ANDHRA PRADESH HIGH COURT

K. Bharathi Devi

Vs.

G. I. Corpn. of India

Appeal No. 1185 of 1979

(K. Rama Swamy, J.)

18.07.1987

JUDGEMENT

K. Rama Swamy, J.

1. An interesting but difficult question of law has arisen, though through old moorings, but sprouted from virgin soil i.e., the Carriage by Air Act, 197 (Act 69 of 1972), for short, "the Act", viz., whether the collateral benefits accrued out of the death of a passenger in an accident on an international carriage, would be a set-off from liquidated damages under the Act. It exacted considerable anxiety and thought as this question has not arisen so far in any Court of the High Contracting Parties. The undisputed facts lie in a short compass which are stated thus : The unsuccessful plaintiffs-appellants' suit for recovery of Rs. 1,22,200/- as damages was entailed with dismissal. The first appellant is the widow, the second and third are the son and daughter respectively of one K. Adinarayana. When he was travelling on an International carriage - Air Craft No. VT-DWN on Airway ticket, when the Aircraft was to reach Bombay on Oct. 12, 1976, it crashed in which Adinarayana died. The respondent issued notice Ex. A-1 dated Nov. 22, 1976, calling upon the appellants to furnish the particulars so as to settle the claim for damages. Pursuant thereto the suit claim was made; correspondence ensued and by telegram Ex. A-28 dated Aug. 1, 1977, the respondent withdrew the offer to pay Rs. 1,20,00/- towards the liability followed by a suit notice Ex. A-13 dated Aug. 20, 1977 and reply thereto under Ex. A-14 dated Aug. 22, 1977 leading to lay the action in the suit. In its defence, the respondent admitted its liability to pay the damages for loss of life of the passenger Adinarayana, for short, "the deceased" but pleaded set- off of a sum of Rs. 2,00,000/- received by the appellant from the Personal Accident Insurance Policy and thereby its liability under the Act stood discharged. It is further pleaded that the appellants suppressed the factum of their receipt and played fraud on the respondent and as a consequence the contract became void. As a result, it is not liable to pay the suit claim. On framing appropriate issues, adduction of evidence and consideration there of, the trial Court dismissed the suit on the ground that the appellants suppressed the material fact of receipt of Rupees two lakhs and thereby they played fraud on the respondent. Accordingly, the contract comes to a terminus. Thereby the suit cannot be decreed. Thus the appeal.

2. Sri Rajeswara Rao, learned senior counsel for the appellants has contended that under the Act,

the liability of the carrier has been fixed at 2,50,000 Francs equivalent to Rs. 1,75,000/- and under Schedule II thereof the liability is the maximum. This is a statutory liability bereft of power to claim any deduction from and out of any benefits received by the appellants towards personal Accident Insurance Policy. The Respondent cannot be relieved of that liability. Accordingly the suit is to be decreed.

3. Sri Ratnakar, learned counsel for the respondent, agreeing that the liability is of 2,50,000 francs equivalent to Indian currency of Rs. 1,75,000/-, contended that it is only as outer limit prescribed under the statute but any other benefit received out of the death of the deceased has to be given set-off before claiming amounts under the Act. Since the appellants have received Rupees two lakhs from Personal Accident Insurance Policy, the respondent is absolved of its liability under the Act. Accordingly, the decree of dismissal can be sustained on that ground. He referred to me the several provisions in the Conventions, the allied Acts in England, the Commentaries thereon, to which I would refer to at the appropriate stage.

4. The respective contentions give rise to the question whether or not the respondent is entitled to plead set-off of any collateral benefit received by the appellants otherwise than under the Act in discharging the liability of the damages payable under the Act. At the outset it may be stated in fairness to the respondent and its counsel Sri Ratnakar, that the ground raised in the Court below that the contract became void by reason of suppression of the receipt of Rupees two lakhs towards Personal Accident Insurance Policy has not been pressed for consideration before me.

5. Oversimplified argument of the learned counsel for the appellants does not cut the ice. It is, therefore, of necessity to track on the first principles to reach satisfactory solution. The well-known doctrine, actio personalis moritur cum persona viz., personal action dies with the person, has its root for long but with passage of time, injustice which it heaped upon has given birth to the Fatal Accidents Act, 1846, known as Lord Chancellor Act introduced by Lord Chancellor vesting on the dependents an independent cause of action to enforce the liability arising out of the death of deceased. It be termed as "Survivals' Statute", for convenience. Independent cause of action also arises to the relatives of the deceased who have been deprived of the assistance of him/her by statutory enactments which are called in American Jurisprudence, "Wrongful Death Statutes" like our Motor Vehicles Act, 1939, Law Reforms (Miscellaneous Provisions) Act, 1934 of England, etc.

