

(1961) 08 CAL CK 0021
In the Calcutta High Court
Case No : Suit No. 611 of 1957

Sm. Mukul Dutta Gupta and Others	Vs	APPELLANT
Indian Airlines Corporation		RESPONDENT

Date of Decision : 11-08-1961

Acts Referred:

Aircraft Rules, 1937 — Rule 115, 161
Contract Act, 1872 — Section 23
Fatal Accidents Act, 1855 — Section 1A

Citation : AIR 1962 Cal 311

Hon'ble Judges : P.C. Mallick, J

Bench : Single Bench

Advocate : B.N. Dutt Roy and A.P. Chowdhury, for the Appellant; Gouri Mitter and Bachawat, for the Respondent

Judgement

1. The plaintiffs are the widow and minor children of one Sanat Kumar Dutta-Gupta who was killed in an air crash. They have instituted this suit under the Fatal Accidents Act for the recovery of damages against the defendant Corporation. It is pleaded in the plaint that the deceased Sanat Kumar purchased a ticket as a passenger from Dum Dum Airport to Jorhat on the defendant's scheduled route known as the Calcutta-Mohonbari route. On March 21, 1956 at about eleven o'clock in the morning the aircraft crashed while landing at Salami Airport. Sanat Kumar was killed in the crash. The plaintiffs' case is that the death of Sanat Kumar was caused by the negligence of the defendant Corporation or its employees. The particulars of negligence are set out in paragraph 5 of the plaint. Leave to furnish further particulars of negligence and/or misconduct however was reserved after discovery. Such further particulars were furnished at the time of the opening of the case by Mr. Dutt Roy the learned counsel for the plaintiff. It is to this effect, that there has been a breach of Rule 115 of the Rules framed under the Indian Aircraft Act. It is pleaded that the defendant is attempting to evade liability by setting up certain conditions of carriage. The plaintiffs' case is that Sanat Kumar had no notice of the said

conditions of carriage nor did he accept them and consequently the same are not binding. The validity of the said conditions has also been disputed. Sanat Kumar was only 44 years of age when he was killed. He was in the best of health and well placed in life. He held a permanent employment in Messrs. I. G. N. and Rly. Co. Ltd. a reputed British company and at the time of his death he was drawing a salary of Rs. 700/- per month with prospect of earning unto Rs. 1,500/-per month. The sum of Rs. 3,00,000/- has been claimed as damages.

2. The main defence disclosed in the written statement is that under the contract of carriage the defendant Corporation is relieved of all liability, Sanat Kumar having expressly or impliedly consented to the conditions of carriage. The conditions relied on will be fully stated later. It is, pleaded these conditions of carriage were binding on Sanat and are also binding on the plaintiffs. All allegations of negligence made in paragraph 5 of the plaint have been denied. It is contended that the defendant had taken all reasonable care and precautions and that the accident was beyond the control of the defendant and could not have been foreseen. On these averments it is submitted that the suit is not maintainable and the same should be dismissed with costs. On these pleadings the following issues were raised :

1. Are the plaintiffs heirs and legal representatives of the deceased?
2. Was there any contract of carriage as alleged in paragraphs 2, 3 and 4 of the Written Statement?
3. (a) Were the conditions of carriage not pointed out to the deceased?
(b) Did the deceased have no notice of the conditions of carriage?
(c) Was the deceased not bound by the conditions of carriage as alleged in paragraph 12 of the plaint?
4. Is the defendant exempt from liability under the terms and conditions of the contract of carriage?
5. Was the accident caused due to the negligence or failure to take ordinary care as alleged in paragraph 5 of the plaint?
6. Was the accident beyond the control of the defendant and could not be foreseen as alleged in paragraph 8 of the written statement?
7. Did the defendant take reasonable care to avoid the accident as alleged in Paragraphs 7 and 9 of the written statement?
8. To what reliefs, if any, the plaintiff is entitled?

3. At the trial, documents disclosed by the parties and embodied in the Brief of Documents have been rendered and marked as Exhibit, parties having dispensed with formal proof. Apart from these the plaintiff Sm. Mukul Dutta-Gupta tendered her own evidence in support of her case. The defendant tendered the evidence of one Pankaj. Kumar Mukerji an employee attached to the Reservation Department

of the defendant company and whose duty it was to issue tickets to the passengers. These are all the evidence on record.

4. It is not disputed that if the contract of carriage as printed on the ticket is held to be valid and binding on Sanat Kumar and/or the plaintiffs, then the defendant would not be liable in law. The first point to be considered is Did Sanat Kumar have knowledge of the conditions of carriage and did he accept them? Sanat Kumar is dead and his widow Sm. Mukul Dutta-Gupta who gave evidence could not throw any light on the question. She was not present when the ticket was purchased. The defendant's witness Pankaj Kumar also could not give any direct evidence on the point. He was employed by the defendant Corporation and was at the counter when the ticket was sold. Beyond that he cannot say anything, in cases like these one hardly expects direct evidence on the point. There are, however, facts proved in this case from which certain inferences can be drawn. It is in evidence that the ticket was sold at the office of the defendant Corporation in Hindusthan Buildings. In the office a board was affixed at the door in which the conditions of carriage are written in bold letters. In the ticket itself it is stated that the ticket was issued subject to the conditions of carriage. The conditions of carriage are Printed on the cover page of the ticket. It is true they are printed in very small letters. I was unable to read it without the assistance of a magnifying glass, the learned Standing Counsel however could read it without feeling any difficulty. This much, however, is established beyond controversy that the defendant corporation did take steps to bring it to the notice of the passengers that the tickets were being issued subject to certain conditions of carriage. A passenger who was so minded could have been apprised of these conditions, if not from the ticket itself, at least from the Board displayed at the door in which the conditions of carriage have been stated in sufficiently bold letters legible to all. I will however, record my view that having regard to the seriousness of the conditions so far as passengers are concerned the conditions should have been printed in red letters in the ticket in order to attract the attention of the passengers. The tickets issued are not required to be signed by the passengers and hence written acceptance of the terms cannot be proved in the case of passenger transport. In the case of consignment of goods the Consignor or his agent is required to sign the consignment note in which the conditions of carriage are printed and acceptance can be proved by proving the signature of the Consignor or his agent on the document issued. Not so in the case of passenger ticket.

5. It is contended by Mr. Dutt Roy that the law requires that the passenger must not only have knowledge of the conditions of carriage but it must also be proved that the passenger accepted the same. Certain English authorities have been cited which lay down that it is necessary to prove not only knowledge of the conditions of carriage but also assent to the conditions by the passenger. The learned Standing Counsel on the other hand contended that the carrier is required in law only to take all reasonable steps to bring it to the notice of the passengers that the tickets are issued subject to certain conditions of carriage. If

the passenger purchases the ticket in such circumstances, he must be deemed to have knowledge of the conditions and impliedly accepted the terms. Actual knowledge of the conditions of carriage and acceptance of the same need not be as indeed it cannot be proved in most cases. Both the learned counsel cited a number of authorities which I do not think necessary to deal with in detail. The law on the point is stated by Anson in his Law of Contract 25th Ed. at Page 149 as under :

"Three general rules have been laid down by the Courts to determine whether the traveller or depositor will be bound by the terms contained in the ticket :

1. If the person receiving the ticket did not see or know that there was any writing on the ticket, then he is not bound by the conditions.

2. If he knew that there was writing, and knew or believed that the writing contained conditions, then he is bound by the conditions even though he did not read them and did not know what they were.

3. If he knew that there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound if the party delivering the ticket has done all that can reasonably be considered necessary to give notice of the term to persons of the class to which he belongs."

