

(2015) 04 NCDRC CK 0200

In the National Consumer Disputes Redressal Commission

Case No : 15 of 2009

INDIAN AIRLINES LTD

APPELLANT

Vs

ASHOK GUPTA

RESPONDENT

Date of Decision : 30-04-2015

Acts Referred:

Citation : (2015) 04 NCDRC CK 0200

Hon'ble Judges : V.K.JAIN , B.C.Gupta J.

Advocate : H.D.NANAVATI , Shiv K.Suri , SASWAT PATNAIK , M.L.SHARMA

Final Decision : Application disposed

Judgement

1. THE complainants, who are husband and wife, boarded Indian Airlines Flight No.IC -814 for travelling from Kathmandu to New Delhi on 19 -10 -1999. When the plane reached near Lucknow, it was hijacked by some extremists, who were carrying arms and ammunition and had boarded the said flight as passengers. When the aircraft landed at Amritsar Airport, fuel was filled in it and thereafter the aircraft was forced by the extremists to land at Kandhar Airport in Afghanistan. The case of the complainants is that the hijackers were able to carry arms and ammunition to the aircraft, due to negligence of the airlines and had they been thoroughly checked it would not have been possible for the extremists to hijack the plane, by threatening the crew and the passengers with the arms and ammunition they were able to carry with them. The complainants, therefore, approached the concerned District Forum, seeking compensation amounting to Rs.4,00,000/ - each along with Rs.5,000/ - towards cost of litigation.

2. THE complaint was resisted by the petitioner Indian Airlines inter alia on the ground that the matter of compensation payable by an airlines is governed solely by the provisions contained in Carriage by Air Act which envisages payment of compensation only in case of physical injury to the passenger during the air carriage and no compensation is payable for mental injury such as mental trauma and agony undergone by the passenger. It was also stated in the reply

that the airline had no role to play at Kathmandu Airport with respect to pre - embarking security checks which were the functions under the control and responsibility of the Civil Aviation Authority of Nepal. Similar stand was taken by Union of India, Ministry of Civil Aviation which was impleaded as opposite party No.2 in the complaint.

3. VIDE its order dated 30 -12 -2003 the District Forum held that in view of the provisions contained in Carriage by Air Act, the complainants were not entitled to any compensation they having suffered no bodily injury. It was also held by the District Forum that the complaint was barred by limitation. Being aggrieved from the order passed by the District Forum the complainants approached the concerned State Commission by way of appeal. Vide impugned order dated 02 -12 -2008 the State Commission allowed the appeal and directed the petitioner to pay Rs.1,00,000/ - each as compensation to all the passengers who were travelling in the hijacked aircraft. It was also directed that the legal heirs of those who had been killed will be paid Rs.5,00,000/ - each as compensation. The complainants were also awarded Rs.25,000/ - towards the cost of litigation. The Director General of Civil Aviation was directed to instruct all the airlines to undertake security checks of all the passengers at the time of embarking aircraft. Being aggrieved from the order passed by the State Commission, the airlines is before us by way of this revision petition.

4. RULE 17 of Schedule II to the Carriage by Air Act, 1972 reads as under: "17. The carrier is liable for damage sustained in the event of 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."

5. THE following questions primarily arise for consideration of this case. Whether Indian Airlines flight no. IC -814 was involved in an "accident" on 19.10.99.

Whether the complainant and other passengers travelling on the aforesaid flight sustained injury covered by Rule 17, onboard the aircraft or in the course of its embarking or disembarking.

Whether compensation from a carrier on account of deficiency in the services rendered by it can be claimed only if it is payable under the Provisions of the Carriage by Air Act.

Whether there was any deficiency in the services rendered by the petitioner to its passengers onboard flight no. IC -814 from Kathmandu to New Delhi on 19.10.99.