6. Action for damages is founded on tort, such as negligence, breach of statutory duty, etc. Damages are intended to recompense for loss of life, etc. as far as money can compensate and will give the injured pecuniary reparation. In certain circumstances, it may be a consolation money viz., solatium. But in all these actions, either under the Survivals' Statute or Wrongful Death Statutes or Common Law, the burden is always on the claimants/relatives or dependents of the deceased or injured to establish not merely of the cause of death or accident or the negligence or breach of duty statutory or otherwise, but also resultant deprivation of their support, etc. The Fatal Accidents Act, 1959 engrafted certain deductions as permissible and catena of decisions upheld deductions and Section 2 thereof excluded insurance premium, etc. as items of deductions. It was further amended in Fatal Accidents Act, 1976 Section 4(1) - Administration of Justice Act, 1982, Section 3. The right conferred on the relatives, etc. is independent of the right and not a continuation of the cause of action vested in the deceased. The Fatal Accidents Act, 1855 is in operation in India, does not contain any provision exempting Personal Accident

Insurance Policy, etc. from being deducted in computing allowable damages.

7. Individuals, Corporations, State Undertakings or States operated Carriages by air, have to navigate through air space of several States or land on their territories who have divergent laws under which the Tribunals or Courts having jurisdiction over the area are to award damages for accidents. Laws may vary from the country of start or of journey or landing or destination, etc.

8. Under Common law, carriage by air is performed upon the terms of the contract made between the carrier and passenger or consignor of cargo. The contract is normally made by the passenger or consignor accepting a ticket or air-waybill offered by the carrier with terms and conditions normally known as standard conditions by way of special contract to restrict or exclude his liability, but Courts have construed the exclusion clause strictly against the carrier in particular, clear provisions are necessary to exclude liability or negligence. (Vide Halsbury's Laws of England, Volume 2, Fourth Edition, Paras 1368 and 1380, pages 656-657). In regard to limitation, the rights and liabilities of the carriers and passenger or cargo, terms of contract under common law are set out in Halsbury's Laws of England, 4th Edition, Volume 5, para 393 at page 191 thus :

> "The parties to a contract for the carriage of passengers or goods may, with certain exceptions, incorporate in it any terms and conditions upon which they may agree. The terms and conditions of any particular contract of carriage are to be ascertained by the application of the general law of contract...Standard conditions of carriage may be incorporated either by express agreement, oral or written, in which case no problem arise either where the contract is made by the issue of a ticket or other contractual document or from a course of dealing between the parties."

In para 397 at page 194-195, "restrictions of terms which may be incorporated", it is stated that "a contract" for the conveyance of a passenger in a public service vehicle "is void so far as it purports to negative or restrict the liability of a person in respect of the death of, or bodily injury to, the passenger while being carried or entering into or alighting from the vehicle, etc. or purports to impose any conditions with respect to the enforcement of any such liability. The conditions to exclude or limit its liability in respect thereof, are void and of no effect. Any clause in the contract and all special agreements by which the parties purport to infringe the appropriate rules, whether by deciding what law is to be applied or by altering the rules as to jurisdiction, and likewise null and void.

9. The Chicago Convention signed by 38 States on Dec. 7, 1944 and came into force from April 4, 1947, superseded the Paris Convention, 1919 and Havana (Pan American) Convention, 1928, recognised that every State has reserved complete and exclusive sovereignty aver the air space above its territory and agreed to have international civil aviation to develop in a safe and orderly manner the international air-transport service on the basis of equality of opportunity and to be operated upon soundly and economically. It laid down the conditions upon which the civil air-crafts are to have the right to fly over the land in the territory of other contracting States. It also provides the nationality and registration of the aircraft and for the adoption of measures to facilitate air navigation and it laid down the conditions to be fulfilled with respect to the aircraft. (Vide Paras 801-802 of Halsburty's Laws of England, Fourth Edition. Vol. 2, pages 394-395).