6. In the instant case I am satisfied that the defendant Corporation gave reasonably sufficient notice that the tickets are issued subject to the conditions of carriage. The conditions are displayed on the Board and could be seen by anybody who was so minded. Sanat Kumar must be deemed to have purchased the ticket with such notice and must also be deemed to have accepted them impliedly though not expressly. on the evidence it is impossible to record a finding as to whether Sanat Kumar had actual knowledge of the conditions of carriage or expressly accepted it. There is no evidence one way or the other. If in law, the burden is on the plaintiff to prove that the plaintiff had no actual knowledge of the conditions of carriage or that he did not expressly accept them, the plaintiffs cannot be held to have discharged this burden. If on the other hand the burden is on the defendant to prove that Sanat Kumar had expressly accepted the conditions with full knowledge, the defendant cannot be held to have discharged this burden. However, in the view that I have taken, the question does not arise.

7. The next question to be considered is whether the negligence alleged against the defendant has been Substantiated in evidence. There is not the least doubt that the co-pilot A.M. Rao who actually landed the aircraft was negligent in more ways than one. It appears in evidence that subsequent to the accident an investigation was made as provided for under the Indian Aircraft Rules. The Investigating Officer in his report held that there was negligence in landing the aircraft. In reply to the letter of the plaintiffs solicitor addressed to the Director General of Civil Aviation one Malhotra the Chief. Inspector of Accidents gave the reply on the behalf of the Director General of Civil Aviation. In this reply the

plaintiff solicitor was intimated that the copy of the report cannot be supplied. But to meet the requirements of the plaintiffs he sent extracts from the investigation report dated 21-3-1956 which is here-under stated :

Extracts from the Investigation Report on the accident to I. A. C. Dakota VT-CGN at Tezpur on 21-3-1956.

Opinion : The accident was due to failure of the co-pilot, who was not qualified to do the landing to level off the aircraft properly during the landing, thus causing it to bounce. Insufficient or delayed corrective action then caused it to stall on to its port wing and swing off the runway.

All other evidence including copies of correspondence between the pilot and co-pilot on the one hand and the authorities of the Airline Corporation and/or the authorities of the Civil Aviation Department leaves no room for doubt that there was negligence on the part of the co-pilot in landing the plane. Indeed, the learned Standing Counsel very fairly admitted that in the instant case it cannot but be held that the co-pilot was guilty of negligence in landing the plane. I must, therefore, record a finding that there was negligence on the part of the defendant Corporation in landing the plane and this negligence led to the crash which caused the death of Sanat Kumar.

8. On the evidence tendered I must, however, hold that the aircraft was airworthy and held a certificate to that effect, that it was regularly maintained in accordance with the approved maintenance schedule and that it had the valid certificate of daily inspection. I must also record that subject to what is hereinafter stated, the rules prescribed under the Indian Aircrafts Rules for maintenance and operation of the aircraft have been complied with. It is now to be considered whether Rule 115 of the Aircraft Rules has been complied with in the instant case. Rule 115 of the Aircraft Rules is one of the general rules of air traffic and reads as follows :

"To facilitate the application of the rules for air traffic contained in this Part, the pilot of a mechanically-driven aerodyne shall, save in exceptional circumstances, be placed either in the plane of symmetry of the aerodyne or on the left-hand side of such plane."

9. The pilot in command on the plane was Capt. Bose. Under the Rules there must be a co-pilot for the operation of this class of aircrafts. In the instant case, while Capt. Bose was the pilot in command, Mr. A.M. Rao was the co-pilot. Both of them must have what is known as "B Licence". A.M. Rao, though holding a "B Licence", was not qualified to command a plane. A pilot qualified to command a plane must hold "the pilot-in-command endorsement" in his licence. Capt Bose, being properly qualified, held such an endorsement, whereas A.M. Rao, not having the qualification, his licence held no such endorsement. At the material time, the seat of the pilot was occupied by A.M. Rao, who had no qualification to command a plane. The learned Standing Counsel contended that all that the Rule requires is that the occupant of the pilot's seat must be a pilot holding a "B

licence". A.M. Rao held the "B Licence". Hence the requirement of Rule 115 has been complied with in the instant case. I am unable to accept this argument of the learned Standing Counsel. The Rule requires that the pilot-in-command of the aircraft must occupy the specified seat in the aircraft. By occupying that seat, the pilot can have proper control of the aircraft and proper look-out. The qualification for being a pilot for flying different classes of aircraft is determined by different rules, and on that determination licences are given. There are different classes of licences wherein is endorsed the qualification for flying different classes of aircraft. In order to fly a double-engined plane, one must not only hold a "B Licence" but also a pilot-in-command endorsement in one's certificate or licence. A pilot having the requisite qualification selected to command a plane in a particular flight is the pilot referred to in Rule 115. He is required to occupy the seat from which he can control the flight and discharge his duties. The Rule requires that the pilot-in-command and nobody else can occupy that specified seat. In the instant case, the breach consists in Capt. Bose's not being in occupation of the seat at the material time and in A.M. Rao being in occupation thereof. The fact that A.M. Rao had a "B Licence" is immaterial. He was not the pilot-in-command nor held an endorsement to that effect in his licence. In the absence of such endorsement, he must be held to be incompetent to command a plane and it is useless for the learned Standing Counsel to rely on his flying records in proof of his ability to command a plane. Further, proof of the pudding is in the eating, and the instant case of bad and dangerous landing is the conclusive evidence of the incompetence of A.M. Rao. This, however, is by the way.

10. That there has been a breach of Rule 115 is proved by the other evidence on record. Both the pilot and the co-pilot were called upon to show cause why disciplinary action should not be taken against them, inter alia, for breach of Rule 115. Neither of them contended that there was no breach. They admitted the guilt. For breach of this Rule the licence of both the pilots was suspended for a period of six months. Both of them were dismissed by the defendant Corporation for the same offence. In recommending the dismissal of these pilots, Shri L.C. Jain, Director General of Civil Aviation in India, wrote a letter dated July 21, 1956 to Shri Sankar Prasad,, Chairman of the defendant Corporation which, inter alia, states as follows:

"In their explanations both Capt. Bose and Shri Rao have confessed that it was Shri Rao who occupied the left-hand seat from Gauhati to Tezpur and made the landing which resulted in the accident. Capt Bose during the flight acted as a co-pilot and the functions of the commander were performed by Shri Rao.

Since Shri Rao did not possess the PIC. Endorsement his flying as a commander and making the landing was in contravention of Rules 115 and 140 of the Indian Aircraft Rules, 1937.

It is clear that all pilots before flying as pilot-in-command of an aircraft with two or more engines on an air transport service should hold the pilot-in-command

endorsement. As Shri Rao did not Possess the requisite PIC Endorsement he flew the aircraft in the capacity of a commander in contravention of the Rules."

On this letter, the Chairman of the Corporation dismissed both the pilots.

11. On a consideration of the entire evidence on record and on a proper construction of the Rule, I find that in the instant case there has been a breach of Rule 115 of the Indian Aircraft Rules. The breach of duty imposed by Rule 115 amounts to negligence in law. I hold that negligence charged against the Corporation has been established on the evidence tendered and as indicated above.