6. THE wording of Rule 17 indicates that three things must be established in order to demonstrate that the carrier is liable. The first is that the passenger must have sustained death or wounding or other bodily injury. The second is that there must have been an accident which took place on board the aircraft or in the course of any of the operations of embarking or disembarking. The third is

that the passenger's death, wounding or bodily injury must have been caused by the accident.

7. THE Word "accident" has not been defined in the Carriage by Air Act. It is defined as (i) an unpleasant event, especially in a vehicle, that happens unexpectedly and causes injury or damage, (ii) something that happens unexpectedly and is not planned in advance, in the Oxford Advanced Learner's Dictionary (New 8th Edition). The word "accident" is defined as (i) an incident, an unforeseen injurious occurrence, something that does not come in the usual course of event or that cannot be reasonably anticipated, (ii) an unforeseen and injurious occurrence due to mistake, negligence, neglect or misconduct; an unanticipated and untoward event that cause harm, (In Black's Law Dictionary (Ninth Edition)).

8. THE question which needs consideration is as to when extremists carrying arms and ammunition succeed in boarding an aircraft, threaten the crew and the passengers and force the aircraft to land at the place of their choice, can it be said that an accident had occurred onboard the said aircraft or in the course of its embarking or disembarking. In "Air France Vs. Saks, 1985 470 US 392" The United States Supreme Court concluded that the liability under Article 17 arises only if the passenger's injury is caused by an unexpected or unusual event that is external to the passengers. The aforesaid proposition was also approved and applied in the case of "Ms. Morris (2001) 3 All ER 126". Viewed from the point of view of the passengers onboard, the aircraft, the act of the terrorists in intimidating the crew and the passengers and forcing the aircraft to land would be an accident since they would not have anticipated such an event while onboard the aircraft. It is something which happened all of a sudden and wholly unexpectedly. The passengers could not have foreseen an incident of this nature nor could they have avoided the same by exercise of human skill or reasonable foresight. Therefore, the aforesaid incident would be an accident on board the aircraft, within the meaning of Rule 17.

9. THIS is not the case of the complainants that they were wounded or had sustained a bodily injury, while onboard flight no. IC -814. Their only allegation in the complaint is that they were swinging between life and death for more than 8 days at Kandhar and suffered mentally due to negligence on the part of the carrier. The question as to whether the scope of Rule 17 is confined only to corporal injury or includes non -corporal injury as well come up for consideration of the House of Lords in "Morris Vs. K.L.M. Royal Dutch Airlines (2002) UKHL7". In the aforesaid case, the House of Lords was concerned with two incidents onboard two separate aircrafts. In one case, the claimant, a minor, having fallen asleep while travelling on an aircraft woke up to discover being caressed by a man sitting next to her. Though she suffered no physical illness or injury, she was very distressed and was subsequently diagnosed as suffering from clinical depression. In the second case, two of the engines of a helicopter flamed out as a result of which helicopter landed on a helideck. The claimant did not sustain

any physical injury, but was extremely frightened and developed severe psychiatric conditions due to accident, which led to the onset of the Peptic Ulcer disease. No attempt was made by either of them to show that the mental or physical illness or injury had been caused, to any extent, by a physical injury. Ruling in the favour of the carrier, the House of Lords inter -alia held as under: "Where a mental injury or illness lacked a physical cause or origin, it could not constitute a "bodily injury" within the meaning of art 17 of the convention but that term did cover physical manifestations of mental injury and (per Lord Nicholls, Lord Mchay and Lord Hobhouse) psychiatric disorders arising from injury to the brain or nervous system. The use of the adjective "bodily" suggested that art 17 had not been intended to cover everything that might possibly be described as an injury to the passenger sustained on board the aircraft or in the course of embarking or disembarking). The word "corporelle" in the French text directed attention to physical changes in the body rather than something that affected the mind, and it had been chosen to qualify, and this restrict, the meaning of the word "lesion". The phrase was therefore to be read in a way that would confine its application to the skin, bones or other tissues of the body and exclude mental injury.