10. With a view to codify the rules in vogue in different countries and to have common or uniform rules relating to liability of damages by common carriers having international carriage by air, initially, Warsaw pact signed on Oct. 12, 1929 was entered into and the signatories thereto were termed as High Contracting Parties; they have drawn twenty four articles to determine the liability and Article 17 relates to payment of compensation on death or injury to or wounding a passenger and Article 22 quantified the damages at 1,25,000 francs. The Rules thus laid down are in fact, "an international Code", declaring the rights and liabilities of the parties navigating international carriers by air; also given the appropriate machinery, prescribed limitations to enforce the liability in the Tribunals or Courts that seized of the cases to award "damages". Pursuant thereto, the Indian Carriage by Air Act, 1934 and Carriage by Air Act, 1932 in England etc. have been made. Article 17 of Schedule I fixes the liability and Article 22 thereof quantified the damage payable to the specified relatives of the deceased either in lump sum or in instalments, but limiting the liability to 1,25,000 francs. The Hague Protocol, 1955 which came into force on Sept. 28, 1955 has amended Warsaw Pact, quantified the damages at 2,50,000 francs in Schedule II. Article 11 reads thus :

> "In the carriage of persons the liability of the carrier for each passenger is limited to the sum of two hundred and fifty thousand 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 two hundred and fifty thousand francs. Nevertheless by special contract the carrier and the passenger may agree to a higher limit of liability."

(Other clauses are not necessary. Hence omitted). This was again followed by English Act, Carriage by Air Act, 1961.

11. The desirability of such an international Code for Air Carriage is apparent. Questions of great difficulty as to the law applicable to a contract of international carriage by air would constantly arise and different Courts would adopt different rules under their laws, either giving or refusing the remedy to the relatives of the deceased or the persons injured or exorbitantly granting damages; also would introduce uncertainty or greatest difficulty as to which law or the laws governed the contract and whether different laws might not apply to different stages of the journey. With a view to put an end to this uncertainty and to avoid overlapping or disadvantage to the injured or the relatives of the deceased passenger or common carrier, uniform Code has been drawn up and given power to the High Contracting Parties to enact the law. In exercise thereof, the Act has been made.

12. The preamble of the Act itself mentions to give effect to the Convention for the "unification of certain rules" relating to international carriage by air signed at Warsaw and Hague subject to exceptions, adaptations and modifications to non-international carriages by air. The Act is an amending and repealing Act. Section 2(i) defines "amended convention" as "the convention as amended by the Hague Protocol on 28th day of Sept, 1955". Section 3 and rules specified in the First Schedule apply to Warsaw Convention; gave power to publish in the Official Gazette as to who are High Contracting Parties in respect of what territories they are parties, etc. Section 4 applies to the amended Convention under Hague Protocol and the Articles engrafted thereunder

find their place as Rules in Schedule II of the Act. The rules are integral part of the Act. They provide the rights and liabilities of carriers, passengers, consignors, consignees and other persons, shall, subject to the provisions of the Act, "have the force of law in India" in relation to any carriage by air to which those rules apply, "irrespective of the nationality of the aircraft" performing the carriage. The liability in case of death has been amplified in Section 5, which reads thus :

> "5.(1) Notwithstanding anything contained in the Fatal Accidents Act, 1855 or any other enactment or rules of law in force in any part of India, the rules contained in the First or Second 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 thebenefit of such of the members of the passenger's family as sustained damage by reason of his death.
> Explanation : In this Sub-Section, the expression "members of a family" means wife or husband, parent step-parent, grand-parent, brother, sister, half- brother, half sister, child, step-child and grandchild.
> 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."

(Emphasis supplied) (Sub-Sections (3) to (5) are omitted, being unnecessary).

13. Section 8 gives power to the Central Government to make rules to apply the Act to internal navigation by adoptation, etc. Section 9 repeals the Indian Carriage by Air Act, 1934. The Act is a "survivals' statute."

14. The legislative device and intendment to engraft non-obstante clause in Section 5(1) is to exclude the operation of the Fatal Accidents Act, 1855 or any other law operating in India; given primacy and exclusivity to the Act either Schedule I or Schedule II; the liability of a carrier in respect of the death of a passenger shall be determined thereunder; it is for the benefit of the members of the passenger's family. The award of damages is either as solatium or to mitigate the hardship sustained by members of the passenger's family by reason of his/her death. An action for damages would lie under the Rules alone.

