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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 30.04.2019
Pronounced on: 22.05.2019

\+ W.P.(C) 7443/2012

AMITA JAIN AND ORS ..... Petitioners

Through Mr.Aruna Mehta, Adv. with
Mr.Sanjeev Mehta, Adv.

versus

M/S AIR CHARTERED SERVICES PVT. LTD AND ORS
..... Respondents

Through Mr.D.D. Singh, Adv. with
Mr.Navdeep Singh, Adv. for R-1.
Mr.A.K. De, Adv. with Mr.Rajesh Dwivedi, Ms.Aanya De & Mr.Zahid Ali, Advs. for R-2.
Ms.Anjana Gosain, Adv. for R-3 to 5.

\+ W.P.(C) 8115/2012

JOY CYRIAC AND ORS ..... Petitioners

Through Mr.Aruna Mehta, Adv. with
Mr.Sanjeev Mehta, Adv.

versus

M/S AIR CHARTERES SERVICES P.LTD AND ORS
..... Respondents

Through Mr.D.D. Singh, Adv. with
Mr.Navdeep Singh, Adv. for R-1.
Mr.A.K. De, Adv. with Mr.Rajesh Dwivedi, Ms.Aanya De & Mr.Zahid

Ali, Advs. for R-2.
Ms.Anjana Gosain, Adv. for R-3 to 5.

\+ W.P.(C) 4284/2013

FATIMA RIZVI AND ANR ..... Petitioners

Through Mr.Aruna Mehta, Adv. with Mr.Sanjeev Mehta, Adv.

versus

AIR CHARTER ..... Respondent

Through Mr.D.D. Singh, Adv. with Mr.Navdeep Singh, Adv. for R-1.
Mr.A.K. De, Adv. with Mr.Rajesh Dwivedi, Ms.Aanya De & Mr.Zahid Ali, Advs. for R-2.
Ms.Anjana Gosain, Adv. for R-3 to 5.

CORAM:
HON'BLE MR. JUSTICE SURESH KUMAR KAIT

J U D G M E N T

1. In W.P.(C) No.7443/2012, the petitioners seek direction thereby directing the respondents to pay a sum of ₹1,42,16,000/- in relation to the death of Dr. Rajesh Jain to the petitioners along with interest @ 12% p.a. from the date of petition till its realization.

2. In W.P.(C) No.8115/2012, the petitioners seek direction thereby directing the respondents to pay a sum of ₹52 lacs in relation to the death of Cyril P Joy, male nurse, to the petitioners along with interest @ 12% p.a.

from the date of petition till its realization.

3. In W.P.(C) No.4284/2013, the petitioners seek direction thereby directing the respondents to pay a sum of ₹46,37,000/- in relation to the death of Dr.Sayad Arshad Abbas to the petitioners along with interest @ 12% p.a. from the date of petition till its realization.

4. The facts and issues are same and similar in all the three writ petitions, therefore, these petitions are being decided by a common judgment.

5. The brief facts of the W.P.(C) No. 7443/2012 are that Dr.Rajesh Jain husband of the petitioner no.1 and father of the petitioner nos.2 & 3 and son of respondent nos.6 & 7 was M.B.B.S. and M.D. Doctor and was working with Apollo Hospital, Sarita Vihar, Delhi as Emergency Medical Officer w.e.f. 01.08.2010. One patient named as Rahul Raj aged about 20 years residence of Patna was suffering from lever cirrhosis and having seen his serious condition, the family members contacted the management of the Apollo Hospital, Delhi to know about the chances of survival of the above named patient. The Medical Superintendent of Apollo Hospital was requested to arrange air chartered ambulance so that the patient could reach from Patna to Delhi in safe condition. Accordingly, the Apollo Hospital tied

up with respondent no.1 and the air ambulance took off from Delhi to Patna with two crew members, two doctors (one Dr.Rajesh Jain who is the subject matter of W.P.(C) No. 7443/2012 and the other Dr.Sayad Arshad Abbas is the subject matter of W.P.(C) No. 4284/2013) and one male nurse (who is the subject matter of W.P.(C) No. 8115/2012).