. there was a consistent body of judicial opinion in the United States that the phrase "any other bodily injury" did not permit compensation for an emotional reaction which had not been shown to be a manifestation of physical injury. Emotional distress was excluded, but so also was a psychiatric illness which affected the mind only and was not capable of being described as a physical injury. However, if the brain could be showing to have been injured and the other conditions for compensation under art 17 were satisfied, such compensation could not be refused .."

10. IN the case before this Commission, the complainants did not allege any would or bodily injury. They also did not claim any physical manifestation, of the mental stress and agony undergone by them during the period they were in the aircraft. Mere emotional stress, fear and palpitation which the complainant must have undergone during the period they were in air or at Kandhar does not constitute wound or bodily injury within the meaning of Article 17 of Carriage by Air Act. Therefore, no claim under Rule 17 is maintainable against the petitioner.

11. IN the context of the compensation for the non -corporal/mental injury, it was contended by the Learned counsel for the petitioner that since Warsaw Convention, incorporated in Carriage by Air Act is an exhaustive code with respect to the liability of a carrier, no claim on account of such an injury is maintainable either before the Consumer Forum or before any other Court of Forum. In other words, the contention of the Learned counsel for the petitioner was that if the claim on account of an injury sustained onboard an aircraft does not fall within the purview of Article 17 of the Carriage by Air Act, it cannot be entertained by any Court or Forum. In support of his contention, he relied upon the decision of the House of Lords in Sidhu and Ors. Vs. British Airways, 1997 1

ALLER 193. In *Sidhu*, the appellants were travelling in a flight operated by British Airways from London to Malaysia via Kuwait. While passengers were in the airport terminal at Kuwait, the airport was attacked by Iraqi forces who took them as prisoners and later on removed them to Baghdad. They were released several weeks later. They brought an action for damages beyond the time limit of two years as prescribed in Warsaw Convention but within the limitation of three years as prescribed under Common law, alleging negligence on the part of the British Airways. Their claim was dismissed by the trial judge on the ground that their sole remedy was under the convention and any right they might have had against British Airways were extinguished under Article 29 of the convention which prescribed two years' time limit for bringing an action. The Court of Appeal having dismissed his appeal, *Sidhu* appealed to the House of Lords. The issue before the House of Lords was as to whether Warsaw Convention as amended at The Hague in 1955, provides the exclusive cause of action and remedy in respect of claims for loss, injury and damage sustained in the course of action or arising out of International Carriage by Air.

12. OBSERVING that the Convention was a compromise adjusting the conflicting interests of the carriers on one hand and the passengers on the other hand, the House of Lords noted that on one hand the carrier surrendered his freedom to exclude or to limit his liability, on the other hand passengers or other party to the contract was restricted in the claims which he could bring inaction for damages by the conditions and limits set out in the Convention. Upholding the decision of the Court of Appeal, the House of Lords *inter alia* held and observed as under: "The reference in the opening words of art 24 (2) to "the cases covered by Article 17" does, of course, invite the question whether art 17 was intended to cover only those cases for which the carrier is liable in damages under that article. The answer to that question may indeed be said to lie at the heart of this case. In my opinion, the answer to it is to be found not by an exact analysis of the particular words used but by a consideration of the whole purpose of the article. In its context, the purpose seems to me to be to prescribe the circumstances, that is to say the only circumstances, in which a carrier will be liable in damages to the passengers for claims arising out of his international carriage by air.

The phrase "the cases covered by Article 17" extends therefore to all claims made by the passenger against the carrier arising out of international carriage by air, other than claims for damage to his registered baggage which must be dealt with under art 18 and claims for delay which must be dealt with under art 19. The words "however founded" which appear in art 24(1); and are applied to passenger's claims by art 24(2), support this approach. The intention seems to be to provide a secure regime, within which the restriction on the carrier's freedom of contract is to operate. Benefits are given to the passenger in return, but only in clearly defined circumstances to which the limits of liability set out by the convention are to apply. To permit exceptions, whereby a passenger could sue outwith the convention for losses sustained in the course of international

carriage by air, would distort the whole system, even in cases for which the convention did not create any liability on the part of the carrier. Thus, the purpose is to ensure that, in all questions relating to the carrier's liability, it is the provisions of the convention which apply and that the passenger does not have access to any other remedies, whether under the common law or otherwise, which may be available within the particular country where he chooses to raise his action. The carrier does not need to make provision for the risk of being subjected to such remedies, because the whole matter is regulated by convention".

