

(2003) 09 NCDRC CK 0065

In the National Consumer Disputes Redressal Commission

U.S.AWASTHY

APPELLANT

Vs

GULF AIR

RESPONDENT

Date of Decision : 30-09-2003

Acts Referred:

Citation : 2003 4 CPJ 114 : 2004 1 CLT 170

Hon'ble Judges : D.P.Wadhwa , Rajyalakshmi Rao , B.K.Taimni , K.S.Gupta J.

Final Decision : Appeal allowed

Judgement

1. WE had earlier heard the arguments and passed the following order on 23.1.2003. It is the complainant who is in appeal before us. His claim for damages against the respondents Gulf Air, an international carrier was dismissed by the State Commission. His complaint was that he was a business class passenger and in the flight of Gulf Air between the Sector Bahrain-Istanbul he was given a seat which was fixed and was not a reclinable on account of which he suffered great inconvenience and discomfort for 6 hours journey. He had not bargained for such a treatment of an international airlines when he had purchased a business class ticket which was of much higher in value than an economy class ticket. Complainant, therefore, claimed Rs. 5.00 lakhs as damages for the agony caused to him. In fact, the ticket was for travel from "Delhi-Doha-Bahrain-Istanbul-Dubai-Delhi." There is no dispute about the purchase of business class air ticket by complainant and the seat which was provided to him by the airlines during the journey from Bahrain to Istanbul was a fixed seat and not a reclinable one. When the complainant found the seat to be fixed he complained to the staff of the airlines for change of the seat. It was not agreed to as he was told that the aircraft was full and alternate seat was not available. In its reply airlines stated that there were 16 first class, 12 business class and 95 economy class seats and all the seats were occupied. Ticket issued to the complainant was subject to various conditions and condition No. 2 was put forward to deny the claim of the complainant. This condition No. 2 reads as under : "Carrier does not undertake to provide an particular seat in the aircraft. The passenger agrees to accept any seat that my be allotted to him on the flight

in the class of service for which his ticket has been issued."

It was stated that otherwise seat given to the complainant was wide, well cushioned and was comfortable to sit and business class facilities were provided. Claim of the complainant was, therefore, denied. State Commission was impressed by the argument of the airlines that the seat was near the emergency exit door of the aircraft and in case of emergency one can jump of these seats to use to emergency exit. State Commission was of the view that the aforesaid condition of the carrier was binding on all the passengers and there was no violation of the terms and conditions by the airlines and since there was no alternative reclining seat was available complainant had no case. WE are afraid State Commission has missed the core issue. For a passenger condition No. 2 would mean that all the seats are of same type. A business class ticket is of much higher value than the economy class. It is not disputed that in business class there are reclining chairs and as a matter of fact even economy class seats are also reclining. As a matter of fact when the seat was allotted to the complainant he should have been told at that time that it would be a fixed seat and not reclining one. Airlines cannot treat one business class passenger differently than other business class passengers and they all have to be provided same type of seats and business class facilities. Condition No. 2 which has been quoted by the airlines in its defence was not applicable to the facts of the present case and has no meaning unless of course the business class passenger is informed before hand that no other reclining seat is available. As to what is the necessity of fixed chair near emergency exist is of no concern to a passenger who had paid for business class fare and expect a reclining chair with of course facilities like other business class passengers. It is not the case of the airlines that when a particular seat was allotted to the complainant he was told that it was a fixed seat for him to accept or not to accept or choose a different flight for the journey. Could it be that a fare charged for reclining seat would be different than that of fixed seat which, without any argument would certainly mean discomfort for a journey of 6 hours. Mr. Wadhwani learned Counsel for the airlines said that complaint itself was not maintainable. In support of his plea he raised the following questions for consideration : (i) Claim was not covered under Article 17 of Schedule - II to the Carriage by Air Act, 1972 which Act incorporates Warsaw Convention as amended by the Hague Protocol and further that cases covered by Article 17 can only be brought subject to the condition and limitations set out in Article 24 of the Convention. (ii) This Commission has no extra territorial jurisdiction to try the present case. (iii) No compensation could be awarded for acute misery and discomfort in absence of the complainant having suffered any bodily injury. (iv) Complainant is not entitled to any compensation in absence of any economic loss suffered by him.

It would appear that none of these points were raised before the State Commission as they do not find mention in the impugned judgment of the State Commission. In support of his submission in regard to Article 17 aforesaid Mr. Wadhwani referred to various judgments of foreign Courts. It is not necessary for

us to refer to all these decisions except to note a few of them. In *Eastern Airlines, Inc. v. Floyd et al.*, 23 Aviation Law Reports 17, 367, Supreme Court of United States was considering Article 17 of the Warsaw Convention. In this case on May 5, 1983 an Eastern Airlines flight departed from Miami, bound for the Bahamas. Shortly after take off, one of the plane's three jet engine lost oil pressure. The flight crew shut down the failing engine and turned the plane around to return to Miami. Soon thereafter, the second and third engines failed due to loss of oil pressure. The plane was losing altitude rapidly, and the passengers were informed that the plane would be ditched in the Atlantic Ocean. Fortunately, after a period of descending flight without power, the crew managed to restart an engine and land the plane safely at Miami International Airport. Respondents, a group of passengers on the flight brought separate complaints against petitioner, Eastern Airlines, Inc. (Eastern), each claiming damages solely for mental distress arising out of the incident. The District Court entertained each complaint in a consolidated proceeding. Eastern conceded that the engine failure and subsequent preparations for ditching the plane amounted to an accident under Article 17 of the Convention but argued that Article 17 also makes physical injury a condition of liability. The District Court concluded that mental anguish was not alone compensable under Article 17. The Court of Appeals for the Eleventh Circuit reversed, holding that the phrase "lesion corporelle" (bodily injury) in the authentic French text of Article 17 encompasses purely emotional distress. After examining the French legal meaning of the term "lesion corporelle" the concurrent and subsequent history of the Warsaw Convention and the cases interpreting Article 17 Supreme Court of United States held : "WE conclude that an air carrier cannot be held liable under Article 17 when an accident has not caused a passenger to suffer death, physical injury, or physical manifestation of injury. Although Article 17 renders air carriers liable for "damage sustained in the event of" ("domage survenu en cas de") such injuries, see 49 Stat. 3005, 3018, we express no view as to whether passengers can recover for mental injuries that are accompanied by physical injuries. That issue is not presented here because respondents do not allege physical injury or physical manifestation of injury. See App. 3-9. Eastern urges us to hold that, the Warsaw Convention provides the exclusive cause of action for injuries sustained during international air transportation. The Court of Appeals did not address this question, and we did not grant certiorari to consider it. WE, therefore, decline to reach it here."