6. The air ambulance named as "*Pilatus*" along with patient and one attendant took off from Patna at about 20.31.58 IST on 25.05.2011. The above said patient Rahul Raj was accompanied by his cousin brother in the said ambulance.

7. Learned counsel appearing on behalf of the petitioner submits that as per the rules of the respondent no.3, a single Engine Aircraft cannot be operated at night or in bad weather condition for medical evacuation purposes. The sub rules 2.2 and 2.3 of Civil Aviation Rules, under provisions of Rule 133A of the Aircraft Rules, 1937 unambiguously demonstrate that the Single Engine Aircraft cannot be used in the night or when the meteorological condition is not good even for medical evacuation purposes. The meteorological department hereinafter referred as respondent no.5 is having its meteorological office at IGI Palam, Delhi which gives 24 hours weather forecast to airport to enable them to judge the conditions of

weather for the safe flight operations. The reports of weather from various meteorological department are based upon various meteorological instruments such as RWY ends, DWR, Satellite weather data etc. for 24 hours which are available to the airport. However, in the present case, the weather warning at 1700 hours and 1730 IST which was valid from 2030 of 25.05.2011 to 0530 IST of 26.05.2011 about squall, movement of CB clouds to the circular domain within the 100 Nautical miles of IGI airport likely to be effected by the dust storm/thunder storm when surface wind speed is associated with squall which will likely to reach from 030 direction with speed exceeding 30 KTS/60 KM per hour and the visibility will become very dim. Accordingly, it would be en-dangerous for any flight to pass through in such condition within 100 Nm of IGI airport. Therefore, in view of the various forecast that weather was not fit for flying of single engine aircraft, there was every likelihood that the single engine aircraft would crash. However, the Air Traffic Controller, who works under respondent no.4 had given the permission to allow the pilot to take off aeroplane either from Delhi airport or from Patna airport, is responsible for his negligent act which took the lives of eight persons on board and three persons on ground.

8. Counsel for the petitioner further submitted that eight persons were

travelling in the ill fated aircraft and the above said aircraft was having the system to receive the meteorological forecast as it was an advanced aircraft. Moreover, when the above said aircraft took off from Patna aerodrome the weather was already hazy and the visibility was low and there was meteorological forecast in the knowledge of the pilot that when the aircraft would reach Delhi the visibility would become very dim. Moreover, there would be high wind pressure at the rate of 100 Nm near the area of IGI coupled with squall, thunder storm and CB clouds and single engine aircraft would not be able to counter such heavy wind pressure squall and CB clouds. Thus, there was every likelihood that above said single engine aircraft would crash in such a weather conditions. Therefore, the pilot had failed to take into consideration the meteorological forecast while taking off from Patna airport. Apart from this, due to non-sharing of the reports of weather forecast by the officials of the respondent no.3, the above said aircraft was allowed to take off from Patna but could not counter the bad weather and fell down on the houses at Faridabad due to which three ladies on ground also lost their lives.

9. It is further submitted that Air Traffic Controller works under DGCA respondent no.3. Despite of all the warning from meteorological

department, the DGCA gave clearance to the flight in the night hours and the said flight started from Patna at about 8.30 IST on 25.05.2011 for Delhi. When the flight reached at Faridabad at about 22.41 IST due to bad weather, strong winds, turbulence and low visibility, the communication of the aircraft with radar disconnected. Since it was light weight aircraft, so due to pressure of wind its tail broke down and it came spirally on the houses at Faridabad. Thus, the officials of respondent no.3 were well aware about the weather conditions which they received from meteorological department and knowing very well that single engine aircraft was not suitable to operate in such conditions. Therefore, the Air Traffic Controller ought to have sent a message in time at the Patna Airport and not to allow the plane to take off due to poor weather condition.

