesses with reference to circumstances mentioned in Rule 25 of Second Schedule of the Carriage by Air Act. Section 35 of the Evidence Act is not applicable. A bare reading of Section 35 would show that the Report does not fall within the purview of the section. No doubt the Report is statutory document but it is not relevant under Section 35. It is not evidence. The Report can be used only to the extent that the statements made before the Court of Inquiry can be confronted to a witness to contradict him if he made a statement before and/or contrary to what he deposed before the Court of Inquiry. That is Section 145* of the Evidence Act. However, under Section 157* of the Evidence Act, statement of the witness made before the Court of Inquiry can be proved to corroborate his statement now made before us in the proceedings. Outside these circumstances,

to our mind the Report of the Court of Inquiry is inadmissible. The Report is merely an opinion of the Court of Inquiry in the form of recommendations to the Central Government as to the causes of the accident and remedial steps to be adopted. It is not substantive piece of evidence for us to hold that the accident was caused due to the negligence of the pilots of the aircraft or poor management or maintenance of the airport by the second opposite party or for any other cause. The Report is only admissible as a fact if it is in issue that accident took place and the Central Government under its powers appointed the Court of Inquiry which submitted its report detailing the causes of accident and the recommendations for action in future. We agree with the view expressed by the Calcutta High Court in the case of Indian Airlines v. Madhuri Chowdhury (supra), which have been referred to above. Supreme Court in the case of Kehar Singh & Ors. v. State (Delhi Administration), (1988) 3 SCC 609, has explained the law that the report of the Commission constituted under the Commission of Inquiry Act is merely an opinion which has no evidentiary value in a trial. The report of the Court of Inquiry constituted under the Aircraft Act and the Rules is no different.

Thus we hold that the Report of the Court of Inquiry headed by Justice Mohta is inadmissible in evidence. Any further question that it has any probative value does not arise. Once having held that Justice Mohta's Report is inadmissible in evidence, there is nothing on the record to support the allegations levelled in the complaints against the opposite parties. We have, therefore, no option but to dismiss the complaints. We order accordingly. However, we leave the parties to bear their own costs. Ordered accordingly.