15. In Chambers 20th Mid Century Dictionary at page 264, the word 'damage' has been defined thus :

> "The pecuniary reparation due for loss or injury sustained by one person through the fault or negligence of another."

16. In Prem's Judicial Dictionary, Volume I, at page 450, it is defined 'damages' means the pecuniary compensation which is awarded to a person for the injury he has sustained by reason of the act or default of another, whether such act or default is a breach of contract or tort.

17. In Halsbury's Laws of England, Fourth Edition, Vol. 12, para 1115, at page 418, under the

Caption "Damages associate with a statute", it is stated thus :

> "By Statute, common law remedies may be excluded or limited or a limit put on the damages recoverable."

18. The word 'damage' in the context of the Act appears to be pecuniary reparation for loss occasioned to the widow, child or other relative or dependents due to the death of the passenger by accident by air.

19. In Chapter I, Rule 1(1) of Schedule II declares that the rules shall apply to allinternational carriage of persons, baggage or cargo performed by air- craft for reward. They apply equally to gratuitous carriage by aircraft performed by an air transport undertaking. Sub-rule (3) thereof amplified "international carriage" the details of which are not necessary for the purpose of this case. In Chapter II, Part I, under the caption "Passenger ticket", Rule 3(1) provides that in respect of the carriage of passengers a ticket shall be delivered containing the particulars mentioned thereunder. Part II relates to Baggage check and Part II relates to Airwaybills. Part III provides the liability of the carrier. Rule 17 is relevant for the purpose of this case which reads thus :

> "The carrier is liable for damages sustained in the event of the death or wounding of a passenger or any other bodily injury suffered if the accident which caused the damage so sustained took place on board (of) the aircraft or in the course of any of the operations of embarking or disembarking."

20. Rule 17, thus, determines the liability of the carrier for death of or injury to or wounds caused to a passenger if the accident occurred on board of the aircraft or while operating the embarkment or disembarkment. An accident leading to passenger's death, or injury to or wounding a passenger, giving rise to a claim is treated as a wrongful act, default or negligence on the part of a carrier.

Rule 21 provides :

> "If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person, "the Court may in accordance with the provisions of its own law exonerate the carrier wholly or partly from his liability."

(Emphasis supplied)

Rule 21 excludes the liability of the carrier wholly or partly under general law if he proves that the injured is a contributory by his negligence to such an injury. Equally, Rule 20 excludes the liability under the Act of the carrier or his servants or agents if he proves that he/they have taken all necessary measures to avoid the damages or that it was impossible for him/them to take such measures; in such an eventuality the burden shifts on to the injured to establish that either the carrier or the servants or the agents have not taken all necessary measures to award damages. Sub-rule (2) of Rule 22 relieves the carrier of his liability to pay damages to the cargo if he proves that the loss or damage was caused due to inherent defect or quality or vice of the cargo.

Rule 26 provides special remedy to the servant or agent when action was brought against him to avail himself of the limits of liability which the carrier himself is entitled to invoke under Rule 22 provided that the servant or agent proves that he has acted within the scope of his employment. In such an event, the aggregate amount specified in sub- rule (1) of Rule 22 shall apply. Otherwise it shall not apply the liability shall be determined under common law.

21. The limitation of the liability of the carrier has been dealt with in Rule 22(1) which reads thus :

> "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 equal 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 higher limit of liability."

(Emphasis supplied) (Sub-Sections (2) to (5) are not necessary for the purpose of this case as they relate to registered baggages and of cargo. Hence omitted).

22. It is thus clear that Rule 22(1) quantifies the liability of the carrier for each passenger, obviously in the case of death limiting to a sum of 2,50,000 francs or the equivalent value to be awarded by Courts seized of the case; damages may be awarded either in lump sum or periodical payment as per common law. It enables the parties to make special contract for a higher limit of liability. Rule 23 provides thus :

> "23.(1) Any provisions tending to relieve the carrier of liability or to fix a lower limit than what is laid down in these rules be null and void but the nullity of any such provision does not involve the nullity of the whole contract which shall remain subject to the provisions of these rules.
>
> (2) Sub-rule (1) of this rule shall not apply to provisions governing loss or damage resulting from the inherent defects, quality or vice of the cargo carried." (Emphasis supplied)