10. Counsel for the petitioners further submitted that in view of above facts, it is established that the above said aircraft had crashed as rules were floated and by-passed by the officials of DGCA as well as by ignoring the meteorological forecast. The respondent no.1 who is the owner of the above said aircraft knew very well that the Air Chartered Ambulance cannot be used in night time and also in poor weather conditions but only to earn the money the said flight was allowed, so the respondent no.1 is equally

responsible for the negligent act of its pilot to take off the flight despite poor weather conditions. The respondent no.2 is the insurer of the above said aircraft and the said respondent is liable to indemnify the respondent no.1 in relation to the compensation/damage passed against the respondent no.1.

11. To strengthen her arguments, counsel for the petitioners has heavily relied upon the judgment dated 25.01.2016 delivered in W.P.(C) 1867/2012 and 1880/2012 by this court.

12. Respondent no.2 Insurance company has filed amended counter affidavit whereby stated that respondent no.1 had obtained a Hull All Risk insurance policy covering amongst others third party liability including passenger legal liability of ₹ 50 lacs per passenger and baggage for ₹ 270 crore and under the said policy, the liability of the respondent no.2 is to indemnify the respondent no.1 for legal liability upto ₹ 50 lacs per passenger and baggage to the extent the legal liability is established against and incurred by the respondent no.1. The liability of respondent no.2 to indemnify respondent no.1 under the policy arises only after the legal liability of respondent no.1. The insurance contract is only between respondent no.1 and respondent no.2 and there is no privity of contract between the petitioners and respondent no.2. So far as the claim of the

petitioners against the employer of the deceased is concerned, it has not been disclosed in the amended writ petition that the petitioners have already received huge amount from the employer of the deceased M/s Indraprastha Medical Corporation Limited. So far as liability of respondent no.1 to pay compensation under the carriage by Air Act 1972 as on the date of accident is concerned, the same is payable as per notification of Ministry of Tourism and Civil Aviation dated 30.03.1973 which is ₹7.5 lacs. The compensation of the said amount payable under the Carriage by Air Act 1972 has been enhanced to ₹20 lacs by notification number 137 dated 07.01.2014 of the Ministry of Civil Aviation with effect from the date of notification. Therefore, under the Carriage by Air Act 1972, the compensation payable in the case of death of a passenger has been increased from ₹7.5 lacs to ₹20 lacs by notification dated 17.01.2014 which is prospective in operation and therefore the petitioners are entitled to ₹7.5 lacs being legal liability of respondent no.1.

13. As noted above, legal heirs of pilot and co-pilot filed W.P.(C) 1867/2012 and 1880/2012. In the said petition, counsel for respondent no.2 contended that the crew were not covered under the insurance policy. The learned counsel, however, accepted the fact that the compensation had been

paid to respondent no.1 for damage to the aircraft. It was affirmed that a sum of ₹13,49,90,000/- had been paid to respondent no.1 in that behalf. Accordingly, argued that no direction whatsoever could be issued to respondent no.2 to pay ₹50 lacs each, on account of death of the crew members, in view of the fact that the policy did not cover the crew.

14. Further contended in the said case that the petitioners therein were entitled to compensation either under the 1923 Act or the 1972 Act in view of notification dated 30.03.1973. As per said notification, the maximum compensation which was payable under the 1972 Act, is ₹7.50 lacs.

15. In the case in hand, the contention of counsel for respondent no.2 is that the passengers are entitled only as per the notification dated 30.03.1973, therefore, beyond that the present petition cannot be allowed.

16. Learned counsel appearing on behalf of the respondent no.1 submitted that the present petitions are not maintainable and are liable to be dismissed for the reason that as per the Carriage by Air Act 1972, the petitioners are entitled to a fixed and specified compensation, amounting of ₹7.5 lacs and answering respondent no.1 obtained the coverage of ₹50 lacs from respondent no.2. That after receipt of above amount from respondent no.2, no claims lies against respondent no.1. He further submitted that in case if

at any stage, it is found that the petitioners are entitled to any compensation, then the same may be recovered from respondent no.2 which has the coverage to the extent of ₹ 50 lacs for each person.