It would be seen that the Supreme Court of United States did not go into the question if Warsaw Convention provided exclusive cause of action for injuries sustained during international transportation. House of Lords, in the case of *Sidhu & Ors. v. British Airways*, (1997) ALL ER 193 struck a different note. WE take the facts of the case and statement of law from the head note which we quote : "The appellants (the three plaintiffs and the pursuer) were passengers on a scheduled international flight operated by the respondent airline (BA) which left London on 1st August, 1990 for Malaysia via Kuwait. On 2nd August the aircraft

landed in Kuwait for refueling several hours after Iraqi forces had begun to invade Kuwait at the commencement of the Gulf War. While the passengers were in the airport terminal, the airport was attacked by Iraqi forces who took them prisoner and later removed them to Baghdad. The appellants were released several weeks later and returned to the United Kingdom. On 30th July, 1993, which was outside the two-year time limit allowed by Art. 29 of the Warsaw Convention, as set out in Sch. 1 to the Carriage by Air Act, 1961, for bringing an action for damages but inside the three-year time limit prescribed for common law negligence, the plaintiffs brought an action against BA in the Country Court claiming damages for personal injury alleging that by reason of BA's negligence in landing the aircraft in Kuwait after hostilities had started they had suffered physical and psychological damage and they also claimed for lost baggage. The Judge dismissed their claim on the ground that the plaintiff's sole remedy was under the convention and that any rights they might have had against BA were extinguished by virtue of Art. 29 of the convention since they had not issued proceedings within the two-year time limit. The Court of Appeal upheld the decision and the plaintiffs appealed to the House of Lords. The pursuer brought her action in the Court of Session in Scotland claiming, inter alia damages at common law for breach of an implied condition of the contract that BA would take reasonable care for her safety. The Lord Ordinary held that the convention excluded recourse to any common law remedy and dismissed her action. The pursuer reclaimed but the Inner House of the Court of Session dismissed her reclaiming motion and she appealed to the House of Lords. Held : Having regard to the objects and structure of the convention, which was to achieve a uniform international code in those areas with which it dealt, including the liability of the international carrier, which could be applied by all the High Contracting Parties without reference to the rules of their own domestic law, Sch. 1 provided the exclusive cause of action and sole remedy for a passenger who claimed for loss, injury and damage sustained in the course of, or arising out of, international carriage by air notwithstanding that that might leave claimants without a remedy. Accordingly, where the convention did not provide a remedy, no remedy was available. The appeals would, therefore, be dismissed."

In this case House of Lords referred to other judgments of other jurisdictions. In an unreported judgment in the case of *Ismail. A Mohammed v. British Airways plc* the incident was the same as was before the House of Lords in the case of *Sidhu & Ors. v. British Airways*. In this case the passengers were all French nationals and they claimed damages from British Airways for the consequences of the same event. The Tribunal de Grande Instance de Paris reached the view on the facts that the damages claimed were not linked with disembarkation operations as such, and that they could not be linked to those risks inherent in aerial navigation as provided by the Warsaw Convention. In these circumstances the Court felt free to determine the law applicable, on the view that the consequential damages claimed were not covered by the field of application of the convention. French law was applied, and the plaintiffs were found entitled to

damages unrestricted by the limits set by Art. 22 of the convention. House of Lords in the case before it did not follow the judgment of the French Court as it was of the view that the case in the French Court did not do a close analysis of the Warsaw Convention nor was there any reference to previous decision in the issue in the French Court or elsewhere. It is also noticed that an appeal was pending against the order of the Tribunal. There was another case of *Gatewhite Ltd. v. Iberia Lineas Aereas de Espana SA*, (1989) 1 ALL ER 944 (1990) 1 QB 326 when a view was taken that in absence of express provision in the Convention excluding the owner's right of action, the owner of goods damaged or lost by a carrier was entitled to sue in his own name in accordance with the *lex fori* and accordingly, that the plaintiffs were entitled to damages to be assessed at common law. It is stated that coming to this conclusion the English Court was attracted by the reasoning in a case of New Zealand, it being *Tasman Pulp and Paper Co. Ltd. v. Brambles JB O' Loughlen Ltd.*, (1918) 2 NZLR 225. House of Lords, however, did not think it appropriate to consider the reasoning in *Gatewhite* case and left the matter at that. *Sidhu's* case was referred by the Supreme Court of United States in the case of *EL AI Israel Airlines, Ltd. v. Tsuiyuan Tseng*. In this case there is a dissenting judgment of one Judge (Justice Stevens) but that is limited to only one aspect of the matter given by majority and that is a treaty like an act of Congress, should not be construed to preempt State law unless its intent to do so is clear. While the United States Supreme Court in the case *EL AI Israel Ltd. v. Tsui Yuan Tseng* before it held that the claim was barred by the Convention under Article 17 read with Article 24 it was not disputed before it the incident which was the basis of the claim that occurred in international transportation in the course of embarking and Supreme Court also accepted that such of the plaintiff at that time was not a "accident" within the meaning of Article 17. As regards to amendment to Article 24 brought out by Montreal Protocol ** the Court observed that it did not alter the situation as existed earlier and the amendment was merely clarificatory in nature. Court was also of the view that the wording of Article 17 as it existed was certainly subject to divergent interpretation. WE may also note that in the judgment of Unites States Supreme Court there is an extract from a legal treatise, *The Warsaw Convention Annotated : A Legal Handbook* 55 (1988) by L. Goldhirsch which we extract : "If the passenger's lawyer does not want the Conventions" limits to be applicable, he must either : (a) prove the Convention does not apply because his client was not a passenger in international transportation as defined in Article 1; or (b) if the Convention is applicable, that the limits are unavailable because the carrier failed to deliver a ticket as provided by Article 3; or (c) the carrier was guilty of wilful misconduct (Article 25*) or (d) there was no "accident"."

When the claim was first instituted by Tsui Yuan Tseng in the District Court it was dismissed on account of the convention but on appeal; Court of Appeals for Second Circuit ruled otherwise. It was the view of Circuit Appeal Court that where a plaintiff did not qualify for the relief under the Convention he could seek relief under local law for an injury sustained in the course of international travel.