"The convention does not purport to deal with all matters relating to contracts of international carriage by air. But in those areas with which it deals and the liability of the carrier is one of them the code is intended to be uniform and to be exclusive also of any resort to the rules of domestic law".

"Alongside these principles, however, there lies another great principle, which is that of freedom of contract. Any person is free, unless restrained by statute, to enter into a contract with another on the basis that his liability in damages is excluded or limited if he is in breach of contract. Exclusion and limitation clauses are a common feature of commercial contracts, and contracts of carriage are no exception. It is against that background, rather than a desire to provide remedies to enable all losses to be compensated, that the convention must be judged. It was not designed to provide remedies against the carrier to enable all losses to be compensated. It was designed instead to define those situations in which compensation was to be available. So it set out the limits of liability and the conditions under which claims to establish that liability, if disputed, were to be made. A balance was struck, in the interests of certainty and uniformity".

"The conclusion must be therefore that any remedy is excluded by the convention, as the set of uniform rules does not provide for it. The domestic courts are not free to provide a remedy according to their own law, because to do this would be to undermine the convention. It would lead to the setting alongside the convention of an entirely different set of rules which would distort the operation of the whole scheme".

"Were remedies outside the convention to become available, it would encourage litigation in other cases to restrict its application still further in the hope of obtaining a better remedy, against which the carrier would have no protection under the contract. I am in no doubt that the convention was designed to eliminate these difficulties. I see no escape from the conclusion that, where the convention has not provided a remedy, no remedy is available. For these reasons, I would dismiss both appeals".

13. WE are in agreement with the House of Lords that if the grievance of the aggrieved person is on account of death, wounding of a passenger or any other bodily injury suffered by a passenger on account of an accident onboard the aircraft or during its embarking or disembarking, the claim against the carrier

must necessarily be founded under the provisions of the Carriage by Air Act, meaning thereby that not only the liability of the carrier in such a case would be governed by the provisions of the said Act, the action against the carrier also will have to be initiated within the period of limitation prescribed there -under. In other words, he will have no remedy outside the convention as incorporated in the Carriage by Air Act, 1972 either before a Civil Court or before a Consumer Forum, in a case of death, wounding of a passenger or his suffering bodily injury on account of an accident onboard an aircraft or during the process of embarking and disembarking.

14. WE also agree with the House of Lords that Warsaw Convention as amended at The Hague in 1955, provides the exclusive cause of action and remedy in respect of loss, injury and damage of any kind, suffered by a passenger on account of an accident onboard the aircraft or in the course of its embarking or disembarking and therefore, no claim on account of a mental injury which does not have a manifestation on the body of the passenger, is at all maintainable against a carrier. In our view, such a claim will not be maintainable even if there is some deficiency on the part of the carrier in rendering services to the passengers, since, grant of compensation in such a case would be in derogation of the provisions of Carriers" Act, 1972. Section 3 of the Consumer Protection Act makes it amply clear that though the provisions of the said Act are in addition to, they cannot be in derogation of the provisions of any other law for the time being in force.