17. I have heard learned counsel for the parties and perused the material on record.

18. Chapter XI notification regarding application of the Carriage by Air Act, 1972 which is not international is relevant in the present cases. As per the said notification, section 4, 5 and 6 of the Act and Rules contained in the Second Schedule to that Act shall apply to all Carriage by Air not being international carriage.

19. As per Chapter III, Liability of the Carrier is that in the event of death of a passenger or any bodily injury or wound suffered by a passenger which results in a permanent disablement incapacitating him from engaging in or being occupied with his usual duties of business or occupation, the liability of the carrier for each passenger shall be ₹7,50,000/- if the passenger is 12 or more years of age and ₹3,75,000/- if the passenger is below 12 years of age on the date of accident; Provided that by special contract, the carrier and the passenger may agree to a higher limit of liability.

20. It is not in dispute that the aircraft was insured by United India

Insurance Company Limited whereby covered all risks and it is mentioned therein that third party liability including passenger legal liability is of ₹ 50 lac per passenger.

21. It is pertinent to mention here that the pilots and co-pilots of the aircraft who also lost their lives in the same accident had filed W.P.(C) No. 1867/2012 and 1880/2012 and the same was decided vide judgment dated 25.01.2016 whereby this Court has come to the conclusion that the crew members also come in the category of passengers and are entitled for an amount of ₹50 lacs each, whereas, in the present case, passengers are the claimants.

22. Therefore, since the accident occurred on 25.05.2011, which was after the issuance of the 30.03.1973 notification and 2009 amendment but prior to the 17.01.2014 notification, the applicable provisions in the present case would be the Second Schedule to the 1972 Act. Though, the 17.01.2014 notification has superseded 30.03.1973 notification, it has saved all those acts which had been done or omitted to be done. Accordingly, the provisions of Section 5 of the 1972 Act read with Rule 17 and Rule 22 of the Second Schedule as amended by the 30.03.1973 notification, would apply in this case. Section 5 of the 1972 Act is reproduced as under:

*"**5. Liability in case of death** - (1) Notwithstanding anything contained in the Fatal Accidents Act, 1855 or any other enactment or rule of law in force in any part of India, the rules contained in the First Schedule, the Second Schedule [and the Third Schedule] shall, in all cases to which those rules apply, determine the liability of a carrier in respect of the death of a passenger.*

(2) The liability shall be enforceable for the benefit of such of the members of the passengers family as sustained damage by reason of his death. Explanation. – In this sub-section, the expression ―member of a family‖ means wife or husband, parent, step-parent, grand parent, brother, sister, half-brother, half-sister, child, step-child and grand-child: Provided that in deducing any such relationship as aforesaid any illegitimate person and any adopted person shall be treated as being, or as having been, the legitimate child of his mother and reputed father or, as the case may be, of his adopters.

(3) An action to enforce the liability may be brought by the personal representative of the passenger or by any person for whose benefit the liability is under sub-section (2) enforceable, but only one action shall be brought in India in respect of the death of any one passenger, and every such action by whomsoever brought shall be for the benefit of all such persons so entitled as aforesaid as either are domiciled in India or not being domiciled there express a desire to take the benefit of the action.

(4) Subject to the provisions of sub-section (5), the amount recovered in any such action, after deducting any costs not recovered from the defendant, shall be divided between the persons entitled in such proportion as the Court may direct. (5) The Court before which any such action is brought may, at any stage of the proceedings, make any such order as appears to the Court to be just and equitable in view of the provisions of the First Schedule or the Second Schedule [or the Third Schedule], as the case may be, limiting the liability of a carrier and of any proceedings which have been or are

> *likely to be commenced outside India in respect of the death of the passenger in question.*"

23. Thus, provides that notwithstanding anything contained in the Fatal Accident Act, 1855 or any other enactment or Rule in force, the Rules contained in the Second Schedule in all cases to which those Rules apply determine the liability of a carrier in respect of death of a passenger. The sub-Section (2) of Section 5 makes it clear that law shall be enforceable for the benefit of such members of the passenger's family who has sustained damage by reason of his death. The explanation expounds that the expression '*members of a family*' would, inter alia, mean, the wife, parent or even the brother and sister etc.