12. A question has been raised whether a breach of Rule 115 is by itself an actionable tort which would entitle a person suffering damage by reason of the breach to sue for damages. It is pointed out by the learned Standing Counsel that the breach of Rule 115 is made an offence in the Rule itself punishable with imprisonment or fine or both. (Vide Rule 161 and Schedule VI of the Aircraft Rules). The Act which creates the duty provides for the remedy, that is, the manner in which the duty is to be enforced. In such cases, argued the learned Standing Counsel, the duty created by the statute is only a public duty to enure to the benefit of the public in general and not for the benefit of a particular member or class of the general public. In such cases, therefore, there is no breach of duty to any individual or class to be enforced by civil action. The learned Standing Counsel cited the case of *Atkinson v. Newcastle and Gateshead Waterworks Co.*, reported in (1877) 2 Ex D 441, where it was held that the defendant company was not liable in damages for destruction of the plaintiff's house by fire, although the destruction was directly due to the failure of the defendants to perform the duty laid upon them under the Waterworks Clauses Act 1847 to maintain an extra pressure of water in their water pipes for the purpose of extinguishing fire. The statute contained a penal clause and the Court held, on construction of the statute, that the intention of the legislature was that it was to be the only remedy. The other cases cited were *Saunders v. Holborn District Board of Works* (1895) 1 QB 64; *Phillips v. Britannia Hygienic Laundry Co. Ltd.* (1923) 2 KB 832; *Clarke v. Brims* (1947) 1 KB 497; *Biddle v. Truvox Engineering Co.* (1952) 1 KB 101. Learned counsel for the plaintiff, on the other hand, cited the following cases : *Groves v. Wimborne* (1898) 2 QB 402; *Read v. Croydon Corporation* (1938) 4 All ER 631, in which later case a breach of duty u/s 35 of the same Act as in *Atkinson's* case (1877) 2 Ex D 441, to supply pure water was held to give a cause of action in damages to the ratepayer injuriously affected thereby. Many other cases were cited on the point which need not be considered.

13. Salmond in his treatise on Torts, 11th Edition, dealing with a number of cases, including the cases cited by learned counsel on either side, summarises the law as follows at page 604:

"The breach of a duty created by statute, if it results in damage to an individual,

is prima facie a tort, for which an action for damages will lie at his suit. The question, however, is in every case one as to the intention of the legislature in creating the duty, and no action for damages will lie if, on the true construction of the statute, the intention is that some other remedy, civil or criminal, shall be the only one available. If the statutory duty involves the notion of taking care not to injure, the tort is now spoken of as "statutory negligence".

One of the means of determining what the intention of the statute is to ascertain whether the duty is owed primarily to the State or community, and only incidentally to the individual, or primarily to the individual or class of individuals, and only incidentally to the State or community. If the statute imposes a duty for the protection of particular citizens or a particular class of citizen, it prima facie creates at the same time a correlative right vested in those citizens and prima facie, therefore, they will have the ordinary civil remedy for the enforcement of that right--namely, an action for damages in respect of any loss occasioned by the violation of it. Thus in (1898) 2 QB 402 the defendant, a manufacturer, was held liable in damages to one of his servants, who had sustained personal injuries through failure of the defendant to perform his statutory duty of fencing dangerous machinery. But this test is not conclusive. "The duty may be of such paramount importance that it is owed" to all the public. It would be strange if a less important duty, which is owed to a section of the public, may be enforced by an action, while a more important duty owed to the public at large cannot." At page 608 the learned author observes :

"Indeed, it is impossible to lay down any definite principle. The general rule is that "where an Act creates an obligation and enforces the performance in a specific manner performance cannot be enforced in any other manner." But in the words of Lord Macnaghten "whether the general rule is to prevail, or an exception to the general rule is to be admitted, must depend on the scope and language of the Act which creates the obligation and on consideration of policy and convenience". The result is that the law depends on the interpretation which the courts (with or without the aid of the principles of construction which are now falling into some disfavour) may place on any particular statute. To a person unversed in the science, or art, of legislation it may well seem strange that Parliament has not by now made it a rule to state explicitly what its intention is in a matter which is often of no little importance instead of leaving it to the courts to discover, by a careful examination and analysis of what is expressly said, what that intention may be supposed probably to be."

14. The question to be considered, therefore, is whether the rules in the Aircraft Act imposing duty on the persons carrying on aircraft operation was for the protection of a particular class, apart from its being for the benefit of the general public. This necessitates the examination of the Aircraft Act and the Rules made thereunder. The object of the Aircraft Act, as set out in the preamble was to make provision, inter alia, for the use and operation of aircraft. The Central Government is empowered to make rules by notification regulating, inter alia, the

use and operation of aircraft. Extensive power of rule-making is given to the Government, including the power to make rule for the punishment of breach of the rules to be framed. Under this rule-making power the Government framed elaborate and extensive rules to secure safety and efficiency in flying. To secure safety and efficiency in flying, such elaborate provisions are necessary and essential. Even a cursory glance at the various Chapters will indicate how it is felt that the el borata rules are necessary for the purpose of securing safe and efficient flying. Part II of the Rules lays down rules for general conditions of flying. Part III deals with general safety conditions. Part IV deals with the registration and marking of the aircraft. Part V deals with the personnel of aircraft. Part VI lays down the rules of airworthiness. Part VII provides for radio and telegraph apparatus to be kept in each aircraft and their maintenance. Part IX relates to the log book. Part X makes provision for investigation of accidents. Part XI provides for the various things to be kept in the acrodromes. Then comes Part XII which deals with the rules of flying. Rule 115 is a Rule in Part XII Section 3, which section contains four rules, namely, Rules 112 to 115. Rule 112 lays down the general rule of giving way by one class of aircraft to another. Rules 113 to 114 lay down rules to avoid the risk of collision. Rule 115 indicates the seat to be occupied by the pilot. The reason given in the rule itself is "to facilitate the application of the rules of air traffic contained in this Part." It is title that these rules are general in character and are applicable to all aircrafts, public and private commercial and non-commercial. The learned Standing Counsel, therefore, contended that these Rules were framed for the general benefit of the public and they create no duty in favour of any particular class of citizens. I am not concerned in this case with any rule other than Rule 115 in Part XII. The mandatory provision directing the pilot to occupy a particular place in the plane to secure safe flying is considered so essential that the breach of this rule is visited with punishment of imprisonment or fine or both. But I am unable to hold that it is the only remedy intended by the Rules. I discern in this Rule a further duty to the travelling public, in particular, which gives the travelling public a corresponding right. The travelling public, in my judgment, has, therefore the ordinary civil remedy for enforcement of its breach, namely, an action in damages. I am unable to hold that the punishment provided in the Rules was intended to be the only remedy to secure enforcement of the Rule. Unless there is a dear indication to the contrary in the statute that the punishment Provided in the statute is the only remedy, I would not be justified in holding that a breach of the Rule made, inter alia, to secure the safety of a passenger in a commercial aircraft would not give a cause of action to the passenger damnified by reason of the breach of the Rule.

15. The learned Standing Counsel however rightly pointed out that except for one purpose the discussion becomes academic in this case. Apart from the breach of Statute, there is the case of negligence and there is Overwhelming evidence to prove it. In fact, the learned Standing Counsel did not seriously dispute that there was negligence on the part of the defendant Corporation in the

instant case. So far as Rule 115 is concerned his contention is that the breach may be an evidence of negligence which may give a cause of action for damages against the defendant Corporation but that the breach by itself is not an actionable tort. This discussion has only become relevant, according to the learned Standing Counsel because of the case made by the plaintiff against the defendant Corporation to this effect that even if in law the liability in damages for mere negligence can be contracted out, a liability for breach of a statutory duty cannot be contracted out. This aspect of the question will have to be considered later.