23. A reading thereof would amplify what is latent in Rule 22(1) that a contract by a carrier tending to relieve him of his liability or to fix a lower limit than was fixed under sub-rule (i) of Rule 22, "shall be null and void", but the nullity thereof does not abrogate or nullify the whole contract, which shall remain subject to the provisions of the Rules i.e., to the extent of lower limit or release alone is void. As regards the liability, Rules 17, 22 and 23 conjointly operate and are to be read together. By so reading it is clear that Rule 17 fastens the liability; Rules 20, 21, 22(2), 23(2) and 26 exclude the liability in specified event; Rule 22(1) quantifies the liquidated damages for each passenger and Rule 23 injuncts the carrier from tending to relieve himself of the liability or to fix a lower rate than was laid down under Rule 22 preventing the passenger to contract himself/herself out of the statute but accords freedom to agree for higher liability. With regard to cargo, sub-rule (2) or Rule 23 similarly relieves the carrier of his liability for loss or damages if it has been occasioned on account of inherent defect, quality or vice of the cargo

consigned and carried by the carrier. It is also seen that under Rule 17, a general liability has been engrafted but as regards bodily injury to or wounding of a passenger by his contributory negligence relieves the carrier under Section 21. Thereby in respect of wound or bodily injury to a passenger, liability of the carrier is subject to proof. But with regard to death, no such proof is insisted upon. Rule 25 again lifts the rigour of the limits of liability specified in Rule 22 stating that it "shall not apply", if it is proved that the damages resulted from an act or omission of the carrier, his servants or agents, with intent to cause damage or recklessly and with knowledge that damage would probably result; but relieves the servant or agent if it is proved that such act or omission of a servant or agent was acting within the scope of his employment. In that eventuality the statutory limitation of 2,50,000 francs or its equivalent does not apply. Exclusion clauses, however, are construed strictly against the carrier, in particular, clear provisions are necessary to exclude the liability for negligence. Further-more, the doctrine of fundamental breach of contract may be used by the Courts as a means of controlling exclusion clauses in such cases." (Vide Halsbury's Laws of England, Vol. 2, para 1370, page 657, 4th Edition) *Sunrise Atlantique Society D. Armement Maritime S.A. v. N.V. Rattandamachic Kolen Central*[1] is an authority for the proposition that a party to a contract is either bound by the terms of the contract including limitation as to damages or to repudiate the contract for fundamental breach of the contract and sue for damages under common law. The same principle applies to the facts of this case. Therefore, the carrier cannot rely on Rule 22 to fasten the maximum liability and at the same time seek deduction of collateral benefits which is no part of the rules as set-off to relieve himself of his liability. In Cheshire and Fifoots Law of Contract, 4th Edition at page 137, it is stated that "Parliament may not only invalidate or regulate exemption clause but may also impose them. The classic example is the Hague Rules.... These Rules provide for limitation of the carrier's liability such rules are commonly to be found in International Convention Carriers." But for the Hague Protocol and the relevant followed-up Act, the relatives/dependents are entitled to much larger amount of damages, though after giving deductions, under the respective Survivals' Statute. The protocol and the Act liquidated the damages and obligated the relatives/dependents to seek their remedy under the Act alone. The High Contracting Parties are aware of the accident policies a passenger may have and yet made no attempt to incorporate it as an integral part in the Articles of Convention or Protocol. The object of the Act is to give effect to the Convention and Protocol. If the deceased is alive on an action for wounding or injuries, he would have received the accident benefit under the contract of policy. The exclusion or limitation clause is a part of contractual right at common law; has the effect of relieving the carrier of its liability wholly or partly based on the terms of the contract. Even under common law such contract is void. The liability under the Rules is a statutory one. The High Contracting Parties are aware of the common law right of exclusion by a special contract. Rule 23 prohibits such a contract as "null and void". The common law right thus yielded place to statutory rights and liabilities having stemmed from the Act. The entitlement to claim set off of collateral benefits must find engrafted within the four corners of the Rules. Any attempt, by process of interpretation to cut down the efficacy of Rule 23 would defeat the uniformity intended to be achieved by the Hague Protocol. The carrier being a tortfeasor cannot be permitted to take