Supreme Court of United States reversed this judgment of the Second Circuit Appeal Court. WE now note the facts of the case as under . On May 22, 1993, Tsui Yuan Tseng arrived at John F. Kennedy International Airport (hereinafter JFK) to board an EL AI Israel Airlines flight to Tel Aviv. In conformity with standard EL AI preboarding procedures, a security guard questioned Tseng about her destination and travel plans. The guard considered Tseng's responses "illogical", and ranked her as a "high risk" passenger. Tseng was taken to a private security room where her baggage and person were searched for explosives and detonating devices. She was told to remove her shoes, jacket, and sweater, to lower her blue jeans to midhip. A female security guard then searched Tseng's body outside her clothes by hand and with an electronic security wand. After the search, which lasted 15 minutes, EL AI personnel decided that Tseng did not pose a security threat and allowed her to board the flight. Tseng later testified that she "was really sick and very upset" during the flight, that she was "emotionally traumatized and disturbed" during her month-long trip in Israel, and that, upon her return, she underwent medical and psychiatric treatment for the lingering effects of the body search. Tseng filed suit against EL AI in 1994 in a New York State Court of first instance. Her complaint alleged a State law personal injury claim based on the May 22, 1993 episode at JFK. Tseng's pleading charged, inter alia, assault and false imprisonment, but alleged no bodily injury. EL AI removed the case to Federal Court. The Second Circuit Appeal Court, had concluded first that no "accident" within the Article 17's compass had occurred; in the Court of Appeals' view, the Convention drafters did not "aim to impose close to absolute liability" for an individual's "personal reaction" to "routine operating procedures. Measures that, although "inconvenient and embarrassing", are the "price passengers pay for airline safety". In some tension with that reasoning, the Second Circuit next concluded that the Convention does not shield the very same "routine operating procedures" from assessment under the diverse laws of signatory nations governing assault and false imprisonment. Article 24 of the Convention, the Court of Appeals said, "clearly states that resort to local law is precluded only where the incident is "covered" by Article 17, meaning where there has been an accident, either on the plane or in the course of embarking or disembarking, which led to death wounding or other bodily injury. US Supreme Court accepted that EL AI's search of Tseng was not an "accident" within the meaning of Article 17, as the parties did not place that Court of Appeals conclusion at issue. The Court accepted again though only for purposes of this decision, that EL AI's actions did not constitute "wilful misconduct" under Article 25 of the Convention. The Court noted that the parties did not dispute that the "episode-in-suit" occurred in international transportation in the course of embarking. In *Air France v. Saks*, 470 U.S. 392 a view has been taken that an "accident" under Article 17 is "an unexpected or unusual event or happening that is external to the passenger". The United States Court observed that this definition should "be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries". In the case of *M/s. Greenseas Shipping Company Pvt. Ltd. v. Chairman & Managing Director, Indian*

Bank, Original Petition No. 264/1996, decided on 23rd November, 2001 (NCDRC) this Commission has taken a view that when a dispute falls within the four corners of the Consumer Protection Act, 1986 relief can be granted which can be enforced, there is no reason why a Consumer Forum will not exercise its jurisdiction. Simply because the discomfort was during part of the journey which was outside the country cannot be ground to reject the claim of the complainant. The question of jurisdiction of Consumer Forums as presently raised was not examined with reference to the Carriage by Air Act, 1972 and so the Warsaw Convention. WE do not find any substance in the argument that since no bodily injury was caused to the complainant or that since he did not suffer any economic loss he is not entitled to any claim. WE, therefore, overrule objections (iii) and (iv) raised by Mr. Wadhvani as aforesaid. WE, however, find that substantial issues have been raised by Mr. Wadhvani with respect to objection Nos. (i) and (ii) aforesaid. WE would like to hear further arguments on these two objections. WE will request Mr. C.S. Vaidyanathan, Senior Advocate (M-20, Jangpura Extension, Telephone Nos. 24311586 and 24313200), to assist us in the matter. He shall be instructed by Mr. Avinash Modi and Astha Tyagi Advocates who shall be paid Rs. 2,500/- each by the NCDRC Bar Association (Legal Aid) to meet their out of pocket expenses. Registry is directed to send complete set of paper book each to Senior Counsel and instructing Counsel.

2. WE have heard the arguments of Mr. C.S. Vaidyanathan, Senior Advocate, Mr. Vinoo Bhagat and Mr. M. Wadhvani. During the course of hearing we had also requested Mr. Bhagat to make his submissions with reference to the issues involved in this appeal. Mr. Bhagat supported Mr. Wadhvani. He said Warsaw Convention provides uniform rules for defining and limiting the carriers liability in cases of international carriage falling under it. He said Rule 24 is quite explicit in itself. He referred to Rule 33* . He said that this Rule 33 forbids to a party to a contract of carriage to enter into any agreements that "infringe the Rules... by deciding the law to be applied.....". In other words he said the right to damages that does not fall within any of the Rules of Schedule II, cannot be created by any agreement between the passengers and the carrier. Further submissions of Mr. Bhagat were, (i) Court cannot, or at least, ought not to create rights that the parties themselves are expressly forbidden from creating. (ii) A cause of action from domestic law cannot be imported into the Second Schedule because if it is then it will be a case of "deciding the law to be applied" contrary to the Rules in Schedule II. (iii) If one cause of action permitting damages in domestic law can be imported into Schedule-II then, equally, every cause of action from any domestic or other law outside the Second Schedule can also be imported and made applicable to increase the carrier's liabilities and obligations beyond those fixed by the schedule. This will render the Warsaw Convention otiose. Thus Mr. Bhagat said the view of House of Lords in the case of *Sidhu & Ors. v. British Airways*, (supra), is logically and legally correct one. Otherwise he said that Schedule-II would be rendered pointless and carriers will be subject to all domestic laws of all States; a few causes of action cannot be selectively imported

and that if this is done then Courts will be altering the international treaty by making additions to it; interpretation of a treaty does not include altering or amending its provisions. On the question whether the health problem suffered by Awasthy, the appellant, falls within "accident". Mr. Bhagat referred to Shawcross & Beaumont, 4th edition, the Air Law by Peter Martin, JD Mc Clean and Elizabeth de Montlaur Martin.

Resuming his arguments on behalf of Gulf Airways, Mr. Wadhwani submitted six rules of interpretation of an international Conventions. Mr. Wadhwani said that the scheme of Convention was though appeared to be simple, it is not so. He said one of the difficulties encountered in its administration had been advertent or inadvertent application of the domestic laws. Mr. Wadhwani said that for proper application of the Convention there are certain Rules of Interpretation applicable to the conventions which he formulated as under this appears to have been taken from the principles of interpretation given in *Re Deep Vein Thrombosis and Air Travel Group Litigation*, (2202) EWHC 2825 (QB) decided on 20th December, 2002: "1. The conventions must be considered as a whole. It should receive a purposive construction. The object of the Conventions is to achieve uniformity of law applicable to the international carriage of passengers and cargo. It is, therefore, essential that the conventions be approached with proper appreciation of this object in *Mind Grein v. Imperial Airways Ltd.*, (1936) 2 ALL ER 1258 at pp 1277-1279; *Fothegill v. Moarch Airlines Ltd.*, (1980) 2 ALL ER 696 at pp 704; *Sidhu v. British Airways*, (supra); *Morris v. KLM*, (2002) 2 ALL ER 565 at pp 76-77. If the language of the convenient be capable of having more than one meaning, then only such meaning be applied as would promote the object of the conventions.