16. We now come to the most important point posed in this case, namely, whether the defendant Corporation is exempted from any liability of the Conditions of Carriage, The conditions relied on and also referred to are certain clauses in Condition No. 6. They are set out hereunder :--

"6. Carriage hereunder shall be governed as follows:-

(a) International carriage as defined by the Convention of Warsaw of 12th October, 1929, for the unification of certain rules relating to International Carriage by Air is subject to the rules relating to liability established by the said Convention. The expressions "High Contracting Parties" and "High Contracting Party" used in Articles 1 and 28 of the said Convention shall mean States and Territories, which are bound by the said Convention either through ratification or adherence.

(b) In all cases in which the carriage is not governed by the said Convention passenger and

(a) the property and/or baggage of the passenger shall be carried at the passenger's own risk and

(b) the carrier not being common carrier, shall not accept the obligation or liability of a common carrier and (c) shall be exempt from any liability under the law whether to the passenger or to his dependants next of kin and other legal representatives in case of death, injury or loss and/or detention of the property or baggage of the passenger from any cause whatsoever including negligence or default of pilots, agents, flying ground and other staff and/or employees of the carrier and/or breach of statutory and/or other regulations whether in the course of the journey, or prior or subsequent thereto and whether while the passenger, his property and/or his baggage can be on board the aircraft or otherwise.

(c) Acceptance of this ticket shall expressly and automatically imply that the passenger holds the carrier indemnified against all claims, suits, actions, proceedings, damages costs charges and/or expenses in respect of and/or arising out of and/or in connection with such" carriage and/or other ancillary services and/or operations of the carrier, whether caused by and/or occasioned by the act, neglect and/or default of the carrier its servants and/or agents and/or employees as aforesaid or otherwise however and that, the passenger renounces

for himself, his heirs, dependants, next of kin and/or other legal representative all rights and/or claims against the carrier for compensation for damage injury and/or death sustained on board the aircraft and/or in the course of any of the operations of flight, embarking or disembarking and/or in the course of any other ancillary operation and/or service of the carrier incidental to the carriage, caused directly and/or indirectly to the passenger and/or his belongings and/or to persons who except for this condition, might have been entitled to make a claim whether such damage be caused and/or occasioned by the act, neglect and/or default of the carrier its servants agents and/or employees or otherwise howsoever.

(d) The obligation of the carrier is expressly limited to the journey between the airports of departure and destination and shall not in any event subsist previous or subsequent thereto, in particular no part or any journey undertaken by the passenger, whether such journey be by land and/or waterborne and/or air-borne, previous or subsequent to the carriage specified on the ticket shall be deemed to form part of such carriage.

(e) The passenger shall comply with all government rules, regulations, present regulations and/or notifications for the time being in force and as may be introduced from time to time and shall fulfil all requirement of the law and shall present all existing and/or entry and/or other documents required by the law and shall not be entitled to any refund of the fare paid in the event of non-performance of the journey arising out of any cause directly and/or indirectly attributable to his failure to comply with such regulations of the Government and the law, the passenger shall also observe the instructions, of the carrier, its agents, servants and/or employees concerning all matters connected with the carriage hereunder, but no agent, servant and/or employees of the carrier shall have authority to alter and/or modify and/or waive any provisions of this contract."

Clause (a) relates to international carriage which is regulated by the rules framed in the International Convention at Warsaw and since incorporated in the Indian Statute of Carrier by Air Act, 1934. This Statute will have to be referred to and considered later. Clauses (b) and (c) deal with the liabilities of the defendant Corporation in respect to all cases other than those regulated by the Statute of International Carriage. Clause (d) provides that the defendant's obligation is limited to the journey between the airports of departure and destination. Clause (e) provides that the passenger shall comply with the rules and regulations issued by the Government and for the time being in force. The passengers must also observe and carry out and observe all instructions of the defendant or its agents. Mr. Dutt Roy, learned Counsel appearing for the plaintiff, made the comment that under the conditions of carriage the passengers have all obligations and no rights and no remedy whatever. It is the Corporation which has all the rights and privileges and no obligation--not even the obligation to abide by the rules framed by the Government for safety of the air flightg and of

passengers of that flight.

17. These clauses in the Contract of Carriage by the defendant Corporation were considered by this Court and other High Courts of India which should first be considered. In the case of National Tobacco Co. of India Ltd. Vs. Indian Airlines Corporation, , the dispute was whether the defendant Corporation was liable for negligence on the part of its employees in respect to 20 cases of cigarettes delivered at Calcutta to the defendant Corporation for carriage to Madras for reward. The consignment note contained the same conditions of carriage as stated above. The decision of Law, J., has been set out in the head-note which reads as follows :--

"There is no statute for internal air carriage in India. The Indian Airlines Corporation is a common carrier as opposed to a private carrier but it is not a "common carrier" within the meaning of the Carriers Act, 1865. The liability of the Corporation as a common carrier is governed by the English Common Law as administered in India, the Contract Act, 1872, has no application. As the English Common Law is applicable, the Corporation can exempt itself of all liabilities, including its liability [or negligence, by special agreement."

It was held that the Corporation is a "Common Carrier" as opposed to private carrier and that the law applicable is the old Common Law of Carrier which prevailed in England. It is held that the common carrier is empowered to exempt himself from liability for negligence by special agreement. In the case of Indian Airlines Corporation Vs. Keshavlal F. Gandhi and Another, , the same view was taken. Banerjee, J., in delivering judgment opined that the Airlines Corporation is a Common Carrier and the relationship between the parties to the contract of carriage is to be governed by the Common Law of England governing the rights and liabilities of the Common Carrier. His Lordship further held that the law permitted Common Carriers totally to contract themselves out of liabilities for loss or damage of goods carried as Common Carrier. In the case of Rukmanand Ajitsaria Vs. Airways (India) Ltd. and Another , Sarju Prosad C. J., took the same view. In the case of Indian Airlines Corporation Vs. Jothaji Maniram, the same view has been expressed by the Madras High Court. All the cited cases are cases of contract of carriage of goods by air.

18. No decision has been cited in which it is held that the Air Corporation is competent in law to contract out of its liability for negligence resulting in the death of a passenger. This is the first case in which the point is raised that by reason of the exemption clause in the Contract of Carriage set out above, the defendant Corporation is relieved of its liability even though the personal injury was caused by negligence and resulted in the death of the passenger. The offending clause in the conditions of carriage has been held to be valid in respect to the contract of carriage of goods in all the cases noticed above. Are the clauses equally valid in respect to the Contract of Carriage of passengers? That is the question to be answered in this case.

19. The learned Standing Counsel contended that there is no Statute Law in India defining the rights and liabilities of a Common Carrier carrying on air transport business within the country. Carriers Act of 1865 defines the rights and liabilities of a Common Carrier engaged in the business of transport of goods by land or by inland navigation. It does not deal with the air transport nor yet transport of passenger. The Carriage by Air Act (Act XX of 1934) regulates international transport by air both of passengers and of goods. It does not regulate the rights and liabilities of carriers engaged in the business of internal transport by air either of passengers or of goods. There is, therefore, no Statute Law regulating internal air transport of passengers or goods. The Rules of Common Law of England is, therefore, the law to be applied in determining the rights and liabilities of a Common Carrier engaged in the business of air transport within the country. In England the rights and liabilities of a carrier by air *tor hire* is no longer governed by the Common Law, Statute Law now governs both international and internal carriage by air. Carriage by Air Act, 1932, regulates international carriages by air. By this Act the rules of air carriage adopted by the Warsaw Convention have been made the rules governing international carriages by air. Powers were given by Carriage by Air Act, 1932 to the Government by an Order in Council to extend the same rules to non-international carriage by air, subject to exceptions, modifications and adaptations. In exercise of that power Carriage by Air (Non-international Carriage U. K. Order, 1952) was Promulgated. The Act and the Order, therefore, cover the entire field determining the rights and liabilities of a carrier by air for hire. Under the Statute a common carrier of carriage by air is liable for damages in the event of death or injuries suffered by a passenger due to negligence and the carrier is debarred from contracting out of his liability. The Common Law Rule is, therefore, completely superseded and it no longer determines the liability of a common carrier of carriage by air in England. In India, however, international air carriage is regulated by statute so far as international air carriage is concerned. The internal air carriage is not yet so regulated by Statute. It follows, according to the learned Standing Counsel that the old Common Law Rules, though no longer regulate the right of a common carrier by air in England, nevertheless regulate the rights of a common carrier by air in India in respect to internal air transport.