[1](1967) 1 AC 361 (HL)

collateral benefits as a shelter or shield to avoid the mandatory rigour of Rule 23. In exercise of the power under Section 8(2) of the Act, while applying Rule 22 of Schedule II to the internal air navigation and the damages payable in an accident occurred in that regard the Government of India in S.O. 1855 dated July 5, 1980, decelerated that in the case of death, "the liability of the carrier for each passenger shall be Rupees two lakhs if the passenger is 12 or more years of age

and Rupees one lakh if the passenger is below 12 years of age on the date of the accident." It would mean that the damages declared is liquidated one, 'nothing more-nothing less' Based thereon, Sri Ratnakar built up an argument that the Government made a dichotomy and fixed the minimum liability. Such an arrangement does not find place in Rule 22(1). Therefore, what was fixed was not the maximum, but the upper limit. This argument lacks force. Firstly, the notification does not have the effect of controlling the operation of Rule 22(1). Rules 22(1) is as found in Article 11 of Hague Protocol and no option is left to the High Contracting Parties to alter the language of the Article. In fact, the Government of India understood the effect of Rule 22(1) to be the minimum liability. Though the language in Rule 22(1) as found in Article 11, does not appear to be happily worded but in the light of the construction. I have put up and the objects sought to be achieved, I have little hesitation to conclude that what was intended by Rule 22(1) is "the minimum one in the case of death" subject to higher limit under special contract. The further argument that even in the case of a child below 12 years of age, Rule 22(1) does not intend to award damages of 2,50,000/- francs or Rs. 1,75,000/-, is also devoid of force since Rule 22(1) itself did not make any such dichotomy.

24. It is thus clear that the Act and the Rules are self-contained uniform Code as part of International Code for civil aviation; jurisdiction has been conferred on Courts seized of the case; statutory maximum liability has been prescribed. Circumstances under which the maximum liability operates or inoperates are enumerated; liquidated damages to a maximum of 2,50,000 francs or its equivalent currency has been provided for. It excludes the applicability of Survivals' Statute or any other law; created new liabilities on the carrier; conferred new rights on the members of the family of the deceased passenger, relieves in case of death of a passenger the need to prove his negligence by the members of the family or dependents of the deceased obviously applying the doctrine res ipso loquitur; new in its principles and fixed uniform liquidated damages; prohibited the carrier tending to relieve himself of any liability or to fix lesser limits than prescribed under the Rules and, thereby, prevented the passenger to contract out of the statute while preserving only a right to contract for higher liability. The Act applies to every carrier or every passenger irrespective of the nationality carried by International Carriage by air. It being Survivals' Statute, it should be broadly interpreted to carry out the avowed, express and implied purpose of the Convention and Protocol. One must be guided by the language couched. No exclusionary clauses are engrafted. On the other hand, positive prohibition against the carrier to relieve his liability by a special contract or to fix lower limit is issued. The deceased should not have brought an action to damages under the Act. The action under the Act is for the benefit of the members of the family of the deceased passenger for damages sustained by reason of his death. The amount received under personal accidents insurance policy is a benefit which the deceased himself has provided for under a contract and is independent of the Act. It is completely collateral. Thereby, the legislative animation that the applicability of the principles contained under the Act are exclusive and disregard of any other rights or liabilities or benefits arising or accruing to the dependents collateral to the death of a passenger.

25. Let us have a look at what the commentators say in this regard In "Damages for Personal Injuries and Death" by John Munkman, Butterwords Third Edition, 1966 at page 75, with regard to the deduction of accident insurance on sustaining injuries, he stated thus :

> "Money received under an accident insurance policy is not deducted or taken into account in any way in assessing damages for personal injuries. It cannot make any difference in

> principle whether the payment takes the form of a lumpsum or (as frequently happens) of weekly payments during disability. In either case, the reason for not taking these payments into account is that they are benefits which the plaintiff himself has provided. The accident is merely the occasion which entitles him to claim the benefits. The insurance is something 'completely collateral'."

26. In Kemp and Kemp "The Quantum of Damages" Volume I, Re-print to Fourth Edition, in Chapter 14, page 151, under the caption "The incidence of Benefits", it is stated thus :

> "Completely collateral matters cannot be invoked by a tort-feasor to reduce the damages payable to the victim of his tort. This is the general principle to be applied when considering whether a deduction should be made from a plaintiff's damages because of the incidence, of some benefits, pecuniary or other-wise."