24. Similarly, Rule 17 of the Second Schedule enunciates that the carrier will be liable for damage sustained, inter alia, in the event of death of a passenger if, the accident which caused the damage so sustained took place on board the aircraft.

25. Rule 17 of the Second Schedule is reproduced 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 operations of embarking or disembarking."*

26. Rule 22 provides for quantification of liability which is reproduced as under:

> "*22. (1) In the carriage of persons the liability of the carrier for each passenger is limited to the sum of 2,50,000 francs. Where in accordance with the law of the Court seized of the case, damages may be awarded in the form of periodical payments the equivalent capital value of the said payments shall not exceed 2,50,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a high limit of liability.*
> *(2) (a) In the carriage of registered baggage and of cargo, the liability of the carrier is limited to a sum of 250 francs per kilogram, unless the passengers or consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the passenger's or consignor's actual interest in delivery at destination.*
> *(b) In the case of loss, damage or delay of part of registered baggage or cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the loss, damage or delay of a part of the registered baggage or cargo, or of an object contained therein, affects the value of other packages covered by the same baggage check or the same air waybill, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.*
> *(3) As regards objects of which the passenger takes charge himself the liability of the carrier is limited to 5,000 francs per passenger.*

> *(4) The limits prescribed in this rule shall not prevent the Court from awarding, in accordance with its own law, in addition, the whole or part of the Court costs and of the other expenses of the litigation incurred by the plaintiff. The foregoing provision shall not apply if the amount of the damages awarded, excluded Court cost and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later.*
> *(5) The sums mentioned in francs in this rule shall be deemed to refer to a currency unit consisting of sixty-five and a half milligrams of gold of millesimal fineness nine hundred. These sums may be converted into national currencies in round figures. Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgement"*

27. Accordingly, the liability in the event of death of a passenger has been pegged qua each such passenger at ₹7,50,000/- if the passenger is 12 years or more years of age. However, if the passenger is below 12 years of age on the date of accident, the liability stands scaled down to ₹3,75,000/-. Rule 22(1) contains a caveat, which is, that by a special contract, the carrier and the passenger may agree to a higher limit of liability.

28. Moreover, Section 5 read with Rule 17 of the Second Schedule makes it clear that the liability of the carrier qua the passenger is determinable only under the provisions of the 1972 Act and the attendant rules, and for this, no

other Act or enactment or Rule need be brought into play. The factors such as age, future prospects and employment, etc. have no bearing upon the liability of the carrier. The principle, which appears to form the bedrock of the statute is that once you are on board the aircraft and if, the accident which caused the damage takes place, the carrier will be liable. As a matter of fact, Rule 17 of the Second Schedule extends the liability to an accident which takes place even in the course of operations of embarking or disembarking.

29. Respondent no.2 has vigorously disputed its liability in so far as the passengers on board are concerned. But admitted in W.P.(C) No. 1867/2012 that respondent no.2 has paid to respondent no.1, a sum of ₹13,49,90,000/- towards the damage to the aircraft. Furthermore, as per the final report of its surveyor, which is dated 15.11.2011, respondent no.2 was requested to pay a sum of ₹1,50,00,000/-, on account of the death of persons on ground and a sum of ₹9,93,510/- towards damage caused to two houses due to the crash. In addition, respondent no.2 has also requested to pay compensation amounting to ₹2,50,00,000/- in respect of passengers on board, which includes the two doctors, male nurse and the legal heir of the patient who died in the crash. Notwithstanding, what is discussed above, since an

insurance contract is a special contract between insured and the insurer, it is a well accepted principle of law that, in a case, where there is any ambiguity in the provisions of a contract of such nature (in this case an insurance contract) then, the ambiguity, in the contract, is held to be against the maker of the contract. The doctrine of *contra-proferentem* would apply, in such circumstances.