19a. The argument of the learned Standing Counsel is that in the absence of express statutory provision applicable to a Particular case the Courts of India must apply the English Common Law Rules. There is no authority, however, for such a wide proposition. The Courts of India are not bound to apply the Common Law of England whenever there is no express statutory provision governing the case. The Common Law Rules are only applied in such cases on consideration of justice, equity and good conscience provided it is found applicable to Indian Society and circumstances. In the early stage of British rule in the absence of any law in India the Courts were required to apply laws prevailing in England as rules of justice, equity and good conscience. As and when the laws in India were codified the necessity to adopt the English Common Law became unnecessary

and the Privy Council had to warn in many of their later decisions that whenever the law is codified in India one should look to the Code for guidance and not to the English Common Law. It is only in respect to matters still uncovered by Statute Law, that the Court may have to look to English Common Law for guidance not as such but as rules of justice, equity and good conscience. The rule of Common Law found unsuitable to England and wholly replaced by Statute Law can hardly be considered to be rules of justice, equity and good conscience. The same reason that made it unsuitable for England must be held to be unsuitable for India as well in respect to a particular class of carriage. I find neither reason nor justice in importing into India rules of English Common Law round inapplicable in England and now relegated in the lumber room of archaic laws. I cannot persuade myself to apply them to India as rules of justice, equity and good conscience after its supersession in, the place of its origin. The case of AIR 1937 354 (Nagpur) is instructive and contains important observations relevant to the points under consideration. The point arose before a Bench consisting of two Additional Judicial Commissioners, namely, Niyogi and Staples, in a dispute between an employer and his workmen. Under the Common Law in a suit by a workman against the employer for negligence there is the defence known as the defence of common employment. In England by the Employers' Liability Act that defence was taken away. There was no such corresponding legislation in India. The question arose whether the defence of common employment was still open in India even though there was no statute in India corresponding to the Employers' Liability Act. There was a difference of opinion between the learned Judicial Commissioners and the matter was referred u/s 98(2) of the Code of Civil Procedure. Niyogi, A. J. C. Opined that this doctrine of common employment no longer is open in India as well. At page 362, Niyogi, A. J. C. makes the following observation:-

"It is true that the Employers' Liability Act has not statutory force in India and no Court would be justified in extending its provisions to India; nevertheless, any Court in India which takes recourse to Common Law of England and seeks to apply its principles to India cannot afford to ignore the extent to which the Common Law stands abrogated by Statute. The rule of common employment was felt to be unfair and inequitable in some of its aspects and it was to correct the unjust operation that the statute was enacted. The position in England today is well stated in Halsbury's Laws of England, Vol. 20, page 131; Article 261, in these words:-

"An employer sued by a servant in respect of injury incurred in the course of the employment may still set up as a defence the doctrine of common employment, save in so far" as the doctrine is abrogated by the Employers' Liability Act, 1880."

It would be clear therefore, that in cases indicated in the statute no employer is entitled to raise the defence of common employment; nor have the Courts of Common Law any jurisdiction or power to entertain such a defence. It therefore

appears to me that it is manifestly anomalous and illogical to apply, in the name of justice, equity and good conscience, to India the doctrine of Common Law which is no longer regarded at its source as fair and equitable and enforced as such."

Pollock, J., while considering the reference in his judgment cited a number of cases in which the Courts of India have refused to apply the rules of English Common Law as rules of justice, equity and good conscience. Stone, C. J., in endorsing the view of Pollock, J., made the following observation at page 363:-

"I concede that, there is a strong presumption that any rule of English Law is in accordance with the principles of justice equity and good conscience in England, but I consider that the Court is entitled to examine the rules in order to find out, as Sir Barnes Peacock put in 9 Suth WR 230, *Degumburee Dabee v. Eshan Chundur Sein*, whether the rules are in accordance with the true principles of equity. The Courts in India had, on several occasions, refused to apply a rule of English law on the grounds that it is not applicable to Indian Society and circumstances."

and again at page 366:-

"But when one in India considers whether a particular branch of the English Common Law should here be applied, one has to ask oneself whether it is, in the language of the Central provinces Act, "in accordance with the justice, equity and good conscience", and one has, in considering that question, to consider the age in which the application is to be made. Things have been part of the English Common Law which are not consonant to modern ideas of justice and on which, had a Judge in England to consider the matter now free from authority, a different conclusion would unquestionably be arrived at to what was arrived at in the 15th, 16th or 17th centuries.""

With respect I agree with the observations made and recorded above.

20. The learned Standing Counsel has argued that the rules of English Common Law are in existence in England for at least three centuries and this would not have been possible had they not been rules of justice, equity and good conscience. This argument loses all its force when it is remembered, that the rules of English Common Law have been found to be unsuitable in England itself, so far as air transport is concerned and an air carrier in England is now debarred by statute from altogether contracting out of its liability for negligence causing death of an air passenger. The Statute has imposed an absolute liability on a common carrier by air to pay compensation in case a passenger dies as a result of misadventure in respect to air transport. A rule found unsuitable in England cannot logically be held suitable to India as being rules of justice, equity and good conscience. I would, therefore, not look to English Common Law Rules for inspiration and guidance in the instant case. England has rejected it and there is no reason why India should cling to it for no other reason than this that once upon a time in the distant past carriers of England were allowed by common Law

to contract out of their liability for negligence to a passenger. In my judgment, we must look elsewhere to find the rules to be applied in cases like the one we are considering as rules of justice, equity and good conscience.

21. Reference has already been made to the Carriage by Air Act (Act XX of 1934). It purports to adopt Warsaw Convention for the unification of certain rules relating to International Carriage by Air. These rules relating to international carriage are embodied in the First Schedule to the Act and as such are the laws of international carriage in India. This Act also deals with carriage by air other than international carriage. The third preamble of the Act is in the following terms :--

"Whereas it is also expedient to make provisions for applying the rules contained in the Convention (subject to exceptions, adaptations and modifications) to carriage by air which is not international carriage within the meaning of the Convention; it is hereby enacted as follows:"

Then Section 4 empowers the Central Government by a notification in the official Gazette, to apply the rules contained in the First Schedule to non-international carriage. The Legislature, therefore, has indicated its intention in no uncertain terms that the Rules of International Aviation should also be applicable to cases of internal aviation and the Central Government is empowered by notification to extend the application of these rules to internal aviation "subject to exceptions, adaptation and modification".

22. Part III of the Rules deals with the liability of a Carrier by air. It makes the Carrier liable in damages both in respect to carriage of goods and passenger. The relevant rules laying down the liability of the Carrier to a passenger are set out hereunder :--

"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 operation of embarking or disembarking.

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

22(i). In the carriage of passengers the liability of the carrier for each passenger is limited to the sum of 1,25,000 francs. Where damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 1,25,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit or liability.

23. 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 this Schedule.