Under the sub-heading "Insurance" it is stated thus :

> "In an action for injuries caused by defendants' negligence, a sum received by the plaintiff on an accidental insurance policy cannot be taken into account in reduction of damages."

From the arena of commentators, let us dredge into and plough back the judicial dicta. In *Dalby v. India and London Life Assurance company*[2] it was held that one who pays premiums for the purpose of insuring himself, pays on the footing that his right to be compensated when the event insured against happens is an equivalent for the premiums he has paid; it is a quid pro quo, larger if he gets it, on the chance that he will never get it at all. In *Bradburn v. Great Western Ry*[3]. Bramwell B. held that the plaintiff is entitled to retain the benefit (arising out of accident insurance policy) which he has paid for in addition to the damages which he recovers on account of the defendants' negligence. Pigott B. held at page 3 thus :

> "The plaintiff is entitled to recover the damages caused to him by the negligence of the defendants, and there is no reason or justice in setting off what the plaintiff has entitled himself to under a contract with third persons, by which he has bargained for the payment of a sum of money in the event of an accident

[2](1854) 15 CB 365

[3](1974) LR 10 Ex. 1 at 2

> happening to him. He does not receive that sum of money because of the accident, but because he has made a contract providing for the contingency; an accident must occur to entitle him to it, but it is not the accident, but his contract, which is the cause of his receiving it."

In *Stead v. Elliott and Caulfield Motors*[4] the Nova Scotia Supreme Court held that where a parent has an action for loss of services of his infant child injured by the negligence of the defendant, he is not required to deduct from his claim the proceed of an accident insurance policy on the child which was provided and paid for by the parent, even though the result is that the parent will get double recovery.

26A. In *Preton v. Hunting AIR Transport Ltd*[5]. the Queen's Bench Division held that damages under the Carriage by Air Act are not restricted to loss of a financial character, and may include for example, compensation for the loss of mother's care during infancy. In that case, additional damages under the Fatal Accidents Act for want of mother's care was awarded to two infants.

27. In *Parry v. Cleaver*[6] in a suit for damages for personal injuries compulsory contribution to pension fund, whether liable to be excluded in computation of damages, Lord Reid has held thus :

> "Moneys received under a contract of insurance are not to be taken into account in assessing damages, since it would be unjust that money spent by an injured man on premium should enure to the benefit of a tort-feasor, and contributory pension is a form of insurance."(pages 14-16)

Lord Pearce has held at page 38 thus :

> "The character of the plaintiff's pension rights brought them within the general principle that private insurance by a plaintiff is not to be taken into account and there is no adequate equitable reason for excluding that principle."

The decision in *Controller of E. D. v. Smt. Motia Rani Malhotra*[7] relied on by Sri Rajeswara Rao relates to estate duty. The amount received under accident benefit policy due to the death in an air accident is not in existence at the death and cannot be said to pass on his death; as a result it is not exigible to estate duty. This principle is well settled and in fairness, Sri Ratnakar did not dispute this proposition. Therefore, the ratio therein is of little assistance to the appellant.

28. The damages fixed under the Act is by way of reparation. It is true, as contended by Sri Ratnakar, that the intendment of the Act is to relieve the carrier from making different persons claiming damages at varied rates depending upon the earning capacity, the longivity and other relevant considerations under their respective survivals' statute and fixed the liability only under the Act. His contention that the Act does not intend to accord double advantage for the same cause of action and the carrier is entitled to deduct by way of set off any additional amounts received due to the accident though apparently

[4](1963) 39 D.L.R. (2d) 170
[5](1956) 1 All England Reporter 443
[6](1970) AC 1
[7](1975) 98 ITR 42 (Punj and Har)

alluring, but for the reasons above stated, it is difficult to accede to. It is equally true that in the English Fatal Accidents Act, 1959, benefits arising by way of premium, pension, gratuity etc. are liable to be excluded by operation of Section 2(1) thereof and similar exclusions have not been made under the Fatal Accidents Act, 1855 of the Indian Act. His further contention based thereon that the respondent is entitled to set off the amount received from accident benefit policy cannot be accepted. The act itself excludes the applicability of the Fatal Accidents Act. By process of interpretation, what was excluded cannot be brought to force. It is true that in the Commentary of Shawcross and Beaumont at page 504 the learned authors have traced the genesis of the English Carriage by Air Act, 1932 and 1961 to the Fatal Accidents Act and the Law Reforms Miscellaneous Provisions Act, 1934 and stated at page 507 that in assessing the

damages adventitious benefits are to be excluded. But at page 508 it is stated that in assessing the damages, the following are to be disregarded :

> "any insurance money benefit or pension or gratuity which has been or will or may be paid as a result of the death."