30. It is pertinent to note that in judgment dated 25.01.2016 passed in W.P.(C) 1867/2012 and 1880/2012, this Court recorded that the surveyor employed by the insurance company in his final report dated 15.11.2011, clearly opined, that the crew were covered by the insurance contract i.e. the policy. As per the insurance policy, the risks covered included the risk to the Hull and other risks including qua persons on board the aircraft.

31. It is also pertinent to mention that as recorded in para 14.7 of the judgment dated 25.01.2016 that the insurance company has clearly admitted that passengers were covered under the subject insurance policy but their contention in that case was the passengers would not include crew. In the present case, the stand of respondent no.2 is that there is no contract between the passengers and respondent no.2, therefore, they are only entitled as per Act of 1973 and are entitled only ₹ 7,50,000/-, which cannot be accepted.

32. As discussed above, section 5 of the 1972 Act clearly establishes that those who are covered under the provisions of the said Act and the Schedules, the liability of the carrier in respect of death of a passenger would be governed by the provisions of the aforementioned Act. The opening words of Section 5 makes clear by use of the expression that notwithstanding anything contained in the Fatal Accidents Act, 1885 or any other enactment or rule of law in force in any part of the India, the rules contained in the first schedule, the second schedule and the third schedule shall determine the liability of the carrier. Therefore, the liability of the carrier under the 1972 Act is in addition to the liability under the 1923 Act with the caveat, that any payment made under the 1923 Act will have to be adjusted qua the liability determined under the 1972 Act. Furthermore, Rule 22(1) clearly provides that a carrier by a special contract may agree to a higher limit qua its liability.

33. Learned counsel for the respondent no.2 has raised the issue that in case this Court is inclined to allow these Writ Petitions, the amount received by the petitioners from the employer of the deceased may be deducted from the compensation to be awarded. On this issue, I find no substance in view of the settled law that the collateral benefit received by the members of the

family of deceased cannot be set-off. Thus, this contention is rejected.

34. Accordingly, I am of the view that each passenger is entitled compensation for an amount of ₹ 50 lacs.

35. In view of above, I hereby direct respondent no.1 to pay an amount of ₹7.5 lacs as per statutory liability under the Act 1972 and respondent no.2 is directed to pay an amount of ₹ 42.5 lacs with interest @ 6% per annum from the date of filing of petitions to the petitioners in each petition within four weeks from the receipt of this order, failing which the petitioners shall be entitled to interest @ 12 % p.a. on delayed payment.

36. In W.P.(C) No. 7443/2012, the petitioner no.1 is the wife and petitioner nos.2 & 3 are the sons of late Dr. Rajesh Jain. Respondent nos.6 & 7 are father and mother of lat Dr.Rajesh Jain. Accordingly, 80% of the compensation amount shall be given to petitioner nos.1 to 3 and 20% shall be given in favour of respondent nos.6 & 7. It is made clear that if any of the respondent nos.6 & 7 is no more, his or her share shall go in favour of petitioner nos.2 & 3.

37. In W.P.(C) No. 8115/2012, petitioner nos.1 & 2 are the parents and petitioner nos.3 & 4 are the sisters of Late Cyril P Joy who died in the accident. Accordingly, out of the compensation amount of ₹590 lacs, 70%

of the same shall be given in favour of the petitioner nos.1 & 2 and balance 30% amount (15% each) shall be given in favour of petitioner nos.3 & 4.

38. In W.P.(C) No. 4284/2013, the petitioners are the parents of Late Dr.Sayad Arshad Abbas who died in the accident. Therefore, the compensation shall be given in favour of the petitioners.

39. In terms of above, these petitions are allowed and disposed of.

(SURESH KUMAR KAIT)
JUDGE

MAY 22, 2019
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