25 (1). The carrier shall not be entitled to avail himself of the provisions of this Schedule which exclude or limit his liability if the damage caused by his wilful misconduct or by such default on his part as is in the opinion of the Court equivalent to wilful misconduct

2. Similarly the carrier shall not be entitled to avail himself of the said provisions if the damage is caused as aforesaid by any agent of the carrier acting within the scope of his employment."

There are other rules laying down the liability of the carrier for carriage of goods. It is clear that the carrier under the Rules is debarred from contracting altogether out of his liability.

23. No notification has as yet been issued by the Central Government extending the application of these rules to non-international carriage by air in terms of Section 4 of the Carriers Act of 1934. In terms, therefore the statute does not apply to cases of carriage by air within the country. Can the statute, therefore, be left out of consideration in determining the law to be applied in cases of carriage by air within the country? In my judgment it cannot be so ignored. Provisions as to matters of principle in the Act are applicable to cases of non-international carriage by air as rules of justice, equity and good conscience. In my judgment these rules are to be looked into for guidance and not the rules of the English Common Law.

24. Transfer of Property Act, 1882 extended not to the whole of India, but left out certain States including the Punjab and Lower Burma. Section 1 provides, this Act or any part thereof may by notification in the official gazette be extended to the whole or any part of the said State by the said Government concerned. In a case in Lower Burma which ultimately went up to the Privy Council, the disputed question was the manner in which the accounting was to be made of the mortgagee's claim where the mortgagee was in possession. Section 76 of the Transfer of Property Act, 1882 laid down the rules to be applied in such cases. But the Transfer of Property Act was expressly exempted from its operation to Lower Burma. Nevertheless, Mr. Haldane, as he then was, submitted as counsel before the Privy Council that the principles of Section 76 of the T. P. Act are nevertheless applicable to Lower Burma, as rules of justice, equity and good conscience. Lord Dwyer in delivering the judgment of the Board reported in *Kader Moideen v. Nepean*, 25 Ind App 241 made the following observation at 245:

"The Burmese Courts are directed, in the absence of any statutory law applicable to the case, to follow the guidance of justice, equity and good conscience. Mr. Haldane contended that there is no rule of abstract justice in taking the accounts of a mortgagee in possession, and that the Indian rule which is now embodied in the 76th section of the Transfer of Property Act, 1882, should, though the Act has not been extended to Burma, be followed there in preference to the English practice. The 76th Section (h) provides that a mortgagee's receipts from the mortgaged property shall, after deducting the expenses mentioned in Clauses (c)

and (d) and interest thereon, be debited against him in reduction of the amount (if any) from time to time due to him on account of his interest on the mortgage money, and so far as such receipts exceed any interest due in reduction or discharge of mortgage money. The expenses mentioned in Clauses (c) and (d) are the Government revenue and the other charges of a public nature, arrear of rent, and repairs. Their Lordships are not prepared to dissent from Mr. Haldane's contentions on this point, but it is really unnecessary for them to express any judicial opinion on it in the present case."

In a number of cases the different provisions of the Transfer of Property Act have been applied in the Punjab as rules of justice, equity and good conscience. The principles of Transfer of property Act regarding mortgage have been applied in Punjab in the case of Jhuman v. Duba by a Division Bench reported in AIR 1923 Lah 646. Principles of Section 55(2) of the Transfer of Property Act have been applied in Punjab by the Punjab High Court in the case of Dala Singh v. Bela Singh reported in AIR 1925 Lah 92. principles of Sections 58(4) and 67 of the Transfer of Property Act have been applied by a Division Bench of the Punjab High Court in the case of Md. Abdullah v. Md. Yasin, reported in AIR 1933 Lah 151. In the case of Tarachand v. Sher Singh reported in AIR 1936 Lah 944, it is held that the right to future maintenance is not transferrable. The principles of Section 6(dd) of the Transfer of Property Act were applied as rules of justice, equity and good conscience. See also the judgment in the case of Was Deb v. Firm Dhiru Mal Baijnath, reported in AIR 1940 Lah 291.

25. In my judgment, the rules of justice, equity and good conscience applicable to internal carriage by air in India are not the rules of common law carrier in England, but the rules to be found in Carriage by Air Act, 1934. The Indian legislature has indicated that it should be applied to non-international air carriage of course "subject to exception, adaptation and modification." The Central Government in exercise of the delegated power of legislation cannot modify the principles embodied in the Rules affecting the liability of the carrier by air, by any notification u/s 4 of the Act.

26. Clear principles to be discerned in the rules are:-

(a) The carrier is liable in damages in the event of death or injury to the passenger in the case of accident.

(b) The carrier is not liable if he proves that he or his agent have taken all necessary measures to avoid the damages or that it was impossible for him or them to take such measures.

(c) Contributory negligence on the part of the passenger will exonerate the carrier from liability wholly or partly depending on the nature of contributory negligence proved.

(d) The carrier is not entitled wholly to contract out of his liability.

In my judgment these principles are more in consonance with the principles of

justice than are to be found in the English Common Law. As such these are to be applied as Rules of justice, equity and good conscience rather than the Rules of English Common Law.

27. These rules were carefully framed and represent the combined wisdom of the Jurists of different nations assembled at Warsaw Convention. They are now embodied in the Municipal Statute of different countries including U. K. and India to be the law of the land. Subject to minor alteration to suit local conditions and requirements, these rules have been applied to carriage by air within the country in England. Indian legislature has also incorporated the same rules in a statute regulating international carriage by air. By the same statute the Government is directed to apply them to carriage by air within the country subject of course to exceptions, adaptation and modification. The broad principles of Warsaw Convention in my judgment should be applied in India as rules of justice, equity and good conscience in respect to Carriage by Air within the country.

28. I realise that my decision is not consistent with the four decisions of this and other High Courts noticed before. It will however appear that the controversy in Court in each of the above four cases was whether the sections relating to bailment in the Contract Act or the Common Law of England will apply to carriage of goods by air. The carriage by Air Act, 1934 having been found not to apply in terms, the Court was never invited to consider whether the rules framed under the carriage by Air Act, 1934 are applicable as rules of justice, equity and good conscience. Except in the Assam case, attention of the Court appears not to have been drawn to the Preamble and Section 4 of the Act which authorised the Central Government to extend the rules to non-international carriage by notification in the gazette. It appears, however, that in the Assam case reported in AIR 1960 Ass 71, the attention of the Court was drawn to Section 4 of the Act. At page 72 of this Report Sarjoo Prosad, C. J., who delivered judgment makes the following observation:-

"At the outset it may be stated that the liability of the defendant company is not governed by the provisions of the Indian Carriage by Air Act, 1934 (Act XX of 1934). This Act was brought into being in order to give effect to a convention, for unification of certain rules relating to international carriage by air. Chapter III of the Rules in this Act provides for the liability of the carrier and under Rule 18 of the Rules, the carrier is liable for damage sustained in the event of the destruction or loss or damage to any registered luggage or any goods, if the occurrence, which caused the damage so sustained took place during the carriage by air; which means, in other words, the period during which the luggage or the goods, were in charge of the carrier, whether in an aerodrome or on board an aircraft.

The carrier, however, could plead exemption from liability if under Rule 20 it was able to show that the carrier or its agents had taken all necessary measures to avoid the damage or that in the circumstances, it was impossible for it or them to take such measures. It is further provided under that Rule that the carrier

would not be liable if it proves that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in the navigation thereof, provided in other respects the carrier and its agents had taken necessary measures to avoid the damage or loss. But these Rules, as I said, apply to international carriage by air. The operation of the Rules could be extended by the Central Government to such carriage by air, not being international carriage by air, as defined in the first schedule as might be specified in a notification published by that Central Government u/s 4 of the Act. But the learned counsel for the appellant has conceded that there is no such notification published by the Central Government. The plaintiff, therefore, could not take any advantage of the Rules contained in this Act for the purpose of enforcing the liability of the defendant company.