2. International conventions are apt to be loosely worded than other Acts of the Parliament; the conventions are never drafted based on any one particular legal system. There is a compromise amongst different countries upon the language, which is intended to be applicable in a uniform way across legal boundaries. *Morris v. KLM* (supra). As such the language used in conventions should be assigned natural and plain meaning without being influenced same or even similar words used in other legislative Acts, AIR 1960 Supreme Court 1058 and AIR 1972 Supreme Court 1405. Therefore, the language of the conventions should be construed on broad principles leading to a result that is generally acceptable. *Sidhu's* case at pp. 204 *ibid* *Fothegill's* case at page 715 *ibid* *Stag Line Ltd. v. Foscolo, Mango & Co. Ltd.*, (1931) ALL ER 666 at pp 677. There is a distinction between "broad principles of general acceptance" and "broad construction" to be given to the words used in the convention.

3. Quite often, behind these conventions, there is an agreement between the contracting states to surrender limited sovereignty as in the present case. The contracting States could ratify and/or adhere to the conventions as these were without reservation because otherwise the objet for which these conventions were drafted and adopted could not be achieved. Thus the Indian Parliament can

withdraw its ratification of the conventions. It cannot amend the conventions. It follows that while assigning meaning to the language social economic and political consideration must be avoided.

4. Reference to "travaux" "preparatories" to resolve ambiguities or obscurities can be made but restrictively so as to avoid "descent into unprincipled subjectivism" What one should look for is the common intentions of the contracting States, *Morris v. KLM* (supra).

5. Decisions of Courts of the contracting States can also be considered, weight to such decisions should be assigned based on general acceptance of their respective interpretation and standing of the Courts concerned. A discriminating approach is required if there be conflict or if there is no clear agreement between them.

6. It would be an erroneous approach if the conventions were necessarily interpreted to give a remedy to a claimant. No doubt the domestic Courts do try as carefully as possible to interpret the conventions to enable a passenger to obtain a remedy but such attempts may well fail as it happened in *Sindhu's* case and many more thereafter."

3. MR. Wadhwani said that after he had concluded his arguments which led to the interim order dated 23rd January, 2003, he came across judgment of the Queens Bench Division in *Re Deep Vein Thrombosis and Air Travel Group Litigation*, 2002 EWHC 2825 (QB). He said that this judgment has since been upheld in appeal by the Court of appeals and perhaps matter is now pending in the House of Lords. In this case a group of passengers filed claims against number of air carriers which included international airlines on the allegation that the carriers were liable under the provisions of Article 17 of the Warsaw Convention as amended and incorporated into English Law by the Carriage of Air Act, 1961. The allegations were that passengers suffered deep vein thrombosis (DVT*) as a result of travelling in their aircraft. Airlines denied that DVT was caused as a result of travelling in their aircraft and said that even if they did suffer, it does not give a valid claim under Article, 17 for the purpose of argument it was agreed that the passengers suffered from a symptomatic DVT caused by the flight, and it was also assumed for the purpose of argument that the claimants assertions that the airlines knew or ought to have known prior to the flight that carriage by air created an increased risk of DVT. Both the Queens Bench and Court of Appeal held that even the agreed facts did not disclose an accident under Article 17 of the Warsaw Convention. After marathon discussion of the issue involved and also taking into account travaux preparatoires Queens Bench Division concluded as under : "224. The agreed factual matrix does not disclose an accident under Article 17 of the Warsaw Convention. The definition of accident which is to be applied is that set out by the United States Supreme Court in *Saks*" case, followed here in the Court of Appeal in *Morris*" case, in *Chaudhari's* case, and approved by the House of Lords in *Morris*" case.

225. Article 17 does not provide a fault based theory of liability which imposes liability upon the carrier where death or injury is caused by its culpable act or omissions. Nor does a proper construction of the Warsaw Convention lead to the conclusion that it apportioned or reapportioned risks on the basis of a modern risk allocation theory. The balance of risk negotiated by the delegates between the interests of the passengers and the carriers achieves uniformity and certainty. The balance that was struck is set out in the case of *Sindhu's case* and *Morris' case* in the House of Lords. The modern risk allocation theory is more rather than in ascertaining the balance of risk agreed by the delegates at the Warsaw Convention of 1929. Article 17 has remained the same throughout all successive versions of the convention.

226. The tests to be applied is "a simple criterion of causation by an accident". That is to be defined as "an unexpected or unusual event or happening that is external to the passenger". 227. The agreed factual matrix does not satisfy this definition. It reveals that no event or happening occurred on the flight which was not ordinary and unremarkable and involved no actions of anyone save for the passenger's reaction to that normal and unremarkable flight. There was no unexpected or unusual event or happening. A culpable act or omission by itself which does not amount to an unusual or unexpected event or happening does not come within the definition of accident.

228. The Warsaw Convention provides an exclusive cause of action and sole remedy in respect of claims against a carrier arising out of international carriage by air. The cases of *Sidhu*, in the House of Lords, and the *EL Al Israel* case in the Supreme Court, establish that this is so. The different wording of Article 24 in Warsaw-Hague MP4 does not alter the exclusivity of the convention."

The decision of Queens Bench, as noted above, was upheld in appeal by the English Court of Appeal by the judgment pronounced on 3rd July, 2003. MR. Wadhwani submitted that Warsaw Convention as amended by the Hague Protocol has further been amended by the Montreal Protocol, 1999 which though has yet to come into force. He said that Article 17 of the Convention in spite of Montreal Protocol, as remained unamended. He said Article 24 of the Convention has been amended in Montreal Protocol and the following words have been added to the existing Article 24: "Whether under this convention or in contract or in tort or otherwise". Mr. Wadhwani said that this amendment is clarificatory in nature and it confirms the interpretation/views on the exclusivity of the conventions taken by various Courts of which the judgments have been referred to hereinabove. As noted above U.S. Supreme Court has said that amendment to Rule 17 by Montreal Protocol is merely clarificatory in nature. Mr. Wadhwani then proceeded to make following submissions. "1. Articles 1, 17, 24 and 33 of the Second Schedule of Convention, are relevant for answer to the question as to whether "Claim" was not covered under Article 17 of Schedule all to the Carriage by Air Act, 1972 which incorporates Warsaw Convention as amended by the Hague Protocol and further that the cases covered by Article 17 can only be brought

subject to the conditions and limitations set out in Article 24 of the Convention".