15. WE however, cannot accept the proposition that even in a case which does not involve an accident onboard the aircraft or during the process of embarking or disembarking, no remedy at all is available to a person, who is aggrieved on account of a deficiency in the services, rendered by a carrier. For instance, a person who, while onboard an aircraft may have to remain hungry or thirsty during the course of journey if no meals or water is provided to him onboard the aircraft or he may, on boarding the aircraft find that the seat allocated to him is occupied by a member of the crew or the seat on which he is made to sit during the course of journey may be found broken or damaged causing great discomfort to him during the course of journey. There may be no accident as such in such a case, though there may be deficiency in the service rendered to him by the carrier. To say that he has no remedy at all against the carrier even in such a case would not be a just, fair and reasonable view and could never have been the intention of the contracting parties. There can be umpteen such examples where there is deficiency on the part of the carrier onboard an aircraft or during its embarkation or disembarkation but there is no accident. To say that despite all his sufferings, the passenger would have no remedy at all against the carrier would result in gross injustice to the passenger and in our view, could not have been intended by the contracting parties to the convention. In taking this view, we find support from Sub -Rule (1) of Rule 24 of Schedule -II, which provides that "in the cases covered by Rules 18 and 19" an action for damages, however, founded, can only be brought subject to the conditions and limitation set out in

these rules. In view of the provisions contained in sub -rule (2) of the aforesaid rule, the provisions of sub -rule (1) would also apply to the cases covered by Rule 17, meaning thereby that in the cases covered by Rule 17 inaction for damages however, founded can only be brought subject to the conditions and limits set out in its rules. The aforesaid provision is a clear indicator that the intention was to deny remedy outside the provisions of the convention only in the cases covered by Rule 17, 18 and 19. Had the intention of the contracting parties been to deny any remedy to a person aggrieved from any act and / or omissions of a carrier on board an aircraft, the wording of Rule -24 would have been altogether different and there would be no necessity of the restricting the scope of aforesaid rule to the cases covered by Rule 17, 18 and 19. Of course Rule 17 will apply only if there is an accident on board an aircraft or during its embarkation or disembarkation.

16. EVEN if we proceed on the assumption that in a case of mental injury suffered by a passenger on account of an accident on board an aircraft, a claim before the Consumer Forum is maintainable, wherever any deficiency on the part of the carrier in rendering services to the concerned passenger is made out, no compensation to the complainants before us can be ordered, since no deficiency on the part of the Indian Airlines in rendering services to the complainants has been established. It is an undisputed position that the security of the passengers at an aircraft is controlled by the Civil Aviation Department / Bureau of the country in which the passenger board the plane, and the carrier, whether national or international, has no role to play in the checking and frisking of the passengers and their baggage. The Civil Aviation Bureau / Department of a carrier cannot be said to be an agent of the carrier since the duty of the checking and frisking the passengers and their baggage / luggage is entrusted to them under the law of the country where the passengers board the aircraft and not by virtue of an agreement with the carrier. It is not permissible for the carriers to engage an agency of their choice for the purpose of checking and frisking the passengers and their luggage / baggage at an Airport, nor is a carrier permitted to allow the passengers to board an aircraft without frisking by the officials of the concerned Civil Aviation Department / Bureau. A large number of carriers operate from International Airports. If they are allowed to engage their own security agency or to check and frisk the passengers as well as their luggage / baggage through their own employees, the security of the passengers, crew members and the aircraft itself may be seriously jeopardized since neither a uniform set of rules in such a case be applied for such checking and frisking nor can the Government of country ensure the safety of the passengers, crew and the aircraft during the course of the journey.

17. IN the case before us, it was the duty of the officials of the Civil Aviation, Bureau of Nepal to check the passengers, including the militants who were able to carry arms and ammunitions with them and therefore, negligence in the aforesaid checking and frisking can be attributed only to the aforesaid Nepalese officials. The officials of the India Airlines, admittedly, were not entrusted with

the task of the frisking and checking the passengers and their belongings at Kathmandu Airport. Therefore, no case of deficiency on the part of the Indian Airlines in rendering services to the passengers is made out on account of the militants being able to carry arms and ammunitions to the aircraft. For the reasons stated hereinabove, impugned order passed by the State Commission cannot be sustained and the same is accordingly set aside. The complaint is consequently dismissed. No order as to costs.