One would very much wish for the sake of uniformity in all such cases of transport by air that these Rules were extended to apply to other cases also as contemplated by Section 4 and that the Central Government would take appropriate action in the matter.'''

But my lord was never asked to consider the question whether notwithstanding the absence of notification in that behalf the court should apply the rules as rules of justice, equity and good conscience in respect to carriage of goods by air to India within the country.

29. The exemption clause relied on and set out before is in the widest possible terms. It expressly exempt the carrier from all liabilities including liability for breach of statutory duty. The passenger renounces not only for himself but also for his heirs and representatives all claims otherwise legally recoverable from the carrier by his heirs and representatives under the law. The passenger purports to renounce the rights of the "dependents" under the Fatal Accidents Act to get compensation in case of death of the passenger. This exception clause has been challenged on the ground that special contract is bad and is not enforceable in law.

30. Before, however, I examine the arguments of Mr. Dutta Roy on this point, I may as well dispose of the contention of the learned Standing Counsel that If this contention of Mr. Dutta Roy is upheld then the contract of carriage becomes void and the deceased Sanat Kumar became a trespasser in law. A trespasser has no right in law against the carrier. The defendant corporation in such event would have no liability either to the deceased or to the dependents of the deceased under the Fatal Accidents Act. The flaw in this argument is that the special conditions sought to be imposed may be bad and as such unenforceable in law but that does not make the contract of carriage void and the passenger a trespasser without any right. The passenger when he paid for the ticket which is accepted by this defendant corporation becomes an invitee for reward and the carrier has accepted him to be lawfully in the aircraft for air carriage. If in such a case it transpires that the carrier sought to impose certain terms in the ticket which are unlawful then the only result is that the terms will be ignored and the

right of the passenger to travel, or to be in the aircraft is not affected in any way. He remains a passenger for reward, an invitee in law and certainly not a trespasser. I am unable to accept this contention of the learned Standing Counsel.

31. Mr. Dutt Roy has contended that the parties are not competent in law to enter into such a special contract exempting the carrier from liability. The defendant corporation is a creature of statute to wit the Air Corporation Act (XXVII of 1953). Section 7 of the Act provides that the function of the Corporation would be to provide "safe, efficient, economical and properly co-ordinated air transport service". The powers of the Corporation to exercise the aforesaid functions have been set out in Sub-section (2) Section 7. SubSection 3(a) of Section 7 provides that "nothing in the section shall be construed as authorising the disregard by the Corporation of any law for the time being in force. The Corporation, therefore, has been debarred by Section 7 of the Act from disregarding the provisions of the Indian Aircraft Act, 1934 or the Rules made thereunder. The certificate of Air worthiness to every aircraft under the Indian Aircraft Act expressly states that the aircraft shall be flown only in accordance with the conditions for flying machine laid down in part XII of the Indian Aircraft Rules, 1937. The instant special contract virtually authorises the defendant corporation to violate the rules of flying. The defendant corporation had, therefore, no authority to enter into the contract. This is the argument of Mr. Dutt Roy. This argument is not acceptable to me. The defendant corporation is not purporting to enter into a contract for violating the rules of flying. What is contracted for is that if by reason of such violation the defendant corporation becomes liable in law, that liability is being contracted out. Whether such a contract is hit by the provisions of Section 23 of the Indian Contract Act is a different question which will have to be considered later. But I find no incapacity of the defendant corporation to enter into a contract like the present, either in the Air Corporations Act, 1953 or the Aircraft Act, 1934 or the rules made thereunder.

32. It is next contended that the agreement amounts to a breach of absolute statutory duty imposed by Rule 115 of the Aircraft Rules on the defendant Corporation. This rule was intended inter-alia for the benefit and Protection of the travelling public. This statutory duty for the benefit and protection of the deceased Sanat Kumar cannot be contracted out. The offending special agreement must therefore be held to be void and of no effect. It is contended that Common Law negligence may perhaps be contracted out but not statutory negligence, i.e., a breach of absolute statutory duty. In the case of breach of statutory duty the rule of "volenti non fit injuria" does not apply. A number of authorities were cited by the respective counsel. In the case of *Baddeley v. Earl Granville* reported in (1887) 19 QBD 423, it was held that "Volenti non fit injuria" does not apply to cases of breach of statutory duty imposed on the owner of coal mines for the benefit and protection of the miners. An agreement whereby the servant agreed to waive and condone the commission of the breach was held void. The owner was held liable. The case of *Flower v. London and North Western*

Rly Co. (1894) 2 QB 65 was a case in which there was a special contract whereby the passenger exempted the Railway Company (defendant) from all liabilities for negligence and breach of duty. The agreement was held not binding and the Railway Co. was held liable. The passenger in this case, however, was a minor. In England the contract by a minor is not void but voidable. But the Common Law Courts keep a sharp and vigilant eye on such a contract and if the contract appears to be unfair to the minor the Common Law Judges never give effect to such a contract. In the cited case the contract was held to be one sided and against the minor. This case therefore, cannot be taken as a good authority on the point under consideration. Many other cases have been cited by the respective learned counsel but the law on the subject is to be found in Salmond on Tort, 11th Edn. at page 611 :

"Although an action for damages arising from a breach of an absolute statutory duty is known as an action of statutory negligence neither the defence of *Volenti non fit injuria*" nor common employment affords a good defence. Possibly the ground for this rule is that it is contrary to public policy that where there is a statutory obligation on the employer the workman should contract out of it. Hence, to give statutory force to a "common law obligation" is by no means an otiose procedure". (u).

This view expressed by Salmond is not agreed to by Pollock in this book on tort as will appear at page 113 of the book. It may be contended that public policy as embodied in the Carriage by Air Act, 1934 and rules made thereunder debar an air carrier from contracting out of his liability totally and completely and an agreement between the carrier and the passenger to that effect is hit by Section 23 of the Indian Contract Act and not enforceable as being contrary to public policy. I cannot hold the argument to be unsound.

33. The learned Standing Counsel contended that a distinction should be drawn between case of breach that by itself gives a cause of action for damages and one wherein the breach of statutory duty is nothing more than evidence of negligence which may give rise to a cause of action for damages. In the latter case the cause of action for damages is negligence. Liability for negligence, howsoever it may arise whether in breach of a duty imposed by Common Law or Statute Law must be treated on the same footing. It follows that just as liability for negligence under the Common Law can be contracted out, so also a liability for negligence for breach of statutory duty can be contracted out. There is however a difference as noticeable in judicial decision. If there is a positive enactment by the legislature whereby an absolute duty is imposed on a certain individual or class for the benefit and protection of another, a breach of such rule must be treated on the different footing from the breach of a mere common law rule which amounts to negligence in law. In *Alford v. National Coal Board* (1952) 1 TLR 687 Lord Reid stated that the formulation of a Common Law duty as a statutory regulation has the effect of depriving the infringer of the benefit of the plea of "*Volenti non fit injuria*". Since the rule of "*Volenti non fit injuria*" is based

upon an implied agreement and the statute imposes a duty independently of contract, how can any party agree to assume a risk that the statute has provided against. If the duty imposed by statute is absolute and is enacted for the benefit and protection of a particular class then the object of the agreement to relieve the party on whom the duty is imposed from all liability would amount to the evasion of the statute. When the object or consideration of an agreement is to evade the law, the agreement is bad u/s 23 of the Indian Contract Act.