2. Article 1 of the conventions stipulates that the rules contained in the conventions apply to all international carriage of the passengers and cargo. Word "all" broods of no exception. Similarly, word "apply" means "subject to". It follows that all (without exception) international carriage of passengers and cargo is subject to the rules contained in the conventions. This Article must be read in conjunction with Article 32 of the Warsaw Convention/33 of the amended Convention, which prohibits the application of any other law even by a voluntary agreement by the parties to the contract. Consequently, the application of domestic laws to all international carriage of passenger and cargo is excluded.

3. Article 17 stipulates that a carrier shall be liable for death, wounding of a passenger or any other bodily injury that may be suffered by a passenger if the accident which caused the damage took place in the course of any of the operation of embarkation or disembarkation or on board the flight. Thus Article defines the period during which if an accident occurs and such accident causes damage as stated in the Article to the passenger before the carrier becomes liable to the passenger.

4. Therefore, in any action against a carrier, the plaintiff has to plead and prove following ingredients of Article 17 to enforce the liability against the carrier. These ingredients are : An accident * occurred during the course of the embarkation, or disembarkation or on board the flight; The accident caused the death or wounding or any other bodily injury to the passenger ; The death, wounding or any other bodily injury caused damage to the passenger. If any of these conditions is absent, the carrier cannot be made liable under Article 17 for the damage suffered by a passenger as stated above. The complainant has not suffered any injury within the meaning of the phrase "Any Other Bodily Injury" used in Article 17 of the conventions. The conventions have not burdened the carrier with any other cause for which it be fastened with liability.

5. There are two important ingredients of the Rule 24. These are : (a) "However founded. This phrase has a very wide meaning. It means "all actions without exception". It refers to the basis of the action brought against a carrier, namely torts; contract; and/or law. (b) "Subject to the conditions and limits". This phrase refers to the conditions stated in the Article 17 itself as well as other articles, and limits stated in Articles 22 and 25 of the conventions as also Articles 1 and 32/33.

6. Article 33 of the amended Convention makes any clause and all agreements between the parties which infringe the rules laid down by the conventions or by deciding the law to be applied or altering the rules relating to jurisdiction as void. Thus, the parties to the contract of carriage are prohibited from entering into any agreement on the choice law to be applicable to the contract between them. The object of this rule is to prevent applicable of the domestic laws to the contract of international carriage of passengers and cargo. In view of this provision in the

conventions, application of domestic laws to the contracts of carriage of passengers from time of embarkation till disembarkation would be contrary to the scheme of the conventions."

Mr. Wadhvani again referred to the decision of House of Lords in the case of *Sidhu & Ors. v. British Airways* (supra), which we have already referred to in our order dated 23rd January, 2003.

4. CONTINUING his arguments Mr. Wadhvani submitted that Carriage by Air Act, 1972 which has incorporated the Convention comes within the domain of Private International Law. He said rules of interpretation of international Convention are different from those of applicable to the domestic laws. In this connection, he referred to Article 31 of Vienna Convention on the Law of Treaties of which is India is a signatory, reads as under. "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given terms of the treaty in their context and in the light of its object and purpose."

Reference was then made to Article 51(c) of the Constitution of India which Mr. Wadhvani said lays down the same principle. In this connection reference was made to the decision of the Supreme Court in the case of *East and West Steamship Co., George Town, Madras v. S.K. Ramalingam Chettiar*, AIR 1960 SC 1058. Thereafter, Mr. Wadhvani made the following submissions ; "The main and principal object of the Warsaw regime was to achieve uniformity of laws in the field of carriage of the passengers and cargo by air. If each country were to apply its domestic laws, the same conflict of laws would arise as it was before the conventions had come into being and enforced as law by the high contracting parties. Instead of achieving "Uniformity", the application of the domestic laws would result in diversity : the result would be legal uncertainty and chaos.

Since, as per Article 1 of the Conventions, the rules contained in the Conventions are applicable to all the International Carriage of Passenger and Cargo, no action brought against a carrier can be tried under domestic laws. The actions have to be tried in accordance with these rules, Article 17 is one such rule; Article 24 makes application of rules mandatory. The applications of domestic laws lead to an incongruous situation. Suppose an accident takes place on board in which one passenger suffers a wound or death; and another person suffers a shock without manifestation of any bodily injury. The former passenger would be entitled to relief under the convention regime that would be subject to the limits prescribed by the conventions, but the later passenger would be entitled to relief under the domestic laws. The nature and burden of proof, the limits of liability of the carrier, the period of limitation to bring action against the carrier, the jurisdiction of the Courts would all be different in both cases. While the passenger who suffers death or gets wounded is placed in an adverse position as compared to the passenger who had suffered only shock, the later would be in an advantageous position.

The passengers of the same flight can also be subject to different set of laws. If

two passengers suffer same type of injury (not coming within the accepted concept of an accident) one of them brings an action in a country where domestic laws are made applicable, the plaintiff might be found entitled to relief; on the other hand, the other passenger who brings an action say in any of the countries of which the judgments have been cited, would not get any relief even though the domestic laws may be permitting the same.

The carriage by air of the passengers and cargo by air carriers involves a large number of varieties of risks . The Conventions have stipulated the conditions under which a carrier is made liable towards the passengers and shipper/ consignees leaving the parties to arrange their own coverage for the remaining risks. This liability was defined so as to enable the carrier to know its obligations and to get it insured; and likewise, the passenger was also made aware of the risks covered by the carrier and to arrange its insurance accordingly. It must be appreciated that the parties are free to enter into the contracts of their choice. Therefore, any enlargement of the conditions by applications of the domestic laws under which the carrier is to be made liable towards the passengers would be subjective, irrational, illogical and illegal. The architects of the Conventions had chosen not to impose any other liability upon the carriers.

The Indian Parliament cannot amend the Conventions so as to enlarge the scope of the liability of the carriers or rights of the passengers. It can denounce the Conventions as a whole. It follows that the Conventions are to be given force of law as these are. And its scope cannot be enlarged or curtailed by judicial pronouncements. If an action brought is outside the scope of Article 17, then such action cannot comply with the stipulations of Article 24 of the conventions."