Lord Mc Nair in his Commentary at page 202 stated thus :

> "As regards the assessment of damages where a claim is made under the 1932 Act in respect of the death of a passenger, it is reasonable to assume that, subject to the limitation just discussed, this will proceed on similar lines to those adopted in claims under the Fatal Accidents Acts, 1846-1959. Two points require particular notice. In claims under the Carriage by Air Act, 1932, as under the Fatal Accidents Acts, 1846-1959, when assessing damages no account shall be taken of any insurance money, benefit, pension or gratuity which has been or will or may be paid as a result of the death. This rule applies in all actions brought in respect of deaths occurring after July 29, 1959. An action brought in respect of a death which occurred before that date will in this respect be governed solely by the Second Schedule to the 1932 Act in which there is no comparable provision relating to insurance moneys."

At page 205 it is stated thus :

> "The difficulties which arise from the limitation of the carrier's liability under Article 22 of the Convention are also removed, for it is expressly 'declared' that the limits apply to the aggregate liability of the carrier in all proceedings which may be brought against him, whether in the United Kingdom or elsewhere. It is noteworthy that Parliament in this most recent statute has used the word 'declared'. This lends support, it is submitted, to the view expressed above that the Law Reforms (Miscellaneous Provisions) Act, 1934 was not intended to and did not increase the limits of the carrier's aggregate liability beyond those stated in Article 22 of the First Schedule to the Carriage by Air Act, 1932."

This was with reference to outer limit. But with regard to set off while making the commentary similar provision namely Rule 23 of Schedule II of the Act has not been adverted to by the learned authors. Thus, we are driven to consider the effect of Rule 23. The above passage does not help the respondent to relieve his liability under the Act. But if any claim is made otherwise than under the Act, certainly the benefit received like the personal Accident Policy may be a set off unless the contract or relevant statute expressly excludes the same. If the plausible contention of the learned counsel is given credence to, then the consequence would be Rule 23(1) rendered nugatory or ineffectual and the mandatory language would be rendered directory. It would appear to me that the language couched in Rule 23(1) is in a mandatory form and Rule 22 intends to subserve public policy, namely, prohibiting the carrier to tend to relieve himself of the statutory liability to fix lesser limit under the Act and thereby salvaging the passenger from contracting out of the State by limiting the liquidated damages.

29. From the above discussion I hold that the deceased paid premium under personal accident insurance policy for a contingency of happening of the event, viz., the accident, to entitle his heirs or nominees to receive the contracted amount; it is not the accident but entitlement under the contract which is the cause for his heirs or nominee to receive the amount under personal accident insurance policy. The accident is only an incident to receive the premium. The receipt thereof is completely collateral to the death in an accident on an international carriage governed by the Act; the tort- feasor i.e., carrier cannot invoke the principle of set off to reduce its liability of the damages payable as reparation to the members of the family of the deceased for the death caused by the carrier's negligence, default or statutory duty to the deceased. Though it may have the insignia of getting double recovery but the cause of action or entitlement for the recovery are two distinct and separate. As stated earlier, the entitlement to receive the personal accident benefit policy is the contract and happening of the accident is only an incident or a chance to receive but the primary entitlement is his contract. But whereas the entitlement under the Act is the liability fixed under Section 5(1) and Rule 17 and quantified as liquidated damages under Rule 22(1) for the benefit of the members of the deceased's family. It is in the nature of no fault liability as reparation to mitigate the loss suffered by the members of the family of the deceased. Thus the collateral benefit received by the members of the family of the deceased for personal accident insurance policy cannot be a set off nor a ground to relieve the respondent of its statutory liability fastened under Section 5(1) of the Act read with Rules 17 and 22(1) of the Second Schedule.

30. The appellants, therefore, are entitled to the maximum damages of Rs. 1,75,000/- fixed under the Act but, unfortunately, they confined their claim to Rs. 1, 15,000/-. Therefore, the appeal is allowed and the suit is decreed for Rs. 1,15,000/- with interest at 6% from the date of suit till the date of realization with costs throughout.
Appeal allowed.