34. I have recorded my finding that an absolute duty is imposed by the Rules on an air carrier and its employees to abide by the rules framed for the safety integralia of the passenger and for their benefit. An agreement purporting to relieve the carrier of its liability for non-compliance of such rules would be to relieve the air carrier of its statutory duty. Such an agreement cannot be enforced by any Court of Law.

35. It is next contended by Mr. Dutt Roy that the offending agreement is in conflict with the provisions of Fatal Accidents Act and is bad in law on that ground as well. The Fatal Accidents Act of India is a verbatim copy of the English Statute. The Act makes a person guilty of wrongful act, neglect or default liable to pay compensation to certain named dependents of the person who dies as a result of such wrongful act, neglect or default. Section 1 of the Act reads as follows :

Sect. 1. "Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof the party who would have been liable if death had not ensued shall be liable to an action or suit for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony or other crime.

Every such action or suit shall be for the benefit of wife, husband, parent and child, if any, of the person whose death shall have been so caused, and shall be brought by and in the name of the executor, administrator or representative of the person deceased;

and in every such action the Court may give such damages as it may think proportioned to the loss resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought; and the amount so recovered after deducting all costs and expenses, including the costs not recovered from the defendant, shall be divided amongst the before mentioned parties or any of them, in such shares as the Court by its judgment or decree shall direct."

36. The nature of the action under the Fatal Accidents Act has been staged by Clerk and Lindsell in the 11th Ed. Of their treatise on Tort in the following terms at page 98 :

"The cause of action given by the Fatal Accidents Act to the Personal representatives or dependants is an entirely different cause of action from that which the deceased person would have had. It is new in its species, new in its quality, new in its principle, in every way new". "The statute does not in terms say on what principle the action if given is to be maintainable, nor on what principle the charges are to be assessed; and the only way to ascertain what it does, is to show what it does not mean". No further indication is given as to the nature of the wrongful act, neglect or default necessary to found the action than that it must be such as would have entitled the deceased to sue if he had not died. The test is to be taken at the moment of death, with the idea fictionally that death has not taken place. If at that moment the right of action of the deceased is barred, e.g. by a contract excluding himself from the right to claim damages, By accord and satisfaction, or by the operation of a statute of limitation, the dependants' right is also barred; if it would have been affected by his own contributory negligence, the damages awarded to his dependants will be proportionately reduced. Where, however, the deceased has made a contract which, while limiting the amount which he can recover, leaves him a cause of action, his dependants' right under the Act is not affected; as he at the time of his death could have brought an action for some damages they can bring an action for their own and quite different damages. The deceased may by his acts deprive his dependants entirely of their remedy, but he cannot (except by contributory negligence) bar their remedy in part."

37. As stated above, the right of the beneficiaries under the Act depends on the existence of any right of the deceased at the time of his death to claim compensation founded on "the wrongful act, neglect or default". If at the moment of his death the right of the deceased is barred, the dependants under the Fatal Accidents Act have no right to compensation. There are cases decided in England under the Fatal Accidents Act which held that if the deceased by contract excluded himself from the right to claim damages, the dependants will have no claim for compensation under the Fatal Accidents Act. The cases on this point are to be found in the footnote at p. 98 of Clerk and Lindsell's treatise. It leads to this curious result that if the injured party contracted not to claim any compensation, the dependants will have no right to get compensation under the Act, Again if the deceased agreed to a compensation which is very nominal and if before death the nominal compensation was accepted by the deceased, in that event also the dependants will have no claim and no right of action under the Fatal Accidents Act. If, however, the nominal compensation was not accepted at the date of death and the deceased, if alive, could have maintained an action founded on the wrongful act neglect or default, the dependants will have a claim and right of action to recover by way of compensation, not the amount agreed to be accepted by the deceased. It may be much more. The deceased could have limited his own claim to occupation but he had no right to contract on behalf of the dependants to limit their claim under the Act. The law is however clear that the right of action under the Fatal Accidents Act depends upon the existence of

the right of action on the part of the deceased had the deceased been alive. Mr. Dutt Roy has read passages from the judgments in the cases noted in Clerk and Lindsell in support of the argument. I have carefully gone through all the authorities referred to in the footnote and read in Court. It appears to me that the law stated in Clerk and Lindsell and set out above is based on authoritative decisions of the English Courts and must be good law in India as well. Certain passages from the judgments read by Mr. Dutt Roy do appear to support Mr. Dutt Roy's contention. But it is no use relying on isolated passages in the judgments when the decision itself is against the proposition. It cannot be said that the instant agreement runs counter to the provisions of the Fatal Accidents Act.

38. It is next contended by Mr. Dutt Roy that the Special Contract is unreasonable and should not be given effect to. In support of this argument Mr. Dutt Roy has cited a passage from Chesire and Fifoot's Law of Contract 5th Ed. page 113 in support of his argument that the terms of the contract wholly exempting the carrier from liability for acts of negligence are unenforceable in law on the ground that it is unreasonable. Opinion of the learned authors is entitled to respectful consideration. But as the learned authors themselves state in the passage read, that their approach is tentative and not by any means generally accepted by the courts. Much as I dislike the agreement, I am unable to hold that the agreement is not enforceable on the ground of unreasonableness.

39. For reasons given above. I hold that the defendant Corporation cannot exempt itself from liability. Sanat Kumar, had he been alive, would have been entitled to maintain an action for damages for the wrongful act, neglect and default on the part of the employees of the defendant Corporation. Sanat Kumar having died as a result of the fatal accident, the plaintiffs as beneficiaries are entitled to recover compensation under the Fatal Accidents Act. Their right to get compensation is not derived from Sanat Kumar but is an independent right under the statute. The amount recoverable by the plaintiffs under the Fatal Accidents Act is not necessarily the amount which could have been recovered by the deceased had he been alive.

40. The only point now left for consideration is what amount of compensation is payable. The amount of compensation payable under the Fatal Accidents Act is the financial loss suffered by the beneficiaries. A wife is entitled in law to be maintained throughout by her husband and the husband's estate would be liable to maintain her. Under the Shastric Hindu Law a widow in the event of a partition between the sons after the father's death would be entitled to an equal share in the estate of her husband in lieu of maintenance. Under the present Statute Law of 1956 the widow is entitled to a share equal to that of the sons and daughters. The sons and daughters in a Hindu family are liable to be maintained by the father and in case of the death of the father they are equally entitled to the father's estate. The daughters in a Hindu family have a right to be married out of their father's estate, Each one of them therefore has suffered financial loss as the result of the death of Sanat Kumar.

41. It is proved that Sanat Kumar was 44 years of age at the time of his death. He was a permanent employee of the I. G. N. and Rly. cO. Ltd. a very stable concern of repute. At the time of his death he was getting Rs. 700/- per month as his remuneration. He had prospects in life. He belonged to a long lived family. Taking into account all these facts I determine the amount of compensation payable by the defendant to the plaintiffs at Rs. 1,00,000/-. The loss suffered by each one of the plaintiffs I determine to be equal, and the amount of compensation decreed after deduction of costs, if any, is to be divisible equally among the five plaintiffs. The plaintiffs will be entitled to all costs incurred. Certified for two counsel.

42. I hope that the law charges of the plaintiffs would not exceed the amount recoverable on account of costs from the defendant Corporation.

43. I cannot conclude this judgment without acknowledging the help and assistance I received from the Bar. The point is difficult and I freely acknowledge my indebtedness to each one of the learned counsel engaged by either party-- Mr. B.N. Dutt Roy and Mr A.P. Chowdhury who appeared for the plaintiffs and the learned Standing Counsel, Mr. Court Mitter and Mr. Bachawat who appeared for the defendant Corporation.