Mr. Vaidyanathan, learned Senior Advocate, submitted that in order to apply Rule 17 of Schedule II to the Carriage by Air Act, 1972 the claimant should have suffered death or wound or any other bodily injury in an accident. He referred to the meaning of the word "accident" as given in the Concise Oxford Dictionary to mean : an unfortunate incident that happens unexpectedly and unintentionally; something that happens by chance or without apparent cause, chance. Mr. Vaidyanathan also referred to a decision of the Supreme Court in the case of Regional Director, ESI Corporation v. Francis De Costa, (1993) SUPPLEMENTARY (4) SCC 100, wherein the word "accident" has been defined to mean : "the popular and ordinary sense of the word "accident" means the mishap or untoward happening not expected and designed to have an occurrence is an accident." He said the above term "accident" is in consonance with the construction of the US Supreme Court in *Saks v. Air France*, wherein the Court, while answering the question as to whether an internal reaction of a person's body to a situation normal to air travel would constitute an accident emphasized on happening or occurrence of an event external to the passenger. In this case the US Supreme Court after examining the definition of "accident" in various dictionaries in French, and that of Great Britain, Germany and the United States and the judgments rendered by the Courts, concluded that : "liability under

Article 17 of the Warsaw Convention arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger. This definition should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries". Mr. Vaidyanathan said that the complainant in the present case, upon purchasing the air ticket expected/anticipated that a reclining seat would be provided to him. Upon boarding the aircraft, his discovery that his seat did not recline is a happening or occurrence external to him and as such would be an "accident" and the discomfort caused to him is the damage caused by the aforesaid accident. He further said the reliance has also been placed by the Gulf Airways in the decision of the Court of Appeal in *Re Deep Vein Thrombosis and Air Travel Group Litigation*, wherein it was held that failure on the part of the air carrier to inform the passengers of DVT in view of the cramped conditions in-flight is not an "accident" inasmuch as it is merely in-action or inertia. However, a totally contrary view has been expressed by the Supreme Court in Melbourne in *Povey v. Civil Aviation Safety & Ors.*, while dealing with a summary judgment sought by the airline, held that the "expectations which the passengers are entitled to have in such a situation may well include warnings of known risks and advice as to precautionary steps to avoid them". The Supreme Court permitted the passengers to amend its pleadings to incorporate facts with regard to such expectation of the passengers and the concomitant duty on the part of the carrier. On this Mr. Vaidyanathan submitted that the reason adopted by the Supreme Court of Australia seems well-founded inasmuch as the differentiation between action and inaction is often illusory. It is submitted that a passenger can legitimately expect a carrier to inform of the defect in the seat in advance and such failure, though inaction, would amount to an accident.

5. WITH reference to the words "other bodily injury" Mr. Vaidyanathan submitted that it suffices to say that physical discomfort to a passenger would fall within the phrase. The various foreign decisions cited by the respondent are not relevant for the present purpose inasmuch as they hold that the clause does not cover cases of "mental injury" and that the Rule deals only with "bodily injury".

6. ON the question : Whether the remedies provided under Schedule II to the Carriage by Air Act, 1972 are exhaustive and whether the said Schedule obliterates the other remedies under common/domestic laws, Mr. Vaidyanathan made the following submissions : "(i) Preamble to the Act states that the "Act is to give effect to the Convention for the unification of certain rules relating to international carriage..... and to make provision for applying the rules contained in the said convention.

(ii) Section 4 thereof provides that the "rules contained in Second Schedule... shall, subject to the provision of this Act, have the force of law in India in relation to the carriage by air to which those rules apply...

(iii) Section 5 thereof, which is non-obstante in nature, overrides the provisions of the Fatal Accidents Act, 1855 applying the provisions of the Act to cases to

which the Act applies. It is submitted that where there is specific, exclusion of one category/class of remedies, it is natural that the legislative intent was not to exclude others. Reference in this regard may be had to the observations of the Hon"ble Supreme Court of India in *Gram Panchayat v. Director, Consolidation of Holdings* :

"16. We have already extracted Section 42 of the Act and Rule 18 of the Rules. It would be clear that though Section 42 envisaged orders, preparation or confirmation of scheme and repartition separately, Rule 18 provides for limitation only in respect of an application under that section in a proceeding where an order was passed. There is the maxim *expressio uniusest exclusio alterius*-expression of one thing is the exclusion of another mention of one thing implies exclusion of another; when certain persons or things are specified in a law an intention to exclude all other from its operation may be inferred. When mention has been made only of "orders", the inference would be that preparation or confirmation of scheme and repartition are excluded....."

(iv) Rule 17 of Schedule II provides for a presumptive liability of the carrier in case of death, wounding or any other bodily injury, exceptions being engrafted in Rules 20 and 21. In fact the statement of objections states that [T]he Convention provides that when an accident..... causes damage to a passenger... there is a presumption of liability of the carrier". The rule does not deal with all kinds of liabilities of a carrier. It does not exclude other liabilities. Neither does it limit the liabilities to the ones mentioned therein, wherefore it is submitted that the same cannot be read therein.

(v) Rule 22 limits the liability of the carrier to a sum of 2,50,000 francs. The limitation put by the rule, being broadly worded, is the maximum a passenger can claim from a carrier for all and any liabilities of a carrier. But this cannot be read to limit the heads of liability to those dealt with under the Schedule/Convention.

(vi) Rule 23 declares any clause relieving a carrier of liability or from lowering the monetary limits set out in the Convention, as null. There is nothing in the provision which limits the liability of the carrier. It is submitted that the rule is for protection of the passengers and not to deprive of a passenger of his rights.

(vii) Rule 24(2) clearly provides that the limitations set out in Sub-rule (1) confine to and relate only to "cases covered by Rule 17". In the face of such clear words, it is submitted, nothing more can be added or inferred.

(viii) Rule 26 clearly contemplates actions/proceedings other than those governed by the Rules/Convention. The Rule provides that [i]f an action is brought against a servant or agent of the carrier arising out of damage to which these rules relate," if the servant acted within the scope of his employment, the limits under Rule 22 would apply.

(ix) In fact reference to *lex fori* is found in Rules 21 and 22. The former provides

that if the carrier can prove contributory negligence, "the Court may in accordance with the provisions of its own law, exonerate the carrier... The latter provides that [W]here, in accordance with the law of the Court seized of the case, damages can be awarded in form of periodical payments, the total amount shall not exceed the maximum of 2,50,000/- francs.

(x) There is no provision in the Act expressly limiting the remedies available to international passengers to those stated in the said Schedule for all and any cause of actions. There is no reason why the Drafters of the Convention could not have expressly stated such pre-emption in clear and unambiguous words if they so intended. Further, there is no provision in the Act repealing the other laws, wherefore it is submitted that such repeal cannot be inferred."

Mr. Vaidyanathan said that strong reliance has been placed on the interpretation made by the English Courts, wherefore the provisions of the main body of the English Act need to be considered. In any case, it is submitted that while interpreting international conventions, it is "desirable that decisions in different jurisdictions [signatory countries] should, so far possible, be kept in line with each other" or else the very consensus arrived at in the convention would no longer remain. This approach becomes all the more important in case of conventions like the present one which have an impact with the day to day international trade and commerce. However, at the same time, it is settled law, that decisions of foreign Courts are not binding and have merely a persuasive value.

Mr. Vaidyanathan then referred to the provisions of English Act to draw the distinction between that Act and the Indian Act as under : "(i) Section 4(1)(b) of the English Act provides that the "limitations on liability in Article 22.... apply whatever the nature of the proceedings by which liability may be enforced.... and that in particular.... the limitation for each passenger.... applies to the aggregate liability of the carrier in all proceedings which may be brought against him under the law of any part of United Kingdom....". The English Act, therefore, clearly contemplates actions/proceedings apart from those provided for under that Act.

(ii) Further, in view of Section 14(3) of the English Act the various enactments enumerated in the Second Schedule thereto have been repealed, which it is submitted, has not been done in case of the Indian Act. Further, the proviso to Section 14 of the English Act saves the rights or liabilities arising out of occurrences prior to the enactment of the English Act. This, it is submitted, indicates a clear obliteration of the rights and remedies under other English Acts enumerated in Second Schedule.

Mr. Vaidyanathan said that the House of Lords in *Sidhu v. British Airways* seems to be the first case to deal with the above proposition, wherein it has been held that the Convention limits the liabilities of carriers to those provided thereunder thereby obliterating other remedies. It is most respectfully submitted that the view taken by the House of Lords is not correct and at any rate distinct in view of

the differences in the wordings of the English Act and the Indian Act. He then referred to the view of the Courts in US, Australia and Germany : "View taken by Courts in US: The subsequent decision of the United States Supreme Court in *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng* follows the view taken by the House of Lords in *Sidhu's* case. However, the dissenting opinion of Stevens, J. in *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng* may also be referred, wherein Stevens, J. arrived at the following conclusions :

(i) Even with regard to liability of carriers, there is no uniformity inasmuch as cases of wilful misconduct are beyond the purview of the Convention. (ii) The interest in uniformity would not be significantly impaired if the number of cases not pre-empted, like those involving wilful misconduct, was slightly enlarged to encompass those relatively rare cases in which the injury resulted from neither an accident nor a wilful wrong. The overriding interest in achieving uniformity of rules governing claims arising from international air transportation", will be accommodated in the situations explicitly covered by Article 24.

(iii) It cannot be doubted that the literal text of the treaty does not prompt claims of personal injury that do not arise out of an accident. The amendment to the title of the Convention made in response to the proposal advanced by the Czechoslovak delegation, see ante, at 15, suggests that the parties assumed that local law would apply to all non-accident cases, though the inference is not strong enough in itself.

View taken by Courts in Australia : In view of clear language of Section 13 of the Australian Act, viz. Civil Aviation (Carriers' Liability) Act, exclusivity of the liability of a carrier under the Convention is undoubted. Sections such express provision is however absent in the Indian Act.

View taken by Courts in Germany : In *Volander v. Lufthansa* the Court after holding that the claim did not fall within the meaning of "accident", went ahead to consider the merits of the claim under German National law, specifically in contract and tort, thereby holding against exclusivity of the Convention with regard to the liability of the carriers.

Further, with regard to damages for goods, the German Courts have regarded claims for a reduction in the agreed fare on the basis of breach of warranty as outside the category of "actions for damages" thereby not accepting exclusivity of the Convention." He, therefore, submitted that there is a divergence of opinion by Courts of various countries with regard to exclusivity of the Convention.

7. ON the issue of travaux preparatoires Mr. Vaidyanathan referred to the interpretation of statutes enacted to give effect to a treaty or convention, the Court of Appeals of UK in *R v. Secretary for the Home Department ex parte Adan* has held that Articles 31 and 32 of the Vienna Convention, 1969 become relevant and need to be considered. Though, the House of Lords in *Sidhu's* case has concluded that the travaux preparatoires is not of any definitive assistance on the issue before us, the clause proposed to be inserted by the Czechoslovakian

delegation, reproduced by the United States Court of Appeals in *Tsui Yuan Tseng v. EIAI Isreal Airlines Ltd.* by far goes to indicate against exclusivity. The clause was however withdrawn upon amendment of the Title of the Convention by inclusion of the words "Certain Rules". It is submitted that the aforesaid clause proposed by the Czechoslovakian delegation is broadly worded and would include all cases for which provision is not made in the Convention. It was also the argument of Mr. Vaidyanathan that the Consumer Protection Act is a later special law would prevail over the Act. This proposition on the face of it is difficult to accept. Consumer Protection Act may be a later Act but compared to the Carriage by Air Act, 1972 it is a General Act while the Carriage by Air Act, 1972 is an Special Act which gives effect to the Warsaw Convention and deals with certain aspects concerning international travel as regards liability of air carrier.

8. WITH reference to the extra territorial jurisdiction Mr. Vaidyanathan made the following submissions : "At the outset, it is submitted that in view of Section 21 of the Act this Hon"ble Commission would have jurisdiction to entertain the present appeal. The section provides that [a]n action of damages must be brought, at the option of the plaintiff... either before the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made."

Further, jurisdiction of this Hon"ble Commission be dependent on the issue whether the Hon"ble State Commission could have entertained the complaint in question. Jurisdiction of the State Commissions has been detailed under Section 17 of the Consumer Protection Act. WITH regard to jurisdiction of State Commissions, the Hon"ble Supreme Court in *Union Bank of India v. Seppo Rally Oy*, III (1999) CPJ 10 (SC)=VII (1999) SLT 633=(1999) 8 SCC 357 has held that the extent thereof would be based on the principles contained in Section 11(2)* of the Consumer Protection Act dealing with the jurisdiction of District Forums. The amendment Act of 2002 has accorded legislative sanction to the foregoing position. Both Clauses (a) and (c) of Section 11(2) are relevant for the instant purpose. It is not disputed that the respondent has its office in Delhi, wherefore, under Clause (a), the Hon"ble State Commission would have jurisdiction. Further, the tickets were purchased in Delhi, wherefore part of the cause of action arose in Delhi. It was contended by the respondent that Section 14(1) requires this Hon"ble Commission to direct removal of deficiency in service. Since this Hon"ble Commission cannot make an order directing the respondent to remove the deficiency all over world, this Hon"ble Commission lacks jurisdiction inasmuch it does not have extra-territorial jurisdiction. It is submitted that it open to this Hon"ble Commission to direct the respondent to make an order requiring it to remove the deficiency insofar its operations relating to India. In any case, it is submitted that the section, which uses the words "shall issue an order to opposite party directing him to do one or more of the following", does not make it mandatory to direct removal of deficiency in service." It was a good opportunity for us to have such wonderful exposition of law by the learned Counsel, Mr. C.S. Vaidyanathan, Senior Advocate, Mr. Veenu Bhagat and Mr. M.

Wadhwani. With clarity of mind they presented both the views with respect to the Warsaw Convention as incorporated in the Carriage by Air Act, 1972. We have been referred to the principles of interpretation of international conventions and the law as laid and understood in various jurisdictions, particularly in England and USA. Both Mr. Wadhwani and Mr. Bhagat stressed on Rule 33 of the Second Schedule of the Convention as amended by the Hague Protocol to contend that in the face of Rule 33 any clause in any contract contrary to the rules of the convention would be nullified and void. This was with reference to the claim made in the present case. Rule 33, however, cannot be read in isolation. Mr. Wadhwani said that no claim for damages whatsoever is sustainable unless the case falls under Rule 17. To sustain a claim under Rule 17 the death or wounding of a passenger or any bodily injury suffered by him has to be on the board the aircraft or in the operation of embarking and disembarking resulting from an accident. As to what is the meaning of the word "accident" and the words "any other bodily injury". Mr. Wadhwani referred to decisions of the foreign Courts specially the cases of House of Lords in *Sidhu & Ors. v. British Airways* (supra), Queens Bench Division Court of Appeal in *Re Deep Vein Thrombosis and Air Travel Group Litigation* and that of United States in the case of *Air France v. Saks* and *Eastern Airlines v. Floyds*. Argument thus advanced was if the case does not fall under Rule 17 no liability can be imposed on the Air Carrier. On the face of it, it appears to be a strange provision. If there is no accident on account of which there is any bodily injury a passenger cannot claim any damages for whatever cause and which claim for damages would otherwise have been maintainable in common law. Mr. Vaidyanathan sought to draw a distinction between the provisions of the Carriage by Air Act, 1972 and that of English Act. He said wordings in the two enactments are different and we need not refer to the decisions of the English Courts. Even though, he said if the issue is same or similar a foreign judgment may have persuasive value, though not binding. With reference to the preamble of the Act, Mr. Vaidyanathan said that Act is to give effect to the Warsaw Convention for unification of "certain rules" relating to international carriage and to make provision for applying the rules contained in this convention. He laid stress on the words "certain rules" but the word "certain" has been used to mean "settled" "sure" "definite" or "known". The Act incorporates all the Rules of Warsaw Convention as amended by the Hague Protocol and has made them into law. Sections 3 and 4 of the Act is quite explicit. Section 5 further clarifies that Rules of Warsaw Convention was applied to determine the liability of an air carrier in respect of death of a passenger and that would be irrespective of the Fatal Accidents Act, 1855 or any other enactments or Rule having the force of law in the Country. Sub-section (2) of Section 5 provides that liability against an carrier is enforceable for the benefit of such of the members of the passengers family has sustained damages by reason of his death. There is explanation which tells us as to what the expression "member of the family" would mean. There is nothing in Section 5 or any other section of the Act which would deviate from the Rules of the Warsaw Convention as amended. We may also note that Section 6 provides for conversion of franks

into Indian Rupees as Rule 22 of the Second Schedule prescribes limited liability of the carrier in terms of French francs. We think in spite of all the arguments we are perhaps missing the real issue. Here is a consumer, who is passenger, who paid for business class fare hoping to get business class facilities. His contract with the airlines was that he wanted a higher class seat for which fare is higher so that he can have a pleasurable long journey with a reclining seat. It is a matter of common knowledge that in higher class more the facilities provided by any airlines. What will happen to a passenger who has been charged business class fare but provided a seat in the economy class ? Does the Warsaw Convention bar the claim of any such passenger for refund of the difference of the fare of the business and economy class and along with that is his claim for compensation also barred ? We do not think so. Appellant never bargained for a lower class seat having paid for a higher class and having been promised that he will be provided a seat in the higher class. Here a passenger will have a right to sue the Airlines both for the difference of the fare and damages for inconvenience undergone by him. We can also assume for the purpose of argument that passenger here is a senior citizen and is used to comfortable life and for that reason he purchased a higher class ticket and he is promised a seat of higher class. This is denied to him for whatever reason. In our view, he can certainly sustain a claim against the airlines. Taken other case where a passenger is misled that he will be provided a higher class seat and he was charged for the same knowing fully well that no such seat would be available. Airlines cannot escape liability in such a case. Illustration may look little inept, but brings out a point to sustain a claim against air carrier without in any way infringing the Act incorporating Warsaw Convention as amended by the Hague Protocol. We need not go into the niceties of legal arguments so ably advanced to deny the claim of the appellant under Rule 17 which has been sought to be relied with reference to Rules 18, 24 and 25, and the principles of *Travaux préparatoires*." No argument is needed to show that a reclining seat gives more comfort than fixed seat in 6 hours journey by air.

9. ON the question of jurisdiction of the State Commission to entertain the complaint and for us to hear the appeal against the order of the State Commission we have to refer to Section 11 of the Consumer Protection Act. We have also held that the claim for damages which is sustainable is outside the scope of Carriage by Air Act, 1972 and is not barred under the Warsaw Convention as amended, which is incorporated in the Act. We may however, refer to Rule 29* of the Warsaw Convention as amended regarding the place where a claim for damages would lie. It is not disputed that respondent-airlines has an establishment in India from where the ticket was purchased by the appellant. We will have, therefore, jurisdiction in the matter even on that account.

10. IN the case before us appellant was promised his seat in the business class with all the attendant facilities. He is not told before embarking in the plane that his seat is at a place where he could not recline as there was no reclining seat and for this the airline committed breach of the promise for which it is certainly

liable. As to the reasons why the seat could not be reclining is of no concern to the passenger, as we said earlier. If he had been told when he purchased the ticket or before boarding card was issued to him that his seat is not reclining, he could have changed his mind and opted for some other airlines or some other flight. He is, therefore, certainly entitled to refund of an amount treating the seat given to him of the lower value. We think it is quite reasonable to hold that petitioner was given a seat in the economy class and not in the business class and would, therefore, be entitled to difference of the fare between the two. Further for the breach of promise petitioner will also be entitled to damages which we assess at Rs. 1.00 lakh. Accordingly, the appeal is allowed. The order of the State Commission is set aside. We direct that the respondent-Gulf Airlines shall pay to the appellant the amount of difference of fare between the business class and economy class existing on the date when the ticket was purchased by the appellant and also pay Rs. 1.00 lakh as damages. Both these amounts will carry interest @ 9% from the date of filing of the complaint till payment. Appellant will be entitled to costs which we assess at Rs. 10,000/-. Before we conclude we express our deep appreciation of the assistance rendered to us by Mr. C.S. Vaidyanathan, Senior Advocate who was ably assisted by Ms. Astha Tyagi and Mr. Avinash Tyagi, Advocates. Appeal allowed.